- PART TWO -

In the foregoing chapter I have reviewed the nature or characteristic of the July incident as a murder case. Particularly I have made a general explanation of the position and responsibility of Iwanami's subordinates who came to participate in the July incident by the order of Iwanami. I would like now to deliver a separate argument in behalf of the defendants Oishi, Tetsuo; Asamura, Shunpei; Yoshizawa, Kensaburo; and Tanaka, Tokunosuke.

1. In behalf of Oishi, Tetsuo.

If we just glance superficially at the acts of Oishi at the scene of the incident that day, it appears as if he played an important part together with Iwanami. After listening to the testimony of the prosecution witnesses, a casual observer may suffer from a misunderstanding that it seems Oishi was involved in the incident to a considerable degree.

Two months before this incident, we find Oishi just being promoted to the rank of surgeon lieutenant in the navy. He was just a young medical officer, ranking 14th among the 18 medical officers attached to the Fourth Naval Hospital then. Therefore in the July execution incident which was held as if it were an event of the hospital under a general assembly, and when we consider Oishi's position and character, ordinarily it would have been the natural thing, I believe, to find him watching from the rear of the officers' line, but on the day of the incident he was pulled out by the order of Iwanami, the head of the hospital, into the center of the scene, and ordered to play the part which seemed to be that of the commander of the execution scene. Furthermore he was ordered to cut the neck of the prisoners. Why was this so? In spite of all the officers assembled that day, why was he the one selected and ordered to do the above duties by the head of the hospital Iwanami? This is the question which first above all must be solved in order to evaluate justly the responsibility of Oishi in the present incident.

At the time of the incident, Oishi was concurrently under appointment as head of the Self Defense Unit. Pursuant to the order of the Fourth Fleet issued on about May, this Self Defense Unit was organized with about fifty enlisted men of the hospital, its duty was to escort patients of the hospital in evacuating to a previously designated safety zone, whenever the Allied Powers started their landing operation. Therefore it was not a concentrated and permanent unit. For weapons they were provided with only thirty rifles. At that time, it was additional work for the men appointed as members of the Self Defense Unit to go through a simple drill two hours every Sunday morning, Oishi's duty as its head, was merely to participate and supervise when there was drilling.

Then, was this incident planned, prepared and executed by Iwanami and the Self Defense Unit and its head Oishi acting under Iwanami's order? The accused Iwanami, Kamikawa and Oishi have all denied this in their testimony. However, at first Iwanami wanted the Self Defense Unit to do it. Oishi who heard of this intention of Iwanami from the adjutant Kamikawa, regarded it as against the purpose of organizing the Self Defense Unit to undertake such a task, and also because his personal feeling did not prefer this. He took the initiative and firmly told the adjutant of his firm opposition and requested the adjutant to refuse to do it to Iwanami for him. Learning of Oishi's opposition and refusal, Iwanami gave up having the Self Defense Unit undertake it. The above facts can be clearly acknowledged from the testimony of the accused Oishi, Kamikawa, Iwanami and the witness Mineto.

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Judge Advocate.

Furthermore, it was not planned in advance that the petty officers who were ordered to stab at the scene that day, be some particular petty officers of the Self Defense Unit, nor were they selected from the petty officers of the Self Defense Unit at the scene. Witness for the prosecution Hayashi testified as follows: "Iwanami upon arriving at the scene, ordered the petty officers to step forward, but they hesitated and did not. So, Oishi was then ordered to do so, and he approached the line of the corpsman petty officers lined up according to their ranks, and made an appropriate division from the head of the line, and had them step forward." This fact clearly establishes that this incident was not carried out by the Self Defense Unit.

The attitude of Oishi who showed full understanding of the true purpose of the organization of the Self Defense Unit, and the manner in which he definitely opposed the performance of the execution by the Self Defense Unit, prior to official orders by Iwanami, should be praised. This incident might not have occurred if the ranking officers of the hospital fully understood the true objective of the military hospital and like Oishi maintained a firm attitude toward the head of the hospital.

Then, not under the capacity of the head of the Self Defense Unit, but as one of Iwanami's subordinates, did Oishi plan this execution? Did he make preparations according to this plan and was he the commander of the petty officers at the scene? Was it previously arranged between Oishi and Iwanami to have the petty officers stab the prisoners with bayonets and spears and after that cut the neck of the prisoners? The testimony of Oishi and Iwanami definitely gives the lie to any such plan or arrangement. Iwanami testified that he absolutely did not confer with Oishi about the execution or make arrangements in advance.

In Ikeya's statement which was produced as evidence by the judge advocate, it is stated: "One day in the later part of July, I went to the afternoon muster, and as I was not on duty at the ward I remained as a worker as usual. The officer-of-the-day, Lieutenant Oishi, gave out the working plan of the day to the senior petty officer (then chief petty officer.) I was then given an order by a senior ranking petty officer whose name I do not recall and without knowing where I was going went aboard a truck lead by Petty Officer Tanaka." He goes on to state, that after that they went to the Forty-first Guard Unit on the truck and brought the two prisoners to the hospital.

We can clearly understand from Ikeya's statement that Oishi gave the plan of the day to the senior petty officer but we cannot clearly understand from this statement that he commanded the petty officers to go and receive the prisoners from the Forty-first Guard Unit. But, he has written it in a manner to imply this fact somewhat.

Ikeya wrote this statement in May of this year. Then on the 1st of July, he was relayed by interpreter Savory the request of the judge advocate to add the lines that the contents of the statement are sworn to be the truth. He added the words of oath in unsettled handwriting which seemed like that of a different person. That night he committed suicide. Why did Ikeya take his own life? Judging from the above circumstance which took place on the day of the suicide, couldn't it have been, because he could not swear to the contents of the statement written before? I believe that the entire contents of Ikeya's statement cannot be accepted as credible evidence.

There is no evidence that Oishi ordered the petty officer to go to the Forty-first Guard Unit and get the prisoners that day. Rather, it has been proved by the testimony of Iwanami that there was no such fact. Hayashi, Masaji, a witness produced by the judge advocate testified, "About 2 o'clock

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

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in the afternoon of the day of the incident, there was a call for general assembly. I assembled in front of the administration building of the hospital and together with about forty enlisted men went to the hill in back of the officers' quarters. On the hill, there were already adjutant Kamikawa, Oishi and about twenty enlisted men surrounding two prisoners, and making preparations." Witness Hayakawa, Hiroyuki however stated, "Some men were going to the hill in back of the officers' quarters, I became curious and went to the hill. On the hill, two white prisoners were seated in the center of the hill. About forty enlisted men were assembled around them. So I took a picture of this with the camera I happened to carry. After I took the picture, other enlisted men led by Oishi came up the hill. I do not remember what these enlisted men had or how many there were. Oishi, however had a sword."

In spite of the fact that both of these witnesses were produced by the judge advocate, their testimony concerning Oishi is inconsistent. According to their testimony, Oishi would have to do two different things with one body at the same time. Therefore, I ever that the testimony of the above two witnesses concerning Oishi, is not credible.

At this point, I should like to comment on the credibility of the witnesses produced by the judge advocate. The judge advocate stated at the end of his opening statement: "All of the statements that the judge advocate has made will be proved by witnesses produced by him. However, let the court be cautioned that nearly all of the witnesses who shall be shortly produced before this court are compatriots of the accused. Nearly all of them were onlookers, either in the dispensary or on the hill. Nearly all of them know a complete and full story, and nearly all of them can be counted on to produce only a fragment of the tale which has just been unfolded. Some of the witnesses will not tell all that they know, some of the witnesses through possible fear of implication may twist their version of the events recounted by the judge advocate."

These words tell one phase of the truth concerning the witnesses produced by the judge advocate. But, I request the commission to take note of the other phase. The things testified by the witnesses produced by the judge advocate, happened three years ago. Some of them at first, were treated as suspects. And only recently, after submitting a concluded statement, were they treated as witnesses. I believe there were some who voluntarily wrote a statement, in order to be transferred to a freer life in the witness camp than that of a suspect. But most of them were prospective witnesses from the beginning and have lived together with other witnesses from the end of the war up to this day. This living together was a sort of collective confinement composed of witnesses of the same case. Therefore, in some cases, the true memory of a person, the memories of others are added. Some have made their memory what they heard from others. There were some witnesses who were believed to be guards at the scene of the execution and actually did not see the stabbing, testifying as: "He was in the line of stabbers," and naming ten odd petty officers. To the witnesses, these accused were some of them superior officers and some subordinates during the war. There is a possibility that some, from their personal feelings during the war made up a story beneficial to some accused and detrimental to other accused. In what they call their recollection, the elements "must be" or "ought to be" abide in a disorderly fashion. For instance, since he was the adjutant, he must have made preparations that day. As he was the head of the Self Defense Unit, he must have led the Self Defense Section up the hill. The petty officers senior in rank were divided by Oishi, and as he is a petty officer of high rank he must have been in the line of stabbers. Since he is a petty officer of high rate, we ought to have him in the line of stabbers, even if he were not actually in the line. It seemed their testimony was of this ilk.

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

All in all, the judge advocate states "nearly all of them know a complete and full story," but we on the contary wish to hold that, "they hardly possess a complete and full recollection purely of their own, concerning the happenings of the incident that day. It is not that they did not want to tell all that they knew, but rather, they have told more than they knew.

In summary, nearly all the witnesses produced by the judge advocate are not qualified as witnesses in the true meaning of the word. But I firmly believe as the judge advocate states, "However, this commission through its experience will be able to evaluate the testimony of these witnesses."

I shall now return to the acts of Oishi at the time of the incident. For there still remain some points which I must argue.

Oishi took the witness stand on his own behalf and testified concerning how he came to be on the hill in back of the officers' quarters, where the prisoners were executed that day, as follows:

"34. Q. How did you come to go to the scene of this incident?
A. On the afternoon of the day of the incident, I was reading a book in the wardroom when I heard hurried footsteps in the garden and in the corridor and I asked an enlisted man who was going by what was the matter and he stated that it was a general assembly on the hill in back of the hospital and that there were prisoners there. At this time there were doubts, I thought I half believed that the prisoners would be executed because I perceived this by remembering the talk I had with the adjutant when I went to see him at his quarters and stated if the head of the hospital is trying to get the Self Defense Section to dispose of the prisoners, I refuse, and the adjutant stated this is not an order. This is not an order, and he also stated that he was against this and also were the officers; therefore, this disposition of prisoners would not take place. I knew about this conversation, but I did not know about the incident until the general assembly. As many enlisted men were going by, I thought I would have to assemble also, and together with Ensign Yokota, who was close by, we went to the scene. When general assembly was called, even though you did not want to go at this time, you were not allowed to refuse; even though you didn't want to go."

Concerning this point, witness Yokota, Haruo who was beside Oishi at that time, gave about the same testimony and corroborated the veracity of Oishi's testimony cited above. It can readily be acknowledged from this, that the facts that Oishi had made preparations of the hill prior to the execution, or that he led the enlisted men up the hill, cannot be.

After going up the hill with Ensign Yokota, we find Oishi going back to his quarters for his sword. As to this point he testified as follows:

"36. Q. What did you do there?
A. I was there a short time. I also saw kapok trees with a cross-bar tied between them and there were also officers, and at that time, I noticed that almost all the officers had swords with them. As I did not take my sword at that time, I thought I had to have my sword, so I returned to my quarters and came back for a sword. I did not go and get this sword with the intention to kill the prisoners with it. In the navy, during my experience in the navy, whenever an assembly is called it is always stated how to be dressed, or what you will have to wear and when I saw them with swords, I thought this assembly was a regular assembly in which swords are used."

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From the facts that Oishi went to the hill even though he half doubted whether prisoners were going to be executed, and after seeing the prisoners were going to be executed, and after seeing the prisoners on the hill he took the trouble to go back to his quarters to get his sword, would be a most prejudicial conjecture to interpret these facts to say that he knew about the execution of prisoners in advance and that he personally had the intent to participate in the actual act of execution. "The prisoners may be executed," "But as it was a general assembly, I had to go even if I did not want to go," "I noticed that all the other officers had swords, so I thought I had to have my sword." Rather, don't these thoughts vividly explain the all too natural mental state, and the figure of a young officer, who has been in the service for only one year and a half and is very particular about military discipline, a young officer whose character is too serious and too precise. I wish to have this point well understood in order to maintain good faith for him.

After that, what did Oishi do at the scene? Iwanami shouted in a loud voice "Petty officers step forward." After arriving at the hill, but the petty officers hesitated to step forward. Suddenly Oishi was called by Iwanami and ordered him to have the petty officers step forward. Oishi had the petty officers step forward as ordered.

After the two columns of about ten petty officers with bayonets or spears in hand and facing the prisoners were formed, Oishi was again ordered by Iwanami to stand beside the line and watch, so that it might be performed in an orderly fashion. Oishi stood by the two columns of petty officers as ordered. After the speech of Iwanami, Oishi said a few words to the petty officers in the column. While he was still talking, he was ordered by Iwanami to make haste. He then gave the word of command to the petty officers in the column to advance and stab.

After the stabbing was over, he was ordered together with Asamura to cut the neck of the prisoner as a ritual. As was ordered, Oishi cut the neck one stroke. Thus, these are all of Oishi's acts at the scene that day.

What we must note concerning Oishi's acts at the scene, is that each act was done in accordance with each of Iwanami's respective orders. This is definite evidence proving that, the part played by Oishi at the scene was not arranged with Iwanami in advance, that Oishi did not know what to do as regards the execution, that Oishi acted under unexpectedly given orders by Iwanami. If Oishi had in advance with Iwanami planned the execution of the prisoners, arranged the execution, and decided upon what he should do at the scene, then it would not have been necessary for Iwanami to give orders to Oishi for each of the respective acts.

Then, why did Iwanami particularly order Oishi to do these things in spite of the fact that nearly all of the officers of the hospital were assembled by order of general assembly? Iwanami testified that it was because Oishi was standing beside him armed. But I do not believe this is the reason. At first, Iwanami intended to have the Self Defense Unit perform the execution, but he had to give this up because of opposition. So Oishi was vividly impressed in Iwanami's mind. And seeing the head of the Self Defense Unit Oishi at the scene, it suddenly occurred to him and he gave orders to Oishi. I believe this is the true state of Iwanami's mind. It indeed was a misfortune for Oishi that he happened to be the head of the Self Defense Unit then.

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The acts of Oishi in their outward appearance seem as if, Oishi together with Iwanami and the petty officers, stabbed and cut the necks of the prisoners. From the point of view of Iwanami, each of the respective acts of Oishi was connected by the consistent intent which possessed one conclusive meaning - to execute and kill the prisoners. But from Oishi's standpoint, his each respective act was done whenever Iwanami gave him an order and his acts are not connected by any consistent intent. It is impossible to acknowledge that his act of giving the word of command to stab and his act of cutting the neck or the prisoner are connected by Oishi's consistent intent. There is a break in his intention between the two acts. Therefore we cannot recognize in Oishi's state of mind a consistent intent to kill the prisoners with malice aforethought, together with the concerted actions of Iwanami and the petty officers.

It was Iwanami who ordered the petty officers to stab. At the end of his speech, Iwanami gave orders to the petty officers in violent words. This fact conforms with the testimony of all the witnesses. Oishi testified as to the words of Iwanami as follows: "These two prisoners are to be executed. You have nothing to hesitate about. Stab the heart and kill them with one stroke. Stab spiritedly." It was not, that Iwanami ordered Oishi to execute the prisoners and according to this order Oishi gave the petty officers the order to stab. The situation concerning this point should be considered with utmost care.

Therefore if Oishi is to bear criminal responsibility for the result of the prisoners death, it should be only for his act of cutting one stroke on the neck of the prisoners after the stabbing was over. Then does this act constitute the crime of murder? This is a grave question.

After the stabbing was over, Oishi was ordered by Iwanami and cut one stroke around the neck with a sword. This was the one and only time that Oishi touched the body of the prisoners with a weapon. Oishi testified the circumstances as follows:

"60. A. When I was resting an enlisted man came to me and said, 'The head of the hospital is calling you.'

"70. A. I went to where the head of the hospital was.

"71. A. I was given the following order, 'Cut the neck of the prisoner with a sword. As this is a ritual, it is not necessary that the head be cut off.'

"72. A. This time I looked around and saw that the 'U' shape had been broken up and that they were grouped closer around the prisoners. No one moved and everyone was watching me, holding their breath.

"73. A. I went to the prisoners and looked at them for a short while.

"74. A. They were held up by a rope which was tied around their breasts and tied to the cross-bar and also by another rope which was tied around the stomach and to the other and tied to the cross-bar and their heads were bowed very deeply and their feet slumped, with both of their feet touching the ground. Their complexion was a whitish-green and very pale. I could not observe any movements of breathing. There was no movement at all. It was almost like a statue.

"75. A. I was standing by the prisoners to the right facing the prisoners. I drew my sword and I swung once; I struck once. I made a small cut in the left shoulder, but I saw no blood coming out.

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Judge Advocate.

"77. A. I stepped back from the prisoner and I looked at the sword.

"78. A. When I looked at the sword, there was no blood on the sword, nor was the blade nicked, but about three or four inches from the tip of the sword, it was clouded as if there was some oil on it. When I looked, I saw a bucket with some water in it, so I dipped the sword in some water and wiped it off with a handkerchief, and placed it in the scabbard. I did this because I did not feel good to just place the sword in the scabbard with the clouded part on it

"76. A. I was ordered directly by the head of the hospital in front of my superior officers and in front of my subordinates who were holding their breath watching me. I was still in this confused or agitated state of mind and I could not refuse. The head of the hospital had said 'ritual'. I knew that in Japan, even on persons who were dead, this cut with a sword was made and my feeling at that time was not to mutilate the body, but as a ritualistic feeling in doing this."

According to the above testimony of Oishi, when he approached the prisoner to deliver the ritual stroke, the prisoner had dropped his head, his breathing had stopped, and motionless he was held up by the ropes so he would not fall to the ground. Oishi made a small cut around the shoulder but no blood came out, nor was there blood on his sword.

Summing up the above facts, it can be affirmed even from common knowledge that when Oishi was about to cut, the prisoner was already dead. Murder is only committed against a living person and is not constituted against a dead person. It was after the stabbing by bayonet and spear was over that Oishi cut. Under this circumstance, if Oishi is going to be charged with the responsibility of murder, the fact that the prisoner was alive when he cut must be proved. But the judge advocate has not proved this fact. Assuming that the prisoner had not reached the stage of death at that time, according to the strictest medical decision, in Oishi's mind at that time, he thought the prisoners were already dead. To Oishi the prisoner was considered a corpse. This is clear from his following testimony; which I have cited.

"I had no intention to mutilate the body of the prisoners". Thus it can be definitely judged that when Oishi cut with the sword he had not the slightest intention of killing a live prisoner. It is not permissible to hold a person who did not have any intention to kill responsible for murder. Thus Oishi is innocent of the charge of murder.

2. In behalf of Asamura, Shunpei.

On the day of the incident Asamura heard that there were prisoners on the hill in back of the officers' quarters. As he had never seen a prisoner before, and as he thought it would involve him, he went to the hill to see them. After he had seen them and when he came to the front of the hospital administration building, he was ordered by the head of the hospital Iwanami to go and watch as the prisoners were going to be executed. After the stabbing was over, Iwanami suddenly ordered him together with Oishi to cut the neck of the prisoner as a ritual. According to the order of Iwanami, he approached the prisoner and aiming at the neck cut once. He did not have any intention to cut off the head. As a great number of officers and enlisted men were watching him, he became excited and nervous, so he did not know where or how much he had cut, but it was obvious that the head was not cut off.

That was all that was done by him at the scene that day. And it is as he testified on the witness stand and there arises no question.

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James P. Kenny

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

In specification three of Charge I, it is alleged that Asamura also, together with Iwanami and the other accused, did wilfully, feloniously, with premeditation and malice aforethought, kill by stabbing with bayonet and spear, beheading with swords two American prisoners of war.

Asamura was ordered by the head of the hospital to go watch the execution and he thus went to the scene. Up till the time he was ordered to cut the neck of the prisoner by Iwanami, he was virtually in the posit of an onlooker. It is apparent that he had not the slightest intention of participating in the actual act of execution. And he had no malice aforethought to kill the prisoner with Iwanami.

His only act in this incident was that he cut the neck of one of the prisoners after the stabbing was over. His act has no connection with the act of stabbing. His act itself and also his intention had no connection with the stabbing. Therefore, it is legally not permissible to argue his responsibility concerning the result of the prisoners death by combining his act of cutting the neck with the act of stabbing done by the petty officers. His responsibility independently arises in relation only to the act of his cutting the neck.

Asamura had cut the neck pursuant to Iwanami's order. And this order was sudden and totally unexpected by Asamura. He obeyed the order of Iwanami.

Originally Asamura was an ensign attached to the Forty-first Guard Unit. He was not an officer belonging to the hospital. Around June of that year, he had been appointed the Commanding officer of a squad defending the peninsula where the hospital was situated and it was chiefly engaged in construction of defensive measures of the peninsula. He and his fifty men had their quarters in one of the buildings of the hospital. He had his meals with the officers of the hospital at the officers' mess. Through this relation he had many chances to come in contact with Iwanami. Particularly Iwanami liked the frank and submissive attitude of Asamura. Moreover Iwanami was different from the ordinary medical officer, and was very anxious and zealous about the defense of Truk. He was constantly deeply concerned about what should be done with the hospital, and about how should the patients be protected when the enemy landed.

Asamura was the commanding officer of the squad defending the peninsula. At that time, Truk was saturated with the feeling of urgency that the American forces would land. The small forces led by Asamura was Iwanami's only hope. Iwanami who was zealous in every work, taught and instructed young Asamura who just was appointed an ensign and who was like his child, with an attitude as if Asamura was his own subordinate. Iwanami gave detailed instructions and precautions to Asamura as to how to dig tank ditches and how operational training should be conducted.

Theoretically, Iwanami had no authority of command toward Asamura. But as he was warned by Commander Nakase executive officer of the Forty-first Guard Unit Asamura obeyed the instructions of Iwanami as far as possible. There was lot to learn from the deep and long experience of Iwanami. Furthermore, Asamura had been taught in the Naval Academy strict obedience to superior orders. Iwanami was a captain. Asamura was just promoted to be an ensign. We can understand it to be only natural that Asamura always obey the order and instruction of Iwanami as if he was

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

his subordinate. And it was only natural that Asamura straightforwardly obeyed when he was ordered to watch the execution on the day of the incident, and that Asamura submissively obeyed when he was ordered to cut the neck of the prisoner by Iwanami. I believe any one with common sense will not blame him for obeying the abovementioned order of Iwanami.

Now let us see whether the prisoner was still alive when Asamura cut. There is no definite evidence showing that the prisoner was alive. Rather, evidence showing that the prisoner was dead is predominant.

The prisoner that Asamura had cut was the prisoner to the left. This is clear because Oishi who was given orders at the same time had cut the one on the right. This prisoner whom Asamura cut was the one Homma had stabbed first. Homma testified that the prisoner seemed to be dead after his stab. Asamura testified as to how the prisoner appeared as follows: "16.A.I went toward the prisoner to the left and stood to the right of the prisoner. The head of the prisoner was bowed deeply, the legs were bent, his face was colorless. The flow of the blood from the wound had already stopped. As he was in the same position as when he was stabbed and in a very difficult position to cut, I wondered how to go about it. Everybody there was looking at me and I saw the head of the hospital, but feeling it was as if the feeling is the same as when you are about to jump off a stand which is ten meters high and about to jump. It was a worried and a sort of hurried feeling. Anyway, I delivered the blow. It did not go well; the feeling up to which time I had forced upon myself and kept me going, left me at this time. I felt sick and started to go to the rear. I became all the more sick and as I passed Yoshizawa, I asked him, 'Hold this sword for me?' and I went down to the head in back of the head of the hospital's quarters. That is what I did." When we consider together the testimony of Homma and the testimony of Asamura as to how the prisoner appeared to him, I believe it is proper to regard the prisoner as already dead. Thus, Asamura inflicted his blow upon a dead body and his act has no connection whatsoever with the cause of the prisoner's death. Thus, Asamura cannot be held responsible for murder in relation to his act. Concerning this point I have already argued in relation to Oishi, thus I shall refrain from repeating.

In concluding, the charge of murder against Asamura has not been proved beyond reasonable doubt. Therefore I urge a finding of not guilty for Asamura as to specification three of Charge I.

3. In behalf of Yoshizawa, Kensaburo.

Yoshizawa took the witness stand and testified in his own behalf. According to his testimony, what he did on that day at the scene can be summarized as follows: In the afternoon of the day of the incident, he was repairing the road with three gunzokus. Shortly after he began the work he saw a truck running toward the hospital with several armed enlisted men on it. He continued the working, and while doing so, he again saw some enlisted men walking up the hill in front of the officers' quarters. He wondered what it was, and went up the hill. He wore nothing but shorts since he was dressed as such while working. On the hill he saw two prisoners, about ten officers and fifty petty officers and enlisted men assembling. As he saw the prisoners he felt so sorry for them that he gave them cigarettes. He found a piece of copra which the prisoners had put in their pockets like some precious thing. He felt pitiful of it and wanted to give them some bananas, so he went back to his quarters to get them. They were green and not ripe yet. So he turned toward the hill half-naked as before. On the hill, he saw almost all of the officers of the hospital, not to speak of Iwanami, petty officers and enlisted men assembling and also the two prisoners tied to a cross-bar. Since he was

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Lieutenant, U.S. Navy,
Judge Advocate.

half-naked he did not enter the line of petty officers and stood outside of the line. The blindfolds were next taken off by order of Iwanami. The one of the prisoners seemed to suffer from cerebral anemia and fainted. He approached him and tapped lightly around his neck so that he would recover. In the meantime, Iwanami, the head of the hospital made a violen speech, and said that he was going to execute the prisoners and that ever body had to stab. He was watching the stabbing from outside the lines. After the stabbing was over Oishi and Asamura used their swords against the prisoners. Asamura grew very pale and asked Yoshizawa to hold his (Asamura's) sword for a while and left. Then the head of the hospital suddenly ordered Yoshizawa as a ritual to cut the neck of the prisoner which he thought Asamura had cut. He obeyed the order and cut his neck lightly as a ritual with a sword which Asamura had given him. He had no intention to cut off the neck and naturally the neck was not cut off.

That is all Yoshizawa did.

However, the witnesses produced by the judge advocates have added other acts to the actual acts by Yoshizawa which I have related above.

1. Witness Yamagishi, Michio, testified: "When the general assembly was ordered, and when I was going, I met Yoshizawa on the way. Yoshizawa asked me where I was going, so I told him that I was going to the hill where the general assembly was ordered. Then Yoshizawa ordered me to bring a sword for him from the room of the senior petty officer. So I went to his room, took his sword and gave it to him on the hill."

This testimony of Yamagishi is quite incomprehensible. According to his testimony, it may be imagined that Yoshizawa had an intent from the beginning to cut the prisoners with his sword. But Yoshizawa used Asamura's sword when he cut the neck of the prisoner. We have the testimony of Yoshizawa and Asamura concerning this point, so it is indisputable about it. Yoshizawa cut with Asamura's sword. This is a powerful evidence to prove that Yoshizawa had no sword at that time. Therefore, I can maintain that the said testimony of Yamagishi is entirely false.

Captain Tanoda also testified that he thought it might be Yoshizawa who had a Japanese sword. But this testimony is also contradictory like that of Yamagishi's. I think that an impression of the figure of half-naked Yoshizawa cutting the prisoner remains in his recollection and that he drew a conclusion that Yoshizawa had a sword from the beginning from the impression. I think this is his mistake.

2. Witness Takahashi, Masahi testified, "When the general assembly was ordered I went to the front of the administration building. About fifteen or sixteen men assembled there. We were conducted to the hill by Yoshizawa."

As Yoshizawa had been repairing the road on that day, he was half-naked and wore only shorts. Witness Hayashi also testified so. Therefore, I think that the fact that he was half-naked is not a mistake. So I believe the situation of the hospital where military discipline was strictly enforced at that time, would not possibly permit Yoshizawa who was half-naked to lead the men up who had assembled by general assembly.

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Hayashi, Masaji, said in his testimony that the men went up the hill in a column from the administration building but that the lead of the column was neither Homma nor Yoshizawa.

From these points, the testimony of Takahashi is incredible. The witness, Hayashi, Masaji, testified that Yoshizawa, Homma and some other men tied the prisoners to the cross-bar, but before he gave this testimony, Hayashi in reply to a question by the judge advocate, "Who tied the prisoners?" replied, "I do not know who tied the prisoners, I just remember that Yoshizawa and Homma were standing by the prisoners." Thus it was not until he was shown a written statement by the judge advocate that he testified that he saw Yoshizawa also tie the prisoners. The testimony of the witness Hayashi, is not very credible. It is unlikely that, when there were many men available, that the senior petty officer would tie the prisoners himself. Iwanami has testified that he directly ordered the men to tie them and had them tied by them. He did not order the senior ranking petty officers Yoshizawa or Homma to do so.

Thus, concerning the acts of Yoshizawa in the July execution incident we can acknowledge that the truth consists of these facts that he himself has testified to. If this is the case all that Yoshizawa, can be held accountable for in this execution of the prisoners, is his act of cutting the neck of a prisoner. He is not in a position that he should shoulder the common responsibility for the act of stabbing done by the other petty officers. From the beginning he did not have the intent to kill the prisoners nor did he wish to cut the heads of the prisoners.

After the stabbing was over, Oishi, and Asamura, were ordered to do the ritual cutting of the neck of the prisoners by Iwanami. But, as Asamura, bungled the job of cutting, Iwanami named Yoshizawa, and ordered him to perform it correctly according to the ritual. The reason that Iwanami, named Yoshizawa must have been because Yoshizawa was the best swordsman at the hospital. Yoshizawa, was surprised at this sudden and unexpected order but, as it was the order of the head of the hospital, he could not very well reject it, therefore he obeyed the order and cut lightly in the neighborhood of the neck according to etiquette. He did not cut off the head, if he had had the intention to cut off the head how easy it must have been for a person of his ability. The prisoner that Yoshizawa cut was the prisoner that Asamura had failed in cutting. There is no concrete evidence which shows that the prisoner was yet alive when Yoshizawa cut but rather it should be recognized that the prisoners were dead as I have already argued in behalf of Asamura. Yoshizawa, in his testimony, has testified as follows on how the prisoner looked at this time:

"29. A. It appeared that the prisoner was not breathing, he had not strength in his body. His legs were bent and he was slumped down and he was held up by the ropes."

In Yoshizawa's case also, even though the prisoner was actually alive, in Yoshizawa's mind the prisoner was already dead. It can be readily surmised that Yoshizawa did not swing his sword with the intention to kill a person who was alive. And we should understand that he merely placed the sword as a ritual and a formality and had no intention to even mutilate the dead body. The reason that his act of cutting the neck of the prisoners does not constitute the crime of murder is the same as I have stated in the case of Oishi and Asamura. Therefore, Yoshizawa should also be found not guilty of Charge I and its specification.

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4. In behalf of Tanaka, **Tokunosuke.**

The defendant Tanaka, together with the defendants Kuwabara and Ikeya who committed suicide, according to orders, went to the Forty-first Guard Unit in the afternoon of the day of the incident, to receive the two prisoners of the July incident.

On receiving the above order, he was told that the prisoners were being brought to the hospital for physical examination and he understood it to be so. He absolutely did not know that the prisoners were being brought to be executed that day. Concerning this point, it is clear from the testimony of defendant Kuwabara who stated: "When I asked Tanaka, 'Is anything the matter with those prisoners,' he replied, 'they are going to have a physical examination at the hospital.'" Therefore, we cannot allege, in view of Tanaka's act in going over to receive the prisoners, that he knew of the plan to execute the prisoners or that he had participated in the plan. This act of Tanaka, should be understood as having no relation with his responsibility in the execution incident.

In specification three of Charge I, Tanaka is also charged with murder. Among the witnesses for the prosecution, there are many who testified that Tanaka with a bayonet or spear in hand, was in the two columns of petty officers facing the prisoners. Then, did Tanaka voluntarily enter the two columns of petty officers with the above weapon in hand, with the intent to stab and kill the prisoner? Definitely not.

How was this column of petty officers in which Tanaka was said to be formed? Witness for the prosecution Hayashi testified as regards this point as follows: "On the afternoon of the day of the incident, a general assembly was called. Almost all of the officers and enlisted men of the hospital assembled on the hill in back of the officers' quarters. After the head of the hospital had arrived on the hill, the two prisoners were tied to a cross-bar tied between two trees. After the speech of the head of the hospital was over, Iwanami gave orders relayed by Oishi for the petty officers to step forward. The petty officers were ordered by Lieutenant Oishi to come forward and for a short time there was a hesitation and no one came forward, and during this period, when I saw Oishi, he looked as if he was thinking very hard, and I remember the head of the hospital saying forcefully to begin the execution. Then Lieutenant Oishi had all the petty officers from a certain point come forward, and the petty officers were brought forward, lined up, as I remember, according to rank in front of the prisoners. Then the bayonets and spears were handed to these petty officers." Defendants Oishi and Homma also gave about the same testimony as that of Hayashi mentioned above. Only one point seems to differ, that is, Hayashi testified that the two columns of petty officers were formed after the speech of Iwanami, whereas Oishi and Homma testified that it was before the speech. I believe this is a misrecollection on the part of Hayashi.

According to this testimony, Tanaka assembled on the hill because of a general assembly, without knowing what was going to take place; and while he was lined up with the other petty officers, he was forced to step forward and enter the two columns of petty officers by Oishi acting under the order of Iwanami, the head of the hospital. It is clear that he did not step forward on his own.

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Lieutenant, U.S. Navy,
Judge Advocate.

Under the circumstances in which he was placed that time, could he have refused to step forward? I believe it would be impossible in the armed forces of any country for a petty officer under the above mentioned circumstances to refuse the orders of his superior. It is more so in the Japanese armed forces, where the men are trained under iron rule to implicit obedience to superior orders regardless of whether the substance of those orders were proper or improper, possible or impossible. Tanaka was virtually forced to enter the two columns of petty officers. Could anyone criticize Tanaka for entering the line?

Furthermore, witness for the prosecution Kikuchi, Goro testified that he saw Tanaka stab with a bayonet. If this is true, why did Tanaka stab? Did he stab of his own free will? No, definitely not. Iwanami shouted excitedly, "We are now going to execute the American aviators who unlawfully bombed our hospital. Stab spiritedly." Then Oishi gave the words of command, "Forward." Some men in the front went charging. When Tanaka's turn came, he heard the same word of command. He moved mechanically and he unconsciously charged with the bayonet.

This act of Tanaka entirely differs in nature with acts generally known as done in accordance with superior orders. This act of Tanaka was done under complete psychological compulsion brought about by the word of command. How does the "word of command" react or operate upon an enlisted man who received it? In particular upon the enlisted men who are lined up? In many cases, it reacts upon them stronger than if physical compulsion were imposed. The purpose of the "word of command" in the armed forces is to move the receiver as intended by the commander, as if he were moving the pieces in a chess game. Herein, lies the essence of the "word of command." The receiver is placed in a situation in which he is completely deprived of his free will. On this point, the acts of a person motivated by the "word of command" should be clearly distinguished from the generally known "acts done in accordance with superior order." In general "acts done in accordance with superior order," the free will of the receiver exists, to some extent. But free will is not acknowledged to the receiver of a "word of command" in the armed forces. Thus, I believe we could definitely conclude that the receiver has no responsibility concerning his acts which are done pursuant to the "word of command" in the military.

Acts done in accordance with superior orders are generally precluded of unlawfulness. Acts pursuant to the "word of command" can be regarded, as a concept, as one kind of act done in accordance with superior orders. But in reality, from the point of view of the receiver, in acts pursuant to "word of command" he is deprived of individual will, and he has no freedom of will. Could anyone who experienced even a single day of military life, dare to deny this position and psychology of the receiver? Thus in a criminal act, the criminal intent of such a doer should naturally be precluded.

Now then, did the bayonet which Tanaka had, actually pierce the body of the prisoners? If it did, what part of the body was stabbed? Did the prisoner die by the stab of Tanaka? Concerning these points, the judge advocate has produced no evidence whatsoever. Witness for the prosecution, Hasegawa, merely testified: "When it was Tanaka's turn, the prisoner was already bleeding from being stabbed, and I do not know whether blood came out when Tanaka stabbed."

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Is this sufficient evidence to find Tanaka guilty for murder? "I saw Tanaka stab", only by this evidence such as this could he be guilty for such a grave crime as murder. No, definitely not. Then, should Tanaka take the responsibility of killing the prisoner by combining the results brought about by the other stabbers? Definitely not. Among the petty officers who were forced to line up, there was no agreement to kill the prisoners tied in front of them, by concerted action. These petty officers in two columns including Tanaka, after being forced to step forward, heard the speech of the head of the hospital, and for the first time specifically learned that these prisoners were going to be executed. They realized that the head of the hospital was going to make them stab the prisoners. Then, they were only ordered to stab separately with their spears and bayonets. There is absolutely no proof that Tanaka personally had the intent to kill the prisoners tied in front of him. Rather, the actual situation at that time which has been established by testimony of various witnesses will contradict this. And as for the fact that he had wilfully, with malice aforethought did so and so it is only too obvious that he had none.

The points I have brought up concerning Tanaka can be similarly said of the other petty officers who were forced with Tanaka to line in the two columns, handed the weapons, then for the first time shown what the weapons were going to be used for, and according to the word of command advanced and stabbed the prisoners.

When it can be acknowledged that "any person in the same position as the defendant, would have produced the same result," the defendant is free of criminal responsibility. This is a principle generally recognized in the theory of criminal law of today. I believe it is not the purpose of the criminal trials to demand superhuman awareness of moral sense from the defendants.

I ask your special and deep consideration concerning the responsibility and position of the petty officers who stabbed in the present case.

- PART THREE -

The issues of the present case are the murders of prisoners of war all occurring at a Japanese Naval Hospital on Truk Atoll. There has been, however, no definite evidence that the prisoners were American prisoners of war. But, the fact that they were prisoners of war under the custody of the Forty-first Guard Unit at Truk, has been established to some extent. I, personally as a Japanese, regret very much that murder by medical officer, particularly that of prisoners of war, should have occurred at a military hospital, whose principal duty is to save the lives of the sick and wounded in the battle fields, and which because of this duty is treated with special protection under international law.

It is said that the history of the Japanese race goes back 2600 odd years, but the historic events which we are able to know through documents, definitely and in detail, are traced back about 1600 years. During this long period of time, the occasions are very few, where the Japanese race engaged themselves in warfare with other countries. If I should enumerate them, there were only two such events.

About 700 years ago, the forces of the Mongolian race which rose to power in the China continent, invaded the shores of Kyushu, and a battle was waged. But this invasion was on a small scale and soon ceased.

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Judge Advocate.

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The other occasion occurred about 300 years after this Mongolian invasion, when the main Japanese forces swept into the Korean peninsula and engaged in hostility with the Korean forces. But this war also did not last long. From that time up until the Meiji Restoration which took place about 80 years from the present day, Japan suspended communications with the outside world and indulged in peaceful dreams within her island. During this period, she did not even experience a single civil war, not to speak of war with another nation.

During this period of 300 years, Japan was under the rule of Tokugawa Shogunate (military leaders) and this period is known as the Era of Seclusion in Japanese history. The government was by the Shogun (military leader), but in actuality the government was not one of military rule. Favored with this peace of 300 years, the Japanese race with calm and possessed attitude, seriously meditated and studied such problems as "what is man", "how should man be", "how should man act in social and family life", with reference to the teachings of Confucius. Furthermore, during this period, Buddhism cast away its transcendental philosophical meditation, and earnestly and understandably preached the spirit of mercy to the masses. It was morality of Confucius and the spirit of the Buddhism which taught mercy, that dominated the minds of the people during this period.

In this era, researches concerning practical science were prohibited as a policy by the people. Thus enlightenment by way of scientific civilization of Europe was greatly retarded. Nevertheless, this duration of peaceful life lasting 300 years in which external and civil war was forgotten, was significant in promoting the spiritual and moral life of the Japanese people, and moulding the typical Japanese characteristics. It is undisputable that the Japanese underwent a certain cultural training during this period.

In this era, the "samurai" (soldier) constituted a priviliged class. But, at that time the samurai, or soldier, was in name only, and not much time was spent by them in polishing their military art. They mostly exerted themselves in philosophical meditation such as, "how should a samurai be", "how can one become an exemplary, courteous man", "what is the true purpose of wielding the Japanese sword." The sharp sword meanwhile rusted unused in the hilt and the beautiful armor peculiar to Japan was put up in the alcoves to be admired as a piece of fine art.

By 1543, the rifle was already introduced into Japan by a Portugese. Subsequently, many improvements were made on it, by the dexterous Japanese artisan, so that it had become a highly elaborate weapon. But, it too was left hanging on the wall to rust, forgotten as an instrument of warfare, for there was no chance to use it. At this time the Japanese people were, rather, living in soft, effeminate atmosphere, remotely distant from militarism.

It was not until the adoption of a national structure under a European basis and the establishment of a modern national military system, subsequently realized after the abolition of the feudalists regime under Tokugawa by the Meiji restoration, did militarism in the true sense of the word, take rise in modern Japan. And it was not until the Russo-Japanese war which broke out in 1904 some 43 years ago, that the Japanese for the first time under a united national consciousness, engaged themselves in a big scale war with another country.

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Judge Advocate.

At this time, no international treaty as regards to treatment of prisoners of war, existed as yet. But, an idea was taking rise in Europe, that the prisoners should be treated, except for certain necessary restrictions of their freedom, in the same manner as the soldiers under whose country's authority the prisoners were taken. It was after the Russo-Japanese war in the year 1907, that the Hague Convention was concluded and provisions were set forth to the above effect.

At this time, Japanese militarism was still possessed with ample morality. During the Russo-Japanese war there was no trouble regarding the treatment and handling of prisoners. On the contrary, prisoners were treated with utmost care. This was not done in obligation to any treaty, but in accordance with natural human sentiment that a prisoner of war, even though he be a foe, should be protected when he has surrendered his arms. Particularly, as the Japanese people had not experienced the suffering brought about by being conquered or invaded by other nations up to this time, they did not have the slightest feeling of racial prejudice. hatred or retribution towards other nations.

In the battle of Japan Sea, between the Japanese and the Russian navies, a captain of a Japanese warship, seeing many members of a sunken Russian ship helplessly drifting, could not bear leaving them in this situation, so he suspended the operations which he had been ordered to carry out, and saved these Russian seamen from drowning. This is a well known incident. Again, when the Commander in Chief Rogestwinsky of Russian Far East Fleet was wounded and captrued, Admiral Togo of Chief of the Japanese Combined Fleet called upon him and hoped for his immediate recovery. Commander in Chief Rogestwinsky, with tears in his eyes, warmly shook hands with Admiral Togo and thanked him for his kind treatment and consideration.

There is a touching episode, which happened in a land battle of this Russo-Japanese war. That is, after Port Arthur capitulated the commanding officer of the Japanese forces, General Nogi and Commanding Officer of the Russian troops General Stessel met at Suishiei. General Nogi greeted the defeated General Stessel at this conference, with the utmost courtesy It seemed General Nogi exerted every effort so that General Stessel would not feel any humiliation of defeat and surrender. This attitude of General Nogi, was praised by all his countrymen. The events of this conference were written into a beautiful poem by a Japanese poet. Later, it was adopted in the Japanese National Reader, and set to a beautiful rhythm which has been sung by almost all of the people. The meaning of the first part of this poem is as follows: At the fall of Port Arthur, General Stessel of the Russian Army surrendered to General Nogi of the Imperial Japanese Army in a small Manchurian village called Suishiei.

They met in a tumble down shack. There was a jujube tree in the garden, its trunk marked by numerous bullets and shells.

Although yesterday they were enemies, they had become friends. They spoke frankly and cordially. Nogi admired the strong defense of Stessel's army, while the latter praised Nogi's fighting spirit.

"I heard", said Stessel sorrowfully, "that you lost your two sons during that furious battle. I can understand how grieved you must be."

Nogi replied in a deep voice, "Yes, I lost them. But they died gloriously in action. I feel it is the honor of the soldier and I'm not grieved with their deaths."

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They had lunch together and continued their friendly conversation.

"I have a nice horse," said Stessel, "and I would be very delighted if you accept it as a momento."

"Thank you very much, General," replied Nogi, "if the army regulations permit me to accept it, I will take good care of it."

After cordially shaking hands, they parted. The battle was over and the horrible sounds of firing which had been roaring hours before were not heerd.

The oppressive and impolite attitude of Japanese General Yamashita, Tomoyuki, displayed in his conference at Bukitema Hill, Singapore, with the Commanding Officer of the British forces, General Percival who had hoisted the flag of truce, cannot possibly be imagined from the sentiments of that Japanese military staff consisting of Nogi, Togo and others of the Russo-Japanese War. The difference of attitude of the head military man shown in these examples, indicates the fundamental differen in disposition between the military leaders of the Russo-Japanese War Period and the present one.

Furthermore, during World War I, there was no case of atrocity concerning the German prisoners who fought at Chingtao, China and were confined by the Japanese. It was totally impossible even to imagine such an incident as murdering prisoners. The attitudes of the political leaders of war and the sentiment of the Japanese people toward the German prisoners of war, were most sympathetic and friendly. There were many German prisoners who even came to love the Japanese feeling and Japan's beautiful views, so that they made up their minds to stay and not return to their mother country after peace was restored. In this period, morality still remained in the hearts of the militerists of this time. But in Europe during World War I, the belligerents were criticizing the measures which the hostile power had taken against them concerning the treatment of prisoners, based upon the Hague Convention. Thus in 1929 a new treaty was concluded concerning the treatment of prisoners, reflecting the experiences of World War I. This treaty established far more detailed provisions than the Hague Convention regarding the treatment of prisoners of war.

Now, how did the belligerents in the present war deal with the prisoners? How were the prisoners treated? I am unaware of the situati of other countries, but I must admit that there were many errors concern ing the treatment of prisoners committed by the Japanese military in the present war, which could not have possibly been thought of by the Japanese people, during the Russo-Japanese War. As a result, those who committed the errors are being severely criticized in the war crime trials. Yes, there was no agreement concerning the treatment of prisoners during the Russo-Japanese War, but the Japanese military protected them with highest courtesy in conformity with the universal morality of mankind. During this present war when detailed provisions concerning the treatment of prisoners of war had already been set forth in the international law, this phenomena of the Japanese military committing many grave errors, some of them of evil nature, is a problem of utmost importance to mankind, that should be noted and reflected upon not only by the Japanese people but all nations of this world.

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Lieutenant, U. S. Navy,
Judge Advocate

The following significant words by St. Paul are found in Romans 4:15

"Where there is no law, neither is there transgression."

The words are simple but their implication is profound and manifold. It is a penetrating criticism of civilization. These words may be construed to imply that subsequent making of laws, does not mean progres of mankind, but its retrogression.

Japan did not have any machineguns, not to mention airplanes, during the Russo-Japanese War. But in the last war, she designed and made airplanes and super-battleships of 60,000 tons such as the MUSASHI and YAMATO. Truly, Japan had made great advance in the field of scientific civilization, in comparison with the days of Russo-Japanese War. But, Japan committed many moral errors in the treatment of prisoners and others. This example of Japan or Germany, I believe, has offered us valuable data showing that keen criticism and strong reflection should be made upon modern scientific civilization. Such incidents concerning prisoners as are now before this court, I believe would not have occurred under the attitude shown by the political and military leaders at the time of the Russo-Japanese War and under the national sentiment which was promoted and guided by these leaders. I may even venture to say that there was absolutely no chance for such an incident to occur under the atmosphere prevalent in those days.

We find, at this point, that the following opinion of a famous European scholar of criminal law, most appropriate: "A will against morm and law may be indicated as a morbid will. And this will is the product of social wrong surrounding that individual. We must seek the cause of this disease in man's will, not in nature, but in society. So long as we account only the psychological operation within an individual and so long as we observe the various acts of an individual apart from all relations with society, we will never attain a true concept of either the wrong will nor rightful will. When we study closely the function between the individual and the society, we will notice that it is twofold That is, society expresses itself, on the one hand, as the producer of character of man, and on the other hand formulator of motive." He further states: "Crime is the product of society. The root of a social phenomena known as crime is truly embedded in the society as a whole, and in the aggregate causes emanating from society." Moreover, it was Montesgieu, a French jurist and philosopher, who said: "A good legislator endeavors to prevent crime rather than to punish it. Such legislator will give us good manners and customs rather than punishment." And he too grasped the truth that crime was not a product of the individual but that of the society in which he lives.

A court of the present day will not hold a criminal responsible for all the consequences, actual harm or loss, which seemed to have resulted directly from or in relation to a certain act of the criminal. The court first of all, segregates those consequences directly connected with the intent of the criminal, and holds him responsible thereto. Then, if there is any responsibility to be attributed for his conception or realization of his criminal intent to the society in which the criminal resides, such responsibility will be precluded from the responsibility of the criminal. And when the court finds a responsibility which the society as a whole should shoulder, it will warn the society and the statesmen who leads the society by the judgment it gives.

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Lieutenant, U.S. Navy,
Judge Advocate

"SSS(24)"

The purpose of the criminal trial in no way, lies only in meting out punishment to the criminal and for his crime in retaliation thereof. I believe this is common sense today. And it is my conviction that the same points should also be considered in the war crime trials.

Moreover, it is my desire to understand that the principle objective and essential function of a war crime trial lies in percieving with wisdom from the concrete example of war crimes, what ethical requirements are demanded of modern man and modern state, rather than punish each individual criminal, and in informing the war criminals and his people of that perception in order to demand their reflection, and in announcing this to the whole world to warn them of the future.

Former Prime Minister of England, Winston Churchill, wrote an article for a certain American magazine in January, titled, "High Road of the Future." In it, I found the following words of profound meaning.

"The only worthwhile prize of victory is the power to forgive and guide."

Members of the commission. As for these accused, if there are reasons to forgive, I ask your forgiveness; if there are possibilities to guide, I ask your guidance, and I beg that they may be given an opportunity to show their abilities and the good which they have in them. This shall be my last word of request to this commission.

SAIZO SUZUKI

I certify the above, consisting of twenty-five (25) typewritten pages, to be a true and complete translation of the original argument of Suzuki, Saizo, to the best of my ability.

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

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JAMES P. KEANY,
Lieutenant, [illegible] Navy,
Judge Advocate

"SSS(25)"

ORIGINAL ARGUMENT OF KARASAWA, TAKAKI, A COUNSEL FOR THE ACCUSED, IN JAPANESE.

(appended to the original record)

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Lieutenant, U. S. Navy,
Judge Advocate.

IWANAMI, et al;
UUU

ARGUMENT FOR THE ACCUSED DELIVERED BY MR. KARASAWA

INTRODUCTION.

If it please the commission.

I would like to argue in behalf of the accused WATANABE, Mitsuo, SAWADA, Tsuneo, KUWABARA, Hiroyuki and NAMATAME, Kazuo among the 18 accused involved in the so-called July incident and charged in Charge I of Specification 3.

The above mentioned 4 accused who I am defending, were all engaged in their own respective work at the scene and did not participate in the stabbers column, as I shall establish in the main part of my argument.

In my argument I will clarify the acts of these accused and point out the errors in the evidence produced by the judge advocate.

As the facts concerning WATANABE and SAWADA are identical, I shall argue in behalf of them jointly. But as to the accused KUWABARA and NAMATAME, I shall have to argue separately because their circumstances are different.

This incident which alleges that two prisoners were killed is very simple. As some facts are common to all the petty officers, I shall try to avoid any repetition by arguing first in full detail concerning these common points in the portion of my argument concerning the petty officers of the paymaster section. And I shall omit from the above portion anything concerning the other accused and obviate repetition.

Despite the fact that this is a simple incident, it seems it has become unnecessarily involved. The chief reason for this is because of the unnecessarily large number of persons indicted. It is clear that IWANAMI, the head of the 4th Naval Hospital ordered some petty officers to stab two prisoners, but the vital point as to who the persons were who stabbed is not clear. This has been the obstacle in this case.

This incident occurred in July 1944, almost a year before the end of the war.

The battle condition of the central Pacific at that time was, that Saipan and Tinian had already fallen, air-raids became ever intense, communication with Japan was completely suspended and the movements towards the end of the war was being accelerated with gread speed. Thus I believe that everyone on Truk at that time resolved upon death and never even dreamed of seeing his home again. Furthermore, I believe no one ever thought that this July incident would be tried before this court as it is being done today. The last year and a half prior to the end of the war were days of suffering hovering between life and death. Therefore it is a most difficult if not impossible task to have the persons connected with the incident to recall who did the incident in killing two prisoners.

All can only remember, even their own acts, as if they were a dream. But it is clear that two prisoners were killed. Confronted with the ultimate

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Judge Advocate.

problem, that someone must take the responsibility, the accused of this case were chosen. Thus I believe that we should note with care that among these accused there are persons charged as the ones responsible who actually did not participate in the stabbing.

MAIN ARGUMENT

For reasons stated in specification three of Charge I, "on or about 20 July 1944, at Dublon Island, Truk Atoll, Caroline Islands, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike and kill, by bayoneting with fixed bayonets, spearing with spears, and by beheading with swords, two (2) American Prisoners of War, names to the relator unknown, both then and there held captive by the armed forces of Japan....." the accused Watanbe, Sawada, Kuwabara, and Nametame are charged with murder. To prove this allegation the judge advocate produced evidence through the testimony of witnesses Kikuchi, Yamamoto, Takahashi, Hasegawa, Hamada, and Hayashi and a statement of Ikeya against the accused Watanabe, and Sawada, and against the accused Kuwabara the testimony of witnesses Hamada, Hasegawa and Mosenibik, a native of Truk and a statement of Ikeya and against the accused Nametame the testimony of witnesses Hamada, Takahashi, and Hasegawa.

But all of this testimony is very vague. We were not able to find out from this testimony how these accused got into the line of stabbers, in what line they were, in what position of the line, what kind of weapon they had, nor which prisoner they stabbed. These witnesses who recalled many names of the accused only recalled one point, in other words, "The names of persons" and did not recall any other points. This as a recollection of a person can not be. Supposing a person did have such a recollecti: we can not recognize this as a recollection which has an objective value. Therefore I firmly believe that testimony which does not have value is not sufficient evidence to prove the guilt of a very serious crime such as murder against these accused. The accused who were the petty officers of the paymaster section, namely Watanabe and Sawada were led by their commanding officer, Paymaster Warrant Officer Ota the afternoon of the day of the incident and were drilling. While drilling a runner came to announce that the general assembly was called and by following this order they were led up the hill in back of the hospital, and assembled as one group to the rear of the corpsman section. The stabbers in this incident by orders of the head of the hospital were lined up in front of the prisoners. They were the eight of ten persons who were separated from the head of the corpsmen section formation. There is no connection whatsoever with the accused Watanabe, and Sawada, who belonged to the paymaster section. Furthermore the accused Watanabe and Sawada did not leave the line of the paymaster section at any time. There is no reason why they should go into the column after the others were separated and lined up in front of the prisoners, and this point has not been proved by the judge advocate at all. I think the commission too has clearly understood as shown through various facts which were brought out in this court up until today, how the persons in the columsn in front of the prisoners were picked and that the paymaster section was lined up separately.

I will bring out this point later by quoting various testimony.

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Judge Adovcate.

There is the fact that the accused Kuwabara, together with co-defendant Tanaka went to the Forty-first Guard Unit to get the prisoners of this incident, but in regard to his action at the scene as clearly testified by the accused Kuwabara, he was standing near the prisoners as a guard for the prisoners. Furthermore this point has been made known by Namatame who was standing near Kuwabara. It is not clear as to how the accused Kuwabara was ordered to such a duty, but we cannot help but surmise that it was because he, with the co-defendant Yoshizawa, did such conspicuous acts as giving cigarettes and water to drink to the prisoners. Because of this, he did not line up in the line where the corpsmen were lined up; therefore he was not pulled out into the columns as a stabber.

It is clear from his own testimony that Namatame was digging a hole on the day of the incident. The relation in time of when the accused Namatame was digging a hole and when the stabbing took place is a very important factor in order to understand the action of the accused Namatame. As it is clearly testified by him this work can be divided into two steps. In other words first, they dug a hole to a specified size. This was the first step in their work. They were then told that the hole was too shallow, so they started to dig again. This was the second step of their work. When they finished the first step of their work, it was just before the prisoners were brought to the scene. And subsequently the second step in their work was continued. Therefore, when the would be stabbers of this incident were selected, he was in the hole and did not participate. It cannot be possible that after he came out of the hole, he then went into the line of stabbers. Furthermore, considering the fact that he was not yet a petty officer at that time, I think the fact he did not participate in the stabbing can be easily understood.

I have explained in the above the actions of each accused on that day, and now at this time I would like to further inquire into this, by comparing it with the evidence produced by the judge advocate.

First I will start with the petty officers of the paymaster section Watanabe and Sawada. The fact that on the afternoon of the day of the incident the fifteen or sixteen men of the paymaster section with the exception of the men on duty at the galley, were drilling is clearly shown by the witness, Ota, Seiichi, who testified, "I led about 15-16 men who had not duty and were having field training." and by the testimony of the accused Watanabe who stated, "In the morning we worked as usual and at that time in the paymaster section with the exception of Saturday and Sunday afternoon we had drilling every afternoon; so that afternoon too, as usual we were drilling." The accused Sawada who also testified likewise. Therefore this fact is clear from the above testimony and there is no evidence to rebut this fact. In regard to this point I think the judge advocate too has no objection.

Then, why did the paymaster section which was drilling gather up on the hill? This too is stated clearly in the testimony of the above witnesses who all testified that a certain young sailor of the corpsman section came to platoon leader Ota and relayed an order for them to assemble on top of the hill, the platoon leader, Ota, stopped the drilling and led the platoon to the scene without changing their attire. To this fact witness Ota, Seiichi testified, "A runner came to me and said for us to assemble on the hill in back of the officers' quarters; so I led the platoon in a formation in which they were training, up the hill." The

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

accused Watanabe and Sawada also have testified similarly. Next, the fact that at the scene the paymaster section was lined up separately in back of the corpsman section, too, has been testified to by each witness. Furthermore a witness of the prosecution, namely Hayashi, testified to the above fact by illustrating with a diagram. And there is no evidence whatsoever against this fact.

This fact that the paymaster section was assembled separately, I think is a point in which even the judge advocate agrees. At this time I would like to add that the paymaster section which was at the scene was the group that was training that day and was composed of only half of the members of the paymaster section, and the other half which was on duty that day was working in the galley preparing food for the members of the hospital and the patients, and that these who were working did not assemble at the scene. Now, the point to which we must especially take notice in each testimony is the point as regards whether or not the men of the paymaster section later went into the two columns in front of the prisoners at the scene.

Before we discuss this point, we must consider the vital point as to what orders and when these men went out to form the two columns in front of the prisoners. As to this point there was only one witness of the prosecution, Hayashi who testified accurately to this point. In other words, in answer to the question 28 which was put to him, he states:

"The petty officers were ordered by Lieutenant Oishi to come forward and for a short time there was a hesitation and no one came forward, and during this period, when I saw Oishi, he looked as if he was thinking very hard, and I remember the head of the hospital saying forcefully to begin the execution. Then Lieutenant Oishi had all the petty officers from a certain point step forward, and the petty officers were brought forward, lined up, as I remember, according to rank in front of the prisoners."

Other than Hayashi all the other witnesses of the prosecution only testified that when they went to the scene, the stabbers were already in the columns, and they did not give any testimony regarding this point. And concerning this point as to who made the petty officers who stabbed come forward, this was testified to by the accused Iwanami and Oishi when they took the witness stand. They testified that Oishi himself by orders of Iwanami separated a part of the enlisted men's formation and made them come forward. This point approximately conforms with the aforementioned testimony of the witness, Hayashi. In regard to the separation of a part of the men from the enlisted men's formation, the witness of the prosecution Hayashi, illustrated this point with a diagram, and testified that they were separated from a part of the corpsman section to the right facing the prisoners. We should note that this witness did not testify that the paymaster section was also similarily separated. In other words, he testified in answer to question 288:

"I do recall the corpsman section being separated, but I do not recall the paymaster section being separated."

Furthermore the accused Oishi testified to the effect that the petty officers he separated were those of the corpsman section and there were no petty officers of the paymaster section in line from that group. And further, the accused Homma who was one of the men to be separated testified that the formation of the corpsman section was separated and that there were no persons of the paymaster section among them. As I have stated,

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Lieutenant, U.S. Navy,
Judge Advocate.

I think it is quite clear that the petty officers who were made to come forward to form the two columns were part of the corpsman section and by Iwanemi's order and by the direction of Oishi they were made to come forward. Then the question arises as to when these petty officers were made to come forward as in the above manner. To this the accused Iwanemi testified as follows:

"After I ordered the prisoners to be tied to the cross-bar, I ordered Lieutenant Oishi to get about ten petty officers and line them up in two columns. Then, I ordered the weapons to be handed over to each of these petty officers, and then I made my speech."

Furthermore, the accused Oishi testified:

"The head of the hospital came, and the prisoners were made to stand under the cross-bar. Then, the head of the hospital shouted in a loud voice, 'Petty officers come out in front.' At which time it was very quiet at the scene and there was not one petty officer to step forward. The head of the hospital suddenly called out my name and said, 'Lieutenant Oishi get the petty officers out in front.' So then, I ordered, 'Petty officers step forward,' but at this time there was no one that came out. Because I had no other means and when I looked around, I saw that the enlisted men were lined up approximately according to their ranks, I separated them from a certain point with my hand and made them step forward. Then the head of the hospital said in a loud voice to form in columns and then said to hand them the rifles with fixed bayonets and the iron spears. He then said to line them up alternately, the ones with rifles with fixed bayonets and those with iron spears. The enlisted men who were watching from around the side handed them the weapons. Then the head of the hospital made the speech."

He thus testified without leaving a single fact that happened during this time.

As to this point the accused, Homma who was made to step forward also has similarly testified. As is clear from each of the above testimonies, it is definite that these two columns were formed during the time after the prisoners were tied to the cross-bar and before the speech of the head of the hospital, in other words, just before the speech of the head of the hospital.

The testimony of the witnesses for the prosecution namely, Kikuchi. Yamamoto, Takahashi, Hasegawa, and Hamada in regard to the petty officers who were in the two columns are exposed as absolutely preposterous false statements. In other words, all the above witnesses testified that when they went up the hill, the persons who seemed to be the would-be-stabbers were already lined up in the center, and that various things happened until the head of the hospital came to the scene and made the speech. In particular Kikuchi and Takahashi, gave such testimony as, the prisoners were tied to the cross-bar after the head of the hospital made the speech.

The fact that these witnesses who recall clearly the ten odd petty officers being at the scene which took place three years ago, gave such discrepant testimony in regard to these very clear facts, gives rise to doubts as to whether their testimony is the truth, whether their recollections are so wrong as to show that their testimony is made up on the bases of fabrication contrary to the facts.

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

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We cannot possibly believe their testimony. These two columns were actually formed after the head of the hospital came to the scene and after he ordered Lieutenant Oishi to get them out in front. In other words, before the head of the hospital came to the scene no one knew who was to stab, or did they even know that a stabbing was to take place. After the head of the hospital came to the scene and by his order the petty officers were made to step forward. Then he made the speech, and because of this speech it was known for the first time who were to be the stabbers and each person definitely found out that the killing of the prisoners was to take place. The testimony as stated by the witnesses for the prosecution, that the would-be-stabbers were already designated, can not be anything else but a complete falsehood. Especially, we absolutely cannot believe such testimony of Takahashi when he stated that when the general assembly was called, the armed persons proceeded to the scene a little before the others.

I believe that the members of the commission have come to understand clearly the details concerning the formation of the two columns. And furthermore, I believe it is clearly understood that the persons who stepped forward were not those of the paymaster section. The fact that the paymaster section had taken a separate action on that day and that they assembled at the scene by the direction of Paymaster Warrant Officer Ota is as I have stated before. I have reiterated before that Watanabe and Sawada were both in the line of the paymaster section. And the fact that no one left this line of the paymaster section's rank was testified to clearly by the witness Ota, who was in charge and commanded the paymaster section as follows:

"No one of the paymaster section who were in the line left the line they were in."

And the accused Watanabe and Sawada too have testified to the same effect. I believe that the fact that both Watanabe and Sawada did not leave this paymaster section's line can be readily understood for the following reasons. Namely, while drilling they were led up the hill, so they did not have any idea why they were led up the hill. There was no reason whatsoever for Watanabe and Sawada to enter the column of the stabbers without any order from anyone. Furthermore in thinking over the condition at the scene that day, it was as the accused Oishi stated in his testimony, that is: When the head of the hospital arrived at the scene and ordered the petty officers to step forward, a hush fell upon the scene and there was no one to step forward; so Lieutenant Oishi was ordered by the head of the hospital to get them out quickly. Therefore, Lieutenant Oishi divided the head of the line of the cornsman section with his hand and made the men at the head of the line step forward. From this fact, if Watanabe and Sawada who were in the line of the paymaster section which was not divided, had stepped forward, they must have come out on their own. If we suppose that they came out on their own, they must have been already out in front when the head of the hospital said, "Petty officers step forward." But when we consider the situation that no one stepped out at that time it shows that no one was willing to volunteer to step forward to stab. The only reason they stepped forward was because they were ordered to do so. However, Watanabe and Sawada of the paymaster section were not ordered to step forward by anyone. In regard to this point it is clear from the following question and answer of the witness Ota:

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"Q. Did the head of the hospital or anyone else order the men of the paymaster section to take part." "A. There was no orders or conversation from anyone." I think the above fact is understood from this testimony. That is, they did not step forward because there was no order given and because they did not go out, they did not leave their lines. Therefore they did not stab. If they had left the line, witness Ota who was their officer in charge, could not have possibly missed seeing them. The reason for this is because they were led up while they were drilling, their ranks were made up of two columns while being led up to the scene, and from this two column formation, they were only made to right about face. As a result the rank of the paymaster section was lined up horizontally with the head of the line to the left and facing the prisoners. The road which led to this hill came up from the right facing the prisoners; so when a column of men came up the hill, the end of the column would be to the right facing the prisoners and the head of the column would be to the left. Therefore, in order to face this column so that it would face the prisoners, they must make a right about face. Then, it would become a rank with the head of the line to the left. In other words, the head of the line was near the officers section. Because witness Ota was in the end of the officers line, he was in a position that was very near the head of the line of the paymaster section. Because Watanabe and Sawada were the senior petty officers of the paymaster section, they were at the head of the line. Thus, it could be easily understood that they were in line near the officers' side. Then, if both Watanabe and Sawada did leave the line, Ota would be the first to see them. However, he has clearly testified that no one left the line of the paymaster section.

In the testimony of the witness Ota, he stated that before the stabbing, he went down the hill for about fifteen minutes to supervise the galley. Furthermore, he testified that when he returned the stabbing was just about to go into action; so thinking that some of the men of the paymaster section might have gone out while he was away, he looked at the lines of the paymaster section which he was in charge, but saw that no one had left the line; so he was very relieved. Therefore Ota testified that Watanabe and Sawada absolutely did not stab.

If at this time the two above mentioned men were in the two columns, then, when did theyleave their line and go out to the front? Soon after these two columns were formed, the head of the hospital made his speech, and soon after this the stabbing took place. There was no time whatsoever to reenter this line of stabbers which had already been formed. We can easily understand this when we consider this atmosphere of the scene and the fact that nobody stepped forward when the order was first given.

It has not been shown in any way from the evidence produced by the prosecution that the paymasters went into this line. The paymasters did not break their formation nor did anyone leave the line until he was dismissed in front of the galley as has been brought out by the testimony of the various accused and witness Ota. We cannot find any evidence denying this. What was brought out by the prosecution witnesses was only that they saw Watanabe and Sawada in the line, and that some of them saw Watanabe and Sawada stab. The witnesses who testified that they saw Watanabe stab were five persons, namely Kikuchi, Yamamoto, Hasegawa, Takahashi, and Hamada. Even one witness among these five witnesses, did not know how Watanabe and Sawada were dressed, what they had nor where they were lined. As to this point, the same can be said about witnesses Hamada and Hasegawa who testified against the accused Kuwabara, witnesses Takahashi, Hamada, and Hasegawa who testified against Namatame. That they merely saw cannot be credible testimony. I believe anyone can merely say, "I saw," even though he actually did not see it. We must express what we

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James P. Kenny

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

recognized in a concrete manner in order to justify our subjective cognizance that we actually saw. Therefore, in order to hold that the testimony must objectively express the truth in concrete manner to a certain intelligeble degree.

Reviewing the testimony of Kikuchi, Yamamoto, Hasegawa, Takahashi, and Hayashi as regards this point, none of them have testified as to where Watanabe and Sawada were lined up in the column, whether they were in the right column or the left, what each had, which prisoner they stabbed, the right or the left prisoner, and so forth. They all testified that they did not recall as regards these points.

Particularly, Kikuchi, Yamamoto, Takahashi, and Hamada gave no specific explanation as to this point in spite of the fact they testified seeing Watanabe and Sawada stab. What concrete explanation did these witnesses produce to establish that the persons they saw were Watanabe and Sawada? Nothing whatsoever. We can not possibly maintain that such testimony is credible. Furthermore there are many inconsistencies in the testimonies of these witnesses, for example, counsel put the following question to witness Kikuchi in the cross-examination:

"Q. How far from the prisoners were you standing?" To this he answered, "I do not remember." He not only testified that he did not know where he was standing but also did not know who were beside him. As for Takahashi, he testified that he remembered none of the fifteen men who went up the hill with him that day. In spite of this, they all pointed out Homma who was at the head of the column farthest away from them, and yet did not recall anything about the column nearest them. It is an improbably inconsistency, that these witnesses who pointed out ten odd men as being in the line, to remember those persons in the farthest column and have no recollection as to who was in what part of the nearest column or who was at the head of the nearest column which was more easily noticeable.

Hamada who was one of these witnesses, replied to the judge advocate's question:

"Q. Did any of these men that you have named ever leave those two rows?
"A. I recall that there were none that left the line."

Kikuchi also testified:

"Q. Did you ever see anyone leave that line?
"A. No."

Both of these witnesses could not have possibly testified as they did, if they had not constantly watched the two lines. Assuming that they were so cautious, then they should at least remember who was at the head of the line closest to them. And they should have clearly remembered such facts as who was the last one to stab,

Witness Kikuchi testified that all those lined in front of the prisoners were armed persons who were presumed to be stabbers. Then where would the paymasters be lined up? Could it be possible that the paymasters were not at the scene?

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Witness Hayashi was one among many prosecution witnesses who testified in detail in comparison with the others. He testified that the petty officers who were made to step forward in front of the prisoners were divided from a part of the corpsman's line. This Hayashi testified as to Watanabe and Sawada that he thinks he recalls them being in the line, and he is not clear on this point. I believe Hayashi was under an illusion when he thinks he recalls Watanabe and Sawada who were at the head of the paymasters line being in that column, because the rear of those two columns and the head of the paymasters line were comparatively close to each other, and because the men of the paymasters were all armed owing to the fact that they had been drilling that day. This illusion can readily be understood when the relation between his position and the rear of the two columns and the head of the paymaster's line is taken into consideration.

Summing up the above points, we are able to understand readily that the recollections of these witnesses were vague and lacked clarity. The same thing can also be said, in that their testimony was in perfect conformity in some portions while as a whole their testimony was of the same mode and form. I was dubious as to why these prosecution witnesses named two senior ranking petty officers of the paymaster section from such vague memories. But my doubt was cleared when I found out the following facts.

In January of this year, a part of the accused petty officers, Kikuchi, Yamamoto, and others who took the stand as witnesses, had a meeting in order to decide the persons responsible for the incident, in the presence of one American officer and interpreter Savory. The accused Watanabe was present at this meeting, and he testified about this meeting when he took the stand on his own behalf. But we were not able to hear the substance of the testimony because of the objection by the judge advocate.

I believe it is impossible to grasp the truth of such a complicated incident as this, which occurred many years ago and involving a great number of people, by depending merely upon direct evidence. Therefore the facts of this meeting are highly relevant in understanding the present case. This meeting was held because it was not clear who was in back of this incident, what people were concerned in it, and also to release the innocent young soldiers from the sufferings of confinement. And another purpose of this meeting was to decide the person responsible in this meeting in order to reach an expeditious solution of the case. The motive of the person who planned this meeting should truly be noted. This person was afraid that this incident would lead to a tragedy, a feud between brothers. This meeting however ended in a failure. The reason for this failure was because they formally tried to determine the responsibility of the persons in the incident. Yamamoto, a witness for the prosecution tried to assert that the head of the hospital should take theresponsibility concerned with the hospital, and that the senior petty officer of each division should take the responsibility involving the enlisted men. In opposition to this allegation, Watanabe firmly held that the ones who actually did the act should take the responsibility and that there was no reason for the persons who did not, to be held responsible. In reply to this, interpreter Savory said that this incident was murder and it would not be well to produce any one as being responsible who actually had no part in it. Thus this meeting came to a close without any result. I firmly believe that if Watanabe had any part in the actual act, he could not have this opposed so strongly. And we must take special note of the fact that the allegation of Yamamoto, Kikuchi, and others at

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

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this meeting materialized before this court. I believe the facts of this meeting have been clarified, and I am sure you have understood why two petty officers of the paymaster section were named by these prosecution witnesses. The judge advocate stated he could not understand why the paymasters were in this line with the corpsmen, but I believe that the judge advocate will have fully understood why this was so.

Next I would like to argue in behalf of the accused Kuwabara. The accused Kuwabara when he took the witness stand on his own behalf, testified in detail his action on the day of the incident. In other words, after the afternoon muster to "turn to," he was developing some X-ray pictures at his post when he was told to go to the Forty-first Guard Unit by his superior. But he refused, saying that he was busy with his work now. Then he was told that everyone was busy with his work and that he must come; so he stopped his work and went to get the prisoners. Of course he did not know for what purpose he was going. On the way he asked Petty Officer Tanaka who went with him and found out for the first time that there was to be a physical examination. Thus, the prisoners were brought to the hospital and they were handed over to the working party in front of the P.X. in back of the officers' quarters. He then planned to go back to do his X-ray work, but hearing that there was a general assembly, he went to the scene. He testified very clearly when he took the stand as to his action at the scene.

Why did the accused Kuwabara at the scene give the prisoners cigarettes and water? And why did he, the lowest ranking petty officer at the Fourth Naval Hospital do such a bold act? Probably the witnesses of the prosecution had a very strong impression of this bold action of his. But I find it necessary to probe into his mental state at the scene.

He performed special duty in getting the prisoners. He gave these unresisting and pitiful prisoners cigarettes and let them see the scenery at the beach. We must notice that there was a big difference between the feelings he had toward the prisoners and that of the persons who assembled at the scene by the general assembly who saw the prisoners for the first time. This difference of feeling was expressed as a bold action on his part, which was conspicuous to all.

Probably this was the reason he was ordered to act as guard for the prisoners. That the accused Kuwabara was not in the line of stabbers can be understood from the fact that when the blindfolds were taken from the prisoners, one of the prisoners fainted and he gave this prisoner some water. When the blindfolds were taken off the prisoners, the stabbers were lined up in front of them with weapons; so when the prisoner saw this in front of his eyes, he was frightened and fainted. The above fact was clearly testified to in the testimony of the accused Yoshizawa as follows: "The blindfolds were taken off from the prisoners and when the skinny prisoner saw before his eyes the two columns, he fainted."

Thus, when he gave the water to the prisoner, the two columns of stabbers were already formed. If we assume that the accused Kuwabara was in these two columns which were formed by the order of the head of the hospital he would not have been able to leave this column whenever he felt like it and give water to the prisoner. He was not in the column of stabbers. And because he was standing near the prisoners, he was able to do the acts which I have just related.

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Judge Advocate.

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In regard to the point that the accused Kuwabara was standing near the prisoner the accused Namatame in his testimony acknowledged this. I have mentioned this once before. But in the testimony of the following witnesses of the prosecution Hamada, Hasegawa, and Mosenibik and in the statement of Ikeya they testified that they saw the accused Kuwabara in the columns of stabbers. In regard to the witnesses Hamada and Hasegawa it is exactly the same as I have already stated in my argument for the petty officers Watanabe and Sawada of the paymaster section. They testified that the accused Kuwabara was in the column, but could not testify what column he was in, what position in the line, what kind of weapon he had nor which prisoner he stabbed.

Furthermore, another fact we must note is, among the witnesses of the prosecution who pointed out many names, Kikuchi, Yamamoto, Takahashi and Hayashi did not point out the name of the accused Kuwabara. Especially, Hayashi did not even mention his name among the persons who he thinks he recalls as being in the column. In other words in regard to Kuwabara almost all of the witnesses have hardly any recollection of him. But because he took such a bold action at the scene, some of the witnesses feel that he might have been in the column, and I think they testified from this vague recollection.

At this point I wish to call your attention to the statement of Ikeya. On 11 July the judge advocate announced here in this court that Ikeya, Kyoichi on 2 July had committed suicide at the witness camp on Guam. I experienced a feeling of cold run through my spine when I heard this and also of the suicide of witness Nakamura who testified against the accused Sakagami.

Furthermore, according to the statement of Ikeya, just a day before he committed suicide, namely, on 1 July he added to his statement as follows:

"I sear that the contents of the above statement is the truth.

"1st July, 1947

"IKEYA, Kyoichi"

The very next day after he had added these words to his statement, to be exact, at midnight of that very day he committed suicide and disappeared forever from us.

From the words of the accused Kuwabara who knew Ikeya it is said that Ikeya was a sincere and quiet person. This sincere Ikeya after adding to the contents of his statement the words of certification mentioned above, committed suicide. What does this all mean? I feel that he was worrying about this statement written under authoritative influence. On top of this he was made to add to it, the words of an oath. I think he finally, in asking for forgiveness of these accused for this responsibility committed suicide. For the accused Kuwabara, Ikeya was a witness who had a very important connection with his alleged crime. The fact that we were not able to cross-examine such a witness in this court, was most unfavorable to the accused Kuwabara and the other accused listed in his statement. The statement of a person whom were not able to cross-examine is I think improper as evidence.

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In looking into this statement we find definite errors which are as follows: That is, he states that after the prisoners were brought from the Guard Unit, they were handed to some officers at the scene. And then he went back to the ward and while washing his body he heard the order for general assembly. If we compare this with the testimony of the accused Kuwabara, he testified that he planned to return to do his unfinished work, but he was worried about the general assembly so he could not. If at this time there was no general assembly as Ikeyastates, the accused Kuwabara would have naturally returned to do his unfinished work. The reason Kuwabara could not return was because of the order for general assembly. But Ikeya states that he heard the order for general assembly after he returned to the ward and while washing up, and his action after that differs in no way with that of Kikuchi, Yamamoto and the others. I express my sincere regret for Ikeya who died because he could not bear his guilty conscience within him which was caused by forced investigation in order to clarify the uncertain facts. And I also regret that there is such great sacrifice on the part of the petty officers in this incident.

Next, I must say a word in regard to Mesenibik, a Truk native who testified that he saw the accused Kuwabara in the column and was the fourth one in the column. But his testimony is such wild talk that with our common sense we cannot possess the courage to take issue with it. He was watching from the top of a coconut tree near the scene where there were many guards posted. Moreover, he was watching from a place higher than the ceiling of this court and has testified that the prisoners were suspended about one foot from the ground. Is it possible for him to see how the prisoners were suspended by watching the scene from such a high place? As shown in the testimony of Kuwabara, he did not see the accused at the scene, but probably came to know Kuwabara when he treated him later. As stated above, the evidence of the prosecution against the accused Kuwabara is truly insufficient and uncertain. To decide the guilt against the accused Kuwabara for the crime of murder with such evidence which is very weak is impossible. Furthermore, the prosecution has not shown any evidence to deny the action of the accused Kuwabara.

The accused Kuwabara is the eldest of the six brothers and sisters and was born in a peaceful farming village in Hokkaido. He entered the navy on 1 June 1940 and he has served up to the present. During this time he received important education as a corpsman at the Yokosuka Naval Hospital as a primary corpsman student, and graduated standing second from the top in his graduation class of many corpsmen. Furthermore, on March 1943 he was selected from among the many corpsmen to obtain higher skill in this field and entered the Yokosuka Naval Hospital again as an advance corpsman student. Therefore he has become highly skilled in this special art. Here too, he graduated with high honors as fifth in his class, he had a promising future indeed.

He is very cheerful and broadminded and very earnest in his work. This can be understood from his high record as a student, and strenuous efforts in the construction of the branch hospital of the Fourth Naval Hospital on various islands, shows that he was an earnest and faithful enlisted man.

At home he is the only one who can help his father, and is in a position to help bring up his brothers and sisters as his father's right-hand man. I sincerely hope that such a young man who has such a great responsibility and of such outstanding record can start over again as a good citizen as soon as possible and can return to his peaceful family of his young brothers, sisters, and his aged father.

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The President and the members of the commission, I ask your utmost consideration of the easily mistaken action of the accused Kuwabara on that day.

Next, I would like to argue in behalf of the accused Namatame.

As the accused Namatame, himself, testified as to his action during the day of this incident when he took the witness stand in his own behalf, he received an order from his superior to dig a hole and was digging the hole with four or five men on the hill in back of the hospital. Of course the accused Namatame and others did not know for what purpose the hole was being dug. Their attitude in digging the hole without any reason for suspicion can be easily understood because at that time there were many holes being dug for dumping scraps and as air raid shelters. And concerning facts of this work, as the accused himself testified clearly, the hole was dug to a size approximately six feet in length; four feet in width, and three feet in depth in about one hour and a half to two hours time. And while Namatame and the others were resting near the completed hole, a great number of persons came up the hill and one of the officers among them said that they had to dig it deeper or it won't be of any use; therefore they went on digging the hole again. This fact was clearly testified by the accused himself. Furthermore, co-defendant, Homma has testified the fact that when he went up the hill to the scene the working party was digging a hole. And when Namatame finished digging the second time and came out of the hole, the prisoners were already tied to the cross-bar and the stabbers were lined up in front of the prisoners. This fact has been testified to by the accused himself. Furthermore, Homma testified that when the line he was in was seperated and made to step forward in front of the prisoners, the working party that was digging the hole was still continuing their work. This hole was near the prisoners; so I believe it was easily seen by Homma. The action of the accused Namatame after that was clearly testified to by himself and co-defendant Kuwabara. He was just standing and watching the stabbing from near the hole. After the stabbing the corpses were buried and he returned. This was his entire action during that day.

Thus, because the accused Namatame had special work to perform, namely digging a hole, he did not participate in the stabbing. But the three witnesses for the prosecution Hamada, Hasegawa, and Takahashi testified that they saw Namatame in the column of stabbers. These three witnesses all testified that when they went to the scene, the persons who seemed to be the stabbers were in the center lined up in two columns as compared from the persons who seemed to be the spectators. Furthermore, from their testimony, the accused Namatame seems to have been already in the column in the center when they came to the scene. But as I have shown before, Homma who was at the head of the stabbers testified that when he stepped forward and the two columns were formed, the digging of the hole was still continuing. We can easily understand that this testimony of Homma coincides in relation to the time required by Namatame for his work. In other words, they were ordered to dig deeper because the hole was too shallow when the prisoners arrived at the scene. Assuming that they started digging for the second time then, from comparing the time required to dig the hole the first time, they would at least take about one hour to finish digging the second time. Then, how was the accused Namatame able to enter the columns of stabbers? In the testimony of Hamada, who went to the scene before the head of the hospital, he stated that he saw Namatame in the column, but this actually could not have happened. Moreover, these witnesses of the prosecution could not even testify in what column Namatame was or what kind of weapon he had. And all the other

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

witnesses of the prosecution namely, Kikuchi, Yamamoto, Ikeya, and Hayashi did not mention the name of the accused Nametame. The reason that only some of them named Nametame was because after Nametame finished digging the hole, he was standing near the hole and watching when the stabbing took place; and this merely impressed itself upon their recollections vaguely. I have stated before that this incident was performed by the petty officers who were separated by the order of the head of the hospital, this is comparatively clear. It seems that the judge advocate also has not changed his allegation that the petty officers participated in the actual action. But the accused Nametame was not a petty officer but a corpsman leading seaman at the time of this incident. This point was clearly testified by him. Formally he was promoted to be corpsman petty officer second class on 1 May 1944, but it was not until after September that the notice of his promotion came to him and he was treated as a petty officer second class. Therefore in July when the incident took place his promotion was unknown and therefore he was not in fact promoted. He was treated as a leading seaman and was given duties only as a leading seaman. In the Japanese navy the promotion of a seaman is done at each organization. But the promotion and the appointment of the petty officer is under the authority of the naval station to which the organization belongs; therefore, the appointment to petty officer and promotion of petty officer is decided by them at a specified date, namely on 1 May and 1 November of each year. Therefore, each organization does not know until it receives a notice whether a person is promoted or is appointed to be a petty officer. Thus, in the case of Nametame even though on May 1st he had the required years to his credit to become a petty officer, it is not know whether he was appointed or not until the notice had arrived. And moreover, petty officers cannot be appointed or promoted until the notice is received.

I think that it has been fully understood that the accused Nametame was not a petty officer at the time of the incident. As I have stated above, the accused Nametame, because he was working in digging the hole, did not participate in the stabbing. I would also like you to note fully the fact that he was not yet a petty officer at that time.

At this time I would like to present to you in behalf of the accused Nametame the fact of how tragic his family is. His father died several years ago and his only brother was conscripted into the army and it is not known whether he is dead or alive in Manchuria. At present the family consists of his mother, wife of this brother, and his brother's three children. During the time the accused Nametame was in the navy, from the small amount he received as pay he sent most of it to his family for a part of their living expense. At present with his brother gone he has to bear the great responsibility of maintaining the livelihood of his family. Since the time he was confined in the Sugamo Prison, Tokyo as an accused of this case, his family has lost any means of livlihood. His aged mother and his brother's wife with three small children in her hand are barely making their daily living by farming the small plot of land they have borrowed. As I have stated above, because of the war, his brother's whereabouts is unknown and he is now tried as a war criminal. Indeed his family is in a very tragic state of affairs. The only way to save this tragic family is for the accused Nametame to go back to his family. If he had participated in the stabbing of this incident, he would have submitted contentedly to this suffering. But I affirm that he had no connection whatever with the stabbing. The President and the members of the commission, I request your consideration of his tragic family and I ask you not to convict him of a crime of which he is innocent on the basis of the uncertain testimony of the prosecution.

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Lieutenant, U.S. Navy,
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CONCLUSION.

In the foregoing, I have clarified the acts of the accused Watanabe, Sawada, Kuwahara, and Nemetame at the time of the incident and have demonstrated that they did not participate in the stabbing.

All in all, the points concerning who did what in this incident, were made up under the assumption of "it ought to be" based upon vague recollections. Thus the evidence produced by the judge advocate was exceedingly vague.

Therefore, I firmly believe that these accused cannot be found guilty of a serious crime such as murder, on such uncertain evidence.

KARASAWA, Takami

I certify that the above, consisting of fifteen (15) typewritten pages, to be a true and complete translation of the original argument of Mr. Karasawa, to the best of my ability.

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

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Lieutenant, U.S. Navy,
Judge Advocate.

ORIGINAL ARGUMENT OF KUWATA, HIDEO, A COUNSEL FOR THE ACCUSED, IN JAPANESE.

(appended to the original record)

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Judge Advocate.

"VVV"

CLOSING ARGUMENT OF DEFENSE COUNSEL KUWATA, HIDEO OF TOKYO, IN BEHALF OF HOMMA, HACHIRO; KAWASHIMA, TATSUSABURO; AKABORI, TOICHIRO; TSUTSUI, KISABURO; TAKAISHI, SUSUMU; MITSUHASHI, KICHIGORO.

CONTENTS

INTRODUCTION

Honorable President and the members of the commission. In behalf of the six accused persons, Homma, Hachiro; Kawashima, Tatsusaburo; Akabori, Toichiro; Tsutsui, Kisaburo; Takaishi, Susumu; and Mitsuhashi, Kichigoro among the nineteen accused persons, I wish to deliver this argument in defense, taking into consideration the facts and the laws of this case.

Since the beginning of the trial on June 10, seventy-four days have elapsed up to this day, and during this period thirty-eight sessions have been held. Notwithstanding the torturing heat, you have heard most patiently and impartially the testimony of various witnesses and the final statements of the accused. And today I am offered the opportunity to deliver this argument. I am most honored. And I wish to add that all of the accused and I are most thankful for the thoughtful and impartial manner in which you have acted during this hearing.

My argument consists of three parts, namely on the facts of the case, on the law of the case and on the circumstances of the case. In the first part (on the facts of the case) I will try to show that the abovementioned accused, with the exception of Homma and Kawashima should be acquitted on the ground of insufficient evidence. In the second part (on the law of the case) I will argue that the acts of Homma and Kawashima are free of unlawfulness and even if the unlawfulness of their acts is not precluded, then owing to the fact that criminal intent is absent, I shall urge they should not be held culpable. If, however, my foregoing argument is disposed of and these accused are to be found guilty, I shall still hold the argument that the crime committed by these accused does not correspond to the concept of murder as alleged in specification three of Charge I, but can be acknowledged to constitute manslaughter, and therefore the criminal responsibility imposed upon them should be legally mitigated in comparison with that of murder. Even if their act constituted the crime of murder, I shall then show that their punishment should be duly reduced or mitigated considering the position or status of the accused.

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Lieutenant, U.S. Navy,
Judge Advocate.

Finally, I shall relate the circumstances under which these accused were placed and ask your consideration. Therefore my argument in Chapter II will mainly be in behalf of Homma and Kawashima, but if the commission should consider the evidence produced against the accused Akabori, Tsutsui, Takaishi and Mitsuhashi sufficient to convict them, I should like to include them also together with Homma and Kawashima in my argument beginning with Chapter II.

Chapter I - On the Facts of the Case.

Three years have elapsed since the occurrence of this incident. As was truly said by Iwanami on the witness stand, neither he nor all the others concerned with the case, ever dreamed that this incident would be tried as a so-called war crime. Therefore, we could not possibly expect that the persons involved, observed every single action which took place minutely and recall it with precision. On the other hand, as I have stated, three long years have elapsed and during that period, they had to forbear acute shortages of food and clothing, and then the incessant bombing of the American planes until the end of the war. Still they had to struggle on. Then, came the surrender. A short time later, they were confined in the Truk stockade. They underwent untold suffering and agony which they had never experienced nor even anticipated before. This drastic change in their environment up to the present day, can only be accounted for by the words "changes and vicissitudes of the secular world." The reason for their varying memories and inconsistent testimony can well be understood. The material witnesses produced by the judge advocate were all personnel of the former Fourth Naval Hospital, and among them were some whose position in the incident was only slightly removed from involvement. Nakamura, Shigeyoshi, witness against the accused Sakagami, Tanede, Tsuneo, witness against the accused Kamikawa, and Hasegawa, Tomio, witness against Iwanami were in this category. And, we cannot say that there were none among the witnesses who in order to defend their own position, did not unwittingly distort the truth. We can also imagine that, since the investigation by the American authorities commenced, various plots and conspiracies have been hatched among the persons concerned as regards the disposition of responsibility. Because of the above reasons, it is almost impossible to grasp the entire truth about the incident.

As to the credibility of testimony in general, it is requested that the commission pay special attention to Section 269 of Naval Courts and Boards under the heading of "Witnesses examined apart from each other," and to Section 297 of the same reference under the heading of "Witness may be warned not to converse upon matters pertaining to the trial."

In detail, the former reference states: "Witnesses are examined apart from each other; no witness is allowed to be present during the examination of another. Before the charges and specifications are read to the accused, the president of the court directs all witnesses to withdraw and not return until they are officially called. At the outset of each days' proceedings the direction to withdraw shall be repeated to all who are cited as witnesses and may chance to be present..... When the court has finished with a witness he shall be directed to withdraw and a minute shall be entered on the record to the effect that the witness withdraws in order to show that two witnesses are not in court at the same time.

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

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"Should a witness inadvertently be present during the examination of another witness, or should he be present even in violation of the court's order, he is not thereby disqualified from testifying, but such fact should be brought out in cross-examination as affecting the credibility of the witness." While the latter reference states: "The reason that no witness is permitted in court during the examination of another witness is to prevent either the deliberate or unconscious coloring of the testimony of any witness. For exactly these same reasons it is highly undesirable and improper for witnesses to an occurrence which may probably be the subject of judicial investigation to converse with each other concerning the testimony which they would give should they be called as witnesses, or, having testified, to disclose to persons not present the testimony which they give, or to converse with anybody, including those present in the court room, concerning the details of the testimony given by them."

Great importance must be attached to these rules by the American law purporting to prevent either the deliberate or unconscious coloring of the testimony of a witness. This conclusion can be easily drawn from the fact that the sentence, "No witnesses not otherwise connected with the trial were present," is entered immediately after the entry of the introduction of every new witness in the record of each day's proceedings; and the President does not fail to remark, "The witness is cautioned not to discuss matters pertaining to the trial during its continuance outside of this court room except with the proper authorities just before a witness leaves the stand.

These steps are considered most proper and leave nothing to be desired for the prevention of the influence of the witnesses upon one another during the time they are giving their testimony and after they have given their testimony. I am afraid, however, that the steps taken during and after the testimony is given are not sufficient in themselves for the complete elimination of the coloring of the testimony. The purity or complete lack of coloring of testimony can never be guaranteed unless the intercommunication of witnesses is strictly forbidden before their testimony is to be given, as well as during and after the testimony is given.

As for the witnesses introduced for the prosecution in this trial, most of them have lived together in groups for a long time in the witness camp in the vicinity of the War Criminal Stockade. The defense counsel did not fail to make every effort in cross-examination of these witnesses to have the court acquainted with this fact. But their endeavors were all in vain because the judge advocate objected on the grounds that it was irrelevant and immaterial to the issues of this case. I believe, however, that it is a well known fact, at least among the parties concerned with this trial, and a fact of which judicial notice should be taken and which needs no evidence to be proved.

Generally speaking, it is only natural that persons who are strangers to each other should come to be close in the course of living together for a considerable period of time. This fact is still more so of these witnesses who once served together in the Fourth Naval Hospital and who have been well acquainted with one another. No one can venture to deny the fact that in the course of this trial there have never been two or more witnesses present in the court room at the same time and each witness has been specifically cautioned by the President not to discuss his testimony with others, except with the proper

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James P. Kenny

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

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authorities. In other words, the aforementioned two rules have been strictly observed. I believe, therefore, the witnesses are prudent enough not to discuss the contents of their testimony with each other. I am afraid, however, that these witnesses who actually saw, or are presumed to have seen, this incident with their own eyes, and who have been well acquainted with it, could easily infer from the examinations of investigators or judge advocates what would be asked in the court room and what should be answered to the questions, and have had the opportunity of discussing matters together so as to reach a common conclusion.

As a matter of fact, of the testimony of the witnesses introduced by the judge advocate, that given by Kikuchi, Goro, Takahashi, Masayoshi; Yamamoto, Hideichi; Hasegawa, Masanao; and Hamada, Toshihisa, is almost identical. Particularly when they testified that they found the stabbers and the bystanders distinctly separated when they arrived at the scene of the incident, the tone in which they gave this testimony and the words they used were nearly the same, and this part of their testimony seemed rather funny for us who could understand Japanese and grasp the indescribable delicacy of the words, the tones, the attitude and other circumstances under which these witnesses gave their testimony. Hayashi, Masaji, was the only witness who could give testimony unique in this respect.

For the reasons stated above it can be safely concluded that the testimony of these witnesses brought before the court for the prosecution does not deserve much weight to be given thereto. Concerning the credibility of their testimony, my colleague, Mr. Karasawa has cited numerous examples and made a detailed commentary on them. So, I shall not discuss this point any further. A few outstanding examples on this point I have already cited, however, this may serve as a reference in your consideration and impartial judgment. I shall in the following part of my argument discuss about the accused whose charge I bear.

I urge a finding of not guilty for the accused Akabori, Tsutsui Takaishi and Mitsuhashi on the ground that the facts of the crime have not been sufficiently proved. The judge advocate alleges that the above accused, did together with codefendant Iwanami, at the Fourth Naval Hospital, Truk Atoll, by bayoneting with fixed bayonets, spearing with spears, kill two American prisoners of war. But I believe, the alleged facts of the crime have not as yet been proved by the evidence established by the judge advocate up to this day. That is, three witnesses, Hasegawa, Masanao; Hayashi, Masaji; and Hamada, Toshihisa were the only ones whose testimony agreed concerning the crime of the above accused Akabori, Tsutsui, Takaishi, and Mitsuhashi. Other than them, witnesses Kikuchi, Goro and Takahashi, Masaji only referred to the above four accused in part and their testimony did not include all of them. These witnesses merely testified that they recall these accused in the line of the stabbers, but there was no testimony as to whether they were in the right column or the left, or what their relative order in the line was, or what sort of weapons they had. In particular, there was not a single witness who testified that he observed the actual stabbing of these accused. It is most dangerous to establish the crime of these accused by such circumstantial evidence and by such ambiguous testimony, and I believe that the honorable members of the commission also will agree with me on this point. Thus, I am firmly convinced that you will find the accused Akabori, Tsutsui, Takaishi, and Mitsuhashi not guilty of the charge, on the ground that their crimes were not proved. TRUE COPY

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James P. Kenny

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

Chapter II - On the Law of the Case.

A crime is a culpable and unlawful act which fulfills the requirements or component elements provided in statute law as being a crime. A war crime is also classified as crime, therefore, it also must have the same requirements as an ordinary crime. The reason the judge advocate alleged in the charges and specifications "wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause can also be attributed to this. It is presumed without error that the terms, wilfully, feloniously, with premediation and malice aforethought, are invariably peculiar to American and English law, and I am unaware of the existence of such terms in the criminal law of the continental systems, which literally correspond to these terms.

I have not had the opportunity to familiarize myself with the theory of American and English Criminal Law as yet, so it is difficult for me to make a precise distinction between wilfully, feloniously, between premeditation and malice aforethought. But I believe that these terms have been deduced by analyzing the substance of criminal intent. Thus, if we were to add the term "without justifiable cause" to these terms, I believe I may assert without great error, that in the American and English laws too, the mental condition of the person who has the responsibility (intent and negligence) and unlawfulness are the determining factors required to constitute a crime.

On consideration, I find the acts of these accused correspond to the type of crime called homicide. And yet I believe these acts do not constitute a crime because they were done with justifiable cause, and even if there was no justifiable cause, then because of the absence of criminal intent. The argument I shall introduce in this chapter will mainly be directed toward rebutting that portion of the allegation in the charge and specification, which states, wilfully, feloniously, with premeditation and malice aforethought and without justifiable cause.

At this point I must ask your understanding of the fact that in the subsequent portion of my argument I shall be citing the provisions and theories of the Japanese Criminal Code, because of my unfamiliarity with English and American law. But I sincerely believe that this will in no way hamper your understanding because the source of every criminal law is founded upon the fundamental morals of human beings. Criminal law is the basic law of every government. Its nature is universal. In every country, whether old or new, where there is any kind of governing body, we are sure to find a criminal code, no matter how primitive it may be. Moreover, this body of law is hardly ever affected by differences in climate, customs, sentiments, language, religions, etc. Because of this nature and characteristics of criminal law, I am sure that the points I bring up in my following argument will be fully understood by you.

Section 1 - On preclusion of unlawfulness.

First of all, I firmly believe that the acts of the accused do not constitute a crime because their acts are precluded of unlawfulness.

Now, even if a certain act has externally fulfilled the requirements which constitute a crime - though it is acknowledged that the quality of a certain act fulfilling the requirements of a crime ordinarily includes its unlawfulness, particularly in case of a malum in se (namely a crime based on natural law) TO BE A CRIME which is evel in itself) and

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

when there are exceptional circumstances to preclude the unlawfulness of that act, then we cannot insist that the acts constituted a crime.

Referring to the present case, the accused did not commit the alleged acts of their own request or of their own preference. The testimony of all the witnesses agrees that they did the act in accordance with the orders of their superior officer, Iwanami, who is a co-defendant in this case. All criminal laws in every modern civilized country have agreed upon acknowledging that acts done in accordance with superior orders are regarded as acts done in pursuance of official duty of the government or public officials and their unlawfulness should be negated or precluded, as has been the case with acts done in accordance with laws and ordinances. Concerning this point, I have not as yet inquired in detail into the theory of American and English law, but considering this in the light of the Japanese Criminal Code, art. 35 provides: "Acts done in accordance with laws and ordinance or in pursuance of a legitimate business are not punishable," and thus its purports is clearly set forth that unlawfulness of acts done in accordance with laws and ordinances are precluded or negated. Incidentally, this article from its wording, appears as if to be construed merely to negate the possibility of punishing an act, but it not only negates the feasibility of punishment but also goes a step further and purports to negate the constitution of a crime. All jurists have agreed and acknowledged this purport. Let us inquire into the opinions of various authorities concerning this point. Makino, Eichi, Doctor of Law, former Professor of Tokyo Imperial University states in his "Revised Japanese Criminal Law" as follows:

"When a certain act is regarded as a right or duty in a law or ordinance, then such acts will not constitute a crime so long as they are within the scope of that duty or right. In this sense, such acts formally are free of unlawfulness. (i) Execution of legitimate duty or business. Execution of legitimate duty can be divided into that of a government or public official who does it in accordance with superior orders, and that of a person doing it on his own authority. In either case, it does not constitute a crime." (Refer pages 349-350 of op.

Concerning these accused who are enlisted men, there are no laws or ordinances which directly set forth their duty and authority but merely provides that they should exclusively receive and obey the orders of their superiors. Therefore, there is no question about their acts corresponding to "acts done in accordance with superior orders," in the above classification of execution of official duty.

Furthermore, Takigawa, Koshin, Professor of Kyoto Imperial University in his "Introduction to Criminal Law" says:

"(1) Acts done in accordance with laws and ordinances.

Even if we do not resort to Art. 35, it is only natural and proper that acts done in accordance with laws and orders have no element of unlawfulness. We can only enumerate by giving specific examples, what acts are acts in accordance with laws and ordinances. Acts concerning judicature (for example, execution of sentence, search, arrest, detention, civil attachment) acts concerning administrative control such as police, finance, etc. are the main examples."

As I have stated above, the acts of these accused are performance of official or legitimate business, in accordance with superior orders;

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

that is, their acts are formally precluded of their unlawfulness as being "acts done in accordance with laws and ordinances" provided in Art. 35 of the Japanese Criminal Code. Consequently, I believe they do not constitute a crime. But concerning this opinion, there would still be room for objection. Though the acts of these accused were done in accordance with the order of their superior, Iwanami, who is a co-defendant, the substance of the order purported "to kill two American prisoners of war." In general, to kill a person, is in itself unlawful. Accordingly, Article 199 of the Japanese Criminal Code stipuletes, "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 set forth stern punishment for homicide. In particular, a prisoner of war has a certain status in International Law, and his life, body, property, honor etc. are all protected therein. This purport is clearly set forth in the Hague Convention, in "Regulations respecting the Laws and Customs of War on Land", Article 4 of which reads: "Prisoners of war are in the power of the hostile Government, but not of the individual or corps who capture them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property."

Thus, the order of the co-defendant, Iwanami, is contrary to the nature of things. It violates international law and can only be regarded as unlawful. Thus the acts of the accused, which were put into practice in accordance with illegal superior order, cannot escape being unlawful. Such would the objection be.

If such be the case, then is the order of the co-defendant Iwanami unlawful? I think it is not unlawful for the reasons mentioned below. In order to judge a persons acts are legal or illegal, we cannot be satisfied by merely considering their outward aspects, but we must scrutinize their substance. We further must probe into the purpose or motive of committing such acts, and finally we must consider the circumstances and other conditions under which the acts were done.

Inquiring into the state of mind of the co-defendant Iwanami when he gave out the order to kill the American prisoners of war in question it can be readily understood from the fact that he carried out this execution of the prisoners in the daytime in the presence of almost all the members of the hospital and especially from the speech that Iwanami made immediately prior to the execution, that he was convinced of the justification of killing the prisoners of war at that time. In his speech, Iwanami deplored the fall of Saipan, criticized the unlawful bombing in broad daylight of the Fourth Naval Hospital which was marked with Red Cross signs. He explained the large damage sustained by the hospital and the casualties among the patients therein owing to such illegal bombings, and concluded that these prisoners were the ones that had dared to do these unhumane acts and that their nature was like that of a beast. He told them to charge with courage, without thinking that they were human. And Iwanami was inclined to stimulate the spirits of those accused who were apt to hesitate.

The inviolability of hospitals situated at the front is clearly set forth by the Red Cross Treaty and it is obvious that the bombing of the Fourth Naval Hospital by the American Air Forces was illegal, not to speak of attacking such an establishment distinctly marked with the Red Cross signs.

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James P. Kenny

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

It has been acknowledged in International Law, that when in course of war there arises an instance where the hostile party violates international law, the opponent takes action corresponding to this violation to induce their reconsideration and subdue such an illegal action and on the other hand demand remedy for such unlawful acts. All in all, when co-defendant Iwanami ordered these accused to kill the two prisoners in the present case, he had not the slightest doubt in his mind as to its unlawfulness. Can a subordinate refuse an order of his superior who acknowledges it to be legitimate, on the ground that he is dubious of its legitimacy, or that he is convinced of its illegality?

At this point, we are confronted with a difficult problem in administrative jurisprudence - the requirements of the binding power of a superior over his subordinate. Concerning this problem, it seems that opinions vary among jurists, and true theory acknowledged by all has not been established as yet. But the most common theory is, that the subordinate can examine the form of the order, but has no authority to inquire into its substance. Thus when the form of an order is without defect, even though in substance it is illegal, it is held, that the subordinate is still obliged to obey. That is, regarding a subordinate who is given an order by his superior officer who has authority to command and who within his capacity acknowledges it to be lega, it is held that the subordinate must obey the order, even though its substance is objectively illegal and the subordinate himself believes it to be illegal. Because, when we view this, from the point of maintaining administrative order, it is proper that the ultimate authority of interpretation as to the legality or illegality of the substance of an order, is vested in the superior officer.

In the instant case, co-defendant Iwanami is the immediate superior of these accused. And the order was actually given verbally by Iwanami himself in the face of these accused. And as I have stated, the co-defendant Iwanami did not have the slightest doubt as to its legitimacy. Thus, this order, in form, did not have the slightest defect. Consequently even if these accused who were subordinates of the superior Iwanami, were convinced of the illegality of the order, it is only apparent that they did not possess the authority to refuse it, considering the common opinion in administrative jurisprudence to which I have already referred. It is more so, as I shall state later, when these accused had not the slightest doubt concerning its legitimacy. I shall further establish my point, citing a Japanese authority, Doctor of Law Moteji, Shinkuma, former Chief of the Supreme Court, Privy Councilor, in his "Introduction to the Japanese Criminal Law" states:

"A person who has a certain duty or is engaged in a certain capacity, must when necessary have authority to interpret the law and establish the facts by himself. Therefore, when an official, acknowledging in a certain case that the conditions required him to perform his official duty, and with intent to do it, performed it, in this case, even if his discretion turned out to be poor and his conviction was at a variance with the objective facts, we cannot assert that the act was an official act.....In conclusion, whether the official discretion corresponds with the objective facts or not, has no necessary bearing in the constitution of an official act."

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

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Considering the present case, co-defendant Iwanami subjectively was convinced of the legitimacy to kill the American prisoners, and since his order was issued upon this conviction, even if this conviction did not correspond with the objective facts, it was done with an intention of executing official duty and thus the order was legal. Consequently the acts of performing this order by these accused were also lawful, particularly in view of the provision of paragraph 3 of Article 2 of the Geneva Treaty concerning the treatment of Prisoners of War which clearly prohibits all means of retaliation upon Prisoners of War.

Section 2 - Preclusion of Criminal Intent.

In the preceding section I have stated the reasons for the preclusion of unlawfulness and established thereby that the acts of these accused do not constitute a crime notwithstanding the external appearance of those acts which indicate they violated the laws and customs of war by killing the prisoners in question.

A criminal act such as killing prisoners of war, however, is no doubt beyond the capacity of co-defendant Iwanami who was the head of a naval hospital, and it is not difficult to expect an argument that the mere fact that Iwanami at the time of his giving out the order had been confinced in his mind of its unlawfulness, does not afford any adequate reason for the preclusion or negation of the unlawfulness of the order, and the acts perpetrated by these accused who obeyed such an illegal order are still unlawful. Therefore I would like to argue on this point in detail. I firmly believe that even though the order of the co-defendant Iwanami is objectively illegal, the acts of these accused should not be punishable because no criminal intent is constituted on the part of these accused.

At this time, for your consideration, I should like to review in chronological order, the representative theories in Japan concerning the substance of criminal intent.

Art. 38, par. 1 of the Japanese Criminal Code defines criminal intent as "intent to commit a crime", and in par. 3 of the same stater, "Ignorance of the law cannot be invoked to established absence of criminal intent." Therefore, in former days, the common theory in Japn insisted that mere cognizance of facts constituting a crime was sufficient to establish criminal intent, and cognizance of unlawfulness was not required for the constitution of criminal intent. That is, it was held that cognizance of unlawfulness was not included in the substance of criminal intent.

This idea of criminal intent originates from the ancient thought that "ignorance of the law is no excuse," and the assertion "Nemo censetur ignorare legem" (it cannot be acknowledged that a person is ignorant of the law) or "punitive regulations must be sternly enforced," also is based on the same view. Facts which constitute a crime are in themselves harmful to society and, if a person ventures to put the facts into practice in spite of the fact that he is aware of the facts, we must say that his character is anti-social.

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James P. Kenny

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

Doctor Motoji states, "Intention is ordinarily a recognition or preconception of facts. Criminal intent set forth in Art. 38, par. 1 of the Criminal Code is an intent to commit a crime, namely a recognition or preconception of facts that would constitute a crime. Therefore, where recognition or preconception of facts which constitute a crime is absent, the conception of criminal intent does not exist." (Motoji, op.cit. p. 452.)

I believe this theory represents the above view. This theory can be applied without much fault to crimes which are evil in themselves or mala in se, such as murder, theft, arson, and the like which in the acts themselves properly possess an anti-social character. But the consequences would be most prejudicial, if we were to apply this theory as it is to crimes which are prohibited by law or mala prohibita, set forth for administrative purposes such as police, finance, and the like, in which an anti-social nature of the act originates from prohibition of statute. Hence, a theory has arisen, stating that mere cognizance of facts constituting a crime may be sufficient for the constitution of the criminal intent of a so-called malum in se, but in a so-called malum prohibitum, the cognizance of unlawfulness is required in addition to the cognizance of facts that constitute a crime.

I would like to take advantage of this opportunity to make a brief comment on the distinction between the theory of moral responsibility and that of social responsibility in order to clarify the subsequent arguments.

In the former, punishment is regarded as censure against an anti-moral act from the moral or ethical point of view, while in the latter it is regarded as one of the various means by which society protects itself from the injuries to be inflicted on it.

In the theory of moral responsibility the basis of responsibility upon which punishment is possible lies in the freedom of will. In other words, only when a person with freedom of will acts in accordance with the free determination of his will can the result produced by the act be ascribed to the person. In spite of a person who has freedom of will being able to avoid an unlawful act in conformity with what his free will orders him to do, he ventures to do the unlawful act. This is the reason why he deserved to be blamed on account of the commission of the unlawful act.

On the other hand, in the theory of social responsibility, the basis of criminal responsibility does not lie in the freedom of will, but lies in the fact that man always lives in groups. According to this theory of man always living in groups, he who does a certain action must be subjected to the corresponding reaction from society.

Professor Mckino holds, although he states in view of his theory of social responsibility that mere cognizance of facts constituting a crime is sufficien in the substance of criminal intent and cognizance of unlawfulness is not particularly required, that cognizance of unlawfulness is also required in the substance of criminal intent of the so-called malum prohibitum. This is because, the act cannot be said to be anti-social when cognizance of unlawfulness is absent in that act constituting a statutory crime, the anti-social nature of which, as I have already stated, originates from the prohibition by statute.

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

Makino states, "I believe, concerning the mistake of law, a clear distinction should be made in a case of a malum in se and in that of a malum prohibitum because, in a malum in se, since the acts are naturally anti-social, the existence of the anti-social character of a person can be logically inferred when he determines to perform such sort of acts upon precise recognition of them. As to a malum prohibitum, however, the act becomes anti-social as a consequence of prohibition by statute, and so it can be said in the absence of a cognizance of its unlawfulness, anti-social intention is not yet constituted. This view may also be adopted in a malum in se when the doer in convinced that there are exceptional reasons for precluding the unlawfulness of a certain act should be precluded for a certain reason, we may say that the doer is free of any intention of violating the requirements of general morality. Thus, in such a case, where cognizance of unlawfulness is absent, we should say that criminal intent is not constituted." (Makino, op.cit. p. 192-193.)

From this point of view, Dr. Makino commented on the decision reached by the First Division Court Martial, on 8 December 1937 concerning the Amakasu case. His comments on this case are as follows: "The said court-martial acquitted the accused in that case on the grounds that their acts were committed, 'without knowing the facts constituting a crime," but this Amakasu case should be understood as a mistake of law rather than that of fact. Indeed, a mistake of law does not ordinarily negate the constituent of a crime. But as far as this particular case is concerned, it is acknowledged from the general standards of morality that the unlawfulness of the acts should be precluded or negated on the grounds that this incident occurred under such exceptional circumstances as Martial Law was in effect, and that the superior giving out the order was always highly esteemed by the accused. Hence criminal intent was not constituted on the part of the accused notwithstanding the fact that the crime committed by the accused was murder, one type of malum in se, and their error did not lie in the fact, but in the law. Viewing this case as a malum in se converted to a malum prohibitum, he applied the above theory in commenting upon this judicial precedent.

But those who adopt the theory based upon moral responsibility will maintain that the responsibility imposed upon a criminal as it is entirely due to his violation of the criterion set up by the law, only when there exists an intention to violate that criterion, is criminal intent constituted. In other words, it is held that criminal intent includes a cognizance of unlawfulness, and even though there is a cognizance of the fact (substance) of the crime, if the cognizance of unlawfulness attached to the fact is absent, criminal intent is still negated, and there should be no difference in the application of this reasoning between a malum in se and a malum prohibitum.

The scholars who uphold this view interpret art. 38, par. 3 of the Japanese Criminal Code as follows, "the responsibility incurred from a mistake or ignorance of law is in itself that of negligence, and yet should be regarded in the same manner as when criminal intent existed." (Essence of Criminal Jurisprudence by the deceased Miyamoto, Eishu, Dr. of Law, Former Prof. of Kyoto Imperial University); or "this provision (Art. 38 par. 3) should be construed as, "the cognizance of each specific regulation is not required to constitute criminal intent." (from "Lecture on Criminal Law", by Ono, Seichiro, Dr. of Law, former Prof. Tokyo Imperial University.)

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James P. Kenny

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

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Professor Takigawa is another scholar who adopts the theory of moral responsibility, stating that criminal intent includes the cognizance of unlawfulness. He says: "The theory that criminal intent requires the doer to be aware (or able to be aware) of the evaluation of the act, other than his being psychologically aware of the objective happenings, is generally called a theory in which the cognizance of unlawfulness is a component part of the substance of criminal intent. The so-called cognizance of unlawfulness is classified as, (1) cognizance that the act shall be punishable, that is, recognition of the criminal law. (2) Recognition of the laws other than criminal law. (3) Recognition of the violation of "La nature des Choses" (the nature of things). As I have stated before, the cognizance of violation of "La nature des choses" (the nature of things), is paramount in the requisites of criminal intent. This does not mean that one must be conscious of the evaluation of his act, other than the substance of the crime. It means that the consciousness of violating "La nature des choses" (the nature of things) is of utmost importance and the awareness of the substance of the crime is no more than a secondary factor in determining the existence of criminal intent. In other words, the psychological element of the criminal intent is not important in itself, but it is significant as an ordinary symptom of the ethical element of criminal intent. Art. 38, part 3 simply means that so long as the attitude of the doer fulfills the requisite of a crime, and he is aware of violating "La nature des choses" (the nature of things), he will be punished whether he is aware of the law or not. A person who recognizes his act violates "La nature des choses" (the nature of things), is a person who is well aware that his attitude is of ethical value in the least, and a person who knows what he should do or should not do, whether the doer is aware that his act is legally permissible or not, is only of secondary importance." (Takigawa op. cit. p. 146-147)

It can be easily imagined from the discussion of the scholars cited above, that the general trend of theories in Japan is shifting from the opinion of interpreting criminal intent merely as "cognizance of the substance (facts) which would constitute crime," to that which interprets it as including together with this cognizance of the "cognizance of unlawfulness," this opinion appears to be coming predominant. The progress of the theory of moral responsibility which professes that the essence of criminal responsibility lies in the violation of morality, has come as its inevitable sequel to place more weight on the ethical aspect rather than on psychological aspect, as regards the substance of criminal intent.

This trend is seen not only in the shifting of theory but also in the principles of legislation. Art. 11 par. 3 of the draft of the amendment for Japanese Criminal Code, states, "In case of ignorance of the law, when there is reasonable ground for a person to believe that his act was legally permissible, the punishment shall be remitted." This draft was made a resolution and adopted in 1931 in the general meeting of the Research Committee concerning amendment of Criminal Law and Prison Law, and just when it was to be introduced in the Diet to be enacted into legislation, it was withheld because of radical changes in the internal state of affairs and it was discarded thereafter. The tide of democratization which has rapidly revived in Japan since the end of the war, I believe, will in the near future inevitably cause this draft to be enacted into law. I believe you understand hereby, the general trend which modern legislation is undergoing.

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James P. Kenny

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

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In the foregoing, I have probed into the substance of criminal intent. Now from the point of view of moral responsibility, which I have mentioned above, I wish to clarify below the issues of the present case.

The accused in the present case were aware that the victims were two American prisoners of war and they ventured to take up spears and bayonets to kill them. If we were to adopt the view that criminal intent is the cognizance of the substance (facts) of the crime, we should have to affirm the constitution of criminal intent in the acts of these accused. But when we view it in the light of the foregoing theory of moral responsibility, which professes that criminal intent includes cognizance of unlawfulness in addition to that of the substance or facts of the crime, we cannot readily hold that criminal intent existed in the acts of these accused. As a matter of fact, these accused have stated that they stabbed just as they were ordered to do by the head of the hospital, without having time to consider the right or wrong of the act. At the moment of stabbing these accused did have time to make any ethical evaluation by appealing to their morality, as to whether to do or not to do the act. Then, can these accused be held liable for negligence in not being able to make an ethical evaluation? In order to determine this issue, we must take into consideration the circumstances under which the act was done.

This incident happened in July 1944, when the Pacific War was in the fourth year after its outbreak. Guadalcanal had been taken the year before. Tarawa and Makin had fallen, Saipan had just been occupied. Every vantage point in the South Pacific was being occupied in succession and the defeat of Japn was inevitable.

Truk Atoll, Caroline Island, the post of these accused, was left stranded under the incessant bombing of the American planes. The men were furious and their blood boiled. Since the turning of the tide against Japan the Central Government over-anxious about the situation, endeavored with all its power to excite hostility and enmity, in order to unite the sentiment and morale of the people, which were already on the decline. Under such a situation, there now stood before these accused two American prisoners of war. Besides, the co-defendant Iwanami, their immediate superior officer delivered a pep talk to them, stating that these prisoners had bombed the hospital in broad daylight, marked with the Red Cross sign, that the establishment had sustained great damage and patients great casualties, that their acts were so abominable that they were not human and that the accused should stab them courageously. Besides the head of the hospital, almost all of the officers were present at the scene of the crime. No word of admonition or objection could be heard from these officers. Could we safely demand from these accused, who were placed under such circumstances and who had just heard a fiery speech from their superior, a judgment of discrimination between right and wrong? Could we expect from them a from them a consciousness that they were violating "La nature des choses" (the nature of things?) I believe it would be like trying to get a fish from a tree. Wasn't the state of mind of the accused at that time, rather inclined to imagine that it was only natural to kill the prisoners?

I should like to go a step further and inquire whether these accused were aware of the status of a prisoner as set forth in internation al law, and if they were not aware of it, whether they could have known it. If a person lacks knowledge of the status of prisoners provided in

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

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international law, he is apt to be unaware of the way in which they should be treated, because ignorance of international law on the part of these accused may tend to bring about the absence of consciousness of violating "La nature des choses" (the nature of things) concerning the killing of the prisoners. And this absence may immediately have a bearing on the criminal intent of these accused.

As I have stated in the preceding section, prisoners of war have a certain status provided in international law; their life, body, property, honor, and all other legal interests belonging to them, are protected and secured. These accused, however,did not know of such a status of prisoners of war as set forth in international law. Now, let us consider whether they were liable for negligence in not knowing of such a status of prisoners. For about one year from 1941 to 1942, I taught students as an instructor of law in the Naval Engineering Academy. I gave some lectures on International Law. But they were mainly taken up by the portion concerning regulations of naval warfare. With the allotted hours for this subject, it was impossible for me to go into the field concerning land warfare. So I did not have the opportunity to lecture on the status of prisoners of war. As I had no intention of making light of the status of the prisoners of war, if I had had an ample time, I would have lectured on this subject without fail. But owing to the insufficiency of allotted hours, I had to satisfy myself by lecturing to the students on the outline of such an essential part of naval warfare as maritime prizes, as it is usual that the army should take care of the prisoners of war. Such was the case with those who were to become officers in the near future, that I think, concerning this subject, there is no need of further reference to the situation of the accused who were petty officers promoted from the ranks. It is only natural that these accused should not know of the status of the prisoners of war provided in international law.

As fully discussed above, taking into consideration the circumstances under which the crime in question was committed, and in view of the absence of knowledge concerning international law on the part of these accused, it can be readily affirmed that, at the time of the commission of the alleged crime, these accused did not have any recognition of unlawfulness, and furthermore that they were not liable for negligence in not being aware of its unlawfulness.

Therefore, I maintain that even though the alleged acts are objectively unlawful, the acts show no criminal intent and they should not be punishable accordingly.

Section 3 - State of Emergency.

Assuming that my foregoing arguments are not adopted by the commission and the accused are found guilty, I would still maintain that they are not guilty of the acts, on the ground that these accused, at the time of the act, were placed in an unavoidable position, that is, because we could not have expected any other legitimate act than what they did. Thus, as a state of emergency or necessity, I still urge their innocence.

In order to enforce discipline and maintain order of the members in group life, we must recognize a predominant status of a certain person in the group, to whose opinion other members must be subordinate. This is only obvious. It is only for this reason, that the State is predominan

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James P. Kenny

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

over its people; and in order to execute its objective the State exercises regardless of the will of the individual such powers as police, taxation, punishment, confiscation, attachment, and other powers, and deprives or restricts the life, body, freedom, liberty, properly and other legal benefits. The same can be said in society of the public and governmental officials. In order to maintain and enforce official discipline, the predominant position of the Chief must be recognized, and the inferiors must be subordinate to him. Accordingly, the relation of order and obedience is brought about.

I have already discussed the administrative opinion of the binding power of the Chief's order over his subordinate. But in the military forces, whose objective is to maintain national security and to repel all aggression, the binding power of a superior over his subordinate can not be compared on the same level with that of the government official. In the military forces, one must possess the attitude "always be prepared." Therefore, military discipline which unites the wills of the thousand into one, is regarded as the very life of the military forces. For this reason, violation of a superior order is considered as a crime, a serious crime in the military forces; while to a government official it will only be a reason for reprimand. This logic is true in the military forces of every country. Especially in the Japanese military forces from the foundation is this true. Emperor Meiji in his Imperial rescript to the military man declared: "The orders of your superior shall at once be regarded as my order." The Japanese military person from the day he enters until his discharge is continuously taught to obey superior orders. The fostering of obedience is the curx of training in military discipline. In the service, the dignity of one's individuality or wisdom of criticism is not allowed. Apart from the discussion of merit or demerit concerning this point, this was the actual situation of the relation between superior and subordinate in the Japanese military forces.

Concerning this point, even the professor of Tokyo Imperial University Dr. of Law Minobe, Tatsukichi who was once severely criticized by society as an extreme liberalist, and who suffered great ostracism, states in his "Outline of Political Sciences" 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.

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

"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 of examining the validity of an order, and is held responsible for obeying an invalid order, then the military person will fear to obey it. 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 stern punishment."

This theory well takes into account the actual situation of the military force. It shows great understanding and sympathy for the position of the military man, the subordinates in particular. The above citation is in the words of Minobe, who did not cringe before the powerful nor the rich and who never surrendered his integrity. I am sure you will understand the actual situation of the Japanese military force, through his words.

As I have stated before in relation to orders in military force, the law compels obedience by stern punishment. Considering the statute law of Japan on this point Art. 55 of the Naval Criminal Code states:

"One who resists the superior officer's 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 a 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."

This is the so-called provision of resisting orders, and approximately the same provision is found in Art. 51 of the Army Criminal Code. As to the interpretation of this article I shall cite from the "Principles of Army Criminal Code," by Army judicial officer Sugano, Yasuyuki: "The provision pertaining to resisting orders was set forth in order to protect the implicitness of superior orders, and to maintain the security and reliability of military actions. The obedience of a subordinate to his superior officer is demanded to some extent in administrative law, but the relation of order and obedience in the military is far closer, and is endowed with an almost religious sacredness. In administrative law, disobedience of an order is only liable to reprimand, whereas disobedience of an order in the military is instantly liable to punishment. This is only natural, because the paramount duty of the military in fighting and its ultimate objective is victory. The substance of an order must be matters within the authority of the superior officer who is in the proper line of command. The common theory is that, in general, the substance of an order pertains to supreme command, but may extend to matters pertaining to military administration, because, it is extremely difficult to distinguish between the two.

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Lieutenant, U.S. Navy,

Next, when the substance of an order pertains to matters which are legally impossible such as to order a commission of a crime it is naturally invalid. But the legal effect produced by obeying such an order must be considered separately. The form of an order can be verbal or written. So long as it is issued by an immediate superior, or superior who has proper authority of command, the order is said to be intact in form. There is no doubt that an order is valid when it is given by a superior who has official authority, and when it is within his authority. But, whether there is still room to maintain its validity when it is not perfect in form and substance, is a point of controversy in administrative law. The common theory is that, when an order is acknowledged to be a superior order, it is regarded as valid. In other words, the subordinate cannot refuse such an order, on the grounds that his interpretation of the law varies , or that he differs in opinion as to the facts. But in the military, relation between order and obedience is further stressed. As a rule, even an invalid order cannot be refused excepting in cases when it can be intuitively perceived that commission or non-commission of an act constituting the substance of an order, would constitute a criminal act. Beyond this limit, it is not permissible in any way to discuss the propriety of an order.

The common theory of administrative law concerning the binding power of superior order over the subordinate, which I have already discussed, namely, the opinion that the subordinate has a right to inquire into the form of a superior order but not its substance, cannot be applied as it is, to superior orders in the military, because, in the military, it is held that subordinates are not only unable to examine the substance of an order but also are not allowed to examine its form. From this point of view, we must say that the acts of these accused done in accordance with their superior officer, Iwanami's order are not liable in themselves. Some may object to this view and state that, because, even the above cited authorities have acknowledged that there are cases where an order in the military force is invalid that the implicitness of order cannot be concluded from this view. The invalidity of a superior order and the responsibility of a subordinate who acted upon obedience to the invalid order, are, however, entirely two different things. In fact Dr. Minobe states, "Therefore it should be construed that acts done in accordance with a superior order, even when the order is not valid, do not make a person who executes them responsible, but the superior who gave out the order responsible." Also Mr. Sugano states, "When the substance of an order pertains to matters which are legally impossible, such as to order a commission of crime, the order is naturally invalid. But the legal effect produced by obeying such an order must be considered seperately." Thus we must know that the above objection or criticism is not proper. But we shall not be satisfied by such superficial rebuttal, but shall probe into the matter further.

The substance of Iwanami's order in the instant case, was to kill two prisoners of war. At a glance, this order in its form, involves a criminal offense. But we must see whether this corresponds to what Mr. Sugano states as, "exceptional cases when it can be intuitively perceived that the commission or non-commission of an act constituting the substance of the order, constitutes a criminal act." As to this point, I have already related my opinion in detail, in the foregoing section entitled, "On preclusion of criminal intent."

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James P. Kenny

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

Judge Advocate.

Taking into consideration the circumstances, under which the contents of Iwanami's speech, the status and capacity of these accused, the other subjective and objective facts under which these acts were committed, namely I must affirm that it was not an exceptional case, where the acts could have been intuitively perceived as constituting a criminal offense. The accused were legally constrained to obey the order of Iwanami. If they had disobeyed they would have been morally violating the spirit of the Imperial rescript; failing in their duty as military men; and what is more could not have escaped being legally condemned for the crime of resisting an order. They could not have escaped punishment for resisting orders in the battle field and in the face of the enemy, which imposes death at the maximum and 10 years' imprisonment at the minimum. These accused were confronted with the horns of dilemma. If they advanced they would kill the prisoners; if they retreated, stern capital punishment awaited them like a devil. Indeed this was a difficult position. A sage once said: "If I were to be loyal to my country, I should not be filial to my parents." If these accused did not stab the prisoners, their own lives were in danger. Indeed, the path of life is difficult. "Necissity defies Law" is a well-known saying in Roman law. Art. 37, Par. 1 of the Japanese Criminal Code states: "Unavoidable acts done in order to avert present danger to life, body, liberty or property of oneself or another person are not punishable, provided the injury occasioned by such acts does not exceed in degree the injury endeavored to be averted." In order to rescue these accused from this difficult situation, we can only rely upon this provision and no other. The requirements of the above provision pertaining to necessity in the Japanese Criminal Code are rigid; and I am not certain as to whether this provision can be literally applied, without error, in this case. But I believe, there are sufficient grounds to infer the application of the purport of this article to the present case.

In the preceding discussion, I have established, from the legal point of view, that the acts of these accused were done under absolute coercion. Now, I wish to shift my point of view to the facts of the case and show the same.

Whether under legal or actual coercion, judicial acts done under absolute coercion are not valid. Whether the actual coercion is mental or physical is not material. The same logic is also applicable to the field of criminal law. Even if we should not acknowledge the part of legal coercion in the present case we cannot yet deny that there was actual coercion. Even if we should say that there was no physical coercion, we cannot yet make the psychological coercion, which oppressed these accused like a prodigious monster.

We must recall the situation at the time of the incident. The war was still being waged. These accused were face to face with their enemy. Moreover, at that time, the tide of the war had already turned against Japan. Japan's defeat was apparent. Still the central Government was issuing propaganda that the enemy should be resisted with the utmost vim and vigor to instigate more hostility against the enemy, and it was trying in a frenzy to further the spirit in the last battle on the home land. The psychological excitement and exasperation which the accused experienced at this time can well be imagined. Iwanami was at this time a surgeon captain and these accused lowly petty officers. The space between ranks were comparable to the distance between the sky and the earth. Moreover, Iwanami was a man of strong self assertion, a man who would strongly condemn others. This characteristic has been brought out by various

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Lieutenant, U. S. Navy,
Judge Advocate.

testimony before this commission. Under such circumstances, having such a superior officer, and having been taught, from their very first steps in the Japanese naval service negation of self under strict regulations, could these accused have refused the fiery and stern order of Iwanami? We must realize that this actual coercion on their state of mind could very well have surmounted the legal coercion stated before.

Thus, these accused at the time of the act were unavoidably obliged to go through this commission. It would only be asking the impossible to expect any other lawful act from them. I believe, therefore, that the acts of these accused are not liable on the grounds, that they were acts under a state of emergency.

According to a treatise in a magazine which I recently read, it seems that in the Nuremburg trials also, the basis of criminal responsibility has been set upon the possibility of moral choice. The treatise reads: "Who should take the responsibility for ordinary war crimes (such as mistreatment of prisoners) and crimes against humanity (such as atrocity)? Should the soldier who actually performed the act or the superior who gave out the order, be held responsible? To what extent should the responsibility for giving out the order or permission, extend? Concerning this point, Art. 8 of the Charter of the International Trial at Nuremburg provides:

> 'The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.'

And the decision of the Tribunal reveals a noteworthy interpretation of this article as follows:

> ' The provisions of this charter are in conformity with the laws of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.'

According to the above reason, criminal responsibility is based upon the possibility of moral choice. That is, criminal responsibility is clearly recognized to be founded upon moral responsibility. Thus, it would be that a soldier who acted pursuant to a superior order under such circumstances as he absolutely could not refuse that superior order, is free from responsibility. (From the 'Law Magazine' No. 734, article entitled 'Legal opinion on the Nuremburn decision,' by Dr. of Law, Ono, Seichiro.)"

Thus, from the foregoing citation, I believe you will notice that the theory of "a state in which any other lawful act cannot be expected from the doer of a certain act," I have already revealed, is adopted in the International Tribunal at Nuremburg. And I firmly believe that the same logic should be adopted by this commission to which the SCAP Rules may be and sometimes are applied.

Section 4 - On Manslaughter.

I firmly maintain that the acts of these accused do not in any way constitute a crime owing to the above stated reasons. That is, in summary, first, the acts of these accused were performed in obedience to

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the lawful order of their immediate superior Iwanami. Thus the unlawfulness of the acts should be precluded, as acts in pursuance of official duty by an officer, in other words, as lawful acts. Secondly, assuming that the substance of Iwanami's order concerned matters beyond the scope of his official duty and violated International Law, also assuming in spite of the fact that he was subjectively convinced of its unlawfulness, the order was still illegal in the objective point of view, even then these accused were not aware of its unlawfulness at the time of the incident; and reflecting upon the subjective and objective circumstances at the time of the incident, it is cognizable beyond reasonable doubt that these accused were not aware of its unlawfulness, hence criminal intent on the part of the accused is not constituted. Thirdly, let us grant that the existence of criminal intent of these accused was affirmed from the point of view that mere cognizance of the substance of the crime is sufficient for the existence of criminal intent and that recognition of unlawfulness accompanying the facts is not required; even then, it would be forcing an impossibility on them to expect from these accused other lawful acts than what they had done, as these accused were soldiers of a comparatively low rank, and under absolute psychological pressure in which they had to obey the orders of their superior, even though at a glance they were able to be aware of its illegality in substance, not to speak of its form they were obliged to perform or rather unavoidably performed the acts alleged in the present case. Thus as a case of emergency, their culpability should be exempted. Now, even if my first point should be ignored and the act of Iwanami be deemed illegal, it is no exaggeration to say that the acts of these accused who were without criminal intent or who were compelled to implicit obedience and whose position was just like that of an instrument or machine were merely utilized by Iwanami in realizing his criminal intent. Consequently Iwanami may not be exempted from liability as an indirect principal, but I firmly believe these accused are not guilty.

Therefore, I should not choose to burden the members of the commission by further argument on this point, but I must consider that all the foregoing points of my argument may be disposed of and the accused found guilty. Therefore I shall try to establish the reason that the punishment for their acts should be legally mitigated in comparison with murder, because their acts do not constitute murder as alleged in the charges and specifications, but merely manslaughter, even though their acts constituted a crime.

According to the Naval Courts and Boards, it seems that the difference between murder and manslaughter, lies in whether malice aforethought exists or not. That is, murder is homicide with malice aforethought, while manslaughter is homicide without malice aforethought. And I firmly believe that malice aforethought is absent in the acts of these accused in the present case.

As has been brought out by the testimony of the various witnesses, these accused suddenly heard while engaged in their work at their respective posts the call of general assembly on the day of the incident and accordingly assembled on the hill at the back of the officers' quarters within the Fourth Naval Hospital, without knowing the purpose of the assembly. After arriving at the scene of the crime, they were then ordered by the head of the hospital to step forward and line up in columns in front of the prisoners, and not until they had heard the speech of the head of the hospital did they become aware that the purpose of the assembly on that day was the execution of prisoners. Moreover, the reason for these accused to be selected was because they happened to be at

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

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the head of the line as seniors among the men, and it was a matter of mere accidence. Hence, it is obvious that until right up to the moment of the crime, these accused did not have any premeditation or aforethought to commit the crime. And it is only obvious, too, that these accused had taken no part in the planning or plotting of the crime prior to its commission.

Section 119 of the Naval Courts and Boards page 114 pertaining to Manslaughter reads:

> "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. When a man, in killing another, acts under the influence of sudden passion caused by reasonable provocation, but not in necessary defense of his life, nor in order to prevent bodily harm, the law does not excuse him because of the provocation; but it does not hold him guilty of murder. To reduce a homicide from murder to manslaughter the provocation must be adequate in the eye of the law, and to be so it must be so great as reasonably to excite passion and the heat of blood. Passion without adequate provocation is not enough; Reasonableness is the test. The law contemplates the case of a reasonable man and requires that the provocation shall be such as might naturally induce such a man, in the anger of the moment, to commit the deed."

As it is apparent from the above citation, provocation must be so great as reasonably to excite passion and the head of one's blood, and whether the provocation of the heat of passion is reasonable (adequate) or not, depends upon whether the provocation is such as might have naturally induced a reasonable man to commit the deed. I believe such provocation by a third party is proper as being the cause of provocation of passion, because though it is possible to construe provocation as being confined to the provocation caused by the acts of the opposing party or the victim, I cannot find any reason to interpret it in this strict sense.

The direct cause which drove these accused to commit the stabbing of the prisoners in the present case was Iwanami's speech which was made at the scene of the crime just before the commission of the crime. Then, was Iwanami's speech so violent as reasonably to provoke the heat of passion? Also, did Iwanami's speech excite a reasonable (adequate) provocation of passion of these accused? If we should recall the various circumstances surrounding the commission of the crime which I have reiterated in the foregoing, such as the condition of the Pacific War, the battle condition on Truk, the casualties sustained at the hospital by the bombings, the circumstances surrounding the scene of the crime, the character of Iwanami, the contents of his speech, the attitude of Iwanami during his speech, particularly the tone in which he delivered the speech and the like, we must say that it was only natural that the heat of passion should be provoked on the part of these accused by Iwanami's speech. Thus when we view the acts of these accused in the light of American Criminal Law, their acts were not murder, but should be regarded as manslaughter; voluntary manslaughter in the heat of passion caused by reasonable provocation. I firmly believe, therefore, the punishment should be legally mitigated to a considerable degree in comparison with that of murder.

Section 5 - On the individuality of responsibility in complicity.

In the preceding chapter I have argued that the punishment of these accused should be legally mitigated in comparison with murder on the grounds

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that their acts did not constitute murder as alleged in the charges but merely manslaughter, even though their acts constituted a crime. In this chapter I shall argue the position of these accused under the subject of "Individuality of responsibility in complicity" and establish the reason for mitiging their punishment.

Honorable President and the members of the commission, I further ask your patience.

If the acts of these accused are culpable and illegal, the crime of the instant case would be called complicity in criminal law. Each participant in the complicity influences to some extent inflicting the danger or actual harm incurred by the crime. But its actual consequence varies in degree. This is the reason why the statute law of each country differentiates crimes as those of joint principals, instigators and accessories. One school of scholars maintain that the degree of penalty to be imposed upon a co-participant in a complicity should be left to the discretion of the court, and that the legislative distinction between principal and secondary should be abolished. Particularly, in American and English law. I have heard that this distinction is not recognized. But, considering the function of security played by criminal law, I believe that there are reasons for establishing a general distinction. Following the examples of other foreign countries the Japanese Criminal Code has adopted the method of differentiation.

From this point of view, let us now examine the position of these accused in relation to the co-defendant Iwanami. First of all, let us consider whether the position of the accused is as joint principals in relation to Iwanami. A joint principal means that a person with an intent to commit crime mutually discusses this intent with another (intent of aid) and collaborating with each other, they bring about (act of aiding) the substance of this mutually planned criminal intent in their acts. Thus the positions of the participants in a joint-principal crime are on equal level.

On the day of the incident the accused in the present case, responding to the call of general assembly went up the hill in back of the officers quarters. Prior to this time, they were not told by Iwanami of his criminal intent, nor did they know of the purpose of this assembly. A short time later Iwanami appeared at the scene. With two prisoners before them, Iwanami in a fiery tone made a speech to the assembled persons consisting of almost all of the entire hospital. He firmly asserted the reason for killing the prisoners and encouraged the action of these accused. It was at this instant, that these accused knew about the crime and were told of his intention to commit the act. If we contrast the above facts and the idea of joint-principal which I have just given, it becomes apparent that these accused are not in a position to be regarded as joint-principals in respect to Iwanami.

Next, let us see whether these accused are in a position of accessories in relation to Iwanami. In other words, is Iwanami a principal and are these accused accessories? Concerning the differentiation of principal and accessory, theories vary. I shall not have time to go into a detailed discussion, regarding this problem, but I shall introduce the various theories to the extent necessary to find a solution for this issue.

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

An objective theory states:

"The person who actually carries out the commission is the principal offender and the one who participates in the preperatory stage of a crime is an accessory."

Another objective theory states:

"A principal is the person who brings about an important effect in the completion of a crime and an accessory is the person who only brings about a slight effect."

Next the subjective theory states:

"A person who commits an act with the intention to commit his own crime is a principal. A person who has the intention of assisting another in committing another's crime is an accessory." Another school of scholars base their theory upon the position which an offender holds in the joint relation, and reveal and unique theory, stating that the person who holds a main position is the principal and he who holds only a subordinate position is the accessory. This may be called the theory of mob psychology.

According to the subjective theory and the mob psychology theory, we may say safely that these accused are in a position of accessories, in relation to Iwanami, because, these accused committed the alleged crimes with merely the intention of assisting Iwanami's crime; and in the relationship of this case, Iwanami is the one who occupies the position as the principal and the other accused have only subordinate positions. The distinction between joint principals instigation and accessory, however, originally took rise from the objective theory; and from the point of subjective theory there is no need of making this differentiation as shown by the opinion of the scholar which I have already cited. Therefore, we must follow the objective theory in order to make an interpretation of the statute law which sets forth this distinction. When we consider the present case through the objective theory, these accused shared a part in the execution of the act of killing the prisoners, and also brought about an important effect in completing the crime. Thus, from this point of view, we are unable to acknowledge the distinction of principal and accessory between Iwanami and the other accused.

Lastly, let us see if the relation between Iwanami and these accused is that of the instigator and the ones who were instigated. That is, let us inquire whether Iwanami is the instigator and these accused were the abettors. Instigation means to produce criminal intent in another person who is free of such intention or to bring another's criminal intent which is still unsettled or indefinite to fruition. This is why instigation is called a crime of producing intent.

If we were to apply the above mentioned relation of acts to the idea of instigation, it is obvious that the present case is that of instigator and the abbettors. Iwanami is the instigator and the accused are the abbettors. I establish the relation between Iwanami and the accused in the present case of complicity as such. Thus establishing their relations what is the responsibility of the accused in the present case?

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

"Two or more persons who have cooperated in committing a crime are (joint) principals."

"A person who has instigated another into committing a crime shall be punished to the same extent as a principal."

"The punishment of an accessory shall be the punishment of the principal in mitigated form."

These are provisions in the Japanese Criminal Code concerning complicity. This form of distinction is common to the examples of legislation of various countries which establish distinction between principal offender, instigator and accessory in a complicity. According to these provisions it appears as if the responsibilities of the instigator and those who were the instigated were the same. Yes, from the phraseology of the provision, it appears as if they were identical.

But in the end of Meijian Era the Supreme Court of Japan said: "As there is a difference in the degree of punishment among joint-principals according to the circumstances of the crime it is proper that there be difference in the degree of penalty, according to the circumstances, between principal offender and instigator." These were the opinions expressed by the Japanese Supreme Court at the end of the Meiji Era. Thereafter, judicial cases followed this precedent. Now can we not utilize this opinion as our guiding mark?

As I have already stated, the distinction between principal offender, instigator and accessory originally grew out of the objectivism of criminal theory. But with the gradual rise of subjectivism in criminal theory, it has been held that the punishment of the instigator who induces criminal intent in a person free of such intent or who changes a weak criminal intent to a strong one, should be graver than the joint principal, because the situations are worse than that of a joint-principal, who means to assist and collaborate with one who already has a criminal intent. This opinion has not as yet been generally adopted in the criminal code of various countries, but it has been partially adopted in the form of special statutes. I regret that I have not any material to acquaint you on this point. However, it is only too obvious, that when we view the relation in complicity through subjective theory or the mob-psychology theory, the position of these accused is that of accessories in relation to Iwanami. Thus, I believe that the responsibilities of these accused should be reduced in respect to Iwanami's.

As a judicial example of individualizing the responsibility in accordance with the position of the co-defendant in a joint crime, I shall cite the provisions relating to civil war and riot. Art. 77 paragraph 1 of the Japanese Criminal Code reads:

"Every person who has committed an insurrectionary or seditious act with intent to overthrow the Government, seize the territory of the state, or otherwise subvert the national constitution shall be (guilty of) the crime of civil war and punished subject to the following distinction:

1. The ringleaders, with death or imprisonment for life;
2. Those who have participated in the plot or held a command in the mob, with imprisonment for life or not less than three years; those who have engaged in various other capacities (functions) with imprisonment for not less than one year not more than ten years.

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Lieutenant, U. S. Navy,
Judge Advocate.

3. Those who have merely joined in the insurrectionary or seditious act as follows, with imprisonment for not more than three years."

Next, Art. 106 of the same reads, "Persons who by assembling in large numbers have used violence or threats shall be punished for riot and in accordance with the following classification:

1. The ringleader, with penal servitude or imprisonment for not less than one year nor more than ten years.
2. Those who have directed or have led others and encouraged (the disturbance), with penal servitude or imprisonment for not less than six months nore more than seven years.
3. Those who have (merely) followed, with a fine not exceeding Yen 50."

The crimes relating to civil war and riot which I have just cited are special types of complicity which the cooperation of two or more persons is legally required to constitute these crimes, and it is obvious from this view that we should not apply to this sort of crimes the ordinary theory of complicity as it is. But, in order to determine the punishment in the present case this provision renders us an excellent reference, as an example of individualizing responsibilities of the co-participants in a collective case. From the above provisions, I wish to point out that even though persons jointly committed a criminal act, the criminal responsibility of the ringleader and the followers is clearly distinguishable. Directing our attention to the instant case, if Iwanami can be assumed to be a ringleader, the other accused are mere followers. For the above reasons, I hold that proper reduction or mitigation should be considered in determining their punishment.

Chapter III - On the extenuating circumstances of the case.

In this last phase of my argument, I would like to state a few words concerning the extenuating circumstances these accused in the present case were placed. In imposing a punishment for a crime, we must take into consideration the character of the offender, his age, the environment which surrounded him, the circumstances of the crime, the condition after the crime and the other various factors. And in determining the circumstances of the crime, we must take into consideration both the subjective and objective phases surrounding the crime, such as the personal record of the offender, intensity of the intent to commit the crime, the motive and purpose of the crime, psychological condition of the offender at the time of the crime, the method of the crime, degree of danger or actual injury inflicted by the crime, the attitude of the offender after the crime and the like. Particularly, in view of the subjective theory of criminal law which states crime as being the expression of the evil character of a criminal, when we are able to recognize by considering the character and environment of the offender, the motive and purpose of the crime, the psychological attitude of the offender at the time of the crime, etc., that the malice of the offender was yet weak, even though the danger or actual injury incurred were grave, we should not impose on him stern punishment for the crime. In the light of the above view, I shall now consider the circumstances of the case.

Let us first examine the environment under which these accused were placed. At that time a war was being waged and these accused were in the battlefield, face to face with the enemy. As I have already reiterated, the conditions of war were turning against Japan day by day, and her defeat seemed inevitable. Truk, which these accused resolved to defend

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Lieutenant, U.S. Navy,
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unto the last, was exposed to the incessant bombing of the Americans, food and clothing shortages became acute, their quarters were destroyed. Moreover, disease was prevalent, health conditions became critical and innumerable men died of sickness. The Fourth Naval Hospital whose duty was to nurse and treat the sick and wounded, lost almost half of its establishment by the bombing of the Americans, and its function was nearly halted. The conditions of the patients grew worse and worse day by day, and the number of death cases began to soar. The corpses in the morgue could not be disposed of as intended, and they were left to rot. I am sure you can visualize the unrest and irritable feelings of these accused under such circumstances. And what was more, the superior they had was Iwanami; a man with a strong sense of self-assertion, an officer who would only have his way, a superior who was most severe in blaming others and who did not tolerate the slightest fault and negligence on the part of subordinates.

Considering the motive of the present case, I find that this incident was not consummated on the initiative and preference of these accused. They only blindly obeyed the stern order of Iwanami, because as petty officers they were bound by strict military discipline. Their situation is comparable to that of mere tools or machinery. I am sure that no one can possibly think for a moment that these accused could have still refused the order of Iwanami; these accused who were persistently taught and had crammed into them implicit obedience under strict military discipline from the time they had entered the navy, these accused who were aroused and agitated by the fiery speech of Iwanami with the two prisoners in front of them under the above related circumstances, these accused who were well aware that stern punishment would be imposed upon them if they should disobey Iwanami's order definitely could not refuse. If these points were taken into consideration I firmly believe we are sure to realize that the acts of these accused were unavoidable and that their circumstances should be considered as extenuation.

In the following I shall individually account the personal history, character, environment, etc., of the accused whom I am defending as their counsel. President and the members of the commission, I ask your consideration and sympathy.

The accused Homma, Hachiro, after graduating from the higher section of the primary school, entered the Young People's School; and while still attending the said school, he volunteered to enter the navy and was enlisted. On June 1, 1936 he entered the Yokosuka Naval Training Center as a corpsman. Ever since entering the service he most faithfully discharged his duty and on September 1945 was promoted to the rank of Warrant Officer for his outstanding records.

As you may have already noticed, the attitude of this accused is most sincere, his speech is clear, his actions are brisk and lively, he is calm and resolute; and if I may so so he is a seaman of seamen, a petty officer of petty officers. That he was an exemplary petty officer can be acknowledged from his record which shows that he was specially recommended from among his seniors and comrades to become a recruit instructor at the Yokosuka Naval Center, to instruct the recruits who know nothing about military discipline, and held this post for a period of one year and a half from October 1941 to March 1943. I believe he was appointed to this post on account of his understanding of the military spirit, his understanding of military discipline, his comprehension of the relation between command and order far exceeding those of his contemporaries, as clearly shown in his final statement. And I am fully convinced that such an exemplary military man with such an outstanding record as he

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Lieutenant, U.S. Navy.

has will succeed without fail in performing outstanding works in civilian life. Truly, I must say that he is a promising young man. If I am allowed to use a paradoxical expression, it was because he was so thoroughly saturated with military spirit that he ventured to stab the prisoner withbut being able to refuse the order of his superior, and as the result is being tried in court today after suffering in the stockade almost a year and a half for it. I cannot but feel the greatest sympathy with him.

The accused Kawashima, Tatsusaburo and Takaishi, Susumu after graduating from the higher section of the primary school entered the navy in June 1938. And after completing the basic principles and practices required for a corpsman saw duty at hospital units and aboard ships. They both were promoted to the rank of corpsman chief petty officer in November 1, 1944, for faithfully executing their duties. They both are gentle, sincere, diligent and reticent, and had promising futures as junior officers. I am sure that such sincere and earnest young men will contribute a great deal to the society as ordinary civilians. It would be most regretable to confine them in prison for a long period and expel them from society.

The accused Akabori, Toichiro, after graduating from the higher section of the primary school, entered the navy on January 1940. As a result of faithful execution of his duty he made an excellent record, and was promoted to corpsman C.P.O. in the navy. His father died when he was still young. And now at home he is left with his aged mother and small brothers and sisters. As there was no one to rely upon, his family had anxiously awaited his return. When in November of last year he was demobilized and repatriated, the joy and relief of his family were beyond all words to describe. But the joy and relief of his aged mother, brothers, and sisters were only ephemeral, for after only six months he was put into confinement at the Sugamo Prison as a suspect in this case, not seeing them anymore. The suffering and agony of the accused to leave his aged mother and brothers, the lamentation of his mother and brothers who would lose their only means of subsistence, the mutual sadness of departing from their loved ones, I know you will understand. I have heard that after her son left his mother was confined to her bed by sickness, caused by anxiety and suffering. When I see the accused, a prisoner in solitary confinement, unable to attend his sick mother's bedside, my heart breaks with grief.

The accused Tsutsui, Kisaburo, after graduating from the higher section of the primary school, worked in an iron works. In January 1940 he entered the navy as a corpsman and fulfilled his duty faithfully, and was promoted to Corpsman Chief Petty Officer. But I must ask your special attention to the fact, which I believe you have already noticed, that he is a stammerer. His stammering has been a setback to him, since his childhood, and owing to this defective articulation he has always suffered mentally and physically. Art. 40 of the Japanese Criminal Code provides: "Acts of deaf-mutes (either) are not punishable or punishment therefore shall be mitigated." I have heard that provisions to the same effect are also found in the criminal codes of other countries. Though the accused Tsutsui is not a deaf-mute as provided in the above article, we may still apply the spirit of this provision to the responsibility of the accused in the instant case.

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

Considering the state of his family, his father died while he was still young, and after his father's death he was entirely brought up by his mother. Hence, I wish to call your attention also to the fact that at his home is left his mother who has long been leading a solitary life, anxiously awaiting for his repatriation

The accused Mitsuhashi, Kichigoro after graduating from the higher section of the primary school, remained at home and engaged in farming, but later became a worker in a Medicine Mfg. Co. He entered the navy in January 1940 and faithfully discharging his duty ever since, he finally was promoted to the rank of Corpsman Chief Petty Officer. Soon after he was demobilized in January 1946, he was married and his wife begot a boy. But fate did not favor him, for without having time to settle down in his new married life and without experiencing the joy of being a father, only ten days after his son was born, he was apprehended and placed in Sugamo Prison. I am sure you will understand his feeling when he left his beloved wife and child to be apprehended. After he left, his aged mother suffering from eye trouble, his wife with a small baby, his little brother and sister, are the only ones to look after the home. It is only too obvious what hardships the family are experiencing in making a living under the present urgent situation of Japan.

As I have related in the above, all of these accused having finished the course of compulsory education are all possessors of sound knowledge and should not be regarded in the same light as any ordinary criminal. It was because of the extraordinary circumstances which I have related, that they perpetrated the act of killing the prisoners. Under ordinary conditions, they all are men who would not even commit a minor misdemeanor not to speak of murder, even if they wanted to do so. Faithfully discharing their respective duties from the time they entered the navy, some for 5 years, some for 10 years, each of them achieved an outstanding record and as exemplary military men they were promoted, some to Chief Petty Officer and some to Warrant Officer. And, we must not forget that these accused are young men only in their twenties. I firmly believe that these accused who achieved such an outstanding record during their military career will be sure in peace time to contribute to the country and society, and promote social progress and culture.

Honorable President and the Members of the Commission, I ask your consideration of the various circumstances which I have related in the above, and solicit your lenient judgment for these accused.

KUWATA, HIDEO

I certify the above, consisting of twenty-eight (28) typewritten pages, to be a true and complete translation of the original argument of Kuwata, Hideo, to the best of my ability.

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

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

"WWW(28)"

ORIGINAL ARGUMENT OF AKIMOTO, YUICHIRO, A COUNSEL FOR THE ACCUSED, IN JAPANESE.

(appended to the original record)

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

CLOSING ARGUMENT FOR THE DEFENSE IN TEHALF OF THE ACCUSED SAKAGAMI, MUKAI, TANABE, KAMIKAWA AND IWANAMI, DELIVERED BY YUICHIRO AKIMOTO, TOKYO, JAPAN

CONTENTS

INTRODUCTION

Your Honor, the President, and Gentlemen of the Commission.

The dark clouds of war which covered the whole earth have been swept away, and the bloody violences of the devil have disappeared. Although the peoples on the earth are suffering from starvation and poverty, they have come to be able to enjoy the peaceful spring sun. With the hope and promise of the future, they ave endeavoring hard for the reconstruction of their fatherland with hoes and axes in their burnt fields. Some of them lost their parents, children and brothers and sisters, some of them were burned out from their property, and were thrown into the darkness of hell. These events have become nightmares of the past for them. This is the present actual situation of the world.

In Japan, we have thrown away our pride in the tradition of 2,600 years. Our national constitution and our national spirit have been completely amended. The Japanese have united together and have made a start in building a truly peaceful country for eternal peace.

This has concretely been manifested by the revolutionary reformation of the Japanese Constitution. On the 6th of March 1946, the Emperor declared in his rescript:

"You must bear in mind that you have determined to enjoy peaceful lives with your self-awakening of justice and to keep friendship with the peoples of the world by giving up the war. Following the principle which seeks its foundation in the general will of the people and honors the fundamental rights of individuals, we hereby have reformed the Constitution hoping that you will solidify the foundation of the reconstruction of our country." This rescript was issued not from the highest position, but manifested itself by the desire and the will of the whole nation of Japan.

Article 9 of the new constitution states: "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential will never be maintained. The right of belligerency of the state will not be recognized.

This article boldly and frankly expresses the aspiration to peace of the Japanese people at the starting point in their reconstruction. Thus the Japanese people renounced war even for their self-defense. This is the first renouncement of war in the history of the world. This shows an earnest determination to set an example of forever renouncing war in the world and to establish a truly peaceful country while keenly feeling the evils of war. We sincerely hope that not only the people of Japan but the peoples of the world will be spared from the nightmare of war.

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

War is indeed the work of devils. No matter how we may advocate justice and humanity, we shall have to encourage hostile feelings, hate and revenge against each other in the actual stage of war. This is the true state of war. In the feudal age, there was a saying, "Murderers of parents or the lord are mortal foes." Revenge against such murderers was deemed the blossoming of loyalty or filial duty, but no one in the civilized societies of today will admit this. This is most strictly forbidden as an inhumane act.

However, we can not deny that any countries were actually encouraging and forcing it in the war under the name of justice.

We are at peace now and each of us iw working hard for rehabilitation. But many officers and soldiers who were compelled by the state are spending their days in jails as war criminals. When I see many defendants before me I am filled with deep emotion.

For what and for whom have they shouldered their guilt. There is no one among them who dared to act according to his own intent knowing that it was unlawful to do so. If they had not been born in Japan, the defeated country, they would not have suffered from these agonies and disgraces.

Gentlemen of the commission, when you examine them today with the severe laws of the peace, you will think that they can not be forgiven. However, the crime should be judged in the subjective and objective circumstances surrounding its perpetration. It should not be judged by general, abstract and idealistic standards of morality disregarding the time of the action.

I think that the A-class war criminals should be accused for their responsibility. But I do not think it is proper to punish those who had to participate in the accidental cases as war crimes which happened in accordance with absolute orders and under the abnormal conditions of war psychology. I believe that it is especially necessary to pay careful considerations to their punishments on the ground of criminal policy.

SCAP Rules state: "Further, action pursuant to order of the accused' superior,...shall not constitute a defense..." I don't mean to say that this is wrong as a principle, it is quite proper that the accused can not be exempted from guilt only because he was so ordered. But in reality, when the accused acted as an instrument of his superior under the irresistible pressures and further the accused did not recognize the unlawfulness of his act in his state of mind of that time, it is not proper to punish him in the same way.

I most frankly admit that this incident can not be approved before the severe laws of today in time of peace. I also feel very very sorry for the victims of the incident. I would respectfully like to pray for their happiness.

However, we must notice that these defendants were forced and instigated by their state to participate in the incident. In the most urgent battle field and with the abnormal psychologies of the war time, they only acted as instruments under the pressure of absolute orders, believing that what they were about to do was right. I sincerely hop that you will consider the objective circumstances of that time and the subjective state of mind of the accused in dealing with this case.

I would like to argue first for Sakagami, Shinji, next for Mukai, Yoshihisa, Tanabe, Mamoru, Kamikawa, Hidehiro and lastly for Iwanami, Hiroshi.

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

"YYY(2)"

ARGUMENT IN BEHALF OF THE ACCUSED SAKAGAMI, SHINJI

With absolute confidence, I maintain that the accused Sakagami, Shinji is not guilty.

The second specification of the first charge alleges: "Sakagami, Shinji, then a corpsman warrant officer, Imperial Japanese Navy, attached to the military installations of the Imperial Japanese Navy, and while so serving at the said military installations of the Imperial Japanese Navy, acting with Okuyama, Tokikazu, then a surgeon commander, Imperial Japanese Navy, and others unknown, did, at Dublon Island, Truk Atoll, Caroline Islands, on or about 1 February 1944, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, injure, blast and kill, by explosions of dynamite and strangulation two (2) American prisoners of war, this in violation of the laws and customs of war."

But this is not the true state of affairs and is burdening the accused with a responsibility which he should not shoulder. I feel very doubtful as to why this specification has been prepared. Sworn by God, the accused testified to the truth of the facts and affirmed his innocence. I thought that there was not a bit of fabrication in his testimony, and listened to them with tears, feeling that Heaven will understand his absoluto sincerity.

I would like to cite an outline of his statement as follows:

One day toward January 1944 Surgeon Commander Okuyama came to my room and asked me for a piece of black powder which he wanted to use for an experiment on dogs, so I gave it to him. Commander Okuyama asked me various questions concerning the use of black powder and I answered what I knew about it.

One afternoon, about one week after that, Commander Okuyama called on me about three o'clock and told me again that he wanted me to have some more black powder for an experiment on a dog. Since I had heard about his previous experiment on dogs I had no suspicion about what he was going to do. I went together with Commander Okuyama to the hill behind the officers' quarters where black powder was kept. As he arrived at the place, Commander Okuyama told me that he wanted a long fuse for that black powder, so I made it twice as long as an ordinary one. I attached a detonator to the black powder so that it was ready to be exploded and gave it to him.

I intended to make a round of inspection of the hospital as I usually did and I was about to leave there when a surgeon, I did not know his name, came up the hill. I took no notice of him, left the hill and began my inspection of the epidemic ward. After finishing my inspection, I walked toward my room and arrived in front of the officers' quarters when I was called by Commander Okuyama who was coming to me from the officers' quarters. He said, "Deck officer, will you bring me a box of scopolamine opium hydrobromide and syrychnine nitrate and hypodermic syringe, please?" I had to go to the pharmacy to get them, but as Commander Okuyama looked to be in a hurry, I dropped in at the First Internal Ward, which was nearby and requested the drugs from Nurse Hattori who soon gave them to me after getting permission from Surgeon Lieutenant Fukuda. I ran around the slope of the hill and gave them to Okuyama at the water tank at the officers' quarters. Commander Okuyama left me going up to the hill with the drugs

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Lieutenant, U.S. Navy,
Judge Advocate.

and the syringe and needle. I wondered what he was about to do, so out of curiosity I followed him to the hill. On the top of the hill, I saw two foreigners. They were sitting side by side, their legs stretched out in front of them. I guessed that they were tied with their hands behind them, but I did not actually see if their hands were tied. Standing by the prisoners, there was Commander Okuyama and another Surgeon whose name I did not know, and they were preparing an injection of the drugs I had given to Okuyama. In the meantime Okuyama injected scopolamine and the young surgeon strychnine into the foreigner's hearts, that is, in the vicinity of their hearts.

I thought that they were killing the prisoners with these poison drugs.

Since I saw the prisoners at an unexpected place and since I witnessed them being injected with poison into their hearts, I was astonished, and I hurried to my quarters. I did not want to be present if the prisoners were being killed. I suspected for what purpose Commander Okuyama used the black powder and why he injected a large amount of poison. It was a great trouble for me who took charge of black powder, and was also a very uneasy matter. Up until then I had no idea that Commander Okuyama and the other surgeon who I now know as Lieutenant Nakamura since he falsely testified against me were probably killing prisoners.

About ten days or two weeks after that, at the officers' mess hall, Surgeon Captain Iwanami told me after breakfast that he wanted to have several natives for a working party. I asked him where I should assemble them. He told me that there were four dead bodies covered in straw mats at the morgue and that I had to tell that natives to bury them at the slope behind the hospital. So saying, he went toward his room. I came back to my room, and, after checking the attendance sheets of the natives, I relayed his message to several male natives.

I wondered why the head of the hospital trusted the natives to bury the dead bodies and was afraid that the natives might make mistakes. So I went with the natives to the morgue. As I opened the door, I saw four dead bodies of foreigners. They were not covered by straw mats, but were putrified and smelled bad. Being surprised, both I and the natives stepped backward. For a while, I was stupified with amazement not knowing why they had died and from where they had been brought to that room. What it good to let ignorant natives see such a dreadful scene? Who dealt with these prisoners? I wondered and wondered. But, anyhow, it was impossible for a man who has a humane heart to leave the corpses as they were.

It was clear that someone had to bury them. I had been ordered to do so. Ordinarily it is not the duty of the commanding officer of the hospital to bury dead persons. In war it is probably different, so I carried out orders and buried them as I was told to do so. I ordered the natives to carry the dead bodies to the slope behind the hospital, divided the dead bodies in two groups of two each and buried them in the ground.

The natives, after finishing the burial, said to me, "Is that enough?" I ordered them to cover the dead bodies with much more soil and let them work again. While they were doing so, I went to my room and got some salt. When the graves were nicely made, I assembled the natives, sprayed the salt and cleaned the place. Then we prayed for the consolation of their souls according to my command. The natives who participated in the burial

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

asked me after the praying, "Why were they killed?" "I do not know why," I replied, but I recalled that when I had given the black powder to Commander Okuyama, I saw two prisoners being injected on the hill behind the officers' quarters. I imagined that Okuyama might have used the blac powder for the experiment of these prisoners, and told the natives what I imagined. Since I thought that it would be a disgrace to the hospital if the incident about these dead bodies was told to others, I told the natives as follows: "Don't tell others about this burial. You may absent yourselves from your work this afternoon so that you may pray for the consolation of the souls of these dead prisoners." After telling them so, I ordered them to break up.

After the end of the war, I heard that these four persons had died because they had been injected with poisonous bacteria. This was only rumored and I do not know it of my own knowledge.

As I stated before, I was dispatched to Tol on 8 July 1944 where I engaged in the construction of the branch hospital. I called Dublon several times in regard to liaison about the transportation of materials t Tol.

I have found the reason why I was charged with the dreadful crime of murder. In the first place, it is because Surgeon Lieutenant Nakamura (I know his name for the first time in this court) gave false testimony, and next because I had told the said natives what I had imagined when we had buried the four dead bodies. My imagination gave rise to their imagination and then it spread. This imagination of the natives became testimony in this court given by those natives. I think that is the reason why I have been accused.

I was put in the American stockade at Moen, Truk Atoll, on 12 Januar of last year, and was investigated by an American officer. At that time, he told me that I was confined as a suspect who had murdered two prisoner with dynamite, so I told him that I was quite innocent and that I had nothing to do with the murder and begged him to release me as soon as possible after his investigation.

Toward July of the same year, I was investigated again. I explained as a matter of information that I had given black powder to Commander Okuyama and that I saw a surgeon whose name I did not know at that time. I begged the investigator to investigate these two surgeons at once so the he would find that I was innocent.

In August of the same year, I was transferred to the Guam stockade, and, toward November or December, I was informed that Commander Okuyama w dead. I was very much confused to hear the news, and requested again and again that the unknown surgeon lieutenant be found, thinking that if the surgeon were found my innocence would be known. I eagerly awaited for th day!

After February of this year, I was told by the investigator every ti I was investigated that the trial would start in the next month, that it would begin soon, that Okuyama had died and the other surgeon was not yet located and that I should have to take all the responsibility. Since I k nothing about the law and had no knowledge about the trial, I lived unea days. I could not understand why the death and disappearance of crimina would burden me with all of their responsibilities. I was innocent and know it. Why couldn't the Americans know that I am innocent?

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"YYY(5)"

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Lieutenant, U.S. Navy,
Judge Advocate.

Toward March, when I was investigated, I was told that the surgeon who had acted with Commander Okuyama was arrested. I begged him to show me hiw picture if it was available but I was not permitted to see his picture or see him or even told his name.

A long time has elapsed since this incident occurred, and, besides, I had never talked with the surgeon whose name I did not know. My recollection of his features was very vague, but I thought that I could identify him if I saw him. I was looking forward to the day when he would emerge in front of me. He would surely say I was innocent.

After that I was asked about what I had done, and I stated only what I had done. For the investigator told me that he knew all about other men's acts but that he was not certain about me. So I did not tell what other men had done.

This statement of his clearly shows the true circumstances of that day, and I am convinced that it is the true state of affairs.

Then, why has Sakagami been accused? Because Commander Okuyama, the actor in the drama was dead, the so-called "others unknown" in the specification were not located, and, therefore, it was only he, Sakagami, who could prove the facts. Besides the prosecution had circumstantial evidence from the natives.

Sakagami very eagerly looked forward to the appearance of Commander Okuyama and "others unknown" who acted jointly with the former. But he was informed by an investigator at the Guam stockade that Okuyama was dead and he was very disappointed. His only hope was the appearance of others unknown who acted jointly with Okuyama. I think that the judge advocate will know that he often begged the investigator to find the "others unknown." Then, at last, the "others unknown" appeared. He was very delighted when he saw him, but his delight was not long. The man did not tell the truth for Sakagami. He emerged in the court as a prosecution's witness, stated his name as Nakamura, Shigeyoshi, and disgraced Sakagami a murderer. The sadness and anger of Sakagami was really beyond descripti However, the witness Nakamura committed suicide after he testified against Sakagami and during the cross-examination of defense counsel, I do not like to blame a dead person, he was also our countryman, and I was also impressed that he was not a bad man. However, he is not a witness of the incident who had nothing to do about it as a third person.

The specification clearly alleges: "acting with Okuyama, Tokikazu, then a surgeon commander, Imperial Japanese Navy, and others unknown." Th "others unknown" is clearly the witness Nakamura, Shigeyoshi. Nakamura, Shigeyoshi is clearly charged as "other unknown," it is clear that he was reserved since his name was unknown and he was not located. The charge and specifications themselves definitely show this fact. It has become evident that the "other unknown" is Nakamura, Shigeyoshi, and he at last was arrested. Then it is necessary that either he should be accused or that the fact of his conspiracy should be stricken out from the charges and specifications if he is found to be innocent as the result of investigation. But the judge advocate did not strike out that fact from the charges and specifications. So, I think that this is because the judge advocate did not admit that Nakamura was innocent. Then he was clearly a conspirator with Okuyama, and the conspirator bore witness and was the prosecution's witness. Therefore, it may be clear that he would have naturally been charged if he testified the facts as it were.

"YYY(6)"

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

This is the reason why he gave false testimony and burdened Sakagami with his crime. After he testified against Sakagami, he committed suicide when he was being cross-examined by the defense. I think we should have special consideration as to these points. Then how did he participate in the incident? I shall pick out some of his testimony as follows:

Direct examination of Surgeon Lieutenant Nakamura by the judge advocate:

"Q. What happened after eleven o'clock?
A. This shock experiment was over and Okuyama stated that he was going to do an experiment on the hill back of the hospital with dynamite.

"Q. Who did you find on the hill?
A. I found Okuyama and Sakagami. Two prisoners were sitting down with their legs spread out in front of them. Okuyama and Sakagami, together, retied them. At a distance of about one meter in front of the out-spread feet, a hole with a depth of about ten centimeters was dug and dynamite placed in it by Sakagami. Okuyama ordered me (Nakamura) to go to the side of the hill to be protected from the charge from the explosion of dynamite. The dynamite exploded and some of the feet were torn, but the prisoners did not die.

"Q. What happened then?
A. As the prisoners were suffering greatly with pain, Commander Okuyama ordered me to alleviate the pain by giving them injections of morphine, and I did this. But morphine did not have too much effect. Commander Okuyama ordered Sakagami to choke them in order to alleviate their pain.

"Q. Were they alive before that?
A. As I recall they were alive.

"Q. Did they die when he finished choking them?
A. As I recollect, they died.

"Q. What happened to the prisoners after they were strangled?
A. They were dissected by Okuyama and Iwanami around 4 p.m.

"Q. What did the dissection show as to the cause of death of these four American prisoners?
A. It was found that two prisoners had died from shock; two had died from shock explosions of dynamite and strangulation.

"Cross-examined by the defense:

"Q. Why did you go to the hill in that afternoon?
A. After the experiments discontinued at the guard unit, Commander Okuyama told me that experiments were to be performed in the hill back of the hospital this afternoon, so I went.

"Q. Why did you climb the hill twice?
A. Because the prisoners did not die with the explosions of dynamite and were suffering, Commander Okuyama ordered me to remove the pain by giving them morphine.

"Q. How did you get this morphine?
A. I brought it from the hospital ward.

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

"YYY(7)"

"Q. From whom did you receive this morphine?
A. I do not remember from whom I received this morphine.

"Q. Did Okuyama ever tell you that he was going to do experiments with dynamite on dogs and received the dynamite from Sakagami?
A. No. But I have heard that Commander Okuyama had experimented with dynamite on dogs.

"Q. What was the size of the dynamite?
A. It was about the size of a person's fist.

"Q. Was a piece of dynamite used for each of the two prisoners?
A. Yes.

"Q. Was there any places other than legs where they had been wounded by this blast of explosion - dynamite?
A. As I recall, there was dirt, smudge, plastered to the chest and stomach

"Q. You testified that you gave injections to the prisoners. Where did you give the injection?
A. In the arm.

"Q. Did the dynamite explode simultaneously?
A. As I recall there were two explosions.

"Q. What was the length of the dynamite?
A. As I recall it was about from 15 to 20 centimeters.

"Q. How much morphine did you give them?
A. Two small ampules.

"Q. How much morphine is necessary for a person to die of it?
A. I do not remember.

"Q. Is it correct that Commander Okuyama ordered you to inject the morphi into the prisoners to relieve their pain?
A. As I recall, there is no mistake.

"Q. Did Okuyama ordered Sakagami to choke them to relieve their pain?

Objection.

"Q. Does any pain occur through injection of morphine?
A. In the injection itself, when the needle is placed under the skin it hurts, but after the injection the pain should be relieved.

"Q. You stated as a result of the dissection you found the cause of death of the prisoners had been strangulation and dynamite. How did you determi this?
A. This is not true in all cases, but it can be said as a result of dissection no major changes can be noticed in the organs.

"Q. When the dynamite was lighted, where was Okuyama?
A. He was with Sakagami."

According to his testimony, Okuyama and Sakagami exploded black powder, but the prisoners did not die, and Nakmura injected morphine by th order of Okuyama. The reason why he used morphine was not to kil' them bu

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"YYY(8)"

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

to remove their pain. But morphine was not effective and they were still suffering from pain. Therefore, in order to remove the pain, Okuyama ordered Sakagami to strangle them.

The prisoners died of strangulation. As a result of their dissection it was found that the causes of their death were explosion of dynamite and strangulation. But this conclusion was not drawn from the changes in the internal organs of the prisoners at the time of the dissection but by summing up what he saw in the experiment. He stated that the injection of morphine was not the cause of the death.

Can you believe all of this testimony? As to the injection, Sakagami testified as follows:

He saw surgeon Nakamura injecting strychnine nitrate and Okuyama scopolamine opium hydrobromide into the hearts of the prisoners. He had been asked for these drugs by Commander Okuyama, so he had gone to the Fi[rst] Internal Ward and had got them with hypodermic syringe from Nurse Hattori who had received permission about that from Lieutenant Fukuda. He though[t] that the prisoners died on account of this injection, so he told the natives so.

Whose testimony is true? It can clearly be imagined from the testi[mony] of each witness that Commander Okuyama had an intent to kill the prisoner.

Nakamura, to the cross-examination of the defense, testified: "Sinc[e] the prisoners did not die, Okuyama ordered me to inject morphine and I di[d] so." But the reason of the injection was not to kill the prisoners but [to] remove pain from the prisoners. Morphine was not effective and Okuyama ordered Sakagami to strangle them in order to remove their pain. The prisoners died of the strangulation. This is what Nakamura testified.

I think that no one will believe such pretense and excuses. Can any[one] believe that Okuyama had different intent in the following two cases: to order strangulation in order to remove the pain, and to order injection in order to remove the pain?

We can not know whether the drug used at that time was morphine as Nakamura testified or strychnine as Sakagami testified. At any rate, bot[h] of them are violent poisons. Nakamura was a surgeon. He should know the doses of these drugs.

If Okuyama intended to kill, he would not prefer strangulation in order to attain his purpose. Anybody can know that the drug would satisf[y] his intention.

There is also another incredible point in Nakamura's testimony. He testified that he had injected morphine into the arms of the prisoners. According to his testimony, the prisoners were tied with their arms behin[d] so it is unnatural to inject their arms. Nakamura said that he had got t[he] morphine from a ward, but said that he did not know from who he received it. He does not even remember whether it was a man or woman who gave hi[m] the drug. From these points it is utterly impossible to believe his testimony.

"YYY(9)"

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

I believe the truth was that Nakamura injected the drug into the hearts of the prisoners according to the order of Okuyama and caused their death. If this be the truth, it is clear that Nakamura himself should have been charged. So he concocted a story that Sakagami strangled them to death after the injection. This is the only possible fact.

There is a proof of this possible fact, that is the amendment of the second specification of the first charge. In that specification, the fact of strangulation was not alleged at first. But after Nakamura was arrested, strangulation was added in the specification. Sakagami testifies as to this point, and I think that the judge advocate will probably admit this. Moreover, his testimony that as the result of the dissection they found that the death was caused by explosive and strangulation has no scientific backing and his testimony was only a poor excuse on his part to make odd ends meet. He stated a train of thought which has no meaning. Furthermore, in regard to the black powder Sakagami testified the fact one week prior to this, Okuyama received from Sakagami some black powder to experiment on a dog and the fact that it was used on the experiment on the dog. In regard to this point Nakamura too has testified that he heard that Okuyama used black powder explosive in the experiment on the dog. And therefore, these two testimonies match. Therefore, on the day of the incident when again Okuyama came to him and asked for black powder to be used in the experiment on the dog, he didn't think it was anything unusual and went with Okuyama up the hill to where it was stored and handed him one stick. At this time he was told that he wanted the fuse to be long; so it was made about twice as long as usual (about one meter) and was handed to him, and Sakagami went to inspect the contagious disease ward according to his daily schedule. He recalled that he heard an explosion of a blast, but at that time there was construction going on around the hospital and as he had been hearing the explosions often he did not think for a moment that the explosion he heard was the one Okuyama used. As I stated before, Sakagami saw that Nakamura was injecting strychnine nitrate and scopolamine opium hydrobromide into the prisoners, so he naturally wondered if Nakamura might have used the explosive. On the next day he made a round of inspection, and found at the place some empty ampules of the said drugs and noticed that the grasses were lying down around that spot. So he came to suspect that the explosive might have been used.

Therefore, he did not know whether the explosive was used, and the testimony of Nakamura is entirely fabrication.

Native witnesses said in their testimony that they had only heard the sound of the explosion. They also testified, "The deck officer (Sakagami) told us, 'They have killed the prisoners.'" That is all they testified.

This testimony does not prove the fact. Any person will not tell his crime of murder to others especially to natives. It can easily be imagined that Sakagami told them so because he thought that someone, not Sakagami, killed the prisoners. In fact the natives testified, "He told us, 'They had killed the prisoners.'" Therefore it is clear that Sakagami told the about what another person had done. Sakagami told what he imagined to the natives when he was asked by them at the time of the burial. He says that this talk of his became a rumor and has come back to confront and accuse him.

Sakagami pointed out inconsistencies in the testimony of Nakamura & the natives. I would like to cite it as follows:

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James P. Kenny

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

"YYY(10)"

The testimony of Surgeon Lieutenant Nakamura was entirely false testimony, and he disgraced the morality of human beings. I wonder why he testified like that I am surely convinced that he was a surgeon lieutenant who, acting jointly with Commander Okuyama, murdered two foreigners by injection on the hill behind the officers' quarters.

In Surgeon Lieutenant Nakamura's testimony:

1. He said that the dynamite was as large as a fist in thickness, but what I gave Okuyama was not so big. It was only about 3/4 inches in diameter, and wasn't even dynamite. I am sure if he used what I gave him I and not Nakamura could have better described it. Of course I did not see the dynamiting so anything is possible.

2. He said that the dynamite had been lit with a match. To light a fuse of dynamite is apt to burn one's hand, because the flame flares out from the fuse. Those who experienced the use of dynamite would never do that. It is usually lit with an incense stick or match cord.

3. He said that two pieces of dynamite were lighted. But like an electric cord, the fuse is a cotton cord in which gunpowder is packed and the surface of the cord is painted and hard. So even when the gunpowder burns, the cotton cord remains unburned. And if one piece of dynamite explodes, the fuse of another one would be blown away by the explosion. Therefore, the other dynamite will usually not explode.

4. He said that the prisoners had their toes injured by the explosion. But since the dynamite had exploded about 10 cm. in the ground it would spray stones,. sand and soil which would cause serious injury on the bodies of the prisoners. He especially stated that two pieces of dynamite had exploded about one meter in front of the prisoners. If so, I think it would injure them very seriously. I also think that when dynamite is buried in the ground its explosion would extend obliquely upward, and injuries to their faces and chests would have been greater than those in their legs. Guessing from the position of the prisoners which he gave in his testimony, the area of the surface of their bodies facing toward the dynamite was greater as to the upper part of their bodies than to the legs, so it is strange that they were injured only in their legs which was a smaller surface area. Such a simple matter is lectured about in the medical officers school as a common knowledge of surgeons.

5. He said that he had injected two ampules of morphine into each of the prisoners in order to remove their pain. But morphine used in the Japanese navy was never used in excess of an ampule for any patients who had any serious pain. It is a matter of common knowledge of a surgeon that less than one ampule should be used according to the condition of the patient.

6. He said that he had injected it in the upper arm of the prisoners but he also testified that their hands were tied behind them. Is it not technically difficult to inject the arm of a man whose hands are tied behind? This testimony is very doubtful. Generally speaking, the injection of morphine is made subcutaneously in the chest or outside upper arm of a man.

"YYY(11)"

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7. He lastly testified that the prisoners were strangled to death. once learned that in cases of strangulation some visible changes are seen in the lungs. But he testified that he had found no visible changes after dissecting them.

I feel that the testimony of the natives against me were nothing but a product of their uncertain imaginations and pure fabrication.

Before Truk was bombed on 17 February 1944, the laundry and cleaning of the rooms of the officers and warrant officers were taken charge of by our orderlies. After the air raid, the hospital became so busy and the orderlies became so few that we sometimes ordered the natives to wash our clothing. But before the air raid, we never ordered any natives to do so. Such testimony by them is false.

They testified that they had been weeding around my house, but since my house was beneath a very big mango tree there were no weeds around it.

A native called Takeo testified that he saw a truck stop in front of my room with two prisoners and a guard with a rifle and bayonet. But before the air raid there was not a single rifle in the hospital. Only because of American air raids did someone order rifles and a defense unit.

A native called Otis testified that I took two prisoners with Petty Officer Homma. I wonder on what ground they gave such false testimony. It is pure fabrication. I had nothing to do with such a thing. It is absolutely a lie.

As I have stated, I prayed from my heart for the souls of the four dead bodies, and I did not behave rudely as the Truk natives testified. I know that these dead bodies had an honorable burial.

As you see in what I have mentioned, I did neither kill the prisoners nor assist in the killing. I can firmly swear before man and God that I am innocent.

If I coolly judge what I have mentioned above, I am convinced as to the conclusion that there was not a bit of falsehood in Sakagami's testimony. I am convinced that the commission will have reached to the same conviction.

The judge advocate could prove nothing against Sakagami except by the testimony of Nakamura, and the testimony of Nakamura is, as I have pointed out, very incredible and worthless.

To the question of the judge advocate, "Why didn't you state to the judge advocate or the investigator what Nakamura had done?" Sakagami stated:

"I tried to explain from the beginning that I had nothing to do with this incident, but they did not believe me. Some American non-commissioned officer informed me even of the date of my execution, saying, 'You will be sentenced to death.' The investigator said to me, 'Okuyama is dead, and another surgeon is not yet located, I do not know whether it was said by the investigator or by the interpreter. Anyhow, it is certain that it was spoken by interpreter Savory. I thought it was necessary to find out a young surgeon who had acted with Okuyama and to let him testify for

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me. I thought this was the only way to save me and looked forward to his coming. Therefore, it was unbearable for me as a humane person to disclose what this young surgeon had done. Since I witnessed what he did, I could imagine what the purpose of his acts was. But it is nothing but my imagination. He was a surgeon and he might have had a special purpose. I thought that I might give him trouble if I related my mistaken imagination. So I did not desire to state about him. But when I first met my defense counsel, I told them all about that. I told it to Commander Carlson, Mr. Akimoto, Mr. Suzuki, Mr. Kuwata and another lawyer."

This is only human nature and is a rational idea. There is no room for suspicion.

When I coolly think, summing up the above facts, I can firmly maintain that Sakagami had nothing to do with the incident, that Sakagami is absolutely innocent.

The judge advocate did not carry out his burden of proof. The second specification of the first charge against Sakagami is not proved.

It is very dangerous to punish the accused under such circumstances. There is a saying, "It is worse to punish one innocent person than to release one thousand suspects." This is a strict rule concerning trial in any place of the world.

Your Honor, The President and Members of the Commission, I sincerely hope that you will have careful consideration as to this matter.

I would like to ask your consideration again for the family condition of the accused Sakagami. This is what Sakagami told me:

"After I arrived on Truk in June 1943, I had no chance to go home and have received no letter since then. So I do not know exactly how my family is. I would like to state my family condition for your information accordin to a letter which I received three years ago and a postcard which I received lately.

My younger brother (33 years old) was called into the army in 1943 and went to the southern front. He has never been heard of since. My second younger brother was enlisted in the navy air forces but no one knows about how he has been since then. I was informed that my two sisters died during the war.

My family was a tenant family. On account of my brothers conscription, my sisters' death and the old age of my parents, they could not maintain their farm and could not pay taxes. So they sold their tenant-right and moved to the outskirts of Sapporo City, Hokkaido. My wife was living in Yokosuka. But she moved to my parents' house with her two children in 1945 when the air raids became intense.

I sent all my salary for the living expenses of my parents, wife and children, and they could manage to make their living with that money. As I was the eldest son, I had the duty of supporting my parents.

I do not know how they are making their living now. All of our relatives have died already. My sister's husband went to Russia during the war and has never been heard of since.

"YYY(13)"

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The father of my wife was a merchant dealing with military goods, so it was impossible for him to continue his business after the end of the war; and the present condition of her family I do not yet know.

My salary when I was in the navy was very little, and we could save no money. I am very anxious about how they can get their living expenses now. Especially, when I think of the terrible inflation of Japan, I can not have any easy time all day long.

Names and address of my family:

Permanent Domicile: 417 Nishino, Oaza-Kamiteina, Teinamura, Sapporo-gun, Hokkaido.
Present Address: Miyanoshita, 24-ben, Kotojimura, Sapporo-gun, Hokkaido
Family: Sakagami, Nisaburo (father) 65 years old, head of the family.
Sakagami, Kane (mother) 64 years old.
Sakagami, Midori (wife) 30 years old.
Sakagami, Nobuyuki (eldest son) 8 years old.
Sakagami, Chieko (eldest daughter) 5 years old."

I beg your special consideration for the accused Sakagami, and ask that you will acquit him as soon as possible by a finding of not guilty.

I maintain that the defendants, Mukai, Yoshihisa; Tanabe, Mamoru; and Kamikawa, Hidehiro, are not guilty.

The above persons were brought to trial and charged with the following as stated in specification three, charge I: "KAMIKAWA, Hidehiro, then a surgeon lieutenant, Imperial Japanese Navy,....., TANABE, Mamoru, then a corpsman chief petty officer, Imperial Japanese Navy,....., MUKAI, Yoshihisa ....., all attached to and serving at the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, at Dublon Island, Truk Atoll, Caroline Island, and others to the relator unknown, did, each and together, on or about 20 July 1944, at Dublon Island, Truk Atoll, Caroline Island, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike and kill, by bayoneting with fixed bayonets, spearing with spears, and by beheading with swords, two (2) American Prisoners of War, names to the relator unknown, both then and there held captive by the armed forces of Japan, this in violation of the law and customs of war."

But, the defendants Kamikawa, Hidehiro; Tanabe, Mamoru; and Mukai, Yoshihisa, all of them have strenuously denied that they had anything to do with the incident from the beginning of the investigation. They were cleared of suspicion and demobilized. While they were working in their various peacetime pursuits they were suddenly placed in Sugamo prison, from which they were sent to the war crimes stockade on Guam. They still cannot understand why they have been taken into custody.

How did these persons who were not involved in the incident come to be charged? I was very interested in this point and did some investigations concerning it. I wish that the commission take special notice of this point.

"YYY(14)"

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This incident occurred over three years ago and the persons who were involved amount to over a hundred and ten some persons, including the spectators. It can be seen without difficulty that by the nature of the incident everyone was very excited at that time. Under these conditions how many people would remember clearly, who was present and who was not or who acted and who did not act? I think it is unusual that persons other than special persons in special circumstances are able to remember clearly what went on. I rather think it is natural that they do not remember. I think it is a fact that, what the authorities experienced when they investigated was that every person told a different story and that they could not obtain what was the truth and what was not the truth. If it is stated frankly, it is a fact that persons have made statements against each other concerning other people, without saying anything about their part in the incident, and on top of this they have stated vague recollections and their imagination in a definite and distinct manner. Because of this it became all the more difficult to gain the truth. Both the persons in custody and the authorities must have been afraid that they would all have to be charged. In consequence one day with an American officer and the interpreter, Mr. Savory, present, the senior petty officers were called together and a meeting held. At this meeting the interpreter Savory stated, "As it is at present we cannot tell who did it. In addition to this the incident will never be cleared up. It will be all the better for you if you confer among yourselves and have some persons take the responsibility." The senior ranking petty officers agreed to this. There were some persons who maintained that the senior petty officers regardless of whether they did act or not, should take the responsibility and have the lower ranking petty officers freed. This made a great impression on the persons who heard this. However, the persons in this group who maintained that they had nothing to do with the incident stated strongly, "How can you say such an absurd thing?" I can understand a senior petty officer taking the responsibility for an act that came in his line of duty, but I see no reason for a person who had nothing to do with it to take the responsibility for this kind of an incident, just because he was of a senior rank. The persons who did it should take the responsibility for the law does not allow that persons who did not take part take the responsibility. I am absolutely against it. If this is the kind of meeting this is I wish it stopped." To this the interpreter Mr. Savory said, "The authorities do not mean to have a person who is not responsible take the responsibility. We will stop this conference." So this conference was dismissed. There is this fact, and concerning this point we tried to prove it by the testimony of the defendant Watanabe, but through the objection of the prosecution we were not permitted to do so. I have just stated concerning this as one of the circumstances in this case.

This did not take place solely on the instructions of the authorities, but, was the line of thought that the persons who were held in custody had at that time. This line of thought not only prevailed among the persons who were held in custody but even among the witnesses. And then some of the defendants came to think that, "It's outrageous. He was a senior petty officer. Naturally, he should take the responsibility. He was the adjutant. It's cowardly to say that he does not know anything about the incident. Many petty officers are suffering. Regardless of how it was, he should take the responsibility." Such thoughts were relayed from one person to another and eventually it came to be stated as if it were the absolute truth that, "He was at the scene." "I saw him there." "He was in the line." or that "I saw him stab." These thoughts circulated as if they were the truth, these rumors eventually came out as the testimony of the witnesses and the statements of the defendants. It is my firm belief that this is the basic reason that made it so hard to gain the truth in this case.

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"YYY(15)"

Consequently such testimony and statements as that Kamikawa was at the scene or that he relayed orders, or testimony and statements that Tanabe and Mukai, were the stabbers were all false made under these circumstances. I ask your deep consideration on this point.

Lieutenant Oishi, in reply to the question by the judge advocate replied as follows; "The reason why I wrote this statement for the judge advocate was because among the persons in custody for the judge advocate there are persons who had nothing to do with the incident and they were suffering. The investigation of this incident would go on for ever. Thinking about this I volunteered to write this statement."

Together with the above circumstances we are able to understand the line of thought which prevailed.

I will now present further argument in behalf of Mukai, Tanabe, and Kamikawa, separately and in the above order.

ARGUMENT IN BEHALF OF MUKAI, YOSHIHISA

Among the defendants in this case Mukai, Yoshihisa, is a senior ranking petty officer. Therefore according to the views of some petty officers that the senior petty officers should take the responsibility, he is in a position in which he would have to take the responsibil ty. But, he was cleared of suspicion and demobilized. This fact did not make the others all the happier. As a compatriot of theirs I regret this very much but I cannot blame them because it is the common mental state of defendants who have led a herd life in confinement. Anyway the happiness of Mukai, was short-lived and he was again taken into custody.

To make the facts clear I wish to cite the substance of Mukai's statement, in which he stated his actions;

"I was attached to the Fourth Naval Hospita, Truk Atoll, in August 1943, and served there until December 1945. On the 28th of December, 1945, I was demobilized and worked as a farmer. But in March 1947, I was suddenly put in Sugamo prison as a war criminal, then transferred to Guam and have been charged in this trial.

However, I cannot understand why I have been charged. I did not stab any prisoners of war whatsoever. I tried to explain my innocence as best as I could to the judge advocate, but he did not believe me.

Some witnesses have testified that I stabbed, but this is a pure fabrication. Everybody knows that I did not stab, particularly Surgeon Lieutenant Oishi knows that I did not stab. I affirm before man and God that I am innocent, although I went to the hill behind the officers ' quarters in accordance with the command of general assembly with the other petty officers and enlisted men and saw the scene and the prisoners.

I went up to the hill from the front of the nurses quarters and I went to the right side facing the prisoners. As I had not seen a prisoner before and I was curious, I left the line to see them. I was standing to the left behind the officers and watched the prisoners. In the meantime the head of the hospital began his speech. Then I heard the command of Lieutenant Oishi, but since I did not want to do anything to the prisoners, I kept standing in the same place and was looking at that what was going on without going back to my division.

"YYY(16)"

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Of course, if I had returned to my division, I probably would have been ordered to stab, and I would have had to obey the order. I do not know whether it was fortunate or unfortunate, I was not with my division and I did not have to obey the order. Naturally I was blamed by my comrades and those who wanted me to take the blame called me a coward. Since I was a senior petty officer I think I was selected to take the responsibility for it, but I did not stab.

I did not disobey the order. I was not in my line at that time. I did not want to stab the prisoners. I could not do that. If they blame me as a coward on that accout, I cannot help it. However, is it right that a man who did not stab take the responsibility as a stabber? Some maintain that the senior petty officers should take the responsibility even if they did not stab. Under such circumstances, although I was innocent, I was said to be a stabber. I think that is the reason why persons testified I was a stabber. But is false testimony. I did not stab at all. I am innocent. I swear this before God. I am certainly innocent and anyone who testified against me and said I stabbed is not telling the truth. I am convinced that some testified before the examination of the judge advocates that I did not stab.

From any point of view, I cannot take the responsibility because I am innocent.

I beg your thorough consultation about this incident and that you will give me a fair verdict. I am innocent.

I am a head of my family and I have a wife, a daughter five years old and a son one year old. If I do not work for them, they will starve. I again beg your kind consideration for the condition of my family.

As stated in the statement of Mukai, I am convinced that there can be no doubt that Mukai, had nothing at all to do with this incident.

Lieutenant Oishi testified that in his statement which he wrote for the judge advocate,he said as stated before, "Among the defendants there are persons who had nothing at all to do with the incident and he thought, it will never be cleared up. This is not good and I wrote this statement." At this time in the statement that he submitted to the judge advocate he stated in substance that Mukai absolutely did not stab and that he had nothing to do with the incident. I proceeded to bring the substance of this statement forth, but I was not allowed to do so, through the objections of the judge advocate. Concerning this point, Lieutenant Oishi, replied to my questions as follows:

"Q. Have you ever stated to the judge advocates persons whom you did not remember stabbing the prisoners in this case?
A. Yes.

"Q. What did you state?

The judge advocate made an objection and the objection was sustained.

"Q. In your recollection do you remember anyone who did not stab the prisoners in this case?
A. Yes.

"YYY(17)"

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"Q. Who are these persons?
A. Among the defendants present here it is Petty Officer Mukai, Yoshihisa.

"Q. Why do you remember that Mukai did not stab?
A. When I made the division in the ranks of the petty officers according to the orders of the head of the hospital, and had them line up in two columsn, Petty Officer Mukai was standing by the prisoners and was not in the columns."

This testimony clearly backs up the statement that Mukai made. I believe the commission is also thoroughly convinced of this point.

But the witnesses of the prosecution have testified as follows; the witness Takahashi testified, "Mukai, was in the lines, everyone in the lines stabbed." The witness Hayashi testified, "Mukai was in the lines, he stabbed, but no blood came forth." The witness Hamada, testified, "I have a faint recollection that he was there." In reply to a question by the judge advocate in redirect examination he replied, "As I stated this morning, my recollection of Petty Officer Mukai is very faint." The witness Commander Okamura testified that, "He did not have any recollection of Mukai." The witness Masuda testified that he did not know of Mukai being there. The witnesses Yamamoto, Hasegawa, Yamagishi, and Kikuchi, have not testified concerning him at all. In other words, among the nine prosecution witnesses, Takahashi and Hayashi were the only two who testified that they did stab. Even on this point only, it can be said that the prosecution has not proved the specification that he is charged with, in that he was involved in this case. In putting together the testimony of the prosecution witnesses, I rather think it is in accord with the principle of common sense reasoning that this testimony can be judged in the negative sense. I think this is reasonable, because, even though the witnesses Takahashi and Hayashi testified that Mukai was in the columns and that everyone in the columns stabbed, it is not unnatural that, as Mukai has testified, he was a senior petty officer and went up the hill, with others, and persons who saw him could have misteken him as having been in the columns. In addition to this when there are so many defendants and the truth in this case is so unclear and when the made up propaganda and rumors can be believed to be the truth when it is not the truth, it is very dangerous to use such weak material as evidence.

I request that you will be able to discern the truth and through your great powers of comprehension give him a fair judgment. I have no doubt that you will be convinced of the truth of Mukai's statement and the testimony of Lieutenant Oishi. With absolute confidence I maintain that he is not guilty.

Also the defendants family was supported with the earnings of the defendant. Since the defendant was taken into custody, his young wife has barely been able to eke out an existence. She has a daughter of five and a baby of eight months to look after. Under the present conditions there is no other way but to starve to death. If he actually did commit a crime, this is fate and cannot be helped but if he was innocent I cannot but sympathize with his sufferings. I request that you will consider deeply and that you will find him not guilty.

Argument in behalf of Tanabe.

The position of the defendant Tanabe at the Fourth Naval Hospital, is the same as that of Mukai, a senior ranking petty officer. He was once

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cleared of suspicion and demobilized in December of 1945, after which he worked in a peacetime pursuit. But, on the 15th of June 1946, he was taken into custody and sent to Guam, where the circumstances and relations with the other prisoners were the same as Mukai. In order not to be repetitious and as the facts are the same as in the case of Mukai, I wish that all of what I have stated concerning Mukai be taken into consideration.

In other words, because the defendant Tanabe, together with his co-defendants Mukai, Watanabe and Sawada, were senior ranking petty officers, and in accordance with the opinion of some persons that the senior petty officers should take the responsibility regardless of who stabbed, this became the general feeling. I feel that is how persons eventually came out and testified that they were the stabbers.

The defendant Tanabe, became sick on the 13th of July, 1944, on the 14th he was examined by Doctor Kamikawa, and entered the hospital ward on the same day. He was discharged from the hospital ward on the 24th and on the 20th of July, as he was in the hospital ward he had no relation whatsoever with this incident. This fact is clear through the testimony of Lieutenant Commander Kamikawa and Ensign Yoshizawa, but in order to make it all the clearer I draw your attention to the statement of the defendant.

"On 27 December 1945, I arrived at the Yokosuka District Demobilization Camp. I was demobilized on the 30th of the same month, and came home. On the 12th of January 1946, I became a member of the Hitashitaishi Railway Dispensary, the Tokyo Government Railway Bureau, and I worked for epidemic prevention and medical treatment of the railway personnel and their families. I was arrested by a Japanese policeman on the 15th of June 1946, and was sent to Guam where I was confined.

I shall never forget, that on the 13th of July 1944, the last hospital ship entered the port of Truk Atoll. Many patients of the hospital were embarked on the hospital ship, and we had busy days. On account of that, I suffered from a high temperature toward evening, and on the next morning, I consulted Lieutenant Kamikawa, a chief of the out-patients dispensary. He said that my temperature was so high that I had to rest in a room of the surgical ward. I soon reported it to the senior petty officer and had a rest on a bed by the east window of the surgical ward which was close to the out-petients dispensary. My bed was near the veranda where there were dining tables.

I recall it was on Monday morning, 24 July 1944, that I recovered my health and began my work again. I recall that I was given medical treatment on Saturday when the chief of the out-petient dispensary said to me to take a rest for a few days more because the next day was Sunday and to begin my work on Monday morning.

On the morning of the 24th, as I recovered my health, I reported it to the senior petty officer when I heard about the prisoners, so I know nothing of what happened on the day of the incident.

I really don't know on what ground I was charged. Some of the witnesses testified that I stabbed. Some of them said that all the hospital personnel were assembled on that day and that the petty officers were ordered by the head of the hospital to step forward and were lined up. At that time, I was a petty officer of a higher rank and was acting as a petty officer of the division. I imagine that these witnesses, without knowing that I was ill and in sickbay at that time, must have thought that I was also at the scene, or that they must have thought that I had to take responsibility because I was a senior petty officer at that time.

"YYY(19)"

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In fact, someone stressed that senior petty officers had to take responsibility whether or not they had participated in the incident. I think that this is the ground of my accusation. As for me, I was delighted that I was ill on the day of the incident.

However, I was suddenly arrested by a Japanese policeman on the 19th of June 1946. I was sent to Guam and have been charged. I am very regretful about this.

There was the following opinion maintained by somebody: "Many days have elapsed since the incident, and no one knows the real fact about it. That is the reason why the incident is not yet settled. I hope that five or six senior petty officers of the self-defense unit will take the responsibility though it may be pitiful for those who had no connection with the incident." I said to him, "Since I was ill at that time, I know nothing about the incident, so I have no responsibility at all. I think it is not permissible by law that an innocent person receive punishment for other's crimes." I firmly objected to that opinion and plan, but they did not listen to me. I found out that some young petty officers became aggressive toward me, and insisted that I had to take the responsibility.

I, of course, did not witness this incident, so I do not know how it was performed nor can I take any responsibility thereof."

Concerning this point Lieutenant Commander Kamikawa has testified in this court to the following effect. "The defendant Tanabe became sick on the 14th and I examined him. He had the following symptoms; a fever of 38.9 degrees centigrade and spots coming out all over him. I diagnosed it as dengue fever, and entered him in the surgical ward. He was in the hospital about ten days, I think I recall examining him on the day of the incident."

And again Ensign Yoshizawa has testified to the following effect: "At the time of the incident, I was the senior petty officer. Whenever an enlisted man is sick he would report to the senior petty officer. The senior petty officer would write this in his log and send him over to the out-patients examination room to be examined. I do not remember the exact time but I think it was about a week before the incident. Tanabe, Mamoru, became sick and I remember his reporting it to me. As I recall it was three or four days after the incident that Tanabe, reporting to me that he had recovered and had been discharged from the ward. But, I do not remember if it was in the afternoon or in the morning." I am sure that by these testimonys it has been proved that the testimony of Tanabe is true.

On top of this, of the nine witnesses for the prosecution, Okamura, Takahashi, Yamamoto, Hameda, Hasegawa, Hayashi, Masuda, Yamagishi, and Kikuchi, the only one who testified that Tanabe stabbed was Hayashi. Takahashi gave the names of persons who were in the line of stabbers, and th conclusion was drawn that Tanabe had stabbed. This indirect way of expressing this fact is proof that his memory is vague. The witnesses Kikuchi, Yamamoto, Hamada, and Hasegawa, testified that they remember his being in the line, but they do not remember that they saw him stab. The witnesses Okamura, Masuda and Yamagishi, have testified that they do not remember his being in the line. In other words the only person who testified that Tanabe stabbed was Hayashi, and the testimony of the other witnesses was vague. I believe it is essential to think deeply on why such unclear and conflicting testimony was made.

"YYY(20)"

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In the first place, the witnesses are living together in the same place and have many chances to talk among themselves. Also this incident was one which took place three years ago, with a hundred persons persons. To remember who was present and who was not is unusual, excepting those who had some special connection. How can a person who was not involved have so clear a memory?

They, in reflecting on their vague recollections thought, "It was the senior ranking Petty Officers." "Tanabe must have been there." A mistake in their recollection or moved by propaganda brought this testimony about I think and the prejudice that the senior ranking petty officers should take the responsibility.

It is very dangerous to consider such weak and conflicting testimony as evidence, especially in this case when the charge is murder. It is insufficient.

I request that the commission will reflect and dwell upon all of the circumstances and I ask you for a fair judgment.

I am a person who absolutely believes that Tanabe, Manoru is innocent. He entered the hospital ward with fever. Who would order him to do such a thing? He was relieved of all work and in the hospital sick ward how could a patient have gone to this hill?

There is the testimony of Doctor Kanikawa who examined him and the testimony of the senior petty officer, Yoshizawa, to whom he reported. It is a clear fact that he was sick in the hospital on the day of the incident. If the prosecution is going to deny this fact he will have to produce evidence to prove it.

With the weak, conflicting and vague testimony of the abovementioned prosecution witnesses this cannot be done. I believe the prosecution has failed completely in proving the specifications in the case of Tanabe. I request that you will see the true light and find Tanabe not guilty.

Especially his home is in a pitiful state, where there is an aged father and mother. Through the efforts of his poor wife they are barely sustaining themselves. Without him it will be very difficult for them to live. I wish that you sympathize with him.

Argument in behalf of Kanikawa:

I am absolutely convinced of the innocence of Kanikawa, Hidehiro, and can argue with this conviction.

As long as Captain Taneda, who was a high ranking officer of the Fourth Naval Hospital, also the head of the first section and deputy head of the hospital is excepted from being involved in this case, all the gun fire is being concentrated on Kanikawa, who had no relationship at all in this incident, because he is the next ranking officer to Iwanami, among the defendants and was also the adjutant. This is not an unusual occurrence in this world. There is a saying in Japan, "The bigger the tree, the stronger the wind." This is what I mean.

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

Especially in this case where there are from forty to fifty persons involved, each one tries to put the blame on another person and protect himself. There are some in which it is very hard to make a distinction between who is a defendant and who is a witness. Also I believe the prosecution will admit that there are conflicting interests even among the defendants. In addition the incident took place over three years ago and no one has a clear recollection. Rumors, propaganda, plots all became mixed together and went floating around as rumors, and reappeared as testimony, this can easily be seen. This was how the testimony against Kanikawa was made up. I sincerely believe that Kamikawa had nothing to do with the incident and was not in a position to have been charged.

Kanikawa testified as follows in this court: Two or three days before the incident Captain Iwanami talked to the senior ranking officers of the hospital, who were by him, about executing prisoners,at the officers' wardroom. He did not say this to Kanikawa, but Kamikawa, thought this was a bad thing. His rank was low but as he was the adjutant he thought he should espress his opinion against this, so on the next day he said to the head of the hospita, "I wish you would reconsider and not go through with it." But the head of the hospital would not listen to him. On the day of the incident he kept away from it and stayed in his room and he absolutely did not go to the scene. He has maintained very strongly that he had nothing to do with the incident, that he had not assisted in the incident, nor had he received any orders concerning the incident and naturally was not taken into the confidence of the head of the hospital. Concerning this, the head of the hospital, Captain Iwanami, has stated that he did not give any instructions or orders nor did he take Kamikawa into his confidence before or after the incident. He has also testified that he did not see Kamikawa, at the scene. The witnesses Ota, Seiichi and Yokota, Haruo, have also testified that they did not see Kamikawa at the scene on the day of the incident. Concerning Kamikawa, Lieutenant Oishi has testified that on the day before the incident, he was told by Kamikawa what the head of the hospital had been saying, and that he had refused it. Except in this he did not confer with Kamikawa concerning the incident, nor did he receive any orders from the head of the hospital via Kamikawa, and naturally did not see Kamikawa, at the scene.

It has been clearly proved by the various witnesses that Kanikawa had nothing to do with this incident. The ten prosecution witnesses beginning with Captain Taneda have testified in ten different ways. As in the case of Captain Taneda, "While talking, Kamikawa came toward the head of the hospital room, saluted and left. Later when I told this to the head of the hospital he said, "Is that so? Then the preparations must be ready," implying that Kamikawa was involved in the preparations.

As Taneda himself has stated, he was the first person that the head of the hospital had confided in. He was the senior ranking officer next to Iwanami. He was also the head of the first section and deputy head of the hospital. If he thought about it as he has stated, why did he not stop the head of the hospital? What warnings did he give the head of the hospital? Did he try to take any steps to stop it? No! On the day of the incident he went up the hill together with the head of the hospital. Isn't he indirectly involved in this incident? If Kamikawa was involved in this incident, Taneda through his position should know what he did. Why can't he testify clearly that Kamikawa did such and was involved in this incident?

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

Concerning the facts at the top of the hill he testified as follows: "At the scene Kamikawa came toward me and said, 'Everything is all right.' So I told him the head of the hospital had said to begin and he went back to where the enlisted men were lined up. He testified in the same way, implying as in the case of the head of the hospital's room when he stated that Kamikawa saluted and left. Concerning this testimony the head of the hospital himself has testified specifically that there was no such thing. Anyone can see that the testimony of Captain Taneda is false and I for one believe this firmly.

Captain Taneda, in answer to my cross-examination answered as follows:

"Q. Did you ever tell anyone that as Kamikawa was the adjutant let us say that he was there?" He answered, "After the end of the war Kamikawa said that he did not know anything about the incident. It is not good for officers to say that they know nothing about the incident." It is not unreasonable to think that through this he knew that the adjutant did not have anything to do with the incident but for some reason or another he wanted to involve Kamikawa in the incident because he was the adjutant.

Again after the end of the war he said to Kamikawa, "Even though you may not have had anything to do with the incident, because you were the adjutant you have a responsibility. Absolutely do not say a thing about this to anyone in Japan, even though you may be killed." There is the fact that again at the branch hospital on Fefan, he asked a subordinate of his, Tanabe, "Kamikawa is saying that he was not at the scene on the day of the incident, is this true?" Tanabe, replied, "As I was sick in the hospital ward I do not know." In summarizing these facts I cannot but believe that his testimony is fabricated and that he is trying to involve Kamikawa. Who can say that the witnesses who are living together with him were not influenced by him?

The witnesses Kikuchi, Goro and Yamamoto testified that "Kamikawa and the head of the hospital came up the hill together." Taneda himself has admitted that he came up the hill together with the head of the hospital and this has been clearly testified to by the head of the hospital himself. I think the witnesses replaced Taneda with Kamikawa purposely. Yamamoto has testified that some enlisted men removed the clothing of the prisoners on the orders of Captain Taneda and that he had buried them. On the other hand Takahashi testified that Kamikawa ordered the tying up of the prisoners. Was there any testimony that confirmed this or even led us to imagine a part of the testimony that Takahashi gave? No matter where you look in the evidence brought forth by either the prosecution or the defense this cannot be found. It is the same as the testimony of the natives that Sakagami took the prisoners up the hill in the July incident - a scarlet lie which has no foundation and is in his imagination.

Commander Okamura testified that he thought he saw Kamikawa there, but he does not know by whom he was standing or whether he was speaking to some one. He also testified that he did not know how long Kamikawa was there or when he left. This shows that his memory is not clear if Kamikawa was there All he did was to state what he imagined when he said, "I think he was there."

The witness Hayakawa in reply to a question by the judge advocate said, "I faintly recall seeing his face," and this same witness replied in cross-

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Lieutenant, U.S. Navy,
Judge Advocate.

examination as follows: "When I say that I saw Lieutenant Commander Kamikawa it is as I have stated before a very faint recollection, and I do not remember where I saw him and when I saw him." Even though this it can be seen that he had no recollection of Kamikawa but that he had to testify that he was there. Again when Yamamoto, Takahashi and Hayashi testified, "It was given from the head of the hospital to Kamikawa and from Kamikawa to Oishi." They made it up so that it would seem as if it had gone through the usual line of command, everything going from the head of the hospital to the adjutant and from the adjutant to the officer of the day. But the head of the hospital and Oishi have testified that this absolutely was not true. Not only have they testified that Kamikawa did not act as a go-between but have also testified that he was not at the scene.

The head of the hospital has stated frankly, that he determined to do this regardless of anyone and without telling the enlisted men why he gave them orders, made preparations through the sailor on duty that day he had him relay the order for general assembly and that at the scene he directly ordered it and had it carried out. Why go to all the trouble and why was it necessary to go about it in the usual round about way, from the head of the hospital to the adjutant and from the adjutant to the officer of the day? The reason that Oishi was given this order was because Oishi was standing close by. The testimony of the prosecution witnesses that made up the story about the intermediary actions of the adjutant are not in accordance with the actual objective circumstances of that day. I wish that the commission will consider well the testimony of the persons connected with the incident, the objective circumstances and judge them fairly.

I bring to your attention the main points of Kamikawa's testimony.

I was demobilized in January of 1946. While I was working at the Otake minesweeping section of the Second Demobilization Section, I was suddenly called to the Otake police station from where I was sent to Sugamo prison. On the 27th of the same month I was sent down to Guam and came to be tried here. As for me this is really unexpected, and I do not understand why I came to be suspected. I have no connection with the incident at all. I think that someone imagined that I should have done such and such a thing because I had been the adjutant. This imagination developed and became a cause of the favorable settlement of this incident.

What I directly know concerning the incidents of the prisoners which is said to have taken place at the Fourth Naval Hospital at the end of July 1944 is as follows:

I recall that during a meal two or three days before the incident, Iwanami, the head of the hospital was talking to some senior officers who were sitting near him, and said, "There are some prisoners at the Forty-first Naval Guard Unit who are to be executed, I think that they bombed the hospital, so they are to be taken to the hospital here to be executed." I listened to his words without saying anything, but I thought that such a plan must not be. On the next day, when I met him near the reception room of the administration building of the hospital, I said to him, "I have heard about the idea of the execution of the prisoners at the hospital here, but I should say you are wrong to execute them and, of course, I did not resist his ideas. I only expressed my opinion which was contrary to what he was thinking feeling that it was the responsibility of the adjutant to give opinions to the commanding officer. But the head of the hospital was

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

not one to listen nor did he listen to my advice at this time. He said as if he were talking to himself, "I had better let the self defense unit do it." "It is not good either, if you let them do it." I replied, "I hope you will think it over again." and we parted without further words.

On the next day I think it was at the beginning of the afternoon work, Lieutenant Oishi approached me in front of the administration building. Thinking it would be better to inform him what the head of the hospital was intending. I told him briefly, because at that time, Lieutenant Oishi was the leader of the self defense section. That evening Lieutenant Oishi together with Lieutenant Mineto called me at my room in the officer's quarters and said, "I do not like to dispose of the prisoners of even have anything to do with them. Please tell the head of the hospital that I refuse to have anything to do with them." I told Oishi that I had also objected to the proposal of the head of the hospital and said that I therefore understood Oishi's opinion.

I recall that on the next morning when I met the head of the hospital I told him that Lieutenant Oishi also did not want to be involved in the incident. The head of the hospital left without saying anything to me.

After I had objected to the opinion of the head of the hospital he did not say anything more to me concerning the incident.

On the day of the incident, I recall that I worked as usual and that I did nothing unusual. In the morning I saw out patients and read books in the adjutant's room. In the afternoon I was in the adjutant's room working on medical statistics and some minor affairs. At that time we were busy on the work of changing the boiler and I recall that I went out to see the work. In about two hours my work was over, and I came back to my room in the officers' quarters and had a rest.

At that time I was convalescent. I had been suffering from dysentary and I had been taken care of at the contagious wards from the beginning of June. Toward that time, the enemy's forces landed on Saipan, and Truk became dangerous. So the head of the hospital allowed me to have a rest at my rooms after my work was over.

On the way to my room, I saw some petty officers and men walking toward the same direction in small groups, and I asked what they were going to do. They replied that prisoners had arrived on the hill and that they were going to see them.

I purposely avoided going up the hill and went back to my room. I wanted nothing to do with an execution. About two hours later many officers came back to the quarters and talked about the execution, I recall that I said to someone of them, I forget his name, "If the enemy comes toward me, I shall be able to fight with him because he is the enemy. But I cannot kill an enemy who is a person who cannot defend himself."

I did not like to talk about the execution after that, and I did not ask anything about it.

After the incident the air raids became more and more furious, and we were fully occupied with work every day, and the incident was forgotten.

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

At the end of the war I wat at the Umon branch hospital. Then Surgeon Captain Iwanami was ill and Surgeon Captain Taneda was acting as the head of the hospital and Surgeon Commander Okamura was assisting him. Since we were strictly forbidden to talk about the incident we could not know the real story of the incident and what had been done in the way of settlement of it even after the end of the war.

On January of 1945 I was leaving the hospital to go back to Japan when Surgeon Captain Taneda said to me, "Although you had no connection with the incident you have a responsibility for it as the adjutant. You must not speak about the incident after you arrive in Japan on any account. Don't tell it even if you are killed."

As I said above, I really had nothing to do with the incident I can affirm it before man and God with confidence. I believe there is not one bid of falsity in his testimony.

I have stated the testimony of the prosecution witnesses, the testimony of the defense witnesses and the testimony of the defendant himself. If this is summarized and judged, it is clear that the defendant is not guilty.

In other words, the fact that Kamikawa had nothing to do with the incident has been proved by Iwanami and Oishi. It has been proved by the witnesses Iwanami, Oishi, Yokota and Ota, that he was not at the scene. It has also been clearly proved by the testimony of Oishi and Iwanami that there is absolutely no truth in that Kamikawa acted as go-between, when the order was given Oishi from the head of the hospital. But the witnesses for the prosecution Taneda and the others only gave suggestive testimony which implied that Kamikawa was connected in some way with the incident. Because of the charges and specifications that the prosecution has charged, have not been proved. According to the testimony of the prosecution witnesses, if the testimony that he was at the scene is recognized, the commission of a crime cannot be determined by this, because there were over twenty officers and almost one hundred enlisted men present. Above all, the law does not recognize that Kamikawa can be found guilty of murder on such weak and unclear evidence.

The prosecution has failed completely in fulfilling its burden of proof. There are the sayings in law which are standard used in making judgment in the east and in the west. They are as follows, "The doubtful shall not be punished." "Though a thousand persons under suspicion escape, do not punish an innocent one."

I request that your honor the president of the commission and its members will find the defendant not guilty.

In particular the family of the defendant Kamikawa consists of his wife, age 28, eldest son, age 7, and daughter Junko, three years old and an aged father a family of four. The defendant's house was burned and his mother and younger sister died pitifully owing to the atomic bomb, which was dropped on Hiroshima. His wife's father and mother met a sorrowful death by the same bomb and at the same time her family house was also burned. The defendant's father is sick in bed with cerebral hemmorage. These are the pitifull conditions under which his wife is trying to support her family by herself. I ask special sympathy in this case. I request that he be released as early as possible.

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

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ARGUMENT IN BEHALF OF THE ACCUSED IWANAMI, HIROSHI.

At present when everybody has been relieved of the abnormal excitement of the desperate bloody battle field, and is enjoying peace with the cool and severe eyes of the law, one may find numerous mistakes in the behavior of the accused Iwanami. However, we must notice that a man is a child of environment. Is there anybody who does not love his fatherland? Even the A-class war criminals who are being blamed as leaders of the aggressive war did so. None of them would think that his acts violated justice and humanity.

Still more, was there a warrior who had important responsibility and duty in the frantic front, where the famous battles were being waged. He had an earnest love of his country. He even abandoned himself in order to perform the absolute order of the irresistible, powerful act of his state. He only thought to do his best in his duty. However, the outlook of battle turned against him. After defeat after defeat, he reached the verge of annihilation. In such cases, how was the state of mind of this warrior? It is far beyond imagination of those who are enjoying peace today to know.

Iwanami was not a warrior, but he was burdened with much more important responsibility than a warrior. At that time he was a commanding officer of the Fourth Naval Hospital, Truk Atoll which was an important base of the Japanese navy in the Pacific Area.

Since he arrived at the hospital, he was so earnest in his duty that he was forgetful of sleep or other comforts. He used to get up early in the morning before the ordinary enlisted men did, and he worked hard until late at night. In the terrible starvation and amidst rains of shells, he built his hospital at last. But it could accomodate only 500 to 600 patients. On account of the day and night air raids of the enemy, many persons died and suffered from illness, injury and various epidemics. In 1944, he had to accomodate more than 1,000 patients. After February 1944, especially after the fall of Saipan, air raids became very intense and brutal. They bombed not only military installations but also the hospital. Equipment of the hospital was damaged and many patients were killed or injured. Everybody was afraid that the enemy would come to attack the base. Not only the military personnel but also the non-combatants resolved to fight to the last man. The incidents in this case happened in such circumstances. I ask the commission to pay attention to the abnormal, special circumstances and psychologies of wartime when you deal with this case.

In his official position, the accused Iwanami was very loyal and strict. He might be sometimes too strict toward his subordinates but he had no lack of discipline under his command even in the unfavorable battle conditions. Everybody carried out his orders faithfully, and his duty was completely carried out.

He is confined today with his many subordinates, and is treated as a wretched prisoners. Being unable to bear the pain of confinement some of his faithful subordinates might have come to think that their commanding officer was wrong. They might have come to think that their commanding officer should be blamed for the painful lives they are leading in that confinement and they have begun to blame or accused him. I think it can not be helped.

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Lieutenant, U.S. Navy,
Judge Advocate.

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However, we must think that when he was a commanding officer of a department he had no personal motives and shared every hardship with his men. Although he was in a high, powerful position, he was never arrogant. He was so unselfish that his family is now in a very poor, miserable condition. His weak wife and daughter are working in order to make their living.

As an individual, he was a good neighbor and a kind doctor. He was filial to his parents, and was a good father and a good husband at home. I would like to cite his family condition from his letter which he gave me. I think that you will know what kind of a person Iwanami was when he was at home.

"To Mr. Akimoto:

"My family consists of my father (81 years old,) mother (72 years old,) eldest daughter (18 years old,), eldest son (16 years old) and second daughter (10 years old.) I am the eldest of seven brothers. Besides, my wife is the eldest daughter of her parents and their son died during the war. Therefore, I have a responsibility to support both of the two families.

"My parents are very old, so I took their place as the head of the family to look after our family. We had no property, and I was helping financially in their old age. My brother was studying at a university, and I had to help him in his study too. The reason why I studied in order to get the title of M.D. was that I wanted to delight my parents who were very old. When I think of my parents, I greatly regret that I have been an undutiful son.

"I received letters from my children. My eldest daughter, who is grown up said, 'When you see a twinkling star, please think that it is my eyes.' My eldest son who is studying at a middle school said, 'I wish you were with me. For I think I could learn English from you.' My second daughter who is a pupil of a primary school said, 'I forgot that you embraced me when I was five years old. Please come back again and embrace me.' When I read the letters of these pitiful children in the light of my unexpected fate, I feel as if my heart were torn to pieces.

"In order to command my tragic life of 50 years and to enjoy my later part of life, I have been working as hard as I could. I feel in a very deplorable state and am filled with deep emotion when I think of my miserable situation of today."

In order to know what kind of man Iwanami was, I would like to cite a part of his occasional notes. He wrote down what he thought and what he felt in his busy time of war, and it is a volume of 280 pages. He is a prisoner now and he thought it useless to keep it, so he burned most of it. He gave me a part of it. Of course it has no connection at all with the case, but I would like to cite just a small part of it to show his character.

"Mango"

"In an open space in front of the hospital there is a big mango tree. Its trunk is as thick so three or four men would be able to spread their arms around it. It stretches its branches and leaves so densely that it has

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Lieutenant, U.S. Navy,
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a wide, green shadow beneath it in the daytime. Patients who come to the hospital used to rest in the green shadow before they walked toward the ward. Patients often said that they felt as if they had recovered their health as soon as they entered the hospital ward. I think that they got a good impression of the hospital from this big mango tree.

"I wish I could give good impressions to others without saying many words. This is my most earnest desire.

"Once a man asked Yamamuro, Gumpei of the Salvation Army, "What is your business throughout your life?" Yamamuro answered, "It is to perfect my personality." He is a very fine, cultured person, yet he says such. I sometimes feel regretful of myself when I reflect upon myself.

"One day I bound my essay book and asked Admiral Nagumo to write something at its beginning. 'What shall I write?' he said. I replied, ' I am not a man of virtue. Culture for me is not the problem of tomorrow but of today. Will you write the following four letters?: 'Control myself and cultivate virtue.' A long time has passed since then, but I am still as I was. I am very regretful. I never sat and meditated beneath the big tree of mango, but I used to pass by the tree. Driven to my wit's end, I once appealed to the tree, saying, "If you have a sould big mango tree, will you give me instructions?", and looked up the tree. I have never felt before or after that time that the tree was really a great being.

Nagai, Kafu felt the sadness of life when he saw a hollow in a trunk of a tree. Mr. Mushakoji composed a poem in praise of beautiful humanity of the world when he saw cedars growing up side by side. I am not a writer nor a poet, but I only express my agony in the things I write down.

Iwanami was a very excellent, studious scholar as a scientific man. He says that he got a title of doctor medicine because he desired to delight his parents. But, think, he got the title immediately after he was graduated from his medical college when he was busy as a surgeon. I think that this shows his earnest desire toward his study and his prominent ability. It is admitted by many people that he contributed much for medical art on the battlefield.

However, a man who is too earnest in his scientific research is apt to fall into temptation. There is a tragedy that Dr. Kiyono, professor of the Kyoto Imperial University, who was too earnest in his research, stole a rare old book and was charged with theft. But the people sympathized with him rather than blamed him.

Okuyama and Nabetani violated military discipline but the accused Iwanami did not punish them, and participated in the dissection of the dead after the experiment. This is a big mistake in his life. Mr. Suzuki stated it with illustration of angling. I think his explanation describes Iwanami's feeling very well.

On account of the dissection he considered that he participated in the January incident, although he had nothing to do with it in fact, and he has been charged as an accomplice of Okuyama and Nabetani. It might be unavoidable under such circumstances, but I feel very sorry for him.

The accused Iwanami has given up every hope now. He has not a bit of cowardice in him. He never intends to escape from the responsibility for what he participated in. He admits the facts as they were. He will never

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

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deny his participation in the January incident, as he said in his statement. Being unable to escape from the temptation, he acted as an accomplice in the dissection which he should not have taken part in, and made specimens of the skulls. He told me what he had thought at that time as follows. I canunderstand his feeling. I beg your special consideration about it:

"My state of mind when I took part in the dissection which I should not have done.

"For three years after I was appointed to be the head of the hospital, I had no chance to treat a patient, and therefore I had no chance of dissection. Mr. Imamura, professor of the Medical Department of the Osaka University, dissected the corpse of his wife and investigated the cause of her death. The whole medical world admired his earnestness in study, while ordinary people regarded the dissection either as a disgrace to the corpse or a brutal act to cut dead bodies to pieces. Such a foolish mistaken view should be corrected by his earnestness for study which stood above his grief. I know him especially well. I not only admired what he had done but also felt keenly the importance of the dissection.

"Just at that time, Okuyama came to me and said, 'I am performing a dissection. Will you come and teach me about it?' Okuyama was a very earnest man in study, and I was very delighted when he asked my instruction. I felt a little proud of myself and went out to the dissection room where I found dead bodies of white men. As I saw them I was astonished, for their chests and bellys were already cut open. The dissection was being performed. There were surgeons and corpsmen. They were earnestly performing the dissection, and looked delighted when they saw me. I could not blame them after all.

"For a long time, I had been treating tuberculosis. In order to judge the X-ray picture of the disease accurately, one must dissect the lungs referring to the picture. That is why I had done many dissections and accumulated the knowledge and experiences of that disease. I saw dead bodies being dissected after three years interval of time. Stimulated by my thought concerning the dissection which I held at that time, I was spurred by my earnestness for research. So I answered the questions of earnest, studious Okuyama, and dissected the second corpse. Then I heard that all of the prisoners were used in experiments. I was very astonished. I recovered my reason and hurriedly quit the room.

"My state of mind when I sent the skull to a medical school.

"I read an essay on research on the skulls of Ainu in order to prove whether the Japanese are the descendants of the Ainu race (Written by Dr. Kodama, professor on dissection at the Medical Department of the Hokkaido University,) and came to have an earnest interest in the skull.

"Just at that time, when I was leaving the dissection room, Okuyama said to me, "I will cremate these corpses." In the next morning, I recalled the dissection. Since I had a great interest in the skulls, I thought it very regretful to dispose of the corpses because I might be able to know the superior quality of Americans from their skulls. The high civilization of America was built by their excellent intelligence. So I intended to send the skulls to a military medical school to show them to experts so that the superior quality of the race might be proved. I thought at that time that their superiority might depend upon marriages between different

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

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and excellent races. I desired that they would study it in order to get some suggestion of the future marriage of the Japanese race. To assume the leadership of the East, Japan must enjoy high civilization as Americans do. I thought of the future of our fatherland so earnestly that I made the specimens.

"When I reflect upon it now, I am very regretful as to why I did such silly things."

Your Honor, the President and Members of the Commission, I beg you will consider what kind of person Iwanami was in all of his activities, as an individual, as an official man and as a scientist.

Now, I would like to argue concerning each specification of the charges.

The first specification of the first charge states: "Iwanami, Hiroshi, then a surgeon captain, Imperial Japanese Navy, Commanding Officer of the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, and while so serving at the said Fourth Naval Hospital, with Okuyama, Tokikazu, deceased, then a surgeon commander, Imperial Japanese Navy, and Nabetani, Reijiro, deceased, then a surgeon lieutenant, Imperial Japanese Navy, attached to the Fourth Naval Hospital and other persons unknown, did, at Dublon Island, Truk Atoll, on or about 30 January 1944, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, injure, infect and kill, by experimenting with injections of virulent bacteria, with exposures to shock and with other methods, the exact nature and character of which to the relator are unknown, six (6) American Prisoners of War, names to the relator unknown, then and there held captive by the armed forces of Japan, this in violation of the law and customs of war."

The accused Iwanami strenuously denies this alleged fact. This incident was performed by Okuyama, Nabetani and Nakamura, and the accused had nothing to do with it.

The beginning of this incident was when Commander Okuyama communicated with Lieutenant Hasegawa, surgeon of the Forty-first Naval Guard Unit and told Iwanami that they went to perform a physical examination on the prisoners. At that time, Okuyama was studying the relation between physical strength and food, and he himself was practicing eating two meals a day. According to his opinion, any grasses that can be eaten by a horse are edible for men. He stated that a man can maintain his physical strength by eating grasses alone and he collected many kinds of grasses in his room. Iwanami once read his essay. It was really worth reading, and he payed certain respect to him. It was Okuyama who told him that he wanted to examine the prisoners, so the accused, Iwanami, had no suspicion about that and gave tacit consent to him.

At 7 a.m. on the day before the incident, Okuyama and Hasegawa came to my room at the hospital and Okuyama said, "I am going to examine tomorrow the blood pressure and the physical condition of the prisoners at the dispensary of the Forty-first Naval Guard Unit." I asked him whether he would go there alone, and he replied that he would take Nakamura with him. Then Okuyama and Hasegawa were talking about something on the veranda of the office of the head of the hospital, and I went out to visit Rear Admiral Wakabayashi who was sick at that time.

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JAMES P. KENNY
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Judge Advocate.

In the morning of the day of the incident, he said to me that he wanted to take a dentist with him as he would examine their teeth too. At that time, all the cars of the hospital were out of order except mine, and besides the fuel was very short. So I went to visit Wakabayashi, took them in my car to the Guard Unit. (Wakabayashi's ward was on the way to the Guard Unit.) I got out of the car in front of the gate of the Guard Unit. As I had never seen the dispensary of the Guard Unit, I intended to see it once, so I went with them.

Okuyama and other persons entered a room, which was not the dispensary but a recreation room according to my recollection at that time. As I entered, I saw eight prisoners, one of whom was a black man. Around the center of the prisoners, there was Lieutenant Hasegawa. As soon as we entered there our breakfast was served. It was about eight o'clock in the morning. I talked with Okuyama and Hasegawa and said that the ordinary meal for enlisted men would not fit for these persons. After the meal, Okuyama said to me that he was going to do a blood examination. I saw a young surgeon near me. As I had long experience in blood examination, I wanted to teach him how to do it. I said, "Only a small amount of blood is necessary. You must pay attention to as not to cause them pain. Do like this." So saying, I took some blood from the ear of a prisoner and gave an example to him. Then Okuyama told me that he wanted to examine them as he came to them. So I advised him, looking at four blood test instruments which were on the desk, that he had better examine them four by four according to order. Then I left the room to visit Rear Admiral Wakabayashi. I was in the dispensary about twenty minutes and I had no connection with the incident except that. I did not see Captain Tanaka nor did I contact him for the use of the dispensary.

I think that this statement is worth believing.

Four witnesses of the prosecution took the stand concerning this point, and I would like to examine their testimony. I shall point out the testimony of Captain Tanaka, Surgeon Lieutenant Hasegawa, Surgeon Lieutenant Nakamura, Commander Iino and the accused Iwanami and compare them with one another.

Before referring to their testimony, I think it is necessary to consider the position of these witnesses in the incident.

First: Surgeon Lieutenant Hasegawa is not charged in this case. But there are many suspicious points about him for which he might be charged. He is not on any account a third person in this incident. In order to be exempted from being charged, he was very busy defending himself. Anyone can imagine this from his testimony.

Second: Surgeon Lieutenant Nakamura was a person who was concerned in the incident. He was a surgeon under the command of Okuyama, and he himself has testified that he participated in the incident by the order of Okuyama. The first specification of the first charge states: "with Okuyama, Tokikawa, Nabetani, Roijiro, and others unknown....." It is now clear that "others unknown" is Surgeon Lieutenant Nakamura, Shigeyoshi. At the time of the investigation, Nakamura was not located. Although it was admitted that Nakamura was a conspirator of the crime, they could not charge him, and so he was not included among the accused. However, Nakamura appeared after the charges were served. If the judge advocate could have found that Nakamura had not committed a crime, he should have

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stricken out "others unknown" from the charges. But the judge advocate did not do that. I think that is because he admitted the guilt of Nakamura. The judge advocate held back from charging him and let him stand as a prosecution's witness. I firmly believe this. I think that no one will object to this belief of mine. Could Nakamura tell the truth under such circumstances? If he was not a foolish man, he would naturally have thought that he would immediately be charged when he told the truth. Then, in distress, he testified that he had only kept the record. In the case of Sakagami, which I argued before, he confessed that he injected the prisoners, but made an excuse that he injected a proper amount of morphine in order to remove the pain of the prisoner. To the cross-examination of the defense, he testified assuming innocence that he did not know how much morphine is necessary for a man to die. Thus he tried to shift his responsibility onto the shoulders of Sakagami. I think anybody can guess this. Concerning Iwanami, he testified in the same way. He committed suicide when he was under cross-examination on the day when he testified against the accused. I hope that the commission will judge what the cause of his suicide is.

I cannot place my confidence in such testimony. Besides, there are numerous inconsistencies and suspicions in his testimony. I beg your careful consideration upon this point.

1. Captain Tanaka, Masaharu, prosecution's witness.

Q. Did you have any conversation with Iwanami concerning the prisoners?
A. Iwanami came to visit me once. When he visited me I talked with him on the veranda of my quarters. At this time he said to me, "I would like to use the prisoners for experiments, and I told him the handling of prisoners is a grave matter. He again stated that these were for the sake of the Japanese navy, and that "I will cause you no trouble." But I refused it again.

Q. Did he say, "Lend me prisoners for experiments?" and did he say where to perform these experiments?
A. No.

Q. Did he make any request for the use of the dispensary at the Guard Unit?
A. No.

(Cross-examined by the accused.)

Q. Then what you testified to regarding experiments at your own dispensary is only hearsay?
A. It is only what I heard.

2. Surgeon Lieutenant Hasegawa, Tomio, prosecution's witness.

Q. Did you ever talk with Iwanami and Okuyama at the hospital concerning the prisoners (except those who were given operations by Hasegawa?
A. Yes. It was in January 1944, about one week after I had received operation of my foot. I was resting at the veranda of the officers' quarters when Executive Officer Nakase told me that the commanding officer was calling me. I went to the Commanding Officer's room where I saw Iwanami and Okuyama. They said to me, "I hear that there are eight prisoners of war at the guard unit. We want to use it for experiments. We also want

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to use some building of the guard unit for the experiment. Concerning the experiments we have already been given permission the highest authority and the understanding of Commanding Officer Tanaka. Will you lend me a part of the building of the guard unit for it?" I said, "I can not give you the answer before I receive permission from Chief Surgeon Iino," but they said, "We have already talked it with Iino and he understood it." Okuyama said, "As soon as we finish the experiments we will cut the prisoners" and he showed how to cut them with his hands. Most part of these negotiations were spoken by Okuyama. After the talk was over, I came back to the dispensary and moved the patients of the isolation ward to another place. In the evening, I telephoned to Iino, but I could not call him. I recalled that Iino had an understanding about it, so I determined to telephone him next morning and returned to my quarters. Then after it was dark, about eight p.m., an enlisted man of the reception room came to me with a paper on which the names of the eight prisoners were written in English. I moved them from their place of confinement to the dispensary. Since I operated on one of them and he was in the dispensary, the prisoners I moved were seven. Early in the next morning, I called Iino by phone and reported it. But he said he knew nothing about such a thing. I was very confused and ran to the dispensary. I intended to stop the experiments if they had not yet begun. But I heard at the reception room that the experiments already began. It was too late. So I went out to visit the patients. After I finished my sick call, I went to the dispensary to greet them when I saw Iwanami, Okuyama, Nabetani and Nakamura. (Then he referred to the experiments performed by Okuyama and Nabetani.)

Q. On the next day, when the experiments were over, did you meet the officers of the hospital?

A. The head of the hospital said to me through the window, "I'll go back to the hospital since the experiments are over."

(Cross-examination by the accused.)

Q. You testified that you saw Iwanami, Okuyama, Nabetani, and Nakamura at the dispensary. But isn't it true that Iwanami left the dispensary shortly after he arrived?

A. It is true that Iwanami left there shortly after he arrived. He said that he was going to do sick call in other places.

Q. Then is it true that the head of the hospital did not take part in the experiments?

A. It is true.

Q. You testified that the head of the hospital said to you through the window, "I will go back to the hospital since the experiments are over." Is that true?

A. This morning, I testified that he was the head of the hospital, but I do not remember exactly whether it was Iwanami or Okuyama. Although I testified such this morning, I am not certain about it. Please ask other witnesses about it.

Q. You testified that Iwanami and Okuyama talked with Captain Tanaka. Which of Iwanami and Okuyama talked with Tanaka?

A. I do not remember who talked with Tanaka. But Okuyama spoke most part of the conversation.

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Q. Who said the following: "I received the permission from the highest authority, the understanding from Captain Tanaka and Chief Surgeon Iino."?

A. I do not remember exactly.

Q. Did you report to Iino about the experiment after that?

A. I telephoned him about it beforehand. About five days or one week after the experiment when I met him at the officers' quarters I reported to him that the experiments were over.

(Reexamination)

Q. (Showing Hasegawa's statement which he wrote at the Sugamo prison and pointed out incorsistencies in his testimony.)

A. As the incident happened years ago, I cannot recall who it was. At that time I thought it was the head of the hospital, but now I am not certain whether it was the head of the hospital or Okuyama. The more I think about it, the less I am certain about it.

3. Commander Surgeon Iino, Shizuo.

(Direct examination by the judge advocate)

Q. Did you ever talk with Hasegawa concerning the use of the dispensary by the officers of the hospital?

A. I did. I cannot recall the date. He said to me that the officers of the Fourth Naval Hospital wanted to use the dispensary for the physical examination of the prisoners. I was surprised and said to him, "You must not allow them to do so. Let them leave.", and I prohibited him to participate in such a thing.

4. Surgeon Lieutenant Nakamura, Shigeyoshi.

(Direct examination by the judge advocate)

A. I was a surgeon and was under the command of Commander Okuyama. I was ordered by Okuyama to keep a record of the physical examination. When I received the order, there was only Okuyama and I there.

Q. Tell about the conversation between you and Okuyama.

A. Okuyama said to me that experiments concerning shock and bacteria would be held at the Guard Unit.

Q. What kind of experiments were done?

A. Experiments on pulse, blood pressure and blood were done. The head of the hospital set a good example of the test.

Q. After the test was over, what happened?

A. The head of the hospital divided them into two groups of four prisoners each then he went to the next room. I think he was there about two hours. It is true that Iwanami was not in Okuyama's room.

Q. Did Okuyama report to the head of the hospital?

A. I think he did. It was on the next day and I recall that he reported the death of the two prisoners.

(Cross-examination)

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Q. You testified that the head of the hospital set a good example of the test. What kind of test was it?
A. He took small amount of blood from the ears of a prisoner.

Q. You testified that the head of the hospital went to Nabetani's room which was the next one. How did you know that?
A. (He could not answer. He was wa ned again and again by the President but kept silence for more than ten minutes and at last he testified) I heard his footsteps.

Q. You testified that Iwanami was in the next room for two hours. How did you know that?
A. (He could not answer, and did not speak for a long time. He was warned and at last testified) I saw him leaving.

Q. Wher did you see it?
A. (He did not answer for a few minutes and at last answered) I saw at the Forty-first Naval Guard Unit.

5. Captain Iwanami, Hiroshi.

(Direct examination by the accused)

Q. Tell about the prisoners you saw at the Guard Unit on 20 January 1944.
A. When I was glancing at the documents at the room of the head of the hospital, Commander Okuyama suddenly came to my room and said, "I am going to examine the physical condition of the prisoners at the Guard Unit." Okuyama used to advocate his two meals principle, and study about edible grasses. He was such an earnest, studious person that I thought it was a usual physical examination and had no suspicion about that. On the next day when I was going to make a sick call to Rear Admiral Wakabayashi, I said to him, "I'll take you to the Guard Unit." In the morning I took Okuyama, Nakamura and a dentist in my car and we got out of the car at the gate of the Guard Unit. I intended to see inside of the Guard Unit, so I went with them. They entered the recreation room and I did so too. In the room, I saw eight prisoners and Surgeon Lieutenant Hasegawa was by them. In the meantime their meals were served. I talked with Hasegawa and Okuyama, "They will be unable to eat enlisted men's meals." Then Okuyama told me that he would do a blood test. As I had had a long experience concerning the blood test I wanted to show how to do it to a surgeon among us. "You must take their blood like this," so saying, I took a small amount of blood from an ear of a prisoner and set the example. Then I made a sick call to Wakabayashi's quarters. So I was at the guard unit only for twenty minutes.

Q. Did you divide the prisoners into two groups of four each?
A. No, I did not. At that time Okuyama disinfected the ear of a prisoners who was at the furthest end. As I saw four blood test implements on the desk and I advised them, "You had better test them four by four systematically, and then I left.

Q. Did you meet Captain Tanaka?
A. Captain Tanaka once came to the Fourth Naval Hospital when he suffered from stomach disease, and I introduced him to the chief of the internal ward. That is the only time I met him.

Q. Did you ever visit him at the commanding officers' room of the guard unit?
A. No. CERTIFIED TO BE A TRUE COPY

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Q. Did you tell Hasegawa that you received the permission of the highest authority concerning the experiments?
A. No. I never asked for such permission, nor liaisoned about it. I am a head of a department and used to advocate the strict maintenance of military discipline. So I could not do like that.

Q. Did you ever talk with Hasegawa and Okuyama in Tanaka's room in his presence?
A. No. I never went to his room.

First of all, let us point out discrepancies and inconsistencies between Tanaka's and Hasegawa's testimony.

Captain Tanaka testified: Iwanami visited him once. He said to him (Tanaka) that he wanted to examine prisoners for the sake of the Japanese navy. But Tanaka refused it saying, "Handling of prisoners is a grave matter." There was no such talk as, "I want to use the prisoners for experiments" or ".....do it at such and such a place." Iwanami did not say that he wanted to do it at the Forty-first Naval Guard Unit. And what Tanaka testified regarding the experiments is only what he heard.

Surgeon Lieutenant Hasegawa testified: Iwanami and Okuyama said to Hasegawa in the presence of Captain Tanaka, "We want to use eight prisoners of the guard unit for the experiments. We also want to have some place in the guard unit for the experiments. As to the experiments, we have received the permission of the highest authority and the admission of Captain Tanaka." Captain Tanaka did not say anything. I thought that Chief Surgeon Iino gave permission for it, so I lent them a part of the dispensary.

Although surgeon Hasegawa might not know how to handle the prisoners, Captain Tanaka had to know it. I think that Tanaka's testimony, "Handling of prisoners is a grave matter," is credible. Then how could Tanaka keep silence when they said in his presence that they had received admission from him? It is clear that the testimony of Hasegawa is false.

As to this point, Iwanami testified that he met Tanaka only once when Tanaka came to the hospital to cure his stomach disease and that he introduced Tanaka to the chief of the internal ward. He also testified that he did not visit Tanaka's room at all. Therefore, it is doubtful whether it was Iwanami or another person who met Tanaka. Tanaka served on Truk only for 58 days. He was sent back to Japan since he was thought to decrepit to be equal to his duty. So he was only thirty-odd days on Truk at the time of the incident. Besides, he is a very old man. We cannot think that he can clearly recall the events which happened three years ago. It might be Okuyama, not Iwanami who met Tanaka. I am afraid that he confused Iwanami with Okuyama.

Even Surgeon Lieutenant Hasegawa testified to the cross-examination of the defense counsel: "Q. You testified that Iwanami and Okuyama talked with you in the presence of Captain Tanaka. Who, Iwanami or Okuyama spoke to you? A. I do not remember who spoke to me. But I recall that Okuyama talked most part of the conversation. To the question: "Who said, I received the permission from the highest authority and admissions from Captain Tanaka and Chief Surgeon Iino?" He answered, "I do not remember exactly." His testimony concerning Iwanami is too vague to be placed in confidence. I conclude that the testimony of Iwanami is the truth.

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Especially Hasegawa testified: Someone said to me, "I received the permission from the highest authority and permission from Captain Tanaka and Chief Surgeon Iino." I trusted his words and began the preparation at once. I telephoned Iino in that evening, but I could not call him on the phone, so I telephoned him again in the next morning. But Iino said to me, "I did not give such permission," and I was confused. I ran to the dispensary to stop the experiments before it would begin. But I heard at the reception that the experiments had already begun. It was too late. So I went out for sick call.

This testimony is most ridiculous. No one will trust such child's play. I believe that the judge advocate himself will not trust it.

Hasegawa is not a child, not ten or 15 years old. He is a surgeon lieutenant. Iino was chief surgeon of both the Fourth Naval Base and the Forty-first Naval Guard Unit, and was not at the guard unit. Therefore, Hasegawa was, in reality, the responsible person in the guard unit. He was in such a responsible position, yet he trusted the words of the officer of the hospital, "I received the permission," and did not inform Iino by telephone until the next morning. Iino used to visit the guard unit once or twice a week, but he did not report the experiments until ten days after that. No one can justify what he did. It may be funny to say he was confused by the next morning's telephone call with Iino and ran to the dispensary to stop the experiment before it would begin, but when he heard that the experiments had already begun he went out for sick call without entering the dispensary. This is most inexcusable. I cannot help thinking about how his state of mind was. If his words were true, he would have entered the dispensary and stopped the experiments according to the intention of Iino. Probably they were doing blood tests at that time, if the experiment had begun. He could have checked the experiment before it grew serious.

But he did not stop it. Even without entering the dispensary, he went out for sick call. Those who are in a normal state of mind cannot understand what he did.

Besides, according to the testimony of Iwanami, Hasegawa was in the room with the eight prisoners when Iwanami and other officers arrived at the dispensary, and then the prisoners meal was served. Your Honor, the President and Members of the Commission, I hope you will give a reasonable judgment as to which of them is true.

Witness Hasegawa testified to the cross-examination of the defense counsel, "It is certain that Iwanami left immediately after he arrived. He said that he had to visit a patient." In this point, both Iwanami's and Hasegawa's testimony coincides. But there is a difference as to what time it was. Iwanami said that he arrived at the guard unit about eight a.m., and left there about twenty minutes after that to visit Wakabayashi. While Hasegawa said that he entered the dispensary after his sick call and it was about 10 a.m.

Then, Hasegawa's testimony that he ran to the dispensary to stop the experiments but heheard at the reception that the experiments had already begun and he went out for sick call is not true. He was in the room at the dispensary. Because he testified, "It is certain that Iwanami left shortly after he arrived. He said that he had to visit a patient." Then the defense counsel asked, "Then it is true that Iwanami did not participate in the experiment on that day?" He answered, "It is true." These numerous facts prove that the testimony of Iwanami is true.

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Hasegawa answered to the direct examination of the judge advocate, "On the next day, the head of the hospital said to me through the window that the experiment was over and that he was leaving." Concerning this testimony, the accused cross-examined in order to clear the point, and he said, "I testified this morning that it was the head of the hospital. But I am not sure whether it was the head of the hospital or Okuyama. Although I testified like that this morning, I am not certain as to that point. I hope you will ask about that to other witnesses." From this testimony, you can see that what he said against Iwanami is incredible.

As I have stated, both Tanaka and Hasegawa's testimony cannot prove that Iwanami had any connection with this incident. On the contrary, it is likely to give an impression that Iwanami had nothing to do with the incident.

The judge advocate again examined the witness Hasegawa by showing his statement written at the Sugamo prison. Then Hasegawa testified: "Since it happened years ago, I cannot recall what it was. At that time I thought it was Iwanami. But now I am not sure whether it was Iwanami or Okuyama. The more I think about it the less I can recall it." I think this might be his true voice.

Can such weak, vague testimony prove the alleged facts against the accused Iwanami? Certainly, they cannot.

I would like to examine the testimony of Nakamura, next.

What Nakamura testified to the direct examination of the judge advocate are as follows:

1. The head of the hospital did a skillful test.
2. The head of the hospital divided the prisoners in two groups of four each.
3. I think that the head of the hospital went to the next room where Nabetani was. I think that he stayed there about two hours.
4. I think that Okuyama reported the experiment to the head of the hospital on the next day.

He also testified to the cross-examination of the defense counsel as follows:

1. Skillful test means to take a small amount of blood from a prisoner's ear.
2. As you noticed he could not answer the question concerning the fact that Iwanami went to the next room. After he was warned again and again by the President, he answered at last, "I think that I heard his footsteps."
3. He could not explain that Iwanami was in the next room for two hours. He was also warned and said gasping, "I saw that he went out."
4. He could not answer the question, "Then where did you see him?" He kept a long silence till at last he answered, "I saw him at the Forty-first Guard Unit.

I think that the commission will remember this funny answer.

As I stated before, Nakamura was one of the conspirators of Okuyama and is alleged in the charge. I believe that he gave false testimony in order to escape from being accused and that he tried to tune himself with the judge advocate.

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Considering all or any testimony of the above witnesses of the prosecution, the first specification of the first charge against Iwanami is not proved. The judge advocate failed to prove it except that Iwanami made a skillful test by taking blood from a prisoner's ear. I am convinced that he should naturally be acquitted as to this point. Iwanami, the accused, should naturally be found not guilty of this charge.

The second specification of the first charge states: Iwanami, Hiroshi, then a surgeon captain, Imperial Japanese Navy, commanding officer of the Fourth Naval Hospital, and Sakagami, Shinji, then a warrant officer, Imperial Japanese Navy, acting with Okuyama, Tokikazu, and others unknown, did, at Dublon Island, Truk Atoll, Caroline Islands, on or about 1 February 1944, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, injure, blast and kill, by explosions of dynamite and strangulation two (2) American Prisoners of War, then and there held captive by the Armed forces of Japan, this in violation of the laws and customs of war.

As to this alleged fact, I have already stated the innocence of the accused Sakagami in my argument. But has Iwanami any connection with this incident? Iwanami had really nothing to do with this alleged fact. It is hard for me to understand why this specification was served against Iwanami. Besides, the judge advocate did not prove anything as to what Iwanami did in this alleged fact. I suppose that the judge advocate might think that this alleged fact has a connection with the fact alleged in the first specification of the first charge. As I have explained in detail, I proved that Iwanami had nothing to do in the alleged fact of the first specification of the first charge. If the judge advocate maintains that there is some relation between these two alleged facts, I shall apply what I have stated before in order to prove the innocence of the accused Iwanami. But in any point of the alleged fact of this specification, I cannot find any relation with the alleged fact of the first specification. The reason Iwanami was accused in this specification is hard to understand.

After all, the accused Iwanami had nothing to do with the alleged fact of this specification. I maintain that this alleged fact is groundless. Since the judge advocate proved nothing about what Iwanami did in this alleged fact, I think it is unnecessary to argue any further. I think that the accused Iwanami should naturally be acquitted from the second specification of the first charge.

It is stated in specification three of charge one that: "In that Iwanami, Hiroshi, then a Surgeon Captain, Imperial Japanese Navy, Commanding Officer of the Fourth Naval Hospital and Chief Surgeon of the Fourth Fleet, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, Kamikawa, Hidehiro, then a surgeon lieutenant, Imperial Japanese Navy, Oishi, Tetsuo, then a surgeon lieutenant, Imperial Japanese Navy, Asamura, Shunpei, then an ensign, Imperial Japanese Navy, Yoshizawa, Kensaburo, then a corpsman chief petty officer, Imperial Japanese Navy, Homma, Hachiro, then a corpsman chief petty officer, Imperial Japanese Navy, Watanabe, Mitsuo, then a paymaster chief petty officer, Imperial Japanese Navy, Tanabe, Mamoru, then a corpsman chief petty officer, Imperial Japanese Navy, Mukai, Yoshihisa, then a corpsman chief petty officer, Imperial Japanese Navy, Kawashima, Tatsusaburo, then a corpsman petty officer first class, Imperial Japanese Navy, Sawada, Tsuneo, then a paymaster petty officer first class, Imperial Japanese Navy, Tanaka, Tokunosuke, then a corpsman petty officer first class, Imperial Japanese Navy, Namatame, Kazuo, then a corpsman petty officer second class, Takaishi, Susumu, then a corpsman petty officer first class, Imperial Japanese Navy, Akabori, Toichiro, then a corpsman petty officer second class, Imperial Japanese Navy, Kuwabara, Hiroyuke, then a corpsman petty officer second class

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Imperial Japanese Navy, Tsutsui, Kisaburo, then a corpsman petty officer second class, Imperial Japanese Navy, Mitsuhashi, Kichigoro, then a corpsman petty officer second class, Imperial Japanese Navy, all attached to and serving at the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, at Dublon Island, Truk Atoll, Caroline Islands, and others to the relator unknown, did, each and together, on or about 20 July 1944, at Dublon Island, Truk Atoll, Caroline Islands, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike and kill, by bayoneting with fixed bayonets, spearing with spears, and by beheading with swords, two (2) American Prisoners of War, names to the relator unknown, both then and there held captive by the armed forces of Japan, this in violation of the law and customs of war.

The defendant Iwanami, has frankly admitted the facts of his acts which concerned him, other than that which related to criminal intent and that he conspired with others. As is stated in his statement which reads as follows: It is I who am to blame for the July incident. I could not bear to see my hospital which I established after hard exertion after my arrival broken to pieces and many patients killed or suffering from injury. I became indignant especially because the bombing was done by the United States which I had admired as a country of humanity. I thought it was righteous and lawful as a method of warning in order to resist these unlawful bombings to protect the sacredness of the Red Cross. However, when I reflect upon it now, in a state of calmness, everything seems to me like a dream and every act I did was based upon mistaken views of righteous. Indeed, I did wrong things. I regret it so much.

This honest but mistaken belief of mine has brought about a grave result today. I have never expected that my many loving, fine subordinates should be brought to this court room under the disgraceful name of "war criminal" and that they should suffer from hard mental and physical pain which are much more serious than the ones that they had experienced during the war. As a man responsible for that, everyday and night I think what words I shall say to them to beg their pardon for my fault.

They were forced to assemble without knowing anything about the incident. They were compulsorily ordered by me to hold a bayonet or a spear and act in accordance with my absolute orders. These subordinates were indeed, nothing but instruments.

Two years have gone by since the end of the war. Still they cannot go home and must live their days in confinement as war criminals. Thinking of their situation and feelings, I feel as if my heart were torn to pieces. Thinking of the grief of their families, I keenly feel and I have already suffered a thousand deaths. This has a close connection with his motive and objective circumstances at that time. I think I will have to discuss those.

Concerning his motive Iwanami has stated as follows: After I entered the navy, I went to America several times. I saw the conditions of the country and I was struck with admiration on the following points; the high degree of education and excellent public institutions and I respected them greatly for it. In everyday life I was always praising America that it was a fine and civilized country. We were unlawfully bombed several times,

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but as it was in the night or early in the morning I took it as being a mistake. I did not think that they had wilfully bombed the hospital which was clearly marked with the Red Cross. The furious bombing on the 13th of July, was in the morning about nine o'clock, and as it was a clear day, they could not possibly have missed seeing the clear markings of the hospital. In the face of this four 250 kilogram bombs were dropped on the hospital and the hospital that I had worked so hard to complete, being completely demolished in front of my eyes and seeing many of the 1200 patients of the hospital being killed, (there were some who were buried alive.) and the patients sickness turning for the worse, I could not help but believe that the many bombings since February of this year were planned and unlawful bombings.

Again when I thought of the crucial conditions on Saipan and in Japan, I became very angry. I was all the more angry because it was America who had done this, a country that I had respected. I thought I should give them a warning concerning the Red Cross. Just at this time I heard from Commander Ueno, head medical officer of the Forty-first Naval Guard Unit, that there were prisoners to be executed at the guard unit, naturally I thought all of the procedure concerning them was over. I thought, "If they are prisoners to be executed, I would have them handed over to the hospital and executed here. It will act as a method of warning to America. Concerning this point the witness Surgeon Commander Ueno testified, "It was the first of July when I talked with Captain Iwanami, concerning prisoners. At this time there were no prisoners at the Forty-first Naval Guard Unit." At first he testified to the judge advocate that, "At this time Captain Iwanami said, 'I want you to do some research on the kidneys.' I replied that I did not have the experience and refused." In reply to questions by the defense counsel he replied, "At this time as there were no prisoners at the Forty-first Naval Guard Unit, I did not reply." This testimony itself is not only conflicting, but it is nonsense that a person would ask research done on prisoners when there were no prisoners. Ueno is a person who is charged as a defendant in the next trial. I think it can be seen that according to how he testifies it relates directly to his specifications in the next case and therefore he cannot state the truth.

Commander Ueno testified as follows: "In the middle of July, two prisoners were handed over to the Forty-first Naval Guard Unit from the army. On the next day by the order of the executive officer, Nakase, to ask the Fourth Naval Hospital if they needed any prisoners, I telephoned the hospital, but as the head of the hospital could not be connected by phone I did not hear his answer." This statement clearly supports the truth of Iwanami's statement. Isn't it perfectly natural that Ueno, who was ordered by the executive officer of the guard unit to telephone the hospital and ask if the needed any prisoners tell this to Captain Iwanami after he had telephoned. As long as it was asked, "Do you want any prisoners," it is the truth when Iwanami stated, "I thought they were to be executed and all the procedure concerning the execution of the prisoners was over." It is not unreasonable that a person who is a doctor and does not have any knowledge of law believe this. It is not against reason that he thought that he was executing the prisoners in place of the guard unit and that it was not unlawful. Therefore, I think as an ordinary person, it was natural for him to think that under the objective circumstances, as he stated before, that he was allowed to do this by law. But, if Iwanami had had a little more knowledge of law and had been a little calmer, he would have known that he should not do this. He was very excited, as stated before and in the above circumstances, this might be possible. I feel very sorry for him.

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

Therefore, in that he made a mistake in not recognizing the unlawfulness of the act, it cannot be helped to be called to account for what he did from the cold,hard standpoint of law, but it is not unreasonable that it can be judged that he had no criminal intent to murder because of the objective circumstances, and the subjective state of mind to which he was a prey. Although we may not be able to deny that there was a mistake in not recognizing the unlawfulness it is clear that he did not have the criminal intent to murder. The crime of manslaughter is not the same crime as murder. On this point it is unlawful to charge him with murder in specification three of charge one. If he is to be charged with manslaughter that is different, I am absolutely against charging him in this case on a charge of murder.

I wish the commission will give profound thought to the motive of Iwanami, and to the volunteered words of the Forty-first Naval Guard Unit executive officer, that, "There are prisoners to be executed, do you want them?" and that he had ample reason to believe that all procedure for their execution had been completed. I wish deep consideration to be given on the point that the defendant absolutely did not have the criminal intent to murder.

The first specification of the second charge states: "Iwanami, Hiroshi, then a surgeon captain, Imperial Japanese Navy, commanding officer of the Fourth Naval Hospital,....., did on or about 30 January 1944,..... unlawfully disregard and fail to discharge his duty as the commanding officer of the Fourth Naval Hospital to control the operations of members of this command, and persons subject to his control and supervision, namely, Okuyama, Tokikazu, deceased, then a surgeon commander, Imperial Japanese Navy, attached to the Fourth Naval Hospital and Nabetani, Reijiro, deceased, then a surgeon lieutenant, Imperial Japanese Navy, attached to the Fourth Naval Hospital, and others unknown, permitting them the aforesaid persons and persons unknown, to kill unlawfully and cause to be killed unlawfully, on or about 30 January 1944, at Dublon Island, Truk Atoll, Caroline Islands, with medical and other experiments, six (6) American prisoners of war, names to the relator unknown, then and there held captive by the armed forces of Japan at said Atoll, this in violation of the law and customs of war."

This specification alleges the accused with the crime of neglect of duty which is punished by the present war crimes trial.

But the charge of neglect of duty is permissible only when the accused is not alleged with Toterschaft or principal offense.

So far as the accused is charged with his principal offense, all his acts are included in his principal offense. Permission, acquiescence, or disregard by mistake are all included in his principal crime. They are only a part of his principal crime, and so all these acts should be alleged together. This is a principle in criminal procedure. These acts are steps in the principal offense. They are naturally one act as a whole. and do not constitute separate offenses. This is the fundamental nature of a principal crime.

If the first specification of the first charge accused Iwanami, Hiroshi as a joint principal of the alleged fact, to charge him again in this paragraph with neglect of duty is not only a mistake in the criminal procedure but also an illegal, improper misunderstanding of the nature of the principal offense. I feel that the accused should be acquitted for the charge of neglect of duty even before judging the alleged fact. Therefore though I feel that it is unnecessary to argue for the alleged fact of this charge, I will argue for caution's sake.

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

As I have minutely argued about the alleged fact against Commander Okuyama, Lieutenant Nabetani and others unknown in the first specification of the first charge, Iwanami had nothing to do with this alleged fact. Iwanami did not know that these acts were performed, so he has no responsibility for these acts. As I have argued in detail concerning this alleged fact, I will not repeat it again in this paragraph. In this case, it is the point whether Iwanami was burdened with criminal responsibility or not on the ground that he was the commanding officer of the hospital, that is, he was in an administrative position to control and supervise these persons. It is very doubtful if such allegation is permissible as a principle of criminal law.

It is of course possible to accuse him as far as administrative responsibility irrespective of whether he knew it or not and impose upon him administrative punishments such as official reprimand, dismissal from office, etc. This kind of administrative punishment has been adopted in every country of the world. But in order to accuse him of criminal responsibility, it is necessary that his act constitutes a crime when we observe them according to the prinsiples of the criminal law. But someone says that in the present war crimes trials, failure to discharge administrative responsibility is charged as failure to discharge criminal responsibility is punished. Someone condemned this way of punishment as a violation of the principle of the criminal law. I have not actually seen each war crimes trial which is now being held, but I believe that, even in any war crimes trial, the country with the highest civilization will not impose punishments by violating the principles of criminal law. Some acts look like failure to discharge administrative responsibility in external aspect, but they are in reality the ones to discharge criminal responsibility. I believe that they are punishable in such a case.

Then in what cases is neglect of administrative duty charged for its criminal responsibility? I will enumerate them as follows:

1. Commission by non-commission.

As Wachenfeld stated, this is a commission of crime by making use of so-called other causes. When a man who has a legal duty under concrete circumstances to perform a positive action, does not carry it out and lets it go by making use of physical causes of others or other persons, he is naturally responsible for the result of the action from a social point of view, because he made use of others to perform the action by his non-commission. In this case, if a crime is committed by these other persons, the person who did not perform his duty should have the criminal responsibility for the crime.

Now let us consider this case. If Iwanami had a responsibility to control Okuyama, Nabetani and others unknown, and if he gave tacit consent knowing their criminal acts and intent and let them do it, he should naturally be accused of the responsibility. But as I have argued as to the first specification of the first charge, there was no understanding between Iwanami and Okuyama, Nabetani and others unknown, Iwanami know nothing about it at the time of its commission. Besides the judge advocate did not give positive proof concerning this point. Under such circumstances, it is not permissible to accused Iwanami of the criminal responsibility, although it is permissible to accuse him of administrative responsibility.

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

2. Action caused by a grave mistake.

This is when a person, who has a responsibility to prevent a certain action of others, neglects to prevent it by his carelessness, knowing a part of the action and knowing that the action will cause a certain result, and caused a criminal action. As a principle, mistake is based upon ignorance of fact. But in this case, he knows a part of the fact and could expect a certain result by his knowledge, but he fails to expect it by his carelessness. Abstractly speaking, the standard of the power of carefulness is that of an ordinary careful person, but more specifically it is an established theory that the standard should be determined according to the degree of carefulness appropriate in the specific situation of the man who did the act. Therefore, if a person who is responsible for preventing such an action failed to discharge his duty through carelessness which is thought proper for ordinary persons and causes a certain crime, he must be responsible for it.

As I have argued in detail in my argument concerning the first specification of the first charge, Iwanami knew at that time that Okuyama was intending to perform a physical examination of the prisoners. Iwanami believed that the physical examination consisted of a blood test and examination of the blood pressure. After he took them to the guard unit, he taught a young surgeon how to take blood according to his experience and then left. Therefore, he had nothing to do with the experiments. He also did not know what Okuyama and Nabetani had done before that. Other than these points, the judge advocate did not give any positive proof.

Then could the accused Iwanami expect the murder of the prisoners by Okuyama and Nabetani and others with the above said knowledge? Any considerate person could not expect with this little knowledge that the actions of Okuyama, Nabetani and others will result in murder.

In case of both commission by non-commission and action caused by mistake, a certain determination of the criminal for the infringement of the right protected by the law is the necessary condition for the constitution of a crime - that is a criminal intent is necessary for the constitution of a crime. But in this case, we cannot find any criminal intent on the part of the accused Iwanami. Therefore, there is no reason that he should be accused for his criminal responsibility.

On these grounds, I think that the accused Iwanami should naturally be acquitted of this specification. He must be not guilty.

The second specification of the second charge states: "Iwanami, Hiroshi, then a surgeon captain, Imperial Japanese Navy, commanding officer of the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, ..., did on or about 1 February 1944, ..., unlawfully disregard and fail to discharge his duty as the commanding officer of the said Fourth Naval Hospital to control the operations of members of his command and persons subject to his control and supervision, namely, Okuyama, Tokikazu, deceased, then a surgeon commander, Imperial Japanese Navy, and Sakagami, Shinji, then a corpsman warrant officer, Imperial Japanese Navy, and other persons unknown, permitting them the aforesaid persons and persons unknown to kill unlawfully and cause to be killed unlawfully, on or about 1 February 1944, at Dublon Island, Truk Atoll, Caroline Islands by explosions of dynamic and strangulation, two American Prisoners of War, names to the relator unknown, then and there held captive by the armed forces of Japan at the said atoll, this in violation of the law and customs of war."

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

In short, this specification alleges that Iwanami disregarded and failed to discharge his duty by permitting the persons to do the fact alleged in the second specification of the first charge.

As I have already argued as to the first specification of the first charge, these alleged acts should be included in the principal offense insofar as the accused is charged as a principal offender. Therefore, to accused him according to two different charges violates criminal procedure and the principles of criminal law. So it is improper. As to this point I have already stated in my argument. I believe that he should be acquitted before judging the alleged fact. Especially the judge advocate proved nothing as to the alleged fact of this specification, just as he did not prove anything about the second specification of the first charge. I hope you will pay special attention as to this point. My legal opinion as to the criminal responsibility of the accused for his neglect of duty regarding this specification is as same as I have stated as to the first specification of the second charge. I maintain that the accused should be acquitted of this specification.

In the third specification of the second charge, it is alleged that under the same condition Iwanami, Hiroshi, unlawfully disregarded and failed to discharge his duty as commanding officer of the said Fourth Naval Hospital to take such measures as were within his power and appropriate in the circumstances to protect two (2) American Prisoners of War, in violation of the law and customs of war.

The entire meaning of this specification is just as that of specificati... two, Charge II. The only distinction between them is the difference of expression. I can hardly understand why the same thing is charged again in this specification. This is clearly a duplication of charge and this specification should naturally be rejected. In the second specification, it is alleged, "disregard and fail to discharge his duty as commanding officer of the Fourth Naval Hospital," while the third specification alleges, "disregard and fail to discharge his duty as commanding officer of the Fourth Naval Hospital to take such measures as were within his power and appropriate in the circumstances to protect....." The difference between these two specifications is only that the third specification has an explanation of the duty of the accused Iwanami. If it is the duty of the commanding officer of the hospital to protect the prisoners, he should be accused for his responsibility to protect the prisoners irrespective of the addition of such an explanation. It is enough to allege "disregard and fail to discharge his duty as commanding officer of the hospital....," as in the second specification. The phraseology, "to take such measures as were within his power and appropriate in the circumstances to protect....." is surplus. There is no reason that this surplus phrase should bear another crime. In short these two specifications allege the same fact and such method is clearly improper.

Responsibility of the commanding officer of the hospital to protect prisoners depends upon whether or not the prisoners are accommodated in the hospital or whether or not they were patients who received treatment at the hospital. But the judge advocate did not refer to this point in his prosecution. Needless to say, a hospital has no legal responsibility to protect any person unless he is treated in the hospital.

Therefore, from any point of view, the accused should be acquitted of this specification.

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The fourth specification of the second charge states: "Iwanami, Hiroshi, then a surgeon captain, Imperial Japanese Navy, commanding officer of the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, and while so serving at the Fourth Naval Hospital, did, on or about 20 July 1944, at a time when a state of war existed between the United States of America, its Allies and Dependencies, and the Imperial Japanese Empire, unlawfully disregard and fail to discharge his duty as commanding officer of the said Fourth Naval Hospital, to control the operations of members of his command and persons subject to his control and supervision, namely, ...(18 persons)..., and others unknown, permitting them, to strike unlawfully, assault and kill, and cause to be killed, by bayoneting with fixed bayonets, spearing with spears, and by beheading with swords, two (2) prisoners of war, names to the relator unknown, said American Prisoners of War being then and there held captive by the armed forces of Japan on said island, this in violation of the law and customs of war."

As I have repeatedly stated, this is a meaningless specification since the third specification of the first charge alleges the accused as a principal offender. Neglect of duty, such as, "To permit" or "to disregard and fail to discharge his duty to control....." cannot be separated from the principal offense. All actions should naturally be alleged together. Needless to say, it is a clear reason of law that it is not permissible to allege them separately in criminal procedure or from the criminal point of view. Especially the accused admitted this alleged fact, so it is only necessary to judge his action as a principal offense. It is entirely unnecessary to separate a part of the offense in order to judge it. I think that the accused should properly be acquitted of the specification before judging the alleged fact of the specification. As to neglect of duty, I have already explained in my argument concerning the first specification of the second charge. I maintain that the accused is not guilty of the fourth specification.

The fifth specification of the second charge states: "Iwanami, Hiroshi, then a surgeon captain, Imperial Japanese Navy, commanding officer of the Fourth Naval Hospital, and chief surgeon of the Fourth Fleet, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands, and while so serving at the said Fourth Naval Hospital, did, at Dublon Island, Truk Atoll, Caroline Islands, on or about 20 July 1944, at a time when a state of war existed between the United States of America, its Allies and Dependencies and the Imperial Japanese Empire, unlawfully disregard and fail to discharge his duty as commanding officer of the said Fourth Naval Hospital, to take such measures as were within his power and appropriate in the circumstances to protect two (2) American Prisoners of War, names to the relator unknown, then and there held captive by the armed forces of Japan, at Dublon Island, Truk Atoll, Caroline Islands, as it was his duty to do, in that he permitted the unlawful killing with bayonets, spears and swords, by members of his command and persons subjected to his control and superivision, of said two (2) American Prisoners of War, in violation of the law and customs of war."

The substance of this specification is the same as the fourth specification of the second charge. But the expression is different. Just as the second and third specifications have the same substance, so the fourth and fifth specifications are the same. That is:

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1. The fourth specification enumerates the names of those who participated in the alleged fact and alleges that Iwanami permitted them to kill or cause to be killed the prisoners, while the fifth specification alleges that Iwanami permitted the unlawful killing by members of his command and persons subjected to his control and supervision. There is not a bit of difference between the two specifications as to this point.

2. The former alleges that Iwanami unlawfully disregarded and failed to discharge his duty as commanding officer of the Fourth Naval Hospital, while the latter alleges that he did unlawfully disregard and fail to discharge his duty as commanding officer of the Fourth Naval Hospital to take such measures as were within his power and appropriate in the circumstances to protect two American Prisoners of War. The latter is explaining the duty and circumstances of the commanding officer of the hospital but the former omits the explanation, so there is no difference between these two alleged facts. If a commanding officer of a hospital has a legal duty to protect prisoners, it is unnecessary to add explanations about that. The description, "disregard and fail to discharge his duty as commanding officer of the hospital," is enough for that allegation. If a commanding officer of a hospital has no legal duty to protect prisoners, any explanation in the charge will make no difference of the fact (that he has no duty to do so.) In short, the alleged fact of the fifth specification is quite the same as that of the fourth specification, therefore, this specification should be rejected. But this specification was actually served, so it is necessary for the commission to give a finding for this specification. But as this is clearly a duplication, I think that the accused should be found not guilty without judging the alleged fact.

By the way, I would like to state a few words about the duty to protect prisoners.

Naturally, medical art is the art of benevolence. Therefore, it can be said that a hospital has an abstract and moral duty to protect the lives of persons. But its legal duty for their protection has a limit. The law does not require infinite duty of the protection only because it is a hospital or he is a doctor. A doctor has a duty to protect the patients whom he treats, and a hospital has a duty to protect the patients who entered the hospital. A commanding officer of a hospital has the same duty.

In this case, the Forty-first Naval Guard Unit had a responsibility for the custody of these prisoners, and the prisoners were not patients who entered the Fourth Naval Hospital. Therefore, there was no legal duty of the hospital to protect them. It is a mistake to charge the accused for his special duty as commanding officer of the Fourth Naval Hospital. From any point of view, these specifications are clearly a duplication and improper.

For cautions sake; I have already stated my legal opinion as to the point that the accused disregarded and failed to discharge his duty in my argument concerning the first and fourth specification of the second charge, so I will not repeat it again. I maintain that the accused should be acquitted of the fifth specification of the second charge.

It is stated in the sixth specification of the second charge: "In that Iwanami, Hiroshi, then a surgeon captain, Imperial Japanese Navy, commanding officer of the Fourth Naval Hospital, attached to the military installations of the Imperial Japanese Navy, Dublon Island, Truk Atoll, Caroline Islands,

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and while so serving at the said Fourth Naval Hospital with Okuyama, Tokikazu, deceased, then a surgeon commander, Imperial Japanese Navy, attached to the Fourth Naval Hospital and Nabotani, Reijiro, deceased, then a surgeon lieutenant, Imperial Japanese Navy, attached to the Fourth Naval Hospital, and others unknown, did, at Dublon Island, Truk Atoll, Caroline Islands, on or about the third of February 1944, at a time when a state of war existed between the Imperial Japanese Empire, wilfully and unlawfully prevent and cause to be prevented the honorable burial of eight (8) American Prisoners of War, names to the relator unknown, who died in the captivity of the Japanese armed forces, by dissection and mutilation of the bodies of the said prisoners, in violation of the law and customs of war.

Of the eight dead bodies of the prisoners, the defendant has admitted the dissection of two of the dead bodies. That the defendant had nothing to do with the other six dead bodies and that it was something other persons had done, is as I have already stated and is clear. It is granted without argument that all the judge advocate has proved concerning this defendant, concerns itself with only two dead bodies.

On the motives and the circumstances on how the defendant came to perform the dissections on the two dead bodies, I have previously argued in detail, and I believe the commission understands it well. I can understand his actions were natural because of his fervent feeling for research as a scientist when I think upon the conditions at that time. Can this constitute a crime according to International Law? Does this constitute the crime of mutilation of dead bodies from the standpoint of criminal law? This will have to be thought about carefully.

In paragraph three, chapter 76 of the Geneva Prisoner of War Convention, of 27 July 1929, it states the following: "Care should be taken that persons dying in the captivity of an enemy should be respectfully buried and all the necessary items placed on the grave and marked. They shall also be respectfully taken care of accordingly."

There is this section, but as Japan did not ratify this convention, in a strict sense of International Law it does not bind Japan to it. However, I do now wish at this time to go into such formalities of law. I am not trying to deny that these should be abided by as a moral responsibility to humanity, but, this is not a responsibility that was placed on the hospital. This was the responsibility of the person who is in charge of the prisoners. In this case it might have been the Forty-first Naval Guard Unit. As there is no charge concerning the burial and its handling, this is a separate matter and I do not feel it is necessary to go into it at this time. The only thing that matters is, does a dissection violate this rule? I say definitely that the fact of the dissection does not have any direct relation to these rules. The only issues are, in what position and for what motive, also whether he had the intent to mutilate and desecrate the dead bodies? As the defendant has already stated, Doctor Imamura, professor at the Osaka Medical University dissected his beloved wife, that he might contribute to humanity. There were some persons who protested this. In reply to these protests a certain medical magazine wrote an article in reply which I remember that argued that it is a mistake to judge a dissection with the low feeling that it is but a part of a concrete physical act. You willhave to take into consideration the mental state of the scientist whose motive and will was for the everlasting happiness of humanity, so that he dissected the dead body of his beloved wife. The

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ections and feeling of Doctor Inamura, are not to be condemned, but he should be praised and thanked.

Then there is the case of the professor at the medical department of Keio University who taught physiology. During the time he was alive he taught the theory of human physiology to the many students, like a father and was the center of respect. He tried to benefit humanity even after his death by stating in his will that he wished his dead body used as a physiology specimen. Therefore the specimen of this professor is kept in the physiology room of the medical department in the university. It is contributing greatly as research material for the students there.

This is the noble mental state of a scientist. It is a mistake to judge with our usual feelings, on only the concrete acts of ripping and cutting of the flesh. All that Iwanami did concerning the dissection and the skulls was but an attitude of the scientist in trying to contribute to human civilization. It is clear through Iwanami's statement which he has read before that there was never anything personal about his acts. I believe without doubt that even America recognizes dissections on the standpoint of medicine and science. A recent example, is the dissection performed by an American doctor on the dead body of the prosecution witness Nakamura, Shigeyoshi, who committed suicide after he had testified. This was testified to by Doctor Kaufman. This act cannot be thought of as an act with the will and motive to mutilate a dead body. I believe this dissection was performed to look into the cause of death and to contribute to humanity from the standpoint of medicine and science. If this act is recognized, the act of the defendant, Iwanami, will also have to be recognized.

There is a difference in the above example and this case in the direct motive and nature of the incident, but look at in in a broad sense. For example, the damage which was inflicted upon the civilians, by dropping the atomic bomb on Hiroshima and Nagasaki turned out to be the greatest disaster in history. We have heard that the reason it was used was to hurry the end of the war and save the people of the world from the ravages of war. We can understand this as being reasonable. We cannot look at a part of the facts with only our usual feelings and arrive at the truth, but we must look well upon them and only then can we arrive at the truth of the facts. The acts of Iwanami in this case were not done with the will and motive to mutilate and prevent the honorable burial of American military personnel.

Concerning the burial as I stated before it is not the responsibility of the hospital. I believe it is the same in America, that the hospital is not responsible for the burial of a dead body.

I request that your Honor, the President of the Commission and its members will consider well on this point and find the defendant not guilty.

On the acts of Iwanami I have argued in detail on each of the specifications of Charge I and II. I request a verdict of not guilty in the first and second specifications of the first charge and in the first, second, third, fourth, fifth and sixth specifications of the second charge.

On the third specification of the first charge, the defendant admits the specification in what he has stated, but, I have argued in detail that in his objective circumstances he had a mistaken conviction that it was lawful and that he had an ample reason to believe this mistaken conviction. I believe the commission understands this well. Even though he may be guilty of a crime, this doctor who knew nothing outside of his medical

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profession performed it under the conviction that it was lawful under the objective circumstances. He made his mistake in believing that it was lawful; therefore, it is a crime which was committed by mistake. It absolutely is not murder.

In other words, as the other defendants acted according to the absolute orders of Iwanami, Iwanami himself was but a machine who was forced to work at the front, forced and incited by the will of the nation. It was not the will and acts of Iwanami as a person. I ask your deep consideration on this point. Please let him contribute to humanity again with his ability and knowledge. There are many human beings but persons with ability are few. I do not have to state that the principle of punishment is to educate persons. In Japan, there is the saying, "Despise the crime and not the criminal." With the great dignity of America, which is to teach and lead Japan in the future, I ask your lenient judgment.

As I have stated before, the defendant's family consists of an aged father of eighty-one, aged mother of seventy-two, wife, eldest daughter, who is eighteen, eldest son who is sixteen and his younger daughter of ten. Not only this but, the head of his wife's family was killed at the front, so he also has the responsibility to look after his wife's family. These members of his family who have no one to help them are waiting day and night, sorrowfully for his return. If he had not been born in defeated Japan, he probably would not have fallen into such a sorrowful predicament. I cannot help but feel tearful when I think of his fifty years of struggle. I ask your sympathetic judgment with all my heart.

CONCLUSION

I have argued on the facts in the case of each defendant and as a conclusion, I wish to express at this time my opinion on the purpose of criminal punishment for the defendants in general.

The judge advocate, Lieutenant Kenny, has stated that the punishment asked for in the case of these defendants was not in revenge, but in the name of justice. I am in complete accord with his sentiments, but even if the principle of revenge the motive is for justice. The issue is, what is justice? If it is "Good effect, good result and bad effect, bad result", in other words if retaliation is the demand of justice, this feudalistic way of thinking is not in accord with the social life of the civilized nation of today and should strongly be rejected.

The idea of justice is not a mysterious one. It is something that changes with the times. The ideal that we strive for in our social life today is harmony between society and the individual. This we call justice. To achieve this goal of harmony between society and the individual, and only in this sphere can the pertinence of punishment be recognized.

Concerning the purpose of criminal punishment there are many lines of thought, but it can be divided into two main groups. One, the retaliation principle and two, the purpose of principle.

1. The retaliation principle is one in which a crime is inevitably punished. A crime is an act against justice, a retaliation administered according to the demand of justice is therefore criminal punishment. Retaliation is a natural demand of humanity, in other words, it is said to be the demand of justice. This is a pure principle of revenge and is a principle of criminal punishment practiced in the feudal ages.

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Lieutenant, U.S. Navy,
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KANT has stated the following: "When a person violates a moral principle and hurts another person, it is an absolute order and natural demand of reason that the person who committed the crime submit to criminal punishment in retaliation for the crime that he committed, and does not need to be proved in any way."

HEGEL has also explained that, "A crime is a negation of law and criminal punishment is the negation of the negation of the law. Therefore it is not necessary that the crime and the criminal punishment be of the same degree, but that it is necessary that they be in accordance with each other." The first one is a principle of moral retaliation, the latter is called the principle of law retaliation. Both of these principles are based on the principle of revenge and calls for, "An eye for an eye and a tooth for a tooth." Their motive is clearly for revenge and they cannot be sustained in this civilized society of today. Next is the principle of purpose which is, "Criminal punishment is to protect our collective life against crime which is an act against it. In other words its motive is to protect society and is but a means by which to protect it." In it are two principles, general prevention and special prevention. Either way, it is because it is necessary for the maintenance of order in society and there should not be any criminal punishment in excess of this necessity. Therefore, in determining the extent of criminal punishment it has to be in accord with the demands of the idea of purpose. This has to be determined by the degree of its anti-social nature or by the part that the criminal plays in society, in other words, the motive for the crime, intent, kind of responsibility, and the importance of the act which the criminal violated upon the organization of society. It should never be the means for revenge. If a mistake is made in this respect the harmony between society and the individual which is justice, cannot be achieved.

As Ihering has stated, "Criminal punishment is like a double edged sword and if a mistake is made in its use it can hurt the criminal and the nation greatly. It is most important in criminal law to know the value of human life, and power.

Today, the law system in the civilized nations have according to the principle of purpose extracted threatening elements in criminal punishment, and have replaced it with educational elements, adopting a so-called educational principle of criminal punishment. But, even in the principle of purpose criminals are divided into two classes, those who could not be readjusted and those who could. In the former it is recognized that the criminal can be readjusted by punishment; in the latter it was thought that there was no other way but to dispose of them by isolating them from society. Recently, as a result of research done on crimes and criminals, it has been made clear that there still is a possibility to readjust persons who up to the present have been thought unadjustable. At the same time there are changes in the ideology of the nation, its functional meaning has come to be stressed and is not recognized merely as the embodiment of authority. It has also come to be stressed that the idea of criminal punishment is in education. Therefore in the civilized society of today, the ideal and purpose of criminal punishment is to bring about harmony between society and the individual. In other words, it can be recognized to the extent which is necessary to achieve and maintain justice in society. It naturally has to be the educational principle of criminal punishment, and never of revenge. Therefore the capital crime should be avoided as much as possible. The purpose of general or special preventions cannot be achieved by the capital punishment, not only that but, history shows that as a result of this not only the individual but the nation is hurt greatly.

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

Then what about war crimes? Do they have to be exempted from the principles of purpose and education? No! That should never be. The principle of education should be applied all the more thoroughly in war crimes to make the people improve and better themselves.

The reason for this being that war is against the state and not for its citizens. Citizens are really innocent as individual persons even in opposing nations in war are good citizens and good friends. All that it amounts to is that they were forced to move by the forceful will of the state. This is the same in the case of the lowest private and the highest ranking officer. They were not possessed of their own free will but as machines that were fanned and egged on by the master minds of the militarists, who were the ones who brought about this war. They do not have any bad characteristics against society. They may have made a temporary unexpected or mechanical mistake for which they should be reeducated and not punished. Is there a possibility that they would again commit crimes in a peaceful society? To whom can they cry out their sorrow that they are cut off from the sunshine as criminals just because they had the ill fortune to have been born in a pitifully defeated nation. Most of them did not want to become soldiers, but were separated from their parents, homes, wives and children, by the forceful will of their country, and unwillingly sent to the front. Praised and honored as soldiers, by statesmen who deceived and tricked them by their tricks, excited and moved by the little school children waving flags and singing "That we are able to go to school today is because of Mr. Soldier, it is because of Mr. Soldier who fought for his country." Some became Kamikazes, some human bombs. However. once the war is lost, how many people are there who express their gratitude to the dejectedly returning soldier? There is no one! All that persons who look like returning sevicement get are cold and accusing stares. This is the present condition in Japan today. Just recentlyone of the Jaluit witnesses who was repatriated and was a high school teacher sent me a letter saying that because he had been connected with war crimes he could not get his former job, even though he had been rejoicingly demobilized. To say nothing about the nineteen defendants in this case, who have been confined for almost two and a half years without knowing and without any means of knowing how their parents were. I cannot keep tears from welling up in me whenever I see them. They may have committed a crime and if they have they have already paid the penalty in full and the purpose of the penalty has been fully achieved. If improvement and readjustment is the purpose of punishment and if punishment is the means by which a good society is to be built in the future, I am convinced that further punishment is meaningless.

Especially cri es which were done unexpectedly and those which were done mechanically do not show the badness of the criminal. I do not think it is a good criminal policy to punish such crimes with capital punishment. Especially since Japan has denounced war forever, they will never have such an opportunity again. But, they are persons with good talent and they are needed in rebuilding a new Japan, not only that but they are needed in the furtherance of humanity.

Your Honor, the President and the Members of the Commission; America has at present spread forth her warm hand in protection and in guidance to Japan, and the people of Japan. In its turn the people of Japan, in full sincerity, have pledged to repay her for this help. These defendants, each and everyone of them are also people of Japan. I request that lenient judgment and another chance for a new life be given them.

AKIMOTO, YUICHIRO

I certify CERTIFIED TO BE A TRUE that the foregoing consisting of fifty-three (53) typewritten pages, to be a true and complete translation of the original argument to the best of my ability.

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

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

"YYY(53)"

Final Argument

For The Defense Of

Surgeon Captain IWANAMI, Hiroshi, Imperial Japanese Navy, et al

Delivered By

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

AT

Guam, Marianas Islands.

August 27, 28 & 29, 1947

As I present this argument in behalf of all nineteen of the accused it is my intention to cover the legal aspects of the charges and specifications as they apply specifically to all specifications. This may duplicate in some instances the arguments of the Japanese Defense counsel but this cannot be avoided because time does not permit a careful and studied perusal of their arguments by me. I shall also discuss to a limited extent the testimony and evidence as it pertains to each of the accused.

Before I do this I should like to review briefly the background of the defendants who are charged as war criminals. In order to consider judicially every phase of this trial the commission should understand the way the Japanese think. I wonder if this is possible for any of us?

May I quote from the "Pocket Guide to Japan", a booklet published by the Army Information Branch, I & E. Division and approved by Fleet Admiral Nimitz:

"You will never fully understand the way the Japanese think or do things to-day, because in almost every way our ideas are exactly opposite to theirs, and, as a result, our actions are too."

Contrast this with the peoples of the axis nations. The Germans, fundamentally, are very similar in thought, action, and reaction to our own people. The background of the Italian people shows a similarity to ours in culture and ideology. Music, art, government, science, literature, all of these are known and appreciated alike both by these other axis nations and by our own nation. It is true that their desire for power precipitated World War II but we can expect the Germans to be governed to a large extent by the same basic principles which govern the other Caucasian nations and we should certainly be be able to understand the German mind. But contrast this with the Oriental, the Japanese - "You will never fully understand the way the Japanese think or do things to-day, because in almost every way our ideas are exactly opposite to theirs, and, as a result, our actions are too." citing Pocket Guide to Japan, U.S. Army I & E Division.

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

The booklet goes on to say, "In time, the Japanese nation can be taught to think that other people have rights." Please note, "In time." Still quoting, "Three main factors have more to do than anything else with the strange ideas and actions of the Japs. These three influences have been bearing down on the lives of the people of Japan for so long that finally they have shaped the personality of the nation. They are:

1. Shinto (religion),
2. Tenno (the Emperor), and
3. Bushido (the Way of the Warrior).

"Shinto" is the national religion of Japan. To begin with, Shinto was based on worship of nature - the birds, trees, waterfalls, etc. This original type of Shinto still exists. However, in the course of recent history the warlords and politicians moved in on Shinto and developed State Shinto, which is the enforced religion of all Japanese today. Under State Shinto, which is ancestor worship twisted to fit a scheme of slavery and conquest, the Emperor is divine. He worships the Sun Goddess and the Imperial ancestors. The rest of the nation worships the Imperial ancestors as well as their own ancestors. Both Imperial and common ancestors are linked together in the Japanese mind.

"Two other principles of State Shinto are (1) that Japan is the land of the Gods; that, as such, it is a sacred land, and (2) that Japan has a mission on earth - the mission of saving the world. Hence the Japanese slogan "the whole world under one roof", and the belief that the world must accept and submit to the leadership of Japan.

"Perhaps the most serious thing about State Shinto from our point of view is the belief that Japanese soldiers killed in battle become protective gods who watch over the homeland. They are enshrined in the Yasukuni shrine in Tokyo, where their names are listed on little tablets."

"Knowing this about the religion of Japan, it is easier to understand why Japanese soldiers don't expect to return when they go off to war and why they are so willing to be killed in battle."

The alleged acts took place in 1944 and we must judge those accused by their state of mind at that time. At that time to all Japanese the Emperor was sacred. Even to-day too many Japanese the Emperor is sacred.

To the Japanese the Emperor is sacred. Prince ITO, who wrote Japan's constitution said of the Emperor:

> 'The Emperor is heaven-descended, divine and sacred; he is pre-eminent above all his subjects. He must be reverenced and is inviolable, he has indeed to pay respect to the law, but the law has no power to hold him accountable to it. Not only shall there be no irreverence for the Emperor's person, but also he shall not be made a topic of derogatory comment nor one of discussion.'

"ITO wrote those lines 50 years ago, but the Japanese people have clung to his teaching. Ever since, the war lords have used the Emperor to promote their own schemes of conquest. He has been their tool. They have used him to stir up the Japanese people to new heights of fanatacism.

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

"To sum up, to the Japanese, the Emperor is a demigod, as well as their political ruler. He is religion and politics in one. No one can stand above him or look down on him. When he passes through the streets, blinds must be tightly drawn on all windoes above the first floor. He cannot be imitated. Only the Imperial family may own a maroon car. No one can touch him. All things emanate from the Emperor - the crops, life, victory. It is in the name of the Emperor that Japan set out to bring "peace, enlightenment, truth, justice, and co-prosperity" to the test of the world.

"Bushido (the way of the warrior): After defeat the Japanese will be vengeful. That is part of their code of behavior. It is a code handed down from feudal times. It is known by the one word: "Bushido".

"Bushido" is a word known to every Japanese boy from the time he is old enough to toddle. Literally, "Bushido" means "The way of the warrior". It is a code based on tradition and legend. There is no actual written formula for it, but it stresses loyalty above all else - loyalty to a master. In feudal times it was loyalty to a feudal lord who was the big boss. In modern times the war lords have focussed "Bushido" on loyalty to the Emperor. It is a one-sided code which calls for loyalty and sacrifice on the part of the underdog but puts no corresponding obligation on the master. Under "Bushido" the little fellow pays. The Japanese don't believe that loyalty begins at the top.

"Bushido" taught its followers to keep cool, and not to draw a sword except to use it. The old version taught not to hit an opponent when he is down, but the Japanese have discarded that part of it as obsolete.

Under the "Bushido Code", deceit and treachery are perfectly permissible, if they are employed to achieve a desirable end.

"The classix example of how "Bushido" works is to be found in the famous "Tale of the Forty-Seven Ronin". The story is familiar to every Japanese. He considers it a perfect example of the way he would act. It is told to the smallest children by their fathers.

"The story is about a feudal lord named ASANO, who was in attendance on the Shogun. The Shogun was the big chief - the ruler who stole, the Emperor's powers.

"Another feudal lord named Koro insulted Asano. This happened in the Shogun's palace but Asano drew his sword and went to work on Kiro, without killing him.

"A private brawl in the palace could not be tolerated, so when the Shogun heard of it he ordered Asano to kill himself by committing hara kiri the same evening. Asano followed instructions. Afterward, his castle was confiscated, his family declared extinct, and his followers were disbanded. They became "ronin".

"Asano's 47 'ronin' scattered all over the country. They took small jobs here and there to avoid suspicion but all the time they were plotting and scheming.

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"Suddenly, on a snowy night two years later, they joined in an attack on Kiro's mansion. This time the job on Kiro was complete. The "ronin" carried his head through the streets to the temple yard where Asano was buried and set it up on their master's grave. For doing this they were ordered to commit hara kiri. They also followed instructions and were buried in the same temple yard as their master. Their graves in Tokyo have since been honored as national monuments. That's the difference between the way we regard gangsters and the way they do.

"What we think is decent, and count on in other people we deal with, means nothing to the Japanese. His notion of honor is entirely different from yours."

Further information about the Japanese ideology can be found in "The Pacific World", edited by Fairfield Osborn and published as a part of "The Infantry Journal". This of course is Japan before the war.

"The educational system of Japan, to which American scholars have substantially contributed, is thorough and efficient. When one realizes that all learning has to be superimposed on the cumbersome system of character writing used by the Japanese, it is amazing that they have accomplished so much, and that the percentage of literacy is one of the highest in the world. Education is compulsory through the sixth grade, even though there are no free schools.

This educational system is directed toward creating a state of individual repression. From the primary schools on, everything is regimented. The children are little automations, and the principal orders his teachers about as a general does his officers. Even the sports are cut and dried, and entered into with deadly seriousness.

The people themselves are dominated by two forces - tradition and repression. The heavy hand of tradition may be illustrated by their capital city. The census of 1940 gave Tokyo a pupulation of well over 7,000,000. It has large business districts and several large newspapers with a daily circulation running into the millions. It's modern subways are cool and clean, have indirect lighting and are decorated with vases of artificial flowers. The railroad trains coming into its three large stations arrive and start with such prompt-ness that people set their watches by them. Yet, in this great city, the streets with a very few exceptions are not named, and the houses in a given area are numbered in the order of erection, without regard to their relative position. The hold of tradition is also evidenced in the written language.

There is no such thing as individualism in Japan. From the time the child is old enough to go to school, he ceases to be an individual and becomes a unit in a group - a cog in a machine. First he belongs to the family. All his doings are decided for him by family council - his education, his subsequent occupation, his marriage, his future. If he fails he may commit suicide - not because of discouragement, but because through his failure his family has lost face. If his parents lose money and cannot see him through his education, it becomes an obligation upon the

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

whole family or clan, not because of sympathy with the young man, but because the family would lose face if one of its members started something that he could not finish. If a Japanese businessman in a foreign city is about to become insolvent, the other Japanese merchants in the city will unite to help him out, for the same reason. These impersonal relations held in all areas of life - family, school, university, place of business and state.

In Tokyo there is a great shrine, the Yasunkuni, where the names of all Japanese soldiers who have given their lives in battle are inscribed. They are thus diefied, and, according to general belief, their spirits help the living in their struggle against the enemy. On the eve of battle, comrades fill their canteen cups with cold water and drink the toast, "Till we meet at Yasunkuni!". Then they charge the enemy. It is all part of a pattern that was cut for them centuries ago, and from which the Japanese people have not deviated. Nor will they, until the military power of Japan is destroyed and the People develop or are exposed to a new philosophy of life.

We see a people sheepliko in their enthusiasm to follow, amenable to propoganda, who believe with fierce fanticism that they are the seed of the sun, the beloved of the gods, the predestined saviors of civilization."

Even our occupation forces in Japan do not understand the Japanese. I would cite you an excerpt from an article by Gwen DEW, a special correspondent of the Post Dispatch. The article appeared on the third page of the Sunday morning edition July 20, 1947, St. Louis Post-Dispatch. I quote:

"The Japanese Character. One of the greatest weaknesses of occupation has been the lack of understanding of Japanese character and psychology.

The Japanese have no religion as we think of it. Shintoism is a nationalistic religion glorifying all things Japanese. Real Buddhism is not practiced in Japan. Lacking religion , the Japanese have no sense of right or wrong, no moral prejudices about truth, no deep sense of the need to 'do good unto others.'

There is no such thing as a national Japanese philosophy. Politeness is all-important, rather than truth. The Japanese have no morals as we know them, but have meticulous codes of conduct between men and women. A wife is a virtual servant. Extra-marital relations are accepted without question.

To think we can impose 'democracy' on such a civilization without experts handling the situation for some time to come, is idle.

A Japanese does not think. His life, from birth to death, is governed by rule. He feels no sense of responsibility, because all decisions are based on family rule, with the Emperor, the Supreme father."

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Lieutenant, U.S. Navy,
Judge Advocate.

These quotations and references could be multiplied considerably, but it would seem that these were sufficient to point out clearly and unequivocally that the defendants in this case should not and cannot be judged in their conduct by general standards. In a civilisation over 2600 years old, they have had contact with the western world for only approximately 90 years. I have seen Sumurai swords which were over 500 years old, handed down from father to son throughout the generations. Do you realize that these swords were forged before American was even discovered? Can you expect a people who have followed a completely alien philosophy and way of life for that period of time to suddenly reverse entirely and immediately assume the standards - and the responsibilities - of the newer nations? Because we have conquered them, we now are in the process of judging their deeds - not by the code which they know and to which they conform, but by our own code, which we have imposed upon them after the act. I have heard the Christian doctines cited as a basis for condemning their deed; unfortunately, possibly, the Christian doctines have not yet been accepted to any extent in the Orient. Execution by the sword has been condemned in this court as a particularly heinous form of death - yet it is the warrior's death in Japan, and the accepted mode of execution - so much so that Kendo experts are looked up to and revered for their ability, as we award medals for marksmanship.

If this commission is to act in an impartial manner in judging these defendants then it should take into its consideration the ideological differences between the Japanese and the western world, as well as the actual facts in each case. It may be at some future date that their way of thinking will conform to our way of thinking. To quote the "Guide to Japan" again, "The peace-loving nations of the world must cure the Japanese habit of mind which is dangerous to peace and the rights of other peoples". In time, the Japanese nation can be taught to think that other people have rights" -- but until that time comes, we should not judge past events by future expectations.

Specifically what each of these accused thought was expressed, better than I can do so, and I point out to the commission the statements which each of these accused read in this court. Every one of these accused by his statement clearly showed that he thought differently than any of us. Why? Because in 2600 years of civilization they have had contact with our western world for only 90 years.

What little impression these 90 years made is brought out in such a startling way when we listened to these accused as they testify in this court. Hardly a single one of these enlisted men had ever even seen an American and those that had certainly knew nothing about Americans and yet they testified they felt sorry for these persons as they saw them there on the hill that afternoon in July of 1944.

All of these accused said that they were ordered to go to the hill that afternoon but many also said that they heard there were American prisoners there and they wanted to see what Americans looked like. Here were Japanese Navy men fighting a war against Americans and they had never even seen an American. Do you realize the great significance of that?

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

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What will did they have to make war? You members of the commission are all military men of many years experience. You know full well the importance of the "will to do" as it applies in war. On Truk in 1944 there must have been many persons who had never seen an American. Those accused were not an exception to the rule.

How did these accused find out about Americans? Each and every one of them have stated that the hospital they were stationed at there on Truk and which Captain IWANAMI, one of these accused, planned and built to take care of the sick and wounded Japanese was bombed by Americans. Bombed in the broad daylight notwithstanding the fact that the buildings were clearly and plainly marked with large Red Crosses.

The Laws and Customs of War! How do persons find out about the laws and customs of war? Those Japanese accused of violating the laws and customs of war had never before seen an American but they had experienced war because many times their hospital had been bombed by the Americans and only ten days prior to this call for a general assembly the Americans had bombed the hospital in broad daylight.

So on or about July 20, 1944, seventeen of these accused are said to have murdered two American prisoners of war in violation of the laws and customs of war.

Two of them have testified they weren't even at the scene of the killing, one the Adjutant of the hospital, still a canvalescent, was told of the plan but refused any part of it and the other a petty officer TANABE, Mamoru was sick in bed, a potient at the hospital, yet these two are joined with sixteen others and all charged with murder. Why? Because certain persons, Japanese officers and onlisted men decided that if a crime had been committed, in their opinion so and so should be responsible and we have these persons testifying in an American court as to their opinion as to who should be guilty of the crime of murder. I saw opinion but these witnesses testified stating it was a fact that the Adjutant Lieutenant KAMIKAWA was at the scene and it was a fact that TANABE, Mamoru was there also.

The killing took place July 20, 1944, and more than three years later these witnesses under oath remember clearly that Lieutenant KAMIKAWA was there and that TANABE, Mamoru was there. They even remember that TANABE, WATANABE, SAWADA, NAMATAME, MUKAI, and KUWABARAI was in the line of stabbers and HAMADA, Toshihisa remembers that TANABE even stabbed. Yet KAMIKAWA took the stand and denied he was ever at the scene and TANABE, Mamoru took the stand and said he wasn't there and that he never left his sick bed at the hospital except for a few minutes when he had to go to the toilet. We shall point out the weakness of the prosecution evidence against both of these accused, later.

Fifteen of the accused said they were ordered to go to the scene and did go there. Of these fifteen , five took the stand and these five WATANABE, SAWADA, NAMATAME, MUKAI and KUWABARA all denied that they were selected to stab the prisoner.

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

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Lieutenant OISHI, Ensign ASAMURA, Chief Petty Officer YOSHIZAWA and Chief Petty Officer HOMMA admitted they did certain acts that day under orders from their superiors.

The Supreme Commander for the Allied Powers rules state that "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." Quite properly under these rules, the defense might well introduce testimony as to obedience to orders after the findings of the commission. Nevertheless, the defense has taken the position that these SCAP rules are only permissive, so far as this commission is concerned, and that the defense will be presented in accordance with the rules and regulations of our own military forces. And does this commission realize just what the difference is between the rules set up in SCAP for the trial of war criminals and those set forth in the rules of our own army. I refer the commission to the Rules of Land Warfare Basic Field Manual FM 27-10 and particularly to section 345.1 of chapter 11, "Penalties for Violations of the Laws of War." In this section it is stated:

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

By order of the Secretary of War;

G. C. Marshall, Chief of Staff.

This was a change that was added to our Rules of Land Warfare. In the War Department Manual EM 11, G-1 Roundtable Series, "What Shall be Done with the War Criminals" we read on page 27:

"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 acting 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 of laws of war) in case they are committed under the 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?

Notice that under this rule the ordinary soldier is excused but his commander or government is liable?

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

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This rule entered the American Rules in 1944. Before that, the Rules failed to mention "superior orders" and American courts martial uphold the principle that a soldier obeying his commander's orders is not protected of the order is unlawful?

What is this commission to do regarding "superior orders"? Must not this commission follow the American Army rule established in 1914 which excuses the ordinary soldier. Even the rule promulgated by order of the Secretary of War signed by General Marshall November 15, 1944 still excused the ordinary soldier.

If we try Japanese military in our military courts we should extend to them all the benefits which our own soldiers have in being tried by a military court.

15 November 1944.

Otherwise we come to the greatest inconsistency of all; a soldier in the Japanese army who followed that army's rule of absolute obedience to orders cannot avail himself of that defense when tried by an American court - but a soldier in the U.S. Army has that defense available to him under the same circumstances. And please note that General Marshall has not qualified that defense by making it obedience to a legal order" - the statement is unequivocal. Will you judge these men by a special set of rules and regulations, established after the end of the war - or will you judge them by the standards established for our own army in time of war.

The specifications and particularly specification 3 of Charge I brings out the great advantage given to the prosecution and the prejudicial disadvantage to the accused in trying eighteen of them in joindor for the acts of killing two prisoners. The only reason for the acts performed by any of the seventeen accused and all seventeen were not even there because they were first of all ordered to be at the scene one of the co-defendants, Captain IWANAMI ordered them to do certain acts. Yet to plead those orders as a defense immediately throws the onus of responsibility on a co-defendant. The position is deplorable, both from the point of view of the accused and from the point of view of their counsel The judge advocate need do little more than throw out a few items of testimony by persons who were also there at the scene. Most of these witnesses are suspects themselves and certainly they have a very definite reason for testifying.

We again call the commission's attention to a well known fact, a fact so well known that Underhill in his book on Criminal Evidence pages 81 - 82 says that courts do take judicial notice, "that cupidity is a most powerful motive to human action." He cites the case of State v DeWeese, 51 Utah 515, 172 Pac 290. We asked the commission to take judicial notice of this case and the fact that cupidity is a most powerful motive to human action because we were convinced that as soon as we saw the list of witnesses that this fact well known by all men, that it was particularly applicable in this case. Having heard the prosecution witnesses, who for the most part have been confined since the end of the war and many of whom were in the stockade until

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

after conferences had been held with the American investigators and certain of these accused at which conferences it was decided that certain persons must take the responsibility for what happened on that hill in July 1944 whether they were there or not simply because it would be a way out if everyone agreed that senior petty officers did do the stabbing. Cupidity is a most powerful motive. Such an attitude by these Japanese is beyond understanding by us.

Are we sure that they understand just what we charge them with doing that day. It is no triflying matter, because we have labeled the first charge "MURDER". No man with ordinary sense would ever agree to such an arrangement to agree he had murdered two Americans so in this case the following accused took the stand and denied that they did any of the acts alleged in specification 3 of Charge I:

WATANABE, Mitsuo; SAWADA, Tsuneo; NAMATAME, Kazuo; MUKAI, Yoshihisa; KUWABARE, Hiroyuki; KAMIKAWA, Hidehiro and TANABE, Mamoru.

They at least wanted no part of any scheme cooked up by their compatriots. They were innocent and would speak out.

It is charged that eighteen of these accused did kill two American in violation of the laws and customs of war. But do we apprise any of these accused what we mean by the laws and customs of war in the specifications or does the judge advocate offer any proof as to what laws and customs of war these accused have violated.

Since the judge advocate hasn't offered any proof or alleged any specific laws which were violated he is perchance relying only on a violation of the "customs of war". Not even as to customs are any of the accused apprised.

We specifically point out to the commission what Naval Courts and Boards says about "Customs". Section 5(d) on page 3 of Naval Courts and Boards says:

> "Circumstances from time to time arise for the government of which there are no written rules to be found. In such cases customs of the service govern. Customs of the service may be likened, in their origin and development, to the portions of the common law of England similarly established. But custom is not to be confused with usage; the former has the force of law, the latter is merely a fact. There may be usage without custom, but there can be no custom unless accompanied by usage. Usage consists merely of the repetition of acts, while custom is created out of their repetition."

Custom. The following are the principal conditions to be fulfilled in order to constitute a valid custom:

(1) It must be long continued.
(2) It must be certain and uniform.
(3) It must be compulsory.

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Lieutenant, U.S. Navy,
Judge Advocate.

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(4) It must be consistent.
(5) It must be general.
(6) It must be known.
(7) It must not be in opposition to the terms and provisions of a statute or lawful regulation or order.

Every single specification charges "this in violation of the law and customs of war." Certainly if the customs of war which these nineteen accused are said to have violated complies with the above seven requirements the judge advocate should be able to tell those nineteen accused and their defense counsel what these customs of war are. We are definitely at a loss even in our final argument to argue the point because we do not know what these customs of war are.

In order to constitute a valid custom seven elements must be present and in accordance with American law, at least, the burden of proof is always on the prosecution and it never shifts to the defense. So we hold that it was incumbent on the prosecution that they first of all set forth the customs of war which have been violated (and not having done so they have prejudiced most sorely the substantive rights of all of these accused) and second they must have shown that such customs of war fulfill all the seven conditions set forth in Section 5(d), Naval Courts and Boards. If any one of these conditions is lacking then it is not a valid custom.

Take for instance the dissection which is charged as a violation of the laws and customs of war in specification 6 of Charge II. Is it a custom long continued, certain, and uniform, compulsory and consistent, general and known and not in opposition to any statutes, lawful regulation or order, not to dissect dead bodies.

If anyone of these conditions is missing it isn't a valid custom. Are these Japanese customs or American customs which are being violated?

It can hardly be a Japanese custom not to dissect dead bodies because Public Notification No. 13, of 10 February 1900, amended in 1913 by Public Notification No. 102, as translated reads:

"When the family, relatives, friends, or surely of military men, gunsokus, or workmen request to dissect the diseased part of the dead body of them with the will of the dead men or with the admission of their family, relatives, and friends, the commanding officer of the naval hospital, the commanding officer of the Naval Medical Officers Academy, the chief surgeon of the Ryojun Naval Station or the chief surgeons of naval port districts may grant the request or perform the examination by dissection. But after the examination is finished, the dead body shall be sewed up."

Is it an American custom not to dissect dead bodies? We call the commissions attention to the testimony of the prosecution witness Doctor J. J. KAUFMAN, Jr., Lieutenant, junior grade, United States Naval Reserve, who testified on the 35th day of the trial, Monday August 11, 1947. Dr. KAUFMAN testified that after the prosecution witness NAKAMURA, Shigeyoshi, had committed suicide his body was taken to the U. S. Naval Hospital, Guam, and U.S. Navy doctors performed

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Lieutenant, U.S. Navy,
Judge Advocate.

a dissection on his body including the brain.

Q. 7. "Was the body of the deceased person dissected after his death?"

Ans. "It was."

Q. 8. "As a result of this dissection and other circumstances, was it known that this person committed suicide? Was it determined if this person, if there was any mental changes in this person?"

Ans. "There was no evidence of organic brain diseases on the post mortem examination. The statement in the death certificate that the deceased committed suicide during a depression following testimony was derived from conversations with witnesses who associated with the deceased sometime before his demise."

By the prosecutions own witness, Dr. KAUFMAN, the prosecution have proved that there is no such custom which prevents and makes it unlawful to perform a dissection. Certainly the prosecution can not twist this testimony and say that it is only lawful to dissect Japanese bodies. It is common knowledge and the commission should take judicial notice that dissections of human bodies is allowed and a dissection performed by a doctor or surgeon does not mutilate the body or does not prevent honorable burial.

Doctor IWANAMI admitted that he assisted with two dissections but he did so as a doctor and scientist with the intent only to further research and as one would perform any dissection. In Criminal Law there must always be a criminal intent. Captain IWANAMI had no more of a criminal intent when he assisted with the dissection of these two bodies than the American doctors who performed the dissection on the body of NAKAMURA, Shigeyoshi, the prosecutions witness who committed suicide before he had finished testifying in this court.

We hold that the customs of war which these nineteen accused are alleged to have violated are all the same as the customs of war alleged in Specification 6 of Charge II. The prosecution have not set forth any particular customs of war, and they do not intend to do so, because they themselves do not know what they mean when they charge "this in violation of the customs of war". They only hope that the commission will skip over that allegation in all the specifications as not being important and unnecessary to prove.

We hold that this allegation is very important in all the specifications otherwise it would not have been alleged. It should have been proved like any other fact and since it wasn't the commission should find it not proved.

It hardly seems possible to us that some of these accused had never before July 20, 1944, seen an American but they have so testified. Isn't it only common sense therefore that the customs of war which they are charged with having violated and which the judge advocate has never as much as mentioned what they might be, are not known to these accused. If the custom is not known it is not a valid custom. In the case of a custom you cannot charge a person with scienter of a custom.

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Lieutenant, U.S. Navy,
Judge Advocate.

This is different than when a law is charged. In the case of a law scienter is presumed but not so in the case of a custom.

And it isn't enough to say that one co-defendant had knowledge of the customs and all are presumed to have knowledge.

Trial by joinder in no way creates any such presumption and the prosecution must show that each and every one of the nineteen accused had knowledge of the customs of war which he has alleged that they violated, whatever those customs of war may be, before this commission can find them guilty of violating customs of war.

All the accused objected to the charges and specifications for the following reasons:

First, the accused objected to the trial in joinder. Section 17, Naval Courts and Boards reads:

"Trial in joinder - Accused persons will not be joined in the same charge and specification unless for concert of action in an offense.
"The mere fact that several persons happen to have committed the same offense at the same time does not authorize their being joined in the charge."

C.M.O. 77-1919 states: Trial in joinder: When joint trial should not be had.
"The mere fact that several persons happen to have committed the same offense at the same time does not authorize their being joined in the charge. Thus where two or more persons in the naval service take occasion to desert or absent themselves without leave, in company but not in pursuance of a common unlawful design and concert, the case is not one of a single joint offense, but of several separate offenses of the same character, which are no less several in law th ough committed at the same time."
"File 26262-5714, G.C.M. Rec. No. 41468."

C.M.O. 1-1929 reads: "It is well settled that the necessary elements for a joint charge and joint trial are that the offense must be one that is not in its nature several, and that there must exist a conspiracy or concert of action.

In Digest of Opinions of the Judge Advocate General of the Army (1901) p. 201 it is stated: Properly to warrant the joining of several persons in the same charge and bringing them to trial together thereon the offense must be such as required for its commission a combination of action and must have been committed by the accused in concert or in pursuance of a common intent....."

Winthrop's Military Law, p. 208 states: "But whenever the offense is, in its nature, several there can be no joinder."

In footnote 3 on page 208, Winthrop quotes 2 Hawkins, c 26, S 89, as follows: "Where the offense indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offense, ... the indictment must charge them severally and not jointly."

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Lieutenant, U.S. Navy,
Judge Advocate.

Not only were these nineteen accused joined in trial to the prejudice of each one individually but they were joined with "and others unknown", "and others to the relator unknown", "and other persons unknown". This joinder with other persons unknown was most prejudicial to the substantive rights of the accused because no one of these accused could probably prepare his defense not knowing who was included in the term other persons unknown.

There is a definite conflict of interest between the parties joined to the prejudice of all parties and to be joined with persons unknown was as we have stated most prejudicial because the accused would like to call as witnesses in their behalf certain persons. All such persons are reluctant to testify on the grounds that if they were present at the scene of an alleged war crime they are as guilty as those persons charged with crime. The extent of the rule laid down in Section 332 of the U.S. Criminal Code is not applicable in time of war to persons who because of assignment to a certain group and because of orders issued to the group requiring the members of the group to be present. We hold that Military Law should be applied and not Civil Law in such cases.

C.M.O. 4-1935 is quoted on this point: "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 term "and other persons unknown" is further objectionable because this enabled the prosecution to evade the rule laid down in Wharton's Criminal Evidence, Volume 2 Section 714, which reads: "Narratives of past events after the conspiracy is fully executed are to measures taken in execution or furtherance of the common purpose inadmissible against co-conspirators."

State v. Huckins holds: "One conspirator does not - - - by its execution under his authority, authorized his co-conspirator to make confessions or admissions of guilt for him to to narrate past events."

"When the common enterprise is at an end, whether by accomplishment or abandonment, no one of the conspirators is permitted by any subsequent action or declaration of his own to affect the others." From Wharton's Criminal Evidence, Volume 2, paragraph 714, citing Logan v. United States, 144 U.S. 263.:

Brown v. United States, 150 U.S. 93.
Sorenson v. State (C.C.A. 8th) 143F. 820.
Gall v. United States, 166F. 419
Haugor v. United States, 173F. 54.
Morrow v. United States 11F. (2d) 256.
Lane v. United States, 34F. (2d) 413.
Collongor v. United States 50F. (2d) 345.
Minner v. United States 57F. (2d) 506.
Dandagarda v. United States (C.C.A. 10th) 64F. (2d) 182.
United States v. White, 5 Crunch (C.C.A.) 38F. Cas No. 16-675.

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

The accused and particularly Captain IWANAMI, Hiroshi, objected to specification 1 of Charge I. Charge I is labeled "MURDER" but the specification does not follow the sample specification in Section 53 Naval Courts and Boards. Specification 1, Charge I contains many of the elements of Common Law Murder and several of statutory Murder.

In American Jurisprudence Criminal Law page 158 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 Pettit v. Walshe, 194 U.S. 205; 18 U.S.C.A. paragraph 451 et Seq.

Section D-13 Naval Courts and Boards states: "In the cases of the more serious offenses triable by Superior Provost Court and Military Commission, there should be a detailed specification as in court-martial practice, and such specification should show on its face the circumstances conferring jurisdiction,....."

We objected because specifications 1, 2, and 3 of Charge I do not show the statute of murder which has been violated. Not to set out the statute verbatim was prejudicial to the substantive rights of the accused and they were precluded from preparing a proper defense not being fully aprised as to the law they violated.

The specifications 1, 2, and 3 of Charge I allege this to be in violation of the law and customs of war. What law and what customs of war? We hold that not to set out such law and customs was prejudicial to the substantive rights of the accused. Among other things they were not fully apprised of the law and the cumstoms they violated, and could not prepare a proper defense.

Specification 3, alleges two separate offenses in that two victims are alleged ye have been killed. Eighteen accused are joined in this one specification and the victims are said to be "two (2) American Prisoners of War, names to the relator unknown". This is and was all very confusing and the accused do not yet know and are not fully apprised of the offense with which they are charged. All eighteen accused are thereby prejudiced as to their substantive rights.

Which ones of the accused is charged with stabbing which one of the two prisoners or are they charged with stabbing both of the prisoners. Certainly the prosecution did not prove that any of the accused stabbed or cut more than one prisoner. Those of the accused that admitted they participated testified they only stabbed one prisoner or only cut one prisoner.

We come to the further question in this case of "when is a man dead?" Is it when his heart finally stops beating and his lungs stop breathing, or is it when he is so wounded that there is no possible hope of recovery, even under the miracles performed by modern surgeons, a man has his neck severed from the back to such an extent that the spinal column and all of the nerves contained therein are forever separated. Perhaps the heart continues to function automatically for a few minutes more - especially if the jugular vien has not been cut

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

and the bleeding is thus slower. But the man cannot live longer than the time necessary for the heart to cease beating. Is a blow struck under these conditions murder? Can a person this far dead, with no hopes of recovery, be further "killed" by another blow?

Can a person who is stabbed thru the heart with a bayonet and so wounded that there is no possible hope of recovery be further killed by another blow? The evidence all shows that enlisted men stabbed with bayonets and spears first one and then after a few minutes the next man. Only one person stabbed one prisoner at a time and no person stabbed a second time or did any person stab at the same time and while another person was stabbing.

The judge advocate resisted every effort and objected to any evidence showing when these prisoners were dead. In other words he would have the commission believe that neither of these two prisoners were dead until long after they had been buried. In no other way can he prove his case against Lieutenant OISHI, Ensign ASAMURA, and Chief Petty Officer YOSHIZAWA. But the commission should know that it is common knowledge that a person fatally wounded or a person hanged dies in less than thirteen minutes and most Americans stabbed through the heart with a bayonet die in much less time than thirteen minutes. The judge advocate will I am sure agree that a person cannot commit murder upon a dead body.

It hasn't been shown except in the case of HOMMA when any of these accused stabbed. It isn't very convincing proof and no civil court would ever convict anyone of murder just because the states attorney said, "There were two Americans alive on that hill that afternoon and at the end of the day the two Americans were dead." This is in effect what the judge advocate said. He would have the commission believe that by forming nineteen accused in trial he thereby doesn't have to prove anything but thattwo persons were alive at two o'clock and at five o'clock they were dead and therefore all eighteen persons who he has formed in trial become guilty of the murder of two Americans. But all eighteen accused do not lose their identity as individuals simply because the judge advocate joins them in trial. The commission must bring in a finding against them individually. "If there is a reasonable doubt as to the guilt of the accused, he must be acquitted. If there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree on which there is no such doubt. In making its finding the court must strictly observe the rule that it must reach its conclusion solely from the evidence adduced. Section 158 Naval Courts and Boards.

The judge advocate must prove individual intent against these accused. It isn't enough that there may have existed an intent on the part of some individuals to kill that day. Each accused who is found guilty of murder must have had the requisite intent. Section 151 Naval Courts and Boards has this to say about intent:

"In respect to the element of intent, crimes are distinguished as follows: Those in which a distinct and specific intent, independent of the mere act, is essential to constitute the offense, as murder, larceny, burglary, desertion, and mutiny, etc.; and those in which the act is the principal feature, the existence of the wrongful intent being simply inferable therefrom, as rape, sleeping on watch, drunkenes neglect of duty, etc. In cases of the former class, the characteristic

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

intent must be established affirmatively as a separate fact; in the latter class of cases it is only necessary to prove the unlawful act."

We shall look to the third specification of the first charge inasmuch as eighteen of these accused are charged with murder in this specification.

This Navy convened Military Commission must decide if these Japanese nationals are guilty of the charges as specified. Each of the accused must be judged only as he is charged. The fact that the convening authority saw fit to join nineteen accused in one trial and then in specification three of charge I only name eighteen of the accused as having each and together further complicates the issues but in no way deprives any of the accused of individual rights.

The first charge is called "MURDER". We ask that the commission carefully consider whether the specifications under Charge I technically and legally allege murder or whether these specifications are only violations of Article 23, paragraph (c) of the 1907 Hague Convention, which states in part, "....it is especially forbidden - ... c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion,.....". We feel it is of the utmost importance that this commission decide this point.

If this is a murder charge, then it does not follow the sample specification in Section 53, Naval Courts and Boards. The statement that the accused did kill is a conclusion of the pleader instead of a statement of fact and does not make good specification. The corpus delicti has in our opinion not been proved.

On the other hand, if these specifications are violations of the Hague Convention, then we maintain that the same should be set forth verbatim in the specification and proved like any other fact. Section 27, Naval Courts and Boards:

"A specification should contain allegations of all the essential elements of the offense in simple, accurate, and concise language. An essential element is one the omission of which in a specification would be ground for sustaining a timely objection on the part of the accused, or if not objected to and the evidence adduced does not supply the omission, will constitute a fatal defect. For example, a specification of theft should allege:

(1) A taking and carrying away of the property in question , and manner thereof.
(2) Description and value of the personal property.
(3) From the actual or constructive possession of the owner or person entitled to possession as against the accused.
(4) Place and time of taking.
(5) Description of owner or person entitled to possession.
(6) Intent to deprive the owner permanently of his property.

For the elements of any particular offense the applicable section under sample charges and specifications should be consulted.

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James P. Kenny

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

It is not essential to state in a specification that an offense was committed in breach of any Federal statute, article of the articles for the government of the Navy, law of the State in which the court is sitting, or general regulation, as the court takes judicial notice of such statute, article, State law, or regulation, under which the charge is laid, but whenever the offense comes directly under any other enactment (foreign law, municipal ordinance, or local ship or station order), the same should be set forth verbatim in the specification and proved like any other fact.

The laws and customs of war are under any concept a foreign law as in contradistinction to a Federal statute. Even if the laws of war are Federal statutes we hold it should be set out verbatim because these accused are not citizens of the United States; they are Japanese nationals. In July 1944 they were all in the Japanese Navy and were stationed at Truk Atoll which was an island possession of the Japanese Imperial Government. It was strongly fortified and for years a closed port. No American or other national was allowed to even come into the harbor let alone go ashore. In July 1944 at Truk this alleged crime is said to have taken place. In view of these circumstances we feel that it is essential to state in each and every specification exactly and verbatim the law or the custom which is said to have been violated and proved like any other fact. Since the judge advocates neither set out verbatim the law or the custom or at any time during the trial stated or proved any such law or custom we still maintain that the substantive rights of these accused have been prejudiced thereby and we also call the commission's attention to the lack of proof as to what law and customs of war were violated. How can the commission find that this essential allegation "this in violation of the law and customs of war" has been proved?

A specification must on its face allege facts which constitute a violation of some law, regulation, or custom of the service. It is not sufficient that the accused be charged generally with having committed an offense, but the particular acts or circumstances attending a specific offense must be complete. It is not sufficient that several specifications taken together may do so.

It is not necessary that a specification be framed with the technical precision of a common law indictment, so long as it clearly shows jurisdiction in the court over the accused and over the offense with which he is charged, and the latter is sufficiently described to advise the accused of the time and place and circumstances under which it is claimed he committed the crime, to enable him to make any defense he may have. The statement of a mere conclusion of law instead of facts will not make a good specification. Thus, it would not be a good specification which merely stated that theft was committed by a certain man at a certain time and place, or that a man unlawfully had in his possession certain property without alleging facts showing wherein the possessor was unlawful. Each specification must support the charge under which it is laid.

We hold that this third specification of Charge I must show jurisdiction over all eighteen accused and particularly over the ten persons who were demobilized.

The following ten persons although prisoners of war at one time

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

were released from custody, returned to Japan and demobilized:

Lieutenant Commander KAMIKAWA, Hidehiro;
Lieutenant OISHI, Tetsuo;
Lieutenant ASAMURA, Shimpei;
Ensign YOSHIZAWA, Kensaburo;
Warrant Payraster WATANABE, Mitsuo;
Warrant Corpsman TANABE, Mamoru;
Warrant Corpsman MUKAI, Yoshihisa;
Chief Corpsman AKABORI, Toichiro;
Chief Corpsman NAMATAME, Kazuo;
Chief Corpsman MITSUHASHI, Kichigoro.

In the case of the above ten persons their return to the custody of the United States follows the same pattern. A Japanese policeman appeared at their home one day and told them to come along with him to the police station. From the police station these persons were sent to Sugamo Prison which is staffed and operated by the United States Army. After a short stay at Sugamo prison they were turned over to the custody of the United States Navy and sent to Guam where they have been kept in close confinement. We question the legality of the process by which these ten persons were returned to the custody of the United States Navy Department.

We call the commission's attention that these ten persons were released as prisoners of war by the United States and returned to Japan where they were demobilized from the Japanese Navy. Clearly therefore they are not fugitives from justice nor did they flee from the custody of the United States or were they personally present at the time the crime was committed within the demanding state, the United States.

We continue to quote from 22 Am Jurisprudence page 255: "The language of the Federal Statutes seems to contemplate that the crime shall have been committed by one, who, at the time, was personally present within the demanding state. Thus, it refers to a demand by the Executive of a state for the surrender of a person as a fugitive from justice to the executive of a state 'to which such person has fled,' and it requires the production of a copy of the indictment found, or the affidavit made, before a magistrate, containing the necessary charges and properly certified by the executive of the state or territory 'from which the person so charged has fled,'.....".

Can it be said that any of these ten persons were personally present within the United States or the territories over which they claimed jurisdiction at the time the crime was committed, January, February, and July 1944? This seems to be one of the requirements of the Federal Statute.

It is a universal rule that a person to be extradited must be charged with a crime against the laws of the state from whose justice he is alleged to have fled. These ten persons did not flee; they were demobilized after having been turned over as released prisoners of war to the Japanese authorities. Even now they are not charged with crimes against the United States but are charged with violations of the law and customs of war.

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

These ten persons are together with eight others accused of a political crime and since extradition is expressly forbidden of persons charged with political crimes we maintain that this commission has no jurisdiction over these ten persons. The proof also shows that these ten persons were on Truk in July 1944 and the Japanese Government had control of and did exercise jurisdiction as a soverign state over Truk at that time. These ten persons were not within the jurisdiction of the commission in July 1944 nor were they within the United States when the crime was committed. The commission should therefore discharge at once the following ten persons:

KAMIKAWA, Hidehiro;
OISHI, Tetsuo;
ASAMURA, Shimpei;
YOSHIZAWA, Kensaburo;
WATANABE, Mitsuo;
TANABE, Mamoru;
MUKAI, Yoshihisa;
AKADORI, Toichiro;
NAMATAME, Kazuo;
MITSUHASHI, Kichigoro.

The accused are all charged with murder under specification 3 of Charge I. The murder charged is common law murder otherwise the statute violated should be alleged and set out in full. There are no common law offenses against the United States and therefore, there is no jurisdiction over the common law offense of murder. We quote from page 158 of the 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. Citing 194 U.S. 205, Pettit v Walshe; 18 U.S.A. Paragraph 451 et seq.

It is common knowledge that this commission had no jurisdiction on Truk in January, February, or July of 1944. This commission should take judicial notice of this fact and also of the fact that there is no Act of Congress giving the Navy Department of the United States exclusive judicial jurisdiction on Truk in January, February, and July of 1944.

Murder as an offense is provided for as follows. Section 53, Naval Courts and Boards:

" Murder. This is provided for in the 6th Article for the Government of the Navy. It must have been committed by a person belonging to a public vessel of the United States and outside the territorial jurisdiction thereof."

"The 6th A.G.N. provides that "if any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court-martial and punished with death." This precludes a court-martial taking jurisdiction of murder committed within the territorial jurisdiction

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

of the United States. If the crime is committed on the high seas or within a foreign country there is no doubt that courts martial having assumed jurisdiction thereof may proceed to a final judgment."

Article 6, A.G.N. before it was amended read:

"Murder. - If any person belonging to any public vessel of the United States commits the crime of murder without the territorial jurisdiction thereof, he may be tried by court martial and punished with death. (R.S. sec. 1624, art. 6)."

This must be law applicable because Article 6 A.G.N. was amended by Public Law 245 on December 4, 1945. AlNav 420 - 45 - 1843 Amendment to Articles for Government of Navy, J.A.G. 8 December 1945.

Article 6, A.G.N. was amended by Public Law 245 on 4 December 1945 and therefore, none of these eighteen accused can be tried under Article 6 A.G.N. as amended by Public Law 245 on 4 December 1945 for an offense committed on Truk in July 1944.

Article 61, Title 34, U.S. c., Section 1200 reads: "Limitation of trials; offenses in general, no person shall be tried by court-martial or otherwise punished for any offense, except as provided in the following article, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest unpediment he shall not have been amenable to justice within that period. (R.S. Section 1624, article 61, February 25, 1895, ch. 28 Stat. 680)."

Accordingly the specification shows no jurisdiction because there is no jurisdiction to punish any of these eighteen for the crime alleged in specification 3 of Charge I. Even the ten persons who were demobilized were always amenable to justice during the period in which they lived as civilians in Japan.

The burden of proving exceptions to the statute of limitations is on the state (citing State v Belbao, 38 Idaho 92, 222, Pac 785; People v Ross 325 Ill. 417, 156 NE 303.

This commission should not consider any reference to the SCAP letter, Regulations Governing the Trials of Accused War Criminals AG 000.5 (5 December 1945) LG, as applicable or conferring jurisdiction on this commission to try the accused. We call the commission's attention to paragraph 2 of the above SCAP letter which reads: "2. Jurisdiction. a. Over persons. 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.

This commission should carefully consider what was said in the case of Pettit v. Walshe 18 U.S. C.A. paragraph 451, et seq as cited on Page 156 American Jurisprudence Criminal Law.

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

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

We again ask this commission and the prosecution: What law are those accused being charged with having violated? Is it the Hague Convention No. IV, of 18 October 1907, Article 23,(c) which reads as follows: "It is expressly forbidden .....(c) to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion."? If it is, then we cite Article 2 of the same convention which provides that the provisions do not apply if all of the belligerents are not parties to the Convention. Since neither Italy nor Bulgaria has ratified the 1907 Convention, these accused claim they are not bound by Article 23 (c), although Japan did sign the Convention.

Section 27 of Naval Courts and Boards says:

"To constitute a crime both criminal intent and a prohibited act must concur. Where the offense specified is one which requires a specific intent and the act both must be set out. For example, a specification alleging that the accused "did feloniously have in his possession with the intention of removing same from said ship" certain Government property, fails to state an offense. The criminal intent is properly alleged, but the word "feloniously" is a <u>mere conclusion of law</u>, and the only facts alleged are that the accused had Government property in his possession and had the intention of removing it from the ship. The mere possession of Government property is not in itself a violation of any law; regulation, or custom of the service, nor is it illegal in itself to take Government property from the ship."

We cannot know with any certainty just what these eighteen accused are charged with in specification 3 of Charge I, but if it is the Geneva Prisoners of War Convention of 1929 we ask what article?

In the Geneva Prisoners of War Convention of 1929, Article 2 provides that prisoners of war "must at all times be humanely treated and protected, particularly against acts of violence,.....". Article 3 of the same Convention provides: "Prisoners of war have the right to have their person and their honor respected."

We point out however that Japan has not ratified or formally adhered to it. The mere fact that Japan has through the Swiss Government agreed to observe these provisions makes no difference legally. This case is being tried by a judicial commission and all its findings must be legal, and the sentence imposed only if there has been a legal violation or crime. This commission must not try these accused only because their morals may have been different than ours at the time they committed the alleged acts. There must be another legal basis for the charges. It is not clear to the accused upon what law the charges and specifications are based.

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James P. Kenny

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

Mr. Justice Rutledge in the dissenting opinion in the YAMASHITA Case said: "It is not our tradition for anyone to be charged with crime ....., in language not sufficient to inform him of the nature of the offense or to enable him to make defense."

In specification 3 of Charge I the prosecution will no doubt state that all eighteen accused are charged with murder as principals. They will probably cite section 332 of the U.S. Criminal Code as defining a principal: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels commands, induces, or procures its commission, is a principal". (R.S. par 5323, 5427, Mar. 4,1909, c 321, 332, 35 Stat. 1152) as found in Section 550 page 21, U.S. Code Annotated Title 18.

Then they will state that a man may be guilty of murder even though he did not strike the fatal blow, but if he aided, abetted, counseled, commanded, induced, or procured its commission. They will even go so far as to say a man is guilty of murder if he has done no more than encouraged or advised one to commit the crime. But they fail to define murder as it applies to the individuals of warring nations.

If the act which constitutes an offense in specification 3 of Charge I, is a Federal offense it should have been set out or at least the stature referred to.

It is necessary to look closely at this section 332 of the Criminal Code and also see what decisions if any there have been.

First we note that this statute says: Whoever directly commits any act constituting an offense defined in any law of the United States. The person must therefore directly commit the act.

Second, the act must be an offense defined in any law of the United States, that is it must be a statutory offense. Note 4 on page 23 of Ibid says: "4. Who are aiders, abettors, etc., within section. - One who persuades another to commit a crime is an accessory under this section. Ackley v U.S. (Mo. 1912) 200 F. 217, 118, c.c. A. 403....."One cannot be convicted under this section of aiding and abetting an offense of which he had no knowledge until after it was complete. Rizzo v. U.S. (CCA Pa. 1921) 275 F. 51."

Note 6 on page 23 Ibid reads: "6. Accomplice defined. - An "accomplice" is an associate in guilt in the commission of a crime, a participant in the offense as principal or accessory. Singer v. U.S. (C.C.A. N.J. 1922) 278 F. 415, certiorari denied (1922) 42 S. Ct. 272, 258, U.S. 620, 66 L. Ed. 795.

Section 908, of the District of Columbia Code defining persons who may be charged as principals, and not as accessories, and this section do not fully define accomplices and any one who knowingly and voluntarily co-operates with, aids, assists, advises, or encourages, another in the commission of a crime is an "accomplice", regardless of the degree of his guilt. Egan v. U.S. (App. D.C. 1923), 287, F. 958.

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

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In the Cumulative Annual Pocket Part Title 18, U.S. Code Annotated page 11, Section 550 (Criminal Code, Section 332 "Principals" defined we read: "The concept of an 'accessory before the fact' presupposes a prearrangement to do the criminal act, and to constitute one an "aider and abettor" he must not only be on theground and by his presence aid, encourage or incite the principal to commit the crime but he must share the criminal intent or purpose of the principal. Id. Morei v. U.S.,CC.A. Ohio, 1942, 127 Fed 827.

In this trial you have heard the evidence which the prosecution introduced against seventeen of the accused charged under specification 3 of Charge I and none of the evidence showed that any of the seventeen by his presence at the scene of the execution aided, encouraged, or incited Captain IWANAMI to commit the crime. But the prosecution must also prove that these seventeen shared the criminal intent or purpose of the principal. This the prosecution failed to do.

WATANABE, SAWADA, KAMIKAWA, TANABE, NAMATAME, MUKAI and KUWABARA took the witness stand and denied they had any part in the incident. TANABE was a patient at the hospital sick in bed the day the incident occurred.

Lieutenant KAMIKAWA testified he was not at the scene and he did not have anything to do with the incident.

WATANABE, SAWADA, NAMATAME, MUKAI, and KUWABARI testified they were ordered to be at the scene but they did not participate in the stabbing.

Lieutenant OISHI, Ensign ASAMURA, Chief Petty Officer HOMMA, and Chief Petty Officer YOSHIZAWA admitted they did certain acts but only because of Superior Orders and they had no criminal intent. It was they who were incited by Captain IWANAMI, the principal and not IWANAMI who was incited by them. They did not volunteer. They were ordered to do the things they did. There was no common purpose here but only a compliance with orders from a superior.

In the course of their testimony these co-defendants did have to testify against each other and particularly against their co-defendant Captain IWANAMI. This was due to their being joined in trial and it was most prejudicial to the rights of the accused, particularly Captain IWANAMI.

Every witness that the prosecution produced could well be said to be a co-defendant, because they were ordered to be at the scene. The rule of law regarding such testimony is: "Testimony of co-defendants testifying for state must be corroborated. Madigan v. U.S. (C.C.A. Wyo. 1927) 23 F. (2d) 180."

We ask that the commission consider carefully all the testimony of the prosecution witness. These prosecution witnesses testified as to certain acts but this is not enough to convict for murder.

"Without guilty knowledge criminal intent cannot exist, and to establish the intent evidence of knowledge must be clear. Estep v. U.S., C.C.A. Utah, 1943, (140 F. 2d 40.)" (Page 195 U.S. Code Annotated Title 18, Accumulative annual pocket part, sec., 6. 83.)

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

No prosecution witness testified as to this knowledge on the part of any accused.

"To authorize conviction of a crime there must be established beyond reasonable doubt that accused's act was done purposefully and with intent to violate the law. U.S. v. Thomas, Wash, D.C. 1943, 52, F. Supp. 571 (Ibid page 195).

Not a single prosecution witness testified that any of the acts which he saw these accused do were done purposefully and with intent to violate the law. How impossible it was for these prosecution witnesses to so testify is easily realized when we consider that even now there has been no showing by the prosecution as to what law was violated by the accused. It is fundamental that a person must know the law before he can have an intent to violate that particular law wher that intent is not presumed but must be proved as in the crime of murder.

In this case where it is necessary to prove that these accused had an intent to violate the law it is also necessary to prove that they had knowledge of the law. When the accused did take the stand we did attempt to show a lack of knowledge of international law, and the law and customs of war, by these accused but the judge advocate insisted that the law presumes knowledge on the part of these accused and it was therefore immaterial as to whether the accused had knowledge. Evidently the judge advocate assumes that it is unmaterial that the accused be informed as to what law and customs of war he is being charged with having violated because as yet there has been no showing by the prosecution as to what law and what customs he refers to when he charges "this in violation of the law and customs of War."

We grant you that one is presumed to have a knowledge of the law of his state and of the nation. (Ford v. U.S. 10 Fed. (2d) 339, Certiorari granted in 271 U.S. 652, 70 L. ed. 1133, 46 Sup. ct. 475.)

We also hold that "unless otherwise shown, the presumption exists that the law of another state is the same as that of the former state." (Mass. Butterworth v. Smith 240 Mass. 192, 133 N.E. 100) "though only as to the common law and not statutory laws". citing People v. Sokol, 226 Mich. 267, 197, N.W. 569.

Since there are no common law offenses against the United States, 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 whereby Act of Congress such offenses are recognized and made punishable" These accused can only properly be charged with having violated statutory laws. The statutory laws of the United States are as a matter of common knowledge not the same as the statutory laws of Japan. How different our laws are from the Japanese laws is clearly shown in the case of both FURUKI and INOUE. In those cases as this commission remembers the accused was charged under the first charge called "Murder as having killed certain persons." This in violation of effective law, especially Article 199 of the Criminal Code of Japan,

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

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."

In this present case the convening authority did not see fit to charge those accused with statutory murder either under the United States Federal Statutes or under the Criminal Code of Japan but have charged these accused with murder at common law and "this in violation of the law and customs of war."

As I have stated there is no presumption that any of these accused have knowledge of our common law or of our Federal Statutory law How then can any of these accused have had the intent to violate the law when they had no knowledge of the law which they are charged with having violated.

"To authorize conviction of a crime there must be established beyond a reasonable doubt that the accused's act was done purposefully and with intent to violate the law.", citing U.S. v. Thomas, Wash, D.C. 1943, 52 F. Supp. 571 and page 195 U.S. Code Annotated Title 18 Cumulative Annual Pocket Part.

What makes a homicide murder? In Underhill Criminal Evidence Section 537, page 1088, we read: "Malice, express or implied, is necessary to make a homicide a murder." citing People v. Motuzas, 352, Ill. 340, 185 M.E. 614; Morgan v. Commonwealth, 228 Ky. 432, 15. S.A. (2d) 273.

"The character of homicide, whether murder or manslaughter, and the validity and cogency of a defense involving justification or excuse for the act of killing, which itself is not denied depends wholly upon the presence or absence of a malicious intent. To constitute the killing as murder in the first degree; malice existing at the instant of the killing, or, at least, at some time not too remote, must be shown, or circumstances must be shown from which it may be presumed. (citing People v. Elmore, 167, Cal. 205, 138, Pac. 989, People v. Dean, 23, Cal. App 745, 139, Pac 904; People v. Johnson. 286 Ill 108, 121. N.E. 246; People v. Collins, 216, Michigan 541, 185, N.W. 850.

Malice must be proved beyond a reasonable doubt. (citing Glass v State, 201 Ala. 441, 78, So. 819; State v. Adams, 6 Penn (22 Del.) 178, 65 Atl. 510; Whitehead v. State, 115, Nebr. 143, 212, N.W. 35; Runyan v. State, 116, Nebr. 191, 216, N.W. 656; State v. McKay, 150, N. Car. 813, 63, S.E. 1059."

This third specification alleges two killings.

We further criticise this third specification of the first charge because two killings are alleged in one specification. What justification is there for naming two victims in one specification? We objected to the charges and specifications at the proper time but were overruled. The fact that we went to trial in no way cures this and other defective specifications.

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

It is not incumbent for the defense to define such technical words as wilfully, feloniously, with premeditation and malice aforethought. We do however, refer the commission to Court Martial Order 5-1921 which clearly states, "The distinguishing character of murder is malice aforethought. When it exists, the homicide is always murder. When it does not exist, the homicide cannot be murder,...". The expression 'malice aforethought' is very technical, and cannot be taken in the ordinary sense of the term 'malice'. It must be construed according to the decided cases which have given it a meaning different from that which might be supposed ... Chief Justice Shaw said in the celebrated Webster case ... "is intended to denote an action flowing from any wicked and corrupt motive - a thing done malo animo - where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief". We continue to quote: "If a man voluntarily and wilfully does an act, the natural and probable consequence of which is to cause another's death, an intent to kill will be presumed."

On page 2067 of Bouvier's, Malice is defined as "The doing a wrongful act intentionally without just cause or excuse. 4 D&C 255; Com v. York, 9 Metc. (Mass), 104; 43 Am Dec 373; Zimmerman v. Whitely; 134 Mich, 39, 95 N.W. 989. A wicked and mischievous purpose which chamactorizes the perpetration of an injurious act without lawful excuse. 4 D&C. 255; Com. v. York, 9 Metc . (Mass) 104, 43 Am. Dec. 373."

In Wharton's Criminal Law, Vol. 1, par 421, pp 634-636 we read. "Murder is distinguished from other kinds of killing by the condition of malice aforethought....".

"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 prosecutior 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.....

"The phrase corpus delicti means, literally the body of the transgression charged, the essence of the crime or offense committed, the existence of the sunstantial fact that a crime or offense 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....."

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

"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) 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.W. 956.

"A conviction very seldom occurs without direct proof of the corpus delicti, either by eye witness of the homicide or by subsequent discovery of the dead body; yet there may be exceptions, where corups delicti may be proved circumstantially 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 could ever be produced. Citing People v. Alivso (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 542; Walker v. State (1883) 14 Tex App. 609.

In the case of McBride v. People (1894) 5. Col. App. 91, 37 Pac. 993, it was held that "The confession of defendant without aliunde cannot establish the corpus delicti".

Want of proof of the corups delicti cannot be supplied by proof of the extrajudicial confession of the accused. People v. Besold, (1908) 154 Cal. 363, 97 Pa. 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 came to his death through the criminal act or agency of another human being.....

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 (1853) 18 N.Y. 179 and People v. Bennett (1872) 49 N.Y. 137.

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James P. Kenny

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

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. 499 - 458: "It seems now pretty generally held that circumstantial evidence is admissible to establish the corups 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, that 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 (1888) 24 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:
(See page 672).

"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 Just., 47; 4 Black, Com., 195; 1 East, P.C. 214; 1 Russel, 482; 1 Gabbett, 454; 3 Greenl. Ev. para 1430; 1 Wharton C.L. para 303; 2 Biship, C.L. para 732, and notes; Com v. Webster, 5 Cush, 304; G.O. 23, Dept of Cal, 1865.

Winthrop's Military Law and Precedents. Second Edition Volumes One and Two, Page 673:

"MURDER -- Definition."

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.

"The homicide must be unlawful, that is to say 'felonious' or

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

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 chargeable 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, - 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 injury 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, etc., 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, being engaged in a riot, fires indiscriminately and kills some one; or, in resisting an officer of justice engaged in the execution of his duty, unintentionally kills him, etc. 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 defences apposite to this charge, viz: 1, that the killing was not murder but manslaughter; i.e. a killing without "malice;"

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

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 this instance, in the supression of an actual mutiny or other violent disorder, or in the capture of an escaping prisoner or desertor, where no other adequate means are available for the purpose. Homicide is in law "excusable" where it is the result of accident of 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, 2A 662; 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 city, U.S. v. Hart. 162, F. 192."

All the evidence clearly shows that OISHI, ASAMURA, YOSHIZAWA, HOMMA, and the other accused did not consciously violate the law when they were ordered by their superior officer, Captain IWANAMI, 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 of any is manslaughter.

Since the absence of intent express or implied is clearly shown by the evidence the commission cannot find these eighteen accused including Captain IWANAMI, guilty of murder.

A homicide committed by a soldier without malice in the performance of duty,..... or kills under the order of a superior officer, citing Commonwealth v. Shortall, 55 A. 952, 206, Pa. 165, 98 Am. S.R. 759; Riggs v. State, 13 Caldw 85. See Army and Navy para 37 d(2)

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

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 A. 244, 246, 126, Me. 223, 53 A.L.R. 241."

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, U.S. v. A.H. Chong, 15 Philippines, 488 (cit Cooks Case, Car 538, 79 Reprint 1063) 30 C.J. Page 38, note 38"

Let us consider the evidence as it relates to Lieutenant OISHI, Tetsuo who was demobilized, and was living in Japan with his wife and family. Having nothing to hide Lieutenant OISHI took the stand as a witness in his own behalf to explain why he did certain acts that day at Truk, July 20, 1944.

Prior to taking the stand, there had appeared as a defense witness, MINATO, Tadao, former surgeon lieutenant, Imperial Japanese Navy. He testified on the 22nd day, Friday, July 25, 1947, that together with Lieutenant OISHI they had gone to the adjutant to protest the Self-Defense Unit having to execute two prisoners at the hospital.

In answer to Question #9, MINATO, in part said: "OISHI said, 'I cannot do it.!' Then the adjutant said, 'I am against it also, all of the officers are against it, we are placed in a difficult position. After having this conversation OISHI and myself felt relieved and returned."

Lieutenant OISHI testified in Answer to Question #34 on the 29th day of the trial:

"At this time there were doubts, I thought, I half believed that the prisoners would be executed because I perceived this by remembering the talk I had with the adjutant when I went to see him at his quarters and stated if the head of the hospital is trying to get the staff-defense section to dispose of the prisoners, I refuse, and the adjutant stated this is not an order. This is not an order, and he also stated that he was against this and also the other officers were against it, therefore, this disposition of prisoners would not take place. I know about this conversation, but I did not know about

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Lieutenant, U.S. Navy,
Judge Advocate.

the incident until the general assembly. As many enlisted men were going by, I thought I would have to assemble also, and together with Ensign YOKOTA, who was close by, we went to the scene. When a general assembly was called, even though you did not want to go at this time, you were not allowed to refuse; even thought you didn't want to go."

This shows how Lieutenant OISHI felt about the incident at that time. He was against any execution at the hospital and personally wanted no part in any such execution. But this was the Japanese Navy and Japan was at war with the United States.

There wasn't any thought of disobedience of orders. Lieutenant OISHI was a young doctor (he was then only 25 years old) and he too had learned Naval Battle Regulations and he knew the penalty for resisting an order in the Japanese Navy.

Some few excerpts from Naval Battle Regulations and the Naval Criminal Code are here set forth:

NAVAL BATTLE REGULATIONS

General Principles:

I Military discipline is the very life of the military forces and harmonious relations is its blood.

The essence of military discipline lies in obedience.

MILITARY TRAINING REGULATIONS

General Principles:

II. A sound military spirit and solemn military discipline are the basis on which the military forces exist. The vital importance in military training is to foster this basis.

Chapter I. General Rules.
Chapter II. Basic Training.

Section I. Spiritual training.

Article 20: The Imperial rescript is the mirror of the military spirit. If all military persons regardless of rank shall bear his majesty's will in mind shall never forget it, and being of one mind shall obey the Imperial teachings, then the spiritual training shall be realized and its objectives shall be attained.

SERVICE REGULATIONS OF PERSONNEL ON SHIPS

General Principle:

II. Military discipline in order to unify the spirits of the military forces and is the principle to mold the minds of a thousand persons into one.

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Lieutenant, U.S. Navy,
Judge Advocate.

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Therefore, military discipline aboard ships must be most solemnly observed and it must be maintained without the slightest slackening, from the Captain of the ship down to the rank. Solemnity of military discipline can only be expected by training the spirit of each individual military person. Therefore, all hands on a ship should bear the Imperial will in mind every moment, chiefly foster the military spirit, be always sincere needless to say when pursuing official duty, with unity in mind and act, respect the sense of honor, value self-restraint, and calmly discharge the duties of a military person when faced with death.

III. The effectiveness of the armed forces lies in the replenishment of its real ability. Therefore, the true objective in the training of the ship lies in the fostering of the real ability together with the training of a military spirit and enforcement of military discipline.

IV. Order is the source of military action. It must be precise and pertinent, when an order is once given out, the commander should supervise its execution and thoroughness. The commander should be careful not to give out orders that are not precise so as to bewilder the receiver, or to make an impertinent demand so as to make the execution difficult, or overlook without giving any encouragement, the negligence of the receiver.

VI. Obedience in the military forces is implicit and must become a second nature. But once an order is given out complaints about the difficulty of its execution, or negligence in carrying it out, or discussion about its fitness should definitely not be allowed, . But there are not a few occassions where arbitrary action is necessary. When the situation is imminent and the condition undergo a change and further instruction cannot be had, the intention of the commander should be judged and with arbitrary action the opportunity must be grasped.

Arbitrary action is not taken to conflict with the spirit of obedience, but always within the scope of the commander's intention and without ending in self-indulgence.

Article 105. In regard to international matters, the Captain should be especially careful, and should dispose of them within the scope of orders, regulations, and treaties. If there are matters beyond this scope the instruction from the senior commanding officer or directly from the naval minister should be requested.

NAVAL CRIMINAL CODE

CHAPTER 4.

CRIMES OF RESISTING ORDER

Article 55. One who resists the superior officer's 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 [illegible] confinement.

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Lieutenant, U.S. Navy,
Judge Advocate.

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Lieutenant, U.S. Navy,
Judge Advocate.

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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.

I would like to read to you the testimony of Lieutenant OISHI:

Answer to question #41: "Then the head of the hospital said in a loud voice, 'Petty Officers step forward!'"

Answer to question #42: "When the head of the hospital said this it became very quiet. No one moved, no one spoke. And none of the petty officers stepped forward."

Answer to question #43: "The head of the hospital suddenly called out my name. I stepped forward and went to the front. I stood in front of the head of the hospital."

Answer to question #44: "Then the head of the hospital said to me, 'Lieutenant OISHI, have the petty officers step forward'."

"45. Q. Then what did you do?
A. When I came up the hill, I was determined that if it was the execution of the prisoners, I would have nothing to do with it, but when I was called forward and ordered this by the head of the hospital in front of almost everyone in the hospital, I could no nothing but to perform it and I thought if I had those petty officers step forward that would be all I had to do, so I stepped out in front and called out for the petty officers to step forward.

"46. Q. Then what did you do?
A. Noone stepped forward.

"47. Q. Then what happened?
A. When I looked I saw that enlisted men were lined up in order of rank, so I went forward and made a division with my hand and had the petty officers step forward.

"48. Q. Then what did you do?
A. The petty officers lined up in sideways in two rows and after I saw them lined up, I started to go back to my former position among the officers.

"49. Q. Why did you have the petty officers step forward?
A. As I stated before, I determined not to take part in the incident if it occurred and I thought that I would have nothing such to do, but when I was suddenly called forward by the head of the hospital and given this order in front of my superior officers and subordinates, there is nothing I could do but ot obey that order.

"50. Q. What did you do after the petty officers were brought forward?
A. When the petty officers were lined up sideways, then I started to go back to my former position, the head of the hospital ordered in a loud voice the two columns change positions so that they would be lined up vertically and steel spears and rifles with bayonets be handed them and also to have them lined up one bayonet, one spear, one bayonet, one spear, in that order.

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"51. Q. Then what happened?
A. Then enlisted men who were lined up around the prisoners who had stepped forward came forward rifles and spears and giving it to them, handing them the rifles and bayonets and spears.

"52. Q. What happened then?
A. When the head of the hospital gave this order I stepped in my tracks and looked over my shoulder and watched them. After this, when I saw that they had lined up, as the head of the hospital had ordered, I went back and took my former position among the officers.

"53. Q. Then what happened?
A. I was again called out by the head of the hospital and came to stand in front of the head of the hospital.

"54. Q. Then what happened?
A. The head of the hospital ordered me as follows: "Stand by the petty officers and see that they perform it, and see that they act in an orderly fashion."

"55. Q. Then what did you do?
A. When I received this order, I was very surprised, and I became very upset, and as I was ordered I stood by the petty officers.

"56. Q. Then what happened?
A. The head of the hospital made a speech.

"57. Q. Do you know the contents of that speech, the speech of the head of the hospital?
A. I was very upset and excited, but I remember his stating in his speech as follows: "The Americans have bombed the defendless cities in Japan. Your parents, brothers, and sisters died of this. The hospital was also bombed; therefore, those two prisoners are to be executed. You have nothing to hesitate about. Stab the heart and kill them with one stroke! Stab spiritedly"!

"58. Q. Then what happened after the speech of the head of the hospital?
A. The head of the hospital said, "Begin immediately".

"59. Q. Then what did he say?
A. I did not expect, and was confused. I looked back toward the petty officers. They all had worried expressions in their faces. I could not bring myself to present the order in this confused frame of mind. I faced toward the petty officers and made a short speech.

"60. Q. What did you tell them?
A. I stated if you go forward, the prisoner will die. It is the same as when the wind blows toward a tree, the tree will fall. The wind does not blow to make the tree fall down , but it just blows; the tree falls because the roots of that tree have been cut.

"62. Q. What did you do after you finished the talk?
A. Before I finished the talking, the head of the hospital excitedly struck the ground forcefully with his stick and I remember exactly what he stated. He said, "Hurry up. Why don't you hurry up? What are you hesitating for? If you can't do it, I will be the first one to do it, and show you how to do it."

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"63. Q. What happened then?
A. While the head of the hospital was saying this, I called out the order to go forward.

"64. Q. Why did you call out this order?
A. At first when I was ordered that I stand by the petty officers and act in an orderly fashion, I could not go against it. I became all the more confused, I wondered why I was ordered to do this and was very irritated at this; also, there was most of all the persons of the hospital were watching, the head of the hospital called out in a loud voice, 'Hurry up!' I could do nothing else but to give that order.

"65. Q. How many times did you call out this order to go forward?
A. As I had stated before, this was the first and only time that I was in such a confused state of mind, and I remember giving the first order to go forward, but I do not remember how many times I gave this order.

"65. Q. Were you watching the petty officers as they went forward to stab?
A. I was watching the back of the persons who were going, running forward to stab the prisoners.

"66. Q. Do you remember how did petty officers appear?
A. The impression that remains in my mind when I was looking at the back of these stabbers, they looked very small. I also notice that there were some who missed when they stabbed.

"67. Q. How long did it take for the stabbers to end?
A. As I stated frequently, the scene is not at all long, and on the other hand, it seemed a very short time, to myself I had no sense of time.

"68. Q. Then what happened?
A. Before the prisoners were stabbed, they were standinb by their own power, but about the middle of the stabbing they were slumped down and it was clear that they were dead.

"The judge advocate moved to strike out the words "and it was clear that they were dead" out of the answer on the ground that they were the mere opinion of the witness.

"The accused made no reply.

"The commission directed that the words be stricken out.

"69. Q. Then what happened?
A. About this time, I felt my throat being very dry and I felt a little sick, I went toward the road and was sitting on thegrass.

"70. Q. Then did anything happen after this?
A. When I was resting, the enlisted men came to me and said, 'The head of the hospital is calling you'.

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"71. Q. Then what did you do?
A. I went to where the head of the hospital was.

"72. Q. Then what did you do?
A. I was giving the following order: 'Cut the neck of the prisoner with a sword.' As this was a ritual, it was not necessary that their head be cut off.

"73. Q. Then what did you do?
A. This time I looked around and saw that the 'U' shape had been broken up and that they were grouped closer around the prisoners. No one moved and everyone was watching at me, holding their breath.

"74. Q. Then what did you do?
A. I went to the prisoners and looked at them for a short time.

"75. Q. Do you remember how the prisoner looked when you went close by and watched the prisoner for a short time?
A. They were held up by a rope which was tied around their breasts and tied to the cross bar and also by another rope which was tied around the stomach and to the other tied to the cross bar and their heads were bowed very deeply and their feet slumped, with both of their feet touching the ground. Their complexion was a whitish green and very pale. I could not observe any movements of breathing. There was no movement at all. It was almost like a statue.

"The commission, then, at 10:16 a.m., took a recess until 10:37 a.m., at which time it reconvened.

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

"No witnesses not otherwise connected with the trial were present.

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

"(Examination continued:)

"75. Q. You testified that you were ordered by the head of the hospital to cut the neck of the prisoners and that you went close to the prisoners. What did you do after that?
A. I was standing by the prisoners to the right facing the prisoners. I drew my sword and I swung once. I struck once. I made a small cut in the left shoulder, but I saw no blood coming out.

"77. Q. Why did you draw your sword and strike the prisoner?
A. I was ordered directly by the head of the hospital in front of my superiors and in front of my subordinates who were holding their breath watching at me. I was still in this confused or agitated state of mind and I could not refuse. The head of the hospital had said 'ritual'. I know that in Japan, even on persons who were dead, this cut with a sword was made and my feeling at that

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Lieutenant, U.S. Navy,
Judge Advocate.

time was not to mutilate the body, but as a ritualistic feeling in doing this.

#78. Q. Then what did you do?
A. I stepped back from the prisoner and I looked at the sword.

#79. Q. What happened then?
A. When I looked at the sword, there was no blood on the sword, nor was the blade nicked, but about three or four inches from the top of the sword, it was clouded as if there was some oil on it. When I looked, I saw a bucket with some water in it so I dipped the sword in some water and wiped it off with a handkerchief, and I placed it in the scabbard. I did this because I did not feel good to just place the sword in the scabbard with the clouded part on it."

Did Lieutenant OISHI do these things wilfully? Not a single witness testified that he did anything wilfully. He himself testified how he became a victim of circumstances, probably because he was head of the Self Defense Section at that time. This seems the only reason that Captain IWANAMI should have singled him out to relay his orders of execution to the stabbers. Yet he was reluctant to even relay orders. He felt as if he were only a puppet, without any intent. So too with the stabbers he allayed any reluctance on their part by telling them this same story. They too, believed they were only puppets.

Did Lieutenant OISHI relay the orders feloniously? By feloniously is meant unlawfully, other than justifully and without excuse. Winthrop says: "no killing of a public enemy can be regarded as committed with such malice." OISHI cannot be held criminally responsible because he was made a mistake of fact and there was no negligence or bad faith on his part. He objected to the execution. Then his superior officer, a Captain Medical Officer in the Navy has the prisoners brought from the guard unit, the Captain makes a speech to the assembled officers and enlisted men, and then without any warning the Captain calls out to OISHI and orders him to relay the execution orders.

Was there any premeditation and deliberation on the part of Lieutenant OISHI? Did he weigh and consider, did he form and determine the intent or design to kill those two prisoners as he is charged with doing? All the evidence shows there was no premeditation on the part of Lieutenant OISHI.

What he did with the sword is in the same manner except that he being a doctor knew these two prisoners were dead and so although still reluctant to do any overt act he thought he must carry out the final order and he struck at one prisoner with his sword. The sword did not even draw blood.

So we say that Lieutenant OISHI, a medical officer relayed certain orders of his superior officer and struck at a prisoner already dead, struck at the prisoner because he was ordered to do so.

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In accordance with the ruling in 40 Corpus Juris Secundum page 960, "An accused is entitled to full acquittal and discharge where the homicide is excusable or justifiable.", citing Erwin v. State, 29 Ohio State 186.

We ask therefore, that the commission find as to Lieutenant OISHI, Tetsuo specification three of Charge I not proved and the accused Lieutenant OISHI, Tetsuo is of the charge of MURDER not guilty and the commission does therefore acquit the said Lieutenant OISHI, Tetsuo of the specification and of the charge of MURDER.

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ASAMURA, Shimpei, an Ensign in the Japanese Navy is also charged with MURDER of these same two prisoners. ASAMURA was only 22 years old. He had entered the Japanese Naval Academy three and one-half years prior and was graduated in September of 1943. He reported for duty to the Naval Guard Unit at Truk in March of 1944.

ASAMURA also was demobilized and then arrested and extradited to Guam. In July of 1944 ASAMURA had never seen an American prisoner so when one of his men said that there were some prisoners on the hill back of the hospital this young boy out of curiosity went to see them.

In answer to question #9 on the 29th day, ASAMURA on the witness stand said: "When I heard this, as I had never seen prisoners up to this time, I went up to the hill to see the prisoners, as a matter of curiosity to see what they looked like."

After he had had his look he left the hill and went to the hospital administration. There he met Captain IWANAMI. ASAMURA testified: "I saluted the head of the hospital. Then the head of the hospital said to me, 'The prisoners are going to be executed on the hill. Go and watch it!' And that is how I came to be on the hill."

To question #12: "Why did you do as the head of the hospital said when the head of the hospital said to go up the hill and watch the execution? ASAMURA gave a long explanation and said: "I was in a position in which I had to obey the orders of the head of the hospital. I had always been obedient to his orders and when he said to me, 'Go to the top of the hill and watch' without thinking I just obeyed what he had instructed me."

Then ASAMURA tells of the stabbing of these two prisoners after Captain IWANAMI's speech.

ASAMURA's answer to Question #16 is as follows: "I thought it was over and was about to leave when I saw Lieutenant OISHI called by the head of the hospital, and they talked. After this Lieutenant OISHI came toward me and called, 'Ensign ASAMURA!' As

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he called I went up to him. Lieutenant OISHI said, "The head of the hospital has ordered you and I to cut the necks of the prisoners? " I was surprised and looked toward the head of the hospital. The head of the hospital said: "Have you ever cut before?", and I replied, 'No!'

The head of the hospital said: "You are supposed to leave one inch connecting the head and the body".

At this time without hardly thinking at all, but feeling that the head of the hospital would be mad if I went against his wishes, I went toward the prisoner to the left and stood to the right of the prisoners. The head of the prisoner was bowed deeply; the legs were bent; his face was colorless. The flow of blood from the wound had already stopped. As he was in the same position as when he was stabbed and in a very difficult position to cut, I wondered how to go about it. Everybody there was looking at me and I saw the head of the hospital, but feeling the same as when you are about to jump off a stand ten meters high I was worried. I had a worried and sort of hurried feeling. Anyway I delievered the blow. It did not go well. The feeling I had up to this time was that I was forcing myself and so I had kept going . Now this feeling left me. I felt sick and started to go to the rear. I became sicker as I passed YOSHIZAWA and asked him, "Hold this sword for me?" I went down to the head back of the hospital quarters. That is what I did."

After ASAMURA had so testified not even the judge advocate desired to cross-examine him.

There is not a doubt but that ASAMURA was forced to do what he did because of superior orders. ASAMURA is charged with MURDER.

One cannot commit MURDER on a dead body and the body that ASAMURA cut at but missed was already dead. Besides ASAMURA had no criminal intent to commit murder.

If ASAMURA were in our army then the rule laid down by General MARSHALL on November 15, 1944, would apply not some rule laid down by SCAP on December 5, 1945.

We believe that this commission must by some means determine what law and what customs of war ASAMURA is charged with violating in specification 3 of Charge I and give ASAMURA as well as the accused the benefit of the defense that an American soldier would have in carrying out orders of his superior.

Rules of Land Warfare Basic Field Manual FM 27-10 Section 345 "Penalties for Violations of the Laws of War."

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

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Lieutenant, U.S. Navy,
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be punished. Signed By order of the Secretary of War; G. C. MARSHALL, Chief of Staff, dated 15 November 1944."

If ASAMURA is to be punished for murder which is said to be in violation of law and customs of war then we hold that individuals who violate such international law as the Hague Convention are not amenable to punishment for any Hague Convention or Geneva Red Cross Convention rule. These laws of nations are binding only on the soverign states and not on the individuals. ASAMURA, a young naval officer in the Japanese Navy could perhaps be punished under Japanese Naval law but he certainly could plead obedience to orders of a superior officer as a defense and under the American Army rule laid down by order of the Secretary of War on November 15, 1944. ASAMURA , if he were an American soldier could plead orders Of a superior officer either by way of defense or in mitigation of punishment. We plead it here by way of defense.

We also point out the utter lack of proof by the prosecution in the case of ASAMURA. The prosecution did not even show the individual that ASAMURA struck at was alive. The necessary elements for common law murder "to wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause" have not been proved.

We ask therefore that the commission find as to Lieutenant ASAMURA, Shimpoi, specification 3 of Charge I, not proved and the accused Lieutenant ASAMURA, Shimpei, is of the charge of MURDER not guilty and the commission does therefore acquit the said Lieutenant ASAMURA, Shimpoi of the specification and of the charge of MURDER.

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In the case of former Chief Petty Officer YOSHIZAWA, Kensaburo, only 28 years old at the time of the incident we call the commission's attention to the testimony YOSHIZAWA gave on the witness stand the 30th day of the trial.

YOSHIZAWA was the senior petty officer and on thatafternoon he did as usual at the one O'clock muster he detailed the men to their various jobs. Together with three men he went to fix the road behind the Third Surgical Ward. From here he could clearly see the hill so when persons began to assemble there about three o'clock knowing he was the senior petty officer at the hospital he went there to see what if anything had happened.

YOSHIZAWA then disgresses in his testimony and characterizes as false the testimony of TAKAHASHI, Masayoshi and YAMAGISHI, Michio, and the statement or deposition which the judge advocate introduced into evidence alleged to have been signed by IKEYA, Kyoichi, on two occasions, the last time just a matter of hours before IKEYA committed suicide on July 2, 1947. Now YOSHIZAWA was a witness in his own behalf and those two witnesses had testified against him. Who better knows whether their testimony was false than YOSHIZAWA?

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Lieutenant, U.S. Navy,
Judge Advocate.

We ask that the commission read TAKAHASHI's testimony of the 12th day and in view of all the evidence that was brought out and the characterization by YOSHIZAWA that it was false as concerning him give no credence or weight to TAKAHASHI's testimony. TAKAHASHI also testified that he knew that TANABE stabbed that day and TANABE was sick in the hospital, confined to a bed that day and yet TAKAHASHI saw him there. Little wonder then that YOSHIZAWA said that TAKAHASHI gave false testimony against him.

YOSHIZAWA came dressed only with a "g-string" and nearly everyone remembered this and yet TAKAHASHI could not. Instead he remembered YOSHIZAWA giving the order to commence to stab. YOSHIZAWA led TAKAHASHI and some fifteen other persons up the hill that day.

It was TAKAHASHI who also imagined he saw KAMIKAWA on the hill that afternoon. KAMIKAWA testified he wasn't there.

When TAKAHASHI's testimony is wrong as to three persons how can the commission believe any of it?

Then we have the fantastic testimony of YAMAGISHI, Mishoo, who testified that YOSHIZAWA ordered him to go and get his sword and he did go to YOSHIZAWA's room and brought a sword which he gave to YOSHIZAWA on the hill.

ASAMURA testified he gave YOSHIZAWA and that is how YOSHIZAWA got a sword. We ask the commission to disregard the entire testimony of YAMAGISHI, Mishoo.

IKEYA at the insistence of the investigators after having been in confinement for two years signs a statement. This isn't enough so they ask him to sign it again. He does and then a few hours later goes out in the jungle and commits suicide. IKEYA was himself a suspect otherwise why keep him in custody for two years?

But the judge advocate doesn't hesitate to use this statement of a suicide as evidence. In Section 711, Naval Courts and Boards we read: "The fact that a man takes his own life is evidence of insanity, but not enough of itself, to overcome the presumption of sanity. It is an act that should be considered with the previous acts of the deceased in determining whether he was not in possession of his mental faculties. If the previous acts of the deceased indicate sanity, or if a motive for killing himself exists - as where by his own misconduct he has brought about a situation from which he thereby seeks to escape - the deceased should be regarded as having been sane at the moment of taking his life. An earnest effort should be made by the court or board investigating the death ot obtain all possible evidence as to state of mind of the deceased just prior to taking his life. His state of mind will often be best evidenced by previous conduct, trouble, domestic or otherwise, considered in connection with brooding, preoccupation, and such like matters."

We had no opportunity to cross-examine IKEYA because he committed suicide July 2, 1947 and then on the sixteenth day of the trial, July 11, 1947, a statement which IKEYA had been asked

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Lieutenant, U.S. Navy,
Judge Advocate.

to sign twice was offered and admitted into evidence. It was supposed to have been sworn to the last time.

In C.M.O. 8-1931, the prosecution introduced into evidence the statement of the deceased Thompson. The J.A.G. Navy said:

"6. It is the opinion of this office, in view of the foregoing, that the court's action in admitting over objection, any of the declarations (oral or written) of the deceased THOMPSON was in error and should, in accordance with the motion of the accused, have been stricken from the record.

"7. This office cannot agree with the conclusion of the convening authority, as noted in the third paragraph of his action quoted above, that the reception of the hearsay evidence referred to was nonprejudicial. The Navy Department, in reviewing this record, cannot determine what effect such testimony had upon the court in arriving at its findings and sentence. The nature of the hearsay evidence admitted, however, would seem to preclude the conclusion that it had no substantial effect upon the court's (P.9) findings. It is the opinion of this office, therefore, that the errors committed by the court were in fact highly damaging to the accused and therefore substantially prejudiced his rights."

The rules of evidence protect an accused from such evidence. On rare occasions depositions are used. Section 211, Naval Courts and Boards, defines a deposition: "A deposition is the testimony of a witness, put or taken down in writing, under oath or affirmation, before an officer empowered to administer oaths, in answer to interrogatories and cross-interrogatories submitted by the party deserving the deposition and the opposite party."

Section 217, Naval Courts and Boards defines an affidavit: "An affidavit differs from a deposition in that it is taken ex parte and offers the opposite party no opportunity to cross-examine the maker thereof. An affidavit therefore, is not admissible in evidence for the purpose of proving the subject matter with which the affidavit deals."

But the commission admitted the statement of IKEYA into evidence. YOSHIZAWA, one of the accused against whom this statement of IKEYA was offered and admitted into evidence says the statement is false as to what IKEYA said about him. Is there anyone better qualified to say IKEYA's statement is false than a witness sworn to tell the truth as YOSHIZAWA was? The judge advocate would have the commission believe that this IKEYA who had been confined for two years and then signs under duress a statement which he is asked to sign a second time and then deliberately goes out into the jungle and commits suicide is rather hard to believe.

What a travesty on justice this would be if accused were to be found guilty on such evidence especially when they have taken the stand as did YOSHIZAWA.

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Lieutenant, U.S. Navy,
Judge Advocate.

To strike part of the testimony of an accused is error and prejudicial to the substantive rights of the accused especially where the evidence against him is a statement made by a person who himself was a suspect and who committed suicide. We challenge the judge advocate to show any ruling or case at law which permits the court to strike such testimony of the accused as the judge advocate requested this commission to do in the case of YOSHIZAWA and which the commission did strike from the record.

Section 454, Naval Courts and Boards protects an accused in those cases where the prosecution uses a deposition. In every such case the limitarion of punishment is imprisonment or confinement for more than one year. Nine of these accused have already been in close confinement for more than two years already awaiting trial.

Section 454, Naval Courts and Boards reads: "Limitation when a deposition is used. - In any case where a deposition is used in evidence by the prosecution by reason of the fact that oral testimony cannot be obtained, as authorized by Article 68, Articles for the Government of the Navy, the maximum punishment which may be imposed shall not extend to death or to imprisonment or confinement for more than one year.

. . . . . .

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

IKEYA's statement was more prejudicial to the eighteen accused charged with MURDER under specification 3 of Charge I than any deposition could ever have been. All of these eighteen accused should be allowed to comment on IKEYA's statement and if any of the eighteen are found guilty the limitation of punishment should be one years inprisonment..

Although SCAP rules may permit such evidence as a statement of a suicide we know of no SCAP rule which denies the accused the right to comment on such evidence when the accused takes the stand as a witness in his own behalf.

YOSHIZAWA continued his testimony and told of the little kindness such a giving that prisoners cigarettes and going to his room for bananas, and giving the prisoners water to drink and even to reviving one of the prisoners who fainted.

YOSHIZAWA continued and told about the speech Captain IWANAMI made and its hypnotic effect on the assembly.

YOSHIZAWA answered question #22 by testifying what he remembered of Captain IWANAMI's speech. He said:

"He stated that this prisoner had attacked Truk, killed many of our countrymen, bombed quarters, clothing and food, and is a

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

despisable enemy. He has brought Truk to this condition. He has bombed the hospital in violation of the Red Cross. In place of Heaven, I will punish them. Strike spiritly!"

As many witnesses have testified, the head of the hospital was very excited, a lot different from his usual attitude. Every one at the scene became very quiet, like a frog which is being looked in the eye by a snake, which has been stared at by a snake. Everyone was very pale in listening to the speech.

I refer the commission to the article appearing in July 5, 1947 issue of Colliers, pages 24-26, 30-31, by Daniel P. MANNIX, titled, "Do As You're Told". The author MANNIX tells about Howard KLEIN, one of the most successful professional hypnotests in America. In the spring of 1943 the U.S. Navy needed a hypnotist to make a German submarine commander talk and KLEIN did make him talk under a hypnotic spell.

"On October 4, 1941, KLEIN caused an international sensation by demonstrating that listeners can be hypnotized by radio. .... Since then, an English hypnotist has been presented over the B.B.C. television network. The results were so startling that the British passed a law forbidding any hypnotist to broadcast again."

"Klein believes there are two forms of hypnosis: 'informal' and 'formal.' Informal hypnosis is tried on us every day of our lives. The radio commercial that monotonously repeats the same idea, the mother who croons the same lullaby over and over until her baby falls asleep, the dictator who constantly screams the same lie, the officer who drills troops until they obey his commands instinctively ... all are using informal hypnosis. It is simply the power of suggestion. It may be used for good purposes or for bad.

"The hysteria of a lynching mob is due to informal hypnosis. But so is the courage of 'green' troops bravely attacking an objective.

"The difference between 'informal' and 'formal' hypnosis is the difference between a gentle push and a knockout blow. Formal hypnosis depends for its power on the trance state. No one has ever been able to explain what happens to the mind during the 'hypnotic sleep.' This sleep is induced by a combination of eyestrain and suggestion from the hypnotist.

"The old time hypnotists used to induce eyestrain in the subject by telling him to stare into their eyes. Actually, the eyes themselves have no hypnotic power. Modern hypnotists usually have their subjects stare at a bring coin or at a spot in thecoiling. To facilitate relaxation, the subject is told to breathe deeply and at a definite rhythm. This is why 'breathing exercises' are such an important part of yogism, which is based on self-induced hypnosis. These physical conditions, coupled with suggestion, cause the 'hypnotic sleep.' Why, no one knows.

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Lieutenant, U.S. Navy,
Judge Advocate.

"There probably is such a thing as mass hypnotism. Crowds usually are controlled only by informal hypnosis. But during Kloin's shows people in the audience frequently go into a trance while he is hypnotizing the subjects on the stage. During one of his Army shows, Klein told any members of the audience who felt that they had been hypnotized to stand up. Three hundred and fifty men rose. Klein had to make them march past him in single file in order to wake them up individually. 'These men were tired from a long day's drill,' explained Klein. 'They were highly susceptible. This was the closest I ever came to hypnotizing a whole audience'."

And so I say that on that day July 20, 1944, on the so called hill back of the officers quarters at the 4th Naval Hospital, Truk, that Captain IWANAMI put the crown in an informal state of hypnosis. They were all as so much putty in his hands. Nobody was really in favor of this execution but the power of suggestion which Captain IWANAMI used was used by him and enabled him to carry out what was a lawful execution of two American prisoners who had bombed the hospital at Truk.

YOSHIZAWA described the situation as well as he could and far better than anyone else has done so far when he said: "Everyone at the scene became very quiet, like a frog which is being looked in the eye by a snake, which has been stared at by a snake. Everyone was very pale in listening to the speech."

Much of YOSHIZAWA's testimony was on motion of the judge advocate stricken out. In effect YOSHIZAWA testified that after ASAMURA had failed to cut the prisoner with his sword ASAMURA gave his sword to YOSHIZAWA and hurriedly left being very sick and upset. Seeing that ASAMURA had failed in cutting the prisoner Captain IWANAMI ordered YOSHIZAWA to cut and YOSHIZAWA under the influence of Captain IWANAMI and by orders of Captain IWANAMI cut one of the prisoners.

YOSHIZAWA testified he struck at a dead body but the judge advocate moved to strike the word "dead" in the Answer to Question #32 on the ground that it was not responsive and that it was the opinion of the witness. If YOSHIZAWA thought the prisoner was dead when he struck at him he clearly didn't have the criminal intent to commit murder. If YOSHIZAWA thought the prisoner was dead the prisoner was no doubt dead having been stabbed by at least ten persons although all eighteen persons are alleged to have "each and together,..... wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike and kill by bayoneting with fixed bayonets, spearing with spears,....."

Because YOSHIZAWA cut at a prisoner in obedience to orders of Captain IWANAMI, because YOSHIZAWA in his opinion knew the prisoner was dead, and because he had no criminal intent to commit murder , we ask that the commission find as to Ensign YOSHIZAWA, Kensaburo, specification 3 of charge I not proved and the accused Ensign YOSHIZAWA, Kensaburo is of the charge of MURDER not guilty and the commission does therefore acquit the said Ensign YOSHIZAWA, Kensaburo of the specification and of the charge of MURDER.

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On the 30th day of the trial, HOMMA, Hachiro, took the stand as a witness in his own behalf. He stated that it wasn't until about 2:30 that he heard the call for general assembly and he went to the regular assembly spot in front of the administration building and was told to go to the hill back of the hospital and he went there. Shortly afterward the two prisoners arrived. Officers and enlisted men from the hospital continued to assembly and then Captain IWANAMI and Captain TANEDA arrived. The prisoners were tied, petty officers were lined up and certain of them stepped forward. HOMMA was in this group that was ordered to step forward and he and the others were handed steel spears and rifles with fixed bayonets. Captain IWANAMI made a speech. There isn't any doubt that everyone who heard the speech was hypnotized. HOMMA was an exceptionally obedient petty officer. He testified in his statement on the stand: "From the time I entered the Navy it was stressed to the marrow of my bone, obedience to orders was the backbone of military service. I have been taught this for nine years and also to carry out all orders of the superiors. This became second nature. In this case, we the petty officers when ordered to stab the prisoners had no authority or duty to reject this when we were given orders. We were taught to carry out the act immediately, even though it meant loss of life; forget your home; forget your parents; forget your wife and children,....."

If ever there was an illustration of informal hypnosis it was there at Truk that afternoon. Captain IWANAMI had so drilled his personnel that they obeyed his commands instinctively he thought. Well, almost but it was necessary that he get them in a hysterical state and this was easy to do because they were highly susceptible. The hysteria that day was due to informal hypnosis and Captain IWANAMI was a master at the act that afternoon.

To question #81, HOMMA said:

"For we the petty officers, the orders of the superior officers were absolute. We relied upon the superior officers and absolutely respected them ..... He (Captain IWANAMI) was always training the enlisted men in military spirit....."

According to paragraph 347 of the Rules of Land Warfare "Individuals of the armed forces will not be punished for those offenses (violations of the customs and laws of war) in case they are committed under the order or sanction of their government or commanders." This was the rule, the American Rule since 1914. On November 15, 1944, by order of the Secretary of War, General MARSHALL issued an order which changed this rule to a slight extent. But in July 1944 when this incident took place the American rule was that an individual like HOMMA had it been in our American Army would not have been punished since he committed the offense under the orders of Captain IWANAMI.

In answer to question #30 HOMMA testified: "We were instilled with the feeling that the orders in the Japanese military service were the direct orders of the Emperor. Once an order

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

was issued no matter what happens that order is to be carried out. As this was an order I did not think it was wrong."

As to what would happen if he disobeyed the order HOMMA testified in answer to question #52: "To disobey an order in the Japanese military service is one of the heaviest penalties and I have been taught in my nine years that in the front lines if an order is disobeyed the penalty would be death."

To question #36: "What did you think when you heard the speech of the head of the hospital?" HOMMA testified: "When I heard the speech of the head of the hospital I was of the same feeling but when I saw these two prisoners tied before my eyes I felt sorry for them."

Does this sound as if HOMMA, "wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause,....." He is so charged. These are the elements of common law murder and if HOMMA is to be found guilty all these things must be proved against him. Malice aforethought, is a strictly legal term. In view of the law it indicates a malignant or depraved nature. No one testified or could they do so, that HOMMA was of a depraved nature. HOMMA was the model chief petty officer. Whatever HOMMA did in stabbing one of these prisoners that day it was not MURDER.

For all these reasons we ask that the commission find as to HOMMA, Hachiro, specification 3 of Charge I not proved and the accused HOMMA, Hachiro, is of the charge of MURDER not guilty and the commission does therefore acquit the said HOMMA, Hachiro, of the specification and of the charge of MURDER.

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TANABE, Mamoru, a chief petty officer in July 1944 was the chief petty officer in charge of the out-patient room and also the senior petty officer in the first division. He, too, is charged with murder of these two prisoners although for twelve days from July 13 to July 24 he was sick in bed, a patient at the hospital. On July 20, 1944, he was still in bed with dengue fever and was not even at the scene of the execution. Why then is he charged with murder of both of these American prisoners. We sincerely hope that the judge advocate will explain why TANABE was indicted and why these prosecution witnesses KIKUCHI, Goro; TAKAHASHI, Masayoshi; HASEGAWA, Masanao; HAYASHI, Masaji and HAMADA, Toshihisa testified they saw TANABE stab. TANABE their shipmate, was however sick in bed with dengue fever. Could it be that these prosecution witnesses are not credible witnesses? Could it be that these witnesses have something to hide and thinking if they testify falsely that they will escape? There isn't any doubt that certain persons got together and decided that certain petty officers and officers were to be blamed for this incident and these persons readily decided upon the persons and agreed to take the witness stand and under oath testify falsely against their own shipmates.

In question #22 TAKAHASHI did not name TANABE as being

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

in the line of stabbers but in question #100 he did name TANABE as being one of the stabbers. However to question #102 he testified that he did not know what TANABE stabbed with that day.

This is an American Military court and such persons as have testified falsely should be punished.

TANABE, Mamoru, was demobilized and was living peacefully with his wife and family in Japan but because of this agreement to blame the leading or senior petty officers for the stabbing he was extradited and brought here to Guam and has for many months been kept in solitary confinement and was joined with eighteen others in trial and he, TANABE, Mamoru, is charged with murder of two American prisoners of war.

Let us look at the testimony of these five false witnesses.

KIKUCHI, Goro, on the tenth and eleventh day also testified falsely that Lieutenant Commander KAMIKAWA came to the scene of execution with Captain IWANAMI.

KIKUCHI also testified falsely that WATANABE, and SAWADA, were in the line of stabbers. This KIKUCHI under oath to tell the truth testified that he saw TANAKA, WATANABE, and SAWADA stab the prisoners.

KIKUCHI even gave his opinion that the prisoner that HOMMA stabbed looked as if he were dead. He qualified this statement however by saying "but as I am not a doctor and I did not take his pulse I can not say for sure." (Answer to question #62.)

Next let us look at the testimony of TAKAHASHI, Masayoshi. He was recalled as a witness on the twelfth day and recalled that when he arrived on the top of the hill with fifteen other men he saw both Lieutenant OISHI and Lieutenant KAMIKAWA And KAMIKAWA ordered prisoners tied and ordered the lining up of the persons who were armed.

TAKAHASHI saw MUKAI, SAWADA, WATANABE, and NAMATAME in the line of stabbers. He also saw those men stab although each of those men testified they did not stab. TAKAHASHI also testified that YOSHIZAWA mustered a group of men in front of the administration building and marched him and the others to the scene. He doesn't remember a single man who mustered with him. YOSHIZAWA on the witness stand denied he mustered and marched these men to the scene.

Next let us hear how HASEGAWA, Masanao testified on the thirteenth day. In answer to question #26 HASEGAWA, names several enlisted men in the line of stabbers including NAMATAME, WATANABE, and SAWADA. Then he says: "I remember the ones I mentioned above also Warrant Officer TANABE. Yet TANABE was sick in bed all that day and NAMATAME , WATANABE, and SAWADA testified on the witness stand that they did not stab. HASEGAWA was willing to say most anything it seemed because when he was asked question #27:

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Lieutenant, U.S. Navy,
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"Are there any others who are here present in court to-day that were in these two lines? Look at these people." He answered, "There is", and then question #28: "Who else?" He answered, "Captain IWANAMI, Lieutenant Commander KAMIKAWA, Lieutenant OISHI, Ensign YOSHIZAWA. The rest I do not remember." The record then shows: "The question was repeated to the witness." Answer by HASEGAWA, "Also there was Corpsman Chief Petty Officer KUWABARA."

KUWABARA also took the stand and denied that he stabbed.

Then HASEGAWA tries to change his testimony because to question #43: "Name the four you saw stab?" He answers: "HOMMA, WATANABE, SAWADA and TANAKA. These I remember."

Next there was witness HAYASHI, Masaji, who also testified on the thirteenth day. He too saw Lieutenant KAMIKAWA on the hill and saw him leave and shortly afterward Captain IWANAMI came to the hill. He also saw TANABE (answer to question #32) who was sick in bed, MUKAI, who testified he didn't stab, WATANABE, and SAWADA who both testified they didn't stab, all these witness HAYASHI imagined he saw in the line of stabbers. His answer to question #138 was that he distinctly remembered TANABE and MUKAI. He thinks WATANABE and SAWADA were lined up. He thinks they lined up according to rank and knowing their rank he therefore can say TANABE who was next senior to HOMMA was lined up. His answer to question #146 he says "I am not sure they lined up according to rank."

TANABE who testified he was sick with dengue fever, however, is said by witness HAYASHI who was asked question #178: "What did TANABE stab with?" Answer "With a spear."

Question #179: "Did he stab the prisoner HOMMA did?
A. Yes."

Question #180: "Where did he stab the prisoner?
A. He stabbed at the stomach of the prisoner, I do not know if the spear pierced or not."

Question #181: "How many times did he stab?
A. Once."

Question #182: "Did you see blood come from the place in the stomach where TANABE stabbed the prisoner?
A. No."

Question #183: "Did you see blood on TANABE's spear?
A. I do not remember."

Question #184: "Was the prisoner still in an upright positi r after TANABE finished stabbing him?
A. He was as if he were dead and limp and sagging against the rope."

And all during this time TANABE, Mamoru, was sick in a hospital bed with dengue fever.

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

Another prosecution witness HAMADA, Toshihisa, tries to follow along the same lines as these other witness because he too, can give us the names of the men who were in the two lines of stabbers. He glibly recites the name of Chief Petty Officer TANABE. In question #236 he said he saw TANABE stab. He also named eleven others including WATANABE, KUWABARI, SAWADA and NAMATAME who have all testified they did not stab. TANABE wasn't even at the scene but was sick in bed with dengue fever. To question #28 HAMADA said: "In relation to MUKAI I have only a faint recollection". HAMADA should have said this about WATANABE, KUWABARI, SAWADA and NAMATAME, and should have checked the hospital records so that he would have known that TANABE, Mamoru, was sick in bed with dengue fever July 20, 1944, and was not at the scene of the execution.

TANABE, Mamoru, on the witness stand as a witness in his own behalf was asked question #31: "Did you remain in your hospital bed the entire day of the twentieth of July?" And the answer was: "Yes, other to my going to the head or smoking a cigarette I stayed in bed all through the period I was in the ward."

In answer to question #33 TANABE said: "Sitting in this court room and listening to the testimony I have found out for the first time what the contents of this incident were. I know about because I heard about it in this court. I have heard much testimony about the contents of this case. According to that testimony on that day of the incident there was a general assembly, almost all the members of the hospital were assembled, the petty officers were brought forward by the orders of the head of the hospital and that they were made to stab, therefore, I was a member of the Fourth Naval Hospital at that time, and the witnesses as they did not know the fact that I was in the hospital at that time thought TANABE must have naturally taken part in this incident and testified to this effect. That is how I believe it is."

The judge advocate continued his cross-examination of TANABE and question #34: "HAMADA, who served with you at the hospital, HAYASHI who served with you at the hospital, and TAKAHASHI who served with you at the hospital not only said that you were on the hill that day, but they testified that they actually saw you stab one of the prisoners. How do you explain their testimony?" And he answered: "It is just as I have stated, with that thought in mind, for myself I absolutely did not stab the prisoners, naturally I was not at the scene, naturally I did not stab."

So in this American court room we find that Japanese will get up and under oath testify that they saw a person stab an American three years ago. That person accused of murder must then take the witness stand and as an accused try to convince the court that he is telling the truth when he too testifies under oath that he was sick in bed with dengue fever, that he did not leave his sick bed for ten days, that he was not at the scene, and that he did not stab. At least ten of these accused have all stated on the witness stand that prosecution witnesses have testified falsely against them. The judge advocate has requested that

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

such testimony be stricken from the record and in most if not all cases the testimony of the accused that witnesses have testified falsely against them has been stricken from the record. As we have stated before we can find no rules of evidence to uphold such a ruling or which permits the striking of such testimony of an accused from the record.

Some of the accused had been demobilized, others have been in confinement since the cessation of hostilities, two years ago. Practically all the prosecution witnesses have been confined or held in custody as suspects or as witnesses since V-J Day, two years ago. Two prosecution witnesses committed suicide during this trial. It is all very confusing and we do not want those accused to invade the province of the commission because we know full well that it is for the court to weigh the evidence but we do want to point out to the commission how difficult it is for those accused to refrain from speaking out against persons who in this court have sworn by the Christian God to tell the truth and yet testify falsely.

In the case of TANABE, Mamoru, we ask that the commission find as to TANABE, Mamoru, specification 3 of charge I, not proved and the accused TANABE, Mamoru, is of the charge of murder not guilty and the commission does therefore acquit the said TANABE, Mamoru, of the specification and of the charge of MURDER.

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KAMIKAWA, Hidehiro, who at the time of the incident was a Surgeon Lieutenant and acting as Adjutant at 4th Naval Hospital Truk is also charged with the murder of these two American prisoners on July 20, 1944.

KAMIKAWA was demobilized January 23, 1946, and returned to Japan. He then secured a position as medical officer on the 19th of September 1946, however, he was taken into custody and brought to Guam. Why he was extradited from Japan and how we have attempted to show but were unable to get such things into evidence. Whether he was ever questioned about this July incident and if he denied it is also important because for some reason KAMIKAWA is also charged with the murder of these two Americans. It is not the American way to indiscriminately charge persons with murder or any crime for that matter. It requires more than suspicion or rumor.

But KAMIKAWA was on or about May 9, 1947, served with the charges and specifications and brought to trial for murder. The prosecution have tried to justify this murder charge against KAMIKAWA by calling as witnesses certain enlisted personnel and the senior section head of the Truk hospital, Captain TANEDA. These prosecution witnesses went as far as they dared in trying to involve KAMIKAWA and thus absolve themselves particularly Captain TANEDA.

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Lieutenant, U.S. Navy,
Judge Advocate.

OKAMURA, Takao, a Lieutenant Commander and head of surgical department at the time of the incident testified that he thought KAMIKAWA was there on the hill. The judge advocate asking him the following leading questions on the eighth day of the trial:

"Q. 47. You saw Lieutenant Commander KAMIKAWA on the hill that afternoon?
A. I think he was there."

We had this answer stricken but the judge advocate again asked the question:

"Q. 48. You saw Lieutenant KAMIKAWA on the hill that afternoon?
A. As I recall he was there."

We did object to those leading questions but were over ruled.

How uncertain this witness was as to who was present at the scene that afternoon an be seen by his answers to question #113: hetestified: "As almost all the personnel of the hospital were there I presumed that almost everyone was there and replaced accordingly. Also as I have nothing definite to confirm that they were not there I testified as I did."

This answer is typical of the entire testimony of this witness. He is not testifying from his own knowledge but on presumptions. All men are guilty unless they prove themselves innocent and he is willing to testify that a person is guilty because he hasn't heard they were innocent.

Let us read this answer of OKAMURA's again: Answer to question #113: "As almost all the personnel of the hospital were there I presumed that almost everyone was there and replied accordingly. Also as I have nothing definite to confirm that they were not there I testified as I did."

His faint recollections about KAMIKAWA should be given no credence and his entire testimony ruled out when he explains as he did the basis for his testimony. Only two officers were senior to OKAMURA, this witness, that afternoon on the hill when the prisoners were executed. It would be better for OKAMURA to have KAMIKAWA there because KAMIKAWA was the Adjutant and can be given the responsibility for certain things. But the Americans are charging KAMIKAWA not merely as being present but KAMIKAWA is actually charged with stabbing and cutting and killing two Americans. This witness in answer to question #207.....Did you see Lieutenant Commander KAMIKAWA stab?" answered: "I do not remember."

What kind of testimony is this for the third senior officer at the scene of the execution. I do not remember if the Adjutant Lieutenant KAMIKAWA stabbed the prisoner. He wasn't honest enough to even say he didn't see Lieutenant KAMIKAWA stab. I say such a witness should not be believed in anything. He gave the same answer to the question #208: "Did you see Lieutenant OISHI stab? Answer, I do not remember." His entire testimony is without any merit.

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The next senior officer at the hospital was Captain TANEDA. He testified on the ninth and tenth days of this trial. Just what kind of a witness is this Captain TANEDA?

A very important witness for the prosecution IKEYA, Kyoichi, committed suicide early Wednesday morning, July 2, 1947. He had been living in the same witness camp area as Captain TANEDA. IKEYA had been kept in confinement since the end of the war and was due to testify but he was now dead.

The judge advocate asks Captain TANEDA: "Q. #27. From whom did you hear the names of the persons who were on the truck with the prisoners? Answer: I heard from Petty Officer IKEYA."

How can this commission believe any of the prosecution witnesses when they are ready to testify not of their own knowledge but what they heard from others, particularly, a Captain in the Navy who gets his information from a non-rated enlisted man, an enlisted man who has committed suicide just a few hours before Captain TANEDA is put on the witness stand. What stories these suspects otherwise referred to as prosecution witnesses agreed to tell or were forced to tell not only by the investigators but by their former officers we will probably never know. What we do know however, is that two witnesses did commit suicide while in custody here on Guam and witnesses now stand their information is derived from these suicides.

Next this Captain TANEDA testifies that as three of them, Vice Admiral HARA, Captain IWANAMI and himself were sitting on the veranda, talking that the Adjutant Lieutenant KAMIKAWA came toward them saluted and returned.

Please remember Captain TANEDA was next senior to Captain IWANAMI at the hospital and he was also a Surgeon Captain. He too has been held in confinement a long time but has agreed to testify for the prosecution. Question #34: "After Admiral HARA had gone did you report to anyone that Lieutenant Commander KAMIKAWA had approached? Answer: As I stated before I told the head of the hospital, I told him that a long time previously the prisoners had passed by and he made a gesture as if he was surprised and he said, 'Is that so?', and then I asked him, 'Are you going to do something with the prisoners as you were saying several days ago?', and he said, 'Yes'."

"The Adjutant had come toward the room and I had motioned for him to come forward but he had saluted and gone back. Then the head of the hospital said, 'The preparations have been made.'

"Then I said, 'That must be it. The adjutant came and saluted twice!"

We, of course, moved that the portion of Captain TANEDA's answer be stricken out because it was hearsay and because it was an opinion and a conclusion of Captain TANEDA, the witness but the commission denied the motion to strike.

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

If ever a witness gave a self serving statement and one that not only inferred that another person should take the responsibility, but said it in so many words, Captain TANEDA did then.

The judge advocate refreshed Captain TANEDA's memory and TANEDA continued by saying: "Before IWANAMI said let us go up the hill I asked him, 'What are you going to do and how are you going to do it?' (See questions and asnwers 35 - 41 inclusive.) The answer to question #40 was that Captain IWANAMI said he was going to doit with bayonets and spears.

So those two went up the hill to the execution side by side but then according to an old Japanese custom it is impolite to reach the general assembly after the department head so Captain TANEDA passed him and went on ahead of Captain IWANAMI.

Captain TANEDA did not answer question #34 the way the judge advocate wanted him to do, so when the defense moved to strike out part of the answer the judge advocate agreed.

Then the judge advocate refreshed the memory of Captain TANEDA and he put question #49: "Now, what did you say if anything to Lieutenant Commander KAMIKAWA and what did Lieutenant Commander KAMIKAWA say to you? Answer: KAMIKAWA said the preparations have been made and saluted". "I said the head of the hospital was saying to have you begin and as KAMIKAWA was starting to return I stopped him and said that as the head of the hospital will soon be here you report to him and as I was passing the head of the hospital on going up the hill he told me what I had just testified."

Q. 51 "After you had this conversation with KAMIKAWA what happened?

A. The head of the hospital soon arrived and KAMIKAWA reported to the head of the hospital."

We ask the commission to read again and note particularly Captain TANEDA's answer to question #52. This next senior to Captain IWANAMI, and himself a Surgeon Captain says: "I forget whether it was before or after the speech the head of the hospital said to me 'have them take off the blindfolds from the prisoners', and I acted as if I did not hear it, and again the head of the hospital said, 'have them-take the blindfolds away from the prisoners', and I acted as if I did not hear it because I thought it should not be done. The head of the hospital went toward the front of the prisoners and I do not remember who did it but he said in a loud voice, take away the blindfolds. A short time after the speech the actual stabbing began."

Now this witness would have us believe that having discussed the execution with Captain IWANAMI and then having walked from the administration building to the top of the so called hill with Captain IWANAMI, and then hurried on ahead of him because it was impolite to get to an assembly at the same time as the head of the hospital that he took his place in front of where the officers were grouped and then when the head of the hospital, his own commanding officer spoke to him, and ordered him to have the

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Judge Advocate.

blindfolds taken off the prisoners that he stood there and acted as if he didn't hear Captain IWANAMI. I wonder how he acted this part out. Not once did he have to act this part of pretending not to hear the commanding officer when he gave him an order before a general assembly but he acted as if he didn't hear him two times. This Captain TANEDA says he acted as if he didn't hear the order "because I thought it should not be done."

My but this Surgeon Captain was squeamish about little things. He didn't go for removing blindfolds from American prisoners but he didn't object to the idea of those same prisoners being stabbed.

Why didn't he object when Captain IWANAMI told him "he was going to do it with bayonets and spears" (answer to question #40.) This Captain TANEDA was the only one according to all the evidence in this case that actually knew what the plans of Captain IWANAMI were before they heard Captain IWANAMI's speech. Captain TANEDA was next senior in rank to Captain IWANAMI and he was also a Surgeon Captain and was in a much better position to adorse Captain IWANAMI than the Adjutant but he didn't do so. Instead he went with Captain IWANAMI up that hill knowing there was to be an execution.

This is probably what Captain TANEDA meant when he replied to question #149: "Did you always agree with the policies of IWANAMI?" by saying: "Frankly, as a whole I disagreed with them." He disagreed when Captain IWANAMI ordered him to have the blindfolds taken off the prisoners but agreed to the stabbing of those prisoners.

Then, too, why didn't Captain IWANAMI order the adjutant to have the blindfolds removed if as Captain TANEDA said the Adjutant came up and saluted TANEDA when he arrived and he also saw KAMIKAWA report to the head of the hospital when he arrived.

No, Captain IWANAMI passed his orders thru Captain TANEDA because the Adjutant Lieutenant KAMIKAWA wasn't there that afternoon.

What sickness did this witness Captain TANEDA mean when he said in his statement on the witness stand: "I regret that due to my sickness that I could not reply definitely to the defense counsel to the events occurring on top of the hill."?

This is the witness and by his testimony the judge advocate hoped to prove to the commission that Lieutenant KAMIKAWA did "wilfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike and kill by bayoneting with fixed bayonets, spearing with spears, and beheading with swords, two (2) American Prisoners of War."

Lieutenant KAMIKAWA on the 23rd day of the trial took the stand as a witness in his own behalf. "Under the common law a person was not allowed to testify in his own interest."

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..... "The law now provides that the accused shall, at his own request, but not otherwise, be a competent witness, and shall be allowed to testify in his own behalf, and his failure to make such request shall not create a presumption against him." Section 234, Naval Courts and Boards.

So when Lieutenant KAMIKAWA took the stand it was in the belief that he would be permitted and "allowed to testify in his own behalf."

Questions #5, #8, #9, and #10 were objected to and the objection sustained.

The answer to question #28 was stricken out on the ground that it was a self serving declaration.

Question "29 was objected to and objection sustained.

The answer to question #30 was stricken out on the ground that it was a self serving declaration.

Why an accused cannot testify in his own behalf is not clear because that is the very reason he takes the stand, to testify in his own behalf.

In answer to question #32 Lieutenant KAMIKAWA told of his being stricken with amoebic dysentary and still sick he nevertheless left his sick bed and tried to carry on with his work. Captain IWANAMI had authorized him to retire to his quarters and rest after his work was completed.

So on the day of the July incident Lieutenant KAMIKAWA retired to his room, but let him tell it in his own words:

Answer to question #34:

"After the work was over I was returning to my room, on the way back to my quarters I met several enlisted men who were walking toward the hill in back of the hospital. I asked them where they were going and they told me 'prisoners have come to the hill in back of the hospital, we are going to see them.' As I had been against bringing the prisoners to the hospital I did not want to see them and I stayed in my room. That is why I remember this clearly."

Part of the answer to question #35 was stricken out on the ground that it was a self-serving declaration.

Question #37 was objected to by the judge advocate and the objection sustained.

Lieutenant KAMIKAWA to question #38 and question #39 testified he might have seen Admiral HARA and saluted him but he cannot remember "going toward the head of the hospital's room where Admiral HARA, Captain TANEDA and Captain IWANAMI were talking and going away."

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Judge Advocate.

The cross-examination of KAMIKAWA by the judge advocate was very bitter. However, KAMIKAWA persisted in his original story and insisted that not only Captain TANEDA but that KIKUCHI, HAMADA, TAKAHASHI, OKAMURA and HAYASHI, all gave false testimony against him.

Let us listen to some of the questions put to KAMIKAWA by the judge advocate on cross-examination and the answers that KAMIKAWA gave.

"Q. 72. Do you expect this commission to believe that you - a Surgeon Lieutenant - would tell the head of the Fourth Naval Hospital, a full Captain, that you did not like what he told you to do. Is that what you want us to believe?

A. I am only telling the truth. My rank was low but as I was the Adjutant it was only natural that I expressed my opinion.

"Q. 73. Were you asked to express your opinion?

A. The head of the hospital did not say to express my opinion but as I was the Adjutant my work was to assist him and I could express my opinion before an order was put out.

"Q. 74. Were you in the habit of giving Captain IWANAMI the benefit of your opinion before you carried out his orders?

A. Whenever I thought it was better that I express my opinion - I did.

"Q. 75. In this particular case you told Captain IWANAMI the head of the hospital that you were opposed to his actions. Is that correct?

A. Yes."

The judge advocate would have this commission believe that Lieutenant KAMIKAWA was a "Yes Man". The testimony of KAMIKAWA and the evidence is quite to the contrary. The "Yes Man" at the 4th Naval Hospital were the other Surgeon Captains, the witnesses who are now testifying against the adjutant, the only officer who had the courage of his convictions and dared oppose Captain IWANAMI and said that the hospital was not a fitting place to carry out an execution even if these American prisoners had bombed the hospital. Remember the hospital didn't capture these prisoners. It was probably the Army on Truk that captured them and turned them over to the 41st Naval Guard Unit. The judge advocate has not shown who was responsible for prisoners of war on Truk but it was certainly not the Naval Hospital.

Someone in the Naval Guard Unit turned those two prisoners over to Captain IWANAMI in order that the execution might be carried out at the very scene of their unlawful bombing, the hospital on Truk. The Adjutant, Lieutenant KAMIKAWA was the staff officer at the hospital. Of and by virtue of his position as Adjutant he had no command responsibility. He could only advise and whenever he issued orders it bears only in the name of the commanding officer. In this instance there was Lieutenant KAMIKAWA said no reason why Captain IWANAMI should insist that the orders for the execution be relayed thru him or any of the other officers at the hospital

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JAMES P. KENNY
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since the officers were against the execution. So Captain IWANAMI arranged everything himself. Not until well after 2 o'clock that afternoon was the word passed to assemble on the hill back of the hospital. This isn't difficult to understand because Captain IWANAMI was an officer that often did things himself rather than go thru the regular channels. If he wanted something done he would order the first person he met to do it and so he got things done without any delay. This was and there was little time for delays. So with this execution Captain IWANAMI could not stop and delay until KAMIKAWA approved. It wasn't necessary that KAMIKAWA approve. IWANAMI just didn't bother with officers who didn't go along with him. He went ahead with his plans. Everyone knew it and yet few really dared oppose him. KAMIKAWA was one of the few who didn't say yes to everything.

This same characteristic of IWANAMI's to disregard others didn't go unnoticed because OKUYAMA, NABATANI and NAKAMURA carried on experiments without Captain IWANAMI's knowledge but more of this later.

"Q. 78. You say you were not on the hill that afternoon when the two Americans were killed?

A. Yes, this is certain.

"Q. 79. You are certain that you did not arrange to get the Self-Defense Section up on the hill that afternoon and practically 90% of the officers and practically 90% of the enlisted men on the hill that afternoon?

A. Yes, I am certain and there were figures, 90% of officers and enlisted men in the question and what I mean is that I did not have anything to do with the people assemb'ing on the hill. I was not at the scene, I can not say about these figures."

"Q. 81 Do you deny that you had a conversation with Captain TANEDA at the top of the hill that afternoon and that you tried to report to him that all preparations for execution has been made?"

Lieutenant KAMIKAWA gave a long answer in reply to this question but the judge advocate objected to the answer and most of it was stricken from the record. Finally KAMIKAWA answered the question as the judge advocate wanted him to or he could find no grounds for objection because he allowed these words to stand in the record: "I deny it."

"Q. 82. Do you deny that on the hill that afternoon in July you directed the tying up of the two prisoners on the cross-bar?

A. I deny it.

"Q. 83. Do you deny that after Captain IWANAMI made his speech you passed the order on to Lieutenant OISHI to begin stabbing?

A. Naturally, I deny it.

"Q. 84. TANEDA, KIKUCHI, HAMADA, TAKAHASHI, OKAMURA, and HAYASHI, all of these men, all of them Japanese and all of them serving with you at the hospital say you were on the hill that afternoon. How do you explain that?"

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Lieutenant, U.S. Navy,
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KAMIKAWA gave a longthy answor and a very important statement. I would like to quote the entire answer because I think it is most important. However I shall only state the most important part of the answer knowing the commission will study the entire answer as it is written in the record.

KAMIKAWA said that according to prosecution witnesses and from what he had heard nearly everyone was there so it was relatively easily to state that the adjutant was there as it was a presumption that the adjutant should have been there.

Second KAMIKAWA stated that certain persons like Captain TANEDA are trying to evade their responsibility by testifying that the adjutant was there and as adjutant has a responsibility. TANEDA's testimony is pure fabrication.

What I regret most is that because KAMIKAWA was the Adjutant he must have been there and they have so testified falsely against me.

Then the judge advocate questioned KAMIKAWA as to why prosecution witnesses had lied about him.

He asked this question on the 24th day on cross-examination: "You have testified definitely that the testimony of Captain TANEDA is false. Tell us now why KIKUCHI, HOMADA, TAKAHASHI, YAMAGISHI, and HAYASHI did all tell lies about your participation in this incident.?"

KAMIKAWA tried to honestly answer this question and said in part that there was a presumption that at such an assembly the adjutant is presumed to be present and that both officers and enlisted men plotted and schemed and decided among themselves that the American investigators were to be told that certain people were involved. Those schemers were all confined and why they said these things may in part be ascribed to the hard life they were subjected to having been in confinement since the armistice now two full years.

Question by judge advocate: "Do you insist that of the six witnesses which we have produced, which the judge advocate has produced into this court and all of them have identified you as being on that hill that day, there isn't a single one of them that has told this commission the truth?

A. At least all testimony concerning that which pertains that I made preparations for the execution or that I was at the scene are all pure fabrications."

The two next questions were to the effect if KAMIKAWA didn't then who did? KAMIKAWA couldn't answer these two questions because he wasn't there.

One last question by the judge advocate: "Q. Then, the only thing that you tell us is that six men have lied about you and that you as the adjutant, didn't fulfill your duties as adjutant that day. Is that correct?"

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Our objection to the question was over ruled so KAMIKAWA answered the question.

Answer: "As for the witnesses, they are clearly lying. As I stated before, the duty of the adjutant is to get by the orders of the head of the hospital. The head of the hospital did not go through the adjutant at this time. I do not know if the adjutant is responsible in such a case, but I do feel responsible that such an incident occurred at the hospital and that so many people are suffering by it."

Is this testimony of KAMIKAWA's so difficult to believe? We think not. The schemers who testified against KAMIKAWA forgot two things. They never realized that this case would come to trial as is the American way. According to their warped way of thinking they thought they were to have the last word and the Americans would punish the persons who they decided among themselves should be punished. But after two years the case did come to trial and it was to be an American trial. They would be required to testify under oath on the penalty of being punished for perjury. But it was too late to turn back. They had already written statements so they went on the witness stand to tell their trumped up story. It was only an oath by the Americans Christian's God so they told their story. Then what happened to them? They were subjected to such a cross-examination as they had never realized would be their lot. Japanese lawyers not skilled in the American art of cross-examination but filled with a desire to bring out the truth even if it meant that Japanese would be exposed as liars tried as best they could to break down this false testimony but these witnesses in most cases were too well prepared with their story. KAMIKAWA and certain other accused, all who took the stand testified that these prosecution witnesses had given false testimony.

All men have a conscience and in the case of two witnesses, one NAKAMURA who while still being subjected to cross-examination committed suicide on a Saturday afternoon so when he was due to resume the witness stand on Monday morning he was dead - a suicide by his own hand. Why? Who can say?

Then there was IKEYA who went out from the witness camp at the stockade where he was confined and when the marines found him he too was dead, a suicide. But the prosecution put his signed statement into evidence. Well, it was as good as the testimony of many of the other prosecution witnesses. In the case of IKEYA who can say why he committed suicide? In America there are presumptions in the case of persons who commit suicide. The members of the commission know full well what these presumptions. It is of little avail that the judge advocate says, "These suicides were Japanese!" We say that they were, however, two of the prosecution witnesses and the fact that a witness does commit suicide while the trial is still in progress has much to do with the credibility of such suicide witnesses.

It isn't enough to outnumber witness and thereby because the prosecution produces more witnesses than the defense can that decide the issue ? You members of the commission have observed

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

KAMIKAWA during this long trial and you saw and heard him on the witness stand. The schemers forgot that according to the American way the accused would have a chance to tell his story in court. Not only KAMIKAWA but other witnesses testified they could not remember KAMIKAWA was there. All witnesses testified as to the part OISHI played in the execution that day. If the adjutant had a duty as the judge advocate maintains it should have been KAMIKAWA who should have relayed the orders of Captain IWANAMI to the enlisted stabbers and who should have selected these stabbers. Did he do it? That is the great weakness in the story of these schemers. Why did OISHI do these things if KAMIKAWA was there?

NO, KAMIKAWA was not there and for want of his testimony he made out as if he didn't hear Captain IWANAMI when he gave orders to Captain TANEDA so Captain IWANAMI looked around and gave orders to Lieutenant OISHI. Poor Lieutenant OISHI! He wasn't as clever or rather he is more honest because he has admitted his part and Captain TANEDA maintains his innocence at the expense of Lieutenant KAMIKAWA, the adjutant, who wasn't even at the scene.

Let us hear what Captain IWANAMI has to say as to whether KAMIKAWA made the plans or was at the scene. On the 27th day Captain IWANAMI while on the witness stand he was asked this question: "But you are positive you didn't order the adjutant to do it this particular day?" He answered: "Yes, I am positive."

Certainly Captain IWANAMI should know if he ordered Lieutenant KAMIKAWA to assemble the persons on the hill and such other incidentals as were necessary in order to carry out his plans for an execution of the two prisoners from the 41st Naval Guard Unit.

No, KAMIKAWA participated in no way in this incident. He wasn't even there.

We ask the commission to find therefore as to KAMIKAWA, Hidehiro, specification 3 of Charge I, not proved and the accused KAMIKAWA, Hidehiro, is of the charge of murder not guilty and the commission does therefore acquit the said KAMIKAWA, Hidehiro, of the specification and of the charge of murder.

Two members of the Paymaster Division were by agreement of the suspects to be held responsible for this incident because it was agreed that it was to be a hospital incident and since the Paymasters group about sixteen men were there at the scene they too must be held responsible and so the two senior petty officers of the paymaster division have been testified against by their own shipmates had made an agreement and it was agreed that WATANABE and SAWADA must take a certain responsibility. The investigators believed the schemers and WATANABE, Mitsuo, although he had been demobilized and was living peacefully with his family in Japan he was seized by the American occupation authorities and sent to Guam on November 16, 1946. He has always

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

maintained his innocence.

The defense procured WATANABE's division officer Warrant Officer OTA, Seiichi, who testified that he did not see WATANABE stab and that he could state for certain WATANABE did not stab. (Answer to question #17 on the 22nd day when OTA testified.)

OTA also testified that SAWADA did not stab.

Question, "Then are you sure that SAWADA did not stab?"
Answer, " I am absolutely sure that SAWADA did not stab."

WATANABE took the stand on the 22nd day of the trial as a witness in his own behalf and testified he had no part in the incident.

Question #28: "Did you stab with a spear that afternoon?"
Answer, "I have never touched a spear."

Question #29: "Did you stab the prisoners with a bayonet?"
Answer: "I did not have a rifle."

Question #30: "Did you stab borrowing a rifle from another person?"
Answer: "No."

Question #31. "Did you cut at the head of the prisoner with a sword?"
Answer: "I did not have a sword."

This testimony by WATANABE under oath clearly proves he did not stab or cut with a sword. It is true he was there but so were many others, all having been ordered to be present. Since they were members of a military organization they certainly could not disobey.

Because WATANABE was the senior petty officer of the Paymaster Division it was decided by certain of those Japanese who were also present at the scene that WATANABE should be held just as responsible as the corpsmen who did the stabbing.

Without the slightest qualms of conscience these persons have testified against WATANABE. It is for the commission to weigh the evidence.

The same five witnesses that testified they saw TANABE stab also testified against WATANABE. TANABE you remember was sick in bed with dengue fever that day and yet these five witnesses perjured themselves and under oath testified they saw TANABE stab. And so they also testified against WATANABE.

One other witness testified against WATANABE. On the 12th day the prosecution produced YAMAMOTO, Shuichi. He too had testified that he saw TANABE at the scene armed. While on the witness stand the judge advocate refreshed his memory by showing him a paper and the witness continued his testimony. He too remembered KAMIKAWA coming up the hill with IWANAMI whereas everyone else including Captain TANEDA testified that it wasCaptain TANEDA who came up the hill that afternoon with Captain IWANAMI. How little

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

truth can be placed in such a witness is thus clearly pointed out.

The judge advocate asked YAMAMOTO this question:

"Q. 41. What happened after OISHI gave orders to those men?

A. The stabbers who had no intent to kill could not hold their positions and the ranks became confused, but no one left the ranks. Lieutenant OISHI gave orders to the first one in the columns to stab."

This answer is typical of this witness. He was always testifying to what he imagined, giving his opinion and conclusion, instead of testifying to what he actually saw or heard.

On the 13th day he continued his testimony. Now of the many men who he saw lined up as stabbers he could only say that he saw HOMMA, WATANABE, SAWADA and TANAKA stab.

This is the witness who left his ward and left the sick patients he was treating in order to get in on this incident. It was more important for him to be at the scene of an execution than to treat his own sick shipmates. Little wonder then that he testifies as he does against persons who were not even at the scene and against men of the paymasters division who did not stab.

How uncertain and confused this witness was is shown by question #138: "Was SAWADA the only paymaster petty officer in the line of stabbers?" Answer: "That is how I remember it."

"Q. 152. Did Warrant Officer WATANABE have a spear?
A. I do not remember."

"Q. 153. Did he have a bayonet?
A. I do not remember.

"Q. 154. Did SAWADA have a bayonet?
A. I do not remember."

This witness even remembers as does IKEYA the suicide witness that Lieutenant OISHI was the officer of the day at the hospital that day. In his answer to question #177 YAMAMOTO says about OISHI, "I remember his being there with this band stating officer of the day."

"Q. 180. Was OISHI wearing this arm band at the scene of execution?
A. As I recall I think he was wearing it."

Little if any of the testimony can be believed especially when we consider that WATANABE took the stand and emphatically denied that he stabbed that afternoon.

We ask that the commission find as to WATANABE, Mitsuo, specification 3 of Charge I not proved and the accused WATANABE, Mitsuo, is of the charge of murder not guilty and the commission

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does therefore acquit the said WATANABE, Mitsuo, of the specification and of the charge of murder.

Since there were 35 or 36 men in the Paymaster Division on duty at the hospital that day in July of 1944, the schemers decided that two senior petty officers of this paymaster division must pay the penalty for this incident so they decided that since SAWADA, Tsunoo, was next senior to WATANABE, he too was said to have stabbed. So SAWADA has been held in confinement for two years because his former shipmates, KIKUCHI, Goro; TAKAHASHI, Masayoshi and HASEGAWA, Masanao have all named him as a stabber. It is true that three prosecution witnesses have also been in confinement during these two years but since they agreed to testify against SAWADA they have only been held so far as witnesses. These three witnesses must not have known that the American way is to allow the accused to testify in his own behalf.

SAWADA, Tsunoo, took the stand as a witness in his own behalf on the 23rd day of this trial.

SAWADA testified that he was at the head of the paymasters division at the scene but never left the paymasters division that afternoon. (questions 22 - 26 inclusive.)

"Q. 30. Did you stab a prisoner with this rifle and bayonet?
A. No.

"Q. 31. Did you stab a prisoner with a spear?
A. No.

"Q. 32. Did you cut a prisoner with a sword?
A. I have never cut a prisoner with a sword."

SAWADA has always maintained his innocence and yet for two years he has been confined as a suspect and is charged with the murder of two Americans. He was greatly relieved to know that he would be allowed to testify in his own behalf and he did testify and denied that he stabbed or cut the prisoners that day.

We ask that the commission find as to SAWADA, Tsunoo, specification 3 of Charge I not proved and that the accused SAWADA, Tsunoo, is of the charge of murder not guilty and the commission therefore acquit the said SAWADA, Tsunoo, of the specification of the charge of murder.

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NAMATAME, Kazuo, was another person who didn't stab but nevertheless he was indicted, charged with the crime of murder. What did he do that he should be charged with murder?

He took the stand as witness in his own behalf. He testified on the 31st day of the trial. On the day of this incident he was a leading corpsman. Someone ordered four or five corpsmen to dig a hole and NAMATAME did as he was ordered to do, he dug the hole. They finished digging and a couple of prisoners were led up to the hill [illegible] NAMATAME had dug the hole and persons began to

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assemble. Someone told NAMATAME to dig deeper and he and the others dug deeper. Then men lined up to stab the prisoners and they did stab the prisoners and after the prisoners were killed they were buried in the hole NAMATAME helped dig. That July 20, 1944. The war ended in August 1945 and in the course of a few months NAMATAME was demobilized and sent home to Japan. Soon, however, he was arrested and thrown in prison and then sent to Guam where he has been in confinement ever since. He has always maintained his innocence and yet he was indicted and has been joined with eighteen others and is charged with the murder of these two Americans, back there at the hospital July 20, 1944.

Why? Because the same two witnesses, TAKAHASHI and HAMADA, who testified they saw TANABE stab although TANABE was sick in bed with dengue fever , and testified they saw SAWADA and WATANABE stab although they too didn't stab, and testifiedthey also saw MUKAI stab although he didn't, testified they saw NAMATAME stab.

On the 12th day of the trial TAKAHASHI, Masayoshi, testified that YOSHIZAWA mustered 15 or 16 men in front of the administration building and then YOSHIZAWA marched them up the hill. But YOSHIZAWA said he never did muster any such group of men.

TAKAHASHI further testified he heard YOSHIZAWA give the order to stab. This too is clearly false testimony. (Answer to question #138.)

Then he testified he saw NAMATAME standing in a line verticle to the two prisoners (See answer to question #22.)

In answer to question #34: "Can you give us the names of those ten persons?" (the persons who stabbed, see question #33.), he answered: "It is the same as the names I gave previously."

To question #100, "Will you repeat the names of the men that you know stabbed that day?

TAKAHASHI gave the name of Petty Officer NAMATAME.

On the 15th day HAMADA, Toshihisa, testified Petty Officer second class NAMATAME was in a line with other petty officers (see answer to question #28.) To question #236 HAMADA said he saw NAMATAME stab.

As against this testimony we have the testimony of NAMATAME, Kazuo, who testified on the 31st day.

"Q. 25. Then you did not enter the line of stabbers? Is that correct?
A. I absolutely was not in the line of stabbers.

"Q. 26. Did you stab the prisoners with a bayonet?
A. Absolutely not.

"Q. 27. Did you stab him with a spear?
A. Absolutely not."

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JAMES P. KENNY
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Judge Advocate.

Who should know better whether they stabbed or not that day, two suspects, TAKAHASHI and HAMADA who have been in confinement since the war, two years ago, or NAMATAME who was released, demobilized and returned to Japan? NAMATAME is rather to be believed than the two witnesses who have given much false testimony.

We ask therefore that the commission find as to NAMATAME, Kazuo, specification 3 Charge I, not proved and the accused NAMATAME, Kazuo is of the charge of murder not guilty and the commission does therefore acquit the said NAMATAME, Kazuo, of the specification and of the charge of murder.

MUKAI, Yoshihisa, was also demobilized but later arrested and sent to Guam where he has since been in confinement and in this trial he too is charged with the murder of these two prisoners. MUKAI has always maintained his innocence.

Against MUKAI we have two of these same witnesses, TAKAHASHI and HAYASHI. TAKAHASHI in testifying on the 12th day of the trial said he saw MUKAI said he saw MUKAI standing in a line vertically to the prisoners (see answer to question #22.)

To question #33 he testified: "As I recall I think it was about ten persons who I saw actually stab."

"Q. 34. Can you give us the names of these ten persons?
A. It is the same as the names I gave previously."

"Q. 100. Will you repeat the names of the men that you know stabbed that day? "

In the answer he included the name of MUKAI. He could not however testify as to what MUKAI or anyone else except HOMMA stabbed with. His testimony as we have previously shown is very weak and not all credible.

HAYASHI, Masaji, testified on the 13th day. He it was who testified he thought HOMMA and YOSHIZAWA tied the prisoners. It shows these prosecution witnesses testify as to anything they imagin He testified he remember MUKAI and three others standing in the two lines facing the prisoners. He further testified MUKAI had a spear and was the second person in the right row and he saw him stab.

The cross-examination of HAYASHI commenced on the 14th day.

"Q. 69. Did YOSHIZAWA tie one prisoner and HOMMA tie the other prisoner?
A. No, I thought they tied the prisoners so I replied like I did yesterday."

And to question #70 he answered,"..... I can not say exactly who tied the prisoners."

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Judge Advocate.

He further testified OISHI had all the enlisted men assemble, 60 or 70 persons yet no one else testified to this effect.

"Q. 118. Why do you say that petty officers that came forward lined up according to rank?

A. Because it was usual for the petty officers and men of the hospital to line up according to rank."

So he explained his testimony, clearly not testifying to what he saw or heard but giving opinions and conclusions based on what he imagined people did. How undependable his testimony is further shown by the answer to question #127. Question #127: "What were those two or three armed with? Answer. When I mean armed they were wearing working uniforms with puttees wrapped around their legs." Certainly the prosecution can not hope to convict persons accused of murder on such testimony.

He said MUKAI did not have a spear or bayonet when he stepped forward (see question #132) and doesn't remember who gave MUKAI a spear or bayonet.

To question #138 he remembers TANABE although TANABE was sick in bed with dengue fever. He also remembers MUKAI. I wonder! He names seven others who he testifies "those I think lined up". Evidently the oath he took to tell the truth didn't impress this witness very much.

To question #166, "What did MUKAI stab with?" he answered on cross-examination: "It was with a bayonet." If in yesterdays testimony I stated a spear I would like to change it at this time."

Here is a witness who can not even remember what he testified to the day before he wants to change his testimony. This is the same witness who saw TANABE who was sick with dengue fever and in bed at the hospital stab the same prisoner as HOMMA stabbed but with a spear in the stomach. No blood however came from the prisoner.

How little he was impressed by the oath he took is further borne out by the statement he made at the end of his testimony. It was stricken from the record but it shows that all his testimony was predicted in his assumption that the petty officers did not have any intent so what difference therefore does it make who he says was in the line or who he says stabbed.

As against such testimony we have the testimony of the accused MUKAI, Yoshihisa, on the 31st day. MUKAI is 34 years old and married. He was demobilized and was living in Japan with his family when one day he was suddenly arrested and brought to Guam.

He testified he went to the scene of the execution alone. He had never been an American before he went up close by the officers and looked at the prisoners. He heard Lieutenant OISHI order petty officers step forward but he stayed where he was be-

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Lieutenant, U.S. Navy,
Judge Advocate.

cause he wasn't sure just what Lieutenant OISHI said and besides he was outside the formation and because he didn't like the whole idea.

"Q. 35. You testified that by order of Lieutenant OISHI some men were brought forward. Did you enter this group or didn't you?

A. I did not enter this group of men.

"Q. 36. Did you or did you not stab a prisoner?

A. I absolutely did not stab the prisoners. I can state this before anyone.

"Q. 37. Did you ever hold a spear or bayonet while you were on that hill?

A. No."

Then the judge advocate began his cross-examination of MUKAI.

"Q. 54. Can you give this commission any reason why TAKAHASHI, HAYASHI, and HAMADA should testify and say that they saw you stab one of those prisoners?

A. Their testimony is false."

We ask that the commission weigh the evidence and find as to MUKAI, Yoshihisa, specification 3 of Charge I not proved and the accused MUKAI, Yoshihisa is of the charge of murder not guilty and the commission does therefore acquit the said MUKAI, Yoshihisa, of the specification and of the charge of murder.

The accused KUWABARA, Hiryouki, has not even been demobilized but he has been held in confinement for two long years. Why? Because two other suspects - HASEGAWA, Masanao, and HAMADA, Toshihisa, have said that they saw him there in the line of stabbers. On such flimsy evidence a person is held in confinement for two years without being questioned and is then brought to trial with eighteen other persons. All that KUWABARA did was go with another person to the guard unit and two prisoners were turned over to them. Sitting guard over them on the way back KUWABARA and the other petty officer visited with the prisoners. They removed the blindfolds from their eyes and gave them cigarettes to smoke. They brought the prisoners to the hospital in a truck and were told to bring them to the hill. They did.

KUWABARA had a rifle with him because he had been detailed as a guard to help bring the prisoners from the guard unit. Many persons were armed on the hill that afternoon but since KUWABARA was held as a suspect two other suspects decided to testify against him.

Who are those two witnesses? They are the same witnesses who have given so much false testimony against several of the other accused. They are HASEGAWA, Masanao, and HAMADA, Toshihisa.

On the 13th day HASEGAWA testified that KUWABARA was in the line of stabbers (see answer to question #28 which is based on question #27.) Question #27: "Are there any others who are here present in court today that were in those two lines? Look at those people. Answer: Those two."

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"Q. 26. Who else?
A. Captain IWANAMI, Lieutenant Commander KAMIKAWA, Lieutenant OISHI, Ensign YOSHIZAWA, . The rest I do not remember.

"The question was repeated to the witness.

A. Also there was Corpsman Chief Petty Officer KUWABARA."

This witness stated he did not remember seeing KUWABARA stab. He was not one of them (See answer to questions 41, 42, and 43.)

On cross-examination this witness stated why he said certain persons were in the line of stabbers.

"Q. 96. You stated the names of persons who were in the lines. Do you know that they were in the lines?
A. I just gave the names of persons whom I have in my recollection."

Of what effect is an oath to such a witness when he admits he just rattles off "names of persons whom I have in my recollection."?

On the 15th day HAMADA, Toshihisa, testified in much the same manner.

He could only remember two officers on the hill that afternoon, Captain IWANAMI and Lieutenant OISHI but could remember 13 names as TANABE and said he was in the line of stabbers. TANABE you remember was sick in a hospital bed with dengue fever.

He named KUWABARA being in this line.

To question #236 he answered he saw KUWABARA stab.

Yet he did not see any blood on the spear or bayonets of the stabbers (See answer to question #239.)

On such testimony is KUWABARA indicted and charged with murder and the judge advocate expects you members of the commission to convict KUWABARA of murder.

KUWABARA took the witness stand on the 32nd day. His testimony was direct and to the point.

"Q. 17. Didn't you enter the column of stabbers?
A. No.

"Q. 18. Didn't you stab the prisoners?
A. No."

"Q. 72. How many men were in the stabbers line?
A. As I remember - eight or ten.

"Q. 73. Were you one of them?
A. No."

Ninety-six questions were asked KUWABARA while he was on the

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Lieutenant, U.S. Navy,
Judge Advocate.

witness stand. The judge advocate attempted to question KUWABARA on a statement which he was asked to sign by the investigators the day after he was served with the charges and specifications. (See question #47.)

The judge advocate introduced into evidence a statement which was purported to have been signed by IKEYA, Kyoichi, some time in May 1947. IKEYA was asked to sign it again on July 1, 1947. He was made to add this statement on July 1, 1947: "I swear the contents of the above statement is true."

No person administered an oath to IKEYA.

On the 15th day the prosecution tried to prove the death of IKEYA, Kyoichi, "who was an important witness". (See answer to question #12.)

IKEYA, Kyoichi, was said to have died a suicide on July 2, 1947, a few hours after he signed this statement.

A board of investigation was convened to investigate "the circumstances of his death". (See answer to question #8.)

In view of his suicide which called for a board of investigation his statement that KUWABARA was in the column of petty officers can have no weight or bearing notwithstanding the fact that the judge advocate felt he must introduce this statement which is in the nature of a deposition and therefore limits the punishment to be inflicted to not more than one year imprisonment in accordance with Section 454 of Naval Courts and Boards.

This statement signed the second time by IKEYA just a few hours before he committed suicide can in no way influence the finding in the case of KUWABARA or any of the other persons that IKEYA mentions.

In view of KUWABARA's continued stand maintaining all during his two years confinement that he is innocent, the very flimsy testimony of only two witnesses and the testimony which KUWABARA gave as a witness in his own behalf we ask that the commission find as to KUWABARA, Hiroyuki, specification 3 of charge I not proved and the accused KUWABARA, Hiroyuki, is of the charge of murder not guilty and the commission does therefore acquit the said KUWABARA, Hiroyuki, of the specification and of the charge of murder.

In the case of KAWASHIMA, Tatsusaburo, TANAKA, Takunosuke, AKABORI, Toichiro, TSUTSUI, Misaburo, TAKAISHI, Susumi, MITSUHASHI, Kichigoro. All these persons were said by IKEYA, Kyoichi, who committed suicide before the prosecution called him as a witness and yet introduced a statement, which he signed only a few hours before he left the stockade and went out into the jungle to commit suicide, into evidence. We objected to this statement being received into evidence but were over ruled . We particularly call the commission's attention to the type of evidence which the prosecution has had to resort to in order to even make any kind of a showing against these accused.

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

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Japanese counsel h a ve pointed out the lack of evidence against the above accused so I will not go further into this phase of the trial.

I only want to call the commission's attention to how little evidence was presented against the above accused. There was some evidence that these accused were at the scene but so were all the prosecution witnesses. And all the prosecution witnesses have been in custody since the cessation of hostilities now for two years.

AKABORI, Toichiro, and MITSUHASHI, Kichigoro, were both demobilized. Is it to be supposed that such persons are guilty because certain other persons who were themselves ordered to be at the scene and who have been held in custody for two years have seen fit to testify against these more unfortunate persons.

These accused are not simply charged with being at the scene but they are actually charged with having "each and together ....., wilfully, feloniously, with premediatation, and malice aforethought, and without justifiable cause, assault, strike, and kill, by bayoneting with fixed bayonets, spearing with spears, and beheading with swords, two American prisoners of war."

No witness was able to definitely say that any of the above speared or that he bayoneted or did so to both of the prisoners. All the witnesses could say was to the effect that they just know these persons were in the line of stabbers and that they **were** sure they stabbed. What did they stab with? They couldn't say. Did these witnesses see blood on the weapons of the stabbers? No, they couldn't even testify as to this.

What then could they say as to intent. Some tried to get into evidence their opinions that the persons they testified against really didn't have the intent to even kill. Any such opinions were objected to and were stricken from the record but the very fact that prosecution witnesses would even express such opinions is worthy of note as to the weight to be given their testimony.

We ask therefore that the commission find as to KAWASHIMA, Tatsusaburo; TANAKA, Tokunosuke; AKABORI, Toichiro; TSUTSUI, Kisaburo; TAKAISHI, Susumu; and MITSUHASHI, Kichigoro specification 3 of Charge I not proved and that these accused KAWASHIMA, Tstsusaburo; TANAKA,Tokunosuke; AKABORI, Toichiro; TSUTSUI, Kisaburo; TAKAISHI, Susumu; and MITSUHASHI, Kichigoro; are of the charge of murder not guilty and the commission does therefore acquit the said KAWASHIMA, Tatsusaburo; TANAKA, Tokunosuke; AKABORI, Toichiro; TSUTSUI, Kisaburo; TAKAISHI, Susumu; and MITSUHASHI, Kichigoro of the specification and of the chargo of murder.

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Surgeon Captain IWANAMI, Hiroshi, is also charged with the murder of these two American prisoners of war on July 20, 1944, under specification 3 of charge I. Captain IWANAMI is

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charged with assaulting striking and killing by bayoneting with fixed bayonets, spearing with spears and by beheading with swords, two American prisoners of war.

Under specification 4 of Charge II Captain IWANAMI is charged with disregarding and failing to discharge his duty as Commanding Officer of Fourth Fleet Hospital to control the operation of seventeen of those accused and other persons unknown permitting them to strike unlawfully, assault, and kill, and cause to be killed, by bayoneting with fixed bayonets and spearing with spears, and by beheading with swords, two American prisoners of war.

In specification 5 of Charge II he is again charged with unlawfully disregarding and failing to discharge his duty as Commanding Officer of Fourth Fleet Hospital to take such measures as were within his power and appropriate in the circumstances to protect two American prisoners of war, in that he permitted the unlawful killing with bayonets, spears, and swords, by members of his command and persons subject to his control and supervision, two American prisoners of war.

All three specifications are founded upon the same incident. From reading those specifications it is difficult to determine just what IWANAMI did do.

CMO 1932 holds that "negligence and wilfulness are the opposites of each other. They indicate radically different mental states."

The same distinction between negligence and wilfulness was made by the U.S. Circuit Court of Appeals, Seventh Circuit (64 Fed 823), where the court held that:

"Negligence is negative in its nature, implying the omission of duty, and excludes the idea of wilfulness. Wilfulness or intentional injury implies positive and agressive conduct and not mere negligent omission of duty."

Also see 135 Fed 74; 89 Fed. 374; 173 Fed 431.

The words "wilfully and knowingly" cannot be rejected as surplusage in the above specification. An indictment which is repugnant in a material part is altogether bad (Clark's Criminal Procedure, page 171). It has been held (see 24 S.W. 1015) that an indictment is bad which charges that the defendant "wilfully and with culpable negligence did kill". In that case the court, affirming a judgment quashing the indictment, said:

"If the killing was "wilful" as charged in the indictment, then it could not have been an accidental, or by "culpable negligence". The terms are inconsistent as they cannot both be true. If the killing was by culpable negligence, then it is not intentional."

The evidence shows that both of the charges, specification 3 of Charge I and specifications 4 and 5 of Charge II are based on the same act and they are drawn to provide for the exigencies of proof.

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If the court considers Captain IWANAMI guilty of specification 3 of Charge I it must then acquit him of specifications 4 and 5 of Charge II or vice versa.

See C.M.O. 2-1932 p. 11 (File: MM Breland, Euclid W/A17-20 (311208), Jan. 22, 1932, approved Feb. 1, 1932.)

C.M.O. 1-1930 p. 12 clearly shows that in case of multiplicity of charges and specifications that the findings on one charge and the specifications thereunder are set aside. In that case it was held:

"Accused was tried and convicted inter alia of 'Scandalous conduct tending to the destruction of good morals,' (embezzlement) and 'Theft'. These two charges were based upon the same circumstances and were so drawn to provide for the exigencies of proof. As the evidence adduced at the trial clearly (p. 12) established the fact that the offense committed was embezzlement and not theft, the findings on the latter charge and specification thereunder were set aside." (File: MM - Reader, Howard / A17-20 (290918) Jan. 27, 1930)

See Also C.M.O. 3-1930 File MM - Cates, Lorwin /A17-21 (300308) March 8, 1932.

In C.M.O. 4-1925 - p. 22 "Inasmuch as the offense of theft includes the conversion of the property alleged to have been stolen as expressed in the specification of Charge I by the use of the words "and did then and there appropriate the same to his own use," it is apparent that the specification of Charge II alleges merely a constituent element of the offense of theft set out in the specification Charge I.

It was therefore the duty of the convening authority to have disapproved the finding on the less serious charge upon his taking action in this case.".

The J.A.G. went further in this case and we continue to read:

"In view of the foregoing the finding of the court on Charge II and the specification ther under is set aside." (File: 26262 - 11605 A.G.C.M. Rec. No. 62522 April 8, 1925.

This we hold to be most important and-yet the judge advocate did not include this in his memorandum to the President, Military Commission, Commander Marianas dated September 27, 1946.

Instead in his memorandum in that case the judge advocate said:

"The only duty to which the commission can be held is to weigh the evidence presented to determine the facts and to apply the law to those facts to reach its findings of guilty or not guilty."

Where do we ask is there any such limitation on this commission or on any law court in these United States of America.

Why would the J.A.G. set aside the findings of the court if it had done its duty? No, the court, this commission has a further duty.

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

This is the same commission as tried the TACHIBANA case although some members are changed. What did the J.A.G. Navy Department say in that case?

In C.M.O. 1-1939, p. 14 in the case of multiplicity of charges and specifications it was held: "Held that when the specification of one charge alleges merely a constituent element of the offense set forth under another charge and there is a finding of guilty on both, it is the duty of the convening authority to disapprove the finding on the less serious charge upon his taking action in the case citing C.M.O. 4-1925, pp. 21, 22. Therefore, the findings on Charge II and on the first specification of Charge III were set aside. (File MM-Lofka, John J. /A17-20 (390206), Apr. 8 and 27, 1939).

Then there follows a statement of Policy of Navy Department which we note the judge advocate did not include in his memorandum to the President, Military Commission, Commander Marianas, Lieutenant General TACHIBANA, et al case. I continue to read from C.M.O. 1-1939 "Policy of Navy Department - where an accused was convicted of Eleaving his station before being regularly relieved" and also of the less serious charge, "Neglect of Duty," both offenses being based upon the same act and no aggravating circumstances being set forth under the second charge to distinguish it from the first, the proceedings and findings on the latter charge and specification thereunder were set aside. Remarked that, while there is no rule of law which prohibits making identical facts and circumstances the basis of more than one charge, it has long been the policy not to do this when the offense falls clearly within the definition of a specific article of the Articles for the Government of the Navy and there are no aggravating circumstances to be set forth under one charge that will distinguish it from the other. (File: MM- Frey, Reinhold /A17-20 (390203), April 6, and 26, 1939) citing C.M.O. 10-1926, p. 8; 8-1927, p. 6; 1-1937, p6, and see 457, Naval Courts and Boards.

C.M.O. 10-1926 p. 8 holds: "As a matter of policy the use of two or more charges is not approved where the identical facts are made the basis of both, and where there are no aggravating circumstances set forth under one charge which distinguish it from the other (See 188 Naval Courts and Boards.)

In C.M.O. 8-1927 p. 6 the policy of the Navy Department is again reiterated, we read: "The Navy Department's instructions merely mean that as a matter of policy the rule which permits such duplication of charge is not available of when the offense falls quite clearly within the definition of a specific article, where there are no aggravating circumstances distinguishing it from the ordinary case contemplated by such article, and where there is no necessity to resort to multiplicity or plurality of charges."

File: MM-....A17-20 (270527) G.C.M. Rec No. 67447, August 2, 1927).

The accused IWANAMI took the stand as a witness in his own behalf on the 24th day and was on the witness stand the 25th, 26th 27th and 28th day of the trial.

Surgeon Captain IWANAMI has been a medical officer in the Japanese Navy since he graduated from Tragoya Medical School in 1923 when he almost immediately entered the Navy as a medical officer. He came to the

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

Truk hospital in November 1943 and by his untiring efforts he built this hospital up to where it was possible to take care of the ever mounting number of Japanese casualities. However, the American Navy in 1944 brought the war to truk and in the course of the bombing the Navy hospital at Truk was bombed. This was most unfortunate particularly for two American aviators names unknown. After a severe bombing of Truk, July 12, 1944, during which time the Fourth Naval Hospital at Dublon was badly damaged (see answer to question #100 to 106.) two Americans were captured and soon were turned over to the 41st Naval Guard Unit.

On the witness stand Captain IWANAMI was asked question #100: "How did you come to execute these prisoners? Answer. Two days before the execution the head medical officer of the Naval Guard Unit came to the hospital, the head medical officer said, "At the Naval Guard Unit there are two Americans, airmen prisoners, who are going to be executed." After saying this Commander UENO went home. I thought if the Guard Unit is going to execute them they should be executed at this hospital which they had bombed many times, especially those two prisoners, as the hospital was bombed on the twelfth of July, I thought there was no mistake that those were the ones who had bombed the hospital as it had already been seven or eight days after the bombing I thought all procedure concerning the prisoners was over. As the Guard Unit is going to execute them I thought they should be executed at the hospital for their bombing the hospital with clear markings. I let the men know about it, persons who did such barbaric actions should be killed and also it was necessary to protect the meaning of these markings and also to pacify the spirits of the patients who had died from the bombing and also as a warning against bombing the hospital. I thought it appropriate to execute them at the hospital."

To question #107 as to what feeling IWANAMI had toward the enemy who bombed the hospital IWANAMI gave a long answer. Among other things he said: "I thought America who stressed its righteousness and humanism that the world of this day was a black one."

Captain IWANAMI talked about what he had heard from Commander UENO that there were prisoners to be executed at the Guard Unit (See question #108 - 118 inclusive and the answers thereto.)

Captain IWANAMI continued to testify again that afternoon of the 25th day Tuesday, July 29, 1947. It was suddenly discovered that one of the accused was missing so the Commission adjourned.

The following day Captain IWANAMI continued his testimony. He told about the lack of enthusiasm for the execution to question #144 he answered:

"I gave up the idea of having the Self-Defense Section do it. I thought they would not be of any help. I also thought I would do everything myself so I talked to the Executive Officer of the Guard Unit and on the other hand I sent the petty officers to get the prisoners at the Guard Unit. I also had the gox hole on the hill enlarged. I ordered this to a petty officer who was passing by the entrance of the hospital. I told him to enlarge it but I did not tell him why."

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Lieutenant, U.S. Navy,
Judge Advocate.

Captain IWANAMI ordered a general assembly about 3 o'clock that afternoon. When the persons had assembled in the hill Captain IWANAMI together went Captain TANEDA went to the scene.

Captain IWANAMI immediately took charge of things himself. In a fiery speech to the assembled persons (See answer to question #173) Captain IWANAMI as a result of long drilling of the hospital personnel simply used upon them the power of suggestion. Some people call it hypnosis. I agree that it was hypnosis used in this instance for a bad purpose but only because the hypnotist was himself hypnotized.

Captain IWANAMI was the most susceptible of all the persons assembled there on the hill that afternoon. Since 1923 he had been in the Japanese Navy, as a doctor it is true yet always exposed to the suggestions of the militarists. Can anyone say it made no difference. Captain IWANAMI has two brothers, all doctors but none of them in the Navy. They are all still working at the job of saving the life of people whereas their brother Captain IWANAMI Hiroshi, is here on trial for his life, a doctor, well educated and highly skilled, charged with murder.

So when the Naval Guard Unit offerred the suggestiam of an execution of the two prisoners who had bombed the hospital he just couldn't resist . Listen to his speech that he made that day and you would have known he wasn't himself. It is difficult to realize that this quiet, little man, he only weights 80 pounds, could ever get so out of his mind as to arrange for an execution of two prisoners at a hospital.

To question #173: "What kind of a speech did you make?" He answered: "I do not remember exactly what I said at this time and cannot say exactly but I was very excited and I stated generally as follows: 'As you know the hospital is far away from any military installations but the American air force has bombed it many times. As you all know ten days ago four 250 kilogram bombs were dropped . America who preaches righteousness and humanity of committing brutal atrocious acts on the Japanese soldiers and officers on Saipan; this is something God or man can not allow. They have violated the sacred Red Cross. In place of God we are going to punish them. Do not hesitate. Strike svirtedly.' "

This certainly doesn't sound like the voice of a murderer. It is rather the executioner trying hard to reconcile himself to the job which is not at all to his liking but a job which must be done. "In place of God we are going to punish them." Can we say that Captain IWANAMI WAS not sincere when he spoke these words.

Superior orders "are a defense. The fact that the accused sincerely and honestly believes that he is doing the right thing proves beyond a reasonable doubt that he lacks the criminal intent to commit a crime like murder. This too is in the nature of "superior orders." To illustrate our point read again what HOMMA said about orders.

HOMMA certainly speaks for all these nineteen accused when he explains how the Japanese feel about orders. All orders he says

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

emanate from the Emperor. All orders are thought to be lawful and must be carried out without question. And how did the Japanese people feel about the Emperor in 1944. The Emperor was a God. As a God the Emperor could of course do no wrong and therefore no order could be anything but lawful.

But the Japanese also believe in Budda. Heaven too is something supernatural. There is a God other than the Emperor because the Emperor is the "Son of Heaven". Many of the Japanese have been to Christian schools. Some Japanese are Christians.

IWANAMI has been to Christian schools. He knows of the Christian God. So it is our Christian God whom he refers to when in his speech to the personnel assembled on the hill that afternoon he said: "As you know our hospital is far away from any military installations on Truk but the American air force has bombed it many times. As you all know ten days ago four 250 kilogram bombs were dropped." "America who preaches righteousness and humanity is committing brutal atrocious acts on the Japanese soldiers and officers on Saipan. This is something God or man can not allow. They have violated the sacred Red Cross. In place of God, we are going to punish them."

Arrogent was he, you say? I ask you how can we understand this doctor? He know of America, "America who preaches righteousness and humanity". He also know the Christian God. Now, he, IWANAMI, Hiroshi, A surgeon captain, Imperial Japanese Navy is going to punish two American prisoners "in place of God".

Murder is unlawful killing of a human being with malice aforethought.

I say to you that IWANAMI had never the motive or the malice or the criminal intent to commit murder. He did not commit murder that day. "In place of God we are going to punish them."

How are you to punish this doctor for this crime if you find it was a crime? Is Capital punis ment the answer. "In the United States we regard every offender as an individual. His assets and liabilities are studied and a program is planned to make the most of his abilities, develop new ones, curb his bad habits, and gradually restore him to a useful and law-abiding place in society." Should this be the case for IWANAMI, Hiroshi? Citing p. 38 "What shall be done with War Criminals War Department Educayion Manual EM 13.

You the members of the commission must decide from the evidence just to what extent Captain IWANAMI is guilty as he is charged under specification 3 of Charge I. Specifications 4 and 5 of Charge II are the same offense described in different words, a multaplicity of charges which is against the Navy Department policy and which you cannot countenance. You must not find Captain IWANAMI guilty of both charges.

The two prisoners were stabbed to death, executed because they bombed the hospital. One more act remained, someone had to cut the neck of the prisoners. So Captain IWANAMI orders two officers to cut. One officer misses so the Captain has the leading Chief Petty officer cut and the ritual of execution is finished. How barbaric!

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These are Japanese. Only psychiatric clinics will ever be able to learn what made Captain IWANAMI carry out this execution.

Captain IWANAMI had the soiled clothes removed from the prisoners before their bodies were buried. Water was sprinkled on the mound of earth above where they were buried. All persons were ordered to bow their heads in prayer for those two Americans now dead, victims of what we say was an illegal execution. You, members of the commission must decide if Captain IWANAMI is guilty of murder as he is charged under specification 3 of Charge I or whether he is only guilty of failing to discharge his duty as set forth in specification 4 of Charge I, or failing to discharge his duty as set forth in specification 5 of Charge II.

No proof has been offered by the judge advocate to show what the duties of the Commanding Officer of 4th Naval Hospital , Truk were in July 1944 so this precludes the commission's finding Captain IWANAMI guilty of either specification 4 or 5 of Charge II.

WE ask that the commission find as to IWANAMI, Hiroshi, specifications 4 & 5 of Charge II not proved and the accused IWANAMI, Hiroshi, is of the second charge as regards specifications 4 and 5 not guilty and the commission does therefore acquit the said IWANAMI, Hiroshi, of specifications 4 and 5 of Charge II and of the charge of neglect of duty in violation of the law and customs of war.

Before you can find IWANAMI guilty of murder you must consider not only the evidence but the way IWANAMI thought that day as a result of his being a Japanese and having been trained in the Japanese Navy. Can it be said he had the criminal intent to commit common law murder as he is charged under specification 3 of Charge I and which is said to be in violation of the law and customs of war.

Legally the evidence does not support the charge. We have also pointed out that the statute of limitation has run in this case as it pertains not only to IWANAMI, Hiroshi, but as to all nineteen of the accused.

Finally because the judge advocate found it necessary, in order to prove certain acts particularly acts alleged in specification 3 of Charge I to put into evidence the statement of IKEYA who committed suicide.

"The term 'deposition' is sometimes used in a broad sense to describe any written statement verified by oath citing State v. Dayton 23 N.J. L. 49, 53, Am. Dec. 270."

16 Am. Jr. p. 699.

"The practice of introducing or securing evidence by depositions taken in advance of the trial was unknown to the common law, and the right to do so in actions at law is dependent upon statutory provisions therefor, citing Munder v. Georgia, 18 9. U.S. 559 46 Lod. 328, 228, S.C. 224; People v, Turner, 265, Ill 594,107, N.E. 1627, Am. Cas. 1916, A1062; State v. Hill 20 S.C. L. (2 Hill) 607, 27 Am. Dec. 504.

Except perhaps, in the case of letters rogatory." 16 Am. Jr. p. 700. "the right to take depositions is governed, ordinarily

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Lieutenant, U.S. Navy,
Judge Advocate.

by the laws of the jurisdiction in the courts of which they are proposed to be used, citing Hanks Dental Asso. v. Artanational Tooth Crown Co, 194, U.S. 303 48 L. ed. 989, 24 S.Ct. 700.

So the right to take depositions for use in the Federal Courts is governed by the rules and regulations promulgated under the authority of the Federal Government, citing Ibid; Exparte Tisk, 113 U.S. 713, 28 L. ed. 1117, 5 S.Ct. 724; King v. Worthington, 104 U.S. 44; 26 L. Ed. 652. 16 Am. Jr. p 700 - 701.

With respect to the taking and use of depositions in criminal cases, as distinction is to be noticed, at the outset, between the right to take testimony by deposition in advance of the trial for use upon the trial, which right does not exist under common law rules of preceduro and is therefore dependant upon statutory provision therefore, citing Mindor v. Georgia, 183, U.S. 559 46 L. Ed. 328, 22 S.Ct. 224; Luxenberg v. U.S. (c.c.a. 4th) 45F. (2d) 497, and many other cases .

A trial court's authority to permit depositions of non-resident witnesses to be taken in criminal cases is derived from statute. Neither the def. nor the state is required to consent to the taking of depositions in criminal cases in any manner other than prescribed by statute. Blanchard v. State, 21 Okla Crim. Rep. 263, 207, P. 96, 27 A.L.R. 1032.

16 Am. Jr. p. 704.

"The validity of statutes authorizing the taking and use of depositions in criminal cases has been challenged upon various constitutional grounds, citing Annotation; 90 A.L.R. 377; Ann. Cas. 1916 A1091.

16. A. Jur. p. 704.

Such statement although not technically a deposition as defined in Section 211 Naval Courts and Boards is for purposes of Section 454, Naval Courts and Boards, a deposition and therefore the maximum punishment which may be imposed upon Captain IWANAMI is confinement for one year. "In any case where a deposition is used in evidence by the prosecution by reason of the fact that oral testimony cannot be obtained as authorized by article 68, A.G.N. the maximum punishment which may be imposed shall not extend to death or to imprisonment or confinement for more than one year."

We say the evidence does not prove murder on the part of IWANAMI because in answer to question #206: he testified:".....at the time of this act I thought it was right. I was also under the influence of war psychology."

Specification 1 of Charge I and specification 1 of Charge II are the same identical incident and allege the same circumstances. As we have pointed out this is against the Navy policy and the use of two or more charges is not approved where the identical facts are made the basis of both and where no aggravating circumstances are set forth under one charge which distinguishes it from the other charge. The many C.M.O. cited previously all so hold.

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Lieutenant, U.S. Navy,
Judge Advocate.

The commission must decide from the evidence whether IWANAMI is guilty under Charge I or Charge II. He cannot be guilty under both charges because the identical facts are the basis of both charges.

The only witness who testified against Captain IWANAMI as to specification 1 of Charge I and gave any direct testimony was NAKAMURA, Shigeyoshi. He was supposed to have been the star witness but after testifying for the prosecution and part way through the cross-examination NAKAMURA committed suicide, Saturday afternoon, June 28, 1947. Under such circumstances we hold his entire testimony should be expunged from the record. The court held otherwise so we will consider his testimony and his conduct and behavior on the witness stand as in contrast to the testimony of Captain IWANAMI and SAKAGAMI.

Lieutenant NAKAMURA was not assigned to duty at the Truk hospital but while recuperating from sickness as he was ordered to study up on surgery (see answer to question #13.)

"Q. 14. Did you study under any particular doctor?
A. I received the teachings of Commander OKUYAMA."

Commander OKUYAMA is the co-defendant named in specifications 1 and 2 of Charge I. He it was so NAKAMURA testified conducted experiments on the American prisoners. OKUYAMA is also a co-defendant named in specification 6 of Charge II. The judge advocate states OKUYAMA is dead. We questioned the proof of his death but the fact is the judge advocate hasn't brought him to trial. NAKAMURA's testimony shows the character of this Commander OKUYAMA.

It is most significant as showing the character of NAKAMURA himself to consider well the answer he gave when he said: "I received the teachings of Commander OKUYAMA."

Remember Lieutenant NAKAMURA committed suicide and the defense never did have a chance to finish the cross-examination. It isn't of much avail to the defense for the U.S. Navy doctors to testify that they conducted a dissection performing an autopsy and found no deterioration of the brain.

There was good reason for NAKAMURA to commit suicide. Why he did it we will never know.

Lieutenant NAKAMURA testified that his teacher, Commander OKUYAMA said to him: "Answer to question #29".:
Commander OKUYAMA said we were going to the Guard Unit to conduct shock experiments, and experiments with injections of bacteria on the prisoners."

NAKAMURA, the student officer, the protege of Commander OKUYAMA, knew before he went to the Guard Unit that he and OKUYAMA were to conduct experiments on American prisoners and yet he went without any reluctance or uneasiness. You well recall how without any feeling or emotion he calmly related the experiments which OKUYAMA performed upon these American prisoners at the Guard Unit.

"ZZZ(82)"

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Lieutenant, U.S. Navy,
Judge Advocate

And what does NAKAMURA say he was doing? Only taking notes! He didn't even speak to these eight American prisoners although he can speak English. For two days he only took notes. How fantastic!

Commander OKUYAMA is supposed to be dead and so is NABETANI and since IWANAMI was the head of the 4th Naval Hospital it would be to the advantage of NAKAMURA to testify against IWANAMI as he did.

There is a basis for his testimony because Captain IWANAMI did take OKUYAMA and NAKAMURA to the Guard Unit that day. He also went in with them and even made a hemoglobin test by extracting a drop of blood from the lobe of the ear of a prisoner. Captain IWANAMI admits this. Then IWANAMI said he left.

Right here there is a sharp difference in the testimony of NAKAMURA and IWANAMI. It is for the commission to weigh the evidence but we must remind the commission that we did not have a chance to complete the cross-examination of NAKAMURA because NAKAMURA committed suicide.

IWANAMI is still here. That Saturday afternoon, June 28, 1947, both NAKAMURA and IWANAMI were confined in the same stockade. NAKAMURA committed suicide. IWANAMI made no such attempt but continued to stand trial and took the sitness stand and testified for five days, the 24th thru 28th days invlusive. Captain IWANAMI is still here in this court room and can be recalled to the stand by this commission at any time.

We wish that we could say the same for NAKAMURA. In his case we have only Doctor KAUFMAN's testimony to the effect that the the dissection which the pathologist at the Navy Hospital, Guam, performed on NAKAMURA showed there was evidence of organic brain disease.

"Q. 7. Was the body of this deceased person dissection after his death?

A. It was.

"Q. 8. As a result of this dissection and other circumstances was it known that this person committed suicide, was it determined if this person, if there was any mental changes in this person?

A. There was no evidence of organic brain diseases on the post mortem examination. The statement in the death certificate that the deceased committed suicide during a depression following testimony was derived from conversations with witnesses who associated with deceased, sometime before his demise."

Question #11 put to Doctor KAUFMAN, Lieutenant, junior grade, Medical Corps, U.S. Navy, "Was there a board of investigation on the death of this witness?"

A. Yes, there was."

Doctor KAUFMAN further testified in answer to question #12:

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"I was a member of this board of investigation. The hospital pathologist who performed the dissection testified before me and the rest of the board as to the cause of death."

If NAKAMURA was not insane then there is a presumption that there was a motive for committing suicide"as whereby his own misconduct he has brought about a situation from which he thereby seeks to escape". Section 711 Naval Courts and Boards.

Let us look at the testimony of NAKAMURA as he continues on the witness stand. NAKAMURA testified he witnessed the shock experiments (answer to question #56) but as he recalled Captain IWANAMI was not present.

"Q. 59. What had become of Captain IWANAMI?
A. As I recall, he went into the next room."

This was just something NAKAMURA imagined because he had to admit on cross-examination he never saw IWANAMI go into the next room and he, NAKAMURA, didn't go into that room until the next day and then only stayed five minutes.

NAKAMURA was there when the prisoners died, however. Referring to the prisoners experimented upon with tourniquets the judge advocate asked: "Were you present in that room when these prisoners died?" The answer by NAKAMURA: "Yes."

NAKAMURA who could speak English never said a word to these Americans, he just stayed there all that day and next day, taking notes while the American prisoners died. NAKAMURA Would have us believe that his hands were tied otherwise why didn't he lift a hand to help these prisoners or why didn't he speak to them? Now three years later when he is apprehended for this crime he gets o the witness stand and blames Captain IWANAMI . But he cannot go through with it. He had gotten himself in a bad situation and he committed suicide in order to escape from the situation. See Section 711 Naval Courts and Boards.

In the next room there were four prisoners and Doctor NABATANI, but NAKAMURA didn't go into this room until the next day and then only for five minutes. This was elicited from the witness NAKAMURA after the question had been answered by him that he had never entered this room only when the judge advocate put the question to NAKAMURA again.

"Q. 79. And when you entered that room, what did you find there?
A. Through injections of bacteria, their faces were red and they were in pain.

"Q. 80. Whose faces and who were in pain?
A. The four prisoners' faces were red and they were suffering."

"ZZZ(84)"

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Lieutenant, U.S. Navy,
Judge Advocate.

This witness is a doctor and yet he testifies to this effect. For the first time he enters a room and see f our American prisoners and this man of science, thi s doctor knows immediately that the four persons he sees have been given injections of bacteria and that is why their faces are red and they are in pain.

We know of no other doctor that would so testify. The judge advocate realizes that this bit of testimony is unbelievable so he puts a question.

"Q. 81. How do you know they were suffering through injections of bacteria?

A. Because Doctor NABATANI told me that through injections of streptococcus bacteria into the blood stream, they were in a fever."

And NAKAMURA was supposed to be a learned man, educated to be a doctor, mature and with a doctors attitude of mind. He testifies instead like a child: "Because Doctor NABATANI told me." No, he isn't the ninive child he would have us believe. He knows more than he is willing to testify to. But it is for the commission to weigh his testimony since the commission would not strike it or expunge it when NAKAMURA committed suicide.

Then NAKAMURA continues and testifies that Doctor OKUYAMA, his teacher , told him he was going to do an experiment on the hill back of the hospital with dynamite (See answer to question #92.). And who is charged with this incident? Not NAKAMURA unless he is meant to be "and others unknown". It is Captain IWANAMI who is charged with this murder and SAKAGAMI was included as an accused because NAKAMURA stated he would testify that SAKAGAMI strangled the two prisoners. But this is how two of the experiment prisoners died. The six that OKUYAMA, NABATANI, and NAKAMURA experimented upon died at the Guard Unit.

Now as against this testimony of a witness NAKAMURA who committed suicide we have the testimony of Captain IWANAMI. IWANAMI it was who took the stand and admitted that he it was who took over the two prisoners from the Guard Unit and carried out the execution of two Americans in July 1944. But as to the experiments conducted by OKUYAMA, NABATANI, and NAKAMURA, Captain IWANAMI disclaims all knowledge of or responsibility for those experiments and the resulting death of these prisoners.

In answer to question #10 Captain IWANAMI says that about seven thirty one morning Commander OKUYAMA came to his room and said he was going to make some physical tests. IWANAMI Thought OKUYAMA was going to make physical strength tests and asked OKUYAMA if he needed any help. OKUYAMA said "No". Later on OKUYAMA told IWANAMI he was going to the Guard Unit at eight o'clock so IWANAMI said he would give him a ride since he was going to attend Admiral WAKABAYASHI who was sick.

The next morning IWANAMI gave OKUYAMA and NAKAMURA a ride to the Guard Unit and when they arrived there IWANAMI got off too to see what OKUYAMA was up to. He saw eight prisoners in a recreation room and with them Surgeon Lieutenant HASEGAWA one of the Guard Unit doctors.

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Lieutenant, U.S. Navy,
Judge Advocate.

It is this same HASEGAWA who testified that IWANAMI had visited Captain TANAKA the day before. Captain IWANAMI definitely says however that he never did visit Captain TANAKA at the Guard Unit and this day when he brought OKUYAMA and NAKAMURA and a dentist to the Guard Unit it was the first time he had been at the Guard Unit.

"Q. 27. Previously Lieutenant HASEGAWA testified that OKUYAMA and yourself visited Captain TANAKA concerning the loan of the sick bay. What do you know about this?

A. I was surprised when I heard the testimony of HASEGAWA in this court. But then HASEGAWA testified to things that I could not even imagine. There was no such thing."

Captain IWANAMI is the only one to testify that one of the prisoners was a negro. Since one of the prisoners was a negro it is very probable that he was not an American. It would be quite simple to check the missing persons records and find out if there was one negro missing in action in an air raid over Truk in January 1944. There is just as much reason to believe this negro was not an American aviator as to believe he was. It is up to the judge advocate to prove he was an American and this he has failed to do.

When Captain IWANAMI heard that Doctor OKUYAMA said he was going to take the pulse, make hemoglobin tests, blood tests and tests with mercury monometers and gage the gripping power of the prisoners Captain IWANAMI thought he would teach them something about blood tests. IWANAMI's answer to question #33: "When I heard about the blood tests, as I had a lot of experience in taking blood tests, I thought I would teach them something concerning it. Even in taking a drop of blood, it should be done skillfully. Taking a needle, I took one tenth of a drop of blood and spread it on a slide and showed them how to make a test."

Captain IWANAMI explained to OKUYAMA and NAKAMURA the defects in the instruments they were intending to use.

"Q. 35. What did you do after this?

A. When I was saying this, Commander OKUYAMA was disinfecting the ear lobe of the negro to get the blood. I told him if you want it to be good, you should go about it in an orderly fashion because there were four sets of instruments which to test this, and I left the room and went to examine Admiral WAKABAYASHI who was very sick."

How long did IWANAMI stay there at the Guard Unit? Who knows better than IWANAMI. He was on his way to see a very sick Admiral - Admiral WAKABAYASHI and could not linger long. At the most it was 20 minutes.

"Q. 38. What was the approximate length of time that you were in the sick bay of the Naval Guard Unit?

A. At the most about twenty minutes. They had taken their meals; I had told them about the instruments, and I had made the blood tests; at the most it was about twenty minutes."

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Lieutenant, U.S. Navy,

Captain IWANAMI only took Commander OKUYAMA and Lieutenant NAKAMURA to the 41st Naval Guard Unit and while therefor a short period of twenty minutes he shows the other doctors how an expert extracts a drop of blood from a patients ear lobe and make a hemoglobin test. For that NAKAMURA testifies against him and thereby hopes to absolve himself.

Even if the commission believed every word of the testimony of Lieutenant NAKAMURA it wouldn't be enough evidence to convict IWANAMI of murder. But against this testimony of NAKAMURA the suicide we have the testimony of Captain IWANAMI.

We ask therefore the commission find as to the accused IWANAMI, Hiroshi, specification 1 of Charge I not proved and the accused IWANAMI, Hiroshi, is of the charge of murder not guilty and the commission does therefore acquit the said IWANAMI, Hiroshi, of the specification and of the charge of murder.

Specification 2 of Charge I and specifications 2 and 3 of Charge II are based on the same acts and they are drawn to provide for the exigencies of proof as far as IWANAMI is concerned.

In the first charge IWANAMI is said to have wilfully ..... killed by explosions of dynamite and strangulation two American prisoners whereas in specification 2 of Charge II IWANAMI is charged with disregarding and failing to discharge his duty as Commanding Officer of Fourth Fleet Hospital to control OKUYAMA, Tokikazu, and SAKAGAMI, Shinji, permitting them to kill by explosions of dynamite and strangulation and under specification 3 of Charge II IWANAMI is charged with disregard and failing to discharge his duty as Commanding Officer of Fourth Fleet Hospital to take such measures as were appropriate and within his power to protect two American prisoners of war in that he permitted the unlawful killing with explosions of dynamite and strangulation the two American prisoners of war.

The commission will note that in Charge II arises out of the same identical facts and therefore as to IWANAMI we have what is known as a multiplicity of charges. There are no aggravating circumstances alleged in Charge II to distinguish it from Charge I and the proceedings and findings of one of these charges must be set aside. This we hold to be the duty of the commission. If the commission do not do so then the convening authority must do so. If the convening authority fails to do so then we are sure the Judge Advocate General, Navy Department will do so in view of the many rulings and policy set forth in Court Martial Orders which we previously cited.

See C.M.O. 10-1926; C.M.O. 8-1927; C.M.O. 1-1939.

Lieutenant NAKAMURA on the witness stand (4th day) Thursday, June 26, 1947 testified that his teacher Commander OKUYAMA ordered him to go to the hill back of the officers quarters and when he arrived there he found Commander OKUYAMA, SAKAGAMI, and two prisoners who had lived through the shock experiments at the Guard Unit tied to a stake.

Then NAKAMURA remembers that SAKAGAMI and OKUYAMA retied the

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Lieutenant, U.S. Navy,
Judge Advocate.

the two prisoners and SAKAGAMI placed dynamite in a hole which was dug.

Now our witness in court and the witness to the experiment or was he still a note taker left the scene: "Commander OKUYAMA ordered me to go to the side of the hill to be protected from the charge of the explosion of dynamite." Answer to question #102.

But he can still remember what happened even if he cannot see from where he is (See answer to question #302).

Q. 430. On cross examination: "Where were you when SAKAGAMI lit the fuse?

A. I was lying on the ground on the side of the hill because I was told to take shelter by OKUYAMA."

"Q. 435. Could you see the prisoner from your place of shelter?

A. If I stood up on my toes I could see the prisoners."

Surely the witness NAKAMURA now realized he was caught in a lie. It was almost 1130 Saturday morning June 28, 1947, and therefore the commission adjourned to meet again at 9 a.m. Monday morning.

The commission will remember how this witness acted upon the stand the little time he was under cross-examination. On Friday, June 27, 1947, when he was asked question #204 and NAKAMURA did not answer the question, he just sat there on the witness stand. Three times the commission directed NAKAMURA to answer the question before he evasively answered,:" As I recall I think I saw him going or leaving."

"Q. 206 . Where did you see him?" and again the witness NAKAMURA didn't answer and again three times the commission directed NAKAMURA to answer the question, the last time informing NAKAMURA if he didn't answer "the commission will have to take some action."

And on a witness such as this the judge advocate came forward and asks that IWANAMI be convicted of specification 3 of Charge I. Even this witness had to admit that Captain IWANAMI wasn't at the explosion scene or there when he and OKUYAMA injected the prisoners with drugs.

Captain IWANAMI testified he knew nothing of the experiments with dynamite question #44 on the 24th day: "Do you know of experiments being made on prisoners on the hill in back of the hospital with dynamite?" Answer: "No."

"Q. 45. Do you know if any injections were made in the prisoners or whether any prisoners were strangled?

A. No, I do not know.

"Q. 46. Did you receive any reports from Commander OKUYAMA after such an incident had occured?

A. No."

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"ZZZ(88)"

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Lieutenant, U.S. Navy,
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Yet this officer, Captain IWANAMI is in specification 2 of Charge I charged with murder. IWANAMI and SAKAGAMI ..... acting with OKUYAMA,.....and others unknown, did each and together.

IWANAMI testified he know nothing about the incident and all the evidence shows he knew nothing about the incident nor did he by the furthest stretch of the imagination in any way whatsoever aid, counsel, or abet the act.

We ask that the commission find as to the accused IWANAMI, Hiroshi, specification 2 of Charge I not proved and the accused IWANAMI, Hiroshi, is of the charge of murder not guilty and the commission does therefore acquit the said IWANAMI, Hiroshi, of the specification and of the charge of murder, as set forth in specification 2 of Charge I.

The judge advocate offered no proof whatsoever as to what the duties of IWANAMI, Hiroshi, Surgeon Captain, Imperial Japanese Navy, were as the Commanding Officer of the Fourth Fleet Hospital. IWANAMI, Hiroshi was a surgeon captain in the Japanese Navy and the commanding Officer of a Japanese Naval Hospital. What his duties were can not be determined in a law court by more conjecture. It isn't enough to state he failed to discharge his duty and this in violation of the law and customs of war. We hold that both specification 2 and 3 of Charge II are mere conclusions on the part of the pleador. No offenses has been stated and no offense has been proved. No offense can be proved until it is proved what duties IWANAMI, Hiroshi, had as Commanding Officer of the Japanese Fourth Fleet Hospital on or about February 1, 1944.

We ask therefore that the commission find as to the accused IWANAMI, Hiroshi, specification 2 and specification 3 of Charge II not proved and the accused IWANAMI, Hiroshi, is of the charge of violation of the law and customs of war not guilty and the commission does therefore acquit the said IWANAMI, Hiroshi, of the specifications 2 and 3 of Charge II in the violation of the law and customs of war as set forth in specifications 2 and 3 of Charge II.

We have said a great deal about the testimony of NAKAMURA who committed suicide before we were through with him on cross-examination. His testimony is the only testimony of any consequence against SAKAGAMI, Shinji. Because of what NAKAMURA told the judge advocates, they changed specification 2 of Charge I by adding the words "and strangulation" after the charges and specifications had been served. It was then up to NAKAMURA to go through with his agreement and he did take the witness stand and testified against SAKAGAMI.

It is indeed fortunate that the commission observed NAKAMURA on the witness stand and also that evidence was finally brought into the trial showing NAKAMURA, Shigeyoshi, committed suicide on June 28, 1947, and for that reason the judge advocate couldn't produce him that Monday morning, June 30, 1947, when NAKAMURA was to have continued on the witness stand subject to cross-examination. We say fortunate because on direct examination

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Lieutenant, U.S. Navy,
Judge Advocate.

NAKAMURA told his story in all its gruesome details with a smile on his face. He was we admit rather convincing except we wondered how even a doctor could relate the incidents he did without any emotion or feeling whatsoever except for the smile which came many times to his face.

All that was changed when he became subjected to cross-examination. Then you will remember how he squirmed and even sat there frozen with terror unable or unwilling to answer. They were such simple questions that were put to him on that fifth day of this trial, Friday, June 27, 1947, those questions #204 and #206 but three times he had to be directed by the commission to answer.

Even this very clever dapper little man with the heavy glasses behind which he hid his eyes could not escape when subjected to cross-examination by his own countrymen, lawyers who until they came to Guam knew nothing about cross-examination.

Syark terror seized NAKAMURA and he sat there frozen with fear. There was no way out. He managed to come back Saturday morning but that afternoon he committed suicide.

What difference therefore does it make what NAKAMURA testified to against SAKAGAMI or anyone else. All that NAKAMURA testified to should be expunged from the record. If ever a witness was discredited not only on cross-examination but because he committed suicide rather than face the cross-examination he know was in store for him Monday morning and/or he didn't or couldn't stand trial himself it was NAKAMURA, Shigeyoshi.

The judge advocates have made much of the fact that SAKAGAMI did not take the stand until after NAKAMURA committed suicide but let me assure you if the rules of procedure SAKAGAMI would have been the first to take the witness stand. He has always maintained his innocence. There is no good reason to have joined him with those other eighteen accused of something altogether different. To have kept SAKAGAMI in confinement for two years and then join him in trial with eighteen other persons all accused of other crimes is very unfair. Then when the prosecutions own witness NAKAMURA commits suicide for the judge advocate to comment that SAKAGAMI is telling his story for the first time is unfair to SAKAGAMI and no justification for the judge advocate for bringing SAKAGAMI to trial and certainly no justification for joining him with eighteen others all charged with other offenses.

On the 20th day SAKAGAMI, Shinji, got his chance for the first time since he had been in confinement to tell his story to persons who would listen and to persons who could do something about it.

SAKAGAMI testified that he did give OKUYAMA some black powder called "caritto" at the request of OKUYAMA who said he was going to experiment on dogs. The two of them OKUYAMA and SAKAGAMI went to the powder storage house and SAKAGAMI gave OKUYAMA one charge of this black powder with a fuse. He had given OKUYAMA powder before so didn't question the right of this Commander Surgeon to use this black powder in his experiments.

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

"ZZZ(90)"