新留少佐ト古木少佐ハ自分ト共ニ審判官ノ任ニ當タレリ井上大尉ノ検察官ノ任ニ當ルヤウ命セラレタル結果井田少将、自室ノ附室ヲ以テ審理室ニ當テシメ3日ヨリ4月9日迄以上ノ構成ニ依リ審理ヲ続行サレタ即4月3日ヨリ今ヨリマデラリージャワ在留四名ノ審理ヲ行ヒ一應終ヲシ4月6日ヨリフタニ亘リラリーメ組四名ノ審理ヲ為シ一應ヲコレヲ終ヲシ、4月8日ノ全被告人ヲ綜合シ審理ヲ為シ前論ノ審理ニ併行シテ補足的調査ヲ行ヒ井田少将ハ自ラ被告人ノ收容所ニ至リ直接訊問シ審理ヲ続ケ4月8日ニハ全被告人ノ行為事実ハ認定セラルヽニ至リ即チ等島民ノ内レロー、ネーベットヲ除ク六名ハ殺人、強盗、間諜、敵ニ與シ帝国ニ抗敵シ及逆罪ヲ犯シタル事実明白トナリ、レロー、ネーベットノ二名ハ間諜行為明白ト認定セラルニ至ルヲ以テレヲ之等事実ノ認定ノ方法トシテハ各被告ノ自白、及被告ノ携帯セル舟艇、物品特ニ殺害セラレタル田中与曹ノ着衣ー舟艇ニハ第66警備隊ノ名ガアリ田中与曹ノ着衣ニハ田中与曹ノ名ガ記サレタ居ター及ビ等島民ノ潜入シタルジャルータ及ケットゲン地区方面指揮ノ報告ノ証據ニ基キ之ヲ認定シタノデアル　其ノ結果4月8日ノ審理ノ終リニ當リ井田少将ハ明日判決ヲ為スヲ井上大尉ハ検察官トシテ意見ヲ述ベルヤウ新留少佐及古木少佐ハ審判官トシテ意見ヲ述ベルヤウ各々準備ヲシテヰヨヤウニト命令サレマシタノデアル　コノ点ニ関シ検事ハ古木証人ニ對シ左ノ審理ノ終リニ際シ井田少将ハ各被告人ニ対シ有罪無罪ノ判断ヲスルヤウ命シタリヤト訊問シ古木証人ハ（答）然ラス、然レートノ証言ヲ続ケントシタル際検事ハ証人ノ「然ラズ」以下ノ発言ヲ阻止

〃川(15)

タリソコデ弁護人ハ Cross examination ニ於テ井田少将ノ「判決」ヲスルカラ各巻ヘテオケト」云ッタ意味ヲ明ニセントシテ証人ニ之ヲ訊シタ之ニ対シ証人ハ「判決」ハ有罪無罪ノ判定ト刑罰ニ対スル決定ヲ含ムモノデ之ハ日本ニ於ケル裁判ニ対スル常識デアルト答ヘマレタ検事ハ之ニ対シ何カ弁護人ガ証人ニ示唆デモ与ヘタカヤウナ印象ガケント試ミラレタコトハ遺憾ニ存シマス 吾々弁護人ハ公正ナル此裁判ヲ何ノ以前ニ念願ハ此座イマセヌ 事実ヲ曲正シタル陳述ヲ企図スルガ如キハ吾々ノ良心ハ許サヌ処デアリマス 自論判決ニ対スル意義ノ如何ヘ大シタ問題デハアリマセヌ 然シ之等ニ関シ聊カデモ誤解ガアリマシテハ被告人ノタメニモ且吾々日本弁護人ノ名誉ノタメ洵ニ残念ニ堪ヘヌ処デアリマスノデ吾々ノ「ブロム」事件ヨリ遡ル以前即昭和20年9月8日被告人ガフレン検事並ニ米国海軍検事総長宛提出シタル陳述書ヲ証拠トシテ提出ヲ申立テタノデアリマスガ検事異議ニ依リ目的ヲ達シ得ヌデオリマシタガコノ陳述書ノ内容ハ被告ヤ記人ガ当法廷デ陳述シタル事実ト全然相異ル処ハナイノデアリマス 元来 finding ノ制度ニハ日本ノ裁判ニハナイノデアリマシテ判決ノ前ニ有罪無罪ヲ決定スルコトハナイノデアリマセヌ 判決トイフハ事実ノ審理ヲ終ッタ裁判長ガ有罪無罪ヲ決定シ若シ無罪ノ場合ハ「被告ヲ無罪トス」宣告シ有罪ノ場合ハ刑ノ言渡ヲスル裁判所ノ最終ノ裁判行為ヲ謂ノデアリマシテ finding ト Sentence ハ米国裁判ノ如ク二個ノ行為デハナク不可分ナル一個ノ行為ヲアリマス 従ッテ finding ニ於ケル guilty of not guilty ニ関シ井田少将ガ審判官ニ其ノ判断ヲ命ゼラルルコトハ

(16)

者ヘラレナイノデアリマス　コノ点論旨ヲサケルタメ一応申上ゲテオキタイト存
レマス　斯ウシテ4月9日最終ノ審理ガ井田少将ノ防空室ニ於テ行
ハレマシテコノ席ニ於テ被告井上大尉ハ検察官トシテノ求刑意見ヲ述
ヘタノデアリマス　其ノ意見ノ内容ハ、証人吉末少佐、井上大尉ノ証言ニ
依レバ「之等犯罪ハ何レモミレ島日本軍防衛部隊ニ従属スルモノデ
シロウ、ネーベット共ニ其ノ除ク六名ノ島民ハ相当謀レテミレ島ニ於
テ帝国軍人ヲ殺害シ軍用舟艇ヲ及ビ軍用糧食ヲ強奪シ敵来軍艦
ニ走リ全艦上ニ於テ米国士官ヨリヤルート島ニ潜入シ日本軍ノ状況ヲ
偵察シ全島ノ民軍人軍属ニ逃亡スルヤウ奨メ告スベク間諜ノ使命ヲ与ヘ
ラレ之ヲ遂行スル意思ト目的トヲ以テ各々ヤルート環礁最東端ジャー
ルート島及最北端ノタットゲン島ニ潜入シ全島ノ民ト接触シ其ノ使
命ヲ果ヘタリ　其ノ行為ハ日本刑法、殺人、強盗、間諜、及敵国
ニ与シ帝国ニ抗敵スル罪　海軍刑法ノ利敵罪、軍用物損壊罪、
糧食ヲ欠乏セシメル罪　敵ニ与ル罪、官命殺害ノ罪、等ヲ犯シ何レモ敵
前ニ於テ行ハレ其ノ罪軽カラス之等ノ行為ハ帝国ノ軍紀ヲ破壊シ戦
争遂行ヲ不能ナラシメ帝国軍ノ滅亡ヲ招来セシムルモノデアルカラ法規
ニ照シ死刑ヲ相当ト思料スル　然シロー、ネーベットノ二名ハ日本刑法
間諜ノ罪ニ該当スルモ何レモ未成年者デアルカラ其ノ死刑ヲ免ジイメー
島ノ隣島島民居ナイ島ニ於テ監視ヲ付シ間諜ノ遂行ヲ不能ナラシムル
方法ヲトルコトヲ相当ト思料ス」ト述ベタ　之ニ対シ吉末、新留、各審判
官モ之ト同様ノ意見ヲ述ベタ　然シ裁判長トシテ井田少将ハ判決
ヲ下シ全部ヲ死刑ニセント宣言セラルルヤ、如ク意見ガ述ベラレタ
犯罪人大人六名ノ処罰ニ就テハ論ヲ、意見ト同様ガ唯一人ノ未成年

(17)

有ニ対シテハ私情ニ於テハ之ヲ処刑スルニ忍ビナイ、ソノ点情ニ於テハ、多クノ子供ヲ持ッテ居ル自分トシテハ君等以上デアルト思ッテ然シ軍ノ現状ハイカナルコノ減亡ノ一歩手前ニアルコノ急迫シタル日本軍ノ状況ガ敵ニ知ラレ又島民並ニ軍人軍属ノ逃亡ガ起ッテハ日本ノ全滅ハ直ニ招来サレル、右ニ名ノ手前ニ於テ此ノコトガ当ノ意識ハ大人ト変ラナイ、コレハ島民ノミナラズ軍人軍属トモ接触ハサセラレナイ、然ラバ如何ニシテ防諜ヲ守リ得ル自分ハ今考ヘタノデハナイ、コレ等島民ノ犯罪事実ガ明白ニナッタ時カラ日撫次ノ手続ノ問題ヲ考ヘタノデアル　殊ニ主謀者犯人ラリメハ現ニ昨夜逃亡シ未ダ逮捕スルニ至ラナイデハナイカコノ犯ト逃亡ノ事実ニ徴シテモ之ヲ処刑スル以前ニ軍紀ヲ保持シ軍ノ全滅ヲ防止スル方法ハナイト断ジテ此ノ決意ヲ示シ井上ノ意見モ古木新聞ノ意見ヲ採用カレナカッタノデアリマス而シテ井田少将ニ依リ判決書ガ作成セラレ井田少将ハ更ニ判決書ノ末尾ニ処刑執行ノ命令ヲ記載シソヲ読朗シテ井上大尉ニ事執行ヲ命ジタノデアリマス　井上大尉ハ井田少将ノコノ命令ニ対シ「私トシテハ此ノ処刑ハ不関ヲ実施スルニ忍ビマセヌ　此ニ対スル死刑執行ヲ許シテ頂キ度イ、他ニ何カ方法ハナイカ研究シタイニ付キ此ノ処刑ヲ延期シテ頂キ度イ」ト苦衷ヲ述ベマシタガ井田少将ハ之ニ対シ「ソヲ荒ラゲテ断固トシテ次ノ如ク申カレマシタト古木ハ証言シテ居リマス「命令ノ審理ノ結果判決ニ依ッテ云ヘラレタノデアル自分ノ私情ニ依ルモデハナイ君ハ命令ガイナクモノデアルカラヤレハgulit 将兵中最モ良ク知ッテ居ル筈デアル」コレ以上命令ニ対シ意見ヲ述ベルコトハ絶対ニ許サズ　タ刻私ガ判決ノ宣告ノ

收容所ニ行ッテヨリ井上ハ同行セヨト之ガ終ッテ井上ハ古木ニ対シ
「私ハヨ仕ニ対スル死刑ノ執行ハ実ニ辛イ、然シ命令ガ参セラレタ以
上執行セネバナラヌ事デアルト云フコトヲ今日程辛ク思ッタコトハアリマセヌト申シマシタ 而シテ其ノ日ノ夕刻ニ田中
ハ井上ト共ニ Side Car ニ乗ッテ判決ノ宣告ニ收容所ニ行キ
マシタ其ノ翌日ヨリメガ捕ヘラレタノデイロイロト噂ニ田中ハ審
判官全部ト井上大尉ヲ招集シ判決書ノ末尾ニヨリメニ対スル死
刑執行命令ヲ記載シ朗読シテ井上大尉ニ其ノ執行ヲ命セラレマシタ云々 之ガ古木カ佐ノ証言デアリマス 猶コノ点ニ関シ判
上自身ハ次ノ如ク述ヘテ居リマス「メダロニ最終ノ審理ガアリ
マシタ 審理ノ結果井田少将ハ8名ノ被告ニ対シ死刑ノ判決ヲ
ヨヘラレマシタ而シテ其ノ場所ニ於テ古木カ佐、新留カ佐ヲ含
ム上コノ8名ノ死刑執行ヲ私ニ命令サレマシタ 其命令ハ判
決ノ末尾ニ書カレテヲ読ンデ私ニ下達セラレマシタ 尤モデ私ハ審
理ノ結果井田ノ将ヨリ判決ガヨヘラレ而シテ井田少将ヨリ死刑
ノ宣告ガヨヘラレタル上デノ命令デアリマスカラ私ハ当然ニ依リ合
法的ナル命令デアルト確信シ命令通銃殺ニ依リ執行シマシタ
然シ未ダ当方ニ8名ノ処刑ニ関シテヘ私ニ許サレル意見ヲ具
申致シマシタ、尤モ何トカヨ仮ニ処刑ヲ延シテ3回ヲ度ト云ヒ不ノ
就ナラベニ三日待ヘル猶後ヲ3回ヲ度ト具申シマシタガ井田ノ将
ハ3回トシテ1回ノ聞入レガナク本日ノ刻執行セヨト厳命サレマシタ
尤モデ私ハ自室ニ帰リ古木少佐ノ室ニ行キ私ノ後任タル今少佐
ニ自分ノ善後ヲ処ス取ルベキ途ニツキ教ヘヲ乞ヒマシタ
(19)"

古木少佐ハ私ニ対シ「自分モ新潟少佐モアノ機ニ息子ノ身申シタノデアルガ聞カレナカッタ今トナッテハ軍ノ命令デアル君トシテハ命令ニ従ッテヨリ外ニ途ハナイ」ト申サレマシタ 夫レデ私ハ已ムナク之ヲ執行致シマシタ之ハ全ク法律ニ基ク正当ナル行為ト確信シ執行シタモノデアリマス」ト述ベテ居リマス 尚ホ此ノ外ニ死刑執行ハ実施サレメタノハ50名ノ内ニ入ルガ執行ハヤルート最高指揮官井田少将ノ名ニ依ッテ公表サレタノデアリマス 其ノ公表ノ内容ハ「ヨタヨシ島ニ潜入シタル島民ハ帝国軍人ヲ殺害シ軍用物ヲ強奪シ逃亡シタル上米艦上ニテ間諜ノ使命ヲ帯ビヤルートノ内部隊ノ作戦地域内ニ潜入シ間諜行為ヲナシ重大犯人ナルニ付全部死刑ノ判決ヲ与ヘ之ヲ処刑シタリ之ヲ公表ス」トイフノデアリマス以上ガ本件ノ概略ノ点ニ付キ概要デアリマス 而シテ之等ノ事実ハ刀テ検事側、弁護人側ノ各証人ノ証言ヲ綜合シ之ヲ認メ得ルモノデアリマス 次ニヤルート環礁基地最高指揮官タル井田少将ガ上述ノ特別手続ニ依ル審理ヲ為シ得ル権限ニ付各証人ノ証言ヲ綜合ノ明確ニシタル処ハ次ノ通リデアル 昭和19年2月ケゼリン陥落後ヤルートハ完全ニ周囲ト交通ヲ杜絶シ絶対的ニ孤立デアッタコト「ヤルート環礁ガ完全ナル戦場デアッテ毎日敵ノ軍艦航空機ニ依リ熾烈ナル攻撃ニ晒ラサレ各将兵ハ各戦斗配置ニハイテ居タコト ソノヤルート環礁地域ノ半径ハ軽井沢ノ有効射程デアリ民間裁判所ハポナペニ在リ常設軍法会議ハトラック島ニアッタガ之等ノ地ヨリ「ヤルート」

11(20)"

環礁トハ絶対ニ交通杜絶シテオッタ而シテヤルートニハ審設裁判所ハナカッタ コノ状勢ニ鑑シPB初ノ与ヒ及ビ又ハ米国海軍ハ「ヤルート」攻略ニ当リ「ヤルート」攻略最高指揮官井田少将ニ対シ示令「ヤルート」環礁地域ニ一切ノ行政司法ハ全基地最高指揮官ニ於テ行フベシ」ト命令ガアッタ、コト之レハ全地域ガ已ニ戦場デアッテ戒厳令施行以上ノ状態ニアルノデ基ノ地域ノ最高指揮官ニ軍政ノ独裁権ヲ与ヘタモノデアルコレ等ノ事項ニツイテハ前ノ事件モ本事件モ全一ノ状態ニアルモノデアリマシテ要旨各位ノ御承知ノ事実デアリマスガ前事件ニ於キマシテ証人有馬少将ハ全地ノ状勢ガ急迫シテ居ルノデ「ヤルート」攻略第四艦隊司令長官ノ別令ヲ待ッマデモナク軍政及軍隊以外ノ統一ナル事項ニツキ之レ等ノ行ノ権限ヲ基地最高指揮官井田少将ニ付与セラレタノデアルト証言シ又証拠書類トシテ提出シタ日本政府第二復員局調査部長作成セル書類ニ「ヤルート」地域ハ已ニ戦場デアッテ事実上戒厳令施行以上ノ現状ニアッタノデアルカラ戒厳令ハ布告セラレズトモ基地最高指揮官ハ戒厳司令官ノ有スル権限ハ当然行使セラレタルモノト記ムト、述ベ旨ヲ証明シテ居ル上述本件島民犯罪処理ニ付井田少将ガ司法権行使ノ権限ヲ有セルコトハ一点ノ疑モナイノデアリマス 仮ニ何等ノ命令ガアリシト仮定スルモ敵ノサロモ周囲ノ連絡完全ニ杜絶シタル絶海ノ孤島ニ孤立セル戦場ニ於テ他ノ何等司法権行使ノ機関ナカリシ場合其ノ地域ニ犯罪ノ発生シタル場合ハ何人モ之ヲ処理シ得ルヤ米軍ガ其ノ主張ニアリタリトスルモ当然其ノ基地最高指揮官ガ其ノ権限ニ於テ之ヲ処理シタデアロウ百歩シ以外ニ逸ハナイデアラウコトハ言ヲ俟タナイコトデハナイカ 果シテ然ラバ井田少将

" 11 (21)

ず等ノ権限ニ於テコノ犯罪ヲ処理スルコトハ當然デアル以上當然ノ
条理ト証據ニ依テ本件事実ヲ有リマシタコトノ事実ガ得テ起訴
第一、及第二ニ記載セラレタルヤウナ殺人罪ヤ戰爭法ニ違及スルデアリマ
セウカ法律ハ道義ノ結晶デナケレバナラヌ、各々文明社會ノ道義ニ照
シ以上ノ行為ハ當然許サルモノデアリマス 法ノ解釋ニ當リマシテ断
ジテ一方的偏狹ナル形式主義ニ陥ッテハナリマセヌ行為當時ノ状況
ベカラザル事情ト本人ノ mental state ヲ充分ニ吟味シ社會
通義ノ根本ニ立ヲ考察シナケレバナリマセヌ 然ルニ本件被告ノ行為
ハ断テ犯罪ヲ構成シナイト確信致シマス 今ノ其ノ理由ヲ次ニ評
論致シマス

"II(22)"

本件第一及第二起訴ニ於テ 被告人ハ意思的ニ違法的ニ企圖ト悪意トヲ以テ正當ノ理由モナク云々ト記載シテ居ルガ如何ナル事實ニ基キ斯カル斷定ガ行ハレタノデアルカ？ 只常套的普通犯罪ニ於ケル phraseology ノ轉用デアッテ本件事實ニハ當テハマラナイノデアリマス。本件ハ思想，人民ヲ理由ナク殺害シタル事件デハナイ。日本軍ニ從屬シタル島民ガ敵前ニ於テ殺人 強盗 救逆ノ重罪ヲ犯シ軍ノ作戰任務ノ遂行ヲ破壊シ防衛部隊ノ存立ヲ危クスル重大ナル犯罪デアルコノ犯罪ヲ法ニ照シテ愼重ナル調査審理ノ結果判決ニ依リ処刑シタモノデアリマシテ其ノ処置ニハ正當ナル理由ガアル。只問題トナルハ其ノ法ニ依ッテ取レル手續ガ不備ガアルカ否ヤ 不備アリトスレハ法律上許サルベキデアルカ否カノ判斷ガ必要ナノデアッテ第一殺人等ノ罪ニ依ッテ起訴サルベキ案件デハナイ。殺人等ノ自然犯ハ行爲自体ノ本質ニ依ッテ定マルモノデ手續ノ過誤等ノ結果ニ依ッテ生スル形式犯トハ嚴ニ区別スベキデアル。コノ点檢事ハ大ナル誤謬ヲ犯シテ居ルノデアル。

先ッ第一ニ正當ノ理由ノアリタル理由ヲ次ニ述ベル。

一、本件起訴狀ニ記載セラレタル被処刑者ノ犯罪行爲ト日本刑法又日本海軍刑法トノ関係ヲ述ベマス。日本刑法第八一條ニハ「外國ニ通謀シテ帝國ニ戰端ヲ開カシメ又ハ敵國ニ與シテ帝國ニ抗敵シタルモノハ死刑ニ処ス」 仝第八三條ニハ「敵國ヲ利スル爲要塞陣營艦船兵器陣藥汽車電車鉄道電線其他軍用ニ供スル場所又ハ物ヲ損壊シ若クハ使用スルコト能ハザルニ至ラシメタル者ハ死刑又ハ無期懲役ニ処ス」

II (23)

仝第八五條「敵國ノ爲ニ間諜ヲナシ又ハ敵國ノ間諜ヲ幇助シタル者ハ死刑又ハ無期若クハ五年以上ノ懲役ニ処ス」軍事上ノ機密ヲ敵國ニ漏泄シタル者亦同シ」　仝第八六條ニハ「前五條ニ記載シタル以外ノ方法ヲ以テ敵國ニ軍事上ノ利益ヲ與ヘ又ハ帝國ノ軍事上ノ利益ヲ害シタル者ハ二年以上ノ有期懲役ニ処ス」仝第八七條ニ「前六條ノ未遂罪之ヲ罰ス」　仝第一九九條ニ「人ヲ殺シタル者ハ死刑又ハ無期若クハ三年以上ノ懲役ニ処ス」仝二〇三條ニ「第一九九條、第二〇〇條及前條ノ未遂罪ハ之ヲ罰ス」仝第五四條ニ「一個ノ行爲ニシテ數個ノ罪名ニ觸レ又ハ犯罪ノ手段若シクハ結果タル行爲ニシテ他ノ罪名ニ觸ルヽトキハ其ノ最モ重キ刑ヲ以テ処断ス」　仝第一條「本法ハ何人ヲ問ハス帝國内ニ於テ罪ヲ犯シタル者ニ適用ス」　~~仝第二條「本法ハ何人ヲ問ハス帝國内ニ於テ罪ヲ犯シタル者ニ適用ス~~

仝第二條「本法ハ何人ヲ問ハス帝國外ニ於テ左ニ記載シタル罪ヲ犯シタル者ニ之ヲ適用ス」　(三)第八一條乃至第八九條ト規定シテアリマス

海軍刑法ニハ

第二三條ニ「敵國ヲ利スル爲左ニ記載シタル行爲ヲ爲シタル者ハ死刑ニ処ス　一艦船兵器彈藥其他軍用ニ供スル場所建物其他ノ物ヲ損壊シ又ハ使用スルヲ能ハサルニ至ラシムルコト　(二三四略)　五兵器彈藥糧食被服其他軍用ニ供スル物ヲ欠乏セシムルコト

仝第二四條ニ「前二條ニ記載シタル以外ノ方法ヲ以テ敵國ニ

軍事上ノ利益ヲ與ヘ又ハ帝國ノ軍事上ノ利益ヲ害シタル者ハ死刑又ハ無期若クハ五年以上ノ懲役ニ処ス」

仝第六四條「守兵ニ対シ兵器又ハ兇器ヲ用ヒテ暴行又ハ脅迫ヲナシタル者ハ左ノ区別ニ従ヒ処断ス

一敵前ナルトキハ無期又ハ五年以上ノ懲役又ハ禁固ニ処ス

仝第六五條　党與シテ前條ノ罪ヲ犯シタル者ハ左ノ区別ニ従テ処断ス　一敵前ナルトキハ首魁ハ死刑又ハ無期ノ懲役若シクハ禁錮ニ処シ其ノ他ノ者ハ無期若ハ七年以上ノ懲役又ハ禁錮ニ処ス

仝第七〇條　第五八條乃至第六八條ノ未遂ハ之ヲ罰ス

仝第七六條　敵ニ走リタル者ハ死刑又ハ無期ノ懲役若ハ禁錮ニ処ス

仝第七七條　第七三條第七四條及前条ノ未遂罪ハ之ヲ罰ス

仝第七九條　略積シタル兵器彈薬糧食被服其他ノ海軍用ニ供スル物ヲ損壊シタル者ハ左ノ区別ニ従テ処断ス

一戦時ナルトキハ死刑又ハ無期懲役ニ処ス

仝第八二條　第七八條ニ記載シタル物又ハ海軍戦斗ノ用ニ供ル鉄道電線若クハ水陸ノ通路ヲ損壊シ又ハ使用スルコト能ハサルニ至ラシメタルモノハ無期又ハ二年以上ノ懲役ニ処ス

仝第八四條　第七八條乃至第八二條ノ未遂罪ハ之ヲ罰ス

仝第二條　本法ハ海軍ノ人ニ非スト雖モ左ニ記載シタル罪ヲ犯シタル者ニ之ヲ適用ス

ノ第六二條乃至第六五條ノ罪及此等ノ罪ノ未遂罪

ロ第七八條乃至第八五條ノ罪

II(25)

公第四條　帝國軍ノ占領地ニ於テ海軍軍人刑法又ハ他ノ法令ノ罪ヲ犯シタルトキハ之ヲ帝國内ニ於テ犯シタルモノト看做ス
海軍以外ノ人ニ非ラストモ帝國臣民、從軍ノ外國人及俘虜ノ犯シタル

而シテ本件起訴狀第一、第二ニ記載セラレタル「ラリメ」以下六名ノ島民ハ日本ノ被統治者デアツテ共謀シテ日本軍ノ守兵ヲ殺害シ軍用物ヲ强奪シ敵ニ走リ帝國ニ抗敵シ且ツ間諜ノ行爲ヲナシタル者デアリマシテ何レモ前記日本刑法、日本海軍刑法ニ違反セル惡質ナル犯罪デアリマス
而モ以上ノ島民ノ行爲ハ何レモ敵前ニ行ハレタル大膽不敵ナル惡質行爲デアル　若シ米軍ガ其ノ立場ニアツタトシテモ日本軍ト全樣嚴罰ヲ以テ之ニ臨ンデアラウ　否、世界何レノ軍隊ニ於テモ敵前ニ於テ斯ノ如ル犯罪行爲ガ行ハレタル場合、之ニ對シ嚴罰ヲ以テ臨ムコトハ當然デアラウ
況シヤ言語ニ絶スル惡逆ノ狀態ニアリシ「マルト」環礁ニ於テ之等ニ對シ死刑ヲ以テ處斷シタル日本軍ノ處置ヲ非難スルコトハ出來ナイ
然シ未成年者ノ犯罪ニツキマシテハ更ニ考察ヲ加ヘラレナケレバナリマセヌ　本件ノ「シロウ」及キーベット」ノ年齡ニ就テハ各証人ノ証言必ズ一致シテ居リマセヌ
「シロウ」ノ年齡ニツキ証人眞名子辰市ハ「シロウ」ト同ジ所「タカイワ」島ニ住ンテ居タ人デアリマスカラ最モ良ク知ツテ居ル關係ニアルノデアリマシテ　全人ノ証言ニ依リマスレバ　十五才位デアルト

JS(26)

申シマシタ 而シテ「シロウ」ハ日常高イ櫛子ニ上リ「チヤガロ」ノ仕事ヲシテ居タ 其ノ仕事ハ相當困難ノ仕事デ大人ノヤル仕事デアルト詳細ノ説明ヲ致シマシタ 之等ノ点ヲ考ヘマスレバ十五才位トイフ彼ノ証言ハ正確ト見ナケレバナラヌ

他ノ証人ハ体躯ハ小柄デ十二三才位ト思ハレタガ意識状態ハ相當發達シ大人並デアッタト証言シテ居ルガ島民ハ登録ノ制度ガナイカラ単ニ想像シ得ルニ止マリ正確ナル事實ハ確メ得ナイノデアリマスガ要スルニ年少者ノ犯罪ハ勿論 犯罪ノ種類ニ依リ異ッテ居ルノテ米國ニ於テモ八才以上ニ対シテハ刑事責任アリトスル場合ガアルト聞イテ居ルガ大体ニ於テコレニ対スル刑罰ハ軽減セラルヽノガ原則デアラウト信ズル 日本ニ於テモ之ガ平時デアッタナラバ死刑ノ判決ガ為サレルコトハナイト信ズル 升田少將モ如何ニコノ点デ苦ミヌイタカハ已ニ古木 井上ノ証言ニ依ッテ明ニセラレタル処デアリマス

然シ本件ノ場合ハ犯罪ノ性質ガ軍紀ノ破壊ヲ目的トスル間諜行為デアッテ 犬レガ敵前ニ於テ行ハレ而モ当時「マルート」ノ防備部隊ノ急迫状態ガ已ニ述ベタル如ク危急存亡ノ瀬戸際デアリマシタ 若シコレヲ放置シタナラバ日本軍ノ全滅ヲ招来スルコトハ火ヲ見ルヨリ明カデアリマシテ 茲ニ於テ日本軍全体ノ存立ヲ救フタメニ已ムヲ得ズシテ為サレタル緊急避難行為デアルコトハ申ス迄モアリマセヌ

日本刑法第三七條ニ、

自己又ハ他人ノ生命身体自由若シクハ財産ニ対スル現在ノ危難

ヲ避クル為 已ムコトヲ得ズ出ヅタル行為ハ其ノ行為ヨリ生ズル害ノ避ケントシタル害ノ程度ヲ超エザル場合ニ限リ之ヲ罰セズ
ト云ノ規定がアリマス之ハ単ニ個人ノ場合ノミナラズ本件ノ如キ軍隊全体ノ生命ヲ救フ場合ニ於テハ益々其ノ適用性ヲ有スルコトハ勿論デアリマス
又海軍刑法第十七條ニ 「敵前若クハ艦船危急ノ際ニ於テ軍紀ヲ保持スル為已ムコトヲ得サルニ出テタル行為ハ之ヲ罰セズ」ト規定シテアリマス
陸軍刑法第二十二條ニハ 「敵前ニ在ル部隊ノ急迫ニ臨ミ軍紀ヲ保持スル為已ムコトヲ得ザルニ出テタル行為ハ之ヲ罰セズ」ト規定シテアリマス 恐ラク米國ノ陸海軍刑法ニ於テモ同様ノ趣旨ノ規定乃至慣令ガアルベキ筈ダト考ヘラレマスガ 軍隊が敵前ニ於ケル危急ナル状態ニアリテ軍紀ヲ保持スルタメ之等ノ已ムヲ得ザルニ出テタル行為が法律上許サレナイトスルナラバ軍ハ作戦ヲ遂行スルコトハ不可能トナルデアリマセウ 私ハ本件行為ハコレ等ノ規定ニ依リ当然許サルベキ行為デアルト確信スルモノデアリマス
然ラバ以上ハ被告井上ノ責任ニ就テ述ベテ居ルノデハナイノデアリマシテ 井上が執行ノ命令ヲ受ケマシタ命令ノ前提タル判決ニ付テノ justifiall ナルコトヲ述ベテ居ルノデアリマス
井上ハ単ニ取調官トシテ事件ノ調査ヲナシ検察官トシテノ意見ヲ述ベタニ過キナイノデアリ 其ノ審理乃至判決ニ付テハ何等ノ権限モ責任モナイノデアリマス 彼ハ只コノ判決ノ結果トシテ弁護ヨリ執行ノ命令ヲ受ケタヲ当然ノ職務行為トシテ実行シタマデデ

"II(28)"

アリマス 従テ井上ノ責任ハ自ラ別ノ立場ニ立ツモノデ夫レハ更ニ後ニ之ヲ詳細ニ述ベマスガ 要スルニ前記ノ理由ニ依リコレ等ノ島民ニ対シテ為サレタル処罰ハ法ノ命ズル処デアッテ何等ノ違法越権ハナイコトハ Comission ニ於カレテ御認メニナルコト、確信致シマス

次ニ之ニトラレタル裁判手続ガ適法ナリシヤ否ヤノ点デアリマスガ之ハ前述各証人ノ述ベタル如ク正規ノ裁判手続デハナク急迫ナル戦場 敵前ニ於ケル一特殊ナル状勢ニ於テ已ムヲ得ストラレタル特別ナル手続ニ依ル裁判デアッタコトハ言ッ迄モナイ

當時マルート環礁地域ガ戒嚴令宣告以上ノ戦場ニアリ戒嚴令ノ形式宣告ノ有無ヲ問ハズ實質的戒嚴令以上ノ地域デアッタコトハ明白デアル

本来ハ戒嚴令ハ本國戦場デナクトモ戦場ニ於ケルガ如キ急迫ナル状態ニ頻シタル場合ニ戦場ニ於ケルガ如ク一般ノ平時ニ於ケル各官廳ノ権限行使ヲ制限又ハ停止シテ其ノ軍最高指揮官ニ依テ軍政ヲ布クコトデアルコトハ一一戒嚴令ノ条文ヲ引用スル迄モナク各國共同様デアッテ又対意見ハアルマイ 而シテ當時ノ「マルート」環礁域ガ周圍トノ連絡ガ全ク杜絶セル敵ノ重圍ニアル絶対的孤立セル急迫ナル戦場デアッテ其基地最高指揮官ガ軍政ヲ布クヨリ外ニ全然途ガナカッタコトハ前述ノ通デアル

仮リニ米國軍ガ其位置ニアッタトシテモ其以上ノ方法ガアッタト考ヘラレマスカ 否 断ジテナイト確信スル

然ラハ コノ場合如何ナル軍政ヲ布クベキカ準據トナスベキハ

戒嚴令ノ規定ヂアル勿論斯ル急迫ナル場合ニ於テ必スモ
戒嚴令ノ規定ノミニ束縛セラルベキヂハナイ コノ場合如何ニナスベキカ
最上ヂアリ又ソレ以上ニ途ガナオツタカ否カガ問題ヂアル
然シテコノ場合如何ナル方法ヲトルベキヂアルカ 参考ノ爲戒嚴令
ノ規定ヲ摘記スレバ
戒嚴令第二條ニ 戒嚴ハ臨戰地境ト合圍地境トニ區ニ
分ツ
ノ臨戰地境ハ戰時若クハ事変ニ際シ警戒スベ
キ地方ヲ区畫シテ臨戰ノ区域トナスモノナリ
ノ合圍地境ハ敵ノ合圍若クハ攻撃其他ノ事変ニ
際シ警戒スベキ地方ヲ区畫シテ合圍ノ区域ヲハナスモノナリ
即當時ノ「ヤルート」環礁地域ハ全条ニ所謂「合圍地境」以上ノ
狀態ニアツタノヂアル 而シテ全第六條ニ
「軍團長 旅團長 鎮台營所要塞司令官 警備隊司令官又ハ分遣
隊長、或ハ艦隊司令長官 艦隊司令官 鎮守府司令官 若クハ特命
司令官ハ戒嚴ヲ宣告シ得ル權アル司令官トス」
トアル 即第四艦隊司令長官ハ勿論 警備隊長タル斗田少將ハ
独自ノ立場ニ於テ戒嚴ヲ宣告シ得ル權限ヲ有スルノヂアル 而シテ
前記第四艦隊司令長官ノ命令ハ實質的ニ戒嚴ヲ宣告シタモノヂアル
コトハ証人ノ証言ノ通ヂアル
全第十條ニ於テ
合圍地境内ニ於テハ地方行政事務及司法事務ハ其ノ地ノ司令
官ニ管掌ノ權ヲ委スル者トス
全第十二條ニ

合圍地境内ニ裁判所カ又其ノ管轄裁判所ト通路断絶セシ時ハ民事刑事ノ別カク凡テ軍律ノ裁判ニ屬スト規定シテアル、

當時ヤルート環境ニハ裁判所カク又平時ノ管轄裁判所タル在「ホ・ナベ」ノ地方法院、及トラック、軍常設軍法會議トハ全然通路断絶シ居タルコト前述証人ノ証言ノ如シ

仝第十三條ニ

合圍地境内ニ於ケル軍律ノ裁判ニ対シテハ控訴上告ヲ爲スコトヲ得ズ

ト規定シテアッテ一審結審カ原則デアル

コレハ軍法會議法ニモ規定セラレテ居ル、即仝法第四二一、四二〇、上告ノ規定ハ合圍地境ニ於ケル特設軍法會議ノ場合ヲ含マナイノデアル

而シテ軍法會議法第八條ニハ　軍法會議ヲ設クルコトカノ如シ

1.2.3.4.5.（常設軍法會議ナルヲ以テ畧）

6.合圍地境軍法會議　　7.臨時軍法會議

仝第九條ニ　　第1.2.項畧

（第3項）合圍地境軍法會議ハ戒嚴ノ宣告アリタルトキ合圍地境ニ特設ス

（第4項）臨時軍法會議ハ戰時事変ニ際シ必要ニ因リ海軍ノ部隊ニ之ヲ特設ス

仝第十條ニ

（第4項）特設軍法會議ハ軍法會議ヲ設置シタル部隊又ハ地域ノ指揮官ヲ以テ長官トス

11(31)

仝第十七條ニ　「臨時軍法會議ハ左ノ事件ニ付管轄權ヲ有ス

(イ) 臨時軍法會議ノ設置セラレタル部隊ノ長ノ部下ニ屬スル者及監督ヲ受クル者ニ對スル被告

(ロ) 管轄區域内ニ在リ又ハ管轄區内ニ於テ罪ヲ犯シタル第一條乃至第三條記載ノ者ニ對スル被告事件

以上ノ規定ニ依リ本件被告ノ關與シタル裁判手續ハ特別軍法會議タル臨時軍法會議ニ屬スルモノデアル

而シテ軍法會議ノ職員ニ關シ

仝第三一條ニ「軍法會議ニ判士　海軍法務官　海軍書記ヲ置ク、判士ハ海軍將校ヲ以テ之ニ充ツ

特設軍法會議ニ於テ長官ハ直系上官ハ急迫ヲ要スル場合ニ限リ部下ノ將官ヨリ判士ヲ命スルコトヲ得

ト規定ス　　更ニ審判機關トシテ

仝第五〇條ニ「特別軍法會議ニ於テハ長官ハ海軍ノ將校又ハ將校相當官ヲシテ法務官ニ代リ裁判官ノ職務ヲ行ハシムルコトヲ得

以上ノ規定ニ依リ判士トシテ弁田、新納、古木ノ三名ノ將校之ニ充リ當時「ウルト」部隊内ニ法務官ヲ欠キタルヲ以テ將校タル井上大尉ヲシテ法務官ニ代リ之ヲ檢察官ノ職ニ當ラシメタルコトハ合法デアル

更ニ訴訟手續ノ規定ニ於テ

仝第八七條乃至第九二條ハ六條ニ於テ辯護人ノ規定ガアル

而シテ八七條ニ「被告人ハ公訴ノ提起アリタル後何時ニテモ辯護人ヲ選任スルコトヲ得」　ト規定シテアルカ　"Is(32)"

令法第九三條ニ「前六條ノ規定ハ特設軍法會議ニ付テハ之ヲ適用セズ」ト規定シ　本件被告ノ干與シタル特別手續ニ於テ辯護人ヲ付セザリシハ合法デアル

裁判ニ關シ

令第九六條ニ「裁判官ノ~~評決議~~評議ハ之ヲ公行セス　裁判官ノ評議ハ裁判長之ヲ開キ之ヲ整理ス　其ノ評議ノ顚末及各裁判官ノ意見ハ秘密トス

令第九六條　裁判官意見ヲ述ブルノ順序ハ法務官ヲ始メトス

以上ノ規定ニ依リ本件被告ノ干與シタル裁判手續ガ公開セラレザリシコトハ合法デアル

而シテ裁判官ノ評議　裁判長タル弁日少將ガ之ヲ開キ之ヲ整理シタルモノニシテ其ノ意見ハ秘密トセラレタルヲ以テ檢察官タル井上トレテハ只檢察官トシテ意見ヲ述ベレバ其ノ職責ヲ終レルモノデアルカラ　其ノ結果ニ對シテハ知ル由モナイ　又責任ハナイノデアル

弁論ニ関シ

全第100條ニハ「判決ハ口頭弁論ニ基キ之ヲ為スベシ但別段ノ規定アル場合ニ限リニ非ズ。決定ハ公判定ノ於テハ訴訟関係人ノ陳述ヲ聞キ之ヲ為スベシソノ他ノ場合ニ於テハ訴訟関係人ノ陳述ヲ聞カズシテ之ヲナス事ヲ得」

全第102条ニハ「裁判ノ先ダチ公判廷ニ於テハ意見ヲ述ベ又ハ証拠ヲ調ベル事ヲ得ベシ但シ別段ノ規定アル場合ニ於テハ此限リニ非ズ」

全第260条ニ証人ニ出頭アル場合ニ於テハ単独会議ノ外裁判長ハ指定場所ニ之ヲ訊問スル事ヲ得

全第265条ニ「検察官ハ証人ノ訊問ニ関シ単独会議又ハ裁判長ト同一権ヲ有ス

全第267條ニ検察官証人ヲ訊問スル場合ニ於テハ宣誓ヲナサシメザル事ヲ得

全第367条「死刑又ハ無期又ハ短期一年以上ノ懲役又ハ禁錮ニ該ル事件ニ於テハ弁護人ナクシテ開廷スル事ヲ得ズ但シ判決ノ宣言ノミノ場合ニ此ノ限リニ非ズ

全第372條「前3条(369, 370. 371)ノ規定ハ特別単独会議ニ於テモ之ヲ適用ス」以上ノ規定ニ依リ訴訟関係人ハ原則トシテ法廷ニ於テ陳述セサルヘカラザルモノアルガ法廷外ニ於テ陳述セシムル事アルヲ法ノ予期セザル処ナルヘカラス第100条後半ノ規定ニ依リ肯定セラルヘキモノアルモ又証人ハ法廷外ニ於テ且宣誓セシメズシテ訊問スル事ヲ得ル第260条第265条ニヨリ明カナリ又特別単独会議ニ於テハ弁護人ニ関スル規定ノ適用ナキ事ハ已ニ述ベタルガ更ニ第369條ト第372条ニ於テハ死刑ニ当ル事件ノ裁判ニモ弁護人ノ出頭ヲ要セサル事ヲ第372条ニ明規セラレアリ然ラバ本件被告ノ手続ニ於テ訴訟関係人ハ被告人ニ限定サレル。然ルニ本裁判手続ニ於テ被告人ノ法廷ニ於テ陳述セシメナカリシ事ニ之ヲ肯定シ得ル之ニ裁判ノ形式ニ違反アル事ヲ弁護人モ之ヲ認メマス然ルニ此点只一ツガ正規ノ手続ニ反スルニテアリマス。然ルニ裁判長ハ被告人ノ収容所ニ主ノ本人ノ陳述ヲ聞カサル事又判決ノ宣告

モナレテ居ル事ハ各証人ノ証言一致スルトコロデアリマス。被告ヲ裁判官ノ席ニ坐ラセナヘスレバ正当ノ裁判デアルノデアルノニ又対ニ裁判官ガ被告ノ地位ニ行ツテシタガタメニ違法トナルデアロウカ？此ノ点ニ付テハ何等ノ法規ノ規定ガナイノデアリマス。事実上ドンナニ証拠ヲ審理シテモ只一ツノ形式ノ具備ガ欠ケテ居ツタ丈ケデ、ソレガ犯罪ヲ犯人罪ニ戦争法規違反ト言ツタ如キ犯罪ニナルノデアリマセウカ？又仮令事実ニ於テハ相当ノ審理ヲアツテモ形ノ不具備スレバ完全ナ裁判トシテ認ムル事ガ出来ルノデアリマセウカ？勿論本法廷ニ於ケルガ如キ完全ナ裁判ト比較スルトスレバ多少ノ欠点ガ指摘サレマセウ。然シ乍ラ時ハ弾雨下ニ絶海ノ孤島ニ完全ニ孤立シ神ト人トニ見ハナサレタル絶望ノ日本将兵2,000名ガ総員玉砕ノ一歩手前ニ於テ敵兵線ニ於ケル僅ノ限リ最上ノ審理ヲナシタノデアリマス。況ヤ設伴ヲ空襲下ニ於テ平時ノ如キ審理ガ出来マセウカ。況ヤ犯人ガ之等ノ自由ニシテ法廷ニ伴レ出ス審理中全裁ガアレバ直ニ逃ヤスルデアロウ。逃ヤスレバ直ニ敵ニ通ジテ日本軍ハ全滅スルト丈ケデス。此ノ外ニトテモ爆発サレレバ島民ノミナラズ高級将校以下審理ニ関係スル者ハ一時ニ爆死スルノ危険ガ迫ツテ居タ事ハ各証人ノ証言ニ依リ明カナル現状デアリマスノ。斯カル状態ニ於キマシテ之レ以上ノ緩慢ナル審理ガ法律上ニ於テ許サレテ居ルデアリマセウカ？断ジテ然ラズ

刑法第5ノ1条ニ曰ク通リニ

自己又ハ他人ノ生命身体自由若クハ財産ニ対スル現在ノ危難ヲ避クルタメ止ムヲ得ズニ出デタル行為ハソノ行為ヨリ生ジタル害ガソノ避ケントスル害ノ程度ヲ超エサル場合ニ限リ之ヲ罰セズ、ソノ程度ヲ超ヘタル行為ハ情状ニヨリソノ刑ヲ減刑又ハ免除スル事ヲ得」

Wharton's Criminal Law p876-879 §642. Sacrifice of another life, excusable when necessary to save one's own The Canonn law, which lies at the basis of our jurisprudence in this respect, excuses the sacrifice of the life of one person, when actually necessary

"II 139"

for the preservation of the life of another, and when the two are reduced to such extremities that one of the other must die. 即ち緊急避難行為. Volstead etal de necessity ト称スル行為ニヨリ日本ノミナラズ文明諸国ニ於テハ何レ刑法ニテ規定セラレテ居ル. 米国ニ於テモ認メラレ居ル. コノ事件ニツイテ避ケントスル法益ハ4000名ノ軍人軍属. 島民, 生命財産ノミナラズ日本全体ノ, 国務ニ関スル重大ナルモノト言ハレネバナラヌ. 一裁判手続ニヨリ経救サレ被告等逃ヲ法廷外ニ於テ為サントシタト言フ問題ニ過ギナイ. 而シテソレガ緊急止ムヲ得ザリシ事ニ詳細ニ述ベタ通リデアル. 仮令本件ノ想定ナカリシトシテモ斯カル緊急止ムヲ得ザル場合ニ於ケル緊急避難ハ前記行為ハ法律ニ許サルベキモノデナイ事ハ法條ニ依ツテ明デアル. 況ンヤ日本刑法第37条ニ於テモノガ法律ニ許サルベキモノニアラズトシテ簡単ニ前記裁判手続ガ合法ナル事ハ今更申ス迄モアリマセヌ. 即チ此ノ合法ナル特別軍事会議ノ決算ニ基ク判決ニ依リ井川少将, 検察官タル井上文夫ノ前記島民ノ死刑執行ノ命ゼ. 井上文夫ハコノ合法ナル命令ニソノ一点ノ疑念モナク検察官トシテノ職務ヲ遂行シテ死刑ノ執行ヲナシタルモノデアル事ハ各記人ノ記言ノ一致シタルトコロデアリマス. 然ラバ本件起訴状第一ニ「正当ナル理由モナク」ト記載セラレタルハ全ク根拠ナキ誤謬デアル. 本件ハ法律ニ正当ナル理由アルモノデアリマスコトハ上ニ述ベタ法的根拠ニ依リ明瞭デアリマス.

次ニ被告井上文夫ノ責任ニ就テ法律上ノ意見ヲ陳述スル. 最モ重要ナル点ハ被告人ノ責任ノ限界デアリマス. 井上ノ責任ハ検察官トシテノ裁判ニ干与シタル責任ト執行官トシテ死刑ノ執行ヲナシタル責任ノニツデアリマスガ偶々此ノニツノ責任ガ同一人ニ依ツテ行ハレタルタメニコノ両者ニ関シ関係アルカノ如ク見ラレガチデアリマスケレドモ夫レハ大ナル誤デアリマス. コノ二個ノ行為ノ間ニハ全然検察官トシテノ井上ノ関与セラレタル裁判及判決ノ言渡ノ如キ行為ニ依リ関係ハ完全ニ中断サレテ居ルノデアル.

"J I (36)"

ヲ表レタルヤラナラ、コノ点特ニComissionノ限界ヲ明ニスベキデアル。
又ノ検察官トシテ裁判手続ニ関与スル責任ニツイテ述ベヨウ
称セ検察官ノ職務ハ
海軍ノ法会議法第六章検察官ノ章ニ規定サレテイル「ソノ会法第67条ニ「検察官ハ長官ニ命ジテ捜査ノ為ノ公訴ヲ行フ」
又ソノ70条ニ「特設軍法会議及臨時海軍ノ法会議ニ於テハ長官ハ海軍将校又ハ将校相当官ヲシテ検察官ノ職ヲ行ハシムルコトヲ得」トヲ見ルト、ソノ職務ハ犯罪捜査ヲシテ犯罪ト認定セバ之ヲ起訴スルノデアレバ之ヲ細分スレバ、犯罪ヲ捜査シ之ヲ調査シ起訴スル場合ハ裁判所ニ於ケル審判ニ対シ起訴ノ理由ヲ説明シ意見ヲ述ブルノ以テソノ職責ヲ終ルモノデアル。之ノ審判ニ有罪、無罪刑罰ノ軽重刑期ノ定ルハ審判官ノ職責ニシテ検察官ノ関与シ得サルモノデアル。之ニ非常告非・性則ニソノ例外ハアラ皆然リデアリ本法迄ニ於テソノ通リデアル
海軍ノ法会議法第95条ニ
裁判ハ合議ノ裁判官評議ニヨリ之ヲ為ス
令第76条ニ
裁判官ノ評議ハ之ヲ公行セズ。裁判官ノ評議ハ裁判長之ヲ開キ且之ヲ整理シ評議ノ顛末及各裁判官ノ意見ヲ秘密トス
トアル之ヲ以テ見ルモ検察官ノ職責ト裁判官ノ職責トハ明確ニ区別シテ互ニ相侵スヲ得ザルモノデアル。而シテ前記特別裁判手続ニ於テ被告ヲ出廷セシムル検察官デアッテ裁判官ハ弁護士ヲ附シ、弁護士ヲ附セズ、若ハ弁護士ヲ附スルヤ否ヤノ裁判長デアッテモ各証言ノ一致スルトコロデ一致シ証セナイ。況ンバ検察官トシテノ出廷ノ行為ノ何処ニ適法ヲ欠ケルカ、何処ニ不法ヲ欠ケルカ事実及法律ノ何レノ点ヨリ見ルモ一致適法セヌカラ。又ノ調査ノ私ノ見ルニ検察官指揮ノ下ニアル各調査官ノ焼却セル戦功下

ニモ不拘、アラユル労力、危険、労力、時間ヲ費シテ、多数、証人、証拠ヲ集メ、慎重ナル調査ヲナシ、完全ナル調査報告ヲ作成シ、検察官ノ共ニ、更ニ調査ヲナシ、実ニ周到ナル注意ノ下ニ調査ヲ完了シ、之ヲ起訴シ、検察官トシテ、最終ノ意見ヲ述ベ、ソノ職務ヲ終ッタノデアル　　猶本法廷ニ於ケル検事、証人ニ自発ヲナサントシタ中ト質問セラレタガ、日本ノ裁判手続ニ於ケル民間裁判ト単ナル会議トノ如キ行ヲ間ニ、調査官乃至検察官ノ証人訊問ニ対シテ自発ヲ要セナイノガ原則デアル（参照　海軍々法会議法第267条）而シテ審判官、評議ノ裁判長之ヲ整理シ公行ナル秘密ナルヲ、検察官ニ之ニ関与セズ又之ヲ知ル由モナイノデアリ予ガ前述軍法会議法ノ文ノ通リデアル而シテ前記特別手続ノ如ク裁判ノ合法ナルコトハ予ガ述ベタ通リデアルガ、仮リニソノ手続ノ誤リガアッタトシテモソレハ審判官ノ責任デアッテ検察官ノ責任デハナク、裁判ト云ヒ人ノ為ス事デアリ、時ニ誤リガアルコトガアル、之ガタメニ文明諸国ニ裁判ニ控ネニ審制度ヲ採リ手続ノ誤リアル時ハ牛許サレヌ特別軍法会議ノ別デアルガ通常ノ裁判ニアリテハ抗告、再抗告ノ途ノ開ケ、実体ノ誤リアル場合ニハ控訴、上告ノ途ノ開行ハレテアル

極端ノ例ヲ挙ゲレバ悪罪ノ被告ニ対シ誤判ニテ死刑ノ判決ヲナセル裁判ハ各国共ソノ例ハ少クナク、之ニ対シ裁判官ハ何カ責任ヲトッテ居ルカ、又之ニ対シ殺人罪トシテ起訴サレタ裁判官ガ世界ノ法制史ノ何レニアルノカ未ダ聞カヌ事ハナク、トモアレソレガ行政法的ノ別ノ罪トナルノナラヌカノ別トシテ、又ハ裁判官ノ判事ノ責任デアルガ如キハ誤事、誤判ニ対シ検察官ガ責任ノ有ル場合アリマスマイ、恐クハ牛許サレヌ事ト信ジマス、検事ニ於テ前記裁判手続ニ関スル限リ牛許被告丼ニ責任アリトノ考ノ下ニ行ッテ居ルノデアロウ、況ンヤ予述ノ通リ丼上ノ検察官トシテノ行為ニハ一点違法ノ点ガ認メラレナイノデアルカラ、ソノ範囲ニ於ケル犯罪不成立ニ関スル犯意論ヤ日本刑法第38条ノ犯罪不成立ノ根拠ヲ引用スル迄モナク、ソノ範囲ニ於ケル丼上ノ行為ハ正々堂々ト為サレタ合法非違ノ行為デアルコトハ何人モ異論ノナイト確信致シマス。

以上(38)"

次ニ被告井上ガ裁判ノ執行言ハンラ死刑ノ執行シタル責任ニ付之ヲ按ズルニ
裁判ノ執行ニ就テハ
陸軍刑法会議法第5章裁判執行章ニ第501條「裁判ノ執行ニ関シ裁判ヲナシタル軍法会議、検察官又ハ其ノ裁判ヲ指揮スル為ニスル指揮ヲ
ト規定シアル之ノ規定ニ基キ判決ヲナシタル所用官ハ、ソノ判決ニ基キ検察官タル井上
文夫ニ死刑ノ執行ヲ命ジタルモノデアリマス　井上ハコノ合法的死刑執行ノ命令ヲ検察
官ノ職責トシテ忠実ニ遂行シタモノデ、ソノ合法ニ対シ一点ノ疑念モ抱カズ正当ナル職務トシテ執行シタルト認ムルヲ相当デアリマス。ソノ真実ナルヲ Commission
ニ於テ認メタル事実デアリマス。コノ判決ニ基ク死刑執行ノ命令ハ合法ニシテ正当ナル
コトハ、彼ノ確信シテ疑ハザリシコトハ各証人ノ一致シタル証言デアリマス。之ハ
彼ノミナラズ、関係者ノ同論ヤルート日午軍全部ガ悉ク斯ノ信ジテ居リマス
又各証人ノ証言ニ
依レバ当時井田少将ハ米国駐豪総領事マッキーソン中佐ニ島民事件ノ厳刑ノ点ニ質問
セラレタルトキ之ニ日本ノ法ニ違反セル日本人ノ島民ヲ日本ノ法律ニ依リ日本軍
ノ正当ナル手続ニ基キ処刑シタルニテ何等天地ニ恥ズル所為ナシ（相手人、何人ニ対シテモ）恥ズル
ナイトノコトヲ述ベタト申シ、関係者ノ各自ノ参考トシテ提出シタノデアリマス。井田少将ノコノ確
信アル言葉ニ依ッテ見テモ彼ノ純然ニ正シイト確信シテヰタノデアリマス。況ンヤ部下ニ於
テヲヤ疑ヲ容ルノ余地ガアリマセウカ。尚ホ井上ハ此ノ手続ニ於テ検察官トシテ当然ノ一
点、違法ト認メモセヌソノ職責ヲ完全シタルモノデアリマス。然ルニ本件起訴状
第一ニ殺人罪トシテ、全ク一ノ戦争性ヲ認メ又トシテ之ヲ訴サレテ居リマス。早ク分ラヌ
ナル根拠ノ基クモノデアリマセウカ。宜シク当然ノ判決ト言ウ外ハナイト思イマス。
本件ノ起訴状第一及第二ニ於テ被告ノ意思的ニ違法的ニ全ク悪意ヲ以テ島民ヲ
殺害シ、又殺害セシメタリトシ、日本刑法第199條並ニ戦争法規並ニ慣習ニ違
反シ(39)

ンタリト記載シ居ルガ前詳述シル被告ノ行為ノ何レニ於テモ之ヲ許容スル事ハ出来ナイ。本件ニ於ケル大本営ノ設ケタ様ナ命令ハ私ノ確信スルモノデアルニ基イテ、旧海軍ニ於ケル海軍刑法会議法第501条ノ規定ニ基キソレノ特別裁判ヲ行ヒ得ル部隊ノ長官ニ相当スル第十方面軍ノ判決ニヨリ合法ニ死刑執行ノ命令ヲ発シタノデ、此ノ命令ノ形式ニ実質ニ其ニ合法ナモノデアル、而シテ其ニガ検察官トシテノ受命執行スルコトハ全ク合法ノ義務デアル行デアル。然ラバ此ノ命令ノ形式及実質ハ完全ニ合法デアル。執行官トシテ其ニヘテ何ノ事ハ絶対ニ出来ナイ。然ラバ更ニ遡ッテ此ノ命令ノ基本タル判決ノ実質ニ付誤リアリヤ否ヤヲ審査スル義務ガ執行官ニアルデアロウカ。断ジテ否。裁判ノ正否ヲ判断シ得ルハ只ソノ上級裁判所ノミノ権限デアル。裁判ノ執行官ハソノ正シキ執行命令ガ正シキ系統ニヨリ発セラレル正シキ命令ナリヤ否ヤヲ知レバ足ル。ソレ以上審査ノ義務ヲ負ハサレテハ居ナイ。而モ此ノ執行命令ヲ示シタル竹田少将ハ当該特別裁判手続ノ裁判長トシテ判決ヲナシタル人デ且ソノ部隊ノ最高指揮官タル長官デアル。而シテソノ命令ハ該裁判ノ判決ノ執行命令デアル。被告ハ此ノ合法ナル命令ハ絶対ニ正シキ事ヲ信ジ法令ニ依ル職務トシテ実行シタノデアル。コノ行為ノ何レニ不法ガアルカ。違法ガアルカ。又過失ガアルカ。何レノ点ヨリ見ルモ之ヲ罰スル事ハ出来ナイノデアリマス。抑モ犯罪ノ本質ハ反社会的行為(anti-social action)デナケレバナラヌ而シテソレガ反社会的ナリヤ否ヤハソノ時ソノ社会ニ於ケル一般道義ニ依リ判断スベキニ非ラザルカ。前記抑止ノ行為ノ何レニ之ヲ認ムベキモノアリヤ断ジテナイノデアル。　又犯罪ハ違法ナル行為デアル。仮令ソノ外形ニ於テソノ行為ガ刑罰法規ノ構成要件ニ該当スル事アルモ特殊ノ理由ニ基クソノ行為ガ法律上許容セラレ又ハ義務トセラレル場合ニ於テハソノ行為ハ罪トハナラナイノデアリマス。日本刑法第七章第35條乃至第38条ニ於テ犯罪不成立又ハ法律上許容ヤ

"J.I (40)"

ラルベキ事項ヲ規定シテアルノデアリマス

私ノ意ニ於ケル特ニ日本刑法規定ノ解釈ノ根本原則ニツキ Commission 並ニ検事ノ御理解ヲ得タイノデアリマス

日本刑法ハ第一編総則 第二編罪ニ分チ 第一編総則ニ於テハ一般犯罪成立、不成立、減免及刑期ニ関シ規定シ第二編各論ニ於テハ各犯罪ノ種類及ソノ type ヲ規定シテアル 第二編各論ニ於ケル単ノ犯罪ノ性質ト type トニ対スル刑罰ノ範囲ヲ定メラレテ居ルノミニテ、或ル事実ガ犯罪トナル中ヤ犯罪ノ成立、不成立、刑ノ量定、法律上免除、酌量減刑等ハ凡テ総則ノ規定ニ依ルコトニナツテ居ルノデアリマシテ、犯罪事実ノ認定、刑ノ量定、判断ニ於ケル両者不可分ノ関係ニ於テ適用サレルノデアリマシテ 第二編各論ノ規定ノミニ依ツテハ犯罪事実ノ判断ハ出来ナイノデアリマス。コノ点ニ関シ検事ノ誤解シテ居ルヤウデアリマス。即チ本件起訴第一ニ、日本刑法第199条ニ人ヲ殺シタル者ハ……ト規定シテアツテ何等犯意ニ就テ規定シテナイカラ日本ノ刑法デハ単ニ或ル人ノ行為ト人ノ死ノ事実ガアリ之ニ因果ノ関係ガアレバソレデ殺人罪ハ構成サレル犯意ハ犯罪ノ認定ニハ必要ガナイト考ヘテ居ルヤウデアル之ハ驚クベキ誤デアリマス。例ヘバ医師ガ手術ノ結果患者ノ死ノ事実ガ発生シタル場合ソノ医師ノ行為ト死ノ事実トノ間ニ因果関係ハアルガ之ガ直ニ殺人罪ヲ構成スルノデハナイ。ソノ医師ノ意志ガ正当ナル業務トシテ手術ヲ行ツタ結果死ノ予期ガ発生シテモソレハ之ヲ殺人トハイヘナイ。之ニ反シテソノ医師ガ医術ヲ利用シテ人ヲ殺サントスル意志ヲ以テ手術ニ依リ他人ヲ死ニ致シタル場合ハ之ハ殺人デアル。茲ニ於テ犯意ノ有無ガ問題ニナルノデ犯意ノ有無ガ犯罪ノアルヤ否ヤヲ決スル必要条件デアル。又死刑執行者ガ当該指揮官ヨリ裁判(判決)ニ依ル死刑執行ノ命セラレ職務行為トシテ之ヲ執行シタル場合ニ於テモ

執行者ノ行為ト被執行者ノ死ノ事実ノ間ニ因果関係ガアル、然シソレガ直ニ殺人罪トハナラズ、然シ正当ナル権限アル指揮官ヨリ合法ナル命令ヲ受ケソノ職務トシテ執行シタル場合ニ罪トナラズ、之又ソノ命令者ガ正当ナル権限ヲ有セザルニ不拘、命令ヲ偽造シ犯意即チ殺人ノ意志ヲ以テ下官ニ命ジ下官ハソノ犯意ヲ知リ乍ラ之ヲ実行シタル場合ニ、殺人罪ヲ構成ス

茲ニ於テ犯意ノ問題ハ最モ重大ナルモノアリマス

要スルニ或ル業ガ犯罪ナルヤ否ヤ或ハ如何ナル処罰スベキヤハ、第一編総則ノ規定ニ依ルノデアリマスルヲ以テ留意願イマス

尚ホ日本刑法第九章第35条乃至第37條ニ於テ犯罪不成立ノ場合ガ規定シテアリマスシテ又第199條ノ行為アリトスレバ此ノ第九章ノ規定ニ照シテソノ行為ガ犯罪ヲ成ヤ否ヤヲ~~判断シナケレバナラヌノデアリマス~~所罰スベカラザルモノヤ否ヤヲ判断シナケレバナラヌノデアリマス

"JI(42)"

第八ニ犯意ニツイテ申ヒマス

日本刑法ヲ始メ諸ノ罪ヲ犯ス意ナキ行為ハ之ヲ罰セスト云ヒ法律ニ特別ノ規定アル場合ノ外此ノ限リニ非ズト法律ヲ矢ロヲガラ以テ罪ヲ犯ス意ナキ為スヲ得ザル事情状ニ因リ其ノ刑ヲ減刑スル事ヲ得ト規定シテアリマス

犯罪トハ犯意ヲ伴ヒ違法行為ヲ為ス事ニシテ其ノ本質ハ反社会的行為デアル従ツテ若シ行為ニシテ社会一般ノ常想逸脱セザル以上ハ反社会的ノ性格ヲ徴表スルモノデアラナイ即チ全ク危険ナル行為ト雖モ特殊ノ理由ニ基キ其ノ行為ガ法律上許容セラレ又ハ義務トセラル場合ニ於テハ其ノ行為ハ犯罪トハナラナイノデアル故ニ犯罪ノ成立ハ各本條ニ該當スル行為ガ更ニ法律上許容セラレナイモノデアル事ヲ條件トルノデアル（牧野博士日本刑法P.69ニ）而シテ犯罪ハ行為デアリ行為ハ意思ノ発動デアル従ツテ犯罪ノ成立ハ意思ガ重要ナル要素トナルノデアルカラ犯罪ノ成立ハ法律ノ假定ニ（牧野博士日本刑法論P.46）ヨリ一定ノ決定意思ヲ犯意ト云フデ有ル（38條第一項）而シテ犯意ハ単ニ犯罪事實ヲ認識スルノミデナク其行為ガ社会道義ニ反シ反社会的性違法性ヲ認識スルコトヲ要スルノデアル故ニ其行為ノ反社会的性ヲ認識シナガラ敢テ其ノ行為ヲ為シタル場合ハ之ヲ犯意アリトイフノヲアリマス然シテ行為ノ違法性ノ認識ニツイテ誤解ナキヨウ特ニ留意ヲ要スルノデアリマス

（43）

日本刑法第38條ノ3項ニハ「法律ヲ知ラザルヲ以テ罪ヲ犯意ナシト爲スコトヲ得ザル」旨ノ規定アル外國ニ於テモ同樣ト思ツガ之ハ犯意ニハ違法性ノ認識ヲ必要トスト云ノ趣旨デハナイノデアリマス本條所謂「法律ヲ知ラザルヲ以テ」トイフノハ「刑罰法規ノ規定ヲ知ラナカツタ」トイフ理由ヲ以テ犯意ハ阻却サレナイトイフ單性ナル意味ヲ謂フモノデ之ハ條理上當然ノ規定デアリマスシテ「オレハ其ノ所罰法律ヲ知リマセヌデシタカラ罪ハアリマセヌ」トイフ事ハ必ヤナリ法律ハ施行セラレタル以上ハ人ヲ知ルベキ筈デアル之ヲ知ラザリシノ故ヲ以テ罪ヲ免ルヽ事ストイフ明瞭ナル規定デアリマス然シ若シ犯意タルニハ違法性ノ認識ヲ要ストイフノハ左樣ノ意味デハナク違法性トハ又社會的條理ヲ謂フノデ有ル

自己ノ行爲カ法律上許容セサレタルモノナリト信シ其ノ信シタル事カ社會通念トシテ是認セラルベキ相當サル理由ヲ有スル場合ハ違法性ノ認識ヲ欠クヲ以テ犯意ナシトイフノデアリマス

ヒ)「自然犯ニ對シテモ行爲者カ其行爲違法ヲ阻却スベキ特別ノ事由アリト信ジタル場合ニアツテハ又社會的意思ノ成立ナキモノト謂フベシ一般道義心ノ上ヨリ考ヘ一見ノ事由ニ因リ行爲ノ違法性ノ阻却セヲルヽ事カ然ルベシト認メラル場合ニ於テハ行爲者カ一般道義心ノ命スル所ニ反スル意思ヲ欠クモノト謂ベシ即斯ノ如キ場合ニ於テ違法ノ認識ヲ欠クトハ犯意ノ成立ヲ阻却スルモノトイフベシ

所謂甘粕事件ニ關スル軍法會議ノ判決ハ此意味ニ於テ理解スルコトヲ得ベシ事實ハ大正十二年關東大震災當時戒嚴令下ニアリ一兵卒ガ上官命令ニ依リ社會主義者大杉栄及其ノ妻ト子供ヲ殺害シタル事件デアル即憲兵上等兵某ニ名ガ上官甘粕大尉ノ命ニ因リ戒嚴令下ニ於ケル非常ノ場合罪トナル事ヲ概知セヌシテ某ヲ(社會主義者大杉栄 今妻及子供)殺害シタリトイフニアリシガ軍法會議ハ「罪トナルベキ事實ヲ知ラズシテ犯シタルモトヨリ無罪ノ判決シタリ(大正十二年十二月八日宣告)之ハ被告人ガ斯カル戒嚴令下ノ非常ノ場合ニ於テ國家ニ有害ナル無政主義ヲ殺害スル事ハ國家ノ許サルベキモノナリト誤解シ居タリテ犯意ハナイトイフノデアル(同博士日本刑法ノ92-195頁)

(二) 又刑罰法規以前ノ法律ノ錯誤即自己ノ行爲ニ對シテ法律上ノ効果ヲ生スルノ基礎トナルベキ法律關係ヲ規定スル法規ニ對シテノ錯誤ハ(己ニ成立セル法律關係ヲ成立セヌト爲スカ又未ダ成立セザルモノヲ已ニ成立シタリト爲スモノヲアルカラ)結局犯罪事實ノ認識ヲ欠クニ至ルモノデアルカラ犯意ヲアラズトス或行爲ガ刑罰法規以外ノ一般法規ノ錯解ニ基キ爲サレタルトキハ犯意ノ成立ヲ阻却スベキナリ他人ノ物ノ橫領トイフカ如キ場合ニ於テ他人ノ物ナリヤ否ヤハ民法ニ依リテ定ムベキモノデアル然ルニ民法ノ規定ヲ錯誤シ他人ノモノヲ自分ノモノナリト信ジテ之ヲ領得シタル場合ニハ橫領罪ハ成立シナイ

115(45)

行為者ガ
要スルニ行為ヲ以テ法律上許容セラルルモノト認識スル場合ニ於テハ犯意ノ成立ナキノ意ト為ス（牧野博士）日本刑法 P/98ノ99）以上日本今日ノ判例学説ノ一致スル処ヂアリマス今御参考ノタメ代表的学説及判例ノ一部ヲ引用ス

小野清一郎著 刑法論義

一、犯意アリト為スガ為メニハ犯罪事実ノ認識アルダケデ勿論其ノ外ニ尚「違法ノ認識」ノ必要トセヌカガ争ハレテ居ル蓋シ猶古クハ故意又ハ犯意ナルモノヲ専ラ他ニ予定的ナモノトシテノ犯罪事実ノ認識ト解サレテ居タノデアツテ其ノ規範自体ノ評価ノ意識ノ如キハ問題ニナラ居ナカツタ「法律ノ不知ハ恕セズ」トノ格言ガアル我刑法38條ノ3項ニハ法律ヲ知ラサルヲ以テ罪ヲ減ナルト為スヲ得ベシトアル然シ「法律ヲ知ル人ノ要ハナイトシテモ行為ノ違法性即チ其ノ行為ノ規範ニ反スル事又ハ反文化的ナル事ノ意識又ハ少クトモ之ヲ意識スルコトノ能ハサルコトハ必要デハナイカ此ノ「モメデイング」ニヨツテ提起カ所謂ル相法ト目セラルル刑法学者ニヨツテ支持セラルル所デアル

一、私ハ刑法所謂罪ノ犯意ノ解釈トシテ大体此ノ如ク考フルモノデアル

（1）犯罪構成事実ノ表象（認識）並其ノ発生ノ認容ヲ

"II(46)"

行為ニ出デザル事.
(2) 行為ノ違法性ノ意識ヲ缺ク事.
(3) 行為ノ当時ニ於ケル具体的状況ニ行為者ニ対シソノ行為ニ出デザル事ヲ期待シ得ベカリシ場合ナルコト行為違法性ノ行為ガ法律秩序ノ精神ニ反スル

(ロ) 行為ノ違法性ヲ意識セサル場合

行為ニ出デタル事ノ期待シ得ラレサル場合ナル事デアリ其ノ實質ハ社會文化的規範ニ反スル事デアル從ツテ違法性ノ意識トハ法律秩序ニ於テ許サレザルモノデアルコトノ意識ハ社會文化的規範ニ反スルモノデアルコトノ意識デアル斯ノ如キ意識ナキ行爲ヲ故意ニ出デタル行爲トシテ処罰スルコトハ道義的責任ノ理念ニ反スル從来斯ル意識ヲ要件トナサザリシハ絶對主義的國家觀念及ビ一般豫防的保安的刑罰觀ニ基クモノデアルガ最近理論及實際ハ漸次此ノ点ニ於テ道義的責任ノ理念ヲテツテイセシメヨウトシテ居ルガ我ガ現行法ノ解釋ニ違法性ノ意識ヲ積極的ニ存スル事ヲ以テ「故意」ノ要件ナリト考ヘルモノデアル

實際ニ於テハ犯罪構成事實ノ認識アルトキハ當然其違法性ヲ認識シテ居ルモノト推定スルコトヲ得ル場合モアル然シ犯罪構成事實ノ認識アルニ不拘違法性ノ意識ナキ場合ガアル

(ハ) 違法性阻却ノ法律的原因（例ヘハ正當防衛）ニ関係アル行爲ヲ適法ニ許サレタルモノト信ジタル場合ニモ其違法性ノ意識ノ欠缺ガ完全デアル限リ故意ヲ阻却スルモノト解スル

(ニ) 行爲ノ具体的狀況ニ依ナスル違法性ノ評價ノ錯誤例ヘバ、カ震災當時戒嚴令ノ下ニ勤メセル一兵卒カ上官ノ命ニ依リ殺人ヲ敢シタル事件ガ軍法會議ニ於テ「罪ヲ犯ス意ナキ行爲トシテ無罪ノ言渡サレタルハコノ意味ニ依ツテ理解サスベキデアロウ

"11(48)"

平井彦三郎(大審院検事)刑法論

一、犯意ノ成立ヤ行為者ガ自己ノ行為ノ違法ナル事ヲ知ル事ヲ要スルヤ否ヤ」ト言フ事ハ犯意ノ成立ニ行為者自己ガ其ノ行為ノ刑罰法規ニ觸レタル事ヲ知ルヤ否ヤノ問題ニ非ズ此ノ法規ニ觸レタルコトヲ知ルヲ要セザルコトハ刑法第38條第3項ノ示ス所ナリ問題トナルハ行為者自己ガ其ノ行為ノ刑罰法ニ觸レタル事ヲ知ルト否トニ不拘之ヲ以テ自己ノ行為ガ法律上許サレザル不法ノ行為ナルコトヲ知ルヲ要スルヤ之ヲ知ルコトヲ要ストセバ此ノ反對ニ自己ノ行為ガ法律上許サレタル正當ノ行動ナル事ヲ知ルニ於テハ犯意成立ノ要件ヲ欠如シ犯意ナシトイフコトヲ得ベシト言フニアリ尚此ノ「違法覚知」ヲ「社會的常識違反ノ認識」ト称スル人アルモ其ノ趣旨ニ於テ異ル処ナカルベシ

一、私ハ行為ノ違法性ヲ認識スルヲ要スト思考スルモノデアル犯意ノ成立ハ行為ノ危險性ト共ニ行為ノ違法即チ[illegible]ノ原因ナルコトヲ知ルニカルヲ以テ苟モ此ノ原因アルコトヲ確信シタル以上縦令其ノ認識ノ誤信ニ基ク場合ト雖モ犯意ノ要件ヲ缺如スルモノト言ハサルベカラズ

一、抑モ行為ノ違法性ハ行為ノ危險性ト共ニ犯罪ノ実質的要件ナリ危險性ヲ認識スルヲ要スルト言ハガルベカラズ又之ヲ反社會的惡性ノ有無ヲ觀察スルニ行為者ニ対シ誤解アリトスルモ行為者ハ其ノ行為ヲ以テ毫モ之ヲ違法即惡事ト思考セザリシ者ナリ

"SI(49)"

斯クノ如ク反社會的惡性ナキ者ヲ処罰スルハ目的主義ノ刑法理論ニ準據スルノミナラズ應報主義ニ於テモ違法性ノ認識ヲ缺如スル場合ハ犯ノ情別ナキニ均シク又之ヲ罰スベキノ價值ナシト言フコトヲ得レハナク大正十五年二月二十二日

大審院判例

刑法第96條公務員ノ爲ス封印又ハ差押ノ標示ヲ損壞シ汚瀆ノ條ノ犯罪被告人ハ民事訴訟ノ解釋ヲ誤リ有効ナル差押ノ標示ヲ已ニ無効ナリト信シテ損壞シタル事件

ニアルガ大審院ハ次ノ如ク判決シタ

「民事訴訟法其ノ他ノ公法ノ解釋ヲ誤リ被告人ガ差押ノ効力ナキニ至リタル爲差押ノ存セズト錯誤シ又ハ封印等ヲ損壞スル權利アリト誤信シタル場合（本件差押物件ニ付キ仲裁ノ勞ヲ採リタルモノニ依リ同人ノ債權者ヘ本件債務ノ辨濟シタルニ因リ差押物件ノ封印ヲ剥離シ得ベシト云ハレタル故ニ封印及標示ヲ剥離シタリ）ニ於テハ本罪ノ犯意ヲ阻却スルモノト云ハザルベカラズ」

法律ノ錯誤

草野豹一郎著刑事判例研究第一卷

一、法律ノ錯誤トスルコトハ今ヤ刑法責任論ニ於テ重点ノ重点ヲ成セルモノアル――刑事法改正草案第11條第2項ニ於テ「單ニ其ノ刑ヲ免除スルトノミ規定シテ之ヲ罰セズト規定スルニ至リタル事ハ畫期的ノ慨アルモノアル

所が今次ノ判決が被告人が自己ノ許サレザル行為ヲ許サレタルモノト信ジタル事ニツキ相當ノ理由アリトシ罰スベカラザルモノトシタ事ハ大イニ多トセザルヲ得ナイ

昭和七年八月四日森林窃盗ニ関スル大審院判決（判例集第十一巻15号）

「諸般ノ事情ヲ參酌シテ考量スルトキハ被告人ハ本件竹藤ヨリ有林ヲ伐採スル當時井堰堤修繕用材ニ不足ヲ生ゼシメザル範圍ニ於テ本件井根ヲ林ヲ自家用ノ爲ニ伐採スルコトハ竹藤區ノ認許スル慣例ニシテ差支ナキモノト誤信シタルニツキ相當ノ理由アリタルモノト認ムルコトヲ得ベク從テ被告人ノ本件行爲ハ罪ヲ犯ス意ニ出デタルモノト爲スヲ得ザルガ故ニ窃盗罪ヲ構成スベキモノニ非ズ」

本判決ハ故意ノ成立ニ事實ノ認識ノ外ニ其ノ事實ニ依存スル違法性ヲ併セ意識スルコトヲ必要トスルモノデアル.

1. 惟フニ故意ヲ解シテ單ニ罪トナルベキ事實ノ認識ト爲スコトハ從來カラ廣ク行ハレテヰル說デアルガ此ノ故意ノ成立ニ罪トナルベキ事實ノ認識ノ外違法ノ意識ヲ必要トスルコトモ故意ノ重点ヲ違法ノ意識トスルコトニナツタノハ最近ノ事デアル 然シ此ノ新シキ說ノ方ガ今日ニ於テハ通說トナツタ觀ガアル. 蓋シ道義責任又ハ規範責任ガ指導シ來ツタカラデアラウ ―― 從來ノ如ク錯誤ガ事實ニ關スルモノヤリヤ否ヤトカヲテ口角泡ヲ飛バシテ論

"II (51)"

ズ㍉ㇺ要ㇴナイコトニナッタノデアル　即事実ノ認識ニ欠ク所カナイ場合デモ其ノ違法ノ認識ニ欠ク所カアル而モ其ノ違法ノ点ノ意識ニ不注意ノ責ムベキモノカアル限リ違法ニ関スル過失ノ責任トシテ故意ニ準ジテ取扱ッコトニナリ過失ノ責ムベキモノカナキニ於テハ其ノ責任~~トハ~~ヲ問フ可カラザルモノトナルノデアル　右ノ判決ハマサニ違法ノ不意識ニ過失ノ責ムベキモノノナイコトヲ言明セルニ外ナラナイノデアル。

JII(52)

Common Law ニ於テモ Murder ハ Malice ヲ
必要トス Malice ハ英、ヤ猶ホ於テ悪意デアル
反社会的反道義的ナル事実ノ認識ヲ只如ニ malice
ハアリ得ナイ即 malice ハ行為ノ違法性ノ認識ニ止ラ
ズシテ為サントスル intention デアルコトハ日ヤ刑法ノ所謂
犯意ト同様デアッテ若シ被告ガ法律上許サルベキモノデアルト
確信シテ或行為ヲ為シタル場合其ノ確信シタルコトガ社会ノ
通念（即一般、通常人ガ其ノ場ニ在ッテ斯ノ信ズルコトハ
当然ナリト考ヘラルル場合）ニ依テ是認セラルル相当ノ理由
アル場合ニ在リテハ違法性ノ認識ヲ欠如スルモノデ犯意ナシ
即 malice ハナク Murder ハ成立シナイモノト云ハナケレバ
ナラヌ 然ラバ被告井上ノ行為ハ果シテ犯意アリト為スコト
ヲ得ルヤ否ヤニ関シ以上ノ学説及判例ニ照シテ考察セン
起訴状第一、第二ニ於テ被告ハ〝意思的ニ違法的ニ
企図ト悪意ヲ以テ正当ノ理由モナク〟ト記載シテアル
之レハ被告ノ犯意ヲ抽象的ニ表言シタモノデモノデアロウガ
被告ノ行為ヲ「犯罪ナリ」ト「殺人罪ナリ」トシテ起訴スル
以上単ニ抽象的形容詞ノ羅列デ犯意事実ノ肯定ハ未ダ
其ノ Criminal intention ヲ具体的ニ立証シナケレバナラナイ
然ルニ検事ハ之ニ対シ何等ノ立証ヲシテ居ナイ立証サレテ
居ルハ「被告ガ法令ニ依リ正当ナル職務行為デアルトノ
確信ノモトニ判決ノ結果トシタル死刑ノ執行ノ命ヲ実行
シタ」トイフ事実ノミデアル

〝II(53)〟

即犯罪為氏ノ死刑執行ガ被告ノ執行言トシテノ執行行為ノ結果生ジタリトイフ事実ノミデアル コノニツノミノ事実ノミニヨリ被告ニ犯意アリト見ルコトハ日本刑法デハ許サレナイノデアル 米國ノ case law ニ於テモ許サレザルコトハ Whorton ノ Criminal Law ニ於テモ明記シテアル

検事ガ註ノ述ベタル被告ノ行為ガ殺人罪乃至戦争犯罪ナリト主張セントスルナラバ先ヅコノ犯意ヲ立証シナケレバナラナイ 之ヲザレバ犯罪事実ノ立証不充分トシテ其他ノ事実ヲ判断スル迄モナク無罪ノ判決アルベキモノト信ズ

被告ハ處刑ニ当ツテハ其ノ命令ノ合法ニシテ正シキモノアルヲ確信シ正当ナル職務即法令ニヨル正当行為トシテ実行シタノデアル 即正当ナル権限有タル千田少将ガ犯罪有タル為氏ノ犯罪事実ヲ慎重ナル調査ト審理ヲ経タル後判決ニヨリ死刑ヲ宣告シ被告人ハ其ノ執行ヲ命ゼラレ正当ナル職務行為トシテ執行ヲ遂行シタノデ被告人ハ其ノ合法ヲ信ジ一点ノ疑ヒモ悪意モナカツタコトハ検事ガ証據トシテ提出シタ被告人ノ陳述書ニモ明記シテアリ又本法廷ニ於ケル被告ノ他ノ証人ノ供述ニ依リ立証サレタル処ノ真実ノ吐露デアリマス

若シ被告ガ斯ノ信ジタルコトニ過失ガアツタデアラウカ又ハ社会道義ノ観点ニ立ツ其ノ通念ニ依ツテ斯ノ信ズルコトガ合理的デアルヤ否ヤニ付テ充分ナル考察ヲ加ヘナケレバナラヌ 先ヅ第一ニ命令者千田少将ガ正当ナル権限有デ

(GA)

アルコトハ今更申ス迄モナイ即チ升田ハ井口ノ直傷表言デアッテコノ処刑事件ノ高裁ノ裁判長デアッタコト井上ハ升田ノ下言デアッテ其ノ事件ノ検察官ノ地位ニアッタノデアルカラ海軍軍法会議法第50ノ條ノ規定ニ依リ此ノ命令ヲ以テ條ハ合法ナルコトハ明カデアル

(2) 次ニ此ノ執行命令ハ合法ナリヤ否ヤトイフニ執行命令ハ犯罪審理ノ結果判決ニ依ッテ表ハサレタルモノデアルカラ上ソレガ合法タルコトニフ迄モナイ

(3) 然ラバ判決ノ前提トナリタル審理手続ガ正当ナリシヤ否ヤノ問題デアルガ井上ハ單ニ執行官トシテ処刑ヲ命ゼラレタニ過ギナイ執行官ハ其ノ命令ノ正当ナリヤ否ヤヲ判断スレバ足ルノデアッテ其ノ前提タル判決乃至審理ノ当不当ヲ判断又ハ審査シ得ル權利ヲ義務ヲ持タナイ従テ正当ナル形式ノ命令ニ依リ実行シタル行為ハ当然合法ナリト謂ハザル可ラズ然シナガラ被告人ハ調査官及検察官ノ立場ニ於テ事件ニ関與シテ居タル故ニ其ノ干與ノ範囲ニ於テ彼ノ知レルコトハ彼ノ確信ノ根拠トナッタコトハ当然デアルコトヲ明ニシナケレバ彼ノ犯意ノ有無ハ判断サレナイノデアル即井上ハ升田ヨリ直接ノ事件ノ犯罪事実ノ調査ヲ命ゼラレコヲ取調ベタ其ノ結果トシテゴ等島民ノ犯罪事実ハ前記ノ如ク殺人、強盗殺人等ノ事実ガ判明シコレニ対シ法律ニ依リ憲ヲナル審理ガ終ゲラレ其ノ結果判決ニ依リ死刑ノ宣告ガ行ハレタルコトヲ良ク知悉シテ居ルノデアル

II(55)

コレ等ノ事実ヲ知悉セル被告人ガ其ノ正当ナル権限ノ
上官カラ正式ノ命ヲ受ケタル場合ニハ之ヲ合法ナリト信ズルハ
自然デ何人ガ被告デアッテモ然リト考ヘラルル処デアリマセウ
又コノ事件ノ審理手続ガ正規ノ裁判手続ト相違スル
点ガアリトスルモ急迫セル敵前戦場ニ於テトラレル特別
裁判手続デアリソレガ事実上ヤムヲ得ズ行ハレタ可能ナル
最上ノモノデアルコトハ已ニ述ベタ通リデアリマス
之レガ法律上許容スルベキハ法規ニ照シ前述ノ通リデ
アリマス 之ヲ合法ナリト信ジタルハ相当ナル理由アルモデ
アリマス
井上ハ此ノ当時ノ心境ニツイテ検事ノ Cross exam.
ニ対シテ次ノ如ク答ヘテ居リマス
私ハ事件ノ審理ガ正規ノ手続ニ依ル裁判トハ考ヘマセヌ
然シ当時ヤムヲ得ズ急迫セル戦場ニ於テトリ得ル最上ノ
手続デアッタ其ノ合法ヲ能ク迄信ジテ居マシタ、ソレガ
裁判デアルカナイカトイフヤウナ疑問 (question) ハ全ク
起リマセヌデシタ夫レガ終戦後問題トナリ収容所ニ
幽禁セラレ、身ノ上トナリ初メテ夫レガ裁判トイフベキカ
否カヲ考ヘサセラレルニ至ッタノデアリマス 而シテ私ハ夫レヲ
裁判デアルトイヘルト考フルニ至ッタノデアリマス」云々
之レガ裁判ニ関スル井上ノ真実ノ心境デアリマス
夫レハ独リ井上ノミナラズ何人ガ其ノ立場ニアリマシテモ
斯ノ如キ条件斯ノ如キ環境ニアッテハ斯ク考ヘルコトハ

自紙デアッテ如何ニ注意深キ合理的ナ人デモ斯ク信ジ斯ク考ヘルデアラウコトハ否ムコトハ出来ナイト弁護人ハ確信ニル処デアリマス

次ニ未成年者ノ処刑ニツキ其ノ点ヲ得ガル事実ハ已ニ之ヲ述ベタガ被告人ノ責任ヲ論ズルニ当リ更ニ之ノ考察ヲ要スル日本ノ刑法ニ於テ刑罰ノ責任年齢ハ十四才以上トナッテ居ルコトハ検事指摘ノ通リデアル而シテ本件ノ犯罪被処刑者シロウ及ネーベットガ果シテ十四才以上デアッタカ以下デアッタカハ正確デハナイ. 森川. 古木. 井上各証人ノ証言ニ依レバ解剖ハ十二三才位ニ見エタガ意識, 発達, 此態ハ大人ノ如クデアッタトイヒ島民ト同ジ<u>タカイワ</u>島ニ住ンデヰタ証人真名子及市川シロウハ十五才位ノ男ノ児デアッテ高イ椰子ノ樹ニ昇リ毎日三度ニ五ルチヤガロ切リノ六ケシイ仕事ニ大人ト同様ニヤッテヰタトイフ, 犯態ヲ詳細ニ述ベ十五才位ノ男児ニ相当ル客観的事実ヲ立証シタ又田中正治, Deposition ニ依レバ五郎トイフ男児ハ15位デアッテ中形デ長イ頭髪ヲシテ居タト述ベテ居ル而シテ真名子ノ証言ノ四郎ト田中ノ証言ノ五郎トハ同一人デアルコトヲ推知スルコトガ出来ル即四郎又ハ五郎ハ日本人ノ呼ビ通称デアルノデアルガ日本デハ男児ノ名ニ一郎ニ郎三郎四郎五郎等ノ名デ呼ブコトガ普通デアルガコレハ数ニ一ニ三四五デアッテ四郎ハ four 五郎ハ five デ

極メテ誤リ易イ話デアルガ故ニ田部又ハ五郎ハ他ノ
客観的事実ノ証言ト綜合シテ同一人ト探知サレル
ト同様ナルハ田中ノ Deposition ニ六才位ノ子供ノ
存在ガ記入シテアルガ之レハ他ノ何レノ証人ノ証言ト
符合セズガナイカラ之ハ全ク無関係ノ人物デアルカ或ハ田中ノ
記憶ノ誤リナリト推論スルコトガ当ノ、探理的論理ノ肯定スル
所デアロウ
然ラバコノ島ノ子供ノ年齢ハ五才ナリヤ十二三才ナリヤ判明
シナイガ弁護人ノ真名子及田中ノ如ク同ジ地ニ住ンデ居タ
ルモノハ証言ヲ正シイト信ジ十五才ナリト判断スルヲ
妥当ト考フル 十五才ナリトセバ刑罰責任年齢ニ達シテ
居ルノデアルカラ一般刑法ニ依ル一般犯罪トシテモ処罰
シ得ルノデアル 然シ何レニセヨ未成年者デアルカラ平時ニ
於テ一般犯罪ノ場合ナラバ恐ラク死刑ノ判決ハ與ヘラレ
ナカッタコト、思ハレルコトハ已ニ前述ノ通リデアリマス
然シナガラ本件ノ敵ノ重囲ニ陥ッタル急迫シタル戦場タル
ヤルート地ニ於テ全防備部隊ハ一歩誤レバ全滅ノ危機ニ
直面シテ居タル緊急状態ニ於テ発生シタルモノデ而モ
其ノ犯罪ガ特殊ナル軍紀ノ破壊ヲ目的トスル殺害罪タル
南諜行為デアッタタメ子供ト雖モ意識ハ発達シテ大人ト
異ラナイ若シ之レヲ放置スレバ日本軍ハ全滅ノ破局ニ陥
ルハ明カデアルカラ日本軍ノ存在ノタメノ已ムヲ得ザルニ出デ
タルモノデアルコトハ已ニ説明シタル処デアッテ犬レハ。
JI(58)

日本刑法第37條及海軍刑法第17條ニ依テ法律上許スベキモノナルコト前述ノ通リデアリマス

トモアレ之レハ裁判長タル井田少將乃至審判官，行為デアッテ井上ノ干知ス処デハナイ又干與スル所デアリ被告井上ハ之ニ対シ何等ノ責任ヲ有スルモノデハナイガ被告井上トシテハ檢察官ノ主張ニ於テ「子供ハ処刑スベカラズ之ヲ離島ニ隔離シテ監視ヲ附シ開墾ニ従事ナイ方法ヲ採ルベシ」トノ意見ヲ述ベタノデアリマス 然ルニ判決ノ結果被ノ意見ニ反シ死刑デアッテ其ノ処刑ヲ井田少將ヨリ井上ニ其ノ執行ガ命ゼラレタノデアルニ付テ井上ハ更ニ子供ノ処刑ニ対シテ反対ノ意見ヲ具申シタガ井田少將ハ前記ノ如ク処刑スルノ理由ヲ說カレタノ正当ナル命令ニ対シテ部下ハ許サヌト命令ノ遂行ヲ厳命セラレタル経緯ハ已ニ述ベタ通リデアリマス

之ニ依リ子供ノ処刑ガ如何ニ自己ノ意ニ反スル命令デアルトハイヘ井田少將ノトレル判決及執行ノ命令ノ合法ニシテ正シイコトヲ確信シテコレヲ執行スルニ至ッタノデアリマス

コノ点ニ関シ檢事及弁護人ノ質問ニ対シ

私ハ子供ノ処刑ヲ違法ナリトハ考ヘマセヌ合法ニシテ正当ナルモノデ私ノ行為ハ法令ニヨル正当ナル職務行為デアルト信ジテ居リマス

何トナレバ井田少將ガ其ノ有スル权限ニヨリ慎重ナル調査ト

II(59)

審理ノ結果判決ニヨリ死刑ノ執行ヲ正当ナル手続ニ於テ為シ
テルガ故ニ不適セラレタルガ故デアリマス ト述ベ井上ハ更ニ最後ノ
自裁的証言ニ於テ彼ガ本件ノ審理ガ井田少将ノ権限ニヨッテ
合法且正当ナル慎重ナル審議ガ為サレタル結果ニヨッテ其ノ
執行ヲ命ゼラレタルモノデアル ト理由ヲ次ノ如ク述ベテ
居リマス
(1) 此ノ事件ニツイテ井田ガトッタ審理手続ハ井田ガ特ニ
自分ノ部屋ノ指定ヲ片付ケテ約10個位審理室トシタ
審理中松井衛兵ヲ入口ノ番兵トシテ使ヒ何人ノ立入ヲ
禁ジテ実施シタ
(2) 特ニ最後ノ判決ヲ与ヘル審理デハ井田以下 Judge ト
Judge Advocate ニ起立ヲ命ジ我ヲ神聖厳粛ナ
態度デ意見ヲキキ判決ヲキイタ
私ガ Jaluit ニ居ル時勤務中此ノ部屋ヲ会議審理ニ
使ハレタノハコレガ始メテデアッタ
(3) 戦争終了後井田ハ Macheson 中佐ニ駆逐艦ニ
呼ビ寄セ次ノ様ニ質問アリ『Mile 島カラ来タ八名ノ島民ガ
アルガ如何ニシタカ?』井田『ソノ8名ノ島民ハ犯罪ヲ
犯シテ来タノデ私ノ権限ニ基イテ日本法ニ照シ合法的ノ
手続デ死刑ヲ執行サセタ』Macheson 中佐ハ
『子供ノ二名ハ?』井田『子供ニ名モ大人モ同様デアッテ
間諜デアリ又 Jaluit 島ノ事情ニツキ大人ト同様承知
シテ居ルノデ Jaluit ハ止ムヲ得ズ処刑セリ』軍人軍属
ヨリ(60)

為民，逃亡至ニ機密，漏洩ハ Jaluit，生命ヲ断ツモノデアル 故ニ軍紀保持 4000名，生命ヲ保ツタメニ死刑ヲ執行シタ 証人ハ Macleeson中佐 同副官 私 通訳 赤松
(3.) 弁明ハ 此ノ俘民ヲ日本法ニ照シ 8名ヲ井上ニ命ジテ死刑ヲ執行セシメタト報告シテヰル 20年10月5日頃
Macleeson中佐ガ他ノ書類ト共ニ持帰ッタ
証人、古木、新留、中村、鈴木各少佐 私 赤松曹長
(4.) 当時私ハ Hague 條約陸戦法規モ承知シテ居ナイ
弁明ノ報告書ニハ 開諜ノ罪ハ日本刑法 85條ヲ適用シタト書カレテヰタト記憶シテヰル
以上被告人ノ死刑執行アルニ至ッタ事情理由及 state of mind ヲ詳細ニ describe シタコノ侭シ、兵ニ於テ彼ノ criminal intention ヲ認メルコトガ出来マスカ 彼ハ徹頭徹尾ソノ合法(正当)ナルヲ信ジ之ヲ実行シタノデアル 殺人ノ意思ハ夢ニモ持ッテ居ナカッタノデアル 然ラバ彼ノ斯ノ合法正当ト信ジタルコトニ誤リガアルデアラウカ？ 弁護人ハ (1). 犯罪俘民ハ悪ク処罰セラルベキ犯罪ノ為ヲ犯シテヰルコト (2) ソレガ調査又審理ノ手続ハ特別ナル手続デアッテモ非常ナル特殊ノ此ノ法律上許容サルベキ正当ナル手続デアルコト (3.) 死刑ノ執行命令ハ正当ナル手続ニ依ッテ為サレタルコトヲ各法廷ニ照シテ主証シタ 故ニソレ等ノ手続ハ合法ナルコトヲ確信ヲソノ主張スルモノデアリマスガ、

II(61)

然シ仮リニ此ノ手続ニ法律ニノ欠陥ガ存在スルト仮定シテモ
夫レハ事国家ニ非ザル限リ普通人ニ対シテ之レガ認識
ヲ得ルコトハ無理デアル 井上ガ之ヲ合法正当ナリト
信ズルハ相当ナル理由ガアルノデアリマス 即チ井上ガ
裁判手続法ニ対シテ錯誤アリトスレバ 矢張リ刑法
第38條3項ノ刑罰法規ノ錯誤デハナク ソレ以外ノ法規
ノ錯誤ニ依ッテ犯罪事実ノ錯誤ニ陥ッタノデ法律ノ事実
ノ錯誤ニ依ル犯意ヲ欠如スルモノデアリマス
之レハ前記大審院判例及諸学者ノ学説ニ依ッテ明白デ
アリマス 故ニ 被告人ノ行為ハ犯意ヲ欠キ犯罪ノ構成
シナイモノデアリマス
然ニ弾ニ Commission ノ御留意ヲ煩ハシ度キハ ニ
手ニマシタ 軍京最高軍法会議ニ於ケル北合主義者大杉
等及ソノ妻子ヲ殺シタル一憲兵兵卒ノ犯罪ニ対スル判例デ
アリマス
之ハ殺人ヲ命ジタル上官ハ元来命令ノ正当ナル権限者デハ
ナク 社会主義者弾ニ大杉ノ如キ無政府主義者ヲ殺ス
コトハ国家ニ利益ナリト誤ル考ヘノ下ニ ほ集ノ調査モ
審理モナク勝手ニ部下ニ対シテ殺害ヲ命ジタノデソレハ
明ニ犯罪ノ為デアル 依テ犯罪トシテ処罰セラレタノデアルガ
命令ニ依リ殺害ヲ実行シタル部下憲兵兵卒ハ全ク上官ノ
犯意ヲ知ラナカッタ 戒厳令下ノ動揺セル世況ニ於テ
コノ命令ハ実ニ全ク合法ナルモノト誤信シテ実行シタ
ノデ(以下62)

ノデアル 然シソノ誤信ハ通常人ガ斯ル状態ニ於テ斯ク信ズルコトハ自然デアル 被告ガ斯ク信ズルコトハ相当ノ理由ガアル 被告ハ罪トナルベキ事実ヲ知ラナカッタ即チ行為ハ犯意ヲ欠グモノトシテ無罪ノ判決ガ與ヘラレタ而シテ之レハ一般學説ニ於テモ認メラレテ居ルノデアリマス コノ事実ト本件井上ノ事実ヲ比較シテ御考察ヲ賜リタイ

本件ノ被告ハ死刑ノ判決ヲ受クルニ相当ユル犯罪者デアッテ井上ハ事実牧師ニ告ゲ之ヲ知ッテオッタノデアル 刑記社会主義者ノ如キ innocent ハナイノデアル

即チ之ニ対シテハ前ニ評論セル如ク升田少将外下裁判官ノ審理ガ行ハレタル結果判決ニ依テ死刑ガ宣告セラレタノデアル 即チ井上ガ検察官タルノ職責ニ於テ正当ナル手續ニヨリ当ノ執行ヲ命ゼラレタノデアル 只ソノ審理手續ガ正規ノ手續ニ依ル正規ノ裁判デハナク特別手續ニ依ッタ迄デアル 然シ其ノ特別手續ハヤルートノ如キ特別異状ナル敵前戦場ニ於テハソレ以上ノ手續ノトレナイ事情ニアッタコトハ前述ノ如クデアル 従ッテコレガ法律上許容セラルルコトデアルトハ何人ト雖モ信ジ得ベキ事実デアル

此点ハ戒厳令下ニアリタル当時ノ事情ノ比デハナイ 還カニ撃退シタル戦場デアッタコトヲ考ヘレバ本件井上ノ場合ハ刑記社会主義者大杉及其妻子供ヲ殺シタル憲兵ノ場合トハ天地ノ差ガアル

以上(63)

井上ガ法令ニ依ル正当ナル職務トシテ正当ナル命令ヲ
遂行シタルト信ズルコトハ相当ノ理由処デハナイ寧ロ
寧ロ却デアル 被告ニ犯意アリトハ断ジテ為シ得ナイ
ノデアリマス 井上ノ行為ハ断ジテ犯罪ヲ構成シマセヌ
寧ロ無罪デアリマス

以(64)

'71(65)'

被告ノ行為ハ日本刑法第三十八條ニヨリ犯意ノ欠如トスルヲ以テ犯罪ヲ構成セザルコト以上論述通リナルガ　更ニ日本刑法第35條ニ依ル法令ニヨル正當ノ行為ナルヲ以テ犯罪ヲ構成シナイト主張スルモノデアリマス

今次ギニ元日本大審院長法學博士泉二新熊氏及東京帝國大學教授法學博士牧野英一氏ノ所説ヲ其ノ著書ヨリ引用スル

泉二氏　日本刑法論（P340～P347）第二節法令又ハ正當業務ニヨル行爲　第35條　法令又ハ正當ノ業務ニ因リ爲シタル行爲ハ之ヲ罰ヲズ

一．法令ニ因ル行爲ハ即法令ニ準據スルモノナルガ故ニ違法行爲ニ非ザルハ勿論ナリ．正當ノ業務ニ因ル行爲ヲ罰セザルモ亦其ノ行爲ヲ以テ違法ニ非ズト爲スノ趣旨ナリト解セザル可カラズ　法令ニ因ル行爲ハ法令ノ規定ニ依リ當然ニ權利義務（職權職務ヲ兼ネ含ス）トシテ認メラレタル行爲ヲ謂ヒ正當ノ業務ニ因ル行爲トハ法律上又ハ國民一般ノ慣例上正當トシテ許容セラル・業務ヲ組織スベキ行爲ヲ謂フ職務上ノ行爲ハ前者ニ屬シ醫師ノ手術ノ如キハ後者ニ屬ス

二．法令ニ因ル行爲トハ法規ニ準據スル一切ノ行爲ヲ謂フ例ヘバ民法商法等ニ依ル權利行爲ハ勿論刑事訴訟法ニ依リ現行犯人ヲ逮捕スル權能ノ行爲特定公務員ノ武器使用權其他（中略）皆総テ所謂法規ハ法令

ノ明文ナノミヲ指スニ非ズシテ法例ノ精神上推理セラルル可キ條理ヲ包含スルモノトス　此ノ意味ニ於テ緊急防衛（正當防衛）ノ如キハ元來法令ニ依ル行爲ノ一種ナリト認ムルコトヲ得ベク法典第36條ガ別ニ之ヲ規定シタルハ其ノ條件及範圍ヲ明確ニシタルニ過ギザル可シ又法律上或者ガ爲スコトヲ要求セラレタル義務行爲ガ法令ニ因ル行爲タルヤ疑ヲ容レズ

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

(イ)公務員ノ職務行爲ハ法令ノ規定ニヨリ公務員ノ義務ニ屬スルト同時ニ其ノ權利ニ屬スルモノナリ．此ノ種ノ行爲ハ直接ニ法規ニ基ク場合アリ例ヘバ刑事訴訟法ノ規定ニ依リ現行犯人ヲ逮捕スル場合或ハ本屬長官ノ命令ニ基キ（死刑執行令狀ニ依リ非現行犯人ヲ逮捕スルガ如キ場合ナリ．然シ乍ラ執行上本屬長官ノ命令ヲ竢ツ可キ場合ニ於テ其ノ命令ナシテ死刑ヲ執行シ或ハ令狀ナクシテ單ニ非現行犯人ヲ逮捕スルガ如キ違法ナル行爲ナリ．

(ロ)然レ共命令ガ形式上若クハ實質上違法ナル場合ニ於テモ下級官吏ガ其ノ命令ニ基キテ爲シタル行爲ハ違法ナルヤ否ヤハ職務上ニ於ケル命令服從關係ノ範圍ヲ先決スルニ非ザレバ之ヲ決定スルヲ得ズ（中略）

大判11(67)

命ハ属官ハ長官ノ命令アル場合ニ於テ其ノ形式ヲ審ニスルコトヲ得ルモ実質ニ付テハ審査ノ権能ナシトス、属官ハ長官ノ命令ガ長官ノ職権ノ範囲内ニ於テ発セラレタルモノナリヤ、其ノ命令ハ法令ノ規定ニ適合スルモノナリヤ其ノ命令セラレタル事項ハ自己ノ職務ノ範囲内ニ属スルヤ否ヤノ点ヲ審査シ凡テガ積極的ニ断定ヲ下シ得ル場合ニアリテハ命令ガ実質上違法ナルモ之ヲ理由トシテ其ノ執行ヲ拒ムコトヲ得ズ

(3) 従リ而シテ命令事項ガ職務ニ関スルヤ否ヤニ付テ長官ト属官トノ見解一致セザル時ハ本ヨリ長官ノ解釋ニ従ハザル可カラズト雖モ何人モ犯罪ヲ犯ス職権ヲ有スルコトナク又如何ナル長官ト雖モ下官ヲ利用シテ犯罪行為ヲ為スノ職権ヲ有セザルハ言ヲ俟タズ故ニ属官ハ其ノ命令者ニ於テ犯罪ノ意志アリテ自己ヲ犯罪行為ニ利用スルモノナルコトヲ認識スル場合ハ服従ヲ拒絶セザル可カラズ

(4) 凡ソ公務員ノ行為ガ一定ノ職務行為ナルコトヲ得ル為メニハ当該行為ガ職務権限ヲ行使スルノ意志ニ出ダルコトヲ要シ且行為ノ目的事項ガ抽象的ニ職務権限ノ範囲ニ属スルモノナルコトヲ要ス例ヘバ裁判官ガ自由心証ニ依リ有罪ノ判決ヲ為シ之ニ因リテ刑ノ執行アリタル後再審ノ手続ニ依リ受刑者無罪ノ判決ヲ受クルコトアリトスルモ之レガ為メニ裁判ヲ以テ職務行為ニ非スト為ス可キニ非ズ」云云

"11(68)"

牧野英一教授ハ其ノ著日本刑法論(P149～P333)ニ於テ
「六 法令ニ依ル行為、法令ニ於テ一定ノ行為ヲ権利又ハ
義務ト為ス場合ニ於テハ其ノ行為ハ罪トナルコトナシ(刑法ナ35條)
例ヘバ次ノ如シ
イ、其ノ権利又ハ義務ノ範圍ニ於テハ其ノ行為ハ罪トナルコトナシ
ソレハ其ノ行為カ形式上違法ヲ欠ケコトナル即チ公ノ職務
ノ執行、公ノ職務ノ執行ニハ官吏公吏カ上官ノ命令ニ因ル
為ス場合ト自己ノ権限トシテ為ス場合トアリ、何レノ場合タルヲ
問ハズ共ニ罪トナルコトナシ、
(ロ) 親権者ノ懲戒行為ノ(民法ナ822條ニヨル行為)
(ハ) 精神病者ニ対スル監護行為(精神病者監護法第一條)
(ニ) 現行犯人ニ対スル逮捕行為(刑事訴訟法ナ125條)
等々ノ場合ハ罪トナラナイ
ヘ、正當ナル行為 法令ニ於テ形式上権利又ハ義務
トセラルル旨ノ規定ナキモ法令一般ノ精神ノ認ムル所ノ慣習又ハ
條理ノ命ズル所ニ従ヒ行為カ公ノ秩序善良ノ風俗ニ
反セザルモノナルトキハ又違法性ヲ欠ク、法令ニヨル行為ノ
形式的ニ違法性ヲ欠ク(ト解スルトキハ正當ナル行為ハ實質的ニ
違法性ヲ欠クモノト解スルコトヲ得ベシ、コレニ対シ刑法ハ
單ニ正當ノ業務ニ就キテノミ之ヲ規定シタリ(刑法35條)然レ共
違法ヲ阻却セラルルハ單ニ業務行為ニ限ルベキニ非ズ実質上
正當ナル行為ハ凡テ皆然リト謂ハザル可カラズ即業務上ノ行為
外慣習上認メラレタル行為其他一般ニ公ノ秩序善良ノ風俗

"11(69)"

ニ反セザル行為ハ罪トナラストナシ　以上泉ニ牧野両博士ノ所論ハ同一デアルガ両氏ノ所論ノヨウニ此ノ点ニ関スル意見ハ全日本凡テノ学説判例ノ一致スル所ニシテ一ツノ反対モナイノデアル私ハ今此ノ處ニ判例集ヲ持参セザリシ為メニソレヲ示スコトガ出来ナイノヲ遺憾ニトスルガ一ケノ又ナ意見判例モ存在ゼザルコトヲ断言致シマス　又日本ノヨウニ此ノ点ニ於ケル独逸ノ如キ成文法ニ於テハ勿論英米ノ如キ判例法ニ於テモ斉シク認メラル所論ハ十分迄ト信ジテ居ル

Wharton's Criminal Law P875－876 §640

Killing under mandate of law justifiable

The execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the law and virdict of their country, is an act of necessity, where the law requires it. But the act must be under the immediate precept of the law, or else it is not justifiable: and therefore wantonly to kill the greatest of malefactors without specific warrant would be murder. And a subaltern can only justify killing another on the ground of orders from his superior in cases where the orders ~~ob~~ were lawful. So we have seen

a warrant (that is, without authority) is no defense; though it is otherwise when the ~~facto~~ defects are merely formal.

而シテ本件被告井上ニ對スル死刑執行命令ハ前述ノ通リ特設軍法會議ノ判決ニ因リ爲サレタルモノデアッテ其ノ命令者ハ其ノ軍法會議ヲ召集シタル第八軍ノ直屬ノ長官斧田少將デアル 而モ今ノ其ノ軍法會議ヲ整理シ判決ヲナサシメタル裁判長ノ職責ニアッタ 而シテ井上ハ其ノ手續ノ檢察官ノ職責ニアッタ、死刑執行ハ其ノ職責デアッテコトハ前掲軍法會議規第96條ヲ501條ノ明記スル所デアッテ斧田少將ガ發令ノ正當ナル權限ヲ有シ井上ガ正當ナル受令者デアッテ之ヲ遂行スルコトノ法ノ命ズル義務デアッテ正當ナル職務行爲デアル、而シテ其ノ命令ハ形式上實質上一點ノ疑モナク合法デアル：而モ井上ガ之ニ對シ絶對ニ lawful ナルコトヲ確信シ聊モ疑ヲ持ッテ居ナカッタコトハ前述ノ通リデアル從ッテ井上ノ行爲ハ完全ニ刑法第35條ニ依リ犯罪ハ成立シナイノデアッテ日本刑法ヲ199條及戰爭法規慣習ニ違反シタリトシテ処罰セントスル本件起訴ヲ一ヲ二條罪狀項目 charge ハ不當デアッテ何レモ無罪タルコトヲ私ハ強力ニ主張スルモノデアリマス

私ノ一、ヲ二起訴各條目ニ對スル被告無罪ノ主張ノ以上ニ充分明瞭ナリト信ズルモノデアリマスガ念ノ爲戰爭法規並ニ慣習ニ違反セリトナスヲ二起訴ニ對シ更ニ意見ヲ述ベマス、起訴狀ヲ二ニ所謂戰爭法並ニ慣習ニ關シ檢察官ノ論

四十五年一月十三日締結セラレタル條約第四号所謂海牙條約
ノ陸戦法規ニ基クモノナルコト検事ノ指摘スル所ナルガ
同法規第二章間諜第二十九條ニ交戦者ノ作戦
地帯内ニ於テ敵手交戦者ニ通報スル意思ヲ以テ隠密
ニ又虚偽ノ口実ノ下ニ行動報告ヲ蒐集シ又蒐集セントスル
モノニ非ザレバ之ヲ間諜ト認ムルコトヲ得ス、故ニ変装ザル軍人
ニシテ情報ヲ蒐集セシガ為敵軍ノ作戦地帯内ニ侵入セラレタル
ハ之ヲ間諜ト認メス又軍人タルト否トヲ問ハズ自国軍又ハ敵軍
ニ宛テタル通信ヲ伝達スル任務ヲ公然執行スル者モ亦之ヲ
間諜ト認メス　通信ヲ伝送スル為及縦ヲ軍又ハ地方ノ各
部間ノ聯絡ヲ通ズル為軽気球ヲ以テ派遣セラレタル者モ亦同ニ
同令第三十條ニ　現行中捕ヘラレタル間諜ハ判決ヲ経
ルニ非ザレバ之ヲ罰スルコトヲ得ズ　ト規定シ間諜ノ定義
ヲ明示セルヲ以テ足レリトスベク、本規定ニ依レバ本起訴
状第二　罪状項目オーノ(3)第二ニ記載セラレタル「ラリーピオップ」
以下十名ノ島民ノ行為ハ何レモ間諜トハ認メラレナイ
右島民ガ処罰セラレタルハ本規定ニ依ル間諜トシテデハナク
日本刑法及日本海軍刑法ノ敵国ヲ利スル為ニ帝国ニ
抗敵シタル罪軍用物ヲ強奪損壊シ又ハ使用
不能又ハ欠乏セシメル罪、軍人軍属ヲ殺害シ又ハセントシタル
罪又敵ニ走ル罪等ノ単純国内犯罪トシテ処罰シタ
モノニシテ各証人ノ証言ノ一致スル所ナリマス　偶々「スパイ」
ノ語ガ用ヒラレタリトテアクマデモソレハ国内犯トシテノ用語ヲ使用

"11(?)"

シダニ止リ断ジテ此ノ国際法規違反ト処罰シタルモノニ非ザルコトハ明白ナリ、彼等ノ犯シタル罪ハ日本帝國ニ対スル反逆罪ナリマス　又陸戦法規第30條ニ所謂現行中捕ヘラレタル間諜ニアラザルコト勿論ナリ、従テ本件ニハ戦争法規並ニ慣習ニ違反スルトスル起訴第一、第二事実ハ見當違ナリ、本来本陸戦法規ノ精神ハ、文明國ハ絶エズ敵ヲ探知シヨリセラ間諜ノ行爲ヲ廣ク解釋シ　敵國人又ハ第三國人ヲ間諜トシテ重ク罰スルノ傾向アルヲ以テ其ノ範圍ヲ厳格ニ制限シコレヲ防止セントシタルモノデ　一般國内人ノ國内刑法ニ違反シタル犯罪ヲ豫想シタル規定デハナイノデアリマス　従テ本件ノ如キ日本ノ被統治者タル臺灣人ガ國内法ニ違反シタル罪ニヨリ處罰シタル事件ヲ國際法規タル戦争法規又ハ慣習ニ違反シタリトナス本件起訴第二ハ全然意味ヲナサナイノデアリマス、又假リニ若シ國際法規ニ照ストシテモ國際法規ニハ處罰規定ハナイノデアツテ之ヲ罰スルコトハ法ノ原則ニ照シ不當デアリマス、然シ何トシテモ處罰シナケレバナラヌトスレバ當然國内刑罰規定ヲ準用シテ處罰スルノ外ニ途ガナイノデアツテ當然日本刑法第35條及第38條ニ依リ罪ヲ構成シナイコトハ明瞭デアル　又之レハ英米ノCase lawニ於テモ當然法律上許サルベキ行爲デアルコトハ Wharton's Criminal Law ニ依ルモ明カデアリマス、

猶處罰ニ関シ日本刑法第54條ニハ一個ノ行爲ニシテ数個ノ罪名ニ觸レ又ハ犯罪ノ手段若クハ結果タル行爲

ニシテ他ノ罪名ニ關ル件ハ其ノ最モ重キ刑ヲ以テ処断スト規定シアリテアリマスコレハ数個ノ法條ニ觸レタル場合ハ其ノ内最モ重キ罪ニ凡テガ吸收セラレ一罪トシテ處罰スベシトノ規定デアリマス

又本件ノ被告ノ行為ハ一個ノ行為デ二個ノ行為デハナイノデアリマス、然レ本件ハ第一、第二ニツノ起訴ニ依テ二個ノ行為ニナツテ居リマス、ケレドモ井上ノナシタル死刑執行ノ行為ハ法令ニ依ル正當ノ爲サレタル一個ノ職務行為デアツテ正當ナル一個ノ行為トシテ日本刑法第35條ヲ適用スベキモノデアリマシテ斯ル犯罪ノ構成ハナイモノトヲ重ネテ主張致シマス

ス上詳論致シマシタル通リ本件被告人ノ行為ハ何レノ点ヨリ見マシテモ犯罪ヲ構成セズ起訴第一罪狀項目其一、其二、其三及起訴第二罪狀項目ノ其一、其二何レモ無罪タルコトヲ絶対的確信ヲ以テ主張致シマス

"U (74)"

猶弁護人ハ各証人ノ証言ニ對シ補充的陳述ヲ爲サントス

ハ. 檢事小井上文夫ノ裁判ニ関スル証言ニ予盾アリトシテ終戰直後「ヤルート」ニ於ケル米國法務官ニ對スル陳述ノ一部ト前古木事件ニ於ケル記錄ノ一部ヲ証據トシテ提出サレタガ弁護人ハコレ等ノ記錄ト井上ノ本法廷ニ於ケル証言トノ間ニ斯カル予盾モ存在シナイト確信スル即片言爽語(a piece of the word or single ?)ヲ抽出シテ曲解スレバ如何ナル場合ニモ予盾ト見エルガ如キ表言ヲ探シ出スコトガ出来マセウ然シ表言ニハ前後ノ関係及語脈ヲ綜合シテ判斷シナケレバ大ナル誤ヲ生ズルノデアリマス. 井上証人ハ古木事件ノ証言ニ於テ

(問)「証人ハ之レガ裁判デアルト考フルニ至ツタハ何時カ」ノ檢事ノ質向ニ對シ

(答)「終戰後收容所ニ入ツテカラデアリマス」ト答ヘタ之ニ對シ檢事ハ更ニ

(問)「然ラバ本事件當時ハ裁判デアルト考ヘナカツタカ」ト問ヒ井上ハ之ニ對シ

(答)「左様デス」「當時ハ裁判デアルトカ.ナイトカトハ考ヘマセンデシタ」ト答ヘタノデアリマス」然ルニ檢事ハ最後ノ答ノ「當時ハ裁判デアルトカ.ナイトカトハ考ヘマセヌデシタ」トノ部分ヲ態ト omitトシテ前ノ「NO」ノ部分丈ヲ証據トシテ提出シタ之レハ聞ク者ニ誤リヲ與ヘルト思フ. 而シテ井上証人ハコノ問題ニ對シ本法廷ニ於ケル檢事ノ Cross examination ニ答ヘヲ

(答)私ノ言葉ガ不足ノタメ誤解ヲ生ジタコトハ殘念デス「私ハ事件ノ當時ハ正シク合法ナル手續キデアルト信ジテヘ此ノ疑ヒモアリマセンデシタガ終戰後收容所ニ入ツテカラコレガ裁判デアルカナイカトイフ問題ヲ考ヘオセラルルニ及ビ初メテ考ヘマシタガ之レハ裁判デアルトイヘルト考ヘマシタ」之ノ意味デ前ニモ証言シタノデアリマス」云々ト証言ヲ致シ居リマスコレニ依

"11(5)"

リテ井上ノ前ノ陳述ト本廷ニ於ケル陳述トノ間ニ何等ノ予備ハナイノデアリマス
法廷外ニ於テ行ハレタル陳述ノ片言隻句ヲ抽出シテ之ヲ曲解スルコトハ Bolton 検事一流ノ訴訟技術ノタロク思ハレマスガ之レハ甚ダ危険デアリマス

二、次ギハ新留少佐ノ証言デアリマス彼ハ當時「ヤルート」ニ於テ海軍最高級ノ将校デアリ副長ノ要職ニアッタ而モ事件當時陸軍ニ於ケル最高先任将校古木少佐不在ノタメコノ島民事件ノ一切ニ関シ升田司令ヲ補佐シ指揮ヲシタルモノナルコトハ他ノ証人ノ証言ヲ綜合シテ容易ニ判断シ得ル所デアリマス彼ハ本法廷ニ於キマシテハ殆ンド全部ニ亘リ知ロラスト陳述シマシタ只次ノ事實丈ハ包ミ隠スコトガ出来ズ陳述シタ即「私ハ井上ガ報告書ニ基キ升田司令及古木少佐ノ前ニ於テ島民ノ内女ト子供ノ処刑ニ関スル意見ヲ述ベテ居ル所ヘ居合セマシタ．井上ハコレ等ノ女ヤ子供ノ處刑ハ免シテ離島ニ監禁シ間諜行為ノ出来ナイヨウニシテ頂キ度ト述ベタ私モ求メラレタノデハナイガ井上ト同様ノ意見ヲ述ベタ古木少佐モ同様ノ意見ヲ述ベタ　然シ升田司令ハ之レニ對シ女子供等ヲ処刑スルコトハ矛盾デアル私情ニ於テハ忍ビナイガ若シ之ヲ放置スレバ脱逃スルソーナレバ日本軍ノ軍状ハ敵ニワカリ軍紀ハ根本的ニ破壊ナレ全滅ニ至ルハ明カデアルカラ処刑スル以外ニ途ハナイ．ト断固タル意思ヲ表明セラレマシタ」云々　又終戦後升田司令ハ米國軍艦司令ニ會ヒレ島民処刑事件ヲ報告セラレ自分ハ日本國ニ違反シタル日本人タル島民ヲ日本國法ニ照シ処分シタノヲ正當ノ行為デアッテ何人ノ前ニモ恥ズルコトハナイ」ト米國司令官ニ申上ゲタト吾々将校ニ報告セラレタノヲ記憶シテ居リマス　昭和二十二年三月二十六日東京ニ於テ

(6)

テ米國法務官ニ對シテ爲シタル陳述書ニ記載シアル島民事件裁判ニ関シテ「裁判ハアッタト思ヒマス何トナレバ間諜ノ何トナレバ間諜ノ…

ト述ベタルコトヲ認メ之ヲ次ノ如ク説明シマシタスパイヲ処刑スルノ裁判ナクシテ行フトイフガ如キコトハ日本軍ニ於テハアリ得ナイコトデアリマシテ之ハ私ノ常識ノ於テ考ヘ得ル処デアル云々而シテ「以上ノ証言ハ「ヤルート」島民事件又「ミレ」島々民事件ノ両方ヲ含メモノデアル」云々ト述テ居リマス、之等ノ点ヲ綜合致シマシテ彼レガ本件審理ニ関シタルコトハ彼ガ表面上如何ナル遁辞ヲ設ケヨウトモ明瞭デアリマス而シテ井上其ノ他ノ証言ノ真實ナルコトハ立証サレルト信ジマス Committeeノ深甚ナル御考慮ヲ仲ヲ次第デアリマス

三、次ニラリメノ子供四郎ガ15才位デアッタトイフ証言ニ對シテ予備ヲ感ズルハラリメノ妻オチヲノ年齢デアリマス、オチヲノ年齢ハ、22.3才トイフ点デアリマス然シ四郎ハ、オチヲノ子デハナイノデアリマス先妻ノ子デアリマシテ ラリメト オチヲトガ同棲スルニ至ッタノハ本事件直前デアッテオチヲハ其レ迄日本人ノ妾等ヲナシテオッタノデ子供ハナイノデアルコトヲ御留意願マス、従テ四郎ノ15才位トイフ証言トハ何等ノ予備ハナイノデアリマス、私ハ茲ニ重ネテ申上マス 彼レ等ノ採リマシタ特別軍法會議ノ手續ハ平時ニ於ケル正規ノ手續ニ比シマスレバ確ニ欠点ヲ有シテ居リマス殊ニ弁護ノ開カレテ居リマス完全ナル本法廷ニ比スレバ幾多ノ欠点ガ認メラレマセウ然シ要ハ形式デハアリマセス實質デアリマス如何ノ愼重ニ事件ヲ取扱ッタカニアルノデアリマス當時ノ急迫セル戦場ニ於テ爲シ得タル最上ノモノデアッタ

"11(77)"

コトハ御記メガ願ベルト信ズルノデアリマス コレハ又未成年者ノ処罰ニ付キ
マシテモ 日本刑法第37條及海軍刑法第17條ニ緊急避難ノ原則
ニ依テ法ノ許容スル処デアリマスコトハ已ニ陳述ノ通リデアル又裁判ノ
手續ハ其ノ採用スル法制文化ノ程度風俗習慣ノ相違ヨリシテ各國
各々ニ致シテ居リマセヌ、米國ノ裁判ニアリテハ裁判官ハ白紙ノ狀態
ニアリ檢事及弁護人ノ提供スル事實ニ依ッテ判斷シ決裁ハ委員ノ票
決ニ依ルヲ原則トシテ居リマスガ日本ノ通常裁判ハ凡ソ裁判長中心
主義デ犯罪ノ取調ベハ裁判前ニアリテハ警察官及檢事ノ專權デアリ
檢事ハコレヲ起訴シ之ニ意見ヲ述ブレバ裁判ニ於ケル其ノ職責ヲ完了シ
裁判所即法廷ニアリテハ其ノ取調ベハ裁判長ノ專權デアリ其ノ判斷
ハ自由心證主義ヲトリ其ノ心證ニ依リ自由ニ決定シ何人モ之ニ干
渉ヲ許シマセヌ又勿論地方裁判所及控訴院ニアリテハ三人ノ判事
アリ大審院ニアリテハ五人ノ判事ガアリ其ノ内ノ一人ガ裁判長デアリ
他ハ陪席判事デ各々意見ノ一致セザルトキ合議ヲ致シマスガ米國
ノ如ク票決デハナイノデ最後ノ判斷ハ裁判長ノ決定ニ依ルノデアリマス
本件ニ於キマシテモ井田少將ハコノ通常裁判所ノ方式ニ依ッタモノト推
定セラレマスコノ点モ充分御考慮ヲ煩ハシタイノデアリマス 又井上ノ行
爲ニ對シマシテモ前述ノ如ク各人ノ行爲ハ (1) 檢事トシテ裁判手
續ニ干與シタル行爲ト (2) 裁判執行官トシテ死刑ヲ執行シタ
ル二個ノ行爲トノ間ニハ法律上完全ニ因果関係ヲ中斷シ何等ノ
関連ノナイコトヲ而シテ彼ノ檢事トシテノ職責ノ調査ヨリ起訴ニ至ル
迄ノ行爲ヲ之レニハ法律上事實上一点ノ不法モ非違モナイ完全ナル
合法行爲デアルコト、而裁判ノ執行ニ付テハ其ノ執行命令ガ形

弐實質何レモ合法デアッテ其ノ命令ノ執行ガ正當デ其ノ行爲ハ完全ニ法
令ニ依ル職務行爲デアルコト仮令裁判ニ多少ノ過誤アリトスルモ其ノ過誤
ハ裁判官ノ責任デアリ上級裁判所ハコレヲ審査スルノ專權ヲ有スルノデア
ッテ檢事又ハ執行官ノ干渉スルコトハ許サレナイコトハ前詳論ノ通リデ
アリマス從ヲテ井上ガソノ責任ヲ負ッベキ理由ハ毛頭ナイノデアリマス
又仮令右裁判手續ガ純理上違法アリトスルモ之レガ法律上許容セ
ラルベキモノナリト信ジタルハ相當ノ理由アリ違法性ノ認識ヲ欠ク犯意
ナキモノデアルカラ犯罪ヲ構成セザル旨ニ詳論シタル通リデアリマス猶
Committion ニ於カセラレマシテハ次ノ諸点ニツイテモ特別ノ御考
慮ヲ賜ハランコトヲ切望致シマス井上ハ職業軍人デハアリマセヌ
High school ヲ卒業シテ入隊シ現役ノ軍隊教育ヲ受ケマシタノモハ僅カ
ニケ年ニ過ギマセヌ此間軍曹ニ昇進除隊トナリ民間會社ノ一事務
員トシテ平和ナル事業ニ從事シテ居タモノデアリマスガ今次戰爭ニ召集セラレ
戰地ニ於テ將校トナッタ地位ノ低イ一大尉ニ過ギマセヌ「ヤルート」
ニ於キマシテハ升田少將ノ下ニハ新留海軍少佐古木陸軍少佐鈴木
海軍少佐中村海軍少佐等ノ先任高級ノ將校ガアル何等重要ナル事務
ニハ関與スルコトヲ得ズ神野大尉作田大尉ト同列ノ下級將校ニ過
ギマセヌ　ミレ島其ノ他他島ノ事情ニツイテ「升田少將ハ井上大尉ハ他
島ノ事情ハ知ラナイデアロウガ云々」トイウタノ証言ニ関連シ軍機
密ニ関スル事項ハ新留少佐古木少佐等ノ幹部將校ト情報將校
タル森川中尉以外ニハ知ラサレマセヌデシタノデ私ハミレ島其ノ他々島
ノ事情ニツイテハ何ニモ知リマセヌデシタ」ト証言シテ居リマスコノ証言ニ
依リマシテモ被告ノ地位ガ如何ニ低イコトガ推知サレル処デアリマス

"11 (79)"

従テ本件調査審理執行ニ当ル迄ハ一切ガ被告人ハ只上官ノ命令ニ依リ行ツタモノデアリマシテ彼ノ自発的意思ノ実現シタル所ハ何等之ヲ認メ得ナイノデアリマス、殊ニ井上ガ子供ノ処刑ニ関シ「私ハ子供ヲ処刑スルニ忍ビマセン又何トカ他ノ方法ヲトツテ頂ケナイデセウカ然ラザレバ二三日御猶予ヲ乍ヘテ私ニ考ヘサセテ下サイ」ト矢田少将ニ願出デタノニ対シ矢田少将ハ「子供ニ対スル処刑ガ如何ニ苦シイカハ自分ト雖モ同様ダ然シコノ危急ノ場合軍ノ生存ヲ保持スルタメニ已ムヲ得ズ処刑シナケレバナラヌコトハ已ニ申シ傳ヘタ通リデアル殊ニ已ニ判決シタコトデアル今更意見ヲ述ルコトハ許サス、命令ヲ実行セヨト声ヲ荒ゲテ厳命シ井上ハ今ハ已ムナク命令ヲ実行シタノデアリマス」トハ古木少佐ノ証言デ井上モ会様ニ述ベテ居リマス、軍隊ノ命令ハ勅諭ニ基キ作戦要務令内務令艦船職務服務規定等ノ諸規定ニ依リ下達セラルル命令ハ断ジテ実行セシムルコトニナツテ居リマス

陸戦要務綱領ニハ　軍紀ハ軍隊ノ命脈ニシテ和協ハ其ノ血液ナリ軍紀ノ要ハ服従ニ在リ

艦船職員服務規定

四、命令ハ軍隊活動ノ源泉ニシテ確実且適切ナルヲ要シ又一度命ジタルコトハ命令者ニ於テ其ノ実行ヲ監視之ガ徹底ヲ期セザル可ラズ

六、軍隊ニ於ケル服従ハ絶対的ニシテ軍人ノ第ニノ天性タラザルベカラズ一旦命令ヲ受ケタル後或ハ其ノ行ヒ難キヲ訴ヘ或ハ実行ヲ懈リ或ハ其ノ当否ヲ議スルガ如キハ断ジテ容許スベカラズ、トノ規定デアルノデアリマス而シテ平時ニアリマシテハ上官ノ命令ニ対シテハ下官

"11(80)'

ノ意見ヲ具申スルコトハ許サレルガ其ノ意見ガ採用セラレザル場合ハ命令ノ拒否ハ絶對ニ許サヌノデアリマス、然シ敵前戦場ニアリテハ意見ノ具申ヲ許サナイノデ一度命令発セラレタル以上服従ハ絶對デアリマシテ若シ拒否シタル場合海軍刑法第55條ノ抗命ノ罪ニ依ッテ処罰セラルルノデアリマス、海軍刑法第55條上官ノ命令ニ反抗シ又ハ之ニ服従セザルモノハ左ノ区別ニ従ヒ処断ス

一、敵前ナル時ハ死刑又ハ無期若クハ十年以上ノ禁錮ニ処ス

コレ等命令服従ノ関係ハ独リ日本ノ軍隊ノミナラズ何レノ國ノ軍隊ニ於テモ同様デアラウト存ジマスガ實ニ軍隊ノ命令ハ峻嚴デアリマス之レ等峻嚴ナル命令ニ依リ絶對絶命抗スヘカラザル被告ノ立場ヲモ上述記ノ法律上ノ理由ト共ニ御考察御判断ヲ賜ハリ度イノデアリマス最後ニ被告井上ノ人格ニ付キ深キ御考慮ヲ賜ハランコトヲ彼レガ如何ナル人ヤ如何ナル性格デアルカハ各委員ニ於テ本法廷ニ於テ親シク御認識ヲ賜ハッタコトト信ジマス前述セル如ク彼ハ職業的軍人デハナイノデアリ召集セラレ軍務ニ服シタルモノデアリマス其ノ性温厚、物靜カナル一市民デアリマス信仰心厚ク他人ニ對シ親切デ義理固ク何処迄モ責任ヲ守ル所謂村風ナデアリマス「ヤルート」ニ於キマシテモ同僚、上下官、ヨク等シク信頼セラレ特務班長トシテモ彼ノ性格トシテハ適當デハナイノデアリマスガ他ニハ將兵ノ信頼スル人物ガナク特ニ彼ガ信頼セラレ其ノ任ニアッタモノデアリマシテ現在グアムニ居リマス証人團ノ全員彼ノ徳ヲ讃ヘナイ者ハナイノデアリマス又彼ノ家庭ハ年老イタル母ト力弱キ妻ト妹及彼ノ出征後産マレ未ダ父ヲ見ナイ六才ノ女児ガ彼ノ深切ニモマレ侘ビシク彼ノ帰宅ヲ待ッ

"11(81)'

テ居ルノデアリマス又彼ノ家族ハ生キル術ガナイノデアリマス何
卒御名鑑ニ依リマシテ無罪ノ御判決ヲ賜ヒ被告ヲシテ再ビ社
會人類ノタメ貢献スルノ機會ヲ與ヘラレマスルヨウ御願シテ止ミ
マセス

以上

秋元寅一郎

'11(82)'

ARGUMENT FOR THE ACCUSED INOUE FUMIO DELIVERED

BY AKIMOTO YUICHIRO ON 29 MAY 1947

* * * * * * * *

Your Honor, the President and Members of the Commission.

I would like to urge a finding of not guilty for the accused Inoue Fumio.

Before entering the main discourse of my argument, I would like to place before you some inspiring historic illustrations of criminal cases tried in Japan and the United States concerning the independence of judicial power and the maintenance of the sanctity of trial as reference material in your judgment.

The first example is the Otsu Case which is famous in the history of criminal cases of Japan. The incident is one in which a Japanese policeman tried to injure a Russian Imperial Prince. It happened before the breakout of the Russo-Japanese War when the feelings of both the Japanese and the Russians were about to collide with each other.

A Russian Prince was making a trip around Japan, and he arrived at Otsu in Shiga Prefecture when a policeman, with his false patriotism, tried to injure the Prince. This became a serious international affair between Japan and Russia. At that time Japan had a constitutional government in force following the examples of the advanced civilized states in Europe and America, and she applied the methods of these civilized states throughout her judicial system. She strictly followed the fundamental principle of mutual independence of the legislature, the executive, and the judiciary. Especially, concerning the independence of the judiciary she held a grave attitude that no power of any state could influence.

However, her national strength could not equal that of the other advanced civilized states.

At that time, Russia was one of the strongest countries in the world and made light of Japan. So she pressed Japan hard in the incident of the Prince and requested Japan to deliver the criminal. However, since this crime was committed by a Japanese in Japan, it was naturally under the jurisdiction of the Japanese court. It was not permissible for a constitutional state to deliver the criminal to Russia. Japanese agreement to this request meant suicide for Japan who intended and tried to be a civilized state. So she firmly rejected this request. Then Russia made a second request, and asked Japan to condemn the criminal to death. The circumstances were such that, if Japan did not agree with the request, diplomatic relations between Japan and Russia would have been severed and a state of war might arise.

So the Japanese government ordered the Minister of Justice and the Judge Advocate General to determine the findings and condemn him to death.

However, according to the Japanese Criminal Code, a simple injury or an attempted homicide cannot be punished by death. So they extended the law and applied the provisions of a crime against the Japanese Imperial Household. In the effective Criminal Code, Article 73 thereof provides, "Every person who injures or tries to injure the Emperor, the Emperor's grandmother, the Empress Dowager, the Empress, the Crown Prince or the Emperor's eldest grandson shall be condemned to death". In the Criminal Code of the time, there was also the same provision. And they tried to apply this provision in order to give him a death sentence.

After the hardships of the Meiji Restoration, Japan was able to become one of the civilized states of the world. But if she had sentenced him in such a way, that is, if she had violated her own judicial system under the unbearable pressure of a foreign country, she would have again become a barbarous state. But there was a man who saved Japan from this crisis. He was Kojima, Iken, the President of the Supreme Court, whom we can never forget in the judicial history of Japan.

President Kojima was very much surprised to hear about this situation. He stated that this was a serious violation of the constitution and that the infringement of the judicial power by the executive had to be repelled on any account. If not, Japan could not exist as an independent nation. He went himself to Otsu with the judges of the supreme court where he encouraged the judges of the district court of the place. On the other hand, the Judge Advocate General, the chief investigator and others, were staying at Otsu, and the Minister of Justice also went to Otsu. They urged the judge advocates and pressed the judges hard. Thus, a violent struggle was enjoined between the prosecution and the judicial staff. But, because of the earnest efforts of the judges, not to speak of President Kojima, a fair trial was able to be conducted after all, and the position of judicial power was maintained. And the Japanese judicial system could develop to the advanced state in which it is today.

The result of this trial brought about an unexpectedly good result. Russia came to admit the civilization of Japan. This is a page in the history of the Japanese judicial system of which we Japanese lawyers are proud.

.....

The second historic story happened in the United States in which the prosecutor protected the independence and the solemnity of judicial power, and I think you are aware of it.

In 1933, a murder was committed at Bridgeport, Connecticut. An Episcopalian minister was murdered by somebody, but the criminal could not be found or arrested. In order to evade the blame and the uproar of the people, the police arrested an innocent citizen. They compelled him to make a confession, produced many dubious witnesses and tried to punish him.

At that time, Mr. Homer Cummings, a prosecutor, in spite of the overwhelming pressure and threats of a political party, insisted on a finding of not guilty for for the accused even at the risk of his life and was successful in proving it. The duty of the prosecutor is not to punish the accused, but to protect justice in behalf of the state. Don't be defeated by power and don't stick to a narrow-minded professional sense. This was his noble, righteous belief. With this belief, he protected the independence of judicial power in a crisis. He is really an admirable man.

I believe that, because of the noble moving efforts of the Japanese judge in the first case and the American prosecutor in the second, the sanctity of trial in both countries was maintained. I was deeply impressed and instructed by these magnificent illustrations.

When we consider a criminal fact, we must see it from various points of view. Even if an accused ought to be found guilty from the facts, we must not neglect the subjective and objective circumstances surrounding the accused, and if we find some points permissible from the points of view of law and morals or if we find some points with which we may really sympathize, we must pay full attention to those points. Not only is this the responsibility of the defense counsel

but the judge and the prosecutor who alleged the crime must cooperate in this in their own position to maintain righteousness. I believe if, in this way, the trials are fairly carried out, the responsibility of those persons for the maintenance of the social order can be fulfilled.

Primarily, the punishment imposed ought to be limited to what is really necessary to maintain order in a state or a society. It is based upon the moral standards of society in general, and is an instrument which is necessary and inevitable to maintain order. We must not forget, however, that if it exceeds the necessary limit, it can not attain its purpose but on the contrary the state.

Mr. Jhering, a German scholor of criminal law said, "Punishment is just like a double-edged sword, and if we misuse it, both the criminal and the state will be injured. The most important thing in criminal law is to know the life, the power and the value of a man." (Jhering: Zweck in Rechet I, 4 aufl., s.292.f.)

The purpose of punishment is still less revenge as it was in barbaric days, nor it is a means of retribution as it was in the feudal age. Now, in the judicial system of the civilized states, thorough education is given to the criminals in society and will again contribute to society and mankind. As judicial history shows, the American judicial system gave this example and other countries followed it. It is a principle which stands rejected in the criminal code of today that a crime must necessarily be punished.

Law must not be cold and cruel. In a Japanese trial, the phrase "tears of the law" is often used. Law has a warm heart and tears of sympathy. It is not a mere cruel formality. If acts constitute crimes in form, some of them are permissible because of the moral standards of society, some of them are really to be sympathized with and some of them are committed through necessity. According to these subjective and objective circumstances, there are provisions in some cases that the act does not constitute a crime. In some cases sentence may be remitted, and in some cases the sentence may be legally mitigated, according to the circumstances. There is also a system of probation. As is clear in the history of judicial systems, probation was originated by the United States and all other countries followed the example.

However, the law is not a living being. It is the man who makes it live or die. If it were a cold man, the result will be like a devil's work; but if a warm man, a divine work. We may feel this keenly when we study the progress of the history of judicial systems and particularly the history of trials.

The accused is not always a criminal. The subjective and objective circumstances carefully, release those who must be released and punish those who must be punished. It is most important to consider the application of law within the limits necessary to maintain peace, order and good manners in the society.

I shall enter my main discourse in the light of these matters. I hope for your careful consideration for these points.

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The facts in this case are clear. The problem is their legal interpretation.

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

"JJ (3)"

Concerning jurisdiction, I argued in detail in my preceding argument, so that I have stated my contentions and will not repeat them again. But, I would like to point out the inconsistencies in the opinion of the judge advocate in order to prove my assertion.

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

As to jurisdiction, he denied Japanese sovereignty and insisted that America had jurisdiction because it is now an American occupied territory. Of course, I don't deny the exercise of American jurisdiction over the cases in the territory after the occupation by the American Forces.

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

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

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

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

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

Especially, I would like to ask the Commission to pay attention to the following:

The place where the act of the accused was committed is at present American occupied territory, and America now has the jurisdiction over the place. So the fact that this case is just the same as one in American territory in the transition period in which both the new and old

laws are effective might be misunderstood. However this case is entirely different from such a case. In its legal aspect, this case is an example of the fact that in international relations the jurisdiction of a country might clash with that of another country. We must consider facts and its legal relation to time. The judge advocate seems to misunderstand this point.

The places where the acts in this case were committed were Jaluit Atoll and Mille Atoll which were, at that time, territory under Japanese administration. Both the person who did the execution and the persons who were executed were Japanese, and the Japanese Armed Forces of the Japanese Government tried and sentenced them. The United States was at that time nothing but a foreign country which had no connection with the affair. The place happened to be occupied by the United States, and so she now has the jurisdiction over the place. Therefore, the United States can exercise her jurisdiction in the place only in cases which were committed after January 1946 when she occupied the place.

The relation between this case and the United States is the same as a case in which a criminal who committed a crime in a foreign country is now living in American territory, and there is no further relationship. Therefore, in such a case, only the country of which the criminal is a subject has jurisdiction over the criminal. The only procedure which remains in this case is that the Japanese government, the country of which the criminal is a subject, must ask the United States, in whose territory the criminal is living now, to deliver the criminal according to the Criminal Extradition Convention. America has no jurisdiction over this case on any account.

Therefore, it is unlawful to try this case in this court, an American court, only because the criminal is now living in territory occupied by the United States.

As I have explained in detail in my objection concerning jurisdiction in this case that it is not a war crime, I shall not repeat it here. But the judge advocate might insist that the United States, the belligerent, has jurisdiction over this case, by maintaining that this is a war crime in which spies were punished without previous trial as alleged in Charge II. Of course, the "spy" alleged in Charge II is different from the one stipulated in Articles 29 and 30 of the Hague Convention, and is the "spy" as set forth in the Japanese Criminal Code. So this crime is treason. It is inadmissible to regard this case as a war crime and to apply the Hague Convention only because the same term "spy" happen to be used. I shall argue later on this point.

However, Even if we assume that this is a war crime, a belligerent can try a national of her opponent only in such a case as when rechtsgut, or protecion of the law, is violated by the criminal who belongs to that country. For instance, the United States can exercise her jurisdiction only when the rechtsgut of her people or her country is damaged by the war crime.

But the natives of Mille who were executed were subject to Japanese sovereignity and were governed by Japanese laws in the same way as Japanese subjects. Since they violated Japanese law, they were punished by Japanese law. This incident has no connection with the United States, and does not affect any interest of the United States. The United States has no legal relation nor any practical connection to this case. I can not understand why the United States is able to try this case. From any point of view, there is no reason which enables this Commission, an American Court, to try this case.

The second problem is whether or not the act of the accused in this case is legally permissible, or in other words, whether or not the act constitutes a crime, or whether or not he must not be punished. This is the most important point.

However, according to the charges in this case, specification 1 of Charge 1 states: the accused "did, on or about 8 April 1945, on Jaluit Atoll, Marshall Islands, wilfully, feloniously, with premeditation and malice aforethought, without justifiable cause, kill, and cause to be killed, seven (7) unarmed native inhabitants of the Marshall Islands, namely, Raliejap, the wife of Raliejap, Niebet, Anchio, Ochiro, Siro and Lacojirik", and specification 2 thereof states that the accused killed and caused to be killed the native, Raline, in the same place in the same condition on or about 13 April 1945, and both specifications allege that this violates Article 199 of the Criminal Code of Japan. Specifications 1 and 2 of charge 2 allege that the accused punished and caused to be punished, these natives by killing.

Then, in what circumstances and with what reason did the accused execute these natives? Let us sum up the testimony of the witnesses and state the outline as follows.

In February, 1944, Kwajalein, the location of the 6th Naval Base Headquarters, fell. Jaluit Defense Garrison was cut off from every means of transportation to the rear and the surrounding bases. Losing its home base, the Garrison came directly under the command of the Commander-in-Chief of the 4th Fleet. But only a few tele-communications between the two bases were made at all. In March 1944, the Commander-in-Chief of the 4th Fleet sent a dispatch to Rear Admiral Masuda, the Supreme Commander of the Jaluit Defense Garrison, which said "From now on, all administrative and judicial affairs of each base shall be dealt with by the Supreme Commander of the base". Thus the said Supreme Commander was vested with the highest authority, and, under his limitless authority, all military, administrative and judicial affairs were carried on.

At that time, Jaluit suffered from intense air-raids and bombardments by warships day and night. Especially, were the air-raids terrible. They came every day several times with groups of ten-odd planes taking part.

Under such conditions, provisions, armament and ammunition ran short; buildings, facilities and transport ships were all damaged. Jaluit literally became a ruin. Health conditions of the military personnel became poorer day by day. Military discipline sank lower and lower. It was afraid that not only the natives but military men and gunzoku might desert. The Defense Garrison was really in pressing circumstances, only one step from the death.

These circumstances were made clear by the testimony of Major Furuki, Capt. Inoue and 1st Lt. Morikawa, and I think that the Commission is already well acquainted with them through the preceding case.

Under these dangerous, pressing circumstances, an unhappy incident occurred; which is this case.

About the end of March 1944, eight natives of Mille Atoll, namely Raliejap, Raliejap's wife, Anchio, Neibet, Raline, Ochira, Lacojirik and Siro arrived at Jaluit in two groups. One group, namely Raliejap, his wife, Anchio and Neibet sneaked into Jaluit Island, at the southern end of Jaluit Atoll, and another group, namely, Raline, Ochira, Lacojirik and Siro into Chitogen Village at the northern end of the Atoll. These natives, after plotting together, killed a Japanese guard, P.O. Tanaka, while carrying military necessities in the lagoon of Mille Atoll, stole the boat, military provisions and a boat which was under the custody of the district commander Takahashi, and deserted. They deserted to an American ship on board of which they were given directions from an American officer, "Sneak into Jaluit Atoll, see the conditions of the Japanese Armed Forces, and advise the natives, gunzokus and military personnel of the Atoll to desert." Having received the order, they sneaked in as stated before, and carried out a part of their duty on some islands. The result was that many natives began to desert from Jaluit

Atoll. In May, about 600 natives deserted in a mass and the defense of Jaluit was completely destroyed on account of that.

These facts are proved by the prosecution's witness 1st Lt. Morikawa, the witness for the defense, namely Manako Tatsuichi, Fueta, Kiyoshi, Furuki, Hidesaku and Inoue, Fumio and by the deposition of Tanaka, Masaji. I shall cite a part of their testimony as follows:

In such an emergency and crisis, the most important thing for the Jaluit Defense Garrison was the maintenance of military discipline. In other islands, riots and desertion of natives, military men and gunzokus, and rebellion of Koreans were so frequent at that time that some units were destroyed on account of them. However, owing to the strenuous efforts of Rear Admiral Masuda, the supreme commander, Jaluit was able to maintain itself in someway or other. In such a serious time, the sneaking of Mille natives into Jaluit as spies was an important affair which would influence the existance of the Jaluit Defense Garrison a great deal.

Rear Admiral Masuda consulted with Lt. Commander Shintone, and in his presence ordered Captain Inoue and Lt. Morikawa to investigate the natives. As the result of the investigation, the crimes of the natives which I stated above were brought to light and determined. Masuda thought that this was a very serious affair which concerned with the lives of the Jaluit Defense Garrison, and worried about the fact that the slightest mistake in dealing with this affair might cause the destruction of the Japanese Forces.

He called Major Furuki, who was then going around the outlying islands for inspection, back to the Headquarters.

On 3 April 1945, he summoned Lt. Commander Shintone, Major Furuki and Captain Inoue, to his air-raid shelter, held a consultation concerning the trial of these natives, and gave them the order concerning the organization and the procedure of the trial. On this point, Major Furuki testified in general as follows:

Masuda called us and said, "As the result of the investigation, I found that the natives of Mille Atoll who sneaked into Jaluit on 31 March did not drift ashore. But it is suspected that they were ordered to act as spies by the enemy, killed a Japanese soldier, stole boats and provisions for military use and deserted. If it is true, it is a serious affair for the Jaluit Defense Garrison. At present, we have no means to send them to the local court at Ponape or the military court at Truk. So, according to the authority vested in me, I shall hold a trial by special procedure with the ranking officers on Jaluit. Lt. Commander Shintone and Major Furuki, you are appointed as judges with me. Captain Inoue you are appointed as a judge advocate."

Rear Admiral Masuda made his air-raid shelter the room for the trial, and the trial continued with the said members from April 3 till April 9. The trial for four (4) natives of Ralie jap's group began on the 3rd of April and was finished on the fifth, and four natives of Ralmo's group were tried on the 6th and 7th. On the 8th, all of these accused were tried together. Of course, the investigation was made parallel with the trial, and Masuda went himself to the place of confinement, examined them directly and continued the trial. On the 8th of April, all facts of what these accused had done were established.

The crimes of murder, theft, spying and treason committed by the six natives excluding Siro and Neibet were clearly proved, and the crime of spying committed by Siro and Neibet was clearly established.

In order to establish these facts, the boats and other articles carried by the accused, especially the clothing of P.O. Tanaka who was

killed by them, -- (on the boat the name of 66nd Garrison and on the coat the name of P.O. Tanaka was written) and the report of the commanding officers of Jaluit and Chitogen districts into which these natives sneaked were introduced as evidence.

On April 8, after the examination and consultation, Rear Admiral Masuda said that the sentence would be announced the next day and that Captain Inoue had to prepare his opinion which he would deliver as a judge advocate and Lt. Commander Shintone and Major Furuki as judges would prepare theirs.

On this point, the Judge Advocate asked the witness Furuki, "At the end of the examination and consultation of the 8th of April did Rear Admiral Masuda order them to judge whether the accused were guilty?" Answer: "No he did not. But ---". The witness tried to continue his testimony, but the judge advocate stopped him.

Then, the defense, in the cross-examination of the witness, asked him to show clearly what the meaning of "consider the 'Hanketsu'", which Masuda had spoken was. The witness testified that 'Hanketsu' includes the finding of guilty or not guilty and also the decision of the sentence and that this is common knowledge in a Japanese trial. I am very sorry that the judge advocate tried to give an impression to the Commission that the counsel instructed the witness on this point.

We, the defense counsel, have no desire except to ask for a fair trial. Our consciences do not allow us to attempt a statement different from the fact. Of course, the definition of "Hanketsu" is not an important question. But, we hope that there will not be slightest misunderstandings concerning these points for the sake of the accused and for the honor of the Japanese defense counsel. So we tried to introduce as evidence a statement of the accused which had been submitted to the Judge Advocate General of the United States Navy through Judge Advocate Flynn in September 1946, many days before our arrival on Guam. Through the objection of the Judge Adovcate, we could not do what we hoped. But the content of the statement is not at all at variance with the testimony of the accused and the other witnesses in this court.

I would like to show that generally, there is no such system as findings in Japanese trial procedure. In Japan, in any trial, we don't decide whether the accused is guilty or not guilty before the sentence.

After the examination and the consultation is over, the president of the trial decides on a verdict of guilty or not guilty. If the accused is not guilty, he announces that the accused is not guilty. If the accused is guilty, he announces the sentence at the same time. This final procedure at the court is called "Hanketsu". In the American procedure, there are two different acts, finding and sentence. But in Japan, they are not separate but unified. So we can not think that Masuda ordered the judges to consider whether the accused were guilty or not guilty. I have made this comment in order to avoid misunderstandings.

Then on April 9, the last examination and consultation was held at the air-raid shelter of Rear Admiral Masuda. At this time, Captain Inoue stated his opinion as to punishment of the accused as a judge advocate. According to the testimonies of Major Furuki and Captain Inoue, the contents of the opinion were:

"These criminal natives were all attached to the Japanese Defense Garrison of Mille Atoll. Six natives, excluding the minors, namely Siro and Neibet, acting jointly in pursuance of a common intent, killed a Japanese soldier at Mille Atoll, stole boats for military use and military provisions and deserted to the enemy ship. On board the ship, they were given the duties of spies to sneak into Jaluit, to reconnoiter the conditions of the Japanese Armed Forces and to advise the natives,

nilitary men and gunzokus to desert from the atoll by an American officer. After they were given these duties, with the intent and purpose to perform them, they sneaked into Jaluit island, at the southern end of Jaluit Atoll and Chitogen Island, at the northern end, and informed the natives of these islands of their duties. These acts constitute crimes of homicide, theft, spying and treason in the Japanese Criminal Code, and the crime of benefiting the enemy, the crime of destroying military property, the crime of causing a shortage of military provisions, the crime of deserting to the enemy and the crime of killing the guard. All set forth in the Japanese Naval Criminal Code. Besides they were committed in the face of the enemy, so their crimes were very serious. These crimes would have caused the destruction of military discipline, made it impossible to carry on the war and would have brought about the annihilation of the Imperial Japanese Armed Forces. So, according to law, they deserve the death sentence because of these crimes. Although Siro and Neibet committed the crime of spying as set forth in the Japanese Criminal Code, both of them minors, I hope that they will not be given the death sentence. It will be better to confine them under guard on the island next to Emidj where no natives are living and make it impossible for them to act as spies."

Two judges namely Shintome and Furuki stated similar opinions. But Rear Admiral Masuda announced that all of them should be sentenced to death, and he gave the reason as follows:

"As to the punishment of the six adults, my opinion is quite the same as yours. My private feeling is that it is unbearable for me to execute the two children. I think I sympathize much more than you do with these young natives because I have many children. But you must consider the actual condition of Jaluit. We are now on the verge of annihilation. In these pressing circumstances, if the condition of our forces were known to the enemy, and if the desertion of natives, military men and gunzokus happen, we would soon be annihilated. Although these minors are small in physical appearance, their mentality is as well developed as adults. I can not let them make contact with the natives and still less the military men and gunzokus. But I am not thinking of how to carry out counter-intelligence. Since the time when the crimes of the natives was brought to light, I thought and thought day and night about how to deal with these minors. In fact, Ralime, the ringleader, deserted last night and we have not yet found him, have we? When we think of the fact of the desertion of the criminal, there is only one way in order to maintain military discipline and protect us from annihilation -- that is to execute all these natives." He stated the above opinion sorrowfully and did not take the opinions of Furuki, Shintome, and Inoue into consideration. Then a judgment paper was prepared by Rear Admiral Masuda who in addition wrote the order to execute the natives. He read it and ordered Captain Inoue to perform the execution.

When Captain Inoue received this order from Admiral Masuda, he stated, "I an very sorry for the children and I can not execute them. I beg you will allow me not to execute the children. I would like to consider whether or not there is any other method then the execution of these children, so I beg you to postpone it for a few days."

Furuki testified that Rear Admiral Masuda replied to this plea in a loud voice as follows:

"This order has been given to you by the decision of the examination and consultation, not because of my private feeling. I think that you ought to know better than anyone else on Jaluit what an order is. I will not allow you to state your opinion further about the order. I'll go to the place of their confinement this evening to announce the sentence. Inoue, you come with me."

After that Inoue said to Furuki, "It is very bitter for me to execute these children. But I must do it because I was ordered to do so. I have never felt more sorrowful than I do now that I am a military man."

That evening, Rear Admiral Masuda and Inoue went together by motorcycle to the place of confinement to announce sentence. On the next day, Raline was captured. And on or about 11th of April, Masuda assembled all the judges and Captain Inoue, wrote the order for the execution of Raline, at the end of the judgment paper and ordered Inoue to perform the execution. -- This is the testimony of Major Furuki.

Captain Inoue also testified as follows on this point:

"On April 9, the last examination and consultation was held. After the examination and consultation, Rear Admiral Masuda announced the sentence of death for all eight natives. And, then and there, in the presence of Major Furuki and Lt. Commander Shintomo, he ordered me to perform the execution. The order was written at the end of the judgment paper. He read it and gave me the order. This judgment was announced by Rear Admiral Masuda as the result of the examination and consultation, and the order of execution was given to me as the result of the announcement of the death sentence. So I believed that it was a legal order by the law, and executed the natives by shooting. But, as to the execution of the two under-aged natives, I stated my opinion that they should be forgiven. That was, I said that I hope they will be forgiven in someway or other, and that if it was impossible to forgive them I wanted to have a few days to think about it. But Masuda did not listen to me at all, and solemnly ordered me to execute them that evening. Then I came back to my room, and went to Furuki's quarters, told him (my commanding officer) of my sorrowful feeling, and asked him what to do. Then Furuki said to me, 'I and Shimtome also gave the same opinion, but Masuda did not listen to us. Now that it is an order, you can do no other but obey it.' As I could not avoid it, I performed the execution. I did it believing that it was a proper act based upon the law."

After the execution of the eight natives was completed, on or about 14th of April, the execution of the death sentence was announced by Rear Admiral Masuda, the supreme commander of the Jaluit base. The announcement was:

"Natives of Mili who sneaked into Jaluit at the end of March killed a Japanese soldier, stole military property, deserted, were assigned the duty of spying on an American ship, sneaked into the operational area of the Jaluit Defense Garrison and spied. Since they were such serious criminals, we sentenced all of them to death and executed them. So we hereby announce it as above."

These are the salient features in this incident, the outline of this case. And these facts were proved by the testimony of the witnesses both of the prosecution and the defense.

Summing up the testimony of all the witnesses, the authority of Rear Admiral Masuda, the supreme commander of Jaluit Atoll base, to hold a trial by special procedure is as follows:

After the fall of Kwajalein in February 1944, Jaluit was entirely isolated and the transportation to the other bases were cut off. Jaluit Atoll was a total battle field, and under intense attack by enery craft all men were in battle position. In peace time, Jaluit Atoll was administered by the South Seas Government at Palau, the civil court for the area was at Ponape, and the regular Military court was at Truk. But the transportation between these islands and Jaluit was entirely cut off, and there was no court at Jaluit. To meet such circumstances, the Commander-in-Chief of the 4th Fleet gave an order to Rear Admiral Masuda, the supreme commander for the area of Jaluit Atoll, in March or April 1944: "From now on, administrative and judicial affairs in Jaluit Atoll area shall be exercised by the supreme commander of the base." This means that the supreme authority in regard to military government was vested in the supreme commander of the area for the reason that the area was already a battle field and was in more serious circumstances than a place in which martial law was enforced. In these matters, this case is entirely the same as the preceding case, and I think that the Commission is already well acquainted with these circumstances. In the preceding case, the witness, Rear Admiral Arima, testified that the area was under duress and "henceforth Rear Admiral Masuda, the supreme commander of the base, was vested with the authority over military government and also

over affairs of a very wide scope other than military and after that it was not necessary for him to ask directions from the Commander-in-Chief of the 4th Fleet."

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

Even if we assume that there was no such order, the supreme commander of the base could have naturally dealt with the case by his authority. Transportation to the other bases was entirely cut off, and it was completely isolated battle field in the middle of the ocean. If there is no organization which exercises judicial authority, in such a place, who deals with the offenses committed there? If the American forces were in their place, the supreme commander of the base would have done it. It is unnecessary to say that there is not other way of dealing with the offenses.

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

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

Do these facts violate the Japanese Criminal Code and the laws and customs of war as are alleged in Charge I and II? Law ought to be a product of the morals of civilized society. The above mentioned acts are properly permissible from the point of view of the moral standards of civilized society. When we interpret the law, we must not fall into one-side, narrow formalism. We must fully consider the inevitable circumstances at that time and the mental state of the person from the fundamental point of view of the morals of society. I am convinced that the acts of the accused in this case do not constitute a crime. I would like to state my reasons as follows:

Charges I and II state, "wilfully, feloniously, with premeditation and malice aforethought, without justifiable cause." I wonder on what grounds such an assertion was made. It is only a utilization of a phraseology used for conventional crimes, and can not applied to the facts in this case.

This case is not that of murder of innocent people. The natives who were subject to the Japanese Armed Forces committed, in the face of the enemy, such felonies as murder, theft, and treason, interfered with the military operations and endangered the existence of the Defense Garrison. According to law, these crimes were carefully examined and consulted upon and after the judgment was announced they were executed. So, there is naturally "justifiable cause". The question is whether or not the procedure which they carried out according to law was complete, or, whether or not is was legally permissible. That is what we must judge. This is not a case which can be charged as murder. A natural crime such as murder depends upon the substance of the act itself. So there ought to be a clear distinction made between a natural crime and formal crime which is the result of a mistake in court procedure. The Judge Advocate has made a great mistake in this point.

I shall state the grounds upon which there was justifiable cause as follows:

Let us observe the relation between the offenses of the natives

in the charges and the provisions of the Japanese Criminal Code and the Japanese Naval Criminal Code.

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

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

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

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

Article 87 reads: "Attempts of the crimes in the preceding six articles shall be punished."

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

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

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

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

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

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

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

"JJ(12)"

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

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

Article 70 reads: "The attempted crime of Articles 50 to 61, 61-3, and 62 to 68 shall be punished."

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

Article 77 reads: "The attempted crime of Article 73 Item 1, Article 74 Item and the preceding Article shall be punished."

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

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

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

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

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

The six natives including Raline named in Charge I and II of this case, were Japanese subjects. They, acting jointly in pursuance of a common intent, killed a Japanese Guard, caused a theft of military property, deserted to the enemy and committed treason against the Japanese Empire. All of their crimes were of evil nature, and violated the above cited Japanese Criminal Code and the Japanese Naval Criminal Code. Besides the crimes of these natives were all boldly and flagrantly committed in the face of the enemy. If the U.S. Forces had been in place of the Japanese forces, they would have as severely punished them as the Japanese forces did. It cannot be denied that any military force in the world would punish these crimes severely in the face of the enemy. Still more was it natural for the Japanese forces at Jaluit Atoll who were then suffering under inexplicably pressing circumstances to condemn these criminals to death.

We must further consider the crime of the natives who were minors. As to the age of Siro and Neibot the testimony of the witnesses does not always coincide with one another.

The witness Manako Tatsuichi was living on Takowa Island where Siro was also living, so he is the man who knows the age of Siro best. According to his testimony, Siro was about 15 years old. And "Siro was collecting coconut toddy and climbing up tall coconut trees." He explained in detail that it is a very hard job usually performed by adults. Considering these points, his testimony that Siro was about 15 years old must be accurate.

"JJ (13)

Other witnesses testified that Siro looked about 12 or 13 years old as he was small in physical appearance, but that his mentality was well developed like that of an adult. Among the natives there is no system of registering name and the date of birth. So we can only guess at his age and can not know the exact fact about it. I hear that in the United States a child of more than 8 years old has criminal responsibility; but of course, it will be different according to the kind of the crime committed. I believe anyway that in general the crime of the child may be mitigated. If the crime of the children in this case were committed in peace time in Japan, I believe they would not be condemned to death. It will be clear by the testimonies of Furuki and Inoue that how Masuda worried about this point. However, in this case, the nature of the crime is an act of spying which was aimed to destroy military discipline in the face of the enemy. Besides, the Jaluit Defense Garrison was at that time in pressing conditions on the verge of annihilation. If they had left them as they were, it would have been natural that the Japanese Forces would have been completely destroyed. It is needless to say that it was a necessary act done in case of emergency in order to save the existence of all the Japanese Forces.

Article 37 of the Japanese Criminal Code states: "Unavoidable acts done in order to avert present danger to life, liberty, or property of ones self or another person are not punishable, provided the injury occasioned by such acts does not extend in degrees beyond the injury endeavored to be avoided. According to circumstances, however, punishment may be mitigated or remitted for acts exceeding such limits."

This provision can be applied not only to a person but also in such a case as to save the lives of all men in an army unit such as in this case.

Article 17 of the Japanese Naval Criminal Code states: "Unavoidable acts done in order to maintain military discipline in the face of the enemy or in case of emergency on ships are not punishable."

Article 22 of the Japanese Army Criminal Code states: "Unavoidable acts done in order to maintain military discipline in the face of the enemy or in case of emergency of a unit shall not be punished."

I think, in the United States Army and Naval Criminal Laws, there must be the same kind of stipulation also.

If unavoidable acts done in order to maintain military discipline in the face of the enemy or in case of emergency of a unit are not permitted by the law, it would be inpossible to carry out military operation. I believe that the act in this case is properly permissible by these provisions.

What I am talking about now is not the responsibility of the accused Inoue but that the prelude to the order of execution given to Inoue, that is the decision of the examination and consultation, is justifiable.

Inoue only investigated the case as an investigator, and only stated his opinion on the case as a judge advocate. He had neither authority nor responsibility for the examination and consultation or the judgment. He received the order of execution from Masuda as the result of the judgment and only performed the execution as his legitimate business. So the responsibility of Inoue is different from that

of examination, consultation and judgment. I shall state it later. But in short, the punishment for these natives was imposed according to law, and there is no unlawfulness nor abuse in it. I believe that the Commission will admit this.

The next point is whether the procedure in the trial of these natives is legal. As all witnesses testified, this is not a regular procedure. Needless to say, it was a trial by special procedure unavoidably done in order to meet special circumstances in the face of the enemy.

At that time Jaluit Atoll was in more serious a place than an area in which martial law was enforced. Although martial law was not formally in force in the area, it was clearly much more serious on Jaluit than in an area in which martial law was in force.

Primarily, martial law is enforced in a place other than a battle field in such a cases as when the place is under a dire emergency condition such as a battle field. In such a case, the authority of each civilian government is limited or ceases, and the military government is proclaimed and enforced by the supreme military commander of the district. It is needless to cite the stipulations, as each country of the world has such stipulations of the Martial law.

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

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

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

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

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

Inoue
JJ

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

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

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

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

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

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

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

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

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

It is quite proper that, according to the above provisions, Masuda, Shintome and Furuki were appointed as judges and, since there was no legal officers on Jaluit, Inoue was appointed as judge advocate in place of legal officers.

"JJ(16)"

Inoue
JJ

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

Therefore, it is proper and legal that no defense counsel was present in the trial by special procedure in which the Accused Inoue participated.

Concerning trial, article 96 of the Naval Court Martial Code states: "The consultation of judges shall be held and settled by the president. Its proceedings and the opinions of judges shall be kept in secret." Article 97 states: "The judge advocate shall state his opinion previous to those of all the judicial members....." As is stipulated in the aforesaid articles it was quite proper that the examinations and the consultations by special procedure in which the accused Inoue participated were not held in public.

Rear-admiral Masuda, the president, held and settled the consultation of the judges, and the opinions of the judges were kept secret. Inoue, in his duty as judge advocate, could only state his opinion, so that he could know the result of what he said. Therefore, he had no responsibility for the result of the trial.

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

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

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

In a trial procedure, the accused were not present at the court to make their own statement.

"JJ(17)"

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

If only they had taken the accused to the court, it would have been a regular trial; but, the fact was, on the contrary, the judges went to the confinement place of the accused. Is that the reason why this trial is illegal? I ask the commission to take careful consideration of this point.

In fact, a very careful judgment was made, a mere formality was wanting. Is that the fact why he was alleged to have committed murder or to have violated the laws of warfare? Practically speaking, can a very careless procedure be deemed a complete trial if only it is complete in form? Of course, compared with a complete trial such as this, it might have many faults. But at that time, 2,000 Japanese soldiers were hopelessly isolated on a solitary island in the ocean under rain of shots and shells. They resolved to fight to the last man and were in position themselves in the skirmish lines. Still they carried out the best trial they could. Having no sufficient shelter from air-raids, was it possible to hold a trial comparable to one in peace time? If these natives who committed the crime of desertion, were present at the court while the trial was in session, they might be able to escape during the confusion of air raids. If they could have deserted, they would have given information about the Japanese forces to the enemy and would have caused the defeat of Japanese forces. Even if they could hot have escaped, it is certain from the testimony of the witnesses that during the judgment, any men at the trial, not only the natives but also the senior officers would have been and were in a dangerous position as regards air raids. Isn't it legally permissible in such a condition to si plify the procedure? Yes, it is admissible.

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

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

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

What could be avoided in this case was the destruction of the lives and property of 4,000 military personnel, gunzokus, and natives which greatly concerned the rise or decline of Japan. What was lost was nothing but the statements of the accused in the court. As I stated, under the necessary circumstances, it could not be helped. Even if there is no such provision as Article 37 it is quote natural from the reasonof the law that the aforesaid act is permissible under such necessary circumstances. Still more, article 37 clearly shows that it is legally admissible. Therefore, it is unnecessary to say that the aforesaid siplified procedure is proper and legal.

"JJ(18)"

Inoue
JJ

Then, according to the sentence legally announced in this specially established court martial, Rear Admiral Masuda ordered Captain Inoue, the judge advocate, to execute these natives. According to thislegal order, without any suspicion, Inoue, Fumio, after fulfilling his duty as judge advocate, carried out the execution. The testimonies of each witness agreed in this.

Therefore, the phrase "without justificable cause" in Charge I and II in this case has no ground and is a mistake. This case legally has a justifiable cause. I believe it is quite clear on the legal grounds I have just mentioned.

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

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

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

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

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

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

Article 95 of the Naval Court Martial Law states: "The trial shall be done by consultation of a certain number of judges." Article 96 states: "The consultation of judges shall not be held public. The consultation of judges shall be held and settled by the president. Its proceedings and the opinions of judges shall be kept in secret." As is clearly provided, a distinction is made between the duty of judges and that of a judge advocate, and they can not intervene in the duty of one another. In the aforesaid trial by special procedure, the defendant Inoue was the judge advocate; Rear Admiral Masuda, Lieutenant Commander Shintome and Major Furuki were the judges, and Masuda was the presiding member. This is evident by the testimony of the witnesses.

"JJ(19)"

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

The judge advocate asked the witness in this court whether the investigators administered the oaths to their witnesses. But in Japanese trial procedure, it is the principle that an oath is unnecessary for the questioning of a witness by the investigator or by the judge advocate whether in a civil court or in a military court. (Article 267 of the Naval Court Martial Code) and as also stated in the same code, the consultation of the judges is settled by the president and it is not held in public but is kept secret. So the judge advocate can not participate in it nor know about it.

The trial by special procedure is legal as I have mentioned above. But even if we assume that there is some mistake in the procedure, it is the responsibility of the judges and not the judge advocate. A trial is carried on by human beings so it is natural that there is often a mistake. That is the reason why thete are three hierarchie judiciare in the trials of civilized procedure in a normal trial, the accused is allowed to complain or recomplain, and if there is a mistake in the substance of the trial, he is allowed to appeal or reappeal, except in a specially established court martial such as the one in this case.

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

Next, I would like to discuss the responsibility of Inoue for the execution as an executioner in the trial.

Concerning the execution of the sentence, article 501 of Chapter 5 "Execution" in the Naval Court Martial Code states: "The execution of the sentence shall be supervised by the judge advocate of the court martial which tired the case or by the judge advocate of the court martial to which the examining judge of the case belongs."

"JJ(20)"

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

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

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

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

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

As I stated before, Rear Admiral Masuda, the commanding officer of the unit in which the trials by special procedure were held, issued after the sentence, proper orders for the execution according to the stipulation of article 501 of the Naval Court Martial Law, to receive the orders and to carry out the execution. The form and substance of these orders were entirely legal. Inoue, the executioner, could not refuse to do it.

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

Inoue
JJ

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

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

Articles 35 to 38 inclusive of Chapter 7 of the Japanese Criminal Code provides for the non-existance of crime (non-constitution) and permissible acts.

Now, I would like to ask the understanding of the commission and the judge advocate especially in the fundamental rules for the interpretation of the provisions of the Japanese Criminal Code.

The Japanese Criminal Code is divided in two parts: Book I "General Principles" and Book II "Crimes." Book I "General Principles" provides for the constitution and non-constitution of crimes, mitigation and terms of punishments, and Book II "Crimes" provides for the kinds and types of crimes.

In the detailed treatments of Book II are provided only the kinds and types of crimes and the scope of punishment thereof. Constitution or non-constitution of crimes, determination of punishment, legal remission or mitigation of sentence and the exemption or mitigation of sentence at the trial are provided in the "General Principles." In determinigg whether the facts of the crime are established or what punishments shall be imposed, the provisions of both two books are applied together. So we cannot judge the facts of the crime only with the provisions of Book II. I think that the judge advocate made a mistake on this point. Article 199 of the Japanese Criminal Code provides, "Every person who has killed another person....," and it does not stipulate as to criminal intent. So the judge advocate seems to think that, in the Criminal Code of Japan, if there is a causal relation between the act of the doctor and the death. But that does not immediately constitute a crime. If the doctor performed the operation as his legitimate business and the patient died, it is not homicide. But if, on the contrary, the doctor had criminal intent to kill through the operation and the patient died thereby, that is homicide. The question is whether he had criminal intent or not, or in other words, the existance of a criminal intent is a necessary condition for the consititution of a crime.

In another instance, an executioner was ordered by his commanding officer to perform the execution according to the judgment of the trial, and he did it as his official duty. In this case there is also a causal relation between the act of the executioner and the death of the prisoner. But it does not immediately constitute a crime. If he was ordered by a lawful order from a commanding officer who had the legal authority to do so and he performed the execution, it does not constitute a crime. But if, on the contrary, the giver of the order had no legal authority to do so, forged the order and gave the order to his subordinate with intent to commit murder, and if the subordinate performed the order knowing that his superior had criminal intent, then, that would consitute a crime of homicide.

"JJ(22)"

Inoue
JJ

Then, the most important problem is that of criminal intent.

In short, I ask you to take notice that whether an act consitutes a crime or what punishment must be imposed must be decided according to the provisions of the "General Principles," Book I.

And Articles 35 to 38 inclusive of Chapter 7 of the Japanese Criminal Code provide for non-existance and non-constitution of crime in certain cases. An act of Article 199 must be considered together with the provisions of this Chapter 7 and then we can judge whether or not it constitutes a crime or whether or not it ought to be punished.

First I shall argue about the criminal intent.

Article 33 of the Japanese Criminal Code states: "Except as otherwise provided by special provisions of law, acts done without criminal intent are not punishable. A person who without knowledge (of the fact) has committed a grave offense (crime) can not be punished in proportion to its gravity. Ignorance of the law can not be invoked to establish absence of intent to commit a crime, but the punishment may be mitigated according to the circumstances."

A crime is an unlawful act with criminal intent, and it is an anti-social act in substance. If an act does not deviate from the ordinary rules of society in general, it has no anti-social character. For certain reasons, even a dangerous act is legally permitted or deemed as a duty; in such a case, the act does not constitute a crime. So, the necessary conditions for the constitution of a crime are: 1) the act must fall under some article of the Criminal Code and at the same time, 2) the act is not legally permissible. (Prof. Makino: Japanese Criminal Law, pp 69 to 81).

And a crime is an act, and an act is the operation or execution of intention. Therefore, intent is an important element in the consititution of a crime. It is necessary for the constitution of a crime that the criminal has determined his intent to violate the Rechtsgut, or right of protection by the law (Prof. Making: Japanese Criminal Law, p. 156).

This certain, determined intention is criminal intent.

In order to determine that a person has criminal intent, it is necessary that he recognizes not only the fact of crime but also the anti-social and unlawful character of his act. If he dares to commit the act while recognizing the anti-social, unlawful character of his act, we say that he has criminal intent.

And special attention is necessary in recognition of the unlawfulness of the act so that we do not make a mistake.

Paragraph 3 of Article 38 of the Japanese Criminal Code provides: "Ignorance of the law cannot be invoked to establish absence of intent to commit a crime....." I think that America has the same sort of provision. However, this stipulation does not mean that the recognition of unlawfulness is not necessary for the establishment of criminal intent.

"Ignorance of the law" in this article simply means that ignorance of the law which provides for punishment does not preclude criminal intent. This provision is logically natural. No one can say, "I am not guilty, because I do not know the law of punishment. Now that a law was issued and promulgated, everyone should know. This article clearly provides that ignorance of the law of punishment can not exempt him from guilt.

"JJ(23)"

But the fact that the recognition of unlawfulness is necessary for the establishment of criminal intent has a different meaning.

By unlawfulness, we mean anti-social (against the logical progress of society) intent.

If a man believes that his act is permitted by the law and his belief has a considerable ground for admission as common knowledge of society, he has no recognition of unlawfulness, and so we can say that he has no criminal intent.

Dr. Makino explains the mistake of the law as follows:

(1) Even in case of natural crime, if the person believes that there is a special ground which precludes the unlawfulness of his act, we can say that he has no anti-social intention. If, from the standpoint of general morals, it is naturally admitted that the unlawfulness of the act is precluded on a certain ground, the person who did the act had no intent to violate general morals. In such a case, ignorance of unlawfulness precludes the existance of criminal intent. On this ground, we can understand the judgment of the supreme court martial in the case of "Amakasu." This incident occurred immediately after the Great Earthquake of Kanto district in 1923 under martial law. This is the case of the murder of a socialist Osugi, Sakae, his wife and child by two soldiers who did so by the order of their superior. Two military police Pfc's were ordered by their superior, Captain Amakasu, to kill a socialist Osugi, Sakae, his wife and his child. The two Pfc's did not think that their acts would consitute a crime, because it was an emergency case under martial law, and they killed them. The court martial pronounced them not guilty because "they committed the acts without knowing the fact that their act would consitute a crime." (This judgment was announced on 8 Decmeber 1923). In this case, the accused mistakenly thought that it was permissible in such emergency as under martial law to kill an anarchist who would do evil against the state, so they had no criminal intent. (Dr. Makino: Japanese Criminal Law, pp. 192 to 195 incl.)

A mistake of the law other than penal laws and regulations, or , in other words, a mistake of the law which sets forth the legal conditions as a baseswhich a legally affect one's act, precludes criminal intent, because, in such case, there is no recognition of the fact of the crime. For instance, if an act is done on account of a mistake in understanding the general laws other than penal laws and regulations, the existence of criminal intent ought to be precluded. Suppose a person embezzled the property of other person. In this case, it is provided in the civil law whether the property belongs to the other person or not, but if this person mistook the provision of civil law and believed that the other person's property is his and took it, the crime of embezzlement does not exist. In short, if a man recognizes that his act is legally permissible, he has no criminal intent. (Dr. Makino: Japanese Criminal Law, pp. 198-199).

This is the established interpretation in Japanese case law and theories of today.

As a reference, I shall cite a part of representative theories and cases.

1. Lectures on the criminal code by Ono Seiichiro, Professor of the Imperial University: "Is only recognition of the fact of the crime sufficient to establish the existence of criminal intent? Is the recognition of unlawfulness also necessary in order to establish criminal intent beside that? It has been subject to argument. Years ago, intention on criminal intent were understood purely as a matter of fact. The recognition of the fact of the crime, and a consciousness of understanding by a criterion of socieity was out of question. There was a saying, "Ignorance of the law is no excuse." Article 38 of the Japanese Criminal Code states, "Ignorance of the law can not be invoked to establish absence of design." However,

although the knowledge of the law is unnecessary, it is necessary that one be conscious, or at least that one can be conscious, that the act violates a criterion of society, a norm or is anti-social. This was advocated by Binding and was supposed by criminal scholars of so-called the old-law.

"I interpret the conditions of criminal intent in the Criminal Code approximately as follows:

1. To recognize that an act constitutes a crime and do it while knowing that it is a crime.
2. To recognize the unlawfulness of the act.
3. From the concrete circumstances of the act when he did the act, it can be expected that he should not act so.

"The unlawfulness of the act comes from the fact that the act violates the spirit of legal order, and that it violates social and cultural criterion in substance. Therefore, the consciousness of unlawfulness may be defined as the state of being aware that one's act is unlawful in the legal order or of being aware that i violates social and cultural norms. It violates the concept of moral responsibility to punish such an act which there has been no such consciousness as in an act with criminal intent. Years ago, such consciousness was not considered a necessary condition because of absolute nationalism and the understanding which was interpreted as being preventative and peace preserving. But lately, both in theory and practice, concept of moral responsibility has come to be thorough on this point. In the interpretation of effective law, I think that the necessary condition for "criminal intent" is that one is conscious, or at least be vaguely conscious of unlawfulness of the act. Practically, in some cases, if a man recognizes the corpus delicti, it can naturally be supposed that he is conscious of its unlawfulness. But, in some cases, consciousness of unlawfulness does not exist, although he recognizes the corpus delicti.

"If a man simply believes that his act is permissible or lawful although the act has no connection with the legal cause which precludes unlawfulness (for instance justifiable homicide), his criminal intent may be precluded in so far as his unconsciousness of the unlawfulness is perfect and complete.

"A mistake in the understanding of unlawfulness depends upon the concrete circumstances of the act. For instance, at the time of the Great Earthquake, under martial law, soldiers committed homicide by theorder of their superior. This case was tried by court martial and they were found not guilty as "they committed act with no criminal intent". We may understand this judgment through the above mentioned mennings."

2. Treaties on Criminal Law by Hirai Hikosaburo (prosecutor of the Supreme Court):

"Is consciousness of the unlawfulness of one's act the necessary element for the existence of criminal intent? This question does not mean that the consciousness that one's act violates penal laws and regulations is the necessary element for the existance of criminal intent. As is stipulated in paragraph 3 of Article 38 of the Japanese Criminal Code consciousness of the violation of the penal regulations is not necessary for the existance of criminal intent. Regardless of whether or not oneknows that his act violates criminal law, is it necessary for him to know beforehand that is act is an unlawful act which is not legally permissible? This is the question. If it is necessary and if he believes that his act is a

lawful act permitted on the contrary by law, then it can be said that he has no criminal intent because there is no necessary element for the existance of criminal intent. Someone says: "Recognition of the violation of social norms" in place of "knowledge of unlawfulness", but I think there is no difference in their meaning.

"I think that the recognition of unlawfulness of an act is necessary. The dangerous character of an act and unlawfulness of an act should be recognized for criminal intent, to exist. Recognition of unlawfulness. of an act is to know that there is no cause which precludes the unlawfulness. So if one believes that there is a cause which precludes the unlawfulness of the act at all, we must think that the necessary element for criminal intent is lacking even when his believe is based upon a mistake.

"Generally speaking, the unlawfulness of an act and the dangerous character of an act are the objective necessary element for a crime to exist. In so far as it is necessary to recognize the dangerous character of an act, it is also necessary to recognize its unlawfulness. When we consider whether a man has an anti-social evil character violates teleological criminal theory but also in exacting retribution it is worthless to punish a man who does not recognize unlawfulness because it is the same as punishing a man who can not distinguish what is right and what is wrong.

"Judicial precedent of the Supreme Court on 22 February 1926:

"Article 96 of the Japanese Criminal Code, the crime of breaking seals on the marks of attachment made by an official. In this case, the accused made a mistake in the interpretation of the Law of Civil Procedure and broke the marks of attachment believing they were already invalid. The Supreme Court judged as follows:

"The accused made a mistake in the interpretation of the law of civil procedure and another public laws and thought that the attachment became invalid and that he had the right to break these seals. So we must say that the criminal intent of this case is precluded. (The accused was told by a man who arbitrated this case that he had the right to break the seals of attached goods because he paid his debt to his creditor, so he broke the seals and marks of attachment.)"

3. A mistake in understanding the law. In study of Criminal Cases Vol 1 by Kusano Hyoichiro: "A mistake in understanding the law is the most important thing in the theory of criminal responsibility..... Draft Criminal Code Amendment, paragraph 2 of Article 11 thereof states only "the punishment will be exempted," and it does not say, "he will not be punished." I am very sorry about this, but I am very glad that this judgment showed a precedent that when there is a considerable reason that the accused believed permissible what was not permissible for him, he can not be punished.

"Judgment of the Supreme Court for the theft of wood of a forest announced on 4 August 1932 (Docket Vol. 11 No. 15):

"Considering the various circumstances, when the accused was cutting down the trees of Taketoku Forest, he mistakenly believed that it is permissible because the custom of Taketoku to cut the trees of Inodachibayashi in this case for family use within such limit as not to cause shortage for the use of the dam. So we can admit that there was a considerable ground

for his doing so. In the act of the accused in this case there is no criminal intent, so it does not constitute a crime of theft.

"This judgment says that not only the recognition of the fact but consciousness of unlawfulness of the act is necessary for the establishment of criminal intent.

"Presumably, it has been a widely-advocated theory from years ago that an intention, or criminal intent, is a simple recognition of a criminal fact. But lately, not only the recognition of a criminal fact but also the consciousness of unlawfulness of an act became necessary for the establishment of criminal intent, and the important condition for the criminal intent became the consciousness of unlawfulness. But this new theory became the established theory of today. It is probably because moral responsibility of responsibility to observe a norm, very important..... It has become unnecessary to discuss to any extent as in the past whether the mistake concerns the fact. That is, if a man recognizes the fact but does not recognize its unlawfulness, and the fact that he was not conscious of its unlawfulness should be condemned as carelessness on his part, he is thought responsible for the error of unlawfulness in proportion to his intention; and if his error should be comdemned, he shall not be accused of his responsibility. This judgment has announced that the error not being conscious of unlawfulness should not be condemned.

In the common law, too, malice, is necessary for the establishment of murder. Malice, in substance, is a malicous intention. When there is no malice, there is no recognition of anti-social and anti-moral facts. So, malice is an intention to venture to do something while knowing the unlawfulness of doing so, and is just the same as a criminal intent in the Japanese Criminal Code. When an accused has done an act believing that it is legally permissible and his belief has a considerable ground for admission because of the common knowledge of society (that means, when a common person is in his place and believes it is proper to believe so), he has no recognition. So he has no malice and murder can not be constituted.

Then let us consider whether the accused Inoue had a criminal intent in his act in the light of the above mentioned theories.

Charge I and II states "wilfully, feloniously (unlawfully), with premeditation and malice aforethought, without justifiable cause." Is this an abstract expression of the criminal intent of the accused? If the Judge Advocate indicts the acts of the accused as a crime, especially as the crime of murder, at all, he can not affirm the fact of that crime by only marshalling abstract modifiers. He must concretely prove the criminal intent of the accused. What he has proved is only that the accused carried out the order of execution (which was issued after a sentence), believing that carrying out the execution was his proper official duty according to the law. He only proved the fact that the act of the accused as an executioner caused the execution of criminal natives. It is inadmissible according to the Japanese Criminal Code to judge from this fact that the accused had criminal intent. Even in the case law of the United States it is not permissible. Wharton's Criminal Law clearly explain this.

If the judge advocate wants to insist that the act of the accused is a crime of murder or a war crime, he must prove the criminal intent of the accused in the first place. If he cannot do so, the crime of the accused

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is not proved, and he ought to be found innocent without taking other circumstances into account.

The accused, when he carried out the execution, believed that the order was lawful and proper; and he carried it out as his legitimate business or as a lawful act in accordance with laws and ordinances.

Rear Admiral Masuda, who had the legitimate authority, carefully examined and held consultations on the crimes of the criminal natives, and, according to his judgment announced the sentence of death. The accused was ordered to carry out the execution, andhe performed it as his proper official duty. The accused believed in the lawfulness of what he had done, and had neither suspicion nor malice. This is clearly stated in the statement of the accused which the judge advocate introduced into this court as evidence, it has been and clearly testified to by the accused and the other witnesses, and proved. In this statement and testimony, the accused laid bare his innocent heart!

Then is it a mistake that the accused believed so? Or from the point of view of a social moral, is it rational to believe so through the common knowledge of society? We must carefully consider these question.

In the first place, there is no doubt that Rear Admiral Masuda, the giver of the order, had a legitimate authority. Masuda was the immediate superior of Inoue and was the presiding member of the judges in the examination and consultation of this case. Inoue was a subordinate of Masuda and had the duty of judge advocate at the examination and consultation. So, according to Article 501of the Naval Court Martial Law, it is clear that Masuda had a legitimate relation with Inoue so he could issue orders to him.

Secondly, was this order of execution lawful or not? This order of execution was issued according to the judgment after the examination and consultation upon the crime, so it is needless to say that the order was lawful.

Then, was the procedure of the examination and consultation, which was the basis of the order, lawful or unlawful? Inoue was only ordered as an executioner to carry out the execution. It is only necessary for the executioner to judge whether the order is lawful or not. He has neither the right or duty tojudge or examine whether the judgment, examination and consultation, the bases for the order are lawful or not. Therefore, the act which the executioner carried out by the order whichwas in proper form is naturally lawful.

However, the accused participated in the case as an investigator and a judge advocate. So it is natural that when we know by his participation in the case became the foundation of his belief. We cannot judgewhether he had criminal intent unless we madd this point clear.

Inoue was directly ordered by Masuda to investigate the crimes in this case. After the investigation, he found that the natives committed murder, theft, treason, etc. For these crimes. a careful examination and consultation was held according to law, and after the result of judgment, the death sentence was announced. Inoue knew these facts very well. If a man who knows these frets well is given a legal order by his superior who has a legitimate authority to do so, it is quite natural that he believes it is proper to obey. If anyone had been in his place, he would have thought in the same way.

"JJ(28)"

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JJ

Although this trial procedure was different from that of a regular one, this was a special procedure in a pressing battle field and in the face of the enemy. As I have already mentioned, this was the best procedure they could apply on Jaluit. As I have also mentioned before, this was legally permissible by law. So there is a proper ground for his believing that was legal.

Inoue answered the cross-examination of the judge advocate concerning his mental state at that time as follows:

I do not think that the examination and consultation of this case is a trial by regular procedure. But it was the best procedure we could apply on the pressing battlefield of Jaluit at that time. I believed absolutely that it was lawful. I had never thought that a question about whether it was a trial or night might arise. It became a question after the termination of the war and I became confined in the stockade. Then, I had to think whether it was a trial and I became convinced that it was a trial...." This is the true mental state of Inoue concerning trial.

It is quite natural that not only Inoue but also anyone who had been in his place under such conditions and circumstances would think so. The counsel believes that no matter how careful and rational he might have been he would have undoubtedly thought so.

Although I have already stated that the execution of the under-aged natives was unavoidable in those circumstances, it is necessary to consider it further when we argue about the responsibility of the accused. As the Judge Advocate pointed out, in the Japanese Criminal Code, the responsible age for crime is over fourteen. But it is not clear whether the natives of this case who were killed namely, Siro and Neibot were under fourteen or not. According to the testimony of Morikawa, Furuki and Inoue, in physical appearance they looked 12 or 13 years old, but their mentality was developed like that of an adult. Mahako, Tatsuichi, who was living on the same island with the natives testified that Siro was a boy of about 15 years old and that he climbed up tall cocoanut trees three times a day to take cocanut toddy which was a difficult job of an adult. He testified in detail about his work and proved the circumstantial fact that Siro was a boy of about 15 years old. According to the deposition of Tanaka, Masaharu, a boy named Goro was about 15 years old, middle size and had long hair. We can imagine that Siro in the testimony of Manako and Goro in the testimony of Tanaka are the same person. Siro and Goro are common names of Japanese boys. In Japan it is common to name boys Ichiro, Jiro, Saburo, Siro, Goro, etc. These names represent one, two, three, four, and five of number. Siro represents four, and Goro five. It is easy to mistake Siro for Goro. So, we can imagine from objective facts that Siro and Goro are the same person.

The only thing in question is that, in Tanaka's deposition, there is a child of about 6 years old. But nowhere in the testimonies of other witnesses, is there such a boy of 6 years old.mentioned. We can imagine with reason that this boy has no connection with this case of the recollection of Takana is faulty.

Then, it is not clear whether the age of the of the under-age natives were 15 or 12-13 years old. But the counsel feels that that testimony of Manako and Tanaka is right because they lived on the same island with these natives, and thinks that it is proper to judge that their age was fifteen. If they were fifteen, they reached the responsible age for crime. So they could be punished as having committed general crimes as set forth in the Criminal Code. But anyhow, they were under age. So if they had committed

any general crimes in peace time, they would not have condemned to death as I have already mentioned.

But in this case, Jaluit was a pressing battlefield under the siege of the enemy, and the slightest mistake in dealing with these affairs might have caused the annihilation of the Jaluit Defense Garrison. This incident happened in such emergency. Besides the crime was spying which was the treason against the Japanese forces and was aimed to disrupt military discipline. Even if they were children, their mentality was as well developpd as an adult. If they had left them as they were, it was evidence that the Japanese forces would have completely been destroyed. As I have explained, the execution was an unavoidable act done in order to maintain the lives of the Japanese forces. Such an act legally is permitted by article 37 of the Japanese Criminal Code and article 17 of the Naval Criminal Code which I cited before.

But this necessary act was that of Rear Admiral Masuda, the presiding member, and other judges, and Inoue could neither know nor participate in it. The accused Inoue had no responsibility for this necessary act. The accused Inoue only acted as a judge advocate and stated his opinion. "I do not wish to execute these children. I hope to confine them in an outlying island with a guard and prevent them from spying." But the sentence was different from his opinion, and the death sentence was announced. And Admiral Masuda ordered Inoue to execute the natives. Inoue stated his opinion further against this order and he objected to the execution of these children. But as I have stated before, Masuda explained that the execution was unavoidable, and solemnly ordered him not to question a legitimiate order and he had to carry it out.

Regarding this point, the prosecution and the defense asked him questions to which he replied as follows:

"I do not think that the execution of the children was not legal. It was legal and just. I believe that what I did was an act in pursuance of proper official duty according to the law, because, Rear Admiral Masuda held a careful examination and consultation by his legitimate authority, announced the death sentence for them after the judgment and gave me the order of execution through a proper route."

Inoue, in his last voluntary statement, testified as to the reason that the examination and consultation of this case was carried out legally, properly and carefully by the authority of Admiral Masuda and that he was ordered to execute them as a result of it, as follows:

"(1) 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, and they carefully guarded it so that no one could come in. Especially at the last examination and consultation when the sentence was to be decided, Admiral Masuda, the judges and myself were all called to attention. He solemnly heard our opinion 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. (2) 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 as the natives had committed crimes, and by my authority and according to Japanese law by lawful procedure they were executed. Commander McKinson

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JJ

then asked what he did with the two children. Admiral Masuda replied the two children were the same as the adults, they were spies and knew the conditions on Jaluit as well as the adults. As there was no other way, these two children were executed to prevent the desertion of the military, gunzokus, and natives and the leakage of military secrets which was dangerous to Jaluit, to maintain discipline and the lives of the four thousand people on Jaluit. They had to be executed. Present at this time were Mc Kinson, 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 the execution. This report was taken back together with other documents by Commander McKinson on the fifth of October, 1945, to the headquarters of the defense garrison at Emidj. Witnesses to this are Major Furuki, Lieutenant Commander Shintome, Suzuki and Nakamura, myself and Sergeant Major Akamatsu. (4) 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 of spying, Article 85 of the Japanese Criminal Code, was applied."

I have just described the reasons and circumstances of the execution and the state of the mind of the accused. I cannot find his criminal intent in any point. He absolutely believed that it was legal and proper and carried it out. He had no intent to commit murder at all. Then, was there any mistake in his belief that it was legal and proper?

The defense proved in accordance with the law:

1) that the native criminals had committed crimes which had to be punished.

2) that although the procedure of their examination and consultation was a special one, it was a proper procedure legally permissible under the special emergency circumstances.

3) that the order of the execution was issued through a proper procedure.

So, we maintain with confidence that the procedure was legal.

Even if there is a mistake in law in this procedure, it is unreasonable to force common people to recognize it because they are not experts in law. There is a considerable ground for Inoue's belief that this procedure was legal and proper. If Inoue made a mistake concerning trial procedure, it was not the mistake of paragraph 3 of article 38 of the Criminal Code but the mistake of the fact of the crime because of a mistake in understanding of procedure of other laws. It is the mistake of fact after all and precludes criminal intent.

This will be clear by the above mentioned judicial precedent of the Supreme Court and the theories of various scholars. There is no criminal intent in the act of the accused and it does not constitute a crime.

Upon what I would like to ask your special attention is the aforesaid judicial precedent of the Tokyo Court Martial for the crime of the soldiers who killed socialist Osugi Sakae, his wife and child.

In that case, the superior who gave the order had no proper authority to give such an order. He mistakenly believed that it was good for his country to kill a socialist, especially such an anarchist as Osugi. He never investigated or examined them, took his own course and ordered his subor-

dinates to kill them; so it is clearly a crime. Of course, he was punished as a criminal, but the military police privates who carried out the order of killing them did not know the criminal intent of their superior at all. They mistakenly believed that it was entirely proper to carry out the order under the emergency circumstances under martial law and did it. But it was quite natural for common people to believe so in such circumstances. There is a considerable ground for the accused to believe so. The accused did not know that their acts would constitute a crime. There was no criminal intent in their act. So they were found not guilty. This is also admitted in theories in general. I request that you will compare that case with this Inoue Case.

The natives in this case were criminals who deserted the death sentence and Inoue knew about it well through his investigation. Of course the natives are not innocent like the socialist I mentioned above. And, as I said before, a careful examination and consultation was held for these natives and the death sentence was announced after the judgment. Since Inoue was on duty as a judge advocate, he was ordered to execute them by due procedure. But the trial procedure was not a regular trial by a regular procedure, but was a special procedure. But not better procedure than that special procedure could be expected in the battlefield in the face of enemy like Jaluit. That was I have already stated. Therefore, anyone can believe that the procedure was legally permissible.

The circumstances of Jaluit were more serious than Tokyo which was under martial law at that time. It was a far more pressing battlefield. Considering these points, the case of Inoue occurred in much more serious circumstances than the case of the military police who had killed the said socialist Osugi Sakae, his wife and child. There is more than a considerable reason for Inoue's carrying out an order given to him as his proper duty. It is quite natural that he did so. No one can say that the accused had criminal intent. Inoue's act does not constitute a crime, so he ought to be found not guilty.

As I have stated, according to article 38 of the Japanese Criminal Code, there is no criminal intent in the act of the accused and his act does not constitute a crime.

I would like to state further that his act is a lawful one in accordance with laws and ordinances as stated in article 35 of the Japanese Criminal Code and that his act does not constitute a crime.

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

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

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

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

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

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JJ

"'Acts done in accordance with laws and ordinances' means the acts which according to the provisions of laws and ordinances, are admitted to be naturally the right or duty (including official right and official duty). 'Acts done in pursuance of a legitimate business' means acts which form such business as is admitted to be proper from the point of view of law and the customs of people in general. Acts in pursuance of an official duty belong to the former, operations done by a doctor and so forth, belong to the latter.

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

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

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

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

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

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

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

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

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

Section 640 of Wharton's Criminal Law states: "Section 640. Killing under mandate of law justifiable. The execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country, is an act of necessity, where the law requires it. But the act must be under the immediate precept of the law, or else it is not justifiable; and, therefore, wantonly to kill the greatest of malefactors

without specific warrant would be murder. And a subaltern can only justify killing another on the ground of orders from his superior in cases where the orders were lawful. As we have seen, a warrant that is without authority is no defense; though it is otherwise when the defects are merely formal."

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

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

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

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

Chapter 2 Spy of the same conventim.

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

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

The definition of spy is clearly shown in these articles. According to the stipulations, the acts of 8 natives written in specifications 1 and 2 of Charge II do not admit them to be spies.

Inoue
JJ

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

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

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

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

If we assume that the laws and customs of war are applicable, it is unlawful to punish the accused, because there is no provision forpunishment in international law. When he ought to be punished on any account, there is notother way but to apply domestic criminal laws for his punishment. But, according to articles 35 and 38 of the Japanese Criminal Law, the acts of the accused do not constitute a crime. When we see the paragfaph of Wharton's Criminal Law, we find that, even in the case laws of England and United States, his acts are legally permissible as a matter of course.

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

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

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

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

"JJ(36)2

The defense would like to make a supplementary argument concerning the testimony of the witnesses.

The judge advocate, insisting that there was an inconsistency in the testimonies of the accused Inoue concerning the "trial," introduced a part of his statement submitted to the United States legal officers and a part of the record of his testimony in the Furuki case. But the defense is convinced thatthere is no inconsistency at all between the testimony of Inoue in this court and the said records. If he abstracts fragments of words and interprets them wrongly, he can easily findlout expressinns which seem to him inconsistent in any case. But if you judge the meanings of these expressions, you must also consider other sentences which came before and after the expression and the meaning of the whole story, or you will make a gross mistake.

Inoue's testimony as a witness in the Furuki case:

Q. When did you come to think this was a trial?
A. After I entered in the stockade after the termination of the war.

Q. When, you did not think at the time of this incident that this was a trial, did you?
A. No. I did not think at that time whether this was a trial or not.

But the judge advocate purposely omitted the last part of the last answer namely "I did not think at that time whether this was a trial or not" and introduced only "no", a part of his answer as an evidence. I think it will cause misunderstanding in the minds of those who hear it.

Concerning to this point, Inoue, on the witness stand of this court, answered to the cross-examination of the judge advocate as follows:

Answer: "I am sorry to have caused misunderstandings, because my words were not sufficient. At the time of the incident, I believed without any questions that this was a right, lawful procedure. So, at that time, I never thought myself about whether this was a trial or not. After the termination of the war, I was put in the stockade, and I had to think about whether it was a trial. This was the first time I thought about it, and I thought about it, and I thought that I could state that it was a trial. I had testified before to this meaning."

By this testimony, we can fully understand that there is no inconsistency between his testimony in this case and that in the previous case.

It might be a special trial technique of the judge advocate to abstract fragments of the statement spoken in court and to interpret them wrongly, but it is a very dangerous one.

Next, I would like to discuss the testimony of Lieutenant Commander Shintome. He was then the highest ranking Navy officer on Jaluit and had the very important duty of executive officer. Besides, at the time of the incident in this case, he assisted Rear Admiral Masuda and supervised everything about this native incident, because at that time Major Furuki, the highest Army officer was not at headquarters. We can judge this from the testimony of all the other witnesses. In this court, he testified that he knew almost nothing about everything connected with this incident, but

he could not conceal the facts and testified: "I happened to be present at the place where Captain Inoue was stating his opinion as to the execution of the women and children of the natives based upon the investigation report in the presence of Commanding Officer Masuda and Major Furuki. Inoue stated his opinion that he hoped not to execute these women and children but to confine them on an outlying island so that they could not spy. Although I was not told to do so, I stated an opinion similar to that of Inoue, and the opinion of Major Furuki was also the same. But C. O. Masuda said although he felt pity for these women and children, they would desert if we leave them free. If we do so, the conditions of the Japanese forces will be told to the enemy and the military discipline would be completely destroyed. It is clear that the Japanese forces will be annihilated. So there is no way but to execute them. Masuda expressed his firm and resolution approximately as above." He also testified, "I remember, after the termination of the war, Masuda said to the officers that he met a Commander of a US warship, reported to him on the incident of the execution of the natives by Japanese law; 'I executed the natives, who are Japanese subjects and who violated Japanese laws. It was a lawful act, and I am not ashamed of it before man and God.'" He admitted that he stated to a US legal officer on 26 March 1947 in Tokyo concerning the trial of the natives as follows: "I would imagine that a trial had been given for the natives as it was thought that they were spies." And he explained as follows: "In the Japanese forces, no spies are executed without previous trial. I think so from my common knowledge." And he stated that the above mentioned testimony concern both the Jaluit natives' case and the Mille natives' case.

Summing up this testimony, it is clear that he participated in the examination and consultation of this case, no matter what smart words he may have used to escape. And I think that it was proved by his testimony that the testimony of Captain Inoue was true. I ask the deep consideration of the commission as to these points.

You may feel it inconsistent that Siro, the son of Ralime, was 15 years old. Because Ochira, the wife of Ralime was very young, and was about 22 to 25 years old. But Siro was not the son of Ochira, but the son of the previous wife of Ralime, as Inoue stated in his statement. Ralime and Ochira came to live together just before this incident, and Ochira had been the mistress of a Japanese up to that time. So she had no children. I again ask the Commission to take notice of what I said. Therefore, there is no inconsistency in the fact that Siro was about 15 years.

I would like to state again:

The procedures of the specially established court martial which they carried out have in fact some faults compared with the regular procedure. Especially, many faults can be counted if you compare it with such a complete court as this one. But the important thing is not the form but the substance. It depends upon how carefully the case is dealt with. I believe that you can admit that it was the best procedure they could carry out in the pressing battle field of the time. This is admitted by the principle of necessity as stipulated in article 37 of the Japanese Criminal Code, and article 17 of the Naval Criminal Code. Execution of underage natives is also permitted by these provisions.

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

"JJ(38)"

Inoue
JJ

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

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

Also as I stated before, although the trial procedure has some unlawfulness from the stand point of pure theory, there is a considerable ground for Inoue's belief that the special procedure was legally permissible. He has no recognition of unlawfulness. So he has no criminal intent and his act does not constitute a crime.

I again ask the commission will take notice of the following:

Inoue was not a professional army officer. After he was graduated from high school, he enlisted and received military training as an active service soldier only for one year. During that time he was promoted to a sergeant and was discharged from the army service. Then he became a clerk of a civilian company and was engaged in a peaceful industry. He was then called at the breakout of the war and became an army officer at the front. He was nothing but a low-ranking officer, an army captain. On Jaluit, there were such high ranking officers under Rear Admiral Masuda as: Lieutenant Commander Shintome, Major Furuki, Lieutenant Commander Susuki, Lieutenant Commander Nakamura; so he could not participate in any important affairs. He was nothing but a low ranking officer and was of the same rank as Captain Jinno and Captain Kadota. He testified to the conditions on the other islands such as Mille, "Masuda said to me that although I did not know the conditions of other islands...." and he added, "The secrets of the forces were not told to anybody except high ranking officers such as Major Furuki, Lieutenant Commander Shintome, etc., and the intelligence officer, Lieutenant Morikawa. So I did not know anything about the conditions of other islands such as Mille." From this testimony, we can imagine that the rank of the accused was very low.

"JJ(39)"

Inoue
JJ

Therefore, the accused carried out everything in this case by order, investigation, examination and consultation, execution, etc. He did everything by order. We can admit nothing about what his voluntary intent was.

Especially, Inoue begged to Admiral Masuda, "I cannot bear to execute the children. Could you make any other disposition of these children than death sentence? Or, please give me two or three days to consider how to deal with them." But Masuda replied, "The execution of the children is also very pitiable to me. But as I have explained, I cannot help executing them in order to maintain the life of our forces in this emergency. Besides, it was already decided by judgment, so I shall not permit you to state your opinion any further." And he strictly ordered in a loud voice, "Carry out the order!" And Inoue unavoidably carried it out.

This was testified to by Major Furuki and Inoue also testified in the same way.

Orders in the military forces are provided for in the Imperial Manuscript Handbook of : the Battle on Land," handbook of army life, Regulations of naval personnel, etc., and the order once issued must be carried out on any account.

The General Principle of the Naval Battle Law states: "Military discipline is the life-blood of the Navy, and harmony is its course. Obedience is the best way to maintain military discipline."

General Principle 4 of the Regulations for Naval Personnel states: "Order is the source of naval activity and ought to be certain and proper. Anything which is once ordered must be supervised in its execution by the officer who ordered it in order that it may be fulfilled completely."

General Principle 6 of the same regulation states: "Obedience in the Navy is absolute and ought to be second nature for navy personnel. Never complain about the difficulty carry it out after receiving an order; never fail to carry it out; never question whether it is just or not."

And in peace time, a subordinate may state his opinion once about the order of his superior. But, if his opinion is not agreed to, he can not refuse the order on any account. In the face of the enemy or in the front, he can not even state his opinion. Absolute obedience is required to an order which is once issued, and if one refused to obey it, he will be punished as the crime of disobeying orders is stipulated in Article 55 of the Naval Criminal Code.

The article states: "Anyone who violates or disobeys the order of his superior will be punished according to the following classification: (1) in the face of the enemy, he shall be punished to death, life or more than ten years imprisonment....."

I think that the obedience to orders is strictly required not only in the Japanese Army and Navy but also in any country's army and navy. Military order is really strict. I ask that the Commission will understand the absolutely desperate situation of the accused before these strict orders together with the legal grounds I have mentioned above."

"JJ(40)"

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

As I stated before, he was not a professional army officer. He was called to military service. He is mild in nature and is a calm citizen. He is pious, kind to others, conscientious, and honest to his responsibility. He is a so-called "plain country man."

On Jaluit, he was trusted by all his superiors, comrades, and subordinates. Although his character did not fit in with the duty of the Chief of the Special Police Section, he was appointed to the post, because he was the man who trusted by officers and soldiers. Every person in the witness camp on Guam praises his high virtue.

At his home he has his old mother, his weak wife, his sister and his daughter 6 years old, who was born after he went to the front and who has never seen her father. They are lonely and are looking forward to his return. His family can not maintain their livelihood without him.

Gentlemen of the commission: I beg that you will find the accused not guilty and that you will give him a chance to work again for the people and for society.

AKIMOTO, YUICHIRO.

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

Eugene E. Korrick, junior,
Lieutenant, U. S. Naval Reserve,
Interpreter.

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 IV

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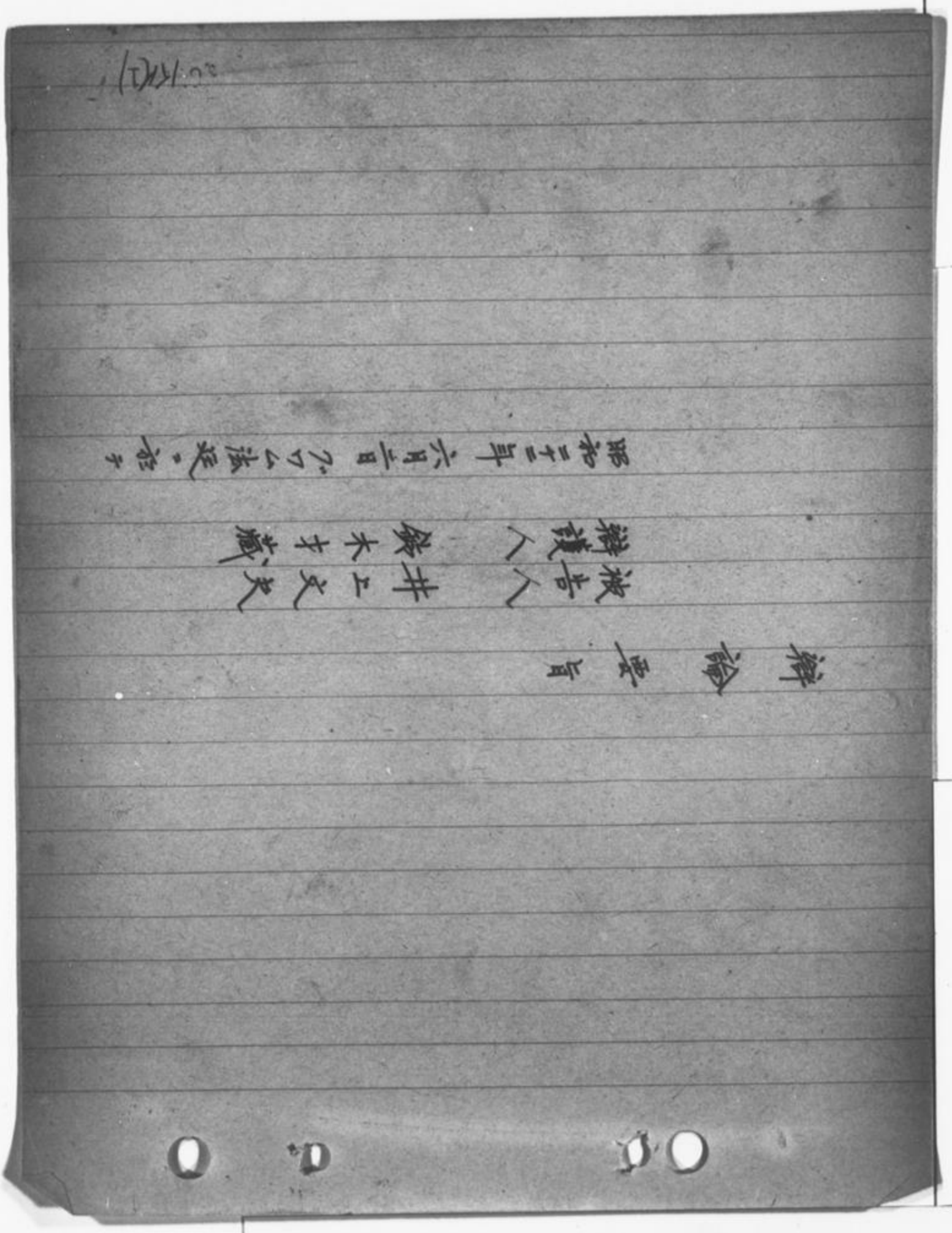

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主文

被告人ハ

鎌谷健一

金井木之丈

昭和二十二年六月二十日ノ決定ヲ

取消ス。

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執行ス

CCKK(3)

死刑ヲ執行セシ土民氏名

ワリーピヤップ　ワリーピヤップノ妻　ネーゾロト　アンナヨリ

オヤラ　シトウ　ワリメ　ヲコヅリツク

死刑ヲ執行セシ土民八名ハ日本人ニ対シテ犯罪ヲ犯シタルモノト島ニ於ケル軍法会議ノ結果竹田少将ヨリ死刑ノ宣告ヲ与ヘラレシ死刑囚ナリ

当時少佐ハ第一ト防衛部隊警備隊長トシテ犯罪ノ取調ニ処罰ノ実施ヲナス任務ヲ命ゼラレ居リ竹田少将ノ死刑執行命令ニヨリ正シイ事ト信ジ一兵ノ誤モナク自己ノ正当ノ業務トシテ処刑ヲ実施セリ

被告氏ノ処刑ノ発表ハ死刑執行後ノ翌日防衛部隊指揮官竹田少将ヨリ書類ヲ以テ指揮下全部隊ニ発表セラレタリ　以上

右陳述書ノ中ニ述ベラレタル事実ハ本件ノ真相ヲ簡単ニ余ス所ナク述ベテアルト信ズルノデアリマス　本弁護人ハコレコソ本件ノ真相デアリ又当時ノ被告人井上ノ偽ラザル心境デアルト断言致スノデアリマス

[redacted]

検事側ニオカレテモ右各事実ハ争ヒナキ事実トシテ之ヲ認メテオラレルノト信ジマス　右陳述書ヲ本件ニ関スル被告井上ノ自白或ハ自認トシテ本法廷ニ提出サレタ以上当然ノ事デアリマセウ

更ニ右ノ各事実ヲ否定スル反証ハ検事側ヨリ何一ツ提出サレテオリマセヌ

2 検事側ノ証人津野海軍大尉　深津海軍中尉　若松海軍中尉

ノ証言ハミレ島ヨリ来タ犯罪島民ニ対シ千田司令ノ命令ニヨリ
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「ゼルート」ニ於ケル最高審議ガ行ハレタ事実ハ否定サレナイ

（次ノ一枚）

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レルノデアロウカ　私ハ甚ダ之ヲ疑フ
要之検事側ノコレラノ証人ノ証言ニヨツテハ未ダ偏ジタ被告
井上ノ虐待事件ノ事実ハ何等否定サレテ居ナイ　シカシ
之等ノ或ハ検事側ノ証人ニヨツテ確認サレテ居ル
此ノ確認サレタ同一ノ事実及行為ニ対シ第一起訴ハ日本刑法
ノ殺人罪ヲ以テ被告ヲ起訴シ第二起訴ハスベテヲ裁判ナク
シテ処罰シ虐待セシメタルモノトシテ戦争法規慣例違反トシテ
起訴シテ居ルノデアル
茲ニ多クノ問題ガ伏在シテ居ル
第一起訴ノ殺人ニ就テ之ヲ考察シテ見ヨウ
被告ノ行為ハ先ヅ其ノ主観ニ於テ其ノ違法性ヲ欠イデ居ル
ナゼトナラバ被告ノ銃殺行為ハセルート基地兵団指揮官ヨリ
死刑判決執行ヲ命ゼラレテ其ノ公ノ職務執行行為トシテナサ
レタモノダカラデアル

CKK(6)

次ニ被告ノ主観ニ於テハ其ノ意志ノ違法性ガ求メラレナイ
彼ハ当時戦況ノ事実ハ認識シテ居タガ然シ殺人犯罪ノ事実ハ認識シテオナイ 更ニ彼ハ其ノ行為ニ対スル違法ノ認識ヲ全然欠除シテオル

従ッテ被告ニ対シ第一起訴ノ殺人ニ就イテ有罪ナリト主張スル者ハ先ヅ其ノ行為ノ客観的ナ違法性ヲ完全ニ論証シナケレバナラヌ
コノ行為ノ客観的ナ違法性ガ論証サレタトシテモ更ニ被告ノ主観ノ違法ヲ論証シナケレバナラヌ

近代刑法理論ノ発達ハ或ル人ニ刑事責任ヲ負ハシメル條件トシテ其ノ行為或ハ行為ノ結果ノ客観的ナ違法ノ外ニ其ノ行為者ノ主観ノ違法ヲ加ヘタ 即チ故意或ハ過失デアル コノ故意ガ原則デアリ過失ガ例外デアル コノ故意又ハ過失アルトキニ行為者ノ主観ノ違法性ガ認定サレルノデアル

然シ其ノ故意ニ於テハ少クトモ日本ニ於ケル刑法及刑法理論ニ於テハ其ノ故意ハ犯意即チ罪ヲ犯ス意図デナケレバナラヌ 単ナル事実上ノ意図デハイケナイ 之レハ犯罪事実ノ希望或ハ認識ノ外ニソノ事実ノ違法性ヲ認識シテオル場合デナケレバナラヌ 右條ノ場合ヲ例ニトレバ単ニ殺人スル事ヲ意識シテオル外ニ其ノ殺人ノ違法ナルコトヲ認識シテオナケレバナラヌ ソウデナケレバ殺ス意図ハアッテモ殺人罪ノ犯意 換言スレバ殺人罪ヲ犯ス意思アリトハ認定スルコトハ出来ナイ コノ点ハ更ニ後ニ詳論スルデアロウ

コノ行為ノ違法ト行為者ノ主観ノ違法ハ戦争犯罪ニモ必要デアル
アイカ

単ニソノ行為ノ外部的違法ノミヲ以テ戦争犯罪ノ有罪ヲ認定スル

(7)

コトハ時代ノ文化的進歩ニオクレヌモノデハナイデアロウカ
日本刑法ト其ノ罪疑刑罰ハ事ニ「裁判ガナカツタ」トイフ事実ハ
論証ノミニヨリテナスベシト被告有罪ノ結論ヘ到達スルコトハ許サ
ナイ 銃殺ノ意志ガ存在シタ理由ノミニヨリテ被告ノ犯意ノ存在ガ
立証サレタトハ認メナイ
アメリカ合衆国ノ法律判例モ然リデアロウト信ズル
次ニ第二ノ起訴ニツイテ考察シヨウ
被告ノ行為ハヘーグ陸戦法規第三十条ノ所謂裁判ナクシテスパイ
ヲ処罰シタ行為ニ該当スルカ 右三十条ノ禁止シテオルハ裁判ナクシ
テスパイヲ処罰スル行為デアル
コノ法規ノ違反者トシテ其ノ責任ヲ負担スル者ハ裁判ナクシテ其ノ
処罰スルコトヲ決定シタモノデアル コレハ其ノ法規ノ文言ノ解釈カラミ
テモ又其ノ立法趣旨カラ考ヘテモ当然ノ解釈ト思フ ソレハ決シテ
スパイヲ銃殺殺害スルコトヲ禁止シテオルノデハナイ 被告ノ如ク
単ニ上官ノ命令ニヨリ其ノ銃殺ヲ実施シタニ過ギヌ者ハ此ノ三十条
違反ノ責任ヲ負担シナケレバナラヌカ 其ノ全責任ヲ負担シナケレバ
ナラヌデアロウカ コレガ第一ノ問題デアル 本件ノミ事実ハヘーグ条約
三十九条同三十条ノスパイニ該当スルカ コレガ解決シナケレバ第二ノ問題
デアル
以上ハ本件ノ刑事事件トシテノ総論デアル コレニヨリ本案全ハ大体
本件ニ於テ問題トナル点ヲ尽シ解サレタコトト信ズル
次ニソレゾレノ問題ニツキ具体的ニ説明シテ行キ度イ
(二)起訴ノ諸點ニ付テ
被告井上ハ本件ニ於テ二ツノ起訴理由ニヨリ起訴サレテオリマス

CKK(8)

又ハ其ノ外ニ於テ、其ノ事件ニ付テハ未ダ公訴ノ提起ヲ
殺人罪ニ付、犯罪ノ犯シタル当時ノ刑法ニ依レバ死刑ニ処スベキ
旨ノ規定アル場合ニ於テ被告人ガ死刑ニ処セラルベキ
トキハ同一事件ニ付テハ未ダ公訴ノ提起ヲ
為シ得ルモノトス　二、右被告人ノ
殺害行為ハ其ノ当時ノ殺人罪ニ非ズシテ戦時ニ
上ノ処罰ニ関スル件ニ依リ殺人罪ト為ルベキ
旨ノ規定ニ依リ殺人罪ト為ルベキ
同ニ付テハ未ダ公訴ノ提起ヲ為シ得ルモノトス
ノ主張ハ採用スルヲ得ズ
ノ主張ハ採用スルヲ得ズ

"The accused then argues that his homicides should be excused because he alleged they were done pursuant to the order of his superior commanding officer. ect.

有罪

In almost every war crimes case, the accused has contended that his illegal acts were the result of the orders of a superior officer. The argument has been universally rejected. The SCAP Regulations which this commission is authorised to use, provide "The official position of the accused shall not absolve him from responsibility .... Further, action pursuant to order of the accused's superior, or of his goverment, shall not coinstitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires."

The legal basis for this Rules is apparent. As Glueck points out, War Criminals, Their Prosecution and Punishment, page 160 "A little reflection will show that this provisions (superior orders and goverment immunity) if followed liberally would give almost the entire band Axis war criminals a valid defense."

KK(10)

The position of the courts on this subject is ably and briefly in the decision of the famous International Tribunal at Nuremberg, in the summary of the judgement released at Nuremberg, September 30, 1946, the Tribunal states.

"The defense of Superior Orders has never been recognized as a defense to a crime, but is considered in mitigation as the charter here provides."

In view of this case, and the numerous other cases on the same subjects, the matter is clearly so well settled that it is unnecessary to burden the commission with furthar argument on this point."

二、被告側、該論ニヨレバ上官命令、抗命ニ於ケル刑罰、日本刑法第七條適用ニ、當ツテハ戰爭犯罪、裁判ニ於テ其、本質ヲ考慮セラルベキコトヲ明瞭ニスルコト、殺人犯罪ヲ戰爭犯罪ト認定セラルルカ、如ク考慮セラルベキコトニアリ

我ガ日本刑法第七條、適用ニ關シ起訴サレタル、ソノ事實、犯罪、本質事實、日本刑法、適用ニ關シ裁判所ニ於テ、ソノ事實、本質ヲ考慮シ、戰爭犯罪、裁判ニ於ケル、如ク、考慮セラルベキ、事由ナシ

(以下(1)

0E00

ホルヘ「マーダー」ニテ犯罪ガ行ワレタトキニハ 其ノ犯罪ハ
次ニ述ベル

willfully Premeditation, Malice afore thought, Feloniously, without justifiable cases,

トイフ語ヲ含ムアメリカ合衆国ノコトバノ英語、法律用語ニ
オケル如ク 日本語ノ殺意ニ該当スル英語ノ意味ヲ有スル
ヲ有スル限リニオイテノミ

日本刑法、規定スル殺人罪デ法令ノ規定ニヨル正当事由、規定
ノ如ク行為ガアリ合衆国ノ「マーダー」ニ該当スル構成要件ヲ充
足、且ツ犯罪ノ記述ニ重大ナ抜漏ニ手落デナクアメリカ合衆国ノコンモン・ロー・マーダー、構成要件ガ証明サレ
有罪ガ認定サレタトキニハ 日本刑法第二九九条、殺人、罪
ガ成立シ ソレト同一ノ行為デアリ 日本刑法ニ日本刑法特有、
理論ガ判例ガナイ限リ 更ニ新理由又ハ証拠ノ提出、
認諾、等ガナクアメリカ

次ニ第二ノ記述ト第三ノ記述ニ違法ナ事実ノ記述デアリ
此ノ点ニ於イテハ 日本法ニ於ケル記述ト異ナルトコロハナイ
ガ 事実ニ於ケル行為ノ記述ハ 証拠ノ提出ト共ニ
事実ニ於ケル行為ノ記述ハ 単純ニ於イテアル違法デアル
ニ非ズ 裁判的ト証明ヲ要スル

第二ノ記述ニ於イテ 有罪判決ヲ受ケタ者ガ 死刑、ムーショ
ナシニ仮出獄ノ判決ヲ受ケタ場合ニ 法律ニ於ケル違法ノ記述
ノ事実ノ中ニ 裁判官ノ判決ニヨル違法ノ記述ニナル
ノデアリ 法ノ誤リノ記述、殺人、罪ニ於ケル記述、殺人

二 弁護：今日ハ午後一時カラ審理ヲ始メマス。

其ノ前ニ、検事ノ方ニ、次ノ通リデアリマス
ガ、起訴事実ニ対スル、答弁ヲ、求メマス。

(三) 答弁ノ問題ニ付テ

ウセラレ、検事ノ担当ニアリタイ。

ニハ、丁度被告ノ殺人罪デ、起訴ニ、同様、殺人行為ノ、事実ニ付テ、
私ハ、コノ二重起訴ニ断ジテ違法デアル信ジマス

ニ於テ、戦争犯罪ト、通常ノ殺人罪トヲ、区別シテ起訴スルノハ、
一定ノ殺人行為ガ、戦争法規ニ違反シタ、犯罪ヲ構成スル、為ニハ、
行為中ニ、ソレニ、対スル、特別ノ、関係ガ、アルコトガ、必要デアリマス

E E 0 0

[redacted]

(15)
(次頁)

「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 Force 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 suffer such punishment as who Court may direct-----」

アメリカ陸軍規約ニハ占領ノ目的（ハ旧条約ハ正）ニハ従ヒ占領地ノ現法ニテ

§ 299 The Laws in force

The Principal object of the occupant is to provide for the security of the invading army and to contribute to its support and efficiency and the success of its operations.

In restoring public order and safety he will continue in force the ordinary civil and criminal laws of the occupied territory which do not conflict with this object. These laws will be administered by the local officials as far as possible. All crimes not of a military nature and which do not affect the safety of the invading army are left to the jurisdiction of the local courts."

従来ハ占領ハ日本ノ一ノ施設ニアラズト云フ点ニ於テ日本説ニ従ヒ占領ハ其ノ権利ニ何ノ影響ヲモ及ボサズト云フ点ニ於テ権利説ニ従ヒテ居タガ此ノ点ニ於テハ日本説ニ従ヒテ居ルモノト云ヒ得ベシ 然シテ此ノ論点ハ結論ニ於テ差ヲ来タサズ 占領ハ其ノ権利ニ何ノ影響ヲモ及ボサズト云フ点ニ於テ権利説ニ従ヒテ居タガ此ノ点ニ於テハ日本説ニ従ヒテ居ルモノト云ヒ得ベシ 然シテ此ノ論点ハ結論ニ於テ差ヲ来タサズ

14 確実ナルモノニアラズ

CK改訂

15

検事：占領軍ニヨリ設立サレタ軍事法廷、裁判権ガ占領中ノ犯罪ニ局限スベキモノトイフ理由ヲニツアゲテオラレマス。

一ツハ国際裁判條令、及スキヤプ條規ニ基ク裁判所ガ戦前及戦時中レビリアンポプレーションニ対シ犯サレタ殺人罪ノ如キ裁判権ヲ有スルコトヲ確定シテヰルト主張サレテヰマス。然シナガラ之モ戦争犯罪、規定デアツテ通常犯罪、規定デハアリマセン。検事：戦争犯罪トシテ本件第一起訴、殺人ノ起訴サレテオルノデアリマセウカ。若シ戦争犯罪トシテ起訴サレテオルナラバ何モ先ニミツソ軍政長官ノ布告等ノ引用サル必要ハ毛頭ナク、又占領軍権利ニ関スルヘーグ陸戦條規ノ條約ノ規定ノ如キ説明サル必要ハ無イ筈モナイデアリマス。占領軍ノ占領地ニ対スルヘーグ陸戦條規ノ規定ニ戦争犯罪ヲ處罰スル權限（裁判権）ヲアタヘタモノデアリマス。

他ノ理由ハヘーグ陸戦條規四十三條ノ「占領國ハ出来ル限リ公共ノ秩序及生活ヲ回復、確保スル爲メニ絶ヘ得ベキ一切ノ手段ヲ盡スベシ」ト云フ文言ニ重点ヲ置キ若シ日本ガ軍事占領前ノ發生シタル犯罪或ハ殺人ガ治安確保ノ存在ヲ考ヘルコトハ不可能デアル」ト云フニアリマス。

吾々ハ決シテ本件（訴因ノ如キ）犯罪ノ其ノ儘罰セズシテ放置スベシト主張スルノデハアリマセン。本件ノ犯罪ヲ起訴スルナラバ今日存在シテヰル日本本土ノ日本裁判所ニ起訴スベキデアルト主張スルノデアリマス。日本裁判所ニ真ノ管轄權ヲ有スルト主張致スノデアリマス。

軍事占領軍ノ占領地ノ對スル權限ハ決シテ無制限デハ

シハ國際法上ノ制限ヲ受ケルモノデアリマス．其ノ占領地及其ノ占領地ノ住民ニ對シ行使スル立法，司法，行政，各權限ハ其ノ占領目的達成ノ爲メ必要ナル限度ニ止メネバナラヌ次第デアリマス．

其ノ占領軍ノ軍事裁判所ガ行使スル刑事裁判權モ亦一定ノ制限ヲ受ケルノデアリマス．シハ原則トシテ戰爭犯罪ヲ除イテハ占領地ニ於ケル占領後發生シタ犯罪ニ限ル上解釋サレルノデアリマス．先ニ引用致シマシタ，ルールズ，オブ，ランドウォアー第二九條ノ如キハ軍事占領後，占領地ニ發生シタ犯罪デモ軍事的性格ヲ有シテ居ル犯罪，占領軍ノ安全ニ影響ヲ及ボス犯罪ハスベテ其ノ占領地ノ現地ノ規定ニヨルノデアリマス．

日本本土ニ於テ聯合國ガ軍事占領下ニアリマス．今日日本本土ニ於テ聯合國ガ採ッテヰル司法ニ關スル政策ニ右引用ノアメリカノルールズオブランドウォアーニ九條ニ示サレテヰル國際法上ノ原則ヲ嚴守シテ居リマス．即チ聯合國（今ハ主トシテアメリカ合衆國）ノ軍事裁判所ノ管轄ニ屬スル日本人ノ犯罪ハ戰爭犯罪ヲ除キスベテ軍事占領後發生シタ犯罪デアリマス．且ツ其ノ犯罪ノ中デモ占領目的達成ノ阻害ニナル犯罪（占領軍ノ發布シタ規定違反犯罪ノ含ム）聯合國人ニ對スル犯罪ニ限定シ其ノ他ノ犯罪ハスベテ日本ノ裁判所ノ管轄ニ委ネテヰルノデアリマス

占領前ニ發生シタ日本人ノ通常犯罪（即チ單ニ日本ノ國法ノ犯シタモノ）ニ付テハ當然，且ツ完全ニローカルコートデアル日本ノ裁判所ノ裁判權ニ委ネテヰルノデアリマス

コノ現實ノ政策カラ推論致シマシタ軍事占領軍ガ其ノ占領
領地ニ發生シタ占領地所屬國人ノ通常犯罪ニツイテ占領國ノ
軍事法廷ガ其ノ裁判權ヲ有スルト云フ解釋論ヲ否定サルベキデアリマス。
檢事側ニコレニ對シ次ノ如ク答ヘテオラレマス。
從來ハルートノ管轄シテヰタノデハナイ。ソレハソノ通リ正シイノデアリマス
サル場合ノ所謂日本ノローカルコートハ存在シテヰナイ。而モ今日ノ日本裁判
所ノ管轄權ハマーシャル群島ニ及ビヰナイト。ソレハソノ通リ正シイノデアリマス
然レドモ故ニ占領前ニ發生シタ通常犯罪ヲ未ダマーシャル群島
ヲ管轄スルアメリカ合衆國ノ軍事裁判所ノ管轄ニ屬スト結論
サレルコトハ論理ノ飛躍デアリマス。
日本本土ヤマーシャル群島ガ地理的ニ遠ク隔テラレテヰルノデアリマス。日本本土モマーシャル群島モ同ジアメリカ合衆
國軍ノ軍事占領下ニアルノデアリマス
今マーシャル群島ヲ日本本土ニ接近セシメテ本件ノ管轄問題ヲ考察
サレルナラバ事態ハ極メテ明瞭ニナルデアリマセウ。日本辯護人ノ論旨ハ採用
利用セラルベキモノト信ジマス。

以上

(四) 井田ニ対スル海軍ヲ将ノ死ト被告井上ノ立場ト責任

本件ミレ島民八名ニ死刑ノ判決ヲ宣告シ被告井上ニ対シ死刑ノ執行ヲ命ジタ。ヤルートノ最高指揮官井田海軍中将ハ現存シナイ。彼ハ終戦後、ヤルートヲ平穏裡ニアメリカ軍ニ引渡シタ後、戦史未曾有ノ猛爆撃ノ為文字通リ廃墟ト化シタヤミエ島ニ淋シク残サレタ己ノミスボラシイ部屋デ自ラ己ノ生命ヲ絶ッタ。

彼ノ自決ハ彼ノ最モ信頼シ且ツヤルートノ全部隊中最モ優レタ人格者トシテ景仰サレタ古木秀業ト井上文夫ヲ戦争犯罪ト殺人ノ罪ノ名ノトニ、アメリカ軍事法廷ノ被告席ニ坐セシメタノニ対スル抗議ノ為デアル。彼ハ最後迄コノ二人ノ部下ガアメリカ軍事法廷ノ被告席ニ坐スルコトハ夢ニモ考ヘテヰナカッタノデアル。彼ハ自決ニ際シ部下ニ遺書ヲ遺シタ。其ノ遺書ノスベテハ昭和十九年ノ始メニ発生シタアメリカノ捕虜ノ事件ニ関スルモノデアッタ。彼ハコノ事件ノ責任ヲトッテ自決シタノデアル。マーシャル島民ノコトハ遺書ニ何等触レテ居ナカッタ。彼ハマーシャル島民ノ処刑事件ガ国際犯罪トシテ又国内犯罪トシテ問題トナルトハ毛頭考ヘテヰナカッタノデアル。彼ノ法律的判断ガ誤ッテヰタカ否カハ別トシテ井田ハ終戦後アメリカ海軍ノマッキンン海軍少佐ヨリヤルート及ミレ島民ニ対キ取調ベヲ受ケタ。取調ベ終了後、彼ハコレラ島民ノ処刑ハ余ノ正当ナ権限ニ基キ合法的ナ手続ニヨリナサレタノデアッテ何等ヤマシイ処ナシト答(テ

来タト肩ヲ張ツテヤルートノ幹部将校ヲ集メテ訓シタ。コノ事實ハ本事件及本件ノ證人ニヨリ異口同音ニ證言サレテ居ル。コノ事實ガ被告達ノ作リ話シデアルトハ檢事側モ主張サレマイト信ズル。若シ彼ノ最モ信頼スル三人ノ部下ガ此ノマーシャル島民處刑事件ノ當ノ被告トナルコトヲ知ツテ居タラ彼ハオソラク自決シナカツタデアロウ。今日生キテ居レバ彼自ラ證人台ニ立チ被告井上ノ爲ニ事ノ眞相ヲ述ベ被告井上ハ只自分ノ命令ニヨリ止ムナク本件ノミレ島民ノ處刑ヲ実施シタモノニ外ナラヌコトヲ明瞭ニシタコトデアロウ。ミレ島民處刑事件ニツキ被告等ニ些カデモ（キハ己レ）付問ウテアツテ被告井上ハ丈夫デハナイトスッパリト證言シタ事デアロウ。増田ノ死ハ今日ノ彼ノ死ノ沈黙ハ被告井上ニトツテ黄金デアロウカ？ 決断シテ黄金デハナイ。

吉木夫妻ノ事件ノ論告ニ於テ檢事ハ次ノ如ク述ベタ

"Masuda is dead, and to the defense, his silence is golden. For, the defense has made him a silent witness for every order or law they wish to prove, every power they wish to create, and every act they wish to explain."

ナント言フ冷酷ナ偏見デアロウ。檢事ト言フ地位ニ在ル

19 許シタ被告ヲカク迄ニ偏見ヲ以テナガメネバナラヌモ

KX(22)

ノテアルノテアロウカ 井田ノ死ハ被告井上ニトッテ黄金ノ
冠デハナクシテ茨ノ冠テアッタ。茨ノ冠ハ殉教者ノ冠デア
ルト言ハレテ井ル。本件ミレ島民ニ対スル死刑ノ判決ヲ宣告シ
被告井上ニ其ノ死刑ノ執行ヲ命ジタ當ノ井田ハ死シテ
モドカシイ沈黙ヲ守リ其ノ口カラ事ノ真相ヲ告ゲエナイ。ソレ
故ニコソ被告井上ハ當時其ノ合法性ニツキ無慮ノ疑ヒヲ挿
ダス正シキ職務命令トシテ實行シタ其ノ處刑行爲ノ為
メニ今日殺人ノ罪デ起訴サレテ井ルノデアル。責任者タル井
田ガ現存セス又故ニコソ單ニ命令ニヨリ死刑判決ノ執行ヲ實
施シタニ過ギス又被告井上ガスパイヲ裁判ナクシテ處罰シ處刑
持タス又被告井上ガスパイヲ裁判ナクシテ處罰シ處刑
セシメタト言フ理由デ起訴サレテ井ルノデアル。ミレ島民處
刑事件ノ全責任ヲ井田ニ代ッテ負担セシメラレ非難サ
レテ井ルノデアル、本来井田ノ負フベキ責任ヲ被告井上ガ負
フベシト要求サレテ井ルノデアル、井田ガ死ンデ責任ヲ負フベキ
モノガ井ナイカラ被告ガ全責任ヲ負フベシト言フノデアル
カ、ルコトハ近代刑法ノ原理ガ之ヲ承認スルモノデアロウカ
遡及ノ刑事責任ハアクマデ個人責任デナケレバナラス又
刑事事件ニ於テハ其ノ枢要ナ地位ヲ占ムル関係者ノ
死ガ被告ニトッテ有利デアルカ不利デアルカ、決シテ
一概ニハ断言デキナイ。本件ニ於テハ井田ノ死ハ被告
ニトッテ甚シイ非運デアッタト信ジスル。将ニ本件ノ
場合ハ處刑島民ノ犯罪ニ間諜罪ヲ含ンデ井タ爲
事件ノ取扱ヒハ極メテ秘密裡ニ行ハレ関係者ガ少ナク

(23)

被告ノ爲メニハ甚ダ不利デアッタ、事件ノ眞相ヲ知ル
現存者ハ被告井上ヲ除イテ犯罪島民ノ取調ニ関與シ
タ森川武中尉ト審理ニ関與シタ新留、古木ノ三人ニ又
キヌノデアル而モ此ノ中新留、森川ノ二人ハ檢事側ノ證人ト
シテ證言台ニ立ッタ、其ノ中ノ一人森川ハ其ノ取調ベノ精シ
イ事情ニツキ證言スルコトヲ許サレナカッタ、他ノ一人新留
ナ佐ハ本件ミレ島處刑事件ニ被告ヨリモ深イ関係ヲモチ、コ
ノ事件ガ犯罪トナルナラバ針田ニ次グ海軍ノ責任者トシテ
被告ヨリモ重イ責任ヲ負担シナケレバナラヌ地位ニアル。コノ
新留ハ何モシラヌ又存ゼヌト一切ノ責任ヲ被告ニナスカケテ
證人台ヲ去ッタ、被告ノ爲メノ證人ハ古木秀榮一人
シカ居ナイデアル、戰爭犯罪、或ハ戰時中ノ戰場ニ
オケル事件ニ於テハ関係者ノ戰死、書類ノ焼失喪
失ノ爲起訴スル側ニモ證據ノ蒐集ガ困難デアル
然シソレ以上ニ被告ノ爲メニモ有利ナ證據ガ少ナイ
本件ニオケル針田ノ死ハ證人ハ古木秀榮一人
於ケル被告ノ責任ノ決定ノ上ニ於テモ又本件ニ
ダ不利デアッタト信ジマス
裁判長並ニ軍法委員會各位ドウカ此ノ点ニ就
イテハ充分ノ御理解ヲ給ハランコトヲ御願ヒスル次
第デアリマス

以上

(五)

(1) 被告井上ハ「死刑ヲ執行セシ島民ハ名ハ日本人ニシテ犯罪ヲ犯シヤルート島ニ於ケル最高審議ノ結果 升田少将ヨリ死刑ノ宣告ヲ與ヘラレシ死刑囚人ナリ」ト其ノ陳述書ニ述ベテ居リマス

此ノ「最高審議」ハ Highest deliberation ト飜訳サレテ居ルガ日本語ノ「審議」ト云フ言葉ノ上ヨリ デリベレイションヲ云フ英語デハ被告ガ「審議」ト云フ言葉ニヨッテ 何ヲ表現シヨウトシタカ其ノ被告ノ意図モ充分ニ理解サレナイト思ヒマス。

葉ノ障害ガアリマス。

本件ノミレー島民ニ対シ死刑判決ヲ與ヘタコノ所謂「ヤルート」ニオケル最高審議ハ実際ニ如何ナル手續ニヨリ行ハレタカ

其ノ法律的性質ハ何カ？ ソレハ裁判行為ト云ヘルカ否カ

コレハ被告ニ対スル第一及第二起訴及ビ其ノ各罪状項目ノ有罪、無罪ノ認定ニツキ決定的ナ要素デハナイガ重大ナ關係ヲ持ツ問題デアリマス。此ノ点ハ慎重ニ考察サレネバナリマセン。

先ヅコノ最高審議ニ関スル事実関係ヲ明確ニシタイト存ジマス。

昭和二十年三月末 ヤルート環礁ノ ジャルート島ノ方面指揮官ヨリヤルート防備部隊指揮官 升田少将ニ宛テ左ノ如キ至急報ガ傳達サレタ

「ミレー島民 ラリージャウブ以下 男二名、女一名、子供一名漂流セシト稱シ昨夕、當方面東部外海ニ漂着(今ノ)

日下他島民トノ連絡ヲ絶テ保護ニアリ　係官至急出張ヲ乞フ」
最高指揮官升田ハ情報係将校森川茂中尉ヲシテ其ノ所持品、搭乗シテ来タ舟艇等ヲイミエジ
旅シ該島民及ビ其ノ
ノ本部ニ輸送セシメタ。其ノ翌日該島民等ハイミエジニ到着シ
第二弾庫ニ収容サレタ。
升田ハ森川中尉ノ外ニ被告井上ヲ加ヘテ其ノ島民ノ漂着事情
ノ取調ヲ命ズルニ當リ其ノ副長新留少
佐ノ立會ノモトニ、井上、森川ニ其ノ取調方法ヲ指示シ、更ニ其ノ取
調ベヨリ知リタル事実ヲ絶対ニ他言セザル旨ヲ誓約セシメタ。
トシテノ呼ベレタ軍醫ニ対シテハ、他言セザル旨ヲ誓約セシメタ。
當時ヤルートノ極ク限ラレタ最高幹部ニハ無電ニヨリマーシャル
ノ他基地、特ニミレ、ウオツゼ島ニ於ケル日本軍ノ敗戦感、食糧
ノ極度ノ缺乏ヨリ来ル甚シイ軍紀弛緩事情、アメリカ軍ノ誘引
ニヨル島民ノ集團的飛島事情ニ関スル情報ヲ知ツテ居タノデアル。
彼等ハコレラ他基地ノ惨憺タル又敗戦ノ崩壊事情ガヤルートノ
将兵及島民達ニ洩レルコトヲ極度ニオソレ警戒シタ。被告井上
モ他基地ノ事情ハヨク知ラサレテ升ナカツタノデアル。
被告井上及森川ハ早速第二弾庫ニ於テラリーシヤツプ以下四名
ノ島民ノ取調ベヲ開始シ、翌廿日夕刻迄ニ大体ノ調査ヲ
終リ事件ノ全貌ヲ把握シタ。
ソノ取調ベヨリ、ラリージヤツプ以下四名
ノミレ島民ガ同時ニヤルートノ他ノ島ヘ潜入シタコト、彼等ハ
共謀シテ、ミレー環礁ニ於テ日本海軍ノ食糧ヲ、ミレー
本島ニボートデ運搬中、同乗ノ日本海軍兵曹田

正治ヲ殺害シテ其ノ舟艇ヲ奪ヒミレー島ヲ脱出シタ途中アメリカ軍艦ニ拾ハレ、其ノ船上ニ於テ間諜ノ任務ヲ授ケラレテヤルートニ潜入シタ事実ガ判明シタ

四月二日夜、チットゲン方面指揮官ハ三月三十日ニ無人島「ナニヤメジ」ニ漂着シタ「ミレ」島民ラリメ以下男二名、女一名、子供一名ヲ本部ニ送致シテ来タ、被告井上ハコレラノ島民ヲモ取調ベタ、彼等ハラリ・ジャップ以下四名ト同様ノ供述ヲシテ、犯行ヲ自白シタ、特ニ此ノラリメ組ハ田中兵曹ノ名入リノ日本海軍ノ上衣ヲ所持シテ居タ。

取調当時離島方面ニ出張シテ不在デアッタ陸軍部隊ノ最高幹部古木秀策少佐ガ四月三日ノ早暁、本部ニ帰投スルヤ升田少将ハ早速ラリジャップ組四名ニ付、ソノ審理ヲ開始シタ、ラリメ組ニ付イテハ調査終了后ノ四月六日頃、其ノ審理ガ開始サレタノデアル、

其ノ審理ニ於テ、升田少将、古木少佐、新留少佐トコッ当時ヤルート防備部隊ノ最高幹部ガ審判官トナリ、被告井上ハ升田ヨリ検察官トシテ職務ヲ取ル様命ジラレタ、

其ノ審理ハ升田少将ノ自室防空壕内ヲ整理シテ、ソコデ行ハレタ

ソレハ被告井上ノ其ノ調査書ノ読ミ上ゲニヨッテ始マッタ、

其ノ審理中ハ一切他ノ者ノ出入ヲ許サズ極メテ秘密裡ニ行ハレタ、其ノ審理ノ場所ニ該島民ハ招致サレナカッタ

但シ審理中被告井上ト共ニ升田ハ島民ノ留置サレテ居ル第二弾庫アイネマン送信所ニ赴キ、島民達ヲ自ラ訊問シタ。

島民達ガボートニ搭載シ来ル荷物ハ審理ノ席迄運ベル
テ検証サレタ. ラリジヤップ組ノ乗ツテ来タ幅一米、長サ二米
ノ和船型ノボートニ付テハ升田古木、新留ニヨツテ海ノ岸ニテ検
證サレタ ラリメ組ノ乗ツテ来タカヌー型舟ハ彼ラノ着岸
ト共ニ砕ケテ現ハル保存シテ居ナカツタ 其ノ審理中デモ
被告井上ノ調査及調査報告ハ平行シテ行ヘタ. 審理中
調査ノ不備及不審ノ点ハ升田ヨリ指摘サヘ両調査ガナサレタ.
四月九日頃處罰ニ関スル最後ノ審判決定ガナサレタ. 其ノ時
被告井上ハ検察官トシテノ意見ヲ述ベタ.
其ノ罪状ニ対シ日本刑法ノ殺人ノ罪. 強盗ノ罪. 敵國ニ
與シテ帝國ニ抗敵シタノ罪. 間諜ノ罪. 軍用物損壊ノ罪.
海軍刑法ノ敵ニ奔リタル罪、守兵殺害ノ罪ガ該當スルトノ意
見ヲ述ベ大人六名ニ対シ死刑ヲ求刑シ子供二人ニハ死刑ヲ求刑セズ
イミエジ本島ノ陸續キ島民ノ居ナイ島ニ送リ日本軍人ト
共ニ生活セシメル様トノ意見ヲ述ベタ.
新留古木ハ審判官トシテ其ノ處刑ノ点ニツキ. 意見ヲ開陳
シタ. 新留古木ハ大体被告井上ノ意見ト同様デアツタ.
然シ升田ハ全員死刑ノ意見ヲ述ベタ. 結局其ノ裁判長
升田ノ意見ガ決定的トナリ 升田ハ裁判長トシテ全員八名
死刑ノ宣告ヲナシタ.
ソシテ同時ニ被告井上ニ対シ其ノ死刑判決ノ執行ヲ命ジ其
ノ執行ノ方法. 執行ノ場所ヲ指示シタ.
其ノ審判決定スルヤ. 升田ハ其ノ日ノ午后. 直ニ. 井上. 通訳
ヲ伴ヒ島民ノ留置サレテヰル第二弾庫. アイネロンノ送信

所ノ地下防空壕ニ赴キ當時逃亡シテ捜索中ノラリメヲ除ク他ノ七名ニ対シ死刑判決ノ宣告ヲ爲シタ　ラリメハ其ノ翌日発見逮捕サレ其ノ后死刑判決ガ云ヒ渡サレタ。

以上ハ被告井上、古木、森川ノ各証言ヲ綜合シテ認定シタ本件ノ審理手續、及其ノ前后ノ事情デアル

(2) 新留ノ證言トソノ信憑性ニツイテ

新留少佐ハ検事側ノ證人トシテ本件ノミレ島民ノ事件ニ付井田ヨリ古木、井上ノ面前デ審判官トシテ審理ニ立會フ様命ゼラレシ事及ビ其ノ審理ニ立會ツタ事ハ全然ナシト證言シコノ点ニ関スル井上、古木ノ證言ヲ否認シタ　唯茲デ忘レテハナラヌノハ彼ハミレ島々民ニ関スル審議ガナカツタコトハ證言シテナイコトデアル　彼ハ唯、己ガ審理ニ関係シテ井ナイコトノミヲ立證シテ居ルコトデアル

新留ノ證言ガ眞実デアツテ井上、古木ノ證言ガ作リ事デアルカ井上、古木ノ證言ガ眞実デ新留ハミレ島々民處刑事件ニ関スル己ノ責任ヲ廻避セシガ爲ニ偽リノ證言ヲシテ井ルノデアルカ當ノ井田ガ現存セヌ今日此ノ疑ヒニ明確ナ返答ヲ與ヘ得ル資格ノアル者ハ誰モ居ナイ

然シ左ノ諸点ヲ綜合シテ判断スルトキ右ノ点ニ関スル新留ノ證言ノ信憑性ハ完全ニ覆ヘサレウルモノト信ズル

第一ニ彼ハ第六十二警備隊ノ副長代理トシテ井田少将ニツグ海軍部隊ノ先任将校デアル　更ニヤルート防備隊編成后モ其ノ最モ重要ナ本部機関ノ自活委員會ノ委員長、機関部長、工作部長ヲ兼任シテヤルート部隊ノ最高幹部ノ一人ト

シテ極機ニ参與セヲサタノデアル。

第二、彼ハ本件ノミナレ島民ガヤルートニ漂着シタ事実及ソレノ島民ガ檻禁サレテ居タ事実及其ノ場所ヲ知ツテ居タコト又其ノ中ノ人ガ逃亡シテ全軍デ大捜査ヲシタ事実ヲ知ツテ居ルト証言シナガラ其ノ島民ガ處刑サレタ事実ヲ約六ケ月経タ終戰後ニ於テハジメテ之ヲ知ツタト警ラクベキ非常識ナ證言ヲシテヰルノデアル。

古木、井上、森川、作田、家木ノ各證人ハ昭和二十年四月中旬ニ本件ノ島民ノ處刑事実ガヤルート最高指揮官ノ名デ全軍ニ公表サレタ事実ヲ證言シテ居ル特ニ作田ハ四月中旬右ノ公表ノ日作業開始ノ笑呼ノ時自分ヲ含ム五十人位ノ海軍ノ将校下士官ノ前デ新留ガミレ島民ガミレデ殺人ソノ他ノ重大ナ犯罪ヲ犯シヤルートデ間諜ヲ行ツタ理由デ處刑サレタト告示シタトハツキリ證言シテ居ル。

新留ハ右ノ公表ノ事実ヘアツタカモシレヌガ自分ニハ記憶ガナイト證言シテ居ル彼ハ己ノ仕事ガ忙シクテ島民ノ處刑ノコトナゾ全然顧ミナカツタト言ヒ又ソシテ居ル。然シ彼ノ地位ヨリ考ヘテノ果敢ノ採ツタ手段イ、イミジクモ島民ガ處刑サレタ事実ヲ六ケ月右ノ終戰近ク知ラナカツタトハ余リニモ非常識ナ證言デハアルマイカ。

コレラノ非常識ナ證言ヨリ考ヘテモ彼ハ本件ノミナレ島々民處刑事件ニツキ己ニ責任ノカヽル事ヲオソレテ己ニ責任ニ関スル様ナ卓デハ極力嘘ヲツイテ居ルコトガ判然トシ、彼ノ證言ハ全体トシテ全然信憑性ガナイト断ジテ差支ヘナイト信ズル。

第三、彼ハ升田ヨリ審判官ヲ命ゼラレタ事ハナイガ偶然ニ升田、古木、井上ガ参集シテ島民ノ事ヲ審議シテヰル処ヘ行キ合

ハセテ升田カラ求メラレナイノニ拘ラズ処刑ノ意見ヲ述ベタト證言シテ居ル。彼ノ證言ニヨルト、先ヅ井上ガ女、子供ヲ死刑ニセズコブラ蒐集ニ使ヘト意見ヲ述ベ、次ニ彼ガ求メラレズシテ同様ノ意見ヲ述ベ、次デ古木ガ意見ヲ述ベ、最后ニ升田ガ島民全部ヲ死刑ニスベキ意見ヲ述ベタト云フノデアル。彼ハ、コレト全ク同ジコトヲヤルート島民ニ関スル古木事件ノ時ニモ證言シテ居ル。二回共偶然ニ検察官ガ処刑意見ヲ述ベテ居ル所ヘ行キ合シテ求メラレザルニ己ノ意見ヲ述ベタト云フノデアル

我々ハ此ノ点ニ関スル新留ノ前后ノ證言ヲ綜合スルト、容易ニ彼ガ其ノ審理ノ関係者トシテ其ノ審理ニ関与シテ居タ事ヲ看取スルコトガ出来ルノデアル

(3) ソレデハ右ノ様ナ実質ヲ持ツタ所謂ヤルートニオケル最高審議ナルモノハ「裁判行為」デアルカ否カ。私ハ裁判デアルト解釈致シマス。然シコレハ事実論デハナクシテ一種ノ法律論デアリマス。事実ノ存在ノ有無ノ問題デナクシテ一定ノ連絡シタ事実、或ハ行為ニ対スル法律的ナ解釈或ハ「アテハメ」(サブサンプション)ノ問題デアル事ニ注意シナケレバナリマセン。従ツテコレハ或ル行為ガ善ナリヤ悪ナリヤノ倫理的ナ判断ニ似テオリマス。其ノ判断者ガ善ト云フモノ、悪ト云フモノヲイカニ理解スルカニヨツテ其ノ結論ハ異ラザルヲ得ナイノデアリマス

一般ノ常識デハッキリト善悪ノ区別ノツク様ナ場合ナラバ問題ハオコラナイノデアリマセウ。然シ善カ悪カ一般ノ常識デハ簡単ニ判断シ得ナイ微妙ナ問題トナリマスト、ソレハ結局、善悪ノ解釈論ニ帰シテ了ツテ単一ナ結論ハ出テ来ナイノデアリマセウ。

本件ノ所謂審議ナルモノガ裁判デアルカ裁判デナイカト云フ

ハ次(二九)

問題モ、結局裁判ノ概念ノ如何ニヨッテソノ返答ハ異ッテ来ルノデアリマス。又答ルモノガ法律上ノ素人デアルカ、法律ノ専門家デアルカニヨッテ異ッテ来ルノデアリマス。

本件ニ於テ検事ハ裁判ガアッタカ否カヲ判断スルニ基礎トナルベキ事実ノ証言ヲ求メナイデ法律ニ余リ通暁シテ居ナイ軍人ノ証人カラ唯「裁判カナカッタ」「裁判ガアッタカ否カ知ラヌ」「裁判ガ行ハレタト云ッタ事ヲ聞イテ居ナイ」ト云ッタ法律的意見ノ証言ヲ求メニ熱心デアッタト思フノデアリマス。

然レル法律ノ素人デアル本件ノ証人、右ノ様ナ法律的意見ノ証言ハ決シテ升田ノ主宰シタ本件ミレ島民ニ対スル審理ガ、審理手続ガ裁判デナカッタコトヲカ証スル権威アル証據トナルモノデアリマセン。ムシロソレハ甚ダ権威ナキ証據デアリマス。

平時ニオイテ常設法廷ニ於テ、常職ノ検事、判事等ニヨリ公開ノモトニ行ハレタ裁判ナラバ、裁判ガ有ッタ、ナカッタト云フ素人ノ証言モ相當ノ権威ヲ持ツデアリマセウ。然ル常設法廷モナイ野戦ニ於テ、スパイ等ヲ審問スル爲メニ設ケラレタ特設軍法會議、軍律法廷ニ於ケル裁判ノ如キハ、其レガ裁判デアッタカ否カガ甚ダ困難デアルト信ズルノデアリマス

カカル場合ノ素人ノ「裁判ガアッタ」「裁判ガナカッタ」ト云フ形式ニナサレタ法律的意見ノ証言ハ裁判ノ有無ヲ決定スル証據トナルモノデハナイト信ズルモノデアリマス。

從ッテ、又、先ニ「裁判ガ無カッタ」ト云フ形式ノ証言ヲ

ヲ證人ガ后ニ「裁判」ガアッタトキ證言シタトシテモ矛盾シタ
證言、證人トシテ其ノ信憑性ヲ問題トスルコトハ出来ナイ
ト思料致スノデアリマス。此ノ場合ニハ判断ノ対象トナッタ一定
ノ事実、或ハ行為ニハ変リハナク、唯、證人ノ法律的判断又ハ意
見ガ変ッタモノニスギマセン、一定ノ事実ニ対スル評價的判断カ
時ノ経過ヨリ変ルノデアリウルコトデアリマス。
ソレハ判断ノ基礎トナッタ「裁判」ナルモノニ関スル證人ノ見解
ガ変ッタニスギヌノデアリマス。
事実ニ関スル證言ガ変ッタノデハアリマセヌ。證言ハ原則トシ
テ、外界ノ、或ヒハ證人ノ心中ニ表象サレタ事実デアケレバ、原則
トシテ證言トハ云ヘナイノデアリマセウ
私ハ本件、犯罪ミレ島民ニ関スル取調ベカラ判決ノ宣告ニ至ル
迄ノ上述、如キ一連ノ行為ハヤルート基地、最高指揮官
升田少将ノ正當ナ權限ニ基キ本件ノミレ島民ノ犯罪ヲ
裁判スル為メニ、升田ヨリ招集サレタ特設軍法會議
手續デアルト解釈致シマス。
謂「ヤルート」ニ於ケル最高審議ナルモノノ本質(或ハ実体
或ハ実質ト)ハ裁判デアルトノ主張致スモノデアリマス。
其ノ理由ハ左ノ通リデアリマス。
一、ヤルート基地ニオケル最高指揮官海軍少将升田仁助
ハ本件発生ノ當時一定ノ犯罪ニ付、裁判ヲ行フ為メ
ヤルートニ軍法會議ヲ特設スル權限ガアッタデアリマス。
海軍軍法會議法第八條ハ軍法會議ノ種類ヲ
定メテ左ノ如ク規定シテ居リマス

(33)

「軍法會議ヲ設クルコト左ノ如シ

1. 高等軍法會議
2. 東京軍法會議
3. 鎮守府軍法會議
4. 要港部軍法會議
5. 艦隊軍法會議
6. 合圍地軍法會議
7. 臨時軍法會議」

更ニ第九條ハ

「合圍地軍法會議ハ戒嚴、宣告アリタルトキ、合圍地境ニ之ヲ特設ス

臨時軍法會議ハ戰時事變ニ際シ、必要ニヨリ海軍ノ部隊ニ特設ス」

此ノ二種ガ第八條ニ規定シテ居ル特設軍法會議デアル

更ニ第十條ハ次ノ如ク規定シテ居ル

「特設軍法會議ハ軍法會議ヲ設置シタル部隊又ハ地域ノ指揮官ガ即チ特設軍法會議ノ部隊又ハ地域ノ指揮官トス」

之ヲ招集シ、ソノ軍法會議ノ裁判官、檢事等、裁判構成ニ必要ナ職員ヲ任命スルノデアリマス。

其ノ他海軍軍法會議法ニ於テ規定シテアル軍法會議ノ長官トシテノ權限ヲ行使スルノデアリマス。例ヘバ其ノ特設軍法會議ニ於テ宣告シタル死刑判決ノ執行ヲ命ズルノハ其ノ長官ノ權能デアリマス。

本件ノ発生当時ニ於ケル群島一面ニ戒厳宣告サレテヰタカ
ヤルート基地ノ最高指揮官竹田少将ハヤルート環礁ニ正式
ニ戒厳ヲ宣告シタカ之ヲ肯定シ或ハ否定スル確タル資料
ガアリマセン。唯昭和十九年二月カラ四月頃ノ間ニ第四艦隊司
令長官カラ其ノ指揮下ノ各マーシャル群島ノ各基地ニ宛テ
「爾今各基地ハ所在先任最高指揮官之ヲ指揮スベシ」トノ
趣旨ノ電報ガ発セラレタ事ハ確認出来ルノデアリマス。
此ノ命令ニ基キ当時ノヤルートニ於ケル最高指揮官デアツタ
竹田海軍少将ガヤルート基地ニ於ケル一切ノ指揮ヲトツタコトモ
争ヒナキ事実デアリマス。

従ツテ戒厳ノ宣告ノ有無ニ拘ラズ竹田ガ戦時ニ際シ必要
アル場合ニ其ノ部隊ニ臨時軍法会議ヲ招集スル権限アツタ
コトハ先ニ引用致シマシタ海軍軍法会議法第九條ノ規定ニヨリ
明瞭デアリマス。

二、元来ヤルート環礁ニハ常設ノ軍法会議、常設ノ南洋庁
法院ハナカツタノデアリマス。従ツテ平時ナラバヤルートニ於テ発生シタ
犯罪、ヤルートニ於テ逮捕サレタ犯罪人ニ就イテハ軍事的犯罪
ハトラツク島ニアル艦隊軍法会議、或ハ通常犯罪ハポナペノ
南洋庁法院ガ夫々裁判権ヲ有シテ居タノデアリマス。
従ツテトラツク或ハポナペトノ交通ガ可能デ、ソコニ事件、犯罪人ヲ
移送スルコトガ出来タラヤルートニ臨時軍法会議ヲ特設スル必要
ハ認メラレナカツタノデアリマセウ。然シ本件発生当時ヤルート環
礁ハアメリカ海空軍ノ完全ナ包囲下ニ孤立シ他島トノ交
通連絡ハ絶対ニ不可能デアツタコトハ各証言ニヨリ委員

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會ニ充分御承知ノ通リデアリマス
此ノ状況下ニ於テ升田少將ガ本件ノミレ島人民ヲ裁判スル爲メニ
臨時軍法會議ヲヤルト部隊ニ特設シタコトハ飽クマデ合法的
ナノ升田ノ權限デアリマス
升田ハ其ノ權限ヲ法律ニヨリ正當ニ與ヘラレテ居ルノデアリマス
三、軍法會議ノ裁判管轄ニ屬スルモノハ、原則トシテ、軍人、軍屬
海軍用船ノ船員、軍ノ仕事ニ從事シ或ハ軍ニ從フモノ及ビ俘虜力
(海軍軍法會議法第一條參照)及、海軍刑法ノ一定ノ犯罪ヲ犯シタ
民間人デアリマス 然シ海軍軍法會議法第六條ハ戰時ニ於ケル左ノ
如キ廣イ特別管轄ヲ認メテオリマス
即チ其ノ第六條ハ曰ク
「軍法會議ハ戰時事變ノ際ニ、軍ノ安寧ヲ保持スル爲メ必
要アルトキハ第一條ニ記載シタル以外ノ者ニ對シ犯罪ニ付裁判
權ヲ行フコトヲ得」
從ツテ 本件ノマーシャル島民ガ軍隊ト關係アリトセラレ拘ラス
軍法會議ニ於テ裁判スルコトハ違法デハアリマセン
海軍々法會議法第七條ニハ臨時軍法會議ノ管轄權ニツキ
左ノ如ク規定シテオリマス
「臨時軍法會議ハ左ノ事件ニ付管轄權ヲ有ス
一、
二、省略
三、臨時軍法會議ノ設置サレタル部隊ノ守備地域ニ在ル
第六條記載ノ者ニ對スル被告事件」

(以下略)

従ツテ本件ノミレ島民ガミレ環礁ニ於テ犯シタル犯罪ニ付テモ裁判
ヲ未ルワケデアリマス
従ツテ井田少將ガ被告井上凡森川中尉ニ本件ミレ島民ノ犯
罪ノ調査ヲシメ其ノ調査ノ結果、島民達ノ供述及其ノボート
其ノ他ノ所持品ヨリ其ノ罪狀明白トナルヤ、被告井上ニ檢察
官トシテノ役ヲ命ジ井田自ラ裁判長トナリ、古木、新留各
少佐ニ審判官ヲ命ジソレテ其ノ島民達ノ犯罪ノ審理ヲ開
始シタコトハ明白ニ海軍軍法會議法規定ヨリ附與セラレタ
ヤルート基地最高指揮官井田正當ナル合法的ナル權限
デアル
コレハ彼ノ指揮下ノヤルート部隊ニ臨時軍法會議ヲ特設シテ本件
ノミレ島民ノ犯罪ニツキ裁判ヲ行フ爲デアルソレ以外ノ何物デモナイ
檢事側ハ其ノ裁判ニ於テ採ラレタ審理ノ手續ノ二、三ノ缺陷カ
ラ本件ノ審理手續ガ裁判デナイト強調セラレル樣デアル
然シ或ル行爲ガ一連ノ行爲ガ、裁判デナイヤ否ヤヲ法定
スル重大ナ要素ハ其ノ間題トナル裁判ヲ行フ者或ハ機關
ガ眞ニ正當ナル合法的ナ裁判權、管轄權ヲ有シタカ否カノ事實
デアル、其ノ裁判ノ手續中ノ一部ノ缺陷ハ第二義的問題デアル
イカニソノ手續ガ訴訟法、規定スル所ニ從ツテ完全ニ履行セラレ
タトシテモ法律上裁判權ガ其ノ基礎ニナカツタトシタラソレハ法律上
ノ裁判デハナイ一種ノ私刑デアル
之ニ反シ正當ナル法律上ノ裁判權ヲ有スルモノガ裁判ヲ行フ
場合、其ノ裁判ノ手續ニ或ル缺陷ガアリ訴訟法ノ規定ニ違

又レテ毫モソレハ裁判トレテ無効トナルノデハナイ 裁判ガナカツタト
云フ事ハ未来ナイ 裁判ガアツタガ其ノ手續キニ違法ガアツタトレテ
上訴ニヨリ批判サレルルノミ
其ノ裁判ニヨリ宣告サレタ判決ハ判決トレテ無効デハナイ ソレハ
飽ク迄裁判所ノ判決トレテ形式的ニ有効デアル コー法理ハ
ヨク正シク理解サレネバナラヌ又
本件ミレ島民ノ犯罪ニ付 弁田ノ主宰シタ審理ノ手續ニツキ
次ノ如ク誤解ナキ様ヨク留意サレネバナラヌ
特設軍法會議ノ手續ハ通常ノ軍法會議ノ手續ト
日本刑事訴訟法ノ手續トノ左ノ点ニ異ツテ居ル
(一)辯護人ヲ附スルコトガ許サレナイ。(海軍々法會議法第九十三條参照)
故ニ本件ノ審理ニ辯護人ガ居ナカツタ事ハ違法デハナイ
右ノ事件ノ論告ニ於テ検事ハ同法九十四條ヲ引用シテ反駁ヲ
加ヘテオラレルガ之レハ全ク見當違ヒノ反駁デアル
コレハオソラク検事ノ手許ニアル海軍々法會議法ノ英文飜訳ガデ
タラメナ為メ其ノ條文ノ意味ヲ誤解サレタモノト善意ニ理解ス
ルガ最少シ慎重サガホシカツタト思フ 一國ノ法律ハ其ノ特殊ノ法
律用語カアル 單ニ之ヲ文字解釈シテハ正シキ理解ハ把握出来
ナイ 特ニ外國法ガ飜訳サレタ時ハ更ニ一段ノ注意ガ要ル
又同法三六九條ニ付イテ反駁シテオラレルガ之モ海軍軍法會
議法全体ヲ讀ミヨク研究シナイデ唯其ノ一部ヲ捨ヒ讀ミサレ
タ重大ナ誤解デアル
イヤシクモ アメリカ合衆國ヲ代表シテ検事ノ職ヲ行ヒ日本ノ
35 法律ニ基キ法律論ヲナサレル場合ニハ日本ノ法律ノ正シイ飜訳

者ニ基キ其ノ法律ノ全條文ヲ讀ミ全体ヲ慎重ニ研究スルト云フ上ガ之レナサレルコトガ希マシイ。

吾々日本ノ辯護士ハ日本ノ法律ニツキ決シテ充分ナ識論ハシテ居ナイツモリデアル。

(二)特設軍法會議ノ裁判ハ公開サレナイ。海軍々法會議法第四九條曰ク「本節中審判ノ公開ニ關スル規定ハ之ノ特設軍法會議ノ許可ヲ拾ヒ讀ミシテ其ノ誤解ノサレナカツタコトハ當然デ違法デハナイ。

コノ点ニツイテモ古木事件ノ辯論デ檢事ハ同法一〇二條ヲ引用シテ介田ノナレタ裁判ノ非公開ノ違法ヲ攻撃シテオラレルガ、コレモ亦軍法會議法全條文ヲ讀マズ一部ヲ拾ヒ讀ミシテ其ノ誤解ノモトニ議論ヲシテオラレルデアル。

(三)檢事ノ法廷ニ於ケル證人ノ訊問ニ於テモ アメリカ合衆國ノ法律用語デアル チヤージ、エンド、スペシヒケイションヲ云フ言葉ヲ使ツテ證人ニ訊問サレテオリマス。アメリカニ於テハ右ノ法律用語ハ常識ケイションヲ區別スル制度ハナイノデアリマス。カル言葉ヲ使ツテ證人ニ訊問サレテモ證人カラハ正シイ返答ハ出テ来ナイノデアリマス。又檢事、判事トナルトモ宣誓ノ制度ハナイノデアリマス。然シ日本ノ刑事訴訟法デハ、判事、檢事、書記ガ裁判ヲ開始スルニ當リ法廷デ宣誓スル制度ハナイノデアリマス。

又日本ノ刑事訴訟法デハ、被告ハ證人トナル資格ハナイノデアリマス。

從ツテ被告ガ宣誓シテ證人トナル事ハ全然ナイノデアリマス。

(39)被告人ハ裁判長ガ訊問ヲ終ルノデアリマス。之ニ對シ判事

辯護人ノ補充訊問ガ許サレテ居ル。
日本ニ於ケル證人ノ宣誓制度ハアメリカノソレト甚シク異リ宣誓ヲシテ證人トナル場合ガ多イデアリマス。
被告人ガナホ文以下ノ時、宣誓ノ上一定ノ親族関係ノアルモノ、被告人ト共犯関係ノアルモノ、被告人ノ雇人又ハ同居人ハ宣誓セレメズニテ之レヲ訊問スルノデアリマス（日本刑事訴訟法第三一條參照）。宣誓シナイデ證人トナッタモノノ證言ノ信憑性ハ裁判官ノ自由心證ニ基イテ合理的ニ判斷サレルノデアリマス。

アリマス。

本件ノミレ島民ノ審理手續ヲ中、最モ問題トナルノハ被告人ノ出席スル法廷ニ於ケル審理ガナカッタト云フ点デアリマセウ。然シ井上ノ證言ニヨレバ升田ハ被告人達ヲ其ノ收容所ニ於テ訊問シ居ル升田ハ何故、其ノ審理ノ場所ヲ定メタ彼ノ防空壕式事務室ニ被告人達ヲ訊問シテカッタカ？連日終日ノ空襲ノ爲ヤ且ツ完全ナ防空壕モナカッタ當時ノヤルートトシテハ止ムヲ得ス手段ト考ヘル。彼ガ其ノ情況判斷ニヨリ、被告人達ヲ升田ノ部屋ニ呼バズ其ノ比較的防空的ニ完全デアル其ノ島民達ノ收容所ニ於テ訊問シタ事ハムシロ當時ノ狀況ニテシテ適宜ノ處置ト考ヘル。私ハ今、ヤルートニ於ケル當時ノ戰況ヲ茲ニ詳述スルハ控ヘル。委員會モ檢事モ良ク御了承ノコトト思フカラ。

ヤルートニ於ケル最高指揮官デアリ且ツ本件ノ臨時軍法會議ヲ特設スル權限ヲ有シタ升田少將ガ其ノ召集權者ノ地位ニ在ッタ時ノ客觀情勢ノ應ズル爲軍法會議ノ手續

77 ×(20.トシテ其ノ時

ノ一部ヲ変更シテ特別ノ手續ヲ採用シタ事ハ許サレルコトデアル
コノ手續ノ変更ニヨリ本件ノ審理ガ裁判デハナイト結論スルコトハ
法律學ノ常識ガ許サナイ。
今デスキヤップノ規定ニ付イテ之ヲ見ヨウ。コレハ今回ノ日本人ノ
戰爭犯罪ヲ裁判スル爲メニ設ケラレタ特別ノ裁判手續
ノ規則デアル。コノ規則ハアメリカ合衆國ノ軍法會議ノ
手續トハ相當異ル手續ガ採用サレテ居ル。證據手續
ニハ相當重大ナ変更カ加ヘラレテ居ル コレハ戰爭犯罪ニ
関在スル特殊ノ事情カラ其ノ事情ニ應ズル爲メニ通常
ノ手續ニ変更カ加ヘラレタノデアル。而モコノスキヤップルール
ハアメリカ合衆國ノ法律デナク日本占領軍ノ最高指揮官
ノ命令ノ形式デ規定サレテ居ルノデアル。最高指揮官ノ命令
ニヨリアメリカ合衆國及其ノ他ノ聯合國ノ軍法會議法
トハ異ル手續、特ニ其ノ手續ノ嚴格性ヲ緩和シタ手續
ガ採用サレテ居ルノデアル。
刑事訴訟法ノ規定スル通リ、訴訟手續ガ行ハレナカツ
タ之ノ理由デ本件ノミレ島民、裁判ガ裁判デナイト主張
サレル。コノ檢事側ノ論理デ行ケバ アメリカ合衆國ノ軍
法會議法ノ法則ヲ変更シテ其ノ判決ヲ下スコトハ許ニテハレル裁
判モ亦裁判デナイト云ヒ結論ニ達スルコレハ何人モ否定出
来ナイ。檢事ノ論理ノ誤ノ入方ガ間違ヲ居ルノデアル。
以上ニヨツテ吾々ハ本件ミレ島民ニ対シテナサレタ本件ノ
「ヤルートニ於ケル最高審理ガ日本ノ國法ニヨル正當ナル
38 9/5(4軍法會議ノ裁判デアル。從ツテ又其ノ審議ノ結果

宣告ヲ判決、日本軍法會議、宣告ヲ判決デアル
本論綴ヲ
本件、ミレ島民、犯罪人ニ対ル裁判ガ行ハタノデアル。

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(六) 日本刑法ノ採用シテ井ル根本理論ニ付テ

先ニ本法廷ニ審理サレマシタ古木秀策ノ事件ニ於テ古木ハ本件ノ井上ノ事件ト同ジク日本刑法第一九九條ノ殺人ノ罪ニヨッテ起訴サレテオリマシク。其ノ事件ノ檢事側ノ最終辯論ヲ聞キマシテ檢事ガ日本刑法及ビ海軍軍法會議法等ヲ良ク理解シテオラレナイコトヲ見ヌシタノデアリマス。良ク理解シテ井ナイト云フヨリモ、ムシロトンデモナイ誤解ヲシテオラレルノニ氣ガ付イタノデアリマス。其ノ誤解ニ基イテ全ク見當違ヒノ議論ヲシテオラレルノヲ發見シテ甚ダ遺憾ニ思ッタノデアリマス。例ヘバ大正十一年ノ昔ニ廢止サレマシタ旧日本刑事訴訟法ヲ現行刑事訴訟法ト誤解シテ其ノ旧刑事訴訟法ノ條文ヲ引用シテ辯護人ノ辯論ヲ反駁シテオラレルガ如キハ其ノ甚ダシイ實例デアリマス。又日本刑法第三十八條第二項ノ理解ニ於テモ、事實ノ不知或ハ錯誤ハ「ミテイゲイシヨン」トシテ考慮ニ入レラレルニ過ギナイ、ソレハ犯意ノ成立ヲ阻却スルモノニアラズト誤解シテオラレルノデアリマス。コレハ重大ナ且ツ輕率ナ誤解デアリマス。此ノ点ニ付イテハ後ニ詳論スルデアリマセウ。日本ノ法律ノ條文ヲ英語ニ飜譯シ其ノ條文ノ意味ヲ正シク傳ヘルコトハ技術的ニ甚ダ困難デアリマセウ。マヅイ飜譯ノ為ニ誤解モ生ズルデアリマセウ。然シ法律ノ條文ノ解釋ニ當ッテ單ニ其ノ條文ノ文字ノ表面的ナ文理解釋（ミニヨッテハ其ノ條文ノ正シイ意味ヲ理解スルコトハ出來ナイノデアリマス）ノミニ依テ特ニ犯意ニ關スル日本刑法ノ規定ハ極メテ簡潔デアリマス。刑法第三十八條ノ規定ガアルノミデアリマス。然シ其ノ背後ニハ夥シイ判例ト數ヘ切レナイ學者ノ解釋論ガアルノデアリマス。此ノ判例ト學說トヲ理解シナケレバ日本刑法ノ犯意ノ概念ハ正シク把握出來ナイノデアリマス。唯日本刑法第三十八條ノ條文ヲ讀ンデ被告人ヘノ犯意ノ有無ヲ論ズルコトハ輕率ノ誹ヲマ

メグレマセン。更ニ又、日本刑法全体ノ正シキ理解ナクシテ被告人ニ対シ、日本刑法第一九九條ノ殺人ノ罪、有罪無罪ヲ論ズルコトモ亦不可能デアリマス。私ハ第一起訴其ノ各罪狀項目ノ有罪無罪ヲ論ズル前ニ日本刑法ノ根本理論ヲ少シ説明シ裏法委員會ノ御理解ヲ深メ度イト存ジマス。今日ノ日本刑法ハ明治四十年ニ制定サレタノデアリマス。当時ヨーロッパニ於テハ刑法ノ改正事業ガ非常ニ活潑ニ行ハレ新シイ刑法理論ガ旺ンニ論議サレタノデアリマス。日本刑法ハ當時ノ最モ斬新ナ理論ト制度トヲ取リ入レテ編纂サレタモノデアリマス。「グワム」ノリーガルセクレヨンニアリ、檢事モ御使用ニナッテ居ルト云ハレル「シーボルト氏」ノ英文日本刑法ノ序文ニハ次ノ如ク日本刑法ヲ批判シテオラレマス「刑法ヲ粗讀サヘスレバソレガ何ニ著シク寛大自由主義的ナ近代的ナ作ニ出來ルノデアル。日本ノ変則的ナ文明並ニ社會學上ノ問題ヨリ生ズル一定ノ特徴ヲ承認スルナラバ、此ノ法典ハ贅言ヲ待タズ大キナ自由ト量ノ力ヲ其ノ最モ必要ナ所ニ附與シテ居ルト云フ事ハ何人モ自由ニ是認スルデアロウ」ト。初犯、刑ノ執行猶豫、假出獄、情狀ニヨリ犯罪ノ不成立及ビ刑ノ減免ニ関ス恢重ナ條項ガ設ケラレテ居ル。他方重犯ニ對シテハ刑ガ加増サレ、最モ重イ打撃ヲ当然受クベキ者ニ當然與ヘラレル仕組ニナッテ居ル。更ニコノ法典ノ他ノ特徴ハ出來得ル限リ犯罪ノ微細ニ亘ル定義ヲサケ、從ッテ西欧諸國ニ屢々見ラレル檢事ノ起訴ニ際シテノ超ゑベカラザル技術的困難ヲ除去シテ居ルノデアル。犯人ト被害者ニ血族関係ガアル場合ニハ一定ノ犯罪ニ對シテハ刑罰ノ技藝ガ認メラレ、依ッテ家族制度ハ保護、育成サレテ居ルノデアル。社會制度全体ガ日本ノ様ニ法律的意味ニ於ケル掌ニヨル依存シテ居ル所ノコレ等ノ條項ハ自然デアリ又必要デアル。

之ヲ要スルニ私ハ日本ノ現刑法ハ日本情況及ビ日本人ノ心理ニ適
応シテ丼ルト確信スルノデアル。ソシテ現在最モ必要ナモノハ基礎法ヲ
下手ニ繕フ事デハナク、法典草案ニ当ツタ人達ノ意志ヲ最モ自
由ニ適応スル事デアルト信ズ。「現行日本刑法ノ根本的ナ特徴ハ一言デ云
ヘバ犯人ノ刑事責任ノ有無、其ノ刑事責任ノ程度（課スベキ刑罰ノ程度）
ヲ決定スル重要ナ第一義的ノ要素ハ犯人ノ主観、換言スレバ犯行
当時ノ意思、殊ニ云ヘバ其ノ「メンタルステイト」及ビ其ノ性格（パーソナリテ
デアル。其ノ外部ノ行為、其ノ行為ヨリ生ジタ実害又ハ険ト云フモ
ノハ第二次的ナモノニ過ギスト云フニアリマス。例ヘバ日本刑法第四十三條
ハ次ノ如ク規定シテ居リマス「犯罪ノ実行ニ着手シ之ヲ遂ゲザルモ
ハ其ノ刑ヲ減軽スルコトヲ得但シ自己ノ意志ニ因リ之ヲ止メタルトキハ
其ノ刑ヲ減軽又ハ免除ス」コレハ犯罪ガ未遂ニ終ツテ結果ガ発
生シナカツタ場合ニ於テモ裁判所ハ其ノ犯人ノ犯情ノ如何ヨツテ既遂
（犯罪ヲ完成）ト同様ノ刑罰ヲ課スルコトガ出来ルト云フ規定デアリマ
ス。即チ未遂ノ場合ニハ既遂ノ時ヨリモ軽イ刑ノ刑罰スルコトハ出来ル。然シ
裁判所ハ当然ニ其ノ軽イ刑ヲ軽クシナケレバナラストカ拘束ヲ受ケナイ
ノデアリマス。行為及ビ其ノ結果ニ重点ヲ置イテ考ヘルトキ未遂ノ
場合ニハ犯罪ノ完成ヲ殊ニ結果ハ発生シテ丼ナイノデアリマスカラ、之
ヲ罰スベキデナク、又ハ少クトモ其ノ課スベキ刑ヲ減軽スベキデアリマセウ。
然シ行為者ノ人格ニ重キヲ置イテ考ヘルトキ、少クトモ自己ノ自由意
志デ犯罪ノ実行ヲ止メタ場合ヲ除イテ、其ノ他ノ未遂ノ場合ハ、犯罪
ガ既遂トナツタ場合ト同様ニ罰スベキモノト考ヘルノガ当然ノ結論デアリ
マス。所罰ノ対象ハ行為者ノ行為、結果デナク、犯人ノ主観、或ヒハ
ゆえ「イーブルインテント」デアルカラデアリマス。又共犯ノ場合ニオキマシテモ

実際ニ其ノ犯罪ノ実行ヲ担当シナクトモ其ノ共犯関係ニ於テ主謀者的地位ヲ占メタモノハ重ノ罰セラレルノデアリマス。教唆ノ場合ハ「人ヲ教唆シテ犯罪ヲ実行セシメタル者ハ正犯ニ準ズ」ト云フ第六十一條ノ規定ガアリマス。殺人ノ場合ヲ例ニトリ考ヘマスト他人ヲ教唆シテ人ヲ殺サシメタ場合ハ其ノ殺人ノ実行ヲ担当シタ者ヨリモ其ノ殺人ノ実行ヲ教唆シタ者ノ方ガ重ノ罰セラレル場合ガアルノデアリマス。

旧刑法デハ殺人ノ罪ヲ謀殺、故殺（コレハアメリカノヨウニ一口上ノ「マーダー」トホボ同ジコトデス）ト云フ様ニ区別シ之ニ対シ課スベキ刑ヲ異ニシテオリマシタ。然ルニ現行刑法ハカカル区別ヲ止メテ単一ノ殺人罪ノ規定ヲ設ケタノデアリマス。ソレテ課スベキ刑モ最高ハ死刑カラ最低ハ懲役二年迄下リ得ルノデアリマス。更ニ其ノ犯情ヲ酌量減軽シテ一年半ノ懲役迄之ヲ軽ク罰シ更ニ其ノ刑ノ執行猶豫ヲスルコトモ出来ルノデアリマス。「日本學者ノ中モ此ノ一九九條ノ殺人罪ニ対スル刑罰ノ余リニモ広イ量定範囲ハ余リニモ理念的デ現実的デナイト非難シテ井ル人モアルノデアリマス。」コレハ決シテ日本ニ於テ人間ノ他人ノ生命ヲ軽視スル傳統ヲ考慮ニ入レテ立案サレタモノデハナイノデアリマス。人ノ生命ヲ奪フコトハ、誠ニ容易ナラヌ犯罪デアリマス。然シ犯人ノ立場ニ立ツテ考ヘルトキ、例ヘ殺人ト云フ重大ナ結果ヲ招イタトシテモ、殺人ヲ犯シタ動機、事情ニ同情スベキ事由ガアル時ハ、或ハ其ノ犯人ノ性格ガ社會的ニ何ノ危険モナク再ビ犯罪ヲ犯スオソレ（プロバビリテイ）ノナイ場合ハ、徒ラニ之ニ重キ刑ヲ課シテ之ヲ懲ラシ社會カラ隔離スル必要ハナイ。意味ナキ懲罰デアリマス。刑務所ニ閉ジ込メル

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第二章　第一起訴ノ殺人罪ニ付テ

(一)被告井上ハ第一起訴ノ殺人等ノ罪ニ付無罪デアル

被告ハ本件ノミレ島民八名ノ銃殺ノ行為ハ上官升田ノ命令ニヨリ死刑判決ノ執行ヲ命セラレ其ノ執行ヲ為トシテ実施シタモノデアル。コレハ官吏トシテノ職務執行々為デアル其ノ銃殺行為ハ日本刑法第三十五条ニヨリ日本刑法第一九九条ノ殺人罪ヲ構成シナイ日本刑法第三十五条ハ曰ク法令又ハ正當ノ業務ニヨル行為ハ之ヲ罰セズト。法令ニヨル行為トハ法令ノ規定ニヨリ當然ニ権利義務、職権、職務トシテ認メラレタ行為ヲ意味スル公務員ノ職務行為ハ其ノ一ツデアル。コレハ法令ノ規定ニヨリ公務員ノ義務ニ属スルト同時ニ其ノ権利ニ属スルモノデアルコノ公務員ノ職務行為ハ直接ニ法規ニ基ク場合ガアル或ハ上官ノ命令ニ基ク場合ガアル。コノ上官ノ命令ガ形式上若シクハ実質上違法ナル場合其ノ命令ニ基イテナシタ行為ハ適法ナルコトヲ得ルヤ否ヤ下官ハ上官ノ命令アル場合其ノ命令ノ形式ヲ審査スルコトガ出来ルガ其ノ内容実質ニ付イテハ審査権ガナイ。其ノ上官ノ命令ガ其ノ上官ノ職権ノ範囲内ニ於テ発セラレ其ノ命令ノ形式ガ法令ノ規定ニ適合シ且ツ其ノ命令サレタ事件ガ下官ノ職務ノ範囲内ニ属スルトキハ其ノ命令ノ内容ガ実質上違法ガアッテモ之ヲ理由トシテ其ノ

執行ヲ拒ムコトヲ得ナイ更ニ其ノ命令事項ガ職務ニ関スルモノデアルカ否ヤニ付イテ上官ト下官トノ見解ガ一致シナイ時ハ上官ノ解釋ニ從ハネバナラヌ又故ニイヤシクモ職務上服從義務ノ存スル範圍内ニ於テ上官ノ命令ニ依ツテ為シタ行為ハ即チ職務行為デアルカラ刑法第三十五條ノ適用ヲ受ケ犯罪ヲ構成シナイコレガ日本ニ於ケル通説デアル

今被告ノ場合ニ付キ之ヲ考察シヨウ

被告ガ其ノ執行ヲ命ゼラレタ本件ミレ島民ニ対スル死刑判決ハ前述ノ如クヤールート島基地最高指揮官升田少將ノ正當ナ權限ニ基キ召集サレ特設サレタ臨時海軍々法會議ノ宣告シタ法律上有効ナ判決デアル升田ハ其ノ特設軍法會議ノ召集權者デアル日本軍法會議法ハ其ノ召集ノ權者ヲ其ノ軍法會議ノ「長官」ト稱シテヰル其ノ長官ハ判決ノ執行ヲ命ズル正當ナ權限ガアル本件ニ付イテ上訴ヲ許サズ直チニ判決ノ執行ヲ命ジタ事モ正當デアル臨時軍法會議ハ一審制度デ其ノ判決ニ対シテハ上訴ガ許サレナイ（海軍々法會議法第四二〇條参照） 又臨時軍法會議ヲ合ム特設軍法會議ガ死刑ヲ宣告シタ時其ノ死刑ノ執行ニハ海軍大臣ノ許可ヲ要セズ其ノ特設軍法會議ノ長官ガ之ヲ命令出来ル（海軍々法會議法第五一〇條）故ニ本件ニ於テ其ノ臨時海

軍々法會議ノ長官デアル升田少将ガ海軍大臣ノ許可ヲ受ケルノ手續ヲトラズ判決宣告后直チニ其ノ死刑ノ執行ヲ命ジタ事モ升田ノ職務權限ニ屬シ其ノ執行命令ハ合法デアル。

被告ハ此ノ裁判ニハ檢察官トシテ行動シ又其ノ平常ノ任務ハ特務班長トシテ其ノ任務ノ中ニ刑ノ四割ノ実施ガ含マレテ井ル。升田ガ被告井上ニ其ノ判決ノ執行ヲ命ジタ事モ正當デアル。被告トシテハ其ノ命令ニ服從スル義務ガアル。其ノ死刑執行后其ノ執行サレタ旨ガヤルートノ全軍デヤルート防備隊最高指揮官ノ名ニ依ッテ公表サレテ井ル。此ノ死刑ノ執行ガ升田井上ノ私的行為デナクヤルート防備部隊ノ公ノ職務執行々為デアル事ハ之ニヨッテモ明瞭デアル以上ノイヅレノ点カラ見テモ被告ノ銃殺行為ハ公務員トシテノ公ノ職務執行々為トシテ違法性ヲ阻却スルモノデアル被告ハ殺人罪ニ付無罪デアル。

(二)問題ハ其ノ執行ヲ命ゼラレタ判決ガ子供ニ対スル死刑ノ判決ヲ含ンデ井ルコトデアル。日本刑法第四十一條ハ「十四歳ニ満タザル者ノ行為ハ罰セズ」ト規定シテ井ル。故ニ本件ノシロー・ネーベットノ年ガ十四歳以下デアッタ場合ニハソレニ対シ死刑ノ判決ヲ宣告スルノハ違法デアル。本件ノシロー・ネーベットノ年齢ガ正確ニ何歳デアッタカ之ヲ確認スル事ハ出来ナイ又本件ニ於ケル

47 (50)

證言ハ十才カラ十二、三才ト言ッ證言ガ多イ。ミレ島デアリメノ子シローヲ知ッテ井タ七呉名子辰市ノ證言ニ依ルト椰子ニノボリチヤガロナド採收シテ井テ十五才位ト言ッテ井ル田中正治ノ口述書ニ依ルト田中ハ田中ヲ殺害セントシタ島民ハ二十三才位ノ妻女ガアリ其ノ妻ニ六才位ノヤセタ子ガ井タト言ッテ井ル然シコノ口述書デハ其ノ六才ノ子ガシローデアッタカ否カ確認出来ナイ。検事側ガ子供ノ年齢ガ十四才以下ト主張サレル場合ニハ其ノ子供ニ対スル判決ノ違法ヲ主張サレル場合ニハ検事側ガ其ノ年齢デアッタコトヲ立證スル必要ガアルデアラウ。

今假リニ本件ノシロー、ネーベットガ十四才以下デアッタトシヨウ十四才ニ満タヌ者ニ刑事責任ヲ認メ死刑ノ判決ヲ宣告キスルコトハアキラカニ日本刑法ノ違反デアル其ノ死刑判決ハ形式的ニ有効デモ其ノ判決ノ内容ハ違法トナル。

違法ノ死刑判決ヲ執行シタモノハ例ヘソレガ上官ノ命令ニ依ル場合デモ刑事責任ヲ負担シナケレバナラヌカ？又カヽル検事ノオープニング・アーギュメントハ之ヲ肯定シテ被告ノ有罪ヲ主張シテ井ル様ニ見受ケル然シ日本刑法第三十五條ノ解釈ニ関スル上述ノ通説ニヨレバ検事側ノ主張ハ必ズシモカク簡單ニ被告有罪ノ結論ヲヒキ出ス事ハ許サレナイ日本ノ通説ハイヤシクモ職務上服從義務ノ存スル範囲内ニ於テ上官ノ命令ニヨッテナシタ行為ハタトヘ其ノ命令

ノ内容ガ違法デアッテモ職務行為デアル故ニ刑法三十五條ノ適用ヲ受ケ犯罪ヲ構成シナイト言ッテアル
右ノ通説ハ官吏公務員ニツイテハ一般論デアル
軍人ニ一般ノ文官ヨリモ比較ナラヌ程強度ノ服従義務ガ課セラレテヰルコトハ各國共通ノ原則デアル從ッテ軍人ノ立場ハ上官ノ職務上ノ命令ハ一層強ク其ノ刑事責任ノ解除ノ理由トナル。
各國ノ軍刑法ハ此ノ上官ノ命令ニ反抗シ又ハ之ニ服從セザル者ニ對シ嚴罰ヲ規定シテ居リマス
日本ニ於テモ陸海軍刑法ニソレ〴〵抗命ノ罪ガ規定サレテ居リマス例ヘバ海軍刑法ニ次ノ規定ガアリマス
「第五十五條上官ノ命令ニ反抗シ又ハ之ニ服從セザルモノハ左ノ區別ニ從ッテ處斷ス
一、敵ニ對シ爲ニスル爲ノ暴行ヲ爲ス際ノ場合ニアリテハ死刑又ハ無期若ハ十年以上ノ禁錮ニ處ス
二、戰時又ハ艦船救護ノ爲ノ暴行ヲ爲ス際ノ場合ニアリテハ一年以上七年以下ノ禁錮ニ處ス
三、其ノ他ノ場合ニアリテハ三年以下ノ禁錮ニ處ス
陸軍刑法第五十七條ニ曰ク
上官ノ命令ニ反抗シ又ハ之ニ服從セザルモノハ左ノ區別ニ從ッテ處斷ス
一、敵ニ對シテ爲ス時ハ死刑又ハ無期若ハ十年以上ノ禁錮ニ處ス
二軍中又ハ戒嚴地境ナル時ハ一年以上七年以下ノ禁

錮ニ處ス

三、其ノ他ノ場合ナル時ハ二年以下ノ禁錮ニ處ス

陸軍法務中佐菅野保之ハ其ノ著書「陸軍刑法原論」ニ於テ日本陸軍刑法ノ抗命罪ニ付キ左ノ如ク説明解釋ヲシテ居リマス「命令抗命罪ハ上官ノ命令ノ絶対性ヲ保護シ以ツテ軍ノ活動ノ確實ナルヲ維持セントスルモノナリ抑々上官ノ命令ニ対スル下官ノ服従ニ付キテハ行政法上モ或程度ニ於テ要求セラル、所ナルモ軍ニ於ケル命令服従ノ関係ハ更ニ之ヲ強化シ殆ンド宗教的神聖性ヲ附與セラル行政法上ノ命令不遵守ガ懲戒ノ原因トナルニスギザルニ対シ軍ニ於ケル命令ノ不遵守ハ直チニ刑罰ノ制裁ニ服セザルヲ得ザル所以ノモノハ軍ガ戦闘ヲ最大任務トナシ戦勝ヲ最高ノ目標トスル當然ノ帰結ナリ」「命令ノ内容　命令ハ正當ナル系統ニ在ル上官ノ權限内ニ屬スル事項ヲ内容トセザルベカラズ而シテ該内容ハ原則トシテ統帥事項ナルモ軍政事項ニモ及ブコトヲ得ルモノト為スヲ通説トス蓋シ両者ヲ区別スルハ実際上極メテ困難ナルガ為ナリ…次ニ命令ノ内容ガ法律上ノ不能ニアタル事項例ヘバ犯罪行為ヲ命ズルガ如キモノアルトキハ當然無効ナリ。但シ之ニ対スル服従ノ法律的効果ハ別個ニ考察セラレザルベカラズ」

「命令ノ形式　命令ハ文書ニ依ルト口頭ニ依ルトヲ問フ事ナク苟モ直屬上官其ノ他正當ニ指揮監督ノ權ヲ有スル上官ヨリ発セラレタルモノナル限リ形式ヲ具

備スルニ至ルモノナリ」「命令ノ有効性、命令ハ前述
ノ如ク職権アル上官ヨリ其ノ権限内ノ事項ニ関シ発セ
ラルル場合ニ於テ有効ナルモ、ナルコトハ疑ヲ容レズ。
然レ共カクノ如ク実質及ビ形式上完備セズト雖モ何
命令ノ有効性ヲ主張シウルノ余地ナキカノ点ハ行政法
學上争多キ所ナリ 通説ハ一般ノ見解上上官ノ命令
ト認メウラルトキハ該命令ヲ以テ有効ナリトスルナリ
換言スレバ斯ル命令ニ対シテハ下官ハ法規ノ解釈又ハ事
実ヲ異ニスト理由ニ基キ服従ヲ拒否スルコトヲ得ズ
而シテ軍ニ於ケル命令服従ノ関係ハ更ニ一歩ヲ進メタトヘ
無効ノ命令ト雖モ原則トシテハ之ガ服従ヲ拒否スルヲ得ズ
但シ其ノ命令ノ内容タル作為又ハ不作為ノ犯罪行為
ニ該当スベキコトヲ直観的ニ感知シ得ル如キ稀有ノ場合
ニ限リ之ニ対スル服従ヲ避クルコトヲ得ルニスギズ此ノ限度
ヲ超ヘテ命令ノ当不当ヲ論難スルハ絶対ニ許サザル所
ナリ」
更ニ「軍人ガ其ノ上官ノ職務上命令ニ基イテ為シタ行為
ニ対スル刑事責任ニ就テ日本ニ於ケル行政學、憲法
學ノ最高権威デアル東京帝國大學名誉教授法
學博士美濃部達吉氏ノ所見ヲ之ニ引用シマス
同博士ハ有名ナ著書「行政撮要」ニ於テ次ノ如ク述ベテ
オル「陸海軍人ガ其ノ軍人タル地位ニ於テ國家ニ対シテ
負フ所ノ義務ハ一般官吏ノ國家ニ対スル義務ト性質ヲ
51 異ニスル事ナシ唯軍人ハ其ノ紀律特ニ厳重ナル事ヲ要シ

随ッテ其ノ拘束ヲ受クル事ノ程度ハ文官ニ比シ遥カニ強シ
軍人ノ職務上ノ義務ノ一般官吏ト異ル最モ主要ナル点ハ
其ノ従順ノ義務ニアリ軍隊ノ戦闘力ヲ発揮シ軍備ノ目
的ヲ全ウスル為ニハ軍令ノ統一ヲ保チ上長ノ命令ヲシテ絶対
ノ効力ヲ有セシメ軍隊ヲシテアタカモ一個体ノ如クニ心ヲ一ニ
シテ活動セシメザルベカラズ、上官ノ命令ニ抵抗スルハ一般
文官ニアリテハ唯懲戒処分ノ原因タルニ止マルニ反シ軍人
ニアリテハ厳重ナル刑罰ヲ以ッテ之ガ制裁トナス軍人ガ上官
ノ命令ニ服従スル事ヲ要スルハ唯其ノ命令ガ有効ナル場合
ニ限ル事ハ勿論ナリト雖モ軍令ノ効力ハ二ツノ点ニ於テ一般
文官ニ対スル職務命令ト区別シテ観察スル事ヲ要ス
(イ)軍人ハ其ノ一身上ノ生活行動ニ付イテモ軍ノ紀律ニ関係
スルモノ多ク職務ニ関係ナキ私生活ノ範囲トシテ認ムベ
キモノ甚ダ狭シ随ッテ軍人ニ対スル命令ハ一見私生活ニ属
スト認ムベキモノニ付イテモ多クノ場合ニ於テ尚有効命令タ
ル事ヲ失ハズ殊ニ入営中及ビ戦時ニ於テ陣地ニアル軍人ハ
其ノ総テノ生活ニ付キ上官ノ命令ニ服ス
(ロ)絶対ニ無効ナル命令ニ対シテハ軍人ハ固ヨリ服従ノ義
務ヲ負ハズト雖モ、軍人ヲシテ自ラ命令ノ有効無効ヲ審
査スルノ責任ヲ負ハシメ若シ無効ナル命令ニ服従スル時ハ
服従者ニ於テハ自ラ責任ニ任ズルヲ要スルトスル時ハ軍
人ヲシテ其ノ服従ニ危惧ヲ感ゼシメヒイテ軍規ノ統一ヲ
害スルヲ以ッテハ上官ノ命令ニ基キテ為シタル行為ニ付イテ
ハ仮令其ノ命令ノ無効ナル場合ト雖モ自ラ責任ニ任ズルコト

ナク其ノ命令者タル上官ニ於テ専ラ其ノ責ニ任ズベキモノト解セサルヘカラズ是レ法律ガ刑法、制裁ヲ以ッテ服従ヲ強制セルコトヨリ生ズル当然ノ條理ナリ」ト言ヲ大略ナリマセン。コノ点ハ濃部博士ハ日本ノ学者デアリマス。

此ノ「ベラクスト」ニシテ此ノ大略ナ結論ガアルノデアリマス。

コレハ軍人ヲ擁護スル為ニ無理ナ結論ヲ與ヘタノデナク極度ニ服従ヲ強制サレテヰル軍人ノ立場ヲ合理的ニ考慮シテ帰納シタモノデアッテ至極正シイ解釈論ト信ズルノデアリマス。

日本ノ軍隊ニ於テハ特ニ其ノ服従義務ガ強調サレテ居リマス日本陸軍ノ軍隊生活ノ規準ヲ規定シテヰル軍隊内務令ニハ此ノ服従義務ニツキ左ノ規定シテ居リマス

(59)

第十一條　命令ハ謹ンデ之ヲ奉リ直チニ之ヲ行フベシ
決シテ其ノ當不當、不當ヲ論ジ其ノ原因、理由等ヲ質問スル事ヲ許サズ。此ノ文章ハ日本人ガ軍隊ニ這入ルト其ノ日カラ暗誦ヲ命ゼラレルモノデアリマス。之ガ日本軍隊ノ服從、鉄則トナッテ居ルノデアリマス。被告井上モ亦之ヲ暗誦シ其ノ軍人生活ノ鉄則ト信ジテ井タモノデアリマス
特ニ戰場或ハ敵前ニ於テハ其ノ服從義務ハ極度ニ強度ヲ強要サレルノデアリマス。ソレハ或意味ニ於テ人間ノ自由意思ヲ喪失シタモノデアリマス。メカニズムノ中ノ歯車ノ如キモノデアリマス。コノ場合命令ヲ受ケタ下官ハ一種ノ心理的強制ヲ受ケテオルト言ヒ得ルデアリマセウ。物的外部カラノ強制ニヨル場合ハ刑事責任ハナイマデモ尚ホ然シ心理的強制或ル場合ニ物的強制ヨリモ人間ノ自由意思ヲ奪フ程度ガ強イ場合ガアリマス。
コノ点ハ軍人デアル被告各位ニ於テヨクヨクモヨク御了解ニナッテオラレル事ト信ズルノデアリマス
(二)以上ニ於テ被告井上ノ本件ミレ島民八名、銃殺行爲ガ公ノ職務執行ノ爲トシテ犯罪ト十ラヌ所以ヲ申述ベマシタ次ニ私ハ被告井上ハ殺人罪ノ犯意ナシトシテ其ノ無罪ヲ主張スルモノデアリマス
檢事ヨリ證據トシテ提出サレマシタ被告井上ノ陳述書中ニ被告井上ハ次ノ如ク述ベテ居リマス
「死刑ヲ執行マシタ島民八名ハ日本人ニシテ犯罪ヲ犯シ

ヤルート島ニ於ケル最高審理、結果井田少将ヲ
死刑、宣告ヲ與ヘラレシ死刑、囚人ナリ
當時小宮ハヤルート防備部隊附特務班長トシテ
犯罪、取調並ニ處刑、実施ヲナス任務ヲ命ゼラレ
オリ井田少将、死刑執行命令ニヨリ正シイ事ト信
ジ一点、疑ヒモナク自ヒ、正當、業務トシテ處刑ヲ
実施セリト
此、被告井上、心境ハ本法廷ニ於ケル、被告井上、證
人トシテ、證言ニヨッテ更ニ確認サレテヰル、此、被告井
上、心境ハ次、二ツ、事実ヲ含ムモノデアル
一ツハ上官ヨリ死刑執行命令ヲ受ケ本件ノミレ島民
、銃殺行為ヲ死刑判決、執行々為ナリト確信シテ
ヰタ事デアルト云フ
二其、結果其、銃殺行為、違法性ヲ全然意識
セズ飽ク迄法律上正當ナル行為ナリト確信シテヰタ事
デアル
元来死刑執行々為ハ法、執行々為デアッテ犯罪ヲ構
成スルモノデナイ故ニ被告ガ本件、島民銃殺行為ヲ死
刑、執行々為ナリト確信シテ其、実行ヲナシタ場合ニハ
銃殺、意志ハ認メラレルガ罪ヲ犯ス、意思ハ毛頭モナク
寧ロ犯意、存在ガ否定(58)サレル
従ッテ被告ガ死刑、執行々為ト確信シテヰタ其、行為
ガ法律上死刑、執行ノ為ト認メラレナイ場合ハ如何
ナル事実又法律、錯誤、問題ガ生ズル(58)

日本刑法及ビ判例學說ハコノ錯誤ノ問題ヲ如何ニ解決シ乎ヲ見ル。日本刑法ノ犯意ニ關スル規定ハ同法第三十八條ノ簡潔ナル三ノ條文ニ要約シテ居ル

日本刑法第三十八條ハ曰ク

一罪ヲ犯ス意ナキ行爲ハ之ヲ罰セズ。但シ法律ニ特ニ限定アル場合ハコノ限リニアラズ

二罪ノ本ニ重カルベキヲ犯ストキ、知ラザルモノハ其ノ重キニ從ヒテ處斷スルコトヲ得ズ

三法律ヲ知ラザルヲ以テ罪ヲ犯ス意ナシト爲ス事ヲ得ズ　但シ情狀ニヨリ

ソノ刑ヲ減輕スルコトヲ得

(1) 犯意ノ概念

若干ノ條文ノ唯罪ヲ犯ス意ナキ行爲ハ之ヲ罰セズト規定スルノミデ損

害賠償ノ義務ニ關シテハ何ガトカノ問題ニ答ヘテ居ナイ。犯意

構成ノ要件ヲ明示シテ居ナイ。茲ニ犯意ニハ違法ノ認識ガ必要カ否カノ問題

ガ發生スル。事實ノ認識ガ犯意ノ要件デアルカ否カノ問題デモ

犯人ハ犯罪ノ事實ヘノ之ノ認識ニテ居タ。例ヘバ本件ノ如ク己ノ銃殺行爲

ハ認識シテ居タ。然シソノ銃殺行爲ハ法律上許サレタル行爲ナリト確信シ

其ノ行爲ノ違法性ノ全然意識シテ居ナカツタ場合ニモ犯意ハ成立スル

カ否カ。

此ノ問題ハ明治四十年現行刑法ノ實施セラレテ以來ヨーロッパノ

刑法學界ノ論爭ニ歩調ノ合セテ日本ノ學界ニ於テモ刑法第

三十八條第三項ノ法律ノ不知ノ問題ニ關聯シテハゲシイ論爭

ガ展開サレタ。

此ノ論ハ自己ノ行爲ガ法律上許サレタルモノナルコトヲ信ジル場

合ニ於ケル右犯意ノ成立スルカトカノ問題ノ形式デ

(59)

タル處、正彦ハ嘗テ社会主義ニ関シ研究ヲ遂ゲタル結果該主義ノ国家ニ対シ有害ナルコトヲ認メ殊ニ無政府主義~~者ノ言動~~ノ如キハ凡テノ権力ヲ否認シ光輝アル我ガ国体ト相容レサル主張ニシテ是等主義者ノ言動ハ到底黙視スヘキモノニ非ストノ信念ヲ懐クニ至リタリ。偶々大正十二年九月一日関東地方ニ未曽有ノ大震災起レルニ際シ不逞鮮人等ニ好機トシテ放火暴動ノ挙ニ出ヅトノ流言宣伝セラレ同月二日大正十二年勅令第三百九十九号ノ布告ヲ見ルニ到リタリト雖モ帝都ノ各所ニ殺人放火等ノ事実頻発シ帝都及其ノ附近ノ住民ノ不安恐怖甚シク極ニ達セシ状態ニ変移予測シ難キモノアリ而シテ是等不逞ノ徒ノ背後ニハ社会主義者活動セリトノ世評専ラ行ハレ且ツ職務上恐怖スベキ種々ノ情報ヲ耳ニシタル正彦ハ主義者ノ行動ニ警察署・検束セラルルニ拘ラズ甚ダ最モ危険視スル無政府主義ノ巨頭大杉栄ノ検束セラレザルヲ知ルニ及ビ同人ノ跳梁隊警備撤去後秩序未ダ整ハズ糧食ノ配給不足ナル時ニ乗ジテ如何ナル不逞行為ニ出ズルモ計リ難キトナシ憂慮措ク能ハズ此ノ際同人ヲ殺害スルハ即チ国家ノ禍根ヲ除クル所以ナリト信ジ窃ニ其ノ機ヲ窺ヒ居ルニ大杉ハ尾行巡査ノ従フアリシテ容易ニ目的ヲ達シ難キヲ遺憾トナセル折柄大杉ヲヤロシタキ意嚮淀橋警察署ニアリトノコトヲ聞キ込ミタルニヨリ廣次郎ニ意中ヲ漏ラシ之ガ事実ヲ確メシメタルニ同月十五日朝廣次郎ハ右警察署ノ意嚮ナリト復命シタル處此ノ際憲兵隊ノ手ニテ大杉ヲヤロウト思ヘルハ尾行解除

要六 (61)


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RK(64)

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違法の認識と犯意

一、謂はゆる甘粕事件なるものは違法の認識と犯意との関係に関する問題にはき、新らしき資料を吾人に供給したものと考へることが出来よう。それで茲に簡単ふ記事を作っておきたいと思ふ。要するに憲兵工等兵たるK及びHが憲兵大尉にして上官たる甘粕某の命令を受け被害者某一を殺害した事実に関するものである。先づ判決を摘録すること次の如し。

次に某一の件では、正彦（甘粕）は當時大杉の子ふりと信じたるも斯かる小兒を殺害するは情に於て忍びずとおし躊躇したるに慶治郎（共犯者憲兵曹長森）は某一を此の儘に放置すれば事件の發覺を速ならしむる虞ありとして其の殺害を主張したるを以て止むなく之に同意したれども、両者何れも自ら手を下すを欲せず部下の上等兵をして之に當らしむることに決し、両名共謀の上前記K及びHを呼び寄せ両名に對し慶治郎は某一を殺害すべきことを命じ次いで正彦は自己が野枝を殺害したる後其の事を行ふべき旨を指示したるに平素正彦を深く信頼せる被告両名は、厳格なる上官の命令に絶対服従したり……被告K、被告Hの各所爲は罪となるべき事実を知らずして犯したるものにして即ち罪を犯す意なき行爲ふるを以て……無罪を言渡す。（もの）

のと（大正九年十二月八日宣告、読津新聞同年十二月十八日第二九上手著七頁以下所載）

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二、此の判決は第一師團軍法會議のそのまゝ確定したのであつた。さて判決は被告が命令された事項を次て『戒嚴令下に於ける非常の場合』に於てのことであるから、犯罪となることなきものと信じたことが『罪となるべき事実を知らざるものとなるとしたのである。しかし、それは其の一定の事由に因つて其の行爲が違法性を失却すると考へたのであるから、行爲の違法性に關する錯誤である。斯様な錯誤は事実の錯誤であるか將た法律の錯誤であるかが問題とならねばならぬのである。

判決が之を次て『罪となるべき事実を知らざる』ものとしたのは、事実の錯誤に外ならぬものとしたのであろう。しかし被告は、其の行爲が其の非常時なるの故を以て法律上罪となることなきものと考へたのである。行爲の客觀的事実とそれに對する主觀的認識との間に齟齬はない。ただその事実が法律上の犯罪を構成しと雖るに拘らず其の法律上の價値について被告は錯誤を持つて居たのである。されば其の錯誤の性質は事実の錯誤に非ずして法律の錯誤であると謂はねばならぬのである。

三、それで問題は、更に轉じて法律の錯誤即ち一定の違法なる行爲を違法なりと認識することは如何なる場合に犯意を阻却するかと言ふことになるわけであるが、刑法第三十八條第三項を解して法律の錯誤を

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犯意の成立に影響なきものとする趣旨なりと爲すことは謂ふまでもなく通説で此の見地を徹底するに於ては本件の被告の行爲は十分に犯意を構成するものと謂はねばならぬのである。しかし之に對してわが邦に於ては既に有力な異説がある――行爲を違法なりと認識することは犯意の成立を阻却することになるといふのである。此の考へはドイツの學界に於ては有力なものであるので、さうして此の判決は此の學説に依拠して特に考へられねばならぬものであるのである。

四、わたくしは右の異説として擧げたものには無條件に賛成するのではない。さうして同時にわたくしは從來の通説に對して二箇の制限を附して考へるのである。第一は刑法第三十八條第三項は謂はゆる法定犯に適用なきものとすることである。第二は行爲の違法性に關する錯誤に對しては、其の錯誤に因つて認識の實質が如何なる影響を受くべきかを考慮すべしとすることである。

第一の点から考へよう。自然犯に對する法定犯に於ては、其の行爲の内容は社会の通念上當然に反社会的のものと見ることのできないものである。されば、斯やうな行爲を敢てするに於ても、其の違法なることを認識せざるに於ては、以て反社会的な意志の成立あるものと解することの出来ないものである。事実の認識を以て直ちに反社会的情操の成立あるものと解し得るのは、之を自然犯に於て

謂い得るに止まる。

第二の点は、要するに、右の見解を更に自然犯に付き、其の違法性の認識に関し擴張したものである。自然犯の内容は、社会の通念と當然に反社会的のものとされるものであるから、其の事実を認識しながら其の行為を敢てすることは、又當然に反社会的情操の發現であると考へねばならぬ。之が、法律錯誤を以て犯意の成立を妨げないとした刑法第三十八條第三項の規定の趣旨である。しかし行為の違法性を阻却するものと考へらるべき特殊の事情のある場合に於ては、其の事情の爲めに、其の行爲の反社会性にはき、社会の通念上の見解としては疑を生ずる場合があり得るもの謂はねばならぬ。換言すれば、行爲がその事実性に於て自然犯——本件に於ては殺人罪——に属する場合でも、一定の事情——本件に於ては戒厳令下に於ける正官の命令——の伴ふことによつて、其の行爲が社会の通念上、公の秩序善良の風俗に反するや否やにはき疑を招くことがあり得るのである。法律上斯くの如き事情の下に其の行爲が許さるべからざる場合に於ても、法律を知らざる爲、單に社会の通念としては、之を許さるべからざるものと考へることが當然である場合には、法律の錯誤は、行爲者に對し反社会性の徴表の成立を阻却するもの謂はねばならぬ。此の場合には、刑法第三十八條第三項の合理的基礎に依つておのづから調節を受け、一種の制限を受けねばならぬのである。

五、わたくしの斯様な見地から考へるときは、本件の事情、即ち

戒厳令の下に於て、軍人として信頼する上官から斯様な命令を受けたことは、果して、社会の通念上行為を違法なものと認識することなるやと言うことが茲に問題となるのである。判決は之を肯定したのであつた。之を肯定すべきや否やは、形式的論理的に定め得べき問題でない。事が既に行為の違法性に関する問題であるだけに、社会心理の解釈を價値判断との綜合によつて之を決するの外はない。さうして、此の判決が之を肯定したことは、此の点に於き重要な資料を吾人に供給するものである。

六、此の判決は、被告を以て犯意なきものと断じた。横言すれば、被告を無罪とするに、刑法第三十五條を以てしながつた。之は、單に軍人の間に於ても上官の命令は決して絶對的なものでないことを予定したものと謂はねばならぬ。即ち、被告が若し通當に法律上の智識を具有したならば、被告は之に從はないが寧ろ其の本分であることになるのである。陸軍刑法第五十七條は、戒厳地境に於て上官の命令に服從しないものに對し一年以上七年以下の重い刑を科して居るが、被告が本件の場合に於てそれに從はなかつたとしても陸軍刑法の其の規定は適用さるべきものと断ずるに付き單に上官の命令に從つたと言うことのみを以て滿足しなかつた。第一に、事が戒厳令下に屬すること、第二に、被告が非常の場合なることが、重きを置いて考慮さるべきものなることを明かにして居るのである。第三に、被告が

『平素正直を深く信頼せる』ことを挙げてある。其の信頼の事実が被告の意志決定に重要な宥恕を與うべきものとするのである。斯くて二箇の考察が特に加へられて居る点に於て、此の判決は、又軍人間に於ても上官の命令が絶対的なものでないことを予定して居るものであると謂はねばならぬのである。―若し、下官が、上官の命令なる一点をの理由として罪となる行為を為さんが、それのみを以ては、犯罪の成立は必ずしも妨げられないことになるのである。

八、ドイツの帝國裁判所は、其の判例として、法律の錯誤に對し、刑罰法令の錯誤とを区別するの見解を採つて居る。即ち、わが邦の通説と同じ歩調を採るのである。しかし此の見解を論理的形式的に徹底せしめるときは、不當な結果を生ずることとなり、さうして、例へば本件の場合の如きに於ては、有罪と決せねばならぬことになるのである。されば、之に對し、學説として、犯意の成立上行為を違法なりと認識するの必要を論ずるのが有力であるのである。しかし、此の學説を論理的形式的に徹底せしめるときは、自然犯の一般の場合に於て不當な結果の發生することあるべきを予期せねばならぬ。斯くて、ドイツの新法草案は一種の折衷案を作つたのであつた。

九、一〇、略

二、最後に、わたくしの希望するところは、軍法会議の右の判決を機会として、現行法に對する改正が認められるやうにとすることである。

OKK(72)

一法政志林第六巻、大正十年、第三号一

が今自ら解釈と一認めうれこ當然ごあると考へる。

修正を待たずとも、犯意とふもの合理的な観念上見る趣旨

多くこの旨が附加されねばならぬであろう。しかし、斯ういう法律上の

第三項は重ね但書は、刑を免除された場合と雖も、犯罪

世界ひろこと。将来、刑法第三十八條が改正されたとき此の

コノ論文ノ末尾ニ特ニ御留意願ヒ度イ　牧野博士ハ立法上ノ修正ヲ待ズトモ犯意ト云フモノノ合理的ナ観念上其ノ趣旨ガ今日カラ解釋トシテ認メラレテ當然デアルト云フノデアル。此レハ大正十四年頃ノ論文デアル。此ノ判決ヲ機會ニ牧野博士ノ主張スル如ク今日デハ、犯意ノ合理的ナ解釋ニヨッテ、犯意ノ成立ニハ違法ノ認識ヲ要スルト云フ解釋ニ判例學説ガ一致シテヰルノデアル。

私ハ右述ノ様ナ確立サレタ日本刑法ノ犯意ノ概念ヲ前提トシテ、被告ニ殺人ノ犯意ナシト断ズル。

即チ被告井上ハ其ノ銃殺行爲ノ違法性ヲ全然意識セズ、アク迄法律上正當ノ行爲ナリト確信シテヰタノ而モ法律上正當ナル行爲ナリト確信シテヰル時ハ充分ノ理由ガアッタノデアル。甘粕事件ノ無罪トナッタ兵士ノ如ク單ニ殺害ヲ命ゼラレタノデハナイノデアル。死刑判決ノ執行ヲ命ゼラレタノデアル。加フルニ、死刑判決ヲ與ヘラレタ本件ノ島民ノ犯罪ニ付イテハ、取調官トシテ其ノ間諜殺人其ノ他重大ナ犯罪ノ犯罪人タルコトヲ確信シテヰタノデアル。コレラノ犯罪人ニ對シ、其ノ由ガ死刑判決ヲ宣告スル正當ノ權限アルコトヲ確信シテヰタノデアル。

(2) 事實ノ錯誤ニ付イテハ、刑法第三十八條第二項ハ「罪ヲ犯ス意ナカリシ行爲ハ其ノ重カルベキ犯ストキ知ラザルモノハ其ノ重キニ從ッテ處斷スルコトヲ得ズ」ト規定シテヰル。コレハ事實ノ錯誤ノ一場合ノ規定デアル。此ノ條文ハ、日本文トシテモ甚ダ難解デ英文ニ飜譯サレルト一層理解シ難イト思フ

KJS (73)

なお事実の錯誤に於ては故意は成立しない旨の判決が出ている。事実の錯誤は犯罪の構成要件に該当する事実の認識に欠けるところがあるという点で法律の錯誤とは異なるものである。即ち

In fact, it appears to be considerably less of a requirement because it seems that for all serious crimes, even ignorance of the facts will only be considered in mitigation.

然しここに若干の説明を。

日本刑法に於ても、事実の錯誤は故意の不成立を阻却する。

日本刑法第三十八条二項に重い罪を犯す意なくして、重い罪を犯した場合でも重い罪について故意を問うことは出来ないと規定しているが、例えば日本刑法では、人の傷害に於て予期した結果以上に死亡の結果を生じた場合、傷害致死罪が成立し、通常、殺人の罪の刑より軽い。或る人に人を殺す意図をもって人に傷害を加えた場合、親子関係という場合に人に対する罪に問われるというような事。

事実の錯誤の場合、二種に分れ、法定事実の錯誤と法律の錯誤とに分れるが、法定事実の錯誤は、故意を阻却する。

次に事実の錯誤は抽象的事実の錯誤と具体的事実の錯誤に分れる。

之レニ結末ヲ説同シテナリ。

法律ヲ知ラザルヨリ犯罪ヲ犯セシトナスヲ得ズト云ヒ利用セル所規定ヲ犯人ガ刑セラルル場合ニ其行為ノ違法ノ意味ヲ例ヘバ犯人ガ日本刑法ノ此ノ條ノ規定ヲ知ラナカリシモ殺人罪ニ該当スルヲ云フナリ。「法律ノ錯誤ハ許サズ」トイフローマ法律諺ヲ基礎トシテ此ノ原則ヲ適用シテ居ルモノナリ。法律ヲ不知ニ錯誤ヲヨリテ生ジタル場合ニ犯意ヲ阻却スルトキハ之ヲ無罪トスルヲ今日ノ日本刑事学説ノ一般ノ解釈デアル。

此ノ点ニ於テハ各国デモ同様ノ原則ガ採用セラレテ居ル例ヘバ WHARTON'S CRIMINAL LAW ニハ次ノ如ク説明シテアル

§ 102 Ignorance of law no defense to an indictment for a violation of law.

§ 104 Mistake of law admissible to negative evil intent.

Cases also may occur in which evil intent is a condition precedent to conviction, but in which a mistake of law, if proved, would negative such evil intent.

Thus in larceny it is admissible to prove that the defendant took the good

a claim of right, however erronous; in malicious mischief, that act was believed to be exercise of legal right.

§ 105 And so as to mistake of subsumption of facts in law.

When the question is whether a particular fact or group of facts falls under a particular rule of law, an error in this respect is to be regarded as an error of fact.

此ノ点ニ関スル日本ノ判例（之モ著名ナル）ヲ引用ス。

「民事訴訟ノ解釋ノ錯誤ニ基ク差押標示損壊罪ノ成否ヲ問却ス」

刑法第二百四条ノ第三項ニ於テ法律ヲ知ラザルニ因リテ罪ヲ犯ス意ナシト為スヲ得ト規定シタルニ犯罪ノ違法ナル錯誤ヲ犯意ヲ阻却セシ趣旨ヲ明ニシタルニシテ現行刑法ニ犯罪行為ノ一般違法性ノ錯誤ト犯罪行為自体ノ構成要素ノ事實ノ錯誤トヲ區別シ後者ノ場合ニ於テニ犯意ナシトスルノ旨ヲ明瞭ナラシムル為ニ犯罪行為ノ一般ノ違法性ト犯罪行為自体ニ関スル構成要素トノ關係ニ付テノ錯誤モ亦其ノ効果ニ於テ之ヲ區別スヘキヤ否ヤニ付テモ法律ノ規定ヲ欠ク又ニ之カ適用ヲ誤リタル結果犯罪行為自体ノ構成要素ノ事實ノ錯誤ヲ生シ即チ或ハ犯意構成要素ノ存在ヲ

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権利ヲ有スト誤認スル場合ノ存スルコトアリ此ノ如キ場合ニ於テハ其ノ錯誤ハ固ヨリ犯罪行為ノ一般違法性トハ何等ノ関係ナキモノニシテ却テ犯罪行為自体ノ構成要素ヲ定ムルニ當リ其ノ内容ヲ民法又ハ公法ノ規定ニ委付シ民法又ハ公法ノ規定ニ於テ其ノ行為ヲ権利ノ實行ナリト為シ又ハ刑法正條ニ定ムル法律上ノ行為ガ其ノ効力ヲ失ヘルモノト為ス場合ニ於テハ刑法ニ於テモ亦犯罪行為ノ構成要素ヲ充サザルモノト為備シテ其ノ實質ニ於テハ犯罪構成要素ヲ充ス限リ刑法第三十八條第三項ヲ適用スヘク此ノ如キ場合ニ於テハ刑法第九十六條ノ罪ハ實ニ上述ヘキモノニ非サルヲ以テ刑法第三十八條第三項ヲ適用スノ場合ニ該當シ同條ノ規定ニ依リ差押ノ標本カ効力ヲ失ヒタル前ニ於テ権利ナクシテ之ヲ損壊シ又ハ其ノ他ノ方法ヲ以テ封印又ハ標本ヲ無効タラシメタル行為ノ其ノ構成要素ト為シタル民事訴訟法其ノ他公法ノ規定ニ依リ差押ノ効力ナキニ至リタルモノト解スヘキ場合又ハ封印等ノ形式ナキ場合ニ於テハ本罪ノ構成要素ヲ缺クモノトアリト認メラル場合ニ於テハ本罪ノ構成要素ヲ缺クモノト解スルヲ至當トス從テ民事訴訟法其ノ他ノ公法ノ解釋ノ誤リ被告人カ差押ノ効力ナキニ至リタル為差押存セスト誤信シ又ハ封印等ヲ損壊スルノ権利アリト誤信シタル場合ニ於テハ本件ノ犯意ヲ阻却スルモノナリト謂ハサルヘカラス本件ニ付キ原判決ノ説明スル所ニ依レハ被告人ハ原審公判ニ於テ本件差押ノ事件ニ付仲裁ノ労ヲ採リタル者ヨリ同人カ債権者ヘ本件債務ヲ弁済シタル旨ノ

差押物件ノ封印ヲ剝離シタルヲ可ナリト言ハレタル故封印及標本
ヲ剝離シタルニ付キ主張シタルヲ以テ原裁判所ノ須ラク右
被告人ノ弁解ニ対シ被告人ノ仲裁ノ弁済ニ因リテ差押ハ
効力ヲ失ヒ至リ差押ナレト誤信シタルヤ否ノ事實ヲ審究シ
剝離スルノ權利アリト誤信シタルヤ否ノ事實ヲ審究シ
以テ其ノ錯誤ハ李仲一犯罪ノ構成要素ニ関スルヤ否ヲ確定セサルヘカラス然ルニ原判決ハ右必要
ナル事實ノ確定ヲ為サスシテ單ニ被告ハ法律ノ否知ヲ
主張スルモノナリト為シ有罪ヲ言渡シタルハ犯意ニ関シ必要
ナル事實ヲ確定セスシテ犯罪ヲ認定シタル不法アリ
(大審大正一四年(れ)第一八二一号大正一五年二月二十二日二刑
事部決定)(大審第五巻刑事九七頁)(評論第一五巻
刑法九二頁)(新聞第二五四五号一五頁)

『慣例ニ依リ認許セラルヽモノト誤信シテ為シタル場合誤信スルニ付
相當ノ理由アルトキハ犯意ヲ阻却ス』
被告人ハ李仲竹藤区有林ヲ伐採スル當時井堰修繕用材ニ
不足ヲ生セラサル範圍ニ於テ李仲井根立林ヲ自家用ノ為ニ
伐採スルコトハ竹藤区ノ認許スル慣例ニシテ差支ナキモノト
誤信シタルモノニシテ之ニ付相當ノ理由アリタルモノト認ムルヲ得ヘク
従テ被告人ノ本件行為ハ罪ヲ犯スノ意ニ出テタルモノト為スヲ
得サル故ニ窃盗ヲ構成スヘキモノニ非ス
(大審昭和六年(れ)第一五〇九号昭和七年八月四日一刑事部判決)
(大審第一一巻刑事一一三五頁)(評論第二一巻刑法
六五頁)

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二五六頁）（大審院裁判例第六巻刑事三〇頁）

本件、被告ノ場合ニ付テモ之ヲ考察シテ見ヨウ

被告ハ升田ノ死刑判決ノ執行命令ヲ受ケ、本件ニミル島民ノ銃殺行為ハ其ノ命ゼラレタル死刑判決ノ執行ノ為デアリ、法ノ執行ノ為トシテ、法律上正シイ行為ト信ジテヰタ。所ガ台ニナッテ、其ノ死刑判決ハ無効ナモノデアルコトガ確認サレタ。従ッテ被告ノ為シタル其ノ死刑ノ執行ノ為ハ法律上ノ厳格ナ意味デ死刑ノ執行ノ為デハナクナッタ。此ノ場合ニハ、被告ニハ、自己ノ銃殺行為ガ死刑判決ノ執行ナリトノ錯誤ガアッタワケデアル。裁判、判決等ニ関スル法律ノ不知又ハ錯誤カラ生ジタ事実ノ錯誤トシテ犯意ノ成立ガ原則トシテ否認サレルノデアル。而モ、此ノ場合、己ノ銃殺行為ヲ死刑判決ノ執行行為ナリト確信スルニ至ッタ原因ニハ充分ノ理由ガアル、コノ点ハ先ニ被告ノ行為ヲ公ノ職務執行ナリト論ジタ所デ詳論シタ積リデアル　故ニ被告ノ錯誤ハ、刑法三十八條第三項ノ云フ犯意ノ成立ヲ阻却シナイ法律ノ錯誤デナク、犯意ノ成立ヲ阻却スル事実ノ錯誤ナノデアル。

以上ハ錯誤ヲ法律ノ錯誤ト事実ノ錯誤トニ分ケテ被告ニ殺人ノ犯意ナキ所以ヲ論証シタ。

終リニ繰リ返シテ要領ヲ中上ゲルト、被告ノ本件ノミレ島民

銃殺行為ハ飽ク迄公ノ職務執行ヲ
装クーデアリマス、犯罪ノ構成スルガ如キ行為デハアリマセン
今假リニ公ノ職務執行ト認定出来ナイトシテモ、日本刑法
ノ犯意ニ関スル解釋カラ、被告ニハ殺人罪ヲ犯ス犯意ハ
毛頭存在シナイ。
以上イヅレノ点ヨリ見ルモ、第一起訴ノ殺人罪ニツイテハ
無罪ナリト主張スルモノデアリマス。

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第三章、起訴理由第二ノ戦争法規並ニ慣習違反ノ罪
ニ付テ

私ハ此ノ起訴並ニ第一第二ノ罪狀項目ニ付テモ、被告ハ無罪
ナリト信ジズルモノデアリマス

一、先ヅ各罪狀項目ニヨレバ、裁判ナクシテ本件ノミレ島民ヲ
スパイトシテ殺害シテ處罰セシメタトアリマスガ、
上述ノ如ク本件ノミレ島民ニハ裁判ガ行ハレタノデアリマス
特ニヘーグ條約三十條ニハ、單ニ裁判トアルノミデ其ノ裁判トハ
イカナルモノカ限定シテオリマセヌ又各國ノ例デハ其ノ裁判ノ通常ノ
軍法會議ノ外ニ簡單ナ軍事委員ノ裁判ヲモ認メテオリマス
本件ミレ島民ニ實質上ノ裁判ガ行ハレタ以上、日本ノ軍法
會議法、刑事訴訟法ノ規定スル通リノ手續ヲソレデ實施
サレナカッタト云ッテ、本條約ノ裁判ナカリシモノトハ斷定出來ヌト
信ジズルノデアリマス

二、ヘーグ條約三十條ノ立法精神カラ合理的ニ解釋
スルトキ全條ノスパイトハ外國人スパイヲ意味シ自國民
ノスパイヲ意味シナイ、コノ点ハ先ニ管轄ノ抗弁ヲ提出
シタ際詳論致シマシタノデ再論ハ控ヘマス　要スルニ本件ノ
ミレ島民ハ事件當時日本ノ垂仕統治地域ノ原住民デ
アッテ、實質上日本國民デアリ、日本ノ主權ニ服シテヰタ
モノデ、外國人デハナイ、
故ニ、コレラノ島民ヲ、タトヘ國内法上ノ間諜罪デ裁判ヲ
シテ罰シタトシテモ、ヘーグ條約三十條ノ違反トシテ戦争
犯罪ヲ構成シナイ、

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三、本件ノミレ島民事件ニ付テハ、被告ハ唯、其ノ決定サレタ死刑判決ノ處刑ヲ擔當シタニスギナイコトハ上述ノ通リデアリマスヘーグ條約三十條ノ禁ンズル所ハ、スパイノ處刑ソノモノデナクシテ、現行中、捕ヘタスパイヲ裁判スルシテ處罰スルコトデアリマス。本件ミレ島民ノ處罰ハ升田、古木、新留ノ構成ニヨル所謂「ヤルートノ最高審議」ニヨリテ決定サレタモノデアリマス。被告ハ其ノ際、檢察官トシテノ役ヲ演ジテオリマスガ、死刑判決ノ決定ニハ關係ガナイノデアリマス。被告ハ唯、其ノ死刑判決ノ執行ヲ上官ヨリ命ゼラレテ實行シタニスギヌノデアリマス、被告ノ行爲ハ決シテヘーグ條約三十條ノ違反ノ行爲デハアリマセヌ

四、被告ハ本件ノミレ島民ノ處刑ヲ擔當シマシタ然シソレハ、上官ノ命令ニヨルモノデアリマス、ヤルートノ最高指揮官、升田スキツプ條例ハ上官ノ命令ノ命令ニヨルモノデアリマス。スキツプ條例ハ上官ノ命令ニ從ツタ行爲ハ責任解除ノ理由ニナラヌト規定シテオリマス

(Action pursuant to orders of the accused's superior shall not constitute a defense.)

然シ此ノ規定ノ趣旨ハ充分、愼重ニ解釋、攻サナケレバナリマセン。コレハ、唯、上官ノ命令ニ從ツタ行動シタト云フ理由ノミデ、其ノ責任ヲ回避デキナイト云フ意味デアルト解シマス。

上官ノ命令ニヨル行爲デモ、從來ノ國內犯罪ニ付テ認メラレタ其ノ他ノ責任解除ノ理由ガアルトキハ、其ノ理由ハ認メ

こレヲ上官ノ命令ニ従ッテ行ッタ場合ニハ
戦争犯罪ノ裁判ニ於テ、近代文明諸国ノ刑法理由ヲ
無視スルコトニ許サレナイデアリマセウ
スキップレイ氏ガ戦争犯罪成立要件ニ付キ詳細ナ
規定ヲ設ケテヰルノハ、従来ノ刑法理論ノ適用ヲ排除
スル意味デハナク、ソノ詳細ナ要件ニ付テハ、之ヲ従来ノ刑法
理論ニ委ネテ居ルト解スベキデアリマス。
従ッテ戦争犯罪ノ成立ニハ、犯意ガ必要デアリマセウ。場合ニハ
軍事行為トノ因果関係ノ存在モ必要デアリマセウ、
上官ノ命令ニ従ッテ命令ニヨル行為ハ、ディフェンスニナラナイ
トイフノハ唯、其レガ戦争犯罪トシテノ違法性ヲ阻却
セナイトイフダケノ意味ト解シマス。上官ノ命令ニ従ッタ行為デモ
犯人ニ犯意ガナイ場合ニハ無罪ヲ言渡スベキト解釈シマス。
若シ上官ノ命令ニヨル行為ガ常ニ有罪トナルナラバ、軍人ト云フ
意味、特ニ下級ノ軍人トイフ点ニ就ニ於テ重大ナ場ニ立ツ
コトニナルデアリマス。
コノ点ノ軍人ノ立場ヲ SHELDON GLUECK 教授ハ
其ノ WAR CRIMINALS THEIR PROSECUTION
AND PUNISHMENT ニ於イテ次ノ様ニ
述ベテヰル

Admittedly, the ordinary soldier is in an unenviable position in time of warfare. He has a dual obligation; to the ordinal

law which prohibits certain acts on pain of punishment, as well as to the military law which compels him to obey the orders of his superior.

Receiving a command from his officer to carry out an act contrary to the laws and customs of legitimate warfare, he may or may not know the act to be unlawful under the circumstances. Even if he does know it to be illegal, it seems hard to hold him responsible when all his military training has stressed duty of instant and unquestioning obedience; and this is still more true if he does not know the order to be unlawful.

It is not generally realized that in respect to the duty of obedience, there are gradations that make the task of the soldier especially difficult;

At least three situations are possible; (a) The order appears to be regular and lawful on its face; (b) the order is "so manifestly beyond the legal power or discretion of the commander as to admit of no rational

doubt of (its) unlawfulness"; (c) there is room for reasonable doubt as to whether or not the order on its face is lawful.

An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he actually knew, or, considering the circumstances, he had reasonable grounds for knowing, that the act ordered is unlawful under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the laws of his country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate.

論ハ軍人ノ戦争ニオケル立場ニ深キ理解ヲ持ツ多適宜ナ理論デアリマセウ。被告ノ場合、井田ノ死刑執行命令ガ違法ナコトハ全然シラナカツタノデアリマス。ソシテ彼ハ本件ノミレ島民ガ重大ナ犯罪ヲ犯シタ事ヲ知ツテヰタノデアリマス、ソシテ、ソレラノ犯罪人ニ對シ、當時ノヤルートノ戦闘状況下ニ於ヲ採リウル最上ノ手段ノモトニ、愼重ナ審理ガ行ハレタト信ジテヰタノデアリマス

昭和十九年初メノ第四艦隊司令長官ノ電命ニヨリ、井田少將ガヤルート基地ノ最高指揮官トシテ、基地ニ関スル一切ノ権限ガ附與サレ、其ノ権限ノ中ニハ裁判権ヲモ含ムコトヲ確信シテヰタノデアリマス　尚被告ハ海軍軍法會議法ヲヨク知ラズ、井田ノ裁判権ガ、コノ第四艦隊司令長官ノ命令ニヨリ與ヘラレタモノト解釋シテヰタ

以上ヲ綜合スルトキ、被告ハ井田ノ命令ノ違法性ヲ認識シカツタコトニハ、充分ノ理由ガ見出サレルノデアリマス

被告ハ井田ノ命令ノ違法性ヲシラナカツタノミナラズ、シラナカツタニモ充分ノ理由ガアツタ、故ニ第二起訴ノ戦争犯罪ニハ無罪ヲ宣告サルベキデアリマス

以上ヲ以テ私ノ弁論ヲ終リマス

K

INOUE, FUMIO (23 APR 1947) (VOLUME I) (159116)

PART 5 OF 5

CLOSING ARGUMENT FOR THE ACCUSED INOUE, FUMIO, CAPTAIN, IMPERIAL JAPANESE ARMY, DELIVERED BY SUZUKI, SAIZO AT GUAM ON 2 JUNE 1947.

CONTENTS

Honorable President and the members of the Commission:

Chapter 1. - INTRODUCTION.

The accused, INOUE, Fumio is indicted with two charges in the instant case. The first charge is murder, and in both of its specifications it is alleged, that, the accused INOUE, then a captain while serving in the Japanese armed forces in Jaluit Atoll, Marshall Islands on two occasions, on or about 8 April 1945 and 13 April 1945, on the said Jaluit Atoll, during the present war wilfully, feloniously, with premeditation and malice aforethought without justifiable cause, did kill Raliejap and the other seven unarmed natives of the Marshall Islands, and committed murder as provided in article 199 of the Japanese Criminal Code. The second charge is violation of the laws and customs of war and in both of its specifications it is alleged that the accused INOUE on two occasions, on or about 8 April 1945 and 13 April 1945, on Jaluit Atoll, during the present war wilfully, unlawfully, and without previous trial, did punish and caused to be punished by executing Raliejap and the other seven unarmed natives of the Marshalls.

But in the statement of the accused INOUE, dated 28 December 1946 which was introduced by the prosecution into the court as the accused's confession or admission and accepted into evidence by this Military Commission, the accused INOUE states as follows:

"I performed the executions by shooting the below named native criminals from Milli Atoll, Marshall Islands, in accordance with the orders of Rear Admiral Nisuke MASUDA, commanding officer of the Jaluit Defense Garrison to perform it. These executions were two in number, one in the early part of April 1945 and the other about the middle of the same month.

"Names of the natives who were executed: Raliejap, wife of Raliejap, Neibet, Anchio, Siro, Lacojirik, Ralime.

"The eight natives who were executed were Japanese subjects and had committed crimes, as a result of the highest deliberation had received sentence to be executed from Rear Admiral MASUDA and had become prisoners awaiting execution.

"At that time, as Commander of the Military Police of the Jaluit Defense Garrison I was under orders to perform the duties of investigating crimes and effecting their punishment.

"Announcement of the execution of these natives was made in a report by Rear Admiral MASUDA, Commanding Officer of the Defense Garrison, to all units under his command on the day following the completion of the executions."

I believe that the above facts stated in INOUE's statement, though it is brief, exhaustivelyreveal the whole truth of the present case. Defense counsel wishes to reiterate that this is the real truth and also the true state of mind of the accused INOUE at that time.

I believe the prosecution has also acknowledged these facts as undisputable. Since this confession or admission of INOUE concerning this case has been submitted for this court, this is only natural. In fact, the prosecution has not produced any evidence denying the above mentioned facts. On the contrary, the testimony of each witness and evidence produced before this court has only served to strongly verify these facts.

The testimony of the witnesses for the prosecution, army captain JINNO, Sergeant Major FUKATSU, and naval Petty Officer WAKAMATSU merely verified the fact that the accused INOUE in accordance with the orders of Admiral MASUDA executed the native criminals from Milli. But, it was not established from their testimony, that the natives which they testified the accused INOUE shot and killed were the identical natives which INOUE killed as alleged in Charge I and each of its specifications, because the witnesses did not testify as to their names.

The next witness for the prosecution, MORIKAWA, Shigeru testified that he had not heard of or saw a trial given for those Milli natives. But is not clear what he meant by trial in his testimony. This was only an amateur opinion of MORIKAWA who is not an expert in law. In its strict meaning this is not testimony. Whether certain facts or acts constitute a trial or not, should be determined only by expert opinion and judgment of law specialists of law. I shall discuss this point later.

We should note in MORIKAWA's testimony that he stated there was a judgment sheet for the native criminals in the present case. After all, in all of MORIKAWA's testimony, he did not deny the fact that there was a certain examination and consultation held for these natives.

In rebuttal, the prosecution called Lieutenant Commander SHINTOME to the stand. I shall reserve my comment concerning his credibility to a later part of my argument. But, he did not deny the fact that there was no examination and consultation held for these natives as was testified by INOUE. He merely denied the fact that he took an active part in the Milli native execution incident as was testified by FURUKI and INOUE. But this portion of his credibility is completely jeopardized by his own conflicting testimony. It is true that he praised the character of the accused INOUE, as was indicated in the opening argument of the judge advocate. But when it came to the point involving his responsibility, with rare impudence and shamelessness he passed the buck on to his former subordinate. Is the judge advocate under the impression that all SHINTOME testified to was the truth and all that FURUKI and INOUE testified to was a fabricated story? I am greatly dubious.

After all, from the testimony of the witnesses for the prosecution, there was nothing to deny the facts of the above mentioned statement of the accused INOUE. On the contrary, their testimony served to ascertain these facts.

The accused INOUE, performed the execution by shooting eight native criminals from Milli Atoll, Marshall Islands, in accordance with the orders of Rear Admiral MASUDA, Commanding Officer of the Jaluit Defense Garrison to perform it.

The eight natives who were executed were Japanese subjects and had committed crimes. As a result of the highest deliberation they had received a sentence that they were to be executed from Rear Admiral MASUDA and they became prisoners.

At the time of the execution, as Commander of the Military Police of the Jaluit Defense Garrison he was under orders to perform the duties of investigating crimes and effecting their punishment.

He performed the execution in accordance with the orders of Rear Admiral MASUDA to perform it without any doubt in his mind believing it was the correct thing to do and he believed it was properly expected of his office.

This identical act and fact which has been ascertained, is being indicted in Charge I as murder in violation of the Japanese Criminal Code and in Charge II as punishing and causing to be punished as spies without previous trial, in violation of the laws and customs of war.

Herein lies numerous problems. Let us study Charge I, murder. First of all, from an objective point of view the act of the accused was not illegal. This is so because the act of shooting and killing by the accused, was performed in accordance with the order to execute the sentence by the Suprere Commander of the Jaluit Garrison, and was done in pursuance of his official duty.

Secondly, in the mind of the accused, we cannot recognize any unlawful intention, at that time he was aware of the fact of shooting and killing, but he did not acknowledge the fact of murder. Moreover, he absolutely did not recognize that his act was unlawful. Therefore to contend that he is guilty of Charge I "murder," it is imperative that this act be proved unlawful, from the objective point of view. Even if this was proved and established, furthermore the fact that the accused had any criminal intent and was conscious of the unlawfulness of the act must be proved and demonstrated.

In determining the conditions of criminal responsibility of an offender because of the progress in modern criminal theory the illegality in the subjective mind of the doer besides the objective illegality of the act or its consequences is now taken into account. This is intent or negligence. Intent is the principle and negligence the exception. When there is intent or mistake, the illegality in the subjective mind of the doer is alleged.

But recently, at least in the criminal law and its theory of Japan it is recognized that intent must be criminal intent - that is intent to commit crime. It must not be mere intent as a matter of fact. Besides, being aware of or hoping for culpable facts it must be that the doer is aware of the illegality of the fact. For example in the present case, beside having cognizance of the shooting and killing, the illegality of that act must be recognized. If this is not so we cannot allege that he had criminal intent to commit the crime of murder - intent to commit murder - even though he had intent to kill. I shall later discuss this point in detail.

Isn't this illegality of an act and the subjective mind of the doer necessary in determining a war crime. Would not it be a retrogression of the cultural progress of the time to allege guilt in a war crime merely by considering the illegality of the outward appearance of an act.

In the judgment cases and theory of the Japanese Criminal Code, it is not permissible to reach a conclusion of guilty or innocence merely by proving the fact that there was no trial. We cannot agree that the criminal intent of the accused was proved by merely the existence of intention to shoot and kill. I believe the laws and cases of America are also such.

Now, let us consider Charge II. Does the act of the accused correspond to article 30 of the Hague Convention governing land warfare, which delineates the act of punishing a spy without trial. In this article 30, what is prohibited is the act of punishing a spy without a trial.

The person who is responsible as the violator of this article is the person who made the decision to punish without a trial. This I believe is the proper interpretation from its context and from the spirit of its legislation. It does not in anyway prohibit the act of shooting and killing a spy itself or the act of the strangling of a spy itself. When a person merely performed the shooting and killing in accordance with superior orders as is the case with the accused, must he take the responsibility of violating article 30? Does he have to take the entire responsibility? This is the first problem. Does the spy provided in article 30 of the Hague Convention correspond to the Milli native of the present case? This is the second problem that must be solved.

I have presented a birds-eye view of the instant case in the light of a criminal case. Thus, I believe the commission has a full comprehension of the issues involved in the present case. I shall now make a specific explanation and argument on each issue.

Chapter 2. Errors in Charge and Specification.

The accused INOUE is indicted with two charges in the present case. But in the present case, two different incidents do not exist. Both charges deal with one incident in which the accused INOUE is alleged to have killed by shootingas an act of execution of the death judgment eight Marshall natives who had committed murder, spying and other crimes and who were given the death sentence. On one hand the act of shooting and killing by the accused INOUE is charged with the crime of murder as set forth in the Japanese Criminal Code, and on the other hand it is condemned by article 31 of the Hague Convention concerning land warfare and customs of war, on the grounds that they were punished, and shot and killed as spies without previous trial.

First of all, we are not able to judge on the face of the charges, whether the crime of murder in Charge I is indicted as a war crime or merely concurrently indicted before this military commission as an ordinary crime of murder which occurred in American occupied territory.

Also in the case of FURUKI, Hidesaku which was previously tried before this commission, as in the present case, the identical incident concerning the execution of Marshall natives, was indicted in Charge I with murder violating article 199 of the Japanese Criminal Code and in Charge II as violating the laws and customs of war. In the closing argument by the prosecution in the previous case, judge advocate maintained that superior orders constituted no defense in his reason for finding the accused guilty for murder in Charge I. He states as follows: "The accused thus argues that his homicides should be excused because he alleged they were done pursuant to the order of his superior commanding officer.....In almost every war crimes case, the accused has contended that his illegal acts were the result of the orders of a superior officer. The argument has been universlly rejected..... The SCAP Regulations which this commission is authorized to use, provides "The official position of the accused shall not absolve him from responsibility..... Further. action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires.

The legal basis for these rules is apparent. As Glueck points out, War Criminals, Their Prosecution and Punishment, page 140, "A little reflection will show that this provision (superior order and government immunity) if followed liberally would give almost the entire band of Axis

war criminals a valid defense." The position of the courts on this subject is ably and briefly set forth in the decision of the famous International Tribunal at Nuremberg in the summary of the judgment released at Nuremberg, September 30, 1946. The tribunal states, "the defense of 'Superior Order' has never been recognized as a defense to a crime, but is considered in mitigation as the charter here provides." In view of this case, and the numerous other cases on the same subject, the matter is clearly so well settled that it is not necessary to burden the commission with further argument on this point."

According to the above argument of the prosecution, it is evident that the prosecution contended the guilt of the crime of violating article 199 of the Japanese Criminal Code in the Furuki case, was based upon the logic that it was a war crime. Thus it seems the crime of murder in Charge I was indicted as a war crime. If it had been indicted as an ordinary crime violating the Japanese Criminal Code, the guilty or innocence should have been determined by the logic and cases of the Japanese Criminal Code. It is a grave error on part of the prosecution to argue on this point by applying the theory, provisions and cases of war crimes whose reason and objectives entirely differ.

In the instant INOUE case, it is not clear whether the prosecution indicted the murder in Charge I as a war crime or an ordinary crime in violation of the Japanese Criminal Code. I recall frequent instances where the questioning of the defense counsel was objected to by the prosecution on the ground that "superior orders" was a matter for mitigation or where questions by counsel concerning "superior orders" was objected to as irrelevant and immaterial. In the Japanese Criminal Code, acts pursuant to superior orders are not always matter for mitigation. Thus, it may be inferred that the prosecution, inthis case, also has indicted the crime of murder in Charge I as a war crime. Of course this is only a guess. The defense cannot decide whether Charge I is indicted as a war crime or an an ordinary crime in violation of the Japanese Criminal Code. Therefore the accused is at a loss to know by what laws or by what countries law he should defend himselfagainst the alleged crimes. In case the accused is found guilty, he is not able to know by what law and under what reasons he was convicted. Such charges and specifications where the accused cannot know by what crime or by what crime set forth in what law he is being indicted, are illegal.

Secondly, Charge I is the crime of murder and article 199 of the Japanese Criminal Code is applied in each of its specifications. But, each of its specifications is stated according to the idea of the common law of U. S. A. and its requirements. In the Japanese Criminal Code there exists no crime called murder as in the American law. The words, wilfully, premeditation, malice aforethought, feloniously, without justifiable cause, used in the charges and specifications are legal terms peculiar to the common law of the U. S. A. When these terms are translated into Japanese the accused cannot understand what they imply.

It is a grave technical inconsistency to state the specifications according to the idea and requirements of American murder which is not found in the provisions of the Japanese Criminal Law, while indicting the accused by murder provided in the Japanese Criminal Code. Even though the requirement of murder in the common law of the U. S. A. is proved and guilt is established, we cannot always say that the crime of murder provided in article 199 of the Criminal Code was constituted. The Japanese Criminal Code has its peculiar theory and cases. This is the second error in the charges and specifications.

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Next, Charge I and II are illegal duplication of charges. As to this point, I have in a previous occasion made a detailed argument in objection to the charges and specifications in this court. I shall not repeat my argument on this point but merely supplement my explanation.

In Charge II and each of its specifications, the act in which the accused INOUE punished, executed and killed as spies, without previous trials the natives of the Marshall Islands, is charged against the accused as a violation of the laws and customs of war. Therefore the crime of murder in Charge I is included in the act of killing in Charge II.

When a certain act of murder constitutes a war crime as violating the laws and customs of war, should the accused who committed the act of murder, be always prosecuted in the Military Court of the opposing power both as having committed a war crime and an ordinary crime of murder? I believe that this duplication of charges id definitely illegal. This would be making the same error as indicting a certain accused with the crime of murder and also with assault and crime of wounding which were included in the act of murder.

Chapter 3. ON JURISDICTION.

Concerning this problem, I have already submitted an objection to the jurisdiction. The gist of my objection was as follows. In the crimes alleged in the charges and specifications of the instant case: (1) The alleged accused is a subject of the Empire of Japan; (2) The place where the alleged crime occurred was a mandated territory of the Japanese Empire and ruled by her as an integral portion of her territory; (3) The alleged victims who were killed were native inhabitants of the Marshalls, subject to the sovereignty of the Japanese Empire and residing in the mandated territories; (4) The time of the crime was during the present war, prior to the occupation of the Marshalls by the American forces.

When we summarize the above elements (the necessary and inevitable factors in determining jurisdiction over crimes) the instant case is purely a domestic problem and a domestic crime of the Japanese Empire. And it is not a crime committed in an occupied territory, during the occupation and in relation to the occupation. The place of the crime only later, became an occupied territory of the American armed forces. Therefore, such a crime should be indicted before the courts of Japan which still exist after the surrender under the allied occupation and they are authorized to exercise jurisdiction over crimes committed by the Japanese. And this case should not be indicted before a court of the U. S. A. This was the substance of my objection.

I shall not burden the commission by repeating my objection in detail, but I wish to point out the inconsistent logic and confusion of concept on the part of the judge advocate in his reply in support of the jurisdiction.

As the judge advocate states, the Marshall Islands including Jaluit Atoll, are at present under the military occupation of the American forces. But contemporary International Law, while acknowledging a certain authority to the occupant, at the same time, obliges the occupant to take all the measures in his power to restore, and insure as far as possible, public order and safety in the occupied country. (Article 43 of the Hague Convention governing land warfare.)

The principle object of the occupant is to provide for the security of the invading army and to contribute to its support and efficiency and the sources of its operation. However, the occupant does not acquire sovereignty over the territory. Therefore, so far as they ought not to exercise sovereignty, the authority which they do exercise is temporary and confined to military matters; and unless it is necessary to achieve the principal object of the occupant, or to maintain public order and peace, the laws in force, in the land should not be altered. Article 43 of the Hague Convention governing land warfare reads "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 insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Thus it is recognized at present, that, so long as the invading power does not alter or abolish the law in force, it is effective.

Proclamation II, article 4, issued by Admiral Chester W. Nimitz, Governor of the Marshall Island Areas, which was cited by the judge advocate in his reply to the objection of jurisdiction reads, "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 Force 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 suffer such punishment as the court may direct....." It may be inferred that this provision was proclaimed in compliance with the spirit of the above international law. It is apparent from the face of this provision, that it does, in no way give authority to the military courts of the occupying power to try and punish crimes violating Japanese Penal Law, in the occupied territory prior to the occupation. It is a grave error to maintain that jurisdiction exists in this military commission to try the offenses in the instant case, particularly the crime of murder alleged in Charge I, on the grounds set forth in the above provisions.

Next, the occupant, in order to maintain order in the occupied territory, is recognized to exercise jurisdiction by his military courts, over offenses occurring in that territory after the occupation. But such trial is, as far as possible, limited to offenses of political and militaristic nature committed by the people of the occupied territory or to violations of the military penal code of the occupying power, or acts violating various military regulations and laws passed by the military authority of the occupying power. All crimes, not of the above nature, are left to the jurisdiction of the local courts. This has been the recognized principle of international law.

"Rules of Land Warfare" published by the U. S. War Department (1914 corrected 1917) provides in article 299 as follows: The laws in force. The principal object of the occupant is to provide for the security of the invading army and to contribute to its support and efficiency and the success of its operations. In restoring public order and safety he will continue in force the ordinary civil and criminal laws of the occupied territory which do not conflict with this object. These laws will be administered by the local officials as far as practicable. All crimes not of a military nature and which do not effect the safety of the invading army are left to the jurisdiction of the local courts.

The judge advocate states that, upon surrender of Japan, the judicial officers of the Japanese court in Ponape which had jurisdiction over Jaluit, were subsequently evacuated, and therefore the court ceased to

exist after that date; and the function of the court ceased with the occupation, so there does not exist any local court to which I have referred. Thus, he concludes that this military commission has jurisdiction over the crime of murder in the instant case. But, this is an inconsistency in logic. In order to deduce such a conclusion, the fact must be established that the occupying power has jurisdiction over offences, violating the effective local law in the occupied territory, prior to the occupation.

The judge advocate gives two reasons in stating that the jurisdiction of the military courts established by the occupying power should not be limited to offenses committed during the occupancy.

The first reason stated is that the Charter of the International Tribunal and the SCAP Rule, establish that the tribunals established in accordance with those Charter and Regulations, have jurisdiction over crimes of murder committed against the civilian population prior to and during the war. But, this is consistently a provision for dealing with war crimes and not ordinary crimes. Is the judge advocate indicting the murder in Charge I as a war crime? If so, there is not the slightest necessity of citing the previously mentioned Proclamations of Military Governor Nimitz, nor is their any point in explaining the rights of the occupying power set forth in the Hague Convention. The rights set forth in the Hague Convention governing land warfare, against an occupied territory by the occupant, and the right to punish war crimes, grows out of entirely separate sources.

The second reason the judge advocate gives is: by giving weight to the passage in article 43 of the Hague Convention which reads "The latter (occupant) shall take all the measures in his powers to restore, and insure, as far as possible, public order and safety." The judge advocate contends "It is difficult to conceive of the existence of any public order and safety if known criminals, particularly murderers, are permitted to remain at large, unpunished merely because their crime against local law or murder occurred in the period prior to the military occupancy."

On the contrary, we do not hold that the alleged crime in the instant case should be left unpunished, but we assert that if the crime in this case is indicted, it should be prosecuted before the present existing court in Japan proper. We reiterate that only the courts of Japan have true jurisdiction.

The right exercised by the occupying military power over an occupied territory is, by no means unlimited. It is limited by international law. The judicial, legislative and administrative powers exercised over the occupied territory and its inhabitants, are limited to the necessity of achieving the object of occupancy. And likewise, the criminal jurisdiction exercised by the military courts of the occupying power have certain limitations. It can be interpreted as limited to offenses, committed in the occupied territory after the occupancy, excepting war crimes. The previously cited American "Rules of Land Warfare" provides in article 299 "All crimes not of a military nature and which do not effect the safety of the invading army are left to the jurisdiction of the local courts."

Japan proper is, at present, under the military occupation of the U. S. A. and other allied powers. In the concept of International Law, the present existing courts of Japan are a kind of a local court in the

occupied territory. The policy, concerning the judiciary adopted by the Allied Powers today, strictly adheres to the principle set forth in article 299 of the previously cited American Rules of Land Warfare. That is, the offenses by a Japanese, except war crimes, over which the Allied Powers (principally the U. S. A. today) have jurisdiction, are all those which were committed after the military occupation had been effected. Moreover, the offenses are limited to those obstructing the objectives of the occupation which include crimes violating the regulations proclaimed by the occupying power, and offenses against persons belonging to the Allied Power. All the other offenses are entrusted to the jurisdiction of the courts of Japan. Ordinary crimes committed by a Japanese (that is, those who only violated the domestic law of Japan) prior to the occupation taking effect, are properly and completely entrusted to the jurisdiction of the Japanese courts. Inferring from this actual policy, we must deny the interpretation that the military courts of the occupying power have jurisdiction over ordinary crimes of the occupied people, committed in the occupied territory prior to the occupation.

The judge advocate has replied to this as follows. The Japanese Ponape Local Court which exercised jurisdiction over Jaluit, have ceased to exist today and there is no so-called Japanese Local Court in the Marshalls today. And the jurisdiction of the present Japanese courts do not extend to the Marshall Islands. This is true. But, because of this, to conclude that the ordinary offenses committed prior to the occupation also belong to the jurisdiction of the Military Courts of the U. S. A. which exercises jurisdiction over the Marshalls, is a great gap in logical thinking.

The judge advocate is laboring under a misapprehension because of the geographical distance separating Japan proper and the Marshall Islands. If we were to study the question of jurisdiction in the instant case by drawing the Marshalls closer to Japan proper, the situation will become self-evident.

Chapter 4. ON THE DEATH OF REAR ADMIRAL MASUDA, NISUKE AND THE SITUATION AND RESPONSIBILITY OF THE ACCUSED INOUE.

Rear Admiral MASUDA, Nisuke, Supreme Commanding Officer of Jaluit, who gave the death sentence to the eight Mille natives of the instant case and who ordered the accused INOUE to execute the sentence, is now dead. Peacefully surrendering Jaluit to the American forces, after the end of the war, he took his own life in his miserable quarters which alone remained on Emidj Island which was transformed into literal desolation by bombings unprecedented in the history of war. His death resulted in his most trusted subordinates FURUKI, Hidesaku and INOUE, Fumio who both were looked upon as noble characters by all personnel on Jaluit, to stand before this American Military Court charged with war crimes and murder. Even in the last moment, he did not dream of his two subordinates standing before an American Military Court. Upon his death, he left a last will. It related entirely to the American prisoner of war incident which occurred on Jaluit in the beginning of 1944. He took the responsibility and ended his life. But nothing was said about the Marshall natives in his last words. He did not have the slightest thought that the execution of Marshallese would be taken up as a problem in international crime or domestic crime. Whether his legal judgment was erroneous or not, is a different question.

After the end of the war, M.SUDA was investigated by Lieutenant Commander McKinson concerning the Jaluit and Mille native incident. After the investigation, he assembled the officers of Jaluit and stated that he had reported that by the authority vested in him, he had executed the natives in accordance with legitimate procedure and had nothing of which to be ashamed. This fact has been testified to by the witnesses in the FURUKI case and the present case. I believe that the judge advocate cannot say that this was a fabricated story. I believe M.SUDA would not have taken his own life if he had known his two trusted subordinates would be accused of the Marshall native incident. He would have taken the stand in behalf of the accused INOUE and revealed the truth that INOUE, in accordance with his orders unavoidably performed the execution of the Mille natives. He would have testified straightforwardly that it should be himself M.SUDA and not INOUE who should be sitting in the chair of the accused, concerning the execution of the Mille natives.

The death of M.SUDA, his silence today, could these be gold to the accused INOUE? Definitely not. The judge advocate in his closing argument in the FURUKI case states, "M.SUDA is dead, and to the defense, his silence is golden. For the defense has made him a silent witness for every order or law they wish to prove, every power they wish to create, and every act they wish to explain." How prejudiced are these words! Must the status of the judge advocate constrain him to view the accused with such prejudice!

The death of M.SUDA is not a crown of gold to the accused INOUE but a crown of thorns. It is said that the crown of thorns is a symbol of the martyr.

Admiral M.SUDA who pronounced the death sentence and ordered the accused INOUE to carry out the sentence is dead. His irritating silence cannot tell us the truth. That is why, the accused INOUE is now being prosecuted for murder, for the execution which without the slightest doubt as to its legality INOUE performed as his rightful official duty. Because of the person who was responsible, Admiral M.SUDA is dead, the accused INOUE who merely executed the death judgment in accordance with orders, who had no connection with determination of the execution, is now being tried on the ground that he punished and caused to be punished spies without previous trial. INOUE is being held to shoulder the whole responsibility in place of M.SUDA and is now being condemned. It is demanded that INOUE take the responsibility which was properly M.SUDA's. M.SUDA is dead, so INOUE is compelled to take the whole responsibility. Can this be recognized by the principle of contemporary Criminal Law? Modern criminal responsibility must persistently be the responsibility of the individual. Whether a death of a person who had an important part in a criminal case, is advantageous or not to the accused, cannot be carelessly determined. I believe that the death of M.SUDA was unfortunate for the accused in the instant case.

Particularly is it a great disadvantage to the accused in the instant case because the crimes committed by the natives included spying and the case had to be dealt with in strict secrecy. Therefore, those living persons who know the truth of the incident excepting the accused number only three, First Lieutenant MORIKAWA, who participated in the investigation of the native criminals and SHINTOME and FURUKI who took part in the examination and consultation. However, among these three persons, SHINTOME and MORIKAWA were called as witness for the prosecution. The

first witness MORIKAWA was not allowed to testify in detail about the investigation. The other, Lieutenant Commander SHINTOME, who had a much greater connection with this Mille native incident than the accused and who was in a position to take heavier responsibility than the accused INOUE as the next ranking naval officer to MASUDA, testified that he knew nothing and leaving all the responsibility to the accused, left the stand. FURUKI, Hidesaku was the sole witness in behalf of the witness.

In war crimes or cases occurring during the war, the prosecution have difficulty in gathering evidence because of the death of persons related to it or because of loss and burning of documents, but even more so, is evidence in behalf of the accused still harder to obtain. I firmly believe that the death of MASUDA was highly disadvantageous to the accused from the point of view of evidence and in the determination of the responsibility of the accused. The silence of MASUDA was never golden.

President and Members of the Commission, I would request your full understanding on this point.

Chapter 5. WHAT IS THIS SO-CALLED "HIGHEST DELIBERATION" ON JALUIT?

The accused INOUE said in his statement, "The eight executed natives were Japanese. They were criminals under the sentence of death who committed crimes and were sentenced to death by Rear Admiral MASUDA after the highest deliberation on Jaluit."

This "highest deliberation" is the translation of the Japanese words Saiko Shingi. But the meaning of the Japanese word "Shingi" is not fully expressed by the word "deliberation." Besides, if we use the English word "deliberation", I think it is hard to understand fully the intention of the accused, or what the accused intended to express by the word "Shingi." Here is an obstacle of a word which is disadvantageous for the accused.

By what actual procedure was this so-called highest deliberation on Jaluit which announced the death sentence for the natives of this case carried out? What was its legal character? Can we say that it was a trial? Although these questions are not decisive elements in establishing the guilt or innocence of the accused for each specification of Charge I and II, they have an important connection with it. This is the point which should carefully be considered.

First, I would like to show the facts clearly which have a connection with this highest deliberation.

At the end of March 1945, Rear Admiral MASUDA, the commanding officer of the Jaluit Defense Garrison, received the following urgent report from the district commander of Jaluit Island, Jaluit Atoll:

"Natives of Mille, namely 2 men, 1 woman and 1 child including Raliejap, arrived on the beach facing the sea near our district headquarters. They said that they had drifted ashore. We are now guarding them, and have them off from the other natives. We request that you will send an officer to be in charge of them."

Supreme Commander MASUDA send Second Lieutenant MORIKAWA, an intelligence officer to Jaluit Island, and made him escort the natives, their belongings and the boat to the headquarters together with what they had

cone. The next day, they arrived at Enidj, and the natives were confined in the Second Ammunition Dump.

MASUDA order Lieutenant MORIKAWA and the accused INOUE to investigate why and how the natives had drifted ashore at Jaluit. When MASUDA gave them the order, he showed them the method of investigation in the presence of Lieutenant Commander SHINTOME, the executive officer, and warned them not to tell others what they would know from their investigation. He also made a gunzoku who was called as an interpreter swear not to disclose the facts which he knew.

At that time, very few senior officers of the Jaluit Garrison knew through any information about the defeatism, the complete destruction of military discipline on account of the shortage of food and the desertion of groups of natives by the inducements of the U. S. forces on the other bases of the Marshalls, especially from Mille and Wotje. They were very much afraid and cautious about the leakage of news of these calamitous circumstances of the destruction of other bases out to the military men and natives of Jaluit. So, even the accused Inoue did not know the circumstances on the other bases.

The accused INOUE and MORIKAWA went to the Second Ammunition Dump at once, and began the investigation of the four natives including Raliejap. They finished their investigation in the evening of April 2, and knew all the aspects of the incident. From the investigation they know the following facts: Other than the four natives including Raliejap, another group of four natives including Raline sneaked at the same time into another island of the atoll. They plotted together on Mille Atoll, and while carrying the provisions of the Japanese Navy by a boat to the main island of Mille, they killed Petty Officer TANAKA who was on the same boat, stole the boat and deserted from Mille Atoll. They they were picked up by an American warship, while on board they were given the duty of spying and they sneaked into Jaluit Atoll.

An the night of April 2 the district commander of the Chitogen Area escorted the natives of Mille namely two men, one woman and one child including Raline who had arrived on the uninhabited island of Nankinedj on March 30 to headquarters. The accused INOUE investigated these natives, too. They made the same statement as the four natives including Raliejap and confessed their crimes. In particular these natives of Raline's group had a Japanese Navy coat on which the name of Petty Officer TANAKA was written. Major FURUKI, the highest ranking officer of the Army who had been making an inspection round of the outlying islands came back to the headquarters in the early morning of April 3. And MASUDA commenced the examination and consultations for the four natives of Raliejap's group, and the trial for the Raline group began on April 6 when the investigation for them was over.

In that deliberation, the highest officers of the Jaluit Defense Garrison, namely Rear Admiral MASUDA, Major FURUKI and Lieutenant Commander SHINTOME were appointed as judges, and the accused INOUE was ordered by MASUDA to be the judge advocate.

They cleared the air-raid shelter of the Rear Admiral, and the examinations and consultations were held inside the shelter. The procedure was commenced by INOUE's reading of his investigation report. The examination and consultations were held in secret. The native criminals were not present there. But during the deliberation, MASUDA and the accused INOUE went to the Second Ammunition Dump and the Aineman Trans-

mitting Station where these natives were confined, and examined them. The cargoes on the natives' boats were brought to the deliberation and were examined. The boat of Raliejap's group which was one meter in width, two or three meters in length and just like a Japanese type, was examined at the beach by MASUDA, FURUKI and SHINTOME. The canoe-shaped boat of Raline's group was broken to pieces when they arrived ashore and it did not show its original shape. The investigation and the report thereof of the accused INOUE were made parallel with the deliberation. During the deliberation, defects and uncertain parts in the investigation were pointed out by MASUDA and reinvestigations were made. On or about April 9, the last decisive deliberation on their punishment was held. At that time, the accused INOUE stated his opinion as the judge advocate. He stated that the crime of homicide, crime of theft, crime of treason, crime of destroying military property and crime of spying as set forth in the Japanese Criminal Code were applicable to their offense, and he stated his opinion that the six adults should receive a sentence of death, but for the two children he desired to send them to the island next to Emidj where no natives were living and to make them live with Japanese military men. Then SHINTOME and FURUKI stated their opinions which were approximately as same as that of INOUE. But the opinion of President MASUDA was the decisive one. He announced the death sentence for all natives as the presiding member among the judges. He then ordered the accused INOUE to carry out their execution and showed the method and wrote out the judgment paper and the place of the execution.

As soon as the sentence was decided, MASUDA went that afternoon with INOUE and the interpreter to the Second Ammuntion Dump and the Lineman Transmitting Station where the natives were confined, and announced the sentence of death to the seven natives except Raline who has escaped for whom a search was conducted. Raline was discovered and arrested on the next day and was sentenced to death after that.

The above are the real circumstances of the deliberation that occurred before and after it which were established by the testimony of the accused INOUE, FURUKI and MORIKAWA.

SHINTOME's testimony and its credibility: However SHINTOME who took the stand as a prosecution witness testified concerning the incident of Mille natives of this case that he was neither ordered in the presence of FURUKI and INOUE to attend the deliberation as a judge nor was he present at the deliberation whatsoever, and denied the testimony of FURUKI and INOUE as to this point. But, we must not forget that he did not testify that there was no deliberation for the Mille natives and that he only testified that he had no concern with the deliberation. Is the testimony of SHINTOME true and those of INOUE and FURUKI a made-up story? Or is it that INOUE's and FURUKI's testimony is true and SHINTOME is giving false testimony in order to escape the burden of his responsibility concerning the incident of punishing Mille natives? No one is qualified to give an exact answer to this question, for MASUDA is dead.

But if we consider the following points, I am convinced that the credibility of SHINTOME's testimony is entirely broken down:

1. SHINTOME was acting executive officer of the 62nd Naval Garrison and was the highest ranking officer next to MASUDA in the Navy. Besides when the Jaluit Defense Garrison was organized he was appointed to be chief of the self-supporting committee, chief of the engineering section and the chief of construction section, and assumed the helm of the Jaluit Garrison as one of the highest ranking officers.

2. He knows the fact that the natives of Mille drifted ashore at Jaluit, that these natives were confined and the place of their confinement. Although he testified that he knows that one of the natives escaped and that all men of his unit searched for the natives, he stated that he knew after the termination of the war, about six months after the execution, that these natives were executed. Still withe a calm attitude, this very senseless testimony was given. Witnesses FURUKI, INOUE, MORIKAWA, SAKUDA and IEKI testified that the execution of these natives was announced to the public by the supreme commander of Jaluit in the middle of April 1945. Especially, SAKUDA clearly testified, "On the day of the announcement in the middle of April, at the roll-call before commencing working, SHINTOME said in front of about fifty naval officers and petty officers including me that the natives from Mille were executed because they had committed murder and other serious crimes and acts as spies on Jaluit." Shintome testified that there might be the announcement but he did not remember it, and apologized that he was so busy on his duty that he had never thought about the natives. But he was a high ranking officer, and Emidj was a very small island. It is really senseless testimony that he did not know until the end of the war, about six months after the incident, that the natives were executed on Emidj, which is such a small island. He is afraid of taking his responsibility for the incident of the execution of the natives. It is clear that he is telling a lie about the fact which concerns his responsibility. I believe that we can say, "there is no credibility in his testimony."

3. He testified that he had never been ordered by MASUDA to be a judge but that he had happened to be present at the deliberation of the natives conducted by MASUDA, FURUKI and INOUE and had stated his opinion for the execution of the natives although he had not been required to do so by MASUDA. According to his testimony, INOUE stated his opinion first that he did not want to execute the women and children but to use them to collect cocomut. Then SHINTOME stated his opinion in the same way although he was not required to do so, and after him FURUKI also stated the same opinion. But MASUDA said that all these natives had to be executed. This is his testimony, and he also testified to the same thing in the FURUKI case on the Jaluit natives. In both cases, he happened to be present at the deliberation when the judge advocate was stating his opinion, and at both times he stated his opinion although he was not required to do so.

When we sum up SHINTOME's testimony concerning this point, we can easily imagine that he was present at the deliberation as a person who was concerned to it.

4. Then is this the so-called highest deliberation Jaluit which is in substance what has been described a trial or not? I interpret it to be a trial. This is not an argument on the state of the facts but is a legal argument. It is not a problem as to whether a certain fact exists or not. We should notice however that the problem of legal interpretation or assumption of certain related facts or acts is what this is. So it resembles an ethical judgment as to whether a certain act is good or bad. The conclusion will naturally be different according to how a man understands the good or the bad. If the distinction of good and bad can clearly be made by common knowledge, there will be no question. But if the distinction is too delicate to make through common knowledge, the conclusion will depend upon how to understand or interpret good and bad after all; so a decisive conclusion will never be established. The

problem of whether the deliberation of this case is a trial depends upon the concept of "trial", after all. The answer will be different according to the difference of the concept. The answer will be different according to whether the man who answers this question is an amateur in the law or an expert in law.

In this case, the judge advocate did not ask for the testimony of the facts which were a basis on which to judge whether there was a trial or not. I think he was too earnest in trying to obtain a legal opinion such as "there was no trial","I do not know whether there was a trial", or "I have never heard that a trial was held" from witnesses who were military officers who did not understand the law well.

However, such testimony of legal opinions by the witnesses in this case who are not experts of the law is not powerful evidence in proving that the deliberation for the Mille natives held by MASUDA was not a trial. It is a very unsubstantial evidence. If this had been a trial held in public in a permanent court, the testimony of amateurs as to whether there was a trial or not, would have considerable value and force. But this trial was held in a specially established court martial or a military court which was to make an examination and consultation on spies in a battle field where there was no permanent court. So, I believe that it is difficult for an amateur to understand whether it was a trial or not. In such a case the formal testimony of amateurs legal opinions such as "there was a trial" or "There was not a trial" could not be held to be the evidence which decides whether there was a trial or not.

Therefore, if a witness who once gave formal testimony such as "there was not a trial" testified later that there was a trial, we can not deal with the credibility of the witness by these inconsistent statements. In such a case, there is no change in a certain fact or act which is the base of understanding, but only the legal judgment or opinion of the witness has changed. It is possible for there to be a change in the estimation of a certain fact as the time goes on. This is nothing but a change of the opinion of the witness concerning his concept of "trial" which is the basis of his judgment. The testimony as to the facts had not been changed.

I interpret the series of acts from the investigation of criminal natives of Mille till the announcement of the sentence to be a procedure of a specially established court martial convened by the proper authority of Rear Admiral MASUDA, the supreme commander of the Jaluit base, in order to try the crimes of Mille natives of this case. In other words, I maintain that so-called the highest deliberation of the accused is that it was a <u>TRIAL</u>.

The grounds for my assertion are as follows:

1. When this incident occurred, Rear Admiral MASUDA, Nisuke, the supreme commander of the Jaluit base, had the authority to establish court martial for the trial of a certain crime.

Article 8 of the Naval Court Martial Law classifies the court martial as follows: "Court martial will be organized as follows:

1) Higher court martial.
2) Tokyo court martial.
3) Naval station court martial.
4) Naval port court martial.

5) Fleet court martial.
6) Isolated court martial.
7) Temporary court martial."

Article 9 further provides: "An isolated court martial will be specially established in a beseiged area when a martial law is proclaimed. A temporary court martial, when necessary during the war and military incidents, will specially be established in a navy unit."

These two court martials are the specially established court martials provided in article 8.

Article 10 further provides: "In the specially established court martial, the commanding officer of the unit or the district where the said court martial is established shall be the convening authority."

As is provided in these articles, the specially established court martial is convened by the commanding officer of the unit or the district and he appoints judges, judge advocates, and other members necessary for the organization of the trial. He also exercises the authority of the presiding member of the court martial provided in the Naval Court Martial Law. For instance, it is the authority of the presiding member to order the execution of death sentence announced in his specially established court martial.

At the time of this incident, was martial law proclaimed over the area of Marshall Islands? Did Rear Admiral MASUDA, the supreme commander of the Jaluit base proclaim martial law in due procedure on Jaluit Atoll? We have no material to affirm or deny these questions. We can only admit that, at a time between February and April 1944, Commander-in-Chief of the 4th Fleet sent a dispatch to the commanding officers of the bases of the Marshalls saying, "From now on, each base shall be commanded by the highest ranking commander of the base." It is an evident fact that, according to this dispatch, Rear Admiral MASUDA who was then the highest ranking commanding officer on Jaluit took over each command of the Jaluit base.

Therefore, regardless of whether or not martial law was proclaimed on Jaluit, MASUDA had the authority to convene temporary court martial in his unit in case of necessity. This is clearly stipulated in article 9 of the Naval Court Martial Law.

2. Primarily, there was no permanent court martial nor civil court of the South Seas Government on Jaluit. So, in time of peace, the fleet court martial at Truk or the court of the South Seas Government at Ponape had the jurisdiction over the crimes committed on Jaluit or the criminals arrested on Jaluit; the former tried crimes of a military nature, the latter ordinary crimes. If transportation had been possible with Truk or Ponape and to send there cases and criminals, it would have been unnecessary to establish a temporary court martial on Jaluit. But, as the commission understands by the testimony at the time of this incident, Jaluit was entirely isolated by the seige of the U. S. Navy and air forces and the transportation to the other bases was entirely impossible. In such circumstances, it was through the absolutely lawful authority of Rear Admiral MASUDA that he specially established a temporary court martial in Jaluit for the trial of these Mille natives. The authority was legally vested in MASUDA according to the law.

3. As a principle, a naval court martial has jurisdiction over navy personnel, gunzokus, sailors on navy vessels, those who are engaged in naval work, those who follow the navy and prisoners of war. (ref. art. 1 of the Naval Court Martial Law.) It had also jurisdiction over civilians who have violated certain crimes of Naval Criminal Law. But article 6 of the Naval Court Martial Law admits its special jurisdiction of wider scope in time of war as follows:

Article 6 states: "In time of war, court martial may exercise its jurisdiction over the crimes of those other than stipulated in article 1 if it is necessary for the maintenance of the order of the navy."

Therefore, regardless of whether or not the natives of the Marshalls of this case had any connection with the navy, it was not unlawful to try them in a court martial.

Article 17 of the Naval Court Martial Law provides for the jurisdiction of temporary court martial as follows: "Temporary court martial shall have jurisdiction over the following cases, (1.2. omitted) 3. The case of an accused who it is defined in article 6 and is in the area guarded by the unit in which the temporary court martial is established."

Therefore, for the crimes of the Mille natives committed on Mille Atoll such as this one, the temporary court martial on Jaluit could try the crime if the criminals are on Jaluit.

Rear Admiral MASUDA ordered the accused INOUE and Lieutenant MORIKAWA to investigate the crimes of Mille natives in this case. After the investigation, their crimes came to light through their statements and their belongings such as boat, etc. Then MASUDA commenced the examination and consultation of the crimes of the natives appointing Major FURUKI and Lieutenant Commander SHIMTOME as the judges and the accused INOUE as the judge advocate. This was the proper and lawful authority of MASUDA, the supreme commander of the Jaluit Base, vested in him by the stipulations of Naval Court Martial Law. This is the act of specially establishing a temporary court martial in the unit under his command trying the crimes of the Mille natives in this case. This is the act of trial and is nothing else.

The prosecution seemed to stress the fact that the procedure of this examination and consultation is not a trial on the ground that procedure applied in the examination and consulation had a few faults. But the important element to determine whether or not a certain act or a certain series of acts is a trial depends upon the fact whether or not the persons or the organization who performed the alleged trial had proper and lawful jurisdiction, or the authority to hold a trial.

No matter how completely the proceedings are carried out according to the laws of criminal procedure, if it has no legal jurisdiction as its basis, it is not a legal trial.

On the contrary, when a person who has proper, legal jurisdiction has carried out a trial, even if there were some discrepency from the provision set forth in the laws of criminal procedure, it is not an invalid trial. We cannot say that there was no trial. We can only condemn it by appealing the unlawfulness in the procedure of the trial. The sentence announced by the trial is not an invalid one. It is formally effective as the sentence of any court is. We must fully understand this principle of law.

As to the procedure of the examination and consultation for the crimes of the Mille natives in this case convened by MASUDA, we must notice the following points in order to avoid misunderstandings.

The procedure of the specially established court martial is different from that of an ordinary permanent court martial or that stipulated in the Law of Criminal Procedure of Japan in the following points:

1). The accused is not allowed to have counsel. (Article 93 of the Naval Court Martial Law). Therefore, it was not illegal that no counsel was present in this examination and consultation. The judge advocate, in his argument in the Furuki case rebutted this point citing Article 94 of the law. But this rebuttal shot wide of the mark. I think that the judge advocate might have been mistaken in the meaning of the article, perhaps on account of the bad translation of the Naval Court Martial Law. But I should say, if he had taken a little more care. The law of a country has special technical terms of its own. Only the literal interpretation of the term does not give a just and full understanding. Especially, we must be much more careful when we read the translation of foreign laws. The judge advocate also rebutted article 369 of the law, but it was also a serious mistake. He did not study the law carefully by reading all of it, but only picked out a part of the law.

2). The trial of the specially established court martial is never held in public. Article 419 of the Naval Court Martial Law states, "The stipulations in this Section concerning publicity of the trial shall not be applied to the trial procedure of the specially established court martial." So it is quite natural that the examination and consultation of this case was not held public. It is not unlawful. As to this point, the judge advocate also argued in his argument in the Furuki case that MASUDA's trial which was not held public, is not lawful, citing article 102 of the Naval Court Martial Law. In this case, the judge advocate is arguing on a misunderstanding which was caused by the fact that he did not wholly read each article, but only a part of each of them.

3). The judge advocate, when he examined witnesses used the words "charges and specifications" which was the technical term in the law system of the United States. It may be a common word in the United States, but, in Japan, we have no such system as to make a distinction between charge and specification. If the judge advocate uses such words and questions the witness, he can not give a correct answer. The judge advocate also asked if the judges took oaths when they were appointed. But in the Law of Japanese Criminal Procedure, there is no such system in which the judges, judge advocates and reporters take oaths at the beginning of the trial. Also in the Japanese Criminal Procedure, the accused can not bear witness in his own behalf. So the accused never takes an oath and takes the witness stand. The accused is questioned by the president of the court, and judges and defense counsel are permitted to examine him by supplementary questions. The Japanese system of oaths of the witness is much different from the American one. In many cases, the witness takes the stand without an oath. The accused under 16 years old, those who can not understand the meaning of the oath, relatives of the accused, accomplices of the accused or employees or lodgers of the accused are questioned without an oath. (Ref: article 201 of the Law of Japanese Criminal Procedure.) The credibility of the witness who did not take an oath is rationally judged by the free convictions of the judges.

The most important problem in the trial procedure of the Mille natives in this case, is that there was no trial in the presence of the accused.

But according to the testimony of INOUE, MASUDA questioned the accused at the place of their confinement. Why didn't MASUDA summon the accused to his officer at the air raid shelter which he determined as the place of the examination and consultation, and why didn't he question the accused there in the presence of FURUKI, SHINTOME and INOUE? I think it could not be helped on Jaluit which then suffered under continuous air raids and which had no complete air raid shelter. Considering these circumstances, they did not call the accused to the office of MASUDA but questioned them at the place of their confinement which was comparatively safe against the air raids. I think this was the best that could have been made in order to meet the circumstances at that time. I shall not explain here the battle condition of Jaluit at that time, because I think that both the Commission and the judge advocate are already well acquainted with them. It was permissible for Rear Admiral MASUDA, the supreme commander of the Jaluit base, who had the authority to establish specially a temporary court martial, to change a part of the procedure of the Naval Court Martial Law and to adopt a special procedure as the convening authority to meet the terrible circumstances at the time. Common knowledge of jurisprudence will not permit a conclusion that the examination and consultation in this case was not a trial only because the procedure was changed in some points.

Let us observe the SCAP Rules. This is the regulations of a special trial procedure for the trial of Japanese war crimes. The rule adopts a procedure which considerably differs from that of American courts martial. There are quite serious changes in the rules of evidence. The ordinary procedure has been changed in order to meet circumstances which come from the special character inherent in war crimes. Besides, this SCAP Rule is not a law of the United States but was issued and promulgated as an order of the Supreme Commander of the Allied Occupation Forces of Japan. By the order of SCAP, it adopts a different procedure from that of the court martial law of America or other countries of the Allied Powers; especially it is adopting a procedure which relaxes the strictness of such laws.

The judge advocate insists that the examination and consultation for the Mille natives is not a trial on the ground that the trial procedure provided in the Court Martial Law or the Law of Criminal Procedure of Japan was not applied. If the judge advocate pursues this logic to its end, we shall come to a conclusion that a trial conducted by the SCAP Rules is not a trial, because it changes the rules of American Court Martial Law. A trial conducted by SCAP Rules is a complete trial. No one can deny it. The logic of the judge advocate is at fault.

In the above mentioned paragraphs, I have proved that the highest deliberation on Jaluit is a proper court martial according to Japanese laws and that the sentence announced after the deliberation was one announced by a Japanese court martial. There was a trial for the native criminals of Mille in this case.

Chapter 6. THE FUNDAMENTAL THEORY ADOPTED BY THE JAPANESE CRIMINAL CODE.

In the previous FURUKI case tried by this commission, FURUKI, like INOUE in the present case was indicted for the crime of murder provided in article 199 of the Japanese Criminal Code. On hearing the final argument of the prosecution in that case, I found that the judge advocate did not have a full understanding of the Japanese Criminal Code nor the Japanese Naval Court Martial Law. I notice that he was under a gross

misunderstanding rather than not being well acquainted with that law. I regret to find him arguing in such a preposterous manner because of this misunderstanding. For instance, he mistook the old Code of Criminal Procedure already abolished in the year 1923, for the present Code of Criminal Procedure and he cited articles of this antiquated Code of Criminal Procedure in attempting to rebut the arguments of the defense counsel. This is merely one conspicuous example. Furthermore, he is mistaken when he contended, in understanding article 38, paragraph 2 of the Japanese Criminal Code, that ignorance or mistake of facts can only be considered in mitigation and does not preclude the existence or constitution of criminal intent. This is a grave and careless misunderstanding on the part of the prosecution. I shall make a detailed discussion on this point later. It is indeed technically difficult to translate the provisions of the Japanese Law into English and convey its full implication most truly. It is true that bad translation leads to misunderstanding.

In interpreting the provisions of law we cannot understand the correct meaning of a provision, merely by making a literal grammatical interpretation of it. This is common knowledge among all jurists. In particular, the provisions in the Japanese Criminal Code pertaining to criminal intent are brief. But in back of it there are many cases of judgment and numerous theories of interpretations by the scholars. Without understanding these cases and theories, it is impossible to reach and comprehend the true concept of criminal intent provided in the Japanese Criminal Code. One cannot escape being criticized as careless, to attempt to argue on the criminal intent of the accused, merely by reading article 38 of the Japanese Criminal Code, also, it is impossible to decide the guilt or innocence of an accused for the crime of murder set forth in article 199 of the Japanese Criminal Code without a true understanding of the Japanese Criminal Code in its entirety. Before going into the argument of whether the accused is guilty or not guilty of Charge I and each of its specifications, I would like to explain a bit on the fundamental theory of the Japanese Criminal Code, in order to further the understanding of the members of the commission.

The present Criminal Code of Japan was enacted in the year 1906. At that time, work in amending the criminal code was very intense and new theories on the criminal code were being discussed very enthusiastically. The Japanese Criminal Code was compiled by adopting these new theories and system of that period. The author of the English translation of the Japanese Criminal Code which is now in possession of the Legal Section on Guam and utilized by the judge advocate comments on the Japanese Criminal Code in his introduction as follows:

The Criminal Code of Japan translated and annotated by William J. Sebold.

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"Even a cursory reading of the 'Criminal Code' will at once indicate it to be a remarkably liberal and modern piece of work. Allowing for certain features which are only suitable for Japan's anomalous civilization and sociological problems, the code wisely places large powers of discretion where they properly belong: in the Courts. Careful provision is made for first offenders, suspended sentence, parole, and for mitigation or remission of punishment when extenuating circumstances exist; on the other hand, sentences are increased for repeated crimes, so that the blow falls heaviest upon those who most deserve it. Another

feature of the code is the fact that minute definitions of crimes are, whenever possible, avoided, thus obviating many of the technical difficulties in prosecutions so often insurmountable by Western prosecutors. The family system is protected and fostered by waiver of punishment in certain crimes when relationship exists between the offender and his victim. In a country where the entire social structure depends upon the family, in the legal sense, these provisions are natural and necessary. In short, I am definitely of the opinion that the present 'Criminal Code' is admirably adapted to conditions in Japan and to the psychology of the Japanese, and I believe that what is wanted is less tinkering with the basic law and a more liberal application of the inventions of those who drafted the code."

The fundamental characteristic of the present Japanese Criminal Code in short would be, the first important principal element in determining the existence of criminal responsibility, the degree of criminal responsibility (the degree of punishment to be imposed) lies in the subjective mind of the offender, in the intent at the time of the offense, or to put it in a broader sense the mental state and personality of the offender. The outward appearance of the act, the actual harm or danger incurred by the act is only considered of second importance. For instance article 43 of the Japanese Criminal Code reads: "Punishment may be mitigated for persons who have begun to commit a crime without consummating it. If preparation (for a crime) has been voluntarily stopped, punishment shall be mitigated or remitted.

This article implies that even when an offense ended in an attempt and the actual culmination of the act not brought about, the court may impose the same punishment upon the offender as that of an accomplished consummated crime, according to the criminal circumstances. In other words, attempts may be punished in a lighter manner than when it had been a consummated crime, but the court is under no constraint to mitigate the punishment accordingly.

When we consider an act of attempt by giving weight to the act and its result, we should not reserve punishment or mitigate punishment solely on the ground that the crime was not accomplished or particularly because its final consummation was not brought about. But when we consider an attempt by giving weight to the personality of the doer, it is only natural that it be similarly punished as that of a consummated crime, except when the commission of the crime was stopped by his own free will. This is so because the object of punishment is not the act and result of the doer, but the subjective mind or the evil intention of the doer.

Also in the case of a conspiracy - even though the person did not take a part in the actual act of a crime, if he occupied a principal position in the conspiracy, he is severely punished. In a case of instigation article 61 reads: "A person who has instigated another to commit a crime shall be considered a principal. The same applies to a person who has abetted an instigator." For example in a case of murder being instigated, the person who instigated the commission of murder is often punished more heavily than the person who actually carried out the murder.

I shall now explain the provision of homicide as set forth in article 199 of the Japanese Criminal Code. In the old Criminal Code of Japan homicide was divided into two crimes "Bosatsu" and "Kosatsu" (these correspond approximately to murder and voluntary manslaughter in

the American common law.) And the punishment imposed to each defendant. But the present Criminal Code abolished this differentiation and merely set forth a single crime of homicide. The degree of punishment extended from 3 year's penal servitude up to capital punishment. Furthermore, upon consideration of the extenuating circumstances the sentence may be mitigated to 1½ years penal servitude, and in some cases the sentence may even be suspended. "There are some scholars in Japan who criticize this wide latitude of punishment as being too idealistic and not realistic."

These provisions were not drafted by taking into consideration the tradition in Japan to slight the life of a human being and other persons. A person's life is of vital importance. It indeed is a grave crime to deprive another of his life. But if we consider it from the view of the offender, even if he did commit a grave murder, when there are reasons to sympathize with his motive or circumstances, or when the nature of the offender is in no way dangerous to society and there is no probability of his repeating another crime, then there is no necessity punishing him by effecting a heavy sentence and confining him away from society. This would only be a meaningless punishment. We should give him an opportunity to benefit society by his work rather than to shut him up in a penetentiary. Punishment should not be imposed for retribution or chastisement. Only those whose character are evil and cannot lead an ordinary life in society or who it is feared will repeat their crimes, are the ones who should be confined. This is the fundamental idea. Therefore, I am able to affirm that when we examine the judgment cases in Japan, those who are sentenced to death for murder are practically limited to those who committed murder in connection with robbery or rape. Other than these cases, the sentence does not exceed more than 10 years. Particularly when there is no element of self-interest in the motive of murder, the sentence is very light. For example, there is a case in which an elder brother after a quarrel killed his brother who had been very undutiful to his parents. He was given a sentence of 2 years penal servitude which was simultaneously suspended. There is another case in which a woman killed her child because of poverty; the extenuating circumstances were taken into consideration and she was given 1½ years of penal servitude which was also suspended. Such cases are numerous in the judgment cases of Japan.

Chapter 7 - ON CHARGE I MURDER.

The accused INOUE is not guilty of Charge I.

The act of the accused in the present case in which he killed 8 Mille natives was performed as an act of executing an order in accordance with the order of his superior officer MISUDA to execute the death sentence. This is an act of an official in pursuance of official duty. His act of shooting and killing does not constitute the crime of article 199 of the Criminal Code, in accordance with article 35 of the Japanese Criminal Code. Article 35 reads "Acts done in accordance with laws and ordinances or in pursuance of a legitimate business (or occupation) are not punishable." "Acts in accordance with law and ordinance" means acts which are acknowledgedto be proper, rights and obligations in accordance with the provisions of laws and ordinances, and acts which are acknowledged to be official authority and official duty.

The official duty of a public officer is one example. This duty is an obligation of the public officer duty and at the same time it is his right. There are cases in which the duties of public officials are

immediately based upon law and ordinances or on the orders of the superior order.

When the order of the superior is formally and substantially illegal, is the act based upon this order legitimate or not? When an inferior is given an order by a superior officer, he can examine the form of the order but he is not allowed to examine the substance of it.

When the order of the superior, was issued within the capacity of the official, when the form of the order complies with the provisions of law and ordinance, and when the matter on which the order was made is within the duty of the inferior officer, and even when the contents of the order are substantially illegal, the inferior officer cannot refuse to carry it out on this ground. moreover when the opinion of the superior and inferior differs as to whether the order has any connection with the duty or not, the inferior must abide by the opinion of the superior, therefore an act done in pursuance of superior order is offical duty, so article 35 of the Criminal Code is applicable and the act does not constitute a crime. This is the established theory in Japan.

Let us cousider this in the case of the accused. The death decision for the Milie natives in the present case and which the accused was ordered to perform, is a legally valid decision pronounced by the specially established court martial convened by the legitimate authority of Admiral MASUDA, Supreme commanding officer of Jaluit.

MASUDA is the convening authority of this specially established court martial. In Japanese court martial law the convening authority is called the "chief" of the court martial law. The "chief" has the legitimate authority to order the execution of the judgment. The appeal was not permitted in the present case and the execution was ordered immediately is legitimate decision of a specially established court martial takes effect after one trial, and no appeals are allowed concerning its judgment. (Refer to article 420 Naval Court Martial Law.) Moreover, when the death sentence is pronounced by the Specially Established Court Martial including the temporary court martial, the permission of the Navy Minister is not necessary in carrying it out. The Chief of the Specially Established Court Martial can order it, (article 501 of Naval Court Martial Law.) Therefore the fact that Admiral MASUDA who was the Chief of the Specially Established Naval Court Martial immediately ordered the execution of the death sentence after the pronouncing of the judgment without applying for permission from the Navy Minister, properly belonged to the official duty of MASUDA and the order of execution is not illegal.

The accused acted as judge advocate in the present case, and in his ordinary duty as head of the Special Police, were included the execution of punishment. It was legitimate for MASUDA to order INOUE to execute the death judgment. As for the accused he was under the obligation to obey it. After the execution had been performed, it was made public to all personnel of the armed forces on Jaluit under the name of the Supreme Commanding Officer of Jaluit, Admiral MASUDA. It is evident from this fact, that the execution of the death sentence was no private affair between MASUDA and INOUE, but a performance of an official duty of the Jaluit Defense Garrison. Thus from every point of view, the act of shooting and killing by the accused, is an official duty done by an official and precludes any illegality.

The problems lie in the fact that the decision ordered to be executed included the death sentence for the children. Article 41 of the

Japanese Criminal Code reads: "Acts of persons under fourteen years of age are not punishable." Therefore it was illegal to pronounce the death sentence upon Siro and Neibet if they were under 14. It is impossible to establish the true ages of SIRO and NEIBET. Most of the testimony in the present case reveals that they were from 10 to 12 or 13. According to the testimony of MANAKO, Tatsuichi, who knew SIRO, the child of RALIME, he states that SIRO climbed coconut trees to gather "Chagaro" and was about 15 years old. According to the deposition of TANAKA, Masaharu the native who attempted to kill him, had a wife about 23 years old and had a child about 6. But it is impossible to ascertain whether this child of 6 was SIRO or not.

In order to contend that the judgment of the children was illegal it is incumbent upon the prosecution affirmatively to prove that they were under 14 years old. Let us assume that SIRO and NEIBET were under 14. It is an apparent violation of the Japanese Criminal Code to recognize criminal responsibility in a child under 14 and pronounce the death sentence upon him. Even if the death judgment was valid in form, the substance of the judgment would be illegal. When a person executed an illegal death sentence, even in case of a superior order, would he have to take the criminal responsibility? It seems that the judge advocate in his opening argument answers this in the affirmative and maintains the guilt of the accused.

But according to the established theory in interpreting article 35 of the Japanese Criminal Code, we are not permitted to drew a conclusion of guilt on part of the accused as was simply done by the judge advocate. This established theory advocates that even in the slightest degree if an act is done in accordance with superior orders within the limit when official obligation to obey exists, article 35 of the Criminal Code is applicable and a crime is not constituted because even if the substance of the order is illegal it is an official act. This established theory is a general theory concerning official and public personnel. The military person is under a still stricter obligation of obedience than the ordinary official. This is a common principle in all countries. Therefore in case of a military person, an official superior order constitutes a much stronger defense.

The military penal code of all the various countries provides stern punishment to those who resist or disobeys superior order. In the Japanese Army and Naval Penal Code we find a provision stipulating the crime of resisting orders. For instance Naval Penal Code, article 55 reads: "One who resists a superior officers' order or who is not subordinate to it shall be condemned to such penalties as follows:

1. In the face of the enemy, he shall be condemned to death or life term or above ten years confinement.
2. In war time or when in need of emergency measures of rescuing ships from above one to ten years confinement.
3. In other cases, under five years confinement."

The Army Penal Code, article 57 reads: "One who resists a superior order or who is not subordinate to it, shall be condemned to such penalties as follows:

1. In the face of the enemy, he shall be condemned to death or life term or above ten years confinement.
2. In war time or in district under martial law, from above one year to 10 years confinement.
3. In other cases, under 2 years confinement."

Army Judiciary Officer, Lieutenant Colonel SUGANO, Yasuzo gives the following explanation and interpretation concerning the crime of resisting an order set forth in the Japanese Army Penal Code, in his book, "Principles of the Army Penal Code." "The crime of resisting an order protects the implicit nature of superior order, and thereby seeks to maintain the precise and secured operations of the military. The obedience of the inferior to a superior order is to some extent demanded from the point of administrative law, but the relation of obedience in the military is further strengthened and a nature of religious sanctity has been brought about. While in the administrative law, resistence of an order is merely a cause for reprimand, in the military it is subject to penal punishment. This is only a natural outcome because the paramount duty of the military is to give battle and its ultimate objective is victory."

"Substance of an order. It is imperative that the substance of an order belongs to matter within the authority of a superior who is in the proper chain of command. It is generally recognized as a principle that the substance has bearing with the matters of supreme command, but it may extend to matters pertaining to military administration. This is so because the distinction between the two is extremely difficult. Moreover, when the substance of an order is concerned with matters legally prohibited, as for instance an order to commit a criminal act, it is naturally invalid. But the legal effect of obeying such an order must be considered from a different point of view.

"The form of an order. Whether the order is written or verbal, so long as it is issued by the immediate superior or others who have legitimate authority of command and supervision, the form is complete.

"Efficacy of order. There is no doubt that an order is valid when it is issued by a superior having official authority and when it is concerned with matters within his authority. But there still remains a controversy in view of administrative law that an order even lacking in the substance and form as stated above can be professed to be valid. But the recognized opinion is that when it is acknowledgedto be a superior order by ordinary understanding, then it is considered valid. In other words, concerning such an order, an inferior cannot refuse to obey on the grounds that he differs in interpreting the law and regulation or the facts. But the relation of command and obedience in the military, goes a step further and as a principle does not allow refusal to obey, even if the order is invalid. Other than on such rare occasion when the substance of an order is intuitively perceived to constitute a criminal act by commission or omission of an act, the order may not be evaded. The fitness of an order beyond this limitation cannot be commented upon."

From the provisions of this crime of resisting order, it is evident that in the Japanese military service the duty of obedience to a superior order is almost implicit obedience. Therefore other than when a criminal act is clearly ordered it is construed that the doer of an act in accordance with superior order is free of criminal responsibility as it is performance of official duty in accordance with article 35 of the Criminal Code.

In addition I shall cite the opinion of MINOBE, Tatsukichi, Honorary Professor of the Tokyo Imperial University, Doctor of Law and highest authority in Japan on political science and the constitution of Japan,

concerning the criminal responsibilities of an act of a military person done in accordance with official order given by a superior order. He states in his famous book "Outline of Political Science" as follows:

"The nature of duty of an army and navy person to the state, in his capacity as a military person differs in no way from that of the ordinary government official, except the discipline of the military person is stricter and consequently the degree of constraint upon him from this aspect is far greater than that of the government official. The most important point of difference in official duty between the military person and the ordinary government official lies in the duty of obedience. In order to promote the fighting power of the armed forces and in order to attain the objectives of armament, military order must have unity, superior order must have implicit effect and the armed forces must be so trained that they will operate as if they were a single organic body with one mind. The government official will only be reprimanded for resisting a superior order but the military person will suffer punishment.

Of course, a military person is required to obey superior orders only when they are valid. But it should be observed that a military order differs from an official order of a government official in the following two respects.

a. As for the military person, even his conduct in private life is to a great deal subject to military discipline. The scope of his private life which is acknowledged as not having relation to his official duty, is very narrow, therefore a military order which seems, at a glance, to belong in private life, in most cases still does not lose its effect as a valid order. Particularly, those military persons who are in service or who are in the battle fields, are subject to superior orders in every phase of their life.

b. Military persons have not, of course any liability to obey invalid orders. But, if the military person is given the responsibilities to examine the validity of an order, and is held responsible for obeying an invalid order, then the military person will fear to obey them. This will lead to obstructing unified military discipline. Therefore it should be construed that acts done in accordance with superior orders, even when the orders are not valid, do not make the person who executes them responsible but chiefly makes the superior who gave out the order responsible. This logical sequence is produced, because the law compels obedience by sanction of punishment."

We must pay special attention to the bold and clear conclusion of the last paragraph which I repeat "Therefore it should be construed that acts done in accordance with superior order, even when the orders are not valid, do not make persons who execute them, responsible, but chiefly to the superior who gave out the order responsible. This logical sequence is produced because the law compels obedience by sanction of punishment."

Doctor MINOBE was by no means a sympathizer of militarism. On the contrary, as a representative liberalist in Japan, he was a scholar against whom from about the year 1930 the militarists harbored extreme antipathy. He was once shot and wounded by an assassin, and during the war in the period of TOJO cabinet, he was a scholar shut out from all social activities.

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This was the bold conclusion of this liberal scholar. This was not an extorted conclusion to sympathize with the militarist but a deduction gained by a rational study of the obedience constrained upon the military person. Therefore I believe it to be a highly correct interpretation.

"Rules of Land Warfare" published by the U. S. A. War Department in 1914, sets forth the following provision concerning the individual responsibility in war crimes. "Individuals of the armed forces will not be punished for these offenses in case they are committed under orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

I believe this provision is of the same view and opinion of the above mentioned Doctor MINOBE.

In the Japanese military forces the duty of obedience is strongly stressed. The handbook of military life which provides the criterion of the military life in the Japanese Army, states as follows concerning duty of obedience."

"Article 11. Orders should be respectfully adhered to and immediately executed. At no time, is it permitted to discuss its fitness or to question its cause, reason, etc."

It is ordered that this passage be memorized on the day a Japanese enters the military service. This was the iron clad rule of the Japanese mililtary forces. The accused INOUE also was compelled to memorize this and to believe this was the iron rule of the Japanese military life. Particularly, in the battle field or in the face of the enemy, this duty of obedience is most strenuously forced upon him. In a sense, the free will of the individual is completely obliterated and he becomes a part of a gear in the prodigious mechanism under such circumstances, we may say that an inferior who is commanded is under psychological coercion. In a case where the coercion is physical or external, it is natural that he is free from criminal responsibility. But there are occasions, when the free will of an individual, is deprived to a greater extent under psychological coercion than under physical. I believe the members of this military commission will understand far better than us, the position and mind of a soldier on a battle field.

I have explained above that the accused INOUE's killing eight natives of Mille with a pistol is an act done in pursuance of an official duty and does not constitute a crime. I would like to argue next upon the finding of not guilty for the accused INOUE on the ground that he had no intent to commit murder. In the statement of the accused INOUE introduced as evidence by the prosecution, he states as follows:

"The eight natives who were executed were Japanese subjects and had committed crimes, as a result of the highest deliberation had received sentence to be executed from Rear Admiral MASUDA and had been prisoners awaiting execution.

"At that time, as Commander of the Military Police of the Jaluit Defense Garrison I was under orders to perform the duties of investigating crimes and effecting their punishment.

"I performed the execution in accordance with the orders of Rear Admiral MASUDA to perform it without any doubt in my mind, believing it was the correct thing to do and properly executed my office."

This state of mind of the accused INOUE was further affirmed by his testimony when he bore witness in his own behalf. This state of mind of the accused INOUE includes the following two facts:

1. He received the order to perform the execution from his superior and was firmly convinced that his act of shooting Mille natives was the act of executing a death sentence.

2. As the result, he was not conscious at all of the unlawfulness of the act of shooting natives, and was convinced that it was absolutely a legal proper act.

By nature, the act of executing a death sentence is the act of carrying out the law and does not constitute a crime. Therefore, when the accused shot the natives of this case believing that it was an act of executing a death sentence, although we may admit his intention of shooting the natives, he had no intent to commit a crime. So we can once deny the existence of his criminal intent. If the act of the accused which he believed to be the act of executing a death sentence is not legally admitted to be so, this is the mistake of fact and law.

How the Japanese Criminal Code, judicial precedents and theories on the law solve this question of mistake? The provision for the criminal intent in the Japanese Criminal Code is summarized in three simple paragraphs of article 38 thereof. Article 38 of the Japanese Criminal Code states:

"1. Except as otherwise provided by special provisions of law, acts done without criminal intent are not punishable.
"2. A person who without knowledge (of the fact) has committed a grave offense (crime) can not be punished in proportion to its gravity.
"3. Ignorance of the law can not be invoked to establish absence of design, but the punishment may be mitigated according to circumstances."

(1) Conception of criminal intent.

The above cited article 38, paragraph 1 only provides that the act done without criminal intent are not punishable, but does not positively answer to the question "what is criminal intent, or intent to commit a crime?" It does not clearly show the elements necessary for criminal intent. Then a question arises, "Is the cognition of unlawfulness necessary for criminal intent?". This question is whether the cognition of unlawfulness is the necessary condition for criminal intent in addition to the cognition of fact. The criminal cognized the fact of crime. As in this case, he cognized his act of killing with a pistol. But he was convinced with reasonable grounds that his act of shooting is the act permitted by the law and was not conscious of unlawfulness of his act. Does criminal intent exist even in such a case? Since the present Criminal Code was promulgated in 1908, this question was being earnestly discussed in the scientific society of Japan in connection with the problem of ignorance of the law in article 38, paragraph 3 of the Criminal Code, when the world of criminal law of Europe was discussing the same problem. This problem was discussed in such a form of question as: Does criminal intent exist when a man believes that his act is legally permissible? At the beginning of the years of Showa (TN - 1926

is the 1st year of Showa), this question was almost solved by judgment of the court and the theories on the law, and the interpretation became agreed to the point that the cognition of unlawfulness is necessary for the establishment of criminal intent.

A famous judicial precedent concerning this problem which has often been referred by jurists is the judgment of the court martial in the so-called Amakasu Case.

There was a military police captin named AMAKASU who believed that the propaganda of socialists and anarchists is harmful to Japan. In 1923, at the time of the Great Earthquake of Kanto District, martial law was enforced in the district and people were feeling uneasy by various rumors. At that time, he killed with his subordinates, Ohsugi Sakae, a leading man of socialists whom he had been watching, his wife and child. This is the outline of the incident.

Then, by the order of AMAKASU, two military police PFC's killed the child who was then 7 years old. The court martial announced not guilty for these PFC's admitting that they killed the child without knowing that it was a crime. The reason was that, although they admitted the fact of killing the child, they believed that their killing was the act permitted by the law and did not know that it constituted a crime.

I shall refer the whole paragraph of the judgment as follows:

Acts done without criminal intent. (Judgment of Court Martial of 8 December 1923. Law Journal No. 2195, page 7.)

"While in the active service, the accused MASAHIKO was the head of the Shibuya Detachment of the Tokyo Military Police and the accused KEIJIRO was attached to the Special Higher Police Section of the Tokyo Military Police Headquarters. While engaged in their duties, MASAHIKO as a result of studying socialism, acknowledgint that this principle was harmful to the state, particularly such a doctrine as anarchy which denied all powers and which was incompatible with the glorious constitution of the empire, formed the belief that the speeches and acts of those who advocates these principles should in no way be overlooked or left alone. It so happened that when in September 1, 1923, a great earthquake and fire occurred in the district of Kanto, wild rumors spread that recalcitrant Koreans, availing themselves of this opportunity, had attempted riot and arson. Though the Imperial Ordinance No. 399 was proclaimed on the 2nd day of that month, murder, arson and other crimes continuously occurred and the insecurity and the excitement of the residents in the capital and its vicinity reached a culminating point. What change the social situation would undergo was unpredictable. Moreover, learning rumors that behind the recalcitrant Koreans the socialists were in action and also through other terrifying information MASAHIKO came to know that though most of the socialists were arrested by the police, OSUGI, Sakae leader of the anarchists regarded as most dangerous was still at large. MASAHIKO was deeply concerned about OSUGI and his followers and feared that, after the military guards were evacuated and while order was not as yet restored and distribution of food inadequate, they might take advantage of the situation and attempt some kind of a riotous act. At this time, he believed that if he killed OSUGI, it would serve to eradicate the evil roots in the nation and secretly awaiting this opportunity. OSUGI was being tailed by the police, so MASAHIKO regretted that he could not accomplish his purpose. Just at that time, MASAHIKO

learned that the Yodobashi police had the intention of "getting" OSUGI. MASAHIKO revealed his intention to KEIJIRO and had him ascertain the facts about the Yodobashi police. On the 15th of the same month KEIJIRO came to report that it was the intention of the police, that if the M.P.'s were willing to get OSUGI they would release the man tailing him and would support the M.P.'s by other means. He also reported that after the earthquake OSUGI usually took his child out for a walk in the evening around Toyama Fields. MASAHIKO concluded that this was a hint to kill him. Saying that this was the opportunity he determined to kill OSUGI. Conspiring with KEIJIRO, MASAHIKO intended to kill OSUGI at the said Toyama Fields. At 5:30 p.m. of that day, MASAHIKO and KEIJIRO without telling the situation to the accused YASUGURO and SHIGEO who were both their subordinates, took them along and went to OSUGI's residence located in 372, Kashiwagi, Yodobashi-cho, Toyotama-gun, Tokyo. There they waited for OSUGI, but, as he did not come out, they were not able to accomplish their purpose. At 2 p.m. of the next day, on the 16th of the month, with the same purpose, MASAHIKO and KEIJIRO took the accused RIICHI and SHIGEO, both their subordinates who knew nothing of the situation and went to the vicinity of OSUGI's residence. But, when they arrived at the place, MASAHIKO and KEIJIRO were told by a policeman of the Yodobashi Station that OSUGI and ITO, Noe, his common-law wife, had gone out about 10 a.m. that morning and would not return until evening. They waited his return by the road near his residence. About 5:30 p.m. OSUGI, his wife NOE and SOICHI (a nephew aged 7) came to the place where they were waiting. After MASAHIKO and KEIJIRO consulted each other, they told OSUGI that they had a few things to investigate and demanded he accompany them to the M.P.'s together with NOE and SOICHI, OSUGI was taken to the Tokyo M.P. Station, Otemachi, Kojimachi-ken, Tokyo City. They were lead upstairs into the former office room of the Head of the M.P.'s which had not been used since the earthquake. They rested there. MASAHIKO having made previous arrangements with KEIJIRO, had him bring OSUGI to the former office of the Commander which was also not in use then and located in the second floor of the M.P. Headquarters on the same premises. KEIJIRO had OSUGI sit with his back towards the door as previously arranged. On about 8:30 p.m. of that day, while KEIJIRO was talking with OSUGI, MASAHIKO suddenly entered the room and putting his right forearm around OSUGI's throat, with his right hand grasped his left wrist and tightly pulled it back. When OSUGI fell from his chair, MASAHIKO pressed his right knee against his back bone and strangled him to death. While MASAHIKO was strangling OSUGI, KEIJIRO was in the hall on the lookout. Then, MASAHIKO and KEIJIRO went down stairs and returned to the office of the Kojimachi M.P. in the aforesaid building. They discussed the disposal of NOE and SOICHI. As NOE was the wife of OSUGI and a sympathizer of his principles, and as the western history of revolution showed that women sympathizers were in the cride sometimes superior to men, the found it necessary to kill her. After plotting together, they decided MASAHIKO would do the act. As regards SOICHI, MASAHIKO believed that he was the child of OSUGI, but he hesitated in killing the child because he did not have the heart to do it. But, KEIJIRO feared that if the child was spared, it would expediate the expose' of the incident and insisted upon killing the child. MASAHIKO had no choice so he agreed. But neither desired to perform the act, so they decided to have a subordinate superior private do it. Plotting together, they called the abovementioned YASUGURO and SHIGEO to the office. KEIJIRO then ordered both to kill SOICHI. MASAHIKO directed them to kill the child after he had disposed of NOE. Both accused YASUGURO and SHIGEO had always had great confidence in MASAHIKO and immediately obeyed without reckoning that it would constitute a crime because of the emergency situation under martial law. MASAHIKO and KEIJIRO then

accompanied by YASUGURO and SHIGEO left the room and went upstairs to the office of the Head of the Military Police. MASAHIKO had a few words with NOE and finding that she was rather delighted over the chaotic situation, ascertained that his opinion of her was in error. MASAHIKO then took SOICHI to the adjoining room of the former Special Higher Police Section and entrusted the child to YASUGURO and SHIGEO. MASAHIKO then returned to the former room of the chief and subsequently left the room. On about 9:30 of that night MASAHIKO returned to the same room and while NOE was talking with KEIJIRO, strangled and killed her from the rear, by the same method used against OSUGI. KEIJIRO was in the hall on the lookout. On about the same time, at the said office, YASUGURO with his right forearm pressed around SOICHI's throat strangled and killed him. The preceding acts of the accused MASAHIKO and KEIJIRO were regarded as done under a continuation of criminal intent. This is established by summing up the above facts. Concerning the point of continuation of criminal intent of the accused MASAHIKO and KEIJIRO, this is acknowledged by their statements. Reflecting upon the law, the act of MASAHIKO and KEIJIRO killing OSUGI and NOE , and the act of having a superior private kill SOICHI, comes under article 60, article 199 and article 55 of the Criminal Code; and therefore both are sentenced to penal servitude within the limit of the respective crime; namely the accused MASAHIKO 10 years and the accused KEIJIRO to 3 years penal servitude. As the act of the accused YASUGURO and SHIGEO were done without their being aware of the fact that it would constitute crime, that is as it is an act without criminal intent, it is disposed of in accordance with article 38, paragraph 1 and article 403 of the Army Court Martial Law. In the indictment of the accused RIICHI as regards the charge that when NOE and SOICHI were being killed, he was on the lookout knowing of the situation, the fact that he was there is clear, but the evidence that he was on the lookout while aware of the situation, is not sufficient therefore he is acquitted in accordance with article 403 of the Army Court Martial Law.

We must take notice in this judgment that the principal officer, AMAKASU was sentenced to 10 years imprisonment with penal servitude. From this fact we can see that the sentence for these military men was not lenient from the point of view of Japanese militarism. This is the standard of punishment in Japan for murder without selfish motive as stated before.

Then, what was the attitude of Japanese scholars toward this judicial precedent? As a reference, I shall cite the commentary on this judgment written by Dr. Makino, Eiichi, a professor emeritus of the Tokyo Imperial University, an authority of the subjectivism criminal theory in Japan.

Makino, Eiichi: Study of Criminal Law, vol 3, pp. 114-125, incl.

CHAPTER FIVE

CONSCIOUSNESS OF UNLAWFULNESS AND CRIMINAL INTENT

"We may realize that the so-called Amakasu Case furnished us with new material about the problem concerning the relation between the consciousness of unlawfulness and criminal intent. So I want to discuss this briefly. The main point of the case concerns the fact that K and H, both Military Police PFCs, killed a victim named Soichi (age 6) by the order of their superior, Amakasu, Military Police Captain, I shall summarize the judgment of the case as follows:

'At that time, Amakasu Masahiko believed that Soichi was the son of Osugi. He had not the heart or the courage to kill such a child and hesitated. But Mori Keijiro (then a military police sergeant major, the accomplice) insisted upon the killing on the ground that the incident would soon be discovered if they left the matter as it was, and Amakasu was obliged to agree to attempt it. However, both of them did not want to do it themselves, and they decided to order their subordinate PFC to do it. They they plotted together and called the said K and H. Mori Keijiro ordered them to kill Soichi, and Amakasu Masahiko told them to do it after he killed Noe (Osugi's wife.) Since the two accused usually placed confidence in Amakasu, they obeyed the order then and there, without knowing that it was a crime in the emergency case under martial law..... The accused K and the accused H committed the crime without knowing the fact that their acts were crimes. So there is no intent to commit a crime in their acts..... Therefore, the judge finds them not guilty.'
(Announced on 8 December 1923, reported on pp 7 - of the Horitsu Shimbun #2194 on 18 December 1923.)

"This judgment was pronounced at the Court Martial of the 1st Division. Since there was no appeal, this finding was the conclusive one. In this finding, what the accused believed that the act had not been a crime as it has been 'in an emergency case under Martial Law,' was regarded as the fact that they 'did not know that it had been a crime.' But as they thought that their acts lost their unlawfulness on account of certain circumstances, they made a mistake concerning the unlawfulness of their acts. It should be the question whether such a mistake is a mistake of the fact or a mistake of law.

"The judge, in his judgment that the accused 'did not know the fact that it had been a crime,' would have thought that it was a mistake of the fact. But the accused thought that their acts were legally not a crime because they were done in emergency. There is no inconsistency between the objective fact of the act and the subjective consciousness of the act. But the accused was mistaken about the legal value of their acts, although their acts legally constituted a crime in fact. Therefore, the character of the mistake is not a mistake of fact but a mistake of law.

"Then, in what case does a mistake of law, in other words namely the consciousness of a certain unlawful act is not unlawful preclude criminal intent? It is an established theory that the meaning of paragraph 3 of Article 38 of the Criminal Code is that a mistake of law has no influence upon the existence of criminal intent. If we get to the bottom of this point of view, the acts of the accused in this case are sufficient to constitute a crime. But in our country, there has already been a forcefully different opinion against it. That is, the consciousness that the act is not unlawful justifies the fact that there is no criminal intent. This opinion is prominent in the academic society of Germany, and this judgment should be considered in connection with this theory.

"Of course, I don't agree with this different opinion unconditionally. But at the same time would like to consider the former established theory with two limitations. That is: (1) Paragraph 3 of Article 38 of the Criminal Law can not be applied to a 'dilit ligal." (TN - There is a thought to classify the crime in two categories: one dilit naturel or natural crime, another dilit ligal or legal crime. The former expects, as a matter of course, the standards of the public peace and good manners

and customs against their violation; the latter another establishes the standards first by the law and gives punishment in order to enforce the standards.) (2) We must put into consideration how a mistake influences the substance of the consciousness on the mistake of the unlawfulness of the act.

"Let us consider the first point. If it is dilit ligal which stands against dilit naturel, the substance of an act can not be deemed anti-social by the common sense of the society. So, when one dares to commit dilit ligal, we can not understand that he has an anti-social intention if he does not recognize the unlawfulness of his act. We can say only concerning a dilit naturel that the consciousness of the fact means the existence of anti-social intention.

"The second point is, in brief, an enlargement upon the said view concerning the consciousness of unlawfulness about a dilit naturel. The substance of dilit naturel is naturally anti-social as the common knowledge of society. So, to commit an act recognizing the fact is naturally the manifestation of anti-social intention. This is the meaning of paragraph 3 of Article 38 of the Criminal Law which signifies that a mistake of law does not influence the existence of criminal intent. But, under special circumstances which justify the fact that there is no intent, there may sometimes arise a doubt, in the common knowledge of the society, as to whether the act is anti-social under such circumstances. In other words, even if an act belongs to dilit naturel in its substance (murder in this case,) the act gives rise to doubt as to whether or not it violates the public peace and the good manners and customs in the common knowledge of society under certain circumstances (the order of the superior under Martial Law in this case.) Even when such an act is not legally permissible under such circumstances, the mistake of law may justify that the fact there is no anti-social intention, if it can be natural to consider that the act is permissible in the common knowledge of society because of ignorance of the law. In such a case paragraph 3 of Article 38 of the Criminal Law should be limited by rational grounds.

"Considering this point of view of mine, there is a question whether the circumstances, to wit receiving orders from a superior who is a reliable military man under Martial Law, does, in reality make the act unrecognizable as an unlawful one in the common knowledge of the society. The judgment answered to this question in the affirmative. It should not be determined formally or logically whether the answer should be affirmative. As the matter concerns the unlawfulness of the act, it should be determined by summing up the interpretation of the social psychology and the judgment of its merit. And the affirmative answer of the judgment gives us the important material on this point.

"This judgment determined that the accused had no criminal intent. In other words, it did not apply Article 35 to the acquittal of the accused. This presumes that the order of the superior is not absolute even among military personnel. That means, if the accused had had a proper knowledge of the law, it would have been their duty to disobey the order. Article 57 of the Japanese Army Criminal Code provides that the violation of the order of the superior in the area under Martial Law shall be punished with more than one year or less than seven years. But if the accused violated the order in this case, the provision of the Army Criminal Code would not be applied.

"This judgment was not content only with the obedience of the superior's order when it determined that the accused had had no criminal intent. It set forth first that the act was done under Martial Law, and made it clear that "emergency" had to be seriously considered. It gave next that the accused 'usually had placed confidence in Amakasu Masahiko,' and showed that the fact of the confidence had a great influence upon the determination of the accused's intention. In these two considerations this judgment presumes that the order of the superior is not absolute even among military personnel. If a subordinate commits a crime only because it is the order of his superior, it doesn't make any difference as to the constitution of the crime.

"Lastly, I hope this decision of the Court Martial may be the opportunity to let people admit my view concerning the effective law. If Article 38 of the Criminal Code is amended in the future, paragraph 3 thereof will have a conditional clause that there are two cases: one, the punishment will be remitted, another a finding of not guilty will be announced. I think however, even without such a judicial amendment, it ought to be properly admitted from now on under a rational conception of criminal intent."

I request your special attention to the last part of this essay, Dr. Makino says that it is quite natural as a rational understanding of criminal intent, even before the amendment of the provision regarding to this point, to admit the meaning of this judgment as an interpretation of the provision. This essay was written in 1925. This judgment was the turning point. At present, as Dr. Makino insists, by the rational interpretation of criminal intent, all theories and judicial precedents say that the recognition of unlawfulness is necessary for the establishment of criminal intent.

On the basis of the abovementioned established conception of criminal intent in the Japanese Criminal Code as a premise, I affirm that the accused has no criminal intent. The accused was not at all conscious of the unlawfulness of his shooting, and believed that it was a legally proper act. Besides, there were reasonable grounds to believe that it was legally a proper act. He was not simply ordered to kill as the soldiers acquitted in the Amakasu case were, he was ordered to perform the execution of the death sentence. Besides, he was the investigator for the crimes of these natives in this case. So he was convinced that they were criminals who had committed such serious crimes as spying, murder, etc. He was convinced that Masuda had the proper authority to announce the death sentence for these criminals.

(2). ON MISTAKE OF FACTS.

Article 38, paragraph 3 reads "A person who without knowledge (of the fact) has committed a grave offense (crime) cannot be punished in proportion to its gravity."

This is a provision setting forth one occasion of mistake of facts. This provision is difficult to understand, so when it is translated into English it becomes very difficult. In the FURUKI case the judge advocate cited this provision and argued that in the Japanese Criminal Code mistake of facts does not preclude criminal intent and may only be considered as a matter in mitigation. He stated, "In fact, it appears considerably less of a requirement because it seems that for all serious crimes, even ignorance of the facts will only be considered in mitigation."

This is a grave misunderstanding. In the Japanese Criminal Code also, mistake of facts or ignorance of facts does preclude the constitution of criminal intent.

Article 35, paragraph 2, merely provides the self-evident fact that, even if in fact a serious crime is committed, when there was no intent to commit a serious crime, the person cannot be condemned for that serious crime.

For instance, in Article 200 of the Japanese Criminal Code a parricide is more heavily punished then ordinary homicide, set forth in article 199. When a person intending to kill his friend, thought the person was his friend, and shot his pistol, but the person was, in fact, his parent. In this case he is punished by ordinary murder as set forth in article 199 and not for the crime of parricide as set forth in article 200. This is the meaning of the article.

There are two kinds of "mistake of facts." One is a simple mistake of fact, the other is the misunderstanding of law, or a mistake in the application of the law and a misunderstanding that certain facts exist or certain facts do not exist. The latter case is often mistaken for the "ignorance of law" set forth in article 38, paragraph 3, but we must not confuse the two.

Article 38, paragraph 3, which reads "Ignorance of law cannot be invoked to establish absence of criminal intent.", simply implies that when a criminal is punished, it is not necessary for him to know the penal provisions applicable to the act. For example, even if the criminal does not know the provisions of article 199 of the Japanese Criminal Code, the crime of homicide is constituted. This paragraph is merely setting forth the traditional principle of the Roman jurist, namely "Mistake of law is not excusable" (error iuris nocet, error iuris non excusat.) It does not also mean that, when mistake of facts is caused by ignorance or mistake of law criminal intent is constituted. This is the interpretation which all of the judicial judgment and theory agree upon.

As to this point, I believe that the same principle is adopted in the U. S. A.. For example Wharton's Criminal Law reads:

"Paragraph 102. Ignorance of law no defense to an indictment for a violation of law.

"Paragraph 104. Mistake of law admissible to negative evil intent."

Cases also may occur in which evil intent is a condition precedent to conviction, but in which a mistake of law, if proved, would negative such evil intent. Thus in larceny it is admissible to prove that the defendant took the goods under a claim or right, however erroneous; in malicious mischief, that act was believed to be the exercise of legal right.

"Paragraph 105. And so as to mistake of subsumption of facts in law."

When the question is whether a particular fact or group of facts falls under a particular rule of law, an error in this respect is to be regarded as an error of fact.

I shall cite an eminent case of judicial judgment on this point.

Mistake in the interpretation of the Code of Civil Procedure precludes criminal intent in the crime of destroying the seals or mark of attachment on things under attachment. (Digest of Legal judgment of the Supreme Court 1925, section 1831, Criminal Section Decision February 22, 1926.) (Digest of Legal judgment of the Supreme Court, Vol. 5, Criminal Section, page 97.)

Article 38, paragraph 3 which reads "ignorance of the law cannot be invoked to establish absence of criminal intent," clearly purports that a mistake of the illegality of a crime does not preclude criminal intent. The existing Criminal Code clearly distinguishes between mistake of general illegality of criminal act and mistake of facts which forms the component elements of the criminal act itself; and only when the latter exists, is it considered that there is no criminal intent. This is so because there should be a clear distinction between the general illegality of criminal acts and the component parts of the criminal acts itself, and because naturally, mistakes in regard to the above distinction have different effects. But when the mistake of facts which constitute the component element of the criminal act itself, is caused as a result of negligence of law or error in its application - for instance to be under a mistaken belief that the component element of the crime had not existed or under a mistaken belief that he had the right to exercise the facts which constitute the component element - in such a case, the mistake primarily has no relation with the general illegality of criminal acts, but comes to be a lack of cognizance for the component element of the criminal act itself, therefore the existence of criminal intent should be denied. It may be said, as regards certain crimes, that the criminal law relies for its contents on the provisions of the civil code or public law in determining its component element. When in the civil or public law, an act is regarded as the exercising of one's rights or a legal act provided in the provisions of the criminal code has lost its effect, then also in the criminal code that criminal act possesses only an outward appearance and in substance it would not fulfill the component element of the crime. In this case article 38, paragraph 3 should not be applied, but a crime set forth in article 96 of the criminal code is the one that actually corresponds to the above case. The provision of this article purports as the component element, the act of destroying or damaging without right, the seal or mark of attachment, prior to losing its effect or to make void the seal or mark of attachment by other means. When in accordance with civil procedure law or other public law, when it is interpreted that the effect of the attachment is lost or when the right to destroy the seal is acknowledged even though the formalities of the seal etc. exists, then it is only proper to construe that the element of this crime is absent. Therefore, when by misinterpretation of the civil procedure law and other public laws, the defendant is under the mistaken belief that the attachment does not exist because the attachment had lost its effect, or when he is under the mistaken belief that he had the right to destroy the seal, etc; in such case we must say that the criminal intent of the crime is precluded. According to the original decision of the present case at the original trial, the defendant was told by the person who arbitrated the attachment that he had repayed the debt involved in the present case so that the seals on the attachment thing could be taken off. Accordingly the defendant states that he took them off. Therefore the original court, in view of this statement, should have investigated the fact that, whether because of the repayment by the arbitrator the defendant was under the mistaken belief that the attachment had lost its effect and no longer existed, or whether he was under the mistaken belief that he had the right to take off the seals and marks.

And because this mistake had relation with the component element of the crime in this case, the original court should have established whether this lead to the conclusion of non-existence of criminal intent or not. But the original judgment did not establish the above pertinent point and regarded the defendant as merely claiming the ignorance of law. The defendant was pronounced guilty but this judgment is illegal since guilt was acknowledged without establishing the pertinent facts concerning criminal intent.

Let us study this point with reference to the accused in this case. On receiving the order of executing the death decision from MASUDA, the accused performed the shooting and killing of these Mille natives as ordered, and it was an act of executing the death sentence. He truly believed his act was legally right as an act of executing the law. Let us assume that later, it was established that the death decision was invalid. And the act of executing the death decision by the accused was not in a legally strict sense, an act of execution. Therefore, in this case, the accused was under the mistake that his act of shooting was an act of executing the death decision. He fell into this mistake by ignorance or misunderstanding the laws pertaining to trial, judgment, etc, or by the mistake in applying the law concerning trial or judgment.

This mistake is the same mistake as in the case of the above cited judicial precedent. Thus, in this case it is not ignorance of law as set forth in article 35, paragraph 3, but mistake of facts growing out of ignorance or mistake of law and as a principle negates the constitution of criminal intent. Moreover, there was reasonable reason for the accused to believe that his act of shooting was an act of execution of the death judgment. As regards this point, I believe I have already discussed in detail in that part when I argued the act of the accused was that of performing official duty.

Thus the mistake of the accused is not a mistake of law as set forth in article 38, paragraph 3 which does not preclude the constitution of criminal intent, but mistake of fact which precludes the constitution of criminal intent. In the foregoing, I have divided mistake into mistake of law and mistake of facts and argued and established the reason for the accused in not having criminal intent.

Members of the commission, I wish to reiterate that the acts of the accused in shooting and killing the Mille natives, is only an act of executing an official duty and is free of illegality. It is not an act to constitute a crime. Even if it is not acknowledged as an act of executing official duty, from the interpretation of criminal intent in the Japanese Criminal Law, the accused did not have the slightest criminal intent to commit murder.

Therefore, viewing it from every point, I maintain that the accused is not guilty as to Charge I.

Chapter 8, ON THE CRIME OF VIOLATING THE LAWS AND CUSTOMS OF WAR IN CHARGE II.

I firmly believe that the accused is not guilty of Charge II and each of its specifications.

1. According to each specification, it is set forth that the accused killed, punished and caused to be punished these Mille natives as spies, without previous trial. But as I have already stated there was a trial

held for these natives. Particularly, article 35 of the Hague Convention merely mentions trial and does not limit as to what kind of trial. According to the customs of various countries, not only a general court martial but a simplified military commission is also recognized as a trial Since a trial in substance was held for these Mille natives, I do not believe that because a trial was not held in accordance with the provision of the Japanese Criminal Procedure Code or Japanese Court Martial Law, we cannot hold that there was no trial held as stated in this commission.

2. When we make a rational interpretation of the legislative spirit of article 30 of the Hague Convention, the definition of spy in this article means foreign spy and not domestic spy. I shall not burden the commission with detailed argument on this point as I have already discussed it in my objection to the jurisdiction. Nevertheless, these Mille natives at the time of the incident were native inhabitants of the Japanese mandated territory. Thus, in substance they were subjects of Japan and under the sovereignty of Japan. They were not foreigners. Therefore, even though they were punished without trial as spies under domestic law, it would not constitute a war crime in viotion of the Hague Convention.

3. Concerning the Mille native incident, I have already stated that the part played by the accused was merely the act of carrying out the death judgment which had been decided. What is prohibited by article 30 of the Hague Convention is not the execution of a spy himself, but to punish a spy who is caught in the act without previous trial. The punishment of these natives was decided by the alleged "highest examination and consultation on Jaluit" composed of MASUDA, FURUKI, and SHINTOME. The accused acted as judge advocate but did not take part in deciding the death judgment. The accused was ordered merely to carry out the death judgment and did so. The acts of the accused in no way violate the Hague Convention, article 35.

4. The accused was in charge of executing the Mille natives in the present case. But it was in accordance with superior orders. It was in pursuance of the order of MASUDA, Supreme commanding officer of Jaluit. SCAP Rules provide that "superior orders" is not a defense, "Action pursuant to order of the accuseds' superior shall not constitute a defense." But we must carefully interpret what this provision purports. I believe it means that responsibility cannot be evaded solely relying upon the reason that the action was pursuant to superior order. But I believe that it is acknowledged as a defense when there exists other recognized reasons for defense against domestic crime. And I believe this is only proper and natural. Furthermore, I cannot think that in a war crime trial, it is permissible to ignore the criminal theory recognized by modern civilized nations.

I am under the understanding that in the reason for the SCAP Rules in not providing in detail the elements to constitute a war crime, it is not meant to do away with the application of existing criminal theory, but the reason is to reserve it to the existing criminal theory.

Therefore in constituting a war crime criminal intent is necessary. In some cases, actions growing out of flagrant necessity may constitute a defense. I believe what is meant by actions pursuant to orders of a superior or government do not constitute a defense, is that it does not preclude the constitution of illegality as a war crime. When there is not the slightest evil intent in an action, even pursuant to superior orders, I believe it to mean that the criminal should be acquitted.

If the act done by the order of the superior is guilty, military men, especially military men of low rank are always in pitiable situation. Professor Sheldon Gleuck, in his "War Criminals, Their Prosecution and Punishment" pictures this awkward situation of them as follows:

"Admittedly, the ordinary soldier is in an unenviable position in time of warfare. He has a dual obligation: to the ordinary criminal law which prohibits certain acts on pain of punishment, as well as the military law which compels him to obey the orders of his superior. Receiving a command from his officer to carry out an act contrary to the laws and customs of legitimate warfare, he may or may not know the act to be unlawful under the circumstances. Even if he does know it to be illegal, it seems hard to hold him responsible when all his military training has stressed the duty of instant and unquestioning obedience; and this is still more true if he does not know the order to be unlawful.

He remarks that there are following three situations in which they receive the orders of a military superior:

"It is not generally realized that in respect to the duty of obedience, there are gradations that make the task of soldiers especially difficult. At least three situation are possible: (a) The order appears to be regular and lawful on its face; (b) the order is so manifestly beyond the legal power of discretion of the commander as to admit of no rational doubt of its unlawfulness; (c) there is a room for reasonable doubt as to whether or not the order on its face is lawful."

Then he makes the following two theories compromise from the view point of deep consideration of humanity. 1. The order of a military superior may exempt a soldier from his responsibility as a war crime; 2. the order of a military superior can not exempt him from responsibilit in any case. And he shows his proper conclusion as follows:

"An unlawful act of a soldier or an officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he actually knew, or, considering the circumstances, he had reasonable grounds for knowing, that the act ordered is unlawful under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the laws of his country. In applying this rule, whenever these three legal systems clash, the last shall be subordinate."

I think, even under the stipulation concerning the order of a military superior in the SCAP Rule, such interpretation as this one should naturally be permissible. According to the interpretation as this one should naturally be permissible. According to the interpretation of Sheldon Glueck, if a man, who did an act in pursuance of the order of his military superior, does not know the unlawfulness of the order, or if there is a reasonable ground for his ignorance of unlawfulness, his responsibility of war crime may be exempted. This interpretation is an appropriate theory which has a deep understanding for the situation of military men in the war.

The accused did not know that the order of execution of the death sentence issued by MASUDA is unlawful at all. He knew that these Mille natives had committed serious crimes, and was convinced that a careful deliberation was convened for those criminals with the best procedure applicable to the circumstances of Jaluit in battle conditions. He believed that, according to the despatch from the Commander-in-Chief of

the Fourth Fleet at the beginning of 1944, MASUDA was vested with the authority for everything on the base as the supreme commander of Jaluit, and that the authority to hold a trial was included in it.

Summing up the above, I can find a reasonable ground that the accused was not conscious of the unlawfulness of the order of MASUDA.

The accused did not know the unlawfulness of MASUDA's order, and there was a reasonable ground for his ignorance of the unlawfulness. Therefore he is not guilty for Charge II which alleges him to have violated the laws and customs of warfare.

In my argument I have stated my conviction that the accused INOUE is not guilty of Charge I and Charge II and each of the specifications therein. Honorable President and members of the commission, I respectfully ask your careful and just consideration.

SUZUKI, Saizo.

I certify the foregoing, consisting of forty (40) typewritten pages, to be a true and complete translation of the original argument to the best of my ability.

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

Inoue
MM

FINAL ARGUMENT

FOR THE DEFENSE OF

CAPTAIN INOUE, FUMIO, IMPERIAL JAPANESE ARMY

delivered by

COMMANDER MARTIN E. CARLSON, USNR.

at

GUAM, MARIANAS ISLANDS.

June 2 - 3, 1947

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The trial of Inoue, Fumio, captain in the Japanese Army, by a United States Navy convened Military Commission for an offense committed on the island of Jaluit in April,1945, while that island was under siege by the American naval and air forces for an offense against natives of Mille, another island which Japan was defending, first of all involves a question of jurisdiction.

This case is an application of international law as regards the jurisdiction of one country to try a citizen of another country for an offense said to be in violation of the criminal code of that other country, the offense having been committed within the territorial jurisdiction of that other country.

The accused did make a plea objecting to the jurisdiction of this commission to try this accused for the offense and we shall not again repeat our remarks except to show how the facts which have been brought out apply to the law of jurisdiction. Lack of jurisdiction is a fatal defect and the plea may be made at any time. Now that the facts are clear to the commission, we again bring to your attention the lack of jurisdiction to try the accused for the alleged crimes.

Since this is a military commission which is trying this case, it is well that we look into the authority of military commission in these United States of America and particularly this military commission.

The Constitution confers upon Congress the power "to define and punish piracies and felonies committed on the high seas and offenses against the Law Of Nations."

Article I, Section 8(10)

"But, in general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies" and which in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-Chief in war."

"MM(1)"

Inopio
MM

Winthrop's Military Law and Precedents (2d), Vols. 1 and 2, page 831:

"It was not until 1847, upon the occupation by our forces of the territory of Mexico in the war with that nation, that the Military Commission was, as such initiated." By G. O. 20 of Feb. 19, 1947 issued from the Headquarters of the Army of Tampico (as slightly added to by G. O. 190 and 287 of the same series) it was announced that certain crimes committed by Mexicans or other civilians in Mexico against individuals of the U. S. military forces, or by such individuals against other such individuals or against Mexicans or civilians, should be brought to trial by military commissions.

The acts thus made punishable by military commissions were mainly criminal offenses of the class cognizable by the civil courts in time of peace." For the trial and punishment of offenses against the laws of war General Scott inaugurated a separate tribunal designated as the council of war, not however materially differing from the military commission, except in the class of cases referred to it.

The military commission and council of war of the Mexican War were together the originals of the Military Commission extensively employed in the Civil War and recognized in existing statute law; the two jurisdictions of the earlier commission and council respectively being united in the later war court for which the general designation of military commission was retained as the preferable one.

"Presently, also, they were recognized as legal courts, and their jurisdiction in some cases added to by, by express statute."

The Military Commission has also been recognized as an authorized provisional tribunal in proclamations and orders of the President and in rulings and opinions of the courts and law officers of the government."

"A Military commission (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander....."

"These rules which have their origin in the fact that war, being an exceptional status can authorize the exercise of military power and jurisdiction only within the limits--as to place, time, and subject--of its actual existence and operation, have not always been strictly regarded in our practice."

"Winthrop's Military Law and Precedents (2d) Vol. 1 & 2, pages 832 to 837 inclusive.

We hold that Commander Marianas cannot legally assume jurisdiction because Jaluit was not within the field of command of the convening authority at the time the offense was committed. Serial 3785 dated February 21, 1947, states: "Pursuant to the authority vested in me by virtue or my office as Commander Marianas Area and Deputy Military Governor, Marianas Area".

The specifications of both charges I and II allege the crimes were committed April 8, 1945, and April 1?, 1945. On those dates Commander Marianas did not have jurisdiction of Jaluit either as Commander Marianas or as Deputy Military Governor, Marianas Area.

The precept (serial 3785 dtd Feb. 21, 1947) further states: "and by the specific authority vested in me by the Commander-in-Chief, U. S.

Pacific Fleet (CinCPac conf. serial 0558 of March 8, 1947), and Pacific Ocean Areas, and Military Governor of the Pacific Ocean Areas." But the confidential serial 0558 is dated March 8, 1946, and the offenses charged were committed on April 8, 1945, and April 13, 1945.

Thus neither by virtue of his office or by authority of the confidential serial 0558 dated March 8, 1946, did the Commander Marianas Area have authority legally to assume jurisdiction of Jaluit on April 8, 1945, and April 13, 1945.

We go further and state that Commander in Chief, U. S. Pacific Fleet did not legally have jurisdiction of Jaluit on April 8, 1945, and April 13, 1945.

Now, let us read what Winthrop says about jurisdiction of a military commission as regards the time when an offense was committed.

"As to time. An offense, to be brought within the cognizance of a military commission, must have been committed within the period of the war or of the exercise of military government or martial law. As in the ordinary criminal law one cannot legally be punished for what is not an offense at the time of the sentence (citing Com. v. Duane, 1 Bruney, 601; Anon., 1 Wash. 84; US V. Tynen, 11 Wallace, 88; US v. Finlay, 1 Abbott, USR, 364) so a military commission cannot (in the absence of specific statutory authority) legally assume jurisdiction of or impose a punishment for, an offense committed either before or after the war or other exigency authorizing the exercising of military power, (citing See Finalson, Coms. on Mar. Law, 53; Clode, M. L., 189; Thring, Crim. Law of Navy, 42-3; Wells on Jurisdiction, 577; 12 Opins. At. Gen, 200; G. O. 26 of 1366; Do. 12, Dept. of the South, 1868; Do. 9 First Mil. Dist., 1870; Digest 507. "Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed." Pratt, 216. And see Jones, 12. The jurisdiction of such a tribunal is "determined and limited by the period (and territorial extent) of the military occupation." G. O. 125, Second Mil. Dist. 1867) Thus, a military commander in the exercise of military government over enemy's territory occupied by his army cannot with whatever good intention, legally bring to trial before military commission, ordered by him, offenders whose crimes were committed prior to the occupation." (We supplied the italics)

Winthrop, Military Law and Precedent, Volumes I and II, (Reprint 1920) page 837.

We hold therefore that since both Charge I and Charge II allege offenses committed April 8, 1945, and April 13, 1945, there is no jurisdiction of this commission since Commander Marianas did not occupy Jaluit until after August 14, 1945, and did not assume the functions of military government until long after that date. This is true of the crimes alleged in both of the charges, but particularly of the crimes alleged in Charge I.

The specifications 1 and 2 of Charge I allege crimes "in violation of effective law, especially Article 199 of the Criminal Code of Japan, "not by the greatest stretch of the imagination can it be said that Commander Marianas could enforce Japanese law against a Japanese citizen for a crime committed on Jaluit prior not only to the time of occupation by the forces of Commander Marianas, but prior even to the forming of the office of the Commander Marianas Area. Neither can the Commander Marianas Area and/or Deputy Military Governor Marianas Area have cognizance of offenses said to be in violation of the laws and customs of war when the said offenses were committed April 8, 1945, and April 13, 1945, when there was no such office. The confidential document, Serial 0558 of March 8, 1946, cannot give jurisdiction as to offenses prior to March 8, 1946, when the office of Commander Marianas did not exist as far as jurisdiction of Marshall Gilbert Area was concerned, until, we believe,

"MM(3)"

about December, 1945.

Let us read what Winthrop says about the jurisdiction of military commission over persons "As to persons. From what has heretofore been said in regard to the application of the laws of war to enemies in arms, and their operation under a state of military government or martial law, it will have been seen that the classes of persons who in our law may become subject to the jurisdiction of military commissions are the following: (1) Individuals of the enemy's army who had been guilty of illegitimate warfare or other offenses in violation of the laws of war; (2) inhabitants of enemy's country occupied and held by right of conquest; (3) inhabitants of places or districts under martial law; (4) officers and soldiers of our own army, or persons serving with it in the field, who in time of war, become chargeable with crimes or offenses not cognizable, or triable by the criminal courts or under the Articles of War".

Of the first class are persons in the military service of the enemy who have been guilty of any of the descriptions of the offenses specified under a previous Title as violations of the laws of war;. . . ."

Only therefore if the prosecution can show that this is a legally authorized military commission having jurisdiction as to place, as to tohthe person and only then if the offense is in violation of the laws of war. But we have shown that this military commission did not have jurisdiction of the place, Jaluit, on April 8, 1945, and on April 13, 1945, nor of the persons on those dates.

We repeat again what Winthrop says on page 837 of his book Military Law and Precedents: "Thus, a military commander, in the exercise of military government over enemy's territory occupied by his army cannot, wi with whatever good intention, legally bring to trial before military commissions ordered by him offenders whose crimes were committed prior to the occupation."

Section D-13 on page 490 of Naval Courts and Boards requires "such specification should show on its face the circumstances conferring jurisdiction." The specifications do not show this because there is no such jurisdiction.

In the civil courts, the rules relating to jurisdiction are the same. In the celebrated Raymond Fornage case it was said, and I quote from the Argument of Mr. Requier: "The right to punish has no foundation except the right of soveregnty which expires at the frontier..... But the law cannot 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 comstitute a violation of international law and an attempt against the sovereignty of neighboring nations..... When a crime has been committed outside of the territory by a foreigner, the culprit is not subjected by that act to the French law; the French tribunals have no jurisdiction over him; the incompetence is radical and absolute. The criminal court, in punishin the act, would commit an abuse of powers; it would usurp a right of sovereignty appertaining to a foreign power."

The case of Inoue was referred for trial to this MilitaryCommission by charges and specifications from the Commander Marianas Area on March 13, 1947, serial 4445 file A16-2/FF12 over 13-JDM-ro.

"MM(4)"

Inoue
MM

The prisoner, Raymond Fornage, was iddicted by the grand jury of the court of appeal and the Fornage case was referred for trial to a court of assizes (composed, in departments where there are courts of appeal, or three judges of that court). 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.

Not only did the court of cassation adopt this view, but 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 principle, the courts of assizes, possesed of a case by judgment of the chamber of indictments not attacked 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 of power and without transgressing the limits of their attributes, take cognizance of all acts punished by the French law; but this jurisdiction, however general it may be, cannot extend to offenses committed outside of the territory by foreigners, who by reason of such acts, are not justidiable 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 in the right of legitimate defense, the French tribuansl are without power to judge foreigners for acts committed by them in a foreign country; that their incompetence in this regard is absolute and parmanent; 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;..... Anul, etc. '"

The Fornage case was an attempt by a French court to exercise jurisdiction over a crime committed in Switzerland. The Supreme Court of France said it couldn't be done.

This present case is an attempt by the US 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. Japanese law was still in effect on Jaluit.

Since the United States had no jurisdictio of crimes which might have been committed on Jaluit, April 8, 1945, and April 13, 1945, they can have no jurisdiction now, especially can they have no jurisdiction to enforce Japanese law on Jaluit.

The only way that a Military Commission could acquire jurisdiction to enforce Japanese law on the Japanese held possession of Jaluit would be by express statute. There is no such statute.

We respectfully call your attention to the evidence which has been introduced at this trial and which clearly proves that there is no jurisdiction in this commission to try the accused. It has been proved that Captain Inoue, Fumio, the accused is a citizen of Japan; that the acts alleged took place on Jaluit Atoll in April, 1945; that Japan acquired possession of Jaluit byconquest during the First World War; that Jaluit was mandated to Japan by the Treaty of Versailles in 1919 and that Japan occupied Jaluit up until the cessation of hostilities of this World War;

"MM(5)"

that in April of 1945, Jaluit was a besieged area to such an extent that Japanese martial law was to all intents and purposes the law in effect on Jaluit because during the early part of the year 1944, in April 1944, all civilian government was abolished and the functions of civilian government taken over by the military on Jaluit; that civilians on Jaluit and on the other Marshall Islands which were still occupied by Japan, particularly Mille, were amenable to the military law of Japan.

The witness Inoue testified that from April, 1944, Admiral Masuda administered all affairs on military and civilian on Jaluit. He had full authority over all civilians on Jaluit byvirtue of orders issued by the commander in chief of the Fourt Fleet. The head of the civilian government on Jaluit was ordered to be under the military commander, Admiral Masuda. Admiral Masuda put out an order to each unit and to the native and other civilians on Jaluit stating that he, Admiral Masuda, was head of all affairs on Jaluit. The evidence clearly shows that martial law was in effect on Jaluit in April, 1945.

Winthrop on page 820 of his book Military Law and Precedents says: "The employment of martial law has been likened to the exercise of the right of self defense by an individual. Its occasion and justification thus is necessity." On page 817 he says: "Martial law, as the term is used in this treatise, is military rule exercised by the United States, (or a State,) over its own citizens, (not being enemies,) in an emergency justifying it."

So we see that all evidence clearly points to the fact that martial law was a necessity and was employed by the Japanese on Jaluit in April, 1945. This notwithstanding that the commission refused to take judicial notice of the Japanese Martial Law Statute and refused to admit it into evidence.

In view of what Winthrop says about martial law under the heading "V. The status of martial law and the laws of war applicable thereto." on pages 817 to 830 inclusive, it is most interesting to read the objection of the judge advocate to our motion that the commission take judicial notice of the Japanese Martial Law State as found in the proceedings of the Eighth Day. In his objection, he quoted article 9 of the Dajokan. He said: "The Dajokan Fukoku No. 38 proclamation contains certain proclamations which appear to go beyond the customary boundaries of martial law and the customary rights of the military commander in a situation of martial law. All of these powers and rights however are prefaced upon the actual proclamation and delcaration of martial law. He cited in this regard particularly Article 9 of the Dajokan Fukoku No. 38, martial law which he said reads as follows:

Prime Minister (it should be Dajokan) proclamation no. 36 [sic] of August 5, 1882: "In a war area, the administrative and judicial affairs of the district, if they are concerned with military affairs, shall come under the command of the commanding officer of the district. Therefore the officials, judges, and judge advocates of the district upon proclamation or declaration of martial law shall immediately come under the command of the commanding officer." This is not a correct translation of either Article 9 or Article 10.

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

Inoue
MM

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

The judge advocate further stated, "It is primarily because of these differences that the judge advocate objects to the taking of judicial notice of the Dajokan Fukoku No. 38, Martial Law.

We call the Commission's attention to the distinction which Winthrop makes between martial law proper and military government. He says that Chief Justice Chase in the case of Ex Parte Milligan, 4 Wallace 141, gave "the first complete judicial definition of the subject." We refer to pages 799 to 818, inclusive, of Winthrop's Military Law and Precedents where Chief Justice Chase's opinion is cited. In footnote 100 (5) on page 818 we read, To quote again from Chief Justice Chase's definition--it (martial law) is "to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion, within the limits of States maintaining adhesion to the national government, when public danger requires its exercise. . . , within districts or localities where ordinary law no longer adequately secures public safety and private rights." 4 Wallace, 141.

Certainly, the battle conditions and the state of siege to which Jaluit was subjected which is common knowledge and which has also been testified to by witnesses at this trial was such that the public danger to Japan required martial law because ordinary law no longer could adequately secure public safety and private rights.

Several witnesses testified to the battle conditions and the state of siege of Jaluit in April, 1945. Major Furuki on the ninth day testified that there was an order from Commanding Officer of the Fourth Fleet to Admiral Masuda in April, 1944. He said about this order "It stated that each supreme commander of each base should command all military,gunzokus, and government officials, and civilians and administer judicial and administrative affairs."

The accused as a witness in hiw own behalf on the eleventh day of the trial testified as follows: "In February, 1944, after the fall of Kwajalein, the Marshalls area and the other bases were cut off, and all transportation was cut off and by the decision of general headquarters, Admiral Masuda was given the full administrative and judicial authority from April 1944 and thereafter Admiral Masuda administered all judicial and administrative affairs on Jaluit Atoll. From this time, the Jaluit Defense Garrison was organized."

"When Admiral Masuda was given the authority by the commanding officer of the Fourth Fleet, he called all the commanding officers together and relayed them this order and from this time the natives were included in the Jaluit Defense Garrison and all civilians were given the situations of gunzokus, and the head of the civil government on Jaluit was ordered to work under Admiral Masuda, and from the fact that Jaluit Defense Garrison was organized, I know this."

Although it is common knowledge that the American forces bombed and shelled Jaluit continuously so that Jaluit was a besieged area in April 1945, the judge advocate would have the commission believe that notwithstanding

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the due straits of Jaluit that civilian government still prevailed. How fantastic! If ever an area was a battlefield, it was Jaluit in April 1945. And on a battlefield, civilian government does not prevail. The military rules supreme.

This is so fundamental that it should require no proof. Chief Justice Stone delivering the opinion of the Supreme Court of the United States in the Matter of the Application of General Tomoyuki Yamashita, No 61 Miscellaneous and 672 October Term 1945 on February 4, 1946, said, "An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seige and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort, have violated the law of war."

The judge advocate by the charges and the specifications questions the right of the Japanese military commander on Jaluit, Admiral Masuda, to take such steps as he saw fit to defend Jaluit. The judge advocate questions the right of the military authorities on Jaluit to seize and subject to disciplinary measures certain person who did attempt to impede the military effort of Japan on Jaluit. He questions what the military did in the field of combat at Jaluit. There is a maxim about the law becoming silent in the noise of wars.

The war on Jaluit in April 1945 was not at all an agressive war as far as Japan was concerned. Japan was strictly on the defense. All measures taken were self defenseive measures.

"There is nothing in the American draft of an antiwar treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and <u>it alone is competent to decide</u> whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action." The Nurnberg Trial and Agressive War, by Sheldon Glueck in Harward Law Review Vol 59, February 1946, page 404, citing in footnote 32, Treaty of Renunciation of War [Dept of State Publication 468 (1933) 5] (italics supplied). It will be noticed that the analogy to the law of self-defense in criminal cases, which has frequently been said to exist, is not sound; for in that field it is the jury and the tribunal, not the accused, which determine whether or not there was legitimate self-defense, while the provision in the Briand-Kellogg Pact left it to the implicated State itself to decide whether or not it had legitimate grounds for a self-defensive resort to war. See Borchard, The Multilaterial Treaty for the Renunciation of War (1929) 23 Am. J. Int. L. 116.

So on Jaluit late inthe month of March, 1945, eight natives sneaked into Jaluit. The garrison on Jaluit were beginning to get jittery because added to the continuous bombings by the Americans, there was not started a war of nerves. This was characterized by attempts to get the natives to revolt and desert and the infiltration into the native population by natives from other islands. Eight natives, strangers to Jaluit were discovered as their two small boats came through the surf and these eight natives were taken into custody by the garrison forces on Jaluit. The consternation must have been as great if not greater than was our consternation when we discovered that German saboteurs had landed on the eastern coast of the United States.

"MM(8)"

The fact that these eight natives landed on Jaluit in two small boats each about two meters long by one meter wide definitely proves that these eight natives were spies and had not drifted ashore, but had been put ashore by the Americans to spy and otherwise impede the Japanese war effort. On the eleventh day, Major Furuki told about the confession of the natives, but his answer to the question "By what facts was it decided that the natives in this cases were spies?" was for the most part stricken out.

Captain Inoue, the accused, in testifying as a witness in his own behalf on the twelfth day in answer to question 54 said: "It was found that they were not natives who had drifted, but natives who had sneaked in with a certain motive."

To question 57 he answered:"It was found that they were ordered by the Americans to try to get the military, gunzokus, and natives to desert, also to relay a message and to look up conditions on Jaluit."

To question 59 he replied: "The following was found out. That on Mille,Raliejap and three other natives, Ralime and three other natives, a total of eight natives, after plotting killed a soldier, stole a military boat and provisions and they all deserted to the enemy and in the open sea out of Mille, they were taken in by an American ship and they were brought by this same boat to the waters adjacent to Jaluit and Raliejap and three other natives were to sneak into Jaluit, Ralime and three other natives were to sneak into another place on Jaluit and that on this American ship, they received a mission to which I have testified previously after this mission was achieved, they planned to escape from Jaluit."

Jaluit was besieged by the Americans, but it was one of those "by-passed islands"; the Japanese defenses were pitifully weak and the Americans could have taken the island with very little effort. But the American plan was different. Eight natives from Mille were to put ashore to stir up the Jaluit natives to revolt and to desert. All this while, Jaluit was being subjected to almost constant bombing and air raids. Major Furuki testified as to battle conditions on Jaluit in answer to question 20 and 21 on the eighth day.

The eight Mille natives were discovered and the Japanese conducted a thorough investigation and two defense witnesses testified as to the trial which was given these spies. Remember that there were only 1400 regular military personnel on Jaluit while there were more than 2000 natives and 600 gunzokus.

To question 43 onthe eighth day, Major Furuki testified as follows: On the third of April to the sixth of April, and examination and consultation was held on Raliejap's group. On the sixth, an examination and consultation was held on Ralime's group, and on the eighth and ninth, a complete examination and consultation was held on both of these incidents."

To question 46, Major Furuki answered: "The boat in which the Raliejap group came to Jaluit was inspected. The things that were in the boat were as follows: Chagama, which was in bottles,and bruiro, which is breadfruit prepared so that it could be kept for a long time. Admiral Masuda went with Captain Inoue to where the natives were confined and ascertained their statements. During the examination and consultation,on points which were not sufficient, Admiral Masuda ordered it looked into further and ordered the consultation. On the fifth of April, the acts of Raliejap's groupd were determined to actually be what was stated in the investigation report."

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Major Furuki continued to testify on the ninth day and to question 47, he answered: "The examination and consultation of the Ralime group was begun on the sixth and completed on the seventh. At first, Captain Inoue read the investigation report which had been made by him. The clothes of Tanaka were submitted for inspection as evidence. Admiral Masuda took the record and went to the natives to ascertain the facts and on points that were not sufficient ordered Captain Inoue to investigate further."

To question 48, "You were testifying to examination and consultation of Raliejap's group. When and where was this examination and consultation held and who was present?" Major Furuki answered: "The place was Admiral Masuda's air raid shelter, the persons assembled there were Admiral Masuda, myself, Lieutenant Commander Shintome, and Captain Inoue."

"49. Q. Where was the place and who were the people present in the consultation or Ralime's group?
"A. It is the same as in the case of Raliejap."

On the ninth day, Major Furuki continued and to the question, "After the crimes of the natives were determined, how was the examination and consultation continued?" he answered, "On the eighth, a new investigation report with a supplementary investigation report attached was received and then at this time, Admiral Masuda said: Tomorrow I shall hold an examination and consultation to determine the sentence on these natives. Inoue in your capacity as judge advocate, shall give an opinion as to the punishment, tomorrow. Furuki and Shintome, prepare opinions as to sentence. On the next day, the ninth, an examination and consultation was held to pass sentence on the natives. Inoue stated his opinion as to sentence by a prepared opinion paper. After this, Shintome, myself, and Admiral Masuda expressed our opinions. Further opinions were exchaged on how or whether to punish these natives. Then Admiral Masuda made his decision and a judgment paper was drawn up by him."

"Q. Where was this last examination and consultation held?
"A. In Admiral Masuda's air raid shelter."

To the question, "Do you know by your own knowledge, if it were possible to send these cases to the Ponape and Truk courts?" he answered: "It was absolutely impossible."

"Q. For what reasons was it absolutely impossible?"
"A. At this time, the central Pacific was dominated by the American forces and all inter-base connections were completely cut off after the fall of Kwajalein. There was no transportation by way of air between Truk or Jaluit or Jaluit and the other bases."

On cross-examination by the judge advocate, Major Furuki told about the examination and consultation held each day.

The witness on the twelfth day testified in answer to question 102: "Tell us by what procedure this examination and consultation was conducted?" answered, "As Admiral Masuda was waiting for the return of Major Furuki, Major Furuki changed his schedule and came back to the main island of Emidj together with natives of the Ralime group on the morning of the third of April. Admiral Masuda called Shintome, Furuki, and myself to his quarters and told us as follows: There are natives who sneaked into Jaluit. I shall have what they said read by Captain Inoue. If possible, I would like to send these natives to Truk and Ponape, but this cannot be done; I shall hold an examination and consultation with the ranking officers on Jaluit on my authority. Shintome and Furuki and myself shall act as judges. Inoue shall act as a judge advocate. The above is what he ordered and the highest

"MM(10)"

examination and consultation on Jaluit was held during the period from the third to around the ninth of April."

"104. Q. Where were these examination and consultations held?
"A. The place was Admiral Masuda's personal air raid shelter which he had turned over for that purpose."

Inoue testified by answering question 20 as follows: "In February, 194[illegible] after the fall of Kwajalein, the Marshalls area and the other bases were cut off, and all transportation was cut off, and by the decision of general headquarters, Admiral Masuda was given the full administrative and judicial authority, and from April 194[illegible], thereafter Admiral Masuda administered to all judicial and administrative affairs on Jaluit Atoll. From this time the Jaluit Defense Garrison was organized."

To question 53, the witness answered: "It was found that they were not natives who had drifted by natives who had sneaked in with a certain motive."

To question 57 Inoue answered: "It was found they were ordered by the Americans to try to getthe military, gunzokus, and natives to desert, also to relay a message and to look up the conditions on Jaluit."

To question 96 as to whom and where he reported, the results of his investigation, of the eight Mille natives, Inoue said: "In the investigation I conducted from the first to the second of April, myself and Morikawa reported to Admiral Masuda with Lieutenant Commander Shintome present in Admiral Masuda's air raid shelter twice a day. On the investigation conducted from the third to the sixth of April, it was reported at the same place with Admiral Masuda, Major Furuki and Lieutenant Commander Shintome present. I reported to them the results one or two times a day."

To question 98 Inoue answered: "The eight natives as a result of the highest examination and consultation on Jaluit were sentenced to death." The judge advocate moved that this answer be stricken from the record on the ground that it was not responsive. The Commission directed that the answer be stricken.

"99. Q. Do you know if an examination and consultation was held for these natives on whom you submitted an investigation report?
"A. I do.

"100. Q. Do you know what steps and procedure was taken in examining and consulting on these natives?
"A. I do.

"101. Q. How do you know this?
"A. Because I was ordered to act as judge advocate by Admiral Masuda and acted in the examination and consultation."

"105. Q. As a result of this examination and consultation, what happened to the natives who were alleged to have committed the crimes?
"A. As a result of the examination and consultation, the eight natives were given a sentence of death."

To question 107 Inoue answered: "On the eighth of April, on the day that Ralime escaped, Admiral Masuda called Shintome, Furuki, and myself to his room and stated: 'Tomorrow the decision on these natives shall be made. Inoue shall think on his opinion on sentence. Furuki and Shintome shall think well on their opinion on their decision.' By this, around the

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ninth of April, in Admiral Masuda's air raid shelter in my capacity as judge advocate, I gave my following opinion: Ralime, Raliejap, Anchios, Lacojirik, Ochiro, 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 of the Japanese Criminal Code; rebellion, spying, and the stealing of military provisions and boats; violationsof the above Japanese laws and turn against the Japanese. And it was necessary to maintain military secrets, military discipline, and also to maintain the lives and existence of the military, gunzokus, and natives on Jaluit that they be executed. As for Neibot and Siro, these two children were guilty of spying but that they should be confined to Aikizen Island (which was a continuation of Emidj) and there were no natives there to confine them there. This was my opinion."

On cross-examination, the fourteenth day, bythe judge advocate, Inoue was asked question 287. "What took place at these periods of examination and consultation?" He answered: "What the natives had stated, all evidence that had been gathered, boats, and a report from the district commanding officer concerning the actions of the natives after they had drifted ashore and this was stated and presented to the judges so that they could determine their actions. Also what the natives had said was produced and documentary evidence was produced and was used to determine what the true actions of the natives were. On the eighth and ninth, examination and consultation was held on whether the natives were guilty or not guilty and how they should be punished and on this the judges consulted. Masuda also stated what the natives had told him. On the ninth the last examination and consultation was held. I, who was judge advocate, was asked to present the opinion as to punishment. The same day the eight natives were found guilty and were sentenced to death."

At 9:30 a. m., Monday, May 19, 1947, the judge advocate started to cross-examine the accused, Captain Inoue. The judge advocate continued to cross-examine him all that day, all day Tuesday, May 20, 1947, and again on Wednesday, May 21, 1947. The commission has only to reread this cross-examination testimony which clearly reaffirms the fact that there was a thorough investigation of these natives from Mille and a long and deliberate consultation and examination procedure after which these eight natives were sentenced to death by shooting.

After the judge advocate, the accused, nor the court had any further questions to put to the witness, Inoue, the commission then about 3:30 p. m., on Wednesday, May 21, 1947, informed the witness that he took an oath to state everything within his knowledge in relation to the charges and that he was now privileged to make any further statement relevant to the issues, necessary to fulfill his oath. Inoue testified by making the following statement from the witness stand:

"Concerning the examination and consultation procedure taken in this incident by Admiral Masuda, Admiral Masuda especially cleared a part of 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, Admiral Masuda, the judges and myself were all called to attention. He solemnly heard our opinions and decided the decision. Durming 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 asnwered, 'As 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 leaking of military secrets, which was dangerous to Jaluit, to retain discipline, and the lives of 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 Furuta, 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 questions put to Admiral Masuda by Captain McKinson clearly shows that these eight natives from Mille were sent ashore to Jaluit to spy by the Americans. Not only did the Americans sent adults but they also sent two children. This, too, was very cleverly planned, and now the Americans were checking up on what happened to their spies. The spies were caught and were executed by the besieged garrison forces on Jaluit. Now almost two years, on March 13, 1947, charges of murder and violation of the law and customs of war are brought against Captain Inoue because of the way Admiral Masuda handled the situation of the eight Mille natives sent to spy by the Americans on Jaluit.

Captain Inoue is being tried by a U. S. Navy convened military commission, not only for a violation of the laws and customs of war, but for violating Article 199 of the Criminal Code of Japan.

It is well that we consider what the authorities say about spies and we know of no better authority than Winthrop. Together with the many authorities that he cites for the rulings made, his treatise of spies is most complete. We quote from Winthrop's Military Law and Precedents, Vols 1 and 2 (Reprint 1920) pages 766 to 771 inclusive: