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一九四四年三月頃第四艦隊司令長官ヨリ第六根拠
陸司令官宛左ノ電報命令ガアリマシタ

「本後各基地ノ上級先任指揮官ハ所在各部隊各官廳
ヲ統轄指揮シ司法行政ヲ施行スベシ

右命令ニ基キ「トラック」方面ノ陸部隊指揮官ハ
左ノ如キ命令ヲ発セラレタ

「第四艦隊命令ニ依リ本職ハ「トラック」
部隊官、民ノ一切ヲ指揮シ司法行政ヲ施行ス

「トラック」出張所長ハ左ノ如キ命令ヲ発セラレタ

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ポツダム宣言ノ受諾ニ関スル詔書ヲ渙発ス

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ヒ申上ル迄モアリマセン

陸軍大佐 古木秀策

STATEMENT

by FURUKI, Hidesaku
Major, IJA,
Ex-Jaluit Defense Garrison

1. By the order of Rear Admiral AKIYAMA, the commanding officer of the 6th Naval Base Force, I was detached from the command of the 64th Naval Guard Unit which was on Wotje, was transferred to Jaluit, and then came under the command of Rear Admiral MASUDA, the commanding officer of the 62nd Naval Guard Unit. At that time, I was attached to the 2nd Battalion of the 1st South Seas Detachment, and was a battalion commander. But only a part of the Battalion, 200 men arrived at Jaluit. Together with the previously detached force which was under command of Captain INOUE and Captain KANEMATSU, the total members of my unit amounted to only about 700 men. About 200 men still remained on Wotje, about 300 on Maloelap, and 150 men died at Kwajalein on the way to the destination.

2. After the fall of the 6th Naval Base Force, the 62nd Garrison came under the direct command of the Commander in Chief of the 4th Fleet. But on this remote, isolated island of Jaluit, Rear Admiral MASUDA had in reality the absolute authority over all Army and Navy personnel, Gunsokus and Natives.

The condition of Jaluit, after the fall of Kwajalein in February 1944, may be compared to a seriously sick man who is suffering from starvation, from deprivation of his food by the enemy, and from fatal wounds on his hands, legs, eyes, and ears, but who is trying to seek food in order to live by shaking off the hands of the enemy which are torturing him day and night in order to kell him. The Americans, besides attacking the military power and installations of Jaluit which was isolated under their absolute command of sea and air, tried to destroy our self supporting system in order to make us starve and also to attack us by propaganda. They carried out these three methods most skillfully, systematically, intentionally, and continuously. Men began to die by starvation in October 1944 and such cases gradually increased. If there had been a slight mistake or delay in dealing with this situation, it was abundantly clear that Jaluit would instantly be wiped out by starvation. In the last half of 1944, there was established in succession under Rear Admiral MASUDA, the commanding officer of the Defense Garrison such agencies as the Self Supporting Committee, Special Police Squad, Transportation Section, Labor Administering Official, Defense Section, Battle Equipment Committee, Counter-propaganda Committee, etc. The establishment of these agencies was the result of struggles and endeavors on Jaluit in order to survive. Every person on Jaluit obeyed the order of Rear Admiral MASUDA: "In order that every person may live, you must all cooperate under my command regardless of whether you are Army or Navy personnel, Japanese or Native. No one is allowed to disobey my will". Every person continued his struggle to live under the firm command of Rear Admiral MASUDA.

3. In the following paragraphs, I shall relate the conditions at that time in more detailed manner.

In February 1944, Kwajalein fell, and Jaluit lost its base. Transportation to the other surrounding Islands and the rear was entirely cut off, and every man was determined to fight to the bitter end on this isolated Island.

"BB(1)"

After occupying Kwajalein, Majuro, Eniwetok, etc., in succession, the bombings and bombardments by American forces from air and sea became ever severe each day. Forty to fifty planes came several times a day regardless of the hour. Because of this attack, our food, armament and ammunition became scarce, and our buildings and establishments were completely destroyed. Communication to the 4th Fleet became very difficult.

Especially, after the fall of Saipan in July 1944, Jaluit became completely isolated, and any anticipated supply vanished. At this critical point, the shortage of food, together with lack of armament and ammunition meant the collapse of the defense of Jaluit.

It was at this time that Rear Admiral MASUDA established plans for self-support, and devised a scheme for defense in order to protect the plan. With a firm determination, he put it into practice. Cultivation of farming land, gathering of weeds, and other measures were carried out. But because of the infertile sandy soil and the systematic bombing of the farm land by the American planes, argicultural production could not possible succeed.

4. Our only hopes were cocomut toddy and copra gathered by the natives. The natives earnestly cooperated with the Japanese forces in this work. Rear Admiral MASUDA was always saying to the military personnel and gunsokus, "Natives are the benefactor of the Japanese forces so we must treat them well." However, no matter how hard the natives and Japanese military man might work, there was a limit in the amount of the production. It was impossible to gather enough food for 4000 military men, gunsokus and natives. Our ration was limited to one cocomut and one sho (T.N. one sho equals to 3.812 pints) of cocomut toddy a day. This was far from sufficient to maintain health. Moreover, houses were bombed over and over again and housing materials were completely destroyed so that even the poorest shelter from rain and dew could not be found. Our health conditions declined day by day. Any edible things such as leaves, grasses, and animals, including lizards were sought and eaten up. Malnutrition and disease were prevalent so that there was not a single man who was in good health. Even the most healthy person had to rest once while walking one hundred yards. But, on the other hand, because of the scarcity of men, our work inversely became greater so that each man had to undertake four or five duties.

Furthermore, boats were destroyed one after another by bombing, and the transportation of food from the outlying islands became so difficult that all members were just on the point of starvation and in a living hell. Crimes, especially food theft, occurred one after another. Rear Admiral MASUDA tried to check it by severe punishment and reinforcement of guard, but it was impossible to stop it.

5. The words "despair" and "misery" would be too weak and vague to express the conditions on Jaluit. Jaluit was filled with a savage and unquiet atmosphere. The dark dreadful shadow of death haunted Jaluit. The reason was that the moral, thinking power of even the officers declined and became distorted so that it really offered a problem to be deplored and dreaded.

I exerted every effort to calm down this savage and unquiet feeling which was then haunting Jaluit, and to give people hope and light. Finally, I reached the conclusion that it was only faith and belief that could save the situation. First of all, I endeavored to make my subordinates seek faith

and belief from every possible aspect. But, after a long struggle, I had to find out that what they were seeking for most was neither faith nor belief, but the very food they were to eat for the day.

6. In September 1944 the bases of the Marshalls were attacked by the general starvation. Intelligence came in that in another island about 200 men died of starvation every month. And since October, I had received reports that every day one of my subordinates on Wotje and Maloelap starved to death. Every night I would dream of my subordinates dying while vainly seeking for food and calling my name. I could only pray for them. I was really grief stricken to find myself 300 kilometers away from them and without measures to save them. Now I realised that it was my mission from heaven to exert all my power in checking the scourge of starvation among military personnel, gunsokus and natives, my subordinates on Jaluit.

But my abdominal troubles became worse owing to eating spoiled food in the food shortage, and also exhausting fatigue tortured me in my physical and mental condition. Whenever I saw my completely exhausted body and mind, and whenever I saw ghost-like figures of people squirming around the ruins of Jaluit seeking for food, I thought not only once but often that to live on Jaluit was far more painful than to die. How I desired the coming of the day when we could fight to the last man as gloriously as in the battles of Kwajalein and Tarawa!

It was the dauntless attitude of Rear Admiral MASUDA that gave us hope, light, and courage at this moment. I was spurred every day and night by the firm faith and resolution of Admiral MASUDA: "There shall be no man who dies of starvation from now on". By obeying the order of Rear Admiral MASUDA, I gained the courage to discharge my duty in which I had to exert myself for the sake of all the members on Jaluit.

7. Rear Admiral MASUDA used to repeat the following words several times every day: "It is beyond my power to do anything about the military personnel, gunsokus, and natives, who are killed in action by the enemy's bullet. But I can not forbear to have them die from starvation. If I rest for an instant or neglect my duties and delay or make an error in coping with the situation, starvation will attack Jaluit as it has done to the other bases. From this point, we must not let even a single military man, gunsoku or native desert". As he had stated the above, Rear Admiral MASUDA made strenuous efforts until the end of the war. Not to mention drawing up orders for the defense garrison but he studied and gave approval to even the smaller matters such as the disposition of military men and gunsokus, what clothes the guard should wear, even the usage of a sheet of galvanized iron.

When the war ended, approximately half of the men (about 2000) on the other bases of the Marshalls were dead from starvation. But on Jaluit this was limited to only 40 to 50 victims. This really was the result of the strenuous efforts of Rear Admiral MASUDA. At that time, Rear Admiral MASUDA was suffering in bed with high fever of 104 degrees, yet he requested various reports on the conditions of operations and self support. When I recall his tragic, heroic attitude, I do no other but shed tears.

It was the most fortunate thing for the military men and natives to have

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had rear Admiral MASUDA as the commanding officer of the Jaluit Defense Garrison. All the military personnel, gunsokus, and natives had infinite confidence in and showed obedience to his resolute will and love which was enhanced by his deep religious feeling. Everyone was well aware how he loved the natives and how the natives respected him. Therefore, every action on Jaluit was done according to his will and order.

8. In such miserable conditions, the most unhappy thing for the Japanese forces was the desertion of the natives in accordance with the American "kidnapping" tactics of natives, especially their group desertion. I will cite the main cases of the desertion:

In the beginning of May 1945, about 600 natives from Medjai, Elizabeth (MEJURIKU) and Ai island deserted.

In July 30 from Jaluit, 150 from ai and 300 from Pingelap, Elizabeth, MENGE, OOA, and Jaluit, ...etc.

Besides these cases, constantly one or several natives deserted. These cases broke out when in March 1945, eight natives from Mille sneaked in under the direction of the US Forces to propagandize desertion.

9. Rear Admiral MASUDA was deeply concerned over the desertion of the natives because it not only completely destroyed the defense of the island but also resulted in starvation for all the men on the island. He drew up many important counter measures, and especially on 6 May when the first incident of kidnapping occurred, he made the following proclamation:

"Natives, you are all subjects of the Japanese empire, so that you must cooperate with the Japanese forces. As long as you remain on this island, your lives and property shall be protected. But if you try to desert or give benefit to the enemy, you shall be severely punished."

At that time we had about 1300 Army and Navy men, and about 700 gunsokus. A considerable part of them was suffering from wounds and illness. Since the beginning of 1945, we had had only three 24mm machine guns and 10,000 rounds of ammunition as anti-aircraft weapons. Natives were the motive power of the life of the Japanese troops. Out of 2000 natives, 600 adult men and also every young and old man and woman were mobilized. They, together with 400 military men and gunsokus, took charge of food production. In such circumstances, it is very clear that the desertion of the natives would have stopped production and transportation of food, caused starvation of all members, informed the enemy of our distress and brought forth our defeat.

10. However, conditions grew worse and worse until unhappy events happened. That is:

1) The case of Echibaru, Lesohr, Kohri, Kozina, Arden, Makui, Tiagrik and another native unknown who attempted to kill Petty Officer OKAMOTO Gunzoku MURAOKA, plunder the boats, and desert on 13 May 1945.

2) The case of Chuta and Chonmohle who attempted to kill the guard, steal military goods, and desert in the beginning of June 1945.

3) The case of Mandala and Laperia who attempted to kill the guard, steal military goods, and desert in the middle of July 1945.

4) The case of Melein and Mejkane who attempted to spy, kill the guard, steal military goods, and desert in the middle of July 1945.

5) There were also such cases as murder, attempted murder, stealing of arms, ships, and other military goods, desertion and spying, etc.

11. It was a very sorrowful thing that among our loving natives who cooperated well with the Japanese forces, some natives committed crimes and we had to punish them.

I think you have already heard from the investigators of these cases what these native criminals had done, what laws they had violated and how they had been punished. Rear Admiral MASUDA, with an attitude of utmost care and in the fairest way possible at that time, tried these natives.

12. In peace time, administrative and judicial affairs on Jaluit were directed by the South Seas Government and the local Court at Palau. But since February 1944, after the Central Pacific Ocean became a battlefield, the South Seas Governor came under the command of the Commander in Chief of Central Pacific Area by the direction of General Headquarters. The administrative and judicial authority of the South Seas Governor towards the natives was entirely invested in the Commander in Chief of the Central Pacific Area. The commanding officer of each base was ordered to have judicial and administrative authority over his responsible area.

Toward March 1944, the South Seas Governor dispatched the following order to the branch Governor of Jaluit Atoll:

> "My authority over juricature administration and all other affairs has been taken over by the Commander in Chief of the Central Pacific Area. Therefore, every branch Governor shall come under the command of the commanding officer of the district concerning the above matters."

Toward March 1944, there was a despatch from the Commander in Chief of the 4th Fleet to the commanding officer of the 62nd Garrison:

> "The highest senior commanding officer of each base shall hereafter command all units and civilian governments of his area."

According to the above despatch, Rear Admiral MASUDA, commanding officer of the Jaluit Defense Garrison, gave the following orders:

"By the order of the 4th Fleet, I command all units, officials, civilians and natives on Jaluit from now on."

Jaluit branch Governor ordered as follows:

"By the order of the South Seas Governor, all officials, civilians and natives shall come under the command of the commanding officer of the Jaluit Defense Garrison."

At that time, Jaluit was a terrible battlefield. It was more serious than a place where martial law was enforced. Therefore, full governing authority was turned over to the highest commanding officer of the military forces. Thus, Rear Admiral MASUDA was the highest administrative and judicial authority as the highest commanding officer of the area.

13. Then Rear Admiral MASUDA, before dealing with the above mentioned case, appointed:

Lieutenant (junior grade) SAKUDA, Second Lieutenant KADOTA, Second Lieutenant IEKI, and Second Lieutenant MORIKAWA as investigators.

Me (Major FURUKI) as the Judge Advocate, and

Lieutenant Commander SHINTOME, Captain INOUE and himself (MASUDA) as judges.

At that time, the enemy's planes continued day and night bombing and strafing in the sky over Jaluit, and, on the outlying islands, our troops were firing against the enemy's ships which tried to kidnap natives. Because of these circumstances, all members at Emidj and the other outlying islands had to be in their battle stations. Rear Admiral MASUDA continued his restless efforts in commanding battle operations against the enemy's aircraft and ships, in reframing the self-support system after the desertion of natives in order to produce food for the day and in changing the positions and duties of the Defense Section after reframing self-support system. He said, "We are now in the face of Jaluit's most serious crisis. If we lose this, 'native kidnapping battle' we shall soon be attacked by starvation as on the other bases," and encouraged his men. Officers and soldiers, according to their assigned duties, were in their battle positions. I did my best as my ability and physical strength warranted as the chief of the Defense Section and as the chief of the Armament Committee. I exerted myself in discharging my duty, wishing that I could have been two people. Any man could not entirely be at ease or think calmly. It was also impossible to assemble many men at the same time in the same place.

In such a battle condition, it was quite impossible to hold a regular type of trial. Informal as it might be, examination and consultation under a special procedure was held by the above said members. Rear Admiral MASUDA ordered that we must try and judge as carefully and fairly as possible, so that the investigators, in their investigations, spent many days and much effort with the utmost carefulness and even at a risk. When investigators reported the results of their investigations, MASUDA listened to their reports in my presence. After the investigations were completed and the reports brought forward, MASUDA went with me to the place where the criminals were

confined and made careful investigations. After he was convinced of the corpus dilecti by his investigation, he assembled SHINTOME, INOUE, and me at his office and the fimal trial was held. Rear Admiral stated first that he acknowledged the corpus dilecti, ordered me to state my opinion and I did so. In each case, SHINTOME and INOUE delivered their statements. After listening to the statements of all the members, Rear Admiral considered the case for a few days, then again assembled us, announced his judgment and made a judgment paper. After that, he went with me to the place where the criminals were confined and announced the judgment directly to them.

This judgment was, of course, different in some parts from my opinion, but I could not say anything about this judgment. After the judgment, those who were ajudged not guilty were released and those who were sentenced to hard labor were put in servitude. I executed those who were sentenced to death by the order of Rear Admiral MASUDA, as was written on my statement presented to American legal officers. Concerning the trial and execution, I have a belief which has never changed since that time. I commanded the natives with love and faith, and I cannot express what agony I felt when I had to execute these beloved natives.

But the judgment of Rear Admiral MASUDA, who, in order to prevent the annihilation of the Japanese forces and in order to maintain the lives of all the natives, military men and gunzokus, sentenced according to the Japanese laws the natives who had committed offenses of treason against the Japanese Empire, was not a mistake. Though the procedure was a special type, I believe it was the fairest trial possible under the circumstances at that time.

As to the execution, the Rear Admiral ordered me to do it, and I could only obey it as an executioner. I faithfully carried out the duty as a Japanese official according to the law. This is my belief and I cannot deny I carried out a legal order before man and God. I received a legal order and carried it out. If I am to be punished it must be for carrying out orders not because I committed murder.

14. At the conference of the district commanders in January 1945, I addressed them concerning the method of commanding of the district commanders:

> "You must not use power or flattery in commanding others. It is love and faith that moves the human heart. If you command natives with love and faith, they are sure to obey you willingly."

After the termination of the war in August 1945, I stated my opinion to Rear Admiral MASUDA at the conference of senior officers of Jaluit as follows:

> "It is the most sorrowful thing that natives become foreigners after the American occupation of Jaluit. Natives cooperated so well with the Japanese forces during the war that we could sustain our lives with but few who starved. Those who starved were very numerous in the other bases. All members of the Jaluit Defense Garrison will never forget it. I believe that we must be thankful to the natives and wish for their happiness. I hope we shall take concrete measures

for them." Rear Admiral MASUDA agreed with my opinion and did several things for them.

It is my belief that men ought to be united with one another with love and faith and this is called humanity. I am convinced that God will recognise that all my deeds at Jaluit both in official and private matters did not violate my belief. My love and affection toward the natives and my desire for their happiness today is not at all different from that when I was on Jaluit. I shall never forget my thankfulness for the great efforts and contributions of the Jaluit natives toward the Japanese forces.

15. Lastly, I would like to tell about the condition of my family. I left my wife and a child of three months at Toyohashi and went to the front five years ago. As i have never heard of them for these three years, I cannot know how they are getting on. Though they might have taken refuge from air raids of Toyohashi, they have no money nor relatives. I feel as if my heart were breaking when I imagine that they are suffering from starvation, being at the mercy of cold miserable reality of life.

Your Honor, the President, I beg your kind consideration concerning what I have just mentioned.

FURUKI, Hidesaku
Ex-Major, IJA.

I certify the above, consisting of eight (8) typewritten pages, to be a true and complete translation of the original statement to the best of my ability.

EUGENE E. KERRICK, jr.,
Lieutenant, USNR,
Interpreter.

AA
(2)

OPENING ARGUMENT FOR THE PROSECUTION

delivered by

LIEUTENANT JAMES P. KENNY, USN.

If it please the commission:

The accused in Charge I is charged with the murder of thirteen Marshallese natives. Murder is defined as "the unlawful killing of a human being with malice aforethough without justifiable cause." Before conviction on any criminal charge, the prosecution must prove (1) the corpus delicti, (2) the corpus delicti was produced by a criminal agency, and (3) that the accused did the criminal act or set in motion the criminal agency.

Corpus delicti means "the body of the offense" or as has been more simply stated, the fact that the crime has been committed. That the corpus delicti has been established in this case is very evident. Wharton's Criminal Law, section 347, states that in order to establish the corpus delicti "on a charge of homicide, it is necessary to prove that the person alleged in the indictment to have been killed is, first actually dead, and second, that his death was caused or accomplished by violence or the direct criminal agency of some other human being." Both of these elements have been proved by the prosecution by the testimony of the Japanese guards who accompanied the accused and the victims to the site of the execution, heard the shots, and assisted in the burial of the bodies. Further verification is contained in the signed confession of the accused which is in evidence and the testimony of various defense witnesses, including the accused.

The second element of necessary proof was to show that the corpus delicti was produced by a criminal agency. On this point we have the testimony of the guards that they heard the gun shots and observed blood pouring from the heads of the victims shortly afterwards. We have the unrefuted confession of the accused to the effect that he shot the thirteen native victims.

The third and final element to be proved by the prosecution before a conviction can be had was that "the accused did the criminal act or set in motion the criminal agency." That the accused did the criminal act has been proven by both prosecution and defense witnesses and admitted by the accused in open court.

"CC (1)"

The allegations in the various specifications as to the time and place of these killings has been proven by the testimony of the Japanese guards and the confession of the accused.

The usual technical terms of common law pleading of homicide are used in the specifications under both Charge I and Charge II. To allege that these killings were done 'wilfully, feloniously, with premeditation and malice aforethough' is merely to state that act of the accused was intentional. If the accused intended to kill these natives then he is guilty of the conduct implied in those legalistic terms. That the accused intended to kill the thirteen natives is apparent and in fact, the evidence shows that he, himself, made a farewell speech to the natives informing them of his intention to execute them.

The identity of the accused and his victims as alleged in the charges and specifications has been proved by ample evidence which is uncontradicted.

We now come to the only open question in this case and that is whether or not these killings were done "without justifiable cause" as alleged by the prosecution. Prosecution witnesses have testified that there was no trial and that the natives were executed after only an investigation and upon a review of the report that resulted from that investigation. The defense witnesses have admitted that there was no regular trial but have attempted to justify the execution on the basis of a 'special procedure'. Since this alleged special procedure consisted merely of the reading of an investigation report, the defense in turn proceeded to attempt to show that these investigations were fair and thorough. In rebuttal, the prosecution has shown that the only thoroughness was in the beatings administered to the native prisoners. The prosecution produced five of the natives who were taken prisoners at the same time and in connection with the same incidents as the victims mentioned in Specifications 3 and 5 of Charges I and II. From these natives, this commission was able to hear a first hand account of what actually took place on Imrodj and Aineman Islands. We learned about the novel lie dector--a pronged wire inserted into the nose--used by defense witness Morikawa. We heard of the use of baseball bats and iron rods on these natives during their questioning, the mistreatment of the victims Chuta and Chonmohlo, and the woman Mejkane. It was evidence secured in this fashion that was contained in the reports that we are tald were considered in the so called 'special procedure.'

The defense that has been offered to the charge of murder can

best be summarized as consisting of the following arguments: (1) We know that these natives were not given the trial to which they were entitled but we would like you to believe that a 'special procedure' was held for them; (2) If we fail to convince you that a 'special procedure' was held, then we want you to excuse Furuki for these murders because he was only acting on superior orders of Masuda; (3) If you neither believe that there was a special procedure nor believe that superior orders are a good defense, then we would like you to excuse these wrongs because there was a war going on and conditions being what they were on Jaluit, it was not unnatural for these murders to occur.

Let us first analyze this so called special procedure. We have heard some fantastic stories about three judges and a judge advocate getting together to decide the fate of the native victims. However, the record shows that the so called judges did not judge and the so called judge advocate only read an investigation report. One of the so called judges--Lieutenant Commander Shintome--called by the prosecution in rebuttal admitted that he never had been told he was a judge and in fact had not so acted. This gives the lie to the testimony of defense witnesses that Admiral Masuda had informed each one of his part in the special procedure and told Shintome that he was to be a judge. Unfortunately, for the defense, this witness was in Japan when this fantastic story about a 'special procedure' was dreamed up and could not be given the word as to the part he was to play in the act. The prosecution has always been convinced that there never was any special procedure and for that reason produced Shintome so that this commission might from his testimony realize that Inoue and Furuki lied about this matter.

The defense of superior orders will be discussed by Mr. Bolton in his closing argument. Suffice for me to say at this time that such a defense can in no way excuse culpability for the crime. This was so held in the famous American case of United States v. Jones, 3 Ward C. C. 209, where the court said, "We do not mean to go further than to say that the participation of the inferior officer in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior." Gentlemen, Furuki is not one who ought to have known, but one who actually knew that in carrying out the orders of Admiral Masuda he was participating in an illegal act.

The last straw defense, as I have stated, is that these murders should be excused because there was a war going on. This, of course, is no legal justification for murder. But let us not forget who started this war. After hearing defense testimony about the merciless bombings of Jaluit by the American forces and the 'kidnaping' of natives, one might be inclined to forget that it was the Japanese who attacked Pearl Harbor on December 7, 1941. It was after that incident that the Japanese forces moved in on the peaceful inhabitants

of the Marshall Islands. Then, when the tide of war turned and the attacker became the def nder, these Japanese would like to charge the rules for their convenience. The defense in this case could well be likened to a housebreaker who after having broken into a home and suddenly finds the place surrounded by the police, decides that it would be well to suspend all laws temporarily so that he might murder the occupants and make his surroundings more comfortable.

There is an old saying that "dead men tell no tales." How the defense has made use of that truism. The entire defense has come out of the mouth of the dead Masuda supplemented by alleged communications which were conveniently destroyed by the Japanese just prior to their surrender to the American forces. Ordinarily such testimony would not be admissible in a court of law. However, under the wide latitude allowed by the special rules under which this commission functions it has been received in evidence. The fact that it has been admitted into evidence does not make it any more susceptible to belief. Particularly when the party relating the hearsay is the torturer Morikawa, or on Inoue who definitely has a selfish motive in trying to establish a defense for the accused, or Furuki himself who has admitted on the stand that he lied to the American authorities on a prior occasion. But even if these 'dead man's tales' or alleged dispatches were to be believed, is there anything in them that would justify murder on the part of the accused? Do they say anything or give any power to Admiral Masuda to order his right hand man, Furuki, to commit murder? They do not.

In Charge II it is alleged that the accused violated the laws and customs of war in that he executed the thirteen natives without previous trial. Testimony shows that Admiral Masuda stated that it was to be presumed that all the natives who attempted to desert to the enemy had the intention of carrying military information. We have testimony that Molein and Majkane were definitely considered and accused of being spies. We therefore claim that the thirteen natives fall within the definition of a spy in Article 29 of the Fourth Hague Convention and were entitled to the protection given by Article 30 which states that "A spy taken in the act shall not be punished without previous trial."

In closing, gentlemen, let me remind you that these Japanese officers when questioned at Kwajalein in late 1945, admitted that no trial was held for the natives. There was no qualification of the word trial at that time. If these Japanese officers are to be

believed, then the story that they told shortly after the hostilities is the one to be accepted. Not one that has come to light for the first time after the serving of charges and specifications on the accused.

James P. Kenny

JAMES P. KENNY
Lieutenant, U. S. Navy.

昭和二十二年三月十四日、十五日

辯　論

被告　古木秀策

辯護人　秋森勇一郎

昭和二十二年三月十四日
辯論（古木秀策被告事件）
辯護人 秋元勇一郎

裁判長閣下並委員諸君

私ハ被告古木秀策ノ無罪ヲ主張セントスルモノデアリマス
本件ノ事實ハ明白デアリマシテ其ノ觀点ニ於テ若干ノ相違アリトスルモ
殆ンド爭ノナイ處デアリマセウ然シ其ノ法律上ノ見解ニ於キマシテハ私ハ
檢事ノ全ク所見ヲ異ニシ被告ノ絶對的無罪ヲ確信スルモノデアリマス
而シテ其ノ法律ノ解釋ガ本件解決ノ根本デアリ否其全部デアルト申
スノモ過言デアリマセヌ
然シナガラ之ノ法律的解釋モ其ノ事實ノ基クモノデ斷ジテ抽象的架
空ノ法理論デアッテハナラナイノデアル然シ其ノ事實ハ同一ノデアル爭ノナイ
事實デアル其ノ同ヘナル事實ニ對シ一ハ之ヲ白ト見他ハ之ヲ黑ト見ル
實ニ矛盾デアル非論理的デアル然シ夫レハ否定ノ出來ナイ現實デアリマス
ヘ体之ノ矛盾ト非論理的現實ハ何故ニ生ズルノデアリマセウカ私ハ之ニ
委員諸君ノ重大ナル御考慮ヲ仰ギ度イノデアリマス
キリストハ吾等ニ「汝幼子ノ如クナレ」ト仰セラレマシタ
而シテコレハ前書第一三章ニ
吾童ノ時ハ語ルコトモ童ノ如ク思フコトモ童子ノ如ク論ズルコトモ童子ノ如ク
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力ノ時ニハ我ガ知ラレタル如ク全ク知ルベシ

一～002

實ニ信仰ト希望ト愛ト此ノ三ツノ者ハ限リナク存ラ而シテ其ノ内ニテ最大ナルハ愛ナリ」ト記サレテ居リマス

But when I was a child. I spoke as a child. I understood as a child, I thought as a child, but when I became a man, I put away childish things. For now we see through a glass, darkly; but then face to face: now I know in part but then shall I know even as also I am known.

And now abideth faith, hope, chrity, these three, but the greatest of these is chrity.

之レハ私ガ三月二十三日當地ノ教會ニ於テ牧師Wellcox氏ノ御説教ヲ拝聴致シマシテ非常ナル感動ヲ受ケマシタ

聖句デアリマス

牧師ハ次ノ如ク述ベラレマシタ

童子ハ経験ヲ淺ク知識ヲ缺キ推察ヲ思慮ヲ之ガ爲メニハ曇リハナハダ甚シキ事多シ此事ハ正直デアル然ニ成人ナレバ色々ナ眼鏡ヲ使用スル之レガ爲ニ甚ダ見ル處ガ朧トナルノデアル

私(牧師)ハ多クノ童子ノ友人ヲ有スルガ甚ダ只一人ノ童子ハ何故ノ私ヲ嫌ヲ私ハ甚ダ子供ノ癖ニテ親シク語ヲ而シテ彼レガ私ヲ嫌ヲタノハ私ガ眼鏡ヲカケヲ居タカラデアルコトヲ知ロヲタ眼鏡ヲトヲテ私ハ彼ノ

親シクナッタト語ラレマシタ」
私ハ前ニ引用シマシタ「コリント」ノ聖句トユウ短イ挿話ニ非常ナル
感動ヲ覚ヘタノデアリマス
永久ノ間ニハ人種風俗人情、習慣、傳統言語等種々ナル
相違ヨリ生ズル偏見ガアリマス又等ガ各々相異ル眼鏡ヲノデアリマス
又等相異ル眼鏡ヲ依テ見マス時ハ一物体ガ白ク見エ黒ク見エ或ハ
赤クモ青クモ見エルノデアリマス又等ノ相異ル生活様式ガ法律制
度ニモ又其ノ解釋見解ニモ等差ヲ生ズルノデアリマス
一個ノ行為ガ正當ナル行為ナリヤ果タ犯罪ナリヤノ判断ハ決シテ其ノ
行為ノ外形ノミニ依テ判断セラレテハナリマセヌ其ノ實質ガ悪質ナ
リシヤ換言スレバ又社會性ヲ有シタリヤ其ノ意圖ガ奈辺ニアリシヤ
其ノ時、其ノ土地、其ノ状況ト行為者ノ主觀乃至信念トヲ綜合シ
實質的眞實ヲ把握シナケレバナリマセヌ之ノ為ニハ人種風俗習慣
傳統人情、言語等各種社會的相異ノ各ル眼鏡ヲトリハズシテ
眞裸体トシテノ眞人間トシテノ眞實ヲ發見シナケレバナリマセヌ然シ之ヲ
完全ニ取リ去ル事ハ容易ナラヌデハアリマスマイガ人種風俗、習
慣人情、相違ハ永イ傳統デアルニ依リ若ヘ方見方ヲ自
然ニ相異ルモノデアリマス從テ吾々ハ自分ト人種風俗人情、慣
習異ル外國人ノ行為ノ觀察ニ當リハ最モ冷靜ニ其ノ者ノ
人種、風俗、人情、慣習、差ニ依ル偏見ノ拂ノナケレバナラヌト思ヒテ
有リマス何トナレバ此等差ハ稍モスレバ偏見ガ伴ヒヤスイカラデ有リマス
私ハ此點ニ付檢事本法廷ニ於テトラレマシタ証人訊問サレタル場合
証人ハ「ウソ」ヲ吐ク者ナリト初メカラ極メテカカラレタ様ニ見

DO 4

エイミタ殊ニ本件ニ關係ナル他ノ記錄ヲソレガ何ニアルカモ告ゲズシテ
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印象ヲ與ヘント努力セラレタ様ニ思ハレルノガ若シ然ラバ証人ハ
「ウソ」ヲ吐クモノナリト偏見ノ眼鏡ヲカケテ之ヲ見テ居ラレタノデナイカト
疑問ヲ持ツモノデアリマス
証人ハ神聖ナル法廷ニ於テ嚴肅ナル宣誓ヲナシテ証言ヲナシテ居ルノ
デアル若シ悪ル時悪ツタ事件ニ付悪ツタ事情ノ下ノ外部デナシタル
言葉トノ間ニ矛盾ガアツタ場合ニハ其ノ矛盾セル言葉ハ如何ナル時
如何ナル場合如何ナル事情ノ下ニ爲サレタルヤヲ示シコノ法廷ニ於テ
嚴ニナサレタル証言ノ credibility ヲ評價スベキデアル檢事ハ
敢テ之ヲナサザル片言隻句而モ悪クヒビクヤウナ表言ヲ用ヒ証人ヲ
誹謗セラレタノハ或ハ巧妙ナル訴訟技術デアルカモ知レマセヌガ私ハ
賢明ナル委員各位ニ於カレマシテハ万一誤解セラルヨウナ事ハナイト信
ジテ居リマスガ一般ニ對シテハ多分ニ誤解ヲ招ク恐レノアル危險
ナル且 bold ナラザル法廷戰術デアリマシテ眞實發見ヲ眞髄トスル刑
事々件審理ニ於テハ排撃サルベキモノデセヌ檢事ハ最ニ本法廷ニ
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米國調査官ニ對シタル述ベタル陳述ノ一部ヲ引用シテ訊問セラレ
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又シカ井田少將生前ト死後ニ於ケルソノ陳述ガ相異ツテ居ル檢
事ハ之ヲ難詰シテ其ノ何レガ正シイカト色ヲナシテ詰メヨツタ証人ハ
井田少將死後ノ陳述ガ正シイト答ヘタコノ檢事作戰ノ功名デ

アツク事件ノ眞相ヲ知ラナイモノハ恐ラク証人等ノ本件ノ事實ニ對シテ陳述ヲ変更シタモノト誤解シテアロウ何トナレバ検事ノ其ノ引用シタル記録ガ何ノ事件ノ記録デアルカヲ示サズ且又ソノ陳述ノ一小部分ノミヲ引用シタルガ故ニ証人等ノ其ノ時陳述シタル趣旨ヲ判断スルコトガ出来ナイカラデアル

果セル哉四月五日ノ Navy News 之ヲ誤解シテ

"Furuki admitted changing his statement regrding the risponsibility of the war crimes after Admiral Nasuda committed suicide. Thus he placed all the responsibility in the dead war criminal's hands.

ト報ジテ居ル之ハ全ク Navy News ノ誤解デアル

彼等ハ本件ニ全然関係ノナイ他ノ事件ヲ検事ガ引用シタルコトヲ知ラズ且又検事ガ証人ノ陳述ノ一部ノミヲ引用シテ証人ノ陳述ノ趣旨ヲ示サナカッタカラデアル斯クノ如キ検事ノ用ヒタル法廷技術ハ巧妙デ事實ヲ知ラナイ者ニ誤解ヲ與ヘルモノデアル相手方ノ巧妙ナル法廷技術ト云ハ或ハ弁ベネモノデアルカモ知レヌガ眞實發見ヲ目的トスル刑事訴訟ノ手續ト云ハ詢ニ危険デアッテ私ハ遺憾ニ堪ヘナイ

現ニ森川、井上、古木ノ各証人ガ本法廷ニ於ケル証言シタル如ク弁田少将ハ終戦後米國駆逐艦長マッキンリー佐ヨリ米國法務官ノ島民事件ニ付訊カレタル際之ヲ幸直ニ述ベ私ハ日本ノ法律違反シタル島民ノ犯罪ノ自分ノ権限ニ依リ合法的ニ審理シ法律ニ

依之ヲ處分シタルヲ當然ノ職分行爲デアル丈ケニ對シ何等恥ズル處ハアリマセヌ」ト述ベテ居ルノデアル

本件ニ關シ何レノ証人モ陳述又ハ証言ノ変更シタル点ノ无イノデアル

委員各位ニ於テハ明瞭ニ御認識アラントハ信ジマスガ Navy Navy ノ誤解記事ガアリマスノデ特ニ陳述申上ゲタル次第デアリマス

又言語ノ障害モ相當大ナル眼鏡デアリマス一字句ノ誤訳モ重大ナル影響ヲ與ヘマス例ヘニ日本語ト英語ハ其ノ構造ガ upside down デアリ又 Negative Question ニ對スル答ヘガ又對デアル處カラ屢々証人ガ返答ニ困ル實情ノ徹底知ノ事ト存ジマス例ヘニ double negative ノ質問ニ對シテハ私自身關係居ル乎如何ニ答ヘテイカワカラヌ又場合ガ度々アリマシタ

以上申上ゲマシタ通リ取調ニ當リマシテハ此等人種言語人情風俗習慣相違ヨリ來ル易キ幾多誤解偏見ノ眼鏡ヲ能フ限リ取去リ事件ノ眞相ヲ把握シナケレバナリマセヌ茲ニオキマシテ特ニ裁判長委員各位ノ御留意ヲ懇願ニ致シ候ヘ本件事實ノ外形ニ不拘其ノ實質ニ對シ如何ニ愼重ナル注意ト手續ガ行ハルヤニ付御考慮ヲ賜ハラン事ヲアリマス

前述ノ如ク本件事實ハ明瞭ナンデアリマス只之ヲ法律上如何ニ見ルガ問題ナノデ有リマス

其ノ第一ハ本件ニ裁判權ガ米國裁判ニ有ルヤ否ヤノ問題デアリ

第二ハ　本件被告ノ行爲ガ法律上許サル可キモノナリヤ換言スレバ被告ノ行爲ハ法律上犯罪ヲ構成スルモノナリヤ否ヤノ問題デアリマス

第一裁判權ノ問題ニ付テハ已ニ提出シタル異議ニ於テ詳論致シタルヲ以テ茲ニ重ネテ述ベルコトヲ省略致シマス只檢事之ニ對スル意見ノ矛盾ヲ指摘シ私ノ議論ノ正シイ事ヲ主張致シマス即檢事ハ日本ノ委任統治領タル「マーシャル」地域ハ日本ガ國際聯盟脫退ニ依リ其主權ヲ失ツタノデ當時「マーシャル」ニ於テ日本ノ統治權ヲ有シテ居ナカツタト主張シナガラ當地時ニ施行セラレテ居ツタ日本刑法ハ local law トシテ有効デ有ルトシテ本件ニ日本刑法第199條ヲ適用セラレタ然レ共裁判權ニ對シテハ日本ノ主權ヲ否認シ現在米國占領地デ有ルノ故ヲ以ツテ米國ニ裁判權ガアルト主張セラレタ勿論米國ノ占領後ニ於テ其ノ占領地域内ニ發生シタル事件ニ對シ米國ガ裁判權ヲ行使スル事ハ私ハ否定シナイ然シ本件ハ日本ノ統治セル領域ニ於テ日本ノ被統治者タル島民ガ日本ノ國法ヲ犯シタニ對シ日本ノ法律ニ照シ日本ノ官廳ガ之ヲ處斷シタノデアルト雖モ之ヲ實行シタルモノハ日本臣民デ有ル

若シ之レガ犯罪ヲ構成スルトセバ人的地的及時ノ三ツノ点デノ関係ニ於テノミ裁判権ヲ有スルノデアル日本ハ敗戦シタリトハイヘ猶独立國デ有ル日本ノ國法ハ現存有効デ有ル日本人ハ世界何レノ地域ニ有ルトモ日本裁判権之ニ及ブデ有ル只事實上犯人ガ主権ノ及ベナイ外國ニ在ル場合ハ事實上直ニ裁判権ノ行使ガ出来ナイノミデ裁判権ヲ喪ヲテ居ルノデハナイ此ノ場合ハ犯人所在國ガ犯人引渡條約ノ締約國デ有ル場合此ノ條約ニ基キ犯人ノ引渡ヲ要求スルノガ國際的慣例デアリマス犯人所在國ガ他國ニ於テ他國人ノ爲シタル犯罪ニ對シ只犯人ガ自國ニ現在スルノ故ヲ以テ之ヲ裁判シ得ルコトヲ規定シタル法律ハ世界何レノ國ニモ有ル事ヲ知ラナイモデ有リマス本件ヲ現在米國ガ今地ヲ占領シテ居ルノ故ヲ以テ米國占領以前ニ他國ニ於テ發生シタル他國人事件ニ對シテ米国ニ裁判権ヲ有スルトスル檢事意見ハ

全ク上記非理ヲ肯定スルモノニテ到底許サルベキモデハナイノデ有リマス

又ハ檢事ハ法律ノ不遡及ノ原則ヲ無視シテ居ル世界何レノ文化國ニ於テモ法律不遡及原則ハ法適用解釋ニ於テ凡ソ文明諸國ガ嚴守シテ居ルノデアル

檢事ハ刑法ノ適用ニ關シテハ不遡及原則ヲ適用シ訴訟手續法ニ關シテハ之ニ違反シテ居ル勿論手續法ニ於テ不遡及ノ原則ニ反スル法律ヲ爲スコトノ可否ニツイテハ議論

-.OOO 9

ハ有ルガ夫レハ此ノ不遡及ノ原則ニ反スル法律ヲ制定スルコトノ可否デアロウ其ノ法律ガ制定セラレザル限リ手續法ニ於テモ不遡及ノ原則ヲ容ニサケレバナラナイ事ハ世界文明諸國ノ法學者ノ一致シタル學說意見デ有ル本件ニ起訴ハ明ニ此ノ原則ニ違反シ居ル私ハ本裁判所ニ於テハ本件ニ對スル裁判權ヲ有セズトノ主張ヲ飽迄維持スルモノデアリマス

第ニハ本件被告ノ行爲ガ法律上許サルベキモノナリヤ否ヤ換言スレバ該行爲ハ犯罪ヲ構成セザルモノナリヤ否ヤ實ニ最モ重要デアリマス先ズ如何ナル行爲ガナサレタルヤ被告人及各証言ヲ綜合シ一致セル所ヲ示セバ次ノ如シ

第一起訴狀罪狀項目其ノ一記載ノ島民四名「レツール」「コーク」「コヂナ」及不詳者

今罪狀項目 其ノ二記載ノ島民三名「アルデン」「マクイ」「ナマクワック」

今罪狀項目 其ノ三記載ノ島民業名「タユータ」「ナヨンモール」

今罪狀項目 其ノ四記載ノ島民二名「マンラーラ」「ラベリヤ」

今罪狀項目 其ノ五記載ノ島民二名「メジカニ」「メーレン」

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第二起訴狀記載レーゾル、コーリ、コゲナ、アルデン、マクイ、タヤクロック、不詳者（第一起訴狀記載）等ノ島民等ハ何レモ日本刑法日本海軍刑法其ノ他ノ法令ニ違反シ罪ヲ犯シタル事ハ明瞭ニテ有ルコトヲ其ノ各自ノ罪狀及適用法令ハ各証人ニ依リ詳細供述シ記錄ニ明記アルヲ以テ茲ニ一一詳述スルコトヲ畧シ茲ニ其ノ罪狀ハ海軍刑法第九九條適敵ニ走ル罪第六五條ヲ數ヲ以テ守兵ヲ殺害スル罪　刑法第百九條敵國ニ與シテ日本ニ抗敵スル罪

仝第一九九、二〇三條殺人罪及其ノ他ノ法條ニ觸レタル犯罪ヲ犯シタルモノデ有ルコト而シテ之ガ犯罪ノ處理ニ付當時「ヤルート」環礁最高指揮官タル升田少將ハ調査官トシテ作田中尉、門田少尉森川少尉　家木少尉等ニ調査ヲ命ジ檢察官トシテ古木少佐ニ審判官トシテ新留少佐、井上大尉及升田少將自ラ之ニ當ルベク命ゼラレタル事及之等任命ニ當リ　升田少將ハ之ノ事件ノ軍ニ影響スル所頗ル大デ有ル然レ現時ノ熾烈ナル戰場ニ於テ正規裁判手續ヲ取ル事ガ出來ナイカラ余ノ有スル權限ニ依リ特別ノ手續ニ依ル審理ヲスル調査官ト雖モ裁判官ノ積リデ愼重公正ニ調査セヨト命ゼラレタ事

而シテ之等犯罪ノ調査ハ幾多ノ時間ト勞力ヲ費シテ愼重ニ調査ガ遂行セラレタノデ有ルコト即チ証據ノ集收多數証人ノ取調本人ノ自白等ニ依リ茲ニ調査結果調査官ニ依ル調査報告書ガ作成セラレ之ヲ古木少佐ヲ經テ升田少將ニ提出サレタ升田少將及古木少佐ハ之ノ調査報告書ニ基キ更ニ被疑者ヲ取調

ベタル上升田少将ハ古木少佐新留少佐井上大尉ヲ集メ愼重タル
審議ヲ爲シ此ノ席ニ於テ古木ハ検察官トシテ意見ヲ述ベ新留少佐
井上大尉ハ審判官トシテ意見ヲ述ベ升田少将ハ審判長トシテ此レラノ意見ヲ
聞キ更ニ熟考スルト云イ一両日ノ後ニ於テ判決書ヲ作成シ新留少
佐井上大尉及古木少佐ヲ集メテ之ヲ示シタル後ニ古木少佐ヲ從ヘテ收
容所ニ行キ當該被告人ニ對シ刑宣告ヲ爲シタルノデアル而シテ検察官
タル古木少佐ノ求刑意見ト審判長トシテノ判決トノ間ニ相違ガアッタコト
即古木少佐ハコーリ、コビナ、タマツクリック、サユタ、サヨンモール、マンデラ、ラベリア、
メジカニ、等ニ對シテハ重勞働15年ノ求刑シタノデアルガ判決ハ死刑デアック
此点ニ關シ commission ノ質問ニ對シ証人作田大尉ハ古木少佐
ノ求刑ハ輕カッタガ升田少将ノ判決ハ重カッタト証言シ森カ証人モ全様
ニ証言シ井上大尉ハ前記島民レクール以下13名ニ對スル升田少将ノ
判決ハ死刑デアッタガ古木少佐ノ求刑ハ其ノ數ヲ正確ニ覺エテ居ナイガ
判數以上ハ重勞働カデアッテ死刑デハナカッタト証言シ古木ハ前記
ノ如ク人名及刑期ヲ明確ニ証言シ之等証言ハ綜合シテ其ノ確實
ナル事ヲ立証シ得タト信ジマス

猶檢事ハ前記手續ニ關シ証人ガ裁判デナカッタト証言シタルカ如キ
印象ヲ與ヘントシテ証人井上文夫ノ証言ノ一部ヲ上テ古木訊問シ
タルトハ抵触ヲ通リデ有ル然シ前記手續ヲ裁判ト見ルヤ否ヤハ
各自意見デアッテ事實デハナイ又証人井上大尉ハ断ジテ裁判デアルコトヲ否定
シハ居ナイ只正規ノ裁判手續デハナク特別ナ手續ニ依ル審理デアル
ト証言シタルニハ他ノ証人全ジデアッテ檢事ノ引用シタル全人ニ對スル

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訊問ノ一部ハ

(問)証人ガ裁判デアルト考ヘタハ審理當時デアルカ或ハ後デアルカ?
(答)終戰後デアリマス
(問)夫レデハ當時ハ裁判トハ考ヘナクフタカ
(答)左様デス當時ハ裁判デアルトハ無イトクハ考ヘマセンデシタト応答シテ居ルコトハ記錄ニ明記シテアリマス
然ルニ檢事ハ態ト最後ノ答當時ノ裁判デアルトガ無イトカイフコトハ考ヘマセンデシタト答ヘタル部分ヲ讀マナカツタ

コノ「當時裁判デアルトカナイトカイフコトハ考ヘナカツタ」トイフ言葉ハ決シテ裁判ノアツタ事ヲ否定シタモノデハアリマセヌ彼ハ當時ノコノ特別手續キガ當然正シイモノト信ジテ行動シテ居タノデ夫レガ裁判デアルトカ無イトカトイフヤウナコトヲ考ヘナカツタ夫レガ問題ニナルトモ考ヘナカツタコトハ井上、古木ガ本件ガ起訴ニナル遙キ以前ニ於テ米国法務官宛提出シタル陳述書ニモ明記シテ居ル夫レガ後ニナツテ思ヒ掛ケヌ問題トナツタノデ初メテ考ヘサセラルルニ至ツタトノ意味デアルコトハ彼ノ証言ノ前後ヲ通ジ見レバ明確ニ認識セラルルコトデアリマス又森川中尉ガコノ手續キモ又裁判ノ一種ニ屬スルモノデアルト証言シタ之ニ対シNavy Newsハ裁判ガアツタト証言シタノハ彼只一人デアルト記載シタガ特別ナル手續キニ依ル裁判ノ實質ヲ証言シタハ各証言ノ一致スル処デアル作田大尉ガ「コノ法廷ニ於ケルガ如キ裁判ハ行ハレナカツタガ特別ノ手續ガ行ハレタトイフタノモ皆同様デアル特別ナル審理トイフモ特別ナル裁判トイフモ要ハ

事實如何ナル手續ヤガ行ハレタリヤガ問題デアツテ用語ハ問題デハナイコノ事實ヲ如何ニ表現シタカハ些々タル問題デアル其事實ヲ何ト見ルカハ各自ノ意見デアツテ私ハ之ニ付後ニ述ヘマス commission ニ於カセラレマシテモ元々ノ考慮ヲ仰ク次第デアリマス

而シテ井田少將ハ判決ニ基キ本起訴狀ニ記載セラレタル島民ノ死刑執行ヲ檢察官タル吉木少佐ニ命ジ吉木少佐ハ井田少將ノコノ命令ニ依リ職務ヲ遂行シ死刑ヲ執行シタルコト各証人ノ証言ニ依リ明デアル

次ニ「ヤルート」環礁基地最高指揮官タル井田少將ガ上述ノ特別手續ニ依ル審理ヲ爲シ得ル權限ニ付各証人ノ証言ヲ綜合シテ明確ニシタル処ハ次ノ通デアル

昭和十九年二月「ケゼリン」陷落後「ヤルート」ハ完全ニ圍圍トノ交通杜絶シ絶對的孤立デアツタコト

ヤルート環礁ガ完全ナル戰場デアツテ毎日敵ノ艦船航空機ニ依ル熾烈ナル攻襲ニ晒サレ各將兵ハ各戰斗配置ニ付イテ居タコトヨリ「ヤルート」環礁地域ノ平時ノ管轄官庁ハ在パラオノ南洋方デアリ民事商裁判所ハポナペニ在リ常設軍法會議ハトラックニアツテガ之等ノ地区ト「ヤルート」環礁トハ絶對ニ交通杜絶ニ陷ツテ

而シテ ヤルートニハ常設裁判所ハナカツタ

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ユノ状勢ニ応ジ昭和十九年三月又ハ四月第四艦隊司令長官ハヤルート環礁最高指揮官升田少将ニ対シ爾今「ヤルート」環礁地域ニ於ケル一切ノ行政司法ハ全基地最高指揮官ニ於テ行フベシト命令ガアッタユトノ全地域ガ已ニ戦場デアッテ戒厳令施行以上ノ状態ニアルノデ其ノ地域ノ最高指揮官ニ軍政ノ独裁権ヲ與ヘタモノデアル証人有馬少将ノ全地ノ状勢ガ急迫シテ居ルノデ爾今第四艦隊司令長官ノ訓示ヲ待ッ迄モナク軍政及軍隊以外ノ広範ナル事項ニツキ之ヲ行フ権限ヲ基地最高指揮官升田少将ニ付與セラレタノデアルト証言シ

又已ニ証拠書類トシテ提出シタ日本政府第二復員局調査部長作成セル書類ニ「ヤルート」地域ハ已ニ戦場デアッテ事實上戒厳令施行以上ノ現情ニアッタノデアルカラ戒厳令ハ布告セラレズトモ其ノ基地最高指揮官ハ戒厳司令官ノ有スル権限ヲ當然行使セラレタルモノト認ムトノ趣旨ヲ証明シテ居ル之等ノ証拠ヲ綜合シ升田少将ガ司法権行使ノ権限ヲ有シタルコトハ一点ノ疑ヒモナイノデアリマス

仮リニ何等ノ命令ガナカリシト仮定スルモ斯ノ如キ周圍ト連絡全ク杜絶シタル絶海ノ孤島ニ孤立セル戦場ニ於テ他ニ何等司法権行使ノ機関ナカリシ場合其ノ地域ニ犯罪ノ発生シタル場合ハ何人ガ之ヲ処理シ得ルヤ米軍ガ其ノ立場ニアリトスルモ當然其ノ基地最高司令官ガ其ノ権限ニ於テ之ヲ処理シタモノト云フ外ニ途ハナイモノデアロウコトハ言ヲ俟タナイコトデハナイカ

果シテ然ラバ升田少将ガ其ノ権限ニ於テコノ犯罪ヲ処理スルコトハ當然デアル

DD 15

以上畢竟、條理ト証據ニ依リ本件事實ノ有ノママニ述ベタコノ事實ガ將ニ起訴第一及第二ニ記載セラレタル如キ殺人罪ヤ戰爭法ニ違反スルデアリマセウカ若シ之ガ犯罪ニナリマスナラバ私ハ法律ハ善良ナル人ヲ助クルモノデハナク却テ之ヲ害スルモノダト云ヒ度クナリマス私ハ本件被告ノ行為ハ断ジテ犯罪ヲ構成シナイト確信致シマス

今其ノ理由ヲ更ニ詳論致シマス.

一、本件起訴狀ニ記載セラレタル被処刑者レソール、コーリ、コジナ、アルデン、マクイ、チヤクリフク、チユータ、チヨンモーレ、マンデーラ、ラベリヤ、メーレンメジカニ外一名ノ犯罪行為ト日本刑法及日本海軍刑法トノ關係ヲ述ベマス

日本刑法第八條ニハ「外国ニ通謀シテ帝国ニ戰端ヲ開キシ又ハ敵国ニ與シテ帝国ニ抗敵シタルモノハ死刑ニ処ス.

仝第九條ニハ「敵国ヲ利スル為メ要塞陣地営舍艦船兵器軍某汽車電車鉄道電線其他軍用ニ供スル場所又ハ物ヲ損壞シ若シハ使用スルコト能ハザルニ至ラシメタル者ハ死刑又ハ無期懲役ニ処ス」

仝第十條「敵国ノ為ニ間諜ヲナシ又ハ敵国ノ間諜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処ス」

0016.

軍事上、機密ヲ敵國ニ漏泄シタル者亦同シ」

仝第86條ニハ「前五條ニ記載シタル以外、方法ヲ以テ敵國ニ軍事上、利益ヲ與ヘ又ハ帝國、軍事上、利益ヲ害シタル者ハ二年以上、有期懲役ニ處ス」

仝第87條ニ「前6條、未遂罪之ヲ罰ス」

仝第199條ニ「人ヲ殺シタル者ハ死刑又ハ無期若シクハ三年以上、懲役ニ處ス」

仝203條ニ「第199條 第200條及前條、未遂罪ハ之ヲ罰ス」

仝第54條ニ「一個、行爲ニシテ數個、罪名ニ觸レ又ハ犯罪、手段若シクハ結果タル行爲ニシテ他、罪名ニ觸ルル時ハ其、最モ重キ刑ヲ以テ処斷ス」

仝第一條「本法ハ何人ヲ問ハズ帝國内ニ於テ罪ヲ犯シタル者ニ適用ス」

仝第二條「本法ハ何人ヲ問ハズ帝國外ニ於テ左ニ記載シタル罪ヲ犯シタル者ニ之ヲ適用ス」

(二)「第81條-及至89條」ト規定シアリマス

0017

海軍刑法ニハ

第23條ニ「敵國ノ利スル爲ニ前ニ記載シタル行爲ヲ爲シタル者ハ死刑ニ處ス」

一、艦船、兵器、彈藥、其他軍用ニ供スル場所、建物其他ノ物ヲ損壞シ又ハ使用スルコト能ハサルニ至ラシムルコト（一、二、四、號）

五、兵器、彈藥、糧食、被服、其他軍用ニ供スルモノヲ交付セシムルコト

仝24條ニ「前ニ條ニ記載シタル以外ノ方法ヲ以テ敵國ニ軍事上ノ利益ヲ與ヘ又ハ帝國ノ軍事上ノ利益ヲ害シタル者ハ死刑又ハ無期若シクハ五年以上ノ懲役ニ處ス」

仝第64條

寄兵ニ對シ兵器又ハ凶器ヲ用ヒテ暴行又ハ脅迫ヲ爲シタル者ハ左ノ區別ニ從ヒ處斷ス

一、敵ニ對シ前ナルトキハ無期又ハ五年以上ノ懲役又ハ禁錮ニ處ス

仝第65條

黨與シテ前條ノ罪ヲ犯シタル者ハ左ノ區別ニ從テ處斷ス

一、敵前ナル時ハ首魁ハ死刑又ハ無期、懲役若クハ禁錮ニ處シ其ノ他ノ者ハ無期若クハ七年以上ノ懲役又ハ禁錮ニ處ス

仝第70條

第58條及至第68條ノ未遂ハ之ヲ罰ス

仝第71條

敵ニ走リタル者ハ死刑又ハ無期、懲役若クハ禁錮ニ處ス

D018

仝第77條

第73條、74條及前條ノ未遂罪ハ之ヲ罰ス、

仝第79條

露積シタル兵器、彈藥、糧食、被服其ノ他ノ海軍ノ用ニ供スル物ヲ損壞シタル者ハ左ノ區別ニ從ヒテ處斷ス、

一、戰時ニ於テハ死刑又ハ無期懲役ニ處ス

仝第82條

第78條ニ記載シタル物又ハ海軍(戰時)ノ用ニ供スル鐵道電線若シクハ水陸ノ通路ヲ損壞シ又ハ使用スルコトヲ能ハザルニ至ラシメタルモノハ無期又ハ二年以上ノ懲役ニ處ス、

仝第84條

第78條及至第82條ノ未遂罪ハ之ヲ罰ス、

仝第2條

本法ハ海軍ノ人ニ非ズト雖モ左ニ記載シタル罪ヲ犯シタル者ニ之ヲ適用ス、

一、第62條及至第65條ノ罪及此等ノ罪ノ未遂罪

三、第78條及至第85條ノ罪

仝第4條

帝國軍ノ占領地ニ於テ海軍ノ人刑法又ハ他ノ法令ノ罪ヲ犯シタル時ハ之ヲ帝國內ニ於テ犯シタルモノト看做ス、

海軍ノ人ニ非ラズト雖モ帝國臣民、從軍ノ外國人及俘虜ノ犯シタルトキ

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而シテ本件起訴状第一第二ニ記載セラレタル「レ・ソール」以下十三名ノ島民ハ日本ノ被統治者デアッテ多数ノ以テ日本軍ノ守兵ヲ殺害シ軍用物ヲ強奪シ敵ニ走リ帝國ニ抗敵シ又ハセントシタル主謀者デアリマシテ何レモ前記日本刑法、日本海軍刑法ニ違反セル悪質ナル犯罪デアリマス而モ「レ・ソール」「コーリ」「コジナ」「アルデン」「ニクイ」「ナヤックリック」等ハ現ニ岡本兵曹及村岡軍属ノ首ヲシメ又ハ「カイ」ヲ以テ打チカカリ殺人ノ現行中格斗ノ末逮捕セラレタル現行犯デアル

而モ以上ノ島民ノ行為ハ何レモ敵前ニ於テ行ハレタル大膽不敵ナル悪質行為デアル若シ米軍ガ其ノ立場ニアッタトシテモ日本軍ト同様厳罰ヲ以テ之ニ臨ンダデアラウ否世界イヅレノ軍隊ニ於テモ敵前ニ於テ斯ル犯罪行為ニ対シ厳罰ヲ臨ムコトハ断言出来ル況ンヤ言語ニ絶スル急迫ノ状態ニアリシ「メルート」環礁ニ於テ之等ニ対シ死刑ヲ以ッテ必断シタル日本軍ノ処置ヲ非難スルコトハ出来ル

然ニ猶本件被告古本ノ如ハ其ノ天性ノ温情ヨリシテ最モ兇悪ナル「レ・ソール」「アルデン」「ニクイ」「メーレン」ノ一名五名ニ対シテハ死刑ノ意見ヲ述ベタノデアルガ其ノ他ノ者「コーリ」「コジナ」「ナヤックリック」「ナユータ」「ナヨンモレ」「マンデーラ」「ラベリヤ」「メジカニ」18名ニ対シテハ前記五名ノ者ニ引キヅラレテ居ル傾キガアッタノデ之ニ死刑ヲ求刑セズ重労働ノ求刑ヲナシタノデアルガ彼ノ検察官トシテノ意見ハ採用セラレズ審判長井田少将ハ以上ノ者ニ対シテハ全部死刑ノ判決ヲナサレタノデアル検察官トシテハ單ニ意見ヲ述ベルノミニテ審判

DD 20

ニ関スルコトハ出来ナイノデアルカラ古来トシテハ如何トモスルコトノ出来ナイノハ法ノ規定ニ依ル当然ノコトデアル之ニ何レニセヨ前記ノ理由ニヨリコレ等ノ島民ニ対シテ為サレタル処置ハ法ノ命ズル処デアッテ何等違法越権ハナイコトハCommissionニ於カレテ御認メニナルコトト確信致シマス

次ニ之レニ引レタル裁判手續ガ適法ナリシヤ否ヤノ点デアリマスガ之レハ前述各記人ノ述ブルガ如ク正規ナル裁判手續ギデハナク急迫ナル戰場敵前ニ於ケル一特殊ナル状勢ニ於テ已ムヲ得ズ取レタル特別ナル手續ニ依ル裁判デアッタ事ハ言ヲ俟モナイ当時マルート環礁地域ガ戒嚴宣告以上ノ戰場デアリ戒嚴令ノ形式宣告ノ有無ヲ問ハズ実質的ニ戒嚴令以上ノ地域デアッタコトハ明白デアル

本来ハ戒嚴令ノ事實戰場デナクトモ戰場ニ於ケル如キ急迫ナル状態ニ陥レタル場合戰場ニ於ケルガ如ク一般ノ平時ニ於ケル各官庁ノ権限行使ノ制限又ハ停止シテ其ノ軍最高指揮官ニ依ッテ軍政ヲ布クコトデアルコトハ一一戒嚴令ノ條文ヲ引用スル迄モナク各國共同様デアッテ又対意見ハアルマイ而シテ当時マルール環礁地域ガ周囲ト連絡全ク杜絶セル敵ノ重囲ニアル絶対的孤立セル急迫ナル戰場デアッテ其ノ基地最高指揮官ガ軍政ヲ布クヨリ外ニ全然途ガナカッタコトハ前述ノ通リデアル依リニ米國軍ガ其ノ位置ニアッタトシテモ其レ以上ノ方途ガアッタト考ヘラレマスカ否断ジテナイト確信スル然ラバコノ場合如何ナル軍政ヲ布クベキカ参考トスベキハ戒嚴令ノ規定デアル勿論斯カル急迫ナル場合ニオイテハ必ズシモ戒嚴令ノ規定ノミニ束縛セラルベキデハナイコノ場合如何ニナスベキヤ最上デ

OD 21

アリ又ソレ以上ニ途ガナカッタカ否カガ問題デアル然レテコノ場合如何ナル方法ヲ取ルベキデアルカ参考ノ為戒嚴令ノ規定ヲ摘記スレバ

戒嚴令第二條ニ

戒嚴ニ、臨戰地境ト合囲地境トノ二種ニ分ツ

一、臨戰地境ハ戰時若ハ事変ニ際シ警戒スベキ地方ノ区画シテ臨戰ノ区域トナスモノナリ

二、合囲地境ハ敵ノ合囲若ハ攻襲其ノ他ノ事変ニ際シ警戒スベキ地方ヲ区画シテ合囲ノ区域トナスモノナリ

即當時「マルート」環礁地域ハ全條ニ所謂「合囲地境」以上ノ状態ニアッタノデアル

而シテ令第六條ニ

「軍團長、旅團長、鎮台官所、要塞司令官、警備隊司令官又ハ分遣隊長、或ハ艦隊司令長官、艦隊司令官、鎮守府司令官若クハ特命司令官ハ戒嚴ヲ宣告シ得ル権アル司令官トス」トアル即チ第四艦隊司令長官ハ勿論警備隊長タル升田中將ハ該区域ニ於テ戒嚴ヲ宣告シ得ル権限ヲ有スルノデアル而シテ前記第四艦隊司令長官ノ命令ハ豈有カラニ戒嚴ヲ宣告シタモノデアルコトハ記人ノ記言ノ通リデアル

令第10條ニ於テ

合囲地境ニ於テハ地方行政事務及司法事務ハ其ノ他ノ司令官ニ管掌ノ権ヲ委スル者トス

令第12條ニハ

合囲地境ニ裁判所ナク又ハ管轄裁判所ト通路杜絶セシ時ハ

DD 22

民事刑事ノ別ナク凡テ軍衛裁判ニ属スト規定シテアル。

当時ベルート環礁ニハ裁判所ナク又平時ノ管轄裁判所ノ在ルナベノ地方法院及トラックノ常設軍法會議トノ全ク交通路断絶シタルコト前述証人ノ証言ノ如シ

仝第13條ニハ

合囲地境内ニ於ケル軍衛裁判ニ対シテハ控訴上告ヲ為シ得ズト規定シテアッテ一審終審ヲ原則トアル。

コレハ軍法會議法ニモ規定セラレテ居ル即チ仝法第422条上告ノ規定ハ合囲地境ニ於ケル特設軍法會議ノ場合ヲ含マナイノデアル。

而シテ軍法會議法第8條ニハ

軍法會議ヲ設ケルコト左ノ如シ

1 2 3 4 5 (常設軍法會議ヲ以テ要ス)

6 合囲地境軍法會議

7 臨時軍法會議

仝第9條ニ

第1、2項略

(第3項)合囲地境軍法會議ハ戒嚴ノ宣告アリタル時合囲地境ニ特設ス(第四項)臨時軍法會議ハ戰時事変ニ際シ必要ニ応ジ海軍部隊ニ之ヲ特設ス)

仝第10條ニ

(第十項)特設軍法會議ハ軍法會議ヲ設置シタル部隊又ハ地域ノ指揮官ヨリ之ヲ長官トス

仝第17條ニ

臨時軍法會議ハ左ノ事件ニ付管轄権ヲ有ス

00 23

(一) 臨時軍法會議ノ設置セラレタル部隊長ノ部下ニ属スル者及監督ヲ受クル者ニ対スル被告

(二) 管轄区域内ニ在リテ管轄区内ニ於テ罪ヲ犯シタル第一條及至第三條ニ記載ノ者ニ対スル被告事件

以上ノ規定ニ依リ本件被告ノ関係シタル裁判手續ハ特別軍法會議タル臨時軍法會ニ属スルモノデアル

而シテ軍法會議ノ職員ニ関シ

令31條ニ

軍法會議ニ判士 海軍法務官 海軍管査ヲ置ク

判士ハ海軍將校ヲ以テ之ニ充ツ

特設軍法會議ニ於テハ長官又ハ直系上官ハ急迫ヲ要スル場合ニ限リ部下ノ將校ヨリ判士ヲ命ズルコトヲ得ト規定ス

更ニ判士ニ関シテハ

令第50條ニ

特別軍法會議ニ於テハ長官ハ海軍ノ將校又ハ將校相当官ヲシテ法務官ニ代リ裁判官ノ職務ヲ行ハシムルコトヲ得

以上ノ規定ニヨリ判士トシテ井田~~士將~~ 新留、井上ノ二名ノ將校之ニ充ツ当時ペルート部隊内ニ法務官ヲ欠ギタルヲ以テ將校タル古木ヲ依ヲシテ法務官ニ代リ之ヲ検察官ノ職ニ当ラシメタルコトハ合法デアル

更ニ訴訟手續ノ規定ニ於テ

DD 24

仝第87條乃至第92條ノ6條ニ於テ辯護人ノ規定ガアル而シテ87條ニ「被告人ハ公訴ノ提起アリタル後何時ニテモ辯護人ヲ選任スルコトヲ得」ト規定シテアルガ
仝法第93條ニハ
前6條ノ規定ハ特設軍法會議ニ付テハ之ヲ適用セズ」ト規定シ
本件被告ノ干與シタル特別手續ニ於テ辯護人ヲ付セザリシハ合法デアル

裁判ニ關シ

仝第96條ニ
「裁判官ノ評議ハ之ヲ公行セズ
裁判官ノ評議ハ裁判長之ヲ開キ之ヲ整理シ其ノ評議ノ順序及各裁判官ノ意見ハ秘密トス
仝第96條裁判官意見ヲ述ブルノ順序ハ法務官ヲ始メトス
仝第98條ニ
「裁判ハ過半數ノ意見ニ依ル」

以上ノ規定ニ依リ本件被告ノ干與シタル裁判手續ガ公開セラレザリシコトハ合法デアル
而シテ裁判官ノ評議裁判長タル升田少將ガ之ヲ開キ之ヲ整理シタルモノニシテ其ノ意見ハ秘密トセラレタルヲ以テ檢察官タル吉木上佐ハ只檢察官トシテノ意見ヲ述ベレバ其ノ職責ヲ終ルモノデアルカラ其ノ結果ニ對シテハ知ル由モナイ又責任ハナイノデアル而シテ評議ノ結果過半數ニ依テ

pp 25

決セラレタルヤ或ハ意見一致セス三人二様デアッテ相一致セズ裁判長タル
升田少将ガ之ヲ決裁シタルモノナリヤハ明瞭デナイガ各証人ノ証言ヲ綜合スルニ
先ヅ検察官タル古木ノ意見ト升田ノ為シタル判決トハ明ニ相違シタルコトハ
明白デアル勿論古木ノ意見ヘ検察官トシテノ意見デアルカラ評議ノ中ニハ
入ラナイノデアル而シテ升田裁判長ハ其ノ場デ裁決スルコトガ出来ズ更ニ熟
考スルト言ッテ記録ヲモッテ退席シテ評議ハ終リヘ両日ノ後判決ヲ作
成シ他ノ二判士ト古木検察官ヲ招集シ判決ヲ宣告シタルモノハ各証人ノ
証言ノ一致スル處デアルカラ升田、井上、新田三判士ノ意見ハ一致セズ判
士長升田少将ガ独自デ裁決ヲ為シタルモノト認ムルハ綜合判断トシテ合理
的デアル
然ラバコノ点ニ於テモ判決ハ合法デアルコトハ明白ニ主張スルコトガ出来ル

弁論ニ関シ

仝ノ100條ニハ
「判決ハ口頭弁論ニ基キ之ヲ為スベシ但シ別段ノ規定アル場合ハコノ限
ニアラズ
決定ハ公判廷ニ於テハ訴訟関係人ノ陳述ヲ聞キ之ヲ為スベシ其他ノ
場合ニ於テハ訴訟関係人ノ陳述ヲ聞カズシテ之ヲ為スコトヲ得」

仝第102條ニハ
裁判ノ告知ハ公判廷ニ於テハ宣告ニ依リ之ヲ為シ他ノ場合ニ於
テハ謄本ノ送達ニ於テ之ヲ為スベシ但シ別段ノ規定アル場合ハコノ

DD26

限ニアラズ」

仝第26・條ニハ
証人ハ必要アル場合ニ於テハ軍法會議ノ指定ノ場所ニ之ヲ召喚シ又ハ其所在ニ就キテ訊問スルコトヲ得

仝第26ノ條ニ
「陪審官ハ証人訊問ニ関シ軍法會議又ハ裁判長ト同一ノ權ヲ有ス

仝第267條ニ
検察官証人ヲ訊問スル場合ニ於テハ宣誓ヲ爲サシメザル事ヲ得

仝第369條
「死刑又ハ無期又ハ短期一年以上ノ懲役又ハ禁錮ニ該スル事件ニ付テハ弁護人ナクシテ開廷スルコトヲ得ズ但シ判決ノ宣言ヲ爲ス場合ハ此ノ限リニアラズ

仝第372條
前三條(369.370.371)ノ規定ハ特設軍法會議ニ付テハ之ヲ適用セズ
以上ノ規定ニヨリ訴訟関係人ハ原則トシテ法廷ニ於テ陳述ナサシムベキデアルガ法廷外ニ於テ陳述セシムルコトアルモ法ノ予期セザル欠缺ノナイコトヘ第100條後半ノ規定ニ依リ肯定セラルルモノデアル又証人ハ法廷外

DD27

ニ於テ且宣誓セシメズシテ訊問スルコトヲ得ル第260條第261條ニヨリ明デアル又特別軍法會議ニ於テハ弁護人ニ関スル規定ノ適用ナイコトハ已ニ述ベタガ更ニ第369條及第372條ニ於テ明カデ死刑ニ該ル事件ノ裁判ニモ弁護人ハ必要デナイコトヲ第372條ニ明規シテ居ルノデアル然ラバ本件被告ノ干與シタル裁判手續キニ於テ訴訟関係人トハ被告ノミニ限定サレル然シ右裁判手續キニ於テ被告人ヲ法廷ニ於テ陳述セシメナカッタコトハ各証人ノ一致シタル証言デアッテ之ヲ肯定シ得ル之ハ明ニ裁判條則ニ違反シテ居ルコトヲ弁護人ハ之ヲ說メマス然シコノ点ハ一ツガ正規ノ手續ヲ欠スルノデアリマス然シ井田裁判長ト古木檢察官ハ被告ノ收容所ニ至リ本人ノ陳述ヲ聞イテ居ルコト又判決ノ宣告モナシテ居ルコトハ各証人ノ証言ノ一致スル處デアリマス

被告ヲ裁判官ノ席ニ出廷セシメカヘスレバ正規ノ裁判デアルノデアルノニ又對ニ裁判官ガ被告ノ場所ニ行ッテ為シタガ為ニ違法トナルデアラウカ？コノ點ニ特ニ御留意ヲ御願致度イノデアリマス事實上ドレナニ愼重ニ審理致シマシテモ又一ツノ形式ノ具備ガ欠ケテ居ッタダケデソレガ犯罪即チ殺人罪戰爭法規違反トイフガ如キ犯罪ニナルノデアリマシヤウカ？又仮令事實ニ於テハ相當ナ審理デアッテモ形ダケ具備スレバ完全ナ裁判トシテ許ルコトガ出來ルデアリマセウカ？勿論本法廷ニ於ケルガ如キ完全ナル裁判ト比較致シマスレバ幾多ノ欠点ガ指摘サレマセウ然シ當時硝煙彈雨ノ下絶海ノ孤島ニ完全ニ孤立シ神ト人ニ見ハナサレタタル絶望ノ日本將兵2,000名ガ總員玉砕ノ死ノ一歩手前ニ於テ散兵戰ニ付キナガラ能ク限リ最上ノ審理ヲ為シタノデアリマス防空設備ナキ空爆下ニ何ッテ平時ノ如キ審理ガ玄

UD 28

来マセウカ逃亡犯人タル之等ノ島民ヲ自由ニシテ法廷ニ伴レ出シ審理
中空襲ガアレバ直ニ逃亡スルデアラウ逃亡スレバ直ニ敵ニ通ジテ日本軍ハ
全滅スルハ必定デス逃ゲナイトシテモ爆撃サルレバ島民ハミナラズ高級将
校以下審理ニ関係スル有志ノ一時ニ爆死スル危険急迫シテ居タコトハ
各証人ノ証言ニ依リ明カナル現状デアリマシタ斯カル状態ニ於テコノ一
手續ガ簡畧サレルコトガ法律上果シテ許サレナイノデアリマセウカ？断ジテ
然ラズ

刑法第37條ニハ
自己又ハ他人ノ生命身体自由若ハ財産ニ対スル現在ノ危難ヲ避ケ
為メニモコトヲ得ガル出デタル行為ハ其ノ行為ヨル生ジタル害其ノ避ケントシタル
害ノ程度ヲ超エザル場合ニ限リ之ヲ罰セズ其ノ程度ヲ超エタル行為ノ情
状ニヨリ其ノ刑ヲ減軽又ハ免除スルコトヲ得ト規定シテアル

Wharton's Criminal Law p876-877
§642. Sacrifice of anothers life, excusable
When necessary to save one's own. The canon
law, which lies at the basis of our
jurisprudence in this respect, excuses the
sacrifice of the life of one person, when
actually necessary for the preservation of the
life of another, and when the two are
reduced to such extremties that one

or the other must die.

之即緊急避難行為 Notstand. état de nécessité ト称スル
行為ニシテ日本ハナラズ文明諸国ニ於テハ何レノ刑法ニモ規定セラ
レテ居ル米國ニ於テモ然リト思フ
コノ事件ニ於テ避ケントシタル法益ハ四千名ノ軍人軍属島民ノ生命財
産ハナラズ日本国全体ノ興廃ニ関スル重大ナルニ及ビ害シタルモノハ
一裁判手續ノ一少軽ビナル被告ノ陳述ヲ法廷外ニ於テ爲サ
レメタトイフ小問題ニ過ギナイ而シテ夫レガ緊急ヤムヲ得ザリシコトニ
詳細ニ述ベタ通リデアル
仮令本條ノ規定ナカリシトシテモ斯ル緊急已ムヲ得ザル場合ニ於テハ
前記行爲ハ法律上許サルベキモノナルコトハ法ノ條理ニ依リ當然デ
アル況ンヤ日本刑法ノ第37條ニ於テ之レガ法律上許サルベキヲ
明示シテアル以上簡略シタル前記裁判手續キガ合法タルコト、
今更申上ゲル迄モアリマセヌ
斯シテコノ合法ナル特別軍法會議ノ結果爲サレタル判決ニ
依ッテ井田少将ハ検察官タル古木少佐ニ前記島民ノ死刑執
行ヲ命ジ古木秀策ハコノ合法ナル命令ニ依リ一点ノ疑念モナク
検察官トシテノ職務ヲ遂行シテ死刑ヲ執行シタルモノデアルコトハ
各証人ノ証言ノ一致スル処デアリマス

以上本件被告古木秀策ノ起訴セラレタル島民事件ノ事實ヲ証人
ノ証言証據ニ依リ明カニシ之ニ對スル法律上ノ意見ヲ日本刑法ヨ

本海軍刑法、日本海軍々法會議法、戒嚴令ノ諸法規ノ各條文ニ照シ評論致シマシタ

以下、古木秀策ノ責任ニ就テ法律上ノ意見ヲ述ベマスガ最モ重要ナル點ハ被告古木ノ責任ノ限界デアリマス

古木ノ責任ハ檢察官トシテ裁判ニ干與シタル責任ト執行官トシテ死刑ヲ執行シタル責任トノ二ツデアリマス偶々コノ二ツノ責任ガ同一人ニ依テ行ハレタル爲ニ何カコノ兩者ニ因果關係ガアルカノ如ク見ル有ガアルトシタラ大ナル誤リデアルコノ二個ノ行爲ノ間ニハ全然檢察官トシテ古木ノ干與シ來リタル審判決トイフ他人行爲ニ依リ因果關係ハ完全ニ中斷サレテ居ルノデアルト忘レテハナラナイコノ點特ニ Commission ノ御留意ヲ仰ギマス

先ヅ檢察官トシテ裁判手續キニ干與シタル責任ニツキ述ベマス

抑モ檢察官ノ職務ハ

海軍々法會議法第六章檢察機關ノ章ニ規定シアル即チ法第60條ニ「檢察官ハ長官ノ隷屬ニ捜査ノ爲ニ公訴ヲ行フ」

又第70條ニ「特設軍法會議及東港海軍々法會議ニ於テハ長官ハ海軍ノ將校又ハ將校相當官ヲシテ檢察官ノ職ヲ行ハシムルコトヲ得」

ト規定シ其ノ職務ハ犯罪捜査ノ爲ニ若シ犯罪ト認ムルトキハ之ヲ起訴スルノデアル之ヲ約言スレバ

犯罪ノ捜査之ヲ調遮訴シタル場合ニ裁判所即審判官

~DD31

ニ對シ起訴ノ理由ヲ說明シ意見ヲ述ベルヨリ以テ其ノ職務ヲ終ン
モノデアル
之ヲ審判シ有罪無罪刑罰ノ種類刑期ヲ定メルハ審判官ノ職責
ニシテ檢察官ノ干與シ得ザルモノデアル之レハ世界各國ノ法制ニ其例外
ハナク皆然リデアリ本法廷ニ於テモ其通リデアル

海軍軍法會議法第九十條ニ
裁判ハ過數ノ裁判官評議シテ之ヲ爲ス
同第九十六條ニ
裁判官ノ評議ハ之ヲ公行セズ
裁判官ノ評議ハ裁判長之ヲ開キ且之ヲ整理ス評議ノ顚末及各
裁判官ノ意見ハ秘密トス

トノ明記アリ檢察官ノ職責ト裁判官ノ職責トハ明確ニ區別シ互ニ
相侵スコトハ出來ナイノデアル而シテ前記特別裁判手續キニ於テ被
告古木ハ檢察官デアリ裁判官ハ升田少將新納少佐、井上大尉
デアリ升田少將ガ裁判長デアッタコトハ各證言ノ一致スル所テ
一点ノ疑モナイ

然ラバ檢察官トシテノ古木ノ行爲ノ何処ニ違法ガアルカ何処ニ不
法ガアルカ事實及法律何レノ点ヨリ見ルモ一点ノ違法モナイ先ヅ調
査ニツイテ見ルニ檢察官指揮下ニアル各調査官ハ熾烈ナル戰場
下ニモ不拘アラユル多大ノ危險、勞力、時間ヲ費ヒ多數ノ証人証據

DD32

ヲ集メ慎重ナル調査ヲナシ完全ナル調査報告ヲ作成シ検察官
タル古木ハ更ニ調査ヲナシ愛ニ周到ナル注意ノ下ニ調査ヲ完了シ之ヲ起
訴シ検察官トシテノ最終ノ意見ヲ述ベ其ノ職務ヲ終ヘタノデアル
猶本法廷ニ於テ検事ハ証人ニ対シ調査官ガ訊問ノ際証人ニ
宣誓ヲナサレメタルヤト質問セラレタガ日本裁判手續ニ於テ民間裁判
ト軍法會議トノ如何ヲ問ハズ調査官乃至検察官ノ証人訊問ニ対
シテハ宣誓ヲ要セナイノガ原則デアル前掲(海軍々法會議法第四六ノ條)
而シテ審判官ノ評議ハ裁判長之ヲ整理公行セズ秘密デアツテ
検察官ハ之ニ干與セズ又之ヲ知ル由モナイノデアル前述軍法會議法
ノ明文ノ通リデアル而シテ前記特別手續ニ依ル裁判ノ合法ナルコト
ハ前述ノ通リデアルガ仮リニ其ノ手續ニ誤リガアツタトシテモソレハ審判
官責任デアツテ検察官ノ責任デナイ裁判ト雖モ人ノ為スコトデアリ時
ニ誤リアルコトガアル之ガタメニ文明法治国ニ裁判ノ概ネ三審制度
ヲ採リ手續ニ誤リアルトキハ本件ノ如キ特別軍法會議ハ別デアルガ
通常ノ裁判ニアリテハ抗告再抗告ノ途ヲ開キ實体ニ誤リアル場合
ニハ控訴上告ノ途ヲ開イテアルノデアル

極端ノ例ヲ擧ゲレバ無罪ノ被告ニ対シ誤判ニテ死刑ノ判決ヲ為セル
裁判ハ各国共其ノ例ハ少クナイ之ニ対シテ裁判官ハ如何ナル責任
ヲトツテ居ルカ又之ニ対シ殺人罪トシテ起訴サレタル裁判官ガ世界ノ法
制史ノ何レニアルカ私ハ未ダ聞イタコトハナイトモアレソレガ行政法的則
ノ罪トナルカ又ナラヌモハ別トシテ夫レハ裁判官タル判士ノ責任デアルガ如
何ナル誤事誤判ニモ検察官ガ責任ヲ負ツ場合ハアリマスマイ證ラク

DD22

本件ヲ起訴セラレタル検事ニ於テモ前記裁判手續キニ関スル限リ本件被告古木ニ責任アリトハ考ヘテ居ラレナイデアロウ況ンヤ前述ノ通リ古木ノ検査官トシテノ行為ニハ一点ノ違法モナイ譏リモナイノデアルカラコノ範圍ニ於テハ犯罪不成立ノ條文ヲ引用スル迄モナク古木ノ行為ハ正ニ適法タル合法非違ノ行為デアルコトハ何人モ異論ハアルマイト確信致シマス

次ニ被告古木ガ裁判ノ執行官トシテ死刑ノ執行シタル責任ニツイテ之ヲ述ベマス

裁判執行ニツイテハ
海軍軍令部令第十章裁判ノ執行ノ章ニ
仝第十四ノ條「裁判ノ執行ハ其ノ裁判ヲナシタル軍法會議ノ検察官又ハ其ノ裁判ヲ為シタル豫審官ノ属スル軍法會議ノ検察官之ヲ指揮ス」

ト規定シアル之ノ規定ニ基キ判決ヲ為シタル升田少将ハ其ノ判決ニ基キ検察官タル古木参策ニ死刑執行ヲ命ジタノデアリマス古木ハコノ合法的死刑執行ノ命令ヲ検察官ノ職責トシテ忠實ニ遂行シタモノデ其ノ合法ニツイテハ一点ノ疑念モ悪意モナク法令ニ依リ正當ナル職務トシテ執行シタノデアルト証言シテイルノデアリマス其ノ當否ナルコトハ Commission ニ於テ御認メノトオリマス

コノ判決ニ基カ死刑執行ノ命令ハ合法ニシテ正當ナル事ヲ彼カ確信シテ一点ノ疑モ以テ居カカッタコトハ各証人ノ一致シタル証言デアリマスシカハ彼ノミナラズ関係有ル多数ヤルート日本軍全部ガ悉ク斯ク信シテ居リマス

井上、森川、古木ノ各証言ハサウデス

終戦後井田少将ハ米国駆逐艦長マッキソン中佐ヨリ島民事件ノ処刑ニ関シ質問セラレタル時之ハ日本ノ国法ニ違反セル日本人タル島民ヲ日本ノ法律ニ依リ日本軍ノ正當ナル手續ノ結果処刑シタルモノデ當然ノ行為デ俯仰天地ニ(神人何人ニ對シテモ)恥ジナイ行為デアル旨申シ関係者ノ名ヲ參考トシテ提出シタノデアリマス井田少将ノコノ確信ノ言葉ニ依ッテ見テモ彼ハ絶對ニ正シイト確信シテ居タノデアリマス況ンヤ部下ニ於テ之ヲ疑ッテ居ガアリマシヤウカ殊ニ古木ハコノ手續ニ於テ検察官トシテ前述ノ如ク一点ノ違法モ認メナイ事ノ職責ヲ完了シタル者デアリマス

然ルニ本件起訴状第一ニハ殺人罪トシテ公第二ニハ戦争法規違反トシテ起訴サレテ居リマス果シテ如何ナル根據ニ基クモノデアリマセウカ實ニ驚クベキ冒険トイフヨリ外ハナイト思ヒマス

而モ検事ハ其ノ、Corpus dilecti ニ對シ何等ノ立証ヲシテ居ナイデハナイカ

若シ裁判執行官ガ命令ニ依リ執行シタル職務行為ノ犯罪ト

セントスルナラベ先ツ其ノ命令有ガ権限ヲ有セザル場合又ハ其ノ命令ガ偽造デアルトカ或命令有ガ犯罪ヲ犯ス意思ヲ以テ詐ヒヲ利用シタル等ノ場合デナケレバナラヌ又仮リニ之等ノ場合ニ被命令有ガ其事実ヲ認識シナガラ敢テ之ヲ実行シタ場合デナケレバナラナイ若シ検事ガ左様ニ立証シナケレバナラヌ然ルニ之ニ対シテハ何等言及シ居ラズ又ハ何事モ詳ニ不可解ナル起訴ト云ヘザルヲ得ズ故ニ私ハ驚クベキ冒険ト云フノデアリマス

本件起訴状第一及第二罪状項目其一ニ其二ニ其三ニ其四ニ其五ニ於テ被告ハ意思的ニ違法的ニ企図ト悪意ヲ以テ島民ヲ殺害又殺害セシメタリトシ日本刑法第一九九條並ニ戦争法規並ニ慣習ニ違反シタリト記載シテ居ルガ前陳述セル被告ノ行為ノ何レニ於テモコノ起訴事実ヲ認ムルコトハ出来ナイ本件起訴ハ大ナル誤ヲ侵シテ居ルト私ハ確信スルモノデアル是ハ前記ノ如ク海軍々法会議法第七〇ノ條ノ規定ニ基キ其ノ特別裁判ヲ行ヒタル部隊長官井田少将ガ其ノ判決ニヨリ合法ナル死刑執行ノ命令ヲ発シタノデコノ命令ハ形式上実質上共ニ合法ナノデアルカシテ古木ガ検察官トシテ之ヲ受命執行スルコトハ之軍法会議法ノ命ズル義務デアルノデアル然ラバコノ命令ノ形式及実質ハ完全ニ合法デアル執行官トシテ古木ハ之ヲ拒ムコトハ絶対ニ出来ナイ然ラバ更ニサカノボッテコノ命令ノ基本タル判決ノ実質ニ付誤リアルヤ無シヤヲ審査スル義務ガ執行官ニアルデアロウカ断ジテ否裁判ノ正否ヲ判断シ得ルモノハ只其ノ上級裁判所ノミノ権限デアル裁判ノ執行官ハ其ノ正シイ執行命令ガ正シキ系統ヨリ発セラレタル

DP36

正レイ命令ナルヤ否ヤヲ知レベ足ルソレ以上ヲ審査ノ義務ヲ負ハサルヲ
居ナイ而モコノ執行命令ヲ発ヘタル升田少佐ハ当該特別裁判手
續キ裁判長トシテ判決ヲナシタル人ヲ且其ノ部隊最高指揮官タル
長官デアル而シテ其ノ命令ハ該裁判ノ判決ノ執行命令デアル被告
ハコノ合法ナル命令ヲ絶對ニ正シキコトヲ信ジ法令ニ依リ職務ト
シテ實行シタノデアルコノ行為ノ何レニ不法ガアルカ又違法ガアルカ又ハ過
失ガアルカ何レ點ヨリ見ルモ之ヲ発見スルコト出来ナイノデアリマス
抑モ犯罪ノ本質ハ反社會的行為（antisocial action）
デナケレバナラヌ而シテソレガ反社會的ナリヤ否ヤハ其ノ時ノ社會ニ於ケル
一般通義ニ依リ判断スベキハ言ヲ俟ナイガ前記吉永ノ行為ノ何レニ
認ムベキモノアリヤ断ジテナイノデアル又犯罪ハ違法ナル行為デアル
仮令其ノ外形ニ於ケル其ノ行為ガ刑罰法規ニ該當シテ居テモ特種ノ
理由ニ基ク其ノ行為ガ法律上許容セラレ又義務トセラレタル場合ニ於ケ
ル其ノ行為ハ罪トナラナイ

日本刑法第七章、犯罪不成立ノ章ニ於テ

仝第35條及仝第36條ノ規定ハソレデアル今次ニ日本元大審院
長法学博士泉二新熊氏及東京帝国大學教授法學博士牧野英
一氏ノ所說ヲ其ノ著書ヨリ引用スル
泉二氏日本刑法論（p340－p347）

第二節 法令又ハ正當業務ニ因ル行爲

第35條 法令又ハ正當ノ業務ニ因リ爲シタル行爲ハ之ヲ罰セズ

一、法令ニ因ル行爲ハ即法令ニ準據スルモノナルガ故ニ違法行爲ニ非ラザルハ勿論ナリ正當ノ業務ニ因ル行爲ヲ罰セザルモ亦其ノ行爲ヲ以テ違法ニ非ズト爲スノ趣旨ナリト解セザル可ラズ

法令ニ因ル行爲トハ法令ノ規定ニ依リ當然ノ權利義務(職權職務ヲ包含ス)トシテ認メラレタル行爲ヲ謂ヒ正當ノ業務ニ因ル行爲トハ法律上又國民一般ノ慣例上正當トシテ許容セラルル業務ノ組織スベキ行爲ヲ謂フ職務上ノ行爲ハ前者ニ屬シ醫師ノ手術ノ如キハ後者ニ屬ス

二、法令ニ因ル行爲トハ法規ニ準據スル一切ノ行爲ヲ云フ例ヘバ民法商法等ニ依ル權利行爲ハ勿論刑事訴訟法ニ依リ現行犯人ノ逮捕スル權能的行爲特定公務員ノ武器使用權其ノ他(中略)皆然リ所謂法規ハ法令ノ明文ノミヲ指スニ非ラズシテ法例ノ精神上推理セラレ可キ條理ヲ包含スルモノトス

コノ意味ニ於テ緊急防衛(正當防衛)ノ如キハ元來法令ニ依ル行爲ノ一種ナリト認ムルコトヲ得ベク法第36條ノ如キ之ヲ規定シタルハ其ノ條件及範圍ヲ明確ニシタルニ過ギザルベシ又法律上或者ガ爲スコトヲ要求セラレタル義務行爲ガ法令ニ因ル行爲タルヤ疑ヲ容レズ

三、法令ニ因ル行爲ヲ列擧ノ說明スルハ不可能ナリ唯一ニハ重要ナル問題ニ付略說スル所アラントス而シテ說明スベキハ職務行爲ナリ

(イ)公務員ノ職務行爲ハ法令ノ規定ニ依リ公務員ノ義務

ニ属スル上同時ニ其ノ権利ニ属スルモノリツノ種ノ行為ハ直接ニ法規ニ基ク場合アリ例ヘバ刑事訴訟法ノ規定ニ依リ現行犯人ヲ逮捕スル場合或ハ本属長官ノ命令ニ基キ(死刑ノ執行令状ニ依リ非現行犯人ヲ逮捕スルガ如キ場合デアル

然しながら執行上本属長官ノ命令ヲ俟ツベキ場合ニ於テ其ノ命令ナクシテ死刑ヲ執行シ或ハ令状ナクシテ非現行犯人ヲ逮捕スルガ如キハ違法ナル行為ナリ

(1) 然レドモ命令ガ形式上若ハ実質上違法ナル場合ニ於テモ下級官吏ガ其ノ命令ニ基キテ為シタル行ハ適法ナルコトヲ得ルヤ否ヤハ職務上ニ於ケル命令服従関係ノ範囲ヲ先決スルニ非ラザレバ之ヲ決定スルヲ得ズ(中略)今ハ属官ハ長官ノ命令アル場合ニ於テ其ノ形式ヲ審スルコトヲ得ルモ実質ニ付テハ審査ノ権能ナルトス属官ハ長官ノ命令ガ長官ノ職権ノ範囲内ニ於テ発セラレタルモノナリヤ其ノ命令ハ法令ノ規定ニ抵触スルモノナリヤ其ノ命令セラレタル事項ハ自己ノ職務ノ範囲内ニ属スルヤ否ヤノ点ヲ審査シ凡テガ積極的ニ断定ヲ下スベキ場合ニアリテハ命令ガ実質上違法ナルモノヲ理由トシテ其ノ執行ヲ拒ムコトヲ得ベ

(2) 然リ而シテ命令事項ガ職務ニ関スルヤ否ヤニ付テ長官ト属官トノ見解一致セザルトキハ本ヲリ長官解釋ニ従ハザル可ラズト雖何人モ犯罪ヲ犯ス職権ヲ有スルコトナク又如何ナル長官ト雖下官ヲ利用シテ犯罪行為ヲ為スノ職権ヲ有セザルハ言ヲ俟タザルガ故ニ属官ハ其ノ命令者ニ於テ犯罪ノ意思アリテ犯罪行為ニ利用スルモノナルコトヲ認識スル場合ニ服従ヲ拒絶セザル可ラズ

0039

(3) 凡ソ公務員ノ行為ガ一定ノ職務行為タルコトヲ得ル為ニハ當該行為ガ職務權限ヲ行使スル意思ニ出デタルコトヲ要但行為ノ目的事項ガ抽象的ニ職務權限ノ範圍ニ屬スルモノナルコトヲ要ス例ヘバ裁判官ガ自由心證ニ依リ有罪ノ判決ヲ爲シ之ニ因リテ刑ノ執行アリタル後再審ノ手續ニ依リ受刑者ハ無罪ノ判決ヲ受ケタルコトアリトスルモ之ガ爲ニ前裁判ヲ以テ職務行爲ニ非ズト爲ス可キニ非ラズ」云々

猪狩野英一教授ハ其ノ著日本刑法論(ハイター P343)ニ於テ

「六、法令ニ依ル行爲　法令ニ於テ一定ノ行爲ヲ權利又ハ義務ト爲ス場合ニ於テハ其ノ行爲ハ罪トナルコトナシ(刑法第35條)

例ヘバ次ノ如シ

イ、其ノ權利又ハ義務ノ範圍ニ於テハ其ノ行爲ハ罪トナルコトナシ但シ其ノ行爲ガ形式上違法ヲ免ルコトトナル

即(1)公ノ職務執行公ノ職務執行ニハ官吏公吏ガ上官ノ命令ニ因リテ爲ス場合ト自己權限トシテ爲ス場合トアリ何レノ場合タルヲ問ハズ共ニ罪トナルコトナシ

(2)親權者ノ懲戒行爲(民法第822條ニ依ル行爲)

(3)精神病者ニ對スル監護行爲(精神病者監護法第4條)

(4)現行犯人ニ對スル逮捕行爲(刑事訴訟法第212條)

等ノ場合ハ罪トナラナイ

ロ、正當ナル行爲　法令ニ於テ形式上權利又ハ義務トセラレ尚ノ規定ナキモ法令一般ノ精神ノ認メル所慣習又ハ條理ニ適スル所ニ從ヒ行爲ガ公ノ秩序善良ノ風俗ニ反セザルモノナル時ハ又違法性ヲ欠ク法令ニ依ル行爲ヲ以テ形式的ニ違法性阻却ス

00 40

レ時ハ正當ナル行爲ハ實質的ニ違法性ヲ欠クモノト解スルコトヲ得ベシ
コレニ付刑法ハ單ニ正當ノ業務ノ一ツノ規定シタリ（刑法35條）然レド
モ違法ヲ阻却セラルルハ單ニ業務行爲ニ限ルベキニ非ズ、實質上正當
ナル行爲ハ凡ソ皆然ニット謂ハザルベカラズ、即業務上ノ行爲ノ外慣習上
認メラレタル行爲其他一般ノ公ノ秩序善良ノ風俗ニ反セザル行爲ハ罰セ
ルコトナシ

以上泉ニ牧野兩博士ノ所論ハ同一ニアルガ兩氏ノ所論ノミナラズ
コノ点ニ関スル意見ハ全日本凡テノ學說判例ノ一致スルトコロニシテ一ツ
ノ反対モナイノデアル、私ハ今茲ニ判例集ヲ持參セザリシタメ茲ニソレヲ
示スコトノ出來ナイノヲ遺憾トスルガ一ケノ反対判例モ存在セザルコトヲ
斷言致シマス

又日本ノミナラズコノ点ニ於テハ獨逸ノ如キ成文法ニ於テハ勿論英
米ノ如キ判例法ニ於テモ等シク認メラレ異論ノナイトコロト信ジテヰル。

Wharton's Criminal Law P875-876
§640 Killing under mandate of law justifiable.
The execution of malfactors, by the person whose office obliges him, in the performance of public justice to put those to death who have forfeited their lives by the law and verdict of their country is an act of necessity, where the law requires it.

But the act must be under the immediate precept of the law, or else it is not justifiable; and therefore wantonly to kill the greatest of malefactors without specific warrant would be ~~mad~~ murder.
And a subaltern can only justify killing of another on the ground of orders from his superior in cases where the order where lawful.
So we have seen, warrant that is without authority is ~~otherwise~~ no defence; though it is otherwise when the defects are merely formal.

而シテ本件被告吉木ニ於ヘラレタル死刑執行命令ハ前述ノ通リ特設軍法会議ノ判決ニヨリ為サレタルモノデアッテ其ノ命令者ハ其ノ軍法會議ノ召集シタル吉木ノ師團長官井田少将デアル。而シテ今人ハ其ノ軍法會議ノ整理ヲ判決ヲナシタル裁判長ノ職責ニアッタ。而シテ吉木ハ其ノ手續ノ検察官ノ職責ニアリ死刑執行ハソノ職責デアッタ。尊前掲軍法會議法第76條ノ第501條ノ明記スルトコロデアリ井田少将ガ法令ノ正當ナル權限ノ下ニ吉木ガ正當ナル命令者デ之ヲ遂行スルニハ法ノ命ズル義務デアッテ正當ナル職務行為デアル。

而シテ其ノ命令ハ形式上實質上一点ノ疑ヲナク合法デアル。而シテ吉木ガ之ニ対シ絶体ニ lawful ナルコトヲ確信シ聊カ疑ヲ持ッテハナカッタ事ハ

前述ノ通リデアル．従ッテ右本件行為ハ完全ニ刑法第35條ニ依リ犯罪ハ成立シナイノデアッテ日本刑法第199條又戦争法規慣習ニ違反シタリトシテ必罰セントセル本件起訴第一、第二ノ各罪状項目、charge ハ不當デアリ何レモ悪罪タルコトヲ私ハ強力ニ主張スルモノデアリマス．
私ハ第一及第二起訴各項目ニ対スル被告悪罪ノ主張ハ以上ニ充分明瞭ナリト信ズルモノデアリマスガ念ノタメ戦争法規並ニ慣習ニ違反セリトナス第二起訴ニ対シ更ニ意見ヲ述ベマス．
起訴状第二ニ所謂戦争法並ニ慣習トハ明治四十五年一月十三日締結サレタル條約第四號所謂海牙條約タル陸戦法規ニ基クモノナルコト検事ハ指摘スル処ナルガ

同法第二章間諜
第二十九條ニ
交戦者ノ作戦地帯内ニ於テ敵ニ交戦者ニ通報スル意志ヲ以テ偽装又ハ虚偽ノ口實ノ下ニ行動シ情報ヲ蒐集シ又ハ蒐集セントスルモノニ非レバ之ヲ間諜ト認ムル事ヲ得ズ
故ニ変装セザル軍人ニシテ情報ヲ蒐集センガタメ敵軍ノ作戦地帯ニ進入シタルモノハ之ヲ間諜ト認メズ
又軍人タルト否トヲ問ハズ自國軍又ハ敵軍ニ属スル通信ヲ伝達スル任務ヲ公然執行スルモノニ非ザレバ之ヲ間諜ト認メズ．通信ヲ伝送スルタメ及網ヲ張リ又ハ地方ノ各部間ノ連絡ヲ通ズルタメ軽気球ニテ派遣セラレタルモノニ亦同ジ～
仝第三十條ニ

現行中捕ヘラレタル間諜ハ裁判ヲ経ルニ非レバ之ヲ罰スルコトヲ得ズ
ト規定シ間諜ノ定義ヲ明示セラレニ居ルノデアル
本規定ニ依レバ本起訴状等ニ罪状項目等ノ及主等ヲニ記載セラレタル
レソール以下十三名ノ島民ノ行為ハ何レモ間諜トハ認メラレナイ
又右島民ガ処罰セラレタルハ本規定ニヨル間諜トシテデハナク日本刑法
及日本海軍刑法ノ敵ニヲ利スルタメ帝ニニ抗敵シタル罪、軍用物ヲ強奪
損壊又ハ使用不能乃至欠乏セシメル罪、軍艦ヲ破壊又ハセントシタル罪
又敵ニ与ル罪等、単純国内犯罪トシテ処罰シタルモノナルコト、各証人ノ証
言ノ一致スルトコロデアル。偶々「スパイ」ノ語ガ用ヒラレタルコトアリトスルモ
ソレハ国内犯トシテノ用語ヲ使用シタルニ止マリ断ジテコノ国際法規違反
トシ処罰シタルモノニ非ザルコトハ明白デアル
又陸戦法第30條ニ所謂現行中捕ヘラレタル間諜ニ非ルコトノ論デアル
本来陸戦法規ノ精神ハ
（従ッテ本件ニツイテ陸戦法規並ニ慣習ニ違反スルトスルモ之ニ
対スル事実ハ認ムベカラザルデアル）
文戦国ハ稍々モスレバ敵愾心ヨリシテ間諜行為ヲ厳ノ訳釋シ敵国人又ハ
第三国人ノ間諜トシテ重ク罰スルノ傾向アルヲ以テソノ軍ノ厳格ニ制限シ
コレヲ防止セントシタモノデ一般国内人ノ国内ニ於ニ違反シタル犯罪ヲ厳罰
シタル規定デハナイノデアリマス。従ッテ本件ノ如キ日本被統治者タル島民ガ
国内ニ於ニ違反シタル罪ニ依リ処罰シタル事件ヲ国際法規ノ戦争法規
又ハ慣習ニ違反シタリトナス本件起訴等ハ全ク意味ヲナサナイノデアリマス
又仮リニ若シ国際法規ニ照ストシテモ国際法規ニハ処罰規定ハナイ
デ之ヲ処罰スル事ハ法ノ原則ニ照シ不当デアリマス。然シ若シドウシテモ処罰シ
ナケレバナラヌトスレバ当然国内刑罰規定ノ準用ニテ処罰スルヨリ外ニ途ガナイノデ
アッテ当然日本刑法第三五條ニ依リ罪ヲ構成シ得ルノ時デアル又

DD 44

JOHN
英米 case law = 於ケル當然法律上許サルベキ行為デアルコトハ
walton's criminal law = 依ルモ明デアリマス.
牽連犯ニ関シ日本刑法第五十四條ニハ一ノ行為ニシテ数個ノ罪名ニ触レ又ハ犯罪ノ手段若クハ結果タル行為ニシテ他ノ罪名ニ触ルルトキハ首ト最モ重キ刑ヲ以テ處断ス.
ト規定シテ居ルデアリマス. 之ハ数個ノ法條ニ触レタル場合ニソノ内最モ重キ刑ヲ以テ
罪ノ凡テガ吸収サレ一罪トシテ處罰スベシト規定デアリマス.

又本件被告ノ行為ハ一個ノ行為デ二個ノ行為デハナイノデアリマス 然シ本件ハ第一第二ノ二ツノ起訴ニ依ッテ二個ノ行為ニナンテ斗リマスケレドモ 古木ノ爲シタル死刑執行ノ行為ハ法令ニ依ッテ正當ニ爲サレタル一個ノ職務行爲デアッテ當然一個ノ行爲トシテ日本刑法第35條ヲ適用スベキモノデアリマシテ断ジテ犯罪ノ構成シナイモノナルコトヲ茲ニ主張致シマス
以上詳論致シマシタ通リ本件被告人ノ行爲ハ何レノ点ヨリ見マシテモ犯罪ノ構成セズ起訴第一罪状項目甲ノ一. 甲ノ二. 甲ノ三. 甲ノ四 甲ノ五又起訴第二罪状項目甲ノ一. 甲ノ二. 甲ノ三. 甲ノ四. 甲ノ五 ノ何レモ無罪ナル事ヲ絶對的確信ヲ以テ主張致シマス.
終リニ臨ンデ 検事側証人新留三次郎ノ証言ニ付一言所見ヲ附加致シマス

証人新留三次郎ハ初メ弁護側ノ証人トシテ喚問セントシテ遂ニ實現ヲ得ナカッタノデアリマスガ 検事側ガ喚問セラレタノヲ感謝シテ居リマス
今人ノ証言ハ記憶明瞭ナラズ ソノ陳述スルトコロ曖昧ニシテ表現通リ信ズルノ

OP45

事、出来マセマが証言確実ナル事ハ次ノ通リデアリマス。

「1. 古木秀策ガ島民事件ノ調査ヲ指揮シ調査ヲ完了シ調査報告書ニ基キ審議ノ席ニ於テ意見ヲ述ベタルコト

2. 又、審議ノ席ニアリタルモノハ井田少将、井上大尉、新留主佐及古木中佐デアッタ事

3. 井田少将ハソレ等ノ島民ハ法ニ照シ死刑トスル旨ヲ述ベタノニ対シ新留主佐ハ今迄日本ニ協力セル島民ヲ罪アリトスルモ死刑トスルコトハ不可デアル又此食糧危機ニ際シ一人ノ島民ヲ失フハ不得策デアルコノ戦争ヲ遂行スルタメニハ寧ロ生カシテ食糧生産ニ働カシムルヲガ必要デアルコノ見地カラシテ島民処刑ニ止メテ貰ヒタイト意見ヲ述ベタノニ対シ古木少佐モ之ト同意見デアッタ

然シテ井田少将ハ之ニ対シ犯罪ヲ法ニ照シテ処罰スル場合ニハ、予備ト銘ジテヲ法ヲ左右スルコトハ不可デアル若シ左様ナコトヲスレバ軍機ノ根本的ニ破壊スル島民ハ不可デハアルガ法ニ照シテ処刑スルコトハ已ムヲ得ナイト断固タル所信ヲ述ベラレタ。自分ハ残念ニ思ッタガ如何トモスル事ハ出来ナカッタ」ト述ベテ居ル之ニ依ッテ他ニ如何ナル表現ヲ用ヒヤウトモ井田新留古木ノ立場ガ何デアッタカ而シテ如何ナル行為ヲナシタカ事實上明白デ他ノ証人ノ証言トハ少シモ矛盾シナイノミカ之ヲ立派ニ裏付ケテ居ル従ッテ私ハ前述ノ本件ニ関スル事実並ニ意見ハ一層強固ニサレタト信ジマス。

私ハ茲ニ主ネテ申上マス

彼等ノ採リ来ッタ特別軍法会議ノ手続ハ平時ニ於ケル正規ノ手続ニ比ベ

0046

マスレバ確ニ欠点ヲ有シテ居リマス殊ニ益ニ開カレテ居リマス完全ナル
本法迄ニ比スレバ幾多ノ欠点ガ認メラレマセウ然シ乍ラ形式デハアリマセ
ヌ実質デアリマス、如何ニ慎重ニ事件ヲ取扱ツテカニアルノデアリマス、當時、
急迫セル戦場ニ於テ爲シ得ル最上ノモノデアツタ事ハ御認メガ願ヘルト
信ズルノデアリマス
コレハ日本刑法第37條ニ所謂緊急避難ノ原則ニ依ツテ法ノ許シ給フルトコロ
デアリマス
又裁判ノ手續ニ関シ採用スル法制、文化ノ程度、風俗習慣、相異ニ
リシテ各国悉ク一致シテ居リマセヌ
米國ノ裁判ニアリテハ裁判官ハ白紙ノ状態ニアリ検事及辯護人ノ
提出スル事実ニヨツテ判断シ陪審員ノ票決ニ依ルノ原則トシテ居リマスガ
日本ノ通常裁判ハ凡テ裁判中心主義デ犯罪ノ取調ベハ裁判前ニアリ
テハ警察官及検事ノ専権デアリ検事ハ之ヲ起訴シ之ニ意見ヲ述ブレバ
裁判ニ於ケルソノ職責ヲ完フシ裁判所即チ法廷ニアリテハ裁判長ノ
専権デアリ其ノ判断ハ自由心證主義ヲトリソノ心證ニ
依リ自由ニ決定シ何人モ之ニ干渉ヲ許シマセヌ。勿論地方裁判所及
控訴院ニアリテハ三人ノ判事カアツ大審院ニアリテハ五人ノ判事カアリ
其ノ中ノ一人ガ裁判長デアリ、他ノ陪席判事ハ各々意見ガ一致セザル時
合議ヲ設ケマスガ米國ノ如ク票決デハナイノデ最後ノ判断ハ裁判長ノ
決定ニ依ルノデアリマス。本件ニ於ケマシテモ井田少将ニ対スル通常裁判所ノ
方式ニ依ツテヤルト推定セラレマス此ノ点ニ充分ノ考慮ヲ拂フ度イノデアリマス
又吉木ノ行爲ニ対シマシテモ前述ノ如ク令人ノ行爲ハ検事トシテ裁判手
續ニ関係スル行爲ト裁判執行官トシテ死刑ヲ執行スル二ノ行
DD 47

行為ト、間ニハ法律上完全ナル因果関係ヲ中断シ何等関聯ノナイヲト
而シテ彼ノ検事トシテノ職責ニ調査ヨリ起訴ニ至ル迄ノ行為デアリ之ニハ法律上
事実上一点ノ不法モ非違モナイ完全ナル合法行為デアルコト.
而シテ裁判ノ執行ニ付テハ既ニ執行命令ガ形式実質何レモ合法デアッテ.ソノ
系統ガ正常デアリソノ行為ハ完全ニ法令ニ依ル職務行為デアルコト.仮令裁
判ニ多少ノ過誤アリトスルモソノ過誤ハ裁判官ノ責任デアリ上級裁判所ノ
之ヲ審査スル事柄ヲ有スルノデアッテ.検事又ハ執行官ノ関与スルコトガ
許サレナイ事ハ前詳論通リデアリマス.従ッテ古木ガソノ責任ヲ負ッテモ
理由ハ毛頭ナイノデアリマス.
最後ニ被告古木秀策ノ人格ニツイテ深キ配慮ヲ煩シタイノデアリマス.
彼ノ人格ハ本審理ニ於テ親シク認識ヲ賜ハッタ事ト信ジマスガ.彼ガ信仰心
ニ厚ク.部下ニ対シテモ島民ニ対シテモ常ニ愛ト誠トヲ以テ接シソノ温情ニ対シ感激
シナイモノハナイノデアリマス.部下ノ将兵ハ彼ヲ親如ク慕ヒ.彼ノタメニハ身命ヲ捨テ
ル覚悟ヲ有スルモノハ決シテ少数デハナイノデアリマス.然ニ又彼ノ部下ノ
タメニ犠牲トナルコトヲモ措ク.今日ノ如ク捕ハレノ身デアリ乍ラ日夜心配シテ居ル
ハ部下ノ事ノミデアリマス.又島民ニ対スル切々ノ情ヲ彼ノ陳述ニ明確ニ
表レテ居リマス.検事側ノ証人ノ島民ノ内一名モ彼ヲ悪イト言ッタモノハアリマ
センデシタ.彼ノ家庭モ彼ノ陳述ノ如ク主レテ三ケ月ノ幼児ト妻等ヲ残シテ出
征シ七ケ年間音信モ機会ナク今妻ハ爆撃ノ途ヒ住ム家モナク何レカニ避難シ
浮世ノ苦難ト闘ヒツツコノ父ヲ夫ヲ待ケ他ヒテオルノデアリマス.實ニ戦人ノ変転
涙ナキヲ得ヨヤヌ.
裁判長並ニ委員各位.何卒眼光ヲ紙背ニ徹シ被告ニ無罪ノ判決ヲ賜ル
被告ノミナラズ社会人类ノタメ周到セラレンコトヲ弁護人ト日本人ノ名ニ於テ

切ニ旧ク願申上ゲル次第デアリマス。

以　上

FURUKI, HIDESAKU (01 MAR 1947) (VOLUME II) (158819)
PART 2 OF 4

ARGUMENT FOR THE ACCUSED, FURUKI, HIDESAKU, DELIVERED ON 14 APRIL 1947, BY AKIMOTO, YUICHIRO, TOKYO, JAPAN.

Gentlemen of the Commission:

I would like to ask for a finding of "Not Guilty" for the accused, FURUKI, Hidesaku. The fact in this case is simply clear. There will be nothing to discuss about that, although the point of view of the parties of this case may differ from one other. But as to the legal understanding of this case, I hold an entirely different view from that of the prosecution, and am absolutely convinced of the innocence of the accused.

It may fairly be said that the interpretation of laws is the fundamental basis of everything in the solution of this problem.

However, the interpretation of laws ought to be based upon fact, not upon the abstract, fanciful theories of the law. The fact in this case is quite clear; there is nothing to argue about it.

But one says the fact is white, while another says that the same fact is black. It is really inconsistent and illogical. But we can not deny it in the actual procedure in this court. Where in the world does this inconsistent, illogical reality come from? I request the Commission to pay careful consideration to this matter.

Chapter 13 of 1st Corinthians reads: "When I was a child, I spake as a child, I understood as a child, I thought as a child: but when I became a man, I put away childish things. For now we see through a glass, darkly; but then face to face; now I know in part; but then shall I know even as also I am known. And now abideth faith, hope, charity, these three; but the greatest of these is charity." I heard this sacred phrase from Mr. Wells on March 23 at the church in this area with great emotion. The Chaplain said as follows: "Child has but little experience, knowledge, philosophy or consideration. But he is pure-minded; what he says or thinks is honest and frank. But when he becomes a man, he will see through a glass, darkly. I have many children as friends, but only one of them did not like me. I called the child and talked with him intimately, and I found that the reason why he did not like me was that I wore glasses. As I took away the glasses, he became close to me".

I was much moved when I heard this story together with the phrase in "1 Corinthians".

Among us there are various prejudices which come from the difference in race, manners, humanity, customs, tradition, language, etc. These are glasses. When we see through these various glasses, the same object may be seen in various ways such as white, black, red or blue. According to these different ways of living, there come forth different judicial systems, different interpretations or opinions about the law.

When we judge whether a certain act is lawful or unlawful, it is wrong to consider only the external form of the act. When we decide whether the substance of the act is wrong, or, in other words whether it is anti-social or what the intention was, we must consider the time, the place, the circumstances and the subjective mind or belief of the man who did it, for the purpose of securing the actual truth. In order to attain this, we must put away the glasses of race, manners, customs, tradition, humanity, language, etc., which come from the different circumstances in each society, so that we can find the truth as an unencumbered man or a real human being.

However, it is very difficult to take away these glasses entirely. The difference of race, manners, customs, and humanity were founded in long tradition, and according to that, the way of thinking and observing of different societies is naturally different. Therefore, when we observe the acts of foreigners whose race, manners, customs and humanity are different from ours, we must carefully consider the differences; because prejudice might follow after these differences.

On this point, I would like to discuss the questioning of witnesses by the Judge Advocate. It seems to me that the Judge Advocate thought from the beginning that witnesses did not tell the truth. Especially, he brought forth a document which had no relation to this case, and, without mentioning what the document was, he cited a part of it and tried to give an impression that the witness had a habit of telling a lie. If he did so, he had a glass of prejudice that the witness always tells a lie.

Witnesses, after taking oaths solemnly in this sacred court, began their testimonies. If there are inconsistencies in their words spoken at different times, concerning different cases and under different circumstances, we must show, at what time, concerning what case, and under what circumstances these different words were spoken, and so consider the credibility of the testimonies solemnly given in this court.

The Judge Advocate dared not do this, and using expressions which gave use to bad impressions in every word of his phrases, abused the witnesses. It might be a skillful prosecution tactic on the part of the Judge Advocate. I am convinced that the Commission will not misunderstand the truth by his words, but it is dangerous, unfair court tactics which might cause misunderstandings, and it ought to be rejected in a criminal procedure which aims at the discovery of the truth.

The Judge Advocate questioned the witnesses INOUE and FURUKI, by citing a portion of their statements offered to an American investigator at Kwajalein concerning the American Aviator's Case. This case has no relation to the present one; besides these witnesses have no connection with that case. They made these statements only as reference. However, the prosecution pointed out the differences in their statements between before and after the death of Rear Admiral MARUYA, and, by accusing them, pressed them hard as to which of their statements

were right. The witnesses replied that their statements after the death of MASUDA were right. This tactic of the prosecution was smart. Those who did not know the real circumstances of the case might misunderstand the fact that the witnesses changed their testimonies for the fact in the case, because the prosecution did not show to what case the document belonged. It is also because the prosecution cited only a tiny part of the statements so that no one could understand the main point of the statement.

As was expected, the paragraphs in the Navy News on April 5 misunderstood it saying: "FURUKI admitted changing his statement regarding the responsibility of the war crimes after Admiral MASUDA committed suicide. Thus he placed all the responsibility in the hands of the dead war criminal."

This was entirely a misunderstanding on the part of the Navy News. They did not know that the Judge Advocate cited the other case which had no relation to the present case. Also they did not know that the Judge Advocate cited only a part of the statements and did not show their main point. Thus the court tactics of the Judge Advocate was smart enough to make those who did not know the fact misunderstand it. He may have to be praised for his able tactics, but it is very dangerous for a criminal procedure which aims at the discovery of the truth. I am very sorry for it.

As was testified in this court by witnesses MORIKAWA, INOUE, and FURUKI, Rear Admiral MASUDA was questioned after the end of the war about the natives cases by Lieutenant Commander McKinson, captain of a U.S. destroyer and by U. S. legal officers. MASUDA stated plainly that he disposed of the offenses of natives who had violated the Japanese law according to the law, by his authority and after proper procedure. He also stated that it was his proper duty and he had nothing of which to be ashamed. Therefore, there was no change of testimony or statement of the witnesses in this case. I think the Commission will clearly admit what I have said, but as the Navy News misunderstood it, I have cited it particularly.

Obstacles of language are also an important glass. Mistranslation of only a word will cause a serious effect. Especially the constructions of Japanese and English are entirely different - upside down. The answers for negative questions are opposite, so that witnesses sometimes found it difficult to answer these questions - I think the Commission will have noticed it. Particularly, for double negative questions, I myself have often been at a loss what to answer.

As I stated above, in the trial, we must take away various misunderstandings, prejudicial glasses which come from the difference of race, language, humanity, manners and customs, and try to secure the real facts in the case.

At this point I would like to ask the Commission to pay careful consideration to the following. This is, irrespective of how the facts may appear on the surface, I would like the Commission to take note of the care given to the substance in the proceedings in this case.

As I stated above, the fact in this case is clear. The problem is how to interpret it legally.

The first problem is whether this military court, an American court, has the jurisdiction over this case, and the second problem is whether the acts of the accused of this case are legally permissible, or, in other words, whether they legally constitute crimes.

Concerning the jurisdiction, I argued in detail in my preceding objection, so that I have made my claim to it and will not repeat it again. But, I would like to point out the inconsistencies in the opinion of the Judge Advocate in order to prove my assertion.

The Judge Advocate insisted that Japan lost her sovereignty over the Marshalls, the Japanese mandate, on account of her secession from the League of Nations, and therefore she had no sovereignty over Jaluit at that time. While saying this, he also stated that the Criminal Code of Japan was effective in the place as a local law, and applied Article 199 of the Code to this case.

Whereas, in the jurisdiction, he denied the Japanese sovereignty and insisted that America had the jurisdiction because it is now an American occupied territory. Of course, I do not deny the exercise of American jurisdiction over the cases in the territory after the occupation of the American forces.

However, this case happened in Japanese territory, and the natives, who were Japanese subjects, violated Japanese Laws, and the Japanese government punished them according to Japanese laws. The persons who carried it out were Japanese subjects. If we consider any aspect of this case - person, place and time - Japan alone has the jurisdiction over this case when this is a crime. Although Japan was defeated, she is still an independent nation. Japanese laws still exist and are effective. Japan has jurisdiction over any Japanese who is in any place in the world. But in reality, if the criminal is in a foreign country outside the sovereignty of Japan she can not exercise jurisdiction then and there. But it does not mean that she lost jurisdiction. If the country where the criminal lives has signed the Criminal Delivery Convention, it is the custom in international law that Japan can request that country to deliver the criminal.

There is no such law in any country of the world which admits the jurisdiction of a country over an offense of a foreigner in a foreign land only because the criminal is at present in that country.

The Judge Advocate stated that America has jurisdiction over the case of a foreigner in a foreign country before the place was occupied by America, only because the place is now an American territory. This opinion is not admissible in any respect whatsoever, because it affirms the above said illegality.

Besides, the Judge Advocate neglects the ex post facto principle. At present, in any civilized states of the world, the ex post facto principle is strictly observed in the application and the interpretation of laws.

The Judge Advocate made use of the ex post facto principle concerning the application of criminal law, and violated the principle concerning the law of criminal procedure. Of course, it is subject to argument as to whether the formation of a law of procedure which violates the ex post facto principle is good or not. But it concerns only whether the establishment of such a law is good, so that, in so far as such a law is not yet established, the ex post facto principle should be observed in the law of procedure. This is an established theory among the jurists of the world. The charges of this case clearly violate this theory. I firmly maintain that this court has no jurisdiction over this case.

Secondly, it is a most important point whether the acts of the accused of this case are legally permissible, or, in other words, whether they constitute crimes.

Then what acts did he do? Let us sum up the common points of the testimonies both of the witnesses and the accused.

The four natives named in Specification 1 of Charge I and II, Leochr, Kohri, Kozina and another person unknown, three natives named in Specification 2 of Charges I and II, Arden, Makui and Tiagrik, two natives named in Specification 3 of Charges I and II, Chuta and Chonmohle, two natives named in Specification 4 of Charges I and II, Mendala and Laperia, two natives named in Specification 5 of Charges I and II, Melein and Mejkane - it is evident that all these natives violated the Japanese Criminal Code, the Japanese Naval Criminal Code and other laws. As the offenses of these criminals and the laws applied for the offense were testified to in detail by witnesses and recorded, I will not state them one by one. They committed such crimes as "the crime of deserting to the enemy" of Article 76, Naval Criminal Code, "the crime of killing a guard in a group" of Article 65, Naval Criminal Code, "the crime of treason" of Articles 85 and 86, Criminal Code, "the crime of homicide" of Articles 199 and 203, Criminal Code, etc. For the treatment of these offenses, Rear Admiral M.SUDA, then the supreme commander of Jaluit Atoll, appointed Lt(jg) S.KUDA, 2nd Lt. K.DOTA, 2nd Lt. MORIKAWA and 2nd Lt. IEKI as investigators, Major FURUKI as Judge Advocate, and Lt. Comdr. SHINTOME, Capt. INOUE and himself as judges. When Rear Admiral MASUDA appointed these members, he ordered, "These cases have a serious influence on the military forces. But as we are on a battle field of continuous activity, we can not apply a regular trial procedure to them. Therefore, I shall hold a trial of special procedure pursuant to my authority. Even you investigators must carefully and fairly investigate the case as if you were judges."

The investigation of these crimes was carried out carefully and the investigators spent much time and effort.

Collecting evidence, questioning many witnesses or obtaining confessions from the criminals, they made full investigations. After that they wrote the report sheets on their investigation, and offered them to Rear Admiral MASUDA in the presence of Major FURUKI. MASUDA and FURUKI investigated the criminal suspects again according to the reports of investigation, and then MASUDA assembled Major FURUKI, Lt. Comdr. SHINTOME and Capt. INOUE and went through careful procedure. At this procedure, FURUKI stated his opinion as judge advocate and SHINTOME and INOUE also stated their opinions as judges. As president, MASUDA listened to these opinions, and after considering the case for a few days, he made a judgment paper. After showing the judgment paper before Lt. Comdr. SHINTOME, Major FURUKI and Capt. INOUE, he went with FURUKI to the place where the accused were confined, and announced the sentence to them, the accused.

There were differences between FURUKI's opinion and MASUDA's judgment concerning the sentences. According to FURUKI's opinion, the sentences of Kohri, Kozina, Tingrik, Chuta, Chonmohlo, Mandelo, Leporia and Mejkane were hard labor for 15 years, while the actual sentences were death.

On this point, Lt. SAKUDA answered to the question of the Commission by stating that the opinions of Major FURUKI had been lenient while the sentences of Rear Admiral MASUDA had been heavy. The witness MORIKAWA also testified in the same way. Capt. INOUE testified that the sentence of Rear Admiral MASUDA for the 13 natives had been all death while according to the opinion of FURUKI more than a half of them had been "hard labor" not "death", although he did not recall the exact number. FURUKI testified in detail concerning each name and the sentence. Therefore, summing up the above testimonies, I think, these facts are proved.

Concerning the above mentioned procedure, the Judge Advocate tried to give the Commission an impression that the witness had testified no trial had been held. As you have already heard, he cited a part of INOUE's testimony and questioned FURUKI about it. But it is the opinion of each witness, not the fact, as to whether the aforesaid procedure is a trial or not. The witness, Capt. INOUE did not deny whatsoever that it was a trial. He stated the same as the other witnesses that it had not been a regular trial procedure, but a trial by special kind of procedure. The questions which Judge Advocate cited are as follows:

Q. Was it at the time of the judgment or after the termination of the war when you thought that this procedure was a trial?
A. It was after the termination of the war.

Q. Then, you did not think at that time that it was a trial, do you?
A. I did not. I did not think at that time about whether it was a trial or not.

This is in the record. But the judge advocate did not intentionally read the last

part of the answer, "I did not think at that time about whether it was a trial or not". But his words, "I did not think at that time about whether it was a trial or not" does not deny the fact that there was a trial. At that time, he was convinced that this special procedure was quite legal, so that he never thought about whether it was a trial or not. FURUKI and INOUE did not think at all that such a fact could cause trouble. Therefore they wrote it in their statement offered to an American legal officer long long days before they were accused. But it caused a serious problem after that, so that they had to think about whether it was a trial. I think you will recognize the meaning of his testimony when you read before and after it.

Lt. MORIKAWA testified that this procedure was a kind of trial. Navy News reported that it was only MORIKAWA who testified that there was a trial. But every witness testified that in substance this trial was conducted by special procedure. Lt. SAKUDA testified, "There was no such trial as in this court, but a special procedure was held." This means the same thing. It is not important whether it was a special trial or special procedure. The important question is what kind of procedure was held. Words or terms are quite out of the question. They only concern a way in which to express the fact. It is the opinion of each party about how to interpret the fact. I will state my opinion later. I request the Commission to pay careful consideration to what I have said.

Admiral MASUDA, according to the sentence, ordered Major FURUKI, the Judge Advocate, to carry out the execution of the natives named in the charges in this case. It is evident by the testimonies of each witness that Major FURUKI, by the order of Rear Admiral MASUDA, carried out the execution as his duty.

Summing up the testimonies of all the witnesses, the authority of Rear Admiral MASUDA, the supreme commander of Jaluit Atoll Base, to hold a trial of a special procedure is as follows:

After the fall of Kwajalein in February 1944, Jaluit was entirely isolated and the transportation to the other bases was cut off. Jaluit Atoll was entirely a battle field, and under intense attacks of enemy's crafts all men were in battle positions. In peace time, the area of Jaluit Atoll was administered by the South Seas Government at Palau, the Civil Court for the area was at Ponape, and the regular Military Court was at Truk. But the transportation between these islands and Jaluit was entirely cut off, and there was no court on Jaluit. To meet such circumstances, the Commander-in-Chief of the 4th Fleet gave an order to Rear Admiral MASUDA, the supreme commander for the area of Jaluit Atoll, in March or April 1944: "From now on, administrative and judicial affairs in the Jaluit Atoll area shall be exercised by the supreme commander of the base". This means that the dictatorship of the military government was vested in the supreme commander of the area by the reason that the area was already a battle field and

was in more serious circumstances than a place where martial law was enforced. The witness, Rear Admiral ARIMA, testified that the area was in pressing circumstances and "henceforth Rear Admiral MASUDA, the supreme commander of the base, was vested with the authority for the military government and also for affairs of a very wide scope other than military and after that it was not necessary for him to ask directions from the commander-in-chief of the 4th Fleet".

Also the document prepared by the head of the Investigation Section, 2nd Demobilization Bureau, the Japanese Government, which we introduced as evidence says: "Jaluit was already a battle field, and was in more serious circumstances than the place where the martial law was enforced. Therefore, though martial law was not enforced in the area, it is admitted that the supreme commander of the base could exercise the same authority as the commanding officer under "martial law", and certified the statement. Putting this evidence together, there is no doubt that Rear Admiral MASUDA had the authority to exercise judicial power.

Even if we assume that there was no such order, the supreme commander of the base could have naturally dealt with the cases by his authority. The transportation to the other bases was entirely cut off, and it was a completely isolated battle field in the ocean. If there is no organization which exercises judicial authority, in such a place, who deals with the offenses committed there? If the American forces were in their place, the supreme commander of the base would have done it. It will be unnecessary to say that there is no other way of dealing with the offenses.

Then it is quite natural that Rear Admiral MASUDA dealt with these offenses by his authority.

I have stated the facts of this case as they were, according to the proper reason and evidences.

Do these facts violate the Japanese Criminal Code or the laws and customs of war as are alleged in Charges I and II? If these facts prove the guilt of the accused, I should say that the law does not help good people, but on the contrary harms them. I am convinced that the acts of the accused in this case do not constitute a crime. I would like to state the reasons as follows.

Let us observe the relation between the offenses committed by Lesohr, Kohri, Kosina, Arden, Mekui, Tingrik, Chute, Chonmohlo, Mandala, Laperia, Melein, Mejkane and another native unknown and the provisions of the Japanese Criminal Law and the Japanese Naval Criminal Law.

Article 81 of the Japanese Criminal Code reads: "Every person who by conspiring with a foreign power has caused hostilities to commence against the Empire, or who has joined an enemy power in taking hostile action against the Empire shall be condemned to death."

Article 83 reads: "Every person, who has the purpose of benefiting an enemy power, has damaged (destroyed) or rendered unfit for use a fortress, camp, vessel, arms, ammunition, train, electric car, railroad, telegraph (or telephone) lines, or other place or thing for military (or naval) use shall be condemned to death or punishment with penal servitude for life."

Article 85 reads: "Every person who has acted as a spy for an enemy power, or has aided a spy for 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 reads: "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 reads: "Attempts of the crimes in the preceding six articles shall be punished."

Article 199 reads: "Every person who has killed another person shall be condemned to death or punished with penal servitude for life or not less than three years."

Article 203 reads: "Attempts at crimes in Art. 199 and 200, and the preceding Article shall be punished."

Article 54 reads: "When a single act results in several crimes or when the means or result of committing a crime constitutes another crime, sentence of the gravest punishment shall be given."

Article 1 reads: "This law shall be applied to every person who commits crimes in the Japanese Empire."

Article 2 reads: "This law shall be applied to any person who commits the following crimes outside the empire:...3) The crimes of Art. 81 to 89...."

Article 23 of the Naval Criminal Law reads: "Those who have done the following action for the benefit of the enemy shall be condemned to death: 1) To destroy or make impossible the use of ships, arms, ammunition, and the places, buildings and other things used by the Navy,....5) to allow the lack of arms, ammunitions, provisions, clothings and the other munitions....."

Article 24 reads: "Those who have given naval facilities to the enemy or injured the Japanese Navy with ways other than those stated in the foregoing two articles shall be condemned to death, or life term or above five years' imprisonment."

Article 64 reads: "One who, resorting to arms or weapons, violates or threatens the guard shall be condemned as follows: 1) In the face of the enemy, life or above five years' imprisonment or confinement....."

Article 65 reads: "Those who, forming a clique, commit the crime in the preceding article shall be condemned as follows: 1) In the face of the enemy, the ringleader to death or life imprisonment or confinement, and others to life or above seven years' servitude or confinement."....

Article 70 reads: "The attempted crime of Art. 58 to 61, 61-3, and 62 to 68 shall be punished."

Article 76 reads: "Those who desert to the enemy shall be condemned to death, or life imprisonment or confinement."

Article 77 reads: "The attempted crimes of Art. 73 Item 1. Art. 74 Item 2 and the preceding article shall be punished."

Article 79 reads: "Those who burn down arms, ammunitions, provisions, clothings or other goods for naval use piled up outdoors, shall be condemned to such penalties as follows: 1) Commited in war time, to death or life imprisonment."....

Article 82 reads: "Those who destroy the things named in Art. 78, or railways, telegraph-wires, or passages on land and sea for Naval war use, or make them unusable, shall be condemned to life or above two years' imprisonment."

Article 84 reads: "The attempted crimes of Art. 78 to 82 shall be punished."

Article 2 reads: "This law shall also be applied to those who commit the crimes mentioned below, though they may not be naval officers or sailors: 1) The crimes of Art. 62 to 65 and those attempted crimes..... 3) The crimes of Art. 78 to 85....."

Article 4 reads: "The naval officers and sailors who commit crimes of Naval Criminal Law or of the other laws or ordinances in the occupied territories of the Japanese Forces are treated as those who commit them inside the territory of Japan. The above clause shall also be applied to the Japanese, foreigners who have followed the navy, and captives, though they may not be naval officers or sailors."

The 13 natives named in Charges I and II of this case, were the Japanese subjects. They were ringleaders, who, forming a clique, did or tried to kill the Japanese guards, cause a deprivation of munitions, desert to the enemy, or commit treason against the Japanese Empire. All of their crimes were of evil nature, and violated the above cited Japanese Criminal Law and the Japanese Naval Criminal

Code. Besides, Loschr, Kchri, Kozina, Arden, Makui, Tiagrik, etc., were flagrant criminals who tried to kill P.O. OKAMOTO and Gunzoku OKAMURA or to strike them by oars, but were captured by them after hand-to-hand fighting. Besides, the crimes of these natives were all boldly and flagrantly committed in the face of the enemy. If the U. S. forces were in place of the Japanese forces, they would as severely punish them as the Japanese forces did. It can not be denied that any military force in the world would punish these crimes severely in the face of the enemy. Still more was it natural for the Japanese forces at Jaluit Atoll who were then suffering under unexplicable pressing circumstances to condemn these criminals to death.

Major FURUKI was a benevolent person in nature. Although he stated his opinio as to the death sentence of Loschr, Arden, Makui, Molcin, and another native unknown, who were most felonious, he recommended hard labor for the other eight natives namely Kchri, Kozina, Tiagrik, Chuta, Chonnohlo, Mandala, Laporia, Mejkane, because he felt sorry that they should be considered deserving of the death sentence. However, his opinion as the judge advocate was not accepted, and Admiral MASUDA, the president, sentenced all the above natives to death. As a judge advocate, he could only state his opinion and could not do anything about the verdict. It is simply natural according to the provisions of law that he could not do anything concerning the verdict. At any rate for the above mentioned reasons, the punishments of these natives were carried out according to the laws and there was no illegality or ultra vires. I am convinced that the Commission will admit this.

Next, let us consider whether this trial by special procedure was proper or not. As each witness testified, they were not the regular procedure. They were undoubtedly trials of special procedure in order to meet pressing conditions on the battle field in the face of the enemy.

At that time, the area of Jaluit Atoll was in the condition of being a more serious battle field than a place where martial law was enforced. Therefore a place which was in substantially much more serious a situation than a place under martial law regardless of whether martial law was formally proclaimed or not.

Primarily martial law is enforced in a place other than a battle field in such a case as when the place is under a dire and emergency condition as a battle field. In such a case, the authority of each civilian government is limited or stopped, and the military government is enforced by the supreme military commander of the district. Each country of the world will have such stipulations of the Martial Law, so that I will not cite the articles of the Martial Law of Japan.

At that time, Jaluit was isolated under the seige of the enemy, its transportation to other bases being cut off. It was in such pressing circumstances that the supreme commander of the base had no way but to enforce military government. If the U.S. forces were in their place, there would not be any other way of meeting the circumstances. Surely not. Then we must refer to martial law before considering how to enforce military government. Of course it is unnecessary to be restricted by only the provisions of martial law. It is an important problem to decide what the best way was in this case and if there were any proper way other than this. Then what measures had to be taken in this case?

As reference, I shall cite the provisions of martial law.

Article 2 of martial law reads: "There are two types of area under martial law: one a war area and another a besieged area. 1) A war area is a place marked out to be guarded in case of war or emergency. 2) A besieged area is a place marked out to be guarded in case of seige or attack of an enemy or other emergencies." At that time Jaluit Atoll was in more serious circumstances than the "Besieged area" mentioned in the above article.

Article 6 of the same law reads: "The following officers are empowered to enforce martial law: an army commander, division commander, brigade commander, Chindai Eisho or fortress commander, garrison or detachment commander, or commander-in-chief of a fleet, fleet commander, naval station commander, or specially appointed commander." Not to speak of the commander-in-chief of the 4th Fleet, but also Rear Admiral M.SUDA, a garrison commander, had the authority to enforce martial law of his own accord. Besides, as the witnesses have testified, the above said order of the Commander-in-chief of the 4th Fleet substantially proclaimed martial law.

Article 10 reads: "In the besieged area, administrative and judicial affairs shall be under the charge of the authority of the commanding officer of the district....."

Article 12 reads: "If there is no court in the besieged area or communications are cut off from the court which exercises jurisdiction over the area, all civil and criminal cases shall be tried in military courts." At that time, there was no court on Jaluit. In peace time, the court which exercises jurisdiction over Jaluit was the local court of Ponape. As the witnesses testified, transportation was entirely cut off to the military court of Truk.

Article 13 reads: "In a besieged area, no appeals for retrial are allowed in a trial by a military court." Therefore, it is the principle that no appeals are permitted. This is also provided in the Naval Court Martial Law, articles 420 and 421 do not include the special court martial in the isolated area.

Article 8 of the Naval Court Martial Law reads: "Courts martial are organized as follows:...6.) Isolated Court Martial. 7.) Temporary Court Martial."

Article 9 of the same law reads: ".....an Isolated Court Martial is established specially in a district surrounded by enemy when a declaration of martial law is made. A temporary court martial, in a case of necessity during war and naval operations, shall specially be established in a naval unit."

Article 10 reads: "...In the specially established Court Martial, the commanding officer of the unit or district where the said court martial is established shall be the president."

Article 17 reads: "A temporary court martial shall have jurisdiction over the following cases: 1.) In the case of the accused who is under the command or supervision of the commanding officer of the unit where a court martial is established. 2.) The case of the accused defined in article 1-3 who committed a crime either inside or outside the jurisdiction of the court....."

According to the above provisions, the trial procedure with which the accused FURUKI was concerned belongs to the temporary court martial, a kind of specially established court martial.

Concerning the members of the court martial, article 31 reads: "In a court martial, judges, navy legal officers, and navy police shall be appointed." Article 32 reads: "Judges shall be appointed among naval officers....." Article 33: ".....In a special court martial, the commanding officer or a direct superior may appoint judges among his subordinate admirals in case of emergency."

Concerning the organisati n of the court, Article 50 states: "In a special court martial, the commanding officer may appoint naval officers or officials ranking with officers as judges in place of legal officers."

It was quite proper that, according to the above provisions, MASUDA, SHINTOME and INOUE were appointed as judges and, since there was no legal officer on Jaluit, FURUKI was appointed as the judge advocate in place of the legal officers.

In the provisions of judicial procedure in "Naval Court Martial Law", the defense is stipulated in article 87 to 92 incl. Article 87 reads: "The accused may select a counsel for his defense at any time after the charges are preferred against him....." But article 93 provides: "Provisions of the preceding six articles shall not be applied to a special court martial."

Therefore, it is proper and legal that no defense counsel was present in the trials of a special procedure in which the accused FURUKI participated.

Concerning trial, article 96 of the Naval Court Martial Law states: "The consultation of judges shall not be held public. Consultation of judges shall be held and settled by the president. Its proceedings and the opinions of judges shall be kept in secret." Article 97 states: "The judge advocate shall state his opinion previous to those of all the judicial members....."

Article 98 states: "The decision of the court shall be determined by a majority." As is stipulated in the aforesaid articles it was quite proper that the examinations and consultations by special procedure in which the accused FURUKI participated were not held in public.

Rear Admiral M/SUDA, the president, held and settled the consultations of the judges, and the opinions of the judges were kept secret. FURUKI, in his duty as judge advocate, could only state his opinion, so that he could not know the result of what he stated. Therefore he had no responsibility for the result of the trial. Concerning the consultation, it is not clear, whether the verdict was decided by the majority vote, or whether the three judges each had different views and M/SUDA decided the verdict according to these different views. But, putting together the testimonies of all witnesses, it is evident that the decision of M/SUDA and the opinion of FURUKI clearly differed. But at any rate as FURUKI was the judge advocate, he could not participate in the consultation. Admiral M/SUDA could not decide the judgment then and there, and he closed the consultation saying that he would consider the case further, and then took the report and left the consultation. After a few days, he determined the sentence. He again assembled the two judges and FURUKI, the judge advocate, and announced the sentence. Regarding this point, each witness testified in the same way. Therefore, it is rational to suppose that the opinions of the three judges did not coincide, and M/SUDA, the president, decided the sentence by his own decision.

Concerning this point also, we can clearly insist that the judgment was a proper one.

As to the argument, article 100 of the Naval Court Martial Law states: "The decision of the court shall be made after oral argument is made, except when there is any special stipulation contrary to it. A ruling in an open trial shall be given after listening to the statements of the parties. In any other cases, it may be given without these statements, except when there is a special stipulation contrary to it..."

Article 102 states: "The announcement of court decision shall be given by declaration in an open court, otherwise by sending a copy from the tenor of the trial proceedings unless there is a special stipulation contrary to it." Article 260 states: "If it is necessary, a witness may be questioned either at a designated place other than the military court, or at his domicile." Article 265 states: "An examining judge shall have the same authority as the court martial or the president when he examines witnesses." Article 267 states: "A judge advocate may omit the oath of the witness, when he examines him." Article 369 states: "The case which concerns a sentence of death, life or more than one years' imprisonment or confinement shall not be tried without defense counsel, except when the sentence is announced in open court." Article 372 states: "The provisions of the preceding three articles (TN- Art. 369, 370 and 371) shall not be applied in the specially established court martial."

According to the aforesaid stipulations, the parties to a trial, as a principle, make their statement in the court. But it is admissible by law that in some cases they make them outside the court as provided in article 100. Also, according to articles 260 and 265, witnesses may be questioned outside the court even without taking oaths. I have already stated that the stipulations concerning defense counsel are not applicable in a specially established court martial. This is clear in the provisions of articles 369 and 372, and article 372 states that even in such a case which concerns the sentence of oath, defense counsel is unnecessary. Then in the procedure in which the accused FURUKI participated, the only party to the trial are the accused.

In that trial procedure, the accused were not present at the court to make their own statement. The testimony of each witness coincided in regard to this point, so that we admit it.

So the defense does not deny that this was evidently in violation in this point of the principles of trial. But this is the only point that is different from the regular procedure. However, each witness has testified in the same way that the president, MISUDA, and the judge advocate, FURUKI, went to the place where the accused were confined, listened to their statement and also announced the sentence there.

In fact, a very careful judgment was made, a mere formality was wanting. Is that the reason why he was alleged to have committed murder or to have violated the laws of warfare? Practically speaking, can a very careless procedure be deemed a complete trial if only it is complete in form? Of course, compared with a complete trial such as this one, it might have many faults. But, at that time, 2000 Japanese soldiers were hopelessly isolated on a solitary island of the ocean under rains of shots and shells. They resolved to fight to the last man and were in position themselves in the skirmish lines. Still they carried out the best trial they could. Having no sufficient shelters from air raids, was it possible to hold a trial comparable to one in peace time? If these natives, whom committed the crime of desertion, were present at the court while the trial was in session, they might be able to escape during the confusion of air raids. If they could desert, they would give information about the Japanese forces to the enemy and would cause the defeat of the Japanese forces. Even if they could not escape, it is certain from the testimonies of the witnesses that during the judgment, any men at the trial, not only the natives, but also the senior officers were in a dangerous position as regards air raids. Isn't it legally admissible in such a condition to simplify the procedure? Yes, it is admissible.

Article 37 of the Japanese Criminal Law states: "Unavoidable acts done in order to avert present danger to life, liberty, or property of oneself or another person are not punishable, provided the injury occasioned by such acts does not extend in degree the injury endeavored to be averted. According to circumstances, however, punishment may be migigated or remitted for acts exceeding such limits.

Article 642 of the "Wharton's Criminal Law, vol. 1" states: "Art. 642 Sacrifice of another's life, excusable when necessary to save one's own. The canon law, which lies at the basis of our jurisprudence in this respect, excuses the sacrifice of the life of another, and when the two are reduced to such extremities that one or the other must die....."

This is called "Notstand" or "Etat de nécessté", and this is provided not only in the Criminal Law of Japan, but also in any criminal laws of any of the civilized countries of the world. I think, of course, America has the same provision.

What could be avoided in this case was the destruction of the lives and properties of 4000 military personnel, gunzoku and natives which greatly concerned the rise or decline of Japan. What was lost was nothing but the statements of the accused in the court. As I stated, under the necessary circumstances, it could not be helped. Even if there is no such provision as Art. 37, it is quite natural from the reason of the law that the aforesaid act is permissible under such necessary circumstances. Still more, article 37 clearly shows that it is legally admissible. Therefore, it is unnecessary to say that the aforesaid simplified trial procedure is proper and legal.

Then, according to the sentence legally announced in this specially established court martial, Rear Admiral MUSUDA ordered Major FURUKI, the judge advocate, to execute these natives. According to this legal order, without any suspicion, FURUKI, Hidesaku, after fulfilling his duty as judge advocate, carried out the execution. The testimony of each witness agreed in this.

I have just explained, according to the testimonies of witnesses and evidence, the fact of the natives' case for which FURUKI, Hidesaku, the defendant of this case was allegedly accused. I have also explained my legal opinion about it, citing the stipulations of the Japanese Criminal Code, Japanese Naval Criminal Code, Naval Court Martial Law and Martial Law.

Next, I would like to explain my legal opinion about the responsibility of FURUKI, Hidesaku. The most important thing is the limit of FURUKI's responsibility. FURUKI has two responsibilities; one the responsibility as a judge advocate who participated in the trial, another that as an executioner who carried out executions. These two were done by the same person. But it is a gross mistake to think by that reason that these two responsibilities have any relation.

The act of the accused as judge advocate and his act as executioner has no connection at all. By casual connection was completely broken by the interposition of the independent responsibility of the judges who consulted and the verdict of judgment independently.

We must not forget that the relation of these two acts is entirely broken by the acts of other persons, namely the trial and the judgment, in which FURUKI, the judge advocate, could not take part. I hope the Commission will take notice of this point.

First of all, I would like to explain the responsibility of the judge advocate who participated in the trial.

The duty of the judge advocate is provided in Chapter 6 of the Naval Court Martial Law, article 67 of which states: "The judge advocate shall be subject to the commanding officer and shall have the duty of investigation and prosecution." Article 70 states: "In the specially established court martial or in a naval port court martial, the commanding officer may appoint a naval officer or an official ranking with an officer as a judge advocate."

As provided above, the duty of the judge advocate is to investigate crimes and to indict them when he finds them to be criminals. In more detail, he searches out the crimes, investigates them, and after he indicts them, he explains to the judges the reason for their indictment and states his opinion. That is the duty of a judge advocate.

To try the accused, to find whether they are guilty or not, or to determine the punishment or the terms of the punishment are the duties of judges, and the judge advocate can not take part in them. There is no exception to this rule, in any judicial system of the world. This court is also based upon this rule.

Article 95 of the Naval Court Martial Law states: "A trial shall be done by the consultation of a certain number of judges." Article 96 states: "The consultation of judges shall not be held public. The consultation of judges shall be held and settled by the president. Its proceedings and the opinions of judges shall be kept in secret. As is clearly provided, a distinction is made between the duty of a judge and that of a judge advocate, and they can not intervene in the duty of another. In the aforesaid trial of special procedure, the defendant FURUKI was the judge advocate, Rear Admiral M/SUDA, Lt.Comdr. SHINTOME and Capt. INOUE were the judges, and M/SUDA was the presiding member. This is evident by the testimonies of the witnesses.

Then, is there any illegality or unlawfulness in the acts of FURUKI? There is none whatsoever from the point of view both in fact and in law. Let us consider the investigation. By the lead of the judge advocate, each investigator, though he was in a severe field of battle, consumed many days and much effort in his dangerous situation in collecting many witnesses and evidence in order to fulfill a careful investigation, and then a complete report of his investigation. FURUKI, the judge advocate made his own investigation further, and finished his investigation with utmost care. Then he indicted them and stated his last opinion as a judge advocate, and his duty was over.

The judge advocate asked the witness in this court whether the investigators administered the oaths to their witnesses. But in the Japanese trial procedure, it is the principle that an oath is unnecessary for the questioning of a witness by the investigator or by the judge advocate whether in a civil court or in a court martil. (Art. 267 of the Naval Court Martial Law.) And, as also stated in the same Naval Court Martial Law, the consultation of the judges is settled by the president and it is not held in public, but is kept secret.

The aforesaid trial by special procedure is legal as I have mentioned. But even if we assume that there is a mistake in the procedure, it is the responsibility of the judges and not the judge advocate. A trial is to be done by human beings, as that is natural that there is often a mistake. That is the reason why there are three hierarchic judiciare in the trials of civilized constitutional states, so that, if there is a mistake in the procedure in a normal trial, the accused is allowed to complain or recomplain, and if t ere is a misteke in the substence of the trial, he is allowed to appeal or re-appeal, except in the specially established court martial such as this one.

As an extreme example, there are not a few instances in all countries of the world that an innocent accused was sentenced to death by the mistake in verdict. Did the judges of the trial take responsibility for that? Were there any cases in the history of the judicial system of the world that those judges were indicted to have committed murder? I have never heard of such cases. It is entirely another thing if they constitute crimes from the administrative point of view. But anyhow it is the responsibility of the judges. There is no reason for the judge advocate to be responsible for the mistake of the verdict in any trial. I think even the judge advocate in this court who indicted this case would not think that, so far as the aforesaid trial procedure is concerned, the accused FURUKI had no responsibility for it. Still more, there is no illegality or mistake in the acts of FURUKI as a judge advocate, as I stated before. Concerning this it is unnecessary to cite the theory of intent for the non-existance of the crime of article 35 of the Japanese Criminal Code which provides the rule of non-existence of the crime. I am convinced that there is no objection to the fact that the acts of FURUKI are fair, legal and right.

Concerning the execution of the sentence, article 501 of chapter 5 "Execution" of the Naval Court Martial Law states: "Execution of the sentence shall be supervised by the judge advocate of the court martial which tried the case or by the judge advocate of the court martial to which the examining judge of the case belong."

According to this stipulation, Rear Admiral MISUDA, who announced the sentence, ordered FURUKI, the judge advocate, to carry out the execution according to the sentence. FURUKI, as the duty of judge advocate, faithfully carried out this proper order of the execution. He testified that he had no suspicion about its lawfulness nor malice aforethought, and he carried it out as his proper duty based upon the law. I think that the commission will have admitted the truth of his testimony.

Each witness has unanimously testified that FURUKI had been convinced without any suspicion at all as to the order of execution according to the sentence which had been legal and proper. Not only FURUKI himself or the people concerned with the case, but also an in the Japanese military forces are convinced so.

As was testified by INOUE, MORIKAWA, and FURUKI, after the end of the war, Rear Admiral M/SUDA was questioned by Commander MacKinson, a captain of an American destroyer, concerning the case of the execution of the natives. They testified that M/SUDA said at that time that he executed these natives, the Japanese subjects, who violated the Japanese laws, after the proper procedure of the Japanese forces by the Japanese laws and that he was not ashamed of it before man and God. As we can see from these self-confident words of Rear Admiral M/SUDA, he was convinced that it was absolutely legal. Still more were his subordinates. Could they doubt its legality? Of course not. Especially FURUKI could not, because he, as I stated before, completely carried out his duty of the judge advocate without any unlawfulness or mistake.

However, charge I alleges that he committed murder, and charge II alleges he violated the laws and customs of war. Upon what reasons are they based? I can not help saying that it is a surprising gamble.

Besides the judge advocate has not yet proved the corpus delicti. If he assumes that the act of the executioner in carrying out his official duty by the order is guilty, he must prove either the giver of the order had no authority to do so, the order was false or the giver of the order made use of his subordinate with an intent to commit a crime. Besides, he must also prove in any of these cases that the receiver of the order dared to carry it out knowing that it was unlawful. He must prove it. However he made no reference to these matters. It is really a very incomprehensible indictment. That is the reason why I call it a surprising gamble.

Specifications 1, 2, 3, 4, and 5 of Charge I of this case state that the accused did, wilfully, feloniously, with premeditation and malice aforethought, kill, and cause to be killed the natives, and that he violated Article 199 of the Japanese Criminal Code. The same specifications of Charge II state that the accused did, wilfully, unlawfully, punish and cause to be punished by killing the natives, and that he violated the laws and customs of war. But in any acts of the accused which I have stated before, I can not admit these charges. I am convinced that these charges make a serious mistake.

As I stated before, Rear Admiral M/SUDA, the commanding officer of the unit in which the trials of a special procedure were held, issued after the sentence the proper orders for the executions according to the stipulation of article 501 of the Naval Court Martial Law. Therefore, these orders were legal both in their form and substance. And it was the duty of FURUKI as the judge advocate, stipulated in Naval Court Martial Law, to receive the orders and to carry out the executions. The form and substance of these orders were entirely legal. FURUKI, the judge advocate could not refuse them.

Then has the executioner any right to consider whether there is a mistake in the substance of the sentence which is the foundation of the order? No, he has none at all. The higher courts alone have the right to do it. It is enough for the executioner to know only whether the order of the execution is issued by a legal method. He has no other responsibility in considering the order. Besides, Rear Admiral MASUDA, who issued the order of execution was the president of the trial of the special procedure who announced the sentence, and also the supreme commander of the unit. And the order concerned the execution of the sentence of the trial. The accused FURUKI believed that this order was absolutely legal, and carried it out as his duty provided in the law. Is there any illegality, unlawfulness or mistake in this act? No one can find it from any point of view.

Generally, the substance of the crime depends upon whether it is an anti-social act. It goes without saying that whether it is anti-social or not, ought to be decided by the general moral standards of the society at that time. Can we recognize any anti-social acts in what FURUKI did? Of course we can not.

Besides a crime is an unlawful act. Even if the act, in outside appearance violates criminal law, the act is sometimes legally admissible or enforced as a duty on account of a certain reason. In such a case the act is not a crime.

In Chapter 7 "non-existence of crimes" of the Japanese Criminal Code, articles 35 to 38 inclusive provide for it.

Now, I shall cite the opinions of MOTOJI, Shinkuma, the president of the Supreme Court of Japan, and MAKINO, Eiichi, the professor of the Imperial University according to their works.

In page 340 to 347 of "Theories of the Japanese Criminal Law", MOTOJI states as follows:

"Chapter 2 Acts Done in Accordance with Laws and Ordinances or in Pursuance of a Legitimate Business (or Occupation),

"Article 35: "Acts done in accordance with laws and ordinances or in pursuance of a legitimate business (or occupation) are not punishable'.

"Acts done in accordance with laws and ordinances are, of course, not unlawful acts, because they are based upon laws and ordinances. We must understand also that "acts done in pursuance of a legitimate business (or occupation) are not punishable' means that the acts are not unlawful."

"'Acts done in accordance with laws and ordinances' means the acts which, according to the provisions of laws and ordinances, are admitted to be naturally the right or duty (including official right and official duty). 'Acts done in pursuance of a legitimate business' means acts which form such business as is

admitted to be proper from the point of view of law and the customs of people in general. Acts in pursuance of an official duty belong to the former, operations done by a doctor and so forth, belong to the latter.

"Acts done in accordance with laws and ordinances means all acts which are based upon laws. Not only the rightful acts in accordance with the civil law or business law, but also the authorized acts such as capturing flagrant criminals in accordance with the Laws of Criminal Procedure, acts of using weapons of specific officials, etc., are all belonging tothis category. So called "laws and regulations" do not only mean the provisions of laws and ordinances but also includes logical sequences which can be reasoned from the spirit of the laws and ordinances. By this meaning, emergency defense (or justifiable defense) may be considered as a kind of act originally based upon laws and ordinances. The provision of article 36 of the criminal law does nothing but to clear up its terms and scope. There is no doubt that an act in pursuance of duty legally requested so to be done is an act based upon laws and ordinances.

"It is impossible to enumerate and explain the acts done in accordance with laws and ordinances. I shall make a brief explanation concerning one or two important problems, and what I am going to state are acts done as official duty. (1) According to the laws and ordinances, the acts of officials done as their official duty are their right as well as their duty. Some of these acts are directly based upon laws and regulations. For instance, in case of arresting flagrant criminals according to the provisions of the Law of the Criminal Procedure, in case of carrying out the orders of immediate superiors (such as the execution of a death sentence, arrest of a non-flagrant criminal by written order), etc. However, the following are unlawful acts: Carrying out the execution without the order of an immediate superior when he must receive the order before doing so, arresting non-flagrant criminals without written order, etc.
(2) However, when the order is an unlawful one either in form or in substance can the acts of the lower officials done according to the order be lawful or unlawful? The answer can not be decided before the determination of the scope of the relation between the order and its obedience in line of official duty... I think that the subordinate officials may judge the form of the order of the superior but they have no authority to judge its substance. Subordinate officials may judge the following: Whether the order issued by the superior is inside the scope of the authority of the superior; whether the order is not inconsistent with the provisions of the laws and ordinances, whether the order is inside the scope of his official duty. When all these can be answered in the affirmative he can not refuse the execution of the order even if the order is unlawful in its substance.
(3) If the opinions of the superior and the subordinate official as to whether the order concerns the official duty differ, the subordinate official must naturally obey the interpretation of the superior. But no one has any official right to commit a crime, and any superior can not have any official right to commit a crime by making use of his subordinates. Therefore, the subordinate official, if he recognizes that the giver of the order has a criminal intent and is trying to make use of him for committing a crime, can refuse to obey the order.

(4) Generally, in order that an act of an official can be an act in the line of duty, it is necessary that the official has the intent to exercise his official duty and right, and it is also necessary that the aim of the act abstractly belongs within the scope of official right and duty. For instance, a judge, according to his free conviction, announced the finding of "guilty", and the execution of the punishment was carried out according to that. But after the retrial, the verdict was "not guilty". In such a case, it is not permissible to say that the foregoing trial is not an act in pursuance of an official duty....."

Professor MAKINO, Eiichi, in his work "Theories on the Japanese Criminal Code, states (pp 149-153):

"6. Acts done in accordance with laws and ordinances: If a certain kind of act is stipulated in the laws and ordinances to be the right or the duty, these acts will never constitute a crime. (Art. 35 Japanese Criminal Code). For instance: If the acts are done within the scope of the right or duty, they never constitute crimes. (1) Pursuance of official duty. There are two cases of pursuing official duty: one, in which it is by the order of a superior, another, as his own right. In both cases they never constitute crimes. (2) Acts of disciplinary punishment by a person in parental authority (acts in accordance with Art. 882 of the Civil Law). (3) Acts of nursing a mentally deranged person (Art. 1 Insance nursing law) (4) Acts of arresting flagrent criminals (Article 125 of the Law of Criminal Procedure), etc...These acts are not crimes.

"7. Legitimate acts: Even if not formally stipulated in the laws and ordinances to be the right or the duty, the acts which are not inconsistent with the general spirit of the laws and ordinances, customs of logical sequences, and which do not violate the social order or the popular morals, are not unlawful. If we understand that the acts in accordance with the laws and ordinances are not formally unlawful, we may understand that the legitimate acts are not substantially unlawful.

"As to this point, the Criminal Code stipulated only about the acts in pursuance of a legitimate business. (Art. 35 of the Criminal Code). However, it is not only the acts in pursuance of a legitimate business that are not unlawful, but also any acts which are substantially legitimate are also lawful. In other words, besides the acts in pursuance of a legitimate business, acts which are customarily admitted to be legitimate or any other acts which do not violate the social order or popular morals, are also lawful and can never be crimes."

The above cited theories of Dr. MAKINO and Dr. MOTOJI are entirely the same. But concerning this point, not only the theories of the two, but also any other theories or judicial precedents in Japan are entirely the same, and there are none to the contrary. As I have no record book of judicial precedents now, I can not show them. But I can maintain that there is no judicial precedent which is contrary to this theory.

I believe, not only in the statute laws of Japan or Germany but also in the case laws of England or United States, this theory is equally admitted and there is nothing to the contrary.

Section 640 of Wharton's Criminal Law states: "Section 640. Killing under mandate of law justifiable. The execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives bythe laws and verdict of their country, is an act of necessity, where the law requires it. But the act must be under the immediate precept of the law, or else it is not justifiable; and, therefore, wantonly to kill the greatest of malefactors without specific warrant would be murder. And a subaltern can only justify killing another on the ground of orders from his superior in cases where the orders were lawful. As we have seen, a warrant that is without authority is no defense; though it is otherwise when the defects are merely formal."

The order to carry out executions given to FURUKI, the accused in this case, was based upon the sentence of the specially established court martial, as I mentioned before. The giver of the order was Rear Admiral M/SUDA., the immediate superior of FURUKI, and the convener of the court martial. Besides, M/SUDA had the official duty of president who settled the consultation of the court martial and announced the sentence. FURUKI had the official duty of judge advocate in the procedure, and the execution of the death sentence was also his official duty. It is clearly stipulated in articles 96 and 501 of the Naval Court Martial Law. Rear Admiral M/SUDA had the legitimate authority to give the orders, and FURUKI was the legitimate receiver of the order. So, it was FURUKI's duty stipulated in the law to carry it out, and it is also an act in pursuance of a legitimate official duty.

The order was, without any doubts, legitimate both in its form and substance. And, I have already mentioned, FURUKI was absolutely convinced that the order was lawful, and he had no suspicion about it whatsoever. Therefore, according to the provision of article 35 of the Japanese Criminal Code, the act of FURUKI is no crime at all. I strongly maintain that the specifications of Charges I and II which allege him to have violated article 199 of the Japanese Criminal Code and the laws and custors of war are not proper ones and that the accused ought to be not guilty under both Charges.

Although I think that my assertion of not guilty of the accused for the specifications of Charges I and II is sufficiently clear, I would like to state my opinion further for Charge II which alleges that the accused violated the laws and customs of war.

The judge advocate pointed out that the laws and customs of war written in Charge II are based upon Hague Convention No. IV of 13 January 1907 which embodies regulations respecting the laws and customs of war on land.

Chapter 2 Spy of the same convention:

Article 29 states: "A person can only be considered a spy when, acting clandestinely or false pretence, he obtains or endeavors to obtain information in the zone of a belligerent, with the intention of communicating it to the hostile party. Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army of a territory."

Article 30 states: "A spy taken in the act shall not be punished without previous trial."

The definition of spy is clearly shown in these articles. According to the stipulations, the acts of 13 natives written in Specifications 6 to 5 inclusive, of Charge II do not admit them to be spies.

The reasons why they were punished are not that they were spies, but that they committed such crimes in violation of the Japanese Criminal Code and the Japanese Naval Criminal Code as: crimes relating to external war, crimes of destroying military goods, crimes of homicide, crimes of deserting to the enemy - these purely domestic crimes. Testimonies of the witnesses coincide as to this point. The term of spy happened to be used, but the term is used as the term in domestic crimes. Therefore it is clear that they were not punished by the reason that they violated the laws of warfare.

Of course, they are also not spies caught in the very act as stipulated in article 30 of the Hague Convention 1907.

Therefore, Charge II which alleges this case as a violation of the laws and customs of war is wide of the mark and does not hit it at all.

The spirit of this "Rules of Land Warfare" is to strictly limit or restrict the scope of punishing spies, because a belligerent is apt to punish his enemy and neutral persons heavily by widely interpreting the acts of spies on account of hostilities. They are not stipulations which anticipate the crimes of persons who violated their domestic laws. This is the case in which natives, the subjects of Japan, were punished for the reason that they violated their domestic law. Therefore, Charge II of this case, which alleges that the accused violated the laws and customs of war is entirely nonsense.

If we assume that the laws and customs of war are applicable, it is unlawful to punish the accused, because there is no provision for punishment in international law. When he ought to be punished on any account, there is no other way but to apply domestic criminal laws for his punishment. But, according to article 35 of the Japanese Criminal Law, the acts of the accused do not constitute a crime. When we see the paragraph of Wharton's Criminal Law, we find that, even in the case laws of England and United States, his acts are legally permissible as a matter of course.

Concerning the punishment, article 54 of the Japanese Criminal Code states "When a single act results in several crimes or when the means or result of committing a crime constitutes another crime, sentence of the gravest punishment shall be given."

This provision means that if a certain act violates several articles, the gravest punishment among them must be applied, and that the act must be punished as a single crime.

However, what the accused had done was one act not two different acts. In spite of that, the prosecution alleges by the two charges that the accused committed two different crimes. Execution of the death sentence by FURUKI was an act on official duty legally in accordance with the laws and ordinances. Therefore, article 35 of the Japanese Criminal Code is applicable to this case, and what he did is not a crime whatsoever.

As I argued in detail above, the act of the accused of this case does not constitute a crime from any point of view. I maintain with absolute confidence that Specifications, 1, 2, 3, 4, and 5 of Charge I and Specifications 1, 2, 3, 4 and 5 of Charge II are not proved and the accused is not guilty of each of the charges and specifications.

Lastly, I would like to add a few words concerning the testimony of SHINTOME, Sanjiro, the witness of the prosecution.

We failed to summon SHINTOME, Sanjiro, as a witness for the defense, but we are thankful to the prosecution for taking him into the court.

The recollections of the witness are not clear and his testimony is vague, so that it is difficult to believe his testimony as it was. But in his testimony the following are certain.

1. FURUKI, Hidesaku supervised the investigation of the natives' cases, and after completing the investigation, he stated his opinion at the deliberation according to the investigation.

2. At the deliberation Rear Admiral MISUDA, Captain INOUE, Lt. Comdr. SHINTOME and Major FURUKI were present.

3. Rear Admiral MASUDA stated that he would condemn those natives to death according to the laws. But SHINTOME stated, "It is pitiable to punish them by death because they had cooperated with the Japanese forces as well. Also it it disadvantageous to lose even one native at the time of food crisis. In order to fight out this war, it is rather necessary to make them work for food production than to condemn them to death. For those reasons I hope that they will not be condemned to death." The opinion of Major FURUKI was the same as his. But Rear Admiral MASUDA firmly stated, "When we punish a crime according to the laws, it is improper to consider the laws in connection with other circumstances. If we do it in such a way, military discipline will be entirely destroyed. Though it be pitiable for the natives, we can not help punishing them by the laws." SHINTOME felt sorry for it, but he could not help it.

According to this, if any other expressions are used, it is quite clear what the positions of MASUDA, SHINTOME and FURUKI were and what they did. Not only is the testimony of SHINTOME not inconsistent with the testimonies of other witnesses, but also it supports them. Therefore, the fact and my opinion concerning this case which I stated before have been confirmed again by them.

I would like to state again:

The procedures of the specially established court martial which they carried out have in fact some faults compared with the regular procedure. Especially, many faults can be counted if you compare it with such a complete court as this one. But the important thing is not the form but the substance. It depends upon how carefully the case is dealt with. I believe that you can admit that it was the best procedure they could carry out in the pressing battle field of the time. This is admitted by the principle of necessity as stipulated in article 37 of the Japanese Criminal Code.

The procedure of trial differs in each country according to the difference of the judicial system, the degree of civilization, manners and customs.

In an American trial, the judges know nothing about the case whatsoever when they go into it for the first time, and, according to the facts introduced by the judge advocates and defense counsel, they make the judgment. As a principle, the verdict is decided by the vote of the judges. While in the common trials of Japan, judges play a dictatorial role in the court. Before the trial, the investigation of the crime is made mostly by the police and judge advocate, and the duty of the judge advocate at the trial is to indict the crime and state his opinion - that is all. At the court, the examination of the crime is chiefly by the president. The judgment is made by his free conviction - that is the conviction is made as the president likes and no one can intervene in it. Of course, there are three judges at the local court or the court of appeal, five at the supreme court, and one of the judges is the president, others are juries. If the opinions of these juries do not agree, a consultation is held. The judgment is not made by vote as in the American system, but by the decision of the president. In the procedure of Rear Admiral MASUDA, I think he applied this usual trial system. I request that you will have full consideration as to this point.

As I stated before, the two acts of FURUKI: 1. participation in the trial as a judge advocate, 2. The execution of death sentence as an executioner, are legally and entirely broken. His duty as the judge advocate are composed of his acts from the beginning of the investigation till the indictment, and they are completely legal acts without any unlawfulness or mistake from the point of view of both law and fact. Concerning the execution of the sentence, the order of execution is lawful in form and in substance, the method of the order is lawful, and therefore it is completely an act on official duty in accordance with the laws and ordinances. If there might be some mistakes in the court procedure, the responsibility for the mistake lies upon the president of the court, and only the higher court has the authority to judge it. As I stated before, the judge advocate or the executioner can not be concerned with it anyway. Therefore, there is no reason that FURUKI must take the responsibility for it.

Lastly, I would like to request your consideration for the character of the accused, FURUKI, Hidesaku. I think you will have closely perceived his character during this trial.

He was a pious man, he was in contact with his men and natives with love and faith, so that everyone was moved by his benevolence. His subordinates loved him as if he had been their father, and not a few of them were willing to sacrifice their lives if it served him. However, he did not mind doing a thankless job if it served his men. Although he is now in the stockade, he is anxious about his men day and night. His affection toward the natives were clearly shown in his testimony. No one of the native witnesses of the prosecution spoke ill of him.

As you have heard in his statement, he left his wife and a child of 3 months old at home and went to the front. They have had no chance to meet again during these seven years. His wife and son lost their house because of an air raid, and, living in the house of other people and bearing the hardships of the life, they are looking forward to his return of this man who is their husband and their father. I can not but shed tears when I see the misfortunes of this ex-military men.

Members of the commission, I beg you as the defense counsel for the accused and also as a Japanese, that you will have careful consideration for what I have just said, that you will find him not guilty and that you will give him a chance to work again for the people of society.

Certified to be a true and complete translation to the best of my ability. "EE 27" AKIMOTO, Yuichiro
Ensign, USNR

辯論

被告　古木秀策

辯護人　鈴木幸藏

裁判長並に軍法会議各位

本件は去る三月はじめ審理が開始されて以来公判を重ねること約二〇回　今日漸く辯護人の辯論を為す機會が參りました

一人の被告のために かくも長期に亘る愼重なる審理を與へられることに對し深甚なる敬意を表します

第一章

さて、本件の被告古木の行つた行爲は本来通常刑事事件として又戰爭犯罪事件として此の法廷に起訴されても有罪無罪の裁を受くべき性質のものではなかつた　此の法廷の許可記錄に記錄さるべき事件ではなく將来必ずや世界戰史上注目すべき研究資料とさるであらう　ヤルート戰史の最後の頁にその最高指揮官海軍少將 升田仁助の名と共に記錄さるべき正當なる島民處刑事件にすぎない　これが本辯護人の被告古木に對する辯論の出發点であり又その結論であります

さて、被告古木に對する第一起訴に殺人の罪を以て起訴しその各罪狀項目はいづれも マーシャル諸島「ヤルート」環礁の大日本帝國軍隊南洋第一支隊第二大隊の大隊長として勤務中の大日本帝國陸軍少佐古木が今次大戰中「ヤルート」環礁に於て意思的に違法に 公圖と惡意を以て 正當な理由なく武裝せざる マーシャル諸島の島民を殺害し 困つて日本刑法第一九九條に

(FP(1)

規定する殺人の罪を犯したと認定してゐる　その第二起訴理由は被告古木を戦争法規並慣習違反の罪で起訴したその各罪状項目はいづれも「ヤルート」環礁の大日本帝國軍隊南洋第一支隊第二大隊長として勤務中の被告古木の今次大戦中マーシャル島民を意思的に違法的に裁判なくして殺害し因って戦争法規並に慣習に違反したと認定してゐます

吾々は此の起訴理由並に各罪状項目に就いて被告古木の有罪無罪を詳論する前に本件の發生した時の日本帝國とマーシャル群島ヤルート環礁及び其の島民との法的関係を明確にしておきたいと存じます

第一次世界大戦に際し日本海軍が占領した　ヤルート環礁を含む赤道以北の旧独乙領太平洋諸島は大正八年（一九二九年）ロンドンに於て開かれた聯合國最高會議の結果日本帝國の委任統治地域と決定し一九二〇年一二月日本帝國と國際聯盟との間に正式に其の委任状が成立した　爾後日本帝國は日本に対する委任状第二條の規定の明言する如く其の委任地域に於て完全なる立法施政の権力を有し其の領土の構成部分として其の日本の國法によって統治すること、なったのであります　国際聯盟の日本に対する委任状の第二條は次の如く規定してゐる

「受任國は本委任状に依る地域に対し日本帝國の構成部分として施政し且つ立法する完全なる権力を有すべく又此の地域に日本帝國の法令を必要に應じ地方的変更を加へて適用

分配せる旧独領土の外、戦者は当然独領土として、戦者は海外領土の外、戦者は当然独領土として、

国際聯盟の委任統治地域の名の下に、事実上、戦勝国の領土となりつゝあり、

委任統治に関するものとして、一九二九年八月六日ドイツ国が、ヤングプランに基く同盟及び聯合国の外交代表者会議に於て、委任状委員会の審査を経て、委任状の内容を定めて、之を訓令国際聯盟と協定すべき、

前者の受諾と後者の確認によりて、C式委任状は一九二一年一月二日に、B式委任状は一九二二年七月二十日に、C式委任状は一九二三年二月十七日に、夫々成立したり、

委任状は、B式、C式共に、旧独領南洋諸島の委任統治に関する訓令にして、之を以て、旧独領土の構成命令となすものなり、

国際聯盟規約によりて、認められたる、委任統治の権力を有し、且つ委任状の条項を実行する義務を負うものは、聯盟国及び、其属領又は、聯盟国以外の国にして、聯盟国たる、其属領の利益の為め、委任国の地域に、軍隊を設くる場合の外、委任国の自由に、任かせられたり、

委任統治地域の住民の物質的及精神的幸福を、増進する事は、委任国の神聖なる信託にして、委任状は、委任国が、此義務を履行する為めに、採るべき、保障及び、制限を規定せり、

委任国は、委任状により、地域の住民の物質的及精神的幸福を、

國の会議によって旧独植民地の分配を受ける諸國は「完全な
主権と共に」譲渡せられる葡萄牙も所謂委任地域の名の下に
分配を受ける日仏蘭及び英諸自治領も共に領土として
分與せられたものと解すべきであって只両者を分つ相異は所謂委任
地域には一種の負担が附せられてゐる点である此の負担は土民の利益
及他の聯盟國の利益の為に一定の施政方針を執り且此の方針
の実行に就て聯盟より或程度の監督を受くべき事である所謂
委任状は帝國の聯盟に向って右の施政方針
を受くべき事を約する合意である 委任統治の実質的内容は主に
同盟及聯合國によって定められ其形式上の效力は一方に於て帝國
の受諾他方に於て聯盟理事会の確認と俟って発生するに事は
右の構成を裏書するものであると思ふ

加ふるに「ルートと合意日本委任統治地域の南洋群島に住む島民
はどこの國の國籍を有してゐるか?
ベルサイユ條約一九九條により独乙の主權の下を離れこれらの南洋
諸島の島民が独乙國の國籍を喪脱したことは疑ひない 然らば
受任國たる日本の國籍を取得したか? 日本帝國に対する委任條項
は此の点に関し何等明言してゐない 國際聯盟規約第二條も亦
明言を避けて唯受任國がこれらの土着民に対し「後見の任務」を
実行すべき旨を規定してゐる 然らば此の「後見の任務」は少くとも
旧独乙植民地に関するB式C式の委任状の場合においてはその委任状
の内容から考察しても受任國が立法司法行政の權力を行使して
直接に統治する事を意味するそれは決して委任地域の住民一体

として國際法上の人格を認め受任國が是る指導、補佐する事を
意味しない むしろ委任統治地域に対する日本帝國の權利の性質
から考察して日本帝國の國民の構成部分として日本帝國の統治
權に服する身分を有するものと理解することの出來ましょう
從って「戰時國際法の適用止その地域は日本の領土 島民は日本國民
に準じて取扱はるべきものであろう C、式委任統治の場合 これは從來
承認されて來た原則であります
さて、日本帝國は大正十一年(一九二二)三月限り從來施行して來た軍政
を廢して南洋庁官制(大正十一年勅令一〇七号)を制定して同年四月一日
南洋庁を「パラオ」に置き同庁長官は南洋群島全般の政務を管理
し警察須要の地に支廳を置くことを統治しこ而して「ヤルート」を南洋
庁「ヤルート」支廳所のおかれ「ヤルート」における一般邦人及島民に対する
行政事務を行ってゐる 司法事務は南洋庁長官に直属する南洋庁
法院之を管掌してパラオに高等法院のあり「ヤルート」を裁判所さく
「ポナペ」にある南洋庁地方法院の管轄に属してゐる

第二、次に日本の戒嚴令と云ふ制定法とヤルート駐在との関係について
説明致します
被告は先ずその judicial notice に於て海軍軍法
會議法と云ふ日本の「戒嚴令」に付いて委員会の留意され人事を
上申しましたが然し此の戒嚴令と云ふ法律のみ御採用になりませんで
でした 然し日本の「戒嚴令」は海軍刑法 海軍軍法會議法と
全く同じ性質を持つ日本の現行法律であります それは即ち戰時に

誰が戒嚴を宣告する權限があるか、戒嚴司令官にいかなる權限と
掌握するかと云ふ事柄を規定するに、戒嚴宣告の基本法であります
此の現行法律である、戒嚴令が何故 martial law に於て
採用されるかが甚だ了解し苦しいのであります、或は此の戒嚴令
と云ふ法律が、太政官布告の形式で制定されておりそれが英文に
文字通り「太政官の布告」と解訳されるため一時的の戒嚴の宣告
文であって制定法でないとの誤解を受けるのも知れません、茲でやゝし
日本の制定法の形式に就いて說明を致し度いと存じます
此の戒嚴令と云ふ法律の制定されたのは明治一五年（一八八二）頃には日本には
未だ議會制度なく法律はすべて上述の太政官布告（今日の總理大臣に該当
する最高官吏）の布告の形式で制定發布されておりました、其后明治二二
年（一八八九）日本帝國憲法が制定發布され、其の結果法律は
原則として議會の協賛を經て天皇の裁可公布する制度に
なったのであります
但し旧憲法第七六條の規定により憲法實施前の法令はその憲法
の規定に矛盾しない限りその儘有效な法律として效力を維持する
ことになりました、明治一五年太政官布告の形式で制定發布された
此の「戒嚴令」と云ふ法律も亦上述の憲法第七六條の規定によって
議會の協賛を經て制定されたに法律と同樣の性質と效力を保持し
ております、そして昭和
拾六年日本の責任統治地域である南洋群島方面にも此の戒嚴令と云ふ
法律が施行される事になりました（南洋群島に於ける戒嚴及徴發に關ス
件（昭和一六年一二月一三日勅令一九二九号））

従て本件の事件發生当時に於てサルト環礁にも此の戒嚴令と云ふ法律は適用実施されて居たのであります

此の点に付委員会の特別の御考慮を拂はれん事を切望する次第であります

第二章

檢事側はその冒頭陳述に於て事件は簡單にして事実は北段的明瞭であると申されそして多くの証人を証人台に据らしめ然しそれらの証人の証言によって第一、第二起訴理由の認定してゐる犯罪の corpus delicti を証することに外ならないのは唯第一の起訴と第二の起訴の証人の証言によって最も明瞭となつたのみであり被告古木の罪状事件は全く同一の事件であると云ふ事実のみであります項目に記載されてゐる名前を持ち十三名のサルト島民を違法に正当な理由なく殺害したと云ふ事実に就て期瞭に証されたるに過ぎず反対に銃殺されたサルト島民は皆日本軍より死刑の判決を與へられた犯罪人で被告古木は死刑の執行官を命ぜられて死刑の執行をしたる者の島民を銃殺したに事実の証言されたのであります

檢事側の証人菅原宮崎秋月田中宇都宮の各証言いれば昭和二十年五月下旬二人のサルト島民の昭和二〇年六月中旬二人のサルト島民の同年七月下旬二人のサルト島民の同年八月頃二人の島民といづれもサルト環礁アイネマン島の郷子林の中で被告古木が合計九名の島民を射殺に事実は一應推定されるとのこれらの証人は皆被告古木がこれらの九人の島民を銃殺する現場を見て居ないで唯銃殺直後古木と一緒にその現場でその死体を埋葬する

時その屍体を見ているのみであるからである
どんな名前の島民であるかの各証人は証言していない但し都宮証人のみ
その埋葬には二人の島民は男と女であったこと及終戦後古木から男に
メーレン女はメジカニと云う名前である事を聞いたと証言しているのみである
従って此等の証人の証言によっては証人達の古木とおよびその屍体と埋葬
とに云う其の島民の本件各起訴の各罪状項目に掲げている其の島民
であるとの事実は直接何ら立証されていないと断言しうるであろう
同じく検事側の証人である作田・門田の証言によっても本件の起訴
理由により古木によって不法に殺害されたものとして認定されている
レソール・コーリ・コゲナ・姓名不詳一の者一人・マクイ・アルデン・チャグリウ・
チユータ・チョンモーレ・マンデーラ・ラペリヤ・メジカニ・メーレンの十三人の
島民のいづれも犯罪を犯した事はヤルートの最高指揮官千田から死刑の判決
を宣告されたものである事実のみを立証されたのみである
同じく作田・門田はそれら死刑の判決を與えられた上述の十三人のヤルート島民
を古木の自ら処刑した旨を古木から聞いたと証言しているに過ぎず古木の
銃殺した現場を目撃した旨はその証言中にあらわれていない
結局検事側の提出した証拠中被告古木の本件の一三人のヤルート
島民を殺したと云う事実を直接立証する唯一の証拠は被告古木
の昭和二十年十二月二日アメリカの法務官に提出した被告古木の陳述書
のみである此の陳述書によって彼は一應本件のヤルート島民と
銃殺した事実はこれを認めているに過ぎず甚だ陳述書の冒頭に
「昭和二十年二月十日ヤルート防備部隊指揮官千田少将の命により全ヤ
ルート島民に対し死刑の判決を與へられた犯罪者を処刑した」と陳述し

其の島民の銃殺が死刑の判決の執行行為として為されたる事を主張してゐる
のも見逃してはなるまい 死刑の執行は法の執行行為の一種であるとは云へそれによって次へ
従って被告古木の此の陳述書は次いて殺人罪を犯す犯罪意志のあ
つた事をも証する証據となるまい 又その犯罪意志を強く
否認してゐる陳述書である 此の陳述書は本件の十三名のサルート
島民の古木によって銃殺された事実をも証するか知れないが殺人罪を
を証する証據とはなるまい 却しろ殺人罪の不成立を証する一つの
証據である
更に檢事側は被告古木によって銃殺された本件のサルート島民十三名が
スパイであった事及び スパイとして銃殺されたと云ふ事実の
を証しも失敗してゐる 檢事側の証人作田・内田両名の証言によっても
本件の銃殺された サルート島民の間諜行為と行った事実は殆ど証されて
ゐない いわんや間諜行為の現行中日本軍に捕へられたとゐふ
事実は更にない
証人門田はメジカにはメーレンより サルートの離島に於ける日本軍の情勢と
題する様に命ぜられたと云ふ事実を証言してゐるが果して間諜
行為を行ったか否か明確な証言はない メーレン・メジカ及び他の
島民達が交戦相手國のスパイとして處刑されたことを証されてゐない
反対にそれはすべて海軍刑法等日本の國法を犯して日本
の犯罪人として所罰されてゐることを証されてゐる 檢事側はメジカの
場合には却って其の間諜行為を行った事を否認せんとする意なし
由であれば此の事は注目すべき事であるまい
斯くて檢事側は第一起訴理由の各罪、就中第一起訴理由の

各罪状項目に認定してある犯罪の犯罪事実（Corpus delicti）の立証に失敗したに被告人に対する二つの起訴理由若しくは各罪状項目は証拠不充分である被告は無罪と宣告さるべきであります

第二章

最初被告古木は検事が員顕陳述で指摘した四十二名の罪のない マーシャル島民の虐殺者として法廷の被告席に坐ってゐた 然し その虐殺者の数は加算に薄らいで 法廷の審議が重ねられるにつれてその虐殺者の数は加算に薄らいで 行った そして最後には ホートの最高指揮官 井田少将の自ら裁判長として主宰する ホートの特設軍法会議に於て死刑の判決を受けた 島民犯罪人に対し同少将が命により死刑の執行をしたと云ふ古木の 本来の真の姿いろいろ帰ると 吾々は法廷にあらはれたすべての証言証拠を綜合する時此の結論は正しいものと確信するのであります これが 事の真相であると信ずる さて、茲で井田少将の死と本件の真相に就いて考察して見たい

井田は終戦後ホートで自次に彼の自次は被告古木にとって非常に不幸であると思ふ 井田の現なくなった今古木の弁護はもつと明確になるであらう 現なしない為め井田の行為は全部古木の行為の如く 意識的に或は無意識的に取扱はれてゐる 更に悪い事は古木が自分に不利な事を全部井田のせいにして「この責任を免れようとしてゐる この偏見を持たれる可能性がある事である 井田が現なしない為め部下と云う勝手に自分に有利な事実を捏造してゐるのではないかとの疑ひを持たれる事であらう 古木にとっては之程心外な事はないであらう 古木は他人の為め責任を負ひそれ自分の責任を他人に

なすりつけるが如き、彼としては夢とも考へられぬ事であらう まして今日も非常に尊敬してゐる升田にすりつける事おや 彼は本件の最初の公判が開かれる朝 余に詩を作って見せた それは升田を父親の様にした歌であった 升田は何時も自分の側に居て激励してゐると云ふ意味のものであった

検事は本件と全然事件の異る事件の調査書を法廷に持出し その調書の中 古木が升田の死の前后によって其の陳述を変更した部分を読んで本件において被告がその陳述を変更したかの如き印象を法廷に與へんとした 然し古木はじめ関係者は本件の島民事件は升田が帰の正当の権限の下に正しい手續によってなされたもので何のやましいものは感じてゐなかった 万一問題となるも完全な國內問題であり戦争犯罪として外國の法廷で裁かれるとは夢にも考へて居なかったのである 従って古木として此の責任を免れ それを隠滅するための工作をしたり嘘をつく必要は全然感じて居なかったのであります

例へば島民犯罪人に対する升田の判決書の如きも検事は後での作りものではないかと偏見を持たれた様に見受ける 当時にはなく後になって判決書があったかの如く見せる為めに考へ出されたものとすれば 最少し判決書らしい気のきいたものにしたであらうと思ふ 一枚の半紙を半分を判決書半分を検事の意見書と云ふ体裁にはしなかったであらう 廃墟と化して紙が大変不足してゐた当時の状況が偲ばれるのであります そこにこそ真実性がある 日本の刑事訴訟法、陸海軍法会議法は判決の体裁に付何の規定も設けてゐない 従って古木が書いて法廷で示した様な体裁のものでも判決書としては無效ではない 此の時

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或者は直に反問するであろう その判決書の形式は違法でないが
知れぬ 又その判決書の作成される手續が無い場合、或は違法である
場合はその判決は無效であり違法な判決
書に基いて死刑を執行する事は不法な執行であり その執行は
正当化されない 死刑をした場合は殺人罪を構成する。と。そして
本件の場合 判決を宣告する迄の手續は日本國法の規定する正規の
手續のふまれたと云う確かな証據がないではないか

余は此の鋭い質問に対して直に法理論を以て應酬する事はしない
であろう 余は靜にその人に告げるであろう 人の刑事責任を論ずる
場合 その個人の行爲を一切の社會関係から その人のおかれてゐた社會
から切り離して抽象的に考察する事は危險である 今日の進歩
せる刑法理論原則はそれを許さないであろう 今日の進歩せる刑法
理論は事いやしくも 犯罪刑罰を論ずる場合 犯人に対して超人間
的道義感を強要して之を守らざるが故に 刑罰を以て責める事は
惧る と。そして その人に スピノザの偉大な思想を教へるであろう
「人間の行動は之を嘲笑すべからず 非難すべからず 呪ふべからず 寧ろ之を
理解せざるべからず」と そして理解することは赦す事である
本件の島民處刑事件は古木の孤立における孤立史の最后の悲劇で
あった あれほど ヤルート島民を愛してゐた彼がその島民十三名を ヒとへそれ
が犯罪人であろうと銃殺して ヤルートから訣別しなければならなかつた
のは非 でであった
法理論は彼に展開するであろうその前に本件の事件がいかにしていかな
るヤルートの実情の許に発生したかを充分に認識する必要があるであろう

FF 12

昭和一八年（一九四三年）十一月 米軍のギルバート諸島占領以后 マーシャル群島は第一線戦場と化し 日毎米軍の襲撃を受けつゝ日本軍各基地は海軍警備兵力の増強と共に陸軍部隊もが満洲から或は内地から続々と増援された

被告古木の率ゐる南洋第一支隊第二大隊もこの時マーシャル群島に増援された第四艦隊指揮下の陸軍部隊の一つである ウオツゼに於て海軍第六四警備隊に配属された被告古木を隊長とする第二大隊は総員ヤルートへの転進を命ぜられ 古木はその一部の兵力二〇〇名の部下と共にウオツゼからケゼリンを経てヤルートに向つた 米軍の制空権下難航の末漸くにして昭和一九年一月一八日 ヤルート環礁に辿りついた そして古木の部隊は第六二警備隊に配属され其の隊長海軍少将 升田仁助の指揮下に這入った

古木達の乗って来た船こそヤルートの見た最后の船となった事は注目すべき事であらう

古木がヤルートに到着してから約半ケ月 昭和十九年二月初旬 クエゼリンが陥落した クエゼリンは第六一警備隊を含む日本軍マーシャル方面部隊司令部の所在地である ケゼリンの陥落はヤルートの本隊の喪失を意味する 此の本隊の喪失はマーシャルの日本軍各基地として悉く文字通り絶海の孤島たらしめた

クエゼリンの陥落後 即昭和一九年三月頃（或は四月頃） 其の同じ玉砕の運命を覚悟してゐた ヤルート環礁の海軍無線電信所の「アンテナ」は第四艦隊司令長官からの飛電を受信した その電文は次の如く読まれた

「爾今各墓地先任最高指揮官ハ墓地所在ノ各部隊官ヲ併セ指揮スベシ」

と。

それは一見誠に簡単な電文ではあつた。然し当時のアンガル方面の戦況を思ふ者にとつては此の簡単な電文は複雑な又深刻な内容を持つものであつた。即ち此の電命は一面に於て当時のガルートに於ける先任最高指揮官千田海軍少将の権限を一層の専制統治者のそれの如く権限へと強化拡大し、然しそれは反面に於てヒゼリン陥落によつて父親と喪つた子供と同様の運命の下におかれたガルートに対し更に母親から遺棄の宣告を受けた事を意味する。それはガルートの将兵にとつて「今後一切の救援補給は不可能なり各自勝手に自力で戦ひ自力で喰へ」と云ふ冷酷な最後通牒と同義語であつた。それはガルートと戦略上の墓地として放棄する旨の宣言であつた。

だが此の遺棄の宣言を意味する此の電文の中には敵と降伏する事を許す旨の文言はなかつた。アメリカ軍の完全な戦力下に孤児の如く捨てられ乍ら尚降伏する事を許されず最後の一兵に至るまで戦はねばならぬ此の事情こそ古来から戦争の裏面の見出される悲劇的な原因が見出される。

若し日本軍隊の伝統精神の合理的な判断の許に為される降伏と指揮官に許してゐたならおそらく此の島成事件は島成事件は発生しておらないであらう。そして古来は此の法廷に被告として立つ事はなかつたであらう

上述の第四艦隊司令長官の電命を受けるや千田少将は墓地の各部隊（当時約一八の部隊が数へられた）の隊長及

及ち時唯一の民間官庁たる南洋庁ヤルート出張所の所長等を集合せしめヤルート環礁の一切の人 軍人軍属一般邦人島民を以て組織する ヤルート防備部隊の編成を命じ自ら其の隊長に就任した そして其の集会の席上 余は爾今ヤルート環礁上の一切の人及物件に対する統治の絶対権を掌握し之れを行使すると宣言した

ヤルート防備部隊の編成！ これこそアメリカ軍の完全な包囲下に彼方からの救援の希みを絶たれ乍ら降伏を許されず最后の一兵に至る迄戦はねばならぬ運命にあつた ヤルートの日本軍の採用した 否採用しなければならなかつた主旅な組織化された総動員体制である

同じ第四艦隊司令長官の上述の如き電命を受けた マーシャルの各基地に於て同様な組織の部隊が編成されたか？ 此の電命は升田に島民を其の防備部隊に編入する権限を与へたか？ 人或はかく問ふであらう 此の点に付いて詳細に論ずる事は后の部分に譲り度い 茲では唯次の点を指摘するに止める 即ち此のヤルート防備部隊の編成と其の編成に当り宣言した言葉こそ 升田が第四艦隊司令長官の上述の電命の趣旨を当時の戦況に照して最も正しく把握し忠実に之を実行した事を示すものである そして茲にこそ最高指揮官升田の怜悧な緻密な頭脳とその組織能力の優秀さと、その独裁的な指揮官の傾向がハッキリと顕はれてゐる 委員会は此の点に特に御留意願ひ度い

此の升田の指揮官としての性格と看取して本件における古木の責任を正しく理解することは絶対に不可能である 他のマーシャル基地に於て殆んど全部の島民がアメリカ軍に逃亡し将兵の四〇%以上の餓死者を出してゐるに拘らず 戦史未曾有の猛烈な砲爆撃にさらされた総面積八平方粁

にみにね栗粒大のヤルート基地の其の総将兵の二〇%の餓死しかまで二〇〇人
の島民の中その約半数の島民が終戦時まで残留してゐた事実これは
或る意味に於て一つの奇蹟であり恐し他面斯の優秀な組織能力
を持つに指揮官としての依然的な態度と雄弁な物語るものではない
であらうかて。
ヤルートの日本軍将兵が今日の明日かと悲壮な決意を固めて来軍の来襲を
待つ中米軍はマーシャル群島のサイパンへ上陸作戦と開始し之を占領しマリアナ列島の日本軍
最後の抵抗線サイパンを我に二ミツ、攻勢は一息つく間もなくパラオ
迫り戦局は遠い西の方に去ってマーシャルの小島ヤルートは既に米軍
第一線の後方に置きまされてゐた米軍の此の飛石戦術はこれらの
軍事的価値を失ひ単なる空からの爆撃と
海上からの砲撃を次々に其の砲撃は誠に言語に絶する猛烈なもので
あり証人井上文夫はその実情を来襲機総数八一〇〇投下爆弾
総個数五〇〇噸と数字で示したが此の砲撃とよりヤルートの島特に
日本軍の必守イミジ本島は全くの廃虚と化し島は総て椰子の
木一本もない砂丘と化し兵舎も格納庫も有ゆる建物は悉く
破壊されてゐた将兵は砂を掘って穴の中に寝破れトタンを拾ひ集
めに掘っ小屋でスコールに濡れ乍ら夜を明す状態となり更に米軍の
猛攻は島中の大樹を破壊し将兵の着るべき衣服も靴もそして
毛布一すら奪ひ去る

此の後生と化した島で糧食の欠乏するのは当然であり食事の量
は二割減り三割減りして遂に規定の半分迄下った。恐し飢と化した

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殺害した事件を実況した写真が公表されて大変話題をよんでいる
世界中一名アルジェリアのオラン警察署で警官の目の前で多くの
人が殺害されたり　裁判官の前で証言の結果　一〇一〇人が
死刑の宣告を受けたりしている国もあるが　日本は死刑廃止国
ではないが　ここ数年は死刑執行数は少なくなっている
昨年一〇月中旬に法務大臣が死刑執行命令に署名したのは
一人だけであった　今年は二月中旬に二人の死刑執行命令に
署名したが　一人は精神病者であるとの理由で執行を停止
した　残る一人は殺人罪で死刑判決を受けた者で　この者
は控訴　上告したが　いずれも棄却され　死刑が確定した
ので　法務大臣は死刑執行命令に署名した
死刑執行命令は　法務大臣が署名した日から五日以内に執行
しなければならないことになっている　法務大臣が署名した
死刑執行命令書は　検事総長から高等検察庁の検事長を経て
検事正に送られ　検事正は　刑務所長に対して執行を指揮
する　刑務所長は　死刑執行命令書の謄本を拘置されている
者に示して　死刑を執行する
死刑は　絞首して行うことになっている　絞首の場所は　刑
務所内に設けられた刑場である　刑場は　一般の人の目に触
れないように　高い塀で囲まれている　刑場には　絞首台
が設けられている　絞首台は　踏板　絞縄　執行者が踏板
を落とすための装置　死体を受ける棺桶などからなっている
死刑執行の場所には　検事正　刑務所長　刑務官　医師　
教誨師　検察事務官　検察官　検察官の指揮を受けた司法
警察職員　それに　死刑囚の指名した者　二人以内が立ち
会うことになっている　死刑囚の指名した者が　一人もいな
いか　または　指名した者が　立ち会いを拒んだときは　
三〇〇〇円以内の日当を支払って　検察官の指揮を受けた
司法警察職員の中から　立ち会いを命ずることになっている
死刑囚は　死刑執行の日の朝　刑務所長から　死刑執行の
告知を受ける　死刑囚は　告知を受けた後　絶対安静の状
態に置かれる　死刑囚は　午前九時ごろ　刑務官に連れら
れて　刑場に入る　刑場に入ると　死刑囚は　踏板の上に
立たされ　絞縄を首にかけられる　刑務官が　踏板を落と
すと　死刑囚は　踏板の下に落ちて　絞首される
死刑囚は　絞首されると　ただちに　医師によって　死亡
の確認をされる　死亡が確認されると　検察官の指揮を受
けた司法警察職員が　死体を検分する　検分が終わると　
死体は　棺桶に入れられる　棺桶に入れられた死体は　遺
族に引き渡される　遺族がいないか　または　遺族が引き
取りを拒んだときは　刑務所長が　埋葬する
死刑執行の事実は　法務大臣の発表によって　国民に知ら
される　法務大臣の発表は　死刑執行の日の午後に行われ
ることが多い　発表は　死刑執行の事実だけで　死刑囚の
氏名　犯罪事実　死刑執行の場所などは　発表されない
死刑執行の事実は　法務大臣の発表によって　国民に知ら
されるが　死刑囚の氏名　犯罪事実　死刑執行の場所など
は　発表されない　死刑執行の事実は　法務大臣の発表に
よって　国民に知らされる

全般が判明した
中田は上述の七人の俘虜を処刑する者に対し裁判を行ふ為め吉木に
検察官の役を行ふ事を命じた 中田は自ら裁判長となり海軍の新留
少佐（当時中田と共に海軍部隊最高幹部）陸軍の井上大尉（当時陸軍
部隊の吉木の次位者）に対し審判官として審判に参ずる事を命じた
審判手続に付ては主張者若は弁護人に依て審理をなす事は通じて一切法定手続なく
止むなく軍法会議法の命ずるが如き法廷を設けず 被告人の訊問は吉木
中田直接被告人の留置されてゐる第二爆撃機の格納庫に赴き、之を
実施した 被告人の訊問は調査官の提示した調査報告書記載の事実
を確認するのみに止まり新留・井上・吉木を招集し 吉木に対し
其の意見を述べしめ之に対し新留・井上も意見の開陳があつた その後
二日して吉木が意見書として書面を作成し中田の判決が書き入れて
宣告された 其の判決は吉木の意見に基き上述のレーシー・アーリー・コルグ
ビーボ・アルテン・アフイー・ケヤーンツイに死刑の判決が出された 判決後中田は
吉木に死刑判決の執行を命じた 吉木はその命を受けて之を銃殺した
これが起訴理由第一、第二の第一、第二、各罪状項目に訴へられてゐる事件
の真相である
起訴理由第一第二の各第三及第四、第五の事件も亦大体同じ
経過を辿り犯罪の審理手続は全く同様である
検事側は森川証人に対し調査官が狭隘な証人の取調べに於て甚しい
非違行為を行つたかの如き印象を与へる質問をなした 森川はそれを
否認した そして今日に於て本件事件について取調べを受けた者は即ちレバデス
オードワード・エモンズ・ミラー等のアメリカ人証人たることを知らしめた達の非違

行為を証せんとして 然しその企図は完全に失敗して 森川より針金を
巣の中に入れられたと云う三郎はその時クシヤミがおこり、おこり その程度であった
彼は森川より殴れたと証言しすかさず隣室で メジカが森川から殴られる
のとコンクリート壁の破れた所より見たと云う
オーベストはレプテガスの如く部屋の入口で メジカが殴られるのを見たと全く
矛盾する証言をして 証言の作り事であることの判明した クシヤミの如き
程度の軽い針金を入れられたと云う三郎を除いて 他の証人は全部
偽証と受けてゐるこの 他の者の残虐行為と受けとるのみであった 五しろ それは自分達はひどい取扱いをうけないつもりで
ために証人台に立った様なものであった
検事は審理の最終の日に 新聞を急撤 日本より召喚して 裁判のすゝめることと
新聞の審判言であるこの事をも証せしめんとしたが 之も成功しなかった
彼は証人台に立って 古木の姿を正視する事が出来ず 彼としては出来
ないつらであろう 其の証言も質問の要旨に触れずして 先づこの会社
事件に関係のない事を証えと努力してゐた様に見受けられた
親は常に落着かぬ風をして次の如く矛盾多き証言をした アルートと於ける
海軍部隊中 升田に次ぐ最高幹部の彼は鳥氏が処刑されたのを知らぬ
と証言した
又偽証 升田司令の部屋に連入る時 古木の書類を開いて 升田に何か
鳥氏の事を説明しゐた その時 升田大将が鳥氏は処刑されねばならぬ
と云ったので 皆は鳥氏に軍に協力し食糧を作って呉れるのであるから
処刑するのは可愛想だ 処刑は思い止って貰い度いと 升田が云う意見と

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求められたのに（彼は此の言葉を何回も使って中田から意見を求められた
事のない事を強調した）自分が中田に申込んだと証言した。そして証言
後証言に附け加へて自分が中田に馬公の軍法会議を見に行く様に言ったとも
中田は軍紀の維持、軍の威厳の維持のため必要を説いたということを述べ
た。その時の中田と彼との話の内容を証言した。その内容は話の始めから
ではなくして判事の評議の結果であると。彼はその話の内容によって自分が
判事だった事を暴露したのであります。
かくて検事側の証人中田・内田、弁護側の証人森川、井上、吉本の
一致した証言が真実であることを裏付けたのであります。

第四章

次に我々は次の事を明確にしておく必要がある
(一) 当時のヤルート支区最高指揮官中田はヤルートに軍法会議を特設する
権限があったか。
海軍軍法会議法第八條は軍法会議の種類を定めて次の如く規定
している
「軍法会議ヲ分ツテ左ノ如シ
1. 高等軍法会議
2. 東京軍法会議
3. 鎮守府軍法会議
4. 要港部軍法会議
5. 艦隊軍法会議
6. 合囲地軍法会議
7. 臨時軍法会議」

EP 22

更に第九條には次の規定がある
「合圍地海軍法會議ハ戒嚴ノ宣告アリタルトキ合圍地境ニ之ヲ特設ス
臨時海軍法會議ハ戰時事變ニ際シ必要ニ因リ海軍ノ部隊ニ特設ス」
此の二種が所謂特設軍法會議である
更に同法第一〇條には次の規定がある
「特設軍法會議ハ軍法會議ヲ設置シタル部隊又ハ地域ノ指揮官ヲ以テ長官トス」
以上の規定によれば中田がマーシャルに戒嚴の宣告をしたか否かに拘らず右犯罪人裁判のため所謂特設軍法會議を設置する根據がある事が明瞭である
從って中田の行使した裁判權は合法的である
(ニ) 然しば此の中田がマーシャルに特設した軍法會議は本件の如き性質の犯罪に付管轄を有したかの問題が生ずる
マーシャルの島民は日本國民に準ずべきものとして日本帝國の統治權に服して日本帝國の司法機關の裁判權に服していた
平時に於ては島民の犯罪はパラオの裁判所で刑法の犯罪を犯した場合はトラックの常設軍法會議の管轄に屬した 又島民が軍事犯罪を犯した場合でも軍人軍屬と共に事件に關係している場合には海軍軍法會議法第一條の三号の規定に從って軍法會議に於て審理される 又海軍軍法會議法第六條は次の如く戰時事變の際の特別管轄を認めている

臨時重大会議には上訴を認めないものとし、又死刑の執行には十五

今般の憲法に於ては、特別裁判所の設置を禁じ、行政官庁の裁判権を認めず、すべて司法裁判所の裁判に属すべきものとしたのである。（憲法第六十条、第七十六条）

(二) 特別裁判所の問題

特設軍法会議に於て弁護人に附すべき事件は、（軍法会議法第一条）

軍法会議法第九十条）

軍法会議の裁判は非公開である。（同第九十一条）

弁護人の為めに公判の日時を通知しない。又裁判所は何ら通知をしない。

(三) 裁判手続の問題

特別軍法会議は一審制度である。

「全国光復の暁には、軍事裁判は、すべて廃止し、軍人軍属の犯罪と雖も、一切普通裁判所の管轄に属せしめ、軍法会議は、これを設置しない。」

と言ふ事を宣言した。

然るに今日の軍法会議は、軍人軍属の犯罪に対する裁判権を有するのみならず、軍人軍属以外の犯罪と雖も、戒厳地域に於ては、軍法会議の裁判に付することが出来る。

普通刑法では、主として行為が戒厳地域に於て行はれたときに限り、軍法会議の裁判に付することが出来ることとなつて居るが、

ある島民犯罪が戒厳地域に於て行はれたときは、今後軍法会議の裁判に付することが出来ることとなつた。

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海軍大臣の命令を要するが（海軍軍法会議法第二〇條）特殊軍法会議の死刑を宣告したときは この海軍大臣の許可を要せず其の特設軍法会議の長官が命令する（同上一〇條）

從て本件の場合 サルート特設軍法会議の長官たる升田少將の判決後直に吉木に死刑を命じたことは合法的である

(注) 更に海軍軍法会議法第三六條は次の如く規定してゐる

「期日（公判期日）に於ける取調べは公判廷に於てなすを常とする

檢察官及録事列席して之を開く」

更に同法三六五條は「被告人期日（公判期日）に出頭せざる時は別段の規定ある場合を除の他開廷することを得ず」と規定してゐる

本件に於て被告人のお蔭で公判廷は公判廷として特別に作られた場所なること要しない 升田が吉木を連れて鳥武の荷禁れとある場所に赴き被告人を直接訊問したる事は認められる此の時

審判官たる升田が事実は認められぬ 然し海軍軍法会議法第三八七條によると「被告人訊問及証據調べは裁判長之を為すべし」とあり裁判長たる升田一人の訊問でも必ずしも違法ではない

これらを綜合すると軍法会議法の規定する正規の手續は履行してゐないが其の趣旨の精神に副ふ手續をとつてゐる様に觀察される 裁判が行はれてその手續が軍法会議法の規定する正規の手續と全く同じくて裁判にあらざる特別の手續によつて判決が下されたと云ふ場合裁判が行はれてゐるとは云へないであらうが 当時の戰況として止むを得ないと考へる事はお来ないか？ 裁判と云ふ概念は甚だ廣汎なるものである 日本の刑事訴訟法では略式手續と云ふ特別の手續がある

FF25

、被告人が法廷において臨検事の起訴状を示し是に刑令を宣告する制度である。法廷を開かれず裁判は裁判と考へないのであります
一定の犯罪に対し一定の手続の下に有罪無罪を決定する行為が裁判である　アメリカ式の法廷を開かなくとも之が裁判でないとは断言出来ない　一定の犯罪に対し正当な裁判権を有する機関が判決を与へること共に之れの手続に於て形式的な欠陥があるとしても全然裁判が無いとは言へないと信ずる
中田が調査を命じそれより判決書を作製する迄の間に一定の手続があることは事実である事であります　之れを裁判と呼ぶか呼ばないかは結局裁判と云ふ言葉の解釈論である　私は之れを裁判と考へるのであります
今吾々が解決しなければならぬのは　この手続を裁判と呼ぶか否かの問題ではなく此の手続の中に被告等としての行動し死刑の判決を中田の命により執行した　古木の刑法上の日本刑法上の責任の有無である
之れが日本刑法第一九九条の違反行為として殺人罪を構成するか否かの問題である

第五章

さて日本刑法第三十五条は「法令又は正当な業務に因り為したる行為は之を罰せず」と規定してある　此の「法令に因る行為は之を罰せず」と言ふ意味は法令に於て一定の行為を権利又は義務とする場合に於ては其の行為は犯罪とならぬと云ふのであります　例へば公の職務の執行の如きであります
人を殺した場合はいかなる場合でも殺人罪となる様に解されるが例へば死刑執行官が命ぜられて死刑を執行して他人を殺した場合でも殺人

FF26

罪が成立するかの如く錯誤に陥り斯くの如き死刑の執行はその職務の
執行であるといふ上述の刑法第三十五條の規定による法令による為した行為
として犯罪とならぬのであります

茲で少し日本刑法の組織を全体として説明申上げ度いと思ひます　日本
では刑法法典をとして罪刑として成文法主義を採って居ります　日本
刑法もその然りであります　然し大審院の判例は相当重大な意味を以て
刑法の條文の解釈に影響を與へて居ります　日本刑法は第一編
総則　第二編　罪　と分けて居り　第二編の罪の部に於て犯罪の
types が列挙的に規定してあり　その規定違反の場合に課せらるる
刑罰の最高と最低とが定めてあります　そして第一編の総則の部は
第七章に犯罪の不成立及び刑の減免せらるる場合の條件を定めた
條文があります　犯罪の不成立の場合には行為の外形は一應第二編
罪の部に規定してある条件に該当するが其の違法性を缺いで犯罪
が成立しない場合と責任が認められないで犯罪が成立しない場合とがあり
ます　日本刑法第三十五條の　法令又ハ正当ノ業務ニ因ル行為　第三十六條
の正当防衛の場合　第三十七條の緊急避難の規定は行為の違法性
を缺ぐ為め罪とならぬ場合であります　更に刑法第三十八條第一項
は「罪ヲ犯ス意ナキ行為ハ之ヲ罰セス但シ法律ニ特別ノ規定アル場合
ハ此ノ限リニ在ラス」と規定し犯意（Criminal intent or Malice）
のない場合は責任がない　但し特別に過失による行為を罰する規定のある
場合は犯意がなくとも罪せられるとの意味であります

第三十八條第二項は事実の錯誤のあった場合の規定　同條第三項は
法律の錯誤の場合の規定であります　刑法理論及び判例の大半は

結局上に掲げた四つの條文を如何に解釈するかにあり判例の大半も此の四ヶ條の解釈に関聯して居ります

結局此の刑法の組織から犯罪の定義を致しますと刑法第二編罪の部門の各條文に該当し責任ある違法な行為と云うことになります従って例へば刑法第一九九條の違反の行為とは唯人の死の結果を招いた行為すべてを意味するのでなく其の殺人行為が違法で責任のある場合のみを意味します死刑執行官が死刑を執行して人を殺した場合は上述の刑法三十五條の「法令ニヨル行為」で行為の違法性を欠き犯罪とならないのであります過失で人を殺した場合は刑法第三百八條第一項の「罪ヲ犯ス意」即犯意がないから又過失の殺人を罰する規定もないから全然責任なく犯罪とならないのであります

第六章

弁護人は先ず被告の行為は公の職務執行行為として無罪を主張するものであります

上述の如く弁護人の特説には合法的であります従って其の行為は合法会議の職員は公の職務を執行する場合にあります公の職務を執行するに当り検察官たる弁田より検察官としての権限を逸脱することを命ぜられたのである従って其の行為は正当であります

彼の検察官としての行動は公の職務の執行行為であります而して彼は論告に於ける検察官としての意見を述べたに過ぎない裁判官として判決の成立には何の関係も有しないのであります判決書の作成されて後弁田は被告古木に其の死刑判決の執行を命じたに此の時弁田がその判決の執行を命じたのは特設軍法会議の長官としての資格であります

EF 28

吉本が執行を命ぜられたのは彼が検察官であつたからで又当然であります
判決の執行は検察官の職掌する所であります 上訴を許さぬ適用
大臣の許可を要せず判決宣告后直ちに其の執行を命じ得る事は上海の
如き合法的であり其の判決は明白な犯罪と認定し正当なる根拠を有して
おるのであります 従って此の判決は正当であり判決作製上の訴訟手続中瑕疵
があるとの説は未だ成立したものではない 形式的には有効なる判決であり
ます 従って其の執行行為は純然たる職務の執行の行為であり其の
執行行為は日本刑法第三十五条により罪とならないものではない
アメリカの判例も同様の解釈をとっているものと思ふ 例へば Whorton の
criminal law には次の如く述べてある

and if there be ~~the~~ no jurisdiction in the court by whom the warrant is issued, the offense is murder, even though the officers charged honestly believed in the validity of the warrant though it is otherwise when the warrant is irregular from some merely formal defect.

尚ほ裁判と云ふ言葉は非常に広義に用いて居る言葉であります 或は
英語の trial と云ふ言葉が英米の人達に与へる印象と「裁判」
と云ふ言葉が日本人の其れに与へる印象は相当違っているのではないかと思ふのであり
ます 又アメリカの裁判手続と日本のそれとは相当異って居る事があります
trial と Court とは混同してはならない

EF29

こと
行為だけをとらえて裁判の対象とすることは法の執行
被告のためには法令にいう行為は犯罪を構成しない
ものであるとの主張をもつ。
これに対し、私は法令にいう行為は犯罪を構成しない
旨の裁判は刑法第二九条の殺人
罪を構成しない旨の裁判と同一であるとの意見を述
べた。
判例で認められている犯意の理論で次に犯罪の成立
要件を検討するに、被告人は本件犯行当時、精神
障害は認められず、被告人には殺人の犯意
があったことは明らかである。
「裁判官の意見に反対」
私は、以上の理由により、原審公訴事実の三項の事実に
ついて被告人を無期懲役に処した原判決は破棄を免れ
ないものと思料する。
(裁判官 [illegible])

裁判官全員一致の意見は「原判決の事実認定は正当
であり、法令の適用にも誤りはない。」という点にあ
るが、裁判官 [illegible] の意見は「原判決の事実認定は
正当であるが、法令の適用に誤りがある。」という点
にあるから、裁判官全員一致の意見は、原判決の刑の
量定は正当であるが、法令の適用に誤りがあるという
点にあるものと解する。

一、裁判官 [illegible] の意見は「本件犯行は、被告人
には [illegible] 障害があったとはいえないが、
被告人には本件犯行当時、精神障害の
ごときものがあったことは明らかである。」というの
であるから、裁判官 [illegible] の意見は、本件犯行当時、被告人
には精神障害があったとはいえないが、被告人には
本件犯行当時、精神障害があったことは明らかであ
るとの意見であるものと解する。

どんな理由でそれを信じていたか それ等の被告の心理状態は知ることが出来ないのであります

茲で私は第二の重要な物的証拠に注意を喚び度い

被告が差出したアメリカの法務官に提出した陳述書は検事側で被告の自認又は自白として本件の証拠に提出されて居ります それは昭和二十一年十二月三日附であります

その陳述書に於て被告は[illegible]が五名の犯罪人に対し宣告された死刑の判決を執行する様中田から命ぜられその執行行為として本件の五名を銃殺したと陳述して居ります事であります この陳述書の書かれたのは弁護人が被告に面会を許される前の事であります 而て死刑判決の執行行為として銃殺したとすればその銃殺は決して殺人罪を構成するものではありません 死刑判決の執行行為として銃殺したと云ふ被告の陳述は既に指摘した如く殺人罪の犯意のなかった事を示すものであります 殺人罪の犯意の否認であります 従って死刑判決の執行行為として銃殺したと云ふ被告の陳述を以て直ちに殺人罪の証拠となすことは許されません 死刑判決の執行行為としての殺人(Homicide)は既に説明した如く日本刑法では法令による行為即ち正当業務の執行行為であります その殺人は適法であり justifiable なものであります 犯罪即ち殺人罪となるものではありません 従って死刑判決の執行行為が殺人罪となる為にはその死刑判決が違法且無効なものであると云ふ事を知ってゐながらそしてその死刑判決の執行を利用して人を殺すと云ふ意図が証明されねばなりません

茲で注意しなければならないのは日本刑法の犯意論から申しますとその死刑判決が手續上法的に違法であつたとしても若し執行者にして本人がその判決の違法である事を知らなかつた場合は殺人の犯意は認められないのであります 違法であることを知り得べきであつたといふ理由で直ちに本人の犯意を認めることは許されません その判決が違法なることを以て注意すれば知り得るものを不注意で知らなかつた場合は過失があるのみであります 日本刑法三八條の犯意は成立しません 從つて日本刑法一九九條も成立しません 検事側は此の点此の法理を被告の何れに付いても提出しないから此の殺人罪の犯意の存在を立証する所の証拠も提出していない 此の点委員会に於かれ御留意願い度い

更に次の事を御留意願い度い

判決書とか判決の執行とかいふ言葉は裁判に関係した言葉であります 判決があつた 死刑の判決があつた その判決を執行した といつた言葉はその意味に於いて裁判の存在を想像するものであります 裁判といふ Word が使はれてゐる事は前にも指摘した通りであります 法律を知らない人が open court で行はれる裁判のみを裁判であると考へてゐたとしても、その人が単に「裁判がなかつた」と述べても之は決して実際裁判がなかつたといふ証拠にはなりません

或國と或國で裁判制度が異る場合に一國の裁判の標準で他國の裁判の有無を直ちに判断することは許されません

更に一言します

私は検事側の Opening statement で表した趣旨に関するものは「辯護側の合理的な抗辯はなされてよいが、濫用は許さぬ」といふ

中傷的言葉であります。かゝる修辞的言葉は日本の法廷では絶対に
用ひられません 証人の [illegible] であります。それは事実を以て証拠を以て示すべきであります。事実をふさ
わしい形容詞を以て事の相手を非難する事は刑事法廷の本旨ではあり
ません
日本でも犯意論は非常に深く又厳く論じられております
結局刑法理論の発達と云ふことは人間性人間の能力の限界と云ふものを
実証的に科学的に理解しようとすることであります 私は被告の利益の
無罪を信じます 然し正直に申しますと それを理屈で片付ける態度は
とり度くないのであります
然し又検事側の [illegible] で述べられた様に戦争中で
あるから無罪にすべきであると主張するのでもありません
私は海軍刑法第十七條（海軍刑法にも同様の規定があります）
を委員会に読みます
第十七條
「多衆共同の暴行を鎮圧スルタメ又ハ敵前若クハ警急ノ際ニ於テ
軍紀ヲ保持スルタメニムヲ得ザルニ出デタル行為ハ之ヲ罰セズ
必要ノ程度ヲ超ヘタル行為ハ情状ニ因リ其ノ刑ヲ減軽又ハ免除スルコト
ヲ得」
第十八條
「前條ノ規定ハ刑法又ハ他ノ法令ノ罪トナルベキ行為ニ之ヲ適用ス」
例ヘバ敵前ニ於テ軍紀ヲ保持スル為メニ」ムヲ得ズ人ヲ殺ス
様な場合はこれを殺人罪で罰せずと云ふ意味であります

此の規定に就いて吉本が被告となっている海軍刑法の如くに規定では
ありません 私は此の規定を適用して被告の無罪を主張するものでは
ありません その意味は此の第十七條の様な條件の下において初めて殺人
が罰せられない事を御留意願いたいのであります ヤルートの当時の
情況に就いて厳刑しおて軍紀を保持する為めとる様な生やさしいもの
ではなかったのであります 事態はもっと深刻であったのであります ヤルート
の将兵は吉本は南海の孤島で祖國から遠く離れて約二年間 全く外部
からの補給救援を断たれて絶海の孤島に地獄の様な生活をいたさねば
ならなかったのであります
その時のヤルートの将兵の生活の実情は既に述べた通りであります 私は
この様な実情の許においてとられた此の犯罪の処置しなければならぬ場合の措置
を手続的という事はこれをよく理解して頂きたいのであります
被告を無罪とする論告として海軍刑法十七條十八條があることを既に
申しましたが 更に私は本裁判が此の規定でなく人道性人間としての
能力の限度ということをよく御理解なさって第一起訴理由に無罪の
宣告を賜りたい

第 七 章

起訴理由第二について申述べます
本件のヤルート事件を戦争犯罪として特にハーグ條約第三十條の
違反として起訴された事は何かの間違いか或は全くハーグ條約第三十條の意義
を誤解ではないかと思います
ハーグ條約第三十條の前條間諜が敵國人及中立國人の間諜を規定
する事は全條の規定上明らかであります 自國民が自國に

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對し間諜を行つた場合は其の國は当然その統治權に基づき自國民につ
いての間諜を自國の裁判所で處罰し得ることも当然であります 然して
今日の文明國では犯罪人を處罰するには必ず裁判を経なければならぬ
事も当然であります
從つて此のヘーグ條約第三十條で裁判を受ける權利を保護する必要は毫も
ないのであります
本件最も重要なことは日本帝國の統治權の適用に関し本論
の冒頭で申述べました日本帝國の本土統治地域においては外人の
場合にも當日本帝國の統治權其の裁判權に服するのであります
從つて此のケースに於ける外國人が日本帝國に對し外國の為めに間諜行為を行
つた場合は現行中捕へられたと否とを問はず日本帝國の裁判所で
裁判を受け又其の間諜行為で處罰されるには裁判を経なければならぬ
事も亦当然であります 從つて裁判を経ずして處罰された場合を除き
ましては何等國際問題とはなりません 全く國内問題であります ヘーグ條約
三〇條の違反となる事は全然ないのであります
検事側の冒頭陳述中「換言すれば敵に就いて或は敵に情報を
齎すといふ目的を以て情報を集めたのである」とあります 然しヘーグ條約の所謂
間諜は其の第二十九條で定義してある如く交戰國法規で各國が規定して
ゐる間諜よりも範圍が狭いのであります 作戰地帯内で情報を蒐集し
蒐集せんとした者であります 従つてかかる情報を敵に齎す行為は此の
ヘーグ條約第二十九條の間諜行為ではないのであります このことから考へ
まして検事側は此のヘーグ條約第二十九條第三十條の間諜の理解に
何の誤解があつたのではないかと考へざるを得ないのであります

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Suzuki
GG(1)

CLOSING ARGUMENT
IN BEHALF OF THE ACCUSED, FURUKI, HIDESAKU,
delivered by
DEFENSE COUNSEL SUZUKI, SAIZO

President and members of the commission:

Since the trial of the present case commenced at the beginning of March, approximately thirty-one days of hearing have been held and today the opportunity to deliver the arguments of the defense has come. I must express my deepest respect to you all in granting us such a long session in the carefuly deliberation on one defendant.

The executions of Jaluit natives for which the accused FURUKI is charged in this case were originally not of a nature to be prosecuted as crimes before this court and to be tried in order to reach a finding of guilty or not guilty on them as an ordinary criminal case or war crimes case. This case should not have been recorded in the legal proceedings of this court, but it should have been recorded merely as a legal execution of native criminals together with the name of Rear Admiral MASUDA, Misuke in the last page of Jaluit's battle history, which undoubtedly will become in the future important data in the military history of the war. This is the starting point in my argument in behalf of the accused and as you shall note will constitute my conclusion.

In Charge I the accused, Furuki, is charged with murder and each specification thereof alleges that FURUKI, Hidesaku, then a major, I.J.A., attached to the Second Battalion, First South Seas Detachment of the Imperial Japanese Armed Forces, and while so serving as the commanding officer of the Second Battalion, at Jaluit,Atoll, did during the present war wilfully, feloniously, with premeditation and malice aforethought and without justifiable cause, kill unarmed natives of the Marshall Islands, this in violation of the crime of murder provided in article 199 of the Japanese Criminal Law.

In charge II the accused, FURUKI, is charged with the crime of violating the Laws and Custors of War, and each specification thereof alleges that the accused, FURUKI, while serving as the C.O. of the Second Battalion, First South Seas Detachment of the I.J.A. at Jaluit Atoll, did during this present war on Jaluit Atoll, wilfully, unlawfully and without previous trial punish and cause to be punished as spies by killing native inhabitant of

the Marshall Islands, this in violation of the laws and customs of war.

Before going into the detailed and concrete argument as to whether he is guilty as to each specification of both charges, I would like to clarify the legal relation between the Empire of Japan and Jaluit Atoll, Marshall Islands and its native inhabitants, at the time this case occurred.

The former German Pacific Islands lying north of the Equator including Jaluit Atoll were occupied by the Japanese Navy during World War I, and as a result of the Allied Conference held in London in the year 1919, the area was mandated to the Japanese Empire. And in December, 1920, the Empire of Japan formally accepted the Class C Mandate from the League of Nations. Thereafter, as stipulated in Article 22 of the League of Nations Covenant and Article 2 of the Mandate for Japan, the Japanese Empire possess full power of legislation and administration over the territory and as an integral portion of the Empire came to rule it in accordance with the laws of Japan. In the charter, it was provided in Article 2 that "the mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Empire of Japan, and may apply the laws of the Empire of Japan to the territory, subject to such modifications as circumstances may require. The mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present mandate."

Now, what was the nature of the rights Japan had over these mandated territories? I shall explain this, in accordance to the theory of OKADA, Ryoichi, a Japanese scholar on International Law.

Based upon the rights provided in Article 109 of the Versailles Treaty, the principal Allied and Associated Powers divided the former German overseas territories between the victorious countries. Some were given possession as outright annexation while others were granted under the title of mandated territories of the League of Nations. On July,8, 1919, concerning the territories subject to mandatory administration, the Mandate Commission appointed by the principal Allied and Associated Powers met in London and decided upon the contents of the various mandates which were later proposed to the so-called mandatories which were Japan, France, Belgium, England, and its dominions and were also proposed to the League of Nations. After the approval of the former and confirmation by the latter had been

given the Class "C" Mandate was formally set forth in December 7, 1920, and Class "B" Mandate in July 20, 1922.

Both Class "B" and "C" Mandates acknowledged that the so-called mandated territory and that it should be administered as an integral portion of its territory in accordance with the domestic law, subject to some administrative limitation only in the interest of the natives of the territory and peoples and countires of the League of Nations other than the Mandatory. It was provided that the Mandatory should make an annual report to the Council of the League of Nations, with regard to its administration and also that the consent of the Council of the League of Nations was required for any modification of the terms of the present mandate.

Therefore, among the various countries that received the distribution of former German colonies after the numerous conferences of the principal Allied and Associated Powers which were held during May 7, 1919 to September 5, Portugal was given the territory "together with complete sovereignty" and Japan, France, England and its dominions which received distribution of the territories under the title of the so-called mandated territories. They should be construed as having received distribution of these areas as territories. The only difference lying between the two types was that in the so-called mandated territories certain obligations were required. This obligation meant that the Mandatory had to adopt certain administrative measures in the interest of the natives and other countries of the League, and in exercising these measures the Mandatory was to receive to a certain extent the supervision of the League of Nations. This so-called mandate was a mutual agreement with the League of Nations that the above administrative measures would be followed under the supervision of the League of Nations. The fact that the substantial contents of the mandate was decided by the principal Allied and Associated Powers and also they forget that it formally became effective after the approval of the Empire on the one hand and the confirmation by the League of Nations on the other hand, I believe proves the composition of the mandate.

Next, we shall see citizenship of what country these natives living on the Japanese Mandated South Sea Islands, including Jaluit, had: It was proper for these natives, who no longer came under the sovereignty of Germany in accordance with Article 199 of the Versailles Treaty, to lose their German citizenship. Then the question arises whether they acquired the citizenship of the Mandatory, namely Japan.

This point is not made clear in the articles of the Mandate to Japan. Article 22 of the League of Nations Covenant also evades a straightforward answer and merely provides that the Mandatory shall exercise "duties as tutelage" for the native inhabitants. In case of "Class "B" and Class "C" mandates concerning former German colonies and also judging from the contents of the mandate, the "duties as tutelage" means that the mandatory exercises legislative, judiciary and administrative powers and governs directly. By no means is it construed to recognize international personality in the natives of the mandated territory as a whole and that the mandatory leads and assists them. But rather, it may be understood as having given them the status of being subject to the sovereignty of Japan as an integral portion of the people. of Japan, when judged from the nature of rights exercised by the Empire of Japan over the mandated territories. Therefore, from the view of applying war-time International Law, these territories, I believe, should be treated as quasi-territory of Japan and the natives as quasi-subjects of Japan. This principle has been hitherto recognized in the Class "C" mandates.

In March, 1922, the Military Government which had hitherto exercised power was abolished, and the South Sea Government Organization was enacted in accordance with Imperial Ordinance No.107, issued in the year 1922. In April 1, 1922, the South Sea Island Government Office was established in Palau and the Chief of the Office exercised administration over all the South Sea Islands. Branch offices were established in various important places within the territory which the Chief also administered. Accordingly, the Jaluit Branch office of the South Sea Government was set up in Jaluit and administrative affairs concerning Japanese civilians and native inhabitants in Jaluit were handled. Judicial affairs were handled by the South Sea Government Court which was immediately attached to the Chief of the South Sea Government. There was a higher court in Palau. Jaluit had no court so it came under the jurisdiction of the South Seas Local Court located in Ponape.

II

Secondly, I shall explain the relation between the Martial Law of Japan, a statute law, and Jaluit Atoll. Prior to the presentation of the defense's case, the accused requested the commission to take judicial notice of the Japanese Naval Criminal Code, Court Martial Law, and the "Martial Law" of Japan. But our request in regard to Martial Law was not granted. The Martial Law of Japan is absolutely of the same nature

as the Naval Criminal Law and Naval Court Martial Law is an existing law. It is the basic law for proclaiming Martial Law and in which is provided such matters pertaining thereto, such as when martial law is proclaimed, who has authority to do so, and with what authority the C. O. of a district under such circumstances is empowered. It is difficult to understand why judicial notice was not taken of the martial law which is a law actually in force. This Martial Law was "enacted by the form of DAJOKAN FUKOKU (Prime Minister's Proclamation)" and this was literally translated into English as Prime Minister's Proclamation, so I believe it was misunderstood as being a temporary proclamation of Martial Law instead of a statute law. I would like to take this opportunity to explain a little further concerning the form of Japanese statute law.

When this law called Martial Law was enacted in the year 1882, Japan did not have as yet the parlimentary (Diet) system, so all laws were enacted and promulgated under the form of the above mentioned FUKOKU (Proclamation) of DAJOKAN (Highest Government Official corresponding to the present Prime Minister). Later in 1889, the Constitution of Japan was enacted and promulgated. Thus, a system was established where all laws, as a principle, were sanctioned and promulgated by the Emperor after obtaining the approval of the Diet. There was an exception, however, that, in accordance with Article 76 of the above mentioned constitution, statute laws prior to the enforcement of the constitution would retain their validity as effective law, so long as they did not conflict with the provisions of the constitution. This law called Martial Law enacted and promulgated under the form of DAJOKAN FUKOKU (Prime Minister's Proclamation) has in accordance with Article 76 of the above mentioned constitution the same validity and characteristic as a law enacted and approved by the Diet, and therefore it was an effective existing law, at the time this case occurred on Jaluit and in 1941, this law called Martial Law was enforced in the territory of the South Sea Island which had been mandated to Japan. (Matters concerning Martial Law and Requisitions in the South Sea Island, issued December 13, 1941, Imperial Ordinance No. 1919). Therefore, this law called martial law was effective on Jaluit Atoll at the time this case occurred. As to this point, I request your special consideration.

III

The judge advocate in his opening statement has stated that the case is simple and the facts comparitively clear. Many witnesses for the prosecution have been summoned. But, from what can be gathered from the testimonies of these witnesses, the prosecution has completely

failed to prove the corpus delicti of the crimes alleged in Chares I and II. One fact that became most clear from the testimonies of these witnesses was that the cases alleged in Charges I and II were entirely idential. In no ways have the facts been explicity proved, that the accused, FURUKI, did unlawfully without justifiable cause kill the thirteen natives whose names appear in the specifications. Quite to the contrary, the facts reveal that all of these natives killed, were criminals given a decision of a death sentence and the accused FURUKI who had been given an order as executioner to execute the sentence, had merely shot and killed them. However, it can be assumed from the testimonies of the witnesses for the prosecution, SUGAHARA, AKIZUKI, TANAKA and UTSUNOMIYA that FURUKI shot and killed a total of nine natives: three Jaluit natives in the middle of June 1945, two Jaluit natives in the middle of June 1945, two Jaluit natives in the end of July 1945, two natives in August 1945. All took place in the coconut grove in Aineman Island, Jaluit Atoll. I say assume because they did not see the accused FURUKI in the actual act of shooting an killing these nine natives. They merely saw the corpses when they buried the bodies at the place with FURUKI, immediately after the shooting. And what the names of the natives were, the witnesses did not testify. Witness UTSUNOMIYA alone identified the two natives he buried as being a man and a woman and that it was only after the end of the war that he had learned from FURUKI that the man was Melein and the woman Mejkane. Therefore, it can be concluded from the testimonies of these witnesses that the facts brought out do not immediately prove that the natives whose corpses were buried by the witnesses were the same natives mentioned in each of the specifications of the charges in the present case. Likewise, the testimony of SAKUDA and KADOTA, both witnesses for the prosecution only proved the following facts: The thirteen natives whom the accused FURUKI has been alleged to have unlawfully killed, namely Lesohr, Kohri, Kozina, and one whose name is unknown, Arden, Makui, Tiagrik, Chuta, Chonmohlo, Mandala, Laperia, Mejkane and Melein, all had committed crimes and were sentenced to death by Admiral Masuda then the C.O. of Jaluit Atoll,, SAKUDA and KADOTA only testified that they heard the accused FURUKI say he had executed the thirteen natives who were sentenced to death. It was not revealed in that testimony that they had actually witnessed the shooting and killing. Therefore, the only evidence produced by the prosecution to prove directly that the accused FURUKI actually did kill these thirteen natives, was the accused's own statement submitted to an American judiciary officer on December 3, 1946. According to this statement the accused FURUKI admits that he had shot and killed the thirteen natives, but he states in the very beginning of this statement, "I, according to the orders of Admiral MASUDA, C.O.

of Jaluit Defense Garrison, in the year 1945 executed the native criminals who were sentenced to death by him." We must not overlook the fact that he contends here that the shooting and killing of the natives was an execution of the decisionof the death penalty and that the execution of death sentence is one phase of execution of law. Even if death of another is incurred by this act, the act is not unlawful, and does not constitute a crime. Therefore, this statement of the accused, FURUKI, in no way offers any evidence that he had criminal intent to commit murder. On the contrary, this statement denies this criminal intent. This statement may prove that FURUKI shot and killed thirteen Jaluit natives of the instant case, but it does not prove murder. Rather, it serves as one piece of evidence to prove the non-constitution of the crime murder.

Furthermore, the prosecution has failed to prove that the thirteen Jaluit natives, shot and killed by the accused FURUKI in theinstant case, were spies or were shot and killed as spies. The testimonies of SAKUDA and KADOTA both witnesses for the prosecution also have not established the fact that these Jaluit natives shot and killed in the instant case, acted as spies, to say nothing of the fact that they were captured by the Japanese armed forces in the actual act of spying. Witness KADOTA testified that Mejkane received orders from Melein to gather intelligence on the Japanese armed forces in the outlying islands, but there was no definite testimony as to whether Mejkane spied or not. It has not been proved that Melein and Mejkane had been executed as spies of the hostile power. On the contrary, it has been proved that the thirteen natives had been punished as criminals of Japan, violating the domestic laws such as the Japanese Naval Criminal Code, the Japanese Criminal Code, etc., It is worthy to note also that the prosecution attempted to deny the act of spying on the part of Mejkane.

Thus the prosecution has failed to prove the corpus delicti of the crimes alleged in each of the specifications of Charge I and each of the specifications of Charge II. Therefore, the accused should be acquitted on the ground that both charges and each of the specifications therein served against the accused have not been sufficiently proved.

IV

At first the judge advocate commented in his opening statement, we see FURUKI occupying the chair of the accused, as a murderer of thirteen innocent Marshallese. But in course of the examination of the commission , the figure of a murderer gradually fades away. Finally, the real and original features of FURUKI are revived; that is, he had according to Admiral MASUDA's orders carried out the execution of the native criminals

who had been sentenced to death by the Special Court Martial in which Admiral Masuda, the C. O. of Jaluit personally presided as President. When we sum up all the testimony and evidence submitted before this commission, I am convinced that this conclusion is correct, and I firmly believe that this was the truth of the actual happening.

Now let us contemplate the subject of the death of Admiral MASUDA and the truth of the instant case. After the end of the war Admiral Masuda committed suicide on Jaluit. I believe this event was most unfortunate for the accused FURUKI. If Admiral Masuda were alive now, FURUKI's position would have been clearer. As Admiral Masuda is not alive, all of his acts have been regarded intentionally or unwittingly as FURUKI's act. Moreover, what's further unfortunate is the possibility of FURUKI being prejudiced by some perhaps believing that Furuki is shifting the blame for his disadvantage to Admiral Masuda and evading his responsibility; and since Masuda no longer lives, to be looked upon with suspicion that FURUKI and his subordinates are wilfully fabricating facts that will be beneficial to him. To Furuki, this is most incredible and vexatious. FURUKI is a man who may take the responsibilities of others, but never places them on another person, and I believe he wouldn't dream of doing this. To think of placing the blame on Admiral Masuda who he still deeply respects, is entirely out of the question. On the morning of the first day of the trial, he showed me a poem which he had written. The idea of the poem was that FURUKI respected Admiral Masuda like a father and that the Admiral was always beside him and encouraging him.

The judge advocate presented an investigation document which had absolutely no relation to this instant case, and read portions of it in which FURUKI changed his statement before and after the death of Admiral Masuda. The judge advocate by using this tactic tried to impress the Commission with the fact that the accused FURUKI in this instant case had changed his statement. But FURUKI and all those who were related to this case, were firmly convinced that the present native case had been dealt with under Admiral Masuda's legitimate authority and proper procedure, and that there was nothing whatsoever about whether to feel guilty. Even if the question should rise, it was a purely domestic issue and they did not dream or think that it would be tried in a foreign court as a war crime. Therefore, there was no need for FURUKI to evade his responsibilities or to lie or fabricate anything to lighten it. For instance, it appears that the Judge Advocate was prejudiced and thought that Masuda's judgment papers concerning the native criminal were something fabricated afterward. If the judgment papers did not exist at that time and were thought out to make it appear as if they actually existed, I should think it would have been a little more apt. Its

form would not be as it was in which the upper half of the sheet judgment paper and bottom half for opinion paper. We can imagine the paper shortage situation in the ruings of Jaluit. There are no provisions concerning the form of HANKETSU (judgment) in the Japanese Criminal Procedure Law of Japanese Court Martial Law. Therefore, the form which FURUKI wrote and illustrated before this commission is not null and void as a judgment paper.

At this point someone may raise the question: The form of Admiral Masuda's judgment paper may be illegal, but the HANKETSU (judgment) is null and void and illegal when there was no formal process for making these judgment papers and when the procedure was illegal. When the death sentence is carried out on the basis of such a null and void or illegal HANKETSU (decision), the execution is unlawful. It is not justified. When the death sentence is carried out it constitutes murder. And in this instant case, there has been no definite showing that the proceedings taken up till sentence was pronounced did comply with the regular procedure provided in the Japanese Criminal Law. So they would say.

In making my response to this shrewd question, I shall not resort to technicality of law. I shall quietly say: In discussing a criminal responsibility of a person, it is most dangerous to make an abstract study of it by cutting his act off from all social relationship and from the society in which he is put. The advanced theory and principle of criminal law will not allow this. Whenever there is a discussion on crime and punishment the advanced theory on criminal law is always cautious about compelling super-human morality and because it was not observed hesitates to condemn him with punishment. I would then acquaint him with the great throughts of Spinoza, "The acts of man, we should not scorn, nor sorrow for, nor curse, but understand." To understand is to forgive.

The execution of the thirteen natives in the instant case was Furuki's final tragedy encountered in Jaluit. Furuki had loved the natives very much and it was a great misfortune for him to have to leave the island after shooting and killing the natives even if they were criminals.

I shall reveal the theoretical part of my argument later. Prior to that, it is highly necessary to fully find out under what circumstances on Jaluit and how these incidents in the instant case occurred.

Suzuki
GG(x)

After the occupation of the Gilbert Islands by the American forces in November, 1943, the Marshall Islands became the front line of battle. Under the ceaseless intense bombing of the American planes, each base force strengthened its naval garrison while reinforcement by army troops from Manchuria and Japan poured in. Just at this time, the Second Battalion of the First South Seas Detachment, commanded by the accused, Major Furuki was sent as reinforcement to the Marshalls. His was one of the many army units that came under the command of the Fourth Fleet.

The second battalion under the command of the accused, Major Furuki, had been attached to the Sixty-fourth Naval Garrison on Wotje. On receiving orders to move to Jaluit, Furuki took with him a part of his battalion, consisting of about 200 men and left Wotje for Jaluit by way of Kwajalein. After a difficult voyage needling through the American air supremacy, on January 18, 1944, they finally landed on Jaluit. There, FURUKI's unit was attached to the Sixty-second Naval Garrison and came under the command of Rear Admiral MASUDA, Nisuke, commanding officer of the Garrison. It should be noticed that the ship which brought FURUKI and his men was the last ship which Jaluit was to see.

In the beginning of February, 1944, about fifteen days after FURUKI's arrival, Kwajalein fell into the hands of the Americans. The headquarters of the Japanese Forces in the Marshalls, including the Sixty-second Garrison was situated on that island. This meant the loss of a base for Jaluit. Moreover, this caused all Japanese forces stationed in the Marshalls to be abandoned in remote isolation in the strictest sense of the word.

After the fall of Kwajalein, about March of 1944, a dispatch from the Commander in Chief of the Fourth Fleet was sent out to Jaluit Atoll which was already resigned its fate of annihilation. This dispatch was caught by the Naval radio receiving station at Jaluit. The dispatch read, "Hereafter each base C. O. shall have command over all military units and Government offices."

At a glance, this dispatch seemed very simple. But to those who were fully aware of the battle conditions of the Marshalls at that time, this simple dispatch had a deep and complicated meaning. This dispatch on one hand enlarged and empowered the authority of the supreme C. O., Admiral MASUDA, to that of a despotic administrator, and on the other hand it meant that Jaluit was put in a situation comparable to the destiny of a child who having already losts its father now was now pronounced to be abandaoned by its mother. It was

for the officers and men a heartless ultimatum saying "Hereafter, all reinforcement or supply is impossible, so continue the battle and support yourself." It was a declaration to abandon Jaluit as a strategic base of operation, but no words were found in it to allow them to surrender to the enemy. Subdued under the complete power of the Americans, Jaluit was abandoned like an orphan and still it was not allowed to surrender but was compelled to fight till the last man. In this inconsistent circumstances, we find the tragic cause of the instant case in which the accused FURUKI is being tried today. If the traditional spirit of the Japanese Military Forces had allowed the Commanding Officer to surrender after a reasonable consideration of the circumstances were made, then perhaps these native incidents, this execution of natives, would not have occurred, and FURUKI would not have been facing this commission as an accused.

As soon as C. O. Admiral MASUDA received this dispatch from the Commander in Chief of the Fourth Fleet he gathered all the C. O.'s of the various military units on Jaluit (there were at that time about eighteen different units) and the head of the Jaluit Branch of the South Sea Government. He ordered the Jaluit Defense Garrison to be organized which included all people on Jaluit Atoll, military personnel, Gunzokus, civilians and natives. He himself assumed the position of its Commander. He then declared at this conference that hereafter he possessed and would exercise absolute authority of administration over all persons and property on Jaluit Atoll. The organization of Jaluit Defense Garrison! This was the general mobilization structure which the Japanese Armed Forces on Jaluit adopted and they had no alternative but to adopt it under the siege of the enemy, when all hopes were lost for reinforcement and supply, when surrender was not allowed and when fate was to fight till the last man was dead.

Now a question arises. Was this sort of organization formed on other bases of Marshall where the same dispatch had been received received from the Commander in Chief of the Fourth Fleet. I would like to reserve my response on this point to a latter part of my argument. It is merely necessary for me to state here that MASUDA did by forming this Defense Garrison and delivering his statement most truthfully grasp and faithfully exercise the substance of the dispatch from the Fourth Fleet after reflecting upon the battle conditions of Jaluit. Here Admiral Masuda shows his sharp, deep thinking mind, his superb organizing ability, and his disposition as a despotic commanding officer. I would like to ask the members of the commission to take special note of this point. It is utterly

impossible to understand the true capacity of FURUKI's responsibility without consulting the nature of MASUDA as Commanding Officer. On all of the other bases of Marshall Islands practically all of the natives deserted and more than 40% of the men died of starvation. In spite of this, Jaluit which was only eight square kilometers and exposed under the most intense bombing and bombardment unprecedented in the history of war, suffered only 2% loss in men by starvation and at the time the war came to andend half of the natives out of 2,000 still remained on the island. This fact is, in a sense a miracle. And on the other hand, doesn't this eloquently explain the reliability on the despot Admiral MASUDA as C.O. who had such superior organizing ability?

All of the officers and men on Jaluit were determined to fight to the bitter end, and waited impatiently day after day for the American attack; but the American forces by-passed them, and in the middle of June, 1944, commenced landing operations against Saipan, which they soon occupied.

In these Nimitz Operations, upon occupying Saipan, after the last Japanese resistance in the Marianas, instantly pressed upon Palau. The tide of the vigorous fighting had by now passed toward the west and the little island of Jaluit in the Marshalls was left behind the fronts of the Americans. In this stepping stone operation of the Americans, a landing attack was not planned against Jaluit because it had already lost its strategic value, and instead annihilation by bombing and bombardment was conducted. The intensity of bombing and bombardment which Jaluit underwent is beyond adequate words to describe. Witness INOUE, Fumio vividly explained the disasterous situation and gave the following figures: number of attacking planes, 8,100; total ton of bombs dropped, 5,000. Under this severe bombing and bombardment, Jaluit Atoll, and particularly Emidj Island, where the Japanese forces were stationed, was reduced to ruins. The topographical features of the island were converted into one big pile of sand; every single coconut tree, barracks, warehouses and buildings were completely destroyed. Every day officers and men had to dig holes in the said in which to sleep when possible. They gathered together the pieces of sheet metal and built a small hut to shelter them from the squalls. Moreover the fierce attack of the Americans destroyed the guns in the island; it deprived the men of clothing, shoes and blankets.

It is only natural that food soon became scarce on this ruined island. The ration was cut 20% then 30%, and finally to half of the regular ration. To make things worse, supplies from the rear to Jaluit could not be anticipated. After the fall of Kwajalein, Rear

Admiral Masuda organized the Jaluit Defense Garrison composed of all the army and navy personnel, Gunzokus and natives. Admiral Masuda, who was well versed in planning and possessed rare ability in organizing showed great concerning toward the food problems. From the time Kwajalein fell, he began to study and did everything possible in regard to the problem. But there was no hope of producing agricultural products in the sandy soil of Jaluit which rose only one to two meters above sea level.

On about July, 1944, "the self supporting committee" was established in the headquarters of the Jaluit Defense Garrison. While fighting continued against the heavy attack of the Americans, now a serious battle to survive, to obtain food had to be commenced simultaneously. Everyone did everything within his power to increase the food production by even the slightest amount. But the topography of the island and the intense attack by the Americans hampered from within and without the success of such self-support measures. Food production was not increased in the least. The reserve food had finally come to the end. Dark clouds overshadowed the future of the Garrison. Besides lacking good air-raid shelters to protect their lives, now the gruesome fear of starvation was pursuing the men who could not predict whether they would live tomorrow or not.

At this crucial moment, when starvation was creeping upon men, a food gifted from Heaven appeared before them. It was called "Chagaro," a native toddy. "Chagaro" is a syrup which filtrates from the section where the flower of the coconut is cut before it blooms. When it was distributed as food the officers and men rejoiced in spite of themselves. Thus, the men of Jaluit found this new food, and launched measures of self-support which sought to provide one copra and one "sho" of Chagaro per person a day.

Thus, they had found this new food called "Chagaro"; but the other natural resources such as copra, fish, wild edible grass and sweet potatoes which they had figured would grow, did not yield as was first planned. Moreover, the production of "Chagaro" depended largely upon the weather, transportation and containers, and because of these bottlenecks, the supply was far from sufficient. On the other hand, minute by minute, starvation was setting upon them. Low and depressed, officers and men staggered weakly around. Suffering from malnutrition, the number of men increased who appeared more or less like skeletons donning garments of human skin. Their condition was so weak that a rest was needed in walking a short distance of 100 meters.

Besides struggling against agony to subsist on the other hand the tide of war took a completely unfavorable change for the Japanese forces. Every stronghold in the South Pacific had fallen into the hands of the enemy, and now the brunt of attack pointed toward Jaluit. Annihilation was only a matter of time. The Americans attack from Majuro and Kwajalein, only 200 kilometers away, seemed never to cease. So severe was the attack, that it seemed this small island, which was only eight square kilometers, would completely submerge into the ocean. Wherever you may have gone on this island, you could not miss seeing numerous large bomb holes filled with ocean water eventually forming a pond.

All this time, not even once was supply brought in from the rear, and contact with the outside was completely suspended. Inch by inch life was being chiseled away by the menace of starvation and bombing. Caught in such circumstances, the officers and men were seized by a most unbearable feeling of despair. What gave these men in despair courage and hope? It was none other than Admiral MASUDA, Nisuke, C. O. of the Jaluit Defense Garrison standing firmly amidst this hardship. He was a man of high intellect, unsurpassed ability in organizing, and resolute will power. The officers and men called him "The Sun of Jaluit." All men united around Admiral MASUDA like a child hugging to its mother's breast in a storm. Resigning everything into his absolute command, they were determined to pull through this miserable situation on Emidj comparable to a living hell.

On obtaining this heaven sent gifted Chagaro or coconut toddy, the men saw a guiding light in the battle against starvation, but it was soon to be dimmed by dark clouds. This was the American progapanda tactics seeking to destroy Jaluit from within--propaganda tactics to encourage native desertion to the American forces. It was known that without the natives who gathered copra, produced coconut toddy and transported food from the outlying island to Emidj, self-support was impossible. Natives were absolutely essential for the subsistence of Jaluit. Stimulated by the incident in which native spies from Mille sneaked into Jaluit on March, 1945, the Defense section was established in the headquarters of the Jaluit Defense Section. FURUKI was assigned as the head of this section and he studied counter measures concerning guarding the Island. But guarding of the out-lying islands was a difficult task, because there were no guns to repel the approach of the American LCI's and no boats were available to make contact with the outlying islands. On May 6 and 7, 1945, an American Destroyer and several LCI's approached the shores of Jaluit and on this occasion about 500 natives deserted to the American vessels. This loss of $\frac{1}{4}$ of the total natives endangered the subsistence of Jaluit. At this critical moment

a proclamation was announced to the natives stating that hereafter desertion, and acts done for the benefit of the enemy shall be severely punished. At this time on Emidj, rats, wild grass and every edible thing were thoroughly eaten up. At this time a number of noncommissioned officers in total despair and impatience committed suicide.

In the middle of May, 1945, a report came to the headquarters that Echibaru, a native of Imrodj Island, after struggling with the head of detachment unit on Imrodj, petty officer Okamoto, aboard a canoe in an attempt to strangle him, had been thrown overboard and disappeared. Admiral Masuda was gravely concerned with the incident and ordered KADOTA and SAKUDA as investigators to conduct a thorough investigation. In the daytime, it was most difficult for them to go to the outlying island because of the airplanes. Great hardship accompanied the investigation. As a result, the whole plot was disclosed. Lesohr, Kohri, Kozina, one unknown, Arden, Makui, and Tingrik were found to be leaders and had attempted to kill the guard, plunder military vessels and carry out large scale desertion of the natives.

In order to hold a trial for the seven ringleaders, Admiral MASUDA ordered FURUKI to act as Judge Advocate. Admiral MASUDA personally presided as President. He ordered Lieutenant Commander SHINTOME (then the hightest ranking naval officer next to MASUDA) and Captain Inoue (then ranking army officer next to FURUKI) both to act as judges in the trial.

As regard the procedure of the trial, there was no suitable air raid shelter to enable them to calmly conduct the consultation so the failure to comply with the Court Martial Law could not be avoided. As to interrogation of the accused natives, FURUKI and MASUDA personally went to the Second Ammunition Dump where they were confined and questioned them. After confirming the facts set forth in the investigator's reports, by way of questioning the accused natives, MASUDA summoned SHINTOME, INOUE, and FURUKI to his office. First of all he had FURUKI express his opinion. INOUE and SHINTOME stated their opinion concerning FURUKI's statement. Two days later, MASUDA wrote down his judgment on the upper half of FURUKI's opinion paper and pronounced the sentence. The sentence was more severe than what FURUKI expressed in his opinion. Lesohr, Kohri, Kozina, one unknown, Arden, Makui, and Tingrik were given the maximum sentence. FURUKI, according to orders, shot and killed them. This is the actual fact of the case alleged in specification 1 and specification 2 of Charges I and II.

The cases alleged in specifications 3, 4, and 5 of Charges I and II are approximately of the same content and the process of examination and consultation of the crimes are quite identical.

The judge advocate questioned witness MORIKAWA in such a way as to give an impression that the investigators exercised violence and brutality in questioning the witnesses and suspects. MORIKAWA definitely denied this. In rebuttal, the Judge Advocate summoned as witnesses Saburo, Levitikos, Obetto, Emos and Ente and others who all were said to have been investigated in the incidents of the instant case and endeavored to prove such acts of violence and brutality. But the attempt of the Judge Advocate completely failed. Ichiro testified he sneezed when MORIKAWA stuck the pronged wire into his nose. The damage was only to that extent. He did not testify that he was beaten by MORIKAWA. Levitikos testified that he saw Morikawa beating Mejkane through the hole in the wall of the adjoining room. Obetto who was in the same place with Levitikos testified he saw Morikawa beat Mejkane from the entrance leading to the room in which he, Levitikos, was and therefore, he gave inconsistent testimony. This proves that that these testimonies were fabricated.

Except for Saburo into whose nose a pronged wire was stuck to the extent that he merely sneezed, all the other witnesses were not victims of mistreatment. They only said that they saw the others mistreated. Even these testimonies concerning what they saw were filled with inconsistence and are open to question. It was as if they had taken the stand in behalf of the defense to testify that they had not been mistreated.

The prosecution further hurriedly summoned SHINTOME from Japan on the last day of their rebuttal, and brought him to the court. They tried to establish by his testimony that there had not been a trial and that SHINTOME had not been the judge. But it was not successful. When he took the stand he could not bear to look at FURUKI. It was impossible for him to do so. His testimonies did not touch the essential point of the issue and he seemed to be endeavoring to prove that he had no concern with the case. He was restless and uneasy all the time, and brought forth such inconsistent testimony as follows:

Although he was next to MASUDA in rank among the high ranking officers of navy unit on Jaluit, he testified that he did not know that the natives had been executed. He also testified when he happened to enter the room

of commanding officer Masuda, FURUKI with some documents was explaining to MASUDA something about the natives. At that moment, Rear Admiral Masuda said that the natives had to be executed. And he, although he was not asked to state his opinion by MASUDA (he used this phrase many times and stressed that he was never requested to state his opinion), he stated that he requested MASUDA to give up the execution, because it was so pitiful to execute natives who worked hard for the production of food in co-operation with the Japanese Forces. He testified that he stated his opinion of his own accord, and after finishing his testimony, he added his long statement concerning the conversation between him and MASUDA and although he advised him not to execute the natives, MASUDA stated he could not help it in order to maintain military discipline and the dignity of the military forces. But the contents of his statement were not a mere talk as he had stated but rather that of the consultation as judges. By the contents of his statement he revealed himself to have been a judge. I think that the commission also knows that there are two types of persons in any country or race: one who calmly takes the responsibilities of other people, and the other who tries to put his responsibility on the other people.

Next we must make the following points clear.

Had Masuda, then a supreme commander of the Jaluit Base, the authority to establish court martial on Jaluit?

Concerning the classification of the court martial, Article 8 of the Naval Court Martial Law provides as follows:

"Court Martials are organized as follows:
1. Higher Court Martial.
2. Tokyo Court Martial.
3. Naval Station Court Martial.
4. Naval Port Court Martial.
5. Fleet Court Martial.
6. Isolated Court Martial.
7. Temporary Court Martial."

Article 9 of the same law provides: "An Isolated Court Martial is established especially in a district surrounded by an enemy when a declaration of martial law is made. A Temporary Court Martial, in a case of necessity during war and naval operation shall be specially established in a naval unit."

These two are so called specially established court martials.

Article 10 provides: "A specially established court martial makes the Commandant of the unit of district where the said court martial is established its president."

According to the above provisions, it is clear that MASUDA had the authority to establish the so-called specially established court martial on Jaluit for the trial of the Native criminals regardless of whether Martial Law is proclaimed and enforced there. Therefore, the authority to hold the trial which MASUDA exercised is lawful.

Next, let us consider whether or not the court martial specially established by MASUDA on Jaluit had the jurisdiction over the natives and their offenses of this case.

As I stated at the beginning of my argument, the natives of Jaluit were subject to the Japanese sovereignity and were under the jurisdiction of the court of the South Seas Government of Japan.

In the peace time, normal offenseswere under the jurisdiction of the court on Palau, the offenses in violation of military criminal laws were under the jurisdiction of the standing court martial on Truk. When a native, who was not a gunzoku but was engaged in the military work, committed a normal crime, he was to be court martialed according to the stipulation of Article 1, paragraph 3 of the Naval Court Martial Law. Article 6 of the Naval Court Martial Law admits the special jurisdiction in time of war or emergency as follows: "A Court Martial, at the time of military operation, if necessary, in order to safeguard the Navy, may exercise power of jurisdiction over crimes of persons other than mentioned in Article 1."

Therefore, not only the crimes against military laws, such as the crime of deserting to the enemy, attempt of killing and assaulting the guard which are committed by the natives of this case, but also any other crimes, if it is necessary for the maintenance of the public peace in in case of war, clearly come under the jurisdiction of the court martial

Therefore, there is no room for dispute in that the court martial specially established on Jaluit by MASUDA had a legal jurisdiction over the natives of this case and their offenses.

<u>Trial procedure</u>.

At the specially established court martial the accused are not permitted to desire counsel for their defense (Article 93 of the Naval Court Martial Law). A Legal Officer is also unnecessary (Article 50). Besides, the trial is not open to the public (Article 419). Therefore, it is not unlawful that there were no defense counsel nor legal officer at the trial or natives and that the trial was not held to the public.

No appeals are allowed in the specially established court martial. Concerning the court martial specially established in the besieged area, Article 13 of the Martial Law stipulates: "In a besieged area, no appeals for retrial are allowed in a trial by a military court."

Article 420 states: "Appeals are allowed for the sentence of Tokyo Court Martial, Naval Station Court Martial and Naval Port Court Martial." And appeals are not permitted for the sentence of the specially established court martial.

Although it is necessary to receive the order from the Naval Minister to carry out the execution of death sentence, (Article 504), it is unnecessary to do so for the sentence of the specially established court martial. In such a case the commanding officer of the court martial orders the execution.

Therefore, in this case, it is lawful that Rear Admiral Masuda, the commanding officer of the specially established court martial, ordered FURUKI after the announcement of the sentence to carry out the execution.

Article 363 of Naval Court Martial Law provides: "Investigation on the fixed date (day of the trial) shall be done in court, the court shall be opened with judges, Judge Advocates, and recorders present."

Furthermore, Article 365 stipulates "When the accused does not appear in court at the fixed date (day of trial), unless otherwise provided the court may not be opened.

Were trials held with the accused present, in the instant case? A court does not necessarily in any way have to be held in a specific place. It is acknowledged that MASUDA accompanied by FURUKI went to the place where the natives were confined and directly questioned the accused. No facts were revealed that at this time INOUE and SHINTOME, both judges, also accompanied them. However , according to Article 387 of Naval Court Martial Law which reads: "The President shall interrogate and investigate the evidence of the accused."

Therefore, this questioning even when only done by MASUDA alone,

who was President is, not in any way, illegal. Summing this up, the regular procedures provided in the Naval Court Martial Law were not carried out, but it may be observed that procedures that were exercised, complied with the spirit of the provisions of this law. Now is it not possible to consider it in this manner, that a trial was held but the procedures adopted were slightly different from the regular procedure as provided in Court Martial Law, and not that there was no trials held and the judgment was made under a special procedure which was not a trial. From the battle conditions of that time, couldn't we consider this as an unavoidable procedure. A conception of a trial is very vague. In the Japanese Criminal Law there is a special procedure called "simplified procedure." This is a system in which the accused is not present but a fine is declared merely based upon the indictment of the prosecutor. Even if a court was not held, there is no difference in a trial being a trial. Trial is an act to decide under a certain procedure a finding of guilty or not guilty, in a certain crime. It cannot be concluded that a trial was not held because the American type of court was not held. Even if there were a defect in the procedure of an agency which had legitimate jurisdiction over a certain crime, when it gave out a decision, I believe we could not say that no trial whatsoever was held.

There can be no question that a certain procedure was held between the time MASUDA ordered the investigation until the judgment papers were formulated. Whether this is called a trial or not, rests entirely upon the interpretation of the word trial. And we consider it as a trial.

What we should interpret at present is not whether we call this procedure trial or not, but whether from the point of view of Criminal Law, particularly Japanese Criminal Law, FURUKI, who acted as judge advocate in this procedure and who executed the death sentences ordered by MASUDA, is responsible or not; the question whether this act constitutes a crime that violates Article 199 of the Japanese Criminal Law.

Article 35 of the Japanese Criminal Code provides: "Acts done in accordance with laws and ordinances or in pursuance of a legitimate business (or occupation) are not punishable." This article implies that when law provides that a certain act is a right or an obligation then that act is not a crime. For example the carrying out official business falls into this category. The execution of official business is classified into (1) that done by superior order and (2) that under one's rights, but neither constitutes a crime. For instance, Article

199 of Japanese Criminal Code provides "Every person who has killed another person shall be condemned to death or punished with penal servitude for life or not less than three years." When we only read this article the impression might be that when a person kills another person whatever the case might be it constitutes murder. For example it would be misleading to think even when an executioner executes the death penalty and kills another person that his act would constitute a crime of murder. But, this execution of the death penalty is carrying out official business; therefore, according to Article 35 of the said Code it is an act in accordance with laws and ordinances and not punishable. Why do not acts in pursuant of official business constitute crimes? The answer is because unlawfulness does not exist in the act.

V

With the permission of the commission I would now like to explain the system of Japanese Criminal Law. The case law system is not adopted in Japan but as a rule the statute law principle has been used. Therefore, the Japanese Criminal Code is a statute law. But the cases of the Supreme Court have been given considerable weight and significance and have influenced the interpretation of the acticles of the Criminal Law. The Japanese Criminal Code is divided into Book I, General Provisions and Book II, Crimes. In Book II, entitled Crimes, the types of crimes are abstractly set forth and the maximum and minimum punishment or penalty imposed when the provisions are violated are set down. In Chapter 7 of Book I, General Provisions, articles which stipulate the conditions of non-constitution of crime and mitigation of punishment are set forth. What is non-constitution of crime? The form of act first comes under each specific article provided in Book II, Crimes, but when it is not unlawful and/or when the responsibility is not recognized then in either case or both, it does not constitute a crime. In the Japanese Criminal Code, Article 35, concerning acts done in accordance with laws and ordinances or in pursuance of a legitimate business (or occupation),. Article 36 , concerning self-defense, Article 37, concerning flagrant necessity, are cases in which crime is not constituted because the act is not unlawful.

Furthermore, Article 38, paragraph 1 provides: "Except as otherwise provided by special provisions oflaw, acts done without criminal intent are not punishable." Which means there is no responsibility when there is not criminal intent or malice; also, except when there are special provisions of law provided that acts done by accident are

punishable even if criminal intent and malice do not exist. Article 38 paragraph 2 provides for "mistake of facts" and paragraph 2 for "mistake or ignorance of law." A great part of the theory and principle of Criminal Law lies in how the above-mentioned 4 articles are interpreted, and most of the judicial cases are related to the interpretation of the 4 articles mentioned.

Thus, if we were to define crime from this system of Criminal Law it would read, crime is an act in which there is responsibility and unlawfulness corresponding to each specific provision in Book II entitled Crime. Therefore, for example, acts violating Article 199 do not merely mean acts which caused any persons death but only acts of killing for which there is unlawfulness and responsibility. When a executioner executes a death penalty and kills a person, it is an act in accordance with law mentioned in Article 35; and it is not unlawful. Therefore, it does not constitute a crime. When a person kills another person accidentally, it is an act "without criminal intent" provided in Article 38 paragraph 2 and because there is no provision to punish mistakes, such an act is completely without responsibility, hence it does not constitute a crime.

The defense holds that the accused is not guilty because his acts were done in pursuance of official duty. As I have stated above, the court martial specially established by MASUDA in the instant case is a lawful one. Therefore, the members of the court martial on Jaluit were carrying out their official duty. FURUKI, the accused, was ordered to carry out his duty of judge advocate by MASUDA who convened the court martial. FURUKI was legitimately appointed and his duties as judge advocate was an exercise of official business. He only stated his opinion as the judge advocate concerning the punishment. He had no concern with the verdict of the judges. After the judgment paper was made, MASUDA ordered FURUKI to carry out the execution of the death sentence. Then, MASUDA, in the capacity of President of the specially established court martial, ordered the execution of sentence, and it was quite natural that FURUKI was ordered to carry out the execution because he was the judge advocate. It is the duty of judge advocate to take charge of the execution of the sentence. As I have stated before, it is also lawful that the execution was ordered as soon as the pronouncement of sentence without allowing appeal or permission of the Navy Minister. The sentence was made also with proper jurisdiction over the offenses of the natives. Therefore, the judgment was also proper. Even though there were defects in the court procedure until the announcement of sentence, the sentence was no in any way invalid. It is a valid

sentence in form. Therefore, the acts in execution of the sentence are definitely the acts in pursuance of official duty. Therefore: the acts do not constitute crimes according to the Article 35 of the Japanese Criminal Code. I think in the cases of American law the same interpretation is made.

For instance, Wharton's Criminal Law states as follows: (Wharton's Criminal Law, Volume I, Section 529).

"and if there be no jurisdiction in the court by whom the warrant is issued, the offense is murder, even though the officers charged honestly believed in the validity of the warrant, though it is otherwise when the warrant is irregular from some merely formal defects."

Generally, the word trial is a very vague and ambiguous word. The impression which the American and English people receive from this word "trial" may considerably differ from that of the Japanese people. Moreover, there is a great difference between the American trial procedure and the Japanese. We must not confuse "trial" with "court." As a matter of fact, in Section 3 of Chapter 1 of the Naval Court Martial Law the word "trial" is construed as the consultation of the judges. In Article 95 of the said law provides "Trial is done by the consultation of a fixed number of judges." It does not mean to hold a law court and investigate. Therefore, even though we insist that there was a trial concerning these native criminals, a person with a different conception of trial will contend that there was not and will contend that the act of the accused is not in accordance with law or ordinance or in execution of law, because there was no trial.

Granting that there was no trial, I would then rebut by the theory that there was no criminal or malice intent to violate Article 199 of the Japanese Criminal Code. It would not be difficult to prove the innocence of the accused FURUKI by resorting to the theory of Japanese Criminal Law and cases and explaining the instant case. But I regret that when I asked the accused FURUKI when he took the witness stand the question "When Masuda told you that under the present pressing battle situation a regular procedure of Court Martial cannot be held, so by his authority he would conduct a trial of the native criminals under special procedure, at that time did you think that a trial by such a procedure was illegal"; this question was objected to and sustained by the commission. Because of this objection, I was not able to probe into the mental state of the accused at that time. What

did the accused think about this procedure? By believing the words of his senior officer, MASUDA, was there a mistake or defect in acknowledging the illegality of the procedure? Did he think this simplified procedure could not be helped under the actual condition on Jaluit at that time? Thus, we were not able to learn the state of mind of the accused.

At this time I would like you to take special note of the following. The statement which the accused submitted to an American judiciary officer has been introduced into evidence by the judge advocate as the accused's admission or confession. The statement is dated December 3, 1946. The accused states in his statement that he was ordered by the C. O. of the Jaluit Defense Garrison, Admiral MASUDA, to execute the death sentence pronounced by him concerning the native criminal. By this order he had shot and killed the natives in this case. This statement was written prior to our talk with the accused.

This act of shooting and killing does not constitute a crime because it was an act of executing the death decision. As I have reiterated before, this statement of the accused stating that the shooting and killing was an act in executing the death judgment shows that the accused did not have a criminal intent of murder. It is a denial of criminal intent or malice of murder. Therefore, this statement stating that the accused shot and killed as an act of executing the death judgment, should not be taken as an evidence of murder. Homicide as an act of executing the death judgment is, as I have explained before, an act in accordance with law and ordinance or in pursuant of legitimate occupation (or business) in the Japanese Criminal Law. Such homicide is not illegal. It is a justifiable act. It does not constitute murder. Therefore, in order for an act in execution of a death judgment to become an act of murder, it must be proved that he knew the death judgment was illegal and invalid and he had intended to use the death judgment and killed a person.

If I should speak from the view of theory of criminal intent in Japanese Criminal Law, what we should note is, even if the death judgment had been illegal, if the executioner, the accused in this case, was not aware of its illegality, the we cannot acknowledge that he had criminal intent. It is not allowed to force the acknowledgment of criminal intent from the accused by saying that he should have known it was illegal. Then, in spite of the fact that he could have known about whether the judgment was illegal or not, if he had taken due caution and he did not know because he was careless, in this case it is only negligence. According to Article 38, this does not become criminal intent. Concerning this point, the Judge Advocate has on one hand submitted this statement as the accused's confession but has not presented any evidence whatsoever to prove the existence of criminal intent of murder. I would

like your special attention on this point.

However, I request you to pay attention to the following:

Such terms as "judgment paper" or "execution of sentence" are the ones which have a connection with the trial. Such words as "sentence was announced", "death sentence was announced" or "the sentence was executed" will naturally remind us of the existence of the trial behind the words. As I have pointed out before, the term "trial" is a vague one. Those who are not familiar with the law will think that the trial means the one in an open court. If such people say that there was no trial, it is not the evidence that there was not a trial in fact. When the trial systems of two countries differ from each other, it is not admissible to judge the existence of the trial of another country by the conception of the trial of one country or by common sense.

I shall add a few words. One thing for which I felt very sorry was that the Judge Advocate stated in his opening argument with slanderous expressions as "the special procedure which is nothing but a fantastic story of the defense." Such an adjectival phrase is never used in the Japanese court. If he thinks that the witnesses are liars or fantastic, he must show it by facts or by evidence. But he never has shown the fact and only debated by using adjectives and blamed his rival. It is inadmissible to do in such a way in a criminal court.

Also in Japan, discussions concerning the theory of criminal intnet are extensive and profound.

After all, the progress of the theory of criminal law is an attempt to try to understand practically and scientifically human nature and the limitation of human ability. I am fully convinced that the accused is not guilty. Frankly speaking, I do not want to assume the attitude of arguing by reason to settle this issue. But this does not mean I am claiming his innocence because of the war conditions, as the judge advocate stated in his opening statement.

I shall now read Article 17 and 18 of the Naval Criminal Code (the same provisions are found in the Army Criminal Code)

"Article 17. The action which has been done in order to quell the people who used violence, or to keep the naval discipline in face of the enemy or when the ship is in danger, shall not be punished.

"When the action was beyond moderation, the punishment for it shall be able to be taken after the extenuating circumstances are taken

into consideration, and it may be reduced or exempted.

"Article 18. The previous article shall also be applied to actions prescribed as crimes in the Naval Criminal Law or other laws or ordinances."

This means, for example, if killing of a person is unavoidably committed in the face of enemy in order to maintain military discipline, it will not be punished as murder.

This provision was not added to the Naval Criminal Code, after FURUKI was accused. Nor, am I convinced that the accused is not guilty by applying this provision. What I want you to note is that, even under such conditions as Article 17, a killing of person is not punished. Conditions on Jaluit at that time were not as easy to describe by the terms "in the face of the enemny and in order to maintain military discipline." They were much more serious. FURUKI and the men of Jaluit did not go to Jaluit in order to commit robbery as the Judge Advocate expressed it. He was sent to a solitary island in the South Seas far away from Japan, and was living there for about two years without any supply or help from his fatherland just as if he had been living in a living hell. Theliving conditions of the military men on Jaluit at that time was just as I have stated before. I hope you will well understand that, even in such conditions, the utmost careful attention was paid for dealing with the offenses of natives. I have already shown to you Articles 17 and 18 of the Naval Criminal Code as provisions on which to base an acquittal of the accused. I maintain that the first charge in not proved, therefore he is not guilty.

I shall state my opinion about Charge II.

I think it was a mistake or a serious misinterpretation of Article 30 of The Hague Confention to have initialed the case of Marshallese natives as a war crime, especially as the violation of Article 30 of The Hague Convention.

It is clear without a doubt that "a spy" provided in Article 30 of The Hague Convention means the spy of a hostile or neutral power. It is simply natural that, if a person spies against his own country, the country may naturally punish the spy who is its citizen in its own court according to the sovereignity of the country. It is also natural in all the civilized countries of today to punish a criminal with previous trial. It is unnecessary to protect their right to trial by taking the trouble of citing Article 30 of The Hague Convention.

I have already stated the relation between thenatives of the Marshalls at the time of this case and the sovereignity of the Japanese Empire. Natives of the Marshall Islands who were in the mandated territory of the Japanese Empire were subjected to the sovereignity and the judicial authority of the Japanese Empire. Therefore, if these natives acted as spies against the Japanese Empire for the benefit of foreign country, it was natural that these natives, regardless of whether or not they were caught in the act, had to be tried in the Japanese Court or had to be tried before they were punished as spies. Therefore, even if they are punished without previous trial, it will not cause an international problem. It is only a domestic problem. It can not by any means be considered as the violation of Article 30 of The Hague Convention.

The judge advocate, in his opening argument, stated that according to the testimony, MASUDA had said that natives who had deserted to the enemy would have given our information to the enemy. But a spy as defined in Article 29 of The Hague Convention is of narrower range than the spy provided in the domestic law of every country. A spy in The Hague Convention means a person who obtains or endeavors to obtain informatinn in the zone of the belligerent. To divulge to the enemy information which he happened to know is not spying as stipulated in Article 29 of The Hague Convention. Considering these points, I cannot help thinking that the prosecution misunderstood the provisions concerning the spy in Articles 29 and 30 of The Hague Convention.

There may be an interpretation which admits that Article 30 of The Hague Convention is applicable to the natives in the Japanese mandate. Even when such an interpretation is admissible, the act of FURUKI does in no way violate the laws and customs of war, because these natives were executed with previous trial as I have stated. "Trial" in Article 30 of The Hague Convention has a very broad meaning. It is the today's interpretation of the international law that it is proper to try a spy in military court of the country which arrested the spy or in any court of the country which arrested the spy or in any court which the country may determine.

In conclusion, I reiterate that the accused is not guilty for this charge under the following reasons:

1. It is not proved that the executed natives were spies under the definition of that and stipulated in Article 29 of The Hague Convention.

2. Those who were executed were the natives of the Marshall Islands who were at that time in the Japanese mandate, had the same status as Japanese and were under the sovereignity and the judicial power of Japan. Therefore, Article 30 of The Hague Convention which limits the punishment of the spy of other nation as a war crime, cannot be applicable to the natives of Marshall Islands of this case.

3. The natives of this case were put on trial in the wide sense of the word.

The accused FURUKI's mind today is peaceful and clear as a mirror. The accused will not evade what responsibilities that he should shculder. He does not fear anything. I believe it is only the dishonor of having been convicted of murdering the natives that he most fears. In closing my argument, I request your righteous judgment and request you to find the accused not guilty.

SUZUKI, Saiso

Certified to be a true and complete translation to the best of my ability
Eugene S Kennedy Jr
Lt USNR

"GG(27)"

Carlson
HH(1)

FINAL ARGUMENT FOR THE DEFENSE

of

MAJOR FURUKI, HIDESAKU, IMPERIAL JAPANESE ARMY

delivered by

COMM'ANDER MARTIN E. CARLSON, USNR

at Guam, Marianas Islands

on April 16, 1947.

Gentlemen of the Commission:

This present case is an application of international law as regards the jurisdiction of nationals. This case should decide whether one nation can try a citizen of another nation for an alleged crime committed in violation of the criminal code of that other nation within the territorial jurisdiction, and upon the sovereign soil of that other nation.

The accused, Major Furuki, Hidesaku, is an officer of the Imperial Japanese Army. The people of the United States of America charge him with murder of certain native inhabitants of the Marshall Islands on the atoll of Jaluit.

Jaluit was mandated to Japan by the Treaty of Versailles on June 28, 1919, and in accordance with the terms of the mandate reported to the League of Nations. The United States of America was not even a member of the League of Nations. Jaluit was not American soil. It was clearly part of the Japanese Empire in 1945, legally and as a matter of fact. It was decided to bring charges against Major Furuki on February 24, 1947, and try him before this military commission on March 1, 1947. This was and is error.

The protection of citizens abroad is a legal subject. The protection of Major Furuki, Imperial Japanese, Army, is a legal matter. It must be decided by Constitutional and International Law. The founders of the government of the United States of American in the preamble of the Constitution said: "We the people of the United States, in order to form a more perfect Union, establish justice, ... and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of

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America." By article three, the judicial power of the United States was vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. Courts of the United States are therefore independent of the executive and legislative branches of the United States Government. Section D-13, Appendix D, of Naval Courts and Boards states that "These exceptional military courts derive. . . . their sanction from the laws of war. . ." This military commission is however, both judge and jury. You must determine the law, arrive at the facts in the case, and apply the ruling law to the facts and thereby reach a finding.

Since March 1, 1947, you have listened to evidence most all of which you decided was relevant to the issue. Are you still of the same opinion as you were when you decided that you had jurisdiction to try Major Furuki, Imperial Japanese Army?

We most respectfully call your attention to the evidence which has been introduced and which proves that Major Furuki, the accused, is a citizen of Japan; that the acts alleged took place on Jaluit Atoll in the year 1945; that Jaluit was mandated to Japan by the Treaty of Versailles in 1919; and occupied since that date by Japan; that in 1945, Jaluit was a besieged area to the extent that martial law was to all intents and purposes the law in effect on Jaluit, during the year 1945 (all civilian government was abolished and the functions of civilian government taken over by the military); that civilians on Jaluit were amenable to the military law and that the natives of Jaluit had as a matter of fact all the responsibilities of Japanese citizens in a besieged area and were by proclamation duly published guaranteed the rights of Japanese citizens particularly as to the protection of life and property. Several witness testified as to this proclamation.

This proclamation also stated that anyone on Jaluit who did not comply with and obey the orders of the military commander would be severely punished. This clearly proves that martial law was in effect on Jaluit in the year 1945.

An argument cannot be made a vehicle of getting evidence before the court. It is not evidence.

The Japanese Martial Law statute was not admitted into evidence but Rear Admiral Arima, defense witness, testified in answer to Q. 17 on the 18th day: "The gist of it was that the senior commanding officer of each Marshall base shall command it." Admiral Arima was testifying regarding the order sent out by the commanding officer, Fourth Fleet to the commanding officers of the Marshall Bases.

"HH(2)"

In reply to Q. 24 on the 19th day, Admiral Arima answered: "24.Q. Do you know martial law?" "A. I do." Q. 31 to Admiral Arima was: "In your capacity as chief of staff, Fourth Fleet, do you know whether martial law was in effect on Jaluit in 1945?" Answer: "In 1945, I was not in Truk, therefore, I do not know." "40. Q. In your capacity as a Japanese Naval officer and particularly as chief of staff, Fourth Fleet, do you know whether Jaluit was a besieged area in 1945?" Admiral Arima answered this question as follows: "As a Japanese Naval officer this was common knowledge."

Admiral Arima was not the only witness that testified along these lines. All witnesses testified that Jaluit was a besieged area in 1945.

The Japanese Martial Law statute has not been admitted into evidence and this argument is in no way evidence or is it the purpose of this argument to in any way to get the Japanese Martial Law statute in evidence.

The commission carefully considered whether or not to admit this Japanese Martial Law Statute into evidence but decided not to do so.

We have only to look at the Japanese Martial Law statute however and we see that martial law although not proclaimed was the law by which Jaluit was being administered during all those months when American fofces used Jaluit as a "sitting duck" target for bombings b y planes and ships. In Japan on August 5, 1882, Dajokan (prime minister) issued a proclamation Number 36.

Article 1 of this proclamation reads: "Martial law is a law to maintain order of the whole country or a district by military forces in case of war or emergency."

Article 2. "There are two types of area under martial law: one war area and another besieged area. (1) War area is a place marked out to be guarded in case of war or emergency. (2) Besieged area is a place marked out to be guarded in case of siege or attack of enemy of other emergencies."

Article 6. "Following officers are empowered to enforce martial law: army commander, division commander, brigade commander, fortress commander, garrison or detachment commander, or commander-in-chief of fleet, fleet commander, naval station commander, or specially appointed commander."

Article 7. "When martial law is proclaimed it shall be reported to the 'Dajokan' (prime minister) together with the situation and reason for it. But it shall be reported separately to the Chief of the district which the area belongs."

Article 9. "In a battle area, authority concerning administrative and judicial affairs related only to military affairs shall be intrusted to the commanding officer of the area. Therefore, when martial law is proclaimed or declared, district governor, district court official, and judge advocate shall immediately come under the command of the commanding officer of the area."

Article 10. "In the besieged area, administrative and judicial affairs shall be under the charge of the authority of the commanding officer of the district. Therefore, district governor, district court officials, and judge advocate, in case of proclamation or announcement of martial law, shall immediately come under the command of the commanding officer."

Article 11. "In a besieged area, civil cases related to military affairs and persons who have committed the following crimes shall be tried in a military court.

Part II Criminal Law.
Chapter 2. Crimes relating to national affairs.
Part III Book 1.
Chapter 1. Crimes of manslaughter and murder.
Chapter 2. Crimes of wounding and battery.
Chapter 7. Crimes of intimidation.
Book 2.
Chapter 2. Crimes of robbery.
Chapter 8. Crimes relating to intimidation.
Chapter 9. Crimes of overturning vessels.
Chapter 10. Crimes of destroying building, properties, and mistreating animals and vegetables."

Article 12. "If there is no court in the besieged area or communications are cut off from the court which exercises jurisdiction over the area, all civil or criminal cases shall be tried in military courts."

Article 13. "No appeals for retrial are allowed in a trial by a military court in a besieged area."

What else could the words "severely punished" mean than that civilians were to be punished in accordance with the provisions of martial law.

"HH(4)"

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HH(v)

We have proved and it is common knowledge that Jaluit was a besieged area in 1945.

The Japanese have a Naval Court Martial Law and a Naval Criminal Law. Both these laws were applicable to citizens in as for as none of the provisions were invalidated by the provisions of martial law. And it is no answer to say, "But Martial Law was not proclaimed on Jaluit." Any reasonable prudent man will arrive at only one conclusion as he considers the facts in the case of Jaluit in 1945 and that is that martial law was in effect at Jaluit.

This argument is not evidence.

The Martial Law Statute was not admitted into evidence.

Neither were the Penal Regulations of the Combined Fleet admitted into evidence. Available witnesses could not or were not allowed to give their opinion as to whether these Penal Regulations were in effect on Jaluit in 1945. Remember, therefore, that these Penal Regulations are not in evidence.

Let us however look at the Penal Regulations of the Combined Fleet, 20 December 1941 (Secret Ordinance of the Combined Fleet, No. 69) (Commander-in-Chief of the Combined Fleet).

Article 1. "This regulation shall be applied to the people other than Japanese subject in the occupied territory of the Imperial Japanese Navy."

Article 2. "Any person who commits the following acts shall be punished by military forces.
(1) hostilities against the Japanese forces.
(2) breaking of public peace of Japanese forces or disturbance of military operation committed by those other than military personnel.
(3) disturbance of tranquility of the occupied area or mischievousness against the benefits of the Japanese forces other than in the above two paragraphs. Incitement, aid, preparation, plot, or attempt of the above mentioned acts shall be punished. . ."

Article 5. "Punishment by the military forces will be classified as follows:
(1) death.

"HH(5)"

Article 6. "The execution of death sentence shall be carried out by shooting."

"Additional Rule: These regulations shall be enforced from 8 December 1941."

Can any reasonable man say that these regulations were not applicable and in full force and effect on Jaluit in 1945.

We could not get these Penal Regulations into evidence in the way we tried to do so because of the objections of the judge advocate. Under the circumstances there is no one avaiable who can really testify that he knows of his own knowledge that these Penal Regulations were in effect on Jaluit. The only one who could really have spoken with authority was Admiral Masuda and he is dead.

The accused is an Army officer and although his opinion could well have been heard on this subject, questions regarding this were put to the accused as a witness on the 22nd day with questions 152 and 153 but the judge advocatedobjected to the questions and all other questions pertaining to these Penal Regulations and it was therefore impossible to get the Penal Regulations into evidence. They are not evidence in this case. Yet, the accused, Major Furuki, Imperial Japanese Army, is charged with a crime in violation of effective law especially article 199 of Criminal Code of Japan. Since the accused is charged with a violation of Japanese isn't it relevant and material to know and must not the commission know what Japanese law is if they are to judge fairly?
If the commission does not know Japanese law well they cannot decide from the facts if certain Japanese law were the law on Jaluit.

The accused, Major Furuki, Imperial Japanese Army, is charged with murder of thirteen native inhabitants of the Marshall Islands. In my plea to the jurisdiction I cited the Raymond Fornage case. From this case I quote:

"The right to punish has no foundation except the right of sovereignty which expires at the frontier. . . . But the law cannot give to the Frenchtribunals the power to judge foreigners for crimes or misdemeanors committed outside of the territory of France; that exorbitant jurisdiction, which would be founded neither on the personal statute nor on the territorial statute, would constitute a violation of international law and an attempt against the sovereignty of neighboring nations. . . When a crime has been committed outside of the territory by a foreigner the culprit is not subjected by that

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act of the French law; the French tribunals have no jurisdiction over him; the incompetence is radical and absolute. The criminal court, in punishing the act, would commit an abuse of powers; it would usurp a right of sovereignty appertaining to a foreign power."

The facts in the Fornage case are analagous to the facts in this present case,

This case of Furuki was referred to this Military Commission by the Commander Marianas Area on February 24, 1947, reference Serial 3786, file reference A16-2/FF12 over 13-JDM-ro.

The case of Fornage was referred to a court of assizes by a judgment of the chamber of indictments but the court of cassation or Supreme Court of France at Paris in 1873 said: "Courts of assizes, being invested with full jurisdiction in criminal matters, can, without committing any excess of power and without transgressing the limits of their attributes, take cognizance of all acts punished by the French law; but this jurisdiction, however general it may be, cannot extend to offenses committed outside of the territory by foreigners, who by reason of such acts, are not justiciable by the French tribunals; seeing that, indeed, the right to punish emanates from the right of sovereignty, which does not extent beyond the limits of the territory, that except in the cases specified by Article 7 of the Code of Criminal Procedure, the provisions of which is founded on the right of legitimate defense, the French tribunals are without power to judge foreigners for acts committed by them in a foreign country; that their incompetence in this regard is absolute and permanent; that it can be waived, neither by the silence nor by the consent of the accused; that it exists always the same, at every stage of the proceedings. . . . Annul, etc."

Our own Supreme Court in 1824 in the case of Appolton, 9 Wharton 362 held: "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its osn jurisdiction."

We said the Furuki case was analogous to the Fornage case, yet it is also different. In the Furuki case, the accused, Major Furuki, is charged with killing thirteen persons, native inhabitants of the Marshall Islands in violation of effective law, especially article 199 of the Criminal Code of Japan which reads in tenor as follows: "Every person who has killed another person shall be condemned to death or punished with penal servitute for life or not less than three years."

"HH(7)"

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HH(viii)

My associates, Mr. Akimoto, Yuichiro, and Mr. Suzuki, Saizo, have both shown that there is neither jurisdiction tp try Major Furuki nor is the crime alleged in Charge I in violation of effective law especially Article 199 of the Criminal Code of Japan.

Section D-13, Appendix D, Naval Courts and Boards, states "These exceptional military courts unlike the court-martial, derive their sanction from the laws of war and not from the enactments of Congress." Our question then is, What are the laws of war that give sanction to this court to try the accused, Major Furuki, for an offense said to be in violation of the Article 199 of the Criminal Code of Japan and second for the same identical offense but described under Charge II as punishing as spies by killing native inhabitants of the Marshall Islands, "this in violation of the laws and customs of war."

We objected to all specifications under Charge II because the specific laws and customs of war were not set forth verbatim as required by section 27, Naval Courts and Boards. We are still not sure what the laws and customs of war are that the accused Major Furuki violated when he was ordered by the Atoll Commander, Admiral Masuda, to carry out his duties as a judge advocate and to execute by shooting the native inhabitants guilty of criminal acts in the face of the enemy.

Section 333, Naval Courts and Boards, states that "under the laws or war and the provisions of the Geneva (Prisoners of War) Convention of 1929, prisoners of war are subject to the jurisdiction of a naval court martial." Article 45, Prisoners of War, Geneva (Prisoners of War) Convention of 27 July 1929 reads as follows: "Prisoners of war shall be subject to the laws; regulations, and orders in force in the armies of the detaining power." /Reference to section 333 NC&B is apparent misquote/

We hold, however, that this does not give this commission jurisdiction to try a Japanese national for an alleged crime committed on Japanese sovereign soil against native inhabitants of this same area over which Japan ruled supreme, and during a war, and at a time when the island atoll of Jaluit was a besieged area. It certainly can confer no jurisdiction on this Commission to try the accused, Major Furuki, for a violation of a Japanese Law, Article 199 of the Criminal Code of Japan.

Under Charge II it is alleged that the native inhabitants were punished as spies. The judge advocate has failed to ppove that any of the thirteen victims were spies.

Section 194 Naval Courts and Boards states: "Burden of proof. The law presumes every man innocent of crime. The prosecution has in each case the burden of overcoming this presumption. The accused's guilt must be established by substantive proof. By the plea of not guilty , every element of the crime specified is debated, and the prosecution must affirmatively prove it, even though it be a matter of negative averment in the specification, proof of which is peculiarly within the knowledge of the accused. The burden of proof never shifts to the accused. It is immaterial that the accused sets up a defense by way of justification or excuse, as insanity, or an alibi."

This is so fundamental that it seems unnecessary to remind the commission. However, since it was alleged that the victims were punished as spies, then it must be proved by the accused. Chapter 2, Laws and Customs of War on Land, Hague Convention IV of 1907, Annex to the Convention, Chapter II, Spies, Article 29 reads:

"A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party." Since the prosecution alleged that Major Furuki punished the natives as spies, the prosecution must prove that allegation.

The commission is reminded that Article 4, United States Navy Regulations, 1920, provides: "The punishment of death, or such other punishment as a court-martial may adjudge may be inflicted on any person in the naval service:"

(1) Who makes or attempts to make, or unites with any mutiny or mutinous assembly, or being witness to or present at any mutiny, does not do his utmost to suppress it; or knowing of any mutinous assembly, or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer;
(2) Or disobeys the lawful orders of his superior officer;
(3) Or strikes or assaults, or attempts or threatens to strike or assault, his superior officer while in the execution of the duties of his office;
(4) Or gives any intelligence to, or holds or entertains any intercourse with an enemy or rebel without leave from the President, the Secretary of the Navy, the Commander in Chief of the fleet, the commander of the squadron, or in case of a vessel acting singly, fromhis commanding officer;

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HH(x)

(6) Or in time of war, deserts or entices others to desert;
(7) Or, in time of war, deserts or betrays his trust, or entices or aids others to desert or betray their trust."

Article 5 reads: "All persons who, in time of war, or of rebellion against the supreme authority of the United States, come or are found in the capacity of spies, or who bring or deliver any seducing letter or message from an enemy or rebel, or endeavor to corrupt any person in the Navy to betray his trust, shall suffer death, or such other punishment as a court-martial may adjudge."(R.S., sec 1624 art. 5.)

We note that the United States laws provide death as the penalty for the above offenses in the descretion of the court. But these are United States laws you say and the accused is a Japanese Army officer who punished Japanese subjects for crimes committed against Japan in the face of the enemy.

Article 20 Part II of the Japanese Criminal Law provides "Those who have formed a clique and have been in arms engaged in rebellion shall be condemned as follows:

1. The leader shall be condemned to death.
2. Those who have been engaged in the plan or led a crowd shall be condemned to death, or to life term or above five years servitude or confinement."

Article 21. "Those who have with the purpose of starting rebellion formed a clique and stolen arms, ammunition and other munitions shall be condemned according to the previous article."

Article 22: "Those who have done the following action shall be condemned to death. . . .

2. To spy for the benefit of the enemy or help the enemy's spy.
3. To give the naval secret to the enemy. . . . "

Article 23. "Those who have done the following action for the benefit of the enemy shall be condemned to death. . . .

6. To inform or make false orders, information or reports.
7. To spread false informations or to make uproars in the face of the enemy."

Article 24. "Those who have given naval facilities to the enemy or injured the Japanese Navy with ways other than those stated in the foregoing two articles shall be condemned to death, or life term or above five years imprisonment."

"HH(10)"

Article 25. "Those who have done the action of the above three articles for the benefit of those who have raised rebellion or civil war shall be condemned to death, or life term or above three years imprisonment or confinement."

Article 25. " The attempted crimes of the above six articles shall be punished."

That is the pertinent Japanese Naval Criminal Law. Article 17 of that same law protects persons who enforce the law because it provides:

"Article 17. The action which has been done in order to quell the people who used violence of to keep naval discipline in face of the enemy or when the ship is in danger, shall not be punished."

The prosecution have failed to show in a single instance any provisions in The Hague Convention, the Geneva Prisoners of War Convention, of the Geneval Red Cross Convention which provides punishment by a victorious belligerent over an individual of the vanquished power for the action he took in order to quell the people who used violence in the face of the enemy or carried out the orders of his superior ufider such circumstances.

Since the prosecutinn charge violation of the laws and customs of war it is incumbent upon them to state this law and to cite cases.

During the First World War, Germany confiscated French and Belgian machinery. Actions for the receipt of stolen goods were instituted against Rhenish entrepreneurs who were in possession of the machinesy The most sensational case that of Robert and HermannRöchling, leading industrialists of the Saar Basin, were indicted for having transferred 8,000 tons of machines and materials from French factories to their own enterprise.

Reading from Ernst Fraenkel's book, "Military Occupation and the Rule of Law" page 59, Prosecution of War Criminals:

"Roberts defense, that he had acted on command of superior authorities, was rejected by the French military tribunal in Amiens which tried the case (Journal du drost international, 1921, vol. 48, pp. 363-363). The looting of foreign factories for one's own benefit was considered to be punishable, even if it had been done on the command of superiors; the Röchling brothers were considered to have acted not as soldiers but as industrialists. It is worth emphasizing, however, that

in a total war, where there is no clear line of demarcation between military and industrialist activities, any distincion between non-military persons and soldiers, in regard to the recognition granted the respondent superior defense may lead to very arbitrary results. Robert and Hermann Röchling, the latter in absentia were sentenced to ten years imprisonment and a fine of ten million francs (Grimm, pp. 58 ff.) but the decision of the Amiens court was revised, on appeal, by the superior military tribunal in Nancy. The reversal, according to the French writer (Cardoux, p. 459), was motivated by the fact that the responsibility for the incriminating acts--however verified and vile these were--rested on the German authorities whose orders were executed by brothers as officers.

"Almost all the leading Rhenish industrialists were in danger of criminal prosecution for possession of French of Belgian machinery and after several others had been arrested, the German government asked R von Hippel, the Gottingen professor of international law, to prepare a memorandum on the legality of the German measures and of the arrest of German managers for the purchase of such machines. Von Hippel (whose memorandum was published in 1920 in Niemeyers Zeitschrift Lür internationales Recht, vol. 28, pp. 183-206), contended that the German military authorities had exercised the right of eminent domain in the occupied Belgain and French territories, with respect to all property that they considered essential for the pursuit of the war. He admitted that no exception had yet been recognized to the rule of international law according to which the private property of the residents of an occupied territory should be protected. He maintained, however, that such protection should be granted only under the same reservations that The Hague Convention (Article 23g) stipulates in regard to private property in an area of actual fighting, since urgent necessities justify infringements of property rights in an occupied as well as in a fighting zone. This principle, he said, was particularly applicable to the german confiscation of Belgian and French machines, because Germany, under the British blockade was in a 'state of distress' (Notstand), and was entitled to take all measures necessary to overcome it. Von Hippel concluded this section of his memorandum with the words (p. 94) that such procedures as those against German industrialists, " which may prove basic significance in the future, can hardly be reconciled with the true French interests. France would implicitly deny that in case of war, recognition whould be granted to a right of distress, aimed at the preservation of (the nation's) existence, and thus would create a precedent which might be applicable to herself in the event of a future war." At the time this memorandum was presented to the victors of the

war, the peace treaty had not yet been signed.

"From the point of view of criminal law, von Hippel denied that the French had jurisdiction in regard to crimes committed by Germans in Germany, even if French interests were violated. (Cf. the Cutting case, in which the government of the United States denied the rights of the Mexican Government to punish an American citizen for having insulted a Mexican citizen on American soil (Moore Digest, vol. 2, p. 233). This contention raises the question of evidence, which was almost as difficult in the confiscation cases as in the more general war-criminal cases, though for quite different reasons. The military authorities in the Rhineland followed the principle that possession of such machines was sufficient to subject the holder to the suspicion that he had violated the criminal provisions on receiving stolen goods. But if the defendant declared that he had bought the machines on German territory it was almost impossible for the prosecuting government to refute his statement. And von Hippel had a strong argument in his favor when he said that the French had no jurisdiction in criminal cases of this kind if the crime was committed in Germany. Neither French nor German law permits the prosecution of a foreign subject for a crime violating individual rights of nationals if the crime was committed on foreign territory--though both permit such prosecutions if the crime was an attack on the security of the state. In an article on the German confiscations, published in 1919, Nast explicitly stated ('Les sanctions penales. . .' pp. 120, 127) that criminal prosecution for the purchase of stolen goods was out of the question if the goods had been acquired on German territory. Actually, all evidence difficulties concerning the Rhenish industrialists could have been overcome by applying the maxim res ipsa loquitur, but this was impossible so long as the 'territorial' principle was adhered to.

"In a conference in Brussels, on 23 March 1919, the Industrial Sub-Committee of the Inter-Allied Armistice Commission decided to abstain from further criminal prosecution of Germans who had benefited from the looting of Belgian and French factories, provided that German enacted a statute permitting the return of the material. Such a statute was enacted on 28 March (Reichsgesetzblatt, 1919, p. 349), and thereafter, in accordance with orders of Marshall Foch, proceedings were instituted only against persons who had not declared or had destroyed the confiscated material (Nast, 'L' occupation. . . .' p. 157; Der Waffenstillstand, vol. 3, pp. 99-103; vol 2, ppl 265-331). The material returned to Belgium and France during the armistice period alone amounted to 164,000 tons, with a value of 135,000,000 gold marks (Der Waffenstillstand,

vol 2, p. 331). The delicacy of the whole problem is indicated in the fact that on several occasions German workers threatened to demolish the machines rather than see them removed (Hunt, p. 233).

"The Brussels decision represented a German victory in the war criminal question. The available sources do not reveal whether the occupying powers were unable or unwilling to overcome the legalistic objections that were used as justification for the gesture of conciliation. Shortly afterward, the occupation authorities extended their lenient attitude from the criminal to the administrative side of the looted-machinery problem. On the ground that many of these machines were in the hands of 'virtually innocent purchasers' they decided to apply 'business arrangements' rather than arbitrary 'methods to the question of retransfer' (Allen, Occupation, p. 67.).

"Although the Reich was compelled to return the confiscated machines to Belgium and France, the Germans clung to the theory that because of German 'distress' during the war, the confiscations had been lawful. This principle was adopted by the German supreme court in a civil case decided on 1 November 1922 (105 RGZ 326; Annual Digest, 1919-22, case 296, p. 427). The court declarated that the requisition although contrary to the Hague Convention, was lawful, for 'it is a principle which is recognized in international law, and which must be applied also to the Hague Conventions, that a states right to self-preservation is superior to all obligations undertaken in treaties, and that in case of necessity, a state may depart from and go beyond the provisions of the Hague Convention'. Thus the Reichsgericht, four years after the end of hostilities, repeated the principle which Germany had used during the war as justification for her violation of Belgian neutrality and for many other violations of international law. This principle, contained in the German Manual of War, 'when carried out to its logical conclustion leads to the absolute supremacy of strategical interests as expressed in the ancient maxim, "omnia licere quae necessaria ad finem belli"' (Garner, German War Code. . . p. 11)." Ernest Frenkel, Military Occupation and the Rule of Law, pp. 59-63.

The prosecution have also failed to show wherein these conventions provide courts of punishments for individuals who violate the laws and customs of war.

The prosecution allege that the accused violated the laws and customs of war. We pointed out that Article 2, Chapter 2, Laws and Customs of War on Land, Hague Convetion No. IV of October 1907, provides that the provisions do not apply in the case. Article 1 reads:

"The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convetion."

Article 2.

"The provisions contained in the Regulations referred to in Article 1, as well as in the present convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention."

Since neither Italy or Bulgaria ratified this 1907 Convention, Japan as a Contracting Power is not bound and certainly the accused Major Furuki cannot be bound by this Convention.

As to the Geneva Prisoners of War Convention of 27 July 1929, Japan did not even ratify this convention or did she formally adhere to this Prisoners of War Convention. Even though Japan did through the Swiss Government agree to apply the provisions thereof to prisoners of war under its control, and also so far as practicable, to interned civilians, (See Foreword to War Department Technical Manual TM27-25, "Treaties Governing Land Warfare.") This makes no difference legally.

Om the other hand we have the distinguished author and professor at Harvard Law School who says in his book "War Criminals and Their Prosecution and Punishment" pp. 14-15.

"In our day and age, one major aim of the administration of justice in international affairs is to demonstrate beyond doubt that lawlessness, whether indulged in by Heads of States, members of military general staff, members of political cliques, or persons of lesser status, entails prosecution and punishment."

This Military Commission must decide if the offense charged is a war crime. There can be no doubt, that, only if the offenses charged is a war crime is there jurisdiction to try the accused, Major Furuki. In Section D-13, Appendix D, Naval Courts and Boards, we read: "These exceptional military courts, unlike the court-martial, derive their sanction from the laws of war and not from the enactments of Congress."

It is incumbent upon the judge advocate to define a war crime. He has not done so during the trial, nor has he proved that the crime alleged is a war crime. All that he has done so far is to show by an admission of the accused (to which we objected), introduced into evidence, that the accused admitted that he executed the native in-

habitants by reason of his duty as judge advocate and by orders of his superior, Admiral Masuda.

In paragraph 347 of the Rules of Land Warfare, we find the following statement: "Individuals of the armed forces will not be punished for these offenses [violations of the customs and laws of war] 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."

Under this rule, the ordinary soldier is excused, but his commander or government is liable. Major Furuki si the ordinary soldier; Admiral Masuda was the commander.

You have seen Major Furuki since the trial started March 1, 1947, and you have heard his testimony. All the circumstances justify any acts which he may have admitted during those awful days when we Americans were making a living hell of Jaluit.

Everyone has testified as to the loyalty of the natives on Jaluit to Japan, but the Americans had a way to break down the most loyal natives and you have heard how six hundred deserted to the Americans in one day. The Americans bombed Jaluit continuously, food was scarce, starvation imminent, and ammunition and guns pitifully inadequate. The Japanese garrison on Jaluit was indeed in a state of distress. Then occurred the native incidents, the subject of this criminal case. How did the garrison on Jaluit handle them? It was all tied up in the problem and the right of self-preservation. There is such a principle as the absolute supremacy of strategical interests. Witnesses have testified that the Jaluit Commander tried to handle the situation the best way possible.

We have heard of the long and thorough investigations, the impossibility of a regular trial, but the holding of the best trial possible.

What is meant by a trial? Bouvier says: "Trial in Practice. The examination before a competent tribunal according to the laws of the land, of the facts, put in issue in a cause, for the purpose of determining such issue" US v. Curtis, 4 Mass 232, Fed Cas. No. 14905, p. 3320, Bouvier's Law Dictionary, vol. 2.

Historically trial has meant many different things. There was the trial by ordeal. Bouvier tells of Trial by Wager of Battle.

"A mode of trial which existed among almost all the German people and was introduced into England by William the Conqueror."

"In the statutes of South Carolina, Edition of 1857 it is said to be in existence in that state." Bouvier's Law Dictionary, vol. 2., p. 3416.

Major Furuki was selected to play a most important and for him indeed an unhappy part. Admiral Masuda appointed him the judge advocate in the case. My associates have explained what the duties of a judge advocate are in Japanese procedure. It was part of his duty also to see that the sentence of the court was carried out. Admiral Masuda ordered him to execute the accused natives.

The prosecution have charged his with "wilfully, feloniously, with premeditation and malice aforethough, and without justifiable cause, assault, strike, kill, and cause to be killed, with an instrument, a deadly weapon."

On page 2067 of Bouvier's, Malice is defined as "The doing a wrongful act intentionally without just cause or excuse. 4 B&C 255; Com v. York, 9 Metc. (Mass.), 104; 43 Am Dec 373; Zimmerman v. Whitely; 134 Mich, 39, 95 N.W. 989. A wicked and mischievous purpose which characterizes the perpetration of an injurious act without lawful excuse. 4 B. & C. 255; Com. v. York, 9 Metc. (Mass.) 104, 43 Am. Dec. 373."

In Wharton's Criminal Law, Vol. 1, par 421, pp 634-636 we read, "Murder is distinguished from other kinds of killing by the condition of malice aforethough. . ."

"Premeditation and deliberation, as an element in murder, consists in the exercise of the judgment in weighing and considering and forming and determining the intent or design to kill." State v. Roberson (1909) 150 N. C. 837, 648 S. E. 182.

"The corpus delicti, or the fact that a crime has been committed, is an important element entering into the trial of every person charged with the commission of a crime. In theory, if not in practice, the prosecution is required to establish the fact that a crime has been committed before it can either (1) introduce evidence to show that the accused committed the crime, or (2) require the accused to show that he did not do so. In otherwords, the corpus delicti must be established by satisfactory evidence before the accused can be put upon his defense. . . . .

Carlson
HH(xviii)

"The phrase corpus delicti means, literally the body of the transgression charged, the essence of the crime or offense committed, the existence of the substantial fact that a crime or offense has been committed. . . . .

"The essential elements of the corpus delicti are (1) the existence of a certain state of fact or result forming the basis of the criminal act charged and (2) the existence of a criminal act or agency or cause in bringing the state of fact into existence; e.g., that a man has died, . . . and that some person wrongfully brought about this state of fact. . . .."

"Some of the cases go a step further and require (3) that the defendant's criminal agency in the production of the state of fact shall also be established; citing "The language of other decisions, however, seems to require proof of the criminal agency of the accused as part of the corpus delicti. See State v. Dickson (1883) 78 Mo. 438; State v. Shackelford (1899) 148 Mo. 493, 50 S.W. 105; Lovelady v. State (1883) 14 Tex. App. 560, (1884) 17 Tex. App. 287; Jackson v. State (1891) 29 Tex. App. 458, 16.S. W. 274; Josef V. State (1895) 34 Tex. Crim Rep. 446, 30 S.W. 1067; Little v. State (1898) 39 Tex Crim Rep. 654, 47 S.W. 984."

"Before a conviction can rightfully be had on a criminal charge, the prosecution must show (1) the corpus delicti (2) that it was produced by a criminal act or agency, (3) that the accused did the criminal act, or set in motion the criminal agency, or sustains responsible complicity therewith. . .

"First essential fact to be proved is the corpus delicti, and this must be established beyond a reasonable doubt. Tatus v. State (1907) 1 Ga. App. 778, 57 S.E. 956.

"A conviction very seldom occurswithout direct proof of the corpus delicti, either by eyewitness of the homicide or by subsequent discovery of the dead body; yet there may be exceptions, where corpus delicti may be proved circumstantially or inferentially, e.g. as where the body is consumed by fire, or boiled in potash, or dissolved in acids, rendering it impossible that it sould ever be produced. Citing People v. Alviso (1880) 55 Cal. 230; Rines v. State (1903) 118 Ga. 320, 68 L.R.A. 33, 45 S.E. 376, 12 Am. Crim. Rep. 205; State v. Cardell (1886) 19 Nev. 319, 10 Pac 433; People v. Beckwith (1888), 108 N. Y. 67, 15 N. E. 53; Lovelady v. State (1883) 14 Tex App 548; Walker v. State (1883) 14 Tex App. 609.

"HH(18)"

Carlson
HH(xix)

In the case of McBride v. People (1894) 5 Col. App. 91, 37 Pac 593, it was held that "The confession of defendant without aliunde cannot establish the corpus delicti."

Want of proof of the corpus delicti cannot be supplied by proof of the extrajudicial confession of the accused. People v. Besold (1908) 154 Cal. 363, 97 Pac. 871...

Thus in a prosecution for murder, proof of the corpus delicti involves the establishment (1) that the person named is dead (2) that he came to his death through the criminal act or agency of another human being...

The facts forming the basis of the offense, that is, the corpus delicti, must be proved either (1) by direct testimony, or (2) by presumptive or circumstantial evidence; and where the evidence is of the latter class, it must be of the most cogent or irresistible kind...

In some of the states it is held that the elements constituting the legal corpus delicti, that is, (1) the state of facts constituting the basis of the prosecution, (2) the criminal agency of some other human being in bringing them about, must be established by direct evidence; citing two New York cases, Ruloff v. People (1858) 18 N.Y. 179 and People v. Bennett (1872) 49 N.Y. 137.

Lord Chief Justice Hale says: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or, at least, the body found dead." 2 Hale P.C. 290.

Wharton's Criminal Law, Vol I, pp. 449-458: "It seems now pretty generally held that circumstantial evidence is admissible to establish the corpus delicti in a trial for murder, but that it must be strong and cogent. Chancellor Walworth, however, says: 'One rule which is never to be departed from is that no one should be convicted or murder upon circumstantial evidence, unless the body of the person supposed to have been murdered has been found, or there is clear and irresistible proof that such person is actually dead.' citing People v. Videto (1825) 1 Park. Crim. Rep. (N.Y.) 603. In New York it is held that in trials for murder, the people must establish by positive evidence either (1) the corpus delicti or (2) the criminal agency producing it; and that after either is thus established, the other may be shown by circumstantial evidence. Ruloff v. People (1858) 18 N.Y. 179; People v. Bennett (1872) 49 N.Y. 137 (by divided court). In such a prosecution the corpus delicti is established by proof of the finding of the body of a human being under

such circumstances as indicate that the death or killing was felonious, and not by accident or suicide. State v. Potter (1879) 52 Vt. 33. But the proof of the identity of the dead body must be established by evidence outside of the death of the party alleged; the remains of the deceased, or a portion of them, must be sufficiently identified to establish the death of the party. Lovelady v. State (1883) 14 Tex App. 545; Gay v. State (1901) 42 Tex Crim Rep. 450, 60 S. W. 771.

Wharton's Criminal Law, Vol I, pp. 459-460. What Blackstone said of confessions was certainly true of the admission which the prosecution introduced in this case: "confessions even in cases of felony at common law, were the weakest and most suspicious of all testimony, very likely to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with precision, incapable in their nature, of being disproved by other negative testimony." 4 Bl.Com. 357.

The accused on the witness stand explained clearly and logically what the natives did in the face of the enemy, the strategical interests of the Japanese Garrison in their great state of distress, which "distress" was caused by the continuous bombings by the American forces, the investigations conducted under great hazards to the investigators, the trial of the nativescriminals, the judgment even to written judgment, the reading of the sentence to the native criminals, and the final chapter, the execution of the natives found guilty and sentenced to death.

The prosecution put into evidence a written statement signed by the accused. This was secured from the accused on December 3, 1947, and then, on February 24, 1947, the accused was served with the charges and specifications.

This admission is what would be known as a circumstantial confession if it were a confession. It is however just an admission.

The prosecution have only produced circumstantial evidence and have introduced a circumstantial admission. This circumstantial admission has been fully explained by the accused on the witness stand. He was subjected to the grilling cross-examination by the judge advocate but this only tended to prove his innocence as regards to both charge one and charge two.

Strictly speaking the statement of the accused which the judge advocate introduced into evidence is strictly speaking not a "confession," but an "admission." Confession is a voluntary acknowledgment of guilt. Admission is an acknowledgment of facts tending to establish guilt. People v. Sevetsky, 323 Ill. 133, 153 NE 615.

Statements, declaration, or admissions of fact incriminating in their nature or tending to prove guilt are admissions and not confessions. People v. Rupert, 316 Ill. 38, 146 NE 456.

This admission was explained by the accused and the commission must now weigh the evidence. The commission must determine the credibility of the testimony of the accused under the same rules and principles as with other witnesses.

If the defendant's testimony explaining his act was not improbable and no contradictory evidence to it was introduced, it could not be rejected by the jury. Miller v. State 191 Wisc. 477, 211 NW 278.

So much for the testimony of the accused.

At this time we wish to call the attention of the commission to what in our opinions are grave errors in the procedure and have been most prejudicial to the substantive rights of the accused.

On the Fourteenth Day of the trial the judge advocate in questioning the defense witness, Morikawa, Shigeru read from a document which purported to be an interrogation of the witness by an officer of the United States Navy.

"Q. When you were interrogated, you were asked concerning the execution of the natives. Question: 'Were they given a trial?' Your answer: 'No.' How do you explain the fact that when youtestified before the officer you stated there was no trial and that now when testifying before this commission you state there is a trial?"

This question was objected to by the accused on the ground of the line of questioning by the judge advocate and seemed the judge advocate is using questions and answers from a document purporting to be a previous investigation thereby putting words into the mouth of the witness and trying to introduce by the back door, evidence in a document without introducing the document. The document is the best evidence and if the judge advocate desires to introduce it into evidence he must do so properly.

The judge advocate replied that he could impeach the witness any way he pleased and he could read from this document or any document and need not or did he desire to introduce the document into evidence.

The commission announced that the objection was not sustained.

The judge advocate continued to read questions from what purported

to be an interrogation of the witness in 1945 by an officer of the United States Navy. Throughout the cross-examination of this defense witness the judge advocate kept saying that the witness was lying and that he, the judge advocate, could impeach his credibility by reading any document and impeach him in any way he wanted.

The defense are still of the opinion that the commission erred in failing to sustain our objection to the procedure of the judge advocate. We are of the opinion that the improper procedure of the judge advocate affected the court in giving or denying credence to the testimony of the defense witness, Morikawa.

The judge advocate on the sixteenth day of the trial had the witness Morikawa read Articles 87 and 89, Japanese Naval Court Martial Law (see question number 428). Why we ask didnt't the judge advocate have him read Article 93, which revokes the provisions of Articles 87 to 92 inclusive in case of Special Court Martial. Article 93 reads: "Regulations of the preceding six articles shall not be applied to a Special Court Martial."

The judge advocate said it was done to impeach the defense witness, Morikawa. Let us see what the Navy Department says of the impeachment of witnesses on pages 829-831, Compilation of Court Martial Orders, 1916-1937, Volume I, we read:

"IMPEACHMENT OF WITNESS: Improper Method.

"In a recent trial during the cross-examination of a material witness for the defense the judge advocate attempted to impeach the witness by showing that he had given testimony before a previous board of investigation to an effect contrary to his testimony before the present court. In attempting to thus impeach the witness on the stand the judge advocate was well within his rights but it so happened that he was permitted over objection, to bring before this court in an imporper manner an unverified version of what had been the witness's testimony before the above mentioned board of investigation. The following excerpt from the record of the testimony of the witness illustrates what is meant:

"87. Q. Now, can you explain why you failed to tell the Board of Investigation or give the Board of Investigation that (bad table manners) as a reason for "bawling out" Mr. A. instead of Seamanship questions? They created quite an impression on your mind and you have no difficulty at all in stating that it was for that reason and no other he was "bawled out"; and yet before the Board of Investigation you said nothing whatever about it and assigned as the reason for his "bawling out," failure to answer Seamanship questions. Can you explain that discrepancy?

A. I do not know that I said Seamanship questions. I said "bawling out" because I thought it was misconduct. It was the same as ill table manners.

'88. Q. But why did you say before the Board of Investigation that he was "bawled out" for failure to answer Seamanship questions and you did not mention his table manners. Now, how can you explain the discrepancy or do you explain it?

A. If I remember rightly I never mentioned his "bawling out" at the table in my former testimony.

'89. Q. You didn't mention table manners before the Board of Investigation?

'Objected to by the counsel for the accused on the ground of the line of questioning by the judge advocate. He is making a supposition and is not quoting exactly from the record of the Board of Investigation. He has improper reasons to suspect this and is bringingtout the evidence without quoting anything from the Board of Investigation.

'The judge advocate replied that he can impeach this witness in any way he pleases, whether by contradictory statements in answer to oral statements, or by referring to the Board of Investigation without bringing it into the record.

'The Court was cleared.

(P. 11) 'The court was opened. All parties to the trial entered and the president announced that the objection by the counsel for the accused is not sustained. It is the understanding of the court that the judge advocate is proceeding along the line of questioning for the purpose that the witness has made contradictory statements before a properly constituted Board of Investigation and that such questioning is permitted by rules of evidence, page 164, paragraph 167.'

"In connection with the foregoing it is important to note that at no time during the trial was the record of the board of investigation brought into evidence for the purpose of showing by reading therefrom, which is the only way in which it could properlyhave been shown, what testimony the witness M. did actually give before said board.

An examination of the context of Section 167 Naval Courts and Boards shows that it in no way supports the above ruling which the court attempted to base upon it. On the contrary, the section in question distinctly requires that the contradictory statements of a witness be proved. It is true that reference is made to certain preliminary questioning in regard to contradictory statements but such questioning is permitted only for the purpose of laying the foundation for future impeaching evidence. It in no way takes the place of such evidence. As stated above no proper impeaching evidence

was later introduced in this case, and the impression is created, from the reading of the above quoted excerpt from the record that the judge advocate's unsworn version of what the record of the board of investigation contained was accepted by the court as evidencing what such record did actually contain. From this it would appear that the judge advocate was permitted to testify without being placed under oath and was permitted to testify in regard to a matter as to which the record of the board of investigation itself and not the testimony of the judge advocate could have been the best evidence. The proper procedure would have been for the judge advocate to have asked the witness questions in regard to the testimony previously given by him before the board of investigation and thus lay the foundation for later impeachment in the event of inconsistence; but in order to have properly brought before the court the impeaching evidence, the judge advocate should have taken the stand . . . as the custodian of the record of the board of investigation and should have introduced such record into evidence and read therefrom the testimony which he intended to impeach the witness.

"It is not know to what extent the improper procedure commented upon above affected the court in giving or denying credence to the testimony of the witness M, but it is considered that the court's ruling in failing to sustain counsel's objection to such procedure was erroneous. It is necessary, therefore, to determine whether such erroneous ruling prejudiced the interests of the accused (P. 12) to such an extent as to invalidate the proceedings in this case; or, in other words, whether the interests of the accused were materially affected by such a ruling. On this question it is the opinion of the Department that, for reasons hereinbefore set forth in full, the credibility of the material witnesses as to facts in this case was of the utmost importance in aiding the court to arrive at its findings and that, in view of the fact that the erroneous ruling of the court now under consideration was on a point that involved the credibility of a material witness for the defense, it must be held that such error was fatal to the proceedings in this case (File 26262-10008, J.A.G., Dec 16, 1922; G.C.M. Rec. 56875,--CMO 1-1923, p. 10-12).

We feel that this Navy Department ruling is exactly in point in this present case. In this case, the judge advocate in attempting to impeach the defense witness, Morikawa, in an improper manner and he was permitted over objection to bring before the court in an improper manner an unverified version of what had been the witness's testimony before an investigating officer. This prejudided the interests of the accused to the same extent as set forth in CMO 1-1923 (p. 10-12).

Next we shall refer to the proceedings of the same day, the sixteenth day, when another defense witness, Inoue, Fumio, Captain, Imperial Japanese Army took the stand after being duly sworn.

"HH(24)"

The judge advocate requested that this witness be advised that anything he might say in this trial may be used against him in any trial from now on. He further stated that the witness had been served with charges and specifications and is to be the next defendant before this commission.

Sixteenth day, Inoue on the witness stand.

"The judge advocate further requested the commission to direct the witness that if he answers a question or makes a statement on direct examination by the accused he is subject to cross-examination on these points and cannot refuse to answer at that time, so it would be well for the witness to remember this before answering questions of the accused."

We objected but were overruled.

"The commission directed that the remarks of the judge advocate be read to the witness and they be explained to the witness as instructions from the commission."

This we hold to be error. The instructions are not correct and it was most prejudicial for the judge advocate to so attack the credibility of the witness before he had even been given one single question by the accused.

Section 261, Naval Courts and Boards, under paragraph (b) reads:

"A witness may properly decline to answer a criminating question."

In our objection to the statement of the law by the judge advocte we referred the commission to the section in Naval Courts and Boards regarding criminating questions, Section 261.

We at this time also feel that the credibility of this witness was seriously impaired by the remarks of the judge advocate. Section 400 of Naval Courts and Boards clearly specifies the duties of the judge advocate during the trial.

On the seventeenth day at 3:42 p. m., the judge advocate started to cross-examine the defense witness, Captain Inoue. Question 87 was: "Have you told the truth in your testimony before this commission?" Answer. "Yes."

"88. Q. In September and October, 1945, were you questioned by the war crimes investigator at Jaluit?"

This question was objected to but not sustained.

"HH(25)"

Answer: "Yes."

"89. Q. Did you tell the truth when you were questioned by the war crimes investigator?"
Answer. "I did."

"91. Q. When you were questioned by the war crimes investigator at Jaluit, did you at first lie to him and then later tell the truth?"

"92. Q. Were you asked the following question during that investigation: /judge advocate then read from a document/ 'I understand that the Admiral wished to disclose all the truth at the time of the surrender, but that a group of officers persuaded him not to, what do you know about that?'"

This question was objected to b y the accused on the ground that it was beyond the scope of direct examination, that it is improper for the judge advocate to read from a document which has not been introduced into evidence and the judge advocate is thereby being allowed to testify without being placed under oath.

The judge advocate replied that he could impeach the credibility in any way he wanted to.

The commission announced that the objection was not sustained.

"94. Q. The record indicates you were asked the following question: /judge advocate read from a document/ 'Why did the subordinate officers make this suggestion?' You answered: 'We officers did not want the AtCom to be punished and likewise we were afraid for the three executioners, so we decided to try and hide the truth.' Did you make this answer to the investigator?"

This question was objected to by the accused on the ground that it was not the proper way to introduce evidence from a former record. The judge advocate is being allowed to again testify by reading from a record which has not been introduced into evidence nor does the judge advocate say he intends to offer the document into evidence. The original document is the best evidence and the only proper way to get it into evidence and not to continue to read from it. By doing the way he is the judge advocate is testifying and is not under oath. The judge advocate is thereby prejudicing the rights of the accused.

The judge advocate replied as before that he could impeach the credibility of the witness any way he saw fit.

Again the commission announced that the objection was not sustained.

The defense witness answered, "Yes I answered this question. This questioning was in another case, altogether different from this native incident. Concerning that case I was asked by Lieutenant Commander McKinson, an investigator, and Okiymiyo, an interpreter was there such a case and I answered truthfully. I was asked who was in charge of this and I replied, 'Major Furuki.' This was all that was asked of me and the questions and answers you have read to me was on a case altogether different from the present case and if it is wished I will clarify this testimony."

But did the judge advocate ask him to clarify it? He did not. He continued to treat him as if he were the accused in this case, quite unfairly and without any consideration. The next question he asked him was question 95. "Is it true that you officers agreed not to tell the truth because you desired to protect your fellow officers and the enlisted men?"

We again objected but were overruled.

Q. 96. The judge advocate again read from a document. "On that occasion when you were questioned you said: /reading from a document/ 'We officers did not want the AtCom to be punished and likewise were afraid for the three executionors, so we decided to try and hide the truth.' Is it true that the reason you tried to hide the truth was because you were trying to protect Admiral Masuda and the three executinnors?"

This question was objected to by the accused because of the line of questionning, because the judge advocate was reading from a document not offered in evidence and thus being allowed to testify not under oath, and by reading questions and answers picked at random from the document he may well be giving improper testimony. The document is the best evidence of what it contains and it should be offered into evidence. This is most prejudicial to accused and damage has already been done. Again the judge advocate replied as before that he could impeach the credibility in any way he may fit.

The commission announced that the objection was sustained this time.

As we stated the damage to the accused has already been done by the improper questioning and conduct of the judge advocate during his cross-examination of the defense witness, Captain Inoue.

"HH(27)"

After one more question by the judge advocate to which we objected the commission adjourned that day, Thursday, March 27, 1947, until the following day, Friday, March 28, 1947.

On the eighteenth day, the judge advocate started out again by reading from a document.

"98. Q. Yesterday you acknowledged that you previously testified at Jaluit that, 'We officers did not want the AtCom punished and likewise, we were afraid for the three executioners, so we decided to hide the truth.' Were you trying to protect Admiral Masuda from being punished?"

The accused objected to this question because it was beyond the scope of the direct examination, and was irrelevant, and because, as before, the judge advocate is being allowed to testify by reading from a record; he is not under oath; he does not state he will offer the document into evidence. This conduct and questioning is most prejudicial to the substantive rights of the accused.

Now the judge advocate replies that he is reading from the record of this case.

The commission again announced that the objection of the accused was not sustained.

If the judge advocate was reading from the record of this case, we feel that he certainly was misquoting by not reading all the pertinent matter connected with the question. We ask that the commission carefully read again the testimony of that day.

The judge advocate's question 96 on the seventeenth day was read from another document than the record of this trial and we objected most strenuously to the judge advocate being allowed to read from the document which was not offered into evidence. We stated that the proper way for the judge advocate to do was to offer the document in evidence and not read at random from it without putting the entire document into evidence.

To this question 96 the commission did sustain our objection.

Question 94, as we have stated, was read from a document not offered into evidence. That question was as follows:

"94. Q. The record indicates you were asked the following question: 'Why did the subordinate officers make this suggestion?' You answered: 'We officers did not want the AtCom to be punished and likewise we were afraid for the three executioners, so we decided to try and hide the truth.' Did

you make this answer to the investigator?"

We have previously given the answer which the defense witness, Captain Inoue, gave to this question 94.

Question 100 was as follows: "Have you decided to try and hide the truth in your testimony before this commission?"

We again call the commission's attention to what was said in CMO 1-1923 (p. 10-12). We feel that the error was just as grave in this present case as in the case cited and that what the Judge Advocate General said is applicable in this case. I shall again read what was said:

"IMPEACHMENT OF WITNESS: Improper Method.

"In a recent trial during the cross-examination of a material witness for the defense the judge advocate attempted to impeach the witness by showing that he had given testimony before a previous board of investigation to an effect contrary to his testimony before the present court. In attempting to thus impeach the witness on the stand the judge advocate was well within his rights but it so happened that he was permitted over objection, to bring before the court in an improper manner an unverified version of what had been the witness's testimony before the above mentioned board of investigation. The following excerpt from the record of the testimony of the witness illustrates what is meant.

"'87. Q. Now, can you explain why you failed to tell the Board of Investigation or give the Board of Investigation that (bad table manners) as a reason for "bawling out" Mr. A. instead of Seamanship questions? They created quite an impression on your mind and you have no difficulty at all in stating that it was for that reason and no other he was "bawled out"; and yet before the Board of Investigation you said nothing whatever about it and assigned as the reason for his "bawling out," failure to answer Seamanship questions. Can you explain that discrepancy?

A. I do not know that I said Seamanship questions. I said "bawling out" because I thought it was misconduct. It was the same as ill table manners.

'88. Q. But why did you say before the Board of Investigation that he was "bawled out" for failure to answer Seamanship questions and you did not mention his table manners. Now, how can you explain the discrepancy or do you explain it?

A. If I remember rightly I never mentioned his "bawling out" at the table in my former testimony.

'89. Q. You didn't mention table manners before the Board of Investigation?

'Objected to by the counsel for the accused on the ground of the line of questioning by the judge advocate. He is making a supposition and is not quoting exactly from the record of the Board of Investigation. He has improper reasons to suspect this and is bringingtout the evidence without quoting anything from the Board of Investigation.

'The judge advocate replied that he can impeach this witness in any way he pleases, whether by contradictory statements in answer to oral statements, or by referring to the Board of Investigation without bringing it into the record.

'The Court was cleared.

(P. 11) 'The court was opened. All parties to the trial entered and the president announced that the objection by the counsel for the accused is not sustained. It is the understanding of the court that the judge advocate is proceeding along the line of questioning for the purpose that the witness has made contradictory statements before a properly constituted Board of Investigation and that such questioning is permitted by rules of evidence, page 164, paragraph 167.'

"In connection with the foregoing it is important to note that at no time during the trial was the record of the board of investigation brought into evidence for the purpose of showing by reading therefrom, which is the only way in which it could properlyhave been shown, what testimony the witness M. did actually give before said board.

An examination of the context of Section 167 Naval Courts and Boards shows that it in no way supports the above ruling which the court attempted to base upon it. On the contrary, the section in question distinctly requires the the contradictory statements of a witness be proved. It is true that reference is made to certain preliminary questioning in regard to contradictory statements but such questioning is permitted only for the purpose of laying the foundation for future impeaching evidence. It in no way takes the place of such evidence. As stated above no proper impeaching evidence

was later introduced in this case, and the impression is created, from the reading of the above quoted excerpt from the record that the judge advocate's unsworn version of what the record of the board of investigation contained was accepted by the court as evidencing what such record did actually contain. From this it would appear that the judge advocate was permitted to testify without being placed under oath and was permitted to testify in regard to a matter as to which the record of the board of investigation itself and not the testimony of the judge advocate could have been the best evidence. The proper procedure would have been for the judge advocate to have asked the witness questions in regard to the testimony previously given by him before the board of investigation and thus lay the foundation for later impeachment in the event of inconsistence; but in order to have properly brought before the court the impeaching evidence, the judge advocate should have taken the stand . . . as the custodian of the record of the board of investigation and should have introduced such record into evidence and read therefrom the testimony which he intended to impeach the witness.

"It is not know to what extent the improper procedure commented upon above affected the court in giving or denying credence to the testimony of the witness M, but it is considered that the court's ruling in failing to sustain counsel's objection to such procedure was erroneous. It is necessary, therefore, to determine whether such erroneous ruling prejudiced the interests of the accused (P. 12) to such an extent as to invalidate the proceedings in this case; or, in other words, whether the interests of the accused were materially affected by such a ruling. On this question it is the opinion of the Department that, for reasons hereinbefore set forth in full, the credibility of the material witnesses as to facts in this case was of the utmost importance in aiding the court to arrive at its findings and that, in view of the fact that the erroneous ruling of the court now under consideration was on a point that involved the credibility of a material witness for the defense, it must be held that such error was fatal to the proceedings in this case (File 26262-10008, J.A.G., Dec 16, 1922; G.C.M. Rec. 56875)--CMO 1-1923, p. 10-12).

Carlson
HH(xxxdi)

On the eighteenth day the judge advocate again read from a document.

"175. Q. In Jaluit in October, 1945, were you asked 'What kind of a trial did they have or was your investigation the only thing used?'"

The accused objected as before but the objection was not sustained. So again the judge advocate was allowed to testify, not under oath by reading from a document not in evidence.

Finally when we were allowed to reexamine the defense witness, Captain Inoue, we tried to show by questions that the testimony read from the document by the judge advocate was not admissible in evidence in this present trial. We put those questions to the witness, Inoue.

"176. Q. Did you have the assistance of counsel when you were questioned at Jaluit?"

"This question was objected to by the judge advocate on the ground that it was immaterial and irrelevant.

"The accused replied.

"The commission announced that the objection was sustained.

"177.Q. Were you allowed to verify the testimony you gave at Jaluit?

"This question was objected to by the judge advocate on the ground that it was immaterial and irrelevant.

"The accused replied.

"The commission was cleared.

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

"The commission announced that the objection was sustained.

"178. Q. Were you told that you did not have to testify at Jaluit?

"This question was objected to by the judge advocate on the ground that it was immaterial and irrelevant.

"The accused replied.

"HH(32)"

"The commission announced that the objection was sustained."

It is very interesting to hear what the Judge Advocate General has to say about the accused offering evidence showing an alleged confession to be voluntary.

"When the question of the admissibility of a confession arises the defense as well as the prosecution should be permitted to introduce evidence to show that the confession was not voluntarily made by the accused. . . . However, it cannot properly accept testimony offered by the prosecution showing a confession to be a voluntary one without giving the defense an opportunity to show contra. It is apparent, therefore, that the court's action in refusing to permit the accused to offer evidence showing the alleged confession to be involuntary was a fatal irregularity. (26262-10507, J.A.G, Oct. 8, 1923; G.C.M. Rec. No. 58085)" Compilation of Court-Martial Orders (1916-1937), Vol I, p. 849, CMO 10-1923, p. 8.).

I shall also at this time refer to Section 400, Naval Courts and Boards.

Defense witness Captain Inoue finsihed his testimony on the eighteenth day; the commission asked the witness if he had anything further to state. Section 588, footnote 25, Naval Courts and Boards, states: "When all the parties indicate that they have no more questions to ask, the court will inform the witness that he took an oath to state everything within his knowledge in relation to the charges, and that he is now privileged to make any further statement necessary to fulfill his oath; that if he is not sure what the charges are they will be explained to him."

"The witness made the following statement:" then the record shows what thedefense witness Inoue said.

The record then reads:

"The judge advocate objected to the statement of the witness and requested that it be stricken on the ground that it was the opinion of the witness, that it was hearsay, and that it was a self-serving statement due to the fact that this witness is to be a defendant in a future war crimes trial.

"The commission announced that the objection was sustained and directed that the entire statement of Inoue, Fumio, be stricken."

We believe the objection of the judge advocate was improper and his statement regarding the witness was prejudicial to the substantitive rights of the accused. We further believe that it was error for the commission to sustain the objection of the judge advocate and to strike the statement of the defense witness Captain Inoue from the record.

We next call the commission's attention to the cross-examination by the judge advocate of the accused, Major Furuki, as a witness in his own behalf. From the record of the twenty-second day we read as follows:

"156. Q. Did you ever read the following Naval Regulations." Then the judge advocate read from a document.

The question was objected to by the accused as shown in the record. This objection is based on the same principle as before that the judge advocate is being allowed to testify when now sworn and is reading from a document not offered into evidence.

Again the commission did not sustain the objection of the defense.

Q. 157 was as follows: "You testified concerning certain things which you claim Admiral Masuda said or did. Did you testify truthfully in these matters?"

The defense objected to this question but the objection was not sustained.

"162. Q. When you were first investigated, did you give one statement to the investigator and then after Admiral Masuda died, did you change your statement?"

The record shows that the accused objected on the same grounds as before that the judge advocate is attempting to introduce into evidence a document not doing it in the proper way, but reading only certain portions from the document. The procedure is highly prejudicial to the rights of the accused who is now on the stand.

The objection was not sustained.

Q. 163 by the judge advocate is another instance of the judge advocate reading from a document which has not been offered into evidence.

"163. Q. The record of the Board of Investigation indicates that in response to the sixth question you said, 'The main reason why I personally made a false statement was because. . . .' and the seventh question reads as follows: 'As far as I'm concerned all the stories sound nice; however,

when you sent the lying statement I assumed you were equally guilty when the truth came out. I want the whole story.' and your answered, "The false statement I made was concerned with this statement and the reason is the same.' Did you admit to the investigator that the first statements were false?"

The record shows:

"This question was objected to by the accused as follows: We object to the judge advocate being permitted to read parts of a Board of Investigation into the proceedings of this commission and being allowed thereby to testify without taking the stand and qualifying as a witness. He is reading from a document and he has now shown that the document will be entered into evidence. He thereby is prejudicing the rights of this witness who is the accused in this case.

"The judge advocate replied.

"The commission announced that the objection was not sustained."

"164.Q. To refresh your recollection, I refer you how to the trial of Kawachi and Yoshimura and others in which you testified you were asked '59. Q. Was that a true statement?' and you answered, 'No, it was not.' This statement was in connection with the American flyers at Emidj. Do you recall making that statement? The trial was held at Kwajalein, U. S. Naval Air Base on December 7,1945."

"This question was objected to by the accused as follows: We object to the judge advocate being allowed to pursue the same line of questioning, reading from documents which have not been as yet introduced into evidence, and there has been no showing that they will be introduced into evidence. He is reading only parts of the document; he is thereby being allowed to testify without qualifying as a witness. This is most prejudicial to the substantive rights of the witness on the stand who is the accused. It is requested that the record show that the judge advocate is reading from a document and we also request that the objection of the accused appear in full in the proceedings and the reply of the judge advocate also appear in full."

The record shows the reply of the judge advocate.

The accused replied as follows: Counsel for the defense does not agree to stipulate that this record from which the judge advocate has been

reading be admitted as part of this trial for very obvious reasons. We agree that the judge advocate is allowed to test the credibility of this witness, or any witness, but we maintain the way the judge advocate is doing it now, and on previous occasions, is most improper and we maintain that to allow him to continue will be most prejudicial to the rights of the accused in this case, and that having allowed him to do it has prejudiced the rights of the accused. The carnage has been done already.

The judge advocate replied as shown by the record.

"The Commission announced that the objection was not sustained."

Q. 166 by the judge advocate: "I will show you this portion of the trial and ask whether or not after you read it, it refreshes your recollection of your testimony. Will you read this portion here.

"The interpreter read in Japanese questions 158 through 163 of this testimony.

"This question was objected to by the accused on the ground that the judge advocate is asking a question concerning a document that has not been offered or received in evidence, and that it is immaterial."

The accused also objected because the judge advocate was again being allowed to testify by reading from a document, this time by way of the translator who translated and read from the document handed him by the judge advocate and read aloud to the witness, the accused, in Japanese.

"The judge advocate replied.

"The commission announced that the objection was not sustained."

We ask that the commission consider carefully the questions and answers and the objections of the accused and the reply of the judge advocate on the twenty-second day of this trial, Wednesday, April 2, 1947.

We are of the opinion that what the Judge Advocate General said in Court Martial Order No. 1-1923 (p. 10- 12) is applicable under the present circumstances and particularly as regards this witness, Major Furuki, the accused in this case.

We shall again read into the record what was said regarding impeachment of witness: improper method.

"HH(36)"

Carlson
HH(22)

"IMPEACHMENT OF WITNESS: Improper Method.

"In a recent trial during the cross-examination of a material witness for the defense the judge advocate attempted to impeach the witness by showing that he had given testimony before a previous board of investigation to an effect contrary to his testimony before the present court. In attempting to thus impeach the witness on the stand the judge advocate was well within his rights but it so happened that he was permitted over objection, to bring before this court in an imporper manner an unverified version of what had been the witness's testimony before the above mentioned board of investigation. The following excerpt from the record of the testimony of the witness illustrates what is meant:

"87. Q. Now, can you explain why you failed to tell the Board of Investigation or give the Board of Investigation that (bad table manners) as a reason for "bawling out" Mr. A. instead of Seamanship questions? They created quite an impression on your mind and you have no difficulty at all in stating that it was for that reason and no other he was "bawled out"; and yet before the Board of Investigation you said nothing whatever about it and assigned as the reason for his "bawling out," failure to answer Seamanship questions. Can you explain that discrepancy?

A. I do not know that I said Seamanship questions. I said "bawling out" because I thought it was misconduct. It was the same as ill table manners.

"HH(3?

'88. Q. But why did you say before the Board of Investigation that he was "bawled out" for failure to answer Seamanship questions and you did not mention his table manners. Now, how can you explain the discrepancy or do you explain it?

A. If I remember rightly I never mentioned his "bawling out" at the table in my former testimony.

'89. Q. You didn't mention table manners before the Board of Investigation?

'Objected to by the counsel for the accused on the ground of the line of questioning by the judge advocate. He is making a supposition and is not quoting exactly from the record of the Board of Investigation. He has improper reasons to suspect this and is bringingtout the evidence without quoting anything from the Board of Investigation.

'The judge advocate replied that he can impeach this witness in any way he pleases, whether by contradictory statements in answer to oral statements, or by referring to the Board of Investigation without bringing it into the record.

'The Court was cleared.

(P. 11) 'The court was opened. All parties to the trial entered and the president announced that the objection by the counsel for the accused is not sustained. It is the understanding of the court that the judge advocate is proceeding along the line of questioning for the purpose that the witness has made contradictory statements before a properly constituted Board of Investigation and that such questioning is permitted by rules of evidence, page 164, paragraph 167.'

"In connection with the foregoing it is important to note that at no time during the trial was the record of the board of investigation brought into evidence for the purpose of showing by reading therefrom, which is the only way in which it could properlyhave been shown, what testimony the witness M. did actually give before said board.

An examination of the context of Section 167 Naval Courts and Boards shows that it in no way supports the above ruling which the court attempted to base upon it. On the contrary, the section in question distinctly requires that the contradictory statements of a witness be proved. It is true that reference is made to certain preliminary questioning in regard to contradictory statements but such questioning is permitted only for the purpose of laying the foundation for future impeaching evidence. It in no way takes the place of such evidence. As stated above no proper impeaching evidence

was later introduced in this case, and the impression is created, from the reading of the above quoted excerpt from the record that the judge advocate's unsworn version of what the record of the board of investigation contained was accepted by the court as evidencing what such record did actually contain. From this it would appear that the judge advocate was permitted to testify without being placed under oath and was permitted to testify in regard to a matter as to which the record of the board of investigation itself and not the testimony of the judge advocate could have been the best evidence. The proper procedure would have been for the judge advocate to have asked the witness questions in regard to the testimony previously given by him before the board of investigation and thus lay the foundation for later impeachment in the event of inconsistence; but in order to have properly brought before the court the impeaching evidence, the judge advocate should have taken the stand . . . as the custodian of the record of the board of investigation and should have introduced such record into evidence and read therefrom the testimony which he intended to impeach the witness.

"It is not know to what extent the improper procedure commented upon above affected the court in giving or denying credence to the testimony of the witness M, but it is considered that the court's ruling in failing to sustain counsel's objection to such procedure was erroneous. It is necessary, therefore, to determine whether such erroneous ruling prejudiced the interests of the accused (P. 12) to such an extent as to invalidate the proceedings in this case; or, in other words, whether the interests of the accused were materially affected by such a ruling. On this question it is the opinion of the Department that, for reasons hereinbefore set forth in full, the credibility of the material witnesses as to facts in this case was of the utmost importance in aiding the court to arrive at its findings and that, in view of the fact that the erroneous ruling of the court now under consideration was on a point that involved the credibility of a material witness for the defense, it must be held that such error was fatal to the proceedings in this case (File 26262-10008, J.A.G., Dec 16, 1922; G.C.M. Rec. 55875;--CMO 1-1923, p. 10-12).

HH(84)

Carlson
HH(xl)

Q. 185 put to the accused on the witness stand was as follows: "You have heard Morikawa testify that Obetto and Paul were sentenced to hard labor. Is that true?"

"This question was objected to by the accused on the ground that this witness should not be required to give his opinion as to the truth or untruth of the testimony of a previous witness.

"The judge advocate replied.

"The commission announced that the objection was not sustained."

Q. 196 by the judge advocate was objected to by the accused on the ground that the judge advocate was reading from a document which had not been introduced into evidence. After the reply of the judge advocate the commission announced that the objection was not sustained.

We respectfully call the commission's attention to the twenty-third day, Thursday, April 3, 1947, starting with question 265. During the questioning the accused, as a witness in his own behalf, was required to write on a piece of paper and as we stated required to manufacture evidence against himself which procedure as we then pointed out was at variance with Section 235 of Naval Courts and Boards.

The accused, Major Furuki, continued on the stand under cross-examination by the judge advocate until late afternoon of the twenty-fourth day, Friday, April 4, 1947.

You remember well how he honestly admitted the acts which he did. You remember also the testimony of all the witnesses. Not a single one testified except that Major Furuki was a loyal soldier. All had only words of praise for this soldier who is charged with murder.

At this time we are not asking for mitigatinn for the accused, Major Furuki. If he is guilty of the atrocities for which his death is sought, he can expect no sympathy because this is a military commission, a legal court and the law must be carried out.

It was Mr. Justice Rutledge in the dissenting opinion in the General Yomoyuki, Yamashita, Petitioner said:

"But there can be and should be justice administered according to law. In this stage of war's aftermath, it is too early for Lincoln's great spirit, best lighted in the Second Inauguaral, to have wide hold for

the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies, or enemy belligerents. It can become too late.

"This long-held attachment marks the great divide between our enemies and ourselves. . . . Every departure weakesn the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes never rose."

The accused, Major Furuki, Hidesaku, is charged with murder and in Charge II with violation of the Laws and Customs of War.

Section 158, Naval Courts and Boards states a fundamental rule: "If there is a reasonable doubt as to the guilt of the accused, he must be acquitted."

We ask the commission, therefore, to find as to the accused, Major Furuki, Hidesaku, specifications one, two, three, four and five of Charge I not proved , and the accused is of the charge of murder not guilty and the commission does therefore acquit the said Major Furuki, Hidesaku, of the specifications and of the charge of murder, and to find as to the accused, Major Furuki, Hidesaku, specifications, one, two three, four, and five of Charge II not proved and the accused is of the charge of Violation of the Laws and Customs of War, not guilty, and the commission does therefore acquit the said Major Furuki, Hidesaku, of the specifications and of the charge of Violatinn of the Laws and Customs of War.

Respectfully,

Martin Emilius Carlson

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

CLOSING ARGUMENT FOR THE PROSECUTION

delivered by

Lieutenant David Bolton, U. S. Navy,

CLOSING ARGUMENT FOR THE PROSECUTION

By Lieutenant David BoBton, USN.

INTRODUCTION

The commission has heard able and extensive arguments by defense counsel, Mr. Yuichiro Akimotp, Mr. Saizo Suzuki and Commander Martin E. CarBson, USNR. The quality and skill of their agruments as well as their zealous defense of this case is as much a tribute to the high standards of the international profession they represent, as it is to their exceptionalpersonal and professional talents. I have highest regard for their integrity and skill, and I desire that they clearly understand that remarks in my argument which relate to obvious fabrications in the defense, do not relate to defense counsel, but are directed toward the accused, and the various Japanese war crimes witnesses who together in close confinement for more than a year, have had ample opportunity to weave this strange fictional fabrication of an alleged defense. If they had possessed more skill and more knowledge, these witnesses would have woven a strong, perhaps indestructible cloth, depicting love and compassion for the natives. But, fortunately for justice and unfortunately for the accused, the cloth they have manufactured is filled with holes and the truth shines through like the brilliant light of the Sun revealing the brutal cold-blooded criminal trying to hide behind this curtain of lies.

In reflecting about Mr. Akimoto's inspiring quotation from the Corinthians, I cannot help thinking about the accused and I am then reminded that even the devil can quote Scripture for his own uses.

Like philosophical Mr. Akimoto, I say, "Let us take off our dark glasses and look at the truth."

Because of the nature of the case and because of the very elaborate arguments by defense counsel, the judge advocate is compelled to deliver an extensive and detailed closing argument. My colleague has tersely discussed the evidence presented in the trial, and noted the applicable law. My function is to give a detailed and complete analysis of the applicable law, and to rebut the fallacious defense arguments.

My argument will be presented in two phases. First, I will briefly discuss my understanding of the purpose and function of these trials. Secondly, I will discuss the charges and the guilt of the accused. Many legal technicalities of International Law, American Law, Japanese criminal and military law, etc., are involved in this phase of my argument, and therefore, in presenting it, I will first give a summary and then for the purpose of thorough treatment will give a complete detailed analysis of the applicable law, the proof of the guilt of the accused, and the necessity of his conviction and punishment

PART I. Purpose of War Crimes Trial.

FIRST, Let us briefly consider the purpose and function of this trial.

With respect to Charge I, the instant case is like any trial of homicide. Charge II is like any typical war crimes case. In the broader social implications in the essential function of law, these charges--the local and the international--merge into one problem of justice and one problem of social order and control.

The war crimes picture has vivid colors. Its background was painted at the sneak attack at Pearl Harbor, and it has been indelibly colored by the "March of Death," and other atrocities too numerous and too horrible to mention. The homicides in the instant case are the product of that same barbaric lust for power which disregarded all decencies and allhuman rights in an effort to win the war so treacherously begun.

When Americans realized that the enemy would stop at nothing, would destroy any and all of the laws and rights of civilized man, we sought to dissuade them. Protests were made, and when disregarded, they changed to warnings. On August 21, 1942, President Roosevelt declared, "It is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invaders in Europe and Asia. It seems only fair that they should have this warning that the time willcome when they shall have to stand in courts of law in the very countries which they are now oppressing and answer for their acts."

The accused had his warning, and now, four years later, in this court room in the presence of three Marshallese observers, he is tried for the barbaric murder of thirteen of their fellow countrymen.

What was said by President Roosevelt in August,1942, and later repeated over and over again, was not a new credo. The deterrent functionof international law was expressed many years ago. Lawrence, in The Principles of International Law (7th ed. 1923) pp. 373-374, expressed it as follows:

"A ruler drunk with the consciousness of overwhelming power might venture to defy the moral sentiments of mankind, but only to discover by and by that outraged humanity avenges itself in unexpected ways. . . . . Those, therefore, who imagine that a state is free to ignorebecause of the exigencies of the moment any rule. . . are as erroneous in their reasoning as they are anarchical in their sentiments. The laws of war are made to be obeyed, not to be set aside at pleasure."

All is not fair in war. Certain fundamental domestic laws must still be obeyed and in the field of war, the laws and customs of war set definite standards, violation of which constitutes a crime against the laws and customs of war and is punishable as such.

Warning potential wrongdoers that society will punish those who violate its fundamental laws and customs is a basic function of international criminal justice. This commission is an instrument of that justice and must exercise that deterrent function. In Charge II, the accused is charged with violation of the laws and customs of war. If he is proven guilty of this international crime as charged, it is your duty to safeguard and protect organized civilized society by convicting and punishing him.

Charge I--Murder--is perhaps not as dramatic as the charge in violation of the laws and customs of war. Yet the social problem, the importance of your decision, and the fundamental juridical principles requiring trial and punishment are identical. Society is governed and controlled by law, and only if that law is effective and enforced can the rights of individuals in society be protected.

Whether we consider the violation of the laws of local society, as evidenced by Charge I, or the violation of the laws of international society, as evidenced by Charge II, the problem is identical. The accused has committed a serious violation of the laws of society. Society demands that he be punished. From the individual standpoint, the particular punishment may be designed to intimidate, reform, or incapacitate him. From the social standpoint--not revenge--but deterrence is the primary objective.

The eyes of the world are upon you. Not only FURUKI, but this court, and international law and order itself is on trial in this room. The purpose and function of the trial is to reaffirm the integrity, the force, and the justice of that law and order. The accused has been given a fair and impartial trial. If he is found guilty, he must be punished so that others who may be "drunk with the consciousness of overwhelming power" or faced with the "exigencies of the moment" will stop and think.

PART II. Proof of Charges and Specifications.
A. Reasonable Doubt.

As to the charges and proof of the guilt of the accused:

The law requires that the accused must be proven guilty beyond a reasonable doubt. This requirement is set forth at length in Naval Courts and Boards, Sections 158 and 159. In part, these sections state:

"It is not necessary that each particular fact advanced by the prosecution should be proved beyond a reasonable doubt; it is sufficient to warrant conviction if, on the whole evidence, the court is satisfied beyond such doubt that the accused is guilty. By reasonable doubt, is meant an honest, substantial misgiving generated by insufficiency of proof. It is not a captious doubt, not a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony, nor is it a doubt born of a merciful inclination to permit the accused to escape conviction nor prompted by sympathy for him or those connected with him. . ."

The accused, FURUKI, Hidesaku, Major, Imperial Japanese Army, is charged in ten specifications with two crimes: Murder and Violation of the Laws and Customs of War. The evidence clearly establishes the guilt of the accused beyond a reasonable doubt.

In considering this evidence, the judge advocate will first give a summary of the main features of the argument, and then present an extensive analysis of the evidence in the light of the applicable law.

B. Summary Analysis.
1. As to Murder.

SUMMARY: As to Charge I, Murder.

Murder has been alleged in violation of the effective local law, Section 199, of the Japanese Criminal Code. Specifications 1 through 5 allege this murder in the language of the local law, and also in the language of the common law.

In substance there is little difference in their application. On analysis, it will be seen that while the language of Section 199 is very broad, its contents must be read in the light of certain limiting provisions in Chapter VII, Book 1, of the Japanese Criminal Code. The pertinent provisions of this chapter, upon analysis are seen to be clearly included within the scope of the terms "without legal justification or legal excuse."

Specifications 1 through 5 in alleging these murders, use certain historical legal terms commonly used in American courts. Analyzing these terms according to legal usage, it is demonstrated that in the instant case, the words "wilfully, premeditation, malice aforethought, feloniously, and without justifiable cause," like the concepts of the Japanese law, require only that the killings be proved to be intentional and "without legal justification or legal excuse."

There is no question that the accused intended to kill the natives. He took them to the place of execution with the intention of killing them, and after they arrived at the place, he did kill them. The defense have not denied that Furuki intended to kill these natives. They merely argue that he did not have a "criminal intent," because he did not intend to commit a crime. The Japanese criminal law, like our own, does not require that it be proved that the accused knew that the acts he intended to commit were prohibited by law. Ignorance of the law is no excuse under any system of criminal law; and it is specifically provided in Article 38 of the Japanese Criminal Code:

"Ignorance of the law cannot be invoked to establish absence of design, but the punishment may be mitigated according to the circumstances."

The defense argument that Furuki did not know the law, and did not know that the killing was illegal, has been interesting, and perhaps should even be considered in mitigation of punishment, but it is totally irrelevant in regard to the question of guilt.

Furuki's good character or his motive in killing these natives is similarly unimportant. For obvious reasons the law does not require that the prosecution prove than a man had a bad motive or an evil mind, when he committed a criminal act. Allegations of good character or good motive are totally irrelevant to the question of guilt once it is established that the accused committed the prohibited acts. From the standpoint of guilt, even if Furuki killed these natives in the belief it was necessary for the survival of his men, even if he killed the natives for their own good or at their own request, he would still be guilty of murder, and his intention to kill is all that must be proved to establish the required criminal intent.

This fundamental legal concept is clearly expressed in Wharton's Criminal Evidence, as follows: "There is no bad act which the perpetrator does not summon up good motives to excuse..... The law is: No matter what may be the motives leading to a particular act, if the act is illegal, it is indictable, notwithstanding some one or more of the motives inducing the act may be meritorious." (Wharton's Criminal Evidence, 11th ed. p. 283; and see numerous cases cited in the footnotes thereto.)

In the instant case, the legal requirement of "intention to kill" is unequivocally present and to establish guilt of murder under Charge I, it is only necessary to prove that the killing was done "without legal justification or legal excuse."

In extensive commingled arguments, the defense has made three separate major defenses. First, they argued an alleged legal justification that the killing was an act of necessity or a kind of self-defense. Secondly, as an alleged legal excuse they have argued that the killing was done pursuant to the order of a superior commanding officer. Finally, they argued it was an execution done pursuant to sentence at a legal trial. None of these arguments are sustained by the facts or the law.

As to the argument of necessity or self-defense. Our law requires that the act be a necessary act of self-defense against imminent peril created by the person killed. The Japanese law similarly requires that the acts be "unavoidable" and done in order to protect "against imminent and unjust violation." It was not necessary to kill these five groups of natives. They were unarmed, bound prisoners of the Japanese. They American Armed Forces, and not those poor frightened natives were responsible for the danger to the Japanese; and even the activity of the American forces was not an unjust violation of the rights of the Japanese; it was just retribution. The killing of these natives could have

been avoided. They could have been released and sent back to their islands. They could have been utilized as laborers. They could have been kept in safe confinement. True, it may have been simpler or more advantageous to kill them as a warning toother natives, but this does not make their killing "unavoidable" or in "self-defense." It does not constitute a legal justification for killing them."

The accused argues that there was a legal excuse for the execution of these natives in that the killings were done by order of a superior commanding officer.

Commingled with this is the argument that Furuki was compelled to execute these mtives, that if he did not do so, he would himself have been punished by MASUDA. This latter argument or coercion has been rejected by the courts in all homicide cases. Society cannot permit an individual to commit an act of homicide and escape conviction with the argument that he was compelled to commit the crime. To permit this excuse would open up a broad avenue for the defeat of justice, and would permit organized criminals and criminal societies to evade punishment by claiming they would have been killed by their boss or fellow members if they refused to obey the order to kill.

For the same social reason, the defense of superior orders must be rejected. There was a time when it was argued that superior orders could be a defense for certain criminal actions. It never was a defense in an otherwise unjustified homicide. It clearly is not a defense under International Law. This argument has been advanced in practically every war crimes case--and it has been universally rejected. The law was well settled long before the famous Nuremberg Trials in which the court tersely stated, "The defense of superior orders has never been recognized as a defense to a crime, but is considered in mitigation, as the charter here provides."

If in fact, Masuda ordered Furuki to execute these natives, then this fact merely makes MASUDA an accomplice, but it does not excuse Furuki for this participation in the crime of murder. Such alleged superior orders may be considered in mitigation--but Furuki must be found guilty as charged.

As his final excuse the accused alleged that these homicides were legal executions resulting from a legal trial. This excuse, if proven by the facts would constitute a full and complete defense. But, to be a legal execution, it must first be established that a proper legal trial was held, that in accordance with legal procedure the accused was found guilty, that a legally authorized sentence was properly determined and pronounced; and that the executions occurred in strict accord with said legal sentence. Defense counsel argued that all five groups of executions were legal because the thirteen natives were convicted at legal trials at which Masuda, Shintomo, and Inoue were the judges.

The judge advocate established that the executed natives were never present at the alleged trials; they were never permitted to question witnesses against them; no sworn testimony was ever considered as in fact no witnesses were present, and the accused natives were never permitted to have counsel or anyone else present to represent them.

Defense counsel argue that the "evidence" utilized at these alleged proceedings consisted of an investigation report and an opinion by Major Furuki based upon it. Defense counsel even argue that these investigations themselves constituted a part of the trial. It is unnecessary to point out that these investigations were not judicial proceedings. They were carried out in an atmosphere of violence, brutality, and terror. According to FURUKI's own testimony, he and Masuda went to see and question the natives before the "trial." It is apparent and it must have been to Furuki and Masuda, who were there, that these brutal investigations and the alleged proceedings in Admiral Masuda's office did not constitute judicial proceedings.

But there is still more to be said on the subject of the alleged trials. The defense contended that prior to each execution, Admiral Masuda, Captain Inoue, and Lieutenant Commander Shintome held these special trials--these special proceedings--and acted as judges. In answer 47, the accused, Furuki, reported in considerable detail hearing Admiral Masuda inform Inoue and Shintome of their appointment as judges and then instruct them in detail about their functions and to express their opinion impartially as judges.

But on cross-examination of the defense witness, Inoue, the judge advocate made him admit that he did not even know he was supposed to be a judge, and did not even know this was supposed to be a trial and didn't decide it was a trial until after the war when he was confined as a war suspect. Is it seriously contended that this man was a judge when he did not even know there was a trial until months afterward? On rebuttal, Former Lieutenant Commander Shintome testified that he was accidentally present at one such meeting; that he was not called upon to give his opinion as to the guilt or innocence of the natives; that he was never informed that he was a judge and that he definitely was not a judge. Thus, two of the three alleged judges testified that they did not act as judges.

The defense admitting that there were five incidents of group killings extending over the period from the end of May to the middle of August contended that there were five separate trials consisting of two meetings each, and that Rear Admiral Masuda, Lieutenant Commander Shintome, and Captain Inoue were the judges at all these "special proceedings." The facts however completely eradicate their argument. The facts proven establish not only that Shintome and Inoue were not judges at these alleged meetings, but that in fact Shintome was present for only part of one such meeting. And at that meeting he and Inoue, according to both their testimonies did not approve execution of the natives. This, despite the Japanese naval court martial law of majority rule, Masuda ordered execution of the natives, which fact also establishes that at that meeting they were not judges, and there was no judicial proceedings.

Let us reconsider the facts concerning these alleged trials: one of the three alleged judges was not present at four of the alleged trials; two of the three alleged judges did not know the proceedings were a trial or that they were supposed to be judges; the third alleged judge is dead. At these alleged meetings, defense contends that the evidence consisted of certain investigation reports, based on confessions which have been proven to have been obtained like the rest of the evidence, through brutality and torture. At the alleged meetings no witnesses were present; no sworn testimony was received; no defense counsel or other representative of the accused was present; and finally the accused was not permitted to be present at these alleged trials.

It is not necessary to consider whether a fair trial was given these natives--for, in the light of all these facts, the elaborately fabricated defense of "special trials," dissolves into a pool of petty falsehoods. There was no trial, and there was no legal excuse for these executions.

Masuda is dead, and to the defense, his silence is golden. For the defense has made him a silent witness for every order or law they wish to prove, every power they wish to create, and every act they wish to explain.

Defense contends that conditions similar to martial law existed on Jaluit and that Masuda controlled all military, administrative, and judicial authority on Jaluit. Mr. Akimoto characterized Masuda as a dictator, and Mr. Suzuki said he was despotic. If so, it merely characterizes the true nature of Masuda's and Furuki's acts, but does not give them legality. Even martial law under the law of Japan, to which, as defense pointed out, is similar to the martial law you are familiar with as military officers, does not give limitless power. Admiral Akimo testified that the Fourth Fleet dispatches did not give the commanding officer the power to violate international law. Martial law may suspend certain civil rights; and it may, as was done during our Civil War, permit trial by military rather than civil courts. But it does not under any system of law, give the legal right to punish by death without a trial.

If the accused had alleged that Masuda, as legal head of Jaluit, had himself attempted to make new laws empowering him to sentence to death without a trial it would only be necessary to point out that the Japanese constitution guarantees its subjects the right of trial; and that in the field of international crimes, similar attempts by the Nazis to escape responsibility for their lawless acts by resorting to subterfuge of passing alleged new laws has been unequivocally rejected. It is a fundamental principle of international law that acts must be legal, not only under domestic, but also under international law, and where they conflict, international law must prevail.

"II(viii)"

It should be noted that even the defense did not try to contend that no trial was necessary, but rather attempted to concoct a wierd intricate theory of a special procedure which they contended was a kind of a trial.

To forestall our proof that there was no trial, the defense have sought to argue that even if it was not a trial, it was the best possible procedure they could apply under the conditions at Jaluit. Even if Masuda or the others believed it to be the best possible procedure, this could not make the executions legal. The human life which the Japanese militarists so wantonly destroyed, is very precious in the eyes of the law. The law does not compromise and it requires that to be legally excusable, there must in fact be not only a fair legal trial, and a lawful sentence, but even requires the strictest compliance with the statutes authorizing theexecutions. Thus, the courts have shown that even where sentence of death was legal, it is murder to substitute a different method of execution. 26 American Jurisprudence 230. I cite this to show how zealously the law guards human life and how strictly it requires fullest compliance with the requirements of a legal executinn before it is considered an excuse for homicide. The law clearly rejects this contention of the accused that even the "best possible procedure under the circumstances" could constitute a legal excuse for the homicides.

When we examine the defense contention a little closer, regardless of the law, the alleged facts do not support them. What was done may have been the most effective procedure from the standpoint of the Japanese, but it clearly was not the best possible procedure from the standpoint of the accused or of justice. Disregarding the investigation and its brutal nature, and looking at the alleged trials in Masuda's office, it is clear that at least the accused could have been present, and the witnesses who were already in custody could have been called,and the accused could have been given an opportunity to deny the charges and try to prove his innocence. All these rights, at least the right to be present, could certainly have been afforded the accused. Clearly, the alleged proceedings could not under any guise be believed to have been the "best possible procedure" for the natives under the circumstances.

Finally, it must be realized that it was not necessary for any judicial reasons to kill the natives without a trial merely because it was inconvenient or even impossible at the time to hold a regular trial. It was possible to imprison them, even if they were guilty, until some future time when trial was possible. Failure to give them a trial or any semblance of a trial prior to execution, could not be justified under any legal or moral standards.

International law requires not merely a semblance of trial, it requires a real trial, a fair trial. But we need not here consider the requirements of a fair trial, for in the instant case, notrial of any kind was held.

I do not know what motive FUNUKI or MASUDA had in killing these natives. And

in the eyes of the law it is immaterial. It does not matter whether the natives were trying to escape and Masuda or Furuki felt it was their moral duty to punish the natives; or whether the killings were intended as warnings to try to keep up the power and prestige of the Japanese forces. The fact remains that whatever the motive, whatever the reason, there was no trial, no legal execution and no legal excuse.

Furuki killed the 13 natives; he intended to kill them; and he killed them without legal justification or legal excuse. FURUKI, as charged in Charge I, specifications 1 through 5, is guilty of MURDER.

2. As to Violation of Laws and Customs of War.

Charge II, charges violation of the laws and customs of war, and Specifications 1 through 5 allege that wilfully, unlawfully, and without previous trial, FURUKI punished these natives as spies. His wilfullness, unlawfullness, and absence of previous trial have been briefly discussed in connection with the charge MURDER. To establish FURUKI's guilt under Charge II, it is merely necessary to establish that these natives were punished as spies.

Sakuda testified that pursuant to Masuda's orders it was presumed conclusively that any native attempting to escape would, and therefore intended to, relay military information to the enemy. Clearly, therefore, all the executed natives, since they were attempting to escape, were presumed to be guilty of spying, and were so punished by execution.

In the case of Melein and Mejkane, Furuki himself proved that they were punished as spies. In his answer 99, he testified "Melein had ordered Mejkane to get the natives to desert from all the islands from Pingelap to Jaluit and also to spy upon the defense garrison military secrets, and to give the information to the Americans. They planned and executed this." In his question 101 he was asked, "What was your opinion in punishment of Melen and Mejkane, and what were the laws applied?" He answered: "My opinion expressed in the case of Melein was death, in the case of Mejkane, fifteen years hard labor. The laws applied to Melein, the same as Mandala and Laperia, and in addition to this spying, and the articles in the Japanese Criminal Code concerning spying and the articles in the military secrets law concerning intentional relaying of information to the enemy...

Thus in all specifications, as testified by Sakuda, and as specifically testified by the accused in thecases of Melein and Mejkane, the natives were punished as spies.

The defense has argued that there is distinction between foreign and domestic spies; and that the Hague Convention can only be applied in the case of foreign

spies. This argument is clearly fallacious. In the first place, The Hague Convention makes no such distinction. The offense of spying has always been considered an international one, and the protection which the Hague Convention sought to give to one accused of spying was not limited to "foreign spies." If such a distinction had been made by the Hague Convention, the commission would be compelled to decide whether or not these natives of the mandated islands were "foreign" of "domestic" to Japan. It is unnecessary to make this distinction for Article 30 of the Annex to the Fourth Hague Convention of 18 October 1907, merely provides: "A spy taken in the act shall not be punished without previous trial," and in Article 29: "A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party." There is no portion of this provision which distinguishes between a "foreign" and a "domestic" spy, and the entire argument of such distinction in application of International Law is one which has no foundation.

Similarly, their argument that because the natives were not caught in the actual act they could be punished without a trial, is patently fallacious. The Hague Convention does not purport to restrict or limit the application of basic accepted international law with regard to the rights of persons accused as spies. It merely reflects part of that basic law and states that even when caught in the very act of spying, one cannot be punished as a spy without a trial. A fortiori, if the natives were not caught in the very act, they were guaranteed by international law the right to a trial before being punished as spies.

Since Furuki, wilfully, unlawfully, and without previous trial, punished these natives as spies, the accused Furuki was guilty of violation of the laws and customs of war, and is guilty of the charge and specifications of Charge II.

This, in essence, is the summary of the prosecution's case against Furuki. Before going into the detailed analysis of this case, the judge advocate will consider certain arguments of defense counsel, which do not merit inclusion in the main argument of this case.

C. Detailed Analysis of Case.
1. Special Defense Counsel Arguments.

Defense counsel have made various arguments implying that certain procedures used before the commission, and that certain rulings by the commission, were prejudicial to the accused. The judge advocate could summarily dismiss these arguments by indicating that all the rulings by the commission are clearly proper under the wide latitude permitted in SCAP rules which the Commission is authorized to utilize under the convening precept. The judge advocate could similarly dismiss these arguments by referring to the fact that this matter has already at

various times been argued before this commission prior to permitting any of the questions or making the rulings to which the defense counsel refers. However, the judge advocate considers that it is important for the accused, as well as defense counsel and the entire Japanese people to realize that this accused has received not only a full, but a completely fair trial and has not been prejudiced by methods of prosecution or rulings of the commission. For this reason, the judge advocate will extensively consider the contentions by accused that certain rulings were improper.

a. Admission of Confession of Accused.

The defense counsel, Commander Carlson, argues that it was prejudicial to admit into evidence the confession of the accused. He also contends that it was improper for the court to sustain the objection to his question asking whether the accused had counsel at the time of the writing of the confession. Defense argument is completely specious. At no time have they sought to deny the contents of that confession--in fact Commander Carlson has himself made use of it in trying to show that the accused thought he was obeying a lawful order of Admiral Masuda. The defense counsel argued that the court did not permit him to show that the confession was involuntary. The defense counsel had the accused on the stand and never sought to establish that the confession was involuntary. On the contrary, the defense counsel asked the witness questions which educed the identical testimony and evidence which is contained in that confession. Clearly there was nothing prejudicial in regard to these confessions.

b. Advising witness Inoue of privilege vs. self-incrimination.

Defense counsel, Commander Carlson, claims it was prejudicial for the judge advocate to request an instruction to the witness Inoue informing him of his right under our law to refuse to answer incriminating questions, in view of the fact that he is to be a defendant in a later war crimes trial. This instruction was intended to prevent any prejudice to Inoue, by informing him of his privilege against self-incrimination. This was not an effort to attack the credibility of this witness, nor did the judge advocate in cross-examination of this witness subject him to an attack on his credibility based upon the fact that he was a defendant in a similar war crimes case and therefore had motive to lie. It was clearly permissible in cross-examination of Inoue, and even by collateral evidence, to establish that he was a war crimes accused and therefore had a motive to lie in his own behalf. The judge advocate has not pursued this method of attacking the credibility of a witness--and it is apparent that the commission did not consider the request that the witness be given instructions as an attack upon his credibility. Defense counsel did not MAKE objection to the request of the judge advocate--it is apparent therefore that they concurred in it. Similarly they did not object when the commission directed that the judge advocate's remarks be explained to the witness as instructions. Their failure to object is, in view of their very numerous objections to even the most trivial matters, clear evidence not only that they were in full accord with the request for this instruction--but that they do not in fact consider that the request was prejudicial.

c. Reference in questions to contents of documents not submitted into evidence.

Mr. Akimoto and Commander Carlson in behalf of the accused argued that the judge advocate has improperly been permitted to refer to certain documents in cross-examination of the defense witnesses. They are mistaken in their assumption that this was improper or prejudicial.

Two documents were referred to by the judge advocate in cross-examination of these witnesses. The documents themselves, and clearly the portions thereof referred to by the judge advocate in his questions, could properly have been offered and admitted into evidence. These are not ordinary memoranda, nor are these self-serving documents prepared subsequent to the commencement of trial, like Exhibits 3 and 4 which were offered by and admitted for the defense.

The documents referred to in cross-examination are first, the official Record of Proceedings of War Crimes Investigation conducted at Jaluit, Majuro, and Kwajalein Atolls, Marshall Islands, by order of the Commander Marshalls Gilberts Area, October 7, 1945, to inquire into the alleged executions of American prisoners and war crimes and atrocities on Jaluit Atoll. The investigation was conducted in the period from October 7, 1945 to November 18, 1945, in accordance with Serial6921, authorizing administration of oath to the witnesses. Some of the witnesses before that Board of Investigation were sworn, others were not, but their testimony was carefully transcribed, and the record included not only the American aviators, but also the death of the thirteen natives concerned in the instant trial. This is evidenced by the Board of Investigation report, paragraph II, as follows: "L. Seven Marshallese natives executed in May, 1945. M. Two Marshallese natives executed in June, 1945. N. Two natives executed in July, 1945. O. Twonatives executed in August, 1945." In the course of this investigation the questions and the answers of the witnesses related not only to the American aviators, but also to the executed natives for whose death the accused, FURUKI, is now being tried.

The second document referred to by the judge advocate in cross-examination was an official record of the trial before a United States Military Commission, on December 7, 1945, at Kwajalein Atoll, Marshall Islands, of Yoshimura, Kawachia, Taska, and Tanaka. The case against Admiral Masuda, an original party defendant was nol prossed. The accused, Major Furuki, testified at that trial, and in cross-examination of Furuki, this testimony of his was referred to in certain questions of the judge advocate.

In cross-examining certain defense witnesses the judge advocate directed their attention to certain prior statements made by the witness which are recorded in the these two documents: the record of the former war crimes trial and the record of the official board of investigation. Largely because the defense witnesses did

not deny the essential content of their prior statements, the judge advoce found it unnecessary from the legal as well as the practical standpoint, to introduce these two documents into evidence; and he refrained from doing so because certain questions and answers by the accused, as well as by other defense witnesses contained in these documents, might be construed as prejudicial to the rights of the accused.

The prior statements by the defense witnesses were of two types: (1) statements indicating that the testimony of these witnesses and of other Japanese military personnel were made to the Investigators were false statements, and that the witnesses before the Board of Investigation had knowingly testified falsely in accordance with a common plan, and (2) statements made at the Board of Investigation indicating that no trials were held on Jaluit.

By reference to the first type of statement, the judge advocate desired to establish that the defense witnesses were not credible before this commission because they had previously under official investigation madd false statements; and that the same motives which, by their admissions, caused them to testify falsely at their prior investigation, namely to aid their commanding officer, were present for fabrication in this trial of the officer second in command. Certainly it is admissible to attack the credibility of any witness by showing the existence of a motive to lie. It is doubly damaging to the credibility of such a witness to show that because of that motive he has previously in official proceedings deliberately falsified his testimony.

With regard to the propriety of establishing the bias or motive to lie of a witness, the judge advocate need merely cite Underhill, op cit., Section 437, which states: "The bias of the witness and his interest in the event of the prosecution are not collateral, and may always be proved to enable the jury to estimate his credibility. They may be proved by his own testimony upon cross-examination, or by independent evidence, and, while much latitude is allowed, the extent of such cross-examination rests very much in the sound discretion of the court. . . The bias of the witness may be shown, either by independent testimony or by questions put to him upon his examination. He may be interrogated as to his sympathy for the prisoner. . . In proving bias or interest by questions put to the witness regarding his previous statements out of court indicating bias, it is necessary to state details of time, place and person attendant upon such declarations. If the witness denies having uttered the statement indicating bias or if he refuses to answer or answers evasively, the facts of bias may be proved by other witnesses." (italics supplied).

With reference to the second type of statement, the judge advocate , in questioning witnesses who testified before this commission that a trial was held for the natives, referred these witnesses to prior statements made by them indicating that no trials were held on Jaluit. Reference to the prior conflicting statements was made for the purpose of establishing that the witness was not credible; and, if in fact the witness denied having made the prior conflicting or contradictory statement, the law requires that a proper foundation be laid before introducing the prior contradictory statement which the witness denies having previously made. Underhill's Criminal Evidence, 4th ed., sec. 425, et. seq., relate to the laying of foundation, etc., for impeachment of an adverse witness by showing of contradictory statements. But if, as in the instant case, the witness fails to deny making the prior statements, then not only is it legally unnecessary to further prove the prior statements, but from the practical standpoint, it is obviously unnecessary when the witness in reiteration of attempted explanation of his prior conflicting statements has directly weaked the efficacy of his testimony.

So much for the law, it is clear, and authorized the use of such questions for the purpose indicated. Now let us look at the facts.

At the Yoshimura trial, Major Furuki was confrontedwith the fact that he had previously made a contradictory statement. Faced with this fact, Furuki claimed that the prior statement was false and that he and the other officers had agreed to tell this lie in order to save the Admiral. Inoue, during the Board of Investigation, was similarly faced with such a prior statement, and he also claimed that the prior statement was false and that he and the other officers had agreed to tell this lie in order to save the Admiral. It is true that the false statement that they gave related to another case, a case concerning American aviators, but it should be noted that the same motive which they admit prompted them to make false statements, namely their desire to aid their senior officer, is similarly present now when Major Furuki who is the next senior officer is on trial before this commission. It should also be noted that the statements that Inoue and Furuki made with relation to the American aviators, is a part of that same record of investigation, which contains the statements concerning the execution of the natives. It would therefore have been proper and material to inquire into this matter of false statements in order to determine first whether or not they had also changed their stories after Admiral Masuda's death in connection with the native cases, and secondly which of the two groups of stories were true--those stores told about both the aviators and the native cases prior to Masuda's death or those stories told after Masuda's death.

That the stores with relation to the natives was changed is what the judge advocate directed his questions at with regard to the question of trial, in order to show by their contradictory statements that the witnesses were incredible and that their testimony indicating a trial conflicted with their prior statements. In questioning Morikawa, the judge advocate directed his attention to a prior

statement made by him in Exhibit 55 of the Board of Investigation. This exhibit refers solely to two native cases--one a case of natives from Millo Atoll which was referred to by defense in their testimony before this commission, and the case of the natives Melein and Mejkane. From the record of the investigation it would appear that both native cases were referred to when the witness was at the board of investigation asked the question concerning trial. The judge advocate therefore asked the witness, Morikawa, "306. Q. When you were interrogated, you were asked concerning the execution of the natives, 'Were they given a trial?'" Your answer, 'No.' How do you explain the fact that when you testified before the officer you stated there was no trial, and that now when testifying before this commission you state that there was a trial?" This question is clearly permissible, and in fact, is essential to laying a foundation for subsequent introduction of the prior contradictory statement if the prior testimony is in fact denied.

The witness Morikawa, however, did not deny that he was asked that question, nor did he deny that he made that answer which the judge advocate cited from the prior Board of Investigation proceeding. The facts of the instant case are therefore clearly distinguished from the case, CMO 1-1923, pp. 10-12, cited by Defense Counsel. Morikawa in answer to question 306 stated: "At that time when I replied I meant there was no regular trial. At present I am still thinking there was no trial, but a trial by special procedure." Similarly, question 318, et seq. the witness did not deny that he was asked these question, nor did he deny that he used the word "no" in his answer--he merely contended that while he did not distinctly remember his answer, he believed that after that he indicated that there was no regular trial. I cite the following pertinent portions of this testimony.

"318. Q. At the original investigation before the investigating officer, were you asked in connection with these natives, 'Were they given a trial?'"
"A. As I recollect it I was asked this question."

"319. Q. Did you answer this question with the word 'No'?
A. I replied that there was not a regular trial.

"320. Q. When did you answer this question using the word 'No' in your answer?
A. I do not remember if I answered in Japanese 'yes' or 'no,' but after the word I stated that it was not a regular trial.

"321. Q. Do you remember distinctly that when you testified you told this investigator that there was not a regular trial. Is that correct?
A. I do not know.

"322. Q. Did you tell this investigator that there was a special trial?
A. No."

Note that the judge advocate did not refer to any other questions or any other testimony by the witness, but merely used this one former question which the witness did not deny answering, but as to which he merely sought to explain what he meant when he made that prior answer. Morikawa was not prevented from making this explanation. He was permitted to explain that he meant there was no regular trial. Since he had not denied making the statement that there was no trial, and since he now, similarly, admitted in his testimony before this commission, that there was no regular trial, there was no practical or legal reason which required the introduction of the prior statement--for the prior statement was not in this respect contradictory to his testimony before this commission, although his credibility had been shaken not only by his shift in testimony but also by his evasiveness in responding to the judge advocate's questions after they were ruled admissible by the commission.

Similarly, Inoue was asked by the judge advocate, "175. Q. In Jaluit, in October, 1945, were you asked 'What kind of a trial did they have or was your investigation the only thing used?'" While the question asked in Jaluit related to the case of the Mille native, the answer which Inoue is recorded as having made in that case clearly related not only to the Mille native, but to all natives, and in fact specifically related even to Japanese soldiers. The judge advocate believed that when he refreshed the witness's recollection with that question the witness would make the same answer which he made at the Board of Investigation, and which in the judge advocate's opinion contradicted his testimony before this commission to the effect that a trial was held for the natives executed by Furuki. Note that the judge advocate did not in his question repeat the content of the witness's former answer at the Board of Investigation and clearly therefore this was not prejudicial to the accused. The witness however avoided and did not answer the judge advocate's question. The judge advocate could have introduced the transcript of this testimony of the witness which indicated a statement conflicting with his current testimony. However, Inoue had already on cross-examination been compelled to admit that no real trial was held for the executed natives, in fact, Inoue carelessly admitted that he did not even believe that the alleged meeting in Masuda's office was any kind of a trial until after the war when he was confined. In view of this testimony it is obvious why the judge advocate deemed in unnecessary to introduce into evidence the record of this answer at the prior Board of Investigation. It was permissible to do so, not only under the rules relating to relevancy, but also under the rules of evidence permitting attack on credibility by proof of prior contradictory statements. But it was unnecessary because not only did the witnesses fail to deny having been asked the question but also, it should be noted, the actual prior contradictory statement was never even quoted on referred to in the judge advocate's question.

So much for the argument that these questions by the judge advocate were improperly permitted by the commission.

d. Objections sustained as to improper defense questions.

Similarly defense counsel, particularly Commander Carlson, have argued that they have improperly been prevented from asking certain witnesses concerning certain alleged penal regulations, and concerning the provisions of martial law. Clearly the judge advocate did object to such questions, but the objections were fundamental ones and the commission properly refused to permit counsel to flagrantly violate the most elementary principles of evidence. If material documents and pertinent provisions thereof had never been admitted into evidence, the defense would have no one but themselves to blame for failure to properly introduce such evidence. That in fact the defense has not been prejudiced by even their own failure, is apparent from reading the full testimony of all the witnesses, and the objection and arguments of defense counsel. But it should be noted that objections of judge advocate were properly sustained as to the methods by which defense counsel sought to introduce this evidence.

As clear illustration, let us consider their numerous questions to various witnesses concerning the content of the "MARTIAL LAW." These questions were asked of witnesses whom the defense refused to even attempt to qualify as legal experts, which is a basic preliminary to any questions calling for expert opinion concerning the meaning of, the application of, and the content of a purported Japanese law and this is particularly true where the effort is made to determine by an inexpert witness, its application to the Marshall Islands. Does defense counsel seriously contend that even he tried to prove the law by the "best available witnesses" whom he did not even try to qualify as experts? There were two well qualified experts on Japanese law available here - in this very court room - all during the course of this trial. I refer to defense counsel Mr. Suzuki and Mr. Akimoto. No attempt was made to prove or establish the existence of, the terms of, or the applicability of that law by means of these available experts. One of these experts, Mr. Akimoto did testify before this commission, but he did not at that time, nor was he subsequently recalled to the stand to testify concerning martial law. Why? Certainly the judge advocate did not prevent it. Was it because the defense was unwilling to have him asked, as an expert under oath, to testify concerning the contents and meaning of that law, and the naval court martial law they were seeking to prove applicable to the natives? Was it because they feared that in cross-examination the judge advocate could unequivocally establish that martial law was not applicable to Jaluit, and from Mr. Akimoto's own lips establish that even if applicable and Navy Court Martial Law could therefore be applied, under Japanese naval court martial law, the natives were not given a trial and were illegally and criminally executed?

e. Jurisdiction.

The next argument of counsel, made by Mr. Akimoto, and reiterated by Mr. Suzuki and Commander Carlson, relates to jurisdiction.

The commission has previously heard extended arguments on the subject of jurisdiction and has clearly, correctly, and unequivocally rejected the misleading

and fallacious arguments of defense. The defense have added nothing to their previous arguments, they continue to cite generalized concepts of law, completely inapplicable to the present case, and still fail to cite a single case which relates to the condition of military occupancy and denies the right of the military occupant to exercise jurisdiction in the occupied area over crimes committed within that area. The defense fails to cite any case denying this power, because they have been unable to find any such case. It is therefore unnecessary in rebuttal to do more than refer the commission to the previous argument of the judge advocate with regard to jurisdiction and to reiterate to the commission that their jurisdiction over the instant case is firmly recognized under established principles of international law authorizing such jurisdiction under the power of military occupancy, as well as the related concept of quasi-sovereignty which similarly empowers the armed forces of the United States under current conditions, as the military occupant, to try the accused criminal Furuki by military commission for the crimes charged.

f. Punishment of individuals for violation of International Law.

It is unnecessary for the judge advocate to answer defense arguments that an individual cannot be punished for international crimes, such as violation of the Hague Convention. The argument was previously answered, and I need merely remind the commission that in the cases referred to them, the Llandovery Castle Case, the Nuremberg Trials, and all the war crimes cases, individuals have been held subject to international law and criminally punishable for violation of the laws and customs of war.

The judge advocate will now in detail discuss the case against the accused, and in the course of this discussion, will fully rebut the remaining defense arguments.

2. Murder.
a. Under effective local law - the Japanese law.

Charge I, in five specifications charges the accused with murder. The judge advocate will first discuss the specifications in terms of the pertinent local law, which was the Japanese law, and will then discuss the meaning of the American and common law terms used in these specifications.

In the language of Article 199 of the Criminal Code of Japan, which was the effective local law on Jaluit at the time the offense was committed, there are no expressed requirements other than the homicide to establish the crime. The language of this provision reads:

"Every person who has killed another person shall be condemned to death or punished with penal servitude for life, or not less than three years."

Chapter VII of the Criminal Code of Japan contains general provisions which provide that under certain circumstances, acts which would ordinarily constitute a crime are not criminal, and that under other circumstances acts which are criminal should receive a lesser punishment because of mitigating factors present.

These provisions have been discussed at length by counsel for the defense, but will be examined minutely and accurately with reference to the facts at issue in the instant case. Certain Articles of Chapter VII are clearly inapplicable and will be briefly disposed of prior to consideration of the instant case. Chapter VII consists of Articles 35 through 42. Articles 39 through 42 are not applicable to the instant facts, nor has the defense attempted to apply them. Article 39 relates to acts of persons of unsound mind; Article 40 relates to acts of deaf mutes; Article 41 relates to mitigation of punishment for those who denounce themselves before official detection.

The remaining articles 35 through 38 of this chapter, will be briefly discussed in order to establish that the pertinent portions thereof are included in the common law concept of murder as an intentional killing, without legal justificatio or legal excuse.

a(1) - Criminal intents.

Article 38 of the criminal code of Japan deals with intent, and what it requires as intent is less extensive than the common law requirement of intentional killing.

Article 38 of the Criminal Code of Japan provides "Except as otherwise provided by special provisions of law, acts done without criminal intent are not punishable. A person who without knowledge of the fact has committed a grave offense (crime) cannot be punished in proportion to its gravity. Ignorance of the law cannot be invoked to establish absence of design, but the punishment may be mitigated according to the circumstances."

While it is true that criminal intent is required by this provision of the Japanese Code, it is clear that the intent required is no greater than that required under our laws. In fact, it appears to be considerably less of a requirement because it seems to provide that for all serious crimes, even ignorance of the facts will only be considered in mitigation; this portion reads: a person who without knowledge (of the fact) has committed a grave offense (crime) cannot be punished in proportion to its gravity.

Furuki admits that he killed the natives, and he admits that he intended to kill the natives. He argues that he believed the executions were legal. If the executions were in fact legal, then he was not guilty of murder, but if the executions were not legal, then the mere fact that he was ignorant of the law, and believed them to be legal, does not protect him. His ignorance of the law is not a defense, it is an argument in mitigation. The Japanese Criminal Code, like our own law, clearly and specifically stated that "ignorance of the law cannot be invoked to establish absence of design," but the punishment may be mitigated according to the circumstances. Similarly, under our law and under international law, Furuki's plea of ignorance of the law is merely an argument in mitigation and not a substantial defense. Since Furuki admits he intended to kill them, the mere

fact that he intended to do what he thought was legal, does not, under any system of law constitute a legal excuse or negative the existence of the criminal intent. The existence of the required criminal intent will be further discussed in analyzing the common law wording of the specifications of Charge I, and at that time the judge advocate will indicate that even the alleged argument in mitigation is an incredible, indigestible defense concoction.

a(2). - Acts of necessity or self defense.

The counterpart of the defense of legal justification by self-defense, etc., is set forth in the Japanese Criminal Code in Articles 36 and 37 of Chapter VII, which relate to "unavoidable acts." The accused, Furuki, in an intricate argument has attempted to show that in view of war conditions on Jaluit, there was a military necessity of self-defense which required and justified the execution of the natives. Articles 36 and 37 of the Japanese Criminal Code do not support this argument of defense or necessity. These provisions require, first that the act be unavoidable, and secondly, as in all self-defense provisions, the danger against which one is seeking to protect oneself must be imminent and caused by the person one injures in such defense.

Article 36 reads: "Unavoidable acts done in order to protect the right of oneself or another person against imminent and unjust violation are not punishable According to circumstances, punishments may be mitigated or remitted for acts exceeding the limits of defense." Article 37 reads: "Unavoidable acts done in order to avert present danger to life, person, liberty or property of oneself or another person are not punishable, provided the injury occasioned by such acts does not exceed in degree the injury endeavored to be averted. According to circumstances however, punishment may be mitigated or remitted for acts exceeding such limit....."

It is clear that both these provisions of Japanese law require first that the acts be unavoidable, and secondly that they be in defense against imminent and unjustifiable danger. We have proved, and the defense have by their silence admitted, that the natives were unarmed. Any imminent danger to the Japanese was not caused by these thirteen natives. The United States armed forces, and not the natives created the conditions causing danger to the Japanese armed forces. Such imminent danger as the Japanese found themselves in, was not an unjust violation of their rights. The illegal aggressor cannot when his victims seek to escape murder them in cold blood and when finally captured and brought to trial by the law argue that he must be excused from this murder because it was necessary for him to prevent the escape of his victims.

Reduced to everyday human experience, the false nature of the defense argument becomes crystal clear. Japan forced the natives to the ground and stood upon them while it treacherously stabbed the United States in the back. The United States turned to defend itself from this treachery. The natives sought to escape from the Japanese, and Furuki killed them. Now in defense of his act, he protests he had to kill them; it was an an act of self-defense or military necessity.

II(e)

Does the law permit an assailant standing upon the throat of his victim to kill that victim because the victim tries to escape to the police? It is a fabulous argument, not recognized by any concept of law or common sense.

In passing it should be noted that the Japanese requirement of unavoidability of the act, is similar to our theory that even in self-defense one must not go beyond the absolute necessities of that self-defense, as required by the immediate conditions at the time of the act of self-defense.

William Sebald of Kobe, Japan, in his authoritative book, "The Criminal Code of Japan," illustrates this concept of unavoidability and shows that even if danger is imminent from an unjust aggression, the extent of force used must be clearly unavoidable. He cites in regard to Article 36 the following decision of the Supreme Court of Japan:

"When a person is attempting to restrain another who, under the influence of liquor, was violently behaving himself was grappled by the latter and in consequence thereof, struck him on the head with a porcelain bowl in order to push him aside, the act was done in order to protect himself against an imminent unjust aggression, but it cannot be said to have been unavoidable. Furthermore, if he struck the drunkard on the head with a candlestick to stop him, because in consequence of the blow the latter was more intoxicated than before and shouted 'come out, old fellow!" and pulled him by the sleeve, his act was done to protect himself against an imminent unjust aggression, but cannot be said to have been done unavoidably." (11 S.C.N.S. 1804, Daishinin Hanreishu.)

Striking the drunkard who was grappling with him, first with a porcelain bowl, and then later with a candlestick, was conceded by the court to have been done "to protect himself against an imminent unjust aggression", but nevertheless the court held that the acts "cannot be said to have been done unavoidably."

The Japanese Supreme Court has thus declared not only that the danger must come from the person who is injured, not only that the danger must be imminent, not only that the danger must be caused by an unjust aggression, but also that the means and extent of repelling such danger must be "unavoidable." In the instant case, the danger did not arise from the natives, but was instead caused by the lawful acts of American armed forces; the accused was not in danger of imminent unjust aggression from these natives. They were unarmed, securely bound, and prisoners under guard. Finally the means used was not unavoidable. As a measure of self-defense, it was not necessary for Furuki to execute them. Furuki himself admits that for he claims that in many of these cases he had recommended that the natives be sent back to work on their home island, thus the Japanese requirements that the act be "unavoidable" and to avert "present danger" or "imminent and unjust violation" are not met in the instant case, and the homicides are not justifiable under the Japanese law. The question of legal justification under our law will be further discussed infra.

The Japanese counterpart of the defense of legal excuse is found in Article 35 of the Japanese Criminal Code which provides: "Acts done in accordance with laws and ordinances or in pursuance of a legitimate business or occupation are not punishable." This provision is a common one applied in all legal criminal systems. This defense of lawful excuse has been argued extensively by defense counsel before this commission, and represents the heart of their case.

The judge advocate will consider this defense at length in discussing the concept of legal excuse under our law. But in considering the Japanese law it should be clearly remembered that the mere fact that an act is done in the course of legitimate business or occupation or within the apparent framework of the law, does not make it legal. The act done must be judged on its own merits, and not in terms merely of whether it purports to be in the course of a legitimate order, business or occupation.

The question of Furuki's criminal intent and the absence of legal justificatio and excuse will be discussed in detail in connection with the common law terms used in the specifications of Charge I.

In summarizing the foregoing discussion of the pertinent Japanese criminal law I need merely say that we have discussed all the provisions of Chapter VII of Book I of the Japanese Criminal Code, and have clearly ascertained that everything included therein is encompassed within the broader protections of the concepts of intention, and legal justification and legal excuse.

In the Japanese law, all of these terms have a narrower meaning than they possess in our own law. For this reason, and for the greater protection of these defendants, the specifications of Charge I have utilized American statutory and common law terms as well as the provisions of Section 199 of the Japanese Criminal Code. In application to the facts of the instant case these historical terms boil down to the requirement that the killing be intentional and that it be without legal justification or legal excuse.

b. Remaining Requirements - statutory and common law terms.

It has been proved, and thereafter the accused Furuki admitted that on Jaluit Atoll, Marshall Islands, he killed thirteen unarmed natives. But, the accused has not pleaded guilty to the charge of murder, and in view of this it is necessary for the commission to determine whether the requirements of the specifications of murder have been met, and it will be established in reviewing the evidence. It should again be noted that in no way can the accused claim that he has been substantially prejudiced by any admission or exclusion of evidence, or by any ruling of the commission. All that is needed to convict the accused is his own testimony - as corroborated by his own defense witnesses - that he killed the 13 natives - and that his alleged justification of trial rests upon a proceeding in which the 13 accused and subsequently executed natives were not present.

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Since Furuki intended to kill the natives, it is clear that this is not a case of involuntary manslaughter, for in such homicide the killing must be accidental. Similarly this is not a case of voluntary manslaughter, for, as it is described in Naval Courts and Boards, Section 119, "Voluntary manslaughter is distinguished from murder by the fact that it is committed not with malice aforethought, express or implied, but in the heat of passion or heat of blood caused by reasonable provocation." It follows therefore, that where the killing is intended (which is all that malice aforethought means) there can be no manslaughter and the killing must be either murder or legally justifiable or excusable.

Naval Courts and Boards, section 53, defines Murder, as "The unlawful killing of a human being with malice aforethought..... 'Unlawful' means without legal justification or excuse. Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed."

Specifications 1 through 5 of Charge I, allege that Furuki wilfuly with premeditation and malice aforethought, feloniously and without justifiable cause, killed thirteen unarmed natives.

A layman approaching the law of homicide for the first time, may well wonder at the peculiar phrasing and technical wording of these specifications of murder. While some of the words used in the specification have an everyday meaning and usage, their legal meaning is special and technical. It must be remembered that these terms are historical concepts which arose in order to make certain differentiations between the punishments allowed by the law for the different degrees of the crime of homicide.

Whenever non-lawyers have been confronted with these terms, confusion occurs. - American Jurisprudence, vol. 26 p. 528, citing State v. McGuire, 84 Conn. 470, 80 A. 761, 38 LRA(NS) 1045 and ANNO: 38 LRA(NS) 1064, in discussing malice states:

".....Indeed, it has been observed by high authority that it is practically impossible so to define and explain the term 'malice' as to bring it within the comprehension of the average juror, and it is said to be the better practice for the trial judge in charging the jury not to attempt a definition of malice, but to say, rather, that if the jurors find the fact of death and that it was accomplished by the defendant without legal justification or excuse and without circumstances of extenuation, then the crime proved is murder."

Why the law continues to use these archaic and confusing terms is difficult to explain. Perhaps as Cardozo implies, certain of the terms were designed to give the jury the opportunity to find the lesser degree of murder and thus forestall the imposition of the death sentence. In discussing the standard of premeditation, used in New York in distinguishing first degree murder from second degree murder, Cardozo "What Medicine Can Do for Law," pp 100-101 states:

"What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistably for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books."

The terms wilfully, with premeditation and malice aforethought, feloniously, and without justifiable cause, are all legal terms, terms of art whose applied meaning must be ascertained by consulting legal authorities and case precedent. Let us examine these terms, see what they mean as applied in the law, and then ascertain whether the evidence educed at the trial establishes them.

b.(2) - Wilfully.

The word "wilfully" means simply intentionally and not by accident. In Bouvier's Law Dictionary (Rawles 3rd edition), for the word "wilfully", the term "intentionally" is used as the defining word, and the definition continues in part as follows: "In charging certain offenses it is required that they should be stated to be wilfully done..... In an indictment charging a wilful killing, it means intentionally and not by accident. State v. Schaefer 116 Mo. 96, 22 S.W. 447.....It is synonymous with intentionally, designedly, without lawful excuse, and therefore not accidentally. Miller v. State (Okl) 130 Pac. 813." In the instant case, Furuki admits he intended to execute the natives. He intended to kill them, therefore, the killing was intentional and not accidental. It is therefore clear and unequivocal from the admission of the defense, that the killings were wilful.

b.(3) - Premeditation.

Simply stated, the term "premeditation" means that the decision to kill was made some appreciable time before the commission of the act. The requirement of premeditation was derived from the American statute and case law, seeking to differentiate between those murders justifying capital punishment. (.first degree murder) and those murders which do not warrant capital punishment. (American Jurisprudence, Vol. 26, page 186). Wechsler and Michael in their stimulating study "A Rationale of the Law of Homicide" 37 Col. Law Review 706 note: "For the most part therefore, the functions performed by all the English definitions of murder--the determination of what homicides may be capitally punished--is

performed in the United States by the 'deliberation and premeditation' formula... However, the balance of the common law of murder performs under American statutes the analogous function of singling out those homicides which, though not capital, are nevertheless punishable more severly for the most part than the other criminal homicides. . . . "

As to premeditation in the instant cases it is clear that prior to the actual killing of each group of natives, Furuki had made his decision to kill these natives. He went for them in a truck; he took them bound to the place where he killed them; and then after instructing the guards not to let any passersby come into the area, he took the natives into the coconut grove and there killed them. It is clear that for some appreciable time prior to the killing of each group of natives, the accused had the design and intention to kill them. It is clear therefore that the prosecution has established the existence of premeditation.

b. (4) Malice Aforethought.

Malice aforethought is a closely related concept. The word "aforethought" in its popular sense conveys some of the sense of premeditation. But the legal terms "with premeditation and malice aforethought" mean little more than the existence of the intention to kill at the time of or just prior to the killing. Wechsler and Michael in their "A Rationale of the Law of Homicide," op. cit., pp. 702-708, explain this briefly as follows:

"The most striking phase of the development of the English law was the reduction of 'malice aforethought' to a term of art signifying neither 'malice' nor 'forethought' in the popular sense. Strikingly analogous in the judicial development of the American law of homicide is the narrow interpretation of 'deliberation' and 'premeditation' to exclude the two elements which the words normally signify: a determination to kill reached (1) calmly and (2) some appreciable time prior to the homicide. The elimination of those elements leaves, as Judge Cardozo pointed out, nothing precise as the crucial state of mind but the intention to kill."

Similarly, American Jurisprudence, Vol. 26, p. 182, states: "Malice in the sense of hatred or malevolence toward the deceased is not necessary to constitute murder in the first degree, nor is it necessary to show what motive, if any, inspiredthe killing." Similarly, on page 183, "Malice is an essential ingredient or element of murder at common law and also under statutes which have been enacted in many jurisdictions. However the term 'malice' as used in the law of homicide is difficult to define, for in its technical sense it comprehends a considerable number of different conditions of mind. The term has often been defined as the intentional killing of one human being by another without legal justification or excuse and under circumstances which are insufficient to reduce the crime to manslaughter. It is said to include all those states and conditions of mind which accompany a homicide committed without legal excuse or extenuation..

Bolton
II(j)

The definitions of malice aforethought, as set forth in Naval Courts and Boards, American Jurisprudence, and numerous other authoritative texts reflects the decisions of the courts. Two typical leading cases are 4 L.R.A.(NS) 954: "Legal malice is the intent unlawfully to take human life in cases where the law neither mitigates nor justifies the killing." Comm. v. Madericus 255 Mass. 304, 151 N.E. 297, 47 A.L.R. 962 "Malice as an element to murder does not necessarily imply ill-will toward the person killed; any intentional killing of a human being without legal justification or excuse, with no extenuating circumstances sufficient in law to reduce the crime to manslaughter, is malicious."

Once it is established that the accused intended to commit the homicide, his motive is completely irrelevant in determining the question of guilt, although it may be considered in mitigation of punishment. This has already been shown in regard to Japanese law, and it should be noted that the same is clearly true under our law. In Roberts v. People, 221 Michigan 187 (1920) the defendant at the request of his incurably sick wife provided her with the means to commit suicide. The defendant was found guilty.

Similarly, since as it has been proved that the accused, Furuki, intended to kill the natives, he must be judged solely on the basis of whether his acts were in fact legally justifiable or excusable. His motives may have been excellent or revolting, it is immaterial, except in mitigation or aggravation of the punishment. It may seem strange to the layman that a man with a good heart or a good character can be found guilty of a crime, but we are dealing with the practical problems of an organized society and in determining guilt, we cannot probe into nor seek justification in the innermost motives of the criminal. Society has determined what circumstances constitute legal justification of legal excuse for acts which would otherwise be criminal. Society does not, and cannot recognize personal motives, or other personal justifications or excuses, as means of escaping criminal liability. The law does permit these things to be considered in determining the extent of punishment--but to permit it to determine the existence of non-existence of guilt, would mean the destruction of the entire system of law, and or organized society itself.

Wharton in his Criminal Evidence (11th ed. vol. 1, p. 283) explains this as follows: "There is no bad act which the perpetrator does not summon up good motives to excuse. As assassination, for instances is rarely for the exclusive purpose of satisfying private hate. A bad man is to be removed from the world, or some good deeds are to be aided by part of the plunder. If whenever good intentions are mingled with the bad intention, there could be no conviction, in any case. . . . The law is: No matter what may be the motives leading to a particular act, if the act is illegal, it is indictable, notwithstanding some one or more of the motives inducing the act may be meritorious."

There could be no conviction

"H(29)"

In the foregoing discussion the judge advocate has established that Furuki killed these natives intentionally, and that in fact this intention to kill existed for some time prior to the actual killing of each group of natives. Therefore, the legal requirements of "wilfullness, premeditation and malice aforethought" have been clearly established. Under the specifications of Charge I, two terms remain to be considered, "feloniously" and "without justifiable cause." In its broader application, the term feloniously includes the term "without justifiable cause," for it means merely that the act was done unlawfully, that is to say without legal justification or legal excuse.

b (5.) - Feloniously.

Bouvier's Law Dictionary (Rawle's Third Revision) defines "feloniously" as follows: "Feloniously. This is a technical word which at common law was essential to every indictment for a felony, charging the offense to have been committed feloniously; no other word nor any circumlocution could supply its place.....It is necessary in describing a common-law felony, or where its use is prescribed by statute; Wharton's Criminal Pleading, Section 260; Bowler v. State 41 Miss 570;.....In an indictment it is equivalent to purposely or unlawfully; State v. Bush, 47 Kan 201, 27 Pac 834, 13 L.R.A. 607."

Felonious homicide is defined in Bouvier as: "Felonious Homicide. The killing of a human creature, of any age or sex, without justification or excuse. It may include killing oneself as well as any other person; 4 Bla. Com 188....."

We have discussed in considerable detail, both the Japanese and the American Law with regard to murder. In synthesis, in relation to the instant case, it has been shown that they require merely that the killing was intentional and that it was without legal justification or legal excuse. We have demonstrated at length, that the required intent to kill was present. It is now necessary to consider the proof that this killing was done without legal justification or legal excuse.

c. - Absence of legal justification or excuse.

Defense counsel implied that Furuki was legally justified in killing the natives because of a good motive to obey Masuda and to help the Japanese forces in their fight for survival. This entire question was fully discussed in proving the existence of intent to kill, and at that time, it was clearly demonstrated that a good motive is not a legal justification, whether under Japanese, American, or international law; and that the entire defense argument of motive is only relevant after finding of guilt, in regard to mitigation of punishment.

c (1.) - Self-defense, necessity or self-preservation.

In a related argument defense counsel implied that even if the motive is not a justification or excuse, the conditions on Jaluit were such that the killing of these natives was required by a condition of self-defense or necessity, and that these conditions and this necessity justified the homicides.

Self-defense is a legal justification for intentional homicide. In its broader aspects it includes the defense of others as well as the defense of oneself. We have already discussed the corresponding provisions under Chapter VII of the Japanese Criminal Code, and have seen that the killing of the natives by the accused was not excused or justified under the provisions of Articles 36 and 37. These require that the acts must be "unavoidable acts" either to protect against "imminent and unjust violation" or "to avert present danger to life.....provided the injury occasioned by suchvacts does not exceed in degree the injury endeavored to be averted." The acts, the killing of the natives, was avoidable, there was no imminent danger from the natives, and as previously demonstrated, neither the natives who were seeking to escape, nor the American forces, were guilty of any unjust violation of the rights of the Japanese.

Under our law - indicated in Wharton's Criminal Evidence, Vol. 1, p. 438, there are four essential conditions to make out a case of self-defense: "First the party assaulted or seriously threatened must be free from fault in bringing about the difficulty; second, he must believe at the time and under the circumstances that the danger of death or of serious bodily harm at the hands of his assailant is such as to render it necessary to take his assailant's life to save his own life or to prevent serious bodily harm; third, the circumstances must be such as to warrant such belief in the mind of an ordinarily prudent person; fourth, there must exist a necessity to take life, of which necessity the jury are the judges."

Since the natives were unarmed, bound prisoners of the accused at the time of the homicide, it is clear that they were not assailants of the accused, that the accused was not in imminent danger of bodily harm from them, and that there was no necessity to take the life of these natives. Finally, it must be noted that the Japanese were not free from fault in bringing about the difficulty. Obviously therefore, this argument of self-defense, or necessity, like the argument of "unavoidable acts" under the Japanese code, is not sustained by the facts in the instant case.

Similarly under international law, the alleged justification is not sustained. It is true that the principle of military necessity is recognized in international law as justifying certain acts which would otherwise be illegal- such as the killing of enemy soldiers during the heat of battle. But the nature and extent of these excused or justified acts, is definitely limited in international as it is in domestic law. Glueck, War Criminals, Their Prosecution and Punishment, pg. 42. All is not fair in war. Lawrence, Principles in International Law, which I quoted earlier in this argument clearly points out the fact that international law does not authorize violation of the rules of international law because of the exigencies of the moment. Also note that under international law the concept of military necessity is limited by the doctrine of humanity which prohibits employment of such kind or degree of violence as is not strictly necessary for the purpose of war. Glueck, op.cit.pg. 42.

It is apparent from what has been said before, the killing of these unarmed natives was not strictly necessary for the purpose of war. There was no imminent danger which necessitated their being killed without a trial, and even if there had been such danger, the alleged necessity of taking their lives would not have constituted a legal justification or excuse. Cardozo (What Medicine Can Do For Law, 1928, in Law and Literature 1930, p.113) speaking of the decision in United States v. Holmes, 1 Wall p. 142, said "There is no rule of human jettison."

c.(2) - Coercion or compulsion.

There is a final argument of the accused in alleged justification, which is commingled with the alleged legal excuse of superior orders. The defense counsel implied that if Furuki failed to obey the orders of his superior officer Admiral Masuda, he might himself have suffered death at the hands of Masuda. The argument is of course sheer speculation because there was no testimony before the commission indicating either that such threat or compulsion had actually been applied, or that the accused even believed that such compulsion existed. Obviously it is highly doubtful whether Masuda could have compelled Furuki, the highest ranking army officer on Jaluit Atoll, to perform these homicides against his will. But it is unnecessary to probe into these facts, for even if such compulsion had actually existed, the law does not recognize this fact as an excuse or justification for a homicide. While generally one may excuse the commission of various crimes by showing that he was acting under coercion or compulsion, one cannot excuse the taking of a human life, under the plea of compulsion. 26 American Jurisprudence 206.

Part of the reason for this rule of law is ably expressed in 2 Stephen History of the Criminal Law (1883) pp. 107-108, as follows: "Criminal Law is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit crimes. Are such threats to be withdrawn as soon as they are encountered by opposing threats? The law says to a man intending to commit murder, if you do it I will hang you. Is the law to withdraw its threat if someone else says, "If you do not do it I will shoot you?"

"Surely it is at the moment when temptation to commit crime is strongest that the law should speak most clearly and emphatically to the contrary. It is of course a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death of violence if they refused to execute their commands. If impunity could be so secured a wide door would be open to collusion, and encouragement would be given to associations of malefactors, secret or otherwise. No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.

"These reasons lead me to think that compulsion by threats ought in no case whatever to be admitted as an excuse for crime, though it may and ought to operate in mitigation of punishment in most though not in all cases. If a man chooses to expose, and still more if he chooses to submit himself to illegal compulsion, it may not operate even in mitigation of punishment. It would surely be monstrous to mitigate the punishment of a murderer on the ground that he was a member of a secret society by which he would have been assassinated if he had not committed murder."

The accused's confused intricate argument of justification because of alleged self-defense, self-preservation, personal compulsion, or so-called necessity, is not sustained in fact or in law as a defense under the circumstances of the killing of these natives.

c.(3) - Superior orders.

The accused then argues that his homicides should be excused because he alleges they were done pursuant to the order of his superior commanding officer. There is no mystic relationship between a commanding officer and his inferior. The courts have consistently held that a soldier like any other citizen is bound to respect the laws of the state, and is justified in disobeying improper and illegal orders, 67 L.R.A. 294. The compulsion of an actual threat of death cannot justify a homicide; and therefore, even the fact that the commanding officer might have the power to kill his inferior, does not in the eyes of the law, excuse a homicide performed in obedience to his order or even his expressed threat.

In almost every war crimes case, the accused has contended that his illegal acts were the result of the orders of a superior officer. The argument has been universally rejected. Superior orders can be argued in mitigation, but they cannot be accepted as a substantive defense in determining whether the accused is guilty of the crime charged. The accused had had due warning that superior orders would not be considered a defense. The Joint Declaration on Punishment of War Crimes, of the Inter-Allied Conference in January 1942, announced to the world that they placed "among their principal war aims the punishment through the channel of organized justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them, or participated in them."

The SCAP Regulations (Basic ltr. SCAP 000.5, 5 Dec 45) which this Commission is authorized to use, provide "The official position of the accused shall not absolve him from responsibility.....Further, action pursuant to order of the 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."

The logical basis for this rule is apparent. As Glueck points out, War Criminals, Their Prosecution and Punishment, page 140, "A little reflection will show that this provisions (superior orders and governmental immunity) if followed liberally would give almost the entire band of Axis war criminals a valid defense."

The position of the courts on this subject is ably and briefly expressed in the decision of the famous International Tribunal at Nuremberg, in the summary of the judgment released at Nuremberg, September 30, 1946, the Tribunal states: "The defense of 'Superior Orders' has never been recognized as a defense to a crime, but is considered in mitigation as the charter here provides." In view of this case, and the numerous other cases on the same subject, the matter is clearly so well settled that it is unnecessary to burden the commission with further argument on this point.

c. (4) - Legal execution.

Only one defense of the accused remains to be considered and that is the argument by the accused that the homicides are legally excused because they were legal executions.

If proved, this excuse would constitute a complete defense, and it would be your duty to find the accused not guilty of murder. But a legal execution must be based upon a legal sentence properly determined and pronounced at a legal trial. The requirements are strictly applied, because the law does not readily or carelessly justify the taking of human life. How rigidly these requirements are applied is apparent in the following excerpt from American Jurisprudence (26 American Jurisprudence, 230)

"If however, judgment of death is given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder.

"Such judgment where legal, must be executed by the proper officer or his duty appointed deputy, and if another person does it of his own head, it is murder, even though it is the judge himself.

"So too, the execution must pursue the sentence of the court, the substitution by the officer charged with the duty of execution of one method of killing for another being murdered." See 2. LRA (NS) 76 and 67 LRA 293.

To constitute a legal excuse it must be proved that the killing of these natives was in fact a legal execution. In the determination of the guilt or innocence of the accused, what Furuki thought about the legality of the execution is totally irrelevant, except in mitigation of punishment after a finding of guilt. Furuki's mental attitude, his motives, his opinion as to whether there was a legal trial and a legal sentence, is immaterial. The only question remaining to be considered by the commission is, was this in fact a legal execution.

c.(4)(a) - Whether natives committed crimes is immaterial if no trial given.

Mr. Akinoto, and other defense counsel argue it must have been a legal execution, for in fact the natives were guilty of serious crimes. We have the story of various Japanese officers, fellow officers of the accused, who by their testimony are revealed as clearly friendly toward the accused. These witnesses testify that the executed natives did plan or attempt to escape, and that certain of the natives committed other illegal acts. Under torture some of the accused

may have confessed, Morikawa and others claimed they did confess. As defense counsel Commander Carlson points out - confessions obtained under duress are no evidence of guilt. Apparently in the case of Melein and Mejkane, the evidence of their alleged guilt was the confessions obtained by the beatings and torture. Certain natives who were questioned in connection with that incident were brought before this commission. They testified as to the brutality of that questioning. On cross examination Saburo testifed that when questioned by Morikawa, even when the wire was stuck up his nose, that he testified then, he did not know anything about Mejkane. (Note: I disagree strongly with defense counsel, the fact that one sneezes when a foreign object is jammed up one's nose is not an indication that it was not painful. It is an automatic involuntary nerve reaction to sneeze and move your head when any foreign body penetrates into one's nose.) And the insertion of a long wire far up into the nose of a witness, is not a judicial procedure. Saburo knew nothing indicating that Mejkane or Melein was guilty. Obetto also testified before this commission, and his answers in Q. 22, 23, and 24 clearly indicate serious ground for doubting that Melein had participated in any crimes. In A. 23, Obetto testified "When I saw Melein his arms and legs were bound and they asked him 'Is it true that you wrote a letter and gave it to Mejkane to take to Obetto?' What was Melein's reply? A. Melein said that he did not write a letter and also that he did not send a letter to Obetto." Obetto also in his testimony before the commission, Q. 10, 11, 12 testified that he had never told the Japanese that he had received any letter from Melein or Mejkane.

From this brief testimony, which came forth incidentally in connection with ascertaining the methods of investigation used by the Japanese, it appears clear that there is certainly serious doubt as to the guilt of some of the natives who were executed. We do not know what acts if any, each of these natives committed. All we know is: that they were executed; that under torture some of them protested innocence, and some of them broke down and confessed. The accused Furuki is on trial here because no trial was given these natives and therefore they had no fair judicial opportunity to prove their innocence. Surely the defense will not argue that we must again convict these natives in absentia and without a trial.

Learned defense counsel argues the executed natives were guilty of serious crimes. The law does not permit the accused to argue that if he had in fact tried the natives he would have been able to prove that all 13 of them were guilty. The law requires that to constitute a legal execution the trial must be held prior to the execution. At this time two years after the events we cannot, nor is it our province to try these dead natives. They cannot testify and they cannot defend themselves. And even if we did now find that they were then guilty, the accused must still be convicted of murder if in fact at the time that he commited the execution it was not legal because no trial was held. It isobvious why society cannot permit men to be executed first and tried later.

Mr. Akimoto himself during the course of his argument, in referring to execution under superior orders, stated that he believed that with regard to the doctrine of legal executions the laws of Japan and Germany, as well as England and the United States was the same. He then cited Section 640 of Wharton's Criminal Law as evidencing that doctrine of legal execution. I agree with Mr. Akimoto that this reflects the law of Japan, Germany, England and the United States - for that section of Whartons clearly establishes the fact that there must be a prior trial or the execution is illegal. That section of Wharton's Criminal Law cited by defense counsel, reads: "Section 640 - Killing under mandate of law justifiable. The execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country, is an act of necessity, where the law requires it. But the act must be under the immediate precept of the law, or else it is not justifiable; and, therefore, wantonly to kill the greatest of malefactors without special warrant would be murder. And a subaltern can only justify killing another on the ground of orders from his superior in cases where the orders were lawful. As we have seen, a warrant that is without authority is no defense; though it is otherwise when the defects are merely formal." (Italics supplied.)

It is apparent from the Section of Wharton cited by defense counsel, that it is totally immaterial to the question of Furuki's guilt of murder, whether or not in fact the executed natives had committed criminal acts. For as Wharton states "Wantonly to kill the greatest of malefactors without special warrant would be murder."

a(4)b - No trial, ergo no legal execution.

It is elementary that to have a legal execution there must have been a legal sentence properly derived, at a legal trial held in accordance with a legal procedure.

Even the Japanese Constitution, provides in Chapter II, Article 23, "No Japanese subject shall be arrested, detained, tried, or punished except according to law." Article 24, "No Japanese subject shall be deprived of his right of being tried by the judges determined by law."

The judge advocate will establish that as to these thirteen homicides there could be no legal execution because there was no legal trial and no legal procedure.

First let us briefly dispose of this so-called judgment paper. On careful examination of all the evidence it was shown that this sheet of paper consisted of a written opinion made by Furuki prior to the so-called trial, and a so-called judgment or sentence portion which was written in by Admiral Masuda. It was then signed by Inoue, Shintomo, Furuki, and according to Shintomo, by all the other unit officers for information, in the same manner as all routine orders. Clearly

this so-called judgment paper was not a trial, and has no probative value to establish a trial. If a legal trial had beenheld, then we would be concerned with the question of whether this paper and its contents could constitute a legal sentence document. It is highly doubtful, for the sentence was attached to an opinion admittedly written by the so-called judge advocate before the alleged trial. Mr. Suzuki himself implies this was improper. However, we are not concerned with this problem, for the facts clearly establish that there was no trial.

Defense counsel argued that the executions were legal because in each of the five incidents, the natives were convicted and sentenced at a "legal trial" "a special proceeding) held in Admiral Masuda's office.

On cross-examination the judge advocate established that the accused natives were never present at these alleged trials; that no witnesses appeared at these meetings; that no sworn testimony was presented at these meetings; that the accused were never permitted to question witnesses against them: and that the accused were never permitted to have counsel or anyone else present to defend ther No civilized country in the world would contend that these alleged meetings in Masuda's office constituted trials or judicial procedures. Why at the infamous Star Chamber Proceedings, at least the accused was permitted to be present, hear the evidence against him, and make his plea in defense. But defense counsel in an effort to save the accused have contended that these were authorized judicial proceedings. Under what law, under what procedure, did these meetings constitute trials?

c(4)(b)1 - No trial under Japanese Code of Criminal Procedure.

The defense has contended that due to war conditions the natives lost their right to trial by the Local Court of Ponape. The judge advocate has previously argued that the authority given Masuda by the alleged dispatches did not give him any power of any governmental agency outside of Jaluit, and therefore, did not deprive the Ponape court of its jurisdiction over all serious criminal cases on Jaluit Atoll. But even if Masuda by means of war conditions derived judicial criminal jurisdiction over these natives, it does not follow that he had the power to subject them to court martial law, rather than the Japanese Code of Criminal Procedure which is the normally applied code of criminal procedure for Japanese civilians.

If the natives were entitled to the protection set forth in the Japanese Code of Criminal Procedure, it is apparent that the proceedings at these alleged meetings was in complete violation of all their rights, and were not trials in accordance with that code. Some of the pertinent provisions of the Japanese Code of Criminal Procedure will be briefly cited: Book IV, Public Trial, Chapter 1, General Provisions, Section 176, Public trial shall be held in court where shall be present the judges, the public procurator, and the clerk of the court. Sec. 177 - the accused shall appear in the court free of personal restraint, but may be

placed under guard. Sec. 179 - the accused may employ counsel to plead for him. Sec. 181, the legal representative of the accused may participate in the proceedings as his assistant. Section 183. If the accused cannot appear at the hearing by reason of mental derangement or sickness, the proceedings shall be suspended until his recovery. Section 189, Witnesses who have been examined, or experts who have given their opinions at the preliminary examination, may be summoned anew. Sec. 193, Witness shall not communicate with each other nor shall they be present at the proceedings until they give their testimony. Section 194. The presiding judge shall interrogate the witnesses and accused. The parties interested in the case may require the presiding judge to put to the witness questions for the elucidation of such matters as they may deem essential to the pleadings."

This is but a brief thumbnail sketch of some of the pertinent provisions of the Japanese Code of Criminal Procedure. It is readily noted that while some of the procedure is slightly different, essential rights are carefully safeguarded. The alleged meetings in Masuda's office were certainly not trials in accordance with these provisions.

c(4)(b)2 - No trial under naval court martial law or any civilized concept of trial.

Defense counsel argues that because of dire battle conditions and because this area was isolated, Admiral Masuda could in accordance with martial law try these natives by "Temporary Court Martial a kind of specially established court martial." Since defense witnesses have admitted that martial law was never established in Jaluit, the judge advocate will not concede that Naval Court Martial Law could legally be applied to these natives. But even if it could be so applied, and even if the natives were legally deprived of their right to be tried in accordance with the Japanese Code of Criminal Procedure, they still retained their right to a trial; and even defense counsel admits this fact, and tries to establish that in substance, the natives were accorded this right. Let us examine the defense argument in the light of the facts and see whether the Japanese Naval Court Martial Law authorizes as a trial, the procedures alleged to have been held in Masuda's office.

c(4)(b)2a - Right to defense counsel.

Defense counsel, Mr. Akimoto, argued that Section 93, which provides that the "preceding six articles" shall not be applied to a special court martial, explains why the accused had no legal representative or advisor at the trial. But he fails to mention that article 94, which does not precede article 93, provides: "Legal representative.....of the accused can at any time after the indictment has been lodged, become a legal advisor to the accused....." It would appear, therefore, that Section 93, was designed not to destroy, even in special courts martial, the right to counsel or legal representative, but was merely designed to permit under special war conditions a relaxation of certain related technicalities with regard to the selection of the number of and the duties of defense counsel. Section 369, cited by defense counsel, merely means that even if the accused does not want defense counsel, he must be required to have one, unless sentence is pronounced in open court. Under Article 372, it would appear that in a special court martial, the accused may waive his right to counsel and be sentenced in camera.

c(4)(b)2b - Closed court.

Next, Mr. Akimoto cited Article 96 of the Naval Court Martial Law to the effect that "The consultation of judges shall not be held public.....It's proceedings and the opinions of the judges shall be held secret." From this the defense counsel argued that the trial should not be public - but should be kept secret. Article 96, as cited, is clearly misleading. The provisions cited relate to "consultations" and to "opinions of each judge" - it appears therefore, that this provision relates to the same common type of "closed consultations" which are held with regard to rulings, objections, findings, and sentences by any military commission or court. Nothing in this section authorizes a secret or closed court. On the contrary, Article 102, specifically provides in part, "The announcement of Court decisions should be given by declaration in open court. But, in the instant case, it is unimportant whether the provisions authorized "secret trials" or not, unless this provision is cited to show that the proceedings the "trial" in Masuda's office, was so secret that even witnesses were not allowed to be present to testify, and similarly the accused was not permitted to be present. Surely, defense will not argue this absurdity, so we need not concern ourselves with it. Mr. Akimoto did not argue that the witnesses could not be present.

c(4)(b)2c - Oath to witnesses.

Defense counsel argued that under Japanese law, an oath is unnecessary in the questioning of a witness by the judge advocate whether in a civil court or a court martial. Counsel cites Article 267 of the Naval Court Martial Law, but this relates to a preliminary investigation. The provisions with regard to trials are set forth in Articles 247, 248, 249 and 250, which state not only that a witness should be given the prescribed oath, but that he should be warned that there is a punishment for false testimony.

If the defense admits that this investigation procedure was not part of the alleged special trial, then the fact that the natives were not sworn is unimportant. But, defense cannot blow hot and cold at the same time, contending on the one hand that it was unnecessary to swear the natives because that was an investigation not a judicial procedure, and on the other hand that the thorough investigation was part of a judicial proceeding, and that therefore, it was unnecessary to have these witnesses present at the alleged meetings.

c(4)(b)2d - Absence of the accused.

But what about the accused? The defense admits the accused natives were not present; and they admit that they have been unable to find any authority for not permitting the accused to be present at his own trial. Mr. Akimoto admits this was in clear violation of all law. He states in his argument, "The defense dounot deny that this was evidently in violation, in this point, of the principles

of trial." But Mr. Akimoto argues this was "a mere formality." I could expect this argument from the accused who, with regard to the executed natives, evidenced a cold-blooded disregard for the "formality" of basic human rights and human life itself. But I did not anticipate this argument from learned counsel. The rights of the accused to be present at the trial and to be confronted with the evidence against him is a fundamental right of every system of jurisprudence in every civilized country of the world. The rule is so fundamental that it requires no discussion and I need merely state that Mr. Akimoto several sentences prior to this argument of "mere formality" himself stated with regard to absence of the accused that it was in violation of "the principles of trial."

Learned counsel Mr. Suzuki in attempting to explain the failure to have the accused present at the alleged meetings, sought tojustify it by reference to a simplified procedure in minor cases in Japan wherein a fine can be levied in absentia. Similarly in our law we have such a simplified procedure and many police courts accept traffic fines in the absence of the accused. This does not mean that such procedure is a trial, it merely means that as admitted by Mr. Suzuki, in certain minor cases, the accused need not be present, but can accept a penalty by default. It means merely that in trivial cases the accused may waive his right to trial, and accept a fine. In the instant case the natives were not fined, they were finished; and as admitted by Mr. Akimoto the failure to have the accused present was in violation of "the principles of trial."

We must not be mislead by Mr. Akimoto's statement that "It was a regular trial if only the accused were present at the court. But on the contrary, the judges went to the place of the accused." The "judges" - plural judges, did not go to the accused. There is no evidence in the record which even alleges that Shintome or Inoue (who are alleged by defense to have been two of the judges), ever went to the accused natives.

There is testimony that Admiral Masuda went to see the natives. But when did he go to the natives - was it during the alleged trial in order to judge the guilt of the accused natives? No! The defense in direct examination claimed that Masuda and Furuki went to see the natives before the alleged meetings. (Note that while this would perhaps be permissible under Special Court Martial Procedure, the practice of the judge going to question the accused before trial, is clearly frowned upon by even Japanese naval court martial law, which provides: "Art. 81. When a judge falls under any one of the following items he shall be rejected from conducting his functions.....7. When a judge has participated on searching, preliminary investigation, or first trial of the case.") Again he was asked with reference to the Mejkane case, "184. ". Did you and Admiral Masuda speak with Melein and Mejkane, Obetto and Paul?" "A. We talked only with Melein and Mejkane." Thus from the admission of the accused himself, it is apparent that the native witnesses were not questioned in these cases.

We come then to the last stand of the defense, namely that at least the convicted natives were questioned prior to these alleged proceedings - here certainly the accused believed his falsehoods could not be disclosed. Ah, but he forgot that in trying to prove the leniency and justice of the Japanese militarists the defense had alleged that two of the convicted natives had only been

sentenced to hard labor. Morikawa had testified that in the Melein and Mejkano incident, Obotto and Paul were convicted and sentenced to hard labor. Furuki never denied this and merely stated in answer 185 that he did not remember if the punishment had actually been carried out. These two allegedly convicted natives, Obotto and Paul, were alive. The judge advocate located Obotto and he was brought to Guam. He appeared and testified before this commission. He was asked, "Q. During your confinement did you ever see a Japanese naval officer? A. No." The accused, Furuki, must have anticipated this as an attack on his credibility for in cross-examination he was asked if Obotto and Paul were questioned by Masuda and Furuki. He himself answered, "We talked only with Melein and Mejkano." From his own testimony, therefore, it is admitted that not even all the "convicted" natives were questioned by even Masuda prior to their alleged trial and conviction.

Did Masuda really question any of the allegedly convicted natives before their trial? If he did, then since it was before their trial, it is indeed a strange coincidence that they are all dead - and that Obotto who was also alleged to have been convicted and is still alive, was not questioned before this alleged trial or at any time by Masuda.

Reduced to the facts - with all the dark glasses removed - the alleged visit of the judges prior to the trial to the place of the accused becomes a claim that they did not question any of the allegedly convicted natives who are still alive, but, by strange coincidence, questioned all the natives who were executed; they did not question the other witnesses or the convicted native who was not executed; and that one, not three, of the alleged judges went to the place where the natives were.

Did this alleged visit by one of the alleged judges, morally or legally, remedy the failure of these Japanese militarists, to afford the executed natives, the most elementary right of trial known to civilized man. The right to be present to defend himself against a death penalty charge.

c(4)(b)2e - Confessions obtained by brutality.

But this is only part of the story, at this ex parte proceeding, without witnesses, the so-called evidence consisted of an investigation report and a written opinion by Major Furuki based upon the report. In substance therefore the investigation constituted a material part of this alleged trial. The defense has attempted to persuade the commission that the natives confessed to their alleged offenses. By cross-examination it was shown that in several of these native incidents, the investigation report was based primarily, if not completely upon the so-called confession of the natives. Under Japanese law, a confession alone is not considered evidence. I cite the learned Japanese counsel Shizuo Morikawa who in his arguments in the Chichi Jima cases, after referring to the famous Teijin Incident, stated, "After this case, it became apparent that to make a decision upon a confession alone was most hazardous, and since then, it has become the practical rule that a confession alone will not be treated as evidence." Defense counsel in their argument before this commission have similarly indicated the importance of rejecting involuntary confessions.

Whatever credibility a voluntary confession may have, it is clear that a forced confession - derived in fear and in torture - has no credibility.

In brief rebuttal, the judge advocate presented some of the natives who had been investigated in connection with two of these incidents. Their testimony established conclusively that the investigations were carried out with bestial violence, brutality and terror. The investigations were not judicial proceedings they were themselves vicious crimes. The investigation reports, and the investigation proceedings can lend no legal color, no judicial fiction to the meetings in Masuda's office.

c(4)(b)2f - Alleged judges and meetings.

But the full story is not yet completely unfolded. The defense contended that prior to each execution a special trial - a special proceedings was held, at which Admiral Masuda, Captain Inoue, and Lieutenant Commander Shintome were the judges. Furuki told of a meeting at which Masuda informed Inoue and Shintome of their appointment as judges, referred to them as such, and instructed them as follows, and I quote, excerpts from Furuki's answer to question 47: "....When the Imrodj incident occurred, Admiral Masuda called myself, Shintome, and Inoue to his room and told us as follows....'You shall perform your duties impartially ~~and carefully~~ and carefully, as your duties require you to judge on people. Lieutenant (jg) Sakuda shall act as investigator, Furuki, you shall act as judge advocate, Lieutenant Shintome and Captain Inoue and myself shall act as judges. .....Inoue and Shintome shall express your opinions as judges' ....,In the last examination and consultation, Admiral Masuda assembled Shintome, Inoue and myself and stated as follows: 'We shall conduct the last examination and consultation. As judges, you shall express your impartial opinions.'"

If such instructions had in fact been given, Inoue and Shintome would certainly have known and remembered that this conference was supposed to be a part of a trial and they would never have forgotten they were judges.

Defense witness Inoue told a lengthy story about these alleged trials - suddenly the judge advocate attacking his credibility faced him with a prior contradictory statement made at the end of the war in which he had said that there were no trials. It should be noted that the question asked at Jaluit in October, 1945, related to the trial of natives, and the answer given by the witness in Jaluit was applicable to all so-called trials on Jaluit.

Inoue was concentrating on the problem of trying to prove that he was a truthful witness and was not lying to the commission. He attempted to discount the effect of the prior statement on his credibility by saying that at the time he made it he believed it was true, and that therefore he was a truthful person then, and was a truthful person now, because he now believed there was a trial.

Suddenly the trap was sprung, and the truth was captured even before Inoue knew that he had destroyed the entire fabricated defense. For in trying to prove that he was a credible witness, Inoue had said he did not know or decide that this was a trial until after the war, and months after the executions. This proved not only that Inoue was not a judge at the alleged proceedings, but also that this elaborate defense story about the alleged original meeting at which Masuda was supposed to have told Inoue and Shintome that they would be judges at a special trial of these natives - was a complete unmitigated falsehood.

Once the judge advocate realized this, he immediately sent to Japan for the witness Shintome who had been located for, but never called by the defense.

Shintome had been in Japan, he had not been in the War Crimes Witness Camp, he had not had an opportunity to be infected by the story prepared for the accused. Shintome appeared and testified in rebuttal before the commission. He was an old mustang, loyal to Japan with no motive to help the prosecution. He testified that he was present at one meeting, with Masuda, Inoue and Furuki, that while he was not called upon to give his opinion as to guilt or punishment of the natives. Clearly this testimony was not intended to help the prosecution, or injure the accused. If he had a motive to lie, to help the prosecution he would have testified that he didn't know anything about any such meetings, that he had never attended any. He certainly would not have testified that he was present and that he, Furuki and Inoue gave their opinions. If he had a motive to lie, to protect himself, it is clear that he would have either given the story of never being at any such meetings, or conversely, if he had previously heard the defense story, he would have accepted it and claimed that he, Masuda, and Inoue were judges, and that therefore the sentence was legal, and he Shintome, as well as Masuda and Furuki were absolutely blameless.

The fact that Shintome testified as he did - proves that he told the truth, if anything, leaning toward the defense in attempting to help Furuki.

Shintome testified that he was not a judge - and that he did not attend the meeting in any judicial or official capacity. He was not called upon to weigh the facts, or determine the guilt of the natives and therefore was not a judge at this meeting. This testimony corroborates the testimony of defense witness Captain Inoue, who on cross-examination admitted that he did not know it was a trial when he attended the meeting. I quote Inoue's testimony of the eighteenth day:

"170. Q. Have you always, since November, 1943, believed that such procedure constituted a trial?
"A. No.

"171. Q. When did you decide that this procedure constituted a trial?
"A. From the time I was confined at Jaluit as a suspect.

"172. Q. Was this after the war?
"A. Yes."

While defense alleged that there were five trials, of two sessions each, and that Masuda, Shintome, and Inoue were the judges at all these trials, Shintome was only present at one such meeting. It is not clear what native incident was discussed at that meeting, but it is clear that with regard to the other four groups of natives Shintome was not even present.

c(4)(b)2g - Alleged judge advocate.

Incidentally, we have heard much talk about how Furuki was the judge advocate not only at the alleged meetings, but also at the executions. It was said that Furuki and Masuda went and questioned the natives at the place of confinement both before the meetings and after those alleged sentences. If true, this implies not only constructive, but actual knowledge of the brutal treatment of the natives.

It was stated by defense counsel that it was the duty of the Japanese judge advocate to make his own careful investigation of the witnesses before the trial. Defense claimed Furuki had made such an investigation before he wrote his alleged opinion paper. Yet on cross-examination Furuki admitted that he and Masuda had only questioned some of the natives; and when we mentioned the names of the witnesses in two of these native incidents, he admitted he had not questioned any of those specific witnesses. The natives who appeared before this commission similarly testified that Furuki had not spoken to them until the day of their release. Obviously, Furuki did not carry out his own careful thorough investigation of the native witnesses at Jaluit.

Does defense counsel wish us to believe that Furuki was a very careless judge advocate and that perhaps the natives were improperly convicted without a trial because of both Furuki's failure to consult the available copy of Japanese Court Martial law, and his failure to investigate the natives carefully and thoroughly as the duty of a Japanese judge advocate requires? Is it not more likely that Furuki who by his daily conduct here in court demonstrates he is a thorough methodical man - in fact did not consider himself to be a judge advocate, and therefore did not in fact concern himself with the legal requirements of the duty of a judge advocate, before and during and after the trial. Certainly his failure to act like a proper judge advocate indicates that he did not consider himself one, and did not consider the alleged proceedings at Masuda's office, a trial.

c(4)(b)2h - Decision by majority.

But the contradictions of the defense are not yet exhausted. The accused is caught in the whirlpool of his own fabrications. Inoue testified that in the case of the woman Mojkane, he and Shintome both gave the opinion that she should be sent home. Similarly, Shintome testified that at the meeting he attended, he and Inoue had expressed their opinion that the natives should be sent home. Naval Court Martial Law, Article 98, provides: "A decision of the court is determined by the majority." However, Masuda ordered the execution of the natives.

It is apparent therefore - and it must have been to Furuki - that since the death sentence was put into effect, contrary to the decision of the majority - Inoue and Shintome were not judges and this alleged procedure was no trial. During Mr. Akinoto's closing argument I believe I heard him mention some type of appeal system in which the judgment is not made by vote, but is made by the decision of the president. I believe he must have been referring either to the decision on rulings on evidence - or perhaps by stating that the decision was made by the president he merely meant the announcement of the decision. In any event, regardless of what he meant, and even if in some civil criminal cases, the majority of judges do not control the decision, it is clear that the citation is irrelevant - for the defense have alleged that the so-called special trials were held in accordance with naval court martial law. Under Naval Court Martial Law, it is clearly provided in Article 98: "A decision of the Court is determined by the majority. When opinions of judges differ in three parts and none of them reach to a majority, then opinions unfavorable to the accused shall be added up to the favorable one gradually, until it reaches a majority number." Clearly therefore in Naval Court Martial Law - A decision of the court is determined by the majority.

c(4)(b)2i - Summary - No trial, no legal excuse.

In summary, when viewed in the light of all this evidence, the fantastic nature of the defense is clear. They contend that there were five trials, five special proceedings. The facts prove that two of the three alleged judges were not judges, and had never been instructed that the meeting was a trial or that they were judges. The third alleged judge is dead, and cannot speak for himself. One of the two living alleged judges testified that he was present at only one of the alleged meetings, yet the accused has attempted to prove that there were five separate trials of two sessions each at which this witness, and the other one (who didn't even know these were trials), acted as judges.

At these alleged judicial proceedings, no evidence was heard other than from an investigation report whose contents were obtained through brutality and torture. No counsel was present for the defense; no witnesses were called for the defense; no witnesses were sworn; and in fact no witnesses were called at the proceedings. And finally, the accused himself was not even present.

This was not a trial, and this was not a judicial proceeding under any concept of law.

The truth of the matter is that Furuki and Masuda did exercise absolute power, dictatorial and despotic power, without regard to law, without regard to justice, without regard to humanity. Whether their motive was revenge, whether it was a military or personal desire for prestige, or whether it was a periodic warning to the other natives, is totally immaterial. No trial was held, no semblance of a judicial procedure was followed, and therefore, on all the facts, no legal excuse existed.

Furuki killed the 13 natives; he intended to kill them; he killed them without legal justification or legal excuse. Furuki as charged in Charge I, specifications 1 through 5 is guilty of murder.

d. - Argument in mitigation should be made after findings.

The accused has protested his purity of motive, his love and compassion for the natives. This is not the time for such an argument which is clearly an argument in mitigation. But when we consider the argument in which the defense speaks of Furuki's good character, etc., consider the fact that according to Furuki, he and Masuda had been to see the natives.

Consider the fact that Furuki was a mature man in a position of responsibility an army academy graduate with fourteen years of army experience, with a copy of the court martial law available, a battalion commander and the highest ranking army officer on Jaluit, head of the defense section, in charge of native affairs, head of intelligence and second in command on Jaluit. Could he honestly and reasonably believe that these natives who were not even present, had been given a fair judicial proceeding? Could he then perform five group killings of 13 natives over a period of several months in the continued unshaken belief that the trials were legal and the executions legally justified?

If the commission believes Furuki's story let them consider it when the time for mitigation of punishment is at hand, I for one, cannot stomach it.

3. - Violation of the Laws and Customs of War.

With regard to Charge II, very little need be said. It charges violation of the laws and customs of war, and in specifications 1 through 5, it is alleged that wilfully, unlawfully, and without previous trial, Furuki punished these natives as spies.

It should be noted that under this charge of violation of laws and customs of war by punishing as spies, without a previous trial, the accused Furuki, as well as other Japanese officers who have been shown to have personally participated could have been tried for the brutal treatment that the natives received during the course of investigation, and admittedly prior to any trial. We must not however consider this aspect of the case, because the specifications in this charge allege that Furuki punished these natives as spies, without previous trial, by "assaulting, striking, wounding, and killing."

It has been proved that the accused Furuki punished these natives - that he killed the 13 natives. Similarly, the wilfullness, unlawfullness, and the absence of previous trial has been established in detail in considering the charge of murder. In order to establish Furuki's guilt under Charge II, it is only necessary to establish that the natives were punished as spies. However, before considering this remaining fact question, certain international law concepts with regard to the right of trial merit brief consideration.

a. - Right of trial under international law.

It should first be noted that Japanese law could not legalize the killing of these natives or their punishment without a trial. For the act of Furuki to be legally excusable, it not only had to be lawful under domestic law, but also under international law. It is a fundamental principle that no country can evade the basic principles of international law and society by the passage of domestic legislation which purports to legalize violation of international law.

Glueck, on cit., pp. 44-45, reviews some of the attempts by Nazis to create a fiction of legality to their uncivilized and brutal atrocities. He concludes that murders are murders, despite the instructions of the government. "No unilaterial "legalization' of such acts is possible; because no member of the Family of Nations can be permitted to make its own rules of warfare justifying mass-murder when committed upon its own governmental order only and as an exclusive instrument of its national policy.....It is not the paranoid decrees of a lawless State that determine the criminal or non-criminal quality of the acts in question, but rather the general principles of law or civilized nations....."

Therefore regardless of any attempt by Masuda to set in force his own laws in contradiction to the laws and custors of war, he was powerless to destroy these fundamental rights guaranteed under international law and carefully protected against such unilateral dictatorship. The defense has conceded this to be the law for they have not even argued that Masuda could punish these natives without a trial.

Since in fact, there was no trial, as we have painstakingly established, it is unnecessary to separately consider whether a fair trial was held as required by basic international law and every principle of civilized humanity. This requirement of a fair trial, is not only a moral, but a legal requirement. It is clearly set forth in numerous decisions in international law, in the expressed opinion of able international jurists and scholars, and in the provisions of various international agreements.

Hackworth, Digest of International Law, Vol 5, p. 589 quotes United States v. Mexico, William T. Way, Opinions of the Commissioners, (1929) 94, 106, as follows: "However, there are certain other broad principles with respect to personal rights which appear applicable to the instant case. These principles are recognized by the laws of Mexico, the laws of the United States and under the laws of civilized countries generally, and also under international law. ..... Gross mistreatment in connection with arrest and imprisonment is not tolerated, and it has been condemned by international tribunals."

Hackworth on cit., on page 590 reference to Margerot Roper (United States v. Mexico) Opinions of the Commissioners (1927) 205, 210, cites the following langurge of the International Commission: "The conclusions of the Judge at

Tampico with respect to the investigation conducted by him were treated in oral and in written arguments advanced in behalf of the Mexican Government as the judgment of a judicial tribunal. And the well known declarations of international tribunals and of authorities on international law with regard to the respect that is due to a nation's judiciary were invoked to support the argument that the Commission could not, in the light of the record in the case, question the propriety of the Judge's finding. In considering that contention we believe that we should look to matters of substance rather than form. We do not consider the functions exercised by a judge in making an investigation whether there should be a prosecution as judicial functions in the sense in which the term judicial is generally used in opinions of tribunals or in writings dealing with denial of justice growing out of judicial proceedings."

The right to trial is stated in the "Draft Convention on Jurisdiction with Respect to Crime," Article 12: (The Research in International Law, Harvard Law School) 29 A.J.I.L. Supp. (1935) 596-597, in part as follows: ".....No State shall.....subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise than by fair trial before an impartial tribunal.....".

Commissioner Nielsen, in his opinion in the Lovin Case, (United States v. Turkey), Nielsen's Opinions and Report (1937) 688, 704-705, cited in Hackworth op cit. Vol 5, p. 598, states:

"Complaints have often been made with respect to improper arrests and mistreatment pending trials. International law requires that, in connection with the execution of criminal laws, an alien must be accorded rights such as are granted under the laws of civilized countries generally both to aliens and nationals. Most important among these are the requirements that there must be some grounds for arrest and trial or, as is said in domestic law, probable cause. A person is entitled to be informed of the charge against him. He must be given a reasonably prompt opportunity to defend himself. He must not be mistreated during his period of imprisonment."

The Geneva Convention of 1929 in dealing with prisoners of war, at considerable length, describes the fundamental requirements of a fair trial. In the case of Rex v. Bosig (Ontario Court of Appeals) 2 D.L.R. 232 (1945) the court summarized those provisions (of parts two and three) as follows: "This provides rules and requirements relating to judicial hearings of charges against prisoners of war, for notice being given of the name and rank of the prisoner; the place of detention, and statement of the charges to the protecting power; that no prisoner should be compelled to admit his guilt, and he has a right to a qualified advocate of his own choice, and if necessary, to a competent interpreter, and various other provisions aimed at safeguarding the rights of a prisoner of war in judicial proceedings."

Moore, Digest of International Law, Vol. 2, p. 233, in discussing the famous Cutting's Case, refers to the dispatch from the Consul of the United States dated 17 Fuly 1886, in which he demanded the release of Cutting, first on the ground that there was no jurisdiction in the Mexican court, and secondly on the ground "that by the law of nations, no punishment can be inflicted by a sovereign on citizens of other countries 'unless in conformity with those sanctions of justice which all civilized nations hold in common.' 'Among these sanctions,' it was stated, 'are the right of having the facts on which the charge of guilt was made examined by an impartial court; the explanation to the accused of these facts, the opportunity granted to him of counsel; such delay as is necessary to prepare his case, permission in all cases, not capital, to go at large on bail till trial; the due production, under oath, of all evidence prejudicing the accused; giving him the right to cross-examination; the right to produce his own evidence in exculpation.....'" (Italics supplied.)

-These brief citations of international law clearly illustrate certain of the fundamental requirements of a fair trial.

b. - Natives punished without a trial.

None of these requirements were met in the handling of the accused natives. In the instant case, not only did the Japanese militarists fail to give the accused a fair trial; but, as has been clearly proven in discussing the murder charge, there was absolutely no semblance of a criminal trial, for the defense has itself established that the accused was not even present.

c. - Natives punished as spies.

In view of the fact that there was no trial, and in view of the fact that the natives were admittedly punished with death, to prove Furuki guilty of the specifications of Charge II, it merely remains to prove that the natives were punished as spies. It is not necessary to consider whether the natives were in fact spies, nor is it necessary to consider whether they were also accused or punished for other acts.

Witness Sakuda testified that by Admiral Masuda's orders, all persons who attempted to escape were presumed to be guilty as spies. I quote the following excerpts from his testimony:

"271. A. Admiral Masuda relayed through Major Furuki that any persons that deserted Jaluit Island, whether they intended to or not, the result would be that they would relay intelligence.....

274. Q. In your investigations, when you determined that these natives intended to escape, did you then determine whether they intended to pass information to the enemy?.....

275. Q. Do you know if Admiral Masuda made that determination?
A. Yes, he did."

Specifically with relation to the cases of Melein and Mejkane, the accused, Major Furuki, admitted that they were punished as spies. I quote parts of the relevant testimony, as follows:

"99. Q. Then please state what you know concerning the case of Melein and Mejkane.
A.....Melein had ordered Mejkane to .....spy upon the defense garrison military secrets and give the information to the Americans. They planned and executed this....."

"101. Q. What was your opinion in punishment of Melein and Mejkane and what were the laws that were applied?
A.....The laws applied to Melein, the same as Mandala and Laperia, and in addition to this spying and the articles in the Japanese Criminal Code concerning spying and the articles in the military secrets protection law concerning intentional relaying of information to the enemy. In the case of Mejkane, the Naval Criminal Code, desertion to the enemy and spying, to the Japanese Criminal Code and the article concerning the intentional relaying of information as to the enemy of the Military Secrets Protection Law....."

From the foregoing, it is clear that the natives were punished as spies. Since Furuki wilfully, unlawfully, and without previous trial punished them as spies, the accused Furuki is guilty of violation of the laws and customs of war and is guilty of the specifications of Charge II.

D. - Conclusion.

The accused Furuki is guilty of Charge I, specifications 1 through 5, Murder. The accused, Furuki, is guilty of Charge II, specifications 1 through 5, Violation of the Laws and Customs of War.

The War is over. The natives are dead. Is it necessary to punish this defendant? The question has been asked many times - there has been only one answer, and there can be only one answer. It is the answer that the law gives to all crime and to all criminals. Society is based upon a system of law - in which the weak as well as the strong - must be protected if life and order is to continue. The individuals who violate the laws of society - whether it is local, state, or international law - must be punished, in accordance with the law. Human nature is such that if we did not punish the individual who commits the crime - that individual and other individuals believing that crimes are not punished - would cease to respect the law and would violate it without fear of punishment. The results would be violence, disorder and a threat to the very existence of society itself.

We have just finished a war in which at the cost of millions of lives we have reaffirmed our belief in a society of law and order in which the rights of individuals and nations is protected against the depredations of the strong or th

ambitions. An ordered civilized society requires that we protect individuals, as well as nations against illegal attack. The accused, Furuki, violated the local as well as the international laws of society. He is guilty; must be found guilty; and must be appropriately punished. Society requires it; justice demands it.

David Bolton

DAVID BOLTON,
Lieutenant, USN,
Judge Advocate.

STATEMENT BY MARSHALLESE OBSERVERS

Guam, Marianas Islands,
April 18, 1947.

We are very glad to have had the opportunity to attend the war crimes trial of Major Hidesaku Furuki, Imperial Japanese Army, held at Commander Marianas. We appreciate the invitation of the Navy Department of the United States and Commander Marianas which permitted us to attend as official observers from the Marshall Islands.

From every standpoint we can say that this trial was just and right, and we are very impressed by the fairness with which the trial was handled.

Also, we are very glad to know that International Laws and Customs of War can be enforced and are still existing everywhere.

We will be very glad to tell our brothers and friends at home that justice and righteousness still rule among men and nations, and that wrongdoers will be punished.

Lajore
LAJORE

Buorn Heine
BUORN HEINE

Mark Juda
MARK JUDA

"JJ"

島民犯罪人処刑ニ関スル陳述書

一九四五年十二月三日
元ヤルート防備隊
海軍大佐　古木秀策

一、概要

小官ハ左記ノ如ク昭和二十年ニ元ヤルート防備隊指揮官増田大将ノ命令ニヨリ増田大将ヨリ死刑ノ宣告ヲ与ヘラレタル島民犯罪人ヲ処刑セリ

左記

島民犯罪人氏名及人数	処刑月日	[illegible]	島民犯罪人ノ[illegible]
レンツール コーリー ヨジナ 其他	五月三日頃	木村二曹（銃殺） 米杉兵曹長（銃殺）	主ニ [illegible]
アルデン [illegible] [illegible]	五月二八日頃	中田上等兵曹（主） 佐藤兵曹長（主）	同右
ナエーク [illegible]	六月中旬	森田兵曹（主）	同右
アンブーラ [illegible]	七月末	白井兵曹（主）	同右
メジカニ メーレン	八月十日頃	宇都宮上等兵曹（主）	同右 [illegible]
計十三名			

二、経過（[illegible]）

イ、小官ハ [illegible] 司令部ニ於テ [illegible] 島民犯罪人 [illegible] ニ

"Exhibit 1(1)"

至リ、島民ニ目隠シヲナシ、手ヲ縛ラシメ
トコロニ案内 作業場ニ於テ島民ヲ跪坐セシメ
ナシテ監視ヲ命ジタリ。

2. 小官ハトラック・アイランドニ向ヒ出発セシメ基地通信所ヨリ約四十米南方ニ於テ停止セシメタリ。

3. 小官ハ作業者ニ対シ現在位置ニ於テ道路通行人ヲ停止セシメ椰子林ノ中ニ入ラシメザル様命ジ島民犯罪人ヲ自ラ連行シテ内海(外海)側ニ出発シ汀附近ニ停止セシメタリ。

4. 小官ハ島民犯罪人ヲ坐ラシメ左記ノコトヲ伝ヘタリ 日本語ヲ十分解セザル者ニハ解スル者ヲシテ通訳セシメタリ。

左記

a. 木村中尉ハ木村中尉ガ国家ニ対シテ犯シタル犯罪ノ為ニ、此ノ罪ニヨリ本日大佐ヨリ死刑ノ宣告ヲ受ケタリ
(本島民ニ探知シタ罪ヲ示セ)

b. 只今ヨリ処刑ヲ実施ス

c. 約五分間ノ時間ヲ与ヘルニ付言ヒ度キコトアラバナセ
又祈ルコトヲ許ス

5. 「ナニーノ」「キヨシャーレ」ハ「悪イコトヲシタ時ニ申シマシタ
マセン。本日大佐ト出遭ヒシニヨリ許シテ下サイ ナドト
ヲ述ベ 戦争ニ勝ッテ下サイ」ト述ベタリ。
他ノ者ハ日本語ニテ島民語ニテ何事カ一言シタ
ルモ内容不明ナリ

6. 約五分後(小官ハ)拳銃ヲ以テ約一米ノ
正面ヨリ島民犯罪人ノ頭ヲ射撃セリ。直チニ死
ニ至ラザリシ者ニハ更ニ一発射撃ヲ加ヘタリ

"Exhibit 1(2)"

7. 小官ニ自己ガ罪人ノ処刑ヲ確認シ之ヲ埋葬スル時ニ用ヒテ穴ヲ掘ル様ニ命ジ其ノ時ニ死体ヲ投ジ砂ヲ上ニ盛リ其ノ上ニ立チ然ル後ニ次ノ犯人ヲ供スル旨ヲ述ベ其ノ後小官ノ埋葬ヲ終ヘ其ノ処ヲ去ル旨ヲ述ベタリ。

8. 小官ニ於テ之ノ処刑ヲ終了シタル旨ヲ報ゼリ。

陸軍大佐 土木秀夫

本陳述書ニ小官ノ自由ナル意思ニテ記述セリ。

一九四六年十二月三日

陸軍大佐 土木秀夫

Subscribed to before me this the 3rd day of December, 1946

Edward T. Field
Lieutenant U.S.N.R.

Eugene F. Kenick Jr.
Lieutenant, USNR

"Exhibit 1(3)"

STATEMENT ON THE EXECUTION OF THE NATIVE CRIMINALS

3 December 1946.

Former Jaluit Defense Force Army Major FURUKI, Hidesaku.

I. Summary.

I executed the native criminals who had been sentenced to death by Rear Admiral MASUDA on orders of Rear Admiral MASUDA former Commanding Officer of the JALUIT Defense Force in 1945 as follows:

Names & number of Native Criminals	Date of Execution	Guards en route and laborers after the completion of the execution	Place where the native criminals were incarcerated.
LESOHR KOHRI KOZINA UNKNOWN —	About 23 May	KIMURA P.O. 2c (dead) IKEZOE, Leading Seaman (dead)	Number two Ammunition Dump.
ARDEN MAKUI TIAGRIK	About 28 May	SUGAHARA, CPO (living) MIYAZAKI, Leading Seaman (living)	Number two Ammunition Dump
CHUTA CHONMOHLE	Middle of June	AKIZUKI, Leading Private (living)	Number two Ammunition Dump
MANDALA LAPERIA	End of July	TANAKA, Leading Private (living)	Number two Ammunition Dump
MEJKANE	About 10 August	UTSUNOMIYA, Sgt. (living)	Number two Ammunition Dump
MELEIN	About 10 August	"	Base Transmitting Station

TOTAL - 13 persons

II. Developments.

1. I took command of the laborers in front of the EMIDJ Battle Headquarters about two-thirty in the afternoon. I loaded them in a truck and went to the native criminal stockade. We blindfolded the prisoners, tied their hands, and put them in the truck. I gave orders to the laborers to stand watch and see that the natives did not escape.

2. We went toward AINEMAN Island and stopped at a place about 4,000 meters south of the Base Transmitting Station.

3. I gave orders to the workers at that place to stop people passing along the road and not to let them enter the coconut grove. I accompanied the native criminals myself and going toward the open sea, I had them halt in the vicinity of the beach.

"Exhibit 2 (1)"

4. I made the native criminals sit down and spoke as follows:

I had a man who understood Japanese translate it to the people who did not understand Japanese sufficiently:

a. You have been sentenced to death by Rear Admiral MASUDA for treason and other serious crimes which you have committed against the state. (I indicated the crime with which each native was linked.)

b. I will now carry out the order.

c. Because I will give you five minutes time, if you have any last minute will to make or offer your prayers, you may do so.

5. CHUTA and CHONMOHLE said, "We have done a bad thing, there is nothing we can say. Please apologize for us to Rear Admiral MASUDA and the men. Take a lot of coconut milk (T.N. to strengthen the body) and win the war." The other person mumbled something in the native tongue, but I don't know what he said.

6. About five minutes later I shot the native criminals in the head with a pistol from a distance of about one meter in front of them. I shot the people who did not die instantly once more.

7. After I had confirmed that the native criminals had ceased breathing, I called the workers from the road and dug a hole with a spade. We untied the ropes, lay the bodies down, piled sand upon them, erected a stone as a grave marker, and offered some flowers from trees in the vicinity. Then the workers and I saluted the body, prayed for their souls and started back.

8. I went to Rear Admiral MASUDA'S place and reported that the execution had been completed.

FURUKI, Hidesaku, Major, IJA.

This statement was written of my own free will.

3 December 1946.

FURUKI, HIDESAKU, Army Major.

Subscribed to before me this 3rd day of December 1946.

E. L. FIELD, Lieutenant, U.S.N.R.

E. E. KERRICK, Lieutenant, U.S.N.R.

Certified to be a true translation of the original Japanese document dated 3 December 1946, signed by FURUKI, Hidesaku and witnessed by Lieut. E. L. FIELD, and Lieut. E. E. KERRICK.

Court interpreter

Court interpreter

Court interpreter

"Exhibit 2(2)"

二復臨時調査部第一九號

昭和二十一年四月廿日

第二復員大臣官房臨時調査部長

第一復員省俘虜関係調査部長殿

「ヤルート」防備部隊指揮官竹田少將ノ
任務等ニ関スル件回答

一復俘第六八號来照、首題ノ件別紙ノ通

別紙一通添

(終)

右は眞実なることを証明す

昭和二十一年十一月二十七日

第二復員局長 前田 稔

日本政府

英語学第十三行譯紙（鈴木譯）

（別紙）

一、「ヤルート」島防備最高指揮官井田少将ニ與フラレタル任務及権限

関係書類ノ焼失ニ依リ第四艦隊司令部職員未帰還等ノ為正確ヲ期シ難キモ當時ニ於ケル「ヤルート」防備部隊指揮官ノ任務及権限ハ概ネ次ノ通リト認ム

(1) 作戦関係

第四艦隊作戦命令ニ基キ「ヤルート」防備部隊ヲ指揮シ擔任地域防衛ノ任務ヲ有シテ「ヤルート」防備部隊ハ昭和十九年二月「クェゼリン」失陥、第六根據地隊司令部玉砕ニ伴ヒ『「マーシャル」群島各基地ハ所在最高指揮官之ヲ指揮セヨ』ナル第四艦隊命令ニ依リ「ヤルート」防備部隊兵力ノ外「ヤルート」島所在各部隊（蔵ヲ含ム）ヲモ併セ

指揮シアリタリ

(ロ) 軍政關係

關係諸令達所定ノ作戰上必要ナル本來ノ任務及權限ノ外將ニアラシ但シ昭和十九年四月南洋廳職員及在邦人全部ノ全面的海軍軍屬採用以後ハ戰場化セル同地ノ特殊事情ニ鑑ミ此等職員及邦人ノ二重人格的機能ニ依リ民政ニ關シテモ實質的責任及權限ヲ有スルニ至レルモノト考ヘ得蓋シ昭和十九年初頭以降「マーシャル」諸島ノ面ハ戰況激變シ連日敵襲ヲ受ケ完全ニ戰場化シ且第四艦隊司令部所在ノ「トラック」島ヲ初メ後方ト、交通全ク杜絶シ生存ノ後方補給ニ依存シ得サルニ至リタル狀態ニ於テハ艦隊令第十六條ノ趣旨ニ則リ所在最高指揮官トシテ同第十八條ヲ準用シ作戰任務遂行上統治、最高權限者トシテ所要ノ

措置ヲ講ジ得ルモノト認ム 事實昭和十九年初頭中央ニ於テ
同方面戒嚴施行ニ関ス議起リシモ同方面ノ戰況竝ニ之ニ対處
シ得ル軍官民協力態勢ハ既ニ戒嚴施行以上ノ實質ヲ具シ且
實效ヲ擧ゲツヽアリ今更事新シク戒嚴施行ノ要ナシト結
論ニ達シタルモノニシテ既ニ戰場化シ外部トノ連絡手段ヲ失ヒタル現地
最高指揮官ニ対シ作戰任務遂行上必要アル場合ハ戒嚴司
令官同様ノ權限アルヲ黙認シタルモノト解シ得ベシ
又島民ハ部隊生存上不可欠ナル糧食生産供給者トシテ實質
上部隊構成一翼トシテノ地位ヲ占メ居レルモノト認メ得ベシ
因ニ「ヤルート」方面最終後方連絡實績及関係諸法規抜萃ハ
附表第一、第二ノ通

二、「ヤルート」島ノ一般人ニ對スル裁判機構及適用法令

(イ)裁判機構

南洋群島裁判令（大正十一年三月三十日勅令第百三十三號）ニ依リ大正十一年三月三十日勅令第百三十三號）ニ依リ昭和十九年四月一日以降第一審ハ「ポナペ」地方法院（在「ポナペ」）ノ管轄ニ屬シ高等法院（在「パラオ」）ヲ覆審裁判所ト爲スモ同島自体ニハ何等ノ裁判機關モ存セズ

「參考」

南洋群島裁判令（大正十一年三月三十日勅令第百三十三號）

第一條　南洋廳法院ハ南洋廳長官ニ直屬シ南洋群島ニ於ケル民事刑事ノ裁判及非訟事件ニ關スル事務ヲ掌ル

第二條　南洋廳法院ヲ分チテ地方法院及高等法院トス

法院ノ設置廢止及管轄區域ハ南洋廳長官之ヲ定ム

第三條　地方法院ハ民事刑事ニ付第一審ノ裁判ヲ爲シ……（以下略）

第四條　高等法院ハ終審トシテ地方法院ノ裁判ニ対スル上訴ニ付
覆審ヲ為ス

四　適用法令

南洋群島裁判事務取扱令（大正十二年一月二十七日勅令第二十六號）
ニ依リ刑法、陸海軍刑法、軍機保護法、刑事訴訟法等ヲ初メ凡
地施行ノ法律ハ概ネ適用ア
「參考」
南洋群島裁判事務取扱令（大正十二年一月二十七日勅令第二十六號）
第一條　民事刑事及非訟事件ニ関スル事項ハ本令其ノ他ノ法令
ニ特別ノ規定アル場合ヲ除ノ外左ノ法令ニ依ル
刑法　刑事訴訟法　陸海軍刑法　軍機保護法：（他略）：
第六十二條　刑事訴訟手續ハ高等法院ニ在テハ刑事訴訟法中

控訴裁判所ニ関スル規定ニ依リ地方法院ニ於テハ国法甲地方裁判所及区裁判所ニ関スル規定ニ依ル

附表第一

一、「ヤルート」ヨリ方面最終後ノ連絡實績

一、潜水艦ニ依ル隠密輸送次ノ通ニテ「ヤルート」ニ対スル潜水艦輸送ハ實施セラレアラズ

補給地	時機	輸送物件及量	記事
ミレ	一九(1944)一三一二	糧食琲菓約二噸	口潜潜水艦
ウォッゼ	三一下旬	同	約五噸 イ潜三隻水艦ヲ以テ
ミレ	三一二〇	同	約四噸 イ潜一八四潜水艦
クサイ	五一二六	同	約二噸 ロ潜四一潜水艦

二、飛行機ニ依ル隠密連絡

行先	時機	輸送人員等	記事
ヤルート	一九一六	「ヤルート」ヨリ飛行機搭乗員及一部整備員ノ抽出	大型飛行艇二機

三、艦船ニヨル連絡

補給地	時	輸送物件及量	記	事
ヤルート	一九一一	不詳	輸送船	

附表 第二

一、特設艦船部隊令

(イ) 第五十七條ノ三 特設警備隊ハ其ノ所在地及其ノ附近ノ防禦及警衛ニ任ジ且必要ニ應ジ港務通信軍需品ノ補給等ニ關スルコトヲ掌ルコトヲ得

(ロ) 第五十七條ノ四 特設警備隊ノ職員及其ノ職務ニ付テハ海軍

警備隊令

二、海軍警備隊令

第十二條 海軍警備隊職員服務ノ細項ニ關シテハ海軍大臣之ヲ定ム

三、海軍警備隊職員服務規程

(イ) 第四條 司令官又ハ其ノ指揮ヲ承ケ正域ノ防禦及警備ニ關シ所在

海軍各部ト連絡ニ関係各部ト気脈ヲ通ズベシ

四 第八條 前各條ニ規定スルモノノ外艦船職員服務規程ハ適用シ得ル限リ海軍警備隊職員ニ之ヲ準用ス

四 艦船職員服務規程

第百十條 艦長ハ其ノ艦所在地方ニ火災、風水害、震災等ヲ

ル場合ニ於テ又必要ト認ムルトキハ地方官憲ト協議シ便宜相當ノ

助力ヲ爲スベシ

五 艦隊令

第十六條 艦隊司令長官ハ麾下ノ艦船部隊ヲ分遣スルトキハ其ノ

首席指揮官ヲシテ指揮ヲ掌ラシメ自己ノ職権内ノ事ヲ之ニ委任スルコトヲ得

四 第十八條 艦隊司令長官ハ地方ノ安寧ヲ保持スル爲地方長官ヨリ兵力行使ノ請求アリタル場合ニ於テ事急ナルトキハ直ニ之ニ應ズルコトヲ得但シ地方長官ノ請求ヲ待ツ遑ナキトキハ兵力ヲ以テ便宜之ヲ處理スルコトヲ得

"Exhibit 3"