SIXTEENTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Wednesday, May 21, 1947.

The commission met at 9:40 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.
The accused, his counsel and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Inoue, Fumio, the witness under examination when the adjournment was taken, resumed his seat as a witness in his own behalf. He was warned that the oath previously taken was still binding, and continued his testimony.

(Cross-examination continued.)

416. Q. You testified that Neibet confessed first. Did she tell about how Raliejap and Ralime had met the Americans and how they had come to Jaluit to spy?
A. Yes.

417. Q. Did she confess all this on the first day of April?

This question was objected to by the accused on the ground that it was irrelevant and immaterial.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. The afternoon of the first day of April.

418. Q. You testified yesterday that the natives did not have a regular trial. Was the accused present when Masuda, Shintome, and Furuki, held their examination and consultation?
A. They were not present.

419. Q. Were the accused represented by defense counsel or legal representative?

This question was objected to by the accused on the ground that it was immaterial and irrelevant.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. No.

420. Q. Were any witnesses sworn to tell the truth in their testimony before that commission?
A. The witnesses were not sworn.

421. Q. Were there any witnesses besides yourself who ever testified before that examination and consultation?
A. I would like to have the question repeated.

The question was repeated in Japanese.

A. (continued.) First Lieutenant Morikawa also spoke concerning the facts in the case and so did Admiral Masuda.

422. Q. Did any other witnesses appear and speak concerning the facts before this examination and consultation?
A. I remember Shintome and Furuki speaking of the boats and of the examination of other evidence and these other were not witnesses but investigation reports from the commanding officers of Jaluit, Chitogen, Pingelap and Ai Islands.

The judge advocate moved to strike out this answer on the ground that it was not responsive.

The accused made no reply.

The commission announced that the motion was denied.

423. Q. Were any documents prepared under oath submitted during the course of the examination and consultation?
A. There were no special documents which were written under oath submitted during the course of the examination and consultation, but a document on which was written down what they had stated was submitted.

424. Q. Were you, as judge advocate, sworn to tell the truth concerning your investigations?
A. I was not required to take any special oath.

425. Q. Was any oath administered to you when you were appointed judge advocate?
A. I was not requested to take an oath.

426. Q. Were the children found guilty of spying but not murder?

This question was objected to by the accused on the ground that it called for the opinion of the witness.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. It is correct that I stated that they were found guilty of spying and not guilty of the other charges.

427. Q. In your official opinion paper that you submitted, did you indicate that they were not guilty of murder?
A. I did.

428. Q. How did you differentiate between the participation of the women in the crime and the participation of the children?

This question was objected to by the accused on the ground that it was irrelevant and immaterial.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. The crimes that the women committed were murder, desertion, and robbery. It was judged, or it was thought, that as principals together with Ralime and Raliejap, they had conspired; whereas, the children only knew about the murder, robbery and desertion on Mille Island from what they heard from their parents; therefore, it was not considered guilty on the part of the children for the crimes on Mille, but it was on the part of the women. This was how it was distinguished between them; this differentiation was made between them.

429. Q. In your capacity as police officer did you use the Japanese Criminal Code?

This question was objected to by the accused on the ground that it was irrelevant, immaterial, too vague and general in its scope.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I received no training on this, but as common sense, I knew a little about it.

430. Q. Were you asked on direct examination, "What opinion was that?" referring to your opinion expressed as judge advocate; and did you answer: "I gave my following opinion: Ralime, Raliejap, Anchio, Lacojirik, Ochira and Raliejap's wife, the above six were guilty of the crime of murder, robbery and violation of the navy criminal code; desertion to the enemy; violation ofthe Japanese Criminal Code," et cetera?

This question was objected to by the accused on the ground that the judge advocate was again reading from a document, and if this document is a part of the record of proceedings of this present case, it is the best evidence as written, and this witness should not be asked to verify it in this manner.

The judge advocate made no reply.

The commission announced that the objection was not sustained.

A. That is how I testified.

431. Q. Then, you did charge these natives with violation of the Japanese Criminal Code?
A. I expressed my opinion that they had violated it - the Japanese Criminal Code.

432. Q. Are you familiar with Article 41 of the Japanese Criminal Code which reads: "Acts of persons under fourteen years of age are not punishable."?
A. At that time I did not know. After I was confined at Guam, I heard about this and know about it.

433. Q. Did you protest that these native children should not be executed?
A. I expressed my opinion that they should be confined to an island which was a continuation of the main island where there were no natives.

434. Q. Did you ever hear of the execution of children in Japan for criminal acts?

This question was objected to by the accused on the ground that it was vague in that the translation of "children" into Japanese would be very indefinite.

The judge advocate withdrew the question.

435. Q. Did you ever hear of the execution of children under fourteen in Japan for criminal acts?
A. I have not heard anything about it in particular.

436. Q. You have never heard of any children being executed for crimes. Did you know it was wrong to execute these children?
A. I did not think it was wrong. I sincerely believed that it was wight.

Reexamined by the accused:

437. Q. In the question of the judge advocate in cross-examination you were asked: "Did you take an oath to perform the duties of the judge advocate?" and in answer to this you stated that you did not take an oath. Do you know that in Japan there is no system in which judges or judge advocates performing the duties of court do not take an oath?

This question was objected to by the judge advocate on the ground that it called for the legal opinion of the witness which he has not been qualified to give.

The accused replied.

The commission announced that the objection was not sustained.

A. I do not know.

438. Q. Have you heard of oaths being taken in a court in Japan?

This question was objected to by the judge advocate on the ground that it called for the legal opinion of the witness and that it was improper.

The accused replied.

The commission announced that the objection was not sustained.

A. No.

439. Q. What were your thoughts as you made the investigation of the natives regarding the legality of the investigations?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection as made was not sustained, but that it felt that the question was too broad and too vague.

The accused withdrew the question.

The commission then, at 10:45 a.m., took a recess until 11:07 a.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

Inoue, Fumio, the witness under examination when the recess was taken, resumed his seat as a witness in his own behalf. He was warned that the oath previously taken was still binding, and continued his testimony.

(Reexamination continued.)

440. Q. When you were ordered to execute the natives by Admiral Masuda, did you consider the order was legal?

This question was objected to by the judge advocate on the ground that it called for the legal opinion of the witness, was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was not sustained.

A. Yes, because by this authority of Admiral Masuda, the death sentence was given them. After an examination and consultation Admiral Masuda himself had given the sentence to each native. They were prisoners who were sentenced to death, and I thought these were lawful orders and that the order of Admiral Masuda was the order of the court; and, therefore, legal and right.

441. Q. Tell us what you know about the authority of a Japanese military commander to award certain punishments without resorting to a formal court martial for it.

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was not sustained.

A. In the Japanese military system, the various ranking commanding officers have the authority to punish according to the disciplinary punishment regulations without formal court martial.

442. Q. What punishments may he inflict under battle conditions?

This question was objected to by the judge advocate on the ground that it called for the legal opinion of the witness, was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

443. Q. Were you ever allowed to verify the testimony that you gave at the Furuki trial?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

444. Q. Were you ever allowed to verify the answer to question seventeen which was alleged by the judge advocate to have been made and from which he read to you from the board of investigation?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused withdrew the question.

445. Q. Were you allowed to verify the answer which you gave to question

seventeen that was alleged by the judge advocate to have been made, in which he read to you from the proceedings of the board of investigation as follows: "17. Q. What kind of trial did they have or was your investigation the only thing used? A. They did not have a trial here because even a Japanese soldier, they never have a trial and they just investigate and decide what to do from the report."?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

446. Q. On October 9, 1945, when you answered certain questions which the judge advocate read from a document, were you represented by counsel? JK

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

447. Q. On cross-examination you were asked about the consultation and examination which Admiral Masuda, Major Furuki and Lieutenant Commander Shintome held regarding the Mille natives. Was this examination and consultation legal? JK

This question was objected to by the judge advocate on the ground that it called for the legal opinion of the witness and was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

448. Q. Under the circumstances, when the consultation and examination are held in secret, as was done at Jaluit, when the Mille incident was examined and consulted, is it necessary that the accused be represented by counsel? JK

This question was objected to by the judge advocate on the ground that it called for the legal opinion of the witness and that it was leading.

The accused replied.

The commission announced that the objection was sustained.

449. Q. Do you know of any rules of procedure for the special trial that was given these natives from Mille?

This question was objected to by the judge advocate on the ground that the witness has not testified that this was a "special trial." The witness has testified that an examination and consultation was given.

The accused withdrew the question.

450. Q. Do you know of any rules of procedure for the special consultations and examinations which were given these natives from Mille?

This question was objected to by the judge advocate on the ground that the witness had not testified that this was a "special procedure."

The accused made no reply.

The commission announced that the objection was not sustained.

A. I did not know any rules.

451. Q. Is a Japanese army officer subject to court martial for the offense of falsehood?

This question was objected to by the judge advocate on the ground that it was irrelevant, immaterial, and went beyond the scope of the cross-examination.

The accused replied.

The commission announced that the objection was sustained.

452. Q. From your investigation, do you know whether or not the children were in the boat at the time when the natives assaulted with intent to murder Petty Officer Tanaka?

This question was objected to by the judge advocate on the ground that the phrase "assaulted with intent to murder" was improper, and that it was irrelevant and immaterial.

The accused withdrew the question.

The commission then, at 11:30 a.m., took a recess until 2 p.m., at which time it reconvened.

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

Robert R. Miller, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

Inoue, Fumio, the witness under examination when the recess was taken, resumed his seat as a witness in his own behalf. He was warned that the oath previously taken was still binding, and continued his testimony.

(Reexamination continued.)

453. Q. In cross-examination by the judge advocate you testified to the period and time that the examination and consultation was held. What was the difference between Tokyo and Jaluit time?

A. The time I stated here was Jaluit time. The difference in time between Jaluit and Tokyo is about three hours. If it was one o'clock in the morning on Jaluit it would be about four o'clock in the morning Tokyo time. As I recall I think it was about three hours difference.

454. Q. You stated that there was a difference of three hours between time in Jaluit and Tokyo. When you were testifying concerning the hours and the times on Jaluit did you use Tokyo time?
A. We did not use Tokyo time. We used Jaluit time.

455. Q. When you say that it was one o'clock in Jaluit, is it in the middle of the night?

This question was objected to by the judge advocate on the ground that it was too vague.

The accused withdrew the question.

456. Q. When you say one o'clock a.m. Jaluit time is it dawn in Jaluit?
A. The sun rises about three a.m. and one o'clock would be near dawn. When I stated previously Jaluit it was misunderstanding on my part and I believe it was Japanese time that we were using.

457. Q. Tell us whether or not night time was used for travelling to the other islands at the time of this incident.
A. At this time travelling between Emidj and the other outlying islands was usually done in the middle of the night.

458. Q. Do you know that a statement you wrote last December while you were confined on Guam has been introduced as evidence by the judge advocate?
A. I do.

459. Q. Do you remember the contents of this statement at present?
A. I remember the general outline.

460. Q. Do you remember writing the following: "The eight natives who were executed were Japanese and they had committed crimes at Jaluit and as a result of the highest examination and consultation they were given a sentence of death by Admiral Masuda and were prisoners with a sentence of death." Do you remember writing this in your statement?
A. I do.

461. Q. On the witness stand you have testified concerning the examination and consultation given the Mille natives from the third of April. Is this the same examination and consultation you refer to in your statement?
A. It is the same.

462. Q. On the witness stand you have been asked questions concerning trials or regular trial procedure. In this instance what did you understand the trial or trial by regular procedure to mean when replying to these questions?
A. I understood trial to mean that the judges and judge advocate examined

and consulted on the criminal case, determined the laws applicable and gave a decision. At that time I did not know what a trial by regular procedure was, but later from what I found out I understand it to be to hold a public trial, call the defendants and witnesses and the judges and the judge advocates, examine and consult and after examination and consultation by the judges and judge advocates determine the laws applicable and determine the decision.

463. Q. In your statement when you stated that certain criminals, after the highest examination and consultatinn on Jaluit, were given a sentence. Did you understand this to be a trial?
A. As it was an examination and consultation called together and held by Admiral Masuda who had the authority I firmly believed that it was a trial.

464. Q. You testified that when you were ordered to execute the two children you expressed your opinion to the contrary. Tell us at this time what were your reasons for this.

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused withdrew the question.

465. Q. You testified that when you were ordered to execute the two children you expressed your opinion to the contrary. Did you express your opinion because you thought that it was illegal?

This question was objected to by the judge advocate on the ground that it was leading and that it was irrelevant and immaterial.

The accused withdrew the question.

466. Q. When you were ordered to execute these natives by Admiral Masuda did you know that this act of executing the death sentence would constitute a crime?

This question was objected to by the judge advocate on the ground that it called for the legal opinion of the witness.

The accused withdrew the question.

Recross-examined by the judge advocate:

467. Q. On redirect examination you testified that military personnel could be given disciplinary punishment without a court martial. Could they be given the death sentence without a court martial?
A. No.

468. Q. You testified that at the time of the executions you thought that an examination and consultation was a trial, but that later on you decided that it had to be a public trial with certain witnesses. When was this that you decided that it had to be a public trial?
A. After the war when I was asked concerning the native incidents and other incidents I was taught by a person who knew a little about law.

469. Q. What did they teach you?
A. I was taught that a trial by regular procedure was such and such a thing.

470. Q. Were you taught that at a trial by regular procedure the accused must be present in the court?

This question was objected to by the accused on the ground that it was irrelevant and immaterial.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I was taught usually that the defendant was to be at the place of the public trial.

471. Q. Were you taught that the defendant had to be present when the witnesses were brought before the court?
A. This I was not taught.

472. Q. Were you taught that any witnesses who appeared before the court had to be sworn?
A. No.

473. Q. Were you taught these things while you were on Kwajalein or while you were on Guam?
A. It was on Jaluit.

474. Q. Were you ever taught the following from the Japanese Naval Court Martial Law with regard to giving an oath: "Article 247. Witness should make an oath unless there is any stipulation contrary to it. Article 248. An oath should be made by witness before questioning begins. However when there is a doubt as to whether he is a right person to make an oath or not then let him make an oath after the inquisition is over. Article 249. An oath should be made on 'the book of oath.' In this book of oath a statement 'I hereby swear that I shall tell the truth. I shall neither hide anything nor add anything.' In a case to make an oath after the inquisition is over, a statement should be written thus: 'I swear that I did tell the truth and I did neither hide anything nor add anything.' The chief judge shall read loudly the letter of oath and let the witness write his name and put his seal on. Article 250. A fact that there is a punishment for person who makes false testimony should be told beforehand to a witness who is to make an oath."
A. No.

475. Q. In October 1945 when you were at Jaluit did you understand the word trial included a procedure by examination and consultation?

This question was objected to by the accused on the ground that it was misleading and irrelevant and immaterial.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I understood it to be included in the word trial.

Neither the accused nor the judge advocate desired further to examine this witness.

The commission did not desire to examine this witness.

The witness made the following statement:

Concerning the examination and consultation procedure taken in this incident by Admiral Masuda. Admiral Masuda especially cleared a part of his quarters and made use of it for this purpose. Matsui and Izumi, two orderlies, were placed as guards at the entrance, carefully guarded so that no one could come in. Especially at the last examination and consultation when the sentence was to be decided by Admiral Masuda, the judges and myself were all called to attention. He solemnly heard our opinions and decided the decision. During my two years period of duties on Jaluit the fact that the commanding officer cleared a part of his quarters for any purpose this was the only time. Immediately after the end of the war Admiral Masuda was called by Commander McKinson to the Destroyer, and at this time he was asked the following question: There should be eight natives here who came from Mille, what did you do with them? The admiral answered that the natives had committed crimes, by my authority and according to Japanese law by lawful procedure they were executed. Commander McKinson then asked what did you do with the two children, Admiral Masuda replied the two children were the same as the adults, they were spies and knew as well as the adults the conditions on Jaluit. As there was no other way these two children were executed to prevent the desertion of military, gunzokus and natives and the leading of military secrets which was dangerous to Jaluit. To retain discipline and the lives of the four thousand people on Jaluit they had to be executed. Present at this time were McKinson, his adjutant, myself and an army interpreter who was Sergeant Major Akamatsu, Isamu. Admiral Masuda submitted a report stating that Admiral Masuda had ordered Captain Inoue to perform this execution. This report was taken back together with other documents by Commander McKinson on the fifth of October 1945 at the headquarters of the defense garrison on Emidj. Witnesses to this are Major Furuki, Lieutenant Commander Shintome, Suzuki and Nakamura, myself and Sergeant Major Akamatsu. At this time I did not know the Hague Convention nor the laws of land warfare of the Hague Convention and the report that Admiral Masuda submitted that they had committed the crime of spying stated that the law for spying, article 85 of the Japanese Criminal Code, was applied.

The judge advocate moved to strike out the portion of this statement which related the conversation between Admiral Masuda and Commander McKinson on the ground it was hearsay.

The accused replied.

The commission announced that the motion to strike was denied and that the commission would consider the statement in its entirety and give it the proper weight.

The witness resumed his status as accused.

The commission then, at 4:25 p.m., adjourned until 9 a.m., tomorrow, Thursday, May 22, 1947.

SEVENTEENTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Thursday, May 22, 1947.

The commission met at 9:15 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.
The accused, his counsel and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

The judge advocate informed the commission that the interrogatories and deposition of Warrant Officer Tanaka had arrived. Defense counsel requested an opportunity to examine these documents.

The commission then, at 9:28 a.m., took a recess until 9:48 a.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

The judge advocate was called as a witness for the defense and was duly sworn.

Examined by the judge advocate:

1. Q. State your name, rank and present station.
A. James P. Kenny, lieutenant, U. S. Navy, judge advocate of this commission, War Crimes Office, Pacific Fleet.

2. Q. If you recognize the accused state as whom.
A. Inoue, Fumio, former captain, Imperial Japanese Army.

Examined by the accused:

3. Q. Are you the legal custodian of a certain document, the interrogatories in the case of Inoue, Fumio, former captain, Imperial Japanese Army and the deposition in the case of Inoue, Fumio, former captain, Imperial Japanese Army by Tanaka, Masaharu?
A. I am.

4. Q. Are these documents signed, sworn to, and otherwise authenticated?
A. The interrogatories are signed by Mr. Akimoto and Mr. Suzuki of defense counsel and Lieutenant Bolton, judge advocate. The deposition is signed by Masaharu Tanaka and sworn to before Captain James A. Moriarty, U. S. Marine Corps, and is further certified by Captain Moriarty, U. S. Marine Corps, and Robert Oldham, yeoman third class, U. S. Navy.

The witness produced the deposition of Tanaka, Masaharu, and it was submitted to the judge advocate and to the commission and by the accused offered in evidence. There being no objection, it was so received, and is appended marked "Exhibit 3." The judge advocate read the deposition.

An interpreter read the deposition in Japanese.

Cross-examined by the judge advocate:

5. Q. From the answer to the eighteenth interrogatory, will you read that portion which relates to the age of the child?
A. The answer to the eighteenth interrogatory, it is stated that the child was a boy. Further on in the answer it reads as follows: "The child was about six years old, very small and quite thin."

Neither the accused nor the judge advocate desired further to examine this witness.

The commission did not desire to examine this witness.

The witness resumed his seat as judge advocate.

The defense rested.

The rebuttal began.

James P. Kenny, lieutenant, U. S. Navy, judge advocate was called as a witness for the prosecution and warned that the oath previously taken was still binding.

Examined by the judge advocate:

1. Q. State your name, rank and present station.
A. James P. Kenny, lieutenant, U. S. Navy, judge advocate.

2. Q. Are you the legal custodian of the record of proceedings of the war crimes investigation conducted at Jaluit, Majuro and Kwajalein Atolls, Marshall Islands, by order of the Commander Marshalls-Gilberts Area to inquire into war crimes and atrocities on Jaluit Atoll?
A. I am.

3. Q. Will you produce this record?
A. I will. Here it is.

4. Q. Are the record of proceedings duly authenticated by the signature of the investigator?
A. The proceedings are duly authenticated by Nathan G. Finkelstein, lieutenant commander, U. S. Naval Reserve, investigator.

5. Q. What portion of the proceedings do you desire to introduce into evidence?
A. That portion of the testimony of the witness, Inoue, Fumio, captain, Imperial Japanese Army which deals with the question of trial of some Mille natives on Jaluit Atoll.

The record of proceedings of the War Crimes Investigation, containing the full testimony of Inoue, Fumio, on October 9, 1945, was submitted to the accused for examination.

The accused requested a short recess for the purpose of examining this document.

The commission then, at 10:32 a.m., took a recess until 10:55 a.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

James P. Kenny, the witness under examination when the recess was taken, resumed his seat as a witness for the prosecution. He was warned that the oath previously taken was still binding, and continued his testimony.

(Examination continued.)

The record of proceedings of the War Crimes Investigation, containing the full testimony of Inoue, Fumio, on October 9, 1945, was submitted to the commission, and by the judge advocate questions three and seventeen and the answers thereto of the testimony of the before-named witness was offered in evidence.

The accused made the following objection:

The defense objects to this document or any part of it being offered into evidence at this time. First, it is not an original document and the original has not been accounted for. The document, therefore, violates the best evidence rule. This is a copy, and the copy is not even signed by the officer who was supposed to have ordered the board of investigation. Furthermore, this document is irrelevant. It is not the same case as this case. We object, also, because the judge advocate desires only to offer part of the document in evidence. It is a fundamental rule that if a document is offered into evidence, the entire document must be offered into evidence. The document is offered into evidence in connection with the testimony of

the accused. The accused was on the witness stand; the accused was available to the judge advocate. At that time it was proper, and that was the only proper time at which the document could have been offered into evidence. Section 678, page 1126, Wharton's Criminal Evidence, "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable." We can find no other rule which permits the reading into a subsequent trial the testimony taken at a former trial where the witness is available. The only exceptions are in case the witness is not available. This witness was available. He was on the witness stand for about three days on cross-examination. Ample opportunity was given the judge advocate at that time to test his credibility or anything else. In Underhill's Criminal Evidence, page 955, the definition for admitting testimony of missing witnesses, and we read this only to show on what grounds the testimony is admitted when the witnesses are missing, and in this case the witness is not missing. He was on the stand! We read: "The latter trial should be for the same matter, and the accused person should be the same as in the former," and they cite Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Shaw v. United States, 1 Fed. (2d) 199; Bridges v. State (Ala.App.), 152 So. 51; Putnal v. State, 56 Fla. 86, 47 So. 864; State v. Emory, 116 Kans. 381, 226 Pac. 754; Commonwealth v. Gallo, 275 Mass. 320, 175 N. E. 718, 79 A. L. R. 1380; State v. Brown, 331 Mo. 556, 56 S. W. (2d) 405; Trobough v. State, 122 Nebr. 7, 238 N. W. 771; Brisno v. State, 36 Ohio App. 459, 173 N. E. 617; Kelley v. State, 51 Okla. Cr. 249, 300 Pac. 436; Rich v. State, 51 Okla. Cr. 418, 1 Pac. (2d) 805; State v. Edmunson, 120 Ore. 297, 249 Pac. 1098, 251 Pac. 763, 252 Pac. 84. Underhill goes further, on page 957, "A statement by the prosecuting attorney that his witness is dead is no proof of the fact such as will let in the missing witness's testimony," and they cite Flannigan v. State (Okla. Cr.), 29 Pac. (2d) 989. On page 961 of Underhill's Criminal Evidence under section 465 "Mode of proving absence of witness," we read "To admit the former testimony of a witness who is absent, insane, ill or deceased, a predicate should be laid."....."that the witness has since died, become incapacitated, or cannot be found by due diligence." That is on page 961, section 465.

On page 970 of Underhill's, we read, "It is a preliminary question for the court, upon which it is error to refuse or neglect to rule, whether in any case it is proper to admit the testimony of the witness given at a prior proceeding," citing People v. Willett, 92 N. Y. 29, 1 N.Y. Cr. 355. In Wharton's Criminal Evidence, page 1126, Section 678, "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable." "Some courts deny the right to reproduce the testimony of a witness unless he is shown to be dead, even though he has gone beyond the jurisdiction of the court," citing U.S. v. Angell (CC) 11F.34; Pittman v. State, 92 Ga. 480, 17 S. E. 856; Collins v. Com. 12 Bush (Ky.) 271; Owens v. State, 63 Miss. 450; State v. Nicholas, 149 Mo. App. 121, 130 S. W. 96; People v. Newman, 5 Hill (N.Y.) 295; "In United States v. Angell (C.C.) 11 F. 34, the court says that under the constitutional provision that in all criminal cases the accused shall enjoy the right to be confronted with the witnesses against him, a witness if living, must be produced, and the mere fact that he is beyond the jurisdiction is immaterial. The court further says that it cannot fairly be maintained that, if the witness has once been confronted with the accused before the committing magistrate, the requirements or guaranties of the Constitution are answered. '.....The fair meaning of the Constitution is that wherever and whenever he is put on his final trial, he

shall be confronted with the witnesses against him, if they be alive'" (Wharton's Criminal Evidence, page 1129, fn. 9.) For these reasons, we hold that the document is not properly presented at the proper time, and it is objectionable evidence and will be most prejudicial to the rights of the accused.

The judge advocate made the following reply:

The defense counsel has failed to examine in the time that he has had the document, what it is, or what it contains. Defense counsel has stated that this is a copy. Defense counsel is in error. This is the original record of proceedings of the war crimes investigation conducted at Jaluit, Majuro and Kwajalein Atolls, Marshall Islands, by order of the Commander Marshalls Gilberts Area, October 7, 1945. This is the original record; the only things in this record which are copies are a duly attested copy of the original order authorizing and convening the investigation dated October 3, 1945, and a copy, duly attested, of the order dated October 6, 1945, appointing an assistant investigator, and a duly authenticated copy of the notice of promotion of the investigating officer, dated October 12, 1945, from the rank of Lieutenant to that of Lieutenant Commander. The report in its entirety and the board of investigation in its entirety, is the original record and is duly signed as the original record by the investigating officer, Lieutenant Commander Nathan G. Finkelstein. Secondly, the defense counsel has stated that the testimony which has been offered in evidence is testimony in a different case. If by that the defense counsel means that this portion of the testimony of Fumio Inoue, refers to a different crime, then, the defense counsel is clearly in error. The portion of testimony which was referred to in the question of the judge advocate on cross-examination during the laying of the foundation for the introduction of this evidence of contradictory statements, clearly and ~~x~~consistently showed that the questions and answers relate specifically to the eight Mille natives for whose murder, the accused is here being tried before this commission. Thirdly, the defense counsel has contended that the proper time for the introduction of this evidence of prior contradictory statements was during the course of cross-examination of the defense witness. Defense counsel is in error. I cite Wharton's Criminal Evidence, which was cited by defense counsel, section 1352, which appears under the subject of Impeachment of Witnesses, sub-paragraph 2, "Contradiction," section 1352 is headed "By rebuttal evidence," and it specifically states, and I quote in part, "Hence, it is proper to admit evidence of any acts of circumstances which are inconsistent with the relevant testimony of the witness. Any evidence which, in any aspect, tends to contradict the witness may not be excluded." Fourthly, Defense counsel has stated that there is no rule which permits the reading of testimony or the utilization of prior testimony where the witness is available. Defense counsel is mistaken by this as to the purpose of the introduction of the prior testimony of the witness at the board of investigation and as to the rule with relation to the introduction of prior testimony by the purpose of contradictions. This testimony which appears in the board of investigation has been specifically utilized for the purpose of establishing prior contradictory statements by the witness. Wharton's Criminal Evidence, section 1356 states: "Foundation for proof of inconsistent statement. A witness cannot be impeached by the proof of contradictory statements until a proper foundation or predicate has been laid by asking him whether he made such a

contradictory statement, or by asking him some kind of warning question to give him a chance to admit, explain, or deny the prior contradictory statement, which he has a right to do." Further in section 1359, of Wharton's Criminal Evidence, section 1359, reads as follows: "Impeaching testimony can be offered when, but only when, the witness denies, directly or qualifiedly, that he made the statement, or when he neither directly admits nor denies the making of such statement, but states that he does not remember whether or not he made it." It is obvious that it was proper for the judge advocate in cross-examination to lay the foundation for the introduction of the prior contradictory statements. The prior contradictory statements by the witness consisted of the testimony before the board of investigation which is now offered in evidence and the statement in the case of Major Furuki, Hidesaku. With regard to the use of prior testimony, the law is contrary to the statements made by defense counsel. Former contradictory testimony can be admitted in evidence, regardless of whether the witness is available or alive, and specifically when the witness is available and has already testified as he has in the instant case, the law clearly provides that evidence of prior contradictory statements made at a former trial may be introduced into evidence; and I cite again Wharton's Criminal Evidence, section 1363, "Former contradictory testimony. A witness may be impeached by proof of a contradictory deposition taken at a time prior to the trial. A witness may also be contradicted by proof of prior contradictory statements made before a grand jury, at a preliminary hearing, at a coroner's inquest, or on a former trial or hearing of the same case." With regard to the use of testimony made on a former trial, Underhill cites numerous decisions of the courts of the various states of the United States. It is obvious that there can be no valid objection to the admission into evidence of that portion of the testimony of Fumio Inoue which has been offered in evidence.

The commission announced that the objection of the accused was not sustained, and received in evidence that portion of the war crimes investigation offered by the judge advocate.

6. Q. Refer to these documents and read from the testimony of the accused, Inoue, Fumio, on October 9, 1945, questions three and seventeen and the answers thereto.

The witness read from the testimony of Inoue, Fumio, as follows:

"3. Q. Tell all you know about the execution of the eight natives who were captured April 1945, their capture and all the things leading up to it.
A. About six months have elapsed so I might have the dates and the names of the natives mixed up but I will give you the true story of it. At that time I was Naval Police Commander. My duties were to check on the civilians and Navy and Army personnel from not eating more than they were allowed to. About the end of March this year there were reports to headquarters that four natives had drifted down to Jaluit. On the following day we had a report that four other natives had also landed on the island north of Medyai. At that time Warrant Officer Omura on Jaluit Island and First Lieutenant Furuno on Chitogen Island notified that the natives had drifted over here. Headquarters had me check on the eight natives because they thought the natives were sent here by the Americans to make some scheme to get the other natives off. Therefore the eight natives were sent to the headquarters. At that time these natives were sent to the headquarters they didn't have any particular person in charge to look after the natives in native cases so the admiral ordered me to investigate these natives. On this atoll here the

Army and Navy got along very harmoniously so whatever we did we had full cooperation among the units, the Naval police were composed of Army and Navy personnel. I was the commander of the Navy and Army police. The natives that were brought from Jaluit were kept on Aineman and the other four were kept at ammunition dump on Emidj. I and First Lieutenant Morikawa, intelligence officer, and Shiroshita, civilian interpreter, the three of us interrogated these eight natives. I first asked this question, 'Why did you desert Mille?', the natives replied, "Because many of the other natives were being rescued by the other American ships and we had heard an order by the commander of Mille that if any more natives tried to escape or escaped that all the natives left on Mille would be executed; so we made up our minds to take a chance in trying to get picked up by an American ship or drift to Majuro.

"The four on Chitogen and the four on Jaluit had conferred with each other before they left Mille.

"17. Q. What kind of trial did they have, or was your investigation the only thing used?
A. They did not have a trial here because even a Japanese soldier they never have a trial and they just investigate and decide what to do according to the report."

An interpreter read these questions and answers in Japanese.

The commission then, at 11:30 p.m., took a recess until 2:55 p.m., at which time it reconvened.

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

Robert R. Miller, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

The judge advocate, the witness under examination when the recess was taken, resumed his seat. He was warned that the oath previously taken was still binding, and continued his testimony.

Cross-examined by the accused:

7. Q. Does the record show how many questions were asked the witness Inoue?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

8. Q. Does question one asked the witness Inoue relate to this incident?
A. No, question one merely asks the witness' name, rank and present station.

9. Q. Does question two relate to this incident?

This question was objected to by the judge advocate on the ground that it was too broad.

The accused made no reply.

The commission announced that the objection was sustained.

10. Q. Does the record show that this is a judicial proceeding?

This question was objected to by the judge advocate on the ground that it called for the opinion of the witness and that it was immaterial and irrelevant.

The accused replied.

The commission announced that the objection was sustained.

11. Q. Does the record show that the witness testified under oath?
A. The record of this investigation indicates that the witness Inoue, Fumio was not duly sworn because it was considered that more information could be secured if the witnesses were not under oath.

12. Q. Is the testimony of the witness Inoue not under oath admissible in this trial in accordance with section 146 of Naval Courts and Boards which reads: ".....When a board of investigation is not required by its precept to take testimony under oath, the record of such board can not be introduced as evidence in subsequent proceedings, except as provided in section 222.."?

This question was objected to by the judge advocate on the ground that it called for the opinion of the witness.

The accused made no reply.

The commission announced that the objection was sustained.

13. Q. Does the record show that the witness Inoue testified voluntarily?

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.

14. Q. Does the record show that the witness Inoue was informed of his rights as a defendant?

This question was objected to by the judge advocate on the ground that it was immaterial and irrelevant.

The accused made no reply.

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

The commission announced that the objection was sustained.

15. Q. Does the record show that the witness Inoue had the benefit of counsel?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

16. Q. Does the record show that the witness Inoue was informed that he was privileged to make any further statement covering anything relating to the subject matter of the investigation which he thought should be a matter of record in connection therewith which had not been fully brought out by previous questioning?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

17. Q. Does the record show that the witness was duly warned after he finished testifying?

This question was objected to by the judge advocate on the ground that it was immaterial and irrelevant.

The accused made no reply.

The commission announced that the objection was sustained.

18. Q. Does the record show that the witness waived the right to have counsel?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

19. Q. Does the record show that section 734(d) to wit".....Should a defendant waive his right to counsel, the president or senior member shall warn him that sworn testimony is admissible as evidence before courts martial, as provided in the 60th A.G.N. or the general rules of evidence, and again advise him to provide himself with counsel, informing him that counsel will be assigned him should he so desire....." was complied with?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

20. Q. Does the record show who the members of the Board of Investigation are?
A. Yes, it does.

21. Q. Who were the members of this Board of Investigation?
A. The record contains a statement dated 3 October 1945 from Commander Marshalls-Gilberts area to Lieutenant Nathan G. Finkelstein, U. S. N.R., which appoints the said Lieutenant Finkelstein to act as investigator into the war crimes and atrocities. The record also contains a statement dated 6 October 1945 from the Atoll Commander Majuro to First Lieutenant Jesse O. Bishop appointing the said Lieutenant Bishop as an assistant investigator in this investigation.

22. Q. Does the record show that both these members were sworn?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

23. Q. Did both of the members sign the board report?
A. The report of this investigation is signed by Lieutenant Commander Nathan G. Finkelstein, U.S.N.R., as investigator.

24. Q. And the other member did not sign the report?

This question was objected to by the judge advocate on the ground that there has been no indication that the other person was a member.

The accused made no reply.

The commission announced that the objection was sustained.

25. Q. Does the record show that the board reported any facts?
A. The record contains a summary of all factual information secured by the investigator duting the course of this investigation.

26. Q. What, if any, facts did they report regarding the result of the investigation of the witness Inoue?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial and highly improper.

The accused replied.

The commission announced that the objection was sustained.

27. Q. What, if any, facts did they report as a result of the answers that the witness Inoue gave to the questions three and seventeen?

This question was objected to by the judge advocate on the ground that it was immaterial and irrelevant.

The accused made no reply.

The commission announced that the objection was sustained.

28. Q. Does this report show that the board made any recommendations for further proceedings such as to try the witness Inoue whose testimony you have read in part as answer to questions three and seventeen?

This question was objected to by the judge advocate on the ground that it was immaterial and irrelevant.

The accused made no reply.

The commission announced that the objection was sustained.

29. Q. Does the record show that the proceedings of the Board of Investigation were approved by the convening authority?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

30. Q. Was question seventeen the last question asked the witness Inoue regarding this incident?
A. No.

31. Q. Will you read such further questions as were asked the witness Inoue regarding this incident?

This question was objected to by the judge advocate on the ground that question seventeen relates to the trial of the Mille natives and the judge advocate does not believe that there are any further questions regarding this trial given the Mille natives which was the purpose of only reading question seventeen.

The accused made no reply.

The commission announced that the objection was sustained.

32. Q. You stated that you were the legal custodian of the document. How did you get custody of this document?
A. At the time I was assigned to the War Crimes Office, Pacific Fleet, this document was a part of the records of the War Crimes Office and automatically by my attachment to that office I become one of the custodians of that record.

33. Q. Is this document a confidential document?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

34. Q. Are you well acquainted with the naval regulations and other regulations regarding classified material?

This question was objected to by the judge advocate on the ground that it was immaterial and irrelevant.

The accused made no reply.

The commission announced that the objection was sustained.

35. Q. By what authority do you offer into evidence this document into the records of court that is a public court?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

36. Q. By what authority do you read from this document in a public session of this court?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

Reexamined by the judge advocate:

37. Q. You were asked by defense counsel "Was question seventeen the last question asked the witness Inoue regarding this incident?" You answered, "No." Was question seventeen the last question which relates to the subject of whether a trial was held for the Mille natives who were executed? A. Yes.

Recross-examined by the accused:

38. Q. Were the other questions after question seventeen a part of the proceedings of which the proceedings are confidential?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

Neither the judge advocate nor the accused desired further to examine this witness.

The commission did not desire to examine this witness.

The witness resumed his seat as a judge advocate.

The commission then, at 3:47 p. m., took a recess until 3:58 p. m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

The judge advocate, a witness for the prosecution, was recalled and warned that the oath previously taken was still binding.

Examined by the judge advocate:

1. Q. State your name and rank.
A. James P. Kenny, lieutenant, U. S. Navy.

2. Q. Are you the legal custodian of the record of proceedings of the Military Commission convened at the United States Pacific Fleet, Commander Marianas, Guam, Marianas Islands, in the case of Furuki, Hidesaku, major, Imperial Japanese Army, on March 1, 1947?
A. I am.

3. Q. Will you produce this record?
A. I will. Here it is.

4. Q. Are the proceedings duly signed and authenticated by the president and all the members of the commission and the judge advocates?
A. They are.

5. Q. What part of the proceedings do you desire to introduce into evidence?
A. I wish to introduce that portion of the testimony of Inoue, Fumio, which deals with the question of trial on Jaluit Atoll during the period of the late war.

The record of proceedings was submitted to the accused and to the commission and such relevant portions thereof that contain the testimony of the before-named witness, Fumio Inoue, at the trial of Major Furuki, that relate to trials of natives held on Jaluit were offered in evidence.

The accused read a written objection to this document being received into evidence, copy appended marked "CC."

The judge advocate read a written reply, copy appended marked "DD."

The commission announced that the objection was not sustained and that the portions of the record referred to would be received in evidence.

6. Q. Will you read from this record such portions from the testimony of Inoue, Fumio, giving the date and place of the proceedings which relate to the question of trial of natives on Jaluit Atoll?

The witness read from the testimony of Inoue, Fumio, captain, Imperial Japanese Army, copy appended marked "Exhibit 4."

7. Q. Do you wish to have marked as part of the record in evidence a transcript of this testimony that you have just read?
A. I do.

This portion has already been admitted in evidence and is therefore appended marked as "Exhibit 4."

The commission then, at 4:32 p.m., adjourned until 9 a.m., tomorrow, Friday, May 23, 1947.

EIGHTEENTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Friday, May 23, 1947.

The commission met at 9:15 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

James P. Kenny, the witness under examination when the adjournment was taken, resumed his seat. He was warned that the oath previously taken was still binding, and continued his testimony.

Cross-examined by the accused.

8. Q. Were you present in court when Inoue testified in the Furuki trial and answered questions 167 to 172?
A. I was.

9. Q. Does the record which you read show that the witness, Inoue, answered questions 167 to 172 in English?
A. The record contains the replies of the witness in English, but having been present at the trial and having prepared the complete record of this case, I am aware of the fact that the witness did testify in Japanese and that in turn was translated into English by an official interpreter.

10. Q. Does the record show that the witness Inoue testified in the Furuki trial for the offense that he is now being tried for?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

11. Q. Do questions 167 to 172 and the answers which the witness, Inoue, was alleged to have made and which you read into the record of this court relate to the same offense for which Inoue is now being tried?
A. These questions and answers that have been read by me from the testimony of Inoue, Fumio, did not relate to any particular offense at all, but related to the general question of trial, and in particular to the question of the mode of trial on Jaluit Atoll.

12. Q. Did the answers which the witness, Inoue, gave to these questions 167 to 172 state specifically that he referred to the trial of the Mille natives?
A. Neither in the question nor in the answer is there any reference to any specific incident on Jaluit Atoll, but the questions are all general and, as stated in my previous answer, relate in general to the question of trial on Jaluit Atoll.

13. Q. Does the record show that the witness, Inoue, was sworn?
A. Yes.

14. Q. Are you familiar with the rule of evidence laid down in Wharton's Criminal Evidence, Volume II, pages 1125 and 1126: "The view has been taken, however, that if the accused is examined under oath before a coroner's jury or a committing magistrate, his testimony cannot be regarded as voluntary, and cannot be reproduced," citing the following: State v. Perry, 106 S. C. 289, 91. S. E. 300?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

15. Q. Are you familiar with the rule laid down in section 638, Volume II, Wharton's Criminal Evidence, which reads: "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable."?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

16. Q. Can you as a judge advocate get this same evidence as oral testimony from the witness, Inoue?

This question was objected to by the judge advocate on the ground that it was irrelevant, immaterial, and beyond the scope of the direct examination.

The accused made no reply.

The commission announced that the objection was sustained.

17. Q. Are you familiar with the rule of law laid down for this in section 454, Naval Courts and Boards, "Limitation when a deposition is used. In any case where a deposition is used in evidence by the prosecution by reason of the fact that oral testimony can not be obtained, as authorized by article 68, A. G. N., the maximum punishment which may be imposed shall not extend to death or to imprisonment or confinement for more than one year"?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

18. Q. Does the record show that the witness, Inoue, was informed that he was priviliged to make any further statement as a matter of record which he thought should be a matter of record in connection therewith, which had not been fully brought out by the previous questions?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

19. Q. Was Major Furuki tried for the same offense as Captain Inoue is being tried for in this case?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

20. Q. Is the witness, Inoue, who answered questions 167 to 172, inclusive, the same Inoue, Fumio, captain, Imperial Japanese Army, who is the accused in this present case?
A. He is.

21. Q. Does the record in the Furuki case show that the witness, Inoue, was allowed to verify the testimony he gave, particularly, the answers which he gave to questions 167 to 172, inclusive?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

22. Q. Is the testimony that you read of Inoue from the Furuki case, all of the testimony concerning trial?
A. It is not.

23. Q. You stated that it was not all of the testimony on trial. What part of this testimony is it?
A. It is that portion that runs from question 167 to the answer to question 172.

24. Q. When you stated that this testimony was not all the testimony concerning the trial, what did you understand trial to be when you answered the last question?
A. I understood that counsel meant by this question any testimony in this previous testimony of Captain Inoue which dealt with the matter of the conduct of trial on Jaluit Atoll.

25. Q. The question I am asking is when I asked you was this all of the testimony of Captain Inoue concerning trial you answered that it was not. In this case, when you answered that it was not, what did you understand trial to mean?

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

The accused withdrew the question.

26. Q. In Inoue's testimony in the Furuki case, is this part from one sixty-seven to one seventy-two all of the testimony of Captain Inoue in which the word trial is used?

This question was objected to by the judge advocate on the ground that it was too broad in its scope.

The accused withdrew the question.

Neither the accused nor the judge advocate desired further to examine this witness.

The commission did not desire to examine this witness.

The witness resumed his status as judge advocate.

A witness for the prosecution entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name, residence, and present occupation.
A. Shintome, Sanjiro, address Kagoshima-ken, Kawanabe-gun, Kaseda-cho, Jito-sho 201. I am a farmer.

2. Q. If you recognize the accused state as whom.
A. I think he is Captain Inoue.

3. Q. During the year 1945, were you stationed with the Japanese forces on Jaluit Atoll?
A. Yes.

4. Q. To what organization were you attached?
A. I was attached to the Jaluit Defense Garrison.

5. Q. In what capacity?
A. I was the head engineering officer and also the head repair officer. I was attached to the Jaluit Naval Guard Unit in October, 1943. After the executive officer of this unit was wounded, I acted as executive officer, but I was not the executive officer ordered by general headquarters. I was also in charge of communications, transportation, also a member of the munitions committee. As the self-supporting measures committee was set up I became head of this committee. But my main duties were as head engineering officer and head repair officer.

6. Q. Who was the atoll commander during the first six months of 1945?
A. The commanding officer Masuda was commanding officer from the beginning.

7. Q. During the first six months of 1945, were you the executive officer?
A. The person who was wounded was the executive officer, but as a necessary measure or through necessity, I was ordered to be the executive officer. I do not remember exactly the date that I was ordered to act as executive officer. I may have been the executive officer during this period.

8. Q. During the early part of the year 1945, did you learn that some natives from Mille Atoll had landed on Jaluit and had been taken prisoners by the Japanese forces?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I heard later that natives had landed at two places on Jaluit Atoll. One place on an island north of Emidj, I do not remember the name, and another on the south island. They were investigated and I heard from no one in particular that they were spies. I do not remember exactly who I heard it from.

9. Q. Do you recall the month of the year 1945 in which this information came to your knowledge?
A. It was the beginning of 1945, and I think it was around March or April. That is about all I can remember.

10. Q. Do you know how many natives were involved in this incident?
A. As it was outside of my authority, and I received no detailed reports concerning this, I do not know. But as they came in a small boat I presumed them to be from six to seven or eight natives.

11. Q. Were you ever directed to perform the duties of a judge in any proceedings concerning these natives?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. No.

12. Q. Did Admiral Masuda ever state in your presence that, "On my authority the highest examination and consultation possible on Jaluit will be conducted by the ranking officers. Furuki, Shintome and myself shall act as judges and Inoue shall act as a judge advocate"?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

The question was repeated.

A. I have never been ordered this.

The commission then, at 10:15 a.m., took a recess until 10:40 a.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

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

(Examination continued.)

13. Q. Were you present at any time when these Mille natives were discussed on Jaluit?

This question was objected to by the accused on the ground that it was leading, too broad in its scope, and too vague.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. There was a time when I went to report on my duties. At this time when I went Captain Inoue was reporting something by document to the battalion commander and the commanding officer. In what I remember, I remember Captain Inoue stating that among the natives were women and children and that these women and children should be confined on another island on Tmiet Island, and as there was a shortage of labor, use them to gather copra. As I was then head of the self-supporting measures committee, this was of interest to me. I was not asked my opinion, but I stated the same opinion as Captain Inoue and Major Furuki also stated the same opinion. The commanding officer then stated he was very sorry for the women and children, but if they were free they may spy, and, therefore, disrupt military discipline, and there was no other way. As I thought the opinion of the commanding officer was firm and could not be helped, as I stated before. I was very busy with my duties and left after about ten or fifteen minutes.

14. Q. Were you directed by anyone to attend this discussion?
A. I was not directed. I went to report to the commanding officer on my duties which were mainly engineering and repair and I was not directed by anyone.

15. Q. Were you ever present in the Admiral's air raid shelter at a discussion of these Mille natives?
A. Other to the time I related before, I was never present.

16. Q. This incident that you have just described to us, where did that take place?
A. As I recall, it was on the veranda, the veranda of the officers' mess.

17. Q. While you were present at this discussion did you sign any document concerning these Mille natives?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. No.

18. Q. Did you ever see a document concerning these Mille natives which contained their names, a list of the crimes, an opinion by Captain Inoue and a decision of Admiral Masuda?
A. No.

19. Q. Did you ever see any document concerning these Mille natives?
A. I do not remember.

20. Q. Did you ever see the clothes of the Japanese who, it was claimed, had been murdered by these natives?
A. No.

21. Q. Did you ever examine the boat in which these Mille natives arrived on Jaluit?
A. By order of the commanding officer, I was ordered to examine the boat. This was, because at this time, we were transporting copra, chagaro and vegetables for self-supporting means and to see if it could be used in this capacity. The width was about one meter, the length about three meters, and it was a Japanese type of boat and as I remember it may have had an oar or a pole.

22. Q. Did you ever see any of the contents of the boats in which the Mille natives arrived on Jaluit?
A. As I remember, and as I stated before, in the boat was an oar or a pole or something to steer the boat.

23. Q. Was that the only content of the boat?
A. I did not discover anything in the boat, or was there anything in the boat besides the oar.

24. Q. After your inspection of the boat, did you report concerning the inspection to Admiral Masuda?
A. I did.

25. Q. What did you report to him?
A. As the motive was to see if the boat could be used by transportion, I answered that it could be used. As I recall, this boat was later sent to an island north of Emidj to see if it could be used.

26. Q. Did Admiral Masuda ever say in your presence, "Tomorrow, I shall hold an examination and consultation to determine the sentence of these natives. Inoue, in your capacity as a judge advocate, shall give an opinion as to their punishment. Tomorrow, Furuki and Shintome prepare opinions as to sentence."?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I do not remember having been told this.

27. Q. Did you ever relay an order from Admiral Masuda to Inoue by saying: "This morning natives from another island who had sneaked into Jaluit had been brought here. Admiral Masuda has ordered Morikawa to investigate them, but he thinks one is not sufficient. Admiral Masuda ordered that you shall also perform this investigation."?
A. I do not remember being told this and relaying it to Captain Inoue, as head of the special police section, they directly came under Admiral Masuda, and this was not a thing that should be relayed through myself.

28. Q. Were you in the presence of Admiral Masuda at any time when he directed anybody to act as a judge or a judge advocate in any proceeding concerning the Mille natives?

This question was objecged to by the accused on the ground that it was leading, too broad in its scope, irrelevant and immaterial.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I have never been in the presence of Admiral Masuda when he said this.

Cross-examined by the accused:

29. Q. When you were asked by the judge advocate, do you recognize the accused, you stated that "I think he is Captain Inoue." Don't you know Captain Inoue well?
A. I know him.

30. Q. Did you say, "I think it may be he" because you did not remember him clearly?

This question was objected to by the judge advocate on the ground that the expression "I think" is often the way in which the Japanese acknowledge something as a fact.

The accused replied.

The commission announced that the objection was not sustained.

The question was repeated.

A. I know the accused Inoue well, but in this question I was asked: Do you know the defendant? Had I been asked: Do you know Captain Inoue, I would answer, I know, but I was asked, Do you recognize the defendant, and it is hard for me to say the defendant Inoue, when a short time ago we were together. In the first place, I cannot speak English, and I would like to say at this time it is difficult for me to get the meaning of the question when it is asked in English and translated into Japanese.

31. Q. You testified as to your position at the beginning of 1945 as that of acting executive officer and also the communications officer. At this time, do you know who was the next ranking officer after Admiral Masuda?
A. In the navy, I was the senior officer; in the army, Major Furuki was one year senior to myself. Major Furuki was the senior officer in the army and was one year senior to myself.

32. Q. As for yourself being the senior naval officer also the executive officer, I believe you know concerning military matters at Jaluit. How about this? Do you?
A. I think all of you think this is how it was, but this is the organization in regular time, and if I was an executive officer who was dispatched from central headquarters, this may be true, but the regular executive officer was wounded and the position was vacant for a long time. No replacements came and the battle conditions became fiercer and I was the officer who was but a person who had come up from the ranks in the engineering department. Only because I was the senior navy officer, I was ordered to be the acting executive officer. I was in the engineering department and I knew the duties of the engineering department, but I did not know the duties of the executive officer. I declined saying that I cannot do the duties. At the time the commanding officer stated that at headquarters, he had many competent young officers; the commanding officer himself was old and experienced and that I need be in name only, and I was ordered to be the acting executive officer; but my work included division officer of the engineering department, division officer of the communication department, division officer of the transportation department. The work I was doing was the work of ten people, and unless I tell the battle conditions at that time it may not be clear. As the saying goes, no food, no ammunition. The conditions on Jaluit were deplorable. There was no food, also work that was no part of my duties.

The judge advocate moved to strike the words "As the saying goes, no food, no ammunition. The conditions on Jaluit were deplorable. There was no food, also work that was no part of my duties." On the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission directed that the words be stricken out.

The witness was duly warned.

The commission then, at 11:38 a.m., took a recess until 2 p.m., at which time it reconvened.

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

Robert R. Miller, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

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

(Cross-examination continued.)

33. Q. To what extent does the executive officer know about the public duties of the commanding officer?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused withdrew the question.

34. Q. As acting executive officer to what extent did you know what the commanding officer did?
A. As acting executive officer the executive officer is closest to the commanding officer. In seagoing units it is an important position and many times he does the work maybe of a department head. On Jaluit the commanding officer was a captain and the executive officer was to be a lieutenant commander or a lieutenant, and a person which at times may have to take over the work of the commanding officer. Usually a person in this position was a graduate of a school. At that time the battle conditions became fierce, Kwajalein fell, Saipan fell and transportation to the rear was cut off. There were no replacements in personnel, there was no supply in ammunition and arms and this was impossible. After the executive officer was wounded the position was vacant for a long time. I was officer in charge of the Engineering Department and a person who had worked up through the ranks and I was executive officer only in name. I could not perform the duties thoroughly and also from the standpoint of my work I would not do it or take the place of the commanding officer. I did not have the ability. To the commanding officer at headquarters there were attached many people to help the commanding officer directly. I could not look after the work of the executive officer or the work of the commanding officer well. Especially engineering and repair was the most important function on Jaluit. There was the repair to the cannon and machine guns and looking after the engineering equipment. The repairs of this and the repairing of boats were the most important work. When there was no food boats were needed to transport grasses gathered on other islands, copra from outlying islands. The boats had to be made available.....

The commission directed that the question be repeated in Japanese and the witness was directed to answer it.

A. (Continued.) Concerning the work of the commanding officer I do not know because I was very busy as I stated before and the commanding officer gave orders directly to people under him who were in charge of the various works.

35. Q. Do you mean that you were not capable of performing the duties as executive officer?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

36. Q. In the testimony of this morning and this afternoon you stated the reasons you did not know about the work of the commanding officer was that you were very busy in your own work and another that the commanding officer did not tell you about his work. Is this correct?
A. As I have stated before I had the duties of repairing arms and keeping up the boats, this was very important. I was always told to keep these things going, I could not have done the work of the commanding officer, I repeat, my work was most important.

37. Q. This morning you testified that you did not know the work of the commanding officer, one reason you gave was because you were very busy and you stated facts concerning that the commanding officer ordered directly the work to the people in charge and did not tell you about it so you did not know about the work of the commanding officer. I am asking you if this is correct.

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

The accused replied.

The commission announced that the objection was not sustained.

A. As I understand it I did not say I did not know the work of the commanding officer, what I said was I knew what I was ordered. What I was not ordered I did not know, and as I hear this question it sounds as if what I was not ordered I knew. I knew what I was ordered, but I do not know what was ordered other persons. The commanding officer had persons directly under him and the commanding officer was also the supreme commander and he can order anyone directly. I did not say that I was ordered something and relayed it to someone else.

38. Q. It is still not clear, but do you mean that the commanding officer told you everything that was connected with the duties of executive officer. Is this correct?
A. It is the will of the commanding officer, he can tell me anything he wishes and under the conditions on Jaluit with no food, no ammunition there may have been things which he could not relay to me.

39. Q. You stated that you had the duties as the communication officer, therefore did you know about the conditions on the other islands?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial and beyond the scope of the direct examination.

The accused replied.

The commission announced that the objection was sustained.

40. Q. At this time you were the communication officer. Did you know about the conditions on Mille?
A. As communications officer I should know all about the dispatches, but as I stated before I was very busy with many duties, but as I had many duties and when I was ordered acting executive officer I declined this, but the commanding officer said that my duties were getting more important and that he wished I would strive to accomplish this work. This was also when there was an ensign communication officer who was in charge of communications and also there were officers attached to headquarters and so I did not actually see all the dispatches.

41. Q. Then to what extent did you know about the conditions on Mille?
A. I knew hardly a thing.

42. Q. Do you know about the natives who sneaked into Jaluit at the end of March 1945?
A. This morning I stated that I knew that they had drifted to Jaluit.

43. Q. Do you know when these natives came to Jaluit, did you know that one of the officers of Masuda, Major Furuki, was absent from the main island?
A. I do not remember exactly if Major Furuki was absent or not.

44. Q. Is the place where Major Furuki was staying and where you were staying far apart?
A. I can not tell anything but what I remember.

The commission directed that the question be repeated to the witness in Japanese and directed the witness to answer the question.

A. (continued.) Usually Major Furuki is at headquarters, but whether he was away from headquarters or whether he was at the outlying island I do not remember exactly.

The commission directed that the question be repeated to the witness in Japanese and directed the witness to answer the question.

A. (continued.) I think they were about thirty to forty meters apart.

45. Q. And when Major Furuki was absent from headquarters for a considerable period of time, didn't you know about it?
A. Major Furuki was out many times on inspections and I do not exactly remember whether Major Furuki was absent at the time of the incident.

46. Q. When these natives who sneaked into Jaluit were brought to headquarters is it not a fact you were present when Morikawa and Inoue were ordered to investigate them?
A. I do not remember of being present.

47. Q. Have you heard of this fact from anyone?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial and called for hearsay.

The accused replied.

The commission announced that the objection was not sustained.

A. No.

48. Q. Do you know about a native who escaped?
A. I do.

49. Q. Tell us what you know.
A. The native escaped from the place where he was and I ordered all the people to search for him so not only myself but all the people knew.

50. Q. When this native escaped is it not true that you were very angry at the guard and that you struck the guard?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was not sustained.

A. I did not strike the guard. In the navy there is the officer-of-the-day and also there is the senigr petty officer who is in charge of the guard and this is the person who directly instructed and watched over the guards. I absolutely did not strike the guard.

51. Q. Is it true that you became angry?
A. I may have told the senior petty officer of the guard that he should be more careful.

52. Q. You stated that you may have. Don't you remember exactly if you did or not?

This question was objected to by the judge advocate on the ground that it went into collateral material which was irrelevant and immaterial.

The accused withdrew the question.

53. Q. Is it true that you lead the search for the natives on the sea?

This question was objected to by the judge advocate on the ground that it was beyond the scope of the direct examination.

The accused replied.

The commission announced that the objection was sustained.

The commission then, at 3:13 p.m., took a recess until 3:38 p.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

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

(Cross-examination continued.)

54. Q. This morning you answered to a question of the judge advocate, "There was a time when I went to report on my duties to the commanding officer. At this time when I went when Captain Inoue was reporting something by document to the Battalion Commander and the commanding officer. From what I remember what Captain Inoue was stating that among the natives were women and children and that these women and children should be confined on another island. Though I was not asked my opinion I expressed the same opinion and so did Major Furuki. The commanding officer stated that he was sorry for the women and children, but if they were confined they may escape and spy and disrupt military discipline and that there was no other way." Do you know if this investigation and meeting was held in secret or in public?
A. I can not say whether it was held in secret or in public.

55. Q. Did Admiral Masuda never tell you, who was the executive officer, anything concerning this native incident?
A. Other to the time I came upon this meeting I have heard nothing from the commanding officer.

56. Q. When you came upon this meeting was this the first time you found out about this incident?
A. The short time before this or after I do not remember exactly I heard that the natives who had drifted from Mille were spies. Other to this I did not know.

57. Q. Then you say that you knew that the natives were spies, but you did not know the substance concerning these natives. Is this correct?
A. Other to this I do not know.

58. Q. You, a person who knew nothing about the circumstances of the incident, came upon this meeting and expressed your opinion. How could you a person who knew nothing about the incident express your opinion?
A. I had heard the natives were spies before this and heard Captain Inoue. I suddenly came upon this meeting and Captain Inoue was saying that the women and children should be confined on an outlying island. As I am old and felt sorry for the women and children, even though they were guilty, without being asked I expressed my opinion.

59. Q. Then is it correct that you expressed your opinion without knowing about what the natives had done?

This question was objected to by the judge advocate on the ground that counsel was misquoting the witness.

The accused replied.

The commission announced that the objection was not sustained.

A. I heard they were spies, and I had gone in suddenly to the meeting. Among the spies there were women and children. At this moment I felt sorry that the women and children should be executed and I expressed my opinion.

60. Q. Then is it correct that you did not know anything about the contents of this incident, but that you felt sorry for the women and children so you expressed your opinion. Is this correct?
A. Yes.

61. Q. Did you know that this was an important meeting to decide whether a person should be executed or not?
A. When I came upon the meeting unexpectedly I did not have the time to think what it was such an important thing because I was so busy in my work.

62. Q. You stated that you expressed your opinion to save them at this time because you were so busy you did not have the time to realize what an important meeting this was. Are you answering this seriously?

This question was objected to by the judge advocate on the ground that counsel was misquoting the witness and that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

63. Q. You stated you expressed your opinion without being asked, you also stated that you knew nothing about the contents of this incident and in this important meeting did Admiral Masuda permit you to express your opinion?

This question was objected to by the judge advocate on the ground that the accused is characterizing the testimony of the witness and that it was irrelevant and immaterial.

The accused withdrew the question.

64. Q. You stated when Captain Inoue expressed his opinion concerning these four people, the women and children, you expressed your opinion without being asked and you, who did not know the contents of this incident, expressed your opinion. Is this correct?

This question was objected to by the judge advocate on the ground that it incorrectly characterized the testimony of the witness.

The accused replied.

The commission announced that the objection was sustained.

65. Q. In your position as executive officer, though you may not be directly connected with these incidents, do you come into the knowledge of these incidents through what is passed to you by Admiral Masuda, or by what is reported to you?

This question was objected to by the judge advocate on the ground that it was too vague.

The accused withdrew the question.

66. Q. In your position as executive officer, though you may not be directly connected with this incident, do you come into the knowledge of these incidents through what is passed to you by Admiral Masuda or by what is reported to you?
A. As the executive officer, the commanding officer did not pass any information to me. If it was the usual executive officer all these arrangements should be made by the executive officer and reported to the commanding officer. Meetings and investigations prepared by the executive officer was the usual procedure in the Japanese navy, but in Jaluit, as I stated before, I was not the regular executive officer and due to these circumstances I was not passed this information from the commanding officer.

67. Q. Then is it correct that Admiral Masuda ordered you to your position of executive officer and then overlooked you and did not pass you information?
A. Yes.

68. Q. During the war is it correct that when the men under you did not call you executive officer you were very angry?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

69. Q. Is there any instance in which after the end of the war you disliked the name executive officer and had them call you Head Engineering Officer?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused made no reply.

The commission announced that the objection was sustained.

70. Q. When these natives were executed do you know of the fact that you ordered five men as guards?

This question was objected to by the judge advocate on the ground that it characterized the testimony of the witness by the words "do you know of the fact."

The accused withdrew the question.

71. Q. Do you know that five navy men were sent out as guards at the time of the execution?
A. On Jaluit there were many bombings and work details were put out frequently there were many working details. I do not remember being ordered to send a working detail for the execution.

72. Q. In the period from April 8 to 13 or 14 did you ever put out five guards from the navy?
A. When you say guard I think you mean sentries. You say you mean in the navy, these come under the direction of the officer-of-the-day and guards are put out by the army and the navy and I do not remember putting out such and such a number on a certain day.

73. Q. Do you know about the execution of the natives?
A. I know about the execution. After the end of the war the commanding officer went to complete the surrender to the commander of the occupation forces. At that time he was asked about the natives, and the commanding officer answered by Japanese laws they have been disposed of and it was nothing to be ashamed of before anyone's eyes. I heard this after he had returned from the boat and I heard that they had been executed for the first time. The commanding officer came back from the boat and I believe it was on the veranda where we were assembled that I heard this.

The judge advocate moved to strike out the portion of the answer beginning with the words "and the commanding officer answered.....", on the ground that it was hearsay.

The accused replied.

The commission announced that the motion to strike was not sustained and that the answer would be given its proper weight.

The witness was duly warned.

The commission then, at 4:30 p.m., adjourned until 9 a.m., tomorrow, Saturday, May 24, 1947.

NINETEENTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Saturday, May 24, 1947.

The commission met at 9 a. m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Shintome, Samjiro, the witness under examination when the adjournment was taken, entered. He was warned that the oath previously taken was still binding, and continued his testimony.

(Cross-examination continued.)

74. Q. In yesterday's testimony, you testified that Captain Inoue expressed his opinion to Admiral Masuda to stay the execution of the children and the women and confine them on an outlying island, and that you also stated the same opinion. Did you ever ask anyone as to what happened to these natives after this?
A. No.

75. Q. You stated that you expressed your opinion to save their lives. Did you have no interest in what happened to them?
A. It was not that I was not concerned with them, but there were people who were in charge of this and it wasn't that I did not have concern, but I did not think deeply about it.

76. Q. Have you ever been questioned as a witness in the Furuki trial in this court room?
A. I was called and was on the witness stand.

77. Q. When you testified in the Major Furuki case, do you remember testifying that in front of Admiral Masuda, Major Furuki, and Inoue, you expressed opinions concerning the execution of the natives?

This question was objected to by the judge advocate on the ground that it was irrelevant, immaterial, and beyond the scope of the direct examination.

The accused replied.

The question was repeated.

The commission announced that the objection was sustained.

78. Q. Did you ever make a statement, affidavit, before an officer of the legal section in Tokyo before you came to Guam, on the twenty-sixth of March, 1947, concerning the Furuki incident and your replies to the questions?
A. They did not say that it was the Inoue incident or the Furuki incident, but I was questioned previously.

79. Q. You just testified that you were not told it was the Inoue incident or the Furuki incident, but you stated that you replied to these questions. Under what understanding did you reply to these questions?

This question was objected to by the judge advocate on the ground that it was too vague, irrelevant, immaterial, and too broad in scope.

The accused replied.

The commission announced that the objection was not sustained.

A. I was asked concerning native incidents and I answered under the understanding that it concerned the native cases.

80. Q. When you say "native incidents," which native incidents do you mean?
A. I was also asked this at Tokyo, but when I answered this, I was not stating as to any specific native incident.

81. Q. Then, do you mean that includes both the Jaluit native cases and also the Mille native case?

This question was objected to by the judge advocate on the ground that it was too broad and misleading.

The accused replied.

The commission announced that the objection was not sustained.

A. As I was not involved in these incidents, I could not say. If I was involved, I may have been able to answer directly, Inoue case or Furuki case; but because I wasn't involved, I could not answer, and if I was involved deeply, I think I would have been able to answer your question.

82. Q. Therefore, I am asking, when you answered the questions to this affidavit, did you answer them including both of the cases?

This question was objected to by the judge advocate on the ground that it was too broad and vague.

The accused withdrew the question.

83. Q. To question twenty-one in the affidavit, "Were these natives given a court trial before execution?" you answered, "I would imagine that a trial had been given the natives, as it was thought that they were spies." Is this correct?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial, and that the prior statement quoted was hearsay, and the answer to the previous question had not been quoted in full.

The accused replied.

The commission announced that the objection was not sustained.

A. At Tokyo, I was asked concerning spies and I answered as the defense counsel has pointed out, "I think a trial was held." After this I was again questioned and I was told that Imui who was a paymaster lieutenant, said there was no trial. Imui says he thinks there was none and you say you think there was. Why is this? As they were spies, it is natural that they be investigated, a trial held before they were punished, and this I presumed as common sense; I presumed this and I replied. I was again asked, "Imui says that it may not have been a trial, and you say that there may have been a trial. How is this?" In the Japanese navy, whenever a person is punished, there would be a trial and in the Japanese service, whenever a Japanese person is punished, I think there would be a trial. I do not think they would have done such a thing as this without a trial, and this is how I replied. And also, I do not know if Imui actually said this or not; I did not hear directly. That is what I was told by the people questioning me, and I would like to point this out.

84. Q. Can the same thing that you replied in this last question be said for this incident?

This question was objected to by the judge advocate on the ground that it called for the opinion of the witness, related to hearsay, was irrelevant and immaterial and that counsel had not shown any prior contradictory statements with regard to which this witness was being questioned as to an earlier affidavit.

The accused made no reply.

The commission announced that the objection was not sustained.

A. Naturally, it includes both of them.

The commission then, at 10:10 a. m., took a recess until 10:50 a. m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

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

(Cross-examination continued.)

85. Q. From what you have testified previously and what you have testified to now, I believe there is contradiction in your statements. You stated just now that you thought "I imagined there was a trial and this was common sense." Does this apply also to this testimony you gave in reply to the question of the judge advocate?

Thes question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

86. Q. You testified that you were the engineering officer, the repair officer, the communications officer, the transportation officer and also head of the self-supporting measures committee. In what unit did you have these duties?
A. I was attached to the Sixty-second Naval Guard Unit and later when the Jaluit Defense Garrison was organized, it referred also the Jaluit Defense Garrison.

87. Q. Was the self-supporting measures committee a committee of the Sixty-second Naval Guard Unit?
A. I do not remember whether the self-supporting measures committee was set up first or organized first, or the Jaluit Defense Garrison was organized first.

88. Q. Do you remember when the Jaluit Defense Garrison was organized?
A. I do not remember the day of the month.

89. Q. Do you have any approximate recollection?
A. As I recall, it may have been after the fall of Kwajalein or it may have been after the fall of Saipan. Anyway, it was after we were not on means of transporting food and replacements, and ammunition became unavailable.

90. Q. Do you know what were the relations between the Sixty-second Naval Guard Unit and the Jaluit Defense Garrison?
A. The headquarters of the Jaluit Defense Garrison was located on Emidj, yet there were units such as the construction corps, construction battalion and the ammunition dump on Jaluit around. Each unit was independent. At that time the Sixty-second Naval Guard Unit existed. I do not remember exactly, but there were orders from the headquarters by dispatch after transportation was cut off from the rear bases and there was no supply that the senior commanding officer in the south seas islands should take command of all units and Japanese on these islands. The senior commander, regardless of whether he was navy or army, would become supreme commander, and Admiral Masuda, who was the commanding officer of the Naval Guard Unit, was the senior officer. He became supreme commander. I do not remember if that is

the time that the Jaluit Defense Garrison was organized, but the ranking officers were called together and Admiral Masuda stated that from this day the Jaluit Defense Garrison would be organized.

91. Q. In your previous testimony you stated that they were talking about the natives on the veranda. Where was this veranda?
A. There was a veranda, the former officers' wardroom. The wardroom was destroyed by bombing and it was built up about one meter off the ground by concrete, and it was also used as a water tank and it was used as an officers' wardroom. When I meant the veranda, it is the officers' wardroom.

92. Q. What was the distance from Admiral Masuda's quarters to the veranda?
A. The direct distance was about twenty meters, and many times it was destroyed by bombings. It was put up again, so that the distance may vary from twenty to thirty meters.

93. Q. When you testified, stated, that you expressed your opinion at the veranda concerning the natives, Admiral Masuda, Inoue, Major Furuki was there. Was there anyone else present?
A. When I went there, it was Admiral Masuda, Major Furuki and Captain Inoue, and when I went there, that made four people altogether. I do not remember anyone else being there.

94. Q. Does Admiral Masuda usually perform his duties at this place?

This question was objected to by the judge advocate on the ground that it was characterizing the witness's testimony, was misleading and vague.

The accused replied.

The commission announced that the objection was sustained.

95. Q. When you entered this veranda when Admiral Masuda, Inoue and Furuki were discussing the natives, were they standing?
A. The three of them were seated.

96. Q. When you talked to them, did you sit down and talk with them?
A. As it was ten to fifteen minutes and there were many chairs at the wardroom, I think I was sitting.

97. Q. Do you remember what time of day this was?
A. I do not remember distinctly the time.

98. Q. Was there a table there?
A. There was a long table which was always there.

99. Q. When you went to Admiral Masuda to receive orders and to discuss problems with him, where did you go to talk to Admiral Masuda?
A. The commanding officer usually performed his duties in his room or on the veranda or the air raid shelter, the command post; and whenever I went to receive instructions, I looked for where he was and I went there.

100. Q. You stated that you went to examine the boat the natives came in. Was the time you went to examine the boat before you came upon this meeting on the veranda or was the meeting on the veranda before you went to examine the boat? Which was first?

A. The boats came under the direction of the transportation officer and it is needed for transportation of copra. I remember exactly going to see the boats, but I do not remember when I went.

101. Q. You stated that you knew that a native from Mille escaped and that you stated that you found out about the execution of the natives after the war. What was the period of time between the time the natives escaped and the end of the war?
A. I do not remember exactly what the period of time was.

102. Q. Approximately how many months was the time?
A. I remember exactly that a native escaped and everybody looked for him, but I do not remember the time.

103. Q. Do you remember the native having escaped around April of 1945?
A. It may have been this time, but I do not remember.

104. Q. Do you know where these natives were confined?
A. The native who was confined at the Second Ammunition Dump was the one who escaped.

105. Q. You stated that you were greatly concerned about the women and children and that without being asked you stated your opinion to Admiral Masuda. Weren't you interested in what happened to the natives?
A. I do not mean that I had none at all, but, it is natural that I am concerned concerning the death of a person, but as the lives of two thousand people on Jaluit depended on my work, my work is transportation of food and this could not be done during the day because of the air raids and planes overhead and at night to travel without lights was very dangerous. There were many cases in which the boats overturned by squalls and there were some who died of this. Repair of boats, oars, and repairmen were mainly made up of conscripted workers and unless I was always with them keeping them going, they would not work; therefore, I would always have to be with them, and unless a person experienced the bombings he must be able to stand by them or was in a very dangerous place. I always was busy. I had no time for myself, and as I was asked by the defense counsel as to whether I had no concern for these natives, I don't say that I had no concern at all, but I was very busy.

The witness was duly warned.

The commission then, at 11:30 a. m., adjourned until 9 a. m., Monday, May 26, 1947.

TWENTIETH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Monday, May 26, 1947.

The commission met at 9 a. m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Robert R. Miller, yeoman first class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Shintome, Sanjiro, the witness under examination when the adjournment was taken, entered. He was warned that the oath previously taken was still binding, and continued his testimony.

(Cross-examination continued.)

106. Q. Do you know whether or not Admiral Masuda made public to all the forces on Jaluit that the natives who had sneaked in from Mille had been executed because they had committed crimes there?
A. If it was to everybody, I do not know if it was proclaimed or not; and I do not remember distinctly.

107. Q. Have you ever relayed this proclamation through your capacity as executive officer to your officers under you?
A. I do not recall.

108. Q. You testified that you knew that these natives were spies. When you say spies, do you mean a public enemy?

This question was objected to by the judge advocate on the ground that counsel was misquoting the witness and that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

109. Q. You testified on direct examination that you came into a conference that Admiral Masuda was holding and gave an opinion. Was this a regular conference that he held each day?
A. I came upon a meeting of the commanding officer and Major Furuki and Captain Inoue. I do not know if this was a regular meeting or not, but there were many meetings of many kinds. When I said many kinds of meetings, as the food was short on Jaluit, it was many meetings concerned with this problem.

110. Q. What time of the day was this meeting?
A. I do not remember.

111. Q. Was it right after the noon meal?
A. I do not know if it was after the morning meal or after the noon meal.

112. Q. Did Admiral Masuda have a conference every day after the noon meal?
A. These meetings concerning the food shortage were held after the morning meal, after the noon meal or after the evening meal.

113. Q. Was this the only thing that was discussed at these meetings?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused withdrew the question.

114. Q. Was the shortage of food the only thing discussed at these meetings that were held after each meal?
A. The shortage of food was not the only thing discussed. I reported the repair of arms during the meal and at times carried over after the end of the meal, and also reports were made concerning the repairs of ships and the repairing of air raid shelters which had been damaged.

115. Q. Did you, Admiral Masuda, Major Furuki and Captain Inoue have your meals together at these times?
A. The four you mentioned were not the only ones present. There was also the senior medical officer, the head supply officer, the head gunnery officer and head of the civil government.

116. Q. Was this the only time you officers got together each day?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was not sustained.

A. The only times we assembled was during the meals.

117. Q. Is it not true that the reason you did not assemble at other times was that it was too dangerous to do so?
A. There were times when meetings were held when a person who was dispatched to the other islands to investigate the food problems was called and meetings were held other to the times after meals.

118. Q. How long did these conferences after the meals last each day?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial, and that it was going into collateral matter.

The accused replied.

The commission announced that the objection was sustained.

119. Q. Did the paymaster and the medical officer stay till the end of each conference from April first to April ninth?

This question was objected to by the judge advocate on the ground that it was misleading.

The accused replied.

The commission announced that the objection was sustained.

120. Q. Did you have a conference after each meal each day from April first to April ninth?
A. I do not remember if there were conferences, when it is stated from first to ninth, every day, but I think there may have been during this period. I do not remember.

121. Q. Is it not true that the most important thing that happened during the period April first to April ninth was the Mille natives landing on Jaluit and their subsequent actions?

This question was objected to by the judge advocate on the ground that it called for the opinion of the witness.

The accused replied.

The commission announced that the objection was sustained.

122. Q. How long did these conferences after the meals from April first to April ninth last, approximately?

This question was objected to by the judge advocate on the ground that the witness had already stated that he did not know how long they were held.

The accused replied.

The commission announced that the objection was sustained.

123. Q. You testified that you did not remember about a document setting forth the crimes which the Mille natives committed. Could there have been such a document issued by Admiral Masuda and you not see it?

This question was objected to by the judge advocate on the ground that it called for the opinion of the witness.

The accused replied.

The commission announced that the objection was sustained.

124. Q. When you inspected the boat the Mille natives came in, did the boat have a sail?
A. No.

125. Q. How did you find out that these natives came from Mille?
A. I heard from someone that natives landed on the north and south of Jaluit and that they were investigated and were found spies. From whom I heard this I do not remember.

126. Q. Didn't you inspect them yourself?
A. I did not see them.

127. Q. At no time during their stay on Jaluit did you see the natives?
A. I did not see them.

128. Q. Not even Ralime?
A. I do not know.

129. Q. How far is it from Mille to Jaluit?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was not sustained.

A. As I have not gone by boat to Mille or by plane to Mille, I do not know how far it was.

130. Q. Are you sure you were ordered to inspect the boat the natives came to Jaluit in?
A. Yes, I was ordered by the commanding officer.

131. Q. After you had been ordered to inspect the boat, tell just what you did.

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial, vague and misleading.

The accused replied.

The commission announced that the objection was not sustained.

A. The reason why I was ordered to inspect the boat by Admiral Masuda is as I stated before, because boats were needed to transport food and to inspect and to see if it could be used for transporting copra. When I went to see the boat, the width was about one meter and the length about three meters, a Japanese type boat, and I remember there was an oar and a rudder in the boat.

132. Q. Did you report your findings with regards to the boat to Admiral Masuda?
A. I did.

133. Q. When did you do this?
A. Immediately after I inspected the boat I returned and reported.

134. Q. Who was present when you reported this?
A. I think it was only the commanding officer. I do not remember anyone else being there.

135. Q. Wasn't Major Furuki there?
A. I do not remember.

136. Q. Do you know where Major Furuki was at that time?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

137. Q. When you made your report to Admiral Masuda was Major Furuki away on an inspection trip to another island?
A. I do not remember.

138. Q. Was it your opinion that the four natives that came from Mille could come all the way from Mille in this boat?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

139. Q. How long did it require for you to make this report to the admiral about this boat?
A. I reported the width, the length and the capacity of its transportation, and that it was a small boat and it could not be used where there were a lot of waves. It was a simple report, so it did not take long.

140. Q. Do you remember hearing the natives from Mille discussed at any time during the period of April first to April ninth?

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

The accused withdrew the question.

141. Q. Do you remember hearing the natives from Mille who were alleged to have been spies discussed by Admiral Masuda at any of the conferences after the meals during the period of April first to April ninth?
A. I do not remember.

142. Q. Where were you when the Mille natives were reported to you to have landed on Jaluit?

This question was objected to by the judge advocate on the ground that it was misleading.

The accused withdrew the question.

143. Q. You testified that you were the acting executive officer. When the Mille natives landed on Jaluit, was this incident reported to you?
A. I do not remember.

144. Q. Do you remember when these natives from Mille landed on Jaluit?
A. I do not remember.

145. Q. When Admiral Masuda told you to inspect the boat, was this the first time that you found out about the natives from Mille landing on Jaluit?
A. Whether this was the first time or whether I heard that the natives were spies was first, I do not remember.

146. Q. Do you remember when you first heard that they were spies?
A. I do not know the time and the date.

147. Q. Was it before you gave your opinion at this conference?
A. I had heard this before I expressed my opinion. Because I had heard of this before the meeting, it came instantly to me that this was about the spies.

148. Q. When you expressed your opinion at this meeting about these natives, did you consider them as enemies of Japan?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial, and called for the opinion of the witness.

The accused replied.

The commission announced that the objection was sustained.

149. Q. Did you, because of your position as executive officer, have to assume the duties and responsibilities of Major Furuki while he was away during the short period the natives landed on Jaluit?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused withdrew the question.

150. Q. Was Major Furuki away on an inspection trip during the latter part of March and the early part of April, 1945?
A. As Major Furuki was away frequently, I do not remember.

151. Q. Do you remember telling Major Furuki when he returned from an inspection trip about the natives from Mille landing on Jaluit?
A. I do not remember telling Major Furuki?

152. Q. Who did you tell about these natives from Mille landing on Jaluit?

This question was objected to by the judge advocate on the ground that the witness had not testified that he told anyone.

The accused withdrew the question.

153. Q. Did you tell anyone about the natives from Mille landing on Jaluit?
A. I do not remember telling anyone.

154. Q. Do you remember ordering people to search for the missing native, Ralime?
A. I do not remember the name of the native distinctly, but I was ordered by the commanding officer to have all people search for the native, other to the ones who were on duty or on important jobs. This was ordered by the commanding officer and I think I ordered the people to search for him, but I do not remember distinctly.

155. Q. Do you remember if this was after the other natives from Mille had been executed?
A. I remember distinctly that the native was looked for, but as I do not know the date the natives were executed, I do not remember.

156. Q. Did you know that this native that you ordered people to look for was a spy?

This question was objected to by the judge advocate on the ground that it called for the opinion of the witness.

The accused replied.

The commission announced that the objection was sustained.

157. Q. When you ordered the search for the missing prisoner, did you know whether he was suspected of being a spy?
A. As I recall, I think it was made public that one of the spies had escaped.

158. Q. Did you consider him as a spy?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial and that it called for the opinion of the witness.

The accused replied.

The commission announced that the objection was sustained.

159. Q. The opinion that you testified to having given, was this opinion given before you ordered the search for the missing native spy from Mille?
A. I do not remember if it was before or after.

160. Q. When you gave your opinion about these spies, did you consider them as public enemies?

This question was objected to by the judge advocate on the ground that it called for the opinion of the witness, was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

161. Q. Was this the first time that you had expressed your opinion, as you testified you did, to the Admiral without being asked to do so?

This question was objected to by the judge advocate on the ground that it was vague, irrelevant, and immaterial.

The accused withdrew the question.

162. Q. Was this the only time that you expressed your opinion, without being asked to do so, about these natives to the admiral?

This question was objected to by the judge advocate on the ground that it was misleading.

The accused made no reply.

The commission announced that the objection was not sustained.

A. I only expressed my opinion once.

163. Q. How did the admiral receive your opinion?

This question was objected to by the judge advocate on the ground that it was vague, called for the opinion of the witness, was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was sustained.

164. Q. What did the admiral say to you after you had expressed your opinion concerning these native spies?
A. As I stated before, Captain Inoue, myself, and I believe, Major Furuki expressed the same opinions and the commanding officer stated, "I am sorry to execute the women and children, but if any of them escape they will spy, therefore disrupting military discipline." This was what he stated.

165. Q. You just testified that Major Furuki and Captain Inoue expressed their opinions. Did they express their opinions before you did or after you did?
A. Captain Inoue expressed his opinion first.

166. Q. Then, did you express your opinion?
A. I did, and as I recall, I think the battalion commander, Major Furuki expressed the same opinion.

167. Q. Did Admiral Masuda ask Captain Inoue to express his opinion?
A. After I arrived, I do not recall, Captain Inoue was stating that he would like to have them confined on Truk Island and have them gather copra. I entered while he was stating this and I do not know if he was asked his opinion or not.

168. Q. Do you remember whether Admiral Masuda asked Major Furuki to express his opinion?
A. I do not remember if the commanding officer said to Furuki, "What is your opinion?"

169. Q. You do remember that Major Furuki expressed his opinion.
A. I do.

170. Q. How long did you stay at this conference?
A. As I recall, about ten to fifteen minutes.

The commission then, at 10:23 a. m., took a recess until 10:38 a. m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

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

(Cross-examination continued.)

171. Q. When you left this conference, did the other two officers, Furuki and Inoue, also leave?
A. I left first, because I had reported on my duties and I was about to start on my other duties. I think they did not leave together with myself.

172. Q. So that when you came into this meeting, you did not know that it was a regularly scheduled meeting. Is that true?
A. I did not think about whether it was a regularly scheduled meeting or not. I just perceived that he was reporting on the women and children spies.

173. Q. Then you knew what they were meeting about, did you?
A. It was not that I knew beforehand, but after I went there I perceived that it was a report on the spies or an examination and consultation.

174. Q. And without being asked you barged in on the admiral and two of his officers on an examination and consultation concerning the spies. Is that right?
A. Yes, I went there.

175. Q. What you testified to in Tokyo by affidavit saying: "I would imagine that a trial had been given the natives as it was thought that they were spies. Naturally such violence would not be committed if there was no trial." Is this then not contrary to what you said on direct examination regarding the trial of Mille natives?

This question was objected to by the judge advocate on the ground that it was vague and highly improper to ask the witness if he thinks it is contrary without pointing out the specific contradiction, as several distinct elements are contained in the quoted statement.

The accused replied.

The commission announced that the objection was sustained.

176. Q. You testified on direct examination that you knew Captain Inoue. What was Captain Inoue's general reputation on Jaluit?

This question was objected to by the judge advocate on the ground that it was beyond the scope of the rebuttal evidence.

The accused replied.

The commission announced that the objection was not sustained.

A. Captain Inoue was attached to the same Jaluit Defense Garrison as myself; the highest ranking army officer was Major Furuki, the next ranking officer was Captain Inoue. He was a very serious and careful person. He was a person

with a sense of absolute obedience which was typical of the Japanese military soldier. He was kindly and looked after his men and friendly with his superiors. As an example one of my men, a person who was in my division, Petty Officer Nishida, worked under Major Furuki. He became sick and died. I was present at his burial and Captain Inoue also was there and I remember him stating that he believed the death of Petty Officer Nishida was his responsibility. He wished he had looked after him more carefully and if he had done so he may not have died. To this he expressed his regret to his superiors and to his division officer who was myself. His sickness was as I recall pulmonary tuberculosis and as I recall I remember his stating as if the death of Petty Officer Nishida was all his fault. He was very kind and very sincere to his superiors and subordinates. Captain Inoue was dispatched many times to the outlying islands because of his numerous duties. Because I was head of the self-supporting committee I came in direct contact with the natives. Due to the heavy bombing of Jaluit the military personnel suffered from an acute shortage of food and clothing. The food situation of the natives was also critical. I remember Captain Inoue stating to me and also at the conference concerning the food problem that the natives should get first priority in case a shipment of food and clothing arrived.

The commission directed that the words "as an example one of my men .....and I remember his stating as if the death of Petty Officer Nishida was all his fault." and "Captain Inoue was dispatched many times to the outlying islands.....that the natives should get first priority in case a shipment of food and clothing arrived." be stricken from the record.

The commission directed that the witness answer the question only with regard to the general reputation of Captain Inoue on Jaluit Atoll pertaining to the issues.

A. (continued.) I would like to state that Captain Inoue was on very friendly terms with his superiors and subordinates. He was not talked of badly. No one talked badly of him.

Reexamined by the judge advocate:

177. Q. On cross-examination you were asked certain questions with regard to an affidavit that you made in Tokyo. In certain of these questions only part of your answer to question twenty-one appears to have been used in the framing of the question. Were you asked at Tokyo the following question and did you give the following answer: "21. Q. Were these natives given a court trial before execution? A. I would imagine that a trial had been given the natives as it was thought that they were spies. Naturally such violence would not be committed if there was no trial. However, I did not hear of any trial myself."?

This question was objected to by the accused on the ground that the entire document should be submitted rather than just a portion thereof read.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. At Tokyo I was asked was there a trial. I stated I did not know. I was then asked did you think there was a trial and because I had heard that some spies had come in I answered that I thought that there was a trial. All that I said to the question was there a trial was that I imagined there was a trial.

178. Q. Is this your signature? (Indicating on subject affidavit.)
A. Yes.

179. Q. When you were asked questions in Tokyo on 26 March 1947 were they translated to you and did you subscribe your name to the bottom of the translation on this piece of paper?

This question was objected to by the accused on the ground that the entire document should be offered in evidence.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I did sign it. What I stated in Tokyo and what I stated here I believe that there was no difference, and when I state this I do not mean this to have a different meaning.

180. Q. The judge advocate is not trying to show that what you said is not true. He merely wishes to know if you were asked the following question and if you gave the following answer: "21. Q. Were these natives given a court trial before execution? A. I would imagine that a trial had been given the natives as it was thought that they were spies. Naturally such violence would not be committed if there was no trial. However, I did not hear of any trial myself."?
A. It is as it is stated here and I understand it.

Neither the accused nor the judge advocate desired further to examine this witness.

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

The rebuttal ended.

The surrebuttal began.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name and rank.
A. First Lieutenant, Imperial Japanese Army, Ieki, Tamenori.

2. Q. Are you presently confined on Guam?
A. Yes.

3. Q. If you recognize the accused, state as whom.
A. Inoue, Fumio.

Examined by the accused:

4. Q. Have you ever had duty with the Japanese forces on Jaluit?
A. Yes.

5. Q. During what period did you have duty on Jaluit?
A. From the end of November 1943 to the end of the war, October 1945.

6. Q. Do you know if a publication was put out in April 1945 by the commanding officer concerning natives of another island?
A. I do.

7. Q. Was this publication made public?
A. A circular was put out. It was put out by the commanding officer of the Jaluit Defense Garrison and it stated that the natives who sneaked in from Mille had committed felonies at Mille and had committed spying on Jaluit, therefore all of them had been executed. At this time I was a platoon leader in charge of some positions. This was put out in the middle of April 1945. I received this circular.

The witness was duly warned.

The commission then, at 11:30 a.m., took a recess until 2 p.m., at which time it reconvened.

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

Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

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

(Examination continued.)

8. Q. Do you know that Lieutenant Commander Shintome was the acting executive officer of the Jaluit Defense Garrison?
A. I do.

9. Q. Through common knowledge, do you know what kind of work the executive officer did in relation with the commanding officer?
A. As the executive officer of the Sixty-second Naval Guard Unit, he directly supported Admiral Masuda and helped him in his work. When Admiral Masuda was sick, Commander Shintome did the work. The character of Commander Shintome is such that he had to have a say in whatever went on, and he had to participate in whatever activity there was.

The judge advocate moved to strike the words "The character of Commander Shintome is such that he had to have a say in whatever went on, and he had to participate in whatever activity there was." out of the answer on the ground that they were hearsay, irrelevant and immaterial.

The accused replied.

The commission directed that the words be stricken out.

10. Q. This morning you testified that the fact of the execution of the Mille natives was made public. Does such publication go through the office of the executive officer?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial and called for the opinion of the witness since this witness was an army officer and was not attached to the Sixty-second Naval Guard Unit.

The accused replied.

The commission announced that the objection was sustained.

11. Q. Do you know by what means Admiral Masuda made public this publication you testified to this morning?
A. I do.

12. Q. Tell us.
A. This was a circular which was put out by the commanding officer of the Jaluit Defense Garrison and on his order; and such orders passed through the ranking officers, Shintome and Furuki, and there can be no mistake when it is said there is nothing which did not pass through Shintome and Furuki.

The judge advocate moved to strike out this answer on the ground that it was hearsay, irrelevant and immaterial.

The accused replied.

The commission directed that the answer be stricken out.

13. Q. Do you know about the escape of a native called Ralime?

This question was objected to by the judge advocate on the ground that it was repetitious, irrelevant, immaterial and beyond the scope of the rebuttal.

The accused replied.

The commission announced that the objection was sustained.

14. Q. Do you know of the fact that Commander Shintome lead the search for this native?

This question was objected to by the judge advocate on the ground that it was repetitious, in that the witness Shintome did not deny participating in the search.

The accused replied.

The commission directed that the record be checked.

The record was checked.

The commission announced that the objection was sustained.

The accused did not desire further to examine this witness.

Neither the judge advocate nor the commission desired to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name and rank.
A. Former lieutenant, Imperial Japanese Navy, Sakauda, Sawaaki.

2. Q. If you recognize the accused, state as whom.
A. Captain, Imperial Japanese Army, Inoue, Fumio.

3. Q. Are you presently confined on Guam?
A. Yes.

Examined by the accused:

4. Q. Have you ever had duty with the Japanese forces on Jaluit?
A. I have.

5. Q. During what period did you have duty there?
A. From October, 1943, till the end of the war.

6. Q. What unit were you attached to on Jaluit?
A. I was attached to the Sixty-second Naval Guard Unit.

7. Q. Do you know Lieutenant Commander Shintome?
A. I do.

8. Q. What was the relation between Lieutenant Commander Shintome and yourself?
A. Lieutenant Commander Shintome was the executive officer of the Sixty-second Naval Guard Unit, but I had no direct relation with him. There was no direct relationship between us.

9. Q. Was Shintome your superior officer?
A. Yes.

10. Q. Do you know, if in April, 1945, Lieutenant Commander Shintome made anything public to his subordinate officers concerning the Mille natives?
A. In April of 1945, at the morning assembly where everyone was assembled, Commander Shintome read a circular which was put out by the commanding officer, stating that the Mille natives had been executed.

11. Q. Do you remember if it was stated that the natives were executed?
A. As I recall, it stated that the natives had committed murder at Mille, and they had sneaked into Jaluit as spies.

12. Q. When this circular was read to you by Commander Shintome, how many persons were assembled there?

This question was objected to by the judge advocate on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was not sustained.

A. The number of people assembled were people of the headquarters, and numbered about fifty officers, non-commissioned officers and men.

13. Q. Do you know the general reputation of the defendant, Captain Inoue, on Jaluit?
A. Concerning Captain Inoue, what I noticed and what the other people on Jaluit noticed was that he was a very serious person in his work. Also that he was very careful and deliberate in his work. He listened to everyone's opinion, after which he received the authorization of the commanding officer; and in performing his duties, he strove for perfection.

The accused did not desire further to examine this witness.

Neither the judge advocate nor the commission desired to examine this witness.

The witness made the following statement:

From the papers I have seen of the Jaluit Defense Garrison and from the character of Captain Inoue, I sincerely believe the disposition of the Mille natives was done in the best way the circumstances could allow on Jaluit.

The judge advocate moved to strike out this statement on the ground that it was the mere opinion of the witness.

The accused made no reply.

The commission directed that the statement be stricken out.

The witness was duly warned and withdrew.

The surrebuttal ended.

The accused read a written statement in Japanese in his defense, appended marked "EE."

The commission then, at 3:27 p.m., took a recess until 3:45 p.m., at which time it reconvened.

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

Robert R. Miller, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

An interpreter read an English translation of the statement of the accused in his defense, copy appended marked "FF."

The judge advocate stated that the invitation from Commander Marianas authorizing the attendance of three official Marshallese native observers at the trial of Inoue, Fumio, has not been accepted. The judge advocate requested that the invitation submitted through the Atoll Commander Kwajalein be appended to the record.

The commission announced that the request was granted and the invitation through the Atoll Commander Kwajalein to the three official native observers from the Marshall Islands is appended, copy marked "GG."

The judge advocate and defense counsel requested an adjournment until 9 a.m., Thursday, May 29, 1947, in order to prepare final arguments.

The commission then, at 4:13 p.m., adjourned until 9 a.m., Thursday, May 29, 1947.

TWENTY-FIRST DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Thursday, May 29, 1947.

The commission met at 9:40 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Robert R. Miller, yeoman first class, U. S. Navy, reporter.
The accused, his counsel and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

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

The accused waived the right to have the opening argument of the judge advocate read in Japanese in open court.

Mr. Akimoto, Yuichiro, a counsel for the accused, began reading a written argument in Japanese, original appended marked "II."

The commission then, at 10:53 a.m., took a recess until 11:25 a.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

Mr. Akimoto, Yuichiro, a counsel for the accused, waived the right to read the remainder of his argument in Japanese in open court at this time.

The commission then, at 11:26 a.m., took a recess until 2 p.m., at which time it reconvened.

Present: All the members, the accused, his counsel, and the interpreters.

Lieutenant David Bolton, U. S. Navy, judge advocate.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

An interpreter began reading an English translation of the argument of Mr. Akimoto, copy appended marked "JJ."

The commission then, at 2:54 p.m., took a recess until 3:08 p.m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

An interpreter continued reading an English translation of the argument of Mr. Akimoto, copy appended marked "JJ."

The commission then, at 3:44 p.m., took a recess until 3:58 p.m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

An interpreter concluded reading an English translation of the argument of Mr. Akimoto, copy appended marked "JJ."

The accused requested an adjournment until Monday, June 2, 1947, for the purpose of acquainting the accused with the Japanese version of the argument of Mr. Akimoto and to complete translations into English of the remaining arguments for the defense.

The commission then, at 5:05 p.m., adjourned until 9 a.m., Monday, June 2, 1947.

TWENTY-SECOND DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Monday, June 2, 1947.

The commission met at 9 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant James P. Kenny, U. S. Navy, judge advocate.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

The record of proceedings of the twenty-first day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

Mr. Saizo Suzuki, a counsel for the accused, waived the reading in Japanese of his argument for the accused, appended marked "KK."

An interpreter began reading an English translation of Mr. Suzuki's argument, copy appended marked "LL."

The commission then, at 10:08 a.m., took a recess until 10:30 a.m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel and the interpreters.

No witnesses not otherwise connected with the trial were present.

An interpreter continued reading an English translation of Mr. Suzuki's argument, copy appended marked "LL."

The commission then, at 11:25 a.m., took a recess until 2 p.m., at which time it reconvened.

Present: All the members, the judge advocate, the accused, his counsel, and the interpreters.

Robert R. Miller, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

An interpreter concluded reading an English translation of Mr. Suzuki's argument, copy appended marked "LL."

Commander Martin E. Carlson, USNR, counsel for the accused, began reading a written argument, appended marked "MM."

The commission then, at 3:18 p.m., took a recess until 3:38 p.m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

Commander Martin E. Carlson, USNR, a counsel for the accused, continued reading a written argument, appended marked "MM."

The commission then, at 4:21 p.m., adjourned until 9 a.m., tomorrow, Tuesday, June 3, 1947.

TWENTY-THIRD DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Tuesday, June 3, 1947.

The commission met at 9 a. m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant James P. Kenny, judge advocate.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

The record of proceedings of the twenty-second day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

Commander Martin E. Carlson, USNR, a counsel for the accused, concluded reading his argument, appended marked "MM."

The judge advocate requested a recess until 2 p. m., in order to prepare his closing argument.

The commission then, at 9:55 a. m., took a recess until 2 p. m., at which time it reconvened.

Present:

All the members, and
Lieutenant David Bolton, U. S. Navy, judge advocate.
Robert R. Miller, yeoman first class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

The judge advocate began reading his written closing argument, appended marked "NN."

The commission then, at 2:31 p. m., took a recess until 2:39 p. m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

The judge advocate continued reading his written closing argument, appended marked "NN."

The commission then, at 3:33 p. m., took a recess until 3:46 p. m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

The judge advocate continued reading his written closing argument, appended marked "NN."

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

TWENTY-FOURTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Wednesday, June 4, 1947.

The commission met at 9 a. m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

The record of proceedings of the twenty-third day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

The judge advocate continued reading his written closing argument, appended marked "MM."

The commission then, at 9:45 a. m., took a recess until 9:56 a. m., at which time it reconvened.

Present:

All the members,
Lieutenant David Bolton, U. S. Navy, judge advocate,
The reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

The judge advocate continued reading his written closing argument, appended marked "NN."

The commission then, at 10:45 a. m., took a recess until 11 a. m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

The judge advocate concluded reading his written closing argument, appended marked "NN."

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The commission then, at 11:10 a. m., took a recess until 2 p. m., at which time it reconvened.

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

Robert R. Miller, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

The accused waived the right to have the closing argument of the judge advocate read in Japanese in open court.

The trial was finished.

The commission was cleared.

The judge advocates were recalled and directed to record the following findings:

The first specification of the first charge proved.

The second specification of the first charge proved.

And that the accused, Inoue, Fumio, then a captain, Imperial Japanese Army, is of the first charge guilty.

The first specification of the second charge proved.

The second specification of the second charge proved.

And that the accused, Inoue, Fumio, then a captain, Imperial Japanese Army, is of the second charge guilty.

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

The commission announced its findings.

Furuki, Hidesaku, major, Imperial Japanese Army, was recalled as a witness for the defense in mitigation and was warned that the oath previously taken was still binding.

Examined by the judge advocate:

1. Q. State your name and rank.
A. Furuki, Hidesaku, major, Imperial Japanese Army.

Examined by the accused:

2. Q. You have testified previously at this trial. Did the accused, Captain Inoue, serve under your command at Jaluit?
A. Yes.

3. Q. What were his duties?
A. He was attached to the main battalion headquarters. He was also head of the special police section on Jaluit and also head of the farm section of the self-supporting measures commission.

4. Q. What were his duties as head of the police on Jaluit?
A. His duties were to supervise all military discipline, the investigation of crimes and the execution of punishment, the supervision of the food and its rationing.

5. Q. What was his general reputation as head of the police force?
A. Captain Inoue was believed in absolutely by all the army, navy and gunzoku personnel on Jaluit. There was no one who would say anything against Captain Inoue, whose character was one of kindness, modest; and he was also humane. His policy in performing his duties was not to uncover crimes, but to prevent crimes beforehand and he exerted all his efforts towards this means. In case he caught a person violating regulations, he would do everything in his power to make him reform. The fact that military discipline was maintained even though persons died of starvation and in the face of the propaganda of enemy forces was all due to Captain Inoue. There was no one who could have filled the job as head of the special police section other to Captain Inoue.

6. Q. You have previously testified that Captain Inoue served as a judge advocate in the case of the eight Mille natives. What were his duties in this case?
A. He investigated the acts of the natives; he reported this to Admiral Masuda; he introduced evidence in the case, expressed his opinion as to decision, and executed the natives on order of Admiral Masuda.

7. Q. You previously testified regarding the decision to sentence the eight Mille natives. What occurred as a result of the decision to sentence these eight natives from Mille?
A. By order of Admiral Masuda, Captain Inoue performed the execution.

8. Q. You previously testified that Captain Inoue came to you and discussed the orders that had been given to him to execute the eight Mille natives. Tell us what he said on this occasion.
A. Captain Inoue looked very sad and stated as follows: "I have been ordered to execute the natives. I especially feel sorry for the two children that I have been ordered to execute. Never have I felt as I do now the hardships of a soldier. I stated to Admiral Masuda to extend the date of the execution of the two native children to get time to think of a way other than execution. Admiral Masuda stated that the execution should absolutely be performed." As I know Captain Inoue's kind character and that he was not permitted to extend the execution and as a soldier I know his difficult position in having to obey orders. Under the dire circumstances under which Jaluit was, Admiral Masuda required strict obedience to orders. I knew that Admiral Masuda was not a person who would tolerate any disobedience to orders. I sympathized greatly with the position and feeling of Captain Inoue, but I was powerless to help him.

9. Q. Was there any doubt as to the legality of this order of execution in the mind of Captain Inoue?

This question was objected to by the judge advocate on the ground that it was improper in mitigation.

The accused made no reply.

The commission announced that the objection was sustained.

10. Q. Was the fact of the execution of the eight Mille natives published at Jaluit?
A. Yes, this was made public.

11. Q. How was the publication made?
A. By mouth and by document, as for the main island of Emidj, the executive officer Shintome relayed this information; as to the district commanding officers, the defense section relayed the information by document.

12. Q. Do you remember what the publication notice contained?
A. I do.

13. Q. What did it contain?

This question was objected to by the judge advocate on the ground that it was repetitious and improper as matter in mitigation.

The accused replied.

The commission announced that the objection was sustained.

14. Q. Was Captain Inoue ever commended for his work at Jaluit?
A. He has been commended many times.

15. Q. Will you tell briefly regarding what he was commended for?
A. When all the ranking officers were present or when many officers were present, Admiral Masuda stated many times that Captain Inoue was very faithful in performing his duties and to everyone in general he tried his best to make everyone happy. On the above points there was no one who excelled Captain Inoue. After the end of the war, I remember Admiral Masuda stating when the ranking officers were present that Captain Inoue's faithfulness to his duties, his feeling of humanity for everyone was one of the great factors that made possible the Jaluit garrison to exist to the end of the war. He also stated when he returned to Japan, "I shall report personally to the Minister of War concerning the uncomparable character of Captain Inoue."

16. Q. What was Captain Inoue's general reputation on Jaluit?
A. His general reputation was one of faithfulness to his duties, very seriousness and that there was no changing of character and that he strove for the happiness of everyone and it was also stated that because Captain Inoue was head of the special police section, that discipline and morale was maintained.

The accused did not desire further to examine this witness.

Neither the judge advocate nor the commission desired to examine this witness.

The witness made the following statement:

There is a case in which Captain Inoue saved the lives of twenty lepers on Jaluit at a time when the bombing was the fiercest and the food situation critical. Captain Inoue, returning from an inspection of the outlying islands, expressed an opinion to Admiral Masuda stating that the lepers had eaten all their food that there was no food left because they did not conserve it and if the lepers are left as they are, they would starve to death. I wish an island where there is food be selected and the lepers moved there. This opinion was acted on and the lepers were moved to this other island where there was food. The lepers expressed their gratefulness to Admiral Masuda

through the district commanding officer. This was at a time when everyone on Jaluit was trying to save himself from starvation and trying to get food for himself, and when there was no time to think of others. While one-half of the garrison of the other Marshall bases starved, it was very few who died of starvation on Jaluit. One of the great factors in this was due to the measures taken to obtain food by self-supporting means. This self-supporting means was first aided by Captain Inoue in April, 1944, when Captain Inoue came to me and stated the situation in the Pacific is going against Japan; we should go ahead assuming that we would be cut off from the rear and unless concrete plans for self-support be taken, it would go hard for us, and asked that I express my opinion to Admiral Masuda concerning the taking of self-supporting measures. I agreed to this, and together with Captain Inoue, we went to Admiral Masuda. I had Captain Inoue express his opinion directly to Admiral Masuda. Admiral Masuda was greatly moved and stated that he would think on the measures and as a result of this, after the fall of Saipan was perceived, the plan for self-supporting was made public. Among all the people I know I respect Captain Inoue the most on his humanity and faithfulness to duty and his careful performance of his duties. I can still see before me Captain Inoue, talking to those who had committed crimes to get them to realize what they had done and to reform. As I lived next door to Captain Inoue, separated by but a wall, Captain Inoue is not a person who would commit murder as the rules and regulations of Japanese military service orders are absolute and orders are the life blood of the army. As the army rules tell us obedience to orders is second nature to a soldier. If a soldier of any military service was in the same position as Captain Inoue, I am convinced that he would have done as Captain Inoue did. For Captain Inoue, I regret very greatly that Admiral Masuda is deceased at present, and for Inoue and his family and the people in Japan who are striving for the reconstruction of Japan, and where the work of Captain Inoue is needed, I ask special clemency in the case of Captain Inoue. I make this request to bring to the attention of the commission the good character of Captain Inoue and in behalf of the two thousand men who were repatriated to Japan, I make this request for Captain Inoue.

The witness was duly warned and withdrew.

The commission then, at 3:57 p. m., took a recess until 4:12 p. m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

A witness for the defense as to matters in mitigation entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name and rate.
A. Sergeant Utsonimiya, Hirosuke, Imperial Japanese Army.

2. Q. Where are you presently confined?
A. I am at the witness camp on Guam.

3. Q. If you recognize the accused, state as whom.
A. Inoue, Fumio, captain, Imperial Japanese Army.

Examined by the accused:

4. Q. Since when have you known Captain Inoue?
A. I have known him from my childhood.

5. Q. Did you have duties together with Captain Inoue with the Japanese military forces on Jaluit?
A. I was together with Captain Inoue from January, 1944, to the end of the war.

6. Q. What was your relation to Captain Inoue in the military service?
A. Captain Inoue was an officer attached to battalion headquarters, and I was a sergeant attached to battalion headquarters.

7. Q. Tell us what you know of Captain Inoue's character.
A. He was born in a rural district and brought up by only his mother. He was influenced by his mother and was a very kind person. Both his mother and himself were sincere believers in Buddhism; when coming overseas, he brought the scriptures of Buddha. After graduating from grammar school, he entered a business school, and it is stated that he was not absent even a day. He was a very serious person on Jaluit; he was head of the special police section, also head of the farm department in the self-supporting measures committee. He performed duties which everyone else disliked. It was usually officers were spoken of badly among us, the non-commissioned officer, but no one spoke bad of Captain Inoue, especially among the gunzokus. He was a very modest person; he was not a person who would call persons curtly which could not be seen in the other officers. He was very sincere in whatever he did. Many people felt sorry for him for his seriousness in performing his duties. From the time he was a child it was well know that he looked after his mother well. Captain Inoue was not the kind of person to perform the duties as head of the police section; he was a person who had strong sense of obedience to help the soldier, he performed these duties. No one spoke bad of him. I heard from a member of the police section as follows: That he was very strict with the regular military, but in the case of natives, he would not report them immediately to headquarters, but would talk to them and get them to repent. When lepers were moved from one island to an island called Botsken, I have heard that it was due to the opinion of Captain Inoue that this was done. After the end of the war, I was taken in by the American forces and confined at Kwajalein where I came together with people from Wake and Maloelap and I heard about their conditions. If rationing had not been enforced and food grown, we would have been in the same condition. I believe Captain Inoue is the benefactor of my life, not only myself, but all the people on Jaluit believe the same.

Neither the judge advocate nor the accused desired further to examine this witness.

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

The commission then, at 4:35 p. m., adjourned until 9 a. m., tomorrow, Thursday, June 5, 1947.

TWENTY-FIFTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Thursday, June 5, 1947.

The commission met at 9 a. m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Major James H. Tatsch, U. S. Marine Corps, members, and
Lieutenant James P. Kenny, U. S. Navy, judge advocate.
Joseph Kase, junior, yeoman second class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

The record of proceedings of the twenty-fourth day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

Sakuda, Sawaki, lieutenant, Imperial Japanese Navy, was recalled as a witness for the defense as to matters in mitigation and was warned that the oath previously taken was still binding.

Examined by the judge advocate:

1. Q. State your name and rank.
A. Lieutenant, Imperial Japanese Navy, Sakuda, Sawaki.

Examined by the accused:

2. Q. Have you testified previously in the case of Captain Inoue?
A. I have.

3. Q. Since when have you known Captain Inoue?
A. From November of 1943.

4. Q. How did you come to know him?
A. I know him well because we were both attached to the headquarters of the Jaluit Defense Garrison.

5. Q. Tell us what you know about what kind of a person Captain Inoue was?
A. Concerning what I know about Captain Inoue, I would like to speak about Captain Inoue as head of the special police section. In December of 1944, when the special police section was organized, it was known through dispatches from the other Marshall bases that crimes concerned with food were increasing. Even though the severest punishments were dealt out, it increased; and it was known that discipline was not maintained. When Captain Inoue became head of

the special police section on Jaluit, the crimes concerning food on Jaluit decreased. It was not only that he uncovered and punished these crimes, but it was also due to his kind treatment of these crimes. Not only did Captain Inoue uncover all the crimes, but his punishments were thought to be too light. The decision on punishments were made by Admiral Masuda, but this decision was largely due to Captain Inoue through the investigation he made and his reporting of it. He looked into the motive of the crime and looked into the mental state of the person who committed the crime through his officers, and taking into consideration all mitigating factors, tried to get him the lightest punishment possible. On Jaluit there were crimes, but even though there were crimes, I have never heard of a person who had once committed a crime repeating that crime again. I sincerely believe this was due to the kind means of handling this crime by Captain Inoue. I have seen Captain Inoue reprimanding people who had committed crimes many times, but the attitude of Captain Inoue in such cases was not that of a person who was dealing out punishment, but of maybe a mother who was teaching her children and reprimanding them. On Jaluit there were no felonies, and misdemeanors were few. This, I believe, was due to the handling of their cases by Captain Inoue.

The accused did not desire further to examine this witness.

Neither the judge advocate nor the commission desired to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

A witness for the defense as to matters in mitigation entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name and rank.
A. Lieutenant, Imperial Japanese Navy, Iwanami, Kenichi.

2. Q. If you recognise the accused, state as whom.
A. Captain, Imperial Japanese Army, Inoue, Fumio.

Examined by the accused:

3. Q. Have you ever had duty with Captain Inoue on Jaluit?
A. I have.

4. Q. How long have you had duty together with him?
A. About two years.

5. Q. What is the relation between yourself and Captain Inoue?
A. As an officer attached to the navy headquarters and also as commanding officer of a battery of anti-aircraft machine guns, I did duty together with him.

6. Q. Tell us what you know about the general reputation of Captain Inoue on Jaluit?
A. After a time, Captain Inoue came to Jaluit, I have been acquainted with him for about two years and I am one of the persons who respects and trusts him greatly. As the commission may have noticed in this court, Captain Inoue

is not a soldier, but gives the impression that he is more of a civilian. He is quiet, serious, and modest. His attitude in speaking to anyone is quiet and very respectful. His warm nature is known by everyone on Jaluit. In a case where there was a person who was killed in action, army or navy, he made no distinction between army and navy, military or gunsoku, and no matter how busy he was or even if he was sick, he would always be present at their funeral. The general reputation of Captain Inoue among the many units was one of trust and respect. Some stated that he was gentle, some that he was humane, and some that he was very kind and a very serious person. I shall repeat: Captain Inoue is a person with a fine character in whom no one can find any fault; he is gentle, modest, serious, and kind.

7. Q. Was Captain Inoue a person to obey exactly, absolutely, the orders of his superiors?
A. He was a person who obeyed the orders faithfully.

8. Q. Was Captain Inoue a person to go against the orders of his superiors?
A. He was not a person who would go against his superiors. I have never seen him say anything against the orders of his superiors.

The accused did not desire further to examine this witness.

Neither the judge advocate nor the commission desired to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

Ieki, Temenori, first lieutenant, Imperial Japanese Army, was recalled as a witness for the defense as to matters in mitigation and was warned that the oath previously taken was still binding.

Examined by the judge advocate:

1. Q. State your name and rank.
A. First Lieutnnant, Imperial Japanese Army, Ieki, Temenori.

Examined by the accused:

2. Q. Have you testified in behalf of Captain Inoue in this court previously?
A. I have.

3. Q. What was the relation between yourself and Captain Inoue on Jaluit?
A. Captain Inoue was attached to the headquarters, Second Battalion, First South Seas Detachment. He was the senior officer after I became attached to the battalion headquarters. I have been taught and learned by him.

4. Q. Are the relations between yourself and Captain Inoue only that of your official position on Jaluit?
A. While I was at Kwajalein, Captain Inoue was the senior officer for regimental headquarters, and when I was sent to Jaluit, I was under the command of Captain Inoue.

5. Q. Tell us what you know about the character of Captain Inoue or any meritorious services that Captain Inoue has performed.

A. The character of Captain Inoue was not that of a soldier. He was gentle, modest, and did not boast. If he was not wearing a uniform, you could not tell that he was a soldier. Whenever we went to Captain Inoue, the feeling was that of coming upon an oasis in the desert. He was a reserve officer, and he understood our positions well. In a military system where it was stated that unless you are a graduate of the military academy, you are not considered an officer; Captain Inoue understood our positions well and lead us well. Even to the lowest ranking soldier, gunsoku and worker, his way of speaking was that of an equal and it was gentle. His kind attitude was something that was not common among the officers in the Japanese military service. While Captain Inoue had duty on Jaluit, he took on the duties as head of the special police section, head of the farm department, the self-supporting measures committee, which was disliked by everyone. It was because of his humane feeling that he took on these duties. At a time when Jaluit's food situation was critical, Captain Inoue stressed the protection of the lepers. He expressed his opinion to have them moved to an island where they could gather food. At this time the lepers were not capable of doing anything but consume food. There were some among the people who expressed their opinions that they should be executed--disposed of--Captain Inoue, agaist this opinion, expressed his opinion and succeeded in having them moved to an island where there was food. I was very glad that this occurred at a time when I thought humane feelings of the Japanese service had fallen to the ground. This humane character, due to the absolute obedience of the orders which is taught in every day life of the Japanese military service, this thought became second nature. Logically, he was a person capable of expressing his modest but gentle and logical opinion, but once it was a definite order, he did not have the strong will to express his opinion over this. It was the same with everyone in the Japanese military service, and I felt sorry for this. As I have stated above, he was believed in by everyone. He had the trust of everyone and also his obedience to orders. He was highly esteemed by Admiral Masuda and Furuki and his superiors. It could be said that he may have been abused by them. Because of this, he was given many difficult duties to perform. He performed these duties with patience and perserverance. If he succeeded, he attributed this success to his superiors; if he failed, he would take the failure upon himself. As stated, he was modest and he was patient in whatever he did. Hearing that he has been found guilty, I cannot help but feel that he should not have become a soldier, and cannot help but regret the mistaken teachings of the Japanese military.

6. Q. What superior officers were there over Captain Inoue?
A. There was Admiral Masuda, Major Furuki, Lieutenant Commander Shintome, Lieutenant Commander Nakamura, and Lieutenant Commander Suzuki.

7. Q. At this time, was Captain Inoue a person in a position to be an important member of the highest command?
A. No. Because he was careful and faithful in his work, he was ordered at times to be present at important meetings.

Cross-examined by the judge advocate:

8. Q. Was Captain Inoue the second ranking army officer on Jaluit?
A. Yes.

Neither the accused nor the judge advocate desired further to examine this witness.

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

A witness for the defense as to matters in mitigation entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name and rank.
A. First Lieutenant, Imperial Japanese Army, Kadota, Itsuro.

2. Q. If you recognize the accused, state as whom.
A. Captain, Imperial Japanese Army, Inoue, Fumio.

Examined by the accused:

3. Q. Have you ever had duty together with Captain Inoue on Jaluit?
A. I have.

4. Q. How long have you know Captain Inoue?
A. I have been in the same unit with Captain Inoue since January of 1943; from January of 1944, I have worked very closely with him at the Jaluit Battalion Headquarters.

5. Q. Tell the commission what you know about the character of Captain Inoue.
A. Captain Inoue was a man of great character. He, the same as myself, was an officer who was a graduate of the reserve officers' school, and we placed the greatest trust in him for his seriousness. Great trust was placed in him by Admiral Masuda and Furuki because of his seriousness, and I have heard Furuki state that, "I have much to learn from Captain Inoue. He is a person whom you should model." Admiral Masuda stated that, "Major Furuki was one of my best helpers and Captain Inoue was one that I could trust any work to, and after returning to Japan, I shall have to report the two of them, I shall have to commend the two of them to the Minister of War." By his superiors, he was trusted; men of the army and navy, it was the same; all of them trusted our captain. How the natives trusted Captain Inoue was the same as that of Admiral Masuda and Major Furuki. The difference was that the like of the natives for Admiral Masuda was one of that of vital worship, and that of Inoue was somewhat like that of brotherly love. What I have stated is not a lie, and also it was not only the opinion of myself. This, I think, can be seen in what I am about to relate. There are many things concerning Captain Inoue, but one that can be noticed is his gentleness. Whenever he is speaking with someone, he speaks with a smile. He was not boastful to his superiors. He was serious and careful in performing his duties, and he would ascertain the opinions of his subordinates, after which he would go about them. Looking back on whatever work, there is not one in which there can be found fault. He did not look forceful and his attitude was not that of a soldier when he became head of the special police section. I considered him as a person unsuited to hold this position. I could perceive his seriousness and sense of responsibility and strong will to perform his duties. I believe his heart is very sincere, but I feel sorry that he did not have the will power to go over the absolute authority and pressure that was exerted on him by his superiors. He was very simple. This could be seen in his everyday work. Captain Inoue was a most busy person. Even though he had stomach trouble due to the poor food on Jaluit, I have seen him keeping

at his work and he looked very pitiful. His duties were many which kept him working from day until night, and his duties were involved. Under conditions in which people died one after the other, he diligently kept to his work. I remember his telling us that this is a test that God has given us; where else can we find a better test than now to improve ourselves. Because he was a very religious person, he was simple, clean, and he was always solemn. His strict disciplinary opinion was made the stronger through the teachings of Major Furuki, and through these traits, Furuki thought that he was just the person to become head of the special police section. I have never heard him express opinions or doubts against orders of his superiors concerning discipline.

The commission then, at 10:39 a. m., took a recess until 11 a. m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

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

(Examination continued.)

A. (continued) I shall state two or three examples concerning discipline, to which Captain Inoue was connected. When the food situation was very critical, a fellow officer of Captain Inoue, seeing Captain Inoue's strife, felt very sorry for him and said, "Let us call Captain Inoue and give him a small party in honor of his work." When Captain Inoue heard of this, he stated, "Even though the food that may be used in this party may not exceed the ration that is allowed, if the party is seen by the men, it will not make a good impression at this point when the rationing of food is being stressed; this will not be very good, and through my position as head of the special police section, I cannot do this"; and he had them stop that party. Another incident happened about that time. I was telephoning instructions to the construction commanding officer concerning the building of fortifications. This commanding officer stated: "Haven't we sufficient fortifications as it is?" I was placed in a very difficult position. Captain Inoue, who was listening to this reply, changed places with me and stated to this officer, who was about the same rank as himself, in a tone of voice which was unusual for him, "Under conditions when it cannot be stated when the enemy would invade Jaluit, how can you say that there is sufficient fortifications. There can never be sufficient fortifications. To defend this island is our duty and at a time when discipline is required of the men, how can a commanding officer state what you have said and still require discipline from his subordinates." I have never seen Captain Inoue disobey any orders and in the discipline of the Japanese military service, as I stated, no matter what the orders, they should be obeyed. This may be wrong, but it is stressed that you shall not disobey orders. As I have stated before, he was of a very warm nature, and he was not boastful. He was kind and he always talked with a smile. This was not only with military and gunzoku, but also with the natives. This was true especially with the natives. I would like to give an instance at this time; at a time when the food situation was very critical, and usually Captain Inoue inspected the outlying islands, he

inspected Pegse Island where there were lepers living. He expressed the following opinion: The food situation on that island is very bad and if they are left as they are, they will all die of starvation. He expressed an opinion that they be sent to Botsken, where there was food and had them moved by boat, even though there was danger of leprosy spreading to the Jaluit Defense Garrison. As head of the special police section, there were instructions that Captain Inoue gave to the men under him in uncovering native crimes, the contents of which are as follows: If natives commit crimes, these should be punished, but as they are necessary and vital to Jaluit, even though you may uncover crimes of natives; if they are kind and are of little importance, do not report them immediately, but reprimand them there and try to get them to repent; if they are of a nature which cannot be overlooked, do not report this to headquarters immediately, but send them to the district commanding officer, where they shall be reprimanded and try to get them to repent. He is a person of high character, and it is natural that all the people on Jaluit looked up to him like a parent. I would like the commission to know how many people there are in Japan with the scars of battle still fresh, forgetting to eat through worry concerning the safety of Captain Inoue.

The accused did not desire further to examine this witness.

Neither the judge advocate nor the commission desired to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

The commission then, at 11:22 a. m., took a recess until 2 p. m., at which time it reconvened.

Present:

All the members,
Lieutenant David Bolton, U. S. Navy, judge advocate,
Robert R. Miller, yeoman first class, U. S. Navy, reporter,
The accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

Mr. Akimoto, Yuichiro, a counsel for the accused, was called as a witness for the defense as to matters in mitigation and was duly sworn.

Examined by the judge advocate:

1. Q. Will you state your name, please?
A. Akimoto, Yuichiro.

2. Q. Are you the defense counsel for the accused Fumio Inoue?
A. Yes.

Examined by the accused:

3. Q. Do you have certain documents in your possession?
A. Yes.

4. Q. Are these documents evidence of character of the accused, Inoue, to be introduced in mitigation?
A. Yes.

5. Q. Have these documents been translated into English?
A. One hundred seventeen of these documents have been translated into English. The remainder have not been translated.

6. Q. Do you wish to offer these documents into evidence in behalf of Captain Inoue?
A. I wish to offer into evidence one hundred seventeen petitions which have been translated into English. In view of the tremendous number of petitions received in behalf of Inoue, Fumio, it is not desired to introduce the remaining two hundred forty petitions because their effect is primarily cumulative and corroborative.

7. Q. Have you read and examined all these documents?
A. Yes.

8. Q. What have you found out as a result of reading and examining all these documents.
A. As a result, I have found that these documents were submitted by his relatives, friends and people of his birthplace, and from people who have served with him in the military service. The contents of these documents as to his character can be summarized as follows: That he was a gentle, serious person from the time of his childhood; he was very kind toward people; he was religious, and he had a strong sense of responsibility. It has been stressed that from the time he was a child and since he has grown up, no one found fault with him, and that he was very gentle and serious minded person. From the petitions that were submitted, it is stated that he mingled warmly with his superiors, his subordinates, and the natives. These are the common points of those petitions.

9. Q. Are you qualified, skilled and able to state this by the reading of these petitions?
A. I believe so as defense counsel.

10. Q. Has the judge advocate had access to these documents?
A. Yes.

The witness produced one hundred seventeen documents in Japanese in mitigation and they were submitted to the judge advocate and to the commission, and by the accused offered in evidence for the purpose of being read into the record in mitigation.

Due to the voluminous nature of the documentary evidence offered in mitigation, the judge advocate reserved the right to object to any petition or portion of any petition if upon examination of the content thereof objectionable matter was discovered.

The commission announced that the documents in question would be received in evidence, subject to the remarks of the judge advocate, and are appended marked "Exhibit 5" through "Exhibit 121."

The witness produced one hundred seventeen documents, the English translations of "Exhibit 5" through "Exhibit 121," in mitigation, and they were submitted to the judge advocate and to the commission, and by the accused offered in evidence for the purpose of being read into the record in mitigation.

Due to the voluminous nature of the documentary evidence offered in mitigation, the judge advocate reserved the right to object to any petition or portion of any petition if upon examination of the content thereof objectionable matter was discovered.

The commission announced that the documents offered would be received in evidence, subject to the remarks of the judge advocate, and are appended marked "Exhibit 5a" through "Exhibit 121a."

11. Q. Refer to certain of these documents and read them.
A. I have in my custody three hundred fifty seven documents; of them, I will read one.

The witness read one petition, appended marked "Exhibit 5," in Japanese.

An interpreter read the English translation of "Exhibit 5," appended marked "Exhibit 5a."

12. Q. Will you waive the reading in Japanese of the balance of these petitions? GK
A. I waive the reading of them in Japanese. GK

13. Q. We ask the interpreter to read in English only such documents as the witness desires.

The commission announced that the request was granted.

An interpreter read the English translations of fifteen petitions in mitigation, appended marked "Exhibit 6a" through "Exhibit 20a."

The commission then, at 2:45 p. m., took a recess until 3:10 p. m., at which time it reconvened.

Present: All the members, the judge advocate, the reporter, the accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

Mr. Akimoto, Yuichiro, the witness under examination when the recess was taken, resumed his seat as a witness for the defense as to matters in mitigation. He was warned that the oath previously taken was still binding and continued his testimony.

(Examination continued.)

14. Q. Do these documents you have read and which the interpreter read show what in general you wish to bring to the attention of the commission without reading the other documents in this group?
A. I believe in general it has been brought out.

The accused did not desire further to examine this witness.

Neither the judge advocate nor the commission desired to examine this witness.

The witness resumed his seat as a counsel for the accused.

Mr. Suzuki, Saiso, a counsel for the accused, a witness for the defense as to matters in mitigation was duly sworn.

Examined by the judge advocate:

1. Q. Will you state your name, please?
A. Suzuki, Saiso.

2. Q. Are you a defense counsel for the accused Fumio Inoue?
A. I am.

Examined by the accused:

3. Q. Do you have certain documents in your possession?
A. I have.

4. Q. Are these documents evidence of character for the defendant Inoue to be introduced in mitigation?
A. Yes.

5. Q. Have these documents been translated into English?
A. One hundred sixteen of these documents have been translated into English. The remaining two hundred forty petitions have not been translated.

6. Q. Are they different documents than those referred to by your colleague, Mr. Akimoto?
A. Yes.

7. Q. Have you read and examined all these documents?
A. Yes.

8. Q. What have you found out as a result of reading and examining all of these documents.
A. These documents are documents submitted by relatives and friends of his birthplace and from people who have served together with him on Jaluit and pertain to his character. He was gentle and serious minded and requested that lenience and mitigation in sentence.

9. Q. Are you skilled and qualified in ascertaining and reading these documents?
A. I am.

10. Q. Has the judge advocate had access to these documents?
A. Yes.

11. Q. Do you wish to offer these documents in evidence in behalf of the accused, Inoue?
A. I wish to offer into evidence one hundred sixteen petitions which have been translated into English. In view of the tremendous number of petitions received in behalf of Inoue, Fumio, it is not desired to introduce the remaining two hundred forty petitions because their effect is primarily cumulative and corroborative.

The witness produced one hundred sixteen documents in Japanese in mitigation and they were submitted to the judge advocate and to the commission, and by the accused offered in evidence for the purpose of being read into the record in mitigation.

Due to the voluminous nature of the documentary evidence offered in mitigation, the judge advocate reserved the right to object to any petition or portion of any petition if upon examination of the content thereof objectionable matter was discovered.

The commission announced that the documents in question would be received in evidence, subject to the remarks of the judge advocate, and are appended marked "Exhibit 122" through "Exhibit 237."

The witness produced one hundred sixteen documents, the English translations of "Exhibit 122" through "Exhibit 237," in mitigation, and they were submitted to the judge advocate and to the commission, and by the accused offered in evidence for the purpose of being read into the record in mitigation.

Due to the voluminous nature of the documentary evidence offered in mitigation, the judge advocate reserved the right to object to any petition or portion of any petition if upon examination of the content thereof objectionable matter was discovered.

The commission announced that the documents in question would be received in evidence, subject to the remarks of the judge advocate, and are appended marked "Exhibit 122a" through "Exhibit 237a."

12. Q. Refer to certain of these documents and read such as you desire to read.

The witness read one petition in Japanese, appended marked "Exhibit 122."

An interpreter read the English translation of "Exhibit 122," appended marked "Exhibit 122a."

13. Q. Do you waive the reading of the rest of these documents in Japanese in open court?
A. I do.

14. Q. Do you desire that the interpreter read certain other documents in English at this time?
A. I do.

15. Q. We ask that the court interpreter read such documents as the witness desires.

The commission announced that the request was granted.

An interpreter read the English translations of two petitions in mitigation, appended marked "Exhibit 123a" and "Exhibit 124a."

16. Q. Do the documents which you have read and which have been read by the interpreter show in general what you desire to bring before the commission without reading the rest of the documents in this group?
A. Yes.

The accused did not desire further to examine this witness.

Neither the judge advocate nor the commission desired to examine this witness.

The witness resumed his seat as a counsel for the accused.

The commission was cleared.

The judge advocates were recalled and directed to record the sentence of the commission as follows:

The Commission, therefore, sentences him, Tsoue, Fumio, Captain, Imperial Japanese Army, to be confined for the term of his natural life.

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

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

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

Bradner W. Lee, junior,
Lieutenant Commander, U. S. Naval Reserve, Member.

James H. Tatsch,
Major, U. S. Marine Corps, Member.

David Bolton,
Lieutenant, U. S. Navy, Judge Advocate.

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

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

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

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

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

David Bolton,
Lieutenant, U. S. Navy, Judge Advocate.

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

Case of

Inoue, Fumio,

captain,

Imperial Japanese Army.

April 23, 1947.

RECORD OF PROCEEDINGS

of a

MILITARY COMMISSION

Convened at

United States Pacific Fleet,

Commander Marianas,

Guam, Marianas Islands,

by order of

Commander Marianas Area.

VOLUME III

159116

L(1)

REQUEST FOR POSTPONEMENT OF TRIAL

The defense is not yet ready for trial and requests an adjournment. We request that the Commission adjourn to meet again at 9 a. m. on Monday, May 5, 1947.

Captain Inoue, the accused in this case was served with the charges and specifications March 13, 1947. However, defense counsel were all occupied in the case of Furuki, Hidesaku. The Furuki case was not completed until Friday, April 18, 1947. Captain Inoue, the accused in this case was a witness for the defense in that case. Until that case was completed on April 18, 1947, there was no opportunity to prepare this case.

This was only four days ago and there has not been sufficient time to prepare any of the defense in this case, including our plea to the jurisdiction of this commission to try the accused.

We have only been able to discuss the case with the accused to a very limited extent. From him we learn that there are several important witnesses now in Japan who, we hope, may be able to testify for the accused. We plan to go to Japan to look up these witnesses. This requires some little time.

The accused is charged with a violation of Article 199 of the Criminal Code of Japan. It is most important that while we are in Japan that we look up the applicable Japanese law and cases particularly as they apply to the charge of murder in violation of effective law, especially Article 199 of the Criminal Code of Japan. The Japanese law may well vitiate charge one if not laid in accordance with Japanese law and procedure.

There are many matters both as to the facts of the case and the legal issues involved which must be investigated here but particularly in Japan.

In this case, the accused is charged with murder of eight persons. Such a charge is far too serious to go to trial in only four days. The prosecution have been preparing their case since August, 1945.

In accordance with Section 213, Naval Courts and Boards, "Depositions may also be taken before the assembling of the court by mutual agreement between the judge advocate and the accused (counsel) subject to objections when read in court."

The judge advocate, Lieutenant Bolton, is going to Japan and the defense counsel and judge advocate have mutually agreed to the taking of depositions while in Japan. We ask that the commission waive the regular procedure which

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is that the list of interrogatories to be propounded to absent witnesses be submitted to the commissionand that the defense be allowed to take depositions while in Japan subject to cross-interrogatories by the judge advocate while the judge advocate is in Japan.

We shall at this time ask for a delay only until 9 a. m., May 5, 1947.

We hope that the commission will give special consideration to our plea.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
Commander, U. S. N. R.

(M) Jurisdictio attonita (M)

昭和二十二年四月　日

裁判言渡ニ関スル抗弁

被告　井上文夫

辯護人　秋元勇一郎

"M (1)"

裁判長並ニ委員各位

辯護人ハ被告井上文夫ニ対スル本件裁判管轄権ニ対シ抗弁ヲ提出スルモノデアリマス。即チ本軍法会議ニ於テハ本件ヲ裁判スル権限ナシ公訴ハ速ニ棄却セラルベキモノナリトノ主張デアリマス。

然シ之ガ抗弁ニ先チ検事主張ノ根本的誤謬ヲ指摘セントスルモノデアリマス。

勿論検事ノ本抗弁ニ対スル法的意見ハ未ダ拝聴スル機会ニ接シマセヌガ本件ハ裏ニ本邦ニ於テ審理セラレマシタ古本事件ト全クノ Acorpe ヲ有スルモノデアリマスガ、古本事件ニ於テ述ベマシタ検事ノ意見ハ即チ本件ニ対スル法的意見ト見テ差支ヘナイト信ゼラレマスルガ故ニ之ヲ引用シテ一々弁駁ヲ加ヘマス。

検事ハ本軍法会議ニ裁判管轄権ヲ有スルヿヲ主張シノノ理由トシテ

第一、マーシャル地区ハ日本裁判所トシテ ポナペ地方法院ガ存在シ居リ之ハ1946年1月3日米軍マリアナ司令部ノ支配ニ入リ日本ノ降伏ト共ニ日本ノ裁判権ハ喪失シ ポナペ裁判所ハソノ存在ヲ失ヒマーシャル諸島ノ裁判権ハ米国マーシャル諸島地区統軍改府ノ管轄スルトコロトナリタル之ハ Proclamation I issued by Admiral Chester A Nimitz, as Admiral United States Navy, Commander-in-chief, United States Pacific Fleet and Pacific Ocean Areas ニ依リテ明デアルト述ベタ之ニ基ク之ヲ認メル数ヶ Proclamation ヲ挙ゲマスカラ当然デアリマス

第二、Proclamation No 2 Article IV ニ於テ

「日本刑法、通則ニ関シ本軍占領以前ニ於テ同諸島ニ有効ナリシ日本刑罰法又ハ民事慣習法ニ基ク一切ノ権ニ何人ト雖モ軍令局ノ権限ノ下ニ判断セラル、其軍法会議ノ裁判ヲ受クベキモノナリ」 "M(2)"

"Any person who commits any act which violates any provision of Japanese penal law in effect in those island Prior to the occupation by the forces under my command, or the provision of native law customary in the island may, at the discretion of the Military Governor, or under his authority, be brought to trial befor Military Court and on conviction, shall suffer such pernishment in Court may direct ....."

トノ規定ガアルカラ占領以前ニ於テ有効ナリシ日本刑法ニ違反シタル本件被告ヲ裁判スルコトハ当然法令ニアルト主張シ得ルデアル.

本 proclamation ニ所謂 Prior to the ~~occupation~~ occupation トハ Japanese law in effect in those island ニ係ッテヰルノデアッテ占領以前有効ナリシ日本法律ト言ッタ意味デ若シ占領以前ニ為サレタル行為ヲ処罰スル場合ニ於ハ当時有効ナリシ日本法ニ照シテ処罰スルモノトノ法律不遡及ノ原則ニ依リ当然デアルカラ此ノ意味ニ於テ Proclamation ニ正シイノデアル

然シソレハ米占領以前他国ノ統治下ニ行ハレタル行為ヲ占領後ニ於テ米国カ処罰限ニ裁判シ処罰ヲ得ルトノ規定ガ断ジテナイ. 何ントナレバ他国ノ主権ヲ侵害シテ勝手ニ他国民ガ他国ニ於テ行ッタ行為ヲ裁判シ処罰スルコトガ出来ルモノデハナイ. 法治国ニ於ケル正義ヲ当然ノ事トスル米国ニ於テ左様ナ思案ガ為シ得ヘル法律家ハヨモアルマイト信ズル. Proclamation ハ迅速ニ於ケル異状ナル状態ニ応ズル為メニ採ラレ

"M(3)"

タル法律施行ノ際ニ関スル一命令デアルコトヲ意ヒテハナラヌ又断ジテ法律デハナイデアル。唯一時的処理ニ関スル命令デアル米国合衆国法律デハナイノデアル即ケ占領過渡期ニ於テハ米国法律ヲ適用スルヲ当ヲ未ダ又過去法律ニヨリテ裁判ヲ為ス様ナ場合ヲ起ル事ガアル。

例ヘバ一ノ行為又ハ連続ノ行為ガ敵旧ニノ時機ニ亘リテ行ハレル場合ガアル即ケ占領前ト占領後ニ亘ル場合ガアル此ノ場合ニ於テハ当然占領国裁判所ニ依テ裁判セラルベキデアルガ占領前ノ行為ニ対シテハ旦ツ当時ノ法律ニ依リテ処罰シナケレバナラヌ。此レ法律不遡及ノ原則ニ基ラシメルルトコロデアル。右proclamation主旨ハ斯ノ如キ事態ニ処スル為メニ設ケラレタモノデアルコトハ当然ノ法律常識デハナイカ。然ルニ検事ガ之ヲ曲解シ占領以前ノ他ノ地ニ於テ他ノ民ガ為シタル行為ニ対シ米国ガ思ノ儘ニ之ヲ処罰シ得ルト主張スルハ法理ノ断ジテ許容スルモノデハナイ。為ニ此ノ原則ヲ無視シ裁判シ処罰シタル場合ハ仮令ヒ其裁判ガ形式的ニ合法デアッテモソノ裁判ハ無効デアリマス。

本件及前ノ件ガ実際上摘発サレル審理ノ行ワレテ犯罪ヲ処罰シタルニカカハラズ、ソノ手続ノ違法ガアリ之ヲ裁判デナイト見ヲ、ソレガ犯罪ナリトシテ起訴セラレタル検事ノ見解ヲ以テスレバ此ノ法ノ原則ニ違反シテ裁判ヲシタル場合ト之ト同様ノ性ノ考察ヲ受ケル許ト信ズル。

尚右proclamationガ法ノ原則及ビ国際法ヲ蹂躙スルモノデアルガproclamationハ何処迄モ命令デアッテ法律デハナイ。命令ヲ以テ法律ヲ改廃変更ハ出来ナイノデアルカラ此ノ点ニ関シテハ無効ナリト断ゼザルヲ得ナイデアリマス。

"m(4)"

第三項

In the precept of 21 February 1947, this Military Commission was authorized to try all offenses within the jurisdiction of exceptional military courts and in addition was specifically authorized to exercise jurisdiction over offenses and Japanese military personal now in the custody of Commander Marianas, referred to in the despatch of the Judge Advocate General of the Navy"

上述ベテ居ルデアリマスガ之ニ申ス迄モナク當軍法会議ノ於ケル形式的権限ハソレニ發セラレタル命令デアリマシテ マリアナ司令部収容所ニ収容セラレテアル日本軍人其他ニ対シテ一應之ニ対スル起訴ノ受理ヲ審理スルコトガ出来ルコトヲ想定スルニ止マリ実質的裁判権ノ発現デアル裁判ノ出来ルコトヲ意味スルモノデハアリマセヌ.

若シ Commission ニ於ケル実質的権限ノ存否ヲ自ラ発見セラレルカ又ハ起訴関係者ヨリ裁判管轄権ニ対スル異議ガアリマストナラバ法ノ原則ニ照シ公訴ヲ棄却セラルベキモノデ此権限ヲ与ヘル何レノ Judge Advocate General ノ Precept ヲ引用セラルベキモアリマセヌ. 裁判ハ法律ニ依ッテ行使セラルベキモノデ如何ナル命令ヲ以テモ左右シ得ルモノデナイヨリモ私ノ申上ゲル迄モナク検事側ノ認ムル所デアル. 形式的権限ニツキ現実ニハ Precept ノ以下ノ法ノ原則ノ実質的裁判権ヲ左右シ得ルモノデナイト此ノ検事ノ主張ハ根本的誤謬デアリマス.

"M(5)"

7. 按ずる。This commission is not ~~empowered~~ empowered to divest itself of this jurisdiction specifically delegated to it by virtue of the precept, duly issued .....

The Judge Advocate General of the United States Navy, the War Department and the Department of State have carefully considered the problem of jurisdiction.

It is their considered opinion that jurisdiction rests in ~~their~~ this Commission .....

ト述ベテキルガ

The Judge Advocate General ガ如何ナル強力ナル权限ヲ有シテキテモ如何ナル考慮ヲ採ルトシテモ司法权ノ独立デアル。法ノ原則ヲ無視シテ裁判セヨト裁判所ニ命ズルコトハ出来又

This Commission is not empowered to divest itself of this jurisdiction --- ト云ヒ切ッテハ、裁判權ノ神聖ヲ冒スモノデハナイデアロウカ

況ンヤ precept ノ趣旨ハ前述ノ如ク断ジテ実質的ノ裁判權ニツキ命令シタモノデハナイ、等シイ如何ナル命令ヲ以テシテモ假令大統領ノ命令ヲ以テシテモ出来ルモノデハナイ夫レハ被告人就中ノ一人ニ過ギナイ personel now in the custody of Commander Marianas ニ対シテハ尺テ一應ハ右ノ許ス處理シ審理スルコトヲ得ルトシテモ形式的權限ニ止マルノデ実質的裁判

m(6)

権ノ存在シナイコトガワカッテモ審理ヲ遂行セヨト、趣旨デナイコト
ハ繰返シテ申入迄モナイコトデアリマス而シテ実質的裁判権
有無ハCommission自体ニ於テ判断スベキデアッテ外
部ノ行政的権限ニヨッテ之ヲ左右シ得ザルコトハ、獨立セル
司法権ノ厳然タル真理デアル之レカラシテ裁判ノ神聖ガ
如何ニシテ保チまし得ルヤ、
第四ニ検事ハNuremberg ヤ極東国際裁判ノ例ヲ引キ
The Supreme Commander for the Allied Powers, 以後 Scap rule, 事柄、管轄、ニ関ニ
(a) over person Military Commission appointed hereunder shall have jurisdiction over all persons charged with war crimes who are in the custody of convening authority at — the time of the trial.
(b) over offenses. (1) Military Commission appointed hereunder shall have jurisdiction over all offenses including, but not limited to, the following ..... (c) Murder, extermination, enslavement, deportation, and other inhumane act committed against any civilian population before or during the war ..... whether or not in violation of the domestic laws.

"M(7)"

of the country where perpetrated.」規定ヲ本件ニ適用出来ルトモノト述ベテ居ル勿論本規定ノ文言ノミヲ見レバ枠モ如何ナル時ト如何ナル場所ニ於テ犯セル如何ナル行為ニ対シテモ之ヲ戦争犯罪ト名ヲ以テ收容サヘスレバ凡テ之ヲ裁判出来ルモノデ何等制限ガナイ様ニ素人ニハ見エルカモ知レナイガ左様ナ観念ガ法律上許サレルカ若シ然リトスレバ戦勝国ハ戦敗国民ニ対シテハ理由ナクシテ之ヲ裁判シ所罰スルコトガ出来ルコトニナル吾々ハ文明国ノ如ク正義ニ立脚シテ明日ノヨリ良イ道徳ヲ建設シヨウト努力シテ居ル聯合国ニ対シ満腔ノ敬意ヲ表シテ居ル左様ナ法ヲ無視スル暴カヲ敢ヘテスルモノト考ヘナイ之ハ純粋ナル戦争犯罪ニ対スル規定デアル戦争犯罪トカ文明社会ノ通義トカ云ッタ観念ノ下ニ犯罪ヲ處理スルコトハ従来ナカッタ従ッテ国際法規ニモ国内法規ニモ之ニ対スル罰規定ハ何レノ国ニモ存在シテ居ナカッタ夫レヲ終戦後新ニ設ケルノガ戦争裁判デアルソレデアルカラ従来ノ法律観念カラ見レバ無理ガアル矛盾ガアル然シ明日ノ良イ道徳ヲ建設スルタメニハ吾々ハ忍ビナクテハナラヌ　然シ乍ラ吾々ノ正義観ガ許ス範圍ニ限ラルノデアッテ断ジテ無制限ナル「切捨御免」ヲ許シタモノデハナイ日本ノ封建時代ニハ武士ハ人民ヲ殺シテモ無禮打トシテ其ノ責任ヲ問ハレナカッタ時代ガアルコレヲ「切捨御免」ト称シ封建主義ニ対スル呪ヒノ代表的表現デアル私ハ戦勝国ガ

此ノ「切捨御免」ヲナスモノトハ考ヘナイ以上、Scap rule
ニハ厳然タル制限ガナケレバナラヌ即 Scap rule 事柄
ノ管轄第一ニハ「侵略戦争又ハ国際条約協定又ハ
保障ノ侵犯スル戦争ノ開始又ハ実行ノ準備計画又ハ
以上ノ行為ノ遂行ヲ目的トスル謀議又ハ陰謀ヘノ参加」
ト明記シアリ第二以下ノ個々ノ行為ハ凡テ此ノ線ニ沿ッテ
判断サル、戦争犯罪行為ニ制限セラレルモノデアルコトハ
自明ノ理デアル。
従ッテ例ヘバ殺人ヲ例ニトレバ
軍閥ガ戦争ヲ開始又ハ遂行セントスル場合或ル平和論
者ガ戦争ニ反対シタルガ為之ヲ殺害シタル場合ノ如キ或ハ
占領地ニ於テ一般非戦斗員ヲ故ナク殺シタル場合ノ
如キ俘虜ヲ故ナク殺害シタル場合ノ如キデアッテ非人道
的又ハ国際正義ノ侵犯シタル者ノ場合ヲ指スノデア
ッテ国内人ガ国法ニ違反シ之ヲ法ニ照シテ処罰シタル
本件ノ如キ行為ヲ含ムモノデナイコトハ言ヘズシテ明デア
ルカ。若シ然ラズセバ過去ニ於テ日本裁判所ニ於テ処
罰セラレタル一切ノ犯罪ヲ遡ッテ此レヲ処罰シナケレバ
ナラヌコトニナル 如何ニ Scap Rule ト雖モ左様無
茶ナコトハ考ヘテ居ルト思ヘナイ 検事ニ於カレテモ
Commission ニ於カシマシテモ其ノ本件ノ性質ヲ御
考ヘヲ願度イ。

"M(3)"

本件ハ日本ノ国民タル島民ガ敵前ニ於テ殺人強姦
謀ト云ッ重罪ヲ犯シタヲ日本ノ国法ニ照シテ審理處断シタル
案件デアリマシテ唯其ノ取ッタ審理手續ニ欠点ガアルカ否
カノ問題デアルバデアリマス 夫レガ急迫セル戦場且敵
前ニ於テ法律上、條理上許サルベデアルカ否カ、問題ノ
残ッテ居ルニ過ギナイ、Scap Rule, 所謂戦争ニ直接
関係アル非人的ナ行為デハナイ況ヤ殺人等ノ罪名ニ觸ル
ベキ行為デハ断ジテナイノデアリマス
若シ裁判手續ニ欠点アリトセバ行政的責任ノ有無ガ問題
ニナル吾々日本人ノ司法ニ干渉シテ居ル者ノ常識トシテハ
懲戒免職等ガ重イ罰トシテ考ヘラル、所デアリマス
裏ネテ云ッテ断ジテ戦争犯罪デハナイ、
又前記 Scap Rule (a) ニ於ケル「軍法会議ハ
審判ノ時ニ於テ之ガ召集権限アル官憲ノ抑留スル者ニシテ
戦争犯罪人トシテ起訴セラレタル者」ニマトアルハ前述ノ
Precepr ト同様形式的裁判権ヲ謂ッノデアッテ実質的
裁判権ヲ云ッノデハ断ジテナイノデアリマス
又「戦争前又ハ戦争中ニ為サレタル行為」トハ云フモ
純然タル戦争犯罪ニ対シテイフノデ一般犯罪ニ対シ
テイフノデハ断ジテアリマセヌ
弊ニ Commission ニ特別ノ係争處ヲ御審理致シタイ
ノハ Nuremberg ノ極東 International Trubunelo
ハ特別ノ目的ト機構ニヨリ設定サレタモノデアッテ本法廷ノ
"M(10)"

如キ純然タル米国裁判所デハナイノデアリマシテ之ガ
規定ヲソノ本裁判ニ適用スルコトハ違法デアリマスコレハ
性質上明瞭デアリマス
以上ノ如ク検事ノ主張セラル、本件ニ対スル裁判権ガ
本軍法委員會ニアル為ニハ根本的ニ謬見デアリマシテ
私ハ飽迄右軍法委員會ニ於テハ本件ヲ裁判スル権
限ヲ有セラレズト主張スルモノデアリマス
以下等ノ法律上ノ見解ヲ述ベマス

先ヅ私ノ所論ノ順序ヲ申上ゲレバ

1. 被告人ノ国籍及行為及行為地ニツキマシテ
   (1) 被告人ノ所属シタル国家即チ被告人ノ国籍.
   (2) 被告人ノ本件行為ノ行ハレタル土地ノ属地的統治権
   (3) 被告人ニツキ處刑セラレタル者ハ當時何レノ国家ニ依リ統治セラレ居タルヤ
   (4) 右被處刑者ハ如何ナル行為ニ如何ナル法規ニヨリ處罰セラレタルヤ
   (5) 被告人ノ行為ト戦争犯罪トノ関係ニツキ
2. 刑法ノ効力ニツキ
   (1) 時ニ関スル効力
   (2) 人ニ関スル効力
   (3) 土地ニ関スル効力
3. 裁判管轄権ニツキ

"M(11)"

事ニ付キ一般的原則ヲ述ベ結論ニ入ラントスルモノデアリマス

第一、被告人ノ国籍、行為及行為地並ニ戦争犯罪ニツキ

1. 被告人井上丈夫ハ本件起訴第一第二ノ各罪状(訴因)ニ示サレタルガゴトク大日本帝国軍人デアリマシテ当時モ現在モ日本帝国ノ臣民タルコトニツキマシテハ今更申上ゴルマデモアリマセヌ

2. 本件起訴第一第二各罪状項目ニ於テ被告人ハ昭和二〇年四月「マーシャル」諸島「ヤルト」島ニ於テ等ノ島民ヲ殺害シタリトアルノデアリマスガ右マーシャル諸島ヤルト環状珊瑚島ハ元独逸ノ領土デアッタガ第一次世界大戦ノ結果国際聯盟ヨリ日本帝国ガ委任統治セル領土デアリマシテ当時日本統治権下ニアッタノデアリマス

而シテ委任統治ノ方式ニツキマシテハ已ニ御承知ノガゴトクA、B、C式ノ三式アリマシテ

A式ハ委任領域ガ独立国トシテ暫定承認ヲ受ケ得ル程度ニ達セルモノデソレガ自主シ得ルマデ受任国ヨリ施政上ノ助言及援助ヲ与ヘルモノデアリマス

例ヘバ英ノ旧トルコ領「イラク」「パレスタイン」及仏ノ「レバノン」等ノガゴトキデアリマス

B式ハA式ヨリモ文化程度低ク人口稀薄ニシテ受任国ガ其ノ地ニ住ゴルモノデアリマシテ例ヘバ中央アフリカノ

「カメルーン」(英領)トーゴーランド(仏領)「ルアンダ・ウルンヂー」(白)等ノ如キヂアリマス

然ルニC式ハ受任国ノ領土ノ構成部分トシテ完全ニ其ノ統治権ノ下ニ統治スルモノヂアリマシテ例ヘバ「西南アフリカ」(南阿聯邦)「サモア」(ニュージランド)「ナウル」(英)赤道以南ノ旧独領土太平洋諸島(土豪)赤道以北ノ旧独領土太平洋諸島(日本)等ヂアリマス即チ本件マーシャル、マーシャル諸島ハヤルートノ環状珊瑚島ニC式委任領ニ属シ完全ニ日本領土ニ非ズト雖モ日本領土ト同様ニ考ヘラレ日本帝国ノ一構成部分トシテ完全ニ日本ノ法律ニ依リ統治セラレタルニテ日本帝国ノヘラ式ニ南洋庁ヲ置キ其ノ首長ヲ各島ニ置キ支庁並ニ裁判所ヲ設ケ行政司法其ノ他完全ニ統治ヲ行ッタヂアル将ニ然ラバ同地方ハ日本ノ統治下ニアル日本ノ領域ヂアリマシテ他ノ国ノ権限ノ及ブベキ余地ハ全クナカッタヂアリマス。

三 従ッテ本件被告人ニヨリ処刑セラレタル訴因本件ノ被害者等島民ハ日本帝国ノ法ニ依リ統治セラレタル日本臣民ト同一ヂアルノヂアリマス。

四 而シテ右被処刑者島民等ハ日本ニ居住セル日本刑法、海軍刑法軍機保護法其ノ法規ニ違反シタルヲ以テ同法ニ照シテ審判セラレタヂアリマス。

五 被告人ノ行為ト戦争犯罪ノ関係ニ就テ申立ヲマスガ

ノ如キ第四回ニヤルタ第一般命令第二十号ニ依ル聯合国最高司令部ノ設ケタル極東軍事裁判條例ハ極東軍事裁判ニ非ル本件ニ適用スベキモノデハナイト信ジマスヂアリマスガ

此ノ国際軍人裁

"M(13)"

判條例ハ特別ノ目的ト特別ナル機構トヨリ以テ制定セラレタルモノデアッテ戰爭
犯罪ノ対照ヲ示ス範圍ニ亘ッテ居ルノデアリマシテ
其ノ五條ニ於テ
(イ) 平和ニ対スル罪
(ロ) 通例ノ戰爭犯罪　戰爭法規又ハ戰爭慣例ノ違反
(ハ) 人道ニ対スル罪
ニ関スル規定ガアルノデアリマス.
依リニ此ノ規定ヲ以テシマシテモ
日本帝国ノ領域内ニ於テ其ノ臣民ガソノ国内性ノ違反ヲ其ノ性ニ於
テ其ノ公務員ガ職務上ノ行爲トシテ之ヲ施行シタル行爲ハ右
(イ) 平和ニ関スル罪ニ該当セザルハ勿論
(ロ) ニ於ケル戰爭法規又ハ戰爭慣例ノ違反ヲモト言ヒ得ベカラズ又
(ハ) 人道ニ関スル罪ノ規定ニモ該当スル文ニハ非ル事ハ條理上明白デアリマス.
此ノ人道ニ対スル罪ノ如キハレイケスノドイツノ如キ
ノ情ニ於ケル、ニ於テハ
主ヂ得ベキモノト考ヘラレマスガ日本ノ如キ
ノ情ニ於テハ尚ホ皆思ヒ
思考サレルノデアリマス.
況ンヤ本件ノ如キ被告ノ行爲ハ本規定ニ該当スルモノト考フルハ條理ヲ
許サザルトコロデアリマシテ
ノ際軍事裁判ニ非ル本裁判ニ於テハ最モ狹義ニ
於ケル戰爭犯罪ノ観念ヲ定ムベキモノト信ズルモノデアリマス. 依ッテ本件被告
人ノ行爲ハ断ジテ戰爭犯罪ニ非ズト確信スルモノデアリマス.

第二　刑法ノ効力ニツキ
即チ刑法ノ効力及ビ範圍ニツキ法理ノ概要ヲ申上ゲマス.

"M(14)"

一. 時ニ関スル効力

法律ノ効力ハ其実施以前ノ事実ニ及ボサザルヲ原則トスルノデアリマシテ之ヲ不遡及ノ原則（Principe la non-retoactivité）ト謂フノデアリマス

日本刑法ニ於テハ此ノ原則ニ関シ犯罪後法律ニ依リ刑ノ変更アリタル時ハ其軽キモノヲ適用ス（刑法六条）ト例外規定ヲ設ケテアルノデアリマス.

之ハ訴訟手続ノ関シテモ同様デアリマス

特別ノ法律ガ制定セラレザル限リ法ノ制定以前ニ発生セル事件ヲ新法ニ依リ處理スルコトハ出来ナイノデアル.

例論一ノ行為又ハ連続セル行為ガ新旧両時ニ亘リ行ハレタル場合ノ如キ新法ニ依リ之ヲ處理スル場合ガアルガ此ノ場合ニモ施行法ニ之ヲ規定スルノガ各国ノ立法例デアル

特ニ本件ノ如キハ犯罪ノ行ハレタル時ニ関スル規定ニ依ッテ片付ケラルベキ事柄デハナイ. 即チ本件行為ノ行ハレタル當時ハ日本ニ統治ノ時期デアッテソノ行為地ハ日本ノ領土内デアルノミナラズ行為者モ被行為者モ何レモ日本人デアル.

之ニ未ダ対シテハ全ク外国ニ於ケル外国ノ行為デアルノミナラズ犯罪ノ未ダソノ土地ヲ占領セラレタノ以前ニ於テ之ヲ裁判スルコトガ如何ニシテ生ズルカ之レハ犯人ガ外国ニ於テ行ハレタル外国ノ犯人ガ犯罪後偶々米国ニ在ッテ在ルト同様ノ法律関係ガアッテ米国ハ之ニ対シ現在在住スルノ理由ノ以テ米国ノ裁判権ヲ有スト言ハルカ之ハ他国ノ主権ヲ侵害スルモノデアル. マサカ之ヲ是認スル者ハアルマイ 之ト同様本件ノ関シテ米国ノ裁判権アリトハ到底法理ノ許サザルトコロデアル.

JM(15)"

二 人ニ関スル効力

人ニ関スル効力ハ国法上国際法上除外セラレタルモノヲ除ク外、何人ニ対シテモ其効力ヲ及ボスモノデアリマス 然シナガラ此ニ国ノ効力ニ依リ ソノ制限ヲ受クベキハ勿論デアリマス.

而シテ左ノ除外ソノ適用ヲ受ケザルモノハ

(イ) 外国ノ元首 大統領 其家族及其従者

(ロ) 信認セラレタル外国ノ外交官、其家族及内国人ニ非ル雇員 従者

(ハ) 承認ヲ経テ入リ来リタル外国軍隊及軍艦、航空機ニ属スル軍人軍属等デアリマス

三 土地ニ関スル効力

土地ニ関スル効力ハ刑法ノ効力ト裁判権トハ之ヲ区別スルヲ要スルノデアリマスガ裁判権ニ就テハ後ニ之ヲ述ベマス.

刑法ノ土地ノ関スル効力ノ関シテハ学説上大別シテ

(イ) 世界主義 (Principe d'universalite)

(ロ) 属地主義 (Principe de territorialite)

(ハ) 属人主義 (Principe de personalite)

ニ、保護主義 (Sahuty prengip)

ノ四トナスノデアリマスガ

日本ニ於テハ属地主義ト属人主義ヲ折衷シテヲリ日本ノ領域内ノ犯罪及外国ニ於ケル犯罪ト雖モ日本ノ行為ニ就テハ又刑法ノ適用アリト為シテヲリマス (刑法第一條 第二条)

即チ刑法第一條ハ

何人ト雖モ帝国内ニ於テ又帝国外、帝国ノ船舶内ニ於テ犯シタルモノニ之ヲ適用ス

(M(16))

刑法第二条ニ於テ
特定ノ犯罪ニ限リ外国ニアル外国人ノ犯罪ニ付キ之ニ刑法ヲ適用スル
場合ヲ規定シ
「外患ニ関スル罪」（第二章 第八一、八二、八三、八四、八五、八六、八七、八八、
八九条）ノ之ヲ含ムモノト解シテアリマス。
又陸軍刑法第四条 海軍刑法第五条ニ於テ
「帝国軍占領地ニ於テ陸海軍ノ人カ刑法又ハ他ノ法令ノ罪ヲ犯シ
タル時ハ之ヲ帝国内ニ於テ犯シタルモノト看做ス。陸海軍ノ人ニ非ズト
雖モ帝国臣民、従軍外国人及俘虜ノ犯シタルトキ亦同ジ」
ト規定シテアルノデアリマス。

第三 裁判管轄権ト刑法ノ属地主義

裁判管轄権モ亦刑法ノ効力ト同ジク、一ノ時ニ関スル効力 二ノ人ニ関
スル効力 三ノ土地ニ関スル効力ノ三面ヲ有スルモノデ裁判権ハ主権ノ実
力ヲ実際ニ行使スルモノデアルガ故ニ刑法ノ効力ノ及ブ範囲ハ主権ノ
効力ノ及ブ範囲ト略ボ一致スルヲ得ズ。ソノ範囲ハ条約ニ特別ノ根據ナキ限リ
ソノ領域ニ限ラレルモノデアリマス。

一、人ニ関スル効力ニ関シテ述ブレバ
ソレニ属スル臣民又ハ臣民ノソノ国内ニアルト外国ニアルトヲ問ハズ
裁判権ニ従ウベキモノデアリマス
二、土地ニ関スル効力ハ即チ一ノ実力ノ実際ニ行使ヲ得ル領域内ニ
在テ罪ヲ犯シタル者ニ対シテハ何人ト雖モソノ主権ノ及ブモノデアル
モノソノ故ニ裁判権ノ及ブモノデアリマス。然ルニ前ニ刑法ノ効力ノ
所ニ述ベタルガ如ク一ノ外ニ元首、君主、大統領ノ家族、従者

"(17)"

(二) 信託セラルル外ニシテ、外交官其ノ家族及内ニ非ル雇員並ニ承認ノ為メニ入リ来ルル外ニシテ、軍隊、軍艦、航空機ニ属スル軍人、軍属等ニ及ベサルガ外ニシテ、領域内ノ一切ノ事項、軍艦、航船、航空機ハ、領土ト同ジク裁判権ノ及ブ範囲デアリマス。

又治外法権ハ外ニシテ、領域内ニ於ケル其ニシテ、裁判権ノ行使ハ義務デアッテ例外的原則デアリマス。此点ニ関シハーバート大学教授ジョウジ、グラフト、ウイルソン博士ハ(Dr Grafton Wilson Professor at Harvard Univarsity)曰ク、

"Nationals are person who owe allegiance to state and are entitled to its ~~pla~~ protection Citizen subject owe allegiance to and are entitled to the protect of a given state whatever their slates under domatic low.

(Over its national whithin its own jurisdiction extends, not only to its domain, but to ocafe its play on the sea or in the air outside the jurisdiction of another state.

Lex Loci, Lex fori, is the accepted principle as stated by the supreme court, general and almost universal rule is that the character of an act as lawful or unlowful must be determined wholly by the law of the country where the act is done.

A state has, in general, jurisdiction over it national

"(18)"

when in a foreign port in ~~v~~vessel, flying its flag, for acts beginning and ending on board the vessel, or for acts which do not take effect outside the vessel."
斯クテ右ニ述ベタル、ソ裁判所ノ詳細ナル判決ヲ詳細ニ挙ゲテ説明ニ代ルノデアリマス。
(全書ノ四六、ノ四八頁)ガ繁ヲ避ケ為ニソノ引用ヲ省略スルガ之ニ依リマスト
米国ハソノ市民乃至外国ヨリ入国シ且ツ市民タラント宣言セル外国人
(~~-~~declared his intention to become a citizen)ニ対シテモ
自国者ニ対スル外国ノ裁判権ヲ武力ヲ行使サヘスルノメカニテ(whith an intimation that force would be needed) ~~and~~ 排除スルノデアリマス
而シテ判士ハ最後ニ次ノ如ク述ベテ居ル
After mentioning that the man (Kasta) had by declaration manifested the intention of making the United States his permanent abode, secretary Yaroy say: The establishment of his domicile here invested him ~~with~~ with that character he acquired the right to ~~or~~ claim protection from the United States, and they had the right to extend it to him as long as that character continued.
This right to protect person having a domicile though not native ~~&~~ born or natural citizen rest ~~on~~ on the foundation justice and the opinion
"M(19)"

to be protected is earned by consideration which the protecting power as the liberty to disregard.

結論トシテ

" A national is subjected to the jurisdiction of his state and is exampted from these of other state"

secretary Mary says ; The figat to protect the nation is based upon the fandmental rule of justice ; and no one is able to disregard it freely

ト述ベテ居ルノデアリマス

斯ノ如ク正義、根本原則ヲ以テシ米合衆国ガ自国民保護ノ為ニ対スル外国ノ裁判権ヲ断呼排除シ、正義人道ノ標語ヲ世界ニ誇ル全国トシテ当然、措置デアリ吾人ニ取リ、熱意ヲ以テ賛同スルモノデアリマス

然シ之ト同時ニ他国民ニ対スル他国ノ裁判権ヲ絶対ニ尊重スルコトデナケレバナラヌ事ハ申ス迄モアリマセヌ.

三 時ニ関スル効力ニ関スル原則ニツイテモ上ニ述ベタ通リデアルガ元ハ一国内ニ於ケル新旧両時法ノ関係トハ全ク ノ趣ヲ異ニシ 本件行為地ナル マーシヤル諸島ハ当時日本領土デアッタ、而シテ行為時ハ当時日本ノ統治セル時期デアッテ 米国ニ対シテハ全ク外国デアッタ

現在米国ガ占領シタノ故ヲ以テ此ノ法律関係ニ変更ヲ生ズルモノデハナイ。 米国ニ於イテ外国内ニ起ッタ外国人ノ犯罪ニ対シ裁判管轄権ノ有ル旨ノ理論ガ生ジタ来ルノ不可解千番デアリマス.

米国ノ外国ニ於テ発生シタル外国人ノ犯罪デ米国又ハ米国人ニ

"m (20)"

関係ナル事件ニ係ル犯人カ米国ニ現在スルトノ故ヲ以テ當テ米国裁判所デ裁判シタル例ガアリマス勿論アリトスレバ外国ノ主権ノ侵害デ、国際問題ヲ惹起スルデアリマセウ。斯カル場合ハ犯人所属国ガ犯人引渡ヲ要求ヲナシ米国ハ犯人引渡條約ヲ締結シテアル場合ニヲ引渡サナケレバナラヌ、然ラザル場合ハ、引渡ヲナイト否トハ米国ノ自由デアルガ、之ヲ自分ノ手デ裁判スルコトハ何レノ国ノ際法ニモ認メラレテ居ナイノミナラズ、夫レハ法ノ原則ヲ根本的ニ破壊スル処デ断ジテ許サレナイノデアル

結　論

以上述ベ来リマシタ理論ニヨリマシテ

本件ノ裁判権ハ日本国ニアリ米合衆国ニアラズトノ結論ハ容易ニ且ツ確ニ生ズルノデアリマス

即チ(一)被告人井上文夫ハ日本ノ臣民デアッテ而モ組織アル日本帝国軍隊ニ所属シ公人トシテ日本領土内ニ於テ其ノ職務ヲ遂行シタノデアル前述シタル如ク承認ヲ受ケ他国内ニ入リ来レル外国ノ軍隊デサヘソノ国ノ裁判権ヲ排除シテ自国ノ裁判権ニ服スルコトガ国際法ノ原則デアルコトヲ考フレバ米被告人ガ米国ノ裁判ニ服スベキデナイコトハ言ヲ要シナイノデアル

(二)被告人ノ本件起訴状ノ及ビ米ニ各罪状項目ニ記載セラレタル行為ハ、コーシャル諸島ヤルートノ環礁珊瑚島ニ於テ行ハレタモノデアリマスガ仝地ハ前述ノ如ク當時日本帝国ノ委任領土デアッテ日本ノ構成部分トシテ完全ニ日本ノ統治ニアッタ日本ノ構成部分トシテ完全ニ日本ノ統治権ノ及ブ日本ノ領域デアッテ仝地域内ノ犯罪ガ日本ノ裁判権下ニアッテ

他ニ主張スル余地ハナイノデアリマス

(三) 本件起訴状ノ一ニ各罪状項目ニ記載セラレタル被害者ハ何レモマーシャル諸島住民ニシテ当時完全ニ日本ノ統治権ニ服シ居リタル日本臣民デアッタコト又明白デアル.

上述ノ如ク本件事実ハ人ニ関スル効力.土地ニ関スル効力.時ニ関スル効力何レノ点ニ於テモ日本ニ以外ニ裁判権ヲ有スル事実ハアリ得ナイノデアリマス

(四) 次ニ了解ニ苦シムハ.

起訴状ノ罪状項目ニ於テ被告人ノ行為ハ戦争法規並ニ慣行ニ違反シタルモノナリト記載シテ居ルノデアリマス.被告人ノ行為ハ公務員ノ法令ニ依リ職務ヲ執行シタルモノデアッテ而モソノ内容ハ日本帝国ガ其ノ統治下ニアル臣民ガソノ名性ニ違シタルモノニシテ何等戦争法規又ハ慣行ニ関係ナイモノデアリマス.

被告人ノ行為ニ対シ外国ニ関スル罪タル刑法第八一乃至八七条ヲ適用シソノ罪状ニ「間諜」罪ヲ以テ或ハ之ヲ名除性上レスペクタブルナ事ヲ宣言セラルタイ.

要スルニ被告人ノ行為ハ戦争法規等ノ何等ノ関係ヲ有シナイ.従ッテ戦争犯罪ノ「カテゴリー」ニハ断ジテ入リ得ナイ性質ノモノデアリマス.従ッテ何レノ点ヨリ見ルモ本件裁判権ハ完全ニ日本帝国ノ有スルモノデアッテ米国裁判所ノ軍事法会議ニ於テ裁判セラルルハ明ニ違法デアリマス.速ニ公訴棄却アランコトヲ

(終)

"M(23)"

1026

ARGUMENT IN OBJECTION CONCERNING THE JURISDICTION OF THIS CASE FOR THE ACCUSED, INOUE, FUMIO, DELIVERED BY AKIMOTO, YUICHIRO, THE DEFENSE COUNSEL ON 5 MAY 1947

If it pleases the commission:

The defense objects to the jurisdiction of this commission over the case of defendant INOUE, Fumio. In insist that this commission has no jurisdiction to try this case and that the charges ought to be rejected.

Before commencing my objection, I would like to point out the fundamental errors in the assertion of the prosecution. Although I have never heard the opinion of the judge advocate concerning the jurisdiction of this case, this case is entirely the similar case to the Furuki case which was tried before in this court. I believe that the objection of the judge advocate for this case may be regarded as same as that of previous case, and I shall cite his previous reply and rebut it.

The judge advocate insisted that this commission has jurisdiction over this case, and stated the reason as follows:

He insisted first that: There was the Japanese Ponape Local Court in the Marshalls Area, but it came under the government of the Commander Marianas of the US Forces on 5 January 1946. With the surrender of Japan, the Japanese jurisdiction disappeard, and the Ponape Local Court lost its existence. The jurisdiction over the Marshalls came under the jurisdiction of the US Military Government.

He stated it is cleard by "Proclamation 1, issued by Admiral Chester A. Nimitz, as Admiral, United States Navy, Commander-in-Chief, United States Pacific Fleet and Pacific Ocean Area, Military Governor of the Marshall Island Areas."

I admit that this is quite proper, and it is needless to cite the Proclamation.

Secondly, he stated, "Under proclamation No. 2, Article IV, it is provided as to violations of the Japanese Penal Laws, 'Any person who commits any acts which violate any provisions of Japanese Penal Law in effect in these islands prior to the occupation by the Forces under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor, or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct.....!"

He insisted that, according to this stipulation, the jurisdiction over the accused in this case who violated the Japanese Criminal Code which was effective before the occpuation naturally lies in this Military Commission.

"Prior to the occupation" in this proclamation modifies "Japanese Law in effect in those islands." So the clause means "Japanese Law which was effective before the occupation." It means that an offense committed before the occupation should be punished by the Japanese Law which was then effective. This is simply natural from the ex post facto principle, and as to this point the proclamation is right. But it does not mean at all that the United States can freely try and punish after her occupation any offenses which were committed under the administration of other country before the occupation. Such cannot exist in a constitutional state especially in the United States which honors righteousness more than anything else. I think no lawyer can imagine such a thing.

We must not forget that this is an order concerning the enforcement of laws in order to meet the abnormal conditions of the transitional period. It is not a law whatsoever. It is nothing but a temporary order for dealing with military affairs. It is not a law of the United States.

In the transitional period of the occupation, the laws of the United States are sometimes inapplicable; and the former effectivelaws of the place are sometimes insufficient to hold a trial.

For instance, an act or a series of acts are done through the two periods, old and new, to wit, before the occupation and after the occupation. In such a case, the occupation forces naturally have jurisdiction over the case. But the part of the act or series of acts which was done before the occupation should be tried by the laws before the occupation according to the ex-post fact principle.

This proclamation was issued in order to meet such circumstances; this is the common knowledge of the law! However, the judge advocate misunderstood the meaning, and stated that America has jurisdiction over any offenses of any nationals before the occupation, even though they were committed byt the people of other states in the territory of countries other than America. This is inadmissible from the reason of law. The trial held in violation of this principle is invalid even if it is entirely proper in its form. In this and the preceding case, the utmost careful procedures were carried out for punishing the offenses, but the proceedings were somewhat illegal. The judge advocate stated that they were not trials and indicted them as crimes. If the judge advocate holds that opinion, it is also a crime to hold a trial by violating the principles of law, is it not? I think we must be careful concerning this point.

I be'ieve that the proclamation does not compel such an illegality. If it does, the proclamation violates the principles of law and international law. A proclamation is nothing but an order, so it cannot abolish or change the law. Then, the proclamation is invalid.

The judge advocate stated thirdly, "In the precept of 21 February, 1947, this Military Commission was authorized to try all offenses within the jurisdiction of exceptional military courts and in addition was specifically authorized to exercise jurisdiction 'over offenses and Japanese military personnel now in the custody of Commander Marianas, referred to in the dispatch of the Judge Advocate General of the Navy.'"

Needless to say, this precept was issued in regard to formal authorisation of this Commission. It means that this Commission may once accept the charges and specifications preferred against the Japanese military personnel now in the custody of Commander Marianas and try them, and it does not mean that this Commission can hold a trial without giving any regard to whether or not it has actual jurisdiction. If the Commission itself finds that this court has no jurisdiction over theoffense, or if there is an objection by the parties concerning the jurisdiction,of this commission must consider them according to the principles of law, and reject the charges if it so determines. Any Judge Advocate General cannot deprive the commission of this authority by the precept. I think the judge advocate himself will know that the trial is conducted according to law and any order can not exert an influence upon it. It is the fundamental mistake of the judge advocate to state that the precept which only provides a formal authority can control the true jurisdiction based upon the principle of law.

The judge advocate also stated:

"This Commissionis not empowered to divest itself of this jurisdiction specially delegated to it by virtue of the precept, duly issued and pursuant to the powers of the convening authority as set forth in paragraph one of the precept.

"The Judge Advocate General of the United States Navy, the War Department and the Department of State have carefully considered the problem of jurisdiction now raised by the defendant. It is their considered opinion that jurisdiction rests in this commission. The dispatch referred to in the precept clearly recognizes the jurisdiction of this commission. In the later communication the Judge Advocate General in referring to the instant case specifically authorizes the charge of the crime of murder as defined under the local applicable law, and this charge constitutes Charge I against the accused."

However, no matter how strong an authority the Judge Advocate General has, and no matter how careful consideration is paid, the judicial authority is independent. It is impossible to order a trial disregarding the principles of law. The paragraph, "This commission is not empowered to divest itself of this jurisdiction....." desecrates the sacred jurisdiction. Still less, the meaning of precept does not show the true jurisdiction. No order can do that way, even an order of the President. It is nothing but the technical jurisdiction which enables the court to accept the indictment once which charges the Japanese military personnel now in the custody of Commander Marianas. It does not order a trial to be held without true jurisdiction. It is the commission who determines whether this court has the true jurisdiction, not the administrative authorities outside the court. Independent judicial authority does solmenly exist. Who can hold a secred trial without it!

Judge advocate cited next the examples in the International War Crimes Tribunals at Nuremberg and Tokyo, and then the SCAP rule:

"2. Jurisdiction.
a. Over Persons. Military Commissions appointed hereundor shall have jurisdiction over all persons charged with war crimes who are in the custody of the convening authority at the time of the trial.
b. Over Offenses.
(1) Military commissions appointed hereunder shall have jurisdiction over all offenses including, but not limited to the following:...
. . . .
(c) Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, ... whether or not in violation of the domestic laws of the country where perpetrated."

The judge advocate stated that this stipulation is applicable to this case.

When a man who is not an expert of the law reads this stipulation, he will understand it as: Any acts done at any time in any place can be tried as war crimes if only the person is arrested as a war criminal. Is such a conception legally admissible? If it is admissible, then the victorious nations can try and punish the defeated nations without reason. We express our deepest respect for the Allied Nations who are trying to establish better morals for tomorrow according to the righteousness of the civilized society, but we don't think that they will use such violence inconsistent with the law.

This is the provision for crimes which are pure war crimes. It has not yet thought to try offenses under the name of war crimes or by the conception of the moral standards of the civilized society. Therefore, neither in international law nor in domestic laws were there provisions which provided for the punishment of

such crimes. The war crimes trial was the first attempt which was established after the termination of the war. So, there is naturally some unreasonableness and inconsistency when we see it from the former point of view of law. But for the establishment of better morals for tomorrow, we must bear them. But this unreasonableness and inconsistency should be limited within the scope which our sense of righteousness will permit. It should not be limitless whatsoever like "Kirisute Gomen" of Japanese feudal ages. In the feudal days of Japan, warriours could kill civilians. If they killed them, they were not responsible for the murder, because, in such cases, the civilians were impolite, it was thought. This is the "Kirisute Gomen," and this word was the abuse toward the Japanese feudalism. I don't think that the victorious nations of the war will permit this "Kirisute Gomen."

Then, there must be a limit as set forth in SCAP rules.

SCAP Rule; 2. Jurisdiction, b. Over offenses. (1) (a) reads: "The planning, preparation, initiation or waging of a war of aggression or a war in violation of internation treaties, agreementsor assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

It is simply natural that the acts in the next paragraphs are considered as war crimes according to this stipulation.

For instance, the following murders are considered war crimes: Killing of a pacifist, who objected to the waging of the war by militarists who tried to commence the war; killing of non-combatant without justifiable cause in the occupation territory; killing of prisoners of war without justifiable cause, etc., These crimes are all inhumane and violate international justice. But war crimes do not include such cases as this one in which domestic persons violated domestic laws and were punished by domestic law.

But, if the judge advocatesinsists they do, then every offense which was once tried in the Japanese law ought to be tried again. I don't think that SCAP rules read in that way.

I ask both members of the commission and judge advocate to consider this case carefully.

The natives, Japanese subjects, committeddfelonies, namely, murder, theft and spying, int the face of the enemy, and were tried and punished according to the Japanese laws, . . . that is this case. The only question is whether or not the trial procedure was perfect. And, if it was not perfect, whether or not the imperfect procedure was permissible in that pressing battlefield. That is all in question. And it is not an inhumane act immediately concerning the war

provided in the SCAP rule. Still less, is it a crime which ought to be charged as murder. If there was a fault in the trial procedure, only the administrative responsibility comes to be the question. And as the common sense of those like myself who participate in the Japanese judicial affairs, official reprimand or dismissal from the office are considered as severe punishments for the fault. I would like to repeat again: This is not a war crime.

The paragraph in the SCAP rule "jurisdiction over all persons charged with war crimes who are in the custody of the convening authority at the time of trial," as similarly as in the paragraph of the precept means the technical jurisdiction, not the actual jurisdiction.

The phrase, "before and after the war" concerns only crimes which are war crimes not general crimes.

I again ask the Commission to have a special consideration that the International Tribunals of Nuremberg and the Far East were established with special purpose and organization and that this court is purely an American Court. So, it is unlawful to apply the rules of the said tribunals to this court. It is simply clear from the nature of the court.

As I stated above, the assertion of the Judge Advocate that this Military Commission has the jurisdiction over this case is a fundamental mistake. I insist that this commission has no jurisdiction to try this case. I shall state my legal opinion as follows:

I would like to enumerate the reasons as follows:

1. The accused's nationality, acts and the place where the acts were committed.
   (a) Country and nationality of the accused.
   (b) The place where the acts of the accused were committed and the sovereignty of the place.
   (c) To what country did the persons who were killed belong and by what laws they were governed when they were executed by the accused.
   (d) For what deeds and by what laws were these executed persons punished.
   (e) Relation between the acts of the accused and war crimes.

2. On efficacy of the Criminal Code:
   (a) Over time.
   (b) Over person.
   (c) Over place.

3. Jurisdition of the trial.

After I argue on the general rules of the foregoing items, I would like to go on to the conclusion.

I. The accused's nationaly, acts; the place where the acts were committed and their relation to the war crimes.

1) As shown in each specification of Charges I and II, INOUE, Fumio, was a soldier in the Japanese armed forces and it is unnecessary to state that he was (and is) a subject of the Japanese Empire.

2) Each specification of Charges I and II read that the accused murdered in 1945, on Jaluit Atoll, Marshall Islands, natives of the above island. Jaluit Atoll, in the Marshalls, was formerly the territory of Germany. After the termination of the World War I, the Atoll was mandated to Japan by the League of Nations, and since then it has been under Japanese mandate. As you know, there are three types of mandatory rule "A," "B," and "C" types.

"A" type is where a territory has reached a state of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone. For example: Iraq and Palestine under British Mandatory formerly belonging to Turkey, and Syria under French Mandatory.

"B" type being of lower culture and development than "A" type Mandatory. The Mandatory must be responsible for the administration of the territory. For example:Territories in Central Africa , Cameroons (British and French), Togoland (British and French), Ruanda-Urundi under Belgium, etc.

"C" type is where the territory is completely administered under the laws of the Mandatory as an integral portion of its territory. For example: The German Protectorate of South West Africa (Union of South Africa), Samoa (New Zealand), Nauru (Britain), all the former German islands situated in the Pacific Ocean lying south of the Equator (Australia), all the former German islands situated in the Pacific Ocean lying north of the Equator (Japan), etc.

Therefore, the islands in this case, Jaluit Atoll in the Marshalls, is a "C" type Mandatory. This island is, exactly speaking, not a Japanese territory by an integral portion of the Japanese Empire, and is administered by Japanese laws as any other portion of the Japanese Empire. Japan established a civil government in Palau and under its jurisdiction established at various places branch offices and courts and completely enforced administrative and judicial powers, etc. As stated, this territory administered by Japan, was Japanese territory and being completely under Japanese authority, no other nation had any right to interfere.

3) Therefore, the natives executed by the accused are in the same category as Japanese citizens administered to by Japanese laws.

4) The natives who were executed had been punished by Japanese laws because they had violated the Japanese Criminal Code, Naval Criminal Code, Military Secret Law, and others.

5) The relation between war crimes and acts committed by the defendant.

I believe the regulations issued by the Supreme Commander Allied Forces, Japan, General Order Number 20 dated 26 April 1946, concerning the Far East International Military Tribunal cannot be adapted to this Military Commission, which is not an International Military Tribunal.

The above International Military Tribunal regulations were issued with a special purpose and system. The sphere of War Crimes to which it was to be adopted was very large.

In Article Five of the above order, there are the following rules:

1. Crimes against peace.
2. Conventional War Crimes, Violations of the Laws and Customs of War.
3. Crimes against humanity.

Even if we compare the acts committed with these regulations, we would find the following:

Acts that were committed and punished by a citizen of Japan, in Japanese territory, in violation of Japanese laws and punished by an official of that country as an act of his office does not constitute a violation of (1) Crimes against peace. It could not be said to have (2) violated the laws and customs of war, and it is logically clear that it does not come under the category (3) of crimes against humanity. Crimes against humanity may have been committed under the circumstances prevailing in a country like Nazi Germany, but I think there were no such cases under the circumstances that existed in a country like Japan. Reason would not permit the actions of the defendant in the case to have violated this article. I believe it is reasonable that this Military Commission, which is not an International Military Tribunal should define its conception of a war crime in a narrow sense. Therefore, I am convinced that the actions of the defendant in this case absolutely do not constitute a war crime.

II. The efficacy of the Criminal Code. In other words, I would like to speak on its efficacy, the sphere to which it can be adapted and an outline of the theory upon which the law is based.

1. The efficacy of the law over time:
   (a) It is the general principle in law that a law shall have no effect on actions which occurred before its enforcement. This is called "Principe de non-retroactivité," or ex-post facto principle. In the Japanese Criminal Code, there is a special clause concerning this principle (Criminal Code, Article 6): "If there be amendment of punishment by a new law promulgated after the crime, the lighter punishment shall be adopted."

This is as same in the trial procedure. If a special law is not established, the case which occurred before the establishment of the new law cannot be dealt with by the new law. Of course, if an act of a series of acts were done through the two periods, old and new, sometimes the act or acts are dealt with according to the new law. In such cases, it is necessary to provide for it by the regulations for the working of the law--this is the case in each country.

Especially, this is not the case which may be dealt with by only the regulations concerning time.

At the time when the acts in this case were done, Japan was exercising her administration over the place. That is the place where the acts were done was the Japanese territory. Both the persons who did the acts and the persons against whom the acts were done were Japanese. For the United States, this case was the acts of a foreigner done in a foreign country. Can the United States try this case only because she occupied the place? This case is just as same as that in which a foreign criminal has escaped into the United States after he committed a crime in a foreign country. Can it be said that the United States can try him only because he is now living in the United States? This is the infringement of the other country's sovereignty. I think there is no one who answers this question in the affirmative.

2. The efficacy of law over person. Laws have full efficacy over any person with the exceptions provided for in domestic and international laws. But, of course, the efficacy over person is limited by that of place. In International Law, persons who are excepted from the efficacy of laws are as follows:

   (a) Heads of nations and Presidents of foreign countries, their families, and subordinates.
   (b) Legally admitted diplomats of foreign countries, their families, and employees who are citizens of foreign countries.
   (c) Military personnel and civilians in military service who are attached to foreign troops, war-ships or planes which were legally admitted.

N(x)

3. Efficacy of law over land. In the efficacy of law over land, you have made a distinction between the efficiacy of Criminal Law and jurisdiction. The latter I shall argue on later.

Concerning the efficacy of criminal law on land from an academic standpoint, we can make the following distinctions:

(a) Principe a universarite or universal principle.
(b) Principe de territorialite or territorial principle.
(c) Principe de personalite or principle of persons.
(d) Schutz prinzip or principle of protection.

In the Japanese Criminal Code (b) and (c) are adopted. In Articles 1 and 2 of the Japanese Criminal Code, it is stated that this criminal code shall be applied both to offenses committed in Japanese territory and to the offenses of Japanese, committed even in foreign countries.

Article 1 of the Japanese Criminal Code states that: "This code shall be applied to all offenses of any person, committed in Japan or in Japanese vessles outside the Japanese territory."

Article 2 of the same code states that: "This code shall be applied to specified offenses committed by foreigners in foreign countries." And in the offenses provided here, treason (Articles 81 to 89) is included.

In Article 4 of the Criminal Code of the Japanese Army and Article 5 of the Criminal Code of the Japanese Navy are the following provisions: "Violation of Criminal Codes or other laws by Japanese Army (Navy) personnel in territory occupied by Japanese Forces shall be dealtwith in the same was as an offense in Japan. The aforementioned offense of Japanese civilians, foreigners in service of Japanese Forces and prisoners of war, even though they are not Japanese Army (Navy) personnel, shall be dealt with according to the above provisions."

"Regulations for court procedure in South Sea Islands" was promulgated in 1923 by the Imporial Ordinance Number 26. Since then, the Japanese Criminal Code has been enforced there.

III. Jurisdiction and the principles of International Law.

There are three kinds in the jurisdiction just as in the efficiency of the Criminal Code. They are: (1) over time, (2) over person, (3) over place. But since jurisdiction is the actual use of sovereignty, it rests within the scope of sovereign power, although the efficacy of criminal code may reach farther. And the scope of the jurisdiction is limited within the territory of the state if not otherwise provided in International Conventions.

"N(10)"

(1) Jurisdiction over offense. Citizens or subjects of a country are under the jurisdiction of the country whether or not they are in the country.

(2) Jurisdiction over place. A country has jurisdiction over any offenses and any persons within the scope of its sovereign power. It has jurisdiction over persons of any nationality. As I mentioned about the efficacy of criminal code, it has also no jurisdiction over the following persons though they are in the place under its jurisdiction.

(a) Heads of nations or Presidents of foreign countries, their families and subordinates.
(b) Legally admitted diplomats in foreign countries, their families and employees who are citizens of foreign countries.
(c) Military personnel and civilians in military service who are attached to foreign troops, war-ships, or planes which were legally admitted. But a country has full jurisdiction over war-ships, ships, and planes of the country though they are in foreign territories. Extra-territoriality is an exception principle to use jurisdiction in foreign territories.

Concerning this point, Dr. George Grafton Wilson, professor of the Harvard University in his work "International Law," pp. 130-131 states:

"Nations are persons who owe allegiance to a state and are entitled to its protection. Citizens and subjects owe allegiance to and are entitled the protection of a given state whatever their status under domestic law.

"Over its nationals within its own jurisdiction a state has full authority. This jurisdiction extends not only to its domain, but to craft, its flag on the sea, or in the air outside the jurisdiction of the state.

"Lex Loci Lex fori is the accepted principle as stated by the Supreme Court. The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

"A state has, in general, jurisdiction over its nationsl when in a foreign port or vessel flying its flag, for acts beginning and ending on board the vessel, or for acts which do not take effect outside the vessel."

Then he cites the examples of trials of such cases and explains it in detail (pages 147-148 of the above volume). But, I would like to omit them. However, according to what he says, the United States rejected the jurisdiction of foreign countries over its citizens and even over foreigners who declared their intention to become citizens "with an intimation that force would be needed."

And at the end he states:

"After mentioning that the man (Kasota) had by declaration manifested his intention of making the United States his permanent abode, Secretary Marcy says: The establishment of his domicile here invested him with the national character of this country and with the character he acquired the right to claim protection from United States,and they had the right to extend it to him as long as that character continued. The right to protect a person having a domicile though not native born or national citizen rests on the foundation of justice and the claim to be protected is earned by consideration which the protecting power has liberty to disregard."

In conclusion:

"A national is subjected to the jurisdiction of his state and is exempted from those of another states. Secretary Marcy says: The right to protect the nationals is based upon the fundamental rule ofjustice, and no one is able to disregard it freely."

It is quite proper for the United States, which highly advocates righteousness and humanity to the world to show exactly the fundamental rule of justice and to reject absolutely the jurisdiction of foreign country for the protection of its citizens. I agree from the bottom of my heart to this dispositian. But, on the other hand, we must admit that it is quite natural to respect the jurisdiction of other countries over their citizens.

Although I have already discussed the efficacy of criminal law over time, I would like to explain it here again.

It is entirely different in meaning from the relatian of old and new laws of a country.

The Marshall Islands, the place where the acts of this case were done, were then Japanese territory. At the time when the acts were done, the place was of course governed by Japan and was entirely a foreign country to America. These circumstances will never change by the reason that the place has been occupied by America.

It is quite incomprehensible that America has jurisdiction over the offense of a foreigner committed in a foreign place.

Were there any instances that the United States tried in her court the offense of a foreigner committed in a foreign place and which had no concern with the United States and her people only because the criminal was living at

that time in America? If she had had, an international incident would have occurred because of its violation of foreign sovereignty. In such a case, the country to which the criminal belongs must request the United States to deliver the criminal, and the United States must give the criminal to the country, if she signed the convention of the delivery of criminals. If she did not sign it, of course, it is up to her to decide freely whether to deliver the criminal or not. But it is not admissible in international law to try the criminal in her court. Besides, it fundamentally violates the principles of law, and it is not admissible anyhow.

CONCLUSION:

As it is clear in the theory mentioned above, we can easily and definitely conclude that the jurisdiction of this case lies in Japan and not in the United States. That is to say:

1. Inoue, Fumio, the accused, is a subject of Japan attached to highly organized Japanese Military Forces, and, as an official of that Force, he discharged his duty in Japanese territory. As I stated above, even foreign troops who enter another country by, to which they belong, admission go under the jurisdiction of the country to the exclusion of the jurisdiction of the country they entered. This is the priniciple in International Law. Considering this point it is unnecessary to argue further that the United States has no jurisdiction over the accused.

2. The acts of the accused specified in Charge I and Charge II were done at Jaluit Atoll, Marshall Islands. Whereas, Jaluit Atoll was then a Japanese mandate, a component part of Japan, and a territory under the sovereignty of the Japanese Empire. Therefore, the offense committed in the area is under the jurisdiction of the Japanese Empire and no country can intervene in it.

3. The victims stated in the specifications of Charges I and II are all natives of the Marshall Islands. It is clear that these natives were then Japanese subjects and were under the sovereignty of Japan. As I mentioned above, no country other than Japan can have jurisdiction over this case from any point of view, such as efficacy over person, efficacy over place, and efficacy over time.

4. There is also another point which is hard to understand:

Each of the specifications of Charge II state that the acts of the accused violated the laws and customs of war.

The act of the accused, Inoue, is the performance of duty as an officer by the order of the law. That the accused did to execute Japanese subjects under the sovereignty of Japan by Japanese law, because they violated the law. Therefore, it has no connection with the laws and customs of war. He applied Articles 81 to 87 inclusive, of the Japanese Criminal Code, the offense of treason, for these natives. He specified their crimes under the name of "spies." The prosecution mistook this for "spies" written in the International Law. I think this is the reason why Charge II was served. But it means the "spies" in domestic law, not in International Law.

In short the accused has no connection with the laws of war so that he is out of the category of "war criminals."

Therefore, from any point of view, the jurisdiction of this case belongs to Japan, and it is illegal to try him in this military commission, an American Court. I believe the charges and specifications ought to be rejected.

I certify the foregoing, consisting of fourteen pages, to be a true and complete translation, to the best of my ability.

Eugene E. Kerrick, junior,,
Lieutenant, U. S. Naval Reserve,
Interpreter.

管轄ノ抗辯 Jurisdiction

被告人　井上文夫

辯護人　鈴木之藏 SUZUKI SAIZO

（昭和2）年5月5日）

裁判長並ニ軍法委員会委員会各位

被告人井上ハ第一起訴及第二起訴ノ各罪状項目ニ於テ認定サレテ居ル被告人ノ犯行ニ付テハ当軍法委員会ハ裁判管轄ニ属セスト思料シ茲ニ管轄ノ抗辯ヲ申立テマス。

先ツ第一起訴行為ニ就テノ抗弁ノ理由ヲ申述ベマス。

第一起訴罪状項目ノ一及ニニ認定ニ居ル被告人ノ犯行ハ其ノ当時アメリカ合衆国及其ノ同盟諸国ト日本帝国トガ戰爭状態ニアッタ昭和20年4月頃、日本帝国軍人デアッタ被告井上ガマーシャル諸島ヤルート環礁ニ於テマーシャル島民ヲ殺害シ日本刑法第199條ノ規定スル殺人罪ヲ犯シタト言フニアリマス。

コノ認定サレタ犯罪ノ裁判管轄ノ問題ヲ取扱フニ際シ吾々ハ次ノ四ツノ点ニ注目セナケレバナリマセン。即チ第一ニ殺人罪ヲ犯シタ犯人トシテ起訴サレテ居ル被告井上ハ日本国民デアルコト第二ニ犯罪ノ行ハレタ時ハ昭和20年4月、即チ日本帝国ガポツダム宣言ヲ受諾シテアメリカ合衆国及ソノ聯合軍ニ降伏スル以前デアリマス。第三ニ犯行ノ行ハレタ場所ハ当時日本帝國ノ委任統治地域ニ属シテヰタ地域デアリマス。第四ニ殺害サレタ被害者ハ何レモ日本帝国ノ委任統治地域ノ原住民デアリマス。

尚チナミニ此ノマーシャル諸島ヲ含ム赤道以北ノ旧独逸領南洋群島ニ

就テハ第一次世界大戦後1919年ロンドンニ於テ開カレタ聯合国最高会議ノ結果日本帝国ガ委任統治地域ト決定シ1920年12月日本帝国ト国際聯盟トノ間ニ正式ニC式委任状ガ成立シタノデアリマス。ソノ委任状第2條ハ「受任国ハ本委任状ニヨル地域ニ対シ日本帝国ノ構成部分トシテ施政ヲ且立法スル完全ナル権力ヲ有スルベク又此ノ地域ニ日本帝国ノ法令ヲ必要ニ應ジ地方的変更ヲ加ヘテ適用スル事ヲ得。受任国ハ本委任状ニヨル地域ノ住民ノ物質的及精神的幸福並ニ社会的進歩ヲ極力増進スベシ」ト規定シ日本帝国トソノ委任統治地域並ニ其ノ地域ノ住民トノ間ノ基本的ナ法律関係ヲ明瞭ニシタノデアリマス。

但シ日本帝国ハ此ノ委任統治地域ニ対シ何故領土主権ヲ求メヲレタカ？此ノ地域ノ原住民ハ日本帝国ノ国籍ヲ取得シタカ？此ノ法律学的質問ニ就テハ委任状及国際聯盟規約（特ニ全規約第22條）ハ明答ヲ避ケテ居リマス。然シ今茲デ此ノ問題ヲ理論的ニ解決スル必要ハナイデアリマセウ。結局ソレハ概念ノ論争ニ帰スルカラデアリマス。主権及国籍ノ解釈ニヨッテ肯定的ニモ否ヲ可能デアリ又否定的ニモ否ヲ可能デアリマセウ。従ッテ本件ノ裁判官ガ此ノ問題ヲ考察スルニ当ッテハ寧ロ次ノ事実ヲ指摘スレバ充分デアリマセウ。即チ日本帝国ハマーシャル諸島ヲ含ム委任統治地域内ニ於テ完全ナル立法施政ノ権力ヲ有シ、日本帝国ノ構成部分トシテソノ国法ニヨッテ其ノ地域並ニ其ノ住民ヲ統治スル権能ヲ承認サレテヰル。只其ノ地域内ノ土着民ノ利益ノタメ及受任国以外ノ聯盟国及ソノ臣民ノ利益ノタメ一定ノ施政方針ヲ執ルト且ソノ方針ノ実行ニ就テ国際聯盟ヨリ或程度ノ監督ヲ受クルノ義務ヲ有シ

ノ、限度ニ於テ、日本帝国ノ施政自由ニ若干ノ制限ヲ受ケテ居タ。然シ
下ラ、此ノ地域ニ対シ、又ソノ地域ノ原住民ニ対シテハ、他ノ国家ノ統治
権ハ全クソノ効力ヲ及ボサナイ。ムシロ日本帝国ノ統治権ガ他ノ国家ノ
統治権ノ効力ヲ排除シテ居タト言フ事ハ異論ナイトコロト信ジマス。
国際聯盟規約第二十二條ハ、受任国ガソノ受任地域ノ原住民ニ対シ後見
ノ任務ヲ実行スベキ旨ヲ想定シテ居リマス。然シ此ノ「後見ノ任務」ハ主権
ノ日本帝国ニ対スル委任状第二條ノ趣旨カラ之ヲ考察致シマス時、ソレハ
決シテ委任地域ノ原住民ヲ一体トシテ国際法上ノ人格ノ認メ受任国ガ
是レヲ指導神依スルコトヲ意味シナイ。ムシロソノ原住民ハ日本帝国ノ国民ノ
構成部分トシテ日本帝国ノ統治権ニ服スル身分ヲ有シテ居タモノト理解スルコト
ガ正当デアリマセウ。現ニ日本帝国ト同時ニアフリカニ於ケル旧独乙植民地
ニ就キC式委任ヲ受ケタ或ル国ハソノ地域ノ原住民ガソノ国ニ対スル
反逆罪デ処罰シタ著名ナ実例ガアルノデアリマス。更ニ他国トノ関係ニ於テハ
C式及B式委任統治地域ハソノ受任国ノ領土ニ準ジテ取扱ハレ
又ソノ地域ノ原住民ハソノ受任国ノ国民ニ準ジテ取扱ハルベキモノデアルコト
ハ後来ノ国際法学ニ承認サレテ居ル原則デアリマス。尚ニ戦時国際法ノ適用ニ於テハ一層ノ瞭ニコノ原則ハ承認サレテ居タモノト断言シ得ルデアリマセウ。
但シ此ノ点ニ於テ次ノ様ナ異論ガ提起サレルカモシレマセン。即チ若ノ
種論ハ日本帝国ガ国際聯盟ヲ脱退スル迄ハ妥当デアル、然シソノ脱退
後ハソノ委任統治地域ニ対シ日本帝国ハ国際上合法的ナル権利
ハ統治権 (sovereign rights) ヲ承認サレテ居ナイト (any internationaly legal title)
此ノ法廷ニ於テ裁判サレタ右木秀策事件ニ於テモ本件ト同様ニ管轄問題
ガ生ジマシタガ、弁護側ノ管轄抗辯ニ対シ検事側ノ答弁ニ於テ ホルトン検事モ

上述ノ如キ異論ノ提出サレテヰルノ如ク述ベテ居ラレマス

It is a matter of public recognition the in these days after 1935, numerous international jurists and legal authorities of the highest calibre not only questioned, but vigorously denied sovereignty of these islands by the Japanese Empire.

Commander Carlson also argues that, the control exercised by the Japanese over these islands subsequent to the period indicated sovereignty. The fact that a criminal possessed the temporary power, the physical force to maintain control over stolen or misappropriated property, does not signify that he thereby derives legal title. Similarly the contention that Japan could acquire legal title and sovereignty to the Mandated islands become the unlawfully and by force exercised control over them, is contrary to basic concepts of international justice. Since Japan's forceful isolation, fortification, occupation and control of these islands was illegal, it could not confer any internationally legal title or sovereign rights in the Japanese Empire.

Ct. D(4)"

日本帝国ハ、国際聯盟脱退ニヨリ日本帝国ハ南洋群島ノ委任統治地域ニ対シテモ権限ノ喪失シタカ？

此問題ハ、委任統治ノ成立史及其ノ権利ノ性質カラ考ヘテ上述ノ如ク簡単ニ断定スルコトハ不可能デアリマス。脱退当時国際法学者間ニ種々ノ議論ガアリ未ダ公的ニハ明白ニ解決サレテヰマセン。又日本ノ聯盟脱退後、国際聯盟カラ正式ニ日本帝国ニ対シテノ委任統治破棄ヲ申入レテノ委任統治地域返還ノ請求ノ事実モナイノデアリマス。今若シ日本帝国ガ聯盟ノ脱退ニヨッテ従来ノ委任統治地域ニ対スル合法的ノ統治権ノ喪失シ、ソノ後ニ於ケル支配ハ非合法トナルデアルト言フ解釈論ニ対シテ又駁ヲ加フル事ハ控ヘタイト思ヒマス。ソレハ結局ニ於テ委任統治権、権利、本質、解釈如何ニ懸ケテヰル無益ナ論争デアリマス。唯ボルトン検事ノ陳述、弁論ニ今日アメリカ合衆国公的ナ見解トハ大ナル差異ガアルコトヲ指摘スルニ止メマス。ボルトン検事ガ同ジク上述ノ言説抗弁ニ対スル答弁ニ於テ引用サレタアメリカ合衆国大平洋艦隊及大平洋方面司令長官、マリアナ方面軍政官、アメリカ合衆国海軍大将ケエスタ、A、ニミッツニヨリ署セラレタ布告第二、第四條ニハ次ノ如ク規定サレテヰマス

"Any person who commits any act which violates any provision of Japanese penal law in effect in these island prior to the occupation by the forces under any ~~command~~ commands, or the provitions of native law ~~cus~~ customary in the island, may, at the discretion of the Military Governor, or under his authority, be

brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct ----」

此ノ宣言ニ依リマスト アメリカ海軍占領下ノ日本ノ委任統治地域ノ南洋群島ニ実施サレテヰタ日本ノ国法タル 日本刑法ヲ有効ナモノト認メテ居ルコトデアリマス。 従ッテ ボルトニ於ケル主張サレル如ク 降伏脱退後ノ日本帝国ハ従来委任統治地域ナル南洋群島ニ対シ国際法的ニ合法的ナ権能ヲ又統治権ヲ有シテヰタソレハ島人ノ益ニ対スル非合法的ナ支配ニ過ギマストスレナラバ アメリカ軍ノ占領下ノ此地域ニ於テ実施サレテヰル日本刑法ハ斯ノ如キ合法的ナ法律トシテ効力ヲ認メラレル理由ハナイト思ッテアリマス。

マタニミッツ大将ノ宣言ヲニ、第四條ニ、ボルトニ於ケル所論ノ見解トハ全ク反対ニ、日本ノ降伏脱退後ノ南洋群島ニ対スル統治ノ合法性ヲ承認シ有力ナ公式見解デアルト信ジマスルノデアリマス。

斯ノ考察ニ参リマスト 本件第一乃至第十一ノ犯罪ノ如キ日本人ノ被告ガ今次戦争中即チ(日本ノ降伏ノ)ソノ日本帝国ノ委任統治地域ニ於テ、其ノ地域ノ原住民ヲ殺害シタ事件ハ純粋ナ日本帝国ノ国内犯罪デアリ、当然ニ日本帝国ノ裁判所ニ於テ裁判スル事件デアルヲノ。

蓋シ現ハレルトコロト信ジマス。 一定ノ犯罪ガドノ国家ノ裁判管轄ニ属スルカヲ決定スル要素ハ ソノ犯罪ノ場所、犯罪ノ時ニ於ケル犯人ノ身分、被害者ノ身分デアリマス。 本件ニ於テハコノ三ツノ要素ノ

(6)

於ケル外国裁判所ノ管轄権ニ就テモ亦ル同題ハ全ク同一ノモノデアリマス

然ラバ日本帝国ガ降伏後今日アメリカ合衆国ヲ含ム聯合国ノ法廷ガ降伏ニ日本人ニ依ツテ犯サレタル純粋ナ日本ノ国内犯罪ニ対シ裁判権ヲ有スルニ至ツタノデアロウカ？

日本帝国ハポツダム宣言ヲ受諾シ1945年9月2日アメリカ合衆国及ビ他ノ聯合国ニ対スル降伏文書ニ正式ニ調印致シマシタ。ソシテ此ノ調印サレタル降伏文書ノ條項ニ依リ日本国家ヲ統治スル天皇ニ日本政府ノ権限ハ降伏條件遂行ノタメ適当ト認メル手段ヲ採ル権限ヲ附与セラレ、聯合国最高司令官ノ権力下ニ置カレタノデアリマス。然シドイツト異リ統一サレタ日本政府ガ存続シ聯合国最高司令官ノ監督ノ下ニ一定ノ制限ヲ受ケテヰリマスガ日本国民全体ニ対シテ立法、行政、司法ニ関スル国家ノ権限ヲ行使スルコトガ承認サレテヰルノデアリマス。特ニ同法ニ関シテハ今日日本ノ裁判所ガ存続シ日本人ノ犯罪ニ対シテハ、ソレガ降伏前ノ犯罪タルト降伏後ノ犯罪タルトヲ問ハズ原則トシテ一切ノ裁判権ヲ行使スルコトガ許サレ現在ソノ裁判権ヲ行使シテ居ルノデアリマス。但シ日本人ノ犯シタ犯罪デモ聯合国ニ属スル人及駐屯スル占領軍ニ対スル日本人ノ犯シタ犯罪及聯合軍ノ日本占領目的達成ヲ阻害スル罪ヲ犯シタル日本人ニ対シテハ、アメリカ合衆国及ビ他ノ聯合軍ノ軍事法廷ガ其ノ裁判権ヲ行使スルコトニナツテヰリマス。

コノ例外ノ場合ハ、スベテ日本ガ降伏シ聯合軍ガ日本ヘ進駐シタル後ニ発生シタ犯罪デアリマス。

日本降伏当時、戦時中ニ日本領土内ニ於ケル日本人ガ日本国法ヲ犯シ行為ヲ

39.0(7)²

タ純然タル国内犯罪ニ対シ、アメリカ合衆国及他ノ聯合国ノ裁判所ガ、裁判権ヲ行使スルト言フ宣言或ハ規定ガ公布サレタト言フ事ハ未ダ之ヲ聞カヌノデアリマス。日本ノ降伏條件ノ基礎トナッタ ポツダム宣言ニ於テモ唯戰爭犯罪人ノ厳重ナル處罰ノミガ宣言サレテ居ルノデアリマス。

一九四五年一二月五日公布サレマシタ戰爭犯罪者被告人審判ニ関スル聯合軍最高司令官ノ命令ニヨリマスルト戰爭犯罪、豪圀ノ往来、国際法等ヲ認メラレテ斗リマシリ特ヨリ甚ダ廣ク

「犯罪地ノ国内法ニ違反スルト否トヲ問ハズ戰爭前又ハ戰爭中一般人民ニ対シ為サレタル殺害(murder)行為」モ亦人道ニ反スル罪ノ名ノ下ニ戰爭犯罪トシテ告訴サレルコトトナッテ斗リマス。本件第一起訴ノ殺人行為ハ人道ニ反スル戰爭犯罪トシテ起訴サレテ居ルノデアリマセウカ？

米起訴ノ罪状項目米一及米二ニ被告人井上ノ殺人行為ニ対シ日本刑法第199條ヲ適用シテ居リマス。之カラ推察致シマス時第一起訴ノ犯罪ハ戰爭犯罪トシテ起訴サレテ居ルモノト到底考ヘル事ハ出来マセン。

ソノ上ニ通常犯罪トシテ起訴サレテ居ルモノト結論セザルヲ得ナイノデアリマス。

以上ノ諸点ヲ綜合スルトキ実質的ニ日本ノ純然タル国内犯罪デアル起訴並ニ罪状項目ノ文言ニ於テ何ラ戰爭犯罪トシテノ性格ヲ顕ハシテ居ラヌコトハ明白ナ事実デアル本件米一起訴、米一及米二ノ罪状項目ノ犯罪ハ今日現在スル日本ノ裁判所ニ起訴サルベキ事件デアリ、本弁護人ノ意見ニ於テハ全ク免訴ノ判決ヲ下スベキモノデアリマス。

第二、次ニ被告井上ニ対スル第二ノ起訴、罪状項目第一及第二ニ於テ規定サレテ居ル犯罪ニ対シテモ亦管轄ノ抗弁ヲ提出致シマス。

D"D(8)

第二起訴ニッノ罪状項目ニ於テ認定サレテ居ル犯罪ハ全ク同一ノ型ヲ有スル条約ニ違反シタト今次日米戦争中当時日本帝国ノ軍人デアッタ被告丈ケガマーシャル諸島ヤルートatollニ於テマーシャル島民ヲスパイトシテ予メ裁判ヲスルコトナクシテ處罰シ之ヲ殺害シ以テ戦争法規並ニ慣習ニ違反シタト言ッテアリマス。

交戦ニ関スル法規並ニ慣例ニ関スルヘーグ條約第三十條ハ明白ニ「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」ト規定シテ井リマス。　従ッテ現行中捕ヘタ間諜ヲ裁判ヲ経ズシテ處刑スルコトハ右ヘーグ條約ノ規定違反デアリ戦争犯罪ヲ構成スルコトハ当然デアリマス。然シ乍ラ右ヘーグ條約第三十條ノ適用ニ関シ特ニ留意セナケレバナラヌハ　若シ捕ヘラレタ間諜ノ国籍ノ問題デアリマス。　ヘーグ條約第三十條ニ謂ヘル「現行中捕ヘラレタル間諜」ト規定スルノミデソノ文面ヲハソノ間諜ノ国籍ニ就テ何等制限ヲ設ケテ居リマセヌ。然シ乍ラヘーグ條約第三十條ノ規定ヲ設ケタ主旨ヨリ推論スルナラバ、ソノ間諜トハ捕ヘタ敵ノ国民以外ノ者ヲ意味スルト解釈スルノガ最モ合理的ナ解釈ト信ジマス。

成文法ノ解釈ニハ常ニ此様ナ合理的ナ解釈ガ許サレネバナラズ又必要デアリマス。唯條文ノ文面ノミニ拘泥スルコトハ成文法ノ生命ヲ殺スモノデアリマス。

国際法学者オッペンハイムハヘーグ條約第三十一條ニ関聯シ次ノ如キ解釈ヲ述ベテ居リマス（オッペンハイム著　国際法第二巻　戦争ト中立第三版　159節）

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War and Neutrality 3rd edition

According to Article 31, a spy who is not captured in act, but rejoins the army to which he belongs, if subsequently captured by the enemy, may not be punished for his previous espionage, but must be treated as a prisoner of war.
But article 31 applies only to spies who belong to the armed forces of the enemy; civilians who act as spies, and are captured later, may be punished.

ヘーグ條約第29條 今次ニ十條ニハ 只、間諜トノミ書イテアッテ 何モソノ間諜ノ国籍ヲ区別シテ居ナイカラ 両條ノ間諜ヲ、foreign spy ニ限ルト解釈スルコトハ許サレヌト言ッテ態度ヲ採ルナラバ 上掲ノ掲ノ掲 Oppenheim ノ31條ノ解釈論ニモ許サレヌ筈デアリマス。ナントナレバ 今31條ニハ 唯「一旦所属軍ニ復帰シタル後ニ至リ敵ノタメニ捕ハレタル間諜」トアルノミデ 今條ノ間諜ガ civilian ノ spy ヲ含マヌト言イ切ッテアリマス。
本来 間諜ハ交戦法規違反デハアリマセン。間諜ノ使用ガ交戦法規違反ノ行為デナイ様ニ、ヘーグ條約第二十四條ノ明定スル所デアリマス。然シ間諜ハ交戦国ノ相手方ニ対シ甚ダシク有害ナル行為ガアルカ故ニ交戦国ノ相手方ハ捕ヘタ間諜ヲ戦争犯罪人トシテ之ニ厳重ナル処罰ヲ課スルコトハ 之ニヨリ害ヲ受ケル交戦国ノ防衛手段トシテ認メラレテオルトコロデアリマス

然シ本国人が本国ニ対シ他ノ利益ノタメニ間諜行為ヲ為シタル場合ニ当然ニ自ラノ統治権ニ基キ自ラノ法律ニヨリテ処罰スルコトガ生ズルノデアリマス。国際法ノ規定或ハ慣習ニ基キワザワザ戦争犯罪人トシテ処罰スル必要ハ元頭ナイノデアリマス。ソレデ今日皆ノ知ッテオル陸戦法規慣例ニ関スル条約ノ第二十九條ノ規定スル厳格ナル狭義ノ間諜トナラズ非常ニ広義ノ間諜行為トシテ処罰スルモ、国内法ヲ有スルノデアリマス。又ハーグ陸戦法規第三十一條ニ掲ケル制限ナク自国民ニ対シテ間諜ノ既遂ヲモ自ラノ法ニヨリ処罰出来ルノデアリマス。

斯ノ考案ニテ参リマスト ハーグ條約第二十九條、今三十條ノ規定ニテオル間諜トハ、間諜ヲ捕ヘタ国ノ自ラノ民ヲ包含スルモノデナイト言ノ解釈ガ最モ合理的デアルト考ヘラレルノデアリマス。

斯ノ解釈ニ立マスト自国民ガ敵国ノ利益ノタメニ間諜行為ヲ行ッテ捕ヘラレタル場合 適法ナ裁判ヲ経ズシテ、之ヲ処刑シタ事実ガ発生シタ訳トナッテモ、ソレハ前記ハーグ陸戦法規第三十條ノ違反トシテ国際問題トナルベキ筋合デハナク、飽迄ソノ、純粋タル国内問題トシテ処理サルベキ性質ノ事件デアルト論断セザルヲ得ナイノデアリマス。

サテ本件ノ冒頭ニ起訴理由並ニ罪状項目ニヨリマストキ被告人ニヨリ裁判ヲ受ケテ、スパイトシテ処刑サレタ者ハ何レモ当時、日本ノ軍政統治下ニアッタマーシャル諸島ノ島民デアリマス。然シテコレラノマーシャル島民ニ対スル起訴理由ニ於テ説明セラレタ如ク本件発生ノ当時ハ敵国或ハ中立国ノ国籍ヲ有スルモノデナク、ムシロ日本国民ノ一部ノ機関ニ、対外的ニハ日本国民トシテ取扱ワレ居リタルモノデアリマス。従ッテ本起訴各罪状項目ニ於テ認定サレテ居リマス犯行ハ日本帝国ノ軍人ガ

(11)

日本ニ民ヲスパイトシテ捕ヘ、日本領土内ニ於テ裁判ニ附スルコトナク違法ニ處刑シタト言フ事実デアリマシテ、ソノ行為ガ犯罪トナルモシクハ、純然タル国内犯罪トシテ、今日現存スル日本ノ裁判所ニ起訴ガルベキ事件デアリマス。決シテハーグ陸戦條約ニ違反スル戦争犯罪トシテ、当軍法委員会ニ起訴サルベキ事件デハナイト信ズル次第デアリマス。以下ノ理由ニヨリ被告人ノ抗弁ヲ採ルヲ以テ本軍法委員会ノ管轄ノ拒否ヲ申立テル次第デアリマス。

E501

ARGUMENT IN OBJECTION CONCERNING THE JURISDICTION OF THE CASE FOR THE DEFENDANT INOUE, FUMIO, DELIVERED BY SUZUKI, SAIZO ON 5 MAY 1947.

If it please the Commission,

The accused Inoue submits this objection to the jurisdiction on the ground that his alleged crimes in the specifications of Charge I and II are not under the jurisdiction of this Military Commission.

First, I shall state my reasons for objection concerning Charge I. The offenses alleged in each of the specifications of Charge I can be summarized as follows: At a time when a state of war existed between the United States, its Allies and Dependencies and the Japanese Empire, namely in April 1945, the accused Inoue, then a member of the Japanese armed forces, committed murder against the natives of the Marshall Islands at Jaluit Atoll, and violated Article 199 of the Japanese Criminal Code which sets forth the crime of homicide.

Before dealing with the problem of the jurisdiction over this alleged crime, we must pay careful attention to the following four points:

(1) The defendant Inoue who is accused as a criminal of murder is a subject of Japan.

(2) The time when the crime was committed was April, 1945, that is before Japan agreed to the Potsdam Declaration and surrendered to the United States of America and the Allied Powers.

(3) The place of the crime was, at that time, a Japanese mandated area.

(4) All the victims of the crime were the natives in the Japanese mandated area. The South Seas Islands to the north of the equator, including the Marshall Islands, which had formerly been the territory of Germany were by decision designated to be the Japanese mandated area by the Supreme Conference of the Allied Forces which was held in London in 1919, after the World War I, and in December 1920, a C-type mandate was duly established between the League of Nations and Japan. Article 2 of the mandate states, "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 inhabitant of the territory subject to the present Mandate." , and clearly showed the fundamental legal relation between the Japanese Empire and her mandated area and its inhabitants.

Then was the Japanese Empire given territorial sovereignty over this mandated area? Did the natives of the area receive Japanese citizenship? To these legal questions, the Mandate and the Charter of the League of Nations, especially Article 22 of the Charter, evade a clear answer. But it will be unnecessary to give the theoretical solution of this question, because it will end in a debate over differing concepts. Depending upon the interpretation of sovereignty and citizenship, both affirmative and negative answers are possible.

Therefore, when we consider the problem of the jurisdiction of this case, only to point out the following fact will be sufficient for the solution. That is: The Japanese Empire was admitted to 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 it could apply the laws of Japan to the territory and its inhabitants. But for the benefit of the natives of the area and also for the benefit of the countries, other than the Mandatory, which were members of the League, Japan had to follow a certain administrative plan and be under some supervision of the League of Nations in carrying out the plan. So there was some limit of the freedom of the administration of Japan. However, over the Japanese Mandate and the inhabitants of the area, the sovereignties of other countries have no power at all. Or it would rather be said that Japan has sovereignty over the area exclusive of other countries' sovereignties. I believe there is no objection to this.

Article 22 of the Charter of the League of Nations provides that the Mandatory must carry out its duty of guardianship for the natives of its mandated area. But considering this duty of guardianship in light of the meaning of Article 2 of the Mandate of Japan, it does neither admit an international personality of the natives of the area nor mean that the Mandatory must lead and assist them. It is rather proper to understand that the natives had a social position under the Japanese sovereignty as equals of the Japanese subjects. In fact, there was a famous instance that a country, which accepted C-Mandate of former German colony in Africa at the same time of Japanese Mandate of South Seas Islands, punished the natives of the area with treason against the country. Also, it is a principle admitted in the theories of the international law that C and B Mandates are dealt with in accordance with the territory of the Mandatory and that the natives of the area as the citizens of the Mandatory. I can maintain that, in the application of international law in war time, this principle is more clearly admitted.

But, at this point the following objection may be raised. That is"your theory is pertinent until the Japanese Empire withdrew from the League of Nations, but after the withdrawal, Japan has not been recognized as having any international legal title or sovereign rights over the mandated territory."

In the case of Furuki, Hidesaku, tried before this court, the similar question of jurisdiction arose as in the instant case, and the judge advocate raising the same question which I have stated above, replied to the objection concerning the jurisdiction of the defense counsel as follows: "It is a matter of public recognition that in those days after 1935, numerous international jurists and legal authorities of the highest calibre not only questioned but vigorously denied sovereignty of these islands by the Japanese Empire. Commander Carlson also argues that, the control exercised by the Japanese over these islands subsequent to that period indicated sovereignty. The fact that a criminal possessed the temporary power, the physical force, to maintain control over stolen or misappropriated property, does not signify that he thereby derived legal title. Similarly the contention that Japan could acquire legal title and sovereignty to the mandated islands because she unlawfully and by force exercised control over them, is

contrary to basic concepts of international justice. Since Japan's forceful isolation, fortification, and control of these islands was illegal, it could not confer any internationally legal title or sovereign rights in the Japanese Empire."

Did the Japanese Empire by withdrawing from the League of Nations lose her legal title over the mandated islands of the South Pacific? Taking into consideration the history of mandatory rule and the essence of its rights, it cannot be simply concluded as in the above citation. At the time of the withdrawal, numerous controversies arose among international jurists and officially no apparent solution has been found as yet. Moreover after the withdrawal from the League of Nations, there are no facts showing Japan was requested to abrogate her mandate and return the mandated area. At present, I would prefer to reserve my rebuttal as to the interpretation that after the withdrawal of Japan from the League of Nations, she had lost her legitimate rule over the mandated territory and that her control was illegal. Because it depends upon the interpretation of the essential rights of the C class mandate and because it is a futile argument I shall only stop to indicate that the above opinion of the judge advocate is inconsistent with the official opinion of the U.S.A. Under proclamation No. 2, Art IV issued by Admiral Chester W. Nimitz, as Admiral, U.S.N., Commander-in-Chief, U. S. Pacific Fleet and Pacific Ocean Area, as Military Governor of the Marshall Island Areas, and cited by the judge advocate in his reply in support of the jurisdiction, provides: "Any person who commits any act which violates any provisions of Japanese penal law in effect in these islands prior to the occupation by the forces under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor, or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct....."

According to this Proclamation, the Japanese Criminal Code, a domestic law of Japan, which was in effect prior to the occupation of the American forces in the South Pacific Islands was recognized to be effective. In other words it was acknowledged as effective local law. If as the judge advocate contends after the withdrawal from the League of Nations, Japan no longer possessed international legal title or sovereignty over the South Pacific Islands and her possession was only a illegal control of a criminal over stolen property, then there would be no reason in recognizing the efficacy of the Japanese Criminal Code as legal law which was in effect prior to the American occupation.

This Article IV of Admiral Nimitz's Proclamation No. 2, I believe is an influential official opinion recognizing the legality of the Japanese sovereignty over the South Seas Islands after her withdrawal from the League of Nations quite contrary to the judge advocate's contention.

Thus, from the foregoing study such crime as alleged in Charge I of the instant case; the case in which the accused who is a Japanese subject, during the present war (that is prior to the surrender) in the mandated territory of the

Japanese Empire killed the native inhabitants of the said area, is purely a domestic crime of the Japanese Empire, and I believe it can be easily understood that it properly should be tried by the courts of the Japanese Empire.

The elements to decide what nation has jurisdiction over a certain crime are, the place where the crime was committed, the status of the offender and the status of the victim at the time of the crime. In the instant case with reference to these three elements, there arises absolutely no question concerning the jurisdiction of a foreign court.

Then, at present after the surrender of Japan, have the courts of the U.S. including the allied powers acquired jurisdiction over a purely domestic crime of Japan committed by a Japanese before the surrender?

Japan accepted the Potsdam Declaration and on September 2, 1945, formally signed the documents of surrender with the U.S.A. and other allied powers. And in accordance with the document of surrender, the Emperor who rules over the Japanese Empire and the authorities of the Japanese Government were placed under the authority of the Supreme Commander of the Allied Forces who is empowered to take necessary steps in carrying out the conditions of surrender. But differing from Germany, a central government still exists, administers the Japanese people as a whole and though under the designated restriction of the Supreme Commander, the Japanese Government is recognized to exercise its proper power concerning legislation, administration and judicture. Especially with regard to the judicature, the Japanese courts still exist and as a principle they are allowed to exercise jurisdiction over crimes committed by a Japanese regardless of whether it was committed before or after the surrender. The Japanese courts are at present exercising this jurisdiction. But as an exception the military courts of the U.S.A. and the allied powers exercise jurisdiction over crimes committed by the Japanese, when they are offenses against a person belonging to the Allied Powers or to the occupation forces now stationed in Japan or ir hinderance to the objectives of the occupation of Japan.

This exception deals with crimes which occurred after Japan surrendered and the Allied Forces had occupied Japan proper. I have not heard of any proclamation or stipulation which has been promulgated stating the courts of the U.S.A. and other allied powers exercise jurisdiction over a purely domestic crime committed by a Japanese violating a domestic law. Even in the Potsdam Declaration which served as a basis for the condition of surrender of Japan, stern punishment for the war criminals is merely declared.

According to the order of the Supreme Commander of the Allied Powers concerning the trials of the accused war criminals which was issued and promulgated on 5 December 1945, the scope of the war crimes became wider than that which was previously admitted in the theories of the international law. "Murder..... committed against any civilian population before or during the war,.....whether or not in violation of the domestic laws of the country where perpetrated" came to

be accused as a war crime under the name of the crime against humanity. Is the crime of murder in Charge I of this case alleged as a war crime against humanity? Both Specifications 1 and 2 of Charge I applies Article 199 of the Japanese Criminal Code to the alleged crime of murder of defendant Inoue. Conjecturing on this, I can not at all think that the crime of Charge I is alleged as war crime. I can not but conclude that it is alleged as a common crime.

Summing up the points I have mentioned above, this is in substance a purely domestic crime of Japan, and I can not find any characteristics of a war crime in the wordings of the charges and specifications. I maintain that the crime alleged in the specifications of the Charge I should be indicted in a Japanese court and that this Military Commission has no jurisdiction over it.

Secondly, we object to the jurisdiction concerning the crimes alleged in Charge II and each of its specifications preferred against the accused Inoue, Fumio. The crimes alleged in both of the specifications of Charge II are of the identical type. It is summarized as follows; at a time when a state of war existed between the U.S.A. and Japan, the accused Inoue, then a Japanese military person, at Jaluit Atoll, Marshall Islands, without previous trial punished and killed as spies the natives of the Marshall Islands, this in violation of the law and customs of war.

In Article 30 of the Hague Convention governing land warfare, it is clearly stipulated "A spy taken in the act shall not be punished without previous trial." Therefore to execute a spy without previous trial would violate the above article of The Hague Convention and it is natural that such an act would constitute a war crime. But in applying this Article 30 of the Hague Convention, we must pay special attention to the nationality of the spy who was captured. Article 30 of The Hague Convention merely provides "A spy taken in the act....." and on the face of the provision there is no restriction whatsoever, as to the nationality of the spy. The same can be said about Article 29 of the said Convention. But making an inference from the legislative aim in establishing Article 30, I believe it is the most reasonable interpretation to construe this "spy" referred to in the provisions in a limited sense as a person other than the nationals of the country which caught him.

In the interpretation of statute law such rational interpretation must not only be permitted but is also necessary. It would be fatal to statute law if we should be too particular about its wording. International jurist Oppenheim gives the following interpretation with reference to Article 31 of The Hague Convention. (International law by Oppenheim, Vol. II, War and Neutrality, 3rd Edition.) "According to Article 31, a spy who is not captured in the act, but rejoins the army to which he belongs, if subsequently captured by the enemy, may not be punished for his previous espionage, but must be treated as a prisoner of war. But Article 31 applies only to spies who belong to the armed forces of the enemy; civilians who act as spies and are captured later may be punished."

In Articles 29 and 30 of The Hague Convention, the word spy only appears and nothing is mentioned as to distinguish the nationality of the spy. So if we should assume an attitude and not admit the interpretation of spy in both articles as being confined to foreign spy, then the above interpretation of Article 31 by Oppenheim should not be permitted. That is because in Article 31 it merely provides "A spy who.....rejoins the army to which he belongs if subsequently captured by the enemy" and nothing is mentioned that the spy in the said article does not include civilians who act as spies. Primarily, spying is not an act in violation of warfare regulations. This is clearly set forth in Article 24 of The Hague Convention. But the act of spying is injurious to the hostile party of the belligerents. So it is recognized as a means of self-defense for the hostile party of the belligerent who incurs the disadvantage to condemn the spy who has been captured to a stern punishment as a war criminal. But when a national acts as a spy against his own country in the benefit for the hostile power, in this case it is natural that he may be punished by his own country's law based upon the sovereignty of the state. And there is not the slightest necessity of going to the trouble of punishing him as a war criminal based upon international laws and customs. Thus, today, each country has its own domestic law, for punishment of the act of spying not only in the rigid and narrow meaning of spy provided in Article 30 of The Hague Convention, but also in a far broader meaning. Also, without being limited as in Article 31 of The Hague Convention, the domestic law can punish the act of spying perpetrated by their nationals.

Thus, I believe the most reasonable interpretation of spy as provided in Article 29 and 30 of the Hague Convention, is not construed to include her own nationals which the country captured as spies. Therefore, when a national is caught for spying for the benefit of the hostile country and a case occurs in which he was executed without legitimate trial, there is no reason for this to cause an international problem as violating Article 30 of the said Hague Convention, and I must conclude that this is a case of such nature to be consistently dealt with as a pure domestic problem.

Now, according to Charge II and each of its specifications, those who were executed by the accused Inoue without previous trial were all native inhabitants of the Marshall Islands which was at that time under the mandate of Japan. These native inhabitants of the Marshall Islands which was at that time under the mandate of Japan, as I have already stated with reference to Charge I, were, at the time of the incident, not of hostile or neutral nationality, but rather composed a part of the Japanese people and were dealt with in foreign relations as subjects of Japan.

Thus, the crime alleged in Charge II and each of its specifications, is the case in which a military person of the Japanese Empire, in the territory of Japan, captured Japanese subjects as spies, and without previous trial unlawfully

executed them. The act may constitute a crime, but it should be indicted before the existing Japanese court as a purely domestic crime, and I firmly believe that in no way should it be indicted before this military commission as a war crime violating the Hague Convention on Land Warfare.

Owing to the foregoing reasons, I place this objection concerning jurisdiction before you and request your wise consideration.

SAIZO SUZUKI

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

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

SPECIAL PLEA TO THE JURISDICTION OF THE MILITARY COMMISSION TO TRY INOUE, FUMIO, CAPTAIN, IMPERIAL JAPANESE ARMY, DELIVERED BY COMMANDER MARTIN E. CARLSON, UNITED STATES NAVAL RESERVE, AT GUAM, MARIANAS ISLANDS ON MONDAY, MAY 5, 1947.

The accused, Captain Inoue, Fumio, Imperial Japanese Army, objects to being tried by this Military Commission. This objection on the ground of lack of jurisdiction, involves a question as to the legal authority of this commission. We shall show by citing well known cases, long established by law, and opinions of leading jurists, that, first, the accused in this case is not subject to the court's jurisdiction, and, second, that the offense is not one cognizable by this Navy convened Military Commission.

We shall also show that there was no crime committed.

The accused, Captain Inoue, is a Japanese national and is still technically an officer of the Imperial Japanese Army, never having been demobilized.

The alleged crimes, murder, were committed on Jaluit Atoll April 8, 1945 and April 13, 1945. Jaluit was mandated to the Japanese government by the Treaty of Versailles on June 28, 1919 and was occupied by and governed by Japan. The victims were native inhabitants of the Marshall Islands. The accused is an officer of the Japanese Army. These are the facts. Now as to the law.

Since the specification does not show on its face the circumstances conferring jurisdiction then it must be shown in some other way since the accused objects to the jurisdiction of this commission to try him.

In his book "The Protection of Naturals" Frederick Sherwood Dunn in writing about the protection of citizens abroad sayd on page 21, "....the subject of protection is primarily a legal subject. Governments do not ordinarily claim or demand something of another government as a matter of right, unless they mean that they are legally entitled to it. International law is, in one sense, merely a summary of what governments claim as their rights or recognize as the rights of others. Hence we should expect to find, and do find, that the subject of protection of citizens abroad is commonly dealt with as a branch of international law. Questions arising thereunder are usually handled by the law officers of the foreign offices concerned and are dealt with on the basis of legal rules and principles or treaty obligation cases not settled by diplomatic negotiations are frequently referred to international tribunals, which dispose of them as juridical questions. Scholars have been diligent in formulating legal rules and principles out of past practice, and in organizing them into a logical system, with the result that we possess at the present time an extensive and well ordered jurisprudence on the subject of diplomatic protection."

This present case is in point with the celebrated Raymond Fornage case. In Moore Digest of International Law, Volume II, page 260, we read not dicta, but a clear statement of the law on the facts in issue.

"Q(1)"

"I have said that crimes committed outside of the national territory by foreigners against citizens or subjects are not punished under any circumstances or conditions by France, Germany, Belgium, Denmark, Great Britain, Luxembourgh, the Netherlands, Portugal, Spain, or Switzerland. Before showing this I pronounced the Mexican contention that the claim to punish foreigners for offenses committed against Mexicans outside of the National Territory was sustained by the French Code, to be wholly unfounded. I shall now show that such a claim has been pronounced by the highest judicial tribunal in France to be unwarranted by the principles of international law.

I refer to the case of Raymond Fornage, decided by the court of cassation, or supreme court of France, at Paris in 1873, and reported in the Journal du Palais (p. 299 et seq.) for that year. This court being the highest judicial tribunal in France, its decisions in respect to the French law are not to be questioned. The circumstances of the case of Fornage are as follows: The prisoner was indicted by the 'Chambre des mises on accusation' (grand jury) of the court of appeal of Chambery for the crime of larceny, which was described in the indictment as having been committed in the Canton of Vaud, Switzerland; and the case was referred for trial before a jury to the court of assizes (composed, in departments where there are court of appeal, of three judges of that court) sitting at Haute-Savoie. The prisoner did not take an appeal, as he had a legal right to do, from the judgment of reference, but proposed before the court of assizes an exception to the competency of that court, based on the ground that, having the quality of a foreigner, the French tribunals could not try him for a crime committed in a foreign country. But the court of assizes, regarding itself as irrevocably clothed with jurisdiction by the judgment of reference from the court of appeal, which had not been attacked declared that the exception of the accused was not receivable. Upon these facts the case was argued at length before the court of cassation by M. Requier, a counsellor and reporter of the court, and M. Bedarrides, advocate-general, both of whom, while admitting that the rule was settled that a court of assizes could not declare itself incompetent to take cognizance of a case of which it had been possessed by a judgment of reference from which no appeal was taken within the periods established by law, nevertheless argued that there were considerations of higher order in the case of Fornage, which ought to make it an exception to the general rule. In this relation I quote from the argument of M. Requier, the following passage:

"'The right to punish has no foundation except the right of sovereignty, which expires at the frontier. If the French law permits the prosecution of Frenchmen for crimes or misdemeanors committed abroad, it is because the criminal law has something of the character at the same time of a personal statute and of a territorial statute. A Frenchman, when he has reached a foreign country, does not remain the less a citizen of his own country; and, as such, subject to the French law, which holds him again when he reenters France. But the law can not give to the French tribunals 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. There exists a single exception to that rule of the law of nations. When a foreigner has committed, even outside of the territory, a crime against the safety of the state, he can be prosecuted, judged and punished in France. But, save that exception, founded on the right of legitimate self-defense foreigners are justiciable only by the tribunals of their own country for acts done by them outside of the territory. The French tribunals, in punishing an act of that nature, would commit a veritable usurpation of sovereignty, which might disturb the good relations of France with neighboring nations.....When a crime has been committed outside of the territory by a foreigner the culprit is not subjected by that act to 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. Would it not be contrary to all the principles of justice to oblige the magistrates to render themselves guilty of an arbitrary act, of a violation of international law?

"'Not only did the court of cassation adopt this view, but in its judgment the full text of which is given herewith as Exhibit B) the rule of international law, as laid down by the Government of the United States in the Cutting case, is expressed in terms which, for force, precision, and freedom from doubt or qualification, have not been surpassed. Translated, the material parts of the judgment are as follows:

"'Whereas, if, as a general principal, the courts of assizes, possessed of a case by a judgment of the chamber of indictments not attached within the times fixed by article 296 of the Code of Criminal Procedure, cannot declare themselves incompetent,...this rule is founded on this, that the courts of assizes, being invested with full jurisdiction in criminal matters, can, without committing any excess ofpower 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 extend beyond the limits of the territory, that except in the cases specified by article 7 of the Code of Criminal Procedure, the provision 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; whereas, indeed, Raymond Formey was brought before the court of assizes of Haute Savois, accused of larceny committed in the canton of Vaud, Switzerland;...and, in ordering the trial to proceed, without passing upon the question of nationality raised by the accused, it (the court) violated article 408 of the code, and disregarded the rights of the defense.

This case was an attempt by a French court to exercise jurisdiction over a crime committed in Switzerland. The Supreme Court of France said it could not be done.

This present case is an attempt by a U.S. Military Commission to exercise jurisdiction over a crime committed by a Japanese national in Jaluit, a possession over which Japan had exercised sovereignty since 1914. On April 8, 1945 and April 13, 1945, Japan was still in possession of Jaluit.

We hold that the United States cannot by this Military Commission exercise jurisdiction over a crime committed on Jaluit in April 1945. What an occupying power can do because of the doctrine that might makes right is also immaterial. The United States of America is not attempting to try this case on any such basis and we feel that this Commission should not listen to or consider any argument that even infers that such a doctrine is the basis for jurisdiction in this case.

This judgment may be regarded as finally and conclusively answering the contentionthat a precedent for article 186 may be found in the French code."

"In the United States the territorial principle is the basis of criminal jurisprudence, and the place of the commission of an offense is generally recognized as the proper and only place for its punishment.

"The earliest bestowal by Congress upon the Federal courts of jurisdiction of offenses committed outside of the territory, actual or constructive, of the United States, was in the crimes act of 1790, which, as read in the text, has sometimes been supposed by writers to have conferred a far more extensive jurisdiction on the courts of the United States than the decisions of those tribunals have attributed to it."

Mr. Justice Story speaking for the United States Supreme Court in 1824 in the case of Appollon, 9 Wharton 362 again stated the rule of law that the laws of a nation have no binding force, except as to citizens, outside of the national territory actual or constructive. Our Supreme Court 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 own jurisdiction."

In the case of crimes committed aboard ship the rule is:

"The crimes of murder and robbery, committed by foreigners on board a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs." Quoting Wharton in Elements of International Lawcited by Moore, A digest of International Law Volume II page 264.

Mr. Justice Story in the case of United States v Davis, 1837, 2 Summer cc 482 had occasion to consider and decide the question of jurisdiction over offenses committed outside of the national territory.

"Of offenses committed on the high seas on board of foreign vessels not being piratical vessel, but belonging to persons under the acknowledged government of a foreign country, this court has no jurisdiction under the act of 1790, ch. 36.

That was the doctrine of the Supreme Court in United States v Palmer, 3 Wheat R 610, and United States v. Holmes, 5 Wheat, 412, and United States v Klintock, 5 Wheat 144, applied it is true, to another class of cases, but in its scope embracing the present..."

Hackworth in his Digest of International Law paragraph 135, Extraterritorial American Territorial Theory of Criminal Jurisprudence, page 179 says: "An American citizen disappeared in China in the summer of 1905, under circumstances pointing to the suspicion that he had been murdered by a French citizen, E. H. LeVerger. In response to an inquiry by the brother of the deceased as to whether LeVerger might be apprehended and returned to China from Algiers for trial, the department of State said that the United States government does not exercise jurisdiction over crimes committed beyond the territorial limits of this country, except a few involving extraordinary elements in which category the one mentioned by you is not included."

In 1909 the German Foreign Office addressed a note verbale to the American Embassy in Berlin with regard to one Max Runge who was being sought by the New York police. The note pointed out that the individual in question would not seem to be extraditable as the offense against him was not included in the extradition treaty of June 16, 1852 but that if he was a German subject he might be prosecuted before the German courts, if this was requested by the United States government and the assurance given of reciprocal treatment on the part of the United States in similar cases. The Department of State instructed the ambassador as follows:

"Inasmuch as, under Anglo-Saxon legal theory, crime is territorial, not personal, and therefore the criminal jurisdiction of the United States does not, as a general rule, extend to crimes committed outside of its jurisdiction, whether by American citizens or aliens, it is not possible to meet the suggestion of the German note verbale that this government guarantee, in such cases the criminal prosecution in this country of an American citizen charged with the commission of a crime in Germany."

Charge Hitt to Secretary Knox No. 527, December 6, 1909 and Assistant Secretary Wilson to Ambassador Hill, No. 299, January 11, 1910 M.S. Department of State, file 22867. See also 1910 For. Rel. 517-518.

In the case of the United States v. Bowman brought to the Supreme Court of the United States on writ of error for a review of the ruling of the District Court of the United States for the Southern District of New York, Chief Justice Taft speaking for the court said:

"We have in this case a question of statutory construction.....Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds which effect the peace and good order of the community, must of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. "Hackworth Digest of International Law, Volume II pp. 197-198.

In Moore's A Digest of International Law, Volume II (1906) page 4 we find the opinion regarding the supremacy of a sovereign nation within its own territory:

"The jurisdiction of the nation within its territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

Article 22, The Covenant of the League of Nations, Treaty of Peace, June 28, 1919 provides that the South Pacific Islands mandated to Japan shall be administered under the laws of Japan as integral portions of Japan.

Chapter VI Digest of International Law by Green Haywood Hackworth Vol. II is National Jurisdiction - Supremacy of Territorial Sovereign - Jurisdiction. The Nation's Absolute and Exclusive Right. We quote from page 1.

"The jurisdiction of a state extends over not only the land within its territorial limits and the marginal sea or territorial waters, as well as the air space above them, but also over all persons and things within such territory....."

The S.S. Lotus case decided by the Permanent Court of International Justice is but another instance of the rights of sovereignty. Justice John Bassett Moore in his dissenting opinion said:

"1. It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either expres or implied. (Schooner Exchange v. McFaddon (1812), 7 Cranch 116, 136) The benefit of this principle equally enures to all independent and sovereign states and is attended with a corresponding responsibility for what takes place within the national territory." Hackworth, Digest of International Law Vol.II pp. 1-2.

Now, just what is this celebrated case. I shall quote from Charles Chaney H. International Law, Vol. II page 825.

"In 1812 Chief Justice Marshall, in the case of The Schooner Exchange v. McFaddon, the Supreme Court of the United States rendered a decision which has sinc- guided the legislature and the judicial departments of the government. The case raised the question whether a vessel commissioned as a man-of-war by the French government was, upon entering a port of the United States, subject to the jurisdiction of a local court, whose aid was invoked by former owners of the vessel to determine whether their title had been lawfully divested by French authority. Chief Justice Marshall, in the opinion of the court, adverted to the exclusive and absolute jurisdiction of a State within its own territory. He declared that any restriction thereof was to be derived from the nations consent; that such consent might be expressed or implied, and might in some instances be tested by common usage, and by common opinion growing out of that usage. He said that a public armed vessel constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.....Without a doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals but until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. 7 Cranch, 144-146.

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This case settled the law with respect to the United States. Since the decision there has been no disposition on the part of the Congress to assert jurisdiction over foreign vessels of war."

This was in 1812 and has as Mr. C.C. Hyde said been the law with respect to the United States. We maintain it is still the law. The Schooner Exchange v. McFaddon case is exactly in point and no one can hold that there is any jurisdiction for this Military Court to try the accused Captain Inoue after reading the Schooner Exchange v. McFaddon case.

Chief Justice Marshall pointed out that his decision dealt with the normal peacetime relations of friendly sovereigns. Professor Sheldon Glueck in his article "The Nuernberg Trial and Aggressive War" published in Volume LIX No. 3 The Harvard Law Review, February 1946 page 423, now published in book form, says, "The immunity which a sovereign and his agents enjoy by virtue of the privilege granted him and them by other sovereigns is based upon international comity and courtesy;".... In the footnote he quotes from Coker Sovereignty in 14 Encyc. Soc. Sci (1937) 266 (italics supplied). "International law.....speaking very generally..... recognizes that every state has, as a sovereign community, the legal right to

select its own form of government and to regulate as it chooses its own territory and the personal and property relations of its citizens and subjects - <u>insofar as it does not exercise this right in such a way as to endanger the peace and safety of other states</u>."

We grant that peace has not been signed with Japan, but Japan has by the Instrument of Surrender signed September 2, 1945 placed herself under the power of the conquering nations including the United States. The Peace Treaty is now up to the United States and the other Allied Powers. Can it not be said therefore that present conditions are abnormal only because the Allied Powers have not yet seen fit to terminate the present state of affairs by a Peace Treaty?

Is the United States of America to refuse to recognize the absolute and complete jurisdiction of Japan within Jaluit in April 1945 simply because we do not see fit to terminate the present condition by a formal peace treaty. We do not believe America will do this.

We ask therefore that both charge I and charge II be dismissed as against this accused, Captain Inoue.

Moro, A Digest of International Law volume II on page 362 says:

A sovereign, according to modern international law, can not exercise the prerogatives of sovereignty in any dominions but his own."

The above rulings from leading cases on jurisdiction and opinions of international lawyers, are particularly applicable to charge one, but they also apply to charge two because the offense is the same identical offense as is charged in charge two, but it is said to be "in violation of the laws and customs of war."

This commission should not consider any reference to the SCAP letter, Regulations Governing the Trials of Accused War Criminals AG 000.5 (5 Dec. 45) LG, as applicable or conferring jurisdiction on this commission to try the accused Captain Inoue. We call the commission's attention to paragraph 2 of the above SCAP letters which reads: "2. Jurisdiction a. <u>Over Persons</u>. The military commission appointed hereunder shall have jurisdiction....." Certainly this commission is not appointed by the Supreme Commander Allied Powers.

This commission is convened by the Commander Marianas Area by Serial 3785 dated February 21, 1947.

It is therefore immaterial and irrelevant what the provisions of SCAP letter AG 000.5 (5 Dec. 45) says about jurisdiction because this commission is not appointed by the Supreme Commander Allied Powers.

"Q(8)"

This allegation "in violation of the laws and customs of war" is a conclusion of the pleader. On the face of the specifications it is alleged the native inhabitants were punished as spies. We ask, "what is the punishment for a spy?" All authorities, as far as I know agree and the rules of land warfare, provide that punishment meted out to a spy may extend to the death penalty.

The acts alleged took place in April 1945. It is common knowledge that Jaluit was a by passed island, but the American naval and army air forces bombed Jaluit continuously. The Navy ships came in at close range and shelled the island at will. The garrison at Jaluit was in sore straits. The native inhabitants were difficult to control and having valuable information were very eager to turn this information over to the Americans. The war as you remember ended in August 1945.

What laws and what customs of war were violated?when these eight native inhabitants of the Marshall Islands were punished as spies?

The accused, Captain Inoue, is not subject to the jurisdiction of this military commission for a violation of the Hague Convention of 1907 or of the Geneva Prisoners of War Convention or the Geneva Red Cross Convention of July 27, 1929.

International Law such as the Hague Convention provides neither courts or punishments for individuals who violate the laws and customs of war. The prosecution must show by what authority the law of nations permits the trial of individuals and what punishment is provided for the violation of the laws and customs of war. We hold that the state and not the soldier is liable for violation ofthe laws and customs of war. The burden is upon the prosecution to furnish legal authority and/or specific rulings in order that this military commission may hold otherwise.

We can only anticipate and ask if the accused is charged with having violated The Hague Convention No. IV of 18 October 1907. If so then we cite Article 2 of this convention:

"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 and parties to the convention."

Since neither Italy nor Bulgaria has ever ratified the 1907 Hague Convention the accused claims neither Japan nor he as an officer of the Japanese army is bound by the convention although Japan did sign the convention.

Suppose at some state of the trial the prosecution decide that what they mean by "violation of the laws and customs of war" is the Geneva Prisoners of War Convention of July 27, 1929 then we say that this military commission has no jurisdiction because Japan has not ratified or formally adhered to this Geneva Prisoner of War Convention.

"Q(9)"

But, you ask, if this commission has no jurisdiction to try the accused Captain Inoue, Imperial Japanese Army for an offense committed on Jaluit during the bombing of Jaluit by the Americans in April 1945, then what court does have jurisdiction. This question is highly irrelevant and this commission should hear no argument or permit any evidence on this subject whatsoever.

We object to any argument which shows that on and after January 5, 1946 Commander Marianas abolished all existing law courts on Jaluit and took over the responsibility for the enforcement of law thereafter. Such argument is as we stated irrelevant and immaterial because the alleged crime for which Captain Inoue is being tried is said to have been committed April 8 and April 13, 1945. The only argument which this commission should listen to is, what was the law and how was it enforced on Jaluit on April 8 and April 13, 1945.

Of what importance and how can any law, or proclamations issued after April 13, 1945 affect or be material to the issues before this commission. Any such laws can only be ex post facto laws if applied to a crime committed before the proclamation was made or the law passed.

And what does the Constitution of the United States of America say about ex post facto laws. Section 9 paragraph 3 of Article I reads:

"No Bill of Attaindor or ex post facto Law shall be passed."

If a United States Military Commission did not have jurisdiction over the accused and the alleged crime on April 8, 1945 and April 13, 1945 then no proclamations or laws passed after those dates can give this or any other United States Military Commission such jurisdiction. This is fundamental.

"We the people of the United States, in order to .....establish justice" established a Constitution. As we pointed out the Constitution specifically provides that no ex post facto law shall be passed. The only effective law therefore was the law in force on April 8, 1945 and April 13, 1945. We maintain that the laws so in effect give this commission no jurisdiction to try the accused, Captain Inoue, Fumio, Imperial Japanese Army. Also highly irrelevant and immaterial is the question of the necessity for the United States of America to establish courts in the Marshall Islands including Jaluit. This commission should not listen to any such arguments. This question is not in issue.

The Charter of the International Tribunal at Nuernberg or at Tokyo is also irrelevant and immaterial. This is a military commission convened by the Navy Department. It was given no powers or do any of the powers of the International Tribunal granted by the Charter to the International Tribunal stem to this military commission. What powers the International Tribunals has and what the provisions of the Charters were which established these International Tribunals is immaterial and irrelevant and this commission should not be required to listen to such argument.

The same must be said about the Cairo Conference of November 1943. It may have been the purpose of the Cairo Conference to strip Japan of all her islands in the Pacific, but this was not accomplished because on April 8, 1945 and April 13, 1945 Japan still was in possession of Jaluit. The Cairo Conference is immaterial to the issues in this trial and we object to the interjection of the Cairo Conference into this trial.

Likewise is the Potsdam Declaration immaterial and irrelevant.

So too is the Instrument of Surrender signed September 2, 1945. Remember Japan was then a defeated nation.

This commission can only be concerned with what was the effective law on April 8, and April 13, 1945. All that has happened since those dates is immaterial because subsequent can only be ex post facto laws and such laws are in these United States of America forbidden.

What our present intentions are in the Marshalls is also immaterial and irrelevant. Whether Japan is now sovereign over Jaluit is also immaterial.

What were the facts on April 8, 1945 and April 13, 1945? That only is material to the issues in this trial. There can be sovereignty or quasi-sovereignty of the United States over Jaluit on April 8, 1945 and April 13, 1945.

It is immaterial what the status of the United States is in Jaluit today, whether the United States now possesses the power and the duty to establish military courts in Jaluit or whehter the United States has quasi-sovereignty powers in Jaluit today.

It does not necessarily follow that because this Military Commission does not have jurisdiction over a crime committed on Jaluit in April 1945 that there is a hiatus in the law. It is not for this commission to determine where jurisdiction in this present case. It is only material at this time for this commission to determine if they have jurisdiction to try the accused Captain Inoue, Fumio, Imperial Japanese Army for an alleged crime committed on Jaluit in April 1945.

This commission should carefully consider what was said in the case of Pettit v. Walsho 18 U.S. C.A. paragraph 451 et seq as cited on page 158 American Jurisprudence Criminal Law.

"There are no common law offenses against the United States and the crime of murder or manslaughter as such is not known to the Federal Government except in places over which it may exercise exclusive jurisdiction and where by Act of Congress such offenses are recognized and made punishable."

We feel that any opinions from the Judge Advocate General's office of the United States Navy Department should be carefully considered. Is the opinion based on all the facts of this case and second is the opinion an out and out opinion that definitely states that this military commission has jurisdiction to try the accused and/or of the alleged crime? Since the reference in the precept containing the opinion is classified it is impossible to bring this opinion into open court so we ask that the members of the Military Commission read it most carefully and determine if it is binding on this commission in view of our pleas to the jurisdiction of this Military Commission to try the accused, Captain Inoue, Fumio, Imperial Japanese Army for the alleged crime.

Martin Emilius Carlson

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

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REPLY OF THE JUDGE ADVOCATE IN SUPPORT OF THE JURISDICTION OF MILITARY COMMISSION

delivered by

Lieutenant David Bolton, USN

Prior to a detailed discussion of the argument of defense counsel with regard to jurisdiction, it is desirable to briefly examine the background picture of administration of justice in the Marshall Islands. The following information concerning the Japanese occupation is derived from the Civil Affairs Handbook, East Caroline Islands, OPNAV P22-5 published by the Chief of Naval Operations, Navy Department, 21 February 1944.

When the Japanese Military occupation of the Marshall Islands took place in 1914, and for a number of years thereafter, criminal courts were established in Civil Administration Sections, later the Branch Governments. In 1922 when the South Seas Government was formed, a local court was established in Ponape with jurisdiction in the Truk and Jaluit districts. An appellate court was located at Korer to which appeal could be taken from the decisions of any of the local courts. The judges in the local courts were Japanese. In 1941, the local judge at Ponape was Koiso Omori and the public prosecutor was Masayuki Esaki, both Japanese civil servants of Sonin rank. In theory all judicial matters in the mandated area were to be handled by the courts of justice. But in practice, certain minor offenses were dealt with by the Branch Governor. Village chiefs and headmen, were also authorized to render summary decisions in respect to certain minor offenses committed by natives on isolated islands. All serious crimes were tried in the Ponape Local Court. In 1937, 118 criminal cases were tried in the Ponape Local Court. Two of these were cases of murder by Japanese.

Upon defeat and surrender of the Japanese, Ponape was placed under military government, and all remaining Japanese, including civil judicial officers, if any, were subsequently evacuated. By 5 January 1946, at the time when Commander Marianas had taken responsibility for the military government of the Marshall Islands, all Japanese personnel had already been removed from Ponape. The Japanese Ponape Local Court, therefore ceased to exist after the date of surrender. No counterpart of the Japanese Ponape Local Court was set up by our military government in Ponape. Therefore, no court exists in Ponape with any jurisdiction over crimes committed in Jaluit Atoll, Marshall Islands.

In the Marshall Islands, the jurisdiction of the courts, under existing United States military government, is specifically set forth in a number of proclamations, ordinances and directives.

Defense counsel, Mr. Akimoto, has contended that those proclamations, etc.,

were "mere orders" and do not constitute law. Defense counsel is in error. A proclamation within the scope of the legal powers of the official issuing said proclamation can have the full force and effect of law. Admiral Chester W. Nimitz, as Admiral, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, and Military Governor of the Marshall Islands Area, had full legal authority to issue proclamations establishing the effective law with regard to all executive, administrative, and judicial aspects of military government. This is a fundamental and elementary principle of military government.

Under proclamation no. 2, Article IV, it is provided as to violations of the Japanese Penal Laws, "Any person who commits any act which violates any provision of Japanese Penal Law in effect in these islands prior to the occupation by the forces under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor, or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct. . . . ."

Ordinance No. 2, amongst other things, established in each atoll a Marshallese Court to be composed of not less than three(3) or more than five (5) members. It specifically sets forth the jurisdiction of the court and states, in Part III, paragraph 12, that the Marshallese Court shall have jurisdiction over: "All offenses punishable under the provisions of this ordinance, except those offenses for which the penalty is death or imprisonment." Under Part IV, regulations, paragraph 32 provides: "The following acts are criminal offenses which shall be punished as herein prescribed: (a) Murder--the willful or intentional taking of the life of a human being without lawful justification or excuse. (This offense is tried by a Military Court.) Punishment: Death, or imprisonment for a period of time which shall not be less than ten (10) years, including imprisonment for life."

Under the pertinent proclamations and ordinances which constitute the effective law of the Marshall Islands, it is clear that the local native courts have not been empowered to exercise jurisdiction over the accused for the offense charged. The jurisdiction has been specifically reserved to Military Courts.

Contrary to defense counsel, Akimoto's argument, the accused is being tried in the area where the crime was committed. With regard to Charge I, the instant commission is sitting as a superior local court in the Marianas area, with clear territorial jurisdiction, specifically provided with regard to the Marshall Islands which are within this area.

The instant military court was convened pursuant to the precept dated 21 February 1947. Authority for the convening of this commission was vested in

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the convening authority, Rear Admiral Pownall, by virtue of his office as Commander Marianas Area, and Deputy Military Governor of the Marianas Area, by specific authority from the Commander-in-Chief, U. S. Pacific Fleet, Commander-in-Chief, Pacific Ocean Area and Military Governor of Pacific Ocean Area, and further by specific authority from the Judge Advocate General of the United States Navy. That source of authority is set forth in paragraph one of the precept.

In the precept of 21 February 1947, this Military Commission was authorized to try all offenses within the jurisdiction of exceptional military courts and in addition was specifically authorized to exercise jurisdiction "over offenses and Japanese military personnel now in the custody of Commander Marianas, referred to in the dispatch of the Judge Advocate General of the Navy," JAG dis 311730Z of Jul 46.

This dispatch ordered the trial of Japanese military personnel alleged to be responsible for the killing on the Marshall Islands of Marshallese natives during the period of Japanese control of these islands.

Inoue, Fumio, of the Imperial Japanese Army, the accused in the instant case, is charged in Charge I with the murder on the Marshall Islands of various Marshallese natives during the period of Japanese control of the Marshall Islands. It is clear that the case of Inoue, Fumio, falls within the scope of the authority of the Judge Advocate General's dispatch and therefore within the specific jurisdiction of this commission.

This commission is not empowered to divest itself of this jurisdiction specifically delegated to it by virtue of the precept duly issued and pursuant to the powers of the convening authority as set forth in paragraph one of the precept.

The Judge Advocate General of the United States Navy, the War Department, and the Department of State have carefully considered the problem of jurisdiction now raised by the defendant. It is their considered opinion that jurisdiction rests in this commission. The dispatch referred to in the precept clearly recognizes the jurisdiction of this commission. In a later communication the Judge Advocate General of the U. S. Navy, in referring to the instant case specifically authorizes the charge of the crime of murder as defined under the local applicable law, and this charge consitutes charge I against the accused, Inoue.

The opinion of the Judge Advocate General of the Navy, the War Department and the Department of State as the considered opinion of outstanding authority in the field of military and international law, is not one to be light dismissed by this commission.

The Judge Advocate General's determination that this crime should be tried before a military commission is in accord with the conclusions reached by other eminent international authorities on the subject of jurisprudence andinternational criminal law, who served in the drafting of the charter for the famous International Military Tribunal at Nuremberg, participated in by the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of Soviet Socialist Republics. The leading international authorities from these countries determined that crimes committed against the local civilian population need not be tried by the local criminal courts, and are properly triable by military tribunals established for such trials. Specifically, the charter provided jurisdiction withregard to crimes against humanity and specifically includes murder "against any civilian population before or during the war. . . . ."

Article 6(c) reads:

"Crimes against humanity. Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war or persecutions on policitical, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated....."

Similarly, the Supreme Commander for the Allied Powers, in SCAP letter Regulations Governing the Trials of Accused War Criminals, AG 000.5 (5 Dec. 45) provides for jurisdiction as follows:"2. Jurisdiction. a. Over Persons-- Military Commissions appointed hereunder shall have jurisdiction over all persons charged with war crimes who are in the custody of the convening authority at the time of the trial. b. Over Offenses. (1) Military commissions appointed hereunder shall have jurisdiction over all offenses including, but not limited to, the following. . . . (c) Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, ... whether or not in violation of the domestic laws of the country where perpetrated.

It should be noted that the SCAP regulations are applicable to Military Commissions composed solely of U. S. Military members as well as to International Tribunals, whereas, the International Military Tribunals derives its members from outstanding jurists from several nations.

It should be apparent that since the determination by the Judge Advocate of the United States Navy, that jurisdiction can and should be vested in this commission, is supported by similar decisions made with regard to Military Commission set up under the Supreme Commander for the Allied Powers, and by the similar decisions with regard to the eminent International Military Tribunal at Nuremberg, the instant Military Commission can be and, as already discussed, has been empowered by competent authority to exercise jurisdiction over crimes against local civilians committed by Japanese military personnel.

As to the substance of the offense, the law to be applied is the law in effect at the time and the place where the offense was committed. This is not an admission by the judge advocate that sovereignty of the Marshall Islands existed in Japan. On the contrary, this merely states what the applicable local law was, and has no bearing on the issue of sovereignty whatsoever. Under the mandate, Japan was delegated authority to establish the applicable local law. Any law could have been used as the basis for local law. If the laws of California had been applied it would hot be contended by defense that thereby California had sovereignty.

At the time of the commission of the instant alleged crime, Imperial Ordinance 26, for the Treatment of Judicial Affairs in the South Sea Islands, which was enacted in 1923, and revised in 1933, was in effect, and defined the laws and regulations which apply to the mandated islands. The laws of Japan which are specifically stated to apply to the mandated islands include the criminal code. (See also OPNAV P22-5, op. cit., pages 81, 82.

Charge I, Murder, sets forth in each specification, the applicable provisions of the Criminal Code of Japan pertaining to the charge of murder, and jurisdiction over this offense has thus been clearly established.

Charge II alleges a violation of the laws and customs of war. The crime falls clearly within the scope of offenses set forth in the precept, and similarly falls within the cope of offenses listed in the charter of the International Military Tribunal and the SCAP regulations. The validity of jurisdiction of this commission over the offenses charged is clear. Not only military courts but similarly civil courts possess jurisdiction over crimes in violation of international law and in violation of the laws and customs of war. Respublica v. De Longchamps.

1 Dallas 110 (Pa -1784). The Saboteurs case ex parte Quirin, 317 US 1(1942)

As the power of the convening authority extends to war crimes as well as violation of local criminal law, it is unnecessary to seprately demonstrate that regardless of the question of jurisdiction as a local court, the commission with regard to Charge II, Violation of laws and customs of war, has a separate and distinct jurisdiction with regard to such violations of international law.

It may perhaps be contended by defense counsel that we cannot maintain jurisdiction in the same trial, over offenses growing out of violation of local law and violations of international law, that is to say the laws and customs of war. Such contention is specious.

As stated in the Appendix to Glueck's article "The Nuremberg Trial and Aggressive War," 59 Harvard Law Rev. p. 455, "Lawfullness as was correctly held by the German Supreme Court in the Leipzig trials, requires the acts of the

soldier to be legitimate not only under domestic criminal law but also under the law of nations, whcih all states and submects are bound to obey. Stripped of the mantle of such legality, the act in question stands out stardly as an unjustifiable and inexcusable killing of a human being something which, by all civilised military and civil penal codes, consitutes plain murder."

Similarly, the United States Supreme Court has affirmed the application of laws and customs of warfare to criminal action against an individual charged before a domestic court. In the Saboteurs case, Ex parte Quirin, 317 US 2(1942) the Supreme Court hold in effect that despite the absence of any prior domestic legislation authorizing its application, individual offenders could be punished for offenses under the "law of warfare branch of the common law of nations."

International law, written and unwritten, has been applied as a basic part of the local law. The doctrine is not a new or novel one. It was ably expressed by "local" courts over 163 years ago. In the famous case of Respublica v. De Longchamps 1 Dall. 110 (Pa. 1784) the defendant was convicted and sentenced to imprisonment and fine for insulting and threatening the Secretary of the French Legation. The defense argued that the reparation sought and remedy offerdd are limited to the municipal law of Pennsylvania which offered only the remedy of "imposition of a legal restraint on the execution" of the threats. The prosecution argued that although the mode of punishment sought was not set out in the act itslef, an offense against the law of nations must necessarily be indictable. The court stated that the case "must be determined on the principles of the law of nations, which form a part of the municipal law of Pennsylvania; and if the offenses charged in the indictment have been committed, there can be no doubt, that those laws have been violated. . . . . The <u>first</u> crime in the indictment is an infranction of the law of nations. This law in its full extent, is part of the law of this State, and is to be collected from the practise of different nations and the authority of writers." (114, 116). It should be noted in passing that reference to the first crime in the indictment as being under the law of nations, indicates that other crimes charged in the indictment were vil violations of domestic or local law, and that joining of the charges in one indictment was not prohibited by the court.

Decisions in Federal and State courts are too numerous to warrant further citation and unnecessary consumption of the time of the commission. Certain classic language used in this connection by these courts is worthy of brief repetition.

Justice Brewer for the court in the decision on the amended bill in the case of Kansas v. Colorado, said:". . . Nor is our jurisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law." <u>International law is no alien in this tribunal.</u> In the Paquete Habana, 175, 700, Mr. Justice Gray declared: "International law is part of our law, andmust be ascertained and administered by the courts of justice of apporpriate jurisdiction as ofen as questions of right depending upon it are duly presented for their determination." 206 US (1907) 46, 97. "R(6)"

. . .

See also the case of the Lusitania, in which it was held that "The United States courts recognise the binding force of international law." 251 Fedd735, 732 (S.D.N.Y., 1918).

Even in a state court, "international law is a part of our law" and must be administred whenever involved in casespresanted for determination. Elizabeth Ridell, executrix v. Sophie V. Fuhrman & others, 233 Mass. (1919) 69, 73, 123, N.E. 237, 239.

The essence of such decisions was ably expressed in the leading case of Kansas v. Colorado by Chief Justice Fuller who in overrulling the demurrer, delivered the opinion of the Supreme Court and stated, "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand.." 185 U.S. (1902) 125, 146, 147.

The judge advocate has briefly presented a picture of the existence of jurisdiction over the person of the accused, andover the offenses charged with regardeto the violation of domestic or local law as set forth in Charge I and the violation of international law, viz, the laws and customs of war set forth in Charge II. From this discussion, and our previous argument with regard to the charges and specifications, it is clear that specific authority has been properly delegated to this commission to try Captain Inoue for the crime alleged in the instant charges and specifications.

Extensive arguments have been made by counsel for the accused, seeding to persuade the commission that their exercise of jurisdiction in this case is not legally justifiable. The commission can properly dispose of the defendant's argument against jurisdictinn by relying on the specific authority and direction of the Judge Advocate General of the Navy, and similar precedent as outlined in the charter of the International Military Tribunal, andin the Regulations issued by the Supreme Commander for the Allied Powers.

However, in view of the extensive defense argument, and in order to prevent the accused from deluding himself that he is being subjected to the arbitrary fiat of the conquerer rather than dound doctrines of international law, the judge advocate will briefly discuss certain fundamental principles of international law which are applicable to the question of jurisdiction in the instant case.

Application of these fundamental principles of law, as additional dources of jurisdiction for the subject military commission, is authorized by paragraph 3 of the precept which authorizes the commission "to try any and all cases which may fall into the proper jurisdiction of exceptional military courts..... Nothing herein limits the jurisdiction of the military commission as to persons and offenses which may be otherwise properly established."

The theoretic sources of jurisdiction of exceptional military courts in criminal cases, rests primarily upon two distinct but not conflicting bases. These can be briefly and simply expressed as follows: First, the criminal jurisdiction implic$ in the rights and duties of the milit-ryoccupying power over the territory occupied. Secondly, the criminal jurisdiction derivable from sovereign and quasi-sovereign powers and rights of the conqueror over territories which have no other sovereign. I will attempt to present to the commission some of the vast body of international law and authority on these two sources of jurisdiction and to indicate briefly how they are applicable in the subject cases

One of the fundamental doctrines of international law is that the military occupation of territory, whether it be enemy, neutral, allied, or one's own national territory, carries with it certain fundamental duties as well as rights and privilegs in regard to the orderly administratinn of the occupied territory.

Article 43 of the Hague Convention IV reaffirms the basic obligations of the occupant to reestablish and assure public order and life--and purusant to this provisions the occupant may establish courts and punish violations of existing criminal law. Professor Mitchell Franklin of Tulane University Law School, in his able article in the American Journal of International Law, titled Sources of International Law Relating to Sanction against War Criminals, in discussing Article 43 and powers of the occupant, states; on page 175, "Article 43 established three principles: (1) the occupying power may introduce his law of military government, in whose or in part, subject to the restrictions of general international law set out in Articles 43-56, Hague Convention IV. (2) The occupying powers may retain "The laws in vigor in the country," in whole or in part. (3) The occupying power may perform acts of fulfillment or administration, or, perhaps, exercise the power of a syndic in relation to the internal legal system. The power of punishment for prior violations of general international criminal law is thus within "the authority of the legal power" which has "in fact passed into the hands of the occupant."

The status of military occupation, inherently entails these aspects of essentiallpivil administration. The administration is commonly referred to as military government, and its authority may be exercised in every field of governmental activity, executive, administrative, legislative, and judicial. Hyde, vol 2, p 361.

Numerous authorities in the field of international law clearly establish the fact that for the administration of justice, the occupying power may establish military tribunals, and these military tribunals may act in the place of local criminal courts and administer local criminal law. I will cite merely a few of the authorities in this connection;

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The Army JAG's school, text no. 11, titled the "Laws of Belligerent Occupation" on page 52 specifically notes that when military necessity or the maintenenace of public order and safety require such action, the occupant may substitute his own tribunal to administer local criminal law. Citation of authority for this statement is found in footnote 74 as follows: "Garner, vol 2, p 87. Courts created by a military governor to administer the local criminal law depend for their existence on the laws of war and not on the constitution or legislation of the legitimate sovereign. US v. Reiter, Fed Cas no. 16, 146; FM 27-250, p. 1."

Spaight in his authoritative text on War Rights on Land (1911), cites common law doctrine in the following statement: "Delicts and crimes against common law can usually be adequately dealt with by the localcourts * * * But if the machinery of justice has been so dislocated by the events of the war as to be out of gear or inoperative--if, for instance, the courts have been closed and the judges have fled or if the judges decline to sit, then the occupant is fully entitled, and indeed called upon, to establish special tribunals for trying offenses against common law. In 1900, Lord Roberts found it necessary to erect such courts in the Transvaal, and deal with offenses under the common or Statute Law of the Transvaal and magistrates were appointed to preside over such courts." (p. 358.)

Similarly Cybichowski, in "Das Volkerrechtliche Okkupations - recht, 18 Zeitschrift Fur Volkerrecht, pp. 295-332 (1934) states that the occupying power has authority under proper circumstances to establish exceptional military tribunals for the enforcement of local criminal law. Cybichowski states: "If the judges of occupied territory have left the territory or refused to serve the occupants must establish new courts * * * These render judgment according to the laws of occupied territory and should be regarded as foreign courts in relation to the courts of the occupant." (That is to say, they are to be regarded as local courts of the place in which they are serving, and not as national courts of the occupant.)

It is clear that in the absence of local courts, the occpant has not only the right, but the clear obligation to establish new courts for the proper administration of justice. This is clearly the situationin the Marshall Islands area where as I have already indicated, no Japanese judicial officials remain to administer justice. The local native officials were not empowered under Japanese law, and similarly under our existing laws of military government, are not vested with authority to exercise jurisdiction over major criminal cases, such as murder, etc.

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But, even if local criminal judges and courts were available for trial of the criminal cases under local criminal law, the occupying power has the power and right to suspend proceedings in the local criminal court and direct that any case of class of cases be tried by a military tribunal. This can be done where prosecution of the case would otherwise be inimical to the interests of the occupant (FM 27-5, par 42d), or where competency of the local court to accord a fair trial is in doubt (JAG School Text 11, op. cit, pg. 53.)

It should be noted that even when subject of neutral powers where involved, where competency of local court to accord a fair trial was in doubt, it has been held that the occupant whould be justified in referring such cases to tribunals created by him. Bentwich, in the British Yearbook of International Law, 1920-21, p. 143, notes that during the British occupation of Palestine duringWorld War I, the local criminal courts regularly tried all persons without regard to nationality; however for serious offenses, foreign subjects were tried either by a British magistrate or by a court with a majority ofBritish judges.

The instant case, involving as it does the trial or a Japanese military officer for the heinous crime of murder alleged to have been committed against Marshallese natives, it is clearly an instance where a fair trial for the defendant would not be expected from the inexperienced local native criminal courts. It would appear to be a case which falls clearly within the scope of the rule permitting the establishment of special military tribunals, even whereat there is available a qualified local court with jurisdiction to try similar crimes. Since international law permits trial before an exceptional military tribuanl for crimes against local law, even where local courts exist which would otherwise have jurisdiction over the crime, a fortiori, an exceptional military commission may be established to try such crimes against local law, where there is no local criminal court with jurisdiction over these crimes.

It is unnecessary to cite further authority regarding the right of the occupant to establish appropriate military courts to punish violations of existing criminal law. The concept is fundamental.

It is possible that counsel for the accused will now seek to contend that the jurisdiction of the military courts established by the occupant is limited to crimes committed during the period of occupancy.

It should be noted that such contention was implicitly rejected in both the Charter of the International Tribunal and in the SCAP regulations. In the former, Article 6(6) vests jurisdiction over crimes, namely murder, committed against any civilian population before or during the war. In the latter,

it is stated that the offense need not have been committed after a particular date,. .. .. but in general, it should have been committed since.. .. .. September 18, 1931. Thus, both these documents prepared by eminent international jurists, appear to maintain the position that these tribunals have jurisdiction over offenses committed prior to the war period.

From the standpoint of any realistic concept of justice, this approach is sound and essential to a vital administration of international or domestic law. Clearly any attempt to limit power of trial or punishment to crimes committed during the period of possession or occupancy, would render completely abortive any attempt to enforce international law or the laws and customs of war, for the vast majority of war crimes are perpetrated prior to occupancy by the new occupant and in territory still held by the forces of the war criminal.

The obviously false doctrine that power of the occupant is limited to crimes committed during occupancy, rests upon failure to understand the nature, function and duties of occupancy. Under international law the duty of the occupant includes the obligation to restore public order and life. Article 43 of the Fourth Hague Convention, reiterates this "common law" of nations stating "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far ass possible, public order and safety (life), while respecting, unless absolutely prevented, the laws in force in the country."

The just prosecution and punishment of persons who have committed crimes against local law, within the period immediately preceding occupancy, is clearly within the scope of the broad language of this article; particularly the language "all the measures in his power to restore, and ensure as far ass possible public order and safety, etc." It is difficult to conceive of the existence of any public order and safety if known criminals, particularly murderers, were permitted to remain at large, unpunished merely because their crime against local laws of murder occurred in the period prior to military occupancy. To fail to prosecute such crimes would make the occupying power a shield for those who on the eve of defeat resorted to crimes of violence, lust, and plunder. Surely sound international jurisprudence neither requires nor tolerates such an anomaly. On the contrary, it must affirm the fact that failure of the occupying power to punish the criminal would itself cousitute a serious violation of the requirements of international law, and specifically of this provision, Article 43 of the Hague Convention.

Mitchell Franklin, in his article on Sanctions Against War Criminals, op. cit, briefly and effectively discussed this provision stating: "Article 43 is a provision dealing with the duty of the military occupant to reestablish

and assure public order and life. This obviously makes it possible for the occupant to employ the law of the occupied state in regard to criminal acts committed after the occupation. But it also seems to make it the duty of the occupant to punish violations of criminal law committed before the occupation, for that is an aspect of the reestablishment or restoration (retablir) and assurance or ensurance (assurer) of public order and public life." (174) On page 175, in discussing the "third principle" established by Article 43 , states "(3) The occupying power may perform acts of fullfillment or administration, or, perhaps, exercise the powers of a syndic in relation to the internal legal system. Theppower of punishment for prior violations of general international criminal law is thus within 'the authority of the legal power' whichhas 'in fact passed into the hands of the occupant.' . . . Hague Convention IV itself created the basis for punishing criminals under general international law whenArticle 43 was formulated and accepted. The only prerequisite for such punishment is occupation of the offending state under Article 42 and seizure of the persons who had violated general international law."

From the foregoing discussion, it is celar that jurisdiction over the offense and the accused in the instant case, is properly vested in this military commission and that sound international law concerning the rights and duties of the occupying military power requires this court to exercise jurisdiction in t the instant case.

The fact that the particular territory occupied, and in which the crime occurred, is the Marshall Islands gives rise to certain special powers and obligations under international law, in addition to those of the military occupant. These powers are in some aspect broader than those of the military occupant, and pursuant to their exercise by the convening authority, this commission has derived additional sources of jurisdiction. To properly demonstrate and evaluate these additional sources of jurisdiction, it is necessary to consider the peculiar status of the Marshall Islands with regard to sovereignty.

In Decmeber of 1914, the Japanese took possession of Jaluit Atoll, Marshall Islands from theGermans and established a military government there.

After the surrender of Germany, Japan in 1920 "accepted" and administered the Marshalls, under a Class "C" Mandate from the League of Nations. In 1922, by a special agreement withJapan, the United States accepted the arragement by which Japan exercised authority over the Class "C" mandatorees. Hackworth, Digest of International Law, Vol. 1, p. 125.)

The exact scope of the Class "C" mandate with regard to the traditional doctrines of sovereignty was never precisely defined. The Civil Affairs Handbook, East Caroline Islands, OPNAV P22-5, published by the Office of the Chief of Naval Operations, notes that "the colonial policy of the League of Nations, expressed in the mandate system represented a compromise between the conservatives who favored outright imperialistic annexation and the territories. . . . . and the liberals who wished them to be directly administered by the League." (Op. cit p. 61.)

It is clear that the native inhabitants of the Marshall Islands were not, and similarly, cannot correctly be considered able to exercise sovereignty over their own territory. The fundamental conditions in the Marshalls have not changed radically from the conditions prevailing at the time of the signing of the Treaty of Versailles.

The conditions of the mandated colonies and territories, and the varying degrees of the inability to "stand by themselves under the strenuous conditions of the modern world" is clearly established by The Treaty of Versailles, part one Art. 22 of the Covenant of the League of Nations. The Class "C" Mandates were deemed so incapable of exercising any degree of independent sovereignty, that it was determined that they could "best be administered under the laws of the Mandatory as integral portions of its territory. . . . ." The pertinent portions of Article 22 read as follows:

"

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves underthe strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such people form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

"The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

"The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances. . . . .

"There are territories, such as South West Africa and certain of the

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South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization or their geographical contiguity to the territory of the Mandatory, and other circumstances, can besbest administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of theiindigenous population."

In the charger laid down by the League of Nations for the government of the islands mandated to Japan 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 theterritory, subject to such modifidations as circumstances may require. The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitant of the territory subject to the preset Mandate."

Article 6 provided "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4, and 5."

Article 7 provided "The consent of theCouncil of the League of Nations is required for any modifidation of the terms of the present Mandate."

From these historic documents it is clear that the native inhabitants of the Marshalls were not deemed capable of exercising sovereignty. The question therefore arrises whether sovereignty over the Marshall Islands ever vested in Japan. Formal acceptance by Japan of the administrationof the territory as a Class "C" Mandate under the League of Nations clearly defeats any contention that she claimed full sovereignty at that time. Similarly the agreement of February 11, 1922 between Japan and the United States, with regard to Yap, evidenced recognition by Japan of the fact that she was not the sovereign of the mandated territories.

Japan at first fulfilled at least nominally the requirements of the Mandate but questions arose with regard to the degree of fulfillment of certain of the obligations under the Mandate Charger. When Japan announced that she would withhold from the Leggue of Nations the question of sovereignty of the mandated islands and Internation Jurists, mostly American, pronounced the opinion "that if Japan withdrew she would forfeit her mandate, and the islands would revert to the League." Japanese jurists held the opposite opinion.

When Japan actually withdrew in March, 1935, she kept control of the mandated territory and she continued to administer it in much the same way and to submit annual reports to the League through 1938. (OPNAV P22-5, op. cit.,

p. 21). Thus further indicating that Japan did not publicly claim sovereignty over the mandated territory.

Proponents of Japanese sovereignty may content that sovereignty was derived from the consent of the "Principal Allied and Associated Powers" in whose favor Germany by Article 119 of the Versailles Treaty penounced "all her rights and titles over her overseas possessions." If this consent was the source of Japanese sovereignty, the basis of this sovereignty was destroyed at the time of the Cairo Conference, November, 1943, when the United States of America, China, and the United Kingdom stated it was "their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914§; thus, revoking any prior consent to Japanese control. It would appear, therefore, that at the time of the commission of these crimes in 1945, Japan did not have sovereignty of the Marshall Islands.

Defense counsel, Mr. Suzuki, argues that the recognition by Admiral Nimitz in proclamation No. 2, that Japanese law was the effective local law in the Marshhll Islands, necessarily rests upon a recognition that Japan had sovereignty of the Marshall Islands after her withdrawal from the League of Nations. This contention is fallacious. The Japanese Criminal Code was recognized as the effective local law because in fact it was the local law. This is explicitly recognized in Charge I against the accused, Inoue. But the fact that it was the local law does not mean Japan had sovereignty.

If prior to occupation bythe United States forces the penal code of Mexico had been made the effective local law of the Marshalls, then the recognition of the penal code of Mexico as effective local law of the Marshalls would not constitute a recognition of the sovereignty of Mexico over these islands. It would merely recognize that effective local law was the Mexican penal code, as the applied local law in effect on these islands.

It is appraent therefore that contrary to the argument of defense counsel, the provisions ofproclamations by Admiral Nimitz, indicating that Japanese penal law was the effective local law, does not in any manner consitute any recognition that after withdrawal from the League Of Nations, Japan had sovereignty over the Marshall Islands.

But it is unnecessary for this commission to make a determination whether sovereignty over the Marshall Islands was vested at this time in Japan, because by the Instrument of Surrender, signed September 2, 1945, Japan accepted the provisions of the Potsdam Declaration. The Potsdam Declaration, specifically provides in (8) "the terms of the Cairo Declaration shall be carried out and the Japanese sovereignty shall be limited to the Islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands asswe determine1" The Marshall Islands have not been decalred minor islands over which sovereignty of Japan should be extended. On the contrary it is a matter of history that the United States has expressed to the Security Council of the United Nations its own intention to exercise full

control of these islands.

It is clear, therefore, on the basis of the Surrender Document that Japan is now unable to claim sovereignty over the Marshall Islands, and therefore it cannot be contended that the defendant, Major Furuki, has the right to be tried by the courts of Japan, as soverogn of the Marshall Islands.

Argument by Mr. Suzuki based on the fact that we have restored in Japan the power of local courts to administer justice in criminal cases is fallacious and misleading. It disregards the fact that Japan no longer possesses any rights in the Marshall Islands, and that the jurisdiction granted to Japanese courts is limited to crimes committed within Japan proper and does not extend to crimes committed in former mandated islands over which Japan has specifically renounced claim to sovereignty. Further, the SCAP trials in Tokyo are obvious reminders of the fact that the jurisdiction given to local Japanese courts is limited.

There are no Japanese courts which possess any jurisdiction over the instant case. I do not believe it can be seriously contended by defense counsel that such courts could possess exclusive jurisdiction.

It has laready been clearly established that there are no available native courts with jurisdiction over the instant offenses and in view of the historical background of the Marshall Islands and their inability at this time to "stand by themselves under the strenuous conditions of the modern world," it should be apparent that no power exists in the natives of the Marshall Islands to establish courts of exclusive jurisdiction of this offense. It should be noted that three Marshallese natives, including a local magistrate, are participating in this trial as observers in the proceedings of this commission.

In addition to the doctrine of military occupancy, under which we have already established the complete power of theUnited States as military occupant of the area to establish a military commission, acting as a local criminal court to try the instant case, there is a doctrine of international law, which can be applied to assert an additional source of authority in the United States for the creation of criminal courts. This doctrine permits an occupant prior to the culmination of a final treaty, to exercise sovereign rights with regard to territories occupied with the intention of not returning them to the former sovereign, and with the intention of exercising certain sovereign rights therein.

Under this theory, jurisdiction is derived fromthe certain quasi-sovereign rights which exist in the United States Government even during the period prior to formal treaty.

Prior to the occupation of the Marshall Islands in August, 1945, in the Cairo

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Conference and the Potsdam Decalation it was clearly stated by France, China, Great Britain, and the Union of Soviet Socialist Republics that Japan would be deprived of any claim of sovereignty over the formerly mandated islands. When Marshall Islands were occupied in August, 1945, a comprehensive system of military government was instituted by the United States. The intention of United States to exercise control over the Marshall Islands was enunciated numerous times prior to the 24th day of February, 1947, the date of the convening of the instant commission. To cite one of the more recet occasions, I bring to the attention of the commission the statements recently made before the United Nations Security Council by the United States Representative, claiming the right to exclusive custody of the strategic mandated islands of the Pacific including the Marianas and the Marshalls. Thus, whatever sovereignty was possessed by Japan has been destroyed and the United States has exercised and openly affirmed the right to exercise even more extensive sovereign rights than those claimed by Japan, for the United States has publicly proclaimed its intention to use those islands as strategic defensive military fortifications.

The doctrine I have referred to with regard to the exercise of sovereign rights by an occupying nation during the period prior to formal treaty is exemplified by the decisions of several national courts after World War I, which created armistice occupations as the equivalent of annexation. These cases apply the theory "that there is a difference between ordinary occupation of war and one made with the purpose of annexation." (Law of Belligerent Occupation, JAG text p. 11).

Thus in GALATIOLA v. SENES, Annual Digest 1919-22, Case No. 319, the court Cassation of Rome, held, that for the purposes of civil action for damages for failing to deliver merchandise, Trieste, in the period between the Armistice and the law annexing it to the Kingdom of Italy, could not be regarded as foreign territory. The court said, "with the complete dissolution of the enemy army and the simulatneous dismemberment of the Austro-Hungarian Empire, the national integration (of Trieste into Italy) has been accomplished almost automatically and pari passu with the military occupation of the provinces....It is absurd to think that in the interval between the armistice and the coming into force of the law of annexation, at a time when not only the sovereignty of Austria-Hungary over thoese provinces, but that very State, had disappeared, the two provinces disiectamembra of a new destroyed organism have been able to live a separate political life outside the sovereignty of the Italian State which had becomd responsible for all its administration, justice, army and finance."

Pursuant to this doctrine of quasi-sovereignty the United States would possess additional sovereign power and authority to create new local courts for the trial of crimes committed against existing laws.

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There can be no contention that soveregnty remains in the Japanese Empire, therefore, there can be no valid contention that trials of this defendant should be held before a Japanese court. Under the theory of military occupancy, and under the theory of quasi-sovereignty, there is clear and irrefutable justification in international legal precedent and authority for the creation of a military commission to act as a local court to punish the accused for crimes committed in violation of local law effective at the time of the commission of the offense.

It should be noted that this is not an instance of imposition of ex post fac facto law. We are alleging laws effective at the time of commission of the offense. As to Charge I, we cite the effective provision derived from the Japanese Criminal Code. As to Charge II, we refer to existing laws and customs of war, the "common law of nations," andit should be noted that the signing by Japan of the Hague Conventinn, clearly constituted a recognition of this provision as part of the common law of nations. (It should be noted that with reference to the Geneva Prisoner of War Convention, the Japanese Imperial Government during the course of the war, agreed, through the Swiss Government to apply the provisions thereof to prisioners of war under its control, and also, so far as practicable, to interned civilians.)

Defense counsel, Commander Carlson, has argued that everything that occurred since the date of the alleged crime--every law that was passed, and every provision of every treaty, international declaration, etc., is completely inapplicable and immaterial with regard to the instant case. He argues that ev everything of this nature is objectionalbe and unconstitutional as ex post facto law. I listened with great surprise to this extensive portion of the able defense counsel's argument. Defense counsel is clearly confused as to the meaning and application of the principle of ex post facto law, and I trust that he has not succeeding in confusing the commission. With regard to the question of jurisdiction of this commission we are concerned with what powers this commission has today. What jurisdiction it possesses now, and that jurisdiction as well as its powers are derived from events, orders, and legal documents which have come into existence since the date of the instant crime.

It is not a violation of the principle of ex post facto law to consider in regard to jurisdiction, etc., occurrences or laws since the date of the crime. The ex post facto principle is one that is firmly entrenched in our jurisprudence. It provides that a law which makes that criminal which was not so at the time the act was committed, or which increases the punishment thereof, is unjust and therefore invalid. The instant crime of murder as charged was, and always has been a crime, and the accused is charged with the crime as it was defined, and is subject to the full punishment provided under local as well as international law existing at the time of the commission of the offense.

All the laws and events referred to since the date of the crime have no effect on the charge of murder under Charge I--in regard to creation of new elements to the offense, or new punishment therefor. These changes relate primarily to the problem of jurisdiction of the offense, and composition of the court. And therefore are not within the compass of the ex post facto principle. The Supreme Court of the United States has considered such specious contentions in the past, and has clearly rejected them. "Statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibiti Duncan v. Missouri, 152 US 378, 14 Sup Ct 570, 38 L.Ed. 485; Thompson v. Mo. 171 US 380, 18 Sup Ct 922, 43 L.Ed. 204." (Bouvier's Law Dictionary, Rawles, 3rd ed. p. 1105.). Also see Gibson v. Miss. 162 US 565, 16 Sup Ct 904, 40 L.Ed. 1075.

Similarly, Underhill's Criminal Evidence, p. 13, states, "But the constitutional prohibition of ex post facto laws is not applicable to statutes which merely alter the method and details of the procedure of a criminal trial, even though the statute was passed after the crime was committed," citing Stokes v. People, 53 NY 164, 174, 13 Am Rep 492.

As it is clearly stated in Wharton's Criminal Law, vol 1, sec 43, "A statute however, subsequent to an offense, may change the mode by which it is to be prosecuted, provided the punishment attached to the offense is not thereby increased, or the defendants rights materially impaired." He cites the following as to statute altering jurisdiction of crime; which is obviously the precise issue before this commission: "A statute or constitution altering the jurisdiction of crimes is not ex post facto. Duncan v. Mo (1894) 152 U.S. 377, 38 L. Ed. 485 , 14 S.Ct. 570; State v. Cooler (1889) 30 SC 105, 3 LRA 181, 8 SE 692; State v. Welch (1892) 65 Vt 50, 25 Atl. 900.

Also similarly note the cases cited therein with regard to change of law as to venueto the effect that law as to venue may be retrospectively changed: But v. Minn (1869), 9 Wall (US) 35, 19 L.Ed. 573; Cook v. US (1890), 138 US 157, 34 L.Ed. 906, 11 S.Ct. 269. And Wharton, Crim. Pl. and Pr. Sec. 602.

It is obvious that defense counsel is mistaken as to the nature of the concept of ex post facto law, and that the jurisdiction of the commission is not divested over the instant crime and criminal merely because its jurisdiction is derived from events and laws subsequent to the commission of the crime. The crime with which the accused is charged is not an ex post facto crime, it always was a crime since man has evolved from the primitive beast--and it was a crime under local law, and under international law, at the time that the accused Captain Inoue committed these brutal, bestial murders.

Counsel for the defendant have also argued that international law cannot be applied to individuals. This argument has already been disposed of by reference to opinions of international jurists, the recent war crimes cases ...

decided in European and Pacific areas, and by the Ditmars and Boldt, Respublica v. De Longchamps, and the Saboteurs cases already discussed briefly with reference to the application of international law in criminal prosecutions of individuals. The latter case recently decided by the United States Supreme Court, justifies brief additional comment. Glueck in his book "War Criminals, Their Prosecution and Punishment," page 102, briefly comments on the Saboteurs case as follows:

"Thus the Saboterus' Case decision 'is impressive judicial testimony to the effect not only that' the 'law of nations may, and oftentimes does, address its injunctions to individuals by attaching an internationally illegal quality to particular acts,' but that 'the law of war as a part of the law of nations is a part of the local law," and 'also that its applicability by the courts in reference to penal matters need not await precise legislative appraisal or definition.'"

The contention that international law cannot be applied to the defendant because he is a member of the Imperial Japanese Army, and therefore entitled to protection for acts done under the cloak of sovereignty of his master, is similarly specious and has been disposed of in the famous Nuremberg trials, by the International Military Tribunal, which punished the very heads of the state themselves.

Certain additional arguments by defense counsel with regard to jurisdiction merit brief discussion at this time. Defense counsel Mr. Akimoto argued that as to Charge II as to the facts alleged as violations of the law and customs of war, the acts of the accused cannot constitute a war crime and that the accused was merely performing his national duty, and therefore this commission has no jurisdiction over the accused or his actions. The judge advocate during the course of the remainder of this trial will prove that the acts of the accused constituted a crime in violation of the laws and customs of war--this argument is properly reserved until the evidence has been produced before this commission on which it can determine whether in fact as charged, the accused is guilty of this crime. With regard to the jurisdictional aspects of the offense, of Charge II, the objections of Mr. Akimoto, may be joined with the able arguments of Mr. Suzuki who contended that Article 30 of the Hague Convention was inapplicableto Charge II. Article 30 and the related provisions of the Fourth Hague Convention reflect some of the laws and customs of war applicable to Charge II and therefore the argument of defense counsel concerning interpretation of this provision is pertinent. Article 30 reads: "A spy taken in the act shall not be punished without previous trial." Defense counsel Mr. Suzuki contends that this provision relates to foreign and not "domestic" spies. Note that Article 29 of the Hague Convention gives a definition of spies which is broad enoughto include any spies. I treads in part: "A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operation of a belligerent, with the intention of communicating it to the hostile party."

There is nothing in this definition which excludes spies who are nationals of the belligerent. Clearly the defense counsel is superimposing his own definition of spies upon Article 30. Obviously, since he failed to cite any, he has been unable to find any cases or other source of authority to support his distinction. The reason is apparent--there is no such distinction in international law. Spies like pirates are peculiarly subject to special treatment, special provisions and special protections of international law. International Law makes no distinction between domestic and foreign pirates--and similarly it makes no distination between domestic and foreign spies. The unsupported argument of defense counsel in ingenious--but it is not international law.

It should be noted in passing that even if such a distinction had been made in international law, thereby limiting its protection to "foreign" spies, the Marshallese natives would not be precluded from this protection under internation law. As I have earlier indicated, eminent international American jurists have denied any contention that Japan ever possessed sovereignty over the Marshall Islands. In addition it should be observed that the strongest argument advanced by defense regarding the authority of Japan over the Marshallese natives is its authority derived from the League of Nations under a Class "C" mandate. This authority exercised as a Class "C" mandatory did not make the Marshallese natives nationsl of Japan. On the contrary, it expressly recognized the fact that they had a special character and were subject to special protection because of their international character as a sacred trust of civilization. As stated in Article 22 of the Covenant, "The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League." Note also that Article 7 of the charter laid down by the League of Nations for the government of the islands mandated to Japan provided: "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate."

From the nature and character of these provisions it is clear that Japan could not arbitrarily determine that these natives were "domestic" and therefore not entitled to right of trial before being punished as spies. The provisions of the Covenant and of the Charter clearly establish the international character of the mandate, and preserve for these natives the protections of international law, assuring them of the right of trial prior to being punished.

Punishment of the natives by death as spies without previous trial was clearly in violation of international law--a violation of the laws and customs of war--and this commission has jurisdiction to try the accused for that offense.

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Commander Carlson in his lengthy argument on jurisdiction has discussed in part the application of the doctrine of sovereignty to jurisdiction of courts. In his effort to persuade the Commission that they are without jurisdiction in the instant case he relied very heavily on two cases, the Fornage case and the Schooner case.

With regard to the Fornage case (Journal du Palais, p. 299, 1873) it should be noted that it deals with the attempt by a French court to exercise jurisdicti over a crime committed in Switzerland. This case and dicta cited from it is completely irrelevant to the issues before this commission. In the Fornage case, there was no occupancy of Switzerland, and the French court was not sitt in Switzerland nor purporting to act in the role of a local Swiss Court. In instant case there is military occupancy of the Marshall Islands, and this Commission is exercising the jurisdiction of a local court under the authority of the military occupant. In the Fornagecase there was no instance of military occupancy, nor has defense counsel even cited any dicta with regard to the validity of jurisdiction based upon occupancy.

The Schooner case involved a civil action with regard to an armed vessel in the service of France which came into port for necessary repairs. The ship conducted herself in accordance with municipal and international law and the question presented was whether she could be libelled in the United States District Court. In an atmosphere of international comity of sovereigns, the United States Supreme Court determined that the libel on this vessel was to be dismissed. There was no assertion by the United States of sovereign rights or title to the vessel. Just as in the Fornage case, no question was presented to the court with regard to the rights of a military occupant to establish courts, nor the scope of jurisdiction of such courts. The language of the court cited by the defense counsel, like the decision of the court, is irrelevant to the issue of jurisdiction presented to this Commission.

One more argument by defense counsel merits brief consideration. Mr. Akimoto noted that Japan follows the theory of personal jurisdiction, and he therefore contended that since the accused is a Japanese national, Japan retains jurisdiction to try the accused for the crime committed on Jaluit, and that, therefore, it can deprive this commission, a "foreign" court of jurisdiction over the accused. Similary defense counsel Commander Carlson also argued that Japan has the right to protectits nationls abroad, and that therefore this commission can have nojurisdiction to try the accused for the crime charged. Defense counsel are mistaken in believing that the right of a nation to protect its nationals--authorizes those nationals to go abroad, commit crimes, and be protected against the due administration of justice, and due trial for the crimes committed.

International law clearly recognizes the fact that a foreigner enjoyes no privilege or immunity against arrest or trial for crimes committed in the country in which he is at the time of his actions. The right and duty to protect one's national's abroad does not extend to interference with the right of the place in which the national is, from exercising its legitimate jurisdiction to arrest and try him for crimes committed therein. The right of protection of one's nationals is limited to the right to protect against serious denials of justice or unlawful arrest and detention. It cannot protect them from the due administration of justice of license them to commit crimes abroad. In his opinion in the Levin case (Alter Levin, US v. Turkey - Commission Nielsen - Opinion and Report (1937) p. 688, 704-705 - in discussing the general rules relating to the arrest and detention of aliens) states, in part, "If there was probable cause for the arrest and if the proceedin s were in accordance with the laws of Mexico, there is no violation of international law, since an alien is subject to all the penal laws of the country in which he lives." Hackworth, vol V, p. 599.

This rule is so fundamental and elementary that it requires no further citation. See Hackworth Vol V, Chapter SVIII for numerous cases based upon recognition of this # fundamental principle.

The Judge Advocate has disposed of all the arguments of defense counsel, but with the permission of the commission would like to deal with some remaining matters. It should be noted that the Commission is meeting in the Commander Marianas area, and that Jaluit Atoll, Marshall Islands, is a part of that area. If the Commission were not sitting in this area it might be contended that jurisdiction should be limited to offenses committed within thearea in which the commission is sitting. With regard to such argument, it would be nedessary to point out to the commission that with regard to war crimes trials, just as in piracy trials, the fundamental requirements of justice have not been defeated by hypertechnical construction of jurisdiction, and in such cases jurisdiction of the tribunal over offenses committed outside the "local" area in which offense was committed, has been sustained. In addition to such cases, the trial of Wolf T[illegible] (27 Howell's St. T. 615 (Dublin, 1798) and the T.E.Hogg case (G.O. 52 - Department of the Pacific 1865)) illustrate other instances where trial by a military court outside the region of martial law or military government has been sustained. In the Hogg Case, the accused, during the period of the civil war were tried by a Military Commission in San Francisco, "a place quite outside the theater of war" for the alleged offense of taking passage on a U. S. merchant vessel at Panama (a foreign country) with the purpose of forcefully seizing it for the Southern Confederacy. The accused were sentenced to death, but subsequently this was commuted to imprisonment.

With regard to the instant case, the fact that Jaluit Atoll, Marshall Islands is within the military government area of Commander Marianas, obviates any objection to the jurisdiction of the commission on the contention that the offense was committed outside the area in which the commission is sitting. The

precept from Commander Marianas vests this jurisdiction in the Commission.

In view of the clear jurisdiction of the commission over the instant case, under either the concept of military occupation, or that of quasi-sovereignty, it is unnecessary for the judge advocate to refer to various other fundamental principles of law which sustain jurisdiction in this case. One fundamental doctrine, however, merits brief presentation to the commission. It is asiomatic that there can be no hiatus in the law. Since the Japanese courts are without jurisdiction and since local courts are without jurisdiction there remains authority in neither the Japanese government nor the Marshallese natives to establish court with jurisdiction over the instant crime, and since the United States is and intends to remain in strategic occupancy of the Marshall Islands, either the United States through its military government possesses power to exercise jurisdiction over this offense and this offender, or there is created a hiatus in the law in that a crime has been committed but jurisdiction does not exist in any court to punish the offender.

Such a condition could not be tolerated in a vital system of effective international law.

To contend that the United States does not possess the authority to convene this court with jurisdiction over the subject offense and offender would be to contend that justice, as well as sovereignty, can be suspended in limbo, while facts grow cold, witnesses die, evidence decays, interest lags, and the defendant either rots in prison awaiting trial or worse, is released upon society unpunished and unrecalcitrant.

Justice is not blind nor can the defense seriously contend that justice can be so myopic that the fundamental necessities and realities of justice can be overlooked in the pursuit of specious and substance-negating technicalilites. Justice is not impotent, and real or fancy technicalities cannot bind her. Justice was not impotent when piracy threatendd the peace and security of the seas. All courts punished piracy rdgardless of previous restrictive doctrines of jurisdiction. All courts found that their legitimate jurisdiction extended to piracy committed on high seas by any national or any ship, because the person guilty of such piracy has placed himself beyond the protection of any state. He is no longer a national but "hostis humani generis" and as such he is justiciable by any state anywhere. (Grotius (1583-1645) De Jure Belli ac Pacis, vol 2, cap. 20 Sec. 40.) In re Piracy, Juro Gentium (1934) A.C. 586, 589). The war criminal is not less justiciable. His crimes are more heinous, and his punishment must be as stern and certain.

David Bolton

David Bolton,
Lieutenant, U. S. Navy.

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OPENING STATEMENT BY THE PROSECUTION

If it please the commission, I will briefly outline the case to be presented by the prosecution. Specification I of Charge I will be proved by the testimony of three members of the Japanese armed forces who will relate how, on or about April 8, 1945, they accompanied the accused and seven native prisoners to a point near the Wireless Transmitting Station on Aineman Island, Jaluit Atoll. These witnesses acted as guards over the natives. They will relate that these seven native prisoners were three men, two women and two children (a boy and a girl). They will testify that, while standing guard at the truck which transported the prisoners to the scene, they saw the accused first take the three men into the jungle, then the two women, and finally the two children. About ten minutes after each departure they heard the sound of shots from the area into which the accused had taken the natives. After hearing the shots which followed the departure of the accused and the two children into the jungle, they were summoned by the accused to the site of the execution, saw the dead bodies of the seven natives, assisted the accused with the burial and heard the accused admit that he had performed the executions. One of these witnesses will also prove the allegations of Specification II of Charge I. This witness will relate how he, as a guard, accompanied the accused and one native prisoner to Aineman Island, Jaluit Atoll, on or about April 13, 1945. He will testify how he stood guard at the truck and saw the accused take this native into the jungle and shortly thereafter heard shots from that direction. He was then summoned by the accused to the site of the execution, saw the body of the dead native and assisted in the burial. The accused in this instance also made an admission to this witness that he had executed the native.

In addition to these three guards, the prosecution will call two other witnesses to the stand. One of these - a Japanese officer - will prove the identity of the victims mentioned in Charges I and II. He will also establish that these executions were performed without trial or legal justification. An American naval officer will take the stand to offer into evidence the confession of the accused.

By the testimony of these witnesses the prosecution will also establish that these natives were executed as spies without previous trial and thereby prove the allegations of Specifications I and II of Charge II.

James P. Kenny
JAMES P. KENNY,
Lieutenant, USN,
Judge Advocate.

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OBJECTION TO REQUEST OF JUDGE ADVOCATE TO COMMISSION TO TAKE JUDICIAL NOTICE OF CERTAIN DATE DELIVERED BY COMMANDER MARTIN E. CARLSON, U.S. N/V/L RESERVE.

The accused objects to the commission's taking judicial notice of the following: that on or about August 14, 1945, the Marshall Islands were occupied by the armed forces of the United States of America, and that said Marshall Islands have continued under the government and jurisdiction of the United States since that date; that Jaluit Atoll is a part of the Marshall Islands and is part of the territory under the command of Commander Marianas; that the Imperial Government of Japan surrendered to the Government of the United States of America on September 2, 1945; the Cairo Conference of December 1, 1943, particularly that portion which reads: "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914."; the Potsdam Declaration of July 26, 1945, particularly paragraph 8, which reads: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and minor islands as we determine."; the instrument of Japanese surrender, dated September 2, 1945; the Imperial Ordinance Number 26 for the Treatment of Judicial Affairs in the South Sea Islands; the Criminal Code of Japan, as applicable to the Marshall Islands, particularly Section 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 servitude for life or not less than three years."; and Article 41, "Acts of persons under fourteen years of age are not punishable."; the Fourth Hague Convention of October 18, 1907, particularly Articles 29 and 30, and that Japan ratified and signed this convention; the Geneva Prisoner of War Convention of July 27, 1929, and of the fact that although Japan has not formally ratified this convention, it agreed through the Swiss Government to apply the provisions thereof to prisoners of war under its control, and also, so far as practicable, to interned civilians; the Treaty of Versailles; Charter established by the League of Nations; Proclamations Number 1 through 7 to the People of the Marshall Islands, issued by and under the authority of Chester W. Nimitz, Admiral, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Ocean Area, Commanding the United States Forces of Occupation in the Marshall Islands, and Military Governor of the areas occupied by such forces; Ordinances 1 through 5, issued under the authority of the Military Governor of the Marshalls area, particularly as applied to jurisdiction over persons, "Jurisdiction of every Military Court shall extend to all persons in the territory except: (a) Members of the Forces of Occupation; and (b) persons who are treated as prisoners of war under the Geneva Convention of July 27, 1929, Provided: that the Military Governor may order the trial before a Military Court of such persons when accused of war crimes."

We object because it is a fundamental rule that a court may not take judicial notice of a foreign law, the existence of such a law being a question of fact which must be proved by competent evidence the same as any other fact, that is,

the purport and the actual wording of the laws must be introduced into the evidence. It must be further shown that the law was in force at the time when the alleged act in violation thereof took place. The proper way to have the court take judicial notice of these laws and treaties is to furnish the court at this time with an official or otherwise trustworthy copy. When the court entertains any doubt as to the propriety of taking judicial notice of a fact it should require it to be proved like any other fact.

Proclamations Number 1 through 7 to the People of the Marshall Islands issued by and under the authority of Chester W. Nimitz, Admiral, U. S. Navy; Ordinances Number 1 through 5, issued under the authority of the Military Governor of the Marshalls area as read by the judge advocate are not dated, are not certified as true copies nor are they certified as being applicable to the present case, or that the accused is bound thereby. There is great and grave doubt as to all these matters before this commission to take judicial notice of these proclamations and ordinances when they are the very things in issue, is prejudicial to the substantive to the rights of the accused. In the Furuki case, the judge advocate attempted to prove these proclamations and ordinances by a witness.

We would like at least to have an official copy so that we will be in a position to question its validity. To take judicial notice of the laws without an official or trustworthy copy is most prejudicial to the substantive rights of the accused. The defense does not have any copies of these laws or treaties.

The treaties should be official copies that we will be in a position to question their validity. To take judicial notice of any and all of these proclamations and ordinances is most prejudicial to the rights of the accused and we feel that it is error. The defense, as we have said, has not been furnished with any copies of these laws or treaties; there has been no showing by the judge advocate that the laws and the treaties which the judge advocate asks the commission to take judicial notice of are in force and that they are applicable in this case; that they are relevant to the issues here being tried, material to the issues in question, or that the accused is in any way bound by such laws and treaties, proclamations and ordinances.

What the effective law was on April 8, 1945, or on April 13, 1945, is the very thing that is being tried at this trial. Charge I alleges "This 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 servitude for life or not less than three years....." Now this is only a translation. It may not be correct or legal; it may not be effective law. It is fundamental that the state or the prosecution must prove every allegation in the specifications. In Charge II, it alleges "this in violation of the laws andcustoms of war. What these laws and customs are is the very thing in issue and we hold that all facts in issue, must be proved like any other fact.

We hold that it must be proved that the Fourth Hague Convention of October 18, 1907, and the annex particularly Articles 29 and 30 and whether or not Japan ratified this convention and was bound by it; the Geneva Prisoner of War Convention of July 27, 1929, whether or not she agreed through the Swiss Government to apply the provisions thereof to prisoners of war under its control and also so far as practicable, to interned civilians; the Cairo Conference of December 1, 1943; the Potsdam Declaration of July 26, 1945; and the instrument of Japanese surrender dated September 2, 1945; the Imperial Ordinance No. 26 for the treatment of judicial affairs in the South Sea Islands; Proclamations No. 1 through 7; Ordinances No. 1 through 5, are relevant to the issues here being tried. CMO 2-1921, p. 18 reads "Only the evidence which tends to prove the allegations made is relevant to the issue." Until the judge advocate proves the relevancy of these laws, conventions, treaties, proclamations and ordinances we hold that they are immaterial and irrelevant.

Section 309, Naval Courts and Boards reads:

".....A court may not take judicial notice of a foreign law, or of a law of another State, etc., than that within which the court is sitting, the existence of such law being a question of fact which must be proved by competent evidence the same as any other fact - i.e., the purport or the actual wording of the law must be introduced into the evidence - and it must be further shown that the law or regulation was in force at the time when the alleged act in violation thereof took place.

"The proper way to have the court take judicial notice of a fact not carried in mind by all intelligent men is for the party desiring it to request that the Court take judicial notice, for example, of 2 U.S. Code 118, and to furnish the court at the time with an official or otherwise trustworthy copy thereof."

We hold that for the court to take judicial notice of these conferences, declarations, treaties, instruments of surrender, Imperial Ordinances, conferences, proclamations and ordinances is prejudicial to the rights of the accused and we request that the judge advocate be required to prove them like anyother fact.

If the judge advocate is allowed to select such laws as he sees fit, interpret them as he wills and simply state that such laws are in effect, and that they are material and are vital to the issues, and that the accused is bound by such laws, and that this commission has jurisdiction of the crime alleged and of the accused by reason of such laws, treaties, regulations, proclamations and ordinances, we hold that the rights of the accused are being most grevicusly violated and prejudiced. We object, therefore, to this court taking judicial notice of the above facts, and move that the judge advocate be required to prove them like any other fact.

Martin E. Carlson

MARTIN E. CARLSON
Commander, USNR.

"V(3)"

Objection to the judicial notice.

被告人 鈴木才藏
弁護人

SOZUKI SAIZO.

検事側ハ、ソノ judicial notice ヲ求ムル為、米国大平洋戦略及太平洋区域司令官第一ヤードル軍事政長官ノ布告第二号第四條ヲ引用セルモ、コノ布告ノ效力ハ、発布ノ日ヨリ其效力ヲ発スルモノデアルコトハ、今布告第七條ニヨリ、明瞭デアリマス。従ツテ、上述ノ布告第四條ニ規定シアル日本刑法ニ違反スル犯罪ニ在リ、コノ布告ノ效力発生ノ後ニ於テ、発セル犯罪ニハ適用サルベキモノデアツテ、此ノ布告発布前ニ発セル日本刑法違反ノ犯罪ニ適用サルベキ規定デハアリマセン。ソレハ今布告第四條ノ様ナ、ソノ規定ニヨリ文言ヲ要セナイコトデアリマス。

" Any person who commits any act which violates any provision of Japanese penal laws in effect in those islands prior to the occupation by the Forces under my command, or the provisions of native laws customary in the islands, may, at the

'W(1)"

discretion of the Military Governor, or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct...."

全四條ニ依リ 及ビ 軍ノマーシャル諸島占領前ニ犯シタル日本人ノ日本刑法ニ依ル犯罪ヲ、占領後、合衆国マリアナ方面軍司令官ノ権限ニヨリ設置セラルル軍事法廷ガ裁判シ得ル旨ヲ規定シタルモノデアリマス。

従ヒテ、此ノ軍ノヤルートヲ占領前、即チ昭和二〇年四月 今迄ニ完了シタル在外邦人ノ撃滅ハ、此ノ第四條ノ何ラ関係ヲモ有スルモノデナイノデアリマス。若シ採用シ 却下サレテモ トノ信ニテ、茲ニ異論ヲ申立テル次第デアリマス。

以上

"W(2)"

OBJECTION TO JUDICIAL NOTICE DELIVERED BY MR. SUZUKI, SAIZO

The judge advocate requested the commission to take judicial notice of Article 4, Proclamation No. 2 issued by Admiral Nimitz, Commander-in-Chief, U. S. Pacific Fleet and Military Governor of the Marshall Islands. But it is clearly set forth in Article 7 that this Proclamation shall become operative on the date of its publication. Therefore, the offenses in violation of the Japanese Criminal Code as provided in Article 4 of the said Proclamation should only be applied to offenses occurring after the Proclamation became effective and this provision is not applied to offenses committed prior to the publication of the Proclamation. This can be easily understood from Article 4 of the Proclamation which reads: "Any person who commits an act which violates any provision of Japanese penal law in effect in these islands prior to occupation by the Forces under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct. The Court shall be guided by punishments customarily imposed for such offenses in these islands, and may, in the case of offenses against native customary law, call upon village headmen or chiefs to sit with the court."

This Article 4 does not in any way mean that the Military Courts convened by the authority of the Military Governor of the Marshall Islands can try offenses committed by a Japanese in violation of the Japanese Criminal Code, prior to the occupation of the American forces of the Marshall Islands.

Therefore, we hold that this proclamation is highly irrelevant and immaterial to the instant Inoue case which occurred on Jaluit in April, 1945. We believe the commission should not take judicial notice of this.

SUZUKI, Saizo

I certify the above to be a true and complete translation of the original document to the best of my ability.

Eugene E. Kerrick Jr.

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

REPLY OF THE JUDGE ADVOCATE TO OBJECTIONS OF THE ACCUSED TO THE COMMISSION TAKING JUDICIAL NOTICE OF CERTAIN DOCUMENTS AND PROCLAMATIONS

In objection to the judge advocate's request that the Commission take judicial notice of various laws, proclamations, treaties, historical declarations, etc. the defense counsel has delivered an eloquent and stirring argument. An argument however, which is not sustained by the law or the facts.

The field of judicial notice is one in which the court normally exercises broad discretionary power. In addition to this usual source of inherent authorit the instant military commission is specifically empowered by its precept, "to relax the rules of naval courts to meet the necessities for any particular trial, and may use such rules of evidence and procedure, issued and promulgated by the Supreme Commander for the Allied Powers....." . In these authorized SCAP regulations, it is specifically provided in 5d(2), "The commission shall take judicial notice of facts of common knowledge, official government documents of any nation, and the proceedings, records and findings of military or other agencies of any of the United Nations."

Quite obviously the Commission is empowered by its own precept, and under the SCAP regulation cited, to take judicial notice of each and every matter which the judge advocate has requested the commission to take cognizance of by judicial notice.

It is however completely unnecessary for this commission to rely upon that source of authority. The fundamental doctrines and rules of evidence give complete authority for the taking of judicial notice of all the material as to which the judge advocate requested the commission to take judicial notice.

The judge advocate has requested the commission to take judicial notice of material which falls within the two following categories:

(a) Historical and geographical matter - viz: a state of war existed; Marshall Islands were occupied; Jaluit Atoll is a part of the Marshall Islands; the surrender of Japan; The Potsdam Declaration; the instrument of Japanese surrender; The Fourth Hague Convention; The Geneva Prisoner of War Convention; The Treaty of Versailles; The Charter by the League of Nations - with respect to the manner of governing the islands mandated to Japan.

(b) Matters of law - Imperial Ordinance No. 26; The Criminal Code of Japan - as applicable in the Marshall Islands; and Proclamations and Ordinances issued under the authority of the Military Governor of the Marshall Islands.

Let us first examine Naval Courts and Boards and consider whether it authorizes taking judicial notice of this material.

Naval Courts and Boards provides in section 309: "The evidence introduced in the trial is supplemented by facts of which the court takes judicial notice; that is, by facts which the court knows to be true without any evidence to prove them. Courts should take judicial notice of: (a) Facts forming part of the common knowledge of every person of ordinary understanding and intelligence, such as qualities and properties of matter; well-known scientific, historical, physiological, and geographical facts; time, days, and dates;....." Note that under section 309(a) the taking of judicial notice of all the historical and geographical matter which the judge advocate has requested the commission to take judicial notice of, is clearly permissible; and Naval Courts and Boards states the courts "should take judicial notice of" such material.

Section 309(b) provides: "Matters which are so easily ascertainable in authentic form that the court may readily inform itself by reference to some authentic, accessible source of information, such as the name of the present United States ambassador to Italy; the time of sunrise on a given day from the Nautical Almanac, etc.".

Section 309(c) provides: "Matters which the court is bound to know as a part of its own special duty and function, such as the United States Constitution, treaties and statutes, and the statutes of the State, Territory, District of Columbia, or possession of the United States within which the court is sitting..."

Under 309(c) all matters of law - referred to in the request for judicial notice can clearly be accepted by this commission. It should be specifically noted that the material which the judge advocate has requested the court to take judicial notice of, is the local law applicable in the place in which this commission exercises jurisdiction. The judge advocate has not requested the commission to take judicial notice of any law foreign to that place, and has merely requested that the commission take judicial notice of the Imperial Ordinance No. 26 which has local application and is therefore local law in that it applies the Japanese Criminal Code to the Marshall Islands; of the provisions of the Japanese Criminal Code as applicable in the Marshall Islands; and of proclamations and ordinances issued by and under the proper authority of the duly authorized military governor of the Marshall Islands, Admiral Chester W. Nimitz.

How does the court take judicial notice of matter? Naval Courts and Boards states in Section 309: "Matters of which courts may take judicial notice need neither be charged nor proved"; and on page 187 continues: "The proper way to have the court take judicial notice of a fact not carried in the mind by all intelligent men is for the party desiring it to request that the court take judicial notice for example of 2 U.S. Code 118, and to furnish the court at the time with an official or otherwise trustworthy copy thereof." Note that this quoted portion does not require that such matter be proved in court merely because it is not carried in mind by all intelligent men. It merely requires that there be made available to the court a trustworthy copy thereof. It should be noted that there is available trustworthy copies of all the matter which the judge

advocate has requested judicial notice be taken of - and that the judge advocate is able and will furnish such material to the commission. It should be noted however that it is the commission, and not the accused who determines what matter the commission requires to refresh or support its knowledge of such matter. There is no requirement that such matter be proved - nor is there any requirement that such matter be furnished the commission in any form, unless the commission itself desires or requires it. For the commission has the power and the right to take judicial notice of all facts "which the court knows to be true without any evidence to prove them." Reliable sources containing the material referred to, will be furnished the commission.

In this connection it should be noted that defense has contended that copies of such material has not been furnished or available to defense and they have claimed they have therefore been prejudiced. This argument is false and misleading. All the material which has been available to the judge advocate has equally been available to defense counsel.

The material concerning historical and geographical matter is clearly available in historical books, current publications and common knowledge of intelligent men. Such matter is clearly as available to defense counsel as it is to the judge advocate.

With regard to the matters of law referred to it is equally clear that such matter is available to defense. As to the Criminal Code of Japan - and as to Imperial Ordinance No. 26 - clearly these provisions of Japanese law are available to defense counsel. Not only are they available, but it is apparent that in fact complete copies of these laws are in the actual possession of defense counsel.

With regard to the proclamations and ordinances issued by military government which the judge advocate has requested the commission to take judicial notice of, it is clear that these have been available to the accused. Like any copy of any statute or any law - there is no need for the judge advocate to provide the accused with copies thereof if they are available in proper official or reliable places. The Headquarters of the Military Government for the Marianas area is located less than three hundred yards from this building. The proclamations and ordinances referred to by the judge advocate are not classified documents - they are freely available for consultation by any person having a legitimate interest in them. They were and are available to counsel

As a matter of fact these same defense counsel had in their possession in the past and utilized in the Furuki trial on 6 March 1947 all of the proclamations and ordinances referred to by the judge advocate, and in framing their objections to the judge advocate's request for judicial notice, utilized the official copies which had been furnished the judge advocate.

Defense counsel has noted with reference to Proclamation No. 2, Article 4, that this provides that any person who commits an act which violates any provision of Japanese penal law in effect in these islands prior to occupation.....may be brought to trial before a military court. It is true that this article does not specifically authorize the trial in military courts of crimes committed prior to occupation in violation of these Japanese penal provisions. From the standpoint of this commission it is unnecessary to refer to this article 4 as the source of its jurisdiction, the precert and despatches referred to therein under which this commission was convened does specifically establish authority in this military commission to try the accused for crimes committed prior to the date of occupation.

Proclamation No. 2, Article 4, merely indicates that the United States Military Government has not given the jurisdiction to any local Marshallese courts to try offenses of the seriousness of murder and that therefore such crimes are reserved for trial by military courts. Specifically Article 4 of this proclamation indicates that all such crimes shall be tried by military courts.

In order that defense shall be fully aware of the fact that the judge advocate is basing his request for judicial notice on fundamental rules of evidence, the judge advocate will in addition to the material already cited from Naval Courts and Boards refer the defense and the commission to other well known authorities on the subject of the law of evidence.

Wharton's Criminal Evidence, Volume one, section 16 comments with regard to judicial notice as follows: ".....The facts of which such notice is taken are those that are of common and general knowledge within the limits of the jurisdiction of the court. This common knowledge of man ranges far and waide, so that the doctrine of judicial notice embraces matters curiously diverse. Its universitality is such that in the discussion thereof it can be subjected to nothing more than a general classification; it cannot be treated logically, or as the development of a subject. Moreover, the doctrine of judicial notice must keep pace with the advance of art, science, and matters of common knowledge generally, and the scope of the subject is constantly expanding as decided cases ripen into precedents. With few distinctive features, the law on the subject is similar to the law of judicial notice in civil cases, and here, more than in any other branch of the law of evidence as applied in criminal prosecutions, should the rules as developed in the civil cases be consulted."

The fact that the commission may not have detailed knowledge or recollection of certain specific items or provisions as to which the judge advocate requested judicial notice, does not prevent the commission from taking judicial notice of these items or provisions. In this regard the judge advocate cites Wharton, op. cit. section 20 which deals with refreshing the memory of the court, as follows: "The fact that the memory of the judge may be at fault, or that he may be unacquainted with a fact of which judicial notice ought to be taken, does not prevent

the application of the doctrine of judicial notice. The judge may inform himself in any way which may seem best to him concerning subjects of which he may take judicial notice. He may refresh his memory from encyclopedias, dictionaries, or other publications or documents that he may deem worthy of confidence. For instance, he may refer to an almanac for the purpose of determining the time of sunrise on a particular day. He may even receive evidence as to facts judicially noticed to aid his memory and understanding. But, as stated above, if, in regard to any subject of judicial notice, the court should permit any documents to be referred to, or testimony to be given, it would not be in any proper sense the admission of evidence, but simply a resort to a convenient means of refreshing the court's memory, or making the trier aware of that which everybody ought to know."

It should be noted that defense counsel has mentioned the fact that during the prior Furuki trial the judge advocate summoned as a witness before this commission Captain Winecoff, the Deputy Military Governor who testified concerning the same material which the commission took judicial notice of in that case. This was in regard to the identical proclamations and ordinances which the judge advocate has again in this case requested the commission to take judicial notice of. It is clear that it was not necessary in the Furuki case to prove by testimony the proclamations and ordinances for the commission had taken judicial notice of them - the purpose of this testimony was in part to refresh the commission's recollection of these proclamations. In the instant case the judge advocate does not consider it necessary to, and does not intend to refresh the recollection of the commission as to the contents of the proclamations and provisions unless the commission so desires. As clearly established in section 20, it is perfectly permissible to present this material in the form of a request for judicial notice, and if judicial notice is taken the judge advocate does not believe proof is required.

The judge advocate requested that various matters of historical and geographical matter be taken judicial notice of. I quote from Underhill's Criminal Evidence, Fourth Edition, Section 69, authority for taking judicial notice of such matter: "Judicial notice is taken of great public and historical events.....". Similarly Wharton's Criminal Evidence provides in Section 35: "Courts will take judicial notice of geographical and historical facts.....". It is obvious that matter such as The Fourth Hague Convention, The Geneva Prisoner of War Convention, The Treaty of Versailles, The Covenant of the League of Nations, The Charter for the Government of the Islands Mandated to Japan, are matters of which this commission can take judicial notice. Similarly Wharton, op. cit. states with regard to the existence of a state of war, Section 58: "The courts will take judicial notice of the existence of a state of war between the United States and another country and that such a status prevailed at the time an offense was charged to have been committed.....".

Similarly the courts will take judicial notice of jurisdictional limits as stated in Wharton's Criminal Evidence, Section 42, which provides; "The cession and segregation of a portion of the territory of a state to exclusive foreign jurisdiction and control is one of the highest acts of sovereignty and affects the people of the state at large. In prosecutions for crime, courts will take judicial notice of the fact of such cession, and that crimes committed within the ceded territory are beyond the jurisdiction of state courts, and are triable in the courts of the United States, but punishable as provided by the state law." With regard to judicial notice of matters of law Underhill op.cit. Section 61 states: "Judicial notice is taken of the statutes of the state and of their provisions, of legislative records; of the statute on which a complaint is based; of the special acts of the legislature; of the proclamation of the governor as to the result of a general election, or other matters;....." ".....The federal courts take judicial notice of state statutes, and state courts take judicial notice of federal statutes. State courts take judicial notice that such federal statutes apply in the other states and that acts done in other states in violation of a federal criminal statute there are unlawful....."

Similarly Wharton, op.cit. in reference to matters of law states in Section 26: "State courts will take judicial notice of the Federal Constitution and of all public acts and resolutions of Congress, at least such as are operative within the jurisdiction of the court, and of the Constitution and the general or public statutes of the state, even though such public statutes may operate locally, or may have been adopted locally, as where such statutes relate to stock law districts....."

With regard to the proclamations and ordinances the following from Wharton's op.cit. Section 27 is in point: "Orders of the Executive Department of either the state or the Federal government are noticed judicially by the courts. Thus, all courts within this country will take judicial notice of the proclamations of the President of the United States and of the recognition or denial by the United States government of the sovereignty of a foreign power. Likewise, a state court will take judicial notice of official proclamations and messages of the governor of the state. Thus, if the executive of a state, either under statutory provision or by virtue of his inherent power, calls upon the attorney general to institute certain prosecutions in certain courts of the state, those courts will take judicial notice of such executive order and it need not be recited in the indictment which such prosecuting officer signs.

"Likewise, where the principal departments of the Federal government establish regulations, carrying into effect public laws, the courts having jurisdiction of questions arising under such laws must take judicial notice of the existence of such regulations. For instance, the courts will take judicial notice of rules and regulations of the War Department, the Post Office Department, the Interstate Commerce Commission, the Commissioner of Prohibition, the Department of Agriculture"

From the numerous cases cited in Wharton's as authority for this question, it is apparent that there is no question as to the propriety of this commission's taking judicial notice of the proclamations, ordinances, etc of which the judge advocate has requested the commission to take judicial notice.

The judge advocate has cited full and adequate authority in support of his request that the commission take judicial notice of certain legal, historical, and geographical facts.

David Bolton

DAVID BOLTON,
Lieutenant, USN,
Judge Advocate.

OBJECTION TO THE DOCUMENT SAID TO BE THE STATEMENT OF INOUE, FUMIO, CAPTAIN, IJA, GIVEN BY COMMANDER MARTIN E. CARLSON, USNR

Gentlemen of the Commission:

The accused objects to introduction as evidence the document purporting to be a statement of the accused because to admit this document into evidence is strictly at variance with Section 734 Naval Courts and Boards.

The witness Lieutenant Field has testified that he is the legal custodian of this document. He testified he was ordered to investigate war crimes and interrogated suspects at the stockade at Guam. He further testified that this statement, the document purporting to be written by the accused Inoue, Fumio, was not even written in his present. We maintain that the witness Lieutenant Field is not competent as a witness to testify regarding this document which is said to contain the statement of the accused. There is a presumption that a witness is competent to testify regarding matters at issue, but in this case the witness has stated that the statement was not made or written in his presence. He is by his own testimony admitted as being incompetent to testify as to whether or not this statement was made under threat, intimidation, promise of reward, or that he was told he did not have to answer incriminating questions.

Since the witness is incompetent to testify regarding these matters we hold that the judge advocate still has the burden of proof and must prove that the document being offered into evidence is regular, that the document was written by the accused, that the accused was warned, that he was a party defendant, that he was notified of the gist of the evidence that tends to implicate him, that he was instructed he would be accorded the rights of an accused before a court martial, namely the right to be present, to have counsel, to challenge members, to introduce and cross-examine witnesses, to introduce new matter pertinent to the inquiry, to testify or declare in his own behalf at his own request and to make a statement and argument. He must be told he has the right to refuse to answer incriminating questions.

Nowhere on this document does there appear anything to indicate that these safeguards guaranteed by the Constitution of the United States were ever accorded to this accused whose alleged statement is sought to be introduced.

To allow this document to be introduced into evidence will be most prejudicial to the substantive rights of the accused. He will be made to testify against himself.

CMO-1, 1949, p. 72 lays down the rule: "A general court martial received in evidence, over the objection of the accused, extracts from the testimony of the accused before a Board of Investigation. The accused appeared before the Board

of Investigation as an interested party. The record did not show that he took the stand at his own request, but did show that he was sworn and allowed to testify at length after it was apparent that he was involved to such an extent that an accusation against him could be implied although he was not made a defendant until he concluded his testimony. It follows therefore that his testimony before the Board of Investigation could have no evidential value in the instant case, and it should have been excluded by the court."

We further object because this document does not show on its face that it was given voluntarily and that the accused, Captain Inoue waived all the rights of a defendant.

We hold that the judge advocate still has the burden of proof and must show by competent witness that this document is regular and that the Fifth and Sixth Amendments of the Constitution of the United States of America and Section 734 of Naval Courts and Boards have not been violated.

Respectfully,

MARTIN E. CARLSON,
Commander, USNR.

(AA) 11 "Effect" of Minakimoto's Objection to the Confession

被告人自書ニ対スル弁護ニ提出ニ関スル異議、
弁護人秋元実一郎

検事ハ、被告人井上文夫ガ昭和二十年十二月 ガム収容所ニ被疑者トシテ被拘禁中当事検事ノ職ニアリシ米国海軍大尉 Field氏ノ勧告ニ従ヒ自書ノ全部ニ提出セル書面ヲ証拠トシテ提出セラレマシタガ本弁護人ハ之ニ異議ヲ申立テマシテアリマス。

其ノ之ハ裁判所ニ於テ為サレタモノデアルガ裁判ガ二於ケル如何ナル被告ガ証拠トシテ認容サレル場合ノ

第一、我レガ完全ナル自発的ニナサレタモノナルコト

第二 権限ヲ有スル人(Person in authority)ヲ除ク外ニ就キ被告ニ利害ノ影響ヲ及ボス可キ権限ヲ有スル人ニ対シテ其ノ他ノ方ニ於テ為サレル場合ニ於イテ誘出又誘起ノ繋ガナクサレル場合デアッテハナラヌコト

デアリマシテ此ノサレル場合ハ証拠トシテ認容シ得ナイモノデアリマス 何トナレハ権限ヲ有スル人ノ主命ニ依ッテ被告人ハドノ様ノ影響ヲ受ケタカヲ知ルコトハ出来ナイノデアリマス。(九州帝大法文部講師田村豊氏著「英国刑事裁判ノ研究」ヲ参照証拠法及アドルフ・ハルトマン氏著"北米合衆国刑事訴訟ー司法資料83ヲ参照)

即チ上述供述ニ当ッテ検事ノ職ニアリ被告ノ行ヲニツキ重大ナル利害ノ影響ヲ及ボス可キ権限ヲ有シ

"AA(1)"

人ノ誘出ニ依リ其ノ人ノ面前ニ於テ作成セラレタルモノデアリマスルテ且ツ完全ナル自発ニ依リ為サレタルモノト言フコトハ出来ナイノデアリマス。
何トナレバ被告人ハ被告人ノ為シタル行為ハ日本帝国ノ統治中其ノ領域外ナル島ニ於テ日本国法律ニ基ク為シタル島民ヲ日本国ノ法律ニ照シ処断シタルモノデアツテ裁判官ノ自由意志ノ命令ニ依リ職ムトシテ為シタモノデ断シテ違法ナラズンバヤ高外行為ノ関係カリニ米国ノ裁判所ニヨル犯罪トシテ起訴セラルルガ如キ夢想ダニシカツタコトハ勿論起訴出自体及ソレヨリ前ニ米国法廷官ニ逮捕サレ出頭ニ依リ明確ニ了知シ得ルノデアリマス
然ルニ二ケ年ノ永キ亘リ拘禁ノ憂目ヲ見シ而モ未ダ起訴セラルルヤ否ヤモ不明ニシテ其ノ文ニ依レバ或意味ニ於テハ調ベニ当リ本件ニ起訴スルヤ否ヤ不明デアル本国ヘ帰ルルヤ否ヤモ知レヌト云ハレタトイフ
甚カナル状態ニアリ被拘禁ノ苦ニヨリ変ケツアル被告人ハ決シテ自由意思ヲ有スル者デハナイ権限ヲ有スル者ト会スルハ人情デアル従テ其ノ権限ヲ有スル人ニ依リ誘致セラルル以上ハ仮令肉体的又ハ精神的強制ヲ加ヘルコトガナカツタトシテモ実生精神上ノ強制下ニアルモノデアル之ハ仮令権限ヲ有スル者ヨリ自白ヲ勧ムタメヤウ誘出ガ為サレタル場合ハ決シテ完全ナル自発ニ依ツテ為サレタルモノデハナイトイフコトガ出来ルノデアリマス
(AA(2)"

又ハ供出米自体ノ收益ヨリシテ該当ノ私有米ヲ自由ニシ自由デハナイトハ明瞭デアリマス

斯カル供出米ハ自由トシテ記載カヲ有シナイモノデアリマスガ故ニ(訴)ヨッテ提出ニ係ル人証ノ訊問ヲ尽ベルモノデアリマス

Commission ニ於テ却下セラレンコトヲ求ム.

以上

弁護人 秋文富一郎

"AA (3)"

1115

OBJECTION TO THE INTRODUCTION OF THE CONFESSION OF THE ACCUSED AS EVIDENCE BY AKIMOTO, YUICHIRO, DEFENSE COUNSEL.

The defense objects to the judge advocate's introduction as evidence of the document which was signed by the accused, Inoue, Furmio, in December 1946 by the advice of Lieutenant Field, USNR, who was then the judge advocate, at Guam stockade wher. he was confined there as a criminal suspect.

This confession was made outside the court. In order for a confession made outside the court to be admissible as evidence, (1) It ought to be made entirely voluntarily, (2) The person in authority, other words the person concerned with the charges and who has authority which can influence the defendant in the above case even though it was made before him, should not offer any inducements to the person making the statement or overlook any inducement which may have been offered to the person making the statements. Therefore in this case the statement cannot be taken as evidence. That is because the effect of the person in authority who was present cannot be known. Tamura, Yutaka, Professor, Law Department, Kyushi Imperial University, in "Research in English Criminal Trials", Chapter V, Laws of Evidence, and Adolph Hartman's Judicial Reference 83 Criminal Trials of U. S. of America.

The above statement was made after an inducement by a person who at the time was a judge advocate who could greatly effect the defendants interest. The actions of the defendant were done in the territory of Jaluit then under Japanese sovereignty to natives who violated Japanese laws and who were executed after a legal judgment. It was done by the order of Admiral Masuda who had the authority. It was done as an official duty and is not a violation of the law. He could not even dream in his wildest dreams that he would be accused in an American court which had no connection at all with the case at that time. From this statement itself, and also from a statement given to an American judge advocate previously this can clearly be seen. He had been confined for a deplorable period of two years not knowing whether he was to be charged or not. I have heard that he was told he might get to go home. It cannot be said that a person who had been confined for so long did things of his own free will. It is only natural that this defendant did what the person in authority wanted him to do. Therefore even though the person in authority did not induce him, he was actually under spiritual and physical inducement. In this case a confession written by this inducment can never be said to be of his own free will and from the statement itself it can be seen that it is not a criminal specification. This document also does not have the defendants seal. Therefore it can not be considered an authentic document. This document can not be taken in evidence as a confession and therefore I object most strenuously to its being introduced in evidence. I request the commission to reject this as evidence.

YUICHIRO AKIMOTO

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

EUGENE E. KERRICK,
Lieutenant, USNR,
Interpreter.

"BB"

OBJECTION TO RECEIVING TESTIMONY FROM THE TRIAL OF MAJOR FURUKI MADE BY CAPTAIN INOUE, DELIVERED BY COMMANDER MARTIN E. CARLSON, U. S. N. R.

The accused objects to the introduction at this time of the record of the Furuki, Hidesaku, I. J. A., trial or any of the testimony of this trial. It is particularly objectionable to offer only part of the testimony given at that trial.

Section 200, Naval Courts and Boards reads: "Although only a part of a document may have been read to the court, or only a general result deduced therefrom may have been testified to, the document in full must have been offered and received in evidence before such testimony can be received. The opposite party is thus afforded an opportunity to call upon the witness to read such additional entries as may be pertinent to the issue and for which the party introducing the document failed to call..... In other words, the rule provides an opportunity for the court to have before it all the information contained in the document, and the party introducing it in evidence cannot pick and chose therefrom the points he desires to set forth and suppress the remainder."

Section 678, page 1126, Wharton's Criminal Evidence, "Testimony taken at a trial cannot be read at a subsequent trial if the witness is available."

The witness, Inoue, was on the witness stand subject to cross-examination for three full days. He was subjected to the most grilling and searching cross-examination, but the judge advocate failed in the slightest degree to shake his original testimony. At that time we objected to the judge advocate reading the testimony as given in the Furuki trial. The judge advocate replied to the effect that he could test the credibility of the witness in any way he saw fit and further that he was not going to offer or did no at that time offer the document of the Furuki trial into evidence. To allow the judge advocate to offer the proceedings of the trial of Furuki into evidence at this time is quite unfair, particularly after the witness Inoue has left the witness stand and after the judge advocate stated he had no further questions.

Section 201, Naval Courts and Boards, states, "Where the author of the document does not appear as a witness, it remains only a hearsay statement and can be received only under some exception to the hearsay rule. Thus, in general, ex parte affidavits, letters from members of the family of an accused, certificates from a physician that an accused has been under medical treatment, etc., the admission of which would in effect permit an author to testify without submitting him to cross-examination are mere hearsay statements and are inadmissible in evidence."

The accused objects because this document is not approved by the convening authority, but CinCPacFlt and the Judge Advocate General, U. S. Navy. It is not a complete proceedings and cannot therefore be accepted as evidence without violating Section 200, NC&B.

We hold that to admit this document at this time is most unfair to the accused. If it is admissible at all it should have been offered into evidence at the time the accused, Captain Inoue, was on the witness stand. The testimony that the witness Inoue gave at that Furuki trial was on an altogether different matter. It was for an altogether different set of facts, a different trial, different natives, and for a different set of facts, than is being tried here. This is altogether irrelevant to the issues here. What the witness Inoue testified to at the trial of Furuki is not for the same offense as he is here being tried for and such testimony and/or evidence is highly irrelevant and immaterial to the issues here being tried. It is most prejudicial to admit such evidence at this time.

In Underhill's Criminal Evidence, page 955, "Grounds for admitting testimony of missing witness. The later trial should be for the same matter, and the accused person should be the same as in the former. It is not material that the later is under another indictment if the offense charged and the parties are identical," citing Reynolds v. US, 98 US 145; Shaw v. US, 1 Fed (2d) 199; Commonwealth v. Gallo, 275 Mass 320.

"CC(1)"

In Wharton's Criminal Evidence, vol 2, p 1125-1126, we read:

"The view has been taken, however, that if the accused is examined under oath before a coroner's jury or a committin magistrate, his testimony cannot be regarded as voluntary, and cannot be reproduced" citing State v. Perry, 106 SC 289, 91 SE 300,

It is true that the Furuki trial was not a coroner's jury or a committing magistrate , but on page 1126 of Wharton's Criminal Evidence, we read, "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable."

"Some courts deny the right to reproduce the testimony of a witness unless he is shown to be dead, even though he has gone beyond the jurisdiction of the court" citing US v. Angell (CC) 11 F. 34, the court says that under the constitutional provision that in all criminal cases the accused shall enjoy the right to be confronted with the witness against him, if living, must be produced and the mere fact that he is beyond the jurisdiction is immaterial. The court further says that it cannot fairly be maintained, that if the witness has once been confronted with accused before the committing magistrate, the requirements or guaranties of the Constitution are answered. . . . The fair meaning of the Constitution is that wherever and whenever he is put on his final trial, he shall be confronted with the witness against him if they be alive.

To introduce into this trial, the records of the Furuki trial is most prejudicial to the rights of this accused. The Furuki trial found the accused, Major Furuki, guilty but the incident was an altogether different incident. To introduce such a trial violates all the rules of evidence and procedure. But worse yet, the prosecution offer the entire trial as written up in four volumes because there was 500 pages of testimony, but then say they only want to put into evidence questions 167 to 172 inclusive. Thus the judge advocate blows both hot and cold at the same time. He offers the entire trial of Furuki (four volumes) but quickly withdraws the four volumes and says he only wants admitted into evidence questions 167 to 172.

The record shows that this Furuki trial has not even been approved by the convening authority, but the I. S. I. C., CinCPacFlt of the Judge Advocate General of the Navy, and yet the judge advocate comes before this court and offers questions 167 to 172 into evidence. These questions and answers are in English and it is common knowledge that the questions as put to the witness, Inoue, were translated into Japanese and by the witness answered in Japanese. Looking at the entire record we can find no place where it is recorded that this witness, Inoue, was allowed to verify his testimony. The record shows it was not for the same offense or for the same incident. The record further shows that these questions were not all the questions asked and answered by this witness. Thus this witness is being made to testify against himself and quite unfairly because only six questions and answers are permitted and the accused is thus being judged in this case by the six answers picked at random by the judge advocate from several hundred asked the accused at another trial which was for an altogether different offense and a different incident and the accused in that other trial is not the accused in this case.

This is most prejudicial to the substantive rights of the accused.

Respectfully,

Martin Emilius Carlson

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

"CC(2)

REPLY OF JUDGE ADVOCATE TO OBJECTION BY ACCUSED TO RECEIVING PORTIONS OF THE TESTIMONY OF CAPTAIN INOUE GIVEN DURING THE TRIAL OF MAJOR FURUKI

The judge advocate in answer to previous objection by defense counsel cited the pertinent portions of Wharton's Criminal Evidence which relate to the use as rebuttal evidence of prior contradictory statements. Further discussion of this question would be repetitious.

Defense counsel has misquoted the judge advocate and has stated that the judge advocate said he could attack the credibility of the accused in any way he saw fit. The judge advocate has never made such a statement. He has indicated however that he could attack the credibility of the accused in the same manner and by the same legally approved methods of attacking the credibility of any witness. It is proper to attack the credibility of a witness by the use of prior contradictory statements. The fact that these prior contradictory statements are made in a judicial proceeding when the accused appeared voluntarily as a witness and was duly sworn and gave his testimony does not in any way remove the efficacy or the propriety for introducing such prior contradictory statements as a method of attacking the credibility of the witness.

The defense counsel has indicated that the judge advocate has not offered into evidence the complete proceedings, but is using the proceedings of the prior trial merely with regard to a limited portion of the testimony of Fumio Inoue. The judge advocate is attempting to attack the credibility of Fumio Inoue by indicating the prior contradictory statement with regard to a particular matter which is the subject of testimony during the current trial of Fumio Inoue. It is proper and essential that only such portions of the prior record that pertain to the particular point at issue. I cite with regard thereto, from Naval Courts and Boards, which with regard to the introduction of evidence from a court of inquiry as evidence of prior contradictory testimony indicates: "Section 219(d) Where a witness before the court martial has made prior inconsistent statements before a court of inquiry, the proceedings of the court of inquiry may be introduced in evidence for the purpose of impeaching the testimony of such witness, subject to the general rules of evidence requiring that a proper foundation be laid before evidence may be introduced to impeach the testimony of a witness by showing prior inconsistent statements."

In Section 223, Naval Courts and Boards, it provides, ".....the judge advocate should take the stand as a witness, identifying the record and stating that he desires to read therefrom so much of the proceedings as embodies the testimony of a particular witness with reference to a particular point in issue."

The fact that it is unnecessary to admit in evidence the entire record of evidence or even the entire testimony of the witness is further clearly established by Wharton's Criminal Evidence, section 1363 which relates to former contradictory testimony. The last two sentences of this section read , "But only that part of the transcript of former testimony should be admitted and this reads as follows: "But only that part of the transcript of former testimony should be admitted for this purpose as is contradictory to the present testimony. Such prior inconsistent testimony may be shown, not only by the stenographer's notes, but by any witness who heard and remembers its."

"DD (1)"

Defense counsel has cited numerous sections of Underhill's which relates to the testimony of a missing witness. It is perfectly obvious that these portions are completely irrelevant to any issue before the commission at this time. Prior contradictory testimony of Inoue is offered in evidence. The use of such prior contradictory testimony is clearly a legally permissible method of attack on the credibility of the witness. The fundamental reason for the introduction of this prior testimony is because the witness is present and the witness has testified and his testimony is attacked as not credible. Wharton's Criminal Evidence, Section 1363.

The specious arguments by defense counsel with regard to the right to be confronted by the witness against one is apparent without further comment. It is true that it is a fundamental right in all systems of justice and in all trials that an accused be present when evidence is offered against him, and that whenever possible he be confronted with the witnesses against him. In the instant case in essence the witness against the accused is himself, and he has been confronted with his prior testimony.

David Bolton

DAVID BOLTON
Lieutenant USN
Judge Advocate.

" DD(2)"

陳述書

元日本軍「ヤルート」防備部隊
第二大隊本部勤務
陸軍大尉　井上文夫

一、私ハ一九四三年十一月末「ギルバート」諸島陥落直後
支隊長大石大佐ノ命ニヨリ在「クエゼリン」島ノ南洋第
一支隊ノ将兵三百名餘ヲ指揮シ「ヤルート」島ニ派遣
セラレ十一月三十日「ヤルート」島到着ト同時ニ第二警
備隊司令井田少将ノ指揮下ニ入リマシタ。
當時私ノ所屬ハ南洋第一支隊本部附デアリマシテ
支隊本部ハ「クエゼリン」島ニアッタノデアリマス。
一九四四年一月十八日古木少佐ハ南洋第一支隊第二大
隊ノ指揮機関百數十名ヲ指揮シ「ウオッゼ」島ヨリ
轉進シ「ヤルート」島ニ到着セラレマシタ。
古木少佐「ヤルート」島ニ到着後　私ノ隊及ビ陸軍兼
松隊ヲ合セ南洋第一支隊第二大隊ヲ編成シ
海軍井田少將ノ指揮下ニアッテ古木少佐ガ第二大隊
長デアリマシタ。
私ハ古木少佐「ヤルート」島ニ到着後第二大隊本部附ノ

no1.

"EE(1)"

一員トシテ終戦迄勤務致シテ参リマシタ.

一九四四年二月以降ノ第六二警備隊ノ命令系統ハ第六根據地隊司令部 玉砕後 第四艦隊司令長官ノ直接指揮下ニアリマシタガ已ニ孤立無援ノ島ニ於キマシテハ海軍部隊、軍属部隊、陸軍部隊、島民等一切ノ指揮ハ井田少将ノ独裁ノ實情ニアリマシタ.

私ハ「ヤルート」島ニ於キマシテ吉木少佐ノ部下デアリ同時ニ最高指揮官ハ海軍井田少将デアリマシタ.

一、「ギルバート」ノ玉砕ニ次デ一九四四年二月「クエゼリン」陥落シ「ヤルート」ハ其ノ本據ヲ失ヒ周囲後方トノ連絡全ク絶エ絶海ノ孤島ニ孤立シ爾来補給ヲ受ケル事ハ一度モナク將兵ハ全員玉砕ノ覚悟ニ立タザルヲ得ナカッタノデアリマス

加フルニ米軍ノ「ヤルート」ニ対スル海空爆撃ハ日ニ〳〵猛烈ヲ加ヘ晝夜ノ別ナク数十機ノ編隊ヲ以テ一日数回乃至十二、三回ノ猛爆ヲ加ヘマシタ.

"ヨヨ(2)"

之ガ為メ食糧、兵器、弾薬ハ欠乏シ建物施設ハ悉ク
破壊サレテシマヒ、「ヤルート」島ハ文字通リ死人ノ如ク灰墟ト
化シ尚主要通信連絡ニモ絶大ノ困難ヲ来シタノデアリ
マス

殊ニ一九四四年七月「サイパン」ノ陥落ニ依テ「ヤルート」ハ絶対
絶命ノ絶望的孤立ニ陥リマシタ

コノ時ニ當リ食糧ノ欠乏ハ兵器、弾薬ト共ニ全ク「ヤルート」
ノ防備ヲ根滅セシムルモノデアリマシタ。

コノ時期以降ノ「ヤルート」島ハ實ニ世界戦史ニ曽テ覿
ナキ悲惨極マリナイ戦場ト化シテシマイマシタ。

茲ニ於テ井田少将ハ自治ニ関スル計画並ニ自治ヲ維持セン
ガタメノ警備計画ヲ立テ堅確ナル意志ヲ以テ實行ニ
着手サレマシタ。

初メ私共ハ農場ノ開拓、野菜ノ栽培 コプラ、タコ、
パン、ノ實ノ收蒐ニ努力シマシタガ 農場ハ珊瑚礁ノ
土質ト計画的空爆ノ猛烈ナルタメ成功ニ至リマセン
デシタ。

一、ソコデ唯一ノ頼ミハ環礁上ニ生育スル約十萬本ノ椰子

樹ヲ利用シ島民ノ力ニ依テ「コプラ」ト「チヤカロ」ヲ獲得スル
コトデアリマシタ、島民ハヨク日本軍ニ協力シテ活動シ
テクレマシタ、私ハ職務上絶エズ環礁内ヲ廻ッテ居マシ
タノデ コノ島民ノ協力振リヲ誰ヨリモヨク承知シテオリ
常ニ感謝ニ堪エマセンデシタ、
少将ハ部下ノ将兵ニ島民ハ日本軍ノ命ノ恩人ダ大切
ニセヨト常ニ命ジテ居リマシタ之ハ并由立特ノ方針デアリ凡テノ
将兵ハ良クコノ命ヲ解シ実行シテ居リマシタ
然シ如何ニ島民ヤ軍隊ノ努力ニ依リマシテモ収穫ニハ
限度ガアリマス、日本軍人軍属島民合セテ約四千名
ノ食糧ハ到底収穫スルコトハ出来マセン
一、ソレデ一人一日ノ主食ハ「コプラ」一個及ビ「チヤカロ」ト稱スル椰子
ノ花ヨリ採ル汁一杯ニ制限セラレマシタ
コレデ私共ハ毎日ノ摂取カロリーノ七十五%ハ「コプラ」ト
「チヤカロ」ヨリ採ッテ居マシタ
「チヤカロ」一杯ト牛乳一杯ノ「カロリー」ハ同等デアルトノ算定
基礎ノ下ニ自活計画ガ立テラレテ居リマシタ
之レデハ到底健康ヲ保ツコトハ出来マセン 加之
建物ノ破壊ハ雨露サヘ完全ニ防ゲズ健康ハ日々ニ
（以下）

衰ヘ将兵ハ毒ニナラナイ凡ユル雑草、地上ノ小動物ハ「トカゲ」「ネズミ」ニ至ル迄食料トナルモノハ悉ク取リ盡ストイフヤウナ悲慘狀態ニ陷リ營養失調ト病氣ノ蔓延デ健康者ハ殆ンドナク四、五百米歩クニモ二、三度ハ必ズ休マネバナラヌ狀態デアリマシタ。慶指揚場所ニ指テアル饅ノ腸ヲ食ベ毒死シタ矢モ数名出マスシ又足ノ無イ患者ガ「リーフ」ノ縁端迄這出デ、貝ヲ捜シテ食ベナケレバ体ガ保テナイ程食料ト人手ガ足ラナイ狀況デアリマシタ。

又兵力ノ不足ノタメニ仕事ハ反比例シテ烈シク一人デ五モ六ツモノ仕務ニツカナケレバナリマセンデシタ。

更ニ小舟ガ次カラ次ト爆破サレ離島トノ交通ガ困難トナリ食料ノ輸送ハ日一日トニ至難ヲ極メ日々餓死者ヲ生ジ正ニ統員餓死十前ノ地獄デアリマシタ

斯カル狀態食糧泥棒ガ頻々トシテ続キ井田司令ハ食糧窃盗ニ對シ嚴罰ヲ以テノゾミ監視ヲ嚴重ニセラレマシタガコレヲ防グコトハ出来マセンデシタ。

毎夜離島ノ食糧生産地カラ本島（運ビマスル翌日ノ食糧モ監視ノ将校ガ乗込ミ取締ニ任ジマシテモ

（ヨミ(5)）

頻々トシテ窃取サレテシマウ事ガ常デアリ私ハ毎日終夜
舟艇ニ乗リコレガ取締ノ任ニ当リマシタガ
コノ食糧窃盗ヲ防グコトハ不可能ナ状態デ御座イマシタ
一将兵ノ精神状態ニ就キマシテハ当時我軍ノ敗戦續
キト連日ニ亙ル米軍機ノ猛爆ニヨリ将校以下敗戦
氣分濃厚トナリ特ニ内地爆撃ノ他ノ悪イ「ニュース」ニヨリ
将兵共ニ軍紀弛緩シ絶望感ヲ抱イテ参リマシタ
将兵ハ一日ノ四大時中ヲ常ニ凡ユルモノト戦ハネバナラナイ
特ニ飢餓ト戦ハネバナラナイ「ヤルート」戦場ノ全テノ人ノ
性格ハ変ッテ居リマシタ、将兵ノ教育指導ニ任ジネバナ
ラナイ将校ニ至ル迄性格ハ一変シ軍属ニ劣ル行為モ
続出スルトイフ状況デアリマシテ、何日軍人軍属共ニ
逃ゲ出ス者ガ出来ルカワカラナイ状態ニ立至リマシタ※
井田司令ハイカニ悲惨ナ戦況ノ間ニ在ッテモ終始毅然
タル態度ヲ持シ部隊ヲ指揮サレ部下ヲ叱咤激励
サレ通シテ来ラレマシタ、
戦況惨烈ノ度ヲ加フルニツレ少将ハ戦斗指揮ニ
軍紀維持、自治對策ニ自ラ率先心血ヲ注ギ骨

"ニ四"

肉ヲ砕キ精励セラレソノ心痛ト一身ヲ捧ゲテノ努力ニ対シマシテハ我々涙ナキヲ禁ジ得ナイ状況デアリマシタ

一、島民ハ部隊ノ構成員デアリ日本軍生活ノ原動力デアリマシテ我々二千名ハ島民ノ労力ニ依リ辛ジテ生キテ居タ状況デアリマシタ、島民二千名ノ中成年男子六〇〇名ヲ中堅トシ老幼婦女子迄一切ヲ動員シ之ニ軍人軍属約三〇〇名ヲ併セテ食糧動員ノ配置ニ充テタノデアリマス之ノ現状ニアッテ島民ノ逃亡ハ直ニ食糧ノ生産輸送ヲ停止シ全島ノ餓死ヲ招クト共ニ我防備ノ状況ヲ敵ニ知ラシメ我才左減ニ至ルハ火ヲ見ルヨリモ明デアリマス

一、ソコデ井田少将ハ軍人、軍属、島民ノ一人ト雖モ敵ニ奔ル者ナク又餓死者ヲ最少限度ニ止メテ最後迄コノ「ヤルート」ヲ死守スルトイフ根本才針ノ下ニ凡ユル對策ガ講ゼラレテ居リマシタ

一九四五年ニ入リ既ニ「マーシャル」他基地ニ在テハ島民、軍人軍属ノ逃亡、並ニ不祥事件頻発シテ居リ多数ノ餓死者ガ続出シテイタノデアリマスガ、「ヤルート」島ニ於テハ當時軍人軍属島民共ニ一名ノ逃亡モナク餓死者ハ数十名ニ止マッテ平マレタ。

1EE(1)'

併シ乍ラ一九四五年二、三月頃ヨリ飛行機並ニ艦船ノ異常ナル行動ヨリ察シ「ヤルート」島ニ対スル米軍ノ巧妙ナル投降工作ハ着々進メラレ「ヤルート」ノ最大危機ハ愈々近迫セルヲ感ゼラル、モノガ御座キマシタ。

コレガ一九四五年三月末頃迄ノ状況デ御座キマス、

斯カル悲惨ナル状態ニ於テ一九四五年三月末日頃「ミレ」島民八名ガ米軍ノ指示ヲ受ケテ「ヤルート」環礁ニ潜入セシ事件ガ発生シタノデアリマス

一、之等ノ潜入島民「ラリメ」以下八名ハ取調ノ結果次ノ行為ヲナシテイタ事ガ判明シタノデアリマス

即チ彼等ハ日本人ニシテ「ミレ」島ニ於テ敵ニ奔ル意思ノ下ニ全員共謀ノ上、軍用弁鈑、軍用糧食、強奪守矢殺害行為ヲ犯シ統員敵ニ奔リ、米軍ノ指示ヲウケ、間諜トシテ「ヤルート」ニ潜入シ間諜トシテ行動シ居リタルモノニシテ彼等ノ行為ハ間諜デアルト共ニ日本帝国ニ対スル叛逆行為デアリマシテ、特ニ「ヤルート」島民ノ脱島勧誘、通信傳達情報蒐集ヲナシツヽアッタ者デアリマス、

一、弁田少将ハ寡ニ慎重ニシテ且事件ノ性質上極秘裏

ニ而モ嚴正ナル態度ヲ以テ當時ノ狀況ニ於テ與フ限リノ公正ナル方法ヲ以テ審理ヲ實施セラレタノデアリマス「ヤルート」ニ於ケル行政司法ハ平時ニ於キマシテハ「パラオ」ニアル南洋廳及ビ地方法院ノ管掌スル所デアリマシタガ一九四四年二月以降「マーシャル」方面ガ戰場ト化シテ以來大本營ノ決定ニヨリ南洋廳長官ハ中部太平洋部隊指揮官ノ指揮ニ入リ南洋廳長官ノ有シタル島民ニ對スル行政司法其全面的ニ中部太平洋部隊指揮官ニ移管シ各基地司令官ハ其ノ責任地域内ニ於ケル司法行政ノ權ヲ有スベク命ゼラレタノデアリマス.

即チ一九四四年二月中旬頃南洋廳長官ハ「ヤルート」出張所長宛左ノ通リ電報指示ヲナサレタノデアリマス.

尓今本職行政司法等一切ニ關スル權限ハ中部太平洋方面部隊指揮官ノ指揮ニ入ル依テ各廳ハ右ニ關シ所在最高指揮官ノ指揮ヲ受クベシ。

一九四四年二月中旬頃第四艦隊司令長官ヨリ第二警備隊井田司令宛左ノ電文指令ガアリマシタ

「尓今各基地ノ上級先任指揮官ハ所在各部隊各官廳

(10)

ヲ統轄指揮シ司法行政ヲ行フベシ」

即チ當時「ヤルート」地域ハ激烈ナル戦場デアリマシテ
戒嚴令施行以上ノ状態デアリマシタカラ同地域ニ於ケル
統治権ハ一切軍司令官ニ移サレタノデアリマス
斯クシテ升田司令ハ基地最高指揮官トシテ行政司法
ノ最高權者デアッタノデアリマス、
一、其處デ升田司令ハ前述「ミレ」島ヨリノ潜入島民犯罪事件
處理ニ関シ
調査官トシテ私ト森川中尉ニ任命シ罪状判明後私ニ
對シ模擬裁判官ノ役目ヲトルヤウニ命ジラレ實判官トシテ吉木
女佐、新留女佐及司令自身ヲ入レテ當ルベシト命ゼラレタ
ノデアリマス。
勿論敵前ニ於テ敵ノ爆撃下ニ人手モ無ク法務官モ居ナイ
戦場デ而モ利用出来得ル附帯施設ハ無ク 方向探知機
ヲ失ヒ常ニ敵機ノ急襲ヲ受ケツヽアリマシテ
瞬時モ平静ハ保ツテ居レナイ危急ナル戦場デアリ
部隊ノ「戦斗事務」ハ何人モ一切コレヲ採ル事ガ出来ナイ
状態デアリマシタノデ多数ノ者ガ同時ニ一ケ所ニ集合シテ

"EE(10)"

静ニ審理スルトイフ事ハ到底出来ナカッタノデ御座イマス
カヽル状況ニ於テ正常ナル裁判構成ハ出来得ヤウモアリマセヌノデ変則デハアリマシタガ右様ノ構成ニ於テ特別ナル形ニ於テ審理手續ガ行ハレタノデアリマス、
調査ノ開始ニ當ツテハ司令ハ新留少佐立會ノ上、私、森川中尉並ニ通訳ニ對シ特ニ注意セラレ
最モ嚴重ニ公平ナル方法ニテ調査スル如ク命ゼラレ
尚事件ノ内容ニ付キ他人ニ洩サヌ様仔細ニ関シ嚴ニ注意ヲ與ヘラレ若シ之ニ反スル時ハ嚴罰ニ處スト命ゼラレマシテ、而モ通訳ハ仔細ニ関シ司令ニ宣誓シテ調査ヲ開始致シマシタ、ソノ人ハ日本人里ナデアリ永ク従テ調査官ノ取調ニ當リマシテハ極メテ慎重ニ公平ナル調査ヲ致シマシタ
而シテ調査ノ報告ノ際ニハ常ニ古木少佐、新留少佐立會ノ下ニ司令ハ報告ヲ聽カレ爾後ノ調査ニ對スル細部ノ指示ガ毎日行ハレマシタ、
司令自ラ取調ノタメ收容所ニ行カレタ事モアリ又罪状ノ調査ノ進行スルニ連レ司令、古木、新留、ト私ノ四名

'EL(1)'

會合ノ上裁回審理ヲ實施致シマシタ
而シテ調査完了シ報告書提出後自ラ愼重ニ調
査セラレ自ラ收容所ニ行カレマシタ。
最後ニ司令及古木少佐新留主佐及私ガ司令室ニ
集マリ司令ヨリ概峯官タル私ニ意見ヲ述ブベシ
ト命ゼラレ私ハ法ノ適用意見ヲ述ベマシタ
次ニ古木新留ニ対シテモ意見ヲ求メラレ西名共ニ
意見ノ開陳ガアリマシタガ
私ノ意見ト同様デアリマシタ、
私ハ特ニ二名ノ未成年者ニ対シマシテハ「イミエジ」本島ヨリ佳統
キデアル島民ノ居ナイ島ヲ指定シテ生活セシメラルヽ如ク
意見ヲ具申致シマシタ。(尚「ラリメント」「オチラ」ハ婦夫ト申ス迄デオリマシタ
ガ「シロー」ハ「オチラ」ノ子デハナク「ラリメント」ノ先妻
ノ子デアルト本件ノ島民ハ申シテヰマシタ。)
然シ乍田司令ハ裁判長トシテ判決ヲ宣告セラレマシタ
同時、同所ニ於テ司令ハ古木新留立會ノ上八名ノ死
刑執行命令ヲ私ニ下達サレタノデアリマス
コノ判決ハ私ノ意見ト異ッテ居リマシタガ判決ニ対シテハ
私共何等云フコトハ出來マセン
死刑ニ対シマシテハ私ガ檢事ニ提出シマシタ陳述書

"ETC"

記載ノ通リ升田少将ノ命令ニ依リ處刑ニ関シマシテモ當時
シタ、私ハ右ノ裁判及ビ處刑ニ関シマシテモ當時
モ今日モ少シモ変ラナイ信念ヲ以テ居リマス、
一、犯罪者ニ對シマシテ升田少将ノ適用サレシ法規ハ次ノ
通リデアリマス
刑法第百九十九条(殺人罪)刑法第二四〇条(強盗ノ罪)
刑法第八十一條(同第八十三條(殺害行爲ノ罪)(同謀ノ罪)
(敵国ニ與シタル罪)(軍用物掠奪ノ罪)
海軍刑法第二十三條第五項(同第七十六條
(軍用穀食ヲ欠ク七セシメタル罪)
升田少将ハ「ヤルート」部隊ノ軍機保護ト軍紀ヲ維持セン
ガタメ且又日本軍ノ全滅ヲ防止スルタメ全島民及ヒ
日本軍人軍隊ノ全生命ヲ保ツタメニ真ニ止ムヲ得ズ
日本ノ法律ニ違反シタ間諜デアリ又日本軍ニ叛逆シタ
(公敵ヲ)
島民ノ犯罪ヲ右法規ニ照シテ所断セラレタルモノデ
アリマス 其ノ手続ニ付キマシテモ能フ限リ
変則デハアリマシタガ當時ノ状況下ニアリマシテハ
ノ公正ナル裁判デアッタト信ズル者デアリマス、
一、當時私ノ職務ハ陸軍大隊本部附デアリマシテ
升田少将ノ指揮サレマス現地自治委員會ノ農園掛長
ト同ジク司令ノ指揮ニヨル特務班長ノ職務ヲ兼務致シテ
居リマシタ

〃 昭(3)1

特務班長ノ任務ハ 人食料消費規正ノ取締、
2. 犯罪ノ取調並ニ處罰ノ實施、3. 軍紀風紀ノ取締
デアリマシテ 憲兵ノ居ナ同島ニ於キマシテ私ハ憲兵ノ如キ
任務ニ從事一致シテ居リマシタ。
「ゼルート」戰場ニ於キマシテ私ハ日本軍將校トシテ又軍
紀風紀ノ取締者トシテ、井田少將 古木少佐、新宮少佐
等上官ノ命令ハ何事ヲ向ハズ最モ忠實ニ實行シ
他ノ將校ニ對スル 治模範ヲ示シ続ケテ參リマシタ
命令ノ徹底的遂行ハ日本軍人ノ生命デアリ
私ハ七年間(軍隊ニ於テ)コレガ骨髄ニ徹底スル如ク教育ヲ受ケテ
參ツタ者デアリマス、軍人トシテ命令ニ服從スル事ハ
私ノ第二ノ天性トナツテイタノデ御座イマス
若シ此ノ裁判デ私ガ處罰セラル、事ガアリマスルナラバ
ソレハ殺人罪デハ無クテ私ガ命令ニ服從シタカラデアリ
マセウ
一、處刑ノ行爲ニツキマシテハ判決ニ依テ司令ガ命ゼラル、以上
私ハ執行官トシテ服從スルヨリ外ハアリマセン
井田少將ノ死刑執行命令ニヨリ私ハ日本ノ官吏トシテ法
ノ命スル所ニ依リ其ノ職務ヲ忠實ニ實行シタモノデアリ
マス。

No 10

EE (14)

一、未成年者二名ノ處刑ニ就テ井田司令ハ決意ヲ次ノ如ク述ベラレマシタ

私ノ未成年者ニ對スル氣持モ井上、新留、古木ノ申シタ。氣持ニ變リハナイ

私ハコノ取扱ニ就テヨク考ヘ抜イタノデアルガ未成年者二名モ他ノ大人ト共ニ死刑ニ判決ヲ下ス

何故ナラバコノ二名モ他ノ者ト行動ヲ共ニシ居リ体ハ小サイケレ共意思ノ發達程度ヨリミテ果シテ何ガ是ガ非カハ大人ト大差ハナイ(敵トノ連絡ガアリ敵ノ指上ヲ教育サレ其ノ使命ヲ帶ビテ来ル)不明ギル、又間諜任務並ニミレ島ノ事情ニツキ大人ト同様ニ承知シ居リ間諜トシテノ實質ヲ具ヘテヰルノデ軍ノ生命ヲ保持スルタメニ生ヲ得ズ死刑ノ判決ヲ下スト我々ノ意見ト異リ頑トシテ死刑ヲ命ゼラレタノデアリマス。

一、未成年者ノ處刑ニ際シテハ當時 私ハ三十三才デアリ親モ有リ子供モ以テヰマスシ人ノ情モヨクワカリマス私ハ人間トシテ又一個人トシテ私ノ苦脳ノ程ハ表現スルコトハ出来マセンデシタ、私ノ心中ハ實ニ苦シクアリ自分ノ職務ヲ怨メシク且嘆キマシタガ、併シ私ノ任務ハコレヲ許サズ己ヲ空シクシテ實行スル外 私ノ選ブ途ハナカッタノデ

"EE(5)"

御座キマス、タビシ判決ヲ下サル、前私ノ意見ハ率直ニ申シ上ゲマシタガ司令ノ判決ハ私ノ意見ト異ッテ居リマシタ又處刑實施前ニハ私ノ(一子矢ノ助命ニツキ十將ニ意見ヲ再度申シ上ゲ)苦シイ心中ヲ古木少佐ニモ申シ上ゲマシタ、處刑ニ際シテハ罪ヲ犯ス意思モ無ケレバ又惡意モアリマセン、司令ノ命令ニヨリ合法ナル事ヲ確信シ死刑執行者ノ正當ナル行爲トシテ(職務遂行ノ)純粋ナ氣持デ處刑ヲ執行致シマシタ

處刑執行後私ハコノ島民ノ人々ニ對シ謹ミテ哀悼ノ誠ヲ捧ゲ(戰爭ノタメニ非ズ運ニ終ツタ)懇ニ冥福ヲ祈リ涙ナキヲ禁ジ得マセンデシタ

當時私ノ心境ハ牟田口將 古木少佐、新留少佐 及ビ處刑實施時ノ警戒兵ノ方ハヨク御存知デアリマス

只今デモコノ處刑ハ合法ニシテ併モ正義ヲ實行セシモノデ私トシテハ他ニ遜ル無カツタ事ヲ確信シ微塵モ犯罪ヲ構成スルトハドウシテモ考ヘル事ハ出來ナイノデ御座キマス

當時何人ガ私ノ立場ニ居ラレマシテモ私ノ採ツタ行爲ノ外ニ途ハ無キモノト信ズル者デアリマス、

神ハ私ノ行爲ノイカニ正シキカヲ御存知ノ事ト確信致シテ

(1947)

居リマス　之レガ當時モ今日モ私ノ変ラザル信念デ御座キマス

要スルニアノ急迫シタ情勢下ニ於テ許ス限リノ

最善ノ調査ト審議ヲナシタル結果司令官田少将

ヨリ私ハ犯罪人ノ処刑ヲ命セラレタノデアリマス

検察官ノ職責ニアリマシタ私トシテハコノ命令ニ

服従スルヨリ外ニ途ハアリマセンデシタ

勿論私ハコレガ合法ナル命令デアルト確信シテ居リマシタ、

而シテ命令者ハヤルート防備部隊最高指揮官

デアリマス、ソノ命令ハ絶対ニ実行シナケレバナラヌ

ノガ軍隊ニ於ケル鉄則デアリマス　私共ハ勅諭ニ依リ

内務令ニ依リ又其ノ他ノ命令服従ノ法令ニ依リ

コレヲ拒否スルコトハ許サレテイナイノデアリマス

殊ニ私ハ自ラコレ等島民犯罪ニ対シ調査ニ當リ

其ノ事実ヲ詳細ニ知ッテ居ルノデアリマス　コノ命令

ノ実行ハ正シイコトデアルト言フ以外ニ何モノモ頭中

ニアリマセンデシタ　私ノ心境ニハ一点ノ悪意モ

アリマセンデシタ　勿論私人トシテハ米軍ノ使命ヲ

受ケテ潜入シ捕ヘラレ処刑セラルヽ彼等ニ同情

シマシタ　詢ニ彼等ノ不幸デアリマシタ　殊ニ子供

ノ処刑ニ関シマシテハ何ント表現シ得ナイ私ノ

"EE(17)"

悲シミデシタ

コレ等未成年者ヲ助ケタイト再三少将ニ具申シマシタ　然シ外田少将ハ情ニ於テハ忍ビナガ軍紀ノ保持上、日本軍ヲ滅亡ヨリ救フタメニハヒムヲ得ナイト断固トシテ処刑ヲ命セラレマシタ　私ハ人生ノ無常ヲ歎キマシタ

戦争ハ個人トシテ為シ得ガルモノデアリマス　神明ニ誓ッテ申上得ル私ノ本当ノ心境デアリマス　検事ガ証拠トシテ提出サレマシタ私ノ陳述書ニモ私ノ真意ヲ披歴シテ居リマス　断シテ殺人ヲ犯ス意ナドハ夢ニモアリマセヌデシタ

平和ト治安ガ維持サレタ今日カラ考ヘマスレバ幾多考ヘサセラレマス　然シ当時ノ急迫シタル実情ニ於テアレ以外ニ途ノナカッタコトヲ陳述申上ゲタイノデアリマス

一、最後ニ私ノ家庭ノ事情ヲ具申致シ度イト存イマス、私ハ一九三八年十二月大東亜戦争ノタメ召集

"EE(18)"

セラレマシタ終戦迄引続キ軍隊ニ服務ヲ致シマシタ
家庭デハ私ハ未タ一度モ見マセヌ六才ニナル長女ト
妻ト妹ト母ノ四人暮シニシテ
私ハ幼サニシテ父ヲ失ヒ母ノ手一ツデ養育セラレマシタ
只今ハ四名共田舎デ生存シ私ノ帰ル事ヲ唯一ノ
楽シミトシ又私ノ帰ル事ノミヲ四名ノ生甲斐ア
モノトシテ日夜神ニ祈リ正シキ裁キノ結果ヲ待
ツテ居ルトノ便リガ一度アリマシタ
一日モ早ク母始メ家族ノ者ヲ安心サセ度イモノト
私ハ日夜神ニ祈ツテ居ル者デ御座イマス
茲ニ謹ミテ陳述申シ上ゲマス

元日本軍"ヤルート"防備部隊
第二大隊本部勤務
陸軍大尉 井上文夫

"EE(19)"

FINAL STATEMENT BY INOUE, FUMIO, FORMER CAPTAIN, IMPERIAL JAPANESE ARMY, ATTACHED TO THE HEADQUARTERS, SECOND BATTALION, JALUIT DEFENSE GARRISON.

Immediately after the fall of the Gilbert Islands at the end of November, 1943, I was ordered by the Detachment Commander, Colonel OISHI, to assume command of 300 men of the 1st South Seas Detachment then on Kwajalein, was detached and went to Jaluit. On arriving at Jaluit Island on November 30, I immediately came under the command of Rear Admiral MASUDA, Commander of the 62nd Naval Guard Unit.

At that time, I was attached to the headquarters of the 1st South Seas Detachment, which was on Kwajalein.

On January 18, 1944, Major Furuki with his commanding staff of the 2nd battalion of the 1st South Seas Detachment, composed of 140 to 150 men, moved up from Wotje and arrived at Jaluit. After the arrival of Major FURUKI, my unit and the KANEMATSU unit (army) were merged and organized into the 2nd Battalion of the 1st South Seas Detachment. This organization came under the command of Admiral MASUDA and Major FURUKI became the Battalion Commander.

After Major FURUKI's arrival I was attached to the headquarters of the 2nd battalion and served as one of its members until the end of the war.

With the fall of the 6th Base Force Headquarters, the chain of command of the 62nd Naval Guard Unit came into immediate connection with the Commander in Chief of the 4th Fleet. But owing to the fact that Jaluit was already isolated and beseiged, Admiral MASUDA actually had supreme and absolute command over all naval and army organizations, gunzoku units, natives and all other civilians on Jaluit, at that time.

At Jaluit, I was a subordinate of Major FURUKI and at the same time my superior commander was Admiral MASUDA.

Subsequent to the fall of the Gilberts, Kwajalein was taken by the American forces in February 1944. Thus Jaluit lost its base. Completely cut off from its surroundings and the rear, Jaluit fell into total isolation. Thereafter, not even once were supplies sent to us and the officers and men had no choice but to face death by slow starvation.

Moreover, the bombardment from sea and bombing from air by the American forces against Jaluit grew more intense day by day. Severe bombings by 40 to 50 American planes were carried out numerous times, both by day and during the night. Because of this severe bombing, food, armament, shelter and ammunition grew scarce. Buildings and establishments were completely destroyed. Outwardly Jaluit actually resembled a corpse reduced to ashes. Furthermore, great difficulties were experienced in communications.

Especially upon the collapse of Saipan in July 1944, Jaluit fell into great distress and utter isolation. The scarcity of food together with the lack of armament and ammunition at this time meant complete destruction of the defense of Jaluit. We did not have the wherewithal to defend this Japanese outpost. From this time on, Jaluit was turned into a most disastrous battle field, unprecedented in the history of this war, or any other wary.

"FF(1)"

At this critical moment, Admiral Masuda set up plans for self-support and defense measures to back up this self-support. With resolute will he immediately began to put this into practice. At first we cultivated every possible bit of land, grew vegetables and labored to gather all parts of the coconut palm, pandanus, breadfruit and any growing plants or trees which were edible. But our plans did not succeed because of the coral soil and the well planned intense bombings of the Americans.

So, our only hope was in the 100,000 coconut trees from which copra and coconut toddy could be produced by the help of native labor. The natives gave good cooperation and worked well for us. Because of the nature of my duties, I frequently made trips around the atoll, so I am better able than anyone else to describe the cooperation given to us by the natives of Jaluit. I have always been thankful to these natives and considered them loyal subjects of Japan.

The Admiral on all occasions ordered his subordinate officers and men to take good care of the natives, because they were the benefactors of our lives. This was his policy and everyone on Jaluit knew Admiral Masuda's policy regarding the natives and always carried it out; no matter how hard the natives and the military and gunzokus might work there was a limit to production. Enough food for the military men, gunzokus and natives totaling 4,000, could not possibly be produced.

Therefore, food was restricted to one copra and one "sho" of coconut toddy (sap from the bud of coconut) per person a day. Seventy-five per cent of the calories we obtained were from copra and coconut toddy. The self-support plan was based upon the calculation that the calories from one "sho" of toddy were equivalent to those from one "sho" of milk. We could not possibly maintain our health on this. Moreover, all buildings were destroyed so we could not shelter ourselves from the rain and the heavy night dew. Our health gradually declined. Officers and men had exhausted every edible thing--grasses which were not poisonous, and living creatures such as lizards and rats. The situation became disastrous. Malnutrition, sickness and disease were prevalent. Practically no person was in good health, two or three rest periods were needed in walking a mere 400 or 500 yeards. There were several men who died from eating the poisonous intestines of sharks which they found in the garbage. Food and the labor situation were so acute that a man who had lost his leg had to crawl to the edge of the reef to find shells to eat in order to maintain his strength. Owing to the scarcity of men, work inversely became more intense so that one man was burdened with 5 or 6 duties.

Boats were subsequently destroyed by bombing. So, transportation to the outlying islands became more difficult day by day and men began to die from starvation. We were on the verge of starving and it was indeed a living hell. Under such circumstances stealing of food occurred continuously. Admiral Masuda met this problem with severe punishment and placed strict guards. But still is could not be prevented. Even when officers were placed on the boats to keep watch over the food for the next day while it was being transported from the production centers of the outlying islands to the main island, the food was often stolen. Day and night I was on the boats and kept watch, but it was impossible to prevent the stealing of food.

Because of the continuous defeats of our forces and the severe bombings of Jaluit the morale of our officers and men declined and a feeling of hopelessness and ultimate defeat became overwhelming. Especially, when we heard the bad news that the homeland, Japan proper, was being bombed did military discipline slacken and despair, hopelessness and ultimate defeat were all that most of us could see. The officers and men had to fight twenty-four hours a day; they had to battle starvation and all. How we ever were able to carry on, no one will ever know.

The character of every man on Jaluit battlefield had changed. Even the character of the officers who were in the position to educate and guide the enlisted men was changed, and some of their acts were beneath that of a gunzoku. It was feared, "that the men and gunzokus would desert." Under such a situation, military discipline was upset. Instances of insubordination, disobedience and other deplorable acts occurred. The commander was so greatly concerned over this corruption of military discipline which is the life of every military force, that he meted out severe punishment to those who were guilty. I was ordered by the commander to maintain discipline and morale, and in accordance with his instructions I carried out my duties. Accordingly, I had to enforce punishment regardless of whether they were my subordinates or not, navy personnel, army officers, gunzokus, natives or other civilians. I impartially strove to maintain the discipline of the organization. I am fully convinced that I should not be ashamed before man or God for the acts I did in pursuance of this duty. No matter how grave and miserable the situation became, Admiral Masuda always assumed a determined attitude and encouraged his subordinates to carry on.

When the battle conditions became more severe and miserable, Admiral Masuda personally directed and strove himself in the command of battle operations, maintenance of discipline and measures of self-support. We could not but shed tears for his sacrificial endeavor and anxiety.

The natives were an integral part of the Japanese military organization of Jaluit and were the reason behind the subsistence of the Japanese forces. By virtue of the labor of the 2,000 natives we barely survived. Among the 2,000 natives, 600 men were picked and worked as the main force, while the remaining young and old, male and female, cooperated; together with the natives, about 300 military personnel and gunzokus were mobilized in food production. Under such a situation the desertion of the natives would immediately suspend the production and transportation of food which not only would cause starvation but also cause leakage about our defense positions to the enemy and jeopardize our chance for life. This would result in complete annihilation.

Thereupon, Admiral Masuda established counter-measures to prevent military personnel, gunzokus and natives from deserting to check starvation and to defend Jaluit to the end.

With the year 1945, numerous cases of desertion of military personnel, gunzokus and natives and other unfortunate incidents had already occurred, in the other bases of the Marshalls. Innumerable men were dying of starvation. At that time on Jaluit not a single military person, gunzoku or native had deserted, and starvation had been checked. Not more than 40 or 50 persons had died by starvation on Jaluit. But from about February or March 1945, judging from the active operations of the American airplanes and vessels,

subtle and clver surrender tactics against Jaluit were being launched by the Americans. The gravest crisis in Jaluit became imminent. Such was the condition until the end of March 1945.

Under this miserable situation, the incident occurred in which eight Mille natives with instructions from the Americans sneaked into Jaluit Atoll at the end of March 1945.

On investigating Ralime and the other seven natives the following facts were revealed.

They were Japanese subjects under the jurisdiction of Japan and with the intention of deserting to the enemy they deserted, after they had conspired and plundered a military vessel and provisions, and then confessed they had killed a Japanese sentry. Then, on receiving instructions from the Americans they sneaked into Jaluit as spies and acted as spies. Moreover, their acts were treason against Japan. Especially, they were found to be persuading the natives on Jaluit to desert, relaying communications and gathering intelligence.

Admiral Masuda because of the nature of the incident most secretly, and with the best possible methods and procedure under the circumstances, and with impartial attitude, most carefully conducted an investigation and held consultations on this incident.

In peace times, administration and judicature were vested in the South Seas Government and Local Courts situated in Palau. But since the Marshall Area was transformed into a battlefield in February, 1944, by the decision of General Headquarters, the Chief of the South Seas Government came under the command of the Chief of the Central Pacific Armed Forces, and the administrative and judicial authority of the Chief of the South Seas Government over the natives, was completely turned over to the Chief of the Central Pacific Armed Forces. Thus, each base commander was ordered to take over the administrative and judicial authority for his responsible territory. Accordingly, in the middle of February, 1944, the Chief of the South Seas Government sent out the following dispatch to the head of the branch office at Jaluit which read: "Hereafter, all the authority vested in me regarding administrative and judicature shall come under the command of the Chief of the Central Pacific Armed Forces; therefore, each government officer shall come under the command of the respective local commanders." And in the middle of February, the Commander in Chief of the Fourth Fleet sent out the following dispatch to Admiral Masuda, "Hereafter, the supreme commanding officer of each base shall have over-all command of all the military units and government offices and shall exercise administration and judicature."

Jaluit was at that time an area of severe battle and the situation was far more serious than a district in which martial law is proclaimed, so the administrative power of that territory was completely transferred to the military commanding officer, in this case, Admiral Masuda.

Thereupon, the commanding officer, Masuda, took the following steps in handling the Mille native criminals who sneaked into Jaluit: First Lieutenant Morikawa and I were appointed investigators. After the facts in the crime had been revealed, Admiral Masuda then assigned me the duty of Judge Advocate, and Major Furuki, Lieutenant Commander Shintome, and Admiral Masuda himself acted as judges. Needless to say, at this time we were facing the enemy and we were under severe bombing. Furthermore, we did not have sufficient personnel nor a judiciary officer. Also, air raid shelters were not available to hold formal meetings of the ranking officers of Jaluit. The situation was so dangerous and critical that we did not have a single moment of tranquility. All desk work concerning battle affairs was completely at a stand still. So

it was utterly impossible for a number of officers to assemble in one place and quietly hold a judicial consultation and deliberation. Under the circumstances, a regular trial procedure could not be held and though the trial was not formal such as this trial is, an examination and consultation procedure under special method was held, composed of the said members.

In commencing the investigation, the admiral with Lieutenant Commander SHINTOME present, told us to be especially careful and ordered that we should impartially conduct the investigation, that we should not reveal any matters related to the incident, and that we should prevent the leakage of military information. Then the admiral administered an oath to the interpreter to this effect. The interpreter was a Japanese citizen who had lived in the Marshalls a long time. Therefore, the investigation conducted by the investigators interpreted by a sworn interpreter was done in the most careful and impartial manner.

When the admiral listened to the daily investigation report, and gave out further instructions concerning the investigations, Major FURUKI and Lieutenant Commander SHINTOME were always present. There were times when the admiral personally went to the place of confinement and investigated the natives. Furthermore during the course of investigating the facts involved in the crime, Admiral MASUDA, Major FURUKI, Lieutenant Commander SHINTOME and I met together several times and conducted the examination and consultation. After the investigation had been completed and the reports had been submitted, Admiral MASUDA personally went to the place of confinement and investigated.

After this Admiral MASUDA, Major FURUKI and Lieutenant Commander SHINTOME and I assembled in the Admiral's office and Admiral MASUDA ordered me who had been appointed Judge Advocate to express my opinion. I expressed my opinion concerning the application of law.

Admiral MASUDA next, asked Major FURUKI and Lieutenant Commander SHINTOME to express their opinion, which they subsequently did. Their opinions were similar to mine. As to the two minors, my opinion was to designate an adjoining island to the Emidj main island and have them live there. Moreover Ralime and Ochira stated that they were husband and wife, but all the natives in the instant case stated that Siro was not the child of Ochira but the child of Ralime. 55K

But, Admiral MASUDA as President pronounced his sentence. He, then and there in the presence of FURUKI and SHINTOME, ordered me to execute the death sentence of the 8 natives. This sentence differed from our opinion as to these natives but we could not change the sentence. As to the execution, I performed it in accordance with Admiral MASUDA's orders as stated in my statement submitted to the Judge Advocate. My conviction as regards the trial and execution has not changed today or since that time. 55K

The laws applied by Admiral MASUDA to the criminals were as follows:

Criminal Law Art. 199. (murder), Art. 240 (theft and robbery), Art. 81 (crimes against joining an enemy power in taking hostile action against the Empire), Art. 83 (crime of destroying military goods), Art. 85 (crime relating to spy), Naval Criminal Law Art 23 para 5 (crime against allowing lack of armament and military goods) Art. 65 (crime of killing a sentry) Art. 76 (desertion.)

Admiral MASUDA in order to protect the military secrets of the Jaluit armed forces, to maintain military discipline, to prevent the annihilation of the Japanese forces, to secure the lives of all the military units and natives, had found it necessary to punish the natives who were public enemies and who had violated the laws of Japan, operated as spies and rebelled against the Japanese armed forces, as regards the above mentioned laws, the procedure was not formal but under the circumstances I am fully convinced that it was a fair trial and the best possible trial under the exigencies of the circumstances.

At that time I was attached to headquarters. I was in charge of the farming which was a part of the duties of the self-support committee under the command of Admiral MASUDA and concurrently I had the duties of the Chief of the Special Police Squad.

The duties of the Chief of the Special Police Squad were (1) regulating food consumption, (2) investigation of crime and enforcement of punishment (3) maintenance of military morale and discipline. There were no military police on the island so my duties were those of military police.

In the battle field of Jaluit, as an officer of the Japanese military force and as the officer in charge of discipline, I most faithfully executed whatever orders my superiors, Admiral MASUDA, Major FURUKI, Lieutenant Commander SHINTOME and others gave me, and I had always been looked upon as a pattern for other officers.

Thorough enforcement of orders is the life of Japanese military forces. During my seven years service in the army, I have been taught this principle until it has penetrated into my very marrow. To obey orders as a military person has become my second nature. If I am to be punished at this trial, I believe it is because I obeyed orders and not because I committed murder.

As for the act of execution, since the admiral commanded me to do so according to his decision, I could not do anything but obey his orders. I only faithfully performed my duty as an official in accordance with the law and according to Admiral MASUDA'S order for execution.

As to the execution of the two minors, Admiral MASUDA expressed his determination as follows; I feel the same pity toward the minors as do INOUE, FURUKI and SHINTOME. I have deeply thought about the matter but I shall sentence them to death together with the grownups. The reason for my decision is because, the 2 minors acted together with the others; and though they are physically small, the maturity of their mind and thought differs in no way from the grownups. Moreover, they have contacted the Americans and have been instructed in their duties as spies and they are fully aware of the situation on Mille as a grownup would be. So they possess the qualities of spies. Therefore in order to maintain the subsistence of the armed forces I am compelled to sentence them to death.

This was the Admiral's opinion. It differed from our opinion but he firmly ordered the death sentence. At that time when I performed the execution of the minors I was 33 years old. I have a mother and a child of my own so I can well understand human feelings. I cannot adequately express the agony as a human being and as an individual, which I had to suffer. My sould was subjected to great pains and agony. I hated my duty. I regretted my duty.

I was helpless. But my duty did not allow this. My only way out was to suppress my own feeling and carry it out.

Before Admiral MASUDA expressed his decision, I had stated my opinion straightforwardly. But his judgment differed from my opinion. Prior to the execution I again expressed my opinion to Admiral MASUDA to spare the children and explained my agony and suffering to Major FURUKI. In performing the execution, I had no intention of committed a crime or did I have malice. In accordance with the Admiral's orders, fully convinced of its legality and in pursuance of a legitimate duty as an executioner with an honest belief and with pure heart I carried out the execution.

After the execution, I expressed my deepest condolence and prayed for the repose of their souls. I could not help but shed tears for these natives who had ended in such misfortune caused by the war.

Admiral MASUDA, Major FURUKI, Lieutenant Commander SHINTOME and the guards at the time of the execution, are fully aware of my feelings then, at the present moment, I firmly believe that the execution was legitimate and right and that there was no other way. I cannot realize that it should constitute any crime whatsoever not unless I can come to not believe in capital punishment. Moreover, if someone else had been in my place, I am convinced that he would have taken my steps and no other. I firmly believe God is aware of my righteousness. In the foregoing paragraphs, I have expressed my conviction and at this time and at that time I wish to say that it has not changed.

All in all, after an investigation and a consultation such as the exigencies of the circumstances permitted, I was ordered by Admiral MASUDA to execute the sentenced natives. In the honest belief that the orders were legal, I could not help but carry them out as the proper duties of the judge advocate. The officer that gave out the order was the superior commanding officer of the Jaluit Defense Garrison. That this order should implicitly be carried out was the iron-clad rule of the Japanese military forces. In accordance with the Emperor Meiji's "Imperial Rescript to Soldiers and Sailors", Rules and Regulations of Army Life and other regulations concerning orders I could not refuse it.

I knew of the investigation because I had personally investigated the incident. I knew of the trial because I had participated in the trial of the eight natives. There was no question in my mind but that I was doing the right thing when I carried out the order. My state of mind was free of any malice toward these persons. Quite to the contrary, I felt pity toward them that they had listened to the Americans and had been assigned this mission so that they sneaked in to gain information of our military and personnel situation. I felt particularly sorrowful and greatly concerned for the children. I had expressed my opinion over and over that I wanted them to be spared. Though Admiral MASUDA sympathized with them, he stated that it had to be done in order to save the military from annihilation and from the point of maintaining military principle and he firmly ordered them to be executed. I grieved over the heartlessness of life.

War does things to a person which he cannot very well escape. In performing the execution it is my honest belief and I swear that I did not have the slightest malice. The statement made by me on December 28, 1946 and submitted into evidence by the prosecution explicitly reveals that I had in

no way any intention at all of committing murder.

It is easy in the quiet and secluded way of peace to see how things could have been different. But I wish to state that by the exigencies of the circumstances there was no other way.

In closing, I would like to express the situation of my family. On December 1938 I was called out for service in the Pacific War and until the end of the war I continued in the service. At home my six year old daughter who I have not yet seen, my sister, wife and mother are living together.

I lost my father when I was only a child and my mother brought me up. I received one letter from home saying they are now living in the country and their only pleasure was my return. They are praying day and night for my return which is their only hope in life and for an impartial judgment, I am praying to be able to relieve my mother and family of their anxiety.

I respectfully place this statement before you.

INOUE, Fumio

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.

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

FF12/A16-2/
13-JDM-rhj

29 APR 1947

Serial: 11702

From: Commander Marianas.
To : Atoll Commander Kwajalein.

Subject: Marshallese Observers at War Crimes Trial - attendance of.

Reference: (a) JAG Desp. 311730Z, August 10, 1946.

1. Reference (a) advised CinCPac that the State War Coordinating Committee had authorized inviting Marshallese to participate in trials of Japanese Military personnel charged with murder of Marshallese natives.

2. Three native Marshallese attended the recent trial of Major Furuki, I.J.A., for the murder of thirteen (13) Marshallese natives.

3. On 23 April 1947, the trial of Captain Inoue, I.J.A. began at Commander Marianas. He is charged with the murder of eight (8) Marshallese on Jaluit Atoll in April 1945. The trial was adjourned until 5 May 1947 on motion of counsel.

4. Chief Lajore, one of the observers at the Furuki trial, has suggested the following persons to be observers at the trial of Captain Inoue:

Kabua of Jaluit
Tokne of Ailingalaplap
Mangingi of Kwajalein

Chief Lajore states that all three are important persons in the Marshalls. Tokne is his son.

5. The Marshallese should be notified that the three natives mentioned in paragraph 4, or substitutes if desired, are invited to attend the Inoue trial. If the invitation is accepted, arrangements should be made to have these Marshallese at Commander Marianas by 5 May 1947.

6. For travel by Naval Transport Aircraft, Class Three (3) Priority is hereby certified.

/s/ C. A. POWNALL
C. A. POWNALL,
Rear Admiral, U. S. Navy.

CERTIFIED TO BE A TRUE COPY
James P. Kenny
Lieut. USN

"GG"

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 eight Marshallese natives. Murder is defined as "the unlawful killing of a human being with malice aforethought 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 on the heads of the victims shortly afterwards. We have the unrefuted confession of the accused to the effect that he shot the eight native victims and finally his admission to this effect in open court.

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.

The allegations in the various specifications as to the time and place of these killings has been proved by the testimony of the four prosecution witnesses 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 aforethought' 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 these legalistic terms. That the

accused intended to kill the eight natives in apparent and we have his own testimony that he discussed the matter with Major Furuki before performing the act.

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 these killings were alone "without justifiable cause" as alleged by the prosecution. Lieut. Shigeru Morikawa, a prosecution witness, testified that he had neither "seen nor heard of a trial" for these natives even though he, along with the accused, investigated them. Although the defense has admitted that there was no 'regular' trial, they have sought to establish that an examination and consultation was held before the executions. From a reading of the testimony it is impossible to determine where the line of demarkation is between the investigations and this so called 'examination and consultation'. We have the one parralleling the other up to the date of the execution of the first seven of the natives. We are told that the accused as an investigator made daily reports to Masuda, Furuki and Shintome and we are also told, and expected to believe, that at some point in these sessions the investigator became a judge advocate and the other three who were present became judges. Through this metamorphasis, we are informed that an examination and consulatation was held. The defense realized that the only thing present to examine or consult on was the investigation report and that some important things - such as the presence of the accused and evidence against them were material to turn this into a judicial proceeding. Therefore in order to remedy these defects we are told that Admiral Masuda visited the natives at their place of confinement and Furuki and Shintome examined the boat in which the natives arrived. This in short, is the defense in this case.

To rebut this fantastic story the prosecution produced the former member of the Imperial Japanese Navy former Lt. Comdr. Shintome. Here was the man who the defense had claimed was present when Admiral Masuda had given the order for an examination and consultation to be held and appointed the accused a judge advocate and Shintome, Furuki and himself as judges. What did Shintome say about this? He unequivically denied that any appointment ever was made or that he had ever acted as a judge in any proceeding connected with these natives. He did testify that he had examined the boat in which the executed natives had arrived on Jaluit but his inspection had nothing to do with any so-called examination and consultation. The defense made a futile and unsuccessful attempt to impeach the credibility of this witness. Can anyone think of a reason why this former member of the Imperial Japanese Navy would tell this story against a man who fought side by side with him unless it were true. He certainly has no animosity for the accused because while he was on the witness stand, at the investigation of defense counsel he became a character witness for Inoue. Furthermore, in the course of this trial, it has been shown by testimony that the accused on October 9, 1945 testified that there was no trial and that the natives had been executed after only an investigation. Shintome, by destroying this fabrication about an examination and consultation, merely verified the truth of that statement

of the accused. Shintome would have liked to help Captain Inoue but this old man was not willing to play a part in the tale of lies which had been fabricated sometime after he returned to his home in Japan.

The defense of superior orders will be discussed by Mr. Bolton in the closing argument of the prosecution. 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 an 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, Inoue knew the order of Admiral Masuda was illegal, he knew that the natives had not been given a trial.

There is one thing above all others that has been embarrasing to the accused in this case and has been an unsurmountable obstacle - that is, the murder of the two young children. It was realized that their execution was in violation of Article 41 of the Japanese Criminal Code. Defense witness Furuki made a weak attempt to add years to these children but was faced with the testimony of Morikawa, the testimony of the guards, the confession of the accused, the deposition of the 'ressurrected' Tanaka - all of which placed the ages of the children under the statutory minimum for punishment. The ridiculousness of the testimony that these young children had to be executed because they were spies who were dangerous to the Jaluit Garrison is so evident that I will not take the time of this Commission to discuss it. The matter at most is academic and collateral.

In Charge II it has been alleged by the prosecution that the execution of these eight natives was a violation of the Laws and Customs of War in that although they were charged with spying they were not given the protection of Article 30 of the Fourth Hague Convention which states that "a spy taken in the act shall not be punished without trial. In order to prove this charge it was merely necessary for the prosecution to establish one additional fact beyond the proof established to sustain Charge I, ie, that the natives were punished for being spies. Such proof is contained in the testimony of both prosecution and defense witnesses.

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

"HH(3)"

INOUE, FUMIO (23 APR 1947) (VOLUME I) (159116)
PART 4 OF 5

II

Mr. AKIMOTO argument.

昭和二十一年 五月二十九日

辯　論

被告人　井上文夫
弁護人　秋森實一郎

昭和21年5月29日

辯　論（被告人井上文夫）

弁護人　秋元勇一郎

裁判長閣下並ニ委員諸君

私ハ被告人井上文夫ニ対シ無罪ヲ主張セントスルモノデアリマス。私ハ本論ニ入ル前ニ先ヅ司法権ノ独立乃至裁判ノ神聖護持ニ関シ日本及米合衆国ニ起リマシタ刑事裁判ノ生キタル歴史実談ヲ申上マシテ裁判所ノ御参考ノ資料ト致シ度イト存ジマス

其ノ一ハ日本ノ刑事裁判史上有名ナル大津事件デアリマス之ハ日本ノ一警察吏ノ一人ガ露西亜ノ皇太子ニ危害ヲ加ヘントシタル事件デアリマス時ハ日露戦争勃発前日露両国民感情ガ著シク尖鋭化シテ居ル当時デアリマシテ偶々ロシヤ国皇太子ガ日本御巡遊中滋賀県大津ニ於テ一巡査ガ誤ツテ愛国心ヨリシテロシヤ皇太子ニ対シ危害ヲ加エントシタル事件デアリマス。之ガ日露両国際間ノ問題トナリ当時日本ハ欧米先進文明国ニ倣ヒ憲法政治ガ施カレ法律絶対制度ヲ之等文明諸国ノ制度ガ採用セラレ三権分立即チ立法権、行政権、司法権ハ各独立シ絶対ニ相侵スコトナキ根本原則ノ厳守シテ居リマシタ　殊ニ司法権ノ独立ニ関シテハ如何ナル国家権力モ之ヲ左右シ得ザル厳然タル主義ヲ守リテ居リマシタ　然シテ之ガ其ノ国力ニ至ツテハ先進文明国ニ対シテ到底一歩ノ相手タルコトヲ得イカツタノデアリマス　茲ニ当時ロシヤ国ハ世界ノ大強国デアリマシテ日本等ノ問題ニシテハ居ナカツタノデアリマシテコノ皇太子問題ニ対シ非常ナル強圧ヲ加ヘマシテ犯人ヲロシヤニ引渡セト要求シマシタ然シテ之ヲ日本国内ニ起ツタ日本人ノ犯罪デアル以上当然日本ノ裁判管轄ニ

(2)

アリマレテ之ヲロレヤニ引渡スコトハ法治国トレテ応スルコトハ許カレマヤヌ
若レ之ニ応ズルコトハ文明国トレテノ日本ノ自殺デアリマスノデ之ノ要求ハ断
固排斥レタノデアリマス 茲ニ於テロレヤハ米銀ノ要求トレテ犯人ノ死刑ニ
処セヨトノ強圧デアリマレタ若レ之ニ応ジテケレバ日露国交ハ断絶し戦争ノ
勃発ノ危機ニマデ発展セントスル状勢デアリマレタ茲ニ於テ政府ハ司法
大臣及検事総長ト申ジ之ヲ死刑スベク方針ヲ決定レタノデアリマス.
然ルニ日本ノ刑法デハ単純傷害又ハ殺人ノ未遂デハ之ヲ死刑トスルコトハ
出来ナイノデアリマス茲ニ於テ法律ヲ曲ゲテ日本ノ皇室ニ対スル罪ヲ適用シ即
現行刑法ニ於キマレテモ73条ニ"天皇、太皇太后、皇太后、皇后、皇太子又ハ
皇太孫ニ対シ危害ヲ加ヘ又ハカロエントシタル者ハ死刑ニ処ス"ト規定シテ居
リマス当時ノ刑法モ全様ノ規定ガアリマレタ
之ヲ適用シテ之ヲ死刑ニセントシタノデアリマス若レ之ガ其ノマヽ実行サレテ居リ
マレタナラバ日本ハ明治維新ノ苦難ヲ経テ文明国ノ一員ニ列シタノヲ外国ノ圧
力ニ堪エカネ自ラ其ノ法制ヲ破リ再ビ未開国ニ転落スルニ至ツタコトデアリマ
セウ. コノ危機ヲ救ヒタル者ハ日本裁判史上永久ニ忘レヘカラザルハ村
大審院長児玉雄輔氏ノ名デアリマス 児玉院長ハ大義ヲ之ヘ由テレテ
憲法違反デ行政権ニ依ツテ司法権ノ独立ヲ侵犯スルコトハ絶対ニ排除レ
ナケレベナラヌ然ヲサレベ日本ハ独立国家トレテ存立スルコトハ出来ナイ自ラ
大審院判事ヲ携エ大津ニ到リ全地方裁判所、判事ヲ督励シ検事総
局論検事総長以下検察長官等ガ大津ニ滞在シ又司法大臣自ラモ乗出
シ検事ヲ督励シ裁判ニ圧迫ヲ加ヘ斯クレテ検事側ノ血ミドロノ争ガ展開
サレタノデアリマスガ児玉院長以下判事ノ善斗ノ結果事ヲ公平ニ公正ナル裁
判遂行シ司法権ノ独立ハ擁護サレ今日ノ日本法制ノ発達ヲ見タノデアリマス.

(C)'11(3)'

コノ結果ハ外交上ニ於テモ意外ノ好結果ヲ生ジ ロレヤ国ハ日本ノ文明ヲ
認ムルニ至ッタノデアリマス之レハ吾々弁護ニ携ハル者ノ誇リトスル司法史ノ一
頁デアリマス
次ニハ亜米利加合衆国ニ於テ日本トハ反対ニ検事カ司法権ノ独立ト尊厳トヲ
擁護シタル美談デアリマス之レハ委員諸君ノ夙ニ御承知ノコトデアリマス
1933年 Bridgefort Canneeticut State 市ニ起ッタ殺人事件デアリマス
一カトリック ノ牧師 (father) ガ何者カニ殺害サレタガ当局ニ於テハ其ノ犯人
ノ逮捕ガ出来ズゴウゴウタル民衆ノ非難ヲ受ケタルタメ無実ナル一平民ヲ捕
ヘ之ヲ強制シテ遂ニ自白書ヲ作成セシメ又多数ノ証人ヲ買収シ遂ニ之ヲ犬
罪セントシタノデアリマス. コノ時一検事 Homer Cummings 氏ハアラユル
攻撃ノ強圧脅迫ヲ排除シ一身ノ危険ヲ犠牲トシテ自ヲ被告ノ無罪ヲ
主張シ之ヲ立証シタ 検事ノ職責ハ断ジテ被告人ヲ有罪トスルコトデハナイ
.国家ヲ代表シテ正義ヲ守リ通スコトデアル断ジテ権力ニ屈服シ又狭量
ナル職務意識ニ捕ハレテハナラヌトノ崇高ナル正義ノ信念ニ依ッテ危機
ニ瀕シタル司法権ノ独立ヲ守ッタノデアリマス. 尚ニ尊敬措ク能ハサル人物デ
アリマス 私ハ茲ニ一ノ日本ニ於ケル裁判官(判事)ト一ノ米国ニ於ケル
検事 孰レニ崇高ナル決ダマレイ倫ヲ依ッテ両国ノ裁判ノ尊厳ヲ保
持サレタト信ズルモノデアリマス. 私ハ之等ノ美談ニ依リ深イ印象ト教訓
ヲ受ケタノデアリマス. 一個ノ犯罪事実ヲ考察スルニ当リマルデモ小ナル角度カラ
深ク有察ヲカケヘ仮令有罪タリト判断サルル事案デアリマレテモ其ノ被
告ノ主観乃至客観的状況ニ於テ法律上又道義上許スベキ哀同
情スベキ点ガアルナラバ之ヲ看過スルコトナク之ガ為ニ考慮ヲ払フコトハ
只ニ弁護人ノ責務デアルノミナラズ裁判官モ又検察官タル検事

ADD. II(4)'

ニ於テモ正義擁護ノ立場ニ於テ当然協力シテ公明ナル裁判ノ遂行
シテ社会秩序ノ維持ノ重責ヲ全フスベキモノト信ズルノデアリマス。之等刑
罰ハ国家又ハ社会ノ秩序維持上已ムヲ得ザル範囲ニ於テ行フモノデアリマシ
テ要ハ一般社会ノ道義心ヲ根底トシテコノ上ニ立テ其ノ秩序維持上
已ムヲ得ズシテトル所ノ必要手段デアリマス若シ其ノ範囲ヲ超エルトキハ其ノ目的
ヲ違スルコトヲ得ズ却テ其ノ国家ニ害ヲ与ヘル結果ニナルコトヲ忘レテハナリマ
セヌ 独乙ノ刑法学者 イエーリング氏ハ「刑罰ハ両刃ノ剣ノ如キモノデ
アツテ其ノ用法ヲ誤ルニ於テハ犯人ヲ国家ニ傷ケラルル人間ノ生
カト（要領ヲ知ル事ハ刑法ニトリテ最モ重要ナルコトデアル）ト謂ヒ居
ル（Jhering, Zweck im Recht I, 4 Aufl, S. 292. f）迄ニ刑罰
ノ目的ハ原始時代ニ於ケルガ如ク復讐デハナイ又封建時代ニ於ケルガ如ク
応報ノ手段デハナイノデアリマシテ今日ノ文明諸国ニ於ケル法制ニ於キマシテ
ハ教育主義ニ徹底シ犯人ヲ還善改過シテ社会ノ善良ナル市民ニ復帰
セシメ延イテ社会ノ為メ人類ノ為メ貢献セシムルニアルコトハ、米国ノ法制ガ其ノ
範ヲ示シ各国之ニ倣ヒタル法制史上ニ示ス処デアリマス、犯罪必罰ノ
原則ハ今日ノ刑罰法規ニ排斥スル所デアリマス 法律ハ決シテ無情
冷酷ナルモノデハアリマセヌ、日本裁判ニ於テ能ク「法depth」トイフ言葉
ガ使ハルマス 法律ニハ温イ人情ガアル同情ノ深ガアル形式一遍ノ
冷血デナイ 仮令其行為ガ形ノ上ニ於テ犯罪ノ形式ヲ備ヘテ居ル
トシテモ社会ノ道義上ニ立テ許サルベキモノモアリマス又同情スベキモノ
アリマス、又其ノ動機ニ於テ正シイモノアリマス、又真ニ已ムヲ得ザルニ
出デタル行為モアリマス 之等ノ主観客観ノ事情ニ於テ全ク犯罪ヲ成
立セザルモノ或ハ罪ヲ免除スルモノ、又法律上減刑スルモノ裁判上ノ

JLII(5)

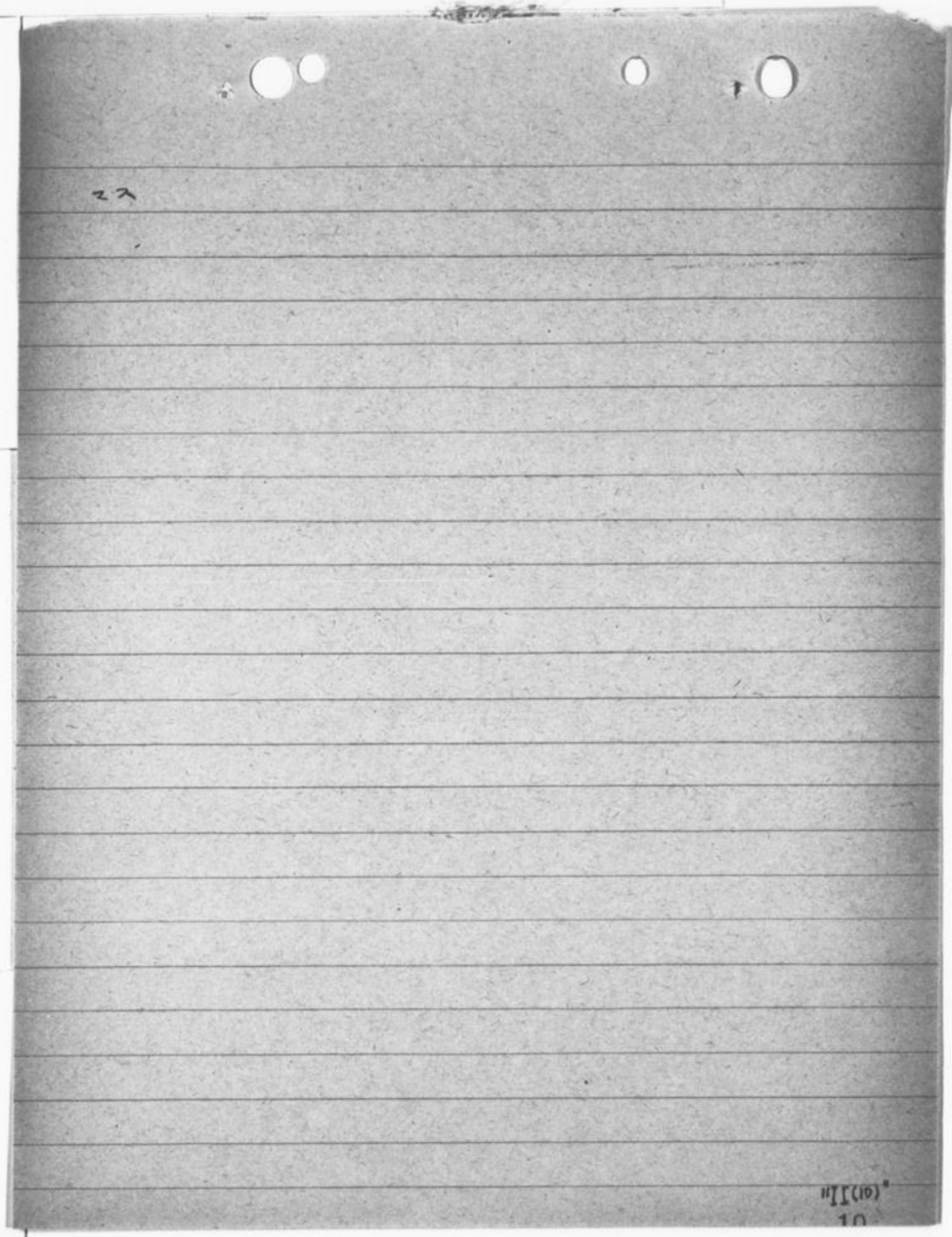
酌量ニ依リ減免スベキモノ等ノ規定ガ設ケラレテアリマス、又執行猶予ノ制度ガアリマス時ニコノ執行猶予ノ制度ハ米国ガ其ノ創始者デアッテ各国ガ其ノ法制ニ慣ヒタルモノデルコト法制史ノ示ス処ガアリマス然シ法律ハ活物デバアルマセヌ之ヲ活用スルモ天用スルモ人間デアリマス、冷酷ナル人、温情アル人ニヨリ其ノ結果ハ種ノ葉ハナゾ更ニ葉トモナルノデアリマス私ハ法制史殊ニ裁判ノ変遷ヲ研究スルニ当リ痛切ニ感ズルノデアリマス、被告人ハ父ズレモ悪人デハアリマセヌ其ノ主観客観ノ状態ノ充分ニ考察シ酌スベキハ酌シ罰スベキハ罰シ飽迄社会公序良俗ヲ維持スル二必要ナル範囲ニ於テ法ノ適用ヲ考慮スルコトハ最モ肝要デアリマス弁護人ハ之等ノ事項ヲ想起シ本論ニ入ラントスルモノデアリマス本日証拠ノ採否ノ御考慮ヲ仰ゲバ次第デアリマス。

本件ノ事実ハ明瞭ナリテアリマス只之ヲ法律上如何ニ見ルカガ問題ナリテアリマス　其ノ第一ハ本件裁判権ガ米国ノ裁判デアル本軍法会議ニアリヤ否ヤノ問題デアリ第二ハ本件被告ノ行ガ法律上許カル可キモノナリヤ換言スレバ被告ノ行為ハ法律上犯罪ヲ構成セザルモノカナ否ヤノ問題デアリマス　第一ノ裁判権ノ問題ニ就テハ已ニ提出シタル異議ニ於ケル詳論致シマシタカラコレヲ採用シテ茲ニ重ネテ述ベル事ヲ有害致シマスガ　只検事ノ之ニ対スル意見ノ予備ヲ以テ前掲シ私ノ議論ニ応ジイコトヲ主張致シマス、即チ検事ハ日本ノ委任統治領タルマーシャル地域ハ日本ノ国際聯盟脱退ノ為カ仁会議ノ結果ニ依リ其ノ主权ヲ失ッタノデ当時「マーシャル」ニ於テ日本ノ統治権ヲ有シテ居ナカッタト主張シナガラ当時之地ニ施行セラレテ居ッタ日本刑法ハ local law トシテ存知デアルトシテ本件ニ日本刑法第199条ヲ適用セラレタ　然ラバ裁判权ニ対シテハ日本ノ主权ヲ否認シ現在米国ノ占領地デアル、故ヲ以テ米国ニ裁判权ガアルト主張セラレタ勿論米国ノ占領後ニ於テ其ノ占領地域内ニ発生シタル事件ニ対シ米国ガ裁判权ヲ行使スルコトヲ私ハ否定シナイ　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民ガ日本ノ国法ヲ犯シ之ニ対シ日法ノ法律ニ照シ日本ノ官庁ガ之ヲ処断シタノデアル而シテ之ヲ実行シタルモノハ日本ノ臣民デアル若シ之ガ犯罪ヲ構成スルニセヨ人的、地的時ノ三ツノ点ニ於テ日本ニ於テノミ裁判权ヲ有スルノデアル、日本ハ敗戦シタトハイヘ連合国デアル日本ノ国法ハ現在シ有効デアル、日本人ハ世界何レノ地域ニアルトモ日本ノ裁判权ハ之ニ及ブノデアル

只事実上犯人が主权ノ及ハナイ!国ニ在ル場合ハ事実上直ニ裁判权ノ行使ガ出来ナイ!イフノミデ裁判权ヲ喪ツテ居ルノデハナイコノ場合ハ犯人所在国ガ犯人引渡条約ノ締約国デアル場合コノ条約ニ基キ犯人ノ引渡ヲ要求スルノガ国際的慣例デアリマス犯人所在国ガ他国ニ於ケル他国人ノ為シタル犯罪ニ対シ只犯人ガ自国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国ニモアルコトヲ知ラナイノデアリマス，本件ヲ現在米国ガ全地ヲ占領シ居ルノ故ヲ以テ米国占領以前ニ他国ニ於ケル発生シタル他国人ノ事件ニ対シテ米国ニ裁判权ヲ有スルトナス検事ノ意見ハ全ク上記非理ヲ肯定セルモノニシテ到底許サルベキデハナイノデアリマス，又検事ハ法律ノ不遡及ノ原則ヲ無視シテ居ル今世界各レノ文明国ニ於テモ法律不遡及ノ原則ハ法ノ通則解釈ニ於テ此テノ文明諸国ガ厳守シテ居ルノデアル検事ハ刑法ノ適用ニ関シテハ不遡及ノ原則ヲ適用シ訴訟手続法ニ関シテハ之ヲ適用セヌ説ハ勿論手続法ニ於テ不遡及ノ原則ニ反スル主張ヲ為スコトノ可否ニツイテノ議論ハアルガ夫レハコ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ツテソノ法律ガ制定セラレザル限リ手続法ニ於テモ不遡及ノ原則ヲ守ラナケレバナラナイコトハ世界文明諸国ノ法学者ノ一致シタル学説意見デアル本件[redacted]起訴ハ明ニコノ原則ニ違反シテ居ル私ハ本裁判所ニ於テハ本件ニ対スル裁判权ヲ有セストノ主張ヲ飽マデ維持スルモノデアリマス

補充＝付＝Comission ノ命令ニ依頼セラレタコトハ被告人ノ本件行為ノ行ハレタル土地ガ現在米国ノ占領地域デアリ現在占地

域ニ裁判権ヲ有スルガタメニ米国領土ニ行ハレタル犯罪ニ対スル單ナル新法旧法ノ時ヲ異ニスル場合ト同様ノ錯覚ヲ生ズル惧レガアルコト本件ノ如ク場合ノ犯罪ヲ異ニシ居ルモノデアリマス法律関係ニ於テハ犯罪ト地域トノ裁判権ノ衝突スル国際関係ニアル行為デアツテ其ノ事実上ニ立チ時ヲ異スル法律関係ヲ考ヘナケレバナラヌノデアリマス、コノ点ニ於テ検事ノ誤解ヲシテ居ラレルト見エマス即チ本件行為ノ行ハレタル当時行為地タルヤルートト環礁ハミレー並環礁ハ日本ノ統治セル領域デアツテ犯罪者ヲ初メ刑者モ共ニ日本人デアツテ之ヲ審理判決シタルモノハ日本政府タル日本軍デアリマス當時米国ハ之ニ対シ何等ノ関係ヲ有セザル一ノ外国デアツタ従ツテ偶々今日ノ如ク地域ガ米国占領スルニ至ルトイフ一事ヲ以テ今日ノ如ク地域ニ対シ裁判権ヲ有スルトイフ一事ヲ以テ而シテ米国ガ其ノ裁判権ヲ実施シ得ルハ其ノ占領時タル昭和二十一年一月以降ノ事実ニ限ラレルモノデアリマス然ラバ本件ノ米国トノ関係ハ恰モ外国ニ於テ行ハレタル犯罪ノ行為者ガ偶々現在米国領土ニ居住シテ居ル場合ト同ジデアツテ之レ以上ノ関係ハナイノデアリマス従ツテコノ場合~~[illegible]~~コノ行為者ニ対シテ裁判権ヲ有スル者ハ其ノ行為者ノ属スル本国ノミデアリマシテコノ場合ニ於テ引渡サレテ居リマス手続ハ「犯人引渡条約」ニ依ル犯人ノ現在スル米国ニ対シ其ノ本国タル日本政府ヨリ犯人ノ引渡ヲ要求スル国際条約上ノ手続ノミデアリマス断シテ米国ニ裁判権ガ発生スルモノデアリマセヌ故ニ単ニ被告人ガ現在米国占領地内ニ居住スルノ故ヲ以テ米国ノ裁判ヲ本法並ニ於テ本件ガ審理サルルコトノ違法アリトイフ"11(9)"


22
"II(10)"
10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猶本件が戦争犯罪ニアラザルコトハ裁判管轄ノ抗弁ニ於テ詳細論述シタルヲ以テ茲ニ繰返スヲ避ケ又仮令本件ガ戦争犯罪ニ起因シ、同謀ニ対シ戦争犯罪ノ名ノ下ニ交戦国タル米国ニ裁判ノアルコトヲ主張スルカモ知レヌ勿論ニ起訴事実ハヘーグ條約第二九条及三〇条ニ所謂間諜トハ其ノ性質ヲ異ニシ日本刑法ノ所謂間諜ニアラズ其ノ本罪ハ軍律違犯罪ニアル筈ニ於テハ軍律会議ニ付スルヲ以テヘーグ條約ヲ適用シ戦争犯罪トスルコトハ事実ノ許サザル処ニアルコノ点ニ付テハ更ニ後ニ論述スルガ仮リニコレヲ戦争犯罪ナリト仮定スルモ交戦国ガ相手国民ヲ戦犯ト為シテ裁キ得ル場合ハ被害法益ガ自国ニ属スル場合ニ限ラルルノデアル仮ニハ米国民又ハ米国ノ法益ガ侵害セラレタ場合ニ於テノミ米国ガ裁判権ヲ有スルノデアル然ルニ被告人ハ当時日本ノ植民地台湾ノ台湾人デアリマス又ハ日本臣民ニ準ジテ日本国法ニ服シ居ッタノデアリマス又ハ日本国法ニ違反シ日本国法ニ照シテ処罰サレタノデアル、米国ニ何ノ関係ガアルカ米国ニ何ノ利害ノアルカ法律上事実上何等ノ関係ノナイ米国ガ之ヲ裁判スル権限ガ何処カラ発生スルカ実ニ不可解千万デアル

如何ニ考ヘテモ米国裁判所タル当軍事委員会ガ本件ヲ裁判スルコトノ合理的理由ガナイノデ断ジマス

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第二ハ　本件被告ノ行為ガ法律上許サルベキモノナリヤ否ハ換言スレバ該行為ハ犯罪ヲ構成セザルモノナリヤ或ハ處罰セラルベカラザルモノナリヤ否ヤノ点デアリマシテ最モ重要ナル点デアリマス　然シナガラ本件起訴状ニ依レバ第一起訴罪状項目其ノ一ニ於テ「被告ハ昭和二〇年メ月ア日頃マーシャル諸島マルート環状島ニ於テ意思的ニ違法的ニ企図ト思意ヲ以テ正当ナ理由モナク武装セザル「マーシャル」諸島ノ島民ヲ「ラリージャプ」ラリージャプノ妻「ネーベット」「アンケヨウ」「メケラ」「シロー」「ラコジリック」殺害シ又ハ殺害セシメタリ全罪状項目其ノ二ニ於テ被告ハ昭和二〇年メ月ノ日頃全所ニ於テ全様ノ状態ニ於テ全島民ヲリメヲ殺害シ又ハ殺害セシメタリト記載シ何レモ日本刑法第一九九條ニ該当スルト記載シテ居リマス　又起訴状第二其ノ一及ニニ於テ前記島民ヲ死亡セシメ之ヲ罰シ又ハ罰セシメタルコトハ戦争法規並ニ慣習ニ違反シタルモノナリト記載シテアリマス　依テ被告ガ之等犯罪島民ヲ如何ナル状況ニ於テ如何ナル理由ニヨリ処刑シタルモノナリヤヲ各証人ノ証言ヲ綜合シ明カニナッタル事実ノ大要ヲ陳述シマスレバ次ノ通リデアリマス　マルート防備部隊ハ一九四メ年二月其ノ本部ヲ六根據地隊ノ司令部ノアッタ「クエゼリン」陥落シテ以来全然後方及周囲トノ連絡杜絶シタルノミナラズ其ノ本據ヲ失ッタ為爾来第四艦隊司令長官ノ直接指揮下ニ入ッタノデアルガ其ノ間ニ於テモ稀ニナル無線連絡ヲ除ケバ殆ンド皆無ニ等シカッタノデアリマス　第四艦隊司令長官ハ一九四メ年三月マルート防衛部隊最高指揮官井田少将ニ対シ「本令其ノ基地ニ於ケル行政司法一切基地最高指揮官ニ於テ之ヲ行フベシ」トノ電報命令ヲ発シ該最高指揮官ニ獨裁権ヲ与ヘラレ其ノ事権ヲトニヘ切軍行政司法ガ実施セラレテ居タノデアリマス　而シテ當時マルート島ノ状況ハ毎日書

夜ノ別ナク海空爆撃ガカエヲレ殊ニ空襲ハ熾烈ヲアリ十数機ノ編隊ヲ数回乃至十二三回ノ爆撃ガ繰ケラレテ居ッタ之ガ為メ食糧、弾薬ハ欠乏シ建物施設及運送船舶ハ悉ク破壊セラレ文字通リ灰燼ト化シテ将兵ノ健康状態ハ日々ニ悪化シ軍紀ハ弛緩シ島民ハナラズ軍人軍属ノ逃亡ノ危険ヲ孕ンデヤルート防衛部隊ハ実ニ死ノ一歩前ニ急迫ナルアッタノデアル　コノ事情ハ証人古木少佐及井上大尉森川中尉ノ証言ニ依リ明瞭デアリマスノミナラズ originally 島ニ於ケセラレマレテモ同事件ニ依リ仍熟知ノ事柄デアロウト存レマス　コノ危機急迫ノ事情ノ下ニ起リマシタ不幸ナル出来事ガ本件デアリマス　即チ1945年3月末日頃下記ミレ島民八名ラリーじゃク、全人妻アンナヨ、ネーベット及ラリメ、オケラ、ラコリじック、シロウ　ガ二組ニ分レラリーレヤック、全人妻アンナヨ、ネーベットノ四名ハヤルート環礁南端ジャルーナ島ニ他ノラリメ、オケラ、ラコじリック、シロウノ四名ハ全環礁北端チットゲン島ニ潜入シタノデアリマスガ之等ノ島民ハ共謀ノ上ミレ島環礁内海ニ於テ軍需品輸送中ノ守谷日本軍人ヲ中ノ書ヲ殺害シ舟艇及軍需食糧ヲ奪ヒ及日本軍高橋隊長ノ保管スル舟艇ヲ奪ヒ逃走シ来艇ニモリ其ノ艇上ニ於テ来ル土官ヨリヤルート島ニ潜入シ日本軍ノ状況ヲ偵察シ且島民軍人軍隊ニ逃亡スルヤウ勧告ノ使命ヲ授ケ又其ノ使命ヲ帯ビシメテ前記ノ通潜入シ一部ノ島ニ捧シ其ノ使命ノ一部ヲ遂行シタコノ結果トシテヤルート島民ノ逃亡ガ続出シ翌ヨリ八ニハ600名ノ集団逃亡ヲ行ハレ「ヤルート」防衛ノ根本的ニ破壊シタノデアリマス之等ノ事実ハ証人検事側証人森川中尉弁護側証人鳥名子辰一、船田清古木秀栄、井上文夫等ノ証言ニ依ッテ明カデアリマス　前記ノ如キ、

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急迫ノ危機ニ鑑レタルヤルート防備部隊ニトッテ最モ重大ナル事柄ハ軍紀ノ保持デアリマス當時他島ニ於テハ島民軍人軍屬ノ暴動乃至敵ニ逃亡、朝鮮部隊ノ反乱等ノ不祥続出シ軍ノ壊滅ニ至リタル事例数カヲズ然シヤルート島ニ於テハ最高指揮官井田海軍少将ノ決死ノ努力ニ依ッテコウシテ成セヲアオイデ居カノデアリマス　此重大ナル時機ニ際シ之等シ島々民間諜ノ集団的潜入ノ事実ハ実ニヤルート防備部隊生死ニ関スル重大事デアリマシタ　井田少将ハ副長新留少佐ト諮リ全人ヲ會シテ井上大尉、兼川中尉ニ命ジ島民ノ調査ニ當ラシメタ処調査ノ結果前記ノ犯罪事実ガ明瞭トナッタノデ之ハ由々シキ問題デヤルート防備部隊ノ生死ニ関スル重大事デー歩誤レバ日本軍ハ全滅ノ運命ニ至ルベシト非常ニ憂慮シ當時離島出張中ノ古木少佐ヲ本部ニ呼ビ返シ昭和二〇年4月3日少将ノ防空室ニ新留少佐、古木少佐及井上大尉ヲ招集シ之等島民ノ犯罪ノ審理ニ関スル會議ヲ為シ裁判構成審理ノ方法ニ関シ命令ヲ下シタノデアル　コノ点ニ関シ証人古木少佐ハ次ノ如キ証言ヲ述べテ居ル　即井田少将ハ吾々三名ニ次ノ通リ申カレマシタ「3月3日ミシ島ヨリヤルートニ潜入セシ島民等ハ調査ノ結果單純ナル漂流民デナク敵軍ニヨリ間諜ノ使命ヲ帯ビ且ツミシ島ニ於テ帝国軍人ヲ殺害シ軍需物資及軍需糧食ヲ強奪シ逃セシタルモノ嫌疑濃厚デ若シ然ラハヤルート防備部隊ニトッテ由々シキ大問題デアルガ現在ニ於テハ之ヲ審理スルタメホンベノ裁判所ニトラワノ軍事裁判所ヘ送致スル方法ガナイノデ自分ニオヘラレタル権限ニ依リヤルートニ於ケル幹部軍人ニ依リ特別ノ審理ヲ続ケトル

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