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HEADQUARTERS EIGHTH ARMY
United States Army
Office of the Staff Judge Advocate

Yokohama, Japan
1 July 1948

UNITED STATES OF AMERICA VS EITARO UCHIYAMA -
UNITED STATES OF AMERICA VS KIYOTOMI OTAHARA -
UNITED STATES OF AMERICA VS NORIO YAMANAKA -
UNITED STATES OF AMERICA VS BUICHI ONO -
UNITED STATES OF AMERICA VS HIDEO MATSUMORI -
UNITED STATES OF AMERICA VS YORIO OGIYA -
UNITED STATES OF AMERICA VS KANJI NAKAMICHI -
UNITED STATES OF AMERICA VS MICHIO KUNITAKE -

Own # 227

Review of the Staff Judge Advocate

1. The attached record of trial by common trial of Eitaro Uchiyama, Kiyotomi Otahara, Norio Yamanaka, Buichi Ono, Hideo Matsumori, Yorio Ogiya, Kanji Nakamichi and Michio Kunitake, at Yokohama, Japan, from 18 July 1947 to 28 August 1947, by a Military Commission appointed by paragraph 1, Special Orders No. 157, Headquarters Eighth Army, United States Army, dated 8 July 1947, as amended by paragraph 14, Special Orders No. 162; same Headquarters, dated 14 July 1947; and paragraph 30, Special Orders No. 165; same Headquarters, dated 17 July 1947, having been referred to the Staff Judge Advocate, this review is submitted to the Commanding General.

Personal Data Concerning Accused

NAME: Eitaro Uchiyama	DATE OF CONFINEMENT: 29 June 1946
AGE: 59	DATE OF ARRAIGNMENT: 18 July 1947
RESIDENCE: 170-2 Chome, Harajuku-Machi, Shibuya-Ku, Tokyo Prefecture	PLACE OF TRIAL: Yokohama, Japan
MARITAL STATUS: Single	PERIOD OF TRIAL: 18 July to 28 August 1947
RELATIVES: Two sisters, brother	DATE OF SENTENCE: 28 August 1947
EDUCATION: Grammar School, 6 years; Military Cadet School, 5 years; Military Officers School, 1½ years; Artillery and Engineers School, 1 year; Army Staff School, 3 years--graduated 1909.	SENTENCE: CHL for thirty (30) years
VOCATION: Army Officer	CLEMENCY RECOMMENDED BY COMMISSION: N
MILITARY CAREER: Entered Army as 2nd Lt., 1909; released as Lt. Gen., 15 Jun 1945.	

NAME: Kiyotomi Otahara	DATE OF CONFINEMENT: 29 March 1946
AGE: 65	DATE OF ARRAIGNMENT: 18 July 1947
RESIDENCE: 910 Ichiby Mimmi Shoma Murd Tkoma	PLACE OF TRIAL: Yokohama, Japan
MARITAL STATUS: Married	PERIOD OF TRIAL: 18 July to 28 August 1947
RELATIVES: Sister	DATE OF SENTENCE: 28 August 1947
EDUCATION: LL. B., Tokyo Imperial University	SENTENCE: Hanging
VOCATION: Lawyer	CLEMENCY RECOMMENDED BY COMMISSION: N
MILITARY CAREER: Judicial Officer 1914; Maj. Gen., Judicial Dept.; released 12 July 1945	

NAME: Norio Yamanaka	DATE OF CONFINEMENT: 30 March 1946
AGE: 33	DATE OF ARRAIGNMENT: 18 July 1947
RESIDENCE: 733 Oaza Heya Heya Mura Shimot-Suga Gum Tochigo Prefecture	PLACE OF TRIAL: Yokohama, Japan
MARITAL STATUS: Married	PERIOD OF TRIAL: 18 July to 28 August 1947

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RELATIVES: Father, mother, two brothers, sister
DATE OF SENTENCE: 28 August 1947
SENTENCE: CHL for twenty-five (25) years
EDUCATION: 18 years, Exasiaud Military Academy
CLEMENCY RECOMMENDED BY COMMISSION: No
VOCATION: Student or Army Officer
MILITARY CAREER: Japanese Army 1 April 1931; discharged as Major, 30 November 1945.

NAME: Buichi Ono
AGE: 42
RESIDENCE: 2468 Oaza Nagas Nagao Cho Asaguche Gun Okayama Prefecture
DATE OF CONFINEMENT: 29 March 1946
DATE OF ARRAIGNMENT: 18 July 1947
PLACE OF TRIAL: Yokohama, Japan
PERIOD OF TRIAL: 18 July to 28 August 1947
MARITAL STATUS: Married
RELATIVES: None
EDUCATION: Graduated law course Kansai University, 17 years
DATE OF SENTENCE: 28 August 1947
SENTENCE: CHL for thirty (30) years
CLEMENCY RECOMMENDED BY COMMISSION: No
VOCATION: Government Official at a Post Office
MILITARY CAREER: Entered Army 16 December 1940; discharged as Capt. 25 October 1945.

NAME: Hideo Matsumori
AGE: 40
RESIDENCE: 520 Shirokane-cho, Shiba-ku, Tokyo
DATE OF CONFINEMENT: 8 September 1946
DATE OF ARRAIGNMENT: 18 July 1947
PLACE OF TRIAL: Yokohama, Japan
PERIOD OF TRIAL: 18 July to 28 August 1947
MARITAL STATUS: Married
RELATIVES: Wife, three children, two brothers, three sisters
EDUCATION: Graduate Economical College of Kyoto Imperial University; total years, 17
DATE OF SENTENCE: 28 August 1947
SENTENCE: CHL for ten (10) years
CLEMENCY RECOMMENDED BY COMMISSION: No
VOCATION: Civil Officer
MILITARY CAREER: Drafted 28 March 1943, 2nd Lt. March 1935, discharged October 1945 as 1st Lt.

NAME: Yorio Ogiya
AGE: 27
RESIDENCE: 48 Osubo-Machi, Takaoka City, Toyama Prefecture
DATE OF CONFINEMENT: 29 March 1946
DATE OF ARRAIGNMENT: 18 July 1947
PLACE OF TRIAL: Yokohama, Japan
PERIOD OF TRIAL: 18 July to 28 August 1947
MARITAL STATUS: Married
RELATIVES: Daughter, father, mother
EDUCATION: Graduate Middle School and Chuo College Law Department
DATE OF SENTENCE: 28 August 1947
SENTENCE: CHL for three (3) years
CLEMENCY RECOMMENDED BY COMMISSION: No
VOCATION: Probationary Attorney
MILITARY CAREER: Drafted as pvt. 1 November 1943, discharged as capt. 1 December 1945.

NAME: Kanji Nakamichi
AGE: 51
RESIDENCE: Taisho Cho, Takada Mache, Yaro Gun, Gifu Prefecture
DATE OF CONFINEMENT: 29 March 1946
DATE OF ARRAIGNMENT: 18 July 1947
PLACE OF TRIAL: Yokohama, Japan
PERIOD OF TRIAL: 18 July to 28 August 1947
MARITAL STATUS: Married
RELATIVES: Two brothers
EDUCATION: Graduate Ichinose Grammar School in 1916, 8 years
DATE OF SENTENCE: 28 August 1947
SENTENCE: CHL for three (3) years
CLEMENCY RECOMMENDED BY COMMISSION: No
VOCATION: Court clerk, prison warden
MILITARY CAREER: Drafted 1916, released as W. O. 1925; attached to Legal Section 3rd Div. 1926; in June 1945 was Capt. in charge of Military Prison (not PW)

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NAME: Michio Kunitake
AGE: 54
RESIDENCE: Mackoga Okayama Mura Yame
Gum, Fukuoka Prefecture
MARITAL STATUS: Married
RELATIVES: Two sons, two daughters, three brothers, sister, father
EDUCATION: Training School 3 years, Military Central School 2 years, Military Cadet School 1½ years, Army Artillery and Engineers School 2 years, Military Academy 3 years.
VOCATION: Army Officer
MILITARY CAREER: Entered Army as 2nd Lt. 1915, released as Lt. Gen. 15 June 1946.

DATE OF CONFINEMENT: 29 June 1946
DATE OF ARRAIGNMENT: 18 July 1947
PLACE OF TRIAL: Yokohama, Japan
PERIOD OF TRIAL: 18 July to 28 August 1947
DATE OF SENTENCE: 28 August 1947
SENTENCE: CHL for three (3) years
CLEMENCY RECOMMENDED BY COMMISSION: No

2. Synopsis of Charges, Pleas, Findings, Legal Sufficiency and Sentence:

<u>Charges and Specifications:</u>	<u>Pleas</u>	<u>Findings</u>	<u>Legal Sustain</u>
<u>UCHIYAMA</u>			
Charge: Accused, at the times and places set forth in the specifications, and during a time of war between the United States of America, its Allies and Dependencies, and Japan, did violate the Laws and Customs of War.	NG	G	No
Sp 1: Between 15 May 1945 and 19 July 1945, at or near Osaka, Honshu, Japan, accused, then Commanding General of the Japanese Fifteenth Area Army, through his command functions, by his own acts and the acts of his subordinates, did willfully and unlawfully permit, authorize, direct and constitute illegal, unfair, false and null proceedings against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, before a Japanese Military Tribunal and did thereby contribute to the unlawful killing of the said PW.	NG	NG	---
Sp 2: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, then Commanding General of the Japanese Fifteenth Area Army, through his command functions, by his own acts and the acts of his subordinates, did willfully and unlawfully approve illegal, unfair, false and null proceedings and sentence of death against Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, by a Japanese Military Tribunal and did thereby contribute to the unlawful killing of the said PW.	NG	Guilty, except the words "and unlawfully", "illegal" and "false and null", of the excepted words, not guilty.	No
Sp 3: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, then Commanding General of the Japanese Fifteenth Area Army, through his command	NG	Guilty, except the words "and unlawfully", "illegal" and "false and null",	No

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functions, by his own acts and the acts of his subordinates, did willfully and unlawfully order executed an illegal, unfair, false and null sentence of death imposed upon 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, by a Japanese Military Tribunal and did thereby contribute to the unlawful killing of the said PW.

of the excepted words, not guilty.

Sp 4: Between 15 May 1945 and 19 July 1945, at or near Osaka, Honshu, Japan, accused, then Commanding General of the Japanese Fifteenth Area Army, and then being the convening and reviewing authority for proceedings by Japanese Military Tribunals on charges against captured enemy airmen within the jurisdiction of said Army, did willfully and unlawfully fail and neglect to take reasonable measures to afford a legal, fair and impartial trial of certain charges against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, and did further willfully and unlawfully fail and neglect to take reasonable measures to afford a legal, fair, impartial and adequate review of the proceedings against said PW, and of the findings and sentence against them, and did thereby contribute to the unlawful killing of the said PW.

NG

NG

OTAHARA

Charge: Accused, at the times and places set forth in the specifications hereto attached, and during a time of war between the United States and Japan, did violate the Laws and Customs of War.

NG

G

No

Sp 1: Between 15 May 1945 and 19 July 1945, the accused, then Chief of the Judicial Department of the Japanese Fifteenth Area Army with Headquarters at or near Osaka, Honshu, Japan, by his official acts did willfully and unlawfully incite, inspire, recommend, approve and cause to be initiated and commenced before a Japanese Military Tribunal at Osaka, Japan, illegal, unfair, false and null proceedings against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, and did thereby contribute to the unlawful killing of the said PW.

NG

Guilty,

No

except the words "and unlawfully", "illegal" and "false and null", of the excepted words, not guilty.

Sp 2: Between 15 May 1945 and 19 July 1945, accused, then Acting Chief of the Judicial Department of the Japanese Second General Army with Headquarters at or near Hiroshima, Honshu, Japan, by his official acts did willfully and unlawfully incite, inspire, recommend, approve and cause to be initiated and commenced before a Japanese Military Tribunal at Osaka, Japan, illegal, unfair, false and null

NG

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proceedings against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, and did thereby contribute to the unlawful killing of the said PW.

Sp 3: In July 1945, at or near Osaka, Honshu, Japan, the accused, then Chief of the Judicial Department of the Japanese Fifteenth Area Army, did willfully and unlawfully incite, inspire, cause, direct and command members of a Japanese Military Tribunal to sentence to death 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, the accused at the time knowing that the evidence and charges against them were false and fraudulent and that a fair and lawful trial would not be afforded them and did thereby contribute to the unlawful killing of the said PW.

NG

Guilty,

No

except the words "and unlawfully", "direct and command", "that the evidence and charges against them were false and fraudulent", and "and lawful", of the excepted words, not guilty.

Sp 4: Between 15 May 1945 and 19 July 1945, at or near Osaka, Honshu, Japan, accused, then Chief of the Judicial Department of the Japanese Fifteenth Area Army and having responsibility for the supervision, direction and control of said Judicial Department in the investigation and determination of charges against captured enemy airmen within the jurisdiction of said Army, did willfully and unlawfully fail and neglect to take reasonable measures to afford a legal, fair and impartial trial of certain charges against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, and did thereby contribute to the unlawful killing of said PW.

NG

Guilty,

No

except the words "and unlawfully" and "legal", of the excepted words, not guilty.

YAMANAKA

Charge: Accused, at the times and places set forth in the specifications, and during a time of war between the United States and Japan, did violate the Laws and Customs of War.

NG

G

No

Sp 1: On or about 18 July 1945, at or near Osaka, Honshu, Japan, the accused, member of the Japanese Fifteenth Area Army, as presiding member of a Japanese Military Tribunal during the course of illegal, unfair, false and null proceedings before said tribunal did willfully and unlawfully adjudge and determine certain false and fraudulent charges and evidence against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, without affording them a fair and lawful trial and did thereby contribute to the unlawful killing of the said PW.

NG

Guilty,

No

except the words "illegal", "false and null", "and unlawfully", "false and fraudulent" and "and lawful", of the excepted words, not guilty.

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Sp 2: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, member of the Japanese Fifteenth Area Army, as presiding member of a Japanese Military Tribunal during the course of illegal, unfair, false and null proceedings did willfully and unlawfully sentence to death 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, without affording them a fair and lawful trial and did thereby contribute to the unlawful killing of the said PW.

NG

Guilty,
except the words "illegal", "false and null", "and unlawfully", and "and lawful", of the excepted words, not guilty.

No

Sp 3: In or about the month of July 1945, at or near Osaka, Honshu, Japan, the accused, member of the Japanese Fifteenth Area Army, as presiding member of a Japanese Military Tribunal did willfully and unlawfully fail to perform his duty as a tribunal member and did neglect to provide a legal, fair and proper trial to 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, and did thereby contribute to the unlawful killing of the said PW.

NG

Guilty,
except the words "and unlawfully" and "legal", of the excepted words, not guilty.

No

ONO

Charge: Accused, at the times and places set forth in the specifications, and during a time of war between the United States and Japan, did violate the Laws and Customs of War.

NG

G

No

Sp 1: On or about 18 July 1945, at or near Osaka, Honshu, Japan, as law member of a Japanese Military Tribunal during the course of illegal, unfair, false and null proceedings before said tribunal did willfully and unlawfully adjudge and determine certain false and fraudulent charges and evidence against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, without affording them a fair and lawful trial and did thereby contribute to the unlawful killing of the said PW.

NG

Guilty,
except the words "illegal", "false and null", "and unlawfully", "false and fraudulent" and "and lawful", of the excepted words, not guilty.

No

Sp 2: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, member of the Japanese Fifteenth Area Army, as law member of a Japanese Military Tribunal during the course of illegal, unfair, false and null proceedings did willfully and unlawfully sentence to death 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, without affording them a fair and lawful trial and did thereby contribute to the unlawful killing of the said PW.

NG

Guilty,
except the words "illegal", "false and null", "and unlawfully" and "and lawful", of the excepted words, not guilty.

No

Sp 3: In or about the month of July 1945, at or near Osaka, Honshu, Japan, accused, member of the Japanese Fifteenth Area Army, as law member of a Japanese

NG

Guilty,
except the words "and unlawfully" and "legal", of the excepted words, not guilty.

No

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Military Tribunal did willfully and unlawfully fail to perform his duty as a tribunal member and did neglect to provide a legal, fair and proper trial to 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, and did thereby contribute to the unlawful killing of the said PW.

MATSUMORI

Charge: Accused, at the times and places set forth in the specifications, and during a time of war between the United States and Japan, did violate the Laws and Customs of War. NG G No

Sp 1: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, member of the Fifteenth Area Japanese Army, as member of a Japanese Military Tribunal during the course of illegal, unfair, false and null proceedings before said tribunal did willfully and unlawfully adjudge and determine certain false and fraudulent charges and evidence against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, without affording them a fair and lawful trial and did thereby contribute to the unlawful killing of the said PW. NG Guilty, No except the words "illegal", "false and null", "and unlawfully", "false and fraudulent" and "and lawful", of the excepted words, not guilty.

Sp 2: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, member of the Fifteenth Area Japanese Army, as member of a Japanese Military Tribunal during the course of illegal, unfair, false and null proceedings did willfully and unlawfully sentence to death 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, without affording them a fair and lawful trial and did thereby contribute to the unlawful killing of the said PW. NG Guilty, No except the words "illegal", "false and null", "and unlawfully", and "and lawful", of the excepted words, not guilty.

Sp 3: In or about the month of July 1945, at or near Osaka, Honshu, Japan, accused, member of the Fifteenth Area Japanese Army, as member of a Japanese Military Tribunal did willfully and unlawfully fail to perform his duty as a tribunal member and did neglect to provide a legal, fair and proper trial to 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, and did thereby contribute to the unlawful killing of the said PW. NG NG ---

OGIYA

Charge: Accused, at the times and places set forth in the specifications, and during a time of war between the United States and Japan, did violate the Laws and Customs of War. NG G Yes

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Sp 1: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, member of the Japanese Fifteenth Area Army, as prosecutor of a Japanese Military Tribunal during the course of illegal, unfair, false and null proceedings before said tribunal against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, did willfully and unlawfully present false and fraudulent charges and evidence against them and did thereby contribute to the unlawful killing of the said PW. NG Guilty, No except the words "illegal", "false and null", "willfully and unlawfully" and "false and fraudulent", of the excepted words, not guilty.

Sp 2: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, member of the Japanese Fifteenth Area Army, as prosecutor of a Japanese Military Tribunal during the course of illegal, unfair, false and null proceedings before said tribunal against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, did willfully and unlawfully request and obtain their sentence to death and did thereby contribute to the unlawful killing of the said PW. NG Guilty, No except the words "illegal", "false and null", and "willfully and unlawfully", of the excepted words, not guilty.

Sp 3: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, member of the Japanese Fifteenth Area Army, as prosecutor of a Japanese Military Tribunal did willfully and unlawfully request and obtain from the Chief of Staff of said Army his confirmation and approval of illegal, unfair, false and null proceedings and sentence of death imposed upon 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, by a Japanese Military Tribunal and did thereby contribute to the unlawful killing of the said PW. NG NG

Sp 4: On or about 18 July 1945, at or near Yokoyama Firing Range, Senboku-gun, Osaka Prefecture, Honshu, Japan, accused, as prosecutor of a Japanese Military Tribunal did willfully and unlawfully supervise and direct the illegal killing of 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW. NG Guilty, Yes except the words "willfully and unlawfully" and "and direct".

NAKAMICHI

Charge: Accused, at the times and places set forth in the specification, and during a time of war between the United States and Japan, did violate the Laws and Customs of War. NG G Yes

Sp 1: On or about 18 July 1945, at or near the Yokoyama Firing Range, Senboku-gun, Osaka Prefecture, Honshu, Japan, the accused did willfully and unlawfully order his subordinates to kill and through their acts did unlawfully kill 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW. NG Guilty, Yes except the words "willfully and unlawfully", of the excepted words, not guilty.

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KUNITAKE

Charge: Accused, at the times and places set forth in the specifications, and during a time of war between the United States and Japan, did violate the Laws and Customs of War. NG G No

Sp 1: Between 15 May 1945 and 19 July 1945, at or near Osaka, Honshu, Japan, the accused, then Chief of Staff of the Japanese Fifteenth Area Army, by his own acts and the acts of his subordinates did willfully and unlawfully permit, authorize, direct and constitute illegal, unfair, false and null proceedings against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, before a Japanese Military Tribunal and did thereby contribute to the unlawful killing of the said PW. NG NG ---

Sp 2: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, then Chief of Staff of the Japanese Fifteenth Area Army, by his own acts and the acts of his subordinates did willfully and unlawfully approve illegal, unfair, false and null proceedings and sentence of death against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, by a Japanese Military Tribunal, and did thereby contribute to the unlawful killing of the said PW. NG NG ---

Sp 3: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, then Chief of Staff of the Japanese Fifteenth Area Army, by his own acts and the acts of his subordinates did willfully and unlawfully order executed an illegal, unfair, false and null sentence of death imposed upon 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, by a Japanese Military Tribunal and did thereby contribute to the unlawful killing of the said PW. NG Guilty, No
except the words "willfully and unlawfully", "illegal" and "false and null"; of the excepted words, not guilty.

Sp 4: On or about 18 July 1945, at or near Osaka, Honshu, Japan, accused, then Chief of Staff of the Japanese Fifteenth Area Army and then having been delegated by the Commanding General of said Army with the duty and responsibility to review and approve or disapprove the proceedings, findings and sentence by a Japanese Military Tribunal on certain charges against 2nd Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW, did willfully and unlawfully fail and neglect to take reasonable measures to afford a legal, fair, impartial and adequate review of the proceedings against said personnel and the findings and sentence against them and the accused did thereby contribute to the unlawful killing of the said PW. NG NG ---

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3. Summary of the Evidence:

a. For the Prosecution:

The prosecution filed a Bill of Particulars in compliance with an order of the Commission. This Bill of Particulars can be found in back of page 18 of the record.

All the specifications of each of the accused are so interrelated that it is necessary, in order to give proper continuity, to state the facts as if they came under one specification. The names of the accused in the instant case are underlined.

Capture and Confinement:

Second Lieutenant Robert Watson Nelson and Sergeant Algy Stanley Augunas, members of the United States Army Air Forces assigned as navigator and radio operator of a United States Army bomber, surrendered to the Kobe Police after being shot down on or about the 17th of March 1945 while on a combat mission over the City of Kobe, Japan (Ex. 13; 14; 37, p 1; 28, Part I, p 1). The next day they were brought to the Osaka Kempei Tai headquarters where they were confined in the 22nd Army Unit Guardhouse, a component of the 15th Army (Ex. 28, Part IV, p 1) for about two months and then in the middle of May were transferred to the Osaka Military Prison at Ishikiri (Ex. 6, p 2). Both Nelson and Augunas were kept in separate cells and not taken out except for interrogation or air raids (Ex. 28; Part IV, p 6). At the time of capture one of Augunas' legs was severely injured (Ex. 25, p 3; Ex. 28, Part I, p 1; Ex. 14).

Preliminary Examination by the Kempei Tai:

The accused Yamanaka, the staff military and intelligence officer, first interviewed Nelson on March 18 or 19, 1945 and at the same time Augunas was interviewed by Takeo Mori; the chief interpreter. Very little information was obtained (Ex. 28, Part IV, p 1; Ex. 6, pp 1, 2; Ex. 36, pp 5, 6). Shortly thereafter on orders of Yamanaka, they were reinvestigated (Ex. 6, pp 1, 2). Lt. Gen. Uchiyama ordered an investigation and report from the Kempei Tai (Ex. 6, p 1; Ex. 28, Part IV, p 1). Mori, as ordered, went to the Legal Section of the 15th Army in April 1945 and obtained from Captain Ono, the senior staff officer and next in command to the Chief of the Section, information to be obtained in the further interrogation of the flyers. Ono told Mori that the Legal Section could not commence the prosecution of the flyers until a report, together with recommendations of the senior Kempei Tai officer, had been received. Mori was instructed by Captain Ono to include in the report the name, age, rank, branch, family record, civil record, army career, decorations of each of the flyers; their position in the plane and their duties in respect to bombing; their conduct in respect to past bombing missions; the number of individuals in the crew of the plane, the number of missions and their targets; and a detailed account of the bombing of Osaka and Kobe from the start of the mission to capture (Ex. 28, Part IV, p 1).

Detailed Interrogation by Kempei Tai:

A few days after receiving instructions from Captain Ono, Mori with Sasaki, members of the Kempei Tai, interrogated the two flyers. After obtaining personal and military history of each of the flyers, information was obtained that the duty of Nelson as navigator was to guide the plane by radar to the target, that the duty of Augunas as radio operator was to contact the base and other planes; that each had been on ten bombing missions of Japan; that both had been together on the night incendiary raids of Tokyo on 10 March, Osaka on 14 March and Kobe on 16 March 1945; and that each had participated in the bombing of Yokohama, Hamamatsu and Nagoya during January and February of 1945. Maps were used in the interrogation of Nelson, and he gave, for each of the raids, the place of departure, the course and altitude of the plane. Information was obtained that high explosive bombs had been used in December, January and February 1945 on specific targets such as the Nakajima Aircraft Factory; that

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since February 1945 Gen. L. May had announced that incendiary bombs would be used, that the targets in March 1945 were the northern center of the City of Tokyo and for Osaka and Kobe the center of the city; that neither of the fliers had anything to do with the dropping of the bombs or knew whether the targets were military installations or private property. Both were told that numerous civilians had been killed and much private property had been destroyed; and that under military regulations all captured fliers could be tried. Both fliers replied that they had no knowledge where the bombs were dropped or what was damaged. They stated they were not guilty of any crime and that they should be sent to a prisoner of war camp. Nothing was said that if they were found guilty under the military regulations that they might be sentenced to death (Ex. 28, Part IV, pp 1-6; Ex. 25; Ex. 27, p 2). The next two days were spent in preparing documents and on the third day the interrogations were translated to Nelson and Augunas and each signed with his name, rank and thumb print (Ex. 28, Part IV, pp 2, 7; Ex. 27, p 2; R. 61).

Documents prepared and forwarded by Kempei Tai:

The final documents prepared by the Kempei Tai consisted of: (1) Interrogation Report of Lt. Nelson and Sgt. Augunas, (2) List of Articles and Papers, (3) Dispatch Record, (4) Index of Papers. The Interrogation Record consisted of the signed Interrogation Report as heretofore set out. The Dispatch Record contained a summary of the facts contained in the Interrogation Record, a recital of the facts that on each of these air raids, Tokyo, Osaka, Kobe, Hamamatsu and Nagoya, there were no definite military targets, and as a result of these air raids numerous civilians had been killed and much private property had been destroyed. It concluded by stating that under the Enemy Airmen's Act the fliers were guilty of indiscriminate bombing (Ex. 27, pp 1, 2; Ex. 28, Part IV, p 7; see also Ex. 16). These records, except the maps, were sent to the Intelligence Department of the Army (Ex. 27, p 1; Ex. 28, Part IV, p 7). Upon receipt of these reports warrants of arrest were issued, by order of General Otahara, as a result of which Nelson and Augunas were moved from the 22nd Army Unit to the Osaka Military Prison in May of 1945 (Ex. 27, p 1).

Interrogation and Investigation by General Otahara:

On or about the 20th of May 1945, on orders of the Fifteenth Area Army Headquarters, Nelson and Augunas were interrogated by Maj. Gen. Otahara, then head of the Judicial Section of the Fifteenth Area Army, with the assistance of Shimamura, clerk of the Fifteenth Area Army Judicial Department, and Matsumoto, an interpreter (Ex. 36, p 6; Ex. 10). First was conducted the Detention Interrogation of Nelson pertaining to the name, age, rank, etc. of the accused. At the bottom of the Detention Form was a question, "Have you anything to add to these facts?" and Shimamura, the clerk, added, "At this point the prosecutor read to the accused the findings of fact from the Dispatch Reports prepared by the Kempei Tai." Also was added the words, "The facts are true as stated." The dispatch reports at this time were not read or translated to the Americans. The Detention Interrogation lasted about twenty minutes and at the conclusion Matsumoto, the interpreter, read to Nelson the contents of the written form, and Nelson signed his name and affixed his thumbprint. Nelson was then taken from the room and Augunas was brought in, and the procedure used in his interrogation was essentially the same (Ex. 27, p 3). After the Detention Interrogation, a pre-trial examination was conducted for each of the Americans (Ex. 27, pp 3, 4). Otahara advised them that he would begin by questioning them about violations of military law (Shimamura, Ex. 27, pp 3, 4) and told both that they must be accused of bombing civilians and private property with impunity. Each replied that such bombings were not intentional; that they did not know that civilian houses were targets or what was damaged by the air raids; and that neither did any bombing (Ex. 26, pp 3, 4, 6; Ex. 27, pp 3, 4; R. 67, 78, 79, 82). The criminal facts, within the Dispatch Report of the Kempei Tai, consisting of five or six pages, were read and explained to the Americans (R. 82). Otahara questioned both fliers about the bombing of Nagoya and Hamamatsu (Ex. 27, p 4). Generally the same questions were asked and answers were received as heretofore set out in the interrogation of the Kempei Tai (Ex. 26, pp 3-6; Ex. 27, pp 3-5; Ex. 10, p 2). Matsumoto, the interpreter, testified (Ex. 26, pp 4, 5, 6) that he at no time

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read to the accused or approved the correctness of the notes taken by the clerk during the interrogation. Shimamura in his affidavit (Ex. 27, p 5) testified that a few days after the interrogation Otahara from his and Shimamura's notes dictated what purported to be the statements of Nelson and Augunas in narrative form in the first person and attached, on Otahara's order, to the final records of interrogation two sheets of paper of the same size on which only the signatures and thumbprints of Nelson and Augunas appeared, with the following words added, "The above has been read to the defendants and has been verified, signed, and thumbprinted by them." These reports were never shown to Nelson and Augunas nor were they ever read or interpreted to them, nor were they signed by Nelson and Augunas (Ex. 27, p 5). In cross-examination Shimamura testified that the recorded statement of Lt. Nelson was read to him by the interpreter and Lt. Nelson and the interpreter both signed the document. Further, he testified that nothing in the contents of General Otahara's report was false in any detail (R. 79). Matsumoto (Ex. B) and Shimamura (R. 77, 79) both testified that no force was used in obtaining the statement and that General Otahara was sincere in his investigation and wanted to learn the true facts (See also Ex. 10, p 2). Twenty days after the final report of interrogation Otahara dictated to Shimamura and he prepared a written opinion consisting of four or five pages. After reciting the personal matters pertaining to Nelson and Augunas, the document stated the number of places they had bombed including Tokyo, Osaka, Kobe, Hamamatsu, and Nagoya. In separate paragraphs it gave detailed accounts of the bombings of Tokyo, Kobe, and Osaka and concluded that the fliers had bombed these cities without aiming at any definite military target, with the result that numerous civilian casualties were inflicted and much private property had been destroyed (Ex. 27, p 5). In this opinion Otahara concluded that Articles 2 and 3 of the Enemy Airman's Act (Ex. 16, p 8) had been violated and that the extreme penalty should be imposed (R. 79). Japanese interrogation procedure was substantially complied with by Japanese interrogators (Ex. 39, pp 18, 19, 20).

Approval of Otahara Opinion by Uchiyama and Kunitake:

About the middle of June 1945 General Otahara submitted his written opinion at a conference to Lt. General Uchiyama, the commander of the Fifteenth Army Area, and his Chief of Staff, Lt. General Kunitake (Ex. 36, p 7). This opinion is required to be submitted to the commander if it discloses that the fliers' acts warrant major consideration. If the facts are not sufficient the commander can direct that the flier be sent to the prisoner of war camp and the case be closed. If the commander's opinion is that the death penalty is justified, it is necessary to obtain the approval of the War Ministry, before submitting the case to a Military Tribunal. No approval is necessary from the War Ministry if it is the commander's opinion that the sentence be less than death (Ex. 5, p 2). It is customary for the commanding general and chief of staff to listen orally to the prosecutor's opinion (R. 137). Otahara conferred with General Kunitake who put his seal of approval on the opinion (Ex. 36, p 8). On the same day another conference was held at which Generals Otahara, Kunitake, and Uchiyama were present. Otahara orally advised them of the information as heretofore set out in the interrogation reports. After a discussion in respect to the duties of Nelson and Augunas and as to whether a life sentence should be recommended, it was determined that all crew members were a team and their purpose was the same and that a life sentence need not be considered in view of the fact that permission to demand a death sentence had to be obtained from higher headquarters (Ex. 36, pp 9-11). After Otahara left, Uchiyama and Kunitake discussed whether they would have to again submit a request to the War Ministry if the prosecutor's view was overthrown, a new view was given by the defense, and the defendants were sentenced to death. Kunitake and Uchiyama both relied on the statements given to them by Otahara. Uchiyama read the record after the conference and then put his seal of approval on the report (Ex. 36, pp 9, 12).

Approval by Higher Headquarters:

Otahara was instructed to take the opinion to General Hata, commander of the Second General Army at Hiroshima, and the War Ministry for approval (Ex. 36 p 12). Shimamura accompanied Otahara to the War Ministry. Shimamura in his affidavit states that Ono accompanied Otahara to Hiroshima, but on cross-examination testified there were several occasions when Ono accompanied Otahara and he may have been confused. On or about the 15th of June, the documents with approvals were forwarded to General Uchiyama and he signed his name and affixed

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his seal to an order instituting prosecution before a military tribunal. Arraignment was prepared, signed with the official seal of General Otahara, and sent to the military tribunal (Ex. 27, p 5; R. 80; Ex. 39, pp 20, 21).

Appointment of Court and Prosecutors:

Early in July 1945 Gen. Uchiyama appointed a military tribunal consisting of the accused Yamanaka as presiding judge, the accused Ono as law member, and the accused Matsumori as associate judge. Otahara recommended Capt. Ono as the law member. Kunitake recommended Major Yamanaka and Lt. Matsumori. Yamanaka was recommended because he was an intelligence officer and was well adapted to know conditions in respect to air raids. Otahara received orders on the 12th of July 1945 transferring him to the Second General Army. He recommended on July 14 or 15, 1945 that the accused Ogiya be appointed prosecutor. Yamanaka, as presiding judge set the date of the trial on or about the tenth of July for the 18th of July, 1945 (Ex. 8, p 1; Ex. 36, pp 14-16). The written opinion of Otahara was delivered to the above members of the military tribunal shortly after they were appointed, but nothing was given to Lt. Nelson and Sgt. Augunas (Ex. 27, p 6). It is customary for the judges to receive documentary evidence prior to the trial so that they could study it (Ex. 36, pp 8, 15; Ex. 39, p 22). Japanese procedure provides that defendants are informed of the date of the trial, but are not permitted to talk to witnesses or have defense counsel (Ex. 39, p 22).

Status of Otahara after July 12, 1945:

Officially, General Yamagami, Otahara's successor, was chief of the Legal Section after 12 July 1945, and Capt. Ono, his next in command, acted as chief of the Legal Section when the chief of the Legal Section was not there (Ex. 36, pp 14, 15; Ex. 39, pp 2, 3). After 12 July Kunitake complained to Capt. Ono about the delay in the trial (Ex. 36, pp 7, 8, 15). Although Otahara may not have been in Osaka during the whole period from 12 July to 15 July 1945 (R. 29), the evidence is clear as hereinafter set out that he participated in the case of Lt. Nelson and Sgt. Augunas after 12 July 1945. Ogiya, a member of the Legal Section, testified that he still considered Otahara as the chief of the Legal Section during the period after the 12th of July 1945; that when he was appointed prosecutor on the 14th or 15th of July 1945 he was told and instructed by Otahara that no further investigation was necessary; that as the approval had been obtained from General Hata and the War Ministry to execute these fliers he should just read the indictment and demand the death penalty; and that execution would be by beheading at the Yokoyama firing range. In respect to the execution, Ogiya further testified that Otahara said, "Chop their heads off!" and although he protested he again confirmed this instruction. No further protest was made by Ogiya because Otahara was not the type of man to listen to protests by subordinates of a lower rank (Ex. 38, pp 4, 5).

Preparation for Execution prior to Trial:

On or about the 15th of July 1945, Otahara ordered Shimamura, the clerk, to obtain detailed instructions from Capt. Ono to find a secret, deserted place at the Yokoyama firing range for the execution. Ono told Shimamura he had already secured permission to use this place and instructed him to see Capt. Nakamichi to obtain a person to accompany him. Chief guard Ogawahara was ordered to go with him. These instructions were carried out on the 16th and 17th of July 1945, and three places for the execution were selected, listed as to their desirability. Shimamura on 17th of July 1945 reported to Otahara, left with him the map indicating the places selected, and reported to Ono that Otahara was given the detailed report (Ex. 27, p 6). Otahara selected the place of execution because he had more power and authority than Nakamichi. Either Otahara or Ono selected the date and hour of the execution (Ex. 38, p 4). The prison commander, at times, submits to the prosecutor for approval the time, place and date of execution. The Commanding General or his subordinates can make this determination (Ex. 39, p 23). On the afternoon of the 17th of July 1945 Nakamichi as prison commander told Ogawahara, one of the chief jailers that two prisoners were going to be executed and ordered him to go with Matsui and Sando, early on the morning of the 18th of July, to the Yokoyama firing ground and dig two holes and have

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them ready by 1300 hours. All three left the military prison at 0600 the day of the trial and proceeded to the place of execution where they dug two graves and awaited the arrival of the execution party. Matsui and Sando served as two of the executioners. Nakamichi on the same morning selected Inoue, a condemned thief then incarcerated in the military prison, to perform religious services at the execution; and selected Matsuda as the third executioner. Nakamichi further, on the morning of 18 July 1945, ordered Inoue and Matsuda to wait in the anteroom at the place of trial and arrange for a truck to be parked outside the courtroom during the trial for the purpose of transporting the victims and the execution detail to the place of execution (Ex. 30, Part I, p 3; Ex. 31, p 2; Ex. 32, p 2; Ex. 33, p 2; Ex. 34, p 1). Matsuda testified that he heard Nakamichi say before going to court that Otahara told him that the execution would be by beheading if the fliers were sentenced to death (Ex. 31, p 2). Mori, the interpreter, testified that there was a rumor that Otahara went to Tokyo to obtain special permission to decapitate the fliers, and then was suddenly transferred (R. 96). Yamagami testified that he heard at Sugamo Prison from Nakamichi and chief guard Sugita that beheading had been decided upon before execution and Otahara gave the order to behead (Ex. 39, p 10). On the day of the trial, General Uchiyama was not in Osaka, having left about four days previous on a tour of inspection and he did not return until 1700 on 18 July 1945. Uchiyama prior to leaving, had instructed Kunitake to approve the execution order, allow no appeal, if the fliers were found guilty of the offenses charged, and if no new facts were developed at the trial. Uchiyama further instructed Kunitake that the execution should be carried out immediately as it was against "bushido" to allow the defendants to live after being sentenced to death (Ex. 36, pp 18, 23).

Trial:

The trial of Nelson and Augunas was held in a courtroom at Osaka Castle and began about 1000, and was concluded about 1130 or 1200 on 18 July 1945 (Ex. 27, p 7; Ex. 8). Persons present, in addition to the judges, were Lt. Ogiya, prosecutor; Sgt. Mori, interpreter; Shimamura, a civilian clerk; Lt. Nelson, Sgt. Augunas, and two guards whose names are not known. Shimamura, as ordered by Ono or Ogiya, brought to the trial blank execution forms (Ex. 27, pp 6, 7, 9; R. 86, 87). All records pertaining to the trial were destroyed after the war by orders of the War Ministry (R. 80), and the details set out herein are mainly taken from the testimony of Shimamura (Ex. 27, pp 7, 8, 9) and Mori (Ex. 28, Part II, pp 1-6). Presiding Judge Yamanaka opened the trial and asked each defendant his name, age, unit, address, birthplace, and occupation before entering the service (Ex. 27, p 7; Ex. 28, Part II, p 1). Shimamura testified that after the interrogation of Yamanaka that Ogiya asked the military tribunal to examine the accused, and Capt. Ono, the law member, first stated to the defendants that they were accused of participating in the bombing raids on Tokyo, Osaka, and Kobe which resulted in the deaths of many civilians and destruction of much property, and demanded a yes or no answer as to whether or not they participated in the raids. Both defendants answered yes (Ex. 27, p 7). Mori, the interpreter, testified that the charges against Nelson and Augunas were stated by Ogiya in his opening statement (Ex. 28, Part II, p 1) and such statement was translated (R. 91). Ono, after the prosecutor's statement, interrogated Nelson about thirty minutes and Augunas about ten minutes. During the interrogation he looked at the documents previously prepared by various units of the Fifteenth Area Army. Mori testified that no parts of the documents were translated by him into English, but Ono showed both Nelson and Augunas their signatures and asked them if their statements were true, and they answered yes. He further testified that all questions and answers of the judges were translated (Ex. 28, Part II, pp 3-5; R. 92). Shimamura testified that the defendants were not shown their signatures and the documents were not translated, but that the substance of the Kempei Tai interrogation reports and pre-trial examination reports were stated by Ono to the accused. Ono then asked each of the accused if they had anything to say and gave them a chance to explain. Each replied that it was true and that they had nothing further to say about the reports (Ex. 27, p 8; R. 80). The following testimony of Nelson and Augunas at the trial was in answer to questions of Capt. Ono (Ex. 27, pp 7, 8; Ex. 28, Part II, pp 1-6). Both testified as to their family background, personal history and military history, and that each had been on ten air raids of Japan. Nelson stated as navigator he used

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radar equipment, navigation maps, and led the planes straight to the bombing target. Augunas stated, as a radio operator, he communicated with the base and gave first aid to crew members. Nelson testified in the air raids on Japan from December 1944 until February 1945 high explosive bombs were used and targets were specific, such as aircraft factories, arsenals, etc. (R. 92 reflects that the specific factories stated in Ex. 28, Part II, p 2 were bombed prior to March of 1945). Nelson further testified as to the dates, time, place of departure, course, altitude, time of arrival, direction of approach in the Tokyo, Osaka, and Kobe air raids of March 1945 (See also Ex. 7, p 2; Ex. 8, pp 1, 2; and Ex. 6, p 3). Nelson also testified that incendiary rather than high explosive bombs were used in the air raids on these three cities. Ono asked in connection with the air raid on each city, "What was the target?" and Nelson replied that all he was told at the briefing was the center of the city. With regard to each raid Ono informed Nelson that many civilians had been killed and much private property had been damaged. He then asked him what he had to say about it, and Nelson replied that since he had no knowledge as to what was bombed or what the results had been there was nothing he could say. Nelson also admitted bombing Hamamatsu, Nagoya, and other cities. Augunas' interrogation was much shorter and his answers were substantially the same as those given by Nelson on the same questions (Ex. 27, pp 7, 8; Ex. 28, Part II, pp 1-6). Ogiya (Ex. 7, p 2) testified that at the trial Nelson stated, as a defense, that when he bombed Japan he was obeying the orders of his superior officers. The following documentary evidence was introduced and considered by the court in determining its sentence.

a. Kempei Tai Documents: (1) Interrogation Reports of Nelson and Augunas, (2) Dispatch Report, (3) List of Articles and Papers of Nelson and Augunas, (4) Index to Papers.

b. Fifteenth Army Tribunal Documents: (1) Warrants of Arrest for Nelson and Augunas, (2) Report of Detention Interrogation of Nelson and Augunas, (3) Warrants for Detention of Nelson and Augunas, (4) Pre-trial Interrogation Report of Nelson and Augunas, (5) Written Opinion of Otahara, (6) Letter of Inquiry (Attached were Approvals of Second General Army and War Ministry), (7) Letter transmitting all Documents to Commander of Fifteenth Area Army (All documents above enumerated were attached), (8) Fifteenth Area Army Commander's Order Instituting Prosecution, (9) Arraignment Order of Otahara.

Nelson and Augunas were not permitted defense counsel, which, from the evidence, is in accordance with Japanese law. Further, it appears that the judges took judicial notice of the destruction caused by the bombing of Osaka and Kobe on March 15 and 16, 1945. Matsumori, the associate judge, asked no questions (Ex. 28, Part II, p 6). Ogiya made a short closing statement (Ex. 28, Part II, p 6; Ex. 27, p 8) in which he demanded the death penalty. The request for the death penalty was never translated during the proceedings (R. 93, 97). The court recessed at 11 o'clock and in 10 or 15 minutes returned with the verdict and sentence (Ex. 27, p 8; Ex. 28, Part II, p 7). Shimamura further testified that the trial was fair in comparison with a Japanese trial, that it was customary to try cases from papers and reports and without witnesses or defense counsel (R. 81, 85, 86). Yamagami (Ex. 39, pp 23, 24, 25, 28, 29) sets out the procedure for trial and it appears that this procedure was substantially complied with at the trial of Nelson and Augunas. On page 29 and 30 he states that the trial was unfair in that the graves were dug before the trial, the bodies were buried at the secluded place with no markers. He further testified (R. 139) that under Japanese military law that this military tribunal had authority to take judicial notice that Kobe and Osaka had been bombed extensively.

Sentence:

At the conference of the members of the military tribunal in determining the verdict and sentence, the legal officer first explains whether the verdict should be guilty or not guilty and gives his reasons. If he considers the verdict guilty he expresses his opinion as to what the penalty should be. Next, the associate judge, and last the presiding judge express orally their independent opinions. Usually the latter two refer to the opinion of the legal officer and rely on his opinion. Judges have a right to exercise an independent judgment in determining the verdict and sentence, but in actual practice they

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follow the opinion of the central authorities. Kunitake testified that he didn't know if the members of the court would be censured for not following the recommendation of the central authorities because that problem had never been presented (Ex. 39, pp 24, 29; Ex. 36, p 47; R. 137). At the conference of the judges in the Nelson and Augunas case each voted for the death penalty (Ex. 11). This conference or recess lasted about ten or fifteen minutes and the judges returned to the courtroom at about 11:30. Yamanaka announced to the defendants that they had been found guilty of all criminal facts and that they were sentenced to death. Ono explained that they were found guilty under military law of the Tokyo, Osaka, and Kobe air raids in March 1945, and as a result many civilians were killed and much private property destroyed. He further stated that they would be executed according to military regulations (Ex. 6; Ex. 8; Ex. 27, p 8; Ex. 28, Part II, p 7). This statement was translated and Nelson vigorously protested that their acts were not in violation of International Law or military law, but were according to orders from their superior officers and they had no official responsibility in regard to the bombing policy of the United States (Ex. 27, pp 8, 9; Ex. 28, Part II, p 8). Mori (R. 94; Ex. 28, Part II, p 7) testified that the fliers were found not guilty by the court of the air raids from December 1944 to February 1945 and the air raids on Tokyo, the first charge, but were found guilty of the second and third charges, the bombing of Osaka and Kobe, respectively. Throughout the proceedings of the military tribunal Otahara was present in the building in which the trial was held (Ex. 27, pp 12, 13). Immediately after the trial Ogiya reported the outcome to Otahara (Ex. 38, p 5). At noon that day a farewell party was given in honor of Otahara (R. 29; Ex. 38, p 5).

Approval of the Death Sentence:

Immediately after the proceedings Ono ordered Lt. Miniemi to be present at the execution as medical officer. Yamanaka reported to Kunitake that no new evidence had been presented and that the defendants accepted the prosecution's charges against them (Ex. 29, Part II, p 1; Ex. 36, pp 17, 18, 19). At about 12:30 Ogiya delivered to Kunitake an execution order, which had been drafted during the noon hour by Shimamura, and after reading the transcript and conferring with Ogiya, Kunitake placed his seal on a duplicate copy and had Uchiyama's adjutant put Uchiyama's seal on the original. The execution order stated the date of the execution but not that the method was by beheading because that would be unlawful (Ex. 27, pp 9, 10; Ex. 36, pp 20-25; Ex. 38, pp 6, 13, 14). The commanding general is required, under regulations, to examine the records before ordering an execution but under Japanese custom, if the evidence is the same as had been previously submitted, the execution may be ordered without a complete examination. The commanding general can reduce the sentence but not order a re-trial. Since the commanding general has already approved the death sentence prior to trial, it is not customary that he reduces the sentence after trial to life imprisonment or less (Ex. 39, pp 26, 27; R. 137, 142).

Execution:

At about 1300 on 18 July 1945, Nakamichi received the execution order from Ogiya and the execution detail assembled and departed by truck from Osaka Castle to the Yokoyama firing ground and arrived there about 1430. Just prior to the departure, according to statements made by Nakamichi to Yamagami (Ex. 39, p 10), Otahara told Nakamichi to "Do it splendidly" and "Do it with courage" and Otahara declared that if he had not been transferred he would have shown them how perfectly it could be done. Shimamura (Ex. 27, p 10) and Matsudo (R. 108, 109) did not remember any statement made by Otahara at the truck prior to its departure. Under the supervision of Ogiya as prosecutor, Nakamichi ordered the guards to decapitate Lt. Nelson and Sgt. Augunas with swords. Guard Sando struck the neck of Lt. Nelson with a sword twice but failed to sever his head completely, whereupon Nakamichi ordered guard Matsuda to shoot Lt. Nelson. In compliance with this order, Matsuda shot Lt. Nelson twice through his head. Guard Matsui struck Sgt. Augunas once with a sword but failed to sever his head completely, whereupon Nakamichi ordered Matsuda to shoot Sgt. Augunas. In compliance with this order, Matsuda shot Sgt. Augunas once through the head. The bodies were buried in an unmarked grave at the place of execution. All personnel present were instructed by Ogiya and Nakamichi to maintain absolute secrecy about the

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incident (Ex. 7, p 3; Ex. 9, p 2; Ex. 27, p 10; Ex. 28, Part II, pp 9-14; Ex. 29, Part III, pp 1, 2; Ex. 30, Parts I and II; Ex. 31; Ex. 32; Ex. 33; Ex. 34; Ex. 35, Part II). The place of execution was in a secluded spot (Ex. 30, Part I, p 4). Ogiya testified that the second sword cut of Nelson was high on the back of the head and was about two sun long and one-half sun deep. (One sun equals 1.19 in.). The first cut was lower on his neck. Augunas was cut below the collar about two sun long and not very deep. He further testified that after the execution he reported to Otahara that the beheading had not been a complete success and Otahara replied that was not good (Ex. 38, p 7). At 1900 on the night of the 18th of July, Kunitake went to the residence of Uchiyama and reported to him among other things the facts concerning the trial, execution and burial of the fliers (Ex. 36, pp 25, 26). On the morning of July 19, 1945 Minami reported to Ono that the execution had been carried out by beheading and then by shooting and was told to record the cause of death on the death certificate as "execution by shooting" (Ex. 29, Part III, p 1). Minami on cross-examination (R. 100) testified that the two fliers died as a result of the shooting. On the 19th of July 1945, Yamagami arrived in Osaka to assume the position of chief of the Legal Section and was told by Otahara that the matter of Lt. Nelson and Sgt. Augunas was completed (Ex. 39, p 4). A few days after the trial the clerk, Shimamura, prepared the record of the proceedings of the tribunal and the report of the execution and secured the necessary signatures (Ex. 27, p 11). Uchiyama ordered Yamagami on or about the 23rd of August 1945 to exhume, cremate, and rebury the remains of Lt. Nelson and Sgt. Augunas. Pursuant to this order, under the direction of Ogiya, their bodies were cremated at the place of execution and were buried in two wooden boxes at an unmarked spot on the edge of Sanadayama military cemetery. Shimamura, Matsui, Matsuda, Sanda, and a few other guards, assisted Ogiya in this action (Ex. 7, pp 3, 4; Ex. 27, p 12; Ex. 38, p 7; Ex. 39, pp 7, 8). Ogiya was later questioned by Ono and Otahara as to whether any sword marks remained on the bones of the fliers after cremation (Ex. 38, pp 7, 8).

Concealment:

After the termination of the war, Kunitake read the Potsdam Declaration, and according to his testimony, in order to protect Uchiyama, he called a conference where it was decided to conceal the facts and report that Nelson and Augunas had died in a bombing raid. Kunitake ordered Yamagami to notify all persons connected with the case to so state if they were questioned. Uchiyama was not told of this plan of concealment until the first part of December 1945 (Ex. 36, pp 28, 29, 30; Ex. 39, p 9). Kunitake (Ex. 36, p 28) and Yamagami (Ex. 39, p 7) both indicated that this conference was held before Uchiyama gave the order to exhume and cremate the bodies. Pursuant to that order false written statements were given by Kunitake, Otahara, Yamanaka, Ogiya, Nakamichi, Mori, Shimamura, Matsui, Sanda, Matsuda, Minami, and Taniguchi (Ex. 1, 2, 4, 5, 6, 7, 27, 28, 29, 30, 31, 32, 36, 37). Some of these statements were introduced in evidence, but in most instances a later and correct statement was introduced. About the tenth of December, Uchiyama attended a conference of former members of the staff and Kunitake advised that it was the opinion of the Demobilization Ministry that the concealment plan was unwise, and instructions were given by the Central District Demobilization Headquarters to report the facts. Uchiyama, who was present at this meeting, agreed that the concealment plan was unwise, and gave instructions that the plan for concealment be cancelled and that all individuals tell the truth (Ex. 39, p 13). Uchiyama in his statement given on the 17th of December 1945 (Ex. 5) gives the facts in the case accurately except that he testified that the execution was by shooting and does not mention the beheadings. Mori testified that in Sugamo during March 1947 that Uchiyama was surprised the fliers were beheaded (Ex. 28, Part III, p 2; R. 92). Uchiyama also asked Yamagami in Sugamo what he knew about the beheading and stated that he had not heard anything about the beheading officially (Ex. 39, p 14).

Exhibit 16, Enemy Airmen's Act:

(It should be noted that the page numbers hereinafter set out refer to pages of the Exhibit). Various orders, regulations, proclamations and military law, pertaining to the trial of enemy airmen alleged to have violated international law and applying to various commands at different dates, are included within this Exhibit. Secret Order 2190 (p 2) and the Army Military Law (p 4),

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which was attached to the "Communication of the Handling of Captured Enemy Airmen (p 3), as an example, appears to be the foundation and authority of subsequent orders, regulations and proclamations. A regulation, dated 11 February 1945 (p 18, 19, 20) gives the Fifteenth Area Army, the command involved herein, the authority to establish a Military Discipline Tribunal which shall enforce military regulations pertaining to the punishment of enemy airmen as specified by the General Commander of the Defense. This latter regulation appears on page 8 and is substantially the same as the "Army Military Law" (p 4). Certain regulations, p 13, 15, of the First General Army, are included within the exhibit. It has been noted from the Certificate, p 12, that the regulations pertaining to the same subject matter of the Second General Army, the higher command of the Fifteenth Area Army, were destroyed and its regulations were the same as the First General Army. The regulations appearing on p 13 is substantially the same as the "Military Law" (p 4). The second regulation, p 15, gives the Area Army Military Tribunal jurisdiction over enemy airmen captured by the Area Army. It should further be noted that the Second Army's Military Tribunal regulations were distributed in July 1945 (p 12). In the instant case the alleged acts of indiscriminate bombing occurred in March 1945 and the trial for said offenses was held on the 18th of July 1945. It therefore appears that the regulations of 11 February 1945 (p 16, 19, 20) and the "Military Law Concerning Air Raids" established by the General Commander of the Defense are applicable regulations. Applicable, herein, are also the "Proclamation of the Commander in Chief, General Defense Command," p 6, and Army Secret Order No. 1289 (p 11). The Military Law (p 8) provided that it would apply to all enemy airmen who raid Japanese territory and that punishment would be meted out to all enemy airmen who carried out bombing, strafing and other acts which inflict casualties on civilians and damage to private property which has no military significance, except for unavoidable cases, bombing and strafing non-military objectives; any atrocious, brutal acts which disregard humanity. Death, by firing squad, was provided as the punishment, but this, according to circumstances, could be changed to imprisonment for life or for not less than 10 years. The regulations under this law, (p 18, 19, 20) provided for a Military Tribunal of three judges nominated by the Commander of the Fifteenth Area Army; that the judges will be two combatant officers and one legal officer, and that the Chief of the Tribunal or Commander of the Fifteenth Area Army may withhold the execution of military punishment. It is further provided (p 2) that the regulations on special court-martials of the Army Court-Martial Law will apply.

Other Exhibits Introduced:

Exhibits 3A and B: Photographs of the names of Nelson and Augunas scratched on the plaster at the police station of Kobe, Japan.

Exhibits 3C to G: Photographs of the place of burial and charred remains of Nelson and Augunas.

Exhibit 13: Service Records of Lt. Nelson and Sgt. Augunas.

Exhibits 17 to 24, inclusive: Personal and military histories of each of the accused.

Rebuttal

James B. Lynd, Capt., MP, GHO, Chief, Osaka Branch, SCAP Legal Section, testified that he had Japanese authorities make a survey in connection with the damage done during the air raid on Osaka and Kobe. The witness could not testify what was damaged except from his information sources. This information was obtained from memory and from questioning people. Witness requested the information on August 15, 1947, and it was produced August 15, 16, and 17, 1947 (R. 257-260 and statements on Ex. 30 to 43, inclusive). Based upon information obtained from talking to people and observation, this witness testified that industries in Osaka and Kobe were in every ward and ku and in each section of the city; that fifty percent of the homes destroyed were combined home-and-factory and that he was not told whether the home factories made commodity goods or war materials. Witness identified several maps reflecting the damage to Osaka and

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Kobe in the air raids of March 13 and 14, 1945 (R. 251, 260, 261). Exhibit 40 is a map of Osaka showing military installations bombed. A statement on the exhibit reflects that wards wherein military installations were installed were not severely damaged. Exhibit 41 is a map of Osaka indicating the location of the largest industries doing work for the army and navy on March 13, 1945. Exhibit 42 is a map of Osaka indicating sixty of the largest industries in Osaka. Exhibit 43 is a list showing 32 out of 207 factories destroyed or partially damaged in the air raid of March 13 and 14, 1945. (See also R. 255, 256).

b. For the Defense:

The defense introduced into evidence affidavits from residents of Osaka (C 1-48) and Kobe (D 1-16) for the purpose of showing that these cities were bombed indiscriminately. From these affidavits it appears that in the raids of March 13, 14, 16 and 17, 1945 many shrines, hospitals and private property were destroyed and that a large number of people, non-combatants, were killed. The affiants in some of these affidavits testified that many of the areas bombed were commercial and residential sections of the city and that there were no factories or military targets. One affidavit, (C-13) the affiant testified that approximately 100 out of 1000 homes destroyed were family factories in the area in which he lived. Other affiants testified that some factories were destroyed in the area in which they lived but these in number were small in comparison to the loss of other private property.

Tadao Fukukari, a witness for the defense, identified Exhibit E, an official record of June 1945 which lists in the city of Osaka the following property destroyed in the air raid of March 13, 14, 1945.

Hospitals	21 totally destroyed; 7 partially damaged
Doctors' offices	416 totally destroyed; 9 partially damaged
Dentists' offices	297 totally destroyed, 4 partially damaged

The witness further testified that in certain sections of the city, no factories were destroyed and in other sections factories were destroyed (R. 163-167).

Ryuchi Ozaki, a witness for the defense, identified Exhibit F, information taken from official records, which lists by sections of the city that 111 schools were damaged or destroyed in the air raid on Osaka on March 13, 14, 1945.

Nabutsuga Shindo, a witness for the defense, testified from a survey that 36 shrines, 268 temples and 261 churches, a total of 567, were totally or partially destroyed in Osaka in the air raid of March 13, 14, 1945 (R. 170-173).

Akira Harukidani, a witness for the defense, identified his affidavit, Exhibit G, which states that he assisted in the interrogation of Nelson and Augunas, twice at the Osaka Kempei-tai headquarters, on or about 18 and 19 March 1945. On the first occasion Major Yamanaka questioned them in reference to military operations and the fliers did not give satisfactory answers. The following day the interrogators were the witness, Shimizu and Masamoto. Nelson stated in the briefing they were told to bomb Osaka and the Kobe sectors in respect to the air raids on Osaka and Kobe respectively. In the briefing for each of these missions no military target was mentioned. Nelson traced the route and course for each air raid on maps. Augunas stated to the witness that after General Le May had been transferred to the Pacific theater he heard a rumor that the bombing of Japan would become more and more fierce (R. 173-175).

Exhibit H, a telegram from the War Department to CINCPAC, was introduced in evidence by the defense. This exhibit, taken from official records, states that on the air raids on Osaka on 13, 14 March 1945 and Kobe on 16 and 17 March 1945 the target was the urban area for each city. The exhibit further states that incendiary bombs were used in each of the air raids.

The defense objected and the prosecution concedes that there is an honest difference of opinion (R. 156, 236, 237) to a portion of the translation

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of Army Secret Order 1289, Exhibit 16, p. 11, issued by the Vice Minister of War and the Sub-Chief of the General Staff, dated 21 February 1944, which states:

"Therefore, it is directed that the central authorities be contacted thoroughly beforehand in such cases, and also that the execution of capital punishment in such cases be withheld until instructions are received from the central authorities."

The defense introduced in evidence, Exhibit I, a translation of Secret Order 1289, which states, in respect to that portion in dispute, the following:

"It is desired that the central authorities be adequately informed in advance, and that furthermore, in case capital punishment is contemplated, instructions be awaited from the central authorities" (Underscoring supplied).

Without conceding the accuracy of Exhibit I, as distinguished from the one heretofore introduced, the prosecution did not object to the introduction of Exhibit I. The prosecution stated at the time it was introduced that the translation previously submitted had been prepared by ATIS and that they would submit at a proper time a translation of Secret Order 1289 prepared by the language expert of the War Ministry trials (R. 237). This translation was never introduced in evidence.

Junicki Banno, a former Lt. Col. of the Judicial Section of the Japanese Army at the War Ministry, testified for the defense. The gist of his pertinent testimony, in respect to Japanese law applicable for the trial of captured enemy airmen, is as follows:

Enemy Airmen's Act: Under the Enemy Airmen's Act, enemy airmen are tried by a military discipline tribunal. The procedure used before this military tribunal is the same as the special court-martial procedure as set out in the Japanese Court-Martial Manual (Ex. 16, p 2). General and special courts-martial procedure is established by legislation enacted by the Diet and the Military Discipline Conference is established by Executive Order under the Emperor's command authority (R. 183). The President, under the special court-martial procedure, is the same as the American appointing authority and the Chief Judge is the same as the President of an American Military Commission (R. 176). The provisions of the Military Tribunal Regulations for Captured Enemy Airmen, Pros. Ex. 16, originated with Vice Minister of War, Lt. Gen. Hyotoro Kimura (R. 177).

The central authorities, who must give directions before proceeding in the case, refer to the War Minister and Chief of Staff. A request for approval to proceed must be submitted to the War Minister before trial and not after trial. Approval of the central authority is not necessary after the verdict has been pronounced and the defendant has been sentenced (R. 177, 178; see Ex. 16, p 11). It is not required, in case of a death sentence, that a firing squad be used but one man shooting the defendant is sufficient (R. 179, 188, 192; see Ex. 16, p 8, Art. 4). Under Article 3 the commanding general can reduce the sentence and under Article 5 he can suspend the sentence (R. 193; Ex. 16, p 8). The Emperor is the only individual that can commute the sentence (R. 182).

Rules of Special Court-Martial Procedure applicable to Military Discipline Tribunals: A Japanese officer would be tried under special court-martial procedure in the same manner as a captured American. Provisions of the Japanese Court-Martial Manual applicable to special court-martials are Article 418, providing that a judgment may be revised (R. 184, 189); Article 473, providing that retrial may be claimed for the benefit of anyone sentenced to the penalty (R. 186, 189); Article 387, providing that the presiding judge shall show the evidence to the defendant (R. 186, 189); Article 105, providing that defendant can, if he requests, obtain a copy of the trial proceedings (R. 187, 189); Article 505, providing that the execution will be performed by the Prison

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Commander in the presence of the Prosecutor and Clerk (R. 187, 189); Article 508, providing that the President, or Commander of the Army, will act in place of the War Minister in executing or suspending the sentence (R. 187, 189); and Article 93, providing that no defense counsel is permitted in special courts-martial (R. 189). There is nothing in the rules to prevent the use of witnesses and it is customary for the court to give its reasons for its sentence to the defendant (R. 186).

Articles in Court-Martial Manual Applicable to General Courts-Martial and not Special Courts-Martial: Articles 424 and 439 are applicable to general and not special court-martials. Article 424 provides that grounds for revision exist if a disqualified judge takes part in the trial, if the evidence is not examined in open court and if the prosecutor at the trial does not explain the offenses. Article 439 provides that it is the duty of the prison commander to write the request for revision if the accused cannot write (R. 184, 185, 189).

Commanding General and Chief of Staff: Regulations do not require that the opinion of the Public Procurator go through the Chief of Staff but it is customary that said opinions will clear through him before being presented to the Commanding General. The Chief of Staff does not have authority to send the opinion back to the Prosecutor for correction (R. 176).

Selection of Judges: The Judicial Officer prepares a roster of officers available for court-martial duty and the Commanding General approves it. Members of the court are nominated by the Commanding General from the roster. It is customary for the Judicial Department to select one of its members to be put on the court (R. 191).

Disqualification of Judges: A member of the court is disqualified if he has previously thoroughly interrogated the defendant (R. 191) but not if the information obtained in the interrogation was limited (R. 192). Interrogation by an intelligence officer to obtain military secrets would not disqualify the officer (R. 192).

Trial: In most cases prepared documents are the only evidence introduced at the trial although in other cases witnesses are used (R. 189, 190). The accused is always questioned and in case he cannot speak Japanese, an interpreter informs him of the charge and interprets a summary of all the evidence (R. 190). The Prosecutor is required to follow the opinion of his superior, but it is not customary for him to read the approval of the Commanding General in demanding the death penalty (R. 192, 193). Witness never heard of a case where the grave was dug before the trial and accused executed within six hours after the sentence (R. 192).

Sentence of the Court: Each individual member of the court can render an individual opinion and not be governed by the opinion of the Chief of the Legal Section. Based upon his own experience the witness testified that he could not state that the court usually followed the recommendation of the Chief of the Legal Section (R. 193).

Review: It is not customary, under special court rules, for the Commanding General to review a case before execution (R. 176, 178). It is customary for him to check and see if there is any mistake in the general procedure (R. 182).

Accused, Eitero Uchiyama having been warned of his rights, elected to be sworn as a witness and testified in substance as follows:

He took command of the Fifteenth Area Army as a Lieutenant General on April 17, 1944, at Osaka (R. 197). Commanded the southern half of the island of Honshu and the island of Shikoku (R. 197, 241). At first 5 divisions were under his command and later 10 divisions (R. 197). He spent half of his time inspecting defenses as he expected an invasion in early fall of 1945 (R. 198, 241). He assumed responsibility for decisions of subordinate chiefs but relied

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on Chief of Legal Section (accused Otahara) in respect to legal matters, as his experience in law was little or none (R. 198). Military discipline was a special duty assigned to the Chief of Staff Kunitake and not a regular one (R. 202). He first heard of the American fliers, Nelson and Augunas, when reports were received from Central Kempei Tai and ordered that this matter be handed over to the Military Discipline Conference (R. 199). He ordered General Otahara to investigate Nelson and Augunas personally because he believed that this was the first occasion in Japan proper that enemy fliers would be tried and that as a precedent might be established, he wanted an experienced man to handle it (R. 199, 206).

Conference Approving Otahara's Recommendations for trial and death sentence: Otahara, in person, submitted his report of the investigation, a document of 200 pages, about the middle of June 1945 (R. 199, 200). A conference, with Kunitake and Otahara, lasted about 40 minutes (R. 206). Otahara read to Uchiyama certain important matters in the investigation and the entire report was read by him (R. 199). Otahara said that Nelson and Augunas had offended international law and would have to be brought before a Military Discipline Conference, that proof was insufficient to charge them with the bombing of Nagoya and Hamamatsu but sufficient to charge them with indiscriminate bombing of Tokyo in March, Osaka on March 13, 14, Kobe on March 16, 17, 1945 (R. 199). Uchiyama remembered from the report that the defendants participated in these bombings and that prior to March 1945, high explosive bombs were used on military targets; that thereafter Japanese cities were bombed with incendiary bombs (R. 199, 208). Otahara said superior orders were not a defense or could be used in mitigation when such orders are against international law and inhuman to a man of common sense (R. 200). A life sentence would be too light a sentence for the violations of the Military Discipline Regulations, Ex. 16, when American flyers, with radar and superior bomb sights, failed to damage the Osaka Castle, the headquarters of the Fifteenth Area Army, the largest arsenal in Japan, the billets of the 22^d and 23^d Infantry, the harbor installations and the civilian factories nearby, but instead in successive bombings over a wide area caused the death of many civilians and the destruction of homes and public properties. Such action showed that the target was not military installations, even though a few factories were damaged and destroyed. (R. 199, 200, 208, 239). Uchiyama defined military installations as those directly connected with the army and factories making military articles and munitions (R. 206). Otahara further said to Uchiyama that the duties of the defendants would make no difference as it was necessary for all members of the crew to cooperate to hit the target and all were guilty under Japanese law (R. 207). The witness did not ask Otahara about other cases involving American airmen although he knew about Doolittle incident and that a part of the crew, perhaps navigator, radio operator, and bombardier, had their sentences commuted to a life sentence (R. 215). At the time of the Doolittle incident Uchiyama was in China but read about it (R. 215). Uchiyama approved the report by placing his seal on it (R. 206) and directed Otahara to take the full report of 200 pages to War Ministry for approval because the War Minister might want to question him as it was an important case (R. 204, 216). The witness does not believe that Otahara intentionally held back facts but after hearing all facts does not believe Otahara reported all the details (R. 242).

Opinion Approved and Instructions of War Ministry: Opinion of Otahara was approved by General Hata and the War Ministry (R. 201, 216). Approval by War Ministry were instructions to the Commanding General that the prosecutor may bring charges against the accused, that if the opinion requested a death penalty, that if no new matter was brought out in the trial and that if the defendants were found guilty as charged, then the execution may be carried out (R. 201). This statement is in conformance with Defense Exhibit I, a correction in the translation of Exhibit 16, p 11 (R. 236, 237).

Appointment of Court and Procurator: Otahara was originally appointed Procurator on the orders and after he received his orders of transfer on July 12, 1945, the accused Ogiya was appointed; not important that Otahara be there as case had been fully investigated and it was customary to carry out trials with speed after they were prepared (R. 201, 219, 220, 240). Appointed court from roster of 10 officers and depended on Otahara as to eligibility of judges (R. 201, 238). Otahara recommended Capt. Ono as judicial officer and

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Ogiya as Prosecutor (R. 216, 237, 238) and General Kunitake recommended Yamanaka and Matsumori (R. 217). Witness did not know that Yamanaka and Ono had participated in any manner in the case before trial although he did know that Yamanaka was an intelligence officer (R. 217, 218, 219, 238, 239). Witness made no inquiry as to whether any of the judges had any of their families killed or property destroyed in air raids on Osaka, Kobe or Tokyo (R. 239). Yamanaka fixed the date of the trial on July 18, 1945 (R. 219). Judges are free to state their opinions and are in no way to be hindered in their findings and sentencing the accused (R. 201).

Instructions to Kunitake on Departure from Osaka: Uchiyama left Osaka on an inspection trip on July 14, 1945 and returned the evening of July 18, 1945 (R. 201, 220). At the time he left he knew the trial of the defendants had been tentatively set on July 18, 1945 (R. 219). Instructed Kunitake to use his name in approving death sentence if no new evidence or statements favorable to the accused were introduced (R. 201). If new evidence was introduced, Kunitake was to await further orders (R. 201). Told Kunitake if there was no ground for appeal or mitigation and if the death sentence was given, the American flyers would be executed immediately in order to prevent them from being tortured mentally (R. 201, 220, 221, 241).

Report of Kunitake, Yamanaka and Ogiya on Uchiyama's return to Osaka: Kunitake on the evening of July 18, 1945 and Yamanaka and Ogiya on the 19th and 20th of July 1945 reported that no new evidence or statements in favor of the accused had been introduced in evidence and the tribunal sentenced them to death (R. 202, 203). Yamanaka further stated that the accused were found not guilty of the bombing of Tokyo, the first charge, because of insufficient evidence and that they had had an opportunity to defend themselves (R. 202, 203, 223, 236). Nothing was said about the beheading or about Nelson's protesting his innocence (R. 223, 224). Uchiyama heard about beheading for the first time in Sugamo during March 1947 from Mori (R. 203, 224) and that Otahara gave the order for the beheading (R. 230). Kunitake did not tell him the location of the execution or that the graves were unmarked (R. 223).

Osaka a Proper Target: Osaka, the second largest city in Japan, was an important industrial and commercial city (R. 209, 210). Munition factories were just outside the city as well as in the city (R. 210). Anti-aircraft emplacements were just outside the city, and both Kobe and Osaka had anti-aircraft guns to repel air attack (R. 210, 211, 240). Military objects in Osaka were not the targets of the raid of March 13, 14, 1945 considering the number of planes used, the type of bombs and the way the raid was carried out which resulted in many civilians being killed and property destroyed (R. 212). When he arrived in April, Kunitake reported that the Central Army Headquarters, Ordnance Depot, Supply Depot, Munitions Factory (all grouped together in Higashiku just outside the city), the railway center, the piers, docks, warehouses and harbor installations were not destroyed (R. 245, 246).

Cremation of the Bodies: Gen. Yamayami was told to cremate the bodies because it was not only a Japanese custom but also the remains would be easier to handle for reburial (R. 227, 228). The bodies were not cremated in crematorium because the spot was isolated and the remains were in a decomposed condition (R. 231).

Concealment: Uchiyama's subordinates did not tell him about concealment plans as it was not an official matter (R. 228). He first learned about it at a conference at the Oei Schoolhouse on the 12th of June 1945 and told the others to tell the truth because the concealment plan was unwise. In this respect he concurred with the Tokyo headquarters (R. 203, 233-235). Uchiyama contacted Lt. Gray and made a truthful statement to him and told him in detail what he considered important and answered all questions (R. 203, 204, statement Ex. 5, herein).

Corrections in Statement (Ex. 5: The word "firing squad" (Page 2 of Exhibit) is corrected to read shot to death by rifleman (R. 243). The statement that Prison Command sets the date, time and place of execution and reports

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that it has been carried out (Page 2 of Exhibit) is incorrect (R. 243). The statement (bottom of Page 2) in respect to Commanding General approving a sentence is corrected to read that in Japan the Commanding General cannot approve or disapprove a sentence imposed by court-martial. In case of a death sentence he can suspend it (R. 243, 244).

Final Statement: During the time of the Nelson and Augunas matter Uchiyama was concerned primarily with military problems. It is just as difficult for him to understand American military court procedure as it is difficult for Americans to understand Japanese procedure. However, whatever the procedures may be, the final objective is to punish the guilty and set free the innocent (R. 247).

Conclusion:

At the conclusion of the accused Uchiyama's testimony, the Defense offered to put on the witness stand any of the accused for questioning by the Commission without cross or direct examination. The Commission properly ruled that it was up to the Defense to decide if any of the other accused took the stand and if they did they would be subject to full cross-examination by the Prosecution. None of the other accused took the stand.

It should be noted that Defense Exhibit A, A-1, and A-2, a brief, was introduced in evidence by the defense (R. 22) in support of a motion of finding of not guilty that none of the accused committed a war crime as charged in the specifications and Bill of Particulars. It is further noted that Defense Exhibit B was introduced in evidence (R. 66) in lieu of cross-examination of the prosecution witness, Kikutaro Matsumoto.

4. Opinion:

Uchiyama

Lieutenant General Uchiyama, through his command functions, by his own acts and the acts of his subordinates, was charged in substance that he did: Specification 1; willfully and unlawfully permit, authorize, direct, and constitute illegal, unfair, false and null proceedings against Second Lieutenant Robert Watson Nelson and Sergeant Algy Stanley Augunas; Specification 2, willfully and unlawfully approve illegal, unfair, false and null proceedings and sentence of death by a Japanese military tribunal against Nelson and Augunas; Specification 3, willfully and unlawfully order executed an illegal, unfair, false and null sentence of death imposed upon Nelson and Augunas; Specification 4, and as convening and reviewing authority he did willfully and unlawfully fail and neglect to take reasonable measures to afford a legal, fair and impartial trial of certain charges against Nelson and Augunas and willfully and unlawfully fail and neglect to take reasonable measures to afford a legal, fair, impartial and adequate review of the proceeding against Nelson and Augunas; and, (applying to all specifications), did thereby contribute to unlawful killing of Nelson and Augunas. Uchiyama was found not guilty of Specifications 1 and 4, underlined, and the words "and unlawfully" preceding the verbs "approve" and "order" and "illegal" and "false and null" preceding the nouns "proceedings" and "sentence" in Specifications 2 and 3. It appears that an anomaly exists in the findings of the Commission. It should be noted that in related specifications of the other accused that the Commission found them not guilty of the same words quoted herein. The following comments in connection with the legal effect of the finding of not guilty of the Commission of the words "unlawfully", "illegal" and "false and null" are also applicable to the other accused in this case with the exception of Specification 4, Ogiya and Nakamichi.

In construing a verdict the object is to arrive at the intention of the military commission, and when this can be ascertained, if it is consistent with legal principles, such effect should be given to their findings as will conform to their intent. In arriving at the intent of the Commission, the verdict should receive a liberal rather than strict construction. The findings and sentence are not to be construed as strictly as a pleading, but are to have reasonable intent and construction. It should be construed with reference to the charge and specifications, the evidence, the proceedings at the trial, and the entire record, and if when so construed, it is definite and clearly expresses the intention of

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the military tribunal and if otherwise legal, technical objections or mere inaccuracies of expression will not render it void. The reviewing authority is vested with sound legal discretion to see that substantial justice may be done and no sentence need be disapproved solely because a specification, as affected by the Commission's findings, is defective if the facts alleged therein and reasonably implied therefrom constitute a criminal offense. The reviewing authority is not at liberty to indulge in conjecture respecting the grounds of the findings and sentence and to add to its terms by inference or reference to extrinsic facts (See "23 CJS, pp 1107, 1108" and "A Manual for Courts-Martial, US Army, 1928, p 74").

In determining the intent of the Commission, upon the principles heretofore stated, it is the duty of the reviewing authority to apply a liberal construction to the findings and sentence and to uphold it if consistent with legal principles. It appears that the Commission thought it was finding all of the accused guilty of a crime under the laws and customs of war or international law or they would not have found them guilty of the charge and sentenced them from death to three years. By finding the accused guilty of the words in the charge "did violate the Laws and Customs of War" the Commission thought the acts as set out in its findings were a breach of international law and thus unlawful. In view of the fact the Commission found the accused not guilty of the words "unlawfully", "illegal"; "false and null", the question arises as to whether the findings are responsive to, and cover the crime charged, whether the acts of which the Commission found the accused guilty, constitute a crime, or whether the findings and sentence are so uncertain and unintelligible as to be void.

In view of the conflict of evidence as to whether Otahara obtained the signatures and thumbprints of Nelson and Augunas to the interrogations reports fraudulently and as to whether or not the evidence set out in the various reports prepared by him were true, it is clear why the Commission found the accused not guilty of the word "fraud". It is not as clear, however, what the Commission's legal intent was in finding the accused not guilty of the excepted words and finding them guilty of the remaining words in the specification and of the charge. In view of the theory of the defense that the order, sentence and proceedings were lawful, legal and valid under Japanese law and thus legal under international law, the Commission may have intended by finding the accused not guilty of the excepted words that the order, approval, proceeding and sentence were lawful, legal and valid only under Japanese law. In reviewing the entire record it appears that the accused herein did substantially comply with Japanese law. If this was the Commission's intent, it erred for the reason that the excepted words are governed by the charge, and the acts complained of in the specifications are violations of the laws and customs of war or international law and not the law of any one nation. The charge merely indicates that the accused is alleged to have violated the laws and customs of war and the specific facts and circumstances relied upon as constituting the violation of international law are set forth in the specifications. (See "A Manual for Courts-Martial, US Army, 1928, p 16"). Thus the association between the charge and specifications is such that the Commission has in effect found the accused herein not guilty of the words "unlawfully", "illegal", "false and null" under the laws and customs of war. In addition it may be stated that if all the specifications under the charge are fatally defective the charge also will fall.

Further, the Commission may have intended, that its findings of not guilty of the words "unlawfully", "illegal" and "null" did not imply the affirmative such as lawful, legal and valid, or that they were mere surplusage, and that the remaining words were sufficient to import a crime or equivalent in meaning but signified a different or lesser degree of guilt.

Disregarding the excepted words the Commission found that Uchiyama (Specifications 2 and 3) "did violate the laws and customs of war", under the charge, by his own acts and the acts of his subordinates, in that (Specification 2) he did willfully approve an unfair proceeding and sentence of death against Lieutenant Nelson and Sergeant Augunas, American flyers, by a Japanese tribunal; that (Specification 3) he did willfully order executed an unfair sentence of death imposed upon Lieutenant Nelson and Sergeant Augunas; and (Specifications 2 and 3) did thereby contribute to the unlawful killing of the said American flyers.

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The acts of Uchiyama in approving the proceedings and sentence of death of the Japanese tribunal and ordering executed the sentence of death are not in themselves mala per se. To hold otherwise would mean that General MacArthur's acts in approving a proceeding and sentence of death of an American military commission and ordering an execution in these war crimes trials would involve evil purpose and criminal intent. The question to be determined is whether the additional descriptive words in the specification, as affected by the Commission's findings, are sufficient to make the acts of the accused a criminal offense.

In discussing the criteria for determining the collective guilt in the Nurnberg trials, Mr. Justice Jackson, the American Chief Prosecutor, in his opening statement said the acts of the accused were similar to those that would test the legality of a combination of conspiracy. The acts of the accused would contemplate illegal methods and illegal ends and the crime would be to combine with others and to participate in the unlawful common effort, however innocent the personal acts of the participant, when considered by themselves (The Nurnberg Case as presented by Robert H. Jackson, pp 108-109).. In Ex parte Quirin, 317, US 1, 36, 46, the petitioner charged that the trial before the American Military Commission was unlawful, but the Supreme Court stated that Specification 1 was sufficient to charge all the petitioners with the offense of unlawful belligerency under the laws and customs of war. Further the Supreme Court in the case of Yamashita v. Styer, 66 S. Ct. 340, 344 said "we consider here only the lawful power of the Commission to try the petitioner for the offense charged."

In similar cases involving the trial of Japanese, before American Military Commissions, who participated in the trial and sentence of death of American flyers before a Japanese tribunal, the Commission found the accused guilty of words involving criminality. Thus in the case of General Sawada et al, (the Doolittle case), the Commission found the commanding general guilty of having American flyers tried on false and fraudulent evidence and excepted the words "knowingly" and "willfully". The members of the Japanese Military Tribunal, with no exception made, were found guilty of "unlawfully", "willfully", trying and prosecuting, without a fair trial, certain American flyers and sentencing them to death. In the case of General Isayamaya et al, the accused were found guilty of participating in an "illegal" and "false" trial and "unlawful" killing of certain American flyers; and in the third trial, General Tanaka et al, the Commission found the accused guilty of "willfully", "unlawfully" and "wrongfully" committing cruel, inhuman and brutal atrocities against Major Hauck by participating in and permitting an "illegal", "unfair", "false and null" proceeding and sentence of death. In the case of US v. Ito et al, Case No. 251, not yet reviewed by this command, a prosecutor and three members of a Japanese tribunal were found guilty of practically identical charges and specifications as originally submitted in the case herein. The Commission, however, found the accused guilty rather than not guilty of the excepted words herein. Although not similar in respect to the facts, the Commission in the case of US v. Iwasaki, Case No. 391, not yet reviewed by this command, denied a special plea of the defense that Specification 2 did not constitute a criminal offense because the word "unlawful" was not contained within the specification. Notwithstanding the ruling of the Commission, the prosecutor after consulting with the individuals in his office who pass on specifications, requested and received permission of the Commission to amend Specification 2 by adding the word "unlawful". R 19. Apparently the members of the prosecution staff in the above cases and in the instant case deemed that the acts of the various accused were not per se an offense and that it was necessary to include in the specification words of criminality such as "unlawful", "illegal", etc. to make the act of each accused a criminal offense.

Where the act charged is not per se an offense, words such as "assault", "wrongful", "unlawful" or the like must be used in the specification or remain in findings to make the act a criminal offense and the failure to use such words is a fatal defect. 35 BR 329, 339; 15 BR 105; 111; 12 BR 61; 64; 34 BR 367, 380; 40 BR 349, 350; CM 113535 and 130811; Dig Ops JAG, 1912-1914, Sec 451 (8); 1 Bull JAG 18; 2 Bull JAG 17; 6 Bull JAG 177. See also 31 CJ, pp 701, 702. In the citations underscored the charge was the "violation of the 95th Article of War" and the "violation of the 63d Article of War" respectively and the only specifications under each of these charges was deemed fatally defective because of the failure to allege words of criminality. The Board of Review by holding the findings of

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guilty could not be sustained under the charge and specifications in effect ruled that the words in the charge did not cure the defect in the specification. Clearly the words in the charge in this case "did violate the laws and customs of war" do not supply the necessary words of criminality for the specifications and these words in the charge are in fact dependent upon the facts and circumstances relied upon in the specifications as constituting the violation alleged.

Assuming that the specifications originally only included the words that the Commission found the accused guilty, and disregarding the legal intent of the Commission in finding the accused not guilty of the excepted words, the question arises whether the remaining descriptive words "willfully" and "unfair" imply the words unlawful or wrongful and thus be sufficient to make the acts of the accused a criminal offense. The word "willfully" is employed as descriptive of the offense (31 CJ p 698) and its meaning should be separately ascertained by the context in which it is used (U. S. v. Murdock 290, US, 389, 395, 54 S. Ct 223, 78 L. Ed. 381). It is an abstract term and has been defined in various ways as set out in its definition in 68 CJ, p 290, to wit:

"When used in criminal or penal statutes or the criminal law; and sometimes in pleadings in tort actions, when used to describe acts which shall be punished criminally, or with reference to violations of the criminal law, it has been said that the word 'willfully' has an understood and accepted, a restricted, or well defined, meaning; that it is a strong word, and is to be given some force, and is most frequently understood, not in a mild sense, but as conveying the idea of legal malice in a greater or less degree, being ordinarily used in a bad sense, denoting evil intention, and being sometimes used to mean perverse, deliberate design and malice. It has been said that the word implies ability to do the act prescribed, a conscious wrong, a criminal intent, a deliberate intention or set purpose to omit to perform a required duty, a deliberate purpose to accomplish something forbidden, or deliberate intention to injure, a determination to execute one's own will in spite and defiance of the law,²⁸ a purpose to do wrong, an evil design and purpose, an evil intent or legal malice, an evil intent without justifiable excuse, an evil or improper motive, intent or feeling, a tort or wrong, knowledge and a purpose to do the wrongful act, malice, wicked purpose or perverse disposition, or the idea of malice of a mild kind; that it includes the idea of an act intentionally done with a bad, or a wrongful, purpose, or with a design to injure another, with knowledge it is unlawful,⁴² or one committed out of mere wantonness or lawlessness; and hence more than knowingly, intentionally, purposely, or negligently, or voluntarily. In the particular connection in which the word is used "willfully" may be construed as meaning causelessly; contrary to duty;⁵⁰ corruptly; for no cause or reason; in an obstinate manner; in bad faith; inflexibly; intentionally and tortiously, or unnecessarily; in violation of law⁵⁸ knowingly and with evil intent, or stubborn purpose; knowing one has no right; obstinately; perversely; purposely and deliberately, or with an evil intention; selfishly; stubbornly; unlawfully;⁶⁸ wantonly; with a bad, evil, or guilty, purpose, or a deliberate intent to do a wrongful act without justification, a malevolent purpose or motive, an intent to do some act in violation of the law,⁷⁵ or criminal,⁷⁶ evil,⁷⁷ unlawful,⁷⁸ wicked, or wrongful, intent, or legal malice, especially if the forbidden act is wrong in itself, or involves moral turpitude; with deliberate intention for which there is no reasonable excuse, or wrongfully; without grounds justifying the act, just cause or excuse, or justifiable, lawful, or

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reasonable, excuse, or lawful, or legal, justification, or reasonable ground for believing the act to be lawful, or regard for the rights of others; without regard to, or without yielding to, reason; wrongfully. When an act is done feloniously, maliciously, unlawfully,⁹⁹ or wantonly it is done willfully." (Numbers noted above refer to cases cited on the statement set out in the definition. Emphasis supplied).

In addition the following cases hold that "willfully" means "unlawful" or "illegal": *Bowles v. Jung*, 57 F. Supp. 701, 709; *Elmore v. State*, 73 S.W. 2d, 107, 108; 128 Tex., Cr. R 509; *People v. Raider*, 292 N.Y. 447; *State v. Cook*, 176 S.E. 757, 207 NC 261. It has also been held cutting with a dangerous weapon with intent to kill in a verdict is sufficient to supply the words "willfully", "unlawfully" and "feloniously" (*State v. Antoine*, 180 So 465, 189 La 619).

It should be noted that in many of these cases the holding is that "unlawfully" will supply the word "willfully" such as *Howenstine v. U.S.*, 263 F 1, *Griffin v. Fancher*, 127 Conn. 686, 20 A (2d) 95, 134 AIR 701 and cases found in note 93 of 31 CJ, p 698. The theory is that if the act is unlawful, the willful intent is presumed.

Other authority holds that the term "willful" is not supplied by the word "unlawfully", *State v. Massey*, 2 S.E. 445, 446, 97 N.C. 465; *Messenger v. O'Hara*, 189 Ill App. 48; *People v. Farber (Cal)* 77 P (2d), 921, 923; that "willfully" is not synonymous with "unlawfully", as a man may do many things "willfully" which are not "unlawful", and he may do many things "unlawfully" which are not "willfully" done; *State v. Hussey*, 60 Me. 410, 411; *State v. Townsell*, 50 Tenn. 6, 7; *Jones v. State*, 9 Tex., App. 178, 179; and that "willfully" and "unlawfully" are not synonymous because "willfully" means intentionally and designedly, and "unlawfully" means without legal justification; *State v. Vanderveer*, 196 P. 650, 115 Wash. 184; *In re Hege*, 172 SE 345, 347, 205 NC 625; *State v. Holiday*, 182 SW (2d) 553, 554; *U. S. v. Edwards*, 43 F. 67; *Grand Trunk Ry. Co. v. U.S.*, 229 F. 116, 119; *U.S. v. Murdock*, 290 US 389, 394, 54 S. Ct 223, 78 L. Ed. 381.

The word "willfully", in offenses involving turpitude means with evil purpose, criminal intent, or the like, but it is often used without such implication in denouncing acts not in themselves wrong, and denotes that which is intentional, knowing or voluntary, as distinguished from accidental and that it is employed to characterize conduct marked by careless disregard whether or not one has the right so to act (*U.S. v. Ill. Cent. Ry. Co.*, 303 U.S., 239, 242, 243, 58 St. Ct. 333, 82 L. Ed. 773). Thus it appears that "willfully" means with criminal intent, or intentionally doing an "illegal" or "unlawful act" when the act involves turpitude or is mala per se and otherwise if the act in itself is not wrong. This basic difference is best expressed in *Townsend v. U.S.*, 95 F. (2d) 352, 357, cert denied 303 U.S. 664, 58 S. Ct 830, 82 L. Ed. 1121, where the court after setting out the various way "willfully" had been defined in *United States v. Murdock*, supra, said:

"It will thus be seen that the court has ascribed three general meanings to the word 'willfully' and has recognized two other meanings. Appellant contends that under the statute here involved the first meaning mentioned by the court, namely, 'done with a bad purpose', is controlling. The cases cited by the court support that meaning and similar holdings are found in other cases, but, even though it applied that meaning to the peculiar facts of that case, it is clear that the court did not intend to limit the application of the word 'willful' in all cases to 'acts done with a bad purpose'. The meaning of the word depends in large measure upon the nature of the criminal act and the facts of the particular case. It is only in very few criminal cases that 'willful' means 'done with a bad purpose'. Generally, it means 'no more than that the person charged with the duty knows what he is doing. It does not mean

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that, in addition, he must suppose that he is breaking the law.' American Surety Co. v. Sullivan, 2 Cir., 7 F. 2d 605, 606. In United States v. Edwards, C.C., 43 F. 67 (cited by appellant) the court said: "'Willfully' means with design, with some degree of deliberation." In Grand Trunk Ry. Co. v. United States, 7 Cir., 229 F. 116, 119, the court said: "The word 'willfully', as used in the act, has a number of times engaged the attention of the courts, and has quite uniformly been held not to require an evil intent, but only that the defendant should have purposely or intentionally failed to obey the statute, having knowledge of the facts."

The acts herein approving a proceeding and sentence of death and ordering executed a sentence of death clearly are not ones involving turpitude or are mala per se. As used in finding herein willfully means intentionally or that General Uchiyama knew what he was doing. The Prosecution in its brief, page 5, concurs in this definition of the word "willfully", and thus intended that it meant, in the specifications, that the accused act was intentional, that he knew what he was doing.

The remaining adjective in the specification is the word "unfair" which modifies the nouns, proceedings and sentence. The criteria of a fair trial for POW appear in Part 3, Art. 60 to 67, of the Geneva Convention. The Supreme Court in the case of Yamashita v. Styer, 66 Sup. Ct. 340, 351 holds that these articles do not apply to precapture offenses, but only to offenses committed after capture. Such provisions are therefore not applicable here. However the Supreme Court in note 10 on page 352, said:

"One of the items of the Bill of Particulars, in support of the charge against petitioner, specifies that he permitted members of the armed forces under his command to try and execute three named and other prisoners of war, 'subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged'. It might be suggested that if Article 60 is inapplicable to petitioner it is inapplicable in the cases specified, and that hence he could not be lawfully held or convicted on a charge of failing to require the notice, provided for in Article 60, to be given. . . . But apart from this consideration, independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense." (Emphasis supplied).

It should be noted that the Supreme Court states that as Article 60 is not applicable to Yamashita, it would not be applicable to the Americans who were tried before Japanese Military Tribunals. It follows therefore that as the accused were not charged with a violation of Article 60 that the American flyers herein were tried as suspected war criminals and not as prisoners of war. Although Yamashita was not found guilty of the specification set out above, nevertheless the American flyers, herein, whether suspected war criminals or POW, were entitled to an opportunity to make a defense or otherwise the hearing would be unfair.

Unfair, standing alone in a specification would be used in its broadest sense. It has been defined in 65 CJ, p 1229 to mean:

"Dishonest, exacting, hard, illiberal, partial, prejudiced, or ungenerous; disingenuous; fraudulent, illegal, or unjust; unreasonable; using or involving trick or artifice."

(p 29, Uchiyama et 7, Case #123)

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In its broadest sense this word would imply the necessary incriminating language to hold that the proceeding as well as the sentence was illegal and fraudulent. Thus the acts of the accused would constitute, if the words "willfully" and "unfair" were used alone in the specification as originally submitted, a crime under international law in that he "willfully" or intentionally approved an "unfair" or "illegal" and "fraudulent" proceeding and sentence of death and "willfully" or intentionally ordering executed an "unfair" or "illegal" and "fraudulent" sentence of death.

In the instant case the words "willfully" and "unfair" were not used alone in the specification but used together with other descriptive words and terms. Thus the specifications used the words willfully and unlawfully together, in describing the verbs "did", "approve" and "order executed" and the adjectives "illegal", "unfair", "false and null" in describing the "proceeding" and "sentence". The meaning of one descriptive word in a statute, or in a specification, must be construed in connection with the descriptive words with which it is associated. This is based upon the obvious reason that if the legislature, or the ones who drafted the specification, had intended the word to be used in its unrestricted sense, they would have made no mention of the other words. In the case of *St. Louis SFR Co. v. U.S.*, 169 F. 69, 71, and cited with the approval by the Supreme Court in *U.S. v. Cent. Ry.*, 303 U.S. 239, 243, it was held that "willfully means something not expressed by knowingly, else both would not be used conjunctively." The words "unlawfully", "illegal" and "false and null" therefore cannot be regarded as surplusage as each would have its own connotation. A legislature is presumed to use no superfluous words in a statute, and the courts will not interpret a statute in such a manner as to regard necessary parts thereof as surplusage. *Platt v. Union Pacific Ry.*; 99 U.S. 48; *Howell v. Port of N.Y.*, 34 F. Supp. 797, 800. By analogy the same statement can be made herein, substituting the word prosecutor for legislature, and reviewing authority for court. Under this rule of construction the word "willfully" clearly would not include within its meaning the word "unlawfully" and the word "unfair" would not include within its meaning "illegal", "false" and "null". Certainly this would be true when the Commission excepted and found the accused not guilty of the words "unlawfully", "illegal", "false and null" in its findings.

This construction clearly eliminates the word "unlawfully", as heretofore defined, from the definition of "willfully" and leaves it meaning only intentional.

The term "illegal" in its common acceptance signifies that which is contrary to law as distinguished from rules of procedure, 42 CJS 382, and "null" means "invalid; nugatory; of no efficacy, force or effect; of no legal or binding force of validity; useless, void" (46 CJ 832). "False" has been defined to mean fraudulent and to characterize a wrongful or criminal act, such as involves an error or untruth, intentionally or knowingly put forward, or as a mere pretense set up in bad faith and without color of fact (35 CJS, p 495). The adjective, "unfair", would therefore have eliminated from its definition the meanings of the words "illegal", "false" or "null" as defined herein.

The legal effect or intent of the Commission in finding the accused not guilty of the excepted words is best expressed in the case of *Private Millard T. Johns*, 12 BR, 133, 134, wherein the Board of Review said:

"Under the long recognized doctrine that an accused is acquitted of all material alleged above which are excepted by a court martial in its findings (par. 2, Sec. 1560, Dig. Ops, JAG, 1912-30) the accused herein was acquitted by the court of all the material allegations which are excepted by its findings, namely assault with intent to do bodily harm with a dangerous weapon, in violation of the 93rd Article of War. By excepting in its findings the words assault and any other word or words stating or implying that the action was wrongful, unlawful or felonious, the legal presumption arises that the act was lawful and innocent (par. 4, Sec. 1471, and par. 4, 5, Sec. 1559, Dig. Ops. JAG, 1912-30,"

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Under the doctrine as expressed in the above case, the findings of the Commission in Specification 2, of Gen. Uchiyama, would be that the accused "willfully" (or intentionally) and lawfully did approve a legal, (in accordance with law as distinguished from the rules of procedure), "unfair", true (based upon truthful evidence not fraudulently obtained), valid (having legal or binding force of validity and effect) proceeding and sentence of death imposed upon Lieutenant Nelson and Sergeant Augunas, by a Japanese Military Tribunal and that he did thereby contribute to the unlawful killing of Lieutenant Nelson and Augunas.

Taking in effect the Commission's finding, it can be readily seen that an absurd conclusion would be reached if it was determined that the word willfully includes within its definition the meaning of the word unlawfully and the adjective unfair would include within its meaning the words illegal, false and null.

The Commission did find the accused guilty of the phrase "and that he did thereby contribute to the unlawful killing of said American P.W.'s." An unlawful killing must be such as would naturally, logically, proximately result from some unlawful act or be an act which is not justifiable or excusable by law (State v. Menko (Ohio), 46 N.E. (2d) 469, 470; State v. Wetter (Idaho), 83 P 341; and Black v. State (Ohio), 133 N.E. 795). The use of the word "thereby" in the quoted phrase makes it a conclusion which must be supported naturally, logically and proximately by the facts set out in the preceding part of the specification describing the alleged homicidal acts. In a complaint for libel, in the case of Schoepflin v. Coffey, 56 N.E. 502, 503, 162 N.Y. 12, it was alleged that the defendant made the slanderous statement in the presence of two reporters, and thereby defendant caused such statement to be published; and the appellate court held that "thereby" will be construed in the sense of "by that means" or in consequence of the preceding allegation, and hence the averment was a conclusion as to the effect or result of the facts previously alleged. Another case on the same point, Daniels v. State (Fla), 41 So. 609, 611, the facts and opinion of the court, as set out in 41 Words and Phrases, p 533, are as follows:

"Where an indictment charges that D. 'did unlawfully and from a premeditated design to effect the death of one G., make an assault on the said G., and a certain pistol, which then and there was loaded with * * * leaden bullets and by him the said D. had and held in his hand, he, the said D., did then and there unlawfully and from a premeditated design to effect the death of the said G., shoot off and discharge at and upon the said G., thereby and by thus striking the said G. with the said leaden bullets, inflicting on and in the body of the said G. one mortal wound, etc., the homicidal act or efficient cause of death is charged to have been perpetrated from a premeditated design to effect death, although the words 'from a premeditated design to effect death' are not repeated when the infliction of the mortal wound is charged, since these words, previously alleged, are connected with the mortal stroke by the words 'thereby and by thus'. The word 'thereby' in the indictment signifies 'by that means', or in consequence of the preceding allegations, and refers to all that precedes it, both as to the act of firing the pistol and to the premeditated design with which the pistol was discharged." (Emphasis supplied).

The court in the above case defined "thereby" in the same manner as Schoepflin v. Coffey, supra, and although it does not state in so many words that the phrase beginning with "thereby" is a conclusion, the implication is clear from the statements made by the court in its opinion.

The homicidal acts of Gen. Uchiyama in Specifications 2 and 3 as submitted and alleged are that the accused "did willfully and unlawfully approve illegal, unfair, false and null proceedings and sentence of death against Lt. Robert Watson and Sgt. Algy Stanley Augunas, American P.W.'s, by a Japanese Military Tribunal", and "did willfully and unlawfully order executed an illegal, unfair, false and

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null sentence of death imposed upon Second Lt. Robert Watson Nelson and Sgt. Algy Stanley Augunas, American PW's, by a Japanese Military Tribunal". The phrase beginning with "did thereby" following these allegations is a conclusion, and not part of the description of the alleged homicidal acts, under the authority submitted herein, for the reason that "thereby" is used in the sense of "by that means" or "in consequence of the preceding allegations" and is therefore a conclusion as to the effect or result of all of the homicidal acts previously alleged. Compare these specifications with Specification 4, Ogiya and Specification 1, Nakamichi where the "illegal killing" is alleged as part of the homicidal act. As submitted to the Commission the "unlawful" killing is amply supported by the acts previously set out in the specification and under the opinion of Daniels v. State, supra, the word "unlawful" would not have had to be pleaded because the word "killing" would refer to all the acts that precedes it. The specification, as finally affected by the Commission's findings, no longer contains in the allegations of the homicidal acts the words "unlawfully", "illegal", "false and null" and as the remaining descriptive words, "willfully" and "unfair", as used in the specification do not include in their meaning the words with which they were associated, there is nothing left in the allegations to support the conclusion that the killing was unlawful. The Commission therefore erred in finding that the accused was guilty of the word "unlawful" preceding the word "killing". This conclusion is further strengthened when the implication of the Commission's act in finding the accused not guilty of the excepted words is taken into consideration.

A trial may be "unfair" in two ways. One in which the acts of those who participate in it are such that this trial itself would be considered "illegal", "unlawful", or "false and null". Thus in this sense a fair trial would be a legal trial if conducted in all material things in substantial conformance to law or one wherein the legal rights of the accused are safeguarded and respected (People v. Ephraim (Cal.), 245 P 769, 774; People v. Wolf (N.Y.), 76 N.E., 592, 595; Flynn v. State (Okla.), 133 P 1133; Johnson City v. Wildwood (N.J.), 184 A 616). All of the accused herein were found not guilty of an "unfair" trial in this sense in view of the findings of the Commission as to the excepted words and their legal intent as heretofore set out. In the other sense the unfairness would be a defect in the procedure or a practice complained of which might lead to a denial of Justice (Vajtauer v. Comm., 273 US 103, 47 S. Ct 302). Such a defect or practice, not per se "illegal" or "unlawful", could only be corrected if properly raised on appeal and result in the case having to be retried. Thus an accused waived his right to object to the alleged prejudicial conduct of the judge when he failed to object to it in the trial below and raised it for the first time on appeal (U.S. v. Domres, 142 F. 2^d 477). Further irregularities in the appointment counsel, matters connected with the jury, conduct and remarks of the court or counsel, all of which may show partiality or prejudice, cannot be raised for the first time on appeal (24 CJS pp 268, 269, 291, 295, 299).

The accused herein were therefore found guilty of the type of unfairness which resulted in a harsh or severe sentence of death resulting from a defect in the Japanese legal procedure not deemed by the Commission as "illegal", "unlawful" or "false" or "null" under the laws and customs of war or for partial or prejudicial acts, not of the character, as determined by the Commission, to be "unlawful", "illegal" "false" or "null". The unfairness, of which the act of accused herein were found guilty would be of the type which an American court would, if properly raised in the court below, order a new trial. In the United States, or in any jurisdiction for that matter, the partiality or prejudice of those who participate in the trial, if not unlawful or illegal, would not constitute a crime. It should be noted at this point that Kunitake, who actually made the review, was acquitted of Specifications 1, 2, and 4 and although found guilty of ordering executed an unfair sentence it was judicially determined by the Commission that his review was adequate. The denial of a fair hearing is not established by proving merely that the decision was wrong, Chen Yow v. United States, 208 US 8, 28 St. Ct. 201, 52 L. Ed. 369, or "if military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review because they made a wrong decision on disputed facts (Yamashita v. Styer, 66 S. Ct. 340, 344, 345).

The acts of the accused are not per se a criminal offense and the specification as finally affected by the findings of Commission allege no facts or words such as "wrongfully", "unlawfully", "without authority", "illegal", "fraudulent", "false and null" which are necessary and required to constitute a criminal

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offense in violation of the laws and customs of war. Such allegations if omitted or excepted may not be supplied by the proof (6 Bull JAG 177; 70 BR 125, 133).

Such acts of unfairness that do not constitute a crime under American jurisprudence, and in the instant case as a lesser included offense, can be held to be "illegal" and "unlawful" under the laws and customs of war, especially when such unfairness resulted in the death of captured American flyers. The reviewing authority, however, is without power to add words of criminality, and particularly in this case when the Commission found the accused not guilty of the words "unlawfully", "illegal", "false and null" under international law. The defect here is fatal and not one the reviewing authority can with sound legal discretion disregard by determining that the facts alleged in the specifications, as affected by the Commission's findings, constitute a criminal offense. An act or conduct, however reprehensible is not a crime unless it is defined and made a crime clearly and unmistakably (State v. Sanford (La.) 14 So (2d) 778, 781). The Reviewing Authority is therefore constrained to hold that the acts upon which the accused were found guilty are not offenses in violation of the laws and customs of war.

The above analysis of legal intent of the Commission in its findings of not guilty of the excepted words in the specifications of General Uchiyama are applicable to the other accused except as herein noted. Even assuming that Specifications 2 and 3 of General Uchiyama, as affected by the findings of the Commission, are sufficient in themselves to constitute an offense in violation of the laws and customs of war, it further does not appear that General Uchiyama was found by the Commission guilty of any crime when the findings of the Commission of not guilty of Specification 2 of Kunitake and Specifications 1 and 4 of Uchiyama are considered.

In Specification 2, Uchiyama was charged under his command responsibility for acts done by Kunitake as alleged in his Specification 2. Kunitake was acquitted of doing these acts alleged but nevertheless Uchiyama was found guilty. Obviously if Kunitake was not guilty of the facts alleged, then Uchiyama could not be guilty under command responsibility. The situation herein is different from US v. Matsumuro, Case No. 144, wherein it was held that a finding of not guilty of a subordinate in a previous trial is not conclusive in favor of the superior in his trial. The rule and authority cited in the Matsumuro case, supra, enunciates the law where there are two criminal proceedings and the legal principles announced are not applicable in the instant case where both the subordinate and the superior are tried together in a common trial. In the same proceedings where the same evidence is presented and the credibility of the witnesses is the same in respect to both the subordinate and superior, a Commission cannot logically acquit the subordinate and find the superior guilty of the subordinate's acts through his command responsibility. The principle announced herein is an exception to and does not overrule the rule as set out in the Matsumuro case, supra. It is therefore recommended that the Commission erred in finding Uchiyama guilty of Specification 2. This recommendation is further strengthened when it is considered that Uchiyama was acquitted, in Specification 4, of willfully and unlawfully failing and neglecting to take reasonable measures to afford a legal, fair and impartial trial and willfully failing and neglecting to afford a legal, fair, impartial and adequate review of the proceedings and sentence of death. The approval of the proceedings and sentence of death is part of the review and the acquittal of Uchiyama of Specification 4 is also an acquittal of that part of the review as alleged in Specification 2.

In Specification 3, Uchiyama was found guilty of willfully ordering executed an unfair sentence of death. This administrative act to be unfair depends upon a finding that the proceeding, the sentence of death, and the review were unfair. Taking into consideration the Commission's findings of not guilty of Specifications 1 and 4, and the recommendations made herein for the acquittal of Specification 2, no finding remains upon which the order can be determined to be unfair. It is therefore recommended that Uchiyama be acquitted of Specification 3.

When the legal implication of finding the accused not guilty of Specifications 1 and 4 is considered, an additional reason can be given why the accused should be acquitted of Specifications 2 and 3. By its acquittal of Uchiyama of

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Specifications 1 and 4 the Commission judicially determined that the initiation of the proceedings was lawful, legal and fair; that he took reasonable measures to afford a legal, fair and impartial trial; and that he took reasonable measures to afford a legal, fair, impartial and adequate review of the proceedings and sentence of death. If the accused's acts are not unfair, but in fact fair, in Specifications 1 and 4, it is difficult to see how his acts were unfair in Specifications 2 and 3 when the proceedings, sentence of death and deaths are the same in all four specifications. The danger of pleading the same homicide in four closely related specifications is aptly illustrated by the specifications herein.

For the reasons given in this opinion relating to seven of the accused and the further reasons applying to Uchiyama specifically, it is recommended that he be acquitted and be found not guilty of Specifications 2 and 3 and the charge.

Kunitake

Lt. Gen. Kunitake was Chief of Staff of the Fifteenth Area Army. As Gen. Uchiyama was not in Osaka at the time of the trial or execution, Kunitake acted for him in approving the trial and the death sentence. Kunitake placed his seal on the duplicate copy of the execution order and had Uchiyama's adjutant put Uchiyama's seal on the original.

Kunitake was found not guilty of Specifications 1, 2, and 4. In Specification 3 it was charged that he did (willfully and unlawfully) order executed an (illegal), unfair, (false and null) sentence of death imposed on Lt. Nelson and Sgt. Augunas. The Commission found him not guilty of the words parenthesized and underlined.

The opinion under the case of Uchiyama as to the effect of the Commission finding him not guilty of the excepted words is adopted as part of this opinion. It is further noted that the Commission excepted the word "willfully". The danger of splitting the homicidal act into several related specifications is again illustrated in the case of Kunitake. In such type of pleading it is necessary in many instances that a finding of guilty be made in the related specifications in order to base a conclusion that the accused was guilty of a criminal act in the others. Thus, where the Commission judicially determined by acquitting the accused (Specification 2) of willfully and unlawfully approving an illegal, unfair and false and null proceeding, and (Sp 4) of failing and neglecting to take reasonable measures to afford a legal, fair, impartial, and adequate review against said American fliers, and the findings and sentences against them, it does not follow that the order of execution was unfair. The execution order is the final act after the review and the approval of the proceedings and sentence of death, and if it is unfair, the review and approval of the death sentence likewise would be unfair. The fact that the Commission found that the approval of the trial and death sentence to be legal and fair and the review adequate, legal, fair and impartial cancelled any determination that the order to execute the fliers was unfair. It is therefore considered that for the reasons heretofore and herein stated, that the Commission erred in finding the accused guilty of a criminal act under the Laws and Customs of War in the specification. It is recommended that the findings in respect to this specification be disapproved.

Otahara

The accused, Maj. Gen. Otahara, as the Chief of the Judicial Department of the Japanese Fifteenth Area Army, was charged in substance with: Specification 1, by his official acts, between 15 May 1945 and 19 July 1945, he did willfully (and unlawfully) incite, inspire, recommend, approve and cause to be initiated and commenced before a Japanese military tribunal (illegal), unfair (false and null), proceedings against Lt. Nelson and Sgt. Augunas; Specification 3, during July 1945, he did willfully (and unlawfully) incite, inspire, cause (direct and command) members of a Japanese military tribunal to sentence to death Lt. Nelson and Sgt. Augunas, at the time knowing (that the evidence and charges against them were false and fraudulent) and that a fair (and lawful) trial would not be afforded them; Specification 4, that having responsibility for the supervision, direction and control of said Judicial Department, and the investigation

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and determination of charges against captured enemy airmen, between 15 May 1945 and 19 July 1945, he did willfully (and unlawfully) fail and neglect to take reasonable measures to afford (a legal), fair and impartial trial of Lt. Nelson and Sgt. Augunas; applying to all specifications; that he did thereby contribute to the unlawful killing of the said American prisoners of war. Otahara was also charged with the same identical acts in Specification 2 as in Specification 1, and during the same period of time, while acting as Chief of the Judicial Department of the Second General Army with headquarters at or near Hiroshima. Otahara was found not guilty of Specification 2 and the words in Specifications 1, 3 and 4 parenthesized and underlined.

The record of this case shows that Otahara was transferred on 12 July 1945 and, officially, after that date he was the Chief of the Judicial Department of the Second General Army at Hiroshima, a superior command of the Fifteenth Area Army at Osaka. Gen. Yamagami, Otahara's successor, was officially the Chief of the Judicial Department of the Fifteenth Area Army after 12 July 1945, and Captain Ono, the next in command, was acting as Chief of the Judicial Department during the period that no chief was present. After 12 July 1945, Kunitake complained to Capt. Ono about the delay in the trial (Ex. 39, pp 2, 3; 36, pp 7, 15).

The facts are clear that Otahara prior to 12 July 1945 acted in the capacity as prosecutor as well as Chief of the Judicial Department of the Fifteenth Area Army, and after that date he was officially the Chief of the Judicial Department of the Second General Army, a superior command. On 12 July 1945, prior to the trial, Otahara was officially relieved of his duties as prosecutor and as Chief of the Judicial Department of the Fifteenth Area Army. The failure of the prosecution to plead Otahara's capacity as Chief of the Legal Department of the Second General Army and as prosecutor in Specifications 1, 3, and 4 might have caused the Commission difficulty in preparing its findings. It might be well argued that the prosecution in pleading Otahara's capacity as only the Chief of the Judicial Department of the Fifteenth Area Army limited the specification to acts committed by the accused prior to 12 July 1945. This factual situation of Otahara's status and capacity may be the reason why the Commission found him not guilty of the excepted words in Specifications 1, 3, and 4 and not guilty of Specification 2. The same acts are pleaded in Specifications 1 and 2 and they, other than the trial, occurred prior to 12 July 1945. Thus the Commission in Specification 2 apparently determined that as the acts occurred prior to his appointment as Chief of the Judicial Department of the Second General Army, on 12 July 1945, Otahara was not guilty of this specification. These statements will be further amplified in the discussion of each of the particular specifications.

Specification 1: Acting as a prosecutor Otahara made an investigation and recommended the trial and death sentence. As Chief of the Judicial Department, Fifteenth Area Army, he approved these recommendations and obtained further approval from his commanding general, the Second General Army, and the War Ministry. These acts, which are the criteria necessary before the trial can be commenced, all occurred prior to 12 July 1945. In this specification, Otahara was found guilty of other descriptive words and phrases in the findings of the Commission not included in the specifications and findings of which Uchiyama was found guilty. These are "incite, inspire, recommend, approve, and cause to be initiated and commenced". None of these, including "incite", which is defined in Webster's New International Dictionary, "to move to action, to spur or urge on", imply that the act itself is criminal. The proof is clear that Otahara did approve and recommend that Nelson and Augunas be tried before a Japanese military tribunal and be sentenced to death, but he was acquitted of any crime in connection with such approval and recommendation by the Commission finding him not guilty of the word "unlawfully". The record does not sustain that Otahara was the primary or moving party in urging that Lt. Nelson and Sgt. Augunas be tried before a Japanese military tribunal. The record is clear that Lt. Gen. Uchiyama ordered the investigation to be made by the Kempei-Tai (Ex. 6, p 1); ordered Otahara to personally make an investigation (R. 199); and ordered the institution of the prosecution of the American fliers after approval had been obtained from Gen. Hata and the War Ministry (Ex. 27, p 5). Otahara did not, as indicated by the specification, upon his own responsibility, cause the prosecution to be initiated and

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commenced, but strictly followed Japanese procedure and obtained the approval of the recommendation from his commanding general, the commanding general of the Second Army, General Hata, and the War Ministry. Such further acts as his obtaining these approvals, the preparation of the charges and the arraignment forms, and Capt. Ono's, the second-in-command to Otahara, advice to the Kempei-Tai in connection with their investigation, are all normal duties in connection with the work of the Judicial Department. It is difficult to see how Otahara's acts were criminal for the type of proceeding given Nelson and Augunas by the Commission finding him not guilty of the words "illegal" and "false and null", and when the Commission acquitted both Uchiyama and Kunitake, under command responsibility, of Otahara's acts in this connection. Thus, Uchiyama, by the Commission finding him not guilty of Specifications 1 and 4, was acquitted of his own acts and the acts of his subordinates (including Otahara's) of unlawfully permitting, authorizing, directing and constituting an illegal, unfair, false and null proceeding against Nelson and Augunas, and of willfully and unlawfully failing and neglecting to take reasonable measures to afford a legal, fair and impartial trial of certain charges (prepared by Otahara) against them.

For the reasons given herein and the comments made under the opinion in the case of Uchiyama above, it is considered that the Commission erred in finding Otahara guilty of any criminal act under the Laws and Customs of War in respect to this specification. It is recommended that the findings of the Commission in respect to this specification be disapproved.

Specification 2: Otahara, as heretofore stated, was found not guilty of this specification.

Specification 3: There is no evidence that Otahara directly caused the three members of the tribunal to sentence Nelson and Augunas to death. The fact is that Otahara was found not guilty of the words "direct and command" in this specification. There is evidence that indirectly Otahara may have caused the members of the tribunal to vote for the death sentence. Part of the evidence presented at the trial of the American fliers was the recommendation and approval of Otahara recommending the death sentence; that this caused the members of the tribunal to vote for the death sentence is not sustained by the proof. Members of a Japanese military tribunal exercise an independent judgment in determining a verdict and sentence, but they may in actual practice follow the opinion of the central (or higher) authority. (Ex. 36, pp 24, 29; Ex. 39, p 47; R. 137). Bonno, a defense witness, testified that based upon his experience members of a tribunal usually did not follow the recommendations of the Chief of the Legal Section (R. 193). Apparently, members of the tribunal follow the recommendations of the Chief of the Judicial Department if it has the approval of the higher authorities and otherwise if such authorities do not concur. In the absence of any other proof, it is determined that Otahara's recommendation and approval, standing alone, would be too remote to base a conclusion that it caused the members of the Commission to sentence Lt. Nelson and Sgt. Augunas to death. Otahara's recommendation, occurring when he was still Chief of the Judicial Department of the Fifteenth Area Army, of Capt. Ono, his next in command, as Law Member of the tribunal, and his appointment as Law Member, undoubtedly was a major factor in the military tribunal arriving at a sentence of death of Lt. Nelson and Sgt. Augunas. The Law Member at a conference after the trial is the one who explains first whether the verdict should be guilty or not guilty, and if he determines that the verdict should be guilty he gives his reasons as to what the penalty should be. The fact that Otahara on 15 July ordered Shimamura, the clerk, to obtain detailed instructions from Captain Ono, his former second-in-command, to find a secret spot at the Yokoyama firing range, and Ono's selection of this place of execution indicates, in absence of any explanation of these acts by either of the accused, that Ono was at least influenced by Otahara to vote for the death penalty prior to the trial and, as law member, to persuade the other members of the tribunal to do likewise. Such acts on Otahara's part were unlawful to such a degree that the trial was clearly illegal and null. However, as these acts of Otahara occurred after 12 July 1945 and when he was no longer the Chief of the Judicial Department of the Fifteenth Area Army, it appears that the Commission determined that these acts after 12 July 1945 were not covered by the specification by its finding him not guilty of the excepted words. It is therefore considered for the reasons heretofore and herein given that the Commission failed to find that Otahara committed a crime under this

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specification. It is recommended that the findings in respect to this specification be disapproved.

Specification 4: The failure and neglect of Otahara to take reasonable measures, in the supervision, direction and control of the Judicial Department, and the investigation and the determination thereof, is alleged in this specification, as the basis why Otahara did not afford the American flyers a legal, fair and lawful trial. This same investigation was the basis for Otahara's recommendation of the death sentence as prosecutor and approval thereof as Chief of the Judicial Department. These acts together with the preparation of the charges are a part of the criterion in the initiation and commencement of the proceeding in Specification 1. As the homicidal acts alleged in this specification are a part and included within the homicidal acts alleged in Specification 1, it is recommended that this specification be stricken as duplicitous and the findings of the Commission thereunder be disapproved.

Acts Not Charged: In the opinion of Gen. Uchiyama it was determined that the Commission erred in finding the accused guilty of the word "unlawful" preceding the word "killing". The same conclusion, based upon the reasons previously set out, can be made herein. These specifications of Otahara could have been drafted to include the "unlawful killing" as part of the homicidal act rather than as part of the conclusion. If this had been done, Otahara's acts in ordering the American fliers to be beheaded, and their partial beheading at the execution, would have been part of the homicidal act. Otahara's acts were illegal and unlawful in that as a staff officer he had no authority to order the manner in which the American fliers would be executed, and the beheading itself is illegal under Japanese regulations. A trial, the sentence of death, its approval, and the order of execution might be legal and lawful, but the execution itself, in the way it is carried out be illegal and unlawful.

The acts set out herein occurred after 12 July 1945 and at the time Otahara was officially Chief of the Judicial Department of the Second General Army, a superior command, and had been relieved of his duties as Chief of the Judicial Department of the Fifteenth Area Army. The Commission undoubtedly considered these acts part of the homicidal act in sentencing Otahara to death. The Commission erred in considering this evidence for the obvious reason that the accused was not charged with this offense and it is not included in any of the specifications with which he was charged.

Ogiya's Statement: A statement of the accused Ogiya was admitted in evidence as Exhibit 38. This exhibit was not admitted as a confession but as an affidavit, by the Commission (R, 127). The SCAP and Eighth Army rules in respect to confessions, Gen. Shaw's opinion that admissions in confessions against co-accused are admissible in evidence, and the decisions in the defense brief in conflict with Gen. Shaw's opinion are therefore not applicable to the question presented. The defense at the time of the trial objected vigorously to the introduction of this exhibit and in its Motion for Dismissal of the Findings and Sentence again stated the same grounds in asserting that the Commission erred in admitting this exhibit. The assertion by the defense that the exhibit was not signed by Ogiya and is therefore inadmissible is not in accordance with the evidence. Part Two of the exhibit is in the nature of an acknowledgment and was signed by Ogiya. In this part of the exhibit appears the statement, "The investigator just read my 14-page statement and I acknowledge that it is true to the extent of my memory", and Ogiya's signature to the part of the exhibit containing this quoted statement clearly cures any defect that the statement, Part One of the exhibit, was not signed.

That the statement was taken without permission of defense counsel and therefore in violation of the ethics of the American Bar Association was asserted by the defense as another ground with respect to the admissibility of the exhibit. The Law Member ruled that although not in accordance with the customs in the United States there was nothing in SCAP or Eighth Army rules to prohibit it. Although such practice on the part of the prosecution would be considered unfair and improper in the United States, it has been considered by SCAP as necessary in order to see that justice is meted out in accordance with the Potsdam Declaration, and it is therefore considered proper.

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The defense statement that Ogiya could not testify in a common trial and that he would be further prevented from doing so under the Exclusion rule is an error. Ogiya could take the stand as a prosecution or a defense witness and there is nothing in SCAP or Eighth Army rules to prevent it. In the Manual of Courts-Martial, US Army, 1928, Section 120-d, p 125, the rule under American Military Practice is as follows:

"One of two or more persons concerned in an offense is always competent to testify, whether he be charged jointly or separately and whether he be tried jointly or separately, and whether he be called for the prosecution or for the defense; except that he can not, if on trial himself, be called except upon his own request, and if not on trial himself he may assert his privilege not to incriminate himself."

The same rule can be adopted in the trial of suspected war criminals. The fact that Ogiya gave this statement to help out his own position, Page 1 of Part One of Exhibit 38, together with his statement in Part Two of the exhibit that he would testify unconditionally and clearly that his statements were true if he testified in court and that he would be able to testify to the truth of his statement to the prosecutor at any time clearly imply that he desired and was willing to be a prosecution witness. Under such facts Ogiya could properly testify for the prosecution under the rules cited herein including the exception.

As stated by the prosecution, in objecting to the introduction of affidavits of defense witnesses without their right of cross-examination, a procedure was adopted by the Commission, based on considerations of fairness, that an affidavit could be introduced in evidence, but if the individual making the affidavit was in Japan and available he would be put on the stand for cross-examination. Upon the ruling of the President of the Commission, the defense stated that it would produce any of the affiants that the prosecution desired to cross-examine (R. 161). The Commission erred in not following its procedure and allowing the defense the right to cross-examine Ogiya. It also erred under the rule stated in paragraph 3, Section 1, of the Rule of Procedure of the Eighth Army, to wit:

"The accused may take the stand as a witness or he may remain silent. If he takes the stand he may make a sworn or unsworn statement but in either case he will be subject to cross-examination on statement made, cross-examination is nowise to be limited to matters brought out on direct examination."

The rule as set out above is applicable in case either the prosecution or the defense would call one of the co-accused as a witness for or against one of the other co-accused in a common trial. A statement or affidavit has the same purport as if the individual had taken the stand. Thus, to permit the prosecution to put a co-accused's statement in evidence as part of their case without cross-examination would result in permitting the defense to offer a statement or affidavit of one co-accused limited solely to the defense of another accused and not be subject to the cross-examination by the prosecution. Application of a rule of procedure, to be fair, must be applied equally for or against both parties and not for the benefit of one alone.

It was unfair not to permit Otahara to cross-examine Ogiya when it is considered that he was the most hostile witness appearing against him. This is illustrated by the following statement in his affidavit: (Ex. 38, Part 1, p 1)

"I may be forced in the prosecution to put most of the responsibility on you. If you have any complaint to make about General Otahara's acts, it would be better for you to tell me now so that I may have the whole story."

Ogiya, as supervisor of the execution, had a good reason to believe that he might be held primarily responsible for the atrocity committed in the partial beheading

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of Nelson and Augunas. Other evidence pointing to Otahara as the one who gave the order to behead were hearsay statements, and Ogiya's testimony directly made Otahara the one principally responsible for this cruel and inhuman atrocity. Such evidence undoubtedly caused the Commission to sentence Otahara to death, where they might have given him a life sentence based upon hearsay statements of other hostile witnesses. Any military commission trying war criminal suspects should look with suspicion on accusations made by one individual against others involved in the same act and determine carefully whether such accusation is actually true or is given for the sole purpose of falsely relieving himself of responsibility.

It is recommended on this point alone that the findings be disapproved.

Yamanaka:

Maj. Yamanaka was a staff officer and head of the Intelligence Section of the Fifteenth Area Army with headquarters in Osaka. He was the presiding member of the Japanese military tribunal which tried Lt. Nelson and Sgt. Augunas on 18 July 1945. It was charged that he did, as presiding member of a Japanese military tribunal, Specification 1, during the course of an (illegal), unfair, (false and null) proceeding before said tribunal willfully (and unlawfully) adjudge and determine certain (false and fraudulent) charges and evidence against Lt. Nelson and Sgt. Augunas, American prisoners of war, without affording them a fair (and lawful) trial; Specification 2, during the course of an (illegal), unfair, (false and null) proceeding did willfully (and unlawfully) sentence to death Lt. Nelson and Sgt. Augunas; Specification 3, that he did willfully (and unlawfully) fail to perform his duty as a tribunal member and did neglect to provide a (legal), fair and proper trial of Lt. Nelson and Sgt. Augunas; and, applying to all specifications, did thereby contribute to the unlawful killing of said PW. (Parenthesized and underlined words indicate not guilty findings of the Commission).

The opinion, under the case of Uchiyama, as to the effect of the Commission's findings of not guilty of the excepted words is applicable to the specifications of this accused.

Taking into consideration that a Commission may find the accused not guilty of certain words and phrases, the danger of splitting the homicidal acts over several related specifications is illustrated by the specifications of this accused. It might have been easier for the Commission to have adjudged this case and much simpler to review if the prosecution had alleged the homicidal act in one specification.

Specification 1: The heart of Specification 1 was eliminated by the findings of the Commission in excepting and finding the accused not guilty of the words "unlawfully" and "false and fraudulent" which describe the adjudging of the charges and evidence. The Commission, by its findings of not guilty of these words, in effect found that the accused lawfully determined certain charges and evidence against Nelson and Augunas. Such was his duty and it is obvious that this act was intentional and not criminal in character. Further, the Commission by its finding of not guilty of all of the excepted words determined that Nelson and Augunas were lawfully and legally tried under the Laws and Customs of War. By determining that the accused lawfully adjudged certain charges and sentence against the captured American fliers, this part of the specification can be eliminated, and all that is left is that during an unfair trial the accused did not afford the American fliers a fair trial. It is the same act as the accused was charged with under Specification 3, as both specifications are affected by the findings of the Commission, and Specification 1 is therefore duplicitous. It is recommended that the findings in respect to this specification be disapproved.

Specification 2: Accused was found guilty of willfully or intentionally (but lawfully) sentencing the captured American fliers to death without affording them a fair trial. It is noted that the word "unfair" was not used as an adjective to describe the sentence of death, but was used only to modify the noun "proceeding". The Commission by its findings of not guilty of "illegal" and "unlawful",

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determined that the trial was legal and the sentence lawful under International Law for acts committed in violation of the Enemy Airmen's Act (Ex. 16).

On the question of the power of military tribunals to hear, decide and condemn, the Supreme Court of the United States in the case of Yamashita vs. Styer, 66 S. Ct., 340, 344, 345, said:

"If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. See *Dynes v. Hoover*, 20 How. 65, 81; 15 L. Ed. 838; *Runkle v. United States*, 122 U.S. 543, 555, 556, 7 S. Ct. 1141, 1145, 1146, 30 L. Ed. 1167; *Carter v. McClaughry*, 183 U.S. 365, 22 S. Ct. 181, 46 L. Ed. 236; *Collins v. McDonald*, 258 U.S. 416, 42 S. Ct. 326, 66 L. Ed. 692 Cf. *Matter of Moran*, 203 U.S. 96, 105, 27 S. Ct. 25, 26, 51 L. Ed. 105."

In the instant case, Kunitake, who actually reviewed the proceedings and sentence of death, was acquitted (Sp 4) of willfully and unlawfully failing and neglecting to afford a legal, fair, impartial and adequate review of the proceedings and sentence of death. The fact that the Commission found the trial legal, the sentence lawful and the review adequate cancels any determination that the accused committed a criminal offense under this specification. It is recommended that the findings of this specification be disapproved.

Specification 3: The basis of this specification is the lawful duty of the accused to provide a legal, fair, and proper trial to the American fliers. The Commission, as affected by its findings, in effect found that he lawfully performed his duty and provided a legal trial, but failed to provide a fair and proper trial. The failure to provide a fair and proper trial, when the trial is itself legal, is an act on the part of the members of the military tribunal not sufficient in itself to make the trial a nullity, but sufficient on review to send it back for a new trial; that the Commission judicially determined that the unfairness in the trial was not criminal in character is shown by their findings of not guilty of Specifications 2 and 4 of Kunitake, who actually made the review and Specification 4, Uchiyama. Thus a judicial determination that the review was adequate in approving the proceedings and sentence of death indicates clearly that the acts of the members of the tribunal, who were required to afford a fair and impartial trial, are not criminal. It is therefore considered that this specification, as affected by the Commission's findings, does not state acts which are criminal and upon which a sentence can be imposed. It is recommended that the findings in respect to this specification be disapproved.

Ono

Capt. Ono was senior judicial officer under Otahara of the Judicial Section of the Fifteenth Area Army. He was the legal member of the Japanese military tribunal which tried Lt. Nelson and Sgt. Augunas and was charged with the same specifications, except as legal member, as Yamanaka. The Commission found him not guilty of the same excepted words.

The opinion under the case of Uchiyama and Yamanaka above as to the effect of the Commission's finding of not guilty of the excepted words and remarks made in respect to pretrial activities under Otahara's opinion is adopted as part of this opinion. For the reasons heretofore expressed, it is recommended that the findings of guilty be disapproved.

Matsumori

Lt. Matsumori was a member of the Fifteenth Area Army acting as liaison officer between the central army and the government offices. He was the associate and junior member of the Japanese military tribunal which tried Lt. Nelson and Sgt. Augunas, and was charged with the same specifications except as associate

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member as Yamanaka and Ono. The Commission found him not guilty of the same excepted words in Specifications 1 and 2 as Yamanaka and Ono, but not guilty of Specification 3.

The opinion under the case of Uchiyama and Yamanaka, as to the effect of the Commission's finding of not guilty of the excepted words is adopted as part of the opinion of this accused.

Specification 1: In addition to the opinion given in respect to the companion specifications of Yamanaka, attention is directed to the fact that the Commission judicially determined by finding this accused not guilty of Specification 3 that he was under no duty to provide a legal, fair and proper trial to Lt. Nelson and Sgt. Augunas. The Commission, therefore, erred in finding the accused guilty of the phrase "without affording them a fair and lawful trial" in this specification. All the accused was found guilty of in this specification is that in an unfair trial under which he had no duty to provide, he willfully or intentionally (but lawfully) adjudged and determined charges and evidence against Lt. Nelson and Sgt. Augunas. Adjudging and determining charges and evidence against an accused, standing alone, does not constitute a criminal act, and it is therefore considered that the Commission erred in finding the accused guilty of this specification. It is recommended that the findings in respect to this specification be disapproved.

Specification 2: For the reasons set forth under Specification 1, the Commission erred in this specification in finding the accused guilty of the phrase "without affording them a fair trial". As eliminated, all the accused was found guilty of was willfully (but lawfully) sentencing to death Lt. Nelson and Sgt. Augunas in an unfair trial which the accused was under no duty to provide. In the clemency petition of the accused's wife it is stated that he first firmly opposed the death penalty, but other members of the tribunal were opposed to this opinion and in the end decided to give a death sentence. Further the accused's wife stated that after the execution this accused made a tablet of the American fliers and placed it in the family shrine where it was worshipped together with the spirits of the family deceased.

Standing alone, voting for a death penalty, when it is not alleged that the sentence itself is unfair, is not a criminal act, and therefore it is considered that the Commission erred in finding the accused guilty of this specification. It is recommended that the findings in respect to this specification be disapproved.

Specification 3: Not Guilty.

*Ogiya

Lt. Ogiya was a member of the Judicial Department of the Fifteenth Area Army and was appointed on the 14th of July 1945 as prosecutor in place of Otahara. Otahara was unable to continue as prosecutor in view of the fact that he was relieved of his duties on 12 July 1945 by his transfer to the Second General Army. Ogiya made no investigation of the matter personally. The opinion under Uchiyama as to the effect of the Commission's finding the accused not guilty is applicable as to Specifications 1 and 2 and not Specification 4.

Specification 1: Ogiya was charged in this specification as prosecutor of a Japanese military tribunal during the course of (illegal), unfair, (false and fraudulent) proceeding before said tribunal against Lt. Nelson and Sgt. Augunas, American PW, that he did willfully (and unlawfully) present (false and fraudulent) charges and evidence against them and did thereby contribute to the unlawful killing of said prisoners of war. The Commission found the accused not guilty of words parenthesized and underlined.

All the Commission found the accused guilty of in this specification is willfully or intentionally presenting charges and evidence against the American fliers. He was under no duty to afford them a fair trial other than fairly presenting the evidence to the tribunal, and as affected by the findings of the

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Commission it is clear that all he was found guilty of in this specification was performing his duty in presenting the charges and evidence, and if this is a crime all prosecutors in any criminal case would be equally guilty of a crime. The Commission after finding that he was not guilty of the excepted words erred in finding him guilty of the specification. It is recommended that the findings in respect to this specification be disapproved.

Specification 2: This specification is the same as Specification 1 except that after "American PW" the homicidal act is alleged to be "did willfully (and unlawfully) request and obtain this sentence of death" in place of the phrase referring to the presentment of the charges and evidence.

In the parts that are the same the Commission excepted the same words as in Specification 1 and in the quoted phrase found the accused not guilty of the word "and unlawfully". One of the duties of a prosecutor in an important capital case is to ask for the death sentence and the jury, judge, or military commission are the ones to determine and are responsible for the verdict and the sentence of death. Under the findings, as affected by the Commission, no affirmative act of Ogiya remains indicating that the request for the death sentence was unlawful or unfair or that his request, standing alone, caused the military tribunal to vote for the death sentence. The Commission, after determining that he was not guilty of the excepted words erred in finding him guilty of a criminal act in this specification. It is recommended that findings in respect to this specification be disapproved.

Specification 3: Not Guilty.

Specification 4: Ogiya was charged under this specification as prosecutor of a Japanese military tribunal that he did (willfully and unlawfully) supervise (and direct) the illegal killing of Lt. Nelson and Sgt. Augunas. He was found not guilty of the words in parenthesis and underlined.

This specification is different from the specifications heretofore set out in that the "illegal killing" is made part of the homicidal act. Further, the Commission excepted the word "willfully" as well as "unlawfully" in its findings.

It appears that the Commission found the accused guilty of involuntary manslaughter. Thus, as said in 6 Bull. JAG 240 and 241, "a specification alleging an 'unlawful killing' and failing to allege words of willfulness or intention to kill, as in the instant case, constitutes a specification alleging involuntary manslaughter only * * * for which the maximum confinement given by the Table of Maximum Confinement is three years."

Involuntary manslaughter has been defined in 40 C.J.S., pp 918-919, to mean:

"As described at common law and under statutes substantially declaratory thereof, involuntary manslaughter consists in the killing of another without malice and unintentionally, in doing some unlawful act not amounting to a felony or naturally tending to cause death or great bodily harm, or in doing some act lawful in itself in an unlawful manner or negligently, or by the negligent omission to perform a legal duty. The unlawfulness of the act in connection with which the killing occurs is the element which distinguishes involuntary manslaughter from a killing excusable as by accident or misfortune. It is difficult to separate sharply an unlawful act from a lawful act done in an unlawful manner or without due caution or circumspection."

In the case of State vs. Anderson, 116 Pacific, 398, 401, 100 Utah 468, the court held that an act which is not itself illegal, but which in a given case becomes illegal because of the manner in which it is performed, is a lawful act done in an unlawful manner.

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Ogiya was required as prosecutor to supervise the execution under Japanese regulations and the fact that he did supervise the execution was not in itself unlawful. As the supervisor he had the duty to order Nakamichi to execute the flyers and see that it was carried out in a legal manner. This order, standing alone, was deemed lawful by the findings of the Commission as it was based upon a legal trial, a lawful sentence of death, an adequate review, and a proper execution order. The execution of a person to be justifiable, however, must be in pursuance of the sentence of a competent court and in strict conformity therewith (41 CJS, p 967). One at the trial stated that the American flyers would be executed in accordance with regulations and under these regulations, Ex. 16, and the evidence, the legal method of execution would be by "shooting". The execution was not carried out in strict conformity with the orders of the court in that the order was first given to behead and as a result thereof the American flyers were partially beheaded. Thus the execution, although based upon a legal execution order, became unlawful by the manner in which it was performed. Although the proof does not sustain the fact that the partial beheading caused the death of the American flyers, it was part of the execution that resulted in their death by shooting. If not a contributory factor to their death, this cruel and inhuman atrocity is at least a lesser included offense. It is therefore considered that the findings of the Commission are legally sufficient to sustain a finding that the accused was guilty of the atrocity of partial beheading, a lesser included offense of the alleged killing of the American flyers.

Nakamichi

Captain Nakamichi was the head of the Osaka military prison and he, at the time of the execution, under the supervision of Ogiya, gave the orders for the guards to decapitate Lt. Nelson and Sgt. Augunas, and immediately order the guards to shoot the American flyers when they failed to sever their heads. Nakamichi was charged with (willfully and unlawfully) ordering subordinates to kill, and through their acts, did unlawfully kill Lt. Nelson and Sgt. Augunas. He was found not guilty of the words parenthesized and underlined.

The words, in this specification, "the unlawful killing", are made part of the homicidal act, and it differs from the other specifications heretofore set out, other than Specification 4, Ogiya. In these other specifications, the words "unlawful killing" are a part of the conclusion. As in Specification 4, Ogiya, the Commission also excepted and found the accused not guilty of the word "willfully".

As stated in the opinion of Ogiya, it appears that the accused was found, as affected by the findings of the Commission, guilty of involuntary manslaughter. Upon the facts, which are the same as under Specification 4, Ogiya, and for the reasons that are set out therein, it is considered that the findings of the Commission are legally sufficient to sustain the finding that the accused was guilty of the atrocity of partial beheading, a lesser included offense of the unlawful killing of the American flyers.

Summary:

The record is not legally sufficient to support the findings of the Commission except as to Specification 4, Ogiya, and Nakamichi. Each allegation of the charge and Specification 4, Ogiya, and Specification 1, Nakamichi, as affected by the Commission's findings was substantially sustained by ample and competent evidence. The Commission was constituted by proper authority and had jurisdiction of the accused and of the offenses alleged. All the accused were very ably represented by competent counsel.

The accused Uchiyama was the only accused who took the stand and testified in his own behalf. Under SCAP and Eighth Army rules of procedure, the other accused elected not to testify.

Other than Otahara, a careful scrutiny of the entire record fails to reveal any error which injuriously affected the substantial rights of the accused or any failure to accord them a fair trial in every respect. It is deemed that the introduction of the affidavit of Ogiya without cross-examination is the only error in which Otahara was not accorded a fair trial.

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There is no evidence that any of the accused were insane at the time of the commission of the alleged acts and at the time of the trial.

5. Recommendations:

There were no requests for clemency from any member of the Commission, and the letters of clemency filed for each of the accused from friends and relatives have been duly considered.

The Japanese and associate counsel for the defense have each submitted briefs. The prosecution filed an answer brief and the associate counsel for the defense replied. All briefs have been read and considered.

The Commission sentenced the accused Otahara to be hanged by the neck until dead, and five of the other accused to be confined at hard labor as follows:

Uchiyama, thirty (30) years
Kunitake, three (3) years
Yamanaka, twenty-five (25) years
Ono, thirty (30) years
Matsumori, ten (10) years

On the basis of the specifications, as affected by the findings of the Commission, it is deemed that the acts of all of the above accused of which they were found guilty do not constitute a war crime under the Laws and Customs of War, and the sentence given to each of the named accused is therefore not legal.

Ogiya: The Commission sentenced the accused to confinement at hard labor for a period of three years. The sentence is legal. Taking into consideration the recommendation that this accused be found not guilty of Specifications 1 and 2 and the further fact that he cooperated with the prosecution, it is deemed that a greater sentence could be given for the cruel and inhuman atrocity of partially beheading the American flyers. Ogiya, under the evidence, knew that the beheading of these flyers was unlawful. However, in order that the accused might receive some punishment for the crimes of which he has been found guilty, it is recommended that clemency be denied and the sentence be approved. Accused was confined 29 March 1946, went to trial 18 July 1947, and was sentenced on 28 August 1947. Under established policy, owing to the length of time accused has been in confinement prior to sentence, it is further recommended that fourteen (14) months of the sentence thus imposed be remitted. Sugamo Prison, Tokyo, Honshu, Japan, is the appropriate place of confinement.

Nakamichi: The fact that this accused knew that the beheading was unlawful and that he selected the guards that partially beheaded the American flyers, a more serious atrocity than if they had been beheaded cleanly, indicates that a much greater sentence could have been given this accused. However, in order that the accused may receive some punishment for the crimes of which he has been found guilty, it is recommended that clemency be denied and the sentence be approved.

Accused was confined 29 March 1946, went to trial 18 July 1947, and was sentenced 28 August 1947. Under established policy, owing to the length of time the accused has been in confinement prior to sentence, it is further recommended that fourteen (14) months of the sentence thus imposed be remitted. Sugamo Prison, Tokyo, Honshu, Japan, is the appropriate place of confinement.

6. Action:

Attached hereto are forms of action designed to carry into effect the above recommendations.

MAHLON Z. EUBANK
Reviewer
Judge Advocate Section

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1. The conclusions in the foregoing review are not concurred in, in general.

2. The following points are especially noted:

a. A judge in the "Military Discipline Conference" or "special" tribunal, as these so-called courts were designated, had the duty to determine guilt by independent judgment (Ex. 4; Ex. 7; Ex. 16, p. 19; and Ex. 39, p. 27).

b. The president of the court which tried Nelson and Augunas was the Chief of Intelligence of the 15th Army Group Headquarters and had interrogated Nelson as an investigator before he sat as judge (Ex. 6, p. 2; Ex. 36, p. 1) and he was active in the investigation (Ex. 36, pp. 2, 4). The law member of the three-man court, Ono, went with his superior, the Chief of the Legal Section of the 15th Area Army, accused Otahara, to the Second General Army Headquarters (a superior unit) to submit a letter of inquiry concerning the death sentence (Ex. 27, p. 5). Ono arranged the execution place beforehand (Ex. 27, p. 6) on the order of Otahara, who had directed that the prisoners be decapitated (Ex. 31, p. 2; Ex. 38, p. 5; Ex. 39, p. 10) and he notified Ogiya that he would have little to do at the trial (Ex. 38, p. 5). The graves were dug before the trial (Ex. 27, p. 6).

c. The third judge, accused Matsumori, had no choice in voting the death penalty. He said, "I voted the death penalty for the two flyers * * * because it couldn't be helped. The decision cannot be helped." (Ex. 11). According to the rules followed by the court, the accused were not permitted to defend themselves (Ex. 6, p. 3). Otahara explained to the Chief of Staff that the sentence "is going to be a death sentence" and the latter and the Commander relied on the former and considered only the death sentence (Ex. 36, pp. 9, 11). The Commander appointed the court from a recommendation by the Legal Chief for the law member (Ono) and from that of the Chief of Staff as to the president and third member (Ex. 36, p. 14). The Chief of Staff picked the president because he was the Intelligence Officer and knew about air raids. It was known that the president had arranged to execute other flyers without trial (Ex. 36, p. 16; Ex. 37, p. 2).

d. It is contrary to ordinary procedure that those who have investigated a case should sit as judges (Ex. 39, p. 22).

e. After the trial on the morning of 18 July, the Chief of Staff approved the sentence during the noon hour for the Commander. The presiding officer of the court reported that the flyers accepted the prosecutor's charges, although he knew that Nelson had bitterly protested the sentence as unjustified (Ex. 27, pp. 8 and 9; Ex. 28, Part 2, p. 8; Ex. 36, p. 18). The execution was held the same afternoon (Ex. 36, p. 24) and the prisoners buried in the pre-dug graves. Secrecy as to the attempted decapitations and as to the execution was enjoined (Ex. 27, p. 11; Ex. 36, p. 27), the decision coming from the Chief of Staff (Ex. 36, p. 27). Ono, the law member, was to claim that the prisoners had been killed in a bombing raid (Ex. 27, p. 12). Captain Ono remained in the Legal Section after his Chief, Otahara, left (Ex. 36, p. 27). It was usual for subordinates to know what was going on in an office (Ex. 36, p. 26).

f. Otahara attended the trial, saw the execution party off with encouraging words and was still considered head of the Legal Section at the time of trial (Ex. 28, Part 4, p. 9; Ex. 27, p. 13; Ex. 38, p. 4). He stated afterwards that since the truth had leaked out, he would be punished (Ex. 39, p. 12).

g. The Legal Chief, who succeeded Otahara, stated that the time from the end of the trial to the execution was too short (R. 138) and a member of the Judicial Section of the Japanese Army stated that he had never heard of a case where the grave was dug before the trial and the execution within six hours of the time the sentence was adjudged (R. 192). After the Occupation had commenced and the matter was being investigated both by the Japanese Government and the Occupation Forces, General Uchiyama came to the conclusion

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that further insistence on the false story that bombing killed the flyers was futile "since concealment was impossible" and sent word to the others to tell the truth (Ex. 39, p. 13).

h. On the stand, Uchiyama described himself as a descendant of Samurai, whose father was a General before him, aide to the Emperor and married to the daughter of an Admiral (R. 196). He recited his victorious command experiences against the Russians and the Chinese (R. 196, 197).

3. Comment

a. The court deleted the words "illegal", "unlawfully" and similar type words with reference to the trial and found guilt as to the "unfair" proceedings involved therein. The findings of the court in this regard were clear and logical under the evidence. The trial was on its face "legal" in the sense that it followed the formal rules as set out by the Japanese authorities. However, in actuality, it was no trial at all. It was, what is known in the vulgate, as a "fixed" trial. The evidence is compelling that each cog in the machine was ready in advance to perform its respective function. Each person knew what he was expected to do beforehand and he performed. A more efficient death machine is difficult to imagine. No major hitch occurred until afterwards. True, when Lt. Nelson learned as the sentence was pronounced what he was being tried for, he almost upset the equanimity of this preplanned justice by protesting bitterly the unfairness of it all. But this was merely a momentary ruffling of the serenity of a mock trial and the full dress party in which the chief handyman, Otahara, for the architect Uchiyama was honored, proceeded without interruption following the trial.

b. The trial was as formally correct as was Otahara in his ribbons and white gloves as he wished the executioners well. But he knew, as it appears from the evidence, that all the participants knew that the whole proceeding lacked the one prime prerequisite of a real trial, fairness. It was "Legal in form, but unfair in substance," "A goodly apple rotten at the core," like a "smiling villain" or "A house built on shifting sand."

c. Yamanaka and Ono had investigated the case beforehand and were thoroughly acquainted with the fact that the death sentence was agreed upon in advance and expected by their superiors. The third member of the court well expressed the situation when he said in effect that he voted for death because he had no choice and could not help it. Therefore, there is no escape from the conclusion that the trial was a mere rationalization and an attempt to cover up with an apparent legal exterior a predetermined decision. The trial was unfair, prejudged and in bad faith.

d. In what strong contrast do the trials afforded by the Occupation Forces to those accused of war crimes stand out? Interpreters, investigators, clerical help, Japanese counsel and American advisory counsel of a high order are supplied to the accused without charge. Free communication service throughout the world for the purpose of securing evidence is provided. Witnesses are procured when available and requested by the accused. An open hearing is provided before unbiased judges who are subject to challenge for cause. If the accused is convicted, an automatic appeal follows in which the verbatim record is studied in detail by highly competent legally-trained reviewers who scrutinize the record and allied papers for any evidence of unfairness or injustice. The record is once more completely read and studied by the Judge Advocate and the final results and recommendations submitted to the Commanding General. He, in turn, carefully considers the matter anew (de novo), even considering evidence outside of (dehors) the record if it favors the accused. In his decision he may and does where it is justified, require a new trial or disapprove the actions of the court. He cannot take action to increase the severity of the court's verdict. In death cases another automatic review follows, in which a Board of Review in the office of the Judge Advocate for the Supreme Commander, again studies the record. The Judge Advocate there also thoroughly goes into the matter and finally the

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Supreme Commander himself carefully considers the case before an execution is ordered. Thus the difference between a fair trial and an unfair one is highlighted. The Japanese lawyers in this case join in the feeling that trials of the type just mentioned are fair. (See their brief).

e. A test for proper trials is given in "The Law of Martial Rule" (1943), pp. 264, 265, Fairman:

"Members of such a tribunal should, of course, act in accordance with the principles of justice, honor, humanity, and the laws and usages of war. * * * They should give the prisoner every reasonable facility for making his defense and should avoid unnecessary severity. * * * What the civil law does require of those who administer punishment under martial rule has thus been stated. * * *: That in all cases there should be a grave and serious examination into the conduct of the accused; every act should evince an attempt to discover guilt or innocence, not to inflict torture."

Hackworth, "Digest of International Law", Vol. V, Sec. 522, p. 528, says:

"* * * The treatment of an alien in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial."

35 CJS, p. 483, defines a fair hearing as:

"One in which authority is fairly exercised, that is; consistently with the fundamental principles of justice, embraced within the conception of due process of law. The term implies a tribunal free from bias and prejudice * * *. Specifically, the term implies that a party concerned shall not only have an opportunity to present evidence in his favor, but also that he shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all the evidence on which the matter is to be decided, * * *" Also that he shall be advised of the charges and "the assistance of counsel, has been held a fundamental requisite of 'fair hearing'. * * * In the case of one placed under arrest on charges, the term implies the right to be apprised of the nature of the charge against him, and the opportunity to meet it."

f. Defense urges that one accused of war crimes (as distinguished from a prisoner of war not so accused) need not be tried at all, but may be punished by executive fiat. Yet defense inconsistently (but correctly) urges that the persons here accused as war criminals must have a fair trial. The latter reasoning is the sounder and more acceptable to civilized peoples. The form of a hearing is not important, the substance is vital. The accused must have a fair chance to defend himself, which means that he must have a fair hearing which is not prejudged. Japan chose in the Nelson-Augurias case to follow the form of a trial in its determination of guilt. It was required to have a hearing in which the accused have an opportunity to defend themselves. They must be proved and fairly determined to be guilty.

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Oppenheim International Law, Lauterpacht's Sixth Edition, Vol. II, p. 458, states that appropriate safeguards under the law of war should be accorded an accused war criminal. These include a fair and public trial and the elimination of any purely summary punishment procedure. The Yamashita case, 66 S. Ct. 340 l.c., 352, holds that: "Independent of notice requirements of the Geneva convention, it is a violation of a law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense."

g. These requirements of international good conscience, universally recognized by civilized nations, were not met in a proceeding such as that promulgated under the aegis of General Uchiyama.

h. In view of the foregoing reasoning, the question as to whether the prevalence of family war-aiding factories throughout the urban Kobe-Osaka area, justified bombing of that urban area become moot. The claim that such bombing was indiscriminate and a war crime cannot be concurred in, but since that point is not necessary to a determination of this case it will not be further discussed here.

i. Details of the proof as applied to specifications are considered hereafter:

(1) Uchiyama. Specification 1, not guilty finding. Overlaps other specifications and doubtless considered as a duplication.

Specification 2, approval of the finding of guilty of this specification is recommended. Although Kunitake actually approved the sentence, he was acting in a ministerial capacity. It was Uchiyama's act. Hence, a finding of not guilty as to Kunitake is not inconsistent with the guilty finding here. The specification alleges: "By his own act * * *,"

Specification 3, the finding of guilty should be approved. A finding of not guilty of Specifications 1 and 4 is not inconsistent since these overlap and duplicate in part. When Uchiyama approved the unfair proceedings, he therefore was a party to the order of execution, which he actually accomplished in advance.

As to his sentence, it seems apparent that the court was very lenient with him. He boastfully spread on the record his and his family's achievements, as persons among the elite of the Japanese militaristic clique. He is in the category of persons condemned in countless petitions received in these war crimes cases from the Japanese "common man", who asks forgiveness of the "small fry" war criminal on the ground that he was misled by the militarists. Uchiyama places himself in that class by his testimony and actions. The fact that he was instrumental in finally persuading several of the accused to abandon their false stories should be considered; but is of little aid in evaluating his case because the impelling motive was his knowledge that he would be found out in any event. Two active investigations were in progress, one by the Japanese government under the Occupation eye, and the other by the Occupation forces. Higher authority than Uchiyama had decreed that the truth would come out. It was natural and "smart" to send word to his underlings to "come clean". Then Uchiyama could assert that he was a man of honest purpose and entitled to clemency for his goodwill. No reduction in sentence is recommended.

(2) Kunitake.

Specification 3. Not guilty findings of Specifications 1, 2 and 4 merely absolve this accused from responsibility for the acts alleged in those specifications, but do not deny their occurrence. In view of the evidence and reasoning set out above, it is believed that the finding of guilty in this specification should be approved.

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The sentence of only three years is not understandable. Kunitake was the willing right hand of the designer of this tragedy, Uchiyama. He personally participated in the acts which effectuated it. His sentence should be approved.

(3) Otahara.

This accused was the Chief of the Legal Section, made arrangements prior to trial for the beheading of the flyers, selected his assistant and a former investigator in the case as the law member, urged secrecy, participated in the arrangements even after his paper transfer to a higher echelon, attended the trial and encouraged the executioners to their work. He received a sentence of death.

Specification 1. The finding of guilty of this specification should be approved. Notwithstanding that the accused was transferred on paper from the 15th Area Army on 12 July, six days before the purported trial, he continued actually through the completion of the trial directing and supervising the furtherance of the plot for a fictitious hearing and illegal execution. Furthermore, the trial was a logical culmination of acts performed by this accused prior to trial on 18 July, such as nomination of a law member whose vote was committed in advance. Whether Uchiyama and Kunitake were convicted of command responsibility for the actions charged would be immaterial since Otahara would nonetheless be responsible for his own actions.

Specification 3. The reasoning as to this specification may be found under Specification 1 above.

Specification 4. Likewise, the logic of Specification 1 may be applied here. Some duplicitous features appear in these specifications, but the sentence adjudged is legal for conviction of any one of the specifications.

The issue is raised that a statement of Ogiya was offered in evidence, and that it added to the proof against Otahara to the extent that he was prejudiced thereby; that Ogiya was not available for cross examination. It is true that he could not be forced to take the stand. However, it is not observed that defense did not have the same opportunity to question him out of court that the prosecution utilized. Statements by one accused incriminating another are admissible against the latter. The protection extends only to the person making the statements. It should be remarked, nevertheless, that a statement by one accused incriminating another and exculpating himself is always to be scrutinized with great severity before it is considered against a person not a party to the statement. If it has probative value to a reasonable person, it is admissible, but it should be weighed carefully with the thought in mind that it is natural for a person to blame others in order to protect himself.

Either side may attempt to secure facts from a witness out of court, but consideration for proper ethics suggests that prosecution should not interrogate an accused unless his assigned counsel is present or consents.

In the instant case, the evidence of guilt of Otahara is compelling even if the statement by Ogiya is disregarded, so in any event no prejudice resulted to the accused.

As to the sentence of death, it is believed that the sentence is legal, but that clemency should be exercised to the extent of commutation to life imprisonment at hard labor. Uchiyama was a person of strong will and there is no question from the evidence that he was the "head man" in this affair. Recommendations were made by this accused, it is true, and details were accomplished likewise. The person with the power of "yes" or "no" was no one else of the accused but Uchiyama. It is not considered that under these facts, as shown in evidence, the principal should escape with a sentence less than death and his helper (no matter how willing) be hanged. A sentence of life imprisonment is believed to be appropriate.

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(4) Yamanaka.

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This was the presiding officer of the court. He was the chief investigator and functioned as such in this case before mounting the bench. He violated the most fundamental rules of fair play in not announcing his disqualifications. He acted under the compulsion admitted by the third member of the court who said, in effect, that they were allowed no discretion in adjudging the death sentence. The charges under Specifications 1, 2 and 3 overlap in places, but a finding of guilty of any one justifies the sentence. He participated in the futile effort to conceal the crime by falsity and artifice, playing a leading role. He knew beforehand that his superiors expected the flyers to be executed (Ex. 1, p. 1; Ex. 5, p. 5; Ex. 6, p. 2).

The findings and sentence should be approved.

(5) Ono.

The discussion concerning Yamanaka applies likewise to Ono. In addition it should be remarked that he was assistant to the Chief of the Legal Section, knew the desires of his superiors beforehand, acquiesced and participated in their accomplishment even to a greater degree than Yamanaka and was a key man in the accomplishment of the criminal purpose involved. His sentence should be approved.

(6) Matsumori.

This accused is in a different category from that of those discussed hereto. He participated in the fatal achievement of the unfair trial, it is true. Nevertheless, he did not take as active a part as did Ono and Yamanaka.

By acquitting him of Specification 3, the commission did not find that he had no duty to furnish a fair, etc., trial, but merely deleted that specification as a duplication.

Specifications 1 and 2 overlap in places, but conviction of either justifies the sentence adjudged.

With reference to clemency, however, it is observed that this accused was only a participant in a minor way. Two-thirds of the court were men of whose prearranged decision their superiors had no doubt. Their actions could accomplish the design even had Matsumori voted not guilty. He lacked the courage to stand up against this false trial and voted with the majority. Yet his heart was not in the "bloody business", as evinced by the fact that he erected a small tablet to the souls of the flyers, placed it in his household shrine by those dedicated to his family and prayed daily for the souls of the flyers whose deaths he assisted in accomplishing. Such feelings of humanity and repentance should be recognized. It is believed that the unexecuted portion of his sentence should be suspended.

(7) Ogiya.

This was the prosecutor.

It is recommended that the finding of guilty of Specification 1 be disapproved because the evidence which convicts this accused of wrongful actions does not depend upon presentation of false evidence and charges in the flyers' case, but is hinged on an unfair, packed, "closed" court which prejudged the case and allowed no defense.

Specification 2, however, should be approved. The accused was established as a participating accessory in the whole of the unfair proceedings. He was advised by Otahara, in substance, that the skids were greased and that his performance was merely to be perfunctory. He knew that the death sentence was a foregone conclusion and made his preparations for execution and burial accordingly.

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Specification 4 should be approved. The actions of which Ogiya was properly convicted, under Specification 2, resulted in the illegal killing of the flyers. The offense under this specification, taken by itself, amounts to an equivalent of involuntary manslaughter, inasmuch as the commission deleted the word "willfully". Since the trial was unfair, the killing was illegal. Guilty knowledge by Ogiya is evident also from his participation in the false story and concealment of the crime (Ex. 4). The sentence should be approved.

(8) Nakamichi.

The discussion under Specification 4, Ogiya, is applicable here. The sentence should be approved.

4. It is reassuring in the review of such sordid stories as the record reveals in this case to find incidents of human virtue, of repentance and regret, such as that displayed by Matsumori. Thus it becomes apparent that such feelings are not found alone in the hearts of any certain nationality, but occur in accordance with the individual's personality.

5. Proposed actions to implement these recommendations are attached.

ALLAN R. BROWNE
Lt Colonel JAGD
Army Judge Advocate

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