OBJECTION TO THE INTRODUCTION OF PROSECUTION DOCUMENT NUMBER 232, THE AFFIDAVIT OF RUSSEL ALLEN PHILLIPS, RESERVE CAPTAIN, DELIVERED BY DEFENSE COUNSEL, MR. TAKANO, JUNJIRO.

The accused objects to the introduction in evidence of Prosecution Document No. 232, the affidavit of Russell Allen Phillips, for the following reasons:

1) In the second paragraph of the affidavit the deponent states that after drifting with ocean currents for forty-seven days, he and the only other surviving member of the B-24 which had been forced down, were picked up by the Japanese and taken to a small island and then afterwards to KWAJALEIN Island, where they were held for forty-three days. Again they were moved to TRUK Atoll and thence to Japan.

In this statement, however, it is not clear who held them or where they were held in KWAJALEIN and TRUK and how they were treated in both of these places. This has no relevancy with the alleged nelgect of duty of the accused.

2) In the third paragraph the deponent simply states that in KWAJALEIN he was placed in a cell about three or four feet wide by six or seven feet long, that the accommodation was bad, and the food barely enough for subsistence.

According to the fifth paragraph of the affidavit, he was held in custody and questioned by Japanese Navy officials in KWAJALEIN, but he does not say to what force or unit these officials were attached; nor their names nor ranks were given. Nothing is said in it as regards the officer in command there, so that these matters prove nothing whatsoever relative to the accused's responsibility for the alleged neglect of duty.

3) In the fourth paragraph he states that the Japanese gave both of them no medical aid, but did use them in some medical experiments.

By this statement, however, it is not clear where they were denied medical aid and used in medical experiments. How then can this be evidence tending to prove the war crime allegedly committed by the accused?

TAKANO, Junjiro.
Counsel for the Accused.

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.,
Lieutenent, U.S.N.R.,
Interpreter.

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OBJECTION TO PROSECUTION DOCUMENT NO. 232

Delivered by

Commander M. E. CARLSON, USNR

22 May 1948

The accused further objects to Prosecution Document No. 232, the affidavit of Russell Allen Phillips, on the grounds that it is immaterial and irrelevant.

The affidavit speaks about Phillips being forced down in a B-24 off Palmyra Island, May 27, 1943. Then for 47 days Phillips says he drifted with the ocean currents on a life raft. Phillips relates how he was picked up by the Japanese on July 14 and taken to an island. Nothing of this is material or relevant.

Phillips continues by reciting certain incidents to describe the hard treatment he received at Kwajalein. But Phillips doesn't state that the accused, Kobayashi, vice admiral, IJN, was present, that he ordered him placed in an uncomfortable cell, or that he approved or even condoned the alleged hard treatment. In no way does Phillips connect his alleged treatment to the accused Vice Admiral Kobayashi. We grant you no prison cell is comfortable. Admiral Kobayashi doesn't like his cell; he didn't like being held in solitary confinement for almost two years without any charges being preferred against him. Nearly all prisoners complain about the fact that they are confined in a small cell and it is uncomfortable. But the affiant, Phillips, doesn't say that Vice Admiral Kobayashi ordered him even to be confined, or that Kobayashi ever knew that he was in a cell at Kwajalein. He doesn't even allege that Kobayashi had a duty as the Commander in Chief of the Fourth Fleet, IJN, to supervise the jailer or that Kobayashi permitted the jailer to abuse him. Phillips doesn't allege that Vice Admiral Kobayashi didn't give him enough food. Phillips doesn't allege that Kobayashi was the one who injected coconut juice into his veins. Who does make this allegation?

The judge advocate alleges that Kobayashi, Vice Admiral and Commander in Chief of the Fourth Fleet, IJN, did, at Kwajalein during the period from July 16, 1943 to August 27, 1943, fail to discharge his duty as Commander in Chief of said Fourth Fleet to control members of his command and persons subject to his control and supervision permitting them to torture, abuse, inhumanely treat Phillips by experimenting upon them with intravenous injections of coconut juice and by confining him in a small unsanitary and unhealthful cell. (See Specification 1 (b)). The judge advocate also alleges Kobayashi, Vice Admiral, and Commander in Chief of the Fourth Fleet, IJN, failed to protect Phillips in that Kobayashi permitted members of the armed forces of Japan to mistreat Phillips while he was held captive by naval armed forces of Japan. Please note the slight difference in Specification 2(b) from specification 1(b). Also note it is only the judge advocate that alleges mistreatment by Kobayashi, not Phillips. Phillips doesn't mention Kobayashi. Phillips doesn't even state that the Navy officials were in any way connected with Vice Admiral Kobayashi, nor does Phillips even state who these navy officials were.

Must the accused, Kobayashi, who has been held in solitary confinement and incommunicado since March 27, 1946, now try to find out who

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these persons were; must Kobayashi prove himself innocent of a charge of neglect of duty which the judge advocate attempts to prove by introducing an affidavit of a person named Phillips who swears he received hard treatment and was placed in an uncomfortable cell after having been rescued by Japanese and after he, Phillips, had been been adrift in a life raft for 47 days. The judge advocate may cleverly say that this only relates to the weight of the evidence. We say it goes to the admissibility of this affidavit of Phillips, because the affidavit doesn't name Kobayashi or even any of his subordinates. The judge advocate may state that all he has to say is "Kwajalein" and that will bind the accused, Kobayashi, for criminal neglect of duty as Commander in Chief of the Fourth Fleet even if Kobayashi were aboard his flagship, a thousand miles away. Again the judge advocate may say this goes only to the weight of the evidence, but we say that it pertains entirely to the admissibility of the evidence. A document is offered into evidence that in no way relates to the accused KOBAYASHI and it should not be admitted into evidence because it is immaterial, irrelevant and incompetent and hearsay.

All the objections we made to the introduction of Prosecution Document 261, the statement of Colonel Oishi, now confined at Sugamo Prison, Tokyo; Prosecution Document 271, the statement of Captain Tanaka, hanged on September 24, 1947; Exhibit 13, the testimony of Miyaki, Toshiro, from the trial of Captain Kawasaki, Susumu; Prosecution Document 233, the affidavit of Louis Silvie Zamperini; Prosecution Document 206, the interrogatories in perpetuation of the testimony of George Estabrook Brown, Jr.,; Prosecution Document 201, the affidavit of Fred F. Garrett, are hereby interposed in objection to the introduction of this Prosecution Document No. 232, the affidavit of Russell Allen Phillips.

This affidavit of Phillips is but hearsay evidence. It is not an exception to the hearsay rule.

In Section 169, N.C.&B., the rule is: "Hearsay evidence is objectionable, first because it is not original evidence; second, the real witness is not testifying in court under the sanction of an oath; and third, the accused has no opportunity to be confronted with the witness against him or to exercise his right of cross-examination.

On all three points this affidavit is hearsay as to the crime which Kobayashi is charged with. The judge advocate has not shown that this document is an exception to the hearsay rule; nor is it an exception to the hearsay rule. In his reply to our previous objections the judge advocate has said in effect that because an army military commission admitted hearsay evidence in the Yamashita case that this navy convened military commission should admit hearsay evidence. The judge advocate is indeed hard put when he must resort to such logic in his arguments.

We call the Commission's attention to Rule 6 as found in Section 201, Naval Courts and Boards. We shall cite this rule notwithstanding that we know full well that the judge advocate will say that Supreme Commander Allied Powers ' ' changed this rule. The rule still stands and here it is:

> "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 an 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, are mere hearsay statements and are inadmissible statements."

In Section 204, N.C.&B., we find the general rule as to private documents:

"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."

Can it be that the judge advocate has forgotten this rule of evidence?

The rule is again stated in Section 217, N.C.&B.:

"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."

All the law we can find is to this same effect, that is, that this affidavit is hearsay, and inadmissible as evidence to prove the criminal negligence of Vice Admiral Kobayashi, Commander in Chief of the Fourth Fleet.

We shall only say this for the much relied upon SCAP Rules: such rules are ex post facto rules and cannot change Naval Courts and Boards or the rules of evidence. Such SCAP Rules are no justification for admitting hearsay evidence into a trial conducted and governed by the provisions of Naval Courts and Boards. If the judge advocate cannot prove their case against the accused by evidence admissible according to the rules of evidence, we believe they should point out specifically in what way they are unable to do so. We know of no necessity which makes it impossible to procure the witness, Russell Allen Phillips or, if the judge advocate can show that it is impossible to produce Phillips as a witness, why it is necessary then to use his affidavit which is hearsay.

Remember, although Vice Admiral Kobayashi was still being held in solitary confinement and incommunicado at Guam, that no opportunity was afforded the accused to submit interrogatories to Russell Allen Phillips. It comes a few months late to say that on May 7, 1948, yes four months late, to say that the accused had a chance to submit interrogatories. Interrogatories have been submitted but this does not comply with the rule because the opportunity was not given the accused at the time Commander Currie made a special trip to the United States and interviewed Phillips.

There just isn't any exception to the hearsay rule which permits the introduction of this affidavit and to admit it will prejudice the substantive rights of the accused. His rights have been prejudiced, we have said in previous objections to documents, by the introduction of such affidavits and other documentary evidence already admitted, such as Document 261, 271a, 233, 206 and 201, but that is no reason to admit one more document which is hearsay evidence.

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In 16 American Jurisprudence, "Depositions," Section 38, "The general rule is that the adverse party must have reasonable notice of the taking of depositions so as to be afforded an opportunity to be present at the examinations. This was not done, in fact no notice whatsoever was given the accused to be present when Commander Currie took this affidavit from Phillips.

For these reasons we object to the introduction into evidence of this Prosecution Document 232, the affdavit of Russell Allen Phillips.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S.N.R.,
Counsel for the Accused.

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BRIEF OF AN ORAL REPLY TO THE OBJECTIONS TO THE RECEIPT IN EVIDENCE OF PROSECUTION DOCUMENT NUMBER 232.

Delivered by

LT DAVID BOLTON, USN
Judge Advocate

22 May 1948

In reply to defense counsel's objections to the admission of this document in evidence, the judge advocate will first direct himself to the much abused reference by defense counsel to the solitary confinement of Admiral Kobayashi. The judge advocate does not know what security or other reasons require the accused to be confined in an individual cell without cellmates, nor does he consider this matter pertinent to the admissibility of this offered document in evidence.

The affiant, Russell Phillips, who is in New Mexico, was not confined or under any duress to make or swear to the truth of this affidavit, and it is difficult to see how the confinement of the accused Kobayashi is relevant to the admissibility of that document, but as a matter of information the judge advocate wishes to point out that defense is in serious error as to the nature of such confinement. The accused, while confined as a war criminal suspect, has not been held incommunicado. He was permitted, and is permitted, to receive and send letters; clearly therefore he has been in communication with those persons he desires to communicate with. The nature of his confinement should be apparent when we note that among his other activities he is permitted to play baseball, which is a group, and not an individual, sport. That, as I say, however, is not relevant to the question of the admissibility of the prosecution document, but is offered in view of the misinterpretation by the defense counsel.

Defense counsel contends that the affidavit of Phillips does not charge the accused with the commission of any crime because it does not even mention the accused by name. The accused has been charged with the commission of the crime of neglect of duty with regard to the mistreatment which Phillips and Zamperini received. It is not pertinent or material whether Zamperini or Phillips themselves charged Kobayashi with neglect of duty. It is incumbent upon the prosecution to establish that this mistreatment of Zamperini and Phillips, which they allege in their respective affidavits, and which Phillips refers to in the offered document, is the result of the neglect of duty by the accused Kobayashi and it is not necessary that the judge advocate, by virtue of this document alone, prove the guilt of the accused with regard to that portion of the specifications. The relevance of the affidavit of Phillips, with regard to mistreatment he received, is apparent by the most cursory examination of the charge and specifications against the accused, for paragraph (b) of Specifications 1 and 2 deal with the mistreatment which was received by Phillips and Zamperini during the period from July 16, 1943 to August 27, 1943, at Kwajalein Atoll, Marshall Islands.

The judge advocate will, in the course of the remaineder of the prosecution's case, establish the responsibility of the accused in his neglect of duty with regard to the commission of these incidents.

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Defense counsel have cited what they themselves term "general rules" from Naval Courts and Boards. They are correct in their interpretation of these as general rules which apply to naval courts martial, but as the judge advocate has pointed out time and time again, the authority of this commission is not limited to these rules of evidence or procedure as are set forth in Naval Courts and Boards, and specifically in reply to defense counsels' objections to Prosecution Document No. 201, the judge advocate pointed out the authority of the precept for this commission dated November 8, 1947, to use the rules of evidence and procedure issued and promulgated by SCAP as are necessary to obtain justice. These rules, as defense counsel can see, permit the use of affidavits, depositions and other signed statements. The judge advocate has presented to the commission the fact that such affidvaits are admissible, not only in army courts as contended by the accused, not only in the case of YAMASHITA, tried by a military commission, but also to military commissions generally, not only of the United States, but of other Allied nations as well. The judge advocate cites in this regard Professor ~~Kinsey~~ Wright, who is an authority on international law, and ~~he~~ states: "I do not believe such an admission constitutes ~~an injustice~~ of international law." The Supreme Court of the United States in the YAMASHITA case similarly held that this type of evidence admitted before military commissions was not repugnant to Constitutional rights ~~that~~ an accused war criminal might have.

Defense counsel has made reference to the SCAP rules of procedure and evidence as ex post facto rules and has condemned them, therefore, as being improper and unconstitutional. Defense counsel is apparently in error with regard to the nature of an ex post facto rule. I will cite briefly Underhill's "Criminal Evidence," Section 12, on page 13, which reads as follows:

> "An accused person has no vested right in this or any other presumption, or law of evidence, or procedure, that the law-making power can not, within constitutional limits, deprive him of. The existing rules of evidence may be changed at any time by legislative enactment; but the legislative power must be exercised within constitutional limitations so that no constitutional right or privilege of the accused is destroyed. He can not be deprived of a fair and impartial trial by a jury of his peers and according to the law of the land. But the constitutional prohibition of ex post facto laws is not applicable to statutes which merely alter the method and details of the procedure of a criminal trial, even though the statute was passed after the crime was committed. Thus, a statute which simply enlarges the class of persons who may be competent to testify against the accused is not an ex post facto law as regards crimes previously committed."

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Similarly, the judge advocate will read from Wharton's "Criminal Evidence," Volume 3, 11th Edition, page 1987, which states the following:

> "However, although a witness was incompetent at the time the offense was committed, he may testify if the disqualification is removed prior to the trial.[6] Statutes regulating the admissibility of witnesses are not unconstitutional as ex post facto in respect to antecedent crimes, unless they should materially impair the defendant's rights.[7]"

And they cite in their footnote the following case, which I believe is pertinent:

> "7Wharton, Am. Law, Sections 474, 494. In Hopt v. Utah, 110 U.S. 574, 28 L. ed. 262, 4 S. Ct. 202, Harlan, J., giving the opinion of the court, said: 'Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crime committed prior to their passage, for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree or lessen the amount or measure of the proof which was made necessary to convict when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence, which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might in respect of that offense be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment, nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but -- leaving untouched the nature of the crime and the amount or degree of proof essential to conviction -- only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the commission of the offense charged.' And see Sutton v. Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744."

So that it is clear from the examination of these authorities that what we have here is an alteration, not in the quantum or amount or degree of proof that is required, but a variation in the method of permitting proof to come before the commission and, therefore, is not ~~without~~ within the ~~compass~~ concept of an ex post facto law.

Defense counsel has contended that the accused should have been given an opportunity to question Phillips at the time that the trip was

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taken by Commander Currie to the United States. It should be noted that the charge and specifications against the accused are dated 30 March 1948, whereas the affidavit made by Phillips is dated 11 January 1948, which is more than two months prior to the time the charge and specifications were served against the accused. The trip of Commander Currie, as he has testified, was not a trip with regard to Kobayashi, or the case against Kobayashi, nor was it a trip made for the special purpose of an interview of Phillips; it was a trip made in connection with numerous war crimes cases, atrocities, and other war crimes business, in the course of which the witness obtained the affidavit of Phillips. It was, therefore, not necessary, nor even feasible, that the accused Kobayashi should be apprised of this trip or of the interviewing of Phillips. The accused has had ample opportunity, by the submission of this document to him early in the course of these proceedings, and has in fact, on May 8, submitted interrogatories in connection with this affidavit.

The judge advocate believes that in the course of this answer to Commander Carlson's objection he has adequately answered the objections made by defense counsel, Mr. Takano, and now wishes to point out that Mr. Takano's objection is directed toward the evidential value of the document. As the judge advocate pointed out in connection with the accused's objection to Prosecution Document No. 201, argument concerning the weight and sufficiency of the prosecution's case is inaptly interposed at this stage of the proceedings and is not germane to the issues of the admissibility of this document in evidence.

It is respectfully requested that the commission admit this document as Exhibit 17.

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

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"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."

憲法第六條

被告人は、公平な陪審による迅速な公開裁判を受ける権利を有し、犯罪が行はれた地の選挙区の予め法律で定めた裁判所の陪審により、速やかに公開裁判を受ける権利を有し、又、何人かを証人として求め、自己のために強制的手続により証人を得る権利を有し、並びに自己の弁護のために弁護人の援助を受ける権利を有する。

昭和三十三年五月二十日

被告人・弁護人　高野隆二印

MOTION BY THE ACCUSED THAT THE DEPONENT OF
PROSECUTION DOCUMENT NO. 232 BE SUMMONED

Delivered by

Mr. Takano, Junjiro
Counsel for Accused

22 May 1948

We move that the deponent 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 cuase 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."

Respectfully,

TAKANO, Junjiro.

I hereby certify the above to be a true and complete translation of the original motion written in Japanese, to the best of my ability.

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

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BRIEF OF AN ORAL REPLY TO THE ACCUSED'S MOTION TO HAVE THE DEPONENT OF PROSECUTION DOCUMENT 232 SUMMONED BEFORE THE MILITARY COMMISSION TRYING THE ACCUSED, KOBAYASHI, MASASHI, VADM, I. J. N.

22 May 1948

Delivered by:

LT DAVID BOLTON, USN
Judge Advocate

In reply to this motion, the judge advocate wishes to advise the commission that the accused is not entitled to the protection of the Sixth Amendment, nor is he under the Constitution of the United States entitled, as a matter of right, to the confrontation of witnesses. DK The Yamashita case in substance must clearly stand for this interpretation of the law. It was there specifically placed before the United States Supreme Court - the issue of whether the evidence admitted in that case, consisting of affidavits, photographs, and descriptive documents, was admitted in violation of the constitutional rights of Yamashita, in a trial before a military commission. The Supreme Court held that the review with regard to the admissibility of evidence before a military commission was not a matter for the Supreme Court of the United States, but was reviewable only by the reviewing military authorities. In essence, this clearly indicates that there could have been no constitutional violation of the xxxxxxx right of the accused.

The judge advocate has established that the affiant to the affidavit before the commission resides in Albuquerque, New Mexico and to the best of the judge advocate's belief and knowledge is currently in the United States. He is, therefore, unavailable to the prosecution before this commission, and since he is a civilian in the United States he is outside the area of the Commander Marianas and is not subject to compulsory or other process by this commission to require his attendance.

The judge advocate has pointed out that under these circumstances the use of affidavit evidence is proper and legally permissible Before military commissions, and the judge advocate respectfully requests that the motion be denied.

David Bolton

DAVID BOLTON,
Lieutenant, U.S. Navy,
Judge Advocate.

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OBJECTION TO THE INTRODUCTION IN EVIDENCE OF THE SKETCH OF THE BRIG AT THE FORTY-FIRST NAVAL GUARD UNIT, TRUK

Delivered by

Commander M. E. Carlson, USNR.,
Counsel for the Accused

We object to this purported sketch of the brig at the 41st Naval Guard Unit being admitted into evidence.

The sketch is immaterial as to all the specifications. The witness has testified that he never inspected this brig until the end of February 1944, or beginning of March 1944. There was a war going on and Truk was being bombed. During the course of the war the brig was practically demolished by American bombs. The witness cannot definitely state as of what date the brig he sketched in some way resembled. It is immaterial and irrelevant. We will admit there was a brig at the Guard Unit. This witness never testified however that he saw any prisoners of war mentioned in these specifications as being in the brig he has sketched. His sketch doesn't make his testimony clearer; it only confuses his testimony.

The witness has not clearly described the brig because he didn't know enough about this brig to testify clearly about it.

The sketch has not been proved to be correct. If the witness cannot clearly describe the brig, never having observed it closely, he surely cannot cover up his lack of knowledge about the brig with a sketch. The sketch is not a legitimate aid therefore to the Commission.

Not having qualified himself as having sufficient knowledge of the bri to testify about it, the sketch is not even approximately correct. It should not be admitted into evidence.

Respectfully,

MARTIN E. CARLSON,
Commander, USNR.,
Counsel for the Accused.

BRIEF OF AN ORAL REPLY TO OBJECTION TO SKETCH OF FORTY-FIRST NAVAL GUARD UNIT BRIG, DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE.

Calling the commissions attention to Section 206,NC&B, the judge advocate wishes to point out that, as there noted "an unofficial chart or sketch, diagram, plan or drawing, representing things that cannot be as conveniently and as clearly described by witnesses, when proved to be correct or when offered in connection with the testimony of a witness, is admissible as a legitimate aid to the court; a showing of approximate correctness is sufficient."

As to when the brig had the appearance shown on the sketch, the witness stated (question 55, the answer thereto) "At the time when the prisoners were being held, and at the time I inspected the brig." Subsequently witness testified he saw the brig when it was being constructed in June of 1943. This clearly establishes the qualifications of the witness to draw such sketch and his testimony adequately indicates the accuracy of the sketch. A subsequent witness will further testify concerning this brig.

Respectfully,

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

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MOTION TO SUMMON A WITNESS DELIVERED BY COMMANDER MARTIN E. CARLSON, U. S. NAVAL RESERVE, COUNSEL FOR THE ACCUSED ON 3 JUNE 1948.

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The accused makes a motion that the commission direct the judge advocate to summon as a witness GEORGE ESTABROOK BROWN, JUNIOR.

In view of the testimony of IINO, Shizuo it is considered that GEORGE ESTABROOK BROWN, JUNIOR is a necessary witness in order to arrive at the truth and to secure the ends of justice.

Much of the testimony of IINO, Shizuo was what HASEGAWA, Tomio was alleged to have told him. Although this hearsay testimony was objected to and motions made to strike it such hearsay testimony is now a part of the record to the prejudice of the accused.

The right of confrontation of witnesses has been denied the accused KOBAYASHI by the procedure of allowing the witness IINO, Shizuo to testify as to what HASEGAWA told him.

So in the case of the interrogatories of GEORGE ESTABROOK BROWN, JUNIOR admitted into evidence as prosecution document number 206 the right of confrontation of witnesses has been denied the accused KOBAYASHI.

In accordance with Articles 244-258 of Naval Courts and Boards it is requested that this witness be summoned. In order that the accused be not denied this right of confrontation of witnesses which denial will defeat the ends of justice . The accused prays that this commission summon the above named witness, GEORGE ESTABROOK BROWN, JUNIOR.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the Accused.

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REPLY TO THE MOTION MADE BY DEFENSE COUNSEL TO SUMMON GEORGE ESTABROOK BROWN, JUNIOR, AS A WITNESS, DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, ON 3 JUNE 1948

In brief reply the judge advocate wishes to point out that GEORGE ESTABROOK BROWN, JUNIOR, is residing in New York City, within the United States. He is not within the area of the Commander Marianas Area, and he is not in the area of compulsory process by this commission. Therefore, the power to subpoena him is not present in this commission.

The accused has had ample opportunity to examine the affidavit of GEORGE ESTABROOK BROWN, JUNIOR, and to submit interrogatories in connection therewith. Such interrogatories were submitted by accused on May 7, 1948 and subsequently during the course of these proceedings an additional set of interrogatories were submitted by the accused for an additional deposition to be taken from GEORGE ESTABROOK BROWN, JUNIOR.

This is a substantial compliance with the requirements of justice. As has been pointed out by the judge advocate in former arguments, the accepted practice in international tribunals, and specifically in military commissions, both international and national, has been such as to accept in evidence affidavits and depositions taken ex parte. This procedure has been before the Supreme Court of the United States for consideration in the YAMASHITA case and has been found acceptable.

The judge advocate feels that a summoning of this witness before this court would be ineffective, and in addition, is not necessary in the interests of justice.

Respectfully,

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

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OBJECTION TO THE INTRODUCTION IN EVIDENCE OF PROSECUTION DOCUMENT NUMBER 234, THE AFFIDAVIT OF JOHN PAUL ROURKE, GMC, U. S. NAVY.

Delivered by
Commander Martin E. Carlson, USNR.,
Counsel for the Accused.

The accused objects to Prosecution Document No. 234, the affidavit of John Paul Rourke, gunner's mate chief, U. S. Navy, now on active duty at U. S. Naval Submarine Base, New London, Connecticut, U.S.A., on the ground that it is immaterial and irrelevant. If John Paul Rourke, and there has been no testimony by this witness or any other witness, is one of the persons alleged to have been mistreated under the specification set forth in paragraph 1 (e) and 2 (e), then his name is not to the relator unknown as is alleged in paragraph 1 (e) and 2 (e). His name should have been added to that of George Estabrook Brown, Jr. Not to set forth his name has been misleading to the accused and it is prejudicial to the accused to have omitted his name. All the objections that we made to the introduction of Prosecution Document No. 261, the statement of Colonel Oishi Chisato; 271 (a), the statement of Captain Tanaka Masaharu; document No. 306, the testimony of Miyaki Toshio in the trial of Captain Kawasaki; document No. 233, the affidavit of Louis Silvie Zamperini; document No. 206, the interrogatories in perpetuation of the testimony of George Estabrook Brown, Jr.; document No. 201, the affidavit of Fred F. Garrett; and document No. 232, the affidavit of Russell Allen Phillips, are made in objection to Prosecution Document No. 234.

This affidavit is hearsay evidence. It is not an exception to the hearsay rule. Sections 68 to 172 inclusive, Naval Courts and Boards, set forth the rule "Why hearsay evidence is objectionable," regarding hearsay evidence. On all three points set forth in Section 169 this affidavit is hearsay as to the crime with which Kobayashi is charged and is objectionable.

The judge advocate has not shown that this document is an exception to the hearsay rule.

Rule six, Hearsay Rule, is found in Section 201, Naval Courts and Boards, and 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." Rourke is a chief gunner's mate in the U. S. Navy, now on active duty (May 12, 1948) and stationed at the U. S. Naval Submarine Base, New London, Connecticut, and is, therefore, available as a witness and he should be summoned as a witness.

Again the rule as found in Section 217, "Affidavits," Naval Courts and Boards, states that an affidavit 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." We hold that this affidavit is hearsay and inadmissible in evidence to prove the criminal negligence of Admiral Kobayashi. 16 American Jurisprudence, Section 38, on "Depositions," "the general rule is that the adverse party must have reasonable notice of the taking of depositions so as to be afforded an opportunity to be present at the examination or to file cross-interrogatories, and that the failure to give the required notice renders the depositions vulnerable to a motion to suppress. (A)" We cite all cases cited in this footnote (6).

This was not done in this affidavit of Rourke. In fact, no notification was given the accused and not until this morning were we notified that there was such an affidavit. To admit such an affidavit would be prejudicial to the substantive rights of the accused Kobayashi, and we

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object to Rourke's affidavit being admitted into evidence.

The judge advocate may well say, citing the Yamashita Case, that the accused has no right of confrontation of witnesses. We call the Commission's attention to an article in the May 27, 1948 issue of Stars and Stripes, "Nisei Treason Trial Draws 45 witnesses." Under date of Los Angeles, May 26 (INS) "Forty-five former war prisoners will be brough to Los Angeles from over half the world to testify at the treason trial of Tomoya Kawakita, California-born Japanese accused of brutalities and sadistic practices in a Japanese prisoner of war camp." "---Five witnesses are Japanese nationals who will be brought from Japan."

So an accused tried in an American court does have the right of confrontation of witnesses and is being given this right.

We object to the affidavit of Rourke being admitted into evidence particularly when Rourke is available as a witness.

We move that the affidavit be suppressed.

Respectfully,

MARTIN E. CARLSON,
Commander, USNR.,
Counsel for the Accused.

0703

REPLY TO COMMANDER CARLSON'S OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENT 234, DELIVERED BY LT. DAVID BOLTON, U.S. NAVY, JUDGE ADVOCATE.

Defense counsel points out that in the pertinent portion of the charge and specifications - paragraph (e) of Specifications 1 and 2, only the name of Brown is set forth, and the others are described as persons names to the relator unknown.

The time to argue the merits of the charge and specifications is long past. The judge advocate however wishes to point out that at the time of the writing of the charge and specifications the information contained in the offered prosecution was unknown, and it was not possible to specifically allege or prove the mistreatment of Rourke. Nor has the prosecution sought to surprise the defense. This affidavit from Rourke was received by the judge advocate yesterday, and due to the mechanics of mimeographing this statement in English, and providing a translation in Japanese, it was im-- possible to provide defense counsel with a copy of this affidavit until early this morning prior to court proceedings when the affidavit was presented to defense counsel.

The remainder of defense counsel's argument has been fully answered in my replys to prior objections to receipt in evidence of similar documents offered by the prosecution. Defense counsel has not educed any new arguments, and it is only necessary to point out that under SCAP rules with regard to receipt of evidence, Section 5 d 1 (c) which has been previously cited, specifically provides for the admission in evidence of affidavits or other signed statements.

Respectfully,

David Bolton

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

"NNNN"

0704

MOTION TO SUMMON DEPONENT OF PROSECUTION DOCUMENT 234

Delivered by

Commander Martin E. Carlson, USNR.,
Counsel for the Accused

We request that John Paul Rourke, gunner's mate chief, U. S. Navy, now on active duty at the U. S. Naval Submarine Base, New London, Connecticut, be summoned as a witness at this trial.

The affidavit of Rourke has been admitted and read into evidence. The right of confrontation of witness has not been accorded to the accused This right of confrontation of the witnesses is a right guaranteed by the Constitution of the United States and is daily being given to all accused tried in our American courts.

Just recently there was carried in the newspaper "Stars and Stripes" and in the Los Angeles newspapers an article concerning the coming trial of an accused, to be held in Los Angeles. Witnesses, at least 42 of them, are to appear, summoned from all parts of the world, 5 of whom are Japanese nationals residing in Japan and who are to appear at the trial to be held in Los Angeles, California. The right of confrontation of witness is being assured accused in our courts. Rourke is in the U. S. Navy on active duty at New London, Connecticut and is subject to this Navy-convened court's jurisdiction. We request that he be summoned.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for the Accused.

"0000"

0705

JUDGE ADVOCATE'S REPLY TO MOTION FOR AFFIANT OF PROSECUTION DOCUMENT 234 DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE.

In answer to the motion by accused, Judge Advocate wishes to point out that there are several elements to be considered prior to summoning any witness before this commission, particularly when this witness is over eight thousand miles away. While it is possible that the commission would be able to obtain this witness who is a member of the naval forces, the commission should consider the nature of the testimony of the witness and its relative importance in the instant case. On the whole the testimony of this witness, as clearly evidenced by his affidavit, will obviously be corroborative of the information set forth in the Brown affidavit. It would appear that production of this witness, in view of the nature of the expected testimony, would not warrant the inconvenience and expense to the United States government in taking Rourke from his duties at New London, Connecticut and bringing him here to Guam before this commission to testify.

The defense counsel have full opportunity through the use of interrogatories to obtain such clarification or examination of the affiant with regard to the contents of this statement as they deem desirable. All of the essential requirements would certainly be accorded the accused if he were permitted this opportunity to submit and obtain a deposition covering the salient points as desired by defense.

The judge advocate in his argument with regard to prior documents had occasion to cite a British case. In that case the prosecution had specifically indicated to defense that the British officer, whose affidavit was subsequently offered in evidence, would be kept available to the accused for cross-examination upon the stand. There was a specific commitment in that case by the judge advocate to keep this British officer available as a witness. However at the time of trial the officer was not held availabl for cross-examination, and the prosecution offered his affidavit in evidence. The defense objected to the introduction of the affidavits as they had been specifically promised that the affiant would be held available. However, despite this specific commitment, the court held the affidavit was properly admissible. The judge advocate feels that that is a clear precedent for application in war crimes trials. The commission can accord this affidavit its due weight taking into consideration the fact that affi has not been produced in person before the commission.

The judge advocate respectfully requests that the motion of defense counsel be denied.

Respectfully,

David Bolton

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

"PPPP"

0706

OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENTS 110, 111, 112, and 113.

Delivered by
Commander Martin E. Carlson, USNR
Counsel for the Accused

The accused, Kobayashi, Masashi, objects to the introduction of those documents numbers 110, 111, 112, and 113 marked for identification purposes numbers 13, 14, 15, and 16, on the grounds that they are not what they purport to be.

The witness, Mr. Fred Savory, has testified that the document 110 was made up by the accused sometime during the evening of March 8, 1948. Mr. Savory got the statement and kept it until Commander Ogden and Lieutenant Bolton appeared at the stockade the next morning and then it would be signed by Admiral Kobayashi, no translation being shown Kobayashi until after he had signed the English statement.

Clearly this is not a statement of the accused, Kobayashi, but a statement made up by the prosecution staff, a statement made up as they wanted it, a statement which they could use as evidence at the trial of Kobayashi who had, after two years solitary confinement, not yet been served with charges or accused of a crime but was still being held without benefit of counsel. It was a statement made up by the prosecution by which they manufactured evidence against the accused. The statements were written in English by the accused because the judge advocates wanted them that way. It is true that the accused understands English and can write it. He learned English while he was naval attache at Washington, D. C. but English is not his native tongue. He is a Japanese national and the English language is foreign to him. Undue advantage was taken of the prisoner Kobayashi and after two years of solitary confinement under constant interrogation and after continuous requesting he did make a written statement. He was denied the benefit of counsel and without any counsel he agreed to sign a statement made up by the judge advocate.

After he had read it over he wanted to make changes in it but he was not allowed to make any changes. It must be as the prosecutors wanted it; it was in effect their statement of the case against Kobayashi and not Kobayashi's statement.

Then after he had been shown a Japanese translation, two or three days later, he again wanted to make changes in his statement but of course was not allowed to do so. The witnesses were not present when Kobayashi made his statement. They were not present all during the time Kobayashi was being kept in solitary confinement. They do not know to what treatment Kobayashi was being subjected. The witnesses admit they questioned Kobayashi all day long and then around 9 p.m. Mr. Savory would return and pick up what Kobayashi had written in English.

Days later when a translation was shown Kobayashi he objected that this was not just what he said. He wanted to change the statement. What answer did he get. Kobayashi was told he could go on the witness stand and explain it. Is that the American way. He wanted to make changes on the statement written March 9 but was again told he could see counsel or tell about it at his trial. So naturally since he was held in solitary confinement and had been for two years he did not request changes be made in the two other documents.

"QQQQ-(1)"

For the reasons set forth in our objection to document 114 we object to these documents being offered into evidence.

We object because the accused is being made to testify against himself. This is forbidden by Article V of the Constitution of the United States. This fifth amendment reads: "No person .... shall be compelled in any criminal case to be a witness against himself." Kobayashi is here accused of a crime and he prays the right of a person accused in a criminal case not to be compelled to be a witness against himself.

Kobayashi was held in solitary confinement without any charges being preferred against him for two years. Without benefit of counsel he made a statement which is here being offered by the judge advocate as evidence against Kobayashi; yes, to prove that Kobayashi is guilty as charged of criminal neglect of duty. The offer of this document into evidence by the judge advocate is a request that the Commission agree with the judge advocate that Kobayashi be compelled to testify against himself.

We have shown by the testimony of Kobayashi that he wished to change these statements but was not permitted to do so. Kobayashi at the request of the judge advocate, wrote these statements in English, a language foreign to him. Days later he was shown a translation and when he objected that it was not what he intended to say he was bluntly told to tell it to the court.

Kobayashi has told it to the court.

You members of the commission are to now decide if these statements written in English by this accused, a Japanese, at the request of the judge advocate, while Kobayashi was being held in solitary confinement represent what Kobayashi wanted to say then or whether Kobayashi wrote what the judge advocate after two years interrogation wanted Kobayashi to write about requested him to write.

We ask you do not admit this document into evidence.

Respectfully,

Martin E. Carlson

Martin E. Carlson,
Commander, U.S. Naval Reserve,
Counsel for the accused.

0708

REPLY OF JUDGE ADVOCATE TO DEFENSE OBJECTION TO INTRODUCTION OF PROSECUTION DOCUMENTS 110, 111, 112, and 113 -- DELIVERED BY LIEUTENANT DAVID BOLTON, USN, JUDGE ADVOCATE.

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Counsel for accused in his argument has reconstructed in a confused and misleading manner some of the testimony that has been given before this commission. There was no testimony that the witness had been subjected to continuous interrogations during his two years of confinement, and the witness has not stated that any force, duress, or continuous requests were used to induce the making of the statements that are now offered in evidence.

These statements, as evidenced by the testimony of Commander Ogden and Mr. Savory, were made in the presence of Commander Ogden, Lieutenant Bolton, and Mr. Savory on the mornings following each day of interrogation. Commander Ogden and Mr. Savory testified as to the manner of the taking of the statements, that the accused read the statement to them in their presence each morning, making such changes as he desired to make at that time, and subscribed and swore to the truth of the statements. Testimony of the accused and of Commander Ogden clearly shows that the accused included numerous explanations in the statements that he wrote.

Counsel for the accused has contended that the accused was not permitted to make other changes in these statements. Assuming the truth of this, it is clearly irrelevant to the issue of the admissibility of these statements. A statement once made is a complete statement and once made it is not subject to change or modification at the whim of the accused. If this were not true, the maker of a statement, the accused, could at any time, up until this very moment in court, decide he wished to change the original statement made by him months prior to the trial. Clearly this would be absurd. Once a statement is made, and in the case of a written subscribed statement, once the person making the statement has signed it, it is complete.

On cross-examination the accused admitted, that with regard to the Abe incident, the accused, even though he had completed a statement on the Abe incident, was permitted in his statement of the following day, to make further explanation concerning the Abe incident.

The testimony of Commander Ogden and Mr. Savory with regard to the translation into Japanese of each statement and submission of these translations to the accused for his examination, shows that in view of the fact that the accused had specifically (as testified by Ogden and Savory) expressed his preference to make his statement in English, and did write his statements in English, every effort was made to guarantee to the accused every protection to assure the fact that the statements of the accused accurately expressed his version of the facts. English is not the native language of the accused, but it should be noted that an interpreter was present throughout the interrogation to assist whenever any difficulty arose regarding an English word or expression. When such difficulty arose interpretation was made and the matter was checked in Japanese to assure the exact connotation of the English word as written. It is unnecessary to consider in detail the testimony of the accused, except to note that this testimony on direct and cross-examination is clear proof of his complete familiarity with and fluency in the English language.

"RRRR (1)"

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It is unnecessary to cite at length the law with regard to confessions and admissions. Nor is it necessary for the commission to decide at this time whether these are confessions or admissions.. The accused subscribed and swore to the truth of these statements. He has testified that they included the statement that they were made voluntarily, and he has testified that the statements made by him were true.

The testimony of the accused shows that he was not forbidden to make any changes in his statements prior to signing them. Clearly after signing and making the statements the accused had no right to change them. The testimony of the accused also established the fact that he did include explanations in his statements, demonstrating that whenever he included such explanations in his statements, the explanations were accepted and were included in his written statements. The accused has not contended that any of the statements offered by the prosecution are not the full statements as made, subscribed, and sworn to by him, but has merely implied that in earlier interrogations he had desired to make additional statements and/or explanations which he did not include in his written and sworn statements.

If the accused had in fact contended that these were not his full statements, or if he had claimed they were not voluntarily made, or that portions thereof were untrue, the statements offered in evidence by the prosecution would nevertheless be admissible in accordance with SCAP rules, section 5d(5) which reads: "All purported confessions or statements of the accused shall be admissible in evidence without any showing that they were voluntarily made. If it is shown that such confession or statement was procured by means which the commission believes to have been of such character that they may have caused the accused to make a false statement, the commission may strike out or disregard any such portion thereof as was so procured." In view of the fact that there has been no contention by the accused that these are not full and true statements, voluntarily made, these statements are properly admissible in evidence without any necessity for the commission to rely upon the above cited authorization under SCAP rules.

The judge advocate respectfully requests the commission to admit in evidence, prosecution documents 110, 111, 112, and 113.

Respectfully,

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

"RRRR (2)"

MOTION FOR A DIRECTED ACQUITTAL DELIVERED BY COMMANDER MARTIN E. C CARLSON, A COUNSEL FOR THE ACCUSED, ON 11 JUNE 1948, at HEADQUARTERS COMMAND, COMMANDER MARIANAS, GUAM, MARIANAS ISLANDS.

* *

The accused makes a motion for a directed acquittal on the grounds that the evidence doesn't support the charge and specifications and further evidence shows the accused KOBAYASHI, Masashi did not order any of the ten acts set forth in the specifications of the charge. All of these acts are alleged to have been committed by persons other than this accused. What is the criminal responsibility of one person for the act of another? I quote from 14 Am. Jur. "Criminal Law" Section 63:

"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. 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) citing the case of Blocker v. Conn. 153 Ky. 304, 155, S.W. 723, 44 L.R.A. (N.S.) 859.

Citing from Section 63, Ibid: "As a general rule, though not one without exceptions, a principal or master is not responsible for the criminal acts of his agent or servants unless he in some way participates in countenances, or approves of what the agent or servant does or has given such assent or concurrence thereto as would involve him morally in the guilt of the act." In footnote 14 there is referred to the subject of Agency, Volume 2, page 301, p. 383; Intoxicating Liquors (Also 15 R.S. L. p. 357); Master and Servants (Also 18 R.C.L. p. 480)."

Kobayashi did not appoint the Base Commanders and the Commanding Officers of the Guard Units on these far flug island. They could only be removed by orders of the Japanese Naval Ministry.

A partner is not criminally liable for the acts of his associates done without his knowledge or consent."

The next paragraph reads and we quote:

"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 further rule is: "A person is not liable for the act of another merely because he is present when it is committed." 14 Am. Jur. Criminal Law, Section 63, page 812.

Even under various statutes making a person criminally liable for doing of particular acts where the prohibited act was done by an independent contractor there is cited in 14 Am. Jur, "Criminal Law" Section 64, in footnote six it was held that if the court is satisfied that the other person had committed the offense in question, without the employer's knowledge, consent or connivance, the other person shall be summarily convicted of the offense, and the employer shall be exempt from any fine.". Annotation 55 A.L.R. 643.

In this Kobayashi case there was no employer-employee relationship because all of these Japanese were Army and Navy officers and enlisted men. KOBAYASHI was appointed to be the commander in chief of the Fourth Fleet and the others were appointed to various other posts such as commanding officer of the guard units, Base Commanders and Army Commanders. KOBAYASHI appointed none of them. He neither had the power of appointment or the power of removal. All were responsible officers,

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some of the same rank as KOBAYASHI. The acts of these other persons were done without KOBAYASHI's knowledge, consent, connivance, or approval. He was present at none of the alleged executions. It has been shown that he was in some instances a thousand miles away engaged in trying to stem the tide of defeat which Japan was facing on these far flung Pacific Island bases. While busily engaged in this most important job there did occur executions of prisoners of war but all such incidents were carefully kept from KOBAYASHI, even after they had occurred. His senior staff officer even testified that although he had been told that prisoners had been executed at the Forty-first Guard Unit he didn't tell KOBAYASHI.

No criminal liability on the part of KOBAYASHI has been shown and there was no criminal liability for the acts alleged.

We ask that KOBAYASHI be acquitted at this time.

The accused sets forth as further grounds for a directed acquittal of the accused KOBAYASHI, Masashi on the grounds of a material variation between the allegations of specification 1(c) and specification 2(c) and the proof as shown by prosecution number 305 and other evidence as to the number of victims alleged to have been killed. The specifications allege ninety-six American prisoners were killed and the proof particularily prosecution document 305 sets forth that HORIE, Kiroku was charged with killing twenty-five American prisoners of war and that the commission found him guilty and sentenced him to be hanged by the neck until dead.

As set forth in our previous motion for a directed acquittal this variance in the number of prisoners killed is material and it is prejudicial to the substantive rights of this accused.

For the reasons set forth in our previous request for a directed acquittal and citing the cases therein cited and on the grounds that there has been a fatal variance and because the evidence doesn't support the charge the accused KOBAYASHI, Masashi prays for a directed acquittal.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
Commander, U. S. N. R.
Counsel for the Accused.

0712

小林仁事件ニ於ケル辯護人冒頭陳述

辯護人　佐藤　毅

被告小林仁ハ彼ガ日本海軍第四艦隊司令長官在職中一ツハ、彼ノ部下ノ行動ヲ抑制スベキ彼ノ義務ヲ違法的ニ無視シ、遂行セズ彼ノ部下ヲシテ米国俘虜ノ虐待又ハ殺害ヲ許可シタルコト、又他ノ一ツハ俘虜ヲ保護スベキ彼ノ義務ヲ違法的ニ無視シ、遂行セズ彼ノ部下ヲシテ米国俘虜ノ虐待又ハ殺害ヲ許可シタルトノ根據ニ依リ其ノ責任ヲ訴追サレテ居ル。

サテ今ヨリ辯護ノ段階ニ入ルニ當リ、本辯護人ハ辯護側ヨリ提出セントスル證據ニ関聯シテ重要ナ点ニ就キ若干ノ豫備的説明ヲ行ハントスルモノデアル。

第一ニ、本事件ニ於ケル主要ナ論爭点ハ、檢事ガ起訴又罪狀項目ニ主張スル如ク、被告小林ガ彼ノ部下ニ、俘虜ニ対スル非行ヲ許可シタカ否カニ在ルデアラウ。之ニ対シ檢事側ハ其ノ立証段階ニ於テ勿論其ノ事実ヲ立証シ得タガ辯護側ハ証人ニ依リ更ニ斯カル事実ノ無カッタコトヲ立証スルデアラウ。

第二ニ、被告小林ガ義務懈怠ニ依ッテ有罪トナル爲ノ要件トシテハ、彼ガ怠ッタト主張サレテ居ル義務ガ法規上彼ノ義務トシテ明記サレテ居リ且ツ其ノ義務ノ懈怠ガ刑事責任トナルコトガ明瞭ナモノデナケレバナラヌ。

"TTTT"

0713

国際法上、指揮官ニ部下ノ行為ヲ監督スル義務アリト解セラルル意味ノ條項ヘアル。然シ乍ラ其ノ責任ノ範圍ニ就テハ、全然之ヲ示シテ居ラズ、不明瞭デアル　檢事モ其ノ冒頭陳述ニ於テ述ベタ如ク、任務ノ範圍及任務ノ不履行ヲ立証スルニ必要ナ要素ハ未ダ確立サレテ居ラズ、事実本問題ニハ相当議論ノ余地ガアル。然シ乍ラ本問題ヲ国際法規ト解決セントシテモ殆ド不可能デアル。夫レ故本件ニ関シテハ、如何シテモ、日本海軍法規ニ依ツテ檢討スル必要ガアル

本委員会ニ於テ、檢事側証人、證言中ニ、司令長官ニハ部下監督ノ責任ハアルガ之ハ行政上ノ責任デアツテ刑事上ノ責任デハナイ旨ノ証言ガアツタガ其ノ法的根據ノ内容ガ明瞭ニサレナカツタ。夫レ故、本辯護人ハ、

(1) 日本海軍法規上、艦隊司令長官ノ任務ガ何デアツタカ

(2) 部下ニ非行ノアツタ場合、指揮官ノ部下監督ノ責任ハ刑事責任トナルモノデアルカ否カ、換言スレバ日本海軍刑法ニ、指揮官ノ之ニ関スル責任ヲ問フ罰則ガアツタカ否カ

(3) 指揮官ノ責任ハ単ニ行政上ノ責任ニ止マルモノデハナイノカ、換言スレバ日本海軍懲罰令ノ範圍ニ留マルモノデハナカツタカ等ノ点ニ就テ日本海軍ノ関係法規ヲ證據ニ提出シテ明瞭ニシヨウト思フ

第三ニ俘虜ノ保護取扱ノ責任ノ所在ニ就テ国際法規ニハ明示サレテ居ラヌ。從ツテ之ニ就テモ亦日本海軍ノ法規ヲ檢討シテ明瞭ニスル必要ガアル。夫レ故本辯護人ハ日本海軍ニ於テ国際法ノ遵守ニ関スル職責ヲ明示シタ法規及俘虜取扱ニ関スル法規ヲ証據ニ提出シヨウト思フ

"TTTT"

0714

日本海軍デハ、国際法規ノ遵守ニ関シテハ艦長ノ職責ニ規定シテアル。之ハ艦内ノコトハ司令長官ト雖モ艦外カラハ、監督ガ出来ナイ。艦内ノコトハ艦長ガ一切ノ責任ヲ負テ處理ヲシナケレバナラヌト云フ海軍特殊ノ事情ニ基イテ定メラレタモノデアル。ソシテコノ傳統ト慣習トニ基キ聯隊ノ場合ニハ国際法規遵守ノ職責ハ聯隊司令ニ課セラレテ居タノデアル

又俘虜ノ取扱ニ関シテハ現ニ俘虜ヲ収容スル部隊ノ長ガ其ノ責任者デアルコトガ日本陸軍俘虜取扱規則カラ帰結シ得ル。

辯護人ハ是等ノ関係法規ヲ証拠ニ提出シテ俘虜取扱保護ノ直接ノ責任者ガ誰デアッタカヲ明瞭ニシヨウト思フ

第四ニ論ヲ俟ノハ、被告小林ガ起訴状ニ列挙サレタ事件ノ発生ヲ知テ居タカ否カト云フ問題デアル。之ニ就テハ被告自身ノ後ノ陳述書（Exhibit No 21）中ニ述ベタ如ク、一九四二年十月七日Wake島ニ於ケル俘虜虐殺事件ハ事件后報告ヲ受ケテ之ヲ承知シタ。然シ其ノ報告ハ戦斗報告デアッタノデアル。其ノ報告ハ第六根據地隊ニ発シ第四艦隊及海軍省ニ回報サレタモノデアル、其ノ他ノ事件ニ就テハ全ク之ヲ知ラナカッタノデアル。彼ガ之ヲ知ラナカッタコトニ就テハ証人ニ依ッテ之ヲ立証スルデアロウ。然シテ一般的ニ云ッテ、被告小林ガ事件ノ発生ヲ知ラナカッタコトヲ裏付ケルニ関聯アル重要ナ事項ハ、被告ノ作戦任務ト各事件発生当時、被告ヲ圍繞セル各種ノ状況デアル　検事モ其ノ冒頭陳述ニ当時ノ状況ヲ考慮ニ入レネバナラヌコトヲ述ベタ居ルガ正ニ其ノ通デアル。

本事件ニ於テ被告ヲ裁クニ当テハ、彼ノ第四艦隊司令長官トシテノ最重要任務ガ太平洋ニ於ケル彼我戦略上ノ要衝デアル南

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洋群島方面ノ作戦ヲ指揮シテ居タコト、又彼ノ在任中ノ前半ニハ彼ノ担任地域ニ隣接シタ南太平洋ニ於テ激烈ナ戦闘ガ行ハレ、其ノ後半ニハ彼自身ノ担任地域ガ米軍ニ進攻サルヽニ至ッタ状況ヲ常ニ念頭ニ置ク必要ガアルノデアル、夫レ故弁護人ハ Judicial Notice ニ於テ被告ノ在任中、太平洋方面ニ生起シタ戦況ヲ公知ノ事実トシテ認知セラレンコトヲ要求スルノモリデアル、コノ戦況ヲ検討スルナラバ、問題トナル事件中ノ若干ハ、被告小林ガ緊要ナル作戦指揮ニ専念シテ居タ最中ニ生起シ、彼ガ之ヲ知ラナカッタノガ尤モデアルト何人モ合理的ニ推定シ得ルデアロウ、

第五ノ論点ニハ被告小林ハ検事ガ其ノ冒頭陳述ニ主張セル如ク部下ニ事件ノ発生シタコトヲ承知セルニ拘ラズ之ニ対シ当然ナスベキ措置ヲ講ジナカッタノデハナイカトイフ点デアル、

被告小林ガ知テ居ル唯一ノ事件即チ 1943－10－7、Wake 島事件ニ対シテ彼ハ或ル程度ノ措置ヲ執ッタコトヲ我々ハ提示スルデアロウ、其ノ他ノ事件ニ就テハ、事件ノ発生前ニモ、又発生後ニ於テモ之ヲ知ラナカッタカラコソ、部下ニ対シ何等ノ措置ヲ講ジナカッタノデアル、若シ彼ガ部下ニ非行ノアッタコトノ一ツデモ承知シタナラバ、之ニ対シ適当ナ措置ヲ執ッタデアラウコトヲ合理的ニ推定シ得ル有力ナ要素トシテ彼ノ人格ヲ挙ゲル必要ガアル、

被告小林ハ生来ノ性格又彼ノ教養カラ推シテ決シテ米国俘虜ニ対シ非人道的行為ヲ黙認シ或ハ許可スル如キ人間デハナカッタノデアル、此ノ点ヲ合理的ニ推定スル資料トシテ弁護人ハ被告ノ一般的人格ヲ証拠トシテ提出スルツモリデアル、

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以上ヲ以テ弁護側ノ提出セントスル、証拠ニ関スル
陳述的説明ヲ終リマス

一九四八年六月二十日

佐瀬毅

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0717

OPENING STATEMENT FOR THE DEFENSE
IN THE CASE OF KOBAYASHI, MASASHI.

Delivered by Sanagi, Sadamu, defense counsel

The accused Kobayashi is being tried for the responsibility of (1) unlawfully disregarding and failing to discharge his duty to control his subordinates in that he permitted his subordinates to mistreat and kill American prisoners of war, and (2) unlawfully disregarding and failing to discharge his duty to protect prisoners of war in that he permitted his subordinates to mistreat and kill American prisoners of war, during his tour of duty as the commander-in-chief of the Fourth Fleet, Imperial Japanese Navy.

Prior to the presentation of the defense, I will make a brief preliminary explanation of the main points relative to the evidence which the defense intends to introduce.

1. One of the main issues in the instant case is whether the accused Kobayashi permitted his subordinates to visit atrocities upon the prisoners of war, as alleged in the charges and specifications. While the prosecution has not in the least proved this fact in the presentation of its case, the defense will further seek to prove by producing witnesses that such a fact never existed.

2. It is imperative, as a requisite for a conviction of neglect of duty against the accused Kobayashi, to have not only the duty which he is alleged to have neglected clearly established as his legal duty, but also to have the dereliction of such duty expressly shown as constituting a criminal responsibility.

Although there is, in international law, a clause which implies that the duty to control the acts of his subordinates is incumbent on the commanding officer, it is not clear, nor, for that matter is it indicated, what the scope of such responsibility is. As the judge advocate stated in his opening statement, the essential elements required to establish the scope of duty and neglect have not as yet been established, so it is, as a matter of fact, still a subject of considerable controversy. Since it is almost impossible to seek a solution of this issue in international law, it is necessary that we study it in the light of Japanese naval laws and regulations.

In the testimony of a prosecution witness, the commission will recall tha t there was mention of something to the effect that the commander-in-chief had the responsibility for supervision over his subordinates but that it was administrative and not criminal. The legal source of such testimony, however was not made clear. The defense, therefore, intends to show by introducing Japanese naval laws and regulations relative to the following three points:

(1) What the duties of the commander-in-chief of a fleet with respect to Japanese naval laws and regulations were.

(2) Whether the responsibility of the commanding officer for supervision constitutes a criminal responsibility in case there is misconduct on the part of his subordinates, or, in other words, whether there existed any punishment regulation holding the commanding officer liable for such responsibility.

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(3) Whether the responsibility of a commanding officer is limited to a mere administrative one, or, in other words, whether such responsibility should not be limited within the scope of the Japanese Naval Disciplinary Punishment Ordinance.

3. There is no express clause in international law with regard to who is responsible for the treatment and handling of prisoners of war. It is therefore necessary, as in the above case, to study the Japanese naval laws and regulations concerning this point. Defense counsel will accordingly introduce in evidence laws and regulations which set forth the duty of observing international law, and those pertaining to the treatment of prisoners of war.

In the Japanese Navy the observance of international law is set forth under the duties of the captain of a vessel. This is because of the special circumstances in the Navy which renders it impossible, even for the commander-in-chief, to supervise externally, activities within a vessel; hence necessitating the captain of a vessel to assume all responsibilities growing out of affairs within the vessel. Based upon this tradition and custom, the responsibility for observing international law, is, for example in a Guard Unit, imposed upon the commanding officer of that unit.

Furthermore, it may be concluded from the Regulations concerning the Treatment of Prisoners of War, that the commanding officer of an organisation actually having custody of the prisoners of war, is the person responsible for them, as for example the commanding officer of the Guard Unit in the case of Truk.

Defense counsel will introduce in evidence such laws and regulations, and will show who was directly responsible for the treatment and protection of prisoners of war.

4. Another point in issue is whether the accused Kobayashi knew of the occurrence of the incidents alleged in the charges. As the accused Kobayashi stated in his st,tement (Exhibit No.21), he later knew of the execution of prisoners of war on October 7, 1943, as he received a post facto report of the incident. The report he received however was a battle report. The report was addressed to the Sixth Base Force and both the 4th Fleet and the Naval Ministery were information addressees. With regard to all the other incidents however, he was totally without knowledge. Witnesses will take the stand to prove that the accused Kobayashi had no knowledge of these occurrences. An important factor which tends to corroborate the fact that the accused Kobayashi was not aware of the occurrences of these incidents, is, that he was busily occupied in operational duties, and, also the circumatances surrounding the accused at that time. The judge advocate contented in his opening statement that the commission must cohsider the circumstances; it is veritably as the judge advocate stated.

In considering the instant case, we must keep in mind that the most important duty of the accused, as the commander-in-chief of the 4th Fleet, was to command the operations in the South Pacific Area -- a most important strategic area of naval operations for both the United States and Japan --- and also that the condition was such, that in the first half of Kobayashi's tour of duty as commander-in-chief of the 4th Fleet, fierce battles were being fought in the South Pacific area adjacent to the area of jurisdiction of the accused, and in the latter half of his tour of duty, American invasions were being conducted on islands within his command. The defense

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will, therefore, request the Commission to take judicial notice of the summary of battles fought in the Pacific area during the accused's tour of duty. When these battle conditions are taken into consideration, it is our confident belief, that any person may reasonably conclude that the accused had no knowledge of these alleged incidents, as he was compelled to concentrate on the most important and urgent duty of operational command.

5. The next point in issue is whether he failed to take appropriate measures against his subordinates deapite the fact as the judge advocate alleged in his opening statement that Kobayashi was aware of the occurence of these incidents.

We shall show that the accused Kobayashi did take some measures regarding the Wake incident which occurred on 7 October 1943 -- the only incident about which he knew. Concerning the other incidents, Kobayashi did not take any measures against his subordinates because he was totally without knowledge of them, before they occurred or even after they occurred. It is necessary, at this point, to refer to his character as an influential element in reasonably inferring that if he had been aware of a single atrocity on the part of his subordinates, he would have taken appropriate measures against them.

On the basis of his cultural background and character, we can safely say that the accused Kobayashi was not a man to condone or permit atrocious acts against prisoners of war by his subordinates. Defense counsel will therefore introduce in evidence documents showing his general reputation as data on which to make a reasonable judgement in regard to this point.

In effect we shall show that Kobayashi did not order a single one of acts charged against these commanding officers and others; he was not present when any of the atrocities took place; he did not approve them or condone them.

With this, I conclude my preliminary explanation of evidence which the defense intends to present in their case.

Respectfully,

Sanagi, Sadamu.

I hereby certify the above, consisting of three (3) typewritten pages, to be a true and complete translation of the original Opening Statement for the defense in Japanese, to the best of my ability.

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

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0720

OBJECTION TO DEFENSE DOCUMENTS DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE, ON 21 JUNE 1948.

At this time the judge advocate would like to make an objection to this document and to several other documents which defense counsel intends to introduce during the testimony of this witness. The objection is in the form of a request that the admission of these documents be conditioned upon the securing of certain additional information by defense counsel.

The judge advocate on examination of the excerpts from the Fleet Ordinance, and the excerpts of the Japanese Criminal Code, Naval Disciplinary Punishment Ordinance, and Ordinances Governing Specially Established Naval Forces which defense have indicated they wish to introduce in evidence, has noticed that these excerpts have been taken from the regulations and ordinances which contain amendments made in 1943, 1944 and 1945. The extracted portions do not on their face indicate whether, or when, the excerpted portions were amended in 1943, 1944, or 1945, or how they were amended. It is apparent that the relevance of these extracted documents is limited to those rules, regulations, and laws which were in effect at the time of the various incidents during the tour of the duty of the accused, KOBAYASHI.

In order to clarify this matter without undue delay to the proceedings of the commission, I questioned the defense counsel, Mr. SANAGI, the witness, and learned that as to certain of these rules, regulations and laws the witness was unable to state whether the excerpted portions as presented had been amended during 1943, 1944 or 1945. A despatch was originated in order to obtain the requisite information from the Second Demobilization Bureau.

The judge advocate is willing to agree to the admission of these documents in evidence at this time, conditioned upon receipt of the reply to this despatch, evidencing whether any of the articles or portions offered in evidence by the defense have been amended during the tour of duty of the accused, KOBAYASHI, and if so, the substance of such amendment.

Respectfully,

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

"VVVV"

OBJECTION TO THE RECEIPT IN EVIDENCE OF DEFENSE DOCUMENT
(COMMANDER MARIANAS LETTER SERIAL 03293 dated 25 SEPTEMBER 1945)
DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE,
ON 28 JUNE 1948.

- -

Before stating his objections to the receipt in evidence of this document, Commander Marianas letter serial 03293 dated 25 September 1945, it is necessary, in order to present this objection, to give the commission the subject matter of this document which should have been previously disclosed to the commission, by defense examination of the witness.

This document consists of a letter on the subject of uniformity and procedure for care, treatment and work of Japanese prisoners of war. It is addressed to the Island Commander, Guam, Saipan, Tinian, and Peleliu. There is nothing on the face of this document or in the content of this document which is in any manner relevant to the issues now before this commission. We are concerned at this time with the question of whether or not the accused has neglected his duty with regard to the treatment of prisoners of war who were in the custody of armed forces under his command and control. What the procedure of the United States may have been with regard to the work, care, or treatment of Japanese prisoners of war on four individual islands is completely immaterial to any issues before this commission.

In mitigation, it is conceivable that the accused may wish to establish that somewhere in his command they did not work the prisoners too hard and they did not treat them too badly. He may wish to establish, perhaps, that his hours of work in certain areas were not greater than the hours of work which have been prescribed by the United States forces in the working of Japanese prisoners of war. But that, clearly, is matter in mitigation and has no relevance to any material issues before the commission at this time.

Respectfully,
David Bolton
DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

"WWWW"

REPLY TO THE JUDGE ADVOCATE'S OBJECTION TO DEFENSE DOCUMENT
(Commander Marianas ltr serial 03293 dated 25 Sept. 1945)

Delivered by

Commander Martin E. Carlson, USNR.
Counsel for the Accused

28 June 1948

The defense contends that International Law, particularly the Hague Convention and the Geneva Prisoner of War Convention, does not contain any provision whatsoever making it the duty of a commander in chief of a fleet to issue any orders regarding prisoners of war. Such orders are already contained in the Geneva Prisoner of War Convention, Hague Convention, and other international treaties.

We maintain that Commander Marianas, a command, is analogous to the Commander in Chief, Fourth Fleet. We are hereby offering in evidence a document issued by Commander Marianas in his official capacity regarding prisoners of war. This document will show the extent of the orders that were issued by Commander Marianas regarding prisoners of war and it is pertinent and relevant because, as we said, Commander Marianas is analogous to the command and office that the accused Kobayashi held.

Respectfully,

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Counsel for the Accused.

"XXXX"

KOBAYASHI MASASHI (13 MAY 1948) (VOL. IV) (165564)

A2
0130

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 IV

0725

OBJECTION TO THE RECEIPT IN EVIDENCE OF PROSECUTION
DOCUMENT NUMBER 10 (C.L.O. No. 2976)

Delivered by

COMMANDER MARTIN E. CARLSON, USNR
Counsel for the Accused

1 July 1948

We object to Prosecution Document Number 10 on the ground that it is irrelevant and immaterial in this case.This document is dated 21 April 1947, long before the charge and specifications were served against Kobayashi, Masashi, the accused in this case. It was therefore, not made up for this case and logically, therefore, it does not pertain to the facts and circumstances that have been brought out in evidence in this particular case.

It is further objectionable on the ground that it is merely the opinion of the maker of this document. It contains much material that is hearsay and on that ground it is fumther objectionable.

Respectfully,

MARTIN E. CARLSON,
Commander, USNR.,
Counsel for the Accused.

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0726

BRIEF OF AN ORAL REPLY TO THE ACCUSED'S OBJECTION
TO PROSECUTION DOCUMENT NUMBER 10 (C.L.O. No. 2976)

Delivered by

LT DAVID BOLTON, U. S. NAVY,
Judge Advocate

1 July 1948

May it please the commission:

The date of the making of this document is not material and has no bearing on the relevance of the document. This document deals with the defense of the Marshall Islands which were under the command of the Fourth Fleet. It is not necessary that the document should arise from information gathered with regard to the instant case. It is merely necessary that the document present facts concerning the Marshall Islands, and in that respect be relevant to the issues before this commission. The document deals with the command relationship between the army and navy in the Marshalls' area. The document is a document from the Japanese Government, Central Liaison Office, made by the Director of General Affairs, at the time, K. Asakai, and contains, therefore, the official statements of the best available evidence in the office of the Central Liaison Officer, Imperial Japanese Government.

Respectfully,

David Bolton

DAVID BOLTON,
LT, U. S. Navy,
Judge Advocate.

0727

MOTION TO STRIKE EXHIBIT 57 (C.L.O. No. 2976) FROM
EVIDENCE IN THE CASE OF KOBAYASHI, MASASHI, VADM, IJN.

Delivered by

COMMANDER MARTIN E. CARLSON, USNR
Counsel for the Accused

1 July 1948

We move that this document, Exhibit 57, be stricken from the record on the ground that there has been no showing that it is an original document. Further, there is no date as to when the pertinent facts and data that it concerns were in effect. The statement is made in paragraph 2 b (1) that the defense of the Marshall Islands was assigned to the Fourth Fleet but there is no showing as to when or during what period. We are concerned with the period April 5, 1943 to February 23, 1944, the period during which the accused is charged with neglect of duty.

The statement is made in paragraph 2 b (1) that the senior officer present was usually made responsible. We are not concerned with what was usually done -- we are concerned with what was done on a particular date and in a particular incident, because that is what the accused is charged with. In paragraph c (2) a period is mentioned from January to 15 August, 1945, clearly without the time during which this accused is on trial for neglect of duty.

Respectfully,

MARTIN E. CARLSON,
Commander, USNR.,
Counsel for the Accused.

0728

BRIEF OF AN ORAL REPLY TO THE ACCUSED'S MOTION TO STRIKE EXHIBIT 57 FROM EVIDENCE

Delivered by

LT DAVID BOLTON, U. S. NAVY
Judge Advocate

1 July 1948

The document which has been offered in evidence and which has been received in evidence as Exhibit 57 is an original document in English, and signed by the maker of the document, K. Asaki, in his own handwriting. The signature is there and clearly that is an original document.

Defense counsel has contended that paragraph 2 b (1) is irrelevant because it does not state when the Marshall Islands were assigned to the Fourth Fleet. The date when the Marshall Islands were assigned to the Fourth Fleet is not important. The important thing, and it has been established, is that defense of the Marshall Islands were assigned to and under the Fourth Fleet during the tour of duty of the accused, when the accused was Commander in Chief of the Fourth Fleet. Therefore, the description in this exhibit of the command situation in the Marshall Islands at the time of assignment of army forces - and apparently continuing through the period of the accused's tour of duty, to the end of Japanese defense in this area, is clearly relevant.

It is not important when the Marshalls were assigned, because we have already established by proof that the Marshall Islands were previously assigned to the command of the Fourth Fleet. We are concerned with what the conditions on the Marshall Islands were during the tour of duty of the accused. This document in paragraph 2 states what the conditions were as of the time the army was originally sent to the Marshall Islands. It is corroborative evidence of the testimony we have had concerning the Marshall Islands area. We have testimony as to when the army came into the Marshall Islands and if my recollection is clear the testimony of the accused, as well as that of Inoue, established the fact that the army came to the Marshall Islands in November, 1943. Paragraph 2 b states that when the army units came to the Marshall Islands they were placed under the operational command of the Commander in Chief, Fourth Fleet under an Imperial Naval Order. Similarly it states that as to remotely isolated areas, all army and navy on such islands were usually placed under the command of the senior ranking officer on the island regardless of whether he was army or navy. This latter point is particularly relevant to the Mille Atoll situation which is at issue in this case. The prosecution,, during the course of this rebuttal, will offer additional evidence with regard to this issue.

With regard to paragraph c2,its irrelevant content may be disregarded by the Commission. It is not in any manner prejudicial to the accused.

Respectfully,

David Bolton

DAVID BOLTON,
LT, U. S. Navy,
Judge Advocate.

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0729

OBJECTION TO THE RECEIPT IN EVIDENCE OF PROSECUTION DOCUMENT NO. 262, THE DEPOSITION OF OISHI, CHISATO

Delivered by

COMMANDER MARTIN E. CARLSON, USNR
Counsel for the Accused.

1 July 1948

May it please the commission,

The accused objects to the introduction of this deposition, made by Colonel Oishi, Chisato, on the ground that Oishi, Chisato is available as a witness. He is in Tokyo, and on the request of the judge advocate, the Supreme Commander for the Allied Powers will produce him as a witness, thereby giving the accused the right of confrontation of witnesses.

The interrogatories as submitted by the judge advocate were submitted in accordance with the authority of the rules of evidence promulgated by SCAP. We point out that these rules were put into effect in December, 1945, and are, therefore, ex post facto rules. They were put into effect for use at the International Military Tribunal which was trying certain suspected accused war criminals at Tokyo. They were based on the military trial procedure which was also an international trial procedure. They were put into effect, not to be used by a military commission convened by the Navy Department, which has its own rules. They were to be used by international military courts.

The judge advocate is attempting to use rules which were set up not for a navy convened commission, but for an international tribunal. We object to the authority contained therein.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
Commander, USNR.,
Counsel for the Accused.

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0730

BRIEF OF AN ORAL REPLY TO THE ACCUSED'S OBJECTION
TO PROSECUTION DOCUMENT NO. 262, THE DEPOSITION OF
COLONEL OISHI, CHISATO.

Delivered by

LT DAVID BOLTON, USN
Judge Advocate

1 July 1948.

With regard to the contention of defense counsel that Oishi, Chisato, is available, the judge advocate wishes to point out that Oishi, Chisato, as shown by the interrogatories, is interned at Sugamo Prison at Tokyo, Japan. He is under the control of the Supreme Commander for the Allied Powers and is not under the control or within the jurisdiction of this commission. Oishi, Chisato, as shown by prior exhibits introduced in this court, is a convicted war criminal and as such it is highly speculative as to whether the Supreme Commander for the Allied Powers would permit the removal of this convicted war criminal out of the jurisdiction in which he is confined.

The rights of the accused with regard to cross-examination have been amply safeguarded in the obtaining of this deposition, in that the accused has been permitted and has, in fact, submitted cross-interrogatories with regard to the interrogatories, the deposition of which is now offered in evidence. The deposition on the cross-interrogatories was received by the judge advocate and has been given to defense counsel for their use. They have, therefore, had ample opportunity to cross-examine Oishi, Chisato, and have availed themselves of this opportunity.

Defense counsel has contended that, because the deposition was taken in conformance with the authority of SCAP rules that this is an improper act and the evidence should not be accepted before this commission. This commission has been specifically authorized to apply these SCAP Regulations Governing the Trials of Accused War Criminals and in conformance with that procedure the commission authorized the taking of these depositions.

The very title of the regulations, their continuous use in all war crimes trials in the SCAP area, and the specific authorization contained in the precept of this commission, to use the procedures set forth in SCAP Regulations, clearly establish the admissibility of this evidence.

Respectfully,

David Bolton

DAVID BOLTON, LT, USN
Judge Advocate.

"DDDDD"

0731

軍法委員會ニ對スル報告

辯護人　佐藤　敏

本法廷第二十六日辯護側カラ証據ニ提出シタ日本海軍法規中ノ一部、即チ Exhibit 27 艦隊令、Exhibit 28 日本海軍刑法 Exhibit 29 日本海軍懲罰令中ニ、一九四三年又一九四四年ニ改定サレタ部分ガアリ其ノ内容ガ不明デアッタ爲、之ヲ第二復員局ニ照會シテ明瞭ニスルト云フ條件ノ下ニ是等ノ書類ヲ證據ニ採用サレタ。

第二復員局カラノ回答ヲ受領シタノデ本辯護人ハ是等ノ法規中、一九四三年又一九四四年ニ改正サレタ部分ヲ調ベタ所、其ノ結果ハ次ノ通デアル。

(一) Exhibit 27 艦隊令ニ關シ。

艦隊令ハ數回改正サレタガ證據ニ提出シタ條項ニ關係アルハ、一九四四年十二月一日、艦隊令第一條ニ「輸送艦」又「敷設艦」ガ追加サレタノミデアル

(二) Exhibit 28 海軍刑法ニ就テハ一九四四年ニ一回ノ改正ガアッタガ證據ニ提出シタ條項ニハ改正ガナカッタ。

(三) Exhibit 29 海軍懲罰令ニ關シ

海軍懲罰令ハ一九四四年二月一日ニ一部改正サレタ。其ノ中、證據ニ提出サレタ條項中デハ第七條、長官ト稱スルモノノ條項、第八條所轄長ト稱スルモノノ條項又第十五條中分隊長ニ關スル懲罰權限ノ部ニ改正ガアッタ。

受領シタ回答書類デハ改正前ノ條文ガ無イノデ確實ニ改正個所ヲ確メルコトガ出來ナイガ、本事件ニ關聯トハ如何ナル點ニ改正ノナカッタコトハ確實デアル

0732

上述ノ如キ結果デアッテ既ニ提出シタ証拠ニハ何等重要ナ修正ハナカッタノデ、証拠書類、27、28、29ヲ夫々其ノ儘証拠ニ採用サレンコトヲ申出デル

尚ニ復答書、回答書類ハ被告側ニ於テ之ヲ受領シ、被告側モ本書類ヲ見テ居ルノデアル.

敬白.

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0733

INFORMATION TO THE COMMISSION CONCERNING THE REPLY RECEIVED FROM SECOND DEMOBILIZATION BUREAU RELATIVE TO PENDING QUESTION REGARDING DEFENSE DOCUMENT, DELIVERED BY MR. SANAGI, SADAMU, A COUNSEL FOR THE ACCUSED, ON 9 JULY 1948.

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Among the Japanese Naval Regulations offered in evidence on the twenty-sixth day of the instant case, Exhibit 27, "Fleet Ordinance", Exhibit 28, "Naval Criminal Code," and Exhibit 29, "Naval Disciplinary Ordinance", were received in evidence on the condition that the amendments made in 1943 and 1944 of the above three documents be referred to the Second Demobilization Bureau and clarified.

Defense Counsel wishes to inform the commission, at this time, that they have received the replies from the Second Demobilization Bureau.

On examining the portions revised in 1943 and 1944 in these documents, defense counsel reports the result as follows:

(1) Concerning Exhibit 27 "Fleet Ordinance":

Although portions of the "Fleet Ordinance" were revised several times, no changes except the adding of the words "Transports and "Minesweepers" in Article 1, were made with respect to the articles offered in evidence.

(2) Concerning Exhibit 28 "Naval Criminal Code":

There was one revision made in 1944, but no amendments were made with regard to the articles offered in evidence.

(3) Concerning Exhibit 29 "Naval Disciplinary Punishment Ordinance":

A part of this ordinance was revised on 1 February 1944. Among the articles offered in evidence, there were some revisions made in Article 7 pertaining to designation of Commander in Chief, Article 8 pertaining to designation of cognizant commander, and in Article 15 that portion which related to the authority of the division officers to impose disciplinary punishment.

Although defense counsel is unable to ascertain specifically what those charges were, from the reply received, because of not having possession of these articles prior to their revision; he wishes to assure the commission that those portions revised are not such as to cause controversy in the instant case.

Defense counsel, therefore request the commission to receive Exhibit 27, Exhibit 28, and Exhibit 29 in evidence since there have been no material changes made therein. The replies from the Second Demobilization Bureau were received by the judge advocate and he has had access to them.

Respectfully,

SANAGI, Sadamu.

I hereby certify the foregoing to be a true and complete translation of the original document written in Japanese, to the best of my ability.

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

"FFFF"

MOTION FOR A DIRECTED ACQUITTAL ON BEHALF OF THE ACCUSED, KOBAYASHI, MASASHI FORMER VICE ADMIRAL, IMPERIAL JAPANESE NAVY, DELIVERED BY COMMANDER MARTIN E. CARLSON, U. S. NAVAL RESERVE, 4 COUNSEL FOR THE ACCUSED.

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9 July 1948

We move for a directed acquittal on the ground that the charge does not state a cause of action because the charge failed to show the negligence charged was the cause of the injury complained of and because it appears from the facts alleged and the evidence adduced that the injuries were not proximately caused by the negligence charged, but by an independent intervening agency. (See Gogol v. Baltimore, etc R. Co., 226 Fed. 224).

The averment "unlawfully disregard and fail to discharge his duty as Commander in Chief of the said Fourth Fleet, to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, permitting them to torture, abuse, inhumanely treat and kill American prisoners of war" is a general averment and is not sufficient because it is statement of a mere legal conclusion and it is not sustained by the facts alleged.

Such an averment is not sufficient because the evidence adduced shows the injuries were not proximately caused by the acts of negligence alleged but by an intervening agency.

The evidence clearly shows that an intervening independent agency was the proximate cause of the injuries complained of and we hereby move for a directed acquittal.

Respectfully,

Martin E. Carlson

MARTIN E. CARLSON,
Commander, U. S. Naval Reserve,
Defense Counsel.

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REPLY TO THE MOTION FOR A DIRECTED ACQUITTAL DELIVERED BY LIEUTENANT DAVID BOLTON, U. S. NAVY, JUDGE ADVOCATE on 9 JULY 1948.

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The charge against the accused is one which follows in its essential nature the outline of the decision of the United States Supreme Court in the famous YAMASHITA Case. The allegation with regard to causation is contained in the phrase "permitted" which appears in the specifications against the accused. Specification one which charges a failure of the accused to control his subordinates contains the phrase "permitted them to torture, abuse, inhumanely treat and kill American prisoners of war". Similarily under specification two which charges the failure of the accused to protect prisoners of war the following phrase appears "in that he permitted the unlawful treatment, abuse, inhumane treatment, and killing of said prisoners of war." This specification conforms to the requirements of adequately charging neglect of duty. The YAMASHITA Case decision of the United States Supreme Court, 327 U.S. 1 is directly in point, and there the language of the court clearly supports the instant charge and specifications.

With regard to the contention by the accused that the injured were not "proximately" killed by the negligence of the accused it should be noted that this is a question of fact which the judge advocate believes has been fully established during the course of the trial. It should be pointed out, however, that the doctrine of proximate cause appears in civil damage actions for negligence and is not one that is commonly applied in a criminal action of this nature. The doctrine of proximate cause arose in part in the effort of civil courts, the common law courts in certain jurisdictions, to delimit the duty that was imposed upon an individual on the theory that an individual should not be held to account in civil responsibility to everyone who could conceivably be injured by his acts of negligence and who were in fact injured thereby. The theory of this development of proximate cause was to limit this duty to those individuals who might reasonably be considered to be placed in danger by the negligent acts of the defendant. It is unnecessary to further cite the law with regard to the development of this phase of the civil action of negligence.

In the instant case we have shown that the accused neglected his duty. At least we have shown sufficient proof of neglect of duty to require consideration of the facts by the commission. We have shown such neglect of duty by the accused not only with regard to persons whom he had the duty to control but more specifically with regard to the persons he had a specific duty to protect, namely, the prisoners of war, the neglect of duty by the accused specifically affected, and there was reasonable grounds to know that it affected the prisoners of war who were in fact killed and mistreated due to the negligence of the accused.

The fact that the actual acts of mistreatment and killing were carried out by subordinates of the accused does not and obviously can not free him from his responsibility for his neglect of duty. If the theory of the defense counsel with regard to these incidents were considered to be valid, then no commander of any armed forces could be punished for any offense which he did not himself directly order or participate in. Such a rule would obviou negate the entire effect of all international law with regard to the law of la

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warfare. This defense theory would permit a commander in chief to assume his position of responsibility as commander of armed forces, to do nothing to protect prisoners of war or helpless civilian populations, to permit wanton crimes and atrocities by his subordinates, and then to escape liability by saying that in fact the acts were carried out by persons other than himself, and therefor he was not the proximate cause of the actual deaths or injury. This argument of the defense counsel is too absurd to warrant further discussion.

Respectfully,

David Bolton

DAVID BOLTON,
Lieutenant, U. S. Navy,
Judge Advocate.

"HHHHH (2)

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陳述書

昭和ニナミ年七月ナニヨ

元海軍中将　小林　仁

私ハ自己ノ為ニ記入シタ記言ヒマレタガ只今更ニ私個人トシテノ陳述ヲミヤウト思ヒマス.

私ハ1926-1928年迄約二ヶ年半駐在員及海軍武官補佐官トシテ又1932-1934年迄約二ヶ年海軍武官トシテ英国ニ駐在セ其他1932年一般軍縮会議随員トシテGeneva=又1936年欧米ニ出張シタル経験ヲ外国ノ事情ニ関シテハ一般日本海軍士官ニ比シ多少優レタル認識ヲ持ヶ自負シ居ラレタル是等ノ自負心ヲモ持ツテ居ルト確信シ居リマス

英国駐在中影響ヲ受ケマシタ点ハ fairplay. frankness 等ノ美徳ヲ處世上、行動ニ実現シヤウト努力シテ来マシタ又英国駐在海軍武官ノ経験アル良心張ト好対象ニ日本ノ大ナル欠陥ヲ痛感シ永年文筆ヲ揮ヒ来リマシタ.

私ハ日本ノ国策トシテ統帥ハ主義ヲ持ツテ居リ海軍部内ニ於ケル公私、主義ヲ持ツテ居ル人達ヲ親友トシテ居リマシタ又Geneva会議ヶ英国駐在海軍武官トシテ勇敢ニ日本外交ヲ助ケマシタガ私ハ公私、主義ヲ持ツ人達ヲ親友トシテマシタガ此等外交官達ハ終戦後モ追放セラレズ各要職ニ就イテ居リマス

陸軍士官ハ英国駐在陸軍武官トシテ英国ノ物語ヲ共ニシ陸軍部内ニ稀ナル統帥ノ主義ヲ持ツタ田中静壱大将ヲ親友トシテヰタ田中ハ1945年八月東部軍司令官トシテ日本降服ノ際モヤ叛乱ヲニヤシタ陸軍、陰謀、及迫ヲ身ヲ以テ止メ日本ヲ更ニ大ナル破滅ト混乱カラ救ヒマシタ

彼ノ二人ノ男児ハ私ノ二人ノ娘トソレゾレ結婚シ孫ノ代ニ於ケル遺言

"JJJJJ"

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ニヨリ其一人ハ私、答ヘトナリ小林ト名乗ツテ居リマス。

日支事変ガ始マリマシテカラ私ハ第四艦隊参謀トシテ(1937-1938)一ヶ年、漢口根據地隊司令官トシテ(1939-1940)一ヶ年、上海方面根據地隊司令官トシテ(1940-1941)約三ヶ年ト三箇月ノ、各方面ノ勤務ニマレリガ部下ノ軍規ヲ厳正ニ保持スルコトニ留意ト部下ノ不法行為ヲ絶対ニ防止スルコトガ重要ト、高級士官ノ関スル場合トニ区別ヲ以テ之ヲ處理シマシタ又開戦注意ノ最終ニ於ケル心構ヘト1938年二月青島方面ニ無血無事行ヲ行フ作戦計畫ヲ実現致シマシタ。1938年四月作戦行動ヲ中止同船President Hooverガ台湾大焼島ニ碇泊セルヲ知リ旗艦足柄ニテ放送ヲ以テ訓示シマシタ又各地ニ於ケル陸軍側ノ開戦注意無知ニヨリ生ズル幾多ノ紛争ヲ防止シ又生ジタル紛争ヲ解決シタルコトガアリマス。

世界戦争ガ始マリマシテカラ私ハ大阪警備府司令長官トシテ一ヶ年半勤務シ1943年四月第四艦隊司令長官トシテ前線ニ参リマシタ。着任後直ニ敵ノ指揮官ニ軍規ヲ厳ニ維持スベキコト開戦注意ヲ通牒スベキコトヲ含ム訓示ヲ発シマシタ。前長官ノ申継ニ参謀長以下各幕僚ヨリ申告ヲ聴キ又自ラ各部隊ヲ巡視シマシテ設営隊ニ若干ノ注意ヲ要スル以外満足ノ状態ニアリ部下各部隊ノ軍規ノ厳正ニ保タレテ居ルコトヲ自信ヲ持チマシタ。

私ノ定時配置ハ東西2800浬南北1600浬ノ地域ニ及ビ広大ナル地域ニ各部隊ハ点々散在シテ居リ通信ハ不完全、船舶航空機ノ数モ少カッタノデ時々ヨリ巡視スルコトハ困難デアリ巡視ノ為メ一万三千浬ノ飛行ヲシマシタガ其全部ヲ巡視スルコトガ不可能デアリマシタノデ等級ノ高イ特ニ各根據地司令官ニ重点ヲ置イテ巡視シマシタ。

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第四艦隊ノ任務ハ此度大ナル已ト域ノ防備已ト支ノ航空作戦開戦後急ヲ新ニ着手セラレマレタ為メ之ノ飛行場ノ造成整備各根拠地ノ機能発揮海上交通保護南方主戦場ニ対スル支援等ヲアリマレタ着任ノ示ノ期ハ私ノ変特已ト域ノ直接敵ノ攻撃ヲ受ケマセンデシタガ根拠地Truk方面ハ南方主戦場タルSolomon方面ハMarshall Gilbertヨリ近距離ニアリマシテ南方ニ重点ヲ指向スル為ニモ之ニ関係スル軍ノ必要ナル諸施設等ニツキ考慮ヲ払ヒマシタSolomon方面ノ激烈ナル戦闘ハ開始ニ四艦隊司令部ノ整備ヲ終ヒマシタ。

Solomon方面ノ戦況ヨリ判断シ特ニ変特已ト域モ敵ノ攻撃ヲ受ケルコトヲ予期シ居リマシタガ米国側ハ人命ノ損失ヲ最少ニスルタメ防備ノ弱キ島嶼ヲ海上兵力ノ支援ヲケヲ以テ直接攻撃スルコトヲ避ケ先ツ島嶼ヲ占領シ航空基地ヲ急設シ優勢ナル航空兵力ヲ以テ日本軍ノ防備ヲ無力ニシタル後上陸作戦ヲ行フヤウニ判断シ居リマシタガGilbert、直接攻撃上陸ニヨリ此判断ヲ裏ヅケラレマシタ。

私ノ変特已ト域ノ防備ハ未ダ完ヒトハ言ヒ難キ根拠地ノ兵力防備資材、要ハ、甚ダ急デアリマシタ内地ヨリノ輸送力モ急ヲ要デアリマシタガ其上途上ニテ敵潜水艦ノ攻撃ニヨリ沈没スルモノアリ到着スル兵力資材ハ更ニ制限セラレマシタ日本側ノ防衛準備カ整ヒ未ダ状態ニアリマシタ米軍側ハ非常ナル犠牲ヲ払ヒ強引ナル作戦ヲ行ッテ来リマシタ。

尚、機動部隊ニツキマシテハTarake, Imarshall Gilbert, Naul, ノ攻撃ヲ受ケマシタガ次ノ攻撃重点ハ各ニ向ケラレバカリニ私ハ私モ他ノ指揮官モ判断ニ苦シミマシタ。我ガ情報ヲ甚ダ貧弱デアリマシタ。

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ソレデ小笠ル兵力資材ヲ如何ニ配分スルヤニ甚ダ困難ヲ感ジマシタ又低速無防禦ナル補給船ヲ以テ前線ニ補給スルコトガ不可能トナリ、Truk ニ於テ巡洋艦駆逐艦ニ弾薬燃料ヲ積ミ換エ前線ニ送ラナケレバナラズ艦数ト積載量ニ制限セラレ更ニ燃料ノ困難ニ逢着セザルヲ得ザルニ至リマシタ。

私ノ任務ハ第六艦隊 Wake, Jaraiwa ノ大空襲ヨリ Gilbert ノ上陸、Marshall ノ大空襲 Marshall ノ上陸作戦ニ引続キ Truk, Saipan ノ大空襲ト連続ニ攻撃ヲ受ケ特ニ Marshall 方面ノ陸海兵力ノ増強中防備未ダ完成セザル中最モ防備薄弱ナル Kwajalein ニ対シ上陸作戦行ハレマシタ。尚又航空兵力ハ倉庫ニ又基地ニ陸ノ施設モ充分ニ行ハレズ私ノ着任前ニ Gilbert, Marshall 方面ニ敵上陸、陸行ハレ之ヲ支援セラレタ機動艦隊主力、出撃セ海上航空兵力ノ弱体ナル為ニ遂ニ行ハレズ敵ノ攻撃近接ノ効果ノ少ナカリシ三ヶ月乃至六ヶ月早クナリマシタ又南方方面ハ十月初旬 Jaraiwa 上陸ニ始リ第四次ニ渉リ二十二月 Caroline ニ対スル聯合艦隊律艦ヲ以テスル輸送等ノ四艦隊司令部ハ更ニ繁忙トナリマシタ。

長官トノ第一ノ任務ハ作戦デアリマスガ以上ノ如キ実況ニアリマシテ私ノ頭ハ作戦ニ専念セザルヲ得ザル状態ニアリマシタ又此状態ニ於テ私ハ各根拠地隊司令官並ニ各警備隊司令ノ各要部隊、管理並ニ次ニ後方ヲ以テ速ニ其ノ全般ニ対スル防禦対策ニ関シ自由手腕ヲ揮ヒ得ルコトガ必要ニナリマシタ。

日本ノ海軍デハ、戦時ニ於テモ、私ハ平時ヨリ数倍ノ兵力、関係法規又ハ書類ヲ有シテ居リマシタ。戦争ニナカラ多数ノ文書ト命令ヲ出シテモ仲々前線ニ到着スルモノデハアリ

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マセン、ソレデ例ノ甲文書ト電報デ指示スルコトガ起メテ立ツテ後リ
ニ平素カラ之ヲ決定又ハ書類デ示サレテ居リ又教育訓練カレテ
居ルノデ、

艦隊戦闘ニ於テハ、艦隊長官ハ一ト先ヅ攻撃行動ヲ
ヲ指示スルコトヤリ簡単ナ決統信号又ハ発光信号デ全般ガ之ノ
艦隊長官ノ作戦方針ニ沿ッテ行動スルノデアリマス而テ各部隊モ
一ヶ自分ノ行動ニ就ノ分ケ時々刻々指示ヲ待ツコトナク其ノ情況
ニ於テ最モ信ズル行動ヲ取ル様訓練サレテ居マス 私ハ永ク
日本海軍教育訓練ニ於テ自分ノ部下ガ最モ善ク自分ノ意
図ニ適ヒニヤッテ呉ルノヲ常ニ望ンデ居リマシタ

私ハ1943年四月第四艦隊司令長官就任ノ時ニ
開隊法規ヲヨク守ルベキ旨ヲ庶ク指揮官ニ訓示ヲ与ヘマシタガ従来
ノ取扱保護ノコトヲ勿論ノ内ニ含マセテ居ル積リデアリマス各
部隊ニハ従来ノ取扱保護ニ関スル規定法規ヲ記載シアル海軍
諸例則及戦時国際法規ノ書ガ支給備付ケラレテ居リマス又
各部隊長ハ其ノ教育者デアリマスカラ之ニ関ニ相当ノ教育ヲ受
ケテ居リマス又私ハ従来上海其他地隊司令官トシテ勤務中部
下ノ指揮官ノ従来ノ保護取扱ヲシテ居リマシタガ艦隊長官ノ
細イ指示ハアリマセンデシタガ事故ヲ起サズニ俘虜ヲ給与
アリマスノデ一々細イ指示ヲ艦隊司令ヨリ与ヘル必要ヲ感ジマセンデシタ
然シ私ハ従来ノコトニ関シ決シテ無関心デアッタ
ノデハアリマセン 着任ノ際Wake島ニ従来ノ残留シアルコトヲ知リ
之ヲ内地ニ送還スル様ニ指揮官ニ先言シマシタ当時之等人
数ヲ日本ニ送ルハ不可能デハアリマセンデシタガ1943年九月Wake
島必視ノ際ニ其取扱ニ関シ詳細ニ視察シマシタガ満井氏

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国際法規ヲ論ズルモ、方針ヲ立テレ Geneva 條約ニ定メ
タル通リ俘虜ヲ取扱ヒ居ルヲ見テ満足ス云ヒマシタ又決メ
タル通リ俘虜ヨリ発ス可キ手紙ヲ検閲ノ上発信ニ許サヒマシタ.
又モニ我ガ也ニヒタ三隻ノ艦仔度ハ短期ニ
完了、我内地ニ帰還セラレタルヲ以テ他ノ国ニ俘虜ガアリスル
ヤ否ヤ調ニ帰還ガ行ハレ居ルコト、思ヒマシタ
又モハ其他国際法規ヲ守ルコトニ充ツ自分ノ
注意ヲ及ボス限リコト致シマシタ Gilbert ヲ向ケ我ノ Nauru
ニ於ケル敵ガ占領セラレ得ル事ヲ予ニテ使用セラレルヲ見テ
指令ヲ与ヘ直ニ還ス様ニ処分ヲ実行セラレマシタ又 Nauru
ニ於ケル敵ニ飛行場建設・降伏ヲ促シ、食糧問題ヲ研究シテ
設ケルコトヲ命ジ又個人財産ニ属スル確実ナル保管ヲ
指令シ又ハ記録ヲ残ス様使用スル様ニ致シマシタ.

私ハ第四艦隊司令長官在任中私ノ使用スル
部下ガ不法ノ行為ヲ為ス又ハ予ヲ、欺クヤウナコトハ
ナカツタト思ヒマセンガシカ

二. 此ノ様ニ述ベヲ為ヒマスト私ガ日本カラ
来ル手紙ヲ受取ルニ当リ為ニスルコトヲ行ヒ相談ヲ通ジテモ
ナサレナカツタコトヲ残ニ遺憾ニ思ヒマス

四ヶ年ニ亘ル大戦ハ大平洋ニ於ケル
戦ヒ米国ノ勝ヲマシタ. 要因ハ多クハ永ク開ケ
頑迷ナル敵ナリシヤウニ. 戦ヒガ終ヲヤカラ最早ヲ争
ハヌヲニナリマス. 私ハ此戦ヒヲ以テ冷静公平ナル
気ノ満ヲタル環境ニ深ク感動ヲ覚ヘマシタ.
ソレハ私ノ知ツテ居リマス米国ノ典型的ノ紳ヒ

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ナニヲ度量、大ナル米国デアリマス.毎冬ノ立ノ
御哉針ヲイノゾ元ヲデアリマス

敬白.

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STATEMENT OF KOBAYASHI, MASASHI

Although I have testified as a witness in my own behalf I would like to make a personal declaration.

I resided in the United States for two and a half years from 1926 until 1928 as language officer and assistant naval attache, and another two years from 1932 to 1934 as naval attache. I attended the General Disarmament Conference at Geneva in 1932 as aide to the Japanese Delegate Plenipotentiary. In 1936 I was despatched to Europe. With these experiences I had, compared to the general run of Japanese naval officers, a somewhat greater knowledge of foreign affairs, and I am convinced that I was not imbued with any distorted concepts of racial superiority.

In my daily life I strove to realize the virtues of justice, fair play and frankness by which I had been deeply impressed during my tour of duty in the United States. Furthermore I profoundly respected and was in social contact over a long period of time with my seniors Admirals NOMURA, Kichisaburo and YAMAMOTO, Isoroku, both men with a strong sense of justice and both former naval attaches in the United States. JK

I chose as close friends those naval officers who shared the moderate policy of the Navy in relation to Japanese diplomacy. Again when I was at the Geneva Conference and when I was naval attache, I became acquainted with a number of Japanese diplomats. I cultivated intimate friendships with only those of their number who shared my policy. These diplomats have not been purged since the Surrender and they all hold important government posts today. Among army officers my close friend was General TANAKA, Shizuichi who was military attache in Washington when I was serving as naval attache at the American capital, and who believed in a moderate policy - a very rare phenomenon in the Imperial Japanese Army.

Tanaka was Commander in Chief of the Eastern Army in August of 1945 and threw himself into the task of preventing Army intrigue to forestall the surrender of Japan and thus saved Japan from still greater destruction. His two sons are married to two of my daughters, and by his last will and testament one of them became my adopted son and now calls himself a Kobayashi. JK

After the commencement of the China Incident I served in the Chinese theater of war on three separate occasions. From 1937 until 1938 as Chief of Staff of the Fourth Fleet for a year, from 1939 until 1940 for a year as Commandant, Hankow Base Force and for approximately a half year from 1940 until 1941 as Commandant, Shanghai Area Base Force.

During these tours of duty I constantly observed that discipline among my subordinates was strictly enforced. No matter of how minute a nature the illegal act of the subordinate, or whether the illegality involved high ranking officers who were my immediate subordinates I always without fail saw the matter investigated and disposed of. I further strove to abide strictly by international law and regulations. I exerted my utmost to achieve a bloodless and non-violent occupation of Tsingtao in February of 1938 and realized my desire. In April of 1938, while in the midst of operations we learned that the American merchantman "President Hoover" had run ashore on an island off Formosa. I hurried to the rescue aboard my flagship, the Ashigara. Further I strove to prevent numerous clashes and to settle disputes which arose in various areas because of the Army's ignorance of international law.

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After the commencement of the Pacific War I served as Commander in Chief of the Osaka Naval District for a year and a half after which I went to the battle front in April 1943 as Commander in Chief, Fourth Fleet. Immediately on assuming my post I issued instructions to my subordinate commanders, among which were maintenance of strict discipline and close adherence to international law. After I was briefed by my predecessor and after I had received the reports of my staff officers headed by the chief of staff and after I had made personal inspection of the various units, I was convinced that discipline of the units was strictly maintained and with the exception of the Construction Department which required some observation, conditions were satisfactory.

My area of jurisdiction was extremely wide in scope, measuring 2,800 miles east to west and 1,600 miles north to south with the various units scattered therein. Owing to faulty communication facilities and lack of surface vessels and planes, it was at times difficult to tour and inspect every one of them. I flew over 13,000 miles on inspection trips but failed to cover all the territory. I had to place responsibility upon Base Force Commandants, particularly

The duties of the Fourth Fleet were the defense of this vast area, air operations in adjacent areas, construction and equipment of numerous airfield hurriedly started after the commencement of the war, the effective functioning of advance bases, surface transport escort, and support operations for the major theaters of war in the South. In the first period after my assumption of office, the area under my command was not subjected to direct enemy attack. The Solomon area which was the main theater of war in the South at this time was closer to my Base Force at Truk than the Marshalls and Gilberts, and thus whenever there were any major operations in the South, we cooperated in matters of transportation and supply.

The furious fighting in the Solomons indirectly caused a great deal of work for Fourth Fleet Headquarters.

In the light of the battle conditions in the Solomon area we expected the enemy to attack the area assigned to me. We had also judged that the Americans to keep their loss of life down to the minimum, would avoid a direct assault of islands that were fortified and supported by fleets and that they would execute landing operations only after occupying neighboring islands, hurrying construction of air bases thereon and from them neutralizing the Japanese defenses by their superior air power. This judgment of ours was completely shattered by the direct forced landings in the Gilberts.

The defense of my area of control was not as yet completed and the demands for men and defense material of the various bases were very urgent. Transportation capacity from the Japanese mainland was small. The number of men and amount of material arriving from Japan were further curtailed because of transports sunk on the way by enemy submarine attacks. America was fighting a very aggressive war while we could do nothing but wage a defensive one.

Enemy task forces had attacked Wake, the Marshalls, the Gilberts and Nauru. It was difficult for me or any Japanese commander to judge where the enemy would concentrate their attacks next. Our intelligence was poor. It was extremely trying to decide how best to distribute what little material and men I had at my disposal.

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Furthermore it had become impossible to supply the front lines by slow-footed and unprotected supply ships, and the cargo had to be transshipped onto cruisers and destroyers at Truk and so transported. Owing to limitations introduced by lack of warships and shipping space, transportation became further involved and had to be abandoned altogether.

In the latter half of my tour of duty we received successive attacks initiated by the big air-raids on Wake and Tarawa, the landings in the Gilberts, the major air-raid on the Marshalls, the landings in the Marshalls, and closely followed by large scale air-raids on Truk and Saipan. Especially in the Marshall area was the defense incomplete. Army reinforcements then were on the way when enemy landings were made on Kwajalein, the most weakly defended atoll of that area. The air force under my command was weak and losses could not be replaced to a sufficient degree so that I was greatly concerned. The scheduled attack by the main force of the Combined Fleet in the event of enemy landings in the Gilbert and Marshall areas did not materialize because of the weakness of our surface and air strength, and the enemy offensive was effected three to six months prior to our first judgment.

Furthermore in the Sourthern area enemy landings were made on Torokina in the early part of November 1943. The fighting increased in intensity in December 1943 and the ensurance of transportation to Kavieng by Combined Fleet warships, etc., further increased the work at Fourth Fleet Headquarters.

The first duty of a commander in chief is operations and under the circumstances described above, my thoughts were fully occupied solely by operations. I had to depend on the guard unit commanders and base force commandants to administer their own units and also to use their initiative as to defensive measures to be taken against the American forces which came on in ever increasing numbers.

In the Japanese Navy, effort was made to teach matters necessary in time of war during peace time and these matters were set forth in pertinent regulations or documents. Once war has started, even if numerous documents or orders are issued they do not easily reach personnel in the front lines. Hence, in order that instructions given through documents or despatches during war-time may be held down to the minimum, regulations and documents which each in their own sphere set forth the requisite information are prepared in ordinary times, and education in these matters is given.

In fleet combat the commander in chief of a Japanese fleet does not direct the movement of each of the units comprising his fleet. The fleet manoeuvers follow closely the operational policy of the commander in chief through means of simple flag signals or blinker signals. Each of the subordinate units too, has its own orders as to its movements and it is instructed to make whatever movement it believes best under the prevailing circumstances without asking for instruction in the matter. In my long experience in the Japanese Navy I have constantly observed in the education and training of my subordinates that they were doing their very best and in accordance with my intent. I am firmly convinced of this.

When I assumed my post of Commander-in-Chief of the Fourth Fleet in April 1943 I issued instructions to my subordinate commanding officers that international law be observed by the units under my command. I, of course meant this to be an overall instruction covering treatment and protection of Prisoners of War, etc. In each unit there were copies of Naval Regulations and the War-time International Law Manual which contained the regulations and laws pertaining to treatment and protection of POW's. The various commanding officers, moreover, were graduates of the Naval Academy so they were relatively well educated in regard to this matter.

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Furthermore, when I was Commandant of the Hankow and Shanghai Base Forces some of my subordinate commanding officers had in custody POW's and they were handling them without mishap and without minute instructions from their Commander in Chief and as I had experience in supervision I did not feel any necessity for issuing minute instructions on every occasion.

However that does not mean that I was disinterested in the matter of POW's. On assuming my post I learned that there were POW's left on Wake and I sent a verbal message to the commanding officer that he despatch them to the Japanese homeland. It was however not possible to send these prisoners to Japan at this time. Again when I inspected Wake Island in September of 1943, I made a detailed inspection relative to their treatment and was satisfied to learn that their treatment was fair and just and according to my policy which Admiral Sakaibara well know was set forth in the Geneva Prisoners of War Convention. I ordered him to send the POW's by the next available boat and I advised him to grant them some additional recreational facilities.

And learning that the submarine POW's had been sent to the Japanese homeland by the first transportation, after a short internment, I thought that transportation to the Homeland would in due course materialise for all POW's captured on these far-flung islands.

Furthermore, I did everything I could to see that international law was observed. When I visited Makin on my inspection tour of the Gilberts, I saw that one of the churches had been requisitioned and was being used as a store-house for foodstuffs. I called the commanding officer and ordered him to return the church to the people and saw to it that my order was executed.

Again when a new air field was under construction on Nauru, I ordered the food problem of the populace studied and plans formulated to settle it. I also commanded inventories of materiel stored in the warehouse of the sulphate company, a private concern, to be taken before it was used on the air-field.

During my tour of duty as Commander in Chief of Fourth Fleet I did not for a moment think that my trusted subordinates had illegally disposed of POW's or handled them inappropriately.

However in retrospection I sincerely deplore the fact that I was not consulted or informed of what my subordinates did as regards these prisoners of war in their custody.

America was victorious in a war which was bitterly fought for four years in the Pacific. You members of the Commission have listened patiently to my story. It is nearly three years now since hostilities ceased. I have been much impressed by the calm and judicial atmosphere which has prevailed throughout this trial. It is as I have known, typical of American, a magnanimous America even in the hour of victory. I await your judgment.

Respectfully,

KOBAYASHI, Masashi.

I hereby certify that the foregoing statement, consisting of four pages, 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.

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OUTLINE OF PROSECUTION OPENING ARGUMENT

Delivered by
Lieutenant David Bolton, USN
Judge Advocate

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OPENING ARGUMENT FOR THE PROSECUTION

In the case of KOBAYASHI, Masashi

Delivered by

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

I. General Background.

A. Basic Principles of the Law and Customs of War.

The accused has been charged with violation of the law and customs of war. Basic rules and principles of the law and customs of war are succinctly set forth in the War Department Basic Field Manual (Rules of Land Warfare, FM 27-10) as follows:

"Chapter 1. BASIC RULES AND PRINICPLES.

1. General. -- Among civilized nations the conduct of war is regulated by certain well-established rules known as the rules or laws of war. These rules cover and regulate warfare both on land and sea. Those which pertain particularly to war on land are called the rules of land warfare. It is the latter with which this manual is concerned.

2. Written rules. -- Many of the rules of war have been set forth in treaties or convention to which the United States and other nations are parties. These are commonly called the written rules or laws of war.

3. Unwritten rules. -- Some of the rules of war have never yet been incorporated in any treaty or convention to which the United States is signatory. These are commonly called the unwritten rules or laws of war, although they are well defined by recognized authorities on international law and well established by the custom and usage of civilized nations.

4. Basic principles. -- Among the so-called unwritten rules or laws of war are three interdependent basic principles that underlie all of the other rules or laws of civilized warfare, both written and unwritten, and form the general guide for conduct where no more specific rule applies, to wit:
a. The principle of military necessity, under which, subject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money;
b. The principle of humanity, prohibiting employment of any such kind or degree of violence as is not actually necessary for the purpose of the war; and
c. The principle of chivalry, which denounces and forbids resort to dishonorable means, expedients, or conduct.

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5. Force of rules. -- a. The unwritten rules are binding upon all civilized nations. They will be strictly observed by our forces, subject only to such exceptions as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy. (See par. 358.)"

B. Duty to Control Subordinates and to Protect Prisoners of War stems from fundamental concepts of military law and the law and customs of war.

The accused has been charged with the violation of the law and customs of war, by neglect of duty. It is charged that he neglected two duties -- 1. The duty to control his subordinates, etc., and 2. The duty to protect prisoners of war. These duties will be discussed at length during the course of this argument but it can briefly be noted here that both the duty to control and the duty to protect prisoners of war have their roots in fundamental concepts and customs of military law and the law and customs of war. The duty to control has been dealt with in numerous international law cases, both in international claims cases and in war crimes cases. The duty to protect has been crystallized more specifically in treaties and conventions: Article 4 of the Annex to the Fourth Hague Convention of October 18, 1907 on Laws and Customs of War on Land, provides: "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated..." Similarly, the later Geneva Prisoners of War Convention of 27 July 1929, restates this fundamental doctrine of the law and customs of war in Article 2 as follows: "Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited."

C. No requirement that prosecution prove knowledge of any incident before its occurrence, as the accused is charged with neglect of duty, not murder.

The accused has been charged with neglect of duty. This is sig-

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nificant for it means that the prosecution need not prove that the accused ordered the commission of any of the incidents which resulted from his neglect of duty, and it means that the prosecution need not specifically prove that the accused knew of the impending commission of any incident before it occurred. This is an important consideration because the defense will undoubtedly seek to confuse the Commission into believing that it is necessary to prove, either directly or circumstantially, that the accused had actual or constructive knowledge of the impending commission of some incident before the incident occurred.

> If the accused had been charged with murder it would have been necessary for the prosecution to prove that the accused either personally committed the crime, ordered the crimes, or aided or abetted in the commission of the crimes.
>
> If the accused had known of the intended commission of any of the incidents before the incidents had occurred, and in view of his official capacity took no steps to prevent the commission of such specific incidents, he could be charged with murder, for it would clearly constitute a case of wilful omission of duty, and not a mere case of neglect of duty.
>
> As was stated in the war crimes trial of United States of America versus Yoshiaki Nakada, civ., Vol. I, Staff J.A. 12 August 1946, "Inactivity with full knowledge of an impending slaughter of human beings is not compatible with innocence." This is not a new doctrine of war crimes trials. It is an elementary application of fundamental rules of law. 26 American Jurisprudence, Homicide, Section 205, p. 295, states: "Where death ensues in consequence of a wilful omission of duty it is said to constitute murder." Similarly, in Section 207 it is stated: "If neglect is wilful, as where a man wilfully abandons his wife to the destruction of the elements when he can save her, or if the neglect or exposure is of a dangerous kind, as where a child is left in a remote place where it is not liable to be found, or where a husband criminally neglects to shelter his wife when he is able to do so and knowingly leaves her to perish, the homicide is deemed to be murder. The same principle may be applied to persons who stand in other relations, such as the keeper of a prison or asylum who undertakes, to the exclusion of others, to take care of inmates, or to a master of a servant or apprentice of tender years who is under the control and domination of the master." (26 Am. Jur., Homicide, 295, citing Gibson v. Com. 106 Ky. 360, 50 S.W. 532, Wharton's Criminal Law, 12th Ed. p. 693, Sec. 459, and Annotations 61 LRA 292, 293).
>
> Similarly, Michael & Wechsler, Rationale of Law of Homicide, 37 Columbia Law Review 721 states: "There is authority for the view that the character and degree of risk distinguish criminal from non-criminal negligence, whereas awareness of the risk distinguishes murder from manslaughter."

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~~Similarly, Wharton's Criminal Law, 12th Edition, Sec. 457, states: "When food is wilfully withheld from a helpless person, under the defendant's special charge, with the intention to kill, it should be remembered that the offence is murder. And the same rule applies where a child is unjustifiably exposed to the weather."~~

~~Similarly, Wharton's Criminal Law, 12th Edition, dealing with negligent homicide, states:~~

~~"Section 484. Killing helpless person by neglect is manslaughter. The doing an act, or the imperfect performance of a duty, toward a person who is helpless, which naturally and ordinarily leads to the death of such person, is murder, if death or grievous bodily harm is intended; and manslaughter, if the cause is negligence."~~

~~"Section 485. ....Independently of these statutes, it may be generally stated that for a parent, having special charge of an infant child, so culpably to neglect it that death ensues as a consequence of such neglect, is manslaughter if death or grievous bodily harm were not intended; and murder if there was an intent to inflict death or grievous bodily harm."~~

The accused in the instant case has not been charged with murder so it is not incumbent upon the prosecution to prove that he knew of any impending incidents before they occurred and wilfully omitted to perform his duty.

D. Accused is not charged with absolute responsibility, but is charged with neglect of command responsibility.

What the accused has been charged with, is neglect of duty. The prosecution does not seek to apply any doctrine of absolute responsibility. There are some theorists who contend that a commanding officer has an absolute responsibility for the acts of his subordinates, that regardless of what preventive measures he takes, regardless of how much care, effort, instruction, control, discipline, investigation, supervision, or punishment he effectuates, he nevertheless has an absolute criminal responsibility for the acts of his subordinates; and the bare proof of commission of war crimes by members under his command and persons subject to his control and supervision, is sufficient to establish criminal liability. The prosecution does not subscribe to this theory. The prosecution subscribes to the principle of command responsibility, not the theory of absolute responsibility.

Criminal responsibility for neglect of duty arising from

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command responsibility has been applied in trials before numerous United States Military Commission, to wit, in the famous Yamashita case, reviewed by the U. S. Supreme Court in 327 U. S. 1; in the case of United States of America versus Lieutenant General Homma; in the case of United States of America versus Colonel Fujishige, et al; in the case of United States of America versus Takeshi Kono; in the case against Vice Admiral Ohsugi; in the case of United States of America versus Captain Minoru Toyama, et al; and numerous other cases. Similarly, the doctrine has been applied in Canadian Military Courts, viz: the trial of Brigadefuhrer Kurt Meyer. The doctrine has been applied in British Military Courts, viz: the trials at Wuppertal, Germany of Karl Rauer, Wilhelm Scharschmidt, et al, on February 18, 1946; the trial of Fritz Hartjenstein and five others on June 4th-5th, 1946; and the trial of General Victor Seeger on 10 July 1946. The doctrine has been applied in Chinese War Crimes Military Tribunals, viz: the case of Takashi Sakai, 27 August 1946. It should be apparent that despite previous erroneous contentions of defense counsel, we are not hear dealing with or applying any new or untried legal concept of international or military law.

The prosecution believes that the position of command is a position of grave social responsibility. It carries with it important and inescapable duties. Every vigilance and every effort must be expended to perform those duties. The Commission being composed of military men knows the extent of that duty in military law.

The very first Article for the Government of the Navy is illustrative of the nature of that duty. It provides: "The commanders of all fleets, squadrons, naval stations, and vessels belonging to the Navy, are required to show in themselves a good example of virtue, honor, patriotism and subordination; to be vigilant in inspecting the conduct of all persons who are placed under their command; to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them; and any such commander who offends against this article shall be punished as a court-martial may direct. (R.S. sec. 1624, art. 1)."

E. <u>The offense of neglect of duty is part of the fundamental law of criminal negligence.</u>

This is not a mere administrative duty, it is a penal duty. Article 1 of the Articles for the Government of the Navy itself specifically provides that "any such commander who offends against this article shall be punished as a court-martial may direct."

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Nor is this merely a provision of military law. It is a fundamental principle in all law dealing with public office. I need merely cite briefly in this regard, the following language from Wharton's Criminal Law, 12th Edition, Vol. II, page 2243:

> "A man who undertakes a public office is bound to know the law, and to possess himself diligently of all the facts necessary to enable him in a given case to act prudently and rightly. If he do not, and through mistake of law or of fact be guilty of negligence, he commits a penal offense. This seems hard law, but it is essential to the safety of the State. If an officer, enjoying the emoluments of office and wielding its occasionally vast powers, should be able to plead in defense of negligence that he mistook either law or fact, not only is there no negligence that could be punished, but ignorance and incompetency would be the masks under which all sorts of official misconduct could be sheltered. In municipal trusts, for instance, to plunder triumphantly, it would be only necessary to secure officers conveniently ignorant and inert. But this the policy of the law does not permit. It says: 'You are bound to know the law and the facts; and if you lean on advisers or subalterns who mislead you, this is the very thing for which you are to be punished.' It is necessary for the State that it should have at its command knowledge and vigilance in the guardians of its liberties and its treasures. In those holding public office, want of either knowledge or of vigilance, resulting in negligence, is a penal offense."

What is this neglect of duty, this neglect of command responsibility which the accused is charged with? In essence it is merely the application of ordinary rules of criminal negligence to the special duty imposed by the law and customs of war upon commanding officers of belligerent forces. The Commission is familiar with this concept of criminal negligence as applied to military duties, and is thoroughly familiar with the military concept of neglect of duty. The instant case falls clearly within that pattern.

1. <u>The offense of criminal neglect of duty, as part of the law of criminal negligence, is recognized in international law, and in the domestic law of civilized nations.</u>

The fact that in the instant case we are dealing with a charge of neglect of duty in violation of the law and customs of war does not materially alter the nature of the issues presented for judicial determination. Criminal neglect of duty is a concept applied not only in all military law, but is itself an integral part of the almost universal con-

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cept of criminal negligence. Defense counsel in the trial of Tojo, et al. before the International Military Tribunal, Tokyo, in defense document N 514, specifically recognized the fact that criminal responsibility for negligence is generally established in International Law, stating, on page 28, "And a superior officer ... may also be justly punished for culpable negligence, if he was in a position to prevent such illegalities." "These principles are recognized in international law,.."

It is unnecessary to cite the numerous war crimes cases in which the doctrine of criminal responsibility for neglect of duty has been applied. The Commission is thoroughly familiar with the numerous trials in this area in which accused war criminals have been found guilty of neglect of duty, and I have previously cited numerous cases which have applied criminal responsibility for neglect of duty of command responsibility.

2. <u>The law of Japan applies the doctrine of criminal responsibility for negligence.</u>

Defense counsel have erroneously contended that precedents in this field of law are few and that the Commission should, therefore, look to the Japanese law for controlling precedents in regard to the guilt of the accused. The prosecution has cited numerous cases which establish that international law in this regard is well settled and that there is no value or relevance in looking to Japanese law for precedents or guides to existing international law. Even if no criminal responsibility for neglect of duty existed in Japanese law, that fact would be completely irrelevant, except perhaps in mitigation, for international law is well-settled, and international law is clearly controlling over domestic law. (See Glueck's "War Criminals, Their Prosecution and Punishment," P. 44, 45, and Chapter 3, footnotes 25, 26, and 27).

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However, in view of the preoccupation of defense counsel with the question of Japanese law, it would be well to briefly note that Japanese law also apparently recognizes and applies the doctrine of responsibility for criminal negligence. The accused in his own testimony before this Commission admitted that under Japanese naval law a superior officer could be punished for neglect of duty for the acts of his subordinates: "154. Question: 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? Answer: A superior officer will be punished according to the degree of misconduct or illegal action of his subordinates." Further evidence of the application by the Japanese of the laws of criminal negligence to military personnel is contained in the testimony of Mr. Sanagi, counsel for the accused, who testified in question and answer No. 149, during the twenty-seventh day of proceedings, that in addition to the Naval Criminal Law, the Japanese Criminal Code was applied to naval personnel. Let us briefly examine the provisions and application of the Japanese criminal code in this respect.

In Japanese criminal law the concept of criminal negligence is very well developed.

> It is interesting to note that the very first case cited by William J. Sebald in his famous translation and annotation of The Criminal Code of Japan (1936 Edition) is a case of criminal negligence (A case relating to the application of laws to the crime of fire by negligence). Chapter IX of the Japanese Criminal Code, which is titled as translated "Crimes of Arson and Fire by Negligence," contains Article 116 which deals with the crime of negligently setting property on fire. Chapter X, Article 122, sets forth the crime of negligently causing an inundation. Chapter XI, Article 129, sets forth the crime by any person of negligently causing danger to train, electric car, or ship traffic, or negligently upsetting or destroying a train, electric car, or ship. Chapter XXVIII, Articles 209, 210, and 211, deals with Crimes of Wounding by Negligence. Article 209 deals with every person who has wounded another person by negligence.
>
> Case interpretations of Article 209 present interesting aspects of how broadly the criminal law of negligence is applied in Japan. For example, a hunter causing an accidental explosion of gunpowder while shooting, which burned another person, is apparently guilty of wounding by negligence in accordance with Article 209.--(82 Daishinin Hoketsu Shoraku 10501). The following under Article 209 similarly illustrates the broad scope of application of the

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doctrine of criminal negligence and responsibility. "If the relation of cause and effect exists between negligence and an injury to another person, the crime of accidental wounding is always formed, regardless of whether the negligence was the direct cause of the injury or not." - (39 Daishinin Hoketsu Shoraku 3956). "Even though negligence on the part of the offender was not the sole cause of accidental wounding, if it was part of the cause, he is guilty of the crime of accidental wounding."--(62 Daishinin Hoketsu Shoraku 7993).

Similarly the annotations to Article 210, which applies to "every person who has caused the death of another person by negligence," present interestingly broad application of the concept.

"If the relation of cause and effect exists between negligence and another person's death, the crime of causing death by negligence is complete irrespective of whether the relation was direct or indirect."--(38 Daishinin Hoketsu Shoraku 2848).

Article 211, which authorized imprisonment of persons who have "failed to use requisite professional care and thereby killed or injured another person," is particularly pertinent to the instant case, and some of the annotated cases merit brief citation.

"The administrative regulations for the control of persons employed in specially dangerous callings are intended to apply merely to such acts as in normal circumstances may cause danger. Therefore, even in the absence of express provisions to that effect, persons engaged in such callings should, in addition to and aside from such acts, strictly conform with the general degree of care that may legally or customarily be necessary. Consequently, even if they have conformed with all the requirements of the administrative regulations for the control of their operations, they cannot be said to have fully fulfilled all their professional obligations."--(57 Daishinin Hoketsu Shoraku 6978).

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

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

Chapter XXX which deals with crimes of desertion, contains numerous interesting annotated cases dealing with criminal responsibility for negligence. Articles 217, 218 and 219 under Chapter XXX deal with neglect of duty toward old, juvenile, sick or deformed persons, and these cases would appear to be analagous to the case of the disarmed, confined prisoner of war, for

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he is similarly helpless unless protected and safeguarded. Article 217 provides penal servitude for "every person who has deserted another person in need of assistance by reason of old age, juvenility, deformity, or illness." The broad application of the provision is shown by the following case:

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

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

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

The following case is particularly interesting:

> "The person liable to protect an aged, juvenile, deformed, or sick person within the meaning of Art. 218, par. 1 of the Criminal Code is not limited to the person primarily bound when there are several persons bound to furnish assistance, but includes those persons mentioned in Art. 955* of the Civil Code. If the person primarily bound fails to perform the duty, the person next in order is bound to furnish assistance."--(82 Daishinin Hoketsu Shoraku 10452).

Article 219 provides that: "Every person who has killed or injured another person by committing a crime of the preceding two Articles shall, by comparing the above punishments and the punishment for wounding, be punished with the graver punishment." The following case is annotated thereunder:

> "In order that a person may be considered to have deliberately committed the crime of desertion causing death, it suffices if he was aware that he was failing to give such protection as may be required by an aged, juvenile, deformed or sick person. It is not necessary that he should have a conscious desire of endangering the life, body, or health of such person."--(7 Daishinin Hanreishu 291).

The foregoing cases and articles illustrating the Japanese law have been cited not for the purpose of establishing specific provisions of the Japanese Criminal law under which the accused would have been punishable for his neglect of duty in the instant case. The presence or

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absence of Japanese criminal provisions for the punishment of the accused is clearly irrelevant to the issue of the guilt of the accused, for the crime charged is violation of the law and customs of war. The Japanese law with regard to criminal negligence has been cited to apprise the Commission of the fact that even under Japanese law the concept of criminal responsibility for neglect of duty is well established and broadly applied.

3. General Analysis of the Law of Criminal Negligence, as presented by leading American cases and authorities.

a. Elements of criminal negligence, and brief discussion of terminology.

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

With regard to (a), the Commission can have no difficulty in determining the existence of a duty, for the duties in the instant case are clearly outlined in international law. With regard to (b), which I have described as "a breach of that duty by nonfeasance or misfeasance which under all the circumstances warrants application of criminal liability," the Commission may encounter some difficulty because of certain vague terms which appear frequently throughout the law of negligence. I refer to such terms as "gross negligence," "wanton negligence," "aggravated negligence," "recklessness," etc., which appear even in a number of the modern decisions and statutes, and which defense have used with some confusion in the course of this trial.

It is sometimes said that "gross negligence" or "wanton negligence" etc., must be found in order to impose certain types of civil or criminal responsibility. Such terms have been generally discarded as fallacious and impractical of application.

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

"V. Degrees of Negligence; Wilful and Wanton Acts. 43.Generally. The concept of degrees of negligence, designated as "slight," "ordinary," and "gross," which appears to have been introduced into the common law from the civil law as it was expounded by scholastic jurists of the Middle Ages, is disapproved by the majority of modern common-law authorities as impracticable, and inconsistent with the theory upon which liability for negligence is imposed. If the care required of one to avoid injury to the person or property of another could be successfully divided into degrees which would be applicable categorically to particular situations, recognition should be given to degrees of negligence, since, as aptly observed, 'degreesof negligence' is the negative expression, the positive counterpart of which is 'degrees of care.' As hereinbefore observed, however, no more and no less than ordinary care under the circumstances of the case is required. Accordingly, there is no sound basis for dividing derelictions of the duty to use care into slight, ordinary, or gross negligence. Moreover, the difficulty in defining the different degrees of negligence and fixing their limits renders them impracticable and unsafe for use in determining legal rights and liabilities. Negligence, whatever epithet is given to characterize it, is failure to bestow the care and skill which the situation demands; and it is better to call it simply "negligence."

> In a minority of jurisdictions the concepts of gross and simple negligence have been retained for purposes of certain civil actions, viz, motor vehicle liability, in order to permit recovery for injuries where the injured persons were themselves guilty of negligence.(The differentiation is there made to enable civil recovery in damages for such injuries despite the presence of contributory negligence); differentiation is also made in order to relieve the owner of motor vehicle from liability for injuries negligently caused to a guest, (on the theory that such individuals are not entitled to the same degree of care as others); or to relieve an owner of property from liability for injuries to certain classes of persons coming upon his property; and similarly in the case of gratuitous bailments. (See 38 Am. Jur., Negligence, p. 688, et seq).

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

26 American Jurisprudence, 299, discussing Homicides, states:

"The authorities are agreed, in the absence of statutory regulations denouncing certain acts as criminal, that in order to impose criminal liability for a homicide caused by negligence, there must be a higher degree of negligence than is required to establish negligent default on a mere civil issue."

Similarly, Michael and Wechsler in "The Rationale of the Law of Homicide, 37 Columbia Law Review, 721," note that:

"For the most part, the negligence that is criminal is distinguished from the negligence that is not, only by the addition of an epithet such as "gross," "culpable," "wanton," or "reckless," as opposed to "ordinary" or "slight." What, if anything, these epithets mean remains for the most part undetermined. But the differences between two negligent acts that are significant for this purpose, must reside in the degree of the risk of injury they unjustifiably create, the character of the injury or the actor's awareness of the risk. There is authority for the view that the character and degree of risk distinguish criminal from non-criminal negligence, whereas awareness of the risk distinguishes murder from manslaughter."

In the instant case we are concerned with a criminal charge of neglect of duty, that is to say, a general charge of criminal negligence. And it should be pointed out that since the accused has not been charged with negligent homicide, but has been charged with neglect of duty, the continued use in certain statutes and decisions with regard to negligent homicide, of terms such as "gross negligence," "wanton negligence," etc., is not a matter of primary concern to us. But a word of caution should be voiced with regard to interpretation of language cited from cases dealing with homicide by negligence.

"Negligence being a breach of duty, depends upon the nature of the duty charged. In negligent homicide the duty involved is the duty to avoid unnecessary danger or risk. Therefore, in negligent homicide cases, emphasis necessarily falls upon the nature and degree of risk created, and according to some authorities, therefore the awareness or knowledge, actual or imputed, of the nature of the risk created is a necessary element of the charge of negligent homicide. (26 Am. Jur. 300, and cases cited in footnote 8). This apparently stems from the theory that the accused, in order to be held criminally responsible, should be shown to have been aware of his duty -- and that therefore it must be shown that he was aware of the risk, in order to show that he knew he had the duty to avoid injuring the persons whom he placed in danger by his negligent act. Of course, according to other authorities, notably former Chief Justice Holmes, "The Common Law," p. 51, et seq., awareness of risk is unnecessary, both in murder and a fortiori in manslaughter. Similarly, Commonwealth v. Chance, 172 Mass. 245, 54 N.E. 551; Commonwealth v. Pierce 138 Mass. 165. But knowledge of the danger may convert what would otherwise be manslaughter into murder. Com. v. Pierce 138 Mass. 165, 180. See Wechsler & Michael, op. cit. 722.

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In the instant case the accused is not charged with negligent homicide, but is charged with neglect of duty to control his subordinates, and neglect of duty to protect prisoners of war, as required by the law and customs of war. The prosecution has established that the accused ~~knew and~~ and did know should have known of the existence of his duty to control his subordinates, and to protect prisoners of war, and it is not necessary for the prosecution to establish, except in aggravation, that the accused actually or "constructively" knew, that by his neglect of duty, he was exposing prisoners of war to specific danger of injury or death.

The offense of criminal negligence or neglect of duty which we are here concerned with is succinctly presented in the following definition of a criminal negligent offense, as set forth in Wharton's Criminal Law, 12th Edition, Sec. 162: "A negligent offense is an offense which ensues from a defective discharge of a duty, which defect could have been avoided by the exercise, by the offender, of that care which is usual, under similar circumstances, with prudent persons of the same class."

b. Analagous problems in the field of negligent homicide.

It is perhaps desirable to look at the field of negligent homicide for discussion of analagous problems with regard to breach of duty. But in doing so we must bear in mind (a) that the offenses charged against the accused in the instant case are neglect of duty to control subordinates, and neglect of duty to protect prisoners of war, and (b) that the view, of some of the authorities in the field of negligent homicide, that actual or implied awareness of danger is an element of negligent homicide, is not applicable in the instant case.

Discussing negligent homicide, Wharton's Criminal Law, 12th Edition, p. 690, states:

> "Omission in discharge of a lawful duty indictable. We have already seen that an omission is not the basis of penal action unless it constitutes a defect in the discharge of a responsibility specially imposed. And the converse is true, that when a lawful duty is imposed upon a party, then an omission on his part in the discharge of such duty, which affects injuriously the party to whom the duty is owed, is an indictable offense."

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Discussing negligent homicide, 26 American Jurisprudence, 297, states:

> "Under the common law, and in the great majority of the states under the statutory definitions of the various grades of homicide, one whose negligence causes or contributes proximately to the death of another, even though the act attended by negligence is itself lawful, is guilty, at least, of manslaughter. The law holds everyone who is so situated that his acts may endanger the life of another bound to exercise caution, and holds him responsible criminally for the loss of life consequent to his failure to exercise the proper degree of caution. As a general rule, the negligent performance of a duty, or the negligent omission to perform a duty, is regarded as an unlawful act; and if it results in homicide, it is homicide in the commission of an unlawful act for which the perpetrator is criminally liable, without regard to the fact that he did not intend to kill the deceased and even though there is no criminal or mischievous intention whatever." ~~The negligence in such cases supplies, in a measure, the direct criminal intent.~~"

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Application of this law of negligent homicide to the failure to perform an affirmative duty throws some light on the neglect of duty charged against the accused Kobayashi. 26 American Jurisprudence, 294, states:

> "As a general rule, where one person owes to another either a legal or a contractual duty, an omission to perform that duty resulting in the death of persons to whom the duty was owing renders the person charged with the performance of such duty guilty of a culpable homicide."
>
> "As to the grade of a homicide which results from an omission of duty the authorities disclose a considerable difference of opinion. Some cases state that the delinquent is guilty of murder. Other cases state that he is guilty of manslaughter, -- involuntary manslaughter according to some opinions. Still other cases assert that the grade depends upon the circumstances, emphasis being put upon the intent of the negligent person. Occasionally, even, the opinion has been expressed that the question depends upon the distinction between negligence and wilful omission. Where death ensues in consequence of a wilful omission of duty, it is said to constitute murder; and where it ensues in consequence of the negligent omission of a duty, it is said to be manslaughter."

The duty to provide food, shelter, clothing, etc., is analagous to the duty of the accused to protect prisoners of war. With regard to neglect of these duties, 26 American Jurisprudence, 295, citing appropriate cases, states:

> "Neglect on the part of one charged with the duty of supporting another to provide the necessary food, clothing, and shelter to the dependent, resulting in the latter's illness and death, renders the person upon whom the duty rests guilty at

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least of manslaughter. Thus, a parent who, having the means at his command, negligently fails to provide his child with food, clothing, or shelter is guilty of manslaughter, where the child dies in consequence thereof. A similar liability is imposed upon a husband who negligently fails to furnish his wife with such necessities. If the neglect is wilful, as where a man wilfully abandons his wife to the destruction of the elements when he can save her, or if the neglect or exposure is of a dangerous kind, as where a child is left in a remote place where it is not liable to be found, or where a husband criminally neglects to shelter his wife when he is able to do so and knowingly leaves her to perish, the homicide is deemed to be murder. The same principle may be applied to persons who stand in other relations, such as the keeper of a prison or asylum who undertakes, to the exclusion of others, to take care of inmates or to a master of a servant or apprentice of tender years who is under the control and domination of the master."

Similarly, Wharton's Criminal Law, dealing with negligent homicide, states:

"Section 484. [redacted]. The doing an act, or the imperfect performance of a duty, toward a person who is helpless, which naturally and ordinarily leads to the death of such person, is murder, if death or grievous bodily harm is intended; and manslaughter, if the cause is negligence."

"Section 485. .....Independently of these statutes, it may be generally stated that for a parent, having special charge of an infant child, so culpably to neglect it that death ensues as a consequence of such neglect, is manslaughter if death or grievous bodily harm were not intended; and murder if there was an intent to inflict death or grievous bodily harm."

The duty under the law and customs of war to control subordinates is in part analagous to the duty of supervision which is applied in ordinary criminal law in the cases of the master servant relationship. With regard to a master's liability for a servant's negligence, Wharton's Criminal Law states, in Section 174:

"Wherever, also, due supervision could have prevented the mischief, then the master neglecting such supervision is indictable[7]." (See cases cited in footnote 7).

Of course command responsibility carries with it duties much beyond the scope of the ordinary master servant relationship and the obligations of control and supervision are commensurate with such greater duties.

This fact is well expressed in the review of Commanding General, Continental Base Force, Kilian case, discussed infra, in the following words:

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"This responsibility could not be delegated to some inferior officer or officers, and the accused cannot and should not be permitted to escape responsibility therefor by merely saying in effect that he was so preoccupied in the performance of other necessary duties that he did not know such things were taking place in his command. Command functions necessarily carry with them commensurate responsibilities. It is believed that the command functions exercised by the accused carried with them an inescapable responsibility for preventing the cruel and unusual treatment imposed upon prisoners confined in the Lichfield Guardhouse."

In view of the practical limitations of time, the foregoing must suffice as a discussion of the general law of criminal negligence. Let us now return to the specific issues of the case before the Commission as reflected in the instant charge of neglect of duty.

II. The Case Against the Accused Kobayashi.

A. Analysis of the Charge and Specifications.

In the instant case the charge of neglect of duty is set forth in two specifications which, speaking generally, require proof of (a) existence of a duty, the duty to control and the duty to protect; (b) breach of that duty, by nonfeasance or misfeasance, [illegible] unlawful acts by those one has the duty to control, or injury to those one has the duty to protect. The following is a brief analysis of the specifications, as made in the prosecution's opening statement:

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 at 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 permitted these members of his command and persons subject

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to his control and supervision to torture, abuse, inhumanely treat and kill American prisoners of war. It is alleged that at the times specified, within the period when the accused was Commander in Chief of the Fourth Fleet, 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, and that these vicious crimes were committed by members of the accused's command and persons subject to his control and supervision.

The second specification alleges that the accused unlawfully disregarded and failed to discharge his duty as the Commander in Chief of the Fourth Fleet to take such measures as were within his power and appropriate in the circumstances, to protect, as it was his duty to do, American prisoners of war held captive by the armed forces of Japan under his command and subject to his control and supervision, 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.

B. Because of similarity of the two specifications only specification 1 will be discussed in detail.

As the incidents involved in the first and second specifications are identical, and the offenses charged therein against the accused are analagous, detailed individual discussions of both specifications would unnecessarily prolong the argument of the prosecution. Such close correlation in fact exists between the specified breaches of duty, that for practical purposes analysis of the pertinent evidence with regard to one specification is equally applicable to the other specification. In the subsequent portion of this argument, the judge advocate will concentrate largely on the first specification which deals with the duty to control, merely pointing out that what is said with regard to this specification is equally applicable to the second specification which deals with the duty to protect prisoners of war.

C. Specification 1, duty to control subordinates.

To establish the guilt of the accused as to Specification 1 requires the prosecution to establish beyond a reasonable doubt (1) That the accused had the duty as Commander in Chief of the Fourth Fleet to con-

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trol the operations of members of his command and persons subject to his control and supervision; (2) That the accused unlawfully disregarded and failed to discharge this duty; and that he thereby permitted those persons whom he had the duty to control, to unlawfully torture, abuse, inhumanely treat, and kill American Prisoners of War.

1. Duty to Control.

That the accused had the duty as Commander in Chief of the Fourth Fleet to control his subordinates (members of his command and persons subject to his control and supervision) is so elementary that it warrants no discussion. Military law and practice in this regard is universal. It has been said: "The commanding general of troops who commit violations of the laws of war, not only cannot escape responsibility therefore, but he is specifically charged therewith." -(Review by Staff J.A. 9 Dec. 1945, USA v Yamashita). "Rules of Land Warfare" (FM 27-10) paragraph 347, reads as follows: "The commanders under whose authority they (acts in violation of the laws of war) are committed by their troops, may be punished by the belligerent into whose hands they fall." And as stated in Vol. I, Staff, J.A. 24 Dec. 1945, in the case of USA v Isamu Morimoto, Lt. Col., et al, "It is further established (FM 101-5) that 'the commander is responsible...for all that his unit does or fails to do. He cannot shift this responsibility to his staff or to subordinate commanders.'" As I have previously stated, this concept is recognized in all military law, and is well recognized and applied in Japanese military forces. The accused himself recognized this responsibility under military law, saying, "Under military law I am responsible for the acts of my subordinates and I have the responsibility to control their actions." (Exhibit 25). The prosecution witness, former Vice Admiral Wakabayashi, IJN, similarly testified concerning the duty to control subordinates.

In international law generally, the doctrine is equally well-recognized. To cite illustration -- Article I of the Annex to Fourth

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Hague Convention "lays down as a condition which an armed force must fulfill in order to be accorded the rights of a lawful belligerent," ~~and stated~~ that it must "be commanded by a person responsible for his subordinates!" (36 Stat. 2295). Similarly, Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels, "must see that the above Articles are properly carried out." (36 Stat. 2389). And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of the execution of the foregoing articles (of the convention) as well as for unseen cases." And ... Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory...' "shall take all the measures in his power to restore, and ensure, as far as possible, public order, and safety, while respecting, unless absolutely prevented, the laws in force in the country." (In re Yamashita 327 U.S. 1, 10). Similarly, see the international arbitration cases: "Case of Jeannaud (1880); 3 Moore, International Arbitrations (1898) 3000; Case of The Zafiro (1910); 5 Hackworth, Digest of International Law (1943) 707."

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

2. Breach of this Duty.

a. Factual nature of this question.

The question of breach of this duty brings us to the crux of the instant case. This is largely a factual question in the determination of which the Commission must consider all the circumstances,

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all the acts and omissions of the accused, examined in the light of his solemn duty and responsibility as Commander in Chief. The Commission must then determine whether the proved facts establish beyond a reasonable doubt that the accused disregarded or failed to discharge his duty under the law and customs of war to control the operations of members of his command and persons subject to his control and supervision. Similarly, the Commission must, on the basis of the pertinent facts, determine with regard to specification two, whether the accused did in fact disregard or fail to discharge his duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war.

(1) Did the accused do everything reasonably required?

Whether the accused neglected his duty is largely a question of fact -- and the Commission must make that determination on the basis of the evidence which has been presented by Prosecution and Defense throughout the course of this trial. If the Commission finds in its examination and evaluation of that evidence, that the accused, in the light of his position of command responsibility, his own background and capacities, and all the other existing factors and circumstances, did everything reasonably possible and reasonably required to prevent the occurrence of any incidents, to punish individual offenders, and to prevent further outrages, then the Commission should find the accused not guilty of the Charge and Specifications.

As it was stated in the case of United States of America versus Masaharu Homma, Vol. I. Staff J.A. 18 Feb. 1946, "Presumably a showing that accused did everything reasonably possible to punish individual offenders and prevent further outrages would be a complete defense to a charge such as is here presented." Similarly, in the SCAP Review of the same case, SCAP Reviews, 1946, 5 March 1946, it was stated: "If the evidence showed utilization by the accused of all available food, medicine, and other facilities at his disposal in caring for prisoners and internees, and the bonding of every reasonable effort to protect them

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from the excesses of his own troops, he could not be held penally responsible for their hardships or deaths."

But if the Commission finds, as the prosecution believes it has unequivocally proved, that the accused failed to perform this duty, that he neglected his duty, as set forth in the specifications, then the accused must be found guilty of the Charge of Neglect of Duty.

b. Brief Summary of pertinent testimony and documentary data.

The factual data, testimonial and documentary, presented by the prosecution and defense has been voluminous. The Commission has heard and examined all this evidence. Detailed analysis and recapitulation would serve little useful function. Therefore, with regard to the evidence against the accused, the prosecution will present the following terse summary and will subsequently discuss one or two of the highlights.

An analysis of the evidence against the accused must include the following:

> He was an experienced commanding officer with broad military experience and knowledge of international law. He knew or should have known that among combat troops war conditions breed strong animosity toward prisoners of war, and that instruction, orders, and vigilant supervision were the only means of assuring conformance to international law with regard to treatment of prisoners of war.
>
> When Accused Took Command: When he took over command of the Fourth Fleet, he examined the standing orders and instructions and found no orders or instructions concerning handling or treatment of prisoners of war. He did not personally undertake to handle prisoner of war matters. He did not assign the duty of supervision or regulation of prisoner of war matters to any member of his staff. He issued no instructions concerning their handling or treatment. He knew of no instructions issued by any member of his staff, and none were issued. He did not institute any method of control or accounting for prisoners of war held or captured within his command. He knew or should have known that prisoners of war were held and confined within his area. He knew of enemy aerial activities (as well as submarine, surface, and land attacks) and therefore knew or should have known of the probability of capture of additional prisoners of war. He knew that he was not taking any specific action to control his men and prevent mistreatment of prisoners of war. He knew or should have known that no action was taken by any of his staff, or any of his subordinates to prevent mistreatment of prisoners of war within the area of his command.

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Additional Factors After Inspection of Kwajalein:

Kobayashi learned from his subordinate, Rear Admiral Abe, that prisoners of war had been executed at Kwajalein. He did not inquire into, investigate, punish, or try to investigate or punish the persons who killed prisoners of war at Kwajalein. He did not issue any orders or instructions to responsible persons at Kwajalein to prevent further killing or mistreatment of prisoners of war in that area. He knew or should have known that not only his subordinates at Kwajalein, but also his own Fourth Fleet staff knew that he had learned of the Kwajalein executions and that he had taken no action and had not even voiced disapproval of the killing of prisoners of war. He knew that other prisoners of war were captive at Wake within the area of command of his subordinate officer, Admiral Abe, Commandant of the Sixth Base Force, who had told him of the execution of prisoners of war at Kwajalein. He knew or should have known of the probability of additional prisoners of war being captured or held within the area of command of the Sixth Base Force. But he made no investigation, issued no orders, issued no instructions, made no comment, and took no action to prevent further mistreatment or killing of prisoners of war within that area.

With regard to the Wake Island Incident: Even though Kobayashi knew that prisoners of war had previously been executed within the area of command of the Sixth Base Force, even though he knew prisoners of war were at Wake Island, even though he was personally at Wake and saw Sakaibara, even though he knew at the time that there were only 2,000 Japanese forces on Wake and almost 100 prisoners of war, even though he knew Sakaibara was concerned over the presence of so many prisoners of war in case of invasion, even though he knew or should have known enemy attack or invasion was probable, he issued no instruction or order to Sakaibara or to Abe that prisoners of war should not be killed. Ninety-seven American prisoners of war died at Wake Island because the accused disregarded and failed to discharge his duty to control his subordinates and his duty to protect prisoners of war.

The Kwajalein executions and the Wake Island incident are the only two incidents that the accused admits personal knowledge of. Certain evidence points toward the fact that he knew or should have known of other instances of mistreatment or killing of prisoners of war within the area of his command, either before or after such other incidents occurred. For purposes of the instant charge against the accused, however, such evidence is immaterial except in aggravation, for the neglect of duty is clearly shown in the evidence previously cited.

Some of the evidence pointing toward his direct knowledge of other incidents is the following:

(a) The fact that he knew of the defense problem at Wake, and of Sakaibara's concern over the presence of so many prisoners of war, is circumstantial evidence that if he did not order Sakaibara to execute the prisoners in the event of enemy attack, he was at least conversant with Sakaibara's intention or the probability that Sakaibara would do so.

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(b) Physical proximity on Truk, of the Fourth Fleet Headquarter to the places where the Truk Incidents occurred.

(c) Continuous telephone communication between such places on Truk and the Fourth Fleet Headquarters.

(d) The fact that the high-ranking personnel involved in the Dispensary and the Fourth Naval Hospital Incidents were the personal physician to the Commander in Chief, and the head of the hospital who was a friend as well as a direct subordinate of the accused; and the fact that at the time of the medical experiments and hospital incidents the accused was a frequent visitor at the hospital and in almost daily contact with his personal attending physician who participated in these experiments.

(e) The fact that the Staff of the Fourth Fleet knew that prisoners of war had been disposed of at Wake because landing was feared to be imminent (testimony of Inoue), the fact that the accused personally knew they were disposed of because of "military necessity" involved in that threatened landing, and the fact that he knew of th feared landing at the time of the Truk Seawall Incident, but gave no instructions to prevent the killing of the prisoners of war at the Guard Unit, is indicative that he knew or should have known that any prisoners of war confined there would be executed, (and that in fact he knew and, at least tacitly, approved of the order for their execution).

(f) The fact that he was a disciplinarian indicates that his troops were well disciplined and would not take such a grave step as executing prisoners of war unless they had express or at least tacit understanding that the Commander in Chief approved or would not punis them for killing prisoners of war. This is further bolstered by the fact that even after knowing of the Abe Incidents and the Sakaibara Incident, the accused took no effective action to investigate or punish the incidents. Similarly, the fact that no action was taken by the Fourth Fleet with regard to the Seawall Incident, which was a widely witnessed public execution, which was clearly known to the staff of the Fourth Fleet (Tanaka's statement, Inoue's testimony, as well as the public nature of the execution,) and which was probably reported directly to the Commander in Chief as a result of the subsequent conference, is further evidence that the accused knew or at least should have known of the mistreatment or killing of prisoners o war, and in taking no action to prevent such mistreatment or killings either expressly or tacitly approved these and the prior incidents against prisoners of war.

<u>Additional factors after knowledge of the Wake Island Executions:</u> Even after the accused received the dispatch advising of the killing of t prisoners of war on Wake, he never issued any orders to Abe or Sakaibara regarding treatment of prisoners of war, and never actually investigated or obtained any report concerning the execution of these 96 prisoners of war.

Even after the Wake Island Incident, Kobayashi issued no orders to his fleet regarding handling or treatment of prisoners of war. He did not institute any system of control or accounting for prisoners of war held or captured in the area of the Fourth Fleet. He did not assign to any staff officer the handling or investigation of prisoner of war matter He made no personal effort to obtain information concerning handling or treatment of prisoners of war in the area. He made no effort to prevent mistreatment or killing of prisoners of war within the area of the Fourth Fleet.

The following high-ranking officers, subordinate to the Commander in Chief of the Fourth Fleet were directly responsible for the following

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incidents set forth in the specifications against the accused Kobayash Three Wake Island incidents set forth in paragraphs (a), (c), and (d) were ordered by Captain Sakaibara, Commanding Officer of the Sixty-fifth Naval Guard Unit at Wake Island. Incident set forth in paragraph (g) was carried out at Truk, by Captain Iwanami, Commanding Officer of the Fourth Naval Hospital, and Surgeon Commander Okuyama, Chief Surgeon of the Fourth Naval Hospital, personal physician to the accused. Incident set forth in paragraph (h) was carried out at Truk by Surgeon Commander Okuyama, Chief Surgeon of the Fourth Naval Hospital and personal physician to the accused. Incident (i) was ordered by Captain Shiga, Commanding Officer of the Sixty-fifth Naval Guard Unit at Millo, and carried out by Colonel Oishi. Incident (j) was apparently ordered by the Fourth Base Force Headquarters, and was carried out by Captain Tanaka, Commanding Officer of the Forty-first Naval Guard Unit at Truk. The accused, because of his neglect of his duty as Commander in Chief of the Fourth Fleet, to control his subordinates, and to protect prisoners of war, is criminally responsible for these incidents, and the other incidents set forth in the specifications.

D. Under the doctrine of command responsibility, the facts established proves accused guilty of neglect of duty, even if prosecution had not proved knowledge of two incidents.

The prosecution, as previously stated, will not attempt to give a detailed analysis of all the pertinent evidence, but will briefly touch upon a few of the highlight facts in the course of the remaining discussion of certain significant aspects of the case.

1. Personal background of the accused and his knowledge of his duty under international law.

One of the facts that warrants emphasis emerges from the personal background of the accused. Command responsibility, as Commander in Chief of the Fourth Fleet, was not suddenly and unknowingly thrust upon the accused. Kobayashi is a man with an extensive military career in the service of the Imperial Japanese Navy. He is a man of considerable education. He has had considerable training in international law, and has held high military and diplomatic positions, including that of Naval Aide in 1931 and 1932, at the famous Geneva Conferences. The fact is clear that the accused was thoroughly familiar with his duty under international as well as national law, to control his subordinates, and to protect

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prisoners of war. In the evidence before this commission the accused has admitted knowledge of this duty, saying: "Under military law I am responsible for the acts of my subordinates and I have the responsibility to control their actions." (Exhibit 25).

2. Defense attempts to prove that he performed this duty clearly fails in the light of the proven facts.

The feeble attempt by the accused to persuade the Commission that he performed his duty is set forth in two alleged facts educed by the defense: first, that all Japanese officers are trained in international law, and, secondly, that at the commencement of his tour of duty the accused instructed all his subordinates to obey international law.

The substance of this argument, as frequently implied by the defense, is: that all Japanese officers are trained in international law, and were in fact provided with a book by Mr. Enomoto on international law; that at the commencement of his tour of duty as Commander in Chief of the Fourth Fleet, the accused issued an order to his subordinates instructing them, in accordance with the similar orders of the Combined Fleet, to obey international law; that the accused therefore felt no need to issue specific instructions with regard to prisoners of war, or to assign to any specific staff officer the duty to handle prisoner of war matters.

Prior to any knowledge or reasonable grounds for suspicion of the occurrence of prisoner of war incidents, such a viewpoint in a novice would be understandable and perhaps even justifiable. But the accused was no novice in war or the laws of war.

We know of his military experience, and as to his knowledge of the law of war. Mr. Enomoto, well-known legal advisor of the Japanese navy on international law, and an intimate friend of the accused, describes Kobayashi as "One of the best versed among the Japanese naval officers in international law." (Exhibit 51).

Every person familiar with the law of war and the history of war knows that war tends to brutalize, and that only by careful deliberate persistent effort can atrocities and individual war crimes be prevented.

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The history of the law of war is itself the history of the struggle between concepts of humanity and the brutalizing force of war. The growth and development of the law and customs of war is the recognition by the civilized nations of the world that the principle of humanity has a place in the law of war. The law and customs of war have recognized, and the judicial tribunals of the world have applied this principle of humanity, as a duty and function of command responsibility to control the operation of military troops under one's command. It is only by continued and unswerving application of this duty as a function of command responsibility that international law can hope to contain the brutalizing force of war within some levels consistent with civilized human decency.

Knowing the history of war, and knowing the laws of war as intimately as the accused did, he knew and should have known that a mere generalized statement to his subordinate forces that they obey international law, would not be effective to prevent cruelty and violence toward prisoners of war.

> The accused was personally aware of the tendency not to obey international law. According to defense Exhibit 51, he had specifically commented on the importance of a passage in Mr. Enomoto's "Outline of International Law," which reads: "In recent years there has even developed a tendency not to censure those who question or even disregard the value of international law, and of wartime law in particular."

Under these circumstances, (even assuming no subsequent knowledge of the killing of prisoners of war within the area of the Fourth Fleet), the action of the accused in merely issuing a generalized statement to his subordinates to obey international law, clearly did not constitute performance of his duty under international law to control his subordinates and to protect prisoners of war.

a. <u>Particularly in the light of the proven knowledge of two incidents.</u>

We have here, under D-2, discussed the situation which existed at the time the accused took command of the Fourth Fleet, before the accused, according to his story, ever heard that prisoners of war had been killed within the area of the Fourth Fleet. We have demonstrated that in view of his broad knowledge of war and the laws of war, the accused clearly neglected his duty and failed in his command responsibility to take necessary and appropriate action to control his subordinates and prevent the commission of war crimes against prisoners of war, and thereby became criminally responsible for the subsequent mistreatment and killing of prisoners of war, by his subordinates, within the area of his command.

But in justice to the efforts of the accused to absolve himself of criminal neglect of duty, by testifying that at the

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commencement of his tour of duty as Commander in Chief of the Fourth Fleet he issued an order to his subordinates to obey international law, we should examine this alleged order in the light of all the facts of the instant case, particularly in the light of his subsequent knowledge of the killing of prisoners of war within the area of his command.

The accused, fantastic as it seems, seeks to persuade the Commission not only that this order constituted full initial performance of his duty under international law, but that this alleged order completely absolved him of all further responsibility in international law for control of his subordinates and their troops. He seeks to persuade the Commission that this order so completely performed all his duty to control his subordinates and to protect prisoners of war, that when he learned of the execution of prisoners of war at Kwajalein not only was it unnecessary for him to further control or curb his subordinate, Abe, the Commandant of the Sixth Base Force, but it was even unnecessary for him to inquire concerning the details of the execution.

Similarly, with regard to the Wake Island executions, the accused apparently feels that his initial order to his subordinates to obey international law, was such a complete performance of his duty under international law, that it made it unnecessary for him to get around to finding out the details of the execution of 96 prisoners of war on Wake, even after he knew of their execution. The accused did not make any comment and does not recall giving any instructions to any of the members of his staff concerning this execution, even though he knew they had read this dispatch telling of the execution of 96 American prisoners of war at Wake.

But even more amazing is the fact that following this episode, knowing that executions had been committed at Kwajalein, which was under the command of his subordinate, Abe, and knowing that executions had taken place at Wake Island under the command of Captain Sakaibara, the accused still failed to issue any instructions to prevent the continuation of murder and maltreatment of prisoners of war. No instructions to Abe; no instructions to Sakaibara; and no instructions to any other units under his command. In the face of these bare facts can there be any conceivable doubt that the accused failed in his duty to control his subordinates?

He disregarded that duty -- for he issued no instructions and wilfully blinded himself to the facts of the Abe incident by not requesting any information concerning the execution of the prisoners of war, even after Abe pointed out the place where they were executed.

Control of his subordinates at that time, and prompt action in the way of specific instructions to all his subordinates that prisoners of war were not to be killed or mistreated, would have prevented the Kwajalein incident set forth in paragraph (b) of the Specification, as well as the massacre of 96 prisoners of war by Sakaibara at Wake, and all the subsequent incidents charged in paragraphs (d) through (j) of the Specifications. Similarly, prompt action in the way of orders or instructions after the receipt of the Sakaibara dispatch would have prevented abuse, torture, mistreatment and murder of other prisoners of war which occurred in the incidents

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set forth in paragraphs (d) through (j). No, the accused did not perform his duty to control his subordinates. And if the facts are permitted to speak for themselves, they shriek the inescapable truth that he wilfully and knowingly breached this duty, to control his subordinates and protect prisoners of war.

3. <u>The majority of the incidents charged are deliberate acts of high-ranking subordinates, not isolated acts of irresponsible persons.</u>

The incidents charged do not constitute an isolated case of brutality, rape, or murder. Such isolated acts committed by in individual soldier or sailor under the command of the accused might well have escaped the attention and even been overlooked by a diligent commander in chief preoccupied with pressing military matters. Proper control, instruction, education, and disciplining of forces might not have prevented an ocassional sporadic act of brutality or murder by an irresponsible or undisciplined individual. But the incidents which occurred under the command of the accused were not spontaneous acts by irresponsible individuals. They were the deliberate acts of high-ranking responsible officers under the command of the accused. One direct order, one specific statement of policy with regard to humane treatment of prisoners of war, one publicized instance of investigation or punishment for mistreatment or killing of prisoners of war, would have prevented and forestalled these deliberate acts of high-ranking subordinates.

Who were the high-ranking subordinates of the accused directly involved in these incidents? Just look at the incidents listed in the specifications: Paragraph (a), Paragraph (c), and Paragraph (d), Captain Sakaibara, IJN, the Commanding Officer of Wake, and Commanding Officer of the Sixty-fifth Naval Guard Unit; Paragraph (g), Captain Iwanami, IJN, Commanding Officer of the Fourth Naval Hospital at Truk, and a friend of the accused; Paragraph (h), Surgeon Commander Okuyama, IJN, chief surgeon of the Fourth Naval Hospital and personal physician to the accused; Paragraph (i), Colonel Oishi, IJA, acting with other named naval and army officers, who admits, and whom the prosecution has proved was acting under

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orders of Captain Shiga, IJN, the Commanding Officer at Mille Atoll; Paragraph (j), Captain Tanaka, IJN, the Commanding Officer of the Forty-first Naval Guard Unit at Truk.

Knowing as we do the discipline of the Japanese armed forces, knowing that the accused has the reputation of being a stern disciplinarian as testified to in Exhibit 45 (a), can there be any doubt that firm action by the accused would have prevented these high-ranking subordinates from deliberately ordering and perpetrating these vicious crimes against helpless prisoners of war?

4. The Yamashita case and command responsibility.

Every case of neglect of duty or criminal negligence must be examined in the light of its own facts. Bearing this in mind, it is extremely helpful to examine some of the decisions in criminal cases dealing with neglect of duty. One of the outstanding cases in this field, is the Yamashita case, which was reviewed and, in effect, affirmed by the United States Supreme Court (In re Yamashita, 327 U.S. 1).

a. The difficult problem of the Yamashita case, the fact that there was no proof of actual knowledge of any incidents, is not present in the instant case. (We have specifically proved that the accused knew of two incidents within his command prior to the occurrence of numerous subsequent incidents charged against the accused).

The Commission should note carefully that we are not here faced with the difficult problems presented in the Yamashita case. In the Yamashita case the prosecution was apparently unable to establish that the accused actually knew of any of the alleged atrocities, even after they occurred. The dissents of Mr. Justices Murphy and Rutledge contain the following language: "Nowhere was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission, or that he had any knowledge of the commission thereof by members of his command." "Nor is there any express finding that he knew of any one of

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the incidents in particular or of all taken together."

In the instant case we have clearly established that the accused learned from his subordinate, Rear Admiral Abe, of the execution of prisoners of war, and clearly should have learned of the illegal nature of the execution, prior to the occurrence of 8 of the charged incidents which occurred during his tour of duty. Similarly, we have clearly proved that the accused knew of the execution of 96 prisoners of war by his subordinate, Sakaibara, prior to the occurrence of 7 of the charged incidents.

In the light of this knowledge, the accused subsequently failed to take any action to control his subordinates. He has confessed that he failed to take any steps to prevent future recurrence; that he failed to accomplish any investigation or to punish the maldoers; that he failed to establish any system or method of accounting or other procedure by which he could follow up the arrival of future prisoners of war within his area and observe their treatment; that he failed to issue any instructions to any of his staff to be responsible for or look into the prisoner of war situation; and that he failed to issue any specific instructions to subordinates with regard to treatment of prisoners of war. I respectfully submit to the Commission that this is the clearest form of neglect of duty, a clear and fundamental disregard and failure to discharge that duty, and the Commission should not have the slightest hesitancy about convicting the accused.

If the prosecution had charged and proved, as much of the evidence circumstantially tends to establish, that the accused had specific knowledge of the impending mistreatment or killing of prisoners of war before such specific incident occurred, the accused, as we have previously pointed out, would be guilty not only of neglect of duty, but of wilful omission which constitutes the crime of murder.

b. Opinion of the United States Supreme Court - on the question of command responsibility.

The Yamashita case, as we have pointed out, deals with command responsibility at the level of knowledge where a commanding officer is not actually aware that crimes have been committed by the armed forces under his command. For this very reason the Yamashita case is particularly pertinent with regard to the point we are now discussing -- namely, that even if the prosecution had not proved his knowledge of two incidents, the accused stands guilty of neglect of duty because of his inaction in the face of his command responsibility.

The discussion by the United States Surpeme Court (In Re Yamashita) of the nature and duties of command responsibility is particularly significant.

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"It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates... These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals. A like principle has been applied so as to impose liability on The United States in international arbitrations. Case of Jenaud, 3 Moore, International Arbitrations 3000; Case of the Zafiro, 5 Hackworth Digest of International Law 707. .....We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See Smith v. Whiting, supra, 178. It is plain that the charge on which the petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed upon him by the law of war and to pass upon its sufficiency to establish guilt."

In footnote 4, the court notes: "In its findings, the commission took account of the difficulties 'faced by the accused, with respect not only to the swift and overpowering advance of American forces, but also to errors of his predecessors, weakness in organization, equipment, supply.... training, communication, discipline and morale of his troops', and 'the tactical situation, the character, training, and capacity of staff officers and subordinate commanders, as well as the traits of character of his troops.' It nonetheless found that petitioner had not taken such measures to control his troops as were 'required by the circumstances.' We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the Commission, upon the facts found, could properly find petitioner guilty of such a violation."

5. <u>Yamashita case is only one of many similar cases tried by U.S. Military Courts applying command responsibility: viz. Kilian case, and other cited cases.</u>

The Yamashita case is only one of many cases which have applied

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this well-known doctrine of command responsibility. The Commission is familiar with the recent Kilian case (General Court-Martial Orders No. 140--Headquarters Continental Base Section, U. S. Forces, European Theater) in which the United States Army applied the doctrine of command responsibility to a member of its own personnel, one Colonel James A. Kilian. Criminal punishment was imposed even though the injury to enlisted personnel mistreated consisted largely of minor beatings, humiliation, and hazing.

The charge, as found proven, was that the accused, "Colonel James A. Kilian, 12th Headquarters and Headquarters Detachment, Special Troops, Second Army, then Commanding Officer of the 10th Reinforcement Depot, European Theater of Operations, United States Army, did, at Lichfield, Staffordshire, England, on and between 1 March 1944 and 18 January 1945, wrongfully and unlawfully fail and neglect to properly perform his duties as such Commanding Officer of said Depot, in that he....permitted the imposition of cruel, unusual, and unauthorized punishment upon...., and certain other persons whose names are unknown, all then prisoners in confinement at said depot, which said punishment consisted of....." In the specification the accused had been charged with "knowingly permitted," but the court-martial found the accused guilty except for the word "knowingly," etc. The case therefore specifically presents an illustration of a situation where no knowledge was had by the accused of the offenses committed within his command. He was nevertheless found guilty.

> Even though only relatively minor offenses were involved, the accused was found guilty and received a minor sentence. The court-martial order notes: "The sentence is approved and will be duly executed. As adjudged by the court, the sentence is totally inadequate from the standpoint of imposing appropriate punishment upon one convicted of such wrongful neglect of duty. In imposing such meager punishment the court reflected no credit upon its comprehension of its responsibility."

> In an able memorandum review of this case, by Hubert D. Hoover, Brigadier General, U. S. Army, Assistant Judge Advocate General In Charge of Military Justice Matters, the following able analysis appears: "In my view the offense of which accused

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was found guilty lies wholly in his neglect of duty. The allegation that the neglect of duty arose from 'knowingly' permitting the punishments described was an allegation of aggravation, or, to put it another way, was descriptive of the quality or degree of the neglect charged. 4. I think it is fundamental, in our conception of military responsibility, that a commanding officer can be guilty of neglect of duty through permitting improper things to occur within his command although he may not know that they are occurring. At least within reasonable limits it is the duty of a commanding officer to see to it that his command operates in accordance with established standards and that deviations from those standards do not occur. Where, through laxity, indifference, or culpable inefficiency, he permits wrongdoing within his command he is guilty of neglect of duty within the meaning of the 96th Article of War which denounced 'all....neglects to the prejudice of good order and military discipline.' It has been traditionally recognized that the neglect denounced by the 96th Article of War may be a mere omission or failure properly to perform a duty (Winthrop, Reprint 722). It is not a defense to a charge of neglect of duty to prove that the omission was not deliberate or conscious. The reasoning of the Supreme Court in the Yamashita case, cited by Colonel Riter, must be applied here..." Major General Thomas H. Green, the Judge Advocate General of the United States Army, concurred in this opinion.

There are those who have found sympathy with Kilian because the guardhouse was only a small fraction of his command. The court giving consideration to all the circumstances, found, and I cite from the review prepared for the Commanding General, Continental Base Section, APO 807, U. S. Army, "the accused not guilty of having any actual or constructive knowledge of the various punishments which were imposed upon prisoners confined in the guardhouse, ...but that from his official relation to and connection with the operation and control of the guardhouse, he was legally responsible to see that such conduct was not permitted to take place in the guardhouse under his command. We must therefore, of necessity conclude that the court found the accused guilty of wrongfully and unlawfully failing and neglecting to properly perform his duties as commanding officer of the 10th Reinforcement Depot by permitting the imposition of certain punishments upon prisoners confined in the guardhouse, which he, as a matter of law, was bound not to permit. He therefore stands convicted of neglect of his official duty in connection with the operation of a guard house and treatment of prisoners therein confined. In general the law relative to the responsibility of a public officer for neglect of his official duties is aptly summarised by Wharton as follows:

> 'A man who undertakes a public office is bound to know the law, and to possess himself intelligently of all the facts necessary to enable him in a given case to act prudently and rightly. If he does not, and through mistake of law or of fact be guilty of negligence, he commits a penal offense. This seems hard law, but it is essential to the safety of the State. If an officer, enjoying the emoluments of office and wielding its ocassionally vast powers, should be able to plead in defense of negligence that he mistook either law or fact, not only is there no negligence that could be punished, but

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ignorance and incompetency would be the masks under which all sorts of official misconduct could be sheltered. ***But this the policy of the law does not permit. It says: 'You are bound to know the law and the facts; and if you lean on advisors or subalterns who mislead you, this is the very thing for which you are to be punished.' It is necessary for the State that it should have at its command knowledge and vigilance in the guardians of its liberties and its treasures. In those holding public office, want of either knowledge or of vigilance, resulting in negligence, is a penal offense....'

"This responsibility could not be delegated to some inferior officer or officers, and the accused cannot and should not be permitted to escape responsibility therefore by merely saying in effect that he was so preoccupied in the performance of other necessary duties that he did not know such things were taking place in his command. Command functions necessarily carry with them commensurate responsibilities. It is believed that the command functions exercised by the accused carried with them an inescapable responsibility for preventing the cruel and unusual treatment imposed upon prisoners confined in the Lichfield Guardhouse. It is therefore believed that the court was justified in finding the accused guilty of wrongfully and unlawfully permitting the imposition of the inhumanities imposed upon prisoners confined in the guardhouse; that the neglect or failure upon the part of the accused to prevent them is in contravention of Article of War 96, and as such, legally punishable to an extent far greater than disclosed by the sentence imposed by the court."

The Kilian case may seem hard law, but it is just law, and it is law that we have applied in prosecuting our own military personnel before our own military courts.

The Yamashita case, and the Kilian case are only two out of many cases in which United States Courts and military commissions have applied the doctrine of command responsibility for neglect of duty in controlling subordinates, even when no knowledge existed that subordinates had committed or were preparing to commit unlawful or improper acts. Other similar cases include; United States of America versus Masaharu Homma, Lieutenant General, IJA; United States of America versus Takeshi Kono; the trial of Vice Admiral Ohsugi, etc.

6. <u>Citations from British, Chinese, and Japanese law, showing that the doctrine of command responsibility is fundamental in the law and customs of war.</u>

This is not a unilateral application of any novel doctrine by the United States. The doctrine of command responsibility is a fundamental element of the law and customs of war. The following material

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briefly illustrates its application in British, Chinese, and Japanese law.

The British Military Court sitting at Wuppertal, Germany, June 4-5, 1946 applied this doctrine in the trial of Fritz Hartjenstein and Five Others, and in the trial on 10 and 11 July 1946, of General Victor Seeger. Also see the Rauer case discussed infra.

The Chinese similarly have recognized neglect of command responsibility as part of the existing law and customs of war. Article IX of the Chinese Law Governing the Trial of War Criminals (October 24, 1946) states: "Persons who occupy a supervisory or commanding position in relation to war criminals, and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as the accomplices of such war criminals."

Similarly, as we have previously stated, Japanese law fixes the same responsibility. In the case of United States of America versus Masaharu Homma, Vol. I, Staff J.A. 18 Feb. 1946, it was pointed out that, "Und the rules of military science taught in Japan, as elsewhere, the commander 'takes the responsibility of the actions' of his men (R. 235)." The witnes former Vice Admiral Wakabayashi made the following statements in this regar

> "Question: Do you mean that a commanding officer is responsible for the actions of his subordinate officers notwithstanding the fact that he does not order his subordinate officer to so act? Answer: What I am trying to say is that if the action of the subordinate turns out to have a bad result then the commanding officer is responsible insofar as his supervision is concerned."
>
> "Question: Do you mean he has the responsibility only if he has ordered the officer to act? Answer: That is not so. Even if the commanding officer does not order his subordinate to act in a certain way, if that subordinate misconducts himself or acts illegally the commanding officer is responsible from the point of view of supervision, otherwise a military organization can not be held together."

Even the accused Kobayashi admitted that under military law he was responsible for the acts of his subordinates. And in answer to questi 154, admitted that in the Japanese Navy a superior officer can be punished for the illegal acts of his subordinates.

E. Case against the accused is stronger than the Yamashita and other cited cases because of proof: that accused knew of inci-

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dents within area of his command; that he took no action to investigate or punish and no action to prevent further incidents; and that subsequent incidents with which he is charged occurred after his knowledge of these prior incidents.

The foregoing material is an adequate sample of the application of the doctrine of command responsibility under the law and customs of war, even where there has been no proof of any knowledge of the commission of illegal acts or the killing of prisoners of war within the area of command. But the instant case is infinitely stronger than the foregoing cited cases because of the presence of admitted positive knowledge by the accused of two incidents when prisoners of war were killed within the area of his command: the execution of prisoners of war at Kwajalein (Rear Admiral Abe having pointed out the place of execution); and the execution of 96 prisoners of war at Wake Island (accused saw the prisoners of war and later saw the dispatch telling of their execution).

As we have previously pointed out, the accused has admitted that no action was in fact carried out with regard to these two incidents. No instructions or orders were issued to prevent future incidents. And in fact no effective action was taken by the accused to even investigate the two incidents he admits knowing about.

> The accused has vaguely alleged that after learning of the Wake Island incident, he later told Abe to "look into the circumstances." Even assuming for the moment the truth of this highly dubious statement, the accused admitted that he never followed up this initial request by requesting or requiring a report from Abe, and made no other efforts to secure the facts of this known execution of 96 prisoners of war. Similarly, knowing of this execution and that his subordinates knew of the execution of these 96 prisoners of war, he did not recall saying anything to his subordinates or issuing any instructions or making any comments to any of his staff at Fourth Fleet Headquarters concerning the execution, (Kobayashi Testimony - Questions 192, 193). In the face of these facts we can say with certainty that the accused took no effective action with regard to the Wake Island incident, or the other known incident at Kwajalein.

It should again be borne in mind that these were not incidents involving irresponsible individuals. The Kwajalein incident, was an incident of execution of prisoners of war at Kwajalein reported to the

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accused by his subordinate, Rear Admiral Abe, IJN, Commandant of the Sixth Base Force under the command of the accused (yet the accused according to his story did not even take the trouble to ascertain the details of that execution from Abe or any other source). Similarly, the Wake Island incident was an incident involving, as the accused knew, the execution of some 96 American prisoners of war by Captain Sakaibara, Commanding Officer of Wake Island.

The known incidents were a clear warning to the accused as to the state of morale and attitude of his subordinates and their troops, but he took no affirmative action. Inaction by the accused, a Commander in Chief, in the face of his knowledge of these incidents, was not only condonation but must have appeared tantamount to express authorization and an open invitation to these and any and all of his subordinates to commit further acts of violence, cruelty, and murder upon prisoners of war.

The staff of Fourth Fleet Headquarters knew of both of these incidents, and knew that the Commander in Chief knew of them, and presumably they knew that no action had been taken by the Commander in Chief to investigate the matters or punish the participants. The incidents that followed speak for themselves -- and it is interesting to note that one of the incidents -- the Sea-wall Incident -- which occurred on February 17, 1944, bears a striking parallel to the Sakaibara incident for it also occurred at the time of an air raid when land invasion was apparently feared.

1. <u>Examination of some of the cases where proof of neglect of command responsibility also included on envisaged some element of knowledge.</u>

We have examined some of the pertinent law and cases which have imposed criminal liability solely upon the basis of command responsibility, and the failure under all the circumstances to fully carry out the duties of that command responsibility. Let us briefly examine a few of the cases where the proof of neglect of command responsibility also included or envisaged some element of knowledge:

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It should first be pointed out, however, that the language of the courts, as well as that of the reviewers, sometimes obscures the precise issues we are here concerned with -- namely, the issue of neglect of duty -- because the charges in such cases are often worded broadly in terms of murder, inciting murder, participation in murder, etc., as well as that of mere neglect of duty or command responsibility.

a. Case of Takashi Sakai, tried by Chinese War Crimes Military Tribunal.

There have been some cases in which the courts, on the basis of meager proof of knowledge have presumed that the accused must have known of all the atrocities. The case of Takashi Sakai tried and sentenced to death by the Chinese War Crimes Military Tribunal of the Ministry of National Defense, Nanking, 27 August 1946, is one of these. In this case the charge inter alia as found against the accused was that of "inciting or permitting his subordinates to murder prisoners of war." Note that here the word inciting required some specific proof of knowledge. The defendant who had directed military operations in Kwantung and Hong Kong admitted a knowledge of the murder of prisoners of war in the Stevenson Hospital, Hong Kong. Apparently, however, the accused had never admitted that he knew of the occurrence of any of the atrocities before their occurrence, or that he had personally ever ordered these atrocities. The court however stated that the accused must have known of the acts of atrocities committed by his subordinates. The Tribunal also expressed the opinion that it was an accepted principle that a field commander must hold himself responsible for the discipline of his subordinates.

b. Case of United States of America versus Masatoshi Fujishige, tried by United States Military Commission.

In the case of United States of America versus Masatoshi Fujishige, Colonel, et al, Vol. I. Staff J.A., 2 April 1946, the accused was sentenced to death in a case which showed failure to act, after knowledge of prior killings. Note the following language: "The failure to exercise sufficient authority to retain control over the members of the command is tantamount to tacit consent to acts in violation of the laws of war. See Rules of Land Warfare, page 86-87. ...The subjugation order

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was his positive act. His failure to act when reports showed wanton killing and destruction was tacit consent thereto and his negative act. For these sins of commission and omission he must, as was determined by the Commission, pay with his life."

c. Case of Rauer, Scharschmidt, et al, tried by British Military Court.

An interesting case, which has certain parallels to the instant case, was tried before a British Military Court at Wuppertal, Germany, on February 18, 1946. Several officers, formerly attached to the aerodrome at Dreierwalde, Germany, were tried for being "concerned in" the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on March 22, 24, and 25, 1945, respectively. Note that the charge here was that of being "concerned in the killing." This charge did not envisage negligence as does the instant charge against the accused Kobayashi, and the judge advocate in the trial stated that the words "concerned in the killing" as applied to Rauer, the commandant of the camp, were a direct allegation that he either instigated murder or condoned it. In other words, the charge in that case was in essence that of murder or of aiding and abetting murder. Clearly in such a case the element of knowledge must be proved to a greater degree than in the instant case which is based on neglect of duty. With this in mind, the facts and treatment of the Rauer case by the British court, becomes doubly interesting.

The facts in that case were briefly as follows: On March 21 the aerodrome was heavily bombed and five allied airmen were captured by the Germans. Rauer, the commandant of the camp, claimed that he issued no specific orders regarding these prisoners, but expected that they would be sent to a prisoner of war camp in the usual way. His adjutant, Scharschmidt, after questioning them, detailed Amberger to lead the escort, despite the warnings of Chief Clerk Lauter that Amberger was unsuitable for the task in view of his open hostility to allied prisoners of war -- the adjutant did make some attempt to find a substitute. On the night of the 22nd, four of the party of prisoners were shot to death on the way to the station. Rauer admitted that he was primarily responsible for prisoners of war, but added that the administration of questions relating to them was a matter for Scharschmidt, the adjutant. Both he and Scharschmidt accepted a report that the prisoners had been shot while

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trying to escape and Rauer passed this report on to higher authority. Rauer pleaded that he had not time to make a personal investigation, and Scharschmidt pleaded that he had no orders to do so. Rauer and Scharschmidt ~~were found~~ were found not guilty of the first charge -- which was that of being "concerned" in this killing which occurred on March 22nd. Note the charge here was that of being "concerned" in, and not the charge of neglect of duty as in the instant case.

On March 24th, a further party of prisoners captured after a second serious air raid were sent at night to help in filling in bomb holes on the runways of the aerodrome. This was done under Rauer's orders transmitted through Scharschmidt. Seven or eight prisoners were shot. There was some evidence that Scharschmidt told the noncommissioned officers involved that they must make a report that the prisoners were shot trying to escape, so that Scharschmidt could pass it on. Scharschmidt, however, took no action because the Commandant, Rauer, had intended to interrogate the escort. The Commandant, Rauer, however, could not find the time to do so. An unchecked report stating that the prisoners had been shot while trying to escape, was thereupon sent to higher command. The court found both Rauer and Scharschmidt guilty of being "concerned in the killing" of these prisoners of war.

> In a commentary on this case, United Nations War Crimes Commission War Crimes Trial Law Reports, "Command Responsibility," it is pointed out that the decision of the court to find Rauer and Scharschmidt not guilty of the first charge, but guilty of the second and third charges may have been influenced by the consideration -- which was pointed out in the trial -- that it was less reasonable for these officers to believe after the second incident that the prisoners involved were shot while trying to escape, than it was after the first, and that measures should have been taken after the first shootings to prevent a repetition.

The third incident occurred on March 25 when a wounded prisoner was taken out of the aerodrome in a motorcycle sidecar and shot. Rauer and Scharschmidt stated in court that they knew nothing of this incident until long afterwards. The court found both Rauer and Scharschmidt guilty of being "concerned in the killing" of this prisoner of war.

This in brief was the evidence with regard to the specific incidents involved. In addition, there was some evidence that both Rauer and Scharschmidt expressed hostile opinions toward captured enemy air crews, in the presence of noncommissioned officers. Rauer, however, denied issuing any orders for the shooting of prisoners of war, and explained that he was prevented from making personal investigations into the shootings by his other duties; the Allied armies were near, the air raids were severe and necessitated extensive repairs by hundreds of prisoners of war, internees and civilians, which he had to supervise, and his task was made worse by ill-feeling among the officers on the aerodrome. No witness claimed that the killings were carried out on the specific orders of either Rauer or Scharschmidt.

Rauer, who was the Commandant of the aerodrome, and his adjutant, Scharschmidt, as well as others directly involved, were sentenced to death

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by hanging. Higher military authority, however, commuted the sentence on Rauer to life imprisonment.

Let us again note that the charge in this case was not that of neglect of duty -- but a charge which required a greater proof of knowledge and participation.

> Summing up the case against Rauer in regard to the equivalant of a motion to dismiss, the Judge Advocate said: "In my view the charge does not envisage anything in the nature of negligence. The words, 'when concerned in the killing,' to my mind, are a complete and direct allegation that Rauer was either instigating murder or condoning it. In my view that is the real basis of the charge which is before you, and I do not propose to embark upon any question as to whether Rauer was negligent either at the time or afterwards in not making a proper investigation." Defense counsel for Rauer similarly submitted: "That this accused 'must be proved to have been a party to a crime or to have acted in consort with others in committing that crime or to have been guilty of criminal negligence of the highest order or to have been an accessory after the killings.'" The judge advocate in his final summing up, dealing with the first charge -- the incident which occurred on the 22nd of March -- said that there seemed no direct evidence that Rauer or Scharschmidt deliberately gave orders to Amberger and his companions to shoot the captives, nor did they pass along the impression that they wanted the killing to happen or that if the prisoners were killed nothing would be done about it.

d. Comparison of the Rauer case, and the instant Kobayashi case.

In the Rauer case discussed supra, the charge of being "concerned in the killing" required proof of murder or condoning murder, and as stated by the judge advocate, did not envisage anything in the way of negligence. In the instant case, however, the requirements of the charge are much less rigid, and proof of neglect of duty, i.e., negligence, is sufficient to convict the accused. Despite this difference analogies presented by comparison of the Rauer case and the instant case are interesting and significant.

> In the Rauer case only three incidents, and the killing of only 12 prisoners of war was involved. In the instant case ten incidents, and the killing of 118 prisoners of war and mistreatment of an additional 51 prisoners of war, is involved.
>
> In the Rauer case, (as in the instant case), the custody of prisoners of war was a minor and temporary responsibility of the command of the accused.
>
> In the Rauer case, and similarly in the instant case, the accused contended that he was preoccupied with his important and time-consuming duties of defense of the area under his

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command. In the Rauer case the accused Rauer had delegated a subordinate, Scharschmidt, to handle prisoner of war matters. In the instant case the accused, while failing to delegate any staff subordinate (See Exhibit 5) to handle prisoner of war matters, contends that it was the duty of his subordinate commanding officers to directly handle prisoner of war matters.

In the Rauer case the accused Rauer did not know of the killing of any prisoners of war by any of his subordinates until after the first incident, and the accused Rauer was thereupon convicted of being "concerned in" the killing which occurred in the very next incident, the second incident. In the instant case it has been proved that the accused knew of one killing, the execution of prisoners of war on Kwajalein, before the occurrence of the Wake Island incident charged in paragraph (c). And he knew of the killing of these 96 prisoners of war at Wake before the occurrence of seven subsequent charged incidents.

In the Rauer case, Rauer contended that at the time he was too busy and had no time to make a personal investigation. Rauer at least, however, required a report, obtained it, and passed it along to higher authority. In the instant case, Kobayashi did not even bother to ask Rear Admiral Abe any details concerning the execution of prisoners of war at Kwajalein. Similarly, he did not follow up the Wake Island incident, and while he contends that he asked Abe to "look into" the incident, he never required and never obtained any report, and never passed any report or information concerning either the Kwajalein or the Wake Island incident to higher authority.

In the Rauer case, the accused claimed that he did not even know of the third incident until long afterwards. Similarly, in the instant case the accused claims that he did not learn of any of the later incidents -- including the Truk incidents. Note, the accused Rauer was convicted of being "concerned in the killing" in this third incident, even though apparently he did not know of it at the time or until long after it had occurred.

Since, in the Rauer case, the court found that the inaction of the accused, Commandant Rauer, constituted being "concerned" in the murders, it appears clear that the accused is guilty of the less direct offense of neglect of duty in permitting the mistreatment and murder of prisoners of war.

III. Conclusion.

The evidence is before the commission. The judge advocate has briefly discussed some of that evidence and has tried to point out its legal and factual implications. The Commission must decide whether this evidence proves beyond a reasonable doubt that the accused is guilty of Neglect of Duty as charged.

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

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最終辯論

被告人元日本帝國海軍
第四艦隊司令長官海
軍中將小林仁の辯護人
高野純二郎

軍法裁判会裁判長並ニ裁判各位

私は被告人小林仁の辯護の為本軍法裁判会の前に私の最終辯論を為すの光榮を有するものである。仍て私は茲に本件の審理が終始公平に且厳粛に行はれたることに對し深甚の感謝を表するのである。

第一編　法律の見地よりの辯論

第一章　職務怠慢と之に関連する法律の原則

第一、本件の起訴罪名は戰爭法規違反に關聯の件及びあつて其の罪状項目一として日本帝國海軍第四艦隊司令長官として勤務中アメリカ合衆國、連合諸國民其の他の諸國が日本帝國と戰爭状態に在りし昭和十八年四月五日より同十九年二月二十七日に至る間彼の指揮下の地域に在りしウエーク島、マーシャル諸島、カロリン諸島及其の他の場所に於て彼の指揮下の人々及彼の統御監督下に在りし人々の行動を抑制すべき前記第四艦隊司令長官としての職責を有せしに拘

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ず違法に之を無視し其の職務を遂行せず上記の人々に日本軍隊に抑留され居りしアメリカ俘虜を苛責酷使、虐待、及殺害することを許可し因て戦争法規並に慣習に違反せりと云ふに在る。

罪状項目二として小林仁は前記第四艦隊司令長官として勤務中アメリカ合衆国、連合諸国及其の属領が日本帝国と戦争状態に在りし昭和十八年四月中旬より同十九年二月二十五日に至る間彼の指揮下の地域たりしロタ島、マニラ外数ヶ所、カロリン諸島及其の他の場所に於て彼の指揮下に在りて彼の統御監督に服し居りし日本の軍隊が抑留中のアメリカ俘虜を職責上保護する為自己の権限内に於て当時の状況下適切なる措置を講ずべき職務を有せしに拘らず之を履行せず日本軍隊の人々に前記アメリカ俘虜の苛責、酷使、虐待及殺害を許可し上記第四艦隊司令長官としての職責を違法に無視し之を遂行せず因て戦争法規並に慣習に違反せりと云ふに在る。

第二、本件起訴状を検討するに罪状項目其の一は被告人は第四艦隊司令長官として職責上自己の指揮下並に統御監督下に在りし人々の行動を抑制すべき立場に拘らず其の職責を全ふせず其等の人々に俘虜を苛責酷使、虐待及殺害することを許可し其の部下統御監督の職務を怠つたと云ひ、罪状項目其の二は被告人は第四艦隊司令長官として自己の指揮下並に統御監督下に在りし人々に抑留され居りし俘虜を保護する為自己の権限内に於て当時の状況下適切なる措置を講ずべきに拘らず此等の人々に俘虜を苛責

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酷使、虐待及殺害することを許可し其の部下の統御整頓の職務を怠つたと云ふのであるから此の罪状項目其の一と其の二は被告人の全く同一の統御整頓上の職務怠慢に帰一すべきものであつて二個の別異の職務怠慢ではあり得ないのである。換言すれば前者は被告人と其の部下に対する関係に立脚して観たるものであつて後者は被告人と部留中の俘虜に対する関係の観点より観たるものである。それであるから此の両者は唯観点を異にしたるのみであつて実体は唯一の部下統御整頓上の職務怠慢である。

二、に特に指摘せねばならぬことは本件起訴状中いづれの部面に於ても被告人小林が(イ)被告自身苛責、酷使、虐待、及殺害行為を為したとか又はこれに参與したとか(ロ)其等の犯罪行為を命令、又は容認若は勧奨したとか(ハ)或は其等の犯罪行為を知つておつたと云ふ様な検察官の主張がないことである。此のことは後に述べるところに関連することがらであるが、こゝに一言述べておきたいのである。

第三、職務怠慢とは或る人が法律又は規則に依つて課せられてゐる特定の義務を履行せざることである。

米国海軍律が職務怠慢に付て規定してゐるところを見るに:

「人が自己の負担せる義務の全部又は一部をも行はざるときはそれに因り職務怠慢となる。それは作為においても亦不作為である。義務は其の犯行の行はれたる当時実施されてゐる法律、規則、命令若は勤務慣例を以て課せられてゐるのである。」(同書第105節97頁)

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と謂ふてゐる。

上に謂ふ所の義務は上掲海軍律法に明記されてゐる通りニ箇の條件に依って限定せられてゐるのである。即ち(一)當該職務怠慢たる犯行の行はれた當時施行せられてゐる法律又は規則其の他に依り課せられたものであって此の法律又は規則其の他に違反したことを要し(二)依って其の義務は特定の義務たることを要するものである。換言すれば其の義務は怠慢たる不作爲の行はれた當時當該に施行せられてゐた法律又は規則に依り課せられたものであって此の法規に違反したことを要するのである。而して其の違反に對し適用せらるべき法律又は規則は其の當時現に有效に存續してゐるものでなければならない。即ち或違反行爲(不作爲)のあった後に制定せられた法規を遡及的に之に適用することは許されないところであり且一般に認められてゐないのである。此のEX POST FACTO LAWの原則又はNULLUM CRIMEN SINE LEGE, NULLA POENA SINE LEGEの原則は今日文明諸國に於て國内法及國際法を通じ確立された刑事法の一般原則である。

CLARK AND MARSHALLは其の犯罪論に於て次のやうに論じてゐる

「アメリカ合衆國憲法はEX POST FACTO法は國會も各州も之を制定すべからずと規定してゐる。即ち各州憲法に於ても立法權に同様の制限が設けられてゐる。此の禁止の意味に於けるEX POST FACTO法なるものは『其の法律の適用に於て當該行爲が實行せられた當時に於ては刑事上の犯罪にあたらなかつたも

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此の法律を依りて之を犯罪とするもの又は刑罰を加重するもの。約言すれば其の犯行或は結果に関して裁判官の立場を被告に不利益に変更するもの』である。例へば其の法律の制定以前は実行せられ且其の実行の当時何等犯罪となよ居かった行為を有罪とするが如き法律を指してある。換言すれば或る犯行が行はれたる後に制定せられた法律は其の犯罪との関係に於ては凡てEX POST FACTOである。併しながら憲法に於ては此の語は頗る広汎なる意味に用ひられてゐる。憲法は第一義的には遡及的刑事法制定に関して厳く規定してゐるのである」と（CLARK AND MARSHALL, 犯罪論, 1940版, 第38節36頁）

上に述べた憲法違反の法律は法律として無效であって何等の拘束力もないのである。随って斯かる違憲の法律は何等の義務を負はしむるものでなく又之に依って保護を与へるものでもない。それ故違憲の法律に基いて刑事責任を負はしむることは勿論ないところである。此の点に付てアメリカ法理学は次の通り論じてゐる：

「刑事責任に及ぼす成文法の合憲性と違憲性。――憲法違反の成文法は絶対法律の形式と効力を有すると雖も実際よりそれは法律でない。斯かる法律は之に依って何等義務を負はしむることなく権能を与へ授與せず又保護と與へるもの

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てない。如何なる刑事責任も助かる注意を
基いてえを負はすることは出来ない。」(同
書第十五巻 刑法 第307節 10頁)

次に上記の特定の義務は法律又は規則に依って
明かに規定されたものでなければならない。不特定
の義務なるものは之り得ないかである。唯漠然たる
意味の義務を課せうした場合があったとすれば斯か
る義務は銀行に過ちいのでとするかに假令之が履行を
怠ったとしも何等の責任を負ふことはないのである。
此の点に付てアメリカ法理学の説いてゐるところを聞
くに:

「危害に對し他人を保護すへき注意を払ふ
義務は成文法……に依り明示的に又
は含蓄的に課せられてゐる」(同書第38
巻怠慢第十四節655頁)

と論じ更に

「單に悪良なる道徳即ち人道的顧慮を
示す義務は法の領域外にない」(同
書第38巻怠慢第16節 658頁)

と述へてゐる。

當時同書は法定の義務怠慢てなければ刑事上の
責任を問擬すへきでない、と云ふことに付て下の如く記
述されてゐる。

「一般的に言へばは怠慢が為さるべきは
法律に依って負はしめられた特定の義務の
不履行に該當せざる限り之を許過すべき
ものでない」と(同書第38巻怠慢第
九節 650頁.)

第四. 而て職務怠慢は其の全部が無差別に刑事上の責任を負うべきものでない、ことは現今文明諸国の法制上一般に承認せらる、ところである. 而て其の職務怠慢の内法律又は規則に依り時に刑事上責任ありと認定せられたもののみが刑事上の責任を問はるのである. アメリカ法理学は此の点に付て次のように説いてある.

「怠慢が為は成文法に依り犯罪なりと宣言せられて初めて犯罪となるのである」と(同書第38巻怠慢第9節650頁)

第五. 凡そ或る人の作為又は不作為が犯罪となるや否やを決定するに当つて最も重要なる要件の一は其の人が作為又は不作為をなすに付故意(犯意)又は過失があつたかどうかを確定することである.

作為又は不作為が犯罪を構成するか為めには其の構成要件として其の故意(犯意)又は過失があり且其の作為又は不作為と客観的事実との間に因果関係が存在することを要することは刑法学の根本原則であることは言を俟たない. 而て其の因果関係たるや之を無制限に拡張すべきものでなくて合理的又は法理的因果関係に限定すべきものであることも亦各国刑法学上の定説である. 随つて斯かる因果関係のない作為又は不作為は仮令それが観念上恰も間接又は連鎖的に連絡があるかの如く観ずることがあつても当該事実との間は刑法学上謂ふところの因果関係即ち相当因果関係がないのであるから其の作為又は不作為は犯罪を構成し得ないのである.

本件に於ては作為の犯罪行為は問題となつて

ろないのであるから、これは職務怠慢と云う不作為犯に限定すべきを論ずることにする。

今此の点に付てアメリカ法理学の述べところを下に引用してみよう。

「怠慢に対する責任は犯罪として問擬せられる怠慢と許容せられている損害との間の因果関係に基かれはならぬことは勿論である。論理学上厳格に言へば損害の原因であるところの人は直近のと遠隔のとを問はず皆その行為より生来せる一切の損害に対し責任を負わねばならぬのである。然しながら社会の実際の必要より往々斯かる法則は普く実行し能はざるのみならず実に正義に反するものである。其故に法律は唯直接且直近の結果のみを観ているのである。法律は人類の欲求範囲を認め又些々の過失より生ずる重大なる結果の発生することをも認めているのである。即ち論理学上の厳格なる過程を従へば幾多甚の原因が法律上の責任を負はしむる根拠であると雖も法律は遠隔の原因はこれを看過し直近の原因のみを眼中においているのである。怠慢と損害の間の果たる或る程度の因果の関係又は関連のある在のみでは怠慢の責任を負はしめている法律を満足せしむるに充分でない。回復の要求せられている損害は高度の行為の合理的な結果であることを要する……。其故に法律は或る人に対し其の人の犯したる違法行為の一切の

可能な結果を以て基の人の責とは帰せしめてはならない」と基の事務遂及が許遇し得べきや否やを決定するに付て通例生ずる通過を無視し基の損害を直近の結果のみを眼中に描くべきである」と述べてゐる（同書第38巻 necligence 第51節 647頁）。尚は同書は次の如く論じてゐる。

「法律は単に necligence 行為即ち不作為にあり之と損害との間に或る関連を辿り得ると云ふだけでは責任を負はしめない。基の損害は過誤の合理的な結果でなければならぬ。而して若し基の necligence 行為と生じた損害が通常の経験上自然に又普通にはかゝる事連関係にありと認められないし且基の損害が出来事の普通の一般の過程に依れば当該行為より生じ来らないものであるときには基の行為（違法行為）と基の損害とは断へざる necligence を構成するに充分な程度に因果の関係に立たないのである。蓋し、之は直近原因の要素が欠けてゐるからである。直近原因を構成するか為には若しも基の行為がなかりせば斯かる損害は発生しなかつたであらうと合理的に言ひ得る程度に基の necligence 行為と基の損害との間に自然的で直接で且連続的の事連がなければならない」と述べてゐる。（同書第38巻 necligence 第56節 704頁）。

上述の法理は民事上の事件上付ても亦刑事上の事件上付ても全く同様である。唯刑事上の責任を負はしむる為めには民事上のそれよりも一層高度のものたることを必要とすることに於て両者の差異があるのみである。

第六、以上縷述したるところに依り職務怠慢が犯罪を構成し且刑事上の責任を負ふ要件として（1）或る人が法律又は規則に依て課せられた特定の義務を怠りたること、（2）其の犯罪となるへき職務怠慢は故意（犯意）又は法律が刑事責任を負はしむる程度の過失（重過失）のあること（3）更に其の職務怠慢たる不作為と発生したる客観的事実との間に直近の因果関係のあること、（4）其の之を罰する法規は其の犯罪行為の為されたる当時実施せられしものたることの外其の法律又は規則に依って刑罰が係せられ且此の法律又は規則に違反したることを以て其の行為の行はれたる後に制定せられたる法律又は規則を以てこれを処罰することを得ないことを知るのである。

第七、軍隊に於ける職務怠慢は其の職務を行ふへき範囲の広狭より観れば下は一等哨の職務怠慢の如き甚だ簡単なるものより上は指揮官又は其の上官たる総軍指揮官或は司令長官の部下の統御及監督上の職務怠慢の如き極めて広汎且つ全般的にて複雑なるものがある。加之平時と戦時に依り其の態様と多少の差異は生ずるのである。而して更に之を其の本質上二つの種類に大別する事が出来る。即ち一は自己の処たる犯罪行為が職務怠

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慢であって上掲の前者の如き基の例である。二は他の者が犯した犯罪行為に付或る人が責任を問はる、監督上の職務怠慢であって後者の如き基の例である。後者の場合は「官が部下の犯した犯罪行為に付基の上官として統御及監督上の職務を怠ったという理由で基の責任となるのである。併し官が部下の者の犯した総ての犯罪行為に付無條件無制限に基の監督上の責任を負うと言うのではない。若し假に上官が部下の一切の犯罪行為に付無條件に監督上の責任をとると言うのは公平を失し酷に過き法として妥當と云うことは出来ないのである。そこには一定の限界がなければならぬ。。。。然らば如何なる要件が具はれば上官は基の部下の者の犯した犯罪行為に付統御及監督上の職務を怠ったものとして責任を負うかと云う點に付ては下項を分ちて述べてみやう。

第八、元来或る人が他人の犯罪行為に付て刑事責任を負うは基の他人の犯罪行為を幇助(aid)、教唆(abet)、勧言(counsel)、命令(order or command)を為したることを要件とするが刑事法の一般原則である。而て基の人と基の他人とが支配者と被支配者の関係、又は監督者と被監督者の関係、或は上官と部下の関係に在る場合に於ては前者が後者の犯罪行為を命令(order or command)、指令(direct)、許可(permit)、したるか又は知りて之を黙認(acquiesce)したる事実があるのみならずは前者をして刑事責任を負はしむることは出来ないのである。CLARK and MARSHALL も犯罪論に於て次のやうに論じてゐる。

「普通法に於ては前論のことが成文法の下に於ても一般に人は基の代理人又は被傭者の犯

罪行為に分縦令それが産婆中ま死き小た
そうでも其の行為が其の主人の指令ま基き行
はれたるが或は其の主人がそれを知りて黙許
したのしたけ小は、其の主人ま対し刑事責任を問
うことは出来ない。基し或る人を犯罪と付
て処罰とするには犯意を中要とすると云ふ
のが一般ま認められた原則てあるからて
ある。」（同書第188節主人又は主人の責
任(c) 230頁）.

右も之は主人と代理人或は主人と被傭人との関
係を論じたものてはあるが小とも其の根本理論は一
般的に監督者と被監督者或は上官と部下の関係
ま付ても等しく適用せらるへきてある。

今上記の原則を軍隊の上官と其の部下の関係に
敷衍して見るに上官が部下の犯した犯罪行為ま付知
悉上の職務を怠ったと小ふ廉て刑事責任を負ふまは
其の上官が部下に其の犯罪行為を命令，指揮，指示，
許可したるか又は其の犯罪行為を知って之を黙認した
のてなけ小はならぬ。CLARK AND MARSHALL が其
の犯罪論ま於て論じてゐるやうに犯罪を構成するには
犯罪行為と犯罪意思の（犯意）がなけ小はなら小のて
ある。("To constitute a crime there must be a criminal act, as well as a criminal intent."—CLARK AND MARSHALL, CRIMES, 第106節147頁)。換言すれは上官は部下の其の犯罪行為
を知ることが必要條件てある。若し上官が其の部
下の犯罪行為ま付何等知るところがなけ小は上官
は之ま付刑事責任を負はないのが原則てある。
然しながら其の知らなかったことに付上官に過失があ

たおかは其の責任を免ぶることは出来ない。但し、ここに謂う「過失」は単純なる過失ではなくして法律が之れに刑事責任を負はしむる程度の過失即ち重過失でなければならないことは言を俟たない。CLARK AND MARSHALL も「不作為を理由として刑事責任を負はしむるには其の人が法律上の作為義務を有し且其の不作為が故意と出でたるか或は刑事責任を問はるゝ過失と基因するものでなければならない」と論じてゐる（CLARK AND MARSHALL, 同書第53節及慣(4)不作為 80頁）。

第九、本件に於て問題となるのは此の「許可する」(to permit)と云ふことである。

(イ)此の語の法律上の術語としての意義は「許し又は免許を與へること」(to give leave or license)或は「或る行為をなすことに明示的に賛成し若は同意を與へること」(to expressly assent or agree to the doing of an act)である。即ち或る犯罪行為をなすことを「許可する」(to permit)とは故意をもつて(intent)其の行為をなすことを許すか又は免許を與へるか(to give leave or license)、若は之に明示的に賛成し又は同意を與へ(to expressly assent or agree)以て其の犯罪行為を知ることを意味するのである。

(ロ) BLACK の法律字典も亦此れを「許可する」(to permit)とは上記の意義の外に猶ほ「…するに委せる」(to suffer)、「許す」(to allow)、「…せしむる」(to let)、「防止せずして黙認する」(to acquiesce, by failure to prevent)ことゝ、

説明している。（BLACKの法律字典，第3版）。此等一つ以上の意味を之を法律的に解釈すれば或る行為を為すことを許可する人は其の對象である行為を知って之を為さしむるか，或はそれを知りながら為すに任せるかであって更に此等の意味に従って之を他人の犯罪行為を「許可する」ということに當てはめて言えばには或る人が他人の犯罪行為を知りながら其の他人が此の行為を為すに任せるか若は其の犯罪行為を知って之を防止せずして黙認することである。

以上述べた「許可する」という語の(イ)(ロ)夫々の意味に於ても或る人が他人の犯罪行為を「許可した」場合，其の人が該犯罪行為と付刑事責任を負うべき場合は其の「許可した人」が法律上他人（犯罪行為の実行者）を監督又は統御すべき義務を負ってゐたことを必要とし且其の犯罪行為を知ってゐたことが必須要件である。

本件の起訴状に記載せられてある「permit」なる語は以上何れの意味を有せざるにあらずして之れ以外の意味は有ち得ないのである。結局被告人が彼の部下が犯したる罪状項目記載の犯罪行為を上記(イ)の意味に於ける許可を為したか或は(ロ)の意味を有する許可を為したかであって両者夫々の場合に於ても被告人は其等の犯罪行為を知ってゐたことが其の字義の中に含まれてゐるのである。然らば被告人が果して其等の犯罪行為を知ってゐたかどうかは後に事実論に於て明かにされるであろう。

第二章　上官の監督責任と國際法及國内法.

第十.　戰爭犯罪並に其の處罰上に關しては從來一般に承認せらるた國際法上の原則はない.　殊に上官、指揮官、司令官、統帥指揮官、司令長官に關する部下の爲した國際法違反の犯罪行爲の監督上の責任に關しては國際法上の原則は全然なく又先例と爲つへきものも殆んどなかつたのである.　即ち此等の問題は今次世界戰爭の終末と共に始めて政治上法律上の重要問題として登場するに至つた問題と言つてよい.

こゝ暫くは從來一般に承認せらるた國際法上の原則がなく實際も一定した處にふゝのしおるかに見依て、裁判官としては在來の部分的な、且つ斷片的な學說例を參考する他はないのである.

今試みに國際法の權威 OPPENHEIM の著書國際法を繙いてみるに本質的に異なる性質の戰爭犯罪として四種の犯罪行爲を擧げ更に戰爭法規の重大なる違反行爲として二十種の行爲を列擧してゐる.　其の外に俘虜の虐待, GENEVA 條約の違反等を擧げてゐるけれども「上官又は指揮官の部下の統御監督上の職務怠慢」を戰爭犯罪として擧げてゐない.　加之其の著書の何れの部分にも此の上官の監督上の職務怠慢を戰爭犯罪として認めてゐないのみならず上官の部下監督上の責任並に指揮官の上官たる統指揮官又は司令長官の部下監督上の責任に關しては全然言及してゐないのである.（OPPENHEIM の國際法第6版第2卷戰時國際法の部第2篇第451-2頁）.

上官は部下の行爲に對して責任を負うへきやの問題

之付ては主として公法上の一般的観点から之に国際法上の学説等を参照してこと論じ本件の被告人小林の軍隊司令長官としての責任に言及せんとする。軍統率関係に於て指揮命令する地位にある上官が其の指揮命令下にある部下の為した国際法違反行為に付て指揮命令者として又は上官として監督上の責任を負わへきやあるか否やこれは刑事責任の本質に関連する困難なる問題である。

この上官の監督責任の点に付て在来の見解は区々である。一方に於ては上官は部下の一切の行為に付て責任を負うと云う見解もあるし又他方に於ては特に自己の指揮命令に於ける行為に付てのみ責任を負うと云う考へ方もある。併し普通には其の中間的又は折衷的な考へ方が採られる。連合軍最高司令部法務部長 CARPENTER 大佐が指摘せる「戦争犯罪及暴虐行為を命令し又は許容し或は勧奨した軍指令官」(Military Commanders who ordered or allowed or induced war crimes and atrocities) は戦争犯罪の責任を負うと云う考へ方も此の折衷的な考へ方の一つである。此の意味に於ける指揮官の責任は部下の国際法違反に対する一種の刑事責任に他ならない。而て刑事責任は近代文明諸国に於ける刑法の一般原則に照し其の本質上自己の故意又は過失に基く犯罪行為に対する責任に外ならない。

此の見地からすれば上官は部下の一切の行為に対して責任を負うという見解は広きに失し妥当とは言へぬ。蓋し一般的には主観的要件を缺く場合には刑事責任を認め得ぬからである。又は既に

上掲第十及第八に述べたところである。此の絶対責任説に對しては検察官も基の冒頭陳述に於て述べたところに徴するに依れば之を採つておらぬやうである。併し又反面から言へば自己の指揮に命令に於ける行為のみ責任を負ふと云ふ見解は決して是認出来ない。假に積極的に指揮命令せずとも部下の国際法違反の行為を黙認し抑制すべきに抑制しなかつたやうな場合には消極不作為犯の成立することも考へられる。のみならず刑事責任の要件として主観的要件は故意のみに限らず過失の有無もこれに同様に考慮されねばならぬのである。

第十一。斯く考へるならば如何なる範囲まで上官の責任即ち統御監督上の責任が認められねばならぬか。一般的に言へば上官が部下に於ける国際法違反の行為を指揮命令した場合は勿論これを知つて黙認した場合及これを知り且これを抑制すべく又抑制し得べき地位に在りながらこれを抑制せず黙認した場合には之に於て責任を負ふべきものであると言ふことが出来る。下に具体的に場合を分けて考察する。

(1) 上官が部下に対し国際法違反行為を指揮命令又指示した場合。

部下が此の指揮命令に基き違反行為を実行した場合に上官がそれに付て責任を負ふべきは極めて当然である。上官は共同正犯若は間接正犯として又時には教唆犯として責任を負ふのである。これに違反した行為をさせたことは上官は部下に依つて犯された国際法違反行為を自己の違反行為が命令に従つて且命令の執行として必然的な一つの範囲を於てのみ

責任を負わのみあって法は上官の命令中る包含せられた部下の行為に対しては上官は責任を負わせられないと云うことである。

上官が部下の国際法違反行為を知りつゝこれを黙認した場合と称する上官の行為は放棄的な性質を有するに止まる。

(2) 上官が部下による国際法違反行為を指揮命令したと云う事実はないまでも単に部下が違反行為を行つてゐることを知りながらこれを黙認し特にこれを抑制するの適切な措置を講じなかった場合。

上官が部下の国際法違反行為を知った場合にこれを抑制すべき国際法上の義務を負わせられやすきや否やは疑がある。此の問題に関しては従来のいづれの條約の中よも亦国際法の文献中よもこれに言及せるものは見当らないのである。例へは上掲 OPPENHEIM の国際法の著書の中よも何等此の問題(事項)に言及したるところがないことは既に上に述べたるところである。係る上官の指揮命令権は反面に於て国家が国際法上負担する義務の実際的履行者たるこの指揮者の義務を包含するものと解すべきであるから上官の部下の違反行為を知りつゝ之を黙認しそれを抑制するの適切なる措置を執るべく又執り得べきを期待し得べかりしにかゝわらず之を執らなかったときは上官は指揮命令権者換言すれば国家の負へる国際法上の義務の実際的履行者として其の責任を負はねばならないのである。

此の問題に付て果して実体的に責任の有無を以て断定を下すに於ては指揮命令関係の実体を究明する

ことが必要欠くへからさる前提となることを注意せねばならぬ。即ち(イ)高級上官と部下との関係が果して直接具体的に指揮命令し得る関係にあり得て又期待する為め適切なる措置を講じ得へき関係にあったかとうか(ロ)又当該具体的事情の下において果して適切なる措置を講じ得へきことあるに拘らず知りつゝこれを講じなかったかとうかを究明しないけれはならぬ。上記(イ)の場合において注意せねばならぬことは統帥指揮官又は司令長官は各現地部隊の国際法違反行為そのものについては一般には責任を負はぬと考へてよい。何となれば具体的の指揮命令権は其の下の各指揮官又は司令官が有するからである。要するに命令権が実際において帰属することと具体的に刑事責任の帰属することとは別個に考へへき問題であって命令権の帰属する為めにも刑事責任の帰属とまでいのである。従来の場合よりても形式上は指揮命令者であっても実際上交通通信の杜絶又は極めて困難なる事情等が命令の徹底を期し得ぬ事情にある場合とか或は管轄地域が非常に広大なる範囲に渉り指揮下の各部隊が極めて遠隔の地に散在する為め急速なる命令の徹底を期し難き事情にある場合又は軍が混乱状態の下に陥り命令の徹底を期し得ぬ事情にある場合の如き指揮者としては適切なる措置を講じ得なかった場合と言はねばならぬのである。而して実際上においては此等の事情が時を同くして競合的に重畳して発起することが屢々あるのである。こうみても此等の場合には不可能又は殆んど不能事であると言はねばならぬ。此の点は民事法の法理学の説くところを引用してみやう。

「官公吏は自己の支配力の及はさる強圧手団ず法律の命する職務を履行することが不可能なるときは其の不履行ず付刑事責任を負はしめざること」（同書第4巻 官公吏 第332節 132頁）。

(3) 上官が部下の国際法違反行為を知りながらこれを抑制する為適切なる措置を執らなかった場合。

此の場合はこれを二つに分けて考へねばならぬ。即ち上官に於て部下の事情を知悉すべきであるに拘らず知らなかった場合と云ふやうに其のことず付て特に過失の責むべきものがある場合（重過失の場合）には其の責任を免れ難いであらう。但し此の過失責任ずついては刑の軽減を認むべきである。之に反し上官に過失の責むべき点がなければ、場合（軽過失の場合）には責任を負ふ限りではない。此のことは既に上記第八ず於て述べたところである。

第十二。之を要するに部下の国際法違反行為ず付て上官の抑制の責任の有無を判断するに際しては先づ指揮命令関係の実体を明確にしなければならぬ。単に形式上に指揮命令系統ず属すると云ふのみで部下の行為ず付て直ちに一般的に上官の責任を肯定することは刑事責任の性質ず言って不可能と言はねばならぬ。寧ろ実質上に指揮命令ず得る関係に在って国際法違反行為を指揮命令したか（黙認した場合を含む）又は抑制すべく且抑制し得べきに拘らず抑制せず黙過したか（重過失の場合を含む）ず依って始めて其の責任を問ひ得るこ

とにはのうえる。

第十三、上に述へた総軍指揮官又は司令長官の名下
塾精義なる分乙一言附言する。

凡そ軍隊は確立した指揮命令系統を精髄とする
組織体である。此の系統を厳に遵守することに依り
軍は軍としの機能を発揮し且其の機構は順調圓滑
に働いて行くのである。若し假に此の指揮命令系統
を誤ったり軍の組織は紊乱を来たし軍の機構は
崩れる。上官が部下に指揮し命令をするには必ず
一定の順序又は段階を経へきことは言を俟たぬ。
例へは総軍指揮官又は司令長官が命令をだそうとする
に當っては必ず其の直属の部下たる指揮官又は司令
官に之を與へ、指揮官又は司令官は更に部下の師団
長又は司令に之を傳へる。其の師団長又は司令は次
て其の部下に之をだすわけにゆのである。然るに
假に司令長官が直属の部下たる司令官を飛ばして直ち
に司令又は部隊長に若は彼等の部下に指揮をだし
命令を與へたとすれは中間の司令官又は司令は其の
司令長官の命令を知ることができないかが之に従って何等
のところなく唯最下部の者のみが司令長官の命令に
従って行動をなすに至る。斯のごき事態の発生は軍の
統帥を攪乱するものであることは勿論である。

日本海軍に於ける艦隊令（仮称"27）第十一條
に

「艦隊司令長官ハ天皇ニ直隷シ聖旨ヲ奉シ艦隊
ヲ統率シ隊務ヲ総理ス。艦隊司令長官ハ
軍政ニ関シテハ海軍大臣ノ指揮ヲ承ケ又作
戦計畫ニ関シテハ軍令部総長ノ指示ヲ承ケ

と規定し、

特設艦船部隊令（証拠#31）第四十九條、三に「特設根拠地隊に司令官を置く。司令官は、許厳長官の隷し、所属艦船部隊の統轄し艦隊及び中司令官の例に準ずる規定及び防衛隊令第六條の規定に準じ服務す」と定め、海軍警備隊職員服務規程（証拠#32）第八條には「前各條の規定にかかわらず、艦船職員服務規程の適用を受ける者に限り、海軍警備隊職員にこれを準用す」と規定され、同じく艦船職員服務規程（証拠#30）第二條1「艦長は一艦の首脳たり、諸法規に示す所に依り上長、命ずる所に従い副長以下乗員を指揮統率し、その任務を遂行し、艦務を総理し、且つ職責を尽くすに遺算なきを期すべし」と規定している。

此等法規の規定は、いつ如何なる場合の指揮命令系統の確保維持を期しているものかは明らかである。

第十四、本件被告人小林の主観的条件即ち日本海軍第四艦隊司令長官としての地位、任務、職務遂行の範囲、部下隊及職員、責任等は彼の所属国たる日本の国内法規に依って定まってゐたことは贅言を要せぬ。しかも此等の事項を論ずるに当っては日本の国内法規を究明することが必要であって之を排除することは出来ない。茲に本件と関係を有する法規を左に掲げておく。

前掲艦隊令に依れば艦隊司令長官は天皇に直隷し麾下の部隊を統率し隊務を総理するのであって（同令第十一條一項）軍政上に於いては海軍大臣の指揮を承け又作戦計画に関しては軍令部総長の指示を承けることとなって居った。（同令第十一條二項）。艦隊司令長官は麾下艦隊の軍紀風紀及教育訓練を統監する任務を有ってゐたのである（同令第十二條）。

同令は艦隊の編成に付て

「艦隊には軍艦二隻以上より以て編成し水雷艇を隷属之に駆逐隊、潜水隊、海防隊、水雷隊、掃海隊、駆潜隊、航空隊又は駆逐艦、潜水艦、海防艦、輸送艦、水雷艇、掃海艇、駆潜艇、敷設艦、哨戒艇、揚陸艦、防備隊、航空隊、特務艦及水雷艇一機関等を附加す」と規定して居る（同令第一條第一項）。併し戦時に於いては此の編成を変更し得ることは勿論であって其のことは下記軍令部の部下に対し明瞭に含まれて居る（第32回小林仁の証言）。

艦隊司令長官は幕僚として参謀長、参謀、副官、機関長、軍医長、主計長を有ってゐた外（同令第五條）直属の部下として各地の海軍根拠地隊司令官も有ってゐた（前掲特設艦船部隊令第四九條ノ五）。其等の根拠地隊司令官は彼等独自の指揮命令権を有する責任ある（responsible officer）士官であったのである（EXHIBIT 61 — 6°, 16° and 21° Q. and A.）。

斯くの如く指揮命令系統の上に於いては艦隊司令長官は其の部下である根拠地隊司令官とは直接の関係を有するけれども後者の部下と其の部下とは間接で

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迄も極めて離隔的な関係しか有しないのである。其の指揮命令関係が間接であり離隔的であると同時に其の統御監督上の責任も亦間接且離隔的たりと為すを得ない。艦隊司令長官と他の五個の部下以下の部下との間に正常なる指揮命令系統が保持せられている限り後者の犯罪行為と之に対する前者の間接の作為例へば艦隊的に之を指揮命令したるが如きとの間に相当因果関係が成立するは疑問の余地はあるのであるが況んや此の場合前者（艦隊司令長官）の抑制監督上の職務怠慢と云うが如き不作為と後者の犯罪の結果たる事実との間には直接且直近の（proximate）因果関係はなき場合なのである。是れ上掲第十一(2)に於て従軍指揮官又は司令長官は各現地部隊の国際法違反行為に付ては一般の責任を負はずと述べた所以である。

第十五、艦隊司令長官の部下統御及監督上の国際法上の責任　即ち其の部下が犯したる国際法違反行為に対する監督上の責任に関しては国際法も順又学説も未だ一般に承認せられた原則のないことは既に上に指摘したところである。こゝに特に述べるのは艦隊司令長官の部下の監督上の責任の特殊性に因と思ふからである。此の司令長官の直属の部下は根拠地隊の司令官であった。此の根拠地隊司令官が自ら国際法違反行為を犯したる場合と前述した両要件を具備すれば司令長官が監督上の責任を問はるゝのは普通の順序である。而も此の責任が刑事上の責任であることは後に述べる。茲に司令長官の直属の部下でないところの前線各地の警

傭隊司令又は其の他の部隊の長が国際法違反行為を犯した場合、尚ほ進んでは其の警備隊司令の部下が此等の違反行為をなした場合に於て司令長官は果して其の監督上の責任を負はねばならぬであらう？此の場合の司令長官の責任は直接の監督上の責任ではなくして間接、離隔的、跳躍的の監督責任と言はねばならぬものであって言を換へて言へば監督責任に対する監督責任と言ふ極めて特異なる責任である。斯かる責任が果して認められるであらうか甚だ疑はしい。此の責任を強ひて認めようとすることは正義公平の観念に反し決して正当妥当とは言へない。

本件に於て被告人小林が訴追されてゐるのは実に此のカテゴリーの監督責任が存してゐる。

第十六、上官の部下の国際違反行為に対する統御監督上の責任は国際法上の問題であると同時に亦国内法上の問題でもある。

上述した如く此の上官の責任に関しては国際法上何等の規定なく又学説も或は参考に資すべき先例もないのみならず国際法上の問題たるべきものでもあるが故に日本の国内法に於て此の事項に関し如何なる法規があったかを述べることは少しも無用ではない。下に論ずるところは本件に関係のある日本海軍軍人に関する事項に限定する。

本委員会に提出せられた日本海軍刑法（証拠#28）に於て尾には上官が部下に対する統御監督上の職務を怠った不作為を処罰すべき条文はないのである（被告側証人佐藤の証言　第26日の証言、即ち証拠#28に関する証言）。　併し上官たる者は

此の監督不行届の職務怠慢に対し何等の責任をも負はないのではない。斯かる場合の上官の責任は刑事上の責任ではなくして懲戒的の責任である。（検察官側証人若林の証言、Q.14乃至17に対するA）　随って之に対して懲戒的の処分を受けるのであるかどうかは犯罪ではないにしても其の処罰は海軍刑法に依り科せらるゝ刑罰ではなくして海軍懲罰令（証拠〃29）に依る懲罰である。海軍懲罰令第二章 HAN-KŌ 第九條第23號及第27號には次の如く規定されてある。

第九條「左に掲ぐる行為アリトキハ其ノ故意ニ出テタルトキハ過失ニ出テタルトキハ何ニテモ之ヲ懲罰ス

二十三、監督指導ヲ怠リタルトキ

二十七、前諸號ノ外職務ヲ怠リ若ハ職務上ノ義務ニ背キ又ハ紀律ニ違ヒ若ハ威厳信用ヲ失フヘキ行為アリタルトキ」

此ノ規定による懲罰は即ち上に掲げ所の懲罰である。依て此の場合に於ても懲罰と科するかは當該上官の部下監督上の職務怠慢が故意又は過失のあることを必要とすることは條文の解釋上明かである。

尚ほ刑罰は犯罪即ち実体法に依って刑罰的効果が付與せられた所の行為に対する制裁である。之に反し懲罰は公法上の特別権力関係又は之に準ずる公法的監督関係に属する者に対して其の関係の紀律を維持する為に科する一定の制裁である。此の両者は性質を異にするが少数刑として併科せらるゝ場合の異なる点を除ても両者の差異は了解出来る。

海軍刑法は海軍人に適用される特別法であるが（第一條）日本刑法も亦一般法として海軍人にも適用

せられたことは言を俟たない。（被告人側伯人佐藤の証言一未だの数回に對する答）。而て叙上の通り上官の部下監督上の職務怠慢は犯罪ではないのであるから刑法中にも其の関係條文のないのは理の當然である。

第十七．國際法上俘虜の取扱及保護の責任の帰属に関する明則はない又之に関する承認せられた学説もないようである。

千九百七年十月十八日の海牙條約第四の附属書（The Annex to Hague Convention No. IV of 18 October, 1907）第四條第一項には次の規定がある。

「俘虜ハ敵ノ政府ノ権内ニ属シ之ヲ捕ヘタル個人又ハ部隊ノ権内ニ属スルコトナシ……」

又千九百二十九年七月二十七日のジュネーブ俘虜條約（The Geneva Prisoners of War Convention of July 27th 1929）第二條第一項次の規定がある。

「俘虜ハ敵国ノ権内ニ在リ之ヲ捕ヘタル個人又ハ部隊ノ権内ニ属スルコトナシ」

更に同條約第十八條第一項は

「各俘虜収容所ハ責任アル将校ノ管下ニ置カルヘシ」

と規定している。

上に引用した此等の規定より依れば上記両條約は俘虜の取扱及其の保護の責任及責任者に付ては其の俘虜を捕へた國家の國内法の決するところに委ねていることは疑を容れない。

では此の問題に関し日本の國内法規特に日本海軍の法律規則中如何なるものがあったかを調べてみやう。

前掲日本海軍の特設艦船部隊令第十三章ニ特設警備隊、第五十七條ノ三ニ

「特設警備隊ハ其ノ所在地及其ノ附近ニ於ケル警備ニ任ジ且ツ命ニ應ジ陸戦、通信、運輸、補給等ニ関スルコトヲ掌ルコトヲ得」

と規定シ又海軍警備隊職員服務規程（証拠＃32）第七條ニ

「司令官又ハ司令ハ衛兵ヲ組織シ重要境域又ハ其ノ所在地附近、海軍官衙、倉庫等ヲ守衛セシムヘシ。但シ現ニ海軍守衛ノ置カレ官衙倉庫等ニハ此ノ限ニアラス」

と規定せられてゐる。

日本海軍部隊ニ於テ俘虜ヲ収容シタノハ二、ニ論ナク前掲各地ノ警備隊デアツテ其ノ長デアル警備隊司令カ俘虜ノ収容、取扱、保護ニ関スル責任者デアツタ。此ノコトハ検察官側証人井上遵一（ス10 Q.＆A.）及若林清作（87－88 Q.＆A.）ノ各証言ニ徴シテ明カデアル。

警備隊司令ハ前掲艦船職員服務規程（証拠＃30）第二章ノ規定セラレタル艦長ニ相当スル職員デアツテ該規定ハ警備隊ノ職員ニモ準用セラレタノデアル。（同規程第二條）（被告人側証人依藤ノ証言第27回 EXHIBIT 30 及32ニ対スル Q.＆A.）而シテ該規程ノ第百五條ニハ

「艦長ハ国際法上、事件ニ関シ又ハ特ニ懲罰ヲ与ヘル旨上官ノ命令、規則又ハ慣例ノ範囲内ニ於テ処断シ若シ其ノ範囲外ニ渉ルヲ以テ上級指揮官又ハ直接海軍大臣ノ指令ヲ請フヘシ」

規定せられてある。 元来が故に警備隊司令は国際法上の事件を関しては特に慎重に之を取扱ひ且つ命令、規則は勿論條約を尊重し之を厳守すべき旨指令されてゐたのである。 されば仮令俘虜の取扱保護等に関しては俘虜の取扱に関する條約の規定其の趣旨に則つて職務を行ふことになつてゐたことは極めて明瞭な事柄である。

警備隊司令の直上の上官は根拠地隊司令官であつた。(証拠〃2 附録3〃4. 証拠〃35 附録1. 検察官側証人井上憲二の証言 211 Q. & A.)

第十八、以上本件に付て法律の見地から之を論じたのであるが之を要約するに上官の部下の国際法違反に対する監督統御上の責任並に之が知悉に関しては従来の国際法上何等の原則も亦又一般に承認せられた学説も現は先例もないのであるから本件は現行文明諸国に於て認められてゐる一般の刑法の原則に照らして之を判断する他はない。 即ち此の刑法の一般原則に拠つて被告人小林が其の部下等多数の部下が国際法違反の行為を犯したことに付艦隊司令長官として監督指揮上の職務怠慢の責任を負わねばならぬものであるとするには小林が起訴状に列挙せられた諸般の国際法違反行為を知つてゐたか否か、若し知つてゐたとすれば之に対し適当なる措置を講じ得べき状態~~中~~況下にあつたに拘らず之を講じなかつたか否か、若し又之を知になかつたとすれば其の知らなかつたことに付て故に過失があつたか否か、等を明確にしなければならぬ。 されば此の点を明確にしなければ小林は彼の本件起訴の責任を負はしむることは出来ないのである。

更に之を犯罪と事実との間の因果関係の原則に

而して考察するに本件に於ける小林と根拠地隊司令長官の部下たる各地警備隊司令及其の部下との間には何等直接の指揮命令関係は無い。従って前者の後者に対する統御監督関係も亦間接乃至離隔的である。それが故に後者の国際法違反行為の結果たる事実と前者（被告人）の指揮監督上の職務怠慢さらに不作為との間には直接且つ直近（proximate）の因果関係はなし得ないのである。

仮に被告人の監督上の職務怠慢に付責任があったとしても小林の負うべき責任は日本海軍の法規に従へば刑事上の責任でなくして懲戒的の責任であって之に於ては海軍懲罰令を基く懲罰を受くべきのみであった。

仮し被告人小林が上掲の国際法違反行為を知りまた又其の知らなかったことに付何等責むべき過失がなかったとまたは何等の罪責を問うべきものでないことは勿論である。又被告人が知っておった事件に対しては艦隊司令長官として其の当時の状況下に於て彼の執り得べき最適の措置を執った事実があるとすれば彼は職務を怠ったとは言へない。

殊に本件に於て被告人小林の問責せられてある責任は起訴状、列挙の戦争犯罪との関係に於ては艦隊司令長官としての責任と云ふ特殊性を帯びた性質の責任即ち間接且つ離隔的な責任であることに注目せねばならない。斯かる関係にある国際法違反に対しては一般的には司令長官としては監督上の責任を負うべきとすべきである。

以下本件の事実に基く弁論に移る次第である。

第二編　証拠に基く事実の検討.

第一章　一般的事実.

一. 被告人小林の第四艦隊司令長官としての任務

被告人小林仁の第四艦隊司令長官としての任務は本営陸軍部と協同して南洋群島方面担任地域の防御、同地域内における航空作戦、航空基地の設営、海上交通保護及艦隊前進根拠地としての機能発揮にあったと認められる。其の担任地域が東西2,800浬、南北1600浬の広大なる地域を擁して所謂重要なる戦略要点を包含して居たこと、而て彼の管轄地域が彼の任期の後半から逐次米軍の本格的進攻を受くるに至った事実を考慮に入れるときは彼の任務が広汎且極めて重大であったことは何人も疑を挿まないであろう.

特に注目すべきことは艦隊司令長官の任務は全般の作戦指揮が最大の任務であって之が為には戦況に応じ随時移動することが一つの特色であったのである.

東条被告人小林は防衛状況視察の為1943年8月下旬より11月上旬迄旗艦鹿島でマーシャル群島方面を行動し又11月20日米軍ギルバート方面上陸の報を受くや直に飛行機に搭乗してクェゼリンに赴き作戦を指揮したのである.

此の艦隊司令長官の任務に関聯して起る事柄は第四艦隊の広大なる管轄地域が数個の根拠地隊に分れ又更にその数個の警備隊に区分され各に責任ある指揮官に依り指揮されて居たことである. 換言すれば第四艦隊の広大なる担任地域は根拠地隊司令官或は警備隊司令の如き各級

指揮官ヨリ依リ夫ニ命ジ之ニ直接指揮セシメテ居タノデアッテ
艦隊司令長官ノ任務ハ証拠書類甲27 艦隊令ニ
示サレタル如ク全般的指揮ヲ執ルニ在ッタノデアル.
訴状項目ヨリ列挙サレタ事件ニ付テ被告人小林ノ責
任ヲ考量スルニ当ッテハ常ニ被告人小林ノ任務ノ限界,
此等中間指揮官トノ指揮関係及此等中間指揮官ノ
任務ヲ念頭ヨリ置クヲ要スル.

二. 部下統御上俘虜取扱又ハ国際法違守ヨリ
被告人小林ノ執リタル措置.

被告人小林ハ第四艦隊司令長官ニ就任ノ際俘
虜ヨリテ直接指示ヲ与ヘタコトハナイ. 係リ開戦後,
時ニ艦隊司令長官山本大将ガ与ヘラレタル訓示ノ中ニ
国際法ヲ遵守スヘキ箇條ノアッタコトヲ見テ彼自身ノ艦
隊司令長官就任ノ時ノ訓示ニ右箇條中ノ一項目トシテ
国際法ヲ厳守スヘキコトヲ述ヘシト回顧シテ各部隊ニ傳
ヘタト証言シタ.

本委員会ニ提出サレタル証拠ニ依レハ日本海軍ニ於テ
ハ国際法ノ遵守ニ付テハ艦長及各部隊長ノ職責ニ
明示サレテアル(証拠甲30)又国際法規中ヘーグ陸
戦法規ハ海軍諸例則巻四. 條約ノ部ニ記載サレテ
アル(小林第32回ノ証言). 又俘虜ノ取扱ヨリ関スル指
示ハヘーグ陸戦法規ニ俘虜ノ待遇ニ関スルジュ
ネーブ條約ヲ記載シタル「戦時国際法綱要」ガ海軍
省ヨリ発行サレ, 各部隊ニ配布サレテ居ルコトヲ小林
ハ証言シタ(第33回ノ証言). 同書ハ俘虜ヲ人道的
ニ取扱フヘキコト又敬愛スヘキコトヲ述ヘテアル(証拠
甲43)

又日本海軍俘虜取扱規則ガ発布サレテオリ, 俘

虜の氏数報告は俘虜を収容した部隊の長が海軍大臣
に報告すべきことに規定されてある。（訊問調書33、海軍
俘虜取扱規則）。又同規則によれば海軍は俘虜を陸
軍に引渡すことを原則とし、陸軍に引渡すまで一時俘虜を
保管するものであることが明示されて居る。更に俘虜は
成るべく速に内地に送還するが如く中央から各部隊に通達せ
られてあることは多くの証人の証言したところである。

上記各種の証拠の示す通り日本海軍当局では平素
より俘虜取扱及国際法の遵守に関する規程が定められ
何も戦争開始後軍隊区司令長官或は根拠地隊司令
官が之に関する規定を設けなくても事務が処理される
やうに準備されてゐたのである。空襲を受け或は険悪
な段階になってから俘虜の捕獲を予想して俘虜取扱
の規定或は命令を発したのでは手遅れであるのみならず
徒らに通信を混乱せしめて重要な作戦通信に支障
を及ぼすまでのである。

軍隊区司令長官としては常に俘虜取扱の言葉と
使用し或は俘虜取扱の規則を作らなくとも唯国際法
を厳守すべきことを訓示すれば部下は守るべき事項
は了解して居る筈である。被告人小林は着任の際
六箇条中の一項目として国際法を遵守すべきことを
部下全般に訓示したのであるから彼としては責務を果
して居るのである。よりて彼が俘虜を保護すべき義務
を違法に無視したと言い得るであろうか。

三、被告人小林の一般的人格。

被告人小林が起訴された事件と関連ある彼の特質
を示す一般的人格証言が本軍法会議に提出された。
彼の一般的人格に付ては日本海軍に於て主要な地

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後を占めた海官及外交界の高官の外云ふ米国海軍の高官が小も証言かあった。此等と依って彼が生来正直な愛国心情深き性格の持主であり、之に加ふるに米国と於ける裁判官は fair play, frankness, justice 等の美徳を備へた人間であることが明瞭であらう。

又彼が特に国際法に明るく之を遵守することを務めた人間であり且つ之を実行する人物であったことは日本海軍将官及横本氏の証言の外云ふにスタンレー大将の証言と依って更に一層強く之を知ることが出来る。即ち同大将は小林が大使館附武官として出向の組織を熟知して居たか彼の外交上の行動及態度は常に注意深く正しく文明戦争の根本的法規の知識に欠けてゐるやうな徴候は少しもなかったと明言してゐる。

被告人小林が第四艦隊司令長官としての在任中彼の部下は国際法規及慣習に違反し或は人道に反する所為のあった場合又之を知りつゝ黙認又は看過するが如き人間では決してなかったこと、況んや起訴状に列挙せるが如き非行を部下に許可して彼の軍紀を違法に無視し遂行せしめるやうな人間では決してなかったことは誰しも疑なく信ずることが出来るであらう。

賢明なる参謀長及参謀各位がこの小林の一般的人格を念頭におき且つ本件殺人の述べんとする罪状項目と列挙された事件と被告小林との関係性を仔細に検討せらるゝならば被告人小林が国際法規及慣習の遵守及俘虜の取扱に関連して違法な職務怠慢の罪に問はれる根拠の全然ないことを充分了解せらるゝことと信ずる次第である。

第二章　各事件と被告人との関連性.

第一節.　罪状項目(a)事件.——1943年7月WAKE島に於ける俘虜一名虐刑事件.

本事件に関しWAKE島所在第六十五警備隊司令酒井直次佐は彼の公判に於て本虐刑は彼自身の発令したものであり(D.B.におけるA.)又本事件は之を発令した彼自身に全責任のあることを証言した(最終証言).

又彼は本虐刑に関し上官の許可を仰き或は虐刑を報告したということに全然証言していない.

一方検察官側証人であり第四艦隊先任参謀であった井上亀一は公判第二十二日に本虐刑に関し何等の報告を受けた記憶なしと証言し又被告人小林もこれに関し全然報告を受けなかったことを証言している.

以上の証拠を綜合するに本事件が事前に於ても事件後に於ても被告人小林に知らされたという証拠は全然立証されていないのである.

第二節.　罪状項目(b)事件——自1943年7月16日至1943年8月27日Captain L.S. Zamperini及Captain R.A. Phillipsに対する虐待事件.

証拠書類#14 Zamperiniの口供書によればクエゼリンに於て日本海軍士官に依り獄に入れられたこと、収容所の係りたれたかは合衆国海軍の准尉と同階級を持ってゐたこと.又彼を虐待したのは男性であったことを述べてゐる.又証拠書類#17 Phillipsの口供書には

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クエゼリンで於て日本海軍當局の俘虜收容所に收容された旨通知があつたと述べてゐる。然るに其の後に米軍側からのInterrogatories 並びにPhillipsのdeposition 等は俘虜が陸軍部隊に收容されたことは確實であると陳述してゐる。

此等の証拠のみによつては此等米國の俘虜がクエゼリンに於て如何なる部隊に收容され誰に虐待されたか又此等の收容及虐待の責任者が誰であり被告人小林と如何なる指揮關係があつたかに付ては全然不明である。

一方被告人小林は直接訊問に於て1943年7月頃マーシャル群島に於て俘虜を捕へたこと、又同年7月中乃至8月下旬の間に於てクエゼリンに二名の俘虜が收容されたことに關し報告を受けたことある旨と証言し(Q.& A. 100-101.)檢察官側証人井上憲一も同様に斯かる報告を受けたることある旨と証言してゐる。(第22回反対訊問)

檢察官は前述の期間に二名の俘虜がクエゼリンに收容されたことが司令長官であつた被告人小林に報告された又此等俘虜が彼の命令に依つて虐待されたことを知つてゐたことに關しては何等之を立証しておらぬ。

被告人小林は昭和十八年七月及八月はトラックに在泊し仁徳艦長艦上にあり八月二十七日漸く第四艦隊マーシャル方面に向つてトラックを出港したのである。

此等の証拠に依り被告人が罪状項目(b)に掲げられた如き俘虜虐待事件のあつたことを全然知らなかつたと云ふことは何人も疑ふ餘地の無いところである。

第三節. 罪状項目(c)事件 —— 1943年10月7日WAKE島において96名の米国作業虜殺事件.

酒井直方面の裁判記録より依れば本虜殺事件は米軍機動部隊の熾烈なる攻撃を受け米軍の上陸が予期する緊急な状況下に於て作業に不穏な行動があったので酒井個人の権限に依り実施したものであり其の責任は全く彼自身の負うものであることを証言している(質問23. 48. 49. 53. 54. 101. 104. 114及最終陳述).

又彼の証言より依れば本虜殺報告は海軍司令部に先ず第四艦隊と第六根拠地隊を通報したと述べている. 検察官側証人井上憲一及被告人小林は本電報は第六根拠地隊に先ず、第四艦隊、海軍省に通報されたと証言している. 此の両者の証言に喰違いはあるが第四艦隊が報告先でなく通報先であったことは明かである. 酒井個人の証言の通りとせば此の報告に依り何か措置を為すべきものありとせば、それは本来南洲である. 井上、小林の証言の通りとせばこの報告に依り何か処置すべきものありとせば、それは第六根拠地隊司令官である.

直接訊問に於て被告人小林は此の報告電報を受領した時直に措置を講じなかった理由の一として酒井個人の直接の上官たる阿部中将を措いて何故か彼の部下に指示を与へることは越権として個人はやらぬと証言している.

本軍法委員会の前の裁判即ち山本一治外十九名の公判に於ては検察官は其の最終論告に於て「日本軍隊に於ても米国軍隊と同様に中尉の士官が居る場合も先任の士官は直接兵と交渉はしないでおくのと

主張する」旨を述べたが此の編則は軍隊に於て当然のものであり本事件に於て被告人小林が阿部を差し措いて行動し得なかったことは当然のことである。

当時は海軍航空部隊がマーシャル方面に進捗しつつあり小林は航空作戦の指揮と情報の蒐集に多忙であったと証言している（Q.90の答）。重要な作戦指揮中であり又旗艦々上にあった被告人小林が直ちに阿部と話す機会の無かったことは誰しも納得し得るところである。

被告人小林は暫くしてから阿部に本事件を調べるやうに話したと記憶すると証言した（8Q Q.&A.）。小林は軍隊に於ける指揮系統上当然の道を踏んだのである。阿部中将も歴とした海軍中将であり マーシャル諸島及ウエーク島の直接の責任者であったのである。被告人小林は広大なる地域の作戦時に航空作戦、指揮、航空基地の造成等両面の緊急なる任務があった外に艦隊主力及南方ソロモン方面で激戦中の艦隊に対する補給修理等の任務があった、又次で南もふく海軍艦艇をもってする陸軍兵力の各地に輸送を計画し指揮する任務も負はされたのである。随って一寸他の事柄に没頭し得ない状況にあったのである。結局当時の状況に於て被告人小林としては彼の為すべき措置は執ったのである。本件点については後述第十一節に於て更に述べることとする。

第四節　罪状項目(d)事件. —— 1943年10月15日WAKE島における俘虜一名殺刑事件.

本殺刑事件に関しては罪状項目(a)事件と略ぼ同様であって、酒井第一審判決録を依れば、酒井第一審が本殺刑事件を上官に報告したという証拠は何もない.

一方検察官証人井上憲一と被告人小林も本事件に関しては報告を受けたことの無い旨を証言している(井上、午22日反対訊問、小林 Q.99.)

当時は東部海軍を指揮した有力な部隊がマーシャル、WAKE方面に迫撃の情報と依り、聯合艦隊主力がマーシャル近海に向って行動した聯合艦隊として最も重要な作戦時機であった. 当時マーシャル方面に於て航空作戦指揮の責任を有っていた被告人小林が本殺刑事件の生起したことを知らなかったことは誰しも万人の疑いなく了解出来るところである.

第五節　罪状項目(e)事件 —— 1943年十一月トラック島に於ける Brown 少佐以下42名の潜水艦俘虜虐待事件.

被告人小林は一九四三年十一月十八、九日聯合艦隊駆逐艦が米潜水艦一隻を撃沈して其の乗員を俘虜とした旨の電報を見た又十一月二十日トラック水上基地で飛行機に乗ったとき参謀から多数の俘虜が艦上に上げた旨の報告を受けたことを証言して(Q.104)、被告人小林が後者の報告を受けたとき彼はギルバート諸島まで上陸

ため米軍反撃作戦指揮の為全幕僚を率いて飛行機にて
第九クエゼリンに向け出発することとなった。

當時トラックには各証人の証言せる如く聯合艦隊司令
部が直接の指揮を執って居り又第四根拠地隊司令部も残っ
て居たのである。被告人小林が當時の状況よりして當然停廬
に関し何等の指令を発しなかったことは極めて當然のことである。

東京俘虜の収容或は他地送還に関しては聯合艦
隊司令部が指示をなしたこと又第四十一警備隊に対し第四
根拠地隊司令部が指示を與へたことはそれぞれ検察官
側証人若林（Q's 47. 136）及中瀬の証言せる通りである。

訴因起訴状に主張されてある俘虜虐待の事実は
著しく誇大されてゐるのである。俘虜を當時 6呎×8呎
の小さな監房に収容したのでないことは検察官側証人
中瀬が明瞭に証言した。俘虜より医療を拒絶したと
いう主張も虚構であることは中瀬及飯野の証言で明
瞭である。Brown少佐が訊問中虐待を受けたと述べ
てゐるが検察官側証人は誰も虐待の事実を認めてゐ
ない。又訊問者が第六艦隊司令部の職員であった
ことは各証人の証言の一致するところであって此の疑
問もないところである。

假令或る程度の虐待があったとしても當時クエゼリン
に在って重要な作戦指揮中の被告人小林の何等関知
し得ざる所である。被告人小林が部下に此等潜水
艦俘虜の虐待を許可したということは誰もが想
像することさへ出来ない事柄である。

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第六節. 罪状項目(f)事件 — 1943年12月マーシャル諸島における日本国船舶ミレ島及クエゼリンにおける Captain F.F. Garret 外六名の虐待事件.

本事件に関しては Captain F.F. Garret の口供書があるのみで何等之を追証する証拠は挙げられなかった.

同口供書中に彼を虐待したと称するマーシャル方面作動中の同船舶の乗員、ミレ島所在の乗員及クエゼリン島における収容所員或は病院入院患者が誰であったかを証さなかった. 之れは被告人小林との間の関係が余りにも縁遠く且不明瞭である.

一方是等の俘虜を捕へ或は収容したことを第四艦隊司令部へ報告したという証拠はあるも又被告人小林及検察官側証人井上の両人共此等の俘虜に関しては何等報告を受けたことのないことを証言している.

一方的に述べられたGarretの口供書のみを以てしては被告人小林が不法に彼の部下監督の義務を無視し部下に虐待を許可したと主張する証拠とはなり得ない.

第七節. 罪状項目(g)事件 — 1944年4月30日トラック第四海軍病院における俘虜六名殺害事件.

本事件に関しては第四海軍病院長であった弁護人側証人岩波浩は直接訊問において俘虜を実験に使用

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することに関し豫め上司の了解を得たことは絶対にないこと（Q.15.）本事件が第四艦隊司令部へ知れては大変だと考えて心配した。そして桑山其の他の関係者から始末書を取ったこと（Q.12の続）及事件後上官には絶体に報告しないということ（Q.16）を証言した。又伊藤の実験を小林と話したかとの反対訊問に対して自宅では度々言った面の始末書を取った後であるから絶対にそんな馬鹿なことはないと再び前証言を確認した（Q.100）.

一方被告人小林は九百四十四年一月下旬から二月初にかけてトラックに伊藤の居たことを知ります（Q.113－114の答）又伊藤を実験に使うことに付て許可を求められたこともあります.（Q.115の答）、岩波とは其の頃伊藤に関して話をしたことはあります（Q.118の答）と証言して居る. 即ち本事件に関し被告人小林が事前に之を知り或は之を許可し或は事件後に報告を受けたと云う証拠は一つも無いのである.

一月五十日、五十一日マーシャル諸島は依然として大空襲を受け二月二日にはクエゼリン島に米軍が上陸したのである. 日本海軍に於ける中部太平洋の前進艦隊根拠地の一であったクエゼリン（小林 Q.6の答）を米軍に進攻されることは日本海軍として非常な痛手であり、第四艦隊司令長官としては作戦指揮の為め極めて重大な時機に際会したのである. 斯かる時機に於て重着の伊藤に対する医学的実験が艦隊司令長官の耳に入らなかった事に付ては誰でも首肯することである.

即ち本事件に関しては被告人小林が不法に彼の要望を容れ部下に非行を許可したということに対して直接の証拠のないのは勿論之と合理的に推定せしむる如き状況証拠も見出すことは出来ない.

第八節. 罪状項目(ホ)事件 — 1944年2月1日トラック第四海軍病院に於ける俘虜二名殺害事件.

本事件は前節の事件と一連の関連ある第四海軍病院で起った事件であるが本事件に於ては岩波浩も被告人の一人であったが公判の結果本軍法委員会に於て之に関与したことは認められなかったのである.

前事件を一切知る筈のない被告人小林が況して本事件を知る筈がないのである.

検察官側は本事件と被告人小林との間の関連性に於ては何等主張しなかったのである.

第九節. 罪状項目(ヘ)事件 — 1944年2月1日ミレ島に於ける大石陸軍大佐以下の俘虜五名殺害事件.

本事件に関しては本軍法委員会に二つの論争点が提出された. 一つは本殺害事件の発令者がミレ島海軍指揮官志賀大佐であったか否やということである. 之に就ては大石陸軍大佐公判の際検察官が rebuttal として提出した志賀大佐の自筆覚書中に志賀が殺害の発令を至当とするので結局発令者が誰であったかは明確でない.

次に大石陸軍大佐と志賀海軍大佐との指揮関係が問題になった. 大石は彼の Deposition に於て志賀が自分の直属上官であったと述べているが検察官側証人井上は敵の上陸の場合には当然先任順位が陸海軍を通じて指揮する

かゝる点以外のことに付ては在トラックの警備陸軍中隊が陸軍部隊を指揮したと証言してゐる。この井上の証言は検察官が rebuttal で提出した東京中央連絡事務局書類2976（証拠〃57）中にマーシャル群島に配された陸軍部隊は第四艦隊司令長官の作戦指揮下に在り且〃in the case of the defense of a remotely isolated island"とあつてこの書類により支持されてゐる。

然しかゝる証拠は被告人小林とは直接の関係はないのである。何となれば之は唯の志賀海軍大佐、大和陸軍大佐其の他誰かゞ此の処刑が被告人小林が発令をし或は彼の承認を得又は事件後に彼に報告をしたと云ふ証拠がなく又一方被告人小林も第四艦隊参謀たりし井上大佐より本事件に関し全然報告を受けなかつたことを証言してゐるからである。

報告が為されたとか或は報告を受領したと云ふ証拠のない限り1200浬を隔つた孤島の出来事を、時恰もマーシャル群島に米軍の大進攻を受け作戦指揮に繁忙であつた被告人小林が知に由がなかつたことは論を俟たざるところである。

第十節　罪状項目(j)事件 — 1944年2月17日トラック島第四十一警備隊における俘虜に対する虐刑事件。

最初に検察官側証人石井力佐及証拠書類〃38、田中裁判における田中政治大佐の証言中より本刑事件発生の経過を検討する。此の二つの証言を綜合

すると トラックが二月十七日米機動部隊の大空襲を受け又米軍が上陸するらしいとの情報に依り第四根拠地隊が上陸戦斗準備を発令した。其の頃第四十一警備隊に収容して居た作屋の取扱に困難を感じた第四十一警備隊の下級士官が田中大佐より作屋処刑のことを提案した。田中は一度之を叱ったけれども其の後更に提案があったので彼の部下に第四根拠地隊司令部の意嚮を尋ねしめた。其の時石井は自ら指揮電話で司令部に照会した石井は司令部側で「オイ」と言った声を聞き司令部が之を承認したものと判断して之を田中大佐に報告した。田中は第四根拠地隊の命令と判断して部下に作屋の処刑を発令した。

以上が大体の経過であるが此に重要な二つの点は石井が指揮電話を使用した件と「オイ」と云う返事の意味である。第四十一警備隊から指揮電話で第四根拠地隊と通話するのは一般電話とは異なる操作をしなければならないと云う弁護側証人樋口の証言に依れば石井が指揮電話を使用したことよりは非常に疑問がある。更に重要なことは石井が電話をかけたときに自分の姓名を告げず又相手にも姓名を告げず唯相手が司令部であることだけを知って話をした。そして「オイ」という返事を聞いて司令部が承認したものであると判断した点である。

石井は「オイ」と云う言葉は海軍士官が通常承認の意味を用いる言葉であると証言したが弁護側証人樋口及被告人小林は之は英語の Hallow 又は How と同じ意味の言葉であり夫れ以外の何の意味のない言葉であることを明瞭に証言した。又樋口は戦斗中第四根拠地隊電話室より高角が三、四名居たと証言

た。石井が「オイ」という言葉を聞いたのは電話器の Hallo の意味の言葉とが考へられない。又常識が言って重要用件を問合せるのに自己の氏名を告げず相手の名を指定せずして用件が達せられる道理がない。又重要用件の回事が「オイ」又は Hallo の一語で解答される道理がない。以上の見地が本件の問合せが実際に第四根拠地隊司令部まで到達したか否かに付ては多大の疑問がある。この事件に関する問合せが第四艦隊司令部に為されたという証拠は何もない。

次に二月十七日呉第四根拠地隊で開かれた会議の席上で田中大佐が作業の為刑を報告したか否か、問題であるが之は直接被告人小林に関係がないから論議を省略する。問題は其の会議の席上田中大佐の作業為刑に関する報告を聞いたと称せる、河村第四艦隊参謀或は河村からこの事を聞いたという井上第四艦隊参謀の両者の中誰れか、本為刑事件を被告人小林に報告したか否かという点である。検察官側証人井上は会議の結果を彼自身は小林に報告しなかつた（第二十一回直接訊問）又河村が被告人小林に作業の為刑に関することを報告したか否かに付ては知らぬと証言した（Q.219の答）。

証拠書類 # 59、河村参良夫の訴問調書に依れば河村は第四十一警備隊司令が会議に於て作業の為刑を報告したことに付ては知らぬ、但し会議後防衛施設に関し指揮官に報告をしたが作業に関することは記憶がないと答へて居る。被告人小林は簡単な事項に付て井上から報告を受けたが作業に関しては報告を受けぬと証言して居る。（Q.140－142の答）。之を要するに

警備隊に於ける俘虜処刑了承に関し被告人小林より報告の有りしかったことは極めて明白である.

當時被告人小林は病を患って職務を遂行するに支障あり二月八日は聯合艦隊司令長官古賀大将より次代の件を申出て古賀大将は之を海軍大臣に取次くと述べたと証言した (Q.150の答). 小林の健康状態に付ては井上も之を証言し、當時作戦関係以外のことは司令長官に報告しなかったと証言した. (Q.231の答)

本法廷に提出された証拠は一として被告人小林が本事件に付て報告を受けたということを立証して居ないのである.

第十一節　罪状項目各事件の証拠に関する結言.

被告人小林の罪状項目に列挙された十個の事件に関する証拠を通覧するに彼が俘虜の虐待又は処刑を発令し又は承認を求められて許可したという事実は一つも無かった又事件後に其の報告を受けたのはWAKE島に於ける十月七日の事件一つ以外はないのである.

十月七日のWAKE島事件に付て被告人小林は海軍の直接上官ではないので彼自ら措置を講ずべき立場よりは無かったのである. 事実被告人小林は広大なる管轄地域に於て各種の重要任務を担任して居り且當時は恰も米軍機動部隊のマーシャル方面攻撃の為マーシャル方面に向って出撃した. 作戦上最も重要な時機であったのである. 事件の調査と処断申請に関したことは當時被告人小林として為すべき

處置を取って居るのである。

更に本問題は海軍省が海軍省に報告されて
ことは從來の示す通りである。唯だ本事件に関する處理
は艦上に在って作戦行動をする艦隊司令長官の
といわよりは寧ろWAKE島の件丈を関し照会電報を
發したところの海軍省自身が當然處理すべき行政的
事項である。本事件に関し小林の處置は寧ろ彼の職
責を適法に無視しなかったことはなかったのである。

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第三編　検察官の論告に対する辯駁

第一、全般的辯駁

1. 検察官は上官の部下監督及統御上の職務怠慢に関する同責の先例は数多あると言われども それは今次亜戦争後のものである。時間的に以前と雖も 小さい事例は必ずも"先例"とは云えない。"先例"と云うのは過去に於て生起した幾多の事例の中多数の専門家に依って「時の篩」にかけて先例として残ったものでなければならない。過去の事例の全部が必ずも先例ではない。吾等は幾多の過去の事例中で"先例"として之を適用すべきものが多数あることを知らざるにはあらざるも、此の意味に於て国際法上上官の部下監督及統御上の職務怠慢の責任に関する先例、殊に統帥指揮官又は司令長官の部下の敵に対する監督上の職務怠慢の責任に関するものはない。検察官の其の論告中に"先例"として援用しておる先例は上に謂うところの厳格なる意味に於ける"先例"ではないのである。随って本件の先例とはならぬ。

2. 国際法上部下の部下が犯したる国際法違反行為に対する上官の監督抑制上の責任は定められておらない。学説も之を認めたものは多く又上記の意味に於ける先例もなきない。

3. 検察官は本件被告人に職務怠慢があったと独断的に仮定して其の前提の下に引例をしておるが本件に於ては彼に果して監督上の職務怠慢の事実があったか否か更に進んでは斯かる責任を被告人が負うべきやなきかが問題なのである。

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4. 検察官は本件起訴は Neglect of Duty であって Murder ではない と言う点が類りに Negligent homicide 又は Murder の例を引用している。... 勅令233例は弁護ではない。

5. 検察官は論告中 被告人は罪状項目3掲げた国際法違反行為を知っておった又は知っていた筈であると いう主張で終始しているけれども それは検察官の単なる主張に過ぎないのであって 審法第3条の実際にあたっては 証拠に基くものではない 此等の証拠に依れば検察官の主張とは反対である。

第二. 個別的弁論

1. 検察官は クエゼリンに於ける俘虜処刑のことを類りに持出すけれども 又は被告人が第四船隊司令長官として就任前の出来事であって本件とは無関係のものである。これに之を持出すことは筋が通らない。

2. 検察官は船隊司令長官であった被告人小林の負うていた俘虜を保護する義務と衣服食料住居を給与する義務と同様であると做し 此等の義務の怠慢として アメリカ法理学が事例を引用している (pp.15-16) けれども 此の引例は全く見当違いであって 其の誤っていることは何人も認むる所である。本件に於て俘虜の取扱並に保護の責任者は各警備隊司令であったことは これに述べて言わを俟たぬ

3. 高級指揮官であった 畑井、志摩、田中、奥山、岩渕が国際法違反行為を犯したことに言及しているけれども 岩渕を除いては 全部 被告人の直属の部下で

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はあかった。それ故検察官の主張は當らず。

4. 検察官は日本刑法中の過失の責任は職務怠慢と因果關係文を持出てゐるけれども辯護人は決して日本刑法も此等の規定がないとは言ってゐない。辯護人の言ふのは「日本刑法は上官の部下に対する監督又は統御上の職務怠慢の責任を問ふた條文、又は監督者の被監督者に対する監督又は抑制上の職務怠慢の責任を問ふ條文は全然ないと言ふのである。實際に於ける條文はない。

5. 検察官は論告中以下ケースを對照に持出すけれども以下のケースと本件とは基の性質が異る。該以下ケースを引ゐは米國大審院の二判事の有力なる反対意見があることを吾等は記憶せねばならぬ。

6. 検察官は中華民國の戰爭犯罪裁判の例を引用してゐる(p.36)。併し政治論は別として法律論としては之はEX POST FACTO lawの適用であって法律論としては非難すべきものである。辯護人が本件の當初より屢々主張するが如く戰爭犯罪の行はれた後に制定せられた處罰に関する法律又は規則或は命令を戰爭犯罪容疑者の審判に於て適用することは出來ない。

7. 検察官は検察官側証人若林の証言を引用してゐるけれども若林は上官の部下監督上の責任を刑事責任とは決して証言しなかった。それは行政上の責任であると証言した。此の行政上の責任という語は

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法律上の術語としては適當ではあいか これは刑事責任に對する語として懲戒上の責任の意味である.

8. 檢察官は KILIAN CASE の例を持ち出し引用されるサルとも (p.33.) それは當らない. 何となれば KILIAN は第十機械補充部隊の指揮官であった. 彼は任務の取扱及保護の直接の責任者であった. 本件の被告人小林の立場とは違う. KILIAN CASE をこゝに引用することは正鵠を得ておらない.

9. 檢察官は RAUER and SCHARSCHMIDT CASE を引用して本件と比較されている. RAUER は階級は檢察官はそれを明示されていないが本件では CAMP の指揮官であったと明示されている. それであるから任務の取扱及保護の責任者であった. 其の RAUER の職務上の責と機關銃隊長であった本件被告人の檢察官主張の監督抑制上の職務上の責を比較するのは全然失當であることは多くを言うを要せぬ.

之と要するに檢察官の論告は當を承服せしむるものでなく又其の引例は當を失している.

第四編.

第一. 最後に以上縷述したところを要約するに被告人小林仁が第四艦隊司令長官として在中起訴の罪状項目甚の一及甚の二に列記せられた国際法違反行為をこの部下又は他の部下の行下に上訴第一編第一章第九に評述したいづれの事実をも有す PERMIT をしたという事実並に小林がそれ等の違反行為を知りながらこれに対し何等適当なる措置を講じなかったという事実は検察官に依って何人も合理的疑念を挟むめまでに立証せられてるないのである. 之と反対に検察官側は被告人側の当法廷に於ける証言に依れば寧ろ被告人小林は此等の国際法違反行為は報告せざるを得ず従って彼としては之を知る由もなかった事実が明かにせられたのである.

第二. 唯 WAKE 島の一事件のみは彼は之を知ったのではあるが之に付ても検察官は検察官の主張する被告人は之に対し何等適当なる措置を講じなかったと云うことと共に小林の部下抑制監督上の職務怠慢と甚の犯罪行為の結果たる事実との間に直接且直近の因果関係の存することを何人も合理的疑念を挟む余地なきまでに立証し得なかったのである. 寧ろ反対に実際被告人は之に対し甚の当時の情勢下第四艦隊司令長官として彼の執り得べき最適の措置を講じたことが明かにせられた.

第三. 以上の理由に因り私は小林は本件起訴の罪状項目甚の一及甚の二に付ては無罪であることを主張する次第である.

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54.

弁護人は本件被告人小林仁及び本弁護人に対し無罪の御判決を賜わらんことを。

護　言

高野俊二郎

CLOSING ARGUMENT

Delivered by
Defense Counsel Takano, Junjiro
in behalf of
the accused Kobayashi, Masashi,
Vice Admiral, IJN,
Commander in Chief of the Fourth Fleet

Part One. Argument on the basis of Law.

Chapter 1. Neglect of Duty and the Principles of Law in Relation thereto.

Chapter 2. Responsibility of a superior officer to supervise and control, and International and Domestic Law.

Part Two. Argument on the basis of Facts.

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The Honorable President and Members of the Commission,

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

PART I -- ARGUMENT ON THE BASIS OF LAW.

Chapter 1. Neglect of duty and the principles of law related thereto.

I. The Charge in this case is titled, "Violation of the Law and Customs of war", and specification 1 reads as follows: "In 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, the Caroline Islands, and other places within the area of his command, 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, unlawfully disregard and fail to discharge his duty as the Commander in Chief of the said Fourth Fleet, to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, permitting them to torture, abuse, inhumanely treat and kill American prisoners of war held captive by the armed forces of Japan, in violation of the law and customs of war."

And specification 2 reads as follows: "In 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, the Caroline Islands, and other places within the area of his command, 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

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Imperial Japanese Empire, unlawfully disregard and fail to discharge his duty as Commander in Chief of the said Fourth Fleet to take such measures as were within his power and appropriate in the circumstances to protect, as it was his duty to do, American prisoners of war, held captive by the armed forces of Japan under his command and subject to his control and supervision in that he permitted the unlawful torture, abuse, inhumane treatment, and killing of said prisoners of war, by members of the armed forces of Japan, in violation of the law and customs of war."

II. Let us, now, examine the charge in this case. Specification 1 states that the accused neglected his duty as the Commander in Chief of the Fourth Fleet, to control, as it was his duty to do, the operations of members of his command and persons subject to his control and supervision, permitting them to torture, abuse, inhumanely treat, and kill prisoners of war held captive by the armed forces of Japan; and specification 2 states that the accused neglected his duty as theCommander 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, 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 the said prisoners of war, by members of the armed forces of Japan.

Specification 1 and 2 should be consolidated into one allegation of neglect of duty on the part of the accused to control and supervise, and they cannot be divided. In examining this still further, we find that the first is based upon the relationship of the accused with his subordinates, while the latter is based upon the relationship of the accused with the prisoners of war who were held captive. Therefore, these two types of neglect of duty are only two different views, and in substance are only one, i.e. neglect of duty to control and supervise his subordinates.

Here, I would like especially to point out that nowhere in the charge does the prosecution allege (a) that the accused Kobayashi, personally tortured, abused, inhumanely treated or killed or participated in these acts, (b) that he himself ordered, condoned, or induced these criminal acts, or (c) that he himself knew of these criminal acts. I only refer to these facts at this time, for it relates to what I will state later.

III. Neglect of duty is a failure to perform a specific duty imposed upon a person by law or regulations.

Naval Courts and Boards provides as follows with regard to neglect of duty: "A person may neglect his duty by never entering upon it in whole or in part. It is an omission rather than an act. A duty may be imposed by a law, regulation, order, or custom of the service in force at the time of the commission of the offense." (NC&B Section 105, p. 97).

The duty mentioned above is qualified by two conditions as is clearly set forth in Naval Courts and Boards; namely, it is required that (1) the duty be one that was imposed by law, regulation, etc., in force at the time of the commission of the offense, and that such laws or regulations were violated, and (2) therefore that it be a specific duty. In other words, since it is essential that the duty must be imposed by a law or regulation actually in force at the time of the negligent omission and that such law or regulations were violated, the law or regulation applicable to such

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violation must be actually in effect at that time. Thus, it is not permissable nor generally recognized that a law or regulations enacted after the act of violation (omission) retroactively apply. This principle of EX POST FACTO LAW, or NULLUM CRIMEN SINE LEGE, NULLA POENA SINE LEGE (No punishment without law), is a general principle of criminal law, established throughout domestic and international law, of all the modern civilized countries.

Clark and Marshall states in "A Treatise of the Law of Crimes" as follows: "It is provided by the constitution of the United States that no "ex post facto law" shall be passed by congress or by any state and in the state constitutions there is a similar limitation on the power of the legislature. An "ex post facto law" within the meaning of this prohibition, is "one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which, in relation to the offense or its consequences, alters the situation of a party, to his disadvantage." In a sense, all acts passed after an offense is committed are "ex post facto" in relation to that offens , but the words are not used in so broad a sense in the constitution, which primarily pertains to retroactive "criminal" legislation!! (Clark and Marshall, "Law of Crimes", 1904 ed., sect. 28, p. 47).

As stated above, laws in violation of the constitution are void as laws, and have no binding power whatsoever. Hence, such unconstitutional law does not impose any duty (obligation) nor afford any protection thereby. American Jurisprudence states as follows with regard to this point: "Constitutionality or unconstitutionality of statute as affecting criminal responsibility: -- Unconstitutional statute, though having the form and name of law, is in reality no law. It imposes no duty, confers no power, and affords no protection. No criminal liability can be based on such a statute. (15 Am.Jur., "Criminal Law", p. 10, sec. 307).

The "specific duty" mentioned above must expressly be provided by law or regulation, because there can be no non-specific duty. In case an undefined duty were imposed, as such duty could not be performed, no liability would ensue even if such was neglected because the performance of such duty would be impossible. With regard to this point, American Jurisprudence states as follows: "The duty of exercising care to protect persons against injury may be imposed expressly or impliedly by a statute...." (38 Am.Jur. Sect. 14, p. 655). And it further states: "Those duties which are dictated merely by good morals, or by humane considerations, are not within the domain of law." (38 Am.Jur. "Negligence", Sec. 16, p. 658). The same authority, moreover, states as follows concerning the matter that neglect of duty should not be charged with criminal liability unless it is a neglect of duty fixed by law. "Generally speaking, a negligent act is not indictable unless it amounts to the non-performance of a specific act." (38 Am.Jur. "Negligence", Sec. 9, p. 650).

IV. It is generally recognized in the judicial systems of the advanced nations of today, that criminal liability is not imposed indiscriminately when neglect of duty in all its broad meanings exists but is included only in certain aspects. In neglect of duty only those kinds of neglect of duty expressly prescribed by laws or regulations as having criminal liability are held criminally liable. With regard to this point American Jurisprudence states: "Negligence becomes criminal when so declared by statute." (38 Am. Jur. "Negligence", Sec. 9, p. 650).

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V. Generally speaking, one of the most important requisites in determining whether the commission or omission of an act constitutes a crime, is to establish whether there was wilfulness (criminal intent) or negligence in such commission or omission.

In order that commission or omission to act constitute a crime, the existence of wilfulness (criminal intent) or negligence and the existence of causal connection between such commission or omission and the objective facts are always required as its element. This, it goes without saying, is a fundamental principle of jurisprudence. It is also the established theory of jurisprudence of all countries that such causal connection should not be extended infinitely, but limited to reasonable or physical causal connection. Therefore, a commission or omission of an act, without such causal connection, cannot constitute a crime because there does not exist between the act and the corresponding fact, even though to our minds there appears to be an indirect or remote sequence, a so-called causal connection referred to in criminal jurisprudence, or reasonable causality.

In the instant case, criminal acts based upon commission are not at issue; so my subsequent argument will be limited to the omission aspect of neglect of duty.

I shall cite American Jurisprudence with respect to this point:

> "Liability for negligence must, of course, bepredicated upon a causal connection between the negligence alleged as the wrong and the injury of which complaint is made. In strict logic, perhaps he who is the cause of loss should be responsible for all the losses, whether proximate or remote, which flows from his acts. But in the practical workings of society, any such rulewould be both impracticable and injust, and therefore, the law looks only to direct and proximate results. The law takes note of the shortcomings of human beings and of the occurrence of serious consequences from small fault; ignores remote causes even where it might, if following the strict path of logic, consider them as basis for imposing legal liability, and looks only to the proximate causes. The existence of merely some causal relation or connection between negligence and an injury is not sufficient to satisfy the law under which liability for negligence exists. The injury for which recovery is sought must be the legitimate consequence of the wrong done.....Accordingly, the law does not charge a person with all the possible consequences of his wrongful act, but ignores remote causes and looks only to the proximate causes of an injury, in determining whether the breach of duty is actionable." (38 Am.Jur. "Negligence", Sec. 51, p. 697).

American Jurisprudence further states:

> "The law does not impose liability merely because it is possible to trace a connection between a negligent act or omission and an injury. The injury must be legitimate sequence of the thing amiss, and if the negligent act and the resulting injury are not known by common experience to be naturally and usually in such sequence, and the injury does not, according to the ordinary course of events, follow from the wrong, then the latter, and the injury are not sufficiently conjoined or concatenated, as cause and effect, to constitute actionable negligence, the element of proximate cause being absent. To constitute proximate cause there must be such natural, direct, and continuous sequence between the negligent act and the injury that it can reasonably said that but for the act the injury would not have occurred." (38 Am.Jur. "Negligence", Sec. 56, p. 704).

The foregoing theory of law can be said in regard to criminal cases as well as civil cases. The two only vary to the extent that the negligence which will impose criminal liability must be of a higher degree than is required to establish liability upon a civil issue.

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VI. From the foregoing argument, it has been made clear that the required elements, in order that neglect of duty constitute a crime and hold criminal liability are, (1) that a person fails to perform a specific duty prescribed by law or regulations, (2) that there is a wilfulness (criminal intent) or negligence of such degree that the law imposes criminal liability thereon (gross negligence), the neglect of duty of which would constitute a crime, (3) that there exists a proximate causal connection between the neglect of duty based upon omission and the objective facts which occurred, (4) that the law and regulations imposing liability and punishment for such act were in effect at the time of the commission of the offense, that the law or regulations were violated, and that laws or regulations enacted after the commission of such act cannot impose retroactive punishment for such acts.

VII. Neglect of duty in the armed forces, viewed from the aspect of the scope of duties of an individual extends from the simple neglect of duty of a sentry to the extremely wide, general and complex neglect of duty to supervise and control subordinates on the part of commanding officers or their superior officers, such as the commanding general or the commander in chief. Furthermore, the kind of neglect of duty varies to some extent depending on time of peace or war. Neglect of duty can further be divided into two categories in view of its substance; the first being when one's own commission of an offense constitutes a neglect of duty as in the above former example and the second being when one is held liable for neglect of duty to control and supervise, as a superior officer, the offense committed by another person, as in the above latter example. In the latter case, the superior officer is liable on the ground that he neglected his duty to control and supervise as superior officer, the offense committed by his subordinate. But, this does not mean that the superior officer is unconditionally and limitlessly held responsible for the supervision of all the offenses committed by his subordinates. If a superior officer is held unconditionally liable for the supervision of all the offenses committed by his subordinates it would be unfair, too preposterous, and in no way just. There must be a certain limitation. In the following, I shall discuss what requisites must be met in order to hold a superior officer liable, as having neglected his duty to control and supervise, the offenses committed by his subordinates.

VIII. In order to hold a person criminally liable for an offense committed by another person, it has been the general rule in criminal law, that the elements "aid", "abet", "counsel", "order or command", be shown involved in such offense. When the relationship between the two persons mentioned above, is, that of one who supervises and one who is supervised, or controller and one who is controlled, or superior and subordinate, the former cannot be held criminally liable, unless the fact that the former either ordered or commanded, directed or permitted the offense committed by the latter, or knowingly acquiesced therein, is established. Clark and Marshall states with r regard to this point as follows: "Certainly, at common law, and generally under statutes as well, a man is not indictable for the criminal act of his agent or servant, though committed in the course of his employment, unless the act by his direction, or unless he knew of it and acquiesced in it, for, as we have seen, the general rule is that a criminal intent is necessary to render one guilty of a crime." (Clark and Marshall "Law of Crimes" chapter 188 "Responsibility of Principal or Master", (c), p. 230).

Although the above is discussed with regard to the relationship between a principal and an agent, or employer and employee, the fundamental theory underlying it, can likewise be generally applied to the relationship between a superior and one who is supervised, or superior and subordinate.

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Let us at this time apply the above rule to the relationship between superior and subordinate in the armed forces. In order to hold a superior criminally liable for a neglect of duty to control and supervise the criminal acts committed by his subordinates, it is essential that the superior either ordered, commanded, directed, permitted or knowingly acquiesced therein, as Clark and Marshall state in their "Law of Crimes"; "To constitute a crime there must be a criminal act, as well as a criminal intent." (Clark and Marshall, ibid, sec. 106, p. 147). In other words, it is requisite that the superior have knowledge of the criminal acts of his subordinate. If the superior is wholly without knowledge of the criminal acts committed by his subordinate, the rule is that the superior is free from criminal liability. If however, there was a negligence on the part of the superior in not knowing of such acts, he cannot be absolved from liability. Needless to say, the "negligence" mentioned above does not mean simple "negligence", but one of such degree as being criminally liable by law, in other words, it must be gross negligence. Clark and Marshall also states as follows: "To render one criminally liable, however, because of an omission to act, he must be under a legal duty to act, and the omission must be wilful or due to culpable negligence." (Clark and Marshall, ibid., Sec. 53, "Negligence", p. 80).

IX. The issue in the instant case is focused upon"to permit".

(a) This term as a technical legal expression, means "to give leave or license", or, "to expressly assent or agree to the doing of act." In other words, "to permit" the doing of a criminal act, is, to allow, or to give leave or license, or to expressly assent or agree, with criminal intent, the doing of such act, and thus naturally having knowledge of it.

(b) Besides the meaning given above, Black's Law Dictionary further explains "to permit" as "to suffer", "to allow", "to let", "to acquiesce by failure to prevent". (See Black's Law Dictionary 3rd Ed.) Legally interpreted all these meanings signify, that a person permitting a certain act to be done, is letting it be done with the knowledge of the act which is the object of the permission, or, knowingly suffers it to be done. Furthermore, in applying this to permitting the criminal acts of another person on the basis of the meanings given above, it signifys that a person, though aware of the criminal act of another person, suffers such act to be done, or, though aware of the act, fails to prevent it and acquiesces therein.

In order to hold a person criminally liable for "permitting" a criminal act of another person, it is highly essential, in either meaning of the term "to permit" discussed in (a) and (b), that the person who did the permitting be expressly liable under law with the duty to supervise and control the other person (the perpetrator of the criminal act), and that he had knowledge of the criminal act.

The term "permit" used in the charge of the instant case, must have either one of the meanings mentioned above, and cannot be otherwise. At any rate, if the accused permitted the offenses of his subordinates a alleged in the specifications he must have done so either in the sense of (a) or (b) mentioned above; and in either case, the term implies that the accused had knowledge of these offenses. Whether the accused knew of these offenses will be discussed in the subsequent portion of my argument dealing with the facts of the instant case.

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CHAPTER 2. Responsibility of a Superior officer to supervise and control, and international and domestic law.

X. There have been no rules of international law, hitherto generally recognized as relating to war crimes and its punishment. There is no principle whatsoever, nor for that matter hardly any notable precedent in international law, particularly concerning supervisory responsibility of a superior officer, commanding officer, commandant, commanding general, or commander in chief, for criminal acts committed by his subordinates in violation of international law. We may say that these problems have come to be an important political and legal subject only after the termination of the recent world war.

Since there is no generally recognized principle in international law, nor any established theory, we are constrained to refer to former legislation and theories, not as yet complete and comprehensive, in the actual trial of war crimes.

On turning to an authoritative book on international law, we find, in the book titled "Opponheim's International Law", that four different kinds of war crimes essentially different in character are enumerated, and sets forth twenty of the more important violations of rules of warfare. Among these, he sets out ill-treatment of prisoners of war, violations of the Geneva Convention, etc., but does not enumerate "neglect of duty on the part of a superior officer or commanding officer to control and supervise his subordinates," as a war crime in any portion of his authoritative book. Also he does not mention anything at all with regard to the responsibility of the superior officer to supervise his subordinates, nor the responsibility of the commanding general or the commander in chief, who is the superior officer or the commanding officer, to control his subordinates.

With regard to the problem of whether the superior officer should be held liable for the acts of his subordinates, I shall, taking into account the theories of international law, argue from the general point of view of public law, and refer to the responsibility of the accused KOBAYASHI, as commander in chief of the fleet. Whether a superior officer occupying a position to command and order in the chain of command of the armed forces, is liable for responsibility to control and supervise, as the issuer of command or order, or as superior officer, the acts of the subordinates in violation of international law, is a difficult problem touching upon the essence of criminal responsibility.

The opinions expressed with regard to this responsibility to supervise, on the part of the superior officer, have been hitherto at variance. On the one hand, there is the opinion that the superior officer is liable for all the acts of his subordinates, and on the other hand that he is responsible only for acts specifically ordered and commanded by him. Ordinarily, an opinion intermediate or compromise between the two, is adopted. The view held by Colonel CARPENTER, Director of Legal Department, SCAP, of "Military commanders who ordered or allowed or induced war crimes and atrocities", is one such compromise. The responsibility of the commanding officer in this sense, is one kind of criminal responsibility, for the violation of international law by his subordinates. Criminal responsibility is, in the light of the general principle of criminal law in modern civilized countries, essentially a liability for a criminal act based upon one's own wilfulness (intent) or negligence.

On the basis of this view, the opinion holding that the superior officer is liable for all the acts of his subordinates, is too estensive in scope and inappropriate, because, generally criminal responsibility cannot be recognized where the subjective element is lacking.

"NNNNN (?)"

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With regard to this point, I have discussed in detail in the foregoing portions V and VIII of my argument. It seems, that the judge advocate also, in view of his opening statement, does not necessarily adopt this theory of absolute responsibility. Yet, on the other hand, the opinion holding that the superior officer is liable for only those acts commanded and ordered by him, is too narrow in scope and also inappropriate. Because, in case where the superior officer without having poisitively given an order or command failed to exercise appropriate measures when he should have done so, and acquiesced in the acts of his subordinates in violation of international law, the constitution of the so-called omission to act is not only brought into consideration but also the subjective element of wilfulness (intent), as well as negligence, must be considered, as the element of criminal responsibility.

XI. From the above reflection of the problem, then, to what limitation should the responsibility of the superior officer, that is, the responsibility to supervise and control, be recognized? Generally speaking, we may say that the superior officer is held liable, certainly when he ordered and commanded such acts, and also when he knowingly induced acts in violation of international law, and when he, knowing of such acts, and being in a position where he should and could have controlled, failed to do so.

In the following, I shall argue concerning each specific instance mentioned above.

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

It goes without saying that the superior officer is liable for responsibility when he commands or orders the perpetration of acts in violation of international law. The superior officer should be held responsible as principal in the second degree, or accessory or instigator in such cases. We must note, however, that the superior officer is liable for the acts of his subordinates which violate international law, only to the natural and logical extent of the acts done in accordance with his orders, and of the consequences involved in the execution of such orders. A superior officer is, in no way, liable for the acts of his subordinates which are not included in his order.

In case a superior officer having knowledge of the acts of his subordinates in violation of international law, induces them to do such acts, his act can only be regarded as that of an abettor.

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

There is doubt as to whether a superior officer is liable under international law for the duty to control, when he is aware of the acts in violation of international law committed by his subordinates. There has been no mention made in any treaties and conventions or reference books on international law up to the present day, with respect to this problem. For instance, Oppenheim does not mention anything with regard to this matter in his book "International Law", as I have already stated. But, as the power to command and order vested in the superior officer, should be interpreted on the other hand, as being included in the duty of the commanding officer regarded as the actual executor of the duty of the State owed under international law, the superior officer, as the person having authority to command and order, or, in other words as the actual executor of the obligation of the State owed under international law, must be held responsible, if he knowingly acquiesced in the acts of his subordinates in violation of international law, and failed to take appropriate measures to control them when he should and could have done so.

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We must note that the essential premise, in determining concretely whether there is liability or not regarding this problem, is to scrutinize the actual command relationship. That is, we must examine and clarify (a) whether the relationship between the superior officer and the subordinate was one which enabled the superior to issue a direct and detailed command or order, hence making it possible for the superior to take appropriate measures to control, (b) whether the superior officer under such actual circumstance knowingly failed to take appropriate measures as was his duty to do. What we must particularly note with regard to (a) is that a commanding general and commander in chief may be considered free from responsibility for the acts in violation of international law committed by various units at the front, because the actual power of command and order, is, in such case possessed by the commanding officers or commandant under him. In effect, the question of where the authority to command ultimately belongs and where the criminal liability actually belongs, should be considered separately; the person to whom authority to command belongs, is not necessarily where criminal responsibility reverts. Even in the latter instance (b), though a superior officer is, in form, the person empowered to command and order, because of the existence of actual circumstances such as the complete suspension of transportation and communications and other difficult conditions rendering it impossible for orders to be executed thoroughly, or because of the extremely vast area of jurisdiction and the remote disposition of his subordinate units dispersed throughout this area, rendering it impossible to anticipate a thorough execution of urgent and emergency orders, or, because of the chaotic condition of the units rendering it impossible to anticipate a thorough execution of orders, we must say, that such are cases where it is impossible for the superior officer, as commanding officer, to take appropriate measures. Actually, it is not infrequent when these conditions arise simultaneously. At any rate, we must say that in such cases to take appropriate measures is impossible and only asking for the impossible. I cite American Jurisprudense with regard to this point as follows:

"Public officers may not be held criminally liable for failure to perform a duty commanded by law when, for causes beyond their control, performance is impossible. (43 Am. Jur. "Public Officers" Sec. 332, p. 132.)

(3) When a superior officer failed to take appropriate measures to control his subordinates acts in violation of international law because he was unaware of them.

We must examine the above dividing it into two categories. That is, in case where there is, in particular, negligence for which a superior officer is blamable, such as, when he should have known about the acts and did not know of them, in case of gross negligence, it would probably be difficult for him to be absolved from liability. Mitigation of punishment, however, should be recognized for such negligence. On the other hand, in case where there is no negligence liable against the superior officer, he cannot be held responsible. I have fully discussed this point in Part VIII of my argument.

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

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XIII I would like to add a word to what I have previously said concerning the responsibilities of a commanding general or commander in chief relative to supervision of subordinates.

In the first instance the armed forces is an organization which has, as its very backbone, an established chain of command. Only by strictly observing this command relation, is an army capable of functioning as an army and only then does the machinery work smoothly and without hitch. If the persons in this chain of command relationship should be misled, the organization of the military would become disordered and confused, and the military set up would disintegrate. It goes without saying that a superior, in giving orders to his subordinates or in commanding them, must follow a certain fixed channel. For example, when a commanding general or commander in chief issues orders, he gives them to his immediate subordinate commanding officer or commandant, while these latter in their turn relay the orders to their subordinate unit commanders or commanding officers. The unit commander or commanding officer, then, passes the orders to his subordinates. Now, if the commander in chief by-passes his immediate subordinate commandant and commands or issues orders to the commanding officer or unit commander, or to their subordinate, the intermediate commandant or commanding officer, in the chain of command will not know of the order of the commander in chief, and consequently will not be able to take any action in abiding by the order, with the result that only the lower or lowest echelon will be executing that order. It goes without saying that the introduction of such a state of affairs would disrupt the order and stability of the military.

In the Japanese navy, it is set forth in Article II of the Fleet Ordinance (Exhibit 27) as follows:

"The commander in chief of the fleet is under the direct command of the Emperor; he shall command the fleet under his command and shall have overall control of its activities.

"The commander in chief of the fleet shall receive commands from the Minister of the Navy concerning military administration and shall receive instructions from the Chief of the Naval General Staff concerning operational plans."

And Article 49-3 of Ordinance Governing Specially Established Naval Forces (Exhibit 31) states as follows:

"There shall be a commandant placed in charge over a specially established base force.

"The commandant is subject to the cognizant commander in chief; he shall have control of the attached naval forces and shall perform his duties in accordance with the provisions concerning commands set forth in the Fleet Ordinance and also Article 7 of the Ordinance Governing Defense Squadrons."

Article I of Service Regulations for Personnel of Naval Guard Units states (Exhibit 32) as follows:

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

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

"The captain is the head of a naval vessel, and in accordance with the various ordinances and regulations and with the orders of his superiors shall, command the crew, all hands, including the executive officer and below, and fully execute his duties of exercising overall control of the various affairs of the vessel."

It goes without saying, that these provisions are provided in order to maintain and secure the chain of command and order in the armed forces.

XIV. The subjective conditions of the defendant KOBAYASHI, namely his position, duties, scope of duty, subordinate units and men, responsibilities, etc., were determined, needless to say, by the domestic laws of Japan , the country of which he was a subject. Consequently to discuss these matters, a study of these domestic laws is necessary and cannot be omitted. I shall elaborate below on the regulations and laws which have a bearing on this case.

According to the Fleet Ordinance cited above, the commander in chief of a fleet is immediately subordinate to the Emperor and commands the units under him and supervises in general the affairs of the fleet. (Para. 1. of Art. 11 of the same ordinance.) He also had the duty to supervise the discipline, morals, education, and training of the fleet under his command. (Art. 12 of same ordinance.)

This Fleet Ordinance prescribes concerning the organization of the fleet as follows:

"Article 1 - A fleet shall be composed of two or more warships and as occasion demands, destroyer division(s), submarine division(s), escort division(s), torpedo boat division(s), minesweeper division(s), subchaser division(s), air group(s), or destroyer's), submarine(s), escort ship(s), transports(s), torpedo boat(s), minesweeper(s), subchaser(s), minelayer(s), and patrol-boat(s) shall be assigned and necessary organs such as harbor master's office(s), defense units(s), air group(s), special duty ship(s), etc. shall be attached.

"As occasion demands, a fleet may be organized by a warship and destroyer division(s), submarine division(s), escort division(s), torpedo boat division(s), minesweeper division(s), subchaser division(s), or other units; or by two or more air groups.

"A fleet shall be denominated according to its organization speciality or duty; or according to the ocean or area to which it is detached."

However, it goes without saying that during war time there were changes in the above organization, changes which we shall make clear in subsequent portion of my arguments concerning the facts of the instant case. (32nd day, testimony of KOBAYASHI.)

The commander in chief of a fleet besides having a staff composed of the chief of staff, staff officers, aides de camp, chief engineer, chief surgeon, chief supply officer (Article 5 of same ordinance) had as his immediate subordinates commandants of Naval Base Forces in various locales. (Para. 3 of Article 49, Ordinance Governing Specially Established Naval Forces.)

These commandants of Naval Base Forces possessed in their own right the authority to command and order their responsible officers. (Exhibit 61, Question and Answers 6, 16, and 21.)

As I have shown in the above, while the commander in chief has a direct relationship with the Base Force Commandant, in the chain of command, the commander in chief merely has an extremely remote and indirect relationship with the latter's (commandant) subordinates. Thus,

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the former's responsibility to control and supervise must, at the same time, as the relationship in the chain of command, necessarily be indirect and remote with respect to the latter's (the commandant) subordinates. Insofar as the normal chain of command is maintained between the commander in chief and the subordinates of his immediate subordinates there is yet room for con controversy as to whether a reasonable causal connection can be established between the former's indirect commission and the offense committed by the latter -- for example commanding or ordering such acts through the chain of command; even then there cannot exist any direct and proximate causal relation between them.

As there is still room for controversy, insofar as a normal chain of command is maintained between thecommander in chief and all subordinates under the commander in chief's direct subordinate, whether a reasonable causal connection can be established between the criminal acts of the latter and the indirect commission of the former, as for example, when command or orders were issued through the chain of command in gradation, so even still, there cannot exist any direct and proximate connection between an omission, such as the neglect of duty to control and supervise on the part of the former (commander in chief) and facts resulting from the latter's offense.

XV. As to the responsibility of the Fleet Commander in Chief for supervision and control of his subordinates from the standpoint of international law, in other words his responsibility for supervision relative to acts committed by his subordinates in violation of international law, there are no generally accepted principles either in international law or theories, as I have previously pointed out. What I here wish to state is the peculiar nature of the responsibility of supervision of subordinates of the commander in chief of a fleet. The immediate subordinate of the commander in chief was the base force commandant. If this base force commandant himself committed an act in violation of international law, and if the case embraces all the elements required to hold him accountable heretofore given above, then it is only a natural procedure for the commander in chief to be held liable as to responsibility for supervision. That this responsibility is not a criminal one will be stated later. Now, if these acts in violation of international law are committed by naval guard unit commanders at various places on the front, who are not the immediate subordinates of the commander in chief, or to go one step further, if these illegal acts are committed by subordinates of these guard unit commanders, must the commander in chief, even in these instances, assume responsibility for supervision? In these cases, the responsibility for supervision of the commander in chief must be said to be indirect, and remote, in other words, a responsibility for supervision for responsibility for supervision, an extremely peculiar type of responsibility. It is extremely doubtful if such responsibility may be recognized. To push back or trace back such responsibility to such higher echelon goes counter to the concepts of justice and fairness, and can never be said to be lawful or appropriate.

XVI. The responsibility for supervision and control of a superior officer for the acts of his subordinates in violation of international law, is, at the same time a problem of international law, and a problem of domestic law.

As previously stated, while there are no regulations in international law pertaining to this type of responsibility of a superior officer, nor theories nor precedents which may be used as reference, and since it is simulatneously a problem of domestic law, I believe that it would be without point to state here what regulations or laws there were in the domestic law of Japan relative to this issue. I shall restrict my discussion which follows, to the matter pertaining to Japanese naval personnel which alone have relevance to the case.

In studying the Japanese Naval Criminal Code presented to this commission (Exhibit 28), there are no articles which impose punishment upon superior officers for omission in neglecting his duty to control his subordinates. (Testimony of defense witness Mr. Sanagi, 26th day, question and answer 28.) However, the superior officer is not free from

all responsibility for neglecting his duty to control his subordinates. In such instances the responsibility of the superior officer is not that of a criminal nature but of a disciplinary one. (Answers to question 13 and following, of prosecution witness WAKABAYASHI.) Consequently, although the superior officer is subject to disciplinary action because the act is not a crime, the punishment imposed will not be according to the Naval Criminal Code, but will be disciplinary punishment according to the Naval Disciplinary Punishment Code (Exhibit 29.) It is provided as follows in sub-sections 23 and 27 of Article 9 entitled "Hanko" (Offense), Chapter 2 of the code.

"When the following acts are committed they shall be punished whether they be done intentionally or through mistake:

.....
.....

23. Losing means of supervision or leadership.

27. Besides the above points, when neglecting duty of violating official duties or violating discipline or committing acts tending to cause loss of authority or confidence."

The disciplinary punishment set forth in this regulation is disciplinary punishment referred to above. However, in this case also, it is clear from the interpretation of the above articles that to mete out disciplinary punishment to superiors for neglect of duty to control subordinates, wilfulness and negligence have to exist.

Criminal Punishment, furthermore, is a punishment imposed upon crimes, that is, upon acts whose punitive effect is imposed by substantive law. Disciplinary punishment, on the other hand, is a certain punishment imposed upon persons belonging to a special relationship of authority in public law, or any corresponding supervisory relationship, for the purpose of maintaining discipline and order of such relationship. As the two forms of punishment differ in nature, and as the two, as a principle, may be imposed together, the difference in the two forms of punishment can be understood.

The Naval Criminal Code was a special law applicable to naval personnel. (Article 1 of the Code.) However, it goes without saying that the Japanese Criminal Code was also applied to naval personnel as a general law. (Answers to the last few questions submitted to defense witness Mr. Sanagi.) However, as mentioned above, inasmuch as the neglect of duty to supervise subordinates does not constitute a crime, so it is reasonable and natural that there can be found no articles relative to this matter in the Criminal Code.

XVII There is no principle in international law which fixes the responsibility for treatment and protection of prisoners of war. Furthermore, there is no accepted theory relative to this.

The following regulation is found in Para 1, Article 4 of the Annex to the Hague Convention No. IV of 18 October 1907:

"Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them."

Furthermore, the following regulation is found in Para 1 of Article 2 of the Geneva Prisoners of War Convention of July 27, 1929:

"Prisoners of war are in the power of the hostile power, but not of the individuals or corps who have captured them."

And in Para. 1 of Article 18 of the same convention the following is given:

"Every camp of prisoners of war shall be placed under the command of the responsible officer."

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

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

Article 57-3, Specially Established Guard Units, of Chapter 13-2 of the Specially Established Naval Forces Ordinance, previously cited, provides as follows:

> "A specially established guard unit shall have charge of the defense and security of the locality of its station and its vicinity, and may have control of matter concerning harbor affairs, communication, supply of munitions, etc., when occasion demands."

Article 3 of the Service Regulations for Personnel of Naval Guard Units (Exhibit #32) reads:

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

In the cases when the prisoners of war were interned by Japanese naval units, they were held in confinement at the guard units mentioned in the above article, which were located in various places at the front, and the commanding officer of these guard units were the persons responsible for their custody, treatment and protection. This is quite clear in the light of the testimony given by prosecution witnesses Inoue (Q. & A. 210), and Wakabayashi (Q. & A. 87-88).

The commanding officer of the guard unit held a post corresponding to that of a captain of a warship as determined by chapter II of the above cited Service Regulation for Personnel on Naval Vessels (Exhibit # 30). The above regulation applied mutatis mutandis to personnel of naval guard units. (Art. 2 of same regulation) (Testimony of defense witness Sanagi 27th day, Q. & A. to Exhibit # 30 and # 32).

In article 105 of the above regulation the following is set forth:

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

As a result thereof, the commanding officer of a naval guard unit was instructed to handle matters relative to international law with particular care and to observe to the letter treaties and conventions, and needless to say, the orders and regulations pertaining to these matters. It is manifestly clear from the foregoing, that commanding officers of naval guard units in their treatment and protection of prisoners of war, were to follow the import and aim of the provisions of the conventions relative to treatment of prisoners of war.

The direct immediate superior of the commanding officers of the guard units was the commandant of the Base Force. (Exhibit 2 Annex 2 and 3 therein, Exhibit 35, Annex 1, therein, testimony of prosecution witness INOUE, question and answer #211.)

XVIII In the foregoing I have argued with regard to the instant case from the point of view of law.

In summary, since there have been no principles, no generally recognized theories, no precedents in international law, with regard to the responsibility and punishment imposed on a superior officer to control and supervise the acts of his subordinate in violation of international law, there is no way but to judge and determine the instant case in the light of the principles of ordinary criminal law recognized by the modern civilized countries. In order to decide that the accused KOBAYASHI is liable for the neglect of duty to control and supervise the acts in violation of international law committed by his subordinates, or rather by his subordinate's subordinates, on the basis of the general principles of criminal law, it is imperative that we first clarify whether the accused KOBAYASHI knew of the acts in violations of international law as alleged in the charge, and if he knew of them, whether he failed to take appropriate measures despite the fact that he could have done so under the circumstances, and if he was not aware of them, whether there was negligence on his part in not knowing, et cetera. Unless the above points are clarified, it is highly improper to hold him liable for responsibility as alleged in the charge.

Furthermore, in examining the above in the light of the rule of causal connection between an offense and the facts, there existed no direct command relationship between the commander in chief KOBAYASHI and the various commanding officers and the men of the guard units who were the subordinates of the commandants of the base forces. Consequently, the relationship between the former and the latter, from the point of view of supervision and control, is also indirect and remote. There cannot be any direct and proximate causal connection between the facts, the results of the acts of the latter in violation of international law, and the omission -- the neglect of duty to control and supervise.

Even assuming that the accused KOBAYASHI was liable for neglect of duty, I have shown that, on the basis of the law and regulations of the Japanese navy, his responsibility did not amount to a criminal one but to a disciplinary one, and would be limited to a disciplinary punishment in accordance with the Naval Disciplinary Punishment Ordinance.

If however, the accused KOBAYASHI had no knowledge of the above acts in violation of international law, or there was no negligence on his part in not knowing of them, it goes without saying that he should not be held criminally responsible, but he also should not be held liable from the point of view of disciplinary punishment. Moreover, if there are facts showing that he took the most appropriate measures possible under the circumstances with regard to the incident of which he knew, then, we cannot say that he neglected his duty.

We must particularly note that the responsibility for which the accused KOBAYASHI is charged, is, in relation to the war crimes set forth in the charge, a responsibility as commander in chief bears a peculiar nature -- indirect and remote. Generally, a commander in chief should not be held liable for the violation of international law which is related to him in the way I have just stated.

I shall now turn to the argument of the facts of the instant case.

"NNNNN (15)"

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PART II

DELIBERATION OF THE FACTS ON THE BASIS OF THE EVIDENCE

CHAPTER I - General Facts

I. The duties of the accused Kobayashi as Commander in Chief, 4th Fleet. Kobayashi testified before this commission that his duties as Commander in Chief of the Fourth Fleet were the defense of the area assigned him in the South Seas, the aerial operations, construction of air bases, maintenance and protection of maritime surface transportation, and the effective operation of the advance fleet bases in that area. When we consider the fact that this area assigned him measured 2,800 nautical miles east to west and 1,600 nautical miles north to south, also the facts that this vast area embraced several vital strategic points and that his area of jurisdiction was subjected to severe attacks by the American forces during the latter half of his tour of duty, there can be no room for doubt in the mind of any man that his duties were extensive and extremely important.

Especially worthy of attention is the fact that the most important duty of a Commander in Chief of a Fleet is the command of operations, and that to fulfill this duty one of the characteristics of his position is that he has to move about from time to time with changes in and demands of the battle conditions.

In actual fact the defendant Kobayashi was in the Marshall area aboard his flagship, the Kashima, from the latter part of August of 1943 until the beginning of November of the same year. Again on receiving reports of American landings in the Gilbert area he immediately boarded a plane for Kwajalein, there to direct operations.

Matters arising from these duties of the Commander in Chief of the Fleet were administered by subordinate responsible commanding officers as this vast area controlled by the Fourth Fleet was divided among several base forces and further subdivided among still more naval guard units. In other words, the vast territory assigned to the Fourth Fleet was allotted to commanding officers of varying ranks, such as base force commandants, and commanding officers of naval guard units, and they individually were in direct command within their own respective areas of responsibility. The duty of the Commander in Chief of a Fleet is the overall command of the units under him as set forth in Exhibit 27, in the Fleet Ordinance.

In deliberating on the responsibility of the defendant with relation to the incidents enumerated in the specifications, it is necessary constantly to bear in mind the scope of the duties of the accused Kobayashi, his command relationship with the intermediary commanding officers, and the duties of these intermediary commanding officers.

II. Measures taken by the accused Kobayashi relative to treatment of POW's and observance of international law from the standpoint of control of his subordinates.

The accused Kobayashi testified that on assuming his post as Commandor in Chief of Fourth Fleet although he did not directly issue orders concerning treatment of POW's, because he had noted a clause in the instructions issued by Commander in Chief of the Combined Fleet, Admiral

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Yamamoto, after the commencement of war that international law be strictly observed, he, Kobayashi, when he became Commander in Chief of the Fourth Fleet issued instructions consisting of six clauses one of which read that international law be strictly observed and sent them to the various units under his command in despatch form.

According to the evidence presented before the commission, the observance of international law in the Japanese Navy is clearly shown among the duties of captains of ships and unit commanders. (Exhibit 30). Furthermore, that portion of international law known as the Rules of Land Warfare is published in Volume IV of Naval Regulations under the section entitled "Treaties." (Testimony of Kobayashi on the 32nd day of the trial). Again, Kobayashi testified (33rd day) that the WARTIME INTERNATIONAL LAW MANUAL published by the Navy Ministry which contained instructions on the treatment of POW's, the Hague Rules of Land Warfare, and Geneva Treaty concerning Treatment of POW's, was distributed to each and every unit. The same manual states that POW's should be humanely treated with respect and kindness. (Exhibit 43).

He furthermore testified that "Regulations Concerning Treatment of POW's" of the Japanese Navy had been issued, and it had been thereby determined that the commander of the unit which had custody of the POW's report to the Navy Minister the number of the POW's. (Exhibit 33. Naval Regulations concerning Treatment of POW's). .And it is further clearly stated in the same regulations that the Navy as a matter of principle shall hand over prisoners of war to the Army and until they are delivered to keep them in temporary custody.

It was further testified to by numerous witnesses that instructions had been issued by central naval authorities to all units that the POW's be sent to the Japanese homeland as soon as possible.

As the different evidence given above shows, in the Japanese Navy regulations were set forth during peace time concerning treatment of POW's and observance of international law, and matters so prepared that situations could be handled without the Commander in Chief of a Fleet or a Base Force Commandant having to issue instructions or determine procedures after the commencement of war. Not only is it too late to issue instructions or orders concerning treatment of POW's after air raids are carried out by the enemy or after entering a stage where enemy air raids are to be expected, in cases where there is anticipation of capture of POW's, but such procedure would unnecessarily clutter up communications and obstruct important operational communications.

Even if the Commander in Chief of a Fleet does not necessarily use the words treatment of POW's or if he does not formulate regulations for the treatment of POW's, but merely issues instructions that international law be strictly observed, his subordinates should understand to what matters they have to pay attention. As on his assumption of duty the defendant Kobayashi included in his 6-clause instructions addressed to all his subordinates the clause that international law be strictly observed, he fulfilled the duty incumbent upon him. How can it be said that he illegally neglected his duty to protect Prisoners of War?

"NNNNN (17)"

III. The general character of the defendant Kobayashi.

General character evidence which shows the characteristics of Kobayashi related to the incidents with which the defendant is charged have been presented to the Commission.

As to his general character, not only have we had testimony from admirals who held important posts in the Japanese Navy and distinguished Japanese diplomats, but also from high-ranking officers of the United States Navy. From them it is quite clear that he had an innate love of justice, that he had a deeply sympathetic nature, and above all was imbued with the virtues of fair play, frankness and justice which he cultivated during his sojourn in the United States.

Furthermore, in regard to the fact that he was especially well acquainted with international law and strove to have it observed, and that he was one to see justice done we have not only the testimony of Japanese naval admirals and Mr. Enomoto, but we are able to know of this fact much more strongly through the testimony of Admiral Standley. In short Admiral Standley has clearly stated that though Kobayashi was at all times under close observation by the United States Navy during the time he was attached to the Japanese Embassy, he as always meticulously correct in his official conduct and bearing and there was never the slightest indication that he was lacking in knowledge of the fundamental rules of civilized warfare.

Who can believe that Kobayashi was such a man that during his tour of duty as Commander in Chief of Fourth Fleet he would have permitted or condoned the actions of his subordinates when they violated international law or customs or when they acted against the code of humanity, let alone that he permitted his subordinates to commit such acts as enumerated in the specifications or unlawfully neglected his duty.

If the wise and enlightened President and Members of the Commission were to bear in mind the general character of Kobayashi in deliberating in detail the relation between the incidents shown in the specifications and the defendant Kobayashi which defense counsel will now state in the following, I am of the firm belief that they will be fully convinced that there is not the slightest ground for the defendant Kobayashi being charged with unlawful neglect of duty relative to observance of international law and customs and treatment of POW's.

CHAPTER II

Connection between the several incidents and the defendant

I. Incident of paragraph (a) - The incident of the execution of one prisoner of war on Wake Island in July of 1943.

In regard to this incident the Commanding Officer of the 65th Naval Guard Unit at Wake, Captain Sakaibara, in his trial testified that he himself issued the order for the execution (Answer to Question 13), and further that the full responsibility for the issuing of the order which caused the incident rested with him (Final statement of defendant).

Furthermore, he absolutely did not testify that he, Sakaibara, asked for permission from his superiors in connection with this execution or that he reported the execution.

On the other hand, the prosecution witness Inoue, Kenichi who was formerly the senior staff officer of the 4th Fleet testified on the 22nd day of the trial that he did not remember receiving any reports whatsoever in connection with this incident. Moreover the accused Kobayashi also testified that he received no report whatsoever on this matter.

In synthesizing the above evidence, it has not been proved at all that the accused Kobayashi was made aware of this incident before or after its occurence.

II. Indident of paragraph (b) - The incident of maltreatment of Captain L.S. Zamperini and Captain R.A. Phillips between the dates 16 July 1943 and 27 August 1943.

In Exhibit 14, in the statement of Zamperini, it was stated that at Kwajalein he was thrown into jail by Japanese naval officers, that the person in charge of the camp was one who held rank corresponding to a Chief Warrant Officer in the United States Navy, and that it was the sentries who maltreated him. Further in Exhibit 17, in Phillips' affidavit it was stated that he was interned and questioned by Japanese naval authorities. However Phillips at a later date in a deposition in answer to interrogatories submitted to him by the defense, stated that he was certain that he was interned by an army unit.

With the above evidence alone it is quite ambiguous what unit held these American prisoners of war in custody, who mistreated them, and who was responsible for their internment and mistreatment, and in what command relationship this unit stood to the accused Kobayashi.

On the other hand the accused Kobayashi has testified (in answer to questions 100 and 101) in direct examination that he did not receive any reports of capture of POW's in the Marshalls around July of 1943, nor of internment of two POW's at Kwajalein between the middle of July and latter part of August of 1943. The prosecution witness, Inoue, Konichi, has also testified that he did not receive such reports (22nd day of trial on cross-examination).

The prosecution has not produced any evidence whatsoever to show that during the periods mentioned above reports were made to the then Commander in Chief, the accused Kobayashi, or that he knew that these prisoners being mistreated by his subordinates.

During July and August of 1943 the defendant Kobayashi was aboard his flagship, the Kashima, anchored at Truk and on the 27th of August left Truk for the Marshalls aboard his flagship Kashima.

"NNNNN (19)"

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In accordance with the above evidence there cannot be room for doubt in the mind of any man that the defendant absolutely did not know of the occurrence of incidents of mistreatment of POW's such as enumerated in paragraph (b).

III. Incident of paragraph (c) - The incident of the execution of 96 American prisoners of war on Wake Island on 7 October 1943.

According to the record of the trial of Rear Admiral Sakaibara, this execution incident occurred because of riotous conduct of prisoners of war under urgent circumstances when landings by US forces were to be anticipated and when Wake was under furious attack by American task forces, and was put into execution by authority of Sakaibara himself; and Sakaibara testified that he himself would assume the whole responsibility for his action. (Qestions and answers 23, 48, 49, 53, 54, 101, 104,114, and the final statement).

Again, according to his testimony, he sent a report of this execution addressed to the Naval Affairs Bureau of the Navy Ministry with 4th Fleet and 6th Base Force as information addressees. The prosecution witness, Inoue, Konichi, and the accused have testified that the despatch was addressed to 6th Base Force with 4th Fleet and Navy Ministry as information addressees. There is a discrepancy in the testimony here but it is clear that 4th Fleet was not the action addressee but an information addressee. If it was in accordance with Sakaibara's testimony, if there was someone who had to take action it was the Central authorities in Tokyo. If it were in accordance with the testimony of Inoue and the defendant, then it was the Commandant of the 6th Base Force who, if anyone, should have taken action on the basis of the report.

In direct examination the defendant Kobayashi gave as one of the reasons for not having taken immediate measures the fact that it was counter to his custom to bypass Sakaibara's immediate superior Vice Admiral Abe and himself to give instructions to Abe's subordinate.

In the previous trial before this commission, namely in the trial of Yamamoto, Kazuharu and his 19 co-defendants, the prosecution in its final argument stated in effect:

> "We hold that in the Japanese Army, as in the American armed forces, where there is an intermediate officer present, the senior officer does not deal directly with privates."

This principle is common to all military organizations and in this case also it is only natural that the accused Kobayashi did not act by by-passing Abe completely.

Kobayashi has testified that at that time American task forces were closing in on the Marshall area and that he was busy in directing aerial operations and in gathering information. (answer to question 90).

"NNNNN (20)"

It is doubtless comprehensible to anyone that the defendant Kobayashi who was aboard his flagship and who was in the midst of directing vital operations did not have immediate opportunity of talking to Abe.

The defendant Kobayashi testified that he recalled having spoken to Abe to look into the actual circumstances soon thereafter. (answer to question 89). Kobayashi followed the natural course according to command relationship in the armed forces.

Vice Admiral Abe was a flag officer in his own right and the officer directly responsible for the Marshall Islands and Wake Island. The accused Kobayashi besides having the urgent duties of commanding operations especially of aerial operations and construction of air bases over a wide territory had the added duty of supplying and repairing ships of the main force of the Combined Fleet and fleets engaged in furious combat in the Solomon area to the South. Moreover, he was soon thereafter given the task of planning and commanding the transportation of army units to various places. He was therefore in a position where he could not be engrossed with matters occurring in one locale.

In final analysis the defendant Kobayashi under the then prevailing circumstances did all that was expected of him. We shall further elaborate on this matter in Part II.

IV. Incident of paragraph (d) - Incident of the execution of 1 prisoner of war on Wake Island on 15 October 1943.

This execution is almost parallel to that of paragraph (a), and if we follow the record of the Sakaibara trial there is no evidence to show that Sakaibara reported this execution incident to his superiors.

On the other hand the prosecution witness, Inoue, Kenichi, and the defendant Kobayashi have both testified to the effect that they had not received reports on this incident. (Inoue 22nd day, Cross-examination. Kobayashi Question 99).

About that time the main force of the Combined Fleet left Truk for Marshall waters on receipt of the information that powerful task forces had left Pearl Harbor, headed for the Marshall and Wake areas. For the Combined Fleet it was a most crucial period in operations.

Everyone can understand beyond doubt that the accused Kobayashi, who was responsible for command of aerial operations in the Marshall area at that time did not know of the occurrence of this execution incident.

V. Incident of paragraph (e) - The incident of mistreatment of 42 submarine prisoners of war headed by Lieutenant Commander Brown in November 1943 on Truk.

The accused Kobayashi saw a despatch to the effect that a destroyer of the Combined Fleet had sunk one American submarine and had taken prisoners of war on the 18th or 19th of November 1943. He testified that when he boarded a flying boat the sea plane base on Truk on the 20th of November he received a report from a staff officer that numerous prisoners of war had landed on Dublon (Question 104). When the accused Kobayashi received the latter report he was on the point of departure for Kwajalein with his whole staff aboard a flying boat to direct counter-offensive operations against the American forces which had landed in the Gilberts.

As each witness has testified, the Headquarters of Combined Fleet at that time was at Truk and had the overall command, and 4th Base Force Hiqs was also there on Truk. It is quite natural that the accused Kobayashi under the then prevailing circumstances did not issue any instructions concerning these prisoners of war.

In actual fact, that Combined Fleet Headquarters issued instructions concerning internment and a despatch to the homeland in regard to the prisoners of war, and that 4th Base Force issued instructions to the 41st Naval Guard Unit are exactly as the prosecution witnesses Wakabayashi (Q. 47, Q. 136) and Nakase have respectively testified.

The prosection witness Nakase has clearly testified that it was not the fact that the prisoners were constantly kept in a small cell measuring 6 ft. by 8 ft. It is also clear from the testimony of Nakase and Iino that the allegation that prisoners of war were denied medical care is a fabrication.

Lieutenant Commander Brown stated that he was mistreated during interrogation, but none of the prosecution witnesses have recognized the fact of mistreatment. Again there can be no room for doubt that the interrogators were members of 6th Fleet Headquarters, the testimony of all the witnesses corroborating this fact.

Even supposing that there had been some mistreatment, it was a matter absolutely beyond the knowledge of the accused Kobayashi who was at that time at Kwajalein directing vital operations.

No one can even imagine that the accused Kobayashi permitted his subordinates to mistreat those submarine prisoners of war.

VI. The incident of paragraph (f) - The incident of mistreatment of Captain F. Garrett and six others aboard a tug-boat, ashore at Mille and Kwajalein Islands in the Marshall group in December of 1943.

Concerning this incident we have only the affidavit of Captain F. F. Garrett, with no other evidence to corroborate it.

It was not proved in the above affidavit who the crew of the tug-boat operating in the Marshall area who allegedly mistreated him were, who the personnel on Mille were, nor who the members of the internment camp at Kwajalein or patients at the hospital were. Under these circumstances the relation between <u>these incidents</u> and the defendant Kobayashi is too remote and obscure.

On the other hand there has been no proof that the capture or internment of these POW's was reported to 4th Fleet Headquarters. Further, the accused Kobayashi and the prosecution witness, Inoue, have both testified that they received no reports whatsoever concerning these POW's.

The one-sided statement of Garrett alone cannot be proof for the allegation that the accused Kobayashi illegally neglected his duty to supervise his subordinates and permitted them to mistreat the POW's.

"NNNNN (22)"

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VII. Incident of paragraph (g) - The incident of murder of 6 prisoners of war at the 4th Naval Hospital on Truk on 30 January 1944.

Concerning this incident, the one-time head of the 4th Naval Hospital and defense witness, Iwanami, Hiroshi testified in his direct examination as follows: (1) that he never sought to obtain approval of his superiors prior to the fact in the matter of using POW's for experiments (Q. 15); (2) that he was extremely concerned that this incident not reach 4th Fleet Headquarters for fear of the consequences and that he made Okuyama and other persons involved write and submit explanatory notes (latter portion of answer to question 12); (3) that after the incident he absolutely did not report the matter to his superiors (answer to question 16). Again when questioned in cross-examination whether he spoke about the experiments with POW's to Kobayashi, he re-affirmed his foregoing testimony by stating that as he had repeatedly said, he had gone to the extent of demaning explanatory notes from the persons involved, he never did such absurd thing.

On the other hand the accused Kobayashi testified that he did not know of presence of POW's on Truk between the latter part of January and beginning of February 1944 (Ans. to Questions 113, 114), that he was not asked for permission to use POW's for experiments (Ans. to Q.115), that about that time he did not talk with Iwanami concerning POW's (Ans. to Q. 118).

In short no evidence whatsoever has been offered to show that the accused Kobayashi knew of this incident prior to the fact or that he permitted it or that he received a post facto report on it.

The Marshall Islands were subjected to air raids of unprecedented scale on the 30th and 31st of January and on the 2nd of February American forces landed on Kwajalein. For the Japanese Navy the invasion of Kwajalein which was one of the advance fleet bases of the Japanese Navy in the Central Pacific (Ans. to Q. 6 Kobayashi) was a telling blow; the defendant as Commander in Chief of 4th Fleet was facing then an extremely grave situation from the standpoint of operational command. It is quite plausible to anyone that under those circumstances reports of the medical experiments of a surgeon on prisoners of war did not reach the ears of a fleet commander in chief.

In short, not only is there no direct proof that concerning this incident the defendant Kobayashi unlawfully neglected his duty and permitted his subordinates to misconduct themselves , but no circumstantial evidence which would permit one rationally to deduce this can be discerned from the evidence presented.

VIII. Incident of paragraph (h) - Incident of murder of 2 POW's at the 4th Naval Hospital, Truk on 1st February 1944.

This incident also occurred at the 4th Naval Hospital and is correlated to the incident of the foregoing part. Iwanami, Hiroshi, was one of the accused in the case, but as the result of the trial the findings of the commission were that he did not participate in the incident.

How could the accused Kobayashi who could not possibly have known even about the previous incident know anything of this incident?

In actual fact, the prosecution has offered no evidence whatsoever to show the relation between this incident and the accused Kobayashi.

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IX. Incident of paragraph (i) - The incident of the execution of 5 POW's by Colonel Oishi and others on Mille Island on the 1st of February 1944.

Concerning this incident two controversial points have been brought before the Commission. One of them is whether Captain Shiga, IJN, the Naval Commanding Officer on Mille Island issued the order for the execution in question. In final analysis it is not clear who issued the order, because in the suicide note of Captain Shiga presented by the prosecution in its rebuttal in the trial of Colonel Oishi, (Exhibit 39 in this trial), Shiga denied the issuing of the order.

The other point of controversy was the command relation of Colonel Oishi and Captain Shiga. Although Oishi stated in his deposition that Shiga was his immediate superior officer, the prosecution witness Inoue testified that though in the event of enemy landings the senior officer present would assume command of all naval and army units; in all other circumstances Lieutenant General Mugikura commanded the army units. This testimony of Inoue is corroborated by Tokyo C.L.O. document #2976 (Exhibit 57) which the prosecution introduced into evidence in its rebuttal which states in part that the army units in the Marshall Islands were under the Operational command of Commander in Chief, 4th Fleet "in the case of the defense of a remotely isolated island."

However, the above points of controversy have no direct relation to the accused Kobayashi, because there is no proof that this execution was ordered by the accused Kobayashi or that it was approved by him or that a post facto report was submitted to him from either Captain Shiga or Colonel Oishi or anyone else on Mille Island.

On the other hand the accused Kobayashi and the one time staff officer of 4th Fleet, Captain Inoue, have both testified that they never received reports concerning this incident.

In so far as no evidence has been produced to show that reports were made or received, it is only natural that the accused Kobayashi did not know of an incident which occurred on an isolated island 1,200 nautical miles away, when especially he was pressed with work in commanding operations in the face of the major American offensive in the Marshalls.

X. Incident of paragraph (j) - The incident of execution of 7 POW's at the Forty-first Naval Guard Unit, Truk on 17 February 1944.

Let us first examine the inception of this incident from the testimony of the prosecution witness Lieutenant Commander Ishii, Exhibit 38, and the testimony of Captain Tanaka, Masaharu, IJN, from the record of the trial of Tanaka. By synthesizing the above testimony we may understand that Truk was subjected to a major air raid by an American task force on the 17th of February, and on the information that American forces would land, 4th Base Force issued orders "to prepare for land warfare." About this time, lower ranking officers at the 41st Naval Guard Unit who were feeling the burden of handling prisoners of war interned at the Guard Unit, suggested their execution to Captain Tanaka. The latter reprimanded them once; but as there were further suggestions from his subordinates on the matter, he ordered them to ask the opinion of 4th Base Force Headquarters on the matter. At this point Ishii broached this subject to headquarters on the command

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telephone. Hearing a voice say "Oi", from the headquarters end of the line, and concluding that headquarters had approved, he reported it to Captain Tanaka. Tanaka concluding that it was an order from 4th Base Force Headquarters ordered his subordinates to execute the prisoners of war.

The above roughly is the story, but the two important points here are the use of the command telephone by Ishii and the meaning of the answer "Oi." According to the testimony of the defense witness Higuchi, the command telephone operated differently from ordinary telephones when conversation was carried on from 41st Naval Guard Unit to 4th Base Force Headquarters. In the light of this testimony it becomes a very moot point whether Ishii ever used the command telephone. A more important point is the fact that when Ishii phoned he did not say who he was nor ask who the speaker at the other end was, but that he conversed while knowing only that he was connected with headquarters, and that when he heard the answer "oi" he concluded that to be acknowledgement from headquarters.

Ishii testified that the word "Oi" was used commonly among naval officers to signify acknowledgement. However, defense witnesses Higuchi and the accused Kobayashi unequivocally testified that this word had the same meaning as the English word "Hello" or the American word "Hey" and that it had no other meaning whatsoever. Further, Higuchi testified that there were three or four telephone operators in the telephone room at 4th Base Force Headquarters during combat. The answer "Oi" which Ishii heard can only be interpreted to mean the "Hello" of the telephone operator. And again judging on the basis of common sense one cannot reasonably accomplish one's business when that business is extremely important without giving one's own name nor ascertaining that of the speaker. And also it cannot be reasonably believed that important business, such as was then in progress, could be fully settled by the one word "Oi" meaning "Hello."

On the basis of the above, there is great doubt as to whether the inquiry concerning execution of POW's ever reached 4th Base Force Headquarters. There is no proof that inquiries were made of 4th Fleet Headquarters about the execution.

Next, the problem arises whether Captain Tanaka made a report of the execution of POW's at the conference convened at 4th Base Force Headquarters on the night of the 17th of February. However, we shall omit discussion of this matter as it is not directly related to the accused Kobayashi.

The problem is whether 4th Fleet Staff Officer Kawamura who is alleged to have heard this report made by Captain Tanaka at the conference, or 4th Fleet Staff Officer Inoue who is alleged to have heard this report from Kawamura reported this execution incident to the defendant Kobayashi. The prosecution witness Inoue testified that he did not report the result of the conference to Kobayashi, and did not know whether Kawamura reported to Kobayashi or not. The accused Kobayashi testified that although he received a brief report from Inoue on the conference, he received no reports on prisoners of war, also that he did not receive any reports from the other staff officers.

"NNNNN (25)

In Exhibit 59, the deposition of Kawamura, Torao, Kawamura answered that he did not know of the report of the execution of POW's made by the commanding officer of the 41st Naval Guard Unit at the conference, and that though he made a report to the commander concerning defense installations after the conference, he did not recall having reported about POW's.

The accused Kobayashi testified that although he did receive a brief report from Inoue on the items discussed (at the conference) he did not receive a report on POW's (answers to questions 140 and 146).

The above clearly shows that the accused Kobayashi did not receive reports relative to the execution of POW's at the Naval Guard Unit.

Kobayashi testified that at the time he was suffering from an anal fistula and that he felt it to be an obstacle in the performance of his duties, that he broached the subject of relief to the Commander in Chief of the Combined Fleet Koga on the 8th of February and that Admiral Koga said he would tell the Navy Minister about the matter.

On the strength of the circumstantial evidence presented to this court it cannot be reasonably deduced that Kobayashi probably received a report on this incident.

XI. Concluding words concerning the evidence relative to the incidents of the specifications.

In studying all the evidence concerning the ten individual incidents enumerated in the specifications directed against the accused Kobayashi, there was not a single fact of his ordering or permitting the mistreatment or execution of POW's. Only in the single case of the Wake Incident of 17 October did he receive a post facto report.

Relative to the Wake Incident of October 17, the accused Kobayashi was not a direct superior of Sakaibara and was therefore in no position to take measures himself. In actual fact, the accused Kobayashi had various important duties to perform in a vast territory assigned to his jurisdiction. Furthermore, it was at a most critical period of time from the operational standpoint <u>that this incident occurred</u>, namely when the American task force was closing in on the Marshall area and the main force of the Combined Fleet was leaving for that area to meet it. In speaking to Vice Admiral Abo about looking into the circumstances, the defendant Kobayashi took the measures required of him at that time.

Furthermore, that the execution of the prisoners of war was reported to the Navy Ministry is exactly as the evidence shows. Consequently the disposition of this incident was rather an administrative matter naturally falling to the Navy Ministry, which had issued a despatch requesting information on prisoners of war at Wake Island, that the business of a Fleet Commander in Chief who was aboard his ship and had to move <u>in conformance with operational demands</u>.

"NNNNN (26)"

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The measures taken by Kobayashi relative to this incident does not in any way whatsoever render Kobayashi liable for having unlawfully neglected his duty.

In short, summing up the evidence relative to the ten alleged incidents, it was not proved beyond reasonable doubt that the defendant Kobayashi unlawfully disregarded and failed to discharge his duty to control the operation of members of his command and to protect the prisoners of war, permitting the unlawful torture and killing of prisoners of war by his subordinates.

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PART III REBUTTAL TO THE PROSECUTION ARGUMENT.

Chapter I. General Rebuttal.

1. Although the judge advocate states that there are numerous precedents in which superior officers have been prosecuted for their neglect of duty to supervise and control their subordinates, these all date back to after World War II.

These instances which have occurred in the past do not necessarily constitute "precedents." "Precedents" are those instances among numerous others which while they have occurred in the past, have successfully withstood the test of time to which they have been subjected by many experts. Not all past instances are precedents. We must realize that there are numerous past instances which we cannot accept as precedents. In this sense precedents relative to neglect of duty of superior officers to control and supervise subordinates are few, and when it is further qualified by the responsibility of a commanding general or commander in chief to control and supervise subordinates of subordinates are non-existent in international law.

2. In international law the responsibility of a superior officer to control the acts of his subordinates' subordinates which violate international law is undetermined. There are no academic theories which recognize this and the term "precedent" as used in the above sense cannot exist. The "precedents" adduced by the judge advocate in his argument are not precedents in the strict sense of that term as defined above. Consequently they cannot be taken as precedents for the present case.

3. The judge advocate, judging arbitrarily that there was neglect of duty on the part of the accused, has drawn his citations on that premise. In the instant case however, the point at issue is whether there was neglect of duty to control on the part of the accused, and going a step further whether this responsibility can be fixed up on the accused.

4. The judge advocate, while stating that the present case is one of neglect of duty and not one of murder, repeatedly cites examples from cases of negligent homicide and murder. This form of citation is not appropriate.

5. The judge advocate throughout his argument has maintained that the accused knew or should have known of the acts in violation of international law enumerated in the specifications, but this is merely a contention on the part of the judge advocate, and a contention without any basis in the light of the evidence actually presented in this court room. If the matter is viewed in the light of the evidence presented, it would be seen that the opposite of what the judge advocate maintains holds true.

Chapter II. Rebuttal of individual facts.

1. The judge advocate has repeatedly dwelt on the execution of POW's at Kwajalein. However this was an incident which occurred before the accused assumed command of the Fourth Fleet, and therefore is irrelevant to the case. It is not of a nature to be brought up here.

2. The judge advocate viewing the duty to protect prisoners of war incumbent on the accused Kobayashi as Commander in Chief of the Fourth Fleet in the same light as the duty to provide clothing, food and shelter has drawn examples from American Jurisprudence for neglect of duty of the latter case. (p. 15-16). However it is quite obvious to all that these citations do not at all hit the mark. It does not require reaffirmation that in the instant case, the persons responsible for the treatment and protection of POW's were the Commanding Officers of the Naval Guard Units.

"NNNNN (28)"

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3. The judge advocate has dwelt on the acts in violation of international law committed by high-ranking subordinates of the accused, Sakaibara, Shiga, Tanaka, Okuyama and Iwanami. With the single exception of Iwanami, they were not his direct subordinates and therefore the contention of the judge advocate is not appropriate.

4. The judge advocate has introduced articles from the criminal code of Japan relative to responsibility for neglect and neglect of duty. The accused does not imply and has not implied that there were no such regulations in the Criminal Code of Japan. What the accused maintains is that in the Japanese Criminal Code there are no articles which question the responsibility for neglect of duty of the superior to control and supervise subordinates, or others which "question the responsibility of the controller for neglect of duty to supervise and control the controlled." In actual fact there are no such articles.

5. In his argument the Judge Advocate has repeatedly brought forth the Yamashita Case. The nature of the Yamashita Case is however different from the present case. And it should also be remembered, that powerful dissenting opinions were expressed by two justices of the Supreme Court of the United States against the verdict of the Yamashita case.

6. The judge advocate has cited examples from Chinese war crimes trials. Leaving political arguments aside for the time being, as a legal argument it is to be criticized as an application of ex post facto law. As the accused has repeatedly maintained from the outset of this case it is not appropriate that laws, regulations or orders relative to punishment established after the commission of the war crimes be applied in the trial of war criminal suspects.

7. The judge advocate has quoted from the testimony of prosecution witness Wakabayashi, but Wakabayashi never testified that the responsibility of the superior to control and supervise subordinates was a criminal responsibility. He testified that such responsibility was an administrative one. The term administrative responsibility is not an appropriate legal term but the sense is that the responsibility is one of disciplinary punishment as opposed to one of criminal responsibility.

8. The judge advocate has quoted from the Kilian Case (p. 33) but the quotation here too, is not appropriate, because Kilian was the commanding officer of the 10th Reinforcement Depot, and he was the officer directly responsible for the treatment and protection of prisoners of war. The position is different from that of the accused Kobayashi in the instant case. The quotation of the Kilian Case here is not appropriate.

9. The judge advocate quoting the Rauer and Scharshmidt case has compared it to the present case. The judge advocate did not clearly state the rank of Rauer, merely stating that he was the commandant of the camp. As such he was the person directly responsible for the treatment and protection of prisoners of war.

"NNNNN (29)"

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It is completely impossible to compare the neglect of duty of Rauer and the neglect of duty of the accused, the then commander in chief of the Fourth Fleet to supervise and control his subordinates which is alleged by the prosecution.

In summing up, the argument of the judge advocate does not convince the accused and his citations are wide of the mark.

Finally in summing up the main points of the foregoing, the prosecution has not proved beyond reasonable doubt that (1) the defendant KOBAYASHI, Masashi permitted, in the sense of that word as used in Chapter I Part I of the above, his subordinates, the subordinates of his subordinates, to commit acts in violation of international law as enumerated in Specifications 1 and 2 of the charge during his tenure of office as commander in chief of the Fourth Fleet, and (2) that KOBAYASHI knowing of these unlawful acts did not take any appropriate measures. On the other hand, according to the evidence presented to the commission both by the prosecution and the accused, these acts in violation of international law were not reported to the accused KOBAYASHI with the consequence that he could not have known about them.

Of only the one incident on Wake did KOBAYASHI have knowledge. However on this issue also, the prosecution failed to prove beyond a reasonable doubt that KOBAYASHI failed to take appropriate measures and also that there was any direct or proximate cause and effect between the neglect of duty to control and supervise his subordinates, which the prosecution allege existed on the part of KOBAYASHI, and the result of the criminal acts. On the contrary the accused KOBAYASHI has made clear that he as commander in chief of the Fourth Fleet took the most appropriate measures that he could have taken under the then existing circumstances.

For the above reasons I hold that the accused KOBAYASHI is not guilty of specifications 1 and 2 of the charge.

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

Respectfully,

TAKANO, Junjiro.

I hereby certify the foregoing to be a true and complete translation of the original document written in Japanese to the best of my ability.

Eugene E. Kerrick Jr.

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

"NNNNN(30)"

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FINAL ARGUMENT OF DEFENSE IN THE TRIAL OF
KOBAYASHI MASASHI
delivered by
Commander Martin E. Carlson
on July 14, 1948.

The argument in defense of Kobayashi, Masashi charged with criminal negligence must of necessity turn largely upon the legal aspects involved in cases of criminal negligence. We cannot limit our discussion to the present case because the accused is charged not with violating any specific statute but is charged only with violating his duty as Commander in Chief of the Fourth Fleet, Imperial Japanese Navy, in failing to discharge his duty as the Commander in Chief of the said Fourth Fleet in violation of the law and customs of war. What that law and what those customs of war are were not set forth in the charge and the specifications.

The accused is a former vice admiral, Imperial Japanese Navy, and has learned to speak, read, and write English. He does not, however, understand what is meant by the vague generality included in the phrase "in violation of the law and customs of war." We did make a motion for a bill of particulars and for a more definite statement of the charge in order to enable the accused to prepare for trial. We cited the opinion of Mr. Justice Murphy in the case of General Tomoyuki Yamashita (66 S.Ct. 340 at 357, a dissenting opinion but nevertheless a strong and sound opinion by a United States Supreme Court justice that: "International law makes no attempt to define the duties of a commander of an enemy 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 difficulty 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."

Was the accused told what he was charged with so that he could understand the crime that he must defend himself against? No! The judge advocate in his reply to the motion by the accused for a bill of particulars says the accused has no right to move for a bill of particulars in a military court. That is a right inherent only in civil courts. Thus the judge advocate would have all the world believe that military courts and this military commission in particular is less liberal in granting one accused of a crime the rights guaranteed by the Constitution of the United States to all persons accused of crimes and that in military courts we do not find the same fundamental rights and procedure guaranteed to an accused that there is in civil courts. So the accused is only generally told that he is charged with criminal negligence in violation of the law and customs of war.

There was never one word of evidence as to what this law was or what the customs were that imposed upon Vice Admiral Kobayashi, Commander in Chief of the 4th Imperial Japanese Fleet a duty to act or evidence what he did not do was the proximate cause and that therefore even justified bringing the criminal charge of neglect of duty against him.

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We did attempt to show the standard for measuring conduct in cases of negligence. We did offer in evidence four documents all dated after the termination of hostilities. According to the testimony of Lieutenant Commander H. D. VANSTON, Flag Secretary, these documents are the only documents in the present files of Commander Marianas, dealin with prisoners of war. The first document, Commander Marianas serial 03293, dated 25 September 1945, was admitted into evidence as Exhibit 40 but was then on motion of the judge advocate stricken from the record. The three other documents dated 14 November 1945; 8 December 1945, and 21 August 1946 were offered in evidence but were not admitted into evidence. Commander Marianas was a command analagous to the Japanese command, Commander in Chief, Fourth Fleet. The present files of Commander Marianas contain only four documents relating to prisoners of war. These documents are dated 25 September 1945, 14 November 1945, 8 December 1945 and 21 August 1946.

What is the standard for measuring conduct? In 38 Am. Jur. "Negligence" Section 30, the rule is: "The standard by which the conduct of a person in a particular situation is judged in determining whether he was negligent in the care which an ordinary prudent person would exercise under like circumstances. (3)" citing the footnotes of Chapter 30 in 38 American Jurisprudence.

We continue to quote: "As has been said, negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or the doing of something which a prudent and reasonable man would not do. (4)" citing the following cases: (4) Heller v. New York, N.H. & H.R.Co. (CCA 2d) 265 F 192, 17 ALR 823; Field v. Webber, 132 Me. 236, 169 A. 732, citing RCL; Altman v. Aronson, 231 Mass. 588, 121 NE 505, 4 ALR 1185; Brotherton v. Manhattan Beach Improv. Co. 48 Neb. 563, 67 NW 479, 33 LRA 598, 58 Am. St. Rep. 709; Smith v. Maher, 84 Okla 49, 202, P. 321, 23 ALR 270; Benedict v. Marks shows, 178, SC 169, 182 SE 299, citing RCL.

Concisely stated, the test of due care is the supposititious course of an ordinarily prudent and careful person under the same circumstances.

The measure of care which one must take to avoid responsibility for accident is that which a man of ordinary prudence and caution would use if his own interest were to be affected and the whole risk were his own.

"The standard man, that is, the ordinarily prudent man, or, as he is sometimes called, the average prudent individual, the reasonable and prudent man, or the careful and diligent man is an abstract man of ordinary mental and physical capacity; but he is an ideal man, in the sense that his conduct is in every case the gauge of due care under the circumstances not withdstanding the precautions attributed to him are not those of usage and custom."

We sought to show what the ordinarily prudent commander did do, by trying to get into evidence the four documents to wit: Commander Marianas serial 03293, dated 25 September 1945; serial 03628, dated 14 November 1945; serial 03701, dated 8 December 1945, and serial 0367, dated 21 August 1946; the only documents contained in the Commander Marianas files regarding prisoners of war.

The evidence proved that Japanese Navy Regulations contained rules and regulations relating to prisoners of war (see Q. 84 of Exhibit No. 41) and that Commander in Chief Combined Japanese Fleet issued orders that international rules as relates to warfare must be observed (see the evidence of the 33rd day, the testimony of the accused, KOBAYASHI, particularly his answers to questions 218 and 219.) And that the

Commander in Chief Combined Fleet did issue rules and regulations regarding prisoners of war (see the testimony of Susumu KAWASAKI, Commanding Officer of the 65th Navy Guard Unit on Wake as set forth in Exhibit No. 41, particularly answers to questions 55, 56, and 57) and that unit commanders did receive rules and regulations regarding the treatment of prisoners of war from the Navy Ministry Tokyo (see testimony of KAWASAKI, Susumu, in Exhibit No. 41, particularly answers to questions 85, 86, and 87.)

And that the commanding officers of the guard units on the far flung Pacific Island bases were all graduates of the Japanese Naval Academy as were the Base Force Commanders and that all the commanders were acquainted with the Wartime International Law Manual excerpts from which were introduced into evidence as Exhibit Number 43.

What ought to be done is fixed according to the standard of the ordinarily prudent man. Who is this ordinary prudent man or rather the ordinary prudent commander in chief of a fleet by whose standard you are to judge the accused, former Vice Admiral KOBAYASHI, Masashi, Commander in Chief of the Fourth Imperial Japanese Fleet? The record of this trial is lacking in any evidence as to this. The judge advocate has not presented any evidence and has given you no standard by which to judge the accused for criminal neglect of duty.

We did show by the witness Lieutenant Commander H. D. VANSTON, Flag Secretary, to Commander Marianas that the present files of Commander Marianas only show four documents issued by Commander Marianas relating to prisoners of war and all these documents were issued after hostilities had ceased.

In Section 34 of Negligence in 38 Am. Jur. the rule is:

"While, as stated, a custom is not conclusive as a standard of reasonable prudence, there is a reasonable basis for the contention that what is ordinarily done by men generally, engaged in a similar activity, has some relevancy to the inquiry as to what an ordinarily prudent person would do under the same circumstances (19)"
citing Seaboard Air Line R. Co. v. Watson, 94 Fla. 571, 113 So. 716, citing R.C.L.; Sweeney V. Blue Anchor Beverage Co. 325, Pa. 216, 189, A. 331, citing R.C.L.

The members of the commission have heard a lengthy argument by the judge advocate. Our answer to this argument is that this argument is specious and much of it is irrelevant. It is very confusing and the judge advocate has still not pointed out what the laws and customs of war are and the duty imposed by any such laws and customs of war upon the accused Vice Admiral KOBAYASHI, commander in chief, Fourth Imperial Japanese Fleet. We take exception to such statements as ".... because the defense will undoubtedly seek to confuse the commission into believing that it is necessary to prove either directly, or circumstantially that the accused had actual or constructive knowledge of the impending commission of some incident before the incident occurred." P. 3 and on P. 5 the statement "It should be apparent that despite previous erroneous contentions of defense counsel, we are not here dealing with or applying any new or untried legal concept of international or military law." P. 7 "Defense counsel have erroneously contended that precedents in this field of law are few and that the commission should, therefore, look to the Japanese law for controlling precedents in regard to the guilt of the accused." P. 11 "I refer to such terms as 'gross negligence,' 'wanton negligence,' 'aggravated negligence,' 'recklessness', etc., which appear even in a number of the modern decisions and statutes and which defense have used with some confusion in the course of this trial."

For the purpose of the record we wish to state that as defense counsel appointed by the convening authority, it is our purpose to carry out the instructions set forth in sections 357, 359, and 360, Naval Courts and Boards.

It is not nor has it ever been our purpose to confuse the commission. Any statements of the law we have made or will make in our arguments will be backed up by as many references and cases as are available to us as defense counsel.

As to our contention regarding this present case we have as yet failed to find a single case in which the commander in chief of a fleet has been charged and tried for negligence because some responsible officer on an island a thousand miles away ordered or allowed an execution of prisoners of war or because some guard did strike a prisoner of war, or

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because some admiral from another fleet questioned prisoners of war taken by a ship of a third fleet rather harshly in order to gain information regarding American submarines, or because a doctor didn't perform an operation entirely to the satisfaction of the prisoner. No person likes to have a hand amputated or a leg cut off even if shattered beyond any hope of saving. The surgeon who has taken the Hippocratic oath upon entering his profession must remain the best judge of whether an operation is necessary or not.

All this is what the accused, former Vice Admiral, KOBAYASHI, Commander in chief of the Fourth Imperial Japanese Fleet is being tried for and we know of no previous trial under such a state of facts.

We asked for a bill of particulars as to what law the accused was charged with having violated but have never been informed. Now in the argument by the judge advocate he can only say there are numerous cases but still he doesn't cite the law. In effect he says because an Army Commission convicted General YAMASHITA that is reason enough to convict the accused, a commander in chief of a fleet. The judge advocate talks about command responsibility and the Supreme Court of the United States. As the judge advocate said on page 32 of his argument the Supreme Court did not weigh the evidence in the YAMASHITA case. That was done by an Army commission.

The judge advocate depends upon the YAMASHITA case as a precedent and a reason for finding KOBAYASHI guilty of criminal negligence. Remember that was a military trial of a commanding general and we believe there were hundreds, perhaps, thousands of incidents occurring in the Philippines. The court could therefore have reasoned that YAMASHITA knew of these widespread atrocities that is he had knowledge before the atrocities took place. YAMASHITA was on the scene. He wasn't on a flagship at sea a thousand miles away when the incidents occurred. YAMASHITA was the Japanese general with headquarters ashore in the Philippines.

In order to find out just what ahppened at the trial of General YAMASHITA the record of the proceedings of the commission which tried General YAMASHITA must be made available to the commission in order that they might see whether there was evidence that YAMASHITA did have knowledge.

The court refused to review the evidence or to consider what measures, if any, the general took to control his troops or whether such measures were appropriate, these being questions for decision by the military commission which was not bound by the ordinary rules of law or evidence.

Let the judge advocate show how the YAMASHITA case applies in this case because we hold that the YAMASHITA case is irrelevant. General YAMASHITA was a general and in command of all the Phillippines. The only similarity in the case of YAMASHITA and KOBAYASHI is that both of them were Japanese.

Next, the judge advocate cites the KILIAN case and says the c
commission is familiar with the case. See p. 33. I hope you read the c
case because there is absolutely no similarity between that case and this case.

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Colonel James A. KILIAN, commanding officer of 10th Reinforcement Depot at Lichfield Staffordshire, England, was charged with violation of the 96th Article of War. This was no vague charge as in this KOBAYASHI case. KILIAN was charged that he did "wrongfully and unlawfully perform his duties as such Commanding Officer of said Depot, in that he authorized, and aided and abetted the imposition of cruel, unusual and unauthorized punishment upon" then follows certain named American soldiers.

In Specification 2 it was charged he did "wrongfully and unlawfully fail and neglect to properly perform his duties as such Commanding Officer of said Depot, in that he knowingly permitted the imposition of cruel, unusual and unauthorized punishment upon" then follows the names of certain American soldiers.

Does this read like a war crimes case? No, it is only the case of a jailer being tried for violation of the 96th Article of War. It is altogether irrelevant in this present trial.

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The charge was not even proved. The court found KILIAN "not guilty" of specification 1 and "guilty" of specification 2 except and there follows twelve lines of excepted words of which they found him "not guilty" including the word "knowingly". So in effect the general court martial found Colonel KILIAN "guilty" of practically nothing which is borne out by the sentence "To be reprimanded and to pay a fine of $500.00." The reviewing authority made further exceptions to the courts findings.

The commission should by all means read the KILIAN case to see how different it is from this present case.

From excerpts from the defense brief prepared we cite Wharton's Criminal Law, paragraph 166 that negligence cannot constitute accessoryship and there are certain instances cited of negligent maliciousness. Read this: "But with these exceptions, a party, who by negligence produces anothers negligence, cannot as we have seen, be chargeable with the consequences of the latters negligence. Morally reprehensible, also, as may be he who by negligence induces another to perform a guilty act, he cannot be made responsible without unduly enlarging the range of criminal law."

In this present trial there has been no evidence that KOBAYASHI induced any of the guards, the doctors or the Base Force commanders or the commanding officers to perform guilty acts. Quite to the contrary - KOBAYASHI by example and precept he set the precedent which ordinarily they would have and did follow to treat prisoners of war humanely and send them to Japan by the first available transportation. And who prevented the transportation of these prisoners of war from Wake, Kwajalein, Mille, and Truk to Japan? It wasn't KOBAYASHI who was fighting desperately to stem the advancing tide of the might of America. America now had thousands of ships, thousands of planes and hundreds of submarines all fully manned by experienced personnel. America had loosed the fury of her righteous might and power upon Japan. There was nothing withstanding of such power. I assure you that Vice Admiral KOBAYASHI, commander in chief of the Fourth Imperial Japanese Fleet had never seen the like of such power. How little does the judge advocate know when he says of KOBAYASHI "He was an experienced commanding officer with broad military experience....." Quite to the contrary this accused, Vice Admiral KOBAYASHI had no experience in such a mighty struggle and against such power as the United States of America hurled at these far flung Pacific Island Bases. America never ceased for a minute. As soon as one mighty fleet under Admiral HALSEY struck, Admiral NIMITZ followed up with another fleet just as powerful under Admiral SPRUANCE. American submarines hunted down any Japanese ships that ventured upon the sea. Bombing planes, huge fortresses, land based, dropped millions of tons of bombs and explosives upon these islands and even upon Japan. America controlled the seas and no prisoners of war got to Japan except by luck. Of the 42 submarine prisoners sent back on two Japanese carriers from Truk, one carrier was sunk and all 21 American prisoners went down with the ship together with the Japanese crew; the ship only a day out of Japan. But the policy of Japan to send prisoners to Japan was still being carried out. They even tried submarines and now and then prisoners of war would get through notwithstanding the American blockade.

But while the prisoners of war were being held on these Pacific Islands awaiting transportation there did occur ten incidents. Ten incidents, just ten incidents on these many Pacific Island Bases in this vast area from April 5, 1943 to February 23, 1944. And yet the judge advocate says that KOBAYASHI did nothing to safeguard prisoners of war. This vast area was divided into areas over which Base Force Commanders exercised jurisdiction and in only two areas, the Fourth Base Force Area and the Sixth Base Force Area did any atrocities occur. If KOBAYASHI was a negligent commander why didn't atrocities occur in the Third Base Force Area and the Fifth Base Force Area? The reason is that the

conduct of KOBAYASHI, the alleged negligence had nothing to do with causing the alleged injuries. The proximate cause was the conduct of the unit commanders. The guilty persons have all been tried, found guilty, sentenced and are serving their sentences. Vice Admiral ABE, Rear Admiral SAKAIBARA, and Captain TANAKA have all been hanged. The judge advocate however is not satisfied. He is asking that you accept his theory that a commanding officer has an absolute responsibility for the acts of his subordinates because all he has proved is that in some instances there were atrocities committed. Kobayashi had no knowledge of the alleged crimes. JK

If the judge advocate did not hold with this theory which he sets out in page 4 of his argument he would have at least charged KOBAYASHI with wilfully and knowingly disregard his duty. He would have proved more than the commission of these acts which he proved only by introducing excerpts from previous trials. The principle of command responsibility which he discusses at great length is only another name for his theory of absolute responsibility . On page 4 of his argument he says there are some theorists who contend that a commanding officer has an absolute responsibility for the acts of his subordinates but who are these theorists other than the judge advocate in this trial?

The judge advocate has cited the KILIAN case as an illustration of command responsibility but the court and the convening authority didn't hold with this theory. From the excerpts from the defense brief in that case I agree and point out to the commission that under Army Regulations and the same is true under Navy Regulations, a commanding officer by virtue of his position is responsible for everything within his command, but he is not criminally responsible for the same. For improper performance of duty he may be administratively reprimanded, given a less responsible position, not recommended for promotion, etc. But to convict a commanding officer, a public officer, or any person of criminal responsibility for acts of omission intent, (knowledge - actual or imputed) is a necessary element. JK

This the prosecution have failed to prove in this present trial. JK

To hold KOBAYASHI as commanding officer criminally responsible for unauthorized offenses of subordinates of which he has no knowledge merely by virtue of his position as commanding officer of the Fourth Fleet is to establish a dangerous precedent.

If as the judge advocate argues there goes with command the criminal responsibility for all acts of subordinates officers will shun the now much coveted command position, discipline will be destroyed in all grades, individual justice and the reliance on law to protect the innocent person will have vanquished.

As in the KILIAN case so in this case the prosecution relied on the YAMASHITA case and the HOMMA case. In the KILIAN case it was contended by the defense and we contend in this case that the YAMASHITA case and the HOMMA case have no application. The prosecution keep trying to apply the YAMASHITA case to all war crimes trials held here on Guam. ~~Certain members of the commission will remember how the prosecution tried to apply the YAMASHITA case to a warrant officer who was recuperating from a severe illness at a rest camp.~~ JK

Both Justice MURPHY and RUTLEDGE wrote strong dissenting opinions in the YAMASHITA case when it was brought to the Supreme Court of the United States on a writ of habeas corpus. They held that the due process clause of the Fifth Amendment applied to any person accused of a crime in our American courts. The record of this trial shows that the judge advocate held the contrary view. The record shows that he has given as his legal opinions that the accused KOBAYASHI is not entitled to the due process clause of the Fifth Amendment. JK

Justices MURPHY and RUTLEDGE further held (dissenting opinion) in the YAMASHITA case that the offense of failing to control his troops without showing the accused had knowledge of their acts was not known as an offense heretofore under the laws of war.

Legally a person, a commanding officer nor anyone else cannot be guilty of a criminal offense without intent (culpable knowledge.)

If we are to accept the theory advanced by the judge advocate of absolute command responsibility, criminal responsibility for all illegal acts of subordinates, acts which he did not authorize, nor aid nor abet, nor approve of or condone, acts of which he had no knowledge actual or imputed then the higher commanders of the accused are equally criminally responsible.

The court evidently did notaccept this theory of command responsibili in the KILIAN case because such superior higher commanders as Colonel HERR, Brigadier General VAUGHAN, Lieutenant General LEE, Major General BROWN, General DWIGHT D. EISENHOWER and General GEORGE C. MARSHALL, were not brought to trial for the alleged illegal acts of Colonel KILIAN, Commanding Officer of the 10th Reinforcement Depot.

Consider what the principle of command responsibility, criminal responsibility for all illegal acts of subordinates would mean in the American Navy. Such a theory or principle is untenable from the standpoint of law or of justice to the accused and all other commanding officers and other individuals concerned.

I shall comment but briefly on other points advanced by the judge advocate in his argument. First, he cites the American War Department Basic Field Manual, Rules of Land Warfare. We do not hold that the accused, Vice Admiral KOBAYASHI, as commander in chief of the Fourth Imperial Japanese Fleet was bound by these American rules of land warfare.

Consider "4(b) The principle of humanity prohibiting any employment of any such kind or degree of violence as is not actually necessary for the purpose of the war. And

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

Are we Americans in the moment of victory to set the rules of war for our adversary? Are we to say to Japan you must observe the Hague Convention and/then incorporate into our rules of warfare such exceptions as suit our convenience? In the "Foreward to the War Department Technical Manual, TM 27-251" there is the following: "This manual is intended to serve as a supplement to F.M. 27-10 Rules of Land Warfare....."

The Geneva prisoner of war convention and

The Hague Declaration Number XIV, October 18, 1907, prohibiting the discharge of projectiles and explosives from balloons, (H.D. XIV), is not binding and will not be observed."

The judge advocate cites Article 1 of the Articles for the Government of the U. S. Navy and says this is a penal duty. But can he cite any cases where American commanders have been tried for violation of this article 1 and can he cite any cases other than this where a Japanese admiral has been tried for violation of this article 1 of U. S. Navy Regulations. Of course, not and therefore any reference to this article is highly irrelevant and immaterial.

The commission should not be mislead by the apparent flattery of the judge advocate when he says in effect I shall not tell you about criminal negligence because "The commission is familiar with this concept of criminal negligence as applied to military duties and is thoroughly familiar with the military concept of neglect of duty."

I know a little something of the military record of the members of this commission and their performance of duty. It was only last Saturday that the president of the commission was presented with a decoration for performance of duty above and beyond that ordinarily required of an officer.

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I ask that the judge advocate clearly and unequivocally set forth the law of criminal neglect of duty as it applies in the instant case and not evade the question by stating that the commission members are "thoroughly familiar with the military concept of neglect of duty."

The judge advocate states Japanese law on the question of criminal negligence is irrelevant and yet he cites pages of excerpts from Sebalds Criminal Code of Japan. He is on y begging the question and injecting into the controversy irrelevant and immaterial issues. See pages 8, 9, and 10 of his argument.

He says the accused would have been punished under the provisons of law that he has cited. That isn't true because he wasn't charged with any neglect of duty under Japanese law and he hasn't been punished nor do we believe it as the intention to punish former vice admiral, KOBAYASHI for neglect of duty as commander in chief of the Fourth Imperial Japanese Fleet.

The judge advocate again attempts to flatter the commission by saying they are "thoroughly conversant with the concept of criminal negligence" and that they can have no difficulty in determining what the duties of KOBAYASHI were as commander in chief of the Fourth Fleet were because the duties "are clearly outlined in international law." Since they are so clearly outlined the judge advocate should at least let us in on them. State what they are so that the accused will know what he is being tried for. The vague terms are not the different degrees of negligence set forth by the judge advocate in his argument but the phrase "in violation of the law and customs of war." We find no mention of any duties of a commander in chief of a fleet which are set forth in international law, as applicable in the instant case.

We hold with Mr. Justice RUTLEDGE in his dissenting opinion in the YAMASHITA case when he says: "It is not our tradition for anyone to be charged with crimes which is defined after his conduct, alleged to be criminal, has taken place, or in language not sufficient to inform him of the nature of the offense or to enable him to make defense. Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so." In re YAMASHITA, No. 61, motion for writ of habeas corpus and 672 for writ of certiorari.

The judge advocate also attempts to bring KOBAYASHI under the rules of law regarding master and servant as to his relationship with prisoners of war held on the far flung Pacific Island Bases awaiting transportation to Japan. Let him cite one single case or the opinion of one international lawyer who holds this theory. There is absolutely no such relationship between the commander in chief, Fourth Fleet and these prisoners of war as a master and servant relationship.

Let him cite a single case that the command responsibility of KOBAYASHI as commander in chief, Fourth Fleet are commensurate with such greater duties than master and servant or have any relationship with master and servant.

This is a criminal case. KOBAYASHI is charged with criminal neglect of duty. Let us not wander far afield into the law of master and servant and the tort liabilities growing out of such a relationship.

Suddently the judge advocate starts quoting from a review of the KILIAN case. Colonel KILIAN remember was the commanding officer of the prison. Of course, he couldn't delegate his responsibility anymore than Vice Admiral

KOBAYASHI could delegate his responsibility as commander in chief of the Fourth Fleet. KOBAYASHI was not preoccupied with operational duties; he was occupied with operational duties. Those duties were paramount. SAKAIBARA, TANAKA, and the other guard unit commanders who had the duty of and custody of prisoners of war, also had other duties but they had a duty as regards prisoners of war. We are not here concerned with whether the command functions exercised by SAKAIBARA and TANAKA carried with them an inescapable responsibility for preventing mistreatment of prisoners of war because both TANAKA and SAKAIBARA have been tried, found guilty, sentenced, and hanged for the mistreatment of these prisoners of war for which KOBAYASHI, a higher command is also now being tried. There isn't even any consistency in the program of trial of KOBAYASHI as a superior and higher commander because the prosecution have dipped down into the lower ranks of officers charging KOBAYASHI as commander in chief of the Fleet with failure to control SAKAGAMI, Shinji, a corpsman warrant officer, (SAKAGAMI by sworn deposition denied any participation in the incident alleged in paragraph (h))and Surgeon Lieutenant NABETANI Reijiro, and Surgeon Commander OKUYAMA, Tokikasu (and OKUYAMA and NABETANI have never been tried for the incidents) and a failure to control certain Army officers whose names and ranks are set forth in paragraph (i) and of enlisted guards whose names are even to-day - five years after the incidents took place still unknown. From reading the charge one would be led to believe that KOBAYASHI was anything but commander in chief of the Fourth Fleet. That job the judge advocate would have him delegate while he hurried to Mille some 1200 miles away to personally take charge of prisoners of war or to rush to the hospital to advise the doctor as to how to operate on a prisoner of war patient.

Well, you say if he had done these things there would have been no mistreatment or injuries of prisoners of war. In the first place there was no such duty owed the prisoners of war by KOBAYASHI as commander in chief of the fleet. Responsible officers, commanding officers of guard units had custody of prisoners of war. It is common knowledge that people including soldiers and sailors break laws every day. As a practical matter it is impossible to supervise everyone if you have a far flung command as did KOBAYASHI. The judge advocate says this duty to control is so elementary that it warrants no discussion. We are of the opinion it does warrant discussion.

The judge advocate naively says there would have been no mistreatment of prisoners of war if KOBAYASHI had issued specific instructions to all his subordinates. We have a law which in effect says "Thou shalt not kill", and yet here on Guam we have murders occurring and in some of our large cities to our shame as many as 267 murders a year. No, even in the army it isn't enough just to issue orders. Someone must follow up and see that the orders are carried out.

There was at each of the guard units responsible officers in command and directly superior to them Base Force Commanders. They have all been charged with these incidents and all except Vice Admiral WAKABAYASHI tried. Vice Admiral WAKABAYASHI although a witness for the prosecution in this case is nevertheless charged with the incidents which took place at the Forty-first Naval Guard Unit.

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IØn a case like this present case there is a tendency to think of negligence in the popular sense and judge the accused on the basis only that he should have prevented the guards from striking the prisoners as it is alleged they did do and should have prevented an army unit from executing a prisoner and that he should have prevented Sakaibara, Shigenatsu the commanding officer of the 65th Naval Guard Unit, Wake Island from executing ninety-six prisoners of war.

Let us not forget however that Kobayashi did not order any of the alleged executions; he was not present at any of the alleged atrocities; he did not approve of them; and he did not condone them.

We maintain that the prosecution have not even set out a good case against the accused. The prosecution know full well what legal negligence is so they use the words "as it was his duty to do" but the evidence presented shows no such duty in any of the allegations. We point out at this time the lack of evidence as to the allegations set forth in paragraph (g) and (h). These two paragraphs allege certain experiments said to have taken place at the Fourth Naval Hospital. Surgeon Captain Iwanami testified that what experiments were made, if any, were made at the 41st Naval Guard Unit and not at the hospital. Iwanami testified he did not see nor was he present when Okuyama and Hasegawa treated a prisoner of war at the hospital in November 1943. See answer to Q. 150 on 31st day of trial. He further testified that the bodies that he did see at the dissection room of the hospital had not died at the hospital. (See answer to Q. 152 on 31st day.)

Iwanami also testified that deaths at the hospital were reported to the Naval Ministry, Tokyo, and one went to the family. No report of deaths at the hospital were made to commander in chief, Fourth Fleet. See answer to Q. 160 31st day of trial.

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

To Q. 168 "When Prisoners of war were deceased were any reports or death certificates submitted to higher authority by the medical authorities?" Iwanami answered "No."

Next question, "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?" Iwanami answered, "No, it was not my duty."

In 38 American Jurisprudence "Negligence" section 2 there is defined legal negligence, "Actionable negligence, or negligence in the legal sense has been defined as a violation of duty to use care." [18] citing Ft. Smith Gas Co. v. Cloud (CCA 8th) 75 F(2d) 413, 97 ALR 833; Union Traction Co. v. Berry, 188 Ind. 514, 121 NE 655, 124 NE 737, 32 ALR 1171; Brotherton v. Manhattan Beach Improv. Co. 48 Neb. 563, 67 NW 479, 33 LRA 598, 58 Am St Rep 709. Actionable negligence is a breach of duty owed by defendant to the plaintiff. Saunders v. Boston & M.R. Co. 82 NH 476, 136 A 264, 50 ALR 367.

"It is doubtful, according to some authorities, whether a more comprehensive definition is practicable. Negligence such as the law takes cognizance of in imposing liability depends upon the existence of various essential elements hereinafter discussed such as a duty owed by the person charged, and an injury which follows the violation of that duty in such direct and natural sequence that the breach of duty can be said to be the proximate cause of the injury.

Iwanami testified he made no reports of deaths or experiments that one of his subordinates made at the 4lst Naval Guard Unit dispensary nor was it his duty to make any such reports. What Okuyama and Nabetani did no one has testified to at this trial. We asked that Okuyama be summoned as a witness but the judge advocate only replied by saying he believed that Okuyama was dead. The judge advocate replied pointing out that all information pertaining to Okuyama Tokikazu was to the effect that he was deceased. This doesn't prove that Okuyama is dead.

To Q. 251 on 34th day Iwanami replied "I believe the hospital would operate according to the regulations given it by the Navy Ministry."

So we have a hospital operated as are our own Naval hospitals by orders of the Bureau of Medicine and Surgery, Navy Department and the treatment of prisoners of war is as prescribed by doctors and not by any rules or regulations established by commander in chief, Fourth Fleet.

There has been direct proof therefore that the accused Kobayashi had no duty as regards the work of the doctors at the Fourth Fleet Hospital. There has been no proof that the injury and the deaths alleged were in violation of any duty Kobayashi had toward the prisoners of war nor that the injury or deaths can be said to be because of any breach of duty owing to the prisoners by Kobayashi. In other words there is no evidence that there was a breach of duty by the accused Kobayashi which is the proximate cause of the injury or deaths complained of.

Continuing to quote from 38 American Jurisprudence "Negligence" Sect. 2 "In any event, negligence in the legal sense is a relative" Workman v. New York, 179 US 552, 45 L.Ed. 314, 21 S.Ct. 212; Southern P. Co. v. Buntin, 54 Ark. 180, 94 P(2d) 639, 124 ALR 1422; Katz v. Helbing, 205 Cal 629, 271 P 1062, 62 ALR 825; Effinger v. Ft. Payne & W. Valley Traction Co. 175 Ind. 175, 93 NE 855, 33 LRA(NS) 123; Palsgraf v. Long Island R. Co. 248 NY 339, 162 NE 99, 59 ALR 1253; Gibson v. Payne, 79 Or 101, 154 P 422, Ann Cas 1918C 383; Shobert v. May, 40 Or 68, 66 P 466, 55 LRA 810, 91 Am. St.Rep. 453; Appalachian Power Co. v. Hale, [illegible] See also infra, SS 29 et seq. Negligence is a word of broad significance and may not readily be defined with accuracy. Jamison v. Encarnacion, 281 US 635, 74 LEd 1082, 50 SCt 440. "Its existence must depend, in each case, upon the particular circumstances which surrounded the parties at the time and place of the occurrence on which the controversy is based" citing: Jacksonville, T & KWR Co. v. Peninsular Land, Transp. and Mfg. Co. 27 Fla 1, 157, 9 So. 661, 689, 17 LRA 33; Northern C.R. Co. v. State, 29 Md. 420, 96 AmDec 545; Shobert V. May, 40 Or. 68, 66 P. 466, 55 LRA 810, 91 Am/St Rep 453; Danner V. South Carolina R. Co. 38 SCL (4 Rich.) 329, 55 Am. Dec. 678; Hays v. Gainesville Street R. Co. 70 Tex. 602, 8 SW 491, 8 Am.St.Rep. 624; Hall v. Ogden City Street R. Co. 13 Utah 243, 44 P 1046, 57 Am St Rep 726.

We have pointed out the particular circumstances and the relationship between Surgeon Captain Iwanami and the accused Kobayashi. We further call the commission's attention to the answers to the interrogatories sent to Sakagami, Shinji. We moved that Sakagami be summoned in order that he might tell all he knew of the allegations set forth in paragraph (h) because interrogatories are not as satisfactory as having the witness on the stand. However here are the interrogatories submitted to Sakagami and the answers he gave under oath:

First Interrogatory:	It is alleged that two American prisoners of war were killed at Dublon Island, Truk Atoll, on or about 1 February 1944 by explosions of dynamite. Did you kill two American prisoners of war at Dublon Island on or about 1 February 1944 by explosions of dynamite?
Second Interrogatory:	Did you kill two American prisoners of war at Dublon Island, Truk Atoll, on or about 1 February 1944 by strangulation?
Third Interrogatory:	Did you ever mistreat any American prisoners of war during the time you were on duty at Dublon Island, Truk Atoll?
Fourth Interrogatory:	Did you ever kill any American prisoners of war on Dublon Island, Truk Atoll during the period of time you were stationed on Dublon Island?
Fifth Interrogatory:	During what period of time were you stationed on Dublon Island, Truk Atoll?
Sixth Interrogatory:	What was your rank and your duty during this period?
To the first interrogatory:	No, I did not.
To the second interrogatory:	No, I did not.
To the third interrogatory:	No, I never did.
To the fourth interrogatory:	No, I did not.
To the fifth interrogatory:	I was stationed at Dublon Island, Truk Atoll, from June, 1943, until June or July 1944.
To the sixth interrogatory:	My rank was warrant officer, Medical Corps, Imperial Japanese Navy. Technically speaking, I was in charge of building and repair work at the hospital, I was also kampanshikan at the hospital.

The evidence is clear that Sakagami, Shinji did not kill two Americans as he is alleged to have done in specifications paragraphs (h). Remember Okuyama has never been tried for the offense so he too as far as the evidence in this case goes is not guilty of the offense.

In footnote 14 on page 643 of 38 American Jurisprudence "Negligence" the following cases are cited: Altman v. Arvinson, 281 Mass. 588, 121 NE 505, 4 ALR 1185; Keyser Canning Co. v. Klots Throwing Co. 94 W.Va. 346, 118 SE 521, 31 ALR 283. The case of Hulley v. Moosbrugger, 88 NJL 161, 95 A 1007, LRA 1916 C 1203 is cited as authority for the rule: "When negligence arises out of an act of commission by one for whose conduct another is responsible it must be with reference to some duty which the responsible party owed to the party injured."

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In Wharton's Criminal Evidence, Volume 2, section 1126, p. 678 the rule of evidence is set forth: "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable. Some courts deny the right to reproduce the testimony of a witness unless he is shown to be dead, even though he has gone beyond the jurisdiction of the court, citing U.S. v. Angell (CC) 11 F. 34 the court says that under the constitutional provision that in all criminal cases the accused shall enjoy the right to be confronted with the witnesses against him, a witness, if living must be produced, and the mere fact, that he is beyond the jurisdiction is immateria The court further says that it cannot fairly be maintained that if the witness has once been confronted with the accused before the committing magistrate the requirements or guarantees of the Constitution are answered... The fair meaning of the Constitution is that wherever and whenever he is put on his final trial he shall be confronted with the witnesses against him, if they be alive."

So under paragraphs (g) and (h) Iwanami, Okuyama, Nabetani, and Sakagami should be produced. The defense put on Iwanami who testified he owed no duties to the accused as regards his work as a doctor nor did he report or have a duty to report deaths to the accused Kobayashi. By means of interrogatories Sakagami answered that he didn't kill two American prisoners of war on or about February 1, 1944 at Dublon Island, Truk and furthermore he never killed or mistreated any American prisoners of war at Dublon Island.

In specifications paragraphs (e) the unlawful killing of five prisoners, names unknown, is alleged to have been done by Colonel Oishi, Major Nakao, Major Takarada, Lt. Fueta, Captain Abe, Lt. Moori, Ensign Motomura, Ensign Tanaka and Warrant Officer Manako. Five of these persons are Army officers, Colonel Oishi being the senior army officer stationed on Mille at that time.

How do the prosecution prove that the accused Kobayashi neglected his duty as commander in chief, Fourth Fleet as regards to this incident? By means of prosecution documents 303 and 261. Colonel Oishi and the others were charged with murder and that charge is set out as is the findings and sentence. Document 261 is a statement alleged to have been made by Colonel Oishi on October 24, 1945 more than two months before he was tried. Colonel Oishi is at present confined at Sugamo Prison, Tokyo and therefore is available as a witness. In accordance with the rule of evidence set forth in Wharton's Criminal Evidence, Ibid., Colonel Oishi and the others should have been produced as witnesses. Instead the prosecution introduced a deposition prosecution document 262, the answers to interrogatories propounded to Colonel Oishi by the judge advocate and marked as exhibit 58 and the entire testimony of Lieutenant Fueta at the trial of Oishi, et al., Exhibit No. 56. Lieutenant Fueta is available as far as we know and according to the rule of evidence cited from Wharton's Criminal Evidence such testimony cannot be introduced at this trial because Lieutenant Fueta is obtainable.

We did show that the accused Kobayashi was at Truk some 1300 miles away and that he did not order the execution, neither did he approve of it or condone it. We did further show that Captain Shiga was not present at the execution and did not order the execution and it was a very secret affair. See exhibits 39, 42.

The rule of law is that a person who has been guilty of negligence is liable only for injuries which are proximately caused by such negligence. Kobayashi the commander in chief of the Fourth Imperial Japanese Fleet was at Truk when Colonel Oishi and his Mountain Artillery units are said to have executed prisoners of war at Mille and the evidence shows that there was no proximate cause as between the accused Kobayashi and the execution of five prisoners of war.

0893

In 45 Corpus Juris "Negligence" sec. 666 on page 1093 the rule is clearly stated as to negligence and proximate cause. "In accordance with the rule that a person who has been guilty of negligence is liable only for injuries which are proximately caused by such negligence, 78" (citing sec. 477 C.J.) a mere allegation of negligence on the part of defendant and of the loss or injury sustained by plaintiff does not charge defendant with responsibility for the damage (79) citing Fay v. Cox, 45 Cal. A. 696, 188 P 623., but the declaration or complaint must show a casual connection between the negligence charged and the injury sustained, that is, it must, either by a direct averment or by a statement of facts, show that the negligence charged was the efficient and proximate cause of the injury sustained."(80) citing the following cases, 45 Corpus Juris. Negligence, Section 666 The connection between negligence charged and injury (1) Necessity of allegation, p. 1093, footnote 80.

"It must show either that defendant's alleged negligence was the sole cause of the injury (81)" citing the following cases: Rome R., etc. R. Co. v. Jones 33 Ga. A. 1617, 127 SE 786; Gillestie v. Andrews 27 Ga. A. 509, 108 SE 906. "or that it contributed to the injury (82)." citing Manwell v. Durst, 178 Cal. 752, 174 P. 881, 1 ALR 669; Ingalls v. Monte Cristo Oil, etc. Co., 176 Cal. 128, 167 P. 857; Fay v. Cox 45 Cal. A. 696, 188 P. 623. As that it put in operation other casual forces which were the direct natural and probable consequences of the original act."

For a definition of proximate cause I cite section 477 from 45 Corpus Juris "Negligence" page 897: "In the law of negligence" proximate cause "has variously been defined as: That which immediately precedes and produces the effect (2) citing Longabough v. Virginia City etc. R. Co. 9 Nev. 271; Hoffman v. King, 160 N.Y. 618, 55 NE 401, 73 Am St Rep 715, 46 LRA 672; Murphy v. New York, 89 App. Div. 93, 85 N.Y.S. 445; Traff v. McClellan, 68 App. Div. 362, 74 NYS 130; Mancuso v. Cleveland R. Co., 23 Oh A. 493, 155 N.E. 243. "As distinguished from a remote, (3) mediate, or predisposing cause (4) citing Birmingham Southern R. Co. v. Harrison, 203 Ala. 284, 82 S. 534, for the rule that "Proximate cause means the direct efficient cause of injury as distinguished from the indirect remote cause." ...Continuing we quote further Ibid, "the efficient cause - the one that necessarily sets the other causes in operations,...; the nearest independent cause which is adequate to produce and does bring about the accident."... A comprehensive definition, and one which is perhaps most often stated, is that proximate cause is any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred." (15) citing the following cases footnote 15, page 898. Section 110 Ibid: "although a defendant may be negligent in the performance or omission of some duty owed to the person injured, no liability attaches unless such negligence was the proximate, rather than the remote cause of the injury" (27) citing the following cases, Footnote 27.

In none of killings or injuries is it alleged [illegible] nor is it proved that because the accused Kobayashi was negligent that such negligence was the nearest independent cause which was adequate to and did produce the injury. The negligence alleged is therefore not the proximate cause and the accused Kobayashi is therefore not guilty. We cite the following cases from 45 CJ. Negligence Sec. 481: Yeates v. Illinois Cent. R. Co. 241 Ill 205, 89 N.E. 338; Grigsby v. Beatton, 128 Tenn. 597, 163 S.W. 804.

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All the evidence shows that the accused Kobayashi performed his duty in a lawful manner. The rule as to criminal responsibility is that "The performance of a lawful act in a negligent manner does not give rise to criminal responsibility" (16) 45 C.J. "Negligence"Section 951 p. 1371 citing People v. Anderson 310 Ill. 389, 141 N.E. 727; People v. Adams 289 Ill. 339, 124 N.E. 575.

Much has been made by the prosecution of the fact that the accused Kobayashi knew that there were American prisonersof war on Wake. Kobayashi did visit Wake on official duty in connection with the defense of Wake in early September 1943. He testified on the 33rd day that when he learned there were prisoners of war on Wake: "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."

In September 1943, Captain Sakaibara told the accused Kobayashi that he would have the prisoners sent home to Japan by the next supply ship (33rd day of trial). Kobayashi then left Wake thinking that the American prisoners of war on Wake would soon be on their way to Japan. He was aboard his flagship the Kashima inside the Kwajalein Atoll, some 670 miles away on October 7, 1943 when the American forces made a heavy raid on Wake. Sakaibara the commanding officer of the 65th Naval Guard Unit, Wake had all the prisoners on Wake executed because as he said it was in his opinion a military necessity. This is what he said at his trial. He was tried for murder of these prisoners, found guilty, sentenced to be hanged and he was hanged here on Guam for that crime.

Captain Sakaibara after the days battle with the American forces was over did send a battle report to the Commandant of the Sixth Base Force, his immediate superior, vice admiral Abe. No copy of that dispatch is or was available even at the trial of Sakaibara or Abe. It has been said that Sakaibara included in the battle report the terse statement "prisoners of war disposed of". It might even be that the words "through military necessity" were included. The message was sent to Commandant, Sixth Base Force at Kwajalein and Fourth Fleet and Combined Fleet, and Navy Ministry, and Naval General Staff are said to have been information addressees. See answer to Q. 88 by Kobayashi. Kobayashi testified he did tell Vice Admiral Abe, the Commandant at Sixth Base Force to look into the actual circumstances. (See answer to Q. 89).

Kobayashi explained why he asked Vice Admiral Abe to investigate in his answer to Q. 90: "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 a position to instruct. Furthermore it was a critical 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."

Vice Admiral Kobayashi was performing his duties as commander in chief of the Fourth Imperial Japanese Fleet in a lawful manner and his manner of performance of the duty as commander in chief, Fourth Fleet does not in any way give rise to criminal responsibility for the executions ordered by Sakaibara on Wake October 7, 1943 while Admiral Kobayashi was aboard his flagship the Kashima at Kwajalein some 640 miles away.

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Sakaibara the commanding officer of the Wake garrison was tried, sentenced and hanged for executing the prisoners on Wake. At his trial he was asked: Q. 23 "As the commanding officer of Wake Island did you have the authority to execute the American prisoners of war, if in your opinion, it was deemed a military necessity?" Answer: "Under ordinary circumstances I could not have done so but the circumstances at that time we extraordinary." Q. 52 "Did you believe that the prisoners were a threat to themilitary security of the island and your forces on October 7, 1943?" Answer: "I believed that they would constitute a threat." There is still much uncertainty about the dispatch which Sakaibara is alleged to have sent regarding the execution of these prisoners October 7, 1943. Sakaibara testified at his trial that he sent a dispatch to the Japanese government See answer to Q. 106. In answer to Q. 101, he testified: "What did you report?" Answer: "Riotous conduct among prisoners. Have executed them." Sakaibara testified he was familiar with the Geneva Prisoners of War Convention. See answers to Q. 107 and 108. Sakaibara ordered the execution and he alone is responsible for the execution. Q. 114 "In other words, you ordered the execution of these prisoners on your own behalf and in your own right without suggestions from anyone else?" Answer, "Yes, that is right. I issued the orders."

While still on the witness stand at his own trial Admiral Sakaibara testified as follows: The witness made the following statement: "all the incidents which took place on Wake Island took place because I ordered them, and if there should be any guilt arising from the incidents that took place, I, as the person who issued the order, would like to take full responsibility for what happened and I would like for the court to take cognizance of this fact."

What about this Base Force Commander, the Sixth Base Force Commander at Kwajalein? In our defense document, Exhibit 61, the third interrogatory submitted to the Chief of the Liaison Section, Central Liaison and Coordination Office, Japanese Government was: "Who was Sixth Base Force Commander from April 5, 1943 to February 23, 1944? In the answer this very important remark is included as to the Sixth Base Force, and I quote: "This Force was placed under the direct command of the commander in chief of the Fourth Fleet on February 6, 1944." Can anyone now say that the acts of the Sakaibara and the negligence of Vice Admiral Abe were not the acts of an independent intervening agency.

The charge and the specifications fail to show that the negligence charged was the cause of the injuries complained of and the evidence shows that the injuries were not proximately caused by the negligence charged but the injuries were proximately caused by an independent intervening agency. According to law therefore the charge is insufficient to state a cause of action against a demurrer. I shall quote the rule of law set forth in 45 Corpus Juris "Negligence" Section 666. "The declaration or complaint is insufficient to state a cause of action as against a demurrer, where it fails to show that the negligence charged was the cause of the injury complained of (84)" citing the following cases: Footnote 84. "Or where it appears from the facts alleged that the injury was not proximately caused by the negligence charged (85)" citing the following cases: Footnote 85. "but by an independent intervening agency."

In 26 Am. Jur. "Homicide" Sect. 45 the rule is stated very clearly: "A person is not criminally responsible for a homicide unless his act can be said to be the cause of death (19)" citing Re Hugho, 18 Idaho 566, 1101 1029, 32 LRA (US) 877, Am. Cas. 1912 A. 138; People v. Brengard, 265 NY 100, 191 NE 850, 93 ALR 1465; People v. Kane 213 NY 260, 107 NE 655, LRA 1915 F 607, An. Cas. 1916 C. 685; Letner v. State, 156 Tenn. 68, 299 S.W. 1049, 55 ALR 915; Keller v. State, 155 Tenn. 633, 299 SW 803, 59 ALR 685.

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Although everyone will be held to contemplate and be responsible for th natural consequences of his own acts, he will not be held criminally responsible for a homicide unless his act can e said to be the cause of the death. Letner v. State, 156 Tenn. 68, 299 SW 1049, 55 ALR 915.

As we have said the evidence shows that Kobayashi did not do anything which can be said to be the cause of the deaths alleged. Nor did the acts of Kobayashi accelerate any of the deaths. The evidence clearly shows that other acts of other persons responsible third persons were the proximate cause of the mistreatments and deaths alleged.

We have shown how the Navy Minister selected the Base Force Commander on the advice and recommendation of the Chief of Personnel. These Base Force Commanders like Vice Admiral Abe were carefully selected and they were responsible persons.

We do agree that "The law holds everyone who is so situated that his acts may endanger the life of another bound to exercise caution, and holds him responsible criminally for the loss of life consequent to his failure to exercise the proper degree of caution" 26 Am. Jur. Section 205 but Kobayashi is not charged with homicide but only neglect of duty and in the rule cited above "familiar illustrations of the principles of criminal liability for homicide resulting from negligence are the reckless use or handling of firearms and the casting of stones or timbers from a housetop into the street where people are known to be passing." 26 Am. Jur. Ibid. This prese case is entirely different.

The judge advocate has said that certain laws are hard and that the Kilian case may seem hard law. As we have pointed out the Kilian case is irrelevant and can only prove that the guard unit commanders like Tanaka and Sakaibara should be punished.

We ask for only a fair trial--a trial such as has been had and we ask f a clear statement of the law of criminal negligence as it applies to the accused, former vice admiral Kobayashi, commander in chief, Fourth Japanese Fleet.

The judge advocate has said that the commission must decide whether the evidence proves beyond a reasonable doubt that the accused is guilty of neglect of duty. We add that the commission must find that the evidence proves the accused is guilty beyond a reasonable doubt of Criminal Negligence or you must then acquit the accused.

We ask you acquit the accused of criminal negligence.

Respectfully,

MARTIN E. CARLSON,
Commander, U.S. Naval Reserve,
Counsel for the accused.

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CLOSING ARGUMENT OF THE PROSECUTION IN THE CASE OF KOBAYASHI, MASASHI,

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

The defense arguments, "Like snow upon the desert's dusty face, lighting a little hour or two, is gone" (The Rubaiyat of Omar Khayyam). The argument lacks substance, content, or vitality. But unlike the desert snow the defense argument, and I speak primarily of the argument of defense counsel Commander Carlson, has left such a fog of misstated alleged law and alleged fact that several hours are required to dispel the residual confusion.

It is not my purpose to review case by case or alleged fact by fact, the material accumulated in the defense arguments. So much of that argument which is not obviously irrelevant is erroneous either in citation of law or alleged application to the facts of the instant case. Every significant relevant argument of the defense has directly, or indirectly and implicitly, been refuted by the facts and analysis of law presented in the opening argument of the prosecution. Intelligent analysis of that argument, and of the evidence presented in the instant case establishes beyond reasonable doubt the guilt of the accused.

Defense counsel have presented what they infer are brief partial summaries of the incidents charged against the accused, and have, by omission of the crucial elements of the neglect of duty by the accused, attempted to persuade the commission that there is no evidence to support the charge and specifications against the accused. I could discuss at length the evidence presented with regard to each incident, and show the causal connection (the concatenation, as the accused expresses it) between the neglect of duty by the accused, and the incidents set forth in paragraphs a through j of specifications 1 and 2. I have avoided presenting such detail in my opening argument, and similarly, in view of the fact that all the evidence is before the Commission and speaks for itself, I feel it is unnecessary in this final argument to burden the Commission with such detail. In my opening argument I briefly presented and discussed some of the pertinent evidence, and by reference to that argument the Commission can observe that even that brief discussion clearly proves the guilt of the accused.

Tersely summarized, in the light of the applicable law, the evidence proves beyond a reasonable doubt that: The law and customs of war place a duty upon the accused to control his subordinates and to protect prisoners of war. The law and customs of war establishes this as a duty of command responsibility. The accused as Commander in Chief of the Fourth Fleet had that command responsibility. The evidence produced before the commission establishes that the accused neglected that duty - he disregarded and failed to discharge that duty. The incidents which occurred within the area of the accused, were the very kind of thing that the command duty and responsibility of the accused was designed to prevent - namely mistreatment and killing of prisoners of war. These incidents were committed by the very persons the accused had the command duty and responsibility to control, namely his subordinates and persons subject to his control and supervision.

This is an adequate summary of the evidence which in the light of existing law and customs of war, and the supporting factual evidence, establishes the guilt of the accused. Further discussion of the evidence other than what is contained in the opening argument of the prosecution, is not required.

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Additional discussion of the pertinent law applicable to the instant case is similarly unnecessary, but the lengthy arguments of defense counsel in deference to their length rather than their content, merit ~~brief~~ comment. These arguments contain many genaralized statements of purported law, and many citations allegedly in support of these statements. I will attempt to tersely summarize, analyze, and explain the inaccuracy, and/or inapplicability of these generalized statements of purported law.

I will deal with Commander Carlson's argument first. That argument is a provoking one - not because of the logic of its contents, but because it manages to encompass in one argument such a vast amount of misstatement and misapplication of law. Because of the excursive nature of this argument it will be necessary for the most part to deal with the content of the pages of counsel's argument, rather than with any logical pattern of argument.

Pages 1 through 3 may be synthesized as containing the following arguments:

(a) No definition in international law, or in the prosecutions' case, of the duty of the accused under international law.

> The prosecution has shown the nature and content of the duty of the accused, by reference to pertinent treaties, and to the decision of the United States Supreme Court in the Yamashita case, in which they discuss the duty of the commander of armed forces to control his subordinates and to protect prisoners of war. This will be discussed again briefly in reply to Mr. Takano's argument.

(b) The duty should have been defined and specifically set forth in the specifications or a bill of particulars.

> The Commission has previously ruled upon both these questions. It is only necessary here to note that in the Yamashita case the pleading was not more specific in this regard, and the Supreme Court of the United States found the charge adequately stated a violation of the law and customs of war.

(c) The standard of conduct in negligence is the care which an ordinary prudent person would exercise under like circumstances.

> This is merely one of many definitions of reasonable care and the judge advocate has no particular objection to it, except that it is derived primarily from cases of civil rather than criminal negligence, and that the judge advocate believes the subject is more adequately discussed in the prosecution's opening argument in dealing with elements of criminal negligence and brief discussion of terminology.

(d) Defense attempted to set up a standard of conduct by offering documents from the files of Commander Marianas, dealing with prisoners of war, war criminals, and witnesses. He cited law to show that custom with regard to what men generally do engaged in similar activity has some relevance, even though it is not conclusive, as to what an ordinarily prudent person would do under the same circumstances.

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The documents offered by defense counsel were rejected, and are not evidence before the Commission. These documents were not relevant to any issue before the commission. The dates of the documents and the nature of the documents as established by defense counsel at the time of offering such documents in evidence, clearly showed their irrelevance. All of these documents which were offered were issued after the cessation of hostilities. They clearly therefor could not be relevant to the standard of conduct to be required of a commander of armed forces during the course of hostilities. The documents were specific and not general in character. They dealt with specific problems, and not with the general question of humane treatment of prisoners of war. They constituted specific orders or interpretation of orders by Commander Marianas, issued after the cessation of hostilities.

They did not purport to be, nor did they contain any general standard of conduct with regard to treatment of war. They did not constitute, nor did they purport to constitute all the orders which had been issued by Commander Marianas, nor did defense counsel establish, or even seek to establish, that in fact no other orders or instructions had been issued by Commander Marianas concerning treatment of prisoners of war. Defense counsel elicited from the witness, Lieutenant Commander VANSTON, the current Flag Secretary, the statement that these four documents were the only four documents in the present files of Commander Marianas. Defense counsel never sought to establish the meaning of the term "present" files, and there is no evidence to establish what the term means. From the testimony and the action of the commission it appears that these four documents which were rejected did not contain anything relevant to the instant case, or the question of standard of conduct to be applied to the accused. These four documents were all issued after the cessation of hostilities. Since defense counsel failed to establish how far back the present files of Commander Marianas go, it is impossible to make any inference even as to the subject of what documentary orders were issued by Commander Marianas during the period of hostilities. It is clear that it can not disclose what verbal or dispatch orders may have been issued. No effort was made by defense to call Commander Marianas, or the Flag Secretary during hostilities to establish what orders, written and verbal were issued during the period of hostilities.

If defense had properly sought to establish the conduct of Commander Marianas during the course of hostilities, by the presentation of all the facts, including information as to what specific orders with regard to treatment of prisoners of war had been issued by the higher echelons with regard to treatment of prisoners of war, such evidence might have some conceivable logical relevance to the question of standards of conduct. (Such comparison of course should more aptly be made with the Commander in Chief of a Fleet, and not with Commander Marianas, since accused has continuously sought to argue that the accused was Commander in Chief of an operational fleet.) But the concensus of sound legal opinion would not permit even this attempt to establish conduct of another individual (viz: an individual U.S. fleet Commander in Chief) as a standard on which to judge the conduct of the accused. Defense counsel has himself cited closest authority for the use of comparison with actual conduct in order to ascertain the legal standard, (in his citation on page 3.) This citation shows that a "custom", "that which is ordinarily done by men generally, engaged in a similar activity" has some relevance. The actions or orders of one individual Commander in Chief, or Commander, even if the factual circumstances such as previously existing orders by higher echelons, and by lower echelons, were shown to be similar, would not establish a "custom" or "what is ordinarily done by men generally" under like circumstances.

In short the attempt of counsel to establish Commander Marianas as a standard for comparison with the accused failed because of (a) the method by which he attempted such proof; (b) the nature of the proof offered, and (c) the content of such proof.

Page 4 of defense counsel's argument takes exception to certain statements in the argument of the judge advocate. Examination of the record, and of the arguments of defense counsel establishes the truth of each and every one of these statements by the judge advocate quoted by defense counsel.

On page 5 defense counsel makes certain comments with regard to the YAMASHITA case. After considerable distortion of the facts of that case he concludes that the only similarity between YAMASHITA and the accused KOBAYASHI is that they were both Japanese. Similar distortions appear throughout his entire argument in connection with this case, and in view of this, it is necessary to briefly set the record clear in this regard.

The judge advocate has not contended that because an army military commission convicted YAMASHITA of criminal neglect of duty that this commission should convict the accused KOBAYASHI. The judge advocate on pages 20 and 21 of his opening argument carefully pointed out that the crux of the instant case "is largely a factual question in the determination of which the commission must consider all the circumstances, all the acts and omissions of the accused, examined in the light of his solemn duty and responsibility as Commander in Chief."

In criminal negligence cases every case must be decided on its own facts. No two cases can be identical in the specific facts. But this does not mean as defense counsel has argued, that we should disregard the YAMASHITA case and the KILIAN case because their facts are not identical. The KILIAN case and the YAMASHITA case, particularly in the light of the decision by the U. S. Supreme Court, are valuable significant precedents, which clearly present the law, and discuss the basic principles involved in the law of criminal negligence as applied to neglect of duty of command responsibility.

The judge advocate cited the YAMASHITA case as a precedent in . . the field of command responsibility, particularly noting that the charge and the findings of the YAMASHITA case evidences the fact that knowledge of incidents or atrocities within the command is not a necessary element in order to prove criminal responsibility for neglect of duty. The Supreme Court of the United States specifically found that the charge, which did not contain any averment of knowledge, was an adequate one, stating, I quote from page 11, of that opinion, "But we conclude that the allegations of the charge, tested by any reasonable standard, adequately alleges a violation of the law of war, and that the commission had authority to try and decide the issue which is raised."

The commission did not, as I have shown in my earlier arguments, make any finding that the accused had knowledge of any incidents. But the Supreme Court, footnote 4, clearly and implicitly shows that a finding of knowledge was not necessary in order to establish criminal guilt, for it notes "We.... hold .... that the commission, upon the facts found, could properly find petitioner guilty of such a violation." The question of knowlege is discussed at greater length in answer to the arguments of Mr. TAKANO, but it may be briefly noted here with regard to the element of knowledge that in the YAMASHITA case, the accused General YAMASHITA, "testifying as a witness in his own behalf, had denied that he issued any orders directing the commission of any act of atrocity, that he received any report of the commission of such acts, that he had any knowledge whatsoever of the commission of such acts, that he permitted such acts to be perpetrated, or that he condoned the commission of such acts" (Trial of General YAMASHITA, War Crime Trial Law Reports, Volume IV, page 26.)

0901

We have proved and the accused has admitted that he had knowledge of the executions on Kwajalein, and the executions on Wake. Yet, despite such knowledge, he took no action to prevent further mistreatment and killing of POWs.

While, as defense counsel notes, the commission in the Yamashita case could have reasoned that Yamashita knew (or should have known) of the widespread atrocities under his command, the commission did not make any finding of that nature, and the supreme court of the United States noted that "the commission, upon the facts found, could properly find petitioner guilty of such a violation."

The accused has argued that in the Yamashita case the accused was on the scene, and not "on a flagship a thousand miles away when the incidents occurred." First let us note that as to the incidents set forth in paragraphs (g), (h), and (j) of the instant case, the accused Kobayashi was on Dublon Island, Truk Atoll, during the time of the occurrence of these incidents. Compare the size of Dublon Island with the size of the Philli-pine Islands. Secondly let us note the vast area of the Philli-pines under the command of Yamashita, the vast number of troops under his command, and the battle conditions prevailing throughout that area during the period of the commission of ~~hostilities~~ incidents. JK Surely the accused Kobayashi cannot argue that the conditions of his command placed any greater personal burdens of an operational nature upon him, than upon Yamashita, in order to claim that his duties were so much more pressing that he cannot be held to a standard of care comparable to that of Yamashita.

It is true that the Yamashita case involved 123 incidents whereas the specifications against the accused merely allege 10 incidents. But the accused can be found just as guilty of criminal neglect of duty, in permitting these ten incidents, as Yamashita was of permitting the incidents which occurred under his command. The question of neglect of duty is not affected by the fact that Yamashita's neglect resulted in greater number of atrocities than occurred within the area of command of the accused.

Whether the acts and omissions of the accused in the instant case constituted a criminal neglect of duty is largely a factual question for the determination of the commission in the instant case. It is a question which must be determined on the facts in the instant case. But that does not mean that the Yamashita case is not a valuable precedent to bear in mind, or that the Commission should fail to examine the pertinent law as set forth in the Yama-shita case. The Supreme Court of the United States, in discussing the problem of command responsibility under international law and the law and customs of war, has ably stated the law with regard to the nature of command responsibility and the duties under the law and customs of war. Argument of defense counsel that the Commission should reject, and fail to consider the opinion of the United States Supreme Court in this matter, because the facts of both cases are not identical, is too fallacious to warrant further comment.

0902

On page 6 of his argument defense counsel comments briefly with regard to the KILIAN case. His comment is clearly misleading. In his first paragraph counsel cites the specification which was not found proved and which therefore has no conceivable relevance to the instant case. For that reason as well as the fact that its content is not relevant to any charge or issue in the instant case, the prosecution did not even present this charge in discussion of the case. Defense citation of it is clearly irrelevant. In the following paragraph he sets forth the specification charging neglect of duty. He learnedly comments "Does this read like a war crimes case? No, it is only the case of a jailer being tried for violation of the 96th Article of War. It is altogether irrelevant in this present case."

(a) Clearly this was not a war crimes case. No one contended that it was.

(b) Colonel KILIAN, the commanding officer of the 10th Reinforcement Depot, was not "a jailor". He was the commanding officer of a large reinforcement depot. The guardhouse of that depot was only a small fraction of that command.

(c) The contention that because this is not a war crimes case it is irrelevant is clearly untrue. The case, judge advocate pointed out, was cited to establish the fact that command responsibility has been applied in cases other than war crimes cases, and that in fact it has been applied by our own armed forces in trial of personnel of our own armed forces, that it has been established, as evidenced by the KILIAN case that liability for neglect of command responsibility does not depend on knowledge of incidents or injuries resulting from such neglect of duty. The KILIAN case clearly stands for, supports and applies all these propositions of law. Clearly therefor it is relevant to the legal problems presented to this commission.

On page 7, defense counsel points out that the Court found accused guilty of the second charge except for the word "knowingly". In short they found him guilty of neglect of his duties as such Commanding Officer of said Depot, in that he "permitted the imposition of cruel, unusual and unauthorized punishment". Clearly therefor the court found that knowledge was not a necessary element of a charge of neglect of duty.

In the remainder of this paragraph defense counsel has either consciously or unconsciously made misleading statements. He says "So in effect, the general court martial found Colonel KILIAN 'guilty' of practically nothing which is borne out by the sentence, 'To be reprimanded and to pay a fine of $500'. The reviewing authority made further exceptions to the courts findings." The implication of defense counsel is that not only did the court find accused guilty of practically nothing, but that the reviewing authority even cut down the scope of the action making "further exceptions" to the courts findings. This implication is diametrically opposed to the facts. The convening authority in that case, as specifically stated in the General Court Martial Order (No. 140, in approving the sentence stated "The sentence is approved and will be duly executed. As adjudged by the court, the sentence is totally inadequate from the standpoint of imposing appropriate punishment upon one convicted of such wrongful neglect of duty. In imposing such meager punishment the court reflected no credit upon its comprehension of its responsibility."

Similarly the review of the Staff Judge Advocate, prepared for the Commanding General, Continental Base Section points out that the neglect or failure upon the part of the accused ..... is..... legally punishable to an extent far greater than disclosed by the sentence imposed by the court."

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Defense counsel then cites, from the argument of defense counsel in the KILIAN case, an extract from Section 166 of Wharton's Criminal Law... reading: "But with these exceptions, a party, who by negligence produces another's negligence, cannot as we have seen be chargeable with the consequences of that negligence....."

despite defense counsels interpretation of the law

With regard to this argument, at this point we need merely briefly note: (a) that KILIAN was found guilty by the court, and sentenced, and the sentence was approved; (b) that in the very next section in Wharton's Criminal Law, it is stated "and as a general rule in this respect we may say, that when a responsibility specifically imposed on the defendant is such that an omission in its performance is, in the usual course of events, followed by an injury to another person or to the state, then the defendant is indictable for such an omission; (c) that section 174, Wharton's Criminal Law notes that where due supervision could have prevented the mischief, then a master neglecting such supervision is indictable for the acts of his servant. This argument will be discussed at greater length later, but it should here be noted that defense's argument is clearly not supported by the law, as evidenced by the very decision from which he attempts to cite the argument of defense counsel. the KILIAN case,

Digressing momentarily from the page to page discussion of counsel's argume..., if we look to page eight we find another clear miscitation of the KILIAN case by defense counsel. He stated that the court, and the convening authority did not agree with the judge advocate that the KILIAN case applied command responsibility.

The fact is that the court did recognize the responsibility of the accused KILIAN, the Commanding Officer of the 10th Reinforcement Depot for his neglect of duty in permitting the imposition of cruel, unusual and unauthorized punishment. The sentence was imposed although he did not know of such incidents of punishment. The convening authority agreed with this view, and stated in effect that the court was derelict in not imposing a greater punishment. In my opening argument I have cited at some length the opinions of the reviewing authority in the case, including the review of the Assistant Judge Advocate General of the United States Army, concurred in by the Judge Advocate General of the United States Army. The action of the court, the convening authority, and the reviewing authority clearly and specifically evidences the fact that knowledge is not an essential element of the crime of neglect of duty. Counsel infers that because the sentence was light this was not a criminal punishment, and hence not a criminal case. True the sentence was light, but the convening authority specifically condemned the minor sentence. And it should be noted that in the KILIAN case, the neglect of duty of KILIAN did not result in deaths, but merely minor beatings, hazings, etc., it would therefor be natural not to expect punishment equivalent to the type of punishment warranted in a case, as the instant case, where the neglect of duty resulted in the death of 118 prisoners of war, as well as torture, abuse and mistreatment, not only of some of these 118, but of an additional 51 prisoners of war.

On page seven, counsel states: that in the instant case there is no evidence that accused induced his subordinates to perform their guilty acts, that effort was made to send the prisoners to Japan but that American control of the sea prevented it.

(a) The judge advocate has not charged that the accused induced his subordinates to perform the guilty acts. The accused is charged with his neglect of duty, and not with being "an accessory before the fact."

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(b) If in fact accused made every reasonable effort to send American prisoners of war to Japan, that is a fact to be considered by the Commission in relation to whether accused did everything reasonably required to control his subordinates and protect prisoners of war. But it should be apparent that it does not negate his responsibility to take additional steps to control his subordinates and protect prisoners of war. Nor does it excuse his inaction, in the face of known incidents of killings of prisoners of war.

On page seven, accused argues that just ten incidents occurred in the whole area of the accused. What proof does defense offer to establish that only ten incidents occurred? Only the fact that ten incidents are charged in the instant specifications against the accused. Similarly he argues that no incidents occurred in the area of the Third or Fifth Base Forces under the accused, on the basis of the same reasoning. In view of the fact that the accused has only been charged with these ten incidents, it would be improper for the judge advocate to discuss this matter further, except to point out that there is absolutely no evidence in the record on which the accused can, or has, based his contention that no other incidents occurred within the area under the command of the accused or in the subordinate areas of the Third or Fifth Base Forces.

On page eight, defense counsel argues that because prosecution has not alleged that the breach by accused was wilful and knowing, that therefor prosecution is applying absolute responsibility not command responsibility. Absolute responsibility is not being applied. Neglect of duty is charged, and if Commission does not find accused neglected his duty under international law to control his subordinates and protect prisoners of war, then the accused should be acquitted. The matter is fully discussed in my opening argument.

Counsel argues there is no criminal responsibility under army or navy regulations for neglect of command responsibility.

Article I - of Navy Regulations specifically provides that: "A commander who offends against this article shall be punished as a court martial directs."

Similarly the KILIAN case found accused guilty of the 96th Article of War for neglect of duty charged.

Counsel for accused in this case, notes that both the defense in this case and in the KILIAN case, contended that neither the YAMASHITA nor the HOMMA case, have any application.

Note that in the KILIAN case the accused was convicted. That the Judge Advocate General of the United States Army concurred with the review of the Assistant Judge Advocate General which specifically states: "The reasoning of the Supreme Court in the YAMASHITA case, ... must be applied here."

Counsel for accused cites the dissenting opinions in the YAMASHITA case. The dissenting opinions are not law. And the peculiar citation of them, and inference from them by defense, is not persuasive.

On page nine, counsel contends that the court in the KILIAN case did not accept the theory of command responsibility because Colonel HERR, Brigadier General VAUGHAN,..... etc., were not brought to trial.

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The argument of defense counsel is illogical, and fallacious:

(a) The court in the KILIAN case could not charge others for crime. It is limited to its own specific duty to try those charged and brought before it. KILIAN was so charged for neglect of duty as commanding officer of the 10th Reinforcement Depot. He was convicted of this neglect of duty. The action of the court clearly reflects its application of the theory of command responsibility.

(b) Fact that persons in higher echelons were not charged or tried with regard to the incidents occurring at Lichfield, is not in the slightest persuasive of accused's contention. These persons in higher echelons may have completely performed all that was within their power and appropriate in the circumstances to protect prisoners. They may have issued specific instructions regarding treatment and handling of prisoners in brigs. They may have issued reminders in the form of instructions or bulletins. They may have delegated specific subordinates to look into the matter. They may have investigated alleged incidents and have ordered and imposed strict punishment for improper treatment of prisoners. The very fact that they ordered the trial of KILIAN is an act in performance of that duty to protect prisoners within the area of their command.

On page ten, defense contends that judge advocate has not set forth the law of criminal neglect of duty as it applies in the instant case.

The judge advocate in his opening argument discussed this at length, but will reiterate certain portions of this in answer to Mr. TAKANO's argument.

Defense counsel claims the judge advocate stated accused would have been punished under the provisions of Japanese law that the judge advocate cited.

The judge advocate did not say this. Counsel is misquoting the argument of the judge advocate. The judge advocate specifically pointed out that the Japanese law was not cited for the purposes of showing provisions under which accused would be punishable, but was cited merely to apprise the commission of the fact that even under Japanese law the concept of criminal responsibility for neglect of duty is well established and broadly applied. The judge advocate specifically pointed out the fact that the presence or absence of Japanese criminal provisions for punishment of the accused is clearly irrelevant to the issue of the guilt of the accused, for the crime charged is "violation of the law and customs of war."

Defense counsel agrees with the dissenting opinion of RUTLEDGE in the YAMASHITA case, that proof should be required that the accused knowingly failed to take action to prevent the wrongs done by others, in order to establish his criminal liability.

The decision of the court, not the dicta of dissenting opinions of Mr. RUTLEDGE is the criterion of what the law is as decided by the Supreme Court of the United States. Knowledge is not an essential - as we have and shall subsequently point out at some length. Similarly we will point out for the interest and edification of counsel that the evidence shows knowledge of two incidents by the accused - which should have put him on warning as to the state of his forces, and their treatment of prisoners of war. His subsequent failure to learn the clear facts, and his failure to learn of the other incidents due to his neglect of duty and failure to be vigilant even after such clear warnings cannot be used as an excuse to forestall his conviction for the neglect which made such subsequent crimes acts of his subordinates and injury to prisoners of war foreseeable and probable.

Defense states that prosecution has cited cases from master and servant relationship. He states the prosecution should cite criminal cases, and not cases of tort liability.

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Defense counsel apparently failed to hear, read, or understand the cases cited by the judge advocate. These cases cited by the prosecution were criminal cases. And the appropriate text from Wharton's Criminal Law, cited was the opinion of recognized authority on criminal law as to analysis of these cases of criminal liability of a master for acts of his servant.

On page eleven, defense counsel states that "the judge advocate naively says there would have been no mistreatment of prisoners of war if KOBAYASHI had issued specific instructions to all his subordinates. He argues murder is prohibited by law, yet murders occur.

The judge advocate has not contended that no mistreatment would have occurred. Isolated acts of mistreatment as the judge advocate pointed out might occur despite every exercise of proper efforts of control and protection. But it is clear that high-ranking subordinates of the accused would not have deliberately disobeyed specific orders of the accused with regard to treatment of prisoners of war. They would not have murdered, and tortured prisoners of war, if the accused had ordered that prisoners of war should not be mistreated or killed, and if the accused had taken appropriate steps to prevent such mistreatment and killing of prisoners of war. Not only would action by accused have forestalled action by such high-ranking officers, but through such orders and evidence of concern over treatment of prisoners of war would have forestalled numerous of the incidents which were committed by lower ranking individuals within his command.

Defense contends that intermediate commanding officers have been tried for their participation in incidents set forth in the specifications.

The accused is not being tried for the acts or omissions of such subordinates. He is charged and being tried for his own neglect of duty in permitting the incidents set forth in the specifications.

On page twelve, defense counsel contends there is no evidence to the crimes set forth in paragraphs (g)&(h) of the specifications. Similarly on page fourteen counsel insists that SAKAGAMI is innocent of the charge, and that OKUYAMA was never tried, and therefor there is no evidence in this case of OKUYAMA's guilt, and participation in the incidents (g) and (h).

The judge advocate has introduced from the record of the IWANAMI case the pertinent portions of charges and specifications showing the action of the commission as to these charges and specifications. These extracts establish the guilt of IWANAMI and SAKAGAMI, in the incidents respectively charged. They also evidence the participation of OKUYAMA and NABETANI. Apparently also with regard to OKUYAMA's participation, defense counsel has forgotten the testimony of his own witness, IWANAMI.

On page twelve, last two paragraphs, defense cites from 38 Am. Jurisp. with regard to "actionable negligence". Note this entire citation is taken from cases and text dealing with civil liability for damages, and not criminal liability for negligence. No cases of criminal negligence are cited there.

On page thirteen, accused argues that there was no report of deaths made to the accused, and that the hospital operated in accordance with regulations from the Navy Ministry. Therefor he concludes the accused had no duty regarding the hospital or its medical officers.

Defense counsel is in error. The accused had the duty to control them. They were under his command. Although medical matters were primarily determined, as it is in our navy by BuMed & Surgery, they were under his command, and accused had duty to control them and keep them from committing crimes and atrocities against prisoners of war. If accused

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theory is to be believed - then even if accused knew beforehand of any atrocities which hospital was about to commit he would have no duty to control them, no duty to prevent such atrocities. Note also the liability of accused re the incident set forth in (g) and (h) is twofold. He not only had the duty to control the medical officers, as well as other subordinates under his command to prevent their commission of brutal atrocities and war crimes, but also had the duty to protect prisoners of war. These prisoners of war were taken from the guard unit, they were prisoners held captive by the armed forces of Japan under the command of the accused. The accused had the duty to protect these prisoners of war. He failed by his neglect of duty to protect them.

Briefly with regard to the citations of case material on pages thirteen and fourteen note that defense counsel is again citing cases dealing with civil liability, criminal cases. Since the relevant phases of criminal negligence have been dealt with adequately in prosecutions opening argument it is unnecessary to dwell upon these elements at this time.

On page fifteen, the first paragraph, purportedly cites "Wharton's Criminal Evidence, Volume 2, Section 678, page 1126, as follows, and I quote from defense argument. "Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable. Some courts deny the right to reproduce the testimony of a witness unless he is shown to be dead, even though he has gone beyond the jurisdiction of the court, citing U. S. v. Angell, etc."

Counsel's citation of Wharton's Criminal Evidence, Volume 2, is most faulty, and misleading. Section 678 of Wharton's Evidence, in fact reads:

> "678. In General. Testimony taken at a trial cannot be read at a subsequent trial if the witness is obtainable. But where former testimony is admissible, it is generally admissible in criminal cases, on the same ground as in civil cases. In some early cases, testimony given on a former trial was held not admissible on a subsequent trial in criminal issues, on the ground that it contravened the right of the defendant to be confronted by the witnesses against him. But these cases have been quite generally overruled, or the rule thereof changed by statute.
>
> "The following grounds have been considered by the courts as a basis for the admission of former testimony: (1) death; (2) absence; (3) illness or insanity; (4) imprisonment; (5) official duty; (6) claim of privilege; (7) absence by procurement."

The second sentence of defense counsel's alleged citation does not appear at all in Section 678, it appears in 680, and the content of that section clearly indicates how misleading defense counsels alleged citation is: Section 680 reads as follows:

> "680. Absence of witness -- In general. The courts did not accept the principle that testimony of an absent witness could be reproduced as readily as they did the proposition that death was a ground of permitting such reproduction. And as the rule has been accepted, various conditions have been made which have required time to overcome, and they are not entirely overcome even at the present time. It seems logical to hold that, if death permits the reproduction of the testimony of the witness, his absence beyond the jurisdiction of the court, so that his presence cannot be secured at the trial, would require the same result. The courts have quite generally adopted such ruling.

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But some of the courts require evidence that he is permanently or indefinitely beyond the jurisdiction. Others hold that the mere fact that his whereabouts cannot be discovered is not sufficient to admit the testimony. Some courts deny the right to reproduce the testimony of a witness unless he is shown to be dead, even though he has gone beyond the jurisdiction of the court. The prevailing rule at the present time, however, is that the absence of the witness will justify the reproduction of his testimony, provided, of course, sufficient predicate for its admissibility is shown. Some courts take the view that the former testimony of a witness may be reproduced where she cannot, with due diligence, be found within the state....."

that citation by defense counsel
Prosecution believes this is consistent with attempt of defense counsel JK
to mislead and confuse the commission in the instant case with regard to the law as well as the facts of the instant case.

From the foregoing citation of authority, as well as from the specific authorization contained in the rules of evidence under which the commission is authorized to proceed it is clear that it was not incumbent upon the prosecution to produce IWANAMI, SAKAGAMI, or OISHI. With regard to OKUYAMA,(and similarly with regard to NABETANI) the judge advocate is not required to produce them as witnesses merely because they were involved in the incidents charged against the accused - and in addition it should be noted that as the judge advocate pointed out at the time of the facetious motion of defense, all evidence known to the prosecution indicates that OKUYAMA is not alive, and the prosecution offered to follow up any leads given by defense indicating that OKUYAMA was alive, and would make every effort to make him available if defense would do so.

On page sixteen, defense counsel again cites the doctrine of proximate cause in negligence as applied in actions for civil liability, and not with regard to criminal liability.

If the commission will examine the cases cited by defense counsel on this page, they will note that not one of them even in its case heading reads like a criminal action. These are not cases of U. S. vs.; or State of ... vs.; or Commonwealth vs.,; or People vs.,; or In re.,. Each and every one of the cases cited by counsel shows by the very title of the case that it is completely inapplicable in the instant case because it deals with civil liability for negligence, and not criminal liability and is an action between private parties as shown by the titles in these cases. I discuss this doctrine of proximate cause specifically in answer to the argument of defense counsel Mr. TAKANO.

On page seventeen, first paragraph, deals with performance of an act, we are here dealing with omission to perform.

With regard to Wake Incident.....defense contends that accused did everything to protect these prisoners of war, and when he learned of it did everything required to investigate the matter.

I will not rehash the defenses argument in this regard. But note - (a) the alleged request via liaison officer was apparently sent early in the tour of duty of the accused, and prior to KOBAYASHI's visit to Wake. The Fourth Fleet staff ordered all ship transportation or knew of all ship transportation to and from Wake. Accused therefor knew that no transportation had been furnished, or it may equally be implied he knew that none was scheduled to be furnished to these prisoners of war at Wake. (b) KOBAYASHI at Wake saw these prisoners of war, and more important saw and spoke to SAKAIBARA. SAKAIBARA told him how concerned he was over having so many prisoners of war at Wake, because

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of fear of enemy invasion. The prisoners of war were large in number and the concern of the commanding officer was considerable. He told KOBAYASHI about his concern - what did KOBAYASHI tell him? This we will never actually know - the accused claims he did not tell SAKAIBARA what to do with the prisoners of war in case of attack or land invasion. The commission can decide whether this is true, and if true whether this failure to instruct SAKAIBARA with regard to what to do with the prisoners of war in the event of land invasion constituted neglect of duty. In considering this it is proper for the commission to evaluate the testimony of the accused to the effect that he planned or hoped the prisoners of war could be removed prior to enemy attack. If the commission believes this testimony they should consider (a) whether, accused did in fact issue instructions to SAKAIBARA as to what to do if attack occurred first, (b) whether if he did not issue such instructions, whether he is negligent in not issuing instructions that prisoners of war should not be mistreated or killed. (c) whether in view of fact that the accused as commander in chief of the Fourth Fleet, knew through his staff of the transportation situation, he should have known that no transportation was available or scheduled, and knowing this whether he shouldhave issued instructions to SAKAIBARA regarding treatment of prisoners of war. With regard to subsequent inaction after knowledge of the killing of the prisoners of war on Wake Island, the judge advocate has adequately discussed this matter in his opening argument and refers the commission to the summary of facts, and ahalysis of certain highlights presented in the opening argument.

On page eighteen defense counsel cites testimony of SAKAIBARA at his trial that he ordered the incident, and "would like to take full responsibility."

That is hardly controlling in this case. SAKAIBARA may have ordered the execution at the time it was committed, and clearly he may have been willing to relieve his subordinates who were tried with him, from their criminal responsibility. But the law does not permit one to absolve another of criminal responsibility, by attempting to accept the responsibility of such other persons. SAKAIBARA paid for his responsibility, but it does not relieve the accused of his criminal liability for neglect of duty. Whether SAKAIBARA in ordering the execution at the time of enemy landing was carrying out express instructions of the accused or conversely carrying out his own intention previously expressed to accused, as some of the evidence would perhaps circumstantially imply is not an essential element of the instant case. The accused is charged with his neglect of duty in not doing that which was in his power and appropriate in the circumstances to control his subordinates, or to protect prisoners of war, and that is the question which the commission must decide. No instructions were issued by the accused with regard to humane treatment of prisoners of war. The accused just prior to his visit to Wake Island, had learned from the very lips of the Commandant of the Sixth Base Force at Kwajalein that prisoners of war were executed at Kwajalein. He made no comment, asked no questions, issued no instructions, made no investigation of the incident. Captain INOUE of the staff of the Fourth Fleet, has also testified that on this inspection he also was informed of the execution of these prisoners of war. No action was taken by the accused. The accused did not even show any interest in this execution of prisoners of war, reported to him by his own direct subordinate Rear Admiral ABE.

Would a "reasonably prudent" man (to cite defense counsel) have considered this was an adequate performance of his duty to control his subordinates and to protect prisoners of war?

"PPPPP(13)"

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Isn't the converse more apparent, that ABE, and ABE's subordinates, could see that the accused KOBAYASHI, commander in chief of the Fourth Fleet, was not interested in prisoners of war matters, and was not concerned about the fact that prisoners of war were killed by his subordinates. His inaction in the face of the express direct knowledge of the killing of these prisoners of war was clearly a permission to ABE and his subordinates to treat prisoners of war as they pleased, for the commander in chief of the Fourth Fleet, did not care if they were killed or not, and even when told they were executed did not bother to ask any details, make any investigation, or make any comment whatsoever.

What greater proof of neglect of duty can be secured - the facts are strong enough to be consistent with the contention that such inaction in the face of knowledge of a killing was tantamount to express authorization to his subordinates to go to any limits they desired in handling prisoners of war. Knowing these prisoners had been killed at Kwajalein - the accused went to Wake, saw 96 prisoners of war at the guard unit, heard SAKAIBARA complain that he was concerned over what to do with the prisoners of war in case of invasion, and the accused said nothing with regard to how to handle the prisoners of war in case of land invasion. Knowing of the Kwajalein incident, knowing that SAKAIBARA might also know of the killings on Kwajalein where the Commandant of the Sixth Base Force was in command, the accused failed to issue any instructions with regard to treatment of prisoners of war. Is this how a reasonably prudent man would perform his command responsibility to control his subordinates, and protect prisoners of war? The facts speak for themselves. See discussion in the prosecution's opening argument.

P.19 - On page nineteen, counsel states that the acts of responsible third persons were independent intervening agencies, and their acts, not the accused's, were responsible for the deaths charged.

This question is fully discussed in reply to Mr. TAKANO's argument.

Similarily on page nineteen, defense argues that the instant case is not a case of negligent homicide, but is a case of neglect of duty and hence those cases cited by the judge advocate with regard to negligent homicide are not applicable or pertinent with regard to the case against KOBAYASHI.

Neglect of duty as I have pointed out is part of the fundamental law of criminal negligence. Similarly negligent homicide is also part of the fundamental law of criminal negligence. These are not separate and distinct parts of the law of criminal negligence, for they overlap. Criminal neglect of duty, where death ensues may in fact constitute negligent homicide. It is clear therefor that much of the law of negligent homicide, is pertinent to consideration of the instant case, not only because of its relevance to general principles underlying the entire law of criminal negligence, but also because of its specific application to problems of neglect of duty. In my opening argument I pointed out the fact that in many cases of negligent homicide the problems of the courts are more difficult than in the instant case, because the court must first find the existence of a duty toward the injured person, in order to establish the breach of that duty and resultant criminal responsibility. In the instant case of neglect of duty (as in similar cases) the duty is a specific one - in that the duty clearly is to control subordinates, etc., and to protect prisoners of war. The problem of existence of a duty, is therefor not a problem for such courts, and discussions of questions of probability of, or foreseeability of injury which sometimes occupy much of the attention of courts in considering cases of negligent homicide in order to find the existence of a duty, are not material in the instant case. The problems of breach of duty, by failure to take necessary or appropriate action, is relevant and presents analogies which may be of some assistance in considering the issues before the commission.

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II. Argument of Defense Counsel, Mr. Takano.

The first argument of defense counsel Mr. Takano - deals with so-called ex post facto application. The essence of this argument is that either the duty of the accused or criminal liability for breach of that duty, is the result of an ex post facto application of law, and therefore invalid. This argument has been raised and answered in so many previous war crimes cases that it is clearly unnecessary to even consider the argument other than to point out the fact that the duty of the accused to control his subordinates, and to protect prisoners of war is one which existed long before the accused became Commander in Chief of the Fourth Fleet, and as I previously pointed out, has its roots firmly implanted in the law and customs of war.

> As far back as 1907 recognition of this accepted usage and custom of war was specifically incorporated in the Fourth Hague Convention. In regard to the duty to control, this convention lays down as a condition which an armed force must fulfill in order to be accorded the rights of a lawful belligerent, that it must "be commanded by a person responsible for his subordinates." With regard to the duty to protect, Article IV of the Annex to this convention provides: "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated." The later Geneva Prisoner of War Convention, 1929, expresses this duty to protect under law and customs of war, more concretely in the terms "...They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity..."

The criminal liability of an individual for violation of the law and customs of war is firmly established. The case of Respublica v De Longchamps, 1 Dall. 110 (Pa. 1784), decided in Pennsylvania in 1784, applied international law in criminal prosecution of an individual 164 years ago. The Llandovery Castle case, (Ditmars and Boldt) arising out of World War I, the Saboteurs case (Ex Parte Quirin, 317 U.S. 1, in which the U. S. Supreme Court held in effect that despite the absense of any prior domestic legislation authorizing its application, individual offenders could be punished for offenses under the "law of warfare branch of the common law of nations"), as well as the numerous war crimes cases decided since the close of World War II clearly evidence the fact that the instant charge is not a prohibited ex post facto application of criminal law. The Yamashita case, is of course particularly in point with regard to the application of criminal responsibility for neglect of the duty of command responsibility, as charged in the instant case. I believe the commission will find the action of the United States Supreme Court in upholding the charge in the Yamashita case more persuasive in this regard than the contention of defense counsel that the offense charged is an ex post facto application of criminal law and therefore invalid.

The next argument of defense counsel deals with causality, and so-called proximate causation. Defense counsel erroneously contends that the connection of the accused with the incidents set forth in paragraphs a through j of Specifications 1 and 2 is too remote to warrant the application of criminal responsibility.

> Much of the language he cites is with regard to the doctrine of proximate cause. This doctrine of proximate cause is one which has its primary application in civil liability for negligence - and the cases that the accused has cited are largely, almost exclusively, derived from the cases dealing with civil not criminal liability. Wharton, Criminal Law, 12th Edition does not even bother to discuss the doctrine as such in his treatment of criminal negligence, and the index merely

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refers one to Chapter VII, which deals with causal connection between offender and offense. Similarly in Miller on Criminal Law, the doctrine is not even mentioned in the index. The reason for this is that the doctrine of proximate cause, like the doctrine of zone of danger is primarily one created in the effort to reasonably limit the class of persons who owe the duty, or to whom one has the duty, to use due care. Such a doctrine is largely inapplicable in criminal law for the majority of instances of criminal negligence arise out of a situation where the duty is specific, having been established by specific law or custom. It is therefore unnecessary to limit the class of persons who owe the duty of due care or to whom such duty is owed, since such class of persons is clearly ascertainable from the nature of the duty and the described class of persons owing such duty. It is unnecessary to discuss at any length the derivation and limited application of this doctrine of proximate cause in criminal cases. But a brief discussion of causation is warranted. ~~The instant case clearly falls within the limits of established criminal law with regard to criminal negligence and necessary causal connection between the acts of the accused and the resultant incidents.~~

The instant case clearly satisfies all the requirements of criminal negligence in regard to adequate proof of required connection between the negligence (neglect of duty) of the accused and the incidents charged.

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

In the instant case, the only element of the specification involving the question of causality at all, is presented by the use in the specifications of the term "permitting". Whether the accused by his neglect of duty, his disregard and failure to discharge his duty, to control his subordinates, and to protect prisoners of war, "permitted" the incidents set forth in specifications 1 and 2, is a question of fact which the commission must determine in the light of all the evidence. The evidence is clear in this regard and should not present the slightest obstacle to the determination of the guilt of the accused.

> The degree of causality expressed in the term "permitting" would appear to be clearly less than that envisaged under ordinary criminal negligence requirements of causality as usually presented under statutes or law requiring proof of definite causal connection between the negligence of accused and, in those cases, necessary resultant injury.

Just what the limitations of causation are in these cases is difficult to determine aside from specific fact situations. As Michael and Wechsler, Rationale of the Law of Homicide, 37 Col. L.R. 724, have stated, "Indeed it may in general be ventured that the only firm thread on which the causality cases can be strung is that of probability. As has often been said the question usually presented is not whether there is cause in fact, but rather whether there should be liability for results in fact caused."

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The essential requirements of causal connection between the omission of the accused and the resultant incidents is clearly and irrefutably established by the evidence presented to the Commission. This is so apparent that it hardly merits discussion. The accused failed to control the very people he had the specific duty to control - namely members of his command and persons subject to his control and supervision. The accused failed to protect the very people he had the specific duty to protect, namely the prisoners of war. The very people he failed to control, directly injured the very people he failed to protect. This is the clearest form of causal connection in a case of neglect of duty. If he had controlled the persons he had the duty to contro, or if he had protected the persons he had the duty to protect, the incidents alleged in paragraphs a through j of specifications 1 and 2 would not have occurred. (a) If he had done all that he could reasonably be required to do in performance of these duties, the incidents would not have occurred and (b) if any incidents had occurred he would not be liable for he would have performed his duty to the utmost of his ability required under the circumstances. The very duties he was under invisaged the very kind of incidents which occurred, that is to say, the duty under international law to control his subordinates and the duty to protect prisoners of war were specifically and obviously intended to prevent the illegal acts by his subordinates and the injuries to prisoners of war. The recognition of probability of injury of this nature was envisaged in the very duty prescribed, and the accused therefore cannot successfully contend that he did not know that failure to perform his duty to control his subordinates or failure to perform his duty to protect prisoners of war would result in danger of the mistreatment and killing of prisoners of war, which occurred.

And, as I have previously cited, in my opening argument, and it is pertinent in this regard, that public officers cannot escape his responsibilities by pleading ignorance of their duty or of the facts, and, as stated by Brigadier General Hoover in his review of the Kilian case: "I think it is fundamental, in our conception of military responsibility, that a commanding officer can be guilty of neglect of duty through permitting improper things to occur within his command although he may not know that they are occurring."

As a corrolary of this argument regarding causation, defense counsel Mr. Takano, argued that the incidents charged resulted from acts by subordinates of the commandants, Counsel argues that the acts of these subordinates are too remote to the accused to warrant application of criminal liability for the neglect of duty by the accused. First it should be noted that this generalized statement of the alleged facts is incorrect, and inaccurate. The incidents in specifications 1 and 2, paragraphs g, as set forth in the specification, and as proved by the evidence before the commission, were the acts of a direct subordinate of the accused, IWANAMI, Hiroshi, Captain, IJN, Commanding Officer of the Fourth Naval Hospital. C Clearly as regards this incident, it was the direct result of the acts of a direct subordinate of the accused. With regard to the other incidents charged, the contention of defense counsel is equally fallacious. These other incidents resulted from the neglect of duty by the accused. The accused failed to take the necessary and appropriate measures to protect prisoners of war, and the very anticipated results of such failure, the very things the duty of the accused was designed to prevent was the commission of acts of violence toward such prisoners of war, not only by his direct subordinates, but even more forseeably by the enlisted personnel and subordinates in lower echelons Similarly with regard to the duty to control, the law makes no distinction between the direct and indirect subordinates of the accused. They were all members of his command and subject to his control and supervision. The accused failed to take necessary and appropriate measures to control and supervise them, it was necessary and intended in the command duty of the accused that he not only control his direct subordinates, but through them control the remaining members of the armed forces under his command. He failed to perform that duty and became criminally liable for the acts of his subordinates, members of his command and persons subject to his control and supervision, whom he failed to control in violation of his duty under the law and customs of war.

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The broad nature of this duty is implicit in the language of the Supreme Court of the United States in the famous Yamashita case: "It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect .... prisoners of war from brutality would largely be defeated if the commander .... could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.... These provisions plainly imposed .... an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war..."

Obviously the nature of a military organization is such that such duty must be performed through subordinate officers. And clearly the accused cannot be permitted to escape the liability for failure to perform his duties by alleging that the injuries which resulted from this neglect of his duty, were directly performed by the subordinates of his subordinates rather than directly by his own subordinates.

Even the most cursory examination of the Yamashita case indicate that numerous incidents set forth in the bill of particulars and proved in that case, were the acts of members of his command who were not direct subordinates of the accused.

The fact that Kobayashi's direct subordinates may also have been guilty of neglect or dereliction of duty does not constitute any excuse or path of escape for the accused. Causation in the instant case is not broken by the acts or omissions of intervening agents.

As it is stated in Wharton's Criminal Law, 12th Edition, Section 204, "The fact that another person contributed either before the defendant's interposition or concurrently with such interposition in producing the damage, is no defense." Similarly, fn. 51, Miller, Criminal Law, cites the following case material, "The accused was held guilty of manslaughter because of negligent failure to perform a legal duty where he permitted his automobile to be operated by a drunken person, accused being present in the automobile when the homicide occurred. Ex parte Liotard 47 Nev. 169, 217 P. 960, 30 ALR 63, 8 Minn. L. Rev. 165; State v. Hopkins, 147 Wash. 198, 265 P. 481, 59 ALR 688, 27 Mich L. Rev. 101, 38 Yale L. Jour. 392. Accused held liable under similar circumstances where his chauffeur was operating the car. Moreland v. State, 164 Ga. 467, 139 SE 77, 41 Harv. L. Rev. 398.

Now the accused has cited from Clark and Marshall, some of the general law with regard to the responsibility of a principal or master for the acts of his agent or servant, and has argued that the law requires "knowledge or acquiescence" in the acts of the servant or agent, in order to establish criminal responsibility. While this is ordinarily true with regard to the master-servant or principal-agent relationship, it is true in those cases only because of the nature of the duty in those cases. In my opening argument, in discussing (p. 16) the fact that under the master-servant relationship, the master can be criminally responsible for negligent acts of the servant when the master has failed to exercise due supervision, I pointed out the fact that "command responsibility carries with it duties much beyond the scope of the ordinary master servant relationship and the obligations of control and supervision are commensurate with such greater duties."

But even under the master servant relationship, or principal and agent relationship, where the nature of the duty warrants it, criminal liability is imposed upon the master or principal for act of servant or agent.

Let me briefly survey this field of criminal liability be reading to the commission some of the pertinent law from Miller on Criminal Law, p. 246, et seq.

"(a) In General: As a rule, at common law, the principal or master is not criminally liable for the acts of his agent or servant if he has not previously authorized or assented to them...A criminal responsibility must rest, except in exceptional cases, upon the ground of assent, for otherwise the mental element necessary to make the act a crime is lacking. We have seen however, that in some cases a man may be criminally liable for his negligence; and upon this ground, in one or two exceptional cases, a man may be responsible for the acts of his servant or agent to which he has not assented. Moreover, it is in the power of the Legislature to make a man criminally responsible for the acts of other persons whom he has failed to control.

"(b) Criminal liability of principal for act of agent upon ground of negligence. In certain cases, in exception to the general rule, the principal is held criminally liable for the acts of his agent, upon the ground of his negligence. Com. v. Morgan, 107 Mass. 199, 202. Thus, in case of libel, an exceptional responsibility has been held to rest upon book sellers and publishers respecting publications issued from their establishments in the regular course of business; and they have been held criminally liable in such cases, although the particular acts of sale or publication were done without their knowledge...In this country the liability of the principal in such cases has been placed on the ground of negligence, or of culpable neglect to exercise proper care and supervision over subordinates in the principal's employ...So in cases of nuisance, a large responsibility has been recognized. Thus it has been held that the directors of a company are liable for a common nuisance consisting in polluting the waters of a river, although they were ignorant of what had been done by their servants, to whom they had given authority to conduct their works. Rex v. Medley, 6 Car & P 292. In Rex v. Dixon, 3 Maule & S, 11, a conviction for selling unwholesome bread on proof that the foreman by mistake had put too much alum in it was sustained on the ground that, if a person employs a servant to use an ingredient, the unrestricted use of which is noxious, and does not restrain him in its use, the employer is liable, if it be used in excess, for failure to apply proper caution against its misuse."

From the foregoing it is clear as I have previously stated, that where the nature of the duty warrants it, criminal liability is even imposed upon the master or principal for the acts of a servant or agent. The instant case is exceptional in this sense, for the nature of the duty is exceptional. It is a duty which carries broad responsibility for the acts of ones subordinates, because the duty specifically envisages the control of such subordinates in order to prevent violence and atrocities upon prisoners of war. The very duty requires control, and the failure by the accused to "take such measures within his power and appropriate in the circumstances" to protect prisoners of war, is the very failure which the law and customs of war makes punishable. Where such duty to control subordinates exists neglect of that duty is clearly punishable. In the discussion of principal's liability for acts of agent, Miller on Criminal Law, p. 247, cited above, it is specifically noted "Moreover, it is in the power of the Legislature to make a man criminally responsible for the acts of other persons whom he has failed to control:" Miller cites the following cases in this regard: Carrol v. State, 63 Md. 551, 3 A. 29; State v. Kittele, 110 NC 560, 15 SE 103, 15 LRA 694, 28 Am.St.Rep. 698; People v. Lundell, 136 Mich. 303, 99 NW 12; People v. Roby, 52 Mich 577, 18 NW 365, 50 Am.Rep. 270; State v. Hartfiel, 24 Wis. 60; Com. v. Emmons, 98 Mass 6. People v. Roby, 52 Mich 577, 18 NW 365, 50 Am.Rep. 270; People v. Blake, 52 Mich 566, 18 NW 360; Noecker v. People, 91 Ill. 491; State v. Denoon, 31 W.Va. 122, 5 SE 315; George v. Gobey, 128 Mass 289, 35 Am.Rep. 376, Com. v. Kelley, 140 Mass. 441, 5 NE 834; Boatright v. State, 77 Ga. 717; Carroll v. State, 63 Md. 551, 3 A. 29; Mogler v. State, 47 Ark. 109, 14 SW 473; State v. Kittelle, 110 NC 560, 15 SE 103, 15 LRA 694, 28 Am. St.Rep. 698.

The law and customs of war have similarly made a commander of armed forces criminally responsible for failure "to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war" and failure 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." (In Re Yamashita).

The accused relying both on the previously mentioned argument, citing from the general rules regarding master and servant relationships, as set forth in Clark and Marshall, and upon the argument derived from the definition in Black's Law Dictionary as to the meaning of the word "permit", argues that knowledge of what is to be done by the servant or agent is essential in order to find the accused guilty of criminal negligence for acts of his subordinates. Later in his argument the accused admits that responsibility of accused can be found if he should have known of the incident. But he contends that at least it is necessary to prove that the accused should have known of the acts of his subordinates.

The accused in this argument is again dealing with inapplicable generalities. In the prosecution's opening argument I have at longth pointed out in Section II-D that the caccused can be found guilty of neglect of duty, as charged, even if the prosecution had not proved knowledge of any incidents. It is unnecessary for me to here repeat the content of that argument which deals with the precise specific issues presented in the instant case. I will merely cite some of the additional material which establishes the fact that where specific duty is imposed knowledge is not required, even in ordinary criminal law, in order to establish the liability of a principal or master, for the acts of another. A fortiori, in cases of command responsibility where the control, and therefore the duty, is commensurately greater.

> In the portion from Miller on Criminal Law, cited supra, it is specifically noted that in criminal actions for libel, booksellers and publishers have been held criminally liable "although the particular acts of sale or publication were done without their knowledge". Similarly with regard to nuisances. Similarly with regard to sale of liquor to a minor.
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> Even under a statute making it an offense to "knowingly" sell intoxicating liquor to a minor, without the written consent of the parent or guardian, it was held that the owner of a saloon could be convicted for a sale by his bartender though he was absent from the city at the time of the sale, and had no knowledge of it, and had instructed his bartender not to sell liquor to minors nor to allow them in the saloon. State v. Constatine, 43 Wash. 102, 86 P. 384, 117 Am.St.Rep. 1043.
>
> Similarly, with regard to permitting minor in a pool room. DeZarn v. Com. 195 Ky 686, 243 S.W. 921; 21 Mich L. Rev. 463.
>
> It is clear that the law can provide that an individual be criminally liable for an act done without his knowledge, (or even for an act done contrary to his instruction.)
>
> As expressed in Miller on Criminal Law, XX, p. 249, "Doubtless it requires a clear expression of intention on the part of the Legislature to justify a construction of a statute as imposing punishment upon a person for an act done without his knowledge or contrary to

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his instructions, and, unless such inte ntion appear, the ordinary rule that a man is not criminally responsible for acts which he has not authorized, must prevail; but where the statute does so provide, it is valid. (The author cites following cases where knowledge was found not required...People v. Roby, 52 Mich. 577, 18 NW 365, 50 Am. Rep. 270; People v. Blake, 52 Mich. 566, 18 NW 360; Noecker v. People, 91 Ill 494; State v. Denoon, 31 WVa 122, 5 SE 315; George v. Gobey, 128 Mass. 289, 35 Am. Rep. 376; Com. v. Kelley, 140 Mass. 441, 5 NE 834; Boatright v. State, 77 Ga. 717; Carroll v. State, 63 Md. 551, 3 A. 29; Mogler v. State, 47 Ark. 109, 14 S.W. 473; State v. Kittelle, 110 NC 560, 15 SE 103, 15 LRA 694, 28 Am St Rep 698.

The accused has argued that even if specific knowledge is not required, there should at least be a requirement that the accused should have known, or have probable grounds to have known of the incidents and injuries which resulted from his negligence. Here again the accused is mistaken in his interpretation of the law. It is specifically noted in Wharton on Criminal Law, Sec. 210, "It is not necessary to constitute negligence that the specific damage should have been forseen as probable."

> The section reads as follows: "210. To negligent causation, not necessary that damage should have been forseen. It is not necessary to constitute negligence, that the specific damage should have been forseen as probable. If it were, and if the offending party resorted to the inculpatory act to produce the particular end, then the case is one of malice, not of negligence. On the other hand, it is of the essence of negligence that the injury caused by it should not have been forseen as likely to arise in the immediate case. The consequences of negligence are almost invariably surprises. A man may be negligent in a particular matter a thousand times without mischief; yet, though the chances of mischief is only one to a thousand, we would rightly hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held, that it is no defense that a particular injurious consequence is "improbable," and "not to be reasonably expected," if it really appear that it naturally followed from the negligence under examination."(Citing numerous cases from the courts of Alabama, Connecticut, Delaware, Florida, Georgia, Iowa, Kentucky, Massachusetts, New York, South Carolina, and Texas.)

While the law does not require forseeability of specific damage or injury in order to create criminal negligence, where accused has failed to perform a duty, the nature of the instant duty, and the background of the development of that duty is such, that it clearly established the forseeability of the kind of incidents which in fact occurred due to the failure of the accused to perform his duty to control his subordinates and protect prisoners of war.

In my opening argument I pointed out that every person familiar with the law of war and the history of war knows that war tends to brutalize and that only by careful deliberate persistent effort can atrocities and individual war crimes be prevented. I pointed out in that argument that the accused, because of his personal knowledge of the law of war, must have known this, and in fact, as evidenced by defense exhibit 51, actually knew of the tendency to disregard the laws of war. It is clear therefore that the accused should have forseen that his neglect of duty would produce the very kind of injuries and incidents which he is here charged with. He should have known that failure to control his subordintes could result in violence and atrocities against prisoners of war.

"PPPPP(21)"

The foregoing discussion clearly establishes that criminal negligence ... may be found even though there is no proof that the accused knew or should have known of the incidents which followed from his neglect of duty. In concluding this phase of the argument, I need merely point out that with regard to the alleged definition of the word "permit", that accused is in error in arguing that it requires proof of knowledge of any incident prior to its occurrence. The charge in the Yamashita case contained this identical term "permitting" them to commit brutal atrocities... There was no charge that he "knowingly" permitted them, and no finding that he knew of any of the incidents charged and "knowingly permitted them". The accused was found guilty, and the Supreme Court of the United States upheld the conviction noting FN 4 that "the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such violation."

In the Yamashita case, the judgment of the Commission does not contain any finding that the accused knew, or should have known of the incidents which occurred under his command. The entire judgment is based upon his failure to perform his duty of command responsibility. The judgment of the Commission, delivered by the President of the Commission, was as follows:

"This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. Should a commander issue orders which lead directly to lawless acts, thecriminal responsibility is definite and has always been so understood. The Rules of Land Warfare, Field Manual 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such cases. These matters have been the principle considerations of the Commission during its deliberations.

"General Yamashita: The Commission concludes: (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands; that they were not sporadic in nature but in many cases were methodically supervised by Japanese officers and non-commissioned officers; (2) That during the period in question you failed to provide effective control of your troops as was required by the circumstances.

"PPPPP (22)"

"Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging."

Similarly in the Kilian case, cited by me in prosecution's opening argument, while the word "knowingly permitted" was charged, the Commission expressly found the charge proved except for the word "knowingly", etc. The accused was found guilty. The Assistant Judge Advocate, in a memorandum review of this case, specifically concurred in by the Judge Advocate General of the U. S. Army, stated, "It is fundamental in our conception of military responsibility, that a commanding officer can be guilty of neglect of duty through permitting improper things to occur within his command although he may not know that they are occurring."

From this examination of the law of criminal negligence, and more particularly from the cases cited in my opening argument, including the Yamashita case, and the Kilian case, it is clear that criminal liability for neglect of command responsibility may be found even though there is no proof of any knowledge of the occurrence of specific incidents within the command of the accused. As I pointed out at length in my opening argument the instant case is in this respect infinitely stronger than these cases in that there has been specific proof, and even testimony of the accused himself, to establish the fact that the accused knew of two incidents within the area of his command prior to the occurrence of numerous other incidents.

The fact that the Kwajalein incident reported to accused by Abe, occurred prior to the commencement of the tour of duty of accused is not material. While the accused has not been charged with this incident, the fact that he knew that within the area of his command, prisoners of war had been executed, and failed to take action to control his subordinates or protect prisoners of war, is relevant to the charge of his neglect of duty. It shows that despite this clear warning of existing conditions within his command he made no effort to investigate the facts, punish any responsible subordinates, or take effective action to protect prisoners of war or control his subordinates.

Even after this knowledge the accused failed "to take such measures as were within his power and appropriate in the circumstances" to control his subordinates and to protect prisoners of war. Examination of II-E of prosecution's opening argument, and the cases cited therein, clearly establishes that in view of this knowledge, the inaction of the accused constituted criminal neglect of duty as charged.

Respectfully,

David Bolton.

DAVID BOLTON,
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