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Post-Second World War British Trials in Singapore: Lost in Translation at the Car Nicobar Spy Case

CHEAH Wui Ling*

30.1. Introduction

Nestled in the Bay of Bengal, the Andaman and Nicobar Islands have long been celebrated by travellers and writers for their lush greenery and idyllic beauty.[1] It has been said that these islands "glitter like emeralds" and lie like a "broken pearl necklace" scattered across 780 kilometres of the Indian Ocean.[2] During the heyday of European colonial rivalry, they were coveted and courted by the Danes, French and British in turn, with Britain outmanoeuvring the rest to secure its colonial grip over the islands until India's independence in 1947.[3] Today they are administratively divided into the districts of Andaman and Nicobar with 36 of the 554 islands serving as home to various communities.[4] The islanders speak various languages such as Bengali, Hindi, Nicobarese and Tamil, and

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1 For a history of these islands, see generally, B.R. Tamta, *Andaman and Nicobar Islands*, National Book Trust, New Delhi, 2000; Laxman Prasad Mathur, *Kala Pani□: History of Andaman & Nicobar Islands with a Study of India's Freedom Struggle*, Eastern Book Corporation, New Delhi, 1985; Philipp Zehmisch, "Freedom Fighters or Criminals? Postcolonial Subjectivities in the Andaman Islands, South-East India", in *Kontur*, 2011, no. 22.

2 Tamta, 2000, pp. 2–3, see *supra* note 1.

3 *Ibid.*, p. 11; Tamta also explains that the British were reluctant to give up the Andaman and Nicobar Islands due to its strategic location. *Ibid.*, p. 79; Mathur, 1985, pp. 226–33, see *supra* note 1.

4 Tamta, 2000, p. 3, see *supra* note 1.

practise a variety of religions including Hinduism, Bahai, Christianity and animism.[5] In the Nicobar district the Nicobarese are the predominant communal group.[6] Historically they have lived off the land by cultivating coconuts and vegetables while engaging in the occasional act of piracy.[7] Despite British colonial rule they continued to follow their own social and political customs.[8] These were the self-sufficient and diverse peoples whom the Japanese found when they arrived on the islands on 23 March 1942.[9]

Japan's Second World War occupation of the Andaman and Nicobar Islands was a dark period in the islands' history. Initially Japanese military personnel treated the islanders well but their conduct soon degenerated into brutality and chaos.[10] As the islands came under Allied attack and as food supplies ran low, the Japanese military started to suspect the islanders of espionage and increasingly accused them of theft.[11] Japanese soldiers rounded up local people for questioning and subjected them to torture, summary trials and execution. The Japanese also organised the mass killings of "undesirables" who included women and children. Many of those responsible for these atrocities would subsequently be tried by the British military in Singapore after the Second World War. Survivors travelled from these islands to Singapore to give their testimony in court before Allied judges. The media reported on these trials, and the words of trial participants were captured for posterity through careful transcription and archival preservation. Yet, today, these trials and these crimes receive little study or attention. The atrocities committed by the Japanese in the Andaman and Nicobar Islands are less well known compared to other war crimes such as the Burma–Siam Death Railway, the Nanjing (Nanking) Massacre or Unit 731's medical experiments.

This chapter hopes to rectify this situation by closely studying the trial of Itzuki Toshio and others for crimes committed by the Japanese in

5 *Ibid.*, pp. 123–27, 134.
6 *Ibid*., p. 130.
7 *Ibid*., pp. 130, 132.
8 *Ibid.*, p. 144.
9 *Ibid.*, p. 46.
10 *Ibid.,* p. 47; Mathur, 1985, p. 247, see *supra* note 1.
11 Mathur, 1985, p. 249, 253, see *supra* note 1.

Nicobar.[12] The main focus is on the communication problems encountered by trial participants during the trial. The criminal trial is increasingly viewed as today's preferred response to wartime atrocities, regardless of the crime's location or the people involved. Christine Schwöbel observes how the prosecution of international crimes has become a "prioritisation", with this "being prioritised over other possible projects of humanitarianism".[13] Debates focus on improving the effectiveness of these trials but do not question their foundational assumptions.[14] One such assumption of the Western adversarial trial is that the prosecution and defence are operating on a level playing field, both equally equipped to argue their respective positions at trial.[15] The criminal trial as conceived from a Western legal tradition assumes that the accused is given a chance to publicly counter the case of the prosecution and the unfavourable testimony of witnesses.[16] The accused is to be a participant rather than an "object of proceedings".[17] At the most basic level this requires participants to share the same language or be supported

[12] British Military Court for the Trial of War Criminals, Trial of Itzuki Toshio and others, WO 235/834, 11–16, 18–29, 25 and 26 March 1946, National Archives, UK ('TNA') ("Trial of Itzuki Toshio and others"). A microfilm and e-version of this case file may be found at the Central Library of the National University of Singapore. As documents are not arranged in order in the file so, in the interest of accuracy, this chapter makes reference to the slide number of the microfilm or e-version. Text from the trial transcripts has been quoted unchanged but for their formatting and visual arrangement. Only glaring spelling errors by the transcriber have been corrected. I have followed the spelling of names used by the transcriber. Key documents in *United Kingdom v. Toshio Itzuki et al.* may be found in the ICC Legal Tools Database as follows: Charge Sheet (http://www.legal-tools.org/doc/d9acc4/), Judgment (http://www.legal-tools.org/doc/9a3772/) and Judge Advocate General's Report (https://www.legal-tools.org/doc/f7e1ba/).

[13] Christine E.J. Schwöbel, "The Comfort of International Criminal Law", in *Law Critique*, 2013, vol. 24, p. 172.

[14] *Ibid*., p. 170.

[15] Writing about the common law adversarial trial in the American context, Kenneth Nunn observes how the "common view" of the trial sees it as "a contest waged between two opponents who have a roughly equal chance of convincing the fact finder that their version of events is true". Kenneth B. Nunn, "The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process – A Critique of the Role of the Public Defender and a Proposal for Reform" in *American Criminal Law Review*, 1995, vol. 32, no. 3, p. 782.

[16] Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros, "Introduction: Towards a Normative Theory of the Criminal Trial", in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds.), *The Trial on Trial Volume 1: Truth and Due Process*, Hart Publishing, Oxford, 2004, p. 2.

[17] *Ibid.*

by adequate interpretation and translation services. The case of Itzuki Toshio and others demonstrates how participant expectations and judicial fact-finding may be frustrated when trial participants speak a multitude of languages. In this case these problems were further complicated by the trial's broader political context. The islands where these crimes were committed played an important role in the independence strategies of Indian nationalists who sided with the Japanese during the Second World War to overthrow British colonial rule.[18] For the British organisers of the trial there must have been high political stakes in ensuring the trial's "success" regardless of the obvious communication problems plaguing it.

This chapter also attempts to give the reader an idea of how the trial proceeded, how witnesses were called, the type of questions asked and the answers given. This trial looks very different from present-day war crimes trials. But like the trial of Itzuki Toshio and others, trials conducted in our globalised world today often involve judges hearing defendants and witnesses with different linguistic and cultural backgrounds. Researchers working on domestic trials have been studying problems of communication that arise in these multicultural contexts for quite some time.[19] However, these problems have only received sustained attention of late from researchers working in international criminal law and transitional justice.[20] This chapter thus hopes to add to the growing scholarship on communication problems in war crimes trials by demonstrating that these problems are not new. They were similarly encountered in historical trials.

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18 Tamta, 2000, p. 68, see *supra* note 1; Mathur, 1985, p. 249, see *supra* note 1.

19 For recent groundbreaking research conducted on war crimes prosecutions, see Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations in International Criminal Convictions*, Cambridge University Press, Cambridge, 2010; Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone*, Cambridge University Press, Cambridge, 2013.

20 Examples of the rich research done on domestic courts are: Virginia Benmaman, "Legal Interpreting: An Emerging Professor", in *The Modern Language Journal*, 1992, vol. 76, no. 4, pp. 445–54; Elena M. de Jongh, "Foreign Language Interpreters in the Courtroom: The Case for Linguistic and Cultural Proficiency" in *The Modern Language Journal*, 1991, vol. 75, no. 3, 285–95; Michael Cooke, "Understood by All Concerned? Anglo/Aboriginal Legal Translation", in Marshall Morris (ed.), *Translation and the Law*, John Benjamins Publishing, Amsterdam, 1995, pp. 37–66.

30.2. An Overview of the Crimes, Trial Proceedings and Trial Participants

Like other trials conducted by the British individually after the Second World War, the trial of Itzuki Toshio and others was conducted pursuant to the Royal Warrant adopted by the British executive in 1945[21] and its appended regulations[22] which referred to and incorporated British military law and rules.[23] Pursuant to this Royal Warrant, the British military established military courts comprising not less than three officers to try war crimes that were defined as "a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939".[24] These courts were authorised to sentence guilty individuals to death, life imprisonment, imprisonment, confiscation or a fine.[25] However, death sentences could only be handed down with the agreement of all judges when the court comprised three judges or with the concurrence of at least two-thirds when the court comprised more than three judges.[26] The findings and sentences of these military courts had to be confirmed by a confirming officer before they were considered valid, and any convicted accused could petition the confirming officer against the court's finding or sentence within 14 days of the trial's completion.[27]

On 11 March 1946 Itzuki Toshio and others was heard before a British military court convened in Singapore.[28] Sixteen Japanese defendants were prosecuted for the torture, ill treatment, unjust trial and

21 War Office, Royal Warrant, 18 June 1945, Army Order 81 of 1945 ("Royal Warrant") (http://www.legal-tools.org/doc/386f77/).

22 War Office, Regulations for the Trial of War Criminals Attached to Royal Warrant, 18 June 1945, Army Order 81 of 1945 ("Regulations for the Trial of War Criminals") (http://www.legal-tools.org/doc/386f77/).

23 The British Military also passed Instruction No. 1 which set out trial procedure in greater detail. Allied Land Forces South-East Asia, War Crimes Instruction No. 1, 2nd ed., WO 32/12197, 4 May 1946 ("ALFSEA Instruction") (TNA). This instruction required the convening officer to provide the accused and his counsel with an interpreter.

24 Regulation 1, Regulations for the Trial of War Criminals, see *supra* note 22.

25 Regulation 9, *ibid.*

26 *Ibid.*

27 Regulations 10 and 11, *Ibid.*

28 Trial of Itzuki Toshio and others, slide 00345, see *supra* note 12.

subsequent execution of civilian residents on Car Nicobar.[29] In summary, the prosecution argued that on various dates in July and August 1945, the accused had been involved in the arrest, trial and execution of numerous civilians suspected of spying against the Japanese on Car Nicobar, an island at the northern tip of the Nicobarese island chain. The Japanese had believed that the spying efforts of these Nicobarese had facilitated the Allied Powers' sea bombardment of Japanese military positions in July 1945. Due to their geographic location, the islands were of great strategic importance to both the British and the Japanese throughout the Second World War.[30] When the Japanese military first arrived on the islands they told the islanders that Japan would liberate them from their British colonial masters, most of whom had abandoned the islands at the news of Japan's impending invasion.[31] During the war the Indian Independence League, which fought on Japan's side with the aim of securing India's independence from British rule, asked Japan to hand over the islands so that they might be used as the League's base for government.[32] Subsequently, Japan's Minister of War Tōjō Hideki made a symbolic announcement that the islands were to be handed over to the Indian Independence League.[33] This explains why the British prioritised the islands' recapture during the Second World War and saw this as fundamental to the restoration of British prestige.[34] Allied espionage efforts and attacks on the islands caused the Japanese to turn their wrath on numerous civilians who were accused of colluding with the Allies and summarily executed. The trial of Itzuki Toshio and others dealt with some of such crimes committed by the Japanese against local people on these islands.

[29] The names and ranks of the defendants were: Major General Itzuki Toshio, Lieutenant Commander Ogura Keiji, Captain (Naval) Ueda Mytsharu, Lieutenant Colonel Sakagami Shigero, Lieutenant Colonel Saito Kaizo, Captain Sumi Toyosaburu, Captain Muneyuki Yasuo, Warrant Officer Kita Tomio, Petty Officer Arai Mitsui, Sergeant Major Matsuoka Hachiroemon, Lance Corporal Torii Kazuo, Lance Corporal Nakazawa Tanakichi, Private Kimura Hisao, Private Ono Minoru, Interpreter Ushida Masahiro and Interpreter Yasuda Munehara.

[30] Tamta, 2000, p. 45, see *supra* note 1.

[31] *Ibid.*; Mathur, 1985, p. 246, see *supra* note 1.

[32] Tamta, 2000, p. 68, see *supra* note 1.

[33] Mathur, 1985, p. 249, see *supra* note 1.

[34] *Ibid.*, p. 70.

The highest-ranking accused in Itzuki Toshio and others held the rank of Major General and the lowest-ranking accused held the rank of Private. Two of the accused had served as interpreters. The presiding judge, Lieutenant Colonel L.G. Coleman, was a solicitor and from the Department of the Judge Advocate General in India.[35] The other two members of the court were Major W.M. Gray and Captain R.D. Kohli.[36] The former was from the Scottish Rifles and the latter was a member of the 2nd Punjab Regiment.[37] The prosecutor, Captain L.B. Stephen, was a law student from the Gordon Highlanders.[38] All 16 of the Japanese accused were defended by two Japanese defence counsel: Nakazono and Toda, who were judges of the High Court in Japan.[39]

The trial featured four charges. The first charge alleged that between 1 July 1945 and 31 August 1945 the defendants had been "concerned in the torture and other illtreatment" of civilian residents resulting in the death of six civilians.[40] The second charge alleged that on 28 July 1945 Major General Itzuki Toshio and Captain Ueda Mytsaharu had been "concerned together in the unjust trial and judgment of civilian residents" which led to 49 civilians being condemned to death and executed.[41] The third charge stated that on 6 August 1945 Itzuki and Lieutenant Colonel Sakagami Shigero had been involved in another unjust trial leading to the sentencing and execution of 22 civilian residents.[42] The fourth charge accused Itzuki and Sakagami of being involved on 12 August 1945 in yet another unjust trial that led to the execution of 12 victims.[43] As a poignant aside, it should be noted that just two days after the 12 August 1945 killings, Japan would unconditionally surrender to the Allied Powers.[44] However, the British only arrived on the Andaman and Nicobar Islands on 8 October 1945, and it was only on

35 Trial of Itzuki Toshio and others, slide 00371, see *supra* note 12.

36 *Ibid.*

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*, slide 00368.

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*, slide 00369.

44 Mathur, 1985, p. 253, see *supra* note 1.

9 October 1945 that the formal surrender ceremony took place on these islands.[45]

The entire trial lasted for 14 days from 11 to 26 March 1946. At the end of the trial, six of the accused were sentenced to death and executed on 3 May 1946 and 23 May 1946.[46] The rest were sentenced to imprisonment terms ranging from three years to 15 years.[47] The prosecution called nine individuals to give evidence, eight of whom were Nicobarese witnesses from Car Nicobar. Most did not have high levels of education.[48] The defence called 20 persons to testify, 18 of whom were Japanese and two of whom were British military personnel. Like other Singapore trials, courtroom interpretation was provided on a consecutive basis. Interpretation was at times given in indirect rather than direct speech.

30.3. The Trial Begins: The Prosecution's Case

The military trial of Itzuki Toshio and others began in Singapore at 10 a.m. on Monday 11 March 1946.[49] The presiding judge read out the order convening the court and swore in the members of the court, interpreters and shorthand writers. The charges were then read out to the accused persons who were asked how they would like to plead. Each of the accused entered a plea of not guilty.[50]

The prosecutor then delivered his opening address before the court. Immediately after that, Japanese defence counsel raised some concerns he had with interpretation:

> By the defence counsel:
>
> > Before calling the witness I should like to ask one thing of the Court.
> >
> > When question is put to the witness, Sir, I should like to have the answer to that question translated into Japanese before the next question comes.

[45] *Ibid.,* p. 255.

[46] Trial of Itzuki Toshio and others, slide 00569l, see *supra* note 12.

[47] *Ibid.,* 00569.

[48] Based on trial transcripts, when witnesses were asked their occupation, they stated that they were involved in "cultivation".

[49] Trial of Itzuki Toshio and others, slide 00371, see *supra* note 12.

[50] *Ibid.,* slide 00372.

> By the court:
>
> > That is the old story all over again. Mr. Nakazano has the advantage of a Japanese Interpreter, and it should be his duty to do just the very thing – to translate everything put to the witness and every answer. Ask Mr. Nakazano whether this is done or not?
> >
> > The Defence Counsel says that while the answer is being translated into Japanese by the Interpreter, the next question comes to him and the interpreter misses his chance of listening to the next question.
> >
> > Ask Capt. Stevens (Prosecuting Counsel) to go very slowly. If there is any question that Mr. Nakazano misses, he may direct it to the attention of the Court and we can see that it is duly translated.[51]

Language and interpretation were to be persistent themes throughout the trial. However, this was not a problem of language alone, but a broader one of culture as the judges encountered defendants and witnesses with cultural backgrounds that were significantly different from their own.[52] This cultural unfamiliarity was in fact recognised by the prosecution's first witness, Captain Robert Gilmour Sadler, who had taken part in British investigations of the crimes concerned. Sadler testified as to how British investigations were conducted on Car Nicobar and how statements had been taken from the Japanese accused and survivors by the British Court of Inquiry. Early on in his testimony Sadler spontaneously volunteered to provide the court with information on "the nature and background of these Nicobarese" as he believed that it had "a very important bearing on this case".[53] However, the court declined Sadler's offer, noting that while it did not dismiss the relevance of information regarding "the character and nature" of the Nicobarese, it was unable to accept Sadler as "an expert witness" on this question.[54]

During his cross-examination of Sadler, defence counsel referred to the interpretation provided during pre-trial investigations and raised doubts as to whether the British interpreters concerned had been fluent in Japanese. Sadler said that the British interpreters appeared to have been

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51 *Ibid.*, slide 00374.

52 Benmaman, 1992, p. 446, see *supra* note 20.

53 Trial of Itzuki Toshio and others, slide 00375, see *supra* note 12.

54 *Ibid.*, slide 00376.

fluent though he also admitted that he did not understand Japanese himself and was unable to therefore judge the British interpreters' level of fluency. The court intervened, asking Sadler whether the accused who had been questioned by these interpreters had "appeared to understand without difficulty", which Sadler confirmed.[55] This exchange underscores the problem faced by those investigating or judging cases involving defendants and witnesses who do not speak the same languages.[56] Investigators and judges are often only able to depend on the appearance or conduct of the witness when deciding whether any interpretation of such testimony proceeds well.

Upon concluding his examination of Sadler, and before calling the next witnesses who were from Car Nicobar, the prosecutor explained to the court that the Nicobarese language is "a language not spoken outside". The common language among Nicobar islanders is Nicobarese which has links to Indo-Chinese languages and which may be further distinguished into six different dialects spoken in different regions.[57] The prosecutor had been unable to secure an interpreter for the Nicobarese witnesses. He suggested that one of two prosecution witnesses who also spoke English serve as an interpreter. The first, Reverend John Richardson, was a priest. The second, Abednego, was a schoolmaster who could speak English and Nicobarese.[58] The court noted that this situation was "most unusual" but would not object to it unless the defence did.[59] The court then asked the court interpreter to explain the situation to defence counsel and to highlight the "unusual" nature of the prosecutor's proposed arrangement.[60] The defence counsel decided on Abednego as interpreter and the court granted this request.[61] Right after this was decided the court adjourned for lunch. When the court reassembled defence counsel explained that during lunch

55 *Ibid.*, slide 00377.

56 In her groundbreaking works on contemporary trials, Nancy Combs observes that it is similarly difficult to discover the reason for inconsistencies between pre-trial investigative statements and trial testimony, and whether such a mistake is due to translation, transcription, memory or lying. Combs, 2010, p. 218, see *supra* note 19.

57 Tamta, 2000, pp. 221–22, see *supra* note 1.

58 Note that the trial transcripts reflect Abednego's name also as Abnego in various places, though he is generally referred to as Abednego. Trial of Itzuki Toshio and others, slide 00379, see *supra* note 12.

59 *Ibid.*

60 *Ibid.*

61 *Ibid.*

the defendants had told him that they were worried that Abednego would be biased as an interpreter. The defendants asked the court whether a Hindustani interpreter could be appointed instead as they believed most of the residents of Car Nicobar spoke Hindustani.[62] The court pointed out that none of the witnesses spoke Hindustani. It also explained that allowing interpretation in this case provided the defence with more advantages than disadvantages as Japanese defence counsel would be able to cross-examine witnesses from Car Nicobar on their admitted statements through the interpreter.

The prosecution called Richardson as its next witness. Richardson testified that he served as a priest of the mission on Car Nicobar.[63] From other historical accounts, Richardson had played an important role in Nicobarese society. As a young boy he had been sent by the church to Burma for further education and had returned to work for the church.[64] He later served as the first representative of the islands to the Lok Sabha, India's parliament.[65] At trial Richardson gave testimony about the Japanese military's treatment of civilian residents including the criminal incidents in question and the death of his son who had been accused by the Japanese of spying. He described the people of Car Nicobar as "primitive", who "don't know much" and "have very little knowledge about things", and confirmed the court's query whether they could be described as "not educated".[66] Richardson's examination in chief went relatively smoothly, especially when compared with other witnesses who did not speak English. Nevertheless when cross-examined by defence counsel, at one point he seemed unable to control his emotions. When asked whether one of the accused had been "good" to the inhabitants, Richardson declared: "Yes, that is all outward only, only whitewash, but in their hearts they had death. If they had felt so kind to us why did they want to kill our people".[67] The court intervened, asking Richardson to limit himself to answering the questions, as this was "a Court of Law".[68]

62 *Ibid.*

63 *Ibid.,* slide 00379.

64 Tamta, 2000, p. 243, see *supra* note 1.

65 *Ibid.*

66 Trial of Itzuki Toshio and others, slide 00382, see *supra* note 12.

67 *Ibid.*, slide 00383.

68 *Ibid.*

The next witness called by the prosecution gave his name simply as Peter and testified to being 16 years of age.[69] Peter had acted as an interpreter for the Japanese and was questioned about the abuse of certain civilian residents. Peter's courtroom testimony was problematic as the multiple chains of interpretation resulted in clear errors and confusion. Before beginning his cross-examination of the witness the Japanese defence counsel stated that he believed the witness had served as an interpreter and could understand Japanese. Peter denied that this was so. Therefore the defence counsel noted that he would first ask the witness questions in Japanese, which would be translated into English for the benefit of the court and prosecution, and then into Nicobarese for the witness.[70] It emerged during the court's examination of Peter that he did speak a little Japanese.[71] The court's examination of Peter revealed problems of understanding:

> Q. What is the Japanese word for wireless?
> A. I do not know.
>
> Q. How was that explained to him by the Japanese?
>
> (Japanese Interpreter) Excuse me, Sir, When you said "what is the Japanese word for Wireless" he (witness) answered in Japanese which he (Nicobarese Interpreter) misunderstood. He (witness) mentioned it in Japanese.
>
> Q. Is that right. Did he reply to that question?
> A. I do not know wireless except telephone.
>
> (Japanese Interpreter) He said telephone in Japanese a minute ago. "Denwa".
>
> Q. Is that the word he used?
> A. (Japanese Interpreter) Yes. That means telephone in Japanese.[72]

Upon concluding its questioning of Peter, and before allowing the prosecution to call its next witness, the court highlighted to the prosecution that it would be "very undesirable" for the interpreter Abednego to "interpret all the evidences and then give evidence

[69] *Ibid.,* slide 00394.
[70] *Ibid.,* slide 00391.
[71] *Ibid.,* slide 00392.
[72] *Ibid*., slide 00393.

himself". [73] After an exchange with the court, the prosecution subsequently agreed that it would not call Abednego the interpreter as its witness. Japanese defence counsel protested to this as Abednego had given a statement which if used would be "rather disadvantageous" to the accused.[74] In light of this the court decided that the Japanese defence counsel could cross-examine Abednego on this statement though Abednego would not undergo any examination-in-chief by the prosecutor. Japanese defence counsel disagreed to this and asked the court to completely ignore Abednego's statement instead. This the court refused to do, explaining that it would be up to the court to decide how the statement should be treated upon its consideration of all relevant facts, including defence counsel's cross-examination of Abdenego.[75]

The court then adjourned for the day and assembled the next day at 10 a.m. on 12 March 1946. The prosecution's next witness was Mohd Husen, a resident of Car Nicobar. He was able to speak Hindustani so the court arranged for interpretation to be provided by Captain Kohli, one of the judges.[76] Such an arrangement, while convenient, casts doubt on the impartiality of a judge. Requiring a judge to serve as interpreter also risks diverting the judge's attention away from his observation of the case. However, Japanese defence counsel did not object to this arrangement. The examination of Mohd Husen proceeded relatively smoothly and without any significant communication issues. Before calling the next witness the prosecutor decided to tell the court that he believed that the Nicobarese interpreter, Abdenego, did not have as good a command of English as Richardson, and that many questions had not been understood by Abdenego.[77] The court replied that it had no other remedy to the situation as the defence had objected to Richardson serving as an interpreter.[78] The court then addressed itself to Abdenego and asked him to inform the prosecutor or the court when there were questions that he could not follow or things that he could not understand.[79]

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73 *Ibid*., slide 00398.
74 *Ibid.*
75 *Ibid.*
76 *Ibid*., slide 00412.
77 *Ibid.,* slide 00403.
78 *Ibid.*
79 *Ibid.*

The prosecution then called its next Nicobarese witness Leslie, a 22-year-old resident of Car Nicobar who had worked for the Japanese in the kitchen and at times as an interpreter. While working as an interpreter Leslie had witnessed the interrogation and beating of detained civilian residents by a number of the accused. During defence counsel's cross-examination of Leslie the former raised questions about the discrepancies between Leslie's courtroom testimony and his pre-trial statement. Counsel questioned Leslie about the pre-trial statement he had made in which he had failed to mention the involvement of a particular individual in the beating of Taruka, whose involvement Leslie had referred to in his courtroom testimony.

> Q. With regard to this question of beating Taruka, the witness stated here that Kimura and Sumi beat him. Did he state that when he was asked by the British Officer the same thing as he stated here with regard to the same matter?
> A. He did not mention Capt. Sumi in his statement.
>
> Q. So he stated that when he was asked at that time that it was only Kimura only who had beaten him.
> A. He forgot Sumi, so he mentioned Kimura only.
>
> Q. Was not it the case that Sumi did not beat him at all?
> A. Capt. Sumi beat him.
>
> Q. Why did he not say so at that time?
> A. Because he has forgotten but now he can tell the truth and no lies.
>
> (By Court) – You mean now that he has sworn he will tell the truth and not lies. If he has not sworn he is able to tell lies?
> A. He will not tell a lie anyway.[80]

Leslie's response must have raised concern over the integrity of his previous statement as well as his courtroom testimony, as reflected in the court's intervention to ask Leslie whether he was telling the truth. However, as defence counsel's questioning continued, Leslie's answers showed that his earlier responses may have been the result of awkward interpretation and could have been explained by more innocuous factors.

> Q. When this question was put to him in December last year – December was 3 or nearly 3 months from now – the

[80] *Ibid*., slide 0411.

> memory must be fresh in those days and he must have known much better than now, why was it he had forgotten at that time and he remembers it now?
> A. He did not mention Sumi, but he kept it in his mind.
>
> Q. When he had it in his mind why didn't he say so?
> A. During the time he made the statement he forgot it, but when the statement was over he remembered it.
>
> Q. Even if after the statement was made when he remembered it why didn't he say so to the Officer?
> A. Because he didn't go to Headquarters again.[81]

After Leslie, 18-year-old Kansoi was called to testify. He had worked in "cultivation" prior to working as an interpreter for three months for the Japanese and had witnessed the abuse of Nicobarese residents.[82] Despite working as an interpreter and receiving training from the Japanese, Kansoi explained that he did not speak Japanese very well. Nevertheless his questioning did not reveal any significant communication problems. The prosecution then called Hachis, who had been detained and interrogated by the Japanese. His swearing in gave rise to an interesting exchange in court.

> By the Court. Ask him whether he knows what truth is?
> A. He knows.
>
> Q. Has he got any religious beliefs at all?
> A. Truth.
>
> Q. That is his belief?
> A. Yes.[83]

The prosecution had problems attempting to get Hachis to respond to its questions and sought to get the court to declare the witness hostile. The court disagreed and noted that though the witness was "quite unsatisfactory", he had "no malice".[84] The prosecution then declined to proceed with its questioning of Hachis. Defence counsel declined cross-examination. However, the court then proceeded to question Hachis in some detail. Hachis responded well to the court's examination. When the

81 *Ibid.*
82 *Ibid*., slide 00416.
83 *Ibid.,* slide 00424.
84 *Ibid.*, slide 00425.

prosecution had questioned him earlier as to what had happened during or after the raid, the interpretation provided of Hachis' response was: "He does not know anything".[85] However, in response to the court's more detailed questioning, Hachis replied that he had been "beaten" by two of the accused as part of their interrogation regarding whether he was responsible for the sending up of rockets as a spy signal.[86] Hachis's earlier inability to answer may be explained by his lower education. Indeed, Hachis was unable to read numbers when he was previously asked by the court to identify the accused by reading the numbers on their chests. As a result, he was asked to identify the relevant accused by physically pointing them out to the court.[87]

The prosecution's next witness was Moosa Ali, a 22-year-old resident of Car Nicobar who similarly stated that he was engaged in "cultivation".[88] Like Hachis he had been detained by the Japanese and interrogated as a suspect for sending up rockets as a signal to the Allied Powers. In the middle of Moosa Ali's examination-in-chief the court adjourned for the day. It reconvened the next day at 10 a.m. on 13 March 1946 and continued with Moosa Ali's testimony. During his cross-examination of Moosa Ali, defence counsel challenged the latter's claim that he had witnessed the abuse of one Dr. Jones:

> Q. Defending Lawyer puts that there was not a case in which Dr. Jones was interrogated by anyone in the presence of other victims and he wondered if the witness's statement might not be some mistake?
> A. The witness states that he could not tell a lie.
>
> (By the Court) – It may not be a lie, but he may have been mistaken when he said he saw Dr Jones being ill-treated.
>
> A. He did not misunderstand. [89]

In this exchange, Moosa Ali insisted on the veracity and accuracy of his testimony. This demonstrates that even witnesses with low education levels are capable of providing clear and decisive testimony under the pressures of cross-examination in court. Though witnesses with lower

[85] *Ibid.*, slide 00424.
[86] *Ibid.,* slide 00425.
[87] *Ibid.*
[88] *Ibid.,* slide 00432.
[89] *Ibid*., slide 00440.

education levels may buckle under pressure, this is not always the case and there is a need to avoid generalising.

Moosa Ali was the prosecution's final witness. It will be recalled that the court had decided earlier on to allow the defence to cross-examine the interpreter Abdenego on his admitted statement. However, the defence then declined to do so when invited by the court.[90] This was surprising given defence counsel's earlier objection to the court's admission of Abednego's statement, and may have been due to a lack of confidence on the part of Japanese defence counsel after having his objection to the statement's admission rejected by the court. The prosecution then proceeded to read to the court the proceedings of the Japanese court martial that had tried the victims.

At this juncture the court decided to recall Richardson.[91] Richardson was the only witness put forward by the prosecution who spoke English. This may explain why Richardson was chosen by the court to clarify questions that the court still had. The court asked Richardson detailed questions about the facilities on Car Nicobar, the layout of the island, whether the Japanese could have not known of any activities on the island and the possibilities of escaping from the island. Upon concluding its questioning of Richardson the court asked the defence whether it wished to question Richardson. The defence explained that because the questions had been "put in sequence", the defence and interpreter had both agreed for interpretation to be provided later to the defence.[92] This presumably meant that the court's questioning of Richardson had proceeded too quickly, and the interpreter had been unable to keep up. In light of this the court adjourned and permitted the defence to conduct its questioning of Richardson after the court's adjournment.

30.4. The Defence Makes Its Case

Before proceeding to call the first witness for the defence, defence counsel explained to the court that he had not yet decided whether the accused should give evidence on oath.[93] This may have been due to the

90 *Ibid*., slide 00447.
91 *Ibid.*, slide 00448.
92 *Ibid*., slide 00449.
93 *Ibid*., slide 00451.

fact that the accused were unfamiliar with the British military court system and needed time to decide whether they should give evidence on oath. The first witness called by the defence was Captain Onida, who had been the Deputy Chief of Staff of the 10th Zone Fleet of the Imperial Japanese Navy and had knowledge of the circumstances in the region during the time of the alleged crimes.[94] Onida described the pressing military circumstances faced by the Japanese during the time of the alleged crimes, the behaviour of various accused persons towards inhabitants of Car Nicobar, the types of anti-Japanese spy activities occurring on the island and the nature of the court that had sentenced the civilians to death. During Onida's testimony, defence counsel intervened to correct the interpreter's use of the word "investigation".[95] To the court the defending officer explained that though "the word used by Captain Onida means in Japanese several things and although it was translated as investigated, the Defending Officer thinks it means 'trial'".[96] The court then adjourned for the day till the next day, 14 March 1946.

When the court reassembled at 2 p.m. on 14 March 1946 for the third day of trial, the defence called Captain Takahashi,[97] who had been based in the Nicobar Islands, and Colonel Oguri Genji,[98] who had been a senior staff officer in the Japanese Army and had been stationed in the theatre of operations that included the Andaman and Nicobar Islands. Then on the morning of 15 March 1946, accused Kimura Hisao took the stand.[99] Kimura had held the rank of an Army Superior Private and had been involved in the Japanese military's interrogation of resident civilians about spy rockets. When Kimura was questioned about pre-trial investigations, he claimed that the British interpreter had not provided accurate interpretations of his statement.

> Q. Who was the Interpreter for Japanese?
> A. It was a British Officer who came with him.
>
> Q. Did you think he understood Japanese fully?
> A. I did not think that he understood Japanese fully.

94 *Ibid*., slide 00452.
95 *Ibid*., slide 00459.
96 *Ibid.*
97 *Ibid*., slide 00446.
98 *Ibid*., slide 00486.
99 *Ibid*., slide 00491.

Q. Is that only what you think or is there any actual example of incident by which you were convinced that he did not understand Japanese?
A. There were several instances and there are some which I still remember regarding myself.
First of all he did not understand the Japanese word Minseibu meaning Civil Administration.
Also he did not understand the Japanese word Hinanchi which means a place for taking refuge.
He could not distinguish between the Japanese word Butsu and Tataku both meaning "beating".

The Defending Lawyer objects to the Interpretation of the Japanese Interpreter.

By the Court. What is his objection?

The Defending Lawyer says there is a difference between Butsu and Tataku. Butsu is the stronger type of beating than Tataku.

Q. The Defending Lawyer likes to have some other instance?
A. While I was examined I made this expression to describe my way of interrogation of the inhabitants. I said I only patted lightly on the shoulders or on the arms of the inhabitants in order to recall his memory and it was a way of beating which a School Master would have applied to his pupil [when] the pupil might have forgotten something. Then I expressed such beating in Japanese Tataku which the British Interpreting Officer understood as beating and he asked me back: "Did you beat him" in Japanese. I said it was Tataku as I could not think any adequate English word which could represent this light beating and I let it go as that. That was an instance of the British Officer not understanding Japanese sufficiently.

Q. That was your impression with regard to the general interpretation. Did you think your meaning was correctly translated by him?
A. I thought that my expression and my meaning were mistranslated to a certain extent.[100]

[100] *Ibid*., slides 00502–00503. In Japanese, *tataku* is used in a weaker way than "beat". For example, when one has stiff shoulders, one may ask a therapist to *tataku* one's shoulders.

Given the resource constraints under which British investigators were operating, and the communication problems plaguing the trial, it is very likely that similar communication problems had occurred during pre-trial investigations stage. However, it should also be borne in mind that such interpretation problems might have been claimed by the defence as part of its strategy. Kimura again alleged interpretation problems when cross-examined by the prosecution about the differences in his statement and his court testimony.

> Q. You also stated in your first statement you beat him with your fist when you were angry with him.
> A. If it is written that I beat him with my fist it was an invention of the interpreter.
>
> Q. So far nothing you said in this statement corresponds with anything you said this morning. Do you mean that the interpreter was so bad that he took down nothing you said correctly?
> A. Yes it comes to that and very apparently it is a mistake of the interpreter because when I was examined it was not through the Investigating Officer. What I did was with gestures.
>
> Q. Did you have this statement read over to you after you made it?
> A. No.
>
> Q. Capt. Sadler said all statements were read to the accused when they had made them.
> A. Who is this Capt. Sadler?
>
> Q. Capt. Sadler is one of the Officers in the Court of Inquiry when these statements were taken.
> A. One British Officer came to our place. In fact he was a British Major and he was not accompanied by any interpreter and when he came to our camps he called out the names of those who were wanted and when they came out he requested them to put their names and finger prints on the statements, and they did so.
>
> Q. And you did? That was very foolish was it not?
> A. I thought it was foolish but then all our people who had been interrogated by the British Officer were very severely scolded before that and we were afraid, and when we were

> told to do so we made it. Not only myself, but all the people did so.
>
> Q. What does he mean? Do you still deny that these statements are untrue?
> A. That is so.[101]

Kimura went on to explain that he had communicated with the British officer in charge of investigating the case through "gestures", and that this had led to misinterpretation and misunderstanding.[102]

The defence then called its next witness Major Jifuku, who had been an Army Judicial Major and had been engaged in Japan's investigation of spying activities on the island.[103] The defence handed Japanese regulations on their court martial system to the witness. After scrutinising the document, Jifuku explained that he did not know this document but knew its contents, explaining that it was a regulation on the Japanese Army's military court system. The court asked the court interpreter whether he had translated the said Japanese regulation. The interpreter confirmed that it had been done by his staff and that he had seen it. The court then asked whether the court interpreter was "satisfied that it was a correct interpretation", and to this, the interpreter gave an equivocal answer: "Yes, but with regard to legal terms, etc., I am not quite certain because I do not know about law, whereas that person who translated it in my place does. It had been done by many persons".[104] It is clear that the court had concerns over the accuracy and quality of document translation. Nevertheless, when the court continued to ask the interpreter whether he was prepared to state to the court that it was a "true interpretation", the interpreter said that he was prepared to do so.[105]

The next witness examined by the defence was Vice Admiral Hara Taiso, who was in the process of being tried by another court and who testified about the conditions on Car Nicobar.[106] After Hara, the defence called Petty Officer Chigi Hajime. He testified that he had personally seen

[101] *Ibid*., slide 00513.
[102] *Ibid.*, slide 00526.
[103] *Ibid*., slide 00529.
[104] *Ibid.*
[105] *Ibid*., slide 00530.
[106] *Ibid*., slide 00537.

signals sent by spies.[107] Chigi's testimony continued until 19 March 1946. The defence followed up by calling Captain Matsushita, a doctor by training who had treated some of the victims on Car Nicobar.[108] Matsushita's answers focused on his treatment of the victims and on the attitude of a number of the accused towards Nicobarese civilian residents. The defence then called Sergeant Kitamura Fukuo,[109] Army Sergeant Toyama Ayeski[110] and Petty Officer Kajiwara.[111] All three stated that they saw spy rockets being sent up on Car Nicobar.

On 20 March 1946 the defence called Captain Muneyuki Yasuo, an accused who had served as a company commander on Car Nicobar.[112] In the course of his testimony Muneyuki stated that his previous statement had been mistranslated. Specifically "wick of the lamp" had been mistranslated as "cover of the lamp".[113] During cross-examination the prosecutor asked Muneyuki whether his statement had been read back to him and whether he had understood it then. The defendant stated that he had understood "some" of what had been read back to him but had also not understood "some".[114] During his re-examination Muneyuki claimed: "There are many things besides which were stated by me and which were not copied in that statement".[115]

Interpretation errors were thus repeatedly raised by the defence as a strategy in the trial. To give further credence to this claim, on 21 March 1946 the defence called Captain Cameron as a witness with the aim of demonstrating British interpreters had made interpretation errors during pre-trial investigations.[116] Cameron had served as an interpreter during pre-trial British investigations of the alleged crimes and was questioned about the investigatory process. He explained that with respect to Kimura and Ueda, as they had some knowledge of English, the British Court of Inquiry had conducted its investigation partly in English and partly in

[107] *Ibid.*, slide 00545.
[108] *Ibid.*, slide 00552.
[109] *Ibid.*, slide 00555.
[110] *Ibid.*, slide 00558.
[111] *Ibid*., slide 00561.
[112] *Ibid*., slide 00576.
[113] *Ibid*., slide 00584.
[114] *Ibid*., slide 00592.
[115] *Ibid*., slide 00595.
[116] *Ibid*., slide 00600.

Japanese.[117] The Court of Inquiry had resorted to Japanese when the accused did not understand what was being said. Defence counsel then asked the court for permission to ask Cameron to interpret certain words into Japanese. This presumably was to test Cameron's interpretation skills and undermine his credibility as an interpreter.

> Q. Defending lawyer should like to ask the Court for permission to ask some of the English words in this document for translation into Japanese.
> (By the Court) – It is a very good idea to clear up some points.
>
> Q. Do you know the Japanese word "Jueiso"?
> A. "Jueiso" means rigorous confinement.
>
> Q. Why is it in this document as "rigorous imprisonment"?
> A. I consider 'rigorous imprisonment' and 'rigorous confinement' as being the same.
>
> Q. What is "Choeki" in Japanese.
> A. I forget.
>
> Q. It is rather strange to me if "Choeki" is not understood and "Jueiso" is understood.
>
> (By the Court) – What is the question?
> A. It is not a question but a comment.
>
> Q. So you don't understand?
> A. No. "Jueiso" is a military term.
>
> Q. Then what is "rigorous imprisonment" in Japanese?
> A. "Jueiso" as I said: rigorous confinement or rigorous imprisonment as meaning the same thing.
>
> Defending Lawyer says it would not do any good in making any further question, but the Defending Lawyer would like to explain to the Court the difference between "Jueiso" and "Choeki".
>
> (By the Court) – Presumably it means some sort of legal term the ordinary person wouldn't know.
>
> (By Defence Counsel) – There is a fundamental difference between "Jueiso" and "Choeki".

[117] *Ibid*., slide 00601.

> (By the Court) – He can tell us the difference in due time, but while Capt. Cameron is on the stand he will ask questions.[118]

Defence counsel continued questioning Cameron on the meaning of certain Japanese words, resulting in the latter's admission that he was unable to understand two of four Japanese words or phrases that had put to him by defence counsel, specifically, "Lamp no Shin" and "Sukisasu".[119] The court expressed its exasperation. When the prosecution noted that he would be able to pick out "a few words in Japanese" that the witness would not be able to understand, the court commented: "Not even from the English dictionary for that matter!"[120] However, right before this particular exchange, defence counsel's questioning of Cameron had revealed a more serious problem.

> Q. Before making this statement, did the accused persons give oath?
> A. They were told by me that they were giving evidence on oath.
>
> Q. Did they actually take the oath?
> A. What I said was: "You must give your evidence on oath; you must speak the truth". I did not know what form the Japanese took an oath.
>
> (By the Court) – Is that what you call on oath? You tell them to give evidence on oath and tell them to tell the truth and nothing but the truth. Would you then say that you have taken an oath?
> A. That was the form which I gave them.
>
> Q. In other words they did not take an oath.[121]

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118 *Ibid*., slides 00601–00602.

119 *Ibid*., slide 00602. "Sukisasu" may be a misspelling of *tsukisasu* which means "pierce" or "stab" in Japanese. The surprise expressed by defence counsel when "choeki" was not understood by the witness while "juieso" was understood is perhaps well-founded. *Choeki* is used in the Japanese criminal code and almost all Japanese understand its meaning. On the other hand, *jueiso*, which probably refers to *eisou* (営倉) is a military term used to refer to military detention barracks, which can be translated into "monkey house" in English. As it is a military term, most Japanese people may not understand its meaning.

120 *Ibid*., slide 00604.

121 *Ibid*., slide 00602.

After the prosecution concluded its cross-examination of Cameron the court asked the latter to interpret a portion of an admitted statement. Cameron proceeded to do so, and the court then asked the court interpreter whether he had any problems understanding Cameron's interpretation. The interpreter responded: "Not much Sir".[122] The court then asked Cameron for the Japanese interpretation of the word "to beat".[123] Cameron explained that there were "at least 3 words" for that. The court asked: "If I were to say to you that I was beating a member of this Court with a short stick, could you mistake it for 'I beat him with a stick'?"[124] Cameron replied: "The Japanese can be very elusive. It can be both".[125]

Defence counsel adopted this same strategy when questioning its next witness Pilot Officer Stewart Kennedy Gibb.[126] Gibb had also served as an interpreter during British war crimes investigations. Defence counsel challenged Gibb's claim that he had read the typewritten statements of the accused back to them in Japanese by asking Gibb to interpret a number of Japanese words into English. Gibb appeared to hesitate and explained that during the investigations he had used a dictionary to look up certain words. The court asked Gibb to do his best, and defence counsel proceeded to test Gibb's interpretation skills. In the course of doing so, the defence counsel asked Gibb to interpret the phrase "rigorous imprisonment" into Japanese.[127] When the defence counsel challenged Gibb's interpretation of this phrase as "jueiso", Gibb explained that it was a word that he "very seldom" used and if he had encountered any doubts when interpreting he "would have referred to the dictionary".[128]

After allowing Japanese defence counsel to repeatedly test the Gibb's interpretation skills by asking him to interpret various terms the court appears to have become frustrated at the strategy pursued by

[122] *Ibid*., slide 00605.

[123] *Ibid*., slide 00606.

[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid.*

[127] *Ibid*., slide 00609.

[128] *Ibid.* As explained above, "Jueiso", which probably refers to *eisou* (営倉), is a military term used to refer to military detention barracks.

defence counsel. When the defence counsel asked Gibbs whether he could remember if a particular word "Sukitsatsu" was used during investigations, Gibbs frankly replied that he was unable to do so.[129] At this point, the court observed: "I cannot see how he would be expected to remember". When it was clear that defence counsel was going to continue with the testing of Gibb's interpretation skills, the court finally asked counsel "how long" the "tedious lesson in Japanese" would continue.[130] Despite the court's apparent exasperation at defence counsel's strategy, the court then proceeded to proactively examined Gibb's interpretation skills after Gibb's cross-examination by the prosecution. The court asked Gibb to interpret a portion of an admitted English statement into Japanese. It then asked the court interpreter to interpret what Gibb had interpreted into English. This presumably allowed the court to check for interpretation mistakes.[131]

Interpretation errors continued to be asserted by various accused during their testimony throughout the trial. After Gibbs, the court heard accused Sergeant Major Matsuoka Hachiroemon whose testimony focused on how he had interrogated the victims and investigated the alleged spying.[132] After Matsuoka, the defence called the accused Private Ono Minoru who completely denied his involvement in the crimes and rejected portions of his statement which showed his involvement.[133] Major General Itzuki Toshio was then called by the defence to give his testimony.[134] Itzuki was the highest ranking defendant and had been in charge of Japanese investigations into the alleged spying incidents. His testimony was then followed by that of another accused Lance Corporal Nakazawa Tanakichi.[135] During Nakazawa's cross-examination, the prosecutor pointed out that he had admitted in his statement to beating one Panta. Nakazawa had denied doing so during his courtroom testimony. The defendant insisted that he had not used the word "beat"

[129] *Ibid*., slide 00610. "Sukitsasu" may be a misspelling of *tsukisasu* which means "pierce" or "stab" in Japanese.

[130] *Ibid.*

[131] *Ibid.*

[132] *Ibid*., slide 00611.

[133] *Ibid*., slide 00632.

[134] *Ibid*., slide 00635.

[135] *Ibid*., slide 00653.

when giving his statement. Rather, he had described how he had "urged" and "pat lightly" the victim.[136]

The defence continued by calling another accused Captain Ueda Mytsharu, who had been one of the judges on the Japanese military court martial. After Ueda, on 25 March 1946, the defence called accused Arai Mitsui.[137] Arai claimed that his earlier statement had been wrongly recorded. In his statement, he had claimed that he saw another accused, Kimura, beat the victim. Arai claimed that what he had really said during investigations was that he had seen Kimura patting or prodding the victim.[138] The prosecution asked Arai whether he realised that based on his claims "half" of his statement would then be incorrect:

> Q. And how do you account for this? Was the interpreter faulty?
> A. When I gave my story in Port Blair for the first time he wanted to tell me about interrogation so I started with my mission given to me and when I finished interpreting he said: "I do not understand your Japanese at all". So I repeated it again and when I came half way he said "I still do not understand you, let's stop and do it tomorrow", and it was postponed until the next time, and the next time he put various questions to which I replied and it was recorded.[139]

Arai alleged that this earlier statement recorded by the British interpreter was highly inaccurate. He argued that he had not stated that he had seen Kimura "beat" a Nicobarese but rather that he had seen Kimura "prodding" him with a "small piece of stick".[140] Though the raising of such interpretation problems may be understood as a mere strategy on the part of the defendants, it is noteworthy that Arai demonstrated genuine problems of understanding when the prosecution cross-examined him on whether he had been instructed to take part in an investigation during which the victim was allegedly beaten. The prosecution highlighted that Arai had said in his earlier statement that he had not been ordered to take part in the investigations. In response Arai explained that he had stated that "permission" had been given for him to partly investigate and partly

[136] *Ibid*., slide 00655.
[137] *Ibid*., slide 00674.
[138] *Ibid*., slide 00677.
[139] *Ibid.*
[140] *Ibid.*

undertake liaison work. The prosecution then asked whether the "negative" was similar to the "affirmative" in Japanese, and in response to this, the interpreter stated that "I am afraid this is too high-class for him".[141] The interpreter's comment shows that even though Arai may have used interpretation problems as a defence strategy, he may also have had genuine problems understanding the questions posed to him.

This brought the questioning of defence witnesses to an end. Defence counsel prepared to read his closing speech and asked the court whether it should be read in Japanese before being read in English. The court agreed to this, noting that it was better for the accused to hear what is said in Japanese.

30.5. The Court's Findings and the Sentences Imposed

On 26 March 1945 the court assembled to hear the closing statements by the defence and the prosecution. The defence repeatedly highlighted the exigent circumstances faced by the accused and the fact that the victims had been tried according to Japanese laws prior to their execution.[142] In his closing address the prosecutor argued that this was as "sordid a case of inhuman brutality" and there was a "complete absence of moral code on the part of the accused", asking the court whether the death penalty could be considered as too much.[143] The court then issued its findings of guilt or innocence before permitting the defence counsel and two of the accused to address the court in mitigation. One of the accused, Saito Kaizo, was acquitted of the first and only charge against him. The court held that though it was not convinced that Saito was "entirely free from blame", the evidence was "not sufficient to lead to conviction with that certainty required by British Criminal Law".[144] All of the other accused were found guilty and their sentences ranged from three years' imprisonment to capital punishment.[145] Altogether six accused were sentenced to death, one by shooting and five by hanging.

As mentioned earlier, the court did not issue comprehensive judgments explaining the reasons for the findings or sentences. The court

[141] *Ibid*., slide 00678.
[142] *Ibid*., slide 00082.
[143] *Ibid*., slide 00102.
[144] *Ibid*., slide 00562.
[145] *Ibid*., slide 00569.

did briefly refer to factual findings when delivering its sentences. It first addressed itself to Itzuki, sentencing him to death by shooting, and finding that with "any serious consideration" he would have realised "the absurdity of his suspicions" based on which he had condemned the victims after a trial that was a "mockery and a travesty of justice".[146] The court described Kita Tomio, Matsuoka Hachiroemon, Kimura Hisao, Uchida Masahiro and Yasuda Munehara as "killers, killers without mercy and without humanity". They were sentenced to death by hanging for their crimes.[147] For Ueda Mytsharu, Sakagami Shigero and Ogura Keiji, the court noted that they had fortunately not played a "major part" in the crimes but nevertheless condemned their "callousness and indifference", sentencing them to 15, three and 12 years' imprisonment respectively.[148] The court then called on Sumi Toyosaburu, Muneyuki Yasuo, Arai Mitsui, Torii Kazuo, Nakazawa Takakichi and Ono Minoru to pay for the "pain" inflicted on "helpless people", sentencing all of them to 10 years' imprisonment except for Muneyuki who received a 12-year sentence and whose flogging of a 77-year-old victim was singled for particular criticism by the court.[149] The court's findings and sentences were eventually confirmed.[150]

30.6. Conclusion

The trial of Itzuki Toshio and others lasted 14 days. During this period, the court had heard eight persons testifying for the prosecution and 20 persons testifying for the defence. Out of these 28 individuals, only three gave their court testimony in English. As in all British post-Second World War trials, the judges in Itzuki Toshio and others did not issue any comprehensive reasons for the findings and there were no substantial discussions about the law. This chapter has sought to highlight how the trial was plagued by significant problems of interpretation and communication. In light of this, it is noteworthy that though the judges did not issue comprehensive findings and judgments, they did hand down dissimilar sentences for different accused persons. The court also made

146 *Ibid.*
147 *Ibid.*
148 *Ibid.*
149 *Ibid.*
150 *Ibid*., slide 00345.

reference to the different roles and behaviour of the different accused when handing down sentences. These gradated sentences were supposedly to reflect the defendants' different levels of involvement and blameworthiness. Given the language and communication problems encountered at trial, such fact-finding and responsibility allocation by the court must not have been easy. Possibly, much accuracy had been lost in translation.

It is important to bear this in mind when organising or advocating for war crimes prosecutions today. These trials require much planning and resources. Their assumptions cannot be taken for granted. It would be very easy to assess post-Second World War trials like Itzuki Toshio and others using today's standards and dismiss them as simple "victor's justice", as vengeance clocked in legal form. However, I suggest that a close analysis of trial records reveals a more nuanced situation. It is true that these trials leave much to be desired in light of our contemporary standards and understandings. The judges were working under post-war conditions of scarcity and disorganisation; they were under pressure to complete their work expeditiously; and, to compound matters, they had to assess defendants and witnesses from different linguistic and cultural backgrounds. Yet trial records show these judges trying to address communication problems that arose during trial, though they may not have done so adequately or successfully. If any characterisation of these trials is necessary, they are probably best described as attempts rather than as charades, clumsy and awkward as they may have been.

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Historical Origins of International Criminal Law: Volume 2

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further develop this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

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