最終辯論

被告人元日本海軍第四艦隊
司令長官 海軍中將 原忠一
の辯護人
高野純二郎

軍法委員會委員長並に委員各位

私は被告人原忠一の辯護人として茲に最終辯論を爲すに當り本件審理が終始公平且愼重に行はれたることに對し深甚の感謝の意を表するものである。

第一編 本事件の法律的問題の考察

第一章 緒 說

第一節 緒 言

吾々は國際正義と國際秩序を確保維持する爲に戰爭法規並に慣習法に違反したる者を處罰することは全く同感であつて當に其の必要なることを認めることに於ては決して人後に陷ちる者ではない。又國際法上の犯罪及戰爭犯罪が久しき以前より國際法学者に依り論じられてゐることは吾々もこれを認めるものである。然しながら國際法上の犯罪或は戰爭犯罪に非ざる或る行爲を國際上の犯罪或は戰爭犯罪であるとしてこれを處罰することは決して國際正義と國際秩序を確保維持する所以ではないのみならず却つて斯かる處罰は國際正義及び國際秩序を紊乱するものである。

本件裁判において主要なる根本問題が委員会へ
判断提供せられたのである　即ち
1. 上官の部下統御及俘虜の職務怠慢が果して
国際法違反即ち戦争犯罪となるやの問題。
2. 事後の法律又は其の他の規則を以て事前の行
為を犯罪なりと遡及的に認定し得るや否
やの問題。
3. 犯罪の構成要件を缺如せる行為を以て刑
事責任を負はしむることが法律上可能なりや
否やの問題。　是である。
以下此等の問題及之に関連せる事項に付て論
述することにする。

第二節　本件の起訴及罪状項目

本件の起訴罪名は戦争法規並に慣習法の
違反であって其の罪状項目其の一として日本帝国海軍
第四艦隊司令長官兼南鳥島海軍中将保忠一は副司令
第四艦隊司令長官として勤務中アメリカ合衆国連合諸国
及其の属領が日本帝国と戦争状態に在った昭和十九年二月
其の日より昭和二十年九月二日に至る間カロリン諸島マーシャル諸
島ギルバート島オーシャン島其の他彼の指揮地域内の場所
に於て彼の指揮下に在りし人に及彼の統御管轄下に在
りし人々の行動を統御すべき前記第四艦隊司令長官と
しの職責を全うせず彼の職責を怠ったに拘らず不法に無
視し違反せず従って本件に抑留せられてゐたアメ
リカ人作蘭、英国人、中国人1名、カロリン諸島、マーシャル諸
島、ギルバート島の住民を苦役、酷使、虐待、
殺害することを許可して戦争法規、並に慣習法に
違反したと云ふにある。
罪状項目其の二は日本帝国海軍第四艦隊司令長官

當時海軍中將 岡敬純 は前記第四艦隊司令長官として
勤務中 アメリカ合衆國、連合諸國 及其の屬領 が日本
帝國と戰爭狀態に在りし昭和十九年二月二十七日より
昭和廿年八月二日に至る間 カロリン諸島、マーシャル諸島、
ナウル島 オーシャン島 其の他彼の指揮地域内の場所
並び彼の指揮下に在りし 及彼の統御及監督下にありし
本軍隊 竝びに其地に於て抑留せられたアメリカ人 俘虜 は彼
の指揮下に在りし 及彼の統御及監督下にありし本軍隊
の占領し、支配せんとしたる ナウル島、オーシャン島 の住民に對し
第四艦隊司令長官として 彼の權限内に於て當時の狀況
下適當なる保護を與へる措置を講ずべきに
又其の他彼の職責上なすべきを始めずして之を不法に無
視し、違反し、怠りたる本軍隊の人に對し 俘虜 及ナウル島 ナウル島 オーシャン島 の住民に對し 故意、過失
等 ナウル島 オーシャン島 の住民に對し 故意、過失、虐待 及 殺害 を許可して 戰爭法規 に違反したと云ふにある。

第三節、本件の重複起訴

本件罪狀、擴回表の一 及 二 は被告人岡敬純が第四艦隊司令長官として 夫々 統御及監督上の職責を怠ささりしことに付て被告人の職務怠慢の點を問ひ 罪狀、項目表の三 及 四 は被告人が被告人の部下幕僚として 又 アメリカ人俘虜及彼の部下幕僚の占領して居た地域の住民に對する保護救濟を懈怠したことに付て被告人の職務怠慢の點を問擬したものである。而して此等二箇の罪狀、項目中其の一の各の(f)、(i)、(j)、(k)の事件を除いては其の全部の事件と其の二の全部の事件とは夫々其の基礎となる基本的な犯罪事實は全く同一である。即ち被告人の部下たる日本海軍の軍人又は被傭人が其等俘虜及住民に對し虐待、酷使、虐殺及

殺害したと云う主張である。検言すれば此の二箇の罪状、項目は全て同一の主張事実を一方は被告人と利罪の主体との関係より之を観入、他方は被告人と利罪の客体との関係に立脚して被告人の責任を問うものであって本件は明かに重複起訴である。刑事訴訟法上重複起訴の不当なることは言を俟たない。

仮に第四脇隊可令長官としての被告人等の部下統御上監督上の責任も俘虜及占領地住民保護の義務も其の責任の本体は唯一つである。即ち義務の本体が唯一箇であって其の態様が二ヶ若しくは三ヶに及ぶだけのことである。更に言葉を換えて言えば検察官の主張かよれば被告人等が部下の統御及監督が不充分であったが為の部下の人々に依って為された俘虜及住民の虐殺、酷使、虐待及殺害が生ぜしめたということになるのである。それ故に若し被告人等の部下統御及監督上の職務怠慢が無かったとするならば俘虜及住民の虐殺、酷使、虐待及殺害も生ぜしめず随って被告人の此等俘虜及住民の保護上の職務怠慢もあり得なかったということに帰するのである。検察官の主張は罪状、項目其の一の被告人の職務怠慢も罪状、項目其の二の被告人の職務怠慢も唯一にして而も同一の部下統御監督上の職務怠慢であると云うことになるのである。本件起訴は不当なる重複起訴である。

然に特に指摘せねばならぬことは本件起訴状中、その部分に於ても被告人等が独自に俘虜及住民を虐殺、酷使、虐待及殺害せしめたと為し又は之を黙認したという検察官の主張のないことで

ある。この二とは後に述べるところに関係を有するが一言前に述べておくのである。

第二章 職務怠慢

第四節 職務の本質と上官の部下統御は監督上の職務怠慢。

職務怠慢が犯罪を構成し且刑事上の責任を負うべき外として(1)某の人が法律又は規則に依って課せられた特定の職務を行はざること。(2)其の犯罪となるべき職務怠慢中には故意(犯意)又は法律が刑事責任を負はしむる程度の過失のあること。(3)並に其の職務怠慢なる不作為と発生したる客観的事実との間には直接の因果関係のあること。(4)其の之を罰する法規は其の犯罪行為のなされたる当時現に実施せられてありたものであってとの法律又は規則に依って其の特定の義務が課せられ且此の法律又は規則に違反したることを以て要とするのであって其の行為(不作為を含む)の行はれたる後に制定せられたる法律又は規則に依って過去に遡及して之を処罰することを得ないのである。

職務怠慢には本質上二つの種類がある。一は自己の犯したる犯罪行為が職務怠慢となって他は他の者が犯したる犯罪行為に対する人が責任を問はるる部下監督上の職務怠慢である。監督者(上官)が被監督者(部下)の犯したる犯罪行為に付其の監督者(上官)たる統御監督上の職務怠慢の理由で其の責任を持つのであって之は上述の後者の例である。本件に於て検察官が被告人弥の第四師団司令長官としての職務怠慢の責任を問おうとするのは此の後者の例である。従て監督者(上官)は被

監督者（部下）の犯した一切の犯罪行為に付無條件無制限に其の監督上の責任を負わせようというのではない。若し假に監督者（上官）が被監督者（部下）の総ての犯罪行為に付無條件無制限に監督上の責任を負うべきものとすることは、それは公平を欠く點に於て法として妥當ではない。並には如何なる事件が果たして監督者（上官）は被監督者（部下）の犯した犯罪に付統御監督上の職務を怠ったことに對する責任を負うべきかということ付ては以下項を分ちて述べてみやう。

第四節　統御及監督上の職務怠慢と刑事責任

刑事上、二人が他人の犯罪行為に付て刑事責任を負うのは其の他人の犯罪行為を幇助、教唆、勧誘、命令、をなしたることを要件とするのが刑事法一般の原則である。即ち其の人と其の他人とが共犯者と被共犯者の関係又は監督者と被監督者の関係にある場合には前者が後者の犯罪行為を命令、指令、許可したるか又は知りて之を默認のうたる事実があるのである場合には前者として刑事責任を負はしむることは出来ないのである。Clark and Marshall 氏犯罪論に於て次のやうに論じてゐる。

「普通法上に於ては包括のこと刑法法の下に於ける一般人は其の他の人又は被傭者の犯罪行為上に對し統御又は傭主が傭傭中に犯したことある其の行為が本人の指図に基き行はれたが或は其の本人がそれを知って默許したのであるだけでは其の本人を刑事責任を負はしむることは出来ない。其し或る

人を代理とせず本人とするとは知悉とは異なるということが一般に認められていた事実を示しているかである」（同書4版，第188節本人又は主人の責任，(c) p.230）

右も之は本人と代理人，或は主人と被傭者との関係を論じたものではあるけれども其の理論は一般的に監督者と被監督者又は上官と部下の関係にも等しく適用せらるべきである。

今此の原則を軍隊の上官と其の部下の関係に於ても見るに上官が部下の犯した犯罪行為に付抑制監督上の職務を怠ったという点に於て刑事責任を負うには其の上官が部下に其の犯罪行為を命令，指揮，指示，許可したるか又は其の犯罪行為を知って之を黙認したるだけでは足りない。Clark and Marshall が其の犯罪論を述べて曰くように犯罪を構成するには犯罪行為と犯罪意思（犯意）がなければならないのである。（同書，第106節 p.147）。従って上官は部下の其の犯罪行為を知ったことが必要条件である。若し上官が其の部下の犯罪行為を現実に知るところがなければ上官はそれに付刑事責任を負わないのが原則である。然しながら其の知らなかったことに付上官に過失があったならば其の責任を免れることは出来ない。蓋し或る行為又は不作為に付刑事責任を負はしむるには犯意のなきか或は過失のなきことが絶対的に必要であるからである。但し茲に謂う「過失」は単純なる過失ではなくして法律がそれに刑事責任を負はしめている程度の過失でなければならないことは言うを俟たない。Clark and Marshall も「不作為を理由として刑事責任を負はしむるには其の人が法律上の作為義務を有し且其の

不作為が故意において行われるか或は刑事責任を負はしめらるゝ過失に基因するものであるかは本件において」（同書，第53節，意慾(1)，不作為，p.80.）と述べている．

此の点につきAmerican Jurisprudenceも次のように論じている：

「犯罪意思が犯罪を画するものであるにせよ若も其の意思が特殊の事実を知っているということに係っているにせよ其の知ることは単に不注意の若は過失の結果であり，限り其の行為の違法性は阻却せらる．此の原則は普通法上の原則なる其の基礎と為す．其の普通法上の原則というのは犯罪の心即ち犯罪意思が欠けているときは犯罪は成り得ない．或る故意の意思が特殊の事実を知っているかを否やに係っているときは必要の事実に関する不知又は誤信は単に証拠であり現実であり又其の違法行為の行為者の過誤又は過失に因るものでなく，それは刑事責任を免除せらるべきものである．（中略）事実に関する善意の不知又は誤信は普通法上犯罪行為に対する免訴なる弁解となる．此の論理は行為自体が犯罪である場合でも又犯罪意図が法律の違反を構成するに単に欲くべからざる場合においても公平である．（中略）．或る特定の意思が犯罪の構成に必要なる場合又は其の被告人の過失に因らない事実の不知又は誤信は抗弁の理由となり得る」と（American Jurisprudence, Vol. 15, Criminal Law, §306, Ignorance

(fact, p. 9.)

此のAmerican Jurisprudenceの説くところは純粋的作為と不作為とを論じたのであるけれども此の理論は純粋的不作為と雖も無論て用いられる。

第六節　「許可」と犯罪行為の了知。

本件において被告人等が彼の部下に対し作業及住民を苛責、酷使、虐待、殺害することを許可したというのであるが此「許可する」ということはBlackの法律字典（第3版）によれば「許し又は免許を與へる」、「防止せずして黙認する」、或る行為をすることを「許可する」人は其の對象となる行為を知って之を為さしむるか或はそれを知りながら其をして任かせるかであって更に此等の意味を從って他人の犯罪行為を「許可する」人ということに就いて言えば或る人が他人の犯罪行為を知りながら其の他人が其の行為を為すがままに任せるか若は其の犯罪行為を知って之を防止せずして黙認することである。

以上述べたる「許可する」という語の如上の意味に於ても或る人が他人の犯罪行為を「許可した」る場合其の人が該犯罪行為に対し刑事責任を負わねばならぬ場合は其の「許可した」人が法律上彼の外かに其の他人（犯罪行為の実行者）を監督又は統御すべき義務を負って居たことを必要とし且其の犯罪行為を知って居たことが必要条件となる。

本件起訴状に記載せられてある「許可せり」なる語は上記の如きの意味を有するものとは認められないのである。仮令被告人が彼の部下の犯したる罪状個別記載の犯罪行為を了知

伊太利の軍事上に於ける許可を与えたのであって、右の場合に於ても被告人等は、基等の犯罪行為を知っていたことが此の事実に徴し全く明白であるのである。それにもかゝわらず検察官が Opening Statement に於て被告人等の如き統御幕僚上の職務怠慢より生じ刑事責任を負はしむるためには単に部下の犯罪行為を知っていたことは必要でない、と主張しているにも拘らず検察官が本裁判の始まる迄にまるまる証力を提出し終る迄に或は状況証拠の一切が基等部下の犯罪行為を知っていたということの確立に帰したのは全く之が為である。然らば被告人等が果して基等の犯罪事実を知って居ったか否か又検察官が直接証拠又は状況証拠により被告人等が基等の犯罪事実を知っていたことを確立し得たか否かは後に事実論に於て明かにせらるべきである。

第三章　統御及幕僚上の職務怠慢と戦争犯罪

第又節　部下の統御及幕僚上の職務怠慢は戦争犯罪なりや？

本件は被告人等が彼の部下に俘虜及住民を虐待、酷使、虐待、殺害することを許可し、部下を抑制監督すべき職務あるに俘虜及住民を保護すべき職務を怠りもって戦争犯罪法規、並に慣習法に違反するに即ち戦争犯罪を犯したという検察官の主張である。然らば一体戦争犯罪とは何か？国際法上自の部下統御幕僚上の職務怠慢は無条件無制限に戦争犯罪と成るであろうか？この二つの疑問が生じ来るのである。以下此等の問題を分って若干の考察を試みてみたい。

(1) 戦争犯罪は刑法上の一般犯罪と基の性質を異

まさしものではない。両者の本質は同一のcategoryに属するものである。Clark and Marshallの説に従えば「犯罪とは公衆保護のため公の法律に依り禁止せられ国家が国家の名において司法手続において処罰すべきものと定めたる行為又は不作為を謂う。それは単なる私的非行または一個人に対する民事的危害と区別せられたる一般人に対する非行である」と定義づけている。(同書, Chap. 1, §1, p.1.) 更にAmerican Jurisprudenceの説くところを見るに「或る種の非行はそれが広く一般公衆に影響を及ぼす重要の要素を果し且つそれが個人の財産上の権利又は身体が侵害せられたというに止まらないで公的性質を有するものであると看做される。かかる非行を『犯罪』と言う。此の語の定義をくだすことは容易ではない。従って次の如く定義するのが最も当を得ておろう。即ち犯罪とは法律に依って禁止せられ且それに対し刑が附せられ国家が自己の名において訴追するところの行為又は不作為である」と説明しているのである(同書, Vol. 14, Criminal Law, §2.—Definitions, p. 753.)

(2) 犯罪となるべき行為又は不作為は之を一般世人に周知せしめるため、如何なる行為又は不作為が犯罪となり又犯罪として処罰せらるべきであるかを知らしめさいて其の行為又は不作為を理由として之を罰することは一般世人を絶えず不安に陥れ、日常の一切の行為又は不作為も常に危惧の念を懐かしめ結局社会に及ぼす公の秩序を紊乱するものである。此のことに対しAmerican Jurisprudenceは論じて次の如く説いている:

「主法者は犯罪即ち罰せらるる行為が何であるか

を的確に市民に周知せしめねばならない。換言すれば市民は行為の規準を了解し、各等は如何なる行為は之を避くべき事柄かを知るのである。若しも犯罪を規定している刑法上の字句の意味が裁判を行うに当って確定し得ないか或は刑法が犯罪行為の要素を確定するに当って該当行為が違法であり又犯罪を構成するものであることを印象付けるに必要な且重要欠くべからざる想定を遺脱している場合でも裁判所は其の缺陥を補い其の法律を明確に確定的たらしむる自由は有たない。仮に法律が如何なる意味の語字を用いても其の言葉が罰すべき行為と罰すべからざる行為を果に包含するかを一般的に不確定なものであるならば斯かる法律は不確定なるの故をもって無効である。犯罪を規定し之を定義している法律は其の法律の意図に依って拡張せらるべきものでないことは公理である。法律に規定せられた犯罪は含意（意味の含蓄）に依って犯罪なりとせよ、ことはない。解釈上の犯罪なるものはあり得ない……」と。（同書, Criminal Law, §19, Requisites of Criminal Statutes, p. 776）

(3) 上に述べたる犯罪の定義に照して戦争犯罪とは戦争の法規又は慣習法に依って禁止せられ罰せらるものとせられたる行為又は不作為であると言うことが出来る。随って戦争犯罪行為（不作為を含む）は一般に承認せられた戦争法規又は慣習法を明瞭且詳細に示さねばならない。Oppenheim の国際法上の戦争犯罪という本質的に異なる性質の

もの四個を掲げている。即ち(a)軍隊の成員が犯した戦争に関する法規の違反行為，(b)敵国軍隊の成員に対する個人の犯した武器を以てする一切の敵対行為，(c)間諜行為及び戦時反逆行為，(d)一切の捕虜行為これである。即ち戦争法規の重大なる違反行為として次の具体的の例を列挙している(Lauterpacht: Oppenheim's International Law, 6th Ed. Vol. II, § 252, pp. 451-2.)

第八節　戦争法規並に慣習と部下統御

監督上の職務怠慢

然しながら国際法は戦争犯罪並に其の処罰に関しては従来一般に承認せられた国際法上の原則はない。従に上官の部下の為した国際法違反の犯罪行為に対する刑罰監督上の責任に関しては国際法上の原則は全然なく又先例と為すべきものはないのである。即ち此等の問題は今次世界戦争の終末に際して始めて政治上法律上の重要課題として登場するに至った問題と言ってよい。

元来国に付ては従来一般に承認せられた国際法上の原則がなく学説も一致に到らないのであるから軍律裁判に関しては在来の部分的な立法も準拠たりと為すに足らず現在の有様である。

上に引用したOppenheimの国際法の列挙している戦争法規の重大なる違反行為の中には停虜の虐待，GENEVE条約の違反行為等を掲げているけれども「上官又は司令長官の部下統御監督上の職務怠慢」を戦争犯罪として掲げていない。加之其の書中の何れの部分を捜しても上官の監督上の職務怠慢を戦争犯罪として取扱っておらないのみならず此

の事項と関しては言及していないのである。

アメリカ合衆国陸軍省のBasic Field Manual Rules of Land Warfare of 1940 において戦争法規の違反を以て想定するところから、其の中に軍隊の指揮官にはて想定しうる、即ちそれは指揮官が戦争法規違反行為を命令したとき又は指揮官のauthorityの下に其の軍隊が此等の違反行為をなしたときは、其の指揮官は違法でにへと想定しうるのであって指揮官等に司令長官の部下統御監督上の職務怠慢を戦争法規の違反であるとは想定しておらない。(同書, Chapter II, Penalties for Violations of the Laws of War, §347, pp.86-88.)

尚はNaval Courts and Boardsにおいても上官等に司令長官の部下統御監督上の職務怠慢が刑事責任を伴う処罰行為であるとの想定はなしいのである(同書, §457.)

上官の部下の行為より生ずる責任を負うべきかの問題よりは寧ろ国際法上の一般的観念が之に関し国際法上の学説等を参照して之を論じ本件の被告人等の如き軍隊司令長官との責任に言及せんとする。軍の統率関係において指揮命令する地位にある者が他の指揮命令下に在る部下の為した国際法違反行為に付て指揮命令者たる又は上官たる資格上の責任を負うべきであるか否か、これは刑事責任の本質に関連する困難なる問題である。

此の上官の監督責任に付ては従来の見解は区区である。一方においては上官は部下の一切の行為より生ずる責任を負うと云う見解と他方においては特に自己の指揮命令に従う行為より生ずるのみ責任を負うと云う見解もある。併し普通には其の中間的又は折

責的主義へと傾きつゝある。即ち刑事責任は近代文明諸國に於ける刑法の一般原則に照らし其の本質上自己の故意（犯意）又は過失に基く犯罪行爲に對する責任でなければならない。

茲に附言せんとすることは民事責任は行爲者の主觀に重きを置かず（故意と過失とを區別せず又無過失の責任をも認めんとする），發生したる結果のみに重きを置くに至り，刑事責任は行爲者の主觀を以て責任の基礎となし（過失を罰するは例外），現實の結果の發生を問はぬ（未遂犯も亦これを罰す）。即ち民事責任の客觀化，刑事責任の主觀化といふ傾向のあることである。

上述の見地からすれば上官は部下の一切の行爲に對して責任を負ふといふ見解は廣きに失し過當とは言へぬ。蓋し一般的には主觀的要件を缺く場合には刑事責任を認め得ざるかである。仍又反面から言へば自己の指揮命令したる行爲にはその責任を負ふと云ふ見解は狹きに失し是亦過當とは言へぬ。假に積極的に指揮命令することなく，新たの國際法違反行爲を默認し抑制すべきに抑制しなかつたやうな場合は所謂不作爲犯の成立することもあり，のみならず刑事責任の要件として主觀的要件は故意のみに限らず過失の有無もここに問題とせねばならぬかである。

第九節　刑事法の理論と部下監督の責任

然らばこれには如何なる範圍まで上官の責任即ち統帥及監督上の責任が認められねばならぬか。一般的に言へば上官が部下に對する國際法

違反の行為を指揮命令した場合は固論これを知りつつ
黙認した場合及これを知り且これを抑制すべく又
抑制し得る地位に在りながらこれを抑制せず黙認
した場合は之れ相当責任を負わしめるべきものであ
ると言うことが出来る。今具体的に場合を分けて
考察して見る。

(1) 上官が部下に対し国際法違反行為を
指揮命令した場合。

本件に於ては被告人等が彼の部下に国際法違
反行為を命令し又は指揮したと言う検察官の主張
がないから斯かる場合を論及することは差控える。

(2) 上官が部下にして国際法違反行為を
指揮命令したと言う事実は有せず単に
部下が違反行為を行ってゐることを知り
乍らこれを黙認し特にこれを抑制
する為の適当なる措置を講じなかった
場合。

上官が部下の国際法違反行為を知った場合これ
を抑制すべき国際法上の義務を負うものであると
同じは従来の一つの条約中にも又国際法の文献
中にもこれに言及せる如き見当たらないのである。但
し上官の指揮命令権は反面に於て国家が国際法上
負へる義務の実際上の履行者としての指揮者の義務を
包含するものと解すべきであるから上官の部下の違反行為を
知りつつこれを黙認しそれを抑制する為の適当なる措置
を執るべく又執り得る場合に之を執らなかったとすれば
上官は指揮命令権者、換言すれば国家の負担する国
際法上の義務の実際上の履行者として其の責任を免
れないものと思う。

此の問題と分け具体的に責任の有無と分け論ず

上下まに置いては指揮命令関係の実体を究明すことが仲要缺くへからざる前提となることを注意せねばならぬ。即ち(イ)監督上官と部下との関係が果して直接具体的に指揮命令し得る関係に在ったかどうか、(ロ)又監督具体的事情の下に於て果して適切なる措置を講じ得べきであるに拘らず之を講じなかったかどうかを究明しなければならぬ。

(3) 上官が部下の国際法違反行為を知らなかったために之を抑制する為適切なる措置を執らなかった場合。

此の場合は之を二つに分けて考へねばならぬ。即ち上官は其の監督上部の事情を知るべきであるに拘らず知らなかったと云ふやうに其の事に付て特に過失の責むべきものがある場合(重過失の場合)は其の責任を免れ難いであらう。但し此の過失責任には通常は刑の軽減を認むべきである。之に反し上官に過失の責むべきものがなかった場合は責任を負ふ限りではない。

「凡そ人為の完全無缺は人間には不可能である。法は何人をも此れを不当なる高度の注意を之を強要しない。怠慢は唯避け得べき場合に於ける不履行よりも生ずるのみ。法は人間の知慧と注意とを以てしては危害を防止し得ない場合には何等の責任をも負はしめることはない」とはAmerican Jurisprudenceの説くところである。(同書Vol. 38, NEGLIGENCE, §29, Generally, Ordinary or Reasonable care, p. 673).

之を要するに部下の国際法違反行為に付ての上官の懲戒抑制の義務の有無を判断するに当っては先づ指揮命令関係の実体を明確にしなければならぬ。

第3条第1項に指揮命令し得る関係にあって国際法違反の行為を指揮命令したか（勧誘した場合を含む）又は抑制すべく且抑制し得べきに拘らず抑制せず黙認したか（重過失の場合を含む）に依って極めて其の責任を問い得ることになるのである。

第四章　日本の国内法

第十節　艦隊司令長官

本件被告人等の主観的傷例即ち日本海軍の艦隊司令長官とその地位、任務、職務遂行の範囲並に部下艦隊及職員、意思等は総て当時国内法規に依って定まってゐたことは贅言を要せぬ。されば此等の事項を論ずるに当っては日本の国内法規を究明することは必要であって之を排除することは出来ない。

艦隊令（Kantai. 26）に依れば艦隊司令長官は天皇に直隷し管下の部隊を統率し隊務を総理するのであって、軍政に関しては海軍大臣の指揮を承け又作戦計画に関しては軍令部総長の指示を承けることになってゐた。艦隊司令長官は管下艦隊の軍紀風紀及教育訓練を統監してゐたのである。艦隊司令長官は幕僚として参謀長、参謀、副官、機関長、軍医長、主計長を有してゐた外直属の部下として各地の海軍根拠地隊司令官及其の他各種部隊司令官を有してゐた。其等の根拠地隊司令官及其の他の部隊の司令官は彼等独自の指揮命令権を有し責任ある職務にゐた。

第四艦隊司令長官としての被告人等の在任中の上級司令部は連合艦隊司令部と中部太平洋方面艦隊司令部であった。右の後者は昭和十九年二月四日以後同年六月十八日に至るまで被告人等の直上の司令部

てあった. 而て弥は此等両艦隊司令長官の指揮命令を受けて部下部隊を統轄するの任務てあった. 被告人等の部下部隊は上述の如く第四根拠地隊, 第四海軍病院, 第四海軍施設部及其の他の直隷部隊の外第四十一, 第六十二, 第六十六警備隊等てあって其の各部隊には夫々司令(指揮官)が配置せられてあった. 而て此等部隊の司令は法規の定むる所に依り夫々自己の部隊を指揮統率してゐた, つまり責任ある指揮てあった. 叙上の如く被告人等は第四艦隊司令長官として又は二重に上官を戴く下は各部隊の司令を率ひてゐた中間的な司令長官てあったのてある.

第十一節 国際違反行為と国内法.

戦争法規並に慣習法の違反行為即ち戦争犯罪は犯罪ふるカテゴリーて例へば大体次の如く(国際法に特殊なる犯罪を除き)国際法上の問題てあると同時に亦国内法ノ刑法(軍の刑罰法を含む)上の問題てもある. 而て上述せる如く上官の部下の国際法違反に対する統率指揮上の責任に関しては国際法上何等の規定なく又判例も学説も参考に資すへきものは「ない」のてある. のみならず之は国内法の処罰法規とも関連のある事項てあるから国内法即ち本件に於ては日本の国内法に於ける上官の部下統率上の責任に関し如何なる法規があったかを参考的に述へることは少しも無用ではないてあろう. 下に論ずるところは本件に関係のある日本海軍人に関する事項に限定する.

本裁判所に提出せられた日本海軍刑法(Exh. "31")と銘打つ書には上官が部下に対する統御監督上の職務を定めた

不作為に左様刑事上の條文はないのである。併し上官たる者は此の監督不行届の職務怠慢に對し何等の責任を負はないのではない。斯かる場合の上官の責任は刑事上の責任ではなくして懲罰令上(Exh."32")の懲戒的の責任である。随つて之に對し懲戒的の處分を受けるのであるか之は犯罪でない。以上の處罰は海軍刑法に依つて科せらる、刑罰ではなくして海軍懲罰令に依る懲罰である。上官の部下監督上の責任を問ひたる罰則は唯上記懲罰令第9條に規定かるのみである。併し此の場合と雖も懲罰を科するのは畢竟上官の部下監督上の職務怠慢に付故意又は過失のあることを必要とすることは條文の解釋上明かである。

尚ほ刑罰は犯罪即ち実定法に依つて刑罰的效果が付與せられたところの行爲に對する制裁である。之に懲罰は公法上の特別権力関係又は之に準ずる公法的監督関係に服する者に對して其の関係の紀律を維持する爲に科する一定の制裁である。此の両者は性質を異にするが爲則として併科するを得る点が雖ども其の差異は了解し来る。

第五章　保護及委任統治地域並に占領地の住民の保護責任.

第十二節　俘虜の取扱及保護

国際法上俘虜の取扱及保護の責任の帰属に関する条約は明示されてゐない。又之に関する承認せられた学説も乏しいのである。

1907年10月18日のヘーグ陸戦条約第四及1929年7月27日のジュネーブ俘虜条約には俘虜は敵国の権内に属しと之を捕へた個人又は之を降伏の権内に属すべきものと規定してゐる（第各附属書 Art. 4 para 1. 後者 Art 2 para 1）更にジュネーブ俘虜条約第18条第一次には「各俘虜收容所には責任ある特校の官吏に置かるべし」と規定してゐる。

上に引用した此等の規定に依れば上記両条約は俘虜の取扱及保護の責任及責任者に付ては俘虜を捕へた国家の国内法の定むるところに委ねてゐることは疑を容れはない。

そは此の問題に関し日本の国内法及特に日本陸海軍の法律規則中にはかゝる規定があったかを調べて見やう。

陸軍警備隊職員服務規程（Ex 30）第三条には「司令官又は司令は工兵を処置し管轄境域又は衛戍地附近の陸軍官衙官等を監督せしむべし但し此の陸軍官衙ある官衙官衙者はこの限りにあらず」と規定し第八条は「各条に規定するものの外警備隊職員服務規定は適用に於ける限り陸軍憲兵隊職員に之を準用す」と規定してゐる。

~~警備隊司令は~~日本陸軍部隊にて俘虜を收容したのは奇隊各地の警備隊で Tsuda にては第四十一警備隊であった。而して之の部隊長である警備隊司令が俘虜の收容取扱保護に関する責任者であった。即ち各警備隊の司令は ジュネーブ条約第10条に謂ふ所の「責任ある特校」であった。

警備隊司令は陸軍職員服務規程（Ex 29）第二章の職員に相当する職員であって該規程は警備隊の職員にも準用せられた（同規程第二條）該規程の第一〇五條には「職員は国際法上の

軍律ニ関しては特ニ捕虜を首とし必ず命令処刑又は特別の取扱ひをなし若し其の取扱ひに違反するものあるときは上級指揮官又は直接指令又直の指令を請ふべし」と規定せられてある。それの故ニ警備隊司令は日常上の事次ニ関しては特に捕虜ニ之を取扱ひ必ず命令処刑は旬論條約を厳守ニ之を厳守するやう指令されてゐたのである。それであるから俘虜の取扱及保護ニ関しては俘虜の取扱ニ関する條約の規定の取扱ニ対して職務を行ふことになつてゐたことは極めて明瞭な事柄である。各部隊には個々指揮官が備はりて其の内ニ俘虜取扱規則が含まれ居り各部隊はこの規則ニ準拠ニ俘虜を取扱ふことになつし居つたのである加之個々指揮官は個々支店各営業行の際的国際法規慣習を各自所持ニ居つたことも当該法廷ニ於ける証人の証言ニ表はれてゐる。

第十三節　南洋委任統治地域内の住民の保護（自昭和十九年二月二十三日至同二十年九月二十日期間）

日本の委任統治政府ハ Trust Territory ニ於ては民政が施行せられ一般行政（警察を含む）及司法は南洋庁長官の之を管掌したのである。而て南洋庁長官は大東亜大臣の管督を受けてゐた南洋庁長官及同庁の職員は総て非軍人であつた南洋庁長官を始め職員は軍隊よりは何等の指揮も命令を受けることなく一般行政及司法の施行ニ付ては軍隊とは何等の関係のない独立ニた別個の官庁であつた。即ち委任統治地域ニ於ける住民の保護は南洋庁長官の責任事項であつた。

然ニ昭和十九年三月中部太平洋方面艦隊が新ニ編成せられた後同年三月以来南洋庁長官は中部太平洋方面艦隊司令長官の直接指揮下ニ入り随て委任統治地域各島の南洋庁支庁長及職員は行政及司法の施行ニついて其地の軍隊ニ指揮官の指揮命令を受けることゝなつたのである。其の実例の一ニ Truk

いる南洋庁支庁長兼警察署長は上記の時期以来 Truk 地方の行政官庁並に軍隊の指揮命令を受けたのである。昭和19年7月中部太平洋方面防衛作戦後においても此の行政司法に関する指揮命令関係には何等の変更もなく見の儘昭和20年9月2日に至ったのである

尚は南洋委任統治地域の治安維持は陸軍の担任であって海軍は何等之れに関係がなかったのである

南洋委任統治地域の民政は勿論陸軍司令官の所管事項でなかったことは Ex 43 の明かに主張ところである

以上の事実は証人信夫の証言（公判第35回）被告人栗の証言（公判第39回及第40回）古木秀作の弁護人提出の第1号証の証言（公判第31回）Exs 43 44 47 等により主張せられてある。

被告人栗は南洋委任統治地域の各島の行政（警察を含む）司法 治安維持に関しては何等の指揮命令の権限を有たず随って何等の責任もなかったのである。

第4 占領地の住民の保護（自昭和19年2月23日至同20年9月2日某日頃）

今此の問題を論ずるに当って先ず其の範囲を Nauru 島及 Ocean 島に限定せんとする

日本軍は Nauru 島及 Ocean 島を占領し前者には第67警備隊を後者には同警備隊分遣隊を夫々配置し此等両島に軍政を布かしめた。上記の某日頃第67警備隊の司令は副田久幸大佐で Ocean 島分遣隊の指揮官は鈴木直美大尉であった Ocean 島分遣隊長鈴木の直上の上官は副田警備隊司令で従て副田は Nauru を鈴木は Ocean を夫々管轄して居ったのである。第67警備隊は第4根拠隊の隷下部隊であって副田警備隊司令は第4根拠隊司令長官原の指揮下

ムセったことは事のおいところである。依しOcean島分遣隊長鈴木は原の連隊の部下ではおかったのである（EX 41 42 49）

上述の如くNauru及Oceanは日本軍が占領後軍政を施行した地域である此の両島の軍政の施行者は前田司令と鈴木指揮官であった それ故ム前田及鈴木は1907年ヘーグ陸戦条規陸戦の法規慣例に関する規則第43条ム規定せられてある占領者ム該当するものである。同條約第43條は次の通り規定してある。

「国の権力が事実上占領者の手ム移りたる上は占領者は絶対的の支障なき限占領地の現行法律を尊重ニ成るべく公共の秩序及生活を回復する為施し得へき一切の手段を盡すへし」と。

Oppenheimは其の著書国際法ムおて占領者の権利及義務とム次の如く論じてある。

「占領者が事ム権力を行使するのであるから占領地の政府は最早権力を行使し得ない。占領者は占領地及其の住民の上ム一時的の統治権を取得するのである。又占領者の施政ム当り占領地の憲法及法律ム也ムおける占領者の施政ム当り権利は第ム行政権ム過ぎない。占領者の施政は通常の行政とは異なる。蓋しそれは軍政であるからである。占領者は施政ム当り占領地の憲法及法律ム係はることなく之を行ふことを得るのである。其の占領が敵対目的の為ムあり軍隊の維持と安全保障の為であるからである。然し乍ら占領者は自己の軍隊の安全と戦争の目的の為ム絶対的ム権利が附与せられたとは言へ彼は占領地の主権者ではないのであるから占領地の法律を改廃する権能を有たない。その改廃し得るは軍隊の維持及安全と戦争の目的達成の為一時的ム必要とするものム止まる。故ム占領者は敢なの法律及敢なの施政の標準ム従って占領地の行政を行ふ外なければならぬ義務が

ある。彼は占領地の秩序及安全を保障せねばならない又家の名誉及権利個人の生命私有財産宗教の信仰及其の遵行を尊重せねばならないのである」と（Lauterpacht - Oppenheim's International Law, Vol II §169 pp 341-2 - 344）

上述の條約の規定及各後に述べる Nauru 島及 Ocean 島の住民の保護の任に當り且其の責に任じて居つたのは両島の占領者たる豪州国王と鈴木少佐とであつたことは明瞭である即ち Nauru 島における住民の保護の責任者は豪州国王と Ocean 島の住民の保護の責任者は鈴木指揮官であつた。

以上述べたところから後り明かなる如く原は少くも臨時司令長官として Nauru 島及 Ocean 島の住民保護の直接の責任は負つておらなかつた。併し Nauru 島の豪州司令官が原の直属の部下である以上原は豪州が占領者として住民保護の義務を充分に履行におるや否やに付ての監督の責任は負わねばならぬのである。Ocean 島の鈴木に関しては鈴木は豪州の直接の部下であつて原の直接の部下ではなかつた。従つて原は後に述べる如くは直接に指揮し命令するの立場にはなかつたけれども鈴木が Ocean 島の占領者として住民の保護義務を充分に履行におるや否やに付ての上位者たる豪州の鈴木を監督することに欠くところあるや否やを監督する義務を負つておつたのみである。而て原の豪州における直接の監督義務は鈴木における豪州を通じての間接の監督義務の遂行に付ての故意又は過失に因る違反があつたとしても原は豪州及鈴木のみをして行おしめた事柄に付ての責任を負わねばならない。又原が鈴木の為したる検事主張の国際法違反行為を原の側において事実なかつたことを知らずそれがおつたとしてもし仮に事の存在を認識することがなかつたとしてもそれは原の部下監督の義務違反と言うことは出来ない。加之原の在任中深く其の本則等が

此の陸軍司令部所在地 Tmbe と Nauru 島と Ocean と云う交通は勿論通信さへも杜絶して居つた事実に鑑みて果が Ocean 島に於ける検事当局の日本法違反行為に付き捜査を為し得なかつたことを以て職務怠慢と做すことは決して正当ではない。

尚ほ占領地には戒厳令が施行せられるものであると言ふことについて Oppenheim は其の著書に於て次の様に説いて居る:-

「占領者は占領地に事の政力を握つて居るのであるから其の地の住民は戒厳令下に立つ。それ占領者の指揮に従はねばならぬ。此の住民が占領者の指揮に従ふと言ふ義務は彼等の日々の読みが生ずる効果をはなく又は降伏上の結果でもなく単に彼等が服従にある占領者の戒厳令から生じ来る結果である…」同書, §173 p343

之に従つて吾等は Nauru 島及 Ocean 島に於ける日本軍の占領において期間戒厳令が布かれて居たことを了解するのである。

第六章 主証責任

第十五節 主証責任

被告人原審弁護人訴訟代理人検事の主張する裁判証拠並に慣習法の違反即ち職務怠慢があつたか否かの主証責任は検事にあるとの主証責任は American Jurisprudence の説くところをみるに

「凡ゆる訴訟の主証責任は訴訟を争点を肯定的に主張する当事者にある而してそれは訴訟手続と其の事件の性質上異つた点まると云ふのが証拠法の根本原則であつてこの根本原則は怠慢に関する訴訟上の主証責任問題も左右する。此の怠慢に関する訴訟においては原告は自己の為に被告による訴訟に於ける怠慢の主要なる要素を設明する事実を主張しそれはおろか其の主要なる要素と言われるのは被告が原告に対し負担している義務の存在、其の義務の違反を主張した点である訴訟の主要なる主張が争点となつてゐる限り言い換れば主要なる主張事実の真実性が認められない限り原告は該事件の主要なる一切の要素を証拠の判断するに足る力を以て之を証明する義務がある。又被告の怠慢に因つて被つたと主張する損害に対する賠償請求を為さんとする者は注意のより有力なる力を以て被告が原告に対して負担している義務を怠つたということ或は被告は原告に対して負担している法律上の義務に違反し其の義務の怠慢に依つて訴状記載の通り原告に損害又は傷害を与へたのであると言われた事を主証する責任がある 言い換へて言わば被告の義務怠慢を訴訟の原因とする原因は言い訴の原因となる行為が怠慢であると言うことのみならず更にそれが~~損害~~原告に対し被告が負担している義務の侵害であるということ迄んでは此の怠慢の主証の絶に其

の義務の不履行即ち急慢加当該弁論の原因たる傷害又は損害の直近の原因であると言うことを主張しおればよろしい。原告は直接に或は正当なる推定によって被告の注意の欠缺が原告の被った損害の原因となったと云う事実合理的に考へ得る程度に主張しおればよろしい……」と論じている（American Jurisprudence Vol 38 Negligence, § 185, Generally pp 973-5）

此の主張に依って明らかにされた通り本件の訴訟は被告人原が民法上検察官の主張する修繕及住民を保護する直接の義務を怠ったということ並に罪状次目記載の民法違反の行為を知っていたということ被告人が指導を執らなかった不作為と罪状次目列挙の事実との間に直接の因果関係があったということの主張責任は検察官にあります

第十六節　状況証拠

本件においては検察官は被告人原の有罪を立証する為の直接証拠を有していない。それ故検察官は一般に本件においては原が罪状次目記載の検察官主張事実を知っていたことは原の部下和制官吏上の職務上の性質上必ずや此等事実を知っていたに違いないから被告人は状況証拠により専ら原の「知れること」を確立せんと努力しているのである。是れ検察官と原の「知れること」が本件立証の主要なる必須条件であることを事実上認めている証拠であると言わねばならぬ。このことは既に第三章第八節以下一言した通り政治責任に関する思想と民事上の責任は意を合致し全きを尽くさざるも刑事上の責任は次第に主観し全きを尽く欠缺のあることと思い合せて当然のことである。

状況証拠の採用に当っては慎重に之を決せねばならぬことは言を俟たぬ。状況証拠の採否については American Jurisprudence

は次の通り説いてある。

「或る事実の主証から他の状況証拠に依ろうとするときは常に其の状況は主証されねばならない。推定してはいけない。又主証せられた各々の状況は相互に矛盾してはならない。且主証せんとする主要事実の間に不一致があってはならない。状況証拠によって一の事実を推定しようとするには其の事実の基礎となる認知の事実が合理的な結果であることを要する（中略）更に主証された事実と争点たる事実との間に或る関連がなければならぬ」と（同書 Vol 20 Evidence §1189 - Direct and Circumstantial evidence p1041.）

尚は同書は論じて次の通り説いてある。

「刑事訴追に対して状況証拠に訴る場合は有罪の想像と一致する程もの事実の主証丈けで有罪の決定を正当化するには充分ではない。状況証拠に基いて人を断罪せんとするか為には各々其の状況が總て一致して被告人が其の犯罪事実を行ったことを証拠立て且有罪の假定を合致するのみならず更に他の合理的の結論と撞着し他の合理的結論と矛盾し他の一切の合理的事実又は有罪の假定を排除するものでなければならぬ。主証せられた事実は相互に矛盾してはならない。事実又は状況から推知せらるる筋道のある場合で合理的疑念があるときは被告人に有利な方の解決をとらねばならない。被告人の有罪を主証せん為の状況が彼の無罪と両立すると同時に彼の有罪とも両立する様な場合には其の状況は証拠として充分でない（中略）刑事訴訟に於ては主証せられた状況より推断を下すに当っては多大の注意を用いねばならない。凡ゆる情況は有罪を支持するものではない」と（同書 §1217 Circumstantial Evidence, p1068）

尚は同書は主証せられた事実と推測事実との合理的な関連については説いてある（同書 §150 Rational Connection between fact proved and fact presumed, p163）

全くは果して本件において主張せらるへき事項か何人にも合理的疑念を抱さおいまた検察官に後って主張せられてあらうか。後の事実論において其の全くされることを期かんとする。

第七章　取消されたる判決の効力と外国の判決

第七節　取消されたる判決の効力－罪状認否其の一(i)及び事件

判決が最高裁判所の判決によって取消さるときは、その判決は当初に遡って無効のものとなり法律的には最初より全然存在せざることとなるのである。即ち其の判決は事実上裁判所の記録の上には存在してゐても法律上は初より全然無かつたと全く同一の状態に復帰するのである是は確立した法律上の原則である。

之に関しAmerican Jurisprudenceの説くところを聴かう「その判決を破棄する最高裁判所の判決は遡及的効力を有する而て其の効果はその判決が悪法ないとするのではなく其の判決は何等の法律的効力がないとするのであると言ふのが一般的原則である」（同書Vol 14－Courts §130－Retroactive Effect of Departure, p345）

更に「訴訟が不完全で判決が無効である場合には裁判所は自己の知識を以て処罰実行ずみことを取消すことが出来る全く無効と宣告せられた判決は最早判決ではない。よし人は裁判所の記録の上に表はれてゐても、と（同書Vol 15, Criminal Law, §376－Validity of Judgement of Convictions, p51）

尚は「無効ある判決は有効ある判決が享受する尊敬は享くる資格がない。斯かる判決は全然無視せらるへきであつて

無効ということを宣告せらるるものである。又此の判決は有効ある判決の有する効果は有たない。それは目的の如何、場所の如何を問はず法律上又物事的効力は有たない。それには強制力もなく且裁判の保護も与へるものではない。無効の判決と云はれた一切の手続はそれ自体無効である換言すれば此かる判決は当然と看做されそれが無効と宣告せられたときは其の判決が全然なかつたと同じ状態におかるのである。仍て訴訟の当事者は裁判官と同様の地位に立つのである」と（同書 Vol 31 Judgement. § 430 Void Judgement pp 91-2）

本件起訴状の訴状次旨其の一(ハ)及び(ニ)事件は Jaluit 島第62警備隊司令井田仁助大佐及び一等主隊井上文雄陸軍大尉の二名が昭和20年4月8日次 Jaluit 島において各のマーレヤン島土民をスパイとして逮捕し軍律裁判を行ふことなく不法に処刑し且裁判の記録を偽造し其の犯行隠蔽を図へ死に至らしめ（起訴状次旨一(ハ)事件）更に此の両人は昭和20年4月13日次 Jaluit 島において一名のマーレヤン島土民をスパイとして軍律裁判を行ふことなく不法に処刑し且裁判の記録を偽造し犯行隠蔽を図へ死に至らしめたと云ふ事件である。（同(ニ)事件）

井上文夫の裁判記録の抜粋（Ex 9）を見るに土民に対し事件は井上に於ける第二起訴の訴状次旨其の一に而して上掲(ハ)事件は同じく第二起訴の訴状次旨其の二に夫々該当するのである又1948年3月30日付アメリカ合衆国弁理官有田重臣発陸軍長官の文書によれば弁理官代理は1948年3月12日有田重臣陸軍長官の通告により第二起訴及其の訴状次旨其の一及其の二の訴旨並に其の訴旨を撤回して召集当局及再審当局の措置を取消すとの措置をとられたことが明示されてゐる。此の有田弁理官の措置によつて且其の結果として井上文夫に対する第二起訴及其の訴状次旨其の一及其の二は適法なる最初より此の起訴がなか

つたと同じことになつたのである。

海軍卿代理の指揮に依つて取消された井上六夫の越判の第二起訴及其の罪状次目其の一及其の二に基礎を置く被告人等に対する第二起訴の罪状次目の其の一(K)及び(L)の両事件は法律上敢初より起訴がなかつたと同じである。それ故此等両事件を以て原の裁判所が之等の犯罪の違法の如き部下統御及監督上の職務違背の責任を問われたことは全く見当違いである。

第十八節　取消された判決の効力と第二起訴罪状次目其の一(K)事件

本件第二起訴罪状次目其の一(K)事件はJaluit島島司第62警備隊司令井田仁助及海軍少将及第一南洋支隊の吉木秀作立陸軍少佐二名が昭和20年8月10日頃Jaluitに於て二名のマーシャル島土民をスパイとして逮捕し事実の越判を行わずして不法に処刑し被告人等に基本的人権を侵害せしめたと言う事件である。

吉木秀作の越判記録の抜粋(Ex 11)を見るに上記(K)事件は吉木少将する第二起訴罪状次目其の五に該当するものである。即ち1948年3月3日附で米国合衆国海軍省海軍法務長官の文書に依れば海軍卿代理は1948年2月12日海軍法務長官の進言に依り第二起訴及其の罪状次目其の五の事実並に此の訴因を認可するに当り当局者及再審当局の指揮を取消す措置が執られたことが明示されている(証人Ldr. Ogdenの証言公判第7日)此の海軍卿代理の指揮に依つて且其の結果として吉木秀作に対する第二起訴罪状次目其の五は遡及的に最初より此の起訴がなかつたと同じことになつたのである。

海軍卿代理の指揮によつて取消された吉木秀作越判の第二起訴及其の罪状次目其の五に基礎を置く被告人等に対する第二起訴の罪状次目其の一(K)事件は法律上最初より起訴がなかつたと同じである。それ故此の(K)事件を以て原の裁判所が此等の犯罪の違法及部下統御及監督上の職務違背の責任を問わ

とは全く文言違いである。

第十九部　外国判決　起訴の罪状次目表の一(イ)(ロ)(ハ)事件　罪状次目表の二(イ)(ロ)(ハ)事件。

本件起訴状の罪状次目表の一(イ),(ロ),(ハ),(ニ)事件及罪状次目表の二(イ)(ロ)(ハ)事件は何れも該州の裁判所において言渡せられ判決せられた事件であることは当裁判所より明かである。

元より如何なる国家も和立協定のない限り他国の裁判所に係属して下されている判決に自国の法律に従って効力を附与する義務はないのである。他国の裁判所の判決に効力を与えるや或は其の効力を拒否するやは其の国家の自由である。故今多くの場合は国家相互間の協定により他国の判決を自国において効力を与へ或は相互主義によるものもある。又或る場合は一方の政府を設け其の効力を認めるとには一方の判決を与へる場合もある。

本件において検察官は此等事件に下されている該州裁判所の判決の効力を認め起訴中に其事件を掲げてあるのである。元より検察官はアメリカ合衆国がかかる該州裁判所の判決に効力を認めるやには之が主張をする責任がある。元より此の点に関する検察官の主張はないのである。

第二十部　結言

之を要するに上官の部下の国際法違反行為に対する刑罰上官の責任並に之が処罰に関しては従来の国際法上幾多の先例もあり又一般に承認された普通先例もないのであるから本件は現今文明諸国において認められている一般刑法に当たるや否を判断するの要はない。而して此の刑法の一般原則に依って被告人原が其の部下が国際法違反行為を犯したるに付未だ防止

司令長官として抑制指揮上の職務上の責任を負うべきものであるとするには原判決に判示された具体の口供以上に被告人等の違法行為を知つていたか否か。若し知つていたとすれば之に対し適当な措置を講じ得べき状況下にあつたか否か。若し又之を知らなかつたとすれば其の知らなかつたことに付て被告人等に過失があつたか否か等を明瞭にした上でなければ被告人等を其の責任面も刑事責任を負はしむることは正当でない。

更に之を犯罪行為と事実との間の因果関係の法則に照して考察しても本件において検察官が主張する被告人等の第四航隊司令長官として部下を抑制指揮する為又同隊に従属する住民を保護する為其の措置を執らなかつたということと、第一次攻撃により生じた検事側主張事実との間に果して直接の因果関係があつたか否かを確定することは絶対に必要であつて此の両者の間に直接の因果関係があつたことを立証せられなければ被告人等に本件につき其の責任を負はしむることは出来ない。

仮に被告人等が上述の国際法違反行為を実際知らなかつた又其の知らなかつたことに付責むべき過失がなかつた或は事後に知つた事件に付執り得べき適当なる措置を執つたとすれば被告人等は何等の罪責を負うべきものでないことは当然である。

以下証拠に基く事実論に入つて各主張事件に付検討を加へて見よう。

第二編　証拠に基く事実の検討

第一章　一般的事実の検討

第一節　被告原の第四航空軍司令官としての任務

第四航空軍司令官としての被告原忠一の任務は、証拠書類26、航空軍令第十一條第十二條に示されたる如く、彼の指揮下の航空軍の航務全般の総理に在り、従つて軍政事項に就ては海軍大臣の、又作戦計画に就ては軍令部総長の指示を受けて任務を遂行すべきことを定められてゐる。

被告原は、これ以外の任務や権限を与へられてゐなかつた。換言すれば被告原の部下の航空軍の指揮にだけあつたのである。特令なければ彼の管轄区域以外に在る陸軍部隊の指揮をすることや、又南方軍総司令官の統轄する、民政、治安維持の指揮に任務や権限を与へられてゐなかつたことは事実問題としても第四航空軍司令官の命令により被告原に新たに任務、権限が与へられたことは、証拠書類43、即ち復員局長、Deposition、に明示されてゐる。

第二節　担任地域内に於ける陸海軍の指揮関係

被告原が訴追されてゐる事件の中には、陸軍々人が主役を演じた事件が含まれてゐる。罪状項目其の一に於ては彼の指揮下及び監督下にゐた人々の中には、陸軍々人が含まれてゐて、其の行動を監督する義務を怠つたことを問責されてゐる。検事は、冒頭陳述に於ては第四航空軍司令官としての彼の問題、事件の生起した地域に居た人々の指揮と又管轄権を持つてゐたことを述べてゐる。従つて被告原の担任地域内に居た陸軍々人に対する彼が指揮監督の任務を持つてゐたか否かを明確にする必要があるので陸海軍の指揮関係を検討しようと思ふ。

昭和十九年三月上旬以降に於ける中部太平洋地域に於ける陸海軍の編制、指揮関係は、証拠書類43、及44、第二復員局長、Deposition (1), (2) に明確に示されてゐる通りであつて即ち中部太平洋方面

艦隊ガ新ニ編成サレ、第四艦隊ハ其ノ指揮下ニ入リ第四艦隊担任地域及ノ海軍部隊ヲ指揮シ、此ノ時、中部太平洋方面艦隊ノ下ニ、第三十一軍ガ指揮下ニ入リ、第三十一軍ガ中部太平洋地域及ノ全陸軍ヲ指揮スル外ニヤルタ、リレゴトラップニ在ッタ第五十四師団ト、ヤルート島ニ在ッタ陸軍第一衛戍隊ヲ除ク第三十一軍ノ指揮下ニアッタコトガ証拠書類44、第三問ノ答ニ明示サレテ居ル、第三十一軍小畑陸軍中将ガマリアナ方面ノ戦斗デ死亡後、次席デアッタ秦彪陸軍中将ガ実際ニ其ノ指揮ヲ執ッテ居リ昭和二十年五月九日正式ニ後ガ第三十一軍司令官ニ任命サレ、全時ニ第五十四師団長ノ兼ネテ居ル事ニ及ビ後ガ被告桑山ヲ先任デアッタコトハ証拠書類44、及被告桑山ノ証言ノ明示シテ居ル通デアル

叙上ニ依リトラックノ所在ノ陸軍ノ人ト、ヤルート島所在ノ陸軍ノ人ト被告原トノ間ニ何等ノ指揮関係ノ無カッタコトガ明白デアル

次ニ、ヤルート島ノ如ク遠ク離レタ島デ所在ノ先任ノ陸軍又ハ海軍将校ガ全陸海軍ヲ指揮シテ居タノデハナイカト云フコトガ一部ノ証拠ニ依リ疑問ガ持タレル処ニ下タ所在ノ先任指揮官ガ全陸海軍ヲ指揮スルハ敵ノ進攻ノ場合ノ防禦戦斗ノ指揮ニ限ラレテ居タコトガ次ノ証拠ニ依ッテ明白デアル、即チ検事側証人井上憲一ハ委員ノ質問ニ対シ次ノ如ク答ヘテ居ル『敵ノ上陸スル迄ハ秦彪中将ト原中将トノ間ニ指揮関係ハナイ……若シ敵ガ上陸スルト各島、先任指揮官ガ陸海軍何レタルトヲ問ハズ其ノ島ノ全兵力ヲ指揮スル』ト又Ex 39(C.L.O. Document No. 2976)中ニ『陸海軍ヲ通ジテ所在先任将校ガ離隔シタ島ノ防禦ノ場合ニ全陸軍ヲ指揮スル』ト述ベテ居ル

之ヲヤルート島ノ場合ニ就テ謂フナラバ第四艦隊司令官ニ任ゼラレタ井田海軍少将ハ陸軍第一衛戍支隊ノ古木陸軍少佐ト井上陸軍大尉ニ対シテハ敵上陸戦斗ノ行ハルル迄ハ指揮関係ハナカッタノデアル、換言スレバ井田海軍少将ガヤルート島ノ先任将校デアッテモ敵ノ上陸戦斗ノ行ハレナカッタ全島ニ於テ井田ヲ通ジテ古木、井上等ノ陸軍将校ノ指揮ニ入ル行動ヲ監督スル任務権限ハ被告桑山ニハナカッタノデアル。

第三節　担任地域ノ民政及治安維持ノ担任

被告側ノ訴追セル各事件ノ中ニ被害者ガ南洋委任統治領及日本軍占領地域ノ土民及住民ヲ含マレテ居ル事件ガ含マレテ居ル次第被告席ガ民政及治安維持ニ関シ如何ナル任務権限ヲ持テ居タカヲ明ニスル必要ガアルノデ以下証拠ニ基キ之ヲ検討シヨート思フ

(一)南洋委任統治領

日本南洋委任統治領ニハ1922年南洋庁ガ設置サレタ(Judicial notice)ノデ地域及民政ハ南洋庁長官ノ管轄下ニ在リテ第四艦隊司令長官ニハ是ニ関シ何等ノ任務権限ノ無カリシト云フ証拠書類43.ノ二後藤長一Deposition及証人澤川ノ証言ガアル

南洋庁長官デアツタ細萱戊子郎ハ其Depositionニ於テ『自分ガ大東亜大臣カラ警察ガ行ハレ治安ノ維持ガ未ダ行ハレテ居ナイ地域ニ於ケル軍隊ノ指揮官ニ指揮ヲ執ル様ニ要求スル様ナ命令ヲ受ケタ自分ハ此ノ命令ヲ自分ノ全部下ニ伝ヘタ事ハ無イ昭和十九年二月カラ七月ノ間デアツタト思フ』又『自分ハ此ノ命令ヲ中部太平洋方面艦隊司令長官南雲中将ニ通知シタト証言シテ居ル.被告席ハ中部太平洋方面艦隊ノ編成ガ中部太平洋方面艦隊司令長官ガ此ノ趣旨ノ命令ヲ部下ニ発令シタトノ証言シテ居リ.尚澤川証人猶且ツ之ヲ追証スル証言ヲシテ居ル

古木陸軍少佐及井上陸軍大佐ハ夫々後述ノ裁判ニ於テ昭和九年二月頃第四艦隊司令長官カラセルト島先任指揮官井田海軍少将ニ全島ノ司政行政ノ権限ヲ附与スル命令ガアツタト証言シテ居ル然ニ被告席ハ反対訊問ニ於テ斯ル命令ヲ各ノ記憶ナシト証言シテ居ル.第四艦隊司令長官ハ権限外ノ事項ニ就キ後ガ部下ニ命令ヲ下ス筈ハ有リ得ナイ又.実際問題トシテ島々ノ先任指揮官ガ以テ海軍特殊ト定テ居ナカツタ状況ニ於テ(一例.エンゼービー島陸軍指揮官陸軍大佐.海軍指揮官兵曹長一様ト口証言)古木.井上ノ述ベルガ如ク第四艦隊司令長官ガ斯ル如キ命令ヲ各ノ島々ニ発給ス権限ヲ無カツタトハ自明ノ理デアル

古木ハ部下トシテ通信ヲ担当シテ居タ陸軍中尉野川ガ古木裁判ニ於テ証言シタ次ノ証言ハ之ヲ追証スルニ充分デアル.即チ後ハ『ヤルート

南洋支庁長ニ南洋庁長官ノ次ノ如キ電報ガ来ル「自分ノ指揮下ニ加ヘラレ度自分ハ大平洋戦隊司令長官ノ指揮下ニ入リタル以後ハ南洋庁職員ハ其ノ地ノ指揮官ノ指揮下ニ入レ」ト訓令シテ居ル

叙上ノ証拠ニ依リ明白ナル如ク南洋委任統治領ノ行政治安維持ハ主管大臣タル大東亜大臣ノ命令ニ依リ南洋庁長官ガ部下職員ニ対シ必要ニ応ジ所在各島ノ指揮官ノ指揮ヲ受ケル如ク要求スル様ニト命令ヲ出シタノデアル

中部太平洋戦隊司令長官ハ南洋群島ノ防衛ニ関スル事項ニ付キ一般的ノ命令ヲ部下ニ与ヘル事ガ出来ル地位ニアリタルニ過ギズ南洋庁長官ニ対シテ任務ヲ与ヘタノデハナク又中部戦隊司令長官ニハ何ノ任務モ与ヘラレナカッタノデアル検察官ハ井田海軍少将ハ二重人格者デアッテ東京ニ参謀隊司令トシテハ井田戦隊司令長官ノ指揮ヲ受ケタガ民政司法ノ担当者トシテハ直接南洋庁長官ノ委任ヲ受ケタノデハナク井田戦隊司令長官ノ指揮当然ニハイッタノデアル

更ニ本法廷ニ次ノ如キ証拠ガ提出サレテ居ル即チ弁護側証人澁川南洋諸島ノ治安維持ノ担任ヲ陸軍ハスト命令ヲ騎兵戦隊カラ受ケタコトヲ証言シ被告原中部太平洋方面戦隊司令長官カラ全一趣旨ノ命令ヲ受ケタ旨ヲ証言シ各命令ニ於テ暗黙ノ内ニ断ハル場合ノ命令ニ出サレタコトニ於テ矛盾ガナイ

南洋庁トラック支庁長藍原有孝ハ彼ノDeposition中ニ自分ガ参席陸軍中将カラ受ケタ命令ハ陸軍ガ治安維持ヲ担任スルト述ベテアッタト証言シテ居ル

叙上ノ諸証拠ヲ綜合スルニ被告原ニハ南洋委任統治領ノ民政治安維持ニ関シテハ何ラノ指揮権ノ無カッタコトガ明白デアル

(ニ)軍事占領地域

日本軍隊ガ占領シタトカル島、オーシャン島ニハ陸軍部隊ノミガ駐屯シテ居タ、従テ全島ノ住民ニ対シテハ全島海軍指揮官ニ保護ノ直接責任ガアリ、中部戦隊司令長官ニ指揮ノ責任ノアッタコトハ事実デアル

第四節　戦況、交通、通信状況

被告原が第四飛隊司令長官ニ就任シタトヤ、マーシャル群島中ノ主要基地クエゼリン及エニウェトクハ既ニ米軍ノ占領サレ又着任ノ数日前トラックニ米機動部隊ノ大攻撃ヲ受ケテ大損害ヲ被ッタノデアル

原ノ着任前、米軍ノ中部太平洋ニ対スル本格的攻撃ガ開始サレ、トラック、ヤルート其他ノ島々ニハ連続米軍ノ一方的攻撃ニ曝サレテ居ル処ニ原ノ指揮下ニハ何ラ海上戦力ヲ航空攻撃兵力ヲ無カッタノデ、マーシャル群島及東カロリン群島ノ制海及制空権ハ完全ニ米軍ノ掌中ニ在リ、

之ガ為、トラック島ト、マーシャル群島、島々及ナウルオーシャン島ノ如ク1000浬以上モ離レタ島ヲトノ間ノ海上交通及空中交通ガ実際問題トシテ杜絶シテアッタコトハ誰シテ容易ニ了解ヲ来ス所デアロー。

被告側証人澁川ハ遠ク離レタ島々ニ対スル補給ノ為直接現地カラ輸合船隊、潜水艦ヲ差向ケ島ニ派遣シテ貰ッタガトラック及メレヨンニ対スルモノハ成功シWake島ノミ島ニ対スルモノハ不成功ニ終ッタト証言シテ居ル即チ努力ヲ払ッタケレドモ遠ク孤立シタ島ヲトノ交通ハ不可能デアッタノデアル

通信ノ状況ニ就テハ被告側証人澁川、弁護側証人楠山及被告原ガ証言シテ居ル。被告原ハ第四通信隊司令(トラック)ノ報告ニ依ルト1944年後半以降ヤルート以外ノ発信ハ殆ト不可能デアッタ。1945年ニ入リヤルートノ通信モ低下シテ通信ガ非常ニ困難ニナッタ旨証言シテ居ル

オーシャン島指揮官鈴木直臣海軍少佐ハ、後ノ裁判ニ於テ次ノ如ク証言シテ居ル。「マーシャル群島、金城ハ自分ハトラックト連絡ヲ保テ居タ1945年6月マーシャル群島、金城ニハ自分ハトラックカラ受信ニ行ク送信ニヤカッタ発電ヲ運転ノ燃料ガ少量トリ硫酸ヲ手元ニナクナッタ送信機ハ非常ニ古クテ殆ト役ニ立タヤカッタ又予備ノ電球ガ一個ニヤナカッタノ重要ナ暗号書ガヤカッタ夫故送信ヲシヤカッタ。自分ハ常時聴取シテ居タガ受信ハ極メテ貧弱デアッタ」

連続爆撃ニ依ル被害及通信器材ノ自然消耗ニ依リ遠隔孤島ノ通信能力ガ時間ノ経過ト共ニ低下スルコトハ誰シテ理解シ得ル所デアロー。

更ニ重要ナコトハ新シイ暗号書ガヤルート、ウォッゼ、オーシャン島ノ如ク遠ク離レタ島ニ送レヤカッタ為ニ実際問題トシテ通信ガ著シク制限サレタコトデアル

検事側証人清川ハ簡単ナ暗号書デ是ヨリ島ニ電報ヲ打ツト事実之ヲ解読サレテ反対措置ヲ敵ニ講ゼラルヽ丈ガ自. 是ヨリ地域ニハ極力通信ヲシナイ方針デアルト証言シテ呉レ. 被告等ニ全然当ノコトヲ追証シテ呉レ

暗号書ガ使用サレナクテモ. 平文ガ保管ノ取扱ニ関ル訓示ハ出シ得ル筈デアルト検事ニ云ワカヽ知レナイガ機密ノ事項デモ、平文デ通信スルコトハ支隊者ノ関係、通信系基地カラ他ノ重要ナ通信機密事項解読ノ端緒トナルノデ戦時厳禁サレテルコトハ将校ヨリハ誰デモ一般常識ノコトデアル

第五節　日本海軍ニ於ケル俘虜取扱方針又之ニ関ル教育訓練

検事ハ其ノ冒頭陳述ニ於テ次ノ趣旨ノコトヲ述ベ. 又裁判中之ニ関係ル証拠ヲ提出シタ即チ被告等ガ第四艦隊司令長官ニ就任スル時、及ノ指揮下ニ在ル軍隊、訓練、規律ノ統統ハ俘虜ノ虐待ニ又ハ殺害シテモ差支ナイトイフ二在ル. 被告等ハ斯カル訓令ノ存在ニツキ承知シ又ハ承知スベキデアルニ拘ラズ及ノ俘虜又ハ市民住民ノ取扱保護ニ関シ及ノ軍隊ヲ抑制スベキ手段ヲ講ジタコトヲ怠ッタトイフノデアル

被告ガ及ノ担任地域ニ於テ及ノ就任前ニ俘虜ニ関ル事件ガアッタコトヲ知テ居タカ否カニ就テハ後章ニ検討スルコトトシ茲ニハ日本海軍ニ於ケル俘虜取扱方針又之ニ関ル第四艦隊ニ於ケル訓練ノ統統ニ就キ証拠ニ基キ検討スルコトヽシ

日本海軍ニ於テ俘虜ノ取扱ニ関シテハ海軍諸法則ニ俘虜取扱規則ガ規定サレテ居リ又海軍大臣官房発行ノ戦時国際法規綱要中ニモ其ノ取扱方針ヲ明記シテ居リ且ツ是等ノ規則ノ図書ガ全海軍ニ配布サレテ居タコトハ多クノ証拠ノ示ス通デアル

俘虜取扱ニ関ル事項ヲ日本海軍人員ニ普及スル為ニ執ラレタ手段ニ就テハ Ex 38, Ex 54 (第二復員局長 Deposition 中渡辺安次大佐ノ口供書) 及弁護側証人有馬篤ノ証言ノ示ス通デアル.

第四艦隊ニ於ケル開戦直前ニ関スル注意ガ各部下指揮官ニ与ヘラレタコト (Ex 54 中ノ復員局長川井巌ノ証言) ハ1943年12月カラ1944年1月東京各軍指令官ガ来テ居タトカノ、所轄各副長等集リ席ヒニ於テ俘虜ノ取扱ヒ其ノ他ニ就テ早ノ四也ニ

帰還セシメル様ニ指示ノアッタト（弁護側証人中溝ノ証言）ガ証拠ニ提出サレタ又検事側証人澁川及小林ニハ海軍省カラ俘虜ヲ早ク内地ニ帰スト云ヒ要求スル電報ヲ受領シタガスルト云ヒ証言シ、小林ハ之ヲ各部下ニ傳ヘタト証言シタ。

第四十一警備隊司令タリシ浅野新平ハ検事側証人トシテ宣誓人台ニ立ツヤ時限自分ハ常ニ俘虜ハ人道的ニ取扱ヒホバクストノ信條ヲ持ッテ居ッタ又自分ガ就任シタトキ俘虜ハ狭イ所ニ収容サレテ居タ。之ハ軍隊施設ニ於ケル一時的収容デアッタカラ成ベク早ク送還ス必要ガアッタ又自分ハコノ才件ヲ司令部デ聞イタトキ雄カニ記憶シテ居ルト述ベテ居ル

第四十一警備隊ノ副長代理タリシ中溝庄一ハ前任者カラノ申継ニ於テ俘虜ヲ一時的ニ収容スルガ便利次第日本ニ送還スルコト等ヲ申継受ケタト証言シ又警備隊ノ衛兵教育ニ当ッテハ俘虜ヲ人道的ニ取扱ヘ俘虜ハ最後迄勇敢ニ戦ッタモノデアルカラ敵ト雖モ我ガ全将ニ取扱ヲ誤ルト教示シタコトヲ証言シタ。

検事ハ本件ヲ担当セル司令官阿部孝寿成判ニ於ケル阿部及証人林幸一ノ証言ヲ証拠ニ提出シ俘虜ヲ内地迄還スルコトナク現地デ処刑シテ差支ナイコトガ中央当局、特ニ軍令部第一部ニ於イテ極テラリ方針デアッタカノ如ク主張シテ居ル。然ニ阿部ガ東京デ受ケタ訊問ノ際ノ答弁及林ニ対スル阿部成判ニ於ケル反対訊問ノ答弁ヲ一見シテ明瞭ナル如ク彼等自身ガ本論ノ俘虜取扱方針ガ斯ノ如キモノデナカッタコトヲ充分ニ承知シテ居ル。

Ex 54 第二復員局長ノ Deposition中ニ、1942年軍令部第一課長ガ二度開催後ノ軍令部第一部ニ於ケル俘虜ノ取扱ニ関スル方針ヲ決定シタトハ全然ナク又斯ルコトハ軍令部ノ所掌範囲外ノコトデアルト証言シテ居ル

日本海軍ノ方針トシテ俘虜ヲ虐待シ又ハ殺害スルガ如キコトノ毫モナカッタコトハ敵ノ諸証拠ニ依ッテ明瞭デアル又報告ガ第四艦隊司令長官就任時、第四艦隊内ニ於ケル俘虜ノ取扱ニ対シ教育訓練ガ行ハレテ居タコト、特ニ彼ノ部下中俘虜取扱ノ直接責任者デアッタ第四十一警備隊司令及副長ニ俘虜取扱ニ関シ日本海軍ノ方針ヲ第四艦隊司令部ノ方針ヲ充分ニ知テ居タコトガ明白デアル。過去ニ於テ第四艦隊ノ部下ノ一部ニ於テ若干ノ不法取扱ガ行ハレタコトハ事実デアルガ之ガ報告着任時ノ第四艦隊ノ訓練、規律ノ紊乱デアッタナドトイフ事ハ決シテナカッタノデアル

検事ノ被告人ガ着任后、俘虜ノ保護取扱ニ関シ命令ヲ何ニモ発シナカリシトナシテヲ後、戦務慣習ノ如キ意味ノヲ主張シヲ居ル。処ニ日本海軍ノ俘虜取扱ノ方針ハ確立シテ居リ之ガ普及ノ方法モ前述ノ如ク講ジラレテ居タノデアルカラ、後トシテハ何等ノ命令ト規則モ出ス必要ガナカッタノモ当然ノコトデアロー。

更ニ検事側証人横山海軍大佐カラ発布サレ諸例則ニ載ヲ居ル規則ト全ク様ナ事項ニ就テ飛行司令長官ガ更メテ命令ヲ出スコトハ日本海軍ノ習慣デナイコトヲ証言シヲ。

前述諸項ヲ綜合シ被告人ガ俘虜取扱ニ関シ命令ヲ発シナカッタコトハ何等後ノ戦務慣習トハナラナイコトガ明瞭デアル

第六章 被告人着任前ニ生起シタ事件ト之ニ対スル被告人ノKnowledgeニ就テ

(一) 本法廷ニ提出サレタ諸証拠中ニ被告人ノ第四飛行司令長官就任前ニ其ノ担任地域ヲ生起シタ俘虜処刑事件ガ被告人ニ知ラサレタトスル証拠ハ一モナク又被告ガ之ヲ承知シタ筈デアルト合理的ニ推論シ得ル根拠トナル証拠モ全然ナイ。先ツ証拠ヲ検討シタ後ニ是等ノ事件ヲ被告ノ知ラナカッタコトガ合理的デアッタトスルコトヲ論述シヨート思フ

(イ) 検事側ハ昭和十七年十月十六日クェゼリンヲ行ハレタ俘虜処刑事件ヲ被告人ノ前任者小林仁少将ガ知ヲ居タトスルコトハニヲ指摘シタ

処ニ小林仁少将ハ新米国一先ツクェゼリン巡視ノ途中、住友第八中カラ来タ阿部六根司令官ノ参謀林ガ俘虜処刑ノ場所ヲ指シタノヲ見テ居ル程度デアルト証言シヲ居ル。井上ハ本件ヲ被告人ニ話シタコトハナイ、又小林ハ被告人ニ申継ノ際俘虜ニ関スルコトハ何モ無カッタト証言シヲ居ル。

(ロ) 昭和十八年十月Wake島デ行ハレタ俘虜処刑ニ関シ参謀井上ガ其ノ当時電報ニ依リテ承知シタコトヲ承認シタ然ル後ハ本件ニ関シテ被告人ニ告ゲタコトノナイコト及斯カル電報ガ容易ニ原ノ見得ル場所ニアッタカトノ問ニ対シ暗号室ニ保管シテアッテ特ニ要求シナケレバ見ルコトガ出来ナイ旨ヲ証言シヲ

(ハ) 昭和十九年二月十七日第四十一警備隊デ七名ノ俘虜処刑事件ノ行ハレタコトヲ参謀井上ガ知テ居タコトガ証拠ニ提出サレタ然ニ井上ハ本事件ヲ当時、司令

長官小林ニ報告セシヤヲ被告席ニモ報告シタルガ無イト証言シテ居ル

第四十一警備隊司令タリシ田中政治ガ1947年9月22日彼ガ死刑ヲ執行サレル直前ニナシタル陳述書ガ証拠ニ提出サレタガ之ニハ二月十七日及和田根拠地隊司令部デ開催サレタル会議ノ席上、司令官若林参謀樋口其他各所轄長出席シテ居ル前デ田中ガ当日警備隊デ俘虜ノ処刑シタルトヲ報告シタト述ベテアル然ニ田中ハ彼ノ裁判ニ於テ自ラノ意志ニ依リ証人台ニ立ッタトキニハ斯ル証言ヲナサズ処刑ノ報告ハ会議終了後参謀樋口ニ報告シタトニハ三回述ベテ居ル

検事側証人井上ガ本事件ヲ知ッタハ和歌浦参謀河村留良夫カラ田中大佐ガ述ベタノヲ聞イタトイッテアルガ河村ガイツ田中カラ聞イタカハ不明デアルト述ベテ居ル一方河村留良夫ノ後、Deposition (Ex 51) ニ於テ田中大佐カラ俘虜処刑ノ報告ヲ聞ク記憶ヤ之ヲ他ノ者ニ話シタ記憶ハナイト証言シテ居ル

弁護側証人若林清作ノ樋口ニ対スル二月十七日ノ会議ニ於テ田中ガ斯ル報告ヲシタノヲ聞イテ居ナイト証言シテ居ル

更ニ田中ハ此ノ陳述書ハ任意的ニ書カレタモノヲ示シテ居ラズ彼ノ裁判ノ際、彼自身ノ証言ト比ベテ証拠力ハ甚ダ少イモノデアル

以上ヲ綜合スルニ、被告席ガ二月十七日事件ヲ知ラサレタトイフ証拠ハ何モ無ク又知ッタ等デアルト合理的ニ推断シ得ル根拠ヤナイノデアル

(二) 証拠書類26 海軍刑法第五十一條ニハ、参謀又ハ隊務ノ参与スル職員ガ司令長官ニ報告又ハ具申スルトキニハ必ズ参謀長ヲ経由スルトニ定メラレテ居ル従テ参謀ノ知ッテ居ルコトハ直グニ司令長官ノ知識トハナラナイノデアル。部下所轄長ノ場合ニ同様ニ公務ノ関係ハ必ズ参謀長ヲ経由スルノデアル。従ッテ所轄長ノ知テ居ルコトハ直チニ司令長官ノ知識トハナラナイノデアル

証人中牧及浅野ノ両名共ニ俘虜到着ハ其ノ都度之ヲ司令部ニ報告シタト証言シテ居ルガ其ノ方法ヲ調ベテ見ルト次ノ様デアル。即チ浅野ハ俘虜ノ扱ニ就テ自分ガ直接ニ報告シタコトハ一度ナイ。書類デ報告シタコトハナク多クノ場合、副長ガ電話又ハ口頭デ報告シタト証言シ、中略

小笹特技ヨンテ電話デ報告セシタガ誰ニ報告シタカ知ラズト証言シテ居ル
斯カル手続ニ依ッテハ警備隊側ガ司令部ニ報告シタトシテモ
司令長官ニ到達スルトハ謂ヒ得ナイトガ明デアル

第二章　被告原ト主張サレル各事件トノ関係

起訴罪状項目ニハ主張サレル事件ガ時間的ニ記載サレテ居ルガ茲ニ便宜上、各地域毎ニ事件ヲ纏メテ検討シ一、最初ニ各事件ニ就テ被告ガ之ヲ知ラナカッタトノ点ヲ検討シ次デ問題トナル点ニ就テ論述シヨート思フ

第一節　ヤルート島事件

(一)　升田・吉村事件（罪状項目　I-(a)　2-(a)）

本事件ハ被害者ト称スル三名ノ俘虜ハ昭和十九年二月九日頃捕ヘラレタモノデ被告原ハ着任ニ先ダチ前任ノコトデアル（Ex 6、升田陳述書）本俘虜ノ捕ヘラレタコトニ就テハ当時ノ参謀長澁川ヲ知ラナカッタコトハ証言シ、被告原ヲ知ラナカッタコトヲ証言シテ居ル

昭和十九年三月十日俘虜三名ヲ庶刑スルニ当リ升田少将ガ第四航隊司令部ニ指示ヲ仰イダコトヲ証拠ヒナシ（Ex 5　升田裁判記録）第四航隊司令部ガ之ヲ容レタコトヲ証拠ヒナシ（澁川、曽ノ証言）

一方Ex 6、升田ノ陳述書ニ依レバ吉村兵曹長ハ俘虜処刑ニ関スル軍命令ヲ糸ヘタト述ベテ居リ従ッテ本処刑ガ軍ヲナス警備隊内デ軍事裁判ニ付サレ、第四航隊司令部ハ知ラサレナカッタコトガ明白デアル

吉村裁判ニ於テ検事側証人　岩波健一ハ升田少将ノ指示ニ依リ戦斗報告ノ末尾ニ三人ノ米国俘虜ガ爆死シタコトヲ附加シタト証言シテ居ルガ実ハ該戦斗報告ガ第四航隊司令部ニ到達シタトシテモ先ハ

保護、虐待又ハ處刑トハ全然囚客ノ異リ、通常ノ爆薬報告ニ過ギナカツタ為メ司令部ノ注意ヲ惹カナカツタトハ当然デアロー.

(二). 井上事件(罪状項目1—(ム)(ヰ))

昭和二十年四月八日及十三日ニヤルート島ニ於テ夫々七名及一名ノ土人ノスパイ事件ガアツタトスル事ハ、土人ヲ處刑スルコトニ就テ、ヤルート島指揮官ガ第四航隊司令部ニ報告ヲナシ或ハ其ノ處置ニ就テ指示ヲ仰ガントスル証拠ハ何モ挙ゲラレテ居ラズ(Ex9. 井上裁判記録)又第四航隊司令部ニ於テ之ニ関シ報告ヲ受ケタトスル証拠ハ何モ挙ゲラレテ居ラズ(證1. 檜ロ. ム被告等ノ証言)

従テ本事件ガヤルート島以限リデ実施サレタモノデアルコトハ合理的ニ推論スルコトガ出来ル.

(三). 古木事件(罪状項目1—(ル))

昭和二十年八月頃ヤルート島デ行ハレタ二名ノ土人スパイ事件ニ就テモ前述ノ井上事件ト同ジ会話デアツテ ヤルート島指揮官ガ土人ノ處刑ニ就テ第四航隊司令部ニ指示ヲ仰ギ又ハ報告ヲナシタトスル証拠モ又第四航隊司令部ガ之ヲ受ケタトスル証拠モナイ.

本事件ニ関シ第四航隊司令部ガ何等知ラサレテ居ラナカツタコトハ合理的ニ推論シ得ル所デアル

(四). 井上、古木事件ニ於ケル裁判ノ有無

罪状項目第一ニ於テ井上古木両事件(ム、ヰ、ル)共ニ事前ニ裁判ナクシテ土人ヲスパイトシテ不法處罰シタモノデアルト主張サレテ居ルニ対シ井上、古木両裁判ニ於テ被告等ハ何レモ裁判ヲ行ツタト主張シテ居ル

本軍律委員会ニ提出サレタ井上古木両裁判記録(Ex9. Ex11)ヲ検討スルニ後者ノ行ツタモノハ厳密ナ意味ニ於テ正規ノ裁判デアツタカ否カニ就テ

○ ○ ○ ○

ル疑問ノ余地ガアル然シ乍ラ敵ノ重圍中ニ在ツテ上人達ノ逃走ヲ、追撃ヲ防ク為メ止ムヲ得ズ止ムヲ得ザル事情ニアリ緊要事デアツタ当時ノ状況下ニ於テ、井田井上、古木等ガ上人スベテノ事件ニ対シテ為シタ調査及審議ハ現地ニ於テ為シ得ル最善ヲ盡シタモノデアツタト云フ充分ニ了解出来ル所デアル

日本海軍刑法第十七條(EX31)ニ曰ク数人共同ノ暴行ヲ鎮圧ノ為又ハ敵前又ハ戒厳発令ノ際ニ於テ軍紀ヲ保持スル為ニ已ムコトヲ得ザルニ出テタル行為ハ之ヲ罰セズ但必要ノ限度ヲ超ヘタル行為ハ情状ニ依リ其ノ刑ヲ減軽又ハ免除スルコトヲ得ト規定シテアル

国際法ニ於テモ軍隊ノ生存又ハ安全ヲ危殆ナラシムル場合ニ避ケ難キ手段トシテ直接生命ヲ破壊スル行為ヲ敢ヘテスルコトハ軍事上ノ必要トシテ一般ニ容認サレテ居ル所デアル

叙上ノ証拠ニ依リ井上、古木両事件ニ於ケル最モ有利ナル意味ニ於ケル証拠ノ無カツタコトハ情状酌量サルベキデアル況ンヤ遠隔ノ地ニ在ツテ是等ノ事件ヲ知ラズ又軍紀維持ヲ全ウスル為ニ部下ノ行動監督ヲ怠ツタトテ刑事責任ヲ問ハルベキ筋合ニ全然ナイノデアル

(五) 民政司法及治安維持ト報告トノ関係

井田海軍少将ガ島ノ先任指揮官トシテ民政司法ノ権限ヲ持ツニ至ツタ経緯及報告ニハ衛生要員統治領ノ民政司法事項ニ関シ何時如何ナル時ニ於テモ何等ノ権限ヲ与ヘラレナカツタコトハ既ニ第一章ニ於テ述ベタ又治安維持ガ陸軍ノ担任デアツタコトヲ明瞭ニ指摘シタ通デアル

井上、古木両事件ハ井田少将ガ衛生兵長官カラ直接委任サレタ権限ニ基イテ実施シ又井上古木等ノ陸軍将校ガ治安維持ノ担任者トシ又ヤルート島其他ノ実施ニ於テ実施シタ事項デ井田私物的委任ヲ報告ニ是ヲ問ニ何等ノ指揮責任ノ無カツタコトガ明白デアル

第二節 トウル、オーシャン島事件

一、Ruka事件（Spec 1(g) 2-4）

(1) E文件、小川迫田其他、濠州裁判記錄中ニ第六十七警備隊分隊長別ニ小川脊藏ニ次ノ如ク陳述シテ居ル「Ruka事件ハ一年前ヨリ以前ヨリノ糧食補給ガ杜絶シ事件当時ハ南瓜及椰子計ヲ主食トモネバナラヌ困難ナ状況ニアツタ糧食窃盗ヲ防止シ尚ニ之ヲ犯シタモノハ射殺セラルベシトスル厳命ガ警備隊司令カラ発令サレテ居タ」ト.

当時警備隊司令ハリン副官久本ノ後、Deposition中ニ糧食ヲ常食シテハ三日間絶食、懲罰ヲ課ス命令ヲ出シタト証言シテ居ル.

分隊長小川ハ更ニ「小隊長中尉カラ後ノ小隊ノ属シテ居ル土人Rukaガ糧食ニ関ス罪ヲ犯シタ報告ヲ受ケ之ヲ確認シタノデ懲罰トシテ三日間ノ禁固ト共ニ同一日十回ノstrokeヲ加ヘルコトヲ命ジタト証言シテ居ル. 土人ニ対シテ笞刑ヌハstrikeヲ懲罰トシテ加ヘルコトガ一般ニ行ハレテ居ルコトハ周知ノ事デアツテ小川ノ命ジタハ当時ノ状況ニ於テ普通程度ノモノデアツテ過度ノモノデナカツタコトハ誰シモ認メル所デアロー

E文書ニ日本陸軍懲罰令第十五條ニ於テ分隊長ハ其ノ部下ニ対シ懲罰ヲ課スル権限ガ与ヘラレテ居ル. 小川ハコノ権限ニ基キ中隊ニ配属シテ居ル土人ニ対シ正当ニ懲罰ヲ行使シタノデアツテ後ノ行為ハ主張サレテ居ル如ク不法監禁ノ範疇ニ入ルモノデハ決シテ無イノデアル.

(2) 証拠書類14（小川裁判記錄）中小川裁判ノ証人トシテ出廷シタ土人ノ証言ノ如何ニ信頼性ニ乏シイモノデアリ之ニ反シ分隊長小川ノ陳述ガ理路整然トシテ居リ経験ヲ積ム余地ノ少イモノデアルカニ就イテ本法廷デ調査サルル証拠ノ明瞭ニ示シテ居ル所デアル

(3) 第六十七警備隊司令副官久本ノ其ノDeposition中ニRukaトイフ名前ノ土人ヲ知ラズ、其ノ土人ニ就テ事件ノアツタ事ヲ知ラヌト. 又其ノ事件ニ関シ第四飛行団司令部ニ指示ヲ仰ギ或ハ報告スルコトヲシナカツタト証言シテ居ル. 濠州檢事及被告席ノ全員ガ本事件ニ関シ何ノ報告ヲ受ケテ居ラヌト証言シテ居ルガ何レノ点カラ見テモ被告席ガ本事件ニ就テ何モ知ラナカツタコトハ明白デアル.

二、Lee事件 (Spec 1-(R) 2-(g))

(1) EL15 漢洲戒判ノ當山記錄中主計兵曹長當山ノ陳述中ニハ次ノ要旨ノ事項ガアル ——十一月二米ノ配給ハ一日一オンスニ減ラサナケレバナラナカッタ.我々ハ蜥蜴ヤ雜草ヲ食ヘテ辛ウジテ飢ヘヲ凌ガナケレバナラナカッタ.我々ハ大部ハ榮養失調ニ罹リ毎日二三人宛死亡シテ行ッタ斯カル狀況下ニ文和人Leeニ何度カ警告ヲ與ヘタニ拘ラズ主食ノ闇取ヲ數回ニ亘リ續ケ.彼ヲ罰スルコトヲ怠ッタナラバ島ノ全員ガ飢餓ニ瀕スルガ爲彼ヲ罰スルコトガ任務デアルト信ジテ罰トシテ殺ッタト.

本事件ハRuka事件ト全樣當時ノ狀況上ヤムヲ得ズ實施シタ性質デアリテ屋倍行爲デハナク.暗殺目的ガ最初ニ死亡シタコトハ無イ,程度ガ過ギタコトハ認メナケレバナラヌ.

(2) 本事件ニ關シ司令前田大佐ハ當時何モ知ラナカッタ.從テ本事件ニ就テ第四航隊司令部ニ指示ヲ仰ギモシナケレバ報告モシナカッタト証言シテ居ル(EL 44). 然ルニ箱口.報告書モ本事件ニ關シ何ノ報告ヲ受ケナカッタト証言シテ居ルガ報告書ガ本事件ニ就テ何モ知ラナカッタコトハ明白デアル

三、鈴木事件 (Spec 1-(L) 2-(k))

(1) 本法廷ニ提出サレタ論証様ハ日本軍ノ戰斗行動停止及降伏ニ關シ中央當局ノ發シタ命令指示並ニ第四航空艦隊司令長官ガ部下ニ對シテ執ッタ措置及ハ發シタ命令ニ就テ次ノ如キ事項ヲ示シテ居ル

1945年8月15日 日本ノ天皇ハ戰斗行動ノ終結ニ關シ國民一般ニ對シラヂオ放送ヲ行ッタコト

1945年8月17日 特ニ陸海軍之大ニ對シ戰斗終結ニ關スル勅諚ガ發セラレ即日第四航空艦隊ノ各ノ海軍航空部隊ニ發信サレタコト

1945年8月16日 海軍大本營命令第48号ニ於テ即時戰斗行動ヲ終始スヘキ命令ガ第四航空艦隊ノ各ノ海軍航空部隊ニ發セラレタコト

1945年9月2日 降伏ニ関スル中央当局ノ指示ガ着セラレタ。
(ソ七 EX 55)
和田飛行団命令ハ終戦ニ関スル勅語ノ即時戦斗行動ノ停止
ニ関スル電報ヲ中央当局カラ受領スルト直ノ之ヲ全部下
部隊ニ伝達シタ (溝口原ノ証言)
上記電報ヲ伝達スルト全時ニ和田飛行団長ハ大命ニ
基ク戦斗行動ヲ停止スルニ当リ訓示ヲ全部ニ発シタ
1945-8-18 和田飛行団長ガ降伏ノ標識ヲ米軍ニ提
示シタコトヲ部下ニ伝ヘ部下ニ迅速且丹精ナル降伏ヲナス
ベキコトヲ指示シタコト (保証)
降伏ニ関シテハマニラニ於ケル予備交渉ノ内容ヲ中央当局ノ
通知ヲ受ケ之ヲ部下ニ伝ヘタコト (溝口)

(ロ) オーシャン島指揮官鈴木直属陸軍少尉ハ濠州軍事法廷ノ被
裁判ニ於テ次ノ如キ証言シテ居ル (EX 16)
『自分ハトラックノ司令長官カラ放送ヲサセタコトヲ覚エテ居ル 1945年8月
15日頃放送ニ於テ彼ハ次ノ如ク述ベタ「日本政府ハ停戦降伏ノ交渉ヲ
開始シタノデ我ガ天皇ノ命ニ従ハネバナラヌノデ最後迄戦ヘト』
全裁判ニ於ケル唯一ノ生存土人デアル証人 Kabunare ノ証言中ニ
モ日本ノ天皇ガ降伏ニ戦争ヲ終ヘタ土人達ハ日本軍ガ去ル迄警ヲ緩メ
仕事ヲスル様ニ下ヘタコトヲ日本軍カラ聞カサレタコトガ述ベテアル
是等ノ証言ニ依リ和田飛行団命令ガ発セラレ大命ニ従ヒ戦斗行動
ヲ停止スベキ電報ハ本事件前ニオーシャン島指揮官ニ到達シテ居タコト
ガ明瞭デアル

(ハ) 鈴木少尉ハ多数ノ土人ヲ虐殺スルニ至ッタ状況ニ於テ彼ガ戦争ノ終ッ
タノヲ知ッタ時機ハ八月二十四日又ハ二十五日頃デアッタコト、八月二十四日又ハ
二十五日頃トラックカラ無線ガアッテ司令長官ガ最後迄戦ヘトイッタコ
ト、土人ガ和蘭ニナルノデ殺サウト決心シタコトガ甚ダ重要ナル理由ハ Tanawa
ニ居ル直属上官柴崎少将カラ斯ル命令ヲ受ケタコト、土人ニ多数ノ叛逆行

(4g.)

行為がアッタト及ビ降伏帰北陸戦斗ガ迫ッタ事実ヲ挙ゲテ居ル

然ニ被告等ハ八月十五日カラ降伏調印迄ノ間ニ敵カラ攻撃ノアッタ場合ニ之ヲ攻撃セヨトノ命令ヲ出シタトカイウ証言ヲシテ居ル前述ノ通リ被告等ガ斯ノ如キ命令ヲ出サナカッタコトハ誰ニモ了解シテアル。

(二) 第十七軍司令部陣営日誌(別冊大成ニ本事件ガオーシャノ島ニ於テ生起シタコトヲ当時知ラナカッタト証言シテ居ル(Ex 44 別冊 Deposition)。第四航空軍司令部ガ本事件ノ間ニ何ノ報告ヲ受ケタコトノナイコトハ確ニシテ居ル。又証ハ1945年8月頃オーシャノ島カラ全滅電報ヲ受ケ取ラストノ証言ニ於ケル如ニオーシャノ島デハ送信ヲシテ居ナカッタト後ノ箇所ニ於テ述ベテ居ル。夫故第四航空軍司令部ガ本事件ノ間ニ何等ノ情報モ報告モ受ケナカッタコトハ明白デアル。

以上ノ諸証拠ヲ綜合スレバ1945年8月15日以後第四航空軍司令官ハ被告等ニ即時戦斗終結及降伏ニ関スル天皇ノ命令ガ部下ニ迅速確実ニ実行サレルコトニ関シ出来得ル限リノ手段ヲ講ジタノデアル。オーシャノ島デ生起セル如キ異常ナ事件ニ誰モ夢想モセガリシ所デアッテ斯カルコトノ生起ヲ予想シテ特別ノ命令指示ヲ為スガ如キコトノ無イノガ常ロ当然ノコトデアル

八月十五日以後被告等ノ部下統御ノ為ニ執ッタ措置ハ不要且充分デアッテ誰モ通常ノ人デアッタナラバ之ガ為ニ此ニ為シ得ルモノデハナイ遠隔孤立ノ島ニ於テ後ノ指令ニ違反シタ事件ガアッタカラトイッテ被告ニ職務怠慢ノ刑事責任ヲ問フベキ何ラノ理由ハナイ

仍テオーシャノ島事件ニ対シ無罪ノ判決ヲナス。

オーシャノ島ニ於テ第十七警備隊員ノ行動ヲ監督指揮シ且人々住民ヲ保護スル直接ノ責任者ハ警備隊司令部附デアッタ。其ノ副官ガ証言ヲ主張サレタ事件当時ニ何ラノ責任ノ追究サレテオラナイ状況ニ於テ(副官不如意、度胸ノ全クナキ絶海ノ遠隔ノ地ニ居ル第四航空軍司令長官ガ警備隊司令ノ為ニ指テ下級部下ノ行為ニ対シテ刑事責任ヲ負フベキモノデアロウカ。我ガ今日ノ国際法ニ於テモ国内法ニ於テモ斯ノ如キ国軍備ノ殆ド無イ状況ニ於テ此ノ、戦務怠慢ノ刑事責任ガ存在シ

ゴトク関行居ラス

第三節　トラック島事件

一、共謀ノ事件（Spec 1—(f)）

(イ) 本法廷ニ提出サレシEx 13（漢洲軍事法廷坂本裁判記録）Ex 52（庄子答訊問書）Ex 59（坂本答答訊問書）中ニハ左記ノ如キ点ガ相互ノ又ハ本事件ノ真相ガ次ノ如キモノデアルト云フ証拠ガ立証サレタ即チ

昭和十九年八月下旬トラック各島デ十人ノスパイ嫌疑事件ガ判明陸軍憲兵軍曹坂本ガ陸軍情報参謀有田中尉ノ憲兵隊指揮官服部権助ノ命令ヲ受ケテ調査ヲ実施シ

其ノ共謀者ノ一ト目ハ島民ノ宣教師二名ガスパイ嫌疑ヲ受ケテ云フ事ガ判明シタ点ニ関シ調査ガ行ハレタ事

而調査ニ当ッタ坂本憲兵ガ主任者デアリタル点ニ於テ第四航空隊ノ司令ノ軍法会議ノ錬事ガ進行シタト

共謀者権助憲兵中隊長ノ大尉ハ本調査ニ兵力約20名ヲ参加セシメ訊問ニ参加シナカッタガ自身調査現場ニ居タト

共謀者ノ調査一、二日後坂本軍曹ガ単独デスパイ容疑者一行ノ夏島ニ連行シテ陸軍憲兵隊ニ収容シタト

トラック島ニ於ケル治安維持ガ陸軍ノ担任デアッタト云フ点ニ証拠ガ立証サレタ本事件ヲ此ノ点ニ於テ陸軍ガ実施シタモノデアリ第四飛行会長ニハ何ノ関係モナイトガ数ヒノ証拠ニ依リ明白デアル

(ロ) 本事件ニ於テ海軍当局ノ大規模ナ捜査ガ十名以上ヲ取調ベガ坂本ニ依ッテ逮捕サレタ点ガ其ノ他ノ罪状項目ニ列挙サレタ海軍人ガ十名ノ宣教師ヲ殺ッタト云フ正当ナ証ヲ挙ゲテ立証サレタ点ナイ庄子等ハ有罪ノ判決サレタ点ガ彼ハ本事件ニハ単ナル事後従犯ニ過ギズ調査中捕ラヘラレテ現場ニ居テカラト云フ点ガ彼ノ裁判時ニ

於ル証言. E.T.52. 庄子ノ訊問書 E.T.53 坂本ノ訊問書ガ明瞭ニ示シノ
居ル所デアル. 彼ガ土人ヲ虐殺ヲ致ヲコトハ正当ナル理ヲ知ラヌ立
証モナシテ居ラナイ

陸軍司令部ノ命ニ依リ憲兵ガ主任トナリテ実施シタル調査ノ際ニ
個々一人ノ海軍軍術ガ土人ヲ殴ッタコトガ中間数段ノ監督責任者ヲ明
瞭ニテ一挙ニ戦隊司令長官ノ職務怠慢ノ刑事責任トナルコトガ果ニテ
公正妥当ナリトデアローカ

(ハ) 罪状項目(一-ホ)ニ記載サレタル海軍人負中石原、竹内ガ戦犯容疑者ト
アッタガ起訴サレルコトナク釈放サレタコト及婦帯家族ガ豪州軍雇傭当局ニ依リ
有罪ノ判決ガ確認サレズ釈放サレタコトニ就テハ Rabaul 豪軍々事法廷ノ弁護
特権トニテ是等ノ人々ト直接間接ニ関係浅カラザリシ Sakamaki 教授ガ証言シタ

糧事例ニ依ッテ提出サレタル証拠ニ石原、婦帯、竹内ガ土人ノ虐
殺ヲ容認又ハ非人道的取扱ヲ加ヘタコトヲ示ニテ居ラナイ. 叙上何レノ根拠
ニ依ッテモ被告原ガ罪状項目(一)ニ関シ刑事責任ヲ問ハレルモノデナイコト
ヲ我ガ主張スル

二、第四十一警備隊事件 (Spec 1- (b) (c) (d) 2- (b) (c, d))

(イ) 昭和十九年六月第四十一警備隊ノ俘虜ガ収容サレテ居タコトニ就テハ
当時ノ参謀長有馬、参謀福田及被告原何レモ知ラナカリシ又ハ記憶ナシト証言シテ居ル. 警備隊司令浅野ハ後ガ来年参謀ノ俘虜訊問ニ立会ノ
為ニ収容所ニ赴ク時ニ其処ニ六名ノ俘虜ノ収容サレテ居タコトヲ始メテ知ッタト証言シテ居ル. 浅野ハ俘虜ノ捕獲収容ニ就テハ毎回上級司令部ニ報
告シテ居ルト証言シタガ司令部ニ浅野デナク作隊長ニ俘虜ノ収容サレテ居
ルコトヲ偶然ノ機会ニ承知シタ状況デアル.

斯カル状況デアルカラ、司令長官トシテ被告原ガ当時俘虜ノ警備
隊ニ収容サレテ居タコトニ就テ知ラナカッタノミナラズ容易ニ首肯出来ル所デアル

(ロ) 第四十一警備隊軍需長上野千里ハ警備隊爆発ノ際生残ッタ二名ノ俘

庵ノ病室ガ変ダスベキ旨ノ司令ノ命令ノ副長中懇カラ伝ヘラレタト証言シ他ニ
司令浅野ノ上野永島中懇田中ニ俘虜ノ刺殺ヲ命ジタコトハナイ二名ノ俘虜ノ
死亡ニツイテ始メテ知ッタノハ上野カラ俘虜ノ手術ヲ実施シタガ失敗デアッタトノ
報告ヲ受ケタ時デアッタト証言シテ居ル

副長中懇ハ其ノ後俘虜ニ関シ上野ト何等会話ヲシタコトガ無ク何
時生残リノ俘虜ガ処刑サレタカヲ知ラスト証言ヲシテ居ル

上野ハ病室裏デ俘虜一人ノ処刑ノ行ハレル前ニ総員集合ガカケラレタト証言シタガ無効ニ司令ヲ副長ヲ始メ自分ガ現地デ実任者デアッタコトヲ認メテ居ル

本法廷ニ提出サレタ証拠ニハ明確ニ処ガアルガ病室裏デ行ハレタ俘虜ノ処刑ニ司令浅野、副長中懇ガ知ラス以ノ実施サレタモノデアルト云フノガ最モ有力ナ証拠デアッタト考ヘラレル

(ハ)浅野ノ本事件ノ翌日又ハ翌々日二名ノ俘虜ノ死亡ニ就テ参謀長有馬ニ浅野ガ上野カラ受ケタ報告ノ要点ヲ報告シタト証言ヲシタ。仮ニ浅野ガ有馬ニ報告シタコトガ事実デアッタトシテモ上野ノ報告ノ要点ヲ説明シタノデアルカ俘虜ヲ救ヒ度イト云フノガハッキリ手術ニ失敗シテ死ニ致ラシメタト云フ報告デアッタニ過ギナイ

一方有馬ハ昭和十九年六月頃誰カラモ俘虜ノコトニ関シ報告ヲ受ケタコトガナイト証言シタガ之ヲ裏付ケルモノトシテ次ノ証拠ヲ挙ゲ得ル

(ロ)上野ガ弁護側証人トシテノ証言中、昭和二十年八月二十四日頃彼ガ浅野カラ受ケタ指示ノ中ニ次ノ如キ部分ガアル「自分(浅野)ハ本事件ヲ事件直後ニ司令部ニ報告シヨウト思ッタガ一日一日ト延ビテ結局忘レテアッタ……」

(ハ)報告書ハ昭和二十一年七月頃浅野ガ此ノ二名ノ俘虜ノ死亡ニ就テ今迄報告ヲシナカッタコトニ就テ謝罪ヲ為ス当時俘虜ハ手当ヲサレタガ恢復セズ遂ニ死亡シタコト又浅野ガ本事件ニ全然関係ナカッタコトヲ報告ニ来タ旨証言シ

(ニ)本事件ノ生起シタハ米軍ガ中部太平洋ニ於テ主要日本軍基地ノーテアルサイパン島上陸ヲ直後ニヤリ又六月七日ニハハルマヘラ西

初面ニ於テ日本駐合飛隊主カト米飛隊トノ間ニ所謂フィリッピン海戦ト云フ大海戦ガ行ハレタ時我テアッタ第四飛隊ニハ海上戦斗兵力ヲ持チ居ナクテモ作戦ニ関係シタ事項ニ多忙デアッタコト、想像ニ難クナイ

是等、証拠ニ依リ浅野ガ参謀長有馬ニ報告シナカッタコト従テ原ガ之ヲ知ラナカッタコトハ合理的ニ推断シ得ル所デアル

(ハ) 捕虜ハ或ハ次ノ如キ主張ヲナスヤモ知レナイ即チ原又ハ有馬ガ浅野カラ直接報告ヲ受ケテヰテモ本事件ハ少サイ島デ起ッタコトデアル。況ヤ捕虜ハ全島民ノ海軍人員ノ共通知識トナルモノデアル従テ島ニ報告係ヲ之ヲ知リ又ハ知ルベキ筈デアッタト、一般ニ島ノ大サノ少サイ島ノ事実ノ総ベテガ長官、参謀長ノ常識トナル要素ハナラナイ。

況ンヤ利用シタ上野ガ浅野カラ受ケタ指示ノ中ニ更ニ次ノ如キ浅野ノ言葉ガアル「自分ハ之ヲ報告セネバナラヌト感ジテヰル司令部ニ状況ヲ見ニ行ッタ自分(浅野)ハ司令部ガ本事件ヲ知ッテ居ナイコトヲ発見シタ。ソコデ副長ニ命ジテ司令部ヲ他ノ部隊ヲ調ベテ見タ其ノ結果六月事件ニ就テハ誰モ知ラナイト云フ確信ヲ得タ由ト。

本事件ガ夏島ニ於ケル海軍人員ノ共通知識トナラナカッタコトガ是ニ依ッテ判明スルデアロー。

三、四病事件(罪状項目(1-(e) 2-(e))

(イ) 本委員会ニ提出サレタ証拠ニ依レバ昭和十九年七月二十日頃第四海軍病院デ感染サレタ二名ノ俘虜ハ七月七日エルダーピー陸軍部隊ニ依ッテ捕ヘラレトラック陸軍ニ送ラレタガ間モナク第四十警備隊ニ収容スルコトニナッタモノデアル。又エルダーピーカラノ電報ニ依リ第四艦隊ハ参謀補ヲ俘虜ガ捕ヘラレタコトヲ知テ居タ。

然シ参謀長有馬ヲ報告ヲ断ッタ俘虜ハ捕後収容ニ就テ知ラナカッタト証言シテ居ル其ノ当時ハスリアナ方面ノ戦闘ハ激ヲ最中デアッタガ主トシテ戦局ノ推移ニ注意ヲ払ッテ居ル司令長官ノ司ル

的ナ事務的事項ガ知ラサレナカツタコトハ充ナコトデアツタデアロー.

(ロ) 第四十一野戦病院ニ収容サレタ二名ノ傷痍ガ第四陸軍病院ニ渡サレルニ至ル経緯ニ就テハ提出サレタ証拠ニ依ツテ明カデアル

野戦病院副長ハ傷痍ノ病院ニ渡ス当日岩波陸軍大尉カラ慶治ガヤリ傷痍ニ対シテ衛生調査ヲスルノデ候ニテ貰ヒタイコト及ビハ司令部ノ了解ヲ得テ居ル旨ノ連絡ガアツタト証言シテヰル.一方岩波ハ斯カル事実ハ絶対ニナイ旨否認シテ居ル

有馬ハ昭和十九年七月頃岩波ガ傷痍ニ関シテ彼ニ話ヲシタコトガナイト証言シ被告原ハ其ノ頃第四陸軍病院及ビ第四十一野戦病院カラ二名ノ傷痍ニ関シ許可ヲ求メラレタコトハナイト証言シテ居ル

以上ノ諸証拠ヲ綜合スレバ野戦病院ニ収容中ノ傷痍ニ就テ第四陸軍病院ガ衛生調査ヲ行フコトニ就テ第四野戦病院ヲ含即ノ承認ヲ求メ或ハ承認ヲ与ヘラルル事実ノ無カツタノガ正シイト判断サレル.

(ハ) 第四陸軍病院デ傷痍ガ発狂サレタ当日被告原ガ第四陸軍病院ヲ訪問シ又傷痍ガ病院ニ到着シタトキ彼ガ病院長ノポストデ岩波ノ稚ヲ田軍医大尉ト会話シテ居タコトハ岩波ノ稚ヲ田ノ証言ニ依リ事実デアルコトニ間違ハナカロー.然ラバ当日何故被告原ガ第四陸軍病院ヲ訪問スルニ至ツタカガ問題トナルガ.之ニ就テハ本法廷ニ提出サレタ次ノ証拠ニ依リ明白デアル

被告原ハ一月ノ四十五日ニ一回.看護見舞ノ為病院ニ来ルノガ例デアツテ当日ハ最後ノ病院船ガ出タ日ト病院ノ状況ヲ見ニ来タノデアル(岩波証言)

其ノ時原中将ハ士官看護婦ノ重症看護ヲ見舞ニ来タ後ガ病院ニ此ノ種ノ訪問ヲスルノガ慣例デアル(Ex 50 稚子田 Deposition)

七月二十日頃行ツタカ否カハ知ラナイガ月ニ一.二回看護見舞ノ病院ニ行ツタ(原証言)

被告原ハ入港スル部下ノ看護見舞ニ病院ニ赴クノガ例デアツタ(Ex 62 三宅卿武証言)

一方.被告原ノ当日病院訪問ノ目的ガ傷痍ノ事件ニ関係ガアツタト云フ証

縁ハ何ヲ醫証サレテ居ラヌ

即チ被告桑ガ当日病院ヲ訪問シ俘虜ノ到着時、病院ニ居タコトハ全ク偶然ノ一致ニ外ナラナイノデアル.

(ニ) 次ニ被告桑ガゲエランダデ会話中当日ノ俘虜ノ事件ノコトガ話題ニナッテハナイカト云フコト. 及被告桑ガゲエランダデ俘虜ガトラックニ乗リ通過スルヲ目撃シタニハナイカト云フコトガ問題ニナル.

(イ) ゲエランダノ会話中俘虜ニ関スル会話ヲ絶対ニシナカッタコトヲ岩波ハ証言シ又種子田ハ自分ハトラックニ乗ッタ俘虜ノ通過スルヲ見タガ之ニ就テハ岩波ニモ原ニモ話サナカッタト証言シテ居ル被告桑ハ岩波ト会話中、中部太平洋方面艦隊司令部敵ノ空襲ノ件、或ハ最近ノ病院ノ爆撃ノ件ニ就テ会話シタカシタカトノ検事ノ質問ニ対シ彼ハ自分ハ病院デ戦闘ノ話ハシナイト証言シテ居ル. 被告桑ノ病院訪問ノ目的ニ徴シテモ当日ノ俘虜ノ事件ニ関シ会話ハサレナカッタコトハ誰シモ疑ハス所デアル.

(ロ) 岩波及種子田ハ俘虜ガトラックニ乗ッテ通過スルヲ見タコトヲ証言シテ居ルモ岩波ハ原ノ坐ッテ居ル位置ノ方向カラトラックガマユゴノ木ノ所カラゲエランダヲ通過スルヲ原ガコノ車ヲ見ルコトガ可能デアルノカトノ検事ノ質問ニ対シ容易ニ見得ルト答ヘタ. 然シ岩波ガ描イタゲエランダニ於ケル三人ノ占位々置ヲ示シタ図面(Eテ24)ニ依レバ原ノ位置カラマユゴノ木ノ一方向ガ見得ルトハ云フ丈ケデアッテ、トラックノ通過スル道路ノ大部ガ見得ル丈ケデハナイ. 然ルニ占位図及種子田ノ証言ハ被告桑ガ道路ニ背中ヲ向ケテ坐ッテ居タコトヲ示シテ居ル又岩波ガ俘虜ヲ見タノハ道路ニ沿ヒタ生垣ヲ越シテ俘虜ノ頭、上半部ヲ見タトハ云フノデアル. 岩波ニ歩イテ居ル俘虜ノ到着スルコトヲ予期シテ居タノデ彼ハトラック上ノ俘虜ニ気付イタノガ当然デアル. 然ルニ岩波ノ証言ニ依レバ被告桑ハ此ノ時種子田トハ話ヲシテ居タノデアル. 斯ノ如キ状況ニアッタ原ニ、彼ノ視界ノ極メテ小範囲デアル一方向ヲ通過スルトラック上ノ人ノ頭、上半部ニ気付カナカッタコトハ寧ロ当然デアル.

(ホ) 叙上ノ諸証拠ニ依リ被告桑ガ当日市田指揮病院ヲ訪問シタコト

が全ク偶然デアリ俘虜事件ニ何ノ関係モナカッタコト、又被告ガ俘虜ニ対デハ何モ知ラサレズ又彼自身モ気付カナカッタ事ガ明瞭デアル

被告原ガ弱者特ニ病人ニ対シテ同情心厚ク病院ヲ見舞ノ習慣アッタコトハトラックノミナラズ其ノ他ニ於テモ一般評判ガアッタノデアル斯ノ如キ原ニ基ク病院ニ於テ俘虜ノ変死ガ行ハレルコトヲ知リタナラバ之ヲ許可スルガ如キコトノ絶対ニ無イコトハ誰ニモ信ジ得ル処デアル

検事ハ其ノ冒頭陳述ニ於テ第四海軍病院デ本事件ノ起ル前ニ被告原ハ事件ヲ知ッテ居タ事実ヲ情況的ニ証拠立テルコトヲ述ベタ、然シ乍ラ前述ノ如ク本法廷ニ提出サレタ証拠ハ情況的ニモ之ヲ立証シナカッタノデアル。

(ヘ)被告原ガ第四海軍病院デ二名ノ俘虜ガ刺殺サレタコトヲ始メテ知リタノハ昭和十九年九月一日ノ所轄長会報デ岩波ガ述ベタ時デアル旨原ハ証言シ

検事ハ被告原ガ本事件ガ部下部隊ニ生起シタコトヲ承知シ乍ラ本事件ノ調査ヲ命ジ或ハ罰スル手段ヲ講ジナカッタ之ガ原、彼ノ指揮下域内ニ於テ罪状項目一、(g)(k)(i)(j)(k)(l)ノ事件ガ続イテ生起シタノデアルト主張スルデアロー

被告原ハ其ノ会議ノ最后ニ俘虜ニ対シ不法ナ扱ヒヲセズ原住民ノ糧食ヲ奪マヌコトヲ含ンダ事項ニ就テ訓示シタ旨ヲ証言シタ。

被告原ガ本事件ニ就テ調査ヲ進メナカッタ事情ニ就テ当時トラックニ於ケル彼ノ部下ガ対外的ニモ対内的ニモ甚ダ困難ナ状況ニアッタコト、コノ状況下ニ於テ部下ヲ罪ニ服セシメルコトガ輿論ニ及ボス影響ヲ考慮シテ調査慎重ヲ行ハナカッタコト、及ビ自分ガ再ビ斯カルコトヲ起サセナイ様ニ気ヲ付ケルコトヲ決心シタ旨ヲ証言シタ。

被告原ガ防空壕ニ居住シタコト(原ノ証言)及彼自身金銭ヲ取リ扱ッテ労務ヲシテ部下ト共ニ苦シミヲ分ケタ事実(種子田証言)ヲ想起スルナラバ彼ガ岩波其他ノ関係者ヲ調査シ罰スルコトヲ行ハトカック気持ニ立ツ筈ルコトガ出来ヨウ。

本事件ニ於テトラックニ於テ捕ヘラレタ唯一人ノ俘虜ガ昭和廿年一月末ニ被爆便デ汲地ニ送還サレタコトハ多クノ証人ノ依ッテ立証サレタ、第四海軍輸送参謀ガ病身デアッタ主計特技ヲモッテ俘虜ヲ優先的ニ送還スルコトニ手配シタコトハ申請

が証言シタ又司令部ヨリ指示カアリ此ノ俘虜ヲ従来ヨリモ優遇シタルトガ上野ニ依リテ証言セラレ是等ノ依リ原ノ決意ガ実行ニ移サレテ居タルトガ明白デアル

昭和十九年以後被告原ノ指揮ノ下ニ於テ生起シタル罪状項目1-(g)(h)(i)(j)(k)ノ事件ハ(九件)何レモ法律又ハ命令ニ違反シタルモノデアリ又ハ十分ニ俘虜ヲ又ハ十分ニ俘虜住民又ハ住民ニ対シ当時ノ状況ニ於テ必要ヒルヲ得ナイ懲罰トシテ実施シタモノデアリテ此事件ハ全ク其ノ性質ヲ異ニシテ居ル。仮ニ司令長官カラ俘虜取扱ニ関スル訓示ガ此事件ノ直後ニ発セラレタトシテモ是等犯則者ニ対スル懲罰トハ関係ノナイ事柄デ此懲罰ニ実施セラルヲ得ナイ状況デアツタコトガ了解サレル筈ニ既述セル如ク無線通信ノ状況カラ断ジ訓示ガ発信シ得ル状況デナカツタコトモ充分ニ了解シ得ル。

擁言スルハ被告原ガ此事件ノ起コトヲ承知シテカラ、此ノ調査ヲ進メ又ハ罰シ又ハ訓戒ヲ発シナカツタコトハ罪状項目1-(g)(h)(i)(j)(k)ノ事件ノ生起シタル一原因デアツタトハ謂ヒ得ナイノデアル

第三章　被告原ノ人格ニ就テ

最後ニ被告原ノ本裁判ノ起訴事実ニ関聯セル彼ノ特色アル人格ヲ未ダ一般的評判ニ就テ一言スル次第デアル。

是ニ関シテハ裁判ノ途中ニ於ケル証人ニ依リ又弁護側最後ノ段階ニ於テ書類ニ依リ証拠ヲ提出シタノデ委員各位ハ充分ニ御了解ニナツタコトト思フ　是等ノ証拠ノ中カラ被告原ノ特性ヲ摘録スルトクハ

正義ノ観念強ク、弱者ニ対シ同情心ノ厚カツタコト。

特ニ病人ニ対スル思ヒ遣リ深ク病院ニ屢々ヲ見舞ヲ習慣ヲ有カラ特ヲ居タコト

占領地住民ノ保護ニ就テハ名声ヲ得住民カラ信望厚カツタ（度々例）

国際法規及協定ヲ守ル観念強ク如何ナル抵抗アラウトモ（例ヘバ陸軍ノ横暴ヤ横車）之ヲ排除シテ遵守ニ適スルコト（御印進駐ノ例）等ヲ特筆スルコトガ出来ル

是等ノ性格カラ、被告原ハ俘虜ヤ原住民ヲ虐待シ或ハ殺害スルコトヲ

部下軍人ニ許可スルガ如キ人間デ決シテナカッタコトガ合理的ニ推断ヲ来ス

更ニモ一ツノ特性ハ被告原ガ自ラ持スルコト極メテ厳ニシテ他人ニ対シテハ寛大デアッタコトデアル、原ガ四病事件ヲ知ッタ後之ニ対スル調査及措置ヲ行ハトカッタ事情ニ就テノ彼ノ証言ハ既述ノ通デアルガ一ツニハ彼ノ此ノ特性カラ斯ノ如キ事件ヲ再ビ起サヌコトニ自ラ深ク決心シ部下ニ対シテハ其ノ罪ヲ宥恕スルニ至ッタモノト思ハレル.

被告ヲ我カ国ニ当リ.要免各位ガ叙上ノ被告ノ特性ヲ充分ニ考慮ニ入レラレンコトヲ希フ次第デアル

結　論.

一、前述諸項ヲ綜合スルニ之ヲ次ノ如ク合理的ニ結論付ケルコトガ出来ル.

(イ) 起訴罪状項目ニ列挙サレタ何レノ事件ニ被告原ハ事前ニ之ヲ知ラナカッタ.

(ロ) 起訴罪状項目ニ列挙サレタ事件中一ツ四病事件(Specl-(ロ))ヲ除イタ他ノ事件ニ於テモ被告原ハ之ヲ知ラナカッタコト(トラック二於ケル北人スパイ事件ニ就テ被告原ハ原田第四施設部長カラ簡単ナ報告ヲ受ケタガ之ハ各別ニ起ッタトラック北人スパイ容疑事件デアッテ罪状項目1-(ト)ニ掲ゲラレタ北人二名ノ宣教師ヲ含ム事件トハ全然別個ノモノデアル)

(ハ) 被告原ハ着任後俘虜保護取扱ニ就テ特別ニ命令又ハ指示ヲ為シテ居ナイガ元ヨリ飛隊長官ガ一々命令ヲ与ヘルマデモ無ク当然捕虜大臣カラ規則ガ与ヘラレテ居ルカラデアル現実ニ被告ノ部下中俘虜ノ直接ノ保護責任者デアッタ第四十一警備隊司令ヤ副長ヤ俘虜取扱ニ関スル日本陸軍方針及第四飛隊司令部ノ方針ヲ充分ニ知ッテ居タ.

(ニ) 被告原ガ第四捕虜病院事件ノ起ッタノヲ知ッタ後.後ニ再ビ斯カル事件ヲ発生セシメヌコトヲ深ク決心シ其ノ後ノ捕ヘタ一人ノ俘虜ヲ後送的ニ収容所ニ送還シタコト

(ホ) 前掲責任統帥領ノ民政及治安維持ニ関シ在任全期間ヲ通ジ被告原ニハ何ノ任務権限ガ与ヘラレナカッタコト.

(ハ) ヤルート島、オルル島、オーシャン島ト、トラックトノ交通ハ全ク杜絶シテ居タ。之等ノ島々トノ通信ハ時間ノ経過ト共ニ不良トナリタルガ、オーシャン島ハ昭和十九年後半以降送信ヲ行ハサリシト又是等ノ島ニハ新暗号書ガ送付出来サリシ為ニ実際問題トシテ第四艦隊司令部カラ是等遠隔地ノ部下部隊ニ対シ通信ノ発信ハ極限セラレタルニ従テ第四艦隊司令長官ガ遠隔地ノ部下ノ行動ヲ抑制監督スルニ何等具体的手段ガ執リ得サリシト

(ト) 昭和二十年八月十五日以後、部下部隊ノ戦闘即時停止及降伏ヲ迅速確実ナラシムル為ニ、被告人ハ普通 reasonable ナル人間ノ為シ得ル最善ヲ尽シタト

二、本弁護人ガ第一部法律論、第二部証拠ニ基ク事実、検討ノ部ニ述ベタルヲ綜合スルガ、検事ノ起訴罪状項目ニ列挙サレタル事件ニ関シ被告人ガ部下及監督下ノ人員ヲシテ俘虜及原住民ヲ虐待又ハ殺害スルヲ許可シ又、俘虜及良民ヲ保護スル任務ヲ怠リタリトスルトセバ何等ノ疑念ヲ残サヽル迄ニ立証シテ居ラサルノデアル

一方被告人ノ人格ニ関スル一般的評判ハ、彼ガ部下ニ対シ斯カルガ如キ不法行為ヲ許可スル如キ人物デナク、彼ガ主張サレタル罪状項目第一、第二ノ両者ニ対シ無罪トルルヲ不スモノデアル

以上ノ根拠ニ依リ本弁護人ハ被告人ガ罪状項目第一、第二ニ対シ無罪ナルコトヲ主張スルモノデアル

委員会ガ被告人ニ対シ無罪ノ判決アランコトヲ謹ンデ希フ次第デアル

弁護人

高柳松一郎

CLOSING ARGUMENT IN BEHALF OF HARA CHUICHI, FORMER VICE ADMIRAL IJN, COMMANDER IN CHIEF OF THE FOURTH FLEET

Delivered by Takano, Junjiro, Counsel for the accused.

PART I
A STUDY OF THE LEGAL ASPECTS OF THE INSTANT CASE.

CHAPTER I
General.

CHAPTER II
Neglect of Duty.

CHAPTER III
Neglect of Duty to Control and Supervise and War Crimes.

CHAPTER IV
The Municipal Law of Japan.

CHAPTER V
Responsibility to Protect Prisoners of War and Residents of Mandated Territory and Occupied Territory.

CHAPTER VI
Burden of Proof.

Closing Argument in behalf of HARA, Chuichi
Former Vice Admiral, IJN, Commander in Chief of the Fourth Fleet

Delivered by
TAKANO, Junjiro, Counsel for the Accused.

The Honorable President and Members of the Commission,

I have the honor to deliver my closing argument before this learned Commission in defense of the accused HARA, Chuichi. I would like to express my great gratitude for the fair and sincere way in which this trial has been conducted.

Part I - A study of the legal aspects of the instant case.

Chapter I General

Section 1 - Introduction.

Defense Counsel fully concurs with the contention that violators of the law and customs of war must be punished to assure the continued preservance of international justice and order and naturally recognizes the necessity for such action, as keenly as anyone. And he also recognized the fact that for quite some time past scholars of international law have been discussing and theorizing on international crime and war crimes. However to punish an act which is in no way an international offense or war crime as such, would never promote international justice or contribute to the maintenance of international peace and order. On the contrary such punishment would disorganize international justice and disrupt international peace and order.

Three important fundamental problems have been presented to this military commission in the course of this trial. Namely,

1. Does neglect of duty on the part of a superior officer to control and supervise his subordinates constitute a violation of international law or a war crime?
2. Can ex post facto law or regulations be retroactively applied to acts committed before their enactment?
3. Is it legally possible to hold a person criminally responsible for an act which has deficient elements to constitute a crime?

The counsel in his argument will refer to these problems, and matters relating to them.

Section 2 - The charge and specifications in this case.

The charge in this case is titled "Violation of the law and Customs of War".

Specification 1 of the charge alleges that Hara, Chuichi, then a Vice Admiral, IJN, Commander in Chief of the Fourth Fleet, Imperial Japanese Navy, and while so serving as the Commander in Chief of the said Fourth Fleet, did, at the Carolines Islands, the Marshall Islands, Nauru Island, Ocean Island, and other places within the area of his command, during the period from February 23, 1944 to September 2, 1945, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Imperial Japanese Empire, unlawfully disregard and fail to discharge his duty as the Commander in Chief of the said Fourth Fleet, to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, permitting

them to torture, abuse, inhumanely treat and kill American prisoners of war held captive by the armed forces of Japan, British nationals, a Chinese civilian, and residents of the Caroline Islands, the Marshall Islands, Nauru Island and Ocean Island, in violation of the law and customs of war.

Specification 2 alleges that Hara, Chuichi, then a Vice Admiral, IJN, Commander in Chief of the Fourth Fleet, Imperial Japanese Navy, and while so serving as the Commander in Chief of the said Fourth Fleet, did, at the Caroline Islands, the Marshall Islands, Nauru Island, Ocean Island, and other places within the area of his command, during the period from February 23, 1944 to September 2, 1945, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Imperial Japanese Empire, unlawfully disregard and fail to discharge his duty as Commander in Chief of the said Fourth Fleet to take such measures as were within his power and appropriate in the circumstances to protect, as it was his duty to do, American prisoners of war, held captive by the armed forces of Japan under his command and subject to his control and supervision, and residents of Nauru Island and Ocean Island, then residing at said Nauru Island and Ocean Island occupied by armed forces of Japan under his command and subject to his control and supervision, in that he permitted the unlawful torture, abuse, inhumane treatment, and killing of said prisoners of war and said residents of Nauru Island and Ocean Island, by members of the armed forces of Japan, in violation of the law and customs of war.

Section 3 - Duplicity of the charge in this case.

In Specification 1, it is alleged that the accused, Hara, Chuichi, failed to discharge his duty as the Commander in Chief of the Fourth Fleet to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, while in Specification 2 it is alleged that the accused failed to discharge his duty to protect American prisoners of war held captive by the armed forces of Japan under his command and subject to his control and supervision and residents of the area occupied by armed forces of Japan under his command and subject to his control and supervision. However, the paragraphs in Specification 1, except paragraphs (g), (i), (j) and (k), and the paragraphs of Specification 2 are exactly same and alleges identical incidents, that the members of the accused's command or persons subject to his control and supervision tortured, abused, inhumanely treated, and killed the said prisoners of war and residents. In other words, the former is the matter seen from the standpoint of the relation of the accused to his subordinates and the latter the same viewed from standpoint of the relation of the accused to the prisoners of war interned. Hence it is a clear case of duplicity of charge. Needless to say, duplicity of the charge is inappropriate in criminal law procedure.

However the responsibility to supervise and control his subordinates and the responsibility to protect prisoners of war and residents of occupied territory of the accused Hara as Commander in Chief of the Fourth Fleet are in essence one and the same. In short the essence of the responsibility is only one but in form of presentation this is broken down into two or three modes in the present case. To paraphrase the idea in still other words, according to the allegations of the judge advocate, it was because the supervision and control of the accused Hara, Chuichi was not thorough that the torture, abuse, inhumane treatment and murder of the prisoners and native residents by subordinates of the accused occurred. It would follow therefore that if there were no neglect of duty on the part of the accused to supervise and control his subordinates, there would not have been any

torture, abuse, inhumane treatment and murder of prisoners and native residents, and consequently there would not have been neglect of duty on the part of the accused to protect these victims. The contention of the judge advocate therefore finally means that the neglect of duty of the accused in Specification 1 and his neglect of duty in Specification 2 are one and the same. The present charge is one of inappropriate duplicity.

What should here be clearly underscored is the fact that the accused Hara is not charged with having abused, tortured, inhumanely treated or killed POW's nor of having participated in such action, in any part of the charge of this case. What has just been stated has reference to what will follow and therefore has been inserted.

Chapter II Neglect of Duty

Section 4 - Nature of Neglect of Duty and Neglect of Duty of a Superior to control and supervise his subordinates.

In order that neglect of duty constitute a crime and in order that criminal responsibility arise from it, the following conditions are necessary: (a) Failure by a certain person to discharge specific duties set forth by law or regulations. (b) For the negligent act to constitute a crime, intent (criminal intent) or negligence of such a degree as to make the omission one of legal or criminal responsibility must be present. (c) The existence of proximate casual connection between the negligent act and the objective facts arising from such neglect. (d) That the law of punishment to be applied in the punishment of this crime was effective at the time of commission or omission of the act; and it is required that specific duties be assigned under certain laws or regulations and that these laws or regulations be violated. It cannot be that commission of acts (omissions are also included) be made punishable by laws or regulations established after the commission of such act.

Neglect of duty may be grouped in two essentially varied classes. One is where one's own offense constitutes neglect of duty and the other neglect of duty to supervise and control, where one is held responsible for offenses committed by another party. Where the supervisor (superior) takes responsibility for offenses committed by the supervised (subordinates) because he assumes responsibility for the neglect of duty to supervise and control, it would fall into the latter category of neglect of duty. The judge advocate's allegation of neglect of duty of the accused Hara as Commander in Chief of the Fourth Fleet in this trial is of the latter group.

It does not mean however that the supervisor (superior) assumes unconditional and unlimited responsibility for supervision for all offenses committed by the supervised (subordinates). If the supervisor (superior) were to assume unconditional and unlimited responsibility for all offenses committed by the supervised (subordinates), it would be unjust and too stern and never fair to the supervisor. Then with what qualifications is a supervisor (superior) to assume responsibility for offenses committed by the supervised (subordinates) conceding that there was neglect of duty and control on his part? Let us examine the matter in the following paragraph.

Section 5 - Neglect of Duty to supervise and control and Criminal Responsibility.

It is a generally accepted principle in criminal law that for a person to be held criminally responsible for the offenses of another, it is conditional that he aid, abet, counsel, order or command the other person. However when the two persons involved stand in a relationship of controller and controlled or supervisor and supervised, then for the former to assume

criminal responsibility for the offenses of the latter, the former must order, instruct, the latter or affirm or knowingly acquiesce in the acts of the latter. Clark and Marshall in their Law of Crimes states as follows: "Certainly, at common law, and generally under statutes as well, a man is not indictable for the criminal act of his agent or servant, though committed in the course of his employment, unless the act was committed by his direction, or unless he knew of it and acquiesced in it, for, as we have seen, the general rule is that criminal intent is necessary to render one guilty of a crime". (Ibid Sec. 188 - Responsibility of Principal or Master. (c) Unauthorized Acts, p 230)

Of course the above is an argument concerning the relationship between a person and his agent or between a master and his servant; however the basic argument may be applied generally to the relationship between supervisor and supervised or to that between superior and subordinate.

Viewing the relationship of the superior to the subordinate in the armed forces in the light of this principle, for the superior to assume criminal responsibility for neglect of duty to control and supervise the offenses committed by his subordinates, the superior must have ordered, commanded, instructed or permitted the commission of these offenses or knowingly acquiesced in their commission. As Clark and Marshall state in their Law of Crimes: "To constitute a crime there must be a criminal act, as well as a criminal intent". (Ibid Clark and Marshall Crimes, Sec. 106, p 147). In other words, it is an absolute condition that the superior have knowledge of the offense of the subordinate. If the superior has no knowledge whatsoever of his subordinate's offense it is the principle that he assume no <u>criminal responsibility</u> for same.

If however there is carelessness or negligence on the part of the superior in not knowing of the offense, then he cannot avoid that responsibility. It does not require explanation that the negligence referred to here must not be a simple negligence but negligence of a degree upon which the law would place criminal responsibility. It is stated in Clark and Marshall as follows: "To render one criminally liable, however, because of an omission to act, he must be under a legal duty to act, and the omission must be wilful or due to culpable negligence". (Ibid Negligence, (b) Omission to act, Sec. 53, p 80)

American Jurisprudence on this subject states as follows:

"<u>Ignorance of Fact</u> - Since, criminal intention is of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality. This rule is based on another rule of the common law, of general application, to the effect that there can be no crime when the criminal mind or intent is wanting; and therefore, when that is dependent on a knowledge of particular facts, ignorance or mistake as to these facts, honest and real, not superinduced by the fault or negligence of the party doing the wrongful act, absolves from criminal responsibility. - - - - (omitted) - - - - .....It is said that ignorance or mistake or fact, guarded by an honest purpose, affords at common law a sufficient excuse for a supposed criminal act. This is no doubt good logic where the crime is mala in se and a criminal purpose is essential to constitute a violation. The view has been taken that if a mistake of fact is due to mistake of law, so that it appears that there is no guilty mind, punishment should not be imposed. - - - - (omitted) - - - - ...Where a particular intent is necessary to constitute an offense, ignorance or mistake of facts without negligence on the part of the accused may be ground for acquittal". (American Jurisprudence Vol. 15, Criminal Law, Para. 306, Ignorance of Fact, p 9).

American Jurisprudence here theorizes on commission of crimes, but this theory applies in an identical manner to omissions to act.

Section 6. - "Permit" and Knowledge of Criminal Acts.

In the present case the accused Hara is charged with having permitted his subordinates to abuse, torture, inhumanely treat and kill prisoners of war.

According to Black's Law Dictionary (3rd Edition) "to permit" means to suffer; to allow; to give leave or license; to acquiesce, by failure to prevent; to express assent or agree to the doing of an act. For a person to "permit" another to commit an offense that person must have knowledge of the act in question and order the act or to have the knowledge and not take any action and silently acquiesce to its commission.

Under any one of the meanings of the word "permit" given above, for a person to be held criminally responsible for "permitting" another to commit an offense, it is necessary that it be clearly established legally that the duty to supervise and control the other party (the perpetrator of the offense) was required of the person who did the "permitting" and it is an absolute condition that he had knowledge of the offense.

The word "permit" used in the charge in this case must have one of the meanings given above, and it can have no meaning other than one of those given above. In final analysis, it is alleged by the prosecution that the accused Hara permitted in the light of one of the meanings of that word given above, his subordinates to commit the offenses enumerated in the specifications. In whichever instance, it is implied that the accused Hara knew of these incidents. It is for this reason that although the judge advocate in his opening statement stated that it was not necessary to show that Hara knew of the offenses committed by his subordinates to fix criminal responsibility for neglect of duty to supervise and control subordinates on him, that he has striven throughout this trial to establish by direct evidence or circumstantial that Hara had knowledge of the criminal acts committed by his subordinates.

It will be shown in the factual argument later whether the accused Hara did or did not have knowledge of these offenses and whether the judge advocate did or did not establish Hara's knowledge of these offenses by direct or circumstantial evidence.

Chapter III
Neglect of Duty to Control and Supervise and War Crimes

Section 7 - Does Neglect of Duty to Control and Supervise Subordinates constitute a War Crime?

The prosecution contends in the present trial that the accused, Hara, permitted his subordinates to abuse, torture, inhumanely treat and kill prisoners of war and that he neglected his duty to supervise and control his subordinates and to protect prisoners of war and natives, thereby violating the law and customs of war. In short that he committed a war crime. What then, is a war crime? Does neglect of duty of the superior officer to supervise and control subordinates, unconditionally and limitlessly constitute a war crime from the standpoint of international law? These are the two problems raised. Let us examine these issues below.
(a) War crimes are essentially no different from general crimes under criminal law. The essence of both are in the same category. Clark and Marshall defines crime as follows: "A crime is any act or omission prohibited by public law for the protection of the public, and made punishable by the state in a judicial proceeding in its own name. It is a public wrong, as distinguished from a mere wrong or civil injury to an individual." (Ibid Clark and Marshall Chapter 1, Sec. 1, p 1)

American Jurisprudence defines it as follows: "Certain kinds of wrongs are considered as of a public character because they possess elements of evil which affect the public as a whole, and not merely the person whose rights of property or person have been invaded. Such a wrong is called a "crime". The term is not easy to define. Perhaps it can best be defined as any act or omission which is forbidden by law, to which a punishment is annexed, and which the state prosecutes in its own name." (American Jurisprudence Vol. 14, Criminal Law, Sec. 2, Definitions, p 753).

(b) Acts or omissions which will constitute crimes must be made widely known to the general public. If acts or omissions are punished without it first having been made known which acts and which omissions would be punishable, it would place the general public in a state of constant concern, causing them to entertain doubts whether their every ordinary day act or omission were not punishable. Such action would be contrary to justice and disrupt public order. On this point American Jurisprudence states as follows:

"The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. If the meaning of a criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency or undertake to make the statute definite and certain. If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakenably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law". (Ibid Criminal Law Sec. 19, Requisites of Criminal Statutes p 776).

(c) In conformance with the above definitions of crime, war crimes may be defined as those acts or omissions which were prohibited and made punishable by the law and customs of war. Consequently acts of war crimes (omissions inclusive) must be clearly and unambiguously set forth in generally accepted (recognized) law and customs of war. Oppenheim's International Law distinguishes four kinds of war crimes which are essentially different in character. Namely, (1) violations of recognized rules regarding warfare committed by members of the armed forces, (2) all hostilities in arms committed by individuals who are not members of the enemy armed forces, (3) espionage and war treason, and (4) all marauding acts. (Lauterpacht - Oppenheim's International Law, 6th Ed. Vol. II - Sec. 252, pp 451-2).

Section 8 - Law and Customs of War and Neglect of Duty to Supervise and Control Subordinates.

However in actual fact there are no international principles which have been generally accepted heretofore concerning war crimes and their punishment. Especially are there no international doctrines governing responsibility of supervision and control of the superior or commanding officer for offenses committed by subordinates in violation of international

law. And there are hardly any precedents which can be considered as such. It may be said that these problems came into political and economic importance only after the last World War.

Since there are no generally recognized principles in international law pertaining to these matters nor any established theory we are constrained today when faced with a concrete trial to turn for reference to incomplete and partial legislation and thebry of the past.

Although Mistreatment of Prisoners of War and violation of the Geneva Convention are listed among the more serious violations of the laws of warfare in Oppenheim's International Law cited above, "neglect of duty on the part of a superior officer or commanding officer to control and supervise his subordinates" is nowhere listed in that book as a war crime. Moreover, not in any part of this book is neglect of duty to supervise of a superior officer recognized; let alone any mention made.

Basic Field Manual, Rules of Land Warfare of 1940 of the Department of the Army of the United States sets forth the violations of the Laws of War, in which regulations are provided for commanders. However it merely provides that the commander be punished in the event he orders the commission of acts in violation of the laws of war or when such acts are committed under his authority by his troops. It is not provided that neglect of duty of a commander and especially that of a commander in chief is a violation of the laws of war. (Ibid Chapter 11, Penalties for Violations of the Laws of War, Para. 347, pp 86-88).

Further Naval Courts and Boards does not provide that neglect of duty to supervise and control subordinates of the superior officer especially of the commander in chief constitutes an offense involving criminal responsibility. (Ibid N6&B Para 457)

With regard to the problem of whether the superior officer should be held liable for the acts of his subordinates, counsel for the accused, will, taking into account theories of international law argue from the general point of view of public law, and refer to the responsibility of the accused Hara, as Commander in Chief of the Fourth Fleet. Whether a superior officer occupying a position to command and order in a chain of command of the armed forces, is liable for responsibility to control and supervise the acts of his subordinates which are in violation of international law in his capacity as the originator of commands or orders, or as a superior officer, is a difficult problem touching upon the essence of criminal responsibility.

The opinions expressed to date with regard to this responsibility to supervise on the part of the superior officer, have been at variance. On the one hand, there is the opinion that the superior officer is liable for all the acts of his subordinates, and on the other hand the opinion that he is responsible only for acts specifically ordered and commanded by him. Ordinarily, however, an intermediate opinion or compromise between the two is adopted. Criminal responsibility is, in the light of general principle of criminal law in modern civilized countries, essentially a liability for a criminal act based upon one's own wilfulness (intent) or negligence.

It should be added that civil responsibility does not place the stress on the subjectivism of the doer (no differentiation of intent and mistake or negligence being made, and attempt is made to recognize responsibility for non-negligence) but lays the stress only on the resultant effect, whereas criminal responsibility views the subjectivism of the doer as the basic of responsibility (the punishment of neglect is the exception) and does not necessarily consider the results (Unconsumated crimes are also punished). The trend shows an objectivization of civil responsibility and subjectivization of criminal responsibility.

On the basis of the view above mentioned, the opinion which holds that the superior officer is liable for all the acts of his subordinates, is too

extensive in scope and inappropriate, because, generally criminal responsibility cannot be recognized where the subjective element is lacking. On the other hand, the opinion which holds that the superior officer is liable for only those acts commanded or ordered by him, is inappropriate because it is too narrow in scope. Because under these circumstances, in the hypothetical event that a superior officer failed to exercise appropriate measures when he should have done so and acquiesced in the acts of his subordinates in violation of international law, without his having positively given an order or command, not only will the constitution of the so-called omission to act have to be brought into consideration but the subjective element of wilfulness (intent), as well as negligence, will have to be considered as an element of criminal responsibility.

Section 9 - Theory of Criminal Law and Responsibility to Control Subordinates.

If we follow the above line of thinking, what scope should be placed (recognized) on the responsibility of the superior officer, in short on the responsibility to supervise and control? Generally speaking, we may say that a superior officer should be held liable, certainly, when he ordered and commanded acts in violation of international law and also when he knowingly induced acts in violation of international law, and when he, knowing of such acts, and being in a position where he should and could have controlled them, failed to do so. In the following, I shall argue concerning each specific instance mentioned above.

(1) When a superior officer commands, orders, or directs his subordinates to act in violation of international law.

As there has been no allegation on the part of the judge advocate that the accused Hara commanded or ordered his subordinates to act in violation of international law, counsel will refrain from commenting on this eventuality.

(2) When a superior officer knowing that his subordinates were committing acts in violation of international law, acquiesced in them, and particularly failed to take appropriate measures to control such acts, without any facts indicating that the superior officer commanded or ordered such acts.

There is no mention made in any treaties and conventions or in reference books on international law up to the present day whether or not a superior officer owes the duty to control under international law, acts in violation of international law committed by his subordinates when he becomes aware of them. However, as the power to command and order vested in the superior officer, should be interpreted on the other hand as being included in the duty of the commanding officer regarded as the actual executor of the duty of the states owed under international law, the superior officer, as the person having authority to command and order, or, in other words as the actual executor of the obligation of the state owed under international law, must be held responsible, if he knowingly acquiesced in the acts of his subordinates which violated international law, and failed to take appropriate measures to control them when he should and could have done so.

We must note that the essential premise, in determining concretely whether there is liability or not regarding this problem, is to scrutinize the actual command relationship. That is, we must examine and clarify (a) whether the relationship between the superior officer and the subordinates was one which enabled the superior to issue a direct and detailed command or order, hence making it possible for the superior to take appropriate measures to control, (b) whether the superior officer under such actual circumstances

knowingly failed to take appropriate measures as it was his duty to do.

(3) When a superior officer failed to take appropriate measures to control the acts in violation of international law of his subordinates because he was without knowledge of them.

We must examine the above by dividing it into two categories. That is, in case there is negligence (gross negligence) on the part of the superior officer, such as, when he should have known about the acts and did not know of them, it would probably be difficult for him to be absolved from liability. Mitigation of punishment however should be recognized for such negligence. On the other hand, in a case where there is no negligence liable against the superior officer, he cannot be held responsible.

It is stated in American Jurisprudence: "Perfection of conduct is humanely impossible; and the law does not exact an unreasonable amount of care from anyone .... Negligence can arise only from a failure of duty possible of performance and the law imposes no liability where wisdom and foresight cannot prevent the injury". (Ibid Vol. 38, Negligence, Sec. 29, Generally: Ordinary or Reasonable Care p 673).

In effect, we must first clarify the substance of the command relationship in determining whether there is responsibility on the part of the superior to control and supervise the acts of the subordinate which are in violation of international law. It must be said that it is impossible on the basis of the nature of criminal responsibility, immediately to affirm in a general manner, the responsibility of a superior officer, merely because he belongs, in form, in the chain of command. Rather, for such responsibility, a superior officer can only be held liable when in substance he was in a relationship where he was able to command and order, he commanded or ordered acts which were in violation of international law (including when he gave inducement), or, when he failed to control and acquiesced therein when he should and could have controlled his subordinates (including when there was gross negligence on his part).

Chapter IV - The Municipal Law of Japan

Section 10. - The commander in chief of a fleet.

It goes without saying that the circumstances subjectively conditioning his person, such as his status, duties, scope of execution of duties, subordinate units and personnel, responsibilities etc. as Commander in Chief of the Fourth Fleet were all determined by the municipal law of Japan, the nation of which he was a subject. Hence to discuss these matters a study of the municipal law of Japan is necessary and cannot be dispensed with.

According to the Fleet Ordinance (Exhibit 26) the Commander in chief of a fleet was under the direct command of the Emperor and had command of the fleet under his command had overall control of its activities. In matters concerning military administration he received instructions from the Navy Minister and in matters concerning operational plans instructions from the Chief of Naval General Staff. The commander in chief of a fleet had overall supervision of military discipline, morale, education and training of the fleet under his command. The commander in chief of the fleet had under him besides his chief of staff, the staff officers, adjutant, chief engineering officer, chief surgeon, and chief paymaster, as direct subordinates the commandants of naval basis and cognizant commanding officers of various other units stationed in various locales within his command. These base commandants and other cognizant unit commanders had their own authority to command and direct and were responsible officers.

The senior headquarters of the accused Hara during his tour of duty as Commander in Chief of the Fourth Fleet were the Combined Fleet Headquarters and the Central Pacific Area Fleet Headquarters. The latter was the immediately superior headquarters of the accused Hara from March 4, 1944 to 18 July 1944. It was the duty of the accused Hara to exercise overall control over his subordinate units receiving instructions and orders from the commanders in chief of these fleets. The subordinate units of the Fourth Fleet were as above stated, the Fourth Base Force, the Fourth Naval Hospital, the Fourth Naval Construction Corps, and other immediately subordinate units; besides which were the 41st, 62nd, and 67th Naval Guard Units. At each of these units was stationed a commanding officer (commander). These unit commanding officers commanded and led their own units in accordance with the various ordinances and regulations, and were responsible officers in their own right. As stated above, the accused Hara as Commander in Chief of the Fourth Fleet was an intermediary Commander in Chief having above him two senior officers and below him the cognizant commanding officers of the respective units.

Section 11. - Acts in violation of International Law and Municipal law.

Acts in violation of the law and customs of war, namely war crimes, are insofar as they belong to the category of crimes, in general (excluding peculiar crimes in international law) present problems in municipal law (including Military Punishment Code), while presenting problems at the same time from the standpoint of international law. However as previously stated, there are no regulations in international law pertaining to this type of a superior officer to supervise and control acts of his subordinates which are in violation of international law, nor theories nor precedents which may be used as reference. Moreover, as the matter is related to penal regulations of municipal law it is believed that it would not be without point to state here by way of reference what laws or regulations there were in the municipal laws in this case especially in the municipal law of Japan relative to the responsibility of a superior officer to control his subordinates.

In studying the Japanese Naval Criminal Code presented to this commission (Exhibit 31), there are no articles in the code which impose punishment upon superior officers for omission in neglecting his duty to control his subordinates. However a superior officer is not free from all responsibility for remissness in his duty to control his subordinates. In such instances the responsibility of the superior officer is not of a criminal nature but of a disciplinary one, in line with the Disciplinary Punishment Code (Exhibit 32). Consequently, although the superior officer is subject to disciplinary action, because the act is not a crime, the punishment imposed will not be criminal punishment according to the Naval Criminal Code but disciplinary punishment in accordance with the Naval Disciplinary Punishment Code. The only place where provision is made for punishment of a superior officer for responsibility to supervise subordinates is in Article 9 of the above mentioned Naval Disciplinary Punishment Code. It is clear from the interpretation of the above article that to mete out disciplinary punishment to superior officers for neglect of duty to control subordinates, wilfulness or negligence must exist.

Furthermore, criminal punishment is punishment imposed upon crimes, that is acts upon which punitive effect is imposed by positive law. Disciplinary punishment on the other hand, is a certain punishment imposed upon persons who stand a special relationship with authority in public law, or who stand in any corresponding supervisory relationship, for the purpose of maintaining discipline and order of such relationship. As the two forms of punishment differ in nature, and as the two, on principle may be imposed together, the difference in the two forms of punishment may be understood.

Chapter V
Responsibility to protect Prisoners of War and Residents of Mandated Territory and Occupied Territory

Section 12. - Treatment and protection of prisoners of war.

There is no explicit principle in international law as to who is responsible for treatment and protection of prisoners of war. Furthermore there is no accepted theory concerning this matter.

The Hague Convention No. IV of 18 October 1907 and the Geneva Prisoners of War Convention of 27 July 1929 provide that prisoners of war are in the power of the hostile power and not of the individuals or corps who have captured them. (Former: Annex Article 4 Para. 2; Latter: Article 2, para. 1.) Further, the Geneva Prisoners of War Convention provides in Paragraph 1 of Article 18 as follows: "Every camp of prisoners of war shall be placed under the command of the responsible officer."

According to the articles cited above, there can be no doubt that the above two conventions delegate the determination of the responsibility and the responsible persons for the treatment and protection of prisoners of war, to the laws of the state in whose custody the prisoners of war are held.

Let us examine what regulations concerning this problem existed in the municipal laws of Japan and in particular in the laws and regulations of the Japanese Navy.

Article 3 of Service Regulations for Personnel of Naval Guard Units (Exhibit 30) provides as follows:

"The commander in chief or commandant shall organize a guard unit to guard naval establishments, warehouses, etc., in the area of a naval port or its vicinity, except these government buildings, warehouses, etc., which actually have sentries."

And Article 8 provides:

"Service regulations for personnel on naval vessels shall be applicable mutatis mutandis, as f r as possible, to personnel of naval guard units, excepting those personnel already provided in the preceding articles."

In cases when prisoners of war were interned by Japanese naval units, they were held in confinement at the guard units located in various places at the front; on Truk this was the 41st Naval Guard Unit. And the commanding officers of these naval guard units were the persons responsible for their custody, treatment and protection. In short, the commanding officers of these naval guard units were the "responsible officers" referred to in Article 18 of the Geneva Convention.

The commanding officer of the guard unit held a post corresponding to that of a captain of a warship as determined in Chapter 2 of the above cited Service Regulations for Personnel on Naval Vessels (Exhibit 29). The above regulations applied mutatis mutandis to personnel of naval guard units. (Article 2 of same regulations.)

In Article 105 of the above regulations the follwing is set forth:

"The captain of a vessel shall exercise particular prudence with regard to incidents involving international law, and shall always deal with such matters within the limitation of orders and regulations, and treaties; in case there arise incidents beyond such limitations, he shall request instructions from higher echelon commanders or directly from the Minister of the Navy."

As a result thereof, the commanding officer of a naval guard unit was instructed to handle matters relat ive to international law with particular care and to observe to the letter treaties and conventions, and needless to say the orders and regulations pertaining to these matters. It is manifestly clear from the foregoing, that commanding officers of naval guard units in their treatment and protection of prisoners of war, were to follow the import and aim of the provisions of the conventions relative to the treatment of prisoners of war. And it has been further brought to light through the testimony of witnesses in this court-room that naval officers had in their possession the Wartime International Law Manual issued by the Secretariat of the Navy Minister.

Section 13. - Protection of residents of the South Seas Mandated Territory (during the period from 23 February 1944 until 2 September 1945)

In the South Seas Mandated Territory of Japan, for example on Truk and Jaluit, civil administration was in effect and the Governor of the South Seas Government Office was in charge of matters of general administration (including police) and judicial matters. The Governor of the South Seas Government Office was under the supervision of the Minister of Greater East Asia. The Governor and all officials of the South Seas Government Office were civilians. These officials headed by the Governor had never received instructions or orders from the Military, and in their execution of matters of general administration and the judiciary were in no way connected with the Military and were an independent government office. In short the protection of residents of the South Seas Mandated Territory was one of the responsibilities of the Governor of the South Seas Government Office.

However, after March of 1944 when the Central Pacific Area Fleet was newly organized, the Governor of the South Seas Government Office became directly subordinate to the Commander in Chief of the Central Pacific Area Fleet around March of the same year. Consequently, the District Governors and officials of the South Seas Government office on the various islands of the Mandated Territory came under the command/orders of the local commanding officers. As a concrete example of this, the District Governor

of the South Seas Government Office at Truk, Airhara, Aritaka was placed under the command of the senior commanding officer on Truk, Lieutenant General Mugikura from the above mentioned time onwards, and received instructions and orders from this commanding officer in matters relating to administration and judicial matters. Even after the deactivation of the Central Pacific Area Fleet in July of 1944, there were no changes in the command relations in regard to administration and the judiciary and these continued in effect as they were until September 2, 1945.

The maintenance of peace and order in the South Seas Mandated Territory was a matter of which the Army was in charge, and the Navy was in no way connected with it.

Exhibit 43 clearly shows that civil administration of the South Seas Mandated Territory was not one of the duties of the Commander in Chief of the Fourth Fleet.

The above facts have been established by the testimony of the witness Higuchi, Nobuo (35th day of the trial) and of the accused Hara, Chuichi (39th and 40th days of the trial) and the testimony of Morikawa, Shigeru from the record of the trial of Furuki, Hidesaku (31st day of the trial) and by Exhibits 43, 44, 47, 48.

The accused Hara did not have any authority to command and direct in regard to administration (including police), judicial affairs, maintenance of peace and order, on the various islands of the South Seas Mandated Territory, and consequently had no responsibilities therefore.

Section 14. - Protection of Residents of Occupied Territory (during the period from 23 February 1944 until 2 September 1945)

In discussing this problem, counsel would restrict the occupied area at this time to Nauru and Ocean Islands. The Japanese armed forces occupied Nauru and Ocean Islands and stationing the 67th Naval Guard Unit at the former and a Detached Unit of the same Guard Unit at the latter island, proclaimed military administration on both islands. During the period of time above given the Commanding Officer of the 67th Naval Guard Unit was Captain Soeda, IJN, and the commanding officer of the Detached Unit on Ocean Island was Lieutenant Commander Suzuki, Naoomi. The direct superior officer of the Commanding Officer of the Detached Unit Suzuki was Soeda the Commanding Officer of the Naval Guard Unit. Soeda and Suzuki exercised jurisdiction over Nauru and Ocean respectively. It is contended that the 67th Naval Guard Unit was a subordinate unit of the Fourth Fleet and that Naval Guard Unit Commanding Officer Soeda was under the command of the Commander in Chief of the Fourth Fleet, Vice Admiral Hara. However the immediate superior officer of Suzuki, the Commanding Officer of the Detached Unit on Ocean was not a direct subordinate of Hara. (Exhibits 41, 42, 49).

As above stated the Japanese armed forces after occupying Nauru and Ocean Islands proclaimed military administration in these areas. The executors of this military administration on these islands were Commanding Officer Soeda and Commander Suzuki. Hence Soeda and Suzuki corresponded to the "occupants" of Article 43 in the provisions of the Annex to the Hague Convention No. IV of 18 October 1907 —— Regulations Respecting the Laws and Customs of War on Land.

This Article 43 provides as follows: "The authority of the power of the State having passed de facto into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."

Oppenheim in his International Law writes as follows concerning the rights and duties of the occupant:

"Para. 169. - As the occupant actually exercises authority, and as the legitimate Government is prevented from exercising its authority, the occupant acquires a temporary right of administration over the territory and its inhabitants; and all legitimate steps he takes in the exercise of this right must be recognized by the legitimate Government after occupation has ceased. But as the right of an occupant in occupied territory is merely a right of administration, he may neither annex it, while the war continues, nor set it up as an independent State, nor devide it (as Germany during the World War divided Belgium) into two administrative districts for political purposes. Moreover, the administration of the occupant is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration. Incarrying it out the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare, and the maintenance and safety of his forces, and the purpose of war, stand in the foreground of his interest, and must be promoted under all circumstances and conditions. But, although as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power, as he is not the sovereign of the territory he has no right to make changes in the laws, or in the administration, other than those which are temporarily necessitated by his interest in the safety of his army and the realization of the purpose of war. On the contrary, he has the duty of administering the country according to the existing laws and the existing rules of administration; he must ensure public order and safety, must respect family honour and rights, individual lives, private property, religious convictions and liberty." (Lauterpachat, --- Openheim's International Law, Vol. II, Para. 169, pp. 341-342.)

In view of the provisions of the Convention and the academic theory cited above, it is clear that the occupants of the two islands Commanding Officer Soeda and Lieutenant Commander Suzuki had the rights and responsibilities in respect to protection of residents of Nauru and Ocean Islands. In short the person responsible for the protection of residents of Nauru Island was Commanding Officer Soeda and the person responsible for the protection of residents of Ocean Island was Commander Suzuki.

JJ
~~11~~ (16)

As is clear from the above, Hara, as Commander in Chief of the 4th Fleet did not have direct responsibility for the protection of residents and natives of Nauru and Ocean Islands. However as Commanding Officer Soeda of Nauru Island was a direct subordinate of Hara, he did have the responsibility to supervise and see whether or not Soeda as an occupant was fully executing his duty to protect residents and natives. Suzuki of Ocean Island was a direct subordinate of Soeda and not a direct subordinate of Hara. Consequently he was never called upon to command Suzuki directly. However Hara had the duty to supervise Soeda and see to it that Soeda as the immediate superior of Suzuki supervised Suzuki in respect to whether or not as occupant of Ocean Island, Suzuki fully executed his duties to protect residents and natives of that island.

If there were no neglect resulting from intent or negligence on the part of Hara, he should by no means assume criminal responsibility for acts committed by Soeda and in particular by Suzuki in the course of his duty directly to supervise Soeda, and his <u>duty indirectly to supervise</u> Suzuki through Soeda. Presuming that there were acts in violation of international law, those that have been alleged by the judge advocate to have been committed by Suzuki, if Hara had no knowledge of them through no negligence on his part and consequently took no measures regarding them, it cannot even then be said that Hara was guilty of neglect of duty to supervise his subordinates. Furthermore, during the tour of duty of the accused, especially towards the end of his tour of duty, communications were severed between Truk where was located the Headquarters of the 4th Fleet and Nauru and in particular Ocean, not to mention transportation, which was of course non-existent. In view of the above facts, it is not appropriate that Hara should be charged with neglect of duty for not having taken any measures in respect to acts in violation of international law alleged by the prosecution to have been committed on Ocean Island.

Oppenheim states in his book that Martial Law is declared in occupied territory as follows:

> "Para. 170. An occupant having military authority over the territory, the inhabitants are under his Martial Law, and have to render obedience to his commands. Their duty to obey does not, of course, arise from their own Municipal Law, nor from International Law, but from the Martial Law of the occupant to which they are subjected."
> (Ibid., Para. 170. p. 343.)

We understand from the above that during the time Nauru and Ocean Islands were under occupation by the Japanese armed forces, Martial Law was in effect on these islands.

CHAPTER VI Burden of Proof.

Section 1: Burden of Proof.

The burden to prove whether the accused Hara, as Commander in Chief of the 4th Fleet violated the laws and customs of war as alleged by the judge advocate, in short whether he neglected his duty, rests with the judge advocate.

American Jurisprudence explains burden of proof as follows:

"Burden of Proof - The fundamental principle of the law of evidence, the burden of proof in any case rests upon the parties who, as determined by the pleadings or the nature of the case, assert the affirmative of the issue, governs the question of burden of proof in negligence actions. In such action the plaintiff must allege facts which show the essential elements of actionable negligence in his favor against the defendant, namely the existence of a duty owing to him by the defendant, the breach of duty, and the resulting injury, and so far as issue is joined upon those essential allegations, that is, so far as there is admission upon the pleadings of the truth of any of the facts alleged, the burden is cast upon the plaintiff of establishing, by a preponderance of the evidence, all of these essential elements of his case. The general rule is that one suing for damages for injuries, either to person or property, occasioned by the alleged negligence of the defendant, has the burden of proving, by a preponderance of the evidence, that the defendant was negligent in the performance of some duty owing to the plaintiff, as charged in the declaration or complaint or that he breached a statutory duty owing to the plaintiff and of showing further that such negligence occasioned loss or injury to the plaintiff in the manner described therein. In other words, a plaintiff who grounds his action upon an allegation of negligence by the defendant must show no only that the conduct of which he complains was negligent in character, but also that it was violative of some duty which the defendant owed to him, and, in addition to such proof of negligence and injury, must prove that such breach of duty or negligence was the proximate cause of the injury or loss complained of. The plaintiff must establish directly or by just inference some want of care on the part of the defendant to which his injury may fairly and reasonably be traced."
(38 American Jurisprudence. "Negligence. 1. Burden of Proof, Section 285, Generally, pp. 973-5.)

It is clearly shown by the above explanation that the burden to prove the following rests with the judge advocate: in connection with the charge, that the accused Hara owed under international law the direct duty to protect prisoners of war and residents and natives, which duty is alleged by the judge advocate; that the accused knew of the acts in violation of international law enumerated in the specifications; that there was a proximate causal connection between the inaction on the part of Hara and the facts listed in the specifications.

Section 16. Circumstantial Evidence.

The judge advocate in the present case has no direct evidence with which to warrant a conviction of the accused Hara. The judge advocate therefore maintains on the one hand that it is not a necessary element that Hara knew of the incidents alleged in the specifications by the judge advocate, to establish his neglect of duty to supervise and control subordinates, while on the other hand he has striven his utmost to establish Hara's "knowledge" through circumstantial evidence. It must be said that this in fact is a recognition on the part of the judge advocate that Hara's "knowledge" constitutes an indispensable element in the charge of the present case. When considered in conjunction with the trend in modern thought concerning responsibility, namely to the gradual shifting of stress to the subject in criminal responsibility, as opposed to the gradual shifting of the stress to the object in civil responsibility, which I have already touched upon

in Section 8 of Chapter III, this is only natural.

It goes without saying that in accepting circumstantial evidence the greatest care must be exercised. American Jurisprudence states as follows on this point:

> " Whenever circumstantial evidence is relied on to prove a fact the circumstances must be proved, and cannot be presumed, and the circumstances proved must be consistent with each other and with the main fact sought to be proved. They must be not only consistent with any other rational theory. To establish a theory by circumstantial evidence, the known facts relied upon as a basis for the theory must be of such nature and so related to each other that the only reasonable conclusion to be drawn therefrom is the theory sought to be established. A fact is not proved by circumstances if they are merely consistent with its existence, or if other inferences may reasonably be drawn from the facts in evidence. It is necessary also that there be some connection between the facts proved and the fact at issue." (Ibid. Vol. 20, Evidence, Para. 1189 - Direct and Circumstantial Evidence, p. 1041)

The same book goes on to state:

"Where circumstantial evidence is relied upon in criminal prosecution, proof of a few facts or a multitude of facts all consistent with the supposition of guilt is not sufficient to warrant a verdict of guilty. In order to convict a person upon circumstantial evidence, it is necessary not only that the circumstances all concur to show that the prisoner committed the crime and be consistent with the hypothesis of guilt, since that is to be compared with all the facts proved, but that they be inconsistent with any other rational conclusion and exclude every other reasonable theory or hypothesis except that of guilt. The facts proved must be consistent with each other and with the main fact sought to be proved. A reasonable doubt must be resolved in favor of the accused where a fact or circumstance is susceptible of two interpretations. If the circumstances tending to show the guilt of the accused are as consistent with his innocence as with his guilt, they are insufficient. In order to convict a person of a crime, the facts must be inconsistent with, or such as to exclude, every reasonable hypothesis or theory of innocence. Of course if any of the facts or circumstances established are absolutely inconsistent with the hypothesis of guilt, that hypothesis cannot be true. The weight of circumstantial evidence is a question for the jury to determine, such evidence alone or in connection with other evidence may justify a conviction. Great care, however, must be exercised in drawing inferences from circumstances proved in criminal cases, and more suspicions will not warrant a conviction."

American Jurisprudence goes on to discuss the rational connection between the fact proved and the fact presumed:

"Section 159 - Rational Connection between Fact Proved and Fact Presumed. --- A presumption cannot ordinarily be raised from some fact proved unless a rational connection exists between such fact and the ultimate fact presumed. The legislature cannot constitutionally declare one fact to be presumptive evidence of another unless this rational connection exists. Furthermore, a fact can be regarded as the basis of an inference only where the inference is a probable or natural explanation of the fact. Inferences may not be drawn from one transaction to another that is not specifically connected with it, merely because the two resemble each other, but must be linked together by the chain of cause and effect and common experience." (Ibid., Para. 150,

Rational Connection between Fact proved and Fact presumed. p. 163)

Has the judge advocate proved those matters which must be proved, beyond a reasonable doubt? The attempt will be made in the following argument on the basis of the facts to show that such clearly has not been the case.

CHAPTER VII
The Validity of Judgments which have been Set Aside and judgments of foreign countries.

Section 17. Validity of judgments which have been set aside.--- Incidents of paragraphs (i) and (j) of Specification 1.

When a judgment is set aside by a court of supreme jurisdiction the former judgment is retrospective in its operation, and the effect is that that the former was not the law ab initio (from the beginning.) In short, although the former judgment may remain in the record of the court it is absolutely similar in effect as though it had never existed. This is an established legal principle. American Jurisprudence states it as follows:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law." (Ibid., Vol. 14 - Courts, Section 130 -- Retroactive Effect of Departure, p. 345.)

It goes on to state further:

> "If a verdict is insufficient and the judgment and sentence void, the court on its own motion may set it aside before punishment is undergone; and a judgment and sentence having been declared void, it is no longer a legal judgment and sentence, even though it may appear on the record of a district court, and cannot be made the basis of a plea of jeopardy." (Ibid., Vol. 15, Criminal Law, Section 376 - Validity of Judgment of Convictions, p. 51.)

Further:

> "A void judgment is not entitled to the respect accorded a valid adjudication, but may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given to it. It is attended by none of the consequences of a valid adjudication. It has no legal or binding force or efficacy for any purpose or at any place. It cannot effect, impair, or create rights. It is not entitled to enforcement and is, ordinarily, no protection to those who seek to enforce it. All proceedings founded on the void judgment are themselves regarded as invalid. In other words, a judgment is regarded as a nullity, and the situation is the same as it would be if there were no judgment. It, accordingly, leaves the parties litigant in the same position they were in before the trial. (Ibid., Vol. 31 Judgments, Section 430, Void Judgment, pp. 91-2.)

The incidents of paragraphs (i) and (j) of Specification 1 of the Charge of this case allege that the commanding officer of the 62nd Naval Guard Unit, Rear Admiral Masuda, Misuko and Captain Inoue, Fumio, IJA, ... of the South Seas Detachment did on or about 8 April, 1945, unlawfully punished as spies, without previous trial seven native inhabitants of the Marshall Islands by assaulting, striking, wounding and killing (Incident of para. (i) of Specification 1 of Charge I of this case.) and that the same two persons unlawfully punished as spies, without previous trial one Marshall native by assaulting, striking, wounding and killing. (Incident of para. (j) of Specification 1 of the Charge I of the present case.)

In studying the excerpt of the record of the trial of Inoue, Fumio (Exhibit 9) we note that the above cited incident of para. (i) corresponds to the incident of para. (i) of Specification 1 of Charge II, and that incident of para. (j) cited above corresponds to the incident of para. (j) of Specification 1 of Charge 2. However it is clearly set forth in the letter from the Judge Advocate General of the Navy dated March 3, 1948, that the Acting Secretary of the Navy, on 12 February 1948 approved the remarks and recommendation of the Judge Advocate General and set aside the findings on Charge II and specifications 1 and 2 thereunder, and the actions of the convening and reviewing authorities thereon. By the retroactive operation of this action of the Acting Secretary of the Navy and as a result thereof, Specifications 1 and 2 of Charge II charged against Inoue, Fumio, were made as though they had not existed at all from the beginning. The incidents of paragraphs (i) and (j) of the charge against the accused Hara which are based on Specifications 1 and 2 of Charge II of the trial of Inoue, Fumio were made as though they had not been charged from the first by the action of the Acting Secretary of the Navy. It is therefore completely off the track to charge the accused, Hara with violation of the laws and customs of war, namely with neglect of duty to supervise and control his subordinates.

Section 18. Validity of Judgments which have been Set Aside--- The incident of paragraph (k) of Specification 1 of Charge I.

The incident of paragraph (k) of Specification 1 of Charge I of the present case is an incident of an alleged unlawful punishment as spies without previous trial of two native inhabitants of the Marshall Islands by assaulting, striking, wounding, and killing on or about August 10, 1945 on Jaluit Atoll by Masuda, Nisuke, Rear Admiral, IJN, Commanding Officer of the 62nd Naval Guard Unit, and Major Furuki, Hidesaku, IJA, of the South Seas Detachment.

In studying the excerpt of the record of the trial of Furuki, Hidesaku (Exhibit 11) we note that the above cited incident of paragraph (k) corresponds to Specification 5 of Charge II. However it is clear from the letter of the Judge Advocate General of the Navy dated March 3, 1948 that the Acting Secretary of the Navy on 12 February, 1948 approved the remarks and recommendation of the Judge Advocate General and accordingly set aside the findings on Charge II and Specification 5 thereunder and the actions of the convening and reviewing authorities thereon. (Testimony of Commander H.L. Ogden on the 7th Day of the trial.)

By the retroactive operation of this action of the Acting Secretary of the Navy and as a result of it, Specification 5 of Charge II became as though it had not existed from the beginning. The incident of paragraph (k) of Specification 1 of Charge I of this case which is based on Specification 5 of Charge II of the Trial of Furuki, Hidesaku which was set aside by the action of the Acting Secretary of the Navy became legally as though it had not been charged at all. It is therefore completely going off the track to charge Hara with violation of the laws and customs of war, namely with neglect of duty to supervise and control his subordinates by confronting him with the incident of paragraph (k).

Section 19. Foreign judgments.--- Incidents of paragraphs (f), (g), (h), (i) of Specification 1 of the Charge and Incidents of paragraphs (f), (g) and (h) of Specification 2 were incidents which were tried and judged by Australian Military Courts.

Now, no nation is bound by duty to grant validity to judgments passed by foreign courts in its domains unless there is a reciprocal understanding between that and the foreign nation or nations which passed the judgment. It is left to the liberty of the nation whether it grant or do not grant validity to the judgments of foreign courts. At the present day, in numerous

cases validity is granted to judgments of courts of foreign nations on the basis of reciprocal agreements between the nations, or on the basis of reciprocality. Or in certain other cases validity is granted under certain regulations, and in other cases under certain conditions.

In the present case the judge advocate has recognised the validity of the judgments of the Australian Military Courts and listed these alleged incidents on which the judgments were passed in the Charge in the present case. The judge advocate then has the duty to show how the United States of America came to recognize the validity of the judgments of the Australian Military Court. There has however been no evidence on the part of the judge advocate on this point.

Section 20. Conclusion.

In short, since there have been no principles, no generally recognized theories, no precedents in international law, with regard to the responsibility and punishment imposed on a superior officer to control and supervise the acts of his subordinates in violation of International Law, there is no way but to judge and determine the instant case in the light of the fundamental principles of ordinary criminal law recognized by the modern civilized countries. In order to decide whether the accused, Hara as Commander in Chief of the Fourth Fleet should assume criminal responsibility from the standpoint of these general principles of criminal law for his neglect of duty to supervise and control his subordinates, it is imperative that we first clarify whether the accused, Hara knew of the acts in violation of International Law as alleged in the Charge, whether if he knew, he was placed in circumstances under which he could have taken appropriate measures and whether placed under favorable circumstances he did or did not take such measures and if he was not aware of them, whether there was negligence on his part in not knowing, et cetera. Furthermore in examining the above in the light of the rule of causal connection between an offense and the facts, it is imperative that it be established that there was a direct and proximate causal connection between the fact that the accused, Hara as the Commander in Chief of the Fourth Fleet allegedly, according to the prosecution, took no measures to supervise and control his subordinates nor indirectly to protect prisoners of war and inhabitants and to facts as enumerated in the Specifications. Unless this causal connection is established it is not possible to impose the responsibility of the Charge of this case on the accused.

If however, the accused, Hara actually had no knowledge of the above acts in violation of International Law mentioned above and there was no negligence on his part in not knowing of them, or if he took appropriate measures concerning incidents of which he learned later, then it is only natural that the accused, Hara should not in any way be held guilty (criminally responsible.).

Let us examine the alleged incidents in the argument on the bases of facts which follows.

Part II. Examination of Facts in Accordance with the Evidence.

Chapter I. General Facts.

Section I. The duties of the accused, Hara, as Commander in Chief of Fourth Fleet.

The duties of the accused, HARA, Chuichi, as Commander in Chief of the Fourth Fleet were to command the fleet under his command, to have overall control of its activities, to carry out his duties in accordance with the instructions of the Minister of the Navy relative to military administration and the instructions of the Chief of the Naval General Staff concerning operational plans as set forth in Exhibit 26, Fleet Ordinance, Articles 11 and 12.

No other duties or authorities were vested with the accused, Hara. In other words, the accused, Hara, commanded only the fleet under his command, and without special orders he could not have commanded the Army units within the area of his jurisdiction; nor was he vested with authorities or duties to direct the Civil Administration and the maintenance of peace and order of the South Seas Mandate Islands. As a matter of fact, Exhibit 43, a deposition of the Chief of the Second Demobilization Bureau, clearly shows that the accused, Hara, who was the Commander in Chief of the Fourth Fleet was not vested with such duties or authorities.

Section II. Command relation between the Army and Navy within the area of the accused, Hara's command.

Among the incidents with which the accused, Hara, is charged, there are included incidents in which Army personnel played a major part. In Specification I, it is alleged that he failed to discharge his duty to control the operations of members of his command and persons subject to his control and supervision, including Army personnel. Again the judge advocate says in his opening statement, "Hara, as Commander in Chief, Fourth Fleet, was in command of the persons, and had jurisdiction over the areas where the alleged incidents occurred". Thus, as it is necessary to make clear whether or not the accused, Hara, did possess the duty to control and supervise the Army personnel within the area of his command, the command relationship between the Army and Navy will be examined at this time.

The Army and Navy organization and command relationship in the Central Pacific Area after the beginning of March 1944 is as clearly shown in Exhibit 43 and 44, Depositions of the Chief of Second Demobilization Bureau, (1) (2). In other words, the Central Pacific Area Fleet was newly organized and the Fourth Fleet was placed under its command, and the Navy units within the area of jurisdiction of the Fourth Fleet were thereby placed under its command. Also, the Thirty-first Army came under the command of the Central Pacific Area Fleet, and the Commanding General of the Thirty-first Army, was put in command of all Army units within the Central Pacific Area. Thus, the Fifty-second Division at Truk, and the First South Seas Army Detachment at Jaluit Island, came under the command of the Thirty-first Army. This is made clear in the answer to question 3 of Exhibit 44. The fact that after the Commanding General of the Thirty-first Army, Lieutenant General Obata, died in action in the Marianas Area, Lieutenant General Hagikura, who was next in succession to command actually assumed command, and on 9 May 1945 was officially appointed the Commanding General of the Thirty-first Army, and that he was concurrently Commanding General of the Fifty-second Division and was senior to the accused, Hara, is made clear in Exhibit 44, and by the testimony of the accused, Hara.

It is true, therefore, from the above, that there was no command relationship whatsoever between the accused, Hara, and the army personnel on Truk and Jaluit.

Furthermore, there is some evidence which tends to question whether on such a far-flung island as Jaluit, the senior Army or Navy Officer had actually assumed command of the entire Army and Navy forces. But the fact that the senior commanding officer of such an island was limited to commanding defensive warfare in event of enemy invasion, is made clear by the following: The prosecution witness, Inoue, Kenichi, in answer to a question put to him by the commission, testified as follows: "Until the enemy would land there was no command relationship between Lieutenant General Mugikura and Vice Admiral Hara. If the enemy should land the most senior officer of each island, whether he be Army or Navy, would command all the forces on that island." And, in Exhibit 39 (C.L.O. Document No. 2976) it states: "The senior commanding officer, whether he be an army officer or a naval one, had overall command of both the army and navy units in the case of the defense of a remotely isolated island." (Underscoring counsel's).

Let us examine for instance how this applied on Jaluit Island. The commanding officer of the Sixty-second Naval Guard Unit, Rear Admiral Masuda, had no command relationship with Major Furuki or Army Captain Inoue of the First South Seas Detachment - until such time as fighting against an enemy landing occurred. Thus, the accused, Hara, had no duty or authority to command the Army officers, Furuki and Inoue, nor to supervise the action of them through the senior officer on Jaluit Island, Rear Admiral Masuda, when no battle against enemy landing had taken place.

Section III. The exercising of civil administrative authority and the maintenance of peace and order within the area of the accused, Hara's, command.

Included in the matters with which the accused, Hara, is charged, are incidents in which the victims were natives or residents of the South Seas Mandated Territory or areas occupied by the Japanese forces. Therefore, it is necessary to show the duty and authority of the accused, Hara, in connection with the civil administration and maintenance of peace and order in these areas. This will be examined in the light of the evidence.

1. South Seas Mandated Territory.

In the year 1922 the South Seas Government Office was established for the South Seas Mandated Territory. Of this fact the commission has taken judicial notice. The fact that the civil administration of the entire territory was under the jurisdiction of the Governor of the South Seas Government Office, and that the Commander in Chief of the Fourth Fleet did not possess any duty or authority whatsoever concerning this matter was affirmed by witness, Sumikawa, and by Exhibit 43, a deposition of the Chief of the Second Demobilization Bureau.

Hosogaya, Goshiro, the former Governor of the South Seas Government Office, testified in his deposition as follows: "I was therefore ordered by the Minister of the Greater East Asia Department to request the military forces to take command in areas where the police were not able to maintain the peace alone. This order I passed on to all my subordinates. I believe this was sometime between March and July 1944." "I informed the Commander in Chief of the Central Pacific Fleet, Admiral Nagumo, Chuichi, of this order." The accused, Hara, testified that after the Central Pacific Area Fleet was organized, the Commander in Chief of the Central Pacific Area Fleet issued an order to this effect to his subordinates, and this the testimony of defense witness Higuchi corroborates.

Major Furuki, IJA, and Captain Inoue, IJA, each, in their trials, testified that around March 1944 Rear Admiral Masuda, the senior commanding officer on Jaluit Island received an order from the Commander in Chief Fourth Fleet giving him judicial and administrative authority over the whole island. However, the accused, Hara, has testified in cross-examination that he does not recall issuing such an order. It was not possible for the Commander in Chief of the Fourth Fleet to issue orders to his subordinates on matters over which he had no authority. As a matter of fact, the senior commanding officer of each of the various islands were not necessarily Navy officers. For example on Enderby there was an Army commanding officer, a Colonel, and a Navy commanding officer, a Warrant Officer, this from the testimony of Higuchi, Under these conditions it is obvious that the Commander in Chief of the Fourth Fleet was not in a position to issue such orders as stated by Furuki and Inoue.

First Lieutenant Morikawa, who was in charge of communications as a subordinate of Major Furuki, testified at the latter's trial as follows: "Following dispatch from the South Seas Governer was received by the Civil Officer in Charge of the Jaluit Branch of the South Seas Government: 'I have you under my authority and I have command under the command of the Commander in Chief of the Pacific Fleet. All government officials, therefore, shall come under the command of the commanding officer of that place'". (Underscoring counsel's). This testimony should prove to be sufficient in way of corroboration.

As was made manifestly clear by the foregoing evidence, The Governor of the South Seas Government Office in conformance with the order from the Minister of Greater East Asia, -- the minister responsible for the administration and maintenance of peace and order in the South Seas Mandated Territory,- issued orders to his subordinate officials that in case of necessity to request direction and command of the resident senior commanding officer of the island.

The Commander in Chief of the Central Pacific Area Fleet on the basis of a Cabinet decision issued instructions of the same tenor to his subordinates. This order assigned duties directly to the senior commanding officers of each island, without respect to whether he was an army or naval officer, but no such duties were assigned to the Commander in Chief of the Fourth Fleet. Thus Rear Admiral Masuda was acting in a dual capacity. As Commanding Officer of the Sixty-second Naval Guard Unit he was under the command of the Commander in Chief of the Fourth Fleet; but as the person responsible for administration and judicial matters he was delegated this authority directly from the Governor of the South Seas Government Office and was not commanded or supervised by the Commander in Chief of the Fourth Fleet.

Furthermore, the following evidence was presented to this court. Namely, defense witness Sumikawa testified that an order was received from the Combined Fleet which directed that maintenance of peace and order in the South Sea Islands would be under the charge of the Army. Hara testified that he received an order from the Commander in Chief of the Central Pacific Area Fleet of the same import. Although there was a difference in the originators of the orders, there can be no doubt that an order to such an effect was issued.

The District Governor of the South Seas Government Office at Truk, Aikera Aritaka in his deposition testified as follows: "The orders I received from Lt. General Mugikura stated that the army would maintain the peace and order."

In summing up the above, it is clear that the accused, Hara, had no authority whatsoever to command in matters of administration and maintenance of peace and order in the South Seas Mandated Territory.

2. Territory under military occupation.

Only naval units were stationed on Nauru and Ocean Islands occupied by the Japanese armed forces. Consequently, it is a fact that the Commanding Officers of these islands had the direct responsibility for protection of natives and residents of these islands, and that the Commander in Chief of the Fourth Fleet had the responsibility to supervise.

Section 4. Battle situation, transportation and communication conditions.

When the accused, Hara, assumed his office as Commander in Chief of the Fourth Fleet, Kwajalein and Eniwetok, the important bases in the Marshalls, had already been occupied by the American forces, and a few days prior to his arrival to take over command, Truk had been a target for a large scale attack by an American carrier task force and had sustained heavy damages.

After Hara's assumption of command the American forces commenced large scale offensives in the Central Pacific, and Truk and Jaluit and other islands were exposed to a continuous one-sided bombing by the American forces. There were, however, no surface fighting force or aerial attacking force whatsoever under the command of the accused, Hara, and consequently, the air and sea supremacy of the Marshalls and Eastern Carolines were completely in the hands of the United States forces.

From this it will be easily understood that for this reason surface and aerial transportation was in fact, completely severed between Truk and the islands of the Marshall group and islands such as Nauru and Ocean, which were over 1,000 nautical miles away.

The prosecution witness, Sumikawa, testified that submarines were dispatched by the Combined Fleet directly from the Japanese homeland on request to ship supplies to far-lying islands. These attempts were successful only in the cases of Truk and Melon; the attempts to reach Wake and Mille ending in failure. In short although efforts were made, transportation to the far-lying and isolated islands were not possible.

Concerning communications conditions, testimony has been given by prosecution witness, Sumikawa, and defense witness, Higuchi, and the accused, Hara.

The accused, Hara, testified to the effect that according to the report of the Commanding Officer of the Fourth Communication Unit (Truk) it was almost impossible for units other than Jaluit to transmit from the latter half of 1944, and that entering the year 1945 transmission from Jaluit decreased and communications became extremely difficult.

Lieutenant Commander Suzuki, Naomi, Commanding Officer of Ocean Island testified as follows in his trial: "Until the annihilation of the Marshalls, I used to contact Truk. About June 1945 I was receiving not transmitting from Truk. There was only a small quantity of fuel to drive generators and there was no sulphuric acid on hand. The transmitter was very old and it was almost unuseable and there was only one spare vacuum tube and there was no important code book, and so I did not do any transmitting. I was listening regularly but the reception was very poor."

The fact may be readily understood by any person that with the damages sustained by continued bombings and natural deterioration of communications equipment the communication potential of far-lying and isolated islands diminished in direct ratio to the passage of time.

Another important factor to be considered was that there were no new code books sent to far-lying islands such as Jaluit, Nauru and Ocean, so that as a matter of fact, communications with these islands were greatly restricted. The prosecution witness, Sumikawa, testified that it was the policy not to send messages to these islands in simple code, as in actual fact they would be decoded and measures would be taken by the enemy to counteract. The accused Hara testified in corroboration of the above.

The prosecution may contend that instructions concerning treatment of prisoners of war could have been sent out in plain form without use of code. However, it is a fact well known among officers that during war time transmission of plain messages was strictly prohibited even for the most trifling matters, because it might become clues to important communications secrets deducable from the relation of the communicants, the communications channels, etc.

Section 5. The Policy Education, Training adopted by the Japanese Navy regarding the treatment of prisoners of war.

The judge advocate in his opening statement states as well as during the course of this trial submitted relevant evidence to the following effect: That when the accused, Hara, assumed his post as commander in chief of the Fourth Fleet, the training, discipline, and experience of the Japanese armed forces under his command was such that it condoned the mistreatment and execution of prisoners of war; and that despite the fact that the accused, Hara, knew or should have known of this state of training, he neglected to take appropriate measures to restrain his forces in the proper treatment and protection of prisoners of war and of civilian natives.

Leaving the matter of whether the accused did or did not know of the incidents regarding prisoners of war which occurred in his area of command before his assumption of duties, to subsequent argument, the policy for the treatment of prisoners of war in the Japanese Navy and the training and experience of personnel in the Fourth Fleet regarding this policy will be examined here, in the light of the evidence.

Numerous evidence points to the fact that in the Japanese Navy the regulations concerning treatment of prisoners of war was provided for in the Naval Regulations; that the policy for the treatment of prisoners of war was clearly defined in the Wartime International Law Manual issued by the Secretariat of the Navy Ministry; and that these regulations and manuals were promulgated to the entire navy.

Regarding the measures taken to familiarize the Japanese naval personnel with matters pertaining to the treatment of prisoners of war, this was shown by Exhibit 38 (C.L.O. Document 7376) and Exhibit 54 in the statement of Captain Watanabe, Yasuji, included in the deposition made by the Chief of the Second Demobilization Bureau, and the testimony given by the defense witness, Arima, Kaoru.

It was introduced into evidence that the Fourth Fleet having issued detailed instructions to each subordinate commanding officer before the opening of hostilities, (Exhibit 54, testimony of Kawai, Iwao, Chief of Second Demobilization Bureau), and on December 1943 or January 1944 instructions were given before an assembly of all cognizant commanding officers and executive officers on Truk by an admiral who came from the Navy Ministry at Tokyo, that prisoners of war should be sent back to the homeland with all speed (testimony of Nakase). Again, prosecution witness, Sumikawa and Kobayashi testified that they received a despatch from the Navy Ministry requesting the immediate return of prisoners of war to the homeland and Kobayashi further testified that this despatch was relayed to each subordinate unit.

Asano, Shimpei, commanding officer of the Forty-first Naval Guard Unit, as prosecution witness, stated on the witness stand, that "I always had a belief that prisoners of war should be treated humanely," and he further stated, "At the time of my appointment, prisoners of war were confined in a very narrow space, ... as it was a temporary place of confinement in a military establishment. It was therefore necessary to send them to the homeland as soon as possible, and I definitely remember having heard this policy at headquarters."

Nakase, acting executive officer of the Forty-first Naval Guard Unit, also testified that, when he was briefed by his predecessor, he was told that prisoners of war were temporarily confined at the Forty-first Guard Unit, but were to be sent to the homeland on the first available transportation, and Nakase further stated that in educating the guards, he instructed them to treat the prisoners humanely and because the prisoners of war had fought courageously to the last, to treat them, not as enemies, but to regard the prisoners of war as one of their own men.

The judge advocate introduced into evidence the testimony of Abe and Hayashi from the trial of Abe, Koso, the Commandant of the Sixth Base Force, and contended that the policy of the Central Authorities, especially that of the First Division of the Naval General Staff, was to allow prisoners of war to be executed locally without sending them to the homeland. It is quite clear that Abe and Hayashi were fully aware of the fact that the policy for the treatment of prisoners of war in the Japanese Navy was nothing like what the judge advocate contended. This may be determined at a glance by the answers of Abe in reply to interrogations put forward to him in Tokyo, as well as by the answers of Hayashi to cross-examination at the Abe trial.

In Exhibit 54, Deposition of Chief of the Second Demobilization Bureau Tomioka, who was Chief of the First Section, First Division, Naval General Staff in 1942, testified that policies regarding prisoners of war were never determined at the First Division, Naval General Staff, and that it was a matter not within the cognizance of the Naval General Staff.

It is obvious, from the foregoing evidence that it was definitely the policy of the Japanese Navy not to permit mistreatment and executions of prisoners of war. It is also apparent that at the time of the assumption of duties of the accused, as commander in chief of the Fourth Fleet, education and training regarding treatment of prisoners of war was being carried forward within the Fourth Fleet. Further than this, among his subordinates, both the commanding and executive officers of the Forty-first Naval Guard Unit, who were directly responsible for the treatment of prisoners of war were well aware of the policy of the Japanese Navy and of the policy of the commander in chief of the Fourth Fleet regarding the proper treatment of prisoners of war. It is a fact that prior to Hara's assuming command there had been a few illegal acts of mistreatment on the part of subordinates of the Fourth Fleet, but in no possible way can it be said that these unlawful acts were the consequence of the training, discipline, and experience of the Fourth Fleet at the time the accused, Hara, assured his duties.

The judge advocate maintains that because the accused, Hara, did not issue any orders regarding the protection and treatment of prisoners of war, he neglected his duties. The policy of the Japanese Navy regarding the treatment of prisoners of war had been established, and steps had already been taken to propagate this policy, and it is quite natural that he found no necessity to give any orders or directions.

JJ
H (28)

Furthermore, prosecution witness, Higuchi, testified that it was not customary in the Japanese Navy for the commander in chief of a Fleet to reissue an order containing similar matters which have been already promulgated by the Navy Ministry or provided in the Naval Regulations.

Summarizing the foregoing, it is plainly evident that the fact that the accused, Hara, did not issue any orders pertaining to the treatment of prisoners of war, does in no way imply his neglect of duty.

Section 6. Regarding the incidents which occurred prior to the assumption of office by the accused, Hara, and his alleged knowledge of such incidents.

The judge advocate has maintained that the accused, Hara, knew or should have known of the occurrence of incidents relating to prisoners of war committed within the area of his command before assuming office. Defense counsel will examine this point in the light of the following evidence.

1. In the evidence introduced during the course of this trial, there is not one indication affirming that the accused, Hara, was informed of the incidents of execution of prisoners of war which occurred in the area of his command, before he assumed his duties as commander in chief. Nor is there any evidence which reasonably supports a contention that the accused, Hara should have learned of these incidents. After examining relevant evidence, it will be shown that it is reasonable that the accused was unaware of these incidents.

(a) The prosecution only pointed out that the predecessor of the accused, Hara, Kobayashi, and his staff officer, Inoue knew of the incident of the execution of prisoners of war at Kwajalein on October 16, 1942.

However, both Kobayashi and Inoue testified to their recollection that the Commandant of the Sixth Base Force and his staff officer, Hayashi, merely pointed out to them the place of execution of the prisoners while they were in an automobile making a tour of inspection on Kwajalein. Inoue testified that he did not tell the accused, Hara, about this incident, and Kobayashi testified that, when he briefed the accused, Hara, there was no briefing in regard to prisoners of war.

(b) Staff Officer Inoue testified that he learned for a despatch at that time, of the execution of prisoners of war on Wake Island in October 1943. But he also testified that he did not tell the accused, Hara about this incident; and, to a query whether this despatch was kept in a place easily accessible to Hara, he stated it was kept in the code room and was obtainable only by special request.

(c) Evidence was introduced to the effect that staff officer Inoue knew that there was an execution of 7 prisoners of war at the Forty-first Guard Unit on February 17, 1944. But Inoue testified that he reported this incident neither to Kobayashi, the then commander in chief, nor to the accused, Hara.

The statement made by Tanaka, Commanding Officer of the Forty-first Naval Guard Unit, just before his execution on September 22, 1947, was submitted into evidence. It is there stated that on the night of February 17 in the conference held at the headquarters of the Fourth Base Force, Tanaka said he reported the execution of prisoners of war on that day at the Guard Unit. This was before an assembly including Commandant, Kobayashi, Staff officer Higuchi, and cognizant commanding officers. But when Tanaka took the stand in his own behalf at his trial he did not testify to this effect, but stated two or three times that he had reported to staff officer Higuchi about the execution after the conclusion of this conference.

The witness for the prosecution, Inoue, learned of the Frebuary 17th incident through the Fourth Fleet Staff Officer, Kawamura, who had heard Captain Tanaka mentioning this incident. Yet, Inoue testified that it was not known to him when Kawamura heard this from Tanaka. On the one hand, in the deposition of Kawamura (Exhibit 51) he testifies that he neither recalls hearing of Tanaka's report on the execution of prisoners of war, from Captain Tanaka, nor, on the other hand, does he recall ever telling anyone about this report.

Both witnesses for the defense, Wakabayashi and Higuchi, testified that on the night of February 17th, at the conference, neither of them heard Tanaka make such a report.

Moreover, Tanaka's statement does not show that it was voluntarily made by him. In evaluating this statement against his own sworn testimony during his trial, the latter should be accorded far more weight than the former.

In summarizing, there is absolutely no evidence that the accused, Hara, was informed of the February 17th incident and no basis on which it can reasonably be concluded that the accused, Hara, should have known of this incident.

2. In Article 51, Fleet Ordinance (Exhibit 26), it is provided that members of a Staff and personnel who participate in the work of the fleet, in making reports to the commander in chief, shall make them through the chief of staff. Consequently it follows that the commander in chief does not necessarily possess all information that comes to the heads of his staff officers. The same applies to the case of subordinate cognizant commanding officers, since all official business must pass first through the chief of staff. Therefore, similarly, any information in the hands of cognizant commanding officers does not necessarily imply that the commander in chief also has such information.

Witnesses Asano and Nakase both testified that whenever prisoners of war arrived, the fact was reported to Headquarters. When inquiry by counsel was made as to the method of reporting, the following facts were elicites: Asano testified that on no occasion had he personally ever reported the confinement of prisoners of war, nor did he ever make such a report in writing. In most cases, his executive officer, Nakase, reported orally or by phone. Nakase testified that he made the officer of the day report by phone, but does not know to whom the officer of the day reported.

It is clear that it cannot necessarily be said that the reports made by the Guard Unit to the headquarters by such a procedure was received by the commander in chief.

Chapter II - The accused HARA and his relation to the incidents with which he is charged

Although the incidents are listed chronologically in the charge and specifications, they will, for purposes of convenience, be examined here grouped according to the areas in which they occurred. First, the evidence concerning the want of knowledge of the accused of each of the incidents of which he is charged will be examined and secondly the main points of these incidents.

Section 1. The Jaluit Incidents.

1. The Masuda-Yoshimura Incident (Specification 1(a), 2(a).)

The victims of this incident were three prisoners of war captured around 9 February 1944, two weeks prior to the accused, HARA's assumption of office. (Exhibit 6, Statement of Masuda.) The then Chief of Staff, Sumikawa, has testified that he did not know of the capture of these prisoners and the accused, Hara, also testified to the same effect.

There has been no evidence to the effect that Rear Admiral Masuda requested instructions of Fourth Fleet Headquarters concerning the execution of three prisoners of war on March 10, 1944 (Exhibit 5, record of the trial of Masuda, Yoshimura.) nor has there been any testimony that Fourth Fleet Headquarters received such requests. (Testimony of Sumikawa and accused, Hara.

On the contrary, Masuda states in his statement, Exhibit 6, that he issued a secret order to Warrant Officer Yoshimura to execute the prisoners-of war. It is, therefore, logical to assume that this execution was conducted in secret at the Sixty-second Naval Guard Unit and that Fourth Fleet Headquarters was not informed concerning it.

Prosecution witness, Iwanami, Kenichi, in the Yoshimura trial, testified that under instructions from Rear Admiral Masuda, he added at the end of a battle report, the information that three American prisoners of war had died through bombing. Therefore, if this battle report actually did reach Fourth Fleet Headquarters, the content of the report being a common place bombing and not an execution of prisoners of war, it must be considered only natural that the attention of the Fourth Fleet Headquarters was not arrested.

2. The Inoue Incidents. (Specification 1 (i), (j).)

No evidence has been offered to the effect that the senior commanding officer on Jaluit Island reported to Fourth Fleet Headquarters, or that he requested instructions from this headquarters, concerning the execution on Jaluit Island of seven natives and one native on the 8th and 13th of April 1945 respectively (Exhibit 9, record of trial of Inoue.) Furthermore no proof whatsoever has been presented to show that Fourth Fleet Headquarters had received reports concerning these incidents. (Testimony of Sumikawa, Higuchi, and the accused, Hara.)

It can, therefore, be logically deduced that these incidents were executed within the bounds of Jaluit Island with knowledge of such incidents kept solely to that island.

3. The Furuki Incident (Specification 1 (k).)

Exactly similar to the Inoue incidents above stated, there has been no evidence presented to show that the senior commanding officer on Jaluit Island ever requested instructions concerning the execution of natives, nor that he reported same in regard to the espionage incident involving two natives which occurred on Jaluit Island on 10 August 1945. Further, there has been no evidence to show that Fourth Fleet Headquarters received such request or report.

It may be logically deduced that Fourth Fleet Headquarters had no knowledge whatsoever of this incident.

4. Whether or not trials were held in the incidents wherein Inoue and Furuki were involved.

It is alleged in Specification 1 that natives were unlawfully punished without previous trial as spies in the Inoue and Furuki incidents, ((i), (j), (k).) Opposed to this, the accused in both of these trials maintained that trials were conducted.

On examining the records of the trials of Inoue and Furuki (Exhibits 9 and 11) which records were submitted to this Military Commission, there is some room for doubt whether in a strict sense, a trial was held. However, it is not beyond reason that Masuda, Inoue, and Furuki, in conducting their investigations and deliberations, were doing their utmost under the then existing circumstances when urgent military necessity dictated that they prevent the escape of the natives and any subversive action on their part during full seige by the enemy.

Article 17 of the Japanese Naval Criminal Code (Exhibit 31) provides as follows: "Unavoidable actions taken in order to quell mass violence, or, in order to maintain discipline in the face of the enemy or when a ship is in an emergency, shall not be punished." "Punishment of actions which exceed the limits of necessity may be reduced or remitted in consideration of extenuating circumstances."

In International Law, also, it is generally accepted that to take action directly destroying life is a military necessity when such action is unavoidable in the event the existence or safety of the unit is jeopardized.

In considering the foregoing, the extenuating circumstances should be reviewed in connection with the fact that, in the Inoue and Furuki Incidents, there were no trials held in the strict sense of that word.

Then, by no line of reasoning or process of logic may the Commander in Chief of the Fourth Fleet, be charged for criminal neglect to control subordinates in regard to these incidents, as he was unaware of these incidents and at a place remote from the scene of their perpetration.

5. Administrative and judicial authority, the maintenance of peace and order, and their relation to the accused.

It has already been stated in Chapter I how Rear Admiral Masuda, as senior commander of the island, was vested with administrative and judicial authority, and, that at no time was the accused, Hara, ever vested with authority in regard to administrative and judicial matters in the South Seas Mandated Territory. Further, it has been clearly shown that the Army was in charge of maintenance of peace and order.

It is evident that the Inoue and Furuki incidents were carried out on the basis of authority delegated directly to Rear Admiral Masuda by the South Seas Governor, and that these incidents were executed by Army officers, such as Inoue and Furuki, who were in charge of the maintenance of peace and order in their capacity as Chief of the Kempeitai and other capacities. It is, therefore, equally evident, that the accused, Hara, who was the Commander in Chief of the Fourth Fleet, had no command responsibility in regard to these incidents.

Section 2. Incidents of Nauru and Ocean Islands.

1. The Ruka Incident. (Specification 1 (g) and 2 (f).)

(a) Ogawa, Division Officer of the Sixty-seventh Naval Guard Unit, according to the Australian record of his trial, testified to the following effect:

"From one year before the Ruka incident all supplies of provisions from the Japanese homeland were cut off, and at the time of the incident we were in a bad way and for staple food we had only pumpkins and toddy. To prevent theft of provisions the commanding officer of the Guard Unit issued strict orders that persons caught stealing will be shot."

Soeda, the then Commanding Officer of the Naval Guard Unit, testified, in his deposition, that he had ordered three days complete abstinence from food as a disciplinary punishment to be awarded anyone apprehended stealing food.

Detachment Commander Ogawa further testified to the following effect:

"I received a report from Second Sub-Lieutenant Nakajima, 2nd Section Leader, that Ruka, one of the natives attached to 2nd Section committed an offence by stealing provisions. I ascertained this fact and as punishment, I ordered that he be imprisoned for three days and that he receive 10 strokes each day during that period."

It was a well known fact that the disciplinary punishments of flogging and striking were generally awarded natives. It must, then, be acknowledged, that the punishment ordered by Ogawa was not extreme but moderate, under the then existing circumstances.

By virtue of Article 15 of the Japanese Naval Disciplinary Code, (Exhibit 32), the Division Officer was empowered to award disciplinary punishment. Ogawa, on the basis of this authority, awarded lawful disciplinary punishment to natives attached to the Company. His action can, in no way, be placed in the category of unlawful mistreatment as alleged.

(b) The unreliability of the testimony of the natives who appeared as witnesses in the trial of Ogawa was clearly shown in the reading in this court of the record of his trial, (Exhibit 14). In contradistinction the statement of platoon commander Ogawa, was both rational and orderly, leaving small margin for any doubt.

(c) Captain Soeda, the commanding officer of the Sixty-seventh Naval Guard Unit, in his deposition, states that he did not know a native by the name of Ruka, nor did he know of an incident having taken place involving this native. He further testified that he had never requested instructions from Fourth Fleet Headquarters concerning the Ruka incident and had never reported it to Fourth Fleet Headquarters. Sumikawa, Higuchi, and the accused, Hara, all have testified that no reports were received. Viewed from any angle, it is apparent that the accused, Hara, had no knowledge of this incident.

2. The Lee Incident (Specification 1(h), 2(g).)

(a) In the statement of Hotakeyama, a Paymaster Warrant Officer, the record of his trial by an Australian Military Court from Exhibit 15 is to be found, in substance, the following: In November the rice ration had to be reduced to 1 ounce a day. We barely managed to stave off starvation by eating lizards and weeds. The majority of us were victims of malnutrition and on an average, two or three persons died daily. Under these circumstances the Chinaman, Lee, despite repeated cautions on several occasions stole pumpkins which constituted the staple food. If his punishment were neglected (I.N. others would be encouraged to steal and) the whole population of the island would then be exposed to starvation. Firmly believing that it was our duty to punish him, I beat him.

This incident is similar to that of Ruka in that it was not an act of abuse but execution of disciplinary punishment under pressure of necessity in the circumstances prevailing at that time. But, it must be admitted that the disciplinary punishment went too far, in that finally the offender died.

(b) The commanding officer, Soeda, knew nothing of this incident at the time of its occurrence. Soeda has testified that he, therefore, did not request instructions from Fourth Fleet Headquarters nor report the matter. (Exhibit 44.)

Sumikawa, Higuchi, and the accused, Hara, have all testified that they received no report concerning this incident. It is manifest that the accused, Hara, knew nothing of this incident.

3. The Suzuki Incident (Specification 1 (1), 2 (h).)

(a) The evidence offered in this court in relation to the cessation of hostilities and the surrender of the Japanese armed forces, namely, the orders and instructions issued by the central authorities, and the measures taken, and orders issued, by the Commander in Chief of the Fourth Fleet directed to his subordinates, present the following points:

August 15, 1945	The Emperor of Japan broadcast over the radio to the Japanese people at large concerning the cessation of hostilities.
August 17, 1945	An Imperial Rescript addressed especially to the officers and men in the army and navy concerning the termination of hostilities was issued. This was, on the same day, sent out to the Navy as a whole, including the Fourth Fleet.
August 16, 1945	The order instantly to terminate all hostile action was issued to all naval units including the Fourth Fleet with the issuance of Imperial Naval Headquarters Directive No. 48.

The instructions of the Central Authorities concerning the Surrender were issued on September 2, 1945 (The foregoing from Exhibit 55.)

Fourth Fleet Headquarters, immediately upon receipt, relayed to its subordinate units the Imperial Rescript concerning the termination of hostilities and, Directive No. 48, the order instantly to terminate all hostile action. (Testimony of Sumikawa, Hara.)

Simultaneous with the relaying of these above despatches, the Commander in Chief of the Fourth Fleet issued instructions to all his subordinates concerning the cessation of all hostile action on the basis of the Imperial Rescript. (Sumikawa, Hara.)

Around August 18, 1945 the Commander in Chief of the Fourth Fleet informed his subordinates that he had expressed his willingness and readiness to surrender and issued further instructions to his subordinates to surrender quickly and smoothly. (Hara.)

Concerning the surrender, information was received from the Central Authorities in regard to the substance of the preliminary negotiations held at Manila, which was relayed to subordinates. (Sumikawa.)

(b) The Commanding Officer of Ocean Island, Lieutenant Commander Susuki testified during his trial before an Australian Military Court, as follows (Exhibit 16):

"I remember a broadcast being made by the commander in chief at Truk. In that broadcast on or about August 16th he spoke the following words, 'That the Japanese government has opened negotiations for capitulation, and that we all should obey the Emperor's orders and fight to the finish'".

In his testimony in that trial the witness, Kabunare, who was the sole native survivor stated that he had heard from the Japanese forces that the Emperor of Japan had surrendered, that the war had ended, and, that the natives were told to work for the Japanese forces for a short while until such forces departed.

According to the above, it is manifest that the Commanding Officer of Ocean Island, had, prior to the incident, received the despatch from Fourth Fleet Headquarters based on the Imperial Rescript, calling for the instant termination of all hostile action.

(c) Lieutenant Commander Suzuki gave, as circumstance leading to the execution of the numerous natives, the fact that he had learned of the end of the war around the 24th or 25th of August; that around the 24th or 25th of August he received a broadcast from Truk which stated that the Commander in Chief had ordered a fight to the last. He gave as his main reasons for deciding to execute the natives because they constituted a hindrance, the fact that he had at one time received orders from his immediate superior officer Rear Admiral Shibazaki at Tarawa the fact that there had been numerous mutinous actions on the part of the natives and the imminent landing of the Allied Forces.

However, Hara has testified that he did not issue orders to counterattack in the event of an offensive action on the part of the enemy during the interim period between August 15, 1945 and the date of the signing of the Surrender document. In reference to the above stated paragraphs (a) and (b) it is obvious that the accused, Hara, issued no such order as referred to by Suzuki.

JJ
(35)

(d) Soeda, the Commanding Officer of the Sixty-seventh Naval Guard Unit, testified that he did not know of this incident on Ocean Island at the time of its occurrence. (Exhibit 44 - Deposition of Soeda). Higuchi has testified that Fourth Fleet Headquarters received no report concerning this incident. Higuchi further testified that there were absolutely no dispatches received from Ocean Island in August 1945. Lieutenant Commander Suzuki also testified in his trial that Ocean Island was not transmitting and, therefore, it is evident that Fourth Fleet Headquarters received no information or report concerning this incident.

Summarizing the above evidence, the accused Hara, in his capacity as Commander in Chief of the Fourth Fleet took all possible measures to see that his subordinates complied with the Emperor's Rescript concerning immediate cessation of hostilities, and surrender with expedition and precision. No one would ever dream that an extraordinary incident such as the one which occurred on Ocean Island could occur. It is quite natural, therefore, that no special orders or instructions were issued in anticipation of their occurrence.

The measures taken by the accused Hara, after August 15, 1945 in regard to supervision and control of his subordinates were necessary and sufficient. No reasonable man could do anything more than what Hara did at that time. There is no ground whatsoever to charge the accused with criminal responsibility for neglect of duty because there was an incident of violation of his instructions on a remote and isolated island.

4. Conclusion on the Nauru and Ocean Island Incidents.

The person directly responsible for supervision, and control of operations, of members of the Sixty-seventh Naval Guard Unit on Nauru and Ocean Islands, and protection of natives and residents, was Captain Soeda the Commanding Officer of that Naval Guard Unit. Captain Soeda has not been charged with responsibility for any of these alleged incidents. How may the Commander in Chief of the Fourth Fleet, residing at a remote place from the scene becharged with criminal responsibility for actions among his lower echelon subordinates when such a subordinate, the Commanding Officer of the Naval Guard Unit who was directly responsible is not indicted. Especially is this so when communications could not be maintained as desired, and when transportation had been completely severed. In our experience in international and domestic law, to date we have never heard of criminal responsibility for neglect of duty of a superior being established on such circumstances and conditions as those existing here, where hardly any casual relation exists.

Section 3 - The Truk Incidents.

1. Tarik Island Incident (Specification 1 f)

(a) So consistent are the exhibits 13 (the record of the Sakamoto trial in the Australian Military Court), 52 (Interrogatory propounded to Shoji, Takashi) and 53 (Interrogatory propounded to Sakamoto, Takeharu) that the truth of this incident has unquestionably been proven to be as follows:

There was on Uman Island, Truk, in the latter part of August 1944, a native spy suspect incident. Kempeitai Sergeant Sakamoto conducted an investigation by orders from Intelligence Staff Officer, Lieutenant Colonel Arioa, and by Warrant Officer Hattori, Commanding Officer of the Kempeitai.

Later, it was discovered that a native of Nauru and two missionaries, on Tarik Island, were suspected of espionage, and the investigation of these people was carried out.

On both investigations the man in charge was Kempeitai Sergeant Sakamoto who was accompanied by a civilian guard of the Fourth Construction Department and a reporter on a Military Court.

The Commanding Officer on Tarik Island, Army Captain and Company Commander Miyagawa, ordered about twenty men to cooperate in this investigation and although he himself did not participate in the questioning, he was at the scene of the investigation.

One or two days after the investigation, Sergeant Sakamoto alone took this group of spy suspects to Dublon Island and confined them at the Army Kempeitai Unit.

It has been undeniably proven that the army was held responsible for the maintainance of peace and order on Truk. This present incident, in accordance with this rule, was also conducted by the Army. It is quite obvious in the light of the above evidence that the commander in chief of the Fourth Fleet had no connection whatsoever with this incident.

(b) Sakamoto has further testified that in this incident one of the Naval civilian guards Soji, Hideo beat the Nauru native, but it has not been proven beyond a reasonable doubt that the naval personnel mentioned in specification 1f did beat the Nauru natives and the missionaries. Shoji, Takashi was found guilty, but Exhibit 52 (Interrogatory of Shoji), Exhibit 53 (Interrogatory of Sakamoto) and the testimony of Shoji at his trial clearly show that he was merely a guide in this incident and that at the time of the investigation, he was away on Param and was not present at the scene. Therefore it was not proven beyond reasonable doubt that he beat the natives or the missionaries. Can it be said with all due respect and fairness to justice that the Fleet Commander in Chief should be held criminally responsible for his neglect of duty ignoring several subordinate echelons of responsible supervisors and charging him for an incident wherein one Naval civilian guard happened to beat a native during the course of an investigation, which was carried out by a Kempeitai in charge, and which, was ordered by the army headquarters.

(c) Ishihara and Takenouchi, who were war criminal suspects, and whose names appear in specification 1f, were released without being indicted. Anetai was released due to the fact that his guilt was not confirmed by the confirming authority. These facts have been testified to by co-defense counsel, Sanagi, who was in direct contact with these people as Defense Officer for the Rabaul Australian Military Court. Also, the evidence introduced by the prosecution does not show that Ishihara, Takenouchi and Anetai did subject the Nauru native and the missionaries to abuse or inhumane treatment.

We maintain that the accused, Hara, should not be charged with criminal responsibility on any of the foregoing grounds (Specification 1f))

2. Forth-first Naval Guard Unit Incident - (Specification 1(b)(c)(d), 2 (b)(c)(d)).

(a) The then Chief of Staff Arima, staff officer Higuchi and the accused Hara, have all testified that they did not know and do not recall that prisoners of war were confined at the Forty-first Naval Guard Unit in June 1944. Commanding Officer of the Guard Unit Asano, has testified that he became aware for the first time, that six POW's were confined at the Guard Unit when he went to the confinement quarters with staff officer Akai to interrogate the prisoners of war. Asano has testified that every time

prisoners of war were captured or confined it was reported to higher headquarters, but it so happened that in this instance even Asano, the Commanding Officer of the Guard Unit, found out only by chance that prisoners of war were confined at his own unit.

Such being the conditions, it can easily be understood that the Commander in Chief, the accused Hara, did not know prisoners of war were confined at the Guard Unit at that time.

(b) Chief Medical Officer of the 41st Naval Guard Unit, UENO, testified that the executive officer, NAKASE, relayed to him the order of the commanding officer to dispose of the two prisoners of war who survived the Guard Unit bombing, at the dispensary. But the commanding officer, Asano, testified that he did not order Ueno, Nakase, Nakashima, or Tanaka to stab the prisoners of war, and that he first learned that the two prisoners of war had died when he received a report from Ueno that the operation which had been performed on the prisoners of war had been unsuccessful.

Executive officer, Nakase, testified that around that time he did not have any conversation with Ueno concerning prisoners of war and that he did not know when the two surviving prisoners of war were executed.

Ueno testified that prior to the execution of one of the prisoners of war behind the dispensary, a general assembly was called, but that neither the commanding officer nor the executive officer was present. He admitted that he was the senior ranking officer among those present. In these regards, there are some discrepancies in the evidence laid before the commission. It is, however, considered very plausible that the execution of the prisoners of war behind the dispensary took place without the knowledge of commanding officer Asano or executive officer Nakase.

(c) Asano testified that he reported to the chief of staff, Arima, the death of the two prisoners of war on the first or second day following the incident, - which was a gist of the report made by Ueno to him. (T.N.-Asano). Presupposing that Asano did report to Arima, if the report was the gist of the explanation made by Ueno, then the content of such report will not have mentioned the killing of the prisoners of war, but will explain how the operation had failed, thereby bringing about their death.

However, Arima testified that around June 1944 he received no reports on prisoners of war from anyone. The following evidence is cited to corroborate this testimony:

(1) According to the testimony of Ueno, a defense witness, he was given certain directions by Asano around August 25, 1945, and a portion was as follows: "I (Asano) intended to report this to the headquarters immediately after the incident, but having postponed it day by day, I eventually forgot about it. ..."

(2) The accused Hara testified that Asano came to him about July 1946 and apologised for not reporting till that time the death of these two prisoners of war. Asano further stated that the prisoners of war were treated (T.N. - operated on) at that time but that they were unable to recover - eventually dying, and, that Asano himself, had no connection whatsoever with this incident.

(3) This June 20, 1944 incident occurred at a time immediately after the United States forces landed on Saipan, one of the main naval bases of the Japanese forces in the Central Pacific. On June 19th and 20th, at sea west of the Marianas a great naval battle, known as the Battle of the Phililine Seas, was being fought, with the main forces of the Japanese Combined Fleet pitted against the United States Pacific Fleet. Although the 4th Fleet Headquarters had no surface fighting force, it may be readily surmised that they were busily occupied with collateral matters pertaining to these operations.

From this evidence, it may logically be concluded that Asano did not report to the chief of staff, Arima, and consequently that the accused, Hara, did not know of it.

The judge advocate may assert that even had Hara and Arima not received any reports directly from Asano, this incident occurred on the small island of Dublon, and an incident of such a nature as this was apt to become a matter of common knowledge among naval personnel, and that, in consequence, the accused,Hara, knew or should have known of this incident. The small size of the island does not necessarily mean that the commander in chief and chief of staff must have knowledge of all the incidents that occur on the island. In the directions given by Asano to Ueno a portion of which I have previously quoted, Asano further stated "I now felt that I should report and I went to headquarters to investigate. I discovered that the headquarters were not aware of this incident ... and ordered my executive officer to go to the headquarters and other units to investigate. As a result I was convinced that nobody knew about the June Incident."

Thus, it is apparent that this incident was not a matter of common knowledge among naval personnel on Dublon Island.

3. Fourth Naval Hospital Incident. (Specifications 1-e, 2-e)

(a) According to the evidence submitted to this commission, the two prisoners of war who were executed at the 4th Naval Hospital around July, 1944, were captured by an army unit on Enderby Island during the early part of July and sent to the army on Truk, where they soon after were confined at the 41st Naval Guard Unit. By a despatch from Enderby, staff officer, Higuchi, learned of the capture of these prisoners.

But chief of staff Armia, as well as the accused, Hara, testified that they did not know about the capture and subsequent confinement of the prisoners. Then the Battle of the Marianas was at its height. For the Commander in Chief, who should have been concentrating his undevided attention to the changing situation in the battle, it is quite probable that in the press of operational matters he was not informed of this local administrative affair.

(b) There are inconsistencies in the evidence submitted to this court surrounding the circumstances by which the two prisoners of war confined in the 41st Naval Guard Unit were handed over to the 4th Naval Hospital.

The executive officer of the guard unit testified that on the day when the prisoners were handed over to the hospital, there was a telephone call from Surgeon Captain Iwanami, in which Iwanami said that

he would like to have the prisoners of war because he wanted to make a physical examination of them, and that he, Iwanami, already had the approval of the headquarters. On the other hand, Iwanami has absolutely denied that such was the case.

Arima testified that Iwanami never spoke to him about prisoners of war around July, 1944. The accused, Hara, testified that around that time no one had requested his permission concerning prisoners of war, from either the 4th Naval Hospital or the 41st Naval Guard Unit. Summing up the above evidence, it may correctly be judged that no request for permission was submitted to the 4th Fleet Headquarters to allow the 4th Naval Hospital to conduct a physical examination of the prisoners of war confined at the guard unit.

(c) From the testimony of Iwanami and Taneda, there seems to be no question about the fact that the accused, Hara, visited the 4th Naval Hospital on the same day that the two prisoners of war were executed at that hospital, and that Hara was talking with Sergeon Captains Iwanami and Taneda on Iwanami's veranda at the hospital when the prisoners of war arrived there. Then the questions arises why the accused, Hara, happened to visit the 4th Naval Hospital on the same day. Hara's reason is apparent from the following evidence submitted to this court.

> It was customary for the accused to visit the patients in the hospital once each month or 45 days, and he came on that day particularly to see the condition of the hospital after the departure of the hospital ship; the last to leave Truk. (Iwanami's testimony)
>
> On that occassion Vice Admiral Hara came also to visit officer patients and those seriously ill. It was his custom to make visits of this nature. (Exhibit 50, Deposition of Taneda.)
>
> Hara states that he went to visit the patients at the hospital once or twice every month but does not recall whether he went there around July 20. (Hara's Testimony.)
>
> Hara used to visit the hospital to inquire after his subordinates when his ship entered into a port. (Exhibit 62, Character Evidence by Mieno, Takeshi.)

There has been no evidence brought forward to prove that the purpose of the visit to the hospital on that day by the accused, Hara, had any connection with the incident of the prisoners.

In other words, the fact that the accused, Hara, visited the hospital on the same day the prisoners of war arrived at the hospital is quite apparently pure coincidence.

(d) Next, there arises the question whether Hara commented on the prisoner of war incident that day on the veranda during the course of the conversation, and whether or not it was possible for him to view from the veranda the prisoners of war passing by.

> (1) Iwanami testified that during the conversation on the veranda no conversation whatsoever regarding the prisoners was brought up. Taneda also testified that although he saw the truk carrying the prisoners of war pass by he neither told Iwanami nor Hara about it. To a question put forward by the judge advocate, as to whether he, Hara, did not speak to Iwanami about the despatch from the Central Pacific Area Fleet headquarters informing them of their final attack, or about the recent bombing of hospitals, Hara replied that he did not speak of battle conditions at the

hospital. In view of the purpose of the accused, Hara's visit to the hospital there cannot be the slightest doubt in anyone's mind that any conversation regarding the incident of the prisoners of war ever took place.

(2) Iwanami and Taneda testified that they saw the truck transporting the prisoners of war pass by. The judge advocate put the following question to Iwanami, "From the direction that Admiral Hara was seated at the time, the vehicle started up the drive, up from the mango tree past the veranda, would it have been possible for Admiral Hara to have seen this vehicle?" Iwanami replied: "It was easily observed." But according to the sketch (Exhibit 24) drawn by Iwanami in which the three persons on the veranda were indicated by three small circles, from Hara's position he (Hara) could have seen that part of the road in line with the mango tree, although this does not mean that he could have seen the greater part of the road negotiated by the truk. This sketch and Taneda's testimony show that the accused, Hara, was seated with his back to the road. When Iwanami saw the prisoners, he was able to see just top portions of their heads only by looking over the hedge which was planted along the road. It was quite natural for Iwanami to notice the prisoners on the truck, because at that time Iwanami was anticipating their arrival. But according to Iwanami's testimony, the accused, Hara, was in an animated conversation with Taneda. Under such circumstances it was far more plausible for the accused, Hara, whose vision was limited to only one direction, not to notice the top portions of the heads of men passing by on a truck.

(e) From the above evidence, it is quite obvious that the accused, Hara's visit to the 4th Naval Hospital was pure coincidence and had no relation whatsoever with the incident of the prisoners. He evidently neither noticed nor ever spoke about prisoners of war.

It was generally reputed not only on Truk, but also in other places, that the accused, Hara, was kind and sympathetic to the weak, - especially to sick persons, - and it was his practice to visit hospitals. There is no shadow of doubt that, had Hara known that prisoners of war were to be executed at the hospital, he would certainly never have permitted such action.

The judge advocate, in his opening argument stated that he would present certain evidence which would prove circumstantially the fact that prior to the time of its occurrence, the accused, Hara, had knowledge of the 4th Naval Hospital incident. However, the evidence submitted to the commission has not proved even circumstantially this fact.

(f) The accused Hara testified that he first learned that two prisoners of war were speared at the 4th Naval Hospital at the conference of cognizant commanding officers, held on September 1, 1944, when Iwanami spoke of it.

The judge advocate may insist that the accused, Hara, knowing full well of this incident which occurred in his subordinate units, did not order any investigation and take measures to punish them; that because of this, subsequent incidents set out in specification 1 - 6, h, i, j, k, l continued to occur in the area under his command.

The accused, Hara, testified that at the conclusion of the Sept. 1st conference he gave instructions cautioning them against illegal acts to prisoners of war, and against the stealing of food supplies from the natives.

Hara also testified regarding the reason why he did not conduct an investigation of this incident, to the effect; that his subordinates were confronted with an extremely difficult situation both internally and externally; that he took into consideration the effect of such action on public opinion should he under the then existing circumstances punish his subordinates for the crime; that he decided not to carry out any investigations or to mete out punishments; and, that he determined never again to permit the recurrence of such an incident.

When we recall how the accused, Hara, lived in an air raid shelter (Hara's testimony); and how he shared the burden of hardship with his subordinates by taking up the plough, (Taneda's testimony) we cannot but concur with his decisions, in such a frame of mind, to not then investigate Iwanami, or those concerned, and punish them.

It has been proved by many witnesses that the only one prisoner of war captured on Truk after this incident, was sent back to the homeland on a flying boat, in January 1945. Nakase testified that the 4th Fleet transporation staff gave this prisoner of war a higher priority than the sick paymaster officer. Moreover Ueno testified that this prisoner of war was given far better treatment than in previous cases by orders from headquarters. It is evident from this action that Hara's determination that no further illegal acts would be perpetrated had been fully realized.

The incidents of specification 1 - g, h, i, j, k, which occurred in the area under the command of the accused, Hara, after September 1944, were unavoidable punishments meted out to those natives of Jaluit and Nauru Islands who had in all cases violated the law and competent military orders. The character of these incidents is entirely different from that of the 4th Naval Hospital. Presupposing that instructions regarding treatment of prisoners of war were issued by the commander in chief immediately after the 4th Hospital Incident, it is a matter wholly unrelated as to the punishment of the native offenders. It can be understood that under the existing situation the punishment was unavoidable.

In short, the fact that the accused, Hara, did not conduct any investigation or that he did not punish anyone, or further that he did not promulgate despatch instructions after he learned of the 4th Naval Hospital Incident can in no way be construed as contributing to the occurrence of the incidents of specification 1 - g, h, i, j, k.

Chapter III Hara's Character.

In conclusion I would like to say a word about the accused, Hara's general reputation inasmuch as this affords an index to his character relevant to the issue at trial.

I believe the members of the commission are fully conversant with this matter by means of the testimony given by some witnesses in the course of this trial; and also through documents submitted in evidence at the conclusion of the defense case.

Reviewing the accused, Hara's, character as pictured by this evidence, the following is considered worthy of special note:

The fact that he had a strong sense of justice and was sympathetic toward the weak. Especially was he very kind toward the sick and had a long acquired custom of visiting the patients at the hospital.

The fact that he was noted for being the champion of the people in the occupied area and won confidence from its residents (Amoy).

The fact that he had a strong sense of honor to abide by International Law and Treaties and no matter how strong the opposition was he would overcome it and obediently followed the agreement. Referring to the high-handed interference of the Japanese army in the occupation of the French Indo China.

From the foregoing it can be reasonably determined that the accused, Hara, was not a person who permit his subordinates to mistreat or kill prisoners of war or natives.

Another trait of the accused, Hara, was that he was very strict with himself but tolerent towards others.

The circumstances which led to Hara's decision then not to punish or investigate the 4th Naval Hospital Incident, after he learned of it, were as he has testified. But another factor distating this decision was, I believe, his firm determination and personal confidence in the prevention of any recurrence which led him to assume the attitude he took towards the perpetration of this incident. This belief is further enhanced by a review of his traits of character as set forth in the above.

In judging the accused, Hara, it was respectfully requested that the members of the commission afford ample consideration to his character.

SUMMATION

I. In summing up the foregoing, the following conclsuion may be rationally drawn:

(1) The accused Hara did not have prior knowledge of any of the incidents listed in the Specifications of the Charge.

(2) With the exception of one incident, namely that of the Fourth Naval Hospital (Specification 1 (e)) the accused did not have knowledge of any of the incidents listed in the Specifications even after their occurrence.
(The accused Hara received a brief report from Harada, the Commanding Officer of the Fourth Construction Department but this report was on a suspected native espionage incident which took place on Uman and an incident completely different from the suspected native espionage incident on Tarik Island involving Nauru natives and two missionaries of Specification 1 (f).)

(3) The accused Hara after assuming his command did not issue special orders or instructions concerning the protection and treatment of prisoners of war. This was because regulations had been issued by the Navy Minister which eliminated the issuing of orders on all matters by a Fleet Commander in Chief.
In actual fact, those of the subordinates of the accused who were directly responsible for the protection of prisoners of war, namely the Commanding Officer and Executive Officer of the Forty-first Naval Guard Unit well knew of the policy of the Japanese Navy and of the Fourth Fleet concerning the treatment of prisoners of war.

(4) The accused Hara learning of the incident at the Fourth Naval Hospital after its occurrence, made a deep resolution that never would a recurrence of such an incident take place, and he sent the prisoner of war captured after that time, granting him priority in the transportation back to the Japanese homeland.

(5) During his whole tour of duty, the accused Hara was never vested with the duty or authority concerning civil administration of or maintenance of peace and order in the South Seas Mandated Territory.

(6) Transportation between Jaluit, Nauru and Ocean Islands and Truk were completely severed. Communication with these islands became gradually worse with the passage of time. Ocean Island was not transmitting from the latter half of 1944. Further, as there were no new code books issued to these islands, transmission of messages from Fourth Fleet Headquarters to these subordinates units on these outlying islands was extremely restricted. Consequently, the Commander in Chief of the Fourth Fleet in exercising control and supervision over units in these outlying islands had no recourse to any concrete measures.

(7) The accused Hara did the best that could be expected of a reasonable man, instantly to terminate hostile action of his subordinates, and to realize their surrender with expedition and precision, after August 15, 1945.

II. In summing up matter stated in the Legal Arguments of Part I and the Argument on the Basis of the Facts of Part II, the judge advocate has not

JJ
~~II~~ (44)

proved bayond a reasonable doubt that in respect to the incidents enumerated in the Specifications of the Charge, the accused Hara permitted subordinates and persons subject to his command to mistreat and kill prisoners of war and natives and residents, and neglected his duty to protect prisoners of war and natives and residents.

On the other hand, the general reputation of the accused Hara tends to show that he was not the man to permit his subordinates to commit the unlawful acts alleged, and tends to show the innocence of the accused in regard to the Specifications.

On the basis of the foregoing, Counsel for the Accused holds that the accused Hara is not guilty of Specifications 1 and 2.

I respectfully request the commission that a finding of not guilty be granted the accused Hara.

Respectfully,

TAKANO, Junjiro.

The Summing Up Of The
Defense

in the case of

HARA, Chuichi,
Former Vice Admiral Imperial Japanese Navy
and Commander in Chief Fourth Fleet

Delivered by

Commander Martin Emilius Carlson, USNR

on

January 8, 1949 at Guam.

Gentlemen of the Commission:

In view of the testimony of the accused, Hara, Chuichi, former Vice Admiral and Commander in Chief of the Fourth Fleet, Imperial Japanese Navy, any statement by me as defense counsel will be but "carrying coals to Newcastle".

In addition to the testimony of the accused, there has been brought into this court many witnesses to testify both for the prosecution and for the defense. Depositions have been used by the prosecution and by the defense. There has been introduced and read into evidence excerpts from former trials, many of such trials relating to incidents which took place months, yes years before Admiral Hara took over command of the Fourth Fleet. In addition there has been introduced as evidence a great many other documents. You have also heard the opening statement of the judge advocate and his argument (?) and then the argument of Japanese defense counsel in refutation of the judge advocate's position set forth in his opening statement. Notwithstanding all the evidence, most of it clear and unambiguous and the summing up of the case by the judge advocate and the Japanese Defense Counsel, we will briefly view some of the evidence and sum up the case for the accused.

Bertram Vogel writing in the October 1948 issue of the United States Naval Institute Proceedings titles his article "Truk - South Sea Mystery Base". Truk should be no mystery now that we have heard so much about it during the more than forty-five days of this trial. The mystery now is that the judge advocate had so little factual knowledge when he made his opening statement.

We agree with Mr. Vogel in his description of the Command relationships on Truk. The evidence in this trial proves Mr. Vogel's words: "the command of Truk's forces, as curious and complex an affair as any which could possibly be devised even by the Japanese themselves. ....., but the precise command relationships were never made clear even to the Japanese, ..."

We are concerned with command relationships on Truk and the command responsibility of Vice Admiral Hara, Chuichi as Commander in Chief of the Fourth Fleet, Japanese Navy because the United States of America charges that "during the period from February 23, 1944 to September 2, 1945" Hara, Chuichi "while so serving as the Commander in Chief of the said Fourth Fleet" ..... "did" ..... " unlawfully disregard and fail to discharge his duty as the Commander in Chief of the said Fourth Fleet to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision permitting them to torture" etc.... "in violation of the law and customs of war" and in the second specification it is charged that Hara, Chuichi, Commander in Chief of the Fourth Fleet, did, ... during the period from February 23, 1944 to September 2, 1945,... unlawfully disregard and fail to discharge his duty as the Commander in Chief of the said Fourth Fleet to take such measures as were within his power and appropriate in the circumstances to protect, as it was his duty to do, American prisoners of war, ... and residents of Nauru Island and Ocean Island, ... in that he permitted the unlawful torture," etc.

Since it has not been the policy to set forth specific measures which Admiral Hara might have taken to protect the victims either in the specifications, in answer to our motion for a bill of particulars, or by any evidence, nor has it been brought out what the laws and customs of war were that imposed such duties and responsibilities upon Admiral Hara, the Com-

mander in Chief of the Fourth Fleet, Imperial Japanese Navy, we conclude that such facts and evidence have deliberately been left vague for reasons best known to the judge advocate. However the judge advocate, and the members of the Commission know full well that by his plea of "not guilty" the accused put in issue every single allegation set forth in the specifications of the charge including the allegation "as it was his duty to do".

We shall briefly but clearly and without exaggeration set forth the pertinent facts, show how the facts have been fully sustained by the testimony and evidence and fully and decisively refute the judge advocate's position in this case. We assume he will make a great pretense that all the things he said he would prove have been proved and that Admiral Hara is guilty. In an opening statement of thirteen typewritten pages he rambled on and on setting forth in great detail what he was going to prove, and prove mind you, beyond a reasonable doubt. But after forty-three days of court trial the judge advocate has failed to prove a single relevant fact which he so rhetorically stated he would conclusively prove. In his opening statement he admits his failure when he says and I quote: "In his opening statement the judge advocate presented a detailed analysis of the pertinent law, and the evidence which he planned to educe in order to establish the guilt of the accused". "Educe" mind you, is the word now used by the judge advocate and not "conclusively prove". The opening argument of the judge advocate admits his failure to prove Admiral Hara guilty as charged.

The facts in this case are that on February 23, 1944 Vice Admiral Hara, Chuichi came to Truk and relieved Kobayashi, Masashi as Commander in Chief of the Fourth Fleet. The Truk group consists of 245 islands in a lagoon forty miles in diameter encompassed by a coral reef approximately 140 miles in circumference. In addition Admiral Hara had a vague jurisdiction over island bases located in an area about two million square miles. His command comprised some 70,000 Navy personnel, gunzokus and other persons employed by the Navy.

It is a fact well established that when the American carrier aircraft roared in over Truk on February 16, 1944 not one Japanese fighter plane was in the air to meet them. The seventy planes launched by the five American carriers had a field day. Fighter planes strafed grounded Japanese planes with deadly effect and torpedo bombers ripped up the air strips on Moen, Param and Eten Islands. American air supremacy in the Truk area was complete. American carrier planes then bombed the Japanese ships at Truk with such consummate skill that not one naval vessel at Truk escaped.

Admiral Hara has testified as to his estimate of the situation when he relieved Vice Admiral Kobayashi. Truk was a badly whipped garrison which had more than met its match. There was no kamikaze spirit at Truk. These are the undisputable facts as to the situation on Truk when Admiral Hara assumed command of the Fourth Fleet, a fleet without any ships. Every witness testified to the deplorable conditions on Truk after that first American air raid on February 16, 1944.

Did conditions get better because Admiral Hara became Commander in Chief of the Fourth Fleet? In answer to question 13 Admiral Hara testified that: "The mission of the Fourth Fleet was to control the seas in the Marshalls, Eastern and Western Carolines, and the Marianas area from bases on the islands in these areas and the defense of these islands on which these bases were located. But, unfortunately, I did not have under my command sea-going units to realize this mission".

Question 15 as to the area of jurisdiction of the Fourth Fleet was

answered by Admiral Hara as follows: "When I assumed command the area of jurisdiction of the Fourth Fleet embraced the Marshalls, Marianas, Eastern and Western Carolines. However, with the formation of the Central Pacific Area Fleet, this whole area was placed under the jurisdiction of this fleet and the Marshalls and Eastern Carolines were assigned to the Fourth Fleet under its jurisdiction".

Admiral Hara testified that his immediate superior in command and the Navy Department knew about the difficulties and the inability of Admiral Hara as Commander in Chief of the Fourth Fleet to carry out his mission. See his answers to questions 183 and 184.

The tactical situation is one of the principle considerations in a charge of neglect of duty. The tactical situation at Truk and in the Pacific Ocean Area is important in deciding whether Admiral Hara neglected his duty. Notwithstanding every effort on the part of the Japanese to reestablish and reorganize their lines of communication, to effectively control their personnel and to rebuild their military and naval forces to a point where they might once again be able to successfully wage war, all their efforts failed.

The facts in the case are that Admiral Hara was specially selected by Admiral Shimada Shigetaro, Navy Minister and Chief of the Naval General Staff in the Imperial Japanese Navy. Shimada as the Japanese Naval Minister selected Vice Admiral Hara, because he considered him best qualified for the position. Shimada testified by deposition (Exhibits 45 and 46) to the above and also stated that Admiral Hara's exporience and past career together with his leadership and personality were excellent qualifications for the position. Shimada also testified that he had known Admiral Hara for more than twenty years and knew him to be honest, frank, a kindly man with good common sense and judgment. Admiral Hara was known as a truthful man and for that reason among other things enjoyed a splended reputation.

You have observed this Admiral Hara in court since October 27, 1948. You have heard him testify. You see him today after what he went through at the Coral Sea and on Truk and after having been a prisoner of war since he surrendered on September 2, 1945 and after two and one-half years of solitary confinement in a cell in a quonset hut on Guam. He still looks like an admiral and talks like an admiral. This is the man that the judge advocate charges was negligent and inefficient, during a period of time when the American forces had dominated all Japanese resistance in the Truk area and blocked even the ability of such an outstanding naval officer as Vice Admiral Hara to maintain effective control.

Let us continue with the facts in the case:

The Central Pacific Area Fleet was organized in early March 1944 and the Fourth Fleet was placed under its immediate command. This Central Pacific Area Fleet was organized to coordinate army and navy commands in the face of the American offensive and to consolidate the defense of the Central Pacific Area. See answers to questions 21 and 22 by Admiral Hara on the 39th day of trial. This fleet didn't last long because in July 1944 it was annihilated by the American Task Force and Saipan, Tinian and Guam were invaded and captured by the Americans. See answers to question 23 by Admiral Hara and answers to questions 14 and 93 by Rear Admiral Sumikawa on the 20th and 21st day of the trial.

Effective control of personnel and the ability to wage effective war in this area was now up to the Combined Fleet which became the immediate superior in command to the Fourth Fleet. See answers to question 58 by Admiral Hara. Admiral Hara still did not have any sea-going units under his command.

There can be no dispute as to who controlled the air and sea approaches to Truk and the entire area of jurisdiction of the Fourth Fleet. The American forces controlled almost the entire Pacific, every historian so writes and all the evidence at this trial has been to that effect. The deposition of Vice Admiral Murray who was Commander Marianas from July 1945 to February 1946 can leave no doubt in anyone's mind because in answer to the seventh interrogatory as to the extent of control of sea and air in the areas in and around Truk from February 23, 1944 to September 2, 1945 he testified: "I am unable to answer with respect to the period February 23, 1944 to July 1945 inasmuch as I was not Commander Marianas during that period. Between the date July 1945 and 2 September 1945 American Naval and Military Forces exercised control of the sea and air areas in and around Truk.

On Ocean Island there was a detachment of the Sixty-seventh Naval Garrison whose headquarters were on Nauru. The Commanding Officer of this detachemtn was Lieutenant Commander Suzuki Naoomi. The Imperial Rescript issued by the Emperor of Japan to the nation in general concerning the termination of hostilities under the date of 14 August 1945, was broadcast by radio throughout the country at 1200 hours 15 August 1945 (See Exhibit 55 Annex 1 Imperial Rescript)which the Emperor said "We wish to make peace ...learning that further continuance of the war would only result in the spiralling up of evils and devastations. In the last paragraph the Emperor said "Ye, the officers and men of the Army and Navy do make up thy mind to establish the basis of the prosperity of our State for long, well understanding our intention, keeping a firm union, conducting and speaking in accordance with the dictate of the justice, surmounting enormcus hardships and bearing the unbearables".

Naval General Staff order 48 was transmitted at 1202 hours 16 August 1945. See Annex No. 2-1 to Exhibit 55. This was an order to terminate instantly the hostile actions and read "It is ordered by the Throne."

Naval General Staff Order No. 49 was transmitted at 1610 hours 17 August 1945. This was also an order to terminate every hostile action from the time on. It too was prefaced with the words "It is ordered by the Throne". See Annex No. 2-2.

Notwithstanding these many orders that every hostile action be terminated and that no person resort to any rash action, Lieutenant Commander Suzuki, Naoomi, Commanding Officer of the detachment of the Sixty-seventh Naval Garrison Unit stationed at Ocean Island ordered all the natives who had been armed by him and employed as part of the Japanese garrison to turn in their uniforms and arms and then on the next day he ordered them all to be executed. This was done on or about August 21, 1945. Suzuki was tried by an Australian court and was sentenced to hand and the sentence has been carried out according to the records introduced by the judge advocate (Exhibit 16) on the eleventh day of the trial. The facts in the case as to the number executed are not certain. There was some testimony that there may have been as many as 95 of these natives executed. See questions and answers read on the eleventh day of the trial from Exhibits 16, 17, 18 and 20. The total number executed was never proved to be 200. Lieutenant

Commander Suzuki however testified at his own trial (Exhibit 16) that he decided to kill these natives and he accepted full responsibility for the execution. (See answers to Q 25 page 30 of Exhibit 16) of these native soldiers who after the cessation of hostilities were made to hand in their uniforms and their arms and were then executed. (See Exhibits 16 par 17 on eleventh day of the trial).

Notwithstanding, Suzuki knew the war was over and he had not one, but several orders to this effect, yes mandates from the emperor to cease fighting and commit no rash acts he had these native soldiers (who were volunteers) lined up, told them the war was over, to turn in their uniform and arms and then carried out his plan of execution the next day. See testimony of Kabunare page 6 of Exhibit 16 read into evidence at this trial on the eleventh day and testimony of Suzuki read on the twelfth day of this trial.

Kabanare testified according to these Australian records (Exhibit 16, p 6) "At that parade the natives were told that the war was over and that the Japanese Emperor had surrendered and that they would carry on their work for a while until the Japanese left. After that he went back to our houses. - - - The last bombing raid on Ocean Island was long before the execution. It was about five or six months before the execution. It was not a severe bombing raid. Before the shooting and the killing there was no allied activity against the Japanese".

There can be no doubt but that Lieutenant Commander Suzuki planned and carried out this execution knowing the war was ended and without any real reason. The excuse he gave at his own trial that these natives, all volunteer soldiers in the Japanese garrison, had committed treason against Japan and he Lieutenant Commander Suzuki was acting under the regulations of Article 173 and Article 220, Regulations of the Naval Land Operation when he ordered the execution.

On page 51-12 of Exhibit 16 Lieutenant Commander Suzuki was asked the following question: "What is the relationship between the HQ of 67 Naval Garrison Unit at Nauru and the Superior HQ at Truk"? to which he answered "In August 45 the Ocean and neighbouring islands were entirely independent and that was ordered by the HQ in February 44".

So thinking his detachment was an independent command this Lieutenant Commander Suzuki ordered the execution of these native soldiers because he suspected them of treason.

You members of the commission must now decide if after the Emperor's Imperial Rescript, the Naval General Staff Order No. 48 and 49, the relaying of these orders by the Commander in Chief to his subordinate units immediately with the additional order by the Commander in Chief Fourth Fleet "In the name of the Emperor, as Commander in Chief of the Fourth Fleet I order the surrender and express gratitude for services rendered. Cognizant commanders will effect the surrender smoothly and expediently" (See answers to questions 168, 169, 170, 171, 172 and 176), Admiral Hara as Commander in Chief of the Fourth Fleet disregarded and failed to discharge his duty as Commander in Chief of the said Fourth Fleet.

We are unable to make answer to the position of the judge advocate in this matter because except for the specification there has been no evidence, no statement and no inference even of what Vice Admiral Hara should have done that he didn't do or in what way he failed to discharge his duty in this instance.

The evidence clearly bears out the fact that there was no neglect of duty on the part of Admiral Hara in this instance. See his answers to questions 165, 166, 168, 169, 170, 171, 172, 285, 286, 274, 275, 83, 84, 85 and 86.

The defense brought out the fact, much to the embarrasment of the judge advocate, that there were standing orders with regard to the treatment of prisoners of war. Both the Geneva Prisoners of War Convention and the Hague Conventions have been a part of the Japanese Naval Regulations for many years and in addition these Naval Regulations contained further standing orders such as we did show in Exhibit 27. This is much more than our own Navy Regulations, but then I suppose we Americans pride ourselves on our high state of civilization. Article 10 set forth in Exhibit 27 provides "Places where prisoners of war are held shall be controlled and guarded by guards under the supervision of a naval officer".

Exhibits 28 and 34 further set forth standing orders regarding prisoners of war.

The testimony of Mr. Sanagi proves that these were Naval Regulations, standing orders and were issued to all naval units and were used by all naval units during the war. See his answers to questions 26, 39, 41, 46, 47, 48, 53, 125 and 126.

The judge advocate didn't even educe any evidence in this connection and his statement on page 8 of his opening statement: "The prosecution will establish that when the accused took over the command of the Fourth Fleet there were no existing orders with regard to the treatment or protection of prisoners of war, etc." was not established but quite to the contrary Hague Convention, Geneva Prisoners of War Convention, Rules of Land Warfare, Wartime International Law Manual and further detailed instructions such as Article 10 (see Exhibit 27) were all a part of Japanese Navy Regulations and orders which all Japanese naval personnel were required to obey. That in rare instances they did not obey them is understandable by any man with common sense. These were sporadic incidents such as occurred on June 20, 1944 and July 20, 1944 at Truk but the incident of June 20, 1944 was not made clear even at the trial of Asano, Ueno, and others and the testimony is still in conflict even today (see testimony of Ueno and Asano at this trial) and Admiral Hara did not find out about it until Asano told him only what he then wanted to tell him in August of 1946. See testimony of Admiral Hara in 43rd day of the trial.

Not until September 1944 did Admiral Hara find out about the July 20, 1944 incident (See testimony of Hara on 43rd day of the trial).

You members of the commission have observed Admiral Hara these many days during his trial. I cannot but feel that you will agree with me that even today Hara, Chuichi is an admiral, if not in name, in bearing appearance, deportment and language.

Admiral Hara testified on the 43rd day of the trial that it was his mature, deliberate and considered judgment that when in September 1944 he heard that Surgeon Captain Iwanami had executed two prisoners at the hospital that an investigation would accomplish nothing further, and because of the critical situation at Truk it might well prove disastrous. He further testified that he resolved that there would be no recurrence of such an incident and there <u>was</u> <u>no</u> such recurrence at Truk.

Furthermore, he did reprimand Iwanami and cautioned all cognizant commanding officers at this conference. See Hara's answer to question 139 which reads in part as follows: "I addressed the conference as follows and my instructions were in substance as follows: Truk is facing imminent death at the present moment. Two months more however and the food situation will be eased and the defenses will be completed. If cognizant commanders will see to it that the personnel under them do not excite themselves and they act with fortitude and resolution and that they retain the resolution to act righteously and that they fight with true courage. It is not my policy that illegal unlawful acts be done to weak prisoners of war or that food be procured from natives, et cetera. In particular you as cognizant commanders will not talk about prisoners of war in a manner to provocate your subordinates. That is the substance of what I told them".

We say the Commander in Chief did take action upon learning about the July 20, 1944 incident which occurred at the hospital. What would you have done had you been Admiral Hara?

It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character and training of his troops are important factors in such cases. See Yamashita case and Rules of Land Warfare Field Manual 27-10 United States Army.

The Commander in Chief, Admiral Hara put it squarely up to the cognizant commanding officers. The guard unit had been designated as the place of confinement for prisoners of war on Truk. Admiral Hara testified to the scope of the authority and responsibility of the Commanding Officer of the Guard Unit in answer to question 61. He testified as follows: "Similar to the captain of a ship, he had full authority and a complete organization therefore in accordance with Naval Regulations the Commanding Officer had the absolute responsibility in regard to the fulfillment of the duties of the Guard Unit; to see that the Naval Guard Unit was functioning to its fullest capacity, that it carried out the duties assigned, and he also had full responsibility in regard to education, training, morale, and military discipline of the subordinates and personnel under his command".

The duties of a captain or the commanding officer of a guard unit are set forth in Exhibit 29. If there was neglect of duty it was here on the part of the commanding officer of the Forty-first Naval Guard Unit.

It makes sense to charge the commanding officer with neglect of duty when his duty is so clearly set forth as is the duty of the commanding officer of the guard unit. You can, in his case see how such neglect might be the <u>proximate cause</u> of the injury complained of.

In 38 Am. Jr. "Negligence" section 2 legal negligence is defined as "actionable negligence or negligence in the legal sense has been defined as a violation of duty to use care. It is doubtful, according to some authorities whether a more comprehensive definition is practicable. Negligence such as the law taken cognizance of in imposing liability depends upon the existence of various essential elements hereinafter discussed, such as a duty owed by the person charged, and an injury which follows the violation of that duty in such direct and natural sequence that the breach of duty can be said to be the proximate cause of the injury".

So when in January 1945 an American prisoner was captured Admiral Hara saw to it that the prisoner was sent to Japan. Both by order (it was in March or April of 1944 so Admiral Hara testified he ordered that any prisoners of war must be sent to the homeland) and by his efforts that the only prisoner captured after he found out that there had been an execution of two prisoners at the hospital was protected and was sent to the homeland in accordance with the orders of long standing from the Navy Minister and the Central authorities. In spite of the effective besiegeing of Truk and the disorganization of the Japanese forces on Truk because of the constant bombings to which they were subjected Admiral Hara did maintain control of his naval forces on Truk after July 1944.

Duties as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations". (In re Yamashita, Mr. Justice Murphy dissenting)

You members of the Commission have a most difficult task because from the time Admiral Hara arrived on Truk the American forces bombed and shelled Truk at will. The April 29, 1944 American carrier attack on Truk is said to have knocked out almost a hundred Japanese planes, destroyed approximately 400 buildings and six hangars and put an end to Truk as a Japanese naval base. From then on it was routine for American planes to bomb Truk. Only the admitable spirit of Admiral Hara kept Truk in existence. His plan of defense of Truk included counter-measures in the event that Truk was invaded.

Admiral Hara is not charged with personally participating in any of the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him.

Co-counsel have pointed out that the evidence is clear on the above facts. Hara did not even know about any of these incidents until long after they occurred. It is simply alleged that Admiral Hara unlawfully disregarded and failed to discharge his duty as Commander in Chief of the Fourth Fleet to control the operations of the members of his command permitting them to commit the acts of atrocity. (Co-counsel have argued the use of and the significance of the word "permitting".) The element of personal culpability has been absolutely disregarded both in the charge and in the evidence.

The judge advocate says that "neither knowledge or wilfullness is an essential element of the crime with which the accused is charged."

In all crimes there must be criminal intent and personal culpability.

That there were atrocities inflicted upon helpless people by persons under the command of the accused is undeniable. That just punishment should be meted out to all those responsible for criminal acts of this nature is beyond dispute. But this is not the problem in this case. The persons responsible for the criminal acts have been punished.

We are here concerned with justice to a defeated enemy commander. Our responsibility is both lofty and difficult. You members of the commission of a victorious nation are still sitting in judgment upon the military strategy and actions of the defeated enemy and by your conclusions you are to determine the criminal liability of the enemy commander, Vice Admiral Hara.

His life and liberty are made to depend upon your will. Objective and realistic norms of conduct should be used in forming your judgment as to deviations from duty. For the principles of justice are substantial and eternal and nowhere else in all the world is there such a great concern that justice be done in the trial and punishment of men, that is of all men, whether they be citizens of the United States of America or not, for our philisppby is one of universal law.

Great and Fair is She our land

By
William Watson.

Great and Fair is She our Land
High of heart and strong of hand

- - - - - - - - - - - - - - - - -

Power unseen, before whose eyes,
Nation fall and nations rise,
Grant she climb not to her goal
All forgetful of the Soul!
Firm on honor be she found,
Justice armed and mercy crowned,

- - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - -

Let her hold a light on high
Men unborn may travel by.
Mightor still she then shall stand,
Moulded by thy secret hand,
Power Eternal, at whose call
Nations rise and nations fall!

We ask that you find Hara, Chuichi, former vice admiral, Imperial Japanese Navy not guilty and that you do acquit him.

Respectfully,

Martin Emilius Carlson

Martin Emilius Carlson,
Commander, USNR.

KK (9)

INDEX TO JUDGE ADVOCATE'S CLOSING ARGUMENT

JUDGE ADVOCATE'S CLOSING ARGUMENT

Delivered by:

Lieutenant David Bolton, USN,
Judge Advocate.

The lengthy arguments of defense counsel, minutely detailed in some respects, and hopelessly vague and general in others, have consumed many hours of presentation; and yet they failed to crystallize a single fact which can support any substantial doubt as to the guilt of the accused. Despite the fog and smoke of many words and conjectures of defense counsel, the essential facts remain clear and plainly visible. Facts have a uniquely resilient quality; they are indestructible. And while words may tend to conceal them, facts cannot be destroyed and they cannot be erased, even by time and the able untiring efforts of a battery of defense counsel. It is more appropriately of facts, rather than destiny, that we can say, in the words of Fitzgerald, "The moving ~~hand~~ finger writes, and having writ, moves on. Nor all your piety nor wit, shall lure it back to cancel half a line, nor all your tears wash out a word of it".

What are the essential and inescapable facts of this case? Briefly - they are: 1. the accused had a duty, an affirmative duty to control his subordinates and to protect prisoners of war and others. 2. He disregarded and failed to discharge that duty. He failed to take such measures as were within his power and appropriate in the circumstances to control his subordinates and to protect prisoners of war, etc. This is the essence of the offenses with which the accused is charged, and none of the subtlety or wit of the accused or his counsel has succeeded in concealing the fundamental facts which disclose his guilt of these offenses.

Some confusion may have been created as to specific incidents charged, or as to the nature of the duty of the accused in reference to certain of these incidents, but the nature of the fundamental duty and the accused's failure to perform that duty has remained untouched and undisturbed by all the evidence and arguments presented by defense.

In deference to these lengthy defense arguments, a summary of the applicable law and a detailed analysis of the facts presented by both prosecution and defense is justified and desirable at this time.

The applicable law in the instant case is the law and customs of war. These are written and unwritten rules of conduct which are binding upon all civilized nations and people. The principles upon which these rules are based ~~is~~ are succinctly set forth in the War Department Basic Field Manual (Rules of Land Warfare, FM 27-10), as follows:

"Among the so-called unwritten rules or laws of war are three interdependent basic principles that underlie all of the other rules of laws of civilized warfare, both written and unwritten, and form the general guide for conduct where no more specific rule applies, to wit:

a. The principle of military necessity, under which, subject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel submission of the enemy with the least possible expenditure of time, life, and money;

b. The principles of humanity, prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war; and

c. The principles of chivalry, which denounces and forbids resort to dishonorable means, expedients, or conduct."

I. BRIEF ANALYSIS OF THE CHARGE AND SPECIFICATIONS

The accused Hara, Chuichi, former vice admiral of the Imperial Japanese Navy, is charged with violation of the law and customs of war. The violation of the law and customs of war is set forth in two specifications. These offenses occurred during the period when the accused was the Commander in Chief of the Fourth Fleet, from February 23, 1944 to September 2, 1945, at a time when a state of war existed between the

United States of America, its allies and dependencies, and the Imperial Japanese Empire.

The first specification alleges that the accused unlawfully disregarded and failed to discharge his duty as the Commander in Chief of the Fourth Fleet, to control the operations of members of his command and persons subject to his control and supervision, permitting them to commit the illegal acts, the specified war crimes set forth in subparagraphs (a) through (l). The duty set forth in this specification is the duty to control the operations of members of his command and persons subject to his control and supervision. The accused Hara is charged with having unlawfully disregarded and failed to discharge this duty in that he permitted these members of his command and persons subject to his control and supervision, to torture, abuse, inhumanely treat and kill American prisoners of war, British nationals, a Chinese national, and residents of various islands. It is alleged and the prosecution has proved that at the times and in the incidents alleged, within the period when the accused was Commander in Chief of the Fourth Fleet, 7 American prisoners of war, and 211 other persons were brutally killed, and an additional 7 persons were tortured, abused and inhumanely treated. The prosecution has proved that these vicious crimes were committed by members of the accused's command and persons subject to his control and supervision.

The second specification alleges that the accused unlawfully disregarded and failed to discharge his duty as the Commander in Chief of the Fourth Fleet, to take such measures as were within his power and appropriate in the circumstances, to protect, as it was his duty to do, American prisoners of war, held captive by the armed forces of Japan under his command and subject to his control and supervision, and residents of Nauru Island and Ocean Island, then residing at said Nauru Island and Ocean Island occupied by armed forces of Japan under his command and subject to his control and supervision, in that he permitted the unlawful torture, abuse, inhumane treatment and killing of said prisoners of war and said residents of Nauru Island and Ocean Island. The gravamen of this specification is that the accused unlawfully disregarded and failed to discharge his duty to protect these persons. The acts and incidents set forth in the subparagraphs of this specification are the same acts and incidents set forth in specification 1, except that subparagraphs (f), (i), (j) and (k) which appear in specification 1 are omitted from specification 2.

II. DUTY TO CONTROL SUBORDINATES AND TO PROTECT PRISONERS OF WAR AND CIVILIANS IN OCCUPIED TERRITORY.

A. Existence of the Duty to Control Subordinates (Factual and Legal Analysis)

The evidence is uncontroverted that the accused was the Commander in Chief of the Fourth Fleet from February 23, 1944 to September 2, 1945 when he surrendered the armed forces under his command. The evidence is also

uncontroverted and is specifically admitted by the accused in his testimony (on the forty-first day of trial) that at the times of each of the incidents alleged, the commanding officers and each of the units involved were subordinate, and in fact were directly subordinate, to the accused. On or about March 10, 1944 Admiral Masuda and the Sixty-second Naval Guard Unit on Jaluit were directly subordinate to the accused. On or about June 20, 1944 Rear Admiral Asano and the Forty-first Naval Guard Unit at Truk were directly subordinate to the accused. On or about July 20, 1944 Captain Iwanami and the Fourth Naval Hospital at Truk were directly subordinate to the accused. On or about August 28, 1944 Captain Harada and the Fourth Naval Construction Department at Truk were directly subordinate to the accused. In September 1944, and on or about December 23, 1944 Captain Soeda and the Sixty-seventh Naval Guard Unit at Nauru were directly subordinate to the accused. On or about April 8, 1945, April 13, 1945, and August 10, 1945, Rear Admiral Masuda and the Sixty-second Naval Guard Unit were directly subordinate to the accused. On or about August 20, 1945 the Sixty-seventh Naval Guard Unit, a detachment of which was on Ocean Island, was directly subordinate to the accused. (The detachment was of course a part of and directly subordinate to the Sixty-seventh Naval Guard Unit.) In each of the incidents set forth in Specification 1, the commanding officer and/or personnel of the units directly participated in the incidents:

In the incident set forth in subparagraph (a), Rear Admiral Masuda and naval personnel of the Sixty-second Guard Unit at Jaluit.

In incident (b) former Captain Asano and naval personnel of the Forty-first Guard Unit at Truk.

In incident (c) former Captain Asano and naval personnel of the Forty-first Guard Unit at Truk.

In incident (d) former Captain Asano and naval personnel of the Forty-first Guard Unit at Truk.

In incident (e) Captain Iwanami and naval personnel of the Fourth Naval Hospital at Truk.

In incident (f) naval civil guards of the Fourth Naval Construction Department, and a civilian employee of the Fourth Fleet at Truk, Army Kempeitai who apparently were not under the control of the accused were also directly involved in this incident.

Defense counsel have spent much time in discussion and treatment of this aspect of the incident. But the incident is itself so trivial that I will merely point out the fact that naval civil guards of the Fourth Construction Department participated in the incident (Exhibit 13, pages 11, 12, 13, 14, 17, 20, 27, 30, 31), and that Ishiwara, a civilian employee of the Fourth Fleet Headquarters was apparently in charge of these naval civil guards (Exhibit 13, pages 24, 29, 33.)

In incidents (g) and (h), naval personnel of the Sixty-seventh Naval Garrison Unit at Nauru.

In incidents (i), (j) and (k), Rear Admiral Masuda was directly involved. In this incident unlike the Jaluit incident set forth in subparagraph (a) in which naval personnel carried out Admiral Masuda's orders, certain army officers, Major Furuki and Captain Inoue, stationed at Jaluit also directly participated in these incidents.

The evidence as to the relation between these officers and Admiral Masuda is somewhat contradictory. The accused Hara contends that the army unit stationed on Jaluit Atoll was not under the command of the Fourth Fleet, but was under the command of the 31st Army.

The testimony of all the military personnel on Jaluit is in direct contradiction of this testimony by Hara. The testimony of all such personnel discloses that the Second Detachment of the First South Seas Detachment was directly subordinate to the Sixty-second Naval Guard Unit, and came under the direct command of Admiral Masuda when it arrived on Jaluit. (Control over the natives and civil government of Jaluit apparently occurred later by specific orders from the Commander in Chief of the Fourth Fleet.)

The testimony of Major Furuki (Testimony of Ogden, 7th day, q. 200; and Exhibit 12) discloses that he was attached on Jaluit to the Sixty-second Naval Guard Unit, that he was head of the defense section, and that his commanding officer was Rear Admiral Masuda.

The testimony of Morikawa (Testimony of Ogden as defense witness, 31st day, q. 58) discloses that immediately upon its arrival on Jaluit the South Seas Detachment under Major Furuki "was attached to the Sixty-second Naval Guard Unit, commanded by Admiral Masuda, and therefore under the command of Admiral Masuda".

Captain Inoue who was stationed at Jaluit states in Exhibit 10 that he was commander of the Military Police of the Jaluit Defense Garrison and that Admiral Masuda was the commanding officer of the Jaluit Defense Garrison. He also states, (Testimony of Ogden, 7th day, q. 3), that on Jaluit "the Naval Police were composed of the Navy and Army Police".

Similarly the testimony of former naval lieutenant Sakuda discloses the command organization on Jaluit during the period from May 1945 to the middle of August 1945 as follows: "Major Furuki as a member of the defense garrison worked as head of the defense section under Admiral Masuda and I worked under Major Furuki." (Testimony of Ogden, 7th day, q. 192 (q. 10).

Similarly the testimony of other witnesses at the Furuki and Inoue trials, presented during the course of the sixth and seventh days of the instant trial, indicate that the army unit was attached to the Sixty-second Naval Guard Unit and was under the command of Masuda.

However, regardless of whether or not the army unit was attached to the Sixty-second Naval Guard Unit, the responsibility of the accused Hara with regard to these incidents remains the same. The evidence is clear and uncontroverted that Admiral Masuda was a direct subordinate of the accused Hara, that Masuda ordered the execution of the prisoners of war on March 10, 1944 (incident (a)); that later he ordered the investigations and executions of the natives and publicized the executions; and that Masuda, the direct subordinate of the accused, was in fact in command of the army personnel who assisted in these later executions.

Brief note can be taken of the fallacious argument of defense counsel that since the analagous "judgments" of the military commissions on the specifications in the Inoue and Furuki cases (the findings on specifications 1 and 2 of Charge II in the Inoue case, and on specification 5 of Charge II of the Furuki case) which charged violations of the law and customs of war by punishment as spies without trial, were subsequently set aside, such incidents cannot be charged or considered proved against the accused as a violation of the law and customs of war. Counsel is in error. (a) In the first place, as a clear legal matter, a commander can be held guilty of violation of the law and customs of war for neglect to control his subordinates, even if the acts committed by such subordinates merely consist of violations of local or domestic law. The findings and charges of murder of these natives by Inoue and Furuki were not set aside. (b) However even disregarding this principle, the argument of the accused is fallacious. The findings and actions on these specifications and charges were set aside not because of disapproval of either the factual findings or the legal basis for such convictions. They were set aside as clearly shown by the action of the Secretary of the Navy, and the opinions of the Judge Advocate General, because of naval policy that except under unusual aggravated circumstances, an accused should not stand convicted of two offenses growing out of but one act. This setting aside of one of the two proven and legally proper findings, is an administrative or in some instances a clemency function, and it is not the exercise of a judicial function. Its effect therefore to vitiate a legally proper finding and judgment is

open to serious doubt and the better view is clearly to assign to such action a reasonable evaluation of the meaning and purpose of such administrative action. Such reasonable evaluation of the excerpted evidence, Exhibits 9 and 11, leaves no ground for reasonable doubt that Inoue and Furuki punished these natives as spies without trial by killing them. (c) In addition it should be pointed out that independently of these findings which were set aside, the remaining evidence produced before the commission proves the commission of these violations of the law and customs of war. Exhibits 9 and 11, and the oral testimony of Ogden from the record of the Inoue and Furuki trials, establishes beyond reasonable doubt that the natives were killed, that such killing was in punishment for alleged spying, that the executions were carried out by order of Admiral Masuda, and that the natives were not afforded a trial, an inherent right and protection guaranteed by the law and customs of war.

In incident (1) naval personnel of the Sixty-seventh Naval Garrison Unit, stationed at Ocean Island, were directly involved.

Personnel involved in each of these incidents were members of the command and persons subject to the control and supervision of the accused.

Under the law and customs of war, the accused had the clear and affirmative duty to control these members of his command and persons subject to his control and supervision.

The legal aspects of the duty of the accused as Commander in Chief of the Fourth Fleet, to control his subordinates (members of his command and persons subject to his control and supervision) are so elementary that they warrant little discussion. This duty to control subordinates has been dealt with in numerous international law cases, both in international claim cases and in war crimes cases.

In international law generally, the doctrine is well-recognized. To cite illustration -- Article 1 of the Annex to the Fourth Hague Convention lays down as a condition which an armed force must fulfill in order to be accorded the rights of a lawful belligerent, that it must "be commanded by a person responsible for his subordinates!" (36 Stat. 2295) Similarly, Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels,

"must see that the above Articles are properly carried out." (36 Stat. 2389) And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in arries in the field, makes it "the duty of the commander-in-chief of the belligerent armies to provide for the details of the execution of the foregoing articles (of the convention) as well as for unseen cases." And Article 43 of the Annex to the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory "shall take all the measures in his power to restore, and ensure, as far as possible, public order, and safety, while respecting, unless absolutely prevented, the laws in force in the country." (In re Yamashita 327 U.S. 1, 10). Similarly, see the international arbitration cases: "Case of Jeannaud (1880); 3 Moore, International Arbitrations (1898) 3000; Case of The Zafiro (1910); 5 Hackworth, Digest of International Law (1943) 707."

Military law and practice in this regard is equally well-established. It has been said: "The commanding general of troops who commit violations of the laws of war, not only cannot escape responsibility therefore, but he is specifically charged therewith." - (Review by Staff J.A. 9 Dec. 1945, USA v. Yamashita). "Rules of Land Warfare" (FM 27-10) paragraph 347, reads as follows: "The commanders under whose authority they (acts in violation of the laws of war) are committed by their troops, may be punished by the belligerent into whose hands they fall." And as stated in Vol. I, Staff, J.A. 24 Dec. 1945, in the case of USA v. Isamu Morimoto, Lt. Col., et al, "It is further established (FM 101-5) that 'the commander is responsible... for all that his unit does or fails to do. He cannot shift this responsibility to his staff or to subordinate commanders.'"

Counsel for the accused have argued that criminal punishment for neglect of command responsibility has no foundation in the principles of international law and is ex post facto in application. Counsel is mistaken. The doctrine that violation of international law (and violation of the law and customs of war) is criminally punishable, is long standing. Resp Publica v. De Longchamps, 1 Dall. 110 (Pa. 1784); Ex Parte Quirin, 317 U.S. 1. Similarly the responsibility of a commanding officer to control his

subordinates and prevent brutal atrocities and mistreatment of prisoners of war and civilians, has long been recognized by all civilized nations. Ergo, although prior to the conclusion of World War II, criminal punishment was not frequently applied to commanding officers who did not order or condone, but solely neglected their responsibility to prevent the commission of illegal acts by their subordinates, the principles and law upon which such criminal punishment is based were well established and recognized in international law. During the two decades between World War I and World War II, much progress has been made in the crystallization and recognition among civilized nations, of the principles of international law and of criminal responsibility under international law; but it should be noted that even at the close of World War I the majority of the Versailles Commission ("Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties") insisted upon application of the "doctrine of negative criminality" (i.e., criminal responsibility for failure to prevent violations of laws and customs of war and humanity). Glueck, War Criminals, Their Prosecution and Punishment, p. 23. And apparently in one of the cases tried by the German courts, Generals Von Schack and Krushka were tried for having caused the deaths of prisoners of war through negligence. Glueck, op. cit. p. 188, fn. 24. The Yamashita case, and other war crimes cases following World War II, clearly corroborate the fact that such principles are well-established, and not ex post facto in application to criminal responsibility for violation of the law and customs of war.

That this duty to control which has its roots in military law and sound international law and practice, is a duty which entails a criminal responsibility for its violation, is evidenced by numerous cases which I will discuss subsequently on the subject of command responsibility as applied in war crimes trials.

B. Existence of the Duty to Protect Prisoners of War and Civilians in Occupied Territory (Factual and Legal Analysis)

The duty of the accused to protect prisoners of war and residents of the areas occupied by the armed forces under his command also stems from the responsibility of the accused as Commander in Chief of the Fourth Fleet. As Commander in Chief of the Fourth Fleet, he had the duty to protect prisoners of war held captive by the armed forces of Japan under his command. Incidents (a), (b), (c), (d), and (e) charge his failure to protect prisoners of war, In each of these incidents, American prisoners of war held captive by subordinate units of the Fourth Fleet, were killed or tortured by naval personnel who were members of the command and subject to the control and supervision of the accused.

As Commander in Chief of the Fourth Fleet, the accused had the duty to protect residents of the areas occupied by armed forces of Japan under his command and subject to his control and supervision. Subparagraphs (f), (g) and (h) deal with this aspect of the duty of the accused.

To avoid unnecessarily complicated arguments concerning the status of Truk and Jaluit as mandated territory (and therefore occupied territory under the existing military conditions), the incidents of mistreatment and killing of civilians on Truk and on Jaluit, which appear in Specification 1, subparagraphs (f), (i), (j), and (k) do not appear in Specification 2, which deals with the duty to protect.

The accused has contended that he did not have the responsibility to protect the native residents of Nauru and Ocean Islands. He argues that while these islands were occupied by military forces under his command, namely the Sixty-seventh Naval Garrison, the authority to deal with native matters was not derived from him but was derived directly from the Central Pacific Area Fleet. This argument although astute is fundamentally defective.

In the first place the testimony of the accused himself directly establishes that at all the times mentioned in the specification, the Sixty-seventh Naval Garrison was a direct subordinate of the accused. It is clear therefore that under international law the accused had the duty to control these subordinates and this duty inevitably carries with it the duty to protect civilians from illegal torture and killing by these subordinates; for the accused had the affirmative duty to take such measures within his power and appropriate in the circumstances to prevent these subordinates from mistreating or killing civilians in an occupied territory.

This duty is one founded and established in international law and even if Japanese military policy sought to avoid this responsibility it would be completely ineffective, for national law or practice cannot absolve an individual of his responsibilities under international law. Glueck, op. cit., Re legalization of atrocities, 137, 197, 206, 217, 218, 232, 234.

In the second place, while the accused contends that the authority of the Sixty-seventh Naval Garrison over matters involving natives was derived from an order of the Central Pacific Area Fleet, the fact remains that at the time of each of the incidents charged, the Central Pacific Area Fleet had ceased to exist and the accused was the immediate superior in command of the Sixty-seventh Naval Garrison Unit, and responsible for their control, as well as supervision of their discipline, morals, education, and training.

Analysis of the facts, discloses:

that the Sixty-seventh Naval Garrison Unit was and continued to be a subordinate unit of the Fourth Fleet; that the accused remained responsible for the operations of this Sixty-seventh Naval Garrison; that under international as well as national law he was responsible for their military discipline, morale, education, and training; that the Central Pacific Area Fleet (which the accused contends had taken over some of the responsibility to control the operations of this Sixty-seventh Naval

Garrison Unit with regard to matters involving natives) only existed from March to July or August of 1944; that at this time the units which had been taken from the Fourth Fleet and directly attached to the Central Pacific Area Fleet reverted to the command of the accused (as admitted by his testimony and that of his subordinates); that similarly even if some of the responsibility of the accused with regard to his control of the operations of this unit were assumed by the Central Pacific Area Fleet, and even if some of the functions of supervision and control of certain operations of the Sixty-seventh Naval Garrison Unit had come directly under the Central Pacific Area Fleet, with the collapse of the Central Pacific Area Fleet such responsibility and such functions also reverted to the Commander in Chief of the Fourth Fleet who was the direct superior in command of this Sixty-seventh Naval Garrison Unit; that all of the incidents charged in subparagraphs (f), (g), and (h) of Specification 2 occurred after the collapse of the Central Pacific Area Fleet, at a time when the accused was the only direct superior in command to the Sixty-seventh Naval Garrison Unit.

The duty under the law and customs of war, to protect prisoners of war and civilian populations in occupied areas, has been specifically expressed in various treaty provisions.

Article 4 of the Annex to the Fourth Hague Convention of October 18, 1907 on Laws and Customs of War on Land, provides: "Prisoners of war are in the power of the hostile government, but not of the individual or corps who capture them. They must be humanely treated...." Similarly, the later Geneva Prisoners of War Convention of 27 July 1929, restates this fundamental doctrine of the law and customs of war in Article 2 as follows: "Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited."

With regard to civilian populations, Articles 43 and 46 of the Annex to the Fourth Hague Convention provide:

"Article 43. - The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

"Article 46. - Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
Private property cannot be confiscated."

The argument by Mr. Takano as to alleged duplicity of Specifications 1 and 2 has previously been answered by the judge advocate and passed upon by the commission, in its consideration of the objections to the charge and specifications.

Defense counsel Mr. Takano has argued, with regard to the duty to protect prisoners of war and civilians in occupied areas, that such duty was solely that of the commanding officer of the guard unit having immediate custody of the prisoner of war or in immediate control of the specific local area which is occupied. No such delimitation of responsibility exists in any provision or principle of international law.

Note with regard to protection of prisoners of war that while page 11 of Mr. Takano's argument quotes Article 18, para. 1 of the Geneva Prisoner of War Convention of 27 July 1929 as reading "Every camp of prisoners of war shall be placed under the command of the responsible officer" (underlining supplied). This provision as set forth in War Department Technical Manual 27-251, Treaties Governing Land Warfare reads "Every camp of prisoners of war shall be placed under the command of a responsible officer." (underlining supplied) The French version uses the general article "un".

With regard to protection of civilians in occupied territory, set forth in the Hague Convention, note that the use of the term "occupying state" (Article 55) in Section III of the Annex to the Fourth Hague Convetnion, which deals with "Military authority over the Territory of the Hostile State" indicates that the word occupant appearing throughout that section is not limited to the specific forces physically present in the occupied area.

The argument of defense counsel is basically fallacious. It has been rejected in numerous war crimes cases. The basis for such rejection is obvious. The duty to control subordinates and to protect prisoners of war is an affirmative duty and responsibility which international law places not only upon the subordinates who are in direct control of the prisoners or civilians, but also upon their superior officers in the chain of command. In this regard the duty to protect is similar to the duty to control which as I have previously indicated, with appropriate citation of law, is a responsibility which goes upward to the commander in chief of the armed forces and down to the lowest enlisted man. Each has a duty and responsibility under international law to "take such measures as are within his power and appropriate in the circumstances". The range of responsibility is clearly recognized in military law and in all military forces. The recognition of this in the Japanese armed forces is evidenced in the testimony of Tanaka as follows: "Everybody has a responsibility according

to their duties. So I was responsible when they were in the custody of the 41st Naval Guard Unit, my direct superiors also had responsibility for the supervision of them. The superior officers above him also have a responsibility for their supervision. Everyone had a responsibility according to their duties". (Testimony of Ogden, 31st day, q. 76 (q. 120)).

III. BREACH OF THE DUTY

It is alleged in Specification 1 that the accused unlawfully disregarded and failed to discharge his duty to control the operations of members of his command and persons subject to his control and supervision, and it is alleged in Specification 2 that he unlawfully disregarded and failed to discharge his duty to take such measures as were within his power and appropriate in the circumstances to protect American prisoners of war and civilian residents of occupied territory. In short, both specifications charge the accused with violation of the law and customs of war, by neglect of duty.

It is necessary in order to properly evaluate the evidence which has been presented before the Commission to consider at some length the nature of the charge of criminal neglect of duty.

> In view of the fact that the offenses charged against the accused are analagous, and close correlation exists between the specified breaches of duty, (as the incidents alleged in Specification 2 are identical with incidents alleged in Specification 1), both specifications will be discussed jointly throughout the remainder of the prosecution's argument. For practical purposes analysis of the pertinent evidence and law with regard to one specification is equally applicable to the other specifications.

A. Analysis of the concept of criminal neglect of duty.

1. Neglect of duty is a funiamental concept in criminal law.

The concept of criminal negligence or neglect of duty is well recognized in the domestic law of all civilized nations, as well as in international law.

> Even if no criminal responsibility for neglect of duty existed in Japanese law, this fact would be irrelevant, except perhaps in mitigation, for international law on the subject is well

settled, and international law is clearly controlling over domestic law, particularly as in the instant case where the duty and responsibility arises from such international law. (See Glueck's "War Criminals, Their Prosecution and Punishment", p. 44, 45, and Chapter 3, footnotes 25, 26, and 27).

It is interesting however to note briefly in passing that in the Japanese criminal law, the concept of criminal negligence is extensively developed. The following material from Sebald's translation and annotation of the Criminal Code of Japan (1936 edition) briefly presents some of the pertinent statutory material and case interpretations illustrative of the Japanese law of criminal negligence.

> Article 209 of the Japanese Criminal Code deals with every person who has wounded another person by negligence. The following annotation illustrates the application of this doctrine of criminal negligence and responsibility.
> "If the relation of cause and effect exists between negligence and an injury to another person, the crime of accidental wounding is always formed regardless of whether the negligence was the direct cause of the injury or not." - (39 Daishinin Hoketsu Shoraku 3956).
> "Even though negligence on the part of the offender was not the sole cause of accidental wounding, if it was part of the cause, he is guilty of the crime of accidental wounding."--(62 Daishinin Hoketsu Shoraku 7993).
> Similarly the annotations to Article 210, which applies to "every person who has caused the death of another person by negligence," present interestingly broad application of the concept.
> "If the relation of cause and effect exists between negligence and another person's death, the crime of causing death by negligence is complete irrespective of whether the relation was direct or indirect."--(38 Daishinin Hoketsu Shoraku 2848).
> Article 211, which authorized imprisonment of persons who have "failed to use requisite professional care and thereby killed or injured another person," is particularly pertinent to the instant case, and some of the annotated cases merit brief citation.
> "The administrative regulations for the control of persons employed in specially dangerous callings are intended to apply merely to such acts as in normal circumstances may cause danger. Therefore, even in the absence of express provisions to that effect, persons engaged in such callings should, in addition to and aside from such acts, strictly conform with the general degree of care that may legally or customarily be necessary. Consequently, even if they have conformed with all the requirements of the administrative regulations for the control of their operations, they cannot be said to have fully fulfilled all their professional obligations."--(57 Daishinin Hoketsu Shoraku 6978).

"The term 'professional care" within the meaning of Article 211 of the Criminal Code refers not merely to professional duties based on laws and regulations, but also to every occupation or callings pursued by contract, custom, or otherwise."--(62 Daishinin Hoketsu Shoraku 8038).

"A person engaged in a certain specific business or profession is obligated to use all proper care to obviate danger in view of the nature of such business or profession. Even though there is no express provision to that effect in laws and ordinances, it does not follow that he is therefore absolved from this obligation."--(2 Daishinin Hanreishu 287).

Chapter XXX which deals with crimes of desertion, contains numerous interesting annotated cases dealing with criminal responsibility for negligence. Articles 217, 218 and 219 under Chapter XXX deal with neglect of duty toward old, juvenile, sick or deformed persons, and these cases would appear to be analagous to the case of the disarmed, confined prisoners of war, for he is similarly helpless unless protected and safeguarded. Article 217 provides penal servitude for "every person who has deserted another person in need of assistance by reason of old age, juvenility, deformity, or illness." The broad application of the provision is shown by the following case:

"If a person living under the same roof with another person, because of sickness, is in such a state that he cannot live without assistance from such other person, the latter, even if not legally or contractually bound to support the former, is guilty of deserting a 'person in need of assistance by reason of .... illness' within the meaning of Article 217, if he fails to support and abandons the sick man."--(53 Daishinin Hoketsu Shoraku 5969).

Article 218 provides penal servitude for one who had deserted aged, juvenile, deformed or sick persons whom he is liable to protect, or "failed to give to such persons necessary protection for existence." Two cases cited thereunder are of interest:

"A person not bound to do so who has taken in a sick person and allowed such person to live with him is legally bound to protect him until protection is no longer required or another person comes forward to do so."--(5 Daishinin Hanreishu 387).

The following case is particularly interesting because it recognizes the fact that the duty to protect may exist in several persons, and that neglect of his duty by each such person is criminally punishable.

"The person liable to protect an aged, juvenile, deformed, or sick person within the meaning of Art. 218, par. 1 of the Criminal Code is not limited to the person primarily bound when there are several persons bound to furnish assistance, but includes those persons mentioned in Art. 955 of the Civil Code. If the person primarily bound fails to perform the duty, the person next in order is bound to furnish assistance."--(82 Daishinin Hoketsu Shoraku 1052).

Article 219 proves that: "Every person who has killed or injured another person by committing a crime of the preceding two Articles shall, by comparing the above punishments and the punishment for wounding, be punished with the graver punishment." The following case is annoted thereunder:
"In order that a person may be considered to have deliberately committed the crime of desertion causing death, it suffices if he was aware that he was failing to give such protection as may be required by an aged, juvenile, deformed or sick person. It is not necessary that he should have a conscious desire of endangering the life, body, or health of such person."--(7 Daishinin Hanreishu 291).

The foregoing cases and articles illustrating the Japanese law have been cited not for the purpose of establishing specific provisions of the Japanese Criminal law under which the accused would have been punishable for his neglect of duty in the instant case. The presence or absence of Japanese criminal provisions for the punishment of the accused is clearly irrelevant to the issue of the guilt of the accused, for the crime charged is violation of the law and customs of war. The Japanese law with regard to criminal negligence has been cited to apprise the Commission of the fact that even under Japanese law the concept of criminal responsibility for neglect of duty is well established and broadly applied.

2. A brief analysis of the law of criminal negligence as presented by leading American cases and authorities.

a. Elements of criminal negligence and discussion of terminology.

The Commission is thoroughly conversant with the concept of criminal negligence. It requires (a) the existence of a duty, (b) a breach of that duty by nonfeasance or misfeasance which under all the circumstances warrants application of criminal liability. In certain cases there is a further requirement that either injury to others or consequent criminal acts result from such negligence.

With regard to (a), the evidence of a duty, the Commission can have no difficulty for as the judge advocate has pointed out, the existence of such duty is definitely established and well-recognized in international law. With regard to (b), which I have described as "a breach of that duty by nonfeasance or misfeasance which under all the circumstances warrants application of criminal liability," the Commission may encounter some difficulty because of certain vague terms which appear frequently throughout the law of negligence.

I refer to such terms as "gross negligence," "wanton negligence," "aggravated negligence," "recklessness," etc., which appear even in a number of the modern decisions and statutes. It is sometimes said that "gross negligence" or "wanton negligence" etc., must be found in order to impose certain types of civil or criminal responsibility. Such terms have been generally discarded as fallacious and impractical of application.

The modern law in this regard is set forth in 38 American Jurisprudence, 688, 689, as follows:

> (V. Degree of Negligence; Wilful and Wanton Acts. 43 Generally.) "The concept of degrees of negligence, designated as 'slight', 'ordinary,' and 'gross' which appears to have been introduced into the common law from the civil law as it was expounded by scholastic jurists of the Middle Ages, is disapproved by the majority of modern common-law authorities as impracticable, and inconsistent with the theory upon which liability for negligence is imposed..... As hereinbefore observed, however, no more and no less than ordinary care under the circumstances of the case is required. Accordingly, there is no sound basis for dividing derelictions of the duty to use care into slight, ordinary, or gross negligence. Moreover, the difficulty in defining the different degrees of negligence and fixing their limits renders them impracticable and unsafe for use in determining legal rights and liabilities. Negligence, whatever epithet is given to characterize it, is failure to bestow the care and skill which the situation demands; and it is better to call it simply 'negligence'."

While the terms "gross negligence," "wanton negligence," etc., are discarded by the better authorities, it is generally conceded that, in the absence of statutory regulations denouncing certain acts or omissions as criminal, a somewhat higher degree of negligence is required to establish criminal negligence than is required for civil liability for negligence.

> 26 American Jurisprudence, 299, discussing Homicides, states: "The authorities are agreed, in the absence of statutory regulations denouncing certain acts as criminal, that in order to impose criminal liability for a homicide caused by negligence, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue."
> Similarly, Michael and Wechsler in "The Rationale of the Law of Homicide, 37 Columbia Law Review, 712," note that: "For the most part, the negligence that is criminal is distinguished from the negligence that is not, only by the addition of an epithet such as 'gross,' 'culpable,' 'wanton,' or 'reckless', as opposed to 'ordinary' or 'slight.' What, if anything, these epithets mean remains for the most part undetermined. But the differences between two negligence acts that are significant for this purpose, must reside in the degree of the risk of injury they unjustifiably create, the character of the injury or the actor's awareness of the risk. There is authority for the view that the character and degree of risk distinguishes criminal from non-criminal negligence, whereas awareness of the risk distinguishes murder from manslaughter."

In the instant case we are concerned with a criminal charge of neglect of duty, that is to say, a general charge of criminal negligence.

> It should be pointed out that since the accused has not been charged with negligent homicide, but has been charged with neglect of duty, the continued use in certain statutes and decisions with regard to negligent homicide, of terms such as "gross negligence," "wanton negligence," etc., is not a matter of primary concern to us. But a word of caution should be voiced with regard to interpretation of language cited from cases dealing with homicide by negligence.

Negligence being a breach of duty, depends upon the nature of the duty charged. In negligent homicide the duty involved is the duty to avoid unnecessary danger or risk. Therefore, in negligent homicide cases, emphasis necessarily falls upon the nature and degree of risk created, and according to some authorities, (26 Am. Jur., 299, fn. 8, p. 300) therefore the awareness or knowledge, actual or imputed, of the nature of the risk created is a necessary element of the charge of negligent homicide.

> This apparently stems from the theory that the accused, in order to be held criminally responsible, should be shown to have been aware of his duty -- and that therefore it must be shown that he was aware of the risk, in order to show that he knew he had the duty to avoid injuring the persons whom he placed in danger by his negligent act.

Of course, according to other authorities, notably former Chief Justice Holmes, "The Common Law," p. 51, et seq., awareness of risk is unnecessary, both in murder and a fortiori in manslaughter. Similarly, Commonwealth v. Chance, 172 Mass. 245, 54 N.E. 551; Commonwealth v. Pierce, 138 Mass. 165. But knowledge of the danger may convert what would otherwise be manslaughter into murder. Com. v. Pierce, 138 Mass. 165, 180. See Wechsler & Michael, op. cit. 722.

In the instant case, the accused is not charged with negligent homicide, but is charged with neglect of duty to control his subordinates, and neglect of duty to protect prisoners of war, as required by the law and customs of war.

> The evidence before the Commission has established that the accused should have known and did know of the existence of his duty, to control his subordinates and to protect prisoners of war etc., and as will be subsequently pointed out, it is not necessary for the

prosecution to establish, except in aggravation, that the accused actually or "constructively" knew that by his neglect of this duty he was exposing specific prisoners of war to specific danger of injury or death.

(1) Injury and proximate cause.

The arguments of defense counsel evidence a confusion as to the required elements of a charge of criminal negligence, and to forestall similar confusion on the part of the Commission, it is perhaps desirable to point out certain fundamental mistakes in the alleged citation of law by defense counsel. Both Commander Carlson (p. 7) and Mr. Takano (p. 16) argue that the doctrine of proximate cause must be applied, and that the prosecution to establish the criminal neglect of duty of the accused must show that the injury to the prisoners of war was "proximately caused" by the neglect of duty by the accused.

Like certain other citations of counsel, the citation of Mr. Takano, on p. 16, from American Jurisprudence, is completely inapplicable to the law of criminal negligence. The citation itself demonstrates that it has nothing to do with the law of criminal negligence. Throughout the cited portion it refers to the plaintiff and the defendant, and thereby directly establishes that this cited portion on alleged burden of proof has nothing whatsoever to do with the criminal law of negligence.

The doctrine of proximate cause is one which has application in the field of civil liability, not the field of criminal liability.

Wharton's Criminal Law, 12th Edition. does not even bother to discuss the doctrine as such in his treatment of criminal negligence, and the index merely refers one to Chapter VII, which deals with causal connection between offender and offense. Similarly in Miller on Criminal Law, the doctrine is not even mentioned in the index - the reason for this is that the doctrine of proximate cause, like the doctrine of zone of danger is primarily one created in the effort to reasonably limit the class of persons who owe the duty, or to whom one has the duty, to use due care. Such a doctrine is largely inapplicable in criminal law for the majority of instances of criminal negligence arise out of a situation where the duty is specific, having been established by specific law or custom. It is therefore unnecessary by any doctrine like proximate cause, to limit the class of persons who owe the duty of due care or to whom such duty is owed, since such class of persons is clearly ascertainable from the nature of the duty and the described class of persons owing such duty.

- Civil and criminal law

The principles and functions of these two fields are completely different and distinct. The plaintiff in a civil action is an individual seeking to enforce his own rights. He is seeking to recover monetary damages for injuries which he claims he received as a result of the negligence of the defendant. Obviously he cannot recover unless he proves that he personally was injured by the negligence of the defendant.

> Hence in actions for civil liability for negligence it is essential that in addition to the existence of a duty, and a breach of that duty, it must be established that the plaintiff was injured by that breach of duty. Since the plaintiff is seeking to enforce his own rights, and is not acting as the representative of society as a whole, even if the defendant has through his negligence caused damages and injury to hundreds of other persons, the plaintiff can only recover for those damages which he personally sustained from the negligence of the defendant.

Not only is the basic function of civil and criminal negligence actions different but also the quantum or degree of proof required is different. A lesser degree of proof is required in civil actions than in criminal actions and hence it should be expected that in civil actions, the liability and zone of responsibility of the defendant should be decreased accordingly. The doctrine of proximate cause is one method of limiting this zone of responsibility.

> The social function of establishing and maintaining certain standards of conduct is adequately protected by the field of criminal law - including criminal negligence, and hence society can properly limit the zone of civil and economic responsibility without materially jeopardizing the socially desired norms.

(2) Causal connection between the neglect of duty of the accused and the torture, abuse, inhumane treatment and killing of prisoners of war, etc.

Criminal neglect of duty can, in the absence of specific statutory requirements, exist without any finding that actual injury resulted from such criminal negligence.

> I need merely cite in this regard some of the pertinent military law which establishes such criminal offenses. For example - a guard on military duty, who neglects his duty by sleeping on watch, or by leaving his post of duty, is subject to criminal punishment, including the punishment of death, even though in fact no injury results to others and no person enters the guarded area.

However in the instant case the question of injury is presented by the allegation in the specifications that the accused permitted the unlawful torture, abuse, inhumane treatment and killing of the prisoners of war, etc. Whether the accused by his neglect of duty, his disregard and failure to discharge his duty, to control his subordinates, and to protect prisoners of war, etc. "permitted" the incidents set forth in Specifications 1 and 2, is a question of fact which the Commission must determine in the light of all the evidence. The evidence is clear in this regard and should not present the slightest obstacles to the determination of the guilt of the accused.

> The degree of causality expressed in the term "permitting" would appear to be clearly less than that envisaged under ordinary criminal negligence requirements of causality as usually presented under statutes requiring proof of definite causal connection between the negligence of accused and, in those cases, necessary resultant injury.
>
> Just what the limitations of causation are in these cases is difficult to determine aside from specific fact situations. As Michael and Wechsler, Rationale of the Law of Homicide, 37 Col. L.R. 724, have stated, "Indeed it may in general be ventured that the only firm thread on which the causality cases can be strung is that of probability. As has often been said the question usually presented is not whether there is cause in fact, but rather whether there should be liability for results in fact caused."

The essential requirements of causal connection between the omission of the accused and the resultant incidents is irrefutably established by the evidence presented to the Commission. This is so apparent that it hardly merits discussion. The accused failed to control the very people he had the specific duty to control - namely members of his command and persons subject to his control and supervision. The accused failed to protect the very people he had the specific duty to protect, namely the prisoners of war and civilians in the occupied territory. The very people he failed to control, directly injured the very people he failed to protect. This is the clearest form of causal connection in a case of neglect of duty.

If he had controlled the persons he had the duty to control, or if he had protected the persons he had the duty to protect, the incidents alleged in paragraphs (a) through (l) of Specification 1 would not have occurred. (a) If he had done, all that he could reasonably be required to do in performance of these duties, the incidents would not have occurred and (b) if any incidents had occurred he would not be liable for he would have performed his duty to the utmost of his ability required under the circumstances.

> Some of the measures the accused could reasonably be required to do under the existing circumstances, and which he failed to perform will be presented during the course of the factual analysis of the neglect of duty by the accused, as set forth in Section III B of this argument.

The very duties he was under envisaged the very kind of incidents which occurred, that is to say, the duty under international law to control his subordinates and the duty to protect prisoners of war etc. were specifically and obviously intended to prevent illegal acts by his subordinates and the injuries to prisoners of war etc. The recognition of probability of injury of this nature was envisaged in the very duty prescribed, and the accused therefore cannot successfully contend that he did not know or should not have known that failure to perform his duty to control his subordinates or failure to perform his duty to protect prisoners of war etc. would result in the danger of the mistreatment and killing of prisoners of war etc. which occurred.

> It is pertinent in this regard to point out that public officers cannot escape their responsibilities by pleading ignorance of their duty or of the facts. As stated by Brigadier General Hoover in his review of the Kilian case: "I think it is fundamental, in our conception of military responsibility, that a commanding officer can be guilty of neglect of duty through permitting things to occur within his command although he may not know that they are occurring."

(3) Duty of Supervision and Control of Subordinates.

> As a corrolary of his argument that there must be proximate causation and from the definition in Black's Law Dictionary of the word "permit", Mr. Takano has argued that the incidents charged resulted from acts by subordinates and that the acts of those subordinates are too remote to the accused to warrant application of criminal liability for the neglect of duty by the accused, unless the accused actually ordered or knew of and acquiesced in the criminal act. The question of knowledge will be discussed separately but the question of duty of supervision of subordinates which is appropriately discussed at this point necessarily somewhat overlaps this field.

The evidence which will subsequently be discussed, establishes that the incidents alleged in the specifications were committed by the subordinates of the accused, and that the accused failed to take the necessary and appropriate measures to control these subordinates and to protect prisoners of war and civilians in occupied territory. In short as I have indicated, the acts which occurred, the illegal acts which his duty was designed to prevent, occurred because the accused neglected that duty. Clearly the fact that these acts were committed by his subordinates rather than by the accused cannot relieve the accused of liability for his failure to perform that duty.

The broad nature of the duty of the accused under the law and customs of war is implicit in the language of the Supreme Court of the United States in the Yamashita case:

> "It is evidence that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect .... prisoners of war from brutality would largely be defeated if the commander .... 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....These provisions plainly imposed .... an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war..."

Obviously, the nature of a military organization is such that this duty must be performed through subordinate officers, and criminal liability of the accused necessarily arises from his failure to control and to supervise these subordinates.

The accused has cited from Clark and Marshall some of the general law with regard to the responsibility of a principal or master for the acts of his agent or servant, and has argued that the law requires "knowledge or acquiescence" in the acts of the servant or agent in order to establish criminal responsibility. While this is frequently true with regard to the master-servant or principal-agent relationship, it is true in specific cases only because of the nature of the duty in those cases.

But it is equally true that under the master-servant relationship the master can be held criminally responsible for negligent acts of the servant when the master has failed to exercise due supervision.

> It should be noted that military command carries with it vast powers of control, much beyond the powers of control in the master-servant relationship. Accordingly, military command carries with it a correspondingly greater duty to control and supervise, and commensurate responsibility for failure to properly exercise such powers of control and supervision. But even under the master-servant relationship or principal-agent relationship where the nature of the duty warrants it, criminal liability is imposed upon the master or principal for the acts of his servant.

Wharton expresses this responsibility under criminal law, as follows: "Wherever, also, due supervision could have prevented the mischief, then the master neglecting such supervision is indictable." (Wharton's Criminal Law, 12th Ed., Sec. 174, and see cases cited fn. 7.)

Criminal liability for negligence in failure to properly control or supervise is also noted, and annotated, in Miller on Criminal Law, p. 246, et sec., as follows:

> "(b) Criminal liability of principal for act of agent upon ground of negligence. In certain cases, in exception to the general rule, the principal is held criminally liable for the acts of his agent, upon the ground of negligence. Com. v. Morgan, 107 Mass. 199, 202. Thus, in case of libel, an exceptional responsibility has been held to rest upon book sellers and publishers respecting publications issued from their establishments in the regular course of business: and they have been held criminally liable in such cases, although the particular acts of sale or publication were done without their knowledge...In this country the liability of the principal in such cases has been placed on the ground of negligence, or of culpable neglect to exercise proper care and supervision over subordinates in the principal's employ... So in cases of nuisance, a large responsibility has been recognized. Thus it has been held that the directors of a company are liable for a common nuisance consisting in polluting the waters of a river, although they were ignorant of what had been done by their servants, to whom they had given authority to conduct their works. Rex v. Medley, 6 Car & P 292. In Rex v. Dixon, 3 Maule & S, 11, a conviction for selling unwholesome bread on proof that the foreman by mistake had put too much alum in it, was sustained on the ground that, if a person employs a servant to use an ingredient, the unrestricted use of which is noxious, and does not restrain him in its use, the employer is liable, if it be used in excess, for failure to apply proper caution against its misuse."

From the foregoing it is clear as I have previously stated that where the nature of the duty warrants it, criminal liability is even imposed upon the master or principal for the acts of a servant or agent. The instant case is exceptional in this sense, for the nature of the duty is exceptional. It is a duty which carries broad responsibility for the acts of ones subordinates, because the duty specifically envisages the control of such subordinates in order to prevent violence and atrocities upon prisoners of war and civilians in occupied territory. The very duty requires control, and the failure by the accused to "take such measures within his power and appropriate in the circumstances" to protect prisoners of war etc, is the very failure which the law and customs of war makes punishable. Where such duty to control subordinates exists neglect of that duty is clearly punishable.

In discussion of principal's liability for acts of agent (Miller on Criminal Law, p. 247), it is specifically noted "Moreover, it is in the power of the Legislature to make a man criminally responsible for the acts of other persons whom he has failed to control." Miller cites the following cases:

> Carrol v. State, 63 Md. 551, 3A 29; State v. Kittele, 110 NC 560, 15 SE 103, 15 LRA 694, 28 Am.St.Rep. 698; People v. Lundell, 136 Mich. 303, 99 NW 12; People v. Roby, 52 Mich 577, 18 NW 365, 50 Am.Rep. 270; State v. Hartfield, 24 Wis. 60; Com. v. Emmons, 98 Mass. 6; People v. Roby, 52 Mich. 577, 18 NW 365, 50 Am.Rep. 270; People v. Blake, 52 Mich. 566, 18 NW 360; Koecker v. People, 91 Ill. 491; State v. Denoon, 31 W.Va. 122, 5 SE 315; George v. Gobey, 128 Mass. 289, 35 Am.Rep. 376; Com. v. Kelley, 140 Mass. 441, 5 NE 834; Boatright v. State, 77 Ga. 717; Carroll v. State, 63 Md. 551, 3 A. 29; Mogler v. State, 47 Ark. 109, 14 SW 473; State v. Kittelle, 110 NC 560, 15 SE 103, 15 LRA 694, 28 Am. St.Rep. 698.

b. Accused is not charged with murder, but is charged with neglect of duty and therefore there is no requirement that prosecution prove knowledge of any incident before its occurrence.

The fact that the accused has been charged with neglect of duty is significant. It means that the prosecution need not prove that the accused ordered the commission of any of the incidents which resulted from his neglect of duty. It means that the prosecution need not specifically

prove that the accused knew of the impending commission of any incident before it occurred. This latter is a material consideration, for the defense has sought to confuse the Commission into believing that it is necessary to prove, either directly or circumstantially that the accused had actual or constructive knowledge of the impending commission of some incident before that incident occurred.

> If the accused had been charged with murder it would have been necessary for the prosecution to prove that the accused either personally committed the crime, ordered the crimes, or aided or abetted in the commission of the crimes.

If the accused had known or from the circumstances should have known of the intended commission of any of the incidents before the incidents had occurred, and in view of his official capacity took no steps to prevent the commission of such specific incidents, he could be charged with murder, for it would clearly constitute a case of <u>wilful omission</u> of duty, and not a mere case of neglect of duty.

> 26 American Jurisprudence, Homicide, Section 205, p. 295, states: "Where death ensues in consequence of a wilful omission of duty it is said to constitute murder."
>
> Similarly, in Section 207, it is stated: "If neglect is wilful, as where a man wilfully abandons his wife to the destruction of the elements when he can save her, <u>or if the neglect or exposure is of a dangerous kind</u>, as where a child is left in a remote place where it is not liable to be found, or where a husband criminally neglects to shelter his wife when he is able to do so and knowingly leaves her to perish, the homicide is deemed to be murder. The same principle may be applied to persons who stand in other relations, such as the keeper of a prison or asylum who undertakes, to the exclusion of others, to take care of inmates, or to a master of a servant or apprentices of tender years who is under the control and domination of the master." (26 Am. Jur., Homicide, 295, citing Gibson v. Com. 106 Ky. 360, 50 S.W. 532, Wharton's Criminal Law, 12th Ed., p. 693, Sec. 459, and Annotations 61 LRA 292, 293).
>
> Similarly, Michael & Wechsler, Rationale of Law of Homicide, 37 Columbia Law Review 721 states: "There is authority for the view that the character and degree of risk distinguish criminal from non-criminal negligence, whereas awareness of the risk distinguishes murder from manslaughter."

But since the accused has not been charged with murder, proof of knowledge is unnecessary, except in aggravation. The law of criminal negligence is clear in this regard. Proof of knowledge is not required.

The offense of criminal negligence or neglect of duty which we are here concerned with is tersly defined in the following definition of a criminal negligent offense, as set forth in Wharton's Criminal Law, 12th Edition, Sec. 162: "A negligent offense is an offense which ensues from a defective discharge of a duty, which defect could have been avoided by the exercise, by the offender, of that care which is usual, under similar circumstances, with prudent persons of the same class."

Miller on Criminal Law cites the following cases of criminal negligence in which it was held that proof of knowledge was not required.

> People v. Roby, 52 Mich. 577, 18 NW 365, 50 Am. Rep. 270; People v. Blake, 52 Mich. 566, 18 NW 360; Neocker v. People, 91 Ill. 494; State v. Denoon, 31 W.Va. 122, 5 SE 315; George v. Gobey, 128 Mass. 289, 35 Am.Rep. 376; Com. v. Kelley, 140 Mass. 441, 5 NE 834; Boatright v. State, 77 Ga. 717; Carroll v. State, 63 Md. 551, 3 A. 29; Negler v. State, 47 Ark. 109, 14 S.W. 473; State v. Kittello, 110 NC 560, 15 SE 103, 15 LRA 694, 28 Am.St. Rep. 698.

Similarly the cases and text previously cited (Miller, op. cit.) concerning criminal negligence based on master-servant relationship, also establish that knowledge is not required to establish criminal liability for neglect of duty. With regard to criminal actions for libel, booksellers and publishers have been held criminally liable "although the particular acts of sale or publication were done without their knowledge". Similarly with regard to nuisances. Similarly with regard to permitting minors in a pool room. (De Zarn v. Comm., 195 Ky. 686, 243 S.W. 921, 21 Mich. L. Rev. 463). Similarly with regard to sale of liquor to a minor.

> Even under a statute making it an offense to "knowingly" sell intoxicating liquor to a minor, without the written consent of the parent or guardian, it was held that the owner of a saloon could be convicted for a sale by his bartender though he was absent from the city at the time of the sale, and had no knowledge of it, and had instructed his bartender not to sell liquor to minors nor to allow them in the saloon. State v. Constatino, 43 Wash. 102, 86 P. 384, 117 Am.St.Rep. 1043.

> From the foregoing case it is clear that the law can provide that an individual be criminally liable for an act done without his knowledge or even for an act done contrary to his specific instruction.

The accused has argued that even if specific knowledge is not required, there should at least be a requirement that the accused should have known or have probable grounds to have known of the incidents and injuries which resulted from his negligence. Here again the accused is mistaken in his interpretation of the law. It is specifically noted in

Wharton on Criminal Law, Sec. 210, "It is not necessary to constitute negligence that the specific damage should have been foreseen as probable."

> The section reads as follows: "210. To negligent causation, not necessary that damage should have been foreseen. It is not necessary to constitute negligence, that the specific damage should have been foreseen as probable. If it were, and if the offending party resorted to the inculpatory act to produce the particular end, then the case is one of malice, not of negligence. On the other hand, it is of the essence of negligence that the injury caused by it should not have been foreseen as likely to arise in the immediate case. The consequences of negligence are almost invariably surprises. A man may be negligent in a particular matter a thousand times without mischief; yet, though the chances of mischief is only one to a thousand, we would rightly hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held, that it is no defense that a particular injurious consequence is 'improbably,' and 'not to be reasonably expected,' if it really appear that it naturally followed from the negligence under examination." (Citing numerous cases from the courts of Alabama, Connecticut, Delaware, Florida, Georgia, Iowa, Kentucky, Massachusetts, New York, South Carolina, and Texas.)

While the law does not require forseeability of specific damage or injury in order to create criminal negligence where accused has failed to perform a duty, the nature of the instant case and the instant duty and the background of the development of that duty is such, that it clearly establishes the foreseeability of the kind of incidents which in fact occurred, due to the failure of the accused to perform his duty to control his subordinates and protect prisoners of war etc.

> Every person familiar with the law of war and the history of war knows that war tends to brutalize and that only by careful deliberate persistent effort can atrocities and individual war crimes be prevented. The accused, because of his military experience and knowledge of the law of war, must have known this. Therefore the accused should have foreseen that his neglect of duty would produce the very kind of injuries and incidents which he is here charged with. He should have known that failure to control his subordinates might and would result in violence and atrocities against prisoners of war, etc.

The foregoing brief discussion of the law clearly establishes that criminal negligence may be found even though there is no proof that the accused knew or should have known of the incidents which followed or accompanied his neglect of duty.

.In concluding this phase of the argument, brief mention should again be made of the argument of defense counsel, that the word "permit" requires proof of knowledge. I have previously referred to and refuted this argument in my discussion of (3) Duty of Supervision and Control of Subordinates. But it should briefly be referred to here with regard to the specific question of knowledge.

The argument of the accused that the word "permit" requires proof of knowledge is fallacious. The charge in the Yamashita case included this identical term "permitting" them to commit brutal atrocities. There was no charge that Yamashita "knowingly" permitted them, and no finding that he knew of any of the incidents charged and "knowingly permitted them". The accused was found guilty and the Supreme Court of the United States upheld the conviction, noting fn. 4, that "the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such violation".

> In the Yamashita case, the judgment of the Commission does not contain any finding that the accused knew, or should have known of the incidents which occurred under his command. The entire judgment is based upon his failure to perform his duty of command responsibility. (The judgment of the Commission is cited in my subsequent discussion of Analagous Cases in the field of Command Responsibility (IV)).

Similarly, in the Kilian case, infra, while the words, "knowingly permitted" were charged, the Commission expressly found the charge proved except for the word "knowingly", etc. The accused was found guilty. The Assistant Judge Advocate, in a memorandum review of this case, specifically concurred in by the Judge Advocate General of the U. S. Army, states: "It is fundamental in our conception of military responsibility, that a commanding officer can be guilty of neglect of duty through permitting improper things to occur within his command although he may not know that they are occurring".

c. Analagous problems in the field of negligent homicide.

It is perhaps desirable to look at the field of negligent homicide for discussion of analagous problems with regard to breach of duty.

> But in doing so we must bear in mind (a) that the offenses charged against the accused in the instant case are neglect of duty to control subordinates, and neglect of duty to protect prisoners of war etc., and (b) that the view (of some of the authorities in the field of negligent homicide) that actual or implied awareness of danger is an element of negligent homicide, is not applicable in the instant case.

Discussing negligent homicide, Wharton's Criminal Law, 12th Edition, p. 690, states:

"Omission in discharge of a lawful duty indictable. We have already seen that an omission is not the basis of penal action unless it constitutes a defect in the discharge of a responsibility specially imposed. And the converse is true, that when a lawful duty is imposed upon a party, then an omission on his part in the discharge of such duty, which affects injuriously the party to whom the duty is owed, is an indictable offense."

Discussing negligent homicide, 26 American Jurisprudence, 297, states:

"....The law holds everyone who is so situated that his acts may endanger the life of another bound to exercise caution, and holds him responsible criminally for the loss of life consequent to his failure to exercise the proper degree of caution. As a general rule, the negligent performance of a duty, or the negligent omission to perform a duty, is regarded as an unlawful act; and if it results in homicide, it is homicide in the commission of an unlawful act for which the perpetrator is criminally liable, without regard to the fact that he did not intend to kill the deceased and even though there is no criminal or mischievous intention whatever."

Application of this law of negligent homicide to the failure to perform an affirmative duty throws some light on the neglect of duty charged against the accused Hara. 26 American Jurisprudence 294, states: "As a general rule, where one person owed to another either a legal or a contractual duty, an omission to perform that duty resulting in the death of persons to whom the duty was owing renders the person charged with the performance of such duty guilty of a culpable homicide.

"As to the grade of a homicide which results from an omission of duty the authorities disclose a considerable difference of opinion. Some cases state that the delinquent is guilty of murder. Other cases state that he is guilty of manslaughter,-- involuntary manslaughter according to some opinions. Still other cases assert that the grade depends upon the circumstances, emphasis being put upon the intent of the negligent person. Occasionally, even, the opinion has been expressed that the question depends upon the distinction between negligence and wilful omission. Where death ensues in consequence of a wilful omission of duty, it is said to constitute murder; and where it ensues in consequence of the negligent omission of a duty, it is said to be manslaughter." (26 Am. Jur. 294).

The duty to provide food, shelter, clothing, etc., is analagous to the duty of the accused to protect prisoners of war etc. With regard to neglect of these duties, 26 American Jurisprudence 295, citing appropriate cases, states:

"Neglect on the part of one charged with the duty of supporting another to provide the necessary food, clothing, and shelter to the dependent, resulting in the latter's illness and death, renders the person upon whom the duty rests guilty at least of manslaughter. Thus, a parent who, having the means at his

command, negligently fails to provide his child with food, clothing, or shelter is guilty of manslaughter, where the child dies in consequence thereof. A similar liability is imposed upon a husband who negligently fails to furnish his wife with such necessities. If the neglect is wilful, as where a man wilfully abandons his wife to the destruction of the elements when he can save her, or if the neglect or exposure is of a dangerous kind, as where a child is left in a remote place where it is not liable to be found, or where a husband criminally neglects to shelter his wife when he is able to do so and knowingly leaves her to perish, the homicide is deemed to be murder. The same principle may be applied to persons who stand in other relations, such as the keeper of a prison or asylum who undertakes, to the exclusion of others, to take care of inmates or to a master of a servant or apprentice of tender years who is under the control and domination of the master."

Similarly, Wharton's Criminal Law, dealing with negligent homicide, states: "Section 484. The doing an act, or the imperfect performance of a duty, toward a person who is helpless, which naturally and ordinarily leads to the death of such person, is murder, if death or grievous bodily harm is intended; and manslaughter, if the cause is negligence."

"Section 485. ..... Independently of these statutes, it may be generally stated that for a parent, having special charge of an infant child, so culpably to neglect it that death ensues as a consequence of such neglect, is manslaughter if death or grievous bodily harm were not intended; and murder if there was an intent to inflict death or grievous bodily harm."

d. Accused is not charged with absolute responsibility, but is charged with neglect of command responsibility.

The prosecution does not seek to apply any doctrine of absolute responsibility. There are some theorists who contend that a commanding officer has an absolute responsibility for the acts of his subordinates, that regardless of what preventive measures he takes, regardless of how much care, effort, instruction, control, discipline, investigation, supervision, or punishment he effectuates, he nevertheless has an absolute criminal responsibility for the acts of his subordinates; and the bare proof of commission of war crimes by members under his command and persons subject to his control and supervision, is sufficient to establish criminal liability. The prosecution does not subscribe to this theory. The prosecution subscribes to the principle of command responsibility, not the theory of absolute responsibility.

Criminal responsibility for neglect of duty arising from command responsibility has been applied in trials before numerous United States Military Commissions; in the famous Yamashita case, reviewed by the U. S. Supreme Court in 327 U. S. 1; in the case of United States of America versus Lieutenant General Homma; in the case of United States of America versus Colonel Fujishige, et al; in the case of United States of America versus Takeshi Kono; in the case against Vice Admiral Ohsugi; in the case of United States of America versus Captain Minoru Toyama, et al; and numerous other cases. Similarly, the doctrine has been applied in Chinese War Crimes Military Tribunals, viz: the case of Takashe Sakai, 27 August 1946. It should be apparent that despite previous erroneous contentions of defense counsel, we are not here dealing with or applying any new or untried legal concept of international or military law.

The prosecution believes that the position of command is a position of grave social responsibility. It carries with it important and inescapable duties. Every vigilance and every effort must be expended to perform those duties. The Commission being composed of military men knows the extent of that duty in military law.

The very first Article for the Government of the Navy is illustrative of the nature of that duty. It provides: "The commanders of all fleets, squadrons, naval stations, and vessels belonging to the Navy, are required to show in themselves a good example of virtue, honor, patriotism and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and any such commander who offends against this Article shall be punished as a court-martial may direct. (R.S. sec. 1624, art. 1)."

This is not a mere administrative duty, it is a penal duty. Article 1 of the Articles for the Government of the Navy itself specifically provides that "any such commander who offends against this Article shall be punished as a court-martial may direct."

Nor is this merely a provision of military law. It is a fundamental principle in all law dealing with public office. I need merely cite briefly in this regard, the following language from Wharton's Criminal Law, 12th Edition, Vol. II, page 2243:

"A man who undertakes a public office is bound to know the law, and to possess himself diligently of all the facts necessary to enable him in a given case to act prudently and rightly. If he does not, and through mistake of law or of fact be guilty of negligence, he commits a penal offense. This seems hard law, but it is essential to the safety of the State. If an officer, enjoying the emoluments of office and wielding its occasionally vast power, should be able to plead in defense of negligence that he mistook either law or fact, not only is there no negligence that could be punished, but ignorance and incompetency would be the masks under which all sorts of official misconduct could be sheltered. In municipal trusts, for instance, to plunder triumphantly, it would be only necessary to secure officers conveniently ignorant and inert. But this the policy of the law does not permit. It says: 'You are bound to know the law and the facts; and if you lean on advisers or subalterns who mislead you, this is the very thing for which you are to be punished.' It is necessary for the State that it should have at its command knowledge and vigilance in the guardians of its liberties and its treasures. In those holding public office, want of either knowledge or of vigilance, resulting in negligence, is a penal offense."

In view of the limitations of time, the foregoing must suffice as a discussion of some of the law of criminal negligence which can be effectively focussed upon the factual problems involved in determining whether the accused breached his duty under the law and customs of war to control his subordinates and protect prisoners of war etc.

B. Proof of Breach of Duty to control subordinates and to protect prisoners of war and civilians in the occupied territory.

1. Factual nature of this question.

The question of breach of this duty brings us to the crux of the instant case. This is largely a factual question in the determination of which the Commission must consider all the circumstances, all the acts and omissions of the accused, examined in the light of his solemn duty and responsibility as Commander in Chief. The Commission must then determine whether the proved facts establish beyond a reasonable doubt that the accused disregarded and failed to discharge his duty under the law and customs of war to control the operations of members of his command and persons subject to his control and supervision as charged in Specification 1, and similarly with regard to Specification 2, whether the accused did in fact disregard and fail to discharge his duty to take such measures as were within his power and appropriate in the circumstances

to protect prisoners of war and civilians in the occupied territory, Nauru and Ocean Islands.

The prosecution has the burden of proof. What this burden consists of, is tersly stated in Naval Courts and Boards, Section 154, as follows:

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

2. Prisoners of war and civilians in the occupied territory were unlawfully tortured, abused, inhumanely treated, and killed by subordinates of the accused.

The evidence is conclusive, and the accused has not even made any serious effort to challenge the fact that all of the incidents alleged did in fact occur, and that prisoners of war and civilians in the occupied territory were unlawfully tortured, abused, inhumanely treated and killed. Subordinates of the accused (members of his command and persons subject to his control and supervision) committed and directly participated in the commission of each of these incidents.

The evidence establishes that subordinates of the accused participated in the incidents set forth in the subparagraphs of Specification 1, as follows:

Incident (a), Rear Admiral Masuda and naval personnel of the Sixty-second Naval Guard Unit at Jaluit.

Incident (b), former Captain Asano and naval personnel of the Forty-first Naval Guard Unit at Truk.

Incident (c), former Captain Asano and naval personnel of the Forty-first Naval Guard Unit at Truk.

Incident (d), former Captain Asano and naval personnel of the Forty-first Naval Guard Unit at Truk.

Incident (e), Captain Iwanami and naval personnel of the Fourth Naval Hospital at Truk.

Incident (f), naval civil guards of the Fourth Naval Construction Department, and a civilian employee of the Fourth Fleet, Court Martial Department (See Exhibits 52 and 53), at Truk.

As I have pointed out previously army personnel were also involved in this incident. In view of the numerous other incidents, the minor importance of this incident does not warrant detailed argument. The evidence indicates that Ishiwara of the Fourth Fleet, Court Martial Department, was in charge of the naval civil guards (Exh. 13, pages 24, 29, 33), but it is immaterial whether the army kempeitai sergeant or whether Ishiwara was in charge of the naval civil guards who participated. If the naval civilian personnel present were under the orders of this army kempeitai, it was due to orders which these personnel had received from their superiors in the Fourth Naval Construction Department, as to the naval civil guards, and from the Fourth Fleet, Court Martial Department, as to Ishiwara. While the navy could delegate its authority, it could not delegate its responsibility. And the fact remains that their personnel did participate in the incident, and that they were under orders of the Fourth Naval Construction Department, and that in fact the Fourth Fleet and the accused were aware of the investigation.

Incident (g), naval personnel of the Sixty-seventh Naval Garrison Unit at Nauru.

Incident (h), naval personnel of the Sixty-seventh Naval Garrison Unit at Nauru.

Incident (i), Rear Admiral Masuda, commanding officer of the Sixty-second Naval Guard Unit at Jaluit.

As to the status of Captain Inoue, IJA, the accused has contended that he was not part of his command. However, the testimony of all the personnel on Jaluit indicates that the South Seas Detachment was attached to the Sixty-second Naval Guard Unit at Jaluit. This would indicate that Inoue was a member of the command of Hara. In addition it should be noted that Captain Inoue, who carried out the orders of Masuda was under the command, control, and supervision of Rear Admiral Masuda, and therefore since Hara was Masuda's immediate superior, Inoue was subject to the control and supervision of Hara.

Incident (j), Rear Admiral Masuda, commanding officer of the Sixty-second Naval Guard Unit at Jaluit. And also Captain Inoue, IJA, as previously indicated.

Incident (k), Rear Admiral Masuda, commanding officer of the Sixty-second Naval Guard Unit at Jaluit. And also Major Furuki, IJA, who was attached to the Sixty-second Naval Guard Unit.

Incident (l), Lieutenant Commander Susuki and other naval personnel of the detachment of the Sixty-seventh Naval Garrison Unit stationed at Ocean Island.

In all twelve of the incidents charged, with the exception of incident (f), the evidence is clear and uncontradicted that subordinates of the

accused were in charge of and directly ordered the commission of the incidents. In these incidents a total of 218 persons were brutally killed.

3. Proof of Neglect of duty.

a. Did the accused do everything reasonable required to prevent such incidents and to carry out his affirmative duty to control his subordinates, and to protect prisoners of war and civilians in the occupied territory?

The mere occurrence of these incidents, while circumstantial evidence of the guilt of the accused, is not in and of itself conclusive proof of the guilt of the accused. If the Commission finds in its examination and evaluation of that evidence, that the accused, in the light of his position of command responsibility, his own background and capacities, and all the other existing factors and circumstances, did everything reasonably possible and reasonably required to prevent the occurrence of any incidents, to punish individual offenders, and to prevent further outrages, then the Commission should find the accused not guilty of the Charge and Specifications.

> As it was stated in the case of United States of America versus Masaharu Homma, Vol. I, Staff J.A. 18 Feb. 1946, "Presumably a showing that accused did everything reasonably possible to punish individual offenders and prevent further outrages would be a complete defense to a charge such as is here presented." Similarly, in the SCAP Review of the same case, SCAP Reviews, 1946, 5 March 1946, it was stated: "If the evidence showed utilization by the accused of all available food, medicine, and other facilities at his disposal in caring for prisoners and internees, and the bending of every reasonable effort to protect them from the excesses of his own troops, he could not be held penally responsible for their hardships or deaths."

But, if the Commission finds, as the prosecution believes it has proved beyond a reasonable doubt, that the accused failed to perform this duty, that he neglected his duty as set forth in the specifications, then the accused must be found guilty.

b. Brief summary of pertinent testimony and documentary data.

The factual data, testimonial and documentary, presented by the prosecution and the defense has been voluminous. Defense counsel have devoted more than 30 pages to their version of this evidence, and in view of the numerous incidents and the quantum of evidence against the accused, their concerted efforts to attack the evidence is not surprising. Nor should it be surprising that the analysis and evaluation of the evidence by the defense should differ materially from the analysis and evaluation of this evidence by the prosecution.

The defense counsel have attempted to create out of the evidence an idyllic illusion of innocence. The difficulties which they have faced in this effort should not be overlooked. The facts do not lend themselves well to such fanciful creations. And the defense have been faced with the difficult task of attempting to reconcile two inconsistent and conflicting positions. They have had to attempt on the one hand to persuade the Commission of the lily-white innocence of the accused and his complete lack of knowledge of the numerous unconcealed, publicly discussed and publicly performed incidents of mistreatment and heinously brutal murders of prisoners of war, and on the other hand to persuade the Commission of the alertness and vigilance of the accused in his performance of his duty to control his subordinates and of his duty to protect prisoners of war.

It is not surprising therefore that they overlook the most significant aspects of the evidence and that they attempt to distort and unreasonably evaluate much of the evidence, and that in their efforts to reconcile the inconsistent position of the accused they frequently find themselves in similarly inconsistent positions.

The following illustration is but one of many of the somewhat inconsistent positions which the defense has been forced to adopt. Mr. Takano in discussing the "Ruka" incident (Spec. 1, para. (g)), explicitly rejects the testimony of the natives, and speaks of the "unreliability" of testimony of the native witnesses, and he seeks to persuade the Commission that they must adopt the version of the platoon commander of the Sixty-seventh Naval Guard Unit. But only a few incidents later (Spec. 1, para. (l)) both Commander Carlson and Mr. Takano are busily seeking to persuade the Commission that they must accept the

the testimony of a single native Kabunare, as reliable (on what was in that case a relatively minor aspect since Suzuki admitted that he ordered the killing of all the natives) and that the Commission should reject the version of the Commanding Officer of the Sixty-seventh Naval Guard Unit which was corroborated by numerous other members of the unit.

It seems that with regard to the question of reliability of the testimony of native witnesses, as in other instances where they find themselves in inconsistent positions, defense counsel try to persuade us to mount the same horse and ride off in opposite directions.

The following is a brief summary and analysis of pertinent and significant evidence produced during the course of this extensive trial.

(1.) The fact that the incidents occurred.

Circumstantially one of the strongest evidences of the neglect of duty by the accused is the fact that these incidents occurred. The accused, under the Japanese military regulations, as well as under international law, was responsible to control and to supervise the military discipline, morale, training and education of the fleet under his command. It is certainly conceivable that even in a well supervised command an isolated incident might occur, but as in the instant case where a total of twelve incidents occurred, four of them on the very island on which the accused had his headquarters, the circumstantial evidence of neglect of duty is very strong and extremely difficult to rebut.

In the instant case the circumstantial evidence derived from the very fact that the incidents occurred, is doubly strong by virtue of the fact that the units and personnel involved were directly subordinate to the accused, and that many of the personnel involved were high ranking responsible officers. The question posed by this fact is - would these subordinates, particularly those located on the same island as the accused, have dared to commit these public executions if they did not have reason to believe that the accused condoned or approved of such action by his subordinates? Even if these subordinates mistakenly believed that the accused condoned the brutal execution of prisoners of war, the existence of such a belief is definite evidence that the accused neglected his duty

to control and supervise these subordinates.

(2.) Background and experience of the accused.

The accused, Vice Admiral Hara, was an experienced commanding officer with broad military experience and knowledge of international law. Prior to his tour of duty as Commander in Chief of the Fourth Fleet he was Commandant of a vast air training command, and in this capacity, according to his testimony, he trained his personnel in international law and the law and customs of war. By virtue of this fact, and his earlier command in occupied China, there can be no reasonable doubt of the fact that the accused knew of his affirmative duty under the law and customs of war to control his subordinates and to protect prisoners of war and civilians in occupied territory. As a commanding officer experienced in such military operations he knew or should have known, that among combat troops war conditions breed strong animosity toward prisoners of war, and that constant instructions, orders, and vigilant supervision were the only means of assuring conformance to international law with regard to the treatment of prisoners of war. This necessity for vigilance in the protection of prisoners of war, should have been doubly evident because of the very fact that the conditions at Truk were so difficult, and there was therefore more reason to anticipate violent retribution against prisoners of war.

(3.) Action by the accused to control his subordinates and to protect prisoners of war and civilians in the occupied territory.

(a.) Failure to issue orders or instructions regarding treatment of prisoners of war is clear proof that the accused disregarded his affirmative duty to control his subordinates and protect prisoners of war and civilians.

Defense counsel CDR Carlson has argued that there were standing orders and dramatically contended that this fact was brought out by the defense "much to the embarrassment of the judge advocate". If CDR Carlson is correct, and such standing orders existed, they were kept very secret. Not only were they kept secret from the officers and personnel who committed the incidents of mistreatment and killing, but they were also carefully kept secret from the Fourth Fleet staff officers and even from

Commanders in Chief of the Fourth Fleet. Vice Admiral Kobayashi, the immediate predecessor of the accused as Commander in Chief of the Fourth Fleet was asked Q. 34 "When you assumed command of the Fourth Fleet were there in existence any standing orders with regard to the protection or safeguarding of prisoners of war?" He testified "A. There were no regulations which specifically pertained to protection of prisoners of war...." He was asked "Q. 33 During the course of your tour of duty, did you ever issue any orders or instructions to any of your subordinates with regard to the treatment of prisoners of war?" He replied, "No". He was asked "Q. 36 Did you ever during your tour of duty receive any specific instructions with regard to the protecting or safeguarding of prisoners of war?" He answered, "A. I did not receive any orders specifically relating to the protection of prisoners of war....." (Testimony of VADM Kobayashi, 17th day).

Similarly Captain Inoue who served as senior staff officer under Vice Admiral Kobayashi, and also for three months served as senior staff officer under Hara testified that there were no standing orders or instructions and none were issued throughout his tour of duty with the Fourth Fleet, concerning the treatment of prisoners of war.

Captain Inoue testified (19th day) "Q. 45 Were there any existing orders or instructions concerning prisoners of war? A. No." "Q. 47 During your entire tour of duty, both before and during the time that Admiral Hara was Commander in Chief of the Fourth Fleet, did you ever see or receive any instructions regarding the treatment or safeguarding of prisoners of war? A. No." "Q. 48 To the best of your knowledge, throughout your tour of duty did the Fourth Fleet ever issue any such orders? A. No."

Similarly Captain Higuchi who was senior staff officer at the Fourth Base Force, and subsequently assistant senior staff officer of the Fourth Fleet throughout the tour of duty of Hara testified as follows: "Q. 43. During your tour of duty with the Fourth Base Force did you ever receive or see any orders issued by the Fourth Fleet concerning the treatment or handling of prisoners of war? A. I do not have such a recollection." "Q. 46. During your tour of duty as a staff officer of the Fourth Fleet, did you ever see any orders issued by the Fourth Fleet concerning the treatment or protection of prisoners of war? A. I do not recall seeing any."

Similarly see the testimony of Hara's chief of staff Sumikawa (20th day).

From the foregoing it is clear that there were no standing orders or instructions for the treatment of prisoners of war. It is also apparent from this testimony, not only that defense counsel must be confused as to what constitutes a standing order - for his argument indicates that he had reference to the Copies of the Geneva Prisoners of War Convention and Hague Convention, and to certain "Regulations" in the manuals of Japanese Naval Regulations; but it is also apparent that either the former Commander in Chief, and Senior Staff Officer Captain Higuchi did not even know that such regulations existed, or that they did not consider them instructions for the treatment of prisoners of war. Note that the regulations (Exhibit 27) do not contain any provision which affirmatively states that prisoners of war are not to be mistreated, or that they should be protected from inhumane treatment or that persons who mistreat them will be subjected to punishment.

It should also be noted that when counsel refers to Naval Regulations, in which these so-called Regulations for the Treatment of Prisoners of War are contained, he is referring to a vast voluminous work consisting of four large volumes. Volume IV in which these so-called regulations appear, itself consists of approximately 1,200 pages.

The information in these volumes with regard to treatment of prisoners of war was clearly not publicized or known. Even the prior commander in chief did not consider that there were any regulations for the treatment of prisoners of war. And these naval regulations were never implemented by any orders of the accused, ~~Hara~~ as he himself testified.

> Note: "Standing Orders" in the accepted military use of the term, means existing orders of general effect promulgated within the Command. Such orders must not be in conflict with general naval regulations, but may implement it. They are not deemed effective orders outside the limits of the command.

When the accused took command of the Fourth Fleet there were no standing orders or instructions in the Fourth Fleet with regard to treatment of prisoners of war. The accused did not personally undertake to handle prisoner of war matters. He did not assign the duty of supervision to any member of his staff. He did not issue orders or instructions to his subordinates concerning the treatment of prisoners of war.

Defense counsel CDR Carlson argues that after learning of the July incident at the September conference, the accused did take action and spoke at this meeting, cautioning all his cognizant commanding officers "...It is not my policy that illegal acts be done to weak prisoners of war, or that food be procured from natives,". But on what does counsel base this argument? - only upon the word of Hara the accused! And who corroborates Hara? - No one! Not one shred of evidence produced by the defense, not one word from any of the numerous cognizant officers and staff officers present at the conference. And who contradicts Hara? - Two witnesses who were completely unassociated and disinterested in that incident, and had no motive to lie about it - Hara's former chief of staff Sumikawa, and Captain Asano who was not involved in this July incident. Both Sumikawa and Asano definitely testified that the accused Hara did not make any statement after Iwanami told of the spearing of the prisoners of war. Even Iwanami and Higuchi were unwilling to go along with the accused's story on this point, and they said they had no recollection.

Clearly any reasonable evaluation of the evidence must discard the story of the accused in this regard, as a clear, and clearly motivated, fabrication.

Subsequent to this conference, the accused, as he admits, issued no orders to his subordinates, either in Truk or in any of the outlying commands, concerning treatment of prisoners of war.

With reference to the testimony of the accused that in January 1945 a prisoner of war was captured and Sumikawa reported that arrangements had been made to send this prisoner back to Japan, and the accused gave his permission, it should be noted: that this action followed the receipt in November 1944 of a dispatch from the Naval General Staff requesting that prisoners of war be sent to Japan whenever transportation was available; that this action was not designed to protect prisoners of war from mistreatment, but was for the purpose of providing sources of intelligence information (Testimony of Sumikawa, q. 58, 20th day); that neither this dispatch nor any instructions to protect prisoners of war were relayed to subordinate units of the Fourth Fleet outside of Truk.

Clearly in the light of these facts it is apparent that the sending of the prisoner back to Japan in January 1945 was not pursuant to any desire to protect prisoners of war or prevent their mistreatment by subordinates under the command of the accused.

The neglect of duty of the accused in not issuing instructions to his subordinates with regard to the treatment of prisoners of war, in not seeking to ascertain whether prisoners of war were being treated properly in accordance with international law or the regulations of the Japanese Navy itself, and in not appointing a member of his staff to handle prisoner of war matters, is doubly apparent when we examine defense document, exhibit number 54, Deposition of KAWAI, Iwao who was senior staff officer of the Fourth Fleet until July 1942. This deposition clearly evidences that the Fourth Fleet and not the Combined Fleet, was responsible for securing conformance to international law, and issuing instructions regarding prisoners of war. This deposition clearly indicates that the predecessor of Kobayashi and Hara did take affirmative steps to carry out his responsibility; that this predecessor recognizing his responsibility, called a conference and instructed the then subordinate commandants and their staff officers in the treatment of prisoners of war; that this predecessor appointed a staff officer, his senior staff officer to handle prisoner of war matters; that this predecessor issued warnings to the units of the Fourth Fleet under his command, that right treatment of prisoners of war should be carried out by every possible means.

When we examine the lack of concern as to handling and treatment of prisoners of war, demonstrated by the Fourth Fleet under Hara, in the light of the activities of this former Commander in Chief of the Fourth

Fleet, it is apparent that this predecessor took measures to perform his affirmative duty under international law, and that the accused Hara disregarded and failed to discharge that duty.

4. Testimony of the accused.

The accused Hara on cross-examination admitted that as Commander in Chief of the Fourth Fleet he had a responsibility with regard to the protection of prisoners of war. He claims that he issued instructions probably in April 1944 to a staff officer or wrote on a report that certain prisoners be sent back to Japan; and that in May he ordered a staff officer that if there were prisoners of war on hand they should be sent to Japan; and similarly in January 1945 he approved the transportation of one prisoner of war from Truk to Japan. He admitted that he did not issue any instructions to his subordinates with regard to the treatment or protection of prisoners of war (except for his alleged statement at the September conference to the subordinate officers stationed at Truk...which alleged statement is denied by his Chief of Staff and the subordinate officers who testified during the trial).

But nowhere in his testimony did the accused even claim that he had ever issued any instructions of any kind with regard to prisoners of war to any of his subordinates stationed outside of Truk, and he admitted that at no time prior to January 1945 did he take any steps to ascertain how prisoners of war were treated by his subordinates.

He knew of enemy aerial activities (as well as submarine and surface attacks) and therefore knew or should have known of the probability of capture of additional prisoners of war. He did not institute any method of control or accounting for prisoners of war held or captured within his command. He knew or should have known that prisoners of war were held and confined within his area, but he admits that he did not even seek to ascertain where or how many prisoners of war were held within the area of his command.

In the light of this evidence, even accepting the testimony of the accused at its face value, can there be any reasonable doubt that the accused disregarded and failed to discharge his duty to take such measures as were within his power and appropriate in the circumstances to control his subordinates and to protect prisoners of war?

The accused claims he took no action to instruct or order his subordinates with regard to proper treatment of prisoners of war because the matter was set forth adequately in the Naval Regulations.

But note, nowhere in these regulations, defense exhibit 27, is there any provision which states that prisoners of war are not to be mistreated, or that they are to be protected, etc. Yet the accused claims that he considered that such provisions in the Naval Regulations were adequate and did not require any action or implementation by him.

But even if these regulations had been comprehensive and definite in terms of ordering proper treatment and handling of prisoners of war, the story by the accused that he took no action concerning them because the articles were comprehensive and "complete in themselves" (41st day, q. 310) is a feeble excuse.

The function of Naval Regulations is not to absolve a commander in chief of his responsibility, but to crystallize that responsibility. The very fact that such instructions were included in Naval Regulations emphasized the fact and made more definite the responsibility of the accused as Commander in Chief of a Fleet to see that these regulations as to treatment of prisoners of war were carried out by the subordinate units under his command.

The Japanese Naval Regulations specifically provide that the Commander in Chief has the duty to supervise the military discipline, morale, education and training of his forces. (Exh. 26, Art. 12) But regardless of the provisions of the Japanese Naval Regulations, international law clearly places an affirmative duty upon the accused as a commander of armed forces to take such measures as are within his power and appropriate in the circumstances. Clearly the mere existence of a naval regulation cannot absolve the accused of his responsibility under international law.

The responsibility of the accused to take strong affirmative action to protect prisoners of war was particularly clear at Truk, for the accused knew or should have known that because of the bombings and serious difficulties on Truk mistreatment of prisoners of war, particularly aviators, was more apt to occur than during times of less emotional and military stress. It is because of the necessity of such control in times of military stress that international law creates this responsibility, and places it upon the commander of armed forces (and clearly the very circumstances which create the responsibility and call most strongly for its exercise, cannot be invoked by the accused to excuse his failure to perform this duty).

The issuance by the accused of even one instruction to all the subordinate units of the Fourth Fleet, to protect prisoners of war and civilians and prevent their mistreatment, would at least have prevented these incidents of public execution under orders of high-ranking subordinates of the accused. No such order was ever issued by Hara to the subordinate units of the Fourth Fleet, even after he knew that prisoners of war had been brutally executed at the Fourth Naval Hospital. Such an order issued even at this time, would have prevented the subsequent killing at Nauru, Jaluit, and Ocean. On the basis of this evidence, the evidence from the testimony of the accused himself, there can be no reasonable doubt that the accused disregarded and failed to discharge his duty to control his subordinates and to protect prisoners of war and civilians in occupied territory.

Defense counsel CDR Carlson has asked what specific measures could Hara have taken, and what would you have done upon learning of the July incident at the hospital?

It is not my purpose or function to speculate as to the various things that Hara could have done and should have done during his tour of duty, to protect prisoners of war, etc. However Hara could and should have done the things that his and Kobayashi's predecessor did, as set forth in Exhibit 54. Even if we disregard the strong evidence of Japanese practice and policy of mistreatment of prisoners of war, and even if we disregard the evidence of knowledge by the accused of the incidents and attitude of his command toward prisoners of war, and even if for the moment we accept as true the evidence introduced by the defense, the accused could and should have done some of the following in performance of his affirmative duty to control his subordinates and to protect prisoners of war and civilians in the occupied territory under his command:

(1) After assuming command and during his tour of duty, the accused could have, and should have inquired of his subordinates, or investigated how prisoners of war were being treated. It is understandable that in view of preoccupation with imperative emergency military measures, the accused might reasonably have postponed such action in the immediate period of his arrival on Truk, but clearly after several months he could have and should have taken such action, at least as regards prisoners of war on Truk.

Particularly in view of the background of the accused as an experienced military commander well versed in military operations and military and international law, the accused knew and should have known that dire military conditions breed brutality and atrocities as to prisoners and civilians in occupied territory.

(2) The accused knew and should have known that prisoners of war might and would be captured by some of the armed forces under his command, and he should have ordered that his subordinates be instructed to treat prisoners of war in accordance with international law.

(3) The accused should have delegated a staff officer to handle and look into prisoner of war matters.

(4) After learning of the arrival and confinement of prisoners of war at the Guard Unit, the accused should at least have inquired of his staff officers how such prisoners of war were being treated by the subordinate units under his command. Such inquiry would in view of the knowledge by his staff officers of previous war crimes incidents, have revealed the treatment that prisoners of war were receiving.

(5) The accused should have known of the widely circulated rumors, as well as the publicly performed incidents which occurred on Truk. Possessing such knowledge he could and should have ordered proper treatment of prisoners, etc.

(6) After learning in September of the July incident, he could have and should have instructed not only all the subordinates on Truk, but all units of the Fourth Fleet that prisoners of war and civilians in occupied territory

should not be mistreated. Despite alleged compromise of all codes, a radio broadcast could have been made in plain language addressed in plain language "To all units of the Fourth Fleet" to treat prisoners of war and civilians in accordance with international law. From the accused's description of communications conditions, it was obvious that messages could be sent to such subordinate units on Jaluit, Nauru, and Ocean where the subsequent incidents occurred.

The accused should definitely have taken such steps because (1) the known atrocity incident, particularly in view of the high rank of the participants, indicated the deplorable condition of morale and discipline; and as a military commander the accused should have anticipated that similar morale and discipline might exist elsewhere under his command. (2) Since he could not personally supervise treatment of prisoners of war on such outlying islands his excuse that he had resolved to personally prevent any subsequent mistreatment of prisoners of war or civilians, could not be applicable to such remote places. And the accused knew and should have known that the only effective means at his disposal was by communication and sending of appropriate orders or instructions. There could have been sent in the clear - and without coded headings - to all subordinates of the Fourth Fleet and worded as an ordinary reminder that prisoners of war and civilians must not be mistreated, but must be treated in accordance with international law.

Even as applied to Truk the excuse that the accused did not issue orders because he personally resolved to prevent such incidents, is feeble and an obvious fabrication. If, as he testified, at only one time prior to September had he learned of the arrival of any prisoners of war on Truk, it was apparent to the accused that he would not be informed of the arrival of prisoners of war. Yet he took no steps after the September conference to order or require the reporting to him of the arrival of prisoners of war. How then did he plan to learn of their arrival and to protect them?

(7) After learning of the July incident the accused could and should have investigated the incident, and inquired concerning prisoner of war treatment and ascertained whether other atrocities or mistreatment of prisoners of war had occurred.

(8) The accused could and should have taken steps to punish the participants in such incidents.

(4)

b. Additional proof that the accused disregarded and failed to discharge his duty to control his subordinates and protect prisoners of war etc.

While the foregoing is itself sufficient and unequivocal proof that the accused neglected his duty to control subordinates and protect prisoners of war, etc., there is considerable additional evidence which further corroborates and conclusively establishes that the accused disregarded and failed to discharge his duty to take such measures as were within his power and appropriate in the circumstances to control his subordinates and to protect prisoners of war and civilians in occupied territory. The additional evidence of this neglect of duty is set forth under four main headings - a, b, c, and d, as set forth in the index to this argument.

a. Knowledge concerning capture and confinement of prisoners of war.

The failure of the accused to take affirmative action to order humane treatment and protection of prisoners of war must be examined in the light of certain facts.

First: The accused had broad military experience and was well versed in international law and the law and customs of war.

> Every person familiar with the law of war and the history of war knows that war tends to brutalize, and that only by careful deliberate persistent effort can atrocities and individual war crimes be prevented.
>
> The history of the law of war is itself the history of the struggle between concepts of humanity and the brutalizing force of war. The growth and development of the law and customs of war is the recognition by the civilized nations of the world that the principle of humanity has a place in the law of war. The law and customs of war <u>have recognized</u>, and the judicial tribunals of the world <u>have applied</u> this principle of humanity, as a duty and function of command responsibility to control the operation of military troops under one's command. It is only by continued and unswerving application of this duty as a function of command responsibility that international law can hope to contain the brutalizing force of war within some levels consistent with civilized human decency.
>
> Knowing the history of war, and knowing the laws of war as intimately as the accused did, he knew and should have known that specific affirmative orders, vigilant supervision, and prompt punishment of disobedience of such orders, was essential in order to carry out his solemn responsibility under the law and customs of war.

Second: The accused knew and should have known that prisoners of war were captured and confined by his subordinates both at Truk and at other areas under his command. The accused knew that military operations were being carried out by the American forces in the Marshalls area, and other areas under his command. He knew that under such conditions there is a probability of capture of some prisoners of war. He specifically admits that without any efforts to ascertain whether prisoners were captured or confined by his subordinates, he learned of three instances of their confinement - in April 1944; in September 1944 (from his knowledge of the spearing of these prisoners); and in January 1945.

> He admits that he made no efforts to ascertain whether any other prisoners of war were confined or had been confined even at Truk.
>
> He did not order the subordinate units of the Fourth Fleet to report or account for the number of prisoners of war confined by them.
>
> In fact he himself claims that he demonstrated such a complete disinterest in his responsibility to protect prisoners of war that he did not even ask any of his subordinate commanding officers or any of the members of his staff whether prisoners of war were captured or confined or how they were treated. The obvious reason why the accused claims this disinterest in prisoners of war, is the fact that it has already been clearly established before this Commission that these staff officers knew not only of the confinement but also of the brutal killings of prisoners of war by subordinate units of the Fourth Fleet and that if the accused admitted speaking to these subordinates about prisoners of war it would be evidence that he also knew of these brutal killings. But the accused is caught on the horns of his own dilemma. While his claim that he did not speak to these staff officers or any of his subordinate commanding officer (except Iwanami) supports his argument that he did not know of any of the incidents, it does not negative the fact that he should have known of these incidents and conversely it directly and materially establishes his disregard and failure to discharge his duty to control his subordinates and protect prisoners of war, for it explicitly points out ~~that~~ not only that he took no measures to carry out his affirmative duty to protect them, but his disregard was so complete that he did not even go so far as to inquire from his staff whether prisoners of war were being captured, or how they were being treated.

Despite Hara's contention that he knew of only two instances of confinement of prisoners of war, and that the Fourth Fleet never ordered submission of prisoner of war reports and never kept records of capture, confinement, etc., of prisoners of war, the fact appears to be clearly

established, that at least on Truk, the confinement of prisoners of war was in fact reported to the Fourth Fleet Headquarters. During the brief time in Hara's tour that the Fourth Base Force was in operation these reports were sent from the Guard Unit to the Base Force, and from the Base Force to Fourth Fleet Headquarters. When the Fourth Base Force was dissolved on May 1, 1944, these reports were made directly from the Guard Unit to Fourth Fleet Headquarters. The direct, as well as the indirect evidence of this fact appears throughout the record of the trial. But I will refer the Commission only to the following testimony which clearly establishes this fact. (Wakabayashi testimony - 37th day, q. 22; Asano testimony, 23rd day, q. 24, 25, 26, 39, 40; Nakase testimony, 38th day, q. 51, 52; Higuchi testimony, 35th day, q. 101, 109.)

It should also be pointed out that the record contains testimony by numerous witnesses that staff officers of the Fourth Fleet did in fact interrogate these prisoners of war. On numerous occasions Lieutenant Akai, the Air Staff officer, interrogated prisoners of war, and on at least one occasion in July, the then Chief of Staff, Captain Imazato, himself interrogated the prisoners. (Testimony of Asano, 22nd day, q. 15, 17, 21, 22, 41, 42, 80; Testimony of Inoue, 19th day, q. 61.)

b.2. Military discipline, morale, training and education of the Fourth Fleet.

While the accused Hara inherited from his predecessor a difficult and perhaps disorganized and demoralized command, the facts were evident or readily ascertainable. Only six days before the accused took over command of the Fourth Fleet a mass public execution of American prisoners of war took place at the Forty-first Naval Guard Unit. On the evening of that execution at a conference of unit commanding officers at Fourth Base Force Headquarters, attended by staff officers of the Fourth Fleet, the execution of these prisoners of war was publicly reported. If the accused had the slightest interest in the state of military discipline, morale, or training of his subordinates, one question to his senior staff officer Captain Inoue would have disclosed the true state of affairs. Admittedly the accused was very busy at the time - but one of the fundamental duties of a

commanding officer is to maintain the discipline, morale and training of his forces. While the accused might justifiably have briefly postponed consideration of this problem, he could not without neglecting his duty both under international law and under his own naval regulations, disregard this entire problem throughout his tour of duty. Investigation of the military discipline, morale and training of his subordinates at any time during the tour of duty of the accused would have disclosed the state of such discipline and training with regard to treatment of prisoners of war.

The loose ineffective training of the command of the accused with regard to treatment of prisoners of war is apparent not only from the fact that the incidents occurred, but also from the widely accepted attitudes and opinions of subordinates of the accused that prisoners of war could be tortured, abused and disposed of without fear of censure or punishment. Some of these attitudes were the result of knowledge of incidents which occurred and which went unpunished both prior to and during the tour of duty of the accused, others were perhaps the result of instructions received prior to the tour of duty of the accused.

> From the testimony of Abe which was admitted in evidence on the 15th day of this trial, it would appear that sometime after September 1942 Staff Officer Okada of the Naval General Staff arrived at Kwajalein with Commander Iida, staff officer of the Fourth Fleet, and that they informed him that the central authorities and the Fourth Fleet determined that prisoners should be disposed of at the front. (Note this is subsequent to the time that KAWAI, Iwao, deponent of Exhibit 54, left the Fourth Fleet in July of 1942, and hence is not conflicting with his statement that prior to that time, in the Fourth Fleet definite measures were taken and vigilant care exercised to protect and assure proper humane treatment of prisoners of war.) While the deposition of Tomioka (Exhibit 54, p. 7) denies that the central authorities gave such instructions to Okada, there is no evidence to indicate that Admiral Abe did not in fact receive such instructions from Okada and Iida, the representative of the Fourth Fleet. On the contrary, circumstantial evidence is extremely strong that such instructions were in fact received by Abe and in fact were the policy of the Fourth Fleet for not only did Abe carry out executions of prisoners of war, but when visited by the then Commander in Chief of the Fourth Fleet, Vice Admiral Kobayashi, he spoke of the execution of the prisoners of war and pointed out the place of execution. (See testimony of

Kobayashi, 17th day, and similarly Abe's senior staff officer pointed out the place of execution to Kobayashi's senior staff officer, testimony of Captain Inoue, 20th day.) Clearly this was the action of a subordinate who believed that he was not violating, but was in fact carrying out the policy of his commander in chief and of the Fourth Fleet.

In view of the fact that no instructions or orders were issued to Abe at that time (Kobayashi testimony, q. 32 & 33, 17th day) and no instructions with regard to treatment of prisoners of war were issued to any of the subordinates of the Fourth Fleet during the tour of duty of Kobayashi (Kobayashi testimony, q. 33, 17th day) it is clear that in fact the policy of the Fourth Fleet at the time Hara took over command was to dispose of prisoners of war at the front, And this policy and attitude continued during the tour of duty of the accused Hara.

> While Hara contends that in April 1944 he did issue instructions to a staff officer of the Fourth Fleet with regard to sending to Japan certain prisoners on Truk mentioned in a specific battle report, and in May issued a vague instruction to a staff officer that if there were prisoners confined in Truk at the time they should be sent to Japan, and similarly in January 1945 approved the sending of one prisoner from Truk, he admits that he did not issue any orders to his subordinates to protect prisoners of war or prevent their mistreatment and did not issue any orders whatsoever with regard to prisoners of war and civilians, to his subordinate units stationed outside of Truk.

In November 1944 instructions were received from the Naval General Staff to send prisoners to Japan for intelligence purposes. Pursuant to this order the prisoner of war captured on Truk in January 1945 was ordered sent to Japan. But even after this November 1944 dispatch was received no orders were issued by the Fourth Fleet to subordinate units outside of Truk concerning treatment of prisoners of war.

Additional evidence that the policy which was reported to Abe actually existed in the Fourth Fleet is found in the testimony of Captain Hiyashi (16th day) which corroborates the testimony of Abe.

Further, high-ranking responsible subordinates of the Fourth Fleet ordered and participated in such executions prior to and during the tour of duty of the accused Vice Admiral Hara.

In view of the foregoing it is unnecessary to recapitulate or analyze the evidence of specific instructions, statements and incidents which evidence the similarly widespread opinion and attitude amongst the subordinates of the Fourth Fleet that prisoners of war could be disposed of in case of danger of land invasion.

> The defense in their efforts to find some evidence that instructions concerning prisoners of war were issued to Fourth Fleet subordinates, elicited from Nakase the statement that an admiral came from the Navy Ministry at Tokyo

around January 1944, and gave instructions before an assembly of all cognizant commanding officers and executive officers on Truk, that prisoners of war should be sent back to the homeland at all speed. (Takano's argument, p. 25) But note that Vice Admiral Sumikawa, Chief of Staff of the Fourth Fleet, who had arrived on Truk on January 3, 1944 did not meet such an officer at that time, nor discuss such matters when he subsequently met such an officer (Testimony of Sumikawa, 20th day, q. 85, 86); nor were there any such instructions when he arrived at the Fourth Fleet in January 1944. (Testimony of Sumikawa, 20th day, q. 56, 57, 82); nor were such instructions received until in November 1944 he received a dispatch from Naval General Headquarters saying that prisoners of war should be sent to Japan as they constitute an important source of information (Testimony of Sumikawa, 20th day, q. 57, 59, 60, and 58).

The testimony of former Fourth Fleet senior staff officer, Captain Inoue, expressly corroborates Sumikawa and establishes that no dispatch or verbal instructions were ever received at Truk prior to November 1944, even with regard to sending prisoners back to Japan. (Testimony of Inoue, 19th day, q. 41, q. 118, and q. 45).

> The fact that specific instructions had to be issued in November 1944, to send prisoners of war to Japan carries the interesting implication that at that time, even general headquarters in Japan was disturbed by the frequency and extent of killings of prisoners of war. But note that even they apparently were not concerned about the fact that prisoners of war were being mistreated (Testimony of Sumikawa, 20th day, q. 58) but were concerned with the fact that it had reached such a scale and became so widespread that it was interfering with the effective receipt of intelligence information.

The widespread existence of these attitudes and opinions of subordinates of the Fourth Fleet, even if in fact no policy existed in the Fourth Fleet approving of the torture and disposal of prisoners of war, is clear evidence of the failure of the accused throughout his tour of duty, to properly exercise overall supervision of the military discipline, morale, training and education of the fleet under his command.

Neglect of duty by the accused to control and supervise his subordinates in this regard, is evidence not only from the existence of the above attitudes among his subordinates, but also from the fact that prior to September 1944 the accused (according to his own testimony) issued no orders or instructions to his subordinates concerning treatment of prisoners

of war. However, the most obvious and unequivocal proof of that neglect of duty rests in the fact that even in the light of his admitted knowledge in September 1944 of the brutal spearing of prisoners of war at Truk, Hara took no action to investigate the treatment of prisoners of war, and issued no instructions to his subordinate units as to the required treatment of prisoners of war and civilians in occupied territory.

> Clearly even if the accused had heretofore failed to recognize the demoralized and brutalized condition of his subordinates, here was a beacon light flashed before his eyes in his own conference room, warning him of the danger throughout his command, and urging him to take action to protect such prisoners of war and civilians in occupied territory. But the accused failed to heed this specific and direct warning. He failed to issue any instructions to his subordinates to prevent mistreatment and to protect prisoners of war and civilians. His failure to heed this direct warning and to issue appropriate orders resulted in six subsequent incidents and the death of 212 persons. These deaths resulted from the failure of the accused as a commander of armed forces to take measures to control his troops, by proper supervision of their military discipline, morale, training and education.

c. 3. The incidents which occurred during the tour of duty of the accused were not isolated acts of irresponsible persons.

A total of twelve incidents have been alleged and proved to have been committed by subordinates of the accused. These incidents occurred in Truk, Jaluit, Nauru and Ocean. These incidents were committed by naval personnel of the Forty-first Naval Guard Unit, the Sixty-second Naval Guard Unit, the Sixty-seventh Naval Garrison Unit (and a separate detachment of that unit at Ocean), and the Fourth Naval Hospital.

> And in one incident naval civil guards of the Fourth Naval Construction Department, and a civilian employee of the Naval General Court Martial Section of the Fourth Fleet participated.

All of these naval organizations were direct subordinate units of the Fourth Fleet.

In incidents (a), (b), (c), (d), (e), (i), (j), (k), and (l) of Specification 1, high ranking responsible subordinate officers of the accused ordered or personally committed the incidents as follows: Incidents (a), (i), (j), (k) - Rear Admiral Masuda, commanding officer of the

Sixty-second Naval Guard Unit at Jaluit; Incidents (b), (c) and (d) - former Captain Asano, commanding officer of the Forty-first Naval Guard Unit at Truk; Incident (e) - Captain Iwanami, commanding officer of the Fourth Naval Hospital and chief medical officer of the Fourth Fleet; Incident (l) - Lieutenant Commander Suzuki, commanding officer of the Sixty-seventh Naval Garrison Unit detachment at Ocean Island.

4. The accused knew or should have known that before and during his tour of duty prisoners of war and civilians were tortured, abused, mistreated, and killed by his subordinates.

The judge advocate cited the relevant law which establishes that actual or so-called constructive knowledge of the incidents is not an essential element of the proof of the charge against the accused. However the existence of such actual or constructive knowledge is strong evidence that the accused did disregard and fail to discharge his duty to control his subordinates and to protect prisoners of war, etc.

a. The accused knew of the incidents.

The accused has denied that he actually knew of any incident except the July incident which was reported at the September 1944 conference, and he denies that he knew of this incident prior to that conference.

The testimony of the accused must be subjected to the same scrutiny and careful evaluation which the Commission gives to all evidence.

The Commission should consider "among other things, the inherent probability or improbability of his statements, his intelligence or want of intelligence, his opportunities for knowledge..., to what extent he has been corroborated by other evidence, the reasonableness of his statements, his interest in the trial, the veracity of his utterances and the manner in which he testifies, together with all the other evidence." (Underhill's Criminal Evidence, Fourth Edition, p. 192)

The testimony of the accused if believed to be credible should be given the same weight as that of other witnesses. But in evaluating the credibility of the accused one of the significant factors to be considered is that he is testifying in his own behalf, and that he is strongly interested in the outcome of the trial. In addition to this fact the Commission must consider the nature of his testimony in the light of all the other evidence presented to the Commission.

(a)
~~(1)~~ The character, intelligence, and credibility of the accused.

In evaluating the testimony of the accused Hara that he did not know of the occurrence of any incidents prior to September 1944 one of the most significant facts to be considered is the character and personality of the accused himself.

The judge advocate cannot share the enthusiasm of defense counsel for Hara's character. We do agree with some of their interpretations of his character, but do not subscribe to others and we definitely disagree with the implications of innocence which defense counsel seek to derive from their alleged analysis of Hara's character.

Obviously Hara, as shown by his experience and background in the Japanese Navy, and his manner and bearing in court, was a man of competence and achievement. His testimony in court revealed an unusual intelligence, nimble-wittedness, astuteness, and foresightedness.

We do agree with defense counsel that Hara was tolerant with others. He must have been, for he never disciplined or punished a single subordinate for their beastly acts of horrible, inhumane torture and murder of prisoners of war. He must have been tolerant, for his own testimony establishes that even after he learned at the September conference of the horrifying murder of prisoners of war by spearing, he never punished or even disciplined the cruel perpetrator of that sanguine fantastic public murder.

We do not agree with defense counsel's contention that Hara is a truthful or credible witness. His manner of testimony was clever and astute but it did not conceal the fact: that he was evading dangerous questions; that he was able to testify in great detail and make definite estimates when testifying for the defense but on cross-examination was unable to give details or make any estimates or rough approximations when questioned by the prosecution on the same or similar matter (viz. re dispatches); that he had no recollection on cross-examination as to matters which from his direct testimony he should clearly have recalled; that some of his explanations, of his inconsistent testimony and of evidence inconsistent with his plan of defense, were indeed feeble; and that on one occasion he was compelled to admit on cross-examination that certain of his testimony on direct examination had been result of conclusion that he drew from testimony he heard at the trial rather than from his actual recollection of the alleged facts about which he had testified.

We do agree with defense counsel that Hara's testimony in court was a striking example of his capacity, his unusual intelligence and his astuteness. But it does not follow that his testimony was truthful, as will be demonstrated in discussion of some of the content of that testimony, which reveals its inconsistencies and its inherent improbability. The accused proved he was an unusually clever and astute witness, but he made one mistake as a witness, and it was a fundamental one. He demonstrated clearly and undeniably his unusual intelligence, his shrewdness, his ability to plan, his ability to ferret out concealed and difficult problems. This cleverness and shrewdness of the accused reveals the fundamental improbability and incredibility of his testimony.

His very intelligence appears to place the accused in a double dilemma for:

1. if in fact ~~that~~ the accused did not know or hear of any of the incidents of inhumane treatment and killing of prisoners of war in view of his unusual shrewdness and intelligence it is apparent that he neglected his duty to control his subordinates and protect prisoners of war, for it would have been a simple matter for him to learn of the widespread rumors and the knowledge of his

staff officers concerning these incidents, particularly of the various public executions which occurred on Truk.

2. if on the other hand the accused did know or hear of these incidents, it is similarly apparent that he knew and should have known of the state of morale and discipline of all the forces under his command and his failure to take action to instruct them in the proper treatment of prisoners of war and civilians in occupied territory constituted clear neglect of his duty to control his subordinates and protect prisoners of war.

The testimony of the accused revealed certain other fundamental inconsistency between his intelligence and such testimony.

For example, the accused in attempting to minimize his association with and knowledge of prisoners of war matters testified that he knew of only two occasions when prisoners of war were confined on Truk (q. 316) et seq. once in April 1944 and the other time in January 1945. When he was asked whether on this first occasion he took any steps to ascertain if prisoners of war had been confined prior to this date, or how they were treated, he testified that until that time he had not heard anything concerning prisoners of war and that he took no such action. He was asked whether there was intelligence information available concerning the size of American forces in the area or their disposition and he testified that no such intelligence information was available. He was then asked whether the thought occurred to him when he took over command at Truk on February 23rd that if there were any prisoners of war captured in that heavy air raid of February 17th, they might be valuable sources of intelligence information. The line of questioning was obvious - if the accused admitted that this thought occurred to him the implication would have been strong that he had upon inquiry learned of the execution of these prisoners of war - therefore he answered that the thought had never occurred to him (Testimony of Hara, 41st day, qs. 323, 324.)

In the light of the clear recognized need for intelligence information concerning the size and disposition of American forces, is it credible that this very astute and experienced military officer did not think of the possibility of securing such vitally needed intelligence information from captured prisoners of war?

(b)

(2) The inherent improbability of his testimony.

The intelligence and clear ability of the accused is one factor which conflicts with his testimony that he did not know or hear about these incidents. Other evidence similarly conflicts strongly with and discloses the inherent improbability of the testimony of the accused. Note the evidence ~~which~~ establishes: that prior to and during the tour of the accused several public executions occurred on Truk; that rumors of mistreatment of prisoners of war were circulating in the command and in the staff of the accused; that numerous commanding officers of units

directly subordinate to the accused knew of these incidents; and that the accused was himself present at the Fourth Naval Hospital on the very day of the public execution of prisoners of war at the hospital, and the accused admits he had previously talked to Iwanami - or at least Iwanami had talked to him about prisoners of war.

(2)
b. The accused should have known - and in the proper exercise of his duty would have known of the occurrence of these incidents.

Even if the commission, despite this proof of conflicting and improbable nature of his testimony, believes that the accused in fact did not know of the incidents which occurred, the commission may in considering the question of neglect of duty of the accused consider as an element of that negligence whether the accused should have known of the commission of those incidents of brutal treatment and killing of prisoners of war, etc.

The evidence that the accused should have known of the incidents, particularly the incidents which occurred on Truk, is so conclusive that it leaves no ground for reasonable doubt.

(2)(1) The accused had opportunity to learn of, and prevent mistreatment of prisoners of war:

The defense have sought to persuade the commission not only that the accused did not know of the prisoner of war incidents on Truk, but also that the evidence does not establish that the accused should have known of the incidents which occurred on Truk. They base this argument upon the contention (1) that the battle conditions on Truk and in the area of the accused were severe, and (2) the accused was so completely occupied with his primary military duties that he had no opportunity to look into the question of prisoners of war.

The first premise is granted, battle conditions in the area were severe. But it must be noted that since the accused had no ships and practically no planes for operational use, it is evident that he had greater

opportunity to concentrate upon conditions on Truk. As to the second contention, the evidence produced by the accused himself controverts this contention. In attempting to establish the good character of the accused, the defense has itself pointed out how the accused made numerous visits to the patients and natives at the hospital, (Exhibit 63), and personally engaged in considerable farming and distributed his produce.

According to defense exhibit no. 53, cited by Commander Carlson, the accused "himself took to the plough and the rake and cultivated food-stuffs, and divided the produce he had made even among non-commissioned officers and enlisted men".

Obviously the accused who had plenty of time for farming, was not so busy that he could act have issued instructions that prisoners of war should be protected. Nor was he so busy that he could not, particularly after knowledge of the July incident, have sought to ascertain at least from his own staff, whether other prisoners of war had been mistreated at Truk or at other places under his command. Nor was he so busy that he could not have sent a dispatch - even in plain language "to all units under command of the Fourth Fleet" instructing them that prisoners of war and civilians in occupied territory must be protected and treated humanely.

(b)(2) Widespread rumors of mistreatment and murder of prisoners of war.

Frequent rumors and scuttlebutt were circulating throughout the units of the Fourth Fleet on Truk concerning the mistreatment and killing of prisoners of war. These rumors were not confined to enlisted personnel or low ranking officers, or even to the lower echelons of the command of the accused. The majority of the witnesses from Truk, who testified about such matters before this commission, have admitted that they heard rumors during the tour of duty of the accused. The widespread nature of such rumors not only establishes that the accused should have known (since he did not hold himself aloof, but talked "intimately" with his men and even invited his

junior officers to dine with him (defense exhibit 63), but that in fact he did know of such rumors of mistreatment and killing of prisoners of war. Assistant senior staff officer of the Fourth Fleet Higuchi admitted he knew of such rumors. Asano heard of such rumors (from Nakase). And Nakase and Ueno admitted they had heard numerous rumors about mistreatment of prisoners of war.

Ueno testified that when he arrived in Truk in May 1944 he heard of the experimenting on prisoners of war at the hospital in January 1944 (24th day, q. 3 and 8); and that during a conversation in the wardroom he heard that seven or eight prisoners of war were killed at the Guard Unit during an American raid on Truk. (24th day, q. 10); and that he heard that after an air raid two prisoners of war were tied to a tree and beaten to death at the Fourth Fleet Headquarters (36th day, q. 56); and that in June 1944 he heard the rumor that the confined prisoners of war were beaten (36th day, q. 61, 63).

Nakase testified that after he left the dispensary on March 5, 1944 he heard rumors of the experimenting on prisoners of war at the 41st Guard Unit dispensary and at the 4th Naval Hospital in January and February (24th day, q. 26, 45, 48).

Asano testified that the day after the July incident occurred at the Fourth Naval Hospital Nakase reported that he had heard of the incident (23rd day, q. 52).

The testimony of Higuchi (21st day, q. 71 and 72) reveals that after he became the assistant senior staff officer of the Fourth Fleet, during the tour of duty of the accused, he heard rumors of the execution of prisoners of war at the Guard Unit on February 17th.

(c)(3) High ranking subordinates and staff officers of the accused knew of incidents which occurred prior to and during the tour of duty of the accused.

The following subordinates knew about the mass execution of prisoners of war at the Guard Unit on February 17, 1944: Captain Inoue (Fourth Fleet senior staff officer during the first three months of Hara's tour of duty), Fourth Fleet Staff Officer Kawamura, Commander Higuchi, assistant senior staff officer under Hara (testimony of Tanaka, see Ogden testimony, 31st day, q. 70 (25) and Exhibit 21, as well as testimony of Higuchi, 21st day, q. 71 and 72), staff officers of the Fourth Base Force, and commanding officers and members of the organizations on Truk (including the commanding officer of the communication unit, and the commander of the munitions unit) (Testimony of Inoue, 19th day, q. 85 to 89; Exhibit 21, a statement of Tanaka, former commanding officer of the Forty-first Naval Guard Unit.)

Captain Inoue, Fourth Fleet senior staff officer, also knew of the mass killing of prisoners of war at Wake, committed by Sakaibara, who remained as commanding officer of the Guard Unit at Wake Island throughout the tour of duty of Hara. (Testimony of Inoue, 19th day, q. 69, and Exhibit 35). Captain Inoue also knew of the executions of prisoners of war at Kwajalein (Testimony of Inoue, 19th day, q. 69). These executions had occurred prior to the tour of duty of Hara, but Inoue continued as senior staff officer of the Fourth Fleet during the first three months of Hara's tour.

Captain Asano, commanding officer of the Forty-first Naval Guard Unit, admits that he learned of the July incident the day after it occurred at the Fourth Naval Hospital (testimony of Asano, 23rd day, q. 52.)

Commander Nakase, the executive officer of the Guard Unit, admits that after March 5, 1944, he heard of the January and February experiments at the Fourth Naval Hospital and at the dispensary, and that he heard of the February 17th incident, and knew of the June and July incidents (testimony of Nakase, 38th day, q. 26, 45, 48, and 65). Similarly Ueno, the medical officer of the Forty-first Naval Guard Unit dispensary, admits knowledge of the January incident, the February 17th incident, the June incident, the July incident (as well as rumors concerning the beatings) (Testimony of Ueno, 24th day, q. 10, 13 and 36th day, q. 56, 63).

Obviously the subordinates of the accused who directly participated in the incidents set forth in the specifications, knew about these incidents. It is not surprising that certain of the persons who participated in the incidents, and therefore clearly knew about the incidents, have denied any knowledge about such incidents. The motive to deny knowledge of prisoner of war incidents, particularly where the witness has been charged with responsibility for such incidents, is too obvious to require further discussion.

(d)(4) Public executions which occurred on Dublon Island, Truk.

In addition to the public execution which occurred in front of the headquarters of the Forty-first Naval Guard Unit on February 17th, just six days prior to the time the accused took over command of the Fourth Fleet, two other public executions occurred on Dublon during the tour of duty of the accused as Commander in Chief of the Fourth Fleet. In this connection

it should be noted that Dublon Island where the accused had his headquarters, is a relatively small island, approximately 3,500 yards by 5,000 yards.

On or about June 20, 1944 at the Forty-first Naval Guard Unit on Dublon Island, at a public execution attended by dispensary personnel and an additional forty or fifty persons, one prisoner of war was stabbed to death, and another was beheaded. (Testimony of Ueno, 25th day, q. 100, 102, etc.) On or about July 20, 1944 at the Fourth Naval Hospital on Dublon Island, at a public execution attended by fifteen officers and about sixty enlisted personnel, two prisoners of war were speared to death. It should be noted that the Fourth Fleet Hospital where the July incident occurred was only slightly more than half a mile from the headquarters of the accused.

(B)5. The July incident and the September conference.

With regard to the July incident the testimony of witnesses discloses two fundamentally inconsistent versions of the facts leading up to the incident: the version of Asano and Nakase, and the version of Iwanami and Ueno. Asano and Nakase were the commanding officer and executive officer respectively of the Guard Unit and they both insist that the initiative for the incident came from the Fourth Naval Hospital which indicated that it had the approval of the Fourth Fleet Headquarters to conduct "physical examinations" of the prisoners of war. The medical officers, Captain Iwanami and Commander Ueno, insist that the initiative came from the Forty-first Naval Guard Unit.

If Asano and Nakase are believed then not only did Iwanami, at the time he obtained the prisoners, indicate that he had the approval of the Fourth Fleet Headquarters, but also, after the incident, at the time of the August conference, Iwanami insisted that it was approved by the Fourth Fleet. (Testimony of Asano, 23rd day, q. 47, 57; testimony of Nakase, 38th day, q. 65). On the other hand, if the medical officers are to be believed, their testimony establishes: that the Forty-first Naval Guard Unit was anxious to dispose of the prisoners; and ~~that~~ Nakase in the wardroom of the Guard Unit asked the persons present if

they desired to dispose of the prisoners, if not, the Guard Unit would send them to some other unit; and that subsequently the hospital was contacted and agreed to take and dispose of the prisoners. (Testimony of Iwanami, 26th Day, q. 15; testimony of Ueno, 24th day, q. 39).

On the basis of credibility, the inherent nature of the testimony, and the other available evidence, the commission should determine which of these versions is to be believed. But it should be noted that even if the commission believes the version of Iwanami and Ueno, the responsibility of the accused is not materially altered, for if the medical officers' version is to be believed, then the fact that the executive officer of the Guard Unit was publicly and openly soliciting persons or units to dispose of prisoners of war is indicative of the attitude of the subordinates of the Fourth Fleet as to treatment of prisoners of war. It must also be realized that the brutal public spearing of prisoners of war at the Fourth Naval Hospital was ordered by the chief medical officer of the Fourth Fleet.

Certain special factors surrounding the confinement of these prisoners who were killed in the July incident, tend to corroborate the version of Asano and Nakase, and to independently evidence that the Fourth Fleet in fact knew and approved of this incident.

> These prisoners had been captured by an army unit on Enderby, which requested that the prisoners be confined at the Guard Unit. Higuchi, who was then assistant staff officer of the Fourth Fleet saw this dispatch. This dispatch was addressed to the Forty-first Naval Guard Unit and to either the Chief of Staff, or to a staff officer of the Fourth Fleet (Testimony of Higuchi, 21st day, q. 60), and a dispatch answer was sent. From these facts, established without reference to any testimony by Asano or Nakase, it is clear that the Fourth Fleet knew about these army prisoners and that they were to be confined at the Guard Unit.

> In addition, other evidence from the testimony of Asano and others confirms this, viz, according to testimony of Asano, the actual arrival of these prisoners of war was reported to the Commander in Chief of the Fourth Fleet, and Captain Imazato the senior staff officer of the Fourth Fleet at the time, came to the Guard Unit and saw these prisoners of war. (Testimony of Asano, 23rd day, q. 40, 41, 42.)

The fact that (a) these were army prisoners, (b) that the Fourth Fleet headquarters knew of and authorized their confinement, strongly

indicates that the Forty-first Naval Guard Unit would not have ordered or authorized or permitted the disposal of these prisoners of war unless it had received definite indication that the Fourth Fleet had approved of such disposal.

Tending to corroborate Asano and Nakase, and also tending independently to establish the fact that the Commander in Chief of the Fourth Fleet knew and approved of the execution of these prisoners at the hospital in July, is the fact that Admiral Hara was personally present at the hospital on the very day that the executions occurred, and in fact was present on the veranda of the hospital when the prisoners were brought in an open truck to the hospital for execution.

(Note also that the prisoners of war arriving in the truck were visible from where Hara sat on the veranda, and in fact they were seen by Iwanami and Asano. Note also that the truck was apparently the only vehicle coming up that road during the time Hara was on the veranda, and that the noises from its engine were obviously strained and loud from the very steep incline directly in front of the veranda.)

Also tending to corroborate the fact that Hara knew of the incident prior to its occurrence, is the fact, as testified to by Sumikawa (who clearly was a credible witness and had no motive to lie) and Asano, that at the September conference after Iwanami spoke about the spearing of the prisoners of war at the hospital, Hara made no comment and apparently indicated no surprise concerning the incident.

While Hara claims that during the conference, after Iwanami's statement he cautioned his subordinates to treat prisoners of war properly, neither Iwanami or Hayashi (as well as Sumikawa and Asano) had any recollection of any statement by Hara concerning prisoners of war.

Also tending to corroborate the fact that Hara knew of the incident prior to its occurrence, and perhaps even approved of it, is the fact that after this conference and throughout his tour of duty, he never investigated the incident or punished or disciplined the perpetrators of this brutal and inhumane spearing of living prisoners of war.

IV. ANALAGOUS CASES IN THE FIELD OF COMMAND RESPONSIBILITY.

In the light of the detailed and lengthy discussion of the evidence by defense counsel, it has been necessary for the judge advocate to reexamine

and discuss at length the evidence which he believes proves beyond reasonable doubt the guilt of the accused as charged.

Prior to closing this argument however, the judge advocate wishes to remind the commission that the charge in the instant case is not novel. Similar charges of neglect of the duty of command responsibility have been presented and tried before numerous military courts and international tribunals. The facts in each case are distinct, and each case must be decided upon its own facts. But the judge advocate believes that brief discussion of such cases in the field of command responsibility is appropriate at this time in order to reveal the reasoning and the approach of these courts to the facts presented in such cases.

A. The Yamashita case.

One of the most interesting cases in the field of command responsibility is the famous Yamashita case, which was reviewed and passed upon by the United States Supreme Court. In the Yamashita case, the charge against the accused was similar to the specifications in the instant case.

> In the Yamashita case it was charged that the accused between October 9, 1944 and September 2, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he ... thereby violated the laws of war".

The findings of the Commission in that case did not include any finding that the accused had any knowledge of any of the incidents.

> This fact is brought out clearly in the dissenting opinion of Mr. Justices Murphy and Rutledge, in the following language "Nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command". "Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together."

The accused Yamashita was found guilty and given the ultimate penalty. The judgment of the Commission discloses the nature of its deliberations in that case.

The judgment of the Commission, delivered by the President of the Commission, in the Yamashita case was as follows:

"This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The Rules of Land Warfare, Field Manual 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such cases. These matters have been the principle considerations of the Commission during its deliberations.

"General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

"Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging."

In the presentation of the Yamashita case considerable time was consumed, and large quantities of evidence produced to present an accurate portrayal of the conditions faced by the accused at the time the alleged incidents occurred. Similarly in the instant case the accused has devoted considerable attention to the tactical situation faced by his command. These factors were considered at length by the Commission in its deliberations which resulted in the finding of guilty against the accused, Yamashita.

The desperate tactical situation faced by Yamashita at the time that the incidents occurred within his command is presented at length in the dissent of Mr. Justice Murphy, as follows: "It is important, in the first place, to appreciate the background of events preceding this trial. From October 9, 1944 to September 2, 1945, the petitioner was

the Commanding General of the 14th Army Group of the Imperial Japanese Army, with headquarters in the Philippines. The reconquest of the Philippines by the armed forces of the United States began approximately at the time when the petitioner assumed this command. Combined with a great and decisive sea battle, an invasion was made on the island of Leyte on October 20, 1944. 'In the six days of the great naval action the Japanese position in the Philippines had become extremely critical. Most of the serviceable elements of the Japanese Navy had become committed to the battle with disastrous results. The strike had miscarried, and General MacArthur's land wedge was firmly implanted in the vulnerable flank of the enemy . . . There were 260,000 Japanese troops scattered over the Philippines but most of them might as well have been on the other side of the world so far as the enemy's ability to shift them to meet the American thrusts was concerned. If General MacArthur succeeded in establishing himself in the Visayas where he could stage, exploit, and spread under cover of overwhelming naval and air superiority, nothing could prevent him from over-running the Philippines.' Biennial Report of the Chief of Staff of the United States Army, July 1, 1943, to June 30, 1945, to the Secretary of War, p. 74.

"By the end of 1944 the island of Leyte was largely in American hands. And on January 9, 1945, the island of Luzon was invaded. 'Yamashita's inability to cope with General MacArthur's swift moves, his desired reaction to the deception measures, the guerrillas, and General Kenney's aircraft combined to place the Japanese in an impossible situation. The enemy was forced into a piecemeal commitment of his troops.' Ibid, p. 78. It was at this time and place that most of the alleged atrocities took place. Organized resistance around Manila ceased on February 23. Repeated land and air assaults pulverized the enemy and within a few months there was little left of petitioner's command except a few remnants which had gathered for a last stand among the precipitous mountains.

"As the military commission here noted, 'The Defense established the difficulties faced by the Accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organization, equipment, supply with especial reference to food and gasoline, training, communication, discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defense contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service.'

"The day of final reckoning for the enemy arrived in August, 1945. On September 3, the petitioner surrendered to the United States Army at Baguio, Luzon."

The above discloses the dire military conditions under which the incidents occurred within the Yamashita command.

The Supreme Court of the United States reviewed the action of the military commission in the Yamashita case, and in effect, without passing upon the evidence, affirmed that decision. The language of the Supreme Court is most informative in its discussion of the nature of command res-

possibility. The following language is particularly significant.

"It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates... These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals. A like principle has been applied so as to impose liability on The United States in international arbitrations. Case of Jenaud, 2 Moore, International Arbitrations 3000; Case of the Zafiro, 5 Hackworth Digest of International Law 707. ...We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See Smith v. Whiting, supra, 178. It is plain that the charge on which the petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed upon him by the law of war and to pass upon its sufficiency to establish guilt."

In footnote 4, the court notes: "In its findings, the commission took account of the difficulties 'faced by the accused, with respect not only to the swift and overpowering advance of American forces, but also to errors of his predecessors, weakness in organization, equipment, supply... training, communication, discipline and morale of his troops', and 'the tactical situation, the character, training, and capacity of staff officers and subordinate commanders, as well as the traits of character of his troops.' It nonetheless found that petitioner had not taken such measures to control his troops as were 'required by the circumstances.' We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the Commission, upon the facts found, could properly find petitioner guilty of such a violation."

B. The Yamashita case is only one of many similar cases, tried by military courts and international tribunals, which have applied the doctrine of command responsibility.

In my earlier discussion of the law of criminal negligence I cited some of the numerous war crimes cases tried by the United States, British, and Chinese courts which have applied the doctrine of command responsibility. (See p. 34) These cases warrant no further discussion. The doctrine is fundamental, and is not a unilateral application of any novel doctrine, developed in war crimes cases. The doctrine of command responsibility has been applied by our own armed forces in trial of our own military personnel. The Kilian case (General Court-Martial Orders no. 14-Headquarters Continental Base Section, U. S. Forces, European Theater) is worthy of some discussion in this connection.

> In the Kilian case, criminal punishment of a minor nature was imposed even though the injury to enlisted personnel mistreated consisted largely of minor beatings, humiliation, and hazing.
>
> The charge, as found proved, was that the accused, "Colonel James A. Kilian, 12th Headquarters and Headquarters Detachment, Special Troops, Second Army, then Commanding Officer of the 10th Reinforcement Depot, European Theater of Operations, United States Army, did, at Lichfield, Staffordshire, England, on and between 1 March 1944 and 18 January 1945, wrongfully and unlawfully fail and neglect to properly perform his duties as such Commanding Officer of said Depot, in that he....permitted the imposition of cruel, unusual, and unauthorized punishment upon...., and certain other persons whose names are unknown, all then prisoners in confinement at said depot, which said punishment consisted of....." In the specification the accused had been charged with "knowingly permitted," but the court-martial found the accused guilty except for the word "knowingly," etc. The case therefore specifically presents an illustration of a situation where no knowledge was had by the accused of the offenses committed within his command. He was nevertheless found guilty.
>
> Even though only relatively minor offenses were involved, the accused was found guilty and received a minor sentence. The court-martial order notes: "The sentence is approved and will be duly executed. As adjudged by the court, the sentence is totally inadequate from the standpoint of imposing appropriate punishment upon one convicted of such wrongful neglect of duty. In imposing such meager punishment the court reflected no credit upon its comprehension of its responsibility."
>
> There are those who have found sympathy with Kilian because the guardhouse was only a small fraction of his command.

The court giving consideration to all the circumstances, found, and I cite from the review prepared for the Commanding General, Continental Base Section, APO 807, U. S. Army: "the accused not guilty of having any actual or constructive knowledge of the various punishments which were imposed upon prisoners confined in the guardhouse, ...but that from his official relation to and connection with the operation and control of the guardhouse, he was legally responsible to see that such conduct was not permitted to take place in the guardhouse under his command. We must therefore, of necessity conclude that the court found the accused guilty of wrongfully and unlawfully failing and neglecting to properly perform his duties as commanding officer of the 10th Reinforcement Depot by permitting the imposition of certain punishments upon prisoners confined in the guardhouse, which he, as a matter of law, was bound not to permit. He therefore stands convicted of neglect of his official duty in connection with the operation of a guard house and treatment of prisoners therein confined. In general the law relative to the responsibility of a public officer for neglect of his official duties is aptly summarized by Wharton.....

"This responsibility could not be delegated to some inferior officer or officers, and the accused cannot and should not be permitted to escape responsibility therefore by merely saying in effect that he was so preoccupied in the performance of other necessary duties that he did not know such things were taking place in his command. Command functions necessarily carry with them commensurate responsibilities. It is believed that the command functions exercised by the accusedcarried with them an inescapable responsibility for preventing the cruel and unusual treatment imposed upon prisoners confined in the Lichfield Guardhouse. It is therefore believed that the court was justified in finding the accused guilty of wrongfully and unlawfully permitting the imposition of the inhumanities imposed upon prisoners confined in the guardhouse; that the neglect or failure upon the part of the accused ~~tp~~ to prevent them is in contravention of Article of War 96, and as such, legally punishable to an extent far greater than disclosed by the sentence imposed by the court."

In an able memorandum review of this case, by Hubert D. Hoover, Brigadier General, U. S. Army, Assistant Judge Advocate General in Charge of Military Justice Matters, the following able analysis appears: "In my view the offense of which accused was found guilty lies wholly in his neglect of duty. The allegation that the neglect of duty arose from 'knowingly' permitting the punishments described was an allegation of aggravation, or, to put it another way, was descriptive of the quality or degree of the neglect charged. 4. I think it is fundamental, in our conception of military responsibility, that a commanding officer can be guilty of neglect of duty through permitting improper things to occur within his command although he may not know that they are occurring. At least within reasonable limits it is the duty of a commanding officer to see to it that his command operates in accordance with established standards and that deviations from those standards do not occur. Where, through laxity, indifference, or culpable inefficiency, he permits wrongdoing within his command he is guilty of neglect of duty within the meaning of the 96th Article of War which denounced 'all...neglects to the prejudice of good order and military discipline.' It has been

traditionally recognized that the neglect denounced by the 96th Article of War may be a mere omission or failure properly to perform a duty (Winthrop, Reprint 722). It is not a defense to a charge of neglect of duty to prove that the omission was not deliberate or conscious. The reasoning of the Supreme Court in the Yamashita case, cited by Colonel Riter, must be applied here....." Major General Thomas H. Green, the Judge Advocate General of the United States Army, concurred in this opinion.

The Yamashita case and the Kilian case are only two of the many cases in which the courts have applied the doctrine of command responsibility for neglect of duty, even when no knowledge existed that subordinates had committed or were preparing to commit unlawful and improper acts.

Other similar cases include: United States of American versus Masaharu Homma, lieutenant general, IJA; United States versus Takeshi Kono; the trial of Vice Admiral Ohsugi, etc.

In discussing the law of criminal negligence I have cited analagous cases in which the same basic principles of criminal justice have been applied and the accused has been found guilty without proof of specific knowledge of any of the incidents which resulted from his neglect of duty.

V. CONCLUSION.

In each case the determination of guilt or innocence must be based upon the evidence presented in that case. In the instant case, the evaluation and weighing of that evidence is a function of the members of this Commission.

Respectfully,

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

Written statement in mitigation for the accused, HARA, Chuichi.

Delivered by Commander Martin E. Carlson, a counsel for the accused.

In addition to the evidence just submitted and read, we respectfully request that the Commission in its deliberations as to the sentence take into consideration the character evidence previously submitted during the course of this trial, the difficult conditions and disorganized nature of his command when he assumed duty and the fact that in contrast to certain other neglect of duty cases there has been no direct evidence that prior to the September conference that the accused had personal knowledge of any of the incidents which occurred, and that after the September conference no further incidents occurred on Truk.

Respectfully,

MARTIN E. CARLSON

JAPANESE GOVERNMENT
CENTRAL LIAISON OFFICE

TO: : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison Office, Tokyo.

SUBJECT : Japanese Naval Documents.

C.L.O. No. 7376 (PD) 19 September 1947.

1. Reference:

a. Legal Section's Check Sheet No. 11652 LS-Z dated 4 September 1947, subject: "Request for Documents."

b. C.L.O. Memorandum No. 7187(PD) dated 12 September 1947, subject as above.

c. C.L.O. Memorandum No. 7231(PD) dated 15 September 1947, subject as above.

d. C.L.O. Memorandum No. 7284(PD) dated 16 September 1947, subject as above.

e. C.L.O. Memorandum No. 7335(PD) dated 18 September 1947, subject as above.

2. Four (4) blue prints and six (6) tables showing the geographical jurisdiction and organization of the 4th Fleet, IJN, successively, as required in Paragraph 1a. of the reference a. Check Sheet, are enclosed herewith.

3. A report of the Second Demobilization Bureau with regard to Paragraph 1f. of the reference a. Check Sheet, is stated on the attached paper (Annex I).

4. A report of the Second Demobilization Bureau with regard to Paragraph 1j. and k: of the reference a. Check Sheet, is stated on the attached papers (Annex 2), and the required documents in that regard are submitted herewith as mentioned therein.

FOR THE PRESIDENT:

/s/ Y. Katsuno
(Y. Katsuno)
Chief of Liaison Section,
Central Liaison Office.

Enclosures:
a. 4 blue prints and 6 tables as stated in para. 2 above.
b. A report as stated in para. 3 above.
c. A report as stated in para. 4 above accompanied by 15 books.

Certified to be a true copy:
Herbert L. Ogden
Herbert L. Ogden,
Commander, U. S. Navy.

Exhibit (1)

Annex chart No. 3

PACIFIC OCEAN

21,130,000 (Lat, 5°)

From the British chart, 1937

The area of jurisdiction of the 4th Fleet

(11 Mar 1944 - June 1944)

25°-0'N 136°-7E

25°-0'N

15° N extended

25°-0'N 160°-0'E

Formosa

20°

1°-0'N 130°-0'E

Central Pacific Area Fleet

4th Fleet

Philippine Is

Mariana Is

Guam 11°-0'N 145°-0'E

11°-0'N

11°-0'N 160°-0'E

Marshall Is

Caroline Is

Yap

Palau

Truk

Ponape

Jaluit

New Guinea

5°-0'N 135°-0'E

4th Fleet

6°-0' 145°-0'E

0°-0'N 160°-0'E

125°

Extended

160°

0°

120°

Certified to be a true copy:
Herbert I. Ogden,
Commander, U. S. Navy.

Exhibit (2)

Annex chart No. 4

D PACIFIC OCEAN AREA

1/21,830,000 (Lat 5°)

Formosa from the British chart, 1937.

The area of jurisdiction of the 4th Fleet

(July 1944 – Aug 1945)

24°-0'N 124°-0'E

24°-0'N

extended

20°

20°

Philippine Is

Marianas Is.

Ogasawara

Marshall Is

Caroline Is

Yap

Palau

Truk

Ponape

Jaluit

0°-0' 142°-0'E

0°-0' 168°-0'E

125°

extended

160°

180°

0°

0°

Certified to be a true copy:

Herbert L. Ogden,
Commander, U. S. Navy.

Exhibit (3)

20
252

JAPANESE GOVERNMENT
CENTRAL LIAISON OFFICE

TO : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison Office, Tokyo.

SUBJECT : Japanese Naval Documents.

C.L.O. No. 7284(PD) 16 September 1947

1. Reference:

a. Legal Section's Check Sheet No. 11652 LS-Z dated 4 September 1947, subject: "Request for Documents."

b. C.L.O. Memorandum No. 7187(PD) dated 12 September 1947, subject as above.

c. C.L.O. Memorandum No. 7231(PD) dated 15 September 1947, subject as above.

2. Submitted below is a report on the period of duty of Commanders-in-Chief and others of the Fourth Fleet, as required in paragraph 1c. of reference Check Sheet:

a. Period of duty of the Commanders-in-Chief of Fourth Fleet.

Name and Rank	Tenure by Official Announcement of Appointment	Actual Period of Assuming Duty
INOUE Shigeyoshi, Vice-Admiral	From: 11 Aug. 1941 To : 25 Oct. 1942	From: 21 Aug. 1941 To : 31 Oct. 1942
SAMEJIMA Tomoshige, Vice-Admiral	From: 26 Oct. 1942 To : 31 Mar. 1943	From: 31 Oct. 1942 To : 5 Apr. 1943

b. Period of duty of four personnel in the posts connected with 4th Fleet.

NAME	RANK	POST	Tenure by Official Announcement of Appointment	Actual Period of Assuming Duty
HARA Chuichi	Vice-Admiral	C-in-C, 4th Fleet	From: 19 Feb 1944 To : End of War	From: 23 Feb 1944 To : End of War
KOBAYASHI Masashi	Vice-Admiral	C-in-C, 4th Fleet	From: 1 Apr. 1943 To :18 Feb. 1944	From: 5 Apr.1943 To :23 Feb.1944
WAKABAYASHI Seisaku	Vice-Admiral	Commandant, 4th Base Force, & 2nd Escort Force.	From:15 July 1943 To :18 Feb. 1944	From: July 1943 To :23 Feb.1944

Exhibit 2(1)

NAME	RANK	POST	Tenure by Official Announcement of Appointment	Actual Period of Assuming Duty
ARIMA Kaoru	Rear-Admiral	ditto	From: 19 Feb.1944 To : 30 Apr.1944	From: 23 Feb.1944 To : 30 Apr.1944
		and Chief of Staff, 4th Fleet	From: 30 Mar.1944 To : 30 Apr.1944	Fro
ARIMA Kaoru	Rear-Admiral	Chief of Staff, 4th Fleet	From: 1 May 1944 11 Aug.1944	From: 1 May 1944 To : 12 Aug.1944

Remarks: (a) The Japanese Navy did not use such compliance of order form, and, as a rule, the responsibility of duty was assumed or transferred at the time of actually assuming or leaving the duty.

(b) The date of actually assuming duty of Vice Admiral WAKABAYASHI is under investigation.

FOR THE PRESIDENT:

Y. Katsuno.

(Y.Katsuno)
Chief of Liaison Section,
Central Liaison Office.

Exhibit 2(2)

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS

CHECK SHEET

(Do not remove from attached sheets) CWW/mwf

File No.: 18912 LS-Z Subject: Request for information

Note No.: From: Legal Section To: Japanese Liaison G-2 Date 27 Sept 1948

Request this section be furnished the following information, in proper and certified form, for use as evidence in court, on or before 2 Oct 1948:

(a) Branch of Service, Army or Navy, of the senior ranking officer on Nauru and Ocean Islands. If an army Officer, was he subordinate to any Navy organization.

(b) The names of the senior army and navy organizations on Nauru and Ocean Islands during the period from 23 February 1944 to 2 Sept 1945 and the name of rank of commanding officers of these organizations.

/s/ C.W.W.
/t/ C.W.W., Major INF
Liaison Officer

CERTIFIED TO BE A TRUE COPY:
C. W. WILLOUGHBY, Major, INF.

Exhibit 3(1)

JAPANESE GOVERNMENT

CENTRAL LIAISON AND COORDINATION OFFICE

TO : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison and Coordination Office, Tokyo.

SUBJECT : Information on Senior Ranking Officer and Senior Navy Organization on Nauru and Ocean Islands.

C.L.C.O. No. 3442(3.I.) 2 October 1948

1. Reference: Legal Section's Check Sheet No. 18912 LS-Z dated 27 September 1948, subject: "Request for Information."

2. Submitted herewith are a report on the subject matter as prepared by the Second Demobilization Bureau Liquidation Division and a certificate of the same Division verifying its authenticity together with its English translation.

FOR THE DIRECTOR-GENERAL:

(K. Yoshida)
Chief of Liaison Section,
Central Liaison and
Coordination Office.

Enclosures: A report and a certificate with its English translation.

Exhibit 3(2)

L 520

JAPANESE GOVERNMENT

CENTRAL LIAISON AND COORDINATION OFFICE

TO : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison and Coordination Office, Tokyo.

SUBJECT : Information on Senior Ranking Officer and Senior Navy Organization on Marus and Ocean Islands.

C.L.C.O. No. 3442(3.I.) 2 October 1948

1. Reference: Legal Section's Check Sheet No. 1891Z LS-2 dated 27 September 1948, subject: "Request for Information."

2. Submitted herewith are a report on the subject matter as prepared by the Second Demobilization Bureau Liquidation Division and a certificate of the same Division verifying its authenticity together with its English translation.

FOR THE DIRECTOR-GENERAL:

(K. Yoshida)
Chief of Liaison Section,
Central Liaison and
Coordination Office.

Enclosures:

Exhibit 3(2)

C E R T I F I C A T E

I, KAWAI Iwao, hereby certify that I am officially connected with the Japanese Government in the following capacity: Director of the Second Demobilization Bureau Liquidation Division, Demobilization Bureau, Repatriation Relief Agency and that the document hereto attached consisting of one page and described as follows: Concerning Commanding Officers on Nauru and Ocean Islands, was compiled by this Division basing upon the data kept in custody in this Division and the statements of the former naval personnel concerned.

Signed at Tokyo on this
1st day of October 1948.

I. Kawai

KAWAI Iwao,
Director of the Second
Demobilization Bureau
Liquidation Division,
Demobilization Bureau,
Repatriation Relief Agency.

Enclosure to C. I. C. O. No. 3492
(3 I)

Exhibit 3(3)

Annex

Concerning Commanding Officers on Nauru and Ocean Islands.

1. It is believed that the forces stationed on Nauru and Ocean Islands were the naval ones and the branch of service of the senior ranking officer on the said islands was the navy.
2. The names of the senior naval organizations and the names and ranks of the commanding officers of the said organizations during the period in question were as set forth below.

Name of Island	Senior Naval Organization Stationed there.	Name and Rank of Commanding Officer.	Remarks
Nauru	67th Naval Guards. 2nd Special Landing Party of Yokosuka Naval Station.	Captain SOEDA Hisayuki	He assumed the posts of Commandants of both units concurrently.
Ocean	Detachment of the 67th Naval Guards.	Lt-Commander SUZUKI Nao-omi	

Exhibit 3(4)

JAPANESE GOVERNMENT
CENTRAL LIAISON OFFICE

TO : GENERAL HEADQUARTERS OF THE SUPREME COMMANDER FOR THE ALLIED POWERS.

FROM : Central Liaison Office, Tokyo.

SUBJECT: Japanese Naval Documents.

C.L.O. No.7231(PD) 15 September 1947

1. Reference:

a. Legal Section's Check Sheet No.11652 LS-Z dated 4 September 1947, subject: "Request for Documents."

b. C.L.O. Memorandum No.7187(PD) dated 12 September 1947, subject as above.

2. Copies in English and in Japanese of the Naval Staff Regulations, as required in paragraph 3. of the reference a. Check Sheet, are enclosed herewith.

FOR THE PRESIDENT:

Y. Katsuno

(Y. Katsuno)
Chief of Liaison Section,
Central Liaison Office.

Enclosures: Copies in English and Japanese of a document.

Exhibit 4(1)

1920

ENCLOSURE 7(J)

（別紙）

一、日本政府の法令、命令及び海軍省又は軍令部から發せられた規則、命令等には部隊抑留中の俘虜に關しその保管の責任、管理及業務を特定の參謀に課することを規定してゐる規則は無い

二、司令部では參謀、副官の職務分擔が司令長官又は副官も司令官に依つて定められてゐる、從つて俘虜の管理を受持つべき參謀又は副官も司令部内としては定められて居た筈である、而して其の分擔業務の遂行上の參謀の權限は飽く迄司令長官又は司令官の幕僚としての權限であつて、海軍に於ては幕僚が單獨に自己の命令又は指示等を發することは出來ない

三、艦隊參謀及戰隊參謀の任務に關しては艦隊令に左の規程がある

第三十五條　司令長官の幕僚たる參謀長は司令長官を佐け隊務を整理し幕僚其の他隊務に參與する職員の職務を監督す

第三十六條　司令長官の幕僚たる參謀は參謀長の命を承け艦隊の軍紀

海軍

Enclosure to C.L.O.No 123/(PD)

Exhibit 4(2)

風紀、教育、訓練、作戰等に關する
機關科將校たる參謀は前項の規定に依るの外機關長の命
を承け服務す

第三十七條　司令長官の幕僚たる副官は參謀長の命を承け儀制、人事
及庶務に關することを掌る

第三十八條　司令官の幕僚たる參謀及副官は司令官の命を承け前二條
の規定に準し服務す、但し其の首席參謀の職務は參謀長
に關する規定に準す又副官を置かさるときは其の職務は
參謀の任とす

第五十一條　幕僚其の他隊務に參與する職員其の職務に關し司令長官
又は司令官に具申又は報告を爲すときは總て參謀長、參
謀長を置かさるときは首席參謀を經由すべし

特設根據地隊參謀の任務に關しては特設掃船部隊令に左の規程がある

第四十九條の四　特設根據地隊に司令官の幕僚として左の職員を置く

海軍

Exhibit 4(3)

但し特設根據地隊の編制又は情況に應じ其の一部を置かず參謀長、參謀、副官、機關長、軍樂長、主計長

前項職員の職務に付ては艦隊令中參謀長以下に關する規定を準用す

（終）

海軍

Exhibit 4(4)

Enclosure

I. There were no regulations whatever in the laws or ordinances issued by the Japanese Government of the regulations or ordeps issued by the Navy Ministry or by the Naval General Staff charging any specified staff officer with responsibility for the custody of POWs detained in a unit, their administration or their operation.

II. The duties of staff officers and aides-de-camp in a headquarters are fixed by the commander-in-chief or the commandant. It follows therefore that in a headquarters there should always be a staff officer or an aide-de-camp assigned to the duty of handling POWs. The competence of such staff officer in carrying out his assigned duty is in any case the competence of a staff member of the commander-in-chief or the commandant; a staff officer in the Navy is never authorized to issue orders, directions, etc. by himself.

III. Concerning the duties of the staff officers in the fleet or squadron the following are stipulated in the Fleet Ordinance:-

Article 3[illegible].

The Chief of Staff, who is a member of the Staff to the Commander-in-Chief, shall assist the Commander-in-Chief in arranging the affairs of the Fleet and in supervising other members of the Staff and other personnel associated in the affairs of the Headquarters relative to the discharging of their duties.

Enclosure to C.L.O.No 723/ (PD)

Exhibit 4(5)

Article 36.

The Staff Officers, who are members of the Staff to the Commander-in-Chief, shall under orders of the Chief of Staff handle affairs concerning discipline, morale, education, training, operation, etc. of the fleet.

Engineer Staff Officers shall, in addition to the foregoing regulation, carry out their duties under the direction of the Chief Engineer of the Fleet.

Article 37.

The Aides-de-Camp, who are members of the Staff to the Commander-in-Chief, shall under orders of the Chief of Staff handle affairs concerning ceremonies, personnel and miscellany.

Article 38.

The Staff Officers and Aides-de-Camp, who are members of the Staff to the Commandant, shall carry out their duties in conformity with the preceding two articles under orders of the Commandant.

But the duties of the Senior Staff Officer shall conform to those of the Chief of Staff; and where there is no Aide-de-Camp, his duties shall be assumed by a staff Officer.

Article 51.

All reports and opinions to the Commander-in-Chief or the Commandant submitted by a member of the Staff or by other personnel affiliated with the Headquarters in carrying out their duties shall always be made through the Chief of Staff, or through the Senior Staff Officer in case there is no Chief of Staff.

IV. Concerning the duties of the Staff Officers of a Temporary Base Force, the converted Vessels and Temporarily Established Units Ordinance stipulates as follows:-

Article 49-4.

The Temporary Base Force shall have the following personnel as the staff to the Commandant; but depending on the organization of a temporary base force or on the situation, a part of them may be dispensed with:

Chief of Staff, Staff Officers, Aide-de-Camp, Chief Engineer, Chief Surgeon, and Chief Paymaster.

The regulations covering the duties of the chief of staff and other corresponding personnel of the fleet in the Fleet Ordinance shall apply with the necessary modifications to the personnel mentioned in the preceding paragraph.

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET

HEADQUARTERS OF THE COMMANDER NAVAL FORCES MARIANAS
NAVAL FORCES MARSHALLS-CAROLINES AND MARSHALLS-CAROLINES AREA

01 NOV 1948

I hereby certify that the annexed are true excerpts taken from the official records of Commander Naval Forces Marianas in the case of Misuki MASUDA, et al, and consist of the following:

1. The charge and specification dated 3 December 1945.

2. Nolle Prosequi in the case of Nisuki MASUDA, dated 8 December 1945.

3. Military Commission Order No. 2 (ComMarGils) dated 5 February 1946.

4. Action of the convening authority, The Commander Marshalls-Gilberts Area, dated 19 December 1945.

5. Action of the reviewing authority, the Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, dated 8 March 1948.

6. Action of the confirming authority, the Secretary of the Navy, dated 10 March 1947.

W. L. Ogden

H. L. OGDEN,
Commander, U. S. Navy.

Exhibit 5 (1)

UNITED STATES PACIFIC FLEET
AND PACIFIC OCEAN AREAS
COMMANDER
MARSHALS-GILBERTS AREA

Area/01
P13

Serial: 9148

3 December 1945.

From: Commander Marshalls Gilberts Area.
To : Lieutenant John A. Murphy, U.S.N.R., or Lieutenant W. P. Mahoney, U.S.N.R., Judge Advocate, Military Commission, Marshalls Gilberts Area.

Subject: Charge and Specification in the case of:

Rear Admiral Nisuki Masuda, Imperial Japanese Navy,
Lieutenant (jg) Tsugio Yoshimura, Imperial Japanese Navy,
Ensign Mamoru Kawachi, Imperial Japanese Navy,
Ensign Tadashi Tasaki, Imperial Japanese Navy, and
Warrant Officer Toshimoto Tanaka, Imperial Japanese Navy.

1. The above named men will be tried before the Military Commission of which you are Judge Advocate upon the following charge and specification. You will notify the president of the commission accordingly; inform the accused of the date set for their trial, and summon all witnesses, both for the prosecution and for the defense.

CHARGE I

MURDER

SPECIFICATION

In that, Nisuki Masuda, Rear Admiral, IJN, Tsugio Yoshimura, Lieutenant Junior Grade, IJN, Mamoru Kawachi, Ensign, IJN, Tadashi Tasaki, Ensign, IJN, Toshimoto Tanaka, Warrant Officer, IJN, attached to the military installation of the Imperial Japanese Navy at Jaluit Atoll, Marshall Islands, and while so serving at said military installation of the Imperial Japanese Navy at Jaluit Atoll, Marshall Islands, did, on or about March 10, 1944 on the Island of Ainoman, Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America and the Japanese Empire, wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American fliers, then and there attached to the Armed Forces of the United States of America, and then and there captured and unarmed prisoners of war in the custody of the said accused, all in violation of the dignity of the United States of America, the International rules of warfare and the moral standards of civilized society.

/s/ W. K. HARRILL
W. K. HARRILL

Authenticated:

/s/ George Murphy
George Murphy
Flag Secretary.

Exhibit 5 (2)

UNITED STATES PACIFIC FLEET
AND PACIFIC OCEAN AREAS
COMMANDER
MARSHALLS GILBERTS AREA

Area/00
P13

Serial: 9364

8 DEC 1945

From: Commander Marshalls Gilberts Area.
To : Lieutenant John A. Murphy, U. S. Naval Reserve, or
Lieutenant W. P. Mahoney, U. S. Naval Reserve, Judge
Advocates, Military Commission, Marshalls Gilberts Area.

Subject: Authorizing entry of nolle prosequi in case of:

Rear Admiral Nisuki Masuda, Imperial Japanese Navy.

1. You are hereby authorized and directed to enter a nolle prosequi as to the accused Nisuki Masuda, Rear Admiral, Imperial Japanese Navy, in the above named case, as to the specification and charge preferred against him December 3, 1945.

/s/ W. K. HARRILL
William K. Harrill,
Rear Admiral, U. S. Navy,
Commander Marshalls Gilberts Area.

Exhibit 5(3)

COMMANDER MARSHALL GILBERTS AREA

5 February 1946

MILITARY COMMISSION ORDER NO. 2 (ComMarGils).

1. On 7 December 1945 the following named accused were tried by United States Military Commission at the U. S. Naval Air Base, Kwajalein Atoll, Marshall Islands, on the following charge and specifications: (By order of the Commander MarshallGilberts Area):

*MASUDA, Misuki, rear admiral, Imperial Japanese Navy,
YOSHIMURA, Tsugio, lieutenant (jg), Imperial Japanese Navy,
KAWACHI, Mamoru, ensign, Imperial Japanese Navy,
TASAKI, Tadashi, ensign, Imperial Japanese Navy, and
TANAKA, Toshimoto, warrant officer, Imperial Japanese Navy.

*Note - On 8 December 1945 convening authority directed a nolle prosequi be entered as to this accused. MASUDA committed suicide before date of trial.

CHARGE: MURDER - Specification - ...Did, on or about March 10, 1944, on the island of Lineman, Jaluit Atoll, Marshall Islands...wilfully, feloniously, with malice aforethought, without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American flyers ... then and there captured and unarmed prisoners of war in the custody of the said accused.

FINDINGS: As to the accused:

"Tsugio YOSHIMURA, lieutenant (j.g.), Imperial Japanese Navy, the specification of the charge proved, and that the accused, Tsugio YOSHIMURA, lieutenant (j.g.) Imperial Japanese Navy, is of the charge guilty".

"Mamoru KAWACHI, ensign, Imperial Japanese Navy, the specification of the charge proved, and that the accused Mamoru KAWACHI, ensign, Imperial Japanese Navy, is of the charge guilty".

"Toshimoto TANAKA, warrant officer, Imperial Japanese Navy, the specification of the charge proved, and that the accused, Toshimoto TANAKA, warrant officer, Imperial Japanese Navy, is of the charge guilty".

"Tadashi TASAKI, ensign, Imperial Japanese Navy, the specification of the charge proved, and that the accused, Tadashi TASAKI, ensign, Imperial Japanese Navy, is of the charge guilty.

Exhibit 5(H)

SENTENCE: The commission on December 13, 1945, sentenced the accused as follows:

"Tsugio TOSHIMURA, lieutenant, junior grade, Imperial Japanese Navy, to be hanged by the neck until dead, two-thirds of the members concurring".

"Mamoru KAWACHI, ensign, Imperial Japanese Navy, to be hanged by the neck until dead, two-thirds of the members concurring".

"Tadashi TASAKI, ensign, Imperial Japanese Navy, to be imprisoned in such prison or penitentary as the convening authority may designate for a period of ten (10) years".

"Tashiroto TANAKA, warrant officer, Imperial Japanese Navy, to be hanged by the neck until dead, two-thirds of the members concurring".

2. On 19 December 1945, the Convening Authority (Commander Marshall Gilberts Area) subject to certain remarks, not here quoted, approved the proceedings, findings, and sentences as above indicated, and prior to the execution of the death sentences adjudged, in conformity with the provisions of Section D-14, Naval Courts and Boards, referred the case to the Secretary of the Navy via the Reviewing Authority (Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas, and the Military Governor Pacific Ocean Areas). The War Criminal Stockade, Kwajalein was designed as the place of confinement, pending instructions from higher authority.

C. A. POWNALL.
Commander Marshall Gilberts Area.

Exhibit 5(4A)

Commander Marshalls Gilberts Area,
19 December 1945.

In the foregoing proceedings it is established that three (3) American fliers on or about February 1944, had been forced to land in the vicinity of Jaluit Atoll, Marshall Islands, and subsequently became unarmed prisoners of war on Emidj Island on which was established the Japanese Naval Garrison Force Headquarters under Command of Rear Admiral Nisuki Masuda, IJN. Approximately one (1) month thereafter, about the hour 2200, and upon orders of Rear Admiral Masuda, the three (3) Americans were taken by truck to a cemetery on the adjoining island of Aineman, secretely shot to death and then cremated. Three (3) Japanese identified as executioners and a fourth identified as custodian of the three (3) Americans and who released them to the executioners, believing the Americans were to be executed, were all convicted of murder. The executioners were sentenced to be hanged, The custodian who released the Americans to the executioners, received a sentence of ten (10) years imprisonment. Rear Admiral Masuda who, it is claimed, ordered the executions, committed suicide prior to the trial.

The accused admitted their part in the execution of the American POW's, but claim as a defense that, as military men of the Japanese Empire, they were acting under orders of superior authority which they were duty bound to obey.

The Military Commission before whom the accused were tried, was authorized to use rules governing the trial of war criminals established by Supreme Commander Allied Powers. These rules provide that action pursuant to an 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. Under this rule of law, the contention of the accused was of no avail. They stood convicted on their own testimony.

Being a member of the Military does not absolve one of responsibility for acts which constitute war crimes. A member of the Military is responsible for his acts not alone to his Superior but also to the laws of custom in civilized society. It is essential to the preservation of civilized society that responsibility for crime should not find a shield in the name of War Power and hence remain beyond the reach of judicial review either by civil or Military tribunals.

The accused are enemy-aliens. They do not come before the Military Commission clothed with guarantees and protections secured under the Constitution of the United States and the Bill of Rights. The Military Commission has no mandate to adopt for guidance the accused's conception of responsibility. Their guide is the moral law of society. The accused stand before a tribunal whose function is to determine guilt or innocence of the crime charged.

The accused were informed of the charges preferred against them; they were represented by Counsel; they presented their defense; the issues were clarified and a decision was rendered by a Military Commission.

Subject to the above remarks, the proceedings, findings, and sentences in the foregoing case are approved.

/s/ W. K. HARRILL
William K. Harrill
Rear Admiral, U. S. Navy,
Commander Marshalls Gilberts Area.

Exhibit 5 (5)

Cincpac File
A17

Serial 2938

RESTRICTED

UNITED STATES PACIFIC FLEET
AND PACIFIC OCEAN AREAS
Headquarters of the Commander in Chief

c/o Fleet Post Office
San Francisco, California.

8 MAR 1946

The Military Commission in this case, which included two Army officers as members, was specifically authorized by the Commander in Chief, U. S. Pacific Fleet and Pacific Ocean Areas, to be convened by the Commander Marshalls Gilberts Area. The precept was issued 3 November 1945. The order for trial (charge and specification) was issued 3 December 1945 and a copy thereof was delivered to the accused 4 December 1945.

The facts are summarized in the action of the convening authority. This is a clear case of the murder of three Americans who were prisoners of war in the custody of Japanese naval authorities, which murder was committed by inferior officers in obedience to orders of a superior. The order of the superior which arbitrarily directed the execution of the three Americans was illegal as it was in violation of the provisions of the Geneva Prisoner of War Convention (1929). The command of a superior neither excuses nor justifies an unlawful act. (Clark and Marshall, The Law of Crimes, 4th ed., sec. 71, n. 310; CMO 212-1919, p. 5; CMO 4-1929, p. 19).

The judge advocate introduced in evidence (R.p. 3) a dispatch from the Commander Marshalls Gilberts Area to the Secretary of State and the Secretary of the Navy and to others for information (R. Ex.P). The dispatch names the five accused as "prisoners of war". It is considered that none of the accused attained a prisoner of war status. They were disarmed military personnel who surrendered after 2 September 1945. (See J.C.S. 1328/5 of 10 Sept. 1945 and J.C.S. 1380/9 of 22 Sept. 1945, p. 116 of encl). It is the opinion of the reviewing authority that in no event could any of the accused have a prisoner of war status for the purpose of this trial for a war crime committed prior to being taken into custody.

It is noted that four members of the Commission recommended clemency in the case of the defendant, Tadashi Tasaki, ensign, IJN. It is the opinion of the reviewing authority that clemency has in effect already been exercised in Tasaki's case inasmuch as he was sentenced to only ten years imprisonment.

Subject to the foregoing remarks, the proceedings, findings, sentences and action of the convening authority in the foregoing case of Rear Admiral Nisuki Masuda, Imperial Japanese Navy, Lieutenant (jg) Tsugio Yoshimura, Imperial Japanese Navy, Ensign Mamoru Kawachi, Imperial Japanese Navy, Ensign Tadashi Tasaki, Imperial Japanese Navy, and Warrant Officer Tashimoto Tanaka, Imperial Japanese Navy, are approved.

Exhibit 5 (6)

Cincpac File
A17

Serial 2938

UNITED STATES PACIFIC FLEET
AND PACIFIC OCEAN AREAS
Headquarters of the Commander in Chief

c/o Fleet Post Office,
San Francisco, California.

RESTRICTED

8 MAR 1946

The Island Command Stockade, Guam, is designated as the place for the execution of so much of the sentence as relates to confinement.

Prior to the execution of the death sentence adjudged in this case the record is, in conformity with section D-14, Naval Courts and Boards, respectfully referred to the Secretary of the Navy.

This record is hereby classified RESTRICTED.

/s/ J. H. Towers
J. H. TOWERS,
Admiral, U.S. Navy,
Commander in Chief,
United States Pacific Fleet,
and Pacific Ocean Areas,
and Military Governor of
the Pacific Ocean Areas.

To: Judge Advocate General.

Re: Record of proceedings of Military Commission - case of Rear Admiral Nisuki Masuda, IJN, et al.

Copy to:
Com MARIANAS
AtCon KWAJALEIN
IsCon GUAM

Exhibit 5 (7)

NAVY DEPARTMENT
Washington 25, D. C.

JAG:I:MDS:jas
Mil.Com.-YOSHIMURA, Tsugio/
A17-20 (2-4-47) 146473

10 MAR 1947

From: The Secretary of the Navy.
To: Commander in Chief, United States Pacific Fleet.

Subj: Military Commission case of Lieutenant (junior grade) Tsugio Yoshimura, I.J.N., Ensign Mamoru Kawachi, I.J.N., and Warrant Officer Toshimoto Tanaka, I.J.N., tried in joinder with Ensign Tadashi Tasaki, I.J.N., by order of Commander, Marshalls Gilberts Area on 7 December 1945.

1. The Military Commission before which Lieutenant (junior grade) Tsugio Yoshimura, I.J.N., Ensign Mamoru Kawachi, I.J.N., and Warrant Officer Toshimoto Tanaka, I.J.N., were tried in joinder with Ensign Tadashi Tasaki, I.J.N., at the U.S. Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, under date of 7 December 1945, found them guilty of the Charge, Murder, and adjudged the following sentences:

> "The commission, therefore, sentences him, Tsugio Yoshimura, Lieutenant Junior Grade, Imperial Japanese Navy, to be hanged by the neck until dead, two-thirds of the members concurring."
>
> "The commission, therefore, sentences him, Mamoru Kawachi, Ensign, Imperial Japanese Navy, to be hanged by the neck until dead, two-thirds of the members concurring."
>
> "The commission, therefore, sentences him, Toshimoto Tanaka, warrant officer, Imperial Japanese Navy, to be hanged by the neck until dead, two-thirds of the members concurring."

2. The Commander, Marshalls Gilberts Area, the convening authority, on 19 December 1945, subject to remarks, approved the proceedings, findings and sentences in this case.

3. The Commander in Chief, United States Pacific Fleet, the reviewing authority, on 8 March 1946, subject to remarks, approved the proceedings, findings and sentences, in this case, and the action of the convening authority thereon.

Exhibit 5(8)

JAG:I:MDS:vll
Mil.Com.-YOSHIMURA, Tsugio/
A17-20 (1-28-47) 146473

4. In accordance with the provision of Section D-14, Naval Courts and Boards, 1937, the Acting Secretary of the Navy, on 9 January 1947, commuted the sentences of death in the case of Yoshimura, Kawachi, and Tanaka, to imprisonment at hard labor for the term of their natural lives.

JOHN L. SULLIVAN
Acting Secretary of the Navy.

CC: CNO
Commander, Marianas Area

Exhibit 5(9)

The Case of Ensign Goranson and two others.

The case in which some natives stated that the said unit had maltreated prisoners of war was actually done by a civilian, TSUTSUMI, and this has led to many rumors and for this we are extremely sorry. On that day TSUTSUMI (civilian) went aboard the KAITSU MARU, which was under the command of MATSUMOTO (civilian later killed in action) and went to BOGORABORAPU Island on some other business, and he learned from the natives there that there were three Americans on REBUJERU Island. He went on his own free will, and attempted to take them into custody. TSUTSUMI stated that the three Americans resisted being taken into custody so he beat them. TSUTSUMI has no knowledge regarding the treatment of prisoners of war. After the American prisoners were transferred to the custody of the officer-in-charge of prisoners of war, we believe that they received no such treatment as stated above, but since Ensign TASAKI (Warrant Officer at that time) main duty was commander of the special corps and also was the officer-in-charge of the prisoners, he was not able to remain in the vicinity of the prisoners all the time. Furthermore, five of six guards who were assigned to guard the prisoners were killed in action, thus we could not complete the investigation. Although there might be a suspicion that the guards might have maltreated the prisoners, we have interrogated the one guard who was on duty and he is still living, but we have no knowledge of what happened when the other guards were on duty.

The following is the complete report on the prisoners treatment, from the time they were received and to the time when they were killed and cremated.

1. Taking into custody.

As it was explained previously, when the KAITSU MARU, commanded by MATSUMOTO (civilian) sailed to BOGORABORAPU Island on February 9, 1944 on official business, they were told by the natives that three Americans had drifted ashore on REBUJERU Island. By their own free will they went to capture them and brought them back. As soon as Lieutenant Twanami (Ensign then) and who was assistant to the officer of the day on that day, received the word of the arrival of the American prisoners of war on EMIDJI Island, he sent the master-at-arms to the pier to receive them and had him quarter the prisoners in the radio receiving station's building. Thereafter, conforming to our regulations we had six enlisted men (Navy or Army) on guard daily, assigning two guards to one prisoner in order to protect the prisoners as well as to prevent them from escaping. After the interrogation was completed the prisoners were transferred to an air raid shelter which was located near the ocean side.

2. Interrogation.

During the first several days the interrogation of the prisoners were carried on at night by the Batallion Commander (Major FURUKI, who interrogated twice) and by Lieutenant TWANAMI (Ensign then, who interrogated several times). The questions asked during the interrogation were their ranks, names, unit attached to, movements, situation of KWAJALEIN and MAJURO, landing tactics of American forces, etc. Thereafter they were questioned once or twice whenever questions came to our minds. After completing the interrogation we were merely waiting for the day when we could ship them to JAPAN. We were very much pleased with their frank answers to our questions.

3. Daily Routine.

In the day time, because we were constantly under air attack, the prisoners were in the air raid shelter most of the time. At night they took a walk in the vicinity when they so desired. As for the

Exhibit "7-B (1)"

CERTIFIED TO BE A TRUE COPY:
Herbert L. Ogden
HERBERT L. OGDEN,
Commander, U. S. Navy.

EXHIBIT 6 (1)

food, they were fed the same as the Japanese, however, they had no appetite for rice and wheat but they like the biscuit, canned meat and vegetables very much.

4. Execution.

(1) Reason. KWAJALEIN had been already occupied by the Americans. Day by day the general trend of the war was getting grave for the Japanese, therefore we decided that it was impossible to find any way to send the prisoners of war back to TRUK or to JAPAN, in spite of our earnest desire to do so.

(a) At that time the general tendency of the war was very disadvantageous to us and the men of our garrison were all desparate and very nervous. The commanding officer was determined to shoot any member of the garrison who dared to escape. The commanding officer had come to the decision that the prisoners attitude was to attempt to escape during the night or during a bombing.

(b) An American invasion on JALUIT was imminent. Every day the enemy's air attacks were so fierce we began to realize it was difficult to continue detaching guard to protect the prisoners and to keep them provided.

(2) The Order.

Captain MASUDA, the commanding officers of the JALUIT Defense Force and who was also the commanding officers of the Naval Garrison Unit (which was in charge of the handling of the prisoners) summoned Warrant Officer YOSHIMURA during the daylight on 10 March and gave him a secret order which read: "You will secretly execute the three prisoners of war tonight".

(3) The Undertaking of the Execution.

Warrant Officer YOSHIMURA requested that Warrant Officer KAWACHI (Engineer) and Chief Petty Officer TANAKA (Paymaster) to assist him in the execution and his request was granted. A truck was made available at 1000 (American time C100) and Chief Petty Officer TANAKA (Paymaster) relayed the order of execution and sent the prisoners and executioners to the crematorium. Somewhere near the crematorium the three prisoners were allowed a short reprieve and they held their hands together and prayed for awhile. Then the three executioners assigned to the three prisoners blind-folded the prisoners and made them stand up. Each executioner fired one round at the head of his prisoner with a pistol. All prisoners fell but were still writhing in pain. The executioners, Warrant Officer YOSHIMURA and Chief Petty Officer TANAKA, feeling sorry to make them suffer for such a long time, fired another additional shot at the heart of their respective prisoner. Warrant Officer KAWACHI confessed to have swung his sword at his prisoner.

5. Cremation.

After completing the execution the executioners ordered KATO, a civilian attached to the Navy (CB), to cremate the bodies at the crematorium. Among those who assisted in cremating of the bodies is SASAKI, a civilian, who is still living at the present. Furthermore, on the following day part of their bones were picked up and were buried in their graves.

6. Personal Belongins of the Dead Prisoners.

On the 21st and 23rd of September this year, the following items were collected at the crematorium: Two buckles, one hob-nail (made in U.S.A.) The wristwatch, rings etc, which civilian TSUTSUMI and others took from the prisoners were returned at the investigation and are now in the hands of the U. S. Navy.

(Signed) MASUDA NISUKI

Exhibit "7-B(2)"

EXHIBIT 6(2)

CERTIFIED TO BE A TRUE COPY:

HERBERT L. OGDEN,
Commander, U. S. Navy.

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET

HEADQUARTERS OF THE COMMANDER NAVAL FORCES MARIANAS
NAVAL FORCES MARSHALLS-CAROLINES AND MARSHALLS- CAROLINES AREA

1 NOV 1948

I hereby certify that the annexed are true excerpts taken from the official records of Commander Naval Forces, Marianas in the case of Shimpei ASANO, et al, and consist of the following:

1. Excerpts from the charges and specifications dated 15 July 1947.

2. Military Commission Order No. 40 in re ASANO, Shimpei, former Rear Admiral, IJN, et al, dated 17 February 1948.

3. Action of the convening authority, The Commander Marianas Area, dated 17 February 1948.

4. Action of the reviewing authority, the Commander in Chief Pacific and United States Pacific Fleet, dated 4 March 1948.

5. Action of the confirming authority, the Secretary of the Navy, dated 27 July 1948.

H. L. OGDEN,
Commander, U. S. Navy.

Exhibit 7 (1)

A16-2/FF12
13-JDN-cn

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

Serial: 15488

15 July 1947.

From: The Commander Marianas Area.
To : Lieutenant Commander Joseph A. REGAN, USN, and/or Lieutenant James P. KENNY, USN, and/or your successors in office as Judge Advocates, Military Commission, Commander Marianas.

Subject: Charges and Specifications in the case of:

ASANO, Shimpei
UENO, Chisato
NAKASE, Shohichi
ERIGUCHI, Takeshi
KOBAYASHI, Kazumi
TANAKA, Sueta

1. The above named persons will be tried before the Military Commission of which you are Judge Advocate upon the following charges and specifications. You will notify the president of the commission accordingly, inform the accused of the date set for trial, and summon all witnesses, both for the prosecution and for the defense.

CHARGE I

MURDER

SPECIFICATION 1

In that ASANO, Shimpei, then a captain, IJN, and commandant of the 41st Naval Guards, UENO, Chisato, then a surgeon lieutenant commander, IJN, and acting head medical officer of the 41st Naval Guards, NAKASE, Shohichi, then a lieutenant commander, IJN, and acting executive officer of the 41st Naval Guards, ERIGUCHI, Takeshi, then a dentist ensign, IJN, attached to the 41st Naval Guards, KOBAYASHI, Kazumi, then a corpsman warrant officer, IJN, attached to the 41st Naval Guards and others to the relator unknown, all attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, and while so serving at said military installations, acting jointly and in the pursuance of a common intent, did, each and together, at Dublon Island, Truk Atoll, Caroline Islands, on or about 20 June 1944, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Imperial Japanese Empire, willfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, kill and cause to be killed, by beheading with a deadly weapon, to wit, a sword, an American prisoner of war, name to the relator unknown, said prisoner of war being then and there held captive by the armed forces of Japan, this in violation of the law and customs of war.

Exhibit 7(2)

CHARGE I (continued)

SPECIFICATION 2

In that ASANO, Shimpei, then a captain, IJN, and commandant of the 41st Naval Guards, UENO, Chisato, then a surgeon lieutenant commander, IJN, and acting head medical officer of the 41st Naval Guards, NAKASE, Shohichi, then a lieutenant commander, IJN, and acting executive officer of the 41st Naval Guards, TANAKA, Sueta, then a leading seaman, IJN, attached to the 41st Naval Guards, all attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, and while so serving at said military installations, acting jointly with NAGASHIMA, Mitsuo, then a chief petty officer, IJN, attached to the 41st Naval Guards, and others to the relator unknown, and in the pursuance of a common intent, did, each and together, at Dublon Island, Truk Atoll, Caroline Islands, on or about 20 June 1944, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Imperial Japanese Empire, willfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, wound, strike, kill, and cause to be killed by stabbing with a deadly weapon, to wit, a bayonet, an American prisoner of war, name to the relator unknown, said prisoner of war being then and there held captive by the armed forces of Japan, this in violation of the law and customs of war.

CHARGE II

VIOLATION OF THE LAW AND CUSTOMS OF WAR

SPECIFICATION 1

In that ASANO, Shimpei, then a captain, IJN, and commandant of the 41st Naval Guards, UENO, Chisato, then a surgeon lieutenant commander, IJN, and acting head medical officer of the 41st Naval Guards, NAKASE, Shohichi, then a lieutenant commander, IJN, and acting executive officer of the 41st Naval Guards, KOBAYASHI, Kazumi, then a corpsman warrant officer, IJN, attached to the 41st Naval Guards, and others to the relator unknown, all attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, and while so serving at said military installations, acting jointly and in the pursuance of a common intent, did, each and together, at Dublon Island, Truk Atoll, Caroline Islands, on or about 20 June 1944, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Imperial Japanese Empire, willfully, unlawfully, inhumanely, and without justifiable cause, assault, strike, mistreat, torture, and abuse, an American prisoner of war, name to the relator unknown, then and there held captive by the armed forces of Japan, by conducting, before a group of Japanese nationals, surgical explorations in and upon the live body of the said American prisoner of war, consisting of subcutaneous cuts on the breast, abdomen, scrotum, right thigh, and right foot of the said American prisoner of war, this in violation of the law and customs of war.

.....
.....

/s/ C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

Exhibit 7 (3)

FF12/a17-10
02-JDM-fsk
Serial: 1905

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

17 February 1948.

MILITARY COMMISSION ORDER NO. 40

(In re ASANO, Shimpei, former Rear Admiral, IJN, et al)

1. On 22 September 1947, ASANO, Shimpei, former rear admiral, IJN, UENO, Chisato, former surgeon commander, IJN, NAKASE, Shohichi, former lieutenant commander, IJN, ERIGUCHI, Takeshi, former dentist lieutenant (jg), IJN, KOBAYASHI, Kazumi, former corpsman ensign, and TANAKA, Sueta, former petty officer first class, IJN, were tried and convicted by a United States Military Commission convened by order of the Commander Marianas Area, dated 21 February 1947, at the Headquarters, Commander Marianas, Guam, Marianas Islands, on the below listed charges and specifications:

CHARGES:

CHARGE I - MURDER (two specifications).

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Killed one American POW, name unknown.	Dublon Island, Truk Atoll.	20 June 1944	ASANO-NAKASE UENO-ERIGUCHI KOBAYASHI
2	Killed one American POW, name unknown	Dublon Island, Truk Atoll.	20 June 1944	ASANO-NAKASE UENO-TANAKA

CHARGE II - VIOLATION OF THE LAW AND CUSTOMS OF WAR (4 specifications)

Spec.	Nature of Offense	Place of Offense	Date of Offense	Name of Accused
1	Mistreatment of one American POW by unnecessary surgery.	Dublon Island, Truk Atoll.	20 June 1944	ASANO-UENO NAKASE-KOBAYASHI
2	Failed to control members of his command permitting them to commit atrocities against two American POWs.	Dublon Island, Truk Atoll.	20 June 1944	ASANO
3	Failed to protect two American POWs.	Dublon Island, Truk Atoll.	20 June 1944	ASANO
4	Failed to protect two American POWs.	Dublon Island, Truk Atoll.	20 June 1944	UENO

FINDINGS: On Charges and Specifications with reference to each accused.

"As to the accused, ASANO, Shimpei:
The first specification of the first charge proved.
The second specification of the second charge proved.
And that the accused, ASANO, Shimpei, is of the first charge guilty.

Exhibit 7 (4)

FF12/.17-10
02-JDM-fsk
Serial: 1905

17 February 1948.

MILIT..RY COMMISSION ORDER NO. 40 (Continued)

"The first specification of the second charge proved in part, proved except the words 'N.K.SE, Shohichi, then a lieutenant commander, IJN, and acting executive officer of the 41st Naval Guards, KOB.Y.SHI, Kazumi, then a corpsman warrant officer, IJN, attached to the 41st Naval Guards,' which words are not proved.
The second specification of the second charge proved.
The third specification of the second charge proved.
And that the accused, ASANO, Shimpei, is of the second charge guilty.

"As to the accused, UENO, Chisato:
The first specification of the first charge proved.
The second specification of the second charge proved.
And that the accus. ,UENO, Chisato, is of the first charge guilty.

"The first specification of the second charge proved in part, proved except the words 'N.K.SE, Shohichi, then a lieutenant commander, IJN, and acting executive officer of the 41st Naval Guards, KOB.Y.SHI, Kazumi, then a corpsman warrant officer, IJN, attached to the 41st Naval Guards,' which words are not proved.
The fourth specification of the second charge proved.
And that the accused, UENO, Chisato, is of the second charge guilty.

"As to the accused, N.K.SE, Shohichi:
The first specification of the first charge proved.
The second specification of the first charge proved.
And that the accused, N.K.SE, Shohichi, is of the first charge guilty.

"The first specification of the second charge not proved.
And that the accused, N.K.SE, Shohichi, is of the second charge not guilty; and the commission does therefore acquit the said N.K.SE, Shohichi, of the second charge.

"As to the accused, ERIGUCHI, Takeshi:
The first specification of the first charge proved.
And that the accused, ERIGUCHI, Takeshi, is of the first charge guilty.

"As to the accused, KOB.Y.SHI, Kazumi:
The first specification of the first charge proved.
And that the accused, KOB.Y.SHI, Kazumi, is of the first charge guilty.

"The first specification of the second charge not proved.
And that the accused, KOB.Y.SHI, Kazumi, is of the second charge not guilty; and the commission does therefore acquit the said KOB.Y.SHI, Kazumi, of the second charge.

"As to the accused, T.N.K., Sueta:
The second specification of the first charge proved.
And that the accused, T.N.K., Sueta, is of the first charge guilty."

SENTENCES: The commission on 24 October 1947 sentenced the accused as follows:

"The commission, therefore, sentences him, ASANO, Shimpei, to be hanged by the neck until dead, two-thirds of the members concurring.

"The commission, therefore, sentences him, UENO, Chisato, to be hanged by the neck until dead, two-thirds of the members concurring.

Exhibit 7 (HA)

FF12/A17-10
02-JDM-fsk
Serial: 1905

17 February 1948.

MILITARY COMMISSION ORDER NO. 40 (Continued)

"The commission, therefore, sentences him, NAKASE, Shohichi, to be confined for the term of his natural life.

"The commission, therefore, sentences him, ERIGUCHI, Takeshi, to be hanged by the neck until dead, two-thirds of the members concurring.

"The commission, therefore, sentences him, KOBAYASHI, Kazumi, to be confined for the term of his natural life.

"The commission, therefore, sentences him, TANAKA, Sueta, to be hanged by the neck until dead, two-thirds of the members concurring."

2. On 17 February 1948, the Convening Authority (Commander Marianas) took the following action (subject to certain remarks and recommendations not herein quoted):

"***the proceedings, findings of guilty, and the sentences in the foregoing case of ASANO, Shimpei, UENO, Chisato, NAKASE, Shohichi, ERIGUCHI, Takeshi, KOBAYASHI, Kazumi, and TANAKA, Sueta, are approved.

"ASANO, Shimpei, UENO, Chisato, ERIGUCHI, Takeshi, and TANAKA, Sueta, will be retained in confinement at the War Criminal Stockade, U. S. Marine Barracks, Guam, pending instructions from higher authority.

"NAKASE, Shohichi, and KOBAYASHI, Kazumi, will be transferred to the custody of the Commanding General of the 8th U. S. Army, via the first available United States ship, to serve their respective sentences of confinement in Sugamo Prison, Tokyo, Japan."

C. A. POWNALL,
Rear Admiral, U.S. Navy,
The Commander Marianas Area.

cc:
Commander in Chief, Pacific and U. S. Pacific Fleet (3)
Judge Advocate General, U. S. Navy (3)
Supreme Commander for the Allied Powers (3)
Commanding General, U. S. 8th Army, Japan (3)
National War Crimes Officer, Washington, D. C. (3)
Commanding Officer, Marine Barracks, Guam (3)

AUTHENTICATED:
H. D. Vanston
H. D. VANSTON,
Flag Secretary.

Exhibit 7 (4B)

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

FF12/A17-10
02-JDM-ro

Serial: 1906

17 FEB 1948

The military commission, composed of Army, Navy, and Marine Corps officers, in the foregoing case was ordered convened 1 March 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 (CinCPac conf. serial 0558 of 8 March 1946) and Pacific Ocean Areas, and Military Governor of the Pacific Ocean Areas; and the Judge Advocate General of the Navy (JAG despatch 311730 July 1946). The commission was authorized to take up this case as indicated in the precept. The order for trial (charges and specifications) was issued 15 July 1947 and served on the accused on 21 July 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 5 December 1945 by the Supreme Commander for the Allied Powers in his Regulations Governing the Trials of Accused War Criminals, and modifications thereof, as necessary to obtain justice.

The evidence establishes that two American prisoners of war were illegally killed in June 1944 at Dublon Island by the six accused.

The record shows that three of the accused, namely, ASANO, UENO, and NAKASE were convicted on two specifications of murder and that the three other accused, namely, ERIGUCHI, KOBAYASHI and TANAKA were each convicted on one specification of murder. One of those, NAKASE, convicted of two murders was sentenced to life imprisonment. Two of those, ERIGUCHI and TANAKA, convicted of one murder each, were sentenced to death by hanging. The latter two, one of whom was a dentist ensign and the other a leading seaman at the time, performed, in my opinion, the immediate acts which brought about the deaths of the two prisoners in obedience to superior orders. ERIGUCHI actually beheaded one of the prisoners with a sword and TANAKA was the first one in a squad of men to bayonet the other prisoner. While their acts were brutal and 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 Department Basic Field Manual, FM 27-10). In view of all the circumstances as indicated in the record the Convening Authority does not believe the culpability of ERIGUCHI and TANAKA 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.

Exhibit 7 (5)

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

FF12/A17-10
02-JDM-ro

Serial: 1906

17 FEB 1948

In view of paragraphs three and four above 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 ERIGUCHI, Takeshi and TANAKA, Sueta to that of life imprisonment. (Sec. 481 NOC. & B. refers).

Subject to the above the proceedings, findings of guilty, and the sentences in the foregoing case of ASANO, Shimpei, UENO, Chisato, NAKASE, Shohichi, ERIGUCHI, Takeshi, KOBAYASHI, Kazumi and TANAKA, Sueta are approved.

ASANO, Shimpei, UENO, Chisato, ERIGUCHI, Takeshi and TANAKA, Sueta will be retained in confinement at the War Criminal Stockade, U. S. Marine Barracks, Guam, pending instructions from higher authority.

NAKASE, Shohichi and KOBAYASHI, Kazumi will be transferred to the custody of the Commanding General of the 8th U. S. Army, via the first available United States ship, to serve their respective sentences of confinement in Sugamo Prison, Tokyo, Japan.

C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

Exhibit 7(6)

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET
Headquarters of the Commander in Chief

Cincpacflt File
A17-25

c/o Fleet Post Office,
San Francisco, California.

Serial 1072

4 MAR 1948

The proceedings, findings of guilty, and sentences, in the foregoing case of ASANO, Shimpei, UENO, Chisato, NAKASE, Shohichi, ERIGUCHI, Takeshi, KOBAYASHI, Kazumi, and TANAKA, Sueta, and the action of the convening authority thereon, are approved.

The reviewing authority concurs in the recommendation contained in the convening authority's action to the effect that the death sentences of the accused ERIGUCHI, Takeshi and TANAKA, Sueta be commuted to life imprisonment.

Prior to the execution of the death sentences adjudged in the cases of ASANO, Shimpei, UENO, Chisato, ERIGUCHI, Takeshi and TANAKA, Sueta, the record is, in conformity with Section D-14 Naval Courts and Boards and Chief of Naval Operations serial 01P23 of 28 November 1945, referred, via the Judge Advocate General of the Navy, to the Secretary of the Navy.

JOHN L. McCREA
Vice Admiral, U. S. Navy,
Deputy Commander in Chief
United States Pacific Fleet.

To: Secretary of the Navy (Office of the Judge Advocate General).
Re: Record of proceedings of a trial by a Military Commission of ASANO, Shimpei, UENO, Chisato, NAKASE, Shohichi, ERIGUCHI, Takeshi, KOBAYASHI, Kazumi, and TANAKA, Sueta.

Copies to:
ComMarianas
IsComGuam
War Crimes Officer (Guam)

Exhibit 7 (7)

NAVY DEPARTMENT
Washington 25, D.C.

JAG:I:HH:mas
A17-10/OQ(7-15-48)161779

27 JUL 1948

To: Commander Marianas Area.

Via: Commander in Chief, United States Pacific Fleet.

Subj: Military Commission case of former Captain Shimpei Asano, Imperial Japanese Navy, former Surgeon Lieutenant Commander Chisato Ueno, Imperial Japanese Navy, former Lieutenant Commander Shohichi Nakase, Imperial Japanese Navy, former Dentist Ensign Takeshi Eriguchi, Imperial Japanese Navy, former corpsman warrant officer Kazumi Kobayashi, Imperial Japanese Navy, and Sueta Tanaka, former leading seaman, Imperial Japanese Navy, tried in joinder by a military commission, convened 22 September 1947, by the Commander Marianas Area.

1. In accordance with the provisions of Section D-14, Naval Courts and Boards, the Secretary of the Navy, on 1 July 1948 confirmed the sentences of death adjudged as to former Captain Shimpei Asano, Imperial Japanese Navy, and former Surgeon Lieutenant Commander Chisato Ueno, Imperial Japanese Navy, and commuted to imprisonment at hard labor for the terms of their natural lives the sentences of death of former Dentist Ensign Takeshi Eriguchi, Imperial Japanese Navy, and Sueta Tanaka, former leading seaman, Imperial Japanese Navy.

2. The sentences upon which the aforesaid action was taken are as follows:

"The Commission, therefore, sentences him, Asano, Shimpei, to be hanged by the neck until dead, two-thirds of the members concurring.

"The Commission, therefore, sentences him, Ueno, Chisato, to be hanged by the neck until dead, two-thirds of the members concurring."

"The Commission, therefore, sentences him, Eriguchi, Takeshi, to be hanged by the neck until dead, two-thirds of the members concurring."

"The Commission, therefore, sentences him, Tanaka, Sueta, to be hanged by the neck until dead, two-thirds of the members concurring."

3. The Commander, Marianas Area, the convening authority on 17 February 1948, subject to remarks, approved the proceedings, findings of guilty, and the sentences. It was recommended that the Secretary of the Navy commute the death sentences of Eriguchi, Takeshi and Tanaka, Sueta, to that of life imprisonment.

Exhibit 7(8)

JAG:I:HH:mas
A17-10/0Q (7-14-48) 161779

4. The Deputy Commander in Chief, United States Pacific Fleet, the reviewing authority, on 4 March 1948, approved the proceedings, findings of guilty, and sentences, and the action of the convening authority thereon, and concurred in the recommendation contained in the convening authority's action to the effect that the death sentences of the accused Eriguchi, Takeshi and Tanaka, Sueta be commuted to life imprisonment.

5. Subject to any directives issued by the Commander in Chief, United States Pacific Fleet, the Commander Marianas Area is directed to effect the execution of the sentences of death as confirmed. It is further directed that the sentences be carried into effect at a date to be designated by the Commander Marianas Area not earlier than 15 September 1948 at Guam, Marianas Islands, and that a report of the execution of the death sentence in each instance be submitted to the Secretary of the Navy.

/s/ John Nicholas Brown
Acting Secretary of the Navy.

Copy to:
Chief of Naval Operations.

Exhibit 7 (9)

HARA, CHUICHI (27 OCT 1948) (VOL. V) (167174)

Case of

HARA, Chuichi

October 27, 1948

RECORD OF PROCEEDINGS

of a

MILITARY COMMISSION

convened at

United States Pacific Fleet

Commander Naval Forces, Marianas

Guam, Marianas Islands,

by order of

The Commander Naval Forces, Marianas

VOLUME 5

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET

HEADQUARTERS OF THE COMMANDER NAVAL FORCES MARIANAS
NAVAL FORCES MARSHALLS-CAROLINES AND MARSHALLS-CAROLINES AREA

1 NOV 1948

I hereby certify that the annexed are true excepts taken from the official records of Commander Naval Forces, Marianas in the case of Hiroshi IWANAMI, et al, and consist of the following:

1. Excerpts from the charges and specifications dated 8 May 1947.

2. Military Commission Order No. ~~41~~ 39 in re IWANAMI, Hiroshi, former Captain, IJN, et al, dated 8 November 1947.

3. Excerpts from the action of the convening authority, The Commander Marianas Area, dated 8 November 1947.

4. Action of the reviewing authority, the Commander in Chief Pacific and United States Pacific Fleet, dated 28 November 1947.

5. Action of the confirming authority, the Secretary of the Navy, dated 9 April 1948.

H. L. Ogden

H. L. OGDEN,
Commander, U. S. Navy.

Exhibit 8(1)

FF12/A16-2
13-JDM-cn

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

Serial: 12147

8 May 1947

From: The Commander Marianas Area.
To: Lieutenant Commander Joseph A. REGAN, USN, and/or
Lieutenant James P. KENNY, USN, and/or
your successors in office as Judge Advocates,
Military Commission, Commander Marianas.

Subject: Charges and Specifications in the case of:

IWANAMI, Hiroshi
KAMIKAWA, Hidehiro
OISHI, Tetsuo
ASAMURA, Shunpei
.....
YOSHIZAWA, Kensaburo
HOMMA, Hachiro
WATANABE, Mitsuo
TANABE, Mamoru
MUKAI, Yoshihisa
KAWASHIMA, Tatsusaburo
SAWADA, Tsuneo
TANAKA, Tokunosuke
AKABORI, Toichiro
KUWABARA, Hiroyuki
TSUTSUI, Kisaburo
NAMATAME, Kazuo
TAKAISHI, Susumu
MITSUHASHI, Kichigoro

1. The above named persons will be tried before the Military Commission of which you are Judge Advocate upon the following charges and specifications. You will notify the president of the commission accordingly, inform the accused of the date set for trial, and summon all witnesses, both for the prosecution and for the defense.

CHARGE I

MURDER

SPECIFICATION 1

.....

SPECIFICATION 2

.....

Exhibit 8 (2)

SPECIFICATION 3

In that IWANAMI, Hiroshi, then a Surgeon Captain, Imperial Japanese Navy, Commanding Officer of the Fourth Naval Hospital and Chief Surgeon of the Fourth Fleet, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, KAMIKAWA, Hidehiro, then a surgeon lieutenant, Imperial Japanese Navy, OISHI, Tetsuo, then a surgeon lieutenant, Imperial Japanese Navy, ASAMURA, Shunpei, then an ensign, Imperial Japanese Navy, YOSHIZAWA, Kensaburo, then a corpsman chief petty officer, Imperial Japanese Navy, HOMMA, Hachiro, then a corpsman chief petty officer, Imperial Japanese Navy, WATANABE, Mitsuo, then a paymaster chief petty officer, Imperial Japanese Navy, TANABE, Mamoru, then a corpsman chief petty officer, Imperial Japanese Navy, MUKAI, Yoshihisa, then a corpsman chief petty officer, Imperial Japanese Navy, KAWASHIMA, Tatsusaburo, then a corpsman petty officer first class, Imperial Japanese Navy, SAWADA, Tsuneo, then a paymaster petty officer first class, Imperial Japanese Navy, TANAKA, Tokunosuke, then a corpsman petty officer first class, Imperial Japanese Navy, NAMATAME, Kazuo, then a corpsman petty officer second class, Imperial Japanese Navy, TAKAISHI, Susumu, then a corpsman petty officer first class, Imperial Japanese Navy, AKABORI, Toichiro, then a corpsman petty officer second class, Imperial Japanese Navy, KUWABARA, Hiroyuki, then a corpsman petty officer second class, Imperial Japanese Navy, TSUTSUI, Kisaburo, then a corpsman petty officer second class, Imperial Japanese Navy, MITSUHASHI, Kichigoro, then a corpsman petty officer second class, Imperial Japanese Navy, all attached to and serving at the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, at Dublon Island, Truk 'toll, Caroline Islands, and others to the relator unknown, did, each and together, on or about 20 July 1944, at Dublon Island, Truk 'toll, Caroline Islands, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike and kill, by bayoneting with fixed bayonets, spearing with spears, and by beheading with swords, two (2) American Prisoners of War, names to the relator unknown, both then and there held captive by the armed forces of Japan, this in violation of the law and customs of war.

CHARGE II

VIOLATION OF THE LAW AND CUSTOMS OF WAR

SPECIFICATION 1

.....

SPECIFICATION 2

.....

SPECIFICATION 3

.....

SPECIFICATION 4

.....

SPECIFICATION 5

.....

SPECIFICATION 6

.....

/s/ C. A. Pownall,
C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

Exhibit 8 (3)

FF12/WC4
02-JDM-hn

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

8 November 1947.

MILITARY COMMISSION ORDER NO. 39

(In re IWANAMI, Hiroshi, former Captain, IJN, et al)

1. On 10 June 1947, IWANAMI, Hiroshi, Captain, IJN, KAMIKAWA, Hidehiro, Lieutenant Commander, IJN, OISHI, Tetsuo, Lieutenant, IJN, ASAMURA, Shimpei, Lieutenant, IJN, SAKAGAMI, Shinji, Lieutenant (jg), IJN, YOSHIZAWA, Kensaburo, Ensign, IJN, HOMMA, Hachiro, Warrant Officer, IJN, WATANABE, Mitsuo, Warrant Officer, IJN, TANABE, Mamoru, Warrant Officer, IJN, MUKAI, Yoshihisa, Warrant Officer, IJN, KAWASHIMA, Tatsusaburo, CPO, IJN, SAWADA, Tsuneo, CPO, IJN, TANAKA, Tokunosuke, CPO, IJN, AKABORI, Toichiro, CPO, IJN, KUWABARA, Hiroyuki, CPO, IJN, TSUTSUI, Kisaburo, CPO, IJN, NAMATAME, Kazuo, CPO, IJN, TAKAISHI, Susumu, CPO, IJN, and MITSUHASHI, Kichigoro, CPO, IJN were tried and convicted by a United States Military Commission convened by order of the Commander Marianas Area, dated 21 February 1947, at the Headquarters, Commander Marianas, Guam, Marianas Islands, on the below listed charges and specifications.

CHARGE I - MURDER (Three specifications).

Spec	Nature	Place	Date of Offense	Name of Accused
1.	Kill 6 POW's	Dublon Island, Truk Atoll, Caroline Islands.	1-30-44	IWANAMI
2.	Kill 2 POW's	Dublon Island, Truk Atoll, Caroline Islands.	2-1-44	IWANAMI-SAKAGAMI
3.	Kill 2 POW's	Dublon Island, Truk Atoll, Caroline Islands.	7-20-44	IWANAMI-KAMIKAWA-OISHI-ASAMURA-YOSHIZAWA-HOMMA-WATANABE-TANABE-KAWASHIMA-SAWADA-TANAKA-NAMATAME-TAKAISHI-AKABORI-KUWABARA-TSUTSUI-MITSUHASHI-MUKAI

CHARGE II - VIOLATION OF THE LAW AND CUSTOMS OF WAR (Six specifications).

Spec	Nature	Place	Date of Offense	Name of Accused
1.	Failed to control persons under his command.	Dublon Island Truk Atoll	1-30-44	IWANAMI
2.	Failed to control persons under his command.	Dublon Island Truk Atoll	2-1-44	IWANAMI
3.	Failure to protect 2 POW's	Dublon Island Truk Atoll	2-1-44	IWANAMI
4.	Failed to control persons under his command.	Dublon Island Truk Atoll	7-20-44	IWANAMI
5.	Failed to protect 2 POW's	Dublon Island Truk Atoll	7-20-44	IWANAMI
6.	Prevent honorable burial of 6 POW's.	Dublon Island Truk Atoll	2-3-44	IWANAMI

FINDINGS: On Charges and Specifications with reference to each accused:

"As to the accused, Iwanami, Hiroshi:
The first specification of the first charge proved.
The second specification of the first charge not proved.
The third specification of the first charge proved.
And that the accused, Iwanami, Hiroshi, is of the first charge guilty.

Exhibit 8 (4)

FINDINGS: (Continued)

"The first specification of the second charge proved.
The second specification of the second charge proved.
The third specification of the second charge proved.
The fourth specification of the second charge proved.
The fifth specification of the second charge proved.
The sixth specification of the second charge proved.
And that the accused, Iwanami, Hiroshi, is of the second charge guilty.

"As to the accused, Kamikawa, Hidehiro:
The third specification of the first charge proved.
And that the accused, Kamikawa, Hidehiro, is of the first charge guilty.

"As to the accused, Oishi, Tetsuo:
The third specification of the first charge proved.
And that the accused, Oishi, Tetsuo, is of the first charge guilty.

"As to the accused, Asamura, Shunpei:
The third specification of the first charge proved.
And that the accused, Asamura, Shunpei, is of the first charge guilty.

"As to the accused, Sakagami, Shinji:
The second specification of the first charge proved in part, proved except the words "IWANAMI, Hiroshi, then a Surgeon Captain, Imperial Japanese Navy, Commanding Officer of the Fourth Naval Hospital and" and the word "both," which words are not proved.
And that the accused, Sakagami, Shinji, is of the first charge guilty.

"As to the accused, Yoshizawa, Kensaburo:
The third specification of the first charge proved.
And that the accused, Yoshizawa, Kensaburo, is of the first charge guilty.

"As to the accused, Homma, Hachiro:
The third specification of the first charge proved.
And that the accused, Homma, Hachiro, is of the first charge guilty.

"As to the accused, Watanabe, Mitsuo:
The third specification of the first charge proved.
And that the accused, Watanabe, Mitsuo, is of the first charge guilty.

"As to the accused, Tanabe, Mamoru:
The third specification of the first charge proved.
And that the accused, Tanabe, Mamoru, is of the first charge guilty.

"As to the accused, Mukai, Yoshihisa:
The third specification of the first charge proved.
And that the accused, Mukai, Yoshihisa, is of the first charge guilty.

"As to the accused, Kawashima, Tatsusaburo:
The third specification of the first charge proved.
And that the accused, Kawashima, Tatsusaburo, is of the first charge guilty.

"As to the accused, Sawada, Tsuneo:
The third specification of the first charge proved.
And that the accused, Sawada, Tsuneo, is of the first charge guilty.

"As to the accused, Tanaka, Tokunosuke:
The third specification of the first charge proved.
And that the accused, Tanaka, Tokunosuke, is of the first charge guilty.

"As to the accused, Akabori, Toichiro:
The third specification of the charge proved.
And that the accused, Akabori, Toichiro, is of the first charge guilty.

Exhibit 8 (3)

FINDINGS: (Continued)

"As to the accused, Kuwabara, Hiroyuki:
The third specification of the first charge proved.
And that the accused, Kuwabara, Hiroyuki, is of the first charge guilty.

"As to the accused, Tsutsui, Kisaburo:
The third specification of the first charge proved.
And that the accused, Tsutsui, Kisaburo, is of the first charge guilty.

"As to the accused, Namatame, Kazuo:
The third specification of the first charge proved.
And that the accused, Namatame, Kazuo, is of the first charge guilty.

"As to the accused, Takaishi, Susumu:
The third specification of the first charge proved.
And that the accused, Takaishi, Susumu, is of the first charge guilty.

"As to the accused, Mitsuhashi, Kichigoro:
The third specification of the first charge proved.
And that the accused, Mitsuhashi, Kichigoro, is of the first charge guilty."

SENTENCES: The commission on 5 September 1947 sentenced the accused as follows:

"The commission, therefore, sentences him, Iwanami, Hiroshi, to be hanged by the neck until dead, two-thirds of the members concurring.

"The commission, therefore, sentences him, Kamikawa, Hidehiro, to be confined for a period of twenty (20) years.

"The commission, therefore, sentences him, Oishi, Tetsuo, to be confined for a period of twenty (20) years.

"The commission, therefore, sentences him, Asamura, Shunpei, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Sakagami, Shinji, to be confined for the term of his natural life.

"The commission, therefore, sentences him, Yoshizawa, Kensaburo, to be confined for a period of fifteen (15) years.

"The commission, therefore, sentences him, Homma, Hachiro, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Watanabe, Mitsuo, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Tanabe, Manoru, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Mukai, Yoshihisa, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Kawashima, Tatsusaburo, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Sawada, Tsuneo, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Tanaka, Tokunosuke, to be confined for a period of ten (10) years.

Exhibit 8 (5a)

FF12/WC4 MILITARY COMMISSION ORDER NO. 39 (Continued)
02-JDM-hn

- -

SENTENCES:(Continued).

"The commission, therefore, sentences him, Akabori, Toichiro, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Kuwabara, Hiroyuki, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Tsutsui, Kisaburo, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Namatame, Kazuo, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Takaishi, Susumu, to be confined for a period of ten (10) years.

"The commission, therefore, sentences him, Mitsuhashi, Kichigoro, to be confined for a period of ten (10) years."

2. On 8 November 1947, the Convening Authority (Commander Marianas) took the following action (subject to certain remarks not herein quoted):

"***** the finding on specification 1 of Charge II is set aside.

"***** the findings on specifications 4 and 5 of Charge II are set aside.

"***** The proceedings, findings of guilty, except on specifications 1, 4 and 5 of Charge II as to the accused, IWANAMI, Hiroshi and the sentences in the foregoing case of IWANAMI, Hiroshi; KAMIKAWA, Hidehiro; OISHI, Tetsuo; ASAMURA, Shunpei; SAKAGAMI, Shinji; YOSHIZAWA, Kensaburo; HOMMA, Hachiro; WATANABE, Mitsuo; TANABE, Mamoru; MUKAI, Yoshihisa; KAWASHIMA, Tatsusaburo; SAWADA, Tsuneo; TANAKA, Tokunosuke; AKABORI, Toichiro; KUWABARA, Hiroyuki; TSUTSUI, Kisaburo; NAMATAME, Kazuo; TAKAISHI, Susumu; and MITSUHASHI, Kichigoro, are approved.

"IWANAMI, Hiroshi will be retained in confinement at the War Criminal Stockade, Tumon Bay Annex, pending instructions from higher authority.

"KAMIKAWA, Hidehiro; OISHI, Tetsuo; ASAMURA, Shunpei; SAKAGAMI, Shinji; YOSHIZAWA, Kensaburo; HOMMA, Hachiro; WATANABE, Mitsuo; TANABE, Mamoru; MUKAI, Yoshihisa; KAWASHIMA, Tatsusaburo; SAWADA, Tsuneo; TANAKA, Tokunosuke; AKABORI, Toichiro; KUWABARA, Hiroyuki; TSUTSUI, Kisaburo; NAMATAME, Kazuo; TAKAISHI, Susumu; and MITSUHASHI, Kichigoro, will be transferred to the custody of the Commanding General of the 8th U. S. Army, via the first available United States ship, to serve their respective sentences of confinement in Sugamo Prison, Tokyo, Japan."

C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

Copy to:
Commander in Chief, Pacific and U. S. Pacific Fleet (3),
Judge Advocate General, U. S. Navy (3).
Supreme Commander for the Allied Powers (3).
Commanding General, U. S. 8th Army, Japan (3).
National War Crimes Office, Washington, D. C. (3).
Commanding Officer, Marine Barracks, Guam (3).

AUTHENTICATED:
H. D. Vanston
H. D. VANSTON
Flag Secretary.

Exhibit 8 (5b)

FF12/A17-10/WC-26
02-JDH-rhj

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

Nov 8, 1947

Serial: 20965

The military commission, composed of Army, Navy, and Marine Corps officers, in the foregoing case, was ordered convened 1 March 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 (CinCPac conf. serial 0558, of 8 March 1946) and Pacific Ocean Areas, and Military Governor of the Pacific Ocean Area; and the Judge Advocate General of the Navy (JAG despatch 311730 July 1946). The commission was authorized to take up this case as indicated in the precept. The order for trial (charges and specifications) was issued 8 May 1947 and served on the accused on 10 May 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 5 December 1945 by the Supreme Commander for the Allied Powers in his Regulations Governing the Trials of Accused War Criminals, and modifications thereof, as necessary to obtain justice.

.....

.....

Specification 3 of Charge I alleges "that IWANAMI, Hiroshi, then a Surgeon Captain, Imperial Japanese Navy, Commanding Officer of the Fourth Naval Hospital and Chief Surgeon of the Fourth Fleet, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Island, KAMIKAWA, Hidehiro, then a surgeon lieutenant, Imperial Japanese Navy, OISHI, Tetsuo, then a surgeon lieutenant, Imperial Japanese Navy, ASAMURA, Shunpei, then an ensign, Imperial Japanese Navy, YOSHIZAWA, Kensaburo, then a corpsman chief petty officer, Imperial Japanese Navy, HOMMA, Hachiro, then a corpsman chief petty officer, Imperial Japanese Navy, WATANABE, Mitsuo, then a paymaster chief petty officer, Imperial Japanese Navy, TANABE, Mamoru, then a corpsman chief petty officer, Imperial Japanese Navy, MUKAI, Yoshihisa, then a corpsman chief petty officer, Imperial Japanese Navy, KAWASHIMA, Tatsusaburo, then a corpsman petty officer first class, Imperial Japanese Navy, SAWADA, Tsuneo, then a paymaster petty officer first class, Imperial Japanese Navy, TANAKA, Tokunosuke, then a corpsman petty officer first class, Imperial Japanese Navy, NAKATAME, Kazuo, then a corpsman petty officer second class, Imperial Japanese Navy, TAKAISHI, Susumu, then a corpsman petty officer first class, Imperial Japanese Navy, AKABORI, Toichiro, then a corpsman petty officer second class, Imperial Japanese Navy, KUWABARA, Hiroyuko, then a corpsman petty officer second class, Imperial Japanese Navy, TSUTSUI, Kisaburo, then a corpsman petty officer second class, Imperial Japanese Navy, MITSUHASHI, Kichigoro, then a corpsman petty officer second class, Imperial Japanese Navy, all attached to and serving at the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, at Dublon Island, Truk Atoll, Caroline Islands, and others to the relator unknown, did, each and together, on or about 20 July 1944, at Dublon Island, Truk Atoll, Caroline Islands, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike and kill, by bayoneting with fixed bayonets, spearing with spears, and by beheading with swords, two (2) American Prisoners of War, names to the relator

Exhibit 8 (6)

unknown, both then and there held captive by the armed forces of Japan, this in violation of the law and customs of war." .....
.....

The proceedings, findings of guilty, except on specifications 1, 4, and 5 of Charge II as to the accused IWANAMI, Hiroshi, and the sentences in the foregoing case of IWANAMI, Hiroshi; KAMIKAWA, Hidehiro; OISHI, Tetsuo; ASAMURA, Shunpei;.....; YOSHIZAWA, Kensaburo; HONMA, Hachiro; WATANABE, Mitsuo; TANABE, Manoru; MUKAI, Yoshihisa; KAWASHIMA, Tatsusaburo; SAWADA, Tsuneo; TANAKA, Tokunosuke; AKABORI, Toichiro; KUWABARA, Hiroyuki; TSUTSUI, Kisaburo; NAMATAME, Kazuo; TAKAISHI, Susumu; and MITSUHASHI, Kichigoro, are approved.

IWANAMI, Hiroshi, will be retained in confinement at the War Criminal Stockade, Tumon Bay Annex, pending instructions from higher authority.

KAMIKAWA, Hidehiro; OISHI, Tetsuo; ASAMURA, Shunpei; .....; YOSHIZAWA, Kensaburo; HONMA, Hachiro; WATANABE, Mitsuo; TANABE, Manoru; MUKAI, Yoshihisa; KAWASHIMA, Tatsusaburo; SAWADA, Tsuneo; TANAKA, Tokunosuke; AKABORI, Toichiro; KUWABARA, Hiroyuki; TSUTSUI, Kisaburo; NAMATAME, Kazuo; TAKAISHI, Susumu; and MITSUHASHI, Kichigoro, will be transferred to the custody of the Commanding General of the 8th U. S. Army, via the first available United States ship, to serve their respective sentences of confinement in Sugamo Prison, Tokyo, Japan.

/s/ C. A. Pownall
C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

To: Commander in Chief Pacific and U.S. Pacific Fleet.
Re: Record of Proceedings of Military Commission - case of former Surgeon Captain Hiroshi IWANAMI, IJN, et al.

Copy to: Island Commander, Guam.

Exhibit 8 (7)

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET
Headquarters of the Commander in Chief

Cincpacflt File
'17-25

c/o Fleet Post Office,
San Francisco, California.

Serial: 6801

28 NOV 1947

The proceedings, findings of guilty, except the findings on specifications 1, 4 and 5 of Charge II as to IWANAMI, Hiroshi, and the action of the convening authority in the foregoing case of IWANAMI, Hiroshi; KAMIKAWA, Hidehiro; OISHI, Tetsuo; ASAMURA, Shunpei; .....; YOSHIZAWA, Kensaburo; HOMMA, Hachiro; WATANABE, Mitsuo; TANABE, Mamoru; MUKAI, Yoshihisa; KAWASHIMA, Tatsusaburo; SAWADA, Tsuneo; TANAKA, Tokunosuke; AKABORI, Toichiro; KUWABARA, Hiroyuki; TSUTSUI, Kisaburo; NAMATAME, Kazuo; TAKAISHI, Susumu; and HITSUHASHI, Kichigoro, are approved.

The record is, in conformity with section D-14, Naval Courts and Boards, and Chief of Naval Operations serial 01P22 of 28 November 1945, transmitted to the Secretary of the Navy for confirmation of the death sentence as to accused IWANAMI, Hiroshi, and to the Judge Advocate General of the Navy for revision and record.

/s/ LOUIS DENFELD
LOUIS DENFELD
Admiral, U. S. Navy,
Commander in Chief Pacific
and United States Pacific Fleet.

To: Secretary of the Navy (Office of the Judge Advocate General);
Re: Record of proceedings of a trial by a Military Commission of former Surgeon Captain Hiroshi IWANAMI, I.J.N., et al.

Copies to: (end. only)
ComMarianas
IsComGuam
War Crimes Officer (Guam)

Exhibit 8 (8)

NAVY DEPARTMENT
Washington 25, D. C.

JAG:I:RAS:bcm
A17-10/0Q (4-2-48)
160413

9 APR 1948

To: Commander Marianas Area.

Via: Commander in Chief, United States Pacific Fleet.

Subj: Action upon Record of Military Commission Trial.

1. In accordance with the provision of Section D-14, Naval Courts and Boards, 1937, the Secretary of the Navy, on 31 March 1948, confirmed the following sentence of death, adjudged by Military Commission:

(a) In the case of former Surgeon Captain Hiroshi Iwanami, Imperial Japanese Navy, tried in joinder with former Surgeon Lieutenant Hidehiro Kamikawa, Imperial Japanese Navy, former Surgeon Lieutenant Tetsuo Oishi, Imperial Japanese Navy, former Ensign Shunpei Asamura, Imperial Japanese Navy,
.....
....., former Corpsman Chief Petty Officer Kensaburo Yoshizawa, Imperial Japanese Navy, former Corpsman Chief Petty Officer Hachiro Honma, Imperial Japanese Navy, former Paymaster Chief Petty Officer Mitsuo Watanabe, Imperial Japanese Navy, former Corpsman Chief Petty Officer Mamoru Tanabe, Imperial Japanese Navy, former Corpsman Chief Petty Officer Yoshihisa Mukai, Imperial Japanese Navy, former Corpsman Petty Officer First Class Tatsusaburo Kawashima, Imperial Japanese Navy, former Paymaster Petty Officer First Class Tsuneo Sawada, Imperial Japanese Navy, former Corpsman Petty Officer First Class Tokunosuke Tanaka, Imperial Japanese Navy, former Corpsman Petty Officer Second Class Toichiro Akabori, Imperial Japanese Navy, former Corpsman Petty Officer Second Class Hiroyuki Kuwabara, Imperial Japanese Navy, former Corpsman Petty Officer Second Class Kisaburo Tsutsui, Imperial Japanese Navy, former Corpsman Petty Officer Second Class Kazuo Namatame, Imperial Japanese Navy, former Corpsman Petty Officer First Class Susumu Takaishi, Imperial Japanese Navy, and former Corpsman Petty Officer Second Class Kichigoro Mitsuhashi, Imperial Japanese Navy, by a military commission, convened 10 June 1947, by the Commander Marianas Area -

"The commission, therefore, sentences him, Iwanami, Hiroshi, to be hanged by the neck until dead, two-thirds of the members concurring."

The Commander, Marianas Area, the convening authority, on 8 November 1947, subject to remarks, approved the proceedings, findings of guilty, except on specifications 1, 4 and 5 of Charge II as to the accused, Iwanami, Hiroshi and the sentence in this case.

The Commander in Chief, United States Pacific Fleet, the reviewing authority, on 28 November 1947, approved the proceedings, findings of guilty, except the findings on specifications 1, 4 and 5 of Charge II as to Iwanami, Hiroshi, and the action of the convening authority thereon, in this case.

Exhibit 8 (9)

4. Subject to any directives issued by the Commander in Chief, United States Pacific Fleet, the Commander Marianas Area is hereby directed to effect the execution of the sentence as confirmed. It is further directed that the sentence be carried into effect at a date to be designated by the Commander Marianas Area not earlier than 1 June 1948 at Guam, Marianas Islands, and that a report of the execution of the sentence be submitted to the Secretary of the Navy.

/s/ John L. Sullivan
Secretary of the Navy.

Copy to:
Chief of Naval Operations.

Exhibit 8 (10)

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET

HEADQUARTERS OF THE COMMANDER NAVAL FORCES MARIANAS
NAVAL FORCES MARSHALLS-CAROLINES AND MARSHALLS-CAROLINES AREA

1 NOV 1948

I hereby certify that the annexed are true excerpts taken from the official records of Commander Naval Forces Marianas in the case of Fumio INOUE, and consist of the following:

1. Excerpts from the charges and specifications dated 13 March 1947.

2. Military Commission Order No. 38 (In re INOUE, Fumio, former Captain, IJA) dated 18 Aug 1947.

3. Action of the convening authority, The Commander Marianas Area, dated 18 August 1947.

4. Action of the reviewing authority, the Commander in Chief Pacific and United States Pacific Fleet, dated 29 August 1947.

5. Opinion of the Judge Advocate General of the U. S. Navy, dated 26 January 1948.

6. Action of the confirming authority, the Secretary of the Navy, dated 3 March 1948.

H. L. OGDEN,
Commander, U. S. Navy.

Exhibit 9 (1)

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

A16-2/FF12
13-JDM-ro

Serial: 4445 13 Mar 1947

From: The Commander Marianas Area.
To : Lieutenant David BOLTON, USN, and/or
Lieutenant James P. KENNY, USN, and/or
your successors in office as Judge Advocates,
Military Commission, Commander Marianas.

Subject: Charges and Specifications - in the case of:

Captain INOUE, Fumio, Imperial Japanese Army.

1. The above named person will be tried before the Military Commission of which you are Judge Advocate upon the following charges and specifications. You will notify the President of the commission accordingly, inform the accused of the date set for trial, and summon all witnesses both for the prosecution and for the defense.

CHARGE I

MURDER

SPECIFICATION 1

In that INOUE, Fumio, then a captain, Imperial Japanese Army, attached to the Second Battalion, First South Seas Detachment, attached to the military installations of the Imperial Japanese armed forces, Jaluit Atoll, Marshall Islands, and while so serving at the said Second Battalion at Jaluit Atoll, Marshall Islands, did, on or about 8 April 1945, on Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, kill, and cause to be killed, with an instrument, a deadly weapon, exact description to the relator unknown, seven unarmed native inhabitants of the Marshall Islands, exact names to the relator unknown, but believed to be Raliejap, the wife of Raliejap, Neibit, Anchio, Ochira, Siro, and Lacojirik, and did, therein and thereby, then and there, inflict mortal wounds in and upon the bodies and heads of said inhabitants of the Marshall Islands, of which said mortal wounds the said inhabitants of the Marshall Islands believed to be Raliejap, the wife of Raliejap, Neibet, Anchio, Ochira, Siro, and Lacojirik, died on or about 8 April 1945, on the said Jaluit Atoll, this in violation of effective law, especially Article 199 of the Criminal Code of Japan, which reads in tenor as follows:

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

EXHIBIT 9(2)

CHARGE I (continued)

SPECIFICATION 2

In that INOUE, Fumio, then a captain, Imperial Japanese Army, attached to the Second Battalion, First South Seas Detachment, attached to the military installations of the Imperial Japanese armed forces, Jaluit Atoll, Marshall Islands, and while so serving at the said Second Battalion of the Imperial Japanese armed forces at Jaluit Atoll, Marshall Islands, did, on or about 13 April 1945, on Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, kill, and cause to be killed, with an instrument, a deadly weapon, exact description to the relator unknown, one unarmed native inhabitant of the Marshall Islands, exact name to the relator unknown, but believed to be Ralime, and did therein and thereby, then and there, inflict mortal wounds in and upon the body and head of the said inhabitant of the Marshall Islands, of which said mortal wounds the said inhabitant of the Marshall Islands believed to be Ralime, died on or about 13 April 1945, on the said Jaluit Atoll. this in violation of effective law, especially Article 199 of the Criminal Code of Japan, which reads in tenor as follows:

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

EXHIBIT 9(2A)

CHARGE II

VIOLATION OF THE LAWS AND CUSTOMS OF WAR

SPECIFICATION 1

In that INOUE, Fumio, then a captain, Imperial Japanese Army, attached to the Second Battalion, First South Seas Detachment, attached to the military installations of the Imperial Japanese armed forces, Jaluit Atoll, Marshall Islands, and while so serving at the said Second Battalion of the Imperial Japanese armed forces at Jaluit Atoll, Marshall Islands, did, on or about 8 April 1945, on Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Japanese Empire, wilfully, unlawfully, and without previous trial, punish and cause to be punished as spies, by assaulting, striking, wounding, and killing with an instrument, a deadly weapon, exact description to the relator unknown, seven unarmed native inhabitants of the Marshall Islands, exact names to the relator unknown, but believed to be Raliejap, the wife of Raliejap, Neibet, Anchio, Ochira, Siro, and Lacojirik, this in violation of the laws and customs of war.

SPECIFICATION 2

In that INOUE, Fumio, then a captain, Imperial Japanese Army, attached to the Second Battalion, First South Seas Detachment, attached to the military installations of the Imperial Japanese armed forces, Jaluit Atoll, Marshall Islands, and while so serving at the said Second Battalion of the Imperial Japanese armed forces at Jaluit Atoll, Marshall Islands, did, on or about 13 April 1945, on Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Japanese Empire, wilfully, unlawfully, and without previous trial, punish and cause to be punished as spies, by assaulting, striking, wounding, and killing with an instrument, a deadly weapon, exact description to the relator unknown, one unarmed native inhabitant of the Marshall Islands, exact name to the relator unknown, but believed to be Ralime, this in violation of the laws and customs of war.

/s/ C. A. Pownall
C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

EXHIBIT 9 (2b)

CHARGE II (continued)

SPECIFICATION 2

In that INOUE, Fumio, then a captain, Imperial Japanese Army, attached to the Second Battalion, First South Seas Detachment, attached to the military installations of the Imperial Japanese armed forces, Jaluit Atoll, Marshall Islands, did, while so serving at the said Second Battalion of the Imperial Japanese armed forces at Jaluit Atoll, Marshall Islands, did, on or about 13 April 1945, on Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America, its allies and dependencies, and the Japanese Empire, wilfully, unlawfully, and without previous trial, punish and cause to be punished as spies, by assaulting, striking, wounding, and killing with an instrument, a deadly weapon, exact description to the relator unknown, one unarmed native inhabitant of the Marshall Islands, exact name to the relator unknown, but believed to be Rolime, this in violation of the laws and customs of war.

/s/ C. A. Pownall
C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

EXHIBIT 9 (3)

13-JDM-cn

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

18 AUG 1947

MILITARY COMMISSION ORDER NO. 38

(In re INOUE, Fumio, former Captain, IJA)

1. INOUE, Fumio, former captain, Imperial Japanese Army, was tried during period 23 April 1947 to 5 June 1947 by a United States Military Commission convened by order of the Commander Marianas Area, dated 21 February 1947 at the Headquarters, Commander Marianas, Guam, Marianas Islands, on the below listed charges and specifications:

CHARGE I - MURDER (Two specifications).

Spec.	Nature	Place	Date of Offense
1.	Kill seven unarmed native inhabitants of the Marshall Islands.	Jaluit Atoll, Marshall Islands.	4-8-45.
2.	Kill one unarmed native inhabitant of the Marshall Islands.	Jaluit Atoll, Marshall Islands.	4-13-45.

CHARGE II - VIOLATION OF THE LAWS AND CUSTOMS OF WAR

Spec.	Nature	Place	Date of Offense
1.	Unlawfully punish as spies seven unarmed native inhabitants of the Marshall Islands.	Jaluit Atoll, Marshalls Islands.	4-8-45.
2.	Unlawfully punish as a spy one unarmed native of the Marshall Islands.	Jaluit Atoll, Marshall Islands.	4-13-45

FINDINGS: The Commission found:

"The first specification of the first charged proved."
"The second specification of the first charge proved."
"And that the accused, Inoue, Fumio, then a captain, Imperial Japanese Army, is of the first charge guilty."

"The first specification of the second charge proved."
"The second specification of the second charge proved."
"And that the accused, Inoue, Fumio, then a captain, Imperial Japanese Army, is of the second charge guilty.

SENTENCE: The commission on 5 June 1947, sentenced the accused as follows:

"The Commission, therefore, sentences him, Inoue, Fumio, captain, Imperial Japanese Army, to be confined for the term of his natural life."

2. On 18 August 1947, the Convening Authority (The Commander Marianas Area), subject to certain remarks took the following action:

Exhibit 9(A)

"*****The proceedings, findings and sentence in the foregoing case of INOUE, Fumio, former captain, IJA, are approved.

INOUE, Fumio, former captain, IJA, will be transferred to the custody of the Commanding General of the 8th U. S. Army, via the first available United States ship, to serve his sentence of confinement in Sugamo Prison, Tokyo, Japan."

C. A. POFNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

Copy to:
Commander in Chief, Pacific and U. S. Pacific Fleet (3).
Judge Advocate General, U. S. Navy (3).
Supreme Commander for the Allied Powers (3).
Commanding General, U. S. 8th Army, Japan (3).
National War Crimes Office, Washington, D. C. (3).
Commanding Officer, Marine Barracks, Guam (3).

AUTHENTICATED:
H. D. VANSTON
Flag Secretary.

Exhibit 9 (4a)

FF12/A17-10/
13-JDM-cn

UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

Serial: 16952

18 AUG 1947

The military commission, composed of Army, Navy and Marine Corps officers, in the foregoing case, was ordered convened 1 March 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 (CinCPac conf. serial 0558, of 8 March 1946) and Pacific Ocean Areas, and Military Governor of the Pacific Ocean Areas; and the Judge Advocate General of the Navy (JAG Secret despatch 311730 July 1946). The commission was authorized to take up this case as indicated in the precept. The order for trial (charges and specifications) was issued 13 March 1947 and served on the accused on 13 March 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 by the Supreme Commander for the Allied Powers in his Regulations Governing the Trials of Accused War Criminals, and modifications thereof, dated 5 December 1945, as necessary to obtain justice.

Attention is invited to the fact that this case involves questions of jurisdiction similar to those involved in the case of FURUKI, Hidesaku, former major, IJA, previously tried by this commission and reviewed and approved by the Commander Marianas Area, 1 August 1947.

The proceedings, findings and sentence in the foregoing case of INOUE Fumio, former captain, IJA, are approved.

INOUE, Fumio, former captain, IJA, will be transferred to the custody of the Commanding General of the 8th U. S. Army, via the first available United States ship, to serve his sentence of confinement in Sugamo Prison, Tokyo, Japan.

/s/ C. A. Pownall
C. A. POWNALL,
Rear Admiral, U. S. Navy,
The Commander Marianas Area.

To: Commander in Chief, Pacific and United States Pacific Fleet.
Re: Record of Proceedings of Military Commission - case of INOUE, Fumio, former captain, IJA.

Copy to:
Island Commander, Guam.
President Military Commission, Guam.
Commanding Officer, U. S. Marine Barracks, Guam.

EXHIBIT 9 (5)

THE PACIFIC COMMAND
AND UNITED STATES PACIFIC FLEET
Headquarters of the Commander in Chief

Cincpacflt File
A17-25

c/o Fleet Post Office,
San Francisco, California.

Serial 5186

29 AUG 1947

The proceedings, findings and sentence in the foregoing case of INOUE, Fumio, former Captain, Imperial Japanese Army, and the action of the convening authority thereon, are approved.

The record is, in conformity with section D-14, Naval Courts and Boards, 1937, and Chief of Naval Operations serial 01P22 of 28 November 1945, transmitted to the Judge Advocate General of the Navy.

/s/ Louis Denfeld
LOUIS DENFELD
Admiral, U. S. Navy,
Commander in Chief Pacific
and United States Pacific Fleet.

To: Judge Advocate General.
Re: Record of proceedings of Military Commission - case of INOUE, Fumio, former Captain, I.J.A.

Copies to:
ComMarianas
War Crimes Officer, Guam

EXHIBIT 9 (6)

NAVY DEPARTMENT
OFFICE OF THE JUDGE ADVOCATE GENERAL
OO-INOUE, Fumio/A17-10 WASHINGTON 25, D. C.
OQ (1-22-48) I:HMM:vll
159116

26 JAN 1948

1. The record of proceedings in the foregoing military commission case of former Captain Inoue, Fumio, Imperial Japanese Army, shows that he was convicted of I, Murder (2 specifications); and II, Violation of the Laws and Customs of War (2 specifications). He was sentenced to be confined for the term of his natural life. The convening authority, subject to remarks, approved the proceedings, findings and sentence. The reviewing authority approved the proceedings, findings, sentence and action of the convening authority thereon.

2. Specification 1 under Charge I alleges that the accused, then a captain, "attached to the military installations of the Imperial Japanese armed forces, Jaluit Atoll, Marshall Islands, and while so serving***, did, on or about 8 April 1945, on Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America * * * and the Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, kill, and cause to be killed, with an instrument, a deadly weapon, * * *, seven unarmed native inhabitants of the Marshall Islands, * * *, this in violation of" a quoted article of the Criminal Code of Japan. Specification 2 under Charge I alleges that the accused while serving in the same capacity, at the same place and while the same state of war existed, on 13 April 1945 killed a named native of the Marshall Islands under the same circumstances as alleged in specification 1 of Charge I.

3. Specification 1 under Charge II alleges that the accused while serving in the same capacity, at the same time and place as alleged in specification 1 of Charge I, punished the same seven natives named therein as spies by killing them without first having a trial, this in violation of the laws and customs of war. Specification 2 under Charge II alleges that the accused while serving in the same capacity, at the same time and place as alleged in specification 2 of Charge I, punished the same native named therein as a spy by killing him without first having a trial, this in violation of the laws and customs of war.

4. The accused made a plea to the jurisdiction of the commission to try him for murder, because the offense was charged as a violation of the Criminal Code of Japan, contending that as a United States court it had no jurisdiction to try persons for offenses against "foreign" (Japanese) law. The accused also made a plea to the jurisdiction of the commission to try him for a violation of the laws and customs of war. The contention of the accused was that the Marshallese natives had been under the dominion of Japan as inhabitants of territory mandated to Japan, and, therefore, they were not within the class of spies protected by the Hague Convention of 1907.

5. The Hague Convention of 1907, which was ratified by Japan and the United States, provides, in Convention IV, Article 43, that "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". (Underlining supplied). As an incident to the restoration of order in the occupied territory, the occupant should bring to trial those offenders who have heretofore escaped punishment by reason of the breakdown of the judicial machinery. The proper law to be applied was, therefore, the local law which was in force at the time of the commission of the offense, i.e., the criminal code of Japan. Cf. Oppenheim's International Law (Lauterpacht) Vol. II, sec. 172.

EXHIBIT 9 (7)

OO-INOUE, Fumio/A17-10
OQ (1-22-48) I:HMM;vll
159116

6. Thedefinition of spies is contained in the Hague Convention of 1907, Convention IV, Article 29. The limitations set forth in that Article do not include any limitation based on the nationality of the spy. Article 30 of the same convention provides that no one shall be punished as a spy without previous trial. Cf. International Law by Charles Cheney Hyde, Vol. III, 2nd Revised Edition, sec. 677.

7. In view of the above, the commission had jurisdiction to try the accused for a violation of Japanese law and for a violation of the laws and customs of war.

8. The allegations of killing the named natives (specifications 1 and 2 of Charge I) and the allegations of punishing the same natives as spies without trial by killing them (specifications 1 and 2 of Charge II) being based as they were on the same circumstances, were preferred to provide for the contingencies of proof. Therefore, since the accused was convicted of four offenses growing out of but two acts, it is recommended that the findings of Charge II, and specifications 1 and 2 thereunder, and the actions of the convening and reviewing authorities thereon, be set aside.

9. Subject to the foregoing remarks and recommendation, the proceedings, findings and sentence, and the actions of the convening and reviewing authorities thereon, in the opinion of the Judge Advocate General, are legal.

10. Referred to the Chief of Naval Operations for information.

/s/ O. S. COLCLOUGH
O. S. COLCLOUGH
Judge Advocate General of the Navy.

ACTING
APPROVED BY SECNAV 2/12/48

EXHIBIT 9 (8)