THIRTIETH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands,
Friday, June 25, 1948.

The commission met at 9 a. m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Robert Oldham, yeoman third class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Higuchi, Nobuo, a witness for the prosecution, was recalled as a witness for the defense and was warned that the oath previously taken was still binding.

Examined by the accused:

1. Q. Will you please state your name and former rank?
A. Higuchi, Nobuo, navy commander.

2. Q. Please state where you were stationed and what your duties were around January and February of 1944?
A. I was at Truk. I was the staff officer of the Fourth Base Force.

3. Q. At that time what guard unit was at Truk?
A. The Forty-first Naval Guard Unit.

4. Q. What method of communication was there between the Fourth Base Force and where you worked and the Forty-first Naval Guard Unit?
A. There was telephone communication.

5. Q. What kind of telephone?
A. Ordinary telephone and command telephone.

6. Q. What is a command telephone?
A. A command telephone is a telephone which the headquarters used for the purpose of relaying one order simultaneously to all of its subordinates.

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7. Q. When the Fourth Base Force wanted to converse through this command telephone to its subordinates, what process had to be taken before the Fourth Base Force could converse with them?
A. In order to converse the headquarters would put on the switch. But when this switch is put on the pilot lamp at the headquarters would light and at the same time the buzzer would ring at each of its subordinates and so the subordinate would pick up its telephone.

8. Q. Can the subordinate pick up this command telephone and call the headquarters?
A. Ordinarily, as a rule, the subordinate cannot call the headquarters, This command telephone was formerly installed by the headquarters in order to relay the headquarters' orders to his subordinates simultaneously. Therefore, if the switch of this command telephone is left on, the buzzer at each of the units will always be ringing and they would not be able to tell when the next order from the headquarters will come. Therefore, the subordinate could not converse with headquarters.

9. Q. You have testified that ordinarily, as a rule, this cannot be done, but can the subordinate converse with the headquarters through this command telephone in some special instance?
A. It can be done, but in order that subordinates can converse with the headquarters by this command telephone, first, it must have the headquarters put in the switch of the command telephone. In order to do this the subordinate calls the headquarters by an ordinary telephone and has the switch of the command telephone put in.

10. Q. Where was this command telephone installed at the Fourth Base Force?
A. In the telephone room of the administration building of the Fourth Base Force Headquarters.

11. Q. Where was the ordinary telephone installed?
A. It was also in this telephone room and in this telephone room there was a switchboard and whenever a call came through it was connected with the party requested within the area of the Fourth Base Force.

12. Q. Who is in this telephone room during battle?
A. I believe there were three or four duty telephone operators there.

13. Q. What would telephone operators do when the Forty-first Naval Guard Unit called up the headquarters and just asked for Headquarters of the Fourth Base Force?
A. The telephone operator will first ascertain from whom and to whom the telephone call is and connect him to the requested party.

14. Q. Among Japanese naval officers what does this word "Oi" mean?
A. The word "Oi" is a word used when one person wishes to call the attention of another person when he starts speaking to him, and also in English it has the same meaning as the English words "hello" or "hey."

15. Q. Was this word used by the naval officers to mean something else?
A. No, absolutely not.

16. Q. Is there any difference in meaning of this word "Oi" as used by the naval officers and as used by an ordinary man?
A. No, there is absolutely no difference.

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17. Q. Do you remember what happened on 17 February 1944?
A. I do.

18. Q. If you remember what took place between the period from 10:30 a. m. to 11:30 a. m. of that morning, please state it?
A. That morning American task forces raided Truk. From the early morning they raided. The planes came in in two or three waves, but it seemed to me that they were coming in continuously.

19. Q. Where were you around 10:30 a. m. of that same morning?
A. I believe I was on a hill in back of the administration building of the Fourth Base Force Headquarters.

20. Q. With whom were you there?
A. I recall I was there with Lieutenant Commander Ago.

21. Q. Do you recall where the Commandant of the Fourth Base Force was at this time?
A. I believe he was in the air raid shelter near the administration building.

22. Q. Do you recall a phone call from the Forty-first Naval Guard Unit to the Fourth Base Force around 10:30 that morning?
A. I do not recall.

23. Q. Do you not recall a guard unit calling the Fourth Base Force concerning prisoners of war about this time?
A. No such call was received that day -- to speak of 10:30 a. m. of that morning.

24. Q. Did you hear from someone else that this telephone call from the guard unit to the Fourth Base Force concerning the prisoners of war had been received.

This question was objected to by the judge advocate on the ground that it was leading and called for a hearsay answer.

The accused made no reply.

The commission announced that the objection was not sustained.

A. I absolutely did not hear.

25. Q. Were you on Truk from around January 8 through January 15 of 1944?
A. From my recollection I stayed until the twelfth of January, at which time I left for Tokyo, but I am not sure whether it was the twelfth or not.

26. Q. For what purpose did you go to Tokyo?
A. On January 15 a conference was to be held in Tokyo concerning surface escort of convoy, so I was ordered to attend this conference.

27. Q. Who was the chief medical officer of the Fourth Base Force at this time?
A. Surgeon Commander Iino.

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28. Q. From around 8 January up until the time you left for Tokyo do you recall hearing from Iino about the telephone conversation he, that is Iino, had with the head of the Fourth Naval Hospital?

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

The accused replied.

The commission announced that the objection was not sustained.

A. I do not recall.

29. Q. Do you recall hearing from Iino that Iino had a telephone conversation with the head of the Fourth Naval Hospital concerning medical experiments on prisoners of war?

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

The accused replied.

The commission announced that the objection was sustained.

30. Q. Do you know the area of jurisdiction of the Fourth Fleet during the period from April 1943 to February 1944?
A. I do.

31. Q. Do you know how this area under the Fourth Fleet was divided among the base forces?
A. I do.

32. Q. Please state the area of responsibility of each base force under the Fourth Fleet and where the headquarters of each was located?
A. The Third Special Base Force - the area of responsibility was the Gilberts, including Nauru and Ocean Islands; headquarters located at Tarawa. Fourth Base Force - Carolines, headquarters at Truk. Fifth Base Force - Marianas, headquarters at Saipan. Sixth Base Force - Marshalls, including Wake, headquarters at Kwajalein.

Cross-examined by the judge advocate:

33. Q. You testified concerning the telephone system as between the Base Force and the Forty-first Naval Guard Unit. Do you know in what room the extension from the command telephone is located at the Forty-first Naval Guard Unit?
A. My recollection is not definite but I recall that there was a telephone room at the entrance of the administration building of the Forty-first Guard Unit.

34. Q. Have you ever seen the command telephone at the Forty-first Guard Unit?
A. No, I have no recollection of seeing it.

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35. Q. Isn't it true that the command telephone worked on either of two systems? That is, either light or buzzer?
A. As to the lamp, I do not know whether the lamp would light at the Forty-first Guard Unit's side but I recall that the buzzer rang.

36. Q. This buzzer rang at the Forty-first Naval Guard Unit?
A. Yes.

37. Q. Were you ever present when it rang at the Forty-first Naval Guard Unit?
A. No.

38. Q. Do you know if it is possible on the command system to use either the buzzer or the light and that a switch may be thrown at the Guard Unit to use either buzzer or light?
A. I do not believe there was such a switch at the Forty-first Guard Unit.

39. Q. Why do you not believe that? Were you ever present there at the phone room?
A. I based my statement on the way the telephone system worked.

40. Q. Are you an expert on the installation of command telephone systems?
A. I am not an expert but am stating what I recollect.

41. Q. Did you ever repair or maintain the command telephone system between the Forty-first Guard Unit and headquarters?
A. No.

42. Q. Did you have anything to do with the installation or construction of that telephone system?
A. No.

43. Q. Then isn't it true that your only knowledge of how that command telephone system between the Forty-first Naval Guard Unit and the Fourth Base Force Headquarters actually worked is this only experience you received at the telephone room?
A. Yes.

44. Q. You have testified that when the switch is thrown on at the headquarters, that all the units under the Fourth Base Force Headquarters are alerted to come to the telephone. Is that correct?
A. At the Fourth Base Force Headquarters there is one switch which is the switch for turning on the power and there are also other switches -- there is one switch for each of their subordinates.

45. Q. By the switch for each of these subordinates do you mean that through the switchboard at the telephone room at the Fourth Base Force Headquarters they have a plug-in system by which they plug in as many of the units under the Fourth Base Force Headquarters that they wish to contact at that time. Is that correct? JK
A. The one that used the plug-in system is the ordinary telephone. The command telephone is of an altogether different set-up. JK

46. Q. On these switches to the individual units -- was the sole effect of these switches to cut the individual units in on the command line so that they could hear messages relayed from the Fourth Base Force Headquarters?
A. The function of this switch was to call each of these units.

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47. Q. Were these power switches or were they merely switches which cut the unit in on the command line?
A. The electricity goes to each unit via the main switch.

48. Q. Is it possible under the command line for the Fourth Base Force Headquarters to contact only one or two units?
A. Yes.

49. Q. And it's similarly possible on the command line to switch in all the units, is that correct?
A. The Fourth Base Force could speak to all of them or one.

50. Q. You testified concerning a telephone room at the Fourth Base Force Headquarters. Was this telephone room the room adjoining the staff room of the Fourth Base Headquarters?
A. Yes.

51. Q. Was there a door from this telephone room directly into the Fourth Base Force staff room?
A. Not directly.

52. Q. Were there sliding windows that connected this telephone room with the staff room?
A. Yes.

53. Q. Was there a telephone extension directly from that telephone room into the headquarters staff room or was the phone taken from the telephone room by opening these sliding windows and the phone passed into the staff room?
A. This command telephone can not be connected to any ordinary telephone. No orders were ever relayed by the command telephone from the staff officers' room.

The judge advocate moved to strike out this answer on the ground that it was not responsive.

The commission directed that the answer be stricken.

The judge advocate reframed the question.

54. Q. Was there a command telephone extension in the telephone room which could be passed into the staff room?
A. There is no extension to the staff officers' room and, I, myself, did not issue any orders by the use of a command telephone extension through these sliding windows.

The judge advocate moved to strike out the words "I, myself, did not issue any orders by the use of a command telephone extension through these sliding windows" on the ground that they were not responsive.

The commission directed that these words be stricken.

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

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

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

No witnesses not otherwise connected with the trial were present.

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

(Cross-examination continued.)

55. Q. Do you know if the Forty-first Naval Guard Unit facilities on Dublon maintained a telephone communication system with all of the outlying islands of Truk Atoll?

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

The judge advocate replied.

The commission announced that the objection was sustained.

56. Q. On the day of the 17th, when did the air raids commence?
A. The actual bombing commenced after it became light. I believe it was around 6 or 6:30, but I am not certain.

57. Q. Between the hours of this initial bombing and 10:30, did the Fourth Base Force issue any orders or instructions to the Forty-first Guard Unit over the command telephone?
A. I do not recall what sort of orders were issued.

58. Q. You do not know whether or not the Fourth Base Force was in communication with the Forty-first Guard Unit over the command telephone during that morning, do you?
A. I do not definitely know whether the Fourth Base Force had telephone communication with the Forty-first Guard Unit or not.

59. Q. Do you know who issued the order to prepare for land invasion?
A. The Commandant of the Fourth Base Force Headquarters.

60. Q. Do you know if this order was communicated to the Forty-first Guard Unit over the command telephone?
A. I do not know definitely, but it was probably issued through this command telephone.

61. Q. When a unit has been switched in on the command line and is in communication with the Fourth Base Force Headquarters, can it speak with the Fourth Base Force Headquarters as well as receive orders from the Fourth Base Force Headquarters?
A. When both sides have their receivers off the hook and are conversing, both sides can converse.

Reexamined by the accused:

62. Q. On the 17th do you recall when the Commandant of the Fourth Base Force issued this order to prepare for land warfare?
A. I am not definite, but I believe it was in the afternoon.

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

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. Will you state your name and former rank in the Japanese navy?
A. Iwanami, Hiroshi, former surgeon captain, IJN.

2. Q. If you recognize the accused, state as whom?
A. Kobayashi, Masashi.

Examined by the accused:

3. Q. Have you ever served on Truk?
A. Yes.

4. Q. Between what periods did you serve on Truk?
A. I arrived for duty on Truk on November 8, 1943 and served until the end of the war.

5. Q. What was your duty station on Truk?
A. The Fourth Naval Hospital.

6. Q. Who was your direct superior officer while you were serving on Truk?
A. He was Vice Admiral Kobayashi.

7. Q. What was Vice Admiral Kobayashi at this time?
A. He was Commander in Chief of the Fourth Fleet.

8. Q. Is the Kobayashi you mentioned the accused in this courtroom today?
A. Yes.

9. Q. Around January of 1944, did you have any connection with prisoner of war incidents? JK
A. It was not to the extent that I was connected with this incident.

10. Q. Around what time do you know of anything in relation to prisoners of war? JK
A. Yes.

11. Q. Will you please tell what you know to the commission?
A. A few days prior to January 20th I saw a surgeon lieutenant from the Naval Guard Unit in the room of Okuyama, the head of the surgical department, who was speaking to someone. Later on I asked Okuyama who this surgeon lieutenant was and he replied to me that he was Hasegawa. Then around the 20th of January

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after breakfast I was in my room going through some papers when Okuyama and Hasegawa came into my room. Hasegawa was right behind Okuyama and Hasegawa saluted me, then Hasegawa left the room. And Okuyama, just before leaving the room, in the entrance, told me that he was going to the Guard Unit to conduct a physical examination on some prisoners of war. Okuyama was a person who stuck to the principle of taking only two meals per day and it was his conviction that a person could live on anything which a rabbit might eat. And, moreover, I had occasion to read his thesis and so I was not deeply concerned with what he had told me about this physical examination. I was thinking while going through the papers that he was going to try out some of his physical examinations which he had been boasting about. Moreover, with regard to Hasegawa, I thought he just came over to pay his respects to me since I had only recently learned of his name. So while going through these papers I was not deeply concerned with what Okuyama had said to me. Forty minutes later I was going through and arranging my papers. After that I made preparations to visit Vice Admiral Wakabayashi to give him treatment for his ulcers. Just when I was about to go out from the entrance I saw at the far end of the corridor Hasegawa and Okuyama, leaning against one of the railings and talking to each other. After that I immediately left for the Fourth Base Force. During lunch or after lunch Okuyama came to me and said that he wanted to go to the Naval Guard Unit at eight o'clock the next morning to conduct his physical examinations. I said to him, as the Number 2 vehicle attached to the hospital was old and out of use, that I would give them a ride. The next day, just before I got out to the entrance to go out, Okuyama, Nakamura, and one dentist were waiting for me at the entrance. When Okuyama saw me he said to me that he was taking along a dentist to make an examination of the teeth. I replied to him that that was all right and we all got into the vehicle and left for the Guard Unit. On the way our conversation was mostly pointed toward Vice Admiral Wakabayashi's ulcers. When we got off the vehicle at the entrance of the Guard Unit and when we walked seven or eight steps to the left, at the headquarters of the Naval Guard Unit I saw Tanaka with his hands crossed behind his back. He was about twenty-five meters away from me. I meant to get the approval of Captain Tanaka that my young officers were going over to the Guard Unit to conduct some physical examinations, but as Hasegawa had been at the hospital the day before and had been there for about thirty minutes discussing something with Okuyama, I thought that arrangements were already made between Hasegawa and Tanaka, and there wasn't any need for me to go over to get his approval, so I did not go. Asking the way to the dispensary, we went toward the dispensary. We arrived at a house where the view was very good right by the shore. When we got in the room there were eight prisoners squatting on the floor, leaning against the wall. Right in front and in the middle Hasegawa was standing. Hasegawa had both hands on his hips. When we entered the room from the opposite side of the entrance, Japanese enlisted men came in and brought enlisted men's food to the prisoners. I looked at this ration and then conversed with Okuyama and Hasegawa. I said in this conversation, "The American people are used to eating cheese, ham, and butter, and they drink coffee, so this enlisted men's food must not agree with them." After looking at this ration I was about to leave when Hasegawa said to me that he was now going to conduct blood tests, blood pressure tests, hemoglobin tests, and strength tests. When I heard that he was going to conduct a blood test I told him how to conduct this blood test because for a long time I had been studying specially about blood tests and had had great experience and I gave him precautions and told him how to do it. At this time I told the young officer that the German-made equipment was far superior to the Japanese which they were using

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and just at that time, on the opposite side I noticed one person standing there who had a white gown on, and in this courtroom later I learned that he was Nakamura, and not a corpsman. There were four sets of this Japanese-made blood test equipment. I explained to them about the equipment. Among the eight prisoners who were lined up the seventh one was a negro and Okuyama said that he would make the blood test of this negro, but I told Okuyama that it was better to do the blood test in an orderly fashion, starting from the first man. Then I left Hasegawa and Okuyama, saying to them that I had to go over and visit Vice Admiral Wakabayashi. I was at the Guard Unit for only about twenty minutes. When I saw Vice Admiral Wakabayashi I did not tell him about this physical examination because I thought it was a simple physical examination and nothing else. I told Wakabayashi how to treat his ulcers and what his condition was and I gave precautions to the nurse attending him how to treat him. The following day, around 5:30 in the evening, I was appointed as one of the officers in charge of a party that was being given and I was at this party when a corpsman came over to me. The corpsman said to me, "Commander Okuyama has started the dissection and he asks you to come over and guide him with regard to how to go about it." It was already late and I was much impressed that Okuyama was working so earnestly at such late hours. So I had on a clean uniform, but I changed into a dirty uniform and went to the dissection room. On the way I was very much impressed by the diligency of Okuyama and was also very much moved by the way he asked for my guidance.

The witness was duly warned.

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

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

Robert Oldham, yeoman third class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

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

(Examination continued.)

12. Q. Will you please continue with your testimony concerning the prisoners that you were giving this morning?
A. Then I went to the dissection room. When I got there Okuyama was very happy that I had come and he said, "The head of the hospital has come." When I got into the room the body was already dissected from the chest down to the stomach. I said to myself, "Why did Okuyama take such rash action?", and, "Why did he have to call me when he himself was an expert at dissection?" But I did not question him because around us there were other medical officers and corpsmen. I took the trouble of coming to this room so I thought I would assist in the dissection and put one rubber glove on to my right hand. With my right hand I lifted the handkerchief which was on the face of the body and noticed the face had a very peaceful look and I did not notice any change on the body. As the dissection of the heart was very difficult to do

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I told him how to manage it by indicating with a pincer that I had. As for the rest, there wasn't any other difficult dissection to conduct so my instructions were mostly concentrated upon the internal organs by pointing with my pincer what changes could be observed. I went through and finished examining the internal organs -- the liver, the kidneys, but I could not notice any conspicuous changes so I asked Okuyama, "What did you do to this person?" I asked him twice what he had done to the body but he only answered, "I conducted a very good experiment -- I have done a very good experiment." I thought to myself that probably he had used a certain medicine which he had been boasting about. I thought there would be some changes on the kidneys because if this certain medicine had been injected and I was examining the kidneys very closely taking it to the side. While I was doing it this first body was already taken down from the table and the second body was placed on the table. Okuyama again began his dissection. I asked him, "What happened to the other prisoners?" He said that they were all subjected to experiments. I thought this was a grave thing -- I must not involve myself. I must not take part in this dissection any longer, so I washed my hands and was about to leave the room when Okuyama said to me, "All these prisoners are going to be cremated." When I examined the first body I could not notice any cause for its death so I remember saying at that time in German, "Cause of the death can not be ascertained." Two days later after returning from my visit of the patients in the contagious ward I happened to pass by the dissection room -- the door of the dissection room was slightly open and I saw through the opening bodies lying in the room. I thought, "For two times they have brought in corpses into this hospital." I immediately went over to Ensign Sakagami and told him to take care of the corpses. Then I went over to Okuyama and told him, "So you have brought in corpses into this hospital twice? It is a very grave matter and I feel very much embarrased. If this should be known at headquarters I would be in a very difficult position." The next morning while I was working in my office he, that is Okuyama, came to the room with an explanatory note saying, "I have acted rashly and I have brought over this explanatory note." Along with him came four corpsmen. I led them into the office of the headquarters of the hospital and with a solemn attitude I had them fix their seal on this explanatory note. Just before he left the room he said, "Head of the hospital, there is nothing to worry about because these prisoners were about to be executed."

13. Q. You mention headquarters, but what headquarters do you mean?
A. Fourth Fleet Headquarters.

14. Q. These experiments that Okuyama had conducted, did you receive orders from your superior to do these experiments?
A. No.

15. Q. Did you receive the approval of your superior officer in conducting these experiments?
A. I absolutely did not receive any approval. Moreover, I thought to myself that if these things became known to headquarters it would be a very grave matter. I was worrying about this matter.

16. Q. After these experiments were over did you report to your superior officer?
A. I absolutely did not.

17. Q. Was Okuyama under your orders when he conducted these experiments?
A. No, he was not.

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18. Q. Did he have your approval?
A. As I stated this morning, he merely said to me that he would conduct a physical examination.

19. Q. Who was the head of the contagious disease department of the Fourth Naval Hospital around January, 1944?
A. Iino.

20. Q. During what period was he on this duty?
A. I do not know when he first assumed this duty but he was on this duty until he left Truk. That is until around April of 1944.

21. Q. When you assumed this duty as head of the Fourth Naval Hospital in November of 1943 was Iino already the head of the contagious disease department?
A. Yes, he was.

22. Q. Was this duty of Iino's his sole duty or did he have any concurrent duties?
A. In addition to this duty he was the chief medical officer of the Fourth Base Force and also of the Guard Unit.

23. Q. By Guard Unit, what Guard Unit do you mean?
A. Forty-first Naval Guard Unit.

24. Q. Where did Iino do his work, usually?
A. He worked at the Headquarters of the Fourth Base Force and came over to the hospital every day.

25. Q. About what time of the day did Iino come to the hospital every day?
A. Around nine o'clock.

26. Q. After coming to the hospital and after looking over the patients, did he immediately return?

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

The accused reframed the question.

27. Q. What did Iino do at the hospital when he came every day?
A. When Iino came to the hospital he would usually stop by at my room, which was right near the entrance, and talk with me for about twenty minutes. Every day he would go over to the contagious ward and look over the patients. He would not drop by my room when he left the hospital.

28. Q. Around January of 1944, how often did you meet Iino?

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

The accused replied.

The commission announced that the objection was sustained.

29. Q. Iino testified that around January of 1944 you had phoned him concerning prisoners of war. Was there such a thing?

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

The accused made no reply.

The commission announced that the objection was not sustained.

A. From the various facts, from various circumstances and from the feeling I had, and from my attitude it was such I never phoned Iino with regard to such a thing.

30. Q. To put it more specifically, did you call up Iino between the 8th and the 15th of January saying that you wanted to borrow some prisoners and that to this request of yours Iino refused and then you immediately cut the line? Did you make such a phone call?

This question was objected to by the judge advocate on the ground that it was leading, irregular, improper and that counsel was trying to coach the witness.

The accused withdrew the question.

31. Q. Between the 8th and the 15th of January did you ever call up Iino with regard to prisoners of war?
A. I can definitely state that such a thing never existed from facts, from various circumstances and from the belief that I have.

32. Q. You stated that on account of various circumstances and facts that such a thing never was. Will you please explain to us what those facts and circumstances are?

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

The commission announced that it would withhold its ruling until after the question was answered.

A. The various circumstances and the facts are as follows: Despite the fact that in Japan through the radio they broadcast that, "do not be merciful or have sympathy with prisoners of war and if people did have sympathy with them they were considered as not having a knowledge of the grave situation Japan was visited with," I, at that time though having no relation with the hospital, learned from a cook at the hospital that certain prisoners of war were suffering from dysentery at the prisoner of war camp at Ofuna and sent them to Yokosuka Hospital. I then attended the conference at Ofuna and saw many prisoners of war there. And I learned that the prisoners of war were rejoicing over the fact that no smoke was coming out of the chimneys of the factories in that vicinity. And the prisoners of war were fully convinced that the United States would turn out victorious. I, at that time, was also of a conviction that this war was not desirable and because I had seen the great factory of Westinghouse in the United States, I believed that Japan would not be able to cope with such great power.

The commission announced that the objection was sustained, and directed that the question and answer be stricken.

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33. Q. Did you or did you not phone Iino with regard to the prisoners of war between the 8th and the 15th of January in 1944?
A. I did not.

34. Q. Between the time that you assumed your duty at the Fourth Naval Hospital around the first of November, 1943, and up until Iino was transferred in April of 1944, did you ever speak to Iino over the telephone?
A. I absolutely did not make any telephone call. The reason for this is as follows: On assuming my duty as head of the Fourth Naval Hospital I was told by the Navy Ministry that my predecessor had some trouble, but they were looking upon me so that no trouble will happen after I get there. And also I was told that since the sanitation of Truk was very bad I was to establish a building by March of the following year which was big enough to accommodate fifteen hundred patients.

The judge advocate moved to strike out all but the first sentence of this answer on the ground that it was not responsive.

The commission directed that all but the first sentence of the answer be stricken.

35. Q. Did prisoners of war ever come to the Fourth Naval Hospital around November of 1943?
A. Yes.

36. Q. Could you approximate the date?
A. I do not remember the date.

37. Q. What part of November was it?
A. I believe it was in the latter part of November.

38. Q. How many prisoner or prisoners came?
A. Two.

39. Q. What was the nationality of these prisoners?
A. I do not know.

40. Q. Did you not learn later what nationality they were?
A. After the end of the war when preparing some documents I learned that they were Americans.

41. Q. Do you know to what branch of service these two prisoners belonged?
A. I do not.

42. Q. Where were these prisoners sent from?
A. Around six o'clock in the evening these prisoners were brought from the Guard Unit to the hospital.

43. Q. What Guard Unit do you mean?
A. The Forty-first Naval Guard Unit.

44. Q. Why were these prisoners brought to the hospital?
A. I believe they were brought to the hospital to be operated upon.

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45. Q. Did you actually see these two prisoners of war?
A. Yes, in a dark room when Okuyama was diagnosing these prisoners of war I saw these prisoners over Okuyama's shoulder.

46. Q. Were these two prisoners wounded?
A. I can not actually recall wounds but one of the prisoner's wrists was swollen and the other's elbow was swollen very much. I saw them when they were being carried on a stretcher into the examination room.

47. Q. Who treated these wounds?
A. Okuyama and a surgeon lieutenant who had come from the Guard Unit.

48. Q. Why were they brought from the Forty-first Guard Unit to the hospital?

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

The accused reframed the question.

49. Q. Were there any operating facilities at the Forty-first Guard Unit?
A. Later on when I became chief medical officer of the fleet I went over to the Forty-first Guard Unit and there was no operating room at that time. I think that these two prisoners were brought over to the hospital because there was no one at the Guard Unit to do this operation.

50. Q. Was there any report made to you from the Forty-first Guard Unit stating that these two prisoners were being brought to the Fourth Naval Hospital?
A. There was no contact made with me, but when the automobile came I heard Okuyama say, "Well, I guess I'll have to perform an operation," so I believe there was some previous arrangement made between Okuyama and the Forty-first Guard Unit.

The commission then, at 3:15 p. m., took a recess until 3:30 p. m., at which time it reconvened.

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

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

No witnesses not otherwise connected with the trial were present.

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

(Examination continued.)

51. Q. What happened after medical treatments were given to the two prisoners at the Fourth Naval Hospital?
A. They returned to the Forty-first Guard Unit.

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52. Q. Did Okuyama make a report to you after this medical treatment was over?
A. No, he did not make any report in particular.

53. Q. Did you hear anything about these two prisoners after they were given medical treatment at the hospital?

This question was objected to by the judge advocate on the ground that it was irrelevant and too broad in scope.

The commission directed the accused to reframe the question.

54. Q. Did you hear anything about their physical condition after they were given treatment at the hospital?
A. No, I did not.

55. Q. Did you report to your superior officer with regard to giving medical treatment to these prisoners?
A. No, I did not.

56. Q. Where were you on 17 February 1944?
A. I was at the Naval Hospital on Truk.

57. Q. Were you at the hospital all through the afternoon and night of the 17th?
A. I was.

58. Q. Did you go anywhere on that day?
A. I did not go anywhere on the 17th but I remember attending a conference on the night of the 18th or 19th.

59. Q. What was this conference about?
A. I recall that this conference was about the defense of Truk and about the damages sustained by the air raid.

60. Q. Who called this conference?
A. I do not know.

61. Q. Did you attend this conference?
A. I did.

62. Q. Then, did you attend this conference without being called upon to attend by anyone?
A. I was informed by a duty person or the adjutant, I don't remember which, from the reception room by telephone, stating that there was going to be a conference that night at the Fourth Base Force Headquarters and I was asked to assemble. JK

63. Q. What time was it when you got to the conference?
A. I do not recall what time I arrived at the conference but when I got there there were a great number of persons who were chiefs and above. I definitely recall that I was standing at the rear. JK

64. Q. Did you go alone or did you have somebody with you when you went to this conference?
A. I went alone.

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65. Q. Where was this conference held?
A. This conference was held in a room which could be the mess hall or a conference room of the Fourth Base Force.

66. Q. As far as you remember, who were the main persons at this conference?
A. I definitely recall the gunnery staff officer because he was making a speech and I also saw Captain Inoue. As for the others I do not remember.

67. Q. This gunnery staff officer -- to what organization did he belong?
A. He was a staff officer of the Fourth Fleet.

68. Q. What was his name?
A. I didn't know his name until recently when I learned it was Kawamura.

69. Q. Was anybody from the Fourth Base Force Headquarters at the conference?
A. I do not remember.

70. Q. Will you please explain about this conference?

This question was objected to by the judge advocate on the ground that it was too broad in scope and irrelevant.

The accused withdrew the question.

71. Q. Were you at this conference until the very last?
A. No, I was not.

72. Q. How long were you present at this conference?
A. I do not recall how long I was there, but I recall Kawamura stating that we should be very careful about ammunition and if the various departments were lacking rifles that they should make iron spears out of materials that were to be used for construction purposes. I recall that I was not there very long.

73. Q. After Kawamura made his speech, who talked after him?
A. I do not recall who talked after Kawamura.

74. Q. Who was the commanding officer of the Forty-first Guard Unit at that time?
A. Captain Tanaka.

75. Q. Was Captain Tanaka present at this conference?
A. No, I did not see him.

76. Q. You stated that Staff Officer Inoue was present at this conference. Did you have occasion to have conversation with Inoue concerning this conference after the conference was over?

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

The accused withdrew the question.

77. Q. Did Captain Inoue say anything to you with regard to the reports that were made at this conference?
A. Captain Inoue was hospitalized later on, but I did not hear anything from him with regard to this matter.

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78. Q. You testified that on departing from Japan to assume your duty at the Fourth Naval Hospital you received orders at the Naval Ministry. Did you report this on arriving at Truk to the Commander in Chief of the Fourth Fleet?
A. The matter was chiefly related with the hospital so I did not make any report.

79. Q. Did you report to the Commander in Chief of the Fourth Fleet about the assumption of your duty?
A. I did. As the Commander in Chief was on board a warship I went and paid my respects and told him that I was going to assume my duty.

80. Q. Where was the Fourth Fleet Headquarters at this time?
A. I believe it was aboard a warship.

81. Q. What warship?
A. It was either the Katori or the Kashima.

82. Q. Who was the Commander in Chief of the Fourth Fleet at that time?

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

The accused withdrew the question.

83. Q. What was the duty or the mission of the Fourth Naval Hospital?
A. The main duties were as follows: To accommodate patients from the front; to send medical supplies to various units and naval vessels; to strive to improve the sanitary conditions on Truk.

84. Q. Between November of 1943 and February 23, 1944, was the Commander in Chief of the Combined Fleet at Truk?
A. Yes, when I assumed my duty around 8 November 1943 the flagship of the Combined Fleet was at Truk and the flagship left Truk around the tenth of February.

85. Q. Did you accommodate the patients of the Combined Fleet at the Fourth Naval Hospital?

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

The accused made no reply.

The commission announced that the objection was sustained.

86. Q. Was it your policy as the head of the Fourth Naval Hospital to experiment upon prisoners of war?
A. No, definitely not.

87. Q. Did you conduct experiments upon six American prisoners of war on about 30 January 1944?
A. There is no such thing.

88. Q. Did you kill six American prisoners of war at Dublon Island on about 30 January 1944?
A. There is absolutely no such thing.

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89. Q. Did you inject bacteria into six prisoners of war around 30 January 1944?
A. There is absolutely no such thing.

Cross-examined by the judge advocate:

90. Q. You testified that two prisoners of war were treated at the Fourth Naval Hospital in the latter part of November. How long did they remain at the Fourth Naval Hospital?
A. I was in my room reading a book and I believe it was around thirty or forty minutes.

91. Q. They were operated upon and they were sent directly back to the Guard Unit, is that correct?
A. Yes.

92. Q. Did Okuyama perform the operation on these two prisoners of war?
A. After the end of the war when preparing reports, I heard that Okuyama chiefly did the operation and Hasegawa assisted.

93. Q. Did these so-called operations consist of the amputation of the arms of both of these prisoners of war?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. At that time I thought it was only going to be an incision, but after the end of the war I learned that this operation consisted of amputations.

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

The judge advocate replied.

The commission announced that the motion to strike was not sustained.

94. Q. During the period from January 10, 1944 to February 1, 1944, did you visit Vice Admiral Wakabayashi every morning and give him medical treatment?
A. Yes, as I recall I went almost every day.

95. Q. During the period from February 1, 1944 until Wakabayashi left Truk, did you visit Wakabayashi every other day in order to give him medical treatment?
A. Yes, that is generally what I did. Later on he contracted dysentery so he was hospitalized.

96. Q. During almost all of your visits to Admiral Wakabayashi was Captain Iino, the Fourth Base Force Medical Officer, also in attendance?
A. Yes, most of the time he was.

97. Q. From around December 12, 1943 to about February 12, 1944, did Vice Admiral Kobayashi visit the hospital frequently for treatment?

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

The judge advocate replied.

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The commission announced that the objection was not sustained.

A. Yes.

98. Q. Was this treatment made in the room next to your office?
A. Yes.

99. Q. During all the period of your visits to Wakabayashi after the disposition of these eight American prisoners of war, did you tell him about these experiments?

This question was objected to by the accused on the ground that the judge advocate was testifying for the witness.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. No, I specifically did not tell him at any time after these experiments.

100. Q. Did you tell Admiral Kobayashi about the experiments which had been performed?
A. As I testified, I myself took an explanatory note from these persons so I did not do such an absurd thing.

101. Q. Iwanami, you have testified before this commission. Have you testified truthfully in all your answers asked you today?
A. Yes.

102. Q. Iwanami, you appeared before a prior military commission and testified concerning these incidents. Did you testify truthfully when you testified before that commission?
A. I did.

103. Q. Today you testified that on the day before you saw the prisoners at the Guard Unit dispensary, Hasegawa was in contact with Okuyama for about half an hour on the 20th when Okuyama came into your office. Is that true?
A. That is correct. The reason I said this today is because on the day I took the stand counsel Suzuki told me that Hasegawa was a witness for the prosecution and he is not being charged, so do not divulge his name if it is possible.

104. Q. Is that the reason why you testified in that case, when you were asked question forty-three, "Do you know if there were any contacts made between Lieutenant Hasegawa and Commander Okuyama?", you answered "I do not know"?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. At that time I said this I said that Hasegawa told the untruth.

The judge advocate moved to strike out this answer on the ground that it was not responsive.

The commission directed that the question be repeated.

The question was repeated.

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A. Yes, and prior to that question I stated that Nakamura and Hasegawa had made false testimony.

The witness was duly warned.

The commission then, at 4:30 p. m., adjourned until 9 a. m., tomorrow, Saturday, June 26, 1948.

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KOBAYASHI, MASASHI (13 MAY 1948) (VOL. III) (165564)

21 h 0

Case of

Kobayashi, Masashi

May 13, 1948

RECORD OF PROCEEDINGS

of a

MILITARY COMMISSION

convened at

United States Pacific Fleet,

Commander Marianas

Guam, Marianas Islands,

by order of

The Commander Marianas Area

VOLUME III

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THIRTY-FIRST DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Saturday, June 26, 1948.

The commission met at 9 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Stewart R. Smith, yeoman first class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Commander Martin E. Carlson, a counsel for the accused, announced that the accused desired to submit interrogatories to Sakagami, Shinji presently confined in Sugamo Prison, Tokyo, Japan.

The interrogatories produced by the accused were submitted to the judge advocate and to the commission.

The judge advocate announced that the prosecution did not desire to submit cross-interrogatories.

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

The commission announced that it had no interrogatories to add to those of the accused and directed the judge advocate to forward the interrogatories submitted by the accused to the proper authority at the earliest possible time.

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

(Cross-examination continued.)

105. Q. Iwanami, on direct examination you testified concerning many details of what happened on January 20th. Did you remember all these things or did you just try to reconstruct in your own mind what must have happened on that day?
A. I stated the facts as they actually were.

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106. Q. Did you actually remember that when you came to the dispensary you saw Hasegawa standing with his hands on his hips?
A. I saw him.

107. Q. You actually remember what your conversation was when you were driving down to that dispensary with Okuyama, Nakamura, and the dentist?
A. I remember that the conversation was chiefly with regard to ulcers on the way to the Guard Unit from the hospital.

108. Q. Did you speak to Okuyama at all about the examinations that he was about to perform on the prisoners of war?
A. I did not converse about the examinations at all. On the other hand, I remember what I said to him.

109. Q. You are sure you did not converse with him about the prisoners of war?
A. Yes.

110. Q. Was there any particular reason for your remembering these conversations in the car so well, or is it just because you have a good memory?
A. I remember it because there was a special reason for it.

111. Q. What is the special reason for your remembering that there was no conversation about prisoners of war?

This question was objected to by the accused on the ground that the judge advocate was misquoting testimony.

The judge advocate replied.

The commission announced that the objection was sustained.

112. Q. Iwanami, you testified that when you got to the Guard Unit you saw Tanaka with his hands crossed behind his back. Do you remember seeing Tanaka with his hands crossed behind his back?
A. I actually saw him, and I told this to Commander Carlson when I first met him.

113. Q. Iwanami, you attended a Fourth Base Force conference on the night of the air raids and you were asked yesterday, "Was anybody from the Fourth Base Force Headquarters at the conference?" and you answered, "I do not remember anyone." Do you remember anyone from the Fourth Base Force Headquarters being at that conference?
A. I said, "I do not know," because I did not see anyone from the Fourth Base Force Headquarters. I did not say I did not remember.

114. Q. On July 31, 1947 when you testified before a military commission here on Guam, were you asked the following questions and did you give the following answers: "Question 274. You are quite definite that in January and February 1944 you went to the Forty-first Naval Guard Unit on only one occasion. Is that correct? Answer. Yes." And "Question 277. Now, on this occasion that you admit that you went to the Forty-first Naval Guard Unit, did you see Captain Tanaka there? Answer. I did not see Captain Tanaka"?
A. I did. The reason for it is as follows. I went to the Guard Unit not because I had a particular reason to go there, but in order to give the persons with me a ride to the Guard Unit. After coming back from the fleet no

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automobile was there to meet me so I stopped by the room by the entrance of the Guard Unit in order to phone up to have my automobile sent down to meet me. On several occasions I dropped by and called up when I went over to the fleet in order to look after the hospital ship and when I was invited to the fleet, etc. Furthermore, I passed through the Guard Unit because the fleet pier was in bad shape due to heavy traffic and so I was told to use the Guard Unit pier to go to the fleet and therefore I passed through the Guard Unit.

115. Q. Does that complete your answer?
A. Yes.

116. Q. You testified in this trial that you saw Tanaka with his hands crossed behind his back, and in the prior case you testified you did not see Tanaka at all. Which of these statements is true?
A. In the previous trial I said I saw him. All the way through I have been saying that I saw Tanaka and I believe I said I saw Tanaka in the previous trial.

117. Q. Are you sure you never asked Kobayashi's permission or were informed that Kobayashi had given his permission for the disposal of these prisoners of war?
A. That is true.

118. Q. And you are sure that in the previous case you said that you saw Tanaka when you went to the Guard Unit?
A. I am sure. I definitely am sure I said that I saw Tanaka. I said this to many persons including Commander Carlson.

The judge advocate moved to strike out the words "I said this to many persons including Commander Carlson" on the ground that it was not responsive.

The commission directed that these words be stricken.

119. Q. When Okuyama came to your office on the 20th and said he wanted to perform physical examinations of the prisoners of war, did you believe this just a routine examination of prisoners of war?
A. I thought it was just going to be a mere physical examination and I did not think of it very deeply.

120. Q. Did the Forty-first Guard Unit have its own medical officer?
A. I just remember Hasegawa. When I got there my attention was drawn to the meal and then to the prisoners, and I do not remember who else was there.

121. Q. Was Hasegawa and was the Forty-first Guard Unit Dispensary under the command of the Fourth Base Force Medical Officer?
A. It was under Iino.

122. Q. Did you contact Commander Iino, the Fourth Base Force Medical Officer, to see if it was all right for your medical officer of the Fourth Naval Hospital to conduct physical examinations of the prisoners of war who were under the medical officer of the Forty-first Naval Guard Unit?
A. No.

123. Q. You testified that Iino came to the hospital every day and saw you in the office. Why didn't you mention the matter to him while he was in your office?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. Iino came over every day and we had conversation, but up until Hasegawa and Okuyama came and contacted me I did not know about it, so I did not have an opportunity to talk about this with Iino.

124. Q. Did you see Iino the day after you were at the dispensary?
A. I believe I did.

125. Q. Did you talk to him then about it?
A. I did not tell him about it because I thought this was a simple physical examination and I was not concerned about it.

126. Q. After the dissection, did you tell Iino about it?
A. No, nor did Iino ask me.

127. Q. When Okuyama said he wanted to conduct physical examinations, you thought it was in connection with his theory that human beings could be fed the food of rabbits -- is that correct?
A. I observed in his room grass laid out and I merely thought, I wonder if human beings can live on grass without taking protein and fat. JK

128. Q. Did you think that Okuyama was going to feed these prisoners grass and cut out their protein and fat?
A. He was always advocating this two meal a day principle and claiming that human beings can live on grass, and I merely thought that he was very much interested in physical tests.

129. Q. Was he interested in physical experiments?
A. I do not know.

130. Q. When he was going down to these prisoners of war to test them and you thought that it was in connection with this diet, did you ask him whether or not he was going to perform any continuous dietary feedings of these prisoners or if he was going to make only some physical examinations? JK JK

This question was objected to by the accused on the ground that it was repetitious, double, and irrelevant.

The judge advocate replied.

The commission announced that the objection was sustained.

131. Q. Did you know at this time of any secret medicine that Okuyama had?
A. He was always boasting about this medicine of his and I asked him to give me some of this medicine but he would always answer that he did not have any of it. But, on the other hand, he would always be using it on persons. I just saw that it was in a brown bottle and in powder form.

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132. Q. Was that the only secret medicine?
A. That is all I know of.

133. Q. Was this the same secret medicine that Okuyama was using in treating the accused Kobayashi?
A. He was boasting about it, so -- yes.

134. Q. When you saw these prisoners of war lying dead in the dissection room and you said to yourself, "Okuyama has given them this secret medicine and it has killed them," why didn't you ascertain whether or not in fact it was this secret medicine, this same secret medicine that was being given to your commander in chief?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. When I asked him what happened twice, he just said, "I just conducted a good experiment." It just occurred to me that he might have used a secret medicine, but I didn't go into it any further than that.

135. Q. Iwanami, when you saw these dead prisoners of war in the dissection room and later in the hospital morgue, did you consider it your duty to report that to the Commander in Chief of the Fourth Fleet, who was your superior officer?
A. No, I did not so think. My mind was very full of the fact that it was very embarassing and I couldn't think of anything else. Moreover, when I came from Tokyo I was ordered at Tokyo that I should not make any mishaps because my predecessor had been in trouble.

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

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

Robert Oldham, yeoman third class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

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

(Cross-examination continued.)

136. Q. Was Okuyama an experienced surgeon?
A. Yes.

137. Q. Was he the chief surgeon of the Fourth Naval Hospital?
A. Yes.

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138. Q. And surgery was his specialty, is that correct?
A. Yes.

139. Q. What was your specialty?
A. Internal medicine and I specialized in tuberculosis.

140. Q. Were you primarily a diagnostician of tuberculosis?
A. My specialty was in giving treatment to tuberculosis patients.

141. Q. Was this surgical treatment that you gave for tuberculosis?
A. It was an internal medicine treatment.

142. Q. Now, when you were at the dispensary and Okuyama, the experienced surgeon, the chief surgeon of the Fourth Naval Hospital, was about to make blood tests, did you interrupt him in order to demonstrate how blood tests should be taken?
A. It was for the benefit of the young officers that were present there that I intended my explanation and moreover I even wanted to explain it to Okuyama, also.

143. Q. What part of the body did you take the blood from?
A. I pierced the lobe of the ear.

144. Q. Now, are blood tests taken frequently in the Japanese navy by the medical personnel?
A. Yes, and during these tests I had frequent occasion to witness the faulty manner in which they conducted these tests. In the previous trial Commander Regan, on cross-examination, put the question to me, "Did you demonstrate things which in the American navy an ordinary nurse would be able to do?" And to that I answered -- I could not make an immediate answer, and I replied that I showed the people there the knack of conducting this blood test and for personnel who are not an expert they would think that a blood test is a very simple thing which a common nurse would be able to do, but I do not think so. For instance, anybody would be able to play catch ball but when it comes to baseball.....

The judge advocate moved to strike the entire answer on the ground that it was not responsive.

The commission directed that all the words following the first sentence be stricken.

145. Q. Yesterday you testified that in your prior testimony before another military commission you did not testify truthfully about Hasegawa because you did not wish to incriminate him, is that true?
A. Yes, in the previous trial Mr. Suzuki, the defense counsel, told me if it was possible not to disclose Hasegawa's name because he was a prosecution witness and was not being charged, and I thought I would do this.

146. Q. Iwanami, you know the accused, your former commander in chief, Kobayashi, don't you?
A. I do.

147. Q. Would you be willing to help him if you could?
A. I am just stating the facts as they were, not thinking whether they would help him or whether they wouldn't help him.

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The judge advocate moved to strike out this answer on the ground that it was not responsive.

The commission announced that the motion to strike was not sustained.

Reexamined by the accused:

148. Q. How is it that you remember the conversation in the automobile going down to the Guard Unit on your way to see Admiral Wakabayashi that day?
A. Because Okuyama had great praise for me because notwithstanding the fact that I was a specialist in internal medicine I knew much about surgery.

149. Q. You said in reply to a question by the judge advocate that Nakamura and Hasegawa had made false testimony. What false testimony did Nakamura and Hasegawa make?

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

The accused replied.

The commission announced that the objection was not sustained.

A. I definitely did not go to the Guard Unit and I absolutely did not have any conversation with Okuyama and Hasegawa. Hasegawa said on this witness stand that he was called by Nakase and was told by Nakase, he, Okuyama, and Iwanami, that is myself, were here and that I, meaning Hasegawa, go to Tanaka, but I did not know Nakase until the end of the war. Despite the fact that Hasegawa had come to the hospital and had a conversation for about thirty minutes, he said that I had gone over to the Guard Unit. Furthermore, despite the fact that I saw him standing right in front of the eight prisoners at the dispensary, that he met me when I came to the dispensary, that I had a conversation with him at the Guard Unit, he testified that on that day, he was out visiting patients.

The judge advocate moved to strike out this answer on the ground that it was hearsay, and that we are not concerned with the credibility of Hasegawa or Nakamura, and also irrelevant.

The commission directed that the words "Furthermore, despite the fact that I saw him standing right in front of the eight prisoners at the dispensary, that he met me when I came to the dispensary, that I had a conversation with him at the Guard Unit, he testified that on that day, he was out visiting patients" be stricken.

150. Q. Were you present when Okuyama and Hasegawa treated a prisoner of war at the Fourth Fleet Hospital in November of 1943?
A. I was not.

151. Q. Then you did not see what they did at that time?
A. I did not.

152. Q. These bodies that you saw at the dissection room, had those persons died at the hospital?

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

The accused replied.

The commission announced that the objection was not sustained.

A. I believe they did not die at the hospital.

153. Q. You frequently mentioned Hasegawa in your testimony, but who was this Hasegawa?

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

The accused replied.

The commission announced that the objection was not sustained.

A. He was the surgeon lieutenant.

154. Q. What organization did he belong to?
A. The Forty-first Naval Guard Unit.

155. Q. Did Lieutenant Hasegawa have any connection with Fourth Base Force?
A. No, he did not have any direct relationship but he was a subordinate of Iino of the Fourth Base Force, and received instructions from him.

156. Q. Then did Hasegawa have concurrent duties as medical officer of the Fourth Base Force?
A. No.

157. Q. In his official capacity did Hasegawa have any relationship with the Fourth Naval Hospital?
A. No, he did not have any relationship but he came over to the hospital to receive guidance from Okuyama.

158. Q. You testified on cross-examination that you went over to the Guard Unit to make a telephone call. Where was this telephone located?
A. It was right beside the entrance.

159. Q. Other than going to the Guard Unit to make a phone call, was it only on this one occasion that you mentioned yesterday that you had gone to the Guard Unit on business?
A. Yes.

160. Q. Were not the death reports of the Fourth Naval Hospital reported to the Naval Ministry and not to the Commander in Chief of the Fourth Fleet?

This question was objected to by the judge advocate on the ground that it had no relation to the issues before this commission and that it was beyond the scope of the cross-examination.

The accused replied.

0481

The commission announced that the objection was not sustained.

A. The death certificates were prepared by the Fourth Naval Hospital and one copy was filed in the office and the other was sent to the family. That is all.

161. Q. This secret medicine of Okuyama's -- did it have any connection with the dissection of the prisoners which Okuyama performed?

This question was objected to by the judge advocate on the ground that it was much too general in scope and called for the opinion of the witness.

The accused reframed the question.

162. Q. Do you know if Okuyama used this secret medicine on the prisoners of war?
A. I do not know.

163. Q. On cross-examination it came out that in the previous trial you had given testimony which was not true; now, in this present trial are there any circumstances which lead you to make any testimony which is contrary to facts?

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

The accused reframed the question.

164. Q. The matters you have testified to yesterday and today, are they the whole truth and nothing but the truth?
A. They are all true and nothing but the truth.

165. Q. In case of death occurring at the hospital, isn't it true that no report was made to the Fourth Fleet?

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

The accused made no reply.

The commission announced that the objection was not sustained.

A. No report was made.

Recross-examined by the judge advocate:

166. Q. In the previous trial to which you testified, did you swear to tell the truth, the whole truth, and nothing but the truth?
A. I did.

Reexamined by the accused:

167. Q. In the previous trial did you ever verify the testimony that was entered into the record?

0482

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

The accused made no reply.

The commission announced that the objection was sustained.

Examined by the commission:

168. Q. When prisoners of war were deceased, were any reports or death certificates submitted to higher authority by the medical authorities?
A. No.

Reexamined by the accused:

169. Q. Was it your duty as head of the hospital to submit a report to the Commander in Chief of the Fourth Fleet on the death of prisoners of war in the hospital?
A. No, it was not my duty.

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

The witness made the following statement:

Four days after Okuyama had conducted his experiment he suddenly came to me and said to me, "At one p. m. I am to give a special talk by orders of the chief medical officer of the Combined Fleet." I said to him, "If you are going to make a talk in front of one hundred twenty or one hundred thirty medical officers, you would naturally have to make some preparations and, moreover, the hospital has to think of itself. Why doesn't the chief medical officer consult me about this?" But I said, "You may go and make this speech." Rear Admiral Asano asked me what this January incident of the hospital was about. I answered to him and said that I did not know the truth -- the facts of that incident. Two weeks after Okuyama and the others had conducted this experiment -- it was around the fifth or sixth of February -- Tanaka came over to the hospital saying that he had some stomach trouble and would like to be treated. I was in a conversation with the chief of staff of the fleet at that time and said that I was occupied and that he had only to go to the head of the internal medicine section and have him look over his trouble, and this was the first time that I had met Tanaka. In January of 1947 or probably it was around Christmas, I was confronted with Tanaka, Asano, and Sumikawa, in the presence of ~~Lieutenant~~ junior grade Tremayne who was very good in speaking Japanese. On this occasion Tanaka said that he had not had any discussion with me concerning prisoners of war. In the end of January, 1944, Lieutenant Kuno of the Guard Unit came to say farewell to me. Upon leaving, he said that he was going to make contact with Hasegawa and Tanaka and he asked me if I had anything to relay -- he would make contacts. There is a little further. My relationship with Iino and also that I saw Hasegawa. With regard to the last part, I told this to defense counsel, Mr. Akimoto, who incorporated this into his argument.

The commission directed that this entire statement be stricken on the ground that it was irrelevant to the issues involved in this case.

The witness was duly warned and withdrew.

The commission then, at 11:35 a. m., adjourned until 9 a. m., Monday, June 28, 1948.

0483

THIRTY-SECOND DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Monday, June 28, 1948.

The commission met at 9:10 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Stewart R. Smith, yeoman first class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

A witness for the defense entered and was duly sworn.

Examined by the judge advocate:

1. Q. State your name, rank and present station.
A. H. D. Vanston, lieutenant commander, U. S. Navy.

2. Q. What is your official function?
A. Flag Secretary, Commander Marianas.

3. Q. If you recognize the accused, please state as whom?
A. I do not recognize the accused.

Examined by the accused:

4. Q. Do you have custody of the official files of Commander Marianas?
A. I do.

5. Q. Do the Commander Marianas files contain documents pertaining to prisoners of war?
A. Yes, they do.

6. Q. Have you with you the documents issued by Commander Marianas regarding prisoners of war?
A. Yes.

0484

7. Q. At the time these documents were issued, were they classified documents?
A. These documents are classified.

8. Q. At the time the documents were issued, what was the classification of these documents that you have with you, pertaining to prisoners of war?
A. These documents were classified as confidential.

9. Q. Have these documents now been declassified?
A. Yes, they have.

10. Q. What documents have you with you issued by Commander Marianas pertaining to prisoners of war?
A. I have Commander Marianas confidential letter serial 03293 of 25 September 1945; Commander Marianas confidential letter serial 03628 of 14 November 1945; Commander Marianas confidential letter serial 03701 of 8 December 1945; and Commander Marianas confidential letter serial 0367 of 21 August 1946.

A certified copy of Commander Marianas letter serial 03293 dated 25 September 1945, produced by the witness, was submitted to the judge advocate and to the commission and by the accused offered in evidence.

The judge advocate made an oral objection to the receipt in evidence of this document, a brief of which is appended, marked "WWWW."

The accused waived the reading of this objection in Japanese in open court.

Commander Martin E. Carlson, a counsel for the accused, made an oral reply to the judge advocate's objection, a brief of which is appended, marked "XXXX."

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

The commission announced the following ruling:

From the remarks of the accused and the judge advocate the commission is unable to accurately determine the relevancy of this document until its contents are inspected. The document will accordingly be received in evidence, subject to a motion to strike after it has been read.

The document was so received, appended marked "Exhibit 40."

Examination by the accused concerning Exhibit 40:

11. Q. Will the witness read Exhibit 40?
A. (The witness read Exhibit 40.)

The judge advocate moved to strike Exhibit 40 from evidence on the ground that it was irrelevant to any issues before the commission.

The accused replied.

0485

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

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

The commission announced the following ruling:

The motion to strike Exhibit 40 is sustained and it is directed that the exhibit be stricken from the record.

Commander Marianas letter, serial 03628 dated 14 November 1945, was submitted to the judge advocate and to the commission and by the accused offered in evidence.

The judge advocate objected to the receipt of this document in evidence on the ground that it was irrelevant, immaterial and referred to the document which had been stricken.

The accused replied.

The commission announced that the objection was sustained.

Commander Marianas letter, serial 03701 dated 8 December 1945, was submitted to the judge advocate and to the commission and by the accused offered in evidence.

The judge advocate objected to the receipt of this document in evidence on the ground that it was irrelevant, immaterial, referred to documents which were not in evidence, and was an administrative determination by Commander Marianas.

The accused replied.

The commission announced that the objection was sustained.

12. Q. What is the subject matter of Commander Marianas letter, serial 0367 dated 21 August 1946?
A. Treatment of Japanese held as accused war criminals and as witnesses in the Island Stockade.

Commander Marianas letter, serial 0367 dated 21 August 1946, was submitted to the judge advocate and to the commission and by the accused offered in evidence.

The judge advocate objected to the receipt of this document in evidence on the ground that it was irrelevant, immaterial, and referred to war criminals and witnesses and not to prisoners of war.

The accused replied.

The commission announced that the objection was sustained.

13. Q. These four documents that you brought with you and which have been tendered into evidence all relate to prisoners of war and accused war criminals and their treatment. Are they all the documents pertaining to prisoners of war issued by Commander Marianas contained in the present files of Commander Marianas?

0486

A. To the best of my knowledge, they are.

Cross-examined by the judge advocate:

14. Q. Were orders or instructions with regard to the treatment of prisoners of war issued by Commander Marianas to his subordinates?
A. I believe they were.

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

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

James P. Kenny, a judge advocate, was recalled as a witness for the defense. He was warned that the oath previously taken was still binding.

Examined by the accused:

1. Q. Have you a part of the original record of the trial of Kawasaki, Susumu which was identified in this court previously? JK
A. Certified excerpts have been extracted from the certified copy of the trial of Kawasaki, Susumu, et al, in accordance with the request of defense counsel.

2. Q. Is this the excerpt of the entire testimony of Kawasaki, Susumu? JK
A. It is.

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

The judge advocate objected to the receipt of this document in evidence on the ground that the incident to which it referred occurred prior to the time the accused in this case took command of the Fourth Fleet.

The accused replied.

The commission announced that the objection was not sustained.

There being no further objections, it was so received, appended marked "Exhibit 41."

3. Q. Will you please read questions 1, 4, 7, 30, 49, and the answers thereto?
A. (The witness read from Exhibit 41 through question and answer 30.)

The judge advocate moved to strike out question and answer number 30 on the ground that they were irrelevant and immaterial.

The accused replied.

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The commission announced that the motion to strike was not sustained.

(The witness continued to read from Exhibit 41 through question 49.)

The judge advocate moved to strike out question and answer number 49 on the ground that it was irrelevant and immaterial.

The accused replied.

The commission announced that the objection was not sustained.

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

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

Robert Oldham, yeoman third class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

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

(Examination by the accused concerning Exhibit 41 continued.)

(The witness read from Exhibit 41, the answer to question 49.)

The judge advocate moved to strike out this answer on the ground that it was irrelevant and immaterial to any issues before the commission in the instant case.

The commission announced that the motion to strike was not sustained.

4. Q. Will the witness read questions 54, 55, 56, 57, 59, 84, 86, and 87, and the answers thereto as set forth in Exhibit 41?
A. (The witness read from Exhibit 41 as requested.)

Cross-examined by the judge advocate concerning Exhibit 41:

5. Q. Will the witness refer to the charge and specifications and read therefrom and note therein whether Kawasaki is charged under specification two?
A. Kawasaki is not charged in specification two of the charge.

6. Q. Will the witness look at specification one and note whether Kawasaki is charged with regard to specification one?
A. Kawasaki is charged in specification one.

7. Q. Will the witness read the date on which the alleged offense with regard to Kawasaki occurred?
A. The offense was alleged to have occurred during the period May 1, 1942 to August 1, 1942, exact date unknown.

0488

8. Q. Will the witness read questions and answers 5, 17 and 28 from the testimony of Kawasaki?
A. (The witness read from Exhibit 41 as requested.)

Neither the judge advocate nor the accused desired further to examine this witness concerning Exhibit 41.

The commission did not desire to examine this witness concerning Exhibit 41.

Examined by the accused concerning defense document number 105:

9. Q. Has the witness a certified excerpt of the testimony of prosecution witness Anyoku Kanagawa taken from the case of Oishi et al which has been marked number eight for identification?
A. I have a certified extract of the testimony of Anyoku Kanagawa which was taken from a certified copy of the record of Oishi et al case.

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

The judge advocate objected to the receipt of this document in evidence on the ground that it was irrelevant and immaterial to the issues before the commission at this time.

The accused replied.

The commission announced that the objection was not sustained.

There being no further objection, the document was so received, appended marked "Exhibit 42."

Examined by the accused concerning Exhibit 42:

10. Q. Will the witness read from Exhibit 42 questions 1, 53, 77, 89, and 131 and the answers thereto?
A. (The witness read from Exhibit 42 as requested.)

The judge advocate did not desire to examine this witness concerning Exhibit 42.

The commission did not desire to examine this witness concerning Exhibit 42.

The witness said that he had nothing further to state.

The witness resumed his status as a judge advocate.

The accused, Kobayashi, Masashi, was, at his own request, duly sworn as a witness in his own behalf.

Examined by the accused:

1. Q. Please state your name and your former rank in the Imperial Japanese Navy?
A. Kobayashi, Masashi, former vice admiral, Imperial Japanese Navy.

0489

2. Q. Have you ever served in the South Sea Islands?
A. Yes, I have.

3. Q. Please state the period in which you served in the South Sea Islands?
A. I was in the South Sea Islands from 5 April 1943 until 23 February 1944.

4. Q. Will you state your duty during that period of time?
A. I was commander in chief of the Fourth Fleet.

5. Q. What posts did you hold immediately prior to this post of commander in chief of the Fourth Fleet?
A. I was the commander in chief of the Minor Naval Station at Osaka.

6. Q. Will you state the duties of the commander in chief of the Fourth Fleet during the time you held that post?
A. As commander in chief of the Fourth Fleet I was assigned an area of responsibility which is shown in a prosecution document. My duties were a division of this area, aerial operations in the vicinity of this area of responsibility, construction of air bases in connection with these aerial operations and protection of surface transport. My other duties involved seeing that the front line bases at Truk and Kwajalein functioned as they should. Supply and repair of naval vessels and units, and cooperation in the operations within the southern areas, especially the Solomons and New Guinea.

7. Q. I now show you Exhibit 2 and ask you whether that area marked off is that area which was assigned to you for defense?
A. It is the area if Wake, Gilberts, Nauru and Ocean Islands were added.

8. Q. Was there a Japanese naval fleet which controlled the area to the south of the area marked on that chart?
A. There was the Southeast Fleet composed of the Eighth and Ninth Fleets and the Eleventh Air Fleet.

9. Q. I further show you Annex Tables number 3 and 4 of Exhibit 2 and ask you if the strength of the forces shown in them were the same forces under your command during your tour of duty?
A. The tables do not show the actual strength of the forces I had under my command.

10. Q. Will you state briefly the units which have been omitted from this chart and which were actually under your command during your tour of duty as commander in chief of the Fourth Fleet?
A. Of the forces I had under my command as commander in chief of the Fourth Fleet - a division could be made into operational forces and administrative forces. In this chart the administrative organizations have been omitted. Of the operational forces I had certain forces assigned me through the Guntai Kubun of the Combined Fleet. (Interpreters note: Guntai Kubun - Assignment of Forces.) Such as the Inner South Seas Forces. In this chart the air units and the air base construction units attached to these air units are not included. As I stated previously - aerial operations and air base constructions were two of my important duties and up until August 1943, the Twenty-fourth Air Group was assigned to me and after that date the Twenty-second Air Group. As air base construction units or C.B.'s were assigned to me, they were given numerical numbers but I do not recall their designations. There were several of these units assigned to me.

JK

0490

The commission then, at 3:20 p.m., took a recess until 3:45 p.m., at which time it reconvened.

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

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

No witnesses not otherwise connected with the trial were present.

Kobayashi, Masashi, the witness under examination when the recess was taken, resumed his seat as a witness in his own behalf and was warned that the oath previously taken was still binding and continued his testimony.

(Examination continued.)

11. Q. During your tour of duty as commander in chief, Fourth Fleet, how many air bases were there within the area of jurisdiction of Fourth Fleet?

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

The accused withdrew the question.

12. Q. During your tour of duty as commander in chief, Fourth Fleet, how many air bases were within the area of jurisdiction, the construction and maintenance of which was assigned to you?
A. The number varied with the times but there were twelve to thirteen completed air bases and twelve to thirteen under construction.

13. Q. I now show you Exhibit 35 and ask you whether the organizations mentioned therein are the administrative organizations to which you previously referred?
A. Yes, they are.

14. Q. Will you state very briefly what the functions of these administrative organizations were?
A. The functions of these organizations were supply, repair, medical care of Fourth Fleet, Combined Fleet, and in some instances the Southeastern Fleet.

15. Q. I show you another portion of Exhibit 35 and ask you whether the forces shown in the table there are the forces which you had under your command during your tour of duty as commander in chief, Fourth Fleet?
A. The chart is correct except for the cases in which the forces assigned through the assignment of forces of Combined Fleet are not included.

16. Q. Was there a command relationship between commander in chief, Combined Fleet, and commander in chief, Fourth Fleet, during the time you were commander in chief, Fourth Fleet?
A. The commander in chief, Fourth Fleet, received orders from commander in chief, Combined Fleet.

17. Q. Who was commander in chief of the Combined Fleet during your tour of duty as commander in chief, Fourth Fleet?
A. When I assumed my position, commander in chief, Combined Fleet, was Admiral Yamamoto but after his death in the middle of April 1943, Admiral Koga was commander in chief.

0491

18. Q. During your tour of duty was the area of jurisdiction of the Fourth Fleet inside the area of jurisdiction of the Combined Fleet or was it outside this?
A. It was inside the area of jurisdiction of the Combined Fleet.

19. Q. During your tour of duty as commander in chief was the area of jurisdiction of Fourth Fleet defended by naval personnel alone?
A. No, that is not so. From around June or July of 1943 army forces arrived on Wake and from November 1943 they moved into the Marshalls and from December of that same year the army moved into Truk.

20. Q. Who undertook the transportation of the army units in the Marshall area in November 1943? Did the navy undertake it or did the army itself do it?
A. The navy undertook the transportation.

21. Q. Who was in command of the transportation?
A. I commanded the transportation by orders of the commander in chief, Combined Fleet.

22. Q. During your tour of duty as commander in chief, Fourth Fleet, who was the senior army officer in charge of army units within the area of jurisdiction of Fourth Fleet?
A. It was Lieutenant General Mugikura.

23. Q. Where was Lieutenant General Mugikura stationed?
A. He was on Dublon, Truk.

24. Q. Who was senior between Lieutenant General Mugikura and yourself?
A. There was no question of seniority between us. We were both appointed to our rank the same day, namely October 15, 1941.

25. Q. Who was the direct superior of Lieutenant General Mugikura?
A. Commander in chief, Combined Fleet.

26. Q. What were the command relationships between army and navy units on the various islands within the area of your jurisdiction?
A. In the event of enemy landings, the senior officer among both army and navy personnel was to take command of the army and navy units. For all other purposes the army units were under the command of the senior army officer and the navy units under the command of the senior navy officer. In the event of landings on Truk it was decided in Tokyo that Lieutenant General Mugikura would take command.

27. Q. Then in the event of an enemy landing on Truk would you be under the command of Lieutenant General Mugikura?

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

The accused replied.

The commission announced that the objection was not sustained.

A. If I were ashore on Truk and an enemy landing took place, insofar as land operations were concerned, I would fall under his command.

0492

28. Q. During your tour of duty as commander in chief, Fourth Fleet, where did you have your headquarters?
A. From the day I assumed command until 10 November 1943 my headquarters was aboard my flagship, the Kashima. From 10 to 13 November on the Nagara, and after that date ashore on Truk.

29. Q. What was the reason for the removal of Fourth Fleet Headquarters ashore after November 13, 1943?
A. The headquarters of a fleet is generally aboard a ship but the Kashima was wanted in Japan for a training ship for the Naval Academy. The light cruiser Nagara which was sent to replace the flagship did not have complete facilities for quartering a headquarters nor did it have communication facilities, therefore I moved my living quarters ashore and left my flag aboard the ship. However, the Nagara was used extensively for salvage work and for transportation of army units, therefore I moved my flag from the Nagara ashore.

30. Q. Where was the Kashima stationed during your tour of duty as commander in chief, Fourth Fleet and while you had your flag aboard that ship?
A. It sailed for the Japanese homeland on 8 April to return late May. From the end of August until the beginning of November it was in the Marshall area.

31. Q. Where were you during that period when the Kashima was in Japan from 8 April to the end of May?
A. I was ashore at Truk.

32. Q. After you, as commander in chief, Fourth Fleet, moved ashore on 13 November 1943, did you remain ashore after that?
A. Excepting for three short visits, namely to Guam and Saipan from the sixteenth of November to 18 November 1943; to Kwajalein from November 20 to 10 December 1943 and to Ponape from 18 January to 20 January 1944, I remained ashore on Truk.

33. Q. What was your objective in going to the Marshalls from the end of August until the beginning of November, 1943?
A. It was for the purpose of inspecting Sixth Base Force, the units under Sixth Base Force, Third Special Base Force and air groups and air bases in that area.

34. Q. What was your purpose in visiting the Marshalls for the second time from November 20 to 10 December 1943?
A. I went to command in that area after hearing on the twentieth of November that the enemy was making invasions in the Gilberts.

35. Q. In what way did you travel on this trip to the Marshalls?
A. I went by flying boat from the seaplane base at Dublon.

36. Q. Where did you stay in the Marshalls on that trip?
A. I was quartered at the barracks formerly used by the Sixth Fleet on Kwajalein.

37. Q. Who accompanied you from the staff of the Fourth Fleet on this trip to the Marshalls?
A. All the members of my staff accompanied me.

0493

38. Q. When you assumed your position as commander in chief, Fourth Fleet, were you briefed by your predecessor on standing orders and instructions, et cetera?
A. I was.

39. Q. Did you see all these standing orders, instructions, et cetera?
A. I did.

40. Q. Were there any orders or regulations concerning treatment of prisoners of war issued by your predecessor or by his superior officers?
A. There were no specific orders but as I remember there was an instruction that prisoners of war when taken should be sent to the Japanese homeland at the earliest possible moment and while confined to be kept at the naval guard units.

41. Q. Were there any orders or instructions issued by your predecessor or by his superior officers stipulating that international law be strictly observed?

This question was objected to by the judge advocate on the ground that it was too broad and general and leading.

The accused replied.

The commission announced that the objection was not sustained.

A. At the commencement of the Pacific war, Commander in Chief, Combined Fleet, Yamamoto issued instructions that international law be strictly observed. I saw this instruction among the standing orders and regulations which I saw when I was briefed.

The commission then, at 4:30 p.m., adjourned until 9 a.m., tomorrow, Tuesday, June 29, 1948.

0494

THIRTY-THIRD DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Tuesday, June 29, 1948.

The commission met at 9:15 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Robert Oldham, yeoman third class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

The accused, Kobayashi, Masashi, resumed the stand as a witness in his own behalf and he was warned that the oath previously taken was still binding and continued his testimony.

(Examination continued.)

42. Q. During your tour of duty with the Fourth Fleet did you receive orders or instructions from your superior officers concerning the treatment of prisoners of war?
A. As to instructions, I do not recall the exact date but I received instructions from the Navy Ministry saying that I was to send home prisoners of war by the first available transport.

43. Q. Were these instructions from the Navy Ministry addressed to you or to all of your subordinates of the Fourth Fleet in general?

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

The accused reframed the question.

44. Q. To whom was this despatch addressed?
A. It was addressed to myself and to all my subordinates in general.

0495

45. Q. During your tour of duty as commander in chief of the Fourth Fleet did you issue orders, instructions, or regulations to your subordinates relative to the treatment and protection of prisoners of war and the strict observance of international law?
A. I did not issue any instructions directly concerning prisoners of war. When I assumed my office I gave as one of the clauses of my instructions the instructions given by the Commander in Chief of the Combined Fleet, Admiral Yamamoto, at the commencement of the Pacific War that international law be strictly observed and to have my instructions disseminated as quickly as possible I sent it to my subordinates in despatch form. These instructions consisted of six clauses including one which stated that international law be strictly observed.

The judge advocate moved to strike out the words "When I assumed my office I gave as one of the clauses of my instructions the instructions given by the Commander in Chief of the Combined Fleet, Admiral Yamamoto, at the commencement of the Pacific War that international law be strictly observed and to have my instructions disseminated as quickly as possible I sent it to my subordinates in despatch form. These instructions consisted of six clauses including one which stated that international law be strictly observed" on the ground that they were not responsive.

The accused replied.

The commission announced that the motion to strike was not sustained.

46. Q. Were there any specific reasons why you did not issue any orders concerning treatment and protection of prisoners of war?
A. In the Japanese navy there is a regulation concerning the treatment of prisoners of war which sets forth matters in detail and therefore, there was no need to issue any specific instructions. As to protection of prisoners of war there were international treaties and in naval regulations, volume four, section titled "Treaties" it contains the Hague Convention Laws of Land Warfare. The observance of international law is further clearly set forth in the Service Regulations For Personnel On Naval Vessels, in that portion which sets forth the duties of a captain of a ship. These regulations that were observed were applied not only to captains of vessels but also to commanding officers of units ashore. Furthermore, there were commandants of base forces superior to these unit commanders and I believed that there was no need for issuing instructions. I was commandant of Fourth Base Force in Hankow and Shanghai and unit commanders under me had custody of prisoners of war and were charged with their protection and treatment and without any orders or instructions from the commander in chief of the fleet, they fulfilled their charge without incident and I had experience in controlling subordinate unit commanders with such charges without causing any incident.

The judge advocate moved to strike out the words "I was commandant of Fourth Base Force in Hankow and Shanghai and unit commanders under me had custody of prisoners of war and were charged with their protection and treatment and without any orders or instructions from the commander in chief of the fleet, they fulfilled their charge without incident and I had experience in controlling subordinate unit commanders with such charges without causing any incident" on the ground that they were irrelevant and immaterial.

The accused replied.

0496

The commission announced that the motion to strike was not sustained.

47. Q. In the regulations concerning treatment of prisoners of war of the Imperial Japanese Navy what policy is set forth as to their treatment?
A. It is set forth in these regulations that (1) prisoners of war be sent to the Japanese homeland at the first possible opportunity; (2) that their charge be delegated to the army; and (3) that for the short period in which they are in the care of the navy, they be temporarily confined.

48. Q. Was it set forth in these regulations that the number of prisoners be checked and reports made on this?

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

The accused replied.

The commission announced that the objection was not sustained.

A. There is.

49. Q. How was it determined?
A. In Article 8 of the Regulations Concerning the Treatment of Prisoners of War it is set forth that the commander who turns over the prisoners of war shall make a report of the number of prisoners of war to the Navy Ministry. JK

50. Q. In these regulations is it set forth who is to punish the prisoners of war if they commit any crimes or if they misconduct themselves?

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

The accused replied.

The commission announced that the objection was not sustained.

A. It is set forth.

51. Q. Who is vested with the authority to mete out disciplinary punishment to prisoners of war?
A. It is written in the regulations concerning the treatment of prisoners of war that the commander of the unit which has custody of the prisoners of war possesses this authority.

52. Q. I show you a book and ask you whether you recognize it?
A. I do.

53. Q. Have you seen it previously?
A. I have.

54. Q. If you recall this book please read the title off it?
A. Manual of Wartime International Law.

At the request of the accused, this book, was marked "Number 17" for identification.

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55. Q. Who issued this manual?
A. The secretary under the Naval Ministry.

56. Q. Do you recall when this book was issued?
A. I believe immediately prior to the commencement of the Sino-Japanese incident. I believe it was the early part of 1937.

57. Q. Do you know who edited this book?
A. Mr. Enomoto.

58. Q. Are there any matters relative to treatment of prisoners of war or to laws of land warfare set forth in this book?
A. It has a detailed interpretation and the text of the laws of land warfare of the Hague Convention and the Geneva Convention concerning the treatment of prisoners of war.

59. Q. To whom in the Japanese navy is this manual distributed?
A. It was distributed to all unit commanders and to any person desiring a copy.

The judge advocate moved to strike out this answer on the ground that it was irrelevant.

The accused replied.

The commission withheld its ruling.

60. Q. Do you know whether this manual was issued to your subordinate commanders in the Fourth Fleet?
A. I know that it was issued.

The commission announced that the motion to strike the previous answer was not sustained.

61. Q. During your tour of duty as the commander in chief of the Fourth Fleet did you actually see with your own eyes prisoners of war?
A. Yes, I did.

62. Q. Where and when did you see these prisoners of war?
A. When I inspected Wake Island in the early part of September 1943.

63. Q. Approximately how many prisoners did you see and what nationality?
A. American civilian prisoners - about eighty or ninety American civilian prisoners of war.

64. Q. Was that the first time you were acquainted with the presence of these prisoners on Wake?
A. No.

65. Q. When did you first learn that prisoners of war were held on Wake?
A. Soon after I assumed my office.

66. Q. What did you learn concerning prisoners of war on Wake Island soon after you assumed that office?
A. I learned that the greater majority of the prisoners of war taken during the invasion of Wake had been sent home to the Japanese homeland but

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that a minority was left to instruct the Japanese on how to manipulate heavy engineering equipment.

67. Q. When you learned there were still prisoners of war on Wake Island did you take any measures?
A. I requested a liaison officer who was on official business to take a message to Vice Admiral Abe and to Captain Sakaibara that these prisoners be sent home at the earliest possible moment.

68. Q. When did that occur?
A. I believe some time around May of 1943.

69. Q. You stated that you inspected Wake Island but for what purpose was this inspection?
A. It was for the purpose of inspecting the Sixty-fifth Naval Guard Unit, the Air Group, the Construction Corps and army units there stationed.

70. Q. Who was the commanding officer of the Sixty-fifth Naval Guard Unit at that time?
A. It was Captain Sakaibara.

71. Q. At that time what was the strength of the air group on Wake Island?
A. I recall approximately ten fighter planes.

72. Q. Under whose command was this air group?
A. This air group was directly subordinate to the Twenty-second Air Group stationed at Roi Island in the Kwajalein Atoll. This Twenty-second Air Group was under my command.

73. Q. When you inspected Wake Island and discovered that what you said in your message was not carried out, the message referred to being the one you testified previously about, did you say anything to Captain Sakaibara?

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

The accused reframed the question.

74. Q. When you saw that prisoners of war were still on Wake Island did you say anything to Captain Sakabara?
A. I did. When I saw the prisoners of war I asked Captain Sakaibara what he had done about the message I sent. He answered that he at once contemplated sending the prisoners home; that he decided to send them home but he changed his mind when he learned that army units would arrive on Wake. The reason being that there would be a great deal of work occasioned by their arrival and that if prisoners of war were present the work would be made easy. However, as the work had been completed and further as the Japanese had mastered the heavy equipment, he would have the prisoners sent home by the next supply ship. I agreed with him and said it was very well.

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

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

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

No witnesses not otherwise connected with the trial were present.

The accused, Kobayashi, Masashi, resumed the stand 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. In which part of Wake Island did you see the prisoners you testified as having seen?
A. I saw them lined up in front of their living quarters. And after that on several occasions because I happened to pass in front of their quarters and I also saw them at work.

76. Q. Please state briefly how the prisoners were treated on Wake Island as you saw them?
A. They were quartered in two barracks and the barracks were kept in a clean condition. They were much the same as the barracks for Japanese personnel. They were properly clad and they were allowed to keep their own possessions. I saw them at work - they were working with the Japanese and supervising the machinery. And when I saw them during their leisure hours they were in no way restricted and they were playing ball and pitching horseshoes. I put a few questions to one prisoner of war but he did not bring up any complaints. On the whole the impression was not that these men were prisoners of war but that they were members of the Japanese construction corps.

77. Q. Concerning the prisoners of war on Wake, did you have any conversation with Captain Sakaibara other than the one which you mentioned in your testimony?
A. I heard from Sakaibara on the food and clothing conditions and the medical treatment given the prisoners of war. As to food, the foodstuff was given to the Americans and there being professional cooks among their number the Americans cooked it to their taste. For the main part, flour and canned food which had been taken at the time of the occupation were being issued. He also said that complaints were made by the Japanese enlisted men that the American prisoners of war were eating better food than they. As to medical treatment, Sakaibara said that there was a doctor among their number and that he issued medical supplies to this doctor and that the physical condition of the prisoners of war was good and there were no sick personnel. During my tour of inspection I saw an excellent movie theatre. When I saw this I asked Captain Sakaibara whether movies were being shown to American prisoners of war, to which he replied that the films coming in from Japan were very old and scratched and that it would be a shame to show these to the prisoners and that they were not shown. I suggested to Sakaibara that he choose the better films out of those arriving from Japan and show them to the prisoners. Sakaibara said that he would think about the matter.

78. Q. Do you remember receiving a report as to whether a prisoner of war was executed on Wake in July of 1943?
A. I have no recollection.

79. Q. Where were you around July of 1943?

A. I was aboard the Kashima at Truk.

80. Q. Where were you on October 7, 1943?
A. I was aboard the Kashima inside Kwajalein Atoll.

81. Q. Do you know the incident which occurred on Wake on that day?
A. I do. As I recall there was an air raid by an American task force and shelling by American surface craft continued from the previous day.

82. Q. Did you receive any dispatches concerning prisoners of war on Wake about that time?
A. I recall receiving a dispatch.

83. Q. About when do you recall having received the dispatch?
A. I do not recall the exact day, but I believe it was immediately after the day of this raid on Wake.

84. Q. How many dispatches concerning prisoners of war on Wake do you recall having seen?
A. As I recall, one dispatch.

85. Q. From whom did you receive this one dispatch?
A. From Commanding Officer Sakaibara.

86. Q. If you recall the substance of the dispatch will you state it?
A. As I recall, as the concluding sentence of this battle report it was stated that prisoners of war had been disposed of.

87. Q. Were any reasons for the executions given in the dispatch?
A. In my statements I said that there were no reasons given, but in thinking the matter over I recall a brief explanation to the effect that the prisoners of war had been disposed of through military necessity. However, I do not recall the wording of that statement.

88. Q. Do you recall the action addressee and information addressees of that dispatch?
A. As I recall, the action addressee of the dispatch was Commandant, Sixth Base Force, and the information addressees were Fourth Fleet, Combined Fleet, Navy Ministry and Naval General Staff.

89. Q. On receipt of that dispatch did you take any measures?
A. I do not recall having taken immediate steps on its receipt, but I recall having told Abe when I met him later to look into the actual circumstances.

90. Q. Were there any circumstances surrounding the fact that you did not take any immediate steps on receipt of the dispatch?

This question was objected to by the judge advocate on the ground that it called for an irrelevant answer and that it related to matters in mitigation.

The accused replied.

The commission announced that the objection was not sustained.

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A. It was not my custom to bypass a directly superior officer, in this instance, Abe, and to issue instructions to a subordinate commander. Abe, as the direct superior officer of Sakaibara, was in the position to instruct. Furthermore, it was a crucial time from the standpoint of operations, as the Combined Fleet was to sail from Truk for the Marshalls because of American task forces in the vicinity of Wake. I was extremely busy in collecting information and in commanding aerial operations and I did not have the time to probe into the matter.

91. Q. Do you have any recollection of having received any dispatches concerning prisoners of war on Wake Island on October 7, 1943 other than the one to which you have previously testified?
A. I have no recollection.

92. Q. Do you recall having made a statement for the prosecution on March 8, 1948?
A. Yes, I do.

93. Q. Do you recall having stated in that statement that you had received a dispatch concerning prisoners of war on Wake Island, other than the one you have testified to?

This question was objected to by the judge advocate on the ground that it was leading and that counsel was impeaching his own witness.

The accused made no reply.

The commission announced that the objection was not sustained.

A. That dispatch referred to was not personally remembered by me. Last year, when I was investigated with my staff officer, Inoue, Inoue remembered this dispatch and this dispatch was not of my own recollection. (T.N. - The dispatch referred to in this answer is a second dispatch mentioned in that statement.) I attempted to explain these circumstances in my statement but was informed by the investigator that the explanation was not necessary. In short, I was told that if you recognize the fact that Fourth Fleet received this dispatch then the explanation is not necessary.

94. Q. Do you know whether the commander in chief of the Fourth Fleet saw all the dispatches received at Fourth Fleet Headquarters?
A. I do.

95. Q. Does he see all the dispatches received by Fourth Fleet Headquarters?

This question was objected to by the judge advocate on the ground that it was hypothetical in form.

The accused withdrew the question.

96. Q. During your tour of duty as commander in chief of the Fourth Fleet, did you see all the dispatches received by Headquarters of the Fourth Fleet?
A. No, I did not see them all.

97. Q. Will you explain the procedure followed at the Fourth Fleet whereby the commander in chief came to see dispatches received at headquarters?
A. On receipt of dispatches the communications staff officer screened

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them. Even regarding dispatches where the fleet is the action addressee, the staff officers disposed of some of these when the matters concerned are not very important. These latter were eliminated, and the rest, with the more important of the intercepted dispatches, were placed in a box for my inspection.

98. Q. Where were you around October of 1943?
A. I was for the most part aboard my ship, the Kashima, at Kwajalein Atoll, but from time to time I visited outlying islands.

99. Q. Did you receive a report on a prisoner of war on Wake Island about that time?
A. No.

100. Q. Did you receive any reports on the capture of prisoners of war in the Marshalls around July of 1943?
A. I do not recall.

101. Q. Did you receive any reports of prisoners of war confined on Kwajalein? That is, in the middle of July or the latter part of August, 1943?
A. No.

102. Q. Under whose command were the transports going back and forth from the Marshalls to Truk, and from the Marshalls to the Japanese homeland?
A. They were under the command of the Combined Fleet or directly under the Navy Ministry.

103. Q. Did you receive any reports of capture of prisoners of war within the area of jurisdiction of the Fourth Fleet?
A. Three times.

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

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

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

No witnesses not otherwise connected with the trial were present.

The accused, Kobayashi, Masashi, resumed the stand as a witness in his own behalf. He was warned that the oath previously taken was still binding and continued his testimony.

(Examination continued.)

104. Q. In your testimony this morning you stated that you received reports on prisoners of war on three occasions during your tour of duty with the Fourth Fleet. Will you please elaborate on that?
A. On the eighteenth or nineteenth of November 1943 I received a dispatch which I remember was addressed to the Combined Fleet stating that a Japanese destroyer had sunk an American submarine outside of Truk Atoll and had taken prisoners. On the morning of 20 November 1943 when I went to the Seaplane Base to fly to Kwajalein and immediately after I had boarded a flying boat

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I received a report from my staff officer that many American prisoners of war had just landed on Dublon Island. During the air raid, the large scale air raid on Truk on 17 and 18 February 1944, I received a report that an American aviator had made a forced landing and had been taken prisoner.

105. Q. You stated just now that you left for Kwajalein on 20 November. When did you return to Truk from that trip?
A. As I recall I returned to Truk on the tenth of December of the same year.

106. Q. You stated that you received three reports on prisoners of war, but were the prisoners mentioned in report number one in any way related to the prisoners mentioned in report number two?
A. I believe they were the same prisoners.

107. Q. While you were on Kwajalein did you receive any reports on prisoners of war about which you testified before from the Fourth Base Force or the Forty-first Naval Guard Unit?
A. I did not receive any reports.

108. Q. Were there any other fleets of the Combined Fleet other than the Fourth Fleet anchored at Truk during the period from the latter part of November to the early part of December 1943?
A. The second and sixth fleets were anchored there.

109. Q. What type of fleet was the Sixth Fleet?
A. It was a submarine fleet.

110. Q. Where at that time was the headquarters of the Combined Fleet?
A. It was aboard the Musashi.

111. Q. Where was the Musashi anchored?
A. It was within Truk Atoll.

112. Q. Will you state for what period of time the headquarters of Combined Fleet was at Truk during your tour of duty as commander in chief, Fourth Fleet?
A. When I assumed my office the headquarters of Combined Fleet was ashore in the Solomons. Admiral Yamamoto died in action in the latter part of April and he was replaced by Admiral Koga. Commander in Chief Koga was at Truk from the latter part of April to the middle of May. He was away from Truk from 17 May to 5 August. He was at Truk from 5 August until 10 February of the next year. On the nineteenth of October the Combined Fleet entered Eniwetok but I do not know for what period of time it was away on that occasion.

113. Q. Where were you from the latter part of January 1944 to the beginning of February?
A. I was ashore on Truk.

114. Q. Did you know at that time whether there were any prisoners of war ashore on Truk?
A. I did not know.

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115. Q. Do you remember having been requested by someone towards the end of January 1944 that permission be granted to conduct experiments on prisoners of war?
A. I received no such request.

116. Q. Who was the head of the Fourth Naval Hospital on Truk at that time?
A. It was Surgeon Captain Iwanami.

117. Q. At that time were you acquainted with Surgeon Captain Iwanami?
A. As I was at that time being treated for anal fistula and as I used to visit the hospital, if Iwanami was in his office I may have met him but I do not recall when I met him. I recall one instance which is when the Imperial Attendant and the Naval Aide de Camp to his Imperial Majesty paid a visit to the Fourth Naval Hospital and I accompanied him and we were conducted by Surgeon Captain Iwanami through the hospital. This occurred on the fourth or fifth of February.

118. Q. Did you confer with Surgeon Captain Iwanami on the subject of prisoners of war around the end of January or the first of February?
A. No.

119. Q. Were you especially engaged in any work from the latter part of January until the beginning of February 1944?
A. From the end of January the Marshall Islands were subjected to air raids of unprecedented size and from the beginning of February enemy landing operations were carried out on Kwajalein and I was kept very busy.

120. Q. Do you recall having received reports on the capture of prisoners of war in the Marshalls in the middle of December 1943?
A. I do not recall.

121. Q. Do you know whether there were prisoners of war held on Mille Atoll in January 1944?
A. I do not know.

122. Q. Who was the Naval Commander on Mille Atoll in the latter part of January 1944?
A. Captain Shiga.

123. Q. Did you, in the early part of February 1944, receive reports on prisoners of war from Captain Shiga?
A. I did not.

124. Q. Do you recall the incident which occurred on Truk on the seventeenth and eighteenth of February 1944?
A. There was a major air raid carried out by American task forces and shelling of Truk by surface ships.

125. Q. How many, approximately, Japanese vessels were inside of Truk Atoll at that time?
A. There were three to four cruisers, five to six destroyers, a flagship and tender of the Sixth Fleet, several submarines, ten odd supply ships, and several minor craft such as chasers.

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126. Q. What was the air strength available on Truk on these two days?
A. There were quite a number of medium attackers, bombers, and fighters.

127. Q. Will you state an approximate number?
A. I do not think that including all types they could have totaled one hundred.

128. Q. Was the commander in chief of the Sixth Fleet on Truk on that date?
A. He was.

129. Q. Who was senior - commander in chief, Sixth Fleet or yourself?
A. I was senior.

130. Q. Who was the senior naval officer at Truk? This includes naval forces ashore and afloat on the day of the raid?
A. The commander in chief, Fourth Fleet - namely, myself.

131. Q. Who took the command of the naval forces afloat at Truk on that day?
A. Commander in chief, Fourth Fleet - myself.

132. Q. Who took command of the air forces?
A. Myself as commander in chief, Fourth Fleet.

133. Q. Were any orders to prepare for land warfare issued by anyone on that day - namely, 17 February?
A. As I recall such an order was issued by Fourth Base Force. In my statement I wrote that I issued the order but I realized my mistake and wished to correct it but was told that as I had written I was not sure after it there was no need for a correction.

134. Q. Who was commandant, Fourth Base Force, at that time?
A. Vice Admiral Wakabayashi.

135. Q. Is there any reason why you did not issue the order to prepare for land warfare instead of Vice Admiral Wakabayashi?
A. Land defense of Truk was the duty of the commandant of Fourth Base Force, therefore all orders relative to preparations for land warfare would be issued by him. All naval units ashore were under the command of Commandant, Fourth Base Force on that date.

136. Q. Do you know whether something occurred on the night of February 17th at Fourth Base Force Headquarters?
A. I know that there was a conference held there.

137. Q. Who convened this conference?
A. Commandant, Fourth Base Force.

138. Q. Do you know the purpose for the calling of this meeting?
A. I heard that this conference was held for the purpose of having the naval units ashore make reports on the course of the day and to discuss preparations for enemy landings.

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139. Q. Did anyone from Fourth Fleet Headquarters attend this meeting?
A. I believe there were two or three staff officers from Fourth Fleet Headquarters who attended this meeting. I know Captain Inoue was present but do not recall the names of the others who were present.

140. Q. After the conference did you receive any reports on the conference?
A. As I recall I received a brief report from Captain Inoue from the conference.

141. Q. Do you recall the condition of the reports?
A. I heard of the damage suffered by the various units but I do not recall the details.

142. Q. Wasn't there a report about prisoners of war?
A. No, there were none.

143. Q. Did you receive any reports from staff officers other than Inoue? JK
A. I do not recall receiving any reports.

144. Q. Was there a command telephone installed at Fourth Fleet Headquarters?
A. I believe there was none.

145. Q. Do you, in your every day conversations, use the word "Oi"?
A. I do.

The judge advocate moved to strike out this answer on the ground that it was irrelevant.

The accused replied.

The commission announced that the motion was not sustained.

146. Q. Please state the meaning of this word "Oi" and on what occasions it is used? JK
A. It is used among people who are well acquainted and by superiors to subordinates when the superior wishes to call the subordinate's attention. Among persons who are well acquainted the superior would use this word in answer to a question by a subordinate or an inferior. The superior may use this word in answer to a question submitted by a subordinate, this among people who are well acquainted. It has no specific meaning. JK

147. Q. Is it used with any special meaning in the Japanese navy between Japanese naval officers other than the ones you have given?
A. I do not know of any such use.

148. Q. How was your physical condition around 17 February 1944?
A. As I stated previously I was suffering from anal fistula, but my condition became worse in the early part of February and I was told by the surgeon that there was no way of recovering unless an operation be undertaken.

149. Q. Did you encounter any hinderances from your physical condition in the performance of your duties as commander in chief in that state of health?
A. I thought my physical condition was a hinderance.

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150. Q. Did you take any measures or steps to overcome this?
A. On 8 February 1944 I visited commander in chief, Combined Fleet, and told him of my physical condition and also informed him that if my physical condition were to effect my operational command I would have no apologies to offer. Commander in Chief Koga told me that, "You had then better be relieved and as I will see the Navy Minister in the near future, I will bring it up with him."

151. Q. When were you relieved of your command of Fourth Fleet by your successor?
A. Do you mean the date?

152. Q. Yes.
A. I was relieved on 23 February.

153. Q. When did you receive the order stating that you would be relieved?
A. I received advanced information on the seventeenth stating that on the nineteenth the order that I be relieved by Hara would be issued and on the twentieth Hara would leave Tokyo for Truk and on the nineteenth I received an official order by dispatch to the effect that I be relieved by Hara. JK

154. Q. In the Japanese navy can a superior officer be punished on the charge of neglect of duty if his subordinates misconduct themselves or commit illegal acts? JK

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

The accused made no reply.

The commission announced that the objection was not sustained.

A. A superior officer will be punished according to the degree of misconduct or illegal action of his subordinates.

The commission then, at 3:15 p.m., took a recess until 3:30 p.m., at which time it reconvened.

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

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

No witnesses not otherwise connected with the trial were present.

The accused, Kobayashi, Masashi, resumed the stand as a witness in his own behalf. He was warned that the oath previously taken was still binding and continued his testimony.

(Examination continued.)

155. Q. What type of punishment does a superior officer receive when he neglects his duty to supervise his subordinates?

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

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The accused replied.

The commission announced that the objection was sustained.

156. Q. In the "Wartime International Law Manual" which you identified, you stated that there were explanations concerning prisoners of war of the two Hague treaties relative to the treatment of prisoners of war. Will you elaborate on the explanation of prisoners of war therein given?

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

The accused replied.

The commission announced that the objection was not sustained.

A. The explanation is written in the book.

(Defense counsel handed the witness the "Wartime International Law Manual.")

157. Q. Will the witness read from this, portions which relate to the treatment of prisoners of war?

The judge advocate objected to the witness reading from a document which had not been introduced and received in evidence.

The commission announced that the objection was sustained and announced that the witness could not read from the book until it had been received in evidence.

The accused stated that he desired, at a later time, through another witness, to introduce excerpts of this book into evidence.

The judge advocate replied, stating that he had no objection since the book had been marked for identification.

The commission announced that the above procedure requested by the accused was approved.

Cross-examined by the judge advocate:

158. Q. You testified in direct examination that you were in charge of transportation of army personnel when they arrived in the Marshalls Area. Is that correct?
A. That is correct.

159. Q. Was the Fourth Fleet in charge of all surface transportation at that time in the area of the Fourth Fleet?
A. No, it was only in November when the supply lines to the Marshalls were in danger and warships, destroyers, et cetera, had to be used for the transportation of army units. I was assigned the transportation of the army units to the Marshalls.

160. Q. Were you assigned all transportation at that time, in November, or was it limited to transportation of the army?
A. I was charged with the transportation by warships and destroyers.

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161. Q. Was any other unit in charge of any other transportation in the area at the time?
A. Units of the Combined Fleet and supply ships immediately under the command of the Navy Ministry were engaged in transportation in areas other than the Marshalls at that time.

162. Q. In the Marshalls Area, were you in charge of all transportation, not only army but navy transportation, in November of 1943?
A. I was in charge of transportation only of army units by warships and destroyers.

163. Q. Did the Combined Fleet operate any transportation facilities at that time in the Marshalls Area?
A. I believe that from the end of November all transportation by supply ships was almost discontinued.

164. Q. Is it true that from the end of November, 1943, the Fourth Fleet was in charge of all transportation to and from the Marshalls Area?
A. That is not correct.

165. Q. Who was in charge of transportation to and from the Marshalls Area from the end of November, 1943 to the end of February, 1944?
A. The Combined Fleet and the Navy Ministry.

166. Q. Did the army operate any transports within the area of the Fourth Fleet during your tour of duty?
A. No, they did not.

167. Q. And is it true that the navy was in charge of the transportation of all prisoners of war as well as all other transportation in the area of the Fourth Fleet?
A. Yes.

168. Q. Was the Fourth Fleet advised of the movements and operations of Japanese ships within the area of the Fourth Fleet?
A. Are you referring to warships or supply ships?

169. Q. All Japanese ships?
A. I believe we had information.

170. Q. You have testified concerning the prisoners of war at Wake. You have testified that you told Admiral Abe to see about the transportation of these prisoners from Wake. Prior to your visit to Wake when you spoke to Admiral Abe in September, did you make any effort to secure transportation from Wake for these prisoners of war?
A. I did not.

171. Q. When you were at Wake you testified you heard about the food, clothing and medical conditions. Did you ask Sakaibara about these things?
A. This information was volunteered to me by Sakaibara on his initiative during the course of the visit.

172. Q. And you asked him no questions which elicited this information?
A. As this information was volunteered by Sakaibara while we were inspecting the prisoners of war, I did not put any specific questions to him.

173. Q. In inspecting the barracks of these prisoners of war, did you ask Sakaibara anything about a sign called "House of Pain" or the "House of Unhappiness"?
A. I heard such testimony from Captain Inoue the other day, but I hardly remember the fact.

174. Q. What was your main purpose in inspecting Wake?
A. It was for the purpose of inspecting the conditions at the Sixty-fifth Naval Guard Unit, the army units, the air groups, and the construction corps units.

175. Q. How long a period of time did you spend at Wake?
A. I arrived there in the evening of the seventh of September and stayed there the eighth and ninth and left early on the morning of the tenth, therefore I spend two full days on Wake.

176. Q. During these two full days you spent on Wake, how much of this time was spent in examining the prisoners of war quarters and discussing prisoners of war matters with Sakaibara?
A. To see the parade ground where the prisoners of war gathered and the barracks took perhaps from ten to fifteen minutes, and during the course of my inspection I passed the barracks where the prisoners were quartered, and this happened quite frequently.

177. Q. During your stay at Wake were extensive defensive maneuvers held involving both army and navy for a period of approximately two days?
A. On the eighth I inspected the army and navy units at their positions and from dawn of the ninth this combined maneuver was held. It took approximately two hours.

178. Q. Your main purpose in going to Wake was with regard to the examination of the defensive installations and defensive plans, is that not true, Admiral?
A. Of course that is included.

179. Q. In connection with these defense plans and your discussions with Sakaibara with regard to defense matters, did you discuss prisoners of war?
A. It was not directly in connection with the defensive plans, but Sakaibara mentioned that they may be bothersome in case of an enemy landing.

180. Q. Now, Admiral, how many times previous to your visit to Wake had Wake Island been bombarded?
A. I do not think it was ever bombarded.

181. Q. Was it ever shelled by enemy ships prior to your visit?
A. I do not recall any shelling or bombardment by surface craft.

182. Q. Had there been any time when Wake Island, prior to your inspection trip, had been attacked by American forces?
A. I believe there was one minor attack by American forces.

183. Q. You were there, Admiral, to help prepare Wake to repell land invasion, is that not true?
A. That is not so. I would like to give a brief estimate of the possibility of whether or not the enemy would land.

0511

184. Q. Your subordinate, during the course of your inspection trip, advised you that he was concerned that the prisoners of war would be in the way in case of enemy land invasion. What did you advise him to do in case the enemy landed while the prisoners of war were still on Wake Island?
A. I did not advise him about what to do.

185. Q. Is it true that the total Japanese strength on Wake Island consisted of approximately two thousand men, including both the army and the navy?
A. That was according to my recollection. I heard later from Sakaibara's statement that there were three thousand five hundred to three thousand six hundred.

The judge advocate moved that the words "I heard later from Sakaibara's statement that there were three thousand five hundred to three thousand six hundred" be stricken on the ground that they were hearsay.

The commission announced that the motion to strike was not sustained.

186. Q. You have testified concerning the dispatch you received indicating that the prisoners of war were disposed of at Wake through military necessity. Do you recall what the exact words of this dispatch were, that prisoners of war were disposed of because enemy landings were imminent?
A. I do not recall any mention of imminence of enemy landings in the dispatch. The latter part of the message stated to the effect that the prisoners were disposed through operational necessity but I do not recall the exact wording of the dispatch.

187. Q. Was this dispatch seen by your subordinates at Fourth Fleet Headquarters?
A. I, of course, assume that they saw it.

188. Q. Do you know if this information was passed along to the staff of the Fourth Base Force?
A. I do not know.

189. Q. Did you tell any of your subordinates at Fourth Fleet Headquarters that it was proper to execute prisoners of war for operational necessity or military necessity?
A. No.

190. Q. Did you tell any of your subordinates at Fourth Fleet Headquarters that it was improper to execute prisoners of war under these circumstances?
A. I do not recall discussing such matters.

191. Q. Do you recall saying anything to your subordinates with regard to whether it was proper or improper to execute prisoners of war when land invasion was threatened?
A. No.

192. Q. Is it true that you gave no instructions and made no comment with regard to this dispatch and its statement concerning the execution or disposal of prisoners of war to any of your subordinates?
A. As I stated previously, when I met Abe later on I told him to look into the circumstances.

193. Q. Did you give any instructions or make any comment to any of your staff at Fourth Fleet Headquarters?
A. I do not recall.

194. Q. You say you asked Abe to look into the actual circumstances of the Wake Island incident. Did you ever receive a report from Abe concerning these circumstances?
A. I did not.

195. Q. Did you ever follow up this initial request and ask Abe why he had not reported the circumstances?
A. I did not.

196. Q. At the time you told Abe to look into the Wake Island incident, did you ask him anything about the prisoners of war that he had told you he executed at Kwajalein?
A. I did not.

197. Q. You stated that one of the reasons that you personally did not look into the Wake Island incident directly was because Abe was Sakaibara's direct superior. Is that correct?
A. That is correct.

198. Q. Were you the direct superior of Admiral Abe at Kwajalein?
A. Yes.

199. Q. Did you look into the incident of prisoners of war executed by Abe?
A. I absolutely did not know that Abe had executed the prisoners.

200. Q. Didn't Abe inform you that prisoners of war had been executed at Kwajalein?
A. He informed me.

The commission then, at 4:30 p.m., adjourned until 9 a.m., tomorrow, Wednesday, June 30, 1948.

0513

THIRTY-FOURTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands,
Wednesday, June 30, 1948.

The commission met at 9:10 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Robert Oldham, yeoman third class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

The accused, Kobayashi, Masashi, resumed the stand as a witness in his own behalf. He was warned that the oath previously taken was still binding and continued his testimony.

(Cross-examination continued.)

201. Q. You testified yesterday concerning the service regulations for personnel on naval vessels; do those service regulations contain any provisions giving specific instructions with regard to the treatment of prisoners of war?
A. Specific matters are not therein given but I believe this concept is incorporated in the portion where it says international law shall be strictly observed.

202. Q. Is there any provision which specifically mentions prisoners of war?
A. No.

203. Q. Now you have testified that in the Japanese navy there is a regulation which sets forth matters in detail concerning the treatment of prisoners of war. What matters in detail are set forth in that regulation?
A. In the naval regulations concerning treatment of prisoners of war the treatment of prisoners of war is set forth in detail.

204. Q. Are these naval regulations concerning the treatment of prisoners of war, that you referred to, Exhibit 33, a copy of which I now show you?
A. Yes.

205. Q. Does this regulation contain any specific provision or instructions that prisoners of war shall not be mistreated?
A. No.

206. Q. You testified concerning this regulation for the treatment of prisoners of war. Were you familiar with this regulation during your tour of duty as the commander in chief of the Fourth Fleet?
A. I knew it roughly in general.

207. Q. You testified yesterday concerning the fact that an officer who turns prisoners of war over to another unit should make a report to the Navy Ministry. Is that correct?
A. It is correct that the unit commander who receives prisoners of war report the matter to the Navy Ministry.

208. Q. Is it also correct that your subordinates should report to the Fourth Fleet Headquarters the fact that prisoners of war were held in custody?
A. I believe that unit commanders would report the presence of prisoners of war, if they deemed it necessary from the point of view of operational necessity.

209. Q. In your statement, dated 9 March 1948, did you make the following statement: "I believe that the monthly reports from each unit should have included the number of POW handled by each unit, but I can not say whether they did or did not include this information for ordinarily I did not see these reports. I did not give instructions that such monthly reports should include this information." Did you write this?
A. Yes, I did write it.

210. Q. With regard to deaths of prisoners of war would such reports of death be made to headquarters by the individual unit commanders?
A. Also I did so write in the statement things - the matter of which was a mistake. Even with the Japanese personnel the reports were made directly to the Navy Ministry and I believe that was the procedure for them. I recall that the hospital submitted statistical reports on deaths but as to individual persons who had died, et cetera, there were no reports made.

211. Q. You did, however, in your statement of March 8, 1948 state as follows: "A medical certificate of death is normally forwarded via the chain of command to the headquarters and then to the Naval Ministry in the case of death of any Japanese military personnel and prisoners of war." Did you not make that statement?
A. As I stated just now, that was a mistake on my part.

212. Q. You testified concerning your trip to Kwajalein which you returned from on or about December 11, 1943. On your return from Kwajalein did you ascertain whether any prisoners of war were on Truk held by your subordinates of the Forty-first Guard Unit?
A. I did not ascertain.

213. Q. Now you stated in your testimony yesterday you did not know if any prisoners of war were ashore at Truk in January of 1944. Did you or any of your subordinates at the Fourth Fleet Headquarters seek to ascertain whether any prisoners were then held at the Guard Unit?

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This question was objected to by the accused on the ground that it was impossible for this witness to testify as to what his subordinates did.

The judge advocate made no reply.

The commission announced that the objection was not sustained.

A. I, myself, did not ascertain the fact - I do not know whether my subordinates did or not.

214. Q. Did you at that time request information be given Fourth Fleet Headquarters regarding the numbers of prisoners of war held at the Guard Unit?
A. I did not so order the Forty-first Guard Unit.

215. Q. You testified concerning the Combined Fleet being at Truk during certain periods. Was the Combined Fleet Headquarters ever ashore at Truk during the course of your tour of duty?
A. No.

216. Q. Were the Fourth Base Force, the Fourth Naval Hospital and the Forty-first Guard Unit located on Truk all subordinate units of the Fourth Fleet?
A. Yes.

217. Q. You testified concerning an alleged set of instructions from the Navy Ministry addressed to unit commanders regarding obeying international law. When were these instructions sent by the Navy Ministry?
A. I did not so testify.

218. Q. Were any instructions received from the commander in chief of the Combined Fleet relative to obeying international laws?
A. Yes.

219. Q. When were these instructions sent by the commander in chief of the Combined Fleet?
A. I believe they were issued simultaneously with the commencement of the Pacific war.

220. Q. Did you ever receive or see subsequent instructions from the commander in chief of the Combined Fleet specifically relating to treatment of prisoners of war?
A. I did not receive any.

221. Q. Did you ever issue instructions to your subordinate unit commanders with regard to the treatment of prisoners of war?
A. I did not issue any specific orders concerning prisoners of war.

222. Q. Now from on or about December 12, 1943 were you receiving medical treatment at the Fourth Naval Hospital?
A. Yes.

223. Q. Were you receiving this treatment in the room next to the office of Captain Iwanami?
A. Yes.

224. Q. How many visits did you make to Iwanami from the period of December 12 to the period of about February 4th or 5th?
A. I do not recall how many times I met Surgeon Captain Iwanami. I went for medical treatment for about twenty times, but I do not recall the number of times I saw Iwanami on these visits.

225. Q. You did, however, see him on a number of times on these visits, is that correct?
A. I can not recall the exact number of times but I saw him on about five or six occasions.

226. Q. On these five or six occasions did you speak to Iwanami?
A. I recall that Iwanami attended while I was being treated and exchanged courtesies.

227. Q. Did you know Iwanami before you came to Truk?
A. I became acquainted with Surgeon Captain Iwanami when I was commandant of the Hankow Base Force.

228. In addition to your visits for treatment at the hospital did you make any other visits in connection with visiting the wounded at the hospital?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. Yes.

229. Q. Who was treating you at the hospital for your ailment?
A. Surgeon Commander Okuyama.

230. Q. Then you were with Surgeon Commander Okuyama about twenty times in the hospital during this period from December 12, 1943 to the early part of February 1944, is that correct?
A. Yes.

231. Q. During the period from early January 1944 to the end of January did Okuyama speak to you about the use of prisoners of war for experimental purposes?
A. No.

232. Q. Did Okuyama speak to you about his experiments in connection with bomb wounds and shock?

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

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I never heard of such matters.

233. Q. Did Iwanami speak to you about the experiments on prisoners of war that he planned to carry through?

This question was objected by the accused on the ground that there had been no proof that Iwanami conducted these experiments.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I never heard.

234. Q. On the day that the air raid on Truk occurred, on February 17 and 18 - do you recall that an order was issued to prepare to land invasion?
A. Yes, I remember.

235. Q. Did you issue any orders with regard to prisoners of war at that time?
A. No.

Reexamined by the accused:

236. Q. When Vice Admiral Abe told you on Kwajalein that executions had been conducted on prisoners of war, did he, Abe, tell you who ordered these executions?
A. No, I did not hear.

237. Q. Did Abe tell you when these executions took place?
A. No.

238. Q. Who transported the American submarine prisoners of war from Truk to Japan in November of 1943?
A. I learned later that they had been sent to Japan aboard two aircraft carriers.

239. Q. Were these two aircraft carriers part of the Fourth Fleet?
A. No.

240. Q. To what unit did they belong?
A. It is under the command of the Combined Fleet. I believe under the air fleet within that command.

241. Q. Do you remember the circumstances at the time Sakaibara told you about the conditions relating to prisoners of war on Wake?

This question was objected to by the judge advocate on the ground that it was too general in form, irrelevant, and immaterial.

The accused replied.

The commission announced that the objection was not sustained.

A. Yes, I remember.

242. Q. What were those circumstances that led Sakaibara to explain to you about the prisoners of war?

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

The accused made no reply.

The commission announced that the objection was not sustained.

A. It was during the inspection of the prisoners of war and Sakaibara was in the position of reporting what the conditions were to me as commanding officer of the unit in charge of the prisoners of war.

243. Q. Did Sakaibara fully explain the conditions of the prisoners of war on Wake to your entire satisfaction at this time?

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

The accused made no reply.

The commission announced that the objection was not sustained.

A. He fully explained to my satisfaction.

244. Q. Isn't it true that all plans discussed with Sakaibara regarding a possible American landing were based entirely upon the premise that the Japanese would be able to repel any American invasion of Wake at this time?

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

The accused replied.

The commission announced that the objection was sustained.

245. Q. What and when did Vice Admiral Abe tell you about prisoners of war on Kwajalein?
A. In the course of the inspection tour while riding in a car Vice Admiral Abe, pointing to a place from the window of the car, said "Here the prisoners of war were executed."

246. Q. This statement made by you on March 8, 1948 regarding deaths of persons he reported to the Fourth Fleet Headquarters as in the chain of command, was this statement written by you at the instigation of Lieutenant Bolton?

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

The accused replied.

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The commission announced that the objection was sustained.

247. Q. This Fourth Fleet Hospital, wasn't this a separate command?
A. It was an independent unit, but under my command.

248. Q. Did you have anything to do with the appointment of Iwanami as commanding officer of the Fourth Fleet Hospital?
A. No.

249. Q. Will you explain for what purpose the Fourth Fleet Hospital was under your command?

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

The accused reframed the question.

250. Q. Was the medical business of the hospital under your command or was that under the supervision of the Bureau of Medicine, Navy Department, Tokyo?

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

The accused reframed the question.

251. Q. Was the medical business of the hospital under your command?
A. I believe the hospital would operate according to the regulations given it by the Navy Ministry.

Examined by the commission:

252. Q. Admiral, did you receive any intelligence reports from members of your staff concerning the result of the interrogations of prisoners of war held by subordinate units?
A. Yes, on one occasion. An aviator who crash-landed on Truk during the air raid of February 17th and 18th was interrogated by staff officers of the Fourth Fleet and they submitted reports to me.

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

The witness said that he had nothing further to state.

The witness resumed his status as accused.

Commander Martin E. Carlson, a counsel for the accused, made a motion to subpoena Okuyama, Tokikazu, as a witness before this commission.

The judge advocate replied pointing out that all information pertaining to Okuyama, Tokikazu was to the effect that he was deceased.

The commission announced as follows:

In the light of the information furnished the commission by the judge advocate the commission is unable to take any action at this time on this request.

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

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

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

No witnesses not otherwise connected with the trial were present.

Sanagi, Sadamu, a defense counsel, was recalled as a witness for the defense and warned that the oath previously taken was still binding.

Examined by the accused:

1. Q. Have you a document which you wish to introduce in evidence taken from identification number 17?
A. I have.

2. Q. What portions did you excerpt?
A. In order to show the contents of this book which is titled "Wartime International Law Manual," I made an excerpt of the main chapter headings included therein and particularly excerpted that portion which relates to prisoners of war.

3. Q. Did you make sure that this excerpt was a true and correct extraction from this book?
A. I did.

4. Q. Is a translation prepared of the excerpt?
A. It is.

5. Q. What was this original document written in?
A. The original book was in Japanese.

6. Q. What was it translated into?
A. It was translated into English.

The document produced by the witness was submitted to the judge advocate and to the commission, and by the accused offered in evidence. There being no objection, it was so received, appended marked "Exhibit 43."

7. Q. Will you please read Exhibit 43?
A. (The witness read Exhibit 43).

8. Q. Have you documents relating to character which you wish to introduce in the record at this time?
A. I have.

9. Q. Are these documents all translated into English?
A. Those that are in Japanese are translated into English and some of them the original is in English.

10. Q. Do you wish to use all these documents to prove the innocence of the accused?

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

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The accused withdrew the question.

11. Q. Do you wish to introduce all these documents in evidence?
A. Yes.

12. Q. Have you read and examined the contents of these documents?
A. I have.

13. Q. After reading and examining these documents what did you find?
A. These documents relate to the general reputation of the accused, Kobayashi, Masashi, and they show his traits relative to the charge for which he is being tried.

14. Q. Are you qualified, skilled, and capable of examining these documents?
A. I believe I am.

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

16. Q. From whom are these documents?
A. Former Admiral, Imperial Japanese Navy, Kichisaburo Nomura; Former Admiral, Imperial Japanese Navy, Mitsumasa Yonai; former Vice Admiral, Imperial Japanese Navy, Seizo Sakonji; former Admiral, Imperial Japanese Navy, Sawamoto, Yorio; former Vice Admiral, Imperial Japanese Navy, Dotaro Tozuka; former Japanese ambassador to the United States of America, Katsuji Debuchi; former ambassador to the United States of America, Matsudaira, Tsuneo; Admiral, United States Navy, Standley; Captain, United States Navy, Rogers; Captain, United States Navy, Puleston.

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

The judge advocate made the following statement:

The judge advocate is of the opinion that many of these documents are clearly irrelevant and immaterial to the issue now before the commission and consist primarily of matters in mitigation. In order, however, not to necessitate detailed objection to individual documents, and in order to avoid motions to strike portions of these documents in evidence, the judge advocate will not offer any formal objection to admission in evidence, but does, in waiving this objection desire to reiterate certain limitations on the use of so-called character evidence and in order to do that will read from Wharton's Criminal Evidence, Volume I, Section 331: "Certain limitations exist as to the extent to which the accused and the state may go in proving good or bad character or reputation. Generally speaking, the proof of good character, to be relevant, just be confined to the nature of the offense under charge, and bear some pertinent analogy and reference to it. In other words, the proof offered must be restricted to the traits of character which are involved or which may affect the offense charged. This, of course, depends upon the moral wrong involved in the commission of the crime charged. There is some authority, however, to the effect that a wider range is permissible.

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Evidence relating to the good or bad character of the accused must be confined to proof of general reputation in the community or communities in which the accused has lived, and must relate to the time which the act charged renders important, or to the time when the character of the person tends to illustrate the act in question." With that brief comment, the judge advocate wishes to state that he has no objection.

There being no objection the documents were so received, appended marked "Exhibit 44," "Exhibit 45," "Exhibit 46," "Exhibit 47," "Exhibit 48," "Exhibit 49," "Exhibit 50," "Exhibit 51," "Exhibit 52," "Exhibit 53," and "Exhibit 54."

17. Q. Will you please read the document from Admiral Nomura?
The witness read Exhibit 44.

18. Q. Will you please read the document from Admiral Yonai?
The witness read Exhibit 45.

19. Q. Will you please read the document from Vice Admiral Sakonji?
The witness read Exhibit 46.

20. Q. Will you please read the document from Admiral Sawamoto?
The witness read Exhibit 47.

21. Q. Will you please read the document from Vice Admiral Tozuka?
The witness read Exhibit 48.

22. Q. Will you please read the document from Debuchi?
The witness read Exhibit 49.

23. Q. Will you please read the document from Matsudaira?
The witness read Exhibit 50.

24. Q. Will the witness read Enomoto's document?
The witness read Exhibit 51.

25. Q. Will the witness read Admiral Standley's document?
The witness read Exhibit 52.

26. Q. Will you please read Captain Puleston's document?
The witness read Exhibit 53.

27. Q. Will you please read Captain Roser's document?
The witness read Exhibit 54.

Cross-examined by the judge advocate:

28. Q. Will the witness read paragraph six of the document from Sakonji?
The witness read paragraph six from Exhibit 46.

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

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness resumed his seat as counsel for the accused.

The commission then, at 11:40 a.m., adjourned until 9 a.m., tomorrow, Thursday, July 1, 1948.

0523

THIRTY-FIFTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands,
Thursday, July 1, 1948.

The commission met at 9:10 a.m.

Present:

Rear Admiral Arthur G. Robinson, U.S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U.S. Naval Reserve,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Robert Oldham, yeoman third class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Commander Martin E. Carlson, a counsel for the accused, made the following statement:

The defense have sent three interrogatories to Tokyo, Japan, but the answers have not been returned as yet. Pending the return of those answers the defense will rest its case at this point with the understanding that they will be able to put those in evidence if they so desire when they are received.

The commission announced that this request was approved.

The defense rested.

The rebuttal began.

James P. Kenny, judge advocate, was recalled as a witness for the prosecution and was warned that the oath previously taken was still binding.

Examined by the judge advocate concerning prosecution document number 234:

1. Q. Do you have in your possession a deposition made by one Russell Allen Phillips, dated 22 June 1948?
A. I have.

2. Q. Is this deposition signed by Russell Allen Phillips and subscribed and sworn to in the presence of William H. P. Robertson?
A. It is.

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

There being no objection, it was so received, appended marked "Exhibit 55."

Examined by the judge advocate concerning Exhibit 55:

3. Q. Will the witness read the interrogatory and the answer to this interrogatory which appear in the deposition?
A. (The witness read from Exhibit 55, the interrogatory.) JK

The accused objected to this interrogatory on the ground that it was leading and double.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. (The witness read from Exhibit 55 the answer to the interrogatory.) JK

The accused moved to strike out this answer on the ground that it was the opinion of the witness.

The judge advocate replied.

The commission announced that the motion to strike was not sustained.

Neither the accused nor the commission desired to examine this witness. JK

The witness said that he had nothing further to state.

The witness resumed his status as a judge advocate.

Inoue, Kenichi, a witness for the prosecution was recalled, and was warned that the oath previously taken was still binding.

Examined by the judge advocate:

1. Q. Are you familiar with the uniforms worn by the Japanese naval personnel?
A. I am.

2. Q. Are you familiar with the uniforms that were worn in the area of the Fourth Fleet during the period of your tour of duty there?
A. I am.

3. Did you make an inspection trip to Kwajalein in late August of 1943 with the commander in chief of the Fourth Fleet?
A. I did.

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4. Q. Will you describe the uniform worn by Japanese naval enlisted personnel at that time in the area of the Fourth Fleet, including Kwajalein?

A. The Japanese naval enlisted men had three types of uniforms. One was a uniform which was called "type three." The second one was a summer uniform and the third one was a working uniform. Ordinarily the enlisted men wore the summer uniform which was khaki colored with short sleeves and short trousers. This "type three" uniform was greenish in color and it was with long sleeves and long trousers. This working uniform had a short jacket and the trousers were long. It did not have any buttons but used draw strings through it. The color was green or white.

Cross-examined by the accused:

5. Q. Did the naval enlisted men who were at Kwajalein around August of 1943 always have their caps on? JK
A. They were combat caps and depending upon the circumstances some of them did not wear any caps at all. JK

6. Q. Was there any insignia on this combat cap?
A. I believe there was a distinction made between the non-commissioned petty officers and the enlisted men but I do not recall clearly what it was.

7. Q. Were there any insignia which distinguished the naval personnel from the army personnel?
A. I believe there wasn't any.

8. Q. Isn't it correct that the combat caps worn by the naval personnel had in front an anchor?
A. As I said before the caps worn by enlisted men had a mark in front of the caps.

9. Q. Do you mean that there was an anchor marked in front of this cap?
A. Yes.

10. Q. Was this cap used with all three types of uniforms that you mentioned before, that is, the "type three" uniform, summer uniform, and working uniform?
A. I do not know what the uniform regulations were with regard to this but I believe they were worn with all three types of uniforms.

11. Q. Do you know what kind of a mark was on the front of the cap worn by army personnel? JK
A. I believe the mark of a yellow star was on the front of the cap.

Reexamined by the judge advocate:

12. Q. Were caps always worn by enlisted personnel with these uniforms when you saw them?
A. Some of them had caps on and some of them did not have caps.

13. Q. When enlisted personnel were indoors did they usually have their caps on or did they have their caps off?
A. They had them off when they were indoors.

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

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The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

James P. Kenny, judge advocate, was recalled as a witness for the prosecution and was warned that the oath previously taken was still binding.

Examined by the judge advocate:

1. Q. Were you one of the judge advocates in the trial of one Iwanami, Hiroshi?
A. I was.

2. Q. Were you present during the proceedings on the thirty-first day of July 1947?
A. I was.

3. Q. Do you recall the question number 274 and the answer thereto and question number 277 and the answer thereto which were made by the witness Iwanami?
A. I have no distinct recollection of those two questions but if I saw the record of that testimony it would refresh my recollection.

(The record of proceedings was handed to the witness.)

4. Q. I show you question and answer number 274 and ask you if after reading that it refreshes your recollection as to the question and answer made by the witness?
A. It does.

5. Q. What was the question and what was the answer?

This question was objected to by the accused on the ground that it was not proper to have this witness testify concerning the testimony of a witness who was available.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. "Q. 274. You are quite definite that in January and February 1944 you went to the Forty-first Naval Guard Unit on only one occasion. Is that correct? A. Yes."

6. Q. On examining question number 277 and the answer thereto does that refresh your recollection?
A. It does.

7. Q. What was the question and the answer?
A. "Q. 277. Now, on this occasion that you admit that you went to the Forty-first Naval Guard Unit, did you see Captain Tanaka there?
A. I did not see Captain Tanaka."

0527

Examined by the judge advocate concerning prosecution document number 307:

8. Q. Does the witness have in his possession a certified copy of the excerpted testimony of Lieutenant Fueta, Kiyoshi, which includes direct examination, cross-examination, examination by the commission, recross-examination, and reexamination by the commission, in the case of Colonel Oishi, Chisato?
A. I have.

9. Q. Is this certified to be a true excerpt from the record ~~of~~ as filed in the office of the Director War Crimes, Pacific Fleet, Commander Marianas Area, in the case of Colonel Oishi, Chisato?
A. There is a certification by Commander Herbert L. Ogden, U. S. Navy, who is attached to the office of the Director War Crimes, Pacific Fleet.

10. Q. Do you recognize the signature of Herbert L. Ogden?
A. I do.

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

There being no objection, the document was so received, appended marked "Exhibit 56."

Examined by the judge advocate concerning Exhibit 56:

11. Q. Will the witness read questions and answers numbered 7, 8, 10, 38, 39, 40, 41, 43, 44, 45, 46, 48, 49, and 50?

The witness read from Exhibit 56 questions 7, 8, 10, 38, 39, 40, and 41 and the answers thereto.

The witness read from Exhibit 56 question 43.

This question was objected to by the accused on the ground that it called for hearsay.

The judge advocate replied.

The commission announced that the objection was not sustained.

The witness read the answer to question 43.

The accused moved to strike out this answer on the ground of hearsay.

The judge advocate replied.

The commission announced that the motion to strike was not sustained.

The witness read from Exhibit 56 questions 44 and 45 and the answers thereto.

The witness read from Exhibit 56 question 46 and the answer thereto.

The accused moved to strike out this answer on the ground that it was not responsive and was an opinion of the witness.

The judge advocate replied.

The commission announced that the motion to strike was not sustained.

The witness read from Exhibit 56 question 49 and the answer thereto.

The accused moved to strike out the words "because the orders which came from OTANI is also from Atoll Commander" on the ground that they were an opinion and not responsive.

The judge advocate replied.

The commission announced that the motion to strike was not sustained.

12. Q. Will the witness read questions and answers 54, 55, 56, 57, 58, 59, 65, 66, 76, 77, 84, 85, 93, 99, and 100?

The witness read from Exhibit 56 questions 54, 55, 56, and 57 and the answers thereto.

The witness read from Exhibit 56 question 58 and the answer thereto.

The accused moved to strike out the words "I was ordered by the headquarters" on the ground that they were not responsive.

The judge advocate replied.

The commission announced that the motion to strike was not sustained.

The witness read from Exhibit 56 questions 59, 65, 66, 76, 77, 84, 93, 99, and 100 and the answers thereto.

Cross-examined by the accused concerning Exhibit 56:

13. Q. Will the witness read the questions and the answers of questions 12, 13, 17, 19, 20, 21, 27, 29, 30, 31, 34, 36, 47, 51, 52, 53, 67, 71, 72, 73, 83, and 97?

The witness read from Exhibit 56 as requested.

Neither the judge advocate nor the accused desired further to examine this witness concerning Exhibit 56.

The commission did not desire to examine this witness concerning Exhibit 56.

The commission then, at 10:35 a.m., took a recess until 10:50 a.m., at which time it reconvened.

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

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

No witnesses not otherwise connected with the trial were present.

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

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Examined by the judge advocate concerning prosecution document number 10:

14. Q. Does the witness have in his possession a document obtained from the files of the Director War Crimes, Pacific Fleet, entitled C.L.O. No. 2976?
A. I have.

15. Q. Is this document signed by the maker of the document?
A. The document is signed by K. Asakai, Director of General Affairs, Central Liaison Office.

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

Commander Martin E. Carlson, a counsel for the accused, made an oral objection to the receipt in evidence of prosecution document number 10, a brief of which is appended marked "YYYY."

The accused waived the reading of this objection in Japanese in open court.

The judge advocate made an oral reply to this objection, a brief of which is appended, marked "ZZZZ."

The accused waived the reading of the judge advocate's reply in Japanese in open court.

The commission announced that it was unable to accurately determine the relevance of this document without further knowledge of its contents and, therefore, the document would be received in evidence, subject to a motion to strike after it has been read.

The document was so received, appended marked "Exhibit 57."

Examined by the judge advocate concerning Exhibit 57:

16. Q. Will the witness read the first two sentences of paragraph 2 b (1) of Exhibit 57?

A. (The witness read from Exhibit 57 the first two sentences of paragraph 2 b (1).)

Cross-examined by the accused concerning Exhibit 57:

17. Q. Will you please read the remaining part of paragraph 2 b (1) of Exhibit 57?

A. (The witness read from Exhibit 57 the remainder of paragraph 2 b (1).)

18. Q. Does the witness know whether there is an original Japanese of this document?
A. I do not know.

Commander Martin E. Carlson, a counsel for the accused, made an oral motion to strike Exhibit 57 from the record, a brief of which is appended marked "AAAAA."

The accused waived the reading of this motion in Japanese in open court.

The judge advocate made an oral reply to this motion, a brief of which is appended, marked "BBBBB."

The accused waived the reading of the judge advocate's reply in Japanese in open court.

The commission announced that the motion to strike was not sustained.

Examined by the judge advocate concerning prosecution document number 262:

19. Q. Does the witness have in his possession interrogatories and a deposition taken in connection therewith from one Oishi, Chisato, the interrogatories being dated 9 June 1948 and the deposition being dated 18 June 1948?
A. I have.

20. Q. Is the deposition signed and subscribed to by Chisato Oishi?
A. The deposition is.

21. Q. Are the interrogatories signed by the judge advocate, Lieutenant Bolton?
A. It is.

22. Q. Does the witness know whether cross-interrogatories were submitted in connection with the submission of this interrogatory?
A. Cross-interrogatories were submitted.

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

Commander Martin E. Carlson, a counsel for the accused, made an oral objection to the receipt in evidence of prosecution document number 262, a brief of which is appended, marked "CCCCC."

The accused waived the reading of this objection in Japanese in open court.

The judge advocate made an oral reply to this objection, a brief of which is appended, marked "DDDDD."

The accused waived the reading of the judge advocate's reply in Japanese in open court.

The commission announced that the objection was not sustained. There being no further objection, the document was so received, appended marked "Exhibit 58."

Examined by the judge advocate concerning Exhibit 58:

23. Q. Will the witness read Exhibit 58?
A. (The witness read Exhibit 58.)

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Neither the accused nor the commission desired to examine this witness concerning Exhibit 58.

The witness said that he had nothing further to state.

The witness resumed his status as judge advocate.

The rebuttal ended.

The accused did not desire to offer any evidence in surrebuttal.

The accused requested an adjournment to await the arrival of further depositions from Tokyo, Japan.

The commission announced that the request for an adjournment was granted and directed the judge advocate to inform the commission as soon as the depositions arrived in order to set a definite day for reconvening. The commission further directed that the delay be utilized by the judge advocate and the accused for preparation of final arguments.

The commission then, at 11:30 a.m., adjourned until further notice.

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THIRTY-SIXTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Friday, July 9, 1948.

The commission met at 9:20 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, judge advocate.
Archie L. Haden, junior, yeoman first class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

With the permission of the commission, the defense reopened its case.

Mr. Sanagi, Sadamu, a counsel for the accused, read a written notice to the commission concerning corrections to "Exhibit 27," "Exhibit 28," and "Exhibit 29," appended marked "EEEEE."

An interpreter read an English translation of the notice of Mr. Sanagi, appended marked "FFFFF."

Lieutenant David Bolton, U. S. Navy, the judge advocate, was called as a witness for the defense and was duly sworn.

Examined by the accused:

1. Q. Will you state your name?
A. Lieutenant David Bolton, U. S. Navy.

2. Q. Are you judge advocate in this case?
A. I am.

3. Q. Do you have in your possession the interrogatory of Kawamura, Torao, dated June 24, 1948?
A. Yes.

4. Q. Is this document signed by the person who prepared this interrogatory?
A. Yes, it is signed by Commander Martin E. Carlson, counsel for the accused.

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5. Q. Do you have the answer of this interrogatory which appears in the deposition?
A. Yes, I have a deposition of Kawamura, Torao which is dated July 2, 1948 and which is in answer to the interrogatory.

6. Q. Is this signed by Kawamura, himself?
A. It is signed apparently with his signature and also affixed is a "han" which I assume is his personal "han."

7. Q. Is this deposition also signed by the parties who took this deposition?
A. Yes. This deposition was taken by Lieutenant Frederick F. Tremayne who has signed it and it was also signed by Joseph Kase, a yeoman in the U. S. Navy.

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

There being no objection it was so received, appended marked "Exhibit 59."

8. Q. Will the witness read Exhibit 59?

The witness read Exhibit 59.

9. Q. Do you have an interrogatory dated June 25, 1948?
A. Yes, I have an interrogatory dated June 25, 1948 signed by Commander Martin E. Carlson, counsel for the accused. These interrogatories were requested to be propounded to one Sakagami, Shinji, presently confined in Sugamo Prison.

10. Q. Have you the original deposition?
A. I have an original deposition which purports to be signed by Sakagami, Shinji which was taken before Lieutenant Frederick F. Tremayne on June 30, 1948 and which was signed in his presence.

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

There being no objection it was so received, appended marked "Exhibit 60."

11. Q. Will the witness read Exhibit 60?

The witness read Exhibit 60.

12. Q. Have you an interrogatory dated June 24, 1948 submitted to the Central Liaison Office, Tokyo?
A. Yes, I have an interrogatory dated 24 June submitted to Central Liaison and Coordination Office of the Japanese Government and this interrogatory is signed by Commander Martin E. Carlson, counsel for the accused.

13. Q. Do you have a deposition to this interrogatory?
A. Yes, I have a deposition received in answer to this interrogatory. It is dated 6 July 1948. It is by Kenichiro Yoshida, Chief of the Liaison Section, Central Liaison and Coordination Office. It was signed and sworn to before Lieutenant Frederick F. Tremayne and the translation was made by Mr. Tremayne.

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

The judge advocate made the following statement:

While the judge advocate has no objection to admission in evidence, he wishes to point out that qestions 6, 11, 16, and 21 and the answers thereto are irrelevant. They deal with the opinion of the Naval Minister of Japan as to the competency of named officers and are clearly irrelevant. The irrelevance is pointed out at this time in order to obviate the necessity for objection to these questions, and ruling by the commission.

There being no objection, the document was so received, appended marked "Exhibit 61." JK

14. Q. Will you read Exhibit 61?

The witness read Exhibit 61.

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

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness resumed his seat as judge advocate.

The commission then, at 10:15 a.m., took a recess until 10:45 a.m., at which time it reconvened.

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

Robert Oldham, yeoman third class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

The defense rested.

Commander Martin E. Carlson, a counsel for the accused, read a motion for a directed acquittal on behalf of the accused, appended marked "GGGGG."

The accused waived the reading of this motion in Japanese in open court.

The judge advocate read a written reply to the motion for a directed acquittal, appended marked "HHHHH."

The accused waived the reading of this reply in Japanese in open court.

The commission announced that the motion was denied.

The judge advocate requested an adjournment until Monday, 9 a.m., July 12, 1948, in order to prepare a translation of his opening argument and further pointed out that the accused would then be prepared to make his final statement.

The commission announced that this request was granted.

The commission then, at 10:55 a.m., adjourned until 9 a.m., Monday, July 12, 1948.

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THIRTY-SEVENTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Monday, July 12, 1948.

The commission met at 9:10 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, judge advocate.
Robert Oldham, yeoman third class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

No witnesses not otherwise connected with the trial were present.

The judge advocate read an order from the convening authority, copy prefixed marked "IIIII", relieving Lieutenant Commander Bradner W. Lee, junior, U. S. Naval Reserve, as a member of the military commission.

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

The accused read a written statement in his defense, in Japanese, appended marked "JJJJJ."

An interpreter read an English translation of the accused's statement, appended marked "KKKKK."

The judge advocate began the reading of his written opening argument, appended marked "LLLLL."

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

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

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

No witnesses not otherwise connected with the trial were present.

The judge advocate continued the reading of his written opening argument, appended marked "LLLLL."

The commission then, at 11:25 a.m., took a recess until 2 p.m., at which time it reconvened. 9K

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

Robert Oldham, yeoman third class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

The judge advocate concluded the reading of his written opening argument, appended marked "LLLLL."

The accused stated that he had personally received a translation of the judge advocate's opening argument in Japanese, and therefore waived the reading of the judge advocate's opening argument in Japanese in open court.

Mr. Takano, Junjiro, a counsel for the accused, began the reading of his written argument, in Japanese, appended marked "MMMMM."

The commission then, at 3:15 p.m., took a recess until 3:30 p.m., at which time it reconvened.

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

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

No witnesses not otherwise connected with the trial were present.

Mr. Takano, Junjiro, a counsel for the accused, continued the reading of his written argument, in Japanese, appended marked "MMMMM."

The commission then, at 4:20 p.m., adjourned until 9 a.m., tomorrow, Tuesday, July 13, 1948.

THIRTY-EIGHTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Tuesday, July 13, 1948.

The commission met at 9:10 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Archie L. Haden, junior, yeoman first class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Mr. Takano, Junjiro, a counsel for the accused, continued to read his written argument, in Japanese, appended marked "[illegible]."

An interpreter started to read an English translation of the argument of Mr. Takano, appended marked "[illegible]."

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

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

Robert Oldham, yeoman third class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

Mr. Takano, Junjiro, a counsel for the accused, continued to read his written argument, in Japanese, appended marked "[illegible]."

The commission then, at 11:20 a.m., took a recess until 2:10 p.m., at which time it reconvened.

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

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

No witnesses not otherwise connected with the trial were present.

Mr. Takano, Junjiro, a counsel for the accused, concluded the reading of his written argument, in Japanese, appended marked "MMMM."

An interpreter continued reading an English translation of Mr. Takano's argument, appended marked "NNNNN."

The commission then, at 3:25 p.m., took a recess until 3:40 p.m., at which time it reconvened.

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

Robert Oldham, yeoman third class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

An interpreter concluded reading an English translation of Mr. Takano's argument, appended marked "NNNNN."

The commission then, at 3:50 p.m., adjourned until 9 a.m., tomorrow, Wednesday, July 14, 1948.

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THIRTY-NINTH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Wednesday, July 14, 1948.

The commission met at 9:42 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Robert Oldham, yeoman third class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Commander Martin E. Carlson, a counsel for the accused, began the reading of his written argument, appended marked "OOOOO."

The commission then, at 10:30 a.m., took a recess until 10:55 a.m., at which time it reconvened.

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

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

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

The accused waived the reading of this argument in Japanese in open court.

The commission then, at 11:25 a.m., adjourned until tomorrow, 9 a.m., Thursday, July 15, 1948.

FORTIETH DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Thursday, July 15, 1948.

The commission met at 9:10 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Archie L. Haden, junior, yeoman first class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

The record of proceedings of the thirty-ninth day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

The judge advocate began the reading of his written closing argument, appended marked "PPPPP."

The commission then, at 10:05 a.m., took a recess until 10:25 a.m., at which time it reconvened.

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

No witnesses not otherwise connected with the trial were present.

The judge advocate concluded the reading of his written closing argument, appended marked "PPPPP."

The accused waived the reading of the judge advocate's closing argument in Japanese in open court.

The commission was cleared.

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

As to the accused, Kobayashi, Masashi:
The first specification of the charge proved in part, proved except paragraph (e) thereof which reads as follows: "(e) The unlawful torture, abuse and inhumane treatment of about forty-two (42) American prisoners of war, namely, George Estabrook Brown, Jr., lieutenant commander, USNR, and others whose names are to the relator unknown, during the period from November 20, 1943 to November 28, 1943, on Dublon Island, Truk Atoll, Caroline -

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Islands, by constantly beating them with clubs, denying them medical care, confining thirteen of them for about one week in a small cell six feet by eight feet, forcing said Brown to stand at attention for a period of forty-eight (48) hours except for intervals of questioning and beating, beating said Brown with six foot two inch by two inch clubs while he was being interrogated, and beating said Brown with a rifle butt upon his bare feet and head, by naval members of the armed forces of Japan on Dublon Island, names to the relator unknown,"
which paragraph (e) is not proved.
The second specification of the charge proved in part, proved except paragraph (e) thereof which reads as follows: "(e) The unlawful torture, abuse and inhumane treatment during the period from November 20, 1943 to November 28, 1943, on Dublon Island, Truk Atoll, Caroline Islands, by naval members of the armed forces of Japan on said Dublon Island, names to the relator unknown, of about forty-two (42) American prisoners of war, namely, George Estabrook Brown, Jr., lieutenant commander, USNR, and others whose names are to the relator unknown, then and there held captive by naval armed forces of Japan, by constantly beating them with clubs, denying them medical care, confining thirteen of them for about one week in a small cell six feet by eight feet, forcing said Brown to stand at attention for a period of forty-eight (48) hours except for intervals of questioning and beating, beating said Brown with six foot two inch by two inch clubs while he was being interrogated and beating said Brown with a rifle butt upon his bare feet and head,"
which paragraph (e) is not proved.
And that the accused, Kobayashi, Masashi, is of the charge guilty.

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

No witnesses not otherwise connected with the trial were present.

The commission announced its findings.

Sanagi, Sadamu, a defense counsel, was recalled as a witness for the defense as to matters in mitigation. He was warned that the oath previously taken was still binding.

Examined by the accused:

1. Q. Please state your name.
A. Sanagi, Sadamu.

2. Q. Are you a counsel for the accused in this case?
A. Yes.

3. Q. Do you, at the present moment, have petitions in behalf of the accused, Kobayashi, Masashi?
A. I do.

4. Q. In what language are these petitions?
A. Those that are written in Japanese have a translation attached to them and there are others which were written originally in English.

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5. Q. Have you seen all of these petitions?
A. Yes, I have.

6. Q. Were they all appropriate as petitions?
A. Yes, I believe so.

7. Q. Have you shown these petitions to the judge advocate?
A. Yes, I have.

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

There being no objection, they were so received, appended marked "Exhibit 62," "Exhibit 63," "Exhibit 64," "Exhibit 65," "Exhibit 66," "Exhibit 67," "Exhibit 68," "Exhibit 69," "Exhibit 70," "Exhibit 71," "Exhibit 72," "Exhibit 73," "Exhibit 74," "Exhibit 75," "Exhibit 76," "Exhibit 77," "Exhibit 78," "Exhibit 79," "Exhibit 80," "Exhibit 81," "Exhibit 82," "Exhibit 83," "Exhibit 84," "Exhibit 85," "Exhibit 86," "Exhibit 87," "Exhibit 88," "Exhibit 89," and "Exhibit 90."

8. Q. Will you read Exhibits 62 through 82?

The accused waived the reading of these exhibits in Japanese.

An interpreter read Exhibits 62 through 82 in English.

9. Q. Are there any petitions that are not yet read?
A. There are about eight petitions.

10. Q. From what persons are these petitions?
A. These petitions are from subordinates of the accused, relatives and neighborhood associates.

The accused waived the reading of Exhibits 83 through 90 in open court.

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

The commission did not desire to examine this witness.

The witness resumed his status as counsel for the accused.

The commission then, at 4:25 p.m., adjourned until 9 a.m., tomorrow, Friday, July 16, 1948.

0543

FORTY-FIRST DAY

United States Pacific Fleet,
Commander Marianas,
Guam, Marianas Islands.
Friday, July 16, 1948.

The commission met at 9:10 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States Army,
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United States Army,
Lieutenant Commander Edwin M. Koos, U. S. Navy,
Captain Raymond F. Garraty, junior, U. S. Marine Corps, members, and
Lieutenant David Bolton, U. S. Navy, and
Lieutenant James P. Kenny, U. S. Navy, judge advocates.
Robert Oldham, yeoman third class, U. S. Navy, reporter.
The accused, his counsel, and the interpreters.

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

No witnesses not otherwise connected with the trial were present.

Inoue, Kenichi, was recalled as a witness for the defense regarding matters in mitigation. He was warned that the oath previously taken was still binding.

Examined by the accused:

1. Q. Please state your name?
A. Inoue, Kenichi.

2. Q. Since when have you known the accused Kobayashi?
A. I knew the accused Kobayashi from 1920 when he was an instructor at the Naval Academy.

3. Q. Have you ever served together with the accused?
A. I served in the capacity as senior staff officer under the accused when the accused was commandant of the Shanghai Base Force between the dates November 1940 and May of 1941. Also in the capacity of senior staff officer when the accused was commander in chief of the Fourth Fleet from August of 1943 to February of 1944.

4. Q. Will you then please state what you know of the character of the accused Kobayashi?
A. Vice Admiral Kobayashi was very strict in dealing with his subordinates and I shall give some specific instances. Around January of 1941 there was a case of one of his subordinate warrant officers entering a Chinese native house in the Shanghai Pootung Area. In the past such instances were over-

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looked and no disciplinary action taken but Vice Admiral Kobayashi brought the matter to court martial and sternly punished the offender. Secondly, in March of 1941 there was a rumor that Captain Nakatsu, commander of the Shuzan Guard Unit, had abused his office and when that reached the ear of the commander in chief, he dispatched his staff officer to investigate the matter. Although as a result of the investigation no facts came to light Admiral Kobayashi said such acts would affect the dignity of the navy and removed Captain Nakatsu from his office. Next, Admiral Kobayashi always abided by international law and always had in mind the welfare of the native population. I will give an instance of this. When Admiral Kobayashi was commandant of the Shanghai Area Base Force he conducted a tour of inspection of his area of jurisdiction between December of 1940 and March of 1941. At each point of his inspection he met and conversed for one or two hours with the representatives of the native population and listened to their demands and after these conversations he issued instructions to the commanding officers of the naval guard units relative to these demands. It was during this tour of inspection in December of 1940 while he was with the Shuzan Guard Unit that the commanding officer of this guard unit requested that permission be given him to dispose of approximately ten Chinese partisans that he had captured. The commandant, the accused Kobayashi, refused this request and turned these partisans over to the representative of the Chinese community and these ten men later became law abiding citizens. Also in February of 1941 a similar request was submitted by the commanding officer of the guard unit at Chinkiang concerning five partisans that he had taken prisoner. The commandant, the accused Kobayashi, took the same measures as in the case of the Shuzan Naval Guard Unit. And I also recall that around September of 1943 when the accused, then commander in chief of the Fourth Fleet, made an inspection tour of Wake Island, he saw a sign in the house of the prisoners saying "Unhappy House." He asked the commanding officer whether the prisoners were subjected to any mistreatment and was put at ease only when the commanding officer replied that there were absolutely no instances of mistreatment. And in the same month, of the same year, he visited Makin in the Gilberts and there he saw that a naval guard unit requisitioned a church and was using it as a storehouse. He ordered the commanding officer to return the church to the people as it was counter to the interests of the native population. The accused inspected Guam Island and he was then asked by the civil government that the government be permitted to raise taxes on coconuts and the accused, having in mind the welfare of the people under occupation, cut down the proposed tax to about one-tenth of its former amount. I clearly recall the thing. And on the same occasion he ordered the commanding officer of the naval guard unit stationed on Guam that no naval personnel shall enter into the homes of the natives and around January of 1944 when the chief of the Fourth Construction Department was leaving for the Gilberts and Marshalls Area, he specifically called him and instructed him saying that, "As the personnel of the Construction Department were not as well trained as naval personnel, there was danger of their causing trouble to the native population, and therefore to issue instructions to these Construction Department personnel in the various locales concerning this matter." Thirdly, the accused Kobayashi had a very strong sense of responsibility. When the Americans landed in the Gilberts in November of 1943 and when they landed on Kwajalein in February of 1944 Vice Admiral Kobayashi did not, on both occasions, sleep for four nights and was day and night concerned in directing operations, et cetera, thinking of the welfare of his subordinates. When the American landing in the Gilberts occurred the accused Kobayashi was at Kwajalein directing operations there. Despite orders from Combined Fleet that he immediately return to Truk, he did not do so until he had requested airplanes and submarines from Combined Fleet and ascertained the actual conditions in the Gilberts, and only after that did he return to Truk. This concludes

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my statement.

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

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

Mr. Sanagi, Sadamu, a counsel for the accused, read a written plea in mitigation, in Japanese, appended marked "QQQQQ."

An interpreter read an English translation of the plea in mitigation, appended marked "RRRRR."

The judge advocate stated that he had no evidence in aggravation.

The commission was cleared.

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

The commission, therefore, sentences Shin, Kobayashi, Masashi, To be confined for a period of ten (10) years.

ARTHUR G. ROBINSON,
Rear Admiral, U. S. Navy, President .

HENRY K. ROSCOE,
Lieutenant Colonel, Coast Artillery Corps,
United States Army, Member.

VICTOR J. GARBARINO,
Lieutenant Colonel, Coast Artillery Corps,
United States Army, Member.

EDWIN M. KOOS,
Lieutenant Commander, U. S. Navy, Member.

RAYMOND F. GARRATY, JUNIOR,
Captain, U. S. Marine Corps, Member.

DAVID BOLTON,
Lieutenant, U. S. Navy, Judge Advocate.

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

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

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

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

Arthur G. Robinson

ARTHUR G. ROBINSON,
Rear Admiral, U. S. Navy, President.

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy, Judge Advocate.

James P. Kenny.

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

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本書は法廷及国民が元日本帝国海軍中将小林躋造に対する抗弁

弁護人　高野徹之助

(一)

裁判所は法律に依つて設けられたものである。裁判所はすべての法律一国際法及国内法の規範を決定する。

Nullum Crimen Sine Lege, Nulla Poena Sine Lege.

(二)

(三)

(1)

"Thus, a military commander in the exercise of military government over enemy's territory occupied by his army cannot, with whatever good intention, legally bring to trial before military commission ordered by him offenders whose crimes were committed prior to the occupation."

"Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed. Pratt 216. And see Jones 12. The jurisdiction of such a tribunal is determined and limited by the period (and territorial extent) of the Military occupation. C.O. 125, Second Mil. Dist. 1876."

"General Rule -- A country or state may punish any person, ..., for offenses committed within its limits, but, as a general rule, the law of a country or state have no operation beyond its territorial limits, and ordinarily, therefore, the courts of a country or state have no jurisdiction to punish for offenses committed beyond such limits. (1) (Ibid. Section 488, page 650, footnote (1) Reg. v. Keyn, L.R.L. Exch. Div. 63, 13 Cox C.C. 408; United States v. Davis, 2 Sumn. 482, Fed. Cas. 14, 932; Beattie v. State, 73 Ark. 428, 84 S.W. 477; Phillips v. People, 55, Ill. 429; Johns v. State, 19 Ind. 421, 81 Amm. Dec. 408; People v. Tyler, 7 Mich. 161, 74 Am.Dec. 703; State v. Wyckoff, 31 N.J.L. 65; People v. Merrill, 2 Parker Cr. R. (N.Y.) 590 rev'd 14 N.Y. 74; State v. Hall, 114 N.C. 909, 19 S.E. 602, 28 L.R.A. 59, 41 Am. St. Rep. 822. See Berge Criminal Jurisdiction the Territorial Principle (1931), 30 Mich. Law Rev. 238.)

"With respect to offenses committed on vessels, it is settled beyond any question that the admiralty jurisdiction of a nation extendsover vessels sailing under its flag, while they are on the high seas, for the vessels of a nation are, as 'floating islands' would be, a part of its territory." (27). "'By the received law of every nation, a ship on the high seas carries its nationality and the law of its own nation with it, and in this respect has been likened to a floating portion of the national territory. All on board, therefore, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on land, and are liable to the penalties of that law for any offense committed against it.' (28) The same is true of the vessel of a nation when they are in the ports or navigable waters of another nation.

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(29) (Ibid Section 492, pp 655-6, footnotes (27) I Kent Comm. 26; Reg. v. Lesley, Boll, C.C. 220, 8 Cox C.C. 269; Reg. v. Carr, 10 Q.B.D. 76, 15 Cox C.C. 129, 52, L.J. Mag. Cas. 12, 47 Law Times (N.S.) 451; Reg. v. Armstrong, 13 Cox C.C. 184; People v. Tyler, 7 Mich 161, 74 Am. Dec. 703;Tyler v. People, 8 Mich. 320. -- (28 Per Cockburn, C.J., in Reg. v. Keyn. L.R. 2 Exch. Div. 63, 13 Cox C.C. 403; Reg v. Lopez, 7 Cox C.C. 431; Reg. v. Sattler, Dears & B. 525; United States v. Rodgers, 150 U.S. 249, 37 L. Ed. 1071 14 S.C. 109. (29) Reg. v. Anderson, L. R. 1 C.C. 198; Rex v. Allen, 7 Car & P. 664, 1 Mood. C.C. 494; United States v. Gordon, 5Blatchf. 18, Fed. Cas. 15,231. And see United States v. McGlue, 1 Curt. 1, Fed. Cas. 15679; United States v. Armstrong, 2 Curt. 446, Fed. Cas. 14,467.)

"Although crimes are ordinarily local, the Illinois court has decided that where the crime was committed on board a moving train it was transitory and the prosecution could take place in any country through which the train passed. This rule is adopted by the American Law Institute in its Code of Criminal Procedure. Of course, if the evidence shows that the crime was committed in a particular country it must be tried there." (Ibid, Section 500, page 666, footnote (91) Watt v. People, 126 Ill. 9. 18 N.E. 340, 1 L.R.A. 403).

いて問疑せられてゐる証據を蒐集する爲に何等の便宜も提供してゐない。それである。事實本件の調査は東京に於て行はれた。そして調査が完了したとき被告は当地へ送られたのである。かゝる状況下に於て東京は裁判の証據を蒐集する事が最も容易で便宜な処であるから裁判を東京で行ふのが被告にもっとも便宜である。それ故被告の利益の為又は手続を速かならしめる為本軍事法委員が本件を裁判する何等の理由もないのである。然し英米法の訴訟手続に於て迅速と言ふことは正當な理由にならない。

此の弁論に答へて検事側は軍法委員會施行令書の第三項の規定に頼って本軍事法委員は本件に対し管轄権を有すると争ふであらう。同第三項に曰く、

"It shall have jurisdiction over all Japanese nationals and others who worked with, were employed by or served in connection with the former Japanese Imperial Government, in custody of the convening authority at the time of the trial."

若し然りとせば之れは恰も如何なる人如何なる犯罪に対しても管轄権があると争ふに等しい。土地に対する管轄権の概念は全く無視せられ、一部に於て被告の利益を考慮し一部に於て議論手続の便宜を計る土地管轄権の概念をみとめる刑事訴訟法の目的は等閑視されるであらう。吾々は本件被告の裁判をグアムに於て行ふことの出来ないことを主張し更に前述の理由により当地に於て裁判を行ふことは極めて被告に不公平であることを主張する。

(五) 本件に於て被告は彼の第四艦隊司令長官としての責任により職務怠慢で起訴されてゐる。起訴及罪状項目によれば被告は彼の指揮下の人々及彼の監督抑制下にあった人々の犯した罪に対して責任を有するとされてゐる。職務怠慢の問題を犯罪として取扱ふ場合、犯人が犯した罪の責任を誰が負ふかが争点となる。被告は諸條約の締盟国に対して責任を負ふであらうか。いや決してそうではない。諸條約を尊重する責任は各締盟国に課せられてゐるのであってその国の個人に課せられてはゐない。それ故日本国は條約を守るべき国の一つとして日本国民により侵せられた諸條約の侵反に対し責任を有する。本件に於ける被告本人は問擬せられたる戦争犯罪に対し日本の最高権限者に対して責任を負ひかゝる犯罪の起訴（若しそれが犯罪を構成するならば）に対し日本の裁判所により裁判せらるべきである。それ故吾々は本件は本軍法委員會により裁判せらるべきでないことを主張する。

敬白

高野純二郎

(4)

"G (4)"

PLEA TO THE JURISDICTION

OF THE MILITARY COMMISSION

TO TRY:

KOBAYASHI, MASASHI,
Ex-Vice Admiral, IJN.

Delivered by:

Mr. TAKANO, Junjiro,
Counsel for Defense.

May it please the commission:

The accused KOBAYASHI, Masashi objects to the jurisdiction of this Commission to try him and hereby enters his plea to the jurisdiction.

(1) It is a fundamental principle of all law -- international and domestic -- that there can be no punishment of crime without a preexisting law. NULLUM CRIMEN SINE LEGE, NULLA POENA SINE LEGE. EX POST FACTO punishment is contrary to the law of all civilised nations. No international law or customs of war had made neglect of duty of a commander a crime at the time of the alleged criminal acts (omissions) were committed. No conventions or treaties had defined neglect of duty of an army or naval commander. No penalty had been fixed for its commission. No court had been created to try and punish such offenders.

The accused KOBAYASHI is now charged with a war crime which he is alleged to have committed during the period from 5 April 1943 to 23 February 1944, by unlawfully disregarding and failing to discharge his duty as the Commander-in-Chief of the Fourth Fleet of the Japanese Navy, (a) in Specification 1, to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, and (b) in Specification 2, to take such measures as were within his power and appropriate in the circumstances to protect, as it was his duty to do, American prisoners of war, held captive by the armed forces of Japan under his command and subject to his control and supervision, in violation of the law and customs of war.

No EXPOST FACTO law shall be passed. The United States Constitution in Section 9(3) provides, "No Bill of attainder or EX POST FACTO Law shall be passed." Inasmuch therefore as this fundamental legal principle is observed and respected the accused KOBAYASHI is not subject to the jurisdiction of this Military Commission.

(2) We hold that the jurisdiction of this Military Commission is limited by the period and territorial extent of the Military Occupation of Wake Island, the Marshall Islands and the Caroline Islands by American Naval Forces. For, during the period from 5 April 1943 to 23 February 1944, Japan was still in possession of and exercised sovereignty over these Islands, and so the offenses by his subordinates of the accused which are allegedly attributed to his neglect of duty as Commander-in-Chief, had been committed long before the United States Navy occupied the said Islands or declared either martial law or military law thereon. In this respect we find an authority in WINTHROP'S Military Law and Precedents, page 837, wherein he lays down the rule: "Thus, a military commander in the exercise of military government over enemy's territory occupied by his army cannot, with whatever good intention, legally bring to trial before military commission ordered by him offenders

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whose crimes were committed prior to the occupation." WINTHROP further cites in footnote 95 on page 837: "Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed." Pratt 216. And see Jones 12. The jurisdiction of such a tribunal is determined and limited by the period (and territorial extent) of the Military occupation." G.O. 125, Second Mil. Dist. 1876."

We maintain therefore Commander Marianas cannot, in his exercise of military government over the aforesaid Islands, legally bring to trial before this Military Commission the accused, KOBAYASHI, Masashi.

(3) In Clark and Marshall Crimes is laid down the General Rule concerning the Jurisdiction as follows: "General Rule -- A country or a state may punish any person, ..., for offenses committed within its limits, but, as a general rule, the law of a country or state have no operation beyond its territorial limits, and ordinarily, therefore, the courts of a country or state have no jurisdiction to punish for offenses committed beyond such limits. (1) (Ibid. Section 488, page 650, footnote (1) Reg. v. Keyn, L.R.L. Exch. Div. 63, 13 Cox C.C. 408; United States V. Davis, 2 Sumn. 482, Fed. Cas. 14, 932; Beattie v. State, 73 Ark. 428, 84 S.W. 477; Phillips v. People, 55, Ill. 429; Johns v. State, 19 Ind. 421, 81 Amm. Dec. 408; People v. Tyler, 7 Mich. 161, 74 Am. Dec. 703; State v. Wyckoff, 31 N.J.L. 65; People v. Merrill, 2 Parker Cr. R. (N.Y.) 590, rev'd 14 N.Y. 74; State v. Hall, 114 N.C. 909, 19 S. E. 602, 28 L.R.A. 59, 41 Am. St. Rep. 822. See Berge Criminal Jurisdiction the Territorial Principle (1931), 30 Mich. Law Rev. 238.) And, as regards vessels of a nation in relation to its territory on land, the same authority states thus: "With respect to offenses committed on vessels, it is settled beyond any question that the admiralty jurisdiction of a nation extends over vessels sailing under its flag, while they are on the high seas, for the vessels of a nation are, as 'floating islands' would be, a part of its territory." (27)."'By the received law of every nation, a ship on the high seas carries its nationality and the law of its own nation with.it, and in this respect has been likened to a floating portion of the national territory. All on board, therefore, whether subjects or foreigners, are bound to obey the law of the country to which the ship belongs, as though they were actually on its territory on land, and are liable to the penalties of that law for any offense committed against it.' (28) The same is true of the vessels of a nation when they are in the ports or navigable waters of another nation." (29) (Ibid Section 492, pp 655-6, footnotes (27) I Kent Comm. 26; Reg. v. Anderson, L.R. I. C.C. 161, 11 Cox C.C. 198; Reg. v. Lesley, Bell, C.C. 220, 8 Cox C. C. 269; Reg. v. Carr, 10 Q.B.D. 76, 15 Cox C.C. 129, 52, L.J. Mag. Cas. 12, 47 Law Times (N.S.) 451; Reg. v. Armstrong, 13 Cox. C.C. 184; People v. Tyler, 7 Mich 161, 74 Am. Dec. 703; Tyler v. People, 8 Mich. 320. -- (28 Per Cockburn, C.J., in Reg. v. Keyn. L. R. 2 Exch. Div. 63, 13 Cox C.C. 403; Reg. v. Lopez, 7 Cox C.C. 431; Reg. v. Sattler, Dears & B. 525; United States v. Rodgers, 150 U. S. 249, 37 L. Ed. 1071 14 S.C. 109. (29) Reg. v. Anderson, L. R. 1 C.C. 161, 11 Cox C.C. 198; Rex v. Allen, 7 Car & P. 664, 1 Mood. C.C. 494; United States v. Gordon, 5 Blatchf. 18, Fed. Cas. 15,231. And see United States v. McGlue, 1 Curt. 1, Fed. Cas. 15679; United States v. Armstrong, 2 Curt. 446, Fed. Cas. 14,467.) A reference is further made in respect to the same subject in the above authority. "Although crimes are ordinarily local, the Illinois court has decided that where the crime was committed on board a moving train it was transitory and the prosecution could take place in any country through which the train passed.' This rule is adopted by the American Law Institute

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in its Code of Criminal Procedure. Of course, if the evidence shows that the crime was committed in a particular country it must be tried there." (91) (Ibid, Section 500, page 666, footnote (91) Watt V. People, 126 Ill. 9. 18 N.E. 340, 1 L.R.A. 403).

Now with reference to the present case against KOBAYASHI, the post in which the accused would discharge his duties as the Commander-in Chief of the Fourth Fleet of Imperial Japanese Navy, was on board his flagship. Hence, he is alleged to have neglected his duty as such, aboard his flagship. If so, wasn't it done on Japanese territory in the light of the above quoted rule? Clark and Marshall say that it is settled beyond any question. How can the United States take jurisdiction of KOBAYASHI's flagship even after 15 August 1945? We hold, therefore, that this case cannot come under the jurisdiction of this Military Commission.

(4) Since the jurisdiction over territory of a court, whether it be in a civil or criminal case, grows out of the consideration that will enable the accused person to be tried in the territory most convenient to him, the question as to which court has jurisdiction over territory in a particular case should be chiefly determined in consideration of the benefit of the accused person. Upon reflection of this point of view, the court which exercises jurisdiction over the accused person's address, residence or present domicile should have priority as regards jurisdiction over territory. Only in the case where the present domicile of the accused and the place of the crime come under different jurisdiction, jurisdiction over territory is recognised also in the court exercising jurisdiction over the place of the crime, because it is generally convenient for investigation and trial on the ground that gathering of evidence is ordinarily easiest at the place of the crime.

In the present case we find that the accused KOBAYASHI, retiring from active service, was placed on the Reserve List on 31 May 1944, and on his return to Japan he subsequently resided in Tokyo as a citizen. At present, Wake Island, the Marshall Islands and the Caroline Islands afford us no convenience whatsoever as regards the gathering of evidence as to the alleged crime in the present case. As a matter of fact, investigations of this case were carried on in Tokyo; and when the investigations had been completed the accused was sent here. Under such circumstances Tokyo being the most convenient and easiest place to gather the evidence of the case, it is most beneficial to the accused to be tried there. Hence, we find no grounds whatsoever on which the Commission might try this case either in view of any benefit for the accused or of expedience of procedure. But under Anglo-American procedure expedience is no justification.

In answer to this argument the judge advocate may contend that the Commission has jurisdiction over the present case by relying upon the provision in paragraph (3) of the precept for Military Commission which reads, "It shall have jurisdiction over all Japanese nationals and others who worked with, were employed by or served in connection with the former Japanese Imperial Government, in custody of the Convening Authority at the time of the trial." If this be the case, it would be like contending that there is jurisdiction over any person and any crime; the idea of jurisdiction over territory would be totally disregarded and the purpose of the criminal procedure law recognising the idea of territorial jurisdiction in part in consideration of the benefit of the accused person and in part in effecting expedience in procedure, would be ignored. We can see no authority for holding a trial of this accused at Guam and, besides, we insist that holding the trial here is highly prejudicial to the accused for reasons above set forth.

"H (3)"

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(5) In the present case the accused is charged with neglect of duty as a result of his responsibility as Commander-in-Chief of the Fourth Fleet . According to the Charge and Specifications, the accused is alleged to be responsible as such for the offenses committed by the members of his command and persons subject to his control and supervision. For dealing with a problem of neglect of duty as an offense it is an issue as to whom the responsibility is owed by the offender for the crime. But it is not made clear in the Charge and Specifications to whom the responsibility is owed. Does the accused owe his responsibility to the Signatory Powers of the Conventions and Treaties in question? No, it cannot be so. The burden to respect the Conventions and Treaties is imposed upon each of the Contracting Parties, not upon individual thereof. And, therefore, the State of Japan should be responsible, as one of the adhering powers, for a violation of the Conventions and Treaties, committed by her nationals. The accused KOBAYASHI, in this case, owes his responsibility, in his turn, to the highest authority of Japan, for the alleged war crime, and he is to be tried on the charge of such crime (if it constitutes a crime) by the judicial power of Japan. We hold, therefore, that this case is not one cognizable by this Military Commission.

Respectfully,

TAKANO, JUNJIRO.

I hereby certify the foregoing, consisting of three and one-half (3½) typewritten pages, to be a true and complete translation of the original plea written in Japanese, to the best of my ability.

Eugene E. Kerrick Jr.

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

"H (4)"

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PLEA TO THE JURISDICTION OF THE MILITARY COMMISSION TO TRY
KOBAYASHI, Masashi, former Vice Admiral, I.J.N.

Delivered by

Martin E. Carlson,
Commander, USNR.

The accused Vice Admiral KOBAYASHI, Masashi objects to being tried by this Military Commission and hereby enters this plea to the jurisdiction.

This plea to the jurisdiction is made on the grounds that he, KOBAYASHI, Masashi, is not subject to the court's jurisdiction and that the offense is not one cognizable by this Military Commission.

The accused KOBAYASHI, Masashi was regularly demobilized.

The precept for this Military Commission reads that this commission is ordered to convene "for trial of such persons as may be legally brought before it." We maintain that KOBAYASHI, Masashi the accused is not legally brought here for trial.

Vice Admiral KOBAYASHI, Masashi, Imperial Japanese Navy (Retired) was living at 49 Taira-machi, Meguroku, Tokyo, as a retired naval officer. He had been retired and put on the inactive list as of May 31, 1944. On March 27, 1946 he was told by the Japanese Second Demobilization Department Bureau to go to Sugamo Prison, Tokyo, so he went out there in a car furnished by this demobilization bureau. Without any charges being preferred against him, he was confined at Sugamo Prison, Tokyo, until May 22, 1946. On that date an American naval officer told him he was being sent to Guam. On arriving at Guam, May 23, 1946, he was immediately placed in solitary confinement and held incommunicado. He was denied the benefit of counsel.

Not until March 30, 1948, more than two years after he was first confined, was he told why he was being held under arrest and in solitary confinement. On March 30, 1948 he was for the first time served with the charge and specifications dated that same date. Now for the first time he was told that he would be given the benefit of counsel.

The charge and specifications are for neglect of duty as Commander in Chief of the 4th Fleet, Imperial Japanese Navy, during the period from April 5, 1943 to February 23, 1944, in connection with incidents occuring almost five years ago.

Now martial law is not retrospective, which means that an offender cannot be tried for a crime committed before martial law was proclaimed Our authority for this is found in Winthrop's "Military Law and Precedents," page 837, wherein he cites footnote 95 Finlason, Coms. On Mar. Law., Clode, M.L. 189, Thring, Crim. Law of Navy, 42-3, Wells on

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Jurisdiction 577; 12 Opins. At. Gen., 200; G.O. 26 of 1866; Do. 12 Dept. of the South 1868; Do. 9 first Mil. Dist. 1870 Digest 507. "Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed." Pratt 216. And see Jone 12. The jurisdiction of such a tribunal is "determined and limited by the period (and territorial extent) of the military occupation." G.O. 125, Second Mil. Dist. 1867.

We further hold that the jurisdiction of this Military Commission in this case is limited by the period and territorial extent of the Military Occupation of Wake Island, Kwajalein Atoll, Dublon Island, Maloelap Atoll Mille Atoll of the Marshall Islands, by the American Naval Forces. (See Winthrop, page 837, Ibid, and footnote 95). On October 15, 1943 Japan was still in possession of Wake Island; on July 16, 1943 of Kwajalein; on February 17, 1944 of Dublon Island, Truk Atoll; on December 15, 1943 of Maloelap Atoll, Marshall Islands; on February 2, 1944 of Millie Atoll, Marshall Islands. So the offenses charged were committed long before the United States Navy occupied these islands and atolls or declared martial law or military law on these islands.

Winthrop, "Military Law and Precedents," page 836, sets forth the rule as to jurisdiction of a Military Commission:

> "A Military Commission, (except where otherwise authorized by statute) can legally assume jurisdiction only of offenses committed within the field of the command of the convening commander. Thus a commission ordered by a commander exercising military government by virtue of his occupation, by his army, of territory of the enemy, cannot take cognizance of an offense committed without such territory." Footnote (88) citing Finalson, Repression of Riot and Rebellion, 106; Franklyn, Outlines of Mar. Law; Pratt, 216; G.O. 125 Second Mil. Dist., 1867; G.O. 20, 1847 (Gen Scott).
>
> The place must be the theatre of war or a place where military government or martial law may be legally exercised, otherwise a military commission (unless specifically empowered by statute) will have no jurisdiction of offenses committed there. Footnote (89) citing Clode, M.L. 189."

Thus the United States of America had no jurisdiction of or on Wake Island in July 1943; of or on Kwajalein from July 16, 1943 to August 27, 1943; of or on Wake Island, October 7, 1943; of or on Wake Island October 15, 1943; of or on Dublon Island, Truk, November 20, 1943 to November 28, 1943; of or on Maloelap Atoll, Marshall Islands, December 15, 1943 to December 28, 1943; of or on on Dublon Island, Truk Atoll, January 30, 1944; of or on Dublon Island, Truk Atoll, February 1, 1944; of or on Mille Atoll, Marshall Islands, February 2, 1944; and of or on Dublon Island, Truk Atoll, on February 17, 1944.

Wake, Kwajalein, Dublon, Truk, Maloelap, and Mille were not within the field of command of the convening authority of this Military Commission.

Wake, Kwajalein, Dublon, Maloelap, and Mille were without Commander Marianas Area command during the period from April 5, 1943 to February 23, 1944 and martial law is not retrospective.

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We call the commission's attention to paragraph 273 of the Rules of Land Warfare of the War Department of the United States, which provides:

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

So in the case of Kwajalein, Dublon, Maloelap and Mille, the military occupation of these islands by the United States conferred only the right to exercise control during the period of occupation. The sovereignty of Japan over these islands was not transferred by the mere act of occupation by the United States forces. Only the authority to exercise some of the rights of sovereignty were, because of the necessity for maintaining law and order indispensable to both the inhabitants of these islands and to the occupying force, the United States transferred to the United States.

The necessity for maintaining law and order by the United States in these islands only commences on the date of occupation of these islands by the United States. It does not go back to July, 1943, or to February 17, 1944. Between these dates, Japan exercised sovereignty in these islands. There was no relinquishment or transfer of power until after August 14, 1945, and until the date when United States Forces occupied these islands.

It is believed that the Government of the United States should recognize the principle that occupation by the United States of these islands carries with it the responsibility for any occurrence which may fairly be regarded as being contrary to international law.

There can be no jurisdiction by this Military Commission over a Japanese national long ago demobilized, relieved of active duty and now a civilian citizen of Japan, for offenses said to have been committed in the above named islands from July of 1943 to February 17, 1944. (See Digest of International Law by Hackworth, Vol. VI, "Military Occupation" Sec. 587, Pages 385-414).

Even the exercise of a state's jurisdiction over its citizens is strictly limited to territorial boundaries. Fenwick in his book, "International Law," states the rule particularly as regards crimes, on page 188:

> "In respect to the acts of citizens outside national boundaries the most frequent assertion of personal jurisdiction by the state is over the commission of crimes. The constitutional law of different states varies in the matter, some states asserting a right to punish their citizens for crimes wherever committed, other states such as Great Britain and the United States, choosing to restrict their ordinary criminal jurisdiction to acts committed within their territorial boundaries.

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In the case of American Banana Co. v. United Fruit Co., decided in 1909, the Supreme Court of the United States refused to enforce the Sherman Anti-Trust Act against two persons alleged to have violated the law in Panama and Costa Rica. 213 U.S. 347 (1909) Hudson, Cases, p. 60."

Fenwick continues:

"We have seen that a state may exercise personal jurisdiction over its nationals for acts committed abroad and may make its jurisdiction effective when such nationals return again within the jurisdiction of the state. Can a similar jurisdiction be exercised with regard to an alien for an act committed abroad when such alien happens to come subsequently within the territorial jurisdiction of the state? The question has given rise to much controversy. Acts of the alien not directly injurious to the state or to its citizens may be excluded from consideration."

The acts of the accused, an alien and a Japanese national was not directly injurious to the United States, for the offense of neglect of duty committed against any of the victims named in the specifications. There can be no jurisdiction then to punish the accused for the alleged offense of neglect of duty against the victims.

There is no jurisdiction in this commission to try the accused, KOBAYASHI, Masashi, for the alleged crime of neglect of duty and failur to protect the victims because we in the United States follow the traditions of the common law which holds that crimes must be tried at the place where committed and since the offenses were committed outside the territorial boundaries of the United States, they cannot be tried by this commission. We again cite Fenwick, Ibid, p. 240:

".....Great Britain and the United States, following the traditions of common law, hold that crimes must be tried at the place where they are committed and that their criminal courts have no jurisdiction over offenses committed outside the territorial boundaries of the state."

Article 42, Section III, Military Authority over the territory of the Hostile States, Annex to the Hague Convention No. IV of 18 October 1907 provides:

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Therefore, even the Hague Convention of October 1907 relied on by the prosecution to convict the accused of neglect of duty lays down the principle that there is no jurisdiction until occupation and since ther was no occupation until after August 14, 1945, there was no jurisdictic from July, 1943, to February 17, 1944, or from April 5, 1943 to Februar 23, 1944, and there cannot, therefore, be any jurisdiction now.

If this Commission is to take judicial notice of the Hague Conven-

tion, they should read all the articles of the Hague Convention. If they are to be bound by one article they should be bound by all articles in this Hague Convention and especially in this case by Article 42 quoted above.

So with the Rules of Land Warfare. Read Section 275 which lays down the rule distinguishing between subjugation and conquest. Section 275, "Military occupation in a foreign war, being based upon the fact of possession of enemy territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. The occupation is essentially provisional.

On the other hand, subjugation or conquest implies a transfer of sovereignty. Ordinarily, however, such transfer is effected by a treaty of peace. When sovereignty passes, military occupation as such must of course cease; although the territory may, and usually does for a period at least continue to be governed through military agencies which have such powers as the President or Congress may prescribe."

We move that the judge advocates inform us if the accused, KOBAYASHI Masashi is being tried by Commander Marianas in his capacity as head of a military occupation force on the islands where the offenses took place or because the United States Navy has by military force conquered and subjugated the people of these islands. If there has been a transfer of sovereignty from Japan to the United States, as regards the islands Kwajalein, Truk, Mille, and Maloelap, we pray that we be so informed.

Eugene Borel, the Arbitrator in the Ottoman Debt. Arbitration (Hackworth, Vol. VI, Ibid, page 387) held: "that mere military occupation did not operate as a transfer of sovereignty."

There is the case of Alexandre Kemeny, C'Etat Serve-croate-slovene holding that an armistice agreement did not have the effect of transferring sovereignty. (VIII recueil des decisions des Tribunaux Arbitraux Mixtes 588; Annual Digest, 1927-28, Case No. 374). (See Hackworth Ibid, Vol. VI, page 387).

In the case of Naoum et autres c. Min. Public et Colonie de l'Afrique occidentale francaise the French court of Causation, Criminal Chambers in 1919 held: "That territory under military occupation cannot be held to be part of the National Territory." Annual Digest, 1910-22, Case No. 312; Gazette du Palais, 1920, 162. (See Hackworth, Ibid, Vol. VI, page 388).

In a case decided on November 17, 1924, the German Reichsgerricht held valid a marriage contracted by a German subject, a member of the army occupation in Russian Poland in 1917. "The German subject had petitioned for a declaration that the marriage was null, since it had not been concluded in accordance with German law. The court stated that the occupied territory was to be regarded as foreign territory where German marriage law did not apply." (See Hackworth, Ibid, Vol. VI, page 388).

This military commission has no jurisdiction over KOBAYASHI, Masashi, for neglect of duty committed by him from July, 1943, to February 17, 1944, or from April 5, 1943 to February 23, 1944.

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Commander Marianas cannot in his exercise of military government over Kwajalein, Truk, Maloelap, and Mille legally bring to trial before this commission, KOBAYASHI, Masashi. In footnote 95 on page 837 of Winthrop, Ibid, we read the rule of law: "Martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed." Pratt 216. And see Jones 12. The jurisdiction of such a tribunal is "determined and limited by the period (and territorial extent) of the military occupation." G.O. 125, Second Mil. Dist. 186.

And Winthrop la down the rule: "Thus, a military commander, in the exercise of military government over enemy's territory occupied by his army, cannot, with whatever good intention, legally bring to trial before military commissions ordered by him, offenders whose crimes were committed prior to the occupation." (Winthrop, Ibid, page 837).

We hold that Commander Marianas cannot legally assume jurisdiction because these islands were not within the field of command of the convening authority at the time the offense was committed. The precept, serial 20971, dated 8 November 1947, states: "Pursuant to the authority vested in me by virtue of my office as the Commander Marianas Area and by the specific authority vested in me by the Commander in Chief Pacific and United States Pacific Fleet and High Commissioner of the Trust Territory of the Pacific Islands (CinCPacFlt Serial 0558 of 8 March 1946; Commander Marianas despatch 292362 Sept. 1947; CincPacFlt. despatch 021003Z Oct. 1947; SecNav despatch 081946Z Oct. 1947; CincPacFlt despatch 082353Z Oct. 1947)." The specifications of the charge allege the neglect of duty was committed during the period from April 5, 1943 to February 23, 1944. During this period Commander Marianas did not have jurisdiction of these islands either as the Commander Marianas Area or by special authority.

The precept further states: "..by the specific authority vested in me by the Commander in Chief, United States Pacific Fleet and High Commissioner of the Trust Territory of the Pacific Islands (CinCPacFlt serial 0558 of 8 March 1946...)" But the confidential serial 0558 is dated 8 March 1946 and the offenses were committed from April 5, 1943 to February 23, 1944. Thus neither by virtue of his office or by authority of the confidential serial 0558 dated 8 March 1946 did the Commander Marianas Area have authority legally to assume jurisdiction of these islands during the period from April 5, 1943 to February 23, 1944. Neither did Commander in Chief, United States Pacific Fleet and Pacific legally have jurisdiction of these islands during this period. Neither did the Secretary of the United States Navy have jurisdiction during this period.

The Commander Marianas Area is no longer the civil administrator of these islands and therefore has no authority as the civil administrator of these islands.

If Vice Admiral KOBAYASHI neglected his duty while aboard his flagship, KASHIMA, it is settled beyond any question that Japan and not the United States had jurisdiction over offenses committed aboard the Imperial Japanese Navy ship, the KASHIMA. (See section 492, Clark and Marshall, "Crimes," 4th Edition).

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We deny the right of this Military Commission to try KOBAYASHI, Masashi, because he was illegally brought within the jurisdiction of the Commander Marianas Area from Japan. How KOBAYASHI, Masashi came into the custody of the United States Navy Department and the Commander Marianas Area is important because it was highly irregular.

His arrest without warrant, confinement for several years without charges being preferred against him and his extradition from Japan to Guam without proper extradition papers are all highly irregular.

Not until after he was served with the charges and specifications on March 30, 1948 was he allowed the benefit of counsel.

So we see that at the time KOBAYASHI was arrested and placed in confinement at Sugamo Prison, Tokyo, on March 27, 1946, he was never furnished with a copy of the charge. All during the time he was confined at Sugamo Prison, Tokyo, Japan, he was never furnished with a copy of the charge and even during the long period of time when in solitary confinement here on Guam, From May 23, 1946 until March 30, 1948, he was not furnished with a copy of the charge.

It was not until March 30, 1948 that KOBAYASHI, Masashi was furnished with a true copy of the charges and specifications. He had then been in solitary confinement for more than two years.

What is the law in regard to this matter? I quote from 36 American Jurisprudence, "Military" section 98, page 252, which reads as follows:

> "It is provided by statute that at the time of arrest the person accused must be furnished with a true copy of the charges, with the specifications.(9)"

Citing United States v. Smith, 197 U.S. 386, 49 L. ed 801, 25 Sup. Ct. 489, Bishop v. United States, 197, U.S. 334, 49 L. ed. 780, 25 S. Ct. 440; Johnson v. Sayre, 158 U.S. 109, 39 L. ed. 914, 15 S. Ct. 773;/ Dynes v. Hoover, 20 How (U.S.) 65, 15 L. ed. 838.

In 14 American Jurisprudence "Criminal Law" Section 217, page 919, the rule is that there are some cases which deny the right of a court to try one who has been illegally brought within the jurisdiction from another state or country.

Annotation: 18 A.L.R. 512; 15 A.L.R. 177.

In the footnote 4 supporting this rule we have the rule that:

> "One seized under a mistake as to identity by the United States soldiers in the country of his residence, and carried into the United States, not having been kidnapped, cannot be tried there for offenses committed other than that for which he was seized, until he has voluntarily submitted himself to the jurisdiction or consent to his trial by the country of his residence, has been secured. (Dominquez v. State, 90 Tex. Crim. Rep. 92, 234, S. W. 79, 18 A.L.R. 503)."

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In re Robinson, 29 Neb. 135, 45 N.W. 267, 8 L.R.A. 398, 26 Am. St. Rp. 378, a person accused of committing a crime in Nebraska was arrested in Kansas by the order of a Kansas justice of the peace and delivered to a Nebraska constable, who forceably, and against the will of the accused and without any warrant, requisition, or other legal process conveyed the accused out of the state of Kansas into Nebraska. Holding that the Nebraska court was without jurisdiction, the court said: "In principle there is no difference between the case at bar and where a person is held for an offense other than the one he was extradited for. In either case it is an abuse of judical process, which the law does not allow. Ample provisions are made for the arrest and return of a person accused of crime, who has fled into a sister state, by extradition warrants issued by the executives of these states. There is no excuse for a citizen or officer arresting, without authority of law, a fugitive, and taking him forcibly and against his will into the jurisdiction of the state for the purpose of prosecution. We cannot sanction the method adopted to bring the petitioner into the jurisdiction of this state. He did not come into the state voluntarily, but because he could not avoid it. The district court, therefore, did not acquire jurisdiction of the person of the petitioner, and his detention is unlawful."

Simply because KOBAYASHI, Masashi is not a citizen of the United States does not put him outside the protection of the Constitution of the United States of American, when we taken him into custody to try him in our courts. Article IV, of the Fourth Amendment to the Constitution of the United States reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

KOBAYASHI, Masashi, a retired vice admiral of the Imperial Japanese Navy, was told to report to Sugamo Prison. He states that no warrant was ever served upon him. He was told by a United States Navy officer that he must be kept confined at the United States Army Prison, Sugamo, Tokyo, Japan. By what quthority did this navy officer order Vice Admiral KOBAYASHI confined at Sugamo Prison without preferring any charge against him? But here he stayed in prison from March 27, 1946 until May 22, 1946, when he was put on a navy plane and sent to Guam. Arriving at Guam on May 23, 1946 he was immediately put into solitary confinement. By what right was this high ranking retired Japanese navy admiral thus imprisoned? Did America fight a war so that the safeguard which all citizens of American enjoy might be denied to people of defeated Japan? No! Is it enough to say that KOBAYASHI was extradited and is now in the custody of the convening authority? We hold that there was no proper extradition. International Extradition is governed by considerations of comity and the provisions of treaties with foreign nations. In footnote one, paragraph 1, on page 243, of Vol. 22, American Jurisprudence, "Extradition," we read:

> "Since the United States cannot as a matter of comity, surrender to a foreign government a citizen of the United States whose extradition is sought it does not seek the extradition, as a

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matter of comity, of citizens of other nations. See infra, para. 4. See 4 Moore, International Law Digest, p. 246 P. §80."

In this case we hold that it is necessary for this commission in deciding whether they have jurisdiction to try KOBAYASHI that they decide the validity of the extradition proceedings by which KOBAYASHI was removed from Japan to Guam. To do so it is necessary that the judge advocate produce the extradition papers in the case of KOBAYASHI. We ask that such papers be made available to defense counsel in order that we may properly point out to the commission our grounds for objection. Not to produce these extradition papers at this time is most prejudicial to the substantive rights of KOBAYASHI and is an admission that there are no extradition papers or that such papers as there are, are not in good order. We ask that the judge advocate answer this our objection.

In Vol. XXII, American Jurisprudence, page 243:

"In the United States the early cases indicated that extradition was generally declined in the absence of a conventional or legislative provision, citing Valentine v. United States, 299 U.S. 5, 81 L ed. 5, 57 S.Ct. 100; Factor v. Laubenheimer, 290 U.S. 276, 78 L. ed. 315, 54 S. Ct. 101; Terlunden v. Amos, 184, U.S. 270, 46 L. ed. 534, 22 S. Ct. 484; United States v. Raushner, 119, U.S. 407, 30 L. ed. 425, 7 S.Ct. 234."

Later cases, however, have made it clear that in the absence of such conventional or legislative provision, the Executive has no power to surrender the fugitive criminal to a foreign government. Citing Valentine v. United States, 5, 81 L. ed. 5 S.Ct. 100. See also Factor v. Laubenheimer, 290, U.S. 276, 78 L. ed. 315, 54 S.Ct. 191."

In footnote 9, page 249 of Volume 12 of American Jurisprudence,

"Extradition proceedings being based upon an act of Congress and the Federal Courts having decided that such act must be strictly construed and that all of its requirements must be respected. Courts are without the power or authority to construe such act liberally, but will be compelled to follow the rule laid down by the Federal Court and require that all of the provisions of the Federal law relating to requisitions must be strictly observed and respected. Ex parte Owen, 10 Okla. Crim. Rep. 284; 136 P. 197, Am. Cas. 1916 A. 682; See also Courts Vol. iv, p. 337, par. 117."

It is well that we consider who may be extradited. On page 235 of Vol. 12 of American Jurisprudence we read:

"The persons against whom extradition proceedings are directed must, of course, be fugitives from justice."

Citing Jones v. Tobin, 240 U.S. 127, 60 L. ed. 562, 368 S. Ct. 290 Tenn. v. Jackson (D.C.) 36 Fed. 258, 1 LRA 370; Jones v. Leonard, 50 Iowa, 106, 32 Am. Rep. 116; Keller v. Butter, 246 N.Y. 240, 158 N.E. 510, 55 A.L.R. 394; State ex rel Lea v. Brown, 156 Tenn. 669, 645 W. (2d) 941, 91 A.F.R. 1246, writ of certiorari denied in 292 U.S. 638, 78 L. ed. 1491, 54 S. Ct. 717; Ex parte McDaniel, 76, Tex. Crim. Rep. 184, 173 S.W. 1918, Am. Cas. 1917 B. 335.

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Annotation: 7 Ann. Cas. 1076; 13 Ann. Cas. 907.

"The surrender of a person in one state for removal to another as a fugitive is expressly or by necessary implication prohibited by U.S. Rev. Sta. Par. 5278, 18 U.S.C.A. Para. 662, where it clearly appears that the person was not and could not have been, a fugitive from justice of the demanding state. Jones v. Tobin, 240, U.S. 127, 60 L. ed. 562, 36, S.Ct. 290."

We call the commission's attention to the fact that Vice Admiral KOBAYASHI, Masashi was ordered released from active duty in the Japanese navy and demobilized and placed on inactive duty. Clearly, therefore, he was not a fugitive from justice nor did he flee from the custody of the United States or was he personally present at the time the crimes were committed within the demanding state, the United States.

We continue to quote from 22 American Jurisprudence "Extradition," Section 17, 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 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 tettitory 'from which the person so charged has fled,'..."

Can it be said that KOBAYASHI, Masashi was personally present within the United States or the territories over which the United States claimed jurisdiction at the time the crimes were committed, from July 1943 to February 17, 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 law of the state from whose justice he is alleged to have fled. KOBAYASHI did not flee; he was ordered to inactive duty and put on the inactive list by orders from the Japanese Navy Department. Even now he is not charged with crimes against the United States but is charged with violations of the law and customs of war in that he neglected his duty as the Commander in Chief of the Fourth Fleet, Imperial Japanese Navy.

Page 265, Volume 22, American Jurisprudence, "Extradition" section 26:

"It is the universal rule that it must be appear to the governor of the asylum state to whom a demand for an alleged fugitive from justice is presented, before he can lawfully comply with the demand, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit certified as authentic by the governor making the demand. It is thus not only the right but the duty of the governor to determine

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whether a crime against the laws of the demanding state has been substantially charged." (10) citing many cases such as: Marbles v. Creecy, 215 U.S. 63, 54 L. ed. 92, 30 S. Ct. 32; Compton v. Alabama, 214 U.S. 1, 53 L. ed. 885, 29 S. Ct. 605, 16 Ann. Cas. 1098; Pierce v. Creecy, 210 U.S. 387, 52 L. ed. 1113, 28 S. Ct. 714 (rule recognized); Illinois ex rel McNicholas v. Pease, 207 U.S. 100, 52 L. ed. 121, 28 S. Ct. 58 (dictum); Appleyard v. Mass., 203 U.S. 222, 51 L. ed. 161, 27 S. Ct. 122, 7 Ann. Cas. 1073; Munsey v. Clough 196, U.S. 364, 49 L. ed. 515, 25 S. Ct. 282; Hyatt v. N.Y. 188 U.S. 691, 47 L. ed. 657, 23 S. Ct. 456; Roberts v. Reilly, 116 U.S. 80, 29 L. ed. 544 6 Ct. 291; Lee Gim Bor v. Ferrari (C.C.A. 1st) 55 F. (2d) 86, 84 A.L.R. 329; Ex parte Spears, 88 Cal. 640, 26 P. 608, 22 Am. St. Rep. 341; Ross v. Croffutt, 84 Conn. 370, 80 A. 90, Ann. Cas. 1912 C. 1295; Chase v. State, 93 Fla. 963, 113 So. 103, 54 A.L.R. 271; People ex rel. Mark v. Toman, 362 Ill. 232, 199 N.E, 124, 102 A.L.R. 379; People ex rel. Carr v. Murray, 357 Ill. 326, 192 N.E. 198, 94 A.L.R. 1487; Dennison v. Christian, 72 Neb. 703 101 N.W. 1045, 117 Am. St. Rep. 817 affirmed in 196 U.S. 637, 49 L. ed. 630, 25 S. Ct. 795; Re Waterman, 29 Nev. 288, 89 P. 291, 11 L.R.A. (N.S.) 424, 13 Ann. Cas. 926; Re Hubbard, 201 N.C. 472, 160 S.E. 569, 81 A.L.R. 547; State v. Admas, 192 N.C. 787, 136 S.E. 116 citing R.C.L.; State ex rel. Davey v. Owen, 133 Ohio St. 96, 12 N.E. (2d) 144, 114 A.L.R. 686; Work v. Corrington, 34 Ohio St. 64, 32 Am. Rep. 345; Ex parte Owen, 10 Okla. Crime Rep. 284, 136 P. 197, Ann. Cas. 1916 A, 522; Com. ex rel. Flower v. Superintendent of Phil. County Prison, 220 Pa. 401, 69 A. 916, 21 L.R.A. (N.S.) 939; Ex parte Murray, 112 S.C. 342, 99 S.E. 798, 5 A.L.R. 1152; State ex rel Grass v. White, 40 Wash. 560, 82 P. 907, 2 L.R.A. (N.S.)563. Annotation: 81 A.L.R. 551; 1 L.R.A. 371¢ 28 L.R.A. 801; 11 L.R.A. (N.S.) 426.

Persons cannot be extradited for political crimes and most treati expressly so provide. All crimes associated with actual conflict of armed forces are of a political character and the perpetrators of them cannot be extradited.

The specification alleged "that KOBAYASHI, Masashi, then a vice admiral, IJN, Commander-in-Chief of the Fourth Fleet, Imperial Japanese Navy, and while so serving as the Commander-in-Chief of the said Fourth Fleet, did at Wake Island, the Marshall Islands and the Caroline Islands, ---during the period from April 5, 1943 to February 23, 1944, at a time when a state of war existed between the United States of Americ its allies and dependencies and the Imperial Japanese Empire."

This neglect of duty as Commander-in-Chief of the Japanese Fourth Fleet is of a political nature. His neglect of duty is a political crime and KOBAYASHI should not be extradicted in order to stand trial for the crime alleged.

I would like to read to you what is said in Volume 22, American Jurisprudence, on page 271:

"EXTRADITION. 31. Political Crimes. - The development of extradition has evolved the principle that there shall be no international extradition for political crimes and offenses. 20 (cite: "Annotation: 112 Am. St. Rep. 127 Sec. 1 Moore Extradition, p. 303, 205; 4 Moore International Law Digest, p. 332, 604.

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"In keeping with this tenet of International Law, most extradition treaties with foreign governments expressly provide that they do not apply to charges of political crimes (1) (Cite: "Annotation: 41 L. ed. 1047. See 1 Moore Extradition, p. 206-207.") Many of the treaties, however, between the United States and foreign countries expressly provide for extradition of persons charged as assasins or murderers of the heads of the various governments where, although such murder may be classed as on in furtherance of a political move, it is accomplished when there is no state of open revolt or war in existence. (2) (Cite: "See 1 Moore Extradition, p. 310, 208; 4 Moore, International Law Digest p. 332, 604.") While the question of what constitutes a crime of a political character has not as yet been fully determined by judicial authority, yet fugitive criminals are not to be surrendered for crimes spacified in the treaty as extradi table, if such crimes are incidental and formed a part of political disturbances. (3)(Cite: "Annotation: 12 Am. St. Rep. 126.") Accordingly during the progress of a revolution crimes of an atrocious and inhuman character may be committed by the con tending forces, and still the perpetrators of such crimes may escape punishment as fugitives beyond the reach of extradition. It does not devolve on the courts in extradition proceedings to determine what acts are, or are not, within the rules of civilized warfare; and, while men in heat blood often do things which are against and contrary to reason, none the less, acts of this description may be done for the purpose of furthering a political rising even though the acts may be deplored as cruel and against all reason. Hence, all crimes associated with the actual conflict of armed forces are of a political character and the perpetrators of them cannot be extradicted, (4)(Cite: "Annotation: 112 Am. St. Rep. 126.") An extradition magistrate has the jurisdiction and it is his duty to decide with competent legal evidence before him, whether an offense charged is a political crime. (5) (Cite: "Orpealas v. Ruiz 161 U.S. 502, 40 L. ed. 787, 16 S. Ct. 689.") And a decision by a commissioner in favor of the extradition of persons charged with murder and other crimes during a raid into an adjoining country, even though there is some evidence that their purpose was to fight against the foreign government, cannot be reviewed on the weight of the evidence and is final for the purpose of the preliminary examination unless palpably erroneous in law. (6) (Cite: Ibid.)"

Since the accused KOBAYASHI, Masashi is charged with a political crime and extradition is expressly forbidden of persons charged with political crimes, we maintain his extradition is illegal and therefore this commission has no jurisdiction of the accused. Since we object to the jurisdiction on these grounds, we insist that the judge advocate produce the extradition papers. Unless such extradition papers and warrants are produced by the judge advocate for our inspection we hold that the burden of proof is upon the judge advocate to prove that the acbused was and is legally before this commission.

We have pointed out to the commission, the judge advocates have alleged it in the specifications that the accused, while serving as the Commander-in-Chief of the Fourth Fleet, IJN, did on Wake Island, July, 1943; Kwajalein, July 16, 1943 to August 27, 1943; Wake, October 7, 1943 Wuka October 15, 1943; Dublon Island, Truk Atoll, November 20, 1943 to November 28, 1943; Malcelap Atoll, Marshall Islands, December 15 to December 28, 1943; Dublon Island, Truk Atoll, January 30, 1944; Dublon Island, Trtk Atoll, February 1, 1944; Mille Atoll, Marshall Islands, February 2, 1944; Dublon Island, Tfuk Atoll, February 17, 1944. We hav pointed out to the commission that on these dates the Japanese govern-

ment still held control of and occupied these islands. The accused was not within the United States when the alleged crimes took place and the accused should be released forthwith. I again cite for you the ruling in Vol. 22 in American Jurisprudence, on page 294:

> "Although if it is clearly shown that he was not within the demanding state when the crime was alleged to have been committed and his extradition is sought on the ground of constructive presence only, the court will ordinarily discharge him."

Until we see the extradition papers we cannot know for what offense KOBAYASHI was extradited. The rule is now well settled that a person who has been brought within the jurisdiction of a court by virtue of proceedings under an extradition treaty can only be tried for one of th offenses described in the treaty and for the offense with which he is charged in the proceedings for his extradition until a reasonable time and opportunity have been given him after his release or trial on such charge to return to the country from which he was taken for the purpose alone of trial for the offense specified in the demand for his surrender. Both English and Canadian cases are in accord with the modern American view, the rule being that they limit the prosecution to the crime of which the fugitive was extradited. Citing Buck v. Rex, 55 Can. S.C. 133, 38 D.L.R. 548, Ann. Cas. 1918, D. 1023. See page 209 of Vol. 22 American Jurisprudence, "Extradition," Sec. 60.

What is the crime for which KOBAYASHI, Masashi was extradited? Unless we have the opportunity to see the extradition papers we cannot know. Not to produce the extradition papers is prejudicial to the substantive rights of KOBAYASHI, Masashi, former vice admiral, Imperial Japanese Navy.

We move that the commission take judicial notice that Kwajalein, Truk, Mille, and Maloelap Islands were possessions of Japan in 1944 and the military and naval forces of Japan were in full possession and control of these islands notwithstanding the many bombings by the United States forces all during the time these crimes were alleged to have been committed, that is from July, 1943, to February 17, 1944, and that the United States did not take over or assume any jurisdiction as to these islands until after August 14, 1945, and that these islands were not actually surrendered to the United States until after August 14, 1945.

The commission can, therefore, have no jurisdiction of KOBAYASHI, Masashi, former vice admiral, IJN, for crimes committed on these island. during the period from April 5, 1943 to February 23, 1944.

This case is different from the trials upon which it is based. Take for instance specification 1 (a) an offense alleged to have been committed in July, 1943, on Wake Island by SAKAIBARA, Shigematsu, commanding officer of the Sixty-fifth Naval Guard Unit, Wake Island, and for which SAKAIBARA was tried, found guilty and hanged. Now, almost two and one half years later the Commander Marianas Area, under a precept dated November 8, 1947, is attempting to try Vice Admiral KOBAYASHI who was the Commander-in-Chief of the Fourth Fleet, IJN, for failing to discharge his duty. Admiral KOBAYASHI was at the time of the incident aboard his flagship in the anchorage off the south side of Dublon Island Truk Atoll, some 1140 miles southwest of Wake Island.

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According to C.M.O. 15-1917, p. 9, "The authority to convene the above mentioned exceptional military courts vests only in the military commander or military governor of an occupied territory, and all such courts may be ordered only in the name of such commander or Governor... Insofar as practicable, the employment of exceptional military courts should, as a general rule, be restricted to the trial of offenses in breach of the peace, in violation of military orders or regulations, or otherwise in interference with the exercise of military authority."

We prefer to look to C.M.O. orders for the law on military commissions convened by the Navy, rather than to expost facto rules promulgated by S.C.A.P. on December 5, 1945, addressed to Commander-in-Chief, United States Army Forces Pacific, Commanding General Sixth Army, Commanding General Eighth Army, and Commanding General XXIV Corps.

Admiral KOBAYASHI, a sea-going officer aboard his flagship, the KASHIMA, some 1140 miles away from Wake Island, which was occupied by the Japanese, they having invaded Wake and captured it on December 23, 1941, is now being tried by authority of an American admiral under the title of "The Commander Marianas Area."

Where, we ask, did this offense, this neglect of duty, this failure to discharge his duty as Commander-in-Chief of the Fourth Fleet, IJN, take place? What measures were within his powers and appropriate in the circumstances for Vice Admiral KOBAYASHI as Commander-in-Chief, Fourth Fleet, IJN?

C.M.O. 15-1917 clearly doesn't authorize the Commander Marianas Area to try Vice Admiral KOBAYASHI for neglecting his duty aboard his flagship, KASHIMA.

The charge, dated March 30, 1948, under which Vice Admiral KOBAYASHI is being tried does not allege that he either committed or directed the commission of the acts and consequently no violation is charged against him. The gist of the charge against Admiral KOBAYASHI is an unlawful breach of duty, a criminal neglect of duty, as the Commander-in-Chief of the Fourth Fleet, IJN.

Aside from the question whether the law of war imposes upon a fleet commander a duty to take such appropriate measures as are within his power to control commanding officers of naval units ashore for the prevention of the specified acts and whether the commander of a fleet may be charged with personal responsibility for his failure to take such measures when violations result, is the question of the jurisdiction of the convening authority of this commission to try the commander of a fleet, the Commander-in-Chief of the Fourth Fleet, IJN, for this alleged neglect of duty.

Vice Admiral KOBAYASHI was not the military governor of Wake, Kwajalein, Dublon, Malcelap or Mille; KOBAYASHI was the Commander-in-Chief of the Fourth Fleet, IJN. Upon each of these islands there was stationed a responsible commanding officer. Yet a sea-going officer, the Commander-in-Chief of the Imperial Japanese Fourth Fleet is selected as an officer who is to be held responsible for the alleged crimes, crimes which were all committed ashore. He is not charged with personally participating in the offenses, the alleged acts of atrocity, or

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with ordering, or condoning their commission. Not even knowledge of these crimes is attributed to him. Only because he happened to be the Commander-in-Chief of the Fourth Imperial Japanese Fleet is he being tried.

The recorded annals of warfare and the established principles of international law, no not even the Yamashita case, affords the slightest precedent for jurisdiction to try the Commander of a Fleet of many ships for failure to control persons on far away and distant islands.

No one in a position of command in any branch of the armed services can escape the boundless and dangerous implications of the procedure which allows the victorious naval commander of an area to try the opposing Fleet Commander for what he, the victorious commander, decides is a dereliction of duty afloat.

We hold that this military commission has no authority to try the accused, Vice Admiral KOBAYASHI, the Commander-in-Chief of the Imperial Japanese Fourth Fleet.

We also maintain that the offense of neglect of duty alleged in the charge is one not cognizable by this commission.

Since there are no common law offenses against the United States, the crime of neglect of duty must be statutory crime. In 14 American Jurisprudence, "Criminal Law," Section 15, p. 766, the rule is clear and uncontradicted: ",.it is now well settled that except as to treason which is defined by the Federal Constitution, there are no common-law offenses against the United States(13)."(citing Donnelly v. United States, 276 U.S. 505, 72 L. ed. 676, 48 S. Ct. 400; United States v. Gradwell, 243 U.S. 476, 61 L ed. 857, 37 S. Ct. 407. Annotation: Ann. Cas. 1918 A 991.

"In order that an act be prosecuted as a crime in the courts of the United States, statutory authority therefore must exist." (Citing 144 U.S. 677, 36 L. ed. 581, 13 S. Ct. 764; United States v. Brewster, 139 U.S. 240, 35 L. ed. 190, 11 S. Ct. 538).

"The courts of the United States in determing what constitutes an offense against the United States must resort to the statutes of the United States enacted in pursuance of the Constitution." Re Kollock, 165 U.S. 526, 41 L. ed. 813, 17 S. Ct. 444.

"The courts have no right to treat an act done within a state as a crime against the United States unless Congress has declared it to be such, citing United States v. Reese, 92 U.S. 214, 23 L. ed. 563."

If it is a statutory offense, that former Vice Admiral KOBAYASHI is charged with having violated, we ask, what is the statute and does the statute define it as a misdemeanor or a felony? What punishment does the statute provide and what courts have cognisance of the offense

We hold that neglect of duty is no crime.

In 14 American Jurisprudence, "Criminal Law," Section 14, page 764 we find the rule that "In some states no act is to be regarded as a

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crime unless it is so declared by statute." Citing Bradley v. State, 79, Fla. 651; Soper v. State, 169 Ind. 177; Steward v. Jessup, 51 Ind. 413; State v. Campbell 217 Iowa 848; State v. Koontz, 124 Kansas 216; State v. Shaw, 79 Kan. 396; Kennan v. State, 86 Neb. 234; People v. Lewis, 260 N.Y. 171, 183 N.E. 353, 86 A.L.R. 1001, writ of certiorari denied in 289 U.S. 709, 77, L. ed. 1464, 53 S. Ct. 786; People v. Knapp 226 N.Y. 373, 99 N.E. 841 Ann. Cas. 1914 B. 243; Toledo Disposal Co. v. State, 89 Ohio St. 59; State v. Ayers 49 Ohio 61; Ex parte Lingenfelter, 64 Tex. Crim. Rep. 30, 142, S.W. 55, Ann. Cas. 1914 C. 765; Annotation: Ann. Cas. 1913 E. 1252; Ann. Cas. 1918 A. 998,

In this same footnote we find the rule:

"What is known as the higher law has no place in the jurispurdence of Oklahoma." Lickfield v. State, 8 Okla, Crim. Rep. 164, 126 P. 707, 45 IRA (N.S.) 153.

And what does the state of New York say about this question of neglect of duty? "This same footnote (2) sets forth the New York rule of law:

"Under the New York Penal Law a bare neglect of a legal duty is not a crime unless a statute so prescribes, as there is no common law crimes in the state. People v. Knapp, 206, N.Y. 373, 99 N.E. 841, Ann. Cas. 1914 B. 243."

What does the international law have to say about neglect of duty?

The gist of the charge in the Yamashita case was an unlawful breach of duty by Yamashita as an army commander. Mr. Justice Stone in the majority opinion said:

"The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result."

We see how different is even the Yamashita case. That case was the case of an army commander who had taken hostile territory and was attempting to govern this territory, the Philippines. In this present case, Vice Admiral KOBAYASHI, Masashi, was the Commander-in-Chief of a fleet, the Fourth Fleet, IJN. His job was a sea-going job. His duty was primarily duty afloat. Any navy installations which were in the area in which he operated were there to support his fleet.

The Japanese Navy Department had ordered responsible navy officers to command these navy bases and installations. We have pointed out who these commanders were. They were responsible for their acts. It is true that KOBAYASHI, Masashi, as Commander-in-Chief of the Fourth Fleet, Imperial Japanese Navy, looked to these bases for support for this fleet which he commanded and these commanding officers of the bases had a duty to support this fleet, the Fourth Fleet.

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This sea-going commander, Vice Admiral KOBAYASHI, however, is not responsible for the acts of these base commanders or because they were derelict in their duty.

Even if these base commanders failed in their duty to support this fleet, Vice Admiral KOBAYASHI would not be punished for their derelictic of duty. Their dereliction of duty would be no crime chargeable to Vice Admiral KOBAYASHI. There were officers at these bases of the same rank as KOBAYASHI. They were responsible to him, but he was not responsible for their shortcomings. As we understand the law responsible persons are chargeable with responsibility for their own acts.

This Yamashita case, when brought to the Supreme Court of the Unite States, was not upheld by all the Supreme Court justices.

Mr. Justice Rutledge dissented and said of the Yamashita case:

> "Much less have we condemned one for failing to take action. I have not been able to find precedent for the proceeding in the system of any nation founded on the basic principles of our Constitutional democracy, in the law of war or in other internationally binding authority or usage."

Mr. Justice Murphy of the United States Supreme Court in his dissenting opinion said:

> "International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations.
>
> Such calculations are usually highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander; objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victors' judgment is an unfortunate but unescapable fact. So great is the probability that international law refused to recognize such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance. It is consideration that undermines the charge against the petitioner in this case. The indictment permits, indeed compels, the military commission of a victorious nation to sit in judgment upon the military strategy and actions of the defeated enemy and to sue its conclusions to determine the criminal liability of an enemy commander. Life and liberty are made to depend upon the biased will of the victor rather than upon standards, objective standards of conduct."

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The accused KOBAYASHI, Masashi prays of judgment of the charge and specifications and prays that the charge and specifications be quashed.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Defense Counsel.

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REPLY TO THE PLEA BY THE ACCUSED TO THE JURISDICTION

DELIVERED BY

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

Judge Advocate.

The accused has objected to the jurisdiction of this Military Commission on the grounds that at the time the alleged offenses occurred, there was no international law which declared neglect of duty of a military commander in time of war to be a crime. We cannot agree with such a contention. As Mr. JUSTICE JACKSON remarked in his opening statement in the Nurenberg case, International Law "is an outgrowth of treaties and agreements between nations and of accepted customs". The Supreme Court of the United States recognized this when in the Matter of YAMASHITA, 327, U.S.I., it stated, "the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." Absence of judicial precedent does not mean the absence of law. The law had been formulated at the time these offenses are alleged to have taken place. We are not attempting to apply any ex post facto law to this case. Military Commissions sitting in this and other areas have set judicial precedents in the form of the case method by applying the law to its violators. Although the case of the late General YAMASHITA is the most prominent, it is only one of the many that have been decided by the various commissions.

The accused next contends that this military commission is without jurisdiction of the alleged offenses because at the time they occurred, Japan, not the United States, was either in possession of or exercising sovereignty over the places where they are alleged to have taken place. The accused erroneously assumes that jurisdiction rests upon the question of sovereignty over or occupation of the area by the convening authority at the time of the alleged crimes. He further confuses the issues by referring to the rights of a military commander under martial law and/or military government. On the question of jurisdiction as to time he quotes from 2 Winthrop's Military Law and Precedents, 2d ed., 1306, footnote 95, that "Martial law is not retrospective." Our claim to jurisdiction does not rest upon a contention that martial law or military government is now in existence. We contend that there is jurisdiction as to time because the alleged offenses occurred during the period of the war. The paragraph from which the accused has quoted the footnote has this to say, "An offense, to be brought within the cognizance of a military commission, must have been committed within the period of the war or of the exercise of military government or martial law." The alleged offenses fulfill the first of these alternatives, viz, they were committed within the period of the war.

The accused next raises a question of jurisdiction as to the place of these alleged offenses. He contends that his command at the time of the alleged offenses was aboard his flagship and since this was a Japanese warship, the United States is without jurisdiction. In support of this he quotes the general rule of law that criminal jurisdiction does not extend beyond the territorial limits of a country and supplies many case citations for support. The accused overlooks the fact that we are here dealing with an international crime. Precedents in the field of ordinary domestic criminal law are not in point. The only question to be decided as to jurisdiction of place is whether or not the alleged crimes were committed within a theater of war. 2 Winthrop, Military Law and Precedents, 2d ed, 1305, states "the ruling, in the leading case of Ex parte Milligan, that a military

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commission, which had assumed jurisdiction of offenses committed in 1862 in Indiana, - a locality not involved in war nor subject to any form of military dominion, - had exceeded its powers, ---." It is apparent from a reading of the charge and specifications that the locale of these alleged crimes was the Pacific theater of war and therefore there is jurisdiction as to place.

The accused contends that the convening authority, Commander Marianas Area, is without jurisdiction because the Pacific Islands on which the alleged crimes occurred were not within the field of his command at the time the offense took place. He then confuses the argument which is one as to jurisdiction of the place of the alleged crime with an argument as to the authority of the Commander Marianas Area to convene this military commission. A military commission may be appointed by any field commander or military officer competent to convene a general court-martial (Naval Courts and Boards Appendix D-15; 2 Winthrop, Military Law and Precedents, 2d ed., 1302). That it was is obvious to the military members of this commission. The other question which is raised is whether this commission is without jurisdiction as to those offenses which are alleged to have taken place on various ex-mandated islands at a time when Japan was still in possession. The Supreme Court of the United States in Ex parte Quirin, 317, U.S.I., and again in the Matter of YAMASHITA, 327, U.S.I., pointed out, "That congress by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to make its precise boundaries. Instead by Article 15 (Articles of War) it had incorporated, by reference, as within the pre-existing jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military commission law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention to which the United States and the Axis powers were parties." The Hague Convention and the Geneva Prisoner of War Convention of 1929, to which Japan agreed to abide, by their terms made the mistreatment of prisoners of war a crime. It was naturally anticipated that these prisoners would be in the territory of the hostile power. At the time they would be subjects for any mistreatment. By such agreements which have the force of International Law the jurisdiction of a military commission over violators of the law of war was extended to the territory of the enemy. If it had been otherwise the law of war would be without force and the Declaration of Potsdam of July 6, 1945, that ".....stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners," would be meaningless.

The accused contends that this trial should be conducted in a place most convenient to him. It is a universal rule of Anglo-Saxon jurisprudence that indictments will be found in the county or district in which the offense was committed. We do not recognize any law of convenience. These alleged offenses were committed in the Marianas Area and it is proper, although not necessary, that the trial be held here under the authority of the Military Commander of the area. Furthermore, the return of this accused to the scene of his alleged crimes for trial is in accordance with the terms of the Moscow Declaration of November 1, 1943, by President Roosevelt, Prime Minister Churchill and Premier Stalin.

The accused attempts to argue the case rather than raise an objection to jurisdiction when he enters into a discussion as to whether or not he can be held responsible for the acts of his subordinates. Earlier we pointed out how the charge and specifications do set forth a recognized war crime and we feel that this is not the time to argue the point of the responsibility of this particular accused; a more proper time would be after all the evidence has been submitted.

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The question raised by the accused as to the status of the islands of Kwajalein, Truk, Mille, and Maloelap at the present time has no bearing on the question of the jurisdiction of this military commission to try him for alleged war crimes. He prays that he be informed if there has been a transfer of sovereignty from Japan to the United States. However, we are happy to inform him that Japan has been divested of any sovereignty she might have had in these islands and they are now being governed by the United States under a trusteeship agreement with the United Nations. The fact that Commander Marianas is not the civil administrator is not pertinent. He is the military commander of the area.

The accused questions jurisdiction by pointing out that the precept convening this commission authorized trial "of such persons as may be legally brought before it," and contends that he does not fulfill that requirement because, he claims, he was not legally extradited from Japan. In support of this contention he quotes many authorities on the law of extradition. However, the laws of the respective nations relative to the extradition of criminals generally are not applicable in the case of war criminals. This is covered by the report of State-War-Navy Coordinating Subcommittee for the Far East dated 12 September 1945 and subsequently issued instructions by the Joint Chiefs of Staff to SCAP. The relative instructions to SCAP were implemented in his Legal Section Memorandum dated 22 June 1946 which in effect provides that any command outside of the Far East Theater may obtain suspected war criminals by submitting a request therefore, including in the request (a) the name and address of suspected war criminal; (b) the name of command making request; (c) information which constitutes basis for request and (d) place where suspected war criminal is to be tried. These provisions have been complied with by the Commander Marianas Area and the accused is therefore legally before this commission.

The accused advances the argument that there are no common law crimes against the United States. There are, however, common law crimes against the law of nations. The crime here alleged is one of them - a crime in violation of the law of war - an international law.

Finally, the accused would again argue evidence which has not yet been produced by claiming a distinction between the facts of his case and those proved in the trial of the late General YAMASHITA. We have no intention of arguing evidence before it is produced. The accused at the same time attempts to argue that the charge and specifications do not allege a violation of a recognized war crime by citing the opinions of the dissenting Supreme Court judges in the Matter of YAMASHITA and the penal law of various states of the United States. We reiterate that dissenting opinions do not make law and that the ordinary tort or criminal laws have no bearing upon the nature of the international crime with which the accused is charged.

We respectfully request that the plea to the jurisdiction be denied.

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

"J (3)"

0577

MOTION FOR A CHANGE OF VENUE

delivered by

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

in behalf of KOBAYASHI, Masashi.

May it please the Commission:

The accused KOBAYASHI, Masashi hereby makes this motion for a change of venue, on the grounds that the action is brought in the wrong place or district, and on the ground of disqualification of four of the members of this Commission, viz, Lieutenant Commander Bradner W. LEE, Junior, USNR., Lieutenant Colonel Victor J. Garbarino, CAC, USA, Lieutenant Colonel Henry K. Roscoe, CAC, USA, and Rear Admiral Arthur G. Robinson, USN, because they sat and tried previous cases referred to in Specification 1 (g), (h) and (j), and Specification 2 (g), (h) and (j) and Specification 1 (c) and 2 (c)

These four members of this Commission tried IWANAMI, Hiroshi, SAKAGAMI Shinji and seventeen others from June 23, 1947 until August, 1947, for the offense set forth in Specification 1 (g) and (h) and Specification 2 (g) and (h).

OKUYAMA, Tokikazu and NABETANI, Reijiro were not joined with the nineteen accused although they were named in the specifications.

The court found both IWANAMI, Hiroshi and SAKAGAMI, Shinji guilty as charged and sentenced IWANAMI, Hiroshi to be hanged and SAKAGAMI, Shinji to life imprisonment.

Rear Admiral Arthur G. Robinson served as president of the Commission which tried TANAKA, Masaharu; DANZAKI, Tomeroku; and YOSHINUMA, Yoshiharu from November 5, 1946 to November 14, 1946 for the offense set forth in Specification 1 (j) and Specification 2 (j) and found all three guilty as charged and sentenced them as follows: TANAKA, Masaharu to be hanged; DANZAKI, Tomeroku to life imprisonment; and YOSHINUMA, Yoshiharu to life imprisonment. TANAKA, Masaharu has already been hanged.

Admiral Robinson served as president of the Commission which tried Captain KAWASAKI, Susumu, Commander CHO, Hikaru, Lieutenant (junior grade) HORIE, Kiroku for the murder of 25 prisoners of war as set forth in specifiction 1 (c) and 2 (c).

Clearly therefore these four members are disqualified, according to Article 388e, N.C. & B., to try the accused KOBAYASHI, Masashi for neglect of duty, the basis of which is the identical offense for which persons were tried by this Commission and found guilty.

In criminal cases the proper venue at common law is the country where the crime was committed.

The crime alleged in Specification 1 (a), (c) and (d), and Specification 2 (a), (c), and (d) are said to have taken place on Wake Island.

This was not within the command of the Commander Marianas Area in July, 1943, or October 15, 1943, or October 7, 1943, nor is it now in the Commander Marianas Area. It is not Trust Territory.

"K (1)"

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Kwajalein Atoll alleged in Specification 1 (b) and Specification 2 (b) to be the place where the crime was committed was not in the Commander Marianas Area on August 27, 1943, nor is it now. It is now Trust Territory.

Mille Atoll alleged in Specification 1 (j) and Specification 2 (j) to be the place where the crime was committed was not in the Commander Marianas Area on February 2, 1944, nor is it now. It is now Trust Territory.

Nor was Dublon Island, Truk Atoll alleged in Specification 1 (e), (g), (h) and (j) and Specification 2 (e), (g), (h) and (j) to be the place where the crime was committed on November 20, 1943 to November 28, 1943, July 30, 1944, February 1, 1944 and February 17, 1944, in the Commander Marianas Area; nor is it now. It is Trust Territory.

Nor was Maloelap Atoll, alleged to be the place where the crime was committed on December 15, 1943 in Specification 1 (f) and Specification 2 (f), on that date in the Commander Marianas Area; nor is it now. It is now Trust Territory.

For the convenience of witnesses and that the ends of justice may be promoted, the accused KOBAYASHI, Masashi does pray for a change of venue.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for Accused.

13 May 1948

"E (2)"

0579

REPLY TO MOTION FOR CHANGE OF VENUE
delivered by Judge Advocate Lt. David Bolton, USN

The defense "Motion for Change of Venue" is based upon two alleged grounds: First, the defense contends that the criminal proceedings against this accused have been brought in the "wrong district" because Wake Island, Kwajalein Atoll, Truk Atoll, and Maloelap Atoll are Trust Territory; Second, that four members of the instant commission are disqualified because they served in the trial of former cases dealing with the incidents referred to in Specifications 1 (g), 1 (h), 1 (j), and Specifications 2(g), 2(h), and 2(j).

This defense motion has confused and commingled elements from both the concept of jurisdiction and that of venue. The distinction is succinctly stated in the case of Southern Sand & Gravel Co. v. Massaponax Sand & Gravel Corporation 145 Va. 317, 133 S.E. 812, 813, as follows: "Jurisdiction" of the court means the inherent power to decide a case, whereas "venue" designated the particular county or city in which a court with jurisdiction may hear and determine the case. The jurisdiction of a military commission with regard to War Crimes depends primarily upon the custody of the accused, and not upon the place in which the crime was committed. In this regard, war crimes are similar to crimes of piracy, and the war criminal, like the pirate, as expressed by Grotius (1583-1645) De Jure Belli ac Pacis, vol. 2, cap. 20, Sec. 40, is "hostis humani generis", and as such he is justiciable by any state anywhere. Hackworth, International Law, Vol. 2, p. 187.

The jurisdiction over the accused rests upon this concept of custody of the accused rather than upon the question of the present civil administration of the place in which the crimes were committed.

Express authority to appoint military commission to try war criminals was delegated to the Commander Marianas Area, by the Commander in Chief, United States Pacific Fleet. In addition this authority would appear to be inherent in his military command (Appendix D, NC&B; Yamashita v Styer, 327 US) and it should be noted that the places mentioned in the specifications, namely Wake Island, Kwajalein Atoll, Truk Atoll, and Meloelap Atoll, are all within the military command area of Commander Marianas Area.

By precept dated November 8, 1947, The Commander Marianas Area convened the instant commission with authority "..to try all offenses within the jurisdiction of exceptional military courts, ...It shall have jurisdiction over all Japanese nationals in the custody of the convening authority at the time of trial, charged with offenses committed against United States nationals..."

The accused is a Japanese national in the custody of the convening authority. In the instant proceeding he is charged with the commission of a war crime against United States nationals. It is apparent therefore that all jurisdictional requirements as set forth in the precept are satisfied in the instant case and this Commission has jurisdiction over the accused and the offense with which he is charged.

The geographic elements of the concept of venue are inappropriate to war crimes trials held before military commissions. It should be specifically noted that in the places referred to by defense, namely Wake Island, Kwajalein Atoll, Truk Atoll, and Maloelap Atoll, there are no military commissions or other courts authorized to try war crimes cases. The contention of the accused that for convenience of witnesses or ends of justice there should be a change of venue is therefore wholly without merit for there are no courts in these places with existing authority to try the accused for the instant war crime. It should also be noted that the accused has not claimed that even a single witness whom he desires to call is presently on Wake Island, Kwajalein Atoll, Truk Atoll, or Maloelap Atoll, and therefore it should be apparent to the court that even the contention of convenience of witnesses is wholly fictitious.

"L (1)"

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The second ground for the accused's motion for a change of venue is similarly without merit. The accused has never been tried before this Commission or any members thereof. The accused has not demonstrated or alleged any evidence to indicate that any member of this commission is antagonistic or prejudiced against him or has formed any positive or definite opinion as to the guilt of the accused.

The members of this commission can truly try without prejudice or partiality the case now depending, according to the evidence which shall come before the commission, the rules of evidence prescribed for the trial the customs of war in like cases, and their own conscience. They have taken an oath to do so. In accordance with the prior duly authorized precedents of this and other military commissions, the members of this commission are qualified to hear and determine the instant case.

The judge advocate respectfully requests that defense "motion for a change of venue" be denied.

DAVID BOLTON,
Lieutenant, U.S. Navy,
Judge Advocate.

"L, (2)"

0581

PLEA IN BAR OF TRIAL

of

KOBAYASHI, Masashi

Delivered by Commander MARTIN E. CARLSON, U. S. Naval Reserve, at Guam, Mardanas Islands.

May it please the commission:

The accused, KOBAYASHI, Masashi makes this plea in bar of trial on the grounds of the statute of limitations.

The offense neglect of duty and failure to discharge his duty is alleged to have been committed during the period from 5 April 1943 to 23 Feb. 1944. The charges and specifications are dated 30 March 1948, more than four years after the offenses were committed.

Appendix B, Naval Courts and Boards, has this to say regarding the laws governing the administration of justice in the Navy:

"The laws governing the administration of justice in the Navy are codified in section 1200, title 34 of the United States Code under the title of 'Articles for the Government of the Navy'."

"On June 30, 1926, Congress enacted the Code of Laws of the United States of America, referred to as the U.S. Code and cited as "U.S.C." The present code id the 1934 edition of the United States Code and is the official restatement in convenient from the general and permanent laws of the United States in force January 3, 1935. It is composed of 50 titles. Title 34 contains the laws relating to the Navy and section 1200 of that title contains the Articles for the Government of the Navy. In enacting the U.S. Code, Congress did not enact any new laws, nor was any law repleaed. To provide for any errors that might be made, the enacting clause contains the following:

The matter set forth in the code ..... shall establish prima facie the laws of the United States, general and permanent in their nature, in force....; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the code. In case of any inconsistency arising through omission or otherwise between the provision of any section of this code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatsoever to such enactments."

"The code is presumed to be the law." ...

"Articles established the Navy of the United States shall be governed by the following articles (R.S., sec. 1624):"

"Article 61. Limitation of trials; offenses in general. -No person shall be tried by court martial or otherwise punished for any offense, except as provided in the following article which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself or of some other manifest impediment he shall not have been amenable to justice within that period (R.S. sec. 1624, Art. 61; Feb. 25, 1895, c. 128, 28 Stat. 680)."

This we maintain is the statute of limitations which is applicable in this present case.

"M (1)"

0582

Section 582 of the Criminal Code of the United States set a three year limitation on criminal offenses.

Title 18 Criminal Code United States Code Annotated. Criminal Code and Criminal Procedure. Sec. 582. "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instatuted, within three years next after such offense shall have been committed:" (R.S. pp 1044; April 13, 1876, c 56, 19 Stat. 32; Nov 17, 1921, c 124, pp 1, 42 Stat, 220.)

Even under this section the offenses which Admiral Kobayashi is being tried for are barred by this Federal Statute of Limitations.

The case of U.S. v. White (CC Dist. Col. 1836) Fed. Cas. Nos. 16675, 16676, holds, "The statute of limitations runs in favor of an offender, although it was not known that he was the person who committed the offense. (See page 138 U. S. C. Annotated, Title 18 Criminal Code and Criminal Procedure.)

The criminal charge in this case was not made until the formal written accusation was made on March 30, 1948 of charges and specifications dated March 30, 1948.

"In the eyes of the law a person is charged with crime only when he is called upon in a legal proceeding to answer to such a charge. Mere investigation by prosecution officers or even inquiry and consideration by examination magistrates of the propriety of instituting a prosecution do not of themselves create a criminal charge. "(Citing United States v. Patterson, 150 U.S. 65, 37 L. ed. 999, 14 S. Ct. 20." 14 American Jurisprudence Criminal Law, Sec. 7, page 758.)"

This statute of limitation is regarded with favor by the courts and it is the consensus of the authorities that the defense of the statute of limitations stands on the same plane as any other legal defense "(citing Wheeler v. Castor 11 N.D. 347, 92 N.W. 381, 61 L. R.A. 620.) and is one to which, in proper circumstances, all men are entitled as a right. (citing Anaconda Min. Co. v. Sailo, 16 Mont. 8, 39, P. 909, 50 Am. St. Rep. 472; Carter v. Collins, 174, Okla., 4, 50 P. (2nd) 203, 34 Am. Jur. Limitation of Actions Sec. 12, p. 23 also states:

"The Defense is not technical (citing U. S. v. Oregon Lumber Co. 260 U. S. 290, 67, L. Ed. 261, 43 S. Ct. 100) but is deemed to be legitimate (citing O'Malley v. Sims, 51 Ariz. 155, 75 P. (2nd) 50, 115 A.L.R. 634) substantial, and meritorious." (Citing Guaranty Trust Co. v. U.S., 304 U.S. 126, 82 L. Ed. 1224, 58 S. Ct. 785; Dupree v. Mansur, 214, U.S. 161, 53 L. Ed. 950, 29 S. Ct. 548; M'cCluny v. Silliman, 3 Pet (US) 270, 7 L. Ed. 676; Lilly-Brackett Co. v. Sonnemann, 157, Cal., 192, 106 P. 715, 21 Ann. Cas. 1279; Whoratt v. Worth, 108 Wisc., 291, 84, N.W. 441, 81 Am. St. Rep. 899, and many more cases. Ekol v. Snevily, 320, 3 Watts and S. (Pa.) 272, 38 Am. Dec. 758.

In 15 Am. Jr. Criminal Law Section 342 page 32 it is stated:

"Statutes of limitation in criminal cases differ from those in civil cases. In civil cases they are statutes of repose, while in criminal cases they create a bar to the prosecution (citing State v. Steensland 33, Idaho 529, 195 P. 1080, 13 A.L.R. 1442; People ex rel. Reibman v. Warden, 242, App. Div. 282, 275, N.Y.S. 59 citing R.C.L.)"

A judgment for the defendant on a plea of the statute is

"M (2)"

necessarily an acquittal of the charge, and not a mere abatement of the action. Therefore, it has been universally classed as a plea in bar and not in abatement (citing U.S. v. Opponheimer 242, U.S. 85, 61 L. Ed. 161, 37, S. Ct. 68, 3 A.L.R. 516; U.S. v. Barber, 219 U.S. 72, 55, L. Ed. 99, 31 St. Ct. 209. 15 Am. Jur. Criminal Law, pp 342 p. 32.

Since we have raised the issue of the statute of limitation in this case it is incumbent upon the judge advocates to affirmatively prove the commission of the offenses charged within the statutory period.

We cite from 15 Am. Jur. "Criminal Law" section 343, page 32: "Where the issue of the statute of limitation is raised, the state must affirmatively prove the commission of the offense within the statutory period." In many jurisdictions, if the state relies upon an exception to remove the bar of the statute, it is incumbent upon the state to prove the exception."

The case of Hogeboom v. State, 120 Neb. 525, 234, N.W. 422, 79, A.L.R. 1171 holds that Statutes of Limitation as applied to criminal procedure, are to be liberally construed in favor of the defendant.

Wharton says this same thing in speaking about statutes of limitation in criminal cases as being different than in civil cases. Yet we know that even at common law pleas of limitation were allowed long before there was any statute on the subject. (See 34 Am. Jr. "Limitation of Actions", Section 2, page 14.)

But let us hear what Wharton says: In Wharton's "Criminal Procedure, Volume I, section 367, is headed: "Statute of limitations construction to be liberal to defendant."

On page 45 we read this regarding such statutes in criminal cases:

"But it is otherwise when a statute of limitation is granted by the state. Here the State is the grantor, surrendering by act of grace its rights to prosecute, and declaring the offense to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense; that the offender shall be at liberty to return to his country, and resume his immunities as a citizen; and that from henceforth he may cease to preserve the proofs of his innocense, for the proofs of his guilt are blotted out. Hence it is that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the legislature of the fact that time, while it gradually wears out proofs of innocense, has assigned it and positive periods in which it destroys proofs of guilty. (2)" Footnote (2): "This is well exhibited in a famous metaphor by Lord Plunkett of which it is said by Lord Broughman (Works, etc., Edinb. ed of 1872, IV 341) that "It can not be too much admired for the perfect appropriateness of the figure, its striking and complete resemblance as well as its raising before us an image previously familiar to the mind in all particulars, except its connection with the subject for which it is so unexpectedly but naturally introduced." "Time" so runs this celebrated passage, "with his scythe in his hand, is ever mowing down the evidence of title; wherefore the wisdom of the law plants in his other hand the hour glass, by which he metes out the periods of that possession that shall supply the place of the muniments his scythe has destroyed."

In other words, the defense of the statute of limitations is one

not merely of technical process, to be grudgingly applied, but of right and wise reason, and, therefore, to be generously dispensed. The same thought is to be found in another great orator, Demosthenes, pro Phorm. ed. Reiske, p. 952.

Independently of these views, it must be remembered that delay in instituting prosecutions is not only productive of expense to the State, but of peril to public justice in the attenuation and distortion even by mere natural lapse of memory, of testimony. It is the policy of the law that prosecutions should be prompt, and that statutes enforcing such promptitude should be vigorously maintained. They are not merely acts of grace but checks imposed by the State upon itself, to exact vigilant activity from its subalterns, and to secure for criminal trials the best evidence that can be obtained."

In U.S. Code Annotated Title 18 Sec. 582, page 138 in note 6, the case of U. S. v. Watkins (cc Dist. Col. 1829) Fed. Case No. 16649 is cited and the rule set forth:

"The time of finding the indictment will appear by the caption, and, where it appears therefrom that the offense was committed beyond the time limited, judgment will be rendered for defendant."

Vice Admiral, KOBAYASHI, Masashi was informed on 11 March 1946 by the 2nd Demobilization that he was on SCAP's list of persons wanted for arrest and that it was desired he report at Sugamo Prison.

He was incarcerated in Sugamo Prison, Tokyo on 27 March 1946 still without warrant of arrest or charges being preferred against him.

Then on 22 May, 1947 he was sent to Guam without extradition papers where he was put in solitary confinement. He has been in solitary confinement at the War Criminal Stockade since 22 May, 1947. For 2 years the prosecution have held Vice Admiral, KOBAYASHI in solitary confine ment and without benefit of counsel. Now the prosecution come before this court and ask that you deny the accused Vice Admiral, KOBAYASHI the benefit of the statute of limitations because they have delayed instituting this trial. They who ask that you enforce the law against the accused ask however that they be outside the law. They know full well that the long delay in instituting this trial is not only pro- ductive of expense to United States Government but that it is a peril to public justice in the attenuation and distortion by natural lapse of memory of testimony they will introduce. The prosecution ask that you approve their action in keeping Admiral, KOBAYASHI, Masashi in solitary confinement here on Guam for 10 months without preferring charges against him or giving him the benefit of counsel when "The rule now prevails in most if not all the States that an accused is entitled, as a matter of contitutional right, to the services of counsel upon his preliminary examination" from 14 American Jurispru- dence Gum. Supp. Criminal Law Sec. 167 p. 74 add new par. p. 884.

And when "It is provided by statute that at the time of arrest the person accused must be furnished with a true copy of the charges with the specifications." 36 Am. Jur. Military, section 98. Citing United States v. Smith, 197 U.S. 386,49 L. ed. 801, 25 S. ct. 449; Bishop v. United States, 197 U.S. 334, 49 L. ed. 780, 25 S. ct. 440; Johnson v. Sayre, 158 U.S. 109, 39 L. ed. 914, 15 S. Ct. 773; Dynes v. Hoover 20 How(U.S.) 65, 15 L. ed. 838.

0585

The statute of limitations has run in this instance because the prosecution deliberately refrained from bringing the accused Admiral, KOBAYASHI to trial. We ask that the law be applied.

The Federal case of U.S. v. Watkins (C.C. Dist. Col. 1829) Fed. Cas. No. 16649 held. "The time of finding the indictment will appear by the caption, and where it appears therefrom that the offense was committed beyond the time limited, judgment will be rendered for defendant."

The accused, KOBAYASHI, Masashi pleads the statutes of limitations as a bar to his trial for the alleged offenses committed during the period from April 5, 1943 to Feb. 23, 1944 and charged under date of March 30, 1948.

The accused KOBAYASHI, Masashi prays of judgment of the charge and specifications and prays that the charge and specifications be quashed.

Respectfully,

MARTIN E. CARLSON
Commander, USNR.

"M (5)"

0586

REPLY TO PLEA IN BAR

Delivered by

Lieutenant DAVID BOLTON, U. S. N.

The accused's plea in bar rests upon two cited statutes of limitation. The first statute cited by the accused is Article 61, of the Articles for the Government of the Navy. This article is completely inapplicable to the instant case. Article 61, AGN, reads in part: "No person shall be tried by court martial...for any offense...committed more than two years before the issuing of the order for such trial...." By its specific terms therefore this statutory limitation relates only to trials by court martial, and is not applicable to offenses triable before exceptional military courts such as the instant military commission. The distinction between a naval court martial and an exceptional military court such as the instant military commission is specifically noted in N.C.& B. Appendix D-12. Article 61, since it relates to trial by court martial, is limited therefore to persons and offenses triable by court martial. In general the persons so triable are members of the naval forces, personnel accompanying the Navy, and spies, as set forth in N.C. & B., Sec. 333. The accused does not fall within any of these catagories, and is therefor not entitled to the benefits of Article 61 or other Articles for the Government of the Navy. The similar question of the applicability of Articles of War to accused war criminals was specifically considered by the United States Supreme Court in the Yamashita case (In re Yamashita, 327 U.S.1). The court there said, p. 13: "By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons."

The limitations set forth in Article 61 of the Articles for the Government of the Navy apply solely to court martial proceedings against naval and related personnel, and therefore have no application to the military commission proceedings against war criminals.

The second statute argued by defense counsel as pertinent, is equally inapplicable. Counsel cites 18 U.S.C. 582. This provision is clearly limited to noncapital cases. It does not apply to cases where the death penalty is authorized. Section 582 reads in part: "No person shall be prosecuted, tried, or punished for any offense, not capital.... unless...indictment is found...within three years..."

Since Military Commissions in the trial of war crimes cases are authorized to impose the capital sentence for the crime this accused is charged with (see N.C.& B.App. D-15), 18 U.S.C. 582 is inapplicable.

18 U.S.C. 581a specifically provides that "An indictment for any offense punishable by death may be found at any time without regard to any statute of limitations."

"N (1)"

0587

With regard to the field of war crimes, there is no applicable statute of limitations. The consistent undeviating line of precedent in decisions of military commissions in this and other military areas, denying the plea of statute of limitations in bar of trial, is adequate confirmation of the law in regard to this question. Similarly, note the "Regulations Governing the Trials of Accused War Criminals," SCAP AG 000.5 (5 Dec. 1945) 2. b(2), which reads: "The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of September 18, 1931."

The judge advocate respectfully requests that the defense plea in bar be overruled.

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

PLEA IN ABATEMENT

The accused KOBAYASHI, Masashi interposes this plea in abatement on the ground that there has not been any notice to the protecting power of the opening of this judicial proceeding against this accused, a Japanese national.

Article 60, Geneva (Prisoners of war) Convention of July 27, 1929, provides: "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting power thereof as soon as possible, and always before the date set for the opening of the trial."

The accused prays that Article 60, Geneva Convention of 1929 be complied with before this trial proceeds and before issue is joined.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for Accused.

0589

REPLY TO PLEA IN ABATEMENT

Delivered by

DAVID BOLTON
Lieutenant, USN.

Judge Advocate.

It should be noted that the accused KOBAYASHI, Masashi, is not a prisoner of war. He was arrested on 27 March 1946, subsequent to the surrender of Japan. He was arrested and confined not as a prisoner of war, but as a suspected war criminal. Article 60 of the Geneva Prisoner of War Convention would therefore appear to be wholly inapplicable.

But even if the accused had been arrested or confined as a prisoner of war the defense plea in abatement is wholly without merit. This precise question was raised in the YAMASHITA case and the United States Supreme Court succinctly disposed of the argument as follows: "Petitioner relies on the failure to give the prescribed notice to the protecting power to establish want of authority in the commission to proceed with the trial. For reasons already stated we conclude that Article 60 of the Geneva Convention, which appears in part 3, Chapter 3, Section V, Title III of the Geneva Convention, applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war." In Re YAMASHITA 327 U.S. 1, 16.

The offenses, with which the accused is charged, are offenses committed by him during the course of the war while Commander in Chief of the Fourth Fleet, and do not include any offenses committed after the confinement of the accused as a war crimes suspect. In accordance with the YAMASHITA case, as cited, Article 60 of the Geneva Convention is inapplicable and no notice to any protecting power is required.

It is respectfully submitted that the plea in abatement should therefore be overruled.

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

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0590

MOTION FOR A DIRECTED ACQUITTAL

Delivered by

Commander Martin E. Carlson, USNR
Counsel for the Accused

15 May 1948

The accused would, at this time, like to enter a motion for a directed acquittal on the ground of former jeopardy. The charge and specifications as they are now written are different and are a new charge and specification from the old charge and specifications. Commander Marianas serial 10226, dated 15 May 1948, reads as follows: "You are hereby authorized and directed to change the charge and specifications preferred by me on 30 March 1948 against KOBAYASHI, Masashi, former Vice Admiral, Imperial Japanese Navy, as follows:...etc." The original charge and specifications on the copy that Admiral Kobayashi received in Japanese read quite differently than they do now. That copy which the accused has reads in Japanese: "....by constantly beating thirteen with clubs, denying thirteen of them medical care...etc." Now, the accused understands English to some extent, but his native tongue is Japanese. He was served with the charge and specifications that were different in Japanese than in English. We offer to put the accused on the stand to testify that the charge and specifications he received in Japanese was different than the one he received in English. We also offer the record of proceedings of this court so far in support of this plea of former jeopardy. We are sorry that this motion was not made in writing as has been the custom, but due to the fact that we were not notified of the change to the charge and specifications beforehand this motion is made extemporaneously now.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for the Accused.

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0591

BRIEF OF AN ORAL REPLY TO THE ACCUSED'S MOTION FOR
A DIRECTED ACQUITTAL

Delivered by

DAVID BOLTON, LT, USN
Judge Advocate

Counsel for the accused has stated that they are placed in a position of requiring at this time that they make the motion without having submitted the motion in writing as has been the prior practice, because they were not advised as to the nature of the change. Defense counsel were advised that the change involved was a change in the order of a minor prepositional clause contained in Specification 1 (e) and Specification 2 (e). It is obvious that they were advised of the nature of the change because they made the request to have this change made. However, it is unnecessary for a motion of this limited merit to require any written argument.

It is obvious, as counsel for the accused has himself noted, that the accused understands English. He not only understands English, but he writes English very well. The judge advocate will have occasion to offer in evidence a series of statements which were written by the accused in English at a later time during the course of this trial. The accused was given a copy of the charge and specifications in English. The official charge and specifications in this case were in English.

As has been contended by the counsel for the defense, there was an error in the translation of this English, or it was so translated to cause confusion. It is clearly apparent that at this date no such confusion exists, for the ground of any confusion has been eliminated by the modification of the charge and specifications ordered by the convening authority. The defense counsel attempts to make much of the fact that the first paragraph of the convening authority's action states that "You are hereby authorized and directed to change the charge and specifications..." Even the most preliminary examination of the matter indicates that the so-called change consists merely of the correction of a minor ambiguity and is not in substance or in important content a change of any materiality.

The accused was apprised in the original Specification 1 (e) and original Specification 2 (e) that he was charged with the "unlawful torture, abuse and inhumane treatment of about forty-two (42) American prisoners of war, namely, George Estabrook Brown, Jr., lieutenant commander, USNR, and others whose names are to the relator unknown, during the period from November 20, 1943 to November 28, 1943, on Dublon Island, Truk Atoll, Caroline Islands, by naval members of the armed forces of Japan on Dublon Island, names to the relator unknown." These are the basic, these are the significant aspects of Specification 1 (e) and Specification 2 (e). They are identical in the original charge and specifications with the same portions in the modifications ordered by the convening authority. The only difference in the specifications, paragraph (e), Specification 1 and paragraph (e), Specification 2, consists of the rearrangement of the order in which a prepositional clause concerning the details of this mistreatment was set forth. In the original specifications, after the word "by," the first clause related to confining thirteen prisoners of war, and subsequent clauses

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related to all forty-two of the prisoners of war. As there was a misinterpretation of this clause because of the order in which it was set forth, it was requested by defense counsel and upon his objection and the ruling of the commission, the convening authority rearranged the order of this specification so that these details of the alleged mistreatment were set forth with the original first prepositional clause being placed after the seconf general clause relating to all forty-two prisoners of war. It is unnecessary to point out that these specifications were sufficient in law to apprise the accused of the crime of which he is charged, as they were originally preferred, and that the additional modification thereof does in no way affect the merit or essential nature of the specifications. The convening authority, in preferring this charge, could legally have omitted the entire detail with regard to how the mistreatment, abuse and torture was committed against the victims, and the specifications would still have been adequate and sufficient in law. It was a desire to give the accused as much detailed particularity as could possibly be afforded him, with the fullest opportunity for his defense, that the convening authority added details in these specifications. It is, therefore, apparent that there has been no material change in the charge and specifications preferred against the accused and it is respectfully requested that the motion be denied.

David Bolton

DAVID BOLTON,
Lieutenant, U.S. Navy,
Judge Advocate.

"X (2)"

0593

MOTION FOR A BILL OF PARTICULARS

Delivered by:

Commander Martin E. Carlson, USNR.

Defense Counsel.

The accused makes a motion for a more definite statement of the charge and for a bill of particulars in order to enable the accused to prepare for trial. We refer the Commission to Rule 12(e) Federal Rules of Civil Procedure for the District Courts of the United States and the case of Herman v. Mutual L. Ins. Co. (C.C.A. 3d) 108 F (2d) 678, 127 A.L.R. 1458.

The accused prays that both Specification 1 and 2 of the charge set out the law and customs of war which it is alleged the accused violated.

The object of this motion is to make more definite and certain the charge and the specifications thereunder. We refer the Commission to the case of Tilton v. Beecher, 59 N.Y. 176, 17 Am. Rep. 337 and 41 Am. Jur. "Pleading" section 276.

It is necessary that the accused definitely know with a certainity just what law and what customs of war he is charged with having violated.

The accused knows of no international law or customs of war or anything in all naval history which justifies such a charge as is set forth against KOBAYASHI, Masashi former vice admiral, Imperial Japanese Navy.

The YAMASHITA case when brought to the Supreme Court of the United States resulted in dissenting opinions by two of the Supreme Court justices.

Mr. Justice MURPHY in the case of General Tomoyuki YAMASHITA, Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands cited as 66 S ct 340 st 357 held: "International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liabilities under such circumstances for failure to meet the ordinary responsibilities of command .... To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgement as to deviation from duty."

The accused cannot properly prepare a defense to a charge based upon vague and indefinite references in certain of the Hague Conventions and Geneva Red Cross Convention No. IV of October 18, 1907. We call the Commission's attention to the case of Gross v. Big Creek Development 75 W. Va. 719, 84 S. E. 75, L.R.A. 1915 E. 1057.

According to the ruling in 41 Am. Jr. "Pleading" Section 271: "As a general rule bills of particulars will be ordered in every case in which the party can satisfy the court that it is necessary to a fair trial that he should be apprised beforehand of the particulars of the charge which he is expected to meet." The following cases are cited in support of this rule. May v. Ill C. R. Co. 129 Tenn. 521, 167 S.W. 477, LRA 1915 A. 781, Ann Cas. 1916 A. 213.

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"A bill of particulars should be granted in furtherance of justice." All these cases are cited: Tiltol v. Beecher 59 N.Y. 176, 17 Am Rep. 337; Haukins v. Lassel, 43 S. D. 191, 178 N.W. 731 citing R.C.L.; May v. Ill C. R. C. 129 Tenn 521, 167 S.W. 477, LRA 1915 A 781, Ann Gas. 1916 A. 213; Richmend and D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749, LRA 849; Turner v. Great Northern R. Co. 15 Wash 213, 46 p 213, 55 Am. St. Rep. 883.

"A bill of particulars should be granted for purposes of effectuating justice and in order not to impose an undue burden upon the accused." These cases are cited: Williams v. Chattanooga Iron Werks 131 Tenn. 683, 176 S. W. 1031, Ann Cas. 1916 B. 101; and May v. Ill. C. R. Co. 129 Tenn 521, 167 S. W. 477, LRA 1915 A 781, Ann Cas 1916 A. 213.

I have read the specifications and it is my belief that there is good ground to support this motion.

This motion is not interposed for delay but to make the charge and specifications more definite and certain and in order to effectuate justice and to insure a fair trial to the accused, KOBAYASHI, Masashi, former vice admiral charged with neglect of duty as Commander in Chief of the Fourth Fleet, Imperial Japanese Navy.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Defense Counsel.

0595

REPLY TO MOTION BY ACCUSED FOR

A BILL OF PARTICULARS

Delivered by:

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

The right to make a demand for a Bill of Particulars is one that is familiar to civil courts but for which there is no provision in the procedure under which this military commission operates. 27 American Jurisprudence, Indictments and Informations, Section 112, states that "the office of a Bill of Particulars is to supply the accused and the court additional information concerning an accusation that the accused has committed an act or acts constituting a criminal offense." It is a remedy that is used in civil courts where the indictment does not inform the accused of the crime with which he is charged sufficiently to enable him to prepare his defense. In a naval court the charges and specifications are the indictment. The right to make a timely objection to the charges and specifications takes the place of the right to demand a Bill of Particulars. It will be noted by the commission that the accused has recognized this since in his objections to the charge and specifications he raises the same point on which this demand for a Bill of Particulars is founded, viz, that the specifications of the charge should set forth the law and customs of war which it is alleged were violated by the accused. Since the merit of this claim will be argued at the time the objections to the charges and specifications are made, the judge advocate will refrain from comment at this time.

The granting or refusing of a Bill of Particulars, in any event, would be a matter resting in the sound discretion of a court (27 American Jurisprudence, Indictments and Informations, Section 111). Because of this and the fact that the accused is provided with a substitute remedy in his right to object to the charge and specifications, the judge advocate requests that the motion for a Bill of Particulars be denied.

James P. Kenny

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

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0596

OPENING STATEMENT OF JUDGE ADVOCATE
IN THE CASE OF KOBAYASHI, MASASHI
DELIVERED BY LT. DAVID BOLTON, USN.

The accused, KOBAYASHI, Masashi, former vice admiral of the Imperial Japanese Navy is charged with violation of the law and customs of war. The violation of law and customs of war is set forth in two specifications. The offenses set forth in these specifications occurred during the period when the accused was the Commander in Chief of the Fourth Fleet during the period from April 5, 1943 to February 23, 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.

The first specification alleges that the accused unlawfully disregarded and failed to discharge his duty as the Commander in Chief of the Fourth Fleet to control the operations of members of his command and persons subject to his control and supervision, permitting them to commit the illegal acts, the specified war crimes set forth in sections (a) through (j). The duty set forth in this specification is the duty to control the operations of members of his command and persons subject to his control and supervision. The accused KOBAYASHI is charged with having unlawfully disregarded and failed to discharge this duty in that he permitte these members of his command and persons subject to his control and supervision to torture, abuse, inhumanely treat and kill American prisoners of war. It is alleged and the prosecution will prove that at the times specifi within the period when the accused was Commander in Chief of the Fourth Flee a total of one hundred eighteen (118) American prisoners of war were murdered, some of them after brutal torture, and an additional fifty-one (51) American prisoners of war were subjected to abuse, torture, and inhumane treatment. The prosecution will prove that these vicious crimes were committed by members of the accused's command and persons subject to his control and supervision.

The second specification alleges that the accused unlawfully disregarde and failed to discharge his duty as the Commander in Chief of the Fourth Fleet to take such measures as were within his power and appropriate in the circumstances, to protect, as it was his duty to do, American prisoners of war held captive by the armed forces of Japan under his command and subject to his control and supervision, in that he permitted the unlawful torture, abuse, inhumane treatment, and killing of said prisoners of war. The gravamen of this specification is that the accused unlawfully disregarded and failed to discharge his duty to protect these prisoners of war. The acts and incidents set forth in this specification are the same acts and incidents of unlawful torture, abuse, inhumane treatment, and killing set forth in Specification 1.

Detailed presentation of the legal aspects of the duty to control one's subordinates and the duty to protect prisoners of war will be deferred until a more appropriate time during the final arguments of the prosecution. However certain focal points of the problem must be kept clearly in mind during the course of the presentation of evidence in the instant case. The existence under the law and customs of war, of the duty to control subordinates and of the duty to protect prisoners of war is no longer a subject of legitimate dispute. However the scope of the duty, and the essential elements required to establish a breach of the duty, are not as unequivocally and clearly established.

There are those who maintain that these are absolute duties, absolute responsibilities. They maintain that the commanding officer has an absolute responsibility for the acts of his subordinates and that the proof

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of commission of war crimes by members of his command and persons under the control and supervision of the accused is sufficient to establish a criminal breach of duty to control. Similarly they maintain that proof of the unlawful injury of prisoners of war, held captive by armed forces under the command of the accused, is sufficient to establish a criminal breach of the duty to protect such prisoners of war. While not contesting the validity of this interpretation of the law and customs of war, the prosecution wishes to point out that its presentation of the instant case does not require the adoption of this broad theory of absolute responsibility.

The first specification which deals with the duty to control, alleges that the accused "disregarded" and "failed to discharge" his duty to control the operations of members of his command and persons subject to his control and supervision, "permitting them" to torture, abuse, inhumanely treat, and kill American prisoners of war. Discussion of the legal implications of the word "permit" will be deferred until the final arguments in the instant case. It should be noted at this point, however, that even the terms "disregarded" or "failed to discharge", clearly envisage something beyond the concept of absolute responsibility. They require that it be proved that the accused "disregarded" or "failed to discharge", that is to say, that he failed to take the required and appropriate action in accordance with the law and customs of war, to control the members of his command.

The second specification is similar to the first specification in that it does not require the application of any theory of absolute responsibility. The second specification sets forth with greater particularity the scope of this duty for it alleges that the accused unlawfully disregarded and failed to discharge his duty "to take such measures as were within his power and appropriate in the circumstances" to protect prisoners of war.

With regard to both specifications the Commission must consider the circumstances, and must determine whether the accused did in fact disregard and fail to discharge his duty under the law and customs of war to control the operations of members of his command and persons subject to his control and supervision, and whether the accused did in fact disregard and fail to discharge his duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war.

The prosecution contends that the accused disregarded and failed to discharge these duties. The prosecution will seek to prove that during the entire period of the accused's command of the Fourth Fleet, the accused not only failed to take the necessary measures, but in fact failed to take any tangible measures to control the members of his command so as to prevent the torture, abuse, mistreatment or killing of prisoners of war. The prosecution will establish that various members of the staff of the accused knew of the torture, abuse, mistreatment and killing of prisoners of war, and the prosecution will seek to establish that the accused should have known, and in fact knew that prisoners of war had been killed within the area of his command by persons subject to his command. The prosecution will prove that despite this fact, the accused took no steps to control the members of his command or to protect prisoners of war.

The prosecution will offer documentary evidence, excerpts from prior court records, affidavits, and the testimony of witnesses in order to establish its case. The prosecution will first present a brief pic-

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ture of the accused, his education, his career and the scope of his command and duties in the Navy. The prosecution will then produce evidence concerning the accused's tour of duty as Commander in Chief of the Fourth Fleet, the jurisdiction of the Fourth Fleet, and the subordinate commands of the Fourth Fleet at that time. The prosecution will then offer excerpts from the records of cases tried by prior military commissions establishing the commission of the war crimes listed in sections (a), (c), (d), (g), (h), (i), and (j) of the specifications. The prosecution will then offer in evidence statements and affidavits concerning the commission of these and the other alleged incidents. Witnesses will be called to testify concerning certain phases of these incidents and concerning the responsibility and activities of the accused. Finally the prosecution will close its case after offering in evidence pertinent statements made by the accused.

David Bolton

DAVID BOLTON,
Lieutenant, USN,
Judge Advocate.

"CC (3)"

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0090

DDD

放棄自筆証書

私は、亡父○○○○の遺産について、次のとおり放棄します。

令和○年○月○日

住所　○○県○○市○○町○丁目○番○号

氏名　○○○○　㊞

解説

1　自筆証書遺言の方式

自筆証書遺言は、遺言者が、その全文、日付及び氏名を自書し、これに押印することによってする遺言です（民法968条1項）。

自筆証書遺言は、遺言者が一人で作成でき、費用もかからないため、広く利用されています。

2　遺言書の保管

自筆証書遺言は、遺言者が自宅で保管することが多いですが、紛失や改ざんのおそれがあります。

法務局における遺言書の保管等に関する法律により、自筆証書遺言を法務局で保管してもらう制度が設けられています。

3　検認

自筆証書遺言（法務局で保管されているものを除く。）の保管者又はこれを発見した相続人は、遺言者の死亡を知った後、遅滞なく、これを家庭裁判所に提出して、その検認を請求しなければなりません（民法1004条1項）。

検認は、遺言書の偽造・変造を防止するための手続であり、遺言の有効・無効を判断する手続ではありません。

4　遺言の撤回

遺言者は、いつでも、遺言の方式に従って、遺言の全部又は一部を撤回することができます（民法1022条）。

前の遺言と後の遺言が抵触するときは、後の遺言で前の遺言を撤回したものとみなされます（民法1023条1項）。

5　遺留分

兄弟姉妹以外の相続人には、遺留分があります。

遺留分を侵害する遺言であっても、遺言は有効ですが、遺留分を有する相続人は、遺留分侵害額に相当する金銭の支払を請求することができます（民法1046条1項）。

6　遺言執行者

遺言者は、遺言で、遺言執行者を指定することができます（民法1006条1項）。

遺言執行者は、相続人の代理人とみなされます（民法1015条）。

遺言執行者がいる場合には、相続人は、相続財産の処分その他遺言の執行を妨げるべき行為をすることができません（民法1013条2項）。

7　相続人以外の者への遺贈

遺言により、相続人以外の者に財産を与えることもできます。

相続人以外の者への遺贈を「包括遺贈」といいます。

包括遺贈を受けた者は、相続人と同一の権利義務を有します（民法990条）。

8　遺言の効力発生時期

遺言は、遺言者が死亡したときから効力を生じます（民法985条1項）。

遺言者が死亡する前に受遺者が死亡したときは、その遺言は効力を生じません（民法994条1項）。

9　遺言書の訂正

遺言書の訂正は、遺言者が、その場所を指示し、これを変更した旨を付記して特にこれに署名し、かつ、その変更の場所に印を押さなければ、その効力を生じません（民法968条3項）。

OBJECTION TO THE COMMISSION TAKING JUDICIAL NOTICE

Delivered by TAKANO, Junjiro, Defense Counsel

1. The defense objects to the commission taking judicial notice that the Marshall Islands, Caroline Islands, and Wake Island are part of the Commander Marianas Area on the grounds that whether or not these Islands are part of such area is not a matter of common knowledge here, but it is a legal question which the judge advocate must prove. Before the commission takes judicial notice that the foregoing Islands are part of the Commander Marianas Area we move that the judge advocate be required to offer proof that they are.

2. We ask that the commission take judicial notice that the above islands were not part of the Commander Marianas Area during the period between 5 April 1943 and 23 February 1944.

3. We object to the commission taking judicial notice of the Hague Convention No. IV of 18 October 1907 and the Annex to Hague Convention No. IV of 18 October 1907, particularly Articles 1 and 4 thereof. The text of this Convention and of the Annex thereto is in the French language, not in English. Since, therefore, the judge advocate makes such request he must give the official translation of the provisions of those articles. We move that the judge advocate be required to prove that the English translation of the provisions of the said two Articles is official.

4. We object to the commission taking judicial notice of the Geneva Prisoner of War Convention of July 27, 1929, and of the fact that although Japan has not formally ratified this Convention, it agreed through the Swiss Government to apply the provisions thereof to prisoners of war under its control. Such is a matter of diplomatic relations between the government of a country and that of another, through the medium of a third country in that case and the matter of this sort is not nor was necessarily published, and, therefore, the aforesaid fact must be proved by the judge advocate.

5. We object to the commission taking judicial notice of the Potsdam Declaration because it is irrelevant and immaterial to the present case.

Respectfully,

TAKANO, Junjiro.

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

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

"EE"

0b01

OBJECTION TO PROSECUTION DOCUMENT NO. 114
Delivered by Cdr. Martin E. Carlson, USNR

The accused objects to the document because the witness is not the originator either of the document dated April 2, 1947 Report of Investigation Legal Section, GHQ, SCAP or of the statement dated March 12, 1948.

The accused has an inalienable right to be confronted with the witnesses appearing against him and also the right not to testify against himself except by his own consent. This ~~reply~~ should be liberally construed. See Bram v. U.S. 168 U.S. 532, 42 LEd 568, 18 SCt 183.

It was in the seventeenth century the English courts adopted as a rule of evidence the Latin maxim: "Nemo tenetur seipsum accusare" (See Tucker v. U.S. CCA 8th 5F (2d) 818 citing RCL; Com. v. Cox, 10 Pa. D & C 678 citing RCL the underlying principle of which has been adopted in this country as the fundamental law of the land, citing Com. v. Cox; 10 Pa D & C 678, citing RCL. The Constitution of the United States provides that no person shall be compelled in any criminal case to be a witness against himself, and similar provisions are to be found in the Constitutions of nearly every state of the union. This doubtless is due to the abhorrance with which confessions coerced by inquisatorial torture were regarded alike in England and America. See the cases cited in footnote 12 page 870, 14 Am.Jur. Criminal Law section 144. The right is not merely a formal technical rule , which may be enforced or dispensed with at the discretion of the courts. It is a mandatory constitutional provision, securing to every defendant a valuable and substantial right. (See cases cited in footnote 13, page 870 Ibid.) Counselman v. Hitchcock, 142 U.S. 547, 35 L.Ed. 1110; 12 S.Ct. 195; Gillespie v. State, 5 Okl. Crim. Rep. 546, 115 P. 620, 35 LRA (N.S.) 1171 Ann Cas 1912D 259. 14 American Jurisprudence, "Criminal Law" Section 144.

The document of 2 April 1947 is, we believe, made by some employee of SCAP and ~~should~~ should be available to appear as a witness. If not the judge advocate should explain why.

The statement dated March 12, 1948 is alleged to have been made by March 12, 1948 at the War Criminal Stockade, Guam. This is the stockade at which the accused Kobayashi, former vice admiral, IJN had been held at that time, March 12, 1948, for nearly two years in solitary confinement without preferring any charges against him, and without benefit of counsel.

The document dated April 2, 1947 reads in part as follows: Reference: Report of John J. Marshall dated 27 Feb. 1947. Details: At Tokyo: On 19 March 1947, T. Katsube, Chief of Liaison Section, Central Liaison Office of the Japanese Government forwarded the military biographical history of Masashi Kobayashi. As set out below the original of which is being transmitted to the Criminal Registry Division, with their copy of this report. The document dated 2 April 1947 contains references which are not available to the defense or to the court and the report of Katsube is not even the original but a copy. By ~~what~~ submitting exception to the rule of documentary evidence does the judge advocate ~~a~~ a copy instead of the original document.

We object to documents offered in evidence by the judge advocate for the above reasons and because to admit these documents into evidence at this time is prejudicial to the substantive rights of the accused.

Respectfully,

Martin E. Carlson.

"FF"

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REPLY TO THE OBJECTION TO ADMISSION OF PROSECUTION DOCUMENT NO. 114

Delivered by Lieutenant David Bolton, USN, Judge Advocate

The accused objects to the introduction of this document in evidence first because he contends he is not the "originator" of either the document dated April 2, 1947, or of the statement dated March 12, 1948. Prosecution Document 114 is a preliminary background document which deals with the military and biographical history of the accused. It consists of a statement by the accused dated March 12, 1948 and of an attached military and biographical history of the accused prepared by the Investigation Division, Legal Section, of SCAP, dated April 2, 1947.

The witness has testified that the accused was shown this military and biographical history, and on 12 March 1948 made a statement concerning this history. This statement corrected the aforementioned history, and the accused attached a corrected copy of the history to this statement. It is therefore wholly immaterial who prepared or "originated" the biographical history which the accused attached to and made a part of his statement.

With regard to the accused's objection that he did not "originate" the statement dated March 12, 1948, the judge advocate is at a loss to understand what the accused wishes to imply. The witness has testified that the accused wrote and delivered to him the statement dated 12 March 1948. The original statement is handwritten in english, and in similar handwriting bears what purports to be the signature of the accused Masashi Kobayashi. The statement was subscribed and sworn to in the presence of the witness, and bears the signature of this witness. The judge advocate does not believe the accused contends that he did not write and sign this statement. But, if the accused does so contend, he should, through his counsel, unequivocably deny that he wrote and signed the statement and the accused should take the stand on voir dire or otherwise to prove that the statement is not in his handwriting, and that the signature is not his signature, and that he did not sign and swear to the truth of the statement in the presence of the prosecution witness Commander Ogden.

In the absence of such evidence the Commission must accept the evidence offered by the prosecution through the witness Commander Ogden, that the accused did in fact make and sign this statement, and that, as sworn and subscribed to by the accused, the statement was made voluntarily, without force, threats, promises of reward or inducements. If the statement was so made then the statement and its attachment as corrected by the accused must be admitted in evidence. It should be noted that it is completely immaterial who prepared the original of the document which the accused has attached to his statement. By reference and correction, he has incorporated that document into his own statement, and it would be immaterial whether that incorporated document had been prepared by himself, prepared by another, or taken from an otherwise unidentified paper. Whoever, or however, that document was prepared, the accused has by his own action made it a part of his statement. It is therefore unnecessary to point out that the attached document upon its face evidences that it is an official document of the General Headquarters of the Supreme Commander of the Allied Powers.

In concluding this reply it is only necessary to briefly point out that the authorities cited by the accused with regard to the privilege against self-incrimination are completely inapplicable. The law with regard to the admissibility of confessions and admissions of an accused is too fundamental to warrant discussion. I cite the commission to Sections 174 and 182 of Naval Courts and Boards. To subscribe to the argument of the accused that acceptance in evidence of extra-judicial admissions and confessions constitutes a violation of the constitutional privilege against self-incrimination, means to accept the doctrine that extra-judicial admissions or confessions are never admissible in evidence. This view is manifestly in contradiction to the entire body of precedent in Anglo-Saxon law.

"GG (1)"

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The admission in evidence of prior extra-judicial confessions and admissions, voluntarily made by the accused is not a violation of Constitutional privilege against self-incrimination,(and it is therefore unnecessary to consider whether the accused is entitled to the constitutional privileges set forth in the Fifth Amendment to the Constitution of the United States of America.)

The allegation by the accused that he was confined for nearly two years without the preferring of charges against him, and without benefit of counsel, while reflecting a grevious and unfortunate situation, does not constitute an allegation that the statement made by him to the witness, Commander Ogden, was made involuntarily, or under threats, duress or promises of reward or benefit. The Commission is here concerned only with the question of the admissibility of this statement offered in evidence by the prosecution. This document, this extra-judicial admission by the accused, is admissible in evidence ~~if if it~~ material, relevant, and voluntarily made. The accused has not contended that the statement was not voluntarily made by him. The last paragraph of prosecution document No. 114, specifically affirms that it was voluntarily made. The statement is therefore admissible in accordance with the requirements of customary common law rules of evidence. In view of this fact the commission in its ruling with regard to admissibility of this document need not invoke the broad authority of SCAP Rules, under which the prosecution document is also admissible.

The judge advocate requests the commission to accept in evidence Prosecution Document No. 114.

Respectfully,

David Bolton

David Bolton,
Lieutenant, USN,
Judge Advocate.

検事側書類第五号提出延期ニ関スル動議

弁護人　佐々維毅

弁護人ハ次ノ理由ニヨリ弁護人カラ日本政府中央連絡事務局宛要求シタ訊問書ノ回答ノ到着スルマデ検事側ガ書類第五号ノ提出ヲ繰延スコトヲ動議トシテ提出スル。

一、検事側書類第五号ニハ左ノ重要ナル三点ニ於テ被告小林ガ第四艦隊司令長官トシテノ任期中実際ニ彼ノ指揮下ニアッタ兵力ノ編成ヲ示シテヰナイ。

(a) 日本海軍ノ編成ハ作戦兵力ト軍政機関トニ大別サレル。検事側書類第五号ノ編成ハ作戦兵力ヲ示シタモノデアッテ軍政機関ヲ全然含ンデヰナイ。艦隊司令長官ノ下ニハ多数ノ軍政機関ガ附属サレルモノデアッテ被告小林ノ任期中多数ノ軍政機関ガ彼ノ指揮下ニアッタ。第四海軍病院ノ如キモソノ一デアル。即チ本書類ノ編成表ダケデハ被告小林ノ実際ニ指揮シタ部隊ガ示サレテヰナイ。

(b) 作戦兵力ニ関スル編成ニハ日本海軍ニハ二通リアル。一ハ大本営ノ定メル「日本海軍戦時編成」デアルガ之ニ従ヒ海軍兵力ノ基本ノ編成ヲ示スダケデアッテ艦隊ニ於ケル実際ノ編成ハ「軍隊区分」ト称サレルモノデ艦隊ハ於テ作戦上ノ必要ニ基キ艦隊司令長官ガ自分ノ指揮下ノ兵力ヲ適宜ニ区分シテ之ヲ実際ニ運用シテヰルノデアル。

(c) 「日本海軍戦時編制」中ニモ又実際ノ軍隊区分中ニモ含マレテヰタ部隊デ第四艦隊司令長官ノ任務ヲ果ス上ニ重要ナ部隊ガ本検事側書類中ニ脱落シテヰルト思ハレルモノガアル。

二、日本政府ノ公式ニ提出シタ書類ニ関スル負擔ハ之ヲ日本政府ニ依ッテ公式ニ回答サルベキデアルト思ヒ。尚中央連絡事務局ヲ経テ訊問書ヲ要求シ前述ノ負擔ヲ明確ニスル等ニハ此ノ回答ヲ待ツベキデアルト思考スル。

0605

MOTION FOR POSTPONEMENT
OF INTRODUCTION OF PROSECUTION
DOCUMENT NO. 5

Delivered by Defense Counsel SANAGI, Sadamu

Defense counsel moves that the introduction of Prosecution Document No. 5 be postponed until such time as answers to the interrogatories submitted to the Central Liaison Office, Japanese Government by him are received, for the following reasons.

1. Prosecution Document No. 5 does not show the organization of the forces actually under the command of accused Kobayashi during his tour of duty as Commander in Chief, 4th Fleet relative to the three important points given below.

(a) Japanese Naval organization may be broken down into two large groups, namely Operational forces and Administrative organs. Prosecution Document No. 5 shows operational forces but does not include administrative organs at all. Several administrative organs or establishments are usually attached to the office of a Fleet Commander in Chief, and the accused Kobayashi during his tour of duty had several such administrative organs under his command. The 4th Naval Hospital was one such establishment. In short, the units actually commanded by this accused Kobayashi are not represented in full by the chart attached to this document.

(b) There are two forms of organization relative to operational forces in the Japanese Navy. One is the "Wartime Organization of the Japanese Navy" as determined by Imperial General Headquarters. However this merely indicates the basic organization of naval forces. The other organization is the so-called "Assignment of forces" (Guntai Kubun). This assignment of forces was determined by the Commander in Chief, Combined Fleet, who on the basis of operational necessities divided the forces under his command as he thought fit and actually executed this division of forces throughout the war.

In actual fact, the Combined Fleet had by virtue of "Assignment of Forces" established a force called the Inner South Sea Force (Uchi Nanyo Butai) and assigning forces outside and independent of the 4th Fleet to same had placed it under the command of Commander in Chief, 4th Fleet.

Consequently, to know the exact strength of the forces under the command of the defendant Kobayashi during his tenure of office, a study of "Assignment of Forces" (Guntai kubun) determined by Combined Fleet is required.

(c) It seems that certain units which would play important roles in showing the duties of Commander in Chief, 4th Fleet and which are included both in "The Wartime Organization of the Japanese Navy" and in the "Assignment of Forces" have been overlooked in this Prosecution document, (No. 5).

2. We believe that questions raised against a document officially introduced by the Japanese Government should be officially answered by the Japanese Government. Hence our request for submission of interrogatories addressed to the Central Liaison Office, Japanese Government.

To clarify the doubtful points given above, we believe that answers to the interrogatories should be awaited.

SANAGI, Sadamu

I certify that the foregoing is a true and correct translation of the original motion in Japanese, to the best of my ability.

Eugene E. Kerrick, Jr.
Lt., U.S. Naval Reserve,
Interpreter.

"II"

検事側書類第五号の証拠採用に関する動議

弁護人 佐々維毅

検事側書類第五号が証拠に採用されるに関し弁護人は左の動議を提出する。

検事側書類第五号の第四輯隊編成表中各部隊指揮官の欄には氏名及其の任期が記載されてあるが其の階級が記載されて居らない。

被告十林は彼の部下の行動を抑制す可き義務を負心つたことに対して問擬されてあるが彼の階級が記載されて居らないことは重要な事柄である。

検事に依ってHレオデン中佐を証人として提出することを予定されてある書類を検討する必要があるも十林の部下の指揮官の階級を明にする必要がある。

故に検事側に於て同時に右の点に関する書類を提出せられんことを要求する。

尚ほ部隊の指揮官の一九四三年四月より一九四四年二月の間に於ける階級を立証されんことを立証する。

MOTION CONCERNING ADMISSION INTO EVIDENCE OF PROSECUTION DOCUMENT NUMBER 5.

by

Mr. Sanagi, Sadamu
Defense Counsel

The accused submits the following motion relative to the admission in evidence of Prosecution Document No. 5:

In the column of Unit Commanders in the Organization Chart of the 4th Fleet of Prosecution Document No. 5, although the names and terms of office are given, the ranks of the respective commanders are not given.

The accused KOBAYASHI is alleged to have neglected his duty to control the actions of his subordinates. It is important that the ranks of his subordinate commanders be clearly stated.

Moreover, it is necessary to clarify the ranks of KOBAYASHI's subordinate commanding officers to study the documents which the prosecution is tentatively planning to submit through Commander H. L. OGDEN assuming the witness stand.

Therefore, it is requested that the prosecution at this point prove the ranks of at least the commanding officers of units stationed on Truk and the Marshalls between April, 1943, and February 1944.

Respectfully,

SANAGI, Sadamu,
Counsel for Accused.

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

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

"KK"

OBJECTION TO THE INTRODUCTION OF PROSECUTION DOCUMENT #5

Delivered by

Commander M. E. Carlson, USNR.
Counsel for the Accused

May it please the Commission:

We object to the introduction into evidence of Prosecution Document Number Five, Central Liaison Office No. 7376 (PD) on the grounds that the maker of the document is available and he should therefore be required to appear as a witness in order that the rights of the accused as guaranteed by the Sixth Amendment of the Constitution of the United States may be complied with.

No opportunity was presented to the defense to be present at the time Document Number 5 was executed and no opportunity was given the defense to submit interrogatories to the maker of this document until May 7, 1948. At least until such time as these interrogatories have been answered this document Number 5 should not be admitted into evidence.

It is the fundamental law of this land that an accused has the right to be confronted with the witnesses against him. We cite the case of Com v. Cox, 10 Pa., D & C 678 and article VI, Constitution of the United States of America and 14 Am. Jur. Criminal Law, Section 144, and the cases cited in footnotes 12 and 13, page 870, 14 American Jurisprudence.

We maintain that the ex post facto rules of evidence promulgated by SCAP cannot change the Constitution of the United States and other fundamental laws of the United States.

This document is made by some person in Tokyo, Japan and he is, therefore, available as a witness in this case. It is a fundamental rule that convenience of the prosecution is no good reason to overthrow all the rules of evidence. We submit that since the maker of the document is available he should be summoned.

Annex Table No. 3 is a report showing an organization as of 1 April 1943 and 1 January 1944, and is irrelevant and immaterial and should not be admitted in evidence.

The organization table dated January 1, 1944 is an organization as of that date only. War was in progress and certainly it is common knowledge that war time organizations changed from day to day. If that particular organization table is to be admitted into evidence it should be admitted on condition that it show only what it purports to show, the organization as of January 1, 1944, and not the organization on the dates of the alleged crimes which Vice Admiral KOBAYASHI is said to have committed in July, 1943, on Wake; during the period from July 16, 1943 to August 27, 1943 at Kwajalein; on October 7, 1943 on Wake; on October 15, 1943 on Wake; on or about February 1, 1944 and on February 2, 1944 at Mille; or February 17, 1944 at Dublon. But no crime is alleged to have been committed on January 1, 1944 and, therefore, that document should not be admitted either.

It is still not clear to us and the prosecution has not proved how these tables of organization dated 1 April 1943 and 1 January 1944 are made up. Are they certified copies of the original documents marked for Exhibit No. 2 only, or are they some different organization which someone in the prosecutor's staff has made up and if so, how were they made up and by whom? We are interested and it is relevant and material only as to what was the organization in July, 1943, from July 16, 1943 to August 27, 1943; on October 7, 1943; on October 15, 1943; on February 1, 1944; on February 2, 1944; and on February 17, 1944.

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We object to these two document tables of organization, as of 1 January 1944 and as of 1 April 1943, as being irrelevant and immaterial.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for Accused.

REPLY TO THE ACCUSED'S MOTION FOR POSTPONEMENT AND OBJECTION TO THE INTRODUCTION INTO EVIDENCE OF PROSECUTION DOCUMENT #5

Delivered by

LT DAVID BOLTON, USN
Judge Advocate

While the judge advocate has not had an opportunity to see, or hear, or be apprised of the contents of this objection by Commander Carlson, counsel for the defense, he feels that in view of the nature of the objection raised it is unnecessary to delay the proceedings by any postponement or request for a recess.

The judge advocate will first direct his reply to the objection by Commander Carlson. Commander Carlson has first attempted to indicate that a witness is available and, therefore, affidavits or documentary evidence should not be admitted. The admission of such ex parte affidavits and documents, in military commission proceedings, is itself often based on the temporary unavoidability at the time of the trial of the witness. The admission of such documents in evidence in war crimes trials is so well established that comment in this regard is completely unnecessary. In addition, it is apparent that in regard to this official document which has been received through official channels from the Japanese Government, the requirements of producing such witness before this commission is completely unnecessary, this is particularly true, in view of the nature of the document and the nature of the evidence sought to be obtained from this document. Defense counsel has said that he has had no opportunity because of the fact that the document is presented, rather than a witness, to effect a cross-examination in regard to that document. Defense counsel received this document several weeks prior to May 7, 1948, the date on which they actually submitted to the judge advocate a group of interrogatories which they requested be asked of the maker of this document, namely, the Central Liaison Office of the Japanese Government. These interrogatories were immediately submitted and sent to Tokyo for the purpose of obtaining this information for defense, as they have requested.

It is clear that the defense, therefore, had adequate opportunity to and in fact made what amounts to a cross examination. They can not be prejudiced by admission of this document in evidence, particularly in view of the fact that this document deals with official Japanese Government records concerning the geographic area and commands subordinate to the Fourth Fleet of the Japanese Navy.

Commander Carlson points out that the document is irrelevant because it deals with certain specified periods which he reads from the document, as being in accordance with Annex Table #3 as of April 1943, and the second table, which is Annex Table No. 4, (the second certified copy in the record,) as of 1 January 1944. These two annexed tables he contends relate only to the specific dates 1 April 1943 and 1 January 1944. If this were

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true, the documents would still be admissible because the organization of the fleet as of 1 April 1943, and the organization of the fleet as of 1 January 1944, are clearly indications, relevant and pertinent to what the organization of that fleet at the specific dates and times with which the accused is charged with neglect of duty committed within his tour of duty as commander-in-chief of that fleet. However, defense counsel, despite all the time they have had with the document, have apparently failed to observe that while the annex tables, for example, Table No. 3 which reads "as of 1 April 1943," nevertheless contains within the charted information, material relevant to changes that occurred from the period from 1 April 1943 to the period of the next table, Table No. 4, which is 1 January 1944. For example, if the commission will note, here we have the 14th Squadron. Under the organization of the Fourth Fleet it is indicated that the commanding officer's name is ITO, Kenzo up until the middle of January 1944, when the commanding officer became Kiyota, Takahiko. Similarly, this entire table of organization has within its contents the charted changes which occurred from the period 1 April 1943, which was the date of this Annex Table, No. 3, to the period of 1 January 1944. The same thing is true with regard to Annex Table No. 4 and the charted information goes through the period of the accused's tour of duty as Commander-in-Chief of the Fourth Fleet.

With regard to Chart No. 1, and Chart No. 2, these show the area of jurisdiction of the Fourth Fleet commencing with the period June, 1941, through July, 1943, as shown on Annex Chart #1, and through the period August, 1943, through February 1944, as shown on Annex Chart No. 2. It is obvious from the most casual examination that these copies of these charts and tables cover the period of the accused's duty as commander-in-chief of the Fourth Fleet and, therefore, are completely relevant. That, I believe, disposes of the argument of defense counsel, Commander Carlson.

With regard to the argument of defense counsel, Mr. Sanagi, the judge advocate wishes to make the following reply. (See attached reply.)

David Bolton

DAVID BOLTON,
Lieutenant, U.S.N.
Judge Advocate.

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REPLY OF THE JUDGE ADVOCATE TO MOTION CONCERNING ADMISSION IN EVIDENCE OF PROSECUTION DOCUMENT NUMBER 5, DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY.

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The accused objects to the admission of this document in evidence on the ground that this document which lists the names and terms of office of various unit commanders in the Fourth Fleet organization does not list the rank of these officers. The objection of the accused is without merit. The argument of the accused is based upon the assumption that the prosecution must prove the ranks of subordinate commanders, in order to establish the responsibility of the accused for his failure to control them, or his failure to protect prisoners of war. This assumption is incorrect for in this regard it is only necessary for the prosecution to establish that particular persons involved in the alleged incidents were in fact members of the command and subject to the control and supervision of the accused. But even if defense assumption were correct, and it was necessary to establish the rank of various subordinate unit commanders, it is clear that defense objection should not be sustained, for the admissibility of prosecution document does not rest upon whether it contains all the pertinent or relevant evidence with regard to factual issues before the court. Additional documents and testimony of witnesses will be offered in evidence to establish the ranks of subordinate officers where relevant.

The prosecution document is admissible if it is properly presented, in due form, and relevant to the issues of the case. Prosecution document number five is properly presented, it is in proper form, and is relevant to the issues of the case. There is no judicial requirement that this document or any other individual document or witness should prove all or any material portion of the prosecution's case.

It is respectfully requested that the Commission rule that defense objection to admission of this document is not sustained.

David Bolton

DAVID BOLTON,
Lieutenant, U. S. N.
Judge Advocate.

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REPLY OF JUDGE ADVOCATE TO MOTION FOR POSTPONEMENT
OF INTRODUCTION OF PROSECUTION DOCUMENT NO. 5
Delivered by
Lieutenant David Bolton, U.S. Navy, Judge Advocate

This defense motion is based upon the contention that Prosecution Document No. 5 does not show the complete organization of the forces actually under the command of the accused during his tour of duty, and that therefore introduction of this document should be deferred until such time as interrogatories submitted to the Central Liaison Office of the Japanese Government with regard to certain allegedly doubtful points, has been received by defense counsel.

The motion of the accused is not well taken. It does not relate to the question of the admissibility of this document. The accused in this motion does not contest the admissibility of the document but merely states that he desires to obtain information which may indicate that certain portions of the contents of this document are inaccurate, or ambiguous. In short the accused is requesting the court to postpone the admission of the prosecution's document until the accused obtains defense evidence to refute or amplify the facts submitted in the prosecution's evidence. Such postponement of presentation of the prosecution's case is both unwarranted and unnecessary. If the prosecution's document is admissible, and the Commission ~~has~~ does so ruled, then there is no reason why the prosecution in presenting its case should be delayed or hampered by the efforts of the defense to obtain additional evidence for the purpose of developing their defense. The standard authorized procedures give the defense adequate opportunity to develop and present their own case after the prosecution has presented its case. The accused in connection with establishing defense evidence can present any relevant evidence which contradicts, corrects, amplifies, or explains evidence produced by the prosecution. Denial of the defense motion with regard to postponement of the introduction of prosecution document No. 5, does not interfere with or prejudice the right of the accused to develop and produce such evidence.

The prosecution desires at this time to introduce this document, Prosecution Document No. 5, which relates to the geographical jurisdiction and organization of the Fourth Fleet, and respectfully requests that the defense motion for postponement of the introduction of this document, be denied.

David Bolton
DAVID BOLTON,
Lieutenant, U.S. Navy.

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稼事例書類第七号提出ん対する異議

弁護人　佐々雄敦

被告は左の理由ん依り稼事例書類第七号が証拠として提出されることん対し異議を申立てる。

一、本書類別紙Ⅰ項ん記載された細隊令第六條第三十七條は原文の如く英ふる翻訳ではふる重要ふる点を脱落して居る。第三十六條及第三十七條では参謀又は副官の職務を示すと同時ん指揮関係を示してみるん拘らず本翻訳んは其の指揮関係を殆んどみる。原文んは参謀（副官）は「参謀長の命を承け」と言う重要ふる文句があるが本書類んは之が抜け乍ら第三十六條及第三十七條の正確ふる譯文を示せば次の通りである。

第三十六條　司令長官の幕僚たる参謀は参謀長の命を承け細隊・実施其の他司令長官の定むる事項を掌る。

第三十七條　司令長官の幕僚たる参謀は前記の規定ん依るの外機関長の命を承け服務する。

機関科特技たる参謀は参謀長の命を承け儀制人事及庶務ん関することを掌る。

二、本書類別紙Ⅱ項の始めん「司令部では参謀副官の職務が司令長官又は司令官ん依って定められてあるけれども実際副官は参謀長の命を承けて其の職務の一部を分担も参謀長が之を定めるものである。」とあるが、そして司令長官の承認をえて実施するのである。換言すれば事実の真相と正確ん表はして居ふいものである。

弁護人　佐々雄敦

OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 7 DELIVERED BY DEFENSE COUNSEL MR. SANAGI, SADAMU.

The accused objects to the introduction in evidence of Prosecution Document No. 7 for the following reasons:

1) The translations of Articles 36 and 37 of the Fleet Ordinance in Paragraph III of the Enclosure of the same document are not true and correct and important portions of the articles have been omitted. In Articles 36 and 37 of the original, the command relations of staff officers and aides-de-camp are shown side by side with their duties.

In the original is found this important clause: ..... staff officers and aides-de-camp "shall (be) under orders of the Chief of Staff". In the present document this has been omitted.

The correct translations of Articles 36 and 37 are as follows:

Article 36. The staff officers, who are members of the Staff of the Commander-in-Chief, shall under orders of the Chief of Staff, handle affairs concerning discipline, morale, education, training, operations, etc., of the fleet.

Engineer Staff Officers shall, in addition to the foregoing regulations, carry out their duties under the direction of the Chief Engineer of the Fleet.

Article 37. The Aides-de-camp, who are members of the Staff of the Commander-in-Chief, shall under orders of the Chief of Staff handle affairs concerning ceremonies, personnel and general affairs.

2) Although it is stated in the first part of Paragraph II of the Enclosure of this document: "The duties of Staff Officers and Aides-de-Camp in a headquarters are fixed by the Commander-in-Chief or the Commandant", Staff Officers and Aides-de-camp discharged their duties under orders of the Chief of Staff as pointed out in the above paragraph.

Consequently the Chief of Staff assigned the duties of these officers. On receiving the sanction of the Commander-in-Chief, the Chief of Staff effectuated these assignments.

In other words, that portion of Paragraph II not expressing the true facts accurately, is not competent evidence.

Respectfully,

SANAGI, SADAMU.

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

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

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REPLY TO OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 7

DELIVERED BY

LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE

With regard to the objection made by Commander Carlson it should be noted that the document offered in evidence - prosecution document #7 consists of certified copies from the original, which has been marked for identification as identification number four. The original consists of a covering letter dated 15 September 1947 which is signed and contains enclosures. It is not necessary that such enclosures be signed or dated. Counsel for the accused might just as well contend that in a document consisting of more than one page - every page should be signed and dated. In this case the document is clearly dated by the covering letter and the information contained therein is therefore in proper form even though it is submitted as an enclosure with that original document. The statement dated 15 September 1947 contains in paragraph two the statement that copies in English and in Japanese of the Naval Staff Regulations, are enclosed and this obviously is part of the enclosure. With regard to the objection made by defense counsel, Mr. Sanagi, the judge advocate wishes to make the following reply. (See reply attached.)

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

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(CONTINUED)

REPLY TO OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 7

Delivered by
Lieutenant David Bolton, USN, Judge Advocate.

The accused objects to the admission in evidence of Prosecution Document No. 7 on two grounds.

The first ground of objection is that this document includes an inaccurate translation of Articles 36 and 37 of the Fleet Ordinances. The translation which the accused objects to, namely, the translation of paragraph III of the enclosure, is the translation received from the Central Liaison Office of the Japanese Government. It should be noted that Prosecution Document No. 7 also includes the Japanese of this enclosure. Examination of the enclosure in Japanese by the official interpreters of the court discloses that the English enclosure does not, in paragraph III, conform to the Japanese enclosure. The interpreters have verified the fact that the Japanese enclosure contains under Articles 36 and 37, as indicated by defense counsel, the phrase, "under orders of the Chief of Staff." In view of this fact, the judge advocate has no objection to the correction of the English translation submitted by the Liaison Office, to include in paragraph III, the phrase, "under orders of the Chief of Staff," to be added in the portion under Article 36, first paragraph thereof, after the word "shall," and in the portion under Article 37, first paragraph thereof, after the word "shall," in accordance with the correct translation of this portion of the Japanese document. With the permission of the commission, the Judge Advocate will make this correction in the English translation. The Judge Advocate believes that this correction will remove the grounds for this first objection of the accused to the receipt of this document in evidence.

The second ground on which the accused objects to the receipt of this document in evidence is the contention of the accused that paragraph II does not "express the true facts accurately," with regard to the duties of staff officers and aides-de-camp in a headquarters. This argument of the accused is directed toward the accuracy or proper evaluation of the evidence. The evidence presented in paragraph II is relevant and competent. The question of interpretation of this evidence, and the weight to be given this evidence, does not affect its admissibility. It is not necessary at this time to refute the defense contention that paragraph II is inaccurate by pointing out the fact that the defense in this objection have themselves admitted that assigning of the duties of staff officers and aides-de-camp had to receive the sanction of the Commander-in-Chief. Similarly it is unnecessary to point out that the Chief of Staff, as well as other staff officers, acts for, in the name of, and under the authority of the Commander-in-Chief, which is evidenced by paragraph II of the enclosure. Both of these facts indicate that the portion of paragraph II which states that the duties of staff officers are "fixed" by the commander-in-Chief does accurately state the true facts. But as I have pointed out, the Commission is now concerned with the admissibility of this evidence, and not with the weight to be given to this evidence. With regard to the interpretation or weight of this evidence, the accused has ample opportunity at the appropriate time, during the presentation of the defense, to offer such evidence as may tend to refute, amplify, or explain the evidence now offered by the prosecution.

The prosecution submits that Prosecution Document No. 7 is competent and relevant, and should be received in evidence.

David Bolton

DAVID BOLTON,
Lieutenant, U.S.N.,
Judge Advocate.

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OBJECTION TO THE INTRODUCTION INTO EVIDENCE OF
PROSECUTION DOCUMENT NO. 301

Delivered by

MARTIN E. CARLSON, CDR, USNR
Counsel for Accused

We object to the introduction into evidence of Document Number 301, the alleged excerpts taken from the official records of Commander Marianas, on the grounds that the excerpts of the of Rear Admiral Shigematsu Sakaibara are not a true record of that case. The excerpts which the judge advocate has selected from that case gave a distorted picture which can only be corrected if the whole record or at least the testimony of the accused in that case, Rear Admiral Shigematsu Sakaibara, are put into these excerpts.

Such testimony is most relevant to the issues here being tried and not to offer such testimony into evidence at this time is prejudicial to the substantive rights of the accused.

We request that the judge advocate be required to submit the testimony of Shigematsu Sakaibara as given in his trial, because such evidence is relevant to the issues and comptetent under the rules of evidence to prove the issues and because it will explain and modify that part which the judge advocate is here offering in evidence.

Even the convening authority, Rear Admiral William K. Harrell, Commander Marshall-Gilberts Area, said in his remarks: "The responsibility of ordering the executions was assumed by Rear Admiral Sakaibara, he having admitted in court and in his statements that he issued the order." These remarks of the convening authority have been conveniently omitted by the judge advocate because it suited his purpose to omit them and yet he copied upon the sheet purporting to be the approval of Admiral Harrell the legent "Certified to be a true copy" Signed W. P. Mahoney."

The most casual and perfunctory inspection, yes, even a quick look at it, will show that this is not a true copy.

The witness, H. L. Ogden, commander, U. S. Navy, has also certified: "I certify that the annexed are true excerpts taken from the official records of Commander Marianas."

We submit how can the judge advocate and the witness copy off a part of the action of the convening authority dated 4 January 1946 and include in the excerpt the legent "certified to be a true copy" signed W. P. Mahoney" when they each know that the legend which Lt. W. P. Mahoney signed certifying that the action of the convening authority as he set it forth was a true copy, but as they have used it is not a true copy but a false copy.

Then there is the statement of Sakaibara dated October 7, 1943, an important part of the record of the trial, but that too is most conveniently omitted by the prosecution, the judge advocate. That statement signed by Admiral Sakaibara reads: "In order to maintain discipline it was necessary to execute this prisoner."

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We ask that the judge advocate be required to introduce that statement also to explain and modify his document number 301.

We cite the following cases as our authority for requiring the judge advocate to prove the contents of the remainder of the document. Crawford v. U.S., 212 U.S. 183, 53 L. ed. 465, 29 S. Ct. 260, 15 Ann. Cas. 392; Tappan v. Beardsley, 10 Wall, (US) 427, 19 L. ed. 974; Greenleaf v. Barth, 5 Pet. (U.S.) 132, 8 L. ed. 72; Walter v. Sperry, 86 Conn. 474, 85 A. 739, 44 L.R.A. (U.S.) 28; Mack v. State, 203 Ind. 355, 180 N.E. 279, 83 A.L.R. 1340; Illinois C. R. Co. v. Manion, 113 Ky. 7, 67 S.W. 40, 101 Am. St. Rep. 345; State v. Smith, 144 La. 801, 81 So. 320, citing R.C.L; Mc Connell v. Combination Mine & Milling Co. 30 Mont. 239, 76 P. 194, 104 Am. St. Rep. 703; Cockcroft v. Metropolitain L. Ins. Co., 125 Pa. Super Ct. 203, 189 A. 687, citing R.C.L.; State v. Thomas, 159 S.C. 76, 156, S.E. 169, citing R.C.L.; Weeks v. Mc Nulty, 101 Tenn. 495, 488 W. 809, 43 L.R... 158, 70 Am. St. Rep. 693; State Nat. Bank v. Urrutia (Tex. Civ. App.) 246 S.W. 404 citing R.C.L.

Additional parts of the record should be introduced by the judge advocate because it bears upon, modifies, and explains the part that was offered by the judge advocate. Particularly, in this instance, it is proper that the commission require the judge advocate to introduce such additional parts of the record because the judge advocate, not the defense, has the record of the case of Rear Admiral Shigematsu Sakaibara, who was tried not by Commander Marianas but by Commander Marshall Gilberts Area. It is not enough that the judge advocate says he will make the record of the case available to the defense.

Then to allow the judge advocate to introduce only certain parts of the record does not bring out the true circumstances and the whole truth of the case. Surely war crimes trials are like all other trials in American Courts concerned only with the truth of case and not only with the conviction of the accused.

The accused in this case is charged with neglect of duty, criminal neglect of duty. When Admiral Sakaibara takes the witness stand in his trial and testified he should be heard by this court, particularly since the prosecution in this case have seen fit to silence Admiral Sakaibara forever.

At this time we ask the judge advocate why they do not call the Wake Island Commander, Rear Admiral Shigematsu Sakaibara as a witness instead of introducing a document.

The testimony of Admiral Sakaibara at his trial and his statement a part of the record of that trial is competent, and pertinent to the issues here involved. We cite Walter v. Sperry, 86 Conn. 474, 85 A. 739, 44 L.R.A. (NS)28.

It is necessary to have his testimony and his statement to ascertain with certainty its real sense and meaning. We cite Young v. Bank of State 5 Ala. 179, 39 Ann. Dec. 322; English v. Johnston, 17 Cal. 107, 76 Ann. Dec. 574.

In 20 American Jurisprudence it is said that the better rule appears to be that it is within the discretion of the court to require all of the material portions of a writing to be read where the plaintiff offers

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a portion thereof. We cite 20 Am. Jur. "Evidence" Sec. 914, p. 771, and the case of Martin v. New York L. Ins. Co., 30 N.M. 400, 234 P. 673, 40 A.L.R. 406.

If a paper is to be read, the whole of it should be read. We cite English v. Johnston, 17 Cal. 107, 76 Ann. Dec. 574.

Then there is Exhibit 8, a most important document in the case, which the judge advocate doesn't offer into evidence.

To allow only the excerpts that the judge advocate offers to be put into evidence will not give the true picture. In fact, it will distort the truth.

We object to the introduction of the excerpt and request that the judge advocate be required to submit the testimony of Admiral Sakaibara and his statement, Exhibit 8.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for Accused.

REPLY TO THE OBJECTION CONCERNING ADMISSION INTO EVIDENCE OF PROSECUTION DOCUMENT NUMBER 301 DELIVERED BY LIEUTENANT DAVID BOLTON, UNITED STATES NAVY, JUDGE ADVOCATE.

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In reply to the objections of the defense counsel, the judge advocate wishes to note on the record that this is another instance where we have not been given an advance copy of defense counsel's argument in accordance with the understood procedure between the prosecution and the defense. To this procedure the court was agreeable at the time the question of procedure was discussed. However, it is unnecessary to delay these proceedings for any recess to make or prepare a reply to the argument of the defense counsel, Commander Carlson.

Defense counsel has stated that to allow only the excerpts that have been offered by the prosecution to be received in evidence would be prejudicial to the accused KOBAYASHI. If this is true the fact still remains that his objection is completely irrelevant to the issues before the commission at this time. The commission is here asked to pass upon the admissibility of these excerpts offered by the prosecution and are not being asked to rule upon the admissibility of any other portion of the record which either the defense or the prosecution might desire to introduce into evidence. The defense has full opportunity to offer in evidence any portion of that record in the case of Shigematsu Sakaibara, et al., which they deem material or pertinent to the issues before this commission with regard to the accused, KOBAYASHI. At such time the offer is made the commission will be concerned with the question of admissibility of such evidence and whether such offered evidence is relevant and material to the charge against the accused, KOBAYASHI. The defense is in error in feeling that the burden is on the prosecution to prove the defense's case. If that is the doctrine of law it is one that the prosecution is not acquainted with.

In the introduction of the prosecution's evidence - the offer of that evidence is to be considered in terms of the question of the relevance of the evidence and its proper form and procedure of offering. It is clear that this document offered in evidence is relevant and material and it is being offered in accordance with the procedure which the commission has indicated they desired. It is apparent from an examination of the excerpts offered in evidence how these excerpts were prepared. It is clear that the excerpts were prepared directly from the action of the convening authority, the reviewing authority and the confirming authority, the findings of the military commission, and the charges and specifications against Shigematsu Sakaibara. These documents were excerpted in order to remove any material that was not relevant or pertinent to crimes committed during the period of the accused KOBAYASHI's tour of duty as commander-in-chief of the Fourth Fleet. All the pages of the offered documents read "Certified to be a true copy" on the individual pages of the excerpts from the action of the convening, reviewing, confirming and other authorities. It is apparent that the certifications on those individual pages was the certification that that was in the official record copy of the action of the confirming and other authorities. The excerpts taken show, as is proper and apparent, that the official record bore the stamp "Certified to be a true copy" signed with the name of the person who certified that action. These excerpts were put together in one document by the witness and he certified that he had made true excerpts from the official records of the Commander Marianas Area. It is obvious on its face, therefore, that the document consists of true excerpts.

The defense have said this document is now placed before them and they reitterate that they have not had an opportunity to examine the document. That is contrary to the fact. The document has been available to the defense counsel at all times and on April 12, 1948, which is more than a month prior to the instant date, the defense counsel for the accused received the excerpts, the individual excerpts which make up this document of certified excerpts prepared by the witness Commander OGDEN. The letter of certification was not signed until the 15th of May 1948 but the document, that is the entire group of excerpts was prepared and were submitted to defense counsel so that they would have them available in the form that those excerpts would later be offered in evidence by the prosecution.

The defense counsel therefore as of April 12, 1948 had complete access to the official records for they were given a copy of all excerpts and were informed that the entire official record of the Director of War Crimes, Pacific Fleet, in this case and all other pertinent cases was available to them for examination / and study. In addition, since they possessed the entire document, with the exception of the certifying covering letter which they were apprised would be added to these excerpts the accused clearly is in error in stating that they have not had an adequate opportunity to examine the document. On May 8th, 1948, they were given a typographically corrected copy of this document together with an undated covering certification letter.

It should be noted that there is no testimony of any witness of the Sakaibara case, included in excerpts that have been offered by the prosecution. The offered excerpts do not relate to anything but the primary issue - of what offenses Sakaibara was charged with which he was found guilty of by the military commission, the findings of the military commission and the action of the convening, reviewing and confirming authorities in that case. The defense counsel have full opportunity if they desire in the presentation of the defense's case to offer in evidence whatever testimony they can establish is relevant in the instant case.

In closing, the judge advocate wishes to comment on the question which the defense counsel asked with regard to "Why the prosecution could not produce Sakaibara". The commission recalls that they claimed the prosecution silenced Sakaibara. The prosecution did not silence Sakaibara. It was the inexorable hand of justice. The very proceedings excerpts from which have been offered in evidence at this time resulted in the unavailability of the accused in that case.

Respectfully,

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

"RR"

OBJECTION CONCERNING ADMISSION INTO EVIDENCE OF PROSECUTION DOCUMENT NUMBER 302 DELIVERED BY COMMANDER MARTIN E. CARLSON, A COUNSEL FOR THE ACCUSED.

We object to the introduction of prosecution document number 302 on the grounds that the excerpts taken from the IWANAMI et al trial are not a true record of the trial of IWANAMI and SAKAGAMI.

Both IWANAMI and SAKAGAMI took the witness stand in that trial and their testimony is material, pertinent, and relevant to the issues here being tried.

As we stated and for the same reasons set forth in our objection to prosecution document number 301 we ask that the judge advocate be required to offer into evidence the testimony of IWANAMI and SAKAGAMI to explain and modify this prosecution document number 302. The cases cited by us in our objection to the SAKAIBARA trial document 301 are cited in support of this objection.

We also ask why does not the prosecution call as a witness IWANAMI, Hiroshi, and SAKAGAMI, Shinji instead of making out only excerpts from their trial. Because it is more convenient for the judge advocate to do it as he is, is no justification for such procedure.

Charge II which is most important is a charge of neglect of duty and failure to protect the very charge now brought against KOBAYASHI. Why isn't that charge excerpted from the record of the trial when IWANAMI was tried for that charge also and he was found guilty of that charge also. How can the excerpt show the truth when such pertinent matter is conveniently omitted from the document offered into evidence by the judge advocate.

We ask therefore that the excerpts as offered be not admitted unless they are ammended to include all specifications of Charge I and all the specifications of Charge II and that the entire ruling or approval of the convening authority dated November 8, 1947 serial 20965.

We also ask that if this trial has been approved by the judge advocate general, U. S. Navy, that that being an important and pertinent and relevant part of the trial, then the judge advocate be required to amend his excerpts still further to include such opinion of the judge advocate general of the U. S. Navy.

If the judge advocate general of the U. S. Navy has not approved the record of the IWANAMI trial we most strongly object to the introduction of any of the excerpts from the IWANAMI trial.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
Commander, U. S. N. R.
Counsel for the Accused.

"SS"

0624

REPLY TO OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT 302

Delivered by
Lieutenant David Bolton, USN, Judge Advocate

It is true that the prosecution is offering in evidence excerpts taken from the Iwanami, et al trial and not the entire Iwanami record. These excerpts, however, are true and accurate excerpts from that record certified by the witness.

The defense counsel says that he desires the testimony of Iwanami and Sakagami to be offered in evidence. It is unnecessary for the judge advocate to offer such testimony merely because the accused believes it may be entirely relevant to the issues before this commission. If relevant the judge advocate considers such testimony superfluous. The judge advocate submits that the charges and specifications as shown in prosecution document 302, the findings with regard thereto, and subsequent convening and reviewing authorities actions clearly establishes the fact of the conviction of Iwanami and Sakagami for those offenses which are specifically set forth in the charges and specifications against Kobayashi as evidence of his neglect of duty. If defense counsel believes that testimony from the case is relevant to the issues in the instant case of Kobayashi, they can present such testimony in proper form and it will then be a matter to determine if such offered in evidence is in fact relevant.

The judge advocate cannot be expected to introduce defense evidence, particularly since the judge advocate is not in a position to know what the accused considers relevant and pertinent, particularly where the prior commission record of the Iwanami case consists of two large volumes containing almost 700 pages of testimony and voluminous appended arguments and statements. The entire record in that case has been available to defense counsel and has now been marked for identification and is still available. The defense counsel were provided with excerpts on 18 April 1948. They have had -- and will continue to have -- ample opportunity to offer in evidence whatever they desire to offer from the official record of the Iwanami case.

The defense counsel contends that charge 2 in the case of Iwanami is a charge which is relevant to the defense of the accused in this case. The judge advocate does not believe that this is so. Charge 2 in the Iwanami case deals with neglect of duty of Hiroshi Iwanami. The question of Hiroshi Iwanami's neglect of duty is not relevant or pertinent in this case. The specification as set forth in the instant case -- specification 1 (g) and specification 1 (h) and similarly specification 2 (g) and 2 (h) -- are adequately established by the excerpts that have been prepared and offered after due certification by the prosecution.

Similarly the accused asks if this record has been approved by the judge advocate general of the Unites States Navy and that the judge advocate be required to produce such action. The question of the conviction of Iwanami and Sakagami was determined in this case of Iwanami et al, is clearly established by the findings of the commission in that case and the action of the Reviewing Authority and Convening Authority. If the judge advocate general had rendered an opinion in this case such an opinion by the judge advocate general would not be relevant because the determining factor would be whether the Secretary of the Navy had set aside the action of the military commission and not what the opinion of the judge advocate general might be.

The action of the Secretary of the Navy if it were a part of this file of the Director War Crimes, Commander Marianas would be relevant and would be introduced. Such action is not in this file and this is the official file of the office of Director War Crimes as submitted by this witness. The judge advocate therefore requests that this document be received in evidence.

Respectfully,
David Bolton,
Lt., USN,
Judge Advocate.

OBJECTION TO PROSECUTION DOCUMENT NO. 303 BEING RECEIVED IN EVIDENCE

DELIVERED BY COMMANDER MARTIN E. CARLSON, U. S. NAVAL RESERVE, A COUNSEL FOR THE ACCUSED.

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We object to the introduction of prosecution document number 303 on the grounds that it is ambigious and misleading. The specification as excerpted from the original record is misleading because of the variation and difference between the original specification. In the original specification YASUYOSHI KADOTA, First Lieutenant, Imperial Japanese Army is named.

We object because the specification under Charge II "Conspiracy to commit murder" is not included in the excerpts. To simply set forth the charge, "Conspiracy to commit murder" and then not to include and set forth the specification thereunder is most prejudicial to the substantive rights of the accused.

From the excerpt the commission are informed that a conspiracy to commit murder is charged. Who committed the conspiracy? Is it the accused, KOBAYASHI? If not - why then does the prosecution introduce the charges and specifications against Chisato OISHI, a colonel, Imperial Japanese Army. The presumption is that there is no relationship between an army colonel who has in his custody prisoners of war and the accused, former vice admiral KOBAYASHI, commander-in-chief of the Fourth Fleet, Imperial Japanese Navy, who on February 2, 1944 was at Truk commanding the Japanese forces engaged in a counter attack against the American forces. KOBAYASHI was 1200 miles away from Mille.

Let us see what the criminal responsibility of one person for the acts of another is? The rule is set forth very clearly in 14 American Jurisprudence "Criminal Law" section 63, page 812. I quote therefrom: "As a general rule, one person is not liable for the criminal acts of another in which he did not participate either directly or indirectly.(12) citing Louisville R. Co. v. Com. 130 Ky. 738, 114 S.W. 343, 132, Am. St. Rep. 408. A person who is not a party to the commission of a criminal offense cannot be adjudged guilty of the offense. Partridge v. State, 88 Ark. 267, 114 S.W. 215, 20 L.R.A. (U.S.) 321, 129 Am. St. Rep. 100. In order that one may be guilty of homicide, the act must be done by him actively or constructively, which cannot be the case unless the crime is committed by his own hand, by the hands of someone acting in concert with him, or in furtherance of a common object or purpose. Com. V. Moore, 121 Ky. 97, 88 S.W. 1065, 2 L.R.A. (N.S) 719, 123 Am. St. Rep. 189, 11 Ann. Cas. 1024. A person cannot be held answerable for the misconduct of a person over whom he has no control and who, independent and of his own volition, violates the law. (13) Blocka v. Com. 153 Ky. 304, 155 S.W. 723, 44, L.R.A. (N.S.) 859."

"In order for criminal liability to arise from the act of another, the act done must be in furtherance of a common design or in prosecution of a common purpose for which the parties were combined." (16) citing Butler v. People, 125 Ill. 641, 18 N.E. 338, 1 L.R.A. 211, 8 Am. St. Rep. 423.

The prosecution have not shown that Vice Admiral Kobayashi, commander-in-chief of the Fourth Fleet, Imperial Japanese Navy participated in the crime alleged in their document number 303 and in specification 1(1) and specification 2(i) either directly or indirectly. They have not shown that Vice Admiral KOBAYASHI, commander-in-chief of the Fourth Fleet, Imperial Japanese Navy, was a party to the offense with this Colonel OISHI or the others named in the charges and specifications Commander Marshalls-Gilberts Area serial 8384, dated 10 November 1945 .

"UU"

The prosecution have not shown that Vice Admiral KOBAYASHI, commander-in-chief of the Fourth Fleet, Imperial Japanese Navy, had any control over Colonel OISHI or the other accused named in the above mentioned serial 8384 on February 2, 1944.

The prosecution have not shown that the act done was in furtherance of a common design or in prosecution of a common purpose for which Vice Admiral KOBAYASHI, commander-in-chief of the Fourth Fleet, Imperial Japanese Navy, and Colonel OISHI were combined on February 2, 1944.

Therefore, the prosecution document number 303 is immaterial and irrelevant and should not be admitted into evidence until such above enumerated conditions and relationship is shown to have existed between Colonel OISHI and Vice Admiral KOBAYASHI.

The prosecution have not shown that Colonel OISHI was the island commander at Mille at the time of the offense - February 2, 1944.

We call the Commissions attention to question forty-six and question one hundred and six put to Colonel OISHI as a witness in his own behalf at his trial and the answers thereto. Such evidence is pertinent to the excerpts offered into evidence and the excerpts should be amended to include the above questions and answers. We ask that the judge advocate be required to offer into evidence the testimony of OISHI, Chisato, Colonel, Imperial Japanese Army, in order to explain and modify this prosecution document number 303. The cases cited by us in our objection to document number 301 are hereby cited.

Why does not the prosecution call as a witness Colonel Chisato OISHI? Just because it is more convenient for the judge advocate to use as a witness Commander OGDEN is no good reason.

We ask that the excerpts as submitted be ammended as set forth above.

We ask that as submitted this prosecution document number 303 be not admitted into evidence.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. N. R.
Counsel for the Accused.

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REPLY TO OBJECTION TO RECEIVING OF PROSECUTION DOCUMENT #303 IN EVIDENCE DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE.

* *

In view of the fact that the judge advocate has not had an opportunity to be apprised of the contents of the lengthy objection by defense counsel prior to its delivery before this commission, the judge advocate has been unable to interrupt or object to the original delivery of that objection.

The judge advocate considers defense counsel's comments with regard to the evidentiary weight of prosecution's proof of portions of the charge and specifications, are highly improper, in that defense counsel is attempting in his objection to the admissibility of this document, to complete his summation with regard to a portion of the charge and specifications. Defense counsel has gone to great lengths to cite what he contends is the law of criminal negligence. Such citation and comment is at this time both improper and irrelevant. We are currently concerned with the question of the relevance of the document which the judge advocate is now offering in evidence.

Defense counsel has argued that it has not been shown that the accused was responsible for the action of one Colonel OISHI and has argued that there is a presumption that the accused could not be responsible for the actions of an army officer. Such presumption is completely unknown in law and such a presumption does not exist in fact or logic. It is a well known fact that army officers - particularly during the course of the invasion of islands occupied by the Japanese were frequently under the operational command of naval officers. Ergo there is no presumption in fact or in logic, as well as no presumption in law, that the accused could not be responsible for the action of a man because he is an army officer.

Specifically defense contend that prosecution has not shown the connection between the accused KOBAYASHI, and the persons set forth in the excerpted charge and specification in the OISHI case. It is obvious from examination of the contents of the excerpted specification in Prosecution Document number 303, that it deals with the same incident alleged in paragraph (i) of Specifications 1 and 2 in the instant case. It should be noted that the persons listed in said excerpt, as well as the persons listed in paragraph (i), include in addition to the army officer OISHI, several naval officers, such as "Kiyoshi FUETA, Lieutenant, Imperial Japanese Navy," "Harushi MOTOMURA, Ensign, Imperial Japanese Navy" etc. It is clear from examination of this portion of the charge and specifications that the incident as alleged indicates connection between naval and army personnel in the commission of this incident. The excerpts from the record of the OISHI case, as here offered in evidence, are clearly relevant to the issues in the instant case, in which the accused KOBAYASHI is charged with neglect of duty to this incident.

The accused further objects to the offered document on the ground that the excerpted portion of the charges and specifications in the OISHI case omits the name of one individual who was charged in the specification of the OISHI case. It is obvious why this name was omitted in the excerpts here offered in evidence. This name does not appear in paragraph (i) of Specifications 1 and 2 in the instant charge against KOBAYASHI, and therefor inclusion of his name would have been irrelevant and unnecessary with regard to the instant case against KOBAYASHI.

"VV(1)"

The reason why KOBAYASHI was not charged with neglect of duty with regard to this individual in connection with the incident is immaterial. But since defense counsel raises the issue it may be noted that one individual originally charged in the OISHI case with regard to the incident there alleged, was apparently found not guilty. In view of the conviction of the others, those named in paragraph (i) of Specifications 1 and 2 of the instant case, and set forth in the excerpted specification of the OISHI case, the fact that one individual was acquitted in that case would appear to be wholly immaterial and irrelevant in the instant case against KOBAYASHI.

The objection of defense counsel that the excerpts do not contain charge two of the OISHI case is without merit. Charge II of the OISHI case related to a conspiracy to commit murder. The judge advocate did not feel that it was necessary or relevant in this case to include that charge or any of the reviewing actions with regard to that charge. If Charge II in the OISHI case had related to the stealing of a bicycle it would not be incumbent upon the judge advocate in this case which does not charge the accused KOBAYASHI, with neglect of duty with reference to subject bicycle, to include in his excerpts such irrelevant portions. Similarly it would be completely irrelevant, in the proceedings of this commission, whether OISHI had been found guilty or not guilty of stealing the bicycle. In the same way it is obvious why the charge of conspiracy to commit murder is not relevant to the charge against KOBAYASHI. The accused KOBAYASHI has not been charged with neglect of duty in permitting Chisato OISHI and the others to form a conspiracy to commit murder. The neglect of duty of the accused KOBAYASHI with regard to this incident is specifically set forth in paragraph (i) of Specification 1 and paragraph (i) of Specification 2. There is nothing mentioned therein which refers to conspiracy to commit murder. Paragraph (i) reads "the unlawful killing of five American prisoners of war....." and does not refer to the term "conspiracy".

The counsel for the accused has requested that the judge advocate should be required to include the testimony of Chisato OISHI in the excerpts which are offered in evidence in this prosecution document. This is another instance where the defense believe that it is the duty of the judge advocate to either prove the defense's case or else prove the prosecution's case in the manner in which the defense prefer that the prosecution should prove it. Obviously the judge advocate is not to be governed by what defense prefers in this respect. The judge advocate will submit and has submitted the evidence which he deems relevant and appropriate with regard to the charge and specifications against the accused. From the record in the case of OISHI et al, the judge advocate has submitted relevant portions, and has offered those excerpts in evidence. The defense is at complete liberty, as the judge advocate has frequently reiterated, to obtain proper excerpts from those case records and offer them in evidence in connection with presentation of the defense case. There should be, and is no burden upon the prosecution to include the testimony of OISHI in the document now offered in evidence.

With regard to the final remarks by defense counsel Commander Carlson, it should be noted that the defense in the midst of their objections seek to introduce a motion for the production of a witness. Obviously such procedure is improper and irrelevant to the question. The commission is at this time considering an objection to a document offered by the prosecution. The motion for the production of a witness is most inappropriately placed in such an objection. The judge advocate therefor will not comment concerning the merits of such motion.

The judge advocate therefore requests that this document be received in evidence.

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

"VV(2)"

0629

OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NUMBER 304.

Delivered by
Commander Martin E. Carlson, USNR, Defense Counsel

The defense objects to the introduction at this time of document 304 on the ground that these excerpts are irrelevant and immaterial.

We object because the excerpts are misleading and incomplete. There is excerpted "Charge III, Neglect of duty in violation of the laws and customs of war Specification 1 and Specification 2". This is all that is excerpted. In order to explain this excerpt and not to mislead the accused or the commission we maintain that the excerpts should be amended to include specifications 1 and 2 of this charge III and that the findings of the commission should be amended to include findings on this charge III.

We object because this document 304 bears on the third page the page which shows or rather purports to show the findings of the commission which tried Captain Tanaka the legend "Certified to be a true copy /s/ E. L. Field, Lt., USNR". This is obviously not the fact because the findings as set forth on that page are not the complete findings. Such a legend should be stricken from that page.

For the reasons set forth above and for the reasons set forth in prosecution document 301 we object to this document.

We object because this prosecution document does not show the testimony of either Captain Tanaka or Vice Admiral Wakabayashi. Such testimony as they gave in evidence is pertinent, relevant and material to explain and modify the excerpted material and should be included in the document 304. We refer to Q. 38 put to Tanaka and his answer thereto and questions 19, 21, and 23 put to Vice Admiral Wakabayashi and his answers thereto.

We therefore object to this document 304 as it is, incomplete, ambiguous, irrelevant and immaterial.

Respectfully,

Martin E. Carlson,
Commander, USNR,
Defense Counsel.

06 30

REPLY TO OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NUMBER 304

Delivered by
Lieutenant David Bolton, USN, Judge Advocate.

Prosecution document number 304 has been offered in evidence. It consists of excerpts from the official record of the case of Captain Masaharu Tanaka et al. It deals with an incident occurring on or about February 17, 1944 on Dublon Island, Truk Atoll. This is the same incident with regard to which the accused Kobayashi is charged in specification 1, paragraph (j) and specification 2, paragraph (j) with neglect of duty. It is obvious therefore that the excerpts from the official record deal with the conviction of the accused Masaharu Tanaka for the offense there stated and that the document offered is relevant and pertinent in the case of Kobayashi.

The accused objects to the contents of the excerpts contending that the entire charge three should be set forth. The judge advocate is of the opinion that this charge and specifications the Tanaka case with regard to the neglect of duty of Tanaka, are not relevant to the issues in the Kobayashi case.

It is not the duty of the prosecution to establish such matters which it does not consider relevant to the instant case. It is not charged that the accused Kobayashi neglected his duty in that he permitted Tanaka to neglect his duty but that Kobayashi neglected his duty in permitting the killing of the seven American prisoners of war by the accused Tanaka and others. The judge advocate therefore believes that the charge of neglect of duty against Tanaka is not relevant to the instant case. Similarly, the judge advocate feels that charge 2 in the Tanaka case which was a charge of assault with intent to commit murder, is not relevant in the instant case against Kobayashi.

With regard to defense request that prosecution introduce the testimony of Tanaka in evidence in the present case, the judge advocate in prior arguments, has pointed out that the prosecution cannot in the content of its proof or in the manner of its presentation of proof required to present the prosecution case in accordance with the desires of the accused.

The judge advocate has offered a document in evidence which the judge advocate believes should be admitted in evidence. In the opinion of the judge advocate, the offered excerpts contain the relevant matter with regard to the conviction of Tanaka and the document is material and relevant to paragraph (j) of specification 1 and specification 2 with regard to which the accused Kobayashi is charged with neglect of duty. The judge advocates submits that the objection of defense counsel is not well taken.

Respectfully,
David Bolton
David Bolton,
Lieutenant, USN,
Judge Advocate.

"X"

0631

検察官書類才三〇五号の変更申請

弁護人　高野純二郎

川崎進事件に関する最高の軍事委員会の公判記録の抜粋である検察官書類才三〇五号には左記の書類が含まれてゐない。

(イ) 公判記録中に録載せられたる軍事委員會決定の眞正なる抜粋。

(ロ) 召集官たるマリナ方面司令官の措置の眞正なる抜粋。

(ハ) 判決再審官たるアメリカ合衆國太平洋陸軍及太平洋方面司令長官の措置の眞正なる抜粋。

最高の軍事委員會の公判記録に基く検察官の他の書類即ち検察官書類才三〇〇五号才三〇二号才三〇三号及才三〇四号には上記の書類と同様の抜粋が含まれてゐる事実に鑑み此の川崎進の事件に関する最高の軍事委員會の公判記録に付ても同様に此の種の抜粋を提出すべきことを証人に下命せられん事を茲に申請する。被告人はN.C.&B.一九八竹即ち規則(3)、二〇〇竹即ち規則(5)、及SCAP條令5、軍事委員会に據り本申請を致します。SCAP條令5、軍事委員會の權限と手続のC、証人のところで証人に対して軍事委員會は書類及其の他の証拠資料の提出を要求する權限を有す」と規定してゐる。

"XY"

REQUEST FOR MODIFICATION OF PROSECUTION DOCUMENT NO. 305

DELIVERED BY MR. TAKANO, JUNJIRO, COUNSEL FOR THE ACCUSED.

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Prosecution Document Number 305, which consists of excerpts from a previous military commission record in the case of KAWASAKI, Susumu, does not contain:

(a) True excerpts from the findings of the Military Commission as recorded on certain pages of the record.

(b) True excerpts from the action of the Convening Authority, The Commander Marianas Area.

(c) True excerpts from the action of the Reviewing Authority, The Commander in Chief, United States Pacicif Fleet and Pacific Ocean Areas.

In view of the fact that such excerpts were included in the other prosecution documents based upon prior military commission records, namely Prosecution Documents #301, 302, 303 and 304, it is respectfully requested that the witness be required to submit such excerpts with regard to the military commission record in the case of KAWASAKI, Susumu.

We wish to make this request by virtue of Sections 198, rule 3 and section 200, rule 5 of Naval Courts and Boards and SCAP rule 5(c) 2 SCAP rule 5 Powers and Procedure of Commissions, c. Witnesses, reads: "The Commission shall have power to require the production of documents and other evidentiary material."

Respectfully,

Mr. TAKANO, Junjiro.

I hereby certify the above to be a true and complete translation of the original request written in Japanese, to the best of my ability.

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

"ZZ"

0633

OBJECTION TO PROSECUTION DOCUMENT NUMBER 305 BEING RECEIVED IN EVIDENCE DELIVERED BY COMMANDER MARTIN E. CARLSON, U. S. NAVAL RESERVE, A COUNSEL FOR THE ACCUSED.

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The accused objects to the original record because it is only a copy and not even a certified copy. It is incomplete.

The accused objects to prosecution document number 305 on the grounds that it is immaterial and irrelevant. It is further objectionable on the grounds that it is incomplete and ambigious. It is still further objectionable because it is only a copy and is not certified to be a true copy.

From a casual glance at the excerpted charges and specifications it is clear that HORIE Kiroku was not the ohly person charged with this crime. We object to these incomplete excerpts. They should not be admitted into evidence unless amended to include the names of KAWASAKI, Susumu and CHO, Hikoru.

We object to the use of the word "official" and ask it be proved that that record is official.

Captain KAWASAKI testified as a witness and his testimony is pertinent, relevant and material and his testimony should be included in this prosecution document. We refer specifically to questions thirty, fifty-four, eighty-four, eighty-six, eighty-seven and the answers that Captain KAWASAKI gave thereto.

The testimony and the statement of HORIE, Kiroku is material and relevant and the excerpts should be amended to include his testimony particularly his answers to questions thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty-five, forty-six, and eighty and his statement.

The testimony of MIYAKI, Toshiro is material and relevant and the excerpts should be amended to include his testimony particularly his answers to questions forty-four, forty-five, fifty-nine, and sixty.

We say that this excerpt ambigious and confusing because no where in the charge and specifications against the accused KOBAYASHI does there appear a charge relating to killing of twenty-five American prisoners of of war on October 7, 1943.

The judge advocate has alleged in specifications 1(c) and 2(c) the killing of 96 American prisoners of war and now they seek to prove the killing of only 25 American prisoners of war. This is a material difference in the sense that it misleads the accused to his prejudice. The judge advocate cannot in the name of the convening authority allege the killing of 96 Americans and prove an entirely different offense, the killing of 25 Americans. It is necessary that the judge advocate prove that exactly 96 American prisoners of war were killed since it was alleged that 96 American prisoners were killed. To bring in excerpts from a former trial of KAWASAKI and CHO and HORIE stating that it is the trial of HORIE only and excerpting that it is the trial of HORIE for the killing of 25 American prisoners of war when the specifications allege 96 American prisoners were killed is alleging one cause of action and proving another and entirely different one.

The accused KOBAYASHI is mislead to his prejudice.

"AAA"

0634

The excerpts which the judge advocate has selected from the case of KAWASAKI, Susumu, CHO, Hikaru, and HORIE, Kiroku gave a distorted picture which can only be corrected by amending these excerpts as we have pointed out.

We cite the following cases as our authority for requiring the judge advocate to prove the contents of the remainder of the document. Crawford v. U.S., 212 U.S. 183, 53 L. ed. 465, 29 S. Ct. 260, 15 Ann. Cas. 392; Tappan v. Beardsley, 10 Wall. (US) 427, 19 L. ed. 974; Greenleaf v. Barth, 5 Pet. (U.S.) 132, 8 L. ed. 72; Walter v. Sperry, 86 Conn. 474, 85 A. 739, 44 L.R.A. (U.S.) 28; Mack v. State, 203 Ind. 355, 180 N.E. 279, 83 A.L.R. 1340; Illinois C.R. co. v. Manion, 113 Ky. 7, 67 S.W. 40, 101 Am. St. Rep. 345; State v. Smith, 144 La. 801, 81 So. 320, citing R.C. L; Mc Connell v. Combination Mine & Milling Co. 30 Mont. 239, 76 P. 194, 104 Am. St. Rep. 703; Cockcroft v. Metropolitain L. Ins. Co., 125 Pa. Super Ct. 293, 189 A. 687, citing R.C.L.; State v. Thomas 159 S.C. 76, 156, S.E. 169, citing R.C.L.; Weeks v. Mc Nulty, 101 Tenn. 495, 488 W. 809, 43 L.R.A. 158, 70 Am. St. Rep. 693; State Nat. Bank v. Urutia (Tex. Civ. App.) 246 S.W. 404 citing R.C.L.

Additional parts of the record should be introduced by the judge advocate because it bears upon, modifies, and explains the part that was offered by the judge advocate. Particularly, in this instance, it is proper that the commission require the judge advocate to introduce such additional parts of the record because the judge advocate, not the defense, has the record of the case of KAWASAKI, CHO, and HORIE who were tried by Commander Marianas. It is not enough that the judge advocate says he will make the record of the case available to the defense.

Then to allow the judge advocate to introduce only certain parts of the record does not bring out the true circumstances and the whole truth of the case. Surely war crimes trials are like all other trials in American courts concerned only with the truth of the case and not only with the conviction of the accused.

The accused in this case is charged with neglect of duty, criminal neglect of duty. When KAWASAKI, HORIE Toshiro took the witness stand in that trial and testified they should be heard by this court.

The testimony of Captain KAWASAKI, HORIE, Kiroku and MIYAKI, Toshiro at that trial and their statements a part of the record of that trial are competent, and pertinent to the issues here involved. We cite Walter v. Sperry, 86 Conn. 474, 85 A. 739, 44 L.R.A. (NS) 28.

It is necessary to have this testimony and the statements to ascertain with certainity its real sense and meaning. We cite Young v. Bank of State 5 Ala. 179, 39 Ann. Dec. 322; English v. Johnston, 17 Cal. 107, 76 Ann. Dec. 574.

In 20 American Juriprudence it is said that the better rule appears to be that it is within the discretion of the court to require all of the material portions of a writing to be read where the plaintiff offers a portion thereof. We cite 20 Am. Jur. "Evidence" Sec. 914, p. 771, and the case of Martin V. New York L. Ins. Co., 30 N.M. 400, 234, 673, 40 A.L.R. 406.

The defense should be afforded an opportunity to call upon the witness to read such additional entries as may be pertinent to the issues and which the judge advocate failed to call.

If a paper is to be read, the whole of it should be read. We cite English v. Johnston, 17 Cal. 107, 76 Ann. Dec. 574.

To allow only the excerpts that the judge advocate offers to be put into evidence will not give the true picture. In fact, it will distort the truth.

"AAA"

0635

We object to the introduction of the excerpts and request that the judge advocate be required to submit the testimony of Captain KAWASAKI, Susumu, Warrant Officer HORIE, Kiroku and Miyaki Toshiro.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the Accused.

"AAA"

REPLY TO REQUEST FOR MODIFICATION OF PROSECUTION DOCUMENT NO. 305

DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE.

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The judge advocate in reply to this request wishes to point out that in his presentation of evidence he is not limited or controlled by the defense counsel's determinatiin of what they desire the prosecution to offer in evidence. Similarly there is no legal requirement that he produce all of his evidence in the same form or in the same detail that he produces other evidence.

Prosecution Document No. 305 includes pertinent ~~extracts~~ excerpts from the charges and specifications, and from the action of the Secretary of the Navy, in the KAWASAKI case. The excerpted portion of the action of the Secretary of the Navy includes adequate reference to the findings of the Military Commission, the action of the Convening Authority, and the action of the Reviewing Authority. The judge advocate considers Prosecution Document No. 305 adequate for his purposes. The document is relevant, competent, and material. The judge advocate offers this document in evidence. If the accused desires to produce from this record additional excerpts, such as excerpts from the findings of the Military Commission, and excerpts from the action of the Convening Authority and Reviewing Authority, he is at liberty to offer such evidence during the course of presentation of his defense. The intention of the accused in this regard have no bearing on the question of the admissibility of the prosecution's document.

The judge advocate respectfully requests that the Commission admit in evidence Prosecution Document No. 305.

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

"BBB"

MOTION FOR A DIRECTED ACQUITTAL IN THE CASE OF KOBAYASHI, MASASHI,
DELIVERED BY:

COMMANDER MARTIN E. CARLSON, U. S. NAVAL RESERVE, COUNSEL FOR THE ACCUSED.

* *

The accused makes a motion for a directed acquittal on the grounds of a material variance between the allegations of specification 1(c) and specification 2(c) and the proof as shown by this prosecution document number 305 as to the number of victims alleged to have been killed. The specifications allege 96 American prisoners were killed and the proof, the prosecution document sets forth that HORIE, Kiroku was charged with killing 25 American prisoners of war and that the commission found him guilty and sentenced him to be hanged by the neck until dead.

This variance in the number of prisoners killed is material and prejudicial.

We cite the rule as to material variance set forth in 27 American Jurisprudence, "Indictments and Informations" section 177: "It is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense." (4) citing the cases of Clyatt v. U.S., 197, U.S. 207, 49 L. ed. 726, 25 S. Ct. 429; Patterson v. State 25 Ariz. 276, 215, p. 1096, 35 A.L.R. 366; People v. Connors 253 Ill. 266, 97 N.E. 643; 39 L.R.A. (N.S.) 143, Ann. Cas. 1913 A. 196; State v. Wilson, 113 Oregon 450, 230, p. 810, 233, p. 259, 39 A.L.R. 84.

We cite the following CMO to further support the rule that the evidence must correspond with the allegations of the specifications of the charge: CMO 1-1932, page 9; CMO 6-1932, pages 8-11; CMO 5-1929, page 17; CMO 10-1924, page 3.

In 27 American Jurisprudence we continue to quote from the rule reguarding variance: "This rule is based upon the requirements that the accused shall be definitely informed as to the charges against him, and that he may be protected against another prosecution for the same offense." (5). citing Berger v. U.S. 295, &.S. 78, 79, L. ed. 1314, 55 S.Ct. 629.

"The indictment or information in a criminal prosecution necessarily confines the state to the charge made against the defendant, in order that the defendant shall know, as the Constitution provides, "the nature of the accusation against him." (6) citing Bandy v. State, 102, Ohio, St. 384, 131 N.E. 499, 21 A.L.R. 594.

In 27 Am. Jur. Ibid Section 107, p. 730 "It is the general rule that where it is essential to the proper charging of an offense sought .. to be charged in an indictment or information to describe a prior judicial proceeding, a material and substantial variance in the names or description of the parties to the prior cause is fatal (12)" citing Wilson v. State, 115, Ga. 206, 41 S.E. 696, 90 Am. St. Rep. 104.

We submit the material and substantial variation in the description of the parties to trial of Kawasaki Susumu, Cho Hikaru, and Horie Kiroku, the judge advocate only alleging it was the trial of Lieutenant, junior grade Horie Kiroku, Imperial Japanese Navy.

In 41 Am. Jur, "Pleading" Section 370 the rule is: "It is a fundamental and vital principle of good pleading and practice that allegata and probata must correspond.(11) citing the following cases: Footnote 11, section 370 "Pleading" Standard Oil Co. v. Brown, 218 US 78, 54, L. ed. 939, 30 S.Ct. 669; Wilcox v. Hunt, 13 Pet (US) 378, 10 L. ed 209; Harrison

"CCC"

v. Nixon, 9 Pet. (US) 483, 9 L. ed. 201, Birmingham v. Estes, 229, Ala, 671, 159, So. 201, 97 A.L.R. 114; American Freehold Land Mortg. Co. v. Sewell, 92 Ala, 163, 9 So. 143; 13 LRA 299; Taylor v, Branch, 1 Stew & P. (ALA) 249, 23 Am. Dec. 293; Maynard v. Fireman's Fund Insurance. Co. 34 California 48, 91, American Decision, 672; Green v. Covillaud, 10 California 317, 70 American Decision, 275; Livesay verses First National Bank, 36 Colo. 526, 86 P. 102, 6 LRA (NS) 598, 118, Am. St. Rep. 120; Ingram-Dekle Lumber Co. v. Geiger 71 Fla 390, 71 So. 552, Ann. Cas 1918A 971; Coons v. Pritchard 69 Fla 362, 68 So. 225, LRA 1915 F 558; Tate v. Pensacola Gulf, Land & Development Co. 37 Fla. 439, 20 So. 542, 53 Am. St. Rep. 251; Fidelity & Co. Co. v. City Nat. Bank, 97, Ga. 634, 25 SE 392, 33 LRA 821, 54 Am. St. Rep. 440; Higgins V. Higgins, 219 Ill 146, 76 N.E. 86, 109 Am. St. Rep. 316; Griffith v. Furry, 30, Ill. 251, 83 Am. Dec. 186; Taylor v, Modern Woodmen, 72 Kan. 443, 83, P. 1099, 5 LRA (NS) 293; Caldwell v. Neil Bros. 21 La Ann 342, 99 Am. Dec. 783; Consolidated Gas Co. v. Connor, 114 Md. 140, 78, A. 725, 32, LRA (NS) 809; Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 316, 26 A. 505, 19 LRA 408, 39 Am. St. Rep. 421; Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J (Md) 248, 29 Am. Dec. 543; Downs v. Finnegan 58 Minn 112, 59 NW 981, 49 Am. St. Rep. 488; Finley v. Quirk 9 Minn 194, Gil 179, 86 Am. Dec. 93; Dougherty v. Matthews, 35 Mo. 520, 88 Am. Dec. 126; Pemberton v. Perrin, 94 Neb. 718, 144 NW 164, Ann. Cas. 1915 B 68; Cockins v. Bank of Alma, 84 Neb 624, 122 NW 16, 133 Am. St. Rep. 642; Rinker v. Aetna L. Ins. Co. 214 Pa. 608, 64 A. 82, 112 Am. St. Rep. 773; Diehl v. Adams County Mut. Ins. Co. 58 Pa. 443, 98 Am. Dec. 302; American Lead Pencil Co. v. Nashville, C. & St. L. R. Co. 124 Tenn 57, 134, SW
613 32 LRA (NS) 323; Dibrell v. Miller, 8 Yerg (Tenn) 476, 29 Am. Dec. 126; Cock v. Taylor, 2 Overt (Tenn) 49, 5 Am. Dec. 650; Avery v. Lewis, 10 Vt. 332, 33 Am. Dec. 203; Wright v. Gear, 6 Vt. 151, 27 Am. Dec. 538; Quarles v. Littlepage, 2 Hen & M. (Va) 401, 3 Am. Dec. 637; Perdue v. Ward, 88 W. Va 371, 106 SE 874, 14 ALR 539. "that nothing can generally be proved that is outside the allegations." (See section 368 supra Ibid) "and that facts must be proved substantially as alleged. If they are not thus proved, a variance results. Hence, a variance as here understood may be defined as a disagreement between a party's allegations and his proofs, (13) citing the following cases: Footnote 13. Berkowits v. Kasparewics, 121 Conn 140, 183 A. 693, 104 ALR 1326; Shelinsky v. Foster, 87, Conn. 90, 87 A. 35 Ann. Cas. 1914 C . 1007; Davidson Grocery Co. v. Johnston, 24 Idaho 336, 133 P. 929, Ann. Cas. 1915 C 1129; Aetna Bldg. & L. Asso. v. McCarty, 78 Okla 187, 189 P. 357, citing RCL: Murchison Oil Co. v. Hampton (Tex Civ App) 21 SW (2d) 59, citing RCL: McDuffee v. Boston & M.R. Co. 81 Vt. 52, 69 A. 124, 130 Am. St. Rep. 1019.

The judge advocate alleged in specification 1(c) and specification 2(c) the killing of 96 American prisoners of war and this document number 305, the alleged trial of HORIE Kiroku purports to be for the killing of 25 American prisoners of war, a material and fatal variance prejudicial to the accused in that it mislead the accused to his prejudice in maintaining his defense. It is a disagreement between the charge and the specifications and the proof of the numbers alleged to have been killed on October 7, 1943, a matter essential to the charge. It is a departure from the evidence in the substance of the issue. We cite the cases of Johnston v. Whitefield, 124 Ala. 508, 27 S. 406, 82 Am. St. Rep. 196; Coffee v. Emigh, 15 Colo. 184, 25 P. 83, 10 LRA 125; Lucke v. Clothing Cutters & T Assembly, 77 Md. 396, 111 A. 505, 19 L.R.A. 408, 39 Am. St. Rep. 421; Dallas Plumbing Co. v. Harrington (Tex Civ. App.) 275 S.W. 190, citing R.C.L.

We are prepared to show the variation not only in the present case the departure between the allegation of 96 American prisoners of war and the proof, the purported trial of Lieutenant, junior grade, HORIE, Kiroku, for the killing of 25 American prisoners of war and his sentence thereof but we have shown the departure and variance between the allegation of 25 American prisoners killed and the proof in that case by the testimony of Miyaki Toshiro that 96 persons were killed. We call the commission's attention to the testimony of Miyaki Toshiro particularly his answers to questions forty-four, forty-five, fifty-nine and sixty.

"CCC"

0639

For the above reasons on the grounds that there has been a fatal variance the accused KOBAYASHI, Masashi, former vice admiral, and commander-in-chief of the Fourth Fleet, Imperial Japanese Navy, prays for a directed acquittal.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the Accused.

"CCC"

1 h 90

„DDD„

OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 261.

DELIVERED BY:

DEFENSE COUNSEL, MR. SANAGI, SADAMU.

Defense Counsel objects to the introduction in evidence of Prosecution Document No. 261, the affidavit of OISHI, Chisato, for the following reasons:

In this affidavit, no mention is made at all of the dates of the occurrence of these incidents.

1. No mention is made of the date when Colonel OISHI was relayed orders for the execution of the POW's from Captain SHIGA, IJN.

2. It is stated that Colonel OISHI received reports of the execution of the POW's from his subordinates on three separate occasions, namely, first about a month, second about forty days and third, two or three days after this, after the day the orders were relayed him. Again no dates have been stated at all.

A statement with no mention of dates of incidents is lacking in one of the fundamental requirements for proving facts. We submit that the statement is not competent evidence because it does not show whether the incidents mentioned therein took place during the tour of duty of the defendant KOBAYASHI, Masashi as Commander-in-Chief of the 4th Fleet.

Respectfully,

SANAGI, SADAMU.

I hereby certify that the above is a true and complete translation of the original objection written in Japanese to the best of my ability.

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

"EEE"

0642

OBJECTION TO THE INTRODUCTION INTO EVIDENCE
OF PROSECUTION DOCUMENT NUMBER 261

Delivered by

Commander Martin E. Carlson, USNR.

We object to the introduction into evidence of prosecution document Number 261 on the ground that the witness is available and should therefore be called.

No notice of the taking of this affidavit was given the defense counsel or the accused, therefore no opportunity was given the accused to question the affiant, Colonel Chisato OISHI. We cite the case of National Fertilizer Co. v. Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 So. 30, Am. Cas. 1916 C 1097; State v. Hill, 20 S.C.L. (2 Hill) 607, 27 Am. Dec. 406; Doty v. Strong, 1 Punney (Wisc.) 313, 40 Am. Dec. 773.

We object because the document is irrelevant and immaterial. It is true that the affidavit speaks about a meeting at 1300 for the purpose of determining defense plans for Mille Atoll, but the date of this meeting is not stated. It is very material that the date be included because time is of the essence of the crime charged. The crime charged is neglect of duty by KOBAYASHI, Masashi, then a vice admiral, IJN, Commander-in-Chief of the Fourth Fleet, Imperial Japanese Navy, and while so serving as the Commander-in-Chief of the said Fourth Fleet during the period from April 5, 1943 to February 23, 1944. The proffered document does not show the date of this meeting for the purpose of determining defense plans.

The document does not show on what date the alleged call from Lt. Hiraoka was made. The accused KOBAYASHI should not be bound by such statements.

In the next paragraph no date is given. Time as we have stated is of the essence and should be alleged.

We object to the statement because no opportunity was given the defense to question the affiant as to whether the statement was made voluntarily. We charge that no such statement was voluntarily made by the affiant on October 24, 1945, because he was in the custody of the American forces as a prisoner of war and therefore not free to come and go or could he have the privilege of not making a statement. The legent that it is a true statement and it is voluntarily made is not necessarily a true statement. Such a statement is subject to attack and the prosecution must prove that the statement is true and that it is voluntarily made by the maker.

The witness, Commander Ogden, was not present when the statement of Colonel OISHI was made, so he is an incompetent witness as to the execution of the statement of Colonel OISHI.

The maker of this statement, Colonel OISHI, was tried for a war crim at least the prosecution introduced the exerpted portion of charges and specifications in the case of Colonel Chisato OISHI, who was tried starting November 24, 1945.

"FFF (1)"

0643

The document in the exhibit, the trial of Colonel OISHI, is not signed; it is not an original but a copy, an unsigned copy. The judge advocate has not proved the unavailability of the original if there is an original. They have not proved that the original is signed. In fact, they have no witness who can state that there even is a signed original copy.

We object to the introduction of this Prosecution Document Number 261, the alleged statement of Colonel OISHI, for the above reasons, and particularly because Colonel OISHI is available as a witness.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
COMMANDER, U.S. NAVAL RESERVE,
Counsel for the Accused.

0644

BRIEF OF AN ORAL REPLY TO THE ACCUSED'S OBJECTION
TO THE INTRODUCTION IN EVIDENCE OF PROSECUTION
DOCUMENT NUMBER 261

Delivered by

LT DAVID BOLTON, USN.

20 May 1948

In reply to Commander Carlson's argument in the objection to the receipt of this document into evidence, it should be noted first, with regard to the question of the availability of this witness, that this witness is not within the area of the convening authority and is not subject to the order of the convening authority, of the commander. This witness is confined in Sugamo Prison in Japan and not within the area of the convening authority, Commander Marianas. DK

The accused contends that there has been no opportunity to cross-examine this witness when he made the original statements, nor was there an opportunity to examine the witness at that time, which was on October 24, 1945. It is obviously irrelevant to the issue here before this commission now whether there ~~has been~~ was there some opportunity provided for the accused to ask such questions in the nature of cross-examination as he desires to ask of this witness. DK

Such an opportunity was afforded to defense when these documents, which are now offered in evidence, were submitted to defense counsel as proposed documents to be introduced by the prosecution. This was done approximately five or six weeks ago, and on May 7th the defense submitted a group of interrogatories which were forwarded immediately to Sugamo Prison in Japan for the purpose of having those interrogatories by the defense answered so that in effect the accused has had an opportunity to cross-examine with relation to the content of this statement.

Commander Carlson contends that this statement is not a voluntary statement because the maker of that statement, Colonel Oishi, was then confined as a war criminal suspect. It is obvious that such confinement does not establish the fact that the maker of the statement did not make that statement voluntarily or that the statement was not in ~~effect~~ fact true. The maker of that statement, Colonel Oishi, himself said, and I read from the last paragraph of the document which is offered in evidence: "The above statement was read to me in Japanese by an interpreter who signed opposite my name as a witness. The above statement is a true statement of the facts and events set forth, and is voluntarily made by me." That, I submit, is the best evidence as to whether or not that statement was voluntarily made or whether or not it was in fact true. DK

It should be noted as corroborative ~~indication~~ of this ~~that~~, that the statement was admitted in evidence and made an exhibit in the case of Oishi, who is the maker of this same statement. DK

It is submitted that this document must have been voluntarily made and was ~~relative~~ RELEVANT to the charges and specifications in the Oishi case. DK

David Bolton

DAVID BOLTON,
Lieutenant, U.S. Navy,
Judge Advocate.

"GGG (1)"

0645

REPLY TO OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 261

DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE.

The accused objects to the admission in evidence of Prosecution Document No. 261 on the ground that in this affidavit there is no mention of the dates of the occurrence of these incidents. It is true that this statement does not mention dates of the incidents referred to therein but it does not follow from that fact that this statement is inadmissible. The dates of the incidents mentioned in this statement will be established during the presentation of the prosecutions case and it will be fully shown that the incidents occurred with the period of the tour of duty of the accused, KOBAYASHI, Masashi, as Commander-in-Chief of the Fourth Fleet. It should be noted that in paragraph (i) of Specification 1 and paragraph (i) of Specification 2 of the Charge and specifications preferred against the accused, the accused is charged with neglect of duty with regard to the unlawful killing of American prisoners of war on or about February 2, 1944, at or near MILLE, by OISHI, Chisato, and other named members of the Japanese armed forces. The statement offered as Prosecution Document No. 261, is a statement signed by said Chisato OISHI which deals with the execution on MILLE Atoll, of American prisoners of war. Clearly therefore the prima facie relevance of this document to the case against the accused is clearly established and the accused has offered no tangible argument to refute the relevance of this document.

The prosecution during the presentation of its case will more fully develop the surrounding facts in regard to the incident alleged in paragraph (i) of Specifications 1 and 2 and will establish that the incidents referred to in the instant statement are part of the incidents alleged in paragraph (i).

The Commission realizes that it is not incumbent upon the prosecution to prove its entire case at any time, and that the admission of any document or other evidence in court may be conditioned by the Commission upon later proof of its relevance. If the Commission believes that the relevance of this document has not been fully established, it can admit the document in evidence conditioned upon the requirement that the prosecution shall during the course of its presentation more fully establish the relevance of the document. Orderly presentation of the prosecution's case together with the desire to eliminate any unnecessary recall of witnesses, justifies conditional admission of this document in evidence even if the commission is not fully assured as to its relevance.

The judge advocate however contends that the evidence already before the Commission clearly established the relevance of the instant statement. I refer to Prosecution Document No. 303 which contains excerpts from the charges and specifications, findings, action of the convening authority, action of the reviewing authority, and action of the confirming authority in the Case of Colonel Chisato OISHI.

"GGG (2)"

0646

There was only one incident for which OISHI and the other accused in that case were tried. That incident occured, as noted in the ~~extracted~~ excerpted charges and specifications, on or about February 2, 1944, which is the date of the incident alleged in paragraph (i) of Specifications 1 and 2 of the instant case. The additional accused, time and place of the incident, number of prisoners of war killed, and the manner of their killing clearly establishes the fact that the incident for which OISHI and the others were there convicted, is the identical incident set forth in paragraph (i) of the instant case.

Prosecution document No. 261, is a statement made by OISHI one of the accused in that case, which was admitted in evidence in that case. Its relevance to the incident is therefor clearly established,for in order to be admissible in that case, it was necessary that it be relevant to that issue, namely the MILLE incident of February 2, 1944, for which OISHI was there charged.

The accused in the instant case has not sought to deny the relevance of this OISHI statement to the incident there charged, but has merely contended that the document standing upon its own must show whether the incidents mentioned therein took place during the tour of duty of the defendant KOBAYASHI. The prosecution submits that this contention is without merit for the prosecution is not limited to the document itself in order to establish its relevance. If the prosecution can in any way establish the relevance of the document, that document is admissible, and the judge advocate maintains that he has established the relevance of the document to the charge against the accused, KOBAYASHI.

The judge advocate therefor respectfully submits that the defense objection to the receipt in evidence of prosecution document number 261 should not be sustained.

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

0647

検事側書類第二七一〇号の證據に對する異議

弁護人 佐々木 [illegible]

被告者は左の理由に基き検事側書類第二七一〇号田中政治の陳述書が證據として受理されることに異議を申立てる。

陳述者田中政治は一九四六年十一月或る軍法委員會に於て被告者として裁判に附され有罪を言渡されたものである。彼の裁判記録に依れば彼は自分自身の為めに證人となることを許され、彼の陳述書に關聯して一九四四年三月十七日付書面を提出した。その報告書に關しその中田根據地隊司令部で開かれた會議の[illegible]詳細に證言した。

然るに一九四七年九月二十三日附の彼の宣誓口供書に於ては本陳述を為し陳述書中に於て中田根據地隊司令部の會議に出席せし人々の名前及其の發言を詳細に述べてゐる。

彼の公判廷の證言と異り且つ斯くの如き重大なる事實が宣誓口供書に一方的に陳述せられ反對訊問の機會の与へられない證據に採用されることは甚だしく公正を失するものである。

又斯かる重大なる陳述が田中政治によって自發的に為されたものであると言ひ難いと思はれるからである。

[illegible]第二十一版には次の如く述べてゐる。

"An affidavit differs from a deposition in that it is taken <u>ex parte</u> 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."

本裁判所條例極東國際軍事裁判所條例第十三條に於て證據はあらゆる手段を用ひて集め得ることを規定しているがそれは "as are necesary to obtain justice" と言ふ條件が付せられてゐる。検事側書類第二七一〇号の田中政治の陳述は前述の根據に依って正義を失するものであるから極東國際軍事裁判所條例第十三條の規定に依っても證據として採用さるべきでないものである。

"HHH"

OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 271a DELIVERED BY DEFENSE COUNSEL MR. SANAGI, SADAMU.

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The accused objects to the introduction in evidence of prosecution document Number 271a, a statement by TANAKA, Masaharu, for the following reasons:

The affiant, TANAKA, Masaharu was tried and convicted in February of 1947 by a Military Commission convened by The Commander Marianas Area. According to the record of proceedings of the TANAKA trial, TANAKA, Masaharu took the witness stand in his own behalf and testified, with regard to the execution of prisoners of war held on 17 February, 1944, that he reported this matter to Staff officer HIGUCHI after the conference which was held at the 4th Base Force that day.

On the 22nd of September 1947 - seven months after his trial, however, he made this statement, and in this statement he stated, first, that he reported this execution of the prisoners of war at the conference held at the 4th Base Force, and secondly, he named and described the seating order of the persons present at the conference.

This varies greatly with the testimony of his trial, and furthermore, to admit such new and important fact taken ex parte after the trial without giving opportunity to cross-examine is most prejudicial to the accused.

Furthermore, it has not been proved that this important statement was made voluntarily by TANAKA, Masaharu.

Naval Courts and Boards, Section 217 states as follows:

"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."

In Paragraph 5 of the precept for this Military Commission, it is provided that the SCAP rules may be utilized in the introduction of evidence, but under the condition, "as are necessary to obtain justice". For the above mentioned grounds the prosecution document number 271a, a statement of TANAKA, Masaharu, is prejudicial to the rights of the accused, and therefore, should not be introduced into evidence even in view of the provision of paragraph 5 of the precept.

Respectfully,

Mr. SADAMU, SANAGI

I hereby certify that the above is a true and complete translation of the original objection, written in Japanese, to the best of my ability.

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

"III"

0649

OBJECTION TO PROSECUTION DOCUMENT NUMBER 271a

Delivered by
Commander Martin E. Carlson, USNR,
Counsel for accused.

We object to the introduction into evidence of the document purporting to be the affidavit of Tanaka, Masaharu, former Captain, IJN, former Commanding Officer of the Forty-first Guard Unit, because to admit this document as evidence in this case is a violation of the constitutional guaranty of the right of the accused, Kobayashi, Masashi, to be confronted in this case, a criminal case, with the witness, Tanaka, Masaharu. The document itself is objected to on the grounds that it is irrelevant, incompetent, and immaterial and hearsay as to the accused Kobayashi.

The sixth amendment to the Constitution of the United States of America provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, ...; to be confronted with the witnesses against him;...."

This amendment to the Constitution of the United States applies to all criminal prosecutions; it includes this criminal prosecution of Kobayashi, Masashi before this Military Commission. Even Japanese nationals are included in the term "the accused" and Kobayashi, Masashi, is guaranteed the right to be confronted with the witnesses who appear against him.

There is no exception to this rule because Captain Tanaka is now dead. Captain Tanaka was tried by this military commission for murder and for neglect of duty in that he unlawfully disregarded and failed to discharge his duty to control as it was his duty to do, the operations of members of his command and persons subject to his control and supervision permitting them to kill seven American prisoners of war on or about February 17, 1944 and because he Tanaka, Masaharu unlawfully disregarded and failed to discharge his duty to take such measures as were within his power and appropriate in the circumstances to protect as it was his duty to do, seven American prisoners of war. The charge and specifications under which this commission tried and found Captain Tanaka, Masaharu guilty of both murder and neglect of duty are serial 10717 dated August 26, 1946 of the Commander Marianas Area. On April 16, 1947 the Acting Secretary of the Navy not the Secretary of the Navy, confirmed the sentence of death in the case of Captain Masaharu Tanaka and on September 24, 1947 at Guam Captain Masaharu Tanaka was hanged.

On the day that Captain Tanaka was hanged, the accused in this case former Vice Admiral Kobayashi, Masashi, was being held in solitary confinement at the War Criminal stockade, Guam. He had been so held here on Guam since May 23, 1946. Now comes the prosecution and they ask that the man that was hanged on September 24, 1947 be allowed to testify in this criminal trial by way of a statement. We do object to such evidence.

This statement is certainly not an official record made by Captain Tanaka as Commanding Officer of the Forty-first Guard Unit and should not be admitted as proof of the fact that there was a meeting at the Fourth Naval Base Force.

The fact that there was such a meeting is irrelevant to the issues in this case. The meeting held at the Fourth Naval Base headquarters according to the chart on the document was alleged to have been presided over by Admiral Wakabayashi and not by Admiral Kobayashi. There is some similarity in names. Such a meeting held after Captain Tanaka executed American prisoners is not relevant and material to the particular inquiry here before this commission. The neglect of duty by Admiral Kobayashi as commander in chief of the Fourth Imperial Japanese Fleet.

"JJJ (1)"

0650

It is true that Captain Tanaka did testify at his trial but it is also true that Admiral Wakabayashi testified at the trial of Captain Tanaka and denied all knowledge of the crime. Admiral Wakabayashi testified he was sick in bed. See his answers to questions 7, 8, 9, the third day of the trial, Thursday, November 7, 1946 and his answers to questions 62, 81, 82, 85, 123. Captain Tanaka himself testified differently than what is contained in his statement.

Is this commission to now accept this statement alleged to have been signed by Captain Tanaka as evidence when it is clearly at variance with his sworn testimony at his trial on the fifth day of the trial, Tuesday November 12, 1946.

The declarent, Captain Tanaka, is dead and this fact does not render his declaration admissible. See the case of Queen v. Hepburn, 7 Crouch (U.S.) 290, 3 L.Ed. 348. There are no circumstances which will attribute verity to Captain Tanaka's statement. In fact Captain Tanaka took the witness stand as a witness in his own behalf and there was ample opportunity afforded him to testify regarding the murder of the seven American prisoners of war and for the neglect of duty and failure to protect these seven prisoners of war. Captain Tanaka was found guilty of both murder and neglect of duty and failure to protect. If the prosecution desired that Captain Tanaka change his testimony in any way and that he testify as a prosecution witness in this case, the prosecution should have made a request for a stay of execution. Not having requested a stay of execution, justice and the rules of evidence prohibit any testimony from the deceased, Captain Tanaka by way of a statement or do the prosecution prefer this self-serving statement of Captain Tanaka to his testimony on the stand.

According to this statement Captain Tanaka made a report in front of C. O. Wakabayashi, Staff Officer Higuchi, Fourth Fleet Staff Officer Kawamura and other persons. But none of these persons are here on trial. By what rule of evidence is the accused Kobayashi to be bound by some sort of a statement which Captain Tanaka now deceased says he made not even in the presence of the accused, Admiral Kobayashi. The declarent further states the report was made after the prisoner had been disposed of by him.

Such a statement as is here being offered into evidence is hearsay as to the accused Kobayashi and res inter alios. We cite the cases of Radtke v. Taylor, 105 Or. 559, 210 P. 863, 27 A.L.R. 1423 as to hearsay and the following cases as to res inter alios: State v. Rozeboom, 145 Iowa, 620, 124 N.W. 783, 29 .RA (US) 37; Helton v Asher, 103 KY 730, 46 S.Q. 22, 82 Am.St. Rep. 601; Hayes v. Wabash R. Co., 163 Mich 174, 128 N.W. 217, 31 LRA (US) 229; Wilbur v. Stoepel, 82 Mich 344, 46 N.W. 724, 21 AmStRep 568; Virtue v. Creamery Package Mfg. Co. 123 Minn. 17, 142 N.W. 930, 1136, LRA 1915B, 1179; State Bank v. Brown, 165 N.Y. 216, 59 N.E. 1, 53 LRA 513; Abbott v. Sebor, 3 Johns. Cas. (N.T.) 39, 2 Am. Dec. 139; Seaboard Air Line R. Co. v. Railroad Comrs. 86 S.C. 91, 67 S.E. 1069, 138 Am.St.Rep. 1028.

In order that this statement of the deceased Captain Tanaka can be binding upon the accused Kobayashi, it must be shown by the prosecution that the accused Kobayashi authorized it. We cite the cases of Beebe v. Kirkpatrick, 321 Ill, 612, 152 N.E. 539, 47 ALR 891; Waltham Watch and Clock Co. v. Waltham, 272 Mass. 396, 172 N.E. 579, 71 A.L.R. 960; Virtue v. Creamery Package Mfg. Co. 123 Minn. 17, 142 N.W. 930, 1136 LRA 1915B, 1179.

This statement of Captain Tanaka's was not a memoranda which the deceased made in the performance of his duty and the deceased Captain Tanaka i in no way connected with the trial. The statement is therefore not admissible in evidence to prove the facts therein stated or recited. The

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following cases are cited: Cummings v. Pennsylvania F. Ins. Co. 153 Iowa 579, 134 N.W. 79, 37 LRA (US) 1169, Ann. Cas. 1913 E, 235; Arnold v. Husey, 111 Me. 224, 88 A. 724, 51 LRA (US) 813, Ann. Cas. 1916 C, 715; Vinal v. Gilman, 21 W.Va. 301, 45 Am.Rep. 562, Hay v. Peterson, 6 Wyo. 419, 45 P. 1073 34 LRA 581.

The prosecution have not even shown the proper foundation for the admission of such a statement as is here offered in evidence. This statement was not made by Captain Tanaka at or about the time of meeting referred to. We object for these various reasons principally because the declaration is immaterial, irrelevant, and incompetent.

How self-serving this statement of Captain Tanaka's is can be clearly seen by comparing it with his testimony at the trial. In order to try to save himself from being hanged we say Captain Tanaka did make this statement but now that he is dead it should not be admitted. It is hearsay as to this accused Kobayashi.

The witness, Commander Ogden, testified that Captain Tanaka gave him additional information different than was given on the witness stand. Yet nothing was done about getting a stay of execution for Captain Tanaka. Captain Tanaka went to the gallows according to the sentence in his case and his voice is forever silenced.

Now a document, a self-serving statement, a statement which the witness says he requested from Captain Tanaka two days before he was hanged is sought to be introduced into evidence. The witness knows the rights guaranteed by the Constitution to be confronted with the witnesses and yet nothing apparently is done to stay Tanaka's execution but the affiant Tanaka goes to the gallows and is hanged thereby making him unavailable as a witness. Why a statement if the affiant is hanged and not available as a witness. But not so. Tanaka is to be made unavailable only for cross-examination because the prosecution seek to introduce a self-serving statement of Captain Tanaka's into evidence. Apparently it is necessary to have Captain Tanaka's testimony. Self-serving we say because Captain Tanaka was tried on specifications and charges dated August 26, 1946 and his sentence of death announced to him by the commission on the completion of his trial was not carried into effect according to this witness on the stand now until September 24, 1947.

Why if the prosecution wanted Captain Tanaka to witness in this case didn't they seek a stay of execution rather than get a statement from him. Can it be that Captain Tanaka makes a better witness when he is not subject to cross-examination.

The accused in this case was being held in solitary confinement at the time Captain Tanaka was being questioned by Commander Ogden. The accused was not present or was he represented by counsel at the questioning. How can he be bound. The accused objects particularly in this instance to the procedure by which the prosecution seeks to deny to this accused the right guaranteed by the United States Constitution to be confronted with the witness against him. Why was not a stay of execution requested.

Because it in no way concerns or implicates the accused Kobayashi, because it is immaterial and irrelevant to this case, because to admit it violates the rules of evidence as to documentary evidence, because it is hearsay, because the prosecution have not shown it was made voluntarily, because the prosecution have not shown it is the truth, the statement being different than the sworn testimony of Captain Tanaka, we object to the introduction into evidence of this statement of Captain Tanaka, prosecution document 277a.

Respectfully,

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

"JJJ(3)"

REPLY TO COMMANDER CARLSON'S OBJECTION TO PROSECUTION
DOCUMENT NUMBER 271a

Delivered by

LT DAVID BOLTON USN
Judge Advocate

In reply to the objections by Commander Carlson, the judge advocate feels himself constrained by the necessity to conform to the requirements of the dignity before a commission of this type in his reply to the contention by Commander Carlson that the judge advocate or this witness preferred to let TANAKA, Masaharu or any other individual hang. This is a most improper and reprehensible comment in an objection. It is far from the fact and defense counsel knows it is far from the fact. Neither this witness nor the judge advocate had any control over the question of whether or not Masaharu TANAKA should be hanged. TANAKA was hanged under orders of the Secretary of the Navy, in conformance with the legal and duly authorized proceedings in which Tanaka was tried and convicted for the crimes that he had committed. The inferance that the judge advocate, or this witness, have made TANAKA unavailable to the defense is not in accordance with fact.

The statement by the defense counsel in his objection to the introduction of this document contains numerous references to alleged testimony in the TANAKA trial. Such testimony has not been before this commission and the issue before this commission at this time is not the relative truth in the testimony in the TANAKA trial, as compared with the statement of TANAKA now offered in evidence. The question before the commission is whether or not this statement is admissible in evidence.

This statement is admissible in evidence and is offered in evidence. If defense wishes to offer from the TANAKA trial such evidence as they believe may explain, conflict with, or contradict the contents of this statement, they are at liberty to do so at such time when they present their defense. And, if admitted in evidence, it would then be proper for the commission to weigh the evidence in the case of the prosecution and in the case of the defense to determine which statements are credible and in what regard.

The statement of TANAKA is not a self-serving statement. The statement was not taken prior to the time he was tried, but was taken subsequent to the time he was tried. This statement was taken after he had been convicted, after he had been sentenced, after the action by the convening authority, and after the action of the reviewing authority and confirming authority in that case. Defense have not established anything self-serving about that statement for counsel shows nothing that TANAKA could gain by making this statement. In this statement, TANAKA does not seek to throw the onus of the crime for which he was convicted upon any other person.

Defense counsel contend that the attempt was made by TANAKA to place the burden of responsibility from himself to WAKABAYASHI, and, therefore, the defense contend that this statement is irrelevant. It is apparent that if WAKABAYASHI is implicated by this statement that fact would be relevant to the accused KOBAYASHI, since WAKABAYASHI, as we know from prior documents admitted in evidence before this commission, was the Commandant of the Fourth Base Force which was under KOBAYASHI, as Com-

"KKK (1)"

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mander-in-Chief of the Fourth Fleet.

It should not be necessary for the prosecution, in establishing the relevance of this document, to do more than show that there is a line of relevance which can be established by subsequent proof. This document does not purport to in and of itself establish the responsibility of KOBAYASHI with regard to the February 17, 1944 indident. This is merely one statement and many other sources of evidence will be produced to implicate the accused and to clarify the entire incident. The witness has testified that the statement was made voluntarily by TANAKA. The statement was in the handwriting of TANAKA, and it was sworn to in the presence of this witness. There is no evidence, I submit, before this commission to controvert the reliability and admissibility of this statement, and the statement specifically notes, and the witness has sworn, that the contents of this statement are the truth.

With regard to the objections to admitting this document in evidence, as made by defense counsel, Mr. Sanagi, the judge advocate wishes to state the following: (See attached reply).

David Bolton

DAVID BOLTON,
Lieutenant, USN,
Judge Advocate.

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REPLY TO OBJECTION TO ADMISSION IN EVIDENCE OF PROSECUTION DOCUMENT 271a

Delivered by Lieutenant David Bolton, USN, Judge Advocate.

The accused in his objection to the admission of this document has pointed out that in accordance with paragraph 5 of the precept it is provided that SCAP rules may be utilized in the introduction of evidence, where necessary to obtain justice. The prosecution is of the firm opinion that the interests of justice require the admission of this document, this affidavit in evidence.

It is true as the accused points out, that there is no opportunity available to the accused for cross-examination of this affiant. The affiant is dead. And the fact that the accused is unable to cross-examine the affiant is a factor which the Commission should, and indeed must take into consideration in evaluating the probative value of this evidence. This fact, while properly going to the weight of the evidence, is not under international or military commission procedure, controlling as to the admissibility of the evidence.

The use of ex-parte affidavits in military commission proceedings is itself commonly based upon the factor of the unavailability of the affiant. The Supreme Court of the United States, in the Yamashita case, did not find the admission of such affidavits and similar evidence violative of the Fifth Amendment or other constitutional requirements.

The admission of such affidavits in evidence in war crimes trials held before military commissions is so well-established that citation of cases in this regard is unnecessary. However the judge advocate believes the Commission will be interested in the following case which indicates how broad an acceptance the admission of this type of evidence has received. During the trial of Erich Killinger and four others by a British Military Court, at Wuppertal, November 26 to December 3, 1945, the defense, before the tendering of the affidavit evidence for the Prosecution, applied for one deponent to be produced in person. The defense had been given to understand that the British Officer in question would be available for questioning. The Court decided after hearing argument, that the deponent could not be produced without "undue delay" and the President of the Court added the significant statement that "we realize that this affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a court, due weight". I cite this case from United War Crimes Commission, War Crime Trial Law Reports, Vol. IV, Trial and Law Report Series No. 50, p. 73.

In that case the affidavit was apparently admitted, although the accused had no opportunity for cross-examination or interrogatories.

In that case the affidavit was apparently admitted by the court without opportunity for cross-examination, because it would cause undue delay to produce the affiant, and the Commission should note that in that case not only was the affiant alive, not only was he a British officer, and therefore apparently within the power of the judge advocate or the court to produce him in court, but in addition in that case the prosecution had specifically given the defense to understand that the deponent would be produced in person. The court taking due note of all these factors, nevertheless admitted the affidavit, while assuring the defense that it would give due weight to their objections.

In the instant case, the deponent being unavailable because of death, the judge advocate requests the Commission to accept Prosecution Document No. 271a in evidence.

"KKK (3)"

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The accused has alleged in his objection that the instant statement is at variance with the testimony given by the affiant during the course of his trial before a Military Commission. The judge advocate does not wish at this time to enter into argument with defense concerning their interpretation of the testimony of the affiant before that court. The testimony of the affiant before that court does not in the opinion of the judge advocate contradict his statement in Prosecution Document 271a. But this is not the appropriate time to argue the weight or sufficiency of this evidence. The appropriate time for such argument is in final argument after the introduction of all relevant evidence by the defense. The prosecution has additional evidence to offer in regard to this Conference, and the defense may similarly offer relevant evidence. After the submission of all the relevant evidence in appropriate closing argument, the accused can argue against the weight or sufficiency of the prosecution evidence. The question of the admissibility of the Prosecution Document rests upon its relevance and materiality, and not upon whether the accused will be able in subsequent offer of evidence, to controvert the evidence presented in the affidavit.

The accused contends that the prosecution has not proved that the statement was voluntarily made by Tanaka, Masaharu. The prosecution contends that it has proved the voluntary nature of the statement. The witness has testified that the statement was made and sworn to voluntarily by the affiant, that no force, violence, duress, threats, or inducements were used in procuring the statement. The accused has not volunteered any evidence to indicate that this statement was not voluntarily made. In the absence of such proffer of evidence the proof of the voluntary nature of the statement is uncontroverted.

For the above reasons the Judge Advocate respectfully requests that Prosecution Document No. 271a be admitted into evidence.

Respectfully,

David Bolton,
Lieutenant, USN,
Judge Advocate.

OBJECTION TO PROSECUTION DOCUMENT NUMBER 306 DELIVERED BY COMMANDER MARTIN E. CARLSON, U. S. NAVAL RESERVE, A COUNSEL FOR THE ACCUSED.

- -

The accused objects to the introduction into evidence of prosecution document number 306, the excerpts from the trial of KAWASAKI, Susumu, et al, said to be the testimony of Miyaki TOSHIRO on the grounds that the excerpts cannot be reliable, true and complete because they are taken from a document, the alleged trial of KAWASAKI, Susumu et al, which document is not an original record. It is not a certified copy. It is an incomplete copy. The witness Commander OGDEN has already testified that the office copy from which he excerpted this testimony and also the excerpts going to make up prosecution document number 305 is an incomplete copy, and not a certified copy. He doesn't know where the original is and doesn't know why no effort was made to get a certified copy, a complete copy. Under these circumstances how can Commander OGDEN certify that the excerpts are the entire testimony of Miyaki, TOSHIRO, His certification to this affect after he has testified that the record he has is incomplete and not a certified copy doesn't make sense. The court should not accept such a certification.

We object because the excerpts do not show the date on which this testimony was given. The date is important. It cannot be implied.

The prosecution are again denying this accused the rights guaranteed by the Constitution of the United States, the right of confrontation of witnesses.

The Sixth Amendment to the Constitution of the United States of America provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial,.....; to be confronted with the witnesses against,.....".

This amendment applies to all criminal prosecutions. It doesn't say all accused except Japanese nationals charged with a war crime. Yes, notwithstanding the remarks of the judge advocate that the YAMASHITA case stands for the denial to all Japanese of all rights guaranteed by the United States Constitution particularly the right to be confronted with the witnesses against him, this accused does have the right to be confronted with the witnesses appearing against him.

The witness Miyaki TOSHIRO is available and he should appear as a witness.

The right of the accused to be confronted by his accusers before the tribunal which pronounces upon the facts has always been one of the most valuable safeguards of all persons tried in our courts. It protects the accused against the peril of conviction by means of ex parte testimony or affidavits given in his absence or when he had not the right of cross-examination. See 14 Am. Jur, Criminal Law, section 176, and footnote 17 citing the following cases: Dowdell v. U.S., 231 US. 325, 55 L. ed. 753, 31 S. Ct. 590; Mattox v. U.S., 156, U.S. 237, 39 L. ed. 409, 15 S. Ct. 337; Smith v. State 147, Ga. 689, 95 S.E. 281, 15 A.L.R. 490; Foley v. Com. 228 Ky. 691, 15 S.W. (2d) 444 citing R.C.L.; State v. Heffernan, 24 S.D.,1, 123 N.W. 87, 25 L.R.A. (N.S.) 876; 140 Am. St. Rep. 764; Spencer v. State, 132 Wise 509, 112 N.W. 462, 122 Am. St. Rep. 989, 13 Ann.Cas. 969.

We quote from Section 176, 14 Am. Jur "Criminal Law,": It is generally agreed that the process of confrontation has two purposes - the main and essential one and a secondary one. The main and essential purpose of confrontation is to secure the opportunity of cross-examination. The

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opponent demands confrontation, not for the idle purpose of gazing on a witness or of being gazed on by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. That this is the true and essential significance of confrontation is demonstrated by counsel and judges from the beginning of the hearsay rule to the present day." (18), citing the following cases: Snyder v. Massachusetts, 291 U.S. 97, 78 L.ed. 674, 54 S.Ct. 330, 90 A.L.R. 575; Dowdell v. United States, 221 U.S. 325, 55 L.ed. 753, 31 S.Ct. 590, and others.

"The opportunity to cross-examine must be real."

Section 178 Ibid, "The right of a person on trial for a crime to be confronted with witnesses against him is secured or guaranteed by the Sixth Amendment to the Federal Constitution....." (3) citing the following cases: Snyder v. Massachusetts, 291 U.S. 97, 78 L.ed. 674, 54 S.Ct. 330, 90 A.L.R. 575; Valdez v. United States, 244 U.S. 432, 61 L.ed. 1242, 37 S.Ct. 330; Motes v. United States, 178 U.S. 458, 44 L.ed. 1150, 20 S.Ct. 993, and others.

We further object to this document because it is irrelevant, immaterial, and incompetent. It doesn't mention KOBAYASHI by name.

The document is confusing and ambigious. It mentions the execution of 96 prisoners whereas the trial was for the unlawful killing of 25 prisoners.

It is hearsay as to the accused KOBAYASHI.

It cannot be admitted under the rule of former testimony because Section 218, Naval Courts and Boards states it must be in a former trial of the same accused on substantially the same issues, and then only if the record of the former trial is shown to be complete.

It is further required that the record show that the witness was duly sworn. These excerpts show only: "Examined by the judge advocate". This isn't enough.

Remember this is the very testimony that the commission ordered stricken from the record yesterday.

For all the above reasons and for the reasons set forth in our objections to Prosecution Documents number 301, 302, 303, 304, 305, 261, 271a and 233 we do object to the introduction into evidence of this prosecution document number 306.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the Accused.

"LLL(2)"

ORAL REPLY TO OBJECTION TO RECEIPT IN EVIDENCE
OF PROSECUTION DOCUMENT NUMBER 306

Delivered by

LT DAVID BOLTON, USN
Judge Advocate

Defense counsel contends that the excerpt does not show the date on which that testimony was given in the KAWASAKI trial, and that the excerpt should, therefor, be inadmissible. The presence of such date on the testimeny itself does not evidence or relate to the question of authenticity or reliability of this evidence. The evidence has been clearly identified as the testimony of Miyaki, Toshiro in the case of KAWASAKI, et al, and the information, if desired by the accused, is readily available in the record of that trial, which has previously been marked for identification as Identification Number 11.

In regard to the right of confrontation of the accused with the witnesses against him, the prosecution has previously disposed of this argument in reply to the objections concerning prior affidavits offered before this Commission. The fact that the accused has been afforded no opportunity for confrontation of such affiants here before this military commission is properly to be considered in evaluating the credibility and probative value of the evidence submitted in this form. But the rules that are followed by military commissions generally, and the practice of United States Military Commissions in trial of war crimes cases, show such evidence is clearly admissible.

Defense counsel has argued that the document is irrelevant. There can be no legitimate question of the relevance of this offered testimony. The relevant portions of this testimony specifically relate to the execution of 96 American prisoners of war on Wake Island on October 7, 1943, and refers directly by name to Lieutenant HORIE. The charge and specifications (paragraph c of specifications 1 and 2) charge the accused KOBAYASHI with neglect of duty in connection with the unlawful killing of 96 American prisoners of war on Wake Island on October 7, 1943, and one of the persons alleged therein as a participant in these unlawful killings is HORIE. The relevance of Prosecution Document No. 306 in the instant case is apparent.

It is respectfully requested that this document be admitted in evidence and accorded its due weight.

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

"MMM"

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検事側事類ノ如キ提出ニ対スル異議

検事ハ次ノ理由ニ依リ被告人、佐藤武敏ノ弁護人、Capt. J.S. Lampson ノ証拠トシテ提出セラレタル検事側書類ノ如キ提出ニ対シ異議ヲ申立テル。

証拠ハ関係アルモノニ限ラルベキ事ハ明カデアルガ、本件ト被告人ト関係ガ全然不明デアルニ拘ラズ、検事ガ本件ニ関係アリト主張シテ居ル日本海軍ノ上官ニ宛テタ書類ヲ提出シ、之ニ依テ自己ノ主張ヲ立証セントスルガ如キハ、全然関係ノナイ書類ヲ提出シテ、之ニ依テ被告人ヲ有罪ニセントスルモノデアル。

仮リニ検事ノ主張スル如ク、被告人ガ日本海軍ノ為ニ諜報ヲ行ヒ、又ハ之ヲ援助シタリ、又ハ之ヲ行ハントシタリシタトシテモ、本件ニ関係ノナイ日本海軍ノ上官ニ宛テタ書類ヲ提出スルガ如キハ、全然関係ノナイ書類ヲ提出シテ、之ニ依テ被告人ヲ有罪ニセントスルモノデアル。

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今後マデニ検事ガ提出セントスル書類ニ付テモ、検事ガ之ヲ提出スル目的ガ、被告人ノ犯行ヲ明カニスルニアルカ、又ハ被告人ノ犯行ヲ証明スルニアルカヲ明カニシテ貰イタイ。

Again,

"..... To establish negligence there should be either direct proof of the facts constituting such negligence, or proof of the facts from which negligence may be reasonably presumed. Its existence may not rest in mere conjecture or in the mere possibility that the accident or injury may have occurred in a particular way."

"..... The degree of proof required in negligence cases is 'a preponderance of the evidence,' and not proof to the 'satisfaction' of the jury".

"NNN"

OBJECTION TO THE INTRODUCTION OF PROSECUTION'S DOCUMENT # 233 INTO EVIDENCE, DELIVERED BY MR. SADAMU SANAGI, COUNSEL FOR THE ACCUSED.

The accused objects to the introduction of the prosecution's document #233, an affidavit deposed by Captain L. S. ZAMPERINI, into evidence on the following grounds:

Captain L. S. ZAMPERINI, in the affidavit made by him on November 1, 1945, did not state anything about in what unit on what Island of KWAJALEIN Atoll he was confined, who was the person in charge of his custody or what was his post. He merely testified, "At KWAJALEIN we were imprisoned by Japanese Navy officials. The man in charge of the prison camp held the rank equal to a warrant officer in the U. S. Navy."

36 American Jurisprudence, "negligence", XIV Actions, C. Evidence, 4. Weight and Sufficiency, Section 332, reads: ".....The degree of proof required in negligence cases is 'a preponderance of the evidence,' and not proof to the 'satisfaction' of the jury....." ".....To establish negligence there should be either direct proof of the facts constituting such negligence, or proof of the facts from which negligence may be reasonably presumed. Its existence may not rest in mere conjecture or in the mere possibility that the accident or injury may have occurred in a particular way."

In the affidavit of Captain ZAMPERINI which the prosecution is trying to introduce into evidence, it is not clearly shown who are the perpetrators who visited cruelties upon the prisoners of war, so no one can find out that these perpetrators had any connection with the accused KOBAYASHI.

According to the rules cited above from "Weight and Sufficiency" of evidence in negligence case, the affidavit of Captain ZAMPERINI does not constitute a preponderance of the evidence; it is neither "direct proof of the facts constituting negligence" nor "proof of the facts from which negligence may be reasonably presumed."

The accused KOBAYASHI holds that this affidavit has too little weight and sufficiency to be introduced into evidence of the case in which he is now being prosecuted.

Respectfully,

SANAGI SADAMU

I hereby certify that the above is a true and complete translation of the original objection written in Japanese to the best of my ability.

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

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0661

OBJECTION TO THE INTRODUCTION AND RECEIPT IN EVIDENCE
OF PROSECUTION DOCUMENT NUMBER 233

Delivered by

Commander Martin E. Carlson, USNR
Counsel for Accused

The accused objects to the affidavit of Louis S. Zamperini, Prosecution Document No. 233, on the grounds of hearsay. Section 204, Naval Courts and Boards, provides:

> "It is a general rule that private documents of an ex parte nature, such as affidavits, are not admissible, if objected to, as evidence of the subject matter therein contained. They are mere self-serving statements."

This affidavit was made on November 1, 1945, about two years after the events he describes took place. It was not made in due course of business.

The affidavit is not against the interest of the maker.

The document recites a story of forty-seven days at sea on a raft and being the only survivor of this ordeal. The Commission will note that the affidavit was made on November 1, 1945 at Birmingham General Hospital. Surely a witness should be available who can testify regarding the circumstances under which this affidavit was made by Zamperini. As offered, this affidavit violates all the rules of evidence set forth in Section 204, N.C. & B.

We object to the introduction of this affidavit into evidence purporting to be the affidavit of Zamperini because to admit this document as evidence in this case is a violation of the Constitutional guaranty of the right of the accused, KOBAYASHI, to be confronted in this case, a criminal case, with the witness, Louis Silvie Zamperini.

Rule 6, Hearsay Rule, is set forth in Section 201 of Naval Courts and Boards. I quote:

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

In this Navy convened Military Commission it isn't enough to justify the use of hearsay evidence to say that the army commissions permit and SCAP rules permit. These SCAP rules are ex post facto rules, say what you will, try to justify them as you will they still stand as ex post facto rules. You may always find persons who can justify any procedure no matter how arbitrary and illegal. So there are persons who justify SCAP rules. But let us hear on what grounds the judge advocate justifies their use in this instance. Even the precept of this Commission doesn't authorize their use except in emergency. What is the emergency?

"PPP (1)"

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The document is objected to on the grounds that it is irrelevant, incompetent, and immaterial, and is hearsay as to the accused KOBAYASHI.

The Sixth Amendment of the Constitution of the United States of American provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial,...to be confronted with the witness against him;...."

The prosecution does not even have the original affidavit of Zamperini, but a copy. This violates the best evidence rule and the document on that ground is objectionable. Even the copy shows changes and deletions such as the date of the document.

This document is not an official record made by Zamperini. Zamperini is, according to the witness, Commander Ogden, in California, and yet no opportunity was given at the time the document was taken to be present or was an opportunity given defense to be present when Zamperini was questioned just recently by Commander Currie. No opportunity was given to even submit interrogatories.

It is true that we did, on May 7, 1948, submit interrogatories, but this does not in any way make this affidavit admissible. We do not even admit there is a person named Zamperini. The prosecution has not proved this fact. The witness, Commander Ogden, does not know this to be a fact; he has never seen a person named Zamperini. So that the fact that on May 7, 1948 we submitted interrogatories is begging the question of the admissibility of this document into evidence. The question is: Did the accused have an opportunity to submit interrogatories at the time this affidavit was taken? He did not. The affidavit should not, therefore, be admitted.

There is no limit to the extent to which the judge advocate goes in offering documents into evidence. Here they have a purported photostatic copy which has been altered in material parts, and they make no attempt to explain the reason for the alteration or where the original is. No witness is presented who was present when alterations were made in this photostatic copy or who can even testify there is an original.

This is a private writing. "It has never been considered safe to make letters self-authenticating." (20 Am. Jur. "Evidence," Sec. 955, citing Lundgren v. Union Indem. Co. 171 Minn. 122, 213 U. N. 553, 52 A.L. R. 580.)

This witness cannot even testify even this photostat copy is admissible in evidence in the state of California.

In 20 American Jurisprudence, "Evidence," Sec. 1036, the rule is:

> "The original of a writing, document, or record is the primary or best evidence of the matter contained in such writings, document or record. Copies are mere secondary evidence and under the general rule requiring the production of the best evidence of which the nature of the case admits, are not ordinarily admissible in evidence over the objection of the adverse party, unless a basis is laid for their reception by showing that the original document cannot be produced. This rule that copies of private documents are admissible only when the absence of the original has been satisfactorily explained is universal."

Even the original would not be admissible without proof of its execution and the copy that is here offered must be testified to by a competent witness who can testify that the original was executed. (See 20 Am. Jur., "Evidence," Sec. 1038.)

The rule in Section 1065 of 20 Am. Jur., "Evidence," is applicable to this affidavit:

> "If such books bear on their face suspicious alterations, interlineations , or erasures, they should not be admitted in evidence unless the suspicious circumstances are satisfactorily explained."[2] (citing Doster v. Brown, 25 Ga. 24, 71 Am. Dec. 153; Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45; Radthe v. Taylor, 105 Or. 559, 210 P. 863, 27 A.L.R. 1423; Churchman v. Smith 6 Whart. (Pa.) 146; 36 Am. Dec. 211).

The affidavit hereby submitted is only a photograph and it does not conclusively establish the existence of the original. See 20 Am. Jur. "Evidence," Section 1204, citing Re Jessup 81 Cal 408, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594.

In Section 730 of 20 Am. Jur., "Evidence," the rule is very clear as to photographs and this document is only a photograph:

> "It is generally agreed that photographs are admissible in evidence only when they are verified or authenticated by some other evidence. One offering a photograph as evidence must show by extrinsic evidence that the photograph is an accurate and faithful representation of the place, person, or subject which it purports to portray.[13] (citing Prescott &. N.W.R. Co. v. Franks, 111 Ark. 83, 163 S. W. 180, Ann. Cas. 1916 A. 773;

> "13 - Prescott & N.W.R. Co. v. Franks, 111 Ark. 83, 163 S.W. 180, Ann. Cas. 1916A, 773; Diller v. Northern California Power Co. 162 Cal. 531, 123 P. 359, Ann. Cas. 1913D, 908; Brownlie v. Brownlie, 357 Ill. 117, 191 N.E. 268, 93 A.L.R. 1041; State v. Ling, 91 Kan. 647, 138 P. 582, Ann. Cas. 1915D, 374; Ligon v. Allen, 157 Ky. 101, 162 S.W. 536, 51 L.R.A. (N.S.)842; Louisville _ N.R. Co. v. Brown, 127 Ky. 732, 106 S.W. 795, 13 L.R.A. (N.S.) 1135; McKarren v. Bostion & N. Street R. Co. 194 Mass. 179, 80 N.E. 477, 10 Ann. Cas. 961; Baustian v. Young, 152 No. 317, 53 S.W. 921, 75 Am. St. Rep. 462; Carlson v. Benton, 66 Neb. 486, 92 N.W. 600, 1 Ann. Cas. 159; Geneva v. Burnett, 56 Neb. 464, 91 N.W. 275, 58 L.R.A. 287, 101 Am. St. Rep. 628; Kingsley v. Delaware, L. & W. R. Co. 81 N.J.L. 536 80 A. 327, 35 L.R.A. (N.S.) 338; State v. Matthews, 191 N.C. 378, 131 S.E. 743, citing R.C.L.; Colonial Ref. Co. v. Lathrop, 64 Okla. 47, 166 P. 747, L.R.A. 1917F, 890; Beardslee v. Columbia Twp. 188 Pa. 496, 41 A. 617, 68 Am. St. Rep. 883; Hughes v. State, 126 Tenn. 40 148 S.W. 543, Ann. Cas. 1913D, 1262; Livermore Foundry & Mach. Co. v. Union Compress & Storage Co. 105 Tenn. 187, 58 S.W. 270, 53 L.R.A. 482; Davis v. Dunn, 90 Vt. 253, 98 A. 81, Ann. Cas. 1918D, 994, citing R.C.L.; Merrill v. Marietta Torpedo Co. 79 W. Va. 669, 92 S.E. 112, L.R.A. 1917F, 1043.

> As to authentication of X-ray pictures, see infra, ss. 736.

> Photographs of a location in question are admitted in evidence only when they represent as nearly as possible a facsimile representation thereof. Kingsley v. Delaware, L. & W. R. Co. 81 N.J.L. 536, 80, A. 327, 35 L.R.A. (N.S.) 338.

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"Proof of the accuracy of a photograph of a person may be made by the testimony of one who was familiar with the appearance of the person at the time the photograph was taken. Brownlie v. Brownlie, 357 Ill. 117, 191 N.E. 268, 93 A.L.R. 1041.

"There is no case which holds that such proof is not necessary."

This witness, Commander Ogden, is incompetent as a witness because he cannot testify regarding this matter. Unless the judge advocate offers better proof this photostat should not be admitted. It isn't enough to say that it is clear as to why this photostat was altered. Prove the original or the photograph should not even be considered.

We do not even admit that the question of the admissibility of photographs rests finally upon the trial judge. See Section 730, "Evidence," in American Jurisprudence, and cases cited in footnote 21, De Forge v. N.Y.U.H.& H.R. Co. 178 Mass. 59, 59 N.E. 669, 86 Am. St. Rep. 464.

For the reasons we set forth in our objection to Prosecution Document 261 and 271a, we object to this document, a photostatic copy of a purported affidavit of Zamporini.

To admit this irrelevant, immaterial, incompetent, and hearsay bit of evidence is most prejudicial to the substantive rights of the accused.

We waive no rights by submission of interrogatories.

Although Commander Currie just recently talked with Zamperini and knows more about him than any other person here, the prosecution put on the stand Commander Ogden, who knows nothing about Zamperini nor about the execution of this document. The accused, Kobayashi, in no way authorized this document and should therefore not be bound by the affidavit. This affidavit is not a memorandum that Zamperini made in the performance of his duty. The affiant Zamperini is not in any way connected with this trial and the prosecution has not shown the proper grounds for the admission of this document. It was not made at or about the time of the incident. We object on the ground that it is simply a self-serving statement of Zamperini. The affidavit does not name the accused Kobayashi and it is therefore immaterial and irrelevant. It is hearsay because the prosecution has not shown that it was voluntarily made. For these reasons we object to the introduction of this document.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for the Accused.

"PPP (4)"

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REPLY TO OBJECTION TO PROSECUTION NO. 233

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

The judge advocate will first consider the objections raised by defense counsel Cdr. Carlson.

In a number of the objections made by defense counsel to the admissibility of statements offered in evidence by the prosecution, defense counsel have implied that the prosecution must establish the voluntary nature of these statements before they can properly be offered in evidence. Defense counsel is apparently confusing two entirely distinct types of statements. He is confusing the offer of sworn extra-judicial statements in accordance with military comission practice, with the use of statements made by the accused in the nature of admissions or confessions. In regard to the latter type of statement, thosemade by an accused, it is normally incumbent upon the prosecution to indicate the voluntary nature of such statement, because of the doctrine affording those persons by our Constitution, a privilege against self-incrimination. This right or privilege against self-incrimination is not involved in these statements (heretofore offered in evidence by the prosecution and objection to by the defense) because these statements are not statements made by the accused Kobayashi. And therefor such objection cannot be raised by him.

The legitimate question to be raised with regard to the admissibility of these statements offered in evidence by the prosecution is whether or not these statements possess sufficient credibility to enable them to be received in evidence. The fact that these statements are sworn and subscribed to by the affiant is sufficient evidence of their reliability to justify admission of these statements in evidence. In this regard it should be noted that in general the burden of proof of inadmissibility, or at least the "burden of going forward", is upon the person objecting to the admissibility of evidence.

The defense object to admission of this document in evidence on the ground that the accused has the right to be confronted by the witnesses against him. This entire matter of the admissibility of ex-parte affidavits has been answered in numerous previous replies by the judge advocate to similar objections by defense counsel. In reply to the objection to introduction of prosecution document 271a the judge advocate pointed out that the Supreme Court of the United States considered this matter in regard to the Yamashita case where numerous affidavits, photographs, etc., were admitted in evidence. The Supreme Court did not find that the admission of such evidence in trial of a war criminal before a military commission was in violation of any rights such accused might be entitled to under the United States Constitution.

Defense counsel objects that when these affidavits were taken the accused did not have an opportunity to submit interrogatories. The invalidity of implication of defense counsel that have been deliberately withholding a substantial right of the accused, is apparent when we note that the affidavit in question was taken more than two years before the accused was charged with the instant crime, and obviously there was no basis for having the accused present or represented in the taking of that affidavit. The fact that the accused was not represented and did not have an opportunity to submit interrogatories at that time is a fact that should be accorded its due weight in evalutating the evidentiary weight of this statement. In this regard the Commission should be apprised of the fact that the accused was furnished a copy of this affidavit on April 27, 1948, and that on May 7, 1948 the accused forwarded to the judge advocate interrogatories which they desired to have

propounded. These interrogatories were immediately forwarded with the request that proper deposition be obtained for the defense. It is apparent therefor that the accused has been afforded opportunity to submit interrogatories and in fact has done so.

In so far as the so-called correction of date on the offered affidavit is alleged as a ground of objection to this affidavit, examination of the document shows that when the form of certification was prepared the month was typed in as October, but the date was not typed in. When the oath was administered the blank for the day was filled in with the written number "1st", and the typed word October was stricken and the word "November" was written in above it. This very correction, instead of being an indication of irregularity or objectionable nature of the affidavit, is on the contrary a clear and striking illustration of the authentic nature of the document because the very nature of this change marks it as the work of an honest and conscientious individual who would not ever permit the affidavit sworn to in his presence to bear a date other than the one on which it was actually sworn to in his presence.

The fact that this document is a photostatic copy of the original should not cause any difficulty with regard to its admissibility. Authentic photostatic copies of documents are admissible inevidence. Use of photostats in ordinary court procedure is evidence from the following from Wharton's Criminal Evidence, Eleventh Edition, Vol. 2, p. 1327 "Photostatic copies of documents, duly authenticated, are accepted instrumentalities of introducing official records." Under the SCAP rules which this comission is authorized to apply, there is a specific provision which authorizes the use of such evidence. SCAP rule 5d (1) (e) authorizes the use of "a copy of any document or other secondary evidence of its contents, if the original is not immediately available." The whereabouts of the original affidavit taken in November 1945 by the United States Army, in California is completely unknown to the judge advocate and under SCAP rule 5d (1) (e) this photostatic copy is therefor admissible.

With regard to the questionof relevance of the offered document, paragraph (b) of specifications 1 and 2 of the charge against the accused Kobayashi, allege that the accused is guilty of neglect of duty in connection with the unlawful torture, abuse, and mistreatment of two American prisoners of war, namely, Louis Silvie Zamperini, and Russell Allen Phillips, during the period from July 16, 1943 to August 27, 1943, at Kwajalein Atoll. It is advious therefor that the affidavit of Zamperini dealing with such mistreatment at Kwajalein is relevant and material to the issues before this Commission.

In reply, to the objections delievered by Mr. Sanagi, to the receipt of prosecution Document # 233, the judge advocate wishes to state the following:

(see attached reply.)

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REPLY TO THE OBJECTION TO THE INTRODUCTION OF PROSECUTION DOCUMENT #233

DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE.

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In reply to the defense objection to the receipt of this document in evidence the judge advocate wishes to point out that the defense objection is based on two grounds. The first ground is that of relevance, the second is that of the weight and sufficiency of evidence. With regard to the question of relevance, the judge advocate need merely point out the fact that the affidavit is clearly relevant to paragraph (b) of Specification 1 and paragraph (b) of Specification 2.

The objection that the affidavit does not specify what unit confined him or visited cruelties upon him is an objection directed toward the weight and sufficiency of the affidavit to prove the charge and specifications against the accused KOBAYASHI. This is a question with regard to the sufficiency of proof, and not a valid objection to the admissibility of the document in evidence. The prosecution is not limited in its proof of the incidents involved to the production of any one document and the admissibility of any one document is not based upon whether that document in and of itself is sufficient to establish beyond a reasonable doubt, the responsibility of the accused for the incident involved. The prosecution may use as many documents and as many witnesses as it requires to establish the guilt of the accused and the accused cannot object to the admission of this prosecution document on the ground that this document does not alone prove the prosecution's case against the accused. This second alleged ground of objection to the admissibility of the prosecution document is therefor inappropriate and without merit.

Prosecution Document number 233 should be admitted in evidence.

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

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OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 206

Delivered by Defense Counsel SANAGI, Sadamu

The accused objects to the introduction in evidence of Prosecution Document No. 206, the testimony of Lieutenant Commander G. E. Brown on the following grounds.

(1) As it is common knowledge there are numerous islands in the Truk Atoll, it is not clear from Lieutenant Commander G. E. Brown's testimony on which of these he was interned with the consoquence that it is not clear which unit had custody of him. Without clarifying this point it is not possible to determine the relation between the defendant Kobayashi, Masashi and the maltreatment of the 41 POW's headed by Lieutenant Commander G. E. Brown and consequently whether the defendant Kobayashi was responsible for controlling the actions of the Perpetrators.

(2) Next, Lieutenant Commander G. E. Brown does not state the name or the unit of the Japanese Rear Admiral who interrogated him.

As a study of Prosecution Documents No. 5 and No. 9 will reveal, the only Japanese Rear Admiral under the command of the defendant Kobayashi in November 1943 was his Chief of Staff NABESHIMA, Shunsaku. However it is proven by Prosecution Document No. 111, that during the time Lieutenant Commander G. E. Brown and the 41 POW's were on Truk, the staff members of 4th Fleet Headquarters were not on Truk but on Kwajalein.

Then in what relation did this Rear Admiral without name and whose command is unknown stand to the defendant Kobayashi? It is absolutely ambiguous.

For the same reason that the accused objected to the introduction of Prosecution Document No. 232, namely that as testimony to prove a case of neglect of duty, it lacks weight and sufficiency, he objects to the introduction in evidence of this document.

SANAGI, Sadamu,
Defense Counsel.

I certify the above is a true and complete translation of the original in Japanese to the best of my ability.

Signed & Sworn to
at USNP
Interpreter

"SSS"

0670

OBJECTION TO PROSECUTION DOCUMENT NUMBER 206
(The purported perpetuation of testimony of George Estabrook Brown, Jr., from an alleged copy.)

Delivered by

Commander Martin E. Carlson, U. S. N. R.
Counsel for the Accused

The accused objects to the introduction into evidence of this copy of interrogatories said to be in perpetuation of the testimony of George Estabrook Brown, Jr., on the grounds that this witness, Commander Ogden, is incompetent as a witness to testify either as to the original or as to the copy that is being offered into evidence.

For all the reasons set forth in our objection to the photostatic copy, the purported affidavit of Zamperini (Prosecution Document 233), we object to this copy being introduced into evidence.

We did make a motion to suppress the use of these interrogatories on the ground that no notice was given the accused at the time they were taken and that there is no provision for their use in this trial.

We cite Section 12 of Depositions in 16 Am. Jur. which definitely states that there is no right at common law to use depositions in criminal cases. We quote:

> "With respect to the taking and the use of depositions in criminal cases, a distinction is to be noted, at the outset, between the right to take testimony by depositions in advance of the trial for use upon the trial, which right does not exist under common-law rules of procedure and is therefore dependent upon statutory provision therefor..." "...Such statutes, being in derogation of the common law, are strictly construed."

We challenge the statement of the judge advocate that this accused does not have the protection of the Constitution of the United States when he is brought to trial in this American court. Such a statement by the accused in reply to our objection that the accused has the right to be confronted with the witnesses is unheard of in American courts. If American laws and rules of evidence are not in force in this military court, when a Japanese national is being tried, what law and what rules are being used in this trial? We challenge such a statement.

Even those cases where statutes authorize the taking and the use of depositions in criminal cases the validity of such statutes has been challenged upon various constitutional grounds. See Section 13, "Depositions" 16 Am. Jur. and 90 A.L.R. 377; Ann. Cas. 1916 A 1091.

In taking these depositions no opportunity was given the accused to be present and to cross-examine the witness on July 10, 1946, although the accused Kobayashi was being held in solitary confinement at the war criminal stockade, Guam, he having been held in such solitary confinement since the day he arrived, May 23, 1946, and without any charges being preferred against him. Not until March 30, 1948 was he charged with a crime.

"TTT (1)"

"In the absence of statute, depositions can be taken for use in a foreign jurisdiction only by authority of a commission or letters rogatory issued by a court of such jurisdiction(5)" 16 Am. Jur. "Depositions", Sec. 74, citing the case of Stein v. Bowman, 13 Pet. (U.S.) 209, 10 L. ed. 129, Ex parte Harkins, 6 Ala. 63, 41 Am. Dec. 38.

"Except by consent of the adverse parties, depositions cannot ordinarily be taken before the execution of process or appearance or filing of the bill."(2) Sec. 19, "Depositions," 16 Am. Jur. citing Cooper v. Bennett 70 W. V. 110, 73 S.E. 260, Ann. Cas. 1913 D. 851.

The accused Kobayashi we can assume did not consent to the taking of these interrogatories in perpetuation of testimony and this witness cannot and has not testified why it was necessary to perpetuate this testimony. The witness, Commander Ogden, cannot even testify that Brown is a competent witness.

The procedure in order to obtain a deposition is set forth in Sec. 213, N.C. & B. We read:

> "The party, prosecutor or defendant desiring the deposition submits to the court a list of interrogatories to be propounded to the absent witness, then the opposite party, after he has been allowed a reasonable time for this purpose, prepares and submits a list of cross-interrogatories. After the court has assented to the interrogatories and cross-interrogatories thus submitted, it adds such as, in its judgment may be necessary to elucidate the whole subject of the testimony to be given by the witness."

We refer to Sections 211 to 216 inclusive.

No opportunity was given the accused at the time this deposition was taken and it should therefore not be admitted into evidence.

We maintain that this Commission should rule that this deposition from these interrogatories must be taken according to the rules set forth in Sections 211 to 216, Naval Courts and Boards, and since it was not so taken that this deposition cannot be admitted into evidence.

For the court to admit this deposition interrogatories in perpetuation of testimony of George Estabrook Brown, Jr., into evidence in this trial will be prejudicial to the substantive rights of the accused.

In Section 30, "Depositions," 16 Am. Jur., we read:

> "A bill to perpetuate testimony may be filed in the court having jurisdiction of the controversy"(10) citing the case of Arizona v. California, 292 U.S. 341, 78 L. ed. 1298, 54 S. Ct. 735.

The accused, the adverse party in this instance, was not given any notice of the taking of this deposition and the deposition must be suppressed. See Sec. 38, "Depositions," 16 Am. Jur., and the following cases cited in footnote 6, Teese v. Huntingdon, 23 How. (U.S.) 2, 16 L. ed. 479; Barfield v. South Highlands Infirmary, 191 Ala. 553, 68 So. 30, Ann. Cas. 1916C, 1097; Woodward v. Spiller, 1 Dana (Ky) 179, 25 Am. Dec. 139; Hunt v. Crane, 33 Miss. 669, 69 Am. Dec. 381; Cunningham v. Irwin, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458; Wainwright v. Webster, 11 Vt. 576, 34 Am. Dec. 707; Miller v. Neff (Miller v. McMechen) 33 W.Va. 197,

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10 S.E. 378, 6 L.R.A. 515; State ex rel. Draw v. Shaughnessy, 212 Wis. 322, 249 N.W. 522, 90, A.L.R. 368.

Where a deposition de bene case is taken before return of the writ, notice should be given to the defendant in person. Gilpin v. Semple, 1 Dall. (Pa.) 251, 1 L. ed. 123.

Depositions taken on interrogatories may be suppressed upon motion when no notice of the filing of the interrogatories and no opportunity to file cross-interrogatories have been given. National Fertilizer Co. v. Holland, 107 Ala. 412, 18 So. 170, 54 Am. St. Rep. 101.

As to law governing requirements as to notice, see supra. SS. 23.

As to notice of retaking, see infra, SS 100. See generally Notice (Also 20 R.C.L. p. 339); Process (Also 21 R.C.L. p. 1258).

In Section 54, "Depositions," 16 Am. Jur. holds: "The deprivation of the right of cross-examination, by lack of notice or otherwise, renders a deposition vulnerable to a motion to suppress it." And we have made such a motion.

In 71 "Depositions," 16 Am. Jur.: "The rule is well established that a deposition taken in a foreign jurisdiction cannot be admitted in evidence without some proof that the party taking the deposition had authority so to act.(5)"citing Ann. Cas. 1914B., 161,

No evidence has been introduced by the judge advocate; the witness, Commander Ogden, is incompetent to testify regarding this matter and he did not testify regarding the authority of Lieutenant Commander Elroy G. True, Jr., USNR, to take the deposition. The authority of Lt. Comdr. True to even administer an oath is questioned unless specifically authorized; a lieutenant commander in the U. S. Naval Reserve has no authority simply by virtue of his rank as a lieutenant commander to administer an oath.

Section 84, "Depositions," 16 Am. Jur. bears out the requirements for the transmission of depositions and neither this section nor sections 211 to 216 inclusive, N.C.&B. were complied with.

We move that this deposition be excluded on the ground that to admit them will inflict substantial injury upon the accused, Kobayashi. We point out that the defects enumerated above proceed from bad faith rather than from accident or mistake. See Partridge v. Stocker, 36 Vt. 108, 84 Am. Dec. 664. See Sec. 89, "Depositions," 16 Am. Jur.

In footnote 18, the rule is set forth:

"Depositions will be suppressed where they are taken in violation of a rule providing that testimony cannot be taken by either party until the cause is at issue by sufficient answer or decree pro confesso as to all defendants." Hall v. Henderson, 134 Ala. 455, 32 So. 840, 63 L,R.A, 673."

No practice,however convenient can give validity to a deposition not taken according to law. This deposition was not taken according to law, and it should be excluded.

This right to object on the ground of defects and irregularities is not waived by our submission of cross-interrogatories on or about May 7, 1948.

"TTT (3)"

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A deposition may be taken only before some person who is duly authorized to act, citing De Rezes v. His Wife (De Renzes v. Palestine) 115 La. 675, 39 So. 805, 2 L.R.A. (N.S.) 1089, 5 Ann. Cas. 893, and See sec. 103, "Depositions," 16 Am. Jur.

We further object to this deposition on the ground that it is incompetent, irrelevant, and immaterial, and that the witness is incompetent. We object because the document is hearsay as to the accused, Kobayashi. Nowhere in the deposition is the accused, Kobayashi, mentioned, or is he accused of neglect of duty or of failure to protect the affiant, George Estabrook Brown, Jr.

Most of the interrogatories relate to a period of time outside of the time during which Kobayashi was accused of neglect of duty.

Much of the interrogatories relate to his treatment aboard a Japanese auxiliary carrier, former NYK converted liner, at Ofuna Prison Camp, Omori Prison Camp, Tokyo Camp No. 1, Mitsushima Prison Camp, and Tokyo Detached Camp No. 2. This is all immaterial and irrelevant as to the neglect of duty charged against the accused, Kobayashi, as Commander in Chief of the Fourth Fleet, Imperial Japanese Navy, from April 5, 1943 to February 23, 1944.

For the above enumerated reasons and for all the reasons we advanced against the introduction of Prosecution Documents 261, Oishi Statement; Document 271a, the statement of Tanaka; and the Prosecution Document 233, the affidavit of Zamperini, we object to this Prosecution Document No. 206, the perpetuation of testimony of George Estabrook Brown, Jr., into evidence.

We reserve all our rights to object and to appeal the ruling of the Commission on this our objection when we did submit cross-interrogatories on or about May 7, 1948.

The use of this deposition by the prosecution limits the punishment which can be imposed. (See Sec. 454, N.C.&B.)

Respectfully,

MARTIN E. CARLSON,
Commander, USNR.,
Counsel for Accused.

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BRIEF OF AN ORAL REPLY TO THE ACCUSED'S OBJECTIONS
TO THE RECEIPT OF PROSECUTION DOCUMENT NUMBER 206.

Delivered by

LT DAVID BOLTON, USN
Judge Advocate

21 May 1948

Defense counsel object to the introduction of this document on the ground that at the time the interrogatories were taken there was no opportunity file cross-interrogatories. It should be noted that at the time of the taking of these interrogatories the judge advocate had no knowledge of the existence of this case, or of the existence of the accused, Kobayashi, himself. The judge advocate did not participate in the taking of these interrogatories. The original interrogatories were taken on 10 July, 1946. The judge advocate, in the preparation of this case, submitted to the accused these interrogatories approximately seven weeks ago, and at that time the defense had an opportunity to prepare cross-interrogatories to be asked of George Estabrook Brown. Such interrogatories were, in fact, prepared and submitted by them to the judge advocate and on May 7, 1948 were forwarded so that the deposition could be taken concerning these interrogatories at the request of the defense.

Defense counsel makes much of an allegation that these are self-serving statements contained in these interrogatories, but there is nothing on which to base such a conclusion. He has given no indication of such basis and there appears to be none in fact from the interrogatories that are submitted.

With regard to the use of affidavits before military commissions, it is unnecessary to burden the commission with citations of law with regard to such affidavits and their admissibility before a military commission.

Defense counsel contends that there are certain irrelevant portions in this affidavit which do not apply to the period during which the accused was Commander-in-Chief of the Fourth Fleet, or do not apply to places that were under the command of the accused. It is clear that such irrelevant portions as may appear in the affidavit which do not relate to the specific charge and specifications may be, and in fact, must be deleted by the commission. However, the commission should consider the relevant portions and give them such weight as they deserve.

Respectfully submitted,
David Bolton
DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

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REPLY TO OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 206

DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE.

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The accused's objection to the admission of this document in evidence is similar to his objection to the admission of Prosecution Document No. 233, and for similar reasons the objection is not well taken. The accused objects that the document does not establish on which island in Truk Atoll the affiant BROWN was interned, nor who interrogated him. The objection is therefor apparently based upon the question of relevance of the document, and the question of "weight and sufficiency" of the evidence. It is unnecessary to reiterate in detail my reply to the objection to Prosecution Document No. 233. It is sufficient to note that the document clearly relates to the incident alleged in paragraph (e) of Specification 1 and paragraph (e) of Specification 2. It is not necessary for the prosecution to establish solely by this document the responsibility of the accused with regard to the alleged incident. As the document is clearly relevant and material to the charge and specifications against the accused, any further discussion with regard to the question of the weight or sufficiency of this document to establish the guilt of the accused is not pertinent to the question of the admissibility of this document in evidence.

The judge advocate respectfully requests that the Commission admit in evidence Prosecution Document number 206.

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

"VVV"

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FED F, GAR E 二十豫備大尉の宣誓供述書
(検察官証拠書類第二〇(一号)の証拠として
提出することに対する異議の申立

弁護人 高野純二郎

被告人は左記の理由に因り検察官証拠書類第二〇(一)号の証拠として提出することに異議を申立てる。

第一、宣誓供述書第二項に於て供述者は單に「撃墜せられたる日-24の搭乗員たりし彼及他の搭乗員等は洋上に救命筏にて漂流中一般の日本の哨戒船に依り救ひ揚げられた、同哨戒船内に於て虐待を受けた、ミレ環礁と思はるゝ陸地に上陸した、指揮に当つてゐた日本士官は本供述者を訊問した、此處でも彼等は虐待せられ且つ医療手当を施すことを拒まれた」と記述してゐる。

併し乍ら此の記載では(イ)該哨戒船船は本件被告人の監督及支配下に在つた船舶であつたかどうか、(ロ)其の士官が陸軍であつたか或ひは海軍であつたか、此等の点が明確を缺いて所属は何れの部隊であつたか、此等の事柄が本件に於て問擬せられてゐる被告人の職務怠慢に牽連があると言ふことを確定し得ないのである。

第二、同宣誓供述書第三項に於て供述者はクエゼリン島に送られ同處に於て高級海軍士官の訊問を受け次で拘留所に入れられた。彼の負傷した足に対しては充分且適当なる治療手当は施されなかつた、彼は病院に収容せられず其處で病院患者等に殴打せられ平手打ちせられた、該病院に於て一衛生兵及日本の一医師の外科手術たるや充分考慮を拂つて手術を受けた、併し其の手術たるや充分考慮を拂つて手術は行はれなかつたと供述してゐる。

併しながら此の供述のみでは第一に於て殴打せられた其の拘留者は如何なる建設物内に設けられてゐたものであるか、第二に其の拘留所は何人の管理下にあつたものであるか、第三に其の高級海軍士官等は何れの部隊に所属してゐたのであるか、第四に其の病院の管理者は何人であつたか、第五に、上記外科手術を施した其等の医務の人々は誰れの監督下にあつたのであるか・・・・・・ことは出来ないのである。仍て被告人は此等の事項に知ることと本件の被告人の職務怠慢との間に何らの関連のあることを主張するものである。

"WWW(1)"

(1) 此の供述書の供述者が証人として本軍法委会に召喚されんことを吾は動議する。即ちアメリカ合衆国憲法修正第六條は左の如く規定してゐるのである。

> 刑法裁判所は被告人に一定の権利を保障せねばならぬ。すべての刑事々件に於て被告人は公平な国家の陪審員によって、法律が豫め確定する所の犯罪が行はれた地域内に於て迅速且公開の裁判に附せらるる権利、訴追の性質及原因を知る権利、反対側証人と対決する権利、自己の為の証人を得るに付強制手続を有する権利及辯護人の助力を有する権利を与へられる。

敬白

高野純二郎

"WWW(2)"

OBJECTION TO THE INTRODUCTION OF PROSECUTION DOCUMENT NO. 201 THE AFFIDAVIT OF FRED F. GARRETT, FORMER CAPTAIN DELIVERED BY DEFENSE COUNSEL MR. TAKANO, JUNJIRO.

- -

The accused respectfully objects to the introduction in evidence of Prosecution Document No. 201 for the following reasons:

1. In the second paragraph of his affidavit, the deponent merely states that he and the other crew members of the B-24 which was shot down were picked up by a Japanese tugboat while they were in a life-raft on the sea; that they were mistreated aboard the tugboat by the Japanese; that they were landed on what they believed to be MILLE Atoll; that the Japanese officer in command questioned him (Captain GARRETT); that they were again maltreated and denied medical attention.

Through this, however, it is not clear (a), if the tugboat was one that was under the supervision and control of the accused; (b), in what establishment they were taken; (c), whether the officer was an army or naval officer; (d), to which force or unit the officer was attached. In the light of this statement it cannot be established that these have any bearing upon the alleged neglect of duty of the accused in the present case.

2. In the third paragraph, the deponent states that he was flown to KWAJALEIN Island, where he was questioned by high ranking Japanese naval officers and then thrown into a cell. His wounded leg was not given adequate and proper medical treatment. He was taken to a hospital and there he was struck and slapped by hospital patients. In that hospital he underwent a surgical operation by a medical corpsman and a Japanese medical doctor, which was not carried out by them with consideration.

But it is impossible to know exactly by this statement (a) in what establishment in KWAJALEIN the cell was, in which he was held in custody; (b) under whose control the cell was; (c) to which force or unit these high ranking naval officers were attached; (d) who was in charge of the hospital; (e) under whose supervision these medical men were, who performed the operation; We hold that there is no relation whatsoever between these matters and the alleged neglect of duty of the accused.

3. We move that the depenent of this affidavit be summoned before the commission as a witness, on the ground that the United States Constitution, the 6th Amendment thereof provides: "Federal Courts must guarantee certain rights to the accused. In all criminal prosecution, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

TAKANO, JUNJIRO.

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

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

"XXX"

0679

BRIEF OF AN ORAL OBJECTION TO THE RECEIPT IN EVIDENCE OF PROSECUTION DOCUMENT NO. 201.

Delivered by

Commander Martin E. Carlson, U. S. N. R.
Counsel for the Accused

21 May 1948

May it please the Commission:

We object to the introduction and receipt into evidence of Prosecution Document No. 206 on the ground that it is irrelevant and immaterial to the issues of the case.

Nowhere in the document does the name of the accused KOBAYASHI appear. The document is hearsay as to the accused KOBAYASHI and should not be admitted.

For the reasons that we advanced in our objections to Prosecution Documents No. 261, 271a, 233 and 206, we object to this document being received in evidence.

We further object because the affiant, Fred F. Garrett, is available and, as the witness, Commander Currie, has testified, Garrett has said he would appear as a witness.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S.N.R.,
Counsel for the Accused.

BRIEF OF AN ORAL REPLY TO THE ACCUSED'S OBJECTION TO THE RECEIPT IN EVIDENCE OF PROSECUTION DOCUMENT NUMBER 201

Delivered By

LT DAVID BOLTON, USN
Judge Advocate

21 May 1948

In reply to defense counsel, the judge advocate is again at a loss to understand how the defense counsel could have misinterpreted the testimony of the witness. The witness stated not that Garrett said that he would appear as a witness, but that Garrett said he would be willing to appear but for the fact that he could not travel, due to his loss of one leg and for other personal conditions.

There was no indication in the testimony of this witness that the affiant, Garrett, is able to come here and there is no testimony relative to the availability of this witness. The witness is in the United States of America and not within the area of Commander Marianas, and no compulsory process would be possible from this commission to obtain this witness.

Defense counsel has again confused the problem of hearsay and that of relevance. That which is contended in Prosecution Document No. 201, as offered, is clearly relevant to the charge and specifications and specifically against the accused Kobayashi in that it specifically relates to paragraph (f) of Specifications 1 and 2, which deal with the mistreatment received by Garrett as set forth in his affidavit as to the times and places there set forth. It is clearly relevant to the charge against the accused Kobayashi.

With regard to the objection by defense counsel that the use of this affidavit is in violation of the Constitutional rights of the accused, defense counsel is in error. Affidavits were submitted in the Trial of YAMASHITA and it was there specifically objected to, and one of the bases of the appeal was with regard to the nature of the evidence which had been introduced in that case. The Supreme Court did not find that the introduction of this evidence was in violation of any Constitutional right of the accused YAMASHITA. And similarly, it is not possible to conceive how it can be any greater violation of the Constitutional rights of the accused KOBAYASHI.

Respectfully submitted,

David Bolton

DAVID BOLTON,
Lieutenant, U.S. Navy,
Judge Advocate.

"ZZZ"

REPLY TO OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT NO. 201

Delivered by Lieutenant David Bolton, USN, Judge Advocate

The accused objects to the receipt in evidence of prosecution document No. 201 on two grounds. The first ground set forth in paragraphs 1 and 2 of the objection requires no discussion. It is another instance where the accused raises the question of the adequacy of this prosecution document to prove the prosecution's case. As the judge advocate has pointed out this is not the appropriate time for the accused to argue the adequacy, the "weight and sufficiency" of the evidence. This document is merely one prosecution document. It is not and does not purport to be the entire prosecution case. The commission in considering the objection to introduction of the prosecution document is not concerned with the evaluation of the prosecution's evidence with regard to the incident discussed in the document, but is concerned with the question of the materiality and relevance of the document. Prosecution Document No. 201 is clearly relevant to paragraph (f) of Specification 1 and paragraph (f) of Specification 2.

The second ground of "objection" by the accused is apparently directed toward the fact that the prosecution is offering an affidavit in evidence, rather than producing the witness in court. This objection merits brief discussion. The Commission in accordance with its precept dated November 8, 1947 is authorized "to use such rules of evidence and procedure, issued and promulgated by the Supreme Commander for the Allied Powers, APO 500, 5 December 1945 A.G. 000.5 (5 Dec 45) LS, Subject: 'Regulations Governing the Trials of Accused War Criminals', and modifications thereof) as are necessary to obtain justice." These regulations specifically provide, in paragraph 5 d (1) "The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. The commission shall apply the rules of evidence and pleading set forth herein with the greatest liberality to achieve expeditious procedure. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted: ,.....(c) Affidavits, depositions or other signed statements."

The instant affidavit is clearly admissible in evidence in accordance with this authority. It is unnecessary for me to remind the Commission that affidavit evidence has been consistently admitted in international tribunals and military commissions. This Commission has itself, during the course of this very proceedings, ~~without objection on that score from the accused~~, received such documents in evidence.

The accused in his objection has argued that this practice is contrary to the protection of the Sixth Amendment to the Constitution of the United States of America. The Supreme Court of the United States, in the case of In Re Yamashita, 327 U.S. 1, had occasion to consider the evidence admitted by the Military Commission in that case, and the court did not find the use before a Military Commission of ex-parte affidavits and other documentary and photographic evidence repugnant to the Constitution. In this regard the Supreme Court of the United States specifically upheld the right of military commissions under the authority of controlling military command to receive such evidence, and the Supreme Court specifically stated (p. 15) "For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities."

In an able discussion of this question in the American Journal of International Law, Vol. 40, No. 2, April 1946, p. 405, Professor Quincy Wright points out that while the Supreme Court did not cite international practice on this matter it is clear "that international tribunals have hesitated to exclude any sort of evidence and the courts in many civilized countries are similarly free in the admission of evidence leaving it to the judges to appreciate the weight that should be attached to the materials. Such evidence has been commonly admitted in military tribunals although in American courts martial certain limitations are imposed by statute. It is not believed that admission of such evidence constitutes a denial of justice in international law."

The question is also briefly discussed in War Crime Trial Law Reports, United Nations War Commission, Trial and Law Report Series No. 50, Volume IV, and the following excerpt from that report merits the attention of the Commission. "In general it may be said that the rules of evidence applied in war crime trials are less technical than those governing the proceedings of courts conducting trials in accordance with the ordinary criminal law. This is not to say that any unfairness is done to the accused; the aim has been to ensure that no guilty person will escape punishment by exploiting technical rules. The circumstances in which war crime trials are often held make it necessary to dispense with certain such rules. For instance many eye witnesses whose evidence was needed in trials in Europe had in the meantime returned to their homes overseas and been demobilized. To transport them to the scene of trial would not have been practical, and it was for that reason that affidavit evidence was permitted and so widely used.

"Furthermore, it should be pointed out that the historic function of many of the stricter rules of evidence such as the rule against hearsay was to protect juries from evidence which had not been subjected to cross-examination and the value of which, owing to their inexperience, they might not be able properly to assess. It has been argued with justification however, that the judges on war crime courts are less likely to need such protections than is the average juryman and that many of the stricter rules therefore lose their raison d'etre."

The judge advocate believes that the foregoing succinctly answers the objection of the accused. It should be noted in closing, that the substantial rights of the accused are not jeopardized by the admission of this document in evidence. While the affiant is a civilian residing in California, and the judge advocate is unable to produce him in court, the accused is not limited in regard to this affidavit to the evidence produced by the prosecution. The accused is at liberty to submit interrogatories in connection with this affidavit and to offer in evidence any further

deposition or affidavit from the author of Prosecution Document No. 201.

Prosecution Document No. 201, was originally submitted to counsel for the accused on April 27, 1948. On May 7, 1948 the accused prepared interrogatories in connection with this affidavit and requested the judge advocate to obtain a deposition from the affiant Garrett. The interrogatories were promptly forwarded. When such deposition is received the accused is at liberty to offer it in evidence before this commission. The judge advocate believes that the substantial rights of the accused are thereby fully protected, and, the admission of Prosecution Document No. 201 in evidence does not constitute a denial of justice in international law, or a violation of the rights of the accused. American Journal of International Law, Vol. 40, No. 2, April 1946, p. 405; In re Yamashita, 327 U.S. 1.

The judge advocate respectfully requests the Commission not to sustain the accused's objection to the admission of Prosecution Document No. 201, in evidence.

In view of the fact that paragraph 3 of the accused's objection to admission of Prosecution Document No. 201 is ambiguously worded, the judge advocate requests the Commission, after considering and ruling upon the accused's objection, to apprise the accused of the fact that as a matter of procedure if he desires to make a motion for the summoning of this affiant as a defense witness, such motion should in conformity with customary procedure, be made separately from his objection to the Prosecution's offer of evidence.

Respectfully,

David Bolton,
Lieutenant, USN,
Judge Advocate.

0184

検事側書類第三三三号予備大尉ラッセル アレン
フィーリアスの口供書提出に対する異議

弁護人
高野他三郎

被告は左記の理由により検事側書類第三三三号ラッセル アレン フィーリアスの口供書の証拠提出に対し異議を申立てる。

(一) 口供書の第二項に於て口供者は左の如く述べている。
彼及び事務所の者から[illegible]日計の[illegible]の指揮下にあった乗組員は太平洋の海流のまゝに四十日間漂流して日本人に拾い上げられ、[illegible]島に連れて行かれ、その後クェゼリン島に連れて行かれ其処で四十三日間抑留せられた。それから彼等は再びトラック島を経て日本に移されたのである。

然しながら此の陳述に於ては何時彼等が抑留されたか、彼等がクェゼリン及トラックの何処に抑留されたか、又之等の場所で彼等が如何に待遇せられたかが明白でない。之は被告の同様せられている[illegible]と何等関係を有しないのである。

(二) 口供書の第三項に於て口供者は彼がクェゼリンに於て約三日間[illegible]の独房に入れられたこと、其の独房の設備がよくないこと及び十分でない食物を与へられたことを述べているに過ぎない。

口供書の第五項に於て、口供者はクェゼリン島に抑留せられ日本海軍士官に訊問せられたと述べているが、之等の士官が如何なる部隊に属していたか、又彼等の姓名及階級が何であるかを述べていない。又同項に於ける訊問方法に関しても何等述べられていない。之等の事は同様せられている被告の[illegible]の責任に関しては何も証していない。

(三) 第四項に於て彼は日本人が彼等二人に医療を与へなかったことを述べている。

然しながら本項に於て日本人が医療を与へなかったことを[illegible]彼等を使用した場所が何処であるか明確でない。これでは到底被告が[illegible]せられている[illegible]を[illegible]証拠であるとは言ひ得ない。

(1)

"BBBB"