

NAKAMURA, KAZUO et al.

( 6 JAN 1948 )

( 162658 )  
PART 2 OF 2

0996

The accused moved to strike out this answer on the ground that it was hearsay.

The judge advocate replied.

The commission announced that the motion was not sustained.

14. Q. From whom did you learn that this prisoner's name was Smith?

A. The German knew a little Japanese and I brought over a book and talked to him in Japanese and in German and English, and while I was guarding him this German told me that this old man beside me -- his name was Smith.

The accused moved to strike out this answer on the ground that it was hearsay.

The judge advocate replied.

The commission announced that the motion was not sustained.

15. Q. What interrupted your guarding of these prisoners?

A. Warrant Officer Ajioka and myself went to Mizuho Village on an inspection. Ajioka came back before me and I was at Mizuho Village for two or three days and when I came back I found that the German couple were not there. I do not recall whether the Englishman was there or not.

16. Q. Did you ever see the Englishman, Smith, again?

A. On August 15, 1945 when we dug up the remains I dug up the remains of Smith.

The accused moved to strike the words "I dug up the remains of Smith" out of the answer on the ground that they were the mere opinion of the witness.

The judge advocate replied.

The commission directed that the words be stricken out.

17. Q. Did you ever see the Englishman, Smith, again?

A. No, I did not see him.

18. Q. Did you ever see the body of Smith again?

A. Yes.

19. Q. Tell the commission how you happened to see the body of Smith again.

A. Around August of 1945 I was attached to the Mizuho Village Detachment. On the 15th of August a messenger came from the headquarters and said that four auxiliary Kempeis were to assemble at Gasupan. I and the others went to the Mizuho Bridge and there Corporal Nakagawa met us and Corporal Nakagawa led us to the scene at Gasupan. While we were waiting there First Lieutenant Nakamura and thirty other auxiliary Kempeis came. Nakamura then ordered us to dig it up. At that time I was designated to dig up the body of the Englishman, Smith, which was buried in a foxhole.

20. Q. Did you recognize the features of this corpse as being those of the person you had guarded at Gasupan in December, 1944?  
OK

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



The judge advocate replied.

The commission announced that the objection was sustained.

21. Q. Did you recognize the features of this corpse that you dug up?  
A. Yes.

22. Q. Whose body was this?  
A. It was the body of the Englishman, Smith.

23. Q. What was done with the corpse of Smith?  
A. These corpses were gathered in one spot and cremated there and afterwards they were buried. ✓

24. Q. Following this cremation was anything said by Nakamura with reference to it?  
A. I do not recall.

Cross-examined by the accused:

25. Q. Was this 59th Regiment that you were a member of a Kempeitai organization?  
A. No.

26. Q. How could Colonel Miyazaki be your commanding officer if you were a member of the 59th Regiment?  
A. In April of 1944 I was in the 59th Regiment and we landed on Angwar. On July tenth of that same year I received orders to be attached to the First Detachment of the Kempeitai unit. JK

27. Q. You said that Colonel Miyazaki was your commanding officer in July when you were ordered to the Kempeitai. Is that the first time he became your commanding officer?  
A. Yes.

28. Q. You said that you heard that this man's name was Smith and that you heard it from this German. Did you also hear that this Smith was married to a native woman?  
A. I didn't hear that.

29. Q. Did you hear that he had always lived in the Palau Islands?  
A. I heard this from someone else.

30. Q. These thirty Kempeis who came with Captain Nakamura, did they all come to dig up the body of Smith? ✓  
A. No.

31. Q. Did any of them?  
A. Myself and three other auxiliary Kempeis dug up the grave of the Englishman.

32. Q. Did the grave have a marker on it?  
A. No.

33. Q. How did you know where to dig?  
A. I think I was instructed by Captain Nakamura or Sergeant Major Kokubo at that time.



34. Q. What do you think they instructed you to do?

A. We were told, "Dig the remains that are in here," and we dug.

35. Q. Then no one told you at that time that these were the remains of Charlie Smith, did they?

A. No, I didn't hear it.

36. Q. It was not until you were questioned by the Americans that you thought you had dug up the remains of Charlie Smith. Isn't that right?

A. I knew that it was Charlie Smith while I was still at Gasupan.

37. Q. When did you first know that it was the remains of Charlie Smith?

A. When I started digging I knew that it was the remains of the Englishman, Charlie Smith.

38. Q. Why? Did someone tell you it was the remains of Charlie Smith?

A. Nobody told me, but I had known Smith because I had gone out to get him at Asahi Village and at Gasupan I had guarded him, so after I dug him up from his appearance I knew it was Charlie Smith.

39. Q. The body that you dug up, did it have the same clothes on as when you had seen him at Gasupan?

A. His clothes were a little soiled and torn compared to when he was at Gasupan. The flesh on his face was somewhat decomposed and his body was somewhat decomposed but Smith was a very short person and he looked somewhat like a native so I knew him when I saw him.

40. Q. How short was he?

A. He was about five feet three or four inches.

41. Q. Was the skin on his face dark like a native when you dug his body up?

A. No, it was not that dark. The flesh around his head was decomposed but his skin was not so dark.

42. Q. His flesh wasn't so decomposed then but that you could pick him up and carry him to the place where he was to be cremated?

A. No. His flesh was not so decomposed that it would come off. It seemed that his foot was kind of broken but when we carried him over to the place of cremation the body was all in one. It did not become separated.

43. Q. Could you tell from looking at the body how Smith had died?

A. No, I did not look into that matter.

44. Q. Are you sure his head was still attached to his body?

A. The head was still on his body.

45. Q. How many bodies were dug up that day?

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

The accused replied.

The commission announced that the objection was not sustained.

A. I only dug up one.



The judge advocate did not desire to reexamine this witness.

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

The commission then, at 4:10 p.m., adjourned until 9 a.m., tomorrow, January 21, 1948.



SIXTH DAY

United States Pacific Fleet,  
Commander Marianas,  
Guam, Marianas Islands.  
Wednesday, January 21, 1948.

The commission met at 9:30 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,  
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States  
Army,  
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United  
States Army,  
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,  
Major Donald B. Cooley, junior, U. S. Marine Corps,  
Lieutenant Commander Edwin M. Koos, U. S. Navy, members, and  
Lieutenant Commander Joseph A. Regan, U. S. Navy, and  
Lieutenant James P. Kenny, U. S. Navy, judge advocates.  
Stewart R. Smith, yeoman first class, U. S. Navy, reporter.  
The accused, their counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

A witness for the prosecution entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name and former rank.  
A. Warrant Officer Ajioke, Misao, Imperial Japanese Army.
2. Q. If you recognize the accused, tell us their names and former ranks.  
A. Captain Nakamura, Kasuo, IJA; Warrant Officer Kokubo, Chihiro, IJA;  
Sergeant Nagatome, Yoshimori, IJA.
3. Q. Did you ever serve in the Palau Islands?  
A. I did.
4. Q. Between what dates?  
A. From September, 1943, until I was demobilized after the end of the war.
5. Q. In December, 1944, to what unit were you attached?  
A. I was with the South Seas Kempetai.
6. Q. And who was the commanding officer of this unit?  
A. Lieutenant Colonel Miyasaki.
7. Q. Who was your immediate superior in command?  
A. Probably it was Captain Nakamura.
8. Q. What do you mean by "probably it was Captain Nakamura"?  
A. I was in the hospital so I do not know exactly.



9. Q. When were you in the hospital?

A. I was in the hospital from 15 August 1944 to 16 September 1944.

10. Q. In December of 1944, when you were not in the hospital, who was your immediate superior in command?

A. Captain Nakamura.

11. Q. Is that the Nakamura who is present in court today?

A. Yes.

12. Q. In December, 1944, where in the Palaus were you stationed?

A. At Gasupan.

13. Q. While you were at Gasupan did you ever have in custody any prisoners?

A. Yes.

14. Q. Do you remember a particular prisoner known as the Englishman?

A. Yes.

15. Q. Do you know the name of that man?

A. Yes, I do.

16. Q. What was his name?

A. I heard it from my superior but he was called Charlie Smith.

The accused moved to strike out this answer on the ground that it was hearsay.

The judge advocate replied.

The commission announced that the motion was not sustained.

17. Q. How did this Charlie Smith happen to be in custody at Gasupan?

A. I do not know.

18. Q. Do you know who brought him to Gasupan?

A. I do.

19. Q. Who brought him to Gasupan?

A. Sergeant Yamada, First Lieutenant Sano of the Special Higher Section and Sergeant Major Tamamoto.

20. Q. This Sergeant Yamada that you referred to, do you know to what unit he belonged?

A. I do.

21. Q. What unit did Yamada belong to?

A. The First Detachment of the Kempeitai, I believe.

22. Q. Do you know who his immediate superior in command was?

A. Captain Nakamura.

23. Q. What became of this Charlie Smith?

A. He was executed.



24. Q. Tell the commission about this execution.

A. I think it was on the 28th or 29th of December, 1944. Captain Nakamura came from Shisui-san and he said, "He will be executed by orders of the commanding officer of the headquarters." Together with Captain Nakamura, Yamada, Uemura, and an assistant Kempei whom Captain Nakamura brought along with him, I went to a jungle about one kilometer from our barracks at Gasupan and there Captain Nakamura ordered Sergeant Yamada to shoot.

25. Q. And then what happened?

A. Captain Nakamura ordered Yamada to shoot and then he was executed. That is all.

26. Q. Did Yamada shoot Smith?

A. Yes.

27. Q. All through your testimony you have referred to Nakamura as a captain. Do you know whether he was a captain in December, 1944?

A. I think he was a first lieutenant. He became a captain after that.

28. Q. And after Yamada shot Smith, what was done with the body of Smith?

A. He was put in an old antiaircraft shelter in the neighborhood and which was made into a mound, and a grave.

29. Q. What, exactly, did Nakamura say to Yamada?

A. When Captain Nakamura came to the old air raid shelter of some other unit he said, "We will do it here," and ordered Yamada to shoot. At that time there were about three planes in the air and as the noise was great I did not hear what Captain Nakamura said but I believe he said something else.

30. Q. Do you know the first name of Yamada?

A. I do.

31. Q. What is it?

A. Kiyoshi.

32. Q. And what was Yamada's rank in December of 1944?

A. Sergeant, I believe.

33. Q. And what was your rank in December of 1944?

A. Warrant officer.

34. Q. How many times did Yamada shoot Smith?

A. Once.

35. Q. Where did he shoot him, if you know?

A. In the back of his neck. I wasn't looking and I do not know for sure but I believe he shot in the back of his neck.

The accused moved that this answer be stricken out on the ground that it was the mere opinion of the witness.

The judge advocate replied.

The commission announced that the motion was not sustained.

Cross-examined by the accused:



36. Q. Where is this Sergeant Yamada now?

A. Right now he is in the witness room in the back of this court.

37. Q. Was Sergeant Yamada tried for this offense?

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

The accused made no reply.

The commission announced that the objection was sustained.

38. Q. Is this the same execution, the same offense, for which you were tried by this commission and found guilty of murder?

A. Yes.

39. Q. Did Nakamura testify against you at that trial?

A. He did.

Examined by the commission:

40. Q. Who was the senior officer at the scene of this execution?

A. Captain Nakamura.

41. Q. Who took Smith to the scene of the execution?

A. Captain Nakamura. Do you mean did he take him by the hand and lead him?

42. Q. Were there any guards? Who guarded him?

A. Captain Nakamura only directed and commanded and I believe somebody else guarded him.

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

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

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

Examined by the judge advocate:

1. Q. State your name, rank and present duty.

A. James P. Kenny, lieutenant, U. S. Navy, judge advocate of this commission and member of the office of the Director War Crimes, Pacific Fleet. *JK*

2. Q. Do you have in your possession any papers dealing with the issues of the present case?

A. I do.

3. Q. Are you the legal custodian of these papers?

A. I am.

4. Q. Will you explain to this commission how these papers came into your possession?



A. This is a report that was forwarded by the liaison office of the Director War Crimes, Pacific Fleet, in Tokyo, Japan, to the office of the Director War Crimes, Pacific Fleet, at Guam. I, being a member of the staff of the Director War Crimes, Pacific Fleet, Guam, received this document. The second document is a translation of the original which is in Japanese.

The documents produced by the witness were submitted to the accused and to the commission, and by the judge advocate offered in evidence.

Commander Martin E. Carlson, U. S. Naval Reserve, a counsel for the accused, made an objection to these documents being received in evidence, as follows:

We object to this document, said to be the statement of Hirai, Kyoshi, translated by Lieutenant Tremayne, on the ground that it should not be admitted into evidence because it is clearly hearsay, therefore prohibited by the rules of evidence. This witness, Lieutenant Kenny, has testified it is true, that he is the legal custodian of this document. He further testified that he received it in the mail. It wasn't, therefore, written in his presence. He doesn't know under what circumstances the document was written. He can't testify as to the truth of the document. He can't testify, therefore, that the document was made voluntarily. Because of these reasons we object to this document being entered in evidence against these accused.

The judge advocate replied.

The commission announced that the objection was not sustained. There being no further objection, the documents were so received in evidence, the original Japanese appended marked "Exhibit 2" and the English translation appended marked "Exhibit 3."

(Examination continued:)

5. Q. Will you please read "Exhibit 3"?

The witness read "Exhibit 3."

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

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

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

No witnesses not otherwise connected with the trial were present.

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

An interpreter read "Exhibit 2."

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

The commission did not desire to examine this witness.

The witness resumed his seat as judge advocate.



A witness for the prosecution entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name, rank and present duty.

A. Herbert L. Ogden, commander, U. S. Navy, attached to the office of the Director War Crimes, Pacific Fleet.

2. Q. If you recognize the accused, will you state their names and ranks?

A. I recognize Nakamura and Kokubo but don't recognize the other.

3. Q. Do you have in your possession any papers dealing with this case?

A. I have a statement of Nakamura dated 23 July 1947 and a statement of Kokubo dated 24 December 1947.

4. Q. Are you the legal custodian of these papers?

A. I am.

5. Q. Will you tell the commission how this statement of Nakamura's came into your possession?

A. This statement of Nakamura's was delivered to our office on Guam by a Marine courier from the Commander Marianas Liaison Office in Tokyo.

6. Q. And what, if anything, did you do after you received this statement of Nakamura?

A. On the ninth of December, 1947, I interviewed Nakamura at the War Criminal Stockade. I presented him the Japanese of the statement that he had made in Tokyo and asked him to certify that it was a true and correct statement of this case. I also had our interpreter, Mr. Frederick Savory, read Nakamura the English translation that had come through from Tokyo and asked Nakamura if he would certify the translation as correct. Nakamura told me at that time that the Japanese statement was true and correct and that the English translation was correct but because he did not read English he did not want to sign the English translation.

7. Q. And on what date did you interview Nakamura?

A. 9 December 1947.

8. Q. Did Nakamura certify to the Japanese of that statement?

A. He did.

9. Q. And in your presence did Nakamura sign that statement in Japanese?

A. He did.

10. Q. At any time did you make Nakamura any promises to induce him to sign that statement?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I did not.

11. Q. At any time did you threaten Nakamura to force him to sign that statement?



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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I did not.

12. Q. Now, concerning the second statement made by Kokubo. Will you tell us how that came into your possession?

A. After Kokubo arrived on Guam I interviewed him at the War Criminal Stockade regarding the execution of the three American aviators and after this I asked him to write a statement telling me what he had told me verbally.

13. Q. And did you make Kokubo any promises to induce him to make this statement?

A. I did not.

14. Q. Did you at any time use force or threats to make him sign that statement?

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

The judge advocate made no reply.

The commission announced that the objection was not sustained.

A. I did not.

The statements produced by the witness were submitted to the accused and to the commission and by the judge advocate offered in evidence.

The accused requested a five-minute recess to allow inspection of the statements.

The commission then, at 10:55 a.m., took a recess until 11:00 a.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

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

Cross-examined by the accused:

15. Q. You said that you questioned Kokubo. Did you question him as to who the other Kempeis were at the execution?

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



The accused replied.

The commission announced that the objection was sustained.

16. Q. Before you asked Kokubo to give you this statement didn't he say that he had not killed these aviators?

A. He stated that he had beheaded the third aviator and that he could have done a better job if he had had an army sword instead of his own.

17. Q. Did he say that he was forced to do this act of execution?

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

The accused made no reply.

The commission announced that the objection was sustained.

18. Q. Are you a licensed attorney and an experienced investigator?

A. I am.

19. Q. In your opinion weren't Kokubo and Nakamura under the excitement of prosecution in a pending trial as described under Selden's "Principle of Mental Agitation"?

A. They did not appear to me to be under any mental strain. They talked very freely of these matters.

20. Q. Is the interpreter Frederick Savory available as a witness?

A. He is available.

21. Q. After you had received this statement from Kokubo, how long a time after you received this so-called affidavit from him was he served with the charges and specifications?

A. I do not know. I believe they might have been served the same day.

22. Q. Did you know that Nakamura did not understand English?

A. I know that.

23. Q. And that he couldn't read English?

A. That is correct.

24. Q. And yet, knowing that, you asked him to sign a paper that was written in English?

A. I asked Nakamura if he was willing to sign the certification of the English and he declined. I also told him that if he was not satisfied with the interpreter that we would get another interpreter of his choice.

25. Q. Did you also offer him the benefit of counsel at that time?

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

The accused replied.

The commission announced that the objection was sustained.

26. Q. Were you present at the time the original statement was made by Nakamura which has now been translated and is being offered into evidence?

A. I was not.



27. Q. So that when you received the original statement it had already been signed by Nakamura at Sugamo Prison. Is that correct?

A. That is true.

28. Q. So you don't know whether this statement was obtained by means of questions and answers that had been put to him while at Sugamo Prison?

A. I do not know.

29. Q. Did you ask Nakamura if the officers at Sugamo Prison had told him that it would go easier with him if he made a statement?

A. I did not.

30. Q. Isn't it true that you didn't caution them before you questioned and interviewed them? Both Kokubo and Nakamura.

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

The accused withdrew the question.

31. Q. Isn't it true that you did not caution and warn the affiants before you interviewed them that these statements that you asked them to sign may be used against them at a subsequent trial?

A. They were not expressly so warned.

32. Q. Isn't it true that you didn't inform either one of them that they were not obliged to say anything or that they were not obliged to sign anything?

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

The accused replied.

The commission announced that the objection was sustained.

33. Q. When Nakamura and Kokubo were questioned here at the War Criminal Stockade, were they held at the War Criminal Stockade here on Guam as civilians or as prisoners of war?

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

The accused made no reply.

The commission announced that the objection was sustained.

34. Q. In the case of these two affiants -- when the statements were taken from them, isn't it true that charges and specifications were already prepared against them?

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

The accused made no reply.

The commission announced that the objection was sustained.



Reexamined by the judge advocate:

35. Q. In relation to this certification which was in English -- did you have it translated into Japanese before you asked him to sign the certification?

A. It was all translated into Japanese.

36. Q. Do you know whether or not these statements were taken before the charges and specifications were served on the accused?

A. They were.

Recross-examined by the accused:

37. Q. The only reason that charges and specifications were not served on Nakamura was that the prosecution decided to use him as a witness in the trial of Ajioke and Yamada before they tried him. Isn't that true?

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

The accused replied.

The commission announced that the objection was sustained.

Commander Martin E. Carlson, a counsel for the accused, made an objection to the introduction of these two statements into evidence as follows:

The accused objects to the introduction of these statements into evidence because they were not obtained, nor has it been shown that they were obtained, by due process of law. We hold that these two statements were not made freely. The prosecution has not shown that they were made freely. This witness could only testify that he asked Nakamura to sign the statement as being true and correct on 9 December 1947 and that on 9 December 1947 he questioned Kokubo in the War Criminal Stockade. The original statement of Nakamura he testified was signed by Nakamura while at Sugamo Prison and not in the presence of this witness. This witness knows nothing about what took place up there. What the prosecution tried was to incorporate into the statement which he had Nakamura sign, a certification that it was true and correct. The original confession was made in Sugamo Prison.

The accused waived the reading of this objection in Japanese.

Mr. Kuwata, Hideo, a counsel for the accused, waived the reading of an objection to the introduction of these statements into evidence in Japanese. His original objection in Japanese appended marked "BB."

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

The judge advocate replied.

The commission announced that the objections were not sustained. There being no further objection, the statements were so received and are appended hereto marked "Exhibit 4," "Exhibit 5," "Exhibit 6," and "Exhibit 7."

The witness was duly warned.

The commission then, at 11:35 a.m., adjourned until 9 a.m., tomorrow, Thursday, January 22, 1948.



SEVENTH DAY

United States Pacific Fleet,  
Commander Marianas,  
Guam, Marianas Islands.  
Thursday, January 22, 1948.

The commission met at 9:30 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,  
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States  
Army,  
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United  
States Army,  
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,  
Major Donald B. Cooley, junior, U. S. Marine Corps,  
Lieutenant Commander Edwin M. Koos, U. S. Navy, members, and  
Lieutenant Commander Joseph A. Regan, U. S. Navy, and  
Lieutenant James P. Kenny, U. S. Navy, judge advocates.  
Archie L. Haden, junior, yeoman first class, U. S. Navy, reporter.  
The accused, their counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Herbert L. Ogden, the witness under examination when the recess was  
taken, entered. He was warned that the oath previously taken was still bind-  
ing and continued his testimony.

Reexamined by the judge advocate:

38. Q. Will you please read "Exhibit 4"?

The witness read "Exhibit 4."

An interpreter read "Exhibit 5."

39. Q. Will you please read "Exhibit 6"?

The witness read "Exhibit 6."

An interpreter read "Exhibit 7."

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

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

The prosecution rested.



Commander Martin E. Carlson, a counsel for the accused, made a plea for severance on behalf of the accused Nakamura, Kazuo, and cited Wharton's "Criminal Evidence," page 411.

The judge advocate replied and pointed out that the motion was untimely, citing Section 404, Naval Courts and Boards.

The commission was cleared. The commission was opened and all parties to the trial entered. The commission announced that the motion was not sustained.

Commander Martin E. Carlson, a counsel for the accused, made a plea for a directed acquittal on behalf of Nagatome, Yoshimori, on the ground that the prosecution had failed to establish a prima facie case against Nagatome.

The judge advocate replied.

The commission announced that the plea was denied.

The defense began.

Mr. Karasawa, Takami, a counsel for the accused, read a request for judicial notice, appended marked "DD."

An interpreter read an English translation of the request of Mr. Karasawa as follows:

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

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

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

3. The Fifth Amendment to the Constitution of the United States:

"AMENDMENT V--CAPITAL CRIMES; DUE PROCESS.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

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

"Article 60. At the opening of a judicial proceedings directed against



a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible and always before the date set for the opening of the trial..."

"Article 63. Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."

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

6. Section 454, Naval Courts and Boards:

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

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

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

7. "Regulations Governing Military Life" - (November 8, 1943, Army Ordnance No. 16):

"General Principle:

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

"Chapter II. Obedience.

"No. 9. The obedience of a subordinate to ones immediate superior must in all occasions be most strict.

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

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



"No. 12. To express to the superiors with a sincere feeling of assisting ones superior, points which one is fully convinced will benefit the armed forces is the duty of all military personnel, particularly the officer. In expressing this, however, it is imperative that it is done in an orderly manner. Moreover, even if one differs in opinion with the matters already decided by the superior, one must efface oneself and endeavour to promote the intention of the superior with heart and soul. 9x

8. The Criminal Code of Japan:

Chapter I Application of Law.

"Article 1. -- This law applies to every person who has committed a crime within the Empire.

"It also applies to every person who has committed a crime on board a Japanese ship outside the Empire."

Chapter III Crimes relating to (external) war.

"Article 85 -- Every person who has acted as a spy for an enemy power or has aided a spy of an enemy power shall be condemned to death or punished with penal servitude for life or not less than five years.

"The same (punishment) applies to every person who has disclosed a military (or naval) secret to an enemy power.

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

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

"Article 88 -- Every person who has made preparations or has plotted for any of the crimes specified in Article 81 to 86 shall be punished with penal servitude for not less than one year nor more than ten years."

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

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

"1. In the face of the enemy, he shall be condemned to death or a life term or above ten years' confinement.

"2. In war times or in an area under martial law, from above one year to ten years' confinement.

"3. In other cases, under five years' confinement."

Commander Martin E. Carlson, a counsel for the accused, made a further request for judicial notice as follows:

The accused moved that the commission take judicial notice of the following facts and matters:

1. Section 388 of Naval Courts and Boards, 1937, particularly the following part: "However, a challenge upon any one of the following grounds, if admitted by the challenged member or proved as provided for in section 390, shall be sustained despite any declaration the challenged member may make:



"(e) That he sat as a member of a court or board which tried or investigated another person upon charges based on the same transaction concerning which the accused is on trial."

2. Section 390, Naval Courts and Boards, 1937, which reads in part as follows:

"A challenge on any of the grounds set forth in the preceding section, if properly supported by the facts, shall be sustained by the court."

3. Section 391, Naval Courts and Boards, 1937, which reads in part as follows:

"It is customary for a member objected to to withdraw when the court is cleared to deliberate on the challenge, and he should always do so."

4. Article 74, United States Navy Regulations, 1920, which reads in part as follows:

"3(g) Naval Courts and Boards: This shall include both the instructions and the forms governing the procedure of naval courts and boards. The order promulgating this publication and the order for all changes that may be made therein shall be signed by the Secretary of the Navy and approved by the President of the United States.

"(4) Orders or instructions contained in any of the publications enumerated in the two preceding paragraphs of this article shall have full force and effect for the guidance of all persons in the Naval Establishment. No other general regulations, general orders, or general instructions to the Naval Establishment shall be signed or issued by any bureau or office under the control of the Navy Department...."

5. Court Martial Order 15-1917, particularly p. 9 which reads in part as follows:

"The authority to convene the above-mentioned exceptional military courts vests only in the military commander or military governor of an occupied territory, and all such courts may be ordered only in the name of such commander or governor. ----

"Insofar as practicable, the employment of exceptional military courts should, as a general rule, be restricted to the trial of offenses in breach of the peace, in violation of military orders or regulations, or otherwise in interference with the exercise of military authority...."

6. Court Martial Order 151-1919, which reads in part as follows:

"It appears from the record of proceedings in this case that the accused, by counsel, objected to each and every member of the court martial, on the ground that 'a similar case having been tried, said member has unconsciously formed an opinion; and regardless of what the finding was, said member will be influenced thereby in this case, as the charge and specification are identical' ----The court refused to sustain the respective challenges of the accused, except in the case of the member who stated that he had formed an opinion.

"In view of the challenges as aforesaid and the reasons advanced in support of said challenges, the department advised the accused that the question



of a new trial in his case would be considered if he made formal petition therefor..."

7. Court Martial Order 2-1924 which reads in part as follows:

"In a recent case it was noted that the accused objected to each and every member of the general court martial on the ground that each member "has personally investigated the charge upon which the accused was being tried and had expressed an opinion thereon," they having been members of a court which had tried another officer on charges growing out of the same occurrence...

"In view of the challenges as aforesaid, and the facts above stated, the Department advised the accused that the question of a new trial in his case would be considered if he made formal petition therefor" ....

8. Court Martial Order 1-1934 which reads in part as follows:

"In each of the last two of these cases tried, the accused objected to the senior member of the court "on the grounds of section 623 E (now 388e), Naval Courts and Boards" -- that is, that he sat as a member of a court which tried another person upon charges based on the same transaction concerning which the accused was on trial...

"As a matter of fact, the record of proceedings of the first trial disclosed that the main witness for the prosecution had referred to both of the two men whose trials are now under consideration as having been present at the time the alleged offense was committed. While a portion of this testimony was stricken from the record, it nevertheless remains that the court was informed that the accused in each of the later cases was involved in the transaction out of which the case being tried arose. From the foregoing, it would appear that the challenged member's mind might be prejudiced to such an extent as to prevent his exercise of the impartial judgment required of a court. Since the members who voted on the challenge of the senior member were both presumably cognizant of the testimony given in the first trial, referred to above, it would appear that they did not carefully weigh the challenges and replies. Moreover, the challenge in each case should have been sustained on the ground on which it was put by the accused (citing sec. 623, N.C.&B., 1923, second sentence), now section 388, N.C.&B.

"It was further noted that during the course of each of the trials here under consideration, the accused challenged a second member upon substantially the same grounds as those on which the senior member was challenged. These challenges were not sustained, apparently on the ground that the challenged member in each case testified on his voir dire to the effect that he had formed no opinion as to the guilt of the accused...

"In view of the foregoing, the Secretary of the Navy set aside the proceedings, findings, and sentences in the cases of each of these two men."

9. Court Martial Order 1-1934, p. 10 (See page 1853-4, Compilation of Court Martial Orders, 1916-1937) which reads in part as follows:

"During the course of the trial, a witness for the prosecution, who was the commanding officer of the vessel to which the accused was attached at the time of the alleged offense, during the course of the direct examination, was asked the following question:



"6. Q. Has there ever been a report of articles missing from the commissary department of your ship?"

"This question was objected to by the accused on the ground that any report made to this witness, unless it could be shown that the accused was present at the time the report was made, was hearsay and inadmissible. The objection was not sustained and the witness answered, in effect, that up to the moment that he received the first report on September 23 he had no knowledge that any articles were missing from the commissary department of his ship.

"The witness was next asked (Q. 7) what report was made to him on September 23, 1923, which question was likewise objected to by the accused on the ground that it called for hearsay evidence. The objection was not sustained, and the witness testified that on the evening of September 23, another officer telephoned him at his home and told him that he had excellent information that accused was taking food ashore with him from the ship of which witness was commanding officer. The accused moved to strike out this answer on the ground that it was hearsay, but the objection was not sustained. Held that the objection to the questions referred to above were proper and should have been sustained by the court on the ground advanced by the accused, namely, that any answers thereto must necessarily have called for hearsay evidence. The answer to question 7 indicated clearly that the witness was testifying to matters reported to him by a third person, not in the presence of the accused. In other words, the witness was not testifying to matters within his own knowledge; furthermore, the so-called report made to this witness was hearsay on the part of the officer reporting the incident, who was passing on information, acquired by him through still other persons. The motion to strike the answer to question 7 should therefore have been granted by the court. To permit the witness under examination to testify to facts reported to him in such a manner would amount to a denial of the accused's constitutional rights to be confronted with the witnesses against him. It consequently follows that the witness under examination should not have been allowed to testify to matters told him by other persons during the course of his investigation of the irregularity out of which grew the trial, the accused not being present at such investigation; such testimony should have been excluded (citing C.M.O. 11-1924, p. 4). Nor did the fact that the information given to the witness was official in character change this rule (citing C.M.O. 7-1924, p. 3)."

"....mere suspicion is insufficient to warrant conviction of a crime. It is incumbent upon the prosecution to establish every material allegation in the specification. Such proof would have established, first, that a crime had been committed, and, second, that the accused was the person who committed it. The so-called admissions of the accused, to which there was a conflict in the testimony, could not be relied upon as a confession of guilt, and warrant a conviction for a crime when proof in the case failed to show that a crime had been committed.

"In view of the foregoing, held that a prima facie case against the accused was not established, and consequently a conviction in this case could not be permitted to stand. Accordingly, the findings and sentence were set aside."

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



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

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

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

The British Nationality and Status of Aliens Act 1914, particularly that part which defines an alien, "As any person (1) who does not come within the definition of a British subject born within His Majesty's Dominions and Allegiance, or (5) to whom a certificate of naturalization has been duly granted"

#### Marriage Laws - British Empire

#### Laws pertaining to British nationality and

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

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

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

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

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

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



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

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

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

13. The American Banana Co. v United Fruit Co. (1909) 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 16 Am. Cas. 1047, which stated the accepted principle *lex loci, lex fori*, "the general and almost universal rule is that the character of an act as unlawful must be determined wholly by the law of the country where the act is done." (See Wilson on International Law, Hornbook Series, Third Edition, Jurisdiction over Person-Nationals, Section 48.)

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

15. United States Navy Military Government of The Caroline Islands Proclamation No. 1, particularly the following:

"To the people of The Caroline Islands.....

"Whereas, in order to preserve law and order and to provide for the safety and welfare both of my forces and of yourselves, it is necessary to establish Military Government over the Caroline Islands.

"Now therefore, I, C. W. Nimitz, Fleet Admiral, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, and Military Governor of the Caroline Islands, do hereby proclaim as follows:

"I -- All powers of government and jurisdiction in the Caroline Islands and adjacent waters, and over the inhabitants thereof, and final administrative responsibility are vested in me as Fleet Admiral, United States Navy, Commanding the forces of occupation and as Military Governor, and will be exercised through subordinate commanders by my direction.

"II -- All powers of the Government of the Japanese Empire are hereby suspended.

"IV -- Your existing customs, religions, beliefs and property rights will be respected. Existing laws will remain in force and effect except insofar as it may be necessary for me in the exercise of my powers and duties to change them.

"V - So long as you remain peaceable and comply with the orders of the forces of occupation you will be subject to no greater interference than is made necessary by existing conditions, and may go about your normal occupations without fear. ---



"Given under my hand at Truk Atoll this 25th day of November, 1945.

/s/ C. W. Nimitz  
Fleet Admiral, United States Navy, Commander in Chief,  
United States Pacific Fleet and Pacific Ocean Areas,  
Military Governor of the Caroline Islands."

16. Proclamation No. 2, United States Navy Military Government of Truk and the Central Caroline Islands, particularly the following:

"Now, therefore, in order to make provision for the safety of the armed forces under my command and for the maintenance of public order and safety in the area so occupied, I, Chester W. Nimitz, Fleet Admiral, United States Navy, Commander in Chief of the Pacific Fleet and of the Pacific Ocean Areas, and Military Governor of Truk and the Central Caroline Islands, do proclaim as follows:

"Article X -- Effective Date.

"52 This proclamation will become operative in each island on part thereof within the occupied territory on the date of its first proclamation.

"Given under my hand at Moen Island this 25th day of November, 1945.

C. W. Nimitz,  
Fleet Admiral, U. S. Navy,  
Military Governor of Truk and the Central  
Caroline Islands.

Robert Blake, Brig. General; U.S.M.C.,  
Commander Occupation Forces, By direction."

17. United States Navy Military Government of Truk and the Central Caroline Islands Proclamation No. 3, particularly the following:

"Exceptional Military Courts.

"To the people of Truk and the Central Caroline Islands,

"Whereas, by Proclamation No. 1, I assumed all powers of government over Truk and the Central Caroline Islands and Adjacent Waters occupied by the armed forces of the United States of America under my command, and

"Whereas by Proclamation No. 2, I established offenses to be tried by Exceptional Military Courts and prescribed punishments therefor, now, therefore, in order to establish Exceptional Military Courts for the trial of offenders against the proclamations, orders and regulations under the authority of my military government, I, Chester W. Nimitz, Fleet Admiral, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, and Military Governor of Truk and the Central Caroline Islands, do hereby proclaim as follows:

"Article I -- Creation of Exceptional Military Courts.

"Exceptional Military Courts for Truk and the Central Caroline Islands and Adjacent Waters are hereby established: There shall be Military Commissions, Superior Provost Courts and Summary Provost Courts, the constitution and competence of which shall be set forth in Article III.

"Article II -- Jurisdiction.



"Section 1. Over Territory, Jurisdiction of every Exceptional Military Court shall extend to the whole of Truk and the Central Caroline Islands area occupied by the armed forces of the United States of America, and with regard to each part of the area, from the time at which that part was first occupied.

"Article III. Constitution of Exceptional Military Courts.

"Section 1. Military Commissions. A military commission shall consist of not less than three officers of the armed forces of the United States of America or its Allies convened by or on behalf of the military governor, at least one of whom shall be an officer of my Military Government.

"Article X. Effective Date.

"This proclamation will become operative in each island or part thereof within the occupied area on the date of its first publication.

"Given under my hand this 25th day of November 1945.

C. W. Nimitz,  
Fleet Admiral, U. S. Navy,  
Military Governor of Truk & the Central Caroline Islands.

Robert Blake  
Brig. General, U.S.M.C., Commander Occupation Forces,  
By direction."

18. Paragraph 347, War Department Basic Field Manual Rules of Land Warfare, FM 27-10 (1940), particularly Change 1, FM 27-10, paragraph 345.1 -

"Individuals and organizations who violate the accepted laws and customs of war may be punished therefore. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment."

The judge advocate objected to the commission taking judicial notice of items 7, 8 and 9 of Mr. Karasawa's request. Item 7 was objected to because the commission was not furnished with an official or otherwise trustworthy copy of the regulations referred to, in accordance with the provisions of Section 309, Naval Courts and Boards. Items 8 and 9 in Mr. Karasawa's request and items 11 and 12 in Commander Carlson's request were objected to because they were foreign laws and must, in accordance with Section 309 of Naval Courts and Boards, be proved to have been in existence and effective at the time of the alleged offenses.

The accused replied.

The commission announced that it would take judicial notice of items 1 through 6 of Mr. Karasawa's request for judicial notice and of items 1 through 10 and 13 through 18 of Commander Carlson's request for judicial notice.

The commission then, at 10:50 a.m., took a recess until 11:05 a.m., at which time it reconvened.

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

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



No witnesses not otherwise connected with the trial were present.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name and former rank.  
A. First Lieutenant Kiyomine, Kazuo, Imperial Japanese Army.
2. Q. If you recognize these accused, tell us their names and former ranks.  
A. Captain Nakamura. Warrant Officer Kokubo. That is all.

Examined by the accused:

3. Q. Were you ever stationed in the Palau Islands with the Imperial Japanese Army?  
A. I was.
4. Q. When?  
A. From 26 April 1944 to December 26, 1945.
5. Q. What was your duty while you were stationed in the Palau Islands?  
A. I was an officer attached to the intelligence section of the staff of the Fourteenth Division Headquarters.
6. Q. Were you present at an execution of three persons alleged to have been American flyers on September 4, 1944 in the Palau Islands?  
A. I did not go. If there is a person who said I went, that is false.

The judge advocate moved that the words "If there is a person who said I went, that is false" be stricken out on the ground they were not responsive ~~responsive~~ to the question. 9x

The accused replied.

The commission directed that the words be stricken out.

7. Q. Were you ever ordered to go to this execution?  
A. No.

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

The witness said that he had nothing further to state. 9x

The witness was duly warned and withdrew.

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

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



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

No witnesses not otherwise connected with the trial were present.

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

Examined by the judge advocate:

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

Examined by the accused:

2. Q. During what period of time did you have duty with the Japanese army?
- A. I was conscripted in March of 1941 and stayed in the army until February, 1946, when I was demobilized.
3. Q. Did you ever have duty on Palau during this time?
- A. Yes.
4. Q. During what period of time did you have duty on Palau?
- A. From September 1943 until February 1946.
5. Q. What unit were you attached to on Palau?
- A. I was attached to the First Detachment of the South Seas Kempeitai.
6. Q. While serving at Palau did you ever see a prisoner of war?
- A. Yes, I did.
7. Q. When was it?
- A. About September of 1944.
8. Q. Where did you see the prisoners?
- A. I saw them on the road in front of the administration building of the Kempeitai at Otaka, Gasupan, Babelthup, Palau Islands.
9. Q. What was the condition of the prisoners when you saw them?
- A. I saw these three prisoners on the truck. All of them were tied by their hands. Three Japanese enlisted men were guarding them, each holding the end of a rope of a prisoner. I also saw a sergeant major there.
10. Q. This sergeant major and guards -- what unit were they attached to?
- A. They were attached to division headquarters.
11. Q. Please explain to the commission how you came to see these three prisoners.
- A. At that time I was suffering from jaundice and was exempted from duties. I was feeling better one day so I took off my coat and was walking around the unit. About 1600 I was told by First Lieutenant Nakamura to come at once so I put on my coat and went to him at once. Then he told me to wear a sword belt. I put on the sword belt and followed Lieutenant Nakamura to the front of the Kempeitai where I saw the three prisoners that I have described before.
12. Q. You just testified that you wore a sword belt. Did you have a sword in your sword belt?
- A. There was no sword in the sword belt. I did not bring a sword that day.



13. Q. Did you bring any other weapon that day?

A. No, I did not.

14. Q. You have just testified that you went with Nakamura to this truck. What happened then?

A. I got on the truck with the prisoners. In the meantime the truck started and it soon arrived in front of the jungle. All of us went into the jungle and there the prisoners were executed.

15. Q. You have testified that there was one guard to each prisoner. There were some enlisted men from Division Headquarters guarding each prisoner. What did these guards do when you went to the jungle?

A. They were on the end of the rope and guarding these prisoners they went to the scene.

16. Q. When you went to the scene did you do anything at the scene?

A. I did not do anything.

17. Q. Did you not receive something from someone at the scene?

A. No, I did not. When I was questioned by the interpreter at Sugamo Prison I was told, "You were handed by Sergeant Major Kokubo the remains of Sergeant Ikushima." I replied I was not because I was never handed such a thing. Furthermore, I have testified to this effect in my statement which I made in Sugamo.

18. Q. You just testified as to the ashes of Sergeant Ikushima. Did you ever see Sergeant Ikushima's ashes?

A. Yes.

19. Q. Where?

A. I saw Sergeant Major Kokubo bring them to the scene.

20. Q. Please show us how large the ashes were.

A. They were about the size of the American cigarette package. Only it is about three inches high and three inches wide.

21. Q. Then do you know why Kokubo brought these to the scene?

A. No, I do not.

22. Q. When you were told by First Lieutenant Nakamura and when you left the Kempeitai did you know that these prisoners were to be executed?

A. No. I just followed Lieutenant Nakamura for he said to come while I was taking a walk.

Cross-examined by the judge advocate:

23. Q. Who was the commanding officer of the unit to which you belonged?

A. Kempeitai Captain Nakamura.

24. Q. And how many men were in this unit commanded by Nakamura?

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



The judge advocate withdrew the question.

25. Q. On the day that these aviators were executed approximately how many men were in the unit commanded by Captain Nakamura -- the unit to which you belonged?

A. The Kempei was eight including Nakamura and I recall that there were about twelve or thirteen assistant Kempeis also.

26. Q. Then there were approximately twenty-one people in this unit -- Is that correct?

A. I recall it to be so.

27. Q. Now, why out of these twenty people did Nakamura tell you to come with him on this duty about these aviators?

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

The judge advocate withdrew the question.

28. Q. Do you know why out of the twenty men in that unit you were chosen by Captain Nakamura to accompany him that day?

A. That day the others were out on patrol and other work and as I was walking in the yard I believe he called me.

29. Q. And what exactly did Nakamura say to you?

A. "Hey, Nagatome, put on a coat and come right away!"

30. Q. And when you went with Nakamura you got into this truck -- is that correct?

A. Yes.

31. Q. Was Kokubo on board the truck when you got there?

A. Yes.

32. Q. Did you notice the ashes of Ikushima at this time?

A. No.

33. Q. When you got on the truck did Nakamura say anything else to you?

A. No. I don't recall anything in particular.

34. Q. Isn't it a fact that Nakamura told you to guard these prisoners?

A. I seem to recall that he said, "Guard them."

35. Q. Isn't the reason you made this trip because you were a guard?

A. I was just told by Nakamura to come along and I did not know where we were going or what for, but as I was told to guard I went along with the feeling that I was a guard.

36. Q. When you got <sup>to</sup> the scene of the execution, you were still guarding the prisoners, were you not?

A. When I went to the scene I was just watching.

37. Q. Well, when did your duty to act as a guard cease?

A. When I got off the truck, I myself did not guard.



38. Q. Did Nakamura ever tell you that your duties as a guard had ceased?  
A. No.

39. Q. Then you were guarding these prisoners right up to the time they were executed, weren't you?

A. I was guarding them up until I got off the truck.

40. Q. What changed when you got off the truck? Why did you think you could quit guarding them?

A. I don't have any recollection as to what reason or why.

41. Q. But you tell us now that you felt you were no longer a guard when you got off the truck?

A. Yes.

42. Q. When you went into the jungle were the division men sent out as lookouts?

A. They held on to the ropes that were tied to the prisoners until they were executed.

43. Q. Describe this execution for us.

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I recall that the first prisoner was beheaded by Lieutenant Nakamura, the second prisoner was beheaded by Kokubo, and Lieutenant Colonel Miyazaki gave the third prisoner a cigarette and while he took two or three puffs he shot him through the back of his head.

The accused moved that this answer be stricken on the ground that the witness was testifying against his co-defendants.

The judge advocate replied.

The commission announced that the motion was not sustained.

44. Q. These three prisoners. Were they all tied together?

A. No. Each of them was tied separate.

45. Q. Was there a grave already prepared at the scene?

A. Yes.

46. Q. How many people were present at the scene of this execution?

A. I recall that there were five from Division Headquarters including the driver. I recall that there were five from the Kempeitai including Lieutenant Colonel Miyazaki.

47. Q. These five men from Division Headquarters. What did they do at the scene of the execution?

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



The judge advocate replied.

The commission announced that the objection was not sustained.

A. The five from Division Headquarters seemed to have come prepared, for after the execution was over they had brought shovels and they covered up the hole.

48. Q. Weren't these five men sent by Lieutenant Colonel Miyazaki to act as lookouts while the execution took place?

A. I do not recall.

49. Q. Who led the first aviator up to the hole to be executed?

A. The guard who came from the Division Headquarters brought him there.

50. Q. Who led the second man up to be executed?

A. That was the same.

51. Q. These ashes that you have testified about -- were they in some sort of container?

A. They were in a small box covered with white cloth and it was suspended from the neck I recall.

52. Q. And did Kokubo continue wearing this box around his neck when he swung his sword on the other prisoner?

This question was objected to by the accused on the ground that there was no testimony to show that Kokubo had beheaded the prisoner.

The judge advocate withdrew the question.

53. Q. How did Kokubo execute this prisoner?

This question was objected to by the accused on the ground that the witness would be testifying against a co-defendant.

The judge advocate made no reply.

The commission announced that the objection was not sustained.

A. I recall that Kokubo had the ashes around his neck and executed the prisoner.

54. Q. The question is how did Kokubo execute the prisoner?

A. He beheaded the prisoner with a Japanese sword.

The accused moved that this answer be stricken on the ground that the witness was testifying against a co-defendant.

The judge advocate made no reply.

The commission announced that the motion was not sustained.

55. Q. And at the time that he swung his sword against this prisoner he still was wearing the ashes -- is that correct?

A. I recall that he was.

56. Q. And you, at no time, ever held up these ashes -- is that correct?

A. No. I never did.



57. Q. Then the only part that you had in this entire execution was to guard three prisoners on this truck?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. Yes.

58. Q. When did you first find out the prisoners were going to be executed?

A. After I got on the truck and went to the scene.

59. Q. What was it at the scene that advised you that the prisoners were to be executed? JK

A. I saw the hole so I found out.

60. Q. What were you using to guard these prisoners?

A. The prisoners were sitting down on the truck and I just sat on the body of the truck and did not have anything.

61. Q. And the only thing you were wearing was a sword belt?

A. Yes.

62. Q. And that is the only thing you had with which to guard the prisoners? Is that correct?

A. Yes.

Reexamined by the accused:

63. Q. So that you weren't really guarding them. They were guarded by being blindfolded, being tied, and each prisoner had a man from Division Headquarters holding on to a line. Isn't that so?

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

The accused replied.

The commission announced that the objection was sustained.

64. Q. Will you tell the commission again just how these prisoners were when you saw them in the truck when you sat down, having been ordered by Nakamura to get in the truck?

A. The three prisoners were sitting with their backs against the cab of the truck and between them were the soldiers of the Division Headquarters holding on to the rope and standing up between them. JK

65. Q. And where were you?

A. I sat down in the back of the truck facing the prisoners.

66. Q. Was Nakamura also in this truck?

A. I did not notice him.

67. Q. At the scene of the execution you said Colonel Miyazaki was there. Was he the senior officer at this scene?

A. Yes.



68. Q. He was in charge of the execution?  
A. I recall it to be so.

The judge advocate did not desire to recross-examine this witness.

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness resumed his status as an accused.

The defense rested.

Commander Martin E. Carlson, a counsel for the accused, requested that the commission adjourn until 9 a.m., Monday, January 26, in order to allow for the preparation and translation of statements for each of the accused and for counsel to prepare final arguments.

The commission announced that the request was granted.

The commission then, at 3 p.m., adjourned until 9 a.m., Monday, January 26, 1948.



EIGHTH DAY

United States Pacific Fleet,  
Commander Marianas,  
Guam, Marianas Islands.  
Monday, January 26, 1948.

The commission met at 9:10 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,  
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States  
Army,  
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United  
States Army,  
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,  
Major Donald B. Cooley, junior, U. S. Marine Corps,  
Lieutenant Commander Edwin M. Koos, U. S. Navy, members, and  
Lieutenant Commander Joseph A. Regan, U. S. Navy, and  
Lieutenant James P. Kenny, U. S. Navy, judge advocates.  
Stewart R. Smith, yeoman first class, U. S. Navy, reporter.  
The accused, their counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

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

An interpreter read an English translation of the statement of the  
accused Nakamura, Kazuo, appended marked "FF."

The accused Kokubo, Chihiro, read a written statement, in Japanese, in  
his defense, appended marked "GG."

An interpreter read an English translation of the statement of the  
accused Kokubo, Chihiro, appended marked "HH."

The accused Nagatome, Yoshimori, read a written statement, in Japanese,  
in his defense, appended marked "II."

An interpreter read an English translation of the statement of the  
accused Nagatome, Yoshimori, appended marked "JJ."

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

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

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



No witnesses not otherwise connected with the trial were present.

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

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

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

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

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

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

No witnesses not otherwise connected with the trial were present.

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

Mr. Karasawa, Takami, a counsel for the accused, read a written argument in Japanese, appended marked "NN."

An interpreter read an English translation of Mr. Karasawa's argument, appended marked "OO." JK

The commission then, at 3:10 p.m., took a recess until 3:25 p.m., at which time it reconvened.

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

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

No witnesses not otherwise connected with the trial were present.

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

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

The commission then, at 4:10 p.m., adjourned until 9 a.m., tomorrow, Tuesday, January 27, 1948.



NINTH DAY

United States Pacific Fleet,  
Commander Marianas,  
Guam, Marianas Islands.  
Tuesday, January 27, 1948.

The commission met at 9:20 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,  
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States  
Army,  
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United  
States Army,  
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,  
Major Donald B. Cooley, junior, U. S. Marine Corps,  
Lieutenant Commander Edwin M. Koos, U. S. Navy, members, and  
Lieutenant Commander Joseph A. Regan, U. S. Navy, and  
Lieutenant James P. Kenny, U. S. Navy, judge advocates.  
Archie L. Haden, junior, yeoman first class, U. S. Navy, reporter.  
The accused, their counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

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

The accused waived the reading of Commander Carlson's argument in Japa-  
nese.

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

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

No witnesses not otherwise connected with the trial were present.

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

An interpreter read a Japanese translation of the judge advocate's clos-  
ing argument.

The trial was finished.

The commission was cleared.



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

As to the accused Nakamura, Kazuo:

The first specification of the first charge proved in part, proved except the words "NAGATOME, Yoshimori, then a corporal, IJA," which words are not proved.

The second specification of the first charge proved.

And that the accused Nakamura, Kazuo, is of the first charge, guilty.

The first specification of the second charge not proved.

The second specification of the second charge not proved.

The third specification of the second charge proved.

The fourth specification of the second charge proved.

And that the accused Nakamura, Kazuo, is of the second charge, guilty.

As to the accused Kokubo, Chihiro:

The first specification of the first charge proved in part, proved except the words "NAGATOME, Yoshimori, then a corporal, IJA," which words are not proved.

And that the accused Kokubo, Chihiro, is of the first charge, guilty.

As to the accused Nagatome, Yoshimori:

The first specification of the first charge not proved.

And that the accused Nagatome, Yoshimori, is of the first charge, not guilty; and the commission does therefore acquit the said Nagatome, Yoshimori, of the first charge.

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

The commission announced its findings.

The commission announced that Nagatome, Yoshimori, was excused from further attendance at this trial.

The accused stated that they had no further evidence in mitigation to offer, but pointed out to the commission that much of the evidence of the prosecution's witnesses was matter in mitigation in that it related to superior orders, and stated that they wished the commission to take notice of this evidence in considering their sentences.

The commission was cleared.



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

*The commission, therefore, sentences him, Nakamura, Kazuo, to be hanged by the neck until dead, two-thirds of the members concurring.*

*The commission, therefore, sentences him, Kokubo, Chikiso, to be hanged by the neck until dead, two-thirds of the members concurring.*

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

*Henry C. Roscoe*  
HENRY C. ROSCOE,  
Lieutenant Colonel, Coast Artillery Corps, U. S. Army, Member.

*Victor J. Garbarino*  
VICTOR J. GARBARINO,  
Lieutenant Colonel, Coast Artillery Corps, U. S. Army, Member.

*Bradner W. Lee, Jr.*  
BRADNER W. LEE, Jr.,  
Lieutenant Commander, U. S. Naval Reserve, Member.

*Donald B. Cooley, Jr.*  
DONALD B. COOLEY, Jr.,  
Major, U. S. Marine Corps, Member.

*Edwin M. Koos*  
EDWIN M. KOOS,  
Lieutenant Commander, U. S. Navy, Member.

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

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

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

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

Commander Martin E. Carlson, a counsel for the accused, made a motion for arrest of judgment and for a new trial on the ground that there had been irregularities in this trial and that the evidence did not support the sentences.

The judge advocate replied.

The commission announced that the motion was not sustained.

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

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

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

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



OPENING STATEMENT OF THE PROSECUTION

by

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

The prosecution will prove that in late August of 1944 an American B-24 airplane was shot down in a raid over the Palau Islands and three individuals parachuted from the plane, but not to safety. The three were captured by men of the Fourteenth Division which was then under the command of Lieutenant General Inoue. His chief of staff was Colonel Tada.

They were taken to headquarters and there interrogated by Lt. Colonel Yajima, staff intelligence officer. During one of the interrogations another air raid occurred and it was necessary for Yajima and the prisoners to take refuge in an air raid shelter. In that same air raid shelter were Colonel Tada and Lieutenant Colonel Miyasaki.

Miyasaki was the officer in charge of the Japanese military police, the Kempeitai. Tada told Miyasaki to dispose of these three prisoners and at that same time told Yajima to cease his interrogation for the prisoners were to be disposed of. He also told Yajima to make arrangements to transfer the prisoners from headquarters to the Kempeitai. This Yajima did.

When the prisoners arrived at the Kempeitai, they were taken from there to a spot in the jungle where a grave had already been prepared. The execution party consisted of Miyasaki, Nakamura, Kokubo, Nagatome, and several unidentified members of the Kempeitai, as well as the guards from division headquarters.

Kokubo, one of the accused, had had a personal friend of his, Corporal Ikushima, killed in an air raid a few days before and his body cremated. His ashes were kept in a box at the Kempeitai headquarters. Kokubo, knowing he was to participate in the execution, secured the box and brought the box with him to the scene.

Miyasaki, after offering one of the prisoners a cigarette, shot him in the back of the head with a pistol. Nakamura, using his Samurai sword, beheaded the second prisoner, and then it was Kokubo's turn.

Kokubo handed the sacred <sup>ashes</sup> of his friend to Nagatome. Nagatome held up the ashes and with this inspiration Kokubo, shouting, "This is in revenge for Corporal Ikushima!" brought his sword down on the neck of the third prisoner. The blow apparently did not kill the prisoner, for Miyasaki fired two additional shots into the prone body and then the grave was filled up.

In December of the same year, 1944, Nakamura, one of the accused, received orders from Miyasaki to dispose of Charlie Smith, alias James, a British national, whom Miyasaki had confined in the Gasupan Detachment of the Kempeitai. Nakamura called the Gasupan Unit and ordered a grave prepared. The same day he visited the Gasupan Detachment, and, taking Ajioke, a warrant officer, and Yamada, a sergeant, both men members of the First South Seas

"X(1)"

Detachment commanded by him, with the prisoner Smith, into the jungle, ordered Yamada to shoot Smith. And Yamada, with some reluctance, put a bullet through Smith's head.

At the end of the war the victims of these atrocities were cremated and their ashes dispersed in order that the Allies would not know of the deeds that were committed in the Palau.

Respectfully,

*Joseph A. Regan*  
Joseph A. REGAN,  
Lieutenant Commander, USN.

Respectfully,

Joseph A. REGAN,  
Lieutenant Commander, USN.

"X(2)"

1037



検事、法廷認知要求=対スル異議

検事側ハ次、項目=ツイテ法廷認知ヲ要求シ 然レテ  
次、諸項目=ツイテ以下述ベル理由ニヨリ、異議ヲ申立テル

→ 停屠、待遇=由スル 1929年7月27日、Geneva 條約 及  
日本政府ガ スイス政府ヲ通ジテ停屠及適用ニ得ル限ッ  
ニ於テ抑留サレタル民間人=対スル 條約、規定ヲ適用  
スルコトヲ 承認シト云フ 事實=ツイテ

検事側ハ、日本ガ スイス政府ヲ通ジテ停屠及抑留  
サレタル民間人=対シテ、條約、規定ヲ適用スル  
コトヲ 承認シト云フ 主張=ツイテハ、承認シ 事實ヲ明  
確ニ示シネハナラナシ。勿論 Geneva 條約=  
対シテ法廷認知ヲ得ルコトハ、敢テ又得スルコトナ  
シガ、日本政府ガ スイス政府ヲ通ジテ承認シト  
云フ 莫シ。未ダ公知、事實トハ 謂ヒ難シ。

殊ニ検事側ガ本條約ヲ適用セシムルハ、事件  
第一起訴第=罪狀項目=示サレテタル 英人スル  
殺害=ツイテデアラウト思フ。然レテ

英人スミス、前記日本、承認ニ所謂民間抑留者  
デハタイ。コ、莫、他、項ニ於テ述ベ、格、ル、商、略  
スルガ、所謂民間抑留者ニアラザル。英人スミス、  
ワ、テ、本條約、適用セシニ、該、認、知、ヲ、事、本、  
校、事、例、申、出、ニ、反、對、シ、テ、アル。

二) 1907年10月18日 Hague 條約規 23條Cニテ、  
本條規、基本條約 第2條ニ、「第一條ニ掲ゲ  
タル規則及本條約、規定、交戰國、ニ、對、シ、  
テ、適用スル、常、事、者、ニ、限、リ、締、約、國、内、ニ、之、  
ヲ、適用スル、ト、規定、セ、レ、テ、アル。即、チ、本條規ニ、  
拘、束、セ、レ、ル、爲、メ、ニ、交戰國、凡、テ、ハ、コ、ノ、條、約、締、  
約、國、デ、ナ、ク、レ、バ、ナ、ラ、ズ、ナ、イ。然、ル、ニ、今、次、戰、争、ニ、於、テ、ハ、  
交戰國、ノ、レ、ハ、何、レ、及、フ、ル、カ、ク、ハ、本條約ニ、拘、束、  
セ、テ、ナ、ラ、ズ、ナ、イ、テ、アル。從、テ、ハ、第、二、條、ニ、基、テ、日、本、  
ニ、本條約ニ、拘、束、セ、レ、テ、アル。故、ニ、本條規、事、件、ニ、對、シ、  
無、關、係、デ、アル。



又條規 23 條Cハ「兵器ヲ捨テ又ハ自衛ヲ行  
シテ降ヲ乞ハル敵ヲ殺傷スルコト」ト明規ル  
敵ノ投降ル場合、規定デアル。換言スルハ敵  
性ヲ有スル者カ、ソノ敵性ヲ自ラ抛棄シ時ニ  
對シ本條規、適用カ生ズル、デアル。然ルニ  
英人ヌミスハ、軍ニハラオテ島、住民ドアツテ  
降ヲ乞ハル敵デハナシ。従テ本規定、之ニ適用  
セシムルコトハ、如何カニ不當デアル。全ク無關係ナ  
ルガ故ニ異議ヲ申立テル。

#### 面) 陸軍法規第四章ニツイテ

本法規、如ク國際法規ヲ適用スルキ國際裁判所  
ニ於テ、軍ニ或一部ノ國家ニ於テハ認メテ、法律  
ヲ以テ事件報告等ニ適用セシムルコトハ、斷レテ  
許サレザルコトデアル。

又檢事側カ本規定ニ陸廷認知ヲ要求スル目的  
ハ、事件中、英人ヌミス殺害事件ニツイテアタリテ、

扱テ、ソ、陸戦法規第四章 民間抑留者、項ニ  
「交戦國、領土内ニ戦争勃発當時ニ居ル  
民間外國人ハ、抑留ナルヲアラフ。カル人々  
英米ハ實施スルニ及ビ是ヲ且國際法ノ權  
限、重シニ基キ、俘虜トシテ取扱ハレル、ト  
規定サレテ居ル。斯ル民間人ヲ俘虜トシテ取  
扱ヒ優遇スルニ及ビ日本ハ同意シト云フヲ  
然ラズ、英人スミズ。戦争勃発當時抑留サレ  
タルハ一度モナシ。1941年12月8日以來最初ニ  
逮捕サレタル1944年12月20日前迄、彼  
等、日本民間人ト同様、生シテ同様、  
環境ニ置カレテサシテアル。従テ彼ヲ抑留  
サレタル民間人ト稱スルコトハ、出来ナイヲアラフ  
唯、彼ハ處刑、アツノ数日前、抑留逮捕サレ  
タル、彼、家族ハ逃亡セシ、彼ハ間諜行為ヲ爲  
ス。之ヲ爲ス、處シカアツタ、爲メテアツテ、今ヲ犯  
罪者疑義トシテ抑留サレタルヲアル。犯罪者



疑有之者ニ對シ停虜トシテノ取扱ヲ爲スベキナリ  
世界何レノ國ニ於テモ認メザルコトナリ  
抑々一般外國民間人ヲ抑留スルハ全ク軍事  
目的ニ基固スル即チ之等ノ直接或ハ間接ニ  
敵國ニ對シ貢獻スル可能性ガアルコト之ヲ抑留  
以テ敵ノ戦力ヲ排除セシメ爲メニ爲サレリ斯  
如ク之等ノ戦争ニ必要ト抑留スルガ故ニ  
停虜トシテ取扱フベク認メラルベキナリ  
本件英人スミスハ或ハ敵國ノ民間人ナラザルコト  
知レタリ然レテ之ヲ戦争勃發當時抑留シコ  
トハ彼ガ數十年ノ長キニ亘リバコト諸島  
居住ニ全ク敵性ナキ民間人トシテ取扱フコト  
爲メナリ彼及彼ノ家族ハ若シ逃亡或ハ  
間諜的行爲ニ出カザルコトヲ恐ラズ彼ノ日本人  
同様自由ニ生活ヲ續ケテ居ラザルコトハ容易  
ニ解出スルコトナリ  
斯如ク民間人ニ對シ停虜トシテノ取扱ニ由ル

定ヲ通押セハスルコトハ、明シカニ矛盾ニ不當ナル  
本規定ハ、本件ニ全ク無關係ナル旨ニ於テ異  
議ヲ申立テル

敬白

昭和23年1月19日

廣澤高美

1043



OBJECTIONS TO JUDGE ADVOCATE'S REQUEST FOR JUDICIAL NOTICE

Delivered by

Mr. Takami Karasawa, a Counsel for the Accused

The judge advocate requested the commission to take judicial notice of certain facts. Defense counsel object to those parts of his request enumerated below for the following reasons.

1. We object to the "Geneva Prisoners of War Convention of July 27, 1929, and the fact that Japan agreed through the Swiss Government to apply the provisions thereof to prisoners of war under its control and as far as practicable to interned civilians." In order to maintain that Japan agreed through the Swiss Government to apply the provisions of this convention to prisoners of war under its control and as far as practicable to interned civilians, the judge advocate must clearly prove that there was such a fact. Of course we have no objection that the commission take judicial notice of Geneva Prisoners of War Convention of 1929, but we hold that the fact that Japan agreed through the Swiss Government to apply the provision... is not a fact which the court knows to be true without any evidence. We believe that the judge advocate wants to apply this convention to the killing of the Englishman, Smith, alleged in Specification 2 of Charge I. However, the Englishman, Smith, was not an interned civilian to whom Japan agreed to apply the convention. Regarding this point, I shall argue at another time. Therefore, we object to the request for judicial notice of the judge advocate that the convention be applied in the case of the Englishman, Smith, who was not an interned civilian.

2. We further object to Article 23(c) of the Hague Convention of October 18, 1907. Article 2 of the convention reads: "The provisions contained in the regulations referred to in Article 1, as well as in the present convention, do not apply except between Contracting Powers, and then only if all belligerents are parties to the Convention." Therefore, in order that this convention be binding, all belligerents should be parties of the convention. However, both Italy and Bulgaria, which were belligerents in World War II, did not ratify the convention. So in accordance with Article 2, Japan is not bound by this convention and this convention has no bearing on this case. Article 23(c) of the convention reads: "It is especially forbidden to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion." This is the provision for an enemy who surrendered. In other words, this provision applies to a person who had once been hostile and been compelled to give up active hostility. However, the Englishman, Smith, was only an inhabitant of the Palau Islands, not an enemy who surrendered. It is therefore clearly improper to apply this provision in this case, and this provision has no bearing on this case, so we object to the commission taking judicial notice of this provision.

This court is an international court and international law should be applied in this court. So it is utterly impermissible to apply a custom which is recognized by only some countries to the trial of the accused in this case.

"Z(1)"

3. We furthermore object to Chapter 4 of the "Law of Land Warfare." We think that the reason why the judge advocate asked the commission to take judicial notice of this chapter is that he is intending to make use of it in regard to the incident in which the Englishman, Smith, was killed. The paragraph on Civilian Internees of Chapter IV of the Law of Land Warfare reads: "Civilian aliens found in a belligerent's territory at the outbreak of the war may be interned. Such persons are, under the American and English practice as well as by the weight of authority under international law, treated as prisoners of war. The United States and the enemy governments, namely, Germany, Italy and Japan have agreed through the Swiss Government to treat interned civilian alien enemies, on a reciprocal basis, at least as favorably as prisoners of war." However, the Englishman, Smith, was never interned at the outbreak of the war. From December 8, 1941 to about December 20, 1944 when he was arrested for the first time, he lived like a Japanese civilian and was in the same status as a Japanese civilian. Therefore, he can not be called an interned civilian. The reason why he was arrested and detained several days before the execution is that his family deserted and that he either committed or might have committed an act of spying. So he was interned purely as a criminal suspect. No country in the world will admit that a criminal suspect should be treated as a prisoner of war. Generally speaking, the internment of civilian aliens is based upon strategic purposes. As it is possible that these internees and the enemy either directly or indirectly are interned in order to remove any possibility of aid to the fighting capability of the enemy. Since they are thus interned for strategic necessity it is admitted that they should be treated as prisoners of war. The Englishman, Smith, might have been a civilian alien enemy, but he was not interned at the outbreak of the war, because he had been living on Palau for many years and he had been treated as a civilian who bore no hostility against Japan. It can be easily understood that he would have been living as freely as the Japanese, if his family had not deserted and if he had not committed an act of spying.


It is clearly inconsistent and improper to apply the provisions for prisoners of war to such a civilian.

Since this provision (of the Law of Land Warfare) has no bearing on this case we hereby object to it.

Respectfully,

/s/ Takami Karasawa.

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

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

"Z(2)"



OBJECTION TO THE REQUEST OF THE PROSECUTION FOR JUDICIAL NOTICE

By

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

May it please the Commission:

We move the request of the judge advocate be denied and we object to the commission taking judicial notice of the textbook, "Law of Land Warfare," Chapter IV, Prisoners of War, page 47, because judicial notice cannot be taken of such writings as are found in textbooks.

In CMO 267-1010, it was held that, "It is a well recognized rule of pleading that the essential elements of an offense must be affirmatively and specifically set forth in the pleading and a court is not warranted in taking judicial notice of the existence of any essential elements unless they are so affirmatively and specifically set forth."

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

The J.A.G., Navy Department, held the proceedings, findings and sentence are illegal and recommended that the same be set aside.

CMO 36-1020 lays down the same rule and cites the same case, the case of Pettibone v U.S., 148 U.S. 202. The proceedings, findings and sentence in that case were also held illegal and the same were set aside.

In CMO 5-1029 the following rule was published by the Judge Advocate General, "The judge advocate requested the court to take judicial notice of certain sections of Clark & Marshall's, "Law of Crimes," but the record failed to show whether or not the court did in fact accede to such request.

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

We object to the commission taking judicial notice of the fact that the Palau Islands are within the area of Commander Marianas area. We know of no judicial ruling which defines what is meant by the phrase, "Commander Marianas Area." It is immaterial and irrelevant. It is without definition. We wish to point out again the law regarding military occupation. Paragraph 273 of the "Rules of Land Warfare" of the War Department of the United States provides:

"AA(1)"

"...Being an incident of war, military occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity for maintaining law and order, indispensable to both the inhabitants and to the occupying force." - Basic Field Manual (FM 27-10, 1940) 73-74.

In the Ottoman Debt Arbitration it was held that mere military occupation did not operate as a transfer of sovereignty.

Repartition des annuités de la dette publique ottomane (article 47 du traité de Lausanne), sentence arbitrale, 40, 41; Annual Digest, 1925-26, Case No. 360.

So "in the case of Alexandre Kémény et l'Etat serbe-croate-slovene the Hungarian-Yugoslav Mixed Arbitral Tribunal in 1928 stated that the armistice agreement, by virtue of which certain Hungarian territory was occupied by Yugoslav forces, did not have the effect of transferring sovereignty over the occupied territory to the Yugoslav Government and that the Hungarian Department of Mines in Budapest continued to exercise the relevant rights of sovereignty over this territory until the entry into force of the Treaty of Trianon transferring the territory to Yugoslavia."

VIII Recueil des décisions des Tribunaux Arbitraux Mixtes 588; Annual Digest, 1927-28, Case No. 374 cited in Digest of International Law, Hackworth Vol. VI, Chapter XX, Section 587, Military Occupation, p. 387.

In the case of Naoum et autres c. Min. public et Colonie de l'Afrique occidentale française, the defendants, having attempted to export French currency to the German colony of Togoland, then under French military occupation, were condemned under a French law of August 17, 1915 prohibiting the export to foreign countries of French silver currency. The French Court of Cassation, Criminal Chamber, in 1919 dismissed an appeal from the judgment saying that territory under military occupation cannot be held to be part of the national territory."

Annual Digest, 1919-22, Case No. 312;  
Gazette du Palais, 1920, I. 62.

In a case decided on November 17, 1924, the German Reichsgericht in civil matters held valid a marriage contract by a German subject, a member of the army of occupation in Russian Poland in 1917. The marriage was valid according to Russian law. The German subject had petitioned for a declaration that the marriage was null since it had not been concluded in accordance with German law. The court stated that the occupied territory was to be regarded as foreign territory where German marriage law did not apply."

Annual Digest, 1923-24, Case No. 237; Fontes Juris Gentium (decisions of the German Supreme Court relating to international law) 746, cited in Hackworth, Vol. VI, page 388, Ibid.

"AA(2)"



"In the case of Galatiolo c. Senes the Court of Cassation of Rome, on November 3, 1922, held that, for the purposes of a civil action for damages for failure to deliver certain merchandise, Trieste, in the interval between the Armistice and the law annexing it to the Kingdom of Italy, could not be regarded as foreign territory."

Annual Digest, 1919-22, Case No. 319; II Foro delle nuove provincie (1923) 185-190.

In the case of Del Vecchio c. Concio the Court of Appeal of Milan held that a decree of divorce in the Court of Trieste during the period between the Armistice and the annexation was a foreign one requiring an executum in order to be recognized in Italy. Annual Digest, 1919-22, Case No. 320; 46 Foro italiano (1921), pt. I p. 208. (cited in Hackworth Vol. VI, Ibid, p. 388.)

Whether Palau Islands is within the area of Commander Marianas at this time is immaterial and irrelevant. What is important and to the point is whether it was within the Commander Marianas Area on December 29, 1944, and on September 4, 1944.

We object to the commission taking judicial notice of the Geneva Prisoner of War Convention of July 27, 1929 unless the prosecution can show that Japan ratified this convention and that these three accused are bound by it.

We move that the court take judicial notice that Japan did not ratify or formally ever adhere to this convention. We call the commission's attention to the Forward to the War Department Technical Manual TM 27-251, War Dept. 7 Jan. 1944, which contains the statement, "Japan has not ratified or formally adhered to the Prisoners of War Convention." Legally, therefore, Japan as a nation is not bound by the convention.

We challenge the judge advocate to show how and by what provision of this convention these three accused are bound.

We object to the Geneva Prisoners of War Convention as being immaterial and irrelevant and that these three accused are not bound by this convention.

By our plea to the jurisdiction and our plea in bar we put in issue the question whether Palau is under the command of Commander Marianas. We hold it is not common knowledge but that it is a legal and military question which the judge advocate must prove.

that

We ask/the commission take judicial notice that Palau Island was not under the command of Commander Marianas on December 29, 1944 and on September 4, 1944, at the time the offenses were committed.

Before the commission take judicial notice that Palau Islands are now within the area of Commander Marianas, we move that the judge advocate be required to offer proof that it is.

"AA(3)"

1048

We also object to the court taking judicial notice of the Hague Convention of October 18, 1907, particularly article 23(d), because the Hague Convention provided that it shall be binding upon any of the belligerents in a war only if all the belligerents in that war are parties to it. Neither Italy nor Bulgaria has ratified the Hague 1907 Convention and Japan is therefore not bound by this Hague Convention of 1907.

Even the United States took advantage of this provision and under section 1, Circular No. 136, War Department, May 7, 1942, stated in part, "The Hague Declaration Number XIV, October 18, 1907, prohibiting the discharge of projectiles and explosives from balloons (HD XIV) is not binding and will not be observed."

Isn't it strange that the judge advocates, in order to prove their case, now ask that the commission take judicial notice of a convention which the United States War Department, in a written circular, number 136, dated May 7, 1942, said was not binding upon the United States.

We move that the judge advocates be required to prove this convention and that it was in force, that Japan is bound by it, and that these three accused are bound by it, particularly article 23(c), show how it is applicable in this case, and relevant to the issues in question.

Section 309, Naval Courts and Boards reads, "A court may not take judicial notice of a foreign law, or of a law of another state, etc., than that within which the court is sitting, the existence of such law being a question of fact which must be proved by competent evidence the same as any other fact - i.e., the purport or the actual wording of the law must be introduced into the evidence - and it must be further shown that the law or regulation was in force at the time when the alleged act in violation thereof took place."

We move that the prosecution be bound strictly by this section of Naval Courts and Boards.

It is common knowledge that all laws such as federal statutes, the United States Constitution, Navy Regulations, Court-martial orders, and such matters as the commission may take judicial notice of are in the English language.

And what of the Hague Convention which the judge advocate asks the commission to take judicial notice of? We call the commission's attention as the judge advocate should to the Foreword to War Department Technical Manual 27-251, War Department, 7 January 1944, which reads in part as follows: "It will be noted that the French text is the only official text so far as the international relations of states are concerned; and accordingly, in case of dispute as to the meaning of any provision, it is the French text which must be accepted as controlling. Though the English translation is, in general, believed to be correct, no translation can always give the meaning of the original with entire accuracy."

Is the judge advocate to be allowed to introduce into evidence simply

"AA(4)"



by way of a request for the commission to take judicial notice of a convention the text of which is in a foreign language, French, and the judge advocate put into evidence an English translation, the commission knowing that no translation can always give the meaning of the original with entire accuracy.

We object to the Hague Convention of October 18, 1907 as immaterial and irrelevant.

We move that the commission not take judicial notice of it.

What is more important, however, is what legal and judicial, and police powers did the United States of America or Commander Marianas have in the Palau Islands on December 20, 1944 and on September 4, 1944, because jurisdiction over crimes is not retroactive. The Constitution of the United States of America prohibits ex post facto laws.

We object to the commission taking judicial notice of the Potsdam Declaration of July 26, 1945 and particularly paragraph 10.

The Potsdam Declaration in and of itself is neither legal evidence material to the issues here being tried or is it a fact of which this military commission can legally take judicial notice in accordance with Section 309 of Naval Courts and Boards.

Look carefully at this Potsdam Declaration. Paragraph (1) reads: "We ---the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agreed that Japan shall be given an opportunity to end this war."

This was on July 26, 1945 and on August 14, 1945 the Emperor of Japan through the Swiss Government informed the United States Government that Japan was prepared to surrender and thus end the war.

The surrender by Japan is a fact which the commission can well take judicial notice of but certainly not of the Potsdam Declaration. It can have no legal standing in any court, federal or international.

It is immaterial and irrelevant from a legal point.

The Potsdam Declaration did not make any new laws, federal, or international, or create a valid and binding custom that day. Japan was only given a chance to surrender.

Why then does the judge advocate ask the commission to take judicial notice of this Potsdam Declaration? The judge advocate doesn't say why he wants the commission which is trying these accused for violation of law and customs of war to take notice of this Potsdam Declaration. Instead he says we want you members of the commission to take particular heed of this one sentence: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall

"AA(5)"

be meted out to all war criminals, including those who have visited cruelties upon our prisoners."

Knowing that international law provides neither courts nor punishments for violations of the Hague Convention or the Geneva Red Cross Convention, realizing full well that these demobilized persons, now Japanese civilians, are not subject to the jurisdiction of the commission, the judge advocate attempts to confuse the issue by asking the commission to accept as law and thereby relieve him of any proof as to the jurisdiction of this commission over these accused and that the offenses alleged are crimes punishable by this commission.

Such a procedure as this will not stand up under judicial review. Should the judges in this case start the trial of these accused with the idea that they the judges are to mete out stern justice to all war criminals including those who have visited cruelties upon our prisoners?

Each member of the commission said he would "truly try without prejudice or partiality, the cases now depending, according to the evidence which shall come before the commission, the rules of evidence prescribed for this trial, the customs of war in like cases, and his own conscience." Now to ask the members of the commission to mete out stern justice to all war criminals including all persons who have visited cruelties upon prisoners is hardly justified at law.

The government of the United States of America has convened a legal court to try Japanese for crimes. What was said at Potsdam on July 26, 1945, while the war was still raging is not calm judicial judgment. International law I am sure will not recognize such a declaration as material and relevant and applicable in the present case.


To accept this paragraph 10 of the Potsdam Declaration would compel the commission to punish these accused not because they had committed the crimes with which they are charged but because they may have visited cruelties upon prisoners.

Not only does the judge advocate rely upon vague and indefinite references in certain of the Hague Conventions and Geneva Red Cross Convention as authority to punish these accused but he now asks that they be punished because of the Potsdam Declaration on July 26, 1945.

These three accused should be punished only if the evidence shows that they committed a crime, a crime for which the law imposes a penalty.

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

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

Respectfully,  
  
MARTIN EMILIUS CARLSON  
Commander, U. S. Naval Reserve,

Friday, January 16, 1948.

"AA(6)"



被告の陳述書採容に関する異議

昭和二十三年一月二十一日

弁護人 鎌田日出夫

弁護側は検事側から提出された被告十久保千尋の陳述書と  
科する書面は被告自身の自白の外に他の被告の行爲に関する陳述  
を包含してゐるから、委員会が之を本件の証拠として採容することに  
対し異議を申立てる。

被告十久保の陳述書には「最初に宮崎中佐が飛行士の一人  
を拳銃で撃ち、次に中村大尉が別の飛行士を日本刀で切った。中  
村大尉が最後の一人を「十久保斬り」と自分に命じ、と云ふ趣旨  
が記載されてゐる。此の陳述は被告中村に取つて著しく不利益  
である。

Naval Courts & Boards §186には "Admissions of  
one joint conspirator are available against  
others. .... Foundation must be laid by  
either direct or circumstantial evidence suf-  
ficient to establish prima facie the fact  
of conspiracy between parties, unless the  
judge advocate states that conspiracy will  
later appear from evidence to be adduced"  
と規定されて居る。又 American Jurisprudence vol.  
26, Homicide §381には "clearly, an admission  
by one person is not evidence against  
another just because it happened that

they are codependents. The mere fact that two defendants are being tried for an offense is not sufficient to render statements in a confession made by one of them admissible against the other. When a conspiracy is established, everything said, written, or done by any of the conspirators during the progress of the conspiracy and in execution or furtherance of the purpose thereof is deemed to have been said, written, or done by everyone of them and may be proved against each other. The foregoing general principles have been applied many times in prosecution for homicide. The existence of a conspiracy to commit murder operates to render the declarations of one of the conspirators admissible against another charged with the murder, even though the declarant is not on trial, but only in so far as they are statements made in furtherance of the conspiracy. Proof of the existence of a conspiracy and the participation therein of the accused is requisite to the admissibility against



the accused of a declaration as one made by a conspirator." と述べられてゐる。

上記引用文中に明らかに述べられてゐる様に他の被告に不利益な一人の被告の陳述が証拠として採容されるのは彼等が互に共謀者である場合に限られてゐる。

米國憲法修正第五條は「何人とも雖も刑事事件に於て自己に不利益なる証人の地位に立つことを強制せらるゝことをなし」と規定してゐる。此の偉大なる憲法の保障を誰が変更し取除けることが出来ようか。此の変更は正當な法廷上の手續に依つてのみ爲され得るものと確信ある。

然るに檢察は本件を被告等の共同謀議の遂行とは認めてゐないといふのである。何となれば第一起訴第一罪狀項目には "Nakamura, Kazuo, --- Kokubo, Chikuro, --- Nagatome, Yoshinari, --- and other members of the armed forces of Japan --- acting with Miyazaki, Iritsune --- did, each and together, --- assault, strike, kill and cause to be killed ..." と記載されてゐるのみで、彼等が共同の不法目的達成の爲に行爲したとは主張されて居らぬのである。

共謀に基づき本件に於て互に他の被告に不利益な陳述を含む所の被告の陳述書を証拠として採容することは明らかに上記一般原則に違反するものである。而も是等の陳述書は事件の當時、その推進の爲に作られたものではなくて、三年后陳述者が逮捕状なしで東京巣鴨刑務所の独房に入られてゐる間に作成されたものである。陳述書には并

證人が付けられてゐる。彼等は陳述書を作成する権限を  
与へられてゐる。

是等の陳述書が若し證據に採容されるならば、Naval  
Courts and Boards §454に依り、科せらるべき刑は  
一年を超えない禁錮に制限されてゐる。吾人が米國法を  
理解する所に依れば、Naval Courts and Boardsは海軍  
當局に依つても海軍の検査総長に依つても、将又海軍省  
長官に依つてさへも変更され得ないものと考へる。合衆國海軍  
條令はNaval Courts & Boardsは海軍に勤務する月  
々の人々の指揮として完全なる効力を有するを規定してゐる。吾人は  
之を法律と理解する。海軍省管下の如何なる官署も米國  
海軍に對し之以外の規則や一般命令や一般的訓令  
を発することを得ない。聯合國最高司令官であらうもNaval  
Courts & Boardsや海軍條令を変更する權限を有し  
ない。

加之書証は一般にそれを全件として採容せねばなら  
ぬから、結局被告小久保の陳述書は本件の證據として  
採用すべきからざるものであるを信ずる。故に其の採用に對し  
て異議を述べらるべきである。(終)

鎌田日出史



OBJECTION TO THE ADMISSION OF THE STATEMENTS OF THE ACCUSED INTO EVIDENCE  
DELIVERED BY MR. KUNATA, HIDEO, COUNSEL FOR THE ACCUSED.

May it please the commission:

The defense objects to the commission admitting into evidence the documents purporting to be the statements of the accused Kokubo, Chihiro on the ground that these statements contain not only the confessions of the accused who made the statements, but also declarations concerning the acts of the other accused than the declarant.

The accused Kokubo in his statement testified by deposition to the following effect: Lt. Col. Miyazaki shot one of the flyers by pistol first, and then Capt. Nakamura beheaded the next flyer with a sword. Then Capt. Nakamura ordered Kokubo to behead the last one. This statement is highly prejudicial to the accused Nakamura.

Section 186, Naval Courts and Boards provides: "Admissions of one joint conspirator are available against others. ...Foundation must be laid by either direct or circumstantial evidence sufficient to establish prima facie the fact of conspiracy between the parties, unless the Judge Advocate states that conspiracy will later appear from evidence to be adduced."

American Jurisprudence Vol. 26 Homicide, Section 381 reads: "Clearly, an admission by one person is not evidence against another just because it happens that they are co-defendants. The mere fact that two defendants are being tried for an offense is not sufficient to render statements in a confession made by one of them admissible against the other. When a conspiracy is established, everything said, written, or done by any of the conspirators during the progress of the conspiracy and in execution or furtherance of the purpose thereof is deemed to have been said, done, or written by everyone of them and may be proved against each other. The foregoing general principles have been applied many times in prosecution for homicide. The existence of conspiracy to commit murder operates to render the declarations of one of the conspirators admissible against another charged with murder, even though the declarant is not on trial, but only so far as they are statements made in furtherance of the conspiracy. Proof of the existence of a conspiracy and the participation therein of the accused is requisite to the admissibility against the accused of a declaration as one made by a conspirator."

As clearly provided in the preceding references, a declaration made by one of the defendants is admissible against the other only when they are coconspirators.

Article V of the amendment of the Constitution of the United States of America provides that "no person shall be compelled in any criminal case to be a witness against himself." Who can change and take away the safeguards guaranteed by your great Constitution? I am sure this can only be done legally. It can not be changed to suit the whim of some person.

However, the Judge Advocate does not allege that this offense was committed by these defendants in execution of their conspiracy. Specification 1 of Charge I reads: "Nakamura, Kazuo, ...Kokubo, Chihiro, ...Nagatome, Yoshinori, ...and other members of the armed forces of Japan, ...acting with Miyazaki, Aritsune, ...did, each and together, ...assault, strike, kill and cause to be killed, ..." and it does not allege that these accused did the act in pursuance of a common unlawful intent.

"CC (1)"

The offense in this case was not done by conspiracy. It is, therefore, in violation of the above cited principles to admit the declaration of an accused against another one.

The statements were not made at the time of incident and in furtherance of it, but three years later while these affiants were being held, without warrant of arrest, in solitary confinement at Sugamo Prison, Tokyo. They were without counsel. They were forced to make statements.

These statements, if admitted into evidence, will, in accordance with Section 454 of Naval Courts and Boards limit the punishment which may be imposed to not more than one year of confinement. Changes in Naval Courts and Boards, as we understand American law, cannot be made by a convening authority, the Judge Advocate General of the Navy or even the Secretary of the Navy. U. S. Navy regulations provide that Naval Courts and Boards shall have full force and effect for the guidance of all persons in the Naval service. This is the law as we read it.

No bureau or office under the control of the Navy Department shall issue any other regulations, general orders or general instructions to the U.S. Navy. SCAP has no authority, even if he is the Supreme Commander for the Allied Powers, to change U.S. Naval Courts and Boards and U. S. Naval Regulations.


Since documentary evidence should generally be admitted into evidence in its entirety, (when the court finds it admissible), I believe that the statement of the accused Kokubo should not be admitted into evidence in this case.

Therefore, the defense hereby objects to the admission of these statements into evidence.

Respectfully,

KUWATA, Hideo

I certify that the foregoing document is a true and complete copy of the original in Japanese, to the best of my ability.

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

"CC (2)"



法廷認知要求ノ申立

辯護人 唐澤高美

弁護側ハ次ノ諸項ニツキ法廷認知ヲ要求スル

一) アメリカ合衆國海軍ノ政條例才61條

裁判ノ制限 - 般ノ犯罪

如何ナル人ト雖モ次ノ條文ニ規定アレバハ場合ヲ  
除イテハ裁判スル処罰ノ命令發布前2年以前ニ  
犯シタル如何ナル犯罪ニ對シテモ軍法會議ニヨリ  
裁判セラル又ハ他ノ方法ニヨリ罰セラルトナリ  
但シ不在若クハ他ノ障害ニヨリ同期間裁判ニ  
服シ得ナカシ場合ニヨリ除外ナリ

二) パラオ諸島ハ1920年12月17日ヨリ 1945年9月  
2日迄日本ノ委任統治下ニアルコト

三) アメリカ合衆國憲法修正第5條

死刑ノ正当ナル手続

何人モ大陪審員ノ申告又ハ起訴ニヨリテアラザレハ  
死刑或ハ自由刑ヲ科セラルル犯罪ノ責ヲ負ハシメラ  
ルコトナレ但シ陸海軍ノ隊又ハ戰時若クハ  
公災ノ危険ニ際シ現ニ服役セル民衆ノ間ニ起  
リタル事件ニ就テハ此ノ限りニ在ラズ何人モ同一罪  
過ニツキ再度生命身體ノ危殆ニ臨ミシメラルル  
コトナレ又何人ト雖モ刑事事件ニ於テ自己ニ不  
利ナル証人ノ地位ニ立ツヲ強制セラルコトナレ又正  
當ナル法ノ手続ニ依ラズシテ生命自由或ハ財産ヲ  
奪ハラルコトナレ又適當ナル賠償ナクシテ私有財産

ヲ公共ノ用途、爲メニ徵收セラルルナリ

四) 1927年7月27日 Geneva 條約第60條及63條  
第60條 停戦ニ對スル裁判手續、開始ニ際シ

捕獲國ハ威ル可ク速ニ且常ニ并論、開始  
期日前ニ保護國、代表者ニ之ヲ通告スベシ……

第63條 停戦ニ對スル判決ハ捕獲國軍ニ屬ス  
ルモノニ關スルト同一、裁判所ニ於テ且同一、  
手續ニヨリテノミ言渡サルコトヲ得ベシ

五) イタリー及ブルガリヤガ 1907年 Hague 條約ヲ  
批准シテ4ナリ

六) 海軍律第454節

訊問調書ガ使用セラルル場合、制限

海軍省條例第68條、規定スルニ從フテ口頭、  
証言ガ得レナリト、理由テ訊問調書ガ複事例  
ニヨリ証拠トシテ使用セラルル場合ハ死刑又ハ一年  
以上、禁錮刑ヲ科スルコトガ出來ナリ

又政策上士官又ハ準士官、裁判ニ於テ複事例  
ガ訊問調書ヲ使用シ場合ハ判定セラル最高刑ハ  
解雇以上デアツテハナラナリ

之等、制限ハ別、制限ガアル犯罪、裁判テアムト  
否トニカワラス スベテノ事件ニ適用サレシ。訊問調  
書ガ全罪狀項目ニ關係シテ4ナリ場合ハ此、制限  
ハ關係アル罪狀項目ニ對シテノミ用ヒラレシ。

七) 軍隊内勢令 (昭和18年8月11日 軍令陸16号)

罰則



5. 軍紀、軍隊、命脈、故 = 軍隊、常 = 軍紀、振作  
スルヲ要ス 時ト所トヲ論モズ 上下齊シ軍、  
本義ヲ体シ 熱誠以テ軍務ニ努力シ命令必ス  
行ハル 是ヲ軍紀振作ノ實証ト為ス 服従、軍紀  
ヲ維持スル 要道ヲ故 = 至誠上官 = 服従ニ  
其命令、絶対 = 之ヲ履行シ習性ト成ル = 要  
スルヲ要ス 而シテ 服従、至誠盡忠、精神ニ  
出テ彈丸兩注、間尚克ク身命ヲ君國ニ献グ  
意上官、指揮 = 従フ = 至ルベキモノニシテ 其、之ヲ  
致ス 所以、道、上官失フ自ヲ命令ヲ遵奉ニ以テ  
服従、範ヲ垂ル = 在リ

## 第二章 服従

9. 隸下、爲見、長 = 服従スルハ如何ナル場合ヲ問ハズ  
必ス嚴重ナルベシ

10. 隸下、非ザル受命者、命令ニ対スル場合モ亦  
之ニ同じ

10. 隸屬若クハ指揮、關係ヲ有セザル上級先任者  
ト下級新任者ト、間ニ在テモ各々其、職務 =  
妨グナキ限、服従、道ヲ守ルベシ

11. 命令、謹ク之ヲ守、直ク = 之ヲ行フベシ 然レテ  
其當不當ヲ論ジ其原因、理由等ヲ質問スルヲ  
許サズ

新 = 受クル命令ト以前、命令ト齟齬スルヲハ  
條口 = 其、趣ヲ申述ハ指示ヲ請フベシ

12. 軍隊ヲ裨益スル = 足ル信ズル所ハ上官ヲ輔佐

その主情ヲ以テ進デ之ヲ上官ニ開陳スルハ  
各級、軍人特ニ幹部、責務トス。然レトモ  
其、開陳ニ當リテハ秩序ヲ紊ルガ如キヲ  
ハカラス。又一度上官、決定シタル事項ニ對  
シテハ縱ヒ意見ヲ異ニスルトモ雖モ常ニ己ヲ  
屈フニテ專心上官、意圖ヲ達成スルヲ要ス。

#### ハ) 日本刑法

##### 第一章 法例

第1條 本法ハ何人ヲ問ハズ帝國内ニ於テ  
罪ヲ犯シタル者ニ之ヲ適用ス

帝國外ニアル帝國船舶内ニ於テ罪ヲ  
犯シタル者ニ之ヲ適用ス

##### 第三章 外患ニ關スル罪

第85條 敵國、爲メニ間諜ヲ爲シ又ハ敵  
國、間諜ヲ幫助シタル者ハ死刑又ハ無期  
若クハ5年以上、懲役ニ処ス

軍事上、秘密ヲ敵國ニ漏洩シタル者亦同シ

第86條 前5條ニ記載シタル以外、方法ヲ  
以テ敵國ニ軍事上、利益ヲ与ヘ又ハ帝國、  
軍事上、利益ヲ害シタル者ハ2年以上、有期  
懲役ニ処ス

第87條 前6條、未遂罪ニ之ヲ罰ス

第88條 前81條乃至前86條ニ記載シタル  
罪、豫備又ハ陰謀ヲ爲シタル者ハ1年  
以上10年以下、懲役ニ処ス



九) 陸軍刑法

第四章 犯命、罪

第57條 上意命令 = 又抵抗 "之" 服

從也 "之" 左区别 = 從テ 処断ス

1. 敵前 "之" 此刑 又 "無期若"  
十年以上, 禁錮 = 処ス

2. 軍中又 "戒嚴地境" "之" 一年  
以上十年以下, 禁錮 = 処ス

3. 其他, 場合 "之" 五年以下, 禁錮 =  
処ス

敬白

亦護人 唐澤高美

Harumi

EE

### 陳述書

本件ニ就テハ私ハ和自身ノ爲ニ証人台ニ立シ  
事ヲ致シマセシテシタ 然シ私ハ茲ニ和自身、陳述ヲ  
サセテ載キ度イト存ジマス

一、私ハ山口縣、田舎ノ農家ニ生シ、學校ノ年間、教  
ヲ終ヘタケデス 昭和二年私ハ二十一歳、時ニ義務  
徴兵ヲ陸軍兵隊ニ入リ 昭和三年ニ等兵、時ニ  
富兵トナリ爾來終戰迄富兵トシテ勤務シマシタ  
終戰ノ少シ前、大尉ニ進級シマシタ之ハ長年勤務  
シタ爲デアツタ時ニ士官トシテ、學校教育ニ受ケテ居  
リマセシ 大尉トシテ復還シ民間人トシテ家族ト共ニ  
住ム様ニナリマシタ

二、公判ノ初メニ私ノ精神状態、コトゾ問題ニナリマシタ  
私ハ五、六年前頃カラ時々頭痛ヤ耳鳴リガアリマ  
シタ其ノ頃ハ大シタ氣ニマ留メマセシテシタ 昭和十九  
年、ハラオニ赴任シタ頃カラ夫レガ段々ヒドクナリ更  
ニ四月間モ弱クナリ仕事ヲ休ムコトモ度々アリ  
マシタ 頭ノ上部ガ燃ヘル様ニ感じガシタデス 特ニ  
昨年三月、私ガ患痛サシタ頃カラ頭ニ熱ヲ感ズル  
様ニナリ眠レマセシテシタ 又最近ハ耳鳴リガ常  
續シテ毎日、様ニ安眠出来ナイノデ困ツタ様タ、  
デアリマス

私ハ味岡ト山田ニ對シ証言シマシタソシタラ、英  
國人ヲ殺シタト云フ同ジ罪ヲ起訴サシタデアリマ  
ス 此ノ度起訴狀ヲ受取ツテ辯護士ト會フコト  
が出来ル様ニナリ 色々質問サレシニ答ヘテ事件



ニ聞スルコト及私ノ心身ニ関スル事ヲ語シ又耻シ  
 イデラ若ク時ニ梅毒ニ罹リタコトヲ告白シタ、  
 デアリマス其ノ後ハ氣合ハスグシイデラ又稍々  
 安心感ヲ得ラレ又睡眠薬等ヲ世間ニシテ治  
 付イテ来マシタ 然シ依然トシテ耳鳴リハ治ラズ  
 又激シイ頭痛ハ止マセデシタ、 本委員會ニ  
 於テ年輩人カラドシテ私ノ精神状態ガ正常  
 デナイトノ証言ガアリマシタガ當時年輩人ニ左様  
 ナリ印象ヲ與ヘタ、ハ無理カラヌコトデアッタと思  
 ヒマス 何トナレハ私ハ氣合ハスグナカッタカラデス  
 三、私ノ現在ノ心境ハ犧牲ニナッタ米軍飛行士ヤ  
 「ミス」ニ對シ誠ニ氣、毒ニ思ヒ當時私ガ宮  
 崎隊長、命令ノ合法性ニ疑問ヲ抱キ作ラセ  
 之ニ従ハナレハナラナカッタ程ニ私ノ意志ガ薄  
 弱デアッタコトヲ残念ニ思ヒ又其ノ命令、実行  
 フ阻セシ 或ハ實行カラ止レルコトヲシナカッタ  
 コトヲ悔ヒテ居リマス 然シ作ラ私ハ今回起  
 訴サレタ如ク斷然ニ多クノ責任ヲ負ハネビ  
 ラデセウカ 我ハ語シタリ書クタリスルコトガ非  
 常ニ不得手デスカラ若シ貴方ガタガ私ヲ理解  
 出来ナレバソレハ皆私ガ悪イカラデス 何分私ハ  
 出校ハ出来ナカッタノ現在氣ガ弱ク少シク  
 落タツケマス、 是刑命令發布、本隊デ  
 ル第十四師團司令部高級幹部ニ責任ヲ追  
 及サレテ居ラズ 又、宮崎隊長ハ自殺シテ了、

レタ爲カ宮崎隊長、負つベキ責任、一切ヲ  
私ニ課セウレタ居ル様ニ見受ケラレマス、起訴  
サレタ居ル責任ト當時、實情及私、負つ  
ベキ責任ト、間ニ余リニ大キナ懸隔カアリマス  
以下當時、實情ヲ少シ述ベ度イト思ヒマス

(イ) 起訴サレタニツ、事件ニ参加スルコトニ何レモ嫌デ  
アリマス、然レニ如何トモ出来アセシタ  
振行士處刑ノ命令ヲ宮崎隊長カウ聞カサ  
タ時、私ニ之ガ正當ナ取扱デナイト思ヒテ隊  
長ニ對シテ反對ノ意見ヲ述べタ、デアリマス  
若シ私が何處カニカスレタラ多分誰カ他、  
人ガ命セウレタデセウ、然レニ私ト云フテス、ソレ自  
分ノ意見ヲ述べタ、ニス、何ウシテ處刑ナツシ  
ケレバナラナカッタ、デセウ、又ドウシテ憲兵隊デ  
処刑ナツレバナラナカッタ、デセウ、然レニ隊長、之  
師團司令部、命令デアルト云ツテ聞入レテ受  
ズ、然レニ隊長、詰りカウ立エツテレドク私ヲ  
叱ラントタ、之レハ本流ニ提出セシメデシタ  
カ私が集鵬デ提出シタ宣誓口供書ニ述ベタ  
事柄デアルト思ヒマス

宮崎隊長ハ飲酒モズ立派ナ人デアリマス、戦  
場軍紀ヲ最モ極端ニ強調シテ居マシタ、夫  
故隊長ノ意志ニ吾々が反對スルト大受大聲  
デ叱リ飛ばシ又ハ殴打シタリ又ハ殺シテヤルト  
云ツテ軍刀ヲ持ツテ吾々部下ヲ追ヒカケ



タコトモアリス 隊長に興奮スルトホシ殺ス  
カモ知シナイデ私ハ彼ヲ恐レテ居リマシタ  
フノ時又隊長に興奮シタフヲ持ツテ床ヨリ  
イテ叱ラレマシタ其ノ見舞ノ恐ロシサハ今  
デモ思ヒラマセン

スミスニ処刑ノ時、私が宣誓口供書ニ就キ  
又味方裁判ノ時私、証言シタ如ク私ハ  
命令ヲ遵行スルトガ頭ハ嫌デアリマシタ  
ソレデ直グニ出立セズニ思圖タタニ居ニ  
シタガ二度目ニ隊長カラ頭ハ強ク叱ラレ  
シタデ其ノ恐ロシサハ余リ仕方ナク処刑  
ノ現場ニ赴イタデアリス私ハ善良ナ  
軍人デアリタカッタデス 宣明中佐ハ現場  
ヘ行ツテ処刑ヲ監督スルガ私ハ職務ヲ  
言ヒマシタ

宣明隊長ハ陸軍士官学校ヲ卒業シ  
又東京ヤシ海軍外事課長ヲ歴仕サシタ  
外國人取扱ニ関スル事問答デアリ非常ニ  
有能ナデアリマシタ之ニ反シテ私ハ長年  
下士官ヲ経テ將校トナシタモイデアリ其ノ  
学歴、能力、階級等ニ著シイ差違ガアッ  
タバカリテナク又性格ガ全然反對デシタ、宣  
明隊長ハ意志、非常ニ強イ機敏ナ人デシ  
タ又仕事ハ一切ノ事ヲ人ニ委セズニ自命  
デ處理シタヘハ承知出来ナイ人デシタ

私が能力低ク性格又弱イ關係ニアリト  
思ヒマスが宮崎隊長ハ私が將校デアリ  
今隊長デアリタコトハ全然念頭ニナク又  
和達ノ意見ヲ採用スルコトエナク彼自身  
デ今隊長又副官、権限マデ立入り吾々  
ハ下士官位ニシカ取扱ツテ呉レマセンデシタ  
カ論或ニトキハ和デモ取テ彼ニ反駁シムル  
外ニ反駁スル度ニ由ニ余リビトリ罵ラント  
ビラントリスルニ至リモウソ以上反駁スル  
氣ニ無クナツテ了ツタデス

ハ師團司令部ト連絡接衝ハ簡單ナコト  
副官又ハ特高課長ニ命令シテ居マシメが重  
要ナコトハ宮崎隊長自ラ處理シテ居テ  
吾々ニハ甚ハ命令ハ實行ヲ理屈ナシニ要求  
スルガデデアリマシタ從テ吾々ニハ甚ハ命令  
ノ性質ニ就テハ全然知ラサシヤセンデシタ  
又ソレヲ無理ニ聞カウトスルトハ命令ニ  
對シ理由ヲ問フコトハ軍隊ノ規定デハ許  
サナイトカ「可成、判斷ハ己ノガスニダ  
オ前等ハ己ノ信頼出來ヌカ」トカハッ  
テ此ラニシタカウ吾々ハ將校デアリ作ラ  
理由ヲ聞クコトサハ出來ナイ採テ情ナイ  
状態デアリマシタ

委員各位、和ヲ意氣地ナキ將校デ  
オ思ヒニナリカト思ヒマスが實際和ハ



宮崎隊長、前二に手元を失つた  
兵常二役、命令に従つて外二に仕方が  
たがひなかり、和に無理ジイ二役、  
命令に従はせられた。

(三) 三人、飛行士及「スミス」、處刑に當  
時何れも米軍空襲下逼迫シテ戦況下  
ニ行はれた。

飛行士處刑、當日に米機部隊、  
大空襲があり、ペリリュー島、陥落ニ次  
デ、明日に米軍が「ベリング」島又、  
コロー島ニ上陸スルことを又ト云フ警  
報が流せられ、師團司令部、戦斗司令  
所ニ移動中であり、空軍兵隊も御鈴  
橋方面、「ジャングル」中ニ移動ヲ命  
ぜられた。其、實施中であり、

「スミス」處刑、時々「カラス」方面、島  
民多数が突如「ベリング」島北岸  
コッソル泊地、米軍艦船ニ出シ、  
及爆撃状況等から判断シテ米軍ニ  
上陸、企圖がアルト予想セられた時、アリ  
マス。

兩事件共孤立無援、ベリング島の  
ニ在リテ優勢ト聯合軍、侵入ヲ予期  
スル逼迫シテ戦況下ニ在リ、吾々軍人、  
平和ト今日想像シ難イ或種、興奮

シタ状態ニアッタハアリス  
以テ来ノミナ様ト逼迫シテ戦況下ニ和ニ最高  
司令部、命令又宮崎隊長、強イ権力又  
強イ意志ニ圧倒サシテ其ノ命ニ従ニ  
ホニナラヌ様ト弱イ立場ニ在ッタハアリス  
若シ和ガハッキリ物ヲ考ヘン能力ガアッタトシテ  
エトテモ考ヘン命ヲカアリマセンテ、斯ノ如  
キ立場ニ在ッタモノ々下級者、三ガ今日兎馬ヒ  
人間トシテ、汚モヲ受ルナラシメテ、ナラヌ方  
宮崎中佐、命令ニ服従ス以外ニ何事、  
意志エカッタ和ヲ殺人犯人ナラヌ方  
和ニ只之等ノ人々ヲ氣、毒ト思ッタハアリス  
ハリス、ソノ師團司令部、命令ニアリ  
正シキコトニ違ハカッタハリス此、三人、人達ニ  
師團司令部カラ傳ヘン目カラ、ソノ司令部  
ノ歩哨ニ警告サシ、サツキ来タハリス、ソノ  
命令ニ彼等ヲ受刑スルコトニアリス  
然レバ、アメリカ、軍隊ヤ士官ニ警告、命令ヲ  
アツテ又警告ヲ受刑セヨト云フ命令ニ拒  
否出来ル、ソノ方、日本、軍隊ヤ士官ニ警告  
然レバ拒否出来タハス、ト貴方ガタハオシ、ナ  
ル事デセウ、然レバ和ニ甚、意味ガ判リマセン  
常ニ命令ニハ服従シテ、ソノ又ト教ヘン、  
和ニハトテモ、ソノ命令ニ従ハナラヌコトガ可能  
ナラヌ理解出来マセン、若シ和ガ命令ニ従ハ



カツタラ 和自身コソ 殺サレタヤデセウ 和ハ  
 ソノノ風ニシテ 死ヌルヲ 恐ルヲ 居タデス  
 身体、捕チサレ良キニ 証人ヨリ立ツガト 和  
 ニ思ヒマス 又身体、捕チサレヨクニ モット 貴  
 方がタ、納得出来様ト 文章を書ケル、ダ  
 ガトモ思ヒマス ホントウニシテ 和ニマス 和自身  
 自身が衰ヒテナリマセンガ ソノ思フタ 前デ何  
 ニモナシ 誤デモアアセン、 他ノ人々が 實ニシテ  
 シヤベツタ、ヲ 解サスルヲ スルニテ 和、彼等、  
 様ニエ手ニ 証が出来ナシ、デセウ 和、何時  
 デモ 物ヲ 覺ヘルコトガ ホント、デス 学校デモ  
 イツモ 困ツタバカリ 居リマス ソノデモ 等感ヲ  
 抱ク様ニナツタデス、 病院、アメリカ、醫  
 者ニ、和ヲ 如何ニ 病弱デアリカガ 判ツタ事  
 ト思ヒマス 彼、親切デシタ 又 弁護人、  
 人々モ 親切デシタ  
 ドウシテ 和ニシテニシメナシデセウ 和、立派ナ  
 軍人ニナラシト 努カシタデス 假令 和、信屬  
 ヲ 殺シ度クニナリテモ ソノデモ 和、立派ナ 軍人  
 タト 思フヲ 居リマス 然レ 現在 和、和、知ッ  
 テ 居ルニ 誰ヨリモ 和ニカニ 不幸ナシデス  
 和、ニシ、殺人罪ニ 依リ 起訴サレテ 居マス 若  
 シ 和ガ 此、事ヲ 信シテ 考ヘルコトガ 出来サス  
 レバ イ、デスが 和ニシテ 出来マセン 和ハ  
 何モ 思フコトヲ 居リマセン ドウカ 和ヲ

信じて下さい」と私が言つた。私に私を裁判  
して居る貴方が、軍法顧問、方々ニドク  
言風ニミテソレヲ説明スルニトが出来マセウ  
然ラズバ「私に何モ悪クコトヲシテ居ルヤ」  
ト私が言ヒタズシテ、理由ヲ貴方がタニ  
私ヲ罪人トト下思ヒナリマス。私に余リニ精  
神が錯乱シテ居マス。何ト云フタリ良ヘカ  
判リマセウ

私、現在、最大、念願、健康ヲ回復シテ、  
身世ニ更生シテ、人間ニ立直リ罪之ボシ、  
爲ニ悔キ度クコトデアリマス。幸甚長ヲ始  
メ幸甚各位何卒私、微意ヲオ取リ下  
サレ寛大ナル御取計シテ賜フコトヲ懇  
願致シマス

四、私、家庭ヲ持ツテ居マス。私、家庭ニ事及  
子四名居リマス。私に各家庭ニ在テアリマ  
スガ資産ニアリマセ、目下郷里、田舎ニシ  
月額五円ニテ一階ヲ附シテ家族一同  
生活シテ居マス。目下収入、金がナシ、困  
リテ居マス。私、男、十五歳、一男  
ニテ小学校ニ中途退學サセマシ、一男  
十三歳、言語ニナリデアリマス。長女十  
一歳、小学校ニ在学ニテ居リマス。三女四  
歳、目下保育ニ在リマス。私、實家  
及妻、實家ニ在リ。私、家庭、生活



ヲ援助ス、資力ナク目下家族、生活  
ニ不可能デアラス

且最後ニ相被<sup>レ</sup>出、永留伍長、爲<sup>ニ</sup>言<sup>ハ</sup>  
サテ裁<sup>キ</sup>度ト思<sup>ハ</sup>ス 和<sup>カ</sup>起訴狀ヲ  
受取<sup>ツ</sup>タ時ニ永留が一緒ニ起訴サレテ  
居<sup>リ</sup>シ見<sup>タ</sup>驚<sup>キ</sup>マシ<sup>ク</sup> 永留ニ出<sup>シ</sup>日  
何<sup>ツ</sup>カト色々考<sup>ヘ</sup>見<sup>タ</sup>シ<sup>タ</sup>が、永  
留ニ起訴サレ<sup>ル</sup>理由が心當<sup>リ</sup>ガア<sup>リ</sup>  
マセ<sup>ニ</sup> 出<sup>シ</sup>日彼<sup>ノ</sup>病弱デア<sup>リ</sup>シ<sup>タ</sup>が  
出<sup>シ</sup>日他<sup>ノ</sup>下士官兵が見<sup>タ</sup>シ<sup>タ</sup>カ<sup>シ</sup>タ  
ハ和<sup>カ</sup>彼<sup>ノ</sup>随<sup>フ</sup>命<sup>ジ</sup>タ<sup>リ</sup>デア<sup>リ</sup>マ<sup>ス</sup>

何<sup>ラ</sup>方和<sup>カ</sup>理解<sup>シ</sup>ニ下<sup>サ</sup>イ和<sup>カ</sup>貴  
方<sup>ノ</sup>カ<sup>シ</sup>ガ公平<sup>ニ</sup>裁<sup>キ</sup>判<sup>ヲ</sup>下<sup>サ</sup>ルコトヲ  
信<sup>ジ</sup>テ居<sup>マ</sup>ス ト<sup>ラ</sup>方深<sup>キ</sup>御<sup>ノ</sup>理解<sup>ヲ</sup>  
御<sup>ノ</sup>確<sup>メ</sup>スル<sup>ト</sup>共<sup>ニ</sup>哀<sup>シ</sup>悲<sup>シ</sup>、御<sup>ノ</sup>以<sup>テ</sup>  
テキ<sup>レ</sup>シ<sup>イ</sup>裁<sup>キ</sup>断<sup>ヲ</sup>和<sup>カ</sup>ラ<sup>テ</sup>下<sup>サ</sup>ル  
コトヲ祈<sup>リ</sup>マ<sup>ス</sup>

(終)

昭和二十三年一月二十六日

中村 数夫

#### STATEMENT

The personal declaration of Nakamura, Kazuo.

I did not take the witness stand and testify in my own behalf in this case, but I would like to be allowed to make a personal declaration now.

I. I was born on a farm in a remote village in Yamaguchi-ken, and only finished the 8th grade of the village primary school. My grades in school were never very good. I was slow to learn.

In 1927, I was conscripted into the army; and in 1928, when I was a superior private, I became a Kempei (military police). From that time to the end of this world war, I served as a Kempei. Just before the war came to a close, I was promoted to the rank of Captain because of my long service. I did not receive any particular training to be an officer. I was demobilized as a Captain and returned to live with my family as a private citizen.

II. In the beginning of this trial the question of my sanity was made a subject of discussion. About 5 or 6 years ago, I suffered from headaches and ringing in the ears, but at that time I did not give them any serious consideration. But after assuming duty at Palau in 1944, these headaches and ringing in the ears gradually became worse. Furthermore, my digestion became so poor that I frequently absented myself from work. I felt a burning sensation on the top of my head. Particularly, after March of last year, about the time I was arrested, I felt this burning fever in my head, so that I could not sleep. And recently I have been experiencing a continuous ringing in the ears. These ailments have been troubling me daily so that I have difficulty in getting a good sleep. I am physically and mentally ill.

I testified against Ajioke and Yamada. Then I was served with charges and specifications accused of the same offense, murder of an Englishman. After receiving the charges, I was allowed to meet the lawyers. I replied to the questions which the lawyers asked me and told them everything about the incident and my personal affairs, and though I was ashamed, I confessed to them that I had contracted venereal disease when I was young. Thereafter, I was somewhat relieved, although still very sick. On the other hand, I was given some sleeping pills and other medicines so I was able to quiet down. The ringing continues in my ears and my head gives me great pain.

My lawyer testified before this commission that my mind appeared not to be in a normal condition. I believe, it was only natural that I gave such an impression to my lawyer at that time, because I am sick.

III. In my present state of mind, I am filled only with the deepest sorrow for the aviators and Smith, who were victims, and regret I had such a weak will power and mind, that I had to obey the orders of the commanding officer. I feel also remorse for not stopping or evading the execution of the order.

I am constrained, however, to ask myself, if I must take all the responsibility for the many things with which I am charged. I cannot speak

"FF(1)"



or write very well, so if you do not understand me it is all my fault. I was never good at school, and my mind now is very weak and unsettled.

It seems to me that I am being held for all the responsibility which commanding officer Miyasaki should bear, perhaps because the higher officers of the 14th division headquarters, the originators of the order to do the execution, are not being brought to justice for their responsibility with which I am charged, and because commanding officer Miyasaki committed suicide. There is too great a disparity between the responsibility with which I am charged, and the actual situation and responsibility which I should bear. Therefore, I should like to describe a little about the actual circumstances at that time. (1) I was reluctant to take part in either of the two incidents with which I am charged. But what could I do? When commanding officer Miyasaki ordered the execution of the aviators I considered it was not the right way to treat them, so I expressed my opposition to him. Maybe I should have kept still, and then someone else would have been ordered to do it. But I was an officer so I expressed myself. Why should it be done? Why should the Kempeis do it? The commanding officer, however said that it was the order of the division headquarters and did not listen to me. He finally rose from his chair and scolded me and reprimanded me severely. I think, I stated this fact in my affidavit submitted at Sugamo, but which was not introduced in this court.

Commanding Officer Miyasaki did not indulge in drinking. He was a fine man. But he stressed the observance of military discipline on the battlefield to the extreme. So if we opposed his intentions, he would scold us and berate us angrily in a thunderous voice, or strike us, or chase us subordinates with his sword shouting that he would kill us. I was afraid of him because I thought he would kill me when he was mad at me. On the occasion which I have stated, he was in an excited rage, and striking his sword against the floor violently, he berated me. I still cannot forget this threatening attitude of the commanding officer at that time.

In the execution of Smith, I was reluctant to carry out the order as I have stated in my affidavit which was introduced in this court, and as I testified in the Ajioka case. So I hesitated and did not depart immediately. But as the commanding officer violently scolded me the second time, I was so overcome with fear that I could not help but leave for the scene of execution. (2) Commanding Officer Miyasaki graduated from the military academy. He had had duty as the Chief of Foreign Affairs in Tokyo, Shanghai and Nanking, so he was well versed in handling foreigners. He was an able man. I, on the other hand, became an officer after serving long years as a non-commissioned officer. So in schooling, ability, rank, etc., I could not be compared with him. Moreover, our characters were directly opposite. Commanding Officer Miyasaki was a shrewd, strong-willed person. He was a man who could not leave work to be done by others; he just had to do it all by himself.

Probably it was because of my incapability and weakness of will that the commanding officer did not give the slightest thought to the fact that I was an officer and leader of the detachment. Not even once, did he adopt my

"FF(2)"

opinion, and invading the rights of the leaders of the detachment or adjutants, he treated us only like non-commissioned officers. Sometimes, I dared oppose him, but every time I did, I was railed at and so severely rebuked that I had no will to oppose him further. (3) With regard to liaison and negotiation with the division headquarters, he gave orders on only the simplest matters to the adjutant and the Chief of the Special higher Section. The commanding officer personally attended to the important matters. He demanded that we carry out his orders without question. So we were not told in any way about the nature of the orders. When we tried to ask him about them, he would reproach us saying, "It is not permitted in the regulations of the Army to ask reasons for an order," or, "I'm the one who judges if it's possible or not. Are you trying to tell me you can't trust me?" So, though we were officers we were in a miserable position of not being able to even ask a simple reason. Members of the Commission, you probably are thinking that I was a cowardly officer. As a matter of fact, I was completely helpless before him. I had no choice but to obey his orders always. I was forced to obey his orders. (4) Both the executions of the three aviators and Smith were done during the American air-raids and under oppressive war conditions. On the day of the execution of the aviators, we had undergone a big raid from the American Task Forces. An alarm had been issued that subsequent to the fall of Paliliu the Americans might invade Babelthnap or Koror within a day or so. Division headquarters was preparing to move up to the command post; the Kempeitai had been ordered to move into the jungle in the district of Misusu Bridge, and was in the course of doing so.

When Smith was executed the situation was such that a great number of natives in the Garasmao District had suddenly escaped to an American vessel which was in Kossol Roads, located at the northern end of Babelthnap; and plans for the landing of American forces could be anticipated, judging from their bombing and other circumstances.

Both incidents occurred on the isolated and unsupported island of Babelthnap under oppressive battle conditions in anticipation of the invasion of superior allied forces. Thus, we military persons were all repressed by a sort of excitement unimaginable in the present state of peace. Under the tense circumstances which I have stated above, I was placed in such a weak and helpless position that I had no choice but to obey the orders under the absolute compulsion of the order of the supreme commander, and according to the absolute authority and tenacious will of commanding officer Miyasaki. There was no time to think if I had been able to think clearly.

All I felt was sorrow for these people. It was the orders of the division headquarters so it must have been right. Three persons came tied and blindfolded from division headquarters and guarded by guards from the division. The orders were to execute them.

But you say, any American soldier or officer would have refused to carry out a general's orders to execute prisoners, so the Japanese soldiers should have refused. That my mind cannot grasp. I who have always been told that I must obey all orders cannot understand how orders can be disobeyed. I myself would have been killed if I had disobeyed orders. I guess I was afraid to die that way.

"FF(3)"



I wish I had been well so I could have taken the witness stand. I wish I were well now, so I could write so you could understand me. It seems that way. I have much pity for myself. This is of no use.

I listen how cleverly other persons talk. Why cannot I talk like that. I have always been slow to learn. I always had trouble in school. I was made to feel inferior. I think the doctor at the American hospital understood how weak I was. He was kind to me. My lawyers have been kind to me.

My supreme desire and hope at the moment is to recover my health and to revive mentally and physically as a man in order that I might work again to atone for my weakness of mind.

Members of the Commission, I ask your special consideration for my inmost feelings and supplicate your lenient judgment.

IV. There is my family! My family consists of my wife and four children. I am the head of the branch family, but I have no resources. At present the family is living together in one room rented for five yen a month. They are experiencing great difficulties since there are no means of income.

My eldest son, fifteen years old, is a feeble minded child, so he had to leave primary school without finishing it. My second son stammers. My eldest daughter is presently attending school. My second daughter is being brought up by her mother alone. Neither my parent's nor my wife's family are sufficiently well-to-do to look after my family, so it is impossible for my family to make a living.

Why has all this misery happened to me? I tried to be a good soldier. Even if I didn't want to execute prisoners I still thought I was a good soldier. But I am far more miserable than any one I know.

I am charged with two murders. If I could only think this thing out clearly. How can I explain to you members of the Commission who are trying me that when I say I did nothing criminal that you should believe me. Or do you believe I am a criminal just because I say I did nothing criminal. I am so distracted. I do not know what to say. I said I was in the most miserable condition of any person.

In closing, I wish to state a few words in behalf of co-defendant Nagatome. When I received the charges, I was surprised to find Nagatome together with me. I thought back about what Nagatome did that day. At that time Nagatome was sick and weak. I ordered him to come along because there were no other non-commissioned officers present.

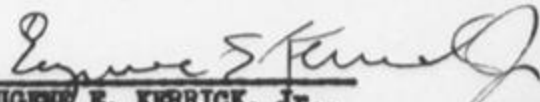
I pray you will understand me. I believe you when you say you will give me a fair trial. With your great understanding I know you will temper stern justice with mercy.

Respectfully,

January 26, 1948

/s/ Nakamura, Kasuo

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

  
EUGENE E. KERRICK, Jr.,  
Lieutenant, U. S. N. R.,  
Interpreter.

"FF(4)"

Kokubo

GG

### 陳述書

元陸軍憲兵連射の久保 千尋

本件。報告である 私は陳述書を讀み度  
いと思ひます

#### 一 私の生立

私の生家は五十嵐と申します。私の祖母の  
實家、父は久保くは相續人がなく、私が幼少の  
頃に父は久保く養子とされ、唯一人。  
私は尚覺する頃より父母を同じふする兄  
弟を見て常に淋しさを味はさねた。  
私が小學校に入つて程なく生家が没落し  
夫以來不遇な生活をして來り、私が  
が中學校に學び、つづてからは學費及生活  
費、定しく種々の仕事に、く事を餘儀な  
くさね、古學子中にも手許の不如意から  
度々退學を志意して、辛うじて卒業  
しました。そして昭和八年、私は二十一歳で  
徴兵に應じて陸軍に入隊しました。よつ家  
と離れ、父母兄弟と別れ、生活をして來  
り、おしく家庭愛に浴するの機会に恵ま  
れず、不幸な境遇の者であります。私  
は平和な家庭生活を味はつたことはあ  
りません。私はいつも一人ぼちでした。

#### 二 私の軍隊生活

私が軍隊に義務服役した二ヶ月間は事故を

(一頁)



起して人より後指をさし水なり。孫にこの父母兄弟  
の期時に添ひ只誠實をつくして参った心算  
であります。除隊の時、伍長勳務上等兵にて  
善行證書並精勳證を附與されました。そ  
れから私は二斗間會社に勤めましたがそれも  
直ぐ辞めねばならぬとせんてした。日本は軍隊  
を增強してゐるのです。除隊約一斗半後に  
私は憲兵召集を受け爾來国内で約二斗  
の間平凡な軍隊生活にを送つて参りましたが  
昭和十八年秋、パオ派遣となりその中、内地に  
敗戦となつてものであります。其間色々事が  
起りました。私がパオで生活しました約二斗半  
を顧ますと着島早々兩度度のデング其他  
の熱病にとりつかれ約半歳を不健康つま  
過しました。私は本當に不幸でした。私は病  
身でした。戦争の情勢が悪化して島が孤立に  
陥りました。五々は猛烈なアメリカ軍の爆撃  
を避ける爲司令部を移動させねばならなく  
なりました。密林内に移動する爲に機材の  
運搬、住居の建造、退避壕の整備等、重  
労働を餘儀なくされ疲弊困憊しました。  
更に食料が極度に不足して來たため私も  
營養失調に陥り月餘入院し其後二  
三ヶ月間まともな働きが出来ず不甲斐  
ない身であつました。然し敗戦の平々を

(二頁)

高谷兵隊曲依場が来る私達十五文名が所謂  
百姓として派遣されきりし時には辛うじて曲依場  
の来る健康になりきりしを以て當時最も大切  
に食糧を生産しようとして精一杯働いて  
いた。

### 三 事件に対する私の心境

1. 事件について現在、私の気持ちで七くけい水を飛  
行士の方々とお気遣いであつた。この気持ち一杯  
です。然し、又、例、當時の私は、ペラオ島が孤立  
して自滅の危機に直面し、當時其防衛  
に全員が最善を盡くすなければならぬ  
時期に上司に於て發せられた命令は正  
當である事を信じて居り、又命令に対す  
る服従心、神聖を此にも疑はなかつた  
ものであります。

2. 私が遺骨を携行した事は既に口供書  
に書いて申上りを通り、自命の気持ちで力  
づける為め持て行つたものであります。殊  
にこの日はペラオ本島始めての大空襲の  
ある日であつた故、親友の遺骨を身  
に付けて行くと云ふ事は、佛が自命の身を  
守つて下さると云ふ気持ちが強かつたで持  
て行つたものであります。然しこの遺骨に  
ついては色々なことが言われましたが遺骨  
と云ふ様なもの、日本人が禮拜するもの

(三頁)



のです。私は普通の人間です。私はその日恐ろしい気がしました。私は親友、筑島軍曹の遺骨が私を守ってくれようと思いを。

3 当時憲兵分隊には中村准尉以下大部分の者が外に中へおりました。爲に、無秩序として、当時隊内にて書類整理中の私及び隊員、二、三名の者が中村分隊長より夫々の命令を受けましたものでありまして、當時の私の任務は過渡期的のものであり、又私として行爲す。私の立場と立派さを何人もとらねばならぬ行爲でした。私は本件俘虜処刑には何等積極的に關與して居らず上官の命令の儘にその手足と行爲して行動したもので過ぎません。二人の俘虜が殺され、夜、私は三人目を斬り、宮崎中佐と中村大尉から命ぜられました。一日長に過ぎない私が、どうして中佐や大尉からやれと命ぜられたことと、さからふことが出来ませう。その日現場に士官が五人居たと言ふ佐野の證言をよく見て、おて下さい。吾々日本の兵隊は何かやれと命ぜられたとき、その命令に自分の意思をさしはさむことは出来ません。命令が一度下達されれば、それが行はれなければ倒れありません。私が斬首した時は確かに俘虜の目は切

(四頁)

れませんでした。私の使った刀は全く切れず、  
刀で只浮屠の着ぐるみ洋服の襟を少し  
許り切ただけです。何故私が剣道の  
達人の様によく切ることが出来たか  
は容易に理解出来ると思ひます。私  
は剣道の達人ではありません。では  
何故護人に立ってその日浮屠を殺した  
ことを否定しなかったかと貴方がおぼ  
ろけして居るでしょう。然し私が切れと命ぜ  
られたことは否定出来ぬ事實です。勿論  
私が謀殺を犯したことは否定します。若  
し貴方が私の言はれる通り命令を實行し  
て私が罰せられねばならぬなら、どうか  
寛大にして下さい。私は一個の哀れな兵隊  
にすぎず上官の命令に従ふこと以外には  
とり得ない人間です。

#### 四 私の家庭について

私は昭和十五年に結婚しまして過去約七年の  
間に私がペラオに派遣となつた約二年半を  
家族と別れて暮し更に現任。立場と置置か  
れて既に半年を過ぎました。私の家  
族は妻及び幼い子供二人であります。妻は  
本年三十三歳ですが関節炎の病気を  
持ち昨年三月以來五ヶ月間病床に  
在りましたもつて未だ回復して居りません

(五頁)



不時の再發を懸念せられるのであります  
私の家庭には資産はなく又幾程の貯蓄も  
ありません私が拘留される頃には何もかもな  
くなってまいりました 私が復員後北海道新  
聞社の事務員として働き其の僅かな収  
入で辛うじて生活を維持して参りましたが  
私が離職に及びましてからは全く他に収入の道  
がなく生活費に困窮する状態になっております 又  
私の身内には頼りになる様な者がありません  
長兄は肺病にて生活が著しく次第及弟は生  
來病弱にて且共に妻子を有し一ヶ月給取  
として食して生活をして居ります 家族は  
現在母の實家に寄食して居りますが同家も  
家人多く長期間の寄寓も叶わぬ事と考へ  
まして全く家族の將來の見通がつかず前途は  
暗澹たるものであります 私は「軍需」に収容さ  
れまして當初は私の赤裸を以て氣持を悶絶し  
嘆願書にて提出致しました 私の氣持には些  
の衰りもありません  
言辭は甚しく拙くありますが何年以上述べまし  
た事情御参照下さい 寂しい寂しい私に對  
し温かい御同情と御寛大なお取計らひ  
あらん事を伏して懇願致すものであります 敬白

昭和三十一年一月二十日

久保千尋

委員長並 委員各位 殿

(大夏)

# STATEMENT

I who am an accused in this case desire to make a statement.

## 1. My personal history.

The name of the family in which I was born was Igarashi. There was no heir for my grandmother's family, Kokubo; so I was adopted by the Kokubo's when I was a child. Alone, I always experienced loneliness whenever I saw my brothers with my own parents, ever since I can remember. Soon after I entered grammar school, my original family was stricken by poverty and since then I have led a miserable life. During the time I went to high school, in order to help bear the school and living expenses, I had to work at various jobs. While thus working my way through school, because of strained circumstances, I often made up my mind to quit school. I was barely able to graduate because I was so poor.

Then in 1933, I was conscripted in to the Japanese Army. From that time, at the age of 21, I have led a life apart from that of my brothers and parents. I am a person of unfortunate circumstances who did not have the chance to receive any family love. I have never known what it is to live a peaceful family life. I have always been alone.

## 2. My military life.

During my two years of compulsory training in the army, I lived up to the hopes of my parents and brothers, by not doing things because of which the finger of scorn could be pointed at me, and I served sincerely. When I was discharged from the army, I received papers of commendation for good conduct and diligence as a superior private with corporal's duties.

Then for one year I worked as a clerk. But that soon ended. Japan was building up her army. One year after I was discharged, I was inducted as a Kempei, and after that for seven (7) years I led a hum-drum military life in Japan. In the fall of 1943 I was sent to Palau, and while serving there many things happened to me before the war came to the end.

In reflecting on the two and a half years during which I lived on Palau, I was indeed unfortunate because as soon as I arrived on the island I was attacked by dengue and other fevers. For about one half year I was sick. It was bad for Japan that the war conditions worsened; the island became isolated. We had to move our headquarters in order to escape from the devastating American bombings. In order to move into the jungle, we had to do hard work such as moving materials, building living quarters, making air-raid shelters and other work, so we were all exhausted from this additional work. Furthermore, our food became very scarce, and I suffered from malnutrition and was in the hospital for about one month. I was disgusted with myself for I was not able to work for two or three months.

In the early part of 1945, the Kempei-tai farm was started, and 15 or 16 of us were sent there as farmers. I was barely able to work on the farm because of my health, but endeavored to produce that most important product, food. I worked as hard as I could.

"H(1) "HH(6)"



3. My state of mind concerning the incident.

(1) My present feelings about the incident are that my mind is filled with regrets for the air-men who are dead. At the time of the incident when Palau was isolated and facing the crisis of self-destruction, and when everyone had to do his best for its defense, I believe that the orders given by superiors were justified.

(2) As I have already said in my statement, I brought the ashes to give me strength. Especially, because this was the first great raid on the main island of Palau, and because I had a strong feeling that it would protect me, I brought the ashes of my best friend with me.

Much has been said about the ashes of my deceased friend. Such things are worshiped by the Japanese. I am just an ordinary person. I was afraid that day. I thought that the ashes of my deceased friend Ikushima would protect me.

(3) That day because Warrant Officer Nakamura and most of the personnel of the Kempai 1st Detachment were out on patrol duty and two or three persons and I who was in charge of the general affairs stayed at the unit and while we were arranging and working on the documents to file them, each of us received orders from First Lieutenant Nakamura to come along with him. My duty on that day was accidental, and any person who would have been placed in my position would have had to take the action I had to take. I did not participate in the execution of the prisoners in this incident in any positive way. I only acted as a tool as ordered by my superiors.

After two prisoners had been killed, I was ordered by Lieutenant Colonel Miyasaki and Captain Nakamura to cut the third.

How could I a sergeant will to do anything that was ordered to be done by a colonel and a captain. Remember Lieutenant Sano testified that there were five officers there that day. There is no will on our part when we Japanese common soldiers are ordered to do something. I never heard of any way out when orders have been given.

I am sure that the neck of the prisoner was not cut. The sword which I used was dull and it just barely cut the collar of the suit the prisoner was wearing. It shouldn't be so hard to understand why I didn't execute like an expert. I was no expert swordsman.

You ask why I didn't take the stand and deny I killed a prisoner that day. I cannot deny I was ordered to cut. I do deny that I committed murder that day. If as you say I must be punished for carrying out orders, please, I pray you be lenient with me a poor soldier who did not know any better but to try to carry out the orders of his superior officer.

4. My family.

I was married in 1940. During the past seven years since my marriage,

"HH(2)" "HH(2)"

I have been separated from my family for two and a half years because I was detached to Palau and furthermore because I have been placed in my present status for the past six months. At present, my family consists of my wife and two small children. My wife is 33 years old and she is at present suffering from peristitis. From March of the last year she has been confined to bed for 5 or 6 months and has not recovered as yet. She fears an unexpected recurrence of this ailment.

My family is without any resource and our savings are small. They were almost all gone at the time I was arrested.

After I was demobilized I found employment as a clerk in the Hokkaido Newspaper Company and with my meager income I barely sustained the livelihood of my family. But since I left my job, all means of income have ceased and my family is hard up to pay living expenses. There is no relative on whom I can rely. My eldest brother is suffering from tuberculosis and is having a hard time. My two younger brothers both have weak constitutions. They both are married and on their meager salary can only support themselves. I know it is hard with them.


My family is at present living at my wife's home. But at my wife's home is a big family so they cannot stay there for a long period of time. When I think of my family's future, my heart becomes heavy.

When I was first taken into Sugamo Prison, I expressed my sincere feelings in a brief statement and submitted it. There has not been the slightest change in my feelings. Though my expression is poor, I ask your special consideration on the above stated facts and beg your warm sympathy and most lenient judgment for me.

Respectfully,

/s/ KOKUBO, Chihiro.

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

  
EUGENE E. KERRICK, JR.,  
Lieutenant, U. S. N. R.,  
Interpreter.

"H(3)" "HH(3)"



Na to e

II

# 陳述書

陸軍憲兵司令部 永留義盛

私は昨年十二月三十一日巣鴨刑務所に拘禁中突然起訴状を渡されそれを讀んで私が証人ではなくて殺人信房殺害事件に関係してゐる様に書かれてゐることを知つたときには全く心を轉倒せんばかりに驚きました

私は起訴状にある様に殺人罪で起訴される様なことは何一つ致して居りませんので全く夢の様にありました

米國の方々は間違つておもう私は殺人罪で起訴される様な者ではありません然しながらまる二日巣鴨を空費し翌三日グアムに到着した日から裁判が始まると聞かされたとき矢張り夢ではなくて現實の問題であることにやっと気が付きました

信房の處刑に全然関係して居ない私が殺人犯人でありませうか私は信房の身体には指一本觸れたこともありません又其の處刑中何一つお尋ねしたこともありません

成程私は當日處刑の現場へは行きましたが憲兵隊を走る時は何の爲に何所へ行くのか全く分らず兵中村介隊長から「永留

II (二)

来と言はれる終にトラツクに乗ったに  
過えません

虚刑の現場に於ても私は何一仕事も命  
ぜられませんでした。たまーして自弁から進んで  
した様なことは全然ありません

唯上官達が浮留を虚刑するのを傍で見  
て居ただけであります。何故浮留を虚  
刑したか私は知りません

刑を傍観して居たことが殺人罪になつて  
は私にはどうして考へられませんか恐らく  
貴方さうして止めなかつたかとは申され  
まうまい隊長や弁隊長様な上官方の  
なせることを一介の他長に過をなかつた  
私がどうして止めることが出来ませう

それは全く無理と申うまづござります

以上は私が巣鴨刑務所で提せました  
口述書にも書きまゝに。又此の法廷の  
証人台に立ちたことを証言したことであり  
まうが私は心から自弁の無罪を確信  
して居りますのでどうか十介の審理下さ  
りまして私に無罪の旨裁判を賜ら  
れる様篤くと祈願致します

六 私以上のこと及び痲痺に付て証言しましたが  
私は昭和十九年八月上旬発痲、同月本旬  
頃黄痲と判明引續き臥床して居り事  
件當日はヤコと病舎外に散歩に出され  
る様になつたばかりでありました中村



中尉が偶然私を見付けて一階に来る様に命じたのは床から起上って散歩して居るときでした  
其後病気が再び悪化し同年九月半ば頃より発熱して急性気管枝炎を起し更に十月上旬頃より胸膜炎をも併発致しまして十二月下旬になつてやうやく日直勤務に服する事が出来る様になつたのであります

斯様に當時私の身体は非常に衰弱して居りましたので外へ出ようは嫌でしたが上官の命令には絶対に服従せねばならぬとかやう教へられ居りましたので中尉中尉の命令に従つて現場へ行つたのでありますそして其爲に私は殺人罪で起訴されております

起訴状には企圖と悪意とも以てと書かれて居ますが私は存心に対して何の企圖もありませんでしたまして悪意など懐かからぬはありません此の事私を信じて下さい私は何等處刑に關係して居ません

なほ病氣上りの私が何故處刑現場に行く事を命ぜられたかと言ふことに付いて師不審を抱かれましたが知れませんが當日隊員の大司令は巡察その他で外出致して居つたからであつたと思ひます

中村中尉が偶ま私が散歩してゐるのを見  
て何故私について来る様命じられたか私には  
はつきり合いません

三 私には村の高等小学校を卒業しただけで  
私は家庭に老たる父母、妻子、幼い弟妹、夫  
合計九人の家族をここに当地に参り  
ました。父母は神経痛で身体が自由に  
ならず妻は幼児を抱へて思ふ様に仕事  
が出来ませんので私の留守中働く者が  
居りません

私は家を去るとを各老人として一寸訊ね  
られる他の者々と考へ真迷ひの様な  
こんな道に所へ送られるのは夢にも思ひ  
ません。だから私の留守に備へて準備さ  
すといふ様なことは何一つして来ません。  
た。随つて斯様な負債の家が私の留守中  
どうして生活してゐるかと思ふと夜更け  
ろく眠れません。私が家に居つて一家の生  
活はたかく困難でたまふ。今は一層甚  
しいでう

尚又現在土地改革問題が盛んに起つて居  
ますが此の時私が留守にして居りますと  
永年耕作して来た土地を買収されて  
まふ虞れがあります。

若しそんな事になつたと農業より外に  
生きて行く術を知らぬ私の一家はとう  
て之から生活して行けるやうに此迄



お併せてお考へ下さりまして一日も早く  
無罪釋放——下さる様伏——をお願  
ひ申——上げます。  
何卒殺人罪甚、他如何なる犯罪を  
犯——おな——いと言ふ私の言を信——て  
下さ——いお願ひ申——上げます。

昭和二十三年一月二十六日

永田 義雄

裁判長閣下 並に  
裁判官各位 敬

STATEMENT

To Your Honor, the President and Members of the Commission.

1. While being held at Sugamo Prison, as a witness I thought, I was suddenly served with the charges and specifications on the 31st of December, 1947. When I read them I was amazed and hurt to know that I was not a witness but I was alleged to have participated in the killing of American prisoners. I knew that I had done nothing to be charged with murder, as I was in the specifications, I was not a participant in the killing of the prisoners. Everything was like a dream. The Americans were wrong. I was not the one to be charged with murder.

However, I was ordered out of Sugamo on the 2nd of January, 1948 and arrived on Guam on the 3rd where I was told that my trial would begin on the 6th of January. I realized for the first time that it was not a dream but a reality that I was going to be tried for murder. I, who had nothing to do with the execution, a murderer! No, it couldn't be. I never touched the body of the prisoner nor did I help in any way in the execution.

It is true that I went to the scene of the execution on that day, but I was ordered to do so. When I left the military police unit, I did not know why and where I was to go. I was told to "come along". I was ordered to get on a truck by my Company Commander Nakamura. He said, "Nagatome, come with me."

At the scene of the execution, I was not ordered to do any job, and I did not do anything. I was only looking at my superiors who were executing the prisoners. Why they executed them, I do not know. I didn't even want to look at the execution. I shuddered. I looked away.

It is hard for me to understand that a mere looker-on of the execution should be charged as a criminal with murder, when I did nothing directly or indirectly to aid in an execution performed by my superior officers.

You surely don't ask me, "Why didn't you stop the execution?" I was nothing but a corporal. How could I stop what my commanding officer and company commander were doing? It was quite impossible for me. I was a Japanese soldier. I had been ordered to be there. I only obeyed the orders given me. Why Americans were being executed, I don't know. My officers must have known.

I wrote down the above mentioned facts in the affidavit which I submitted in Sugamo Prison, and I also testified to them in this court when I took the witness stand in my own behalf. I am innocent. I did not do a single thing to help in the execution. I beg that you will judge me with fair and careful consideration and that you will find that I am not guilty of murder.

2. I have testified to all this and also to my illness. I fell sick in the beginning of August 1944, and suffered with jaundice until the middle of the month. So I had to stay in bed. On the day of the incident, I was a little better, so I could just walk around my quarters. It was while I was

"JJ(1)"



walking around, just up from my bed, that Lieutenant Nakamura happened to see me and ordered me to come along.

I returned to my quarters after the execution. After that, my illness grew worse. Around the middle of September, I became feverish with bronchitis. Around the beginning of October, it was complicated by pleurisy. It was not until the end of December that I regained my health and I could resume my daily duties.

As I have mentioned, I was very weak at the time of the incident, so I was reluctant to go with Lieutenant Nakamura. However, I had been taught that the orders of superiors should absolutely be obeyed. That is why I obeyed the orders of First Lieutenant Nakamura and went with him. We went to an execution of prisoners and for that I was charged with murder. Does that make me a murderer? I know enough to feel sure I did nothing which anyone can say was murder.

The charges and specification allege, "with premeditation and malice aforethought", but I had no premeditation toward the prisoners, still less did I have any malice toward them. I pray that you do believe me as to these points. I did not aid in any way in the execution.

You cannot understand why I was ordered to go to the scene of the execution because I was then very weak from my illness. It was because most of the members of the unit were out patrolling or on other duties on that day. Why First Lieutenant Nakamura, when he happened to see me taking a walk, ordered me to come with him, I do not know. But there were many things he did that I did not know why nor was I ever told the reason. Lieutenant Nakamura never told me why he gave the orders to me to come along. I was only supposed to carry out orders.

3. I only graduated from the grammar school in my native place. My family consists of nine persons, namely, my old parents, wife, child and five young brothers and sisters. I left them and my farm and came to this island. I have about three acres of land and in order to make a living for them I farmed this three acres. While I am away from home and the farm, no one can work, because my parents are suffering from neuralgia and my wife has an infant child to look after. When I left my home, I thought I should have just a short examination as a witness. I never thought I should be sent to such a far away place as Guam. I had no time to prepare anything for the livelihood of my family during my absence. I often have sleepless nights wondering how my family is getting along without me. It was hard for me to make a living for them all even when I was home, but now they must be suffering all the worse.

Ownership of land is actively discussed and criticized in Japan. If I am not at home, I am afraid that my land which I have cultivated for many, many years might be purchased by another. If such a thing comes true, I and my family can no longer make our living, because we know no other means of livelihood than farming. I beg that you will also consider these matters and that you will release me as soon as possible.


"JJ(2)"

Believe me when I say I am not guilty of murder or any other crime.

January 26, 1948

/s/ NAGATOME, Yoshimori.

I certify the foregoing, consisting of two and one half (2½) type-written pages, to be a true and complete translation of the original document in Japanese, to the best of my ability.

  
EUGENE E. KERRICK, Jr.,  
Lieutenant, U. S. N. R.,  
Interpreter.

"JJ(3)"

1093



OPENING ARGUMENT FOR THE PROSECUTION

Delivered by

Lieutenant James P. Kenny, U.S.N.

If it please the commission:

Naval Courts and Boards, Section 53, defines murder as: "The unlawful killing of a human being with malice aforethought." The killing is unlawful if there exists no legal justification or excuse for it. "Malice aforethought" is present if at the time of the killing there existed the intention to kill. There has been no evidence or contention in this trial that there existed any legal justification or excuse for the execution of either Charlie Smith, the Englishman, or the three American prisoners of war. There is no question that the accused intended to kill the three fliers or that Nakamura intended to kill Charlie Smith. They were taken to the place of execution for the express purpose of killing them.

The prosecution's evidence that the accused Nakamura and Kokubo, together with the now deceased Miyazaki, killed the three aviators is uncontradicted. Their guilt has been proved beyond any reasonable doubt. The third accused, Nagatome, took the stand in his own behalf and denied the testimony given by the prosecution witness, Sano, that he assisted in the execution ceremony by holding the ashes of Ikushima while Kokubo wielded his sword on one of the Americans. However, while under cross-examination he admitted that he had acted as a guard over these three prisoners. It is true he was of the opinion that this role of his ceased upon the arrival of the truck at the scene of the execution, but it is evident that Nakamura never released him from that assignment and the only logical conclusion is that he continued to perform the duty of guarding the prisoners until their final disposal. So now we not only have Nagatome participating at the scene but we have him, by his own admission, becoming an active member of the execution party as it left the Kempeitai en route to the scene of the execution. It is true that Nagatome testified that he was not aware that the prisoners were to be executed until he arrived at the execution site and saw the grave which had been prepared for their bodies. Whether or not this is to be believed rests in the province of you members. You will recall that Nagatome testified that the three prisoners were bound, accompanied by armed guard and men from headquarters with shovels. What did Nagatome think these people were going to do? The answer is obvious.

But let us assume that we were to believe that Nagatome did not know the purpose of the trip until he saw the grave. He definitely knew then by his own admission. Thereafter he continued to guard the prisoners and a member of his own Japanese army, albeit a prosecution witness, testified that he saw him holding the ashes of Ikushima while Kokubo cut the neck of an American prisoner. In addition to his duty as a guard, Nagatome had assumed a role in this ceremony to avenge the death of Ikushima. Nagatome would have us believe that Kokubo allowed himself to be encumbered with the ashes about his neck while he performed the difficult task of beheading. Knowing the degree of care that must be exer-

"KK(1)"

1094

cised in this act in order that the wielder of the sword may not injure himself; it is doubtful if any Japanese would have attempted to do it while so encumbered. The only reasoning by which Nagatome can be absolved of guilt is for this commission to believe that he was a mere spectator at the scene of the execution of those three unfortunate Americans. He definitely was not a spectator. Nakamura ordered him along as a guard. Clark & Marshall in Crimes - Fourth Edition - Sec. 167, states that 'if one is present in concert with the actual perpetrator of the offense for the purpose of assisting, if necessary, or of watching and preventing interference or detection, or for the purpose of encouragement' he is a principal. Nagatome was present with the actual perpetrators of these murders. He guarded and watched the prisoners. He was present for the purpose of assisting in any other way that was necessary. One of those other ways of assisting turned out to be the holding of ashes. He was not a spectator. He was a participant. The degree of his participation is immaterial.

In specification 2 of Charge I the accused Nakamura is charged with the murder of the Englishman, Charlie Smith, alias James. The murder of Charlie Smith and the principal part played in connection with it by the accused Nakamura has been proved beyond any reasonable doubt. We have also established, as alleged, that Charlie Smith was an Englishman. It should be noted that doctrine of reasonable doubt does not extend to each particular fact advanced by the prosecution. We have established that the individual killed at that time was Charlie Smith and that he was an English National. The defense in preliminary arguments raised the point of whether or not this individual was a prisoner of war. We refer the commission to Paragraph 70 of the Rules of Land Warfare, "Except as otherwise hereinafter indicated, every person captured or interned by a belligerent power because of the war is, during the period of such captivity or internment, a prisoner of war, and is entitled to be recognized and treated as such under the laws of war." It has been a well recognized principle of law, recognized by the weight of authority on International Law, that civilian aliens found in a belligerent's own territory at the outbreak of the war may be interned but are entitled to be treated as prisoners of war. Japan recognized this when she agreed through the Swiss Government to treat interned civilian alien enemies at least as favorably as prisoners of war. The evidence shows that Charlie Smith was interned because he was a civilian alien who it was suspected had been of assistance to the enemy.

The prosecution's evidence has proved that all three accused acted as the result of superior orders. It is now a well settled principle of law that superior orders are not a defense to crime. The SCAP Regulations (Basic ltr. SCAP 000.5, 5 Dec. 45) which this commission is authorized to use, provide: "The official position of the accused shall not absolve him from responsibility... Further, action pursuant to order of the accused's superior, or his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires."

"KK(2)"



The International Tribunal at Nuremberg, in the summary of the judgment released at Nuremberg, Sept. 30, 1946, stated: "The defense of 'Superior Orders' has never been recognized as a defense to a crime, but is considered in mitigation as the charter here provides."

In four specifications under Charge II Nakamura is charged with a violation of the law and customs of war. The evidence establishes that Nakamura was the commanding officer of the First Detachment in September when the three Americans were executed and also in December when Charlie Smith was executed. In reviewing the case of the late General Yamashita, the Supreme Court of the United States recognized the duty which international law places upon commanders of troops in the following words: "It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders of their commanders would almost certainly result in violations which it is the purpose of the law to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." ---- (Matter of Yamashita, 14 U.S.L. Weekly, Feb. 4, 1946). Nakamura was the commanding officer of Kokubo, Nagatome and others at the scene of the execution of the three Americans. In Specification 1 of Charge II he is charged with failing to control their operations in that he permitted them to kill one of the American prisoners. This was the prisoner whom Kokubo beheaded. The evidence shows and Kokubo's confession verifies that Nakamura gave him the order to cut this prisoner. Nagatome was assisting at the time as a guard and the holder of the ashes of Iku-shima whose death was being avenged.

In Specification 2 of Charge II Nakamura is charged with neglect of duty in that he did not discharge his duty to protect the three American prisoners by permitting their unlawful killing by Kokubo, Nagatome and other members of the Japanese armed forces. The evidence shows that Nakamura did not perform his duty to protect the prisoners but ordered Kokubo and Nagatome to participate. At the scene he, the commanding officer of the First Detachment, did not protect these Americans or take any measures to protect them.

Specifications 3 and 4 of Charge II charge Nakamura with neglect of duty in connection with the murder of Charlie Smith. The evidence shows that at this execution he, the commanding officer of the First Detachment, did not control the operations of Ajioke, Yamada and others, members of his command -- and persons subject to his control -- in that he permitted them to kill Charlie Smith. He took no measures to protect Charlie Smith from these individuals. In fact he ordered them to participate.

Finally, gentlemen, let me state that the murder of unarmed prisoners of war or civilian alien enemies has always been recognized as a crime under international law. The Hague Convention of 1907 merely formulated and reduced this law to writing when it stated: "It is especially forbidden to kill or wound an enemy who, having laid down his

"KK(3)"

1096

arms, or having no longer any means of defense, has surrendered at discretion." These three accused were charged with a knowledge of that law. They violated it and now justice demands that they be punished for their crimes.

Respectfully,

*James P. Kenny*

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

"KK(4)"

1097



被告中村数夫=対し辯論

一九四八年一月二十六日 辯護人 佐藤 教

委員長 各位、委員各位。

本裁判=於ては 被告中村数夫、小久保千尋、永留義盛、三名が起訴され居ります。辯護、都合上、本辯護人、中村数夫、爲=辯論し、他、二名、被告=対しては、同僚 銀田、唐澤両辯護人=辯論を譲つたこと致します。

故て、被告=対し辯論、本論=入る=先、序論として、戦争犯罪=対し處罰、原則=関し若干、本辯護人、所信を報告せしめ、度いと思ひます。

序論第一、個人、責任=就て

戦争犯罪=於て個人、責任=関し=エルンベール国際裁判、米国首席検事 Mr. Justice Robert Jackson 氏、著書 "Nürnberg Case" 中 "The Law of individual responsibility" の項中、たゞ、如く興味ある一節が、此、茲=引用し度いと思ひます。

"The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind."

Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defence based on either of these doctrine can be entertained.

Of course, we do not argue that the circumstances under which one commits an act should be disregarded in judging its legal effect. ----- The Charter implies common sense limits to liability just as it places common sense limits upon immunity. But none of these men before you acted in minor parts. Each of them was entrusted with broad discretion and exercised great power. Their responsibility is correspondingly great and may not be shifted to that fictional being the "State".

私に「将来戦争犯罪ヲ再び生起セシメザルニ爲ス」ニ對シテ「罪ヲ犯シテ」者、階級、上下ヲ問ハズ、又上官、命令ニ基クモテアロトモ、個人ノ責任ヲ追及スル方針、採用セラルトハ、誠ニ結構ナルト考ヘマス

過去ニ於テ上官、命令ニ服従スルヲ絶対ニ強要セシ、又上官ニ依ツテ犯シテ罪ニ對シテハ、下官ノ責任ナシト散ハシタル事、日本軍人ノ現在此、方針ニ依ツテ嚴重ニ裁カレルトモ、已ムヲ得ナキコトアリマス。然レモ、之ヲ裁クニ當リテハ、下級軍人ニ對シテハ、其、地位、ト情況、ト充分ニ考慮スルニ必要アリト考ヘマス

本裁判ニ於ケル報告、立場ヲ只今引用シテ Mr Jackson, 所説、終リ、即、独乙主腦者、立場ト置換ヘルヲハ、全氏、所説、次、如ク



書に直に将す

"Each of them entrusted with narrow discretion and exercised very little power. Their responsibility is correspondingly small."

現在委員各位、前記被告等、如き少き人々を裁くは當り、其、情状と地位とを充分考慮に入れしを希望す

### 序論第一、上官、刑事責任に就て

将来再び戦争犯罪を生起せしむるは、罪を犯し常事者、個人個人責任を追及せしむるは、部下、行動、監督、取締、立場に在る上官に對して刑事責任を追及せしむる必要ありと考へる

然し其、刑事責任、誰に課せざるべきに在るか、換言すれば犯行者を監督すべき上官が二級、三級階級に及ぶ場合、何れ致階、上官に對し刑事責任を問ふべきに在るか、或は犯行者、屬する部隊長一人に對し責任を問ふに充分に在るか、之は慎重に考慮を要すると考へる  
本講演人、軍隊に於て上官、夫々の階級、地位、兼て下官、行為に對し相應に監督、責任を課すに在ることを認む。然し其、軍隊に於ける統率、根本原則から見れば一般的に、部下、戦争犯罪を犯し者、取締に對し刑事責任、各部隊長一人が負つるに充分なりと考へる

不法戦争開始、又ハ平和に對する犯罪ト云ふが如き重大な責任を問はるべき日本、國際戦犯裁判、被告トナツタモノ、大部ハ國務大臣、又ハ陸海軍大將に在り。實際に戦争の計画に所謂 brain-trust 又ハ片腕ト云はるる役等、部の責任を追及せしむるべきに在る。

参考、爲。私ガ關係致シテ豫州軍ニ依リ行ハルヲバウレ  
戦争裁判ヲ例スルコトヲ即断シ下サルヲバ、全裁判ニ於テ起訴セラル者  
約ニ百ニ十名中、部下ノ行動ヲ監督スベキ義務ヲ遂行シカコトヲ庫ニ依  
リ起訴セラル者ハ、陸軍将官三名ノミデアリマシ。

当地ニ於ケル裁判、前例ニ少数ノ例外ヲ除キ殆ド全部ハ独立  
部隊ノ長ニ對シテ部下ノ行動ヲ監督、責任ヲ追及セラル居リマス。

同僚、鉄田辯護人ハ、小市陸軍大尉事件、味岡准尉事件及本  
事件、各裁判、初メ、各第一起訴及共、罪狀項目ニ對シ異議ヲ  
提出致シマシ。全長、辯護人ハ主トシテ法律的根據ニ基キ居リマス  
ハ根本理念ニ於テハ本辯護人、所信ト共通シモイガアリマス。

以上論述シテ所ハ戦争犯罪ノ罰、原則ニ關シ本辯護人、  
所信アリマス。之ニ對シテハ異論ガアルカモ知レマセシ。一般ニ戰  
争犯罪、特ニ上官、刑事責任ヲ追究シテ判例ハ、少イトモ思ヒマス  
公正且正義、判例ヲ作ル任務ガ委員各位、又肩ニ在リテアリマ  
ス。裁判ニ當リ本辯護人、所論ニ對シ充分即考慮アラントヲ  
希フ次第アリマス。

以下各起訴項目ニ就テ辯論、述ノ度ト思ヒマス。

本論第一、第一起訴ニ對シテ辯論。

報告中村ハ第一起訴第一罪狀項目ニ於テ1944年9月4日頃パラオ  
諸島、バベルタッブ島ニ於テ小久保千尋、永留義盛ト共同又ハ各個ニ、当  
時日本軍ニ抑留セラル居タ三人、米人俘虏ヲ殺シテ庫ニ依リ又、矛ニ



罪状項目=於テ 1944年12月29日頃、バベルタツブ島=於テ他ノ日本軍人ト共同シテ英人4名ヲ殺シテ=依リ討逆サレタリマス。

本辯護人ハ本委員会=提示サレタ諸証據=依ツテ報告中村=第一罪状項目又チ=罪状項目=拘束サレタ行方、アツタコトヲ否定シマス。然レテ中村ガ此ノ二ツ、裁判事=提出サレル=至ツタハ、当時各段ノ経テ難イ状況=依リ己ヲ守リカコトモノアツタコトヲ主張スルモノデアリマス。

以下本辯護人ハ是等当時ノ状況=就テ検討ヲ進メ度ト思ヒマス。  
(一)戦況。

1944年9月、三名、米格乗員係属ガ処刑サレタ当時、パラオ諸島ノ戦況ハ如何デアツタデアリマセウカ。

バベルタツブ島=対スル聯合軍、空襲ハ熾烈デアリ。ヘリリエー島、陥落=シタ。バベルタツブ島又ハ、コロール島=対スル聯合軍、進攻ガ豫期カレ。最も逼迫シタ戦況=在ツタデアリマス。

事件当日、即チ9月4日、米軍機動部隊、大空襲、アツタコトハ、検事側証人矢島俊彦又チ佐野義一=依ツテ証言サレタ。日本軍=於テハ機動部隊ノ空襲=シタ。新上陸作戦、行ハルルノカ聯合軍、常套戦法デアルト云フ事ヲ戦訓=ヨツテ教ヘラル。機動部隊、攻撃ヲ受ケタ時ハ、最も警戒ヲ嚴=スルノガ通例デアリマス。証人矢島ハ直接証言=於テ9月4日師団司令部職員ガ戦術指揮所=居タ旨証言シタリマス。之=依ツテ事件当日バベルタツブ島ノ日本軍ガ臨戦状態=ル極メテ緊迫シタ状況=アツタコトガ明瞭=窺知サレマス。

斯ル戦況下=於テ最高司令部カウ係属處刑、命令ガ発シラセリデアリマス。報告中村ガ当時、逼迫シタ戦況下=於テ軍事上、必要=基テ決定サレタ思ハル最高司令部、命令、従フコト=彼、如キ下級將校

トシハ、己47倍+カフタ云フベキデアリマス。

1944年12月 スミス 處刑当時、戦況を略之=似タニガアリマス。即バベルツツグ島、一部荷、多数、原住民が突如敵側=逃亡シテアリマスガ、之が敵、重大な新企圖 即ち 侵攻、前觸レト判断サレタハ、最モ有リ得ルコトデアリマス。此、時英人 スミスガ スパイ嫌疑ヲ逮捕サレ、解同司令部カク死刑=処セラレタ=ナツタ旨、隊長 宮崎中佐カラ傳カサレテアリマス。斯ル戦況下=於テ 下級者が最高司令部、命令、法的理否ヲ疑ハズ、之ヲ阻止シカフコトシテモ、下級者、不注意ヲ多ク責ムルハ、苛酷デハアリマスヨカ。

(1) 報告、教育程度、経歴、能力。

報告中村ハ、小学校、教育ヲ終タノミデ徴兵トシテ陸軍兵籍=入り永年下士官トシテ勤務シ、日本軍隊、嚴格な規律、下ニ命令服従ヲ習慣付ケラレテ來タ者デアリマス。委員各位ガ本法庭=於テ即覺=ナル通、中村ハ決テ敏捷ナ將校デハアリマセシ。

本公判、当初ニ、中村、精神状態ガ問題=トシマシ。之=對シテハ、米海軍、精神病身問軍需、最モ厳格ニ検査ガ行ハレ。精神=異状、無レトガ立証サレマシ。從テ再ビ之ヲ茲ニ問題=スル譯デハアリマセシ。然レモ、日本人、精神的能力或ハ能力、当人ト日本語=依リ多数、會話ヲナスコト=依リ、素人ニモ相當程度之ヲ判定スルコトガ出来マス。本辯護人、ミナラズ、私、同僚ニ、中村ト、多数、會話ヲ通ジテ、彼、精神力、智力ガ將校トシテ可成低イコトヲ認メラルヲ得タイデアリマス。

(2) 環境。

報告中村ハ、事件当時 陸軍中尉デアリ、第一分隊長デアリマシタ。



實際上、彼ハ憲兵隊員ニ於テ如何ナル立場ニ、換言スルハ、隊長宮崎中佐ト如何ナル相對的關係ニ在ッタデアリマセウカ。中村ハ本法庭デ居ンヲ陳述中ニ、宮崎ト彼トノ間ニ、學識、能力、性格、階級ニ著シイ懸隔ガアリ、中村ハ宮崎カラ下ニ地位ニシテ取扱ハレナカッタト述ベマシ。此ノ陳述ニ、證據力ハアリマセウカ。次ノ証言ニ依ツテ充分其ノ可能性ヲ推定スルオカ出来ト思ヒマス。即チ、オグデン中佐ニ依ツテ本委員會ニ提出セラル宮崎中佐ニ關スル報告書中ニ、宮崎、言フニ、たゞ、事項ガ記載セラル居リマス。

『自分ハ東條(註、戰時、首相トシテ東條陸軍大將)ノ部下トシテ相當活躍シタマシ』

2ノ一言ニ依ツテ見テ宮崎ガ非常ノヤリ手デアッタ憲兵隊員デ獨裁的權力ヲ振ヒ、彼ノ前ニ中村ガ如何ニ手ニ足ニ出ナイ弱イ状態デアッタガ解出来ト思ヒマス。

以上論述致シマシタ所ヲ綜合致シマスルニ、被告中村ハ第一罪狀項目又チ罪狀項目ニ間題カルタニ、事件共ニ通過シ、戦況ニ加フルニ、宮崎隊長、圧力、中村個人ノ能力等、兵カラ嫌々下ラ上官、命令ニ服従スル己ニテ悔ナカッタセリテアリ。中譯、正々事情ガ外考ヘルデアリマス。

若シ要員ニ於ケル、之ヲ採擇セラル、被告ヲ第一起訴ニ就テ有罪ト判決セラル、場合ニ於テモ減刑スベキ事情ノルオテ充分御考慮ニ入レ、同情ト理解ル裁斷ヲ乞フ次第デアリマス。

本論要二 第一起訴・對心辯論

第一起訴 戦争法規及慣習違反・於テ被告中村ハ第一起訴ヲ  
訴追サシ米橋乗員三名及英人スミス 處刑事件ニ関シ南樺太兵隊  
第一分隊長兼警務課長トシテ部下ノ行動ヲ抑制スベキ職責及米俘虜  
等ニスミヲ保護スベキ職責ヲ遂行セス、部下ニ復讐ヲ殺スヲ許  
可シト云フ責任ヲ訴追セリ居リマス。即チ本辯護人ハ冒頭ニ論  
述シ上官、刑事責任ヲ追及セリ居リデプリマス

本辯護人ハ冒頭ニ論述セル論據ニ基キ、南樺太兵隊ニ於テ隊  
長宮崎、指揮下一部、長デプツタ被告ニ、尚且サシ責任ヲ課スルハ  
不合理デプリ。斯ル責任ハ宮崎一人之ヲ負フバク中村ハ無罪ナル  
ヲ主張スルモデプリマス。

然レテ上官、刑事責任ニ関スル原則・對心私、論據ヲ委員各位ガ  
即認メテス。第一起訴ニ對シ被告ハ無罪ナリト直ジニ了解サレタイ場合  
ニポーカト思ヒマス。仍テ、米人俘虜及スミスハ刑事事件、真相ヲ検討シ  
被告中村ガ第一起訴ニ對シ無罪ナルコトヲ明確ニシ度ト思ヒマス  
以下各罪狀項目ニ就テ之ヲ検討シテ見セウ

（一）第一罪狀項目

被告中村ハ第一罪狀項目ニ於テ復、分隊員及復、抑制下ニ在ツ  
人々即チ小久保及永留。並ニ其他日本軍隊ノ人々、行動ヲ抑制スベキ  
南樺太兵隊第一分隊長トシテ復、職責ヲ違法的ニ無視シ是等ノ人々  
ガ一名、米人俘虜ヲ殺スヲ許可シテ依リ尚且責任ヲ居リマス

小久保ト永留ガ中村ノ分隊員デプツタ事實ニ間違ハアリマス。然レ  
處刑現場ニ於テ小久保ハ一名、俘虜ヲ斬ルヲ命ジタル現場ニ於

(8)



テ直接處刑ヲ指揮シ居タ宮崎隊長自身デアリマス。コノ事ハ檢  
事側証人佐野ノ証言ニ依ツテ明瞭デアリマス。當時、被告中村ハ  
小久保、永留ト全橋、宮崎、抑判下ニ在ッタデアリマス。

小久保ガ一名ノ俘虏ヲ斬ツタ行爲ハ、何等第一分隊長トシテノ  
中村ノ權限外ニ於テ彼自身ノ意志ニ依リ處理セリト事柄デハナイ  
デアリマス。假リニ、中村ガ處刑ノ現場ニ居タラフテモ、小久保ハ、  
宮崎ノ命令デアル以上、斬首ヲ行フテ居リ。又中村ガ現場ニ居テモ  
小久保ノ斬首ヲ阻止セシメテモ宮崎ノ命令ニ依リテ overrule セ  
テアリマス。即チ、宮崎ニ依リテ直接命令セリト以上、小久  
保ノ斬首行爲ハ、第一分隊長ガ之ヲ許可スルカ又ハ阻止スルカ  
トハ全然彼ノ權限外ノ事デアリマス。此ノ責任ハ宮崎ノミノ負フベキ  
モノデアリ。之ヲ中村ニ追及スルハ誤デアリ道理ニ反ス。

## (二) 第一罪狀項目

第一罪狀項目ニ於テ被告中村ハ南洋軍兵隊第一分隊長タル  
彼ノ職責ヲ遺憾ナク無視シ、三人ノ俘虏ヲ自己ノ職務上保護  
シ、彼ノ權限外ニシテ且當時ノ状況下適當ニ處理ヲ講ズベキヲ  
アリト拘ラズ、之ヲ行ハス。小久保會長其他日本軍隊ノ人々ニ、俘虏  
ヲ処刑スルコトヲ許可セシメテ依リテ責任ヲ追及サレテ居リマス。然レ  
テ當時軍兵隊第一分隊長タリシ中村ハ、尚疑ハサル如キ職責ハ  
全然有リテ居ラナカツタデアリマス。

之ヲ證據ニ依リテ檢討シマス。

(1) 証人矢野及佐野ノ証言ニ依リテ三人ノ俘虏ハ處刑サル迄  
軍兵隊第一分隊長ニ保護權存セリトハ無ク、彼等ハ師團司  
令即監理部長ノ保護下ニ在ッタコト。

(四) 証人佐野及永留ノ証言ニハ、三人ノ米人俘虜ハ、処刑当日、師団司令部、衛兵ニ依リテ直接護衛セラル。此ノ状態ハ、処刑直前迄繼續シテ居ル。ソレハ、処刑直前、宮崎、命令ニ依リテ一人宛、師団司令部衛兵ガ宛、前ニ連シテ來タトケ立証セラルガリマス。

即チ、俘虜ヲ保護シ適當ナル措置ヲ講ズベキ職責ハ、處刑ノ直前迄、全ク師団司令部ニ在リ、宮崎ガ俘虜ヲ一人宛、前ニ呼ビ寄セテ將其責任ハ、直接宮崎自身ニ移ワサデアリマス。三人ノ米人俘虜ガ日本軍隊ニ收容セラル以前、處刑セラル迄、彼等ヲ保護スベキ責任ガ南洋憲兵隊チ一分隊長タル中村、權限ニ屬シ、事實ハ、全然ナク、檢事側モコノ責ニ關シ何等立証シテ居ラセシ。

第一罪狀項目及チ第二罪狀項目共ニ、三人ノ米人俘虜ノ処刑ニ關シテ、問題ナル責任ハ、何レモ、宮崎隊長ノ負フベキモノナルヲ明瞭ニサツテ信ジマス。

宮崎隊長ガ死ニシテ不在デポトエ、彼ノ負フベキ責任ハ、彼ノミガ負フベキデアリ。彼ガ居タイ為ニ、其ノ下級者ニ之ヲ轉嫁スル外ハ、正義ニ反ス。

### (三) 第二罪狀項目

第三罪狀項目ニ於テ報告中村ハ、南洋憲兵隊チ一分隊長兼警務課長トシテ彼ノ職責ヲ違法的ニ無視シ、遂行セシ。味岡操、山田清等ニ英人スミスヲ殺セル外ヲ許可シ、廉ニ依リ、彼ノ責任ヲ新進セラルガリマス。

スミス処刑事件ニ於ケル中村、一切ノ行動ハ、本法ニ提出セラル。彼ノ宣誓口供書ニ記載セラル如ク、宮崎隊長カ、山田情ヲ以テ射殺セシメル外ヲ含ミ、詳細ナル指示ヲ受テ、其ノ通りニ実施シ、退ギタイデアリマス。山田ニ射ワサテ命ジラセ、宮崎隊長、命令、範



園内ノストデアリ。第一分隊長及警務課長タル中村ノ職務ニ基キ、彼自身ノ  
命意又ハ意思分別ニ依ツテ実施シタハナイデアリマス。

此ノ點ヲ明瞭ナラシムル爲メ、今假リニ、特高課長佐野中尉ガ中村  
代リニスミス處刑ニ関スル宮崎ノ命ヲ受テ、中村ガ局ニシテ全ク全一ノ行  
爲ヲ行ヒタト假定シテ見ヨウ。此ノ場合、佐野ハ山田ヲ指揮  
スベキ第一分隊長トシテ、職務ヲ有シ居タイガ宮崎ノ命令デアルガ  
故ニ、山田ニ射ツコトヲ命ジ得ル。本件ニ於テ山田ニスミスヲ射ツコ  
トヲ許可スル行爲ハ、宮崎隊長カラ命ゼラレシ憲兵隊ノ士官デアルナラ  
バ誰デモ爲シ得タコトデアリマス。夫レ故ニ、中村ガ山田ヲ射ツコトハ命  
ジタ行爲ハ、第一分隊長ノ職務トハ無関係デアリ。彼ノ職務ヲ違法  
的ニ行使シ、遂行シタコトハナラナイデアリマス。

之ニ依リ、第三罪狀項目デ問題ナル責任ハ、中村ニ付、宮崎ニアル  
コトガ明瞭ニトツタ思ヒマス。

#### (四) 第四罪狀項目。

スミスヲ收容シテ居タガスバ、分遣隊ガ第一分隊長タル中村ノ  
指揮下デアルコト、及中村ガ現場ニ於ケル先任者デアルコトハ事實  
デアリマス。然レテ當日中村ノ爲シタ行爲ハ、宮崎隊長カラ命ゼラ  
レシ憲兵隊ノ士官デアルナラバ誰デモ、彼ト全ク全一ノ行爲ヲ行  
ヒ得タデアリマス。換言スルバ、本罪狀項目ニ問題ナル責任ハ、第一  
分隊長兼警務課長トシテ、職務トハ無関係デアリ。彼ガ其ノ職務ヲ  
遂行シタコトハナラナイ。中村ハ責任ハ、宮崎一人ガ之ヲ負フベ  
キデアリマス。

之ヲ要スルニ、第二起訴各罪狀項目デ問題ナル責任ハ、被告中村ニハ

ナ。部隊長タリシ宮崎ニ在リ。從テ被害中村ハ弟ニ起ルニ對シ  
無罪デアルト主張スルモデアル

### 本論ニ。 結論。

本辯護人ハ。祖国ノ爲ニ勇敢ニ戦ヒ其義務ヲ果シ名譽アル  
米軍搭乗員三名ハ。不幸ニテ俘虜トナシテ。日本軍隊ニ依リテ処刑  
サレ。又老人ヌミスガ処刑サレトニ對シテハ。日本人ノ一員トテ深甚  
ノ遺憾。意ヲ表スルモデアル。又其家族ニ對シテ厚ク同情。意ヲ表  
スルモデアル。ソレ又被害中村ガ是手ニ刑事事件ニ捲込メラレタ  
ヲ悲シムモデアル。

然レテ。被害中村ガ是手ニ刑事事件ニ参加スルニ至リタハ。当時  
已メテ各控ノ事情。ハツタ。又本辯護人ガ冒頭ニ論述  
セル如ク。彼ガ所謂「サキヤ人」ノ一員デアリ。其責任。他メテカレト  
ハ。委員各位ニ於テ充分。即チ解リ得タト信ズルモデアル。

委員各位ニ。委員各位。

被害中村ニ對シ裁断ヲ下サレニ當リ。當時ノ戦況甚。他各  
種ノ状況ヲ特ニ即考慮ニ入ラレ。仁慈アル裁断ヲ賜ハラントヲ  
希フ次第デアル。

(終)

佐 藤 毅



ARGUMENT FOR THE ACCUSED NAKAMURA, KAZUO DELIVERED BY DEFENSE COUNSEL SANAGI, SADAMU.

Your honor the President and the Members of the Commission:

In this trial 3 persons, the accused NAKAMURA, Kazuo, KOKUBO, Chihiro, and NAGATOME, Yoshimori are charged, but for the convenience of defending these accused I will argue in behalf of Nakamura, Kazuo and with regard to the accused Nagatome and Kokubo they will be defended by my associates Mr. Kuwata and Mr. Karasawa respectively.

Before going into my discourse in behalf of the accused, I would like to express my conviction concerning the principle of punishment against war crimes as my introduction.

Introduction I. On individual responsibility.

Concerning the individual responsibility in war crimes there is an interesting paragraph under a clause, "The law of individual responsibility" of a book called, "Nurnberg Case" written by Mr. Justice Robert Jackson, chief of counsel for the United States in the Nurnberg International Tribunal; so I would like to quote it at this time.

"The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter no defense based on either of these doctrine can be entertained. Of course, we do not argue that the circumstances under which one commits an act should be disregarded in judging its legal effect. -----The Charter implies common sense limits to liability just as it places common sense limits upon immunity. But none of these men before you acted in minor parts. Each of them was entrusted with broad discretion and exercised great power. Their responsibility is correspondingly great and may not be shifted to that fictional being, 'The State.'"

In order not to have war crimes reoccur in the future, I believe it is a good idea to adopt a policy in which individual responsibility is asked of a person committing a crime notwithstanding his rank or whether or not it was under superior orders.

In the past the Japanese armed forces exacted absolute obedience to superior orders and were taught that subordinates had no responsibility for crimes committed by superior orders, but it is inevitable that they are being severely punished because of this policy at present.

But in trying this, I think there is a necessity of considering deeply the positions and circumstances in the cases of minor military persons.

If we put these accused of this trial in place of the German dictators' position shown in the latter part of Mr. Jackson's opinion, it can be rewritten as follows: "Each of them was entrusted with narrow discretion and exercised very little power. Their responsibility is correspondingly small."

In trying these accused, "The little people", who are sitting before you at present, I beg that deepest consideration be given to their position and circumstances.

"MM (1)"

Introduction II. Concerning criminal responsibility of superiors.

In order not to have war crimes reoccur in the future I think it is necessary not only to impose individual responsibility on the person committing the crimes but also to pursue the criminal responsibility of the superiors who were in the position to control and supervise the acts of their subordinates.

But upon whom should this criminal responsibility be imposed? In other words, when there are two or three ranks of superiors above you who are in the position to control a said criminal, upon which rank of superior should this criminal responsibility be imposed, or whether it will be sufficient to impose the responsibility on the commanding officer of an organization alone to whom the criminal is a subordinate? In regard to this deep consideration must be given.

I recognize the fact that in military life, each superior, according to his rank and position, has a certain responsibility to control the acts of his subordinates. But looking at it from the fundamental principle of command and leadership in military life, in general, I think it proper and sufficient that one person of each unit should take the criminal responsibility for the duty of supervising the subordinates who committed war crimes.

Most of the accused in the International War Crime Tribunals of Japan and Germany upon whom were imposed the great responsibilities of crimes against peace or beginning illegal war are ministers or Generals and Admirals of the army or navy. Their subordinates who actually planned the war, the so-called brain trusts or the right-hand men are not held for their responsibilities.

At this time I wish to be allowed to refer to the Rabual War Crime Tribunal in which I had the privilege of participating, held by the Australian Armed Forces for your reference. Among some 230 persons who were tried in this tribunal there were only 3 Army Generals who were charged with --"failed to discharge their duties to control the operations of their subordinates".--

In the precedents at the tribunal here, other than a few exceptions, almost all commanding officers of independent units have had imposed upon them the responsibility for controlling their subordinates' operations.

As far as I know, my associate Mr. Kuwata has submitted objections to Charge II and its specifications at the beginning of this case, Ajioke's case, and Captain Koichi's case. His argument is mainly based upon legal grounds but in the fundamental idea there is a common interest with my conviction.

What I have stated above is my conviction concerning the principle of punishment against war crimes, but there might be different opinions on this.

I think there are only a very few judicial precedents in war crimes in general, especially where criminal responsibility is imposed on superiors. The duty of making fair and just judicial precedents lies solely with the members of this commission. In judging this I pray that my argument be deeply considered.

I will proceed with my argument on each charge and specification.

"MM(2)"



I. Argument in regard to Charge One.

The accused Nakamura is charged in specification one of Charge I that on or about 4 September 1944 at Babelthup Island, Palau Islands with Kokubo, Chihiro, and Nagatome, Yoshinori, did each and together kill 3 American Prisoners of War then and there held captive by the armed forces of Japan, and in specification 2 that on or about 29 December 1944 at Babelthup Island he acted with other members of the armed forces of Japan and killed a British national, Charlie Smith.

I will not deny the fact that there was the action on the part of the accused Nakamura as charged in specification 1 and 2 as shown by various evidence submitted to this commission. But I hold that the reason Nakamura was indicted into these two execution incidents was that he could not help but participate by various unavoidable circumstances of that time.

I would like to examine the circumstances surrounding them as follows:

1. The military situation.

What was the military situation in the Palau Islands in September 1944 when the 3 prisoners of war, all American aviators, were executed?

The Allied attacks on Babelthup Island were furious. Following the fall of Peleliu Island the Allied Forces landing on Babelthup Island or Koror Island was expected. It was under a most pressing military situation.

The fact that there was a furious raid by an American Task Force on the day of the incident, that is on 4 September has been testified to by the prosecution witnesses, Yajima, Toshihiko and Sano, Giichi. In the Japanese service as a military lesson we were all taught that the usual Allied strategy was to start a new landing operation following a task force attack. And it was usual that strictest precautions were taken when attacked by a Task Force. Witness Yajima in direct examination testified that on 4 September the members of the division headquarters were at their command post. From this we can clearly comprehend that the Japanese armed forces on Babelthup Island were on the alert and were under pressing conditions.

Under such a military situation an order to execute the prisoners was issued by the supreme headquarters. We must maintain that a low ranking officer such as Nakamura under such pressed military situation could not help but obey the order of the supreme headquarters which seem to have been decided on a basis of military necessity. A similar military situation prevailed in December 1944 at the time of Smith's execution, that is, a group of natives suddenly escaped to the enemy from one village on Babelthup Island; so it is only proper to judge this as an grave enemy plot, an advance notice of an invasion. At this time an Englishman, Smith, was held under suspicion of spying and was told by commanding officer Lieutenant Colonel Miyasaki that he was sentenced to death by division headquarters. Under such military situation isn't it too severe to condemn the failure on the part of a low ranking officer even though he did not doubt the legal merits of the orders of the supreme headquarters and did not try to prevent it.

2. Personal history, ability, and schooling of the accused.

The accused Nakamura only finished primary school and was conscripted into the army. He served as an NCO for such a long time under the strict discipline of the Japanese army that he formed a habit of obeying orders. As the members of the Commission can see in this court, Nakamura is not an intelligent officer.

"MM (3)"

At the beginning of this trial Nakamura's mental condition was made an issue. Concerning this a detailed examination was made by an American naval psychiatrist, and it was proved that he was sane. Therefore, I do not wish at this time to make an issue of it again, but even a layman by conversing with him many times in Japanese, his native tongue, can judge to a certain degree the mental ability or intellectual faculties of a Japanese. Not only I but also my associates through numerous conversations with Nakamura can not help but realize that his mental ability and intellectual faculties are quite low as an officer.

### 3. Environments.

The accused Nakamura at the time of the incident was a First Lieutenant and head of the First Detachment, but actually what position did he hold within the Kempeitai? In other words, what was his correlative status in relation to CO, Lt. Col. Miyazaki? In the statement which Nakamura read in this court he stated that there was a great disparity between him and Miyazaki in learning, ability, character, and rank, and that he was greeted only as an NCO by Miyazaki.

There is no evidential value in this statement, but I think we can sufficiently infer its possibility from the following statement, because in the report concerning Lt. Col. Miyazaki which was submitted to this Commission by Comdr. Ogden, it states the following fact as the words of Miyazaki: "As a subordinate of Tojo (Note: General Tojo, the prime minister during the war) I played a very active part." From this one phrase alone I believe we can understand that Miyazaki was a very active and positive man and displayed dictatorial power in the Kempeitai and that Nakamura was weak and inconspicuous and was helpless before Miyazaki.

In summing up what I have said above, in the two incidents charged in specifications one and two the accused Nakamura, no matter how reluctant he might have been, had to obey his superior orders because in addition to the pressing military situation there existed the coercion of CO Miyazaki, and Nakamura's own low ability. This I think there were extenuating circumstances.

Even though the Commission does not adopt this and find the accused guilty of Charge One, I pray that the Commission will consider the fact that there are circumstances for mitigation and judge him with sympathy and understanding.

### II. Argument in regard to Charge II.

In Charge II, Violation of the Laws and Customs of War, the accused Nakamura is charged with the responsibility of disregarding his duty as Commanding Officer of the First Detachment and as Chief of the Police Section South Seas Military Police, to control the actions of his subordinates, and to protect the American prisoners of war and Smith, in that he permitted his subordinates to kill the said prisoners and Smith. In other words, the accused Nakamura is charged with the criminal responsibility of a superior officer, which I have discussed at the outset of my argument.

Based upon my argument in the beginning, I maintain that it is unreasonable to impose the alleged responsibility upon Nakamura who was only a chief of a certain section and under the command of Commanding Officer Miyazaki, at the South Seas Kempei Unit, that such responsibility should be imposed upon Miyazaki alone and that Nakamura is not guilty. I believe, however, that the members of the commission may not accept the basis of my argument with regard to the principle of the criminal responsibility of the superior officer, and I fear you might not fully understand immediately that the accused is not guilty of Charge II. Therefore, I am constrained to examine the true situation of the execution of the American prisoners and Smith, in order to indicate to you that the accused Nakamura is not guilty of Charge II.

"MM (4)"



I shall examine and demonstrate this point with regard to each specification.

Specification 1.

The accused Nakamura is charged in this specification, in that he unlawfully disregarded his duty as Commanding Officer of the First Detachment, South Seas Military Police, to control the operations of members of his detachment, and persons subject to his control and supervision, namely sergeant Kokubo, Corporal Nagatome, and other members of the armed forces of Japan, permitting them to kill one American prisoner of war. It is true that Kokubo and Nagatome were members of Nakamura's detachment. It was Commanding Officer Miyazaki, himself, however, who directly commanded and supervised the execution at the scene of the execution. This fact is clear from the testimony of witness Sano produced by the prosecution.

At that time, the accused Nakamura, was under the control and supervision of Miyazaki, as were Kokubo and Nagatome.

The act of Kokubo cutting a prisoner is not in any way a matter which disposed of by Nakamura's own intention under his authority as the Commanding Officer of the First Detachment, South Seas Military Police. Assuming that Nakamura was not present at the scene, Kokubo would have still beheaded the prisoner since it was the order of Miyazaki, and Nakamura being present, even if he had tried to prevent the beheading, he would have been prevented by the order of Miyazaki.

Since Kokubo was directly ordered by Miyazaki to behead the prisoner, Kokubo's act was entirely beyond the authority of Nakamura to permit or prevent it. Therefore, this responsibility should be imposed upon Miyazaki alone and it is erroneous and unreasonable to charge Nakamura with it.

Specification 2.

In this Specification, the accused Nakamura is held responsible because he unlawfully disregarded his duty as Commanding Officer of the First Detachment, South Seas Military Police, to take such measures as were within his power and appropriate in the circumstances to protect three American prisoners, in that he permitted the unlawful killing of these prisoners by Sergeant Major Kokubo, Corporal Nagatome and other members of the armed forces of Japan. At that time, however, Nakamura, who was the Commanding Officer of the First Detachment, did not in any way have such an alleged duty.

Let us examine this by evidence.

(a) According to witnesses Yajima and Sano, the 3 American POW's were under custody of Chief of Administration of the division headquarters up until the time they were executed and were not confined and under protection of the First Detachment Kempeitai.

(b) According to witnesses Sano and Nagatome, on the day of the execution the 3 American POW's were directly guarded by the guards of the division headquarters, and this state of affairs continued until just before the execution. And it was proved that just before the execution the prisoners were led to the hole one at a time by the guards of division headquarters by orders of Miyazaki.

In other words, the duty to take such measures as were within his power and appropriate in the circumstances to protect the prisoners was absolutely in the hands of division headquarters until just before the execution. When Miyazaki ordered and the prisoners come to the hole one by one, this responsibility fell directly upon Miyazaki himself. From the time the 3 American prisoners were held captive by the Japanese Armed Forces up until the time of the execution, there is absolutely no fact to show that the responsibility of protecting these

"MM (5)"

prisoners lay within the power of Nakamura, the head of the 1st Detachment of the South Seas Kempei-tai, and the prosecution has not so proved.

I believe it has been made clear that the responsibility of the superior officer concerning the execution of 3 American prisoners alleged in both specifications one and two is in both cases the responsibility of CO, Miyazaki.

Even though CO Miyazaki is dead and not present, the responsibility which should be borne by Miyazaki should be borne by him and him alone, and to shift this responsibility on a lower ranking officer because he is not present, is contrary to all concepts of justice.

Specification 3.

The accused Nakamura is alleged in specification 3 to have unlawfully disregarded and failed to discharge his duty as CO of the 1st Detachment, South Seas Military Police, and as Chief of the Police Section, Headquarters, South Seas Military Police and permitted Ajioka and Yamada to kill an Englishman, Smith, and he is asked for this responsibility.

All actions on the part of Nakamura in the Smith execution incident as written in his sworn affidavit submitted to this court are that he merely carried out as ordered the minute instructions including having Yamada, Kiyoshi shoot which he received from CO Miyazaki. Ordering Yamada to shoot was within the scope of the orders of CO Miyazaki, and it was not an act carried out by Nakamura's own initiative or his own cognizance based upon his duty as the commanding officer of the 1st Detachment or as Chief of the Police Section.

In order to make this point clear, let us presume in place of Nakamura First Lieutenant Sano, the Chief of the Special Higher Section received the orders from Miyazaki concerning Smith's execution and performed the identical actions which Nakamura performed.

In this case, Sano has no duty as the commanding officer of the 1st Detachment to command Yamada, but since it was Miyazaki's orders, he would have ordered Yamada to shoot. In the present case, any superior officer of the Kempeitai if he had been ordered by Commanding Officer Miyazaki could have permitted Yamada to shoot. Therefore Nakamura's act of ordering Yamada to shoot has no connection with his duty as the Commanding Officer of the First Detachment, consequently we cannot conclude that Nakamura unlawfully disregarded and failed to discharge his duty.

It is obvious, therefore, that the responsibility alleged in Specification 3 lies upon Miyazaki and not upon Nakamura.

Specification 4.

It is true that the Gasupan Detachment where Smith was held in custody was under the command of Nakamura, Commanding Officer of the First Detachment, and that Nakamura was senior person at the scene. The acts which Nakamura performed that day, however, were the same acts which could have been done by any officer of the Kempeitai who had been given orders by Commanding Officer Miyazaki. In other words, the duty alleged in this specification has no connection with that of the Commanding Officer of the First Detachment and The Chief of the Police Section, and it does not follow that he did not discharge his duty. Nakamura is not responsible; Miyazaki alone should be held liable for it.

All in all, the responsibility alleged in Charge II lies not upon Nakamura, but upon Miyazaki the Commanding Officer of the unit. Therefore, I hold that the accused Nakamura is not guilty as of Charge II.

"MM (6)"



III. Conclusion.

I wish to express my sincere regret that the three American aviators, who valiently fought for their country and honorably discharged their duties, were executed in the hands of the Japanese forces after being unfortunately captured as prisoners, and that Smith, an aged man, was executed. I wish to extend my deepest compassion to their bereaved families. Also, I regret that the accused Nakamura was involved in these executions;

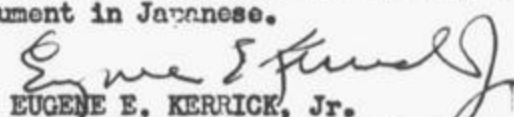
But, I believe, I have gained your full understanding that the accused Nakamura participated in these executions because of the various unavoidable circumstances, and that he was just another of the so-called little people and his responsibility correspondingly little, as I have stated at the outset of my argument.

Mr. President and the Members of the Commission. In judging the accused Nakamura, I ask your merciful decision. I request you take into consideration the battle conditions and other circumstances prevailing at that time.

Respectfully,

SANAGI, Sadamu.

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

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

"MM (7)"

1116

## 辯論

弁護人 唐澤高美

委員長並委員各位

本弁護人が以下述べようとする弁論は、本件三名、  
被告中小久保千尋＝対するモノであります。

被告小久保は、本件第一起訴第一罪状項目、  
殺人罪＝問責せられて居るわけであります。即ち

検事側は、被告小久保が、昭和19年9月4日頃  
アキカ人俘虜ヲ軍刀＝ヲ斬首シテ主犯ガレニ  
証拠トシテ証人佐野義市並被告小久保、  
陳述書ヲ本法院ニ提出シ、てあります。

以下、私の言、証拠ヲ検討シ、被告小久保、  
刑ヲ責任ニシキ立入ッテ居る点見たいと思つてます。

被告小久保は、果シテ俘虜ヲ斬首シ殺人罪ヲ犯シ  
てありますやうか。

この問＝対する答、本法院＝提出せられたる諸証  
拠が最も明解＝物語つて居るわけであります。

即ち検事側、証人中本件、殆ど全貌ヲ証言シ  
且ル刑現場＝廣く唯一、証人たる佐野、  
証言ヲ茲ニ引用シ、

即ち検事側、直接訊問41、問＝対シ彼は  
(前男)

三人目ヲ宮崎隊長が現場ニ居る小久保＝「小久  
保切レ、ト命じ、中村大尉が「小久保切レ、



ト隊長、命令ヲ傳達シタノ様ニ記憶スル  
小久保常長、所持シタヲ九五式軍刀デ首ニ  
切リタケタノ然レ上手ヲ切レタセシメタノ知  
ル見タトコロデハ、軍刀、巾着ニシテ切リカツタ  
ト記憶シタス。ソレデ、宮崎隊長ハ“小久保  
切レタ底ナイン”ト言フテ、宮崎隊長ハ更ニ  
自分、拳銃デソノ三人目ヲニ、三番射ヲ  
殺シタノ様ニ記憶シタス。

ト証言シテ居ルデアリマス。

更ニコノ案ニ関スル被害小久保、口供書第9項  
及10項ヲ見ル。

9項、最後、船行士1人ニ対シ中村大尉、  
“小久保切レ、ト直接知ニ命令シタノ”

10項

知ハ上氣シテ居タノ事ヲ為ニ見タカツカズ  
軍刀(九五式)ハ、船行士、上衣、襟ニ当リ全然  
斬レタセシメタノ

ト述バテ居ルデアリマス。

而シテ被害小久保ハ事件ニ起訴セラレ、ソノ立  
証、為人ニ用ヒラレタトコロ、証人ハ、以上、二個、  
証人ハ、然ルミデアリマス。

扱テコノ二ツ、証人ハ、ヨクテ明確ニセラレタ事。

(1) 被害小久保、宮崎隊長並中村大尉、命令ニヨッテ  
停屠ヲ斬首セシメタノ

(2) 而シテ斬首セシメタルモ、ソノ目的ヲ達シ得ズ

俘虜、被告小久保、九五式軍刀＝ヨツテハ切  
レカツツト

(3) ヲコデ 空陸隊長が自ラ拳銃ヲ射殺シ  
21＝兵＝ツイテ、最早争ツ余地カナイ迄立証セ  
ラル。之ニ又スル何等、証拠ヲ提出サレ居コセン。  
証拠、21 明確ナル事實＝基テスル 立入ッテ  
事件ヲ考察シテ見度トスル。

殺人罪カ人、生命ヲ奪フ犯罪デ、PWT 言フ、常識  
ノ領域＝立入ッテ居ル程明白＋法律的 基本觀念  
デアリマス。或人ガ 殺人罪＝問責セラルルガ爲  
メニ、彼ノソノ人、悪意の攻撃＝ヨツテ他人ノ死ト  
言フ結果ヲ発生セシメ、而シテソレガ立証サレネハ  
ナリコセン。然ルニ 事件 被告小久保＝対シテ  
コ、基本的要素ガ立証セシメテアリマセラルカ。尤  
寧ロ 全証拠、彼、攻撃ガ俘虜、死ト言フ結果ヲ  
発生セシメ＋カツツト立証シ、テアリマス。

果シテ 然レハ 第三章目、アメリカ人 俘虜、如何ニ  
シテ殺サレ、テアリマセラルカ。

被告小久保ガ 彼、九五式軍刀ヲ振ル上ノ時ハ、誰  
カ＝俘虜、生キテ居タデアリカ。然レハ 被告小久保ガ  
コ、九五式軍刀ヲ振ル下ノ時 俘虜、生キテ居タデ  
アリカ。或、最早死ンデ居タデアリカ。21 兵  
ガ 事件 被告小久保＝トツテ最モ重要ナル兵デアル  
事、論ヲ俟タシ。

是ゾ 証拠＝ヨツテ 被告小久保ガ 彼、軍刀ヲ振ル



下口の時停屠、首、如くアロカ 電カ、見ヤウ  
校ア側、証人佐野、の、事ヲ。

九五式軍刀ヲ切リツケタ ウツレトカッタ 和、見ヲ  
トカテ、軍刀、中位カ切レトカツト記憶ス  
ト証言ニ更ニ校ア側ニツテ提出セシメ小久保、口供書  
ニ、 "和、上ニテ居タ為 見ヤカツカス 軍刀、"

飛行士、上ニ 襟ニツテ全然 斬レセシメタ、  
ト述ベテ居ルデ アツス。 2、校ア側、証人ニツテ  
(此カ 金銀デカ) 明瞭ト云。 小久保、振ッ下ロツ  
カ、停屠、首ヲ切リ得トカッタト云ツテアツス 而モ切  
レタ者ハ 定崎隊長。 "小久保切レテ居タイゾ"ト  
云ツテ自ラ 彼、拳銃ヲ停屠ヲ射テ殺シテアツス。  
以上、論述ニ於テ 第三卷目、停屠、定崎隊長、射殺  
ニツテ此ノ結果ヲ生カシタト云。 明白ニツツ  
ト 思フ、デ アツス。

第三卷目、停屠、結局定崎隊長、拳銃ニツテ処刑  
サレタ。

2、定崎隊長、拳銃ヲ発射サレタ前ニ 被害小久保、  
彼、九五式軍刀ヲ停屠ニ切リツケタ、デ アツス。  
72デ 和、3、被害小久保、行方ト 第三卷目、  
停屠、又云ツニ、事實ニ関シ 若干考察ニテ見度イト  
思フ。

アキナ法律學 26 卷 45 節ニ。

人、彼、行方カ此ノ 罪因ヲアツト云ヒ得タレバ

殺人=ツテ刑<sup>上</sup>, 責任<sup>ハ</sup>ナ<sup>シ</sup>

ト論<sup>ハ</sup>セ<sup>テ</sup>ヤ<sup>ル</sup>. 即<sup>チ</sup> 或<sup>ノ</sup>人=殺人罪<sup>ノ</sup>刑<sup>ヲ</sup>責任<sup>ヲ</sup>  
負<sup>ハ</sup>ス<sup>ル</sup>場合=ツ<sup>ノ</sup>人、行為=ツ<sup>テ</sup>他人、死<sup>ト</sup>言<sup>フ</sup>  
結果<sup>ハ</sup>発生<sup>シ</sup>。換<sup>言</sup>ス<sup>レバ</sup> 行為<sup>ト</sup>死<sup>ト</sup>間<sup>ノ</sup>結果<sup>ト</sup>、間<sup>ノ</sup>  
因果<sup>ノ</sup>関係、然<sup>レ</sup>モ<sup>ハ</sup>絶対<sup>ニ</sup>必要<sup>ナ</sup>ラ<sup>ズ</sup>。

果<sup>シ</sup>テ然<sup>レ</sup>モ<sup>ハ</sup>被害<sup>者</sup>小<sup>久</sup>保、行為<sup>ト</sup>停<sup>尸</sup>、死<sup>ト</sup>間<sup>ノ</sup>  
二、因果<sup>ノ</sup>関係<sup>アリ</sup>。

二、因果<sup>ノ</sup>関係<sup>アリ</sup>。在<sup>リ</sup>テ<sup>ハ</sup>「<sup>決</sup>得<sup>ル</sup>論<sup>」</sup>、基礎<sup>ヲ</sup>為<sup>ス</sup>。原  
因<sup>ト</sup>結果<sup>ト</sup>、必然<sup>ノ</sup>の<sup>ヲ</sup>関係<sup>ヲ</sup>理解<sup>ス</sup>ル<sup>ハ</sup>、ツ<sup>ノ</sup>人  
原因<sup>ノ</sup>行為<sup>ヲ</sup>正確<sup>ニ</sup>認識<sup>シ</sup>テ<sup>ハ</sup>ナ<sup>ラ</sup>ズ。二、  
「<sup>全</sup>」<sup>ノ</sup>証<sup>明</sup>論<sup>ニ</sup>帰<sup>ス</sup>。

佐野、証<sup>言</sup>及<sup>ビ</sup>小<sup>久</sup>保自<sup>白</sup>、口<sup>供</sup>書<sup>ヲ</sup>見<sup>テ</sup>全<sup>ク</sup>共通<sup>シ</sup>  
居<sup>ル</sup>事<sup>ヲ</sup>。停<sup>尸</sup>、首<sup>ハ</sup>切<sup>レ</sup>カ<sup>ツ</sup>人<sup>ノ</sup>言<sup>フ</sup>事<sup>ヲ</sup>。死<sup>ト</sup>間<sup>ノ</sup>結果<sup>ト</sup>、  
生<sup>カ</sup>ツ<sup>ル</sup>程<sup>ニ</sup>切<sup>レ</sup>カ<sup>ツ</sup>外<sup>ニ</sup>言<sup>フ</sup>事<sup>ヲ</sup>。既<sup>ニ</sup>明白<sup>ナ</sup>ル。若<sup>シ</sup>モ<sup>ハ</sup>小<sup>久</sup>保、振<sup>下</sup>下<sup>ノ</sup>  
軍<sup>刀</sup>=ツ<sup>テ</sup>停<sup>尸</sup>が<sup>死</sup>シ<sup>ト</sup>モ<sup>ハ</sup>何<sup>故</sup>=富<sup>崎</sup>隊<sup>長</sup>  
が「小<sup>久</sup>保切<sup>レ</sup>テ<sup>ハ</sup>ナ<sup>ラ</sup>ズ」ト<sup>モ</sup>言<sup>フ</sup>。彼、拳<sup>銃</sup>ヲ<sup>發</sup>  
射<sup>シ</sup>テ<sup>ハ</sup>ナ<sup>ラ</sup>ズ。二、富<sup>崎</sup>隊<sup>長</sup>、拳<sup>銃</sup>、發<sup>射</sup>  
シ<sup>テ</sup>停<sup>尸</sup>、被害<sup>者</sup>小<sup>久</sup>保、行為<sup>ト</sup>停<sup>尸</sup>、死<sup>ト</sup>間<sup>ノ</sup>結果<sup>ト</sup>、  
因果<sup>ノ</sup>関係、中<sup>断</sup>ス<sup>ル</sup>事<sup>ヲ</sup>。

ア<sup>リ</sup>テ<sup>ハ</sup>法律<sup>学</sup> 26 卷 50 節=

共<sup>ニ</sup>謀<sup>ハ</sup>カ<sup>ツ</sup>場合=於<sup>テ</sup>若<sup>シ</sup>モ<sup>ハ</sup>死<sup>ハ</sup>否<sup>カ</sup>別<sup>ニ</sup>人<sup>ニ</sup>  
ツ<sup>テ</sup>死<sup>シ</sup>場合=人<sup>ノ</sup>法律<sup>上</sup>殺人<sup>罪</sup>ヲ  
有<sup>ル</sup>事<sup>ヲ</sup>得<sup>ル</sup>事<sup>ナリ</sup>。

若<sup>シ</sup>モ<sup>ハ</sup>被害<sup>者</sup>、行為<sup>ハ</sup>彼<sup>ノ</sup>訴<sup>述</sup>セ<sup>テ</sup>ヤ<sup>ル</sup>。



此、直接、原因デタイが判明シテソレ  
彼が何等関係、ナリ中間ニ在リ他、原因  
ニ基クモナリソレ若シソレナカリセハ此  
発生ニカフデアコト思ハルモナリ新  
條約的ニ原因、殺人、起訴ニシテ立派  
ナキ獲トナ

ト論セシテハ、此ノ事件ニ適用スレハ被害小  
久保、行為並ニ停廢、死トシテ結果ト、関係、明  
瞭ニ解決セシテナルデアリマス

唯前記引用、アソコ法理、"共謀ナリ  
場合ニ於テハ、トモ限定的ニ言葉ヲ用ヒテハ  
コト、見モズル事件ヲ誤解ニ導キ易ク、一應説明  
セリ。共謀ニハ、二人以上、多数、高カ互ニ  
意思、交換ヲシテ居ラナレバナリ。然ルニ模  
例、事件ニ於テ被害小久保ト宮崎隊長ト、間ニ  
カル意思、交換ガ為サレトコト、全然主張  
モナレナレバ又立証モナレバナリ。加之事件  
起訴狀ニ、"各個ニ相共ニ、ト述べシテハ  
オケテアツテ共謀ナル言葉、全ク見出デ得ナ  
シ。従而事件、停廢ヲ知ル刑ニ為ニ、行為ガ  
為レリ。然レハ、各個、行為、被害小久保ニ  
斬首ノ命シタ宮崎隊長ニトコト、一個、意思ガ  
外部的ニ二個、行為トコトテ發現シテア  
ツテモ、間ニ意思、連続ガルカ然レ  
被害小久保ニトコト、彼自身、行為ニツキテ、ミ

彼、意思ヲ認めず、出来、然る、後ニ為サレシ  
宮崎隊長、射撃ト云、行為ニツイテ、何等小久保、  
意思ヲ求めず、出来、若シ小久保が、自分、  
失敗、故、宮崎隊長ニ、知リ、下サイト、頼ム  
トス、ラハ、勿論、彼、意思、後、隊長、行為  
、上ニ、継続、サレ、テ、ア、ラ、ウ、従、而、後、行為ニ、  
刑ヲ、責任ヲ、負、ハ、ネ、ハ、ナ、ラ、ズ、可、然、ト、ス

然、下、ラ、本、法、廷ニ、顯、出、セ、ル、諸、証、拠、ニ、ツ、テ、  
小久保が、更ニ、宮崎ニ、依頼、シ、テ、立、寄、サ、レ、ル、ト、カ、ナ  
カ、ラ、ズ、従、而、宮崎隊長、射、撃、行為、被、害、小久  
保ニ、ツ、テ、全、ク、無、関、係、事、柄、ニ、属、ス、更ニ、  
宮崎隊長、射、撃、行為、被、害、小久保、意思、今、入  
ル、余、地、ナ、ク、為、サ、レ、タ、ト、被、害、小久保、が、斬、  
断、シ、テ、後、直、ニ、宮崎隊長、が、被、害、拳、銃、ニ、ツ、  
射、撃、シ、テ、佐、野、証、言、ヲ、見、シ、ハ、明、白、デ、ア、ラ、ズ  
従、而、彼、行為、が、死、亡、結果ヲ、發、生、セ、ル、次ニ、為、サ  
レ、シ、宮崎、行為、ニ、ツ、テ、初、メ、死、亡、結果ヲ、發、生、セ、  
ル、ト、云、フ、本、件ニ、於、テ、被、害、小久保ニ、彼、行為  
後、全、ク、別、個、體、立、ニ、為、サ、レ、シ、宮崎、行為、ニ、ツ、テ、  
發、生、シ、ル、死、亡、結果ニ、ツ、テ、刑、ヲ、責任ヲ、問、フ、ト、  
明、カ、ニ、不、可、能、デ、ア、ラ、ウ

立、論、ヲ、代、フ、テ、宮崎隊長、が、最初ニ、停、屠ヲ、命、ジ、  
タ、が、殺、害、目的ヲ、達、セ、ル、次、イ、テ、被、害、小久保ニ、  
命、ヲ、拳、銃、ヲ、射、シ、セ、ル、場合ヲ、假定、シ、テ、見、テ、  
コ、レ、場合ニ、前、者、宮崎隊長、ノ、行為、結果、



死が發生せし小久保、射撃=ヨリテ死が生じタルニ  
尚且 小久保、射撃=ヨリテ生じシ死=ヨリテ責任ヲ負ハル  
ナリ。何故ナリハ 前者カ 後者、意思、繼續が存  
スルカヲテアル。即チ當時、小久保=命スルヲヨリ  
テ自己、意思ヲ繼續セシムルヲホシタリ。然レテ  
事件ニ於テハ 前述セシ如ク、小久保が 官崎=死ニ更  
ニ自分、意思ヲ實現セシムルヲ依頼シタル。事件審理=  
於テハ 上述セシカコトナリ。

要約スレバ 被告小久保が 官崎中村カ 命セラル  
俘虜ヲ処刑セシメテ後、軍刀ヲ振り下ロシタ 時 =  
彼、事件ニ於ケル行為ハ 終了シタ、デアルニ  
シテ 舞臺ハ 是レヲ 被告小久保、意思トハ 別個  
独立、官崎、意思、行動=ヨリテ 俘虜ハ 殺セラル  
デアルニ。

以上説論セシ如ク 被告小久保、行為ハ 俘虜、  
死トシテ 結果、發生セシメタコトナリ。果シテ然ラバ  
被告小久保ニ於テハ 事件刑罰責任、限界ハ 官  
崎隊長カ 俘虜ヲ 射撃シ 直前迄、彼、行動ニ  
局限セシメバナラヌトナリ。何トナレハ 意思ナキ  
トモ = 刑罰責任ハ 生じ得ナリカヲテアル。

然ラバ 我々コト 被告小久保、刑罰責任ヲ如何ニ  
解釋シナケレバナラヌカト云フ 問題ニ當面シ。

被告小久保ハ 成ル程 俘虜、殺害、目的ハ 果サカ  
ナカ 彼ハ 俘虜ニ 向ッテ 軍刀ニ 以テ 襲撃ヲ加ヘタデアル  
ニ。是ヲ 法律的ニ 見レバ。

矢ッ彼ハ殺人、意思ヲ以テ存続ニ切リツケメカシ、  
結果ハ発生シカツタ。故ニ彼ハ殺人未遂罪ヲ以テ  
論ズベキデアル。

ト云フ解釋が成リ立テ得ル。然レトモ日本及大陸  
諸國ニ於ケル刑法理論カラスレハ斯ク解釋スル  
外ガ最も妥當ナルデアル。然レウ、アメリカニ於テハ  
本件、如キ殺人未遂罪ヲ「殺人、意思ヲ以テスル  
脅害」ト呼ンデ居ル。即チ

N. C. B. 457 節 犯罪及刑罰、制限表ニ云フ  
「殺人、意思ヲ以テスル脅害」トハ刑罰カ揚ゲラ  
レテ居ルデアリマス。即チ本件被害ノ人係カ  
存続ニ対シ軍刀ヲ以テ切リツケメルモ、此ナル結  
果カ発生シカツタ様ナ。カル場合ニハコ、殺人、  
意思ヲ以テスル脅害ニ該スルミナト考ヘラレシ  
結果、発生シカツタ行為ニ対シ既遂ノ責ヲ負ハシ  
ムト、出来ナイハ。世界各國何レ國、刑法理論  
モ認メテ居ルト云ハデアリマス。

ウーニトニ刑法論 212 節ニモ

若シ完成シテ居レバ既遂罪ニテ起訴スベキ  
デアルカ、未遂ハ未先成デナレハナラヌ。  
然レウ、セノモ何等カ、認識ニ得ベキ犯罪、  
断片カナレハナラヌ。ソレテ未遂ハソレヲ  
企圖シ人、意思カ、離レタ事情ニヨリテ  
妨ゲレナレハ完成スルゾウト云フ様ナ  
進行情態ニナレハナラナシ。



1 論じ居る以上より考へてモ 結果、発生した行為ニ  
対し既遂罪、責任ヲ問フ事ト出来セシム

従而知ル、被告小久保ニ対スル事件、刑ヲ責任、  
殺人、意思ヲ以テスル 暴行等ニ犯罪ニ該当スルモ  
ト確信スル

従而知ル、被告小久保ニ対シ事件殺人罪ニツキ無罪  
ト言渡 アツテ然ルベキモノト考へル

然レモ若シ殺人罪、基礎、下ニ為レバ 起訴ニ対シ  
殺人、意思ヲ以テスル 暴行等ニツキテ、判決ヲ維持シ  
得ルモノトシテモ ソノ刑ハ、N.C.B. 45ノ節犯罪  
及刑罰、制限表ニ基キ 20年ヲ超ル事ト出来ナ  
シ而モ被告小久保ハ、彼、上官タル宮崎並中村、  
命令ニツテ為サレシモノデアツテ情状酌量スベキモノ  
ト理由アルモノト考へル事アリ

是レニ對シ、被告小久保、携行シ 銃 砲 軍 需、遺骨  
ニツキ一言ツケ加ヘヤウ

何故ニ被告小久保ハ 銃 砲 軍 需、遺骨ヲ現場ハ持ツテ  
行ツタ、デアリウカ

2 其ニ關シテハ 模範例ニツテ証拠トシテ法廷ニ  
提出セバ 被告小久保、口供書第4項ニ

夫レト同時ニ知ル、何カシテ恐怖ヲ感じマシタ  
ハ 恐怖ヲ除クモノニ 銃 砲 軍 需、遺骨ヲ携行  
シタウト突然思ヒ付キマシタ

ト述バテ居ルデアリマス

即ち被害小久保が、この発島、遺骨ヲ携行シテ理由、  
彼が事件処刑ニ対シテ現場、行方不明ニシテ恐怖  
心ヲ抱キ、自分、死持ヲカッセル為メニ持参シテモテ  
アト言フが了解出来テアラス。偶々現地  
ニ於テ宮崎隊長が「発島、仇ヲ却レト言フ事ト  
シテモコレニヨリテ被害小久保が發島ニ対スル  
復讐心カ彼、遺骨ヲ持参シ斬首シト云フ結論  
ヲ導キ出サシ。被害小久保、全ク彼自身、  
死持ヲ殺メ処刑ニ対スル恐怖ヲ除ク為メニ持  
ツテ行方不明ニテアツテ發島、仇ヲ却ル為ニ遺骨ヲ  
持ツテ行方不明ニテ。能ク対シテ。処刑カ發島、  
仇ヲアトシ。全ク現場ニ於ケル宮崎隊長、瞬  
間の感情ニ違ハシモテアル。この小久保、遺骨  
持参問題ヲ殊更ニ事件処刑ト結び合ヒ發島  
、復讐心ニヨリモテアト考ル事。全ク誤レハ  
倫見ト云フ事ナシ。成ル程校事例、  
証人佐野義市、証言ニヨリ。宮崎隊長が小  
久保却レト命ジタ時「發島、仇ヲ却ラ、ト怒リ  
シ小久保。發島、仇ト云フ様ニ記憶スル  
証言カ彼、この事ニ関スル証言、必ずしも真実、  
理解出来シ。ヨシハソウデアツタシテモ、  
＝宮崎隊長、肉体的感情ニ属スル事デアツテ何事  
他、小久保等ニ関シテ事デハナシ。又被害小久保、  
悪性ヲ象徴スル事デハナシ。  
処刑、現場ニ於テ殊ニ被害小久保が惨状ヲ





ARGUMENT FOR THE DEFENSE IN THE CASE OF NAKAMURA, KAZUO, ET AL. DELIVERED BY  
MR. TAKAMI KARASAWA, DEFENSE COUNSEL.

May it please the commission:

I would like to deliver this argument in behalf of Kokubo, Chihiro who is one of the three accused in this case.

The accused Kokubo is charged with murder in Specification 1 of Charge I. The Judge Advocate maintained that the accused Kokubo beheaded an American prisoner of war with a sword on or about 4 September 1944, and introduced into evidence the testimony of witness Sano, Giichi and the affidavit of the accused himself in order to prove his allegation.

Now I would like to examine the evidence and make a detailed inquiry concerning the criminal responsibility of the accused.

Is it sufficiently certain that the accused Kokubo beheaded the prisoner and committed murder? The evidence introduced into this court will give a definite answer to this question

Sano was the only prosecution witness who was at the scene of the execution and who testified to almost the entire procedure at this incident. I shall quote his testimony as follows:

To the direct examination of the Judge Advocate, Q. 41, he testified: "Commanding Officer Miyazaki ordered Sergeant Major Kokubo who was at the scene, 'Sergeant Major Kokubo, cut.' I recall at this time Captain Nakamura also relayed the orders of Commanding Officer Miyazaki to Kokubo by saying, 'Kokubo, cut.' Sergeant Major Kokubo, with his type 95 sword which he had, cut at the neck but it didn't cut well. From what I saw he cut only about the width of his sword, therefore, Commanding Officer Miyazaki said, 'Kokubo, it hasn't been cut.' And then Commanding Officer Miyazaki with his pistol shot this third prisoner two or three times and killed him, as I recall. "

Let us see the affidavit of the accused Kokubo concerning this point. He states in Paragraphs 9 and 10 thereof as follows:

"9. Captain Nakamura ordered me directly in regard to the last aviator, saying, 'Kokubo, cut.'"

"10. Because the blood rushed to my head, I did not aim and the sword (Type 95) only hit the collar of the aviator's coat and did not cut him."

Only the above mentioned two items of evidence were introduced in order to prove the allegation in the charge against the accused Kokubo in this case.

The evidence proved the following facts:

- (1) In accordance with the orders of Commanding Officer Miyazaki and Captain Nakamura, the accused Kokubo tried to behead the prisoner.
- (2) Although Kokubo tried to behead the prisoner he could not cut the prisoner with his Type 95 sword.
- (3) Then Commanding Officer Miyazaki, with a pistol, shot him to death.

These three points were proved beyond reasonable doubt, and no counter-evidence was introduced to disprove them.

"00 (1)"



In accordance with these clearly established facts, I would like to examine this case in more detail.

That homicide is a crime of killing a human being is so clear legal conception that it is deemed common knowledge. In order to charge a person with murder, it should be proved that the death of another person is caused by his malicious assault. In this case, however, was this fundamental element proved? No. The evidence proved that the assault of Kokubo did not cause the death of the prisoner.

Then, how was the third American prisoner killed. The prisoner was definitely alive when Kokubo raised his Type 95 sword overhead. Then, was the prisoner alive immediately after Kokubo struck with this Type 95 sword, or was he already dead? Needless to say, this is the most important issue for the accused Kokubo in this case.

Regarding this point, Prosecution witness Sano testified: "Sergeant Major Kokubo, with his Type 95 sword which he had, cut at the neck but it didn't cut well. From what I saw, he cut only about the width of his sword." In Kokubo's affidavit which the prosecution introduced into evidence, it is stated: "Because the blood rushed to my head, I did not aim and the sword (Type 95) only hit the collar of the aviator's coat and I did not cut him."

According to this evidence (as a matter of fact that is all the Judge Advocate proved), it is clear that the sword which Kokubo struck did not cut the prisoners neck. As the neck was not cut, the Commanding Officer Miyazaki said, "Kokubo, it hasn't been cut", and then he shot him with a pistol two or three times and killed him.

As I have mentioned, it is sufficiently clear that the death of the third prisoner was caused by the shots fired by Commanding Officer Miyazaki.

After all, the third prisoner was executed by the pistol of Commanding Officer Miyazaki. The accused Kokubo struck with his sword before these shots were fired.

Now I would like to examine the two facts, namely the act of the accused Kokubo and the death of the third prisoner.

26 American Jurisprudence, Homicide, Section 45, reads: "A person is not criminally responsible for a homicide unless his act can be said to be the cause of death." In order to burden a person with criminal responsibility of homicide, it is essential that the death of another be caused by the act of the person, himself. In other words, there must be a causal relation between his act and the death.

Then, is there any causal relation between the act of the accused Kokubo and the death of the prisoner? In order to understand the inevitable relation between a cause and its result, we should accurately know the act which is deemed to be the cause. So we come back to the evidence of this case.

Both the testimony of Sano and the affidavit of the accused himself state the neck of the prisoner was not severed. It is clear that the sword cut the neck to such an extent that the prisoner did not die of the wound inflicted by the cut. If the prisoner had died of the strike with the sword by Kokubo, Commanding Officer Miyazaki would not have said, "Kokubo, it hasn't been cut", and would not have fired shots with his pistol.

These pistol shots fired by Commanding Officer Miyazaki cut off the causal relation between the act of the accused Kokubo and the death of the prisoner.

"00 (2)"

1130

26 American Jurisprudence, Homicide Section 50 reads: "In the absence of conspiracy, one cannot be lawfully convicted of homicide if the deceased dies from another and distinct wound inflicted by a different person...If it appears that the act of the accused was not the proximate cause of the death for which he is being prosecuted, but that another cause intervened, with which he was in no way connected, and but for which death would not have occurred, such supervening cause is a good defense to the charge of homicide."

Let us apply this to this case. This paragraph gives us a clear solution by which to determine the relation between the acts of the accused Kokubo and Commanding Officer Miyazaki, and the death of the prisoner.

However, we should notice that the above cited paragraph says: "In the absence of conspiracy, ..." This limitation might cause misunderstandings in this case so I would like to explain it. For the existence of conspiracy, it is necessary that two or more persons plotted before the commission of their acts. In this case, however, the judge advocate did neither maintain nor prove that there was such a plot between the accused Kokubo and Commanding Officer Miyazaki. Besides, the specification states, "...did, each and together,..." but it does not allege that there was a conspiracy.

Two acts were done in execution of this prisoner in this case. These two acts, although they appeared two in their external appearance were derived from one origin -- the will of Commanding Officer Miyazaki who ordered the accused Kokubo to behead. Miyazaki's will continued to exist throughout the two acts. However, the accused Kokubo, although he had willed his own act, did not will the shots of Commanding Officer Miyazaki who fired them after Kokubo did his own act. If Kokubo had asked Commanding Officer Miyazaki by saying, "Will you execute him because I failed", his will would have continued to exist throughout the act of the commanding officer. So in that case, he ought to be criminally responsible for Miyazaki's act which was done after his own act. But the evidence introduced in this court did not prove that Kokubo asked Miyazaki such a thing. Therefore the accused Kokubo had nothing to do with the act of shooting of Commanding Officer Miyazaki.

According to the testimony of Sano, Miyazaki shot the prisoner to death with a pistol immediately after Kokubo failed to but, but it is clear that the shots of Miyazaki were fired without any connection with the will of Kokubo.

Therefore, the act of the accused did not result in the death of the prisoner but death was caused by the act of Miyazaki which followed Kokubo's act. So it is clearly impossible to charge the criminal responsibility of the accused for the death of the prisoner which was caused by Miyazaki's act which was entirely independent from the act of the accused.

Now let us change their positions, and assume that Commanding Officer Miyazaki cut first failing to kill the prisoner and ordered the accused Kokubo to shoot him with a pistol.

In this instance, the act of Miyazaki is not the cause of the death but the death is the result of Kokubo's shooting, yet Miyazaki is responsible for the death caused by the shooting of Kokubo. Because there continuously exists the will of Miyazaki from the former to the latter. Miyazaki could continue the will then by giving an order to Kokubo.

However, in the pending case, it is not proved that Kokubo asked Miyazaki to effectuate his will, as I have already mentioned.

"00 (3)"



In short, the act of the accused Kokubo in this case was completed when he was ordered by Miyazaki and Nakamura and struck with his sword in order to execute the prisoner. Then the stage turned. And the overbearing will of Miyazaki continued on and the acts were independent of Kokubo, and then the prisoner was killed.

As I have explained, the act of the accused Kokubo did not result in the death of the prisoner. Then, the criminal responsibility of the accused Kokubo in this case is limited to his act which he did before Miyazaki shot the prisoner, because where there is no intent there is no criminal responsibility.

Now, we are confronted with a problem, how should we interpret the criminal responsibility of the accused Kokubo? It is true that the accused Kokubo did not attain the purpose of his killing the prisoner, but, anyway, he assaulted and struck the prisoner with a sword. If we observe this fact from a legal view-point, the following conclusion is possible:

First, the accused assaulted and struck the prisoner with intent to commit murder, but the death was not caused by his assault. Therefore, he should be charged with attempt to murder. With the theory of criminal law of Japan and the countries in Europe, this conclusion is at least the most proper one. However, in the United States, name such an attempt at murder is termed "Assault with intent to commit murder."

Section 457, Naval Courts and Boards, Schedule of Offenses and Limitations, enumerates such a crime as "Assault with intent to commit murder." The accused Kokubo in this case struck the prisoner with a sword, but the prisoner did not die. In this instance, I think that his act falls under "Assault with intent to commit murder" enumerated in that schedule. However, the criminal theory of any country of the world will admit that an act which did not bear a result cannot be charged as a complete crime. Section 212 of Wharton's Criminal Law reads: "...It (an attempt) must be unfinished, as otherwise the indictment would be for the complete crime, but there must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." As you see in this stipulation, an act which did not bear a result cannot be charged as a complete crime. I believe, therefore, that the accused Kokubo in this case is criminally responsible for the crime of "assault with intent to commit murder". I think that the accused Kokubo should be found "not guilty" for the alleged crime of murder.

Even if the accused be found guilty with "assault with intent to commit murder," in spite of his being charged with murder, the punishment for his crime cannot exceed 20 years according to Section 457, Naval Courts and Boards, namely, Schedule of Offenses and Limitations. Besides, it should be further noted that the accused Kokubo acted in accordance with the orders of Miyazaki and Nakamura both of whom were his superiors. So there should be a reasonable ground for the mitigation of his punishment.

Lastly, I would like to explain about the ashes of Sergeant Ikushima which the accused Kokubo carried with him. Why did the accused Kokubo carry the ashes of Sgt. Ikushima to the scene? In regard to this question we have the affidavit of the accused Kokubo which the judge advocate introduced into evidence in this court. Paragraph 4 of the affidavit reads: "4. At the same time as that, I felt afraid somehow or other. I suddenly thought of taking the ashes of Sergeant Ikushima in order to rid myself of this fear." We understand from the above-mentioned statement that the accused feared even to go to the scene of the execution and that he took the ashes of Sgt. Ikushima in order to compose himself.

"OO (4)"

1132

Even if the commanding officer, Miyazaki, happened to say at the scene of the execution, "Avenge Ikushima on him! Cut!", that will not draw a conclusion that the accused Kokubo brought the ashes to avenge Ikushima on the prisoner and cut. The accused Kokubo brought the ashes in order to compose himself and to rid himself of fear, not for the revenge of Ikushima. It is nothing but a momentary feeling of Commanding Officer Miyazaki at the scene that the execution was done for the revenge of Ikushima. To intentionally like the fact that Kokubo had the ashes with the execution and take this as having been for the revenge of Ikushima is definitely a mistake and a prejudice. It is true that the prosecution witness, Sano, testified, "When Commanding Officer Miyazaki ordered Kokubo to cut, Commanding Officer Miyazaki shouted in a loud voice, 'Sergeant, take revenge for Sgt. Ikushima!' Therefore when Sgt. Major Kokubo swung his sword I recall him saying that it was for the revenge of Ikushima." I can not think that his testimony concerning this point is the truth. Even if it be the truth, this testimony expresses only the feeling of Commanding Officer Miyazaki and it neither has anything to do with Kokubo nor shows that Kokubo is a man of evil character.

The judge advocate took the question of who had the ashes of Ikushima when the accused Kokubo cut the prisoner in this court. However, whether the accused Kokubo had them hanging around his neck or handed them to another person has nothing to do with the killing of the prisoners in this case. How can we think that the ashes themselves could aid or assist the performance of the execution?

If there had been a conspiracy in this case between Miyazaki and the accused, the accused would have had the same will as Miyazaki. But as I stated before no one maintained nor proved that this offense is in conspiracy of these persons. Then whatever did Miyazaki think of these ashes is nothing but the thought or feeling of Miyazaki and is quite irrelevant to the issue of the case of these defendants. Besides, Kokubo took the ashes in order to rid himself of his fear. Even if there had been a feeling of revenge in the mind of Miyazaki, Kokubo could not have known that. The accused Kokubo tried to behead the prisoner in accordance with the orders of Miyazaki and Nakamura, but he failed. And the prisoner was killed by an entirely different cause, the shots fired by Commanding Officer Miyazaki.

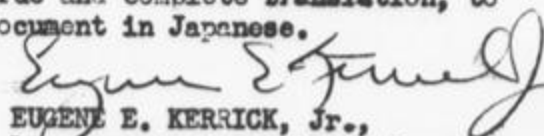
I believe that limit of his criminal responsibility has been made clear.

I would like to finish this argument by pleading with you to find the accused Kokubo not guilty of the crime of murder.

Respectfully,

KARASAWA, Takami.

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

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



弁 論

昭和二十三年一月二十六日

弁 護 人 鎌 田 日 出 夫

本弁護人は被告永留義盛の爲に弁論せんとするものである。  
凡そ人は彼自身が直接に爲した行爲に付てのみ責任を負ふと云ふのが刑法の基本原則である。然し乍ら法律は或る事情の下に於ては此の原則を或は修正し或は拡張する。此の例外の一つは共犯である。共謀が存在する場合に於ては、共謀者の一人が共謀者の間に成之れた共通の不法目的の促進或は遂行の爲に爲した行爲に付いて他の共謀者は犯行の現場に於て共同に行爲し或は其の他何等かの方法で実行者を援助した場合に固より、假令現場に居らなくとも責任を負はねばならぬ。然し乍ら本件に於ては被告等の間に共謀が存在したと云ふ事実は主張されてもゐないし、証明されてもゐないので、「人は彼自身が直接に爲した行爲に付てのみ責任を負ふ」と云ふ上記原則が其の終本件に妥当する。然し此の原則は人は彼自身が直接且單獨に爲した行爲に付てのみ責任を負ふと云ふ意味ではない。他人の犯罪行爲に参加しても有罪とされる場合がある。然らば如何なる行爲をすれば、他人の犯罪に参加したことになるであらうか。凡そ人は殺人行爲の参加者であるを見做されるには、殺人を激勵し、教唆する等の意図を以て、其の殺人を援助、教唆、補助、激勵又は助言してゐなければならぬ。

本件に於て被告永留が三名の米人俘虜殺害に干与した理由として主張された事実は、(イ)彼が憲兵隊から処刑の現場附近迄其等の俘虜を護送したと云ふこと、(ロ)彼が処刑

の現場にゐたこと、及び(イ)処刑の現場に於て彼が偽島  
軍曹の遺骨を持てゐたことである。本弁護人は以下果  
して之等の事実が存在したか否か、若し然うして、斯かる行為が  
本件俘虜殺害に参加したと云ふ理由になり、それに依つて果して  
被告に刑事責任を負はしめるに足る原因となるものであるか否か  
を論議して見たいと思ふ。

先づ被告が憲兵隊から処刑の現場附近まで三名の俘虜  
を護送したと云ふことは、彼が自ら行為に証人台に上つたとき  
検事の反対質問に答へて「トラックへ乗つたとき中村中尉から  
俘虜を警戒して行けと命ぜられました」と述べてゐるから其の  
真実なること疑念を容れざる余地はない。然し乍ら被告は  
トラックへ乗つて憲兵隊を出発するときは何の爲に何処へ行くの  
か全然知りなかつた。彼が始めて俘虜が処刑されることを知つた  
のはその現場へ行つて穴を見たときであるとも証言にゐるから  
ある。換言すれば彼が俘虜の護送を命ぜられたとき、彼はそれ  
より俘虜が処刑されるだらうと云ふことを全然知りなかつたので  
ある。若し俘虜が処刑されることを知つて、之を処刑の現場  
まで護送したとすれば、俘虜の殺害を幫助したことになる  
であらうから、幫助者として責任あるとせらるゝであらう。然し乍  
ら俘虜の処刑を知りなかつた以上、彼に犯害の成否を認め  
得べくもない。然るに「憲兵隊を出発するとき俘虜が  
殺害されるであらうと云ふことを知りなかつた」と云ふ彼の証  
言は果して真実であらうか。之を決定する爲には彼が処刑  
の現場に行くに至つた経緯を顧みる必要である。  
此の點に付て被告は「自分は身件當時黄疽に罹り休務



17日だが、当日は少し身体具合が良かったので上衣を脱いで隊の附近を散歩してゐる中、中村中尉が「永留上衣を着て直ぐ来い」と命ぜられたので直ちに上衣を着て出て行きました」と述べてゐる。病気で休務にゐる者が、憲兵隊の行軍の内容を知ることがない。又中村が永留に「上衣を着て直ぐ来い」と命じたとき之から俘虜の処刑に行くのだと云ふことを告げたと云ふ何等の立証もない。是等の状況から判断して、処刑の現場で穴を見ても、是等は俘虜が殺害されることを知らなかつたと云ふ被告の証言は真実なりと断定して差支ないと思ふ。

以上は俘虜護送の事実を被告の心理状態から主観的見地に立つて考察したのであるが、次に此の護送を其の要件に於て客観的に考察しよう。被告永留は中村中尉から俘虜の護送を命ぜられたもの、何等の武器をも持つてはゐるかつた。或程彼は刀帯は着けてはゐるが、それには刀は着いてゐなかつた。甚う他は銃、ピストル等如何なる武器をも携行してゐなかつた。之は彼が明快に証言にゐる所である。加之同題の三人の俘虜は某團司令部からトラックに乗せられて憲兵隊に連れ込まれたとき、細い両手を捕縛され某團司令部の衛兵が一人の俘虜に一人宛その捕縛を取つて警戒してゐたのである。而して此等の衛兵は被告がトラックに乗つたとき、之を交代に司令部へ帰つたのではなく、依然として俘虜に施した捕縛を取つて警衛して、処刑の現場まで行つたのである。更に処刑の現場で宮崎隊長に是等の俘虜を引渡したのも、是等司令部の衛兵である。それ故に処刑の直前宮崎隊長に引渡されるまで俘虜は某團司令部の者だ

依って護送されたことと云ふ事は十分に明白である。換言すれば、浮屠の護送は専ら集團司令部が担当したものと謂ふべきである。これは被告永留は中村から浮屠の護送を命ぜられたとしても、結局護送と呼ぶべき様な行為は何一つしてしなかつたことと云ふに帰着する。換言すれば、浮屠護送の名目があつても、護送の責務に至つては主観的にも客観的にも皆無である。随て被告永留が中村から浮屠の護送を命ぜられて現場へ行ったことは浮屠殺害の参加を構成するものではなく、彼に刑責を負はしめる理由とはならぬと確信する。

次に被告永留が処刑の現場にゐたことと云ふ事実に付て考察しよう。彼が処刑の現場にゐたことは他の証言を援用するまでもなく彼自身が之を肯定に認めるのであるから最早議論を待たぬ余地はない。然し共謀に基かざる限り、単に犯行の現場にゐたことと云ふだけでは、犯罪を構成するものではない。本弁護人の此の議論を支持するものとして、以下二、三の米国の文献を引用しよう。L. Harton's Criminal Law Vol. I §246 には "Merely witnessing a crime, without intervention, does not make a person a party to its commission, unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement or protection of the perpetrator." と述べて



54(2号)又 American Jurisprudence Vol. 26,  
Homicide § 601に於て "One who is merely pre-  
sent and sees that a homicide is about  
to be committed, and yet in no manner  
interferes, is not thereby deemed to parti-  
cipate in the commission of the offense.  
Failure to prevent homicide, or tacit  
assent, to, silent acquiescence in, secret  
approval of or consent to the act, by one  
present, generally does not make him  
guilty, where there is no previous  
understanding, although as to the con-  
sent there are some statements to the  
contrary" と述べられてゐる。右引用文申にも述べ  
られてゐる様に犯罪を阻止することは其の人の義務で  
ある様な人については唯犯行の現場に居たといふ  
だけで参加を構成するであらう。然し下り被告永留は  
事件當時一介の伍長に過ぎず、中佐の殺害は被告  
の上官たる宮崎中佐の指揮監督下に行はれたのである。  
法律は上官の不法行為を阻止すべき義務を其の上官に  
負課することはあるが上官の不法行為を阻止すべき上官の  
義務を定める規定は吾界中何れの国の法律にも之を  
見出し得まいと思ふ。随て被告永留が殺害を阻止しな  
かつたことは其の犯行に参加したことにほなりぬのである。  
次に上記引用文にもある様に、或る人の地位身分に鑑み

現場に居り乍ら犯行を阻止しないことが実行者を激励し、或は之を保護するものとして作用する場合は容易に思考し得る所である。例之、本件に於ける宮崎隊長の如きは、現場で命令し、煽動し、激励し、教唆し、幫助し、勸告等一切の行爲を爲さなくとも唯現場にゐることを以て、実行者の激励或は保護の作用をなし、随て唯それだけで犯罪に参加したものと謂ひ得るであらう。然し乍ら一時一介の伍長に過ぎなかつた被告永留が現場にゐるからして宮崎隊長の直接指揮下に行はれた本件俘虜殺害に於て、それが実行者を激励し、保護するに役立つものであることは常識で考へても容易に理解し得る所である。故に被告が犯行の現場にゐることを以ては、それ自ず、彼の犯行に対する参加を意味するものではなない。

然し乍ら之に対して検事は反駁するであらう。成程我々も永留が唯犯行の現場にゐることを以てなり彼を起訴しないであらう。然し彼は犯行の現場に於て成島軍曹の遺骨を持つてゐるのか。これ彼が乍ら保つ犯行を幫助したものに外ならぬ。乍ら保が俘虜を襲撃するに被告が成島の遺骨を持つてゐる様に記憶すると証言したのは証人佐野義一である。然しながら佐野証人の証言は他の証人の証言と齟齬する所が多く、彼の記憶は必ずしも正確とは言ひ得ないのである。例へば佐野は問題の俘虜を情報参謀矢島中佐が憲兵隊で取調べたと証言したが、証人矢島俊孝は問題の俘虜に關する限り、自分は憲兵隊で取調べを爲したことはないを断言してゐる。又佐野は清谷中尉も犯行の現場にゐると記憶すると証言したが、井渡



側証人として立つた清藤和夫は自分は犯行の現場へは行かなかったと証言している。或る人が自分や隊で浮屠を<sup>取</sup>行ったか  
どうか、又或る人殊に士官が犯行の現場にみたかみなかった  
かと女子様の顯著な事実についてすらも誤れる証言を以て  
佐野が久保が襲撃するとき、永留が僅か三時五十分か五時十分  
位の小さな成島の道骨を持ってみたか、どうかと女子様の瞬  
間的な余り人目を惹きつけるような事実には正確なる記憶  
を有するとは到底考へ得ざる所である。されば久保が浮屠  
を襲撃するとき、永留が成島の道骨を持ってみたことと女子佐  
野の証言は被告自身が其の事実を明確に否定し居り、且  
又久保も之を永留に渡したと述べてゐる以上佐野  
の記憶違ひを謂ふべきであつて、到底措信するに足らぬ  
ものである。かゝるが故に本弁護人は久保の犯行当時、  
被告が成島の道骨を持ってみたことと女子は全然なかつ  
たものと断定して争ひない。

今假に百歩譲つて、被告永留が久保の犯行当時成島  
の道骨を持ってみたことを假定しても、それは永留が久保の犯  
行を援助したことに絶對にならなうである。抑、本件  
浮屠殺害事件に於て成島軍曹の道骨は何を意味するか。此  
の點に關し、証人佐野は久保に呼びを命じたとき宮崎隊長  
は成島の仇を打てと怒号したと証言した。即ち成島の道  
骨こそは宮崎隊長の胸中に秘められた復讐心の象徴に  
外ならぬのである。佐野の前記証言によつて正しとすれば、宮  
崎の胸中に浮屠に対する復讐心が宿つてゐたことは或は  
息災であつたかも知れぬ。然しそれは飽く迄宮崎個人の

問題であつて、被告中村を始め本件被告等一同の何事も  
知る所ではない。加之復讐は宮崎の犯罪の動機を  
形成するに過ぎない。動機と犯意とは之を厳別し考へね  
ばならぬとは法律学の講義に於て繰返し教へられる所で  
ある。動機は或る人をして一定の決意を起さしめる要因で  
はあるが、それは決して意思の内容を爲すものではない。  
此の點に付き *American Jurisprudence, Vol. 26,*  
*Homicide* §361には "Motive may be defined  
as the impulse or purpose which leads  
or moves the mind to perpetrate a crim-  
inal act, whether it is murder or some other  
crime. Motive must not be confused  
with intent. .... While it is true, however,  
that malice is of the essence of the crime  
and must be proved, it by no means  
is true, that proof of motive is essential  
to the conviction of one who is charged  
with murder. Motive is not an essential  
element of the crime of murder, or of any  
other crime, except to the extent that  
it is made so by statute." と述べられて  
ゐる。上記引用文中にも明記されてゐる様に動機は殺  
人罪の構成要件ではないのである。而して凡そ他人の犯罪を  
援助したとして起訴される場合には、犯行の方法を教へるとか  
犯罪の用に供すべき器物を供するとか、実行者を犯行の



現場へ案内するとか、月夜犯罪を完成するに足る行為の遂行を容易ならしめる様な行為をしなければならぬ。換言すれば、構成要件を充足する行為の遂行を容易ならしめることが必要であつて、構成要件に属しない動機に加功するが如きは犯罪の幫助とは云へないものである。然し乍ら、問題の遺骨がそれを以てはヤス保が浮屠を醸成することを不可能であるか、着しく困難である程に大きなものであるならばそれを持つてやることはヤス保の犯罪の遂行を容易ならしめたと云へるであらう。然し乍ら、成島の遺骨は永留の証言に依れば僅かに三寸五分、佐野の証言に依つて三寸五分、五寸五分位の極めであるものであつて、それを持つたからして、ヤス保の犯罪遂行が不可能であるとか、困難であるとか、甚大程の大きさのものではない。此の意味に於ても永留はヤス保の犯罪遂行を容易ならしめたものとは謂ひ得ないのである。

然し乍ら、成島の遺骨に付ては、今一つ看過するところの出来ぬ証據がある。即ち検事に依つて提出された委員会の証據として採用した被告ヤス保の自白書中に彼は自分は飛行士処刑のことを知る（同時に何かしら恐怖を感じたので、その恐怖を除く爲に成島の遺骨を携行しようと思つた）と述べてゐるのである。ヤス保の此の陳述に依れば成島の遺骨はヤス保に取つてはその恐怖心を除く手段である。犯行の恐怖を除くことを犯意を強めることにもなるのであつて、其の意味に於て成島の遺骨は精神的にヤス保の犯罪行為を援助するものである。随て其の

遺骨を持つてやることをはオス保の犯罪を幫助したとも  
言へるであらう。然し乍ら成島の遺骨がオス保の恐怖を  
除く手段であるを去ふことは専らオス保の胸底に秘めら  
れてゐて、何人にも打明けられ居ないのである。オス保が  
之を他人に打明けたことを証據は一つとして存在しない  
のである。被告永留は自己の爲に証人台に立つたとき「証人  
はオス保が何の爲に成島の遺骨を持つて行つたか知つて  
ゐるか」との質問に対し「全然知りませぬ」と明白に答  
へてゐるのである。即ち永留の此の証言に依れば、永留は  
成島の遺骨がオス保に取つて何を意味するかを全然知らな  
かつたのである。被告永留が假令オス保から成島の遺骨を  
預つたとしても、彼はそれに依つてオス保の犯行を容易ならし  
めゐるのだと去ふ認識は全く缺けてゐるのである。固より  
犯行の方法を教へるとか、犯行の用具を供与するとかを去ふ  
種な幫助の通常の方法に依るものならば、其の行為自体  
から幫助の意思を推定することに可能であらう。然し本件  
に於けるが如く、オス保に取つてのみ意味ある特殊な場合に  
あつては、オス保から其の企圖を打明けられざるよりは、何人  
にも雖も外部から容易に其の意味を窺知し得べきもので  
はない。さればオス保が何の爲に成島の遺骨を持つて來た  
かを知らなかつたことを去ふことは洵に宜なる哉と云ふべきで  
ある。要之、永留にはオス保の犯行を援助する意思は  
全くなかつたのである。犯意なき所に犯罪の成る  
余地はない。吾人は茲に再び American juris-  
prudence を引用して此の争論を終結したいと思ふ。



"In order that a person may be regarded as a participant in a homicide, he must have aided, abetted, assisted, encouraged, or advised the killing, with intention of encouraging and abetting the commission thereof." (A.J. Vol. 26, Homicide § 60)

叙上の理由に因りて、弁護人は被告永留は彼に  
付ある才一起訴才一罪状項目に付ては絶対に無罪なり  
と確信し且之を主張するものである。(終)

録 田 日 吉 丈

A FINAL ARGUMENT FOR THE DEFENSE

delivered by

Mr. Kuwata, Hideo

May it please the Commission:

I wish to make this argument in behalf of the accused NAGATOME, Yoshimori.

It is a fundamental rule of criminal law that a person is criminally responsible only for the acts committed directly and immediately by himself. The law, however, modifies or relaxes this rule under certain circumstances. One of the exceptions to this rule is conspiracy. In cases where there is a conspiracy, a conspirator will be held liable, not only when he acts together with the perpetrator at the scene of the offense, or assists him by some means or other, but even when he is not present at the scene, for the acts committed by his associates in furtherance or execution of a common unlawful design for which they are combined. Since in the present case, no contention or proof has been made that there was a conspiracy among the accused, the foregoing principle that a person is criminally responsible only for the acts committed directly and immediately by himself, is applicable. This principle does not mean, however, that a person is guilty only when he himself directly and immediately committed a criminal act. There are cases where he is condemned for participating in a criminal act of another person. Then, what constitutes participation in a crime? In order that a person may be regarded as a participant in a homicidal act, he must have aided, abetted, assisted, encouraged or advised the killing with the intention of encouraging and abetting the commission thereof.

The facts under which the accused Nagatome is alleged to have participated in the killing of the three American prisoners are (1) that he escorted these prisoners from the Kempeitai to the vicinity of the scene of the execution (2) that he was present at the scene of the execution, and (3) that he held the axes of Sergeant Ikushima at the scene of the execution. In the following portion of my argument, I shall discuss whether these alleged facts existed, and if they did, whether these facts constitute his participation in the killing of the said prisoners and if they are sufficient causes for which he can be held criminally responsible.

First of all, that the accused Nagatome escorted the three prisoners from the Kempeitai to the vicinity of the scene of the execution, was testified to by the accused himself on the witness stand, when he replied, on cross-examination, "When I got on the truck, I was ordered by First Lieutenant Nakamura to guard the prisoners." So, there is no denying that this is true. The accused, however, also testified that he absolutely did not know where and why he was going, when he got on the truck and left the Kempeitai, and that he did not know about the execution until he arrived at the scene and saw the hole. In other words, he did not know that the prisoners would be executed when he was ordered to escort them. He would be held responsible as an aider, if he had known about the execution of

"QQ(1)"



the prisoners and escorted them to the scene of the execution, because he would be aiding, by the means of escort, the killing of the prisoners. But since he had no knowledge of the execution of the prisoners, there cannot be recognized any existence of criminal intent in him.

Then, can his testimony that he did not know that the prisoners would be executed when he left the Kemepitai be true? In order to determine this, it is necessary that we examine how he came to go to the scene of the execution. As regards this point, the accused Nagatome testified, "At the time of the incident, I was suffering from jaundice and was excused from duty. That day I was feeling better, so I was taking a walk around the unit with my coat off. Just at that time, around 4 o'clock in the afternoon, I was ordered by First Lieutenant Nakamura, 'Nagatome! Get your coat and come immediately', so I got my coat and went out." A person who was sick and excused from duty could not have known what was going on at his unit, and there has been no proof that the accused Nagatome was told that he was going to the execution of the prisoners when Nakamura ordered him, "Get your coat and come immediately." Therefore, judging from these circumstances, it can be safely concluded that the testimony of Nagatome stating that he did not know about the killing of the prisoners until he saw a hole at the scene of the execution is true.

In the foregoing, I have examined the fact of escorting the prisoners from the subjective viewpoint of the accused Nagatome's psychological state. Next, I shall analyze objectively the substance of this escorting itself. Though the accused Nagatome was ordered by First Lieutenant Nakamura to escort the prisoners, he did not carry with him any weapon whatsoever. Of course, he had a sword belt strapped around him, but there was no sword attached to it. He has clearly testified that he did not carry a rifle, or pistol, or any other kind of weapon. Furthermore, when these three prisoners were brought to the Kemepitai on a truck from the division headquarters their hands were tied and each prisoner was guarded by a guard from division headquarters who was holding the rope. These guards from the division headquarters did not return to headquarters as having been relieved by the accused Nagatome when he got on the truck, but still holding the ropes and guarding the prisoners, they went as far as the scene of the execution. Moreover, it was these guards who delivered the prisoners to Commanding Officer Miyazaki at the scene of the execution. In view of this, it is quite obvious that the prisoners were escorted by the guards of division headquarters up to the time when they were handed over to Commanding Officer Miyazaki just before the execution. In other words, division headquarters was solely in charge of escorting the prisoners. Therefore, the conclusion is that the accused Nagatome finally did not do anything in relation to the escorting of prisoners, though he had been ordered to escort them by First Lieutenant Nakamura. Here, he escorted prisoners exists in name but not in substance looking at it either subjectively or objectively. Consequently, I am convinced that the fact that the accused Nagatome went to the scene, having been ordered by Nakamura to escort the prisoners, does not constitute his participation in the killing of the prisoners, and cannot be a reason for holding him criminally responsible.

"QQ(2)"

Next, let us study the fact that he was present at the scene of the execution. There is no need of citing other testimony as regards this point, because Nagatome himself admitted that he was there. The mere fact that a person was present at the scene, unless based upon conspiracy, does not in itself constitute a crime. I shall cite, in the following, American references supporting this view: Wharton's Criminal Law: Vol. 1, section 246 states, "Merely witnessing a crime, without intervention, does not make a person a party to its commission, unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator." Again, American Jurisprudence: Vol. 26, Homicide Section 60, states, "One who is merely present and sees that a homicide is about to be committed, and yet in no manner interferes, is not thereby deemed to participate in the commission of the offense. Failure to prevent the homicide, or tacit assent to, silence acquiescence in, secret approval of or consent to the act, by one present, generally does not make him guilty, where there is no previous understanding, although as to the consent there are some statements to the contrary."

As it is stated in the above citations, participation in an offense may be constituted against a person for merely being present at the scene when it is the duty of that person to prevent the offense. The accused Nagatome, however, was, at the time of the incident, only a lowly corporal, and the killing of the prisoners was performed under the command and supervision of Lieutenant Colonel Miyazaki, who was the accused's superior officer. The law, in some cases, imposes the duty of preventing an unlawful act of a subordinate upon his superior officer, but, I believe we will not be able to find any law in any country of the world which sets forth the duty of subordinates to prevent the unlawful act of his superior officer. Consequently, the fact that the accused Nagatome did not prevent the killing of the prisoners does not mean that he participated in the crime.

As stated in the above cited references, it can be considered that non-interference of a person in an offense operates in view of his rank or status as an encouragement to or protection of the perpetrator. For instance in the present case, the mere fact that Commanding Officer Miyazaki was present at the scene operates as an encouragement to or protection of the perpetrator, even if he did not do any of such acts as to give orders, instigate, encourage, abet, aid, counsel, etc., and consequently he would be considered as a participant in the offense to such extent. It can be readily conceived, by sheer common sense, that the mere presence of the accused Nagatome at the scene of the execution performed under the direct command of Miyazaki, rendered nothing to the encouragement to or protection of the perpetrator. Thus, the fact that the accused Nagatome was present at the scene, by itself, does not mean his participation in the crime.

The judge advocate, however, will probably rebut my foregoing argument, by asserting that they, of course, would not indict him if he was only present at the scene. Didn't he hold the ashes of Sergeant Ikushima at the scene of the crime? This is none other than aiding the commission of Kokubo's offense,

"QO(3)"



It was witness Sano, Giichi, who testified that he recalled the accused Nagatome holding the ashes, while co-defendant Kokubo assaulted the prisoner. There are, however, many inconsistencies in the testimony of witness Sano; and we cannot say that his recollection is always correct. For example, Sano testified that intelligence staff officer Yajima had interrogated the prisoners at the Kempeitai, but witness Yajima, Toshihiko definitely stated that, as far as the prisoners in question are concerned, he did not investigate them at the Kempeitai. Again, Sano testified that he recalled Second Lieutenant Kiyomine was present at the scene, but Kiyomine, Kazuo, the witness for the defense, testified that he did not go to the scene of the crime. It cannot be conceived that Sano who gave such an erroneous testimony with regard to such salient facts as whether a certain person investigated the prisoners at the Kempeitai, or whether a certain person, particularly an officer, was present at the scene, could possess a precise recollection on such a transient and inconspicuous fact as whether Nagatome was holding the ashes of Sergeant Ikushima, a tiny thing about three or five inches cubed, when Kokubo assaulted the prisoner. And since the accused Nagatome has clearly denied this fact, and since Kokubo did not state that he gave the ashes to Nagatome, the testimony of Sano stating that he recalled Nagatome holding Sergeant Ikushima's ashes while Kokubo assaulted the prisoner, must be a mistake in Sano's recollection, and should not be given any credibility. In view of this, I do not hesitate to state definitely that there was no fact that the accused Nagatome was holding the ashes of Sergeant Ikushima when Kokubo committed his offense.

Conceding this point, and assuming that the accused Nagatome was holding the ashes while Kokubo committed the offense, it does not follow in any way that Nagatome aided in Kokubo's offense. Now, what was the significance of Sergeant Ikushima's ashes being at the scene of the execution of the prisoners? With regard to this point, witness Sano testified that Commanding Officer shouted, "Take revenge for Corporal Ikushima" when he ordered Kokubo to cut. In other words, the ashes of Ikushima were nothing but a symbol of revenge secreted in the mind of commanding officer Miyazaki. If Sano's testimony is true, the revenge against the prisoners may have been sequestered in the mind of Miyazaki. This, however, was solely Miyazaki's personal problem, and had no connection in any way with the accused Nakamura and the rest of the accused. Furthermore, revenge merely constitutes the motive for the crime which Miyazaki committed. It has been repeatedly taught in lectures on jurisprudence that between motive and criminal intent a rigid distinction should be made. Motive is a factor which incites a person to a definite determination, while it does not constitute the substance of intention. American Jurisprudence, Vol. 26, Homicide, Section 36, states as regards this point as follows:

"Motive may be defined as the impulse or purpose which leads or moves the mind to perpetrate a criminal act, whether it is murder or some other crime. Motive must not be confused with intent.... While it is true, however, that malice is of the essence of the crime and must be proved, it by no means it is true that proof of motive is essential to the conviction of one who is charged with murder. Motive is not an essential element of the crime of murder, or of any other crime, except to the extent that it is made so by statute."

"QQ(4)"

As it is clearly stated in the above citation, motive is not a constituent element of the crime of murder. In order to charge a person with aiding a crime, he must do an act which facilitates the commission of an act effective to the consummation of the offense, such as teaching the perpetrator the method of the offense, or providing him with instruments to be used in the offense, or leading him to the scene of the crime. That is, it is essential that the person should do an act to facilitate the perpetration of an act fulfilling the constituent requirements, and to aid or abet the motive which does not belong to the constituent element cannot be deemed as abetting or aiding a crime. If the said ashes, however, were so voluminous that Kokubo who was carrying them with him found it impossible or considerably difficult to assault the prisoner, we may say that holding the ashes for him would have constituted an aid to the perpetration of his crime. But Ikushima's ashes, according to Nagatome's testimony, were only three inches cubed, and even according to Sano, merely five inches cubed, a very small thing. So, the ashes were not of a size to render the perpetration of Kokubo's offense impossible or difficult even though he held them himself. From this view also, we cannot say that Nagatome facilitated the perpetration of Kokubo's offense.

There is, however, other evidence with regard to the ashes of Ikushima, which cannot be overlooked. That is, the fact that the accused Kokubo admitted in his statement introduced by the judge advocate and accepted by the commission, that as soon as he heard about the aviators, he felt a sort of fear, and that it suddenly occurred to him to carry the ashes of Sergeant Ikushima in order to remove the fear. According to this statement made by Kokubo, Ikushima's ashes were the means by which Kokubo removed this fear. To remove fear from the commission of crime, implies, in a way, that criminal intent was strengthened; in this sense Ikushima's ashes served as a mental aid to Kokubo in his commission of the offense. The fact that the ashes of Ikushima were the means to remove Kokubo's fear was secreted in Kokubo's mind until the end, and this intention was not disclosed to any other person. There is not a single bit of evidence showing Kokubo had told this to someone else. When the accused Nagatome was asked on the stand, "Do you know why Kokubo had taken the ashes of Ikushima?" he clearly answered, "I haven't the slightest idea." According to this testimony of Nagatome, he did not know what these ashes meant to Kokubo. Even though Nagatome was entrusted with the ashes by Kokubo, he did not have the slightest cognizance that he was facilitating the commission of Kokubo's offense by his act. It is possible, of course, to infer the intent of aiding from the acts themselves, if they are ordinary ways of aiding, such as teaching the method of committing an offense, or providing one with instruments for committing an offense. But in such an extraordinary case as the present one, where an act had significance only to Kokubo himself, no person is able to comprehend his intention, unless Kokubo discloses it himself. Thus, it is only natural that the accused Nagatome should say that he did not know why Kokubo took the ashes with him. All in all, Nagatome did not have the slightest intent to aid Kokubo in his commission of the crime. Where there is no criminal intent, there is no room for the constitution of a crime. In closing my argument, I would like to cite again from American Jurisprudence:

"QQ(5)"



"In order that a person may be regarded as a participant in a homicide, he must have aided, abetted, assisted, encouraged, or advised the killing, with intention of encouraging and abetting the commission thereof." (Ibid Vol. 26, Homicide Section 60).

I maintain that the accused Nagatome is absolutely not guilty of Specification 1 of Charge I.

Respectfully,

KUWATA, Hideo

I hereby certify the foregoing, consisting of five and one-quarter (5 $\frac{1}{4}$ ) typewritten pages, to be a true and complete translation of the original document in Japanese, to the best of my ability.

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

FINAL ARGUMENT FOR THE DEFENSE

IN RE NAKAMURA, ET AL

Delivered by

Commander Martin E. Carlson, USNR.

January 27, 1948

May it please the Commission:

In accordance with Section 421, Naval Courts and Boards, the accused (counsel) in every case is afforded an opportunity to present an argument before submitting his case to the court. This same section of Naval Courts and Boards also reads: "Neither the prosecution nor the defense is required to make an argument; however, the proper presentation of the case, as well for the benefit of the court as of the reviewing authority, would suggest that both prosecution and defense avail themselves of their respective rights to make argument."

In summing up the case for these three accused we shall point out certain irregularities which according to court-martial orders are prejudicial to these accused.

On the first day of the trial the accused challenged three of the five members of the commission, namely: Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, U. S. Army; Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, U. S. Army, and Rear Admiral Arthur G. Robinson, U. S. Navy, President. Lieutenant Colonel Garbarino was challenged first and the court was cleared. The challenged member withdrawing. However, when Lt. Colonel Roscoe was challenged the court was not cleared, neither did Lt. Colonel Roscoe withdraw as he should do but the president of the court simply "announced that in view of the fact that the reasons for this challenge were practically identical with the first objection, the objection was likewise not sustained." When the president of the commission was challenged the court was not cleared, neither did the challenged member, Rear Admiral Robinson, withdraw. Lieutenant Colonel Roscoe "announced that the objection was not sustained."

We asked that the court take judicial notice of C.M.O. 5-1929 and they did do so. This court martial order although criticizing the court and the judge advocate for lack of knowledge of correct court martial procedure, held that the errors and irregularities were not prejudicial to the interests of the accused because the accused was acquitted. How it would have been had the accused been found guilty we can be sure by the remarks of the judge advocate in the C.M.O. 6-1921 in which he said, "Such procedure was wholly illegal."

In C.M.O. 5-1929, case of Benjamin Katz, U. S. Navy, the convening authority placed the following remarks on the record: "A review of the record of proceedings of the general court martial in the foregoing case of Ensign Benjamin Katz, U. S. Navy, discloses a number of errors and irregularities which indicate unfamiliarity on the part of both the court and the judge advocate, with prescribed court martial procedure."

"It is noted (p.1) that the accused objected to a member of the court, Lt. Comdr. Oliver L. Wolford, U. S. Navy. The record shows that the court was cleared but fails to show that the challenged member withdrew."

"TR(1)"



"In this connection, section 626, Naval Courts and Boards states, 'It is customary for a member objected to to withdraw when the court is cleared to deliberate on the challenge, and he should always do so.'

The Chief of the Bureau of Navigation fully concurred in the remarks of the convening authority and the Secretary of the Navy approved the remarks of the convening authority and the recommendation of the Chief of the Bureau of Navigation."

In this present trial the three members of the commission were challenged because they sat as members of the commission which tried Ajioka, Misao and Yamada, Kiyoshi upon charges based on the same transaction concerning which the accused Nakamura is on trial. The following court martial orders seem to set forth rulings to this effect: first that a challenge in a case where a member "sat as a member of a court which tried another person upon charges based on the same transaction concerning which the accused is on trial" should be sustained and second, if the challenge is not sustained the proceedings, findings, and sentence will be set aside.

We call the commission's attention to this C.M.O. 5-1020 and to the following C.M.O. relating to challenges. C.M.O. 151-1019 resulted in the J.A.G. disapproving the findings in revision.

C.M.O. 2-1024 was another case of challenge of members for valid cause and again the J.A.G. advised the accused that the question of a new trial in his case would be considered if he made formal petition therefore.

In C.M.O. 1-1034, pp 7-8, the Secretary of the Navy set aside the proceedings, findings, and sentences in the cases of these two men in the last two of three cases where "all three trials were based on practically identical testimony elicited from a certain witness who was the only one called by the prosecution in each of the three cases. The accused objected to the senior member of the court "on the grounds of Section 623(e) Naval Courts and Boards"- that is, that he sat as a member of a court which tried another person upon charges based on the same transaction concerning which the accused was on trial."

"...As a matter of fact, the record of proceedings of the first trial disclosed that the main witness for the prosecution had referred to both of the two men whose trials are now under consideration as having been present at the time the alleged offense was committed. While a portion of this testimony was stricken from the record, it nevertheless remains that the court was informed that the accused in each of the later cases was involved in the transaction out of which the case being tried arose.

From the foregoing, it would appear that the challenged members' mind might be prejudiced to such an extent as to prevent his exercise of the impartial judgment required of a court. Since the members who voted on the challenge of the senior member were both presumably cognizant of the testimony given in the first trial, referred to above, it would appear that they did not carefully weight the challenges and replies. Moreover, the challenge in each case should have been sustained on the ground on

"RR(2)"

which it was put by the accused (citing Sec. 623, N.C.&B., 1923, second sentence.)"

It was further noted that during the course of each of the trials here under consideration, the accused challenged a second member upon substantially the same grounds as those on which the senior member was challenged. These challenges were not sustained, apparently on the ground that the challenged member in each case testified on his voir dire to the effect that he had formed no opinion as to the guilt of the accused.

(2) In view of the foregoing, the Secretary of the Navy set aside the proceedings, findings, and sentences in the cases of these two men."

In C.M.O. 4-1929 p. 5, the convening authority stated, "It is noted that the court failed to sustain the objection of the accused to a member; the convening authority is of the opinion that courts should be liberal in passing upon challenges and that the court in the present case should as a matter of policy have sustained the objection of the accused."

In C.M.O. 6-1921, the J.A.G. of the Navy Department said: "In a recent case each member of the court was challenged by the accused, and the challenge in each case was sustained. The record shows, however, that none of the challenged members withdrew, but continued to sit on the court and determine the remaining challenges. Such procedure was wholly illegal."

In C.M.O. 7-1931, p. 10, the J. A.G. of the Navy Department held: "From the record of proceedings in this case, it appeared that the convening authority knew that the accused had valid grounds for objecting to five of the six officers comprising the membership of the court. In this connection attention was invited to the provisions of section 578, Naval Courts and Boards, as follows: "No officer should be named as a member against whom....the accused can reasonably object when called upon to exercise the privilege of challenge."

In accordance with Navy Regulations, court martial orders have full force and effect for the guidance of all persons in the naval establishment.

United States Navy Regulations, 1920, Article 74:

- "(1) All general rules and regulations for the guidance of, and all other general orders and general instructions to, persons in the Naval Establishment shall be contained in the following publications
- (a) Regulations for the Government of the Navy of the United States (Navy Regulations)
  - (b) Navy Department General Orders.
  - (c) Changes in Navy Regulations circulars.
  - (d) Court-Martial Orders.
  - (e) Signal books and drill books.
  - (f) Uniform Regulations.
  - (g) Naval Courts and Boards.
  - (h) Manuals or circulars of instructions issued by any bureau or office and rules for gunnery exercises and engineering performances.

"RR(1)"



"3.(g) Naval Courts and Boards: This shall include both the instructions and the forms governing the procedure of naval courts and boards. The order promulgating this publication and the order for all changes that may be made therein shall be signed by the Secretary of the Navy and approved by the President of the United States.

"(4) Orders or instructions contained in any of the publications enumerated in the two preceding paragraphs of this article shall have full force and effect for the guidance of all persons in the Naval Establishment. No other general regulations, general orders, or general instructions to the Naval Establishment shall be signed or issued by any bureau or office under the control of the Navy Department..."

Court Martial Order No. 4-1931 laid down the rule: "As court martial orders have full force and effect for guidance of all persons in the naval establishment (Art. 74, par. 4, Navy Regulations, 1920) held, that where such court martial orders provide precedents in point with cases under consideration by courts martial, members of such courts should refrain from disregarding such precedents. To so disregard established precedents, as was done in this case, not only indicates a dereliction of duty on the part of members of the court but also results in a gross miscarriage of justice."

So in accordance with Navy Regulations, Article 74(4), no bureau or office under the control of the Navy Department can issue general instructions to the Naval Establishment and all changes to Naval Courts and Boards shall be signed by the Secretary of the Navy and approved by the President of the United States.

Section 388(e) Naval Courts and Boards cannot therefore be changed by a dispatch originating in some office of the Navy Department.

But Nakamura, Kazuo, the chief prosecution witness in the Ajioka trial has been tried for the same offense that he witnessed against Ajioka and in order to prove the case against him the prosecution had Ajioka testify against Nakamura.

Ajioka testified on the sixth day of the trial. He said that the commanding officer of the South Seas Kempeitai was Lt. Colonel Miyazaki.

There was only one Kempeitai organization in the Palau Islands and there was only one commanding officer and that was Lieutenant Colonel Miyazaki.

Where is he? The judge advocates naively bring in a slip of paper signed he says by some Japanese policeman to the effect that Lieutenant Colonel Miyazaki committed suicide while being arrested. And the court are supposed to accept this piece of paper as the best evidence of the death of Miyazaki. The writer isn't even identified.

All three of these accused are charged with "acting with Miyazaki, Arisune, deceased, then a lieutenant colonel, IJA, did, each and together, at Babelthump Island, Palau Islands, on or about September 4, 1944..."

"RR(4)"

One of the judge advocates testified as to this piece of paper. But all he could say was that it was received in the mail one day.

Miyazaki, the commanding officer of all the Kempeitai in the Palau Islands, and who according to the testimony supervised and also executed by shooting one or more of the three prisoners (at least two of them) and who ordered Nakamura to order Yamada to shoot an alleged Englishman, isn't to be punished for these alleged crimes because some Japanese who signs his name Hirai, Kyoshi, writes a statement that while arresting Miyazaki he committed suicide.

No doctor's testimony is offered; no testimony by anyone who even knew Miyazaki is offered; only a written statement by an unknown policeman who went out to arrest Miyazaki. There is no showing he ever arrested the right man let alone that the man he arrested did commit suicide; only his written explanation why he didn't bring in Miyazaki. No one testified they knew the policeman or knew Miyazaki.

If the Japanese can go to all the trouble they did to hide the identity of Katsuyama, Tetsuji, by trying to fake a suicide in his case how much easier isn't it to hide the whereabouts of Miyazaki who was a colonel and an important person. Katsuyama was only a second lieutenant. You members of the commission remember the story of Katsuyama well because you tried him in the Koichi trial. It is common knowledge among all Japanese that death can be proved in this war crimes court by a piece of paper which has what looks to be a signature on it. It is too easy to prove death in this manner. How can anyone resist the temptation to at least try to get away with it. This court has accepted proof of death by what is contained on a piece of paper before, so why not try it again. There is nothing to lose. Of the many cases of death that have been proved by a piece of paper in this court none have ever been questioned by the commission.

But is Miyazaki dead? Specification 1 of Charge I alleges, "acting with Miyazaki, Aritsune, deceased, ....., on or about September 4, 1944."

Witnesses have testified he was alive on September 4, 1944, and the piece of paper introduced into evidence says he was dead on July 27, 1947. Who are we to believe?

Many people say Hitler is still alive. The only person who says Miyazaki is dead is the judge advocate and he says he knows because he has a piece of paper on which it is written in Japanese that Miyazaki committed suicide.

But the judge advocate says it isn't important anyway so why be concerned with it. But if it isn't important whether Miyazaki is dead or alive why bring him into the specification of the charges at all?

Could it be that if the court accepts as proof of the death of Miyazaki a piece of paper, that proof of death of the three Americans and the Englishman can also be proved by a piece of paper?

"RR(5)"



There can be no cross-examination when a piece of paper is submitted by a witness who knows only that he received the piece of paper in the mail one day.

To prove that Nakamura killed three unarmed Americans "by beheading with swords and by shooting with firearms" the prosecution called as a witness Sano, Giichi, a former first lieutenant in the Japanese Kempeitai. He was there he said. He also said that Colonel Miyazaki was the commanding officer of the Kempeitai in the Palau Islands.

Before he testified about the execution he testified under oath when asked question 18: "Tell the commission how you happen to know the nationality of these men?"

Answer under oath by Sano: "I recall that it was around the end of August 1944. At this time these prisoners were landed on the coast of Mizuho. They were pilots of the B-24. On the way to division headquarters they stopped over at the Kempeitai headquarters and Staff Officer Yajima came to question them; at this questioning I was present, so I know this."

We moved that part of this answer be stricken on the ground of hearsay but our motion was denied.

The judge advocate asked their witness Sano, Q. 24: "Going back for a moment to the interrogation of these prisoners by Yajima, did the prisoners say what their nationality was?"

We objected to the question but were overruled. And Sano testified: "I recall that I heard them say that their nationality was American."

And so the court should believe that these three persons were Americans because Sano testifies under oath that he heard them say so when Yajima was questioning them at the Kemepitai headquarters.

Sano saw these prisoners again he said in front of <sup>the</sup> commanding officer's quarters in a truck; they were blindfolded and yet he was allowed to testify they were the same prisoners he saw Yajima interrogate at Kempeitai headquarters about a week previous.

Q. 37: "Were the prisoners that you saw in that truck the same prisoners that you had seen Colonel Yajima interrogating?"

We objected to the question because it was leading but were overruled.

Under oath Sano testifies:

"I felt that they were, for the first time I saw them it was only for a short while, but I thought that they were the same prisoners."

"RR(6)"

We shall show how this witness Sano testifies, not alone to what he sees and hears, but largely what he imagines. Although an officer, he was never given any orders to do anything as far as prisoners were concerned. He would have the commission believe he just went along so he could witness against his compatriots.

You saw him on the witness stand, hard, cold, and ruthless, without a trace of emotion, or feeling of sympathy as he told of the execution: (Answer to Q 41:)

"Commanding Officer Miyazaki ordered Captain Nakamura, who was at the scene, to cut the next one by saying, 'Captain Nakamura, cut.' (He had already testified how Colonel Miyazaki had shot the first one.)

"Therefore, Captain Nakamura with his sword beheaded him. Commanding Officer Miyazaki ordered Sergeant Major Kokubo who was at the scene, 'Sergeant Major Kokubo, cut.'...

"Sergeant Major Kokubo, with his type 95 sword which he had, cut at the neck but it did not cut well. From what I saw he cut only about the width of the sword, therefore, Commanding Officer Miyazaki said, 'Kokubo, it hasn't been cut.' And then Commanding Officer Miyazaki with his pistol shot this third prisoner two or three times and killed him, as I recall."

Sano continues in answer to Q. 42 he adds for good measure, "At this time Ikushima's ashes were brought to the scene and when Sergeant Major Kokubo cut, I recall that Sergeant Nagatome was holding them."

Now this is the prosecution's case. This is the only witness who will testify against all three accused. He saw everything and what he didn't see he imagined and will testify to that also. How much of what he testified to can be believed is a very serious question. Although he took an oath to tell the truth by our Christian God, it evidently didn't impress him because on cross-examination he again testified about the prisoners coming down in a parachute but admitted it was only hearsay and he wasn't there. He also admitted that when he said they were pilots of the B-24 that that was also hearsay.

To question 88 he answered as follows: "They were on the way to the division headquarters when they stopped at the Kempeitai and they stayed there for one or two hours and Staff Officer Yajima came and questioned them and then they were again put on the truck and sent to division headquarters, so I know about it."

To question 89 he answered: "I recall that Staff Officer Yajima was already at the Kempeitai and these prisoners were taken from the truck and questioned at the Kempeitai for a while and then went off to division headquarters and Staff Officer Yajima was at the Kempeitai before the prisoners came."

To question 92: "Then when you said that they were Americans that is hearsay, too? - Lieutenant Sano answered, "I heard it because I was present when Staff Officer Yajima was questioning them."

"RR(7)"



So it was. Sano kept reiterating that he was present when Colonel Yajima questioned these three persons at the Kempeitai headquarters.

Sano had to admit he never got nearer than six meters from the truck and that he just thought that these were the same three prisoners he had seen and heard Yajima interrogate at Kempeitai headquarters.

When Colonel Yajima came to the witness stand as a prosecution witness he testified that there were ten prisoners, seven from Yap and three from Palau. The three prisoners Colonel Yajima said he first saw at Division Headquarters and not at the Kempeitai.

Colonel Yajima stated very clearly on his cross-examination that he interrogated them for three days and then sent them to the Kempeitai on orders of Colonel Tada. Colonel Yajima was asked: "Did you ever investigate these prisoners at the Kempeitai?" He answered: "No, I did not."

Colonel Yajima was asked another question in order to completely discredit Sano. He was asked: "Did you ever investigate prisoners at the Kempeitai?"

He answered, "I did,"- but the judge advocate objected to the question "When was this?" so we tried again and this time asked Colonel Yajima: "When you asked if they were Americans or not did this questioning take place at the Kempeitai?" He answered: "No."

Question: "Lieutenant Sano wasn't present at that time was he?"  
Answer by Colonel Yajima: "He was not there."

How can the commission believe anything Sano testified to?

Sano even testified that Lieutenant Kyomine was present at the execution and we brought in Lt. Kyomine who testified that he wasn't at this execution.

Sano testified regarding a diary which was an official publication of the Kempeitai. But although he said he made the entry in the diary about the execution he said he wrote the entry on instructions of Colonel Miyazaki what Miyazaki told him to write and not from what he saw. He further testified he burned this official document on orders of Colonel Miyazaki.

He says he remembers writing in this diary: "Three American aviators were ordered by the Division Headquarters to be executed by the Kempeitai. This was performed."

Remember it was only what Colonel Miyazaki ordered him to write and not what he saw. However the prosecution haven't proved it was a Kempeitai execution so their chief witness Sano testifying as to what another person told him can not be a creditable witness. He testifies too much from what he imagines.

"RR(8)"

However, this testimony relating to the entry in the diary about the execution is most important. It proves it was an official function ordered by Division Headquarters. If the court finds that there was an execution, that execution according to the testimony of both Lieutenant Sano and Colonel Yajima was an official execution. It cannot therefore be murder any more than a hanging which a hangman is ordered to do is murder.

Only three persons are accused of this crime of killing three Americans. All three of these accused were ordered to be present at the execution. One of the accused, Nagatome, did absolutely nothing at the scene of the execution yet he is singled out of at least ten persons and charged with the murder. Why?

In order to gain a conviction it is necessary for someone to testify against the accused. So although Nagatome did absolutely nothing, he testified he didn't even hold the ashes of Ikushima, which Kokubo had brought with him to the scene of the execution, he must of necessity go on the witness stand to refute the testimony of Lieutenant Sano. Once on the witness stand the judge advocate insists that Nagatome answer his questions as to what Nakamura and Kokubo did at the scene.

We objected to the charges and specifications on the ground of misjoinder. Then when we found out that the judge advocate intended to use affidavits of these accused not only to prove the case against the affiant but against the other two accused we made an attempt to get a severance. We tried to move for a severance on the fourth day of the trial. However, the judge advocate interrupted the motion of the defense counsel and made an objection to the motion for severance of the accused, citing section 404 of Naval Courts and Boards in support of his objection."

The commission rejected our motion for a severance.

In 14 American Jurisprudence Criminal Law, Sec. 253, p. 944, we read: "Not only must the opportunity of pleading be afforded to the defendant, but the fact that he did plead, or at least was furnished an opportunity to plead, must appear affirmatively in the record. (citing Hill v State, 1 Yerg.(Tenn.) 76, 24 Am. Dec. 441). This requirement as to the record is not a matter merely of form, but of substance; (citing State v Walton, 50 Or. 142, 91P. 490, 13 L.R.A. (U.S.) 811.) and the presumption of regularity as to procedure will not avail where the record does not affirmatively show such fact. (citing Appeal and Error Vol. 3, p. 518, Section 956, Am. Jur.). Sec. 260, American Jurisprudence, Ibid, states the law: "The defendant has an absolute right to an opportunity to plead (Sec. 13 L.R.A. (U.S. 811) Without it, due process of law is impossible (citing State v Walton, 50 Or 142, 91P, 490, 13 L.R.A. (U.S.) 811.) In a number of jurisdictions it is held that the absence of an opportunity to plead is fatal to a conviction (citing Hoskins v People 84 Ill. 87, 25 Am.Rep. 433; State v Walton, 50 Or 142, 91 P, 490, 13 L.R.A. (U.S.) 811; Hill v State, 1 Yerg (Tenn) 76, 24 Am. Dec. 441.

"RR(9)"



Annotation: 45 L.R.A. (U.S.) 644; Am. Cas. 1917 D, 830.)---

We cannot but cite these cases cited in American Jurisprudence because there are not any reports available here on Guam.

We maintain there was misjoinder of the accused in this case to the prejudice of each of the accused and that there was no reason for the joinder of these persons. There are two charges but Nakamura is the only person charged in Charge II. Kokubo and Nagatome aren't even charged in Specification 2 of Charge I.

The real perpetrator of these alleged crimes is either Colonel Miyazaki or General Inoue or Colonel Tada. The evidence is conflicting as to who the principal in the first degree was. Instead of charging the real criminal the judge advocate charges Nakamura, Kokubo and Nagatome as "acting with Miyazaki, Aritsune, deceased, --- did, on or about September 4, 1944" and in Specification 2, Nakamura "acting with other members of the armed forces of Japan, --- on or about December 29, 1944"

"The distinction between principals and accessories applies to statutory felonies, as well as to felonies at common law unless the statute shows a contrary intent." Marshall & Clark, A Treatise on the Law of Crimes 4th Edition, 1940, Sec. 157, citing Reg. v. Tracy, 6 Mod. 30, Com v. Carter, 94 Ky. 527, 23 S.W.344, 15 Ky Law Rep. 253.

We would like to have the views of the judge advocate as to whether there is any distinction between principals and accessories in the "law and customs of war" which he has in mind when he charges these accused with killing the three Americans and Charlie Smith alias James. What does the judge advocate say is the intent of article 23(c) of the Hague Convention of 1907?

Though the English translation of the Hague Convention is in general believed to be correct no translation can always give the meaning of the original with entire accuracy, so in case of a dispute as to the meaning of article 23 the French text must be accepted as controlling. We hold that Article 23, Hague Convention never intended to punish individuals and certainly mere aiders and abettors were not deemed to be within the article.

"In practice, however, the distinction between the principal and the accessory is important, except where the law has been changed by statute. Thus, at common law, an indictment must charge a person correctly as principal or accessory, according to the facts. On an indictment charging one as principal there can be no conviction on evidence showing that he was merely an accessory (citing *People v. Legion*, 99 N.Y. 210, 1 N.E. 673. See also *Com v. Di Stasio*, Mass, 8 N.E., (2d) 923.) and vice versa." citing *Reg. v. Winifred*, 1 Leach C.C. 515; *Reg. v. Brown*, 14 Cox C.C. 144."

The judge advocates speak much of the common law of international crimes. Do they know and have they informed the commission that:

"RR(10)"

"At common law an accessory cannot be tried, without his consent, until the guilt of the principal has been legally ascertained by a conviction or outlawry, unless they are tried together, and then the jury must be charged to inquire just as to the guilt of the principal, and, if they are satisfied of his guilt, then as to the accessory." - citing Post. C.L. 361; Com V. Phillips, 16 Mass. 423; 422; Com V Knapp, 10 Pick (Mass.) 477, 20 Am. Dec. 534; Starin v People, 45 N.Y. 333.

If a man is indicted as accessory to two or more, and only one has been convicted, he may be arraigned, tried, and convicted as accessory to that one, but not as accessory to all. Steops v Corn, 7 Serg. & R (Pa.) 491, 10 Am. Dec. 482.

Where the principal was convicted by verdict or confessed and had his clergy before judgment, the accessory was discharged because it did not appear judicially that there was a principal. Bibb's Case, 4 Coke 43b)

If the principal is dead, or if he is acquitted on his trial, the accessory cannot be tried. - citing Com V. Phillips, 16 Mass. 423.)

Reversal of a judgment against the principal operates as a discharge of the accessory. Marsha's Case, 1 Leon 325."

Clark & Marshall, Ibid, Section 158.

So in this present trial the evidence clearly shows that these three accused were not principals in specification 1 of Charge I or that Nakamura was the principal in specification 2 of Charge I.

Specification 1 of Charge I even alleges that these three accused, "acting with Miyazaki, Aritsune, deceased, then a lieutenant colonel, I.J.A.,"

The prosecution allege Miyazaki is dead. They brought in a piece of paper saying he is dead. All the evidence which they introduced proved that it was either Colonel Miyazaki, General Inoue, or Colonel Tada who was the principal in the crime alleged in specification 1 of Charge I.

Clark and Marshall, Ibid, define a principal as: "A principal in the first degree is the one who actually commits the crime, either by his own hand, or by an inanimate agency, or by an innocent human agent" --citing 4 Blackstone Comm. 34; 1 East P.C. 228; 1 Hale P.C. 617.

Nakamura and Kokubo were innocent human agents of General Inoue and Colonel Miyazaki according to all the evidence. An innocent human agent is a person who is not guilty because of ignorance of fact, youth or insanity. See Section 161, Ibid, and the following cases cited in footnote 32, page 208: Reg. V Bannen, 2 Mood. C.C. 309; People v McMurray, 4 Parker Cr. R. (N.Y.) 234; Smith v State, 21 Tex. Appl 107, 130, 17 S.W. 552.

Sano, Giichi, the chief prosecution witness testified that Lt. Colonel Miyazaki was the commanding officer of the South Seas Kempeitai.

"RR(11)"



(See answer to Q. 6) and General Inoue was the commanding officer of the Fourteenth Division (answer to Q. 10) and that Chief of Staff to General Inoue was Colonel Tada (answer to Q. 12)

To Question 30 he answered that Colonel Miyazaki told him that Chief of Staff ordered him to execute the three prisoners of war at the division headquarters by the Kempeitai.

To question 41 he testified that Commanding Officer Miyazaki stood near the hole and said, "Bring him here." "He was brought there and was made to sit in front of the hole. Commanding Officer Miyazaki shot him in the back of his head with the pistol he had, from the back." Commanding Officer Miyazaki ordered Captain Nakamura who was at the scene, to cut the next one, by saying, "Captain Nakamura, cut." ....Commanding Officer Miyazaki ordered Sergeant Major Kokubo who was at the scene, "Sergeant Major Kokubo, cut." .....Commanding Officer Miyazaki said, "Kokubo, it hasn't been cut." And then Commanding Officer Miyazaki with his pistol shot this third prisoner two or three times and killed him, as I recall."

Sano even testified that Miyazaki gave orders to the guard who was watching that particular man and the division headquarters guard brought the prisoner to the hole and made him sit down. (See answer to Q. 46.)

To question 77 Sano testified: "Commanding Officer Miyazaki was at the scene and he himself was giving the orders and other things."

He testified that it was the usual order of things and in accordance with Apparel Regulations of the Japanese Army that Kokubo wore his sword. Sano testified to the official Kempeitai diary in which he entered by orders of Colonel Miyazaki the following: "Three American aviators were ordered by the division headquarters to be executed by the Kempeitai. This was performed."

Then Yajima testified he saw a report submitted by the commanding officer of the Kempeitai, Lieutenant Colonel Miyazaki, to Division Commander Inoue (answer to Q. 29). It was a brief report which stated that the execution of the three aviators had been done. See answer to Q. 32.

Yajima testified the prisoners were sent to the Kempeitai by orders of Colonel Tada who ordered, "Then I request the three prisoners be executed." See answer to Q. 45 - he testified that he understood the prisoners were being sent to the Kempeitai to be executed.

Yajima testified that Miyazaki had a duty to perform to execute the prisoners in his answer to the next to the last question.

The evidence all shows that the principals are not on trial here. The principals are either Colonel Tada or as alleged, Lieutenant Colonel Miyazaki who actually committed the crime. Lieutenant Colonel Miyazaki killed two of the three prisoners and killed the third by an innocent human agent, Nakamura, according to Sano's testimony. Miyazaki ordered

"RR(12)"

Kokubo to cut one but Miyazaki shot this prisoner himself several times and killed him.

In his statement Nakamura testified he was only a pawn. He was afraid of Colonel Miyazaki. Nakamura is not guilty because of ignorance of fact. He was never told by Miyazaki that the execution was anything but lawful. Nakamura asked why the prisoners were to be executed and was told it was by orders of the Division Commander. Miyazaki, if he knew the execution was unlawful, was a principal and is guilty as a principal in the first degree since he procured the commission of the execution of one prisoner by Nakamura who was an innocent human agent, ignorant of the fact that the execution was unlawful.

What is said about Nakamura, an officer, is true to a much greater extent as to Kokubo. Nakamura was ordered to bring along a couple of Kempeis and so ordered Kokubo to come along.

At the scene of the execution, Lieutenant Colonel Miyazaki ordered Kokubo direct to duty. Not satisfied with ordering Kokubo, an innocent agent to cut, Miyazaki himself shot the prisoner several times. So whatever Kokubo did he was only an innocent agent ignorant of the fact that the execution might be unlawful.

Then we have the third accused, Nagatome. Nagatome although he was ordered to come along by Nakamura was never told why or that there was to be an execution. He was certainly an innocent human agent, ignorant of the fact of the execution, ignorant because of his youth about lawful executions ordered by Division Headquarters. Nagatome was only an enlisted man and in the Japanese Army the Commanding General didn't as a matter of fact take enlisted men into his confidence about why he did things. Neither did Lieutenant Colonels. So neither General Inoue or Lieutenant Colonel Miyazaki told Nagatome why there was an execution and since they hadn't told Nakamura and Kokubo they too didn't know.

Nogatome did take the witness stand. The record shows he desired to take the stand as witness in his own behalf. Nagatome not only denied all the allegations such as that he "wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, kill and cause to be killed, by beheading, with swords, and by shooting with firearms" but he absolutely denied that Kokubo ever gave him any ashes to hold or that he held any ashes during the execution. See his answer to question 17: "Did you not receive something from someone at the scene?" Answer: "No, I did not. When I was questioned by the interpreter at Sugamo Prison I was asked, 'You were handed by Sergeant Major Kokubo the remains of Sergeant Ikushima.' I replied, I was not because I was never handed such a thing. Furthermore, I have testified to this effect in my statement which I made in Sugamo.

We will not admit that Nagatome did anything at this execution.  
Q. 16: "When you went to the scene did you do anything at the scene?"  
Answer: "I did not do anything."

"RR(13"



As he testified he was sick that day, he was walking around in the yard, resting as it were from his illness, and Lt. Nakamura, who had been ordered by Colonel Miyazaki to send some Kempei men to the execution, happened to see him and because the few Kempeis attached to the organization were out on patrol he ordered Nagatome to "come along." Nagatome was never told why he should come along. He replied to the judge advocate's question that he was a guard that day by saying, (Answer to Q. 34:) "I seem to recall that he said, "Guard them."

But remember all three prisoners were blindfolded and tied and holding the lines with which the prisoners were tied were three guards from the division headquarters, one for each prisoner and in addition there was at least one non-commissioned officer and one officer from division headquarters. So Nagatome without any weapon or even a club couldn't have been a guard. Nakamura having no heart for the execution in his simple way went through the motions of complying with Miyazaki's orders to have some Kempeis there by ordering Nagatome even if he were sick to come along.

What a trick of Fate it was that Nagatome should have been sighted by Nakamura that day walking around in the yard getting a little sunshine to help him as he thought to recover from his illness. Purely by accident a mere chance that he was seen by Nakamura and Nakamura had orders to send some Kempeis to the execution, Nagatome was ordered to an execution and today Nagatome finds himself on trial for the murder of all three of the prisoners.

The judge advocates rely on civil cases entirely when defining murder. They cite the Federal rule as to a principal, found in Sec. 332 of U. S. Criminal Code. This rule is: "Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or procures its commission is a principal (R.S. 5323, 5427; March 4, 1909, c. 321, U.S. Code Annotated; Title 18.

Then instead of trying these accused for statutory or common law murder they rely on the vague and undefined phrase "this in violation of the law and customs of war."

We asked for a bill of particulars as to what was meant by this phrase and what specifically was the law and what customs were violated by those three accused. We were told that in due time we would be told. The prosecution rested; the defense offered evidence; the defense rested; the accused made personal statements; the trial is practically over and the accused are still at a loss as to what the "law and customs of war" are which they are in the specifications charged with having violated. Still there is only the vague references to the Hague Convention and the Geneva Red Cross Convention.

They even go to a textbook which we think is a perfectly good textbook, and Clark & Marshall in the Law of Crimes for a definition

"RR(14)"

of a second degree principal and quoting from this textbook they would have the commission believe that Nagatome is a second degree principal but mind you they do not so charge him. Nagatome is charged as willfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, kill and cause to be killed by beheading with swords and by shooting with firearms,---, three unarmed American prisoners of war..." If Nagatome is to be found guilty as a second degree principal he should be so charged and it should be proved and it should be proved who the principals were.

But let us read this section 167 of Clark and Marshall which the judge advocate relies upon to convict Nagatome of beheading and shooting these three Americans. We read: "To render one guilty as principal in the second degree, he must in some way participate in the commission of the offense, by aiding or abetting the actual perpetrator of the deed. Mere presence at the time the offense is committed, and acquiescence or failure to make any effort to prevent its commission, or to apprehend the offender, is not enough." - citing Reg v Coney; 82 B.D. 534; People v. Woodward, 45 Cal 293, 13 Am. Rep., 176; Lawrence v State 68 Ga. 289; People v Barnes, 311 Ill. 559, 143 N.E. 445 (riding in an automobile known to be stolen does not render one party to theft); State v Malory, 44 Iowa 104; Levering v Com. 132 Ky. 666; 117 S.W. 253, 136 Am St Rep. 192, 19 Am. Cas. 140; Carey v State, 194 Ind. 626, 144 N.E. 22; Chapman v State, 43 Tex Cr. R. 328, 65 S.W. 1098, 96 Am. St. Rep. 874; Connaughty v State, 1 Wisc. 159, 69 Am. Dec. 370.

"If he be present," said Sir Mathew Hale, "and not aiding or abetting to the felony, he is neither principal nor accessory.... Mere mental approval is not enough to render one an aider and abettor." (citing De Gregorio v United States, 7 Fed (2d) 295.)

Section 168, Clark and Marshall, Ibid, reads, "To be guilty as a principal in the second degree, a criminal intent is necessary..."

"When a specific intent is necessary to constitute a particular crime, one cannot be a principal in the second degree to that particular offense unless he entertains such an intent, or knows that the party actually doing the act entertains such intent." Footnote 55 reads: "In order to convict a person of murder in the first degree, as an aider and abettor, it must be shown that he knew or believed that the person who committed the homicide intended to kill, or that he himself acted with such intent." Savage v State, 18 Fla. 909. And see, as to assault with intent to kill, State v Hickam, 95 Mo. 322, 8 S.W. 252 6 Am. St. Rep. 54. Mayhem: State v Taylor, 79 Vt. 1, 39 Atl. 447, 42 L.R.A. 673, 67 Am. St. Rep. 648.

Nagatome cannot be either charged or found guilty as an accessory before the fact because "The accessory must be neither actually or constructively present when the offense is committed," and there must be some participation by way of procurement, command, or counsel. Mere knowledge that the offense is to be committed, or even mental approval, is not enough." - Section 169, Clark & Marshall, Ibid.

Little wonder the judge advocate doesn't want to inform these accused what law and customs of war they are charged with having violated. He knows full well that there is no international law, no Hague

"RR(15)"



Convention or Geneva Prisoner of War Convention which provides for punishment of individuals for violation of these conventions.

Let the judge advocate produce the statute which imposes punishment upon individuals; let him show the statute which imposes a punishment upon the person alone who actually commits the act constituting the offense and not in general terms upon those who are guilty of the offense.

More aiders and abettors will not be deemed to be within the act where the punishment is imposed by statute upon the person alone who actually commits the acts constituting the offense. See *Stamper v Com.*, 7 Bush (Ky) 612 and Sec. 157, Clark and Marshall, Ibid. In Section 168 of Clark and Marshall, Ibid, the rule is: "To be guilty as a principal in the second degree, a criminal intent is necessary."

There has been no showing that Nagatome had any malice and malice cannot be implied except, (1) "when there is an actual intent to inflict great bodily harm." (2) "When an act is wilfully done or a duty wilfully omitted, and the natural tendency of the act or omission is to cause death or great bodily harm." Section 236, Clark & Marshall, Ibid.

"The distinguishing characteristic of murder is malice aforethought." citing 4 Blackstone 198; *Com v York*, 9 Metc. (Mass) 93 43 Am. Dec. 373.

See all the learned article, Perkins' "A Re-examination of Malice Aforethought" 1934, 43 Yale L.J. 537."

"When it does not exist, the homicide cannot be murder." Clark & Marshall, Ibid, Sec. 237, pages 287-288.

But the judge advocates go even further in their scramble to convict Nagatome, an innocent bystander, of murder. They say as long as he was there he is guilty of murder because he is responsible for the murder because of nonfeasance.

But we will again quote from Clark & Marshall, Ibid, Sec. 262(e), page 332: "To render one responsible for a homicide because of mere nonfeasance, he must have omitted some legal duty which he owed to deceased. Failure to perform acts of mercy or mere moral obligations is not enough." - citing 1 Wharton Criminal Law, Sec. 329, 330; *State v Reitze*, 86 N.J.L. 407, 92 Atl 576; *Barrell v State*, 18 Tex 713; *Connauhty v State* 1 Wisc 159, 69 Am. Dec. 372.

"There must have been a legal duty, and it must have been owing to the deceased," citing *Reg. v Smith* 11 Cox. C.C. 210.

Thus in *Rex v Smith*, 2 Car. P. 449, it was held that one was not guilty of homicide, in allowing his idiot brother living in the same house to die of want, it not appearing he had assumed any duty to support him."

"RR(16)"

"It is also necessary, in cases of this character, that the accused shall have known of the facts making it his duty to act, for a man cannot be said to neglect to perform a duty unless he knows of the condition of things which requires performance at his hands", citing State v Smith, 65 Me. 257; Westrup v Com., 123 Ky. 95, 93 S.W. 646, 29 Ky Law Rep 519, 6 L.R.A. (N.S.) 685, 124 Am. St. Rep. 316. -- Clark & Marshall, Ibid, Sec. 262, pages 332-3.

And why am I so sure that these three accused are all innocent human agents? First because of their cultural background. You realize that Japanese have a different cultural background and I say because of this background they are innocent. Second because of their religion. Their religion isn't something that can be explained in so many words. It taught them to obey. Third, their military training and position in the Japanese military organization. Blind obedience and unquestioned compliance was the order of things in the Japanese army. Because of these things there could be no criminal intent on the part of Nakamura, Kokubo, or Nagatome. This case clearly and definitely is a case of the principal, Miyazaki, actually committing a crime by his own hand, he shot two of the three accused and then committed it by innocent human agents. Poor distracted Nakamura, never very strong mentally, innocently obeyed the orders of Miyazaki in both instances, in the case of the aviator and in the case of the alleged Englishman. We say alleged Englishman because no one testified that the victim was Charlie Smith alias James and an Englishman except by way of hearsay testimony to which we objected but under SCAP rules hearsay was allowed to prove a controverted fact. Lieutenant Sano is typical. He believed he was English because some one told him and so did Ajioka. So when Miyazaki ordered things to be done Nakamura obeyed innocently and so did Kokubo. Nagatome as innocently went along. He thought he was meant to be a guard but he had nothing to guard with. How naive! So it was with these accused, naive beyond any words. Innocent human agents best describes them.

So as to specification one of Charge I, Nakamura and Kokubo are not guilty as principals but were only innocent human agents to Lt. Colonel Miyazaki. According to Clark and Marshall, Law of Crimes, Section 159, Nakamura and Kokubo must be acquitted because they were not principals.

Nagatome didn't do anything and so he must be acquitted of murder.

We will agree with the judge advocates that Miyazaki, Aritsune, deceased, was the principal. Miyazaki procured the execution by two innocent agents, Nakamura and Kokubo, and Miyazaki is therefore himself guilty as the principal in the first degree. (See section 164, Clark and Marshall, Ibid.) None of these three accused are accessories before the fact, all having been present when the offense was committed. The evidence shows Miyazaki the principal is dead. The commission should acquit all three of these innocent agents of the crime of murder as alleged in specification 1 of Charge I.

"RR(17)"



Then there is specification 2 of Charge I. Nakamura is charged - that he did "wilfully, feloniously, with premeditation and malice aforethought and without justifiable cause, strike, kill and cause to killed by shooting with firearms-----one Charlie Smith, alias James, an unarmed British national.

Lieutenant Sano testified as to the nationality of Smith but admitted, in answer to Q. 22 on the fifth day of the trial Lieutenant Sano said, "By nationality I mean that the person residing in that country and registered in that country." To Q. 24 Sano said he knew Charlie Smith was residing in the Palau Islands and that he was married to a native woman.

Then the prosecution brought in Ajioka who had been tried and found guilty of this same offense for which Nakamura is now being tried.

Ajioka testified in answer to Q. 24 as follows: "I think it was on the 28th or 29th of December, 1944. Captain Nakamura came from Shinsui-zan and said, 'He will be executed by orders of the commanding officer of the headquarters.'-----and Captain Nakamura ordered Yamada to shoot."

In answer to Q. 25 he said: "Captain Nakamura ordered Yamada to shoot and then he was executed. That is all."

As we have pointed out previously Miyazaki the commanding officer is in this incident again the principal. He it was who actually committed the crime by Nakamura, who was but an innocent human agent. See Section 159, Clark & Marshall, Ibid.

Ajioka and Yamada were both members of the Kempeitai and the commanding officer of the South Seas Kempeitai was Lt. Col. Miyazaki. Nakamura was but the officer-in-charge of a few men called a detachment. Nakamura had no malice toward this man Charlie Smith. The record fails to show any testimony that Nakamura had any malice, or that he did this wilfully.

The only evidence produced by the prosecution is the testimony of Ajioka that Yamada did shoot on the orders of "Nakamura. Nakamura we say was only an innocent human agent of Colonel Miyazaki.

The judge advocate was right. Nakamura should not have been tried for this crime. Miyazaki was the principal and should be charged with the crime. According to the piece of paper introduced into evidence Miyazaki is dead.

Acquit Nakamura of the crime of murder as he is charged in specification 2 of Charge I. He was but an innocent human agent. The evidence introduced by the prosecution shows it is the same offense for which Ajioka and Yamada were convicted. They too were both ready to testify but only Ajioka was called as a witness.

"RR(18)"

Nakamura acted only because he was compelled to act because of threats on the part of Miyazaki to do him grievous bodily harm if he refused. These threats were present threats and Nakamura knew full well the unrelenting Japanese discipline. His fear was well grounded.

The order was to Nakamura apparently lawful and Nakamura in good faith had reasonable grounds to think he was justified to act, particularly when threatened with grievous bodily harm.

The judge advocates are not satisfied with trying Nakamura for murder but charge him with failing to act and failing to protect the very persons whom they charge him with murdering.

Case after case we hear about the Yamashita case and so in this case the judge advocates say find Nakamura guilty because an army court found Yamashita guilty. We have pointed out the great difference in the Yamashita case before and hesitate to do so again because they are so obvious. Yamashita was a general. Nakamura was but a first lieutenant and had a small detachment of military police, some six or seven men and a handful of assistants. Miyazaki was the commanding officer. In the aviator case, specification 1, Miyazaki stood over Nakamura and forced him to do the act. Poor little Nakamura, only an innocent human agent thinking it was right to obey did act.

According to our standards of morality we say Nakamura had a duty to protect. He didn't know about our moral standards. International law imposed no such duty upon him, particularly when his commanding officer and the commanding officer of the Japanese military police in the Palau Islands stood there with a smoking pistol in his hand having just killed one of the three prisoners and ordered, "Cut." When Kokubo failed to cut Miyazaki fired five or six shots into the third prisoner. There was the duty to protect? Who had the moral duty to control when the commanding officer was executing and ordering others to execute?

If there was any such duty imposed by our code of morals Nakamura didn't know it. "Failure to perform acts of mercy or more moral obligations is not enough" (Sec. 262; Clark & Marshall, Ibid)\* The law doesn't punish for violation of moral codes.

The Yamashita case is poor law, as applied to Nakamura. It was decided when feeling was running high and yet there are two strong dissenting opinions by two Supreme Court justices on appeal. But no matter how poor the law of the Yamashita case as applied to Nakamura or any other case is, there will always be something to peg other cases upon it and say, "This is our precedent." It would seem that there should be another case than the Yamashita case especially when that case carried two strong dissenting opinions. It is the duty of lawyers to show distinctions and there are plenty between the Yamashita case and the case of Nakamura.

\* - "There must have been a legal duty and it must have been owing to the deceased" - Sec. 262, Ibid.)

"RR(19)"

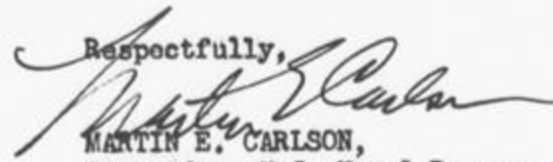


So even in the Charlie Smith case the duty Nakamura owed was a legal duty to carry out the principal's orders, because Nakamura was but an innocent human agent.

We ask that this case be decided according to law. Let us not punish these accused because their moral standards were different than ours. Let us not punish them because they were innocent human agents.

A crime has been committed you say, and someone must be punished. Agreed. Punish the principal not the innocent human agents of the principal.

Respectfully,

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

January 27, 1948.

"RR(20)"

1170

CLOSING ARGUMENT FOR THE PROSECUTION

IN RE NAKAMURA, ET AL.

Delivered by

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

May it please the commission:

Defense counsel has spoken for many minutes. Although a closing argument is expected to be an exposition on the evidence adduced throughout the trial, much of his argument has been on matters already ruled upon by the commission. The question of challenges has been decided. The question of whether or not Miyazaki is dead has already been passed upon, and let the Judge Advocate assure defense counsel that the Office of the Director of War Crimes, Pacific Fleet, has satisfied itself that Miyazaki is dead. As in past times, defense counsel attacks the principal prosecution witness, in the present case Sano. There have been some small inconsistencies in Sano's testimony but the mere passage of time -- the crime occurred in 1944 -- would explain the minor differences. On the main issue of this case, the murder of the three prisoners and the circumstances surrounding their death, Sano is uncontradicted.

The mere fact that defense counsel argues that the execution is legal does not make it so. The analogy between the accused here and a hangman is poor. No official hangman ever acts until he has been shown that the execution ordered is a proper one -- and one ordered after a trial. There is no evidence in this record that the victims were ever given a trial. In fact, all the evidence tends to show that they were not.

Today there is no distinction between accessory and principal. -- See Section 41, Naval Courts & Boards. Thus we have charged all three accused as principals and the evidence shows that they were principals.

Contrary to the statements of counsel, the record contains nothing showing that Nakamura was ever threatened by Miyazaki. Nakamura hints at this in his statement but his unsworn statement is not evidence.

The defense counsel in their arguments seem to have misread the charges and specifications in the present case, for they deal with each accused as though he were being tried for a separate murder. In specification 1 of Charge I we allege that all accused participated in the murder of three unarmed American prisoners of war. We have proved that they were all members of a common execution party and are all equally responsible for the violence used upon the prisoners. In specification 2 of Charge I only Nakamura is being held accountable for the murder of Charlie Smith.

With respect to the specific arguments of counsel for both Nakamura and Kokubo, they might better have been made after the findings of the commission, for they are definitely arguments in mitigation rather than arguments in support of the proposition that Nakamura and Kokubo are not guilty of the crimes to which they have already confessed. In the case of

"SS(1)"



Kokubo, it has been argued that because Miyazaki found it necessary to fire additional bullets into the head of the airman that Kokubo had used his sword upon, Kokubo is thereby not guilty of murder. Kokubo is guilty of murder because he was a member of the execution party and also because he actually did use a weapon upon an airman. We have his confession in support of this and we have the uncontradicted testimony of Lieutenant Sano; and we also have the uncontradicted testimony of Nagatome brought out on cross-examination. With respect to the contention that as Kokubo's blade did not instantly cause death he should be released from responsibility, we call the commission's attention to Section 225 of Wharton's "Criminal Law", page 340, which says, "Where one assailant strikes a blow which is not fatal and a confederate follows it up with a fatal blow, both are principals in the homicide." Thus Kokubo is a principal in the homicide. And as Mr. Kenny advised the commission, this homicide, because it was done intentionally and without justifiable cause, is murder. Kokubo, although he did not take the stand, like Nagatome, who did take the stand, would have this commission believe that he actually did not know why he was to accompany the execution party. He did not know before they left the Kempeitai what was going to be done with the three bound and blindfolded victims and yet he felt it necessary to secure the ashes of Corporal Ikushima and to take these ashes along with him. If he did not know that he was going to participate in an execution, where was there any necessity of bring a morale builder, the ashes of Ikushima, with him? All parties involved in this case knew when they left the Kempeitai that the aviators were going to be killed. True, in the case of Nagatome we were unable to show by definite evidence that he knew before he boarded the truck what the end result of the journey was to be, but the commission is justified in believing from all the facts of the case and in spite of his denial that he knew that the aviators were to be executed. Again, as pointed out by Mr. Kenny, if Nagatome didn't know when he boarded the truck he surely knew when he left the truck. Nagatome is guilty because he acted as a guard and once having been given the duty he never relinquished it until the execution was over.

The fact that there were additional armed men from Division Headquarters who also acted as guards in no way denies the guilt of Nagatome. Possibly at some later date these additional guards may be brought to trial for their participation. But merely because there were additional guards does not absolve Nagatome from his guilt. He aided and abetted and assisted this execution. He went along as a guard and for any other duties that he might be assigned at the scene. In spite of his denials, we know from the testimony of Sano that he did have an additional duty at the scene -- he relieved Kokubo of the ashes of Ikushima in order that Kokubo would be unhampered when he swung his sword against the victim. Any degree of active participation in a murder is sufficient to warrant an individual's being held as a principal. While the commission may believe that Nagatome used no violence, and we have never claimed that he did, that therefore his participation was alight, let the commission take this into consideration when it comes time to sentence Nagatome but not be misled into believing that his actions did not actively mark him as a participant.

The commission has paid close attention to the testimony in this case and there is no point in laboring the guilt of Nakamura and Kokubo.

"SS(2)"

Once again the commission has been forced to hear the minority opinion in the Yamashita case. In the Yamashita case one of the minority opinions made mention of the fact that Yamashita was unable to control the operations of his men because the American had ruined the communications between his headquarters and his outlying companies. That is not the case here. In all instances involving the second charge, Nakamura was present with his men and he did not control them. International law requires that the commanding officer exercise control over men under his command. There was nothing here to prevent Nakamura from exercising his control and he failed to do so. Kokubo was his man, as was Nagatome. In both instances through his orders Americans died. Ajioka was his man as was Yamada and through his orders Charlie Smith died and Nakamura should be held to have violated the law and customs of war in not controlling or protecting the aviators and Charlie Smith.

In all the arguments of defense counsel the question of superior orders has been used. They have blamed Miyazaki and Inoue for the acts of Nakamura and his subordinates. The prosecution admitted and in fact introduced evidence that the original idea of the execution of the aviators came from Tada and the idea for the execution of Charlie Smith came from Miyazaki. However, in no war crimes trial has the defense of superior orders been recognized as a legitimate and exculpatory defense. The fact that there were superior orders goes to the degree of punishment which should be assigned individuals rather than the question of their guilt or innocence. The prosecution, as my fellow judge advocate has pointed out, is under no obligation to prove every word in the charges and specifications beyond a reasonable doubt but only the incidents of the corpus delicti. The prosecution in this case has proved beyond a reasonable doubt that Nakamura murdered the aviators and Charlie Smith and that Kokubo and Nagatome aided Nakamura in murdering the first three victims.

On that day in September their various illnesses and their various feelings of foreboding and their sympathy for the victims did not prevent them from murdering the victims and we ask that they now be found guilty of their crimes.

Respectfully,

*Joseph A. Reiman*  
JOSEPH A. REIMAN,  
Lieutenant Commander, U.S. Navy,  
Judge Advocate.

"SS(3)"

1173



NH44/926  
P2-4  
DJW:JPB/rh

U. S. NAVAL HOSPITAL  
U. S. NAVAL MEDICAL CENTER  
GUAM, MARIANAS ISLANDS

13 January 1948

From: Staff Psychiatrist, U. S. Naval Hospital, Guam, Marianas Islands.  
To: Commander Marianas Area.  
Subject: Examination of NAKAMURA, Kasuo.  
References: (a) Your serial 206 of 7 January 1948.

1. In accordance with reference (a), I report the results of the examination of NAKAMURA, Kasuo, as follows:

7 January 1948: The above named former captain of the Imperial Japanese Army was admitted for psychiatric evaluation at the request of the war crimes commission following his plea of insanity in connection with war crimes charges being brought against him.

He was admitted ambulatory under armed guard. He is extremely polite and cooperative. He speaks no English. Interviewed only through an interpreter. Complaining of a burning pain in the top of his head. At this time is apparently coherent. Well oriented. States that he is here for examination because the possibility of something being wrong with his mind was brought up at his trial.

Temperature - 99.2° F. Pulse - 70 Respiration - 20

The following examination was obtained by direct examination and interview of the subject through a Japanese interpreter, Isamu UEDA.

CC: "Hot pain in the top of head."

PM: The patient is a 42 yr. old former Captain of the Imperial Japanese Army who has been in confinement on Guam since October, 1947, in connection with the war crimes trials. Until 24 December 1947 he was an important witness. On that date he was charged with murder and neglect of duty in protecting American prisoners from cruelty. He wants to plead not guilty.

At this time he complains only of a slight headache in the top of his head which is described as a hot pain. He denies that the sensation interferes with his thinking in any way.

He states that for the past two months he has had a transient sensation of pain and pressure in his chest on the right side anteriorly. He received examination and treatment by a Navy medical officer and was told that it would be all right. Thinks he was given Vitamin C. His appetite improved and the pain improved and is now no longer present.

He also complains that beginning about 40 days ago he had difficulty in going to sleep at night. In the last week that complaint has subsided. The history concerning the peculiar headaches is rather vague. He thinks that it has been present off and on for 4 - 5 years. He denies that the complaint has caused hospitalization or has caused him to be incapacitated. He feels that the pain has increased in severity since he came to Guam and he attributes this to the heat in his cell. He does not feel that worry has affected his headache.

CERTIFIED TO BE A TRUE COPY

*James P. Keary* LP. USN

"Exhibit 1(1)"

1174

He also complains of a continuous ringing (like an insect's cry) in both ears which has been present 2-3 mos. Present recurrently previously over a period of 2-3 yrs. Thinks that the sound is more marked when he lies on his back. There is no history of associated visual, equilibrium or gastro intestinal symptoms.

There is no history of loss of balance when eyes are closed or when he tries to walk in total darkness. He denies that there is anything wrong with his mental faculties. He adds that he thinks he was sent here for observation because he told his lawyer about his eldest son who is not bright and could not pass in school. He denies that his son is "insane". He denies that he told the court that he is insane. He denies that his lawyer entered a plea of insanity but that they requested an examination on the possibility that something might be wrong with him.

#### Family History:

The subject states that both his parents died several years ago of old age. There were eight siblings. Two died in early childhood of unknown causes. Two died in adult life, one during child birth, the other of carcinoma of the uterus. The others are all living and well with no history of nervous or mental diseases.

He states that his father was an alcoholic. History of grandparents and uncles and aunts is negative concerning feeble mindedness, epilepsy, migrane, alcoholism, neuritis, invalidism, psychosis, fits or spells of any kind, "nervousness" "nervous breakdowns" Tuberculosis, Syphilis, malignancy and heart disease.

The subject was married in 1931 or 1932. Wife is living and well, age 34. There were six children. One died at birth. One died at age 2-3 of unknown causes. The other four are living and well and apparently normal except for the eldest who is apparently a mental defective.

The subject's father was a farmer. The financial status of the family was quite low. He claims a good home adjustment but states that parents did not adjust well to each other at times.

He claims that the compatibility of his own family (wife and children) is good.

#### Personal History:

Developmental. The birth history is normal. Early physical mental and physical development was apparently normal. There is a history of nailbiting as a child.

Educational. He attended six years of grammar school and two years of higher grammar school. He denies failures. Claims good adjustment to other students and teachers.

Occupational. Following his formal schooling, the subject worked as an apprentice in a shoe factory until he was inducted into the Army. Claims acceptable adjustment to fellow workers and superiors.

CERTIFIED TO BE A TRUE COPY

*James A. Henry* Lt. USN

-2-

"Exhibit 1(2)"

1175



**Military.** He entered the Japanese Army in 1927 as a Private. Claims a good service record and he came through the ranks to Captain. He denies that he has participated in actual combat. Has one decoration for time in service and one "for services rendered in China incident".

**Self Evaluation.** The subject evaluates himself as an average individual. States that he makes and keeps friends fairly well. However, he denies that he becomes very intimate with anyone. He has no hobbies or any special interest in athletics. His main interests are his family and his present situation.

**Sexual and Marital:** He claims a normal sexual development and marital adjustment.

**Habits.** He denies the use of habit forming drugs or the intemperate use of alcohol.

**Religion.** Parents are Buddhist. States that he is a Buddhist but not an ardent one. Just passive.

**Criminal.** He denies any civil or military criminal record.

**Clinical.** There is no history of serious injuries or illnesses other than syphilis 12 yrs. ago. He received 4-5 shots of "606" at that time.

More recent medical history is recorded under PI and he received no medical attention for these complaints prior to his coming to Guam. He has had no surgical operations.

**Verbal.** There is no history of mental illness or treatment for mental or nervous disease.

#### **Mental Examinations:**

On admission and since the subject has been extremely polite and cooperative. He is neat and clean. He is alert to his surroundings and does not appear to be fearful or anxious. There is no overt evidence of hostility or suspiciousness. There has been no evidence of any behavior that could be interpreted as abnormal.

As nearly as can be determined his speech is normal and his answers are prompt and coherent. There is no evidence of blocking, flight of ideas, retardation, perseveration, echolalia, neologisms or incoherence. There is no evidence of delusions, ideas of reference, hallucinations, ideas of unreality, ideas of unworthiness or great sin or suicidal thoughts.

Attention, perception, comprehension, consciousness are considered to be intact. Orientation is intact in all three spheres. Remote and recent memory are considered to be intact as are retention and recall.

General intelligence and general information are very difficult to evaluate because of the language and cultural factors but there are no obvious defects. Insight is considered to be good.

**Physical Examinations:** The patient is a well developed, well nourished Japanese male adult. He does not appear to be acutely ill. Is ambulatory. TPR normal. BP-100/60. Weight-126 lbs. General physical examination is essentially normal throughout.

CERTIFIED TO BE A TRUE COPY  
*James A. Kenny* M.D.

**Neurological Examination:** The cranial nerves are intact except for questionable decreased auditory acuity, bilaterally. Fundoscopic exam.-negative. ENT consultation gave the opinion that his tinnitus was due to exposure to firing, and also stated that there was "some loss of hearing".  
**Diagnosis:** Irritation of the 8th Nerve.

**Motor system:** Gait is normal. Station is normal. (Romberg test is negative). There are no involuntary movements. Muscular strength is normal. There is no evidence of muscular atrophy. Abnormal rebound is not present. Non-equilibratory coordination. Tongue movements normal. Tests of upper and lower extremities normal.

**Reflexes:** Normal (present in normal individual).  
**Deep:** Massitis-normal. Rectal-normal. Biceps-normal. Triceps-normal. Patellar-normal. Achilles-normal. Ulna-normal. Radial-normal.  
**Superficial:** Cremasteric-normal. Abdominal-normal.  
**Pathological Reflexes:** (Not usually seen in normal individuals) No pathological reflexes were elicited.  
**Sensation:** Light touch normal. Heavy touch-normal. Touch localization-normal. Two point discrimination normal. Joint position sense normal. Form and texture recognition-normal. Figure recognition-normal. Vibratory sense-normal. Temperature recognition-normal. Pain perception-normal.  
**Peripheral nerves:** No abnormalities found. Autonomic functions-No abnormalities noted.

9 January 1948: The subject continues to be extremely cooperative. No spontaneous complaints.

10 January 1948: LP this day-clear fluid. Sent to laboratory for examination.

12 January 1948: The subject continues unchanged except for slight headache and back ache since lumbar puncture was done. Symptomatic therapy. Laboratory and special study reports:

10-21-47: PA chest and left rib film are negative.

1-10-48: Skull films are negative.

Spinal fluid examination a few days prior to admission to the sick list:

Pandy negative (normal)

Kahn negative (Normal)

Colloidal gold curve-1110000000 (Considered normal if not accompanied by positive findings).

1-8-48: RBC-4,300,000 WBC-9,200 Hemoglobin-12.5 gms%; 86% WBC-

differential-Bands-2 Segmented-59 Lymphocytes-33 Eosinophiles-6.

1-8-48: Blood Kahn - normal.

1-8-48: Blood sedimentation rate 8 mm drop in one hour.

1-8-48: Urinalysis-normal throughout.

Report on spinal fluid drawn 10 Jan 1948; 45 mg. of protein/100 cc of spinal fluid. Colloidal gold curve 1110000000 (Not considered abnormal when other findings are normal).

13 January 1948: Conclusions:

I am unable to demonstrate evidence of any functional psychosis or any evidence of incapacitating disease of the nervous system. Established diagnosis as: No Disease (Psychiatric Observation)#2143. Return to former status.

CERTIFIED TO BE A TRUE COPY

*James P. Kenny* Lt. JN

R. E. SWITZER,  
Lieut., MG, USA,  
Psychiatrist.

"Exhibit 1(4)"



Echubet

報告書

本籍 東京都世田谷区上馬場二丁目一五番地  
住居 岡山縣真庭郡湯梨野大字湯本二五番地

中田正則

宮崎有恒

明治三十四年十月六日生

昭和二十二年一月二十四日、聯合軍最高司令部法務  
局大股支部在勤の吉田調査官殿より  
右者の逮捕連行方を私に母が刑事の  
二名に命ぜられ、同月二十六日午前九時三十分頃  
前記住居地の自宅に於て逮捕せられ  
右者は痲痺に就き居り、尚住居地は  
交通の便悪く、遂に翌二十七日車行すべく  
準備中、一月二十七日午前七時頃看視の預  
を預か、遂所内にて青暖加里を服用し  
泳に死せり  
私は逮捕後、大股村へ無線連絡及び自衛連  
の手配等。遂右者とは時に中断せり  
一月二十六日午後十一時頃監視を母が刑事に依  
頼し、宿舎に居るの向う右者より花記の如  
き語を聞いた故に記憶します

花記

戦犯といふは私は南京に居る時、相手が  
て来ながら、此れは戦犯に殺されり

致方あります  
私はフランス語をよく知っていますが  
英語はあまり利らないのでね  
この東捕伏はピラオと書いて  
あるから、ピラオ島時代の事でしょう  
ピラオと恐る時は、相当現住民を大事  
にしていたから、不正な事は絶対に  
なかったはず。それは現地新聞が今も  
あるから、それが証拠です。  
ピラオ島の事はあつた  
捕虜を殺した者を死んだ奴にするため  
現住民を殺して、疑家の死体を作った  
のを憲兵隊に承認せよと云ふので、憲兵隊  
が承認をした事がある  
ピラオの事はあつたが、事は  
この事は、多田が指揮してやった  
事である。多田が謀は度、憲兵隊に  
自分と都合の悪い事は、皆憲兵隊に  
責任をなすりつけるのである。  
私は必ず、東隊の部下で、赤坂を根拠  
に、相手を倒したものである。  
右の如き語をなした奴に記憶します  
昭和二十二年十月二十日  
大坂府警部刑事課勤務



平井 兼

良右

「從ハ眞實を述ヘ何事モ  
又何事モ附加セザル

事モ證言ス

余の証言ハ此範圍内及ハ言フ

限リニ於テ眞實なる事を證言ス

昭和二十二年十月十日

平井 兼

Exhibit 3

Report

Place of Registration:  
Tokyo-to, Setagaya-ku,  
Kamiuma-machi, Itchome,  
875-Banchi.

Address:  
Okayama-ken, Maniwa-gun,  
Yuhara-machi, Oaza-Yumoto,  
115-Banchi.  
Care of NAKATA, Masatane.  
MIYAZAKI, Aritsune.  
Born 6 October 1901.

On 24 January 1947, Detective TANJI, Akira, and myself were ordered by Investigating Officer YOSHIDA, who is on duty with Osaka Branch of Legal Section, GHQ, SCAP, to arrest and bring in the above person. Even though we arrested him in his room at the above mentioned place of residence about nine-thirty in the morning on the twenty-sixth day of the same month, he was sick in bed and, as communications were bad from his place of residence, we made preparations to bring him in on the following day, the twenty-seventh. About seven o'clock in the morning on the twenty-seventh he watched for a moment when the guard wasn't watching, took potassium cyanide internally in the latrine and finally died.

After the arrest I had to be away from the above mentioned person TN. MIYAZAKI from time to time to send a wire to Osaku-fu and to make arrangements for an automobile to go to Osaka. About eleven o'clock on the night of 26 January I asked Detective TANJI to stand guard and returned to the barracks. Up to this time I recall hearing the following story from the above mentioned person TN. MIYAZAKI.

Following Story:

"As for being a war criminal, since I committed quite a few TN. war crimes when I was in NANKING, there is no escape from being put to death as a war criminal for these.

"I know French very well, but I don't understand much English.

"As Palau is written on this warrant for arrest, this is probably something to do with the time I was on Palau.

"Since I took good care of the people living there when I was on Palau, there were absolutely no illegal acts. As I still have the local newspapers, these will be proof!

"If it is something to do with Palau, it did happen that in order to make it look like the person who killed a prisoner had died, they killed a local inhabitant, camouflaged the corpse, and then, as they said for the kempeitai to approve it, the kempeitai approved it. If it is something to do with Palau, that is probably the affair.



"Staff Officer TADA directed this affair. Staff Officer TADA was an evil man. He was a fellow who put all the responsibility on the kempeitai if any of his arrangements went awry.

"I was formerly a subordinate of TOJO. I established my base at Akasaka and did quite a bit of work for him."

I recall that he related the story in the above fashion.

20 October 1947

Osaka-fu Police Department,  
Detective Bureau,  
HIRAI, Kyoshi.

According to my conscience, I swear that I have told the truth, concealed nothing and added nothing.

I have testified to the facts within my knowledge and belief.

20 October 1947.

HIRAI, Kyoshi.

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

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

*Exhibit 4*

Actual Circumstances of the Execution and Disposal of the Englishman.

Around the latter part of December 1944 the Kempei tai was situated at Shisuizan. The Kempei detachment had broken up and was together at headquarters. I recall that I was a first lieutenant at that time and had been ordered to be Chief of police affairs. One morning just after MIYAZAKI, the unit commander, had returned from division headquarters, he called me to the unit commander's room and gave me the following orders.

He said, "It has been decided that the Englishman who is with the Gasupan Kempei tai detachment is to be executed. As it is an order of division headquarters, Lieutenant NAKAMURA, go to Gasupan immediately and have the execution carried out at the detachment."

Furthermore, he told me to have Sergeant YAMADA shoot him, that <sup>near</sup> the place where they killed the Spanish would be best and that you will not just leave it up to the commander of the detachment but even though it is unpleasant you yourself will go to the scene and supervise it directly. He also said that it was not necessary to pronounce the sentence of execution upon the Englishman as he did not understand the language, told me to phone the detachment commander to dig a hole at once, and called my attention to many other details.

As for myself, to go to the Gasupan area at that time was dangerous because air raids were frequent and moreover, I didn't like the job. However, as it was an order of the unit commander and since under the circumstances I couldn't get out of it, there being no alternative, I informed the detachment by phone that they were to dig a hole. After lunch that day I was again called by the unit commander and when I went to the unit commander's office the unit commander said further, "As there aren't any air raids now, go quickly," and he cautioned me again about the details. I left immediately taking one auxiliary kempei with me and arrived at the Gasupan detachment about two or three o'clock in the afternoon. I don't think Warrant Officer AJIOKA was there at that time. After I had waited about ten minutes he came back and said to me, "The hole has been prepared." With that I informed Warrant Officer AJIOKA of Unit Commander MIYAZAKI's order. Then Warrant Officer AJIOKA immediately gave orders to the men of the detachment and they made preparations to start out. After a short while, as Warrant Officer AJIOKA said, "We are ready to go," I stepped out to look around. Warrant Officer AJIOKA, Sergeant YAMADA, one auxiliary kempei (HAYASHI, perhaps?), and UYEMURA, the servant were all out in front and also the Englishman. <sup>near</sup> The one auxiliary kempei I brought with me ~~and~~ I went together on foot to the top of Gasupan Hill and looked for the hole which had been dug but could not find it. Therefore, as there was something that looked like an old air raid shelter about two meters square which was at the entrance of the jungle, I said to Warrant Officer AJIOKA, "Shall we do it in this hole?" As detachment commander AJIOKA agreed, I ~~gave orders to~~ <sup>ordered</sup> Sergeant YAMADA, "YAMADA, do it." I recall that Sergeant YAMADA made a grimace and didn't look like he was going to do it so Warrant Officer AJIOKA said again to Sergeant YAMADA,



"YAMADA, do it, do it." With that Sergeant YAMADA sat the Englishman down on the edge of the hole (or perhaps he stood him there) and shot him in the back of the head with a pistol. AJIOKA, the others and myself were watching ~~from the side~~. As he was killed outright by the one shot and fell into the hole, and since he was definitely dead when we looked from above, I had the soldiers bury him.

The Englishman never said anything and was very quiet.

On the way back in the middle of the hill the one auxiliary kempei whom I brought with me and I separated ourselves from the detachment and returned together. I reported the circumstances to the unit leader at once and the unit leader said, "Thank you for your trouble."

23 July 1947

Former Chief of Police Affairs,  
South Seas Kempei tai.

Former Kempei tai First Lieutenant, IJA.

NAKAMURA, Kazuo.

I hereby certify the above to be a true and complete translation to the best of my ability of the original statement written in Japanese.

*Fredrick F. Tremayne*  
FREDERICK F. TREMA YNE,  
Lieutenant (jg), USNR.  
Interpreter.

*The contents of the above statement  
is all true.*

*Nakamura, Kazuo.*

*I hereby certify the above to be a true  
and complete translation to the best of my  
ability of the original statement written  
in Japanese.*

*SS Kenneth J  
USNR*

-2-

"Exhibit 4(2)"

1184

英國人死刑處分實施狀況

昭和十九年十二月末日頃當時憲兵隊ハシスイ山ニテマリ  
マルテ憲兵分隊ハ無クナリ分隊ハ本部ト一緒ニテツテ居  
テ私ハ中尉デ警務課長ヲ命ゼラレテ居リマシタト  
思ツテ居マス或日ノ午前宮崎隊長が集團司令部  
カラ飯ツテスグニ私ヲ隊長室ニ呼ビマシテ次ノゴトヲ  
命ゼラレマシタ

ガスパン憲兵分遣隊ニ居ル英國人ハ死刑ニ決ツタ集團  
司令部ノ命ヲカラ中村中尉ハスグニガスパンニ行  
ツテ分遣隊テ死刑ヲヤラセヨ

ト云ハレ更ニ山田軍曹ニ銃殺サセヨトカ場所ハスペイン  
人ヲヤツタ附近ガヨイトカ分遣隊長ハカリニ任セス  
オ前ガイヤデモ現場ニ行ツテ直接指導セヨトカ又

昭和 年 月 日



No. 2

昭和 年 月 日

ハ英國人ニ對スル死刑ノ言渡ハ言葉が通ジナイカラ  
 言ハナクテモヨイトカ 今スグニ穴ヲ掘ル様ニ分遣隊  
 長ニ電話デ言ヘトカ其他細部ニ注意ヲタタサン  
 云ハレマシタ 私トシテハ當時がスパンノ方面ニ行クコトハ  
 空襲がタダクテ危險デアリマシ又仕事モイヤデア  
 リマヌガ隊長ノ命デアリマヌカラ其場合之ヲ逃レ  
 ルコトハ出来マセンノデ仕方ナクスグニ電話デ分遣隊  
 ニ穴ヲ掘ルコトヲ傳ヘマシタ シシテ其日ノ晝食後  
 又隊長カラ呼バレテ隊長室ニ行キマシタ處隊長  
 ハ更ニ 日 今空襲がナイ様カラ早ク行ケ  
 ト云ハレ又細部ノ注意ヲサシマシタ 私ハスグニ補助  
 官兵一名ヲ連シテ出カケ午後二時カ三時頃ニカスパン  
 分遣隊ニ着キマシタ 其時味岡准尉ハ留守デアツ

昭和 年 月 日

夕様ニ思ヒマスガ十分間ばかり待ツテ居マシタ處取ツテ  
 来テ私ニ對シ「穴ハ準備出来テ居マス」ト云ヒマシタノデ私ハ味岡准尉ニ對シ「宮崎隊長  
 ノ命ヲ傳ヘマシタ」處味岡准尉ハ「スグニ分遣隊  
 員ニ命ジテ出發ノ準備ヲシテ居マシタガ」シバラクシテ  
 味岡准尉ハ「出奔ノ準備」が出来マシタト云ヒマスガ  
 ラ出テ見マシタ處味岡准尉ト山田軍曹ト補助憲  
 兵一名（林デアツタか？）ト傭人ノ植村トが出テ居テ  
 英國人モ出テ居マシタソレテ私ト私ノ連レテ來タ補  
 助憲兵一名ト同道ニテ徒歩デカスパン台ニ行ツテ  
 堀ツタ穴ヲ捜シマシタガ判ラナイノデ「ジャングルノ入  
 ロニアツタ」約ニ米四方位ノ古防空壕ヲレイモノガアリマ  
 シタカラ其處デ私ハ味岡准尉ニ對シ「此ノ穴ニシヨ



No. 4

昭和 年 月 日

ウカ<sup>ア</sup>ト云ヒマシタ處味岡分遣隊長モ同意シマシタノ  
デ私ハ山田軍曹ニ對シ<sup>コ</sup>山田ヤレ<sup>ト</sup>命ヲ傳ベマ  
シタ處山田軍曹ハイヤナ顔ヲシテヤリソウニモナカ  
ツタ<sup>ン</sup>デ味岡准尉カ更ニ山田軍曹ニ對シ<sup>コ</sup>山田  
ヤレヤレ<sup>ト</sup>云ツテ居タ<sup>コト</sup>シ<sup>テ</sup>記憶シテ居マス  
<sup>（或ハ山田軍曹ハ英國人ヲ穴ノ前ニ坐ラセ</sup>  
拳銃デ後頭部ヲ射チマシタ私ト味岡ト其  
他ノ者ハ其ノソバデ見テ居マシタが一發デ即  
死シテ穴ヘ落チマシタカラ上カラ見マシタ處タ  
シカニ死ニシテ居マシタカラ兵ニ埋メサセマシタ  
英國人ハ何モ云ハナイデオトナシタシテ居マシタ  
ソシテ歸途ハ山中デ分遣隊ノ者ト別レテ  
私ハ連行シタ補助憲兵一名ト共ニ歸ツテ

No. 5

昭和 年 月 日

スグニ隊長ニ状況ヲ報告シマシタ處隊長  
ハ御苦勞デアッタト云ハレマシタ

昭和二十二年七月二十三日

元南洋憲兵隊警務課長

元陸軍憲兵中尉中村數夫

右連述ノ内容ハ全部真實ニアリマス

中村數夫

"Exhibit 5"

1189



STATEMENT

1. I do not know where the three American aviators were apprehended.
2. I did not hear any talk beforehand about the execution of the aviators.
3. As I was setting out for the place of the execution, Captain Nakamura ordered me, "Sergeant Major Kokubo, come armed." I knew at that time for the first time about the execution of the aviators.
4. At the same time as that, I felt afraid somehow or other. I suddenly thought of taking the ashes of Sergeant IKUSHIMA in order to rid myself of this fear.
5. A hole was already dug at the place of the execution.
6. The people who happened to be present at the place of execution were in all about ten odd persons such as Unit Commander, Lieutenant Colonel Miyazaki; Detachment Commander, Captain Nakamura; First Lieutenant Sano; Sergeant Nagatome, assistant Kempeis, officers and men of headquarters and other units.
7. The aviators were blindfolded.
8. First Lieutenant Colonel Miyazaki shot one of the aviators with a pistol. Next Captain Nakamura cut one of the aviators with a Japanese sword.
9. Captain Nakamura ordered me directly in regard to the last aviator, saying, "Kokubo, cut."
10. Because the blood rushed to my head, I did not aim and the sword (Type 95) only hit the collar of the aviator's coat and did not cut him.

24 December 1947  
/s/ KOKUBO, Chihiro

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

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

"Exhibit 6"

- (1)
1. 米國飛行士三人は 何処でつかまつたもつか 私は知りません。
  2. 飛行士の処刑については 事前に話を私は聞いて居りません。
  3. 処刑場に出かける間際に 中村大尉は「小久保曹長武装して来い」と私に命令はした、其時始めて 飛行士処刑の事を私は知りました。
  4. 夫と同時に 私は何かしら 恐怖を感じました。私は恐怖心を除く為に 幾島軍曹の遺骨を携行しようと 突然に思いました。
  5. 処刑場には既に穴が掘られて ありました。
  6. 処刑場に居合せた者は 隊長 宮崎中佐、分隊長 中村大尉、佐野中尉、永留軍曹、補助曹、司令部及他部隊の將兵等全部で十数名です。
  7. 飛行士等は 目かくし、されて居りました。
  8. 最初に 宮崎中佐が 飛行士の一人を拳銃で撃ち、次に中村大尉が 飛行士の一人を日本刀で斬りました。



9. 最後の飛行士一人に対し 中村大尉は「小久保  
斬れ」と直接 私に命令した。
10. 私は上気して居りました。めに見當がつかず  
軍刀(九五式)は飛行士の上衣の襟に當り全  
然斬りませんでした。

昭和22年12月24日

小久保千尋

FF12/A17-10(2)  
02-JDM-ro

UNITED STATES PACIFIC FLEET  
COMMANDER MARIANAS

Serial: 4542 -

24 APR 1948

The military commission, composed of Army, Navy, and Marine Corps officers, in the foregoing case, by precept dated November 8, 1947, was ordered convened November 20, 1947, or as soon thereafter as practicable by the Commander Marianas Area pursuant to his inherent authority as a military commander and the specific authorization of the Commander in Chief, U. S. Pacific Fleet and High Commissioner of the Trust Territory of the Pacific Islands (CinC U. S. PacFlt serial 0558 of 8 Mar. 1946; ComMarianas Desp. 292336Z Sept. 1947; CinCPacFlt Desp. 020103Z Oct. 1947; SecNav Desp. 081946Z Oct. 1947; CinCPacFlt Desp. 092353Z Oct. 1947). The commission was authorized to take up this case as indicated in the precept. The order for trial (charges and specifications) was issued December 24, 1947 and served on the accused NAKAMURA and KOKUBO on the same day; on the accused NAGATOME on 31 December 1947. The trial was held under authority of Naval Courts and Boards except that the commission was authorized by the precept to relax the rules for naval courts to meet the necessities of the trial and to use the rules of evidence and procedure promulgated December 5, 1945 by the Supreme Commander for the Allied Powers in his Regulations Governing the Trials of Accused War Criminals, and modifications thereof, as necessary to obtain justice.

On page 1 of the record it is noted that the commission, before its members were sworn, approved a stipulation, concerning the security of classified matter, entered into by the judge advocate and the defense counsel. It does not appear from the record that the stipulation was made with the specific consent of the accused. "Until a court is duly sworn (organized) according to law, it is incompetent to perform any judicial act except to hear and determine challenges against its members." (Sect. 394, N.C.&B). Accordingly the action of the commission in approving the stipulation was erroneous. Further when a stipulation is made it should be followed by an affirmative statement in the record to the effect that the accused acquiesced in the agreement made by his counsel (CMO 1-1942 p. 290). However, here the stipulation accepted related only to matters pertaining to the security of classified material and did in no way involve the issues of the case. It is the opinion of the convening authority that the substantial rights of the accused were not prejudiced. (CMO 2-1943, p. 183).

The record shows that the accused NAKAMURA was convicted on two specifications of murder and that the accused KOKUBO was convicted on one specification of murder. NAKAMURA and KOKUBO, in my opinion, performed their acts in obedience to superior orders. While their acts were brutal, unwarranted and unauthorized in law, it does not appear that their conduct in carrying out their orders was more severe or aggravated than the nature of their acts and orders required.

The command of a superior neither excuses nor justifies an unlawful act but may be given consideration in determining the culpability of an accused (Para. 345.1, War Dept. Basic Field Manual, FM27-10). In view of all the circumstances as indicated in the record, the convening authority does not believe the culpability of NAKAMURA and KOKUBO equal to that of their superiors who issued the orders. In this connection a review of all previous trials in this area reveals that no person has been sentenced to death, as finally approved, who was convicted of murder which he committed without aggravation while acting in obedience to superior orders.

1193



FF12/A17-10(2)  
02-JDM-ro

UNITED STATES PACIFIC FLEET  
COMMANDER MARIANAS

24 APR 1948

Serial: 4542

In view of the above two paragraphs and because the convening authority believes that the punishment for similar war crimes should, insofar as practicable, be uniform, it is recommended that the Secretary of the Navy commute the death sentences of NAKAMURA, Kazuo, and KOKUBO, Chihiro, to that of life imprisonment (Sec. 481, N.C.S.B. refers).

Subject to the above remarks, the proceedings in the foregoing case of NAKAMURA, Kazuo, KOKUBO, Chihiro, and NAGATOME, Yoshimori are approved. The findings of guilty and sentences as to the accused NAKAMURA and KOKUBO are approved.

NAKAMURA, Kazuo and KOKUBO, Chihiro will be retained in confinement at the War Criminal Stockade, U. S. Marine Barracks, Guam, pending instructions from higher authority.

NAGATOME, Yoshimori, who was acquitted, was released from arrest and returned to Japan.

*C. A. Pownall*  
C. A. POWNALL,  
Rear Admiral, U.S. Navy,  
The Commander Marianas Area.

FF12/417-10(2)  
02-JDM-sh

UNITED STATES PACIFIC FLEET  
COMMANDEER MARIANAS

Serial: 4569

24 APR 1948

MILITARY COMMISSION ORDER NO. 43

(In re NAKAMURA, Kazuo, former First Lieutenant, IJA, et al)

1. During period 6 January 1948 to 27 January 1948, NAKAMURA, Kazuo, former first lieutenant, IJA, KOKUBO, Chihiro, former sergeant major, IJA, and NAGATOME, Yoshimori, former corporal, IJA, were tried by a United States Military Commission, convened by order of the Commander Marianas Area, dated 8 November 1947, at the Headquarters, Commander Marianas, Guam, Marianas Islands, on the below listed charges and specifications:

CHARGES:

CHARGE I - Murder (two specifications)

<u>Nature of Offense</u>	<u>Place of Offense</u>	<u>Date of Offense</u>	<u>Names of Accused</u>
1. Kill three unarmed American POWs, names unknown.	Babelthuap Island, Palau Islands.	4 Sept. 1944	NAKAMURA KOKUBO NAGATOME
2. Kill an unarmed British national, POW, Charlie Smith, alias James.	Babelthuap Island, Palau Islands.	29 Dec. 1944	NAKAMURA

CHARGE II - Violation of the Law and Customs of War (four specifications).

<u>Nature of Offense</u>	<u>Place of Offense</u>	<u>Date of Offense</u>	<u>Names of Accused</u>
1. Failed to control persons under his command permitting them to kill one unarmed American POW, name unknown.	Babelthuap Island, Palau Islands.	4 Sept. 1944	NAKAMURA
2. Failed to protect three unarmed American POWs, names unknown.	Babelthuap Island, Palau Islands.	4 Sept. 1944	NAKAMURA
3. Failed to control persons under his command permitting them to kill an unarmed British national, POW, Charlie Smith, alias James.	Babelthuap Island, Palau Islands.	29 Dec. 1944	NAKAMURA
4. Failed to protect an unarmed British national, POW, Charlie Smith, alias James.	Babelthuap Island, Palau Islands.	29 Dec. 1944	NAKAMURA



FF12/417-10(2)  
02-JDM-sh

UNITED STATES PACIFIC FLEET  
COMMANDER MARIANAS

Serial:

MILITARY COMMISSION ORDER NO. 43

(In re NAKAMURA, Kazuo, former First Lieutenant, IJL, et al)

FINDINGS: The Commission on 27 January 1948 made the following findings:

"As to the accused NAKAMURA, Kazuo:  
The first specification of the first charge proved in part, proved except the words 'NAGATOME, Yoshimori, then a corporal, IJL,' which words are not proved.  
The second specification of the first charge proved.  
And that the accused NAKAMURA, Kazuo, is of the first charge guilty."

"The first specification of the second charge not proved.  
The second specification of the second charge not proved.  
The third specification of the second charge proved.  
The fourth specification of the second charge proved.  
And that the accused NAKAMURA, Kazuo, is of the second charge guilty."

"As to the accused KOKUBO, Chihiro:  
The first specification of the first charge proved in part, proved except the words 'NAGATOME, Yoshimori, then a corporal, IJL,' which words are not proved.  
And that the accused KOKUBO, Chihiro, is of the first charge guilty."

"As to the accused NAGATOME, Yoshimori:  
The first specification of the first charge not proved.  
And that the accused NAGATOME, Yoshimori, is of the first charge not guilty, and the commission does, therefore, acquit the said NAGATOME, Yoshimori, of the first charge."

SENTENCES: The Commission on 27 January 1948 sentenced the accused as follows:

"The Commission, therefore, sentences him, NAKAMURA, Kazuo, to be hanged by the neck until dead, two-thirds of the members concurring."

"The Commission, therefore, sentences him, KOKUBO, Chihiro, to be hanged by the neck until dead, two-thirds of the members concurring."

2. On 24 April 1948 the convening authority (Commander Marianas), subject to certain remarks not herein quoted, took the following action:

"...the proceedings in the foregoing case of NAKAMURA, Kazuo, KOKUBO, Chihiro, and NAGATOME, Yoshimori are approved. The findings of guilty and sentences as to the accused NAKAMURA and KOKUBO are approved."

"NAKAMURA, Kazuo and KOKUBO, Chihiro will be retained in confinement at the War Criminal Stockade, U. S. Marine Barracks, Guam, pending instructions from higher authority."

"NAGATOME, Yoshimori, who was acquitted, was released from arrest and returned to Japan."

C. L. FOWNALL,  
Rear Admiral, U.S. Navy,  
The Commander Marianas Area.

cc: CinCPacFlt (3) ✓  
J/G, USN (3)  
SCLP (3)  
ComGen U.S. 8th Army, Japan (3)  
National War Crimes Officer, Wash., D.C. (3)  
CO, Marine Barracks, Guam (6)  
ComMarianas Liaison Officer, Tokyo, Japan. (3)

AUTHENTICATED:

H. D. VANSTON  
Flag Secretary.

11196