TWENTY-FIRST DAY

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

The commission met at 9:40 a.m.

Present:

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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

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

No witnesses not otherwise connected with the trial were present.

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

The commission then, at 2:54 p.m., took a recess until 3:06 p.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

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

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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

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TWENTY-SECOND DAY

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

The commission met at 9 a.m.

Present:

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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

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

No witnesses not otherwise connected with the trial were present.

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

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

The commission then, at 3:18 p.m., took a recess until 3:36 p.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

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

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

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TWENTY-THIRD DAY

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

The commission met at 9 a. m.

Present:

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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

Present:

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

No witnesses not otherwise connected with the trial were present.

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

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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TWENTY-FOURTH DAY

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

The commission met at 9 a. m.

Present:

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

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

No witnesses not otherwise connected with the trial were present.

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

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

Present:

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

No witnesses not otherwise connected with the trial were present.

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

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

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

No witnesses not otherwise connected with the trial were present.

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

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

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

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

No witnesses not otherwise connected with the trial were present.

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

The trial was finished.

The commission was cleared.

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

The first specification of the first charge proved.

The second specification of the first charge proved.

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

The first specification of the second charge proved.

The second specification of the second charge proved.

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

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

The commission announced its findings.

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

Examined by the judge advocate:

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

Examined by the accused:

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

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

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

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

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

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

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

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

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

The accused made no reply.

The commission announced that the objection was sustained.

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

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

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

13. Q. What did it contain?

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

The accused replied.

The commission announced that the objection was sustained.

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

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

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

The accused did not desire further to examine this witness.

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

The witness made the following statement:

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

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

The witness was duly warned and withdrew.

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

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

No witnesses not otherwise connected with the trial were present.

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

Examined by the judge advocate:

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

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

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

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

The witness was duly warned and withdrew.

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

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

No witnesses not otherwise connected with the trial were present.

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

Examined by the judge advocate:

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

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

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

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Examined by the accused:

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

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

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

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

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

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

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

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TWENTY-FIFTH DAY

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

The commission met at 9 a. m.

Present:

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

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

No witnesses not otherwise connected with the trial were present.

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

Examined by the judge advocate:

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

Examined by the accused:

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

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

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

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

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

The accused did not desire further to examine this witness.

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

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

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

Examined by the judge advocate:

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

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

Examined by the accused:

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

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

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

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

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

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

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

The accused did not desire further to examine this witness.

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

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

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

Examined by the judge advocate:

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

Examined by the accused:

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

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

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

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

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

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

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

Cross-examined by the judge advocate:

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

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

The commission did not desire to examine this witness.

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The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

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

Examined by the judge advocate:

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

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

Examined by the accused:

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

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

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

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

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

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

No witnesses not otherwise connected with the trial were present.

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

(Examination continued.)

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

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

The accused did not desire further to examine this witness.

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

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

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

Present:

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

No witnesses not otherwise connected with the trial were present.

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

Examined by the judge advocate:

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

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

Examined by the accused:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The commission announced that the request was granted.

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

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

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

No witnesses not otherwise connected with the trial were present.

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

(Examination continued.)

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

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The accused did not desire further to examine this witness.

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

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

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

Examined by the judge advocate:

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

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

Examined by the accused:

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

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

5. Q. Have these documents been translated into English?
A. One hundred sixteen of these documents have been translated into English. The remaining two hundred forty petitions have not been translated.

6. Q. Are they different documents than those referred to by your colleague, Mr. Akimoto?
A. Yes.

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

8. Q. What have you found out as a result of reading and examining all of these documents.
A. These documents are documents submitted by relatives and friends of his birthplace and from people who have served together with him on Jaluit and pertain to his character. He was gentle and serious minded and requested that leniency and mitigation in sentence.

9. Q. Are you skilled and qualified in ascertaining and reading these documents?
A. I am.

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

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

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

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

The commission announced that the documents in question would be received in evidence, subject to the remarks of the judge advocate, and are appended marked "Exhibit 122" through "Exhibit 237."

The witness produced one hundred sixteen documents, the English translations of "Exhibit 122" through "Exhibit 237," in mitigation, and they were submitted to the judge advocate and to the commission, and by the accused offered in evidence for the purpose of being read into the record in mitigation.

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

The commission announced that the documents in question would be received in evidence, subject to the remarks of the judge advocate, and are appended marked "Exhibit 122a" through "Exhibit 237a."

12. Q. Refer to certain of these documents and read such as you desire to read.

The witness read one petition in Japanese, appended marked "Exhibit 122."

An interpreter read the English translation of "Exhibit 122," appended marked "Exhibit 122a."

13. Q. Do you waive the reading of the rest of these documents in Japanese in open court?
A. I do.

14. Q. Do you desire that the interpreter read certain other documents in English at this time?
A. I do.

15. Q. We ask that the court interpreter read such documents as the witness desires.

The commission announced that the request was granted.

An interpreter read the English translations of two petitions in mitigation, appended marked "Exhibit 123a" and "Exhibit 124a."

16. Q. Do the documents which you have read and which have been read by the interpreter show in general what you desire to bring before the commission without reading the rest of the documents in this group?
A. Yes.

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The accused did not desire further to examine this witness.

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

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

The commission was cleared.

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LIEUT., JAGC.

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The judge advocates were recalled and directed to record the sentence of the commission as follows:

The Commission, therefore, sentences him, Inoue, Fumio, Captain, Imperial Japanese Army, to be confined for the term of his natural life.

Arthur G. Robinson,
Rear Admiral, U. S. Navy, President.

Henry K. Roscoe,
Lieutenant Colonel, Coast Artillery Corps, United States Army, Member.

Victor J. Garbarino,
Lieutenant Colonel, Coast Artillery Corps, United States Army, Member.

Bradner W. Lee, junior,
Lieutenant Commander, U. S. Naval Reserve, Member.

James H. Tatsch,
Major, U. S. Marine Corps, Member.

David Belton,
Lieutenant, U. S. Navy, Judge Advocate.

James P. Kenny,
Lieutenant, U. S. Navy, Judge Advocate.

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The commission was opened. All parties to the trial entered.

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

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

Arthur G. Robinson,
Rear Admiral, U. S. Navy, President.

David Bolton,
Lieutenant, U. S. Navy, Judge Advocate.

James P. Kenny,
Lieutenant, U. S. Navy, Judge Advocate.

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LIEUT., USN.

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U. S. War Department

(MATERIAL MUST NOT BE REMOVED FROM OR ADDED TO THIS FILE)

File No. 48-34-1 NAVY CASE PART 2

Sub. INOUE

WAR CRIMES OFFICE

Judge Advocate General's Office

See also Nos. .....

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U. S. GOVERNMENT PRINTING OFFICE 16—63279-1

0002

Case of

Inoue, Fumio,

captain,

Imperial Japanese Army.

April 23, 1947.

RECORD OF PROCEEDINGS

of a

MILITARY COMMISSION

Convened at

United States Pacific Fleet,

Commander Marianas,

Guam, Marianas Islands,

by order of

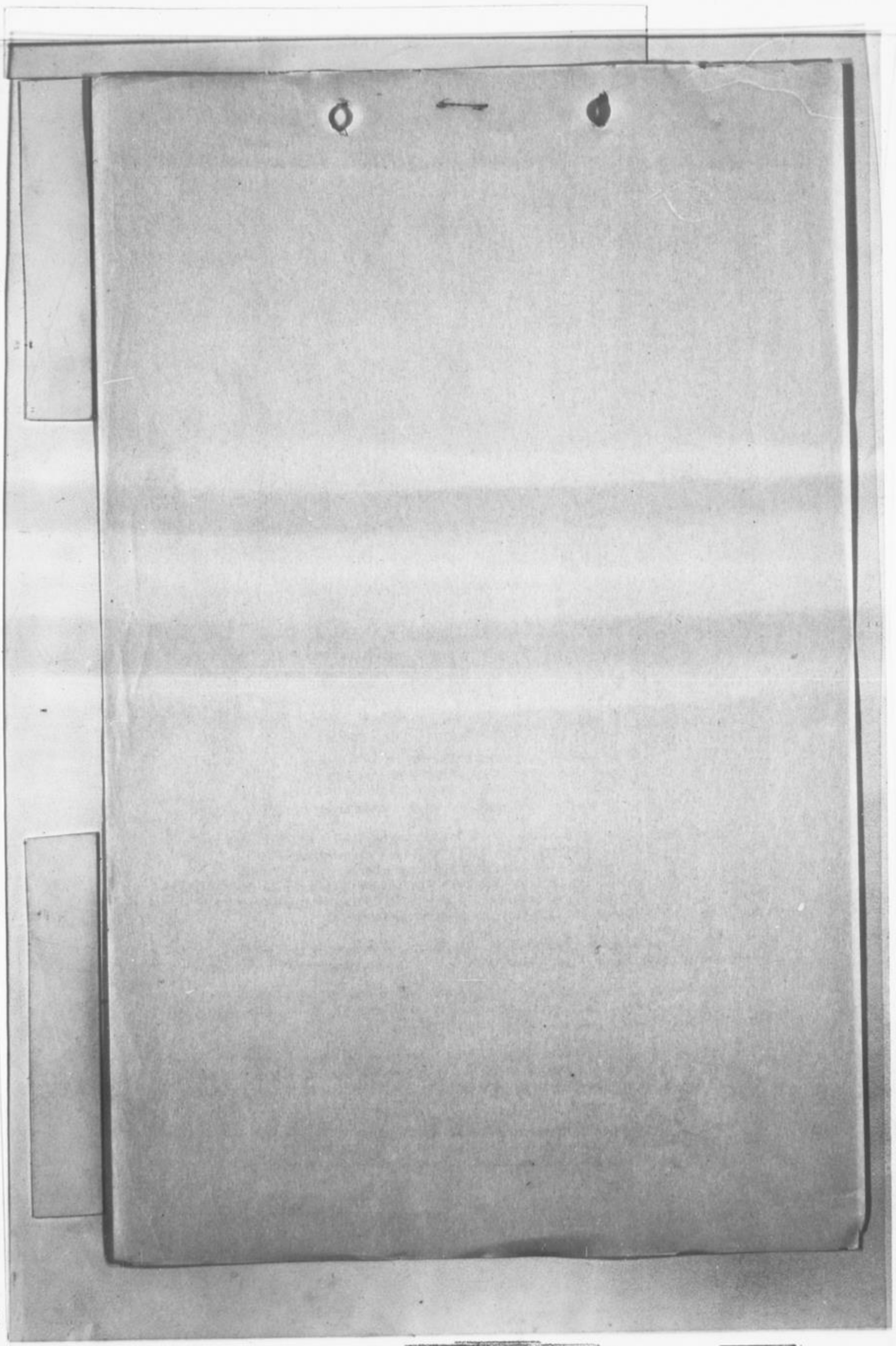
Commander Marianas Area.

RECEIVED
4 SEP 1947
OFFICE OF JUDGE
ADVOCATE GENERAL
U.S.A. SECTION

VOLUME II

159116

0003


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L(1)

REQUEST FOR POSTPONEMENT OF TRIAL

The defense is not yet ready for trial and requests an adjournment. We request that the Commission adjourn to meet again at 9 a. m. on Monday, May 5, 1947.

Captain Inoue, the accused in this case was served with the charges and specifications March 13, 1947. However, defense counsel were all occupied in the case of Furuki, Hidesaku. The Furuki case was not completed until Friday, April 18, 1947. Captain Inoue, the accused in this case was a witness for the defense in that case. Until that case was completed on April 18, 1947, there was no opportunity to prepare this case.

This was only four days ago and there has not been sufficient time to prepare any of the defense in this case, including our plea to the jurisdictio of this commission to try the accused.

We have only been able to discuss the case with the accused to a very limited extent. From him we learn that there are several important witnesses now in Japan who, we hope, may be able to testify for the accused. We plan to go to Japan to look up these witnesses. This requires some little time.

The accused is charged with a violation of Article 199 of the Criminal Code of Japan. It is most important that while we are in Japan that we look up the applicable Japanese law and cases particularly as they apply to the charge of murder in violation of effective law, especially Article 199 of the Criminal Code of Japan. The Japanese law may well vitiate charge one if not laid in accordance with Japanese law and procedure.

There are many matters both as to the facts of the case and the legal issues involved which must be investigated here but particularly in Japan.

In this case, the accused is charged with murder of eight persons. Such a charge is far too serious to go to trial in only four days. The prosecution have been preparing their case since August, 1945.

In accordance with Section 213, Naval Courts and Boards, "Depositions may also be taken before the assembling of the court by mutual agreement between the judge advocate and the accused (counsel) subject to objections when read in court."

The judge advocate, Lieutenant Bolton, is going to Japan and the defense counsel and judge advocate have mutually agreed to the taking of depositions while in Japan. We ask that the commission waive the regular procedure which

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James R. Fanny
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is that the list of interrogatories to be propounded to absent witnesses be submitted to the commissionand that the defense be allowed to take depositions while in Japan subject to cross-interrogatories by the judge advocate while the judge advocate is in Japan.

We shall at this time ask for a delay only until 9 a. m., May 5, 1947.

We hope that the commissinn will give special consideration to our plea.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. N. R.

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LIEUT., USN.

0006

[redacted]

Original document in Japanese appended to the original record.
Certified translation appended herewith marked "E."

0007

N(1)

ARGUMENT IN OBJECTION CONCERNING THE JURISDICTION OF THIS CASE FOR THE ACCUSED, INOUE, FUMIO, DELIVERED BY AKIMOTO, YUICHIRO, THE DEFENSE COUNSEL ON 5 MAY 1947

If it pleases the commission:

The defense objects to the jurisdiction of this commission over the case of defendant INOUE, Fumio. In insist that this commission has no jurisdiction to try this case and that the charges ought to be rejected.

Before commencing my objection, I would like to point out the fundamental errors in the assertion of the prosecution. Although I have never heard the opinion of the judge advocate concerning the jurisdiction of this case, this case is entirely the similar case to the Furuki case which was tried before in this court. I believe that the objection of the judge advocate for this case may be regarded as same as that of previous case, and I shall cite his previous reply and rebut it.

The judge advocate insisted that this commission has jurisdiction over this case, and stated the reason as follows:

He insisted first that: There was the Japanese Ponape Local Court in the Marshalls Area, but it came under the government of the Commander Marianas of the US Forces on 5 January 1946. With the surrender of Japan, the Japanese jurisdiction disappeard, and the Ponape Local Court lost its existence. The jurisdiction over the Marshalls came under the jurisdiction of the US Military Government.

He stated it is cleard by "Proclamation 1, issued by Admiral Chester A. Nimitz, as Admiral, United States Navy, Commander-in-Chief, United States Pacific Fleet and Pacific Ocean Area, Military Governor of the Marshall Island Areas."

I admit that this is quite proper, and it is needless to cite the Proclamation.

Secondly, he stated, "Under proclamation No. 2, Article IV, it is provided as to violations of the Japanese Penal Laws, 'Any person who commits any acts which violate any provisions of Japanese Penal Law in effect in these islands prior to the occupation by the Forces under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor, or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct.....!"

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LIEUT., USN

0008

He insisted that, according to this stipulation, the jurisdiction over the accused in this case who violated the Japanese Criminal Code which was effective before the occpuation naturally lies in this Military Commission.

"Prior to the occupation" in this proclamation modifies "Japanese Law in effect in those islands." So the clause means "Japanese Law which was effective before the occupation." It means that an offense committed before the occupation should be punished by the Japanese Law which was then effective. This is simply natural from the ex post facto principle, and as to this point the proclamation is right. But it does not mean at all that the United States can freely try and punish after her occupation any offenses which were committed under the administration of other country before the occupation. Such cannot exist in a constitutional state especially in the United States which honors righteousness more than anything else. I think no lawyer can imagine such a thing.

We must not forget that this is an order concerning the enforcement of laws in order to meet the abnormal conditions of the transitional period. It is not a law whatsoever. It is nothing but a temporary order for dealing with military affairs. It is not a law of the United States.

In the transitional period of the occupation, the laws of the United States are sometimes inapplicable; and the former effectivelaws of the place are sometimes insufficient to hold a trial.

For instance, an act or a series of acts are done through the two periods, old and new, to wit, before the occupation and after the occupation. In such a case, the occupation forces naturally have jurisdiction over the case. But the part of the act or series of acts which was done before the occupation should be tried by the laws before the occupation according to the ex-post fact principle.

This proclamation was issued in order to meet such circumstances; this is the common knowledge of the law! However, the judge advocate misunderstood the meaning, and stated that America has jurisdiction over any offenses of any nationals before the occupation, even though they were committed byt the people of other states in the territory of countries other than America. This is inadmissible from the reason of law. The trial held in violation of this principle is invalid even if it is entirely proper in its former In this and the preceding case, the utmost careful procedures were carried out for punishing the offenses, but the proceedings were somewhat illegal. The judge advocate stated that they were not trials and indicted them as crimes. If the judge advocate holds that opinion, it is also a crime to hold a trial by violating the principles of law, is it not? I think we must be careful concerning this point.

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I believe that the proclamation does not compel such an illegality. If it does, the proclamation violates the principles of law and international law. A proclamation is nothing but an order, so it cannot abolish or change the law. Then, the proclamation is invalid.

The judge advocate stated thirdly, "In the precept of 21 February, 1947, this Military Commission was authorized to try all offenses within the jurisdiction of exceptional military courts and in addition was specifically authorized to exercise jurisdiction over offenses and Japanese military personnel now in the custody of Commander Marianas, referred to in the dispatch of the Judge Advocate General of the Navy."

Needless to say, this precept was issued in regard to formal authorization of this Commission. It means that this Commission may once accept the charges and specifications preferred against the Japanese military personnel now in the custody of Commander Marianas and try them, and it does not mean that this Commission can hold a trial without giving any regard to whether or not it has actual jurisdiction. If the Commission itself finds that this court has no jurisdiction over theoffense, or if there is an objection by the parties concerning the jurisdiction, of this commission must consider them according to the principles of law, and reject the charges if it so determines. Any Judge Advocate General cannot deprive the commission of this authority by the precept. I think the judge advocate himself will know that the trial is conducted according to law and any order can not exert an influence upon it. It is the fundamental mistake of the judge advocate to state that the precept which only provides a formal authority can control the true jurisdiction based upon the principle of law.

The judge advocate also stated:

"This Commissionis not empowered to divest itself of this jurisdiction specially delegated to it by virtue of the precept, duly issued and pursuant to the powers of the convening authority as set forth in paragraph one of the precept.

"The Judge Advocate General of the United States Navy, the War Department and the Department of State have carefully considered the problem of jurisdiction now raised by the defendant. It is their considered opinion that jurisdiction rests in this commission. The dispatch referred to in the precept clearly recognizes the jurisdiction of this commission. In the later communication the Judge Advocate General in referring to the instant case specifically authorizes the charge of the crime of murder as defined under the local applicable law, and this charge constitutes Charge I against the accused."

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However, no matter how strong an authority the Judge Advocate General has, and no matter how careful consideration is paid, the judicial authority is independent. It is impossible to order a trial disregarding the principles of law. The paragraph, "This commission is not empowered to divest itself of this jurisdiction....." desecrates the sacred jurisdiction. Still less, the meaning of precept does not show the true jurisdiction. No order can do that way, even an order of the President. It is nothing but the technical jurisdiction which enables the court to accept the indictment once which charges the Japanese military personnel now in the custody of Commander Marianas. It does not order a trial to be held without true jurisdiction. It is the commission who determines whether this court has the true jurisdiction, not the administrative authorities outside the court. Independent judicial authority does solmenly exist. Who can hold a sacred trial without it!

Judge advocate cited next the examples in the International War Crimes Tribunals at Nuremberg and Tokyo, and then the SCAP rule:

"2. Jurisdiction.
a. Over Persons. Military Commissions appointed hereunder shall have jurisdiction over all persons charged with war crimes who are in the custody of the convening authority at the time of the trial.
b. Over Offenses.
(1) Military commissions appointed hereunder shall have jurisdiction over all offenses including, but not limited to the following:...
. . . .
(c) Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, ... whether or not in violation of the domestic laws of the country where perpetrated."

The judge advocate stated that this stipulation is applicable to this case.

When a man who is not an expert of the law reads this stipulation, he will understand it as: Any acts done at any time in any place can be tried as war crimes if only the person is arrested as a war criminal. Is such a conception legally admissible? If it is admissible, then the victorious nations can try and punish the defeated nations without reason. We express our deepest respect for the Allied Nations who are trying to establish better morals for tomorrow according to the righteousness of the civilized society, but we don't think that they will use such violence inconsistent with the law.

This is the provision for crimes which are pure war crimes. It has not yet thought to try offenses under the name of war crimes or by the conception of the moral standards of the civilized society. Therefore, neither in international law nor in domestic laws were there provisions which provided for the punishment of

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such crimes. The war crimes trial was the first attempt which was established after the termination of the war. So, there is naturally some unreasonableness and inconsistency when we see it from the former point of view of law. But for the establishment of better morals for tomorrow, we must bear them. But this unreasonableness and inconsistency should be limited within the scope which our sense of rightcousness will permit. It should not be limitless whatsoever like "Kirisute Gomen" of Japanese feudal ages. In the feudal days of Japan, warriours could kill civilians. If they killed them, they were not responsible for the murder, because, in such cases, the civilians were impolite, it was thought. This is the "Kirisute Gomen," and this word was the abuse toward the Japanese feudalism. I don't think that the victorious nations of the war will permit this "Kirisute Gomen."

Then, there must be a limit as set forth in SCAP rules.

SCAP Rule; 2. Jurisdiction, b. Over offenses. (1) (a) reads: "The planning, preparation, initiation or waging of a war of aggression or a war in violation of internation treaties, agreementsor assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

It is simply natural that the acts in the next paragraphs are considered as war crimes according to this stipulation.

For instance, the following murders are considered war crimes: Killing of a pacifist, who objected to the waging of the war by militarists who tried to commence the war; killing of non-combatant without justifiable cause in the occupation territory; killing of prisoners of war without justifiable cause, etc., These crimes are all inhumane and violate international justice. But war crimes do not include such cases as this one in which domestic persons violated domestic laws and were punished by domestic law.

But, if the judge advocatesinsists they do, then every offense which was once tried in the Japanese law ought to be tried again. I don't think that SCAP rules read in that way.

I ask both members of the commission and judge advocate to consider this case carefully.

The natives, Japanese subjects, committeddfelonies, namely, murder, theft and spying, int the face of the enemy, and were tried and punished according to the Japanese laws, . . . that is this case. The only question is whether or not the trial procedure was perfect. And, if it was not perfect, whether or not the imperfect procedure was permissible in that pressing battlefield. That is all in question. And it is not an inhumane act immediately concerning the war

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provided in the SCAP rule. Still less, is it a crime which ought to be charged as murder. If there was a fault in the trial procedure, only the administrative responsibility comes to be the question. And as the common sense of those like myself who participate in the Japanese judicial affairs, official reprimand or dismissal from the office are considered as severe punishments for the fault. I would like to repeat again: This is not a war crime.

The paragraph in the SCAP rule "jurisdiction over all persons charged with war crimes who are in the custody of the convening authority at the time of trial," as similarly as in the paragraph of the precept means the technical jurisdiction, not the actual jurisdiction.

The phrase, "before and after the war" concerns only crimes which are war crimes not general crimes.

I again ask the Commission to have a special consideration that the International Tribunals of Nuremberg and the Far East were established with special purpose and organization and that this court is purely an American Court. So, it is unlawful to apply the rules of the said tribunals to this court. It is simply clear from the nature of the court.

As I stated above, the assertion of the Judge Advocate that this Military Commission has the jurisdiction over this case is a fundamental mistake. I insist that this commission has no jurisdiction to try this case. I shall state my legal opinion as follows:

I would like to enumerate the reasons as follows:

1. The accused's nationality, acts and the place where the acts were committed.
   (a) Country and nationality of the accused.
   (b) The place where the acts of the accused were committed and the sovereignty of the place.
   (c) To what country did the persons who were killed belong and by what laws they were governed when they were executed by the accused.
   (d) For what deeds and by what laws were these executed persons punished.
   (e) Relation between the acts of the accused and war crimes.

2. On efficacy of the Criminal Code:
   (a) Over time.
   (b) Over person.
   (c) Over place.

3. Jurisdition of the trial.

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After I argue on the general rules of the foregoing items, I would like to go on to the conclusion.

I. The accused's nationaly, acts; the place where the acts were committed and their relation to the war crimes.

1) As shown in each specification of Charges I and II, INOUE, Fumio, was a soldier in the Japanese armed forces and it is unnecessary to state that he was (and is) a subject of the Japanese Empire.

2) Each specification of Charges I and II read that the accused murdered in 1945, on Jaluit Atoll, Marshall Islands, natives of the above island. Jaluit Atoll, in the Marshalls, was formerly the territory of Germany. After the termination of the World War I, the Atoll was mandated to Japan by the League of Nations, and since then it has been under Japanese mandate. As you know, there are three types of mandatory rule "A," "B," and "C" types.

"A" type is where a territory has reached a state of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a mandatory until such time as they are able to stand alone. For example: Iraq and Palestine under British Mandatory formerly belonging to Turkey, and Syria under French Mandatory.

"B" type being of lower culture and development than "A" type Mandatory. The Mandatory must be responsible for the administration of the territory. For example:Territories in Central Africa, Cameroons (British and French), Togoland (British and French), Ruanda-Urundi under Belgium, etc.

"C" type is where the territory is completely administered under the laws of the Mandatory as an integral portion of its territory. For example: The German Protectorate of South West Africa (Union of South Africa), Samoa (New Zealand), Nauru (Britain), all the former German islands situated in the Pacific Ocean lying south of the Equator (Australia), all the former German islands situated in the Pacific Ocean lying north of the Equator (Japan), etc.

Therefore, the islands in this case, Jaluit Atoll in the Marshalls, is a "C" type Mandatory. This island is, exactly speaking, not a Japanese territory by an integral portion of the Japanese Empire, and is administered by Japanese laws as any other portion of the Japanese Empire. Japan established a civil government in Palau and under its jurisdiction established at various places branch offices and courts and completely enforced administrative and judicial powers, etc. As stated, this territory administered by Japan, was Japanese territory and being completely under Japanese authority, no other nation had any right to interfere.

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3) Therefore, the natives executed by the accused are in the same category as Japanese citizens administered to by Japanese laws.

4) The natives who were executed had been punished by Japanese laws because they had violated the Japanese Criminal Code, Naval Criminal Code, Military Secret Law, and others.

5) The relation between war crimes and acts committed by the defendant.

I believe the regulations issued by the Supreme Commander Allied Forces, Japan, General Order Number 20 dated 26 April 1946, concerning the Far East International Military Tribunal cannot be adapted to this Military Commission, which is not an International Military Tribunal.

The above International Military Tribunal regulations were issued with a special purpose and system. The sphere of War Crimes to which it was to be adopted was very large.

In Article Five of the above order, there are the following rules:

1. Crimes against peace.
2. Conventional War Crimes, Violations of the Laws and Customs of War.
3. Crimes against humanity.

Even if we compare the acts committed with these regulations, we would find the following:

Acts that were committed and punished by a citizen of Japan, in Japanese territory, in violation of Japanese laws and punished by an official of that country as an act of his office does not constitute a violation of (1) Crimes against peace. It could not be said to have (2) violated the laws and customs of war, and it is logically clear that it does not come under the category (3) of crimes against humanity. Crimes against humanity may have been committed under the circumstances prevailing in a country like Nazi Germany, but I think there were no such cases under the circumstances that existed in a country like Japan. Reason would not permit the actions of the defendant in the case to have violated this article. I believe it is reasonable that this Military Commission, which is not an International Military Tribunal should define its conception of a war crime in a narrow sense. Therefore, I am convinced that the actions of the defendant in this case absolutely do not constitute a war crime.

II. The efficacy of the Criminal Code. In other words, I would like to speak on its efficacy, the sphere to which it can be adapted and an outline of the theory upon which the law is based.

"N(8)"

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1. The efficacy of the law over time:
   (a) It is the general principle in law that a law shall have no effect on actions which occurred before its enforcement. This is called "Principe de non-retroactivité," or ex-post facto principle. In the Japanese Criminal Code, there is a special clause concerning this principle (Criminal Code, Article 6): "If there be amendment of punishment by a new law promulgated after the crime, the lighter punishment shall be adopted."

This is as same in the trial procedure. If a special law is not established, the case which occurred before the establishment of the new law cannot be dealt with by the new law. Of course, if an act of a series of acts were done through the two periods, old and new, sometimes the act or acts are dealt with according to the new law. In such cases, it is necessary to provide for it by the regulations for the working of the law--this is the case in each country.

Especially, this is not the case which may be dealt with by only the regulations concerning time.

At the time when the acts in this case were done, Japan was exercising her administration over the place. That is the place where the acts were done was the Japanese territory. Both the persons who did the acts and the persons against whom the acts were done were Japanese. For the United States, this case was the acts of a foreigner done in a foreign country. Can the United States try this case only because she occupied the place? This case is just as same as that in which a foreign criminal has escaped into the United States after he committed a crime in a foreign country. Can it be said that the United States can try him only because he is now living in the United States? This is the infringement of the other country's sovereignty. I think there is no one who answers this question in the affirmative.

2. The efficacy of law over person. Laws have full efficacy over any person with the exceptions provided for in domestic and international laws. But, of course, the efficacy over person is limited by that of place. In International Law, persons who are excepted from the efficacy of laws are as follows:

   (a) Heads of nations and Presidents of foreign countries, their families, and subordinates.
   (b) Legally admitted diplomats of foreign countries, their families, and employees who are citizens of foreign countries.
   (c) Military personnel and civilians in military service who are attached to foreign troops, war-ships or planes which were legally admitted.

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3. Efficacy of law over land. In the efficacy of law over land, you have made a distinction between the efficiacy of Criminal Law and jurisdiction. The latter I shall argue on later.

Concerning the efficacy of criminal law on land from an academic standpoint, we can make the following distinctions:

(a) Prinèipe a universarite or universal prinèiple.
(b) Principe de territorialite or territorial principle.
(c) Principe de personalite or principle of persons.
(d) Schutz prinzip or principle of protection.

In the Japanese Criminal Code (b) and (c) are adopted. In Articles 1 and 2 of the Japanese Criminal Code, it is stated that this criminal code shall be applied both to offenses committed in Japanese territory and to the offenses of Japanese, committed even in foreign countries.

Article 1 of the Japanese Criminal Code states that: "This code shall be applied to all offenses of any person, committed in Japan or in Japanese vessles outside the Japanese territory."

Article 2 of the same code states that: "This code shall be applied to specified offenses committed by foreigners in foreign countries." And in the offenses provided here, treason (Articles 81 to 89) is included.

In Article 4 of the Criminal Code of the Japanese Army and Article 5 of the Criminal Code of the Japanese Navy are the following provisions: "Violation of Criminal Codes or other laws by Japanese Army (Navy) personnel in territory occupied by Japanese Forces shall be dealt with in the same was as an offense in Japan. The aforementioned offense of Japanese civilians, foreigners in service of Japanese Forces and prisoners of war, even though they are not Japanese Army (Navy) personnel, shall be dealt with according to the above provisions."

"Regulations for court procedure in South Sea Islands" was promulgated in 1923 by the Imperial Ordinance Number 26. Since then, the Japanese Criminal Code has been enforced there.

III. Jurisdiction and the principles of International Law.

There are three kinds in the jurisdiction just as in the efficiency of the Criminal Code. They are: (1) over time, (2) over person, (3) over place. But since jurisdiction is the actual use of sovereignty, it rests within the scope of sovereign power, although the efficacy of criminal code may reach farther. And the scope of the jurisdiction is limited within the territory of the state if not otherwise provided in International Conventions.

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(1) Jurisdiction over offense. Citizens or subjects of a country are under the jurisdiction of the country whether or not they are in the country.

(2) Jurisdiction over place. A country has jurisdiction over any offenses and any persons within the scope of its sovereign power. It has jurisdiction over persons of any nationality. As I mentioned about the efficacy of criminal code, it has also no jurisdiction over the following persons though they are in the place under its jurisdiction.

(a) Heads of nations or Presidents of foreign countries, their families and subordinates.
(b) Legally admitted diplomats in foreign countries, their families and employees who are citizens of foreign countries.
(c) Military personnel and civilians in military service who are attached to foreign troops, war-ships, or planes which were legally admitted. But a country has full jurisdiction over war-ships, ships, and planes of the country though they are in foreign territories. Extra-territoriality is an exception principle to use jurisdiction in foreign territories.

Concerning this point, Dr. George Grafton Wilson, professor of the Harvard University in his work "International Law," pp. 130-131 states:

"Nations are persons who owe allegiance to a state and are entitled to its protection. Citizens and subjects owe allegiance to and are entitled the protection of a given state whatever their status under domestic law.

"Over its nationals within its own jurisdiction a state has full authority. This jurisdiction extends not only to its domain, but to craft, its flag on the sea, or in the air outside the jurisdiction of the state.

"Lex Loci Lex fori is the accepted principle as stated by the Supreme Court. The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.

"A state has, in general, jurisdiction over its nationsl when in a foreign port or vessel flying its flag, for acts beginning and ending on board the vessel, or for acts which do not take effect outside the vessel."

Then he cites the examples of trials of such cases and explains it in detail (pages 147-148 of the above volume). But, I would like to omit them. However, according to what he says, the United States rejected the jurisdiction of foreign countries over its citizens and even over foreigners who declared their intention to become citizens "with an intimation that force would be needed."

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And at the end he states:

"After mentioning that the man (Kasota) had by declaration manifested his intention of making the United States his permanent abode, Secretary Marcy says: The establishment of his domicile here invested him with the national character of this country and with the character he acquired the right to claim protection from United States, and they had the right to extend it to him as long as that character continued. The right to protect a person having a domicile though not native born or national citizen rests on the foundation of justice and the claim to be protected is earned by consideration which the protecting power has liberty to disregard."

In conclusion:

"A national is subjected to the jurisdiction of his state and is exempted from those of another states. Secretary Marcy says: The right to protect the nationals is based upon the fundamental rule ofjustice, and no one is able to disregard it freely."

It is quite proper for the United States, which highly advocates righteousness and humanity to the world to show exactly the fundamental rule of justice and to reject absolutely the jurisdiction of foreign country for the protection of its citizens. I agree from the bottom of my heart to this dispositian. But, on the other hand, we must admit that it is quite natural to respect the jurisdiction of other countries over their citizens.

Although I have already discussed the offiency of criminal law over time, I would like to explain it here again.

It is entirely different in meaning from the relatian of old and new laws of a country.

The Marshall Islands, the place where the acts of this case were done, were then Japanese territory. At the time when the acts were done, the place was of course governed by Japan and was entirely a foreign country to America. These circumstances will never change by the reason that the place has been occupied by America.

It is quite incomprehensible that America has jurisdiction over the offense of a foreigner committed in a foreign place.

Were there any instances that the United States triedin her court the offense of a foreigner committed in a foreign place and which had no concern with the United States and her people only because the criminal was living at

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that time in America? If she had had, an international incident would have occurred because of its violation of foreign sovereignty. In such a case, the country to which the criminal belongs must request the United States to deliver the criminal, and the United States must give the criminal to the country, if she signed the convention of the delivery of criminals. If she did not sign it, of course, it is up to her to decide freely whether to deliver the criminal or not. But it is not admissible in international law to try the criminal in her court. Besides, it fundamentally violates the principles of law, and it is not admissible anyhow.

CONCLUSION:

As it is clear in the theory mentioned above, we can easily and definitely conclude that the jurisdiction of this case lies in Japan and not in the United States. That is to say:

1. Inoue, Fumio, the accused, is a subject of Japan attached to highly organized Japanese Military Forces, and, as an official of that Force, he discharged his duty in Japanese territory. As I stated above, even foreign troops who enter another country by, to which they belong, admission go under the jurisdiction of the country to the exclusion of the jurisdiction of the country they entered. This is the priniciple in International Law. Considering this point it is unnecessary to argue further that the United States has no jurisdiction over the accused.

2. The acts of the accused specified in Charge I and Charge II were done at Jaluit Atoll, Marshall Islands. Whereas, Jaluit Atoll was then a Japanese mandate, a component part of Japan, and a territory under the sovereignty of the Japanese Empire. Therefore, the offense committed in the area is under the jurisdiction of the Japanese Empire and no country can intervene in it.

3. The victims stated in the specifications of Charges I and II are all natives of the Marshall Islands. It is clear that these natives were then Japanese subjects and were under the sovereignty of Japan. As I mentioned above, no country other than Japan can have jurisdiction over this case from any point of view, such as efficacy over person, efficacy over place, and efficacy over time.

4. There is also another point which is hard to understand:

Each of the specifications of Charge II state that the acts of the accused violated the laws and customs of war.

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0020

The act of the accused, Inoue, is the performance of duty as an officer by the order of the law. That the accused did to execute Japanese subjects under the sovereignty of Japan by Japanese law, because they violated the law. Therefore, it has no connection with the laws and customs of war. He applied Articles 81 to 87 inclusive, of the Japanese Criminal Code, the offense of treason, for these natives. He specified their crimes under the name of "spies." The prosecution mistook this for "spies" written in the International Law. I think this is the reason why Charge II was served. But it means the "spies" in domestic law, not in International Law.

In short the accused has no connection with the laws of war so that he is out of the category of "war criminals."

Therefore, from any point of view, the jurisdiction of this case belongs to Japan, and it is illegal to try him in this military commission, an American Court. I believe the charges and specifications ought to be rejected.

I certify the foregoing, consisting of fourteen pages, to be a true and complete translation, to the best of my ability.

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

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0021

ANNEXURE IV OBJECTION CONCERNING THE JURISDICTION OF THE CASE FOR THE [illegible] DATED [illegible] AND DELIVERED BY JUDGE [illegible] ON 5 MAY 1947.

Original document in Japanese appended to the original record.
Certified translation appended herewith marked "P."

0022

ARGUMENT IN OBJECTION CONCERNING THE JURISDICTION OF THE CASE FOR THE DEFENDANT INOUE, FUMIO, DELIVERED BY SUZUKI, SAIZO ON 5 MAY 1947.

If it please the Commission,

The accused Inoue submits this objection to the jurisdiction on the ground that his alleged crimes in the specifications of Charge I and II are not under the jurisdiction of this Military Commission.

First, I shall state my reasons for objection concerning Charge I. The offenses alleged in each of the specifications of Charge I can be summarized as follows: At a time when a state of war existed between the United States, its Allies and Dependencies and the Japanese Empire, namely in April 1945, the accused Inoue, then a member of the Japanese armed forces, committed murder against the natives of the Marshall Islands at Jaluit Atoll, and violated Article 199 of the Japanese Criminal Code which sets forth the crime of homicide.

Before dealing with the problem of the jurisdiction over this alleged crime, we must pay careful attention to the following four points:

(1) The defendant Inoue who is accused as a criminal of murder is a subject of Japan.
(2) The time when the crime was committed was April, 1945, that is before Japan agreed to the Potsdam Declaration and surrendered to the United States of America and the Allied Powers.
(3) The place of the crime was, at that time, a Japanese mandated area.
(4) All the victims of the crime were the natives in the Japanese mandated area. The South Seas Islands to the north of the equator, including the Marshall Islands, which had formerly been the territory of Germany were by decision designated to be the Japanese mandated area by the Supreme Conference of the Allied Forces which was held in London in 1919, after the World War I, and in December 1920, a C-type mandate was duly established between the League of Nations and Japan. Article 2 of the mandate states, "the mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Empire of Japan, and may apply the laws of the Empire of Japan to the territory, subject to such modifications as circumstances may require. The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitant of the territory subject to the present Mandate." , and clearly showed the fundamental legal relation between the Japanese Empire and her mandated area and its inhabitants.

Then was the Japanese Empire given territorial sovereignty over this mandated area? Did the natives of the area receive Japanese citizenship? To these legal questions, the Mandate and the Charter of the League of Nations, especially Article 22 of the Charter, evade a clear answer. But it will be unnecessary to give the theoretical solution of this question, because it will end in a debate over differing concepts. Depending upon the interpretation of sovereignty and citizenship, both affirmative and negative answers are possible.

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Therefore, when we consider the problem of the jurisdiction of this case, only to point out the following fact will be sufficient for the solution. That is: The Japanese Empire was admitted to have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Empire of Japan and it could apply the laws of Japan to the territory and its inhabitants. But for the benefit of the natives of the area and also for the benefit of the countries, other than the Mandatory, which were members of the League, Japan had to follow a certain administrative plan and be under some supervision of the League of Nations in carrying out the plan. So there was some limit of the freedom of the administration of Japan. However, over the Japanese Mandate and the inhabitants of the area, the sovereignties of other countries have no power at all. Or it would rather be said that Japan has sovereignty over the area exclusive of other countries' sovereignties. I believe there is no objection to this.

Article 22 of the Charter of the League of Nations provides that the Mandatory must carry out its duty of guardianship for the natives of its mandated area. But considering this duty of guardianship in light of the meaning of Article 2 of the Mandate of Japan, it does neither admit an international personality of the natives of the area nor mean that the Mandatory must lead and assist them. It is rather proper to understand that the natives had a social position under the Japanese sovereignty as equals of the Japanese subjects. In fact, there was a famous instance that a country, which accepted C-Mandate of former German colony in Africa at the same time of Japanese Mandate of South Seas Islands, punished the natives of the area with treason against the country. Also, it is a principle admitted in the theories of the international law that C and B Mandates are dealt with in accordance with the territory of the Mandatory and that the natives of the area as the citizens of the Mandatory. I can maintain that, in the application of international law in war time, this principle is more clearly admitted.

But, at this point the following objection may be raised. That is"your theory is pertinent until the Japanese Empire withdrew from the League of Nations, but after the withdrewal, Japan has not been recognized as having any international legal title or sovereign rights over the mandated territory."

In the case of Furuki, Hidesaku, tried before this court, the similar questi n of jurisdiction arose as in the instant case, and the judge advocate raising the same question which I have stated above, replied to the objection concerning the jurisdiction of the defense counsel as follows: "It is a matter of public recognition that in those days after 1935, numerous international jurists and legal authorities of the highest calibre not only questioned but vigorously denied sovereignty of these islands by the Japanese Empire. Commander Carlson also argued that, the control exercised by the Japanese over these islands subsequent to that period indicated sovereignty. The fact that a criminal possessed the temporary power, the physical force, to maintain control over stolen or misappropriated property, does not signify that he thereby derived legal title. Similarly the contention that Japan could acquire legal title and sovereignty to the mandated islands because she unlawfully and by force exercised control over them, is

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contrary to basic concepts of international justice. Since Japan's forceful isolation, fortification, and control of these islands was illegal, it could not confer any internationally legal title or sovereign rights in the Japanese Empire."

Did the Japanese Empire by withdrawing from the League of Nations lose her legal title over the mandated islands of the South Pacific? Taking into consideration the history of mandatory rule and the essence of its rights, it cannot be simply concluded as in the above citation. At the time of the withdrawal, numerous controversies arose among international jurists and officially no apparent solution has been found as yet. Moreover after the withdrawal from the League of Nations, there are no facts showing Japan was requested to abrogate her mandate and return the mandated area. At present, I would prefer to reserve my rebuttal as to the interpretation that after the withdrawal of Japan from the League of Nations, she had lost her legitimate rule over the mandated territory and that her control was illegal. Because it depends upon the interpretation of the essential rights of the C class mandate and because it is a futile argument I shall only stop to indicate that the above opinion of the judge advocate is inconsistent with the official opinion of the U.S.A. Under proclamation No. 2, Art IV issued by Admiral Chester W. Nimitz, as Admiral, U.S.N., Commander-in-Chief, U. S. Pacific Fleet and Pacific Ocean Area, as Military Governor of the Marshall Island Areas, and cited by the judge advocate in his reply in support of the jurisdiction, provides: "Any person who commits any act which violates any provisions of Japanese penal law in effect in these islands prior to the occupation by the forces under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor, or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct....."

According to this Proclamation, the Japanese Criminal Code, a domestic law of Japan, which was in effect prior to the occupation of the American forces in the South Pacific Islands was recognized to be effective. In other words it was acknowledged as effective local law. If as the judge advocate contends after the withdrawal from the League of Nations, Japan no longer possessed international legal title or sovereignty over the South Pacific Islands and her possession was only a illegal control of a criminal over stolen property, then there would be no reason in recognizing the efficacy of the Japanese Criminal Code as legal law which was in effect prior to the American occupation.

This Article IV of Admiral Nimitz's Proclamation No. 2, I believe is an influential official opinion recognizing the legality of the Japanese sovereignty over the South Seas Islands after her withdrawal from the League of Nations quite contrary to the judge advocate's contention.

Thus, from the foregoing study such crime as alleged in Charge I of the instant case; the case in which the accused who is a Japanese subject, during the present war (that is prior to the surrender) in the mandated territory of the

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Japanese Empire killed the native inhabitants of the said area, is purely a domestic crime of the Japanese Empire, and I believe it can be easily understood that it properly should be tried by the courts of the Japanese Empire.

The elements to decide what nation has jurisdiction over a certain crime are, the place where the crime was committed, the status of the offendor and the status of the victim at the time of the crime. In the instant case with reference to these three elements, there arises absolutely no question concerning the jurisdiction of a foreign court.

Then, at present after the surrender of Japan, have the courts of the U.S. including the allied powers acquired jurisdiction over a purely domestic crime of Japan committed by a Japanese before the surrender?

Japan accepted the Potsdam Declaration and on September 2, 1945, formally signed the documents of surrender with the U.S.A. and other allied powers. And in accordance with the document of surrender, the Emperor who rules over the Japanese Empire and the authorities of the Japanese Government were placed under the authority of the Supreme Commander of the Allied Forces who is empowered to take necessary steps in carrying out the conditions of surrender. But differing from Germany, a central government still exists, administers the Japanese people as a whole and though under the designated restriction of the Supreme Commander, the Japanese Government is recognized to exercise its proper power concerning legislation, administration and judicture. Especially with regard to the judicature, the Japanese courts still exist and as a principle they are allowed to exercise jurisdiction over crimes committed by a Japanese regardless of whether it was committed before or after the surrender. The Japanese courts are at present exercising this jurisdiction. But as an exception the military courts of the U.S.A. and the allied powers exercise jurisdiction over crimes committed by the Japanese, when they are offenses against a person belonging to the Allied Powers or to the occupation forces now stationed in Japan or in hinderance to the objectives of the occupation of Japan.

This exception deals with crimes which occurred after Japan surrendered and the Allied Forces had occupied Japan proper. I have not heard of any proclamation or stipulation which has been promulgated stating the courts of the U.S.A. and other allied powers exercise jurisdiction over a purely domestic crime committed by a Japanese violating a domestic law. Even in the Potsdam Declaration which served as a basis for the condition of surrender of Japan, stern punishment for the war criminals is merely declared.

According to the order of the Supreme Commander of the Allied Powers concerning the trials of the accused war criminals which was issued and promulgated on 5 December 1945, the scope of the war crimes became wider than that which was previously admitted in the theories of the international law. "Murder..... committed against any civilian population before or during the war,.....whether or not in violation of the domestic laws of the country where perpetrated" came to

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be accused as a war crime under the name of the crime against humanity. Is the crime of murder in Charge I of this case alleged as a war crime against humanity? Both Specifications 1 and 2 of Charge I applies Article 199 of the Japanese Criminal Code to the alleged crime of murder of defendant Inoue. Conjecturing on this, I can not at all think that the crime of Charge I is alleged as war crime. I can not but conclude that it is alleged as a common crime.

Summing up the points I have mentioned above, this is in substance a purely domestic crime of Japan, and I can not find any characteristics of a war crime in the wordings of the charges and specifications. I maintain that the crime alleged in the specifications of the Charge I should be indicted in a Japanese court and that this Military Commission has no jurisdiction over it.

Secondly, we object to the jurisdiction concerning the crimes alleged in Charge II and each of its specifications preferred against the accused Inoue, Fumio. The crimes alleged in both of the specifications of Charge II are of the identical type. It is summarized as follows; at a time when a state of war existed between the U.S.A. and Japan, the accused Inoue, then a Japanese military person, at Jaluit Atoll, Marshall Islands, without previous trial punished and killed as spies the natives of the Marshall Islands, this in violation of the laws and customs of war.

In Article 30 of the Hague Convention governing land warfare, it is clearly stipulated "A spy taken in the act shall not be punished without previous trial." Therefore to execute a spy without previous trial would violate the above article of The Hague Convention and it is natural that such an act would constitute a war crime. But in applying this Article 30 of the Hague Convention, we must pay special attention to the nationality of the spy who was captured. Article 30 of The Hague Convention merely provides "A spy taken in the act....." and on the face of the provision there is no restriction whatsoever, as to the nationality of the spy. The same can be said about Article 29 of the said Convention. But making an inference from the legislative aim in establishing Article 30, I believe it is the most reasonable interpretation to construe this "spy" referred to in the provisions in a limited sense as a person other than the nationals of the country which caught him.

In the interpretation of statute law such rational interpretation must not only be permitted but is also necessary. It would be fatal to statute law if we should be too particular about its wording. International jurist Oppenheim gives the following interpretation with reference to Article 31 of The Hague Convention. (International law by Oppenheim, Vol. II, War and Neutrality, 3rd Edition.) "According to Article 31, a spy who is not captured in the act, but rejoins the army to which he belongs, if subsequently captured by the enemy, may not be punished for his previous espionage, but must be treated as a prisoner of war. But Article 31 applies only to spies who belong to the armed forces of the enemy; civilians who act as spies and are captured later may be punished."

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In Articles 29 and 30 of The Hague Convention, the word spy only appears and nothing is mentioned as to distinguish the nationality of the spy. So if we should assume an attitude and not admit the interpretation of spy in both articles as being confined to foreign spy, then the above interpretation of Article 31 by Oppenheim should not be permitted. That is because in Article 31 it merely provides "A spy who.....rejoins the army to which he belongs if subsequently captured by the enemy" and nothing is mentioned that the spy in the said article does not include civilians who act as spies. Primarily, spying is not an act in violation of warfare regulations. This is clearly set forth in Article 24 of The Hague Convention. But the act of spying is injurious to the hostile party of the belligerents. So it is recognized as a means of self-defense for the hostile party of the belligerent who incurs the disadvantage to condemn the spy who has been captured to a stern punishment as a war criminal. But when a national acts as a spy against his own country in the benefit for the hostile power, in this case it is natural that he may be punished by his own country's law based upon the sovereignty of the state. And there is not the slightest necessity of going to the trouble of punishing him as a war criminal based upon international laws and customs. Thus, today, each country has its own domestic law, for punishment of the act of spying not only in the rigid and narrow meaning of spy provided in Article 30 of The Hague Convention, but also in a far broader meaning. Also, without being limited as in Article 31 of The Hague Convention, the domestic law can punish the act of spying perpetrated by their nationals.

Thus, I believe the most reasonable interpretation of spy as provided in Article 29 and 30 of the Hague Convention, is not construed to include her own nationals which the country captured as spies. Therefore, when a national is caught for spying for the benefit of the hostile country and a case occurs in which he was executed without legitimate trial, there is no reason for this to cause an international problem as violating Article 30 of the said Hague Convention, and I must conclude that this is a case of such nature to be consistently dealt with as a pure domestic problem.

Now, according to Charge II and each of its specifications, those who were executed by the accused Inoue without previous trial were all native inhabitants of the Marshall Islands which was at that time under the mandate of Japan. These native inhabitants of the Marshall Islands which was at that time under the mandate of Japan, as I have already stated with reference to Charge I, were, at the time of the incident, not of hostile or neutral nationality, but rather composed a part of the Japanese people and were dealt with in foreign relations as subjects of Japan.

Thus, the crime alleged in Charge II and each of its specifications, is the case in which a military person of the Japanese Empire, in the territory of Japan, captured Japanese subjects as spies, and without previous trial unlawfully

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executed them. The act may constitute a crime, but it should be indicted before the existing Japanese court as a purely domestic crime, and I firmly believe that in no way should it be indicted before this military commission as a war crime violating the Hague Convention on Land Warfare.

Owing to the foregoing reasons, I place this objection concerning jurisdiction before you and request your wise consideration.

SAIZO SUZUKI

I certify the above to be a true and complete translation of the original objection to the best of my ability.

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

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0029

SPECIAL PLEA TO THE JURISDICTION OF THE MILITARY COMMISSION TO TRY INOUE, FUMIO, CAPTAIN, IMPERIAL JAPANESE ARMY, DELIVERED BY COMMANDER MARTIN E. CARLSON, UNITED STATES NAVAL RESERVE, AT GUAM, MARIANAS ISLANDS ON MONDAY, MAY 5, 1947.

The accused, Captain Inoue, Fumio, Imperial Japanese Army, objects to being tried by this Military Commission. This objection on the ground of lack of jurisdiction, involves a question as to the legal authority of this commission. We shall show by citing well known cases, long established by law, and opinions of leading jurists, that, first, the accused in this case is not subject to the court's jurisdiction, and, second, that the offense is not one cognizable by this Navy convened Military Commission.

We shall also show that there was no crime committed.

The accused, Captain Inoue, is a Japanese national and is still technically an officer of the Imperial Japanese Army, never having been demobilized.

The alleged crimes, murder, were committed on Jaluit Atoll April 8, 1945 and April 13, 1945. Jaluit was mandated to the Japanese government by the Treaty of Versailles on June 28, 1919 and was occupied by and governed by Japan. The victims were native inhabitants of the Marshall Islands. The accused is an officer of the Japanese Army. These are the facts. Now as to the law.

Since the specification does not show on its face the circumstances conferring jurisdiction then it must be shown in some other way since the accused objects to the jurisdiction of this commission to try him.

In his book "The Protection of Nationals" Frederick Sherwood Dunn in writing about the protection of citizens abroad sayd on page 21, "....the subject of protection is primarily a legal subject. Governments do not ordinarily claim or demand something of another government as a matter of right, unless they mean that they are legally entitled to it. International law is, in one sense, merely a summary of what governments claim as their rights or recognize as the rights of others. Hence we should expect to find, and do find, that the subject of protection of citizens abroad is commonly dealt with as a branch of international law. Questions arising thereunder are usually handled by the law officers of the foreign offices concerned and are dealt with on the basis of legal rules and principles or treaty obligation cases not settled by diplomatic negotiations are frequently referred to international tribunals, which dispose of them as juridical questions. Scholars have been diligent in formulating legal rules and principles out of past practice, and in organizing them into a logical system, with the result that we possess at the present time an extensive and well ordered jurisprudence on the subject of diplomatic protection."

This present case is in point with the celebrated Raymond Fornage case. In Moore Digest of International Law, Volume II, page 260, we read not dicta, but a clear statement of the law on the facts in issue.

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"I have said that crimes committed outside of the national territory by foreigners against citizens or subjects are not punished under any circumstances or conditions by France, Germany, Belgium, Denmark, Great Britain, Luxembourgh, the Netherlands, Portugal, Spain, or Switzerland. Before showing this I pronounced the Mexican contention that the claim to punish foreigners for offenses committed against Mexicans outside of the National Territory was sustained by the French Code, to be wholly unfounded. I shall now show that such a claim has been pronounced by the highest judicial tribunal in France to be unwarranted by the principles of international law.

I refer to the case of Raymond Fornage, decided by the court of cassation, or supreme court of France, at Paris in 1873, and reported in the Journal du Palais (p. 299 et seq.) for that year. This court being the highest judicial tribunal in France, its decisions in respect to the French law are not to be questioned. The circumstances of the case of Fornage are as follows: The prisoner was indicted by the 'Chambre des mises on accusation' (grand jury) of the court of appeal of Chambery for the crime of larceny, which was described in the indictment as having been committed in the Canton of Vaud, Switzerland; and the case was referred for trial before a jury to the court of assizes (composed, in departments where there are court of apreal, of three judges of that court) sitting at Haute-Savoie. The prisoner did not take an appeal, as he had a legal right to do, from the judgment of reference, but proposed before the court of assizes an exception to the competency of that court, based on the ground that, having the quality of a foreigner, the French tribunals could not try him for a crime committed in a foreign country. But the court of assizes, regarding itself as irrevocably clothed with jurisdiction by the judgment of reference from the court of appeal, which had not been attacked declared that the exception of the accused was not receivable. Upon these facts the case was argued at length before the court of cassation by M. Requier, a counsellor and reporter of the court, and M. Bedarrides, advocate-general, both of whom, while admitting that the rule was settled that a court of assizes could not delcare itself incompetent to take cognisance of a case of which it had been possessed by a judgment of reference from which no appeal was taken within the periods established by law, nevertheless argued that there were considerations of higher order in the case of Fornage, which ought to make it an exception to the general rule. In this relation I quote from the argument of M. Requier, the following passage:

"'The right to punish has no foundation except the right of sovereignty, which expires at the frontier. If the French law permits the prosecution of Frenchmen for crimes or misdemeanors committed abroad, it is because the criminal law has something of the character at the same time of a personal statute and of a territorial statute. A Frenchman, when he has reached a foreign country, does not remain the less a citizen of his own country; and, as such, subject to the French law, which holds him again when he reenters France. But the law can not give to the French tribunals the power to judge foreigners for crimes or misdemeanors committed outside of the territory of France; that exorbitant jurisdiction, which would be founded neither on the personal statute nor on the territorial statute, would

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constitute a violation of international law and an attempt against the sovereignty of neighboring nations. There exists a single exception to that rule of the law of nations. When a foreigner has committed, even outside of the territory, a crime against the safety of the state, he can be prosecuted, judged and punished in France. But, save that exception, founded on the right of legitimate self-defense foreigners are justiciable only by the tribunals of their own country for acts done by them outside of the territory. The French tribunals, in punishing an act of that nature, would commit a veritable usurpation of sovereignty, which might disturb the good relations of France with neighboring nations.....When a crime has been committed outside of the territory by a foreigner the culprit is not subjected by that act to the French law; the French tribunals have no jurisdiction over him; the incompetence is radical and absolute. The criminal court, in punishing the act, would commit an abuse of powers; it would usurp a right of sovereignty appertaining to a foreign power. Would it not be contrary to all the principles of justice to oblige the magistrates to render themselves guilty of an arbitrary act, of a violation of international law?

"'Not only did the court of cassation adopt this view, but in its judgment the full text of which is given herewith as Exhibit B) the rule of international law, as laid down by the Government of the United States in the Cutting case, is expressed in terms which, for force, precision, and freedom from doubt or qualification, have not been surpassed. Translated, the material parts of the judgment are as follows:

"'Whereas, if, as a general principal, the courts of assizes, possessed of a case by a judgment of the chamber of indictments not attached within the times fixed by article 296 of the Code of Criminal Procedure, cannot declare themselves incompetent,...this rule is founded on this, that the courts of assizes, being invested with full jurisdiction in criminal matters, can, without committing any excess ofpower and without transgressing the limits of their attributes, take cognizance of all acts punished by the French law; but this jurisdiction, however general it may be, cannot extend to offenses committed outside of the territory by foreigners, who by reason of such acts, are not justiciable by the French tribunals, seeing that, indeed, the right to punish emanates from the right of sovereignty, which does not extend beyond the limits of the territory, that except in the cases specified by article 7 of the Code of Criminal Procedure, the provision of which is founded on the right of legitimate defense, the French tribunals are without power to judge foreigners for acts committed by them in a foreign country; that their incompetence in this regard is absolute and permanent; that it can be waived, neither by the silence nor by the consent of the accused; that it exists always the same, at every stage of the proceedings; whereas, indeed, Raymond Formeo was brought before the court of assizes of Haute Savois, accused of larceny committed in the canton of Vaud, Switzerland;...and, in ordering the trial to proceed, without passing upon the question of nationality raised by the accused, it (the court) violated article 408 of the code, and disregarded the rights of the defense,

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This case was an attempt by a French court to exercise jurisdiction over a crime committed in Switzerland. The Supreme Court of France said it could not be done.

This present case is an attempt by a U.S. Military Commission to exercise jurisdiction over a crime committed by a Japanese national in Jaluit, a possession over which Japan had exercised sovereignty since 1914. On April 8, 1945 and April 13, 1945, Japan was still in possession of Jaluit.

We hold that the United States cannot by this Military Commission exercise jurisdiction over a crime committed on Jaluit in April 1945. What an occupying power can do because of the doctrine that might makes right is also immaterial. The United States of America is not attempting to try this case on any such basis and we feel that this Commission should not listen to or consider any argument that even infers that such a doctrine is the basis for jurisdiction in this case.

This judgment may be regarded as finally and conclusively answering the contentionthat a precedent for article 186 may be found in the French code."

"In the United States the territorial principle is the basis of criminal jurisprudence, and the place of the commission of an offense is generally recognized as the proper and only place for its punishment.

"The earliest bestowal by Congress upon the Federal courts of jurisdiction of offenses committed outside of the territory, actual or constructive, of the United States, was in the crimes act of 1790, which, as read in the text, has sometimes been supposed by writers to have conferred a far more extensive jurisdiction on the courts of the United States than the decisions of those tribunals have attributed to it."

Mr. Justice Story speaking for the United States Supreme Court in 1824 in the case of Appollon, 9 Wharton 362 again stated the rule of law that the laws of a nation have no binding force, except as to citizens, outside of the national territory actual or constructive. Our Supreme Court held:

"The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction."

In the case of crimes committed aboard ship the rule is:

"The crimes of murder and robbery, committed by foreigners on board a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs." Quoting Wharton in Elements of International Lawcited by Moore, A digest of International Law Volume II page 264.

Mr. Justice Story in the case of United States v Davis, 1837, 2 Summer ee 482 had occasion to consider and decide the question of jurisdiction over offenses committed outside of the national territory.

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"Of offenses committed on the high seas on board of foreign vessels not being piratical vessel, but belonging to persons under the acknowledged government of a foreign country, this court has no jurisdiction under the act of 1790, ch. 36.

That was the doctrine of the Supreme Court in United States v Palmer, 3 Wheat R 610, and United States v. Holmes, 5 Wheat, 412, and United States v Klintock, 5 Wheat 144, applied it is true, to another class of cases, but in its scope embracing the present..."

Hackworth in his Digest of International Law paragraph 135, Extraterritorial American Territorial Theory of Criminal Jurisprudence, page 179 says: "An American citizen disappeared in China in the summer of 1905, under circumstances pointing to the suspicion that he had been murdered by a French citizen, E. H. LeVerger. In response to an inquiry by the brother of the deceased as to whether LeVerger might be apprehended and returned to China from Algiers for trial, the department of State said that the United States government does not exercise jurisdiction over crimes committed beyond the territorial limits of this country, except a few involving extraordinary elements in which category the one mentioned by you is not included."

In 1909 the German Foreign Office addressed a note verbale to the American Embassy in Berlin with regard to one Max Runge who was being sought by the New York police. The note pointed out that the individual in question would not seem to be extraditable as the offense against him was not included in the extradition treaty of June 16, 1852 but that if he was a German subject he might be prosecuted before the German courts, if this was requested by the United States government and the assurance given of reciprocal treatment on the part of the United States in similar cases. The Department of State instructed the ambassador as follows:

"Inasmuch as, under Anglo-Saxon legal theory, crime is territorial, not personal, and therefore the criminal jurisdiction of the United States does not, as a general rule, extend to crimes committed outside of its jurisdiction, whether by American citizens or aliens, it is not possible to meet the suggestion of the German note verbale that this government guarantee, in such cases the criminal prosecution in this country of an American citizen charged with the commission of a crime in Germany."

Charge Hitt to Secretary Knox No. 527, December 6, 1909 and Assistant Secretary Wilson to Ambassador Hill, No. 299, January 11, 1910 M.S. Department of State, file 22867. See also 1910 For. Rel. 517-518.

In the case of the United States v. Bowman brought to the Supreme Court of the United States on writ of error for a review of the ruling of the District Court of the United States for the Southern District of New York, Chief Justice Taft speaking for the court said:

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"We have in this case a question of statutory construction.....Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embesslement, and frauds of all kinds which effect the peace and good order of the community, must of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard. "Heckworth Digest of International Law, Volume II pp. 197-198.

In Moore's A Digest of International Law, Volume II (1906) page 4 we find the opinion regarding the supremacy of a sovereign nation within its own territory:

"The jurisdiction of the nation within its territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

Article 22, The Covenant of the League of Nations, Treaty of Peace, June 28, 1919 provides that the South Pacific Islands mandated to Japan shall be administered under the laws of Japan as integral portions of Japan.

Chapter VI Digest of International Law by Green Haywood Hackworth Vol. II is National Jurisdiction - Supremacy of Territorial Sovereign - Jurisdiction. The Nation's Absolute and Exclusive Right. We quote from page 1.

"The jurisdiction of a state extends over not only the land within its territorial limits and the marginal sea or territorial waters, as well as the air space above them, but also over all persons and things within such territory....."

The S.S. Lotus case decided by the Permanent Court of International Justice is but another instance of the rights of sovereignty. Justice John Bassett Moore in his dissenting opinion said:

"1. It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either expres or implied. (Schooner Exchange v. McFaddon (1812), 7 Cranch 116, 136) The benefit of this principle equally enures to all independent and sovereign states and is attended with a corresponding responsibility for what takes place within the national territory." Hackworth, Digest of International Law Vol.II pp. 1-2.

Now, just what is this celebrated case. I shall quote from Charles Cheney H. International Law, Vol. II page 825.

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"In 1812 Chief Justice Marshall, in the case of The Schooner Exchange v. McFaddon, the Supreme Court of the United States rendered a decision which has since guided the legislature and thejudicial departments of the government. The case raised the question whether a vessel commissioned as a man-of-war by the French government was, upon entering a port of the United States, subject to the jurisdiction of a local court, whose aid was invoked by former owners of the vessel to determine whether their title had been lawfully divested by French authority. Chief Justice Marshall, in the opinion of the court, adverted to the exclusive and absolute jurisdiction of a State within its own territory. He declared that any restriction thereof was to be derived from the nations consent; that such consent might be expressed or implied, and might in some instances be tested by common usage, and by common opinion growing out of that usage. He said that a public armed vessel constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.....Without a doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals but until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. 7 Cranch, 144-146.

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This case settled the law with respect to the United States. Since the decisio there has been no disposition on the part of the Congress to assert jurisdiction over foreign vessels of war."

This was in 1812 and has as Mr. C.C. Hyde said been the law with respect to the United States. We maintain it is still the law. The Schooner Exchange v. McFaddon case is exactly in point and no one can hold that there is any jurisdiction for this Military Court to try the accused Captain Inoue after reading the Schooner Exchange v. McFaddon case.

Chief Justice Marshall pointed out that his decision dealt with the normal peacetime relations of friendly sovereigns. Professor Sheldon Glueck in his article "The Nuernberg Trial and Aggressive War" published in Volume LIX No. 3 The Harvard Law Review, February 1946 page 423, now published in book form, says, "The immunity which a sovereign and his agents enjoy by virtue of the privilege granted him and them by other sovereigns is based upon international comity and courtesy;".... In the footnote he quotes from Coker Sovereignty in 14 Encyc, Soc. Sci (1937) 266 (italics supplied). "International law.....speaking very generally..... recognizes that every state has, as a sovereign community, the legal right to

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select its own form of government and to regulate as it chooses its own territory and the personal and property relations of its citizens and subjects - <u>insofar as it does not exercise this right in such a way as to endanger the peace and safety of other states</u>."

We grant that peace has not been signed with Japan, but Japan has by the Instrument of Surrender signed September 2, 1945 placed herself under the power of the conquering nations including the United States. The Peace Treaty is now up to the United States and the other Allied Powers. Can it not be said therefore that present conditions are abnormal only because the Allied Powers have not yet seen fit to terminate the present state of affairs by a Peace Treaty?

Is the United States of America to refuse to recognize the absolute and complete jurisdiction of Japan within Jaluit in April 1945 simply because we do not see fit to terminate the present condition by a formal peace treaty. We do not believe America will do this.

We ask therefore that both charge I and charge II be dismissed as against this accused, Captain Inoue.

More, A Digest of International Law volume II on page 362 says:

A sovereign, according to modern international law, can not exercise the prerogatives of sovereignty in any dominions but his own."

The above rulings from leading cases on jurisdiction and opinions of international lawyers, are particularly applicable to charge one, but they also apply to charge two because the offense is the same identical offense as is charged in charge two, but it is said to be "in violation of the laws and customs of war."

This commission should not consider any reference to the SCAP letter, Regulations Governing the Trials of Accused War Criminals AG 000.5 (5 Dec. 45) LG, as applicable or conferring jurisdiction on this commission to try the accused Captain Inoue. We call the commission's attention to paragraph 2 of the above SCAP letters which reads: "2. Jurisdiction a. <u>Over Persons</u>. The military commission appointed hereunder shall have jurisdiction....." Certainly this commission is not appointed by the Supreme Commander Allied Powers.

This commission is convened by the Commander Marianas Area by Serial 3785 dated February 21, 1947.

It is therefore immaterial and irrelevant what the provisions of SCAP letter AG 000.5 (5 Dec. 45) says about jurisdiction because this commission is not appointed by the Supreme Commander Allied Powers.

"Q(8)"

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This allegation "in violation of the laws and customs of war" is a conclusion of the pleader. On the face of the specifications it is alleged the native inhabitants were punished as spies. We ask, "what is the punishment for a spy?" All authorities, as far as I know agree and the rules of land warfare, provide that punishment meted out to a spy may extend to the death penalty.

The acts alleged took place in April 1945. It is common knowledge that Jaluit was a by passed island, but the American naval and army air forces bombed Jaluit continuously. The Navy ships came in at close range and shelled the island at will. The garrison at Jaluit was in sore straits. The native inhabitants were difficult to control and having valuable information were very eager to turn this information over to the Americans. The war as you remember ended in August 1945.

What laws and what customs of war were violated?when these eight native inhabitants of the Marshall Islands were punished as spies?

The accused, Captain Inoue, is not subject to the jurisdiction of this military commission for a violation of the Hague Convention of 1907 or of the Geneva Prisoners of War Convention or the Geneva Red Cross Convention of July 27, 1929.

International Law such as the Hague Convention provides neither courts or punishments for individuals who violate the laws and customs of war. The prosecution must show by what authority the law of nations permits the trial of individuals and what punishment is provided for the violation of the laws and customs of war. We hold that the state and not the soldier is liable for violation ofthe laws and customs of war. The burden is upon the prosecution to furnish legal authority and/or specific rulings in order that this military commission may hold otherwise.

We can only anticipate and ask if the accused is charged with having violated The Hague Convention No. IV of 18 October 1907. If so then we cite Article 2 of this convention:

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

Since neither Italy nor Bulgaria has ever ratified the 1907 Hague Convention the accused claims neither Japan nor he as an officer of the Japanese army is bound by the convention although Japan did sign the convention.

Suppose at some state of the trial the prosecution decide that what they mean by "violation of the laws and customs of war" is the Geneva Prisoners of War Convention of July 27, 1929 then we say that this military commission has no jurisdiction because Japan has not ratified or formally adhered to this Geneva Prisoner of War Convention.

"Q(9)"

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0038

But, you ask, if this commission has no jurisdiction to try the accused Captain Inoue, Imperial Japanese Army for an offense committed on Jaluit during the bombing of Jaluit by the Americans in April 1945, then what court does have jurisdiction. This question is highly irrelevant and this commission should hear no argument or permit any evidence on this subject whatsoever.

We object to any argument which shows that on and after January 5, 1946 Commander Marianas abolished all existing law courts on Jaluit and took over the responsibility for the enforcement of law thereafter. Such argument is as we stated irrelevant and immaterial because the alleged crime for which Captain Inoue is being tried is said to have been committed April 8 and April 13, 1945. The only argument which this commission should listen to is, what was the law and how was it enforced on Jaluit on April 8 and April 13, 1945.

Of what importance and how can any law, or proclamations issued after April 13, 1945 affect or be material to the issues before this commission. Any such laws can only be ex post facto laws if applied to a crime committed before the proclamation was made or the law passed.

And what does the Constitution of the United States of America say about ex post facto laws. Section 9 paragraph 3 of Article I reads:

"No Bill of Attaindor or ex post facto Law shall be passed."

If a United States Military Commission did not have jurisdiction over the accused and the alleged crime on April 8, 1945 and April 13, 1945 then no proclamations or laws passed after those dates can give this or any other United States Military Commission such jurisdiction. This is fundamental.

"We the people of the United States, in order to .....establish justice" established a Constitution. As we pointed out the Constitution specifically provides that no ex post facto law shall be passed. The only effective law therefore was the law in force on April 8, 1945 and April 13, 1945. We maintain that the laws so in effect give this commission no jurisdiction to try the accused, Captain Inoue, Fumio, Imperial Japanese Army. Also highly irrelevant and immaterial is the question of the necessity for the United States of America to establish courts in the Marshall Islands including Jaluit. This commission should not listen to any such arguments. This question is not in issue.

The Charter of the International Tribunal at Nuernberg or at Tokyo is also irrelevant and immaterial. This is a military commission convened by the Navy Department. It was given no powers or do any of the powers of the International Tribunal granted by the Charter to the International Tribunal stem to this military commission. What powers the International Tribunals has and what the provisions of the Charters were which established these International Tribunals is immaterial and irrelevant and this commission should not be required to listen to such argument.

"Q(10)"

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0039

The same must be said about the Cairo Conference of November 1943. It may have been the purpose of the Cairo Conference to strip Japan of all her islands in the Pacific, but this was not accomplished because on April 8, 1945 and April 13, 1945 Japan still was in possession of Jaluit. The Cairo Conference is immaterial to the issues in this trial and we object to the interjection of the Cairo Conference into this trial.

Likewise is the Potsdam Declaration immaterial and irrelevant.

So too is the Instrument of Surrender signed September 2, 1945. Remember Japan was then a defeated nation.

This commission can only be concerned with what was the effective law on April 8, and April 13, 1945. All that has happened since those dates is immaterial because subsequent can only be ex post facto laws and such laws are in these United States of America forbidden.

What our present intentions are in the Marshalls is also immaterial and irrelevant. Whether Japan is now sovereign over Jaluit is also immaterial.

What were the facts on April 8, 1945 and April 13, 1945? That only is material to the issues in this trial. There can be sovereignty or quasi-sovereignty of the United States over Jaluit on April 8, 1945 and April 13, 1945.

It is immaterial what the status of the United States is in Jaluit today, whether the United States now possesses the power and the duty to establish military courts in Jaluit or whehter the United States has quasi-sovereignty powers in Jaluit today.

It does not necessarily follow that because this Military Commission does not have jurisdiction over a crime committed on Jaluit in April 1945 that there is a hiatus in the law. It is not for this commission to determine where jurisdiction in this present case. It is only material at this time for this commission to determine if they have jurisdiction to try the accused Captain Inoue, Fumio, Imperial Japanese Army for an alleged crime committed on Jaluit in April 1945.

This commission should carefully consider what was said in the case of Pettit v. Walsho 18 U.S. C.A. paragraph 451 et seq as cited on page 158 American Jurisprudence Criminal Law.

"There are no common law offenses against the United States and the crime of murder or manslaughter as such is not known to the Federal Government except in places over which it may exercise exclusive jurisdiction and where by Act of Congress such offenses are recognized and made punishable."

"Q(11)"

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We feel that any opinions from the Judge Advocate General's office of the United States Navy Department should be carefully considered. Is the opinion based on all the facts of this case and second is the opinion an out and out opinion that definitely states that this military commission has jurisdiction to try the accused and/or of the alleged crime? Since the reference in the precept containing the opinion is classified it is impossible to bring this opinion into open court so we ask that the members of the Military Commission read it most carefully and determine if it is binding on this commission in view of our pleas to the jurisdiction of this Military Commission to try the accused, Captain Inoue, Fumio, Imperial Japanese Army for the alleged crime.

Martin Emilius Carlson,
Commander, U. S. Naval Reserve.

"Q(12)"

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Bolton
R(1)

REPLY OF THE JUDGE ADVOCATE IN SUPPORT OF THE JURISDICTION OF MILITARY COMMISSION

delivered by

Lieutenant David Bolton, USN

Prior to a detailed discussion of the argument of defense counsel with regard to jurisdiction, it is desirable to briefly examine the background picture of administration of justice in the Marshall Islands. The following information concerning the Japanese occupation is derived from the Civil Affairs Handbook, East Caroline Islands, OPNAV P22-5 published by the Chief of Naval Operations, Navy Department, 21 February 1944.

When the Japanese Military occupation of the Marshall Islands took place in 1914, and for a number of years thereafter, criminal courts were established in Civil Administration Sections, later the Branch Governments. In 1922 when the South Seas Government was formed, a local court was established in Ponape with jurisdiction in the Truk and Jaluit districts. An appellate court was located at Korer to which appeal could be taken from the decisions of any of the local courts. The judges in the local courts were Japanese. In 1941, the local judge at Ponape was Koizo Omori and the public prosecutor was Masayuki Esaki, both Japanese civil servants of Sonin rank. In theory all judicial matters in the mandated area were to be handled by the courts of justice. But in practice, certain minor offenses were dealt with by the Branch Governor. Village chiefs and headmen, were also authorized to render summary decisions in respect to certain minor offenses committed by natives on isolated islands. All serious crimes were tried in the Ponape Local Court. In 1937, 118 criminal cases were tried in the Ponape Local Court. Two of these were cases of murder by Japanese.

Upon defeat and surrender of the Japanese, Ponape was placed under military government, and all remaining Japanese, including civil judicial officers, if any, were subsequently evacuated. By 5 January 1946, at the time when Commander Marianas had taken responsibility for the military government of the Marshall Islands, all Japanese personnel had already been removed from Ponape. The Japanese Ponape Local Court, therefore ceased to exist after the date of surrender. No counterpart of the Japanese Ponape Local Court was set up by our military government in Ponape. Therefore, no court exists in Ponape with any jurisdiction over crimes committed in Jaluit Atoll, Marshall Islands.

In the Marshall Islands, the jurisdiction of the courts, under existing United States military government, is specifically set forth in a number of proclamations, ordinances and directives.

Defense counsel, Mr. Akimoto, has contended that these proclamations, etc.,

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were "more orders" and do not constitute law. Defense counsel is in error. A proclamation within the scope of the legal powers of the official issuing said proclamation can have the full force and effect of law. Admiral Chester W. Nimitz, as Admiral, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Ocean Areas, and Military Governor of the Marshall Islands Area, had full legal authority to issue proclamations establishing the effective law with regard to all executive, administrative, and judicial aspects of military government. This is a fundamental and elementary principle of military government.

Under proclamation no. 2, Article IV, it is provided as to violations of the Japanese Penal Laws, "Any person who commits any act which violates any provision of Japanese Penal Law in effect in these islands prior to the occupation by the forces under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor, or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct. . . . ."

Ordinance No. 2, amongst other things, established in each atoll a Marshallese Court to be composed of not less than three(3) or more than five (5) members. It specifically sets forth the jurisdiction of the court and states, in Part III, paragraph 12, that the Marshallese Court shall have jurisdiction over: "All offenses punishable under the provisions of this Ordinance, except those offenses for which the penalty is death or imprisonment." Under Part IV, regulations, paragraph 32 provides: "The following acts are criminal offenses which shall be punished as herein prescribed: (a) Murder--the willful or intentional taking of the life of a human being without lawful justification or excuse. (This offense is tried by a Military Court.) Punishment: Death, or imprisonment for a period of time which shall not be less than ten (10) years, including imprisonment for life."

Under the pertinent proclamations and ordinances which constitute the effective law of the Marshall Islands, it is clear that the local native courts have not been empowered to exercise jurisdiction over the accused for the offense charged. The jurisdiction has been specifically reserved to Military Courts.

Contrary to defense counsel, Akimoto's argument, the accused is being tried in the area where the crime was committed. With regard to Charge I, the instant commission is sitting as a superior local court in the Marianas area, with clear territorial jurisdiction, specifically provided with regard to the Marshall Islands which are within this area.

The instant military court was convened pursuant to the precept dated 21 February 1947. Authority for the convening of this commission was vested in

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the convening authority, Rear Admiral Pownall, by virtue of his office as Commander Marianas Area, and Deputy Military Governor of the Marianas Area, by specific authority from the Commander-in-Chief, U. S. Pacific Fleet, Commander-in-Chief, Pacific Ocean Area and Military Governor of Pacific Ocean Area, and further by specific authority from the Judge Advocate General of the United States Navy. That source of authority is set forth in paragraph one of the precept.

In the precept of 21 February 1947, this Military Commission was authorized to try all offenses within the jurisdiction of exceptional military courts and in addition was specifically authorized to exercise jurisdiction "over offenses and Japanese military personnel now in the custody of Commander Marianas, referred to in the dispatch of the Judge Advocate General of the Navy," JAG dis 311730Z of Jul 46.

This dispatch ordered the trial of Japanese military personnel alleged to be responsible for the killing on the Marshall Islands of Marshallese natives during the period of Japanese control of these islands.

Inoue, Fumio, of the Imperial Japanese Army, the accused in the instant case, is charged in Charge I with the murder on the Marshall Islands of various Marshallese natives during the period of Japanese control of the Marshall Islands. It is clear that the case of Inoue, Fumio, falls within the scope of the authority of the Judge Advocate General's dispatch and therefore within the specific jurisdiction of this commission.

This commission is not empowered to divest itself of this jurisdiction specifically delegated to it by virtue of the precept, duly issued and pursuant to the powers of the convening authority as set forth in paragraph one of the precept.

The Judge Advocate General of the United States Navy, the War Department, and the Department of State have carefully considered the problem of jurisdiction now raised by the defendant. It is their considered opinion that jurisdiction rests in this commission. The dispatch referred to in the precept clearly recognizes the jurisdiction of this commission. In a later communication the Judge Advocate General of the U. S. Navy, in referring to the instant case specifically authorizes the charge of the crime of murder as defined under the local applicable law, and this charge consitutes charge I against the accused, Inoue.

The opinion of the Judge Advocate General of the Navy, the War Department and the Department of State as the considered opinion of outstanding authority is the field of military and international law, is not one to be light dismissed by this commission.

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Bolton
R(iv)

The Judge Advocate General's determination that this crime should be tried before a military commission is in accord with the conclusions reached by other eminent international authorities on the subject of jurisprudence andinternational criminal law, who served in the drafting of the charter for the famous International Military Tribunal at Nuremberg, participated in by the United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of Soviet Socialist Republics. The leading international authorities from these countries determined that crimes committed against the local civilian population need not be tried by the local criminal courts, and are properly triable by military tribunals established for such trials. Specifically, the charter provided jurisdiction withregard to crimes against humanity and specifically includes murder "against any civilian population before or during the war. . . . ."

Article 6(c) reads:

"Crimes against humanity. Namely, murder, extermination, onslavement, deportation, and other inhumane acts committed against any civilian population before or during the war or persecutions on policitical, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated....."

Similarly, the Supreme Commander for the Allied Powers, in SCAP letter Regulations Governing the Trials of Accused War Criminals, AG 000.5 (5 Dec. 45) provides for jurisdiction as follows:"2. Jurisdiction. a. Over Persons-- Military Commissions appointed hereunder shall have jurisdiction over all persons charged with war crimes who are in the custody of the convening authority at the time of the trial. b. Over Offenses. (1) Military commissions appointed hereunder shall have jurisdiction over all offenses including, but not limited to, the following. . . . (c) Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war, ... whether or not in violation of the domestic laws of the country where perpetrated.

It should be noted that the SCAP regulations are applicable to Military Commissions composed solely of U. S. Military members as well as to International Tribunals, whereas, the International Military Tribunals derives its members from outstanding jurists from several nations.

It should be apparent that since the determination by the Judge Advocate of the United States Navy, that jurisdiction can and should be vested in this commission, is supported by similar decisions made with regard to Military Commission set up under the Supreme Commander for the Allied Powers, and by the similar decisions with regard to the eminent International Military Tribunal at Nuremberg, the instant Military Commission can be and, as already discussed, has been empowered by competent authority to exercise jurisdiction over crimes against local civilians committed by Japanese military personnel.

"R(4)"

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Bolton
R(v)

As to the substance of the offense, the law to be applied is the law in effect at the time and the place where the offense was committed. This is not an admission by the judge advocate that sovereignty of the Marshall Islands existed in Japan. On the contrary, this merely states what the applicable local law was, and has no bearing on the issue of sovereignty whatsoever. Under the mandate, Japan was delegated authority to establish the applicable local law. Any law could have been used as the basis for local law. If the laws of California had been applied it would not be contended by defense that thereby California had sovereignty.

At the time of the commission of the instant alleged crime, Imperial Ordinance 26, for the Treatment of Judicial Affairs in the South Sea Islands, which was enacted in 1923, and revised in 1933, was in effect, and defined the laws and regulations which apply to the mandated islands. The laws of Japan which are specifically stated to apply to the mandated islands include the criminal code. (See also OPNAV P22-5, op. cit., pages 81, 82.

Charge I, Murder, sets forth in each specification, the applicable provisions of the Criminal Code of Japan pertaining to the charge of murder, and jurisdiction over this offense has thus been clearly established.

Charge II alleges a violation of the laws and customs of war. The crime falls clearly within the scope of offenses set forth in the precept, and similarly falls within the cope of offenses listed in the charter of the International Military Tribunal and the SCAP regulations. The validity of jurisdiction of this commission over the offenses charged is clear. Not only military courts but similarly civil courts possess jurisdiction over crimes in violation of international law and in violation of the laws and customs of war. Respublica v. De Longchamps.

1 Dallas 110 (Pa -1784). The Saboteurs case ex parte Quirin, 317 US 1(1942)

As the power of the convening authority extends to war crimes as well as violation of local criminal law, it is unnecessary to seprately demonstrate that regardless of the question of jurisdiction as a local court, the commission with regard to Charge II, Violation of laws and customs of war, has a separate and distinct jurisdiction with regard to such violations of international law.

It may perhaps be contended by defense counsel that we cannot maintain jurisdiction in the same trial, over offenses growing out of violation of local law and violations of international law, that is to say the laws and customs of war. Such contention is specious.

As stated in the Appendix to Glueck's article "The Nuernberg Trial and Aggressive War," 59 Harvard Law Rev. p. 455, "Lawfullness as was correctly held by the German Supreme Court in the Leipzig trials, requires the acts of the

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soldier to be legitimate not only under domestic criminal law but also under the law of nations, whcih all states and submects are bound to obey. Stripped of the mantle of such legality, the act in question stands out stardly as an unjustifiable and inexcusable killing of a human being something which, by all civilized military and civil penal codes, consitutes plain murder."

Similarly, the United States Supreme Court has affirmed the application of laws and customs of warfare to criminal action against an individual charged before a domestic court. In the Saboteurs case, Ex parte Quirin, 317 US 2(1942) the Supreme Court held in effect that despite the absence of any prior domestic legislation authorizing its application, individual offenders could be punished for offenses under the "law of warfare branch of the common law of nations."

International law, written and unwritten, has been applied as a basic part of the local law. The doctrine is not a new or novel one. It was ably expressed by "local" courts over 163 years ago. In the famous case of Respublica v. De Longchamps 1 Dall. 110 (Pa. 1784) the defendant was convicted and sentenced to imprisonment and fine for insulting and threatening the Secretary of the French Legation. The defense argued that the reparation sought and remedy offerdd are limited to the municipal law of Pennsylvania which offered only the remedy of "imposition of a legal restraint on the execution" of the threats. The prosecution argued that although the mode of punishment sought was not set out in the act itslef, an offense against the law of natiops must necessarily be indictable. The court stated that the case "must be determined on the principles of the law of nations, which form a part of the municipal law of Pennsylvania; and if the offenses charged in the indictment have been committed, there can be no doubt, that those laws have been violated. . . . . The first crime in the indictment is an infranction of the law of nations. This law in its full extent, is part of the law of this State, and is to be collected from thepractice of different nations and the authority of writers." (114, 116). It should be noted in passing that reference to the first crime in the indictment as being under the law of nations, indicates that other crimes charged in the indictment were vil violations of domestic or local law, and that joining of the charges in one indictment was not prohibited by the court.

Decisions in Federal and State courts are too numerous to warrant further citation and unnecessary consumption of the time of the commission. Certain classic language used in this connection by these courts is worthy of brief repetition.

Justice Brewer for the court in the decision on the amended bill in the case of Kansas v. Colorado, said:". . . Nor is our jurisdiction ousted, even if, because Kansas and Colorado are states sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law." International law is no alien in this tribunal. In the Paquete Habana, 175, 700, Mr. Justice Gray declared: "International law is part of our law, andmust be ascertained and administered by the courts of justice of apporpriate jurisdiction as ofen as questions of right depending upon it are duly presented for their determination." 206 US (1907) 46, 97. "R(6)"

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See also the case of the Lusitania, in which it was held that "The United States courts recognize the binding force of international law." 251 Fed. 715, 732 (S.D.N.Y., 1918).

Even in a state court, "international law is a part of our law" and must be administred whenever involved in cases presented for determination. Elizabeth Ridell, executrix v. Sophie V. Fuhrman & others, 233 Mass. (1919) 69, 73, 123, N.E. 237, 239.

The essence of such decisions was ably expressed in the leading case of Kansas v. Colorado by Chief Justice Fuller who in overrulling the demurrer, delivered the opinion of the Supreme Court and stated, "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand.." 185 U.S. (1902) 125, 146, 147.

The judge advocate has briefly presented a picture of the existence of jurisdiction over the person of the accused, and over the offenses charged with regard to the violation of domestic or local law as set forth in Charge I and the violation of international law, viz, the laws and customs of war set forth in Charge II. From this discussion, and our previous argument with regard to the charges and specifications, it is clear that specific authority has been properly delegated to this commission to try Captain Inoue for the crime alleged in the instant charges and specifications.

Extensive arguments have been made by counsel for the accused, seeding to persuade the commission that their exercise of jurisdiction in this case is not legally justifiable. The commission can properly dispose of the defendant's argument against jurisdiction by relying on the specific authority and direction of the Judge Advocate General of the Navy, and similar precedent as outlined in the charter of the International Military Tribunal, and in the Regulations issued by the Supreme Commander for the Allied Powers.

However, in view of the extensive defense argument, and in order to prevent the accused from deluding himself that he is being subjected to the arbitrary fiat of the conqueror rather than sound doctrines of international law, the judge advocate will briefly discuss certain fundamental principles of international law which are applicable to the question of jurisdiction in the instant case.

Application of these fundamental principles of law, as additional sources of jurisdiction for the subject military commission, is authorized by paragraph 3 of the precept which authorizes the commission "to try any and all cases which may fall into the proper jurisdiction of exceptional military courts..... Nothing herein limits the jurisdiction of the military commission as to persons and offenses which may be otherwise properly established."

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The theoretic sources of jurisdiction of exceptional military courts in criminal cases, rests primarily upon two distinct but not conflicting bases. These can be briefly and simply expressed as follows: First, the criminal jurisdiction implicit in the rights and duties of the military occupying power over the territory occupied. Secondly, the criminal jurisdiction derivable from sovereign and quasi-sovereign powers and rights of the conqueror over territories which have no other sovereign. I will attempt to present to the commission some of the vast body of international law and authority on these two sources of jurisdiction and to indicate briefly how they are applicable in the subject cases

One of the fundamental doctrines of international law is that the military occupation of territory, whether it be enemy, neutral, allied, or one's own national territory, carries with it certain fundamental duties as well as rights and privilegs in regard to the orderly administration of the occupied territory.

Article 43 of the Hague Convention IV reaffirms the basic obligations of the occupant to reestablish and assure public order and life--and purusant to this provisions the occupant may establish courts and punish violations of existing criminal law. Professor Mitchell Franklin of Tulane University Law School, in his able article in the American Journal of International Law, titled Sources of International Law Relating to Sanction against War Criminals, in discussing Article 43 and powers of the occupant, states; on page 175, "Article 43 established three principles: (1) the occupying power may introduce his law of military government, in whose or in part, subject to the restrictions of general international law set out in Articles 43-56, Hague Convention IV. (2) The occupying powers may retain "The laws in vigor in the country," in whole or in part. (3) The occupying power may perform acts of fulfillment or administration, or, perhaps, exercise the power of a syndic in relation to the internal legal system. The power of punishment for prior violations of general international criminal law is thus within "the authority of the legal power" which has "in fact passed into the hands of the occupant."

The status of military occupation, inherently entails these aspects of essentiallpivil administration. The administration is commonly referred to as military government, and its authority may be exercised in every field of governmental activity, executive, administrative, legislative, and judicial. Hyde, vol 2, p 361.

Numerous authorities in the field of international law clearly establish the fact that for the administration of justice, the occupying power may establish military tribunals, and these military tribunals may act in the place of local criminal courts and administer local criminal law. I will cite merely a few of the authorities in this connection:

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The Army JAG's school, text no. 11, titled the "Laws of Belligerent Occupation" on page 52 specifically notes that when military necessity or the maintenenace of public order and safety require such action, the occupant may substitute his own tribunal to administer local criminal law. Citation of authority for this statement is found in footnote 74 as follows: "Garner, vol 2, p 87. Courts created by a military governor to administer the local criminal law depend for their existence on the laws of war and not on the constitution or legislation of the legitimate sovereign. US v. Reiter, Fed Cas no. 16, 146; TM 27-250, p. 1."

Spaight in his authoritative text on War Rights on Land (1911),cites common law doctrine in the following statement: "Dedicts and crimes against common law can usually be adequately dealt with by the localcourts * * * But if the machinery of justice has been so dislocated by the events of the war as to be out of gear or inoperative--if, for instance, the courts have been closed and the judges have fled or if the judges decline to sit, then the occupant is fully entitled, and indeed called upon, to establish special tribunals for trying offenses against common law. In 1900, Lord Roberts found it necessary to erect such courts in the Transvaal, and deal with offenses under the common or Statute Law of the Transvaal and magistrates were appointed to preside over such courts." (p. 358.)

Similarly Cybichowski, in "Das Volkerrechiliche Okkupations - recht, 18 Zeitschrift Fur Volkerrecht, pp. 295-332 (1934) states that the occupying power has authority under proper circumstances to establish exceptional military tribunals for the enforcement of local criminal law. Cybichowski states: "If the judges of occupied territory have left the territory or refused to serve the occupants must establish new courts * * * Those render judgment according to the laws of occupied territory and should be regarded as foreign courts in relation to the courts of the occupant." (That is to say, they are to be regarded as local courts of the place in which they are serving, and not as national courts of the occupant.)

It is clear that in the absence of local courts, the occpant has not only the right, but the clear obligation to establish new courts for the proper administration of justice. This is clearly the situationin the Marshall Islands Area where as I have already indicated, no Japanese judicial officials remain to administer justice. The local native officials were not empowered under Japanese law, and similarly under our existing laws of military government, are not vested with authority to exercise jurisdiction over major criminal cases, such as murder, etc.

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But, even if local criminal judges and courts were available for trial of the criminal cases under local criminal law, the occupying power has the power and right to suspend proceedings in the local criminal court and direct that any case of class of cases be tried by a military tribunal. This can be done where prosecution of the case would otherwise be inimical to the interests of the occupant (FM 27-5, par 42d), or where competency of the local court to accord a fair trial is in doubt (JAG School Text 11, op. cit, pg. 53.)

It should be noted that even when subject of neutral powers where involved, where competency of local court to accord a fair trial was in doubt, it has been held that the occupant whould be justified in referring such cases to tribunals created by him. Bentwich, in the British Yearbook of International Law, 1920-21, p. 143, notes that during the British occupation of Palestine in World War I, the local criminal courts regularly tried all persons without regard to nationality; however for serious offenses, foreign subjects were tried either by a British magistrate or by a court with a majority ofBritish judges.

The instant case, involving as it does the trial of a Japanese military officer for the heinous crime of murder alleged to have been committed against Marshallese natives, it is clearly an instance where a fair trial for the defendant would not be expected from the inexperienced local native criminal courts. It would appear to be a case which falls clearly within the scope of the rule permitting the establishment of special military tribunals, even where there is available a qualified local court with jurisdiction to try similar crimes. Since international law permits trial before an exceptional military tribunal for crimes against local law, even where local courts exist which would otherwise have jurisdiction over the crime, a fortiori, an exceptional military commission may be established to try such crimes against local law, where there is no local criminal court with jurisdiction over these crimes.

It is unnecessary to cite further authority regarding the right of the occupant to establish appropriate military courts to punish violations of existing criminal law. The concept is fundamental.

It is possible that counsel for the accused will now seek to contend that the jurisdiction of the military courts established by the occupant is limited to crimes committed during the period of occupancy.

It should be noted that such contention was implicitly rejected in both the Charter of the International Tribunal and in the SCAP regulations. In the former, Article 6(6) vests jurisdiction over crimes, namely murder, committed against any civilian population before or during the war. In the latter,

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it is stated that the offense need not have been committed after a particular date,. .. .. but in general, it should have been committed since.. .. .. September 18, 1931. Thus, both these documents prepared by eminent international jurists, appear to maintain the position that these tribunals have jurisdiction over offenses committed prior to the war period.

From the standpoint of any realistic concept of justice, this approach is sound and essential to a vital administration of international or domestic law. Clearly any attempt to limit power of trial or punishment to crimes committed during the period of possession or occupancy, would render completely abortive any attempt to enforce international law or the laws and customs of war, for the vast majority of war crimes are perpetrated prior to occupancy by the new occupant and in territory still held by the forces of the war criminal.

The obviously false doctrine that power of the occupant is limited to crimes committed during occupancy, rests upon failure to understand the nature, function and duties of occupancy. Under international law the duty of the occupant includes the obligation to restore public order and life. Article 43 of the Fourth Hague Convention, reiterates this "common law" of nations stating "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far ass possible, public order and safety (life), while respecting, unless absolutely prevented, the laws in force in the country."

The just prosecution and punishment of persons who have committed crimes against local law, within the period immediately preceding occupancy. is clearly within the scope of the broad language of this article; particularly the language "all the measures in his power to restore, and ensure as far ass possible public order and safety, etc." It is difficult to conceive of the existence of any public order and safety if known criminals, particularly murderers, were permitted to remain at large, unpunished merely becasue their crime against local laws of murder occurred in the period prior to military occupancy. To fail to prosecute such crimes would make the occupying power a shield for those who on the eve of defeat resorted to crimes of violence, lust, and plunder. Surely sound international jurisprudence neither requires nor tolerates such an anomaly. On the contrary, it must affirm the fact that failure of the occupying power to punish the criminal would itself consitute a serious violation of the requirements of international law, and specifically of this provision, Article 43 of the Hague Convention.

Mitchell Franklin, in his article on Sanctions Against War Criminals, op. cit, briefly and effectively discussed this provision stating: "Article 43 is a provision dealing with the duty of the military occupant to reestablish

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and assure public order and life. This obviously makes it possible for the occupant to employ the law of the occupied state in regard to criminal acts committed after the occupation. But it also seems to make it the duty of the occupant to punish violations of criminal law committed before the occupation, for that is an aspect of the reestablishment or restoration (retablir) and assurance or ensurance (assurer) of public order and public life." (174 On page 175, in discussing the "third principle" established by Article 43 , states "(3) The occupying power may perform acts of fullfillment or administration, or, perhaps, exercise the powers of a syndic in relation to the internal legal system. Thepower of punishment for prior violations of general international criminal law is thus within 'the authority of the legal power' whichhas 'in fact passed into the hands of the occupant.' . . . Hague Convention IV itself created the basis for punishing criminals under general international law whenArticle 43 was formulated and accepted. The only prerequisite for such punishment is occupation of the offending state under Article 42 and seizure of the persons who had violated general international law."

From the foregoing discussion, it is celar that jurisdiction over the offense and the accused in the instant case, is properly vested in this military commission and that sound international law concerning the rights and duties of the occupying military power requires this court to exercise jurisdiction in t the instant case.

The fact that the particular territory occupied, and in which the crime occurred, is the Marshall Islands gives rise to certain special powers and obligations under international law, in addition to those of the military occupant. These powers are in some aspect broader than those of the military occupant, and pursuant to their exercise by the convening authority, this commission has derived additional sources of jurisdiction. To properly demonstrate and evaluate those additional sources of jurisdiction, it is necessary to consider the peculiar status of the Marshall Islands with regard to sovereignty.

In Decembor of 1914, the Japanese took possession of Jaluit Atoll, Marshal Islands from theGermans and established a military government there.

After the surrender of Germany, Japan in 1920 "accepted" and administered the Marshalls, under a Class "C" Mandate from the League of Nations. In 1922, by a special agreement withJapan, the United States accepted the arragement by which Japan exercised authority over the Class "C" mandatorids. Hackworth, Digest of International Law, Vol. 1, p. 125.)

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The exact scope of the Class "C" mandate with regard to the traditional doctrines of soveregnty was never precisely defined. The Civil Affairs Handbook, East Caroline Islands, OPNAV P22-5, published by the Office of the Chief of Naval Operations, notes that "the colonial policy of the League of Nations, expressed in the mandate system represented a compromise between the conservatives who favored outright imperialistic annexation and the territories. . . . . and the liberals who wished them to be directly administered by the League." (Op. cit p. 61.)

It is clear that the native inhabitants of the Marshall Islands were not, and similarly, cannot correctly be considered able to exercise sovereignty over their own territory. The fundamental conditions in the Marshalls have not changed radically from the conditions prevailing at the time of the signing of the Treaty of Versailles.

The conditions of the mandated colonies and territories, and the varying degrees of the inability to "stand by themselves under the strenuous conditions of the modern world" is clearly established by The Treaty of Versailles, part one Art. 22 of the Covenant of the League of Nations. The Class "C" Mandates were deemed so incapable of exercising any degree of independent sovereignty, that it was determined that they could "best be administered under the laws of the Mandatory as integral portions of its territory. . . . ." The pertinent portions of Article 22 read as follows:

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves underthe strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such people form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

"The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

"The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances. . . . .

"There are territories, such as South West Africa and certain of the

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South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization or their geographical contiguity to the territory of the Mandatory, and other circumstances, can besbest administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of theiindigenous population."

In the charger laid down by the League of Nations for the government of the islands mandated to Japan it was provided in Article 2 that "the Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of the Empire of Japan, and may apply the laws of the Empire of Japan to thetorritory, subject to such modifidations as circumstances may require. The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitant of the territory subject to the preset Mandate."

Article 6 provided "The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing full information with regard to the territory and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4, and 5."

Article 7 provided "The consent of theCouncil of the League of Nations is required for any modifidation of the terms of the present Mandate."

From these historic documents it is clear that the native inhabitants of the Marshalls were not deemed capable of exercising sovereignty. The question therefore arrised whether sovereignty over the Marshall Islands ever vested in Japan. Formal acceptance by Japan of the administrationof the territory as a Class "C" Mandate under the League of Nations clearly defeats any contention that she claimed full sovereignty at that time. Similarly the agreement of February 11, 1922 between Japan and the United States, with regard to Yap, evidenced recognition by Japan of the fact that she was not the sovereign of the mandated territories.

Japan at first fulfilled at least nominally the requirements of the Mandate but questions arose with regard to the degree of fulfillment of certain of the obligations under the Mandate Charger. When Japan announced that she would withhold from the League the question of sovereignty of the mandated islands and Internation Jurists, mostly American, pronounced the opinion "that if Japan withdrew she would forfeit her mandate, and the islands would revert to the League." Japanese jurists held the opposite opinion.

When Japan actually withdrew in March, 1935, she kept control of the mandated territory and she continued to administer it in much the same way and to submit annual reports to the League through 1938. (OPNAV P22-5, op. cit.,

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p. 21). Thus further indicating that Japan did not publicly claim sovereignty over the mandated territory.

Proponents of Japanese sovereignty may content that sovereignty was derived from the consent of the "Principal Allied and Assocated Powers" in whose favor Germany by Article 119 of the Versailles Treaty penounced "all her rights and titles over her overseas possessions." If this consent was the source of Japanese sovereignty, the basis of this sovereignty was destroyed at the time of the Cairo Conference, November, 1943, when the United States of America, China, and the United Kingdom stated it was "their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914; thus, revoking any prior consent to Japanese control. It would appear, therefore, that at the time of the commission of these crimes in 1945, Japan did not have sovereignty of the Marshall Islands.

Defense counsel, Mr. Suzuki, argues that the recognition by Admiral Nimitz in proclamation No. 2, that Japanese law was the effective local law in the Marshhll Islands, necessarily rests upon a recognition that Japan had sovereignty of the Marshall Islands after her withdrawal from the League of Nations. This contention is fallacious. The Japanese Criminal Code was recognized as the effective local law because in fact it was the local law. This is explicitly recognized in Charge I against the accused, Inoue. But the fact that it was the local law does not mean Japan had sovereignty.

If prior to occupation bythe United States forces the penal code of Mexico had been made the effective local law of the Marshalls, then the recognition of the penal code of Mexico as effective local law of the Marshalls would not constitute a recognition of the sovereignty of Mexico over these islands. It would merely recognize that effective local law was the Mexican penal code, as the applied local law in effect on these islands.

It is appraent therefore that contrary to the argument of defense counsel, the provisions ofproclamations by Admiral Nimitz, indicating that Japanese penal lqw was the effective local law, does not in any manner consitute any recognition that after withdrawal from the League Of Nations, Japan had sovereignty over the Marshall Islands.

But it is unnecessary for this commission to make a determination whether sovereignty over the Marshall Islands was vested at this time in Japan, because by the Instrument of Surrender, signed September 2, 1945, Japan accepted the provisions of the Potsdam Declaration. The Potsdam Declaration, specifically provides in (8) "the terms of the Cairo Declaration shall be carried out and the Japanese soveregnty shall be limited to the Islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands asswe determine1" The Marshall Islands have not been decalred minor islands over which sovereignty of Japan should be extended. On the contrary it is a matter of history that the United States has expressed to the Security Council of the United Nations its own intention to exercise full

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control of these islands.

It is clear, therefore, on the basis of the Surrender Document that Japan is now unable to claim sovereignty over the Marshall Islands, and therefore it cannot be contended that the defendant, Major Furuki, has the right to be tried by the courts of Japan, as sovereign of the Marshall Islands.

Argument by Mr. Suzuki based on the fact that we have restored in Japan the power of local courts to administer justice in criminal cases is fallacious and misleading. It disregards the fact that Japan no longer possesses any rights in the Marshall Islands, and that the jurisdiction granted to Japanese courts is limited to crimes committed within Japan proper and does not extend to crimes committed in former mandated islands over which Japan has specifically renounced claim to sovereignty. Further, the SCAP trials in Tokyo are obvious reminders of the fact that the jurisdiction given to local Japanese courts is limited.

There are no Japanese courts which possess any jurisdiction over the instant case. I do not believe it can be seriously contended by defense counsel that such courts could possess exclusive jurisdiction.

It has laready been clearly established that there are no available native courts with jurisdiction over the instant offenses and in view of the historical background of the Marshall Islands and their inability at this time to "stand by themselves under the strenuous conditions of the modern world," it should be apparent that no power exists in the natives of the Marshall Islands to establish courts of exclusive jurisdiction of this offense. It should be noted that three Marshallese natives, including a local magistrate, are participating in this trial as observers in the proceedings of this commission.

In addition to the doctrine of military occupancy, under which we have already established the complete power of theUnited States as military occupant of the area to establish a military commission, acting as a local criminal court to try the instant case, there is a doctrine of international law, which can be applied to assert an additional source of authority in the United States for the creation of criminal courts. This doctrine permits an occupant prior to the culmination of a final treaty, to exercise sovereign rights with regard to territories occupied with the intention of not returning them to the former sovereign, and with the intention of exercising certain sovereign rights therein.

Under this theory, jurisdiction is derived fromthe certain quasi-sovereign rights which exist in the United States Government even during the period prior to formal treaty.

Prior to the occupation of the Marshall Islands in August, 1945, in the Cairo

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Conference and the Potsdam Decalation it was clearly stated by France, China, Great Britain, and the Union of Soviet Socialist Republics that Japan would be deprived of any claim of sovereignty over the formerly mandated islands. When Marshall Islands were occupied in August, 1945, a comprehensive system of military government was instituted by the United States. The intention of United States to exercise control over the Marshall Islands was enunciated numerous times prior to the 24th day of February, 1947, the date of the convening of the instant commission. To cite one of the more recet occasions, I bring to the attention of the commission the statements recently made before the United Nations Security Council by the United States Representative, claiming the right to exclusive custody of the strategic mandated islands of the Pacific including the Marianas and the Marshalls. Thus, whatever sovereignty was possessed by Japan has been destroyed and the United States has exercised and openly affirmed the right to exercise even more extensive sovereign rights than those claimed by Japan, for the United States has publicly proclaimed its intention to use those islands as strategic defensive military fortifications.

The doctrine I have referred to with regard to the exercise of sovereign rights by an occupying nation during the period prior to formal treaty is exemplified by the decisions of several national courts after World War I, which created armistice occupations as the equivalent of annexation. These cases apply the theory "that there is a difference between ordinary occupation of war and one made with the purpose of annexation." (Law of Belligerent Occupation, JAG text p. 11).

Thus in GALATIOLA v. SENES, Annual Digest 1919-22, Case No. 319, the court Cassation of Rome, held, that for the purposes of civil action for damages for failing to deliver merchandise, Trieste, in the period between the Armistice and the law annexing it to the Kingdom of Italy, could not be regarded as foreign territory. The court said, "with the complete dissolution of the enemy army and the simulatneous dismemberment of the Austro-Hungarian Empire, the national integration (of Trieste into Italy) has been accomplished almost automatically and pari passu with the military occupation of the provinces....It is absurd to think that in the interval between the armistice and the coming into force of the law of annexation, at a time when not only the sovereignty of Austria-Hungary over theese provinces, but that very State, had disappeared, the two provinces disiectamembra of a new destroyed organism have been able to live a separate political life outside the sovereignty of the Italian State which had becomd responsible for all its administration, justice, army and finance."

Pursuant to this doctrine of quasi-sovereignty the United States would possess additional sovereign power and authority to create new local courts for the trial of crimes committed against existing laws.

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There can be no contention that soveregnty remains in the Japanese Empire, therefore, there can be no valid contention that trials of this defendant should hold before a Japanese court. Under the theory of military occupahcy, and under the theory of quasi-sovereignty, there is clear and irrefutable justification in international legal precedent and authority for the creation of a military commission to act as a local court to punish the accused for crimes committed in violation of local law effective at the time of the commission of the offense.

It should be noted that this is not an instance of imposition of ex post fac facto law. We are alleging laws effective at the time of commission of the offense. As to Charge I, we cite the effective provision derived from the Japanc. Criminal Code. As to Charge II, we refer to existing laws and customs of war, the "common law of nations," andit should be noted that the signing by Japan of the Hague Conventinn, clearly constituted a recognition of this provision as part of the common law of nations. (It should be noted that with reference to the Geneva Prisoner of War Convention, the Japanese Imperial Government during the course of the war, agreed, through the Swiss Government to apply the provisions thereof to prisioners of war under its control, and also, so far as practicable, to interned civilians.)

Defense counsel, Commander Carlson, has argued that everything that occurred since the date of the alleged crime--every law that was passed, and every provision of every treaty, international declaration, etc., is completely inapplicable and immaterial with regard to the instant case. He argues that ev everything of this nature is objectionalbe and unconstitutional as ex post facto law. I listened with great surprise to this extensive portion of the able defense counsel's argument. Defense counsel is clearly confused as to the meaning and application of the principle of ex post facto law, and I trust that he has not succeeding in confusing the commission. With regard to the question of jurisdiction of this commission we are concerned with what powers this commission has today. What jurisdiction it possesses now, and that jurisdiction as well as its powers are derived from events, orders, and legal documents which have come into existence since the date of the instant crime.

It is not a violation of the principle of ex post facto law to consider in regard to jurisdiction, etc., occurrences or laws since the date of the crime. The ex post facto principle is one that is firmly entrenched in our jurisprudence. It provides that a law which makes that criminal which was not so at the time the act was committed, or which increases the punishment thereof, is unjust and therefore invalid. The instant crime of murder as charged was, and always has been a crime, and the accused is charged with the crime as it was defined, and is subject to the full punishment provided under local as well as international law existing at the time of the commission of the offense.

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All the laws and events referred to since the date of the crime have no effect on the charge of murder under Charge I--in regard to creation of new elements to the offense, or new punishment therefor. These changes relate primarily to the problem of jurisdiction of the offense, and composition of the court. And therefore are not within the compass of the ex post facto principle. The Supreme Court of the United States has considered such specious contentions in the past, and has clearly rejected them. "Statutes regulating procedure, if t they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibiti Duncan v. Missouri, 152 US 378, 14 Sup Ct 570, 38 L.Ed. 485; Thompson v. Mo. 171 US 380, 18 Sup Ct 922, 43 L.Ed. 204." (Bouvier's Law Dictionary, Rawles, 3rd ed. p. 1105.). Also see Gibson v. Miss. 162 US 565, 16 Sup Ct 904, 40 L.Ed. 1075.

Similarly, Underhill's Criminal Evidence, p. 13, states, "But the constitutional prohibition of ex post facto laws is not applicable to statutes which merely alter the method and details of the procedure of a criminal trial, even though the statute was passed after the crime was committed," citing Stokes v. People, 53 NY 164, 174, 13 Am Rep 492.

As it is clearly stated in Wharton's Criminal Law, vol 1, sec 43, "A statute however, subsequent to an offense, may change the mode by which it is to be prosecuted, provided the punishment attached to the offense is not thereby increased, ro the defendants rights materially impaired." He cites the following as to statute altering jurisdiction of crime; which is obviously the precise issue before this commission: "A statute or constitution altering the jurisdiction of crimes is not ex post facto. Duncan v. Mo (1894) 152 U.S. 377, 38 L. Ed. 485 , 14 S.Ct. 570; State v. Cooler (1889) 30 SC 105, 3 LRA 181, 8 SE 692; State v. Welch (1892) 65 Vt 50, 25 Atl. 900.

Also similarly note the cases cited therein with regard to change of law as to venueto the effect that law as to venue may be retrospectively changed: Gut v. Minn (1869), 9 Wall (US) 35, 19 L.Ed. 573; Cook v. US (1890), 138 US 157, 34 L.Ed. 906, 11 S.Ct. 269. And Wharton, Crim. Pl. and Pr. Sec. 602.

It is obvious that defense counsel is mistaken as to the natture of the concept of ex post facto law, and that the jurisdiction of the commission is not divested over the instant crime and criminal merely because its jurisdiction is derived from events and laws subsequent to the commission of the crime. The crime with which the accused is charged is not an ex post facto crime, it always was a crime since man has evolved from the primitive beast--and it was a crime under local law, and under international law, at the time that the accused Captain Inoue committed these brutal, bestial murders.

Counsel for the defendant have also argued that international law cannot be applied to individuals. This argument has already been disposed of by reference to opinions of international jurists, te recent war crimes cases

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decided in European and Pacific areas, and by the Ditmars and Boldt, Respublica v. De Longchamps, and the Saboteurs cases already discussed briefly with reference to the application of international law in criminal prosecutions of individuals. The latter case recently decided by the United States Supreme Court, justifies brief additional comment. Glueck in his book "War Criminals, Their Prosecution and Punishment," page 102, briefly comments on the Saboteurs case as follows:

"Thus the Saboterus' Case decision 'is impressive judicial testimony to the effect not only that' the 'law of nationsmay, and oftentimes does, address its injunctions to individuals by attaching an internationally illegal quality to particular acts,' but that 'the law of war as a part of the law of nations is a part of the local law," and 'also that its applicability by the courts in reference to pehal matters need not await precise legislative appraisal or definition.'"

The contention that international law cannot be applied to the defendant because he is a member of the Imperial Japanese Army, and therefore entitled to protection for acts done under the cloak of sovereignty of his master, is similarly specious and has been disposed of in the famous Nuremberg trials, by the International Military Tribunal, which punished the very heads of the state themselves.

Certain additional arguments by defense counsel with regard to jurisdiction merit brief discussion at this time. Defense counsel Mr. Akimoto argued that as to Charge II as to the facts alleged as violations of the law and customs of war, the acts of the accused cannot constitute a war crime and that the accused was merely performing his national duty, and therefore this commission has no jurisdiction over the accused or his actions. The judge advocate during the course of the remainder of this trial will prove that the acts of the accused constituted a crime in violation of the laws and customs of war--this argument is properly reserved until the evidence has been produced before this commission on which it can determine whether in fact as charged, the accused is guilty of this crime. With regard to the jurisdictional aspects of the offense, of Charge II, the objections of Mr. Akimoto, may be joined with the able arguments of Mr. Suzuki who contended that Article 30 of the Hague Convention was inapplicableto Charge II. Article 30 and the related provisions of the Fourth Hague Convention reflect some of the laws and customs of war applicable to Charge II and therefore the argument of defense counsel concerning interpretation of this provision is pertinent. Article 30 reads: "A spy taken in the act shall not be punished without previous trial." Defense counsel Mr. Suzuki contends that this provision relates to foreign and not "domestic" spies. Note that Article 29 of the Hague Convention gives a definition of spies which is broad enoughto include any spies. I treads in part: "A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operation of a belligerent, with the intention of communicating it to the hostile party."

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There is nothing in this definition which excludes spies who are nationals of the belligerent. Clearly the defense counsel is superimposing his own definition of spies upon Article 30. Obviously, since he failed to cite any, he has been unable to find any cases or other source of authority to support his distinction. The reason is apparent--there is no such distinction in international law. Spies like pirates are peculiarly subject to special treatment, special provisions and special protections of international law. International Law makes no distinction between domestic and foreign pirates--and similarly it makes no distinction between domestic and foreign spies. The unsupported argument of defense counsel in ingenious--but it is not international law.

It should be noted in passing that even if such a distinction had been made in international law, thereby limiting its protection to "foreign" spies, the Marshallese natives would not be precluded from this protection under international law. As I have earlier indicated, eminent international American jurists have denied any contention that Japan ever possessed sovereignty over the Marshall Islands. In addition it should be observed that the strongest argument advanced by defense regarding the authority of Japan over the Marshallese natives is its authority derived from the League of Nations under a Class "C" mandate. This authority exercised as a Class "C" mandatory did not make the Marshallese natives nationsl of Japan. On the contrary, it expressly recognized the fact that they had a special character and were subject to special protection because of their international character as a sacred trust of civilization. As stated in Article 22 of the Covenant, "The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League." Note also that Article 7 of the charter laid down by the League of Nations for the government of the islands mandated to Japan provided: "The consent of the Council of the League of Nations is required for any modification of the terms of the present Mandate."

From the nature and character of these provisions it is clear that Japan could not arbitrarily determine that these natives were "domestic" and therefore not entitled to right of trial before being punished as spies. The provisions of the Covenant and of the Charter clearly establish the international character of the mandate, and preserve for these natives the protections of international law, assuring them of the right of trial prior to being punished.

Punishment of the natives by death as spies without previous trial was clearly in violation of international law--a violation of the laws and customs of war--and this commission has jurisdiction to try the accused for that offense.

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Commander Carlson in his lengthy argument on jurisdiction has discussed in part the application of the doctrine of sovereignty to jurisdiction of courts. In his effort to persuade the Commission that they are without jurisdiction in the instant case he relied very heavily on two cases, the Fornago case and th Schooner case.

With regard to the Fornago case (Journal du Palais, p. 299, 1873) it should be noted that it deals with the attempt by a French court to exercise jurisdictio over a crime committed in Switzerland. This case and dicta cited from it is completely irrelevant to the issues before this commission. In the Fornago case, there was no occupancy of Switzerland, and the French court was not sittir in Switzerland nor purporting to act in the role of a local Swiss Court. In th instant case there is military occupancy of the Marshall Islands, and this Commission is exercising the jurisdiction of a local court under the authority of the military occupant. In the Fornagocase there was no instance of military occupancy, nor has defense counsel even cited any dicta with regard to the validity of jurisdiction based upon occupancy.

The Schooner case involved a civil action with regard to an armed vessel in the service of France which came into port for necessary repairs. The ship conducted herself in accordance with municipal and international law and the question presented was whether she could be libelled in the United States District Court. In an atmosphere of international comity of sovereigns, the United States Supreme Court determined that the libel on this vessel was to be dismissed. There was no assertion by the United States of sovereign rights or title to the vessel. Just as in the Fornago case, no question was presented to the court with regard to the rights of a military occupant to establish courts, nor the scope of jurisdiction of such courts. The language of the court cited by the defense counsel, like the decision of the court, is irrelevant to the issue of jurisdiction presented to this Commission.

One more argument by defense counsel merits brief consideration. Mr. Akimoto noted that Japan follows the theory of personal jurisdiction, and he therefore contended that since the accused is a Japanese national, Japan retains jurisdiction to try the accused for the crime committed on Jaluit, and that, therefore, it can deprive this commission, a "foreign" court of jurisdiction over the accused. Similary defense counsel Commander Carlson also argued that Japan has the right to protect its nationls abroad, and that therefore this commission can have nojurisdiction to try the accused for the crime charged. Defense counsel are mistaken in believing that the right of a nation to protect its nationals--authorizes those nationals to go abroad, commit crimes, and be protected aghinst the due administration of justice, and due trial for the crimes committed.

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International law clearly recognizes the fact that a foreigner enjoyes no privilege or immunity against arrest or trial for crimes committed in the countr in which he is at the time of his actions. The right and duty to protect one's national's abroad does not extend to interference with the right of the place in which the national is, from exercising its legitimate jurisdiction to arrest and try him for crimes committed therein. The right of protection of one's nationals is limited to the right to protect against serious denials of justice or unlawful arrest and detention. It cannot protect them from the due administration of justice of license them to commit crimes abroad. In his opinion in the Levin case (Alter Levin, US v. Turkey - Commission Nielsen - Opinion and Report (1937) p. 688, 704-705 - in discussing the general rules relating to the arrest and detention of aliens) states, in part, "If there was probable cause for the arrest and if the proceedin s were in accordance with the laws of Mexico, there is no violation of international law, since an alien is subject to all the penal laws of the country in which he lives." Hackworth, vol V, p. 599.

This rule is so fundamental and elementary that it requires no further citation. See Hackworth Vol V, Chapter SVIII for numerous cases based upon recognition of this fundamental principle.

The Judge Advocate has disposed of all the arguments of defense counsel, but with the permission of the commission would like to deal with some remaining matters. It should be noted that the Commission is meeting in the Commander Marianas area, and that Jaluit Atoll, Marshall Islands, is a part of that area. If the Commission were not sitting in this area it might be contended that jurisdiction should be limited to offenses committed within thearea in which the commission is sitting. With regard to such argument, it would be nedessary to point out to the commission that with regard to war crimes trials, just as in piracy trials, the fundamental requirements of justice have not been defeated by hypertechnical construction of jurisdiction, and in such cases jurisdiction of the tribunal over offenses committed outside the "local" area in which offense was committed, has been sustained. In addition to such cases, the trial of Wolf T. (27 Howell's St. T. 615 (Dublin, 1798) and the T.E.Hogg case (G.O. 52 - Department of the Pacific 1865)) illustrate other instances where trial by a military court outside the region of martial law or military government has been sustained. In the Hogg Case, the accused, during the period of the civil war were tried by a Military Commission in San Francisco, "a place quite outside the theater of war" for the alleged offense of taking passage on a U. S. merchant vessel at Panama (a foreign country) with the purpose of forcefully seizing it for the Southern Confederacy. The accused were sentenced to death, but subsequently this was commuted to imprisonment.

With regard to the instant case, the fact that Jaluit Atoll, Marshall Islands is within the military government area of Commander Marianas, obviates any objection to the jurisdiction of the commission on the contention that the offense was committed outside the area in which the commission is sitting. The

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precept from Commander Marianas vests this jurisdiction in the Commission.

In view of the clear jurisdiction of the commission over the instant case, under either the concept of military occupation, or that of quasi-sovereignty, it is unnecessary for the judge advocate to refer to various other fundamental principles of law which sustain jurisdiction in this case. One fundamental doctrine, however, merits brief presentation to the commission. It is asiomatic that there can be no hiatus in the law. Since the Japanese courts are without jurisdiction and since local courts are without jurisdiction there remains authority in neither the Japanese government nor the Marshallese natives to establish court with jurisdiction over the instant crime, and since the United States is and intends to remain in strategic occupancy of the Marshall Islands, either the United States through its military government possesses power to exercise jurisdiction over this offense and this offender, or there is created a hiatus in the law in that a crime has been committed but jurisdiction does not exist in any court to punish the offender.

Such a conditinn could not be tolerated in a vital system of effective international law.

To contend that the United States does not possess the authority to convene this court with jurisdiction over the subject offense and offender would be to contend that justice, as well as sovereignty, can be suspended in limbo, while facts grow cold, witnesses die, evidence decays, interest lags, and the defendant either rots in prison awaiting trial or worse, is released upon society unpunished and unrecalcitrant.

Justice is not blind nor can the defense seriously contend that justice can be so myopic that the fundamental necessities and realities of justice can be overlooked in the pursuit of specious and substance-negating technicalilites. Justice is not impotent, and real or fancy technicalities cannot bind her. Justice was not impotent when piracy threatendd the peace and security of the seas. All courts punished piracy rdgardless of previous restrictive doctrines of jurisdiction. All courts found that their legitimate jurisdiction extended to piracy committed on high seas by any national or any ship, because the person guilty of such piracy has placed himself beyond the protection of any state. He is no longer a national but "hostis humani generis" and as such he is justiciable by any state anywhere. (Grotius (1583-1645) De Jure Belli ac Pacis, vol 2, cap. 20 Sec. 40.) In re Piracy, Jure Gentium (1934) A.C. 586, 589). The war criminal is not less justiciable. His crimes are more heinous, and his punishment must be as stern and certain.

David Bolton

David Bolton,
Lieutenant, U. S. Navy.

"R(24)"

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OPENING STATEMENT BY THE PROSECUTION

If it please the commission, I will briefly outline the case to be presented by the prosecution. Specification I of Charge I will be proved by the testimony of three members of the Japanese armed forces who will relate how, on or about April 8, 1945, they accompanied the accused and seven native prisoners to a point near the Wireless Transmitting Station on Aineman Island, Jaluit Atoll. These witnesses acted as guards over the natives. They will relate that these seven native prisoners were three men, two women and two children (a boy and a girl). They will testify that, while standing guard at the truck which transported the prisoners to the scene, they saw the accused first take the three men into the jungle, then the two women, and finally the two children. About ten minutes after each departure they heard the sound of shots from the area into which the accused had taken the natives. After hearing the shots which followed the departure of the accused and the two children into the jungle, they were summoned by the accused to the site of the execution, saw the dead bodies of the seven natives, assisted the accused with the burial and heard the accused admit that he had performed the executions. One of these witnesses will also prove the allegations of Specification II of Charge I. This witness will relate how he, as a guard, accompanied the accused and one native prisoner to Aineman Island, Jaluit Atoll, on or about April 13, 1945. He will testify how he stood guard at the truck and saw the accused take this native into the jungle and shortly thereafter heard shots from that direction. He was then summoned by the accused to the site of the execution, saw the body of the dead native and assisted in the burial. The accused in this instance also made an admission to this witness that he had executed the native.

In addition to these three guards, the prosecution will call two other witnesses to the stand. One of these - a Japanese officer - will prove the identity of the victims mentioned in Charges I and II. He will also establish that these executions were performed without trial or legal justification. An American naval officer will take the stand to offer into evidence the confession of the accused.

By the testimony of these witnesses the prosecution will also establish that these natives were executed as spies without previous trial and thereby prove the allegations of Specifications I and II of Charge II.

JAMES P. KENNY,
Lieutenant, USN,
Judge Advocate.

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OBJECTION TO REQUEST OF JUDGE ADVOCATE TO COMMISSION TO TAKE JUDICIAL NOTICE OF CERTAIN DATE DELIVERED BY COMMANDER MARTIN E. CARLSON, U.S. NAVAL RESERVE.

The accused objects to the commission's taking judicial notice of the following: that on or about August 14, 1945, the Marshall Islands were occupied by the armed forces of the United States of America, and that said Marshall Islands have continued under the government and jurisdiction of the United States since that date; that Jaluit Atoll is a part of the Marshall Islands and is part of the territory under the command of Commander Marianas; that the Imperial Government of Japan surrendered to the Government of the United States of America on September 2, 1945; the Cairo Conference of December 1, 1943, particularly that portion which reads: "Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914."; the Potsdam Declaration of July 26, 1945, particularly paragraph 8, which reads: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and minor islands as we determine."; the instrument of Japanese surrender, dated September 2, 1945; the Imperial Ordinance Number 26 for the Treatment of Judicial Affairs in the South Sea Islands; the Criminal Code of Japan, as applicable to the Marshall Islands, particularly Section 199 of the Criminal Code of Japan which reads in tenor as follows: "Every person who has killed another person shall be condemned to death or punished with penal servitude for life or not less than three years."; and Article 41, "Acts of persons under fourteen years of age are not punishable."; the Fourth Hague Convention of October 18, 1907, particularly Articles 29 and 30, and that Japan ratified and signed this convention; the Geneva Prisoner of War Convention of July 27, 1929, and of the fact that although Japan has not formally ratified this convention, it agreed through the Swiss Government to apply the provisions thereof to prisoners of war under its control, and also, so far as practicable, to interned civilians; the Treaty of Versailles; Charter established by the League of Nations; Proclamations Number 1 through 7 to the People of the Marshall Islands, issued by and under the authority of Chester W. Nimitz, Admiral, United States Navy, Commander in Chief, United States Pacific Fleet and Pacific Ocean Area, Commanding the United States Forces of Occupation in the Marshall Islands, and Military Governor of the areas occupied by such forces; Ordinances 1 through 5, issued under the authority of the Military Governor of the Marshalls area, particularly as applied to jurisdiction over persons, "Jurisdiction of every Military Court shall extend to all persons in the territory except: (a) Members of the Forces of Occupation; and (b) persons who are treated as prisoners of war under the Geneva Convention of July 27, 1929, Provided: that the Military Governor may order the trial before a Military Court of such persons when accused of war crimes."

We object because it is a fundamental rule that a court may not take judicial notice of a foreign law, the existence of such a law being a question of fact which must be proved by competent evidence the same as any other fact, that is,

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the purport and the actual wording of the laws must be introduced into the evidence. It must be further shown that the law was in force at the time when the alleged act in violation thereof took place. The proper way to have the court take judicial notice of these laws and treaties is to furnish the court at this time with an official or otherwise trustworthy copy. When the court entertains any doubt as to the propriety of taking judicial notice of a fact it should require it to be proved like any other fact.

Proclamations Number 1 through 7 to the People of the Marshall Islands issued by and under the authority of Chester W. Nimitz, Admiral, U. S. Navy; Ordinances Number 1 through 5, issued under the authority of the Military Governor of the Marshalls area as read by the judge advocate are not dated, are not certified as true copies nor are they certified as being applicable to the present case, or that the accused is bound thereby. There is great and grave doubt as to all these matters before this commission to take judicial notice of these proclamations and ordinances when they are the very things in issue, is prejudicial to the substantive to the rights of the accused. In the Furuki case, the judge advocate attempted to prove these proclamations and ordinances by a witness.

We would like at least to have an official copy so that we will be in a position to question its validity. To take judicial notice of the laws without an official or trustworthy copy is most prejudicial to the substantive rights of the accused. The defense does not have any copies of these laws or treaties.

The treaties should be official copies that we will be in a position to question their validity. To take judicial notice of any and all of these proclamations and ordinances is most prejudicial to the rights of the accused and we feel that it is error. The defense, as we have said, has not been furnished with any copies of these laws or treaties; there has been no showing by the judge advocate that the laws and the treaties which the judge advocate asks the commission to take judicial notice of are in force and that they are applicable in this case; that they are relevent to the issues here being tried, material to the issues in question, or that the accused is in any way bound by such laws and treaties, proclamations and ordinances.

What the effective law was on April 8, 1945, or on April 13, 1945, is the very thing that is being tried at this trial. Charge I alleges "This in violation of effective law, especially Article 199 of the Criminal Code of Japan which reads in tenor as follows: "Every person who has killed another person shall be condemned to death or punished with penal servitude for life or not less than three years....." Now this is only a translation. It may not be correct or legal; it may not be effective law. It is fundamental that the state or the prosecution must prove every allegation in the specifications. In Charge II, it alleges "this in violation of the laws andcustoms of war. What these laws and customs are is the very thing in issue and we hold that all facts in issue, must be proved like any other fact.

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We hold that it must be proved that the Fourth Hague Convention of October 18, 1907, and the annex particularly Articles 29 and 30 and whether or not Japan ratified this convention and was bound by it; the Geneva Prisoner of War Convention of July 27, 1929, whether or not she agreed through the Swiss Government to apply the provisions thereof to prisoners of war under its control and also so far as practicable, to interned civilians; the Cairo Conference of December 1, 1943; the Potsdam Declaration of July 26, 1945; and the instrument of Japanese surrender dated September 2, 1945; the Imperial Ordinance No. 26 for the treatment of judicial affairs in the South Sea Islands; Proclamations No. 1 through 7; Ordinances No. 1 through 5, are relevant to the issues here being tried. CMO 2-1921, p. 18 reads "Only the evidence which tends to prove the allegations made is relevant to the issue." Until the judge advocate proves the relevancy of these laws, conventions, treaties, proclamations and ordinances we hold that they are immaterial and irrelevant.

Section 309, Naval Courts and Boards reads:

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

"The proper way to have the court take judicial notice of a fact not carried in mind by all intelligent men is for the party desiring it to request that the Court take judicial notice, for example, of 2 U.S. Code 118, and to furnish the court at the time with an official or otherwise trustworthy copy thereof."

We hold that for the court to take judicial notice of these conferences, declarations, treaties, instruments of surrender, Imperial Ordinances, conferences, proclamations and ordinances is prejudicial to the rights of the accused and we request that the judge advocate be required to prove them like anyother fact.

If the judge advocate is allowed to select such laws as he sees fit, interpret them as he wills and simply state that such laws are in effect, and that they are material and are vital to the issues, and that the accused is bound by such laws, and that this commission has jurisdiction of the crime alleged and of the accused by reason of such laws, treaties, regulations, proclamations and ordinances, we hold that the rights of the accused are being most grevicously violated and prejudiced. We object, therefore, to this court taking judicial notice of the above facts, and move that the judge advocate be required to prove them like any other fact.

MARTIN E. CARLSON
Commander, USNR.

"V(3)"

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OBJECTION TO JUDICIAL NOTICE DELIVERED BY MR. SUZUKI, SAIZO

Original document in Japanese appended to the original record.
Certified translation appended herewith marked "Z."

OBJECTION TO JUDICIAL NOTICE DELIVERED BY MR. SUZUKI, SAIZO

The judge advocate requested the commission to take judicial notice of Article 4, Proclamation No. 2 issued by Admiral Nimitz, Commander-in-Chief, U. S. Pacific Fleet and Military Governor of the Marshall Islands. But it is clearly set forth in Article 7 that this Proclamation shall become operative on the date of its publication. Therefore, the offenses in violation of the Japanese Criminal Code as provided in Article 4 of the said Proclamation should only be applied to offenses occurring after the Proclamation became effective and this provision is not applied to offenses committed prior to the publication of the Proclamation. This can be easily understood from Article 4 of the Proclamation which reads: "Any person who commits an act which violates any provision of Japanese penal law in effect in these islands prior to occupation by the Forces under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor or under his authority, be brought to trial before Military Court and on conviction, shall suffer such punishment as the Court may direct. The Court shall be guided by punishments customarily imposed for such offenses in these islands, and may, in the case of offenses against native customary law, call upon village headmen or chiefs to sit with the court."

This Article 4 does not in any way mean that the Military Courts convened by the authority of the Military Governor of the Marshall Islands can try offenses committed by a Japanese in violation of the Japanese Criminal Code, prior to the occupation of the American forces of the Marshall Islands.

Therefore, we hold that this proclamation is highly irrelevant and immaterial to the instant Inoue case which occurred on Jaluit in April, 1945. We believe the commission should not take judicial notice of this.

SUZUKI, Saizo

I certify the above to be a true and complete translation of the original document to the best of my ability.

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

"X"

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REPLY OF THE JUDGE ADVOCATE TO OBJECTIONS OF THE ACCUSED TO THE COMMISSION TAKING JUDICIAL NOTICE OF CERTAIN DOCUMENTS AND PROCLAMATIONS

In objection to the judge advocate's request that the Commission take judicial notice of various laws, proclamations, treaties, historical declarations, etc. the defense counsel has delivered an eloquent and stirring argument. An argument however, which is not sustained by the law or the facts.

The field of judicial notice is one in which the court normally exercises broad discretionary power. In addition to this usual source of inherent authority the instant military commission is specifically empowered by its precept, "to relax the rules of naval courts to meet the necessities for any particular trial, and may use such rules of evidence and procedure, issued and promulgated by the Supreme Commander for the Allied Powers....." . In these authorized SCAP regulations, it is specifically provided in 5d(2), "The commission shall take judicial notice of facts of common knowledge, official government documents of any nation, and the proceedings, records and findings of military or other agencies of any of the United Nations."

Quite obviously the Commission is empowered by its own precept, and under the SCAP regulation cited, to take judicial notice of each and every matter which the judge advocate has requested the commission to take cognizance of by judicial notice.

It is however completely unnecessary for this commission to rely upon that source of authority. The fundamental doctrines and rules of evidence give complete authority for the taking of judicial notice of all the material as to which the judge advocate requested the commission to take judicial notice.

The judge advocate has requested the commission to take judicial notice of material which falls within the two following categories:

(a) Historical and geographical matter - viz: a state of war existed; Marshall Islands were occupied; Jaluit Atoll is a part of the Marshall Islands; the surrender of Japan; The Potsdam Declaration; the instrument of Japanese surrender; The Fourth Hague Convention; The Geneva Prisoner of War Convention; The Treaty of Versailles; The Charter by the League of Nations - with respect to the manner of governing the islands mandated to Japan.

(b) Matters of law - Imperial Ordinance No. 26; The Criminal Code of Japan - as applicable in the Marshall Islands; and Proclamations and Ordinances issued under the authority of the Military Governor of the Marshall Islands.

Let us first examine Naval Courts and Boards and consider whether it authorizes taking judicial notice of this material.

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Naval Courts and Boards provides in section 309: "The evidence introduced in the trial is supplemented by facts of which the court takes judicial notice; that is, by facts which the court knows to be true without any evidence to prove them. Courts should take judicial notice of: (a) Facts forming part of the common knowledge of every person of ordinary understanding and intelligence, such as qualities and properties of matter; well-known scientific, historical, physiological, and geographical facts; time, days, and dates;....." Note that under section 309(a) the taking of judicial notice of all the historical and geographical matter which the judge advocate has requested the commission to take judicial notice of, is clearly permissible; and Naval Courts and Boards states the courts "should take judicial notice of" such material.

Section 309(b) provides: "Matters which are so easily ascertainable in authentic form that the court may readily inform itself by reference to some authentic, accessible source of information, such as the name of the present United States ambassador to Italy; the time of sunrise on a given day from the Nautical Almanac, etc.".

Section 309(c) provides: "Matters which the court is bound to know as a part of its own special duty and function, such as the United States Constitution, treaties and statutes, and the statutes of the State, Territory, District of Columbia, or possession of the United States within which the court is sitting..."

Under 309(c) all matters of law - referred to in the request for judicial notice can clearly be accepted by this commission. It should be specifically noted that the material which the judge advocate has requested the court to take judicial notice of, is the local law applicable in the place in which this commission exercises jurisdiction. The judge advocate has not requested the commission to take judicial notice of any law foreign to that place, and has merely requested that the commission take judicial notice of the Imperial Ordinance No. 26 which has local application and is therefore local law in that it applies the Japanese Criminal Code to the Marshall Islands; of the provisions of the Japanese Criminal Code as applicable in the Marshall Islands; and of proclamations and ordinances issued by and under the proper authority of the duly authorized military governor of the Marshall Islands, Admiral Chester W. Nimitz.

How does the court take judicial notice of matter? Naval Courts and Boards states in Section 309: "Matters of which courts may take judicial notice need neither be charged nor proved"; and on page 187 continues: "The proper way to have the court take judicial notice of a fact not carried in the mind by all intelligent men is for the party desiring it to request that the court take judicial notice for example of 2 U.S. Code 118, and to furnish the court at the time with an official or otherwise trustworthy copy thereof." Note that this quoted portion does not require that such matter be proved in court merely because it is not carried in mind by all intelligent men. It merely requires that there be made available to the court a trustworthy copy thereof. It should be noted that there is available trustworthy copies of all the matter which the judge

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advocate has requested judicial notice be taken of - and that the judge advocate is able and will furnish such material to the commission. It should be noted however that it is the commission, and not the accused who determines what matter the commission requires to refresh or support its knowledge of such matter. There is no requirement that such matter be proved - nor is there any requirement that such matter be furnished the commission in any form, unless the commission itself desires or requires it. For the commission has the power and the right to take judicial notice of all facts "which the court knows to be true without any evidence to prove them." Reliable sources containing the material referred to, will be furnished the commission.

In this connection it should be noted that defense has contended that copies of such material has not been furnished or available to defense and they have claimed they have therefore been prejudiced. This argument is false and misleading. All the material which has been available to the judge advocate has equally been available to defense counsel.

The material concerning historical and geographical matter is clearly available in historical books, current publications and common knowledge of intelligent men. Such matter is clearly as available to defense counsel as it is to the judge advocate.

With regard to the matters of law referred to it is equally clear that such matter is available to defense. As to the Criminal Code of Japan - and as to Imperial Ordinance No. 26 - clearly these provisions of Japanese law are available to defense counsel. Not only are they available, but it is apparent that in fact complete copies of these laws are in the actual possession of defense counsel.

With regard to the proclamations and ordinances issued by military government which the judge advocate has requested the commission to take judicial notice of, it is clear that these have been available to the accused. Like any copy of any statute or any law - there is no need for the judge advocate to provide the accused with copies thereof if they are available in proper official or reliable places. The Headquarters of the Military Government for the Marianas area is located less than three hundred yards from this building. The proclamations and ordinances referred to by the judge advocate are not classified documents - they are freely available for consultation by any person having a legitimate interest in them. They were and are available to counsel

As a matter of fact these same defense counsel had in their possession in the past and utilized in the Furuki trial on 6 March 1947 all of the proclamations and ordinances referred to by the judge advocate, and in framing their objections to the judge advocate's request for judicial notice, utilized the official copies which had been furnished the judge advocate.

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Defense counsel has noted with reference to Proclamation No. 2, Article 4, that this provides that any person who commits an act which violates any provision of Japanese penal law in effect in these islands prior to occupation.....may be brought to trial before a military court. It is true that this article does not specifically authorize the trial in military courts of crimes committed prior to occupation in violation of these Japanese penal provisions. From the standpoint of this commission it is unnecessary to refer to this article 4 as the source of its jurisdiction, the precept and despatches referred to therein under which this commission was convened does specifically establish authority in this military commission to try the accused for crimes committed prior to the date of occupation.

Proclamation No. 2, Article 4, merely indicates that the United States Military Government has not given the jurisdiction to any local Marshallese courts to try offenses of the seriousness of murder and that therefore such crimes are reserved for trial by military courts. Specifically Article 4 of this proclamation indicates that all such crimes shall be tried by military courts.

In order that defense shall be fully aware of the fact that the judge advocate is basing his request for judicial notice on fundamental rules of evidence, the judge advocate will in addition to the material already cited from Naval Courts and Boards refer the defense and the commission to other well known authorities on the subject of the law of evidence.

Wharton's Criminal Evidence, Volume one, section 16 comments with regard to judicial notice as follows: ".....The facts of which such notice is taken are those that are of common and general knowledge within the limits of the jurisdiction of the court. This common knowledge of men ranges far and wide, so that the doctrine of judicial notice embraces matters curiously diverse. Its universitality is such that in the discussion thereof it can be subjected to nothing more than a general classification; it cannot be treated logically, or as the development of a subject. Moreover, the doctrine of judicial notice must keep pace with the advance of art, science, and matters of common knowledge generally, and the scope of the subject is constantly expanding as decided cases ripen into precedents. With few distinctive features, the law on the subject is similar to the law of judicial notice in civil cases, and here, more than in any other branch of the law of evidence as applied in criminal prosecutions, should the rules as developed in the civil cases be consulted."

The fact that the commission may not have detailed knowledge or recollection of certain specific items or provisions as to which the judge advocate requested judicial notice, does not prevent the commission from taking judicial notice of these items or provisions. In this regard the judge advocate cites Wharton, esp. cit. section 20 which deals with refreshing the memory of the court, as follows: "The fact that the memory of the judge may be at fault, or that he may be unacquainted with a fact of which judicial notice ought to be taken, does not prevent

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the application of the doctrine of judicial notice. The judge may inform himself in any way which may seem best to him concerning subjects of which he may take judicial notice. He may refresh his memory from encyclopedias, dictionaries, or other publications or documents that he may deem worthy of confidence. For instance, he may refer to an almanac for the purpose of determining the time of sunrise on a particular day. He may even receive evidence as to facts judicially noticed to aid his memory and understanding. But, as stated above, if, in regard to any subject of judicial notice, the court should permit any documents to be referred to, or testimony to be given, it would not be in any proper sense the admission of evidence, but simply a resort to a convenient means of refreshing the court's memory, or making the trier aware of that which everybody ought to know."

It should be noted that defense counsel has mentioned the fact that during the prior Furuki trial the judge advocate summoned as a witness before this commission Captain Winecoff, the Deputy Military Governor who testified concerning the same material which the commission took judicial notice of in that case. This was in regard to the identical proclamations and ordinances which the judge advocate has again in this case requested the commission to take judicial notice of. It is clear that it was not necessary in the Furuki case to prove by testimony the proclamations and ordinances for the commission had taken judicial notice of them - the purpose of this testimony was in part to refresh the commission's recollection of these proclamations. In the instant case the judge advocate does not consider it necessary to, and does not intend to refresh the recollection of the commission as to the contents of the proclamations and provisions unless the commission so desires. As clearly established in section 20, it is perfectly permissible to present this material in the form of a request for judicial notice, and if judicial notice is taken the judge advocate does not believe proof is required.

The judge advocate requested that various matters of historical and geographical matter be taken judicial notice of. I quote from Underhill's Criminal Evidence, Fourth Edition, Section 69, authority for taking judicial notice of such matter: "Judicial notice is taken of great public and historical events.....". Similarly Wharton's Criminal Evidence provides in Section 35: "Courts will take judicial notice of geographical and historical facts.....". It is obvious that matter such as The Fourth Hague Convention, The Geneva Prisoner of War Convention, The Treaty of Versailles, The Covenant of the League of Nations, The Charter for the Government of the Islands Mandated to Japan, are matters of which this commission can take judicial notice. Similarly Wharton, op. cit. states with regard to the existence of a state of war, Section 58: "The courts will take judicial notice of the existence of a state of war between the United States and another country and that such a status prevailed at the time an offense was charged to have been committed....."

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Similarly the courts will take judicial notice of jurisdictional limits as stated in Wharton's Criminal Evidence, Section 42, which provides; "The cession and segregation of a portion of the territory of a state to exclusive foreign jurisdiction and control is one of the highest acts of sovereignty and affects the people of the state at large. In prosecutions for crime, courts will take judicial notice of the fact of such cession, and that crimes committed within the ceded territory are beyond the jurisdiction of state courts, and are triable in the courts of the United States, but punishable as provided by the state law." With regard to judicial notice of matters of law Underhill op.cit. Section 61 states: "Judicial notice is taken of the statutes of the state and of their provisions, of legislative records; of the statute on which a complaint is based; of the special acts of the legislature; of the proclamation of the governor as to the result of a general election, or other matters;....." ".....The federal courts take judicial notice of state statutes, and state courts take judicial notice of federal statutes. State courts take judicial notice that such federal statutes apply in the other states and that acts done in other states in violation of a federal criminal statute there are unlawful....."

Similarly Wharton, op.cit. in reference to matters of law states in Section 26: "State courts will take judicial notice of the Federal Constitution and of all public acts and resolutions of Congress, at least such as are operative within the jurisdiction of the court, and of the Constitution and the general or public statutes of the state, even though such public statutes may operate locally, or may have been adopted locally, as where such statutes relate to stock law districts....."

With regard to the proclamations and ordinances the following from Wharton's op.cit. Section 27 is in point: "Orders of the Executive Department of either the state or the Federal government are noticed judicially by the courts. Thus, all courts within this country will take judicial notice of the proclamations of the President of the United States and of the recognition or denial by the United States government of the sovereignty of a foreign power. Likewise, a state court will take judicial notice of official proclamations and messages of the governor of the state. Thus, if the executive of a state, either under statutory provision or by virtue of his inherent power, calls upon the attorney general to institute certain prosecutions in certain courts of the state, those courts will take judicial notice of such executive order and it need not be recited in the indictment which such prosecuting officer signs.

"Likewise, where the principal departments of the Federal government establish regulations, carrying into effect public laws, the courts having jurisdiction of questions arising under such laws must take judicial notice of the existence of such regulations. For instance, the courts will take judicial notice of rules and regulations of the War Department, the Post Office Department, the Interstate Commerce Commission, the Commissioner of Prohibition, the Department of Agriculture"

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From the numerous cases cited in Wharton's as authority for this question, it is apparent that there is no question as to the propriety of this commission's taking judicial notice of the proclamations, ordinances, etc of which the judge advocate has requested the commission to take judicial notice.

The judge advocate has cited full and adequate authority in support of his request that the commission take judicial notice of certain legal, historical, and geographical facts.

David Bolton

DAVID BOLTON,
Lieutenant, USN,
Judge Advocate.

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James C. Kenny
LIEUT. USN.

0078

OBJECTION TO THE DOCUMENT SAID TO BE THE STATEMENT OF INOUE, FUMIO, CAPTAIN, IJA, GIVEN BY COMMANDER MARTIN B. CARLSON, USNR

Gentlemen of the Commission:

The accused objects to introduction as evidence the document purporting to be a statement of the accused because to admit this document into evidence is strictly at variance with Section 734 Naval Courts and Boards.

The witness Lieutenant Field has testified that he is the legal custodian of this document. He testified he was ordered to investigate war crimes and interrogated suspects at the stockade at Guam. He further testified that this statement, the document purporting to be written by the accused Inoue, Fumio, was not even written in his present. To maintain that the witness Lieutenant Field is not competent as a witness to testify regarding this document which is said to contain the statement of the accused. There is a presumption that a witness is competent to testify regarding matters at issue, but in this case the witness has stated that the statement was not made or written in his presence. He is by his own testimony admitted as being incompetent to testify as to whether or not this statement was made under threat, intimidation, promise of reward, or that he was told he did not have to answer incriminating questions.

Since the witness is incompetent to testify regarding these matters we hold that the judge advocate still has the burden of proof and must prove that the document being offered into evidence is regular, that the document was written by the accused, that the accused was warned, that he was a party defendant, that he was notified of the gist of the evidence that tends to implicate him, that he was instructed he would be accorded the rights of an accused before a court martial, namely the right to be present, to have counsel, to challenge members, to introduce and cross-examine witnesses, to introduce new matter pertinent to the inquiry, to testify or declare in his own behalf at his own request and to make a statement and argument. He must be told he has the right to refuse to answer incriminating questions.

Nowhere on this document does there appear anything to indicate that these safeguards guaranteed by the Constitution of the United States were ever accorded to this accused whose alleged statement is sought to be introduced.

To allow this document to be introduced into evidence will be most prejudicial to the substantive rights of the accused. He will be made to testify against himself.

CMO-1, 1949, p. 72 lays down the rule: "A general court martial received in evidence, over the objection of the accused, extracts from the testimony of the accused before a Board of Investigation. The accused appeared before the Board

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of Investigation as an interested party. The record did not show that he took the stand at his own request, but did show that he was sworn and allowed to testify at length after it was apparent that he was involved to such an extent that an accusation against him could be implied although he was not made a defendant until he concluded his testimony. It follows therefore that his testimony before the Board of Investigation could have no evidential value in the instant case, and it should have been excluded by the court."

We further object because this document does not show on its face that it was given voluntarily and that the accused, Captain Inoue waived all the rights of a defendant.

We hold that the judge advocate still has the burden of proof and must show by competent witness that this document is regular and that the Fifth and Sixth Amendments of the Constitution of the United States of America and Section 734 of Naval Courts and Boards have not been violated.

Respectfully,

MARTIN E. CARLSON,
Commander, USNR.

"Z(2)"

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James P. Kenney
LIEUT. USN.

OBJECTION TO THE INTRODUCTION OF THE CONFESSION OF THE ACCUSED AS EVIDENCE BY AKAMATSU, YOICHIRO, DEFENSE COUNSEL.

Original document appended to the original record.
Certified translation appended herewith marked "BB."

"AA"

0081

OBJECTION TO THE INTRODUCTION OF THE CONFESSION OF THE ACCUSED AS EVIDENCE BY AKIMOTO, YUICHIRO, DEFENSE COUNSEL.

The defense objects to the judge advocate's introduction as evidence of the document which was signed by the accused, Inoue, Furmio, in December 1946 by the advice of Lieutenant Field, USNR, who was then the judge advocate, at Guam stockade when he was confined there as a criminal suspect.

This confession was made outside the court. In order for a confession made outside the court to be admissible as evidence, (1) It ought to be made entirely voluntarily, (2) The person in authority, other words the person concerned with the charges and who has authority which can influence the defendant in the above case even though it was made before him, should not offer any inducements to the person making the statement or overlook any inducement which may have been offered to the person making the statements. Therefore in this case the statement cannot be taken as evidence. That is because the effect of the person in authority who was present cannot be known. Tamura, Yutaka, Professor, Law Department, Kyushi Imperial University, in "Research in English Criminal Trials", Chapter V, Laws of Evidence, and Adolph Hartman's Judicial Reference 83 Criminal Trials of U. S. of America.

The above statement was made after an inducement by a person who at the time was a judge advocate who could greatly effect the defendants interest. The actions of the defendant were done in the territory of Jaluit then under Japanese sovereignty to natives who violated Japanese laws and who were executed after a legal judgment. It was done by the order of Admiral Masuda who had the authority. It was done as an official duty and is not a violation of the law. He could not even dream in his wildest dreams that he would be accused in an American court which had no connection at all with the case at that time. From this statement itself, and also from a statement given to an American judge advocate previously this can clearly be seen. He had been confined for a deplorable period of two years not knowing whether he was to be charged or not. I have heard that he was told he might get to go home. It cannot be said that a person who had been confined for so long did things of his own free will. It is only natural that this defendant did what the person in authority wanted him to do. Therefore even though the person in authority did not induce him, he was actually under spiritual and physical inducement. In this case a confession written by this inducment can never be said to be of his own free will and from the statement itself it can be seen that it is not a criminal specification. This document also does not have the defendants seal. Therefore it can not be considered an authentic document. This document can not be taken in evidence as a confession and therefore I object most strenuously to its being introduced in evidence. I request the commission to reject this as evidence.

YUICHIRO AKIMOTO

I certify the above to be a true and complete translation of the original objection to the best of my ability.

EUGENE E. KERRICK,
Lieutenant, USNR,
Interpreter.

"BB"

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James P. Kearney
LIEUT. USN

0082

OBJECTION TO RECEIVING TESTIMONY FROM THE TRIAL OF MAJOR FURUKI MADE BY CAPTAIN INOUE, DELIVERED BY COMMANDER MARTIN D. CARLSON, U. S. N. R.

The accused objects to the introduction at this time of the record of the Furuki, Hidesaku, I. J. A., trial or any of the testimony of this trial. It is particularly objectionable to offer only part of the testimony given at that trial.

Section 200, Naval Courts and Boards reads: "Although only a part of a document may have been read to the court, or only a general result deduced therefrom may have been testified to, the document in full must have been offered and received in evidence before such testimony can be received. The opposite party is thus afforded an opportunity to call upon the witness to read such additional entries as may be pertinent to the issue and for which the party introducing the document failed to call..... In other words, the rule provides an opportunity for the court to have before it all the information contained in the document, and the party introducing it in evidence cannot pick and chose therefrom the points he desires to set forth and suppress the remainder."

Section 678, page 1126, Wharton's Criminal Evidence, "Testimony taken at a trial cannot be read at a subsequent trial if the witness is available."

The witness, Inoue, was on the witness stand subject to cross-examination for three full days. He was subjected to the most grilling and searching cross-examination, but the judge advocate failed in the slightest degree to shake his original testimony. At that time we objected to the judge advocate reading the testimony as given in the Furuki trial. The judge advocate replied to the effect that he could test the credibility of the witness in any way he saw fit and further that he was not going to offer or did he at that time offer the document of the Furuki trial into evidence. To allow the judge advocate to offer the proceedings of the trial of Furuki into evidence at this time is quite unfair, particularly after the witness Inoue has left the witness stand and after the judge advocate stated he had no further questions.

Section 201, Naval Courts and Boards, states, "Where the author of the document does not appear as a witness, it remains only a hearsay statement and can be received only under some exception to the hearsay rule. Thus, in general, ex parte affidavits, letters from members of the family of an accused, certificates from a physician that an accused has been under medical treatment, etc., the admission of which would in effect permit an author to testify without submitting him to cross-examination are mere hearsay statements and are inadmissible in evidence."

The accused objected because this document is not approved by the convening authority, but CinCPacFlt or the Judge Advocate General, U. S. Navy. It is not a complete proceedings and cannot therefore be accepted as evidence without violating Section 200, NC&B.

We hold that to admit this document at this time is most unfair to the accused. If it is admissible at all it should have been offered into evidence at the time the accused, Captain Inoue, was on the witness stand. The testimony that the witness Inoue gave at that Furuki trial was on an altogether different matter. It was for an altogether different set of facts, a different trial, different natives, and for a different set of facts, than is being tried here. This is altogether irrelevant to the issues here. What the witness Inoue testified to at the trial of Furuki is not for the same offense as he is here being tried for and such testimony and/or evidence is highly irrelevant and immaterial to the issues here being tried. It is most prejudicial to admit such evidence at this time.

In Underhill's Criminal Evidence, page 955, "Grounds for admitting testimony of missing witness. The later trial should be for the same matter, and the accused person should be the same as in the former. It is not material that the later is under another indictment if the offense charged and the parties are identical," citing Reynolds v. US, 98 US 145; Shaw v. US, 1 Fed (2d) 199; Commonwealth v. Gallo, 275 Mass 320. "CC(1)"

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James R. Kenney

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In Wharton's Criminal Evidence, vol 2, p 1125-1126, we read:

"The view has been taken, however, that if the accused is examined under oath before a coroner's jury or a committin magistrate, his testimony cannot be regarded as voluntary, and cannot be reproduced" citing State v. Parry, 106 SC 289, 91 SE 300.

It is true that the Furuki trial was not a coroner's jury or a committing magistrate , but on page 1126 of Wharton's Criminal Evidence, we read, "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable."

"Some courts deny the right to reproduce the testimony of a witness unless he is shown to be dead, even though he has gone beyond the jurisdiction of the court" citing US v. Angell (CC) 11 F. 34, the court says that under the constitutional provision that in all criminal cases the accused shall enjoy the right to be confronted with the witness against him, if living, must be produced and the more fact that he is beyond the jurisdiction is immaterial. The court further says that it cannot fairly be maintained, that if the witness has once been confronted with accused before the committing magistrate, the requirements or guarantics of the Constitution are answered. . . . The fair meaning of the Constitution is that wherever and whenever he is put on his final trial, he shall be confronted with the witness against him if they be alive.

To introduce into this trial, the records of the Furuki trial is most prejudicial to the rights of this accused. The Furuki trial found the accused, Major Furuki, guilty but the incident was an altogether different incident. To introduce such a trial violates all the rules of evidence and procedure. But worse yet, the prosecution offer the entire trial as written up in four volumes because there was 500 pages of testimony, but then say they only want to put into evidence questions 167 to 172 inclusive. Thus the judge advocate blows both hot and cold at the same time. He offers the entire trial of Furuki (four volumes) but quickly withdraws the four volumes and says he only wants admitted into evidence questions 167 to 172.

The record shows that this Furuki trial has not even been approved by the convening authority, but the I. S. I. C., CinCPacFlt of the Judge Advocate General of the Navy, and yet the judge advocate comes before this court and offers questions 167 to 172 into evidence. These questions and answers are in English and it is common knowledge that the questions as put to the witness, Inoue, were translated into Japanese and by the witness answered in Japanese. Looking at the entire record we can find no place where it is recorded that this witness, Inoue, was allowed to verify his testimony. The record shows it was not for the same offense or for the same incident. The record further shows that these questions were not all the questions asked and answered by this witness. Thus this witness is being made to testify against himself and quite unfairly because only six questions and answers are permitted and the accused is thus being judged in this case by the six answers picked at random by the judge advocate from several hundred asked the accused at another trial which was for an altogether different offense and a different incident and the accused in that other trial is not the accused in this case.

This is most prejudicial to the substantive rights of the accused.

Respectfully,

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

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James R. Kenney
LIEUT., USN.

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0084

REPLY OF JUDGE ADVOCATE TO OBJECTION BY ACCUSED TO RECEIVING PORTIONS OF THE TESTIMONY OF CAPTAIN INOUE GIVEN DURING THE TRIAL OF MAJOR FURUKI

The judge advocate in answer to previous objection by defense counsel cited the pertinent portions of Wharton's Criminal Evidence which relate to the use as rebuttal evidence of prior contradictory statements. Further discussion of this question would be repetitious. offered in evidence. The use of such prior contradictory testimony is clearly a legally permissible method of attack on the credibility of a witness. Defense counsel has misquoted the judge advocate and has stated that the judge advocate said he could attack the credibility of the accused in any way he saw fit. The judge advocate has never made such a statement. He has indicated however that he could attack the credibility of the accused in the same manner and by the same legally approved methods of attacking the credibility of any witness. It is proper to attack the credibility of a witness by the use of prior contradictory statements. The fact that these prior contradictory statements are made in a judicial proceeding when the accused appeared voluntarily as a witness and was duly sworn and gave his testimony does not in any way remove the efficacy or the propriety for introducing such prior contradictory statements as a method of attacking the credibility of the witness, and he has been confronted with his prior testimony.

The defense counsel has indicated that the judge advocate has not offered into evidence the complete proceedings, but is using the proceedings of the prior trial merely with regard to a limited portion of the testimony of Fumio Inoue. The judge advocate is attempting to attack the credibility of Fumio Inoue by indicating the prior contradictory statement with regard to a particular matter which is the subject of testimony during the current trial of Fumio Inoue. It is proper and essential that only such portions of the prior record that pertain to the particular point at issue. I cite with regard thereto, from Naval Courts and Boards, which with regard to the introduction of evidence from a court of inquiry as evidence of prior contradictory testimony indicates: "Section 219(d) Where a witness before the court martial has made prior inconsistent statements before a court of inquiry, the proceedings of the court of inquiry may be introduced in evidence for the purpose of impeaching the testimony of such witness, subject to the general rules of evidence requiring that a proper foundation be laid before evidence may be introduced to impeach the testimony of a witness by showing prior inconsistent statements."

In Section 223, Naval Courts and Boards, it provides, "....the judge advocate should take the stand as a witness, identifying the record and stating that he desires to read therefrom so much of the proceedings as embodies the testimony of a particular witness with reference to a particular point in issue."

The fact that it is unnecessary to admit in evidence the entire record of evidence or even the entire testimony of the witness is further clearly established by Wharton's Criminal Evidence, section 1369 which relates to former contradictory testimony. The last two sentences of this section read , "But only that part of the transcript of former testimony should be admitted and this reads as follows: "But only that part of the transcript of former testimony should be admitted for this purpose as is contradictory to the present testimony. Such prior inconsistent testimony may be shown, not only by the stenographer's notes, but by any witness who heard and remembers it."

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Defense counsel has cited numerous sections of Underhill's which relates to the testimony of a missing witness. It is perfectly obvious that these portions are completely irrelevant to any issue before the commission at this time. Prior contradictory testimony of Inoue is offered in evidence. The use of such prior contradictory testimony is clearly a legally permissible method of attack on the credibility of the witness. The fundamental reason for the introduction of this prior testimony is because the witness is present and the witness has testified and his testimony is attacked as not credible. Wharton's Criminal Evidence, Section 1363.

The specious arguments by defense counsel with regard to the right to be confronted by the witness against one is apparent without further comment. It is true that it is a fundamental right in all systems of justice and in all trials that an accused be present when evidence is offered against him, and that whenever possible he be confronted with the witnesses against him. In the instant case in essence the witness against the accused is himself, and he has been confronted with his prior testimony.

David Bolton

DAVID BOLTON
Lieutenant USN
Judge Advocate.

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James P. Kenny
LIEUT, USN.

0086

[redacted]

FINAL STATEMENT BY MUTO, AKIRO, FORMER CAPTAIN, IMPERIAL JAPANESE ARMY,
[redacted]

Original attached to the original record.
Certified translation appended herewith marked "77."

0087

FINAL STATEMENT BY [redacted], [redacted], FORMER CAPTAIN, IMPERIAL JAPANESE ARMY, ATTACHED TO THE HEADQUARTERS, SOUTH DETACHMENT, JALUIT ATOLL, GILBERTS.

Immediately after the fall of the Gilbert Islands at the end of November, 1943, I was ordered by the Detachment Commander, Colonel OTAKE, to assume command of 200 men of the 1st South Seas Detachment then on Maloelap, who finished and went to Jaluit. On arriving at Jaluit Island on December 20, I immediately came under the command of Rear Admiral MASUDA, Commander of the 62nd Naval Guard Unit.

At that time, I was attached to the headquarters of the 1st South Seas Detachment, which was on Maloelap.

On January 30, 1944, Major FUKUDA with his commanding staff of the 2nd battalion of the 1st South Seas Detachment, composed of 140 to 150 men, moved up from Wotje and arrived at Jaluit. After the arrival of Major FUKUDA, my unit and the KAIGUNTAI unit (army) were merged and organized into FUKUDA, my unit and the KAIGUNTAI unit (army) were merged and organized into the 2nd Battalion of the 1st South Seas Detachment. This organization came under the command of Admiral MASUDA and Major FUKUDA became the Battalion Commander.

After Major FUKUDA's arrival I was attached to the headquarters of the 2nd battalion and served as one of its members until the end of the war.

With the fall of the 6th Base Force Headquarters, the chain of command of the 62nd Naval Guard Unit came into immediate connection with the Commander in Chief of the 4th Fleet. But owing to the fact that Jaluit was already isolated and besieged, Admiral MASUDA actually had supreme and absolute command over all naval and army organizations, gunmen units, natives and all other civilians on Jaluit, at that time.

At Jaluit, I was a subordinate of Major FUKUDA and at the same time my superior commander was Admiral MASUDA.

Subsequent to the fall of the Gilberts, Maloelap was taken by the American forces in February 1944. Then Jaluit lost its base. Completely cut off from its surroundings and the rear, Jaluit fell into total isolation. Thereafter, not even ones were supplied each to us and the officers and men had no choice but to face death by slow starvation.

However, the bombardment from sea and bombing from air by the American forces against Jaluit grew more intense day by day. Seven bombings by 40 to 50 carriers planes were carried out everyday alone, both by day and during the night. Because of this severe bombing, food, ammunition, fighting and communication gear supply, buildings and establishments were completely destroyed. Consequently Jaluit actually resembled a corpse reduced to ashes. Furthermore, great difficulties were experienced in communications.

Especially upon the officers of Saipan in July 1944, Jaluit fell into great distress and utter confusion. The scarcity of food together with the lack of ammunition and communication at this time made complete surrender on the defense of Jaluit, to did not have the determination to defend this isolated outpost. From this time on, Jaluit was turned into a most disastrous battle field, unparalleled in the history of this war, or any other war.

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James P. Kenny

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At this critical moment, Admiral Nagumo set up plans for self-support and defense measures to back up this self-support. With results will be immediately began to put this into practice. At first we cultivated every possible bit of land, grew vegetables and labored to gather all parts of the coconut palm, pandanus, breadfruit and any growing plants or trees which were edible. But our plans did not succeed because of the coral soil and the will planned intense bombings of the Americans.

So, our only hope was in the 100,000 coconut trees from which copra and coconut toddy could be produced by the help of native labor. The natives gave good cooperation and worked well for us. Because of the nature of my duties, I frequently made trips around the atoll, so I am better able than anyone else to describe the cooperation given to us by the natives of Jaluit. I have always been thankful to these natives and considered them loyal subjects of Japan.

The Admiral on all occasions ordered his subordinate officers and men to take good care of the natives, because they were the benefactors of our lives. This was his policy and everyone on Jaluit knew Admiral Nagumo's policy regarding the natives and always carried it out no matter how hard the natives and the military and gunzoku might work there was a limit to production. Enough food for the military men, gunzoku and natives totaling 4,000, could not possibly be produced.

Therefore, rohi was restricted to one copra and one "ghe" of coconut toddy (cup from the bud of coconut) per person a day. Seventy-five per cent of the calories we obtained were from copra and coconut toddy. The self-support plan was based upon the calculation that the calories from one "ghe" of toddy were equivalent to those from one "ghe" of milk. We could not possibly maintain our health on this. Moreover, all buildings were destroyed so we could not shelter ourselves from the rain and the heavy night dew. Our health gradually declined. Officers and men had exhausted every edible thing--grasses which were not poisonous, and living creatures such as lizards and rats. The situation became disastrous. Malnutrition, sickness and disease were prevalent. Practically no person was in good health, two or three rest periods were needed in eating a mere 400 or 500 yards. There were several men who died from eating the poisonous intestines of sharks which they found in the garbage. Food and the labor situation were so acute that a man who had lost his leg had to crawl to the edge of the roof to find shells to eat in order to maintain his strength. Owing to the scarcity of men, work inversely became more intense so that one man was burdened with 5 or 6 duties.

Rats were subsequently destroyed by baking. So, transportation to the outlying islands became more difficult day by day and men began to die from starvation. We were on the verge of starving and it was indeed a living hell. Under such circumstances stealing of food occurred continuously. Admiral Nagumo met this problem with severe punishment and placed strict guards, but still he could not be prevented. Even when officers were placed on the boats to keep watch over the food for the next day while it was being transported from the production centers of the outlying islands to the main island, the food was often stolen. Day and night I was on the boats and kept watch, but it was impossible to prevent the stealing of food.

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Because of the continuous defeats of our forces and the severe hardships of Jaluit the morale of our officers and men declined and a feeling of hopelessness and ultimate defeat became overwhelming. Especially, when we heard the bad news that the homeland, Japan proper, was being bombed did military discipline slacken and despair, hopelessness and ultimate defeat were all that most of us could see. The officers and men had to fight twenty-four hours a day; they had to battle starvation and all. How we ever were able to carry on, no one will ever know.

The character of every man on Jaluit battlefield had changed. Even the character of the officers who were in the position to educate and guide the enlisted men was changed, and some of their acts were beneath that of a gunsoku. It was feared, "that the men and gunsoku would desert." Under such a situation, military discipline was upset. Instances of insubordination, disobedience and other deplorable acts occurred. The commander was so greatly concerned over this corruption of military discipline which is the life of every military force, that he meted out severe punishment to those who were guilty. I was ordered by the commander to maintain discipline and morale, and in accordance with his instructions I carried out my duties. Accordingly, I had to enforce punishment regardless of whether they were my subordinates or not, navy personnel, army officers, gunsoku, natives or other civilians. I impartially strove to maintain the discipline of the organization. I am fully convinced that I should not be ashamed before man or God for the acts I did in pursuance of this duty. No matter how grave and miserable the situation became, Admiral Maeda always assumed a determined attitude and encouraged his subordinates to carry on.

When the battle conditions became more severe and miserable, Admiral Maeda personally directed and shared himself in the command of battle operations, maintenance of discipline and measures of self-support. We could not but shed tears for his sacrificial endeavor and anxiety.

The natives were an integral part of the Japanese military organization of Jaluit and were the reason behind the subsistence of the Japanese forces. By virtue of the labor of the 2,000 natives we barely survived. Among the 2,000 natives, 600 men were picked and united as the main force, while the remaining men and old, male and female, cooperated together with the natives, about 300 military personnel and gunsoku were mobilized in food production. Under such a situation the desertion of the natives would immediately suspend the production and transportation of food which not only would cause starvation but also cause leakage about our defense positions to the enemy and jeopardize our chance for life. This would result in complete annihilation.

Therefore, Admiral Maeda established countermeasures to prevent military personnel, gunsoku and natives from deserting to death starvation and to defend Jaluit to the end.

With the year 1945, numerous cases of desertion of military personnel, gunsoku and natives and other unfortunate incidents had already occurred, in the other bases of the Marshalls. Innumerable men were dying of starvation. At that time on Jaluit not a single military person, gunsoku or native had deserted, and starvation had been checked. But more than 40 or 50 persons had died by starvation on Jaluit. But from about February or March 1945, judging from the active operations of the American airplanes and vessels,

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subtle and clever surrender tactics against Jaluit were being launched by the Americans. The gravest crisis in Jaluit became imminent. Such was the condition until the end of March 1945.

Under this miserable situation, the incident occurred in which eight Mille natives with instructions from the Americans sneaked into Jaluit Atoll at the end of March 1945.

On investigating Raline and the other seven natives the following facts were revealed.

They were Japanese subjects under the jurisdiction of Japan and with the intention of deserting to the enemy they deserted, after they had conspired and plundered a military vessel and provisions, and then confessed they had killed a Japanese sentry. Then, on receiving instructions from the Americans they sneaked into Jaluit as spies and acted as spies. Moreover, their acts were treason against Japan. Especially, they were found to be persuading the natives on Jaluit to desert, relaying communications and gathering intelligence.

Admiral Masuda because of the nature of the incident most secretely, and with the best possible methods and procedure under the circumstances, and with impartial attitude, most carefully conducted an investigation and held consultations on this incident.

In peace times, administration and judicature were vested in the South Seas Government and Local Courts situated in Palau. But since the Marshall Area was transformed into a battlefield in February, 1944, by the decision of General Headquarters, the Chief of the South Seas Government came under the command of the Chief of the Central Pacific Armed Forces, and the administrative and judicial authority of the Chief of the South Seas Government over the natives, was completely turned over to the Chief of the Central Pacific Armed Forces. Thus, each base commander was ordered to take over the administrative and judicial authority for his responsible territory. Accordingly, in the middle of February, 1944, the Chief of the South Seas Government sent out the following dispatch to the head of the branch office at Jaluit which reads: "Hereafter, all the authority vested in me regarding administrative and judicature shall come under the command of the Chief of the Central Pacific Armed Forces; therefore, each government officer shall come under the command of the respective local commanders." And in the middle of February, the Commander in Chief of the Fourth Fleet sent out the following dispatch to Admiral Masuda, "Hereafter, the supreme commanding officer of each base shall have over-all command of all the military units and government offices and shall exercise administrati n and judicature."

Jaluit was at that time an area of severe battle and the situation was far more serious than a district in which martial law is proclaimed, so the administrative power of that territory was completely transferred to the military commanding officer, in this case, Admiral Masuda.

Thereupon, the commanding officer, Masuda, took the following steps in handling the Mille native criminals who sneaked into Jaluit: First Lieutenant Morihana and I were appointed investigators. After the facts in the crime had been revealed, Admiral Masuda then assigned me the duty of Judge Advocate, and Major Furuki, Lieutenant Commander Shintone, and Admiral Masuda himself acted as judges. Needless to say, at this time we were facing the enemy and we were under severe bombing. Furthermore, we did not have sufficient personnel nor a judiciary officer. Also, air raid shelters were not available to hold formal meetings of the ranking officers of Jaluit. The situation was so dangerous and critical that we did not have a single moment of tranquility. All desk work concerning battle affairs was completely at a stand still. So

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it was utterly impossible for a number of officers to assemble in one place and quietly hold a judicial consultation and deliberation. Under the circumstances, a regular trial procedure could not be held and though the trial was not formal such as this trial is, an examination and consultation procedure under special method was held, composed of the said members.

In commencing the investigation, the admiral with Lieutenant Commander SHINTOME present, told us to be especially careful and ordered that we should impartially conduct the investigation, that we should not reveal any matters related to the incident, and that we should prevent the leakage of military information. Then the admiral administered an oath to the interpreter to this effect. The interpreter was a Japanese citizen who had lived in the Marshalls a long time. Therefore, the investigation conducted by the investigators interpreted by a sworn interpreter was done in the most careful and impartial manner.

When the admiral listened to the daily investigation report, and gave out further instructions concerning the investigations, Major FURUKI and Lieutenant Commander SHINTOME were always present. There were times when the admiral personally went to the place of confinement and investigated the natives. Furthermore during the course of investigating the facts involved in the crime, Admiral MASUDA, Major FURUKI, Lieutenant Commander SHINTOME and I met together several times and conducted the examination and consultation. After the investigation had been completed and the reports had been submitted, Admiral MASUDA personally went to the place of confinement and investigated.

After this Admiral MASUDA, Major FURUKI and Lieutenant Commander SHINTOME and I assembled in the Admiral's office and Admiral MASUDA ordered me who had been appointed Judge Advocate to express my opinion. I expressed my opinion concerning the application of law.

Admiral MASUDA next, asked Major FURUKI and Lieutenant Commander SHINTOME to express their opinion, which they subsequently did. Their opinions were similar to mine. As to the two minors, my opinion was to designate an adjoining island to the Ebidj main island and have them live there. However Raline and Oshira stated that they were husband and wife, but all the natives in the instant case stated that Siro was not the child of Oshira but the child of Raline.

But, Admiral MASUDA as President pronounced his sentence. He, then and there in the presence of FURUKI and SHINTOME, ordered me to execute the death sentence of the 8 natives. This sentence differed from our opinion as to these natives but we could not change the sentence. As to the execution, I performed it in accordance with Admiral MASUDA's orders as stated in my statement submitted to the Judge Advocate. My conviction as regards the trial and execution has not changed today or since that time.

The laws applied by Admiral MASUDA to the criminals were as follows:

Criminal Law Art. 199. (murder), Art. 240 (theft and robbery), Art. 81 (crimes against joining an enemy power in taking hostile action against the Empire), Art. 89 (crime of destroying military goods), Art. 85 (crime relating to spy), Naval Criminal Law Art 23 para 5 (crime against allowing lack of armament and military goods) Art. 65 (crime of killing a sentry) Art. 76 (desertion.)

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Admiral MASUDA in order to protect the military secrets of the Jaluit armed forces, to maintain military discipline, to prevent the annihilation of the Japanese forces, to secure the lives of all the military units and natives, had found it necessary to punish the natives who were public enemies and who had violated the laws of Japan, operated as spies and rebelled against the Japanese armed forces, as regards the above mentioned laws, the procedure was not formal but under the circumstances I am fully convinced that it was a fair trial and the best possible trial under the exigencies of the circumstances.

At that time I was attached to headquarters. I was in charge of the farming which was a part of the duties of the self-support committee under the command of Admiral MASUDA and concurrently I had the duties of the Chief of the Special Police Squad.

The duties of the Chief of the Special Police Squad were (1) regulating food consumption, (2) investigation of crime and enforcement of punishment (3) maintenance of military morale and discipline. There were no military police on the island so my duties were those of military police.

In the battle field of Jaluit, as an officer of the Japanese military force and as the officer in charge of discipline, I most faithfully executed whatever orders my superior, Admiral MASUDA, Major FURUKI, Lieutenant Commander SHINTOME and others gave me, and I had always been looked upon as a pattern for other officers.

Thorough enforcement of orders is the life of Japanese military forces. During my seven years service in the army, I have been taught this principle until it has penetrated into my very marrow. To obey orders as a military person has become my second nature. If I am to be punished at this trial, I believe it is because I obeyed orders and not because I committed murder.

As for the act of execution, since the admiral commanded me to do so according to his decision, I could not do anything but obey his orders. I only faithfully performed my duty as an official in accordance with the law and according to Admiral MASUDA'S order for execution.

As to the execution of the two minors, Admiral MASUDA expressed his determination as follows; I feel the same pity toward the minors as do INOUE, FURUKI and SHINTOME. I have deeply thought about the matter but I shall sentence them to death together with the grownups. The reason for my decision is because, the 2 minors acted together with the others; and though they are physically small, the maturity of their mind and thought differs in no way from the grownups. Moreover, they have contacted the Americans and have been instructed in their duties as spies and they are fully aware of the situation on Mille as a grownup would be. So they possess the qualities of spies. Therefore in order to maintain the subsistence of the armed forces I am compelled to sentence them to death.

This was the Admiral's opinion. It differed from our opinion but he firmly ordered the death sentence. At that time when I performed the execution of the minors I was 39 years old. I have a mother and a child of my own so I can well understand human feelings. I cannot adequately express the agony as a human being and as an individual, which I had to suffer. My could was subjected to great pains and agony. I hated my duty. I regretted my duty.

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I was helpless. But my duty did not allow this. My only way out was to suppress my own feeling and carry it out.

Before Admiral MASUDA expressed his decision, I had stated my opinion straightforwardly. But his judgment differed from my opinion. Prior to the execution I again expressed my opinion to Admiral MASUDA to spare the children and explained my agony and suffering to Major FURUKI. In performing the execution, I had no intention of committed a crime or did I have malice. In accordance with the Admiral's orders, fully convinced of its legality and in pursuance of a legitimate duty as an executioner with an honest belief and with pure heart I carried out the execution.

After the execution, I expressed my deepest condolence and prayed for the repose of their souls. I could not help but shed tears for these natives who had ended in such misfortune caused by the war.

Admiral MASUDA, Major FURUKI, Lieutenant Commander SHINTOME and the guards at the time of the execution, are fully aware of my feelings then, at the present moment, I firmly believe that the execution was legitimate and right and that there was no other way. I cannot realize that it should constitute any crime whatsoever not unless I can come to not believe in capital punishment. Moreover, if someone else had been in my place, I am convinced that he would have taken my steps and no other. I firmly believe God is aware of my righteousness. In the foregoing paragraphs, I have expressed my conviction and at this time and at that time I wish to say that it has not changed.

All in all, after an investigation and a consultation such as the exigencies of the circumstances permitted, I was ordered by Admiral MASUDA to execute the sentenced natives. In the honest belief that the orders were legal, I could not help but carry them out as the proper duties of the judge advocate. The officer that gave out the order was the superior commanding officer of the Jaluit Defense Garrison. That this order should implicitly be carried out was the iron-clad rule of the Japanese military forces. In accordance with the Emperor Meiji's "Imperial Rescript to Soldiers and Sailors", Rules and Regulations of Army Life and other regulations concerning orders I could not refuse it.

I knew of the investigation because I had personally investigated the incident. I knew of the trial because I had participated in the trial of the eight natives. There was no question in my mind but that I was doing the right thing when I carried out the order. My state of mind was free of any malice toward these persons. Quite to the contrary, I felt pity toward them that they had listened to the Americans and had been assigned this mission so that they sneaked in to gain information of our military and personnel situation. I felt particularly sorrowful and greatly concerned for the children. I had expressed my opinion over and over that I wanted them to be spared. Though Admiral MASUDA sympathized with them, he stated that it had to be done in order to save the military from annihilation and from the point of maintaining military principle and he firmly ordered them to be executed. I grieved over the heartlessness of life.

War does things to a person which he cannot very well escape. In performing the execution it is my honest belief and I swear that I did not have the slightest malice. The statement made by me on December 28, 1946 and submitted into evidence by the prosecution explicitly reveals that I had in

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no way any intention at all of committing murder.

It is easy in the quiet and secluded way of peace to see how things could have been different. But I wish to state that by the exigencies of the circumstances there was no other way.

In closing, I would like to express the situation of my family. On December 1938 I was called out for service in the Pacific War and until the end of the war I continued in the service. At home my six year old daughter who I have not yet seen, my sister, wife and mother are living together.

I lost my father when I was only a child and my mother brought me up. I received one letter from home saying they are now living in the country and their only pleasure was my return. They are praying day and night for my return which is their only hope in life and for an impartial judgment, I am praying to be able to relieve my mother and family of their anxiety.

I respectfully place this statement before you.

INOUE, Fumio

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

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

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[signature]
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UNITED STATES PACIFIC FLEET
COMMANDER MARIANAS

F712/A16-2/
13-JDM-ehj

29 APR 1947

Serial: 11702

From: Commander Marianas.
To : Atoll Commander Kwajalein.

Subject: Marshallese Observers at War Crimes Trial - attendance of.

References: (a) JAG Despo. 281730Z, August 10, 1946.

1. Reference (a) advised CinCPac that the State War Coordinating Committee had authorized inviting Marshallese to participate in trials of Japanese Military personnel charged with murder of Marshallese natives.

2. Three native Marshallese attended the recent trial of Major Furuki, I.J.A., for the murder of thirteen (13) Marshallese natives.

3. On 29 April 1947, the trial of Captain Inoue, I.J.A. began at Commander Marianas. He is charged with the murder of eight (8) Marshallese on Jaluit Atoll in April 1945. The trial was adjourned until 5 May 1947 on motion of counsel.

4. Chief Lajore, one of the observers at the Furuki trial, has suggested the following persons to be observers at the trial of Captain Inoue:

Kabua of Jaluit
Tokne of Ailingalaplap
Mangingi of Kwajalein

Chief Lajore states that all three are important persons in the Marshalls. Tokne is his son.

5. The Marshallese should be notified that the three natives mentioned in paragraph 4, or substitutes if desired, are invited to attend the Inoue trial. If the invitation is accepted, arrangements should be made to have these Marshallese at Commander Marianas by 5 May 1947.

6. For travel by Naval Transport Aircraft, Class Three (3) Priority is hereby certified.

/s/ C. A. POWHALL
C. A. POWHALL,
Rear Admiral, U. S. Navy.

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"GG"

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OPENING ARGUMENT FOR THE PROSECUTION

delivered by

LIEUTENANT JAMES P. KENNY, USN.

If it please the commission:

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

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

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

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

The allegations in the various specifications as to the time and place of these killings has been proved by the testimony of the four prosecution witnesses and the confession of the accused.

The usual technical terms of common law pleading of homicide are used in the specifications under both Charge I and Charge II. To allege that these killings were done "wilfully, feloniously, with premeditation and malice aforethought' is merely to state that act of the accused was intentional. If the accused intended to kill these natives then he is guilty of the conduct implied in these legalistic terms. That the

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accused intended to kill the eight natives in apparent and we have his own testimony that he discussed the matter with Major Furuki before performing the act.

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

We now come to the only open question in this case and that is whether the killings were alone "without justifiable cause" as alleged by the prosecution. Lieut. Shigeru Morikawa, a prosecution witness, testified that he had neither "seen nor heard of a trial" for these natives even though he, along with the accused, investigated them. Although the defense has admitted that there was no 'regular' trial, they have sought to establish that an examination and consultation was held before the executions. From a reading of the testimony it is impossible to determine where the line of demarkation is between the investigations and this so called 'examination and consultation'. We have the one parralleling the other up to the date of the execution of the first seven of the natives. We are told that the accused as an investigator made daily reports to Masuda, Furuki and Shintome and we are also told, and expected to believe, that at some point in these sessions the investigator became a judge advocate and the other three who were present became judges. Through this metamorphasis, we are informed that an examination and consulatation was held. The defense realized that the only thing present to examine or consult on was the investigation report and that some important things - such as the presence of the accused and evidence against them were material to turn this into a judicial proceeding. Therefore in order to remedy these defects we are told that Admiral Masuda visited the natives at their place of confinement and Furuki and Shintome examined the boat in which the natives arrived. This in short, is the defense in this case.

To rebut this fantastic story the prosecution produced the former member of the Imperial Japanese Navy former Lt. Comdr. Shintome. Here was the man who the defense had claimed was present when Admiral Masuda had given the order for an examination and consultation to be held and appointed the accused a judge advocate and Shintome, Furuki and himself as judges. What did Shintome say about this? He unequivically denied that any appointment ever was made or that he had ever acted as a judge in any proceeding connected with these natives. He did testify that he had examined the boat in which the executed natives had arrived on Jaluit but his inspection had nothing to do with any so-called examination and consultation. The defense made a futile and unsuccessful attempt to impeach the credibility of this witness. Can anyone think of a reason why this former member of the Imperial Japanese Navy would tell this story against a man who fought side by side with him unless it were true. He certainly has no animosity for the accused because while he was on the witness stand, at the investigation of defense counsel he became a character witness for Inoue. Furthermore, in the course of this trial, it has been shown by testimony that the accused on October 9, 1945 testified that there was no trial and that the natives had been executed after only an investigation. Shintome, by destroying this fabrication about an examination and consultation, merely verified the truth of that statement

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of the accused. Shintome would have liked to help Captain Inoue but this old man was not willing to play a part in the tale of lies which had been fabricated sometime after he returned to his home in Japan.

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

There is one thing above all others that has been embarrasing to the accused in this case and has been an unsurmountable obstacle - that is, the murder of the two young children. It was realized that their execution was in violation of Article 41 of the Japanese Criminal Code. Defense witness Furuki made a weak attempt to add years to these children but was faced with the testimony of Morikawa, the testimony of the guards, the confession of the accused, the deposition of the 'ressurrected' Tanaka - all of which placed the ages of the children under the statutory minimum for punishment. The ridiculousness of the testimony that these young children had to be executed because they were spies who were dangerous to the Jaluit Garrison is so evident that I will not take the time of this Commission to discuss it. The matter at most is academic and collateral.

In Charge II it has been alleged by the prosecution that the execution of these eight natives was a violation of the Laws and Customs of War in that although they were charged with spying they were not given the protection of Article 30 of the Fourth Hague Convention which states that "a spy taken in the act shall not be punished without trial. In order to prove this charge it was merely necessary for the prosecution to establish one additional fact beyond the proof established to sustain Charge I, ie, that the natives were punished for being spies. Such proof is contained in the testimony of both prosecution and defense witnesses.

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

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James P. Kenny
LIEUT., USN.



ARGUMENT FOR THE ACCUSED, INOUE, JUNIO, DELIVERED BY AKIMOTO, JOACHIRO

Original document in Japanese appended to the original record.
Certified translation appended herewith marked "JJ."

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ARGUMENT FOR THE ACCUSED INOUE FUMIO DELIVERED

BY AKIMOTO YUICHIRO ON 29 MAY 1947

* * * * * * * *

Your Honor, the President and Members of the Commission.

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

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

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

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

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

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

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

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

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

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

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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James B. Keenan
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"JJ (3)"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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"JJ (9)"

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

Captain Inoue also testified as follows on this point:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Let us observe the relation between the offenses of the natives

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

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

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

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

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

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

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

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

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

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

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

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

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

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"JJ(12)"

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

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

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

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

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

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

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

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

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

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

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

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

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

"JJ (13)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Inoue
JJ

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Inoue
JJ

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

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

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

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

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

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

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

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

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

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

First I shall argue about the criminal intent.

Article 38 of the Japanese Criminal Code states: "Except as otherwise provided by special provisions of law, acts done without criminal intent are not punishable. A person who without knowledge (of the fact) has committed a grave offense (crime) can not be punished in proportion to its gravity. Ignorance of the law can not be invoked to establish absence of intent to commit a crime, but the punishment may be mitigated according to the circumstances."

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

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

This certain, determined intention is criminal intent.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"(1) Concerning the examination and consultation procedure taken in this incident by Admiral Masuda, Admiral Masuda especially cleared a part of his quarters and made use of it for this purpose. Matsui and Izumi, two orderlies were placed as guards at the entrance, and they carefully guarded it so that no one could come in. Especially at the last examination and consultation when the sentence was to be decided, Admiral Masuda, the judges and myself were all called to attention. He solemnly heard our opinion and decided the decision. During my two years period of duties on Jaluit, the fact that the commanding officer cleared a part of his quarters for any purpose this was the only time. (2) Immediately after the end of the war, Admiral Masuda was called by Commander McKinson to the destroyer, and at this time he was asked the following question: "There should be eight natives here who came from Mille, what did you do with them?" The Admiral answered as the natives had committed crimes, and by my authority and according to Japanese law by lawful procedure they were executed. Commander McKinson

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then asked what he did with the two children. Admiral Masuda replied the two children were the same as the adults, they were spies and knew the conditions on Jaluit as well as the adults. As there was no other way, these two children were executed to prevent the desertion of the military, gunzokus, and natives and the leakage of military secrets which was dangerous to Jaluit, to maintain discipline and the lives of the four thousand people on Jaluit. They had to be executed. Present at this time were Mc Kinson, his adjutant, myself, and an army interpreter who was Sergeant Major Akamatsu, Isamu. Admiral Masuda submitted a report stating that Admiral Masuda had ordered Captain Inoue to perform the execution. This report was taken back together with other documents by Commander McKinson on the fifth of October, 1945, to the headquarters of the defense garrison at Emidj. Witnesses to this are Major Furuki, Lieutenant Commander Shintome, Susuki and Nakamura, myself and Sergeant Major Akamatsu. (4) At this time I did not know the Hague Convention nor the Laws of Land Warfare of The Hague Convention and the report that Admiral Masuda submitted that they had committed the crime of spying stated that the law of spying, Article 85 of the Japanese Criminal Code, was applied."

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

The defense proved in accordance with the law:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 2 Spy of the same conventim.

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

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

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

"JJ(35)"

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Inoue
JJ

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

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

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

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

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

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

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

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

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

"JJ(36)"

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0137

Inoue
jj

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I would like to state again:

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

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

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"JJ(38)"

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Inoue
JJ

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

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

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

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

Inoue was not a professional army officer. After he was graduated from high school, he enlisted and received military training as an active service soldier only for one year. During that time he was promoted to a sergeant and was discharged from the army service. Then he became a clerk of a civilian company and was engaged in a peaceful industry. He was then called at the breakout of the war and became an army officer at the front. He was nothing but a low-ranking officer, an army captain. On Jaluit, there were such high ranking officers under Rear Admiral Masuda as: Lieutenant Commander Shintome, Major Furuki, Lieutenant Commander Susuki, Lieutenant Commander Nakamura; so he could not participate in any important affairs. He was nothing but a low ranking officer and was of the same rank as Captain Jinno and Captain Kadota. He testified to the conditions on the other islands such as Mille, "Masuda said to me that although I did not know the conditions of other islands...." and he added, "The secrets of the forces were not told to anybody except high ranking officers such as Major Furuki, Lieutenant Commander Shintome, etc., and the intelligence officer, Lieutenant Morikawa. So I did not know anything about the conditions of other islands such as Mille." From this testimony, we can imagine that the rank of the accused was very low. "JJ(39)"

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[illegible]

Inoue
JJ

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

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

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

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

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

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

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

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

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

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

"JJ(40)"

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

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

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

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

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

AKIMOTO, YUICHIRO.

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

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

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

Original document in Japanese appended to the original record.
Certified translation appended herewith marked "LL."

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

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Honorable President and the members of the Commission:

Chapter 1. - INTRODUCTION.

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

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

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

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

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

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

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

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

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

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"LL 1"

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

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

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

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

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

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

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

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

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

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"LL 2"

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

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

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

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

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

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

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

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

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"LL 3"

0147

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

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

Chapter 2. Errors in Charge and Specification.

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

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

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

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

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

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

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

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

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

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

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

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

Chapter 3. ON JURISDICTION.

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

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

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

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

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

Proclamation II, article 4, issued by Admiral Chester W. Nimitz, Governor of the Marshall Island Areas, which was cited by the judge advocate in his reply to the objection of jurisdiction reads, "Any person who commits any act which violates any provisions of Japanese penal law in effect in these islands prior to the occupation by the Force under my command, or the provisions of native law customary in the islands, may, at the discretion of the Military Governor, or under his authority, be brought to trial before Military Court and on conviction suffer such punishment as the court may direct....." It may be inferred that this provision was proclaimed in compliance with the spirit of the above international law. It is apparent from the face of this provision, that it does, in no way give authority to the military courts of the occupying power to try and punish crimes violating Japanese Penal Law, in the occupied territory prior to the occupation. It is a grave error to maintain that jurisdiction exists in this military commission to try the offenses in the instant case, particularly the crime of murder alleged in Charge I, on the grounds set forth in the above provisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The grounds for my assertion are as follows:

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

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

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

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

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

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

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

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

At the time of this incident, was martial law proclaimed over the area of Marshall Islands? Did Rear Admiral MASUDA, the supreme commander of the Jaluit base proclaim martial law in due procedure on Jaluit Atoll? We have no material to affirm or deny these questions. We can only admit that, at a time between February and April 1944, Commander-in-Chief of the 4th Fleet sent a dispatch to the commanding officers of the bases of the Marshalls saying, "From now on, each base shall be commanded by the highest ranking commander of the base." It is an evident fact that, according to this dispatch, Rear Admiral MASUDA who was then the highest ranking commanding officer on Jaluit took over each command of the Jaluit base.

Therefore, regardless of whether or not martial law was proclaimed on Jaluit, MASUDA had the authority to convene temporary court martial in his unit in case of necessity. This is clearly stipulated in article 9 of the Naval Court Martial Law.

2. Primarily, there was no permanent court martial nor civil court of the South Seas Government on Jaluit. So, in time of peace, the fleet court martial at Truk or the court of the South Seas Government at Ponape had the jurisdiction over the crimes committed on Jaluit or the criminals arrested on Jaluit; the former tried crimes of a military nature, the latter ordinary crimes. If transportation had been possible with Truk or Ponape and to send there cases and criminals, it would have been unnecessary to establish a temporary court martial on Jaluit. But, as the commission understands by the testimony at the time of this incident, Jaluit was entirely isolated by the seige of the U. S. Navy and air forces and the transportation to the other bases was entirely impossible. In such circumstances, it was through the absolutely lawful authority of Rear Admiral MASUDA that he specially established a temporary court martial in Jaluit for the trial of these Mille natives. The authority was legally vested in MASUDA according to the law.

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3. As a principle, a naval court martial has jurisdiction over navy personnel, gunzokus, sailors on navy vessels, those who are engaged in naval work, those who follow the navy and prisoners of war. (ref. art. 1 of the Naval Court Martial Law.) It had also jurisdiction over civilians who have violated certain crimes of Naval Criminal Law. But article 6 of the Naval Court Martial Law admits its special jurisdiction of wider scope in time of war as follows:

Article 6 states: "In time of war, court martial may exercise its jurisdiction over the crimes of those other than stipulated in article 1 if it is necessary for the maintenance of the order of the navy."

Therefore, regardless of whether or not the natives of the Marshalls of this case had any connection with the navy, it was not unlawful to try them in a court martial.

Article 17 of the Naval Court Martial Law provides for the jurisdiction of temporary court martial as follows: "Temporary court martial shall have jurisdiction over the following cases, (1.2. omitted) 3. The case of an accused who it is defined in article 6 and is in the area guarded by the unit in which the temporary court martial is established."

Therefore, for the crimes of the Mille natives committed on Mille Atoll such as this one, the temporary court martial on Jaluit could try the crime if the criminals are on Jaluit.

Rear Admiral MASUDA ordered the accused INOUE and Lieutenant MORIKAWA to investigate the crimes of Mille natives in this case. After the investigation, their crimes came to light through their statements and their belongings such as boat, etc. Then MASUDA commenced the examination and consultation of the crimes of the natives appointing Major FURUKI and Lieutenant Commander SHIMTOME as the judges and the accused INOUE as the judge advocate. This was the proper and lawful authority of MASUDA, the supreme commander of the Jaluit Base, vested in him by the stipulations of Naval Court Martial Law. This is the act of specially establishing a temporary court martial in the unit under his command trying the crimes of the Mille natives in this case. This is the act of trial and is nothing else.

The prosecution seemed to stress the fact that the procedure of this examination and consultation is not a trial on the ground that procedure applied in the examination and consulation had a few faults. But the important element to determine whether or not a certain act or a certain series of acts is a trial depends upon the fact whether or not the persons or the organization who performed the alleged trial had proper and lawful jurisdiction, or the authority to hold a trial.

No matter how completely the proceedings are carried out according to the laws of criminal procedure, if it has no legal jurisdiction as its basis, it is not a legal trial.

On the contrary, when a person who has proper, legal jurisdiction has carried out a trial, even if there were some discrepency from the provision set forth in the laws of criminal procedure, it is not an invalid trial. We cannot say that there was no trial. We can only condemn it by appealing the unlawfulness in the procedure of the trial. The sentence announced by the trial is not an invalid one. It is formally effective as the sentence of any court is. We must fully understand this pripciple of law.

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As to the procedure of the examination and consultation for the crimes of the Mille natives in this case convened by MASUDA, we must notice the following points in order to avoid misunderstandings.

The procedure of the specially established court martial is different from that of an ordinary permanent court martial or that stipulated in the Law of Criminal Procedure of Japan in the following points:

1). The accused is not allowed to have counsel. (Article 93 of the Naval Court Martial Law). Therefore, it was not illegal that no counsel was present in this examination and consultation. The judge advocate, in his argument in the Furuki case rebutted this point citing Article 94 of the law. But this rebuttal shot wide of the mark. I think that the judge advocate might have been mistaken in the meaning of the article, perhaps on account of the bad translation of the Naval Court Martial Law. But I should say, if he had taken a little more care. The law of a country has special technical terms of its own. Only the literal interpretation of the term does not give a just and full understanding. Especially, we must be much more careful when we read the translation of foreign laws. The judge advocate also rebutted article 369 of the law, but it was also a serious mistake. He did not study the law carefully by reading all of it, but only picked out a part of the law.

2). The trial of the specially established court martial is never held in public. Article 419 of the Naval Court Martial Law states, "The stipulations in this Section concerning publicity of the trial shall not be applied to the trial procedure of the specially established court martial." So it is quite natural that the examination and consultation of this case was not held public. It is not unlawful. As to this point, the judge advocate also argued in his argument in the Furuki case that MASUDA's trial which was not held public, is not lawful, citing article 102 of the Naval Court Martial Law. In this case, the judge advocate is arguing on a misunderstanding which was caused by the fact that he did not wholly read each article, but only a part of each of them.

3). The judge advocate, when he examined witnesses used the words "charges and specifications" which was the technical term in the law system of the United States. It may be a common word in the United States, but, in Japan, we have no such system as to make a distinction between charge and specification. If the judge advocate uses such words and questions the witness, he can not give a correct answer. The judge advocate also asked if the judges took oaths when they were appointed. But in the Law of Japanese Criminal Procedure, there is no such system in which the judges, judge advocates and reporters take oaths at the beginning of the trial. Also in the Japanese Criminal Procedure, the accused can not bear witness in his own behalf. So the accused never takes an oath and takes the witness stand. The accused is questioned by the president of the court, and judges and defense counsel are permitted to examine him by supplementary questions. The Japanese system of oaths of the witness is much different from the American one. In many cases, the witness takes the stand without an oath. The accused under 16 years old, those who can not understand the meaning of the oath, relatives of the accused, accomplices of the accused or employees or lodgers of the accused are questioned without an oath. (Ref: article 201 of the Law of Japanese Criminal Procedure.) The credibility of the witness who did not take an oath is rationally judged by the free convictions of the judges.

The most important problem in the trial procedure of the Mille natives in this case, is that there was no trial in the presence of the accused.

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But according to the testimony of INOUE, MASUDA questioned the accused at the place of their confinement. Why didn't MASUDA summon the accused to his officer at the air raid shelter which he determined as the place of the examination and consultation, and why didn't he question the accused there in the presence of FURUKI, SHINTOME and INOUE? I think it could not be helped on Jaluit which then suffered under continuous air raids and which had no complete air raid shelter. Considering these circumstances, they did not call the accused to the office of MASUDA but questioned them at the place of their confinement which was comparatively safe against the air raids. I think this was the best that could have been made in order to meet the circumstances at that time. I shall not explain here the battle condition of Jaluit at that time, because I think that both the Commission and the judge advocate are already well acquainted with them. It was permissible for Rear Admiral MASUDA, the supreme commander of the Jaluit base, who had the authority to establish specially a temporary court martial, to change a part of the procedure of the Naval Court Martial Law and to adopt a special procedure as the convening authority to meet the terrible circumstances at the time. Common knowledge of jurisprudence will not permit a conclusion that the examination and consultation in this case was not a trial only because the procedure was changed in some points.

Let us observe the SCAP Rules. This is the regulations of a special trial procedure for the trial of Japanese war crimes. The rule adopts a procedure which considerably differs from that of American courts martial. There are quite serious changes in the rules of evidence. The ordinary procedure has been changed in order to meet circumstances which come from the special character inherent in war crimes. Besides, this SCAP Rule is not a law of the United States but was issued and promulgated as an order of the Supreme Commander of the Allied Occupation Forces of Japan. By the order of SCAP, it adopts a different procedure from that of the court martial law of America or other countries of the Allied Powers; especially it is adopting a procedure which relaxes the strictness of such laws.

The judge advocate insists that the examination and consultation for the Mille natives is not a trial on the ground that the trial procedure provided in the Court Martial Law or the Law of Criminal Procedure of Japan was not applied. If the judge advocate pursues this logic to its end, we shall come to a conclusion that a trial conducted by the SCAP Rules is not a trial, because it changes the rules of American Court Martial Law. A trial conducted by SCAP Rules is a complete trial. No one can deny it. The logic of the judge advocate is at fault.

In the above mentioned paragraphs, I have proved that the highest deliberation on Jaluit is a proper court martial according to Japanese laws and that the sentence announced after the deliberation was one announced by a Japanese court martial. There was a trial for the native criminals of Mille in this case.

Chapter 6. THE FUNDAMENTAL THEORY ADOPTED BY THE JAPANESE CRIMINAL CODE.

In the previous FURUKI case tried by this commission, FURUKI, like INOUE in the present case was indicted for the crime of murder provided in article 199 of the Japanese Criminal Code. On hearing the final argument of the prosecution in that case, I found that the judge advocate did not have a full understanding of the Japanese Criminal Code nor the Japanese Naval Court Martial Law. I notice that he was under a gross

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misunderstanding rather than not being well acquainted with that law. I regret to find him arguing in such a preposterous manner because of this misunderstanding. For instance, he mistook the old Code of Criminal Procedure already abolished in the year 1923, for the present Code of Criminal Procedure and he cited articles of this antiquated Code of Criminal Procedure in attempting to rebut the arguments of the defense counsel. This is merely one conspicuous example. Furthermore, he is mistaken when he contended, in understanding article 38, paragraph 2 of the Japanese Criminal Code, that ignorance or mistake of facts can only be considered in mitigation and does not preclude the existence or constitution of criminal intent. This is a grave and careless misunderstanding on the part of the prosecution. I shall make a detailed discussion on this point later. It is indeed technically difficult to translate the provisions of the Japanese Law into English and convey its full implication most truly. It is true that bad translation leads to misunderstanding.

In interpreting the provisions of law we cannot understand the correct meaning of a provision, merely by making a literal grammatical interpretation of it. This is common knowledge among all jurists. In particular, the provisions in the Japanese Criminal Code pertaining to criminal intent are brief. But in back of it there are many cases of judgment and numerous theories of interpretations by the scholars. Without understanding these cases and theories, it is impossible to reach and comprehend the true concept of criminal intent provided in the Japanese Criminal Code. One cannot escape being criticized as careless, to attempt to argue on the criminal intent of the accused, merely by reading article 38 of the Japanese Criminal Code, also, it is impossible to decide the guilt or innocence of an accused for the crime of murder set forth in article 199 of the Japanese Criminal Code without a true understanding of the Japanese Criminal Code in its entirety. Before going into the argument of whether the accused is guilty or not guilty of Charge I and each of its specifications, I would like to explain a bit on the fundamental theory of the Japanese Criminal Code, in order to further the understanding of the members of the commission.

The present Criminal Code of Japan was enacted in the year 1906. At that time, work in amending the criminal code was very intense and new theories on the criminal code were being discussed very enthusiastically. The Japanese Criminal Code was compiled by adopting these new theories and system of that period. The author of the English translation of the Japanese Criminal Code which is now in possession of the Legal Section on Guam and utilized by the judge advocate comments on the Japanese Criminal Code in his introduction as follows:

The Criminal Code of Japan translated and annotated by William J. Sebold.

Preface Page VI

"Even a cursory reading of the 'Criminal Code' will at once indicate it to be a remarkably liberal and modern piece of work. Allowing for certain features which are only suitable for Japan's anomalous civilization and sociological problems, the code wisely places large powers of discretion where they properly belong: in the Courts. Careful provision is made for first offenders, suspended sentence, parole, and for mitigation or remission of punishment when extenuating circumstances exist; on the other hand, sentences are increased for repeated crimes, so that the blow falls heaviest upon those who most deserve it. Another

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feature of the code is the fact that minute definitions of crimes are, whenever possible, avoided, thus obviating many of the technical difficulties in prosecutions so often insurmountable by Western prosecutors. The family system is protected and fostered by waiver of punishment in certain crimes when relationship exists between the offender and his victim. In a country where the entire social structure depends upon the family, in the legal sense, these provisions are natural and necessary. In short, I am definitely of the opinion that the present 'Criminal Code' is admirably adapted to conditions in Japan and to the psychology of the Japanese, and I believe that what is wanted is less tinkering with the basic law and a more liberal application of the inventions of those who drafted the code."

The fundamental characteristic of the present Japanese Criminal Code in short would be, the first important principal element in determining the existence of criminal responsibility, the degree of criminal responsibility (the degree of punishment to be imposed) lies in the subjective mind of the offender, in the intent at the time of the offense, or to put it in a broader sense the mental state and personality of the offender. The outward appearance of the act, the actual harm or danger incurred by the act is only considered of second importance. For instance article 43 of the Japanese Criminal Code reads: "Punishment may be mitigated for persons who have begun to commit a crime without consummating it. If preparation (for a crime) has been voluntarily stopped, punishment shall be mitigated or remitted.

This article implies that even when an offense ended in an attempt and the actual culmination of the act not brought about, the court may impose the same punishment upon the offender as that of an accomplished consummated crime, according to the criminal circumstances. In other words, attempts may be punished in a lighter manner than when it had been a consummated crime, but the court is under no constraint to mitigate the punishment accordingly.

When we consider an act of attempt by giving weight to the act and its result, we should not reserve punishment or mitigate punishment solely on the ground that the crime was not accomplished or particularly because its final consummation was not brought about. But when we consider an attempt by giving weight to the personality of the doer, it is only natural that it be similarly punished as that of a consummated crime, except when the commission of the crime was stopped by his own free will. This is so because the object of punishment is not the act and result of the doer, but the subjective mind or the evil intention of the doer.

Also in the case of a conspiracy - even though the person did not take a part in the actual act of a crime, if he occupied a principal position in the conspiracy, he is severely punished. In a case of instigation article 61 reads: "A person who has instigated another to commit a crime shall be considered a principal. The same applies to a person who has abetted an instigator." For example in a case of murder being instigated, the person who instigated the commission of murder is often punished more heavily than the person who actually carried out the murder.

I shall now explain the provision of homicide as set forth in article 199 of the Japanese Criminal Code. In the old Criminal Code of Japan homicide was divided into two crimes "Bosatsu" and "Kosatsu" (these correspond approximately to murder and voluntary manslaughter in

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the American common law.) And the punishment imposed to each defendant. But the present Criminal Code abolished this differentiation and merely set forth a single crime of homicide. The degree of punishment extended from 3 year's penal servitude up to capital punishment. Furthermore, upon consideration of the extenuating circumstances the sentence may be mitigated to 1½ years penal servitude, and in some cases the sentence may even be suspended. "There are some scholars in Japan who criticize this wide latitude of punishment as being too idealistic and not realistic."

These provisions were not drafted by taking into consideration the tradition in Japan to slight the life of a human being and other persons. A person's life is of vital importance. It indeed is a grave crime to deprive another of his life. But if we consider it from the view of the offender, even if he did commit a grave murder, when there are reasons to sympathize with his motive or circumstances, or when the nature of the offender is in no way dangerous to society and there is no probability of his repeating another crime, then there is no necessity punishing him by effecting a heavy sentence and confining him away from society. This would only be a meaningless punishment. We should give him an opportunity to benefit society by his work rather than to shut him up in a penetentiary. Punishment should not be imposed for retribution or chastisement. Only those whose character are evil and cannot lead an ordinary life in society or who it is feared will repeat their crimes, are the ones who should be confined. This is the fundamental idea. Therefore, I am able to affirm that when we examine the judgment cases in Japan, those who are sentenced to death for murder are practically limited to those who committed murder in connection with robbery or rape. Other than those cases, the sentence does not exceed more than 10 years. Particularly when there is no element of self-interest in the motive of murder, the sentence is very light. For example, there is a case in which an elder brother after a quarrel killed his brother who had been very undutiful to his parents. He was given a sentence of 2 years penal servitude which was simultaneously suspended. There is another case in which a woman killed her child because of poverty; the extenuating circumstances were taken into consideration and she was given 1½ years of penal servitude which was also suspended. Such cases are numerous in the judgment cases of Japan.

Chapter 7 - ON CHARGE I MURDER.

The accused INOUE is not guilty of Charge I.

The act of the accused in the present case in which he killed 8 Mille natives was performed as an act of executing an order in accordance with the order of his superior officer MASUDA to execute the death sentence. This is an act of an official in pursuance of official duty. His act of shooting and killing does not constitute the crime of article 199 of the Criminal Code, in accordance with article 35 of the Japanese Criminal Code. Article 35 reads "Acts done in accordance with laws and ordinances or in pursuance of a legitimate business (or occupation) are not punishable." "Acts in accordance with law and ordinance" means acts which are acknowledgedto be proper, rights and obligations in accordance with the provisions of laws and ordinances, and acts which are acknowledged to be official authority and official duty.

The official duty of a public officer is one example. This duty is an obligation of the public officer duty and at the same time it is his right. There are cases in which the duties of public officials are

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immediately based upon law and ordinances or on the orders of the superior order.

When the order of the superior is formally and substantially illegal, is the act based upon this order legitimate or not? When an inferior is given an order by a superior officer, he can examine the form of the order but he is not allowed to examine the substance of it.

When the order of the superior, was issued within the capacity of the official, when the form of the order complies with the provisions of law and ordinance, and when the matter on which the order was made is within the duty of the inferior officer, and even when the contents of the order are substantially illegal, the inferior officer cannot refuse to carry it out on this ground. moreover when the opinion of the superior and inferior differs as to whether the order has any connection with the duty or not, the inferior must abide by the opinion of the superior, therefore an act done in pursuance of superior order is offical duty, so article 35 of the Criminal Code is applicable and the act does not constitute a crime. This is the established theory in Japan.

Let us consider this in the case of the accused. The death decision for the Milie natives in the present case and which the accused was ordered to perform, is a legally valid decision pronounced by the specially established court martial convened by the legitimate authority of Admiral MASUDA, Supreme commanding officer of Jaluit.

MASUDA is the convening authority of this specially established court martial. In Japanese court martial law the convening authority is called the "chief" of the court martial law. The "chief" has the legitimate authority to order the execution of the judgment. The appeal was not permitted in the present case and the execution was ordered immediately is legitimate decision of a specially established court martial takes effect after one trial, and no appeals are allowed concerning its judgment. (Refer to article 420 Naval Court Martial Law.) Moreover, when the death sentence is pronounced by the Specially Established Court Martial including the temporary court martial, the permission of the Navy Minister is not necessary in carrying it out. The Chief of the Specially Established Court Martial can order it, (article 501 of Naval Court Martial Law.) Therefore the fact that Admiral MASUDA who was the Chief of the Specially Established Naval Court Martial immediately ordered the execution of the death sentence after the pronouncing of the judgment without applying for permission from the Navy Minister, properly belonged to the official duty of MASUDA and the order of execution is not illegal.

The accused acted as judge advocate in the present case, and in his ordinary duty as head of the Special Police, were included the execution of punishment. It was legitimate for MASUDA to order INOUE to execute the death judgment. As for the accused he was under the obligation to obey it. After the execution had been performed, it was made public to all personnel of the armed forces on Jaluit under the name of the Supreme Commanding Officer of Jaluit, Admiral MASUDA. It is evident from this fact, that the execution of the death sentence was no private affair between MASUDA and INOUE, but a performance of an official duty of the Jaluit Defense Garrison. Thus from every point of view, the act of shooting and killing by the accused, is an official duty done by an official and precludes any illegality.

The problems lie in the fact that the decision ordered to be executed included the death sentence for the children. Article 41 of the

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Japanese Criminal Code reads: "Acts of persons under fourteen years of age are not punishable." Therefore it was illegal to pronounce the death sentence upon Siro and Neibet if they were under 14. It is impossible to establish the true ages of SIRO and NEIBET. Most of the testimony in the present case reveals that they were from 10 to 12 or 13. According to the testimony of MANAKO, Tatsuichi, who knew SIRO, the child of RALIME, he states that SIRO climbed coconut trees to gather "Chegaro" and was about 15 years old. According to the deposition of TANAKA, Masaharu the native who attempted to kill him, had a wife about 23 years old and had a child about 6. But it is impossible to ascertain whether this child of 6 was SIRO or not.

In order to contend that the judgment of the children was illegal it is incumbent upon the prosecution affirmatively to prove that they were under 14 years old. Let us assume that SIRO and NEIBET were under 14. It is an apparent violation of the Japanese Criminal Code to recognize criminal responsibility in a child under 14 and pronounce the death sentence upon him. Even if the death judgment was valid in form, the substance of the judgment would be illegal. When a person executed an illegal death sentence, even in case of a superior order, would he have to take the criminal responsibility? It seems that the judge advocate in his opening argument answers this in the affirmative and maintains the guilt of the accused.

But according to the established theory in interpreting article 35 of the Japanese Criminal Code, we are not permitted to drew a conclusion of guilt on part of the accused as was simply done by the judge advocate. This established theory advocates that even in the slightest degree if an act is done in accordance with superior orders within the limit when official obligation to obey exists, article 35 of the Criminal Code is applicable and a crime is not constituted because even if the substance of the order is illegal it is an official act. This established theory is a general theory concerning official and public personnel. The military person is under a still stricter obligation of obedience than the ordinary official. This is a common principle in all countries. Therefore in case of a military person, an official superior order constitutes a much stronger defense.

The military penal code of all the various countries provides stern punishment to those who resist or disobeys superior order. In the Japanese Army and Naval Penal Code we find a provision stipulating the crime of resisting orders. For instance Naval Penal Code, article 55 reads: "One who resists a superior officers' order or who is not subordinate to it shall be condemned to such penalties as follows:

1. In the face of the enemy, he shall be condemned to death or life term or above ten years confinement.
2. In war time or when in need of emergency measures of rescuing ships from above one to ten years confinement.
3. In other cases, under five years confinement."

The Army Penal Code, article 57 reads: "One who resists a superior order or who is not subordinate to it, shall be condemned to such penalties as follows:

1. In the face of the enemy, he shall be condemned to death or life term or above ten years confinement.
2. In war time or in district under martial law, from above one year to 10 years confinement.
3. In other cases, under 2 years confinement."

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Army Judiciary Officer, Lieutenant Colonel SUGANO, Yasuzo gives the following explanation and interpretation concerning the crime of resisting an order set forth in the Japanese Army Penal Code, in his book, "Principles of the Army Penal Code." "The crime of resisting an order protects the implicit nature of superior order, and thereby seeks to maintain the precise and secured operations of the military. The obedience of the inferior to a superior order is to some extent demanded from the point of administrative law, but the relation of obedience in the military is further strengthened and a nature of religious sanctity has been brought about. While in the administrative law, resistence of an order is merely a cause for reprimand, in the military it is subject to penal punishment. This is only a natural outcome because the paramount duty of the military is to give battle and its ultimate objective is victory."

"Substance of an order. It is imperative that the substance of an order belongs to matter within the authority of a superior who is in the proper chain of command. It is generally recognized as a principle that the substance has bearing with the matters of supreme command, but it may extend to matters pertaining to military administration. This is so because the distinction between the two is extremely difficult. Moreover, when the substance of an order is concerned with matters legally prohibited, as for instance an order to commit a criminal act, it is naturally invalid. But the legal effect of obeying such an order must be considered from a different point of view.

"The form of an order. Whether the order is written or verbal, so long as it is issued by the immediate supreior or others who have legitimate authority of command and supervision, the form is complete.

"Efficacy of order. There is no doubt that an order is valid when it is issued by a superior having official authority and when it is concerned with matters within his authority. But there still remains a controversy in view of administrative law that an order even lacking in the substance and form as stated above can be professed to be valid. But the recognized opinion is that when it is acknowledgedto be a superior order by ordinary understanding, then it is considered valid. In other words, concerning such an order, an inferior cannot refuse to obey on the grounds that he differs in interpreting the law and regulation or the facts. But the relation of command and obedience in the military, goes a step further and as a principle does not allow refusal to obey, even if the order is invalid. Other than on such rare occasion when the substance of an order is intuitively perceived to constitute a criminal act by commission or omission of an act, the order may not be evaded. The fitness of an order beyond this limitation cannot be commented upon."

From the provisions of this crime of resisting order, it is evident that in the Japanese military service the duty of obedience to a superior order is almost implicit obedience. Therefore other than when a criminal act is clearly ordered it is construed that the doer of an act in accordance with superior order is free of criminal responsibility as it is performance of official duty in accordance with article 35 of the Criminal Code.

In addition I shall cite the opinion of MINOBE, Tatsukichi, Honorary Professor of the Tokyo Imperial University, Doctor of Law and highest authority in Japan on political science and the constitution of Japan,

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concerning the criminal responsibilities of an act of a military person done in accordance with official order given by a superior order. He states in his famous book "Outline of Political Science" as follows:

"The nature of duty of an army and navy person to the state, in his capacity as a military person differs in no way from that of the ordinary government official, except the discipline of the military person is stricter and consequently the degree of constraint upon him from this aspect is far greater than that of the government official. The most important point of difference in official duty between the military person and the ordinary government official lies in the duty of obedience. In order to promote the fighting power of the armed forces and in order to attain the objectives of armament, military order must have unity, superior order must have implicit effect and the armed forces must be so trained that they will operate as if they were a single organic body with one mind. The government official will only be reprimanded for resisting a superior order but the military person will suffer punishment.

Of course, a military person is required to obey superior orders only when they are valid. But it should be observed that a military order differs from an official order of a government official in the following two respects.

a. As for the military person, even his conduct in private life is to a great deal subject to military discipline. The scope of his private life which is acknowledged as not having relation to his official duty, is very narrow, therefore a military order which seems, at a glance, to belong in private life, in most cases still does not lose its effect as a valid order. Particularly, those military persons who are in service or who are in the battle fields, are subject to superior orders in every phase of their life.

b. Military persons have not, of course any liability to obey invalid orders. But, if the military person is given the responsibilities to examine the validity of an order, and is held responsible for obeying an invalid order, then the military person will fear to obey them. This will lead to obstructing unified military discipline. Therefore it should be construed that acts done in accordance with superior orders, even when the orders are not valid, do not make the person who executes them responsible but chiefly makes the superior who gave out the order responsible. This logical sequence is produced, because the law compels obedience by sanction of punishment."

We must pay special attention to the bold and clear conclusion of the last paragraph which I repeat "Therefore it should be construed that acts done in accordance with superior order, even when the orders are not valid, do not make persons who execute them, responsible, but chiefly to the superior who gave out the order responsible. This logical sequence is produced because the law compels obedience by sanction of punishment."

Doctor MINOBE was by no means a sympathizer of militarism. On the contrary, as a representative liberalist in Japan, he was a scholar against whom from about the year 1930 the militarists harbored extreme antipathy. He was once shot and wounded by an assessin, and during the war in the period of TOJO cabinet, he was a scholar shut out from all social activities.

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This was the bold conclusion of this liberal scholar. This was not an extorted conclusion to sympathize with the militarist but a deduction gained by a rational study of the obedience constrained upon the military person. Therefore I believe it to be a highly correct interpretation.

"Rules of Land Warfare" published by the U. S. A. War Department in 1914, sets forth the following provision concerning the individual responsibility in war crimes. "Individuals of the armed forces will not be punished for these offenses in case they are committed under orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

I believe this provision is of the same view and opinion of the above mentioned Doctor MINOBE.

In the Japanese military forces the duty of obedience is strongly stressed. The handbook of military life which provides the criterion of the military life in the Japanese Army, states as follows concerning duty of obedience."

"Article 11. Orders should be respectfully adhered to and immediately executed. At no time, is it permitted to discuss its fitness or to question its cause, reason, etc."

It is ordered that this passage be memorized on the day a Japanese enters the military service. This was the iron clad rule of the Japanese mililtary forces. The accused INOUE also was compelled to memorize this and to believe this was the iron rule of the Japanese military life. Particularly, in the battle field or in the face of the enemy, this duty of obedience is most strenuously forced upon him. In a sense, the free will of the individual is completely obliterated and he becomes a part of a gear in the prodigious mechanism under such circumstances, we may say that an inferior who is commanded is under psychological coercion. In a case where the coercion is physical or external, it is natural that he is free from criminal responsibility. But there are occasions, when the free will of an individual, is deprived to a greater extent under psychological coercion than under physical. I believe the members of this military commission will understand far better than us, the position and mind of a soldier on a battle field.

I have explained above that the accused INOUE's killing eight natives of Mille with a pistol is an act done in pursuance of an official duty and does not constitute a crime. I would like to argue next upon the finding of not guilty for the accused INOUE on the ground that he had no intent to commit murder. In the statement of the accused INOUE introduced as evidence by the prosecution, he states as follows:

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

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

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"I performed the execution in accordance with the orders of Rear Admiral MASUDA to perform it without any doubt in my mind, believing it was the correct thing to do and properly executed my office."

This state of mind of the accused INOUE was further affirmed by his testimony when he bore witness in his own behalf. This state of mind of the accused INOUE includes the following two facts:

1. He received the order to perform the execution from his superior and was firmly convinced that his act of shooting Mille natives was the act of executing a death sentence.

2. As the result, he was not conscious at all of the unlawfulness of the act of shooting natives, and was convinced that it was absolutely a legal proper act.

By nature, the act of executing a death sentence is the act of carrying out the law and does not constitute a crime. Therefore, when the accused shot the natives of this case believing that it was an act of executing a death sentence, although we may admit his intention of shooting the natives, he had no intent to commit a crime. So we can once deny the existence of his criminal intent. If the act of the accused which he believed to be the act of executing a death sentence is not legally admitted to be so, this is the mistake of fact and law.

How the Japanese Criminal Code, judicial precedents and theories on the law solve this question of mistake? The provision for the criminal intent in the Japanese Criminal Code is summarized in three simple paragraphs of article 38 thereof. Article 38 of the Japanese Criminal Code states:

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

(1) Conception of criminal intent.

The above cited article 38, paragraph 1 only provides that the act done without criminal intent are not punishable, but does not positively answer to the question "what is criminal intent, or intent to commit a crime?" It does not clearly show the elements necessary for criminal intent. Then a question arises, "Is the cognition of unlawfulness necessary for criminal intent?". This question is whether the cognition of unlawfulness is the necessary condition for criminal intent in addition to the cognition of fact. The criminal cognised the fact of crime. As in this case, he cognized his act of killing with a pistol. But he was convinced with reasonable grounds that his act of shooting is the act permitted by the law and was not conscious of unlawfulness of his act. Does criminal intent exist even in such a case? Since the present Criminal Code was promulgated in 1908, this question was being earnestly discussed in the scientific society of Japan in connection with the problem of ignorance of the law in article 38, paragraph 3 of the Criminal Code, when the world of criminal law of Europe was discussing the same problem. This problem was discussed in such a form of question as: Does criminal intent exist when a man believes that his act is legally permissible? At the beginning of the years of Showa (TN - 1926

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is the 1st year of Showa), this question was almost solved by judgment of the court and the theories on the law, and the interpretation became agreed to the point that the cognition of unlawfulness is necessary for the establishment of criminal intent.

A famous judicial precedent concerning this problem which has often been referred by jurists is the judgment of the court martial in the so-called Amakasu Case.

There was a military police captin named AMAKASU who believed that the propaganda of socialists and anarchists is harmful to Japan. In 1923, at the time of the Great Earthquake of Kanto District, martial law was enforced in the district and people were feeling uneasy by various rumors. At that time, he killed with his subordinates, Ohsugi Sakae, a leading man of socialists whom he had been watching, his wife and child. This is the outline of the incident.

Then, by the order of AMAKASU, two military police PFC's killed the child who was then 7 years old. The court martial announced not guilty for these PFC's admitting that they killed the child without knowing that it was a crime. The reason was that, although they admitted the fact of killing the child, they believed that their killing was the act permitted by the law and did not know that it constituted a crime.

I shall refer the whole paragraph of the judgment as follows:

Acts done without criminal intent. (Judgment of Court Martial of 8 December 1923. Law Journal No. 2195, page 7.)

"While in the active service, the accused MASAHIKO was the head of the Shibuya Detachment of the Tokyo Military Police and the accused KEIJIRO was attached to the Special Higher Police Section of the Tokyo Military Police Headquarters. While engaged in their duties, MASAHIKO as a result of studying socialism, acknowledgint that this principle was harmful to the state, particularly such a doctrine as anarchy which denied all powers and which was impompatible with the glorious constitution of the empire, formed the belief that the speeches and acts of those who advocates these principles should in no way be overlooked or left alone. It so happened that when in September 1, 1923, a great earthquake and fire occurred in the district of Kanto, wild rumors spread that recalcitrant Koreans, availing themselves of this opportunity, had attempted riot and arson. Though the Imperial Ordinance No. 399 was proclaimed on the 2nd day of that month, murder, arson and other crimes continuously occurred and the insecurity and the excitement of the residents in the capital and its vicinity reached a culminating point. What change the social situation would undergo was unpredictable. Moreover, learning rumors that behind the recalcitrant Koreans the socialists were in action and also through other terrifying information MASAHIKO came to know that though most of the socialists were arrested by the police, OSUGI, Sakae leader of the anarchists regarded as most dangerous was still at large. MASAHIKO was deeply concerned about OSUGI and his followers and feared that, after the military guards were evacuated and while order was not as yet restored and distribution of food inadequate, they might take advantage of the situation and attempt some kind of a riotous act. At this time, he believed that if he killed OSUGI, it would serve to eradicate the evil roots in the nation and secretly awaiting this opportunity. OSUGI was being tailed by the police, so MASAHIKO regretted that he could not accomplish his purpose. Just at that time, MASAHIKO

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learned that the Yodobashi police had the intention of "getting" OSUGI. MASAHIKO revealed his intention to KEIJIRO and had him ascertain the facts about the Yodobashi police. On the 15th of the same month KEIJIRO came to report that it was the intention of the police, that if the M.P.'s were willing to get OSUGI they would release the man tailing him and would support the M.P.'s by other means. He also reported that after the earthquake OSUGI usually took his child out for a walk in the evening around Toyama Fields. MASAHIKO concluded that this was a hint to kill him. Saying that this was the opportunity he determined to kill OSUGI. Conspiring with KEIJIRO, MASAHIKO intended to kill OSUGI at the said Toyama Fields. At 5:30 p.m. of that day, MASAHIKO and KEIJIRO without telling the situation to the accused YASUGURO and SHIGEO who were both their subordinates, took them along and went to OSUGI's residence located in 372, Kashiwagi, Yodobashi-cho, Toyotama-gun, Tokyo. There they waited for OSUGI, but, as he did not come out, they were not able to accomplish their purpose. At 2 p.m. of the next day, on the 16th of the month, with the same purpose, MASAHIKO and KEIJIRO took the accused RIICHI and SHIGEO, both their subordinates who knew nothing of the situation and went to the vicinity of OSUGI's residence. But, when they arrived at the place, MASAHIKO and KEIJIRO were told by a policeman of the Yodobashi Station that OSUGI and ITO, Noe, his common-law wife, had gone out about 10 a.m. that morning and would not return until evening. They waited his return by the road near his residence. About 5:30 p.m. OSUGI, his wife NOE and SOICHI (a nephew aged 7) came to the place where they were waiting. After MASAHIKO and KEIJIRO consulted each other, they told OSUGI that they had a few things to investigate and demanded he accompany them to the M.P.'s together with NOE and SOICHI, OSUGI was taken to the Tokyo M.P. Station, Otemachi, Kojimachi-ken, Tokyo City. They were lead upstairs into the former office room of the Head of the M.P.'s which had not been used since the earthquake. They rested there. MASAHIKO having made previous arrangements with KEIJIRO, had him bring OSUGI to the former office of the Commander which was also not in use then and located in the second floor of the M.P. Headquarters on the same premises. KEIJIRO had OSUGI sit with his back towards the door as previously arranged. On about 6:30 p.m. of that day, while KEIJIRO was talking with OSUGI, MASAHIKO suddenly entered the room and putting his right forearm around OSUGI's throat, with his right hand grasped his left wrist and tightly pulled it back. When OSUGI fell from his chair, MASAHIKO pressed his right knee against his back bone and strangled him to death. While MASAHIKO was strangling OSUGI, KEIJIRO was in the hall on the lookout. Then, MASAHIKO and KEIJIRO went down stairs and returned to the office of the Kojimachi M.P. in the aforesaid building. They discussed the disposal of NOE and SOICHI. As NOE was the wife of OSUGI and a sympathizer of his principles, and as the western history of revolution showed that women sympathizers were in the crido sometimes superior to men, the found it necessary to kill her. After plotting together, they decided MASAHIKO would do the act. As regards SOICHI, MASAHIKO believed that he was the child of OSUGI, but he hesitated in killing the child because he did not have the heart to do it. But, KEIJIRO feared that if the child was spared, it would expediate the expose' of the incident and insisted upon killing the child. MASAHIKO had no choice so he agreed. But neither desired to perform the act, so they decided to have a subordinate superior private do it. Plotting together, they called the abovementioned YASUGURO and SHIGEO to the office. KEIJIRO then ordered both to kill SOICHI. MASAHIKO directed them to kill the child after he had disposed of NOE. Both accused YASUGURO and SHIGEO had always had great confidence in MASAHIKO and immediately obeyed without reckoning that it would constitute a crime because of the emergency situation under martial law. MASAHIKO and KEIJIRO then

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accompanied by YASUGURO and SHIGEO left the room and went upstairs to the office of the Head of the Military Police. MASAHIKO had a few words with NOE and finding that she was rather delighted over the chaotic situation, ascertained that his opinion of her was in error. MASAHIKO then took SOICHI to the adjoining room of the former Special Higher Police Section and entrusted the child to YASUGURO and SHIGEO. MASAHIKO then returned to the former room of the chief and subsequently left the room. On about 9:30 of that night MASAHIKO returned to the same room and while NOE was talking with KEIJIRO, strangled and killed her from the rear, by the same method used against OSUGI. KEIJIRO was in the hall on the lookout. On about the same time, at the said office, YASUGURO with his right forearm pressed around SOICHI's throat strangled and killed him. The preceding acts of the accused MASAHIKO and KEIJIRO were regarded as done under a continuation of criminal intent. This is established by summing up the above facts. Concerning the point of continuation of criminal intent of the accused MASAHIKO and KEIJIRO, this is acknowledged by their statements. Reflecting upon the law, the act of MASAHIKO and KEIJIRO killing OSUGI and NOE , and the act of having a superior private kill SOICHI, comes under article 60, article 199 and article 55 of the Criminal Code; and therefore both are sentenced to penal servitude within the limit of the respective crime; namely the accused MASAHIKO 10 years and the accused KEIJIRO to 3 years penal servitude. As the act of the accused YASUGURO and SHIGEO were done without their being aware of the fact that it would constitute crime, that is as it is an act without criminal intent, it is disposed of in accordance with article 38, paragraph 1 and article 403 of the Army Court Martial Law. In the indictment of the accused RIICHI as regards the charge that when NOE and SOICHI were being killed, he was on the lookout knowing of the situation, the fact that he was there is clear, but the evidence that he was on the lookout while aware of the situation, is not sufficient therefore he is acquitted in accordance with article 403 of the Army Court Martial Law.

We must take notice in this judgment that the principal officer, AMAKASU was sentenced to 10 years imprisonment with penal servitude. From this fact we can see that the sentence for these military men was not lenient from the point of view of Japanese militarism. This is the standard of punishment in Japan for murder without selfish motive as stated before.

Then, what was the attitude of Japanese scholars toward this judicial precedent? As a reference, I shall cite the commentary on this judgment written by Dr. Makino, Eiichi, a professor emeritus of the Tokyo Imperial University, an authority of the subjectivism criminal theory in Japan.

Makino, Eiichi: Study of Criminal Law, vol 3, pp. 114-125, incl.

CHAPTER FIVE

CONSCIOUSNESS OF UNLAWFULNESS AND CRIMINAL INTENT

"We may realize that the so-called Amakasu Case furnished us with new material about the problem concerning the relation between the consciousness of unlawfulness and criminal intent. So I want to discuss this briefly. The main point of the case concerns the fact that K and H, both Military Police PFCs, killed a victim named Soichi (age 6) by the order of their superior, Amakasu, Military Police Captain, I shall summarize the judgment of the case as follows:

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'At that time, Amakasu Masahiko believed that Soichi was the son of Osugi. He had not the heart or the courage to kill such a child and hesitated. But Mori Keijiro (then a military police sergeant major, the accomplice) insisted upon the killing on the ground that the incident would soon be discovered if they left the matter as it was, and Amakasu was obliged to agree to attempt it. However, both of them did not want to do it themselves, and they decided to order their subordinate PFC to do it. They they plotted together and called the said K and H. Mori Keijiro ordered them to kill Soichi, and Amakasu Masahiko told them to do it after he killed Noe (Osugi's wife.) Since the two accused usually placed confidence in Amakasu, they obeyed the order then and there, without knowing that it was a crime in the emergency case under martial law..... The accused K and the accused H committed the crime without knowing the fact that their acts were crimes. So there is no intent to commit a crime in their acts..... Therefore, the judge finds them not guilty.' (Announced on 8 December 1923, reported on pp 7 - of the Horitsu Shimbun #2194 on 18 December 1923.)

"This judgment was pronounced at the Court Martial of the 1st Division. Since there was no appeal, this finding was the conclusive one. In this finding, what the accused believed that the act had not been a crime as it has been 'in an emergency case under Martial Law,' was regarded as the fact that they 'did not know that it had been a crime.' But as they thought that their acts lost their unlawfulness on account of certain circumstances, they made a mistake concerning the unlawfulness of their acts. It should be the question whether such a mistake is a mistake of the fact or a mistake of law.

"The judge, in his judgment that the accused 'did not know the fact that it had been a crime,' would have thought that it was a mistake of the fact. But the accused thought that their acts were legally not a crime because they were done in emergency. There is no inconsistency between the objective fact of the act and the subjective consciousness of the act. But the accused was mistaken about the legal value of their acts, although their acts legally constituted a crime in fact. Therefore, the character of the mistake is not a mistake of fact but a mistake of law.

"Then, in what case does a mistake of law, in other words namely the consciousness of a certain unlawful act is not unlawful preclude criminal intent? It is an established theory that the meaning of paragraph 3 of Article 38 of the Criminal Code is that a mistake of law has no influence upon the existence of criminal intent. If we get to the bottom of this point of view, the acts of the accused in this case are sufficient to constitute a crime. But in our country, there has already been a forcefully different opinion against it. That is, the consciousness that the act is not unlawful justifies the fact that there is no criminal intent. This opinion is prominent in the academic society of Germany, and this judgment should be considered in connection with this theory.

"Of course, I don't agree with this different opinion unconditionally. But at the same time would like to consider the former established theory with two limitations. That is: (1) Paragraph 3 of Article 38 of the Criminal Law can not be applied to a 'dilit ligal." (TN - There is a thought to classify the crime in two categories: one dilit naturel or natural crime, another dilit ligal or legal crime. The former expects, as a matter of course, the standards of the public peace and good manners

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and customs against their violation; the latter another establishes the standards first by the law and gives punishment in order to enforce the standards.) (2) We must put into consideration how a mistake influences the substance of the consciousness on the mistake of the unlawfulness of the act.

"Let us consider the first point. If it is dilit ligal which stands against dilit naturel, the substance of an act can not be deemed anti-social by the common sense of the society. So, when one dares to commit dilit ligal, we can not understand that he has an anti-social intention if he does not recognize the unlawfulness of his act. We can say only concerning a dilit naturel that the consciousness of the fact means the existence of anti-social intention.

"The second point is, in brief, an enlargement upon the said view concerning the consciousness of unlawfulness about a dilit naturel. The substance of dilit naturel is naturally anti-social as the common knowledge of society. So, to commit an act recognizing the fact is naturally the manifestation of anti-social intention. This is the meaning of paragraph 3 of Article 38 of the Criminal Law which signifies that a mistake of law does not influence the existence of criminal intent. But, under special circumstances which justify the fact that there is no intent, there may sometimes arise a doubt, in the common knowledge of the society, as to whether the act is anti-social under such circumstances. In other words, even if an act belongs to dilit naturel in its substance (murder in this case,) the act gives rise to doubt as to whether or not it violates the public peace and the good manners and customs in the common knowledge of society under certain circumstances (the order of the superior under Martial Law in this case.) Even when such an act is not legally permissible under such circumstances, the mistake of law may justify that the fact there is no anti-social intention, if it can be natural to consider that the act is permissible in the common knowledge of society because of ignorance of the law. In such a case paragraph 3 of Article 38 of the Criminal Law should be limited by rational grounds.

"Considering this point of view of mine, there is a question whether the circumstances, to wit receiving orders from a superior who is a reliable military man under Martial Law, does, in reality make the act unrecognizable as an unlawful one in the common knowledge of the society. The judgment answered to this question in the affirmative. It should not be determined formally or logically whether the answer should be affirmative. As the matter concerns the unlawfulness of the act, it should be determined by summing up the interpretation of the social psychology and the judgment of its merit. And the affirmative answer of the judgment gives us the important material on this point.

"This judgment determined that the accused had no criminal intent. In other words, it did not apply Article 35 to the acquittal of the accused. This presumes that the order of the superior is not absolute even among military personnel. That means, if the accused had had a proper knowledge of the law, it would have been their duty to disobey the order. Article 57 of the Japanese Army Criminal Code provides that the violation of the order of the superior in the area under Martial Law shall be punished with more than one year or less than seven years. But if the accused violated the order in this case, the provision of the Army Criminal Code would not be applied.

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"This judgment was not content only with the obedience of the superior's order when it determined that the accused had had no criminal intent. It set forth first that the act was done under Martial Law, and made it clear that "emergency" had to be seriously considered. It gave next that the accused 'usually had placed confidence in Amaknsu Masahiko,' and showed that the fact of the confidence had a great influence upon the determination of the accused's intention. In these two considerations this judgment presumes that the order of the superior is not absolute even among military personnel. If a subordinate commits a crime only because it is the order of his superior, it doesn't make any difference as to the constitution of the crime.

"Lastly, I hope this decision of the Court Martial may be the opportunity to let people admit my view concerning the effective law. If Article 38 of the Criminal Code is amended in the future, paragraph 3 thereof will have a conditional clause that there are two cases: one, the punishment will be remitted, another a finding of not guilty will be announced. I think however, even without such a judicial amendment, it ought to be properly admitted from now on under a rational conception of criminal intent."

I request your special attention to the last part of this essay, Dr. Makino says that it is quite natural as a rational understanding of criminal intent, even before the amendment of the provision regarding to this point, to admit the meaning of this judgment as an interpretation of the provision. This essay was written in 1925. This judgment was the turning point. At present, as Dr. Makino insists, by the rational interpretation of criminal intent, all theories and judicial precedents say that the recognition of unlawfulness is necessary for the establishment of criminal intent.

On the basis of the abovementioned established conception of criminal intent in the Japanese Criminal Code as a premise, I affirm that the accused has no criminal intent. The accused was not at all conscious of the unlawfulness of his shooting, and believed that it was a legally proper act. Besides, there were reasonable grounds to believe that it was legally a proper act. He was not simply ordered to kill as the soldiers acquitted in the Amakasu case were, he was ordered to perform the execution of the death sentence. Besides, he was the investigator for the crimes of these natives in this case. So he was convinced that they were criminals who had committed such serious crimes as spying, murder, etc. He was convinced that Masuda had the proper authority to announce the death sentence for these criminals.

(2). ON MISTAKE OF FACTS.

Article 38, paragraph 3 reads "A person who without knowledge (of the fact) has committed a grave offense (crime) cannot be punished in proportion to its gravity."

This is a provision setting forth one occasion of mistake of facts. This provision is difficult to understand, so when it is translated into English it becomes very difficult. In the FURUKI case the judge advocate cited this provision and argued that in the Japanese Criminal Code mistake of facts does not preclude criminal intent and may only be considered as a matter in mitigation. He stated, "In fact, it appears considerably less of a requirement because it seems that for all serious crimes, even ignorance of the facts will only be considered in mitigation."

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This is a grave misunderstanding. In the Japanese Criminal Code also, mistake of facts or ignorance of facts does preclude the constitution of criminal intent.

Article 35, paragraph 2, merely provides the self-evident fact that, even if in fact a serious crime is committed, when there was no intent to commit a serious crime, the person cannot be condemned for that serious crime.

For instance, in Article 200 of the Japanese Criminal Code a parricide is more heavily punished then ordinary homicide, set forth in article 199. When a person intending to kill his friend, thought the person was his friend, and shot his pistol, but the person was, in fact, his parent. In this case he is punished by ordinary murder as set forth in article 199 and not for the crime of parricide as set forth in article 200. This is the meaning of the article.

There are two kinds of "mistake of facts." One is a simple mistake of fact, the other is the misunderstanding of law, or a mistake in the application of the law and a misunderstanding that certain facts exist or certain facts do not exist. The latter case is often mistaken for the "ignorance of law" set forth in article 38, paragraph 3, but we must not confuse the two.

Article 38, paragraph 3, which reads "Ignorance of law cannot be invoked to establish absence of criminal intent.", simply implies that when a criminal is punished, it is not necessary for him to know the penal provisions applicable to the act. For example, even if the criminal does not know the provisions of article 199 of the Japanese Criminal Code, the crime of homicide is constituted. This paragraph is merely setting forth the traditional principle of the Roman jurist, namely "Mistake of law is not excusable" (error iuris nocet, error iuris non excusat.) It does not also mean that, when mistake of facts is caused by ignorance or mistake of law criminal intent is constituted. This is the interpretation which all of the judicial judgment and theory agree upon.

As to this point, I believe that the same principle is adopted in the U. S. A.. For example Wharton's Criminal Law reads:

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

"Paragraph 104. Mistake of law admissible to negative evil intent."

Cases also may occur in which evil intent is a condition precedent to conviction, but in which a mistake of law, if proved, would negative such evil intent. Thus in larceny it is admissible to prove that the defendant took the goods under a claim or right, however erroneous; in malicious mischief, that act was believed to be the exercise of legal right.

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

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

I shall cite an eminent case of judicial judgment on this point.

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Mistake in the interpretation of the Code of Civil Procedure precludes criminal intent in the crime of destroying the seals or mark of attachment on things under attachment. (Digest of Legal judgment of the Supreme Court 1925, section 1831, Criminal Section Decision February 22, 1926.) (Digest of Legal judgment of the Supreme Court, Vol. 5, Criminal Section, page 97.)

Article 38, paragraph 3 which reads "ignorance of the law cannot be invoked to establish absence of criminal intent," clearly purports that a mistake of the illegality of a crime does not preclude criminal intent. The existing Criminal Code clearly distinguishes between mistake of general illegality of criminal act and mistake of facts which forms the component elements of the criminal act itself; and only when the latter exists, is it considered that there is no criminal intent. This is so because there should be a clear distinction between the general illegality of criminal acts and the component parts of the criminal acts itself, and because naturally, mistakes in regard to the above distinction have different effects. But when the mistake of facts which constitute the component element of the criminal act itself, is caused as a result of negligence of law or error in its application - for instance to be under a mistaken belief that the component element of the crime had not existed or under a mistaken belief that he had the right to exercise the facts which constitute the component element - in such a case, the mistake primarily has no relation with the general illegality of criminal acts, but comes to be a lack of cognizance for the component element of the criminal act itself, therefore the existence of criminal intent should be denied. It may be said, as regards certain crimes, that the criminal law relies for its contents on the provisions of the civil code or public law in determining its component element. When in the civil or public law, an act is regarded as the exercising of one's rights or a legal act provided in the provisions of the criminal code has lost its effect, then also in the criminal code that criminal act possesses only an outward appearance and in substance it would not fulfill the component element of the crime. In this case article 38, paragraph 3 should not be applied, but a crime set forth in article 96 of the criminal code is the one that actually corresponds to the above case. The provision of this article purports as the component element, the act of destroying or damaging without right, the seal or mark of attachment, prior to losing its effect or to make void the seal or mark of attachment by other means. When in accordance with civil procedure law or other public law, when it is interpreted that the effect of the attachment is lost or when the right to destroy the seal is acknowledged even though the formalities of the seal etc. exists; then it is only proper to construe that the element of this crime is absent. Therefore, when by misinterpretation of the civil procedure law and other public laws, the defendant is under the mistaken belief that the attachment does not exist because the attachment had lost its effect, or when he is under the mistaken belief that he had the right to destroy the seal, etc; in such case we must say that the criminal intent of the crime is precluded. According to the original decision of the present case at the original trial, the defendant was told by the person who arbitrated the attachment that he had repayed the debt involved in the present case so that the seals on the attachment thing could be taken off. Accordingly the defendant states that he took them off. Therefore the original court, in view of this statement, should have investigated the fact that, whether because of the repayment by the arbitrator the defendant was under the mistaken belief that the attachment had lost its effect and no longer existed, or whether he was under the mistaken belief that he had the right to take off the seals and marks.

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And because this mistake had relation with the component element of the crime in this case, the original court should have established whether this lead to the conclusion of non-existence of criminal intent or not. But the original judgment did not establish the above pertinent point and regarded the defendant as merely claiming the ignorance of law. The defendant was pronounced guilty but this judgment is illegal since guilt was acknowledged without establishing the pertinent facts concerning criminal intent.

Let us study this point with reference to the accused in this case. On receiving the order of executing the death decision from MASUDA, the accused performed the shooting and killing of these Mille natives as ordered, and it was an act of executing the death sentence. He truly believed his act was legally right as an act of executing the law. Let us assume that later, it was established that the death decision was invalid. And the act of executing the death decision by the accused was not in a legally strict sense, an act of execution. Therefore, in this case, the accused was under the mistake that his act of shooting was an act of executing the death decision. He fell into this mistake by ignorance or misunderstanding the laws pertaining to trial, judgment, etc, or by the mistake in applying the law concerning trial or judgment.

This mistake is the same mistake as in the case of the above cited judicial precedent. Thus, in this case it is not ignorance of law as set forth in article 35, paragraph 3, but mistake of facts growing out of ignorance or mistake of law and as a principle negates the constitution of criminal intent. Moreover, there was reasonable reason for the accused to believe that his act of shooting was an act of execution of the death judgment. As regards this point, I believe I have already discussed in detail in that part when I argued the act of the accused was that of performing official duty.

Thus the mistake of the accused is not a mistake of law as set forth in article 38, paragraph 3 which does not preclude the constitution of criminal intent, but mistake of fact which precludes the constitution of criminal intent. In the foregoing, I have divided mistake into mistake of law and mistake of facts and argued and established the reason for the accused in not having criminal intent.

Members of the commission, I wish to reiterate that the acts of the accused in shooting and killing the Mille natives, is only an act of executing an official duty and is free of illegality. It is not an act to constitute a crime. Even if it is not acknowledged as an act of executing official duty, from the interpretation of criminal intent in the Japanese Criminal Law, the accused did not have the slightest criminal intent to commit murder.

Therefore, viewing it from every point, I maintain that the accused is not guilty as to Charge I.

Chapter 8. ON THE CRIME OF VIOLATING THE LAWS AND CUSTOMS OF WAR IN CHARGE II.

I firmly believe that the accused is not guilty of Charge II and each of its specifications.

1. According to each specification, it is set forth that the accused killed, punished and caused to be punished these Mille natives as spies, without previous trial. But as I have already stated there was a trial

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held for these natives. Particularly, article 35 of the Hague Convention merely mentions trial and does not limit as to what kind of trial. According to the customs of various countries, not only a general court martial but a simplified military commission is also recognized as a trial. Since a trial in substance was held for these Mille natives, I do not believe that because a trial was not held in accordance with the provisions of the Japanese Criminal Procedure Code or Japanese Court Martial Law, we cannot hold that there was no trial held as stated in this commission.

2. When we make a rational interpretation of the legislative spirit of article 30 of the Hague Convention, the definition of spy in this article means foreign spy and not domestic spy. I shall not burden the commission with detailed argument on this point as I have already discussed it in my objection to the jurisdiction. Nevertheless, these Mille natives at the time of the incident were native inhabitants of the Japanese mandated territory. Thus, in substance they were subjects of Japan and under the sovereignty of Japan. They were not foreigners. Therefore, even though they were punished without trial as spies under domestic law, it would not constitute a war crime in violation of the Hague Convention.

3. Concerning the Mille native incident, I have already stated that the part played by the accused was merely the act of carrying out the death judgment which had been decided. What is prohibited by article 30 of the Hague Convention is not the execution of a spy himself, but to punish a spy who is caught in the act without previous trial. The punishment of these natives was decided by the alleged "highest examination and consultation on Jaluit" composed of MASUDA, FURUKI, and SHINTOME. The accused acted as judge advocate but did not take part in deciding the death judgment. The accused was ordered merely to carry out the death judgment and did so. The acts of the accused in no way violate the Hague Convention, article 35.

4. The accused was in charge of executing the Mille natives in the present case. But it was in accordance with superior orders. It was in pursuance of the order of MASUDA, Supreme commanding officer of Jaluit. SCAP Rules provide that "superior orders" is not a defense, "Action pursuant to order of the accuseds' superior shall not constitute a defense." But we must carefully interpret what this provision purports. I believe it means that responsibility cannot be evaded solely relying upon the reason that the action was pursuant to superior order. But I believe that it is acknowledged as a defense when there exists other recognized reasons for defense against domestic crime. And I believe this is only proper and natural. Furthermore, I cannot think that in a war crime trial, it is permissible to ignore the criminal theory recognized by modern civilized nations.

I am under the understanding that in the reason for the SCAP Rules in not providing in detail the elements to constitute a war crime, it is not meant to do away with the application of existing criminal theory, but the reason is to reserve it to the existing criminal theory.

Therefore in constituting a war crime criminal intent is necessary. In some cases, actions growing out of flagrant necessity may constitute a defense. I believe what is meant by actions pursuant to orders of a superior or government do not constitute a defense, is that it does not preclude the constitution of illegality as a war crime. When there is not the slightest evil intent in an action, even pursuant to superior orders, I believe it to mean that the criminal should be acquitted.

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If the act done by the order of the superior is guilty, military men, especially military men of low rank are always in pitiable situation. Professor Sheldon Glouck, in his "War Criminals, Their Prosecution and Punishment" pictures this awkward situation of them as follows:

"Admittedly, the ordinary soldier is in an unenviable position in time of warfare. He has a dual obligation: to the ordinary criminal law which prohibits certain acts on pain of punishment, as well as the military law which compels him to obey the orders of his superior. Receiving a command from his officer to carry out an act contrary to the laws and customs of legitimate warfare, he may or may not know the act to be unlawful under the circumstances. Even if he does know it to be illegal, it seems hard to hold him responsible when all his military training has stressed the duty of instant and unquestioning obedience; and this is still more true if he does not know the order to be unlawful."

He remarks that there are following three situations in which they receive the orders of a military superior:

"It is not generally realized that in respect to the duty of obedience, there are gradations that make the task of soldiers especially difficult. At least three situation are possible: (a) The order appears to be regular and lawful on its face; (b) the order is so manifestly beyond the legal power of discretion of the commander as to admit of no rational doubt of its unlawfulness; (c) there is a room for reasonable doubt as to whether or not the order on its face is lawful."

Then he makes the following two theories compromise from the view point of deep consideration of humanity. 1. The order of a military superior may exempt a soldier from his responsibility as a war crime; 2. the order of a military superior can not exempt him from responsibilit in any case. And he shows his proper conclusion as follows:

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

I think, even under the stipulation concerning the order of a military superior in the SCAP Rule, such interpretation as this one should naturally be permissible. According to the interpretation as this one should naturally be permissible. According to the interpretation of Sheldon Glueck, if a man, who did an act in pursuance of the order of his military superior, does not know the unlawfulness of the order, or if there is a reasonable ground for his ignorance of unlawfulness, his responsibility of war crime may be exempted. This interpretation is an appropriate theory which has a deep understanding for the situation of military men in the war.

The accused did not know that the order of execution of the death sentnece issued by M/SUDA is unlawful at all. He knew that these Mille natives had committed serious crimes, and was convinced that a careful deliberation was convened for those criminals with the best procedure applicable to the circumstances of Jaluit in battle conditions. He believed that, according to the despatch from the Commander-in-Chief of

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the Fourth Fleet at the beginning of 1944, MASUDA was vested with the authority for everything on the base as the supreme commander of Jaluit, and that the authority to hold a trial was included in it.

Summing up the above, I can find a reasonable ground that the accused was not conscious of the unlawfulness of the order of MASUDA.

The accused did not know the unlawfulness of MASUDA's order, and there was a reasonable ground for his ignorance of the unlawfulness. Therefore he is not guilty for Charge II which alleges him to have violated the laws and customs of warfare.

In my argument I have stated my conviction that the accused INOUE is not guilty of Charge I and Charge II and each of the specifications therein. Honorable President and members of the commission, I respectfully ask your careful and just consideration.

SUZUKI, Saizo.

I certify the foregoing, consisting of forty (40) typewritten pages, to be a true and complete translation of the original argument to the best of my ability.

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

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James P. Kerrick
Lieut USN

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FINAL ARGUMENT

FOR THE DEFENSE OF

CAPTAIN INOUE, FUMIO, IMPERIAL JAPANESE ARMY

delivered by

COMMANDER MARTIN E. CARLSON, USNR.

at

GUAM, MARIANAS ISLANDS.

June 2 - 3, 1947

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The trial of Inoue, Fumio, captain in the Japanese Army, by a United States Navy convened Military Commission for an offense committed on the island of Jaluit in April, 1945, while that island was under siege by the American naval and air forces for an offense against natives of Mille, another island which Japan was defending, first of all involves a question of jurisdiction.

This case is an application of international law as regards the jurisdiction of one country to try a citizen of another country for an offense said to be an violation of the criminal code of that other country, the offense having been committed within the territorial jurisdiction of that other country.

The accused did make a plea objecting to the jurisdiction of this commission to try this accused for the offense and we shall not again repeat our remarks except to show how the facts which have been brought out apply to the law of jurisdiction. Lack of jurisdiction is a fatal defect and the plea may be made at any time. Now that the facts are clear to the commission, we again bring to your attention the lack of jurisdiction to try the accused for the alleged crimes.

Since this is a military commission which is trying this case, it is well that we look into the authority of military commission in these United States of America and particularly this military commission.

The Constitution confers upon Congress the power "to define and punish piracies and felonies committed on the high seas and offenses against the Law Of Nations."

Article I, Section 8(10)

"But, in general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies" and which in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-Chief in war."

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Winthrop's Military Law and Precedents (2d), Vols. 1 and 2, page 831:

"It was not until 1847, upon the occupation by our forces of the territory of Mexico in the war with that nation, that the Military Commission was, as such initiated." By G. O. 20 of Feb. 19, 1947 issued from the Headquarters of the Army of Tampico (as slightly added to by G. O. 190 and 287 of the same series) it was announced that certain crimes committed by Mexicans or other civilians in Mexico against individuals of the U. S. military forces, or by such individuals against other such individuals or against Mexicans or civilians, should be brought to trial by military commissions.

The acts thus made punishable by military commissions were mainly criminal offenses of the class cognizable by the civil courts in time of peace." For the trial and punishment of offenses against the laws of war General Scott inaugurated a separate tribunal designated as the council of war, not however materially differing from the military commission, except in the class of cases referred to it.

The military commission and council of war of the Mexican War were together the originals of the Military Commission extensively employed in the Civil War and recognized in existing statute law; the two jurisdictions of the earlier commission and council respectively being united in the later war court for which the general designation of military commission was retained as the preferable one.

"Presently, also, they were recognized as legal courts, and their jurisdiction in some cases added to by, by express statute."

The Military Commission has also been recognized as an authorized provisional tribunal in proclamations and orders of the President and in rulings and opinions of the courts and law officers of the government."

"A Military commission (except where otherwise authorized by statute), can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander....."

"These rules which have their origin in the fact that war, being an exceptional status can authorize the exercise of military power and jurisdiction only within the limits--as to place, time, and subject--of its actual existence and operation, have not always been strictly regarded in our practice."

"Winthrop's Military Law and Precedents (2d) Vol. 1 & 2, pages 832 to 837 inclusive.

We hold that Commander Marianas cannot legally assume jurisdiction because Jaluit was not within the field of command of the convening authority at the time the offense was committed. Serial 3785 dated February 21, 1947, states: "Pursuant to the authority vested in me by virtue or my office as Commander Marianas Area and Deputy Military Governor, Marianas Area".

The specifications of both charges I and II allege the crimes were committed April 8, 1945, and April 1[illegible], 1945. On those dates Commander Marianas did not have jurisdiction of Jaluit either as Commander Marianas or as Deputy Military Governor, Marianas Area.

The precept (serial 3785 dtd Feb. 21, 1947) further states: "and by the specific authority vested in me by the Commander-in-Chief, U. S.

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Pacific Fleet (CinCPac conf. serial 0558 of March 8, 1947), and Pacific Ocean Areas, and Military Governor of the Pacific Ocean Areas." But the confidential serial 0558 is dated March 8, 1946, and the offenses charged were committed on April 8, 1945, and April 13, 1945.

Thus neither by virtue of his office or by authority of the confidential serial 0558 dated March 8, 1946, did the Commander Marianas Area have authority legally to assume jurisdiction of Jaluit on April 8, 1945, and April 13, 1945.

We go further and state that Commander in Chief, U. S. Pacific Fleet did not legally have jurisdiction of Jaluit on April 8, 1945, and April 13, 1945.

Now, let us read what Winthrop says about jurisdiction of a military commission as regards the time when an offense was committed.

"As to time. An offense, to be brought within the cognizance of a military commission, must have been committed within the period of the war or of the exercise of military government on martial law. As in the ordinary criminal law one cannot legally be punished for what is not an offense at the time of the sentence (citing Com. v. Duane, 1 Bruney, 601; Anon., 1 Wash. 84; US V. Tynen, 11 Wallace, 88; US v. Finlay, 1 Abbott, USR, 364) so a military commission cannot (in the absence of specific statutory authority) legally assume jurisdiction of or impose a punishment for, an offense committed either before or after the war or other exigency authorizing the exercising of military power, (citing See Finalson, Coms. on Mar. Law, 53; Clode, M. L., 189; Thring, Crim. Law of Navy, 42-3; Wells on Jurisdiction, 577; 12 Opins. At. Gen, 200; G. O. 26 of 1366; Do. 12, Dept. of the South, 1868; Do. 9 First Mil. Dist., 1870; Digest 507. "Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed." Pratt, 216. And see Jones, 12. The jurisdiction of such a tribunal is "determined and limited by the period (and territorial extent) of the military occupation." G. O. 125, Second Mil. Dist. 1867) Thus, a military commander in the exercise of military government over enemy's territory occupied by his army cannot with whatever good intention, legally bring to trial before military commission, ordered by him, offenders whose crimes were committed prior to the occupation." (We supplied the italics)

Winthrop, Military Law and Precedent, Volumes I and II, (Reprint 1920) page 837.

We hold therefore that since both Charge I and Charge II allege offenses committed April 8, 1945, and April 13, 1945, there is no jurisdiction of this commission since Commander Marianas did not occupy Jaluit until after August 14, 1945, and did not assume the functions of military government until long after that date. This is true of the crimes alleged in both of the charges, but particularly of the crimes alleged in Charge I.

The specifications 1 and 2 of Charge I allege crimes "in violation of effective law, especially Article 199 of the Criminal Code of Japan, "not by the greatest stretch of the imagination can it be said that Commander Marianas could enforce Japanese law against a Japanese citizen for a crime committed on Jaluit prior not only to the time of occupation by the forces of Commander Marianas, but prior even to the forming of the office of the Commander Marianas Area. Neither can the Commander Marianas Area and/or Deputy Military Governor Marianas Area have cognizance of offenses said to be in violation of the laws and customs of war when the said offenses were committed April 8, 1945, and April 13, 1945, when there was no such office. The confidential document, Serial 0558 of March 8, 1946, cannot give jurisdiction as to offenses prior to March 8, 1946, when the office of Commander Marianas did not exist as far as jurisdiction of Marshall Gilbert Area was concerned, until, we believe,

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about December, 1945.

Let us read what Winthrop says about the jurisdiction of military commission over persons "As to persons. From what has heretofore been said in regard to the application of the laws of war to enemies in arms, and their operation under a state of military government or martial law, it will have been seen that the classes of persons who in our law may become subject to the jurisdiction of military commissions are the following: (1) Individuals of the enemy's army who had been guilty of illegitimate warfare or other offenses in violation of the laws of war; (2) inhabitants of enemy's country occupied and held by right of conquest; (3) inhabitants of places or districts under martial law; (4) officers and soldiers of our own army, or persons serving with it in the field, who in time of war, become chargeable with crimes or offenses not cognizable, or triable by the criminal courts or under the Articles of War".

Of the first class are persons in the military service of the enemy who have been guilty of any of the descriptions of the offenses specified under a previous Title as violations of the laws of war;. . . ."

Only therefore if the prosecution can show that this is a legally authorized military commission having jurisdiction as to place, as to tohthe person and only then if the offense is in violation of the laws of war. But we have shown that this military commission did not have jurisdiction of the place, Jaluit, on April 8, 1945, and on April 13, 1945, nor of the persons on those dates.

We repeat again what Winthrop says on page 837 of his book Military Law and Precedents: "Thus, a military commander, in the exercise of military government over enemy's territory occupied by his army cannot, wi with whatever good intention, legally bring to trial before military commissions ordered by him offenders whose crimes were committed prior to the occupation."

Section D-13 on page 490 of Naval Courts and Boards requires "such specification should show on its face the circumstances conferring jurisdiction." The specifications do not show this because there is no such jurisdiction.

In the civil courts, the rules relating to jurisdiction are the same. In the celebrated Raymond Fornage case it was said, and I quote from the Argument of Mr. Requier: "The right to punish has no foundation except the right of soveregnty which expires at the frontier..... But the law cannot give to the French tribunals the power to judge foreigners for crimes or misdemeanors committed outside of the territory of France; that exorbitant jurisdiction, which would be founded neither on the personal statute nor on the territorial statute, would comstitute a violation of international law and an attempt against the sovereignty of neighboring nations..... When a crime has been committed outside of the territory by a foreigner, the culprit is not subjected by that act to the French law; the French tribunals have no jurisdiction over him; the incompetence is radical and absolute. The criminal court, in punishing the act, would commit an abuse of powers; it would usurp a right of sovereignty apertaining to a foreign power."

The case of Inoue was referred for trial to this MilitaryCommission by charges and specifications from the Commander Marianas Area on March 13, 1947, serial 4445 file A16-2/FF12 over 13-JDM-ro.

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The prisoner, Raymond Fornage, was indicted by the grand jury of the court of appeal and the Fornage case was referred for trial to a court of assizes (composed, in departments where there are courts of appeal, or three judges of that court). The prisoner did not take an appeal, as he had a legal right to do, from the judgment of reference, but proposed before the court of assizes an exception to the competency of that court, based on the ground that, having the quality of a foreigner, the French tribunals could not try him for a crime committed in a foreign country.

Not only did the court of cassation adopt this view, but its judgment (the full text of which is given herewith as Exhibit B) the rule of international law as laid down by the Government of the United States in the Cutting Case, is expressed in terms which, for force, precision, and freedom from doubt or qualification, have not been surpassed. Translated the material parts of the judgment are as follows:

"'Whereas, if as a general principle, the courts of assizes, possesed of a case by judgment of the chamber of indictments not attacked within the times fixed by Article 296 of the Code of Criminal Procedure, cannot declare themselves incompetent. . . . this rule is founded on this, that the courts of assizes, being invested with full jurisdiction in criminal matters, can, without committing any excess of power and without transgressing the limits of their attributes, take cognizance of all acts punished by the French law; but this jurisdiction, however general it may be, cannot extend to offenses committed outside of the territory by foreigners, who by reason of such acts, are not justidiable by the French tribunals; seeing that, indeed, the right to punish emanates from the right of sovereignty, which does not extend beyond the limits of the territory, that except in the cases specified by Article 7 of the Code of Criminal Procedure, the provision of which is founded in the right of legitimate defense, the French tribuansl are without power to judge foreigners for acts committed by them in a foreign country; that their incompetence in this regard is absolute and permanent; that it can be waived, neither by the silence nor by the consent of the accused; that it exists always the same, at every stage of the proceedings;..... Anul, etc. '"

The Fornage case was an attempt by a French court to exercise jurisdiction over a crime committed in Switzerland. The Supreme Court of France said it couldn't be done.

This present case is an attempt by the US Military Commission to Exercise jurisdiction over a crime committed by a Japanese national in Jaluit, a possession over which Japan had exercised sovereignty since 1914. On April 8, 1945, and April 13, 1945, Japan was still in possession of Jaluit. Japanese law was still in effect on Jaluit.

Since the United States had no jurisdictio of crimes which might have been committed on Jaluit, April 8, 1945, and April 13, 1945, they can have no jurisdiction now, especially can they have no jurisdiction to enforce Japanese law on Jaluit. T

The only way that a Military Commission could acquire jurisdiction to enforce Japanese law on the Japanese held possession of Jaluit would be by express statute. There is no such statute.

We respectfully call your attention to the evidence which has been introduced at this trial and which clearly proves that there is no jurisdiction in this commission to try the accused. It has been proved that Captain Inoue, Fumio, the accused is a citizen of Japan; that the acts alleged took place on Jaluit Atoll in April, 1945; that Japan acquired possession of Jaluit byconquest during the First World War; that Jaluit was mandated to Japan by the Treaty of Versailles in 1919 and that Japan occupied Jaluit up until the cessation of hostilities of this World War;

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that in April of 1945, Jaluit was a besieged area to such an extent that Japanese martial law was to all intents and purposes the law in effect on Jaluit because during the early part of the year 1944, in April 1944, all civilian government was abolished and the functions of civilian government taken over by the military on Jaluit; that civilians on Jaluit and on the other Marshall islands which were still occupied by Japan, particularly Mille, were amenable to the military law of Japan.

The witness Inoue testified that from April, 1944, Admiral Masuda administered all affairs on military and civilian on Jaluit. He had full authority over all civilians on Jaluit byvirtue of orders issued by the commander in chief of the Fourt Fleet. The head of the civilian government on Jaluit was ordered to be under the military commander, Admiral Masuda. Admiral Masuda put out an order to each unit and to the native and other civilians on Jaluit stating that he, Admiral Masuda, was head of all affairs on Jaluit. The evidence clearly shows that martial law was in effect on Jaluit in April, 1945.

Winthrop on page 820 of his book Military Law and Precedents says: "The employment of martial law has been likened to the exercise of the right of self defense by an individual. Its occasion and justification thus is necessity." On page 817 he says: "Martial law, as the term is used in this treatise, is military rule exercised by the United States, (or a State,) over its own citizens, (not being enemies,) in an emergency justifying it."

So we see that all evidence clearly points to the fact that martial law was a necessity and was employed by the Japanese on Jaluit in April, 1945. This notwithstanding that the commission refused to take judicial notice of the Japanese Martial Law Statute and refused to admit it into evidence.

In view of what Winthrop says about martial law under the heading "V. The status of martial law and the laws of war applicable thereto." on pages 817 to 830 inclusive, it is most interesting to read the objection of the judge advocate to our motion that the commission take judicial notice of the Japanese Martial Law State as found in the proceedings of the Eighth Day. In his objection, he quoted article 9 of the Dajokan. He said: "The Dajokan Fukoku No. 38 proclamation contains certain proclamations which appear to go beyond the customary boundaries of martial law and the customary rights of the military commander in a situation of martial law. All of these powers and rights however are prefaced upon the actual proclamation and dolcaration of martial law. He cited in this regard particularly Article 9 of the Dajokan Fukoku No. 38, martial law which he said reads as follows:

Prime Minister (it should be Dajokan) proclamation no. 36 [sic] of August 5, 1882: "In a war area, the administrative and judicial affairs of the district, if they are concerned with military affairs, shall come under the command of the commanding officer of the district. Therefore the officials, judges, and judge advocates of the district upon proclamation or declaration of martial law shall immediately come under the command of the commanding officer." This is not a correct translation of either Article 9 or Article 10.

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

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

The judge advocate further stated, "It is primarily because of these differences that the judge advocate objects to the taking of judicial notice of the Dajokan Fukoku No. 38, Martial Law.

We call the Commission's attention to the distinction which Winthrop makes between martial law proper and military government. He says that Chief Justice Chase in the case of Ex Parte Milligan, 4 Wallace 141, gave "the first complete judicial definition of the subject." We refer to pages 799 to 818, inclusive, of Winthrop's Military Law and Precedents where Chief Justice Chase's opinion is sited. In footnote 100 (5) on page 818 we read, To quote again from Chief Justice Chase's definition--it (martial law) is "to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion, within the limits of States maintaining adhesion to the national government, when public danger requires its exercise. . . , within districts or localities where ordinary law no longer adequately secures public safety and private rights." 4 Wallace, 141.

Certainly, the battle conditions and the state of siege to which Jaluit was subjected which is common knowledge and which has also been testified to by witnesses at this trial was such that the public danger to Japan required martial law because ordinary law no longer could adequately secure public safety and private rights.

Several witnesses testified to the battle conditions and the state of siege of Jaluit in April, 1945. Major Furuki on the ninth day testified that there was an order from Commanding Officer of the Fourth Fleet to Admiral Masuda in April, 1944. He said about this order "It stated that each supreme commander of each base should command all military,gunsokus, and government officials, and civilians and administor judicial and administrative affairs."

The accused as a witness in hiw own behalf on the eleventh day of the trial testified as follows: "In February, 1944, after the fall of Kwajalein, the Marshalls area and the other bases were cut off, and all transportation was cut off and by the decision of general headquarters, Admiral Masuda was given the full administrative and judicial authority from April 1944 and thereafter Admiral Masuda administered all judicial and administrative affairs on Jaluit Atoll. From this time, the Jaluit Defense Garrison was organized."

"When Admiral Masuda was given the authority by the commanding officer of the Fourth Fleet, he called all the commanding officers together and relayed them this order and from this time the natives were included in the Jaluit Defense Garrison and all civilians were given the situations of gunzokus, and the head of the civil government on Jaluit was ordered to work under Admiral Masuda, and from the fact that Jaluit Defense Garrison was organized, I know this."

Althought it is common knowledge that the American forces bombed and shelled Jaluit continuously so that Jaluit was a besieged area in April 1945, the judge advocate would have the commission believe that notwithstanding

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the due straits of Jaluit that civilian government still prevailed. How fantastic! If ever an area was a battlefield, it was Jaluit in April 1945. And on a battlefield, civilian government does not prevail. The military rules supreme.

This is so fundamental that it should require no proof. Chief Justice Stone delivering the opinion of the Supreme Court of the United States in the Matter of the Application of General Tomoyuki Yamashita, No 61 Miscellaneous and 672 October Term 1945 on February 4, 1946, said, "An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seige and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort, have violated the law of war."

The judge advocate by the charges and the specifications questions the right of the Japanese military commander on Jaluit, Admiral Masuda, to take such steps as he saw fit to defend Jaluit. The judge advocate questions the right of the military authorities on Jaluit to seize and subject to disciplinary measures certain person who did attempt to impede the military effort of Japan on Jaluit. He questions what the military did in the field of combat at Jaluit. There is a maxim about the law becoming silent in the noise of wars.

The war on Jaluit in April 1945 was not at all an agressive war as far as Japan was concerned. Japan was strictly on the defense. All measures taken were self defensive measures.

"There is nothing in the American draft of an antiwar treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and <u>it alone is competent to decide</u> whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action." The Nurnberg Trial and Agressive War, by Sheldon Glueck in Harward Law Review Vol 59, February 1946, page 404, citing in footnote 32, Treaty of Renunciation of War [Dept of State Publication 468 (1933) 5]7 (italics supplied). It will be noticed that the analogy to the law of self-defense in criminal cases, which has frequently been said to exist, is not sound; for in that field it is the jury and the tribunal, not the accused, which determine whether or not there was legitimate self-defense, while the provision in the Briand-Kellogg Pact left it to the implicated State itself to decide whether or not it had legitimate grounds for a self-defensive resort to war. See Borchard, The Multilaterial Treaty for the Renunciation of War (1929) 23 Am. J. Int. L. 116.

So on Jaluit late inthe month of March, 1945, eight natives sneaked into Jaluit. The garrison on Jaluit were beginning to get jittery because added to the continuous bombings by the Americans, there was not started a war of nerves. This was characterized by attempts to get the natives to revolt and desert and the infiltration into the native population by natives from other islands. Eight natives, strangers to Jaluit were discovered as their two small boats came through the suff and these eight natives were taken into custody by the garrison forces on Jaluit. The consternation must have been as great if not greater than was our consternation when we discovered that German saboteurs had landed on the eastern coast of the United States.

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The fact that these eight natives landed on Jaluit in two small boats each about two meters long by one meter wide definitely proves that these eight natives were spies and had not drifted ashore, but had been put ashore by the Americans to spy and otherwise impede the Japanese war effort. On the eleventh day, Major Furuki told about the confession of the natives, but his answer to the question "By what facts was it decided that the natives in this cases were spies?" was for the most part stricken out.

Captain Inoue, the accused, in testifying as a witness in his own behalf on the twelfth day in answer to question 54 said: "It was found that they were not natives who had drifted, but natives who had sneaked in with a certain motive."

To question 57 he answered:"It was found that they were ordered by the Americans to try to get the military, gunzokus, and natives to desert, also to relay a message and to look up conditions on Jaluit."

To question 59 he replied: "The following was found out. That on Mille,Raliejap and three other natives, Ralime and three other natives, a total of eight natives, after plotting killed a soldier, stole a military boat and provisions and they all deserted to the enemy and in the open sea out of Mille, they were taken in by an American ship and they were brought by this same boat to the waters adjacent to Jaluit and Raliejap and three other natives were to sneak into Jaluit, Ralime and three other natives were to sneak into another place on Jaluit and that on this American ship, they received a mission to which I have testified previously after this mission was achieved, they planned to escape from Jaluit."

Jaluit was besieged by the Americans, but it was one of those "by-passed islands"; the Japanese defenses were pitifully weak and the Americans could have taken the island with very little effort. But the American plan was different. Eight natives from Mille were to put ashore to stir up the Jaluit natives to revolt and to desert. All this while, Jaluit was being subjected to almost constant bombing and air raids. Major Furuki testified as to battle conditions on Jaluit in answer to question 20 and 21 on the eighth day.

The eight Mille natives were discovered and the Japanese conducted a thorough investigation and two defense witnesses testified as to the trial which was given these spies. Remember that there were only 1400 regular military personnel on Jaluit while there were more than 2000 natives and 600 gunzokus.

To question 43 onthe eighth day, Major Furuki testified as follows: On the third of April to the sixth of April, and examination and consultation was held on Raliejap's group. On the sixth, an examination and consultation was held on Ralime's group, and on the eighth and ninth, a complete examination and consultation was held on both of these incidents."

To question 46, Major Furuki answered: "The boat in which the Raliejap group came to Jaluit was inspected. The things that were in the boat were as follows: Chagama, which was in bottles,and bruiro, which is breadfruit prepared so that it could be kept for a long time. Admiral Masuda went with Captain Inoue to where the natives were confined and ascertained their statements. During the examination and consultation,on points which were not sufficient, Admiral Masuda ordered it looked into further and ordered the consultation. On the fifth of April, the acts of Raliejap's groupd were determined to actually be what was stated in the investigation report."

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Major Furuki continued to testify on the ninth day and to question 47, he answered: "The examination and consultation of the Ralime group was begun on the sixth and completed on the seventh. At first, Captain Inoue read the investigation report which had been made by him. The clothes of Tanaka were submitted for inspection as evidence. Admiral Masuda took the record and went to the natives to ascertain the facts and on points that were not sufficient ordered Captain Inoue to investigate further."

To question 48, "You were testifying to examination and consultation of Raliejap's group. When and where was this examination and consultation held and who was present?" Major Furuki answered: "The place was Admiral Masuda's air raid shelter, the persons assembled there were Admiral Masuda, myself, Lieutenant Commander Shintome, and Captain Inoue."

"49. Q. Where was the place and who were the people present in the consultation or Ralime's group?
"A. It is the same as in the case of Raliejap."

On the ninth day, Major Furuki continued and to the question, "After the crimes of the natives were determined, how was the examination and consultation continued?" he answered, "On the eighth, a new investigation report with a supplementary investigation report attached was received and then at this time, Admiral Masuda said: Tomorrow I shall hold an examination and consultation to determine the sentence on these natives. Inoue in your capacity as judge advocate, shall give an opinion as to the punishment, tomorrow. Furuki and Shintome, prepare opinions as to sentence. On the next day, the ninth, an examination and consultation was held to pass sentence on the natives. Inoue stated his opinion as to sentence by a prepared opinion paper. After this, Shintome, myself, and Admiral Masuda expressed our opinions. Further opinions were exchaged on how or whether to punish these natives. Then Admiral Masuda made his decision and a judgement paper was drawn up by him."

"Q. Where was this last examination and consultation held?
"A. In Admiral Masuda's air raid shelter."

To the question, "Do you know by your own knowledge, if it were possible to send these cases to the Ponape and Truk courts?" he answered: "It was absolutely impossible."

"Q. For what reasons was it absolutely impossible?"
"A. At this time, the central Pacific was dominated by the American forces and all inter-base connections were completely cut off after the fall of Kwajalein. There was no transportation by way of air between Truk or Jaluit or Jaluit and the other bases."

On cross-examination by the judge advocate, Major Furuki told about the examination and consultation held each day.

The witness on the twelfth day testified in answer to question 102: "Tell us by what procedure this examination and consultation was conducted?" answered, "As Admiral Masuda was waiting for the return of Major Furuki, Major Furuki changed his schedule and came back to the main Island of Emidj together with natives of the Raline group on the morning of the third of April. Admiral Masuda called Shintome, Furuki, and myself to his quarters and told us as follows: There are natives who sneaked into Jaluit. I shall have what they said read by Captain Inoue. If possible, I would like to send these natives to Truk and Ponape, but this cannot be done; I shall hold an examination and consultation with the ranking officers on Jaluit on my authority. Shintome and Furuki and myself shall act as judges. Inoue shall act as a judge advocate. The above is what he ordered and the highest

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examination and consultation on Jaluit was held during the period from the third to around the ninth of April."

"104. Q. Where were these examination and consultations held?
"A. The place was Admiral Masuda's personal air raid shelter which he had turned over for this purpose."

Inoue testified by answering question 20 as follows: "In February, 1944 after the fall of Kwajalein, the Marshalls area and the other bases were cut off, and all transportation was cut off, and by the decision of general headquarters, Admiral Masuda was given the full administrative and judicial authority, and from April 1944, thereafter Admiral Masuda administered to all judicial and administrative affairs on Jaluit Atoll. From this time the Jaluit Defense Garrison was organized."

To question 53, the witness answered: "It was found that they were not natives who had drifted by natives who had sneaked in with a certain motive."

To question 57 Inoue answered: "It was found they were ordered by the Americans to try to getthe military, gunsokus, and natives to desert, also to relay a message and to look up the conditions on Jaluit."

To question 96 as to whom and where he reported, the results of his investigation, of the eight Mille natives, Inoue said: "In the investigation I conducted from the first to the second of April, myself and Morikawa reported to Admiral Masuda with Lieutenant Commander Shintome present in Admiral Masuda's air raid shelter twice a day. On the investigation conducted from the third to the sixth of April, it was reported at the same place with Admiral Masuda, Major Furuki and Lieutenant Commander Shintome present. I reported to them the results one or two times a day."

To question 98 Inoue answered: "The eight natives as a result of the highest examination and consultation on Jaluit were sentenced to death." The judge advocate moved that this answer be stricken from the record on the ground that it was not responsive. The Commission directed that the answer be stricken.

"99. Q. Do you know if an examination and consultation was held for these natives on whom you submitted an investigation report?
"A. I do.

"100. Q. Do you know what steps and procedure was taken in examining and consulting on these natives?
"A. I do.

"101. Q. How do you know this?
"A. Because I was ordered to act as judge advocate by Admiral Masuda and acted in the examination and consultation."

"105. Q. As a result of this examination and consultation, what happened to the natives who were alleged to have committed the crimes?
"A. As a result of the examination and consultation, the eight natives were given a sentence of death."

To question 107 Inoue answered: "On the eighth of April, on the day that Ralime escaped, Admiral Masuda called Shintome, Furuki, and myself to his room and stated: 'Tomorrow the decision on these natives shall be made. Inoue shall think on his opinion on sentence. Furuki and Shintome shall think well on their opinion on this decision.' By this, around the

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ninth of April, in Admiral Masuda's air raid shelter in my capacity as judge advocate, I gave my following opinion: Ralime, Raliejap, Anchios, Lacojirik, Ochiro, and Raliejap's wife, the above six were guilty of the crime of murder, robbery, and violation of the Navy criminal code; desertion to the enemy; violation of the Japanese Criminal Code; rebellion, spying, and the stealing of military provisions and boats; violationsof the above Japanese laws and turn against the Japanese. And it was necessary to maintain military secrets, military discipline, and also to maintain the lives and existence of the military, gunzolaus, and natives on Jaluit that they be executed. As for Neibet and Siro, these two children were guilty of spying but that they should be confined to Aikizen Island (which was a continuation of Emidj) and there were no natives there to confine them there. This was my opinion."

On cross-examination, the fourteenth day, bythe judge advocate, Inoue was asked question 287. "What took place at these periods of examination and consultation?" He answered: "What the natives had stated, all evidence that had been gathered, boats, and a report from the district commanding officer concerning the actions of the natives after they had drifted ashore and this was stated and presented to the judges so that they could determine their actions. Also what the natives had said was produced and documentary evidence was produced and was used to determine what the true actions of the natives were. On the eighth and ninth, examination and consultation was held on whether the natives were guilty or not guilty and how they should be punished and on this the judges consulted. Masuda also stated what the natives had told him. On the ninth the last examination and consultation was held. I, who was judge advocate, was asked to present the opinion as to punishment. The same day the eight natives were found guilty and were sentenced to death."

At 9:30 a. m., Monday, May 19, 1947, the judge advocate started to cross-examine the accused, Captain Inoue. The judge advocate continued to cross-examine him all that day, all day Tuesday, May 20, 1947, and again on Wednesday, May 21, 1947. The commission has only to reread this cross-examination testimony which clearly reaffirms the fact that there was a thbrough investigation of these natives from Mille and a long and deliberate consultation and examination procedure after which these eight natives were sentenced to death by shooting.

After the judge advocate, the accused, nor the court had any further questions to put to the witness, Inoue, the commission then about 3:30 p. m., on Wednesday, May 21, 1947, informed the witness that he took an oath to state everything within his knowledge in relation to the charges and that he was now privileged to make any further statement relevant to the issues, necessary to fulfill his oath. Inoue testified by making the following statement from the witness stand:

"Concerning the examination and consultation procedure taken in this incident by Admiral Masuda, Admiral Masuda especially cleared a part of of his quarters and made use of it for this purpose. Matsui and Izumi, two orderlies were placed as guards at the entrance, carefully guarded so that no one could come in. Especially at the last examination and consultation when the sentence was to be decided, Admiral Masuda, the judges and myself were all called to attention. He solemnly heard our opinions and decided the decision. During my two years period of duties on Jaluit, the fact that the commanding officer cleared a part of his quarters for any purpose this was the only time.

"Immediately after the end of the war, Admiral Masuda was called by Commander McKinson to the destroyer, and at this time he was asked the following question: 'There should be eight natives here who came from Mille; What did you do with them?' The admiral answered, 'As the natives had committed crimes, by my authority and according to Japanese law by lawful

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procedure they were executed.' Commander McKinson, then asked, 'What did you do with the two children?' Admiral Masuda replied, 'The two children were the same as the adults; they were spies and knew as well as the adults the conditions on Jaluit. As there was no other way these two children were executed to prevent the desertion of military, gunzokus, and natives, and the leaking of military secrets, which was dangerous to Jaluit, to retain discipline, and the lives of four thousand people on Jaluit, they had to be executed.'

"Present at this time were McKinson, his adjutant, myself, and an army interpreter, who was Seggeant Major Akamatsu, Isamu. Admiral Masuda submitted a report stating that Admiral Masuda had ordered Captain Inoue to perform this execution. This report was taken back together with other documents by Commander McKinson on the fifth of October, 1945, at the headquarters of the defense garrison on Emidj. Witnesses to this are Major Furuta, Lieutenant Commander Shintome, Suzuki, and Nakamura, myself, and Sergeant Major Akamatsu.

"At this time, I did not know the Hague Convention nor the laws of land warfare of the Hague Convention, and the report that Admiral Masuda submitted that they had committed the crime of spying stated that the law for spying, article 85 of the Japanese Criminal Code, was applied."

The questions put to Admiral Masuda by Captain McKinson clearly shows that these eight natives from Mille were sent ashore to Jaluit to spy by the Americans. Not only did the Americans sent adults but they also sent two children. This, too, was very cleverly planned, and now the Americans were checking up on what happened to their spies. The spies were caught and were executed by the besieged garrison forces on Jaluit. Now almost two years, on March 13, 1947, charges of murder and violation of the law and customs of war are brought against Captain Inoue because of the way Admiral Masuda handled the situation of the eight Mille natives sent to spy by the Americans on Jaluit.

Captain Inoue is being tried by a U. S. Navy convened military commission, not only for a violation of the laws and customs of war, but for violating Article 199 of the Criminal Code of Japan.

It is well that we consider what the authorities say about spies and we know of no better authority than Winthrop. Together with the many authorities that he cites for the rulings made, his treatise of spies is most complete. We quote from Winthrop's Military Law and Precedents, Vols 1 and 2 (Reprint 1920) pages 766 to 771 inclusive:

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DEFINITION OF SPY--NATURE AND PROOF OF THE OFFENCE.

A spy is a person who, without authority and secfetely, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy; or who, being by authority within the lines, attempts secretly to accomplish such purpose (citing fn 92: Project of Brussels Conference, Art. 19; Bluntschli 629; Halleck, Int., Law., 560; Lieber, Instructions, G. O. 100 of 1863; 88, Manual of Mil. Law, 270; G. O. 13, Dept. of the Mo., 1861; Do. 39, Id., 1863; Do. 23, Dept. of Kans., 1864.) The information is commonly such as relates to the numbers of resources of the enemy, the state of his defences, the positions of his forces, military or naval, (citing 93: Note the case of Samuel Stacy, arrested in July, 1813, by Commodore Isaac Chauncey of the Navy, for spying upon of fleet at Sackett's Harbor, and giving information to the enemy. In re Stacy, 10 Johns, 328), their proposed movements or operations, and the like. The clandestine character of his proceedings and the deception thus practised constitutethe gist or rather aggravation of the offence of the spy. (94: Authorities cited in last note; also Digest, 708; G. O. 174 of 1862; Do. 74, Dept. of the Ohio, 1863.) The statute refers to him as "lurking"; and Halleck describes him as "insinuating himself among the enemy." The concealment is in general contrived by his disguising himself by a change of dress, (95: In a case in G. O. 92, Dept. of the Ohio, 1864, a female spy, when arrested,was disguised as a man.) by assuming the enemy's uniform, (97: Cases of "Col. Williams" and "Lieut. Dunlop" of the Confederate army. VII Rebellion Record, 6, 287.) by coloring the hair, (97: Case of S. B. Davis alias Willoughby Cummings. See Digest, 709) removing the beard or wearing a false one, assuming a false name, (98: See cases in G. C. M. O. 215 of 1864; G. O. 24, Dept. of the East. 1865, (case of Kennedy;) Do. 92 Dept of the Ohio, 1864; also Andres case, Printed Trial, Philad., 1780; 2 Chandler Crim. Trials, 157.) &c.; as also by false representations, by personating another individual, (99. Case of Williams and Dunlop ante, who personated a Colonel and Major of our army sent to inspect outposts.) or by any other false pretence or form or fraud. During the recent war (Civil War) the majority of the persons tried and convicted as spies were officers or soldiers 1194) of the enemy's army, who, in penetrating our lines, had abandoned their proper uniform for the dress of a civilian; (100: See cases in G. O. 267, 269, of 1863; Do. 5, 41, of 1864; G. C. M. O. 93, 152, 248, of 1864, G. O. 57, Middle Dept., 1863; Do. 3, Dept. of the Ohio, 1864; Do. 14,, Dept of the East, 1864, (case of Beall;) Digest, 709. So,,Major Andre was disguised in a suit of clothes belong to Joshua Hett Smith. 2 Chandler, C. T., 185.) and it was held that such an officer or soldier, discovered thus disguised, was in general to be treated, not as a prisoner of war, but as being prima facie a spy. (1: See Lieber's Instructions 83; Digest, 708; G. O. 30, Dept. of the Mo. 1863; Do. 21, Middle Dept. 1863; Do. 23, Dept. of Va. & No. Ca., 1863; Do. 74, Dept. of the Ohio, 1863; Do. 10, Dept of the Tenn., 1863; Do. 23, Dept. of Kans., 1864.) This presumption, however, might--it was ruled-- (2: Digest, 706. And see G. C. M. O. 110 of 1864.) be rebutted by evidence that the party had come within the lines for a comparatively innocent purpose--as to visit his family; or, having been detained within the lines by being separated from his regiment, &c., on a retreat, had changed his dress merely to facilitate a return to the other side. (3. See case in G. O. 59, Dept. of the Susquehanna, 1864.) In such a case indeed the clearest proof would properly be required before accepting the defence.

But to be charged with the offence of the spy, it is not essential that the accused be a member of the army or resident of the country of the enemy; he may be a citizen or even a soldier of the nation or people

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against whom he offends, and, at the time of his offence, legally within their lines. (4: See case in G. O. 26, Dept. of Va. & No. Ca., 1864, of a soldier of the federal army convicted as a spy.) So he may either be an emissary of the enemy (5: Thacher, Mil, Jour., 195, refers to "three emissaries from the enemy," tried and hanged as spies in New Jersey in 1780.) or one acting of his own accord.

Beside the coming within the hostile lines without authority, being in disguise, (6: In G. O. 10, Dept. of the Tenn. 1863, General Grant orders that guerillas or southern soldiers, "caught within our lines in Federal uniform, or in citizen's dress, will be treated as spies.") making false representations, &c., a most significant circumstance going to fix upon the suspected person the animus of the spy is the concealment of important papers or written information, (7: Thus Andre carried official returns of the forces and state of the defences at West Point, concealed in his boots. In May, 1863, a "Miss Hozier" of Suffolk, Va., was arrested while attempting to pass our lines and reach Richmond. Concealed "in the handle of her parasol" were diagrams and papers describing the fortifications near Suffolk, and giving the strength of their garrisons. VI Rebellion Record, 77.) or the destruction of attempted destruction by him, upon being detected, or letters, dispatches, or other writings in his possession, containing information for the enemy." (8. Case in Digest, 709 & 3. A well-remembered instance is that of Daniel Taylor, who, upon his apprehension, after the capture of Forts Montgomery and Clinton, in October, 1777, swallowed a silver bullet which contained a dispatch from Sir Henry Clinton to Burgoyne.) So, of the presenting of forged or false orders purporting to be issued by the commander of the army to which the spy pretends to belong. (9: Williams and Dunlop, See an te,) presented forged orders purporting to be signed by Gen. Rosecrans and Adjt. Gen. Townsend.) Another suspicious circumstance is an attempt to bribe the arresting party to allow him to proceed. (10: This was a feature in the case of Andre.)

But to prove him to be a spy, it is not necessary that the accused should be shown to have communicated, or even to have obtained, the desired information, or any information whatever. (11. Lieber's Instructions 88.) The fact that he was "lurking" or "acting" with intent to obtain material information, to be communicated by himself or another to the enemy, is all that is required to complete the offense. (12: See the definitions above cited; also case in G. O. 92, Dept. of the Ohio, 1864.)

Further, it is not necessary that the spy should be within the lines without authority. (13: See G. O. 348 of 1863.) One who, being legally admitted under a flag of truce, abuses his privilege by secretely collecting facts for the use of the enemy, renders himself liable to the punishment of the spy. (14: Lieber's Instructions 114.) Such was the situation in the case of Andre, who moreover, held a passport from Arnold. But this could not protect him from being treated as a spy, since having been given by one who was in criminal complicity with him, it was null and void as a safe-conduct. (15: See Halleck, 408. A false passport given for the purpose of concealing the identity of the party was a feature in the case of Kennedy. G. O. 24, Dept. of the East, 1865.

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JURISDICTION. A spy, under capture, is not treated as a prisoner of war but as an outlaw, and is to be tried and punished as such. Under the law of nations and of war, his offense is an exclusively military one, co cognisable only by military tribunals. (Citing: Smith v. Shaw, 12 Johns, 257; in re Martin 45 Barb., 142; Do. 31 How. Pr., 228.) In our law, as we have seen, an express statute has, since August, 1776, made this crime triable by court-martial, and since March, 1863, jurisdiction of the same has been given also th the military commission, a species of tribunal to be considered in Part II of this treatise.

It has always been legal, however, and would still be so in time of war, notwithstanding the statute, to proceed summarily without trial and against spies; and in some of our earlier cases--that of Andre, for example (Citing: So, in the case of Thomas Shanks, G. O. Army Headquarters, June 3, 1878.) the investigation was had, not by a court-martial, but by a court of inquiry or board ordered for the purpose, upon whose report, to the effect that the accused was found to be a spy, the death penalty was presently executed. (Citing: 24; As to the form of investigation in Andre's case, see Chapter IV, "Courts of inquiry".) Modern codes, however, call for a trial of the offender. Thus, in the Manual of the Institute ofInternational Law, of 1880, one of the most complete of the projets of the laws of war, it is said "To guard against the abuse to which accusations of acting as a spy give rise in time of war, it must clearly be understood that--"No person accused of being a spy can be punished without trial."

Special Principles. A military court, in passing upon a case of an alleged spy, is to be governed not only by the ordinary rules of evidence but by the principles established by the usages of war as recognized in the law of nations. Of the latter there are to be noticed two jurisdictional principles peculiarly applicable to cases of spies, to wit:---

1. A spy, to be triable as such, must be taken in flagrante delicto, or rather before he succeeds in getting through the lines and returning to the territory or army of his own nation or people. If he thus makes good his return without being arrested, the jurisdiction for his offence does not attach but lapses, and if, subsequently to such return, he is taken prisoner in battle or otherwise captured, he is not triable to trial or punishment for the original offense. (Citing: 25: Project of Brussels Conference, Art. 21; Manual, Inst. Int. Law 26; Lieber's Instructions 104; In re Martin, Ante; Digest, 710; G. O. 24, Dept of the East, 1865, (Kennedy's case.) But he will be liable upon such re-capture, to be subjected to a closer surveillance. Bluntschli 633. In Kennedy's case the point is properly taken that for an alleged confederate spy to have escaped, without arrest, into Canada, (where there were agents of his government,) was not such a return as to have discharged him from liability to trial and punishment for his offence.)

2. Further, a spy, to be punished as such, must be brought to trial and convicted during the existence, i. e. before the end of, the war. (Citing: 26: In re Martin, 45 Barb., 142; Do. 31, How. Pr. 228; Well, Jur. of Courts 577.) Thus, in the case of Robert Martin, above cited, it was held that as the alleged offender had not been arrested as a spy till after the surrender of the Confederate armies and the termination of hostilities,(Citing: 27: This was the view of the court at the time. As a matter of fact, the war, at the date of Martin's arrest, (December, 1865,) had not yet ended--according to the subsequent rulings of the Supreme Court, heretofore cited. See under Fifty-Eighth Article, ante p. 669.) he was not subject to trial by a military tribunal; and he was accordingly discharged on habeas corpus from the custody of the military authorities. But, as will be noticed in a subsequent part of this treatise, (Citing 28: PartII---"Jurisdiction of the Military Commission.") this second principle is not peculiar to the case of the spy alone, but applies toother cases of persons offending in time of war against the laws of war.

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[illegible] (Citing: 2: Vattel, Book III, p. 175; Manual, 27; Halleck, [illegible]: Smith v. Shaw; in re Martin, supra.)

PUNISHMENT: By the law of nations the crime of the spy is punishable with death, (Citing 29: Vattel, Book 111, p. 179; Manual, 270; Halleck, 406, 407; Lieber sec. 88; Smith v. Shaw, ante; In re Martin, ante; G. O. 13, Dept of the Mo., 1861; Do. 23, Dept. of Kans., 1864.) and by our statute this penalty is made mandatory upon conviction. Such penalty may be executed either by shooting or hanging. The sentence "to be shot" was in a few instances imposed during the late war; (Citing 30: G. O. 174 of 1862; Do. 346 of 1863; Do. 39, Dept. of the Mo., 1863; Do. 4, Dept. of Ky., 1864.) but, in the great majority of cases, the form of death by hanging, as the more ignominious and severe, (Citing 31: See Halleck, 407; G. O. 107, Dept. of the Mo., 1863.) was adjudged. In some instances, women (who,by reason the natural subtelty of their sex, were especially qualified for the role of the spy) were sentenced to be hung as spies, though in their case, this punishment was rarely if ever enforced. (Citing 32: See cases in G. O. 208, Dept. of the Mo., 1864, Do 92, Dept of the Cohio, 1864, in which the death sentence was "disapproved." Other cases of females tried as spies are contained in G. O. 43, 93, 121, Middle Dept., 1864; Do. 102, Dept. of Va. & No. Ca., 1864; Do. 14, Dept of the Mo. 1865.) In a considerable proportion of the other cases the capital punishment adjudged was executed, and commonly on the next day or within a brief period after the approval of the proceedings. (Citing 33: As in the case of Andre and that of Palmer (see post). And compare case in G. O. 8, Mid. Mil. Dept., 1865, also case in Do. 92, Dept of the East, 1864, where it is announced by Gen. Dix that a certain class of alleged spies will, upon conviction, "be executed without the delay of a single day." In a case in G. O. 58, Dept. of Va & No. Ca., 1864, it was ordered that the sentence of hanging be executed as near as practicable to the place of the arrest, "for the purpose of the example.")

It may be observed, however, thatthe extreme penalty is not attached to the crime of the spy because of any peculiar depravity attaching to the act. The employment of spies is not unfrequently resorted to by military commanders, and is sanctioned by the usages of civilized warfare; (Citing 34: Vattel, Book 111, p. 179; Halleck, 406.) and the spy himself may by an order, to assume the office of spy; he must volunteer for the purpose; (Citing 35: Halleck, 406, 409; Manual, 270.) and where so volunteering, not on account of special rewards offered or expected, but from a courageous spirit and a patriotic motive, he generously exposes himself to imminent danger for the public good and is worthy of high honor. (Citing 36: Note the circumstances of the case of Capt. Nathan Hale. Halleck, 407.) Where indeed a member of the army or citizen of the country assumes to act as a spy against his own government in the interest of the enemy, he is chargeable with perfidy and treachery, and fully merits the punishment of hanging; (Citing 37: In the case in G. O. 26, Dep. of Va. & No. Ca., 1864, of a U. S. Soldier convicted as a spy, the accused was sentenced to be hung, and the sentence was approved and executed. Lieut. Palmer, whose sentence was so summarily executed by Gen. Putnam, in 1777, was an American who had taken a commission in the service of the enemy.) but--generally speaking--the death penalty is awarded this crime because, on account of the secrecy and fraud by means of which it is consummated, it may expose an army, without warning, to the gravest peril; and, as Vattel (Citing 38: Book 111, p. 179) observes, "puisque l'on n' a gueres d'autre moyen de se garantir du mal qu'ils peuvent faire."

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Inoue
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In order to find Inoue guilty of the first charge murder every allegation contained in specifications one and two must be proved. Section 154, Naval Courts and Boards reads:

"The lawpresumes 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."

It has been seen fit to not only charge Inoue with common law murder but merged into the same charge it is also specified he did this "in violation of effective law, especially Article 199 of the Criminal Code of Japan."

On page 158 of the American Jurisprudence Criminal Law we read:

"There are no common law offenses against the United States and the crime of murder or manslaughter as such is not known to the Federal Government except in places over which it may exercise exclusive jurisdiction and where by Act of Congress such offenses are recognized and made punishable." citing 194 US 205, Pettit v. Walsh, 18 USA, 451 et seq.

Can it be said that this commission had exclusive jurisdiction on Jaluit April 8, 1945, and April 13, 1945, particularly when even at this date the accused is charged with both common law murder but also Japanese statute law. Certainly it is common knowledge and this commission must take judicial notice that there is no Act of Congress giving the Navy Department exclusive judicial jurisdiction on Jaluit in April 1945.

Inoue is charged with having "wilfully, feloniously, with premeditation and malice aforethough, and without justifiable cause, assault, strike, kill, and cause to be killed, with an instrument, a deadly weapon."

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

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

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

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

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

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

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

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

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

"A conviction very seldom occurs without direct proof of the corpus delicti, either by eyewitness of the homicide or by subsequent discovery of the dead body; yet there may be exceptions, where corpus delicti may be proved circumstentially or inferentially, e.g. as where the body is consumed by fire, or boiled in potash, or dissolved in acids, rendering it impossible that it should ever be produced. Citing People v. Alviso (1880) 55 Cal. 230; Rines v. State (1903) 118 Ga. 320, 68 L.R.A. 33, 45 S.E. 376, 12 Am. Crim. Rep. 205; State v. Cardell (1886) 19 Nev. 319, 10 Pac. 433; People v. Beckwith (1888), 108 N.Y. 67, 15 N.E. 53; Lovelady v. State (1883) 14 Tex. App. 548; Walker v. State (1883) 14 Tex. App. 609.

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

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

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

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

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

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

Wharton's Criminal Law, Vol I, pp. 449-458: "It seems now pretty generally held that circumstantial evidence is admissible to establish the corpus delicti in a trial for murder, but that it must be strong and cogent. Chancellor Walworth, however, says: 'One rule which is never to be departed from is that no one should be convicted of murder upon circumstantial evidence, unless the body of the person supposed to have been murdered has been found, or there is clear and irresistible proof that such person is actually dead,' citing People v. Videto (1825) 1 Park. Crim. Rep. (N.Y.) 603. In New York it is held that in trials for murder, the people must establish by positive evidence either (1) the corpus delicti or (2) the criminal agency producing it; and that after either is thus established, the other may be shown by circumstantial evidence. Ruloff v. People (1858) 18 N.Y. 179; People v. Bennett (1872) 49 N.Y. 137 (by divided court). In such a prosecution the corpus delicti is established by proof of the finding of the body of a human being under such circumstances as indicate that the death or killing was felonious, and not by accident or suicide. State v. Potter (1879) 52 Vt. 33. But the proof of the identity of the dead body must be established by evidence outside of the death of the party alleged; the remains of the deceased, or a portion of them, must be sufficiently identified to establish the death of the party. Lovelady v. State (1883) 14 Tex. App. 545; Gay v. State (1901) 42 Tex Crim Rep. 450, 60 S.W. 771.

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

Let us turn again to Winthrop. He defines murder as follows:

"Murder, at common law, is the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, with malice aforethought either express or implied. Citing Coke, 3 Inst., 47; 4 Black. Com., 195; 1 East, P.C., 214; 1 Russel, 482; 1 Gabbett, 454; 3 Greenl. En. 1430; 1 Wharton C.L. 303; 2 Bishop, C.L. 732, and notes; Com. v. Webster, 5 Cush., 304; G.O. 23, Dept. of Col., 1865.

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The homicide must be unlawful, that is to say "felonious" or other than "justifiable" or "excusable"; it must be committed by one who is neither non-compos nor an infant under the age of criminal capacity; the person assailed must be a living being, (not an unborn; child) such person must be entitled to the protection of the laws, not a public enemy nor a pirate; and lastly the act must be characterized by "malice aforethought" or "malice prepense", i.e. evil and deliberate purpose. A brief description of murder which would cover all cases likely to arise under the present Article would be - the unlawful killing, with malice aforethought, by a legally responsible person, of any other person not a public enemy; or, as all killing with malice aforethought must be unlawful, as a person not legally responsible cannot be charged with malice aforethought, and as no killing of a public enemy can be regarded as committed with such malice, - murder, at common law and unaffected by statute, may be simply and briefly described as homicide with malice aforethought."

Malice aforethought. The term malice, as ordinarily employed in criminal law, is a strictly legal term, meaning not personal spite or hostility but simply the wrongful intent essential to the commission of crime. When used, however, in connection with the word "aforethought" or "prepense," in defining the particular crime of murder, it signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating, in the view of the law, a malignant or depraved nature, or, as the early writer, Foster, has expressed it, "a heart regardless of social duty and fatally bent upon mischief." The deliberate purpose need not have been long entertained; it is sufficient if it exist at the moment of the act. Malice aforethought is either "express" or "implied;" express, where the intent - as manifested by previous enmity, threats, the absence of any or of sufficient provocation, &c, - is to take the life of the particular person killed, or, since a specific purpose to kill is not essential to constitute murder, to inflict upon him some excessive bodily infury which may naturally result in death; implied, where the intent is to commit a felonious or unlawful act but not to kill or injure the particular person - as where a party, intending to kill by shooting, &c., one person, actually hits and kills another; or, when detected in a burglary, fires his pistol in the dark to aid his escape and kills an inmate of the house; or, in resisting an officer of justice engaged in the execution of his duty, unintentionally kills him, &c. Thus a soldier who resists a military superior, when legally engaged in making an arrest or executing any other duty, and in resisting kills him, though not purposely, is guilty of murder in law.

In every case of apparently deliberate and unjustifiable killing, the law presumes the existence of the malice necessary to constitute murder, and devolves upon the accused the onus of rebutting the presumption. In other words, where in the fact and circumstances of the killing as committed no defense appears, the accused must show that the act was either no crime at all or a crime less than murder; otherwise it will be held to be murder in law. Justifiable and excusable homicide. The definition of Murder is well illustrated by the two defenses apposite to this charge, viz: 1, that the killing was not murder but manslaughter; i.e. a killing without "malice;" 2, that it was not felonious but justifiable or excusable in law. The distinction between murder and manslaughter will be further noted presently. Homicide is said to be justifiable when committed by a public officer in the due execution of the laws or administration of public justice, or when committed by any person in the due prevention of a violent crime. Thus homicide is justifiable where committed by an officer of the army, or at his instance,

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in the suppression of an actual mutiny or other violent disorder, or in the capture of an escaping prisoner or deserter, where no other adequate means are available for the purpose. Homicide is in law "excusable" where it is the result of accident or mishap, or where it is committed in self-defense.

Now let us read what there is in Corpus Juris:

"Intent - the fixed purpose of the mind in connection with a given act; citing State v. Goldston 103 N.C. 323 33 C.J. p. 168. the purpose of the mind including such knowledge as is essential to such intent, citing Powe v. State 48 N.J.L. 34, 36, 2A662; 33 C.J. p. 168. Intent implies premeditation, citing Ernest v. State, 20 Fla. 383, 388; (33 c.j. 168) In law there is a clear distinction between motive and intent and they are not regarded as synonymous."

cc Fla. 1908 "Malice, legally speaking in relation to murder is a conscious violation of law to prejudice of another citing U.S. v. Hart, 162 F. 192."

All the evidence clearly shows that Inoue did not consciously violate the law when he was ordered by his superior officer, Admiral Masuda, to carry out the sentence of execution.

In American Jurisprudence Criminal Law on page 178 we read:

"Intent is the state of mind of the slayer that is sought to be described. On page 181 we find a clear statement of the difference between murder and manslaughter."

"In the absence of any expressed or implied malice the crime if any is manslaughter."

Since the absence of intent express or implied is clearly shown by the evidence the commission cannot find the accused, Inoue, guilty of murder.

"A homicide committed by a soldier without malice in the performance of duty,..... or kills another under the order of a superior officer, citing Commonwealth v. Shortell, 55 A. 952, 206 Pa. 165, 98 Am. S.R. 759; Riggs v. State, 3 Coldw. 85. See Army & Navy paragraph 37 d (2) which does not expressly and clearly show its illegality on its face is justifiable. Citing in re. Fair, cc Neb. 100F. 149"

In 40 Corpus Juris Secundum page 956 we read:

"Justifiable homicide is the necessary killing of another in the performance of a legal duty. It is a homicide authorized by law. Citing State v. Walker 14 Del. 464. Gill v. Commonwealth, 31 S.W. 2d, 608. By order of court, citing State v. Bridge 137 A244, 246, 126 Me. 223, 53A L.R. 241."

Inoue was in the performance of his legal duty as judge advocate as head of the special police force on Jaluit when he executed the eight Mille natives who were found guilty of several crimes, principally of the crime of spying.

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On page 959 40 C.J. Secundum we read: "However a person is not criminally responsible for a homicide committed by him by reason of a mistake as to facts, where his ignorance or mistake was not due to negligence or bad faith on his part and where he would have been exempt from criminal liability if the facts were as he had supposed them to be. Citing US. v. Ah Chong 15 Philippines 488 (cit. Cooks Case, Car. 538, 79 Repring 1063) 30 C.J. p. 38 note 38."

All the evidence shows that Inoue is not criminally responsible for the homicide he committed thinking that he was carrying out the execution by reason of a sentence of the senior officers of Jaluit. There was no negligence or bad faith on the part of Inoue.

In 40 Corpus Juris Secundum on page 960 we read that: "An accused is entitled to full acquittal and discharge where the homicide is excusable or justifiable. citing Erwin v. State, 29 Ohio State 186."

Inoue the accused in this case is therefore entitled to a full acquittal.

The prosecution must prove each and every allegation. We call the commission's attention to the following evidence. On the tenth day Major Furuki testified as follows in answer to question 94.

"Right after the decision was made Admiral Masuda gave Captain Inoue orders concerning the execution. He wrote these orders on the bottom part of the judgment paper and read it to Captain Inoue. It stated as follows: 'Captain Inoue on April 9,'I do not know the exact date,' '1945, you shall execute the sentence of death on the seven natives other than Raline, by shooting.' Captain Inoue after hearing this order was silent for a short time, after which he stated the following opinion to Admiral Masuda: 'As for myself, the execution of the children I can not do because I feel very sorry for them and I wish I could be excepted from the execution of these children or at least postpone the execution for two or three days so I may have time to think of means other than the execution.' At this time Admiral Masuda raised his voice and stated definitely that this was an order of execution and that this order of execution was reached after an examination and consultation and you should know better than any of the men on Jaluit what an order is. 'I shall not tolerate any further opinions on this order. In the evening I shall go to tell the natives their sentence. Captain Inoue, you shall accompany me.' After this Captain Inoue told me as follows: 'It is very difficult for me to execute these children, but as I have been ordered to do so I can not get out of performing the execution. Never before have I felt as I do not how hard the life of a soldier is.' That evening Captain Inoue went with Admiral Masuda on a motorcycle with a side car attached to where the natives were confined to read the sentences to them. Two days later when Raline was captured Admiral Masuda called all the judges and Captain Inoue to him and at the bottom of the judgment paper wrote the following: 'About the eleventh of April' (I do not know the exact day) '1945, after sentence of death passed on Raline, Captain Inoue shall perform the execution by shooting.' On the evening of that day Admiral Masuda accompanied by Captain Inoue went to tell the sentence to Raline at his place of confinement."

To question 124 as to why no inquiry was made upon Mille regarding the natives and the crimes they had committed there, Major Furuki answered:

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"The reasons were (1) Eight natives had confessed and it was evident that their guilt was established and thought not necessary to probe further; (2) was from the standpoint of operations, through fear of interception of their messages which was undesirable to the defense garrison of Jaluit."

To question 133 on the 13th day Inoue testified as follows: "How I came to execute the sentence is as follows: At the time of the last examination and consultation on the ninth of April, as a result of this examination and consultation, Admiral Masuda gave the natives the decision of death. At this time, with Shintome and Furuki present, Admiral Masuda ordered me, who was head of the special police section at this time, to execute the death sentence. After this order was written at the end of the judgment paper and reading the order to me, I was relayed this order. As a result of the examination and consultation, Admiral Masuda gave the death sentence and read the sentence to each native. I was convinced that it was legal; therefore, I was convinced that it was legal and lawful act to execute the order. After I was ordered to perform the execution, I expressed what opinion I was allowed concerning the execution of these two children to Admiral Masuda. In other words, I asked was there some way to save the children, at least postpone the execution for two or three days so I could think of other means to save them. To this Admiral Masuda would not listen to my opinion, reprimanding me, he said: 'Execute the order tonight.' Returning to my quarters, I went to Major Furuki who was my commanding officer. I told Furuki of my difficult position in having to execute the children and asked his advice. Major Furuki said that he and Shintome had also expressed opposite opinions, but the Admiral would not listen. 'There is no other way but to do as ordered.' The execution of the two children; I was convinced that this was a legal act and I had no doubt that this was a rightful act."

To question 149, "How did you understand your position in rejecting the order of Admiral Masuda?" Answer: "As a soldier and as a person who is responsible for the maintenance of discipline on Jaluit, it was absolutely impossible to disobey the order, especially as this order was put out after the highest examination and consultation on Jaluit by the ranking officers was decided upon; and this placed me in a position where I was unable to disobey Admiral Masuda's order.

To question 312 on cross-examination by the judge advocate, Inoue answered: "Admiral Masuda himself told them the specifications and stated according to Japanese law you are sentenced to death."

To question 365 Inoue answered that he saw Admiral Masuda write the judgment paper and to question 366 he answered that he saw Admiral Masuda write in the sentence. To question 393, "Was the proceeding of examination and consultation held in regard to the Mille natives a trial?" Inoue answered after the commission directed his answer be stricken on the grounds that it was not responsive. "From that time I have thought in substance that it was a trial."

To question 398 "Then did you understand that this examination and consultation procedure was to be a trial when Admiral Masuda told you that you, Shintome, and Furuki were to act as judges and judge advocate in this case?" Inoue answered: "I understood it to be a trial in substance."

The judge advocate read from a document which he did not at the time offer into evidence question 171 and asked the witness Inoue if he had so answered. We objected by were overruled.

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Inoue testified as follows: "What I answered at that time, that is not what I answered at that time. I do not believe that was what I answered at that time of the previous trial due to the shortage of words I feel sorry that the exact true meaning was not grasped. What I really meant was that at the end of the war I came to understand clearly that the examination and consultation procedure that was taken at that time could be called a trial. At the time of this examination and consultation no doubt as to whether this was a trial or not, I had no doubts as to whether this would be called a trial or not. At the time of this examination and consultation I felt not doubt whether this was a trial or not. The reason for this was because I believed that this exrmination and consultation procedure was a legal one and the only one possible under the battle conditions, and I was under the impression that that was how I explained this. Due to the shortage in the words I used, I do not remember how it was written down."

Question 414 on the 15th day by the judge advocate to Inoue, "And when you executed the natives you knew that they did not have a trial by regular procedure. Is that correct." Inoue answered as follows: "When I did the execution I had no questions in my mind whether this was a regular trial procedure or not. I thought this was a lawful examination and consultation procedure and believed that it was right. No question arose in my mind as to whether this was a regular trial procedure or not."

On reexamination Inoue on the 16th day was asked Question 439 "When you were ordered to execute the natives by Admiral Masuda did you consider the order was legal?" He answered: "Yes, because by this authority of Admiral Masuda, the death sentence was given them, after an examination and consultation and Admiral Masuda himself had given the sentence to each native and they were prisoners who were sentenced to death, and I thought these were lawful orders and that the order of Admiral Masuda was the order of the court; and therefore, legal and right."

To question 462: "In your statement when you stated that to certain criminals after the highest examination and consultation on Jaluit they were given a sentence. Did you understand this to be a trial?" Inoue answered: "As it was an examination and consultation called together and held by Admiral Masuda who had the authority I firmly believed that it was a trial."

Then when all parties had indicated that they had no more questions to ask the witness Inoue, the Commission informed him that he took an oath to state everything within his knowledge in relation to the charges and he could make any further statement necessary to fulfill his oath as long as it was relevant. Inoue made the following statement from the witness stand: "Concerning the examination and consultation procedure taken in this incident by Admiral Masuda. Admiral Masuda especially cleared a part of his quarters and made use of it for this purpose. Matsui and Isumi, two orderlies were placed as guards at the entrance, carefully guarded so that no one could come in. Especially at the last examination and consultation when the sentence was to be decided, Admiral Masuda, the judges, and myself, were all called to attention. He solemnly heard our opinions and decided the decision. During my two years period of duties on Jaluit the fact that the commanding officer cleared a part of his quarters for any purpose this was the only time. (2) Immediately after the end of the war Admiral Masuda was called by Commander McKinson to the destroyer, and at this time he was asked the

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following question: 'There should be eight natives here who came from Mille. What did you do with them?' The Admiral answered, 'As the natives had committed crimes by my authority and according to Japanese law by lawful procedure they were executed.' Commander McKinson then asked what did you do with the two children. Admiral Masuda replied, 'The two children were the same as the adults. They were spies and knew well as the adults the conditions on Jaluit. As there was no other way these two children were executed to prevent the desertion of military, gunsakus, and natives and the leaking of military secrets which was dangerous to Jaluit, to retain discipline and the lives of the four thousand people on Jaluit they had to be executed.' Present at this time were McKinson, his adjutant, myself, and an army interpreter who was Sergeant Major Akamatsu, Isamu. Admiral Masuda submitted a report stating that Admiral Masuda had ordered Captain Inoue to perform this execution. This report was taken back together with other documents by Commander McKinson on the fifth of October 1945 at the headquarters of the defense garrison on Emidj. Witnesses to this are Major Furuki, Lieutenant Commander Shintome, Suzuki, and Nakamura, myself and Sergeant Major Akamatsu. (4) At this time I did not know the Hague Convention nor the laws of land warfare of the Hague Convention and the report that Admiral Masuda submitted that they had committed the crime of spying stated that the law for spying, article 85 of the Japanese Criminal Code was applied."

We have brought all this testimony introduced by the defense to the attention of the Commission because this evidence clearly shows that the accused, Inoue, did not "wilfully, feloniously, with premeditation and malice aforethought and without justifiable cause."

The burden of proof is however upon the judge advocate to prove every allegation. How did he attempt to do it? The first witness for the prosecution, Sergeant Major, Imperial Japanese Navy, Fukatsu, Tadashi, on the third day of the trial, May 6, 1947 in answer to question 12 stated in part: "Then Inoue said to us, 'They were executed after investigation as spies and because they had committed murder at Mille; they had been consulted and examined.' And he also stated that he had been ordered to do this execution by the commanding officer. He had been ordered to do this by the commanding officer and I executed them. It sounded as if Captain Jinno was asking him did he also kill the children and Captain Inoue answered he could not help but kill them, he expressed his opinion many times to the commanding officer, but the commanding officer did not heed me. I can not help but shed tears. I made myself blind to the tears and executed them. Next he stated that we are going to bury the natives; you shall help in this and he started to throw dirt in the hole. After we had finished, the four of us gave prayers for the dead natives and went back toward the truck."

The prosecution would have the Commission believe that this proves Inoue was guilty of murder. We think otherwise. We hold it proves conclusively Inoue did not commit murder.

This same witness testified as to the incident later in the month and in answer to question 28 stated in part:

"When I went there Captain Inoue said that the person came here to spy and that he had committed murder at Mille, he was the worst one among them and by the orders of the commanding officer he was executed. He said we are going to bury him, so help me, so we buried the native. After he was buried prayers were offered."

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As before we hold this proves that Inoue was anything but a murderer.

On cross-examination this same witness said in answer to a question "How did he appear to you when the first of the natives were taken off the truck and when he went into the jungle with them?" Answer, "He seemed a little different from his usual self. He looked sad.
Q. And how did he look when the next group were taken into the jungle?"
"Answer. Then he came out to take the next group in, when Captain Jinno asked him, 'What were those shots?' he said nothing as if he could not hear us and looked as if he was thinking deeply."
"Q. How did he look when he took the two children in?"
"Answer. "The same as when he took the others. He looked very sad."
The next answer was: "He did not look happy." "Q. You testified that he said, 'I cannot help but shed tears; I made myself blind to tears.' Did you see any tears in his eyes?" Answer: "At that time I did not look at his face, but I saw that he was very sad." On that same day the fourth day of this trial May 7, 1947, Warrant Officer, Imperial Japanese Navy, Takematsu, Minoru, testifying for the prosecution in reply to question number nine stated in part as follows: "Captain Inoue solemnly said that on Mille as a result of an investigation it was found that these natives had killed a person on Mille and came to spy on Jaluit. An examination and consultation was held. I, Inoue, was ordered to execute them by the Commanding Officer, and I have just done so. And he also stated: "Now I am going to bury them. Assist me." At this time First Lieutenant Jinno asked him did he also execute the two children. Captain Inoue seemed very grave and he stated that on this I expressed my opinion many times to the commanding officer to confine them to another island but he did not heed my opinion." He looked very low-spirited." This was the testimony of another of the witnesses for the prosecution. His testimony shows Inoue had no malice; Inoue did not do the act wilfully, feloniously or with premeditation.

On the fourth day Captain Jinno, Shigeru, Imperial Japanese Army, another witness for the prosecution testified in answer to question 11 in part as follows: "Then Captain Inoue said to the three of us, 'The natives you brought today were found upon investigation that in escaping from Mille Island had killed a soldier and sneaked into Jaluit to spy; consultation was held and I was ordered to do the executions by the commanding officer and I just did it.' Then at this point I asked Captain Inoue, 'Did you also kill the children?' Concerning the children Inoue said, 'I expressed my opinion many times that they should be confined on another island, but the commanding officer did not heed and had them executed.' After this he stated that we were going to bury them, so we assisted him. The four of us buried the natives. Captain Inoue said, 'Let us offer our prayers and return.' We offered our prayers and we returned."

Does this evidence prove that the allegation as set out in the specifications under Charge I are proved. Quite to the contrary it proves that the accused, Captain Inoue did not commit murder.

The facts thus testified to even by the witnesses for the prosecution prove there was no murder. Winthrop on page 672 says: "And as no killing of a public enemy can be regarded as committed with such malice." Winthrop continues: "When used, however, in connection with the word "aforethought" or "prepense" in defining the particular crime of murder, it signifies the same evil intent, as the result of a determined purpose, premeditation, deliberation, or brooding, and therefore as indicating in the view of the law, a malignant or depraved nature, or

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as the early writer, Foster, has expressed it, 'a heart regardless of social duty and fatally bent upon mischief.' citing Crown Law, p. 257, 262. In Com v. Webster, 5 Cush. 304, Shaw, C.J. says of "Malice" in the terms "malice aforethought" that it is "used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful act and unjustifiable motive. It is not confined to ill will toward one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive." and see the case of murder, indicating a malignant animus, commented upon by Gen. McDowell in G.O. 23, Dept. of Cal., 1865 & U.S. v. King, 34 Fed 306, and U.S. v. Meagher, 37 Fed. 878-879."

At this time we call to the attention of the Commission one of our own court martial orders. In C.M.O. 4-1935 we read: "Had there been specific orders to fire in this case the general rule laid down would be excusable if committed by a military guard, without malice, and in the performance of his supposed duty as a soldier, unless it was manifestly beyond the scope of his authority, or was such that a man of ordinary sense and understanding would know that it was illegal. See also In re Fair, 100 Fed 149.

Commenting on this same point, namely, the extent to which a military guard is protected by his orders, the court in McCall v. McDowell, 1 Abb. 212, 15 Fed. Cas. No. 8673, said:

"Between an order plainly legal and one palpably otherwise..... there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior; leaving the responsibility where it properly belongs - upon the officer who gave the command."

That the wilfull killing of a soldier by a military guard on duty is not necessarily a justifiable homicide is illustrated by the case of United States v. Carr, 1 Woods 480, 25 Fed. Cas. No. 14732, but regarding the responsibility of such a guard and his duty to carry out orders, the court in McCall v. McDowell, supra, went on to say:

"The first duty of a soldier is obedience and without this there can be neither discipline nor efficiency in the Army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflict between the advocates of conflicting opinions."

See in this connection Digest J.A.G. Army opinions 1895, pp. 486 and 487; Manley v. State, 62 Tex. Cr. R. 392, 137 S.W. 1137; (P. 16) and United States v. Lipsett, 156 Fed. 65. See also C.M.O. 37, 1915, in which many of the above citations appear.

The weight of authority is to the effect that due to the difference in legal relationship of the parties, the standard set by the civil courts should not be followed by military authorities much less by binding upon them. The following remarks appear in the opinion of the court in United States v. Clark, supra:

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"It would be extremely unwise for the civil courts to lay down general principles of law which would tend to impair the efficiency of the military arm, or which would seem to justify or condone conduct prejudicial to good order and military discipline. An army is a necessity - perhaps I ought to say an unfortunate necessity - under every system of government, and no civilized state in modern times has been able to dispense with one. To insure efficiency, an army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars, his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offenses unknown to the civil law, to relinquish his right to trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offense." In quoting the above, the court In re Fair, supra, said:

"The wisdom, expediency, or justness of the military laws, rules, and regulations adopted and prescribed by the United States are no concern of the state. The proper endorsement of such laws, rules, and regulations cannot be measured and determined by state laws." See sec. 1028 N.C.B., 1923; File: MM-Spivey, Howard A. / 417-25 (350304), April 8, 1935, approved April 26, 1935.

Let us consider some of the procedure used by the judge advocate in his attempt to gain a conviction.

On the fourth day of the trial the prosecution put on the witness stand, Lieutenant Edward L. Field and offered into evidence a document purporting to have been signed by the accused. Although we objected to this document it was admitted into evidence. This notwithstanding that the witness testified in answer to question 4 in part as follows: "This document was not written in my present, but was later delivered to the guards at the stockade by Captain Inoue after he had written it and it was in turn delivered to my custody." So this witness not having seen the document prepared was in no way qualified to testify regarding it.

This admission is what would be known as a circumstantial confession if it were a confession. It is however just an admission. Strictly speaking the statement of the accused which the judge advocate introduced into evidence is strictly speaking not a "confession," but an "admission." Confession is a voluntary acknowledgement of guilt. Admission is an acknowledgement of facts tending to establish guilty. People v. Sevetsky, 323 Ill. 133, 153 N.E. 615. Statements, declaration, or admissions of fact incriminating in their nature or tending to prove guilt are admissions and not confessions. People v. Rupert, 316 Ill. 38, 146 N.E. 456.

On the 13th day of the trial the defense tried to get into evidence a written document dated September 11, 1946 which in our opinion tended to explain the so-called admission which the judge advocate had introduced into evidence. The judge advocate objected and the document was not admitted into evidence. On the fourteenth day the judge advocate in cross-examining the accused began reading from a document which he had not offered into evidence. Question 189 that day was taken from what the judge advocate said was testimony from a board of investigation concerning war crimes. We objected but our objection was not sustained. At this time we cite for the Commission CMO 1-1923 as follows:

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CMO 1-1923, p. 11-12.

IMPEACHMENT OF WITNESS: Improper Method.

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

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

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

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

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

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

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

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

"The court was cleared.

P. 17 "The court was opened. All parties to the trial entered and the president announced that the objection by the counsel for the accused is not sustained. It is the understanding of the court that the judge advocate is proceeding along the line of questioning for the purpose that the witness has made contradictory statements before a properly constituted Board of Investigation and that such questioning is permitted by rules of evidence, page 164, paragraph 167."

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

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

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the purpose of laying the foundation for furture impeaching evidence. It in no way takes the place of such evidence. As stated above no proper impeaching evidence was later introduced in this case, and the impression is created, from the reading of the above-quoted excerpt from the record th that the judge advocate's unsworn version of what the record of the board of investigation contained was accepted by the court as evidencing what such record did not actually contain. From this it would appear that the judge advocate was permitted to testify without being placed under oath and was permitted to testify in regard to a matter as to which the record of the board of investigation itself and not the testimony of the judge advocate would have been the best evidence. The proper procedure would have been for the judge advocate to have asked the witness questions in regard to the testimony previously given by him before the board of investigation and thus lay the foundation for later impeachment in the event of inconsistency; but in order to have properly brought before the court the impeaching evidence, the judge advocate should have taken the stand as the custodian of the record of the board of investigation and should have introduced such record into evidence and read therefrom the testimony with which he intended to impeach the witness.

It is not known to what extent the improper procedure commented upon above affected the court in giving or denying credence to the testimony of the witness M, but it is considered that the court's ruling in failing to sustain counsel's objection to such procedure was erroneous. It is necessary, therefore, to determine whether such erroneous ruling prejudiced the interests of the accused [P. 12] to such an extent as to invalidate the proceedings in this case; or, in other words, whether the interests of the accused were materially affected by such a ruling. On this question it is the opinion of the Department that, for reasons hereinbefore set forth in full, the credibility of the material witnesses as to facts in this case was of the utmost importance in aiding the court to arrive at its findings and that, in view of the fact that the erroneous ruling of the court now under consideration was on a point that involved the credibility of a material witness for the defense, it must be held that such error was fatal to the proceedings in this case (File 26262-10008, J. A. G., Dec. 16, 1922; G. C. M. Rec. No. 56875).

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On the fifteenth day of the trial the judge advocate again started to read this time from the proceedings of the trial of Major Furuki. Starting with question 400 that day the judge advocate brought into the record of this trial questions and answers given at that trial. We objected and particularly to question 404 wherein the judge advocate read from the Furuki trial question 171 and the answer thereto.

However the witness did answer as follows: "What I answered at that time, that is not what I answered at that time. I do not believe that was what I answered at that time of the previous trial due to the shortage of words. I feel sorry that the exact true meaning was not grasped. What I really meant was that at the end of the war I came to clearly understand that the examination and consultation procedure that was taken at that time could be called a trial. At the time of this examination and consultation I had no doubt as to whether this was a trial or not, I had no doubt as to whether this could be called a trial or not. At the time of this examination and consultation I felt no doubt whether this was a trial or not. The reason for this was because I believed that this examination and consultation procedure was a legal one and the only one possible under the battle conditions and I was under the impression that was how I had explained this. Due to the shortage in the words used, I do not remember how it was written down.

The judge advocate then read questions 167 to 173 from the Furuki trial and the answers thereto and asked the witness if he had given the answers. We again objected but were overruled. Then in question 408 the judge advocate read question 17 from the Board of Investigation. We objected but were overruled. The witness in answer to question 409 did testify however, "I remember distinctly that a regular trial was not given them, but as I remember, I remember stating that an examination and consultation was held for them by the high ranking officers."

We feel that CMO 1-1923 is directly in point and would like to again read into the record what the judge advocate general said:

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CMO 1-1923, p. 11-12.

IMPEACHMENT OF WITNESS: Improper Method.

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

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

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

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

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

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

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

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

"The court was cleared.

P. 12 "The court was opened. All parties to the trial entered and the president announced that the objection by the counsel for the accused is not sustained. It is the understanding of the court that the judge advocate is proceeding along the line of questioning for the purpose that the witness has made contradictory statements before a properly constituted Board of Investigation and that such questioning is permitted by rules of evidence, page 164, paragraph 167."

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

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

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the purpose of laying the foundation for furture impeaching evidence. It in no way takes the place of such evidence. As stated above no proper impeaching evidence was later introduced in this case, and the impression is created, from the reading of the above-quoted excerpt from the record t that the judge advocate's unsworn version of what the record of the board of investigation contained was accepted by the court as evidencing what such record did not actually contain. From this it would appear that the judge advocate was permitted to testify without being placed under oath and was permitted to testify in regard to a matter as to which the record of the board of investigation itself and not the testimony of the judge advocate would have been the best evidence. The proper procedure would have been for the judge advocate to have asked the witness questions in regard to the testimony previously given by him before the board of investigation and thus lay the foundation for later impeachment in the event of inconsistency; but in order to have properly brought before the court the impeaching evidence, the judge advocate should have taken the stand as the custodian of the record of the board of investigation and should have introduced such record into evidence and read therefrom the testimony with which he intended to impeach the witness.

It is not known to what extent the improper procedure commented upon above affected the court in giving or denying credence to the testimony of the witness M, but it is considered that the court's ruling in failing to sustain counsel's objection to such procedure was erroneous. It is necessary, therefore, to determine whether such erroneous ruling prejudiced the interests of the accused (P. 12) to such an extent as to invalidate the proceedings in this case; or, in other words, whether the interests of the accused were materially affected by such a ruling. On this question it is the opinion of the Department that, for reasons hereinbefore set forth in full, the credibility of the material witnesses as to facts in this case was of the utmost importance in aiding the court to arrive at its findings and that, in view of the fact that the erroneous ruling of the court now under consideration was on a point that involved the credibility of a material witness for the defense, it must be held that such error was fatal to the proceedings in this case (File 26262-10008, J. A. G., Dec. 16, 1922; G. C. M. Rec. No. 56875).

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Question 414 asked by the judge advocate that day and the answer which the accused gave should leave no doubt as to what Inoue thought about the trial given these eight natives.

"Q. 414. And when you executed the natives you knew that they did not have a trial by regular procedure. Is that correct?

"A. When I did the execution I had no questions in my mind whether this was a regular trial procedure or not. I thought this was a lawful examination and consultation procedure and believed it was right. No question arose in my mind as to whether this was a regular trial procedure or not."

This was certainly not the answer the judge advocate wanted and he quickly moved to strike the answer. The Commission however did not sustain his motion and this answer is evidence in the record.

We call the Commission's attention to the following three C.M.O.'s and read into the record at this time as part of our argument:

"Court Martial Order 1914 - 1918

"Written statements: Not admissible in evidence in substitution for testimony of witness before court.

"It was noted, in a recent general court martial case, that several statements, apparently prepared and signed by witnesses who were before the court, were offered and received in evidence. The witness in each instance while on the stand was shown a statement, asked if he had signed it, and if it were true; the statement was then offered in evidence by the judge advocate. In one instance the witness was not further questioned. These statements were recitals of what the witness knew of the case on trial. In another instance the statement was read to the witness before it was submitted to the accused or the court and opportunity afforded either to object to its use or introduction as evidence. The course thus adopted in this case was highly irregular and contrary to all recognized legal procedure and most prejudicial to the interests of the accused. The introduction of these statements, which were simply recitals of what the witnesses knew relative to the case on trial, was contrary to all recognized legal procedure and the fundamental rules of evidence. (File 26262 - 4918, G.C.M. Rec. No. 39689.)"

"Court Martial Order 237 - 1919.

"Evidence: Copy of statement of a witness as.

"In a recent trial before a military commission the judge advocate took the stand and testified that he was the legal custodian of the papers in the case and that among such papers was a copy of a statement signed by a witness which copy was then submitted to the accused and the court, and by the judge advocate offered in evidence. There being no objection it was thus received. The author of the statement was then called, and in reply to the question whether he had made a statement in reference to the murder in question testified that he had made such a statement; that he could not read or write; but if the same were read to him he could identify it. Upon its being read to him by the interpreter the witness stated that he identified it as the statement made by him; that it was a voluntary and correct statement made by him to the interpreter.

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"(P. 14) The impropriety of the course pursued by the judge advocate in introducing in evidence a copy of the statement purporting to have been made by the witness who was present at the trial is self-evident. The oral testimony of the witness was the best evidence as to the subject matter which could have been procured from him, and the only evidence coming from said witness which, under the circumstances, legally could have been introduced and used against the accused. The matter contained in the copy of the statement could have been testified to by the witness in response to questions by the judge advocate, thus placing such matter in evidence and affording the accused an opportunity to cross-examine the witness thereon, but the admission of the copy of a written statement cannot be considered as evidence touching upon the facts related therein. The copy of the statement in question, therefore, should not have been admitted in evidence. (File 16870 -47: 289, J.A.G., July 24, 1919.)"

"Court Martial Order No. 6 - 1927

(P.8.) "In reviewing the record of proceedings in the general court martial case of Pay Clerk Myron A. Poole, U. S. Navy, whose trial was commenced April 6, 1927, at the U. S. Naval Operating Base, San Diego, Calif., it is noted on page 14 of the record that the judge advocate introduced in evidence over the objection of the accused a statement purporting to have been signed by one Eads, who was then a witness on the stand. The objection of the accused was not sustained and the statement was admitted in evidence, marked exhibit 6. The statement contained matter which the witness was testifying to on the stand.

"The court erred in allowing the admission in evidence of the written statement of the witness Eads, as the contents of such statement was not the best evidence obtainable. The witness was present in court and could testify as to any matter contained in the statement and therefore its contents was not the best evidence. The admission of the statement in this instance was highly irregular and contrary to all legal procedure. (See Court Martial Order 114, 1918, 30.)

"The contents of the statement mentioned above agreed in most part with the testimony of the witness Eads on the stand and therefore the only apparent reason for the introduction of the statement was for matter of evidence of the contents thereof. Had the contents of the statement contradicted the testimony of the witness, it could have been introduced for impeachment purposes, but not as evidence as to its contents. (40 Cyc., p. 2764.)

"In the case of Illinois Central Railroad Co. v. Wade (69 N.E. Reporter 565.), the court remarked as follows:

"'That the statement of a witness made out of court, orally or in writing, if contradictory on a material point to his sworn statements as a witness, may be introduced in evidence, not as substantive proof of the truth of (P.9) such statements but as tending to discredit the witness has been so frequently declared by courts and law writers, and is so universally understood and accepted, that the citation of authorities in support of the proposition is considered entirely unnecessary.'

"The error on the part of the court in allowing the admission of the written statement in evidence did not prejudice the rights of the accused inasmuch as the witness testified with but slight difference as to the contents of that statement."

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"On May 12, 1927, the sentence was confirmed by the President."

On the seventeenth day the judge advocate took the stand as a witness for the prosecution and "The record of proceedings of the War Crimes Investigation containing the full testimony of Inoue, Fumio on October 9, 1945 was submitted to the Commission and by the judge advocate questions three and seventeen and the answers thereto of the beforenamed witness was offered in evidence."

We objected to the introduction as the record shows but were overruled. In questioning the witness we asked if the document was a confidential document. Q. 33 on the 17th day. This question was objected to on the ground that it was irrelevant and immaterial. We feel that it is very material and cite Winthrop, Military Law and Precedents p. 330 "Evidence excluded from consideration of Public Policy. State papers, Public Documents, etc. Under this head is to be noted - first - confidential archives and "secrets of state" pertaining to the administration of the government, the disclosure of which would be prejudicial to public interest, of this kind of evidence would be the ....., reports of investigations and other official communications made in the line of duty by officers of the army or navy to their military or naval superiors, and records of advisory boards and courts of inquiry. Such papers are esteemed of so privileged a character that heads of departments or others in whose legal custody they are, cannot in general be required to furnish the same (or copies) to be produced in court, if it be determined by them not to be for the public interest that their contents should be disclosed; nor if furnished will the courts in general admit them if objected to."

The defense objected to the document as shown by the record. This was principally because it was offered into evidence when the witness who was alleged to have testified at the Board of Investigation was not on the witness stand. The prosecution also offered into evidence only questions three and seventeen instead of the entire document.

Then the judge advocate submitted to the accused and to the Commission the record of the proceedings of the Furuki trial and such portions thereof that contain the testimony of Inoue, Fumio at the trial of Major Furuki, that relate to the trials of natives on Jaluit was offered in evidence.

We objected to the trial of Furuki or any part of it being offered into evidence. Our objection is made a part of the record by a copy appended marked "CC."

The Commission admitted into evidence questions 167 to 172 from the Furuki trial. The judge advocate therefore has read into this trial testimony from a former trial which has not yet been approved and which trial is for an altogether different incident and has read into this trial at a time when the witness Inoue is no longer on the witness stand. The rule laid down in Wharton's Criminal Evidence section 638 is "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable."

I will not say anything regarding the prosecution witness Shintone, Sanjiro because this has been covered in the arguments of my colleagues. Suffice to say he gave no testimony regarding the real issues of this trial.

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One thing that the witness Shintome did bring out very clearly however is that any document purporting to be an admission, a confession, or statement, or answers to interrogatories made by any Japanese taken in connection with War Crimes investigations must be taken and read with a great many reservations. On the nineteenth day of the trial Shintome was asked on cross-examination question 83 "To question 21 'Were the natives given a court trial before execution?' you answered, 'I would imagine that a trial had been given the natives, as it was thought they were spies.' Is this correct?" Shintome answered as follows: "At Tokyo, I was asked concerning spies and I answered as the defense counsel has pointed out, 'I think a trial was held.' After this I was again questioned and I was told that Imui who was a paymaster Lieutenant, said there was no trial. Inui says he thinks there was none and you say you think there was. Why is this? As they were spies, it is natural that they be investigated; a trial held before they were punished, and this I presumed as common sense; I presumed this and I replied."

We ask therefore that the Commission find the accused Inoue, Fumio not guilty of Charge I.

In Charge II the prosecution have failed to prove that the crime alleged is a war crime.

We have denied the homicide and "In a murder trial, if the homicide is denied, the burden of proving the crime beyond a reasonable doubt in all its constituent elements, i.e. the corpus delicti and the malicious intent is upon the state throughout." p. 1143 Underhill's Criminal Evidence. On page 1147 we read "some states hold that mitigating circumstances require an acquittal if they raise a reasonable doubt as to the guilty of the def." citing Frank v. U.S. 42 Fed (2d) 623. Ill. People v. Durand 307 Ill. 611, People v. Duncan 315 Ill. 106, People v. Meyer 331 Ill. 608. Then we read on page 1149 "If any fact proved against him by the prosecution satisfies the jury that the killing was excusable or justifiable, they jury should acquit him" citing Walker v. State 220 Ala 544, State v. Castle 133 N.Car. 769, State v. Vacos 40 Utah 169.

Winthrop, Military Laws Precedents, pp. 296-297.

"OBEDIENCE TO ORDERS. That the act charged as an offense was done in obedience to the order - verbal or written - of a military superior, is, in general, a good defense at military law.

"The act, however, must have been duly done - must not have been either wanton or in excess of the authority or discretion conferred by the order. Thus an officer or soldier ordered to suppress a mutiny or disorder or to make an arrest, a guard ordered to keep in custody a prisoner, or a sentinel ordered to prevent persons from passing his post, will not be justified in taking life or in resorting to extreme violence, where the object of the order can be effectually accomplished by more moderate and customary means: otherwise where the forcible resistance of the party, his persistence in disregarding warnings, his sudden flight, &c., render it impracticable to seize or stop him without extreme violence or the use of a deadly weapon.

"Further the order, to constitute a defense, must be a legal one. It must emanate from a proper officer - a superior authorized to give it - and it must command a thing not in itself unlawful or prohibited by law. In other words, it must be an order which the inferior is bound to

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obey. While obedience by inferiors is the fundamental principle of the military service, it is yet required to be rendered only to a lawful order. It is "the lawful orders of the superiors appointed over them" that "all inferiors" are, by par. 1 of the Army Regulations, "required to obey strictly and to execute promptly;" and it is the "lawful command of his superior officer" which by the 21st Article of War, "any officer or soldier" may be punished even with death for disobeying. But for the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and lawful on its face, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness. Such would be a command to violate a specific law of the land or an established custom or written law of the military service, or arbitrary command imposing an obligation not justified by law or usage, or a command imposing to do a thing wholly irregular and improper given by a superior when incapacitated by intoxication or otherwise to perform his duty.

"Except in such instances of palpable irregularity, which must be of rare occurrence the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court.

"It may be added that an order which might not be regarded as legal in time of peace, may furnish to the inferior obeying it a complete defense in time of war, as being warranted by the laws and usages of war. This point, as also this title in general, will be illustrated in treating of the civil amenability of military persons in Part III."

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

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

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

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

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

Under Charge II it is alleged that the native inhabitants were punished as spies. The judge advocate has failed to prove that any of the eight victims were spies. We however feel that we have proved that all eight natives were spies and were punished as such.

Section 154 Naval Courts and Boards states: "Burden of proof. The law presumes every man innocent of crime. The prosecution has in each case the burden of overcoming this presumption. The accused's guilt must be established by substantive proof. By the plea of not guilty, every element of the crime specified is debated, and the prosecution must affirmatively prove it, even though it be a matter of negative averment in the specification, proof of which is peculiarly within the knowledge of the accused. The burden of proof never shifts to the accused. It is immaterial that the accused sets up a defense by way of justification or excuse, as insanity, or an alibi."

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

"A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party." Since the prosecution alleged that Captain Inoue punished the natives as spies, the prosecution must prove that allegation. The definition of a spy as found on pages 766-767 Winthrop's Military Law and Precedents is in point. We quote in part only: "But to be charged with the offense of the spy, it is not essential that the accused be a member of the army of resident of the country of the enemy; he may be a citizen or even a soldier of the nation or people against whom he offends, and, at the time of the offense legally within their lines."

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

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(1) Who makes or attempts to make, or unites with any mutiny or mutinous assembly, or being witness to or present at any mutinous assembly, or of any intended mutiny, does not immediately communicate his knowledge to his superior or commanding officer;
(2) Or disobeys the lawful orders of his superior officer;
(3) Or strikes or assaults, or attempts or threatens to strike or assault, his superior officer while in the execution of the duties of his office;
(4) Or gives any intelligence to, or holds or entertains any intercourse with an enemy or rebel without leave from the President, the Secretary of the Navy, the Commander in Chief of the fleet, the commander of the squadron, or in case of a vessel acting singly, from his commanding officer;
(6) Or in time of war, deserts or entices others to desert;
(7) Or, in time of war, deserts or betrays his trust, or entices or aids others to desert or betray their trust."

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

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

Article 20, Part II of the Japanese Criminal Law provides "Those who have formed a clique and have been in arms engaged in rebellion shall be condemned as follows:
1. The leader shall be condemned to death.
2. Those who have been engaged in the plan or led a crowd shall be condemned to death, or to life term or above five years servitude or confinement."

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

Article 22. "Those who have done the following action shall be condemned to death.....
2. To spy for the benefit of the enemy or help the enemy's spy.
3. To give the naval secret to the enemy....."

Article 23. "Those who have done the following action for the benefit of the enemy shall be condemned to death.....
6. To inform or make false orders, information or reports.
7. To spread false information or to make uproars in the face of the enemy."

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

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

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

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

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

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

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

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

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

"Robert's defense, that he had acted on command of superior authorities, was rejected by the French military tribunal in Amiens which tried the case (Journal du droit international, 1921, vol. 48, pp. 363-363). The looting of foreign factories for one's own benefit was considered to be punishable, even if it had been done on the command of superiors; the Röshling brothers were considered to have acted not as soldiers but as industrialists. It is worth emphasizing, however, that in a total war, where there is no clear line of demarcation between military and industrialist activities, any distinction between non-military persons and soldiers, in regard to the recognition granted the respondeat superior defense may lead to very arbitrary results. Robert and Hermann Röshling, the latter in absentia were sentenced to ten years imprisonment and a fine of ten million francs (Grimm, pp. 58ff.) but the decision of the Amiens court was revised, on appeal, by the Supreme military tribunal in Nancy. The reversal, according to the French writer (Cardoux, p. 459), 'was motivated by the fact that the responsibility for the intimidating acts - however verified and vile these were - rested on the German authorities, whose orders were executed by brothers as officers.'

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"Almost all the lobding Rhenish industrialists were in danger of griminal prosecution for possession of French or Belgian machinery and aftersevunk others had been arrested, the German government asked R. von Hippel, the Gottingen professor of international law, to prepare a memorandum on the legality of the German measures and of the arrest of German managers for the purchase of such machines. Von Hippel (whose memorandum was published in 1920 in Niemeyers Zeitschrift Für internationales Recht, vol. 28, pp. 183-206.) Contended that the German military authorities had exercised the right of eminent domain in the occupied Belgian and French territories, with respect to all property that they considered essential for the pursuit of the war. He admitted that no exception had yet been recognized to the rule of international law according to which the private property of the residents of an occupied territory should be protected. He maintained, however, that su protection should be granted only under the same reservations that The Hague Convention (Article 23g) stipulates in regard to private property in an area of actual fighting, since urgent necessities justify infringements of property rights in an occupied as well as in a fighting zone. This principle, he said, was particularly applicable to the German confiscation of Belgian and French machines, because Germany under the British blockade was in a 'state of distress' (Notstand), and was entitled to take all measures necessary to overcome it. Von Hippel concluded this section of his memorandum with the words (p. 94) that such procedures as those against German industrialists, 'which may prove basic significance in the future, can hardly be reconciled with the true French interests. France would implicitly deny that in case of war, recognition would be granted to a right of distress, aimed at the preservation of (the nation's) existence, and thus would create a precedent which might be applicable to herself in the event of a future war.' At the time this memorandum was presented to the victors of the war, the peace treaty had not yet been signed.

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

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"In a conference in Brussels, on 23 March 1919, the Industrial Sub-Committee of the Inter-Allied Armistice Commission decided to abstain from further criminal prosecution of Germans who had benefited from the looting of Belgian and French factories, provided that Germany enacted a statute permitting the return of the material. Such a statute was enacted on 28 March (Reichsgesetzblatt, 1919, p. 349), and thereafter, in accordance with orders of Marshall Foch, proceedings were instituted only against persons who had not declared or had destroyed the confiscated material (Nast, 'L' occupation.....' p. 157; Der Waffenstillstand, vol. 3, pp. 99-103; vol 2, pp. 265-331.) The material returned to Belgium and France during the armistice period alone amounted to 164,000 tons, with a value of 135,000,000 gold marks (Der Waffenstillstand, vol 2, p. 331.) The delicacy of the whole problem is indicated in the fact that on several occasions German workers threatened to demolish the machines rather than see them removed (Hunt, p. 233.)

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

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

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

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

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

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Article 2.

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

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

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

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

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

This Military Commission must decide if the offense charged is a war crime. There can be no doubt, that, only if the offenses charged is a war crime is there jurisdiction to try the accused, Captain Inoue. In Section D-13, Appendix D, Naval Courts and Boards, we read: "These exceptional military courts, unlike the court-martial, derive their sanction from the laws of war.

It is incumbent upon the judge advocate to define a war crime. He has not done so during the trial, or has he proved that the crime alleged is a war crime. All that he has done so far is to show by an admission of the accused (to which we objected), introduced into evidence, that the accused admitted that he executed the native inhabitants by reason of his duty as judge advocate and by orders of his superior, Admiral Masuda.

In paragraph 347 of the Rules of Land Warfare, we find the following statement: "Individuals of the armed forces will not be punished for these offenses [violations of the customs and laws of war] in case they are committed under the orders or sanction of their government commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

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

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You have seen Captain Inoue since the trial started April 23, 1947, and you have heard his testimony. All the circumstances justify any acts which he may have admitted during those awful days when we Americans were making a living hell of Jaluit.

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

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

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

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

We hold that the evidence shows that these spies were investigated, there was a trial procedure, the best under the exigencies of the circumstances, and the eight natives found guilty as spies and sentenced to death by shooting.

Winthrop says on page 769:

"A spy under capture, is not treated as a prisoner of war but as an outlaw, and is to be tried and punished as such. Under the law of nations and of war, his offense is an exclusively military one, cognizable only by military tribunals.....It has always been legal however, and would still be so in time of war notwithstanding the statute, to proceed summarily without trial against spies, and in some of our earlier cases - that of Andre, for example - the investigation was had, not by a court-martial, but by a court of inquiry or board ordered for the purpose upon whose report, if to the effect that the accused was found to be a spy, the death penalty was presently executed."

So all the things which we said about Charge I apply equally to Charge II because it is the same offense but in Charge II it is said to be in violation of the laws and customs of war and in Charge I it is called murder.

We hold that Inoue had a complete defense, superior orders. In time of war under the circumstances it is a complete defense. All the things that Winthrop said about obedience to orders being a defense, a complete defense is true in this case.

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Inoue certainly did not have the power and the authority to prevent the execution of those eight natives who had been investigated, had been tried under a procedure as was warranted by the exigencies of the circumstances, found guilty as spies and of having committed other crimes, had been sentenced to death by shooting.

Inoue testified as we have pointed out that he firmly believed the eight natives had been given a sufficient trial, and that he believed the order to execute these natives was legal and right and that he was under solemn duty to obey the order.

We read from the booklet, "What Shall be done with the War Criminals", ~~EM~~ 11 - G - 1 Roundtable:

"One of the most difficult problems to be faced in trying war criminals is that of determining the guilt of men who claim that they were operating under orders of their superior that they did not commit offenses of their own free will.

"You will find in paragraph 347 of the Rules of Land Warfare the following statement: "Individuals of the armed forces will not be punished for these offenses (violations of the customs and laws of war) in case they are committed under the orders or sanction of their government or commander. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops may be punished by the belligerent into whose hands they may fall."

Notice that under this rule the ordinary soldier is excused but his commander or government is liable.

The question is being raised whether the rule as to superior orders should not be changed. It should be noted that it did not enter the American Rules until 1914. Before that the rules failed to mention "superior orders" and American courts martial upheld the principle that a soldier obeying his commander's order is not protected if the order is unlawful.

We again cite what was said in C.M.O. 4-1935:

"Had there been specific orders to fire in this case the general rule laid down in United States v. Clark, 31 Fed. 710, would apply, this rule being that a homicide would be excusable if committed by a military guard, without malice, and in the performance of his supposed duty as a soldier, unless it was manifestly beyond the scope of his authority, or was such that a man of ordinary sense and understanding would know that it was illegal. See also In re Fair, 100 Fed 149.

"Commenting on this same point, namely, the extent to which a military guard is protected by his orders, the court in McCall v. McDowell, 1 Abb. 212, 15 Fed. Cas. No. 8673, said:

'Between an order plainly legal and one palpably otherwise..... there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions, of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands, and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior; leaving the responsibility where it properly belongs - upon the officer who gave the command.'

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"That the wilful killing of a soldier by a military guard on duty is not necessarily a justifiable homicide is illustrated by the case of United States v. Carr, 1 Woods 480, 25 Fed. Cas. No. 14732, but regarding the responsibility of such a guard and his duty to carry out orders, the court in McCall v. McDowell, supra, went on to say:

'The first duty of a soldier is obedience and without this there can be neither discipline nor efficiency in the Army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflict between the advocates of conflicting opinions.'

"See in this connection Digest J. A. G. Army opinions 1895, pp. 486 and 487; Manley v. State, 62 Tex. Cr. R. 392, 137 S. W. 1137; (P.16) and United States v. Lipsett, 156 Fed. 65. See also C.M.O. 37, 1915, in which many of the above citations appear.

"The weight of authority is to the effect that due to the difference in legal relationship of the parties, the standard set by the civil courts should not be followed by military authorities much less be binding upon them. The following remarks appear in the opinion of the court in United States v. Clark, supra:

'It would be extremely unwise for the civil courts to lay down general principles of law which would tend to impair the efficiency of the military arm, or which would seem to justify or condone conduct prejudicial to good order and military discipline. An army is a necessity - perhaps I ought to say an unfortunate necessity - under every system of government, and no civilized state in modern times has been able to dispense with one. To insure efficiency, an army must be, to a certain extent, a despotism. Each officer, from the general to the corporal, is invested with an arbitrary power over those beneath him, and the soldier who enlists in the army waives, in some particulars his rights as a civilian, surrenders his personal liberty during the term of his enlistment, and consents to come and go at the will of his superior officers. He agrees to become amenable to the military courts, to be disciplined for offenses unknown to the civil law, to relinquish his right of trial by jury, and to receive punishments which, to the civilian, seem out of all proportion to the magnitude of the offense."

In quoting the above [illegible], the court In re Fair, supra, said:

'The wisdom, expediency, or justness of the military laws, rules, and regulations adopted and prescribed by the United States are no concern of the state. The proper endorsement of such laws, rules, and regulations cannot be measured and determined by state laws.'"

See sec. 1028, NCB, 1923; File: MM-Srivey, Howard A./117-25 (350304), April 8, 1935, approved April 26,1935.

Lest we forget may we remind the commission how important corpus delicti is and how the body of the victim should generally be produced. The eight natives from Mille confessed to the murder of Tanaka. Now after two years we find out that Tanaka escaped death and is still alive. Yet the Japanese garrison on Jaluit took the confession of these eight natives that they had killed Tanaka and among the other crimes such as spying, stealing food intended for the military and stealing military boats, they also found them guilty of murder.

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Murder is an ugly word. The accused, Captain Inoue is charged with murder. You have observed the accused as he sat in court day after day, and you heard him on the witness stand. He testified as to his utter lack of criminal intent. In all criminal cases there must be a criminal intent. This is the most important thing in a criminal case. The commission must find out what the state of the mind of the accused was at the time he committed the offense.

We again remind you what the accused Captain Inoue said on cross-examination by the judge advocate: "Q. 414. And when you executed the natives you knew that they did not have a trial by regular procedure. Is that correct?" Answer: "When I did the execution I had no questions in my mind whether this was a regular trial procedure or not. I thought this was a lawful examination and consultation procedure and believed it was right. No question arose in my mind as to whether this was a regular procedure or not."

The prosecution witness, Fukatsu, Tadashi; Wakamatsu, Minori, and Jimno, Shigeru, all testified as to what Captain Inoue said, how he looked and acted prior to the time of the execution and immediately thereafter. You remember well how the accused honestly admitted the acts which he did. You remember the testimony of all witnesses, prosecution and defense, to the effect that Inoue is not a man who would commit murder. All had only words of praise for this honest and upright man, a soldier it is true, but a soldier who was called into service from his civilian occupation.

We ask only justice for him, justice as we in America know it, and which Mr. Justice Rutledge in the dissenting opinion in the General Yomoyuki Yamashita Petitioner case said:

"But there can be and should be justice administered according to law. In this stage of war's aftermath, it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is of all men, whether citizens, aliens, enemies, or enemy belligerents. It can become too late.

"This long-held attachment marks the great divide between our enemies and ourselves..... Every departure weakens the tradition whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered. If we need not or cannot be magnanimous, we can keep our own law on the plane from which it has not descended hitherto and to which the defeated foes never rose."

The accused, Captain Inoue, Fumio, Imperial Japanese Army, is charged with murder in Charge I and with the violation of the law and customs of war in Charge II.

Section 158, Naval Courts states a fundamental rule: If there is a reasonable doubt as to the guilt of the accused, he must be acquitted.

We ask the commission therefore, to find as to the accused, Captain Inoue, Fumio, specifications one and two of Charge I not proved, and the accused is of the charge of murder not guilty and the commission does therefore acquit the said Captain Inoue, Fumio, of the specifications and of the charge of murder and to find as to the accused, Captain

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Inoue, Fumio, specifications one and two of Charge II not proved and the accused is of the charge of Violation of the Law and Customs of War, not guilty, and the commission does therefore acquit the said Captain Inoue, Fumio of the specifications and of the charge of Violations of the Law and Customs of War.

Respectfully,

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

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CLOSING ARGUMENT FOR THE PROSECUTION

delivered by

Lieutenant David Bolton, U. S. Navy.

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CLOSING ARGUMENT FOR THE PROSECUTION
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Part I. A. INTRODUCTION.

The road and the hope of civilisation is man's continued struggle against chaos and crime. The function of criminal law in this struggle is the vigilant, stern, quick application of preventive, corrective and deterrent measures to control these individuals who disregard or destroy the rights and lives of others. The true focus of criminal law is not the past, but the future. It is concerned not with moral vengeance for a crime committed, but rather with the intimidation, reform or incapacitation of the criminal and the deterrence of others. This commission is a vital instrument of that law and justice. It sits as a tribunal with international and local function, dedicated to the principle of humanity, assuring the accused of an impartial and fair trial, and assuring society that if after such trial he is found guilty he will be convicted and appropriately sentenced.

While Charge I - Murder constitutes essentially a local crime, and Charge II - Violation of the Laws and Customs of War, constitutes an international crime, the problems which this Commission faces are basicly the same. The facts and the law must be ascertained. The accused if guilty must be convicted and punished. It is your function to safeguard and protect organized civilized society. It is your stern duty to exercise the vital power of deterrence so that others who may "be drunk with the consciousness of overwhelming power" or faced with the "exigencies of the moment" will stop and think.

B. MISCELLANEOUS DEFENSE ARGUMENTS.

There are certain defense arguments which because they have already been fully considered by the Commission after thorough argument, do not merit further serious consideration by the Commission at this time, and I will briefly dispose of them before entering the main issues now properly before the Commission.

1. Rulings on Evidence.

The defense counsel Commander Carlson in his argument has spent valuable time in a redundant discussion of the admission of certain statements made in the Furuki trial, and made before the War Crimes Investigation. The statements were carefully limited to prior contradictory statements. Defense were given every opportunity to attempt to establish that these prior statements were not in fact contradictory to the testimony of the accused. It is unnecessary to do more than note that Commander Carlson in the very argument he has given cites rulings indicating that it is proper to use prior statements for purposes of contradiction or impeachment. The matter has been thoroughly discussed, carefully considered and definitely ruled upon. Further discussion is meaningless.

The voluntary confession of the accused - no part of whose contents have been denied by the accused, and which in fact has been used by accused and defense counsel in their effort to establish a defense - was properly introduced and correctly admitted into evidence.

Even the most cursory examination of the record reveals that this Commission in its rulings on evidence has given the accused every opportunity to attempt to establish a defense. How far they deviated from the normal rules of evidence in favor of the accused is illustrated by the alleged conversation of Admiral Masuda and Commander McKinson. The Commission denied the motion by judge advocate to strike from the record the answer of the witness Inoue which contains

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clearly objectionable matter in the form of an alleged conversation between the deceased Admiral Masuda, and an alleged officer of the U. S. Navy, a Commander Mc Kinson. The Commission in denying the judge advocate's motion stated that it would give the answer its proper weight. It is clear that no weight should be given to such remote hearsay.

The defense was trying to prove that the accused Inoue had an innocent motive and did not have a sense of guilt. To prove this they used as indicated by Mr. Susuki, a statement allegedly made by Masuda when after the investigation he called the officers of Jaluit together and reported that he had reported to McKinson that "by the authority vested in him, he had executed the natives etc." So we have the witness Inoue testifying as to what Admiral Masuda said, that he Masuda had said to McKinson. The defense offered this testimonial evidence; it was accepted; and the defense have used it in their arguments.

No the accused has no grounds on which he can legitimately claim that he has been prejudiced by the rulings of the court with regard to admission of evidence.

2. Punishment of Individuals for violation of International Law.

As to Charge II, defense have argued that an individual cannot be punished for international or war crimes, such as violation of the Hague Convention. This contention has previously been answered at length, and the Commission is well aware of the fact that our domestic courts, as evidenced by the Pennsylvania decision in Respublica v De Longchamps, foreign courts, as evidenced by the German Llandovery Castle Case, and international courts, as evidenced by the Nurenberg and other War Crimes decisions, have all unequivocally held that individuals are subject to international law and are criminally punishable for violation of the laws and customs of war.

3. Charges and Specifications.

Mr. Susuki has argued that there are errors in the charges and specifications. This entire subject was thoroughly and exhaustively argued before the Commission earlier in this case. The Commission after careful consideration rejected the specious argument of defense. Charge I is clearly laid under effective local law - the Japanese local law - and the specific statutory provision is cited in the specifications. Charge II clearly charges violation of the laws and customs of war, and the specifications establish that the crime charged is the wilful, unlawful punishment of the natives as spies, without previous trial. Clearly the charges and specifications under Charges I and II, fairly apprise the accused of the acts and crimes with which he is charged.

4. Jurisdiction.

The Commission has previously heard extended arguments on the subject of jurisdiction, and has correctly, and unequivocally rejected the misleading and fallacious arguments of defense. The defense have added nothing to their previous arguments, they continue to cite generalized concepts of law, completely inapplicable to the present case, and still fail to cite a single case which relates to the condition of military occupancy and denies the right of the military occupant to exercise jurisdiction in the occupied area over crimes committed within that area. The defense fails to cite any case denying this power, because they have been unable to find any such case. It is necessary in rebuttal merely to refer the commission to the previous argument of the judge advocate with regard to jurisdiction and to reiterate that jurisdiction over the instant case is firmly recognised under established principles of international law authorising such jurisdiction under the power of military occupancy, as well as the related concept of quasi-sovereignty which similarly empowers the armed forces of the United States under occupant conditions, as the military occupant, to try the accused criminal Inoue by military commission for the crimes charged.

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PART II - THE LAW AND THE FACTS ESTABLISH THE GUILT OF THE ACCUSED.

Whether the acts of the accused Captain Inoue constitute a crime depends upon both the law and the facts. The defense counsel and the judge advocate are in considerable disagreement not only as to the facts and their proper interpretation, but also as to certain questions of law - and it therefore becomes the task of this Commission to resolve both problems. The Commission must determine what the law is, and then in accordance with that law must determine whether the facts establish the guilt of the accused beyond a reasonable doubt.

A. REASONABLE DOUBT.

The law requires that the accused must be proven guilty beyond a reasonable doubt. This requirement is set forth at length in Naval Courts and Boards, Sections 158 and 159. In part, these sections state:

"It is not necessary that each particular fact advanced by the prosecution should be proved beyond a reasonable doubt; it is sufficient to warrant conviction if, on the whole evidence, the court is satisfied beyond such doubt that the accused is guilty..... By reasonable doubt, is meant an honest, substantial misgiving generated by insufficiency of proof. It is not a captious doubt, not a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony, nor is it a doubt born of a merciful inclination to permit the accused to escape conviction nor prompted by sympathy for him or those connected with him....."

The accused INOUE, Fumio, Captain, Imperial Japanese Army, is charged in four specifications with two crimes: Charge I, Murder, Charge II, Violation of the Laws and Customs of War. The evidence clearly establishes the guilty of the accused as to all Charges and Specifications, beyond a reasonable doubt.

B. CHARGE I - MURDER.

Charge I in two specifications charges the accused with murder. It has been proved and thereafter the accused Captain Inoue admitted that on Jaluit Atoll, Marshall Islands he killed eight unarmed natives. There is no question that the accused intended to kill the natives. He took them to the place of execution with the intention of killing them, and after they arrived at the place he did kill them. The defense have not sought to deny this. They deny however that this constituted a crime. Their denial consists of the contention that the accused did not have the requisite criminal intent, that the killing was done pursuant to superior orders, and that the killing itself was not illegal but was the result of proper trial under the circumstances.

The Commission must determine whether under the circumstances of the instant case, the intentional killing of eight human beings constitutes murder.

The specifications of Charge I in addition to applying the broad language of the homicide provision of the Japanese Criminal Code, utilize the phraseology commonly employed in charging murder in American courts. Upon analysis of these historical legal terms according to their technical usage it is readily demonstrated that in the instant case, the words "wilfully, premeditation, malice aforethought, feloniously, and without justifiable cause", like the corresponding concepts of the Japanese law, require only that the killings be proved to be intentional and without legal justification or legal excuse."

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1. American Statutory and common law terms.

a. Murder.

Since Inoue intended to kill the natives, it is clear that this is not a case of involuntary manslaughter, for in such homicide the killing must be accidental. Similarly this is not a case of voluntary manslaughter, for, as it is described in Naval Courts and Boards, Section 119, "Voluntary manslaughter is distinguished from murder by the fact that it is committed not with malice aforethought, express or implied, but in the heat of passion or heat of blood caused by reasonable provocation." It follows therefore, that where the killing is intended (which is all that malice aforethought means) there can be no manslaughter and the killing must be either murder or legally justifiable or excusable.

Naval Courts and Boards, section 53, defines Murder, as "The unlawful killing of a human being with malice aforethought..... 'unlawful" means without legal justification or excuse. Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed."

Specifications 1 and 2 of Charge I, allege that Inoue wilfully with premeditation and malice aforethought, feloniously and without justifiable cause, killed eight unarmed natives.

A layman approaching the law of homicide for the first time, may well wonder at the peculiar phrasing and technical wording of these specifications of murder. While some of the words used in the specification have an everyday meaning and usage, their legal meaning is special and technical. It must be remembered that these terms are historical concepts which arose in order to make certain differentiations between the punishments allowed by the law for the different degrees of the crime of homicide.

Whenever non-lawyers have been confronted with these terms, confusion occurs. American Jurisprudence, 26, 528, citing State v. McGuire, 84 Conn. 470, 80 A. 761, 38 LRA(NS) 1045 and ANNO: 38 LRA(NS) 1064, in discussing malice states:

".....Indeed, it has been observed by high authority that it is practically impossible so to define and explain the term 'malice' as to bring it within the comprehension of the average juror, and it is said to be the better practice for the trial judge in charging the jury not to attempt a definition of malice, but to say, rather, that if the jurors find the fact of death and that it was accomplished by the defendant without legal justification or excuse and without circumstances of extenuation, then the crime proved is murder."

Why the law continues to use these archaic and confusing terms is difficult to explain. Perhaps as Cardozo implies, certain of the terms were designed to give the jury the opportunity to find the lesser degree of murder and thus forestall the imposition of the death sentence. In discussing the standard of premeditation, used in New York in distinguishing first degree murder from second degree murder, Cardozo "What Medicine Can Do for Law," pp. 100-101 states:

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"What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemance of the passion, seems to call irresistably for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words. The present distinction is so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it. I am not at all sure that I understand it myself after trying to apply it for many years and after diligent study of what has been written in the books."

The terms wilfully, with premeditation and malice aforethought, feloniously, and without justifiable cause, are all legal terms, terms of art whose applied meaning must be ascertained by consulting legal authorities and case precedent. Let us examine these terms, see what they mean as applied in the law, and then ascertain whether the evidence educed at the trial establishes them.

b. - Wilfully.

The word "wilfully" means simply intentionally and not by accident In Bouvier's Law Dictionary (Rawles 3rd edition), for the word "wilfully", the term "intentionally" is used as the defining word, and the definition continues in part as follows: "In charging certain offenses it is required that they should be stated to be wilfully done..... In an indictment charging a wilful killing, it means intentionally and not by accident. State v. Schaefer 116 Mo. 96, 22 S.W. 447.....It is synonymous with intentionally, designedly, without lawful excuse, and therefore not accidentally. Mille v. State (Okl) 130 Pac. 813." In the instant case, Inoue admits he intended to execute the natives. He intended to kill them, therefore, the killing was intentional and not accidental. It is therefore clear and unequivocal from the admission of the defense, that the killings were wilful.

c. - Premeditation.

Simply stated, the term "premeditation" means that the decision to kill was made some appreciable time before the commission of the act. The requirement of premeditation was derived from the American statute and case law, seeking to differentiate between those murders justifying capital punishment. (First degree murder) and those murders which do not warrant capital punishment. (26 American Jurisprudence.) Wechsler and Michael in their study "A Rationale of the Law of Homicide" 37 Col. Law Review 706 note "For the most part therefore, the functions performed by all English definitions of murder - the determination of what homicides may be capitally punished - is performed in the United States by the 'deliberation and premeditation' formula..... However, the balance of the common law of murder performs under American statutes the analogous function of singling out those homicides which, though not capital, are nevertheless punishable more severely for the most part than the other criminal homicides....."

As to premeditation in the instant case it is obvious that prior to the actual killing Inoue had made his decision to kill these natives. He went for them in a truck; he took them bound to the place where he killed them; and then after instructing the guards not to let any passersby come into the area, he took the natives into the jungle

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and there killed them. It is clear that for some appreciable time prior to the killing of the natives, the accused had the design and intention to kill them. It is clear therefore that the prosecution has established the existence of premeditation.

d. - Malice Aforethought.

Defense counsel has cited some archaic language concerning malice which appears in Winthrop's Military Law and Precedents (1920 reprint.) The language cited is from a 1920 reprint of a text originally written in 1886. The inference is obvious.

Of course it is true that occasionally the dicta in some judicial opinion speaks of a requirement of express malice in language similar to that cited by Commander Carlson; but upon examination of the decisions it is readily seen that even the words "express malice" mean merely an intention to commit the act, and not an intention to commit any crime. Thus the court in People v. Motuzos 352 Ill. 340, 185 N.E. 614,617, in a homicide case states: "Express malice is the deliberate intention to take the life of another - which is manifested by circumstances capable of proof.

Malice aforethought is a concept closely related to that of "premeditation." The word "aforethought" in its popular sense conveys some of the sense of premeditation. But the legal terms "with premeditation and malice aforethought" mean little more than the existence of the intention to kill at tht time of or just prior to the killing. Wechsler and Michael in their "A Rationale of the Law of Homicide," op. cit., pp. 702-708, explain this briefly as follows:

"The most striking phase of the development of the English law was the reduction of 'malice aforethought' to a term of art signifying neither 'malice' nor 'forethought' in the popular sense. Strikingly analogous in the judicial development of the American law of homicide is the narrow interpretation of 'deliberation' and 'premeditation' to exclude the two elements which the words normally signify: a determination to kill reached (1) calmly and (2) some appreciable time prior to the homicide. The elimination of these elements leaves, as Judge Cardozo pointed out, nothing precise as the crucial state of mind but the intention to kill."

Similarly, American Jurisprudence, Vol. 26, p. 182, states: "Malice in the sense of hatred or malevolence toward the deceased is not necessary to constitute murder in the first degree, nor is it necessary to show what motive, if any, inspired the killing." Similarly, on page 183, "Malice is an essential ingredient or element of murder at common law and also under statutes which have been enacted in many jurisdictions. However the term 'malice' as used in the law of homicide is difficult to define, for in its technical sense it comprehends a considerable number of different conditions of mind. The term has often been defined as the intentional killing of one human being by another without legal justification or excuse and under circumstances which are insufficient to reduce the crime to manslaughter. It is said to include all those states and conditions of mind which accompany a homicide committed without legal excuse or extenuation....."

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The definitations of malice aforethought, as set forth in Naval Courts and Boards, American Jurisprudence, and numerous other authoritative texts reflects the decisions of the courts. Two typical leading cases are Mann v. State 124 Ga. 760, 52 S.E. 324, LRA(NS) 934: "Legal malice is the intent unlawfully to take human life in cases where the law neither mitigates nor justifies the killing." Comm. v. Maderious 255 Mass. 304, 151 N.E. 297, 47 A.L.R. 962 "Malice as an element to murder does not necessarily imply ill-will toward the person killed; any intentional killing of a human being without legal justification or excuse, with no extenuating circumstances sufficient in law to reduce the crime to manslaughter, is malicious."

Once it is established that the accused intended to commit the homicide, his motive is completely irrelevant in determining the question of guilt, although it may be considered in mitigation of punishment. In Roberts v. People, 221 Michigan 187 (1920) the defendant at the request of his incurably sick wife provided her with the means to commit suicide. The defendant was found guilty. Similarly note the Japanese case cited by Mr. Suzuki of the woman who was convicted of homicide who killed her child due to their conditions of very extreme poverty.

Since it has been proved that the accused Inoue intended to kill the natives, he must be judged solely on the basis of whether his acts were in fact legally justifiable or excusable. His motives may have been excellent or revolting, it is immaterial, except in mitigation or aggravation of the punishment.

In the foregoing discussion the judge advocate has established that Inoue killed these natives intentionally, and that in fact this intention to kill existed for some time prior to the actual killing of each group of natives. Therefore, the legal requirements of "wilfullness, premeditation and malice aforethought" have been clearly established. Under the specifications of Charge I, two terms remain to be considered, "feloniously" and "without justifiable cause." In its broader application, the term felohiously includes the term "without justifiable cause," for it means merely that the act was done unlawfully, that is to say without legal justification or legal excuse.

e. - Feloniously.

Bouvier's Law Dictionary (Rawle's Third Revision) defines "feloniously" as follows: "Feloniously. This is a technical word which at common law was essential to every indictment for a felony, charging the offense to have been committed feloniously; no other word nor any circumlocution could supply its place....It is necessary in describing a common-law felony, or where its use is prescribed by statute; Wharton's Criminal Pleading, Section 260; Bowler v. State 41 Miss 570;.....In an indictment it is equivalent to purposely or unlawfully; State v. Bush, 47 Kan 201, 27 Pac 834, 13 L.R.A. 607."

Felonious homicide is defined in Bouvier as: "Felonious Homicide. The killing of a human creature, of any age or sex, without justification or excuse. It may include killing oneself as well as any other person; 4 Bla. Com 188....."

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The prosecution has established that the terms "wilfully, premeditation, malice aforethought, feloniously, and without justifiable cause" require only that the killings be proved to be intentional and "without legal justification or legal excuse." The fact that the killings were intentional has been proven without contradiction from the accused. The remaining question - whether there existed legal justification or legal excuse - will be discussed at length after full consideration of the scope of the requirement of intent under Japanese law.

2. Requirements under effective local law - the Japanese law.

Despite lengthy and learned argument by defense counsel, careful analysis of the pertinent Japanese law reveals that there is little practical difference between the application of the Japanese law, and that of the American statutory and common law. While the language of Section 199 of the Japanese Criminal Code is very broad, its contents must be read in the light of certain limiting provisions contained in Chapter VII, Book I of the Japanese Criminal Code. In essence, these provisions, like the corresponding provisions of statutory and common law require merely that the killings be intentional and without legal justification or legal excuse.

In the language of Article 199 of the Criminal Code of Japan, which was the effective local law on Jaluit at the time the offense was committed, there are no expressed requirements other than the homicide to establish the crime. The language of this provision reads:

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

Chapter VII of the Criminal Code of Japan contains general provisions which provide that under certain circumstances, acts which would ordinarily constitute a crime are not criminal, and that under other circumstances acts which are criminal should receive a lesser punishment because of mitigating factors present. These provisions have been discussed at length by defense counsel but certain provisions thereof have been erroneously interpreted and fallaciously applied to facts in the instant case, and we must therefore reexamine them minutely and accurately with reference to the facts in issue in the Inoue case.

Chapter VII consists of Article 35 through 42. Certain articles of Chapter VII are clearly inapplicable and will be briefly disposed of prior to consideration of the instant case. Article 39 relates to acts of persons of unsound mind. Article 40 relates to acts of deaf mutes. Article 42 relates to mitigation of punishment for those who denounce themselves before official detection. Article 41 relates to the punishment of persons under the age of fourteen, and will be discussed subsequently. The remaining articles 35 through 38 of this chapter will be briefly discussed in order to establish that the pertinent portions thereof are included in the common law concept of murder as an intentional killing, without legal justification or legal excuse.

a. Criminal Intent under Japanese law.

(1) Article 38.

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Article 38 of the Japanese Criminal Code deals with criminal intent. It provides: "Except as otherwise provided by special provisions of law, acts done without criminal intent are not punishable

"A person who without knowledge (of the fact) has committed a grave offense (crime) cannot be punished in proportion to its gravity.

"Ignorance of the law cannot be invoked to establish absence of criminal intent, but the punishment may be mitigated according to circumstances."

From the foregoing it would appear that the requirement of criminal intent under Japanese law is less stringent than the requirement under common law - for the second paragraph of article 38 appears to provide that for all serious crimes even ignorance of the facts will only be considered in mitigation; this paragraph reads "A person who without knowledge of the fact has committed a grave offense.....cannot be punished in proportion to its gravity." The provision however seems to have been given a narrow interpretation. and for practical purposes it would appear that Article 38 is similar to our concept of criminal intent.

(2) Stare Decisis.

The judge advocate and the defense counsel disagree as to the correct interpretation and application of the provisons of Article 38 of the Japanese Criminal Code. In connection with Charge I, the Commission must determine the meaning and correct application of these provisions to the instant case. The defense counsel in their argument have cited certain text writers and extracts of certain court cases. The judge advocate believes that defense counsel have misinterpreted and misapplied the opinions of the courts; but if defense counsel correctly interpreted these opinions it is clear that these decisions incorrectly interpret and apply the Japanese law. The judge advocate will prove this be citation of contrary Japanese case law, citation of Japanese legal authorities, and by reference to elementary universal principles of criminal jurisprudence.

In considering cases cited by defense counsel, the Commission should give them due weight and consideration as a judicial interpretation, but the Commission should not feel bound to follow clearly erroneous decisions. Even in the United States, where we follow the doctrine of stare decisis, the courts do not feel bound to perpetuate bad decisions.

This doctrine of stare decisis says, that the courts should abide by or adhere to decided cases. Bouvier's Law Dictionary (Rawles Third Revision) in discussing stare decisis says "It is a general maxim that when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from." As was stated in The Madrid, 40 Fed. 677, "The rule of stare decisis means, in general, that when a point has been once settled by judicial decision, it forms a precedent for the guidance of courts in similar cases."

But despite the fact that the American courts follow the doctrine of stare decisis, it is clear that they are not bound by and will not follow clearly erroneous authority. "The rule is founded on public policy and does not require a court to follow a clearly erroneous authority", (Bouvier, op.cit. citing pertinent cases.

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Despite the rule of stare decisis, Bouvier points out that there are many hundreds of overruled cases. If the interpretation of the law in certain previous Japanese cases is wrong, then I urge upon the Commission the language of Justice Howard, who in Ellison v. R. Co. 87 Ga. 691, 13 S.E. 809, said, "Let this decision be right whether other decisions were right or not."

The Japanese law does not follow the doctrine of stare decisis. It does not in theory recognize the binding force of prior decisions, but merely utilizes them as a guide to the proper interpretation of the law. William J. Sebald, of Kobe Japan, who is an outstanding authority on Japanese criminal law, in the introduction to his famous translation and annotation of the Criminal Code of Japan, comments briefly upon the theory of judicial decision in Japan, on pg. vii, he states "No attempt has been made to present the decisions of the Supreme Court as an orderly body of case law, principally because Japan has not adopted the doctrine of stare decisis, and to do so might easily give rise to erroneous conclusions. Hence upon almost identical facts, contrary decisions are often reached. Many such instances will be found in this work."

In view of this fact that Japan does not follow the doctrine of stare decisis, it is clear that the Commission is not bound to follow any individual case precedent which erroneously interprets the law.

(3) Defense arguments re criminal intent upon Japanese law.

The defense counsel have advanced several ingenious arguments designed to persuade the commission that the Japanese requirement of criminal intent is a requirement of subjective personal malevolence and that the accused did not possess this malevolence and therefore cannot be found guilty of the crime of murder in violation of effective local law.

Note that the defense counsel have not denied that Inoue intended to kill the natives. They merely argue as to the requirement of criminal intent: that he intended merely to obey the superior orders of Admiral Masuda; that he did not intend to commit a crime; that he believed that what he was doing was lawful;that he believed that the examination and consultation and the subsequent execution was the best possible procedure under all the circumstances.

In the course of discussion of the applicable law the judge advocate will consider and dispose of each of these arguments. The judge advocate will cite outstanding Japanese legal authority to evidence the fact that the defense has misinterpreted the applicable law. The judge advocate will then prove that even under the defense's subjective theory of criminal intent, (a standard of personal responsibility in the recognition of a wrongful or unlawful act) the accused clearly and irrefutably possessed the knowledge or the responsibility of knowing that his acts were morally and legally wrong; and therefore the accused possessed the requisite criminal intent under that concept of subjective criminal intent.

(4) Criminal intent is not subjective.

Criminal intent does not require proof of a malevolent state of mind, or a psychological realisation of wrongfulness or unlawfulness.

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Defense counsel have argued that Inoue believed that he was performing his legal duty, that he had no anti-social intention, no sense of moral wrong, and therefore cannot be found guilty, for the law requires proof of criminal intent. They have attempted to interpret criminal intent as a personal psychological state of consciousness of the socially wrongful or illegal nature of one's act.

At this point we are concerned with the legal rather than the factual aspects of this argument, and the judge advocate will try to establish that the defense counsel have misinterpreted and misapplied the Japanese law of criminal intent.

The defense counsel have argued what might be called a "subjective" theory of criminal responsibility as opposed to a social or "objective" theory of criminal responsibility. The judge advocate will at length examine these two theories and show that in application they are fundamentally the same, both apply objective standards - that is to say social rather than individual standards of conduct.

Before discussing these theories and the defense argument, it should be carefully noted that we are discussing theories of criminal intent in the determination of guilt, and not theories of criminal punishment or penological treatment. The theories and the practice are distinct and different. In the determination of guilt, primarily objective social standards are applied. In the determination of the individual's sentence, subjective matters are properly considered. The individual's subjective standards of responsibility, his motives, as well as numerous other individual psychological and social factors in extenuation or aggravation are properly considered in the determination of sentence. Similarly after sentence is pronounced, the law in penological treatment applies subjective standards in the preventive, corrective, and incapacitative methods of treatment. The judge advocate agrees that modern theory applies subjective standards to the criminal - but these subjective standards are standards of sentence and of penological treatment. It is only after the determination of guilt that individual subjective standards can be applied. It is only after the determination of guilt that the law provides the time, the control of the individual who has committed the criminal act, the experts and expert facilities for the study of the individual and his social background, and the power to exercise methods of reeducation and rehabilitation.

The numerous reasons why a subjective theory of criminal responsibility and treatment is not applied until after the finding of guilt, will be discussed at length after consideration of the defense's argument.

The defense have argued that in order to possess criminal responsibility the individual must realize that his act is unlawful. Defense counsel have cited several Japanese legal authors who express a theory of subjective criminal responsibility. Their purpose is to convince the Commission that at least the accused is not guilty of Charge I. The judge advocate has not heretofore discussed any abstract theories of law, because he believes that this Commission as a court of law is concerned with specific provisions of the law and the application of those provisions, rather than with abstract theory.

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Some of the language cited by the defense counsel from so-called subjective theorists would appear to conflict with the judge advocate's application of the provisions of Japanese criminal law to the instant case. The judge advocate will first discuss this theory and show that this so-called subjective theory, does both in theory and practice, apply objective standards.....so that apparent contradictions are largely theory rather than application. The judge advocate will then briefly present some of the Japanese authority, and Japanese case law, which proves that in Japanese, as in American criminal law, objective standards, are applied - and the law of homicide merely requires that the judge advocate by objective proof establish that the accused intended to kill the natives, and that the homicide was without legal excuse or legal justification. After establishing what the judge advocate believes to be the correct application of the Japanese law of criminal intent in homicide cases, the judge advocate will demonstrate that even under the theory of law argued by defense counsel, the evidence clearly proves that the accused had the necessary subjective criminal intent.

(a) The so-called subjective theory applies objective or social norms.

Let us first examine the writings of these so-called subjective theoriests and see what they themselves have recognized in this regard. Mr. Akimoto has cited from Ono Seiichiro's Lectures on the Criminal Code, certain language which clearly indicates that Ono Seiichiro realizes that we cannot probe into an individual's mind, but must make and apply external objective standards from which to determine his acts. He states "However although knowledge of the law is unnecessary, it is necessary that one be conscious or at least that one can be conscious that the act violates a norm or a criterion of society or is anti-social." Note the language "or at least that one can be conscious that the act violates a norm". Clearly here the author is applying an objective standard, a standard of what the individual should have known rather than a standard of what he actually did know. The portion quoted by Mr. Akimoto also contains the following language "I interpret the conditions of criminal intent in the Criminal Code, approximately as follows 1. to recognize that an act constitutes a crime and do it while knowing that it is a crime. 2. to recognize the unlawfulness of the act. 3. From the concrete circumstances of the time when he did the act it can be expected that he might be able to act otherwise, or should not act so." This third kind of criminal intent is clearly not a subjective, but an objective standard. It reads "3. From the concrete circumstances of the time when he did the act it can be expected that he might be able to act otherwise or should not act so."

The analysis of this language shows that even the Japanese so-called subjective theorists admit the existence of criminal intent when the accused "should have known" that his act was wrong or illegal. An even clearer expression of this is found in the article by Takikawa Koshen, in Volume IV of Horitsu Gaku Jiten, a famous Japanese dictionary of jurisprudence, consisting of a five volume compilation of notes by eminent Japanese jurists. Koshen beliqves in the theory that criminal law is based on subjective responsibility, but nevertheless recognizes the fact that it is necessary to apply social norm standards, rather than subjective standards of right and wrong. With regard to criminal intent, he states in part:

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"1. Responsible factors Condition. In order to punish a person for illegal acts, we must say that the act was based on intention or on negligence. This is called responsible condition. The criminal code says this, but is silent on what is intention or what is negligence. It merely provides 'except as otherwise provided by special provisions of law, acts done without criminal intent are not punishable.' The crimes set forth in the criminal code - commence with article 73 et seq., and are based on the principle of crimes requiring intention. In this way, intention and negligence are made responsible conditions, but the significance of the terms is left to theory. As a result, as far as theory goes, there is a split in the meaning and significance of intention and negligence.

"2. Significance of intention. The intention set forth in the criminal code is a development of the Roman law of Dolus. Intention in criminal law does not stress the psychological fact of knowing the value and significance, and the factual relationship of the act by the committer; for if this consciousness existed, then the committer would have used this sense of responsibility and had the opposite motive. Thus the stress is placed on the norm - and the fact that the motive should have been opposite....."

Note particularly the language "The stress is placed on the norm - and the fact that the motive should have been opposite."

Once it is realized that the subjective theory applies the standard of what an individual should have known - as well as what he actually knew, the practical differences in application between a subjective and objective theory become negligible.

Under both theories it is recognized that there are certain subjective elements that the law requires - for example, the law requires that for criminal responsibility to exist a man must either act or fail to act when he has the responsibility of acting. In the concept of the word act - or failure to act, the law recognizes a volitional state of mind and a physical ability to control the act. In addition, in certain crimes the law requires a specific type of knowledge and a specific type of intent - thus in order to constitute larceny it is necessary that the criminal know that the property belong to another person. In addition, in other crimes the law requires proof that a man intends his act, as in the case of an intentional homicide - or intends the reasonably forseeable consequences of his act, as in the case of a criminally negligent homicide. All these illustrations are cited to show that the objective theory also applies standards of responsibility which are based upon the individual and his knowledge of the facts and circumstances.

It is clear therefore that both the subjective and objective theories of criminal responsibility apply social norms and that implicit in these social norms is full consideration of certain social requirements of proof of individual responsibility. But it is the social norm, and not the individual's standards, not his concept of what is right and wrong, but society's concept of what he is presumed to know and what he should have known, which determines the existence of criminal intent. The law will presume that he knew or should have known they were wrong, and therefore regardless of whether in fact he knew them to be wrong or not, the law will presume that he had the requisite criminal intent.

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Even where mistake of fact is involved, the law is clear that where the accused should have known the facts, his ignorance of the facts does not negate criminal intent. So that even if the accused, as he testified, really believed that his acts were legal, and even if this erroneous belief was based on ignorance of the facts, his ignorance cannot excuse him. For if he should have known the wrongful or illegal nature of his acts, the law will conclusively presume that he did know and will conclusively presume the existence of criminal intent.

The rule is expressed in 22 Corpus Juris Secundum Sec. 47, as follows: "And the general rule is that such ignorance or mistake of fact will exempt one from criminal responsibility unless the mistake arises from a want of proper care on the part of the accused." See Townsend v. U.S. 95 F.2d.352, certiorari denied 303 U.S.664, 82 L.Ed 1121.

Similarly, 39 Amer. Jur. p.236,237 expresses the rule as follows:

"Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him.....In other words, whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice); he does wrong not to heed to 'signs and signals' seen by him. It will not do to remain wilfully ignorant of a thing readily ascertainable, and it is no excuse for failure to make an inquiry, that if made, it might have failed to develop the truth....."

(b) Japanese law clearly indicates that an objective standard of criminal responsibility is applied.

From the discussion of the Japanese authors on the subjective theory, it has been demonstrated that even in their interpretation of the Japanese law, the objective standards of what should have been known or what should have been intended, is applied.

The judge advocate in a later portion of this argument dealing with ignorance of law will cite numerous eminent Japanese jurists, and Japanese supreme court cases which prove conclusively that the Japanese law, like our law, applies an objective standard of criminal responsibility. At this time it need merely be pointed out that while the vague and broad language of paragraph 1 of Article 38 provides that "except as otherwise provided by special provisions of law, acts done without criminal intent are not punishable", it is apparent from examination of the other provisions of this article, and of other articles in the code, that there is no requirement that the accused have a "guilty state of mind" - a personal psychological recognition of the wrongful or illegal nature of his act. Paragraphs 2 and 3 of Article 38 - clearly indicate that criminal intent can exist even though there are mistakes of law and certain mistakes of fact. Under these conditions, ignorance or mistake of fact or law, clearly the accused cannot have a sense of moral or legal wrong, because he does not even know the true facts or law. This proves

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that a subjective standard is not used. Similarly the fact that negligence can constitute the basis of a criminal conviction under Japanese law as well as under our own, is also clear proof that criminal intent does not require proof of a psychological state of mind - a personal subjective standard of realization of moral or legal guilty. See Horitsu Gaku Jiten (Dictionary of Jurisprudence) Volume 1, pages 229-231, by Takikawa Koshen.

(c) Fundamental requirements and theories of jurisprudence require the application of objective, social norms.

When any theory of criminal jurisprudence, even the so-called subjective theory of criminal intent, is examined from the practical standpoint of application, it is obvious that objective standards must be applied.

In the first place, in the application of any theory of criminal jurisprudence we are faced with the practical problem of proof. Clearly for proof we must look to objective proof. The science of psychology has not progressed sufficiently, to accurately probe the subjective mind of all accused criminals in order to establish what the accused actually knew or whether he actually believed his act to be legally or morally wrong. Whenever the science of psychology does progress that far, society will have to determine whether it will give up the legal system of objective proof of guilt in favor of a scientific laboratory technique of psychological experts. Until such time we are compelled to judge the accused individual, not by his psychological subjective state of mind, and not by his subjective intentions, but by objective standards namely the things that he has done and the acts that he has performed.

The accused will argue that even though we use objective standards of proof, one of the things that we must establish by such objective means, is the fact that the accused knew or should have known that his acts were morally or legally wrong. The judge advocate has by objective standards established that the accused Inoue intended to commit the act - the act of killing the natives. Unlawful homicide is a crime where no further specific intent is required - and therefore it is not necessary to establish even by objective standards that the accused knew or should have known it was morally and legally wrong. In such a case, if the acts were legally prohibited, and the accused intended to commit the acts, then the law conclusively presumes the existence of the requisite criminal intent.

Criminal law is not a system of moral retribution. It is a vital system of social control. Society is just as interested in corrective, preventive, and incapacitative treatment of those who commit wrongs without knowing the acts are wrong, as it is in treating those individuals who commit illegal or wrong acts knowing their acts to be illegal or wrong. In fact it is probably considerably more important for society to give appropriate penal treatment to those individuals whose ignorance or underdeveloped or warped sense of social or moral responsibility permits them to commit serious crimes without even knowing them to be wrong. Many of our most vicious and even some of our so-called hardened criminals fall in this category.

No - the law does not require proof of a specific intention to commit a crime or a mental state of mind to do an evil or a wrong act. In fact a man may be convicted of crime although he clearly establishes that he had the most excellent of motives and the very best of intentions.

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It may seem strange to the layman that a man with a good heart or a good character can be found guilty of a crime, but we are dealing with the practical problems of an organized society and in determining guilt, we cannot probe into nor seek justification in the innermost motives of the criminal. Society has determined what circumstances constitute legal justification or legal excuse for acts which would otherwise be criminal. Society does not, and cannot recognize personal motives, or other persons justifications or excuses, as means of escaping criminal liability. The law does permit these things to be considered in determining the extent of punishment - but to permit it to determine the existence or non-existence of guilt, would mean the destruction of the entire system of law, and of organized society itself.

Wharton in his Criminal Evidence (11th ed. vol. 1, p. 283) explains this as follows: "There is no bad act which the perpetrator does not summon up good motives to excuse. An assassination, for instance is rarely for the exclusive purpose of satiating private hate. A bad man is to be removed from the world, or some good deeds are to be aided by part of the plunder. If whenever good intentions are mingled with the bad intention, there could be no conviction, there could be no conviction in any case..... The law is: No matter what may be the motives leading to a particular act, if the act is illegal, it is indictable, notwithstanding some one or more of the motives inducing the act may be meritorious."

This is the law not only in our courts, but is the Japanese law as well. Defense counsel Mr. Suzuki proved this and at the same time inadvertently proved that his whole theory of "the mental state and personality" as the basis of criminal intent, is definitely not the law in Japan. Mr. Suzuki cited the case of the mother who because of extreme poverty killed her child. Here the woman clearly believed that the motive to prevent continued starvation and suffering of her child justified killing the child. She did kill the child. But the law, despite her motive and her sense of the dire necessity and bitter compulsion of her circumstances, found her guilty of the crime of homicide. The court was convinced that her motive was good and that she believed in the righteousness of her act, and the court considered these factors, but it considered them in mitigation of sentence, and the court clearly held that the motive did not negate "criminal intent" or constitute a legal excuse. Note that Mr. Suzuki admits that such cases are numerous in the judgment cases of Japan. This case clearly proves that the "mental state or personality of the accused", a consciousness of guilty, is not required in order to constitute criminal intent under the Japanese law.

(5) Ignorance or mistake of law does not negate criminal intent.

The fact that Article 38 of the Japanese Criminal Code specifically provides in paragraph 3, that "Ignorance of the law cannot be invoked to establish absence of criminal intent" would appear to clearly and unequivocally destroy any possible contention by defense that a Japanese criminal law requires that it be proved that the accused knowingly intended to commit a crime or a wrongful act. But the defense have contended: that the provision of law does not mean what it says; it does not mean in the Japanese law what it means in other systems of criminal jurisprudence; that instead it has a specialized meaning, it means that ignorance of specific punitive provisions does not negate criminal intent, but ignorance of the

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illegality of an act does negate criminal intent.

Under this theory the language of paragraph 3 is limited to the stipulations of punishment, but it is still necessary to prove that the accused knew his acts were illegal, in order to establish the existence of the criminal intent. Clearly such an interpretation completely vitiates the meaning and significance of this provision which reads: "Ignorance of the law cannot be invoked to establish absence of criminal intent, but the punishment may be mitigated accordingly."

This ingenious argument rests upon the identical fallacies and falls under the weight of the same proof we have discussed in connection with criminal intent in general. The practical problems of proof, and the sociological impossibility of adopting the subjective standard for the determination of guilt or innocence, demonstrate why Japanese law like our own rejects the interpretation and argument of the defense.

Earlier in this argument I spoke of the doctrine of stare decisis, the binding force of prior precedents, and I demonstrated the very obvious fact that even the courts which follow this doctrine overrule decisions which are erroneous. I speak of this now because I am about to speak of the Amakasu or Masahiko case. This case is a bad decision - not only as regards the alleged doctrine of subjective intent for which defense counsel have cited it, but it is so clearly and patently wrong on the facts and alleged application of that doctrine as to have absolutely no value. It does not serve as a guide to the law of Japan. It does not reflect that law. It does not reflect any law.

When we examine this case - it is apparent that it sharply conflicts with the customary and correct interpretation of Article 38, as reflected in the numerous decisions of the Japanese Supreme Court.

Before briefly discussing this case to show how erroneous and valueless it is - let me first point out that even in this decision it is clear that innocence of motive even if believed does not negate criminal intent. Masahiko and Keijiro who had a good motive to "eradicate the evil roots in the nation" were held guilty. Similarly let me point out that even with regard to the two privates first class who were acquitted, there is this clear distinction - namely that they were two privates first class, and not officers with 7 years of officer experience. Note that Makino says, and I quote from defense counsel's argument "if the accused had a proper knowledge of the law, it would have been their duty to disobey the order." Clearly as privates first class they could not be presumed to know military law - and in their participation in the incident it was clearly shown that they did not know all the facts. Inoue on the other hand is an officer with 7 years of experience - and by his own testimony clearly participated in every phase of this incident, from the early investigation through the alleged meetings, and to the very act of personal execution. Inoue should have known and knew the wrongful and illegal nature of his acts. Thus it will later be proved that even under Makino's interpretion of the Amakasu case - the accused Inoue is clearly guilty.

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The judge advocate however does not wish to deal in fine distinctions where the errors are so obvious and the decisions so patently wrong. The defense counsel have cited what I understand is extracted from an Essay on Criminal Intent written by Makino in 1923, the year that the crime was committed and the court martial held. Makino whom defense cite as an authority on the subjectivism criminal theory in Japan apparently interpreted this case as determining that the accused had no criminal intent.

Makino himself states that this Amakasu case furnished us with "new material." He also states that "this judgment was pronounced at the Court Martial of the First Division. Since there was no appeal, this finding was the conclusive one. So Makino points out what we should bear in mind - first it was a "new" case. Secondly, it was decided by court martial - with no appeal taken, and obviously no judicial review.

The vital and significant parts of this decision were not pointed out: the fact that this case occurred during a period of Martial Law; the fact that it was decided by a court martial; and the fact that the Militarists were by this same policy of assassination eliminating opposition and criticism, and gaining full control over the Japanese empire. The fact that this decision by a military court martial was not universally condemned by every lawyer and every jurist of Japan - can be understood, but not praised. This was a political decision which makes the French court martial case, the infamous Dreyfuss case, a comparative paragon of justice.

Note the obvious pattern of this assassination. The accused Masahiko was head of the Shibuya Detachment of the Tokyo Military Police. The accused Keijiro was attached to the Special Higher Police Section of the M.P. Headquarters. While "most of the socialists were arrested by the police", the regular Yodabashi police had not arrested Osugi, the "leader of the anarchists regarded as most dangerous." They were tailing him. The police informed Keijiro that they would release their man who was tailing Osugi, and would support the M.P. by other means. They apparently "hinted" that the military should kill him. The police told Masahiko and Keijiro of the movements of Osugi - they told him of Osugi's habits, and movements, and on the very day of the execution the police of the Yodabashi station told them where Osugi had gone and when he would return. The pattern of assassination, the cooperation between the police and the Military Police, is clear indication of the political nature of the assassination, which is so openly evidenced throughout the discussion of the so-called judgment of the court martial.

This assassination was not an isolated incident. It was part and parcel of the military move to gain complete control and dominance over the Japanese government and empire. Assassination was one of the accepted and standard means of gaining that control. The militarists ordered, organized, planned, and personally carried out political assassinations. Is it surprising therefore that a military court martial should vindicate two privates first class for carrying out these very crimes of political assassination. No, the Amakasu case is not a guide to the law of Japan. The conviction and sentence of Masahiko and Keijiro to relatively short terms of imprisonment - 10 and 3 years - was a meagre sop to public indignation, and was clearly justified because of the stupidity with which

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the assassinations were carried out - a 7 year old child, and a woman, as well as Osugi, were strangled in the Military Police Headquarters. This was stupid enough, but to have the information leak out, clearly was sufficient reason for punishment even by the militarists.

The Amakasu decision - in its language, in its approach to the interpretation of the evidence, in its attempted exculpation of a man who strangled a 7 year old child - and in its meagre 10 and 3 year sentences to those police officers who planned and carried out these assassinations - is the clearest proof that this was not a judicial decision. It is not a precedent which this or any court should consider except to condemn it as part and parcel of that same inhuman, criminal militarism which because of its countless other atrocities and war crimes, has evoked the bitterest condemnation of every civilized human being. No, the Amakasu case does not help the accused.

The defense theory of interpretation of paragraph 3 of Article 38, is not the law of Japan. It is one of many theories of interpretation of this provision. It is not a majority view, and is obviously not a sound view: and the Commission should reject this misleading and sterile doctrine.

In Volume 2, page 1042, column 2, paragraph 3 of Horitsu Gaku Jiten, responsible editors, Suyehiro, Gentaro and Tanaka, Kotaro, the following brief comment appears with regard to interpretation of this provision regarding ignorance or mistake of law:

"Concerning the interpretation of article 38, paragraph 3 there are the following 5 schools of thought:

1) The first is that having the conditions identical to a judicial precedent, a mistake of criminal law does not negate the establishment of the criminal intent. On this point there shall be no difference between natural and statutory crimes.
2) The second is that the mistake of law when it concerns civil law and regulations also negates the intent.
3) The third is that in the case where one believes his acts are not contrary to law, there is no establishment of intent. It is not necessary to know the various punishments so far as Article 38 para 3 is concerned.
4) The fourth is that in the case where there is ignorance of the law, (while) there is theoretically no existence of (actual) intent, but (yet) on the fact of being ignorant, the situation is considered the same as where there is an (actual) intent.
5) The fifth is that although a person believes his acts to be permitted by law, as long as the facts of the crime are known, it cannot be said that the intent did not exist. This principle applies only to natural crimes. As for statutory crimes, intent exists as long as violation of the law was known in the matter..... (i.e. ignorance of the law is an excuse in statutory crimes.)"

The third of these five schools of thought gives credence to the doctrine advanced by the defense counsel. It is apparent that the defense theory of interpretation of paragraph 3 is only one of many schools of thought, and that the other schools of thought apparently reject this fallacious and erroneous doctrine. In general the authorities agree with the interpretation which has been given in

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all countries to the rule that "ignorance of the law is not an excuse." And they do not seek to apply any narrow restrictive, aborting doctrine like that advanced by the defense.

In Horitsu Gaku Jiten, Vol. II, Page 1040 (column 2 and ff), the fact that the doctrine follows the general interpretation of such provisions, is clearly and specifically noted. "It has been argued whether or not intention requires the element of cognition of illegality. According to the usual doctrine, Law, mentioned in paragraph 3 of Article 38, refers to criminal or penal law. The term penal law is not used in the strict sense, which would limit it to general norms, it also includes merely prohibited acts. It is shown therefore that for criminal intent, a consciousness of the law or illegality, is not necessary. In all countries it is held that 'ignorance of the law is not an excuse' and Article 38, para 3 'Ignorance of the law cannot be invoked to establish absence of criminal intent' virtually expresses the same thought."

Similarly, Makino, Eiichi, whom defense counsel themselves cites as an authority on the subjectivism criminal theory of Japan, writing in Vol. 2, page 1042 of Horitsu Gaku Jiten, states: "Our legal precedents follow the usual theory and consider that mistakes of law do not negate the criminal intent, and moreover do not differentiate between natural and statutory crimes."

Makino cites several cases in illustration of the validity of this interpretation. Several of these cases are derived from the Daishinin Keiji Hanrei Yoshi Ruisan (Classified Digests of Criminal Judgments of the Supreme Court), published in 1934 by the Hosokai, a society of distinguished Japanese jurists. Several of these cases are also cited by William Sebald, in annotation of Article 38, in his annotation of the Criminal Code of Japan.

One of the most famous of these cases is the case of the flying squirrel. Makino briefs this case as follows: "When one captures a flying squirrel, not knowing that capture of this animal (provincially known as Moma) is prohibited by law, and believing that capturing this animal does not constitute a crime, nevertheless, since it is ignorance of the law, one is considered as having criminal intent." 3 S.C. N.S. (Daishinin Hanreishu) 367."

In the flying squirrel case the accused captured the flying squirrel, and he believed that capture of this animal did not constitute a crime. Similarly in the Inoue case, Inoue killed the 8 natives, and he claims that he believed that killing these natives did not constitute a crime. As was stated in the flying squirrel case, this is "ignorance of the law, one is considered as having criminal intent."

Another famous Japanese case is reported in 10 S.C.N.S. (Daishinin Hanreishu) 6. This was a narcotics case, in which the accused who was engaged in the lawful business of trading in drugs, brought two packages of morphine into Japan, and he failed to declare them. He was charged with smuggling narcotics. He proved that he did not know of any regulations requiring that narcotics should be specially declared, and it was established that he did not intend to violate the law. Nevertheless he was found guilty of the crime, but his ignorance of the law was considered in mitigation and he was placed on probation for three years, with regard to his sentence at

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hard labor. The court specifically cited paragraph 3 of Article 38 and said: "in statutory crimes, just as in penal crimes, in the establishment of criminal intent, cognition of illegality is not considered necessary."

Inoue has attempted to plead that he was engaged in the lawful duties of an executioner and that he was ignorant of the law, that he believed he had the right to execute the natives, and that he did not intend to violate the law. This was exactly the argument in the narcotics case - and in the narcotics case the court found that the facts were exactly as claimed by the drug dealer, but nevertheless held that the acts still constituted a crime, and the innocent state of mind and blameless intention was merely appropriate in mitigation. Note there are two obvious distinctions between the drug case and the Inoue case. First, in the drug case the accused proved his ignorance of the law and the absence of any intent to commit a wrong; whereas in the Inoue case, the judge advocate will prove that Inoue knew or should have known the law with regard to the illegality of his act. Secondly, in the drug case, the nature of the act was not such as to require a man to be on notice that his actions might be illegal; whereas in the Inoue case, the nature of the act, the taking of human life, is such as to put an individual on notice that society demands the most careful and precise exercise of his duties with regard to the legality of his acts, and that there are laws which specifically relate to his activities.

In view of these two obvious distinctions, it is clear that the Inoue case is an immeasurably stronger case for conviction of the accused than the drug case. If the Japanese law holds, as shown by the opinions of Makino, and the other eminent Japanese writers cited by the judge advocate, and as clearly demonstrated by the two cases cited supra from the Supreme Court of Japan, that ignorance of ones acts does not negate criminal intent - there can be absolutely no argument by the accused that he did not possess the requisite criminal intent. This is doubly true in view of the nature of the case - one of homicide.

The law places a tremendous value upon the human life. As stated in 40 Corpus Juris Secundum, sec. 98, pg. 958 - "It is important that the taking of human life be not excused or justified except in strict accordance with the established law." And specifically with regard to the question of ignorance or mistake of law, 40 Corpus Juris Secundum Sec. 98, pg. 959, states "A homicide is neither justified nor excused by a mistake of law as to the slayer's right to take life", citing People v. Cook 39 Mich. 236, 33 Am.Rep. 380.

From the foregoing discussion of the Japanese law with regard to the requirement of criminal intent, and with regard to the question of mistake of or ignorance of law, the Judge Advocate believes that defense is clearly in error in contending that under Japanese law criminal intent is measured in terms of existence of a subjective intent to commit a wrongful or knowingly illegal act. On the contrary the judge advocate believes that the outstanding authorities, the statutes, and the case law of Japan, clearly demonstrate that Japanese law, like the similar concept under American statutory and common law, recognizes the existence of the required criminal intent, in the proof that the accused intended to commit the act. In the case of a criminal homicide, all that is required is proof that the accused intended to commit the act of killing, and that under the circumstances the homicide was not legally justifiable or legally excusable.

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b. Evidence clearly establishes existence of criminal intent.

The accused Inoue claims that he had no "consciousness of guilt" and he did not know that his acts were illegal or wrong.

The legal authorities and the decisions of the Supreme Court of Japan cited by the judge advocate clearly establish that the subjective state of mind of the accused is totally irrelevant, and that for criminal intent for the crime of homicide all that is required is proof that the accused intended to kill. The prosecution proved, and the accused has not denied, that he intended to kill the natives. Under the law, as interpreted by the judge advocate, this is all that is required to establish the existence of criminal intent.

Defense counsel have cited certain text authorities who support the theory that there must be subjective responsibility - and that it must be shown that the accused knew or should have known the wrongful or illegal nature of his acts. The judge advocate believes that this is a fallacious, meaningless, and negativistic approach to criminal jurisprudence; but even if the Commission accepts the subjective theory of criminal intent the accused is nevertheless clearly guilty, for the evidence unequivocally establishes that he possessed the necessary criminal intent even under the subjective theory advanced by defense counsel.

Even the subjective theory holds a man responsible for what he should have known, as well as what he actually knew. This is partly because of the objective nature of proof, partly because of a recognition of the fact that for certain crimes society must establish and apply standards or norms of conduct regardless of whether the individual actually knows these standards or norms, and partly because even a subjective theory of responsibility must establish minimum external standards of right and wrong. The subjective theory therefore recognizes the fact that an external objective standard is applied, that "knowledge which one.....ought to have under the circumstances is imputed to him", and that when one should have known the illegal or wrongful nature of his acts the law will presume that one did have the criminal intent.

Thus even under the subjective theory, the Commission need not accept the self-serving declarations of the accused as to his mental attitude, but must presume that what he should have known under the circumstances he did in fact know. When the Commission applies this standard, the accused is as readily and conclusively proven guilty of having the requisite criminal intent, as he is under the judge advocate's interpretation of the law, by his own admissions of intention to kill. For the evidence is clear that the accused knew or should have known of the illegal and criminal nature of the killing of these natives.

(1) Objective nature of proof.

The judge advocate established that there is no theory of law which requires the prosecution to prove the actual psychological state of mind of the individual. Even under the subjective theory it is sufficient if the prosecution establishes from external, objective evidence, that the accused knew or should have known that his acts were legally or morally wrong. Objective evidence is all

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that can be required for we cannot even by the most advanced psychological techniques accurately establish the actual mental state of accused criminals. Criminal law cannot engage in a psychological guessing game, and even the fallacious defense theory of subjective criminal intent merely requires that the prosecution prove the facts which establish beyond a reasonable doubt that the accused knew or should have known the illegal or wrongful nature of his acts.

Even under the subjective theory, the law cannot permit a criminal to escape responsibility for his crime by falsely stating that he did not know he was committing an illegal or wrongful act. Not only the testimony of the accused but all the facts must be considered in determining whether the accused knew the act was wrong or illegal. Clearly testimony by the accused that he did not know the act was wrong, and did not intend to commit any crime, is of the weakest and most incredible nature. The Commission has heard such testimony but such a self-serving statement can clearly have no probative value and the Commission should reject it, particularly in view of the clear contrary evidence that the accused actually knew and obviously should have known that the executions were legally and morally wrong. But even if the Commission were convinced that in fact Inoue did not know and did not realize that the execution of these natives and children was an illegal and wrongful act, it would be necessary for the Commission to determine whether from a standard of criminal responsibility Inoue should have known the nature of his acts. The law does not permit an individual to escape responsibility by closing his eyes to the wrongful and criminal nature of his acts, and contending that since he did not see that his acts were wrong or illegal he cannot be punished because he did not know the criminal nature of his acts. We need not here become involved in any hair-splitting argument as to whether this was ignorance of the law or ignorance of the fact. Even assuming that this is ignorance of the fact, the law clearly holds as indicated by the authorities I previously cited, that ignorance or mistake of fact will not exempt one from criminal responsibility where the mistake arises from a "want of proper care on the part of the accused."

(2) Proof that the accused knew or should have known that the executions were illegal.

(a) The accused Inoue is not a credible witness.

We cannot accept as true his statement that he honestly believed that his acts were legal and that he carried out the alleged execution order of Masuda under the conviction that it was right and legal. If he had not lied so frequently, so consistently, and so stupidly, the Commission might be persuaded that he actually had this belief in the legality and moral propriety of these execution; and the Commission would therefore have to confine its consideration to whether or not under the circumstances the accused should have known of the illegality and criminality of the act.

But the accused lied so many times from the witness stand that he lost track of his fabrications and they keep tripping him up. Let us briefly examine his testimony in order to demonstrate this.

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(1) Testimony concerning minute details evidences fabrication, not memory.

In the first place, the fact that two years after the events Inoue testified with such minute detail as to the days, times of day, duration, etc. of all the visits with Masuda to the natives, all the periods during which he investigated the natives, all the times when he reported concerning the natives, all the examinations and consultations held concerning the natives, is clear proof that either Inoue is a genius or he is a liar. He did not impress me as a genius.

He testified as to the following alleged days, hours, and incidents: Days and times he went with Masuda to visit the natives: On April the 3rd, about one hour from 7 to 8. On April the 6th, from about 3:30 to 5:30. On the evening of April the 9th, about 10 minutes at the 2nd Ammunition Dump, and about 10 minutes at the transmitting station. On the day Rolime was executed, about 5 minutes in the morning. Days and hours of his investigation work: April 3rd about 2 hours from 8 to 10 and for about 2½ hours in the afternoon. April 4th about 1½ hours, before 10 a.m. and for about two hours from 1:30 to 3:30, April 5th about 2½ hours in the morning from 8 to 10 a.m., and for two hours from 1 to 3 p.m. April 6th, 1½ hours in the morning from 8:30 to 10, and one hour in the afternoon from 1 to 2. April 7th, 1 hour in the morning from 8:30 to 9:30, and 1½ hours in the afternoon from 1 to 2:30. On April the 8th, only in the afternoon (from about 1:30 to 2:30.) And on April the 9th about 3:30 in the afternoon, after the evening meal.

In addition to all this the accused remembered that every day from 20 to 30 minutes after each morning and afternoon session he reported to Shintome, Furuki, and Masuda concerning his investigation.

In addition he testified and gave the following details concerning the alleged examinations and consultations: On April the 3rd, at about 5:30 a.m. for about 20 to 30 minutes before the morning meal. Also in the afternoon about 3:30 or 4. On April 4th, from 11 to 12:30. On April 5th, from 11 to 12. On April 6th from 10:30 to 12. On April 7th, 3:30 in the evening. On April 8th, 3:30 to 4:30 in the evening. On April 9th from 6 to 9 a.m.

It would take a phenomenal memory to recall such details even three or four months after the events. But it seems inconceivable more than two years after the incidents, particularly after the trying events that have intervened, that any individual could remember such detailed information. I believe the inference is clear.

Inoue has a most powerful motive to fabricate - for his very life is at stake. He took the stand in a desperate gamble to save himself. How desperate his effort was can be seen from his testimony. He tried very hard to persuade the commission that these careful investigations were held and that a great number of careful examinations and consultations were held. He tried so hard to tell a convincing story that he told one that was too good. He told so many details that it seems clear that he was not remembering what had happened, but was inventing and creating details. He talked so hard, and so long that he not only contradicted his own witnesses, but he also kept contradicting himself. Note this phenomenal detailed alleged memory with regard to these alleged visits to the natives,

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investigation periods, reporting periods, and examinations and consultations - and also those long winded detailed reports of alleged conversations with Admiral Mosuda, and alleged detailed orders and instructions from Mosuda. Compare these as an illustration, with his answer when the judge advocate confronted him with a prior contradictory statement made after the war to the War Crimes Investigation, He then said "After the end of the war, there was much confusion and I do not remember what I stated." Similarly note his short memory with regard to his testimony in the recent Furuki trial - the judge advocate asked the accused: "In that trial, in question 171 were you asked 'When did you decide that this procedure constituted a trial?' and did you answer 'From the time I was confined at Jaluit as a suspect.'" Inoue in his answer stated "That is not what I answered at that time." Excerpts of the record of that recent trial were introduced by the judge advocate - and clearly establish that Inoue gave that answer. Accepting the most favorable interpretation for the accused, it is clear that at least he has forgotten what he testified to only one month ago - but he claims to remember such precise conversations held with Masuda more than two years ago, and to remember the incredible details he related concerning the hours and days he visited the natives, investigated the natives, reported, and attended these alleged examinations and consultations.

With regard to memory, note also that in answer to question 410, with relation to the Investigation he said "I remember stating that an examination and consultation was held for them....", but in his answer to question 413 - when he was asked whether he had said no trial was given, he said "After the end of the war there was much confusion and I do not remember what I stated."

It is apparent that with regard to things that would tend to help him, the accused developed a fabulous, an unbelievable memory - and that with regard to these matters which contradicted his story, he showed a definite failure of memory. The evidence is inescapable. Inoue does not have a remarkable memory - Inoue was not remembering, he was fabricating.

The proof that he was fabricating is transparent through all the elaborate testimony of the alleged trials, these alleged examinations and consultations. While the judge advocate will at a later portion of this argument establish that even if they were held these alleged examinations and consultations were not a trial and did not constitute a legal excuse for the killing of these natives - we can at this point briefly consider the incredulous nature of the story about the investigations and these alleged examinations and consultations, in order to show that Inoue is a liar, and any statements made by him concerning his alleged state of mind, his alleged intent, etc. are not worthy of any belief.

(2) The testimony concerning the investigation, etc.

The story of the accused was carefully planned - but the inconsistencies and contradictions, and the fundamental nature of the lie, could not be hidden from this commission.

Let us begin with the story of the confession of Niebot. Inoue in cross-examination tried to give the impression that no force or violence was used on this child, and that he gained her confidence and she then confessed. In his answer to question 354 he clearly gave

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the impression that it took some time to persuade her - "As the food given them was not good for the child, and as an investigator, every day when I went to investigate I asked the supply officer for emergency candy, which was made in Jaluit, and took this to the child, then gained her confidence. At first she would not talk, but she later stated, I think it was one afternoon, she stated that if her parents were told she would get scolded, but she stated that they had killed Tanaka and had stolen a boat and food and had deserted from Mille....." But in answer to further questions - 355, 416, 417 he testified that she confessed on the afternoon of the first day of April, which was the first day of questioning as indicated by direct examination question 47.

Now the fact that this was on the first day of questioning indicates very clearly that Inoue testified falsely. He wishes, as indicated by question 360, to have this Commission believe that in one day, by the use of candy, he was able to gain the confidence of this child, imprisoned with her parents, so that she confessed that her parents had killed Tanaka. The story is incredible - if the natives had attacked or killed Tanaka and plotted to spy, the child would have been warned, and the child could not have been trapped by the proffer of candy, to betray its parents, to their death. Inoue could not have gained the confidence of the child in his two visits of investigation on that one day. But the truly absurd nature of this story is revealed when we look at what Inoue said, when he was concentrating on another aspect of the case and was trying to show that the killing of the children was not a vicious, or morally wrong act. At that time, on direct examination, he was asked the age of Niebet, and he replied "Her mind was developed to that almost of an adult, but her size was very small; and from what I remember her age may have been from about ten or twelve or thirteen years old." The contradiction is clear. If Niebet was mentally mature, then Inoue's story of gaining her confidence in his two brief visits on the first day of questioning, by the use of some candy is clearly a lie. If as Inoue testified, he "took this to the child, then gained her confidence. At first she would not talk, but she later stated,..... that if her parents were told she would get scolded", then clearly the child could not have been ten or 12 or 13 years old, with a "mind developed to that almost of an adult."

What are we to believe in view of the clear contradictory nature of these stories? First we are to believe that Inoue is a liar. Secondly we are to believe that he was clearly lying in order to aid himself, so that the facts are contrary to his testimony. Thus we must conclude that - as indicated by other evidence which we will discuss, Niebet was a small child, and there was no confession by these natives. There was merely a brief careless investion, and a cruel inhuman decision to execute all the natives including the children.

The fact that Niebet did not confess is corroborated by a clear inconsistency in the testimony of Inoue. In cross-examination Inoue was asked question 416 - "You testified that Niebet confessed first. Did she tell about how Raliejap and Ralime had met the Americans, and how they had come to Jaluit to spy?" Answer - "Yes." Question 417, "Did she confess all this on the first day of April?" Answer - "The afternoon of the first day of April." It is obvious therefore that if she confessed as Inoue testified she did, as to both groups of

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