

THE TOKYO TRIALS: THE UNHEARD DEFENSE

Written and Edited by KOBORI Keiichiro, PhD.

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INTRODUCTION

KOBORI Keiichiro

I. The Legal Basis for the IMTFE (International Military Tribunal for the Far East)

This book consists of excerpts from a body of documents compiled and published under the title *Defense Evidence Rejected by the IMTFE*, which encompasses eight volumes and 5,500 pages. The editors of *Defense Evidence Rejected by the IMTFE* (one of whom is also the editor of this book) undertook its publication in the belief that these documents constitute an indispensable resource for the study of modern history. As deserving as it is of a place in everyone's library, we found it difficult to urge nonspecialists to purchase the set, given its high price and bulk. To resolve this dilemma, we have decided to publish *The Tokyo Trials: The Unheard Defense*, an abridged version of the larger work. This Introduction is meant to provide background material, and an explanation of the import of the huge publication from which it was excerpted, for general readers and for those who are not familiar with the Tokyo Trials.

The original work, a compilation of documentary evidence prepared for submission to the Tokyo Trials (formally, the International Military Tribunal for the Far East or the IMTFE), embraces three types of documents: (1) documents prepared for submission to the Tribunal, but rejected because of objections from prosecutors or the presiding judge, (2) documents that the defense was not permitted to submit to the Tribunal, and (3) documents that the defense, anticipating that they would be rejected, refrained from submitting to the Tribunal and relegated to their files, where they languished for years. These documents owe their existence to an historic drama that unfolded on the stage of the IMTFE in Japan, a defeated nation.

What sort of proceedings were the Tokyo Trials? Although many readers will not require a response to this elementary question, we will answer it, thus providing this Introduction with a proper beginning.

When the Cabinet decided to end the war by acquiescing to the Potsdam Declaration, its members anticipated that the victors would institute war-crimes proceedings against the vanquished sometime in the near future. Article 10 of the Potsdam Declaration, the Allies' final ultimatum to Japan, reads in part, "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." The imperial government acceded to the final ultimatum with the knowledge that the Declaration contained such language. (Soon after the Tribunal commenced, defense counsel raised objections to the Japanese translation of the term "stern justice" as "severe punishment" in the prosecution's opening statement. Thereafter, the term was replaced by the word "trials," but from the outset, everyone involved knew that it meant "trials.")

At the historic imperial conference that began late at night on August 9 and lasted until dawn, the chief of the General Staff, the chief of the Naval General Staff, and the minister of war discussed the terms of the Potsdam Declaration. We can sense that the three ministers of state knew that war-crimes trials were in the offing from one of the conditions they attached to acceptance of the ultimatum, i.e., that Japan be permitted to administer any trials of war criminals. However, this condition, as well as two of the other conditions submitted by Japan

(that there be no military occupation of Japan, and that Japan assume the responsibility for the disarming of its soldiers) was rejected. The only condition accepted was the preservation of the imperial institution.

The first arrests of accused war criminals were made in the early days of the Occupation. But having signed the surrender agreement (which contained the same language as the Potsdam Declaration, as far as war crimes were concerned) on September 2, 1945, the Japanese government had been stripped of the authority to protest those arrests.

The origins of the trials of Class B and C war criminals, and the IMTFE, which prosecuted persons accused of Class A war crimes, can be traced to the Potsdam Declaration. However, the concept of victorious nations' trying and punishing suspected war criminals was also outlined in the protocol relating to the prosecution of war crimes submitted by the United States to a meeting of foreign ministers of the U.S., Great Britain, France, and the U.S.S.R., held at the San Francisco Conference in April 1945. Similar language appears in the Moscow Declaration of October 30, 1943, drawn up after discussion among the foreign ministers of the U.S., Great Britain, and the U.S.S.R.

As we stated earlier, the "stern justice" mentioned in the Potsdam Declaration referred to trials, but the concept of a war-crimes tribunal remained unformed until August 8, 1945, when the London Agreement was signed. Like the Moscow Declaration, this agreement, which announced the establishment of a tribunal to prosecute and punish citizens of European Axis nations who had been accused of serious war crimes, was signed by representatives of the United States, the United Kingdom, France, and the Soviet Union. Annexed to the Agreement was a Charter outlining the "constitution, jurisdiction and functions of the International Military Tribunal."

Although it was assumed that similar proceedings would take place in Japan, no one knew what form they would take when the Occupation began. Moreover, the indictments for the International Military Tribunal held at Nuremberg, which would set the precedent for the Tokyo Trials, were not issued until October 19, 1945. Therefore, when former Prime Minister Tojo Hideki was arrested and charged with war crimes on September 11, and attempted suicide, no one had even a vague notion of the nature of the crimes Tojo had allegedly committed. However, everyone did know that Tojo occupied the position of supreme authority when Japan initiated hostilities against the United States and Great Britain. The fact that the man responsible for Japan's military accomplishments was the first to be arrested gave rise to the fear that this was the beginning of a campaign reminiscent of the barbaric, medieval custom of exacting vengeance. Tojo's arrest alarmed and disheartened ordinary citizens, as well as leading politicians, diplomats, and military figures who realized that they, too, were vulnerable. Japanese who were familiar with the Potsdam Declaration believed that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners" referred to acts committed in violation of international law. However, when General Tojo Hideki, who was unarguably responsible for the initiation and execution of hostilities, but who didn't seem to have committed any crime, was arrested, apprehension spread throughout Japan. Would the Allies redefine, even expand, the concept of war crimes for their own purposes, and would they apply their new definitions arbitrarily?

Leaving the questionable rationality of the Allies' legal criteria, namely the application of *ex-post-facto* law, aside for the moment, one might assume that it was easy to predict which political, diplomatic, or military activities the Allies would view as war crimes, once the

IMTFE was announced. However, in the fall of 1945, when Japan had just been occupied, this was not the case. No one imagined that the occupying forces' fact-finding investigation (intended to determine who played what role in Japan during the war) would proceed so swiftly. The ambiguity and mystery that overshadowed the waves of arrests of not only those accused of Class B and C war crimes (e.g., the torture of prisoners), but also those charged with Class A war crimes (those who were involved in the conduct and guidance of the war), cast serious doubts on the Tribunal, which was soon to commence.

Both the arrests and the arrival of the prosecution team in Japan preceded the promulgation of the IMTFE Charter. The prosecution team, led by Chief Prosecutor Joseph B. Keenan numbered nearly 40 persons, including prosecutors, clerks, and secretaries. The party arrived in Japan on December 6, 1945. Its members immediately began to collect, organize, and analyze evidence. At that point, the Tribunal had not yet been announced, but the prosecution needed only to follow the guidelines in the Charter governing the Nuremberg Trials to prepare for the IMTFE.

On January 19, 1946, a special proclamation was issued announcing the establishment of the International Military Tribunal for the Far East, signed by "Douglas MacArthur, General of the Army, United States, Supreme Commander for the Allied Powers." To it was appended the controversial Charter that would serve as the basis for the Tribunal and the law that would be applied there. As anticipated, the introduction to the special proclamation stated that the IMTFE would be established in accordance with the Potsdam Declaration issued on July 26, and the Instrument of Surrender signed on September 2. It went on to state that at the Moscow Conference held on December 26, a decision had been made to vest complete authority over the Tribunal in the Supreme Commander for the Allied Powers, i.e., MacArthur. Based on that decision, MacArthur issued the aforementioned special proclamation in connection with the execution of the Terms of Surrender,¹ consisting of the following three articles.

ARTICLE 1. There shall be established an International Military Tribune for the Far East for the trial of those persons charged individually, or as members of organizations, or in both capacities, with offenses which include crimes against peace.

ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the Charter of the International Military Tribunal of the Far East, approved by me this day.

ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

Not until then did the Japanese learn the pretext (crimes against peace) for the vengeful trials at which the political leaders of a vanquished nation would be judged. Not until then did they realize that it was possible to construe the conduct of war itself a crime.

¹ *Special Proclamation: Establishment of the International Military Tribunal for the Far East.*

Section 1 of the IMTFE Charter, “Constitution of Tribunal” (Articles 1-4), contains the regulations governing the judges and members of the Secretariat. Section 2, “Jurisdiction and General Provisions” (Articles 5-8), defines the crimes for which the defendants are to be tried and outlines the defendants’ and prosecution’s responsibilities. Section 3, “Fair Trial for Accused,” is an attempt to create the impression that the Tribunal would be a court of law in which fair trials would be held. It comprises Articles 9 and 10, which specify court procedures. Section 4, “Powers of Tribunal and Conduct of Trial” (Articles 11-15). Article 13 pertains to evidence; we have reproduced it below because we believe that it is particularly noteworthy.

ARTICLE 13. Evidence.

a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

b. Relevance. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

c. Specific evidence admissible. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

- (1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.
- (2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.
- (3) An affidavit, deposition or other signed statement.
- (4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.
- (5) A copy of a document of other secondary evidence of its contents, if the original is not immediately available.

d. Judicial Notice. The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation or of the proceedings, records, and findings of military or other agencies of any of the United Nations.

e. Records, Exhibits, and Documents. The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

Section 5, “Judgment and Sentence” (Articles 16 and 17), states that the Supreme Commander for the Allied Powers has the authority to carry out sentences imposed by the Tribunal.

In accordance with the Charter, MacArthur appointed judges from nine of the 11 Allied nations. With the announcement of these appointments, the personnel assignments for the Tribunal had been completed.

Toward the end of April, final preparations for the Tribunal were made. The team of defense lawyers was assembled, procedural rules were announced, and two additional judges were appointed. One represented the Philippines, the other (Justice Pal), India. The appointment of these two men would turn out to have a fateful impact on the Tribunal. On April 29, the Emperor's birthday, the indictment was issued.

II. The Trials

The formal IMTFE proceedings began on May 3, 1946, on which day the indictment was read. The indictment bears witness to the Americans' self-serving interpretation of Japanese foreign policy. It appears, in translation, in the excellent *The True Story of the Tokyo Trials* written by Kiyose Ichiro in 1967.² It must have been widely read in Japan, but the Japanese don't seem to have noticed the peculiar bias of the American viewpoint.

Here, we would like to reproduce the introductory portion of the indictment so that readers can acquire an understanding of the Allied (or more accurately, American, since the chief role was assumed by the U.S.) perception of the Tokyo Trials.

INDICTMENT

In the years hereinafter referred to in this Indictment the internal and foreign policies of Japan were dominated and directed by a criminal militaristic clique, and such policies were the cause of serious world troubles, aggressive wars, and great damage to the interests of peace-loving peoples, as well as the interests of the Japanese people themselves.

The mind of the Japanese people was systematically poisoned with harmful ideas of the alleged racial superiority of Japan over other peoples of Asia and even of the whole world. Such parliamentary institutions as existed in Japan were used as implements for widespread aggression, and a system similar to those then established by Hitler and the Nazi party in Germany and by the Fascist party in Italy was introduced. The economic and financial resources of Japan were to a large extent mobilized for war aims, to the detriment of the welfare of the Japanese people.

A conspiracy between the defendants, joined in by the rulers of other aggressive countries, namely, Nazi Germany and Fascist Italy, was entered into. The main objects of this conspiracy was to secure the domination and exploitation by the aggressive States of the rest of the world, and to this end to commit, or encourage the commission of crimes against peace, war crimes, and crimes against humanity as defined in the Charter of this Tribunal, thus threatening and injuring the basic principles of liberty and respect for the human personality.

² See Kiyose Ichiro, *Hiroku: Tokyo Saiban* (The True Story of the Tokyo Trials) (Tokyo: Yomiuri Shinbunsha, 1967).

In the promotion and accomplishment of that scheme, these defendants, taking advantage of their power and their official positions and their own personal prestige and influence, intended to and did plan, prepare, initiate, or wage aggressive war against the United States of America, the Republic of China, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, the Commonwealth of Australia, Canada, the Republic of France, the Kingdom of the Netherlands, New Zealand, India, the Commonwealth of the Philippines, and other peaceful nations, in violation of international law, as well as in violation of sacred treaty commitments, obligations and assurances; such plan contemplated and carried out the violation of recognized customs and conventions of war by murdering, maiming and ill-treating prisoners of war, civilian internees, and persons on the high seas, denying them adequate food, shelter, clothing, medical care, or other appropriate attention, forcing them to labour under inhumane conditions, and subjecting them to indignities; exploit to Japan's benefit the manpower and economic resources of the vanquished nations, plundering public and private property, wantonly destroying cities, towns and villages beyond any justification of military necessity; perpetrate mass murder, rape, pillage, brigandage, torture, and other barbaric cruelties upon the helpless civilian population of the over-run countries; increase the influence and control of the military and naval groups over Japanese government officials and agencies; psychologically prepare Japanese public opinion for aggressive warfare by establishing so-called Assistance Societies, teaching nationalistic policies of expansion, disseminating war propaganda, and exercising strict control over the press and radio; set up "puppet" governments in conquered countries; conclude military alliances with Germany and Italy to enhance by military might Japan's programme of expansion.

Therefore, the above named Nations by their undersigned representatives, duly appointed to represent their respective Governments in the investigation of the charges against and the prosecution of the Major War Criminals, pursuant to the Potsdam Declaration of the 20th July, 1945, and the Instrument of Surrender of the 2nd September, 1945, and the Charter of the Tribunal, hereby accuse as guilty, in the respects hereinafter set forth, of Crimes against Peace, War Crimes, and Crimes against Humanity, and of Common Plans or Conspiracies to commit those Crimes, all as defined in the Charter of the Tribunal, and accordingly name as Defendants in this cause and as indicted on the Counts hereinafter set out in which their names respectively appear, all the above-named individuals.

Now we shall provide a summary of the ideological basis of the Tokyo Trials. According to the indictment, Japan's domestic and foreign policies were controlled by a "criminal militaristic clique" between 1928 and 1945 (the years on which the IMTFE focused). The Japanese people, victims of this clique, were dragged into a war that could not be won. The indictment also equates Japan's political structure with the totalitarian regimes in place in Nazi Germany and Fascist Italy.

These perceptions can be traced to a report compiled by the U.S. Department of State entitled *Peace and War: U.S. Foreign Policy, 1931-1941*, published in 1943. It describes World War II as a conspiracy on the part of the totalitarian nations (Japan, Germany, and Italy), which

sought to dominate the world, against which the Allied nations defended the freedom and democracy that they held so dear. The notion of an alliance among two Anglo-Saxon nations, both of which sought to enlarge their territories through imperialist expansion, and the Soviet Union, a totalitarian nation striving to spread communism throughout the world is, from the outset, a strange one. However, immediate goals (Great Britain's fear of the threat posed by Germany and the U.S.'s loathing of Japan) brought those two nations together despite the fact that they embraced different philosophies. Those same goals motivated Great Britain and the U.S. to align themselves with the Soviet Union, a marriage that makes even less sense. However, the realities of international politics often produce uneasy bedfellows. Incompatibility between the U.S. and Great Britain, and the U.S.S.R., would eventually cause tension to mount. Even during the Tokyo Trials, portents of the Cold War were palpable. However, in the early days of the Tribunal, the three nations were intimately bound by the desire to bring their archenemies, Japan and Germany, to their knees.

To the Allies, the most convenient means of describing Japan's elusive "militaristic clique" was to equate it with the Nazis. Since Japan had, in fact, formed a military alliance with Nazi Germany and Fascist Italy, the Axis powers, this interpretation seemed convincingly objective. The Allies concluded that "irresponsible militarism" had "deceived and misled the people of Japan into embarking on world conquest,"³ and furthermore, that the defendants had plotted to "increase the control of the military and naval groups over Japanese government officials and agencies."⁴

Underlying this interpretation was the desire to create a rift between militarist leaders and the citizenry of Japan, i.e., to fuel the flames of resentment and hate by the latter against the former, thus garnering emotional support for the Tokyo Trials. Such an emotional response would facilitate the strategic enterprise that was the Occupation. In retrospect, this elaborate propaganda campaign was immensely successful. The Japanese fell for it, hook, line, and sinker.

Reasoning of this sort is particularly effective on the vulnerable human psyche. Many Japanese, intellectuals in particular, fell into the trap: "You people are blameless. You, too, were victims --victims of a handful of criminals -- the militarists." By succumbing to this flattery, they would be absolved of any wrongdoing; they couldn't resist the bait.

³ Potsdam Declaration, Article 6.

⁴ IMTFE, *Indictment*, p. 2.

And bait it was. In the fall of 1945, the General Headquarters (GHQ) of the Allied powers had abolished laws governing public order and “thought crimes” (entertaining political ideas forbidden by the State). Political prisoners, now released from their jail cells, lauded the Occupation forces as a liberating army. GHQ also implemented a series of administrative acts in defiance of international law, dismantling the *zaibatsu* (financial combines), redistributing farmland, and enacting the Labor Union Law. It seemed that the Americans’ efforts to “remove all obstacles to the revival and strength[en]ing of democratic tendencies among the Japanese people”⁵ were motivated by the best of intentions. However, during the presentation of the prosecution’s case at the Tokyo Trials, which began on May 3, 1946, the Americans launched their War Guilt Information Programme, which was forced upon the Japanese people in the most persistent and insidious manner.

Before the prosecution began presenting evidence, on the morning of May 6, the third day of the proceedings, defense attorney Kiyose Ichiro requested that the presiding judge and several other judges recuse themselves on the grounds that they were not qualified to serve as justices at the IMTFE. Prior to the IMTFE, William Webb, the presiding judge, had been assigned by the Australian government to investigate Japanese violations of the regulations annexed to the Hague Convention of 1907 Concerning the Laws and Customs of War on Land in New Guinea, and had submitted a report based on those investigations. That report would certainly have been subject to scrutiny at the IMTFE and, in that case, Webb would be serving as both prosecutor and judge (conflict of interest). Kiyose’s recusal motion was legally sound, but it was denied on the grounds that MacArthur’s Charter would take precedence over legal principles at the IMTFE. The motions challenging the qualifications of other judges were rejected even before their names were officially announced.

On May 13, the fourth day of the Tribunal, Kiyose submitted another important motion, this one challenging the jurisdiction of the IMTFE. This resulted in a response from the British chief prosecutor, followed by a rebuttal from an American defense attorney. The fascinating debate that ensued lasted for three days. However, on May 17, the seventh day of the proceedings, the presiding judge rejected Kiyose’s motion. On that same day, Justice Radhabinod Pal, representing India, sat on the bench for the first time.

On May 14, while arguments about jurisdiction flew back and forth over the courtroom, defense attorney Ben Bruce Blakeney interjected a statement that proved to be the most explosive uttered during the entire proceedings. The gist of his speech was that nations responsible for perpetrating “crimes against humanity,” namely the unprecedentedly savage unleashing of atomic bombs on Hiroshima and Nagasaki, were not qualified to judge defendants in a court of law.

As evidence of the shockwaves this remark sent through the courtroom, the simultaneous interpretation (provided for in the Charter) into Japanese halted at that point, and didn’t resume until Blakeney had finished speaking. The equipment was in working order; there were no technical problems. However, if Blakeney’s words had been translated into Japanese, they would have been recorded for posterity by the court stenographer. The Japanese spectators in the courtroom would have heard them, and told others what they had heard. Eventually, everyone in Japan would be privy to them. Then the powerful reasoning behind Blakeney’s argument would have dealt a decisive blow to the prestige of the United States,

⁵ Potsdam Declaration, Article 10.

which had dared to defy reason by establishing the Tribunal, and to the dignity of the deceit-ridden proceedings. It would have added new fuel to the anger already felt by the Japanese over the dropping of the atomic bombs. The Tribunal wished to avoid such a consequence at all costs. Therefore, we must assume that the simultaneous interpretation was *intentionally* interrupted, leaving Japanese spectators unable to follow rapid-fire English completely in the dark. Not until more than 36 years later, in the summer of 1982, did the Japanese public learn what Blakeney had said, via subtitles supplied to *Tokyo Trials*, a documentary produced by Kodansha. His argument follows.

The bald proposition indeed, is that, as a matter of law, individuals may not be charged with responsibility for wars, not at all because of high position in the state but because existing law does not prohibit it and assess a penalty. For this reason, additionally, the Indictment, insofar as it relates to the new crime of waging war by individuals, should not be tried by the Tribunal. It is superfluous to add that all charges of conspiring to do what was not itself criminal must likewise fall.

As my next point, I wish to discuss ... the proposition that killing in war is not murder. That killing in war is not murder follows from the fact that war is legal. This legalized killing -- justifiable homicide, technically, perhaps -- however repulsive, however abhorrent, has never been thought of as imposing criminal responsibility.

...

If the killing of Admiral Kidd by the bombing of Pearl Harbor is murder, we know the name of the very man who [sic] hands loosed the atomic bomb on Hiroshima, we know the chief of staff who planned that act, we know the chief of the responsible state. Is murder on their consciences? We may well doubt it. We may well doubt it, and not because the event of armed conflict has declared their cause just and their enemies unjust, but because the act is not murder. Show us the charge, produce the proof of the killing contrary to the laws and customs of war, name the man whose hand dealt the blow, produce the responsible superior who planned, ordered, permitted or acquiesced in this act, and you have brought a criminal to the bar of justice.

Blakeney's speech does appear in the English-language stenographer's record. Anyone who examined the transcript would have found it, but other than specialists, very few made the effort to do so. This remarkable episode remained buried in archives, inaccessible to the general reader for more than three decades.

The prosecution's case began on June 4. Chief Prosecutor Joseph Keenan's opening statement consumed the entire first day. Since the Tribunal was in recess over the next eight days, no evidence was submitted until June 13. There was no summer vacation; court remained in session for the next eight months until the prosecution rested on January 24, 1947.

The initial, general phase of the prosecution's case began with an examination of the Meiji Constitution (1889), and proceeded to describe how every Japanese institution (government, diplomacy, economics, education, and information) had been transformed for the purpose of preparing for and waging war during the period covered by the Tribunal. The defendants were accused of having entered into a conspiracy to effect those transformations. In subsequent phases, the prosecutors presented evidence relating to the Manchurian Incident,

the Second Sino-Japanese War, border disputes with the Soviet Union, the Tripartite Pact with Germany and Italy, and the war against the United States and Great Britain. Day after day, the eyes of the populace were riveted on newspaper reports of the proceedings.

Particularly memorable were the incoherent testimony of Puyi, the deposed emperor of Manchuria, who testified for the prosecution in late August, and of the witnesses who attested to events that took place in Nanking in 1937-1938. The Nanking testimony, which began in late July, overshadowed the proceedings until the beginning of September. Witnesses exaggerated and lied shamelessly. All of this “evidence” came as a complete surprise to the Japanese public. Ordinary citizens who read those prevarications in newspapers, and defense attorneys, journalists, and spectators who heard them firsthand in the courtroom were, unfortunately, powerless to refute or object to them. Anyone armed with evidence can claim that an incident took place. But it is much more difficult to prove that it did not happen; any attempts along this line are inevitably countered with, “You simply weren’t aware of it.” The attempt to lend credence to those lies was the most egregious scandal of the IMTFE, and a blunder that was destined to sully the annals of history for decades. A great deal of research has been done since then, and evidence has been discovered that proves that the Nanking Incident, as presented at the IMTFE, was a totally contrived farce staged by witnesses for the prosecution. In 1995, the first of many exposés, Fuji Nobuo’s *How the “Nanking Massacre” Was Manufactured*,⁶ the author reports the results of his research into the IMTFE proceedings, during which the “massacre” was created.

The presentation of the prosecution’s case relating to the Nanking Incident was typical of the way in which the Tribunal operated. It spanned a period of eight months, but during that entire time, defense counsel was prohibited from submitting any rebuttal evidence. It is true that the defense was allowed more than 10 months to present its case. But a seemingly interminable prosecution that allowed no immediate objections from the defense was extremely effective in planting the seeds of bias in the minds of the Japanese. The press was forced to chronicle the proceedings without printing one word of criticism. GHQ wished to ensure that the media were emasculated by controlling the information they disseminated. Censorship was imposed on all organs of public opinion, on all information circulated by all media — the press and broadcasting companies.

The censorship imposed by the Allies on Japan’s fourth estate, which began during preparations for the Tribunal, was virtually coincidental with the commencement of the Occupation, in September 1945. As GHQ issued forth fiat after fiat, it became clear exactly what was going to be censored. Included, of course, was a prohibition against any criticism of the IMTFE proceedings, which applied to all publishing and broadcasting media. Even if media representatives had recognized the insidiousness, deception, and hyperbole in testimony given about the Nanking Incident between July and early August 1946, they had been deprived of the right to issue reports to that effect. Any such attempt would have been excised by the censors’ red pencils. The portion of the defense case relating to Nanking was presented in early May 1947. By then, 10 months had passed since the prosecution witnesses had, with total impunity, perjured themselves. Over the winter, the lies about “atrocities” committed by Japanese troops in Nanking had spread throughout Japan, and become incontestable historical fact. Once a preconception has been legitimized, it is nearly

⁶ Fuji Nobuo, *How the “Nanking Massacre” Was Manufactured: The Deception of the Tokyo Trials* (Tokyo: Tendensha, April 1995).

impossible to dismiss. This phenomenon also distorted the perception of other incidents as well, and severely hampered the considerable efforts of defense counsel. They were battling a presupposition that, thanks to censorship, had become engraved in the collective mind of humanity.

Since every aspect of the Nanking Incident had been manufactured, no evidence would have served to disprove it. What little rebuttal evidence the defense attorneys were able to submit was passive in nature: It couldn't have happened, no one had witnessed it, etc. In this case, very little of the defense evidence was withheld or ruled inadmissible. Even in *Defense Evidence Rejected by the IMTFE*, from which this book was excerpted, there is no documentary evidence that reveals a basis for new arguments.

On January 27, after the prosecution had finished presenting its case, the defense submitted a motion requesting that a mistrial be declared. This is a tactic often used by defense lawyers, who petition for dismissal on the grounds that the prosecution has failed to prove a defendant guilty. Unsurprisingly, the motion was summarily rejected on February 3.

The presentation of the case for the defense began on February 24, 1947, and ended on January 22 of the following year. First, the eminent attorney Kiyose Ichiro read his eloquent opening statement.⁷ At long last, defense counsel would be afforded an opportunity to explain the policies and actions of the imperial government between 1928 and 1945. Or so they thought.

One must be mindful that in 1947, censorship suppressed the voice of the Japanese people, the noble references to freedom of speech and freedom of the press in the MacArthur Constitution (the current Japanese Constitution) notwithstanding. Ironically, Ichigaya, the site of the IMTFE, was the only place in Japan where freedom of speech was assured. Kiyose, Uzawa Somei (chief defense counsel), Takayanagi Kenzo, and Okamoto Toshio, four of Japan's most distinguished attorneys, proceeded to present a bold defense of their fatherland, followed by a denunciation of the Allied powers.

However, the Tribunal refused to admit a large portion of the documentary evidence submitted to justify the Japanese position before and during World War II. The rejection of this evidence was, in fact, the main motivation for the compilation and publication of the eight-volume *Defense Evidence Rejected by the IMTFE*. It contains sections of Kiyose's opening statement that he was not permitted to read, and that were not reproduced in his aforementioned book. Takayanagi Kenzo was ordered to postpone his argument, which had been scheduled to follow Kiyose's, for a year, until March 1948, when the defense presented its summation. By that time, it was too late; time had erased any effect the statement might have had on the proceedings. It might as well have been rejected outright.

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Kiyose, *op. cit.*

The defense concluded the presentation of its case on January 12, 1948. On the following day, the prosecution began submitting rebuttal evidence, a process that ended on January 30. Then the defense submitted its rebuttal evidence, ending on February 10. On February 11, Foundation Day,⁸ the prosecution began its summation, which ended on March 2. The defense summation lasted from March 2 to April 15. This was followed by rebuttals from the prosecution on April 15 and 16, which were completed within a relatively short period of time. Before the verdicts were read, the Tribunal recessed for six months, until November. Though the IMTFE lasted for two-and-a-half years, the actual courtroom proceedings, which took place between May 3, 1946 and April 16, 1948, occupied only about two years of that time.

III. The Treatment of Evidence at the Tokyo Trials

As we indicated previously, the chief incentive for publishing the documents comprising *Defense Evidence Rejected by the IMTFE* was the sheer volume of defense evidence rejected by the Tribunal. Rules governing evidence are set forth in Section III (Fair Trial for Accused), Article 9 (Procedure for Fair Trial), Paragraphs d. and e., and in Section IV (Powers of Tribunal and Conduct of Trial), Article 13 (Evidence), as follows.

SECTION III: FAIR TRIAL FOR ACCUSED

ARTICLE 9. Procedure for Fair Trial

4. Evidence for Defense. An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

5. Production of Evidence for the Defense. An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

SECTION IV: POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

ARTICLE 13. Evidence.

- a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.
- b. Relevance. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.
- c. Specific evidence admissible. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

⁸ National holiday commemorating the accession of Emperor Jimmu; abolished in 1948, reinstated in 1966.

- (1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.
- (2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.
- (3) An affidavit, deposition or other signed statement.
- (4) A diary, letter or other document, including sworn or unsworn statements, which appear to the Tribunal to contain information relating to the charge.
- (5) A copy of a document of other secondary evidence of its contents, if the original is not immediately available.

d. Judicial Notice. The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation or of the proceedings, records, and findings of military or other agencies of any of the United Nations.

Paragraph d. of Article 15 (Course of Trial Proceedings) also refers to evidence, as follows: “The prosecution and defense may offer evidence, and the admissibility of the same shall be determined by the Tribunal.”

About the definitions of evidence provided in the Charter, Judge Pal wrote, “Following these provisions of the Charter, we admitted much material which normally would have been discarded as HEARSAY EVIDENCE.” He added, “[Hearsay evidence] is ordinarily excluded because the possible infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words remain untested when the deponent is not subjected to cross-examination. These might be so far exposed by cross-examination as to enable the judge fairly to evaluate the utterance.”⁹ We will refrain from any further discussion of this matter here, allowing Pal’s opinion to speak for itself.

In the portions of the Charter cited above, we believe that relevance, as set forth in Article 13, Paragraph b. and admissibility, as set forth in Article 15, Paragraph d., merit special attention. They allowed Webb, the presiding judge, the discretion to reject documentary evidence on the pretext that it was irrelevant, which he used time after time. In the opinion that he wrote, Webb acknowledges that he rejected the bulk of the evidence submitted by the defense.

Much of the evidence tendered, especially by the Defence, was rejected, principally because it had too little or no probative value or because it was not helpful as being not at all or only very remotely relevant or because it was needlessly cumulative of similar evidence already received.¹⁰

⁹ ¹ Radhabinod Pal, *Dissentient Judgement of Justice Pal* (Tokyo: Kokusho-Kankokai, 1999), p.142.

¹⁰ IMTFE, *Proceedings*, p. 48,431.

What was the reaction of the defense team to these rejections? Sakano Jun'ichi, an attorney who assisted in the defense of Itagaki Seishiro, contributed a chapter ("The Pal Judgement and Evidence and Procedure at the IMTFE") to a book entitled *Joint Research: The Pal Judgement*. In it, he describes Webb's use of the discretionary authority over evidence invested in him by the Charter, and defense counsel's perception that two-thirds of the evidence they had prepared was rejected.

He used it arbitrarily on some occasions, or to favor one side (the prosecution) on others. That authority plagued defense counsel throughout the Tribunal. We never knew when or how it would be imposed.

Although Webb rejected approximately two-thirds of the evidence the defense team had prepared, on the grounds that it lacked probative value, relevance, or importance, he admitted hearsay evidence submitted by the prosecution (e.g., the diaries kept by Kido Koichi, Baron Harada Kumao, and the late Prince Saionji Kinmochi). He insisted that the defense present evidence of impeccable quality, but often rejected it. Although defense counsel were profoundly discouraged by the presiding judge's exercise of his discretionary authority, they strived valiantly to present a solid defense for their country, hoping against hope that their evidence would be admitted.¹¹

In a roundtable conversation that appeared in the weekly *Nippon Shuho* under the title "Five Important Facts Relating to the Tokyo Trials Revealed," the moderator posed the following question to Kiyose Ichiro, deputy chief defense counsel: "Was a great deal of documentary evidence rejected?" Kiyose's reply follows.

A huge amount. Among the evidence we submitted were Japanese government proclamations, which were rejected at the outset on the grounds that they were self-serving. Proclamations issued during the Second Sino-Japanese War (this was called the "China Incident" in Japan), on the basis of agreements reached with the governments of Chiang Kai-shek and Wang Jingwei were all rejected – every one of them, even though they are historical records. My impression is that eight out of 10 of the documents submitted by defense counsel were rejected.¹²

Although Kiyose was voicing his general impression, not exact figures, he claimed that more than two-thirds (close to 80%) of the evidence submitted by the defense team was rejected. Moreover, by rejecting all official Japanese government proclamations, the Tribunal was making it clear that it never intended to allow the defense to present Japan's case. The section of the IMTFE Charter referring to "Fair Trial for the Accused" abounds with lofty sentiments, but they were meaningless.

The amount of admitted evidence versus rejected evidence differs, depending on whether we count individual documents or the number of pages. There is no special significance in compiling precise statistics, but when we were selecting documents for publication, we did make some discoveries. The Tribunal was more likely to admit some types of evidence than others. The percentage of the entire body of evidence rejected is not extraordinarily high.

¹¹ IMTFE Research Association, *Joint Research: The Pal Judgement* (Tokyo: Kodansha Gakujutsu Bunko, 1996).

¹² See *Nippon Shuho* (Japan Weekly Report), No. 395, 05 April 1956.

However, we find the general impression, i.e., that more than two-thirds of evidence pertaining to critical topics was rejected, valid.

What sort of evidence was admitted? According to the IMTFE Judgement, evidence deemed to have probative value and relevance, and to be helpful to the Tribunal was admitted. All other evidence was rejected. Here, we shall cite Section 3 (“Rules of Evidence and Procedure”) of Justice Pal’s judgement.

1. Evidence relating to the state of affairs in China prior to the time when the Japanese armed forces began to operate.
2. The evidence showing that the Japanese forces restored peace and tranquillity there. It was observed in this connection that “none of the accused will be exculpated merely because it is shown, if it is shown, that the Japanese forces in China restored peace and tranquillity there. What you must establish ... is that the Japanese armed forces ... had authority or justification or excuse for what they did.”
3. Evidence relating to the Chinese trouble with Great Britain in 1927.
4. Evidence showing the public opinion of the Japanese people that Manchuria was the life-line of Japan.
It was observed in this connection that “that type of reasoning is useless. What does it matter ... if the Japanese people did think they needed a part of China? Their honest belief, if it be an honest belief, as to their needs for part of China, is not justification for an aggressive war.”
5. (a) Evidence as to the relations between the U.S.S.R. and Finland, Latvia, Esthonia, Poland and Roumania.
(b) Evidence as to the relations between the U.S. and Denmark *vis-a-vis* Greenland and Iceland.
(c) Evidence as to the relations between Russia and Great Britain and Iran.
6. Evidence relating to A-Bomb decision.
7. Evidence regarding the Reservation by the Several States while signing the Pact of Paris.
8. (a) The United Nations Charter.
(b) The Lansing-Scott Report.
9. (a) Statements prepared by the then Japanese Government for the Press.
We have discarded these on the ground that these were prepared for the PROPAGANDA PURPOSES and consequently have NO PROBATIVE VALUE.
(b) Statements made by the then Japanese Foreign Office.
These were discarded as being SELF-SERVING STATEMENTS.
10. Evidence relating to Communism in China: The Tribunal was of opinion that no evidence of the existence or spread of Communism or of any other ideology in China or elsewhere is relevant in the general phase. Evidence of an actual attack on Japanese nationals or property by Chinese Communists or any other Chinese may be given in justification of Japan’s act.
When the accused come to give evidence, they may tender their fear of Communism in explanation of their acts. This was decided on 29 April 1947 by a majority of the Tribunal. Later on it was ruled that ‘assault’ includes a threat of assault, where the threat is of a serious nature, where it is imminent, and where the persons making it have present ability to give effect to it.
11. Evidence otherwise considered to have NO PROBATIVE VALUE.¹³

¹³ Pal, *op. cit.*, p. 157-8.

IV. The Arduous Task of Preparing Defense Evidence

Before we discuss the documents that were rejected, by category, we would like to describe the defense team's struggle to prepare evidence. Evidence that was either rejected or not submitted for fear that it would be rejected fills approximately 4,800 pages of *Defense Evidence Rejected by the IMTFE*. When we add evidence actually admitted by the Tribunal, we can envisage the staggering amount of work done by the defense team.

The first priority of Japanese members of the defense team was defending their country. The defense of the accused took second place. If a particular argument showed Japan in a bad light, defense counsel did not present it, even though it might exonerate an individual defendant. Since a court defense is normally intended to protect the accused's interests, one would expect objections to such a policy. To American defense lawyers, who had a strong professional commitment to protecting human rights and an orientation in Anglo-American law, the individuals whom they were defending came first. Some of the Japanese attorneys also took this position, probably because of the way in which they had been educated. Their differences notwithstanding, they were united in their desire to defend their fatherland. Furthermore, all of them agreed that under no circumstances should the Emperor be summoned to testify in court.

The living conditions endured by the Japanese defense team were so wretched as to defy comparison with those enjoyed by the American prosecutors, judges, and lawyers. For instance, the home of Kiyose, its most eminent member, had been destroyed during an aerial bombing raid. He found temporary shelter in a dormitory near the ruins of his house, fashioned a bathtub from an oil drum he found in the rubble, and survived on squash that he grew himself. Lacking the funds with which to pay assistants for research or the compilation of evidence, Kiyose scrimped and saved, and paid them out of his own pocket. He made the rounds of Japanese companies, hat in hand, begging for financial assistance. A great deal of shoe leather was consumed during the evidence-gathering process. However, sheer determination and energy alone do not suffice to produce documentary evidence of the highest quality. Financial resources, which the defense team lacked, are an equally, if not more important factor. In the aforementioned dialogue published in *Nippon Shuho*, both Hayashi Itsuro and Sanmonji Shohei said that if they had had 10 million yen at their disposal for extensive, expeditious information gathering, accurate translations, and for the hiring of competent interpreters for the Tribunal, not one defendant would have been sentenced to death.

Despite the appalling conditions under which they were forced to operate, the Japanese defense team somehow managed to prepare documentary evidence of surprisingly high quality. Teamwork was an important factor. Even Kiyose's brilliant opening statement, a defense of Japanese politics, diplomacy, and warfare between 1928 and 1945, was not the product of his ideation alone. As he recalled at a later date, it was a crystallization of the defense team's combined wisdom and discernment, and there is no reason for us to dispute his recollections.

The powerful opening statement was a scathing counterattack on the arrogant, antagonistic indictment that had been forced upon 28 defendants, representatives of the nation of Japan and its people, some 10 months before. It also served as a fitting advance rebuttal to the prosecution's summation, which was to follow a year later. But it owed a great deal to

assistance from relevant government ministries and agencies, which provided as much support as possible. Legal specialists who belonged to the Japan Federation of Bar Associations resented the bureaucrats at the Foreign Ministry, believing that the latter looked down on them because they lacked familiarity with Anglo-Saxon law and the English language. (Most of the Association's members had studied German law.) The bureaucrats may indeed have harbored such sentiments, but it is clear from the extant documents that the Ministry extended its full cooperation during the collection and preparation of documentary evidence. Moreover, when Kiyose was preparing his defense of Tojo Hideki, including Tojo's testimony, he enlisted the aid of the Ministry of War, former high-ranking Army and Navy officers, the press, scholars, businessmen, and industrialists. Either directly or indirectly, Japan's entire intellectual community participated in that defense. Thus, we can characterize the body of arguments collected and presented by the defense team during each phase of the IMTFE as an important reference resource for modern Japanese history.

The information gathered through the efforts of the American defense attorneys is also valuable because of its universality. In retrospect, we might claim that today's Japanese scholars could have accomplished the same task if they made the requisite amount of effort. Be that as it may, the documents collected are of inestimable value and, given the circumstances, it is nothing short of a miracle that the Japanese were able to obtain and assemble them. However, most of them, whether they reflected positively or negatively on the defendants, were rejected on the grounds that they were "irrelevant," that they would not directly serve to explain their actions. Those documents obviously had no influence on the judgement, since counsel were not permitted to use them.

V. The Three-Part Defense Rebuttal and the Documents Selected for This Book

As we stated in our outline of the IMTFE proceedings, the presentation of rebuttal evidence by defense counsel began on February 24, 1947 and continued until January 12, 1948. This portion of the defense case comprised three phases. During the first phase, general issues were addressed. The second phase dealt with war and wartime diplomacy. Individual defendants took the stand during the third phase. We have already mentioned Kiyose's superlative four-part opening statement, which served as a general introduction, and in which he challenges the indictment, the prosecution's case, and the anticipated judgements. Kiyose read the first part. Takayanagi Kenzo was scheduled to follow him the second part, but was not permitted to read his statement, because the first section ("The Instrument of Surrender and the Charter") contained an acrimonious attack on the Instrument of Surrender (the Potsdam Declaration) and the IMTFE Charter for applying the law retroactively, i.e., "punishment by ex post facto legislation is sheer lynch law in the guise of justice." This argument was viewed by the Tribunal as a resubmission of the motion presented by Kiyose on the fourth day of the proceedings (May 13, 1946) challenging the IMTFE's jurisdiction, to which it had already "responded." On May 17, the presiding judge had rejected the motion, offering only the lame, "for reasons to be given later." Since the Tribunal perceived the portion of the opening statement that Takayanagi was about to read as a resubmission of Kiyose's motion concerning jurisdiction, it was bound to reject the former as well for consistency's sake, and did. Takayanagi was told, "In your closing address you may, perhaps, refer to all of them."

Therefore, it seemed that the portion of the opening statement read by attorney William Logan was the second part of the opening statement, since Takayanagi's portion had been omitted. Logan was forbidden to read parts of his statement as well, as Kiyose had been.

We decided to reproduce all three sections of the general opening statement in this book, including the portions that were rejected. We will provide an introduction for each section, but would like to mention that after it was rejected, the portion of the statement read by Takayanagi as it appears in this book, was revised and augmented while he waited (for more than a year) to present it at the defense summation.

After the general opening statement was read, defense counsel began their rebuttal of the evidence presented by the prosecution. First came the General Division, which covered the Constitution of the Empire of Japan and other laws and regulations, treaties with other nations, problems concerning diplomatic responsibility, conspiracy involving Japan's political mechanisms (the fact that there was none), the *hakko ichiu* (universal brotherhood) and Greater East Asia Coprosperity Sphere concepts, and economics, education, and information.

Fifty-two of the documents prepared for submission in this division were rejected, and 159 never submitted, which means that 211 documents never served their purpose and, instead, remained buried in archives for nearly 50 years. Of those documents we have selected only the sworn affidavit of Tokutomi Soho.¹⁴ There were many others that we would have liked to include (for instance, the transcript of Sun Yat-sen's lecture on East Asian unity, which was rejected in its entirety), but could not due to space restrictions. We excluded many government documents, as well as newspaper and magazine articles, because they do not make for interesting reading. In comparison, Tokutomi's statement is a scholarly treatise, commensurate in quality with Kiyose's opening statement.

Now we shall provide a brief description of the rebuttal evidence prepared by the defense relating to disputes with other nations during the 1920s and 1930s, and Japan's wartime diplomacy. We shall also explain which of those documents we have selected for this book, and why.

A. Evidence relating to the Manchurian Incident and the Eve of the Establishment of Manchukuo

Evidence was rejected when it fell into the following two categories established by Judge Pal.

1. Evidence relating to the state of affairs in China prior to the time when the Japanese armed forces began to operate.

2. Evidence showing the public opinion of the Japanese people that Manchuria was the life-line of Japan.¹⁵

All defendants were charged with acts of aggression against the Republic of China, said acts being the result of a conspiracy to which all defendants were party, i.e., the establishment of Manchukuo, which in turn gave rise to the Manchurian Incident. The first stage of that

¹⁴ Tokutomi Soho (1863-1957), eminent historian, critic, journalist, and essayist.

¹⁵ Pal, *op. cit.*, p. 157.

conspiracy allegedly involved acquiring control over Manchuria by engineering the Mukden Incident. The defense countered with the argument that the movement to resurrect the Qing Dynasty and then establish Manchukuo as an independent state was not the product of a Japanese plot. Rather, it originated spontaneously among the residents of Manchuria. The defense then attempted to introduce voluminous documentary evidence in support of its argument.

Subsequent to the revolution of 1911, China was in a state of chaos very nearly approaching anarchy. Military factions employing bands of thugs controlled bases in every region of China, and civil war raged among them. By 1926, the citizens of China, weary of misgovernment, had already begun to lobby for the restoration of the monarchy and the installation of its last emperor, Xuan Tong (Puyi). If these facts had been demonstrated in the courtroom, the prosecution's argument in the indictment (that the imperial government of Manchukuo was nothing more than a puppet government created by the Kwantung Army to serve as a base for further aggression) would have collapsed. The testimony of its outlandish star witness, Puyi himself, on which the prosecution's allegation hinged, would have been discredited. Therefore, the Tribunal vetoed every single document demonstrating that the movement to establish Manchukuo was a democratic one and that its initiators were none other than the Manchurians themselves, claiming that the evidence was irrelevant and immaterial.

One of the rejected documents was an excerpt from a book entitled *Twilight in the Forbidden City*, an account of the years its British author, Sir Reginald F. Johnston, who had served as Puyi's tutor, spent in China. (The book has come into the spotlight recently due to the production of a film version.) In it, Johnston refutes the Lytton Report, which asserts that there was no Manchurian independence movement prior to the Manchurian Incident. The author states that the Lytton Commission simply wasn't aware of it. He also describes how Puyi's outrage at the bombing of the Eastern Imperial Tombs in Beijing and the defiling of Empress Dowager Ci Xi's (Tz'u-hsi) grave was one of the main factors that motivated him to agree to ascend the throne. However, the IMTFE rejected the excerpt, and the myth created in the courtroom, i.e., that the enthronement of Emperor Puyi was the result of intimidation from the Kwantung Army, became solidly ensconced.

We have decided not to include government documents that require a certain amount of specialized background knowledge to be understood, in our selections for this phase, for the same reasons as stated before. Instead, we have reproduced the portion of the opening statement presented by Franklin Warren and Okamoto Toshio, which stands on its own contextually, and an a report written by Willis Abbot, editor-in-chief of the *Christian Science Monitor*, which describes his tour of Manchuria in December 1931.¹⁶

Only two of the 198 rejected documents from this phase have been selected for this book. The Manchurian problem seems to be a thorn in the side of many scholars of modern history. Historians seem to have succeeded in dispelling the curse that the IMTFE pronounced on the Second Sino-Japanese War and the war against the United States, and to form and articulate independent opinions on these events. But when it comes to the Manchurian Incident, they remain captive to the popular perception, i.e., that it was a war of aggression, and are incapable of extracting the facts from the forest of fiction. These two documents provide a

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This article also appeared in the *Osaka Mainichi Shinbun* (January 1932).

valuable introduction, but only an introduction. We urge readers to consult the nearly 200 documents included in *Defense Evidence Rejected by the IMTFE*.¹⁷

B. Evidence Relating to the Eve of the Second Sino-Japanese War and Nonexpansion Policy of Subsequent to the Outbreak of War

During this phase, all documentary evidence demonstrating that damage and indignities to Japanese residents and interests in China resulting from a widespread, organized anti-Japanese movement rooted in hostility toward Japan, was disallowed. So was evidence describing Japanese efforts to combat the machinations of the CCP (Chinese Communist Party) and prevent the spread of communism. Declarations and memoranda proving that the Japanese Government made concession after concession, and exercised a policy of appeasement to the maximum extent possible in its earnest desire to contain the conflict and to settle it locally, were also rejected on the grounds that they were self-serving.

Only seven out of 74 documents relating to Communist and anti-Japanese activity in China were admitted. The remainder were either rejected or not submitted. This was truly unfortunate, since these documents (surveys and appeals to the Japanese government from Japanese institutions in China concerning damage resulting from such activity, e.g. resulting from Chinese Communist and anti-Japanese activities, such as *rihuo paichi* (boycotts of Japanese imports)) were teeming with factual information.

Documentary evidence relating to the Chinese Communist movement suffered the same fate. Only one document out of 75 was admitted. Kiyose's recollection, i.e., that eight out of every 10 documents submitted by the defense were rejected, seems to have been well-founded. Moreover, the rejection of so much evidence on this subject reveals that criticism (or even statements of fact) relating to Communist Party atrocities or the inherent danger of communism was taboo at the IMTFE.

¹⁷ Professor Watanabe Shoichi advised us that portions of the Japanese translation of the excerpt from *Twilight in the Forbidden City* have been excised without comment. We assume that the publisher wished to avoid any repercussions resulting from violating the taboo imposed by the historical perception that prevailed at the IMTFE.

A source easily as meritorious as Johnston's *Twilight in the Forbidden City* is *My Twenty-Five Years in China*¹⁸ by John B. Powell, editor-in-chief of the *China Weekly Review*. Its author was witness to that fateful turning point in modern Chinese history, beginning with the Sian (Xian) Incident and ending with the Nationalist-Communist united front against the Japanese. Defense counsel had planned to introduce 16 excerpts from Powell's book, but after seeing four of them rejected because they described Communist activities, decided against submitting the other 12.

Japanese consuls-general in Shanghai, Hankou, and Canton (Guangdong) sent detailed, encrypted telegrams to the foreign minister in Tokyo, describing how the CCP was maneuvering Nationalist troops in a direction that spelled danger, and how other nations were responding to that situation. Looking at them today, we realize how prophetic they were. These telegrams provide valuable, accurate information upon which Japan acted. All of them were rejected.

We know today that the Marco Polo Bridge Incident was engineered by the CCP, and was intended to draw Japanese and Nationalist troops into a conflict from which the CCP would profit, because the CCP has said as much, and proudly so. However, at the time of the Tokyo Trials, the incident was enshrouded in mystery. The only available option then was to reconstruct the incident on the basis of eyewitness testimony, and attempt to pinpoint culpability. Therefore, much of the defense's documentary evidence was admitted. The Tribunal did, however, exclude government documents, opinions, and manifestos issued by the Cabinet, the Foreign Ministry, and military units stationed in China, all of which demonstrate that the Japanese government did its utmost to contain the incident, claiming that they were self-serving.

We find it difficult to understand why the IMTFE refused to admit most of the defense evidence relating to the causes of the Second Shanghai Incident, i.e., the assassination of Oyama Isao, a naval sublieutenant, and indiscriminate bombing on the part of the Chinese. Similarly, 70% of the evidence relating to the slaughter, by unspeakable means, of large numbers of Japanese citizens in Tongzhou was rejected. The best explanation we can offer is the guiding principle of the IMTFE, i.e., that Japanese war crimes, not Allied war crimes, would be judged in the courtroom. Any suggestion that the horrors of war, which necessarily involves the killing of human beings, are basically the same no matter who the combatants are was suppressed. The Tribunal did not view the notion that Japanese soldiers might have been partially motivated by the desire to avenge the atrocities that had been visited upon their compatriots as a mitigating circumstance. Allied crimes against humanity were passed over. Only the Japanese were required to be morally perfect, and that was the standard, however unrealistic, by which they were judged.

¹⁸ John B. Powell, *My Twenty-Five Years in China* (New York: The Macmillan Company, 1945).

Of the evidence rejected or not submitted during this phase, we have selected the following, in accordance with our guidelines for this book: (1) defense attorney Aristides G. Lazarus' opening statement, (2) excerpts from *Proceedings of the Sixth Conference of the Institute of Pacific Relations*¹⁹ held at Yosemite National Park in California (August 15-29, 1936), and (3) a confidential missive, "Report on the Anti-Japanese Movement in China and the Boycotting of Japanese Goods," written in 1921 by Shigemitsu Mamoru, ambassador to China and addressed to Foreign Minister Shidehara Kijuro. We chose (2) and (3) because, among the 363 unpublished documents submitted on this subject, they offer a comprehensive outlook on domestic affairs in China and the Chinese world view at the time of the Second Sino-Japanese War, rather than detailed accounts of the Japanese response to individual incidents. Of these two documents, (2) describes strategies used by the CCP to spread communism, and (3) outlines Chinese (chiefly Nationalist) efforts to expel the foreign presence, mainly the Japanese.

C. Evidence Relating to Russo-Japanese Relations

The focus in this phase was on the Anti-Comintern Pact, skirmishes at Zhanggufeng (Changkufeng) and Nomonhan, defensive military preparations against the Soviet Union, and the Russo-Japanese neutrality pact. The Tribunal's reluctance to countenance any criticism of communism greatly affected the fate of documentary evidence submitted by the defense. In his introductory remarks, the presiding judge stated that the communist movement in Europe had no connection with Far Eastern problems, and that the Tribunal had neither the right nor the obligation to judge communist ideology. Therefore, of the 21 documents relating to the Anti-Comintern Pact submitted by the defense, 13 were disallowed because they were critical of communist thought.

However, when the defense introduced rebuttal evidence relating to CCP activity in the Republic of China, there was a slight change in the atmosphere. Tension between the U.S. and the Soviet Union, the first signs of the Cold War, and an awareness of the threat posed by communism had begun to exert a subtle influence in the courtroom. Additionally, Blakeney's superb performance, including his exposé of the secret protocol agreed upon at the Yalta Conference, and his examination of the Nomonhan Incident and the Russo-Japanese neutrality pact, placed the Soviet prosecution team under suspicion. Later, doubts would arise regarding the credibility of the Soviet diplomatic stance, but they were not openly expressed in the courtroom. That interlude was momentous for the epiphany that occurred in the courtroom. It was the one and only awakening to the threat and the criminality of communism, which the Tribunal had consistently minimized or refused to acknowledge.

For this phase the defense was prepared to submit 112 unpublished documents, mainly diplomatic documents relating to border disputes, such as the Zhanggufeng and Nomonhan incidents, Soviet violations of treaties, and the initiation of hostilities against Japan by the USSR. It was patently obvious that the USSR was at fault in every one of these disputes, and that Japan had committed no unlawful acts. Therefore, we have included only the opening statement presented by Aristides G. Lazarus.

D. Evidence Relating to War with the United States

¹⁹ *Proceedings of the Sixth Conference of the Institute of Pacific Relations*, ed. W.L. Holland et al. (Chicago: University of Chicago Press, c1937).

In the initial part of this division, the points at issue were as follows.

1. Was the Tripartite Pact a belligerent treaty, or was it forged to maintain peace?
2. How detrimental were American trade restraints, export restrictions, and the freezing of Japanese assets to the Japanese economy?

These arguments were followed by an examination of Japanese-American diplomatic relations, the surprise attack on Pearl Harbor, and the delay in declaring war on the United States. Subsequent issues were mainly standard war crimes, i.e., the treatment of prisoners of war.

The bulk of rejected evidence consisted of: (1) documents proving that Japan signed the Tripartite Pact for purposes of self-defense and the maintenance of peace, not to prepare for war against the Allies, and (2) documents attesting to Japan's desperate economic situation on the eve of the war, and describing the deleterious effect of American restrictions on exports to Japan on the Japanese economy.

The Japanese are now aware of the existence of Plan Orange, a U.S. contingency plan for war against Japan, through a Japanese translation that appeared recently. Plan Orange served as the foundation upon which the 50-year strategy against Japan was built. Japanese actions that, at first glance, appear to be preparations for war, must be interpreted as a reaction to the first manifestations of this long-term American strategy. An enormous amount of documentary evidence demonstrating the U.S. deployment of the strategy was, of course, rejected. This makes perfect sense, when we remind ourselves that, from beginning to end, Japan was on trial, not the Allied nations.

Noteworthy in this phase is the dispute over the Pearl Harbor attack: Was it intended as a sneak attack, and was its success a result of a *deliberate* delay in advising the U.S. of Japan's intention to commence hostilities? The documents in *Defense Evidence Rejected by the IMTFE* include reports issued by the U.S. Senate Joint Committee on the Investigation of the Pearl Harbor Attack. The task of finding the responsibility for the "Pearl Harbor tragedy," which culminated in these reports, began soon after the attack, and included individual hearings involving the U.S. Army and Navy. The Joint Committee's reports are widely known today, thanks to the achievements of so-called revisionist historians, such as John Toland and James Rusbridger. At the Tribunal, they were submitted as proof that the attack on Pearl Harbor by Japanese naval and air units was not a sneak attack, but most of them were rejected. Nevertheless, the Tribunal did acknowledge in the judgements it handed down that the delay in declaring war (which is why the Pearl Harbor attack was perceived as a surprise attack) was not planned, but inadvertent, due to negligence and carelessness on the part of Japanese Embassy staff in Washington, D.C. Its success in destroying the conspiracy theory advocated by the prosecution was one of the very few victories enjoyed by the defense team during the IMTFE. We were shocked to hear slogans like "Remember Pearl Harbor" and "No More Sneak Attacks" issuing from the mouths of both Japanese and Americans on the 50th anniversary of the Pearl Harbor attack.

Many of the unpublished documents from this phase, 726 in all, are included in *Defense Evidence Rejected by the IMTFE*. For this edition, we selected four items: the general opening statement for the Pacific Phase, and the opening statements for each of its three subdivisions, which extend to the outbreak of the Pacific War. They are:

- 3.The general opening statement for the Pacific Phase, presented by Takahashi Yoshitsugu.
- 4.Pacific Phase, Subdivision 1 (Tripartite Pact), presented by Owen Cunningham.
- 5.Pacific Phase, Subdivision 2 (Allied Pressure against Japan), presented by William Logan.
- 6.Pacific Phase, Subdivision 3 (Diplomacy: U.S.-Japan Negotiations), presented by Ben Bruce Blakeney.

In addition, we have chosen an excerpt from a report written by Joseph Grew, U.S. Ambassador to Japan from 1932-1942. In the report, written not long before the war, Ambassador Grew provides a realistic account of the unprecedented sense of crisis felt by the Japanese government as a result of economic pressure and the impasse in Japanese-American negotiations. This selection was chosen for two reasons: (1) Grew's very significant diplomatic contribution both on the eve of the war and immediately prior to the issuance of the Potsdam Declaration, and (2) the editor's wish to include at least one excerpt from Grew's memoirs, since he was the most distinguished pro-Japanese foreign diplomat of that era.

The last document we selected for this phase is the affidavit prepared by Ishibashi Tanzan,²⁰ entitled "The Industrialization of Japan Was Not for Preparation of Aggressive War." The arguments and evidence presented are so straightforward and objective, and his approach so scholarly that Ishibashi's affidavit would be an ideal candidate for a modern Japanese history textbook, without any alteration. These attributes notwithstanding, the Tribunal refused to admit the affidavit.

Before they submitted evidence on behalf of individual defendants, defense counsel addressed war crimes, i.e., the torture of prisoners of war, as governed by international law in force at the time. A vast majority of the cases involving the torture of prisoners of war were handled at B- and C-class war crimes trials. The IMTFE pursued this issue with regard to A-class defendants only when they were viewed as having been at the top of the chain of command. During its presentation of evidence relating to general problems, the defense team submitted testimonies of prisoners of war held in Japan, which expressed gratitude for the humane treatment they had received. However, those testimonies were deemed irrelevant and rejected. The defense argued that as far as atrocities were concerned, i.e., the murder of noncombatants and civilians, those committed by American troops, i.e., the dropping of atomic bombs on Hiroshima and Nagasaki, the aerial bombing of eastern Tokyo, and the bombing of unfortified cities in every prefecture of Japan, were far more heinous.

On May 14, 1946, during the fifth session of the IMTFE, American defense attorney Blakeney came forth with a scathing accusation, i.e., that the dropping of the atomic bombs, which claimed an enormous number of noncombatants, was the worst war crime of all. Even the usually voluble chief prosecutor was stunned into silence, and there was no rebuttal forthcoming from the prosecution. As we stated in Section II, Blakeney's words were not translated into Japanese, and are therefore absent from the stenographer's record, which simply states "no interpretation provided." The Tribunal feared that Blakeney's courageous (and legitimate) argument would become known to the Japanese public.

²⁰ Ishibashi Tanzan (1884-1973) was a politician, economist, and journalist. He was finance minister in the postwar Yoshida Cabinet, and prime minister from December 1956 to February 1957, when he was forced to resign due to ill health.

During the proceedings, two topics were taboo — the atomic bombs and the threat of communism. Nevertheless, Blakeney again broached the subject of the atomic bombs on March 3, 1947, when the defense presented rebuttal evidence. He stated that the dropping of the atomic bombs was clearly in violation of Article 4 of the Hague Convention, and offset any violations of that same article by Japanese troops. Thereupon, Webb trotted out his usual argument, i.e., that the Tribunal had been established to judge Japan, not the Allied nations. The IMTFE refused to admit into evidence a newspaper article reporting on U.S. Secretary of War Henry L. Stimson's decision to use atomic bombs.

Other evidence relating to direct responsibility for the outbreak of war between Japan and the U.S. was rejected. But here, the Tribunal's failure to pass judgement on the Hull Note, an inflammatory ultimatum, is certainly more indicative of the warped notion of justice that prevailed there than its refusal to admit much of the defense evidence, and made it perfectly clear that the IMTFE was a victors' court. An affidavit written by Tokutomi Soho and documentary evidence supporting Japan's self-defense argument were also rejected. These documents are seeing the light of day for the first time in 50 years.

The presentation of evidence pertaining to the treatment of prisoners of war was followed by evidence relating to individual defendants, the presentation of which lasted for four months. We have not included any of the latter in this book.

After the defense presented rebuttal evidence, the prosecution was given an opportunity for further rebuttal. Another rebuttal from the defense ensued, followed immediately by the prosecution's summation and the defense summation. In the portion of the general opening statement (read in the courtroom between March 2 and April 15, 1948) presented on March 2-15 (Japan's defense) are several excellent essays that should be passed on to future generations. They were not the subject of evidentiary disputes, since the defense attorneys were permitted to read them. However, since they have not been published, we included them in Volume 7 of *Defense Evidence Rejected by the IMTFE*.

As we stated previously, one of the most important items in this phase was Takayanagi Kenzo's argument on the law entitled "Answer of the Defence to Prosecution's Argument on International Law." This was originally intended to serve as Part B of the defense's general opening statement. But since Takayanagi was not permitted to read it as scheduled, the document was revised, augmented, and refined during the waiting period. When he finally delivered the statement, it had taken the form of a legally and logically forceful, searing reproach to the IMTFE. If he had been allowed to read Part B immediately after Kiyose read Part A, the Tribunal, brazen as it was, might well have lost the nerve to continue applying ex-post-facto law.

In connection with Takayanagi's statement, we should also mention the general argument presented by Uzawa Somei, chief defense counsel, at the beginning of the defense summation on the afternoon of March 2, 1948. Since Uzawa's statement was not rejected, it appears in the *IMTFE Proceedings* in its entirety, and highlights from it can be found in Fuji Nobuo's *An Eyewitness Account of the Tokyo Trials*.²¹ Therefore, we have not included it in this book, but would like to cite one brief passage.

²¹ Fuji Nobuo, *Watakushi no mita Tokyo Saiban* (An Eyewitness Account of the Tokyo Trials) (Tokyo: Kodansha, 1988).

The Chief Prosecutor in the closing address stated that we have come to the 'closing of the gates.' If I may be permitted, I should say that we are come to the 'opening of the gates' to the rule of reason and law.

Uzawa's daring remark is trenchantly sarcastic, not for effect, but as it should be used in good oratory.

The statement comprises three sections. Section 1 ("The World Crisis and Unrest of the Far East") describes the world situation in the latter half of the 19th century. Uzawa explains that while the U.S. and the European nations accelerated their efforts to colonize East Asia by way of colonization, Japan endured pressure from those nations with "perseverance and tolerance," setting world harmony as its first priority. Not until cornered did Japan rise up in self-defense; the slanderous accusation that Japan engaged in an aggressive war cannot be condoned by administrators of true justice. Like Churchill, who consulted the Book of Revelations, Uzawa sought inspiration in the Chinese classic *Yi Jing* (I Ching), as he poured all his energy into the preparation of his statement. He mentions the difficult situation confronting Japan, about to become enmeshed in a new world revolution, by which we assume he meant the Russian Communist revolution and the danger of its spreading to Japan. As we will discuss later, the Tribunal rejected most of the evidence pertaining to the threat of communism and the CCP. The judge and prosecutor from the USSR. objected to such evidence without fail. So did the judge representing the Republic of China, who later joined the CCP. The presiding judge fawned on the Soviet judge and prosecutor, ever cautious to avoid offending them. At the IMTFE, any and all criticism of communism was taboo.

In the second section ("Justice and Responsibility"), the principle of *hakko ichiu* (universal brotherhood), also mentioned in Kiyose's opening statement, is explained, referring to *Huainanzi*,²² from whose writings the term was taken. Hakko ichiu is a cultural concept that formed the basis for the Greater East Asia Coprosperity Sphere ideology. It is a peaceful concept.

The third section ("Peace and Wang-Taoism") compares the Wang-tao (royal sovereignty) with the Pa-tao (authoritative sovereignty) in the context of universal brotherhood concept, and is excerpted from a paper Uzawa wrote in 1925. It argues that all the defendants were educated to value the rule of law (right) over the rule of power (might). The entire statement is imbued with a historical and philosophical tenor similar to that of the section of Justice Pal's opinion entitled "Recommendation."²³ Uzawa artfully circumvented language that might invite rejection (hence his allusion to a "new world revolution"). He obviously put a great deal of thought into the wording of his statement.

The 15-part general defense summation (including general arguments pertaining to individual responsibility) appears in *Defense Evidence Rejected by the IMTFE*. There are many other documents that would have been ideal for this book, e.g., Okamoto Toshio's presentation of the Manchurian Division, and the presentation on war with China by Kanzaki Masayoshi and Aristides G. Lazarus. Both of them are quite long, however, so we were forced to omit them due to space restrictions. We have selected only the self-defense argument presented by

²² *Huainanzi*: Literally, "Master Huainan" a Chinese classic written in the 2nd century B.C., which covers metaphysics, cosmology, matters of state, and conduct.

²³ Pal, *op. cit.*, pp. 697-701.

William Logan. We imagine that readers will guess the content from the subtitle (“Japan Was Provoked into a War of Self-Defense”).

Although we were unable to include the portion of the defense summation relating to diplomatic negotiations between Japan and the U.S., presented by Ben Bruce Blakeney, we will reproduce a few lines from the final section, which deals with the Hull Note, and which later became quite famous.

With the handing of his note to the Japanese Ambassadors on 26 November, [Hull] placed the matter “in the hands of the Army and Navy”— the words were his own — announcing on the 27th that “the conversations had been terminated with the barest possibility of resumption.” The free press of America formed the same opinion of the Hull Note; the Secretary held special press conferences on the 26th and 27th, when, abandoning the policy of both Governments since the beginning of the negotiations, he explained the whole matter to the press: it responded by proclaiming it Japan’s choice, whether to accept the Note or fight. Looked at from the Japanese side of the Pacific, it was Hobson’s choice: Japan could only surrender now, or fight to all-but-sure defeat. The Hull Note is a part of history now; let us leave it with a contemporary historian’s words:

“As for the present war, the Principality of Monaco, the Grand Duchy of Luxemburg, would have taken up arms against the United States on receipt of such a note as the State Department sent the Japanese government on the eve of Pearl Harbor.”^{24 25}

The contemporary historian to whom Blakeney referred is Albert J. Nock; *Memoirs of a Superfluous Man*²⁶ is his autobiography. Apparently, this citation had a strong effect on Judge Pal as he listened in the courtroom. In the famous Section 4 of Pal’s judgement (a lengthy treatise that denies the existence of a major conspiracy), in which he comments on the Hull Note, Pal cites Nock directly and adds: “Even contemporary historians could think that.” Since the Japanese lacked access to Blakeney’s summation, it was through Pal’s citation that this aphorism became so widely known.

VI. Conclusion

As we stated at the beginning of this Introduction, this book consists of excerpts from the eight-volume [ORIGINAL TITLE], and is intended to give readers a general idea of the larger work, which we hope they will consult for more complete information. However, we believe that by selecting documents that stand on their own contextually, we have provided general readers who do not have the time to read the latter with a good perspective on Japan’s defense at the Tokyo Trials.

Some readers may perceive Japan’s defense as a group of passive, conservative arguments that it would be more accurate to describe as excuses. But the presentation of a defense is a time-honored classical tradition that dates back to Socrates. Furthermore, when prepared and

²⁴ Albert J. Nock, *Memoirs of a Superfluous Man* (New York: Harper, 1943), p. 249.

²⁵ Defense Summation, (Rejected) Document No. 3100, pp. 186-7.

²⁶ Albert J. Nock, *Memoirs of a Superfluous Man* (New York: Harper, 1943), p. 249.

presented properly, a defense can be exceedingly assertive and forceful. The documentary evidence that comprises the defense of Japan prepared for the IMTFE possesses both these qualities, and that is exactly why we decided to reproduce and publish salient extracts from it for this book. Even this abridged version contains material that is convincing enough to exorcise the misguided perception of history that tainted the IMTFE.

We would like to supplement our explanations of the significance of the defense rebuttal evidence excluded during the course of the IMTFE that we have provided in this Introduction (which is also the significance of publishing this book) with a brief summary.

Rejected defense evidence can be divided into two broad categories. One embraces evidence that was deemed propagandistic, self-serving, or the restating of personal opinions. The “propagandistic and self-serving” label was applied (as mentioned in the citation from Kiyose Ichiro’s memoirs) to proclamations issued by the Japanese government (the Cabinet’s Information Bureau, the Foreign Ministry, and military authorities) and views expressed via newspaper articles. Most of the excerpts from books written by Ambassador Grew, British Ambassador Sir Robert Craigie, Sir Reginald Johnston, John Powell, and others were excluded because they were merely personal opinions. This despite the fact that public opinion in any era is an amalgam of the opinions of individuals and, more pertinently, despite the fact that diaries, memoirs, and even hearsay evidence were used by the prosecution with impunity. Such evidence had an important and often decisive influence on the judgement.

In short, most of the documentary evidence prepared in Japan’s defense was suppressed. The Tribunal refused to hear Japan’s defense, believing that it could render objective decisions based only on the evidence that emerged, which was recorded as fact. The pretense may have been objective justice, but very little justice was done at a trial where the explanations of the defendants and their counsel were discarded, and most of the allegations made by the prosecution were accepted.

The second category is evidence relating to communism. Documentary evidence justifying Japan’s response to the communist movement in China, which corresponds to “Evidence Relating to Communism in China,” is mentioned in Judge Pal’s opinion.²⁷ Pal offers an excellent interpretation of the threat of the communist movement to Japan, which he arrived at by analyzing the Lytton Report. He writes that the evidence submitted by Japanese defense counsel was well within the scope of admissibility. Pal could not see the logic in the Tribunal’s rejection of that evidence, especially since the prosecution’s skewed summation of Chinese communism was allowed to stand. It was absolutely necessary for the Tribunal to hear the defense evidence in order to arrive at a fair decision as to whether Japan’s response to communism was in self-defense or (conspiratorially) aggressive. It should not have been dismissed as irrelevant, as William Logan so convincingly argued. However, it was rejected nonetheless, for political reasons (the Tribunal handled the Soviet judge and prosecutor with kid gloves, as we stated previously).

This evidence included herein and in the original book from which it was excerpted will reveal for once and for all what the Tribunal actually was: a kangaroo court at which the vengeful victors meted out punishment to the vanquished. It is our fervent hope that this book

²⁷ Pal, *op. cit.*, p. 157-158.

will serve as a weapon in the battle to revise correct, inaccurate perceptions about the IMTFE and the historical view that it engendered.

PART 1: DEFENSE OPENING STATEMENTS: GENERAL ARGUMENTS

CHAPTER 1: GENERAL OPENING STATEMENT A

Presented by Kiyose Ichiro on February 24, 1947 (Session 166)
Rejected in part (two sections)

As we stated in the Introduction, the prosecution presented its case between June 4, 1946 and January 24, 1947. A month-long recess followed, subsequent to which Kiyose read the aforementioned statement. Kiyose later wrote his recollections in a book entitled *The True Story of the Tokyo Trials*, one chapter of which (“The Opening Statement and Criticism Thereof”) is devoted to the gist of his statement and the repercussions it caused.

At the time, that courtroom was the only place where free speech was allowed. Many spectators agreed wholeheartedly with my statement.²⁸ Some of the foreigners present voiced their opposition.²⁹

Japanese defense counsel had searched high and low for information, and then put the results of their efforts in writing; this statement elicited a tremendous response. Since the defense team had listened to the prosecution’s evidence over a period of eight months, they knew what sort of logic and arguments to use. This opening statement is essentially a rebuttal of the prosecution’s case, and follows the same order (five phases): general problems, the Manchurian Incident, the Second Sino-Japanese War, disputes with the Soviet Union, and the war with the United States. In *The True Story of the Tokyo Trials*, the entire opening statement is appended to Kiyose’s recollections. Since Chuko Bunko, the publisher of his book, has kept it in circulation since 1986, readers might think that it was not necessary to include it here. However, we have decided to reproduce the statement *in toto* because Kiyose was forbidden to read two sections of it in the courtroom, and those sections do not appear in *The True Story of the Tokyo Trials* or in any other publication. We have enclosed the two rejected sections in boxes. They contain language similar to that in the jurisdiction motion submitted by Kiyose on May 13, 1946, the fourth day of the proceedings. An example follows.

The Potsdam Declaration not only binds our country but also binds the Allies. In other words, this Tribunal is empowered to make charges and try what are called “war criminals” in accordance with the tenth article of the Potsdam Declaration, but not so empowered to try those who cannot be considered as war criminals.³⁰

Kiyose was in the right according to the principle of law. If the Tribunal had actually deliberated on his motion, there was a strong likelihood that the entire foundation of the IMTFE would have collapsed at that very moment. That is why the motion was rejected, for reasons that were not stated at the time. Since the Tribunal viewed these portions of the opening statement (enclosed in boxes in this book) as a reappearance of the aforementioned motion, which attacks the shaky legal foundation of the IMTFE with an interpretation of the Potsdam Declaration and international law up to 1945, it had no choice but to prohibit Kiyose from reading them. However, an examination of the entire statement reproduced in this book will remind readers how weak the legal basis for the Tribunal was. We will refrain from

²⁸ Several attorneys collaborated in the preparation of this statement.

²⁹ Kiyose, *op. cit.*

³⁰ IMTFE, Proceedings, p. 120.

analyzing the opening statement, as that has been done in *The True Story of the Tokyo Trials*, both in the main text and in the Introduction written by Nagao Ryuichi (in both the Yomiuri Shinbunsha and the Chuko Bunko editions).

Mr. President and Members of the Tribunal: The time has now come for the accused to present their defenses to the charges in the Indictment and the proofs adduced by the prosecution in support thereof.

The Tribunal has with great care listened to the prosecution's case these many past months. It has also with great indulgence permitted the defense within the framework of its concept of a fair and just trial to conduct its part of the case with a tenor befitting the historical importance of these proceedings. Needless to say, the defense to be presented will proceed with the utmost expedition of which we are capable, hewing only to the issues raised for decision. The task to be undertaken by us is of such grave and novel import that we must at the outset invite the Tribunal's forbearance should we unwittingly stray from the standards we have set for ourselves or should we deviate from the precepts established by the Tribunal.

On 6 May 1945 the accused in open session before this Honorable Tribunal pleaded not guilty to all the counts and charges of the Indictment, except the accused OKAWA. The defense will disprove each and every charge of criminality lodged against them.

The allegations in the indictment are divided into fifty-five counts. Many of them are one and the same allegations concerning the same charges viewed from different angles and seem to overlap. Some of the counts refer to all the accused and others refer to but a few. If all the accused here were to produce evidence individually and separately on behalf of themselves one after another against these numerous and diverse counts, much repetition and confusion would be bound to arise. So the defendants and their counsel have come to an agreement that they will produce as far as possible, evidence in common where the offences charged are in common.

As a result of this arrangement, the proof to be presented in common has been divided into the following divisions and evidence will be produced accordingly:

- Division 1 — General problems.
- Division 2 — Matters concerning Manchuria and Manchukuo.
- Division 3 — Matters concerning China.
- Division 4 — Matters concerning the Soviet Union.
- Division 5 — Matters concerning the Pacific War.

After the presentation of evidence in the above divisions, each accused will from his own individual standpoint offer evidence concerning himself. It may be probable that since the interests, views and actions of some of the accused were opposed to each other, conflicting evidence will be presented. In so doing some of the accused may, from their own standpoint, demand exceptions to the facts and evidence as adduced in the above five divisions or may furnish other evidence in their individual interest. This phase may for the sake of convenience be called "Division 6. Individual cases or individual defenses."

We shall now point out a few important facts which will be dealt with under Division 1, and explain the proposed method of presenting evidence. Needless to say, the matters to be pointed out here are but a part and not all of the matters to be dealt with in Division 1, further remarks being reserved to be made at the opening of that division. The same can be said with regard to other divisions.

The prosecution assumes that all military precautions adopted by the government of Japan during the years from 1928 to 1945, from the standpoint of international law, were criminal acts in themselves. It not only avers that the policies of Japan were criminal but it asserts that if a nation initiates a so-called war of aggression, or a war in violation of certain treaties, etc., the individuals who happened to be in office at the time and participated in the decision to wage such a war are criminally responsible. In other words, the fundamental proposition advanced in this case is that Japan, including the accused, continuously committed alleged international crimes during the entire period of seventeen years.

All the accused deny these propositions with the utmost emphasis of which they are capable. Counsel for the defense also represent to your Honors and respectfully point out that neither in 1928 or thereafter there was in existence anywhere a principle of international law that even tended to impute to political acts personal responsibility upon individuals acting on behalf of the state in its sovereign capacity.

In this unprecedented proceeding an important issue for consideration is whether or not the safety measures, military and naval preparedness, undertaken by Japan since 1928 were aggressive in nature.

It is too elementary to indicate to the members of this Tribunal that preparedness of one nation is made in contemplation of the activities and apparent objectives of another nation or nations. The sinister purpose, if any, of such preparedness cannot be determined apart from this vital consideration. It may well be, and no doubt has occurred in history, that a particular nation having doubled its standing army has been assailed as an aggressor, whereas it has later been ascertained that a neighboring state trebled its standing army and the act of the first nation is thereafter considered logical and sound.

It is realized that only Japanese military and naval preparedness is here on trial — not that of other countries, some of whom are party complainants — but to the extent necessary to determine the nature of the policies and measures of Japan we expect that we may be permitted to present briefly evidence concerning similar activities and undertakings of other nations.

There are three vital considerations which should be outlined in this opening statement in order properly to comprehend the exact nature of the internal and external policies of Japan during the period covered by the Indictment. These are independence, abolition of racial discrimination and fundamental principles of diplomacy. These are not merely the policies of any particular cabinets, of which there were many, nor are they principles of specific political parties. Rather they are national, long standing, and firm aspirations universally subscribed to and cherished by the entire Japanese nation since the opening of the country to foreign intercourse in 1853, and are as important to the Japanese as are free speech, free education and freedom of religion in America.

The first of these national characteristics is the fervent desire of the Japanese people to preserve the nation as a perfect independent and sovereign state. The treaty of “ANSEI” between Commodore Perry and the Shogun not only impaired the sovereignty of the nation extra-territorially but infringed upon its customs autonomy and hence was most deeply regretted by all Japanese of that era.

The sincere desire of foremost leaders throughout Japan in the Meiji period was to elevate and enhance the standing of the nation to a position of perfect independence and sovereignty. Since that purpose was a worthy one, consistent with the principles advocated by President Wilson after World War I, its attainment should be recognized by this Tribunal. The defense expects to prove that this principle was the universal aspiration of the Japanese people.

The second point is the demand for the abolition of racial discrimination. Racial discrimination affects those who are discriminated against much more keenly than those who discriminate. However, in order to eliminate racial discrimination the standards of culture and education for this nation needed to be raised. The government and the people of Japan were not blind to these necessary requisites. Where morality and custom called for certain modifications and improvements they willingly admitted their necessity and adopted them but the culture of the world is not singular but plural according to the number of nations and races concerned. Each nation has its own history and tradition, and culture is created and developed accordingly.

Since East Asia has its own culture it has been the desire of the Japanese people to preserve and purify it so that an equal position may be maintained with all races and peoples in every respect and thus contribute to the progress of mankind everywhere. The aspiration for racial equality cannot be realized simply by raising the position of the Japanese to the standard of Europeans and Americans. By its very nature the standard of all the peoples in East Asia should be raised in order to attain the complete abolition of discrimination. It is true that some few authors might have referred to this idea in an extravagant manner, but these writers were the exception. It was the unanimously held hope of the Japanese people, together with all other peoples of East Asia, to reach that standard attained by Europeans and Americans. It is expected that this point too will be proved by the defense in order to clarify and avoid any misunderstanding as to any alleged theory of Japanese racial superiority erroneously implied by the prosecution. We shall further develop that Dr. Sun Yat-Sen, the father of the Chinese revolution, and other leaders in India and throughout East Asia expressed sympathy with this idea. If the true intention of the Japanese people in this respect is rightfully understood antagonism of other peoples and other countries would surely vanish.

The third fact to be referred to is what has been termed “the fundamental principles and doctrines of diplomacy” of Japan. Since, the Meiji Period the prevailing ideal held by the government and the people of Japan in respect to foreign relations was to maintain peace in East Asia and thereby contribute to the welfare of the whole world. This was called the “cardinal principle of diplomacy” in official documents and Imperial Rescripts, that is to say, the fundamental ideal of Japan which guided its foreign policy. The war with China 1894 to 1895 and the war with Russia 1904 and 1905 were fought with that aim and consideration in view. That is explicitly written in the Rescripts declaring these wars. In the actual conditions at that time, Japan was the only country in the Far East which had adopted a western civilization and had all the qualifications of a modern state. Although China was a vast country abundant in resources, she faced the danger of being partitioned by the powers into spheres of influence. Most of the regions in the south had already come under the domination

of several Occidental Powers. Under such circumstances the Japanese people sincerely felt that Japan had a special mission as a stabilizing power in the East. This is not a peculiar notion held only by the accused; it has been a fundamental principle held for at least two generations by the Japanese nation. This principle has been recognized by the great powers, and we expect to prove that the Anglo-Japanese Alliance was concluded and renewed as a result of its recognition. The Japanese people cannot forget the sympathy of the government and the people of the United States shown toward Japan at the time of the Russo-Japanese war, which was fought for the maintenance of that cardinal principle. That principle of stabilization was never of an aggressive nature. On the one hand, it prevented East Asia from falling into political and economic confusion, and on the other hand it promoted the common development of all Asiatic races and thus their contribution to the progress of mankind. Only in the light of the foregoing ideals can the true relations between Japan and her neighbors be fully understood.

The government and the people of Japan have been especially sympathetic to the preservation and development of China. This is well expressed in official and unofficial documents since the Meiji Period. The relations between Japan and the Celestial Empire have often been voiced by the proverb “Shin-Shi-Hosha” which means that “without lips teeth are exposed to coldness,” or “two wheels of a car help one another.” Another saying is “dobun doshu” meaning that both countries use the same letters, represent the same Confucian ethics and are of the same race. About 1900 Japan invited many students from China, President Chiang Kai-shek being one of them. Since the Chinese revolution in 1911 the Government and people of Japan extended sympathetic understanding to Doctor Sun Yat-Sen’s work. While it is true that the Japanese General Staff had annual military plans, as has been pointed out by the prosecution, it is also true that the military staff never had a hypothetical military over-all plan against China. The presentation of evidence on these facts will, we believe, be helpful to the Tribunal in disproving several averments contained in the Indictment and the testimony in the record.

In Count 5 of the Indictment, citing the whole of the particulars in Appendix A, and treaties and assurances in Appendix B and C, it is charged that the accused as leaders, organizers, instigators or accomplices formulated and executed a conspiracy with an intention to dominate the whole world in conjunction with Germany and Italy. There is no greater misunderstanding than this. As to relations between Japan and Germany and Italy, my colleagues will present our case in the phase dealing with the Anti-Comintern Pact and the Tri-partite Pact. I should like here to treat the matter as a whole concerning the ideals and aspirations of Japan on the one hand and those of Germany and Italy on the other.

Much of the confusion and misunderstandings are due to the interpretation of the idea of “hakko ichiu,” cited in the preamble of the Tri-partite Pact and in the Imperial Rescript, issued at the time of the conclusion of the pact. Solemn classical words and phrases are fondly and customarily used in our official documents, giving to the document an effect of dignity but often adding obscurity even to the Japanese people themselves. So much more with foreigners who have different languages and concepts. For example, the Imperial Rescript issued on the conclusion of the Tri-partite Pact paraphrases “hakko ichiu” and says, “It is indeed a great teaching of our Imperial ancestors that the Great Cause shall be propagated all over the eight corners of the world and the whole humanity on earth shall be deemed one family. To this august teaching we endeavor to adhere day and night.” “The Great Cause” here means “universal truth.” To be “propagated” here means that the said idea be made plain and manifest by all the world. “To be in one family” means that whole

mankind is to live together with the feeling of fraternity in one household. As said before, the culture is of a different origin from that of the West and, therefore, the expression is necessarily very different or even quaint to Europeans and Americans.

In the proposed plan for Japanese-American understanding, which was the basis of negotiation between the Secretary of State Hull and Ambassador NOMURA, “Hakko Ichiu” is translated into English as “universal brotherhood.” The preamble of the Tri-partite Pact should be interpreted in its proper meaning. Whatever was the idea held by Germany and Italy at the time of the conclusion of the treaty, concrete and conclusive evidence will be produced to show that the Japanese Government had no intention to conquer the world in cooperation with Germany and Italy.

In Article 2 of the said Pact it is provided in effect that Germany and Italy respect and recognize the leading position of Japan in the establishment of a new order in Greater East Asia. No word is more subject to misunderstanding than the expression “New Order in East Asia” or “Greater East Asia Co-Prosperity Sphere.” The prosecution went so far as to say that “a new order” is an idea to destroy democracy and freedom and the respect for personality, which are the basis of democracy. Is it not a confusion of the ideal of the Japanese nation and that of other countries, or, at least, a product of association with other ideas that led the prosecution to such a misunderstanding? But the implication of the particular Japanese words as used at the period under consideration, and the nature of the Japanese idea itself alone are necessary for consideration here.

It was in the KONOYE declaration of November 3d and December 22, 1938, that the words “New Order in East Asia” were first officially used. As to the meaning of “New Order in East Asia” as used in the KONOYE declaration, that declaration is a document which speaks for itself; that Japan, Manchukuo and China will cooperate on the basis of good neighborliness, common defense against communism, and economic cooperation. As to the relation with other countries, the declaration says, “With regard to the economic relations between Japan and China, Japan has no intention of monopolizing China economically.” It did not exclude the principle of equal opportunity. We must, however, remember, as the prosecution contends, that it was during the period when large scale battles were taking place between the two countries involving more than a million soldiers. In such a period of large scale conflict it was inevitable that various restrictions were imposed upon foreigners as well as upon nationals of the conflicting states. In connection with this point, the joint declaration of Foreign Minister ARITA and the British Ambassador Craigie in July 1939, will be presented as evidence. The declaration says in part that, “the British Government fully recognizes the actual condition that a large scale warfare is going on in China, and the British Government recognizes that the Japanese Army has a special demand in order to secure its own safety and to maintain peace and order of the area under its control as long as the said condition continues to exist”

The intrinsic content of the idea of the new order as used in Japan is the “Ko-do” or “Imperial Way,” as it is sometimes translated. The gist of the “Imperial Way” is benevolence, righteousness and moral courage. It respects courtesy and honor. Its ideal is to let everyone have his or her own part, and fulfill his or her duty. It envisions ruler and ruled to be of one mind and the affairs of state to be administered by the sincere aid of the whole people. It is just the opposite to the idea of militarism and despotism. It is extremely difficult to express such ideals in language other than Japanese, but as far as the respect for individual personality is concerned, there is no fundamental difference between the “Imperial Way” and

democracy. It is unusual to adduce evidence to prove such abstract ideas in a court of justice, but we must do this in the present case. We shall offer a speech made by one of the accused in the Imperial Diet showing the difference between the “Imperial Way” and the totalitarianism of Germany and Italy.

Another obvious distinction between the two is that there is no taint of racial superiority in Japan as is found in Germany. On the contrary, our people are always conscious of our own limitations and are anxious to reach the world standard with other peoples in East Asia. Since our new order was to respect the independence of every country, it never implied the idea of world conquest and it has nothing to do with the restriction of individual freedom. The terminology of “leadership” is understood by us not to mean domination or control but only to take the initiative as a leader or guide among ourselves as equals. Such fundamental national ideals can never be affected or changed by the inept wording of a treaty or any other document, official or otherwise. Later on we came to use the words “the New Order in Greater East Asia” or “the Greater East Asia Co-Prosperity Sphere” as including not only Manchuria and China, but also other countries in East Asia. Notwithstanding the fundamental idea remained the same. The Joint declaration consisting of five articles adopted at the Greater East Asia Conference at Tokyo in November 1943, well expresses the essence of the concept of the new order in Greater East Asia. It provides:

1. The countries of Greater East Asia through mutual cooperation will ensure the stability of their region and construct an order of common prosperity and well-being based upon justice.
2. The countries of Greater East Asia will ensure the fraternity of nations in their region by respecting one another’s sovereignty and independence and practicing mutual assistance and amity.
3. The countries of Greater East Asia by respecting one another’s traditions and developing the creative faculties of each race, will enhance the culture and civilization of Greater East Asia.
4. The countries of Greater East Asia will endeavor to accelerate their economic development through close cooperation upon a basis of reciprocity and to promote thereby the general prosperity of their region.
5. The countries of Greater East Asia will cultivate friendly relations with all the countries of the world and work for the abolition of racial discrimination, the promotion of cultural intercourse and the opening of resources throughout the world, and contribute thereby to the progress of mankind.

The foregoing resolution, together with the speeches given at the conference by the representatives of various countries will be presented as evidence. Although the resolution considers East Asia as a family of nations calling for mutual cooperation and amity, it takes a world-wide view as far as the intercourse among countries and development of resources and the exchange of cultures are concerned. Article 5 of the resolution is especially noteworthy. It was generally held at that time that this planet is too large as a political unit, but too small economically if it is divided into various units. Thus it will be shown that the idea of new order among us has not been that of world conquest, but is in essence strangely similar to the Good Neighbor Policy of the United States.

My duty is to outline facts to be presented to the Tribunal in concise form. Therefore, I will avoid legal arguments as far as possible. As the prosecution aptly indicated, conspiracy as the first crime specified in the Charter of this Tribunal, is only referred to and not defined in the Charter. Apart from the legality of the Charter to punish conspiracy, we cannot without definition of conspiracy determine the facts which the prosecution charges as criminal. Nor can the defendants know what kind of evidence they are called upon to disprove.

The prosecution has cited decisions of inferior federal courts of the United States in an attempt to define conspiracy and seems to assert that the decisions of such courts are indisputable. This Tribunal is an international court and the President has already expressed the opinion that because of its status it could hardly be expected to take judicial knowledge even of the Constitution of the United States of America, and it is inconceivable that the Tribunal could accept the decisions of inferior federal courts of the United States when those same courts came into existence only as a result of the provisions of that same Constitution.

We submit respectfully that it is not proper to apply a particular legal theory which has developed in a certain country with its peculiar historical background at this Tribunal as if it were a general principle of law of universal application. The idea of conspiracy is unique in the Anglo-American legal system and its counterpart cannot be found in the countries following the Roman Law. Even in countries which have adopted Anglo-American legal principles, it is impossible strictly to apply in toto particular decisions of England and America. In some countries when two or more persons plot a particular crime they are punished as accomplices. In that case the object of the plot must be clearly illegal and it must be shown that it cannot be accomplished except by adopting an illegal method. In Japan it is rather exceptional to punish the preparation of a crime and plot thereof before the commission of a criminal act. The kinds of crimes the preparation of which are punishable are enumerated in the criminal code. The same, as I understand it, could be said as to the criminal law of other countries which have adopted the Roman legal system. Moreover, in order to constitute a plot or conspiracy as an independent crime, the date and place of such plot or conspiracy must be specified to an intelligible extent. In countries which have not adopted the Anglo-American legal system, it is inconceivable, therefore, that a conspiracy could exist from January 1928 to September 2, 1945. What I wish to submit is that the said doctrine, to-wit, the doctrine of conspiracy, as has been developed in England and America as one entity, cannot be deemed to constitute international law. If the decisions cited by the prosecution mean that those who join the conspiracy after the common plan was formulated are criminally responsible to the same extent as the original conspirators, we submit this is decidedly not a commonly accepted legal principle throughout the world and, therefore, cannot be applied by this International Tribunal as a precept of international law.

The method of selecting the head of the cabinet since 1928 was largely a matter of chance. If a cabinet falls for some reason or other, the Emperor seeks, through the Lord Keeper of the Privy Seal, the advice of elder statesmen (mostly ex-premiers) as to who is to be the successor. As the elder statesmen themselves are not an organized group, those who happen to attend the meeting discuss the matter and select extemporaneously a premier designate after due consideration is given to the exigency then existing and report the decision to the Throne. The Emperor accepts the advice without exception. Since there is no way to foretell who will become the Premier until the moment the report of the elder statesmen is submitted to the Throne, it is impossible in Japan for a certain organization, party or clique to monopolize power for any duration of time, and continue a particular plan or conspiracy. The

so-called “TANAKA Memorial” referred to by a certain prosecution witness as evidence of conspiracy, is, we submit, a forgery and a travesty. Pertinent documents and witnesses will be produced to prove these points.

Section 2 of the preamble of the Indictment and paragraph 4, Section 6 of the Appendix of the Indictment seem to consider the Imperial Rule Assistance Association and the Imperial Rule Assistance Political Society as something akin to the Nazis in Germany or the Fascists in Italy. Nothing can be a greater misunderstanding of Japanese politics than this. Although this point has been partly proved by cross-examination of the witness produced by the prosecution, we think it necessary to prove our contention more conclusively by authoritative documents and witnesses, and expect to do so.

The prosecution refers to the Imperial Ordinance of 1936 to the effect that the Ministers of War and of the Navy must be selected from among generals and lieutenant generals or admirals and vice-admirals of the active list, and goes on to contend that the purpose of the Ordinance was for the army to control the government and that the army utilized the Ordinance for the plotting of armed expansion of Japan. This is contrary to the real state of affairs. This Imperial Ordinance was promulgated after the February 26 Incident of 1936, a rebellion in which Premier OKADA and other elder statesmen were assaulted. It was feared at that time that, if some generals in the reserve list had any connection with any group of men concerned in the February Incident, and one of them happened to be appointed War Minister, that would be a serious matter for the safety of this state. This Ordinance was enacted to prevent the occurrence of that kind of thing. In other words, the purpose of the said Ordinance was to make a thorough purification of the army possible. As a matter of fact, the Ordinance was effective. Its result was, contrary to the prosecution's charge, to restrain those who insisted on using armed force illegitimately. On this point we are ready to present evidence. Briefly speaking, it is a misunderstanding of fact to think that there was any military organization which controlled the Japanese Government during the period specified in the Indictment.

The defense will refute the charge of conspiracy among the accused for the conquest of the world in general (Counts 4 and 5); domination of East Asia, the Pacific, Indian Ocean and regions adjacent thereto, (Count 1); or the control of China (Count 3); or the control of Manchuria, (Count 2). There are differences of age and environment among the accused. Some of them are army or navy officers, some are civil officers, some are diplomats, and some are authors. They never had any chance to meet as a whole with any special object in view. They never had any occasion as a group to exchange their opinions on any such matters. As a matter of fact there were real differences and divisions of opinion among some of them. If some of them as a group were in any way related with the Manchurian Incident, the China Affair or the Pacific War, it was due to the fact that they were prominent personages when those incidents or hostilities which demanded concerted activities of the whole nation took place. There is no such fact nor supporting proof that the accused and certain divers persons, who have never been named by the prosecution, who are not indicted, created a conspiring organization and by some method or other devised a common plan to conquer or dominate the world, East Asia, the Pacific Ocean, the Indian Ocean, China or Manchuria. We will produce evidence to disprove the existence of any such conspiracy of conquest or domination.

There is another point in this connection which the defense are ready to prove. It is a mistake to think that there was one common and premeditated plan throughout the Manchurian Incident, the China Incident and the Pacific War. They were separate events having separate

causes. Persons who were concerned with one incident were different from the persons concerned with the others. There is no such fact that the former officials passed on their premeditated plans to their successors or that they were accepted by them. The most obvious thing is the difference between the Manchurian Incident on the one hand and the China Incident and the Pacific War on the other. The Manchurian Incident came to an end in 1933 by the Tangku Truce. After that officials of the Chiang Kai-shek Government concluded agreements with Manchukuo with regard to customs, postal service, telegraph and railroad. In 1935 Chiang Kai-shek promulgated the Good Neighbor Ordinance toward Japan. Mr. HIROTA, Foreign Minister of the OKADA cabinet, negotiated with China and formulated the "HIROTA Three Principles" including the recognition of the status quo of Manchuria and North China and secured the consent of the Chinese Government to discuss the details with those principles as the basis. It is unnatural and erroneous to suppose that the China Incident, which took place four years after the Tangku Truce, had been intentionally planned and executed by particular individuals with the same object as the Manchurian Incident in view. The necessary evidence to prove the above points will be produced.

In Division 1, various evidence will be produced in connection with Japan's internal politics. The prosecution alleges that for many years, even previous to January 1928, the Japanese Army taught the militaristic spirit to Japanese young men, and tried to cultivate an extreme nationalistic idea that the progress of Japan depended upon wars of conquest; also that the army enforced that educational policy in public schools, and concludes that this fact is evidence of the existence of a conspiracy. Nothing can be a greater mistake than such a view of Japanese education. The educational system in the public schools was modeled on the American system after 1872. The foundation of Japanese national ethics has since then been the synthesis of Japan's ancient tradition and China's Confucian teachings with Occidental ethics. In 1890, the Imperial Rescript concerning education was promulgated, in which certain virtues such as loyalty, filial piety, universal love, justice, public spirit and the spirit of service were specified. It never included warlike spirit. The fundamental principle held by the Imperial family has always been peace, love and benevolence, excluding extravagance and encouraging simplicity and vigor; but this is different from the encouragement of war. It is true that after 1929 following the example of the United States and Switzerland, Japan adopted military drill in the schools with the aim in view of developing discipline of mind and body, and to improve the character of youth. This was done in order to make up for the deficiency caused by retrenchment in armaments and military budgets by the Japanese Government and hence cannot be considered as an expression of aggressiveness. The foregoing was the fundamental educational policy and no Minister of Education had the power to modify it. There is nothing to prove that the Government or the army taught the people that the future of Japan depended on aggressive war.

Japan being a country of small area and incapable of self-support because of meagre natural resources, there is no way for Japan other than immigration, foreign trade and industrialization in order to feed her rapidly increasing surplus population and to maintain her economy. Since immigration was restricted by many of the Western powers, Japan was forced to choose foreign trade and industrialization and she naturally adopted the appropriate method towards that direction, especially in East Asia, which because of propinquity and special interests it was natural for her to do.

Meanwhile under the storm and stress of world economic depression, England dropped off the gold standard in September 1931 and other countries soon followed her example. Since the British Imperial bloc was formed with the Ottawa Conference in July 1932, the world-

wide tariff war was intensified and trade barriers became serious. Notwithstanding, Japan still maintained the principle of free trade, and when the world currency and economic conference was held in June 1933 Japan participated in it with great expectation; and Viscount Kikujiro ISHII, the Japanese delegate, enthusiastically presented Japan's point of view. However, the conference was unsuccessful, the United States' stand contributing heavily to that end.

In 1934 an Anglo-Japanese trade conference was proposed by Great Britain and was held. Although Japan sent her delegates to that conference, Great Britain insisted on the limitation and allocation of Japan's trade, not only within the British Commonwealth of Nations but even to third countries. Since it was impossible for Japan to accept such a proposal she withdrew from the conference and thus the negotiations ended fruitlessly. Consequently, with the declaration of Mr. Ranshman, Secretary of Commerce, the whole British Empire restricted Japan's trade. Meanwhile a trade conference was held between Britain and the Dutch East Indies, and the latter adopted forceful measures to prevent Japanese imports and then proposed a Japanese-Dutch trade conference. Although this conference took place in June 1934, adjustment of Japanese-Dutch trade was extremely difficult since the position of Japan was different from that of England. On the other hand, the anti-Japanese movement in China also became intensified. Thus Japan, which had to depend on foreign trade for her existence, was faced with a grave situation.

Because of such economic stress throughout the world, Japan was compelled to turn to planned economy and the formation of an economic bloc for her economic self-autonomy. In particular, the consecutive five-year plan of the Soviet Union was keenly felt by Japan. Since she was considerably backward in heavy industry, she strongly felt the necessity of promoting this phase of her economy. Various measures of economic control and planning were adopted under such circumstances. They were in no sense premeditated preparation for the China Incident; so much less so with regard to the Pacific War. On these points we will produce evidence and statements of expert witnesses.

Before the war, freedom of speech was respected in Japan as much as in most other countries. However, it is a truism that the propagation of communism and ultranationalism has been prohibited by law since 1925. Japanese people wished to maintain the system of private property and they violently abhorred having the Imperial Household subjected to disrespect. The communists deny the system of private property and they intend to destroy the Imperial Dynasty. Since 1920 the movement of the Communist Party had become active in Japan and a subversive movement to destroy private property and the Imperial Dynasty began to take impetus throughout the country. It is only natural under such circumstances that a sovereign state should prohibit such a movement. It is neither a plan nor a preparation for war. This point can be easily proved by the fact that the Peace Preservation Law was proposed by a coalition government of the three parties which were regarded as liberals. The facts concerning the direction of thought and speech will have to be shown by producing evidence. It is needless to say that once war opens a certain amount of restriction on freedom of speech and other civil liberties becomes necessary for preventing espionage, and it is introduced in every country without exception. There should be no confusion of thought on this point. The object of the thought control was not only the leftist movement mentioned above but also the rightist or ultranationalist movement. Some of the accused while in office were responsible for the control of such movements.

There arose in Japan about 1930-1931 a so-called reformation movement (Kakushin Undo). This movement was not necessarily aimed at expansion. It must be remembered, however,

that the Japanese population was rapidly increasing year after year and was almost on the point of reaching one hundred million. Natural resources were extremely limited. And as a result of world-wide economic depression, commerce and industry as well as agriculture were facing serious difficulties. Party politics existed at that time; and the Seiyukai and the Minseito alternately formed the cabinets. But the methods of political contest was unfair and instances of political corruption were exposed day after day. Being excited and irritated by these facts and incidents, hot-headed young men and young officers appealed to direct action. The evidence to show the motive of this movement was partly destroyed by air raids to our regret but the remaining part and witnesses will be produced to show that the movement did not aim at aggressive war. At this opportunity it is worthwhile to point out that some of the accused contributed to suppression of this movement.

The prosecution presents the national defense plans of Japan since 1937 as evidence of Japan's aggressive design. But armaments are always relative as has been said before. It is not possible to determine whether the national defense plan of Japan was aggressive or not until and unless it is studied in comparison with the plans of other countries. In 1937 the military neighbors of Japan were China and the Soviet Union. As to China, Japan never proposed to come to an over-all conflict and therefore had no comprehensive plan of operations as to Russia, we shall prove the nature of Japan's military plan by presenting her second and third five-year plans and the condition of the Far Eastern Army of the Soviet Union after 1936. The military or naval staff of every country makes annual plans in consideration of potential enemies but it is needless to say that the existence of such plans does not indicate that the country has the intent to wage war against other nations. It is also possible to prove that the intent of Japan was not aggressive by contrasting Japan's naval plans after the London Naval Conferences with those of the United States and the British Empire.

The nature and scope of the right of self-defense is a question of international law, and therefore no evidence is necessary. However, the question to what extent the right of self-defense is reserved in a particular treaty may be answered in the light of circumstances surrounding the conclusion of the treaty. The defendants are prepared to produce the evidence relative to the negotiation of the Kellogg-Briand Pact, the official declarations of the parties concerned and the reservations of the governments at the time of the conclusion of the Pact, which will be of assistance in delimiting the right of self-defense implicit in the said Pact.

This issue of the interpretation of the right of self-defense was also raised at the time of the negotiations between Secretary Hull and Ambassador NOMURA in 1941. At that time the United States showed its own view as to the extent of the right of self-defense. The defense are prepared to produce records concerning the United States' view on self-defense.

It is also said that "every nation is competent to decide whether circumstances require recourse to war in self-defense." Under international law it is well established that the party invoking such right has the sole and absolute discretion to determine the valid existence of such right.

It will be a difficult matter for foreigners to understand the relation in Japan between the high command and the authority of ordinary state affairs. It is, nevertheless, important to illuminate this relationship in order to determine the responsibility for any act or omission in the present case. This depends upon the interpretation of the Constitution of Japan, especially Articles 11 and 12 and upon established custom in this country. With regard to military

affairs, the extent of the respective jurisdiction and responsibility of the military command (the Chief of the Army General Staff and the Chief of the Navy General Staff) and of the Minister of War of the Navy is an important issue. The jurisdiction of various other governmental organs must also be considered in this connection. The defendants are prepared to produce witnesses to clarify this point. The nature of command and the duty of obedience in the Japanese Army are different from those of other countries. This will be considered separately with regard to peace time and war time.

Concrete evidence will be submitted to show the connection with the interpretation and application of the Potsdam Declaration and the Instrument of Surrender.

- A. Japan accepted the Potsdam Declaration which was proposed by the Allies on July 26, 1945 and thereafter surrendered. This Tribunal was created as a result of Japan's capitulation by the Instrument of Surrender. Although Japan surrendered "unconditionally" in the sense that she accepted the Potsdam Declaration as a whole we cannot forget that the Potsdam Declaration itself constitutes a condition as between the Allied Powers and Japan. Article 5 of the Potsdam Declaration provides: "The following are our terms. We will not deviate from these Articles."
- A. The words "unconditional surrender" are used in Article 13 of the Declaration and in paragraph 2 of the Instrument of Surrender. In either case it refers to the surrender of the Japanese armed forces only. That is to say, the Japanese forces were ordered to "unconditional surrender" used in connection with the armed forces.
- B. The meaning of the words "war crimes" used in Article 10 of the said Declaration remains an important issue. We are ready to prove in what sense Japan, that is to say, Japanese responsible authorities, understood the term in issue at the time of accepting the Declaration. Corroborating evidence also will be adduced to prove the general understanding of the term "war crimes" at the end of July or beginning of August 1945 in Japan as well as all over the civilized world. This will show that the said term as known to international law did not include "crimes against peace" and "crimes against humanity." This seems to be necessary in supporting the position of the Defense that this Tribunal has no jurisdiction to entertain Counts invoking Sections (a) and (c) of Article 5 of the Charter creating this Tribunal.
- C. By accepting the Potsdam Declaration, Japan surrendered with respect to the Pacific War, in which she had been engaged. She had no intention to surrender with respect to the Manchurian Incident, the Lake Khasan Incident or the Nomonhan Incident. In order to prove those points, the documents showing that the Manchurian Incident had been settled by 1935, the documents showing that the Khasan Lake Incident or Nomonhan Incident had been settled by specific respective agreements, and the documents showing that a neutrality treaty was concluded between the Soviet Union and Japan in April 1941 will be presented. The appended declaration to the neutrality treaty is very important. It provides in part that "the Soviet Union respects the territorial integrity and inviolability of Manchukuo."
- D. Additional evidence will be produced with reference to the interpretation and application of the Potsdam Declaration.

This will be done for the following reason.

When one party induces the other to surrender while employing certain mode of warfare, it is naturally presumed that the former induces surrender assuming his own particular mode of warfare to be legitimate. If the word “crime” happens to be used in such inducement to surrender, that word should not include such mode of warfare as is being used by that party while inducing surrender.

This we take to be a correct interpretation of any such inducement or declaration. Therefore, the type of warfare which the Allied forces openly employed against Japan should be excluded from the “crimes” provided for in the Potsdam Declaration. This will determine the limit of war crimes to be dealt with in this Tribunal. Records, photographs and many witnesses will be produced in order to show the type of warfare conducted by the Allied Powers.

The prosecution contends that aggressive war has been an international crime for a long time and gives a definition of aggression. In order to support its theory of aggression it goes on to cite various treaties and agreements. As John Bassett Moore has said in his “Appeal to Reason,” it is impossible to define what is aggression. We are not going into a legal argument now. We expect to have an opportunity to discuss legal problems later on. However, we think it is appropriate at this moment to point out certain omissions in the facts by the Prosecution. It first invokes the Hague Convention I of 1907. But this treaty does not make good offices and mediation an absolute duty. The contracting parties are only expected to submit their disputes to good offices or mediation “as far as possible” or “as far as circumstances allow.” The prosecution next refers to the draft treaty of Mutual Assistance, which was discussed at the Fourth Assembly of the League of Nations in 1923. The said draft was dropped at the Fifth Assembly in 1924 and has never become a treaty. Therefore it is not binding on any power. The prosecution refers to the Geneva Protocol of 1924. This was signed by the delegates but since Great Britain withheld ratification, no state ratified it. Thus the Geneva Protocol has never become a treaty. This fact proves that it has been thought too premature as well as too difficult to define and to determine aggressive war as an international crime. The Kellogg-Briand Pact of 1928 does not provide that aggressive war is an international crime.

The Indictment from Count 37 on provides for a group of crimes under the title, “murder,” and charges crimes of murder against the defendants for the loss of lives due to the act of war. The defense contends that the loss of lives due to the act of war does not constitute murder. This, we believe, is an accepted theory of international law and is too obvious to call for any authority. The state of war in this instance came into existence when the first shot was fired. Therefore, we will produce evidence to show that the loss of lives referred to in Counts 37 to Count 44 in the Indictment occurred after the state of war existed.

The prosecution asserts that in all cases of aggressive war those who are in official position should be treated as common felons; that is, murderers, brigands, pirates and plunderers and should be punished as such. It goes on to say that such is a generally recognized principle of international law. Does the prosecution refer to the primitive age in which international law did not exist? Since international law came into existence there has always been a distinction between war as an act of sovereign states and acts of brigands or pirates. This seems to us the first principle of international law.

In case a war is waged by the will of the state, it becomes an important question in international law whether individuals who are in official positions of the state are *ipso facto* criminally responsible. The Allied Powers contend that this World War II was fought by them for the maintenance of international law. We take it, therefore, the Allied Powers will have no objection to the strict interpretation of international law. The prosecution refers to this point several times in the opening statement. It maintains this although it is fully aware of the danger of proceeding without precedents. For our part, we are convinced that international law as it existed from 1928 to 1945 imparts no responsibility to individuals in official positions for the act of the state. Even the new Charter of the United Nations, the latest pronouncement of international law, does not propose such a doctrine. Therefore, we believe that the provisions concerning individual responsibility in this Charter, something which the Potsdam Declaration we submit did not contemplate, are *ex post facto* law. For this reason we will produce evidence to show that international law as it existed during the period indicated by the Indictment did not impute criminal responsibility to individuals for the act of the state.

The Prosecution frequently compares incidents which occurred during the Pacific War with acts of Germany during the European war. It asserts that terrorism and atrocities occurring during the Pacific War were of the same type that Germany committed, and that these acts were not incidental errors on the part of the individuals but premeditated acts committed in pursuance of a national policy. Counsel for the Defense are prepared to show that the central government and high command strongly desired that the rules and customs of war be strictly observed and that civilians and even enemies who had given up arms, be treated humanely. For that purpose "The Battlefield Manual" was issued In January 1943 and distributed to all soldiers, while the Navy on its part endeavored to have these rules and customs of war properly and thoroughly understood by its personnel, and violators were tried by Court Martial. The Army and Navy Chiefs of Command at the front were always emphatic in stressing this point. We must admit, however, that during the later period of the war when the communications with the home country were cut, battlefields isolated, orders from the commanding officers became impossible, food became scarce and the very existence of the Japanese soldiers precarious, or when they met with cruel guerrilla warfare by natives inhumane acts may have been committed. As to the prisoner of war labor of non-commissioned officers and officers, we contend the orders were that such labor should be performed voluntarily. On these matters we are prepared to produce concrete facts in Division 1. Intentional violation of human decency as was alleged to have been committed against the Jews in Germany was never present in Japan. We are prepared to produce evidence to explain the difference between the war crimes of Germany and the alleged acts of the accused.

Division 2 is provided for the purpose of disproving crimes as alleged by the prosecution to have been committed in Manchuria since 1931. It relates to Count 2, Appendix A, Count 18 and Count 27. Count 44 also relates to this division to some extent. There is ample evidence which the accused will present under this division.

The Lytton Report, which the Prosecution presented, says in part: "... the issues involved in this conflict are not as simple as they are often represented to be. They are, on the contrary, exceedingly complicated, and only an intimate knowledge of all the facts, as well as of their historical background, should entitle anyone to express a definite opinion upon them."

In order to show the special conditions in Manchukuo, Japan's special rights and interest in Manchuria and their legitimacy will be proved. Why did Japan acquire special rights and interests in Manchuria? Why did the Japanese go to Manchuria? Japan is a country of small area and a large population. As long as emigration was possible the problem was hoped to be partly solved by that. In 1906 Japan's emigration to the United States was virtually stopped by the so-called "Gentlemen's Agreement." At that time Mr. Jutaro KOMURA, Foreign Minister, spoke at the Imperial Diet as follows: "In order to prevent our people from scattering around remote foreign territories, it has become necessary to concentrate them to this district (Manchuria) and administer them with their joint cooperation -- The Japanese government in consideration of these points will follow the established policy with regard to the immigration to the United States and Canada, and is faithfully enforcing the restriction of immigrants." This declaration has been taken in Japan as having previously been understood by the United States. With regard to Japan's relations with the United States an agreement was reached between Mr. Lansing, Secretary of State of the United States and Mr. ISHII, Japanese representative, in December 1917. It says in part: "The governments of the United States and Japan recognize that territorial propinquity creates special relations between countries, and consequently, the Government of the United States recognizes that Japan has special interests in China, particularly in the part to which her possessions are contiguous." The agreement was made in the form of exchange of notes. The agreement was cancelled later, but before its nullification our people had done much in Manchuria. This achievement cannot be taken away by the nullification of the Lansing-ISHII Agreement.

At that period the authorities in Manchuria maintained their power in cooperation with Japan.

Since 1925 the national rights recovery movement arose throughout China. The situation in Manchuria was vitally affected. In 1928 Chang Tso-Lin was killed and the Manchurian authorities adopted the Chinese Republic flag. As soon as the Kuo-min-tang (Chinese Nationalist Party) stepped into Manchuria, Japanese-Manchurian disputes continuously increased. In 1931 there were more than three hundred pending problems. We will show these facts by evidence.

Japan had a legal right under treaties and agreements to maintain the Kwantung Army in Manchuria in order to protect her rights and interests in the Kwantung Peninsula and Manchuria. In 1931 the total of the Kwantung Army consisted of eight battalions of infantry, two batteries of artillery and one independent garrison (six battalions of infantry), making 10,400 men in all, it being less than the number of fifteen soldiers per kilometre of railway lines in Manchuria, provided for in the additional articles to the Portsmouth Treaty of 1905. The forces under the control of Chang Hsueh-Liang, on the other hand, consisted of 268,000 of the regular army and hordes of irregulars. The Kwantung Army was a small force of 10,400 encircled by more than 200,000 Chinese. Its duty was to protect the South Manchuria Railway, which extended one thousand kilometres, and Japanese nationals numbering one million two hundred thousand scattered all over the vast expanse of Manchuria. Under these circumstances in the emergency that arose it was necessary for the Kwantung Army to take prompt measures of self-defense.

The Prosecution contends the occurrence at Mukden on September 18, 1931, was a planned action on the part of Japan. The defense will produce evidence to prove the true cause of the incident, which resulted in armed conflict. Once a conflict occurred, the Kwantung Army for its own self-defense and for the execution of its own duty had to defeat the Chinese forces. We will show the details of the incident by producing the testament of General HONJO. The

government of Japan did not wish to see the situation aggravated and tried its best to stop the incident, but the situation grew from bad to worse against its will. The truth of this situation and the attitude of the League of Nations and of the United States will be explained by producing pertinent documents, and has already been shown by testimony and documents already presented by the Prosecution.

While the Kwantung Army was fighting with the Chinese forces for self-defense, the inhabitants in Manchuria started a self-rule movement for Manchuria for various motives, such as the consideration for the welfare of the various peoples, anti-communism, the desire of the Mongolian people for independence from the Chinese Republic, the discontentments of the various generals against Cheng Hsueh-Liang, and the desire to restore the Chin Dynasty. In February 1932 the Administrative Committee of the North East provinces was created, and on March 1 the government of Manchukuo was inaugurated. The outline of these activities will be explained and proved.

After the establishment of Manchukuo the Japanese were permitted to acquire Manchukuoan nationality. It is true that some number of the Japanese nationals became officials, and directly participated in the development of the country. But these all were after the new State was created. In September 1931 the Minister of Foreign Affairs and the Minister of War of Japan instructed the Japanese officials in Manchuria not to participate in the establishment of the new State. In other words, notwithstanding the Lytton Report, the birth of Manchukuo was the result of a voluntary independence movement by the inhabitants of Manchuria. Evidence will be produced to prove this fact.

The Manchurian incident was settled in May 1933. During 1935-1936 China was inclined to recognize the *de facto* status of Manchuria. Other countries began to recognize Manchukuo. Especially the Soviet Union, which now sends prosecutors to this Tribunal, agreed to respect the territorial integrity and inviolability of Manchukuo in 1941.

The third division concerns China. The counts relating to this division are counts 3, 6, 19, 27, 28, 36, 45 to 50, and 53 to 55.

The responsibility for the Marco Polo Bridge incident does not lie upon Japan. It will be noted that Japan along with the other powers had a right to station some armed forces in North China and was allowed to hold field maneuvers under the Boxer Protocol of 1901 and its appended notes. Moreover, in this area Japan had other important lawful interests and a considerable number of her nationals residing there. Had the incident been settled locally, as was desired by Japan, the conflict would not have been aggravated to such a magnitude and there would not have arisen any question of aggressive war. Therefore, we will also prove that China was responsible for the enlargement of the incident and that Japan throughout the whole incident adhered to the policy of non-aggravation and tried its best to settle the question locally.

On July 13 the KONOYE Cabinet declared as follows: "Even now the Army will adhere to the policy of non-aggravation and local settlement and will avoid to its utmost effort any action which might lead to a war. For this reason the Japanese Army has approved the conditions submitted by the representatives of the 29th Army signed at 8:00 p.m. of the 11th, and will watch its execution."

But China did not stop hostile acts. The assault at Lanfong, the Kwan An Men incident, the atrocities at Tungchow, etc. continuously occurred. China began to take on an organized war attitude. On July 12, Generalissimo Chiang Kai-Shek ordered a mobilization applicable to a large area. Meanwhile, the concentration of the Chinese forces in North China became increasingly intense. The Japanese forces in Fengtai were encircled and violently attacked by the Chinese forces. On July 27 the Japanese forces in China decided to take up arms for self defense. The actual conditions during this period will be explained and proved by documents and witnesses.

Japan notwithstanding still persisted in the policy of non-aggravation. Chiang Kai-Shek continued to strengthen his forces. On August 15 the Total Mobilization Order was issued. The general headquarters was established; Chiang Kai-Shek himself became commander-in-chief of the army, navy and the air forces. The whole country was divided into four war districts: First War District (Hopei-Charhar), Second War District (Charhar-Shansi), Third War District (Shanghai), Fourth War District (South China), for each of which respective army forces were allocated, and thus a total war basis against Japan was completed.

It can be said that hostilities on a large scale commenced at this time, although even then diplomatic relations between the two countries were continued. Because of the menacing conditions just described, on August 31 Japan sent three divisions to North China in order to safeguard her lawful interests. The name of the Japanese Army in China was changed to the Japanese Forces in North China. The commander of the Japanese Forces in North China was instructed to secure the stabilization of the Peiping-Tientsin area and to break down the warlike intention of the opposition and to bring the conflict speedily to an end. Even at this stage Japan only sought to restore friendly relations and order and tranquility in North China and abandonment of anti-Japanese policy on the part of China.

The Japanese government first designated this conflict “The North China Incident” because it thought its extent could be limited to North China. But it spread to Middle China in August contrary to Japan’s desire, the cause of which will be explained later. China, ignoring the Shanghai truce which was concluded in 1932 by the good offices of British, American and other representatives, constructed military bases in an unfortified area, and concentrated forces of more than 50,000, while the Japanese marines in that area were not more than 4,000, thereby jeopardizing Japanese lives and interests there. Lieutenant OYAMA, company commander of the special marine detachment of the Japanese Navy, was wantonly shot to death by the Chinese Army. On August 15 Japan decided to send troops to Shanghai for the protection of lives and properties of her nationals. It was under such circumstances that the conflict in Middle China started. In other words, it was China that aggravated the incident and expanded its scope and magnitude. We will produce witnesses concerning these facts for the consideration of the Tribunal in determining the responsibility for these hostilities.

This further conflict with the Republic of China was designated as the China Incident and not as the China war. A state of belligerency was not declared nor recognized by either of the parties or in fact by any other power. Actually Generalissimo Chiang Kai-Shek did not declare war upon Japan until the Pacific war broke out in 1941. This should appear, we presume, rather strange to the Occidental mind. The objective of this conflict on our part was to induce the Chinese leaders then in power to reconsider their stand against Japan, thus restoring to a natural and proper state the disturbed Sino-Japanese relations. It was, however, the attitude assumed by the Communist Party of China that actually gave rise to a decided anti-Japanese movement in the greater part of the Republic. Moreover, Generalissimo Chiang

Kai-Shek had come to countenance various activities of the Communists ever since the Sian Incident in which his sensational kidnapping was successfully carried out. The Japanese government regarded this new step on the part of the Generalissimo as a lamentable deviation more or less short-lived. At the inception, there was neither diplomatic rupture nor disrupted treaty relations between Japan and China. Members of the Chinese army who surrendered themselves to our hands were released and those nationals of the Republic of China residing in Japan at that time were not treated as enemy persons but were allowed to pursue their own occupations unmolested. One of our aims in not declaring war with the Chinese Republic was not to restrict the rights and interests of the third powers by the application of rules of war. Nevertheless the hostilities, against Japan's desire, spread far and wide. Consequently it became quite unavoidable that those nationals of neutral Powers who happened to be in the Japanese occupied territories should suffer therefrom to some extent. Hence the conclusion of an agreement known as the ARITA-Craigie agreement between Japan and the United Kingdom.

Had there been waged a declared war the question of application of the Nine-Power Treaty to the situation would never have been raised, for treaties would cease to be in force automatically or at least be suspended during hostilities so far as China and Japan were concerned. As a matter of fact, however, declaration of war was not resorted to by the Republic of China or by the Empire of Japan, thus leading to an anomalous situation wherein the question of application of the said treaty became an issue.

There had occurred in the Orient five very extraordinary happenings within the period of fifteen years between 1922, when the Nine-Power Treaty was concluded, and 1937 when the China incident broke out. The first of the five items is this: The Republic of China, after the conclusion of the Nine-Power Treaty, made it a national policy to oppose Japan and insult her in every way possible, and illegal boycott of Japanese goods was resorted to generally. China went so far as compiling text books for her public schools so that anti-Japanese sentiments were widely disseminated among the younger generation.

The second is: The Communist Internationale which determined its new strategy against Japan during those years, and the Communist Party of China which acted in conformity with the directives of the former; also the acquiescence of the Chiang Kai-Shek regime in the latter's behavior.

The third is: The resolution to reduce Chinese forces adopted at the Washington Conference was not only not carried out but, on the contrary, war lords and military cliques in China raised and maintained huge bodies of troops many times greater than those existing before. Besides, they made extensive preparations for war with Japan by importing modern arms and implements of war in large quantities.

The fourth is: The National power of the U.S.S.R. was expanded tremendously since then. The Union of Soviet Socialist Republics not being a party to the Nine-Power Treaty and never under the commitment of the said treaty, made its pressure felt along the entire Sino-Soviet boundaries extending not less than 3,000 miles. In fact, a very wide area comprising Outer Mongolia was under the influence of the U.S.S.R. although China still claimed sovereignty.

The fifth is: The world economy since the conclusion of the Nine Power Treaty was seen to veer from economic internationalism to national protectionism.

The Nine-Power Treaty is, it must be noted, a treaty without a provision as to expiration. What kind of tales these five happenings tell will be clarified later; evidence to be presented in due course will speak for itself. Here it must be stated, however, that under these circumstances the Nine-Power Treaty had become so unrealistic that its strict application to the situation was impossible. Hostilities were going on, though neither China nor Japan declared war upon the other. In the territory of the Republic of China, whether it was under Japanese occupation or not to carry out the provisions of the said treaty to its very letter was practically impossible. The defense contends that failure strictly to adhere to the treaty in these given circumstances does not necessarily constitute a crime and upon that thesis the defense will prove that the five points above stated indisputably so altered the situations contemplated by the said treaty as to render its effective application nugatory.

The prosecution has made it a point to charge the accused as being responsible for economic aggression. The defense will show that there had been no economic aggression in China. Furthermore, we submit that an aggression in the economic sense does not constitute a crime.

Now about the assertion of the prosecution concerning narcotic drugs. The prosecution avers that Japan caused an influx of narcotics into China and by this means wanted to crush the war efforts of the Chinese on the one hand and on the other turn the proceeds from the sales of the drug into its war chest. We invite the attention of the Tribunal to the fact that here in Japan we have had special experience in the gradual reduction of opium eaters in Formosa. In Formosa a government monopoly and control of the said drug was set up throughout the years when the island was under our jurisdiction and Japan by such policy put an end to illicit traffic in opium and through these means reduced by degrees the number of addicts.

Japan, wherever possible, applied this policy to China where the use of drugs is an ancient and widespread custom principally due to the traffic engaged in by the Western Powers. Concrete facts and figures in this connection will be given as well as to show that proceeds from the sale of opium in China were not utilized by Japan as part of war expenditures. Finally, let it be said that the accused had no connection whatsoever with such matters.

Atrocities perpetrated by some Japanese troops in several parts of China, while admittedly most regrettable, are believed to be unduly magnified and in some degree fabricated. We shall endeavor to clarify this matter by showing the true condition. The Japanese government and the responsible commanders made it a policy to prevent such occurrences and where such deplorable facts came to their knowledge, to mete out due punishment to the perpetrators of the crimes. Maintenance of friendly relations with the Chinese people was and still is one of the salient principles of our national policy. It is quite unthinkable that the accused, some of whom were holding key positions in the Tokyo government or entrusted with important expeditionary forces abroad should lightly commit or disregard such misconduct. Those charges laid upon some of the accused are, we believe, without foundation and we shall leave no stone unturned to prove that none of the accused ever ordered, authorized or permitted such acts or deliberately and recklessly disregarded his legal duty in this connection.

As to the matters related to the Soviet Union, aside from the conspiracy counts, the specific counts are 17, 25, 26, 35, 36, 51 and 52. That these accusations are beyond the pale of this Tribunal has been already pointed out heretofore. Especially the Changkufeng and the Nomonhan Incidents are closed issues between the Powers concerned. This is clear beyond peradventure of doubt by the conclusion of the treaty of neutrality between Japan and the

USSR in April 1941. Both the Changkufeng Affair and the Nomonhan Incident resulted from ambiguities concerning the boundaries between Manchuria and the USSR. Needless to say these border incidents do not fall in the category of an aggressive war. The frontiers between Manchukuo and the Soviet Union once defined, the outstanding difference were settled then and there. That the boundaries Japan defended were ultimately right can be verified by the evidence which we shall present. It may be added here that these disputes had no relation to the policy of the Tokyo government or the plans of the Kwantung Army. True circumstances of our despatch of troops on these two occasions will surely demonstrate that Japan had no intention of waging war against the USSR. We shall also show that the Japanese government followed an "absolute pacific policy vis-a-vis Russia."

The prosecutors representing the Soviet Union endeavored to establish an aggressive intention on the part of Japan by displaying the 1941 annual program of the General Staff. But let it be remembered that the said program was hypothetical and was not to be put into execution unless the hypothetical war, for which the program was made, materialized. To our mind, any Power may devise such programs without arousing the suspicion of others. This is purely a matter all the fighting services of all nations are duty bound to do. Therefore, we can never conclude from the mere existence of such a program ominous intention by any government. As stated in my earlier remarks, military preparations in themselves will not prove the existence or non-existence of an aggressive intention unless they are compared with similar preparations of other Powers. We will prove that the USSR had a plan of operation in 1936 by which simultaneous attacks upon Germany and Japan were contemplated. After 1939 when the Nomonhan Incident occurred, the Soviet armed forces operating east of Lake Baikal were to be doubled over those maintained by us in Manchuria and Korea. The prosecution also stressed the presence of Japanese reinforcements in Manchuria during 1941. Japan kept some forces in Manchuria after 1941. That is quite true. However, those forces were meant solely for our defense. In support of this assertion there will be no better evidence than the above stated reinforcement plans of the USSR coupled with the maneuvers by that army along the borders of Manchuria and the USSR during that period. Special mention should be here made that tremendous forces of the Soviet Union trespassed across the borders from the south of Hutung in the early part of August 1945 and actually invaded Manchuria. The decision for such an aggression was made as early as February 11, 1945 at Yalta. This was clearly in violation of the neutrality treaty still in force between the USSR and Japan. That our defensive measures adopted at that time in Manchuria were justified will be conclusively shown.

We proceed to division V, the Pacific War, involving Counts 1, 4, 5, 7 and 16, Counts 20 to 24 inclusive, Counts 29 to 34 inclusive, Counts 37 to 43 inclusive, and Counts 53 to 55 inclusive. For more logical presentation the subject matter of some of the above counts will be treated separately later in greater detail.

There existed before the war close relations between the three Powers, Germany, Italy and Japan. This relationship was by no means made in anticipation of the Pacific War. We shall submit adequate evidence in order to prove this point. The seventh Congress of the Communist Internationale planned its primary destructive objectives against Germany and Japan and consequently they were obliged for their self-protection to cope with this situation. Especially for Japan, this was a really alarming development. Communism was engulfing our neighbor state, China, instigating political and social revolution. Assistance was extended from the Soviet Union in the shape of Russian technique of revolution as well as personal emissaries. These activities have been in progress ever since 1923 when Dr. Sun Yat-sen and

M. Joffe issued a joint declaration expressing mutual sympathy between the two parties. This was an extremely dangerous situation for the well being of the Japanese Empire. Thus followed the joint defense against communism by Japan, first with Germany and then with Italy. The proposal of Joint defense of China and Japan against communistic activities was enunciated in three principles by Mr. HIROTA, Foreign Minister. These principles were included later in the KONOYE statement in 1938. In defending against the menace of communism, since the interests of Germany and Japan were identical, the two Powers concluded an agreement on November 25, 1936, known as the Anti-Comintern Pact. Needless to say, this Pact was not made in anticipation of the Pacific War. In Article 2, the Pact stipulated that, "The High Contracting Parties will jointly invite third States whose internal peace is threatened by the subversive activities of the Communist Internationale to adopt defensive measures in the spirit of this agreement, or to take part in the present agreement." Again, the so-called secret understanding attached to this instrument never aimed at aggression against any third party. The understanding merely provides that the parties will not take such measures as may lighten the burden of the USSR if and when one of the parties should become the object of an unprovoked attack by it, and is entirely negative in nature. In 1939 negotiations were entered into in an attempt to strengthen the Anti-Comintern Pact, but they were abruptly ended by the unexpected conclusion of the German-Soviet non-aggression treaty. These negotiations did not have for their object an unfriendly attitude toward Great Britain and America.

The Tri-Partite Pact between Japan, Germany and Italy was given wide publicity, but its stipulations are quite simple. War between Japan and America was also never made its object. Rather, it was the very avoidance of war between America and Japan that was contemplated in the agreement. The evidence will prove that there was no effective collaboration between Germany and Japan and Italy and will emphasize that Germany urged Japan to enter the war against Russia. This Japan refused to do.

Germany sought the assistance of Japan in their war against Britain. Japan refused to cooperate with Germany, but acted independently. Germany negotiated the Tri-Partite Pact to keep the United States out of the European War. This was not accomplished. The evidence will show that General Marshall stated in his annual report to the President of the United States during the war that there was no military cooperation between the two countries, that is, Germany and Japan.

Japan's planned economy and military and naval preparations prior to the fall of 1941 were defensive in nature and also not undertaken in anticipation of the Pacific War. Comparison of the British and American navies and their programs with that of Japan, as well as the study of the annual programs of the Japanese naval command, will conclusively disclose *per se* the latter's non-aggressive purpose. The prosecution asserts that the Japanese Navy constructed in the mandated territories fortresses and established bases of operations in violation of the terms of the mandates and treaties. But this, too, we maintain is without foundation. A fortress must be provided with specific defensive facilities against attacks from land, sea and air, while a base of operations is incomplete unless it is equipped with supply facilities for providing the fleet in action. We shall show that what were installed actually were either communication facilities of peaceful nature or temporary establishments for naval maneuvers, all of which were permissible.

Much of the atrocities and cruelties alleged to have been committed by Japanese forces against prisoners of war did not come to the knowledge of many of those accused until they were disclosed in this Tribunal. Others had no authority to restrain them even though they

were aware of the fact. Again, others did their best to restrain and punish the perpetrators of such crimes. Evidence will show that there was neither the opportunity nor available means to stop them before the crimes were committed. We shall submit evidence that no defendant ever formulated a common plan, or ordered, or authorized or permitted atrocities or deliberately and recklessly disregarded his legal duty to take steps to prevent observance of the laws and customs of war in this respect.

Coming now to the causes of the Pacific War itself, a situation inviting the closest and most impartial scrutiny, we shall prove that it ensued because of the supreme necessity of Japan to invoke the right of self defense. With your permission, let us remind this Honorable Tribunal that since 1937 Japan was unwittingly involved in large-scale hostilities tantamount to war with China, but which were treated by the world at large as being "short of war." We naturally expected that third powers would recognize this peculiar situation. In fact, Great Britain did so in the joint declaration with the Japanese Government dated July 22, 1939, issued as a result of the Tsientsin Incident and declared that His Majesty's Government fully recognized the actual situation in China where hostilities on a large scale are in progress. In what way the Washington Government regarded this situation we were not sure, but suddenly on July 26, 1939, notification of abrogation of the Treaty of Commerce and Navigation, a firm basis of the trade relations between the two countries since 1911, was received. Misunderstanding began to grow. From that time on the United States brought to bear upon Japan every kind of pressure and intimidation. The first was economic pressure. The second was the help extended to the Chiang Kai-Shek regime with which Japan was in a life and death struggle. The third was the progress of encirclement by the United States, Great Britain and the Dutch East Indies; in concert with China a ring was thrown and tightened by them around Japan. These three steps after 1939 were adopted one by one, their intensity increasing in vigor as time went on. A typical example of economic pressure thus brought to bear upon us Japanese will be recited here. In December 1939 the moral embargo was extended in scope, and in addition, aircraft and its equipment and instruments and machinery for construction of aircraft and for refining gasoline were added to the prohibited list. During July 1940 the Washington Government put an embargo on scrap iron. Considering the system of iron production then prevailing in Japan, scrap iron was an item of crucial importance. A heavy blow was thus dealt to this key industry of Japan. In August of the same year, the United States further put restrictions on the export of gasoline for aviation purposes. Upon the whole, Japan's yearly need of oil was estimated at 5,000,000 tons, the very minimum required for the nation's subsistence including her national defense. Since its annual home production of this fuel was not more than 300,000 tons, this deficit had to be made good with imports from abroad. By this time, the only available source was the Dutch East Indies. Accordingly, a mission headed by Mr. I. KOBAYASHI, Minister for Commerce and Industry, was sent there and later Ambassador YOSHIZAWA was ordered to continue the thread of negotiations with the Dutch East Indies authorities at Batavia. But all those efforts came to naught, because the leaders of the Dutch Indies were working in close concert with American and Great Britain. The same kind of obstacles were also interposed by the authorities of French Indo-China and Siam, and our normal and necessary imports of rice and rubber were thus hampered.

Now about the second point, assistance extended to the Chiang Kai-shek regime. The United States granted on November 20, 1940, an additional loan of \$50,000,000 to the Chungking Government, apparently in retaliation for the treaty between Japan and the Wang Ching-Wei regime which was concluded the same day. Moreover, the United States authorities made it known that a further sum of \$50,000,000 was contemplated, to be offered for use in

stabilizing Fapi, the Chinese currency. Following this step, the London Government also made it known that a grant of £1,000,000 would be forthcoming. These are but a few of the examples, to say nothing of the continuous supply of materials to Chungking by the London Government. As soon as the rainy season came to a close that year, Great Britain reopened the Burma Road to traffic and directly forwarded arms and munitions to the Chiang regime. In addition, the French Indo-China route was being utilized by the other nations as a line of supply to the Chungking Government. In 1941 application of the Lend Lease Act was extended to China. We shall produce direct evidence of these facts.

Here we come to the third point, an iron ring of encirclement thrown around Japan by the several powers. In December 1940, the flower of the American Pacific Fleet was concentrated in the Hawaiian waters, constituting a demonstration against Japan. The British Government on November 13 of the same year established at Singapore the headquarters of the Far Eastern Command, all of Malaya and Burma as well as Hongkong coming within its orbit. That government also began to undertake a formidable military expansion, a system of organizing British possessions in East Asia into a close unit with Australia and New Zealand. Conferences participated in by representatives of America, Great Britain, the Dutch East Indies and the Chiang Kai-shek regime took place in rapid succession during those days. A parley in Manila, held in April 1941, among the British Commander-in-Chief in the Far East, the United States High Commissioner in the Philippines, the United States Commander-in-Chief of the Asiatic Fleet and the Dutch Foreign Minister, attracted our attention. Further, military councils were held between the delegates of Great Britain and Generalissimo Chiang Kai-shek at Singapore about the middle of June. Particulars of these parleys will be disclosed by evidence.

Reacting to these numerous manifestations, the Government of Japan hastened to take steps in order to avoid the imminent calamities. The Ambassador of Japan at Washington was requested since the spring of that year to do his best so that the deplorable tension might be ended and relations between America and Japan smoothed out. Parleys between the United States Chief Executive and the Japanese Ambassador, negotiations between the Secretary of State and the Japanese Ambassador were incessantly held, these sessions reaching several score in number. The Tokyo Government exerted every effort in order to effect a peaceful solution of all outstanding differences. The Japanese Premier offered to meet and negotiate directly with the Chief Executive of the United States somewhere in the midst of the Pacific in an attempt to settle the matter peacefully once and for all. Another envoy was dispatched to Washington to this end. A ministerial change en bloc was undertaken in the middle of July to carry through successfully the Japan-America negotiations, this being the last final step that an independent sovereign state could take for the purpose of diplomacy. However, all of these efforts were of no avail. On July 25, 1941, the government at Washington took steps to freeze all our assets within the United States. This resulted from a misconstruction of Japan's peaceful sending of troops to French Indo-China. Britain and Dutch East Indies also followed suit immediately, although at the time treaties of commerce and navigation were still in force between Japan and Great Britain and the Netherlands, so that the freezing of Japan's assets by Great Britain and the Netherlands was in violation of those treaties.

With your permission, let us again remind this Honorable Tribunal that Japan was quite unable to keep its population alive by the products raised within the Empire alone. Japan had to obtain necessary commodities by foreign trade. By the freezing of assets by the United States, Britain and the Dutch East Indies, more than half of Japan's foreign trade disappeared and the toil of eighty years' standing was wiped out. These were the results of the foregoing

steps legally or illegally taken by America, Great Britain and the Netherlands. The inalienable right to live was deprived from the Japanese people. Just about that time, America at last put an embargo upon oil by an executive order issued on August 1st, making good the veiled notification given to Ambassador NOMURA on July 24th. Japan's navy was thus to lose mobility after her oil in stock was exhausted; solution of the China Incident was made practically impossible; Japan's defense was emasculated. Hereupon the stark question of self-defense presented itself before the whole nation as a cold and hard fact. This demanded immediate solution.

In short, fundamental factors justifying the exercise of the right of self-defense were entirely complete by that time. Notwithstanding, Japan did not exercise this right at that time. On the contrary, it was still willing to bear the unbearable, endeavoring to the utmost to eliminate somehow factors that might lead to a *casus belli*. Its strenuous efforts to this end will be fully proved by evidence, at once strong and convincing.

Japan's will to peace, Japan's sincere efforts to attain peaceful settlement did not bear fruit. America's note on November 26, 1941, made it finally crystal clear that not one single factor contributing to a *casus belli* could be settled by pacific means. Thereupon, the Japanese Government, after threshing out the opinion and observations of its various departments, and after the utmost care and deliberation, was forced at last to resolve upon recourse to the right of self-defense. This was on December 1st. However, even after the actual date on which the use of this right was decided upon, the war order issued contained an explicit proviso canceling all naval and military operations if a compromise should be effected between Japan and the United States. In that case, the combined fleet was to come back to home waters.

The prosecution is of the opinion that Japan was defective in communicating her intention to fight and that this must constitute a crime. The defense maintains the following facts: In the first place, due explanation will be developed concerning the time in which the Japanese note was handed to the United States together with particulars about this diplomatic procedure. On December 6, 1941, Washington time, the Japanese Foreign Ministry sent a dispatch to the Japanese Ambassador at Washington intimating that a note in English to be addressed to the State Department was ready.

Though the time in which the note in question was to be presented would be some time thereafter, they should be careful in the preparation of the document and be always in readiness to handle any matters in this connection, the dispatch instructed. All these telegrams were intercepted by the United States. Now, that note comprised fourteen parts in all. Our Embassy at Washington was in receipt of thirteen parts on the evening of December 6. The United States intercepted that part of the dispatch by 9:30 p.m. December 6, and the President gave them personal perusal. About the time when the said part was received, another dispatch arrived at the Embassy indicating the time at which the important note should be delivered; that time was one o'clock in the afternoon of the same day. Whereupon, Ambassador NOMURA hastened to make an engagement with the Secretary of State, Mr. Cordell Hull, to meet him at one o'clock p.m. Had the note been delivered as was intended at one o'clock p.m. December 7, 1941, the delivery would have preceded the attack at Pearl Harbor, which took place at 25 minutes past 1:00 p.m., Washington time. But the Embassy's deciphering and typing took so much time that, as the prosecution pointed out, Ambassador NOMURA was unable to arrive at the State Department until 2:00 p.m. and handed the note at 2:20 p.m. If the Ambassador could have delivered the note on his arrival at the State Department, the time of delivery would have been thirty-five minutes after the attack at Pearl

Harbor, but as the Ambassador was kept waiting for twenty minutes, the delivery of the note was fifty-five minutes behind time.

As the Tokyo Government had sent the greater part of the dispatch the night before, and the remaining part was sent so as to be received early in the morning in order that the note should safely be delivered prior to 1:00 p.m. December 7th, that is, before the commencement of military operations, and if the routine business of the Embassy had gone smoothly, notification would have been made as was anticipated, some time before the attack. But owing to circumstances beyond the control of Tokyo, the delivery of the note was delayed as above stated. These facts the defense will prove in due course.

Besides, we shall also try to prove the following facts with a view to providing this Honorable Tribunal with materials which we hope will be useful for its decision whether the attack on Pearl Harbor was a surprise attack or not. The State Department authorities considered Japan's note to the United States dated November 20, 1941 as the last one, and after November 26 the whole matter was thrown into the lap of the fighting services. On the morning of November 27, 1941, the highest official of the State Department stated that the matter of relations with Japan was in the hands of the Army and Navy. On the same day the Chief of Naval Operations and the Chief of Staff sent war warnings to the forces in Hawaii.

As previously stated, the American authorities deciphered the Japanese note, excepting the last part, by the evening of December 6th, and this last part was deciphered December 7th early in the morning, the President being in receipt of it at about 10:00 a.m. the same day.

The United States Departments of War and Navy were both in possession of intelligence suggesting that diplomatic rupture was at hand, and by conjecture that an imminent attack was to be anticipated. The Hawaiian Department was also in possession of an instruction that the policy to induce Japan to commit the first overt act should not be construed as restricting the department to a course of action that might jeopardize its defense. Also it was directed to undertake reconnaissance prior to Japanese hostile action. No wonder that between 6:33 and 6:55 a.m. December 7 (Hawaiian time) the U.S. Navy shot and sank a Japanese midget submarine in the contiguous waters. We are adducing the above facts in order to show that the Pearl Harbor attack at 7:55 a.m. on December 7 (Hawaiian time) did not come as a surprise attack.

It is contended by the prosecution that the Japanese note in question does not amount to a declaration of war with the reasons assigned as stipulated in Article I of the Hague Convention III. In interpreting a document, circumstances giving rise to it must be weighed carefully to say nothing of its letter. Moreover, a document of this nature must always be studied as a whole, and not judged only by its wording and sentences. In the political atmosphere prevailing at that time, some of the responsible American authorities observed, as was stated before, that after November 26 matters were put into the hands of the fighting services. The Japanese note is a diplomatic document of considerable length consisting of not less than 2,400 words, which must be treated as a whole. We find in the Japanese note the following passages criticizing the American stand toward Japan and making it clear that there was no means left for Japan but to resort to arms. After confessing the difficulty the Japanese Government experienced in understanding the American attitude, the note observes: (I) "The peace of the world may be brought about only by discovering a mutually acceptable formula through recognition of the reality of the situation and mutual appreciation of one another's position. An attitude such as ignores realities and imposes one's selfish views upon others

will scarcely serve the purpose of facilitating the consummation of negotiations.” (II) “The American Government, obsessed with its own views and opinions, may be said to be scheming for the extension of the war.” (III) “Whereas the American Government, under the principles it rigidly upholds, objects to settling international issues through military pressure, it is exercising in conjunction with Great Britain and other nations pressure by economic powers. Recourse to such pressure as a means of dealing with international relations should be condemned as it is at times more inhuman than military pressure.” (IV) “All the items demanded of Japan by the American Government ... ignore the actual conditions of China, and are calculated to destroy Japan’s position as the stabilizing factor in East Asia. This demand of the American Government, falling as it does in line with its above-mentioned refusal to cease from siding [with] the Chungking Regime, demonstrate[s] clearly the intention of the American Government to obstruct the restoration of normal relations between Japan and China and the return of peace in East Asia.”

Briefly, the above parts of the note make plain in the position of the Japanese Government, being deprived of the hope of further negotiation, that it was forced to have recourse to the last final step for the very sake of its self-defense. On the evening of December 6, 1941, even upon reading thirteen parts of the Japanese note, the President said: “This means war.”

At the end of the note it was pointed out that “the earnest hope of the Japanese Government to adjust Japanese-American relations and to preserve and promote the peace of the Pacific through cooperation with the American Government has finally been lost. The Japanese Government regrets to have to notify hereby the American Government that in view of the attitude of the American Government, it cannot but consider that it is impossible to reach an agreement through further negotiations.” This was tantamount to severance of diplomatic relations and in the light of the tense situation then existing is unmistakable notification of Japan’s intention of commencing war.

Because of necessary limitations, only some of the most important issues have been touched upon in my present statement. There still remain numerous others but these have been deferred for treatment in the opening statements to be made later at the inception of several division of the defense case as I have previously outlined.

Mr. President, and Members of this Tribunal, I hereby beg your permission to express my sentiment of profound thanks for the generosity and patience with which you have given a fair hearing to the lengthy remarks I have made on behalf of the accused. We shall now go forward and present evidence of importance in great abundance. It is our firm belief that it will be worthy of your esteemed credence and consideration.

Truth we all here seek is not a matter of proving that one party is entirely right and the other absolutely wrong. Truth in the human sense often envelops itself with human frailties, but we must plumb, even though painfully, but with impartiality, the deeper causes that prompt modern global wars. The way to peace must eradicate the vices underlying the present world. Whether the tragedy of modern wars might be due to racial prejudice or unequal distribution of natural resources or mere misunderstanding between governments or to the cupidity and covetousness of the favored or the less happy peoples, the cause must be ferreted out in the interests of humanity.

By finding the true and deeper cause or causes of this war and incidents during the period indicated by the prosecution, the guilt or innocence of the accused can be fairly determined,

serving at the same time to guide the present and future generations in the direction and endeavor for a lasting world peace.

CHAPTER 2: GENERAL OPENING STATEMENT B

Defense rebuttal of the prosecution's interpretation of international law presented by Takayanagi Kenzo

Originally scheduled for presentation on February 24, 1947 (Session 166) but rejected; read on March 3 and 4, 1948 during defense summation (Sessions 384 and 385)

As we noted in the Introduction, this portion of the general defense opening statement was rejected in its entirety. The reason for rejection was the same as that given when parts of Kiyose's opening statement were excluded, i.e., that they raised objections to the legal foundation of the IMTFE Charter. Takayanagi's statement begins with the following rather abrasive sentence.

We propose, therefore, to discuss the criminal provisions of the Charter mainly in their relation to international law, with a view to refuting *seriatim* and as a whole the interpretations placed upon them by the Chief of Counsel in his opening statement made on June 4, 1946.

Since the Tribunal had already rejected a motion pertaining to jurisdiction submitted by Kiyose in May 1946, it must have viewed the first part of Takayanagi's statement as an objection similar to that raised in Kiyose's motion. Unless it rejected the offending portion of Takayanagi's statement as well, the proceedings would have been totally undermined. However, the notice of rejection was accompanied by a comment to the effect that Takayanagi would be permitted to read his statement during the defense summation. While he waited (for an entire year) for the opportunity to present his statement, Takayanagi made major revisions to his manuscript. The final product was an authoritative treatise on international law, which is twice the length of the original statement. Reading it, one can sense his determination and ardor.

The decision about which version of Takayanagi's statement to include in this book proved to be a difficult task. The original version presents fewer challenges to the reader in that it is shorter, and the citations and illustrations therein are more concise. Because it is shorter, Takayanagi's thesis is easier to follow. However, we selected the revised four-part version, since it is a more forceful attack on the prosecution's opening statement, and since it is imbued with Takayanagi's enthusiasm for his work (he later included it in his list of works). We ask readers to bear with the large number of citations and references, and the complexity of his argument.

As readers will note, Takayanagi's statement is divided into two parts. The first part is a rebuttal of Chief Prosecutor Keenan's interpretation of international law (presented on June 4, 1946), intended to serve as part of the defense opening statement. The second part was written after the presentation of the prosecution's summation. The chief argument in the first part is an important one, i.e., that both Japan and Germany may have been defeated in World War II, but the actions taken by the two nations prior to defeat were in no way similar, nor was their post-defeat legal

status. Furthermore, as we mentioned in the Introduction, Takayanagi insists that the term “stern justice” in Article 10 of the Potsdam Declaration be translated into Japanese as “trials,” not as “severe punishment,” as had been done. This seems, at first glance, to be an issue that involves translating a term correctly and consistently, but there was trenchant irony in this argument. The IMTFE was, after all, a ceremonial lynching motivated by a desire for vengeance. It was a Tribunal only in name.

Equally significant is the painstaking research done by Takayanagi on international law in the context of the 1928 Pact of Paris (Kellogg-Briand Pact), in connection with the definition of “aggressive war.” Awakening to one of its deficiencies, i.e., the application of ex-post-facto law, the IMTFE leaned heavily on the Pact as the basis for its legal argument. Some Japanese scholars who specialize in postwar history have lauded the Pact of Paris for its ethical objectives, as well as for its legal effectiveness, and have even castigated Japan for its (alleged) violations of it. But Takayanagi demonstrates, in his careful analysis of the Pact, that it is not at all praiseworthy, either in legal or ethical terms.

Mr. President and Members of the Tribunal, with the Tribunal’s permission I want to read defense document 2987. I represent all the defendants except the accused HASHIMOTO and MATSUI.

Law is a common consciousness of obligation.

Criminal law is a common consciousness of obligation coupled with an obligation to suffer penalties if it is disregarded.

Statesmen perform their transcendently important functions under a common consciousness of obligation under international law.

But statesmen have not hitherto performed their functions under any common consciousness of obligation to suffer the arbitrary penalties of military law in case the obligations of international law are broken.

The absence, as a patent fact, of any such common penal consciousness, prevents the existence of such a penal law. Whether there ought or ought not to be such a consciousness of penal liability is irrelevant. In the absence of such a law, the imposition of such penalties would be nothing but lawless violence.

If any of the accused conceived, like Professor Spykman and Mr. Walter Lippman, world politics and diplomacy in terms of military strategy, and ever conspired with others to promote the Triple Military Alliance (which to Spykman lay in the logical sequence of world events), or to establish a Greater East Asian Sphere of Common Prosperity in those terms of military strategy alone, such behavior might most certainly be offensive to the Soviet Union or the United States or

Great Britain. Such an attitude towards world politics is indeed incompatible with the tenor and spirit of the New Constitution of Japan which provides for her total disarmament and is inspired by the ideal of abolition of the institution of war itself. But such political behavior, however unpalatable to enlightened minds, falls, in our submission, within the sphere of freedom of opinion and of combination which has not been banned nor declared a criminal offense by the law of nations. If any act done by the Government of Japan was illegal under international law or was declared so by an international body to whose determination she had agreed to submit, or, if Japan was defeated in her war, the entire nation would have to bear the consequences. She must pay reparations or indemnities or be deprived of territory as the case may be. In such cases the political responsibility of her leaders to the nation for their mistakes in policy would indeed be serious. However, whether their acts constitute criminal offenses on the part of such leaders by the canons of international law is entirely a separate and distinct question. If they do constitute such offenses, American, British, and Soviet leaders in similar situations should also be subjected to penalties provided by international law. If they do not constitute such offenses by that law these accused should be pronounced "not guilty." The accused must, in our submission, be declared innocent, unless it is proved beyond a reasonable doubt that they committed some criminal offense known to the established law of nations.

If the law of crimes provided in the Charter had been designed as an act of force, a fiat issued irrespective of the terms of the Instrument of Surrender and of the well-recognized rules of international law, it would be futile for the defense to discuss the law of the Charter in the light of that law. Judging from the opening statement of the Chief of Counsel, however, that is not the position taken by the prosecution. Its contention is that the accused should be declared "criminals" not because their acts fall under the formula of crimes unilaterally decided upon by the policy of the Allied Governments, but because they constitute criminal offenses under the law of nations. The prosecution, therefore, endeavors with an ingenious display of learning and much logical acumen to prove that the law of crimes laid down in the Charter is declaratory of the current rules of international law. The defense readily agrees with the prosecution that the law of the Charter ought to be interpreted in the light of international law. They flatly deny, however, that the said law of crimes is declaratory of the law of nations.

It is a source of encouragement to the defense that the Nuremberg tribunal rejected some of the interpretations placed thereon by the prosecution. It is respectfully submitted that inasmuch as the factual and the consequent legal situations in Germany and Japan are entirely different, the Tribunal here has the broader task of deciding on the relations between the Instrument of Surrender and the law of the Charter, and that the Charter, contrary to what was the case at Nuremberg, should serve only as a convenient guide for ascertaining the real rules and principles of international law, under which latter alone the guilt or innocence of the accused should be decided.

We propose, therefore, to discuss the criminal provisions of the Charter mainly in their relation to international law, with a view to refuting *seriatim* and as a whole the interpretations placed upon them by the Chief of Counsel in his opening statement made on June 4, 1946 (Record, pp. 383-475, especially pp. 394-435). As far as possible here we shall follow the order in which the

Chief of Counsel developed the thesis of the prosecution, and divide our discussion into the following eight sections:

1. The Instrument of Surrender and the Charter.
2. Conspiracy.
3. War of Aggression.
4. War in violation of International Law, Treaties, etc.
5. Murder.
6. "Conventional" War Crimes.
7. Personal Responsibility.
8. The new doctrine of international law proposed by the prosecution.

The Instrument of Surrender and the Charter.

The judgment in the Nuremberg trial concerning the law of the its charter states as follows: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered: and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world" (Transcript, p. 16,871).

The German Government ceased to exist in May 1945, through conquest by the Allies, or by what is commonly known as *debellatio* in the language of the law of nations. The Allied Powers could, therefore, exercise rights of sovereignty in the territories over which they had complete control. They could govern the country in whatever way they pleased. They could, if they liked, behave as an absolute monarch like Louis XIV. They could, if they were so minded, set up a Tribunal to punish those persons they disfavored by laying down an *ex-post-facto* law, the rule of abstention from such legislation being a principle of justice not absolutely binding on their sovereign authority (Transcript, p. 16,871). Or perhaps they might have gone further and disposed of them by executive action without any trial at all. At least such an exercise would not contravene the tenets of the law of nations. It was therefore: "not strictly necessary for the Tribunal to consider whether or not the planning, preparation or initiation of an aggressive war was an international crime involving personal responsibility before the conclusion of the London Agreement" (Transcript, p. 16,871).

The discussion of international law in the Nuremberg decision is, therefore, a sort of *obiter dictum*, a display of learning which was not strictly necessary for the judgment itself. That, at least, is the doctrine on which the Nuremberg decision is based. We respectfully direct the attention of this Honorable Tribunal to the undoubted fact that the legal relation between the Government of Japan and the Allied Governments is altogether on a different footing from that subsisting between Germany and the Allies.

The powers of the Allied Governments are indeed comprehensive, yet those powers are not unlimited. General MacArthur is invested with the supreme power only in so far as its exercise is deemed proper and necessary for the effectuation of the terms of the Instrument of Surrender.

The Allies as represented by him are not, therefore, in a position similar to that of Louis XIV, but one resembling that of modern constitutional monarchs like William and Mary.

This basic legal distinction between the position of Germany and that of Japan is, of course, owing to the circumstances upon which the armistice was predicated. Unlike Germany, Japan was not at the time of its surrender overrun by the Allied forces. The Japanese mainland was still unoccupied and Japan was then in a position to offer strenuous armed resistance for some time to come, necessarily involving losses to the Allied forces. The Japanese Government consented in such circumstances to accept the peace offer of the Allies, the “terms” of which are laid down in the Potsdam Declaration. The Instrument of Surrender formally and expressly referred to the terms of that Declaration. The document states: “We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever actions as may be required by the Supreme Commander for the purpose of giving effect to that Declaration.

“The authority of the Emperor and the Japanese Government to rule the State shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender.”

The document styled the Instrument of Surrender is in the nature of an international agreement by which not alone the unconditional surrender of the Japanese armed forces but several other terms are provided which are binding on the contracting parties. If Japan’s obligations to the Allied Powers under the Instrument are not unlimited; but confined to the terms of the Instrument of Surrender, it naturally follows that, unlike the situation in Germany, there are certain limits to the demands which the Allied Governments can make of her. Japan is in duty bound to perform all the demands made by the Allies within those limits but, at the same time, it has a right to insist that those limits shall not be overridden. If so, there are corresponding duties involved which the Allied Powers too must observe. For no legal relation can be unilateral. And the criteria for those reciprocal rights and obligations are set forth in the terms of the Potsdam Declaration constituting part and parcel of the Instrument of Surrender.

Do not the noble words of the Supreme Commander for the Allied Powers at the time of the surrender proceedings in Tokyo Bay stress the high importance of the strict observance by the victor and the vanquished alike of the understanding embodied in the Instrument of Surrender: “It is not for us here to meet, representing as we do a majority of the people of the earth, in a spirit of distrust, malice or hatred. But rather it is for us, both victor and vanquished, to rise to that higher integrity which alone benefits the sacred purpose we are about to serve, committing all our people unreservedly to the faithful compliance with the understanding they are here to assume.”

The juridical basis on which this trial in the International Military Tribunal for the Far East is conducted lies in that term of the Potsdam Declaration, embodied by reference in the Instrument of Surrender, which says: “[S]tern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners of war.”

“WAR CRIMES”

Now, we respectfully request the Tribunal to consider the interpretation of the term, “war criminals,” in the above passage — not at this stage of the proceedings from the point of view of jurisdiction, but from the entirely different one presented by the interpretation of the law of the Charter.

1. “War Crimes” and “War Criminals” are well-established terms in the law of nations. War crimes, according to Oppenheim, are such hostile or other acts of soldiers or other individuals as may be punishable by the enemy on capture of the offenders (Oppenheim, *International Law*, Vol. II, 5th Ed. (1935) edited by Lauterpacht, pages 452-3). Here “war crimes” is not used in the moral sense of the term but only in a technical legal sense. It comprises violations of certain recognized rules regarding warfare committed by members of the armed forces and other persons, including the ill-treatment of prisoners of war, all hostilities in arms committed by individuals who are not members of the armed forces; espionage and war treason, and marauding acts. War crimes are acts committed during the war, especially in the field of operations, and usually dealt with summarily by military courts. Minor divergence of juristic opinion may exist regarding categories to be comprised in the term “war crimes.” They certainly do not comprise any act committed prior to the outbreak of a war, though they may be connected historically with a war. When this technical term appears in diplomatic correspondence, it must, unless the contrary be shown, be construed in the technical sense, according to the well-known canon of legal interpretation.
2. This construction is further justified by the ensuing phrase, “including those who have visited cruelties upon our prisoners of war.” The maltreatment of prisoners of war is but a type of the “war crimes” in the technical sense of the term.

That this, the ordinary and accepted meaning of “war crimes,” is the meaning intended by the Potsdam Declaration, is supported by the fact that when that instrument means to include such a special category of those crimes as the treatment (possibly also by civilians) of prisoners of war, it carefully says so, and specifies them as within its scope. If it was really intended that the term be used as comprising the so-called “crimes against peace” and “crimes against humanity,” that fact, not merely the maltreatment of prisoners of war, would have been particularized in the qualifying phrase.

3. This construction is further justified in the light of the so-called “warnings” addressed to each of the Axis nations by Allied governments and their leading statesmen (Cf. Glueck, the Nuremberg Trial and Aggressive War, 59 *Harvard Law Review* 332, 418, 419, note 75).

A careful study of the declarations and statements made by various governments and their leaders, keeping in mind the background of the occasions on which they were made, would reveal that when they speak of crimes alleged to have been committed by the Axis nations they are speaking of acts committed during the progress of war, such as atrocities to the

civilian population in occupied areas and the maltreatment of prisoners of war. None of them, so far as we are aware, refers to the so-called crimes against peace. Even the reference in the Moscow Declaration of November 1, 1943, to “major criminals whose crimes have no geographic location” is shown by its context simply to mean persons in authority whose orders were executed “not only in one area or one battlefield but affected the conduct of operations against several of the Allied armies,” clearly referring to the violations of the law of war, not to the so-called “crimes against peace.” It seems that the said Declaration was taken as the basis of the London Agreement of August 8, 1945, by an extensive construction which, it is submitted, deviated from the natural interpretation of the Declaration in view of its historic context. At any rate it was a declaration addressed solely to Germany and not to Japan, and the express term of the Potsdam Declaration of a later date makes it clear that the Moscow Declaration cannot justify an interpretation unilaterally modifying the natural meaning of the phrase “war crimes.” This is corroborated by a statement made by Professor Sheldon Glueck in his article on “The Nuremberg Trial and Aggressive War” (Glueck, 59 *Harvard Law Review* 397). He says:

“Judging from available published, date, this idea of including the launching of an aggressive war — a ‘crime against peace’ — among the offences for which the Axis Powers were to be held liable had its origin, so far as American policy is concerned, in a report to the President made on June 7, 1945, by the American Chief of Counsel for the prosecution of major war criminals.”

“Justice Robert Jackson there said:”

‘It is high time that we act on the judicial principle that aggressive war-making is illegal and criminal.’

In a note on the same page Professor Glueck confesses:

“During the preparation of the author’s book, *War Criminals: Their Prosecution and Punishment* (1944) he was not at all certain that the acts of launching and conducting an aggressive war could be regarded as international crimes. He finally decided against such a view, largely on the basis of a strict interpretation of the Treaty for the Renunciation of War (Briand-Kellogg Pact) signed in Paris in 1928. He was influenced, also, by the practical question of policy. Since liability of the leading Nazi malefactors under familiar principles of the laws and customs of war and the Hague and Geneva Conventions was clear, it seemed to be an unnecessary and dangerous complication to resort to prosecution for the “crime” of aggressive war, involving a doctrine open to debate and one which might require long and historical inquiries not suited to judicial proceedings. Further reflection upon the problem has led the writer to the conclusion that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed *custom* to be acceptable as international law.”

In “The Backstage at Nuremberg” by Ernest D. Hauser (*Saturday Evening Post Overseas Edition* for February, 1946) we are told that Justice Jackson’s novel idea met with opposition on the part of Allied representatives in the six weeks’ London negotiations, and that it was not until August 8 that they finally agreed upon the policy embodied in the London Agreement. That decision was made with reference to the trial at Nuremberg and it may be presumed that it was at a later date that the Allied governments agreed to adopt the same policy at the trial in Tokyo.

The Potsdam Declaration was issued on July 26, 1945. In 1944 Professor Glueck in America was deeply concerned whether his anxiety to punish the makers of an aggressive war could legitimately be satisfied by such an extension of the well-known words “war crimes,” and Justice Jackson was representing that extension as a novelty in 1945. The allied policy for the extension of the term was, after prolonged negotiations, decided upon as late as August 8, 1945, in London. How can such an extension be read into the Potsdam Declaration of July 26, 1945?

4. Moreover, it would be a gross insult to the political intelligence of the Allied statesmen assembled at Potsdam to contend that in their laudable endeavor to make the Japanese statesmen and military men lay down their arms they imposed as one of the conditions that there should be severe punishment acted out to those Japanese leaders as “war criminals” apart from the recognized crimes of belligerent barbarity. In view of the war situation then prevailing, it must have been amply clear to the Allied leaders that such a condition would naturally involve the danger of forcing the Japanese leaders to carry on the war to the very last extremity. However, if the Allied statesmen had desired to insert that term in the Potsdam Declaration, prudence would certainly have made them refrain from doing so. It must, therefore, be concluded — and such conclusion is only a matter of horse sense — that it was not their intention at all to have the phrase understood by the political and military leaders of Japan as comprising so-called “crimes against peace.”
5. If, notwithstanding all this, any shade of doubt still remains and the Tribunal deems the terms ambiguous and susceptible of two meanings, we beg to draw the attention of the Tribunal to that well-known rule of interpretation that a document which is ambiguous must be construed against the party who made it. *Verba fortius accipiuntur contra proferentem*. That this maxim is a general principle of law applicable in the interpretation of an agreement of an international character is shown by a decision of the Permanent Court of International Justice. In the *Brazilian Loans Case*, it was said to be a familiar principle for the construction of instruments that where they are ambiguous, they should be taken *contra proferentem* (*Publications of the Court*, Series A, No. 20/21, p. 214).

We also beg leave to draw the attention of the Tribunal to the advisory opinion concerning the interpretation of the treaty of Lausanne where it was said to be a sound principle that if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the *minimum* of obligations for the parties should be adopted (Series B, No. 12, p. 25). We also call the attention of the Tribunal to another equally

well-known canon of legal interpretation. The expression of one thing is the exclusion of another. *Expressio unius est exclusio alterius*. This maxim has also been applied in the Permanent court of International Justice (Series A/B, No. 42, p. 121).

EX POST FACTO LAWS — “JUSTICE?”

The Potsdam Declaration says, “stern justice shall be meted out.” It is “justice,” however stern and unmitigated by mercy, that is to be meted out.

Justice means in civilized communities justice according to law. It means that justice is to be administered by established legal rules and principles, not according to the sense of right and justice of the judge, however good or wise he may be.

The fact that the present Tribunal is composed not of professional military men but includes eminent lawyers and jurists from among the Allied nations attests to the fact that the Allied nations themselves intend to administer this “justice” according to law.

In the administration of criminal justice especially, the wisdom of the canon that justice ought to be administered in conformity with established rules has long been tested by past experience, political and otherwise. The history of the Star Chamber in England amply shows that the machinery of criminal law can easily be utilized by the powers that be for suppressing, eliminating or “liquidating,” through the most nauseating travesty of trial, political groups or persons of whom they disapprove. The rule against ex post facto law has been accepted by all civilized nations as a canon of criminal justice. And this canon should assuredly be respected in a case involving political offenses, national or international.

The omnipotent English Parliament has since 1688 never resorted to ex post facto legislation to punish political offenders. Ex post facto laws, state or federal, are banned by the Constitution of the United States. And it seems that retroactive laws relative to political offenses have been extremely rare in the whole history of American legislation. It is true that there were such attempts after the Civil War, and two cases were brought to the Supreme Court of the United States involving laws, state and federal, penalizing those persons who had rendered assistance to the Confederacy. It is, however, the permanent glory of that Tribunal, that in the midst of intense popular passions it declared, through Justice Field, that both laws were unconstitutional and void (*Cummings v. Missouri*, 4 Wallace 277 (1866); *Ex parte Garland*, 4 Wallace 333 (1866)). A “Report on Essential Human Rights,” received by the American Law Institute, February 24, 1944, says in Article 9:

“No one shall be convicted of crime except for violation of law in effect at the time of the commission of the act charged as an offense nor be subjected to a penalty greater than that applicable at the time of the commission of the offense” (Cited in Quincy Wright, “War Criminals,” 38 *American Journal of International Law* 257, N. 3).

And it is said that this principle is in substance comprised in the constitutions of thirty countries. Indeed, whether constitutionally guaranteed or not, *nulla poena sine lege* constitutes one of the basic principles of criminal justice in civil law countries. It is true that in Nazi Germany the principle was mercilessly destroyed by an act of June 28, 1935, authorizing judges to decide cases according to the “sound popular feeling.” It reads:

“Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under the law of which the fundamental conception applies most nearly to the said act.”

The Permanent Court of International Justice declared in an advisory opinion on December 4, 1935 that the application of this Hitlerite legislation to Danzig was in violation of the requirement that the government of the city be by rule of law (*Rechtsstaat*). The Germans, as is well known, authorized the beheading of Van der Lubbe for burning the Reichstag, when the penalty for arson at the time of the fire was a term of imprisonment only. And this shocked the juridical conscience of the whole world, including that of the Far Eastern islanders. The principle which the Chief of Counsel invokes, viz.: “a principle that follows the needs of civilization and is a clear expression of the public conscience” (Record, p. 435) may appear to untutored minds as sound as “deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling.” As a matter of fact, such a vague principle when it actually operates in the administration of criminal justice is just as cruel and as oppressive as the penal doctrine which characterized the Third Reich. It is to the honor and credit of the Siamese judiciary, that, if the report be true, on March 24, 1946, it released Marshal Pibul and eleven major “war criminals” who had collaborated with Japan during this war, on the grounds that a new law punishing war criminals is *ex post facto* and cannot be applied retroactively. The sentiment that punishment by *ex post facto* legislation is sheer lynch law in the guise of justice is not a product of the so-called Era of Enlightenment in Europe, but represents the universal conception of justice, ancient and modern, East and West, though the principle was frequently violated by despots down through the ages. If a code of international criminal law is to be made by civilized nations providing for the punishment of individuals for a breach of international duties, the *nulla poena* principle will and must certainly constitute one of its basic principles.

It is our submission that criminal conspiracy, the so-called crimes against peace and crimes against humanity (apart from cases which form part of the “war crimes”) were crimes unknown to the law of nations. And if that has ever become law binding on nations during the war, it was not law at the time of the commission of the alleged acts, and it is clearly *ex post facto* law — regarded as unjust, whenever and wherever the question of Justice has been reflected upon. To apply such law to the accused at the bar is not civilized justice, not “justice” as envisaged in the Potsdam Declaration.

In view of the natural interpretation of the term “war criminals” in the Potsdam Declaration on the one hand, and of the universal concepts of civilized justice, on the other, it is our submission that that part of the Charter providing punishment for “Conspiracy,” “Crimes against Peace,” and

“Crimes against Humanity,” in so far as they are not comprised in the category of “war crimes,” is not the law for this Tribunal. Just as that part of an act of the American Congress which is in contravention of the Constitution of the United States, and that portion of a statutory order-in-Council which goes beyond the authority delegated by a British Act of Parliament is null and void, so that part of the Charter which is contrary to the fundamental document — the Instrument of Surrender, in which the terms of the Potsdam Declaration have formally and expressly been incorporated — must be declared void. It is a universally-recognized general principle of law that the obligations undertaken by one party can not arbitrarily be increased by the other party or parties.

CONSPIRACY

The Chief of Counsel does not state in so many words that the doctrine of conspiracy as a crime is an institute of the law of nations. But he assumes it, for he states, “this section of the Charter creates no new law” (Record, p. 396). And by “law” the Chief of Counsel must mean the law of nations. In this particular case, however, the Chief of Counsel does not as he did in the case of aggressive war cite any assembly participated in by large groups of nations which recognized conspiracy as an international crime. He does not cite any treaty, declaration, or resolution by which it was designated as an international crime. Instead he merely cites the opinion of the United States Circuit Court of Appeals in *Marino v. United States* and says:

“This offense is known to and well recognized by most civilized nations, and the gist of it is so similar in all countries that the definition of it by a high Federal Court of the United States may well be accepted as an adequate expression of the common conception of this offense” (Record, p. 402).

This is certainly astonishing! Are not all cooperative jurists aware that the doctrine of criminal conspiracy is a peculiar product of English legal history? (Stephen, *History of Criminal Law of England*, Vol. 3, pp. 202-227; Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, 1921; R.S. Wright, *The Law of Criminal Conspiracies* (1873); Francis B. Sayre, “Criminal Conspiracy,” 35 *Harvard Law Review*, 393-424). It is a theory of criminal jurisprudence unknown, we believe, in other legal systems and certainly not known to all — as it must be in order to possess international validity. Says Professor Sayre of the Harvard Law School: “It is a doctrine as anomalous and provincial, as it is unhappy in its results. It is unknown to the Roman law; it is not found in modern continental codes; few continental lawyers ever heard of it” (Sayre, p. 427, *supra*). Unlike what is observed in the instances of parliamentary government, the rule of law, the criminal jury, habeas corpus or the trust, civilians do not entertain any high regard for this particular Anglo-Saxon institute. Especially that part of the doctrine which is stated below is palpably unfair and shocking to the juridical conscience:

“All of the conspirators need not join in the commission of an overt act, for if one of the conspirators commits an overt act, it becomes the act of all the conspirators” (Record, p. 404).

We must confess this is going back to the collective responsibility which prevailed in the tribal age of mankind. It is all the more reprehensible as it is designed, as the prosecution contends, to extend to all alleged crimes against peace, war crimes and crimes against humanity. For this means that once a war is somehow declared to be aggressive or in breach of international law or treaties, any person who rendered war service to his own country, whatever his motives, is held responsible for murder and for all shocking crimes committed by others, even if he is totally unaware when, where, and by whom these crimes were committed.

Followers of the civil law are frankly told by their Anglo-Saxon confreres that the doctrine of conspiracy is a convenient legal weapon for prosecutors and judges bent on punishing groups in disfavor with the powers that be. They might also be told that it was used in England with effect in order to punish members of the trade unions — a social group highly obnoxious to the dominant class in the eighteenth century — as we read in Adam Smith (*An Inquiry into the Wealth of Nations*, Bk. 1, c. 10, pt. 2, p. 222), and also so employed in the nineteenth century as is pointed out by the late Lord Passfield (Sidney Webb, *History of Trade Unionism*, 2d edition (1920), (p.73). And they might further be told that enlightened judges and jurists in the English-speaking countries do not look upon this particular doctrine as an ornament calculated to lend luster to the common law.

In a dissenting opinion in *Commonwealth v. Donoghue* (250 Ky, 343, 63 S.W. (2d-3), it was said:

“[I]ts chief danger lies in the fact that for all time to come, it will be the basis for the creation of new crimes never dreamt of by the people.”

Did not Professor Sayre after making a careful study of the subject in his article in the Harvard Law Review mentioned heretofore say:

“A doctrine so vague in its outlines and uncertain in its fundamental nature as conspiracy lends no strength or glory to law, it is a veritable quicksand of shifting opinion and ill-considered thought” (Sayre, p. 375, *supra*).

“Under such a principle every one who acts in cooperation with another may some day find his liberty dependent upon the innate prejudices or social bias of an unknown judge. It is the very antithesis of justice according to law” (Sayre, p. 413, *supra*).

“It is a doctrine which has proved itself the evil genius of our law wherever it has touched it. May the time not be long delayed in coming when it will be nothing more than a shadow stalking through past cases” (Sayre, p.424, *supra*).

What would pre-eminent jurists like the late Lord Russell of Killowen and the late Justice Oliver Wendell Holmes, Jr. say to a proposal to import this oppressive doctrine into the international arena, not to mention its induction by *ex post facto* methods? The apt warnings of Judge Hudson may also be cited:

“It would indeed be dangerous practice for judges of an international court to conceive of themselves as permitted to introduce into international law principles of the particular system of national law with which they happen to be familiar ... ” (Manley O. Hudson, “The Law Applicable to the Permanent Court of International Justice,” in *Harvard Legal Essays Written in Honor of and Presented to Joseph Henry Beale and Samuel Willston* (1934), (p. 133, 137).

Especially strange is the Chief of Counsel’s application of the doctrine in the form of what he terms “progressive conspiracy.” Unlike in the case of the Third Reich he cannot, of course, prove that the accused were a “united band who were in agreement with one another” and admits that “there appear to have been sharp differences of opinion between them and fierce rivalries” (Record, p. 471). Nevertheless, the Chief of Counsel, like a true prosecutor, endeavors to read, if not sermons in every stone, a conspiracy, a constructive conspiracy, into every progressive turn of events in a nation’s international career in a world in which national armaments, use of armed force for safeguarding national interests and the institution of wars are not yet relics of bygone days. If his logic is correct, you could equally read “progressive conspiracies” in the expansion of England, France and Holland, the growth of the Russian Empire, and the gradual expansion of the original thirteen American states into the great American Republic, for which their foremost statesmen and generals must be held criminally responsible, whether they were imperialistic or anti-imperialistic in their personal convictions.

The Tribunal at Nuremberg ruled that under its Charter it had no jurisdiction to try persons participating in a common plan to commit War Crimes or Crimes against Humanity (Tr., p. 16,884). Moreover, it denied that any and every significant participation in the affairs of the Nazi Party or government is evidence of a conspiracy that is in itself criminal. It says that “conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action” (Tr., p. 16,882). This has in a certain measure disarmed the doctrines of conspiracy of those most oppressive features which, convenient as they may be for enmeshing the innocent, shock the juridical conscience. But the judgment did not reject the doctrine itself. It should be remembered, however, that the law of the Charter was regarded, like an English act of parliament, as absolutely binding on the Tribunal in Europe, while here the Charter is like an American act of the legislature, subject to a higher law, viz., the express terms laid down in the Potsdam Declaration and solemnly accepted by the Instrument of Surrender.

And it is our contention that even in the attenuated form of the Nuremberg decision as applied to the alleged “Crimes against Peace,” it was not an institute of the law of nations at the time the alleged “crimes” were committed, and no international lawyer ever dreamed of it.

WAR OF AGGRESSION

Is Aggressive War an International Crime?

The Chief of Counsel next deals with “War of Aggression.” He asks: “Is this a crime under international law and has it been so understood during all the period of this Indictment ... ?” He

claims that it is and proposes to establish two things: “First, that there is international law covering the subject, and, second, that it is a crime under that law” (Tr., p. 405).

He first cites some general statements on the growth of international law by custom made by such respectable authorities as Justice Cardozo, Lord Wright, Sir Frederic Pollock, the Judicial Committee of the Privy Council, the Statute of the Permanent Court of International Justice and the decision of the Mixed Claims Commission, United States and Germany. The views there expounded on this head of growth of international custom are, of course, for the most part commonplaces well known to every student of international law.

Then the Chief of Counsel concludes:

“Having ... shown that when many civilized nations have acted on a matter of general welfare it becomes recognized as a principle of international law, we shall now attempt to show that the question of aggressive war has been considered by so many nations and deliberately outlawed by them that their unanimous verdict arises to the dignity of a general principle of international law” (Record, p. 415).

By citing the high authorities mentioned above, the Chief of Counsel may have shown that as an historical process concerted action of many civilized nations tends to the establishment of a principle of international law, and that international tribunals should not exercise their functions relying on the creations of their unrestricted fancy but must strictly abide by certain sources of the law of nations, among which international custom is comprised. But he has *not shown* and *cannot* show any juridical principle that the concerted action of many civilized nations on a matter of general welfare *ipso facto* establishes a general principle of international law. The authorities he cites do not propose to lay down that sort of doctrine. Take, for example, the famous Declaration of Paris.

“Privateering is and remains abolished” formed part of the Declaration adopted at the Conference of Paris in 1856 with reference to Maritime Law, and all civilized states have since become signatories of the declaration except the United States, Spain and Mexico. Did this declaration in 1856 by many civilized nations elevate the prohibition of privateering to a principle of international law? Is it not a well known fact that the Declaration was regarded by all international jurists as binding as between the signatories only, and that privateering might be used by and against the three countries mentioned above?

In 1898 the United States Government announced its intention not to resort to privateering, but to adhere to the rules of the Declaration. Does this not show that she was not otherwise bound to refrain from resorting to privateering? Was not Spain regarded as perfectly justified and as not violating any principle of law of nations in having maintained her right to issue letters of marque?

Again, the Geneva Convention of July 27, 1929, Relative to the Treatment of Prisoners of War has been signed by many civilized nations. Does the Soviet Union, for instance, which has not

signed it, consider itself bound by the provisions of the Convention as embodying a general principle of the Law of Nations?

However, the Chief of Counsel seems to assume that the thesis holds not alone as a matter of historical process but as a juridical principle. On that assumption he cites a number of international conventions which, he alleges, prove that aggressive war has long been an international crime. But it is respectfully submitted that the evidence adduced palpably fails to prove the proposition.

1. The first convention he cites is the first Hague Convention (Record, p. 416). The phrases “as far as possible” and “as far as circumstances allow” mentioned in the provisions the Chief of Counsel has in mind prove, on the contrary, that the signatories were not prepared to be legally bound to settle all their difference by pacific means. Apart from “vital interests” and “national honor” self-defense may not indeed have allowed the assumption by the contracting parties of such a duty, as illustrated in the case of The Netherlands, in Appendix A, Section 10 of the present Indictment, where it is said:

“Consequently, the Netherlands Government immediately after the last mentioned attacks, declared war on Japan in self-defense.”

2. The next convention he cites is Hague Convention III (Record, p. 416). The Chief of Counsel asserts that by that agreement undeclared wars were branded as *international crimes*, which, it is submitted, is sheer *ipso dixit*.

This convention recognizing that hostilities should not commence without previous and explicit warning is a technical rule which is considered desirable mainly for purposes of clarifying the time at which a state of war comes into being. The fact that even the 24-hour interval proposed by the Netherlands delegation was rejected at the Conference goes to prove that it was not designed to place the stigma of crime, or any ban at all, on a “surprise attack” conducted for strategic purposes. Treachery is largely a matter in the forum of conscience and a war can be treacherous with or without a declaration. In ancient and medieval societies, east and west, the declaration of war was connected with gallantry. That idea still lingers in the popular imagination, which, as is well known, is fully utilized for purposes of war propaganda by denouncing the enemy as “treacherous.” Grotius, however, says in his *Jus Belli ac Pacis*:

“The cause for which nations have required a declaration for a lawful war was not, as some allege, that they might do nothing secretly or by a clever trick, for that consideration belongs rather to the perfection of gallantry than to law, as we read some peoples even appointed the day and place of combat, but that it might appear with certainty that the war was not waged by private audacity but by the will of the people on either side, or their heads; for that is the source of its peculiar effect which have no place in a contest with brigands or in one between the king and his subject” (3.3.71).

The main purpose in regarding declaration of war as desirable in the modern society of nations is no more gallantry — a matter of subjective conscience — but technical legal expediency in determining the consequence of a state of war. Since the days of Grotius, however, many a Great Power despite Grotius' injunction opened hostilities without any declaration of war. Brevet-Lt.-Col. J. F. Maurice of England, who published in 1983 his laborious work entitled *Hostilities Without Declarations of War* (London; His Majesty's Stationery Office, 1883) examining the commencement of various wars that had taken place from 1700 to 1870, wrote in April 1904, in "The Nineteenth Century and After" as follows.

"Numerically, within the time I more particularly examined, Britain struck thirty of these blows, France thirty-six, Russia seven (not reckoning her habitual practice towards Turkey and other bordering Asiatic states, including China), Prussia seven, Austria twelve, the United States five at least."

Would it not be chimerical to assert that the leading powers such as Great Britain, France, Russia, Prussia, Austria and the United States were habitual delinquents in treachery and perfidy in war for the breach of this technical recommendation of international law?

Whether or not Hague Convention III imposed any legal duty on the signatories is a matter of controversy, whatever views various governments, including the Japanese, American and British, may have entertained about the matter. Eminent international jurists in England such as Lawrence, Westlake, and Bellot are of the opinion that the wording of the original French text ("*Les Puissances contractantes reconnaissent que les hostilités entre elles ne doivent pas commencer sans un avertissement préalable et non équivoque, qui aura, soit la forme d'une déclaration de guerre motivée, soit celle d'un ultimatum avec déclaration de guerre conditionnelle.*") indicates that this did not impose any legal duty on the signatories. Westlake thinks that the Convention did not seriously affect the previous law on the subject. Pitt-Cobbett's classic *Leading Cases on International Law* (1924 edition by Hugh H. L. Bellot) says on p. 18 of Vol. II.

"At the same time the signatories do not pledge themselves absolutely to refrain from hostilities without a prior declaration, but merely *recognized* that as between the belligerents hostilities 'ought not to commence without previous and unequivocal warning.' The object, no doubt, was to exclude *cases in which it might be necessary to use instant force in order to repel some hostile preparation or movements occurring* either at a place where communication with the war declaring authority would be difficult, or *under circumstances where the other party would obviously have no cause for complaint on the ground of surprise.*"

And Bellot concludes his discussion by saying that despite the limits imposed by custom and convention, the opening of hostilities appears to be mainly a question of strategy. And the passage here cited stands unaltered in the 1937 edition of the same work, edited by another scholar.

There are, however, other authors who assume that a legal duty was undertaken by the signatories of the Convention III. Oppenheim, for instance, states:

“There is no doubt that, in consequence of the Convention III recourse to hostilities without previous declaration of war, or a qualified ultimatum is prohibited” (Oppenheim, *International Law*, 5th Ed. Vol. II Section 96, p.249).

And he further intimates that the states which deliberately order the commencement of hostilities without a previous declaration of war or a qualified ultimatum commit an international delinquency. Is Oppenheim’s “international delinquency” synonymous with “international crime?” The author himself gives the warning that international delinquencies must not be confused either with so-called Crimes against the Law of Nations or with so-called International Crime (Oppenheim, *International Law*, Vol. I, 5th Ed., Sec. 151, p. 275).

Even assuming therefore that the latter view is correct, and that a breach of such a technical rule of international law is an international delinquency, the illegal act would even in Oppenheim’s view be in the nature of a breach of contract or possibly a tort but certainly not of an “international crime,” as the Chief of Counsel asserts. Indeed no international lawyer ever imagined that the signatories to Hague Convention III thereby agreed that statesmen who participated in a breach of this technical rule should be criminally punishable — not to speak of being executed.

3. The Chief of Counsel proceeds to say, “In 1919 the victorious nations of the last war, including Japan, agreed that the violation of international treaties was a justifiable offense” (Record, p. 416).

Perhaps the Chief of Counsel is referring not to Articles 228-30 but to Article 227 of the Treaty of Versailles. For the former deal with the trials which were to be conducted by the military tribunals of the Allied and Associated Powers of persons accused of having committed acts in violation of the laws and customs of war, i.e. “conventional” war crimes. Article 227 provides for the public arraignment of William II of Hohenzollern “for supreme offense against international morality and sanctity of treaties and for his trial before a specially constituted tribunal.” It must be noted, however, that the above article does not regard an aggressive war or a war in breach of a treaty as an “international crime,” or any legal offense, it being only an offense against morality and good faith. The Government of the Netherlands acted perfectly within its right when it refused to surrender the Squire of Doorn for an “offense” which was not among those listed in its extradition treaties. Indeed, James Brown Scott, legal adviser to President Wilson at the Versailles Conference, was of the opinion that “Holland has made the world its debtor by refusing to surrender the Kaiser for the Commission of an offense admitted political” (Scott, “The Trial of the Kaiser” in House and Seymour. *What Really Happened at Paris* (1921), p. 231). It is too well known to require mentioning that both the American and Japanese members of the Committee of Fifteen opposed the trial of the Heads of State. It may be worthy of note, however, that the Commission refused to recognize “those acts which provoked the World War and

accompanied its inception such as the invasions of Luxemburg and Belgium, constituting a violation of treaty obligations, as a sufficient ground for making any criminal charge against the responsible authorities and individuals.” The wording of Article 227 must certainly be read against this background.

4. The Chief of Counsel then takes up the Preamble to the Geneva Protocol of 1924, and the Declaration of the eighth Assembly of the League of Nations of September 27, 1927, in which the expression “a war of aggression is an international crime” appears (Tr., p. 416).

It may be noted that these statements reflected the Geneva sentiment with its supranational ideologies then dominant. The Soviet Union, however, was then outside the “anti-communistic” League and so was the United States, which feared to be entangled in European affairs. Indeed the latter’s foremost international jurist, John Bassett Moore, denounced Geneva international law and the Protocol inspired by it — proceeding as they did on the facile assumption that there was a close analogy between the law within a state and the international system governing a society of sovereign nations — as a “bedlam theory,” destructive of sound international law. Great Britain herself refused to ratify the Geneva Protocol, because she was not prepared for compulsory arbitration and was not sure as to how such a Pact could work in practice. The Protocol never came into effect, nor can that Conference bind the world. The term “international crime” in treaty preambles, moreover, is employed as merely expressive of emphatic condemnation, just as in the phrases “the neglect to use the toothbrush is a hygienic crime!” or “The Albert Memorial is an aesthetic crime!” The Chief of Counsel himself employed the words “unpardonable crime” in his opening statement (Record, p. 393) where it was employed in that emphatic sense. The same can be said of the resolution of the Sixth Pan-American Conference of February 18, 1928, cited by the Chief of Counsel, which declares that “war of aggression constitutes an international crime against the whole human species” (Record, p.417). Such condemnation, motivated as it may be by political or moral considerations, is without any legal connotation whatsoever.

5. Lastly, the Chief of Counsel mentions the Pact of Paris of 1928.

The vague stipulation of that multilateral treaty, which developed out of the proposal of an American-French bilateral treaty by M. Briand, made on June 20, 1927, with a definite political purpose, has, as is well known, caused an abundance of speculation as to its true import, political as well as legal.

The text of the Pact consists of very simple and abstract formulae, a general renunciation of war as an instrument of national policy and a general pledge to settle all differences by pacific means.

It may be recollected that some saw in it the advent of a *novus ordo seclorum*, an epoch in history, a revolution in human psychology which would make all rules of the traditional law of nations out of date. Skeptics with an analytical eye, however, saw in it nothing but a pious expression of the will to peace, just like declarations contained in treaties of amity and

commerce expressing a more categorical will to peace, viz., that there shall be “perpetual peace” or “a perfect and inviolable peace” between the contracting parties.

Astute European statesmen, like H. Briand, saw in it a gesture of the United States evincing its willingness to be drawn into the League, and into European politics. Did not M. Boncour, Mr. Briand’s friend, authoritatively tell us that for Mr. Briand, before all else, it was a means to draw the United States into the League of Nations? (*The New York Times*, April 10, 1932, cited in “An Appeal to Reason” by John Bassett Moore, *Foreign Affairs*, Vol. 11, No. 4 (July, 1933) at p. 554).

Many of the leading publicists who carefully analyzed not only the text of the Pact but prior correspondence between the powers have come to the conclusion that the Pact merely had the effect of changing the vocabulary of international law, the classical “just war” having been replaced by “defensive war.” Some contended that the Pact, instead of outlawing war, had the contrary effect of affirming the legality of a defensive war.

With this well-known historical background in mind, we shall proceed to analyze the exact legal obligations undertaken by the signatories, especially Japan, which the prosecution alleges were broken by Japan.

It is admitted by all international lawyers that in interpreting international treaties we must get at the real intention of the parties. And it is also admitted that the real intention must be ascertained not only by the text of a treaty itself, but also by the preliminary material as well. And courts, arbitrators and diplomats have given great importance to preliminary material in the interpretation of treaties.

Ralston states in his authoritative work, *The Law and Procedure of International Tribunals*:

“The events leading up to the signing of a treaty are often referred to as explanatory of the intentions of the parties entering into the treaty and so of prime importance in determining their intention” (Sec. 26, p. 18).

When, in 1912, the proposed arbitration treaties between the United States, Great Britain and France were before the Senate, Mr. Root stated clearly the settled law when he declared that if the treaties were ratified the prior recorded understandings would at all times be competent in determining their true interpretation; that the rules in international intercourse were much more liberal than were the rules of municipal law relating to the construction of statutes and contracts; that, in interpreting treaties, it was and always had been universally accepted that every declaration made before or at the signing, and all correspondence and expressions of opinion by the representatives of both countries were to be considered, and that there never could arise a situation when the declarations in question would not be laid by the side of the text to determine ... the scope and effect of the stipulations contained in the instrument (A5 *Congressional Record* 2935 (1912)).

With special reference to the Pact of Paris Phillip Marshal Brown says in his well known essay on “The Interpretation of the General Pact for the Renunciation of War” published in the American Journal of International Law, April, 1929:

“No rule of international law would seem more firmly established than this rule of interpretation of treaties in the light of intent of the negotiators. That intent naturally is assumed to be stated in the text of the treaty itself, but it also may be sought elsewhere, either in specific reservations attached to treaties at the time of signature or ratification, or in interpretations, clarifications, understandings, constructions, qualifications or actual conditions set forth during the negotiations prior to the ratification. Hence, it is to be expected that in any future divergence of opinions concerning the nature of the obligations assumed under the General Pact for the Renunciation of War recourse must necessarily be had, not only to the official correspondence of the negotiations, but to various official utterances of such government spokesmen as Sir Austen Chamberlain, M. Briand, Secretary Kellogg and Senator Borah. Their interpretations of this instrument will be entitled to the closest scrutiny and respect. So far as the commitments of the United States are concerned, the Report of the Senate Committee on Foreign Relations giving its understanding of the ‘true interpretation’ of the pact conditioning the American ratification must also be taken into account, whether by a judicial tribunal or by international public opinion To make certain of the intent of every signatory to the Pact; to hold every signatory to the strict fulfillment of its commitments under that Pact, it would appear good sense and good ethics as well as good law, to give due weight and credit to the interpretations placed on this momentous declaration by every signatory prior to ratification” (p. 379).

The following words of Professor Charles C. Hyde may also be kept in mind:

“It remains . . . to take special note of the effort of judicial tribunals, whether international or domestic, to rid themselves of the influence of any formula purporting to regard the form of an instrument which regards accord as decisive of the character of the obligations of the parties thereunder, in the face of extrinsic evidence establishing an opposite design” (Hyde, *International Law*, 2nd edition (1945), Vol. 2, Section 531, p. 1472).

With that accepted canon of interpretation as a guide, we shall now turn to statements made by responsible statesmen in those days.

(a) The United States

In a speech made on April 28, 1928, Secretary Kellogg said:

“There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to

decide whether circumstances require recourse to war in self-defense. If it has a good cause, the world will applaud and not condemn its action.”

Then Secretary Kellogg in his note of June 23, 1928, addressed to the governments invited to sign the treaty, after embodying his own “constructions” of the treaty with reference to the six major “considerations” emphasized by France and the British note mentioned below, states:

“In these circumstances I have the honor to transmit herewith for the consideration of your excellency’s government a draft of the multilateral treaty for the renunciation of war containing the changes outlined above.”

In the United States, as is well known, there was much concern about the effect of the General Pact on the Monroe Doctrine, but Mr. Kellogg assured the Committee on Foreign Relations of the U.S. Senate on December 7, 1928, that the safeguarding of the Monroe Doctrine was covered by the fact that self-defense was not precluded, of which the United States is solely entitled to judge for itself. He further states that “the American Government had a right to take such measures as it believed necessary to the defense of the country or to prevent things that might endanger the country,” and admitted that “the whole of that rule would apply equally to every other country.” The American Secretary of State also said that “the American Government would never agree to submit to any tribunal the question of self-defense and that no other Government would.”

Senator Borah stated during his speech and debates in the Senate on January 3, 1929, that “no nation would surrender the right to determine for itself what constitutes an attack or what is justification for defense,” and that “the United States would have nothing to do with deciding the question of self-defense with reference to the action of any other nation unless the action of that nation were in the nature of an attack upon the United States itself” (*Congressional Record*, 2nd Session, pp. 1268 & 1271).

The Executive Report of the 70th Session U.S. Senate, January 15, 1929, states:

“The Committee reports that above treaty with the understanding that the right of self-defense is in no way curtailed or impaired by the terms or conditions of the treaty. Each nation is free at all times and regardless of the treaty provisions to defend itself, and is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same.”

“The United States regards the Monroe Doctrine as a part of its national security and defense. Under the right of self-defense allowed by the treaty must necessarily be included the right to maintain the Monroe Doctrine which is a part of our system of national defense.”

“The committee further understands that the treaty does not provide sanctions, expressed or implied. ... In other words, the treaty does not, either expressly or implied by, contemplate the use of force or coercive measures for its enforcement as against any nation violating it”

Senator Robinson expressed his skepticism in the meeting of the Foreign Relations Committee meeting of the U.S. Senate:

“If you recognize the right of every nation to construe for itself what is aggressive war and what is defensive war, you have not accomplished much by agreeing to renounce war”

Secretary Kellogg replied:

“Senator, if I had started out to define what aggression was and what self-defense was I would not have been able to negotiate a treaty during my life-time or that of anybody present here” (General Pact for the Renunciation of War. Committee on Foreign Relations. U.S. Senate December 7, 1928, p. 16).

And we are told by Judge Moore that:

“I have always surmised that Senator Borah, as an advocate of the ‘outlawry of war,’ played in this transaction a larger part than is generally known, especially as I observed that in the national campaign of 1928 he did not abate his appeals for the maintenance of an effective navy — not, of course, for the purpose of providing the renunciation of war with ‘teeth,’ but for the purpose of enabling the United States to exercise the right of self-defense that had been so amply safeguarded” (Moore, “Appeal to Reason,” *Foreign Affairs*, Vol. II, No. 4, p. 553).

(b) Great Britain

On May 19, 1928, the British Government issued a circular which, after quoting the renunciation of war as an instrument of national policy, declared that there were certain regions of the world the welfare and integrity of which constituted a special and vital interest for that government’s peace and safety, and that as their protection against attack was a measure of self-defense no interference with them could be suffered. It may be noted that the regions were not named and complete liberty of action as to their future designation was reserved. The note was an interpretation by the British Government in more or less concrete terms of that doctrine of “self-defense” which was expounded in Secretary Kellogg’s speech. And in order effectually to forestall any subsequent challenge or quibble, Sir Austen Chamberlain in a note of July 18 attached the unequivocal condition which follows:

“As regards the passage in my note of the 19th May relating to certain regions of which the welfare and integrity constitutes a special and vital interest for our peace and safety, I need only repeat that His Majesty’s Government in Great Britain accept the new treaty upon the understanding that it does not prejudice their freedom of action in this respect.”

It is true that the Soviet and Persian Governments refused to recognize the British reservations, but it was thought unimaginable that the British Government, if accused of any violation of the Kellogg Pact, would not invoke its own interpretation of self-defense drawn up with such meticulous care and duly deposited with the League of Nations, together with the text of the Treaty.

(c) France

M. Briand in his note of July 14 declared:

“The Government of the Republic is happy, moreover, to take note of the interpretations which the Government of the United States gives to the new treaty with a view to satisfying the various observations which have been formulated from the French point of view. ... In this situation and under these conditions, the Government of the Republic is happy to be able to declare to the Government of the United States that it is now entirely disposed to sign the treaty”

(d) Japan

In a note handed by Baron TANAKA, Giichi, to Mr. Edwin L. Neville, American Charge d’affaires in Tokyo, on July 20, 1928, the Japanese Foreign Minister refers to the aforesaid speech of Mr. Kellogg made on April 28, stating: “You proceed to reinforce in detail the explanations made by the Secretary of State in his speech of the 26th of April,” and says:

“In reply, I have the honor to inform you that the Japanese Government are happy to be able to give their full concurrence to the alternations now proposed, their understanding of the original draft submitted to them in April last being, as I intimated in my Note to His Excellency Mr. MacVeagh dated the 26th of May, 1928, substantially the same as that entertained by the Government of the United States. They are therefore ready to give instructions for the signature on that footing of the treaty in the form in which it is now proposed.”

When, on June 17 and 26, 1928, councilors TOMII and KUBOTA asked the Government at the Privy Council whether self-defense is confined to the defense of territory, suggesting the applicability of the Pact to forcible measures which might become necessary in China and especially in Manchuria and Mongolia, and whether it would not be more prudent to be as explicit in those matters as Great Britain, the Government’s answer was that self-defense was not limited to the defense of territory, but extended

outside of the territory. The protection of rights and interests in Manchuria and elsewhere by forcible means was sufficiently covered by the fact that self-defense was not precluded by the Pact. And that fact is clearly stated in the Report of the Privy Council concerning the General Pact, adopted on June 26, 1929.

It states:

“Upon receipt of the proposal made by the American Government, the Imperial Government adopted the broader interpretation that the operations of national self-defense were not confined to actions to be taken for defending the territory of our own country, but extended to actions which might be adopted by the Empire in order to safeguard its vital rights and interests in China, especially in the regions of Manchuria and Mongolia, but regarded it as more opportune to refrain from making such a declaration on this occasion. It also adopted the view that it was not in conflict with the Covenant of the League of Nations and Locarno treaties which guarantee general peace. In its reply to the American government, therefore, the Imperial Government added its understanding that the Pact did not deny to any independent nation the right of self-defense, and that it was not in any way in conflict with the obligations to guarantee general peace under the League Covenant and Locarno treaties.”

Thus it may be emphasized that the Foreign Minister's explanations in the Japanese Privy Council regarding the nature of self-defense were substantially the same as those made by Secretary of State Kellogg to the United States Senate.

Governments, of course, do not make these declarations and reservations as idle gestures not to be taken seriously. On the contrary, they constitute the frank and honest avowals of the governments' understanding of the obligations contracted. They constitute an inherent and essential part of the treaty obligations as if they had been written into Article I of the Pact.

In view of the declarations made by leading statesmen, and especially those of Secretary Kellogg and Senator Borah to the American Senate, it was apparent that the intention of the Contracting Parties was:

- (1) That self-defense was not precluded by the Treaty.
- (2) That self-defense was not confined to the defense of territory.
- (3) That self-defense comprised the right of any nation to take such measures as it believed necessary for the defense of the country or to prevent occurrences that might endanger the country.
- (4) That the nation resorting to measures of self-defense was to be the sole judge on the question of self-defense.
- (5) That the question of self-defense was not to be submitted to any tribunal.
- (6) That no nation should have anything to do with deciding the question of self-defense regarding the action of any other nation unless such nation constituted an attack on itself.

It is true that in the United States Mr. Kellogg and others denied that there were “amendments” or “reservations.” But it is beyond any doubt in the light of the record that what they meant was that the prior declarations of the signatories could not be called “amendments” or “reservations” for they were “interpretations” of what was meant by the Pact itself, taking nothing out of it. That the United States Senate ratified the Pact on the same explicit understanding is shown clearly by the record (70 *Congressional Record* 1730).

By the Kellogg Pact the parties renounced war as an instrument of national policy and pledged themselves to settle all differences by peaceful negotiation. In the light of these interpretations, however, this was not done without a clear and definite prior agreement that each party should interpret the engagement for itself.

It may finally be noted that the United States was particularly concerned with Central and South Americas and with her Monroe Doctrine, Great Britain with certain unspecified regions, possibly including Belgium and the borderland of her far-flung Empire, France with the Rhineland and the Locarno Treaties, and Japan with her neighbor China, particularly the regions of Manchuria and Mongolia. Their common understanding was that all forcible measures which might be necessary to be taken by them were covered by national self-defense, of which they were the sole judges which was never intended by the signatories to be referred to any tribunal.

The Chief of Counsel admits that the text of the pact does not use the word “crime” (Record, p. 417), and indeed not only the text but the entire deliberations fail to reveal any such idea. The league conception of “sanction” was, as was well known, anathema to the American Secretary of State. The Chief of Counsel, however, asserts that the signatories made an aggressive war “illegal” (Record, p. 417). The dulcet term “aggressive war” as will be shown later, is amorphous, illusive and indefinable. But it may be granted that a non-defensive war admitted as such by the belligerent who wages it is illegal under the pact. The Chief of Counsel then declares that it is an international “crime.” The learned counsel’s logic is beyond our comprehension. To us the fact that the contracting parties to a treaty have agreed to make illegal a war not considered as self-defense by the belligerent does not make violation of the treaty a crime. It may be a breach of contract or a tort, but it is not a crime. How can an agreement to make a thing illegal convey of itself that the thing is a crime?

We desire to draw particular attention to the well-known principle in the interpretation of contracts, that the paramount rule is to ascertain the intention of the parties. Can it be supposed that it was the intention of the parties to any of the contractual instruments referred to in this case that a breach of their terms would involve the liability of individuals to arbitrary penalties? If they had meant so would they not have said so, and would they not have provided appropriate and graduated penalties and procedures to suit so novel a case as the infliction of penalties on public officials?

It is true that since the first World War certain international lawyers and publicists found the road to world peace in the administration of collective sanctions to an “aggressor” state. They have

vigorously combated the views of the orthodox school which found the road to peace in the strict observance of the rules of neutrality and the consequent localization of force and anarchy. The former endeavored to enforce the sanctions provided in the League Covenant and implement the Kellogg-Briand Treaty by modifying the prevailing rules of neutrality. The latter attempt was made at the meeting of the International Law Association in Budapest, September 1934, at which the well-known "Budapest Articles of Interpretation" were drawn up after a discussion of the legal consequences of a branch of the Pact of Paris (International Law Association, *Report of the 38th Conference*, p. 66). Again since 1936 a similar, though not exactly the same, attempt had been made by a group of American jurists and the result of their studies was embodied in the "Draft Convention on Rights and Duties of States in Case of Aggression," published in October 1939 by the American Society of International Law, as part of the Harvard Research in International Law (33 *A.J.I.L.*, No. 4, supplement section). The Budapest Articles of Interpretation were intended to be a statement of the existing state of the law although the soundness of that interpretation was a subject of heated discussions (e.g., the discussion of the Budapest Articles in the British Parliament on February 20, 1935, Vol. 95, H.L. Deb., 5th Series, Col. 1007 ff.), although such an interpretation is of course not binding on the signatories of the Pact of Paris. The Draft Convention on Rights and Duties of States in Case of Aggression, on the contrary, speaks *de lege ferenda* (p. 828). It was avowedly an academic attempt "to suggest a possible future development of the law rather than the law now in force" (p. 826). It is also stated:

"The considerations of the Draft Convention on Rights and Duties of States in case of Aggression revealed fundamental differences of opinion regarding the general organization of the draft, its underlying theories, and a number of the specific rules and principles set forth therein. The research nevertheless presents it, without any implication that the draft as published reflects even a consensus of the members of the Advisory Committee, hoping that its debates upon the problem may be continued among scholars throughout the world with a view to the further clarification of the subject" (p. 827).

Whether or not one agrees with the contents of the Draft Convention, great respect is certainly due to Professor Phillip C. Jessup and members of the Advisory Committee for having pursued dispassionately the study of "a subject embroiled in political controversy and emotion," and "not affected by momentary currents of diplomacy, enthusiasms and prejudices."

It may be noted particularly that neither the Budapest Interpretations nor the Draft Convention — both certainly products of the school of collective sanctions — suggests that a breach of the Pact of Paris or "aggression" constitutes an international crime. Indeed the latter makes apologies for the choice of the word "aggression" which has acquired a "psychological fringe" (p. 847). It also says that the purpose of the Draft Convention is to define legal relationships between states in cases where a resort to armed force has been in violation of a legal obligation not to resort to such means and where such violation has been duly determined by a procedure to which the lawbreaking state has previously agreed. It is not designed to indicate any opinion for or against a system of "collective security," nor to "implement" any specific treaty such as the League Covenant or the Pact of Paris, nor to enter into the field of "just" and "unjust" war (p. 825).

It may also be noticed that in considering the legal consequences of war in breach of the Pact of Paris or war of aggression, no idea of punishing the individuals responsible for such war was expressed by those jurists favoring collective sanctions who participated in the preparation of the Budapest Articles and the Draft Convention. This, we submit, is practically conclusive on the question of the attitude of contemporary thought. It repudiated the criminal liability of individuals altogether; it never even discussed such a thing.

From the foregoing it is clear that the argument which the Chief of Counsel presents fails to substantiate his conclusion that an aggressive war has become a crime in international law by custom recognized by civilized nations.

The Chief of Counsel quotes from Lord Wright's article on "War Crimes and International Law" as evidence that his conclusion meets with the approval of students of international law (Record, pp. 418-419). Lord Wright is certainly a very distinguished jurist and his ideas are entitled to great respect. But he is not a world legislator. In this article he is, we suppose, speaking not as a judge, but as an advocate, avowedly writing *ex parte*, as he is perfectly entitled to do, in support of his government's thesis. His very positive contention certainly does not represent the consensus of jurists versed in the law of nations, which alone — not the policy of governments nor the views of their avowed advocates — can be relied upon by a tribunal, national or international, regarding the question whether an international custom exists concerning this matter. "One swallow does not make a summer."

Even if Lord Wright's thesis were to be endorsed by all contemporary students of international law in the year of grace 1948, which is assuredly not the case, and if international law had rapidly and bewilderingly transformed itself during the war, of which we were unaware, it is palpably *ex post facto* action and unjust to apply those novel rules to the accused at the bar.

In order to prove the thesis that aggressive war is an international crime, the Chief of Counsel relies not so much on international agreements as such, which are obviously insufficient, as on the custom of nations. It may, however, be noticed that international jurists speak of a custom, when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right (Oppenheim, *International Law*, Vol. 2, p. 24). Article 38 of the Statute of the Permanent Court of International Justice mentions as a source of the law of nations "international custom, as evidence of a general practice adopted as law." The drafting of the phrase may be inelegant and open to criticism, but it is amply clear that in order to show that an international custom binding on all states has grown up, a general practice as well as the *opinio necessitatis* must be proved:

Vague and often rhetorical declarations made at international assemblies and in treaty preambles are surely not enough. We must look not only to the *animus* but to the *corpus*, a general practice of nations. The practice of nations, however, contradicts the thesis that an aggressive war involves criminality either on the part of a responsible state or on the part of responsible individual members of a state. The invasion of Ethiopia by Italy was regarded as an "aggressive

war” by the League of Nations, but the only sanction imposed by that body was economic severance. And no one suggested the criminal punishment of Italy, to say nothing of Mussolini and his cabinet. The invasion of Finland by Soviet Russia in 1939 was stigmatized by the league as a war of aggression but the only step taken was expulsion from membership. There was no thought of criminally punishing the Soviet Union or its political or military leaders.

Lastly it must emphatically be stated that in this trial the guilt or innocence of the individual accused and not that of the State of Japan is the issue. The two are entirely distinct legal questions. The Chief of Counsel failed to prove either that treaties have been entered into or that a custom of nations has been established, by virtue of which individual authors of an aggressive war are made punishable; which, it is confidently submitted, is fatal to the prosecution’s case.

AGGRESSIVE WAR AS A JURIDICAL CONCEPT

Another serious difficulty with the thesis presented by the prosecution, that aggressive war is an international crime, is that the terms “aggression” and “aggressor” are too vague to be defined.

Take, in the first place, the simplest lexicographic definition in Webster’s Dictionary cited by the Chief of Counsel:

“A first attack” (Record, p. 419). The aggressor is one who fires the first shot. “A cannon shot is a cannon shot,” says Briand, and “you hear it and it often leaves its traces.” So you can. That is, however, a physical test; it has no necessary moral or juridical connotation, and you would be required further to distinguish just from unjust aggression. Says Judge Moore: “Although nations when they go to war always profess to repel overt acts yet they frequently do not go to war on account of them; but an assurance of associate force would necessarily increase their propensity to do so. Moreover it is notorious that overt acts are sometimes craftily provoked for the purpose of justifying aggression” (Moore, “Appeal to Reason,” *Foreign Affairs* Vol. II No. 4, p. 568). And that is perhaps the reason for Webster’s alternative definition, “an unprovoked attack.” But what modern nations go to war without any provocation? Would the opening of hostilities by Japan on December 8, 1941 fall under the definition? It appears that some high public officials outside Japan thought even prior to the armistice that there was considerable provocation and that to deny it would be a travesty of history.

Judge Moore continues:

“[T]he taking of a forcible initiative may be the only means of safety; and the importance of this principle is necessarily enhanced by the insistence of nations or groups of nations on maintaining preponderance of military power. Portugal acted on this principle when, in 1762, the combined forces of France and Spain were hovering on her frontiers” (p. 568).

Take, in the second place, the definition also cited by the Chief Counsel:

“The aggressor being that state which goes to war in violation of its pledges to submit the matter of dispute to peaceful settlement, having already agreed to do so” (Record, p. 419). An obviously imperfect definition, since there are infinite possibilities of aggressive war where no treaty of arbitration exists. And it ignores also the possibility that a nation, which has agreed to arbitral processes, may find it necessary to exert warlike efforts in self-defense; and further ignores the possibility that there may exist no dispute, but simply a serious menace.

Would or would not the definition justify the landing of troops to preserve order in a disintegrated state as has often been done in Mexico, South American republics and also in China? (Herbert Arthur Smith, *Great Britain and the Law of Nations: a Selection of Documents Illustrating the Views of the Government in the United Kingdom upon Matters of International Law*, Vol. I (1932), Section 2 (Disorganized States), pp. 18-30.)

Was or was not the United States an aggressor when American forces suddenly seized and occupied Vera Cruz in April 1914, in disregard of the Treaty with Mexico of 1848, which expressly provided that neither party should resort to force before trying peaceful negotiation, and if that should fail arbitration? Or was the dispatch of British troops to China in 1925 without recourse to the methods of settlement provided by the League Covenant an aggression? (For the defense of its legal position by the British Government on this point, see note of 8th February 1927 addressed by Sir Austen Chamberlain to the Secretary-General of the League of Nations cited in Smith, *Great Britain and the Law of Nations*, pp. 25-29.)

We need not dwell on the many attempts at definition, short or long, which have not been cited by the Chief of Counsel. The longest, as elaborated by the Soviet Government has been characterized as lexicographic rather than lucid. The shortest, like the French proposal, “the presence of troops on territory not their own,” caused Major General Fuller to declare that whoever thought it out must have been a lunatic or a humorist. They all failed, because they were attempting to define the undefinable. Did not Sir Austen Chamberlain say: “I, therefore, remain opposed to this attempt to define the aggressor because I believe that it will be a trap for the innocent and a signpost for the guilty.” And did not Secretary Kellogg, at the time the Kellogg-Briand Treaty was being discussed, object on that very ground, to the French proposal limiting the scope of an anti-war treaty to wars of aggression? (Kellogg, “The War Prevention Policy of the United States,” in *A.J.I.L.*, Vol. 22, No. 2, p. 259.)

The authors of the Draft Convention on Rights and Duties of States in Case of Aggression, mentioned above, are, of course, wise enough to abstain from defining “aggression” except in a formal way. The draft says:

“(As the term is used in this Convention)

“Aggression” is a resort to armed force by a state when such resort has been duly determined by a means which that state is bound to accept, to constitute a violation of an obligation.”

The Draft Convention, as stated above, speaks *de lege ferenda* only. It will be remembered that under the Pact of Paris, the signatories implicitly reserved a wide margin of self-defense, of

which the State resorting to self-defense was to be the sole judge. They were not then minded to allow any other state or any group of other states or any international body to determine whether the employment of armed force was made “as an instrument of national policy” or in self-defense. It was one of the objects of the Draft Convention to ameliorate this state of the law. By the Charter of the United Nations the Security Council was invested with the power of deciding on questions of aggression. However, the interminable discussion in that august body concerning the unanimity principle on governing its decisions, indicates that any decision on aggression would be likely, in the present state of international affairs, to be motivated solely by a political alignment against a particular state or states. It indicates also the inherent limitations of that penal conception of world peace which envisages the abolition of armed conflict by making every war a world war.

At any rate, the provision in that charter brings us no nearer to a definite knowledge of what “aggression” is.

Judge Moore says:

“As experience has conclusively shown that the attempt to decide the question of the aggressor on first appearance is reckless of justice, we must, unless our purposes are unholy, rely on an impartial investigation of the facts. But this takes time. The Assembly of the League of Nations assumed jurisdiction of the Sino-Japanese conflict on September 21, 1931, the report of the Lytton Commission was signed at Peiping, China on September 4, 1932; the assembly adopted the report of its own committee on February 17, 1933. The actual time covered by the proceedings was seventeen months and even then a final conclusion was not reached” (Moore, *Appeal to Reason*, pp. 568-9).

And the Report of the Lytton Commission itself says in the concluding chapter:

“It must be apparent to every reader of the preceding Chapters that the issues involved in this conflict are not as simple as they are often represented to be. They are, on the contrary, exceedingly complicated and only an intimate knowledge of all the facts, as well of their historical background, should entitle anyone to express a definite opinion upon them. This is not a case in which one country has declared war on another country without previously exhausting the opportunities for conciliation provided in the Covenant of the League of Nations. Neither is it a simple case of the violation of the frontier of one country by the armed forces of a neighboring country, because in Manchuria there are many features without an exact parallel in other parts of the world.”

It may also be noted that under the actual state of international world organization in the first half of the twentieth century, serious problems confronted all conscientious statesmen regarding the scope of national authority to act in what they conceived to be necessary self-defense. Was that not the reason why the statesmen of America, Great Britain, France and Japan made comprehensive reservations in signing the Kellogg-Briand Treaty? It may be that the Hitlerite wars presented little difficulty to the Nuremberg Tribunal regarding their “aggressive” character,

for the reason that they were commenced by those who did not themselves believe that they were in immediate danger of being attacked by others. But does not the record of this trial clearly show that the cases of Germany and Japan are quite different in this and other respects, and that an “aggressive” or “defensive” character of Japanese war cannot so readily be pronounced without being subjected to the charge of *ipse dixit*, if not of subservience to popular prejudices or of a wilful travesty of history. Aggression is, after all, a matter of opinion. To hold a man a “murderer” because you differ from him is to kill him with a word. And it would certainly be the height of injustice to brand a statesman as a criminal and a felon for the mistakes he might make in his political decisions of the most delicate kind.

Equity — and natural law — is a roguish thing, if not in civil justice, at least in that category of criminal justice which is closely related to politics, national or international. If we give up the definition of aggression and leave the matter entirely to a tribunal to decide in each case whether a particular war was aggressive or defensive, its decision, without any measure to abide by, is likely to be swayed by contemporary political prejudices. For the term “aggressor” like “American Imperialism” or “Red Imperialism” — is a vituperative epithet, often employed in international politics merely with a view to stigmatizing a political opponent as a pariah in the eyes of the world.

In view of the preceding considerations, we not only contend that the Chief of Counsel’s thesis is not the law as it is but humbly submit that the proposition ought not to be the law. It may at first sight appeal to uninformed and unreflective minds, but when carefully considered it is seen to be a juridical principle which will not work without doing injustice. Its practical application could not but be such that the general public gets the impression, not that wrong has been conquered but that Bulwer’s dictum “Earth’s law: the conquered is wrong” remains ever true. Its application would be a most dangerous precedent for future victorious aggressors to exploit against their victims. We submit that it is a pseudojuristic doctrine which should be excluded from the holy precincts of the law of nations.

WAR IN VIOLATION OF INTERNATIONAL LAW, TREATIES, ETC.

Next, the Chief of Counsel deals with the so-called “Crimes against Peace” relative to the planning, preparation, initiation, or waging of war in violation of international law, treaties, agreements and assurances.

We are told that “here the law is well settled and has been enforced for generations” (Record, p. 420).

When it was stated by the American Secretary of State at the time of the making of the Kellogg Pact that the limits of self-defense have been clearly defined by countless precedents, students of international law remarked that it would be interesting to know what these countless precedents were but their curiosity has never been gratified. So when we are told this part of the so-called “Crimes against Peace” is well-settled and has been enforced for generations, every student of international law will rub his eyes and lament his profound ignorance.

International law and treaties ought to be observed. No sensible persons, including all the accused, will doubt that. The Chief of Counsel asks, “Do these accused contend that those (i.e., treaty stipulations) are empty words?” (Record, p. 422) Of course not. It is most unfair to attribute to the accused moral depravity of such a low level as to think that a nation may disregard international law and treaties. True, nations may in a particular case have a different interpretation of international law and treaties, and sometimes one nation may attribute to the other party a breach of the law or of the plighted word. But that is a matter which ought to and could be decided by an impartial tribunal. If a rule of general international law or any provision of a treaty is violated, nobody doubts that it is *illegal*. But it is a long way from pronouncing a national action to be illegal to the condemning as criminal, and capitally so, of the individual leaders of a nation that initiated such an action. Every civilized nation does not treat every breach of a contract or every tort as a crime.

The Chief of Counsel particularly cites Hague Convention III as an example example (Record, p. 421). We shall not repeat here what has been said before. Even allowing for the moment that its violation is illegal in all cases, it does not constitute a crime on the part of individuals responsible. The *punishment* of “crimes against peace” in violation of treaties has never been known to the law of nations. The thesis was, as stated before, rejected as untenable at the Versailles Conference. The law is settled in a direction contrary to what the Chief of Counsel asserts it to be. Of course the accused did not “know” that their acts were “criminal” as the Chief of Counsel alleges (Record, p. 421), for everyone “knows” that they were not criminal at all in the law of nations.

It may be noted that the above-mentioned Draft Convention of 1939 on Rights and Duties of States in Case of Aggression, contains the following passage in one of its comments on the text:

“(1) The United States is a party to the Third Hague Convention of 1907, which , in Article I provided that hostilities must not commence without a previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war. The United States goes to war without issuing an ultimatum or declaration of war; the United States has not committed an ‘aggression’ within the meaning of this Convention.”

“(2) Japan is a party to the Washington Nine-Power Treaty of 1922, which in Article I provides that, the parties will ‘respect the sovereignty, the independence, and territorial and administrative integrity of China.’ Japan, without justification, conquers and annexes Chinese territory; Japan has not committed an ‘aggression’ within the meaning of this Convention” (page 896).

This means that the authors of the Draft Convention who proposed *de lege ferenda* to clothe “aggression” with certain legal consequences unfavorable to the aggressor determined as such by procedure to which such state has given its previous assent, did not regard war merely on account of being in breach of treaties such as the Third Hague Convention or the Nine-Power Treaty as constituting such “aggression.” It also implies that even jurists of the sanctionist school certainly do not go so far as to hold the broad proposition alleged by the Chief of Counsel to be the settled

law, nor do they propose under the suggested regime to impose criminal punishments on individuals responsible for initiating war in breach of such treaties.

MURDER

Next, we are confronted with an explanation by the Chief of Counsel of the strange charge in the Indictment that the accused are guilty of murder.

The Chief of Counsel argues that in civilized countries the international killing of a human being without legal justification is murder, citing the Japanese Criminal Code (Record, p. 425). This may be admitted, with the grave qualification that an illegal killing is not necessarily the capital crime of murder even in Great Britain or the U.S.A. It may be a mere manslaughter and entail only a month's imprisonment or a fine. And in some jurisdictions homicide is never capital at all. Then he says, "In the case before us, the deaths all occurred as a result of belligerency of war, and since the war was illegal, all the natural and normal results flowing from the original act are also illegal. This is even true under Japanese Law" (Record, p. 425).

With respect, we cannot follow the logic of the Chief of Counsel. He begins by using the ambiguous epithet "illegal," meaning "illegal by the Law of Nations," and the erroneously uses the same word to mean, "illegal with all the consequences and accompaniments of acts illegal by municipal law."

As a matter of fact every student of the law of nations is aware that this is not so in international law.

It is the consensus of international lawyers that even if war is commenced in breach of international law or treaties, nevertheless a state of war comes into being and both belligerents have a right to be protected by the rules of war.

Professor Lawrence cites an extreme case of an attack made without provocation and without any previous diplomatic negotiation, and says:

"To attack another state in a period of profound peace, without having previously formulated claims and endeavored to obtain satisfaction by diplomatic means, would amount to an act of international brigandage, and would probably be treated accordingly. But the state of things set up by such abominable means would nevertheless be war, and both sides would be expected to carry on their operations according to the laws of war" (Lawrence, *Principles of International Law*, 7th edition (1925), revised by Percy Winfield, page 323).

It is true that pirates are punishable as criminals against all mankind. But pirates act without any authorization from any government, and it is strange learning to treat members of the regular forces acting with the authorization of the government or persons politically responsible for the commencement of war as murderers simply because the war allegedly commenced in an illegal manner.

It may be noted that within a State, a well-organized community, persons who plan, prepare and initiate civil war are clearly acting illegally. Municipal law naturally treats them as guilty of high treason. But it normally treats them as political offenders, not as common “felons” or as murderers, and the law of nations excludes them from extradition.

The Chief of Counsel further cites various provisions of Hague Convention IV (Record, pp. 425-7) of which Article XXIII runs as follows:

“In addition to the prohibitions provided by special Conventions it is especially forbidden:

(2) To kill or wound treacherously individuals belonging to the hostile nation or army.”

The Chief of Counsel draws this conclusion from the foregoing provision:

“[T]herefore, an attack without warning upon another nation with which Japan was at peace constituted treachery of the worst type, and under the provisions of the Hague Convention the killing of any human being during such attack became murder” (Record, p. 427).

It may seriously be doubted in view of the opinions of such eminent authorities as Westlake and Bellot, quoted above, whether a sudden and strategic attack made by one nation after grave provocations and after prolonged efforts through diplomatic negotiation, and when the other nation knew that the situation had become so tense that it expected and was prepared for the opening of hostilities at any moment, can be illegal under Hague Convention III or can be dubbed “treachery of the worst type.” But even if this be admitted for purposes of argument, the conclusion of the Chief of Counsel does not follow from the foregoing provision for the phrase to “kill or wound treacherously” clearly means “in the course of war already in progress;” otherwise there could be no “hostile nation or army.” The provision cited by the Chief of Counsel does not envisage any act relating to measures provided for in Convention III.

The parable of the “rabbit trick” seems to be the fashion of the day. In criticizing the Government plans for the nationalization of inland transport before the British Parliament, Lord Reading said that the Government in a relatively short time had shown themselves extremely adept at bringing “socialized rabbits out of a nationalization hat.” At the All-India Congress, Mr. Acharya Kripalani, criticizing the proposed Constitution introduced by the British, said in Hindustani that like magicians, they produced rabbits or eggs from the hat whenever it suited them. May we be pardoned for following this world-wide fashion with a view of dissipating once for all the cobwebs of fine-spun casuistry which, it is respectfully submitted, characterizes the argument of the prosecution. You see the conjurer borrow an ordinary hat. He plants it on the table, and mutters some incantations over it. Then he lifts it up — and the table is swarming with little rabbits. There were no rabbits in the hat. He put them there.

The argument of the prosecution, we venture to say, is exactly like that. It takes an ordinary hat, the nice well-known, respectable hat of International Law, covering states and nations. It places

the hat on the table and intones over it some weird incantations among which we can catch the words, in a crescendo, “unlawful,” “criminal,” “murder.” And then the hat is lifted, and immediately the Tribunal swarms with newborn little doctrines drawn from odds and ends of municipal law, to the extreme amazement of us all. Where the prosecution got them is immaterial. They were surely not in our silk hat. The prosecution put them there.

“CONVENTIONAL” WAR CRIMES

As for the “conventional” war crimes, and the “crimes against humanity” in so far as they are part of the “conventional war crimes,” we admit that they may and should be punished, if guilt is proved according to the established rules of international law before a duly constituted tribunal.

War is a brutal affair. Stripped of all human justifications and excuses, and judged by the highest of human standards indicated by the Prince of Peace, war, defensive or aggressive, may be regarded as an institution necessarily involving murderous action. It is a notorious fact, amply shown by the history of war, that war has a tendency to make the participants brutal, giving rise to many cruelties to opposing combatants and to civilian populations, especially where the latter are suspected of hostile actions. These are the deplorable accompaniments of the bloody operations.

However natural and inevitable this may be in the war, the dictates of the established law of nations require that punishment be imposed upon the guilty, and indeed that “stern justice be meted out” to the perpetrator of such crimes is clearly within the purview of the terms of the Instrument of Surrender to which the Japanese Government plighted its honor.

Persons who may be actually guilty of atrocious acts in contravention of the laws and customs of war may properly be punished by a duly constituted court. But we call the attention of the Tribunal to the fact that the American members of the Commission of Fifteen at the Versailles Conference altogether denied assent to the doctrine of “negative criminality,” i.e. responsibility for failure to prevent “conventional” war crimes, and that negligence in preventing death is only non-capital manslaughter in England.

Perhaps on the facile assumption that the German and Japanese situations were the same, the Chief of Counsel imagines that there were orders from the accused officers for every offence against the law of war which might have been committed by delinquents on various battlefields. But such “orders from above” cannot be proved. The Chief of Counsel, therefore, bases his charges of “orders from above” on assumption and on assumption only. For he concludes:

“These murders followed such a wide range of territory and covered such a long period of time, and so many were committed after protests had been registered by neutral nations, that we must assume only positive orders from above; those accused here in this prisoners’ dock made them possible” (Record, p. 429).

But it must surely be shown at what exact level the assumed command issued; an indiscriminate assumption of guilt at all levels or at all above a certain level would be essentially contrary to justice and would be revolting to the conscience of the world.

Even if the alleged atrocities or other contraventions assume a similar singular pattern of acts it cannot justify such an assumption. Such a pattern may have been a sheer reflection of national or racial traits. Crimes no less than masterpieces of art may express certain characteristics reflecting the *mores* of a race. Similarities in the geographic, economic, or strategic state of affairs may in part account for the “similar pattern” assumed. The existence of a command from above, and from whom it issued, has certainly to be proved beyond any reasonable doubt in a case of this grave character. The impression prevails after listening to the testimony of the witnesses alleging atrocities, that they follow not a uniform pattern but manifold patterns according to the nationality of the witnesses, not only negating “orders from above” but telling an entirely different story.

PERSONAL RESPONSIBILITY

The Chief of Counsel then proceeds to the question of personal responsibility on the part of the accused. He cites a decision of the Supreme Court of the United States, *Ex parte Quirin*, the saboteurs’ case, in support of his thesis that the planning, preparation, initiation, and execution of war in breach of international law or of treaties involves individual responsibility (Record, pages 431 *et seq.*). But *Ex parte Quirin* is a case concerning the question whether an American act of Congress can, instead of crystallizing in permanent form and in minute detail every offense against the law of war, adopt the system of common law, applied by military tribunals so far as it should be recognized and deemed applicable by the courts. This is simply a question of the interpretation of an Act of Congress, which might enact in constitutional terms whatever it pleased. The interpretation put by the Court on the will of the Congress cannot bind other nations.

It is, moreover, a far cry from adopting by reference the well-established common law of warfare in which individuals have by established custom been tried by military tribunals, to the adoption of a perfectly revolutionary doctrine that the planning, preparation, initiation, and execution of war in violation of international law and of treaties involves not alone responsibility of the state concerned, but criminal responsibility on the part of individuals acting on its behalf. Such a criminal responsibility has been expressly denied by the consensus of international jurists as well as by the custom of nations, and was assuredly never thought of by responsible statesmen of any country when they negotiated international treaties. If such an interpretation had been proposed at the time of the negotiation, those treaties would never have been concluded. Can it for a moment be supposed that the parties to the Kellogg-Briand Treaty intended that if they went to war in contravention thereof, they should be guilty of murder? The Charter of the United Nations does not contain such a doctrine, and if such a provision had been made, the Charter might never have been adopted.

Let us now cast a glance at the principles of the law of nations affecting personal responsibility. As the Tribunal is well aware, international law is a delicate and unaggressive body of law governing the community of sovereign states. If the family of independent nations should evolve

a world government, international law as we know it would *ipso facto* disappear and be replaced by the universal law. Those essential characteristics of the law of nations, which arose from the conditions obtaining in European society since the Renaissance, still remain today after centuries of its development and despite the extension of its orbit to other continents. The law of nations is, therefore, enforced not by a universal government but by organized states capable of exercising an effective control over their respective territories and of assuming a certain measure of responsibility for acts of all persons subject to their sovereignty as well as for their own conduct.

The principles of international responsibility can be understood in their true perspective only when this basic fact in this particular legal system of ours is fully realized.

It is the general principle of the law of nations that duties and responsibilities are placed on states and nations and not on individuals. The breach of an international duty gives rise to the collective responsibility of the delinquent state. The specific sanctions of international law, such as reprisals and war, are directed not against the individuals through whose conduct international law has been violated but against the state itself, i.e., against all the individuals composing such state. In a regime of the world state with its universal law, justice would require that criminal or civil sanctions be directed against the guilty alone and not against innocent citizens, just as the punishment for treasonable acts committed by certain citizens of the State of New York is meted out to guilty persons alone and not to the entire population of that State. Such, however, is not the system prevailing in the Community of Nations.

Through the practical experience of intercourse between nations both in war and peace, however, there came to be recognized a few well-known exceptional cases, real or apparent, in which individual responsibility might be imposed. The oldest exception is that of piracy. According to custom antedating the rise of modern international law, a pirate was regarded as an outlaw, a "*hostis humanis generis*." Under the law of nations a pirate loses the protection of his home State and all nations are entitled to seize and punish him. By this exceptional rule the State of which the pirate is a national cannot invoke the principle of the freedom of the open seas to protect him, and other States are not authorized to resort to reprisals or war against the State whose subject or vessels have committed acts of piracy. Another well-known group of exceptional instances is breach of blockade and carriage of contraband of war. International law provides for specific sanctions against blockade-runners and contrabandists in the shape of confiscation of the cargo, which can be enforced by the prize courts of the capturing State. A third group of exceptions is violations of the law of warfare, or so-called "war crimes," in which persons even though not belonging to the armed forces of a State can be summarily punished by its military tribunals.

A State assumes collective responsibility for its own act, that is to say, for an act of State performed by individuals at the government's command or with its authorization. To say that an act is an act of State means that the act in question is imputed to the State and not to those individuals who have performed the act. It is a well-established principle in the law of nations that the state injured by such an act can hold the State alone responsible for an international delinquency. It cannot, without violating the law of nations, hold the individuals responsible without the consent of the State. In the famous MacLeod case, MacLeod, a member of the

British forces dispatched in 1837 into the territory of the United States in order to capture the *Caroline*, was arrested in 1840 in the State of New York and indicted for the killing of an American citizen on that occasion. Mr. Webster, Secretary of State, wrote to Mr. Crittenden, Attorney General, on March 15, 1841: "All that is intended to be said at present is, that, since the attack on the *Caroline* is avowed as a national act, which may justify reprisals, or general war, if the Government of the United States in the judgment which it shall form of the transactions and of its own duty, should see fit so to decide, yet that it raises a question entirely public and political, a question between independent nations; and that individuals connected in it cannot be arrested and tried before the ordinary tribunals as for the violation of municipal law. If the attack on the *Caroline* was unjustifiable, as this Government has asserted, the law which has been violated is to be sought in the redress authorized by the provisions of that code" (Moore, *Digest of International Law*, Vol. 2, Sec. 179).

In the Report adopted by the Committee of Experts for the Progressive Codification of International Law at its third session, March-April, 1927, it is stated: "The inability of a court to exercise jurisdiction in regard to a sovereign act of a foreign government ... should apply where the defendant is sued personally for acts done by him in his capacity as a public official ... though he no longer retains that capacity at the time of the proceedings ... or under powers conferred upon him by a sovereign State" (Publications of the League of Nations, Legal, 1927, Vol. 9 in *A.J.I.L.*, 1928, Vol. 22, Supp. p. 125).

Woerterbuch des Voelkerrecht und Diplomatie, herausgegeben von Karl Strupp (1925), Vol. 2, p. 2, also says: "The State is responsible for the acts of all its organs, but the organs are not responsible at all insofar as they act in their capacity as organs of the State."

This fundamental rule of the law of nations is not, however, without a few well-known exceptions, as is clearly the case in espionage and war treason which, even if committed by command of the government of the enemy State, can be punished as "war crimes." But such exceptions to the general rule of the immunity of individuals must clearly be established by special rules of the customary or conventional law of nations.

Individual responsibility either for acts of State or for non-official acts can be provided for by international treaties. This is true of slave-trading, cable-cutting and pelagic sealing. A more recent (but abortive) attempt at establishing such an exception to the general principle of immunity was the treaty relative to the use of submarines concluded at Washington February 6, 1922. Article 3 of the treaty provides that:

"Any person in the service of any State who shall violate any rule of this treaty relative to the attack, capture, or destruction of commercial ships whether or not he is under order of a government superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any power within the jurisdiction of which he may be found."

In view of the extreme reluctance of the nations to recognize exceptions to this basic principle of the law of nations and the meticulous care which is exercised in establishing such exceptions by international agreement, it must be said to be amply clear that neither Hague Convention III nor the Kellogg-Briand Pact was designed to establish any exception to the general principle, by introducing individual responsibility for acts of State, as the Chief of Counsel contends. If that was really the intention of the contracting parties, they would have expressly said so.

The above system of responsibility is grounded on the realities of our community of states, and is the only system which can practically function with justice in view of those realities. It would surely be an act of folly to criticize the system with a mind permeated with notions derived from municipal law, or on the erroneous assumption that the world state is a present reality or can be established in the immediate future. Persons both wise in municipal law and with sincere aspirations for the welfare of mankind have participated in the building up of the present system. If acts of State loom large in that system it is but a reflection of the realities of the society of nations, in which peace and order is primarily maintained by means of the fullest recognition of state sovereignty, which the nations of the world seem not yet prepared to replace by the sovereignty of a world state and the reign of the universal governmental law. Would it not be to be blind to the realities of the community of nations to think that the business of government, whether political, economic, or military, can possibly be conducted, if an officer of state has to decide for himself in every case as to whether the command of his government is in violation of international law, treaties, agreements and assurances, lest he should some day be declared a war criminal by an alien judge?

That at least might be one of the potent reasons why many a state would ponder long before signing a treaty by which the conspiring for, preparing, initiating and executing of a war liable to be some day declared by the victors aggressive or in breach of an international agreement is a criminal act, involving the personal responsibility of its statesmen and military officers. At any rate it is quite clear that there exists in the law of nations no crime against peace involving personal responsibility unless and until express provision is made for such criminal responsibility by an international agreement.

May we not here state another reason why it cannot be supposed that the treaties like the Kellogg-Briand Treaty and Hague and the Geneva Conventions intended to impose individual penalties upon statesmen. It is to be found in the fact that international relations are so intimately interwoven that the true situation cannot be revealed by evidence in court without gravely jeopardizing the relations between the countries immediately concerned *and other states*. Also, the securing of evidence from independent sovereign states must always be precarious or often impossible, because of the dislike or refusal of the latter to reveal compromising or secret matter of importance to themselves. Such considerations seldom, if ever, hamper the defense in municipal prosecutions.

These matters sharply differentiate the responsibility of those who conduct the affairs of state from that of persons who have nothing to do with them. It is obvious that the law of Nations and the signatories of International Conventions have been well aware of this all important fact.

Justice cannot be done to statesmen without the production of evidence which might set the world in a blaze. It is not any undemocratic discrimination in favor of statesmen as such. Nor is it derived from an outmoded doctrine of corporate fiction as applied to the state. It is the just recognition of a truth that statesmanship cannot properly be defended without that enormous danger. And as nations will not incur that dangerous risk, statesmanship cannot properly be defended in courts at all. That is one of the reasons why impeachments, bills of attainder and bills of pains and penalties turning on foreign policy have been so uniformly discredited and disliked. The hands of the accused are tied by the impossibility of obtaining the evidence of foreign chanceries and the danger of disturbing foreign relations. The Panama Scandals, the Dreyfus case, Caillaux case, are only pale reflections of the difficulties of doing anything like real justice when an international governmental element is indirectly concerned. The immunity of statesmen is not a mere tradition: it is a necessity.

We heartily agree with the Chief of Counsel that law, international and national, can grow by judicial decision as well as by legislation. But, we submit, the development of law by judicial decision proceeds and ought to proceed within the bounds of the spirit and fundamental principles of a legal system.

A reference to the history of the law in Europe or America will show how exceedingly careful and moderate the courts have been in their development of the law they administer. They have worked like the processes of Nature, gradually and imperceptibly, not suddenly nor violently. Therefore, their work has been permanent. The court exists to administer the established law. The court is expected by its decision not to effect a revolutionary change in law, but to interpret existing law. If a tribunal attempts to revolutionize the law, it arrogates to itself the function of a legislature.

It is true that sometimes the courts virtually legislate in the guise of rendering legal interpretation. But such judicial legislation proceeds by the slow process of tentative and meticulous inclusion here and exclusion there, not by the overhauling of any fundamental principle of the particular legal system it administers. In *Southern Pacific Co. v. Jensen* (224 U.S. 205, 221 (1917)), Justice Holmes says:

“I recognize without hesitation that judges do legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common law rule of master and servant and propose to introduce it here en bloc.”

A parallel has sometimes been drawn between the present attempt to import new crimes into the law of nations and the introduction of new crimes into medieval English law. The parallel is superficial and the justification based on such analogy is certainly fallacious. The English criminal law in medieval times was designed to regulate a small community held together by a single faith — that of Rome — which pervaded all affairs of life and conduct. The society which international law is intended to regulate today is a world-wide community of sovereign nations

with manifold cultures and divergent social and political outlooks. In medieval England the judges were mostly Catholic ecclesiastics and their judgments in criminal matters reflected the medieval conception of justice. Here the eminent judges represent nations with different religions, social and political outlooks, and different legal traditions. The new crimes introduced by the Court of King's Bench in medieval England were all flagitious conduct according to the Christian code of morals, and the process of introducing them was a gradual extension of an admitted legal system already judicially administered. No one could be surprised or complain if the Court treated them as crimes imposing appropriate penalties. No protesting voice impugning the novelty of a crime was to be heard. Not even the accused complained that they were being tried and condemned for something novel. They felt, like the rest of the world, that they were criminals. Here the proposed new crimes are political acts on which opinion widely differs, and the principle proposed is contrary to all well-established principles and startling to all previous conceptions and practice. Scholars throughout the world are declaring that the novelty of the process is a bar to its reception, that it is an attempt to penalize men for their opinions and to conclude questions of statesmanship and politics by ex parte pronouncements of law. These declarations of great jurists may be right or wrong. The point is that they are made and cannot be ignored, and with their existence the alleged parallel vanishes into thin air.

A revolutionary legal change can properly be made only after prolonged discussions as to the pros and cons of the proposal by all concerned, which cannot be undertaken by a tribunal, where the evidence for or against such change in law is extremely limited, depending as it does in large measure upon the facilities and learning which happen to be available for the counsel of the contending parties. If any fundamental change in the law of nations is necessary, an international body like the United Nations might be a proper organ, if it develops into a world legislature. But it is certainly not a task for an International Court of Justice or for a Military Court, national or international. The Chief of Counsel says that the development of the art of destruction has proceeded to such a stage that the world cannot wait upon the debating of legal trivialities (Record, p.461). But law is not a triviality. The rules and principles of the law of nations built up by centuries of experience, tested by reason, should not brusquely be set aside as "legal trivialities." Perhaps the Chief of Counsel has here been seized with that zeal for a new order of things which has characterized every generation which has become conscious after a great war of its own pivotal position in history. But we must bear in mind that "a new order of things" and "emergency" are the well-known techniques for disregarding due process of law by the powers that be. If it were really the universal sense of the nations of the world that new principles governing their intercourse be set up to avert disaster to mankind, as alleged by the Chief of Counsel, the method well settled for such purposes, i.e., multilateral treaty-making, might easily be resorted to. It may not be inappropriate here to remind the Tribunal of Lord Digby's famous dictum made in 1641 regarding the Strafford Bill of Attainder:

"There is in Parliament Double Power of Life and Death by Bill, a Judicial Power, and a Legislative, the measure of the one is what is legally Justice, of the other what is Prudentially and Politically fit for the good and preservation of the whole. But these two, under favor, are not to be confounded in Judgment. We must not piece up want of legality with matter of conscience, nor the default of prudential fitness with a pretence of Legal Justice."

It may be “high time” that the principle of individual responsibility in these exalted circles of government was introduced. But let it not be done in a manner which will inevitably cast suspicion and discredit on it, by making it appear as the unilateral opinion of a conqueror; that will set back its acceptance for centuries.

After urging the Tribunal to take this opportunity to effect a fundamental change in the system of international law, the Chief of Counsel closes his discussion of the criminal law of the Charter by again invoking the notorious doctrine of criminal conspiracy, as if it already constituted an institute of the law of nations.

Thus totally disregarding the eminently sound principle that guilt is personal, he declares that “these men, who held positions of power and influence in the Japanese Government and by virtue of their position conspired to, and planned, prepared, initiated, and waged illegal war, *are responsible for every single criminal act resulting therefrom* (Record, pp. 433-4).

He also endeavors to invigorate his thesis by referring to another theory of domestic criminal law (Record, p. 434) — apparently recognized in some jurisdictions — that all who participated in the formulation or execution of a criminal plan, in the execution of which crimes happen to be committed by some of their number, are liable for each of the offenses committed and for the acts of each other, without regard to whether they knew of them and whether they had forbidden them.

On this cognate topic we also urge that this Tribunal will reject, as forming any part of the law of nations, the illogical Anglo-Saxon doctrine that if several persons are engaged in the accomplishment of an unlawful design, however insignificant, they are all equally liable for the penalties of a crime, however atrocious, committed in its furtherance by one of their number, although without their knowledge or against their express instructions. For instance, if a party of hunters is taking game unlawfully and one of them deliberately kills a warden who interferes, all the rest by this doctrine are held guilty of murder, although they know nothing of his act and would have done their utmost to prevent it if they had known. It is an offense to common sense to suppose that such a peculiar and unfair doctrine, based on purely historical grounds, is accepted as law by all the nations of the world.

The Chief of Counsel asserts that excepting one point, namely, the doctrine that their official position does not protect the accused, the law laid down in the Charter represented the rules and principles of the law of nations not only at the time the Charter was penned, but at the time of the acts alleged to have been committed by the accused. The question regarding ex post facto law is not, according to the Chief of Counsel, involved in this case and the accused can justly be punished (Record, p. 474). We beg squarely to join issue with the Chief of Counsel on this question of ex post facto law. Allow us to take a concrete example. Suppose that one of the accused in this trial were to be sent to the United States and were to be charged with the crime of conspiracy or the crime of aggressive war by a military tribunal created by the President of the United States with or without the cooperation of other nations. Suppose also that having been

sentenced to prison, he were to seek a writ of habeas corpus from a Federal Court. Would the Chief of Counsel seriously contend that the prisoner would not be entitled to be released on the ground he was held in violation of the ex post facto clause of Article I, section 9, of the Federal Constitution? Will not the case clearly fall under the said clause according to the classical interpretation of Justice Chase in *Calder v. Bull*, which is as follows:

“1st. Every law that makes and punishes such action.

“2nd. Every law that aggravates a crime, or makes it greater than it was when committed.

“3rd. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed.

“4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender” (3 Dallas 386, 390 (1798)).”

It may be noted that the rule against ex post facto penalization is not a technical rule of American jurisprudence. It is a rule based on natural and universal justice. As fire burns and water flows alike in Washington and Tokyo, so a violation of that rule will be felt to be unjust and oppressive in the East as well as in the West. We beg to reiterate here that except in the case of “conventional” war crimes the criminal law laid down in the Charter is clearly and entirely ex post facto and therefore excluded by the Potsdam Declaration as not being “stern justice” but the Hitlerite “justice” of vague “popular feeling:” the antithesis of justice according to law.

THE NEW DOCTRINE OF INTERNATIONAL LAW PROPOSED BY THE PROSECUTION

The Chief of Counsel strongly urges the Tribunal to create by an unprecedented and historic decision a novel and, in his opinion, salutary principle in the law of nations that aggressive wars and wars in breach of international law and treaties are international crimes for which persons who acted on behalf of such a State are punishable with all the ignominy of common felons (Record, p. 389).

Before importing a proposition so far reaching in effect into the law of nations, we must examine it not merely as an expression of a glowing and irreflective moral sentiment but as a legal principle as it actually functions, not in the texture of a state or a super-state, but in that of a complicated society of sovereign states. It is conceivable that at a time of revolutionary excitement, when the public passions aroused by war have not yet subsided, an international body might unanimously adopt the proposal. It is, however, greatly to be doubted whether it can ever be technically elaborated in the form of a treaty which can be accepted by all nations, great and small, as soon as they are fully conscious of its practical implications.

It is a notorious fact that in time of war “aggressor” is the epithet which each of the belligerents in self-righteousness and for purposes of soliciting public sympathy hurls at the other. When one

of the parties is defeated, will the victor ever admit that it was the aggressor and punish its responsible statesmen and officers? Unless human nature is fundamentally altered, it will always be the defeated nation that will be declared the aggressor and the violator of international law and treaties. A defeated nation has from time immemorial been penalized by the loss of its territory and by the payment of indemnities. Its statesmen and military officers were penalized through the loss of their prestige and their fortunes and by the pain of seeing their beloved country reduced to ruins. To add criminal penalty to all this would only signify a long step farther away from that elevated spirit of perpetual oblivion, amnesty and pardon which used to characterize the termination of war in the East as well as in the West. It will be to introduce a disturbing element in the peaceful intercourse of nations. If nations are to continue as a unit they would not like to be eternally reminded of the stigma of crime set on their forehead by other nations whom they may not deem to be above reproach or wholly disinterested and unprejudiced. If war is outlawed altogether and persons who prepare for war, either defensive or aggressive, are made punishable by law domestic and international, the proposal may be more just, reasonable and calculated to promote world peace than the qualified and equivocal undertaking of the Kellogg-Briand Treaty. But to add to the “war” to be outlawed the adjective “aggressive” or “in breach of international law or treaties,” though sounding reasonable enough in the abstract, is practically fraught with the serious danger of functioning as “a trap for the innocent and a signpost for the guilty.”

We must also realize that such a basic change will have far-reaching effects on international and domestic law. In an address by Dean Roscoe Pound on “The Future of Law,” delivered at Tokyo University on February 20, 1937, he sounded a weighty warning to ardent but rash law reformers that a change in a body of norms may have effects at many other points, and that the stability of the economic order may be greatly disturbed thereby. He showed how a novel doctrine such as that of a sit-down strike, asserting a vested interest of the employee in the *locus* of performing the job undermines the foundations on which are based the common-law doctrines regarding the employer’s criminal and civil liability, by which the general security has been maintained — since the owner of the locus has not longer the control or choice of the persons who work there. The doyen of American jurists here referred only to the effects of a comparatively minor change in domestic law. But the criminal responsibility of the authors of a war comprising all persons plotting, preparing, initiating, and executing it, and made still more comprehensive by the use of the Anglo-American doctrine of conspiracy, if introduced into the law of nations will have far-reaching effects on other portions of international law and may have unexpected repercussions on domestic law. For it is an innovation which undermines the very foundations on which all doctrines of the law of nations have been built and will engender confusion and chaos in the conduct of state affairs, whether political, economic, or military.

It is a dangerous undertaking to attempt to alter to conform to the exigencies of a temporary executive policy any fundamental principle of that body of law which has been developed by civilized nations through centuries of arduous travail. Was it not very wise and far-sighted of the Judicial Committee of the British Privy Council to have advised the Crown in the leading case of *The Zamora* (*Law Reports* (1916) 2 Appeal Cases 77):

“The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the Principles of our Constitution.”

It is well known that Karl Schmidt and others in Germany attempted to build up a new international law to suit the political exigencies of the Third Reich. That attempt has been looked down upon as unworthy of the glorious traditions of the legal profession, for it meant the subservience of law to politics. Such an attempt, however well-intentioned, is especially to be avoided at a time when war's hates and prejudices remain undiminished. It has been said that it is the duty of every generation to consider its conduct under a deep sense of responsibility to future generations and uninfluenced by that emotional hypocrisy which facilitates a reversion to evil practices under righteous pretences. For the sake of our posterity, may we not here stop and ponder not only that well known Johnsonian aphorism “Hell is paved with good intentions,” but Walter Bagehot's not ineptly expressed paradox, “The work of the wise in this world is to undo the mischief done by the good.”

The Chief of Counsel vigorously denies the “small meaner objects of vengeance and retaliation” (Record, p. 387). However, persons who have studied the history of World War I may be permitted to recollect that the public passion caused by German *Schrecklichkeit* created a popular clamor in the Allied countries for the punishment of the authors of the war, and that their leading statesmen could but respond at least for a time to that popular sentiment. May it not be surmised that history is repeating itself in this respect in World War II, and that the prosecution is doing its very best to give effect to the policy of their respective governments, acting knowingly or not in consonance with the supposed similar popular sentiment.

The Chief of Counsel asserts that the establishment of this principle is necessary for deterring future aggressors (Transcript, p. 387). But it is not necessary for that desirable end. For statesmen will never be disposed to make aggressive war in the face of probable defeat. And if their country is not defeated, they are unlikely to be penalized. The risks of defeat are terrible enough in themselves to be a most potent deterrent; and in the anticipated event of victory, penal consequences are no deterrent at all, for the victor will impose them instead of suffering them. Would Bismarck have been deterred from war in 1870 by the fear that if France were victorious he might be tried and condemned by a military court? Indeed such a doctrine of individual crimes of leaders may have the most deplorable effect of making future wars more cruel and inhuman. For political and military leaders in belligerent countries will be all the more intensely bent on quick victory by fair means or foul, not only to save the lives of their compatriots but to save their own necks. In the process of such wars the laws and customs of war such as were recognized by the Hague and Geneva Conventions will be disregarded by both belligerents as “legal trivialities.” The doctrine of military necessity, of *Kriegsraison* will be in the ascendant. Moreover, an international lid placed on a national boiling pot by threats of punishing the leaders of an exasperated nation will never secure peace so long as there is a strong national feeling of injustice. Resentment will breed conflict unless adequate machinery is provided for peaceful and just change. The road to world peace must be sought elsewhere, namely, in international

cooperation, in the economic and social amelioration of mankind and the conciliation of differences between nations, if they occur, in the spirit of amity and justice.

We have heretofore answered the arguments of the prosecution in its opening statement at the commencement of this trial. In its summation the prosecution has presented some new arguments and amplified those referred to previously. We shall answer these in the following order:

- I. War Criminals.
- II. The Pact of Paris and Self-Defense.
- III. Conspiracy.
- IV. Murder.
- V. "Conventional" War Crimes.
- VI. Liability of the Defendants.

I. "WAR CRIMINALS"

We have already shown that the term "war criminals" employed in the Potsdam Declaration as embodied and accepted by the Instrument of Surrender should, for the reasons already stated, be interpreted as meaning conventional crimes.

- (1) The prosecution cited two entries in Kido's Diary to prove that the Japanese Government understood the term to mean persons responsible for war (B-3, Tr. 39,001): "senso sekinin sha" (literally "war responsible persons") in the Japanese language did not prior to the armistice necessarily mean "persons responsible for war" but equally meant "persons responsible in the course of war." And we understand that the accused KIDO himself used the word in that latter sense. The latter interpretation is entirely compatible with the Emperor's remarks, for they might comprise generals or admirals in whom His Majesty placed his trust and confidence.

A well known precedent for a proposal by way of conditions for leaving to the Japanese Government the trial of persons charged with violations of laws of war can be found in that demand made by the German Government at the close of World War I which was certainly known to the Japanese statesmen. In that historic instance the persons who were to be tried were not "persons responsible for war" but "persons responsible in the course of war."

The accused TOGO's statement in answer to the question put by the Bench confirms the latter interpretation (Tr. 36,131). At any rate KIDO's entry regarding the proposed conditions is merely hearsay.

Even assuming for argument that "senso sekinin sha" meant "persons responsible for war," which is denied by the defense, there is no reason why the Japanese authorities should not have mooted the possibility of themselves going further. In a serious case like the present such trivial and ambiguous utterances recorded by hearsay ought surely to receive the most favorable interpretation.

- (2) The prosecution says: “If there was any doubt it could have been cleared up by a question.” The answer is that the natural meaning of the wording of Clause 10 was, as has been shown, so clear that no doubt could be entertained on this point.
- (3) The prosecution says: “It would be necessary for the defense to show, as a matter of construction, that the phrase in the Potsdam Declaration could not include those responsible for the war before they could have any hope of attacking with success the basis of the Charter of this Tribunal or the counts in the Indictment founded upon it, even if it were now open to them to do so.”

The answer is that the defense has shown that in view of the natural and universally accepted meaning of the term “war criminals” as well as of the circumstances attending the emitting of the Potsdam Declaration on July 26 that the term used in the Potsdam Declaration can but bear one meaning.

It is then for the prosecution to show that the natural and universally accepted meaning was not the meaning of the term as employed in the Potsdam Declaration. The only evidence it adduces is (1) the Cairo Declaration, which does not throw the slightest light on the point at issue, and (2) the vague entries in the KIDO Diary.

The prosecution, which represent the Allied Governments, might easily have produced affidavits of the Allied statesmen who were actually at Potsdam so as to clarify what they intended by the use of that term.

Although such evidence would by no means be conclusive, it might serve as forcible evidence in the prosecution’s favor. That the prosecution failed even to take this step, which was peculiarly within its power, places the contention of the prosecution in an extremely dubious light.

Moreover, it would not only be frivolous but quite unfair in a historic case like this to leave this momentous issue to the technical procedural rule of the burden of proof. The point should, in the interests of truth and justice, be clarified by the Tribunal, if necessary, on its own motion.

- (4) The argument based on the Agreement and Charter published on August 8 regarding the trial of German accused has no application here, for the Japanese making a conditional surrender naturally expected those terms to embody different treatment. Nor is the argument in Para. B-7 (Transcript, 39,014) of any greater validity. It is not a question of what the opinion of the Nuremberg Tribunal was as to the comparative heinousness of waging aggressive war and breaking a Hague Convention. It is a question of what the accused were entitled to consider the meaning of the current term “war criminals.” Our submission is that to these accused it meant the criminal breach of the accepted rules governing the conduct of armed

forces in the field and analogous acts during the progress of hostilities, and that it is oppressive to extend it beyond that previously universal understanding.

- (5) In Para. B-7 (Tr. 39,015) it is observed that the German Emperor was an absolute monarch. This is quite inadmissible. The federal constitution of the Empire was by itself sufficient to prevent such a thing. Yet no German King or Minister was arraigned. And the extraordinary statement must be repudiated which alleges that a single unconsummated attempt to try an Emperor (which failed largely because it was startling to the conscience) “established a right” (Para. B-8, Tr. 39,017).
- (6) The assimilation (Para. B-9, Tr. 39,017) of persons responsible for the war to conventional war criminals is hasty and unfounded. The latter class fall under long-established principles, so do their penalties. Above all their treatment is controlled by the constant possibility of reprisals: which the former are not. At one time in the XVIth Century so instructs us Dr. T.A. Wolker in his “Science of International Law,” the experiment was made in the course of the Wars of Religion of abolishing the laws of war altogether. But the crescendo of reprisals was such that “these things made them admire antiquity,” and the Laws of Arms were restored. But there is no check upon the belligerent who desires to punish an aggressor beyond his own sentiment. This alone sharply differentiates the two things which the prosecution represents as indistinguishable.
- (7) In Para. B-15 (Tr. 39,025), it is advanced as an essential element that there should be reasonable grounds for an honest belief on the part of an accused. It is submitted that as a general doctrine of criminal jurisprudence this is going much too far. It would make a man criminally and capitally responsible for his honest but stupid or over-anxious mistakes. It would make a man a criminal for being “unreasonable.”

II. THE PACT OF PARIS AND SELF-DEFENSE

The Pact of Paris in its relation to national self-defense has been fully dealt with in our previous argument. However, a few remarks should be made in view of certain new arguments offered by the prosecution on that topic.

- (1) The prosecution assumes in B-10 and B-12 (Tr. 39,019-21) that permissible self-defense is restricted to self-defense against invasion. But that is contradicted in express terms by what Secretary Kellogg formally told the Senate Committee and by the statements of Mr. Borah, Chairman of that Committee, made to the Senate, and also by what is implied by Sir A. Chamberlain’s Note on accepting the Kellogg-Briand Treaty — all of which have already been referred to. It certainly extends to the protection of Japanese forces legitimately stationed in China and Manchuria, as it extends to the protection of American forces legitimately stationed in the Panama Canal Zone.

It may also be added that the Franco-Soviet Mutual Assistance Treaty of May 2, 1932, stipulating that should either country be subjected, in certain circumstances, to unprovoked aggression by any European State, the other should immediately come to its assistance, limited the aggression thereby envisaged to aggression involving violation of French or Soviet territory, clearly demonstrating that self-defense against aggression is not necessarily limited to defense against invasion.

- (2) The assertion that self-defense is a matter to be decided by a tribunal implied in B-14 (Transcript, 39,025), is contrary to the repeated declarations of leading American statesmen of the highest rank when they stated that each nation must be the judge of what constitutes its own self-defense, that it is not to be referred to any tribunal by the United States or by any other nation and that public opinion would regard a state's alleged action in self-defense with approval or the reverse. These statesmen meant exactly what they said. They meant that the act of alleged self-defense incurs the only sanction of the law of nations — general disapproval. They did not mean and could not have meant anything more. How would it have satisfied a James G. Blaine, insisting on the right of the United States to go to war in defense of the Monroe Doctrine in Central America, to be told that her leaders might be liable to be tried for their lives if they fell into the power of the enemy.

A personal view of a text-writer like Oppenheim, possibly based on his own theoretical preference, or of a group of Japanese jurists, possibly advanced to wield a restraining influence on their government, cannot alter the well-established rule of international law that in the interpretation of a treaty the prime principle is to ascertain the real intention of the contracting parties which can and must be gathered not solely by the wording of the text of the treaty but in the light of diplomatic correspondence and declarations of leading statesmen made before or at the time of its making. No evidence has been adduced to prove that the said basic principle of International Law has changed. International law may certainly grow by the common consent of the nations, but international treaties cannot be extended or modified without the consent of all the signatories. This is true of multilateral treaties relative to the general rules of international law like the Declaration of Paris or the Geneva Convention of 1929 or the Pact of Paris as well as bilateral treaties.

- (3) In relation to the contention of the prosecution in B-16, (Tr. 39,025) that self-defense can only apply in the case of a reasonably anticipated armed attack and cannot be extended to cover "encirclement" either military, or still less economic, the Tribunal is respectfully reminded of the express statement denying such contention made by Secretary Kellogg to the Senate Committee on Foreign Relations (General Pact for the Renunciation of War. Committee on Foreign Relations. U.S. Senate December 7, 1928). But this matter will be treated elsewhere by another defense counsel.

The Tribunal may also be reminded of the express statement by the Chairman of the Senate Committee on Foreign Relations, already cited, that each nation is entitled to decide for itself what constitutes an attack to itself.

III. CONSPIRACY

III

- (1) It is a striking illustration, which the learned members of the Tribunal will readily appreciate, of the danger of attempting to create new international crimes by drawing on fancied analogies of municipal law, that the term “conspiracy” is highly ambiguous. In Anglo-American law, upon which the Chief of Counsel relied in his opening statement by citing a federal decision, it is the specific name of a certain minor crime, namely a concerted attempt to accomplish any unlawful act. That is a so-called “misdemeanor,” carrying in England only a maximum of two years imprisonment. We have already stated that in that specific sense it is probably peculiar to Anglo-American law. But in popular language the word is used to denote what is everywhere regarded as one of the most flagrant crimes, namely, a concerted plot to subvert the Government by violent means: in plain English, treason. The prosecution refrains from giving its charge that name — and why? Because it would then be evident to the merest child that it is a crime of which these accused could not possibly be guilty. For there is no World State which they were trying to subvert.

The tradition of criminal process has always been such that the prosecution should prove its case in the clearest and plainest manner, refraining from everything that bears the appearance of straining a case. The prosecution must, therefore, be called upon to show some reason why the crime of treason should be applied internationally beyond its imagination and hope that it should be so applied. Although the defense is convinced that the point is clear, it will endeavor to show affirmatively the essential difference between a State and International Society which makes the crime of treason inapplicable to the latter.

- (2) In the case of treason, we have men who are members of a well-established community which is constantly present to them at every point of their lives, and on which they depend for every step they take and every mouthful they eat — the nation to which they belong. In treason we have an attempt by them to destroy the organization which keeps that nation together, and to replace it by force with one of their fancy: No wonder, perhaps, that the easily startled apprehensions of mankind should in some and perhaps in most countries have not only made such plots a most terrible crime, but should in their fierce recoil from it, have made equally responsible and equally guilty, everyone who had the least part in the plot, even those who had not any knowledge of it. There could be no degree of guilt, nor did it matter how far the plot was put in execution. All was treason, and all were equally guilty.

But how different is the case here. There is no World State. There is no World Government which can restrict or punish a nation imposing tariffs on the exports of other nations without any regard for their convenience, or a nation which provides for national armaments which might some day be employed against other nations. It is certainly salutary for educators throughout the world to bond their efforts for cultivating a sense of a World Community in the minds of youth. But a sense of a World Community is still weak, and world politics still operate on the hypothesis of a society of sovereign states. You might lament over the fact but it is a fact and a reality on which alone the rules of international law must be predicated. Statesmen and soldiers of the world still perform their duties on that hypothesis, and it

would be a height of injustice to judge of and penalize their conduct by the assumed rules of a game under a World State which does not exist.

International war is a terrible evil, and a growing evil. Everyone hates and fears it. Agreements have been made by states to refrain from it. Everyone attaches value to the engagements and hopes they will be kept. But where in the world is the parallel between a person who conspires to wage war, even an “aggressive” war, against another state — with a person who is a traitor to his country? The traitor is breaking down the whole fabric of society and touching a vital nerve. The planner of war is disappointing a pious hope of a world community in which the lion lies down with the lamb.

Far be it from us to ridicule such a pious hope. We only desire to point out that there is no parallel whatever between the planning of a war on the one hand and traitorous conspiracy on the other — no parallel which would in the remotest degree justify the sweeping fury of the municipal law of treasonable conspiracy or *complot* in a novel and startling application to the acts of independent statesmen and soldiers.

- (3) The introduction of treason under the name of conspiracy is an attempt to foist upon international law the sweeping vindictiveness of the hoary feudal English Law based on allegiance — with its indiscriminate imputation of the deepest guilt upon everyone who touched treason with his little finger. But it must surely be rejected by the noble simplicity of the Law of Nature and of Nations, which, if it regards individual guilt at all must measure individual guilt by individual conduct.
- (4) With regard to the arguments of the prosecution on conspiracy, presented for the first time in its summation, we beg to add the following comments.

The argument that conspiracy is a “form of charge and of the proof of responsibility” is frivolous. To charge a person with and to make him responsible for a capital crime which is not proved to be an international crime under the guise of a procedural device is certainly preposterous.

In the submission of the defense, the prosecution’s attempt to prove by drawing on comparative criminal jurisprudence that conspiracy is an international crime is a complete failure. The prosecution cites municipal criminal codes with the view of showing that criminal conspiracy constitutes a rule of the law of nations under the head of the “general principles of law recognized by civilized nations,” which is alleged to be a source of international criminal law. This thesis can easily be refuted, if we carefully distinguish four things in Anglo-American law.

- (a) Treasonable Conspiracy. This is really treason. Treason, the gravest of crimes, may indeed involve everyone who takes the smallest part in this crime, who may be punished capitally.

However, the fact that the security of the State or its basic institutions are protected in all states under the severest criminal penalty proves nothing in this case. For clearly there does not exist a World State on which alone the Crime of Treason including treasonable conspiracy can be predicated.

- (b) The substantive crime of Conspiracy. This consists in a concerted design to commit any unlawful act (or even an immoral act). This is the crime which has so vehemently been criticized by judges and jurists as already mentioned.

The broad Anglo-American doctrine of misdemeanor of conspiracy is not, so far as we are aware, recognized in the civil law countries. Some may punish a plot to commit a felony, others may not, as is admitted by the prosecution. Here, therefore, there are no “general principles of law recognized by civilized nations.”

- (c) Criminal Implied Agency. The odd principle according to which, if several people are engaged in a common unlawful design, any crime committed in the course of the execution of the design by any one or more of them makes the rest guilty, not only of the designed offense but the crime so committed, irrespective of whether it was more or less serious than the designed offense. This may be called the principle of Criminal Implied Agency. This doctrine in all its comprehensiveness, it is submitted, is peculiar to the Anglo-American law based on historical grounds, and although the prosecution refers to the notorious Supreme Court decision on Joint Crimes vehemently denounced by a majority of Japanese criminal jurists, the decision does not go so far as the Anglo-American doctrine of conspiracy, as the prosecution seems to assert. Be that as it may, the Anglo-American doctrine of Criminal Implied Agency has not been proved by the prosecution to be universal. The principle is, moreover, palpably contrary to our sentiment of justice. It cannot be deemed one of the “general principles of law recognized by civilized nations.”
- (d) The principle of Civil Agency, by which the employer is liable for the civil injuries committed by his servants or agents “in the course of employment.” It is difficult for us to say to what extent this modern Anglo-American principle has now (1948) made its way into the civil laws of various nations. The majority, we presume, still adhere to the classical *culpa* principle. It certainly has no application in criminal law, even in Great Britain and the United States. Only in the most petty cases, are employers subjected to penalties for the offenses of their subordinates. This principle is only mentioned here because it seems to be laid hold of by the prosecution (in K-17 *seq.*) to sustain the criminal liability of cabinet ministers.
- (5) The very fact that the prosecution has to fall back on the “general principles of law” clearly reveals that its contention is without any foundation in the established law of nations. For the said source of international law is designed to be drawn upon, as is well known, only in cases where no positive international law can be found. It is intended to make provision for “a blind alley of *non-liquet*,” to use Judge Huber’s famous phrase, i.e., to prevent the Court to refuse to decide on the pretext that there is no applicable law. It may in some cases be a

useful source of law to fall back upon in order to dispose of a dispute between states according to international law. That was the very object which the draftsmen of the Statute of the Permanent International Court of Justice had in view in 1920. It definitely has, and ought to have, no place in international criminal law. The resort to it would palpably contravene the principle of *nulla poena sine lege* recognized by civilized nations.

It may be noticed, moreover, that the prosecution expressly admits, as if under the Hitlerite legislation, that its contention is based on analogy and analogy only. However, the analogy of treasonable conspiracy in municipal law would remain a fallacious one, unless and until a World State becomes a reality.

IV. MURDER

- (1) If the contention of the prosecution is true (B-21, Tr. 39,030) — that the treatment by all nations of wilful killing without just cause or excuse constitutes it an international crime, then it necessarily follows that it is a crime everywhere without regard to the place or the persons concerned or to its “international character,” whatever that may mean. The whole proposition always maintained by Great Britain and the United States and strongly asserted by France in the famous Lotus case, that “crime is territorial” would fall to the ground. That, in our submission, can never be admitted. Moreover, the excuses and justifications of homicide vary in every system. A state which abolishes the death penalty may not consider the order of a court a defense. One may concede wide powers to an injured husband, which another might refuse. How can such laws be represented as creating an international norm internationally enforceable? It would involve intolerable contradictions and anomalies. State A may consider X a murderer, while State B may consider it murder to execute X. The whole idea of an international crime called “murder” involving a capital penalty implies the existence of a World State and a World Law. No such World State exists, and no such World Law beyond the accepted laws of war prevailing as a *pis aller* in time of active conflict.

Murder is one thing in Persia and another thing in France. To take some kind of common element and erect it into an international law of murder is to put an abstraction in place of fact. But what can be said of the prosecution’s attempt to establish such an abstract international law of homicide and then to clothe it with all the incidents of particular systems?

The just excuses for homicide are quite various in different countries, and the prosecution must show, before it can say that murder is the same everywhere, that in all nations the courts certainly regard the waging of aggressive wars as no excuse. It is of no avail for it to show that such courts certainly ought to regard the waging of aggressive wars as no excuse. So long as it cannot be shown affirmatively that they do, then there is no pretence for assuming that throughout the world aggressive war is treated as a capital crime. Of that there is no evidence whatever, and it is essential to the prosecution’s claim that all the rest of the world agree with them. Is it conceivable that a Swiss or a Persian court would

condemn a Prime Minister to the penalties of unlawful slaying, because he had launched a war precipitately?

- (2) That “the crime of murder” is “part of International Law” as stated in 3-21 (Transcript, 39,030) is pure assumption. The broad statement by various authorities and in particular the great men who originally framed the Statute of the Court of International Justice was designed solely to indicate the sources of the law of nations as a law between nations and binding on nations. Those sources comprised (1) international conventions, (2) international custom, (3) the general principles of law recognized by civilized nations, (4) judicial decisions, (5) teachings of highly-qualified publicists and (6) justice, equity and good faith.

But the original framers of this classification would have been astounded to find that anyone supposed that they were advancing the proposition that principles regarding the conduct of individuals were being made part of international law. “The general principles of law recognized by civilized nations” were evidently included merely by way of analogy as applicable to the conduct of states. It could mean nothing else.

- (3) There is no justification whatsoever for the further statement that there is an international law of “murder” — and that with the ambiguous qualification for which no reasons appear, that it must be “of an international character” — which can be dealt with (and apparently dealt with on its principles alone) by any court in the world. The qualification that the court must have jurisdiction leaves the violently debated question of jurisdiction unsettled. Besides, if the crime is “international,” why should not every national jurisdiction be competent to deal with it? The whole argument is a tissue of assumptions and unrealities. The late Lord Phillimore and his colleagues of 1920 would have been considerably astonished to think that they were importing domestic law wholesale into the law of nations — and a singular sort of distilled domestic law at that!
- (4) That belligerency to be an excuse for homicide must be “lawful” is an unsustainable proposition since the whole argument depends on the absolute concurrence of all nations in treating homicide without just excuse as a capital crime. For it is not proved, or even probable, that all nations agree with the proposition that belligerency, if “unlawful” in the sense of being unlawful for the state, affords no defense to a charge of homicide. And their complete agreement in such a disputable proposition is the whole substratum of the prosecution’s argument.
- (5) B-25 (Transcript, 39,033) advances the view that there is no distinction between illegal acts done in the course of hostilities and those which happen at its commencement. This misses the point, which does not reside in the relative culpability of the acts, but simply in the scope of the Hague Conventions. A convention framed to regulate the conduct of war cannot be supposed to have been intended to cover acts which have nothing to do with its conduct.

V. “CONVENTIONAL” WAR CRIMES.

Conventional war crimes are discussed in the “Prisoners of War Summation” (J, paras. J-161). The latter is designed to be summary of the facts only, the law being dealt with in “Liability of the Defendants” (K). However, the above summary is predicated on certain assumptions concerning the law. Here we shall comment only on a few aspects of those assumptions.

- (1) Japan’s so-called “agreement” to observe the Geneva Convention “*mutatis mutandis*” (para. J-46).

The prosecution assumes that there was an international agreement binding on Japan. In the submission of the defense, this is an error. What the United States and Great Britain said in 1942 was that they “proposed to follow certain provisions” — not even “intended to follow” — and they hoped Japan would imitate them. The other declarations by those powers were *in pari materia*, and must be read in the same way. Evidently they were simply statements of present attitude and contained no binding promise. They were not contingent on any action of Japan, but were entirely independent and voluntary and were without “cause” or consideration. Nor did they become more binding on the United States and Great Britain when Japan took note of them. Japan’s own counterstatements were no more binding. There was no “agreement” or “undertaking” (para. 160-B) — only note was taken of an intention, and a similar intention was expressed not in return for the prior intention but *ex gratia*. It is therefore inaccurate (p. J-24, line 11 up) to call the counterproposal a “promise.” It makes no difference whatever whether its issuance was beneficial to Japan, and it is immaterial what the reservation “*mutatis mutandis*” meant! Just as one tourist may tell another, “I am going to the Kabuki tomorrow — what about you?” and the other party may reply, “Yes, that’s my idea too.” There is no pretence of any agreement or undertaking, whether in morals or law. Or if this illustration be thought outside the sphere of Law, suppose one member of the Bourse says to another, “I’m going to push copper this week for all it’s worth — are you?” The other answers: “Yes, so am I.” Both are perfectly at liberty to follow their own course and leave copper alone (Para. J-160B-161).

- (2) The Hague and Geneva Conventions.

The prosecution says: “In any event the Geneva POW Convention of 1929 merely makes explicit what was already implicit in the Hague Convention of 1907.” But surely the Convention of 1929 was intended not only to codify but to improve the existing law of nations by securing improved conditions for prisoners of war.

The general statement of the Preamble to the Hague Convention 1907 cannot be pressed to show more than that a state must be held liable in damages for the improper acts of its military commanders in dealing with unforeseen cases. It did not expect that states foresee those cases and issue instructions to their commanders accordingly. All that the preamble declares is that the convention is not exhaustive and that if unforeseen cases arise it will not suffice a state to say that the commander’s judgment is final about the law to be applied. Preambles cannot enact anything. This preamble only declared that the enactments which

followed were not exhaustive. In 1907 the main object of such conventions was to secure the responsibility of the state. Little attention was paid to traditional liabilities, in occasional cases, of individuals, and certainly nothing was thought of any new liability of high government officials. The question in the preamble was not one of imputing responsibility to one set of officers or another set — to the commanders or to the cabinet. It was a question of securing the responsibility of the state. Therefore, it declared that a signatory state could not escape responsibility by sheltering itself behind the arbitrary judgment of its military commanders. That such a declaration, followed by a provision that a delinquent state should pay compensation, and no word concerning ministers, shall be distorted as implying personal liability on the part of government officials will serve as a warning for future statesmen against the dangers of international agreements unless drafted with the patient care of a chancery barrister or a land title specialist. International agreements have hitherto been drafted in the broad spirit of agreements between friends who have a common background of ideas.

Finally the prosecution derives international duty of individuals from the word “Governments.” When, however, the Hague Convention speaks of “Governments,” it does not mean the individuals momentarily running the government in various capacities. The word is used as a synonym for States. Thus, treaties in the most recent practice are expressed to be entered into between “governments” — yet none imagines that the gentlemen exercising the functions of ministers are themselves parties in the treaty, still less that any of their subordinates are. No one supposes that German prisoners in Great Britain were or are in the personal custody of Mr. Atlee and Mr. Morrison and Miss Wilkinson. It is the state, the state alone that is intended. No one believes that Sir Stafford Cripps, Mr. Joseph Westwood and Lord Jowith are personally liable to pay their keep, yet according to Article 7 of the Hague Convention the government into whose hands prisoners of war have fallen are charged with the cost of their maintenance.

The argument of the prosecution is a transparent equivocation, based on a confusion between the two meanings of “Government,” viz. (1) the persons carrying on the government; (2) the impersonal incarnation of the sovereignty of the state. It is the state which is liable for the breach of the provisions of the convention. There is no suggestion in the convention from one end to another of there being any duty on the part of ministers or other civil officials to supervise and control the conduct of warfare, not to speak of liability on their part to partake the guilt of the offender. The convention might have introduced such duties and liabilities putting the whole machinery of government under the grip of military law, but its framers had more sense than to do so. What they refrained from doing expressly, it will not be wise to attempt by startling implication.

- (3) “Common pattern.” The prosecution’s dominant idea seems to disregard the maxim: *Dolus latet in generalibus*. It manifests itself most notably in the doctrine of “common pattern” as proof of “a common plan” and of an instruction emanating from the “central authority” (Para. J-130 *seq.*)

The prosecution says:

“The fact that the crimes committed by the Japanese were found to be the same in nature, and in the manner of their commission, throughout Japan and many of the areas occupied by the Japanese would give rise to an almost irresistible inference that they had not been committed at the whim of the individual perpetrators but as a part of a common plan. It argues very strongly that they were committed as a result of special training towards that end, or at the least as a result from instructions emanating from some central authority.”

This, it is submitted, is far too vague to be made the foundation of a highly criminal charge. It does not even say that the “pattern” was uniformly found everywhere. In some cases admittedly it was not. That does away with the inference of “special training towards that end,” or at the least (note the hesitation of the prosecution) of “instructions emanating from some” (note the uncertainty of the prosecution) — “some (unidentified) central authority.” Moreover, a scrutiny of the alleged patterns will show that the alleged acts were sporadic and that no common plan or instruction from the central authority existed.

- (a) The making of oaths or agreements not to escape (Paras. J-31-9). The account in these paragraphs purports to show genuine cases of compulsion. It is significant that no such cases are cited regarding other places than Singapore (3 cases), Hong Kong (2 cases), Borneo, Java, Batavia, Zentsuji and Formosa. Nothing is said concerning India, Burma or the Philippines. So the pattern evinces unexpected gaps. In fact, there is little in common about the alleged acts of compulsion. Sometimes by starvation, sometimes by confinement, sometimes by beating, sometimes by threats, sometimes heat, sometimes by a combination. Where is the common pattern? Of course, the demand of an oath is a common feature, but that is admitted and justified as a fair offer of freedom from close guard. All these incidents took place in the first nine months of 1942. Is that not cogent evidence that there was no official policy of compulsion of unlawful coercion? If cruel events took place, they were the sporadic acts of local officers of inferior rank.

(ii) Massacres (5-142-49)

It is difficult to see any “pattern” in the alleged massacres in different varying methods detailed in these paragraphs. Even the prosecution cannot see any pattern in them — for it hesitates to link them by any motive. It might, they guess, be to save trouble or it might be to terrorize. But there is no “pattern” alleged in it. All it amounts to if established would be that there were a certain limited number of “massacres” in the first three months of 1942. Does that not show that if such incidents took place they were immediately checked rather than their being “in accordance with the pattern of some” (undefined) “central authority?”

- (a) Para. J-145. The massacres detailed were nearly all in Borneo, 1943, and appear to have been perpetrated, if at all, in the course of the suppression of local attempts at insurrection. Armed rebellion cannot be put down with rose-water. It is not the case that formal trials are a

necessary preliminary to military execution in the face of force, of “war rebels” and “war traitors.”

- (b) Paras. J-146-7-8, evince no “pattern.” They only show, if proved, that prisoners were sometimes killed when an invading enemy was at hand. The motive is only hazarded by the prosecution that is might be to prevent the prisoners from giving assistance — avowedly a guess. How can a “guess” prove a “pattern?” The killing of prisoners in such circumstances may indeed, sometimes be a proper and admissible military precaution. The inconsistency is manifest between professing to deal with events “in anticipation of” invasion, etc., and immediately citing a case (Tarawa) where the killing alleged occurred “after an air raid.” Very few cases of this “anticipatory” type are alleged. No “pattern” is discernible from them. Prisoners’ stories of threats, and clerk’s stories of secret orders are not a “strong corroboration” but very weak evidence.

Had such a “central” “over-all” Japanese policy existed, it would have been applied uniformly and always and everywhere, and not merely in a few isolated places. It is not sufficient, in any event, to stigmatize such a supposed “over-all policy” as Japanese, without specifying what “Japanese” were responsible for its inculcation.

It may be that the Japanese military theory has been that the obligations to prisoners is not paramount to that of preserving the lives of the troops and in isolated instances commanders may have interpreted this principle with improper laxity. But that is not to say that they were instructed to do so. The principle itself is not contradicted by the Hague and the unratified Convention of Geneva of 1929.

With regard to third degree methods employed by the Kempeitai it is said in Para. J-156: “This uniformity cannot have arisen by chance; it must have been the result of a common training. But if such a common training had been given it must have been a matter of a government policy.”

The inference of “a common training” is unsupported by common sense, for the third degree methods may have been due to a common mentality of a certain profession. The further inference that the supposed “training” was a “matter of government policy” shows that by “training” was a “matter of government policy” shows that by “training” is meant “military training” and is again unjustified. It is not the business of the government to supervise the details of military training.

- (4) The use throughout this summation by the prosecution of a comprehensive and undifferentiated phrase, “the Japanese Government” may be in accord with the prosecution’s theory of liability. It is said to be used “in a wide sense as embracing not merely members of the cabinet but officers of the army and navy, ambassadors and senior career public servants.” It is so used in the following paragraphs that it amounts to covertly adding to the apparently simple definition the words “or some or all of them.” This is, it is submitted, unfair in a criminal trial against the individual accused — a technique which would not be tolerated in a domestic court of justice. For instance, when it is stated that certain alleged war crimes or other matters were known to the “Japanese Government,” it is likely to lead to an

inference that all of the persons comprised in the above definition were aware of them, while they were known only to a few. When a certain policy is declared “governmental,” it may only be a strategic policy of the Navy, of which other cabinet ministers or ambassadors or career public servants have nothing to do with. Yet it sounds as if all of them should be responsible for it.

The defense respectfully submits that capital criminal responsibility must not be imposed on the accused even regarding this category of crimes on the basis of such misleading assumptions and express the desire that the tribunal will not be misled by assumptions and surmises with which the entire summation is riddled.

- (5) It is stated in J-6: “On the other hand this part ignores defense evidence relating to camps or other places in respect of which no evidence has been given by the prosecution. This has been done on the basis of his Honor, the learned President’s remarks to the defense, ‘meet the charges made against you and do not try to prove that in other cases where no charges were made no faults could be found.’”

For the prosecution to ignore such defense evidence is palpably unfair which is perhaps not unrelated to the basic theory of liability of the prosecution. The learned President’s supposed view that the defense ought not to give evidence of good conditions but meet the charges of bad conditions is well enough as regards charges directly against the officials at those particular places as regards higher officials, it is surely relevant to prove that in other places where they were in control the conditions were good. This raises an inference that the conditions were good in the challenged instance also. In the case of a defendant charged with want of supervision, it is clearly relevant to that charge to show that his supervision was generally effective. If a man is charged with participation in an anti-catholic riot, it is surely relevant to show that he is a Papal Chamberlain.

VI. LIABILITY OF THE DEFENDANTS.

- (1) Fallacious Analogy of Treason. “No man has been charged with crimes against peace and conventional war crimes or crimes against humanity unless he is in some way responsible for the aggressive policy followed by Japan which gave rise to these crimes” (Para. K-3). This, however little such a person foresaw or expected that war was probable or that those crimes would happen!

This gives us the master-key to the whole fallacious theory pervading the Indictment. It is an idea called up by the design of treasonable conspiracy or complot in municipal law. The prosecution assures such a parallel with its usual assumption. But people on trial for their lives cannot be condemned in such an easy fashion.

Even so, the prosecution cannot keep free from vagueness. Allowing themselves the sixteenth-century license to hold the least participation in the formation of a policy to involve

liability for all its ramification and consequences, they proceed where there exists no formulation of policy at all on the part of a given individual, to hold him responsible as if there were — because, forsooth, the “toleration of the situation” is “tantamount” to formulating it!

- (2) The Whole Principle of Embassies Nullified (K-4). The argument on this point will be treated fully in a later stage by other defense counsel.
- (3) Responsibility of Persons Invested with Power (K-6). The paragraph is riddled with assumptions.

First, it represents the cabinet, the Privy Council and the Lord Keeper as severally charged with the ultimate responsibility for the formulation of policy within their respective spheres of power. But the Privy Council was under no duty of formulating policy — only of criticizing it, while the Lord Keeper had even less initiative.

Secondly, it assumes a principle against which we have to protest vigorously, namely, that if a person is invested with an ultimate power, he is liable for the misuse made of that power by his subordinates. Even in Anglo-American Law, it is in most trivial cases that a person is subjects to penalty for the conduct of his servants and agents. If a barman sells his beer out f hours, the innkeeper can now be fined, and that is, we understand, about the extent of the principle in England and Scotland. It may be noted that the prosecution itself does not seem certain of its proposition, for in one passage we find the remark that it is “particularly true” in a certain case. Either a proposition is true, or not. To say that it is sometimes “particularly true” is to admit that it cannot be admitted as simple truth.

Thirdly, it is stated that acquiescence in the decision of his associates or subordinates “may be” deemed a ratification of that decision and “tantamount” to a personal exercise of his power.

We repeat that such calm assumptions of a vicarious capital liability, without any warrant from anything but police court or *juge de paix* practice, are intolerable to any general mind.

- (4) Responsibility of Superiors (K-8). This paragraph proceeds on the same theory of an assumed vicarious liability. It is not denied that the progress of events may make the corrective intervention of the superior official necessary, and for his failure, with full knowledge and opportunity to correct matters the superior may be constitutionally responsible. International responsibility, of course, we deny altogether.
- (5) Responsibility of Subordinates (K-13). This paragraph dealing with the responsibility of subordinate officials fails to take account of the fact that a subordinate has not necessarily the full information which would reveal to him the facts which would make the policy or conduct improper which he propounds. Yet the prosecution urges that such official must

either have nothing to do with the impugned act or else must have opposed and advised against it, and that otherwise he is criminally responsible.

- (6) Responsibility of Cabinet Members (K-14). This paragraph makes still another daring assumption. A Cabinet Minister might well consider himself personally incompetent to press his opinion on a matter on which his colleague in charge of such matters was presumably better informed than himself; at any rate to the point of resigning. A Cabinet Minister is not ex officio an expert on foreign relations and foreign policy. He may have his doubts about a proposal and push them to a division. But he is entitled to assume that his colleagues know better — particularly the Minister in charge of the matters in question.

It is unfair to say that he goes on full cognizance and “conviction of the evil.” He does not know that it is an evil. He is properly willing to accept the assurance of the rest of the Cabinet that it is not an evil, and that he is over-apprehensive. How can a Minister of Agriculture be liable for aggressive warfare, if the Minister for War and Foreign Affairs assure him with their far superior knowledge that he is mistaken? Just as a bank director is not a criminal for concurring in putting out a mistaken report based on information regarding a property in New Guinea furnished by a co-director who has been there to inspect it.

It may be said that “aggressive war” is such an obvious thing that anyone ought to be able to recognize and repudiate it. On the contrary it depends on such subtleties as the nature of a state, the existence of “real” servitudes and their protection by force, the existence and formidable character of violent threats to national interests, and the whole intensely difficult and complicated question of self-defense, that the decision is extremely difficult. A Minister for Agriculture may be struck with a superficial aspect of a policy, and may even push his view to a division. But he is entitled to suppose that the question is after all a difficult one, and that he may well be mistaken. He need not hurriedly resign in a fit of self-importance, as the prosecution would have him do.

Naturally, there are cases in which he should. But this is not one of those cases. It raises a question of the utmost complexity and uncertainty — that of self-defense, as to the definition of which no nation has as yet promulgated a satisfactory theory.

- (7) The High Command and the Cabinet (K-18). This paragraph asserting in the strongest terms the power of the High Command over foreign policy nevertheless persists asserting the responsibility of the Cabinet which could not control it. Were the Cabinet by resigning to leave the country without a government, or by refusing supplies to it to leave it without an adequate army? It is clear that a Cabinet cannot be condemned for deferring to its military advisors, nor is it or its members to be saddled with the responsibility for all their plans in which it did not participate. The prosecution themselves say (K-21) that “responsibility for an act follows the power and duty to do the act.” And the Cabinet had no power to control the Supreme Command.

- (8) The Privy Council (K-19). The Privy Council was not a Senate or House of Lords. It had only to give its opinion on certain important affairs of state. However, a claim is put forward to condemn those who *ex hypothesi* had no part in formulating the supposed "aggressive policy," namely, whose action on certain matters "*led to* the formulation of the aggressive policy." Where are such imputations to stop? It might be said that every communist publicist throughout the globe "*led to* the formulation of that policy."
- (9) The Lord Keeper (K-21). As to the Lord Keeper it is another hasty assumption to say "there is an ordinary presumption that responsibility for an act follows from the power and duty to do the act."

What alone can be meant by the so-called "presumption" is that a person who performs a duty of giving advice, free from any civil or criminal liability to A (the Japanese Emperor and public) is thereby placed under a liability to B (the prosecuting Powers). Unless everyone in each country, who is under a duty to give free and untrammelled advice, is to be bound to give it, not freely and unreservedly at all but subject to the possible repercussions it may have, such an "ordinary presumption," so far from being "ordinary" is seen to be extravagant and oppressive. The next step will be to assert that journalists are criminally responsible for the untrammelled statements they make in the performance of their duty to instruct and advise their public. Such a stifled press would be no free press at all.

The essential nature of the Lord Keeper's advice was that it was to be absolutely free from considerations of liability; that it was to be absolutely privileged. And now the prosecution comes and arbitrarily denies the privilege, which it would concede to every legal adviser in Great Britain and the United States.

A most notable admission is found in this paragraph which destroys the whole substratum of the prosecution's case. It charges that the objectionable acts of the accused were breaches of law. Yet what do we find here? If the Lord Keeper, it is plainly said, was responsible by Japanese law, that responsibility would be imposed by law; if not it would be one "in fact." Thus a responsibility imposed by fact is not in terms distinguished from a responsibility imposed by law. In other words, all these asserted individual responsibilities and obligations do not rest on law at all.

Straws show which way the wind blows. The fact that the prosecution when off their guard recognize that legal responsibility is a sharply distinguished thing from the responsibility that they are trying to assert that they unconsciously recognize the hollowness of their basic contention.

This paragraph makes the assumption unwarranted on the face of it, that the recommendation by the Lord Keeper of a Prime Minister was "fairly be said to be" part of the customary law of Japan. That such a recommendation was to be made by somebody might be customary but was no more "customary law" than the conventions of the Constitution on the part of the United

Kingdom and the United States. And that it should be made by the Lord Keeper was not even a convention; Marquis KIDO was the very first to be so consulted.

CONCLUSION

Mr. President and members of the Tribunal: The International Military Tribunal for the Far East, though technically termed “Military,” is not a rough and ready court military devoid of legal training and experience and of legal impartiality and patience instituted to deal summarily with war crimes in the heat of military conflict, with the fear of reprisals by the antagonist as the sole check on its arbitrary tendencies. On the contrary, this Tribunal operates in the midst of a peaceful environment in which hostilities have long since terminated without the slightest prospect of their being revived.

I omit the next sentence and go to the middle of the page.

The accused are not ordinary felons, but were high-ranking statesmen and soldiers who, divergent as they might have been in their philosophy of life and in their outlook on world politics, all endeavored according to their respective lights to steer the Ship of State through the stormy seas of Far Eastern politics — a sequel to political contact between the Far East and the Western Powers since the past century. Since Japan as a “stabilizing force” in the Far East has lapsed into past history, and the responsibility of securing peace and order in this part of the world has now fallen on the shoulders of other leading nations the nature and character of the insistent difficulties which confronted the accused may be appraised in their true perspective. The eyes of the Far Eastern people, indeed of all mankind, are centered on its historic judgment.

I omit several paragraphs and go to page 155.

According to the belief both of the prosecution and the defense, the International Military Tribunal should symbolize the dignity of the law of nations to which all the governments of the world must bow. As Burlamaqui said two hundred years ago (1747), the Law of Nations is a law, obligatory in itself, to which the peoples or the sovereigns who govern them ought to be subject (Burlamaqui, *Principes de Droit Naturel*, Part II, Chapter 6, Section 6). This trial involves, on the one hand, the current executive policy of the victorious nations ably represented by the prosecution and, on the other, the lives and liberties of the statesmen and leaders of a defeated but self-respecting nation — or may we not better say, the rights of man on an international level — for the safeguarding of which our American legal friends are here with us. We urge strongly upon the Tribunal that in rendering its epochal judgment in this unprecedented criminal trial, the sole guide should be the well-established law of nations. It will not be necessary to remind the wise and learned Tribunal that an injustice done by imposing severe punishment through *ex post facto* law for crimes unknown to the law would be calculated to leave such rancor in the hearts of generations to come as might check that permanent reconciliation otherwise so evident and certainly so necessary for amicable relations between the East and West and for the peace of the world. Future generations of Oriental peoples — indeed of the whole of mankind — who look back on this epochal judgment in a broad historical perspective might come to feel that a gross

injustice had been done through *ex post facto* penalization of the leaders of an East Asian nation, remembering that Western statesmen and generals had never been penalized during the preceding three centuries for their aggressions on Eastern lands. Just as a simple daughter of Orleans, tried and executed under the vigilant eyes of the occupying English army, later became a martyr and saint in the eyes of the French people, capital punishment, if ever meted out to any of the accused under the auspices of the conquerors, would be fraught with the danger of converting a plain son of Yamato into a martyr in the eyes of his nation, or even a martyr to the cause of the freedom of Asia. The Tribunal is well aware that history is replete with instances where the death penalty imposed on a political or religious leader not only purges all his offences, but magically lends glory to an otherwise prosaic life. It would also be getting a cruel example to, and chill the enthusiasm of, the Japanese people now dedicated to the tenets of the new Constitution, the rule against *ex post facto* penalization forming an integral part thereof. It would create an enduring impression on their mind that there could be one law for the victors and another law for the vanquished: Such an injustice would be looked upon as a manifestation of power-politics, which certainly does not conduce to the building of that one world in which just law reigns supreme. Such a precedent in this historic and dramatic trial might, moreover, have far-reaching repercussions on the future administration of criminal justice within the territories of the victorious nations represented here, for in that case the maxim would be true that “we but teach bloody instructions which being taught return to plague the inventor.” It would, therefore, be the part of right and discretion as well as an expression of judicial courage for the Honorable Tribunal to abide strictly by the law. By upholding the well-known and well-established principles of international law, and by that alone, can the Lamp of Legal Primacy, constituting an integral part of Civilization itself, be kept ever bright in the community of nations and shine as a fixed beacon, and not as a wavering light, for the guidance of a storm-tossed world.

CHAPTER 3: OPENING STATEMENT, DIVISION 1

Presented by William Logan on February 25, 1947 (Session 167)

Partially rejected

Since defense attorney Takayanagi Kenzo's opening statement was rejected in its entirety, William Logan's statement (actually the third part) became the second part. The rejected portions are enclosed in a box. They describe, on the basis of submitted evidence, the Soviet Union's invasions of Finland, the Baltic nations, and Manchuria, as well as the Soviet-British occupation of Iran. Logan questions the right of the USSR, a nation that has committed violations of treaties equivalent to those of which Japan is accused, to judge the Japanese government in a court of law. Questions of this sort were continually arising, and the IMTFE needed to make considerable efforts to avoid offending the Soviet prosecutor. Thus, the Tribunal wished to prevent assertions like Logan's, which showed the USSR in a very bad light, from being read in the courtroom. The opening statement announces that supporting evidence will be submitted at a later date, using language such as "we will present evidence" or "we will demonstrate proof." However, the IMTFE refused to admit most of that evidence. The fact that so much defense evidence was rejected, and so often, raises serious doubts about the fairness of the IMTFE proceedings, and obliged us to publish the documentary evidence contained in *Defense Evidence Rejected by the IMTFE*, on which this book is based.

In Part 4 of his statement, Logan elucidates the tremendous setback the Japanese economy suffered when Japan was encircled and isolated by the Western powers. He ends this section with an explanation of Japan's reasons for commencing hostilities: "Japan had been gradually encircled economically and territorially by world powers leading up to a critical situation." This comment is significant in that it is prophetic of a statement made by Douglas MacArthur before the U.S. Senate in May 1951 to the effect that self-defense was the motivation for Japan's participation in World War II.

Division I of the defense case will produce evidence of a general nature showing that under the existing state of international law the charges in the Indictment must fall; that there was no conspiracy of the accused *inter se* precluding any finding of guilt for the acts and conduct of these accused on the conspiracy counts and that Japan's domestic conditions, coupled with encirclement by the World Powers, forced her as a last resort to fight for her very existence.

This evidence will be presented in five parts:

- I. Evidence of basic documents relating to the surrender, the creation of the Tribunal, treaties and the constitutional laws and regulations of Japan.

I will omit II.

- III. Evidence of lack of conspiracy of the accused *inter se* including the Greater-East Asia Co-Prosperity Sphere.
- IV. Evidence of the national economy of Japan and the encirclement of Japan by the World Powers in the Pacific and Asia.
- V. Evidence of the Japanese domestic conditions from educational, anti-communistic and propaganda standpoints.

The type of evidence and its subject matter to be produced in support of each of these five parts is as follows:

I. EVIDENCE OF BASIC DOCUMENTS RELATING TO THE SURRENDER, THE CREATION OF THE TRIBUNAL, TREATIES AND THE CONSTITUTION, LAWS AND REGULATIONS OF JAPAN.

We will read from treaties and basic documents relating to the surrender, the creation and jurisdiction of the Tribunal; treaties which the accused are charged with violating and the Japanese constitution, laws and regulations which the prosecution introduced into evidence but did not read into the transcript. In addition, the defense will present additional treaties and other basic documents.

These treaties, conventions and assurances will make clear in part Japan's position; how and why various actions and countermeasures were taken by her in past years and why she failed to act at times, explaining her position and the position of powerful countries in the family of nations. Her special interests in China and Manchuria will be shown to have been recognized and accepted by World Powers for many years.

The interests she was legally charged with protecting, the steps taken on her behalf by some to defend those interests, the misinterpretation of her intentions by some nations, and the recognition of her accomplishments by many nations will be portrayed. It will be demonstrated that with respect to Manchuria and China, national policies were formed after, not before, the occurrence of those military incidents. Succeeding governments were thus forced to accept conditions as they found them and attempts were made to localize these incidents.

III. EVIDENCE OF LACK OF COMMON CONSPIRACY OF THE ACCUSED INTER SE INCLUDING THE GREATER EAST ASIA CO-PROSPERITY SPHERE.

The prosecution's charge that these accused conspired to initiate, plan and wage aggressive wars; to murder and to mistreat prisoners of war and civilians will be disproved by irrefutable evidence. Further evidence on this, of necessity, will be offered throughout the trial.

The evidence to be presented will conclusively establish that the situation in Japan was entirely different than in Germany. There Hitler and his small group of followers started in 1919 and first using the 25 points of the German Labor Party and later in 1925 using “Mein Kampf” as their Bible, with a definite plan in view unaltered throughout, overcame all opposition until they seized control of the Government of Germany and continued in power as its government until the termination of the war.

The expressed program of Hitler and his cohort was adjudged to be ominous including among other points an anti-Jewish provision, planned territorial expansion and premeditated disregard of treaties. It will be shown that no such provisions or ones even remotely resembling those were ever a national policy conspired or planned by these accused. Hitler was the dominating factor throughout. Such a personage is absent here. Throughout, he had a close group of followers. Such was not the case here. It will be shown that instead of a common conspiracy in Japan, the converse is true. The military were divided; the Army opposed the Navy; the diplomats disagreed with the Army and the Navy; the Cabinets were divided and fell with great frequency; the Diet was independent of governmental policies or influence of the military; military and non-military governmental officials often violently disagreed with one another and some stayed in office whenever possible to fight with vigor for what they thought was right even though their opinions did not always prevail — the latter a commendable deed, and lauded by representatives of the prosecuting powers. It will be shown that these accused were never close enough to one another in time of holding office to form or continue any common plan or conspiracy for the purpose of expanding the power of Japan by aggressive war. Internal dissension in Japan precluded the formation or execution of any common conspiracy or plan as charged.

Furthermore, it will be shown that the composition of the cabinets of the Government of Japan was a continuously changing constituency. Since 1928, fifteen different cabinets rose and fell in Japan. Cabinets fell because of crises brought about by various events and differences of opinion between some of these very accused and between them and other officials. No two cabinets fell because of identical reasons.

Many of them fell because of purely domestic reasons, unrelated to any international situation. Among the reasons for their termination are the following: The TANAKA Cabinet fell on July 1, 1929 because of internal dissension in the cabinet. The HAMAGUCHI Cabinet's fall on April 13, 1931 was due to the illness of the Prime Minister. The 2nd WAKATSUKI Cabinet fell on December 12, 1931 because of a difference of opinion between WAKATSUKI and ADACHI, Minister of Home Affairs, with regard to whether or not the Cabinet should be a coalition form of government. The INUKAI Cabinet fell on May 25, 1932 when INUKAI was assassinated by some young officers over a domestic political issue. The SAITO Cabinet fell on July 7, 1934 because of a public scandal which compromised some of the ministers and high officers of the government. The OKADA Cabinet's fall on March 8, 1936 was the result of the February 26th Incident. The fall of the HIROTA Cabinet on February 1, 1937 was occasioned by a difference of opinion between HIROTA and TERAUCHI, Minister of War, on the issue of whether the House of Representatives should be dissolved. The HAYASHI Cabinet fell on June 3, 1937 when HAYASHI dissolved the Diet. The new Diet which was elected was opposed in

HAYASHI's domestic policies. The 1st KONOYE Cabinet fell on January 4th, 1939 due to a difference of opinion among Cabinet members with regard to the anti-Comintern Pact. The HIRANUMA Cabinet's fall on August 29th, 1939 was due to internal dissension and the sudden and unexpected conclusion of the non-aggression pact between Germany and Russia. The ABE Cabinet fell on January 15, 1940 because of the domestic price commodity policy and the question of whether or not the Trade Ministry should be established. The YONAI Cabinet fell on July 21, 1940 because of differences of opinion concerning the formation of a new political party. The 2nd KONOYE Cabinet's fall on July 17, 1941 was brought about by KONOYE's difference of opinion with MATSUOKA, Minister of Foreign Affairs, as to foreign negotiations. The 3rd KONOYE Cabinet fell on October 16, 1941 because of KONOYE's differences with TOJO with respect to American policy. The TOJO Cabinet fell on July 17, 1944 because of the trend of the war. The KOISO Cabinet's fall on April 7, 1945 was due to a difference of opinion with the Army. The SUZUKI Cabinet's fall on August 16, 1945 came upon the completion of its duty in connection with the surrender. The HIGASHIKUNI Cabinet fell on October 6, 1945 because of post war conditions.

Unlike Hitler, no one in Japan was in a continuous position of control in these cabinets or in the military during the period of time covered in the Indictment. In three of these cabinets — the TANAKA Cabinet April 20, 1927 to July 1, 1929; the HAMAGUCHI Cabinet, July 2, 1929 to April 13, 1931, and the HAYASHI Cabinet, February 2, 1937 to June 3, 1937 — not one of the accused was in a position to control, lead or direct any conspiracy as not one of them was even a member of these cabinets, nor was any of them Chief of the Army General Staff or Navy General Staff during those times.

That there could not have been a continuing common conspiracy to initiate or wage aggressive war will be shown by the fact that not one of the accused was a member of any two of the cabinets which were in office at the time of the outbreak of the Manchurian in September, 1931, the commencement of the China Affair in July, 1937, and the outbreak of the Pacific War in December, 1941. Only one accused was in the cabinet at the time of the commencement of the Manchurian Incident and none was Chief of the Army or Navy General Staff. Only two were in the cabinet at the time of commencement of the China Incident and none was Chief of the Army or Navy General Staff. Only four were in the cabinet at the time of Pearl Harbor and the Chief of Naval General Staff was a former accused. The evidence will show that the alleged conspiracy had no core due to the absence of a leader who would necessarily appear in a position of dominant control in at least two out of these three significant and important periods of time -- that situation is absent. During the entire period of time covered in the Indictment the national policy constantly changed, thus disproving a common continuous conspiracy.

Furthermore, it will be significantly demonstrated by evidence that with respect to the charge of conspiracy to plan aggressive wars, where ample time is necessary to make preparations, none of the accused was in the HAMAGUCHI Cabinet which fell five months before the commencement of the Manchurian Incident nor was any of them Chief of the Army or Navy General Staffs during the time of that cabinet. Likewise none of the accused was in the HAYASHI Cabinet

which fell one month before the commencement of the China Incident nor was any of them Chief of the Army or Navy General Staff during that time.

There was an absence of any agreement whatsoever among the accused even remotely pointing to any common plan or conspiracy. The evidence will show that true to sound principles of constitutional government, there was no planning, scheming or plotting to propose a new Prime Minister who would further any such common plan or conspiracy as is charged, or any other common conspiracy at all. The reasons why these cabinets fell and new ones rose will definitely establish that no such common conspiracy among these accused existed.

The evidence will further show that among the accused during the period charged in the Indictment there was never any single group of them in a position of power and influence over any extended period of time. The absence of such a group holding important political offices or military posts of control prevented any cooperation to carry out any plan or plans for any common conspiracy or purpose as charged in the Indictment during the terms of office held by these accused.

Individually it will be shown that they acted in no way different than would be expected or normally anticipated of the officials of any other country under similar circumstances. Evidence will be produced to show that the prosecution by the use of certain labels has magnified, distorted and misconstrued the true meaning and intent of the innocuous phrases — New Order in East Asia, Hakko Ichiu and Greater East Asia Co-Prosperity Sphere. It will be shown, contrary to the prosecution contention, that these phrases had no malicious or criminal implication and did not contemplate military aggression; that they are just as innocent and innocuous as the phrases or implications contained within the “Good Neighbor Policy” and Wendell Wilkie’s “One World.”

The prosecution's charge that all these accused and others were part and parcel of a common plan or conspiracy to cause cabinets to fall and prevent cabinets from being formed is contrary to the facts. Its contention is based on the assumption that the accused conspired to and used the Imperial Ordinance of 1905, as amended in 1912, and the Imperial Ordinance of 1936 for this purpose.

Military influence for individual rather than political reasons occasionally played a part in the selection of a new Prime Minister, but it was not pursuant to any organized common plan or conspiracy by these accused. It will be shown with respect to this there never was, or could be any such a common conspiracy among all these accused, due in part to the fact they held different offices at various periods of time. Some at various times expressed different ideas on this controversial issue and some were not in positions to act either affirmatively or negatively on the choice of a Prime Minister, and most of them had no voice in the selection.

The evidence showing lack of conspiracy will be presented from charts, various speeches made by some of the accused and others at the time of the fall of the cabinets; by evidence of prominent Japanese statesmen; by governmental proceedings; by unimpeachable records; by

publications; diary entries; speakers of the House of Representatives; interrogations of the accused; newspaper reports and proceedings of the Liaison Council and Imperial Conferences.

IV. EVIDENCE OF THE NATIONAL ECONOMY OF JAPAN AND THE ENCIRCLEMENT OF JAPAN BY THE WORLD POWERS IN THE PACIFIC AND ASIA

We will also demonstrate in a conclusive way that there was no economic preparation by Japan for any wars in Manchuria, China, against the Soviet Union, nor in the Pacific. In the last few months before December 1941, when it became apparent that the Pacific War was probable and later inevitable, defensive measures were taken. The economy of Japan, being an economy of scarcity, perhaps in its totality and to a greater extent than many other countries, the true economic condition will be shown by impartial studies and reports. The economic condition of various basic industries such as shipping, coal, food, textiles, rubber, oil, electricity, etc., will be offered to demonstrate positively that there was no economic preparation for war or any conspiracy in regard thereto. The enactment in 1932 of a Capital Flight Prevention Law and in 1933 of Foreign Exchange Control Legislation were natural phenomena forced on Japan by the world wide depression and dislocation of foreign trade which was particularly acute in Japan because of progressively higher tariff walls and other trade barriers erected against her throughout most of the world.

Moreover, we will show that between 1928 and 1935 the vast majority of the trading nations of the world enacted identical or similar legislation and that such legislation as Japan enacted had no relation whatsoever to preparations by Japan for war. Japan, being a nation which must import in large quantities in order to live, was particularly injured in her foreign trade by the Ottawa Conference decision of 1932 to grant Empire preference in tariff treatment, a decision which was roundly condemned by the United States and practically every trading nation in the world outside of the United Kingdom. The evidence relating to the economics of Japan including Korea, will show persuasively the absence of any manipulation, regimentation or control for any such purpose as is alleged by the prosecution. We will show that prior to the Pacific War, 80 per cent of the foreign trade of Japan was conducted with the United Kingdom, Netherlands and the United States. From this the Tribunal will be able to gauge the terrific impact of the embargo and freezing regulations of the ABCD bloc upon the economy of Japan particularly with respect to the imminent threat it offered in attempting to force a capitulation in China.

The evidence will indicate the economic encirclement to which Japan was subjected. The situation in Japan and the disastrous result of such restrictions and sanctions on Japanese economy will be shown. The evidence will further point to the lack of any economic aggression preparatory to waging any alleged aggressive wars by these accused or any conspiracy by them in regard thereto. It will also be shown by maps and charts how Japan had been gradually encircled economically and territorially by world powers leading up to a critical situation.

V. EVIDENCE OF THE JAPANESE DOMESTIC CONDITIONS FROM EDUCATIONAL, ANTI-COMMUNISTIC & PROPAGANDA STANDPOINT

Evidence will be introduced to show that the prosecution has exaggerated the importance of military education in the Japanese school system. Military education as practiced in Japan was less objectionable than that of other prosecuting nations. This evidence will be presented in the form of curricula, statements and testimony.

It will be shown that there was no common conspiracy among these accused to prepare the children of Japan for alleged aggressive wars by training, drills, maneuvers or exercises, using the school system as a nefarious vehicle. There were no textbooks devised or used for such purposes. Teachers and educators were never indoctrinated with any militaristic or ultra-nationalistic philosophy or required to teach such ideas in support of any such alleged plan, scheme or common conspiracy. The evidence will further show that military education played only a minor part in the Japanese school system since 1902; that it was never intended to, nor did it dominate school life, or teachings of the children.

Furthermore, it will be shown that in 1929 when the military budget of Japan was cut, and the size of the Army reduced, an election was offered to the students of military instruction in the schools or limited service in the Army after graduation.

It will be shown that even when Japan was engaged in hostilities with China, commencing in 1937, her universities were not turned into military schools as claimed, which has been the practice of other nations during times of war. There never was any common conspiracy among these accused to regiment the youth of Japan through the school system and to inculcate them with a spirit of totalitarianism or aggression.

The Peace Preservation Law was enacted and enforced for the purpose of combating the rightists and the menace of Communism. It will be shown that the effect of the three Russian five-year plans, the resolutions of the 7th Conference of the Internationale in 1935, and the activities of the communists in Japan caused real anxiety among the Japanese people and the government. The government was charged with the responsibility of maintaining law and order in Japan, and subversive activities of the communists warranted the steps taken for their control. It was entirely unrelated to any alleged preparations for aggressive war.

These accused are charged with using propaganda, censorship, press, radio and moving pictures for the purpose of furthering the alleged plan or conspiracy for aggressive war. It will be shown that no such use was ever made of these means of communications for such purposes during peace time and it will be further shown that during times of war the uses made of these means of communications were no different than those which could reasonably be expected to be used and were used by other countries during war times. This use was totally unrelated to any alleged common conspiracy among these accused.

It will be shown by witnesses, publications and official documents that there was no propaganda as charged by the prosecution to bring about any wars or criminal acts. The evidence will show that there is no foundation for stamping these various measures taken by Japan and some of these accused in the normal operation of the government with the label of aggressive war. The enactment and execution of laws and measures were not for ulterior purposes as claimed but for

sound and proper reasons and in the promotion of good government, unrelated to the charges in the Indictment.

With respect to the evidence to be present in this division, as has been pointed out in the general opening statement, individual accused may, in the presentation of their defenses, differ with certain items of evidence, the inferences to be drawn therefrom and their involvement therein.

PART 2: DEFENSE REBUTTAL EVIDENCE: GENERAL AND SPECIFIC ARGUMENTS

CHAPTER 4: AFFIDAVIT OF TOKUTOMI SOHO

Japan's Trend in More Recent Times: A Historical Observation
(Affidavit prepared by Tokutomi Soho)

Submitted to the IMTFE on March 18, 1947 (Session 182), but rejected in its entirety

This is the only one of more than 200 documents rejected during the general phase of the defense rebuttal that we have included in this book. As the subtitle indicates, Tokutomi's affidavit is a concise overview of modern Japanese history. This is historical commentary at its best and one of the highlights of this book, in that it is sufficiently self-contained to stand on its own.

According to Kiyose Ichiro's *The True Story of the Tokyo Trials*, Tokutomi wrote to him on March 2, 1947, praising the opening statement Kiyose had presented on February 24, and adding words of gratitude and encouragement. About two weeks later, Tokutomi submitted a sworn affidavit. There is a great deal of similarity between Tokutomi's perception of modern history and that outlined in Kiyose's opening statement, both of which share common ground with the renowned deposition given by General Tojo Hideki.³¹ Perhaps the commonality among the three aforementioned documents is a result of mutual influence. Nevertheless, we can conclude that they express perceptions shared by many of Japan's leading intellectuals at that time.

DEF DOC #632

JAPAN'S TREND IN MORE RECENT TIMES — A Historical Observation — by TOKUTOMI Ichiro

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³¹ For more information about Tojo's deposition, see Sato Sanae, *Tojo Hideki: Fuin sareta shinjitsu* (Tojo Hideki: Suppressed Truth) (Tokyo: Kodansha, August 1995).

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— The End —

I. A Brief Sketch of My Life

Now I will narrate my life in brief sketch. Without exaggeration and without self-depreciation I will tell what I myself believe is true.

My family lived for several hundred years at Minamata, which is bordered by mountains and facing on the sea. It is located close to Satsuma Province at the southern tip of Higo Province in Kyushu. In the national history written one thousand years ago, Minamata appears as one of the postal service stations established by the central Government.

My family was neither wealthy nor poor. In its native place it was of a prominent stock. From generation to generation its members were appointed local officials, and engaged themselves in river improvement, reforestation, reclamation and other work. They also established schools to promote local education.

My Father was a disciple of YOKOI Shonan, and in the renovation of the Meiji Restoration contributed not a little to the administrative reformation of the Kumamoto Clan.

Not only was YOKOI Shonan my father's teacher, but also we were Yokoi's relatives by marriage, for his wife was my mother's sister. I myself have been one of his disciples who throughout their lives followed Shonan's academic views.

Shonan was one of the principal characters who effected the reformation of the Meiji Restoration. It is true that he was not the author of the "Five-Articled Imperial Covenant," which constituted the cardinal principles of the basic national policy in the Restoration. However, YURI Kimimasa, one of his disciples, drafted the Covenant's first manuscript. It was completed through joint efforts by many other collaborators and revisers. Nevertheless, there is little doubt that its guiding spirit is based upon Shonan's inspiration; upon this point I have made detailed comments in my "National History."

Born in 1863 (the third year of Bunkyu), around 1873 (the sixth year of Meiji) I entered the Kumamoto Yogakko, where I studied English under Captain Zens, an American. In 1876 (the ninth year of Meiji), I went to Tokyo, thence proceeded to Kyoto, where I entered the Doshisha College and became a disciple of NIJIMA Jo. I was at the University till 1880 (the thirteenth year of Meiji); just before graduation, however, I had a conflict of views with the university authorities, and without graduating left Doshisha for Tokyo.

While at the University I studied elements of history, politics, economics, and other sciences under Dr. Larned, an American. My academic career ended here.

From the age of eighteen, when I left the Doshisha University, till I was eighty-three on the 15 August, 1945 (the twentieth year of Showa), I was almost constantly in newspaper work. Particularly, from 1890 (the twenty-third year of Meiji) till 1929 (the fourth year of Showa) as the president and concurrently the editor-in-chief of the newspaper Kokumin, and thence till the

termination of hostilities as the guest of the newspaper Mainichi, I devoted most of my time to literary work.

In addition to the publication of newspapers, I established the Minyusha Publishing Company, and engaged in the publication of books and magazines. My works published by the Minyusha and elsewhere total several hundred.

Again, I rendered assistance to NIIJIMA, Jo in his efforts to found a university. After his death, in order to fulfill his wishes, I became the chairman of its founding committee, and contributed my small share to the work.

For nearly a decade I did my best in the capacity of supervisor of the newspaper Keijo Nippo in Korea.

By establishing the “Kokuminkyoiku Shoreikai” (the National Education Promotion Society), I rendered service to the national education, and by founding the Aoyama Kaikan (the Aoyama Assembly Hall), I strove for the promotion of adult and social education.

Yet what I concentrated my best efforts on, other than the newspaper work, was the compilation of Japanese history. To this work I have devoted nearly thirty years of my time, publishing seventy-odd volumes and completing over ninety volumes of manuscripts.

For this accomplishment I was awarded an Imperial prize through the Imperial Academy, given the Prince Arisugawa’s Scholarship, and was appointed a member of the Imperial Academy. Shortly after this I was appointed also a member of the Imperial Academy of Arts. In 1911 (the forty-fourth year of Meiji) I was nominated by the Emperor a member of the House of Peers. I was also awarded in 1943 (the eighteenth year of Showa) the Cultural Medal. I gave up all these last year. I have confined myself now to my home and am now nursing my illness.

As persons who have influenced me most through my life I would mention the names of YOKOI Shonan, NIIJIMA Jo, KATSU Kaishu, and my father TOKUTOMI Kisui.

Because of the difference in ages, I did not have the opportunity to come into personal contact with YOKOI Shonan. However, all of his academic views I heard through my father.

NIIJIMA Jo was a typical Japanese. He taught me what a Japanese should be.

KATSU Kaishu was a Japanese of rare personality such as is seldom found amongst any or all persons I have associated with. From him I have learnt something of human philosophy. This is all I am going to say about them except a few words which I should like to add here about my mother.

My mother taught me a great many things. Above all, she taught me that whatever straits I might get into I should trust in Heaven and calmly accept my fate. She practiced this teaching herself. Today, I am specially appreciative of the precepts left by my mother.

II. Key to Japanese History (1)

Today the Japanese people are regarded as a war-like nation; and the Imperial policy of the Meiji Restoration is misunderstood as having aimed at Japan's armed invasion of the world. This is not confined to foreigners, but at present even certain Japanese have come to hold such a view.

If this is not a biased interpretation, it is a misunderstanding. As a student of Japanese history I feel keenly my own responsibility to elucidate the truth of the matter.

If I am to give first my own conclusion of my study in Japan history, I say the Japanese are second to no people or nation in the world in their love of peace. The Imperial policy in the Meiji Restoration aimed at having Japan, theretofore isolated from international society, join this society so that she might finally be in a position to do creditable service as a member of it.

In a word, the Imperial policy was so formed as to have Japan progress of its own accord to other Powers' level, stand on an equal footing with them, and attain a status for maintaining harmony with them. In this sense one can never attach to Japan any intention of world invasion according to the Imperial policy. Throughout her career Japan has had no intention of invading the world, but has rather been in the fear of being invaded by the Powers. That she has been concentrating her energies on self-defence alone is the fact shown all through Japanese history. I should like to cite instances here to prove my point; only that would amount to my giving a lecture upon Japanese history.

I regret I am obliged to give here only conclusion induced from facts. Self-defence has been the most important matter for Japan. For this purpose her ancient Government erected barricades in the north-eastern province, dug moats in the south-western region, stationed a commander of local government in the north-eastern province, and guarded the south-western region with a conscripted garrison with permanently established headquarters.

It was not for the reason of its security alone that the Tokugawa Shogunate adopted the policy of national seclusion.

The Shogun closed the country to foreign intercourse lest Japan should be invaded by foreign Powers. In a certain respect this policy had something in common with the American Monroe Doctrine.

To say nothing of historians of other countries, even Japanese historians do not understand what the Japanese national characteristics are like.

It is extremely difficult to state here in a nutshell the Japanese national characteristics, Japan's traditional national policy derived therefrom, and the history of how the traditional policy gave rise to the reformation through the Restoration. However, I should like to produce here a key for understanding all these.

What constitutes such a key? It is the fact that Japan had as her neighbour a big continental Power in China, which not only had far more extensive territories and far more numerous population, but also possessed a much higher culture than Japan.

In a certain sense it might be said that, mostly the Japanese national characteristics have been contributed by, or been created under the influence of, China, if not moulded by China.

Temporarily disregarding Japan's ancient history, when the Japanese gained their self-consciousness, as stated above, they either became conscious of or felt unconsciously, the existence in their vicinity of a country whose land and population both were more than ten times or scores of times larger, and whose culture was far higher than Japan's.

Thus the Japanese felt culturally toward China deep emotion, great admiration, strong envy, and deep longing.

Forgetting every thing else, they strove to imitate China. At the same time Japan wondered how she could preserve her own independent self decision such a great country. First came the competitive spirit for elevating Japan to an equal footing with China, culturally and in other respects. Yet however bitterly Japan strove, she was an island country with a small population. However closely one tries to imitate, a branch or a retail store is no match against its principal or wholesale store.

Thus, on the one hand, Japan did her best to imitate or to learn from China in every possible field; on the other, she strove to possess something which China lacked, whereby to keep up rivalry with her.

This made Japan acquire a strong imitative ability and adaptability. At the same time it helped her to cultivate a national characteristic of trying to find something which was peculiar to her alone. Traces of all these are clearly found in the Japanese today.

It is a serious mistake to make the charge that Japanese are self-conceited enough to regard themselves as superior people, and to look down upon other nations. All that the Japanese hoped for at first was, that, though the Japanese were no equal to the Chinese, Japan might at least maintain her national prestige by imitating China's culture. In the next stage the Japanese aims were if China was superior in quantity, Japan should improve in quality; if China excelled in number, Japan should show higher grade; and if China boasted of her nationals, Japan should improve her spirit. The Japanese eventually managed to acquire consciousness that Japan at last had attained an equal footing with China on the score that, though China was a continental Power, at every revolution its dynasty changed; and that though an island country, Japan was ruled by an ever-unbroken line of Emperors.

III. Key to Japanese History (2)

In order to learn Japanese history it is best to make Japan's principal figures its index. One of the most suitable of such characters is Prince Shotoku.

He was the embodiment of the Japanese people's admiration for China; and yet at the same time their rivalry against China was crystallized in him. On the one hand, the Prince adopted Chinese culture and institutions and, on the other, he despatched official documents, the salutations of which were, "The Eastern 'Tenno' informs the Western Emperor (!) or "The 'Tenno' of the Country of the Rising Sun informs the Emperor of the State of the Setting Sun!

Generally speaking, whatever objects existed heretofore in Japan have been created to match similar objects in China.

The Mausoleum of Emperor Nintoku, for instance, which ranks among the grandest mausolea in the world, was erected probably in order to emulate such as the Li-Shan Mausoleum of the Founder of the Chin Dynasty, the Quinary Mausolea of Han, the Chao Mausolea of Tang, and so on. The same could be said of the great image of Buddha in Nara. Again, it was the same motive that led to the compilation of the *Nippon Shoki*, deservedly called the fountainhead of Japanese history.

The Japanese at times felt respect for and at other times stood in fear of China; but despite respect and fear, their greatest efforts were directed to the maintenance of an independent status towards China and also to the demonstration of such.

Among the leading thinkers in Japan, there were seemingly two currents, one pro-Chinese and the other anti-Chinese. As a matter of fact, however, these two currents were traceable to one and the same source: the basic conception that Japan could not possibly cope with China developed, in passive minds, into zealous adoration towards China and in defiant minds, into rivalry, if not antagonism. It was for this reason that the vast majority of the most prominent nationalists in Japan ranked at the same time among the greatest sinologists.

SUGAWARA, Michizane, famed as the Pai Le-Tien of Japan, upheld the theory of being "spiritually Japanese even if culturally Chinese," admonishing that the Japanese, while copying Chinese arts, should take care not to lose the spiritual characteristics as Japanese. We have another example in KITABATAKE Chikafusa, author of the *Jinno Shotoki*, which is the most excellent Japanese history of individual authorship. He was conversant not only in Chinese classics but also with teachings of such scholars as Cheng Chu, closer to him in the point of time; he was also well read in Chu Tzu's *Tsugan Komoku*. Yet, he opened his *Jinno Shotoki* with the specially emphatic statement, "Japan is the country of gods," thereby giving Japan a position more than equal and even superior, to that of China.

He had two major objectives for writing this book. The first objective was, as anyone would notice, to establish that the Southern Dynasty was the legitimate line of the Imperial Family of Japan. Secondly, he declared, with firm confidence, that not only was Japan superior, in the point

of national policy, to such powers as China and India, but also she was more advanced, though few people seem to pay any attention to this second point. In short, the two major protests, that is, the protest of the Southern Dynasty against the Northern Dynasty, and the protest of Japan against China and India, constitute the very essence of this work.

However, dissenting ideas, too, had attained considerable popularity in Japan. A Zen priest named Engetsu, a near contemporary of KITABATAKE Chikafusa, wrote a book entitled *Chuseishi*, declaring that the ancestors of the Japanese Imperial Family had been the descendants of Tai-Po of the Wu Dynasty. Because of this he incurred adverse criticism of the Imperial Court and the book was subsequently ordered to be destroyed by fire.

On the other hand, the views of another Zen priest Kokan who wrote the *Genkyo Shakusho*, a kind of Buddhist history of Japan, belonged to a trend of thought similar to, if not the same as, that of Chikafusa's.

At the beginning of the Edo Era, YAMAGA Soko wrote the *Facts About Chucho*, setting forth his own opinions concerning a chapter, entitled "Age of Gods," of the *Nippon Shoki*. In reality, however, he merely added but little to what had already been set forth by KITABATAKE Chikafusa. By "Chucho" he meant Japan, not China, and from the very title of the book, the contents would be self-evident. YAMAGA Soko, too, was one of the most celebrated sinologues in those days.

About this time the EDO Shogunate ordered the compilation of a Japanese history to the HAYASHI family — that is, HAYASHI Doshun, his son Shunsai, and so on — who were responsible for the educational affairs of the Shogunate. This book was known as the *Honcho Tsugan*. When the work was completed, it so happened that MITO Mitsukuni, a relative of the Tokugawa Shogun and popularly called the Vice-Shogun, happened to censor it, before it was presented to the Shogun for inspection. At the wholly unexpected passages asserting that the Imperial Family of Japan had been descended from Tai-Po for the Wu Dynasty, Mitsukuni became infuriated and it is generally held that the indignation actuated him to compile the *Dai Nipponshi*, a golden rule, so to speak, of Japanese history.

Although, personally speaking, I do not suppose such was necessarily the only motive for the compilation, yet at the same time I do not think this the kind of idea to be dismissed with a smile.

Up to the time of the Ashikaga Era, the Japanese used to be sheer idolaters of China. ASHIKAGA Yoshimitsu, for instance, used to take pride in his crown and clothes sent from China. At his death, he was given by a Chinese friend of his the posthumous name of "Kyokeno." After the Tokugawa Era, however, rivals other than China appeared, namely, western countries. Thus far China had been Japan's only neighbour; but since ocean navigation came into vogue, the number of Japan's big neighbours increased, that is, Western powers appeared. When the single neighbour China had been troublesome enough, the sudden appearance of so many new neighbours was unbearable. So, the Shogunate, deciding upon the policy of keeping them off as much as possible, issued a decree of national isolation. In spite of

this, they came. The greatest of these neighbours was Russia. Japan had from the beginning respected China as a civilized nation; but Russians she had feared as “red barbarians” rather than regarding them as a civilized people.

In the *Modern History of the Japanese People*, I have stated at length how great was Japan’s fear towards Russia and how deep was her worry over what should be done to meet Russia’s southward advance. Side by side with the fear towards foreign countries, there grew also aspiration after foreign culture, as was evidenced by the enthusiastic study of the Dutch language. This, too, I have already related in detail. What the Japanese feared most was at first Russia; but by and by Britain became another object of fear. While Russia disturbed Japan’s northern frontier, Britain, in violation of the Shogunate’s national isolation decree, impudently forced her way into the Nagasaki Harbour. The Magistrate of Nagasaki, taking the responsibility upon himself, committed “harakiri.”

Furthermore, the news of Britain’s activities extending from the Indian Ocean to the China Sea constantly reached Japan. In point of national defence, the Japanese became greatly concerned as to whether or not Japan, now hemmed in on both sides by Russia and England, could possibly maintain her independence. Confronted with such a situation, Dutch scholar SUGITA Gempaku, for instance, maintained that since it was by no means possible for Japan to meet Russia’s southward advance the best way for Japan was to conform to the law “might is right” and to make friends with Russia.

Afterwards, about the time Commodore Perry came to Japan, HASHIMOTO Sanae, a man of long sight, argued that it was necessary for Japan now to become allied either with Russia or with Britain, and that, however, since Britain was cunning and hard to deal with, it was better to league rather with Russia. In short, the Japanese had substantially the same mental state, only more magnified and exaggerated, towards the Western powers as she used to have towards China. Far from contemplating aggressions, Japan was simply in awe and trepidation lest she herself should be invaded by foreign powers.

Besides, at the bottom of their hearts all the Japanese, wise or otherwise, believed from their respective standpoints, that Japan could not possibly cope with, far less excel, other countries, although nobody dared to speak out. About the time of Meiji Restoration, there was not a single soul in Japan who believed Japan to be the greatest country in the world, who considered the Japanese as the greatest people, who thought of invading other countries, or who had a sense of superiority towards other nations.

Very rarely, however, some people did publish preposterous opinions. These, however, were mere boastings unfounded on any conviction. At bottom, they are traceable to the same motive as gave rise to the idea, prevalent in the last war, that if the foreign troops landed in the homeland of Japan, the Japanese should annihilate them with bamboo spears.

IV. MOTIVE OF THE MEIJI RESTORATION AND BASIC POLICIES

I could not possibly enumerate here all the factors leading to the Restoration. The most decisive motive or the root cause was that the Shogunate could not possibly maintain the independence of Japan; that, if left solely to the administration of the Shogunate, Japan might be invaded by various foreign countries and there was no telling what a miserable plight Japan would find herself in, what dishonour she would incur, and what total collapse Japan herself might meet with; that, therefore, the unification of Japan, with the Imperial Family at the very center, should be effected; and that the entire Japanese nation should do their best to defend Japan, so as to enable her to maintain her status as a fully independent state. Under such circumstances, the reform was effected in a short time and almost without any great difficulties.

Consequently, the basic policy after the Restoration was nothing but to effect these aims, that is, firstly, to put Japan in a position free from foreign invasion; secondly, to let her attain perfect independence; and thirdly to enable her to join the international society and, as a member or an important member of the society, to act like a power in her dealings with various other powers. As a basic policy for the realization of those objectives was promulgated on 15 March in the year 1868 or the first year of Meiji “The Imperial Covenant Consisting of Five Articles.” This Covenant determined the basis of Japan’s national policy and served as the criterion for all matters. For about 80 years since its promulgation, up to the present day, almost everything has conformed, although with occasional digressions, to this covenant.

The political leaders of the Meiji Restoration were Sanjo, Iwakura, Saigo, Okubo, and Kido. Apart from them, YOKOI Shonan was one of those, though not necessarily the only one, who drew up the general outline of the Restoration, or in other words, who set forth the fundamental principles.

The “inspiration” of the Covenant was given by YOKOI Shonan, to YURI Kimimasa, the drafter or one of the drafters of the Covenant. This YURI Kimimasa himself knows better than anybody else.

YOKOI Shonan was not one of the so-called doctrinaires carried away by empty ideas and ideals. As even his opponents called his group “Practical Theorists,” he kept his feet firmly on the ground while his face was turned heavenward. He was always trying to realise ideals and to idealise realities. Immediately after the Restoration, he was summoned by the Emperor, and he started from his home in the Higo Province for Kyoto. On this occasion, YURI Kimimasa — then known as MITSUOKA Hachiro — belonging to Echizen Province, who had been appointed some time earlier to be a councillor of the Imperial Court, came to Osaka to meet Yokoi. According to what Yuri says (cf. “The Manuscripts Left by the Late Shonan”), Yokoi then told Yuri that Japan was truly a blessed country firstly because she had the Imperial Family of an unbroken lineage, and secondly, she was opened later than the various powers of the world.

Setting aside for the present the question of the unbroken lineage, what Yokoi meant was that not only were the Japanese able to make one grip of all sorts of knowledge that the Westerners had spent long years of hard application to acquire, but also the Japanese were able to choose between the merits and demerits of the Western culture, and that, therefore, they could learn

much more in a much short period of time. Yokoi, according to his own words and writings, had great expectations for the Emperor Meiji, who then was still in his boyhood. Yokoi firmly believed that this Emperor alone would be able to add glory to the restored administration. Although he himself was assassinated shortly afterwards by members of the “Extreme Conservatives,” his aims were brought fruition by his disciple and friend MOTODA Eifu.

Yokoi wished, if possible, to go over to the United States himself, and convene, with the approval of the President, an international peace conference, for Yokoi believed that the greatest contribution Japan could make to the world was for her to take an initiative in the realization of the international peace. His death, however, prevented him from carrying out his ideal. As is evident from what Motoda said about Yokoi (cf. “The Manuscripts Left by the Late Shonan”) Yokoi worshipped Washington, next to Yao Shun, ideal monarch of China, and used to maintain that the sovereign of a country should follow the example of Washington. It was his conviction as a Confucianist that the idea “benevolence disarms enemies” could be put into actual practice. He aimed at a new code of political ethics and believed that the work of ethicisation should start with the home and gradually proceed to the town and village, the entire country, and finally to the whole world. It is needless to say that the post-Restoration government was formed indeed out of civil wars but by no means for the purpose of waging further wars, and its chief object was not only to maintain the sway of peace within the country but also to realise international peace throughout the world.

These observations of mine are by no means desk theories. As a close examination of every one of the leading figures among the organizers of the post-Restoration government would disclose, there are no traces in the fact of any imperialists ever manipulating or directing the fundamental policies of the post-Restoration period.

In particular, the leading politicians of the post-Restoration government of Japan, such as Iwakura, Kido, Okubo, and so on made between the end of 1873 (the 6th year of Meiji) a tour of inspection through American and Europe and seeing with their own eyes the actual conditions of various Anglo-American countries, came to the conclusion that Japan, as she was then, was no match for these countries, that the most important duty for Japan was to elevate her international status, and that, in order to do so, it was most urgent for her to copy the good points of foreign countries. From their tour they came back with a firm determination to effect these objects. Under these circumstances there is not a scintilla of truth in the allegation that the post-Restoration government was a militaristic regime or that it was the forerunner of Japan’s militarism. In the early stage of the Restoration, the Emperor Meiji was still young and he had not yet acquired the ability to take administration into his own responsibility. From 1877 (the 10th year of Meiji) onward, the Direct Imperial Rule, thus far only nominal, gradually came to be realized. Among the political advisors, the two in whom the Emperor used to place greatest confidence were Iwakura of earlier days and Ito of later years. Both of them were peace-loving politicians and no one would think of them, even for a moment, as militarists. And a Japanese who exerted a most profound influence on the Emperor Meiji was MOTODA Eifu. “The lectures given by Professor Motoda in the Imperial presence,” published by me, show what he told the sovereign. He was a small-scale YOKOI Shonan but he was devoid of his flaw of roughness and

endowed with the sheen of burnt gold and a pure gem. And so was his view. A foreigner who exercised a great influence on the Emperor was General Grant, sometime President of the U.S.A. When he came to Japan in the autumn of the 12th year of Meiji (1879), the Emperor Meiji talked with him with unusual ardour. A youth of 28, as he was then, he listened to the advice of General Grant, which impressed him deeply. The General discouraged rather than encouraged over-zealous Europeanization of Japan. He expressed to the sovereign his fervent wishes that Japan would become a completely independent State and free herself from undue influences of the foreigners. The collected poems of the Emperor Meiji are eloquent on how he was a model monarch of peaceful international conciliation. Thus, the Emperor, who was the pivot of the Meiji Government, and all the influential statesmen who assisted him, were no militarists. Nor was even a slightest trace of militarism found in them. It does not require any special explanation on my part that such Emperor, such Government had no occasion for a conspiracy of world domination.

In short, until the middle of the Meiji Era, both the government and the people were occupied sedulously on the achievement of complete independence. What harassed them most were extraterritoriality and absence of tariff autonomy. They were determined to recover their tariff and judicial rights at any cost. But the nation was divided into two factions over the question. The one faction proposed to raise the cultural standard of Japan speedily, and to plan and effect Europeanization of Japan to ease and satisfy the foreigners. The other faction rejected Europeanization of Japan and considered it a shortcut to make the Europeans give in and propose voluntarily the revision of treaties through numerous inconveniences and difficulties they were sure to feel if they should keep the Japanese in the lurch. In another word, the latter advocated strict observance of the treaty terms in opposition to the Europeanization policy of the former. For, should these terms be observed to the letter, the foreigners would not be allowed to trespass, for example, an inch further the ten *ri* limit of free passage which was stipulated by treaties. They would be then nonplused by such constraint and obliged to propose a treaty on equal terms. Public opinion was agitated but excitement subsided after the 27th and 28th years of Meiji (1894-5) when the question was settled of itself.

The Western powers recognized the continuous efforts of the government and the people since the Meiji Restoration and admitted the growth and development of Japan which the years had brought on her, if not as their equal. Thus Japan achieved her complete independence, as described by General Grant, thirty years after the foundation of the Meiji Government.

V. Internal and external stimuli to modern Japan

It was the Western powers that taught Japan that she did not need to fear China. Japan not only followed their precept faithfully but became fully awake to the weakness of China. Respect and fear Japan had had towards China were now turned with doubled intensity to the Western powers. However, there were such persons in Japan who did not concur with the current of the age. In early years of Meiji, NAKAMURA Keiu published his view that China should not be held in contempt, warning the Japanese to modify their attitude towards China. In the years prior and after the Sino-Japanese War in the 27th and 28th years of Meiji (1894-5) when the Japanese

people were elated with realization of vincibility of China, KATSU Kaishu cautioned them against their flippancy, drawing their attention to the superior intelligence and discretion of the Chinese people.

Now at this juncture I should like to say a few words on the Sino-Japanese War. This Sino-Japanese War can be considered as a continuation or repetition of the war which was fought in Korea against China in the reign of the Emperor Tenchi about 1,200 years ago, i.e. in the 7th century A.D., the only difference being that the Japanese influence in Korea was completely driven out by China by the war of ancient days and the Chinese influence in Korea was almost entirely driven out by Japan by the war in the 27th and 28th of Meiji, Korea had been the front line of Japan's defence since the ancient days in Japanese history. After complete evacuation of Japan from Korea, Japan redoubled the defence of Kyushu. But it did not prevent the attack of the Mongolians who used Korea as the basis of operation. Fortunately the "divine wind" drove away the Mongolian troops. But it did not mitigate her fear. Japan had since attempted to despatch troops to wipe out these bases of operations, though the plans did not materialize because of her internal situation. In the 6th year of Meiji (1873) SAIGO Takamori and others advanced the so-called "Advocacy of the Korean Invasion," but their real intention was to confront Russia by concluding a defensive alliance between Japan and Korea. The opposing parties made objections in fear of possible friction. Opinions differed between these parties for and against the proposed campaign only as regarded the method and policy of defense against the foreign powers, but there was no such difference as to the fact that Korea was the front line of Japan's defense, which had been common knowledge since the foundation of Japan.

Now I resume the subject I left. China had made so little of Japan from the very beginning. But she became offended by the Japanese encroachment of the Loochoo Island, Formosa, and Korea. Not only did she contempt and disdain but begin to hate; become indignant, and fear Japan. She adhered to her traditional policy of befriending distant States and antagonizing neighbours, and revenged herself on Japan by restraining Japan through the influence of the foreign powers. But this was not a wise policy for her, for the so-called breaking-up of China originated in it, to say the least of it. Even during the Sino-Japanese War, however, no small number of the Japanese hoped to shake hands with China. Pacifist statesmen like Ito were these. General Kawakami, the Japanese Moltke of the Sino-Japanese War, was also a very enthusiastic advocate of the cause. Neither did China lack these who considered Sino-Japanese co-operation advantageous to her in the long run. But the majority of the Japanese doctinated with contempt for China. They made no particular study of her nor preparations, considering China as a stone lying in front of a gate which one can move at one's will. The Chinese, on the other hand, seethed with resentment and revenge, waiting for an opportunity for reprisal. But in view of the formidability of Japan, they pretended innocence for the time being and patiently watched for such a chance. Thus Japan and China had never reached mutual understanding and friendship in spite of their affinity geographical and linguistic since the Meiji Restoration. Of course, among the individuals of the two nations, considerable intimacy had developed, but as a nation their relationships had remained superficial throughout. They never had an occasion of whole-hearted cooperation. It is not proper for me to discuss the right and wrong of the China Incident, so I will not dwell on this point any further. Japan paid dearly for her contempt of China, which has almost ruined her. Had

the Japanese understood and studied China better, had they acted with more prudence, the present state of affairs would never have occurred. The present disaster may probably be attributed to their lack of presence of mind. At any rate, the Japanese considered the Chinese as a race like sand. The Chinese on their part made the most of antagonism, hostility, and revenge against the Japanese — or rather stimulated and enkindled antagonism against Japan, as we might say. Thus Japan played a part of cementing the sand of the Chinese, consolidating a heap of sand into a towering citadel of concrete. China had contributed to the development of national spirit in Japan. And now Japan in her turn paid back her obligation with interest, having contributed to the advent of the Kuomintang and the Communist Party in China. The United States deserted Japan in favour of China, but whether it is a change for the better, I am not in a position to say. History will show it in the nearest future.

The so-called militarist clique never existed in Japan. I can firmly say so with my conscience. I am an old man, and as I have been connected with the Press since my mature days, I have met all kinds of Japanese people. I was a war correspondent at the time of the Sino-Japanese War. I watched the development of the Russo-Japanese War as a closely interested party. I have never hesitated to express my views of the military and other questions.

Field Marshal Yamagata was the leading man and the helm of the Japanese Army. Yamagata, as home minister, twice premier, and later elder statesman exercised a most profound influence on politics in general, though he himself was a military man. He reformed the military system of Japan and enforced the conscription law, thus abolishing the privileged class of samurai numbering 500,000 or 2,500,000 including their families, and making the entire nation share the duties of national defense. He personally attended the coronation of a czar in Moscow as the delegate of Japan. He was a most enthusiastic advocate and supporter of the Anglo-Japanese alliance. His illustrious deed was the establishment for self-government in Japan. He was probably one of the greatest statesmen of Japan in the last one hundred years, though I do not share his political views. He was not a militarist. He wished complete armament, but it was for the sake of peace and national defense of Japan. He proved to be a sedative rather than a stimulant to the military in general. (See the *Life of Prince Yamagata*, which is a true account of his life, written by me.) Same can be said about Saigo, Jr., Yamamoto, Togo, and others, who were the leaders of the Navy. Especially Saigo and Yamamoto were advocates of international conciliation and stood firmly against starting troubles upon the initiative of Japan. The influential persons in the Army and Navy, so far as I know, were no exceptions. For example, upon his departure from Japan as Commander-in-Chief of the Manchurian Army, Field Marshall OHYAMA was reported to have left a cordial message to the effect that he would take full charge of military operations, but the Government should not miss an opportunity to restore peace. Thus until the middle of the Taisho Era things moved on in perfect order in conformity with the wishes of the Emperor Meiji for peace. What was the cause, then, that brought irregularity to political circles? The question must be studied from two aspects, internal and external.

I will start with the internal aspect. From the end of the reign of the Emperor Taisho, various cabinets were formed, party cabinets, bureaucratic cabinets, coalition cabinets of the political

parties and bureaucrats, and others. The political parties, however, almost lost the confidence of the law-abiding citizens, if not the entire nation, through their high-handedness. The bureaucratic cabinets also could not maintain the confidence of the nation in a different sense. Political strife was a struggle for government positions and, again, for personal gain once those positions were obtained. Politicians of the day had no consistent objectives or principles. They led a “hand-to-mouth” political life, living in the present only, caring nothing for the consequences, coveting present ease, and being content when their desires were satisfied. The nation, who were thus disillusioned by the political parties and bureaucrats, thought that men of loyalty to the nation might only be found in the military or the fighting services. Some of the young members of the military, that is, officers fresh from the Military Academy or university, from first or second lieutenants to majors or lieutenants-colonels, assumed upon themselves the duties of reforming Japan, and their activities culminated in the May 15 or the February 26 Incident. If a term “militarist clique” can be used at all, it may be applied to this faction, this gang, which was only a small portion of the military. But no such thing as a militarist clique ever existed in the fighting services themselves. Unfortunately the military class, the last hope to the Japanese, which was considered free from all the corruptions and incompetences, proved no less scandalous upon its advent to power than the political parties and bureaucrats, bringing wars and miseries to Japan. I hope I have made it clear in what I said that the so-called militarist clique never existed in Japan.

External stimuli became manifest after the World War I. The Anglo-Japanese Alliance had kept equilibrium in the East Asia. But it became only a nominal existence shortly after the World War I. Japan was given harsh treatment at the Versailles Conference by her former allies, Great Britain and her Dominions. Still harsher was the treatment the United States, Japan’s semi-ally, accorded to her. At the Washington Conference, which followed, the Anglo-Japanese Alliance was dissolved. And Great Britain and the United States united themselves to put pressure on Japan who was then emerging into a full-fledged power. One is apt to mind another’s business and forget his. The truth of this will become clear once the attitude of the Anglo-American countries to Japan after the Russo-Japanese War is recalled. Japan hoped at that time to step on the stage of the world hand in hand with the World Powers since she became a full-fledged power, but she found herself completely surrounded by thorns of hostility and antagonism. There is a Japanese saying “Envy will pursue merit as its shade.” And that was the situation she found herself in. The population of Japan, which was 30,000,000 at the time of the Meiji Restoration, reached 70,000,000 at the end of the Taisho Era. It was increasing steadily by 1,000,000 a year or more. Shortage of food was a natural outcome. But a placard with “No Japanese Allowed” lettered on it had been raised everywhere in the world. Worse still, the Japanese nationals who had settled themselves abroad were driven out or threatened to be driven out. The United States, who had remained a close friend to Japan since she opened her door to the world, now built a powerful armada with Japan as her potential enemy. Russia had remained a chronic menace to Japan. China, our neighbour, took full advantage of her policy of befriending distant states and antagonizing neighbours, obstructed the policies of Japan, and gave a rude check to her onset at every opportunity. But the Japanese cabinets remained unconcerned with such a national emergency. Politicians who “have not” aspired to “have.” Those who “have” tried to keep it. They were intent upon the struggle for political power and acquisition of concessions, and had no leisure to give thought to the national crisis or emergency. Under such circumstances, the

younger set of the military was more or less justified in their indignation. Nor was it accidental that some of the nation expressed sympathy toward them. This was the actual situation that prevailed from the end of the Taisho Era to the middle of the Showa Era, judging from my long experience and observation.

VI. Japan's Self-Existence, Self-Defense, and Self-Respect

My observation from the viewpoint of a historian and a newspaperman (I am associated with the press over half a century) tells me positively that Japan is not an aggressive country nor the Japanese an aggressive nation, but that she is on the contrary a peace-loving country and the Japanese the most peace-loving nation in the world. It is farthest from the Japanese to look upon the nations of the world with a sense of superiority, for they realize many disadvantages of theirs — smallness of their country, scarcity of natural resources, lowness of their culture, though they do not show it outwardly. Such realization has led them to imitation, blind following, resistance, or creation of a special milieu, by which they have humoured their sense of inferiority.

Generally speaking, there is no other nation than the Japanese who are so much attached to their own country. They have a national trait to open their country to the world and absorb anything the world will offer, but it is not in their nature to push themselves on the world. “Norito” or prayers to the God, which is one of the oldest literature, declares that Japan will absorb everything and will not force others to adopt things Japanese. Japan has once said that she has many things to receive from the world but few to offer it. I believe this is true to the national trait of the Japanese. It also proves that Japan is fully qualified to receive but not to give. In short, the Japanese have absorptive faculty but little, if not no expanding faculty. They are attached to their native places and never forget them for a moment when they are abroad. Even Abe-no-Nakamaro, a Japanese overseas student who went to China in the Tao Period and succeeded to obtain an important government position there, wrote in his verse, “Oh Moon that shines over the Mikasa hill!,” longing to see the familiar landscape in Nara. Thus a nation who has much of centripetal force but little of centrifugal force never dreams of world domination or encroachment on its neighbours. Why did such a nation then find its way to various places in the world after the Meiji Restoration? It was because of difficulties of living. Shortage of food and clothing drove them abroad in spite of their national trait.

All the moves of the Japanese Government, the people, or rather the entire nation since the Meiji Restoration were motivated primarily by self-existence. That is, the Japanese people began moving out of their country in search of livelihood — food and clothing. The second motive was self-defense. These moves were aimed at achieving complete independence, maintaining her prestige as an independent country, and safeguarding such independence from foreign influences. Wars Japan was forced to be engaged in from the Meiji Era to the present days were fought mostly for these purposes. They were wars for self-existence and self-defense.

The third motive was self-respect. That is, a protest as a result of explosion of dissatisfaction and malcontentment with unfair treatment the World Powers accorded to Japan as an independent State. Japan, on the other hand, fell in the mood that “Alexander was a man, so am I,” so to

peak, when she saw what the World Powers had done. She thought it too undignified and pluckless to remain a mere looker on to what Great Britain, the United States, Russia, Germany and other World Powers were doing. Thus, the so-called national “aspiration” should be considered as a motive for her moves. In short, this is nothing but the manifestation of imitative nature with which the Japanese are richly endowed. For example, even a strict abstainer, whether a secretary of a Temperance League or a minister of the Church, will be excited and join in dancing, if wine flows in abundance, songs rise in glee, women whirl in dance.

More so for an ordinary man. Suppose that the moves of Japan had been tainted with imperialism, who were they that taught the Japanese what Imperialism is? They were the World Powers, I do not hesitate to say so openly. History of Japan from the latter half of the nineteenth century to the early half of the twentieth century was not of her own but closely interwoven with that of the world. It shows that Japan was constantly imitating what the senior powers had done, though she might have been clumsy in playing her part compared with the other powers. There is a Japanese saying “People ruin themselves by trying to ape their betters.” The saying may be applied to Japan, with this reservation that what the “ruined people” aped was not of their invention but of “their betters.” The World Powers, if I may compare them to cormorants, dived into the water and caught fishes big and small. Japan took the suite but failed to catch any fish and drowned herself. The folly of the Japanese is indeed unsurpassed. The World Powers that set them such examples may laugh and jeer as much as they please at the clumsiness of the Japanese. But censure or condemnation of Japan for it on their part will never be considered as an act of fairness in the eyes of God.

If the Japanese are to be blamed, they should be blamed for their misjudgement of China, the Anglo-American powers, the U.S.S.R, Germany, Italy, and most of all Japan herself. As Suntsu said, the Japanese knew neither others nor themselves. This is the cause of the present disaster. Thus the Japanese have nobody to blame but themselves. Some Japanese, however, shift the responsibility for the disaster to a limited number of persons, such as a military clique or financial magnates and remain unconcerned. The responsibility for all the actions taken by the Japanese must rest with all the nation. Although there is a difference of degree in the responsibility, those who pretend innocence and try to gain credit at others’ expense are guilty of forgetting what Japanese Spirit stands for.

I do not hesitate to acknowledge even now that I, as a member of the Japanese nation, believed in every letter of the Imperial Rescript on the Declaration of War on December 8 in the 16th year of Showa (1941). I am not in a position to criticize it now in view of His Imperial Majesty’s broadcast on August 15 in the 20th year of Showa (1945), but I am convinced that, as the Imperial Rescript said, this war was never welcome to the Japanese but it was a war forced on them — a defensive war — and that Japan had no other way but to find life in death and to start action without any thought for the result, since the so called ABCD line closed on her so tightly that she could neither keep still nor find refuge. Even today I still believe in the implications of this Rescript. Although only too short a time has elapsed since then to discuss the matter without prejudice, and although I am conscious of my disadvantageous position as a Japanese newspaperman, which will probably make my views less accredited than I believe them to

deserve, I am none the less convinced that they will no doubt be accepted by unbiased historians who may come a hundred years later.

In conclusion, I should like to talk about myself as a newspaperman. From the beginning of the Taisho Era I was firmly convinced that the U.S.S.R. and the U.S.A. were two great menaces to Japan and warned our people against them. Since my childhood days I have owed much to the Anglo-Saxon civilization. At the beginning of my career as newspaperman, I was so much impressed by *The Nation*, a magazine still being published in New York though under different management, that I named the newspaper I started *The Kokumin Shimbun*, a Japanese equivalent to *The Nation*. So I never hoped to fight against the U.S.A. But after the U.S.A. dealt a series of blows to Japan concerning the immigration problem and the Japanese school question in the Pacific coast or at the Washington Conference, I felt a great danger from the viewpoint of national defense and self-respect. Accordingly I gave a warning not only to the Japanese but to the Americans as well. Part of my warning was in fact translated into English and published in New York.* (**Japanese-American Relations*, by the Hon. Iichiro Tokutomi. Published by the Macmillan Co., N.Y. 1922.) I was quite candid and blunt in this article, but it was because I am a “candid friend” of the Americans and I hoped from the bottom of my heart that the Americans would change their attitude to Japan. Besides this book, I contributed many articles to magazines and newspapers for the purpose of improving America-Japanese relationship. Also the same principle pervades all the rest of my works. But as the situation developed, not only Japan’s self-defense and self-respect were endangered by the U.S.A., but even the national life of Japan became exposed to danger by the abolition of the Treaty of Commerce and Navigation, freezing of assets, and embargo of U.S. exports to Japan. Now Japan’s self-existence itself was involved. Thus the three great principles of Japan since the Meiji Restoration were violated by the United States and her allies and Japan was forced to give up hope. All my labours were lost, all my works were written in vain. My heart bleeds when I think of the present plight of Japan. Sorrow and shame for my incompetence lies heavy on my aged heart when I realize that I failed in realizing the teaching of my master YOKOI Shonan, and that all my life’s labour as a newspaperman was brought to naught.

CHAPTER 5: OPENING STATEMENT, MANCHURIAN DIVISION

Presented by Franklin Warren and Okamoto Toshio on March 18-19, 1947 (Sessions 182, 183)

As Radhabinod Pal indicated in his judgement,³² the IMTFE never intended to admit any exculpatory evidence pertaining to action taken by Japanese troops in Manchuria prior to the Mukden Incident (evidence describing Manchurian regional politics or social conditions). In the portions of the statement entitled “Problems prior to the Mukden Incident” and “Special features of Manchuria and the birth of Manchukuo” there are numerous phrases like “the defense will confirm by evidence” and “the evidence will show that ... ,” but most of defense counsel’s attempts to submit that evidence ended in failure. But from our perspective, as we attempt to look back at past history, it is very important to have an accurate perception of the true state of affairs in Manchuria before the Mukden Incident. In short, the incident was not the cause of a disturbance, but the result of years of anarchy in Manchuria, and countless, unchecked acts of violence intended to expel the Japanese. Without a doubt, the Mukden Incident served to resolve the problems in Manchuria, but defense counsel never dreamed that Article 6 of the Potsdam Declaration would be used to exhume events that had taken place, ended, and been settled nearly two decades prior to the IMTFE.

OPENING STATEMENT FOR THE MANCHURIAN DIVISION.

(Franklin Warren)

In offering evidence concerning the Manchurian division, it is respectfully submitted, first of all, that the affairs centering around the so-called Mukden Incident of the 18th of September, 1931, have been regarded as a closed book; that the Potsdam Declaration did not contemplate prosecuting such ancient events.

In the face, however, of the charges brought forth by the prosecution, as to the origin and defense of Japanese rights and interests in Manchuria, and to the causes which gave birth to the new state of Manchukuo, we must of necessity show the background and sentiments which certainly affected the actions of the parties concerned. The task of the defense is severe and extremely difficult in view of the time lapse, which has resulted in the death or disappearance of many important witnesses and the loss or deportation of innumerable documents of value, vital to the defense of many of the accused.

To expedite the presentation of the case in chronological order, the following five sub-divisions are adopted:

(1) Problems prior to the Mukden Incident;

³² See Introduction, p. ?? . [PLEASE INSERT PAGE NUMBER FROM *THIS BOOK*.]

- (2) The Mukden Incident and affairs incidental thereto;
- (3) Special features of Manchuria and the birth of Manchukuo;
- (4) International problems of Manchukuo;
- (5) Domestic affairs of Manchukuo.

PART I. PROBLEMS PRIOR TO THE MUKDEN INCIDENT.

1. The defense will confirm by evidence the statements in the Lytton Report (p.39) that the Japanese interest in Manchuria originated in the Sino-Japanese War of 1894-5 and that the Japanese people felt they had obtained a moral right in that area, deeming it as their "life-line" against the menace of Russia. The so-called three Powers' intervention (i.e. Russia, France and Germany) deprived Japan of her legitimate acquisition of sovereignty over the Liaotung Peninsula. Immediately after the evacuation of Japanese troops the three Powers and Great Britain forced China to concede various parts of her territory.

Although Japan and Russia came to an understanding as to their respective spheres of influence in Manchuria and Mongolia by treaties concluded between 1907 and 1916, past experience had taught Japan to be very jealous in guarding her rights. Consequently, for that purpose numerous treaties and agreements were signed between China and Japan during the period from 1905 to 1915.

At the Washington Conference of 1921-1922 and prior and subsequent thereto Japan gave back to China the rights and interests in the Shantung Peninsula which she acquired from Germany, renounced her priority rights concerning loans and advisers to China, and cancelled the Lansing-Ishii Agreement and the Anglo-Japanese alliance which recognized Japanese predominance in the Far East. Such facts will be offered as proof of Japan's sincerity in maintaining friendly relations with her neighbors, particularly China, in spite of all the maltreatment which Japanese nationals received in that country.

The evidence will show that the outbreak of the Chinese revolution in 1911, and the Russian revolution in 1917, turned the Far East into utter chaos. Anti-foreign movements, especially anti-Japanese boycotts and terrorism were rampant everywhere. The defense will submit evidence to show the loss in Japanese lives and property suffered prior to the Mukden Incident. We will show the effect on Japanese interests as the civil war went from bad to worse, and the effect thereof as Chang Tso-lin of Manchuria invaded North China and claimed himself to be Generalissimo in Peking, while the Kuomintang Party started a northern expedition from Canton, establishing a regime in Nanking. We will also show that many warlords assumed their independent authorities in prospective provinces and competed against each other with resulting increase in their military strength, in contravention of the resolution of the Washington Conference for the reduction of Chinese troops.

We will show that by this time Manchuria had already become an indispensable source of supply for food and raw materials to Japan, in exchange for manufactured articles and capital, and that Japan was anxious to preserve the friendship of China as well as peace and order in

Manchuria. The evidence will show that the Soviet Government and the Third Internationale had adopted a policy opposed to Powers which maintained relations with China on the basis of existing treaties. This attitude of the Soviet, coupled with China's nationalistic aspirations, was a matter of vital concern to Japan. As stated in the Lytton Report on page 37, "Her misgivings were further increased by the predominant influence acquired by the U.S.S.R. in Outer Mongolia and the growth of Communism in China."

Chang Hsueh-liang, who succeeded Chang Tso-lin in 1928, as the ruler of Manchuria and North China, allied himself with the Kuomintang to wipe out all the vested interests of foreigners from his domain; many discriminatory laws and regulations were issued affecting Japanese and Korean residents there. We will show that such acts of the Chang regime not only ignored the wishes of the Manchurian people but also violated various Sino-Japanese treaties and were not contemplated by the Nine-Power Pact.

In the summer of 1931, the second Wakatsuki Cabinet was endeavoring to execute the traditional peace policy of the Minseito Party through Foreign Minister SHIDEHARA, with a problem of settling more than 300 pending cases in Manchuria. Such policy, the evidence will show, resulted only in increasing violent acts of the Chinese.

Despite this fact we will show that all the outpost garrisons in Manchuria and elsewhere were maintained at the treaty minimum, and the commanders were instructed to refrain from any offensive acts. Maps and charts will be produced to show the distribution of Japanese nationals in Manchuria; the number and position of the Japanese troops, and the areas where bandits were active.

The evidence will show that there were a long series of events involving loss of life and property of Japanese nationals legally resident in Manchuria; large scale banditry being so prevalent and brigands being so entrenched and so powerful that the Chinese Government was unable to eradicate them. This prevalence of brigandism was often the subject of international protest and claims were presented by many states as a result of the failure of the Chinese Government to suppress banditry.

We will show that the members of these bands formed robber communities, were motivated by no public cause, and their acts were authorized by no state. They conducted "warfare" as a private venture, essentially in their own interest. The feature, which distinguished acts of violence committed by those bands from piracy was that their operations were not carried on in a place subject to no sovereignty, such as the high seas, but in the territory of an individual state. These bandits operated in and adjacent to areas in Manchuria with respect to which Japan had special rights. When pursued, they invariably retired within the territory from which they had come, and where China was unable to effectively pursue and deal with them. The result was to facilitate their flight and enable them to escape punishment.

We will see in Manchuria that brigandage increased in degree and viciousness in direct proportion to the lack of political order and adequate law enforcement. Because of a chaotic

state of affairs, oppression and tyranny, the bandits took advantage of these conditions to commit crimes with impunity. These men were peculiarly dangerous because they easily evaded pursuit, and by laying down their arms became insidious enemies. We will show that many civilians and soldiers fell into banditry with intermitting returns to their homes and avocations and with occasional assumption of a semblance of peaceful pursuits, divesting themselves of the character or appearance either of soldiers or of bandits. We will show that the illegal activities of such irregular participants gave rise to the need for adequate protective measures to be taken.

Evidence will show that as a result of the Wanpaoshan affair and the murder of Captain NAKAMURA, reported by the press in July and August, 1931, the Sino-Japanese relations in Manchuria became strained to the breaking point. General Chang Kai-shek delivered fiery speeches inciting the Chinese against the Japanese on the 7th and 14th September. It was natural that there were rumors that something would happen. We will show that Maj.-Gen. TATEKAWA was sent to Manchuria to ascertain whether Tokyo's instructions for forbearance were being carried out.

(Okamoto Toshio)

PART II. THE MUKDEN INCIDENT AND AFFAIRS INCIDENTAL THERETO:

We will show that on September 18, 1931, between 10 and 10:30 p.m., Lieutenant KAWAMOTO of the Japanese Garrison at Mukden, who was patrolling along the South Manchurian Railway, heard an explosion and was fired upon by Chinese troops. He returned the fire and reported to the commander of No.3 Company, Captain KAWASHIMA, who was engaged in night maneuvers some 1500 yards to the north. At the same time Lieutenant KAWAMOTO telephoned to Lieutenant Colonel SHIMAMOTO, Battalion Commander at Mukden, who in turn communicated with garrison commander Colonel HIRATA. We will show that subsequent actions of these officers were prompted by sheer necessity for self defense due to the precarious position in which both the Japanese residents and garrison found themselves in this emergency; the lives and property of 200,000 Japanese and 800,000 Koreans being protected only by 10,000 soldiers of the Kwantung Army who were stretched out over the length of 1,000 kilometers of the Railway Zone and who were surrounded by more than 200,000 hostile troops of Chang Hsueh-liang.

Lieutenant General HONJO, commander of the Kwantung Army, realized, as the evidence will show, that the only way to protect his countrymen from disaster was to seize the enemy headquarters. The Lytton Report recites that he ordered the fleet at Port Arthur to go to Yinkow (p. 69); but the evidence will show that his urgent request was not an order and was refused by the fleet commander, Rear Admiral TSUDA. It will also be shown that his request for Korean Army reinforcements was refused by the order of Tokyo. Such facts show the unexpected occurrence of the Mukden Incident and the absence of any common plan or cooperation among the authorities concerned.

The evidence will show that when the Tokyo Government received news from Mukden early in the morning of the 19th of September, 1931, they decided upon a non-expansion policy which decision was immediately telegraphed to Lieutenant General HONJO, and that they also denied the request from the Korean Army for permission to despatch reinforcements to Manchuria. The War Minister immediately sent Colonel ANDO to Mukden to make an investigation, the result of which will be shown by evidence.

In the afternoon of the 19th, Geneva time, Mr. YOSHIZAWA, Japanese Chief Delegate to the League of Nations, announced to the Council that the fighting at Mukden would be localized. The defense will show that this statement and other publications and assurances given were made in good faith but that there were unforeseen events, aggravations and developments.

Evidence will show how Lieutenant General HONJO faced a dilemma as between the instruction of the home government, which apparently minimized the existing dangers, and the urgent cries for help from residents in Manchuria. He, being the sole judge of the requirements for self-defense, rushed small detachments to the defense of Changchun and Kirin. Evidence will also clarify the circumstances which necessitated the despatch of a mixed battalion of the Korean army on the 21st September by its commander, Lieutenant General HAYASHI, without knowledge or consent from Tokyo. By the end of the month, however, the governmental instructions will be shown to have been carried out and all Japanese troops were withdrawn to the Railway Zone, despite repeated requests for protection from residents in Harbin.

The clashes in Mukden and Changchun were only of a few hours' duration. There were no real hostilities in Manchuria until the so-called Nonni Bridge operation in early November 1931. Even then the cause was rivalry between General Ma Chan-shan and General Chang Hai-peng for leadership of Heilung-kiang Province, which led to the destruction of railway bridges. A Japanese repair party was fired upon by Ma's troops. Evidence will show that Japanese authorities held prolonged diplomatic negotiations before the Kwantung Army took steps for repulsing Ma Chan-shan from the Tsitsihar area. Thereafter, immediate evacuation was effected in conformity with instructions from Tokyo. In the latter part of November the Kwantung Army sent a force towards Chinchow in support of the Japanese garrison at Tientsin, and later withdrew to the original position, "to the great surprise of the Chinese," as the Lytton Report states (p.77).

During this time, the primary responsibility of the Kwantung Army was the protection of residents and property. Evidence will be produced of the outrages committed by bandits before and after the Mukden Incident. It was, therefore, essential and necessary for Japan to protect and reserve right of action against lawless elements. While being in full accord with the resolution of the League Council of December 10, 1931 for the cessation of hostilities, Japan could not well afford the risk of withholding needed protection or of shifting such burden and responsibility to the Chinese who would likely be impotent to cope with the situation.

On the 10th of December, 1931, the WAKATSUKI Cabinet resigned en bloc and the opposition, the Seiyukai Party, formed a new cabinet under Mr. INUKAI as Premier. We will show that during December Chang Hsueh-liang's forces, having established headquarters at Chinchow, took advantage of the evacuation, in accordance with government policy, of the Kwantung Army, to march across the frozen Liao River to disturb the Mukden area, joining hands with local bandits. Prior to this, diverse diplomatic negotiations were carried on for the mutual withdrawal of troops and the establishment of a neutral zone. Evidence will show these came to naught because of infidelity on the Chinese side. A detachment of the Kwantung Army clashed on the 23rd December with Chang's troops, who were riding on an armored train towards Mukden. When the Japanese authorities announced a resolution to restore order in the Chinchow area, Chang's army retired, and residents in Chinchow were afforded protection by January 3, 1932.

In January, General Ting Chao revolted against General Hsi Hsia of the Kirin Province and besieged the city of Harbin. We will show that the Japanese residents appealed for help and the Kwantung Army entered the city on the 5th February, restricting troop movements to the minimum necessary for adequate defense. Evidence will show that the policy of the INUKAI Cabinet was to restore peace and order in Manchuria and to provide protection against bandits.

We will show that anti-Japanese boycotts and terrorisms spread all along the Yangtze River. Mob insurrection became imminent in Shanghai, and the Municipal Council proclaimed martial law on the 28th January, 1932. Garrisons of the U.S.A., Great Britain, France, Italy and Japan took positions according to the defense program of the International Concession. The Japanese marines, in carrying out this program, were attacked by the 19th Route Army, an independent Chinese force. Evidence will show that the Japanese marines suffered heavy losses in defense of the concession. Rescue troops were despatched from Japan, and the Chinese troops retreated beyond the 20 kilometer limit asked for by the Japanese Commander.

Previously, the Japanese Government had requested the good offices of the U.S.A., Great Britain, France and Italy to arrange a conference with the Chinese and welcomed an opportunity to discuss an armistice which was signed on the 5th of May, 1932. We will show the circumstances of how Japan tried to localize hostilities and how, after establishment of a neutral zone, to avoid future conflicts, Japan evacuated immediately the whole expeditionary force, even renouncing the rights given by the Armistice for stationing troops.

PART III. SPECIAL FEATURES OF MANCHURIA AND THE BIRTH OF MANCHUKUO.

Manchuria was inhabited by the Manchus, who belonged to the Tungus tribe, the same as the Mongolians, Koreans and Japanese. The Manchus were distinctly different from the Hun [Han] race of China proper. The evidence will show that the Chinese, that is, Hun race, did not influence Manchuria in any great degree. However, the Manchus ruled China for three hundred years until the revolution of 1911. The policy of the Manchu empire, that is, the Ching dynasty, was to keep Manchuria as the land of the Manchus forever and as "forbidden territory" for the Hun race. This restriction was rather relaxed in later days and became extinct after the 1911

revolution. We will show, however, there was an inherent desire of the Manchus to preserve their territory from the revolutionary influence of China, and that this desire was shared by the Chinese immigrants who had fled from the turmoil of civil war and found peace and tranquility in Manchuria.

Manchuria was undeveloped and under-populated at the beginning of this century, but we will show that the benefits derived from activities of Japan and Korean residents invited an influx of Chinese, which amounted to more than ten million persons within two score years.

The evidence will show that in 1920 Soviet Russia recognized the Mongolian People's Republic as an independent country. In 1922 Chang Tso-lin, who arose to Generalissimo from a captain of brigands, declared independence of Manchuria and tried to establish separate diplomatic relations with other powers.

In 1929 Soviet Russia invaded Manchuria. At that time the Mukden regime under Chang Hsueh-liang was using 90% of its revenue for military expenditures. Currency had depreciated more than 100 times. The Manchurian people were aroused against the maladministration of the Chang family, and many hoped for the former emperor of the Ching dynasty to return to his ancestral home. We will show that following the Mukden Incident movements of Manchurians came to the surface and were openly carried on to fulfill their long cherished aspirations.

On the 24th of September 1931, Mr. Yan Chin-kai was announced chairman of the Peace Preservation Committee of Fentien Province. On the 26th, General Hsi Hsia declared the independence of the Kirin Province. On the 27th, General Chang Chin-hui, General Ting Chao, and General Wan Jui-hwa, with other Manchurians, formed an emergency committee for their Special Administrative District. On the 29th, General Tang Ju-ling announced full responsibility for the autonomy of the Jehol Province. On the same day, General Yu Chun-shan declared the autonomy of the Eastern Border District. On the 1st day of October General Chang Hai-peng announced the independence of Taonan. We will show that it would have been impossible for the Kwantung Army to have inspired so many independence movements in such a short time. Such movements, excepting Mukden and Kirin, took place in areas where no Japanese troops were present. It will also be shown that the Tokyo government had repeatedly sent instructions to Japanese authorities in Manchuria not to intermeddle with any new regime movements of Manchuria.

We will show that concurrent with local movements for provincial independence, there was a popular movement for the restoration to the throne of the former Emperor Hsuang Tung, that is, Pu Yi. Evidence will show that Lao Tin-yu, a follower of Pu Yi, contacted General Hsi Hsia of Kirin and General Chang Hai-peng of Taonan, who, together with General Chang Chin-hui and certain Mongolian princes, had been staunch supporters of the Ching dynasty. At the beginning of November 1931 representatives from these Manchurian provinces went to Tientsin to solicit Pu Yi's assistance.

The rivalry between General Chang Hai-peng and General Ma Chan-shan in October and November 1931 and the revolt of General Ting Chao and General Li Tu against General His Hsia in January 1932 were settled amicably by the efforts of General Chang Chin-hui and other Manchurian officials. Evidence will show that Mr. Yu Ching-hau, leader of the movement for promoting “the territorial peace and people’s welfare,” advocated severance from the old regime and formation of a new state. On the 16th of February 1932 a conference was called in Mukden in the name of the North Eastern Administrative Council, consisting of General Chang Chin-hui, General Tsung Shih-yi, General Hsi Hsia, General Ma Chan-shan, General Ten Ju-lin, Prince Chawang, Prince Ling Sheng and Mr. Chao Hsia-pao. On the 18th of February 1932 the declaration of independence of Manchuria was proclaimed by that council. By the unanimous vote of this council, Pu Yi was elected as the head of the new state and on the 9th of March Pu Yi was nominated Regent of Manchukuo, to form the first government with Mr. Tseng Hsia-tsu as premier. The evidence will show that the independence of Manchukuo was the inevitable consequence of a long existing tradition and desire of Manchurians.

PART IV. INTERNATIONAL PROBLEMS OF MANCHUKUO

The birth of the new state affected Japanese rights and residents therein, and a basis for their protection and peaceful cooperation with Manchuria was needed. The Nine Power Pact was not considered as being applicable, so the Diet presented and passed a resolution to recognize Manchukuo. On September 15, 1932, General MUTO, the first Japanese ambassador to Manchukuo, signed a protocol with the premier, Tseng Hsia-tsu, whereby Japan recognized Manchukuo. We will show that the protocol and its attached articles were meant for the enhancement of independence and not as a limitation on sovereignty.

The following undertakings were pledged thereby:

- (1) That Japan would respect the independence and territorial sovereignty of Manchukuo.
- (2) That Manchukuo would encourage cooperation of its different races to build up the nation for the benefit and prosperity of all.
- (3) That Japan would support and assist Manchukuo with such means at her disposal.
- (4) That Manchukuo would maintain peace and order, provide equal protection for all residents and suppress brigandism and anti-foreignism.
- (5) That Japan would receive equal treatment with all other nations.
- (6) That Japan and Manchukuo would cooperate for joint defense.
- (7) That friendly relations and economic cooperation between Japan, Manchukuo and China would be encouraged.

In April 1932 Ma Chan-shan revolted against the new state. Ting Chao and Li Tu joined forces with Ma but were defeated by joint operation of the Japanese and Manchukuoan armies. Ma lost his power but General Ting later became the governor of Antung Province and still later a privy councillor of Manchukuo. Su Ping-wen in November 1932 and Tan Julin in February 1933 revolted against Manchukuo, but they were defeated likewise. We will show that these joint operations against rebels were carried out under an agreement to provide assistance in

maintaining peace and order in Manchukuo and without trespassing on territory of Russia or of China.

The report of the Lytton Commission was published and adopted by the League Council. Japan had to respect the independence of Manchukuo, and accordingly in March 1933 withdrew from the League under the provisions of paragraph 3, article I of the Convention. On the 31st of May 1933 Japan and China came to an understanding and the Tangku Truce was signed, thereby settling those matters affecting Japan, China and Manchuria.

We will show that a conference was opened in Dairen in July 1933 to discuss economic questions between China, Japan and Manchukuo. This paved the way to concluding several agreements in following years with regard to customs, postal, telegraphic and transportation matters. Restoration of friendship between China and Japan was complete and peace reigned in the Far East despite the action of the League of Nations.

We will show that on March 1, 1934 Pu Yi was enthroned as emperor of Manchukuo. During this period expressions of amity were exchanged between the United States and Japan. In April the Pope recognized Manchukuo. In May the Republic of Salvador and, in October, the Republic of Dominica followed suit. In September 1934 and in March 1935, respectively, agreements between the U.S.S.R. and Manchukuo were signed for navigation rights on rivers and for the sale of the Chinese Eastern Railway. Between China and Japan three principles, of non-menace and non-aggression, defense against communism, and economic cooperation were declared and supported by governmental action. The Emperor of Manchukuo visited Japan in April 1935 and was cordially welcomed by the Japanese. Development of Manchukuo as a civilized state was rapid; peace and order were restored under modern systems of administration and judicature, in striking contrast to previous conditions of disorder and corrupt practices under the Chang regime.

We will show that the Japanese government proclaimed in August 1935 that she would abolish extra-territorial rights and waive her rights in the railway zone, which she carried out by December 1937. We will show that Manchukuo's status of independence was recognized by Italy in November 1937, by Spain in December 1937, by Germany in May 1938, by Poland in October 1938, by Hungary in January 1939, by Slovakia in March 1939, by Rumania in December 1940, by Bulgaria in May 1941, by Finland in July 1941, and by Croatia, Thailand and Denmark in August 1941; other international diplomatic and commercial relations will also be shown.

We will show that the U.S.S.R. guaranteed the inviolability of the territory of Manchukuo by the Neutrality Pact of 1941 and the United States indicated willingness to recognize Manchukuo in the course of negotiations held in 1941.

PART V. DOMESTIC AFFAIRS OF MANCHUKUO

1. Pu-Yi testified in such a way as to infer that his liberty has been completely lost after he left Tientsin and that his Government was a puppet of Japan. Evidence will be produced to destroy this inference. Evidence will be produced in respect to his handwriting, to his efforts to be restored as Emperor and his request for cooperation from the Japanese.

The power of Pu-Yi as a modern monarch under constitutional limitations were different from former prerogatives of an Emperor of the Ching Dynasty where rule was absolute. We will show the powers of the Regent and the emperor under the constitution of Manchukuo, and the duties of the minister of state and of other functionaries. Because of their ability, many Japanese, who we will show became citizens of Manchukuo, were solicited to become officials in the government of Manchukuo. The activity of various public bodies will be explained to point out their assistance in developing discussions of important domestic problems, voicing public opinion, and effecting cooperation among the various races resident in Manchukuo.

2. We will show that the new government of Manchukuo paid foremost attention to the liberation of the people from feudal customs and practices. A budget system for a modern state was introduced. They did away with the practice of issuing contracts to collect taxes. Rationalization of taxation abolished arbitrary impositions previously exacted under the Chang regime. A new currency was established, replacing more than 15 kinds of old currency of fluctuating value. Adjustment and regulation of new enterprises were accomplished to avoid wasteful duplication and competition in certain fields and to distribute benefits among the people over a wider area.

We will show that the five-year plan for industrial development of Manchukuo was not offensive to any country. Primary consideration was given to the benefit which the people would receive through conservation and utilization of the country's resources. We will show that the establishment of heavy industries was to secure a stable economy, essential to an independent nation, and to promote self-sufficiency to meet any crisis in the face of a world-wide tendency toward bloc economy. We will show the effort made to invite foreign capital and technique under the principle of equal opportunity. We will show that after the abolition of extra-territoriality Japanese residents were regulated under the same laws as other Manchurians.

We will show that legislation concerning opium and narcotics in Manchukuo, and the establishment of anti-opium hospitals, resulted in a decrease in the number of addicts. The ten-year plan to effect gradual prohibition was a just and practical measure. It allowed the stamping out of black market sources and gradual control and corrective measures to be taken toward total prohibition.

3. The defense will clarify many matters by evidence not made available or presented in detail to the Lytton Commission. In Manchukuo, policies and worthwhile changes of a legitimate nature were realized in the shortest time ever seen in the annals of any country. Recovery of peace and order, security of life and property from bandits and warlords, wholesale

retrenchment of military expenditures, reduction of taxation, reform of currency and of financial system, abolition of extra-territoriality and encouragement of racial equality, enhancement of cultural and educational institutions, and raising of standards thereof, and tremendous increase of national wealth and prosperity of the people, all were achieved as a result of mutual cooperation of citizens of Manchukuo under a sovereign and independent government.

I thank the Tribunal for hearing me through this humble statement which is now concluded.

CHAPTER 6: WILLIS ABBOT'S REPORT ON THE SITUATION IN MANCHURIA

Report by Willis Abbot, editor-in-chief of the *Christian Science Monitor*, describing his observations of the situation in Manchuria in 1931

Source: *Osaka Mainichi Shinbun*, January 17, 1932 edition

Scheduled for submission on April 8, 1947 (Session 191); not submitted

In view of the fact that we have included the portion of the defense opening statement that refers to problems in Manchuria prior to the Mukden Incident, we have decided to include this report as well. Of all the documentary evidence and testimonies relating to this subject, Abbot's report is the most readable. It is also concise, comprehensive, and unbiased. He compares the relationship between Japan and Manchuria to that between the U.S. and Cuba, adding that the former might prove to be an alliance that benefits both parties. This opinion was shared by many members of the international community.

The Manchurian Situation From *Osaka Mainichi*, Jan. 17, 1932

A Fair And Unbiased View of The Problem as Seen by a Prominent American Newspaperman

By Willis J. Abbot
Editor-in Chief
The Christian Science Monitor
(December 5, 1931)

(1)

Returning from the scene of military operations and diplomatic maneuvers in Manchuria to the United States, one can hardly fail to be impressed with the idea that precise knowledge of the conditions in the Far East is not generally possessed by most Americans. There seems to be a widespread feeling that Japan has violated the spirit of its agreement as a member of the League of Nations; has been utterly oblivious to its obligations under the Nine Power Pact; has wilfully cast the Pact of Paris into the discard, and is playing the part of a militaristic land pirate in seizing the territory of a friendly Power.

I am convinced that none of these charges is well founded. But there can be no understanding of the merits of the controversy now in progress over Manchurian domination without some consideration, first, of the nature of the Government which is opposed to Japan; second, of the provocation under which Japan acted; third, of the character of the Japanese activities, and fourth, of the final purposes by which the Japanese are animated.

No Responsible Government

I know well-meaning friends of China will be shocked at the flat assertion that there is no effective and responsible Chinese Government in existence today. Nevertheless, I believe that assertion to be literally correct. The authority of the Nanking Government extends over but a small fraction of the territory and the people of China. It never did extend to Manchuria, the territory in issue, which was ruled by the “Young Marshal,” Chang Hsueh-Liang, by right of inheritance from his father, who acquired that right by prowess as a bandit.

In the south the authority of the Nanking Government is effectively challenged by what is known as the Canton Government. These two rival governments sought to reach a treaty, or merger, in the face of the so-called Japanese menace, but the meetings which were in progress when I was in Shanghai broke up in disorder, and the Cantonese retired, threatening new military attacks upon Nanking. The widow of Sun Yat-sen, the real founder of the Chinese Republic, has denounced the present Government as utterly out of accord with the fundamentals her husband enunciated. Her repudiation of it is made the more impressive by the fact that her brother, T.V. Soong, is its financial minister. Canton refused to merge so long as Chiang Kai-Shek headed the Nanking Government. Yet Japan is urged to deal only with this leader.

Challenge to Powers

This so-called Government has thrown its glove in the face of the nations of the world by declaring that, whether they desire it or not, their extraterritorial rights will be cancelled on the first of January (1932). In other words, it seeks to repudiate its own treaties with the Powers in the same way that it is trying to overthrow the treaty under which Japan invested over \$1,000,000,000 in Manchuria. Weak and elusive as is the Nanking Government, even it made little pretension to authority in Manchuria, and it is to be noticed that while Nanking talks to the League of Nations, Japan negotiates with the Young Marshal for the settlement of the controversy.

The Japanese rights in Manchuria date mainly from a treaty negotiated in 1915, but had their origin in earlier agreements with both China and Russia. For some years the Chinese have been endeavouring to nullify this treaty by systematic violation of certain of its provisions. They have built railway lines paralleling the South Manchuria Railway. They have raised the duty on Fushun coal, although the price had been fixed by formal agreement. They have enlisted the business men of the country in a campaign of hatred and boycott against Japanese interests. They have persecuted Chosenese farmers settled in Manchuria; have killed guards on the South Manchuria Railway, and more than once have attempted to wreck portions of that property.

Against all of these invasions of their rights the Japanese protested diplomatically, but the Chinese persistently evaded any settlement of these diplomatic issues. More than 300 such cases are cited by the Japanese as outstanding. When, on the night of September 18, 1931, a group of men, since identified as Chinese soldiers in uniform, were detected attempting to blow up the tracks of the railroad, the Japanese military authorities on the ground sought to apply immediate

discipline. Out of their effort to save the road and drive off the assailants sprung the present military situation.

It has been urged that instead of taking military action the Japanese should have appealed to the League of Nations for the protection of their property. It may fairly be questioned whether any people could be expected, in view of the immediately threatened destruction of their property, to appeal to a tribunal 10,000 miles away, and not at the moment in session, for protection.

Moreover, the Japanese had at that time fewer than 12,000 troops in Manchuria. The Chinese possessed an army of 250,000, ill-disciplined and poorly equipped it is true, but nevertheless by its overwhelming numbers a formidable adversary.

Obviously, if the Japanese desired to protect their property and their nationals, they must disable their opponent at the first stroke. They therefore struck swiftly, seizing strategic points and capturing the arsenal within the walled city of Mukden, the loss of which, of course, crippled the Young Marshal's forces. This action the Japanese insist was not war, but rather an exercise of police power for the sole purpose of protecting their property and their people.

To the merely evil observer of world affairs the seizure of arsenals and walled cities and the killing of a few hundred men seems to savour strongly of war. Yet it is to be borne in mind that none of the campaigns of the United States in Nicaragua, which have been going on for years, with casualties approaching those in Manchuria, has been considered war, nor did the Wilson Government ever admit that in bombarding Vera Cruz, landing marines, and killing a not inconsiderable number of defenders, any war with Mexico was either entered upon or intended. The Japanese hold to the same opinion regarding their operations in Manchuria.

After establishing themselves in control of certain important portions of the country, the Japanese flatly refused to evacuate at the demand of the League of Nations, and have since repeated that refusal in the case of certain specified territories, which at first they thought might safely be evacuated.

Misinterpretation Easy

Here again it is easy to misinterpret the reported action. In Manchuria and in some other portions of China it is difficult to distinguish between the regular armed forces of the Chinese Government and bandits. Indeed, the two are not uncommonly interchangeable, men undertaking lawless enterprises and returning to the ranks of the army after their zest for plunder has been satisfied, or perhaps after it has been defeated. At any rate, the contention of the Japanese is that in certain sections a retirement of their forces would leave the populace, and particularly Japanese or Chosenese residents, wholly at the mercy of bandits or an ill-disciplined and rapacious soldiery. I offer this defensive argument for what it may be worth. No one not on the ground can express an intelligent view as to the degree of danger to which peaceful residents of the territory might be exposed if military protection were withdrawn.

I am convinced the general opinion that Japan has embarked upon an enterprise of land piracy and desires to seize Manchuria as a subject province, ultimately to be annexed to her territory, is without foundation. I have been assured frequently by Japanese in and out of official station that they have no desire to own or to govern Manchuria. It is a rich country, producing many raw materials necessary to Japanese industry. It is penetrated by the South Manchuria Railway, one of the best railroads of which I have knowledge any where in the world, which is owned by the Japanese Government, and which that Government must protect.

What Japan needs and what Japan wants in Manchuria is a stable Government which will respect the treaty obligations already entered into; which will not attempt to foment hostile movements against Japan; which will stabilize a currency which today is almost worthless, and which will enable the people of the territory to attain to the degree of prosperity that the national wealth available would seem to promise. The present purely military Government has done none of these things.

A volume might be written as to the effect of its policy in forcing the peasants to sell to it for paper the products which it thereupon sells in the markets of the world for gold and silver. In the vaults of the Young Marshal are stored tens of millions of dollars in precious metals thus obtained, while the people who furnished the products sold have been paid in paper which depreciated more than 50 per cent while I was in Manchuria, and the value of which now I can only guess. It is because of this rapacious robbery of the people that banditry has become the economic refuge of the peasants.

If Japan could have its way in Manchuria, it would, in my judgment, assume toward that country a relationship somewhat similar to that of the United States to Cuba. It would lend its influence to the establishment of a stable, intelligent, competent Government, and once this was established would withdraw, retaining the right to return in the event of a revolutionary overthrow of that Government. The United States holds this relationship to Cuba without incurring the reproach or the contumely of the world. Under it Cuba has prospered and been law-abiding. There is every reason to believe that a similar relationship between Japan and Manchuria would produce like happy results.

The common impression that Japan must have Manchuria to provide for its rapidly increasing population is a fallacy. That population is increasing to an extent that makes it a real problem. It is estimated that the rate is somewhere in the neighbourhood of 900,000 a year. But the solution of this problem is not to be found in emigration. That never has corrected overpopulation, and is made the more difficult in the case of Japan by the obvious fact that all the ships on the Pacific could not carry her 900,000 new people away in a year.

But more than that, the Japanese, who only too eagerly press into California and Honolulu, will not emigrate to the Asiatic mainland. The climate is too rigorous for them. The Government has made every effort, by bonuses, free land, free transportation, to persuade Japanese to settle in the southern part of Manchuria, where Japan holds a 99 year lease. The effort has failed. Every effort to encourage Japanese emigration to a land where the climate is more rigorous than the home

climate has failed. The Government knows that Manchuria would be worthless for this purpose, even were it available.

Basically the situation can hardly be fairly understood without a thorough comprehension, first, of the utter impotence and corruption of the Chinese Government today, and second, of the extent of the Japanese financial interests in the territory, which, because of the impotence of that Government, were exposed to spoliation and ultimate destruction. Two billion dollars, the estimated value of Japanese interests in Manchuria, is to that country a sum quite as important as \$10,000,000,000 would be to the United States. Would the United States stand by and witness the annihilation of such an interest in Cuba or in Mexico without taking steps for its protection?

CHAPTER 7: OPENING STATEMENT, CHINA DIVISION

Presented by Aristides G. Lazarus on April 22, 1947 (Session 201); rejected in part (one section)

This is a six-part statement. The first part is a rebuttal of the prosecution's accusations in connection with the Marco Polo Bridge Incident, which triggered the Second Sino-Japanese War. The argument therein does not exceed the bounds of common knowledge within the context of international law. However, we believe that there is ample justification for the reexamination of this statement, especially for Japanese born after World War II, who lack that common knowledge. Lazarus cites portions of the Joint Note signed by the Western Nations and Japan and the Boxer Protocol, concluded in 1900 to resolve the rebellion in North China. He then indicates that Japanese troops had the legal right, in accordance with those treaties, to conduct night maneuvers in the vicinity of the Marco Polo Bridge. There is nothing startling about this indication. However, the noxious perception of history sowed during the Occupation was rampant in Japan. At the time it had not been determined with any certainty who fired the first shots. Was it Japanese troops, Nationalist troops, or student activists under orders from the Central Bureau of the CCP? (Today we are reasonably certain that the CCP engineered the incident.) However, the minds of the Japanese had been so poisoned by the perception of history promulgated by the Occupation authorities that no one even questioned the prosecution's insistence that the Japanese maneuvers in the outskirts of Beijing constituted "aggressive" action. Not until the opening statement was read, that is. The IMTFE rejected much less defense documentary evidence during this portion of the opening statement. But more pertinently, defense counsel's arguments were so persuasive that the prosecution ultimately backed down, realizing that a vigorous pursuit of this incident would damage its case.

Lazarus was not permitted to read a passage at the end of the second part of his statement. It concerns CCP activities and attempts to rid China of the foreign presence (we have enclosed it in a box). The rejected portion mentions "clinging evidence in support of Japan's rightful fear of the spread of Communism." The IMTFE's failure to grasp the seriousness of the communist threat resulted in dire consequences. Only four years later, during the Korean War, MacArthur was relieved of his commands because of his stubborn refusal to wage a limited war against the communists. When he testified before the Senate Joint Committee on Armed Services and Foreign Relations, he voiced his sincere regret over the mistake his country had made (see Chapter 18).

Subdivision I: THE MARCO POLO BRIDGE INCIDENT AND JAPAN'S POLICY OF LOCALIZATION.

On 7 July 1937 at 11:40 p.m. near Liukouchiao at a point commonly known as the Marco Polo Bridge, a Japanese force maneuvering there was fired upon by the Chinese Army and the local Chinese authorities tried to settle the matter promptly and locally.

Japan's stationing of troops in North China is based on Article 9 of the Joint Note concerning the North China Incident of 1900 and Article 9 of the Boxer Protocol. The right of the Japanese army to engage in such maneuvers is recognized in the exchange of notes between Japan and China over the retrocession of Tientsin in 1902. It states as follows:

“They will have the right of carrying on field exercises and rifle practice, etc., without informing the Chinese authorities except in the case of *feux de guerre*.”

On that particular night the Japanese Army was exercising in preparation for inspection and had no bullets but was using only blanks. Evidence will be adduced on this point. There was, therefore, no breach of any agreements on the part of the Japanese Army in engaging in such maneuvers. There is much evidence to prove that this incident was entirely unexpected by the Japanese troops. It will be proved by competent evidence that:

- (a) At the time of the incident most of the Japanese forces stationed in Peiping had gone to Tungchow to prepare for inspection;
- (b) The second infantry regiment which had been stationed in Tientsin had gone to Shanhaikwan for inspection;
- (c) Lieutenant General TASHIRO, commander of the garrison in North China was so ill that he could not command his forces. He died shortly thereafter;
- (d) The commander of the infantry brigade, Major General KAWABE Shozo, was away from his post in Peiping and was in Shanhaikwan with his troops to inspect the second regiment there;
- (e) In Tientsin, the base of the Japanese garrison force, there was no supply of arms and ammunition.

On the other hand, the Chinese army had taken up its position on the banks of the Yunting River and approximately one battalion had advanced to that line. On 8 July 1937 when the General Staff in Japan was informed of the incident it promptly decided to localize the incident and to settle it on the spot as quickly as possible. This continued to be the attitude of Japan towards the incident for a considerable period of time.

At forty-two minutes past six that evening the Chief of the Japanese General Staff sent a telegram to the commander of the Japanese forces in China, forbidding the use of further military force in order to help localize the incident. On the 9th of July the Vice-Chief of the General Staff, General Imai, wired the Chief of Staff of the Japanese force in North China urging settlement of the incident on the following terms.

- (a) The Chinese force responsible for the incident should be withdrawn to the left bank of the Yungting River;
- (b) Future security be assured;
- (c) The persons directly responsible for the incident be punished.

In accordance with the orders of the General Staff, representatives of the Japanese garrison met with the representatives of the Chinese army and it will be shown that on 11 July an agreement was reached embodying the above terms, thus acknowledging that the responsibility for the incident lay with the Chinese. It will be proven that on the 18th of July General Sung Cheh-yuan, commander of the Hopei Chahar political council, who was responsible for the 29th Division, came to Tientsin and officially acknowledged the agreement of the 11th. This would have ended the entire matter, but on 25 July the Langfan incident took place. It will be shown that the telegraphic wire had been cut between Peiping and Tientsin. The Japanese Army, with the consent of the Chinese Army made the necessary repairs at the break which was found to be approximately 50 kilometers southeast of Peiping. After the Japanese had repaired the break they were fired upon by members of the Chinese Army. Then on 26 July there occurred what is known as the Kuang-an Gate incident. With previous notice to, and the consent of the Chinese Army, the Japanese Army sent troops to Peiping to protect the Japanese citizens there. When a part of the Japanese force had entered the city the Chinese suddenly closed the gate, separating those troops from the remaining Japanese body. Both groups were then fired upon by the Chinese. This incident will be testified to by a witness who took part in this action. By this time the Chinese Army was heavily concentrated in North China and had completely surrounded the Japanese forces in Fengtai. It will be shown that on 27 July the Japanese garrison stated that it had exhausted every means of settling matters peacefully and there was now left to it no alternative other than to fight. In Tokyo on the same day the Chief Secretary of the Cabinet issued a similar statement. In these statements it was made clear that Japan was fighting only against the Chinese Army and not with the Chinese people. The statements further pointed out that it was the intention of the Japanese Army to restore peace and order as quickly as possible, to respect the interests of third nations, and to protect the lives and property of their people. It was unequivocally stated that Japan had no territorial ambitions in North China.

Up to this point the activities of the Japanese had been limited to Peiping and surrounding territory only. On 29 July the Tungchow incident involving the massacre of 200 Japanese residents by the Chinese Peace Preservation Corps took place. Evidence will show that on that same day Japanese forces in Tangku and Tientsin were attacked. This forced extension of the incident to these areas. During the entire month of July there was no change whatsoever in the Japanese desire and attempts to localize the incident. It was the Chinese who repeatedly violated the agreement of 11 July and all Japanese military, it will be proven, was in the nature of self-defense only in every one of the enumerated incidents.

It will be shown that on 10 July units of the Chinese air force and four divisions of troops were sent to the northern boundary of Honan Province. On the 12th the armies of Shansi, Honan, Hupeh, Anwei, and Kiangsu Provinces were massed on the Lunghai Railway and Peiping-Hankow Railway lines. Chinese troops continued to pour northward and in August the Chinese Central Army was in a position to besiege the Japanese garrison in North China. Evidence will be introduced to show that on 15 August Chiang Kai-shek ordered general mobilization and established General Headquarters, he himself became Commander-in Chief of the army, navy and air force of China and the country was divided into four military districts. China was now fully prepared to wage war. By the end of August approximately four hundred thousand Chinese

troops were massed in Hopei Province. By these actions China had expanded a series of local incidents into an armed conflict tantamount to war on a large scale.

It will next be shown that on 31 August Japan decided to send, three divisions to China. The Japanese Army was left no alternative but to prepare to meet the situation. It was not until 20 November that Japanese General Headquarters was established. It will thus be shown, when the above evidence has been introduced, that Japan did not attack China and did not violate any of the treaties as charged by the prosecution.

As the evidence offered by the defense will show, the China incident was generated by an unexpected local incident, and in spite of Japan's consistent attempts to localize it, it expanded finally into large scale hostilities. We will prove that the autonomous movement which began and which was promoted in North China some time before the Marco Polo Bridge Incident, had nothing to do with the China Incident. There was no connection between them.

After the making of the Tangku Agreement in May 1933 it was the National Government of China itself which established the North China Political Committee governing the five districts of Hopei, Chahar, Shantung, Shansi, Suiyuan, and the two cities of Peiping and Tientsin on 17th June of the same year. It appointed Huang Fu head of the committee. Policy in North China was decided by this organ.

Later Yin Ju-ken was appointed Special Director of Administration of twenty-three counties in unarmed district of Eastern Hopei on the recommendation of Huang Fu, the Chief of the North China Political Committee. It will be shown that in 1935 the autonomous movement of the farmers gained momentum, and in November of the same year the Eastern Hopei Anti-Communist Autonomous Committee was established with Yin-Ju-ken as its chief. Though this was strictly a local Chinese affair, the Chinese Government seized upon it and used it for anti-Japanese propaganda, thereby aggravating the situation. It will be shown that General Sung Che-yuan resigned his post as Chief of Chahar district and as Commanded of 29th Army, but was shortly thereafter appointed Commander of Peiping-Tientsin Garrison. At the end of November 1935 he demanded self-government for North China. On the 11th of December in the same year the Administrative Council of the National Government of the Chinese Republic accepted the demand, and on the 15th of that month the Hopei-Chahar Political Committee was established to govern the districts of Hopei and Chahar and the cities of Peiping and Tientsin, with Sung Che-yuan as the chief of the committee. This too was purely an internal affair of China. To all appearances this committee was authorized to handle only military, foreign, financial, communications and personnel problems. But, in reality, it constantly kept in close touch with the National Government, most of the committee being men of importance in the National Government. Evidence will show that Sung Che-yuan's advance into North China was accompanied by the advance of Communist elements. Among Sung's followers there were many Communists who espoused the anti-Japanese and Communist movement, although Sung himself was pro-Japanese. (This subdivision will be presented by Messrs. Miyata and Ohara and Mr. Levin.)

Subdivision II: ACTIVITIES OF CHINESE COMMUNISTS AND THE ANTI-JAPANESE MOVEMENT

As our evidence will show, it was the Communist movement in China that created the anti-Japanese movement. In September 1920 a meeting for the organization of the Chinese Communist party was held in Shanghai under the direction of Voichinsky, chief of the Far East Division of the Comintern. In May 1921 the party came to be formally organized. From 1924 to 1927 there was cooperation between the Communist Party and the Nationalist Party (Kuomintang). Thereafter a schism developed and the two parties, now in fact two states in China, started making war on each other. The Communist Party in China took the lead in the general anti-foreign movement and further developed the anti-Japanese movement, expanding it to such a degree that it finally took the form of unlawful belligerent action. It will be shown that at the Seventh General Meeting in 1935, the Comintern expounded its doctrines of national unity, the popular front, anti-fascism, condemnation of imperialism, and called for war against Japan. Immediately, on the first of August of the same year, the Communist Party in China made what is known as the 8.1 Declaration — to wage war with Japan, and it actually began preparations for war. This declaration, it will be proven, had an important connection with the development of the incidents in Asia.

In December of the following year, the Chinese Communist Party made what is called its December Decision in which it set up the organization of anti-Japanese allied forces and the establishment of a defense government in anticipation of the anti-Japanese war. In December of 1936, the Sian Incident took place. This was the kidnapping of Chiang Kai-shek. One of the terms of his release was his promise to cease fighting the Communists and instead, to make war on Japan. Evidence will show that since the Sian Incident three important changes took place in the character of the anti-Japanese movement in China.

The first was the adoption of anti-Japanism as an instrument of Chinese policy. The second, the use of military power to support this movement. The third was the further development of the Communist movement. It will be shown that General Chiang Kai-shek had to consent to reconciliation with the Communists and to war with Japan in order to be released from captivity at Sian. It will be shown that this cooperation policy, as was openly stated by the Communist army, was but an expedient for the expansion of the anti-Japanese front. Now that the Communist movement no longer had to undergo the opposition of the National Government, its activity became unrestricted and anti-Japanese propaganda became more intensified. Into this propaganda, Communist principles were woven. The development of this movement threatened the safety of Japan as the Chinese Communist Party was the armed vanguard of the world Communist movement which, it will be shown, had, at the Seventh Congress of the Third International in 1935, declared Japan its natural enemy.

The evidence will trace and will show that the declaration by this convention in 1935, the kidnapping of Chiang Kai-shek in 1936 and the Marco Polo Bridge Incident in 1937 were closely related and were natural steps in a deeply laid conspiracy to drag Japan into war with China. Statements of high-ranking officials of China will be introduced to show that it was considered that only a major war with another country could unify China and stop its civil wars.

All this evidence will show that the planning and initiating of the Sino-Japanese conflict lay not with Japan, but elsewhere.

The evidence will show that the Communist Party on 8 July the day after the Lukouchiao Incident, sent a telegram stating it would wage war on Japan in collaboration with the National Government forces. Again, as the evidence will show, there was a close connection among the Chinese Communist Party, Soviet Russian Communist Party, and the former Comintern. As already stated, the Chinese Communist Party was constituted under the direction of the Comintern and was in such an organic relation as to be directed by the latter. The nature and scope of these directions will be revealed by evidence.

It will be shown that Japan had reason to fear, and in fact did fear, that the spread of Communism in China, and then in Japan itself meant Japan's destruction.

One look at the map today will show what has happened to Russia's neighbors and former neighbors both in Europe and in Asia. The clinching evidence in support of Japan's rightful fear of the spread of Communism is President Truman's address to the United States Congress last month on that subject and the desperate measures he recommended to stop its spread.

This subdivision will be presented by Messrs. OHARA and ITO and Mr. Cunningham.

Subdivision III: EXTENSION OF THE INCIDENT TO CENTRAL CHINA

The Shanghai Incident was entirely separate from that of North China. In 1932 the Shanghai truce was concluded. As evidence will show, at about the time of the North China incident, China was constructing fortifications within the demilitarized zone in violation of the above truce.

It will be shown that, to encourage international intervention, an incident took place in the international city. On August 9th, Lieutenant OYAMA, chief of the company of the Japanese marines, and his chauffeur were shot to death. China had been openly concentrating her troops in the neighborhood of Shanghai, and by August 12th, the number amounted to 50,000. The Japanese marines in charge of protecting Japanese residents there numbered only 4,000 and on August 13th both forces clashed. Thereupon the Japanese government and army headquarters decided to send to Shanghai two divisions in order to ensure the safety of the marines and to protect Japanese residents there in the emergency.

When the expeditionary forces arrived at Shanghai on 23rd August, the already overwhelming Chinese forces had been increased still further. The Japanese government continued to adhere to its policy of trying to localize the incident and it tried to avoid a clash of arms but when the Chinese increased their forces to between 300 and 400 thousand, it finally became obvious that the incident could not be terminated and three divisions were landed at Hangchow on 5 November to stop the large Chinese force which was advancing from Chekiang Province on Shanghai where the Japanese garrison was too small to protect the Japanese residents there.

This subdivision will be presented by Mr. SOMIYA AND Mr. Roberts.

Subdivision IV: OCCUPATION OF NANKING AND JAPANESE ATTEMPTS TO BRING ABOUT PEACE

In November 1937 the Chinese forces fighting Japanese landing forces at Hangchow retreated to the west and the Japanese, fearing a counter-attack, pursued them along the line of Soochow and Kashing, and then along the line of Wuhsi and Fuchow. In order to meet the continued threat of a Chinese counterattack the fighting front was gradually enlarged. Before the fall of Nanking peace terms were proposed through the German ambassador.

The chief points were: acknowledgement of Manchukuo, amelioration of conditions in North China and Inner Mongolia, cooperation in preventing the spread of Communism, cooperation in economic development and indemnities. China delayed its reply, the time limit of January 15, 1938 expired and with it the chance of making peace. The Panay and Ladybird incidents, it will be shown, were settled by apology and compensation, and the incidents were considered closed in accordance with then existing international law and diplomatic practice.

With reference to counts 45 to 50 relative to attacks on various cities of China, we will present evidence pertaining to the Japanese army chain of command, the orders given by commanders to troops before the entry into a city, punishments meted out by courts martial for offenses against civilians, the exaggeration of stories of atrocities in some places, the non-existence of atrocities in others, and atrocities by Chinese which were charged to the Japanese. Further, international law will be introduced on the treatment of bandits, irregulars, guerrillas, and others who cannot claim the status of soldiers and whom international law pronounces outlaws and beyond the protection accorded combatants. In any event, we shall conclusively prove the nonculpability of the accused as to such matters.

This subdivision will be presented by Messrs. ITO, S. OKAMOTO, SOMIYA and HAYASHI, and Messrs. Mattice, Cole, Blewett, Roberts and Harris.

Subdivision V: ATTACK ON HANKOW AND AFTER

It will be shown that from the Shanghai incident onwards, it was Japan's policy to terminate the incident as quickly as possible. That Japan had no territorial ambitions in China will be shown by the statement of Premier Prince KONOYE on 3 November 1938, and his declaration on 22 December 1938. Conclusive evidence on this point is the treaty between Japan and China in which Japan even surrendered the extraterritorial rights she enjoyed under previous treaties.

With reference to alleged economic aggression, it will be shown that Japan did not monopolize the Chinese economy, nor did she exclude third powers. Japan invested money and developed the unexploited resources of China to the mutual benefit of both nations. The North China Development Company was organized on 7 November 1938 with capital of 350,000,000 yen.

The next sentence is omitted.

It invested its capital in transportation, port facilities, communications, electricity, mines and salt. On the 7th of November 1938 the Central China Development Company was established with capital of 100,000,000 yen and it invested its capital in railways, transportation, electricity, gas and mines in Central China. Both companies contributed much to the welfare of the Chinese.

It will be shown that the economic control exercised by Japan was due to military necessity and was no different from that engaged in by other occupying powers during hostilities and recognized by international law. These measures were taken because it was necessary to protect Japanese business establishments from violence and to maintain the occupying forces. It will further be shown that when military necessity no longer existed, economic control was returned to the hands of the Chinese, even while hostilities went on in other parts of the country. Similarly, the exigencies of war, it will be shown, sometimes required the placing of temporary restrictions on third powers.

With reference to opium, the prosecution has alleged that its use was encouraged in order to weaken China and to raise funds for Japan. It will be shown that poppy growing had never ceased in China, that vast taxes were collected from opium, that its use had never been stamped out, as alleged. It will further be shown that Japan advised the Chinese government to introduce the system of opium control successfully used in Japan, Korea and Formosa. This entailed the licensing of known addicts and supplying them through recognized channels. It will be shown that the League of Nations approved control rather than prohibition as the solution of China's opium problems. Facts and figures will be produced to show the efficacy of the system proposed by Japan and used by her in her territories. In fact, what Japan expected most from China was duplication of the policy of gradual abatement which was already practiced in Formosa and which had won world-wide approval. Absolute prohibition, it will be shown, cannot be enforced. It was so arranged that habitual opium smokers might openly get their minimum needs by certificate. In this way, purchase was restricted to those certificate holders and no other people could secure opium. Thus, the use of opium could be controlled. The evidence will show that the profits accruing from the sale of opium all went into the coffers of the new Chinese regime and none of it ever went to the Japanese army or government as alleged.

This subdivision will be presented by Messrs. SHIOBARA, SAMMONJI, and TAKANO, and Messrs. Freeman and Williams.

And the last subdivision, VI: THE NEW REGIME IN CHINA.

Japan is charged with having set up one or more separate governments in China under the control of Japan and having made them the means of aggression. It will be shown that in China, because of its vastness and poverty and widely divergent regions, local autonomous bodies often sprang up to maintain peace and order when the central government was unable to do so. The evidence will show that at the time of the conflict between China and Japan, such autonomous bodies

came into existence, and, as the incident progressed, they grew, joined together, grew in size, and supplanted the former government. As these bodies served to maintain peace and order, Japan naturally supported them in order to preserve stability in the occupied areas. These were not puppet governments as charged, but independent, as proved by the China-Japan treaty previously alluded to. It will be shown that the Chief of the Chinese Republic, Wang Chin-wei, was no mere upstart, but had been vice-president of the Chinese Republic and president of the Central Committee of the Kuomintang under Chiang Kai-shek. He had fought in the Nationalist Revolution beside Sun Yat-sen and had helped to establish the Chinese Republic. He was and always had been a leader in the Chinese Government.

As the evidence will show, Wang Chin-wei escaped from Chungking and sought to conclude speedy peace with Japan. It was natural that Japan, desiring such peace with China, should support him. When he established the National Government of China on March 30, 1940, he used the Chinese national flag, adopted the policy of anti-Communism and peace and returned the capital to Nanking.

Japan recognized the Wang Chin-wei regime as the legitimate government of China and as the best means of effecting an early peace with China. Again the treaty between Japan and China shows that the new government was not considered as a puppet government.

The evidence will sustain the defense contention that the accused did not enter into any conspiracy, did not plan and initiate a war of aggression against China, did not use opium to debauch its people and to raise funds for war, nor did they foist upon China a puppet government by supporting Wang Chin-wei. In short, that the accused are not chargeable with the offenses set forth in the Indictment.

This subdivision will be presented by Messrs. SAMMONJI, YAMADA and HANAI, and Messrs. Furness and Blewett.

CHAPTER 8: EXCERPTS FROM *PROCEEDINGS OF THE SIXTH CONFERENCE OF THE INSTITUTE OF PACIFIC RELATIONS*

Problems of the Pacific, 1936: Aims and Results of Social and Economic Policies in Pacific Countries

“Document IV: Recent Developments in the Chinese Communist Movement”

Contributed by Reizo Otsuka, member of the staff of the South Manchuria Railway Company

Scheduled for submission on April 25, 1947 (Session 204); not submitted

The following text was excerpted from the *Proceedings* of the Sixth Conference of the Institute of Pacific Relations (held at Yosemite National Park in August 1936), published in book form by Oxford University Press in 1937. It is an objective, fair-minded report on the movements of the CCP from 1928, when the party held its Sixth National Congress, to 1936. We do not know why defense counsel decided not to submit a reference of such excellent quality. As we mentioned in the Introduction, we have included these excerpts not because their content contains crucial information, but because they provide an accessible, reliable portrayal of the CCP in its early years.

The Red Army: *Sovietization of Hsiens in North Shensi*

When the Red Army occupies a district, it first of all assembles the populace and holds a meeting at which a Soviet Government will be formed and the land distributed. But in reality the good tracts of land are reserved as ‘public land’ for the Soviet Government and the Red Army. This land is cultivated by the destitute peasants, and the remaining tracts are distributed to the peasants. Land is granted to the people, but it must be taken into consideration that in order to execute the policy of the Red Army, some ‘pulling of the wires’ is put into practice. After the distribution of the land, the young men under thirty years of age are recruited into the flying column, the youths ranging from fourteen to twenty are compelled to become vanguards, while the boys under fourteen must join the Pioneer (boy scout) organization. The boys in the Pioneers are given instruction in communism so that the flying column and the youthful vanguards may later form an independent body and become reserves for the Red Army. From the old men and the young women transport corps are organized to aid in the transportation of supplies or the cultivation of the ‘public land’ or scouting and sentry duty. It is said that the poor peasants, who are given only bad tracts of land, are compelled not only to enlist in the Red Army, but also to present four-tenths of their harvest for the public supplies.³³

³³ Reizo Otsuka, “Document IV. Recent Developments in the Chinese Communist Movement in *Problems of the Pacific, 1936: Aims and Results of Social and Economic Policies in Pacific Countries, Proceedings of the Sixth Conference of the Institute of Pacific Relations* (Chicago: University of Chicago Press, 1937), p. 356.

PRESENT SITUATION OF THE CHINESE COMMUNIST PARTY'S ANTI-IMPERIALISM MOVEMENT

At the Sixth Conference of the Chinese Communist Party, which was held at Moscow in July 1928, the two great tasks of the party were decided upon: (1) Drive out the Imperialists from China and complete a real unification of China. (2) By the democratic system abolish the private ownership of land by the landholding class and execute a 'land revolution' so that the peasants may shatter the semi-feudalistic bonds in the existing land system.³⁴

...

On July 15, 1934, when the fifth drive was in its second stage, the Chinese Communist Army issued the 'Manifesto for the Northward March of the Red Army of Workmen and Peasants', and after organizing a vanguard army for the anti-Japanese campaign to the north dispatched it with all possible speed. Simultaneously with this move, anti-foreign demonstrations called the 'People's Armed Self-Defence Movement' were originated in Shanghai and in the other leading cities proposing the 'Fundamental Policy for the Chinese People's anti-Japanese Military Operations'. In answer to the call of the Communist Army in its anti-imperialism movement, extensive activities were begun in the various localities. These were the anti-imperialism activities of the Red Army during its stay in Kiangsi. The noteworthy characteristic of these movements is that the main activity of the Red Army at this time was to fight off the campaign of the Nanking Government; in reality, the anti-Japanese movement was of secondary importance. Directly after dispatching the army for the Northern Campaign against the Japanese, Chu Teh, the leader of the Red Army, during the course of his speech which stressed the urgency of repulsing the government forces, said:

'The Red Army consisting of peasants and workmen is the only armed force to deliver China from the outrage of Japanese Imperialism. For this reason, our second task is to carry on direct military operations against Japan.'

But in the so-called 'New Strategy', which was made public in August 1935, the mutual relation has been completely changed.

Present Position of the Anti-Imperialism Movement.

What is the 'New Strategy'?

Briefly it is the method by which the Chinese Communist Party is trying to solve its problems through turning the spear-head of the anti-foreign movement towards Japan. Primarily, this measure is directed against Japan; and secondly, the policy towards the Kuomintang will be decided therefrom. This is the change of policy of the Communist Party based on the resolutions passed at the seventh congress of the Comintern. The new policy was made public on August 1,

³⁴

Ibid., pp. 367-368.

under the names of the People's Commissariat of the Soviet Government and the Central Committee of the Chinese Communist Party.

The difference between this policy and the others is that all parties are to join and form a united front, for which purpose a proposal was made for the organization of a National Defence Government and the formation of a Confederate Army against Japan. Consequently, the party which formerly advocated the overthrow of the Kuomintang is now opposed to the dissolution by a foreign Power of the Kuomintang and the 'Blue Shirts' Organization' in North China. In this way the Communist Party is endeavouring to win the warlords and the financiers in one division of the Kuomintang over to the National Defence Government. This may be interpreted as a great change indeed.

Did this change lead to the abandonment of the initial political policy of the party? The answer is in the negative – the Chinese Communist Party adhered to its fundamental political policy; the change merely indicates the development of the policy. Simultaneously with the change in its policy, the Chinese Communist Party has made partial modifications in the domain of the agrarian and the economic policies. That is to say, certain parts of the various conditions of the land reforms have been moderated. The reason for this is that for the Chinese Communist Party the struggle for the formation of the united front in the anti-imperialist movement is now all important. The party is thoroughly convinced that as long as it follows this line the other problems will either be solved of their own accord or else be easily realized. Wang Min (Chen Shao-yu), who was one of the central figures of the Chinese Communist Party attending the seventh congress of the Comintern, made a statement to the following effect:

'It is necessary to believe firmly that under such conditions as exist in China of the present day, where there exists a Soviet régime in one part of its territory, the adoption of the tactics for the formation of the anti-imperialistic people's united front by no means weakens but rather consolidates the strength of the position of the Communist Party in its struggle for the future victory of the Soviet Revolution and the consolidation of the proletariat hegemony.'¹

Again, in connexion with the Soviet Government and the National Defence Government whose task is to form a united front against imperialism, Wang Min has stated:

'The policy of the National Defence Government is not only coincident with the duties of the Soviet Government. For this reason the Soviet Government can and must set an example to the followers of the National Defence Government. But the Soviet Government has for its chief task the complete racial and social liberation of the Chinese, thus it will not be able to restrict its activity merely within the frame of the policy of the National Defence government. For instance, in order to let the Agrarian Revolution develop, the Soviet Government will, as part of the constitution of the Agrarian Revolution and as its starting point, execute the National Defence Government's policy, by confiscating the land of traitors to the country and endeavour to distribute it to the people. At the same time the Soviet Government will abolish the

¹ *Revolutionary Movement in the Colonies and the Tactics of the Communist Party.*

feudal system of land possession and strive for the realization of the fundamental aim of the Communist Party.'

Thus, simultaneously with its protection of the Communist Party's right to guide, the 'New Strategy' is making it possible for the Chinese Communist Party to win over the people gradually in its plan for the realization of the anti-imperialism movement and the land revolution. The essential point of the 'New Strategy' is that the full force of the Chinese Communist Party against the so-called 'international imperialism' is directed towards Japan. This situation is similar to that in 1925, when the spear-head of anti-imperialism was pointed at Britain. In the tactics of the Communist Party, the struggle which the Chinese Communist Party terms 'Resist Japan' is no different from the general anti-imperialism movement of the students, inhabitants of the cities, and the labourers. Secondly, there is the recent manifestation of the anti-Japanese movement created by agitators in the Kuomintang and a part of the capitalists and financiers; and thirdly, there is the failure of the Government Army to exterminate the Reds in Kiangsi, thus permitting the main forces of the Red Army to proceed northward to Szechwan without suffering much loss. Having occupied a vast territory where no economic blockade and no chains of blockhouses exist, the Red Army, which moved towards the north, is now in a position to engage in any sort of warfare and take part in any revolutionary movement. This is indeed a great blow to the Nanking Government.

The Chinese Communist Party is now forming a united front under such favourable circumstances; how is the Nanking Government going to control this movement?

Student Movements. Since the close of 1935, even Chiang Kai-shek's instructions to the representatives of the schools have not been successful in preventing the development of student movements throughout China. In Peiping on December 9, 1935, the students of Tsinghua and Yenching Universities, who were angered by the resolution passed against self-government by the presidents of the universities in Peiping on December 8, visited Sung Cheh-yuan at Wanshoshan and held a demonstration. Upon attempting to enter the city they were stopped by the police at one of the west gates. Within the city, six thousand secondary school and university students rose and finally overcame the patrols after much bloodshed and disorder. Then on December 16, eight thousand students, with those of the National Normal University acting as the pivot, commenced a demonstration after meeting in secrecy. From this movement was formed the Federation of the Students of Peiping consisting of representatives from more than thirty schools. The federation has mobilized the students and is doing its utmost to create an anti-Japanese atmosphere.

In Tientsin, too, a student movement was formed, and in Shanghai students rose in co-operation with their fellows in North China. On December 19 the students of Fudan University presented a petition to the Municipal Government. Furthermore, on December 23, with the students of Fudan University in the central position, the 'Band of Petitioners for the Entrance of Students to Nanking' converted the North Station into the base of their activities. In sympathy with these, approximately two thousand students held a 'sympathy demonstration' on the 24th. In Kaifeng (Honan Province), also, fourteen thousand students from thirty-eight schools, under the pretext of proceeding to Nanking to present a petition, held up the traffic by occupying the station and the passenger trains. Canton, too, was the scene of a student demonstration. On January 3 of the

present year the students attacked the police and incurred ten casualties. On March 28, in order to form a unification of the student movements throughout China, the 'Preliminary Organ for the Students' Federation for National Salvation' was formed, and a two-day struggle which followed produced ten casualties. With the nation-wide union of the students, the Student Movement is spreading over the country like wildfire, as if mocking at the powerlessness of the Nanking Government; needless to say, the Chinese Communist Party is its guiding influence.

National Salvation Societies. Fanned either directly or indirectly by the Chinese Communist Party, anti-imperialism associations have begun to be formed in all parts of China in co-operation with this student movement. Particularly active among these is the National Cultural Salvation Association in Shanghai, which occupies the position of the highest guiding organ of the National Salvation Associations. The formation of this society was in co-operation with the student movement in Peiping. It began with the issuance on December 12, 1935, of the so-called 'Manifesto of National Salvation' which bore the signatures of more than two hundred and fifty intellectuals of Shanghai, including Communists, Social Democrats, Nationalists, and members of the Kuomintang. But these personalities were all utilized to advantage by the Chinese Communist Party. This fact was revealed by the 'Statement to the People' which was published on February 11 by the Communist Party's Central Department of Propaganda.

Furthermore, there exist the following in Shanghai: the Shanghai Women's National Salvation Union, the National Salvation Union of the Trade Unions of Shanghai, the Shanghai Workmen's National Salvation Union, the National Salvation Association of Primary School Teachers of Shanghai, the Shanghai Motion Picture Artists' National Salvation Association, the Shanghai Young Artists' National Salvation Association, and others. With these various associations, the aforementioned Shanghai Students' National Salvation Federation has joined to form the Shanghai National Salvation Federation of all classes of people.¹

Union of the Chinese People's Revolution. The participation of some of the wealthy people may be observed in the National Cultural Salvation Association. Furthermore, in answer to the call of the Chinese Communist Party for co-operation in national defence, some of the military people, especially the 'anti-Chiang' group, are now endeavouring to form a united front with the Chinese Communist Party. Chen Ming-shu and Li Chi-shen, the chief leaders of the Fukien Independence Movement, and Tsai Ting-kai, Chu Shou-nien, Ong Chao-huan, and Chiang Kuang-nai, the dauntless generals of the Nineteenth Route Army, had either taken shelter in foreign countries or had made their abodes in Hongkong, Kwantung, and Kwangsi, where they continued their 'anti-Chiang' work. On the occasion of the fifth congress of the Kuomintang, which was held in November 1935, they telegraphed Tsou Lu, Feng Yu-hsiang, and Yen Hsi-shan, who were at that time in Nanking, and demanded: (1) that the Kuomintang abandon its arbitrary one-party rule, (2) the release of all those imprisoned for political offences, (3) the enforcement of the freedom of democracy, and (4) the establishment of a special organ to supervise the finances and national defence programme of the Government.

¹ More recently, with the Shanghai Federation as a pivot, the All China National Salvation Federation has been organized.

However, they later followed the proposal of the Chinese Communist Party and formed the 'Union of the Chinese National Revolution'. With the publication of its journal, the *Journal of National Salvation*, the union is doing its utmost in persuading the Hu Han-min Party and the Kwangsi Party to join in forming a 'united front'. Thus, even influential men in the Kuomintang are now assenting to the proposal of the Chinese Communist Party.³⁵

³⁵

Ibid., pp. 367-373.

CHAPTER 9: REPORT ON THE ANTI-JAPANESE MOVEMENT IN CHINA AND THE BOYCOTTING OF JAPANESE GOODS

(Letter from Shigemitsu Mamoru, minister to China, to Foreign Minister Shidehara Kijuro)
Confidential Document No. 448 dated February 2, 1931

Scheduled for submission on April 29, 1947 (Session 206); not submitted

Defense counsel collected numerous documents relating to anti-Japanese activity and boycotts of Japanese imports between 1926 and the outbreak of the Second Sino-Japanese War, intending to submit them to the Tribunal. Most of them were rejected, which was not surprising, since the IMTFE was determined to adhere to its basic policy to the bitter end, i.e., the Tribunal's mission was to judge Japanese war crimes, not crimes committed against Japanese citizens and sanctioned by Nationalist China, one of the Allied Nations. The Tribunal flatly refused to countenance the defense argument that the Japanese had been left with no choice but to strike back after so many acts of violence were inflicted on them. It excluded en masse documents attesting to terrorism and brutality suffered by Japanese residents at the hands of the Chinese and boycotts of Japanese goods. Defense counsel refrained from submitting this report wired by Minister Shigemitsu, presumably because they knew it would be rejected. They did submit a report on China's anti-Japanese policy contained in a publication issued by the Osaka Chamber of Commerce in 1931, *An Overview of Sino-Japanese Political and Economic Relations*, to the Tribunal. Although the report is objective and dispassionate, the IMTFE rejected it along with nearly 20 other documents on the day before the defense planned to submit Shigemitsu's telegram. It would stand to reason that the defense attorneys would decide not to submit the latter as well, and we assume that that was the case. We selected this document not because of its evidentiary significance, but because we thought that readers would find a diplomat's field report to the foreign minister instructive.

DEFENSE DOCUMENT #1303

Confidential Document No. 448

To: Baron SHIDEHARA Kijuro, Foreign Minister

From: SHIGEMITSU Aoi

Envoy Extraordinary and Minister Plenipotentiary in China

November 2, 1931

Subject: Report on the anti-Japanese movement and the boycott of Japanese goods

(Please have this report translated into English, and distribute it to all foreign diplomatic establishments.)

The Anti-Japanese Movement and the Boycotting of Japanese Goods in China

It is established fact at home and abroad that the Nationalist (Kuomintang) government calls the treaties with the Western powers, which they consider disadvantageous, “unequal treaties.” It wishes to have them abolished, and to that end is making use of anti-alien movements.

China refused to recognize the treaties even before the establishment of the Nationalist government. For instance, the Peking government stated that they would not be effective in the future, when it came time to revise the commercial treaty with Belgium in 1925. The government assumed the same attitude in 1927 on the occasion of the revision of the commercial treaty with Japan.

However, the Nationalist government’s stance was more blatant — that is to say, on July 7, 1928, it announced that when term of the treaties expired, it intended to revoke the extraterritorial rights of foreign nations, without conducting any negotiations whatsoever. It also announced a provisional law that gave Chinese courts jurisdiction over foreigners. In December 1929, the government declared that extraterritorial rights would be abolished after 1930, and in December 1931 enacted the aforementioned law relating to court jurisdiction over foreign nationals.

The Chinese have adopted a particularly harsh stance on Japanese extraterritorial rights, as follows:

1. When the agreement concerning the provisional court of justice (*huishen yamen*) in the special area of Shanghai was to be revised in 1929, China refused to meet with the Japanese under the pretext that Japan’s right to exercise her interests in connection with extraterritorial rights had already expired. Since 1928, despite any number of requests to conduct negotiations on the revision of the commercial treaty with nations possessing said extraterritorial rights, the Chinese government has refused to negotiate with Japan, and only Japan, under the same pretext.
2. In addition to repudiating the aforementioned treaties, China has instituted an anti-Japanese movement and the boycotting of Japanese goods, with the intent of removing the foreign presence from China by withdrawing existing rights and interests pursuant to said treaties.

The coolies’ strike and boycotts of English goods in Hong Kong and Kwantung in 1925, when the Nationalist government had its seat at Canton, were instigated by that government and designed to drive the English out of China.

The English relinquished their concessions in Hankow and Chiuchiang in 1927 upon the conclusion of an agreement between England and China. However, the relinquishment was in fact the result of violent acts committed by hordes of Chinese who occupied said concession under the direction of the Nationalist Party, in yet another attempt to remove the foreign presence.

During the process of the wresting of foreign interests and rights in China, Japan was treated much more harshly than other nations, especially where Manchuria was concerned. Manchuria, being separated from China proper, was formerly an undeveloped colony, but after 30 years of Japanese efforts, it became the most fertile region in China. Nevertheless, the Chinese government gave no consideration to the many contributions the Japanese had made in Manchuria over the years. It was determined to remove Japanese influence, rights, and interests, and to take *any* action necessary to that end. Some examples follow.

- III. The Chinese government has insisted on abolishing the treaty of 1915 relating to Southern Manchuria and Eastern Mongolia after the Washington Conference in 1921. Recently, it has been disregarding that treaty, and has made attempts to divest Japan and its citizens of their acquired rights and interests, resorting to cunning and malicious means. The Nanking government has demanded, openly, that the Japanese withdraw from Lushun and Talien.
- IV. In violation of the treaty prohibiting the construction of a rail line parallel to the South Manchurian Railway, and of the agreement to rely on Japanese loans for railway construction, China has constructed the Tahushan-Tungliao, Hailung-Kirin, and Mukden-Hailung lines on both sides of and parallel to the South Manchurian Railway, using its own funds.
- V. Without settling loans from the South Manchurian Railway for the construction of the Kirin-T'ungghua and Taonan-Angangchi feeder lines, the Chinese have constructed lines that connect to the aforesaid lines running parallel to the South Manchurian Railway, making the former more competitive.
- VI. Disregarding the Chientao agreement, the Chinese have assiduously avoided completing the Kiling-Huining line.
- VII. Railroad lines constructed by the Chinese national railway are hindering the operation of the South Manchuria Railway due to pricing and freight policies that discriminate against the latter.
- VIII. It is well known that the authorities in three eastern provinces have contravened the provisions of the treaty by refusing to lease land to Japanese nationals, and attempting to strip the Japanese of land that they have already obtained.
- IX. Attempts are underway to oust Koreans from China, despite the fact that the former have been cultivating rice fields in South Manchuria for many years, and have contributed greatly to the development of industry. To compel the Koreans to leave, the Chinese are arresting and jailing them without

justification, abrogating their farm tenancies, and deporting them. The Wanpaoshan Incident is only one of many such incidents.

- X. There have been countless instances of violations of the rights of Japan and Japanese citizens. Many Japanese businesses, as well as mining, forestry, and agricultural operations have been usurped by the Chinese. There will be more.

Three Principles of the People

3. The denial of the rights of foreign nations and their citizens in China, and the movement to exclude foreigners and foreign goods, which are methods used to hasten their departure, are founded on the last directive issued by Sun Wen (Sun Yatsen), and have been adopted as Nationalist government policy. Sun Wen wished China to adopt his Three Principles of the People, i.e., nationalism, democracy, and people's livelihood, which he had been advocating ever since the revolution. To achieve the third principle, it is necessary to establish rights for the people and to improve their welfare. That means first ridding China of foreign political and economic influence. Since China is incapable of physically expelling the foreigners, it is attempting to encourage them to leave by refusing to cooperate with them. Sun Wen urged the Chinese not to work for foreigners, and to avoid foreign goods and currency. Therefore, to adhere to Sun Wen's last directive, the Chinese must embrace nationalism, which means driving out the foreign powers. Anti-foreign movements and boycotts of foreign goods are the only possibilities open to them for the attainment of that goal at present.

The aforementioned Three Principles of the People have become Nationalist Party policy, as well as the fundamental principles by which China is governed. Consequently, they have been incorporated into the Chinese Constitution. As one would expect, the Nationalist government (headed by a member of the party's Executive Committee) is observing the Three Principles to the letter. That explains why it is Nationalist foreign policy to denounce the unequal treaties, to instigate and orchestrate violent anti-foreign movements, and to exclude foreign goods.

4. Methods used against foreign nationals and foreign goods have become more sophisticated and thoroughgoing with each passing year, under the guidance and control of the Nationalist Party and the Nationalist government. A chronology follows:

First, national and local Kuomintang units formed a group to which it entrusted the oversight of a nationwide movement designed to expel foreign nationals and goods. To foment hostility toward foreigners (and foreign goods) among the masses, the organization published propaganda in newspapers and disseminated leaflets and posters.

The group ordered the Chinese to boycott foreign goods and refuse to work for foreigners, warning them that if they do not comply, they will be subject to punishment, the likes of which has never before been seen in civilized countries.

The anti-Japanese movement and the boycotting of Japanese goods have been executed exhaustively and systematically, as described above, under the direction of the Nationalist Party's central and local organizations.

Japanese freight losses have been immense.

The Nationalist government, in order to avoid giving foreign nations an excuse to intervene or to turn foreign public opinion against the Chinese, has stopped short of inflicting physical violence on Japanese lives and property. Instead, it is secretly compelling the Chinese people to break off economic relations with the Japanese.

At present, the masses seem to be obeying the Nationalist Party and its government, which are the leaders of the anti-alien movements, as described above. As occasion demands, they rise to action; at other times, the situation is calm. But as the masses are by nature excitable, it is possible that an unforeseen incident will lead to a situation that not even the government can suppress. Such things have happened in the past. When the masses get excited, the government cannot control them at all and must curry favour with them to stay in power.

Accordingly, Japanese nationals who live in remote areas and have been the targets of the anti-Japanese movement and boycotts of Japanese goods fear for their lives. Some of them have evacuated, returning to Japan. The staffs of the Japanese consulates in Chingchow, Yunnan, Chengtu, Chungking and Ch'ihfeng, feeling threatened by the Chinese government's organized, covert terrorism, have sought refuge at the nearest Japanese legation or consulate.

5. Boycotts of foreign goods are tantamount to war, particularly when such activities, executed as described above, are instigated by the government. Needless to say, the effects have been devastating. These boycotts are a demonstration of the Nationalist government's repudiation of the "unequal treaties," and its intention to rid China of all foreign influence, as a matter of national policy.

CHAPTER 10: OPENING STATEMENT, RUSSO-JAPANESE RELATIONS DIVISION

Presented by Aristides G. Lazarus on May 16, 1947 (Session 218)

The Soviet Union was an effective partner in the war against Germany, and certainly helped the Allies achieve victory. However, during the war with Japan, the USSR behaved in a way that was totally devoid of fairness or ethical principles. The American defense attorneys at the IMTFE were in complete agreement with this view (as most likely would have been the case had they been British, Dutch, or French). To assert that the signing of the Anti-Comintern Pact or the border disputes with the USSR (all of which were “settled” because Japan yielded or compromised) is to defy logic. Therefore, when Lazarus prepared this statement, he seems to have been confident that it would be effective in discrediting Soviet charges against Japan. Lazarus calls attention to the fact that the Soviet prosecutor relied almost exclusively on affidavits, seldom producing live witnesses (who were incarcerated in the Soviet Union). The defense thus was deprived of the opportunity to cross-examine those witnesses. He also discusses the CCP’s August 1 Declaration (also known as the 8.1 Declaration), which was tantamount to a declaration of war against Japan. If more emphasis had been placed on the Declaration, it would have been useful in demonstrating the CCP’s role in the Marco Polo Bridge Incident, which occurred two years later. But since the Tribunal refused to admit so much of the supporting evidence, this part of the opening statement did not have the effect the defense had hoped for.

The defense now opens its evidence in the division of the case concerned with charges by the U.S.S.R., charges of aggression political and military. Firstly, on the political plans, aggression is charged in entering into the Anti-Comintern Pact. Secondly, on the military plans, in the incidents of Lake Khasan (or Chang-ku-feng) in 1938 and Khalkin Gol (or Nomonhan) in 1939, and in planning military aggression against the U.S.S.R. at other periods.

The defense is, broadly, that the entire current of Japanese diplomatic and military policy vis-a-vis the Soviet Union, during the years from 1928 to 1945, was one of defense, in which the military clashes growing out of frontier uncertainties were mere accidents, not instances of planned aggression but eddies seeming only to run counter to the general current.

Before proceeding to detail our evidence, we must point out the singularly unsatisfactory and, so to say, intangible character of the case which we are called upon to meet. We are confronted with much evidence of witnesses who testified not in person but by affidavit, affording no opportunity to the most reliable weapon against falsehood known to men — cross-examination. Some of these witnesses will be shown to have been dead, others to have been, when they gave their evidence, under charge or investigation for “crimes” allegedly committed against the U.S.S.R.; others, stated to be ordinary prisoners of war, have nevertheless not been yet repatriated, 21 months after the end of the war, to Japan where they might be subjected to cross-examination. In one instance the direct order of the Tribunal that a witness be produced has been responded to by production of neither witness nor explanation. The affidavits of these witnesses consisted in large

part of argument, conclusion and opinion; but we have no criterion for determining to what extent their testimony is considered by the Tribunal. In no single instance, lastly, did the subpoena of the Tribunal succeed in obtaining for the defense the attendance of a witness from Soviet custody. Those, some of the difficulties of the defense, are adverted to in reminder to the Tribunal that it is not without perplexities that we exercise our judgment in the dual effort to meet any substantial and substantiated issues which have been raised, and to keep our evidence within reasonable bounds.

Our solution of this problem is to present our evidence under a few general heads: the Anti-Comintern Pact; the Chang-ku-feng Incident; the Nomonhan Incident; general relations between Japan and the U.S.S.R. from 1928 to 1945, including the Neutrality Pact and Japanese military measures on the Continent.

On the Anti-Comintern Pact question, the evidence will be as follows:

In connection with the Anti-Comintern Pact, we shall adduce evidence that the German, Japanese and Italian nations were acting within their legal rights in making a pact against the spread of Communism in Europe and Asia. Proof of the present developments and the world-wide anxiety over the spread of Communism will be offered to show a justification for the fears which prompted the action initially. Since Communism is a social weapon and not a belligerent's tool, we must show the political development as the threat, rather than relying upon the armed threat as was suggested in considering the China Communist problem.

We will offer to prove that the movement of Communism into various countries in Europe and the threat presented by Communism in Asia were just cause for the agreement between Germany and Japan.

Our proof will establish that the object behind the pact was to take the lead among nations to preserve the peace of Europe and Asia by curtailing the spread of Communism beyond certain limits; we will show that various nations — particularly the United States — took action individually to prevent the spread of Communism in their countries. The pact was certainly not a prelude to joint aggressive action in general, as charged.

Our evidence will show that the Anti-Comintern Pact was an ideological pact primarily. The purpose of it from the German side was to prevent Communism from spreading in Europe; Britain and Holland were approached with a view of having them also join in the movement against Communism.

After withdrawing from the League of Nations Japan, her relations with the United States being strained, was left quite alone diplomatically. Japan felt pressure from the U.S.S.R., a nation maintaining a long frontier in Asia. At that time the Comintern was extremely active in Spain and China, and in 1935 the decision of the 7th general meeting of the Comintern to make Japan and Germany its first targets drew the special attention of the Japanese Government. Large military preparations by the U.S.S.R. were in progress, with the five year plan behind the

Comintern at that time. In such circumstances it was natural for the Japanese Government to try to secure its national defense.

At the time there was a mutual assistance pact between the U.S.S.R. and France (1935), which cannot be considered aggressive. Why should the Anti-Comintern Pact be so considered? This pact was prepared after the 1935 decision of the Comintern against Japan and Germany and because of the military preparations of the U.S.S.R., the backbone of the Comintern. It was designed only for self-defense, and was without any aggressive intentions.

On 1 August 1936 the Chinese Communist Party made a declaration, its so-called "1 August Declaration", openly expressing its hostile attitude toward Japan. Testimony will be offered to the relation between the Chinese Communist Party and the Comintern.

The prosecution has said that the Anti-Comintern Pact, and especially the secret agreement, was part of the conspiracy between Italy, Germany and Japan. Whether it was the secrecy or the agreement itself which was the principal element of the charge we are not advised, but we will explain the meaning of both to avoid any misunderstanding. The pact shows on its face that it and the secret agreement were perfectly legal documents, within the rights of the nations concerned to execute. They are similar to numerous bilateral agreements between the Allied nations. We will show that they were intended not as a suggestion for action, but only as passive political documents indicative of a resistance idea, purely defensive in character.

It is common knowledge that the background of the Communist idea and the resistance to it dated back as far as the end of World War I, when many of the Allied nations declared and waged open war against the Communists. This relates to the question, was the Anti-Comintern Pact justified, and if so, were the powers within their rights in proposing means to prevent the spread of Communism.

This relates to the question, was the Anti-Comintern Pact justified, and if so, were the powers within their rights in proposing means to prevent the spread of Communism? It should be unnecessary to offer proof that the nations of the world were interested in 1936, as they are today, in curtailing the spread of communism. We will offer sufficient evidence on this subject to justify the action of Japan as being exercise of the sovereign right of a nation to take steps to defend itself from a political idea which it considered dangerous to its way of life.

We will show the considerations which entered into the deliberations of the leaders charged with the responsibility for the signing of the Anti-Comintern Pact. We shall thus explain and justify the Anti-Comintern Pact and shall analyze the extent to which these accused participated in its execution to exonerate them from any criminal responsibility for doing their duty of helping defend their country, as they believed, from an enemy and alien way of life.

As to the prosecution's allegation that Japan and German collaborated in China, during the China Incident, on the basis of the Anti-Comintern Pact, concrete evidence will be tendered in rebuttal. We shall show that Germany found the outbreak of the China Incident surprising and embarrassing; that Germany did not withdraw its military advisors from the Chiang Kai-shek Government, and continued the supply of armaments to that government until considerably later;

and that Japan refused to grant Germany any preferential treatment in comparison to that accorded third powers in the economic field of China.

From the summer of 1938 until the summer of 1939 negotiations took place between Japan and Germany for the so-called “strengthening of the Anti-Comintern Pact.” The negotiations were for a pact of mutual assistance among Japan, Germany and Italy; Japan, however, never intended to make it an unconditional, aggressive pact as alleged by the prosecution. Her purpose was rather to conclude a passive, defensive agreement, in consideration mainly of the increasing Russian menace. While the negotiations were continuing, Germany concluded the Non-Aggression Pact with Soviet Russia in August 1939, and thereupon Japan broke off the negotiations.

The details concerning this abortive pact and the fact that it was fundamentally different from the Tripartite Pact actually concluded in September 1940, will be the subject of proof to be tendered in the Pacific and individual phases.

The prosecution in presenting its case laid great stress on the fact that, as it alleged, “the Japanese Government refused to sign a non-aggression pact with the U.S.S.R.”, and in its opening statement went so far as to say that “this could have but one meaning,” that it “proves beyond any doubt” that Japan was preparing for aggressive war. The documentary evidence read by the prosecution indicates that at no time was any formal non-aggression pact definitely proposed or refused, that the discussions were of the most informal and tentative nature, in Litvinov’s diary the first was said to be “over a cup of coffee.”

By reading portions of exhibits already accepted in evidence in the prosecution’s case but not read by the prosecution, we will show that the Japanese Government did not refuse to enter into discussion of such a pact, but merely it stated that it believed that pending controversies should be solved before a pact of such general nature was concluded. Litvinov, Commissar for Foreign Affairs of the Soviet Union, in urging in 1932 that such a pact be discussed, stated that the Soviet Union had concluded such a pact with Lithuania, was conducting negotiations with Poland and was starting negotiations with Finland, Estonia and Latvia. In 1933, in refuting the Japanese submission that pending questions should be settled before a general pact was concluded, the Soviet Union stated that the states with which it had closed such pacts by no means admitted the absence of mutual claims and controversies, but that in fact against one or such states the Soviet Union had well-grounded territorial claims, by reason of a disputable border.

We will assume that the Tribunal reads history and will take judicial notice of what happened to those states along the western border of the Soviet Union with which the Soviet Union had concluded non-aggression pacts, and will ask the Tribunal to judge the effectiveness of such pacts in preventing aggression. We contend that the Japanese Government showed foresight not shown by Poland, Finland, Estonia, Lithuania and Latvia in its belief that a non-aggression pact should not be concluded with Soviet Russia before pending controversies and territorial claims had been settled.

The contention that refusal to sign such a pact proves preparation for aggressive war by the smaller state against the larger state is, we contend, patently untenable, and is in this case affirmatively disproved by the conclusion of the neutrality pact between Japan and Soviet Russia in 1941. This pact was in effect for more than four years, during which time we will show that the Soviet Union repeatedly stated that it was being faithfully observed by both parties, and even in its belated declaration of war did not charge violation by Japan. But we will prove that even that pact did not prevent final aggression by the larger state against the weaker in violation of the definite terms of the treaty.

The prosecution has alleged the occurrence of numerous border incidents to be proof of plans of aggression against the Soviet Union by Japan. In the indictment it is charged that two of these incidents — one along the border between Manchukuo and the Maritime Province of Siberia near Lake Khasan, one along the border between China (not the Soviet Union) and Manchukuo at the Khalkin Gol river — were aggressive wars against the Soviet Union, and has charged certain of the accused with murder in connection with those two incidents. We shall prove that these were typical border incidents, inevitable along a border where both states are armed and the lines are vague or in dispute. It is our contention that there were no violations of the border by Japan, no encroachment by one nation on the territory of another with a view to retaining that territory. If there were violations of the border, which we do not admit, we contend that there has been no proof that those involved knew that the border between the two states was being violated. Those remote from the scene acted on the basis of information and instructions conveyed to them by others, on which they had the right and duty to rely.

As to the first of these incidents, that of Lake Khasan or Chang-ku-feng, we will prove that this portion of the border was in dispute, the treaties regarding it were vague and subject to disagreements as to the location of the border. The border ran through rough country with few monuments to indicate the lines claimed by either of the two states. We will prove that it had been regarded by the natives of Manchukuo as part of that country, and that it had not been occupied by the troops of either country until mid-July 1938, when it was occupied by frontier troops of the Soviet Union. We will prove further that despite the Soviet claim that the border ran over the summit of hills to the west of Lake Khasan, such troops occupied one hill definitely to the west of that line, and dug trenches and erected barbed-wire entanglements below the summit of Chang-ku-feng Hill, which submit marked the border of the Russian claims. We will prove that gendarmes, sent by the Japanese-Manchukuoan authorities on the scene to demand withdrawal, were fired on while definitely within Manchukuoan territory, even under the Russian claims, and that one was killed and others imprisoned. Diplomatic protests were made as early as 14 July. On 20 July the Japanese Ambassador, Shigemitsu Mamoru, renewed such protests, more than a week prior to the beginning of any serious hostilities.

Although it was their contention that such territory was within the limits of Manchukuo, the Japanese Government from the very beginning stated that if the *status quo ante* prior to the occupation of such territory were restored by the withdrawal of troops it would submit the frontier to negotiations. We will submit evidence to prove that such hostilities were started by an attack by the Soviet troops, and that after hostilities began the Japanese Government immediately

proposed cessation on the basis of existing positions, the question of the frontier to be settled by existing positions, the question of the frontier to be settled by diplomatic negotiations. This the Soviet government twice refused, the second time even though it admitted that no Japanese troops were in territory claimed by the Soviet Union. We will prove that throughout the incident the Japanese Government urged negotiations and that at no time did it, as alleged in the opening statement made by the prosecution, demand cession of territory nor that international treaties should be ignored. We will prove that despite the charges made in the indictment, no plans for aggressive war, resulting in this incident, were made by Japan; and that tanks, long-range artillery and airplanes were used by the Soviet troops, not by the Japanese, Soviet airplanes bombing non-military objectives far within the borders of Korea. We will prove further that despite this neither side at the time regarded the incident as war nor as more than a border incident. Finally, we will prove that the incident was settled on the basis first submitted by the Japanese Government through its ambassador. We contend that the agreement for the cessation of hostilities, which is already in evidence, was carried out and the incident closed, and that it cannot now be alleged as aggression.

The Khalkin-Gol incident — “Nomonhan”, as it is known to the world — will be shown to have come about as a result of the ambiguity of frontiers on the bare, almost uninhabited steppe of Western Manchuria and Eastern Outer Mongolia. Like other borders of Chinese territory, that of Outer Mongolia rests upon old administrative boundaries of the Ch’ing Empire and is evidenced rather by tradition and description by metes and bounds in ancient writings than by accurate maps or by boundary-markers. In the spring of 1939 troops of the U.S.S.R. and of the so-called Mongolian People’s Republic — a “republic” not recognized by China or Japan — crossed the river Khalkin-Gol, and clashes with Manchukuoan troops, later reinforced by Japanese, occurred. The Khalkin-Gol had always been considered by China to be the boundary of the Northeastern Provinces and by Manchukuo therefore as its border. Despite efforts on both sides to prevent extension or continuation of the incident, it continued in sporadic outburst of conflict, alternating with lulls, until September. On the 15th of that month the incident was settled by agreement between Japanese Ambassador Togo in Moscow and Foreign Minister Molotov, agreement being made upon a boundary line by which Manchukuo, as the defeated party, conceded territory. It was further agreed that the frontier should be surveyed and marked, which was finally accomplished after work of a joint commission extending over more than two years. The Nomonhan incident was thus settled and closed.

Aside from these specific border incidents, the defendants are charged with having plotted, as agents of their country and government, military aggression against the Soviet Union during the years covered by the indictment (as well as presumably other years referred to, but not made the subject of proof, as far back as 1918 and 1904). The contention of the defense is that nothing was plotted vis-à-vis the U.S.S.R. but prudent measures of defence, which proved in the end to be vitally needed but quite inadequate. To this point evidence will be addressed, some of the particulars thereof being as follows.

As a result of the Nomonhan incident, the Commander-in-Chief of the Japanese Kwantung Army was replaced, the new commander (General Umezu) being specially selected for his ability faithfully and effectively to carry out the policy of the government and the orders of the military

authorities to see that no conflict with the U.S.S.R. occurred. The evidence will amply show that from that time to the date of the Soviet attack on Japan those orders and that policy were carried out most scrupulously in Manchuria.

If Japan did not wage war against the U.S.S.R., the evidence will show that equally no war or aggression was plotted or planned during the period in question. The operations plans testified to by prosecution witnesses will be shown not only to have been nothing more than theoretical plans for the event of hostilities, but to have been wholly defensive in the bargain; the famous Kantokuen — “Kwantung Army Special Maneuver” — of which so much is made in affidavits was nothing more than a precautionary reinforcement of the Continental force at a time of tenseness of international relations. The strength — quantitatively and qualitatively — of the Japanese forces in Manchukuo and Korea will appear to have been inferior at any given time to that of the U.S.S.R. in its contiguous territories; the colossal expenditures and the rapid increase of expenditures for armament by the Soviet Union will help to explain the Japanese determination to be adequately armed for defence. All Japanese forces were disposed defensively, as is obvious from, for example the placing of air-bases; and these forces were even drawn upon and weakened continuously throughout the progress of the Pacific War.

The Russo-Japanese Neutrality Pact was, after Japan had endeavored for some time to secure Soviet agreement to such a treaty, entered into in April 1941, from which time it was the fundamental factor in the relations between the two countries. Despite the outbreak successively of the Russo-German war in Europe and the Japanese-American and British in the Pacific, the Pact continued to govern the status of Japan and the U.S.S.R. vis-à-vis each other. Repeated assurances of its continued observance were given by the U.S.S.R., upon Japanese request, despite which the Soviet Union was, from as early as the middle of 1942 onward, concurrently violating it in various ways. Specific assurance was given, simultaneously with the Soviet denunciation of the Pact in 1945, that the government of the U.S.S.R. would (what in any event it was bound by the very terms of the Pact to do) faithfully observe it until its expiration date of April 1946; notwithstanding which the Soviet Union, without having or professing to have any reason therefor except the request of America and Britain, suddenly attacked Japan in August 1945 at a time when there was no pending issue of magnitude between the two countries, but when there was pending Japan's request to the U.S.S.R. to mediate on its behalf for a termination of the Pacific war. Despite repeated German demands after June 1941, Japan had consistently refused to enter the war against the U.S.S.R. The declaration of war by the U.S.S.R. against Japan was delivered to the Japanese Ambassador in Moscow, with the assurance that his cables reporting it would be forwarded to Tokyo. The cables were never received in Tokyo, nor did the Soviet Ambassador in Tokyo make any effort to deliver a declaration of war until hours after the military actions had begun.

Evidence relating to the Anti-Comintern Pact will be presented by Mr. Owen Cunningham.

CHAPTER 11: OPENING STATEMENT, PACIFIC DIVISION

Presented by Takahashi Yoshitsugu on August 4, 1947 (Session 242)

The Pacific Division covers Japan's war against the U.S. and Great Britain. The U.S. created its own interpretation of the Pacific War for political purposes, which it then proceeded to disseminate. That interpretation was: Under extreme provocation, i.e., aggressive acts of totalitarian states (Japan, Germany, and Italy) that had entered into a military alliance (the Tripartite Pact), the Allied nations, champions of freedom and democracy, were forced into a defensive war. This interpretation is more or less correct as far as Germany is concerned. But it makes absolutely no sense to apply it to Japan. Perhaps for that reason, the prosecution attempted to censure Japan for having industrialized, on the grounds that that industrialization was a long-term plan whose objective was aggressive war.

Takahashi's opening statement is a rebuttal of that charge. In his cogent argument, he explains that the Japanese economy was not sufficiently robust to engage in a long-term war. On the contrary, it was on the verge of collapsing due to increasing economic pressure from the Allied powers, which commenced in 1931. Had it not been rejected, Ishibashi Tanzan's affidavit, replete with detailed information and statistics, would have provided strong support for Takahashi's statement.

I shall now deliver the opening statement with reference to the Pacific War Phase.

Mr. President and Members of the Tribunal:

We now move into the final phase of the general defense which concerns the events relating to the Pacific War. The evidence to be presented will establish that Japan and these accused, acting in their representative capacities, did not wage a war of aggression but in reality were involved in a conflict of self-defense which jeopardized national existence. Much of the matters to be related will drive at the prosecution charge that this was a premeditated and long-prepared war. And in so destroying this allegation it will be clearly established that the resultant hostilities were against the wishes of the accused.

For expediency and because of its logical sequence, the defense has divided the matters to be presented now into separate sub-divisions, each of which will be preceded by a concise and enlightening opening statement.

The prosecution claims that Japan's industrialization was planned and pointed for aggressive war. As opposed to this our evidence will show the following state of facts. Japanese industrial economy was conceived out of necessity; developed in accordance with civilian requirements and, only as a last resort and after she found herself involved in war, the necessary part thereof was converted for war usage.

A proper understanding of Japan's industrial development will necessitate the presentation of background matters showing Japanese economic conditions which necessitated industrialization for her survival. As the years rolled by the population increased and the land became insufficient to support the people. Various measures undertaken to overcome its economy of scarcity failed to alleviate this condition, and industrialization was the natural result. Japan, being an island nation, however, with a paucity of resources, it became imperative for her to import raw materials and manufacture them into finished products for export. This, of necessity, required dependence on trade with other nations and the reestablishment of credits abroad.

It will further be shown that from 1931 onward, through the medium of high tariffs, import restriction regulations, quota systems, surtaxes and trade blocs, the freedom of Japan's international trade was impeded. Economic pressure increased in severity with each passing month culminating in the violent reaction of December 7, 1941. These encroachments on the Japanese right of economic intercourse with the other nations of the world most bitterly expressed themselves in July 1941 with a complete blockade of Japan's import and export trade in those areas outside of East Asia. It was recognized by many in Japan at that time that a continuation of this blockade spelled economic ruin.

Paralleling this economic strangulation, a policy of military encirclement of Japan was steadily being pursued by the Western Powers. Commencing with naval rearmament, followed by the mobilization of the manpower of America for both the production of armaments and weapons of war and for the conscription of Army and Navy personnel, the United States feverishly made preparations for war with Japan.

With the Russian Five-Year Plan hanging as an ever-present menace over Japan's head, the United States, pursuing its policy of interference in the conflict between Japan and China, not only gave all-out aid in the way of materials and money but also actively aided Chinese fighting strength by the back-door procedure of providing aerial assistance and military advice to the Chiang Kai-shek regime. Troop reinforcements were being concentrated in the Pacific. Fortifications were being strengthened and new ones constructed. Waters surrounding strategic island positions were being mined, and Singapore had been fortified beyond the necessities of ordinary defense. The United States was not alone in her plans for war against Japan but had consulted for a number of years with Great Britain and the Netherlands, with the resultant effect of having formulated elaborate plans for future hostilities. This then was the picture of events from the Japanese point of view.

To escape the imminent danger of extinction as a power threatened by these economic and military measures, Japan earnestly sought a way out by peaceful means. From early 1941 diplomatic negotiations were intensively carried on by three successive Japanese cabinets. Japan exerted every effort to achieve a pacific settlement of matters in dispute, even going to the extreme of twice changing her government to further the negotiations.

Throughout the prolonged and complicated diplomatic efforts, conditions continuously worsened. The military high command, faced with the almost certain fact of a complete disruption of diplomatic negotiations and the ultimate failure of pacific solution to the difficulties involved, insisted that if war was inevitable, that war should be commenced without delay, before the full effect of allied economic warfare against Japan should have resulted in depletion of Japanese reserves and before Japanese power to defend herself vanished. To this end, the government was strongly urged to reach a decision as to whether they could achieve by negotiation the ends so greatly desired by the nation. Realizing the reasonableness of this request of the Military High Command, the Government renewed its efforts by advocating further concessions.

In July 1941, after Japan sent troops into Southern French Indo-China by virtue of agreement for a common defense with the Vichy Government, American, British and Dutch reaction expressed itself in the freezing of Japanese assets and the temporary suspension of the American-Japanese negotiations. By these events, relations became strained almost to the breaking point and change from possibility of war to probability of war was felt on both sides of the Pacific. Thus while the Government was discharging its duties in the diplomatic field, the Military High Command was charged with the responsibility of providing prudent and adequate military safeguards predicated upon the probability of a complete collapse of diplomatic negotiations. Although the highly trained and competent Japanese military command could have, at any time, prepared operational plans against the Western Powers, the evidence will show that even when circumstances dictated that danger of hostilities was imminent, no preparations in reality for a war against the United States and Britain had been made. It was not then until 6 September 1941 that serious steps in this regard were taken.

Diplomacy having by that date arrived at a stalemate, the Government, while still hoping for a peaceful solution, was compelled to make more definite provisions for the eventuality of war. While contingent operational plans were accordingly made, the evidence will be that, nevertheless, no decision for war was reached even on 6 September. In October, the Government again changed because of a split of opinion between the then leaders as to what course to pursue in face of the increasing diplomatic dilemma. The incoming cabinet undertook to and did reexamine the situation with a view to bringing the negotiations to fruition. By that time international relations had reached such a point that the best of intentions and sincerity, together with the making of all possible concessions by the Government, could not avail to save the situation. Every possibility of saving the situation was thoroughly studied in the Liaison Conferences, and formula after formula based on them was tried. Although the Military High Command could not agree to the immediate and total withdrawal of forces from China in face of the tremendous sacrifices thus far made to achieve settlement of that problem, the government as the result of feverish endeavors finally succeeded in obtaining the consent of the Military High Command to the Proposals A and B as presented to the United States Government.

The 26 November note from the United States to the Japanese Government was accepted as an ultimatum and brought a virtual end to the Japanese hopes of a pacific settlement of the issues confronting them. That the American demands could not be accepted by Japan was apparent not only to Japanese leaders but to the American authorities and others as well. The United States and her Allies knew that for Japan to accept the conditions therein laid down would have meant

literally her disappearance as a power militarily, industrially and commercially. What hopes for peace remained in the minds of the governmental leaders of Japan at that time died after the receipt of this unyielding dictate from the United States. When on 1 December 1941 Japan, hope all but abandoned, decided on war, it was a decision long anticipated by the United States. The attack which followed a week later proved the correctness of the opinions of the highest American authorities as to what the natural consequence would be. That the final Japanese note to the United States was not delivered until after the attack on Pearl Harbor and other points was not the result of intention or design on the part of the Japanese authorities but resulted from circumstances in Washington beyond the control of any of these defendants.

The defense has elected to present both the Army and Navy picture relative to their participation into the vital matters at issue before this Tribunal. The prosecution has represented that preparations for aggressive war were made by the Army from 1932 onwards, with the final objective of waging war against the United States and Great Britain. Substantial proof will show the fallacy of this allegation. The evidence will be, as previously stated, that no plans or preparations reflecting this objective were made prior to 6 September 1941. Before that time, as was the universal custom among nations, annual operation plans were drafted against hypothetical enemies. These plans were of purely military and technical nature. Moreover, Japan was fighting in China. She was menaced by a huge and powerful Army in the North; with nations around her creating large armies and greater navies. She was threatened from every direction. The evidence will reveal that even though Japan desperately needed oil and supplies for her civilian economy she was at the same time warned that if she moved south in quest of it, it meant war. The military leaders of Japan were faced with the duty of carrying out their obligations to their country, of providing for her national security. Although utilizing every means to achieve a peaceful solution by the diplomatic negotiations before mentioned, it was only prudence on those responsible to prepare for the eventuality of war in the event other measures for peace failed.

In order to comply with the military needs then presenting themselves, the Army was compelled to extract troops and materials from various units in Manchuria and Japan proper, and especially from China where actual hostilities were in progress. The evidence to be presented will, we submit, clearly indicate lack of preparedness and lack of planning on the part of the Army for purposes alleged by the prosecution, and that operational collaboration with the Axis powers was non-existent.

The organization of the Japanese Navy, together with its chain of command, will be duly explained and proven. In refuting certain charges of the prosecution relative to the part played by educational propaganda for war, as so alleged, certain matters will be revealed touching upon the training and teaching of naval personnel. The Washington and London Naval Conferences which have been the subject of considerable evidence thus far adduced against the accused will be treated with emphasis on the sincerity and reasonableness of Japan in supporting the proposals there made.

The prosecution allegation and proof adduced thereunder, that the so-called mandated islands were fortified by Japan prior to the outbreak of hostilities and in violation of covenant provisions will be totally refuted through the production of witnesses testifying as to the actual status of affairs in these areas.

It further will be shown that there existed a cleavage of thought between the Army, Navy and civilian officials as to the course of conduct to be followed in dealings with the United States and Great Britain as well as other countries. In portraying this disunity in military circles, the striking impossibility of a conspiracy to wage aggressive war through a combination of mutual intent will be shown.

Regarding naval preparations for war, the evidence will be that naval advisors exercised their inherent right to provide adequate naval defense for a nation entirely surrounded by water and that its actions in improving and modernizing this branch of the armed forces was not inconsistent with the actions then being taken by all of the other great powers of the world. It will be shown that the attack on Pearl Harbor was not long in preparation nor was it a premeditated act indicating aggressive tendencies. Rather it was adopted to meet the current situation and reveals a desperateness of thought regarding war with the great Western Powers in face of the overwhelming odds confronting Japan from a military viewpoint.

The thought that, in so far as naval action was concerned, Japan collaborated with Germany for the purpose of waging a war or wars of aggression will be utterly dispelled by the testimony of Chief German Naval Attaché in Tokyo during this period.

The defense will produce documents and witnesses to show that the Japanese Government and leaders of the High command lived up to the benevolent and chivalrous spirit and that violence and mistreatments to prisoners of war and the civilian population were furthest from their wishes. It will be established by competent evidence that neither the Japanese Government nor the accused ever permitted or condoned such offences.

Relative to the treatment of prisoners of war, Japan was bound by the Hague Convention of 1907 and by the Red Cross Convention of 1929. While not having ratified the Geneva Convention of 1929 and hence not bound by it, Japan gave notice of its intention to apply *mutatis mutandis* the provisions thereof to prisoners of war under its control, and also as far as possible to interned civilians. It will be shown through army and navy regulations and excerpts from exhibit 1965 that at no time was there any regulation issued which could even be remotely considered prejudicial to the welfare and well-being of prisoners of war and civilian internees.

Evidence will be further adduced to show that the problem of supplies and transportation, as a result of unrestricted submarine warfare and allied bombing, were the primary cause for the suffering not only by prisoners of war and civilian internees, but by Japanese soldiers as well. It will be shown by witnesses that instances of suffering and mistreatment were isolated, and that prisoners of war and civilian internees were given equal treatment with Japanese soldiers.

Just as various defendants had opposed the commencement of war but had agreed to it only as a last resort measure of self defense, so during its progress it was believed by some that the war must be ended as soon as possible, and some of them in various ways made attempts even as early as 1943 to bring about its termination. By the spring of 1945, when the SUZUKI Government came into office, some of the ministers entered it on the understanding that the government would attempt to bring about the end of the war. The attempts which had been made, through the U.S.S.R. and otherwise, prior to July were unavailing. The issuance, however, of the Potsdam Declaration gave rise to very serious dispute in the highest circles of Japan concerning the continuation of the war; and in the end, after much violent debate, decision to accept the Potsdam Declaration was reached on the basis of the interpretation made by Japan of the conditions contained in that declaration. Japan, therefore, announced her surrender on 15 August 1945, and the Instrument of Surrender was signed on 2 September.

The evidence in this general phase, then, will show that Japan was not engaged in preparing and waging any war of aggression or in deliberate violation of any existing international treaties and conventions; and that the complex state of international relations existing at the time of the opening of the Pacific War furnished ample support and reasonable grounds for the decision of Japan that it was inevitably driven, notwithstanding strenuous efforts to maintain the peace, to wage a war of self-preservation and in self defense.

These are the facts which the evidence to be adduced will establish. Evidence later to be introduced on behalf of the defendants individually will clarify the connection of those individuals with these states of facts and what actions each of them took or proposed as a result.

Mr. Logan will now proceed with the presentation of the initial subdivision of this phase.

CHAPTER 12: OPENING STATEMENT, PACIFIC DIVISION, SUBDIVISION 1: TRIPARTITE PACT

Presented by Owen Cunningham on June 12, 1947 (Session 236)

As readers will note, this portion of the opening statement is relatively brief and to the point. The Soviet prosecutor had argued vehemently (and ludicrously) that the Anti-Comintern Pact (the precursor of the Tripartite Pact) concluded between Japan and Germany was a demonstration of the former's intention to take aggressive action against the USSR. But no military action on Japan's part resulted from the Pact, not against the USSR (Japan actually refused several requests from Germany to open hostilities against the Soviet Union) or any of the other Allied nations, for that matter. Cunningham asserts that the Tripartite Pact did not foster close cooperation among Japan, Germany, and Italy (each nation fought separate wars) anything like that among the Allies. His argument is eminently legitimate; he speaks the truth.

Opening statement, Tri-Partite Pact, Pacific Division V, Sub-Division 1: The Tri-Partite Pact was concluded between Japan, Germany and Italy on 27 September, 1940.

The prosecution alleged that it was an extension or revival of the abortive negotiations for the so-called "strengthening of the Anti-Comintern Pact," which were conducted between the three countries in 1938 and 1939, and that "this pact in its essence contained the ultimate development of the plot of the aggressive powers directed toward the division of the world and the establishment of the so-called "new order." We will show, if permitted, first: That the Japanese government completely broke off the negotiations for the "strengthening of the Anti-Comintern Pact;" second, the German-Russian Non-Aggression Treaty was concluded on 23 August 1939, and that this treaty caused such a great shock in Japan as to bring about the downfall of the HIRANUMA Cabinet. As a result, the Japanese-German relations broke off completely (extreme anger and irritation felt by the Japanese Government and the military at this bad faith of Germany was the cause of this rupture in relations.)

There was no continuity as alleged by the prosecution in the relations between Japan and the two countries of Germany and Italy. This will be conclusively shown.

This point will be corroborated by presenting the documents to show that the Cabinet of ABE and YONAI, which succeeded the HIRANUMA Cabinet, took up as the primary aim of their foreign policy, the improvement of Japanese-American relations. They made every effort to attain this objective and that the Japanese-German relations during the period remained extremely cool. The efforts of Japan were not reciprocated by the United States. Economic pressure upon Japan increased by the United States and other countries after the expiration of the Japanese-American Commercial Treaty.

The German victory in Europe in May 1940 gave Japan reason to fear the emergence of Germany in East Asia as successor to France and the Netherlands. The coolness of the Japanese-German relations at that time did not permit any possibility of collaboration of the two countries concerning these Far Eastern problems. The prosecution has tendered evidence of Japanese-German contact concerning the question of Netherlands East Indies and French Indo-China, especially conversation between Ribbentrop and SATO, alleging the existence of collaboration. It will be proved that these facts show the contrary; non-collaboration between Japan and Germany. It will also be shown that the negotiations for the Tri-Partite Pact began in September, 1940 under the KONOYE Cabinet, and not in June of the same year as alleged by the prosecution.

The prosecution alleged that the purpose of the Tri-Partite Pact was the establishment of the so-called "new order," which had for its purpose the extinguishment of democracy throughout the world and the subjugation of all the nations by the aggressive states.

In rebuttal of this charge, it will be proved that the Japanese Government concluded the Tri-Partite Pact for the defensive and peaceful purpose of contributing to the world peace; Japan wanted ultimately to improve the relations with all countries of the world, especially with the United States of America, on the basis of equality and mutual respect. She thought it necessary, as the primary step for it, to prevent the deterioration of her political position by getting out of the international isolation which faced her at that time. After the failure of her policy of direct approach to the Anglo-Saxon countries and facing the danger of complete international isolation as a result of increasing American pressure, Japan was compelled to the conclusion that her ultimate goal, the improvement of the Japanese-American relations, could not be attained without first improving her international political situation. By joining with other countries, even if some danger should there be involved, this must be done under the international circumstances then prevailing, German and Italy were the only countries which could be used as allies. That the Japanese Government had no aggressive purpose and took every precaution in order not to be drawn into the European war as a result of the Tri-Partite Pact will be shown by the official record of the negotiations and will be the object of part of our evidence.

On the interpretation of the term "new order" it will be shown by evidence that it meant the establishment of a regional organization as part of the world peace program. It was not aggressive in its nature. It was not in violation of any existing treaties and obligations. Evidence will be tendered proving the fantasy of the allegation that leaders of Japan and Germany contemplated conquest or division of the world. As to the prosecution's charge that the pledge of mutual assistance as provided in the pact would become effective automatically, it will be proved that this was not so.

Concerning the Japanese-German-Italian relations after the conclusion of the Tri-Partite Pact until the outbreak of the Pacific War, the defense will prove that there was no cooperation by pointing out the following facts, namely, that:

- (1) Germany wanted Japan to join the war against Britain;

- (2) Germany after the outbreak of the German-Russian war, wanted Japan to go against Soviet Russia when the German Army was knocking at the door of Moscow;
- (5) Germany did not wish a Japanese-American war; Japan acted independently in the war with the United States.

Most of the evidence presented by the prosecution with respect to the Singapore question are documents of the German Government, which by their own nature are one-sided.

Skipping. then, down to the next paragraph.

The defense will tender evidence that Japan always refused in a diplomatic way German request to enter the war against Britain. These requests were contradiction of assurances given by Germany at the time of the conclusion of the Pact. It will be clearly shown that the records of various conversations introduced by the prosecution kept by the German Foreign Office were not official or accurate, and that the German leaders were not telling Foreign Minister MATSUOKA the truth when he visited Berlin in March and April, 1941.

Towards Soviet Russia, Japan strove to maintain a friendly relation in accordance with the stipulation and spirit of the Tri-Partite Pact. She emphatically refused repeated German demands to join her in the war against Soviet Russia. Evidence will also be tendered to show that Japan considered the German attack on Russia which occurred in spite of her opposition, as a betrayal on the part of Germany, and considered that the very foundation of the Tri-Partite Pact was shattered by this act of Germany.

The prosecution has pointed to the Japanese occupation of French Indo-China as instances of Japanese-German collaboration. It will be shown, that in the solutions of these problems Japan did not utilize German pressure on the French home Government.

Japanese-German relations experiences further set-back when the Japanese Government entered in informal negotiations with the United States in April 1941. Germany entertained doubts as to Japan's intentions, and requested that Germany be informed of the facts about the negotiations and be permitted to participate in them, but Japan did not comply with this. Evidence will also be tendered on this point.

The circumstances which compelled Japan to decide the war with the United States of America will be clarified thoroughly in other sub-divisions of this phase.

It will be shown that the Japanese decision resulted from consideration of self-defense, independently of any exterior influences, not to mention any consultation with Germany and Italy, and that Japan did not accept any assistance or help from the two countries in setting up her plans of military operations. On the contrary, Japan kept her decision to fight strictly secret, and the attack on Pearl Harbor was most complete a surprise to Germany, to which fact evidence will be tendered. It will also be shown on the other hand that German declaration of war on the United States of America was not connected with the Tripartite Pact, and Germany considered herself to be de facto in a state of war with the United States since the "shoot at sight" order of President Roosevelt in September 1941.

Convincing evidence will be tendered not only from Japanese and German, but also from Allied sources, as to the fact that Japanese-German-Italian relations during the war were not close, making the military convention practically valueless, but in contrast to the intimate cooperation of the Allied side, politically, economically and militarily, Japan and the two countries of Germany and Italy in fact fought separate wars.

It should be observed by the Tribunal that the effect of the Italian relationship with Germany and Japan is ignored in our presentation of the evidence. History has already shown that Italy was impotent and a useless ally, and even in the optimistic evaluation of her aid in any cause the result would have to be nil. The fact that she surrendered in 1943 and that Germany surrendered in 1945 and that Japan surrendered later precludes any necessity of justifying or explaining No-Separate Peace Pact mentioned so often by the prosecution in their evidence.

With the permission of the Tribunal I present documents and witnesses supporting this brief statement.

CHAPTER 13: OPENING STATEMENT, PACIFIC DIVISION, SUBDIVISION 2: ALLIED PRESSURE AGAINST JAPAN

Presented by William Logan on August 4, 1947 (Session 242)

The prosecution presented its evidence in chronological order. Therefore, Logan's presentation for the defense should have followed Cunningham's statement relating to the Tripartite Pact (as it does in this book). But it was read immediately after Takahashi had finished presenting his statement, because it was relevant to and elaborated upon that statement. Earlier, Franklin Warren had argued, and credibly so, that the 10 years of unrest in Manchuria was not the cause of the Mukden Incident (and later, the Manchurian Incident), but longstanding, rampant lawlessness. Similarly, Logan asserts that it was not the attack on Pearl Harbor that ignited the "powder keg of war" between Japan and the U.S., but unrelenting Allied economic pressure on Japan. He refers to Plan Orange (now well known in Japan through a recently published translation). Nearly 50 years before war broke out, the U.S. had been formulating a meticulous military strategy against Japan. Japan, on the other hand, had not even begun to conceive of waging war with the U.S. until 1940, about a year before hostilities commenced. It should be obvious to readers which nation provoked the war — which nation was the first to contemplate war with the other. As Logan develops his argument, he cites statistics that fully supported his factual evidence. Ishibashi Tanzan's affidavit (see Chapter 16) would have supported Logan's carefully crafted, articulate statement, had the IMTFE not refused to admit it.

If the Tribunal please, we now present a statement for the Tribunal's consideration in order that it may be the better enabled to understand in detail the proof about to be offered of the Japanese view of Allied pressure against Japan. The principal object is to show the effect on Japan of the economic legislation which was passed by the Western Powers commencing in 1930, in disregard of the rights of others, and that in the years immediately preceding Pearl Harbor the economic and military pressure of the Western Powers was deliberate, premeditated, and coordinated, and they acted with full and expressed knowledge of the consequences — war. As an affirmative defense it will be shown that the situation became so increasingly oppressive and acute that, true to expectations and desires of the Western Powers that Japan strike the first blow, Japan ultimately was forced to make a decision to fight for her very existence. History alone will decide in the years to come whether in the larger sense that hope was justifiable in view of the results. But we are concerned here with the means used to obtain the immediate end of provoking Japan into a state of war.

A proper conception of the effects of the pressure applied first requires an understanding of the domestic economic conditions in Japan as they existed for some years prior to December 7, 1941. These conditions will demonstrate why Japan established a civilian, industrial economy. After the presentation of those conditions we will then present evidence relating to the paralyzing impact of the economic pressure applied by the Western Powers and lastly the military encirclement of Japan.

As the Tribunal will readily understand, this subject covers a large field and deals with many conditions of a specialized nature. Counsel has made every effort to obtain the best evidence and to narrow the volume of evidence consistent with a fair understanding by the Tribunal of the magnitude and true facts of the subject. Some of the evidence consists of expert studies made by the United States Tariff Commission and the United States Department of State, and, in so far as such studies are confined to factual statements supported by the statistical tables, they are heavily relied upon by the defense. Other evidence from Japanese sources is based on the testimony of experts and expert economic studies and are urged by the defense as entirely reliable and persuasive. Undisputed records from the Pearl Harbor Investigation Report of the Joint Congressional Committee of the United States will also be offered.

The following facts constitute the evidence we will present. Japan is a rugged, mountainous country of approximate size of the State of California. Not more than 16 per cent of all the land area in Japan is arable and much of the arable land is subject to a slope of 15 degrees or more, which makes agriculture extremely difficult. It was early recognized by the Japanese Government that, in the face of a large increase in population annually, the arable land available in Japan was not sufficient to support its people. The population of Japan proper increased from 37,689,000 in 1884 to 73,114,000 in 1940. Within the past decade the population has been increasing by approximately 800,000 to 1,000,000 persons a year. It has a greater density per arable square mile than any other country.

A solution of Japan's population problem was undertaken by the Government. An attempt was made to increase the food supply by expanding the area of arable land and a certain amount of success was obtained in this direction. A second measure was undertaken by encouraging agricultural development in Korea and Formosa which also met with a certain amount of success. The third method of improving the situation, by emigration, was encouraged but it proved a failure, one of the principal reasons being the bars erected by many of the Western Powers. The last policy adopted by Japan was domestic industrialization and foreign trade. In connection with the industrialization, evidence will be presented of industries which are native to Japan and those producing commodities of the kind that have been introduced from Western countries.

The development of industrialization in Japan was a gradual process. It was not a creation pointed towards militarism nor geared for conversion into militarism. Because Japan is an island nation with a deficiency in practically every mineral and other raw material resources to support a normal civilian economy, those materials had to be imported from many regions of the world for manufacture and exportation as finished products. It was necessary to sell in export markets in order to obtain the necessary foreign exchange to pay for these vital imports. Japan was practically and substantially limited in what it could buy for importation by her sales in the export markets. Thus the ability of Japanese industry to expand was automatically limited by the foreign exchange situation which was always acute for the period of at least 1925 to 1940. Japan had no cotton, negligible quantities of wool, no metallurgical coal, practically nothing in the way of cattle and hides, no rubber, no iron ore containing a substantial percentage of iron content, insufficient quantities of copper, no tin, zinc, bauxite (principal raw material for making

aluminum), insufficient food production, serious deficiency in timber and building lumber, and in many respects it was economically vulnerable both from the standpoint of maintenance of an ordinary civilian economy and livelihood of the people on the one hand and a modest potential for self-defense on the other.

The studies to be presented will show the production, imports, exports and the consumption of the pertinent industries in Japan between the years 1928 and 1939, and for comparative purposes, in some instances, will be carried through the year 1945. These studies include industries, among others, which have a direct bearing upon the civilian economic potential and for self-defense as iron and steel, oil, cotton, wool, rubber, hides, metallurgical coal, iron ore, scrap iron, copper, lead, zinc, cement, food, timber, electrical equipment, tanks, aircraft, trucks, bicycles, shipbuilding and the shipping industry. The industrial potential Japan possessed at the time of Pearl Harbor barely adequate for the support of a modest self-defense and the requirements of a poverty stricken civilian economy which had virtually been living a hand-to mouth but progressive existence for at least twenty years.

Figures will be presented showing the production of iron and steel between 1928 and 1945; the amounts allocated in various years to the Army and Navy; the approximate amount of iron ore on hand December 7, 1941, and the iron content of the ore; the fact that in 1932 Japan had the lowest per capita consumption of iron and steel of any of the principal nations; that during the period 1931 to 1941 Japanese production of iron and steel was woefully insufficient compared to the production of the U.S.S.R., Germany, France, England, and, of course, the United States. At the time of Pearl harbor the total annual production of the Japanese iron and steel industry was less than the total monthly production of the United States alone. At all times prior to December 7, 1941, Japan was entirely dependent on the United States, Netherlands East Indies and Burma for the supply of petroleum. Facts and figures will be introduced to show the true condition of the shipbuilding industry in Japan; the scrap and build program; the reasons for government subsidy which paralleled subsidies granted by other leading nations of the world; the conditions of unemployment in the shipyards and other industries during the depression; the fact that Japan never had an excess of bottoms and that the merchant fleet was not designed or constructed for the purpose of war against any nation; that the merchant and fishing tonnage was not at any time excessive in view of the fact that Japan is an island nation whose population in the main resides principally along its sea coast and relies upon seafood for sustenance; the total truck and trailer production of Japan was absolutely infinitesimal compared with that of other leading nations of the world; that its tank production at all times prior to 1941 was insignificant and that Japanese armored divisions had only one-fifth as many tanks and motorized equipment as an American armored division and one-third the motorized and tank strength of a German division. 1935 marked the humble beginning of the aircraft and aluminum industry in Japan. She was unable to produce sufficient aircraft of her own design until 1937 and that [sic] its production up to December 7, 1941, was pathetically weak.

In the two decades before 1941, Japan was unable to produce or sell in the export markets of the world virtually anything other than cotton textiles, raw silk, rubber goods, canned sea food, toys, pottery, pencils, matches, electric light bulbs, agar-agar, and a few other minor items. From 1932

to 1940, however, Japan was a substantial exporter of machinery, tools and other commodities which would ordinarily be stockpiled in this precarious economic situation of Japan if there had been a plan for large scale war.

The world wide depression seriously impaired the market for raw silk and other exports of Japan. Economic nationalism which became progressively rife in the world after 1930, among other factors, precipitated Japanese export-import trade into a struggle in order to procure the raw materials necessary for the export industry. This trade was vital and indispensable to her existence as a modern nation and the very sinews of civilian life in Japan. Following a bottom depression year in Japan in 1931, she began to recover from her depression in late 1932. At that time, when practically the entire world was still suffering from the depression, Japan was able to move some goods in old and newly acquired export markets because of lower prices. The fact that Japan was able to sell at lower prices was caused in part by lower labor costs which were not cheap by Oriental standards and by the depreciation of the Yen which occurred notwithstanding strenuous and expensive efforts on the part of the Government to stabilize the value of the Yen. A considerable amount of evidence will be directed to the expansion of governmental responsibilities in Japan over a period of years prior to 1941. It will be shown that various governmental regulations directed to selected businesses paralleled similar actions in other foreign countries and were necessary and reasonable measures taken in view of the economic exigencies at the time. Those laws were passed by the Diet. The regulatory measures which were taken prior to July 7, 1937 had no direct or immediate relation to preparation for wars. Those measures taken after July 7, 1937, when hostilities in China assumed serious proportions, were necessary and reasonable measures taken to meet the then urgent requirements.

To refute an inference from prosecution testimony that these laws were passed for the purpose of preparation and waging of aggressive warfare and world domination, the purpose of those laws will be shown by statements made by responsible governmental officials at the time the bills were introduced in the Diet. There is no reason to suppose that at that time the purposes of the bills were otherwise than as stated by their sponsors. Some of these laws were to be operative only for a period of time until one year after the termination of the China Incident. Even during the continuation of the Pacific War, the regulation of industry in Japan was not so severe or so extensive as the regulations which were promulgated and enforced in the United States and Great Britain. The economy of Japan was not a "regimented" economy in any totalitarian sense whatsoever prior to the surrender in 1945.

Commencing with the Hawley-Smoot Tariff Bill in 1930 and the Ottawa Conference in 1932, Japan began to be directly affected by legislation passed and enforced by Western Powers. Some of the governmental regulations in Japan were passed because of the foreign pressure. For example, Japan being faced with prohibitory tariff regulations in various countries with respect to cotton textiles, rayon, canned tuna fish, pencils, electric light bulbs, and so forth, was able to alleviate such action to her detriment only by voluntarily enforcing quantitative and qualitative quotas; this in turn required governmental intervention to put those Japanese export industries on a quota basis and to fairly apportion the export quota among the producers.

For at least two decades prior to 1941 Japan had the largest number of small and middle sized independent business men in proportion to population known to any country in the world. Because of this very nature of things, it was impossible at any time to channel the economy of Japan along totalitarian lines. Even during the continuance of the Pacific War, it will be shown that the government faced insurmountable problems in endeavoring to synchronize raw materials, production and labor for an efficient prosecution of the war. The economy of Japan was ill equipped and ill prepared for the China Incident of 1937 and between that date and the middle of 1941 there had been no economic preparation in Japan to fight a Pacific War or any other economic preparation which would indicate that Japan had set out to dominate the world or even a small portion thereof.

It is true that the figures between 1932 and 1937 show an increase in the production of virtually every industry in Japan. This is true of industries which have no possible relationship to a war potential as well as some of those industries which have a direct relationship and some of those industries which might be converted to wartime usage. Nevertheless, documentary evidence and the testimony of witnesses will be offered that this increased production in the main went into the civilian economy of Japan and improved the livelihood and economic situation of the people of Japan who for many years had been living on a subnormal standard compared to many leading countries of the world. To say that this increased production was a premeditated and designed preparation for a war potential is flirting with the truth.

Japan, like other nations of the world, did not desire to live in a status quo or a vacuum. Like other progressive nations, its governmental leaders have constantly sought to improve the standard of living of its people and one of the methods adopted was by international trade and industrialization. Such advance as Japan was able to make in the decade prior to 1941 in the standard of living of its people and increase in civilian consumption was an extremely modest advance and at no time prior to 1938 was the civilian consumption curtailed in order to build up a so-called war potential. Between 1938 and the middle of 1941 there was little interference by the government with ordinary civilian consumption except to the extent the government was driven to intervene in limited situations because of the international credit condition and the need to curtail nonessential imports in favor of imports indispensable to the prosecution of the China Incident.

In 1939 the Treaty of Commerce and Navigation which had been in existence between Japan and the United States since 1911 was abrogated by the United States, effective January 1940. Embargoes against exportation of materials to Japan were adopted as a policy by the United States. Month after month more and more articles and commodities were added to this list. Vigorous protests were made by Japan at this discriminatory treatment.

The military and State Department officials of the United States worked together, although often not in agreement, regarding moves against Japan. When the final July 26, 1941 economic sanctions against Japan were under serious study by the President of the United States he asked the opinion of his military heads as to the advisability of such a step. The opinion given him was definitely that "trade with Japan should not be embargoed at this time" as "an embargo would

probably result in a fairly early attack by Japan on Malaya and the Netherlands East Indies and possibly would involve the United States in early war in the Pacific.” Not only did “practically all realistic authorities” agree “that imposition of substantial economic sanctions or embargoes” against Japan would “involve serious risk of war,” but frank Japanese comment to United States State Department officials was to the effect that such action would create a situation where “Japan would have no alternative sooner or later but to go to Malaya and the Dutch East Indies for oil and other material.” This known reaction of Japan coupled with the President’s frank admission that the United States was committed to the “policy of assisting Great Britain” produces an obvious answer to the question of whether the attack on Pearl Harbor really started the war. When the freezing order finally issued on July 26, 1941, the British Empire and the Netherlands East Indies lost no time in following suit. In fact, they took similar steps immediately in violation of their treaty obligations. The terrific impact of these freezing orders was immediately felt in Japan. It was recognized that if continued for any appreciable period of time the Japanese economy would be crippled. These embargoes and freezing orders were deliberately designed to paralyze, and in themselves were capable of paralyzing within a short space of time, the entire economy of Japan. They were designed to force Japan’s capitulation in China from sheer industrial and raw material exhaustion. One of the principal commodities vitally affected was oil. Without it civilian economy and her entire national security would be strangled. Previous peaceful attempts to obtain sufficient oil from the Netherlands East Indies had failed. From the Japanese point of view those embargoes and freezing orders assumed the gravity and proportions of the denial of a right to live. The reported success of the Russian 5-Year Plan presented another threat to Japan.

The picture is not complete if it tells only of the economic isolation of Japan from the family of nations. There is more to the story. Simultaneously, the military minds of the great powers were plotting a course of warfare against “Orange.” “Orange” was in their war parlance Japan.

It might well be said the military plans against Japan reflected two philosophies which varied with the time and turn of events. The first of the plannings simply denoted great countries’ military minds performing a routine function of their profession with the actual execution of such preparations considered exceedingly remote. The second of the plannings in a later period recognized the great probability of armed conflict with Japan and expressed strategic measures to meet that situation. It might be restated to say that the initial war plans were based upon the theory “if war comes” and the second plans, dropping the conditional attitude, changed to “when war comes.” Thus it will be shown that the wording of the Indictment, “Japan continued at a feverish pace to prepare for war,” does not beg its existence of Japanese actions alone but could be applied to those of the Allied Powers. As early as the latter part of 1938 high-ranking Navy officials of the United States and Great Britain held secret conferences in London, discussing and laying plans for mutual cooperation and strategy in the Pacific against Japan. These plans were further discussed and made more definite and certain in a further secret meeting in Washington in early 1941. In addition, in American, Dutch and British conversations held in April 1941, Great Britain was organizing “subversive activities, sabotage and corruption in Japan and Japanese occupied territories” and recommended that the United States do likewise and “coordinate them with those of the British.” Great Britain also recommended at that time that the

United States follow the steps also being undertaken by her of operating Chinese guerrilla forces, armed, equipped and directed by the Associated Powers.

In addition to the formulation of war plans against Japan, it will be shown that upon the insistence of the United States State Department in 1940, the United States fleet in the Pacific was moved from California to Hawaii for no other reason than to threaten Japan into submission to American demands. It will be revealed that the tension between the United States and Japan even at this time was so acute that the commander of the United States fleet did not know whether he was being ordered to actual combat against the enemy or not.

Further, the evidence to be adduced will describe the intervention of the United States in the Sino-Japanese conflict to a degree unprecedented between non-belligerent powers. All-out aid to China became a bold policy of the United States, even though the effect of such assistance literally meant the spilling of more Japanese blood on China soil. The assistance to China took form in the granting of outright loans with little expectancy of repayment, the subtle closing of official eyes and even silent approval while American fighter pilots with American planes engaged in aerial combat against Japanese forces on behalf of China, the sending of economic and military advisors to Chiang Kai-shek and the shipments of war and food materials.

During this period the United States was not sleeping in the Pacific. Troop reinforcements were being continuously sent to the Philippines, the laying of mines in the waters surrounding this Island, the fortification of Singapore, the hurried improvement of outflung bases were in progress.

This is the picture of affairs in the Far East before the revealing day of December 7, 1941. The powder keg of war with its many fuses was plainly visible for all to see. Who lit the first fuse is all important — not which fuse set off the first blast.

CHAPTER 14: OPENING STATEMENT, PACIFIC DIVISION, SUBDIVISION 3: DIPLOMATIC SECTION

Presented by Ben Bruce Blakeney on August 13, 1947 (Session 249)

This portion of the opening statement describes the course of Japan-U.S. diplomatic negotiations, and asserts that Japan was not responsible for the breakdown thereof. The U.S. was at fault here, more because of its stubborn adherence to previously laid policy, i.e., war, than because of its refusal to compromise. We call readers' attention to two points Blakeney makes in his statement: (1) Japan's political system at the time was such that the civilian government and the military high command tended to be separate entities, with separate authority, and (2) contrary to the prosecution's view that the high command's decision to advance into southern French Indochina prompted the U.S., Great Britain, and the Netherlands to freeze Japanese assets and to break off economic ties with Japan, in actuality the aforementioned three nations had decided to impose those economic sanctions prior to the Japanese military advance.

As far as (1) is concerned, the independent authority of the military high command created serious problems, which erupted suddenly as a result of the 1930 London Naval Conference, and crippled the Japanese government during the late 1920s and early 1930s. In his statement, Blakeney stresses the fact that pinpointing responsibility for the decision to commence hostilities against the U.S. (leaving the issue of whether the opening of those hostilities was a crime aside for the moment) requires an objective elucidation of the relationship between the Japanese government and the military high command. He was wise to do so, since a relationship of this sort existed nowhere else in the world, Europeans and Americans obviously had difficulty comprehending it.

In connection with (2), when historians examine the Japanese advance into southern French Indochina and the economic sanctions imposed on Japan to determine cause and effect, even today they often look only at the chronology, and point to the hard line adopted by the Japanese military at the time, which they conclude was provocative and therefore, a fatal error. The advance into French Indochina clearly hastened the onset of hostilities, but it is incorrect to assume that it brought about a sudden change in the U.S. stance on Japan. As Blakeney indicates, the U.S. had already decided to impose economic sanctions on Japan. Documentary evidence prepared to support his argument had been rejected on August 8 at IMTFE Session 246. When Blakeney spoke on August 13, that same evidence was resubmitted. This time the presiding judge admitted it.

William Logan makes the same point during the defense summation (see Chapter 17). Unfortunately, historians failed to notice the events that transpired in the courtroom. Instead, the prosecution's views became established fact. Historians never examined evidence proving that American economic sanctions preceded the Japanese advance into French Indochina until *Defense Evidence Rejected by the IMTFE* was published.

I now open the sub-division of the case, which, for convenience, we have nominated the Diplomatic Section.

The Tribunal having had presented to it the evidence of Japan's internal conditions, and of the course of Far Eastern history during the decade preceding the fateful year 1941, we now come to grips with what may well be called the most momentous events of modern history — the straining and final breaking of relations between Japan and the other great Pacific powers, the United States, the British Empire, and the Netherlands. We have now by seeking for the truth in connection with these events, by attempting to disclose fully why and how war came, to assist the Tribunal in determining whether these twenty-five men in the deck have earned a stigma of guilt for bringing or conspiring to bring that war about as a war of aggression.

The Tribunal has already received evidence explanatory of some aspects of the unique and complex Japanese governmental and political system — not the least recondite point of which is, from the Occidental point of view, the interrelation between the civil and the military authority. To assist the Tribunal in understanding what is to follow and in correctly determining what men were responsible for the decisions — be they criminal or justifiable — which led to the clash of arms here under investigation, we shall offer additional evidence in clarification of the respective prerogatives and powers of the civilian government and the military high command. This evidence will show that in the Japan of those days, in operational military matters the high command — the general staffs of Army and Navy — were supreme and omnipotent, having power to decide without accountability to the government all questions of military strategy and related matters. The government had of course full authority over non-military matters, and the Army and Navy Ministers, as members of the government, had some authority over military matters, so far as those were of administrative nature; but where the two spheres impinged upon each other no action could be taken without the concurrence of the high command, which was thus enabled, on the plea of the necessities of national defense, to exert a powerful influence on affairs of state.

With this as a background we shall come to consider the long course of negotiations between Japan and the United States, acting for herself and her allies, which was designed but failed to avert the war which in the end came on 7 December 1941. The Tribunal will be reminded that relations of Japan with the United States and Britain had gradually changed for the worse since the Manchuria Incident; and that beginning at about the time of the abrogation of the Japanese-American Commercial Treaty in July 1939 the process of deterioration was much accelerated. The unabated continuance of the China Affair; the abrogation of the Commercial Treaty; the move into French Indo-China; the Tripartite Pact — these were the mileposts of the road to 1941, a year which opened with relations between the two countries at their worst of the century.

It was into this atmosphere that the new Japanese Ambassador, Admiral NOMURA, was projected when he arrived in Washington in early 1941. The evidence will be that he arrived with instructions to work for the betterment of relations, although with no specific plan; but that soon after his arrival the President and the Secretary of State of the United States on several occasions

invited him to the commencement of negotiations with a view to effectuating a general settlement of all the pending questions between the two nations. The Ambassador reported on 17 April that the American authorities had offered to commence negotiations upon the basis of a tentative draft of understanding, prepared by private individuals, Japanese and American, which they presented to serve as a starting-point.

We shall show by the evidence of Prince KONOE himself, then Premier of Japan, that upon receipt of advice of the American proposal and draft the government and the military high command gave the matter the most earnest consideration, thoroughly debating the various questions raised by the proposal, and finally agreed that such negotiations as those proposed offered the best prospect of establishing a peace not only in the Pacific but throughout the world. After study of the details, a counter-draft was accordingly made. It being presented to the United States Government on 12 May, the negotiations based on these and later proposal, between Ambassador NOMURA (later assisted by Ambassador KURUSU) and the American representatives, as well as the authorities in Tokyo, continued for over six months.

The details of these negotiations, so far as they are pertinent to the issues of this case, will be shown by evidence, which however it is unnecessary to detail here. It may be said that in general that evidence will be that the conversations in Washington soon narrowed the important differences between the parties to three: the question of equal commercial opportunity in China; the stands of the respective nations on the extent of the right of self-defense (including Japan's obligations under the Tripartite Pact); the question of the stationing of Japanese troops in and their withdrawal from China. It was on these issues — later complicated by that raised by the Japanese advance into Southern Indo-China — that the negotiations continued to the end.

The evidence will be that in the almost daily conversations held throughout May, June, and early July between Japanese and American representatives there was thorough discussion of every aspect of the questions at issue. The evidence will show that despite good will and concession in some matters on each side, the parties stood by the end of September approximately on the ground which they had occupied in May. Meanwhile, however, there had occurred in Europe an event which had a far-reaching influence in Japan and in America, that of 22 June. The outbreak of the Russo-German war resulted in a decision by government and high command of Japan not to participate; but at the same time the government had to yield to the high command's insistence on moving into southern French Indo-China. This advance, which took place in accordance with the France-Japanese agreement of 21 July, led the United States to discontinue the negotiations for a time, and will be shown to have been the turning-point, the point at which the United States, losing interest in the negotiations, seemed to have decided that war was but a matter of time. An immediate sequel to the Indo-China move was the American, British and Dutch freezing of Japanese assets and rupture of commercial relations with Japan; but the evidence will show that that move had been under contemplation by the United States since some weeks before.

On 16-18 July the second KONOE ministry resigned and the third was formed. This change of government will be shown to have been directly and wholly brought about by the necessities of reaching an agreement with the United States — the negotiations were not progressing, and it

was felt that a change of foreign ministers was required to further them. The new cabinet continued with the attempt to bring about an agreement. Not only were new proposals offered, but Premier KONOE, taking up and elaborating a suggestion contained in the original draft proposal, urged that a meeting be held between him and President Roosevelt for a *tête à tête* from which there was every reason to expect much. To this suggestion — which the premier had been able to make on some conditions proposed by the Army — to this suggestion the American authorities at first responded with some enthusiasm, but they later imposed so many conditions for the meeting that it could never be realized.

By August the pressure of the Army authorities upon the government for a quick settlement of the Japanese-American relations had become too powerful to be any longer resisted. The United States, it was argued, was insincere in negotiating; she had no real intention of agreeing; if Japan yielded on the points at issue then, the United States would impose further measures of oppression; and it was useless longer to negotiate, and better to go to war in defense of the nation than to yield. This position was opposed by the Government, which urged that further concessions could and should be made to preserve peace; the Navy at this time was reluctant to see the nation embarked upon a war, but entrusted the decision to the premier rather than openly opposing the Army's stand. At the Imperial Conference of 6 September the decision was arrived at that unless a settlement by diplomacy could be reached by mid-October war would be resolved upon.

The government redoubled its efforts; Premier KONOE urged anew the promise held out by the meeting with the President; a new proposal, embodying the maximum concession which could be agreed upon, was presented to the United States; Foreign Minister TOYODA began consultations in Tokyo with the American and British Ambassadors to insure that every possible effort should be made. Despite all, the negotiations did not prosper; the United States remained unconciliatory and adamant and, as reported by Ambassador NOMURA, seemed determined on maintaining its stand even if it meant war. The Army renewed its insistence that diplomacy, having little prospect of success, must give place to arms; the opposing points of view could not be reconciled; and on 16 October the third KONOE government, like its predecessor, fell, a victim of the Japanese-American question.

The emergency of the successor cabinet, that of General TOJO, was widely regarded as evidence of the victory of extremist opinion in Japan. That, on the contrary, the new premier was charged to and did immediately upon taking office undertake reexamination of the whole question of Japanese-American relations, 'wiping the slate clean' of the Imperial Conference decision of 6 September which had established the limit beyond which Japan could not go by way of concession toward America, will be shown by the evidence to be adduced. The highest officials of government and high command plunged at once into a round of Liaison conferences at which the whole subject was minutely restudied with a view of finding the utmost concessions which could be offered. It having been understood from Ambassador NOMURA's reports that a basis for agreement concerning the other two large questions had been obtained, the Liaison Conference devoted the most of its consideration to the problem of withdrawal of troops from

China, the Army's intransigence in connection with which had caused the fall of the KONOE government and had brought the negotiations in Washington to a stalemate.

During this period the position of the Army high command remained that which it had been before: That there was but a faint prospect of successful conclusion of the negotiations, and that Japan would therefore eventually have to go to war. But while negotiations dragged out interminably, so it was argued, Japan was being subjected to gradual exhaustion of resources as the economic warfare of the allied powers began to take full effect; the nation was losing its power to fight; and hostilities should therefore be commenced while Japanese fighting power was still relatively strong as compared with that of the potential enemy. The viewpoint of the Naval General Staff had come to be that if war was to be inevitable, it should be determined upon promptly. But the result was that agreement of the high command was secured to offer further concessions and to continue diplomatic efforts; but with the provisos that precautionary military preparations should go on simultaneously, and that if diplomacy failed to achieve results, a resolution for war should be taken.

The evidence will be that at the Liaison Conference of 1-2 November agreement was reached upon the presentation to the United States, in obedience to the policy so established, of two alternative proposals: One in general form, embodying such points of understanding as had theretofore been reached, together with the new concessions: The other in form of a *modus vivendi*, to be offered, in the event of American unreceptiveness to the general proposal, as a means of relaxing the tension to create a favorable atmosphere for continuance of negotiations. These proposals were approved at an Imperial Conference on 5 November, and Ambassador NOMURA was immediately instructed to commence negotiations on that basis. Ambassador KURUSU was dispatched at the same time, in accordance with a long-standing request of Ambassador NOMURA, to assist.

The first of these proposals — "Proposal 'A'", as it was designated — was duly presented to Secretary Hull and the President. At first, the evidence will show, prospects from it seemed good; but gradually the United States seemed to lose interest; it made light of the concessions agreed to with great travail by Japan, it questioned the sincerity of Japan. There seeming to be no prospect of success in that direction, the Liaison Conference authorized the presentation of the *modus vivendi*, Proposal "B". It was handed over on 20 November. Both before and after that date, the evidence will show, a variety of efforts had been made by the Japanese representatives to meet the American position on the points at issue. Meanwhile, under the limitations of the decision previously taken, and in face of the obviously mounting threat to the national existence, time was running out.

Receipt from the United States of the memorandum of 26 November will be shown virtually to have extinguished hope of preserving peace. All participants in the Liaison Conference were in agreement at last, that unless the United States could be persuaded to reconsider, Japan must resort to war in self-defense. Military preparations had, of course, been proceeding in accordance with the 5 November decision; but those preparations had been subject to countermand at any

time that an agreement might be reached, and that even after the actual decision for war was taken at the Imperial Conference of 1 December.

Liaison Conferences following the decision upon war considered and settled the manner of giving notice before commencement of hostilities and the content of that notification. Evidence will be tendered of the decision that before the opening of hostilities the United States should be notified, and that a note breaking off the current negotiations should be sent. Preparations were made accordingly and the final note was ordered delivered in Washington at 1 P.M. of 7 December. The note was dispatched to Washington and was there received in good time, but owing to delays there in the mechanical processes incident to its preparation, delivery was delayed until more than an hour after the appointed time, and consequently until after the attack on Pearl Harbor and other points in the Pacific. All concerned in the government and the Liaison Conference intended, when the matter of notice was decided, that notification should precede any attacks.

Evidence will be introduced to show that the delay in delivery of the President's message of 6 December to the Emperor was without the knowledge or authorization of the Foreign Ministry or the Cabinet, but that, on the contrary, the Foreign Ministry made every effort to expedite its delivery.

The evidence will show that the members of the Liaison Conference charged with responsibility for decision of the question of war or peace considered the final note dispatched to the United States to be in the circumstances then prevailing tantamount to a declaration of war, and a substantial compliance with the convention governing commencement of hostilities. That the responsible authorities of the United States concurred in that opinion; that the United States was amply warned of the coming of war, and in fact had anticipated that the delivery of the note of November 26 would result in rupture of the negotiations and of peaceful relations; and, lastly, that the highest military authorities of the United States expected the war at the hour that it came, will be shown by an abundance of evidence.

CHAPTER 15: REPORT FROM AMBASSADOR GREW TO THE SECRETARY OF STATE

The Ambassador in Japan Reports to the Secretary of State (Joseph Grew, U.S. ambassador to Japan)

Dispatched from Tokyo on November 3, 1941

Scheduled for presentation on August 8, 1947 (Session 246); not submitted

Grew wired this telegram to the U.S. Department of State from Japan shortly before the commencement of the Pacific War. For this phase of the proceedings, defense counsel had prepared and submitted a large amount of documentary evidence describing the situation in Japan (mainly observations of the deplorable state to which the Japanese economy had been reduced as a result of American and British sanctions). That evidence was submitted to the IMTFE, and the defense was planning to submit Grew's telegram and entries from his diary (published under the title *Ten Years in Japan*³⁶) as well. Most of the documents in the first batch submitted were rejected. The defense assumed that this telegram would be rejected also, and decided not to submit it. Grew's report is a rational, impartial assessment of the atmosphere prevailing in Japan on the eve of the war, and deserves to be read, especially by modern historians.

Defense Document 206E (114)

The Ambassador in Japan Reports to the Secretary of State (Substance)

(Paraphrase of original text prepared by the Department of State)

Tokyo: November 3, 1941, 4:19 p.m.

The Ambassador reports for Secretary Hull and Under Secretary Welles as follows:

He cites a leading article from the Tokyo *Nichi Nichi* of November 1 (reported in telegram No. 1729 of the date), adding that a banner headline declaring "Empire Approaches Its Greatest Crisis" introduced a dispatch from New York with a summary of a statement the Japanese Embassy reportedly gave to *The New York Times* regarding the need of ending the United States-Japanese economic war. Both the article and the *Nichi Nichi* editorial are believed to be close reflections of Japanese sentiments at present.

³⁶ Joseph Grew, *Ten Years in Japan* (New York: Simon & Schuster, 1944).

The Ambassador refers to these various telegraphic reports during several months past analyzing the factors affecting policy in Japan and says he has nothing to add thereto nor any substantial revision to make thereof. In his opinion, a conclusive estimate may be had of Japan's position through the application to the existing situation and the immediate future of the following points:

It is not possible for Japan to dissociate either Japan or the conflict with China from the war in Europe and its fluctuations.

In Japan political thought ranges from medieval to liberal ideas and public opinion is thus a variable quantity. The impact of events and conditions beyond Japan may determine at any given time which school of thought shall predominate. (In the democracies, on the other hand, owing to a homogeneous body of principles which influence and direct foreign policy and because methods instead of principles are more likely to cause differences of opinion, public opinion is formed differently.) For example, in Japan the pro-Axis elements gained power following last year's German victories in Western Europe; then Japanese doubt of ultimate German victory was created by Germany's failure to invade the British Isles, this factor helping to reinforce the moderate elements; and finally Germany's attack on the Soviet Union upset the expectation of continued Russo-German peace and made the Japanese realize that those who took Japan into the Tripartite Alliance had misled Japan.

An attachment to correct the error of 1940 may be found in the efforts to adjust Japanese relations with the United States and thereby to lead the way to conclusion of peace with China, made by Prince Konoye and promised by the Tojo cabinet. If this attempt fails, and if success continues to favor German arms, a final, closer Axis alignment may be expected.

The Embassy in Japan has never been convinced by the theory that Japan's collapse as a militaristic power would shortly result from the depletion and the eventual exhaustion of Japan's financial and economic resources, as propounded by many leading American economists. Such forecasts were unconsciously based upon the assumption that a dominant consideration would be Japan's retention of the capitalistic system. The outcome they predicted has not transpired, although it is true that the greater part of Japan's commerce has been lost, Japanese industrial production has been drastically curtailed, and Japan's national resources have been depleted. Instead, there has been a drastic prosecution of the process to integrate Japan's national economy, lacking which there might well have occurred the predicted collapse of Japan. What has happened to date therefore does not support the view that continuation of trade embargoes and imposition of a blockade (proposed by some) can best avert war in the Far East.

The Ambassador mentions his telegram No. 827, September 12, 1940 (which reported the "golden opportunity" seen by Japanese Army circles for expansion as a consequence of German triumphs in Europe). He sent this telegram under circumstances and at a time when it appeared unwise and futile for the United States to adopt conciliatory measures. The strong policy recommended in the telegram was subsequently adopted by the United States. This policy, together with the impact of world political events upon Japan, brought the Japanese Government to the point of seeking conciliation with the United States. If these efforts fail, the Ambassador

foresees a probable swing of the pendulum in Japan once more back to the former Japanese position or even farther. This would lead to what he has described as an all-out, do-or-die attempt, actually risking national hara-kiri to make Japan impervious to economic embargoes abroad rather than to yield to foreign pressure. It is realized by observers who feel Japanese national temper and psychology from day to day that, beyond peradventure, this contingency not only is possible but is probable.

If the fiber and temper of the Japanese people are kept in mind, the view that war probably would be averted, though there might be some risk of war, by progressively imposing drastic economic measures is an uncertain and dangerous hypothesis upon which to base considered United States policy and measures. War would not be averted by such a course if it is taken, in the opinion of the Embassy. However, each view is only opinion, and, accordingly, to postulate the correctness of either one and to erect a definitive policy thereon would, in the belief of the Embassy, be contrary to American national interests. It would mean putting the cart before the horse. The primary point to be decided apparently involves the question whether war with Japan is justified by American national objectives, policies and needs in the case of failure of the first line of national defense, namely, diplomacy, since it would be possible only on the basis of such a decision for the Roosevelt administration to follow a course which would be divested as much as possible of elements of uncertainty, speculation, and opinion. The Ambassador does not doubt that such a decision, irrevocable as it might well prove to be, already has been debated fully and adopted, because the sands are running fast.

The Ambassador emphasizes that, in the above discussion of this grave, momentous subject, he is out of touch with the intentions and thoughts of the administration thereon, and he does not at all mean to imply that Washington is pursuing an undeliberated policy. Nor does he intend to advocate for a single moment any "appeasement" of Japan by the United States or recession in the slightest degree by the United States Government from the fundamental principles laid down as a basis for the conduct and adjustment of international relations, American relations with Japan included. There should be no compromise with principles, though methods may be flexible. The Ambassador's purpose is only to ensure against the United States becoming involved in war with Japan because of any possible misconception of Japan's capacity to rush headlong into a suicidal struggle with the United States. While national sanity dictates against such action, Japan sanity cannot be measured by American standards of logic.

The Ambassador sees no need for much anxiety respecting the bellicose tone and substance at present of the Japanese press (which in the past several years has attacked the United States intensely in recurrent waves), but he points out the shortsightedness of underestimating Japan's obvious preparations to implement an alternative program in the event the peace program fails. He adds that similarly it would be shortsighted for American policy to be based upon the belief that Japanese preparations are no more than saber rattling, merely intended to give moral support to the high pressure diplomacy of Japan. Action by Japan which might render unavoidable an armed conflict with the United States may come with dangerous and dramatic suddenness.

(Excerpt from Diary of Former U. S. Ambassador Grew entitled *Ten Years in Japan*, pp. 467-470)

CHAPTER 16: AFFIDAVIT OF ISHIBASHI TANZAN

The Industrialization of Japan Was Not for Preparation of Aggressive War

Affidavit (with attachments) prepared by Ishibashi Tanzan (president of the *Toyo Keizai Shinpo* and former finance minister)

Submitted on August 11, 1947 (Session 247); rejected

The portions of the opening statement read by Takahashi Yoshitsugu and William Logan argue that at no time during the late 1920s and early 1930s did Japan plan or prepare for a war of aggression. In the first place, the Japanese economy was not sufficiently healthy to support such an effort. This affidavit (really an essay) offers solid evidence in support of this claim. Ishibashi was an eminent commentator on economic affairs, and was also lauded for his penetrating political insight. It is a superlative essay, and should never have languished for decades in a file cabinet along with other rejected evidence.

Defense Document No. 1762

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

THE UNITED STATES OF AMERICA, et al

— vs —

ARAKI, Sadao et al

Affidavit

Deponent: ISHIBASHI Tanzan

Having first duly sworn as per sheet attached hereto and in accordance with the procedure followed in my country, I hereby depose as follows:

- 1) I, ISHIBASHI Tanzan, was born in Tokyo in September 1884, graduated in 1907 from Waseda University, majoring in philosophy in the department of literature, and immediately took a post-graduate course in philosophy in the same university.
- 2) In 1908 I obtained a position on the editorial staff of the Tokyo Mainichi Newspaper Publishing Company.
- 3) In 1911 I secured a position on the editorial staff of the Toyo Keizai Shinpo Publishing Company. This publishing company was established in 1895 for the purpose of supplying

the educated classes of the Japanese people with a correct knowledge of economics and up-to-date information on world topics. It has since devoted itself to the publication of economic periodicals such as the *Toyo Keizai Shinpo* (Oriental Economic Reports) (weekly), the *Oriental Economist* (monthly, later weekly), *Nihon Keizai Nenpo* (Japan's Yearly Economic Reports) (quarterly), *Gaikoku Boeki Geppo* (Foreign Trade Monthly), etc., and also to books on economic subjects, as well as the compilation and publication of statistical books such as the *Meiji and Taisho Japan Almanac* (1927), *Foreign Trade of Japan*, a statistical survey (1935), the *Meiji and Taisho Financial Almanac* (1927) and *Toyo Keizai Statistical Year Book* (from 1916 yearly). *Toyo Keizai Shinpo* (Oriental Economic Reports) was started in 1895 after the style of the *Economist*, published in London. It is the oldest economic periodical in Japan and has, ever since its foundation, been regarded as the best and most trustworthy of periodicals in the industrial and economic world of Japan.

- 4) In 1914 I became chief of the editorial staff of the same publishing company, and in 1924, manager of the same company. In 1935, after the reorganization of the company, I became its president. For 34 years I had been most closely connected with the editing of the aforesaid *Toyo Keizai Shinpo* (Oriental Economic Reports), until May 1946.
- 5) In July 1931, I had the Keizai Club (Economic Club) organized in Tokyo and then in Osaka, Nagoya, and various other cities throughout the country, by getting together the leading businessmen of each city for the purpose of the joint study of economic questions. As chairman of the board of directors of the Central Economic Club, I took the leadership of these clubs.
- 6) From April 1925 to July 1932, I lectured on economics at the Yokohama Kogyo Senmon Gakko (Yohohama Industrial College).
- 7) In June 1943, I founded the Kin'yu Gakkai (Financial Institute) as an organ for financiers and technical experts of the country to study financial questions. Its headquarters were in the office and building of the Toyo Keizai Shinpo Publishing Company. As acting director of the Institute, I devoted myself to its leadership and the promotion of its activity.
- 8) In 1934, I started an English Magazine, the *Oriental Economist*, of which I became editor-in-chief. This magazine portrayed the economic conditions of Japan as well as of the East in general. It soon obtained many appreciative readers abroad, who considered it as the most fair-minded and trustworthy economic magazine published in Japan. Even after the outbreak of the Pacific War in 1941, and the consequent stoppage of communications with the Western countries it was, by the request of the League of Nations, continuously forwarded to Geneva.
- 9) Since 1935, representing the financial circles of Japan, I have held 21 different memberships in various committees and councils in the cabinet, Finance Office, and Commerce and Industry Office of the Japanese government.

- 10) In May 1946, I was appointed Finance Minister in the Yoshida Cabinet. In January 1947, I was appointed managing head of the Economic Stabilization Office and head of the Price Board, and on March 20, 1947 resigned from the same offices. On the resignation en bloc of the Yoshida Cabinet on May 24th, 1947, I resigned from the office of Finance Minister.
- 11) The essays I have written and published in various magazines since graduating from the university on economic subjects and others are innumerable. The following are representative of my works published in book form:

a) <i>Advocating a New Agricultural Policy</i>	July 25, 1927
b) <i>Influence of the Lifting of the Gold Embargo and Countermeasures Thereto</i>	July 12, 1929
c) <i>A Study of the Gold Standard</i>	May 12, 1932
d) <i>Theory and Facts about Inflation</i>	July 8, 1932
e) <i>Recent Economic and Financial Phases in Japan</i>	Sept. 5, 1939
f) <i>Financial History of Japan</i>	Sept. 15, 1936
g) <i>The Japanese Economy in a Revolution</i>	Nov. 20, 1937
h) <i>Impressions of Industrial Phases of Manchuria and Korea</i>	Feb. 26, 1941
i) <i>Human Life and Economy</i>	Oct. 20, 1942
- 12) I collaborated with E.B. Schumpeter in the editing of *The Industrialization of Japan and Manchukuo*, 1930-1940 (pub. 1940), which was carried out by the financial support of the Bureau of International Research at Harvard University and Radcliffe College.

1. Overpopulation and the Food Shortage in Japan

It is not too much to say that all distinctive features of Japanese economy and politics have emanated from the pressure of overpopulation. How Japan has been overpopulated may be best shown by comparing the area of her arable land with her population.

As shown in Table 1 (attached), the density of population per square kilometer on the Japanese mainland stands at 191, only slightly lower than 196 on the British mainland. However, the density of population per square kilometer of *arable land* on the Japanese mainland is 1,194, far higher than 891 on the British mainland and is eclipsing the corresponding density in any other country.

Overpopulation in Japan has become aggravated with the lapse of time as shown in Table 2. During the period from 1882 to 1939, the Japanese population nearly doubled, increasing from 37,000,000 to 73,000,000. During the same period, however, the area of arable land increased less than 35%, from 4,507,000 to 6,079,000 *chobu*. Thus, the Japanese population is disproportionately large to the small area of her arable land.

In this connection, it should be additionally pointed out that the proportion of agricultural population in the total population in Japan is exceptionally large, although it has begun to

decrease lately in Japan, as in other countries. As shown in Table 3, the agricultural population at present still accounts for 47.2% of the total population. According to the national census, the agricultural population also accounted for 43.1% of the working population in the year of 1944 (Table 4). Those population figures are compared with those in other Pacific countries in Table 5. According to Table 5, the percentage of the agricultural population in the working population in Japan is surpassed only by British Malay, and is twice as high as in the United States.

Under these circumstances, the agricultural management unit in Japan inevitably becomes small. As shown in Table 6, 94% of Japanese farmers in 1946 were cultivators of less than 2 chobu (less than 2 hectares) of arable land. Japan is not self-supplied in foodstuffs domestically. Table 7 shows how the supply-and-demand situation of rice, the staple food for the Japanese, stands. It shows that Japan proper in the past was able to meet the national demand for rice by importing from 9,000,000 to 15,000,000 *koku* from abroad.

2. Steps Taken by Japan To Combat the Aforementioned Difficulties

In order to combat the aforementioned difficulties, Japan as a whole, adopted four major policies.

In the first place, Japan attempted to bolster the food supply by either expanding the area of arable land within the country and/or increasing the per-unit harvest. Apparently Japan succeeded in attaining a certain success in these two attempts.

As Table 2 shows, the area of arable land rose from 4,507,000 chobu in 1882 to 6,098,000 chobu in 1921. From then, however, the increase has stopped. In connection with the increase in per-unit crops, the Government placed special stress on the improvement of rice. As shown in Table 8, the per-tan rice harvest, which averaged 1.536 *koku* during the years 1901 to 1905, was boosted to an average of 2.007 *koku* during the years 1934 to 1938. In order to increase the per-tan production, however, fertilizer consumption naturally rose markedly, as shown in Table 9. The increase of per-tan production, too, came to a standstill in 1939 (Table 8).

In the second place, Japan encouraged agricultural development in Korea and Formosa, and the importation from those countries to Japan of their farm products, particularly rice. Thus, Japan was eventually able to import rice from these two countries in a quantity almost enough to make up for the domestic shortage, as shown in Table 10.

In the third place, emigration was encouraged. This policy, however, proved a failure. Since the first year of Meiji (1868) up to the present, the Japanese population has increased by 36,000,000, while Japanese overseas residents numbered roughly 1,000,000 in 1938, as Table 11 shows.

In the fourth place, domestic industrialization and foreign trade were encouraged. As stated, Japan compensated for her food shortage with imports from Korea and Formosa, for the most part. Naturally, Japan was called upon to make incidental payments for such imports with industrial manufactures.

Japan, lacking self-sufficiency in foodstuffs, cannot be expected to be self-supplied in agricultural raw materials. Mineral resources, too, are poor and scanty in Japan. In order to remove the pressure of overpopulation and elevate the living standard of the people even minimally, Japan was necessarily called upon to encourage domestic industrialization and accelerate foreign trade. Such were the basic policies that Japan has adopted since the early years of Meiji.

3. The Industrialization of Japan

Gradual development of the industrialization in Japan experienced since the Meiji era can also be seen from the structure of the working people (Table 4). The 12th Table attached hereto also shows the above fact from the viewpoint of the shift in the number of workers in various industries since 1909.

According to this table, the total number of workers in Japanese industries reached 1,520,000 in 1919, a 90% increase as compared with 800,000 in 1909. Thus, during this period, industrialization in Japan progressed rapidly. But the number of plant workers in 1931 amounted to 1,660,000, showing an increase of only a little less than 10%, as compared to that of 1919. This period corresponded precisely with the depression period, which occurred after the first world war and accordingly, Japanese industries too were brought to a complete standstill. But this period of depression ended in Japan in 1931, and as a result of a reflation policy adopted since 1932, industries have experienced a boom, with the total number of workers in 1938 amounting to 3,215,000, showing an two-fold increase over those in 1919 and 1931.

The above-mentioned increase in the number of industrial workers explains, in the main, with what tempo the industrialization of Japan was carried out, and an explanation of this can be summarized as follows: The scope of industry during the period of 10 years from 1909 to 1919 was doubled, and it was the same in the seven-year period from 1931 to 1938. But industry was almost at a standstill from 1919 to 1931, so that the total number of workers in 1938 barely showed an increase — only twice as much compared with that of 1919 during a period of 19 years; in this increase there was nothing phenomenal, if a comparison be made with the progress that was made during the 10-year period from 1909 to 1919. The comparatively speedy progress experienced since 1931 means, as a matter of fact, only recovering what had been in arrears during the 10-year period preceding 1931; it was, by no means, extraordinary progress.

Now let us see what kind of industry was developed in Japan by such industrialization as mentioned above. First, the chief characteristic of industry in Japan was that of the textile industry, which had always occupied a preponderant position. In referring to the number of workers given in the 12th table, it is found that in 1938 there were 976,000 textile workers, or 30.4% of the total number of workers. If the 87,560 workers in 1938 in the rayon manufacturing industry, which is included in the chemical industry, is added hereto, the number of the textile workers would increase to 1,064,542, and their ratio to the total number of all industrial workers to 33.1%.

This ratio accounted for by the textile industry has tended to decrease gradually, from a historical viewpoint; viz., the proportion of textile workers to that of workers of all the industries is as follows: 60.8% in 1909, 55.2% in 1919, 54.1% in 1931, and 30.4% in 1938. This clearly shows a general, gradual decline.

By what, then, was this decline in the textile industry supplemented? Principally, by the metal, machine-and-tool, and chemical industries. For example, with the number of workers for each of these industries in 1909 taken into account, we see that the ratio of the metal industry was 2.3%, that of the machine and tool industry, 5.8%, and that of the chemical industry, 5.4%. But in 1919 this ratio increased respectively to 4.9%, 12.3% and 7.1%, which shows an increase, during this period, of 113%, 112% and 31% respectively for the metal, machine-and-tool, and chemical industries. From these figures it is clearly understood how great a development these three industries achieved during this period.

The development of the above three industries was retarded, however, in the period of depression covering 12 years from 1919 to 1931. Not only this, but in the machine-and-tool industry, the number of workers fell from 187,000 to 158,000 and in all industries, the ratio from 12.3% to 9.5%.

But this state of depression ended with the year of 1931 as aforesaid, and the above-mentioned three industries began to be active again. The ratios for the number of workers increased in 1938 to 11.7% for the metal industry, 26.8% for the machine-and-tool industry, and 10% for the chemical industry. Compared with 1919, however, the increase in the ratios of these three industries during the period of 19 years was 139% in the metal industry, 118% in the machine-and-tool industry, and 41% in the chemical industry. But this increase can by no means be said to be very much compared with the increase experienced during the 10-year period from 1909 to 1919.

Thus, even in 1938, the ratio of the metal, machine-and-tool, and chemical industries to all industry was 48.5%. and if we classify these as non-consumer material industries, the remaining 51.5% is accounted for by consumer material industries. Moreover, in the chemical industry is included, as aforesaid, the rayon industry (in the 13th year of Showa, the number of workers was 87,560) and, besides this, the soap and toilet article manufacturing industry (9,238 workers in 1938), and the pulp-and-paper manufacturing industry (42,597 workers in 1938). Accordingly, if these are excluded, the ratio of the non-consumer material industries goes down and that of the consumer material industries increases all the more.

In short, Japan's industrialization since the Meiji era was brought about out of the necessity for survival, and as a characteristic of a belatedly developed industrial country, we have seen Japan industrialized principally by the textile industry and other consumer material industries. It appears as if the production material industry developed with great speed since 1931, but it was due to delays in industrialization during the period between 1919 and 1931. In other words, this means only that the above delay was speedily adjusted by the influence of a business boom after

1931. This trend is considered quite natural for a belatedly developed industrial country that had to follow such a path trudgingly.

4. Growth in Trade

Industrialized Japan expanded her foreign trade at the same time. The trend of increase is shown in Table 13. Exports amounted to 222 million yen in 1899, but in 1909 the amount became approximately twice as much as the former, or 458 million yen, and in 1919 it increased with a rush to 2 billion 374 million yen. It was five times as much as the amount of 10 years prior. But in 1931, it decreased to 1.479 billion yen, almost half of the amount in 1919, owing to the depression after World War I. Japan's economic circles were beset with difficulties. However, during this period, exports to Formosa and Korea increased slightly. And thus, the decrease of exports to other foreign countries was covered to some extent.

Japanese exports, which continued to decrease up to 1931, began to increase again with the suspension of the gold standard, effected again in the fall of the same year (in 1917 Japan suspended the gold standard, but she restored it in January 1930), as well as with the depreciation of the foreign price of yen. Then the amount of exports increased to 4.88 billion yen in 1937 and to 5.163 billion yen in 1939.

Next, imports also showed almost the same change as exports up to 1937. But during the period between 1937 and 1939, imports decreased slightly, while exports increased continuously as mentioned above. Although imports from Formosa and Korea increased continuously, imports from other foreign countries decreased markedly.

We have reviewed thus far the condition of Japanese trade from the point of view of its value, but value is influenced by fluctuations in commodity prices. So, after dividing the value of trade, as shown in Table 13, by the price index, in order to exclude these fluctuations in prices, we show the trend of Japanese trade in Table 14. According to this table, one can conclude that Japanese exports and imports (with the exception of their decrease since 1937) did not show great variations, and increased smoothly, even rapidly.

Next, by what goods was this increase in trade brought about? Table 15 shows this trend regarding export trade since 1919. In this table, two items, the eighth and ninth, which are textile manufactured goods, stand first on the list decidedly all through this period.

The total amount of these two items was 1.291 billion yen in 1919, 1.598 billion yen in 1937, and 1.503 billion yen in 1939. Their proportions to the grand total of Japan's export trade are 61.5%, 50.3%, and 42% respectively. But the ratio of exports of textile goods fell gradually, as clearly shown in the figures given above. The export of textile goods in 1939 also decreased in value, in comparison with that of 1937. These facts show that the rate of increase for the export of Japanese textile goods was already slowing down.

Next, the special feature of Japanese exports, as we have previously observed in regard to Japan's industry. If we examine this point in Table 15, 10 items, namely the first (live plants and animals), second (grains, flours, starches, and seeds), third (beverages, comestibles, and tobacco), fourth (skins, hairs, horns, tusks, and manufactures thereof), eighth (yarns, threads, twine, cordage, and materials thereof), ninth (tissues and manufactures thereof), 10th (clothing and accessories thereof), 11th (paper and paper manufactures), 13th (pottery and glass) and 17th (miscellaneous articles), all can be classified as consumer goods. These (plus reexports) totalled 1.773 billion yen in 1919, 2.499 billion yen in 1937, and 2.602 billion yen in 1939. Their proportions to the grand total of exports were 84.5%, 78.7%, and 72.8%, respectively. But here also, their ratio falls gradually. To compensate for this decline, other items, first of all the 14th (ores and metals), then the 15th (metal manufactures), and 16th (scientific instruments, firearms, vessels, vehicles, and machinery) began to be exported.

Although the total of these three items amounted to 139 million yen in 1919, 451 million yen in 1937, and 657 million yen in 1939, and did not increase further, this rate of increase was remarkable. However, when we consider the rise in the prices of these goods during this period, we cannot say that there was such a remarkable increase in their quantity.

5. Foreign Pressure on Japanese Goods

The increase of Japanese exports, especially after 1931, created a problem in the world. At that time, the world was in a general depression, every country suffering from the decline of its export trade. However, as already stated, by suspending the gold standard for the second time in December 1931, Japan was successful in raising domestic prices, thereby stimulating her industrial activities. At the same time, reduction of the international value (exchange rate) of the yen was favourable for the exportation of Japanese goods. As stated above, this was the reason why Japanese increased exports during the period between 1931 and 1937. This also caused increases of imports. For Japan, this policy was absolutely indispensable to her existence, because the depression, at its worst in 1931, not only struck hard Japan's industries causing much unemployment, but also put her agriculture in an extremely difficult condition.

Many incidents that happened following the assassination of Premier Inukai in May 1932 had much connection with this critical state of Japan's domestic condition. Had it not been for the second suspension of the gold standard in 1931 in an attempt to regain economic prosperity, Japan would have been in a state of extreme disorganization as early as 1932.

However, when Japanese exports were increased, the world was in the midst of a major depression. It was just then that the British Empire decided to create the so-called British Empire Bloc by concluding the Ottawa Agreement (in July 1932). Meanwhile, the World Currency Conference of June 1933, to which much hope was pinned, fell through. Japanese goods, in the course of their penetration into new markets, encountered serious obstacles everywhere in the world. Principal events are as follows:

VI. Abrogation by British India of the Japanese-Indian Commercial Treaty

In April, 1933, British India notified Japan of its abrogation of the Japanese-Indian Commercial Treaty. Its establishment of a discriminatory prohibitive tariff upon Japan's cotton goods followed this. Japan opposed this with the resolution of boycotting Indian cotton. In September of the same year, the Japanese-Indian Commercial Conference was convened, and an agreement was reached whereby a link system was established between the quantity of Japanese cotton cloth imported into India and Indian cotton imported into Japan. Embodying the new provision, a New Japanese-Indian Commercial Treaty was concluded in July, 1934.

26. Disruption of the Anglo-Japanese Cotton Industry Conference

In accordance with the request by the British Government, an unofficial Anglo-Japanese Cotton Industry Conference was held between February and March 1934. The conference however, was finally disrupted because the British side insisted upon having the agreement cover not only the British territories but also foreign markets. In addition to this, in May of the same year, the British Government established throughout the territories of the British Empire an import quota system, which was extremely disadvantageous to the import of Japanese cotton cloth.

27. Prohibitive Canadian Dumping Tariff

In 1935, Canada imposed an almost prohibitive rate of tariff upon Japanese goods. Against this, in July of the same year, invoking the Trade Protection Law, Japan levied a retaliatory tariff on Canadian goods. In August of the same year, Canada took recourse to increasing the rate of her tariff supertax. However, a compromise was struck between the two countries towards the end of the same year, and since January 1936, Japan has given up the application of the Trade Protection Law, while Canada effected either the reduction of rates or the limitation of the scope of her dumping and other tariffs.

28. Raising of Tariff Rates and the Import Licence System by Australia

In May, 1936, the Australian Government raised tariff rates and put into effect an import licence system, both of which were aimed at Japanese goods. As a countermeasure, Japan invoked the Trade Protection Law in June of the same year. Australian extension of the licence system followed this. However, a compromise was reached at the end of the same year whereby Japan gave up the application of the Trade Protection Law, guaranteed the quantity of wool she imported from Australia, and limited quantities of her cotton cloth and artificial silk cloth exported to Australia. The desire to find substitutes for wool stimulated Japan's staple fibre industries.

29. Restrictions Placed upon Imports and Importers by the Netherlands East Indies

In September, 1933, the Netherlands East Indies put into practice the Emergency Import Restrictions Law and the Law Restricting Qualifications of Importers, both of which were aimed at Japan. In order to discuss problems of trade with Japan, with a view to comprehensive negotiations, the Netherlands East Indies proposed a conference with her in 1934. Japan accepted the proposal and beginning in June of the same year, the conference was held at Batavia. While the conference was in progress, however, the Netherlands East Indies extended the scope of import restrictions, and Japan retaliated by suspending the exportation of certain goods. Thus, the conference proceeded at a snail's pace. With the conclusion of the Marine Transportation Agreement in June 1936, however, the conference began to make headway. In March 1937, a compromise was struck, and an agreement was concluded in April, which safeguarded the right of Japanese firms to export goods to the Netherlands E.I. (25% of the total amount), guaranteed the import of Java sugar into Japan, alleviated the restrictions Netherlands E.I. had placed upon imports, and made 1933 trade results the basis of the allotment for Japanese goods.

30. United States Trade Policy

In 1930 the United States established high tariff rates via the Smoot-Hawley Act, which merits special mention in the world economic picture. Under the provisions of this tariff, an additional *ad valorem* levy of about 23% was imposed on over 20 types of Japanese goods exported to the United States.

In 1932 the United States, extended customs laws to include anti-dumping provisions to check the influx of imports, as a countermeasure against the depression and competition from countries that had gone off the gold standard. In 1933, the United States suspended the gold standard but took steps to prevent the import of Japanese sundry goods. The Industrial Recovery Act and the Agriculture Adjustment Law of the same year incorporated provisions restricting imports and raising tariff rates. Furthermore, in June 1934, the sole authority to effect changes in the tariff rates within the limit of 50% was vested in the President, which proved to be a serious menace to Japan. In 1935, an increase in imports of Japanese cotton cloth into the U.S. brought about opposition from American cotton merchants, and in December of the same year, Japan enforced self-restrictions of its exports in the form of a gentleman's agreement. However, still dissatisfied with, American merchants demanded that the quantity of exports be limited via the application of the provisions of the A.A.A. Thereupon the American Government, in June 1936, put into effect an all-around increase in the tariff rates on an average of 42%.

In 1937, a mission representing the American cotton industry came to Japan, asking for the conclusion of the Cotton Industry Agreement. Japan complied with this and, in June of the same year, put into effect restrictions upon the quantity of her cotton cloth exported to the United States. In view of the fact that goods imported from the United States were either indispensable or raw materials, Japan was unable to take any retaliatory or defensive measures.

31. Trade Policy of Central and South America

Having been driven away from British Dominions, including India, and shut out of the Netherlands East Indies, Japanese export goods found their way into Central and South American markets, where intense competition for the market took place between Japanese goods and goods from other countries. In an attempt to secure her markets in Central and South America, the United States concluded a Reciprocal Trade Agreement with these countries. Meanwhile Japan endeavoured to establish a compensating trade system with these countries; the Central and South American countries themselves consolidated their commercial policies.

It is only natural that the above-mentioned policies of the foreign countries against the Japanese goods virtually prevented the extension of Japanese overseas trade. As has been shown, Japanese exports and imports decreased significantly after 1937. Table 16 shows the rate of decrease by region. The table shows that, compared with exports in 1937, those in 1939 suffered a decrease in every district save in Asia, where an increase is indicated. As for imports, there was a decrease also in Asia, but the decrease was no more than one 114 million yen. Since the total decrease in imports was 866 million yen, the decrease in imports from all areas except Asia amounted to 752 million yen.

A further examination of increased exports to Asiatic markets reveals that the increase was due goods bound for Manchuria, Kwantung Province, and China. As for exports to other regions, except for slight increases to Iran and Iraq, a general decrease is indicated. That is to say, according to Table 17, which compares exports to Asiatic regions between 1937 and 1939, exports in 1939 to all Asiatic regions, except Manchuria, Kwantung Province, and China, show a decrease of 281 million yen in comparison with those in 1937. In other words, the decrease is equivalent to 32.9% of total exports to these regions in 1937, which amounted to 854 million yen. Furthermore, according to Table 16, exports in 1939 to all continents except Asia show a decrease of 273 million yen compared with those in 1937. Consequently, there was a decrease totaling 554 million yen in Japanese exports in 1939 for all areas of the world, excepting Manchuria, Kwantung Province, and China, compared with those in 1937. In terms of percentages, Japan lost in 1939 23.3% of her exports to those regions in 1937, which had amounted to 2,384 million yen. These figures demonstrate how heavy the blow dealt to Japanese financial circles was.

It goes without saying that Japan could not stand such a plight for a long time. However enormously Japan might have increased her exports to Manchuria, Kwantung Province, and China, there was no likelihood that she could import in return raw materials, foodstuffs, etc., from those regions, which were indispensable to her. Accordingly, it was only natural that she had no choice but to decrease her exports to these three regions. Thus, under the circumstances, Japan could not have endured the strain of the China Incident for long — even the peaceful livelihood of her nationals had been endangered.

It was indeed unavoidable that Japan, pressed into such a distressing state, should have taken measures to repel such serious financial and political insecurity. It was just as President Truman stated in one of his recent speeches, attached hereto. Because of the apprehension that Japanese goods, especially textile fabrics, might be shut out from the world market, the tendency to reorganize Japanese industries from the manufacture of goods for consumption into other fields was accelerated. The export difficulty made the import difficulty inevitable, thereby strengthening the idea of national self-sufficiency. The advocacy of the creation of the Japanese-Manchurian or Japanese-Chinese economic bloc resulted from this. Finally, this state of affairs made the Japanese conceive the idea of the establishment of the Greater East Asia Co-prosperity Sphere.

However, the establishment of the Greater East Asia Co-prosperity Sphere was no more than an idea (indeed, no Japanese ever had any definite idea about the Greater East Asia Co-prosperity Sphere), and even the development of Manchuria and China could not be accomplished in a short time. Certainly, Japan had exerted considerable efforts in these undertakings, resulting, however, in excessive investments in and exports to Manchuria and China. As has been pointed out, Japan could not expect an immediate and extensive increase in imports of necessary commodities from these regions.

After the conclusion of the Tripartite Alliance, the situation rapidly grew worse, and in 1941, when the United States froze Japan's assets, she was in such a predicament that there was no way to save the situation. This means that Japan had lost a market for raw silk, one of her most important products. It means also that Japan had lost the source of materials for her cotton industry, which was also one of her most important industries. Above all, the fact that the United States resolutely carried out the freezing of Japanese assets had an immediate effect on Britain and the Netherlands East Indies, both of which froze Japanese assets.

Following their examples, Canada, Australia, New Zealand, Malay, Burma, India, the Union of South Africa, etc. all froze Japanese assets and abrogated respective commercial treaties with Japan. Thus, Japan had suffered an almost complete economic blockage, and Japan's industries, as well as her very existence, were threatened. This was the actual state of things at that time. However, Japanese industrialists still believed in a favourable turn in relations between Japan and the United States.

On this 29th day of July, 1947
At YAMANASHI

DEPONENT: ISHIBASHI Tanzan (seal)

I, Migita Masao, hereby certify that the above statement was sworn by the Deponent, who affixed his signature and seal hereto in the presence of this witness.

Witness: Migita Masao (Signature and seal)

OATH

In accordance with my conscience I swear to tell the whole truth, withholding nothing and adding nothing.

ISHIBASHI Tanzan (Seal)

Excerpt from President Truman's Address at Baylor University on Foreign Economic Policy

Policy of All the People

This is not, and it must never be, the policy of a single administration or a single party. It is the policy of all the people of the United States. We in America are unanimous in our determination to prevent another war.

But some among us do not fully realize what we must do to carry out this policy. There still are those who seem to believe that we can confine our cooperation with other countries to political relationships; that we need not cooperate where economic questions are involved.

This attitude has sometimes led to the assertion that there should be bipartisan support for the foreign policy of the United States, but that there need not be bipartisan support for the foreign economic policy of the United States.

Such a statement simply does not make sense.

Our foreign relations, political and economic, are indivisible. We cannot say that we are willing to cooperate in the one field and are unwilling to cooperate in the other. I am glad to note that the leaders in both parties have recognized that fact.

The members of the United Nations have renounced aggression as a method of settling their political differences. Instead of putting armies on the march they have now agreed to sit down around a table and talk things out.

In any dispute each party will present its case. The interests of all will be considered and a fair and just solution will be found. This is the way of international order. It is the way of a civilized community. It applies, with equal logic, to the settlement of economic differences.

Economic conflict is not spectacular — at least in the early stages. But it is always serious. One nation may take action in behalf of its own producers, without notifying other nations, or consulting them, or even considering how they may be affected. It may cut down its purchases of another country's goods, by raising its tariffs or imposing an embargo or a system of quotas on imports. And when it does this some producer in the other country will find the door to his market suddenly slammed and bolted in his face.

Pictures Effects of Dumping

Or a nation may subsidize its exports, selling its goods abroad below their cost. When this is done a producer in some other country will find his market flooded with the goods that have been dumped.

In either case the producer gets angry, just as you or I would get angry if such a thing were done to us. Profits disappear; workers are dismissed.

The producer feels that he has been wronged, without warning and without reason. He appeals to his Government for action. His Government retaliates, and another round of tariff boosts, embargoes, quotas and subsidies is under way. This is economic war. In such a war nobody wins.

Certainly nobody won the last economic war. As each battle of the economic war of the Thirties was fought the inevitable tragic result became more and more apparent. From the tariff policy of Hawley and Smoot the world went on to Ottawa and the system of imperial preferences, from Ottawa to the kind of elaborate and detailed restrictions adopted by Nazi Germany. Nations strangled normal trade and discriminated against their neighbors all around the world.

Who among their peoples were the gainers? Not the depositors who lost their savings in the failure of the banks. Not the farmers who lost their farms. Not the millions who walked the streets looking for work. I do not mean to say that economic conflict was the sole cause of the depression. But I do say that it was major cause.

Now, as in the year 1920, we have reached turning point in history. National economies have been disrupted by the war. The future is uncertain everywhere. Economic policies are in a state of flux. In this atmosphere of doubt and hesitation the decisive factor will be the type of leadership that the United States gives the world.

We are the giant of the economic world. Whether we like it or not the future pattern of economic relations depends upon us. The world is waiting and watching to see what we shall do. The choice is ours. We can lead the nations to economic peace or we can plunge them into economic war.

(The New York Times: Friday, March 7, 1947)

PART 3: DEFENSE SUMMATION AND SUPPLEMENT

CHAPTER 17: DEFENSE SUMMATION: JAPAN WAS PROVOKED INTO A WAR OF SELF-DEFENSE

Presented by William Logan on March 10, 1948 (Session 390)

As we stated in the Introduction, we would have liked to include more of the 15-part general defense summation in this book. However, due to space restrictions, we have reproduced only Logan's presentation (with the exception of Takayanagi's rebuttal argument, which was originally intended to serve as part of the opening statement).

As the title indicates, the intent of this portion of the summation is to demonstrate that the Allies, not Japan, provoked the Pacific War. Since Logan employs the same strategy he used for his part of the defense rebuttal, we recommend that his summation be read in concert with Ishibashi's affidavit. In our opinion, "Japan Was Provoked into a War of Self-Defense" is the most effective, compelling refutation of the perception of history popularized by the IMTFE.

If the Tribunal please, this topic is, "Japan was Provoked into a War of Self-Defense."

1. Thirteen years ago to the day before the Japanese attack on Pearl Harbor announcing the commencement of open hostilities in the Pacific, a group of distinguished American statesmen were assembled in the Capitol Building at Washington, D.C. Their purpose was to discuss the advisability of the United States ratification of the now famous Kellogg-Briand Peace Pact. In the group was none other than the co-author of that document himself, then Secretary of State, the Honorable Frank B. Kellogg.
2. In the course of the recorded discussions that took place Secretary Kellogg was asked this question: "Suppose a country is not attacked — suppose there is an economic blockade ... ?" Secretary Kellogg replied: "There is no such thing as a blockade without you are in war." A senator then said, "It is an act of war," and Secretary Kellogg concurred saying, "An act of war absolutely"
3. During the same conference Secretary Kellogg also stated to the body of Senators: "As I have explained before, nobody on earth, probably, could write an article defining 'self-defense' or 'aggressor' that some country could not get around; and I made up my mind that the only safe thing for any country to do was to judge for itself within its sovereign rights whether it was unjustly attacked and had a right to defend itself and it must answer to the opinion of the world."^a
4. The foregoing is not set forth for the purpose of criticizing American statesmen or governmental leaders but only to show that it is the solid thought existing in the United

^a (3.a. 70th Congress, Hearing of Committee on Foreign Relations, Friday, Dec. 7, 1928.)

States, at least, that to interfere with a country's economic stability is a dire and drastic movement.

5. To indicate to this Tribunal that none other than the co-author of the Pact of Paris regarded such economic interference as an act of war absolutely we have quoted from the language used by Secretary Kellogg to reveal with conciseness and clarity that this great and learned American admitted with extreme frankness that it was the inherent right of a country to judge whether it had a right to defend itself or not based upon the factual situation confronting it.
6. The following remarks are designed to assist the Tribunal in arriving at the true and real picture existing in the Pacific area in the darkened period before the advent of war, December 8, 1941. We might well pose these questions: Did Japan instigate and wage a war of aggression against the Western Powers which was the result of premeditated planning, the utterance of evilly prepared plans whose sole object was directed at conquering and dominating the great powers upon which it had depended with almost childlike faith for its economic sustenance? Or, did Japan attempt to exercise its internationally recognized sovereign right of self-defense against encroachments by foreign powers which threatened its very existence — a decision which no authority questions as being their prerogative?
7. The instruments of war are wide and varied. The evolution of man with his advancement in science with the ever-increasing interdependence of nations upon each other for their sustenance introduces into the realm of warfare more than the explosion of gun powder and the resultant killing of the enemy but other and equally formidable methods of reducing the resistance of an opposing nation and curbing it to the will of another. Today we hear the shout round the world that economic medicine is needed to forestall the disease of another great world conflict. To deprive a nation of those necessary commodities which enables its citizens and subjects to exist is surely a method of warfare not dissimilar to the violent taking of lives through explosives and force because it reduces opposition by delayed action resulting in defeat just as surely as through other means of conventional hostilities. It can even be said to be of a more drastic nature than the blasting of life by physical force for it aims at the slow depletion of the morale and well-being of the entire civilian population through the medium of slow starvation.
8. The prosecution would have this learned Tribunal believe that the Allies perpetrated economic blockades against Japan which were aimed only at the diminution of military supplies but the evidence is that the blockade affected all types of civilian goods and trade, even food, as will be shown.
9. This was more than the old fashioned encirclement of a nation by ships of overwhelming superiority and refusing to allow commerce to enter or leave. It was the act of all powerful and greatly superior economic states against a confessedly dependent island nation whose existence and economics were predicated upon world commercial relations.

10. The prosecution theory that the action of the United States as taken was justifiable as a means of curbing alleged Japanese aggression in China is answered by the Japanese with its solid announcement that the Western Powers refused to understand the true situation existing in the Orient. To argue whether or not one nation was right or wrong in its contention is immaterial and unnecessary. The true value of the evidence is to show only that there was a legitimate issue existing between Japan and the Western Powers — a problem which could give rise, whether through nationalistic thinking or not, to the conclusion that Japan was being threatened. If there was then a legitimate basis for such a concept on the part of the government leaders of this defeated power the element of aggression is dissipated in the wake of solid international utterances of all powers that a nation has the right to decide for itself when it is placed in jeopardy. With this thought in mind we proceed to point out for the benefit of the Tribunal Allied economic action against Japan. And we will not rest our case alone with the showing of fact on this subject matter but shall go further and reveal the military concerted action that was likewise taken.
11. Though Japan did not so elect, it had a right to determine that the economic blockade amounted to an act of war against it. Nevertheless with characteristic patience it tried to settle the differences amicably but the increased economic blockade coupled with the military encirclement threat finally convinced Japan that as a last resort she had to go to war for her own self-preservation and self-defense. It is to the eternal credit of Japan that she did not immediately interpret these economic acts of the Allied nations as tantamount to a declaration of war but perseveringly pursued the path of attempted peace through negotiations. Moreover it must be borne in mind that during this period the Allied Nations were not militarily asleep or inactive but to the contrary were pursuing a path which could hardly be accepted as lawful acts of a neutral country. These acts were recognized by Japan as definitely hostile and she reacted to them. It should forever be borne in mind that Japan was not interfering with events in the Western Hemisphere and particularly things American but had concerned itself for many years with the problems of the Orient. It was the Western Powers who had forced their intervention into the other side of the globe.
12. The prosecution in its opening statement in discussing what is an aggressive war set forth a definition of aggression as a first or unprovoked attack or act of hostility; the first act of injury or first act leading to a war or a controversy; an assault; also, the practice of attack or encroachment; as a war of aggression.
13. “A nation that refuses to arbitrate or to accept an arbitration ward, or any other peaceful method, in the settlement of dispute but threatens to use force or to resort to war.”
14. The facts adduced in this trial definitely establish that within the prosecution’s own definition the Pacific War was not a war of aggression by Japan. It was a war of self-defense and self-preservation, resulting from unjustified provocation.

JAPAN’S ECONOMY WAS NOT PLANNED OR DEVELOPED FOR WAR

15. Before arriving at a decision in this case, we suggest consideration be given to the fact that for many centuries Japan had been a peace-loving nation. The Japanese people had been content with their own civilization, their ages of high culture and their reverence for the virtues and traditions handed down from time immemorial. They were satisfied to such an extent that they had closed their ports, shut themselves away from outsiders and blissfully enjoyed the frugality from the resources of their own islands. Their troubles did not commence until the Western Powers with their so-called civilization including a long history of wars and conquest by force, opened its doors and brought to its shores trade, commerce and contacts with the outside world. Colonization by force and imperialism was in full swing. It is not passing strange that after being compelled to emerge from its long retirement Japan found itself embroiled in world affairs, intrigues and wars. It became awakened to new interests in life. Its population increased rapidly and its home resources were not sufficient to support its people. The Tribunal is well aware of the fact that only a small portion of the land in Japan is arable and on slopes which make agriculture extremely difficult. It was soon recognized that the arable land available was not sufficient to support its people and particularly as the population had been increasing by almost a million babies each year. Prosecution's interpretation of Exhibit 865 (GG 24) was dispelled by the testimony of OBATA.^a The primary purpose of the population policy was one of health and not pronounced until 1941.
16. The Government attempted to increase the food supply by expanding the area of available arable land and rotation of crops and some success was achieved. Further success was obtained by encouraging agricultural development in Korea and Formosa. Emigration was encouraged but proved a failure due to the various bars created by many of the Western Powers. Faced with an economy of scarcity it would have been criminal on the part of the Japanese Government to sit idly by and do nothing.
17. The evidence shows that the only policy left for Japan to adopt was domestic industrialization and foreign trade. Taking her cue from the Western Powers, Japan ascertained how industries could be developed. She learned how to reproduce machinery and even to improve on it in some ways. She learned how to build steam ships. She developed electric power and established a transportation system. Being an island nation with a scarcity of raw materials she found it necessary to support her civilian economy to import materials from many regions for manufacture and use in Japan as well as the exportation of finished products. The latter step was necessary in order to obtain foreign exchange to pay for vital imports. The ability of the Japanese industry to expand was practically wholly dependent on foreign raw materials which in turn was governed by the foreign exchange situation which was always acute from 1925 to 1940. Japan had to face the issue squarely of how to take care of its teeming population since its own resources were inadequate.
18. Because of these economic conditions prevailing in Japan, her industries and trades, domestic as well as overseas, would not be left entirely to drift or continue in free

^a (15.a. T. 29151-29152.)

competition. Governmental control of industries and trades was not peculiar to Japan. The 20th Century has witnessed a growing trend in practically all the countries of the world toward planned economy and government control of trades and industries. The National Recovery Act in America, commonly called the N.R.A., is a typical example. The unusually large number of small industries and trades in Japan made her particularly susceptible to the need for government control. It was necessary that some form or extent of control be exercised in order that Japan could overcome her economic difficulties at home and abroad and to develop her industries and trades. Moreover the evidence shows that the conditions which most frequently and strongly urged her to adopt control measures were those of foreign markets and the balance of foreign exchange. Japan's economy, chiefly depending on export and import for its existence was being fatally affected by the policies of foreign countries and it was necessary that she take measures to adjust and regulate her industries and trades.

19. The defense contends that the prosecution has failed to sustain its burden of proof that beyond a reasonable doubt Japan's economy was geared for aggressive war. On the contrary a resume of the competent evidence discloses it was a normal development, except for a modest diversion for the necessities of the China Incident and designed to aid the civilian population. The evidence about to be reviewed also definitely establishes that by means of the economic blockade and military encirclement Japan was forced to act.
20. Government control of industries had been undertaken in Japan many years prior to 1928, the inception of the alleged conspiracy. Apparently the prosecution relies on HIROTA's pronouncement of August 7, 1936 as establishing a governmental policy for economic development for the purpose of preparing for war.^a This document on which the prosecution relies specifically states that Japan's position with respect to East Asia was to be accomplished "by dint of diplomatic policy and national defense." The prosecution interprets the words "national defense" as used in this document to mean war. If this interpretation is correct, then every nation in the world (and there are many who have appropriated money and backed policies for national defense) would be equally guilty of "beguiling the peace." In the paragraphs of this document not read by the prosecution, it is crystal clear that a policy was adopted for securing peace in East Asia and contributing to the well-being of the whole world and that Japan should be built up inwardly. It must be borne in mind that at this time Japan had withdrawn from the League of Nations and the world situation as it then existed made it necessary for Japan to adopt a progressive policy for her own well-being. Certainly the adoption of a policy to contribute to the peace of the world cannot be condemned.
21. Apparently the prosecution contends that this document marked the beginning of a conspiracy of economic preparations for war. If this be true, no explanation is offered of Japan's previous laws tending towards control of industries and commerce. Furthermore, if it be true, the prosecution's theory that it was for war must fall because it contends that the Army caused the fall of the HIROTA Cabinet. It is generally recognized that cabinets rise

^a (20.a. Fl.-Ex. 216, T. 2727-2728.)

and fall as a result of differences of opinion as to their fundamental policies. The prosecution accepts the testimony of TSUGITA that the responsibility for the fall of the HIROTA Cabinet rested on the Army and that the War Minister finally resigned and HIROTA could no longer maintain his Cabinet.^a It also adopts the Home Ministry report that “the Army authorities stated that they could not do business with a party whose policy for administrative reform was opposed to the policy demanded by the Japanese people for the existence and expansion of Japan as a stabilizing power of East Asia — the abandonment of which would cramp Japan into her islands and prevent her from accomplishing her mission.”^b The conclusion from the prosecution’s review of the facts with regard to the resignation of the War Minister is irresistible that the Army disagreed with HIROTA’s policy. When the HIROTA Cabinet fell its governmental policy fell with it. In its argument that the economic conspiracy continued, the prosecution claims that on February 20, 1937 the HAYASHI Cabinet, although made up of different personnel, continued the policy of the HIROTA Cabinet. That his conclusion is baseless is demonstrated by the fact that the prosecution fails to cite any evidence in support thereof. It is merely content to cite exhibit 218 which wholly refers to a third administrative policy towards North China unrelated to HIROTA’s policy. In the absence of any evidence, it cannot be assumed that the HAYASHI Cabinet or any of its successors concurred in the HIROTA policy. All these cabinets rose and fell because of differences of fundamental policies. Thus, the prosecution’s basic claim that the various plans later adopted stemmed from the HIROTA policy of 1936 is not supported by the evidence.

22. Since the prosecution has elected to accept the date of August 7, 1936 as the commencement of an alleged conspiracy for economic preparation for war, there can be no claim that the following pronouncements and bills which were adopted by the Japanese Government prior to 1936 were designed for such purposes although some of them are referred to by the prosecution. Furthermore, they show that they were not so designed. They are reviewed here to show the background and basic trend of Japan’s economy.
23. On January 31, 1930 State Minister HAMAGUCHI told the Diet that the country’s efforts should be directed in the promotion of industries and development of trade, and for that reason the gold embargo had been lifted the previous November.^a His resume of Japan’s economics can be searched in vain for any indication that it was the government’s policy to prepare for any war. It was about this time when the depression and unemployment was plaguing Japan. Minister TAWARA on April 27, 1930 dealt with the remedies against these conditions.^b He spoke of the necessity of restricting imports, promoting exports and urged greater production in Japan to overcome these difficulties so as to help the Japanese civilian economy. He urged the development of new markets in other parts of the world and encouraged exportation of commodities. Mention was made by him of the weaknesses of wasteful competition and he argued for coordination and industrial development. His speech was a typical one which could be similarly expected of statesmen in any country speaking before a national legislative body. The next month the Shipping Guild Bill was adopted

^a (21.a. FF-1. b. E-25.)

^b (23.a. T. 24950-24958. b. Ex. 2771-B T. 24959-63.)

which dealt with the welfare of the shipping industry and the rationalization of shipping circles.^c

24. The next year on February 28, 1931 the Major Industries Control Bill was introduced in the House of Representatives. This bill was devised for the purpose of stabilization of those industries and its purpose was alien to any thought of war.^a
25. After 1931 the economic depression centering in the rural communities reached its depth and the social and political insecurities became aggravated during the Cabinets of WAKATSUKI, INUKAI, SAITO and OKADA.^a In order to assist Japan's internal economy and defeat this depression, the Capital Flight Prevention Bill was introduced in the Diet on June 4, 1932.^b This bill was designed to prevent the flow of Japanese capital overseas. As a result of the anticipation of the fall in the value of the yen, it was in no way related to either preparation for or waging of war. The Japanese foreign exchange rate was gradually declining. Speculative dealings in exchange businesses were occurring and in order to control this situation the Foreign Exchange Control Bill was introduced in the Diet on February 16, 1933.^c The evidence shows that most countries in the world were practicing exchange control at that time. Was it therefore wrong for Japan to exercise control over all phases of foreign exchange?
26. It was recognized that Japan's iron manufacturing industry was seriously affected by imported goods and it was difficult to supply steel at a low price to meet an ever-increasing demand. Consequently, the bill to establish the Iron Manufacturing Company was introduced in the Diet on February 28, 1933.^a It was felt at that time that with the assistance of special funds from the government, a rationalization of the industry could be planned and low cost of production promoted and the industry would thereby be placed on a stable basis. Here, too, there was no thought or mention of planned aggression.
27. Four months later in June 1933 the London International Economic Conference ended in failure. Perhaps if it had been successful, the economic disturbances in the world and hostilities which followed might have been avoided. As a result of the failure of the London Conference, it was recognized by Minister TAKAHASHI on January 24, 1934 in a speech to the Diet that the overcoming of the depression by international cooperation became impossible and that it was becoming the policy of all of the powers to strengthen their self-protection policies and carry out self-sufficiency principles of national economy at home.^a Perhaps he had in mind such policies as the Ottawa Conference of 1932.
28. On March 10, 1934, again apparently referring to the failure of the London Economic Conference, Mr. TAKAHASHI stated, on the introduction of the Adjustment of Trade and

^c (23.c. T. 24966.)

^a (24.a. Ex. 2772-A, T. 24968.)

^a (25.a. UEMURA - T. 25202. b. Ex. 2773-A, T. 24970-24971. c. Ex. 2774-A, T. 24972-24974.)

^a (26.a. Ex. 2774-B, T. 24976.)

^a (27.a. Ex. 2776, T. 24996.)

Protection of Commerce Bill in the Diet, that there was no sincerity for international cooperation in world commerce and that there was a marked tendency among the countries to adopt selfish policies.^a He significantly pointed out that other countries were gradually building a wall against Japan's export trade by such methods as restricting their imports from Japan. In order to overcome this, he stated it was the intention of the Japanese Government to establish a system of regulating trade and obtaining a balance of international incomings and outgoings; of regulating the import duty and protecting Japan's commerce by prohibiting and controlling imports and exports. He also pointed out that in view of the then current situation, it was unavoidable for Japan to make temporary arrangements.

29. On May 11, 1936 the Automobile Industry Control Bill was introduced in the Diet because, as explained at that time, the industry was not on a firm foundation and the situation at home and abroad necessitated a bill for the production of automobiles for the general people. At that time the automobile industry in Japan was in its infant stage and the automobiles it had were supplied by foreign countries and assembled in Japan.^a With respect to the motor vehicle industry, the prosecution is content to quote from the plans but fails to cite any evidence about the production of one single automobile, one tank, one locomotive or one freight car, pursuant to those plans or that Japan even had the facility for such manufacture of those.^b
30. The figures cited by the prosecution and incidentally the source thereof not disclosed by Liebert^a of the expansion of Japan's aircraft industry for the purpose of dominating and controlling the world are to say the least ridiculously low. It states "The undisputed statistics show that from 1935 to 1941 army aircraft bodies increased from 349 to 3,787, navy aircraft bodies from 408 to 2,080, and total military aircraft from 584 to 11,654."^b Need we do more than to point to the plan of the United States^c of January 1940 to turn out at least 50,000 military and naval planes *per year* which plan as we know was consummated and almost doubled.
31. An examination of Japan's financial situation up to 1936 discloses that in 1931 expenditures were reduced by ¥338,000,000. This policy was adopted to reduce prices of commodities to cope with the depression and to balance Japan's foreign trade. When Great Britain went off the gold standard in September 1931, it became clear that Japan could no longer continue its deflation policy. In December of that year Japan suspended the gold standard. After 1932 she entered into a reflation policy by increasing financial expenditures and encouraged the demand for goods and labor. Because of this, the prices of commodities rose and business conditions improved. The export of Japanese goods was made easier. Expenditures of the government started to increase after the 1932 fiscal year. Since 1933 and up to 1936 there was hardly any increase and some decrease occurred in 1934 and 1935. The financial

^a (28.a. Ex. 2777-B, T. 25000-25002.)

^a (29.a. Ex. 2778-A, T. 25002, 25004. b. F-19, 20.)

^b (30.a. T. 8380, 8381. b. F-21. c. T. 25470.)

expansion during the eight years from 1920 to 1928 of ¥455,000,000 was almost equal to the ¥467,000,000 for the eight years from 1928 to 1936.^a

32. The financial policy of Japan, its plans for increasing taxation, inflation of currency and high prices was explained to the house of Representatives by SAKURAUCHI on January 21, 1937. He pointed out that prices had increased 32% since 1931 while wages increased only 15% and that if prices went higher the life of the people in Japan would be menaced. He deplored the precedents of Russia and Germany.^a On the same day Minister of State BABA pointed out that the government had revised its decree based on the Foreign Exchange Act in view of the increase in speculative importation and that temporary emergency measures had been taken.^b
33. That national economic selfishness is a curse was recognized on February 15, 1937 when Mr. YUKI discussed the development of foreign trade. He pointed out the necessity of a prudent policy with regard to exchange rates and that international economy was being frustrated by the ideology of economic nationalism. He claimed it would alleviate the situation of international relations and contribute to world peace to break the deadlock of international economy.^a One week later, he also introduced the Bill Concerning Export Control Tax Law, at which time he stated various countries were taking measures such as raising customs duties and limiting imports, and that they were “being taken especially against Japanese exports.” As a result he believed it absolutely necessary to enlarge the export compensation system by establishing a new import compensation system.^b
34. In striving to better Japan’s civilian economy it was necessary to adopt hand in hand with the foregoing measures a program with respect to her shipping industry, because she was an island nation. The United States Department of State reports that during the 1920’s Japan’s shipbuilding industry entered a long period of depression when ship construction dropped to 42,000 gross tons in 1927. In 1929 the government framed a program for the assistance of shipbuilding in the form of loans on easy terms, but owing to the world economic depression which followed, little use was made of this facility.^a The report further shows that in 1932 the government introduced the first three Scrap and Build Plans. The first plan resulted in the scrapping of 94 vessels of approximately 400,000 gross tons and the building of 31 new vessels of about 200,000 gross tons. The cost was approximately ¥55,000,000, of which the government’s subsidy was only ¥11,000,000. The second and third plans in 1935 and 1936 were on a smaller scale, their combined result being the scrapping of 100,000 gross tons and the construction of only 17 vessels of about 100,000 gross tons. The three plans resulted in the scrapping of 500,000 gross tons and the construction of 48 new ships of 300,000 gross tons.^b The cost of these three improvement plans to the government

^a (31.a. T. 25421-25428.)

^a (32.a. Ex. 2779 T. 25005 - 25007 b. Ex. 2780-A, T. 25008-25009.)

^a (33.a. Ex. 2780-B, T. 25009-25011.)

^b (33.b. Ex. 2780-C, T. 25011, 25012)

^a (34.a. Ex. 2768, T. 24910 b. Ex. 2768, T. 24911, 24912.)

amounted to only \$4,000,000, which we submit is a mere drop in the basket for any country accused of developing a shipping program for the purpose of engaging in aggressive war.

35. The report further shows that a further plan came into operation in April 1937 for the building of passenger and passenger cargo liners. Before the outbreak of the China Incident the trend of shipbuilding was for the construction of luxury liners for deep-sea service, but after the China Incident, Japan's policy was reversed from large-sized vessels for deep-sea service to small and medium-sized bottoms for coastal trade.^a We submit that this is a definite indication that Japan's shipbuilding industry was not designed for preparation for the China War nor for the Pacific War. As an island nation, if she had been planning an aggressive war, her first thought would have been directed towards adequate deep-sea shipping facilities, and in so far as volume is concerned, if she had been preparing to conquer the world, it hardly seems necessary to mention the infinitesimal number of ships Japan built and war building when compared to the combined powerful marine fleets of the United States, Great Britain and their allies. Would she scrap any ships if she was preparing for war? The report further shows that a great majority of the ships built were of a very small tonnage. Many of her vessels were made of wood.^b
36. Although the prosecution introduced evidence on Japan's marine shipbuilding activities, it probably realized that it had failed to prove a most vital point, as its evidence showed that Japan, as an island nation, was not preparing for aggressive war, because it had not developed a merchant marine. It changed its position and tried to forestall a presentation of the true facts regarding shipbuilding by stating, when the defense was introducing evidence, "It is not the claim of the prosecution that the control of shipping was for the purposes of war."^a Nevertheless it has again changed its position because it deals with the subject in its summation.^b It relies on Liebert's testimony. Liebert did not disclose the document from which he obtained the information set forth in his testimony with respect to shipbuilding. Although the defense tried to obtain all the documents from which Liebert called out his testimony, it did so in vain.^c We were, however, able to find the document on which Liebert based his shipbuilding testimony. It is the United States Department of State report which is summarized above.^d An examination of that document clearly demonstrates that it was the one from which Liebert got his information, as the wording of his testimony is in some instances practically identical with this report, and the continuity of both documents are the same. An examination of the United States Department of State report demonstrates how inadequately Liebert summarized it. It also shows that Liebert presented to the Tribunal a one-sided picture of the shipping industry. He failed to reveal to the Court the number of ships and their gross tonnage which was scrapped by the Japanese Government. He confined his direct testimony to stating only the number of new ships built. His testimony was carefully worded to create an impression that the new ships were built entirely by government subsidies.^e Whereas in truth and in fact, the government only subsidized the program to the extent of approximately one-fifth of the total cost. In view of the above, it is

^a (35.a. Ex. 2768, T. 24912, 24915. b. Ex. 2768, T. 24915, 24929.)

^a (36.a. T. 24965. b. F. 16. c. T. 8305, 24813, 28819, 28820, 28821.)

^d (36.d. Ex. 2768. e. T. 8318, 8322 f. F16 g. T. 24903.)

difficult to understand the prosecution's claim that the defense does not challenge Liebert's testimony with respect to shipbuilding.^f It is no wonder that the prosecution admitted it was on the horns of a dilemma when the defense produced the United States Department of State report, which it then admitted was used by Liebert.^g

37. The prosecution also states "the defense denies that any portion of the increase in shipbuilding from 402,000 tons in 1938 to 605,000 tons in 1940 was for war purposes."^a It does not reveal the evidence supporting such an increase. Apparently the prosecution took these figures from a plan which was adopted in 1939 and assumed that that amount was actually constructed. This plan was referred to by Liebert. Even if the planned increase to 605,000 tons had been accomplished, it would have been ridiculously low for a country bent on dominating lands beyond the Pacific. The defense introduced the total tonnage of vessels launched from 1934 - 1940.^b The shipbuilding laws which Japan passed in 1939 show no planning for any aggressive war.^c Even in 1941 there was a woeful lack of sufficient shipping to carry on any protracted war. Documents written January 1, 1941, substantiate this.^d
38. The United States Department of State report further states "For several months after the outbreak of the China Incident (7 July 1937), it is true, the Japanese economy remained ostensible on a peacetime basis in practically all its aspects; wartime control measures were adopted only when strategic needs created urgent requirements."^a It also pointed out that even before the war, it was obvious that Japan could not develop a "war economy" and at the same time trade in manufactured goods in keeping with her policies.
39. In support of its claim that Japan was preparing economically for war, the prosecution relies heavily on Exhibit 841 and 842. Exhibit 841 is an outline for a five-year plan for production of war materials of the War Office dated June 23, 1937. We need not concern ourselves with this, because 14 days later upon the sudden outbreak of the China Incident, "it died a natural death" as testified to by OKADA.^a
40. Prosecution exhibit NO. 842 is divided into three parts:
 12. Summary of Five-Year Program of Important Industries Prepared by War Ministry, dated 29 Nov 1937.
 13. Resume of Policy Relating to Execution of Essential of Five-Year Program of Important Industries. (Trial Draft Prepared by Army, dated 10 June 1937.)
 III. Summary of Program for Extension of Productive Capacity. (Prepared by Planning Board, dated January 1939.) There is no evidence that Part I or Part II were approved by the Cabinet and the prosecution does not claim that they, as such, were adopted. If Parts I and II of Exhibit 842 were incorporated in Exhibit 841 (prosecution calls this Plan III) then the undisputed testimony is that they all "died a natural death," at the outbreak of

^a (37.a. F16.)

^b (37.b. T. 24919 c. T. 24919, 24932 d. T. 24890, 24895.)

^a (38.a. Ex. 2797, T. 25093.)

^a (39.a. T. 18278.)

the China Incident. The evidence is, and the prosecution admits, that Part III of Exhibit 842 was not adopted by the cabinet until January 1939.^a Therefore, it is quite apparent that this plan was not put into effect and designed for the purpose of preparation for the China Incident of 1937. The outbreak of the Incident necessitated the organization of a makeshift plan in 1938 which had no relation whatsoever to the plan set forth in Exhibit 842.^b The prosecution asks, if these plans were defensive, “against what nation did Japan think it necessary to execute defensive preparation?” The prosecution then answered the question by admitting that OKADA testified that the plan was prompted by fear of Russia.^c OKADA pointed out that because many of Japan’s important industries depended heavily on the importation of materials from abroad, the economics of Japan were very shaky, and as they were not independent there was a great tension. Furthermore, at that time the world divided up onto economic blocs and Japan believed it was necessary at that time to develop every industry so that she could continue as a modern state and provide for the welfare of her people.^d OKADA fully explained that development by the U.S.S.R. of its industries was extremely startling. After Russia had completed its first and second five-year plans, Japan believed that the Soviet was about ready to begin a third five-year plan.^e The prosecution has failed to show any evidence that the reason for the adoption of the plan was otherwise than as testified to by OKADA. That plans one and two drafted in 1937 were prepared for the purpose of commencement of a war in 1941 would have required clairvoyance on the part of Japan, considering the momentous world events which occurred during that period of time over many of which Japan had absolutely no control. Furthermore, it is difficult to understand the prosecution’s mathematics that a four-year plan adopted in 1939 would be completed in the same year as a five-year plan adopted in 1937 if the latter had been accepted.^f

41. We submit that all the evidence points to a clear conclusion that all the laws pertaining to economics passed prior to 1937 had no relation to aggressive war, nor to the Plans I and II of 1937 which were admittedly never adopted. Furthermore, the laws passed after 1937 had no relation to either Plans I or II, and certainly those passed up to 1939 had no relation to Plan III, which was not adopted until 1939. Even if they were related, the prosecution’s argument is difficult to follow. It assumes that all the plans were for aggressive war.^a It then states, in substance, that considering all of Japan’s conduct prior to 1937, its aggressive action between 1937 and 1939, and planning and waging of aggressive war after 1939, the only conclusion is that the plans were for aggressive war.^b Such reasoning, we submit, is illogical. The prosecution assumes a conclusion, and to support it, assumes other conclusions, upon all of which it has the burden of proving the facts, and which burden it fails to sustain.
42. The Iron and Steel Industry Bill of July 29, 1937 was proposed because of the dependence of these industries on foreign countries. Mr. YOSHINO stated at the time the bill was

^a (40.a. F9 b. T. 18318 c. F7. d. T. 18276 e. T. 18274)

^f (40.f. F9.)

^a (41.a. F5; F6. b. F6.)

introduced that self-sufficiency, including the development of further overseas markets for iron and steel products, was necessary.^a

43. The bills introduced in the Diet in the latter part of 1937 were primarily designed for self-sufficiency and many of them were adopted because of measures being taken by foreign countries to prevent Japanese goods from being imported. Some of these laws as enacted were to be abolished one year after the China Incident terminated. Included were the Bill Concerning Adjustment of Foreign Trade of August 2nd, 1937;^a the Gold Production Law of August 5th, 1937,^b the Temporary Law Controlling Shipping of September 10th, 1937;^c the Temporary Capital Funds Adjustment Law of September, 1937;^d the Temporary Measures Concerning Exports and Imports of September 10th, 1937;^e and the Law Providing for Emergency Trading in Rice effective December 1st, 1937.^f UEMURA testified that after the China Incident had broken out the public felt uneasy about the prospect of importing cotton. The Government felt the necessity of establishing synthetic plans and although the Planning Board was established in 1937 the Commodities Mobilization Plan was very rough and it was not until 1938 that it took on definite shape.^g
44. The prosecution under the heading of Expansion of War Industries first mentions the formation of Japan's Electric Generation and Transmission Company, citing Liebert's testimony.^a Liebert does not disclose the source of his conclusion to the effect that this company had as one of its objectives the increase of Japanese electric power resources and development to meet military requirements. On numerous occasions the Tribunal has stated the Liebert's opinions and conclusions would be disregarded. The defense were not permitted to examine OWATA on this conclusion for the above reasons.^b Yet the prosecution uses Liebert's opinions in its summation.
45. The reason for the adoption of the Bill for State Control of Electric Power was explained to the Diet on January 26th, 1938. It was pointed out by NAGAI that electricity was not only indispensable to national life for lighting and heating purposes but also played a part as motive power for all industries and to provide against war as well as for peaceful purposes.^a
46. These purpose were fully explained by OWATA. The development of water power in Japan had been in a piecemeal sort of a way and it was necessary to develop waterpower on a large scale to avoid waste of waterpower. The production of electric power in the East was large but in the West it was scarce. The joining of the generating stations in East and West by power lines did result in economizing on coal and the eliminating of the generation of electricity by coal. Furthermore the electric power industry had a tendency to concentrate around large cities and it was necessary to devise some means to send power into the

^a (42.a. Ex. 2781-A, T. 25013, 25015)

^a (43.a. Ex. 2783, T. 25027-25033 b. Ex. 2784, T. 25034, 25038

c. Ex. 2786, T. 25041, 25044; Ex. 2790, T. 25053. d. Ex. 2768, T. 25091, 25100

e. Ex. 2791, T. 25054 f. Ex. 2787, T. 25044, 25045 g. Ex. 2802, T. 25197, 25215.)

^a (44.a. F10. b. T. 18255, 18256)

^a (45.a. Ex. 2792-A, T. 25055, 25058)

agricultural districts. In addition it would be possible to send electrical power to large scale industries and for lower cost. It also seems unnecessary to point out that the bill for state control of electric power had been adopted prior to the approval in January 1939 of Plan III^a and could under no circumstances be considered as carrying out the latter plan. It is quite apparent, because of the absence of any date of publication of the figures quoted by Liebert^b and of the absence of any date on the graph be submitted,^c that these figures and charts were drawn under Liebert's direction and the classification of basic war industries and war supported industries is his personal classification. If these were figures and charts of the Ministry of Commerce and Industry it nowhere appears on what date they were published or prepared. Thus based on Liebert's own classifications of what is a basic war or war supported industry he and the prosecution asked the Tribunal to draw conclusions that the large increase of electric power was consumed by war and war-supported industries and that there was no change in consumption by civilian companies, utilities, and civilian uses. In the absence of any evidence as to what constituted basic war and war industries it is submitted that Liebert's testimony and conclusions are valueless. In other words, we submit neither his figures^d nor the Chart^e are original documents but prepared at his suggestion.

47. The prosecution also relies on the economic opinions of news reporter Goette regarding China.^a He was permitted to give his opinions and conclusions on economic matters over due and timely objections.^b In all fairness, considering the restrictions placed on defense witnesses against expressing opinions, all of Goette's opinions and conclusions should be disregarded.
48. In discussing the machine tool industry and the precision bearing industry the prosecution merely cites Plan 3 of January 1939, and concludes that Japan imported enormous quantities of machine tools basing this assertion on Liebert's dubious charts and figures.^a Liebert's assertion that between 1937 and 1940 the Army purchased approximately 22 1/2 million dollars worth of machine tools is unsupported.^b With respect to his chart it is interesting to note that although he quotes figures showing production import and export, his graph fails to portray the exports. Here again the Ministry of Commerce and Industry and Machine Tool Association figures are undated and apparently were prepared from figures supplied by Liebert, the source of which is unknown. For the same reason the chart and figures with respect to the precision bearing industry should also be disregarded.^c The reason for the development of the Machine Tool Industry Department in Japan was well expressed when the bill was introduced in the Diet on March 10, 1938.^d It was explained that the industry had only recently been developed and there were difficulties from the point of manufacturing ability and techniques. The capacity for the manufacture of machine tools was consequently inferior to those of foreign goods and in the past Japan had to depend on import of machine tools and it was thought proper that the management of the industry be placed on a rational foundation.

^a (46.a. Ex. 842 b. T. 8282, Liebert's Aff., p.6. c. Ex. 843)

^d (46.d. T. 3281, Liebert's Aff. p.6 e. Ex. 843.)

^a (47.a. E 87. b. T. 3866.)

^a (48.a. F19. b. T. 8356 c. T. 8357 d. Ex. 2793, T. 25063-25065)

49. On March 17th, 1938 Prince KONOYE spoke on the introduction of the National Mobilization Bill.^a It finally became law in May 1938 which was ten months after the China Incident had commenced. On February 24, 1938, Mr. SAITO spoke in the Diet on the necessity for the adoption of a national General Mobilization Bill.^b He pointed out that the China Incident “had assumed serious proportions beyond our imagination,” that Japan’s policy of non-expansion and settlement on the spot were incapable of fulfillment. He was unable to foretell the future of the Incident but felt it might be an extremely long way off. He emphasized that the Incident was proving to be the source of all troubles, that Japan’s future was beset by great difficulties and that her national defense should be strengthened by enforcing a certain degree of control over personnel, resources and materials. Prince KONOYE also pointed out that the bill was necessary to replenish munitions of war and to render smooth all national activities necessary for the prosecution of war. The mechanics of the bill was to enable the government to take such emergency measures consonant with the actual demands of the situation. He pointed out that at that time there was in existence the Munitions Industry Mobilization Law of 1918. But the law was not adequate in its scope and because of the China Incident the bill was offered to supplement the deficiencies of that law. He stated, “The contents of this bill are, on the whole, based on matters provided for in the Munitions Industry Mobilization Law and in the various provisional laws relative to the China Incident.”^c The Bill contains special provisions for the creation of a Deliberation Council. With respect to this latter provision the United States Department of State reported that the provisions of the bill in setting up a council nullified its military function saying “However the decision to set up a National Mobilization Council of fifty members (largely from the two houses of the Diet) to review the measures applied under this statute tended to nullify its effectiveness as a weapon of the Military in the struggle for nationalized industries.”^d The United States report also quoted a leading Japanese publication which stated, “On the whole even in 1940-1941 Japan’s economy was financed and operated by private enterprise which disposed of profits and dividends with relatively slight government interference.”^e Control in the sense of comprehensive state plans enforced on industries was still in embryonic form. As a matter of fact, as testified to by UEMURA, Japan was backward in preparation for national mobilization as compared with other nations. In drafting the National Mobilization Law he stated that reference was made to Great Britain’s Uniform National Defense Law of World War I and subsequent legislation such as the Italy and Czechoslovakia National Mobilization Law and the United States National Mobilization Bill Number 5539 introduced in Congress in 1935 and then under consideration of the Upper House.^f
50. As explained by the witness UEMURA, who was not cross-examined by the prosecution, the reason why Plan III was adopted in January 1939 was to aspire to a well balanced development of the country’s industries. Due to the China Incident the allocation of

^a (49.a. Ex. 2794, T. 25069, 25071. b. Ex. 2792C, T. 25061, 25063)

^c (49.c. T. 25068, 25071 d. Ex. 2768, T. 25099 e. Ex. 2768, T. 25100)

^f (49.f. Ex. 2802, T. 25210, 25215)

materials for the expansion of capacity productive potential was not carried out as expected.^a

51. The prosecution has commented on the establishment of the Heavy Industries in Japan. As explained in the United States Department of State report, the reason for this war that if China and other nations should become industrialized it was probable that light industries would be established first, thereby reducing Japan's exports and that Japanese industrial reorganization in favor of heavy industries should be carried out as the only means of enabling Japan to continue as an industrial nation.^a The Bill for Light Metals Manufacturing Industries such as aluminum and magnesium was introduced on March 17th, 1939. The reason for its necessity was for national defense, domestic demand, exportation in peace time and the securing of a balance of supply and demand as well as just and fair prices.^b
52. In discussing production of light and non-ferrous metals the prosecution contents itself with the statement of planned increases and an assertion that the planned increases were not realized. Apparently by ignoring it, it considers Liebert's testimony unimportant. We concur in this in view of Liebert's admission on cross-examination that he obtained his facts and figures with respect to raw materials from the Japanese Government, control associations, trade statistics of the United States Government, publications of the United States Government, and other sources, it must be assumed that the figures Liebert chose were designed to fit the need and since he is not an expert his conclusions are not reliable.^a
53. In support of its claim that the iron and steel industry was geared for war purposes, the prosecution relies on Liebert's conclusions unsupported by facts.^a Here we find Liebert making such statements as "Enormous quantities of scrap iron were imported ...," unsupported by any facts. He sets forth figures comparing the years 1938 and 1941 for such items as steel, special steel, steel ingots, pig iron, iron ore;^b but these were only the planned increases and not actual increases.^c He sets forth subsidies supposed to be paid by the Ministry of Commerce and Industry.^d There is no evidence as to the exact source of his figures. Liebert's testimony purports to set forth tables showing production and imports of iron ore;^e production and imports of pig iron;^f production and imports of steel scrap;^g and steel production and imports for the years 1926-1941.^h The authenticity of these figures and their exact source is not disclosed by Liebert and pursuant to the Tribunal's ruling, we assume they will be disregarded. Even if they are not disregarded, an impartial review of them demonstrates that the increase was normal and not excessive. For example, Liebert admitted that his figures for steel production and import as shown on prosecution exhibit 845 were prepared by draftsmen and employees of Economic and Scientific Section of SCAP on the basis of information supplied by Liebert.ⁱ He further admitted that he had conferences with various associations and compared their figures with other data from the

^a (50.a. T. 25209)

^a (51.a. T. 25091, 25100 b. Ex. 2795-A, T. 25073, 25075)

^a (52.a. T. 8774, 8775)

^a (53.a. T. 8322-8336. b. T. 8327 c. T. 8326 d. T. 8323-8324 e. T. 8329-8330 f. T. 8331 g. T. 8332 h. T. 8333 i. T. 8665)

United States and Japan. Yet we find on the chart submitted, exhibit 845, the notation, Source: Ministry of Commerce and Industry, and it is undated. Thus it develops that the figures represented in the graph did not wholly come from the Ministry of Commerce and Industry but they are a conglomeration of figures from various sources and all of which are entitled to absolutely no weight.

54. The witness YOSHINO testified to the background of the industry from 1868 to 1930.^a Prosecution's contention that ADACHI's testimony was given without referring to any of the plans and is therefore valueless is to say the least naive. His testimony was based on facts and figures and dated charts found in various governmental departments. In fact, there are 12 charts in evidence which were attached to his affidavit.^b Apparently the prosecution accepted these facts and figures because they refused to cross-examine him. An examination of ADACHI's testimony and the charts attached to his affidavit demonstrate the fallaciousness of prosecution's argument that the Iron and Steel Industry of Japan was geared for aggressive war. Chart 1 shows the market prices of bars and plates. Chart 2 shows the steel consumption per capita per annum of the various countries, showing that Japan's consumption in 1931 equaled about one-seventh of the United States of America. Chart 3 shows how Japan from the years 1930-1940 was well back of Australia, Germany, United States, Russia, in ingot production and that only England produced less than Japan. Chart 4 shows the effect of the revision of tariffs on Japan's imports. Chart 5 shows the increased production of pig iron which it is submitted was a normal increase unrelated to any designs for aggressive war but as testified to by ADACHI, some of this production was necessary for the military because of the China Incident. Chart 6 shows the production of finished steel which showed a decline after 1938. Chart 7 shows the import of iron ore which showed a sharp decrease from 1936 - 1938 and increase thereafter to 1941 when it again dropped. The increase for the years 1938-1941, it is submitted, were not excessive because of the China Incident. Chart 8 shows the import of finished steel and that except in the year 1937 the import of steel material decreased from 1932-1942 with a small increase in 1939. Chart 9 shows the percentage of increase of export of finished steel rising sharply from 1932-1936 with a decrease until 1938 when the export of finished steel increased again and decreased again after 1939. The decrease in 1937-1938 of 410,000 tons was due to the China Affair. Chart 10, showing the export of machines which means the export of transformed steel material, was extremely large and increased continuously from 1932-1939. This belies plans for aggressive wars. Chart 11, showing the consumption of finished steel, shows that it rose steadily to meet promotion of civilian life in Japan and then had a tendency during the period 1939-1941 to descend. Chart 12 shows the planned consumption of finished steel for military and civilian uses. The data contained in this chart was presented in 1945 to the United States Bombing Survey by the Iron and Steel Control Association but was originally made by the government. That there was no design for aggressive war insofar as consumption of finished steel is concerned is shown by this chart in that it was planned that civilian consumption far exceeds military consumption.

^a (54.a. T. 18211-18213 b. Ex. 2775, T. 24979, 24994)

55. The necessity for the government's action with respect to iron and steel was fully explained by ADACHI. Japan was menaced by the import of iron and steel from foreign countries and of the two hundred manufacturers during the first World War one hundred and fifty went into bankruptcy.^a In 1932 to 1940 the increased production movement in Japan was no different than in all countries after World War I. He cited figures to sustain this contention.^b As collateral security for the import of raw materials Japan was forced to increase the amount of her exported steel and machinery. Plans which were made by the Ministry of Commerce and Industry in 1934 were made solely from the standpoint of economy.^c And in endeavoring to solve the problem the amount for military and naval demands was estimated at less than 10% of the whole which calculation was based upon the same demands of the Army and Navy from 1896 to 1930. The plan was expected to come to an end in 1938. Production of steel materials reached its peak in 1938 a year after the outbreak of the China Incident and thereafter decreased despite the Incident. Consumption from 1932 to 1942 reached its peak in 1939 and decreased thereafter. Imports reached their peak in 1939.^d The whole plan of the Ministry of Commerce and Industry was civil economy and ADACHI knew of no plan for promoting war. The large production was planned out of necessity since Japan was turning from a farming country to an industrial country as a counter-measure to the increase in population and was a contribution to the elevation of Japanese economic life.
56. The production of steel material decreased with the development of the China Incident.^a It was greatly affected by the prohibition of the import of scrap iron in 1940. The amount of iron in Japan greatly decreased. Consumption of pig iron increased progressively from 1935 to 1941. Consumption of scrap iron increased progressively to 1939 when it commenced decreasing. The Army and Navy requirements increased after the start of the China Incident which was only natural for a country at war. And the supply for the people in 1941 was reduced to the degree of about 1921.^b The prosecution apparently accepted ADACHI's testimony in toto as it failed to cross-examine him.
57. The prosecution also failed to cross-examine the witness HASUMI who testified of the government's efforts for many years to obtain sufficient food and how a food shortage — particularly rice — existed in 1939 because of the continued dry weather in Japan and Korea. He related the efforts of the government to moderate the condition of 1939 and 1940 by fixing the price but increased consumption in Korea resulted in an extreme shortage of food in Japan proper.^a
58. On March 11th, 1940 the bill for Coal Supply Law was introduced in the House of Representatives.^a It was explained that because of the insufficient supply all fields of Japanese national life were menaced and that Japan did not have sufficient coal to supply

^a (55.a. T. 24982, 24983 b. T. 24984 c. T. 24986)

^d (55.d. T. 24989)

^a (56.a. T. 24991 b. T. 24994)

^a (57.a. T. 25050-52)

^a (58.a. Ex. 2796-A, T. 25076-8)

power plants and other industries. The object was to increase the output and develop new mines. The quality of the coal produced in Japan was not of high grade.

59. The prosecution contents itself with stating in conclusion that the only object of the control and increase of coal “must necessarily have been the assistance of war industries.” This in utter disregard of the fact that it admits that Japan relied upon the importation of coking coal which is necessary in industrial plants. Lacking evidence that the Japanese normal economy did not require the measures adopted, the prosecution itself concludes that the bills relating to the coal industry were not reasonable from the point of view of self-defense.
60. It was not until March 15, 1940 that the bill relating to synthetic chemical industries was introduced in the Diet.^a It was stated at that time that these enterprises had only been recently developed and that there was a lack of natural resources. It was pointed out that the demand for increased production was necessary after the outbreak of the China Incident. The prosecution argument with respect to the Japanese chemical industry is based on two assumptions: (1) That the chemical industry plays an important part in the manufacture of explosives and war materials, and (2) that the chemical industries underwent tremendous expansion during the years immediately preceding 1941. We admit that the chemical industry does play a certain part in the manufacturing of explosives and war materials but submit that there is no evidence in the case that the chemical industry was developed for the purpose of preparing for war, nor is there any competent evidence that the greater part of it was similarly developed. It is well known that the chemical industry plays an extremely important part in normal civilian economy. We urge the Tribunal to ignore the figures, conclusions, and opinions submitted by Liebert on Japan’s chemical industry and development. Admittedly, he is not an economist, and on cross-examination he stated he examined hundreds of documents, disregarding those which in his opinion he considered inaccurate and he made a selection of only these documents which pointed out what he wished to show.^b A request was made while he was on the stand on October 22, 1946 as to the source of his figures with respect to the chemical industries and the defense was never advised, as its request was parried by the prosecution.^c In other words, it is quite apparent that Liebert started out to show that Japan was preparing for aggressive war and only accepted and presented to this Tribunal figures which he selected and which he thought showed this and he disregarded others. Such an admission by the prosecution’s chief economy witness makes it imperative that his testimony be disregarded. The Tribunal indicated that on the summation under such circumstances a request that his figures be disregarded would be entertained. Even if Liebert’s figures were true with respect to the chemical industry, they demonstrate a normal growth of a newly developed industry.
61. Viewed from a financial standpoint, it is impossible to arrive at a conclusion that Japan ever prepared for aggressive war. The first turning point of Japan’s financial policy occurred after the outbreak of the Manchurian Incident and this change had to be made to meet the

^a (60.a. Ex. 2796-B, T. 25078-82)

^b (60.b. T. 8777 c. T. 8305)

emergency conditions.^a Her operations had to be met by public borrowing. The second turning point in Japan's financial policy began with the February 26, 1936 Incident. The third turning point began after the commencement of the China Affair which involved an increase of taxes and further public borrowing.^b The fourth turning point occurred in January 1938. From a financial standpoint, it is quite apparent that none of these measures show any plans or preparations for initiation of any aggressive wars.

62. The purpose of the Petroleum Control Bill which was introduced in the Diet on March 4, 1936 was explained by Mr. MATSUMOTO as being necessary due to the then present situation of the oil refining industry in Japan.^a He recognized that Japan had to rely on foreign countries for more than half of her supply of benzine and crude petroleum and that it therefore became necessary to regulate imports and establish control of the industry. Nowhere in his speech does it appear that the purpose of the bill was otherwise than as stated. This law was described by the witness YOSHINO as being enacted to insure a six months' supply of oil and there was no reason given that it was for military purposes. On the contrary, it was for the use of domestic industries. It also created competition between Russian, Netherlands, United States and British oil companies, and the bill was based on the example of French legislation. The costs for increasing the supply to six months were borne by the government. If there had been any military purposes in connection with the bill the costs would have been charged to Army and Navy expenditures.^b
63. The Synthetic Oil Industry Bill and the Imperial Fuel Development Company Bill were introduced on July 29, 1937. It was stated that Japan was very poor in oil resources, that large sums of money were being spent by Japan and the demand for oil was increasing. Self-sufficiency was set forth as the object of these bills.^a OKADA testified that Japan was completely lacking in storage of oil until the outbreak of the China Incident. After it commenced American crude oil was bought and a minimum of aviation oil was secured for the Army. This was the first occasion of the Army's storage of oil. At that time Japan, as a whole, was woefully lacking in oil and the amount obtained was barely sufficient to satisfy the needs of the Army's air power for a year, even if civilian oil was added to that of the Army.^b
64. The prosecution refers to the planned increase of the Petroleum Industry which it admits was not adopted until 1939. Its argument that the laws which were passed in 1934 and 1935 for the purpose of carrying out the plan of 1939 is of course untenable. It also comments on the fact that a rationing system was effectuated to curtail civilian and government use of oil in March 1938.^a In view of the fact that hostilities with China were in progress at that time

^a (61.a. Ex. 2769, T. 24935-9)

^b (61.b. Ex. 2769, T. 24936)

^a (62.a. Ex. 2777-A, T. 24998-25000 b. T. 18215-17)

^a (63.a. Ex. 2781-A, T. 25013)

^b (63.b. T. 24855-6)

^a (64.a. F13)

this curtailment was not unusual. As a matter of fact, rationing was practiced by other countries even before they got into the war.

65. The impression that oil was required in Japan solely for the use of the army and navy was dissipated by the testimony of Mr. OKAZAKI whom the prosecution failed to cross-examine.^a He testified that in 1931 the army and navy consumed 36,000 kilolitres of diesel oil while the civilian consumption was 1,240,000 kilolitres and that this proportion continued from that time up until the outbreak of the Pacific War. Civilian consumption in 1941 was 1,066,150 kilolitres. This drop in civilian consumption was also accounted for by the drop in importation from 1,346,000 kilolitres in 1940 to 465,000 kilolitres in 1941 because of the embargoes. With respect to fuel oil he pointed out that the volume of naval consumption increased after 1931. This was due to the fact that coal burning boilers on vessels were gradually changed to fuel oil burning boilers. The annual consumption of fuel oil in 1941 was 1,367,360 kilos.
66. It is interesting to note that although Liebert freely expressed opinions and conclusions with respect to many industries he voluntarily stated on direct examination that there was tremendous stockpiling of reserve oil for some purpose or others.^a He thus refused to testify that its use was for war purposes. He well knew of the large civilian demands for oil in Japan. In view of the prosecution charge that Japan was endeavoring to dominate the world, it is interesting to note that Japan did not have sufficient oil to last more than a year and a half as testified to by many witnesses for the defense. Certainly that is not a large supply for a country charged with endeavoring to dominate the world. YOSHINO pointed out that government subsidies and encouragement of prospecting for oil deposits on the part of Japan dates back as far as 1900.^b
67. Under the caption of Mobilization of Japan's Economy for War the prosecution in broad and sweeping terms concludes that the various laws and bills which were passed were all designed to carry out some aggressive scheme.^a It reluctantly admits that nationalization had begun some years prior to 1937 but fails to explain why it does not conclude that the nationalization prior to 1936 was either for or not for the purposes of aggressive war. The reason is obvious. It arbitrarily seized upon HIROTA's statement of August 7, 1936, and without any basis in fact or reason assumed that all legislation thereafter was pursuant to HIROTA's policies. In reviewing the laws and acts of the government it attaches to these laws and actions statements unsupported by the transcript, except in some instances it adopts Liebert's conclusions and opinions that the laws were designed to further aggression. After reviewing Liebert's testimony it states: "None of the facts contained in the testimony just reviewed has been challenged by the defense. All of the defense witnesses either completely ignored them or silently or openly admitted them."^b This is an amazing statement in view of the defense evidence just reviewed. Furthermore, when one considers the vast amount of

^a (65.a. Ex. 2782, T. 25020.)

^a (66.a. T. 8287 b. T. 28314)

^a (67.a. F21-F31)

^b (67.b. F-29)

economic evidence which was offered by the defense and to which the prosecution's objections were successfully sustained the inferences are irresistible that the prosecution's contention with respect to economic development in Japan is so shaky and unfounded that it fought vigorously to prevent the evidence from coming to light. We have in mind particularly but not exclusively defense document 1762 which was the testimony of ISHIBASHI Tanzan, who is perhaps one of the most outstanding economic experts in Japan. His affidavit was well documented and illustrated by charts. It ill behooves the prosecution to comment that its testimony was not challenged. It is submitted that the prosecution has failed to sustain its burden of proof that Japan's economy was geared for war. To substantiate its theory that Japan economically planned for the Pacific War, a war time pep talk reported to have been made by SATO is heavily relied upon by the prosecution. This talk at best was pure propaganda and the figures used in the press report have not been corroborated by the prosecution. Obviously the speech was given for home consumption.

- f. It is significant that the prosecution has not seen fit to remind this Tribunal that its only economic witness, admittedly not an expert and not regarded as such by the Tribunal, finally admitted on cross-examination that his figures showed no stockpiling of any materials for war on December 7, 1941,^a except oil, and even as to oil be stated it was for some purpose or other.

ECONOMIC BLOCKADE AGAINST JAPAN

69. This Tribunal has stated the law to be "We are all clear that you cannot justify an attack on another country because the other country decides not to trade with you unless perhaps that trade is vital to your very existence."^a While this pronouncement goes further than the statement of Secretary Kellogg that an economic blockade is an act of war, the evidence now to be reviewed comes within the Tribunal's statement of the law, and meets the test that the embargoes threatened Japan's very existence.
70. The evidence just reviewed deals in fact with the various nationalistic economic measures of the Western Powers which affected Japan and Japanese goods requiring her to adopt internal measures to overcome their effect on Japanese trade and commerce. We now pass on to the evidence showing the active steps, amounting in instances to bold belligerency, undertaken to choke Japan economically. The economic blockade thrown around Japan had such damaging effect that Japan was forced to fight.
71. According to Secretary of State Hull "moral embargoes against Japan commenced in 1938."^a On July 1, 1938, as a result of a circular letter by the United States Department of State to manufacturers and exporters of aircraft and aircraft parts it became virtually impossible for Japanese firms to import any airplanes and airplane parts of American make. This was pointed out in a letter from Japanese Ambassador HORINOUCI to Secretary of

^a (68.a. T. 8784.)

^a (69.a. T. 20914.)

^a (71.a. Ex. 2840, T. 25409. b. Ex. 2799; T. 25154, 25159. c. Ex. 2840, T. 25408.)

State Hull. He protested that this action was in derogation of the provision of Article 5, Paragraph 3 of the Treaty of Commerce and Navigation between Japan and the United States dated February 21, 1911.^b On July 26, 1939 this treaty was abrogated effective in six months, because, according to Secretary Hull, “[T]he operation of the most favored nation clause of the treaty was a bar to the adoption of retaliatory measures against Japanese commerce.”^c

72. Ambassador HORINOUCI also complained to the United States Department of State vigorously protesting the action of the United States in circularizing various manufacturers and exporters dissuading them from applying for licenses and subsequent action extending the list of embargoed products. On December 20, 1939 the United States Secretary of State advised Ambassador Grew that the United States did not wish to enter into negotiations for a new Treaty to replace the Commercial Treaty of 1911 which had been abrogated by the United States in July 1939.^a As OKADA testified, when this treaty lapsed in January 1940, an aggravated economic pressure was applied to Japan.^b
73. We will not burden the Tribunal with a recitation of all the commodities embargoed and their effective dates. The Tribunal’s attention, however, is directed to Appendix “A” attached hereto containing this information. A cursory examination of this appendix reveals the large amount of products absolutely necessary for Japan’s civilian life. Some of course could have been converted into munitions of war. Since Japan was not able to import those which could be used for war purposes, it is difficult to reconcile Liebert’s and the prosecution’s contention that Japan prepared economically for war during this period. America was in most cases the sole exporter of such articles to Japan.
74. On June 28, 1940, the United States Secretary of State discussed the Far Eastern situation with the British Ambassador and the Australian Minister. Secretary Hull informed Ambassador Grew that he, Secretary Hull had declared “that the United States had been exerting economic pressure on Japan for a year, that the United States fleet was stationed in the Pacific and that everything possible was being done ‘short of serious risk of actual military hostilities’ to keep the Japanese situation stabilized.” “This course,” he added, “was the best evidence of the intentions of the United States in the future.”^a As shown in Appendix A, proclamations were issued increasing the severity of the embargo on July 2, 1940, July 26, 1940, September 12, 1940, September 25, 1940, September 30, 1940, October 15, 1940, December 10, 1940, December 20, 1940, and January 10, 1941.
75. It was during this period of time that Japan was so worried about the economic pressure that she endeavored with renewed vigor to enter into negotiations with the Netherlands East Indies, particularly with respect to oil. The witness ISHIZAWA testified that discussions were started on September 12, 1940, when KOBAYASHI arrived in Batavia. At that time the Japanese-American Commercial Treaty had been abrogated and the economic pressure of the United States against Japan was being stiffened. He further stated that by the middle

^a (72.a. Ex. 2799, T. 25154, 25159. b. T. 24857.)

^a (74.a. Ex. 2800-A, T. 25168, 25169.)

of October Japan acceded to the proposals of the Netherlands East Indies with respect to approximately a million tons of oil. Then the negotiations took an unfavorable turn upon Japan's entering into the alliance with Germany. Negotiations continued, however, and the general proposition apart from the petroleum question, was presented to Dr. Van Mook on January 16, 1941. The witness testified that prosecution document 2748-A-2, Exhibit 1311, was a mere draft and did not constitute Japanese demands. This was further strengthened by his testimony on cross-examination. The memorandum presented on January 16, 1941, was the memorandum contained in Exhibit 1309-A. From February to May 1941, the proposals were discussed and the Japanese approved the compromise. On January 6, 1941 the Netherlands Government's reply had many points of differences and the negotiations proved abortive. Reconsideration was urged by the Japanese representative on June 17, 1941, but the Netherlands' representative replied that there was no room left for reconsideration. A joint communiqué was published.^a In the meantime, further economic pressure was exerted by the United States by the issuance of embargo proclamations on February 4, 1941, February 25, 1941, March 4, 1941 and April 14, 1941.

76. On May 28, 1941, the Japanese Ambassador told the United States Secretary of State that "they were feeling the pinch of a restricted economy and would welcome a resumption of trade."^a On the same day, notwithstanding, the Department of State proclaimed that the embargo was extended to the Philippine Islands.^b
77. In a memorandum from Rear Admiral Turner to Admiral Stark a conversation with Ambassador NOMURA on July 20, 1941, is recorded. Ambassador NOMURA pointed out that Japan's economic position was bad and steadily getting worse due to United States and Philippine export restrictions against Japan and a reduction in shipping tonnage. He pointed out the necessity for Japan to have raw materials.^a
78. On July 18, 1941 assistance was asked of the United States Acting Secretary of State because three Japanese steamers had been held up in the Panama Canal although ships of other nationalities were being permitted to go through the canal.^a
79. On July 21, 1941, in a conversation between President Roosevelt and the Japanese Ambassador, the President stated that the United States had been permitting oil to be exported from the United States to Japan. If this had not been done, the Japanese Government would have used this as a pretext for moving down upon the Netherlands Indies. The United States had been pursuing this policy to preserve peace in the Pacific. The President also stated that if Japan attempted to seize oil supplies by force in the Netherlands Indies, the latter would resist; the British would come to their assistance and war would result. And in view of the United States' policy of assisting Great Britain "an exceedingly

^a (75.a. Ex. 2821 T. 25269, 25297.)

^a (76.a. Ex. 2819, T. 25261, 25262. b. Ex. 2820, T. 25262, 25263.)

^b (77.a. Ex. 2823, T. 25303, 25305.)

^a (78.a. Ex. 2825, T. 25308.)

serious situation would immediately results.”^a Apparently President Roosevelt realized that even oil alone was “vital” to Japan’s “very existence.”

80. On July 25, 1941, Brigadier General Sherman Miles sent a memorandum to the Chief of Staff and copies were sent to the Secretary of War and others in the War Department. This memorandum points out the Japanese Government had announced its decision to take over control of the nation’s capital funds for the purpose of mobilization and the distribution of capital in order to obtain maximum production and bolster defense and that “the new policy is obviously a belated attempt to improve the deplorable economic conditions in Japan” which were pointed out in a confidential economy estimate on May 27, 1941, a copy of which was attached to the aforesaid memorandum. It is noteworthy that the subject matter set forth in this memorandum “Sanctions Against Japan” contained a pencil notation that the memorandum was written prior to receipt of information regarding the embargo decision.^a
81. On July 25, 1941, the United States Chief of Naval Operations sent a message to Admiral Kimmel and others under the heading “Economic Sanctions Against Japan advising that the United States would impose economic sanctions on July 26, that the Japanese assets and funds would be frozen, that he did not anticipate immediate hostile reaction by Japan through use of military means but that appropriate precautionary measures against possible eventualities should be taken. He further stated that action was being initiated by the United States Army to call the Philippine Army into active service.”^a
82. The purpose of the imposition of an economic blockade against Japan became apparent when a radio bulletin was issued by the White House on July 25, 1941, wherein President Roosevelt stated that the United States during the past two years had to get rubber, tin, etc., from the South Pacific and had to help get meat, wheat and corn for England and Australia and that it was essential from the standpoint of the United States to prevent a war from starting in the South Pacific. He also pointed out that the United States wanted to keep the line of supply from Australia to New Zealand going to the Near East — all their troops, supplies, etc. — so that it was essential for Great Britain that peace be kept in the South Pacific. In replying to Japan, he stated “whether they had at that time aggressive purposes to enlarge their empire southward, they didn’t have any oil of their own in the north.” We pointed out the method of letting the oil go to Japan with the hope — and it worked for two years — of keeping war out of the South Pacific for the good of the United States and in defense of Great Britain and for the freedom of the seas.^a
83. Perhaps the most significant statement on which this Tribunal can rely in holding that Japan was provoked into the Pacific War is the one of President Roosevelt just stated. The conclusion is irresistible that President Roosevelt in making the above statement fully realized that a healthy economic situation is necessary for the establishment of peace in the

^a (79.a. Ex. 2824, T. 25305, 25307.)

^a (80.a. Ex. 2826, T. 25312.)

^a (81.a. Ex. 2828, T. 25319.)

^a (82.a. Ex. 2827, T. 25316, 25317.)

world. It is not a new idea, but the direful consequences which followed a policy blockading trade with Japan demonstrates the soundness of the position that unhealthy economic conditions is one of the principal underlying causes of war. The postwar policy of rendering economic aid to the unfortunate which is being followed today to prevent war demonstrates the wisdom of such a policy. If rendering economic aid to a nation can prevent wars, then it follows that a deliberate plan to choke a nation economically is a justifiable cause of war. This Tribunal has had an unprecedented opportunity of examining the causes and effects of world conflicts covering a period of 17 years. A ray of light in the judgment of this Tribunal which would lead the world out of the darkness of wars to the light of peace would transcend in importance any profound judgment deciding the law or the fate of these accused. Perhaps, the above-quoted statement of President Roosevelt may lead the way to a world-wide recognition of equality in economics cutting across national boundaries.

84. In a document handed by Japanese Ambassador TOYODA to American Ambassador Grew on July 25, 1941, he pointed out the amicable agreement between the Japanese Government and the Vichy Government on 21 July 1941 concerning the joint protection of French Indo-China. He also stated that if the United States proposed a complete embargo of oil that there would be a wave of antagonism against aid to Chiang Kai-shek's regime and the encirclement campaign against Japan. He also set forth that the feelings of the Japanese people had been aggravated by the unsatisfactory result of the Netherlands East Indies-Japanese negotiation and the tightening of the encirclement campaign against Japan.^a
85. Notwithstanding President Roosevelt's recognition of the fact that the continuance of supplying oil to Japan had prevented a war, on July 25, 1941, the Executive Order freezing Japanese assets was issued in Washington, D.C. The reason advanced was to prevent the use of financial facilities and trade between Japan and the United States in ways harmful to the national defense and American interests. It was pointed out that "At the specific request of Generalissimo Chiang Kai-shek and for the purpose of helping the Chinese Government, the President has, at the same time, extended the freezing control to Chinese assets in the United States." It was also announced that administration of the licensing system with respect to China's assets would be conducted with a view to strengthening the foreign trade and exchange position of the Chinese government and that the inclusion of China in the Executive Order was a continuation of United States policy of assisting China.^a
86. Great Britain and the Netherlands lost no time in collaborating with the United States. Although they had treaties of Commerce and Navigation with Japan dating back to 1911, on July 26, 1941 and July 28, 1941 respectively they abrogated all these treaties. Although they stated the treaties would terminate at the end of the periods prescribed in them, nevertheless illegal steps were taken immediately by prohibition of business transactions and control of financial transactions with Japan, thus effecting an economic freezing of Japanese business.^a

^a (84.a. Ex. 2830, T. 25323.)

^a (85.a. Ex. 2829, T. 25321.)

^a (86.a. T. 36970, 36972.)

87. The drastic effect of the freezing order of July 26, 1941 was recognized by the United States Government. "This order brought under control of the government all financial and import and export trade transactions in which Japanese interests were involved and the effect of this was to bring about very soon the virtual cessation of trade between the United States and Japan."^a
88. Admiral Stark admitted that after the imposition of economic sanctions against Japan in the summer of 1941, he had stated that Japan would go somewhere and take the oil and that if he were a Jap, he would. As had so informed the State Department.^a Admiral Stark also stated that it was in line with his thought that the Japanese would have no alternative sooner or later but to go to Malaya or the Dutch East Indies for oil and other materials. He believed that the State Department agreed with his thought that sanctions would bring war on ultimately. As recorded in "Peace and War": "Practically all realistic authorities have been agreed that imposition of substantial economic sanctions or embargoes against any strong country unless that imposition be backed by a show of superior force, involves serious risk of war." The President and heads of the Army and Navy and Department of State were in constant consultation through this period regarding all the aspects of the diplomatic and military situation.^b
89. A letter from Admiral Stark to the Honorable Sumner Welles, dated July 22, 1941, reveals that the President had previously asked Admiral Stark for his reaction to an embargo on a number of articles to Japan and he had told the President that he had expressed the same thought to the President as he had expressed to Sumner Welles and Mr. Hull regarding the oil. He also advised that he was having the War Plans Division make a quick study, which was finished on July 21; a copy of which he had sent to the President who expressed himself as pleased with it and asked Admiral Stark to send a copy to Mr. Hull.^a This study which is dated July 19, 1941, sets forth as its purpose the determination of the effect which would be produced by enforcement of an absolute or partial embargo on trade between the United States and Japan. It shows that export to Japan in 1940 declined \$5,000,000 from 1939 and \$13,000,000 from 1938 but during the first ten months of 1940 the value of exports increased due to higher commodity prices and Japan's increased demand for American products as a result of inability to purchase from Europe. Sharp recessions were noted during the last two months of 1940 as a result in part of application of export license controls.^b In November and December 1940 declines were registered in machine tools, ferro-alloys and refined copper while scrap iron exports were practically negligible. United States exports to Japan during the first five months of 1941 were \$44,000,000 less than for the same period of 1940. Trade declines from \$11,000,000 in January to \$6,000,000 in May 1941. Iron and steel products and metal working machinery which amounted to \$67,000,000 in 1940 virtually disappeared in 1941 as a direct result of the embargo.^c American raw cotton purchased by Japan dropped from \$42,000,000 in 1939 to \$29,000,000 in 1940 due to

^a (87.a. Ex. 2831, T. 25326.)

^b (88.a. Ex. 2833-A, T. 25336 b. Ex. 2833-A, T. 25340.)

^c (89.a. Ex. 2833-A, T. 25341. b. Ex. 2833-A, T. 25342, 25343. c. Ex. 2833-A, T. 25344.)

the quantity of piece goods on hand in Japan, the high price of the American cotton compared to that of India and of Latin America and shipping requirements for other items.

90. Declines in other items including automobiles was due to the decline of purchasing power in Japan and Japanese restrictions on importation of these items. Imports from Japan to the United States were practically the same for 1939 and 1940 and for the first four months of 1941 imports declined only \$8,000,000 for the same period in 1940 as compared with the decline in American exports of \$37,000,000^a.
91. The report further states: "It is generally believed that shutting off the American supply of petroleum will lead promptly to an invasion of the Netherlands East Indies. While probable, this is not necessarily a sure and immediate result. ... Furthermore, Japan has oil stocks for about eighteen months war operation. Export restrictions of oil by the United States should be accompanied by similar restrictions by the British and Dutch. ... Furthermore, it seems certain that, if Japan should then take military measures against the British and Dutch, she would also include military action against the Philippians, which would immediately involve us in a Pacific War."
92. The report ends with a recommendation that trade with Japan be not embargoed at this time. R. K. Turner. "(Written in longhand:) I concur in general. Is this the kind of picture you wanted? H.R.S."^a.
93. Cordell Hull testified before the Joint Congressional Committee on the Investigation of the Pearl Harbor Attack that on July 26, 1939 when the United States notified the Japanese Government of its desire to terminate the Treaty of Commerce and Navigation of 1911, it was felt that the Treaty was not affording adequate protection to American commerce while at the same time the operation of the most-favored-nation clause of the treaty was a bar to the adoption of retaliatory measures against Japanese commerce. Further that the termination of the treaty on January 26, 1940 removed the legal obstacle to the United States placing restrictions upon trade with Japan; that moral embargoes were begun by the United States in 1938 and after the Act of July 2, 1940, the restrictions imposed were intended also as deterrents and expressions of United States opposition to Japan's actions. He further stated that the decision of the United States to enter into the conversations with the Japanese was in line with the need of the United States to rearm for self defense. He further pointed out that the freezing order of July 26, 1941 brought under the control of the government all financial and import and export trade transactions in which Chinese or Japanese interests were involved. The effect was to bring about a virtual cessation of trade between the United States and Japan.^a.
94. The terrific impact of the freezing orders on the civilian life of Japan has been amply demonstrated by the evidence. A large number of trades, industries, and commodities whose

^a (90.a. Ex. 2833-A, T. 25345.)

(92.a. Ex. 2833-A, T. 25346, 25350.)

^a (93.a. Ex. 2840, T. 25808.)

very existence depended upon the importation of raw materials and the exportation of finished products unrelated to the production of military goods were immediately affected. Some of these were as follows: Cement, aluminum, lead, copper, coal, rice, beans, phosphate rock, fats, oil and oil bearing materials, hides and skin, tanning materials, leather and leather manufactures, potassium salts, wheat and wheat flour, zinc, sugar, lumber, textile machinery, sulphur and sulphuric acid, wool and wool manufactures, marine products, soda, ash and caustic soda, chemical nitrogen, rayon yarn and staple fibre, bicycles, electrical equipment, silk fabrics, cotton textiles, rubber and rubber manufactures, rayon fabrics, and raw cotton.^a The evidence further discloses that the freezing orders effected such basic commodities as rice, fodder, cattle, sugar, fertilizers, salt and so forth.^b Its textile industries including such materials as cotton, wool, silk and rayon upon which many of the civilian population depended for a living were practically brought to a standstill.^c

95. Diversified commodities which the Japanese shipping industry carried to various parts of the globe virtually ceased as a result of the freezing orders.^a The extent of Japan's imports and exports affected by kinds, by countries, and by political units has been graphically presented to the Tribunal.^b We might mention here incidentally that the prosecution's contention that foreign trade with Manchukuo practically ceased after the State was established is unfounded when it is noted that in 1936 almost 2000 foreign ships with a total tonnage of approximately 5 million tons entered Dairen.^c
96. As early as July 2, 1941, the United States Department of State had arrived at a conclusion that "the freezing of Japanese funds in the United States could be expected in the near future."^a This negates any prosecution claim that the freezing was in retaliation for the advance into Indo-China. Even if it were in retaliation, an examination of the facts demonstrates unquestionably that such retaliation was not justified.
97. On August 14, 1941, the United States Office of Naval Operations sent a top secret dispatch to the commanders in the Pacific in which was recited a curtailment of Japanese trade and shipping as a direct result of the United States-British-Dutch interference and partially through refusal of transit of the Panama Canal, export control decisions, refusal of bunkering and port facilities and fund freezing.^a
98. The evidence shows that indignation was running so high in Japan as a result of the progressive steps taken by America including the freezing order that Prince KONOYE took the initiative in a conciliatory move and Ambassador NOMURA had so advised the President by the delivery of a communiqué from Prime Minister KONOYE. It was about this time that the announcement was made that oil was being sent to the Soviet Union and a decision made to send a military commission headed by General Magruder to Chiang Kai-

^a (94.a. Ex. 3714, T. 36968; Defense Document 500A-1-500A-37. b. Ex. 3710-A, T. 36966.

^b c. Ex. 3712-A, T. 36968.)

^c (95.a. Ex. 3711-A, T. 36967. b. Ex. 2766-A, Ex. 2766-B c. Ex. 3713-A, T. 36968.)

^a (96.a. Ex. 2880, T. 25739.)

^a (97.a. Ex. 2854, T. 25576.)

shek.^a The situation was becoming so tense that General ISODA pointed out to Brigadier General Sherman Miles “Japan has her back to the wall. She can be pushed just so far, then will have to fight us to save her national honor and integrity though war with the United States is the last thing desired by Japan. General Miles also stated in the memorandum he submitted to the United States Chief of Staff: “General ISODA’s visit clearly parallels conversations now in progress between the Japanese Ambassador and the State Department.”^b

99. The prosecution has conceded that the report of the United States Tariff Commission in September, 1941, showed that the United States would be affected not at all by the cessation of imports from Japan.^a On October 9, 1941, a request was made of Congress to amend the Neutrality Act to permit the United States vessels to rearm and carry cargoes to belligerent ports anywhere. This was approved on November 17, 1941.^b
100. In order to avoid war notwithstanding the economic blockade, investigations were made with respect to the possibility of the production of synthetic oil in Japan. It was found to be impossible from a practical standpoint due to the lack of steel pressure pipes, coal, and cobalt.^a A further study was made in October, 1941, after the TOJO Cabinet was formed and it was thought that war could be avoided by an expansion of the oil industry, and when War Minister TOJO was told it was impossible, he ordered a more fundamental investigation on October 29, 1941. After that, even the Planning Board reached the conclusion that such a plan was impossible. Its assumptions and conclusions were submitted to the Imperial Conference On November 5, 1941.^b
101. Investigations were also made with respect to shipping if war started. Due to loss of tonnage, inability to obtain coal or iron and the consumption of materials on hand, it was felt that Japan’s resiliency would be questionable.^a The total amount of oil stocked by the Army, Navy and civilian population showed that Japan, if provoked to war would only be able to continue fully for one year in the air against a strong power and for one year of operations at sea. The assumptions and conclusions with regard to the shipping industry show that there was a woeful lack of shipping to carry on any protracted war.
102. That the Japanese were led to wonder about the degree of sincerity of the American Government was set forth in a memorandum from Ambassador Grew dated November 10, 1941. He stated that the Japanese Minister had complained that Japan needed raw materials for its existence and that unless the American Government realized this fact successful conclusions to the conversations would be difficult. He pointed out that for more than six months the Japanese Government had made proposals calculated to approach the American point of view but that the American Government had yielded nothing.^a

^a (98.a. Ex. 2835, T. 25360, 25363. b. Ex. 2856, T. 25585, 25587.)

^b (99.a. T. 25083-25085. b. Ex. 2839, T. 25395.)

^a (100.a. T. 24870. b. T. 24861, 24863.)

^b (101.a. T. 24870.)

^a (102.a. Ex. 2838, T. 25394.)

103. The foregoing abundantly demonstrates that on the facts and the law as pronounced by Secretary Kellogg and this Tribunal, Japan was justified in attacking, as its trade, vital to its very existence, was blockaded. It is to be noted that the evidence in support of this conclusion is not only from Japanese sources, but is derived from statements made by due representatives of the Western Powers at the time of the occurrence of the blockade. In addition to the economic evidence reviewed we shall now proceed to summarize the facts regarding the military encirclement threat which also played a major role in Japan's decision to fight.

MILITARY ACTION AGAINST JAPAN

104. Hand in hand with the expressed policy of economic strangulation of Japan, the Western Powers took more forceful and drastic action to enforce their policy with military might. Can the prosecution rightfully contend that by furnishing men and materials of war to China, and the consequent spilling of Japanese blood on Chinese soil, there was no aggression against Japan? Let us examine the evidence and see if Japan had just cause to react against the military ring being forged around her. The facts amply demonstrate she had just provocation to strike in self-defense.

105. As early as 1933 the United States allocated funds for the purpose of constructing and equipping 32 naval vessels.^a Next year the Vinson Naval Bill was authorized for construction of ships up to the limits of the Washington and London Naval Treaties.^b In April, 1935, the United States War Department Appropriation Act authorized an increase in the Army to 165,000 enlisted men.^c

106. While Japan was endeavoring to work out its economic difficulties through legislation, Admiral R. E. Ingersoll went to London in December, 1937. The primary purpose of his visit was to investigate and talk with the British Admiralty on figures regarding command relationships, communications, liaison, codes, ciphers and so forth. These conversations were based on the assumption that the United States and Great Britain might find themselves at war with Japan in the Pacific. He readily admitted before the Pearl Harbor Investigation Committee that his purpose in going there was "to work out a tentative plan as to how each nation would co-operate with the other in the event that (war) should occur." The report of these conferences remained effective until later agreements A-B-C-1 became effective in 1940 or 1941.^a Admiral Stark, in his testimony before the same committee, corroborated this visit.^b

107. On January 28, 1938, it was recommended to the Congress of the United States that the United States national defense should be strengthened and not limited to one ocean and one coast. Substantial increases were asked in military and naval armaments. Suspicion was voiced in Congress that the naval increases were based on an agreement for naval

^b (105.a. Ex. 2842, T. 25435, b. Ex. 2842, T. 25435. c. Ex. 2842, T. 25435.)

^a (106.a. Ex. 2844-A, T. 25448, 25449. b. Ex. 2849-A, T. 25532.)

cooperation with some other power such as Great Britain which was denied by Secretary Hull in a letter to a member of Congress on February 10, 1938. The proposals for military and naval rearmament were substantially adopted by the Congress.^a

108. In 1939 the United States proceeded to extend preparations beyond continental America and the location of the military strategic sites being fortified left no doubt that they were aimed at Japan. "Peace and War" reveals that on January 12, 1939, President Roosevelt, in a special message to Congress, asked for an appropriation of more than a half billion dollars for military equipment, particularly military and naval aircraft to strengthen the air defense of continental United States, Alaska, Hawaii, Puerto Rico, and the Canal Zone. He also recommended training additional air pilots and steps be taken for quantity production of war materials. These recommendations were substantially enacted into law.^a
109. In a letter of October 21, 1938, to the President, Secretary Hull pointed out the necessity of obtaining sufficient supplies of raw materials to be used in the event of a general war. Steps were initiated to make such supplies available when the recommendation of the Secretary of State was enacted into law on June 7, 1939, and \$100,000,000 was appropriated for securing stock piles of strategic materials for industrial, military, and naval needs. As the result of an agreement between United States and Great Britain dated June 23, 1939, 100,000 tons of rubber were brought into the United States in exchange for cotton.^a
110. It was in January, 1940, that the President of the United States asked for a further appropriation of \$1,800,000,000. In May, 1940, the American fleet was advanced to Hawaii and based there as a threat to Japan.^a In the same month further appropriations in Congress were requested. In his address to Congress on May 16, 1940, President Roosevelt stated that he would like to see the United States "geared up to the ability to turn out at least 50,000 planes a year." He requested one million dollars appropriation for Army and Navy equipment. On May 31, 1940, an additional request for appropriations of over a million dollars was asked together with authority to call the National Guard and necessary reserve personnel into military service. Congress appropriated the money together with the President's request of July 10, 1940, for five billion dollars more for the rearmament program. His request to call the National Guard and reserve personnel into active military service was also approved by Congress on August 27, 1940. It is significant to note that the legislation provided that such personnel could be used in the territories and possessions of the United States including the Philippine Islands.^b In January, 1941, the United States budget called for an additional appropriation of eleven billion dollars, thus raising to twenty eight billion dollars the outlay for military purposes since May, 1940.^c

^a (107.a. Ex. 2843, T. 25442.)

^a (108.a. Ex. 2845, T. 25451.)

^a (109.a. Ex. 2845, T. 25452.)

^b (110.a. Ex. 2800-A, T. 25168, 25169. b. Ex. 2846, T. 25469.)

^c (110.c. Ex. 2847, T. 25493.)

(111.a. Ex. 2848, T. 25495, 25499.)

111. The United States Lend-Lease Bill became law on March 11, 1941, and seven billion dollars was appropriated to accomplish the objectives of the bill. The avowed purpose was the establishment of a policy for unqualified and immediate all-out aid to certain countries including China.^a
112. Admiral Stark testified in the Pearl Harbor Attack Investigation that in 1940 he had requested the British Government to send naval experts to the United States to discuss the possibility of naval cooperation. The meetings were held in 1941 and completed in March, 1941. He stated that he had requested the meeting on his own responsibility and informed the President that he had done it. This commission from Great Britain arrived in the United States in civilian clothes.^a
113. The next step aimed at Japan was the Most Secret American-Dutch-British Conversations held in Singapore in April, 1941. The report of these conversations states: "It is important to organize air operations against Japanese occupied territory and against Japan herself. It is probable that her collapse will occur as a result of economic blockade, naval pressure and air bombardment." It also referred to the offensive value of Luzon for submarine and air force operations and recommended that every effort should be made to maintain a bombing force there as well as building up a similar force in China and also points out under the heading of "Plan for Employment of Land and Air Forces" that "The operating of Chinese Guerrilla Forces armed, equipped and directed by the Associated Powers. Steps have already been taken by the British Government to organize such operations. It is recommended that the United States Government organize similar guerrilla forces." The Report further states: "The organization of subversive activities in Japan and occupied territories. Activities of this kind are already being organized by the British Government. It is recommended that the United States should also undertake such activities and co-ordinate them closely with the British."^a
114. On May 27, 1941, President Roosevelt proclaimed the existence of an unlimited National Emergency and he also stated that the program of the United States had given it time to build more guns, and tanks and planes and ships. At that time, he also made the significant pronouncement that "We in the Americas would decide for ourselves whether and when and where our American interests were attacked or our security threatened."^a This was not an idle statement. It is submitted that if the United States contended it had the right to determine for itself when its security was threatened, the same rule should apply with respect to Japan.
115. A memorandum was sent from Laughlin Curry to President Roosevelt, May 9, 1941, regarding an aircraft program for China in which he informed the President that he had worked out a tentative program for the balance of the year and pointed out the importance of establishing a Chinese air force in China and the psychological importance of such a

^a (112.a. Ex. 2849-A, T. 25532-25534.)

^a (113.a. Ex. 2851-A, T. 25547, 25548, 25550.)

^a (114.a. Ex. 2852, T. 25560.)

program to the Chinese. Attached to the memorandum was the tentative program which included the supplying of 244 pursuit ships, 122 bombers, 340 trainers and 22 transport planes. The schedule provided for increased amounts from May to December, 1941, and for the first six months of 1942. The President answered this note under date of May 15, 1941, stating that it was all right to go ahead and negotiate but that he did not want to imply that he was at that time in favor of the proposals. He suggested that it could only be worked out in relationship to the whole military problem and should be taken up with General Burns and General Arnold.^a

116. On July 5, 1941, Ambassador NOMURA related to United States State Department officials Japan's concern over the threat to it from the ABCD encirclement. He observed that the reports were that America was aiding Chiang Kai-shek in various ways including the dispatch of American pilots to Chungking. American supplies were being sent to Malaya and Netherlands East Indies. There were visits of American squadrons to Australia which to a naval man like himself were of greater significance than more courtesy visits. And also prospects of American aid to the Russian Far East and acquisition of American air bases in Siberia.^a
117. That Japan knew of and feared the military encirclement appears from the fact that also on July 20, 1941, Ambassador NOMURA in a conversation recorded by Admiral Turner complained about the aid the United States was providing China and pointed out that if China was left without industrial and military support, the Chungking regime would be unable to continue the present incident and Japan would then be able to withdraw from the greater part of China. He also pointed out that the United States was improving the Burma Road and was supplying airplanes and pilots to be sent to Chungking and that the pilots were being supplied from the Armed Forces of the United States. He also stated that the British were contributing more and more to measures sustaining the Chungking regime. He also disclosed that within the next few days Japan expected to occupy French Indo-China that this occupation has become essential for Japan's security against a possible attack from the South and for better control over the activities of Chungking. He also expressed apprehension that the United States would take further action against Japan either economically or militarily as soon as Japan's troops were known to be occupying French Indo-China.^a
118. Throughout this period the United States increasingly followed a policy of extending all assistance to China. Among the forms of assistance were loans and credits aggregating some two hundred million dollars and later lend-lease and military supplies were sent to be used in China's resistance against Japan.^a

^a (115.a. Ex. 2850-A, T. 25536.)

^a (116.a. T. 25733.)

^a (117.a. Ex. 2825, T. 25308, 25309.)

^a (118.a. Ex. 2840, T. 25408.)

119. The Japanese proposal of August 6, 1941, was in addition to the withdrawal of troops from French Indo-China that the United States should undertake to “suspend its military measures in the Southwestern Pacific areas and to recommend similar action to the Governments of the Netherlands and Great Britain”^a This further demonstrates Japan’s knowledge of the military activities in the Pacific and its apprehension of an attack.
120. In August, 1941, the problem of supplying the munitions of war as provided in the Lend-Lease Act to belligerent countries was one of the topics discussed by President Roosevelt and Prime Minister Churchill when they met at sea.^a It was also in this month of August, 1941, that the results of the conference held at Singapore on April 19, 1941, had been revised and the A-D-B-2 plan was evolved.^b
121. In November, 1941, negotiations between representatives of the United States and Great Britain were stepped up upon the arrival of Admiral Philipps in Manila.^a On November 23rd large United States Army troop movements were scheduled to depart from San Francisco involving 22 vessels, which included large liners, to assemble at Honolulu.^b On November 26, 1941, a secret message from the United States War Department to General Short in Hawaii reveals a request that the United States pilots be instructed to photograph Truk Island in the Caroline Group and Jaluit in the Marshall Group and that a visual reconnaissance be made immediately. Port Moresby, on the Australian mandated island was to be used. The object of this special photo mission was to obtain information with respect to naval vessels, air fields, aircraft, guns, barracks, and camps. The planes were to be fully equipped with guns and ammunition. The crews were instructed to use means for self-preservation if attacked.^c
122. On November 27th the Chief of Naval Operations, Admiral Stark, and the Army Chief of Staff, General Marshall, prepared a memorandum for the President advising him that considerable Army and Navy reinforcements had been rushed to the Philippines and that ground forces to a total of 21,000 are due to sail from the United States by December 8, 1941.”^a Apparently realizing that the economic blockade had proven effective and that Japan was at last being provoked into war a message was sent from the United States War Department on November 27, 1941, stating that “negotiations with Japan appear to be terminated to all practical purposes, with only the barest possibility that the Japanese Government might come back and offer to continue. Japan’s future action unpredictable but hostile action possible at any moment. If hostilities cannot repeat cannot be avoided, the United States desires that Japan commit the first overt act.”^b Practically identical messages were sent to Hawaii, a dispatch was sent from General Marshall to General MacArthur in the Philippines, and similar messages were sent out by the Navy.^c

^a (119.a. Ex. 2840, T. 25411, 25412.)

^a (120.a. Ex. 2854, T. 25576. b. Ex. 2853-A, T. 25565.)

^b (121.a. Ex. 2853-A, T. 25565, 25566. b. Ex. 2857, T. 25605.)

^a (121.c. Ex. 2858, T. 25608.)

^b (122.a. Ex. 2859, T. 25613. b. Ex. 2860, T. 25620. c. Ex. 2861, Ex. 2862, T. 25621, 25622.)

123. That the Hull Note of November 26, 1941 was intended as a final ultimatum is fully understood from the memorandum of General Gerow of November 27, 1941. It reveals that he had attended a conference, apparently on November 27, 1941, with the Secretary of War, Secretary of Navy and Admiral Stark. The Secretaries were informed of a proposed memo which the Chief of Staff and Admiral Stark directed be prepared for the President. "The Secretary of War wanted to be sure that the memo would not be construed as a recommendation to the President that he request Japan to reopen the conversations. He was reassured on that point."^a In view of the foregoing, one wonders if the final message of President Roosevelt of December 7, 1941 was sent merely to keep the record straight, and with no desire to accomplish anything.
124. Under instruction of the Japanese Government, the Japanese Ambassador in Washington, NOMURA, represented to the United States Government on 3 December 1941 among many other things, that "the United States, British and other countries have increasingly of late intensified their military preparations against Japan and adopted a provocative attitude toward us. On the 20th of last month (November), for instance, an American plane made a reconnaissance flight over Garambi in the south of Formosa. This is not an isolated case of such American and British actions. It is our desire in view of the delicate situation that they should themselves refrain from repeating such actions."^a
125. The prosecution has endeavored to show an elaborate spy system employed by Japan, reporting all types of information to Japan officials. If the Tribunal so finds, then it naturally follows that the Japanese were informed of the various military steps hereinbefore recited. It cannot be questioned that many of them, such as public messages to Congress, enactment of laws, etc., were well known to the Japanese. The testimony of various accused reveals knowledge and subsequent action on their part based on such knowledge. Japanese newspaper reports revealing some of the Allied actions were not permitted in evidence — particularly the 1900 series.^a
126. In the light of the foregoing can it be said that Japan had no reason for apprehension and that she was not justified in advancing into the southern part of French Indo-China and in attacking the United States and Great Britain on December 8, 1941?
127. Before moving into the southern part of French Indo-China, the Japanese Government well knew at that time and reacted to the positive actions which had been committed against her up to that time by the Western powers. She knew; the American Navy had been retained in Hawaii as a threat since May 1940;^a various appropriations had been made by the United States for military expansion and the United States Navy increased;^b Secretary Hull had opposed the British prohibition of aid to Chiang over the Burma road in July 1940;^c

^a (123.a. Ex. 2863, T. 25624.)

^a (124.a. Ex. 2951, T. 26059-26061.)

^a (125.a. T. 25481, etc.)

^b (127.a. T. 36274. b. T. 36274. c. T. 36245. d. T. 36247. e. T. 36246. f. T. 36246. g. T. 36247

Admiral Yarnell had advocated on July 8, 1940, a strong policy against Japan;^d the creation of the 13th Naval District in Alaska in August 1940;^e public announcement of the details of the eight million dollar naval construction budget for American territories in the Pacific in September 1940;^f the United States statement of policy in September 1940 for the construction of a two-ocean fleet and reinforcement of the air force;^g the pronouncement in October 1940 by Secretary of Navy Knox that America was ready to meet the challenge of the Tripartite Alliance;^h the recommendation of the evacuation of women and children in East Asia in October 1940;ⁱ the one hundred million dollar loan to the Chungking Regime in November 1940;^j the establishment of the Pan-American Airlines between Manila and Singapore in the same month;^k Foreign Secretary Eden's pronouncement in the House of Commons on non-cooperation with Japan;^l broadcast by President Roosevelt on December 29, 1940 that America would be an arsenal of democracy for the purpose of combatting the Tripartite Alliance;^m Secretary Morgenthau's speech that America was prepared to extend Lend-Lease to Chungking and to Greece on December 30, 1940;ⁿ the various conferences between military representatives of the United States, Britain and the Netherlands' Army and Navy in Singapore and Manila in October 1940 and April 1941;^o the announcement of Secretary Knox in February 1941 that the Chungking Government had completed an agreement for the purchase of 200 American planes;^p the dispatch by the United States of naval advisors and military observers to Australia, South East Asia, Thailand, Singapore and the Dutch East Indies in February 1941;^q guidance by Great Britain to the Chinese guerilla forces in March and May 1941;^r the visits of the United States Fleet to New Zealand and Australia in March 1941;^s the signing of the British-Chinese Military Agreement including British aid to China and joint defense plans for Burma in March 1941;^t the conferences between representatives from the United States, Great Britain, and the Netherlands in Manila in April 1941;^u military preparation of bases in and around the Pacific areas by the United States, Great Britain, Australia, New Zealand and the Netherlands in the early part of 1941;^v the arrival of Brigadier General Claggett at Chungking in May 1941 for the purpose of assisting Chiang's army;^w the British-Chinese conference in Singapore in May 1941;^x and the strengthening of the anti-Japanese encirclement front with Manila and Singapore as its pivotal points was being undertaken. This evidence has not been disputed, nor were the witnesses cross-examined on it.

128. On July 21, 1941 an understanding of mutual defense was reached between the Japanese and French Governments and a formal exchange of notes took place. The next day pursuant thereto Japan dispatched her armed forces to the southern part of French Indo-China. On July 29, 1941 the protocol between Japan and France for the joint defense of French Indo-China was formally signed.^a Meanwhile the general economic rupture of July 26, 1941 occurred on the pretext that the advance of Japanese forces into the southern part of French

^d h. T. 36247. i. T. 36248. j. T. 36248. k. T. 36246. l. T. 36248. m. T. 36245. n. T. 36245.

^e o. Ex. 3567, T. 34682. p. T. 36245)

^t (127.q. Ex. 3566, T. 34677.

r. Ex. 3567, T. 34682. s. Ex. 3566, T. 34677. t. Ex. 3567, T. 34682. u. Ex. 3566, T. 34677.

^v v. Ex. 3566, T. 34677. w. T. 36245.)

Indo-China was harmful to American national defense and American interests. But was this pretext justified?

129. Prior to this on August 30, 1940, Japan and France had entered into an understanding in which Japan had assured France of its respect for her rights and interests in East Asia, especially the territorial integrity of French Indo-China and her sovereignty over the whole of the said union.^a The Agreement was concluded on September 22, 1940. At that time neither the United States nor Great Britain took any action on the ground it was harmful to American national defense or American interests. It is not unreasonable to suppose that at that time the military encircling ring against Japan was not yet so strengthened as might enable them to take such an attitude.
130. We cannot but wonder how the France-Japanese Protocol of July 29, 1941 and the advance of Japanese forces into the southern part of French Indo-China could constitute a menace to the national defense or interests of either the United States or Great Britain. The national policy on the part of Japan had been clearly laid down on the above mentioned agreement of September 22, 1940. The preamble of the treaty relative to the maintenance of friendly relations and mutual respect for territorial integrity which Japan had concluded with Thailand on June 12, 1940 of the same year also had declared that the two countries entered into the treaty because they were convinced that the peace and the stability of East Asia was their common concern. It was indeed because of the peace and tranquility in French Indo-China and Thailand which had the greatest influence upon the destiny of Japan that she offered to mediate the armed border dispute between Thailand and French Indo-China. The Peace Treaty of 1942 was concluded as a result of this successful mediation.^a
131. What are the contents of the Protocol of July 29, 1941, which caused such a grave international issue? An examination of its text^a discloses no reason why Western powers should have considered it menacing. It specifically states: 1) "The two governments promised to cooperate militarily for the joint defense of French Indo-China; 2) the measures to be taken for the purpose of this cooperation shall be the object of special arrangements; 3) the above arrangement shall remain effective only as long as the circumstances which constitute the motive for their adoption exist."
132. Carefully scrutinizing and pondering over it, we cannot but be at a loss to find out how this protocol concluded with the passive object purely for self-defense could constitute a menace to the United States and Great Britain. Therefore so far as the United States and Great Britain harbored no intention to menace the security of French Indo-China the Protocol as interpreted was utterly harmless to them. It was after all nothing more than a measure of

^a (127.x. Ex. 3567, T. 34682.)
(128.a. Ex. 651; T. 36251, 36252.)
(129.a. Ex. 620, T. 36200.)
^a (130.a. Ex. 647, T. 36625.)
^a (131.a. Ex. 651, T. 7104, 7105.)

self-defense for Japan. They reverse the cause and effect who maintain that this self-defensive measure was a menace to the United States and Great Britain.

133. At the time of the proposed move to French Indo-China, it was stated by the Chief of the First Department of the Navy General Staff that such a step was inevitable because of the effect that the American-Anglo aid to Chiang Kai-shek's regime was having. It was growing increasingly vigorous. The United States, Great Britain, China and the Netherlands were acting in concert in the creation of the so-called A, B, C, D ring.^a The Japanese Navy, being charged with the primary duty of national defense in the Pacific, had knowledge of the United States, Great Britain and the Netherlands war preparations designed against Japan in July 1941 and it was the belief of the Navy that Japan was steadily being encircled.^b
134. The above consideration naturally leads to the conclusion that it was only as a pretext that the United States and Great Britain made the most of the Japanese advance into the southern part of French Indo-China for the freezing of Japanese assets and for the severance of economic relations with Japan. It can safely be said that they raised trouble where there was no cause. Leaving aside for the moment the right or wrong of the advance into the southern part of French Indo-China and the freezing of the assets, it is submitted that the foregoing amply demonstrates that Japan honestly believed that she was being threatened and that it was necessary for her to enter into the Protocol of July 29, 1941, for her own self-defense. After July 26, 1941, conditions became more and more unbearable to Japan because of the affirmative actions of the Western Powers heretofore recorded.
135. In explaining the perplexing international situation prior to and on 5 November 1941 when the Imperial Conference was held, one of the accused succinctly and accurately portrayed the plight of the Japanese as follows: "The Allies had effected an economic encirclement of Japan with a result more telling than we dared admit to the world. We viewed with alarm the increasing armaments of the United States, and could not reason that such military steps were taken in contemplation of war with Germany alone. The American Pacific Fleet had long before moved from its west coast base to Hawaii and there stood as a threat to Japan. The United States policy towards Japan had been strict and unsympathetic, revealing a determination to enforce their demands without compromise. The American military and economic aid to China had aroused the bitterest of feelings among the Japanese people. The Allied Powers had carried on military conferences which were pointedly directed against Japan. It was a tight, tense and trapped feeling that Japan had at that time."^a
136. In attaching weight and importance to the claim that Japan was provoked to and did in fact act in self-defense on December 7, 1941, it must be borne in mind that this position of the accused is not an afterthought. The foregoing summary points to the numerous documents written with regard to protests recorded at the time of their occurrence by Japan's responsible representatives against the economic blockade and military encirclement which

^a (133.a. T. 26911, 26912.)

^b (133.b. T. 26712)

^a (135.a. Ex. 3565, T. 34658, 34659, SHIMADA.)

was being imposed upon her commencing in 1938. Countless pages of testimony have been taken of witnesses who testified to the innumerable cabinet meetings, liaison conferences, meetings of the Senior Statesmen, Privy Council meetings and military discussions — all centering around the effect the economic blockades and military threats were having and would continue to have unless Japan undertook some measures to alleviate the condition. This she patiently tried to do by diplomatic negotiations and failed. It may be said that these embargoes at first were irritating and as they increased in intensity, frequency and scope they prodded Japan into a state of anxiety and finally with the realization that there was no hope of diplomatically breaking out of the stranglehold which was being placed around her neck she was provoked into doing that which any other self-respecting nation would have done. These well-documented facts recorded at the time of their occurrence are summed up in the Imperial Rescript issued on December 8, 1941 that Japan was acting in self-defense.

137. Was Japan justified? Did these accused of those of them who were responsible leaders at that time sincerely and honestly believe that Japan's national existence was at stake because of the blockade and the military encirclement? Responsible leaders in America knew it at that time, and believed it.^a A conclusion to the contrary would be in utter disregard of the facts. We know of no parallel case in history where an economic blockade accompanied by the display of military might was enforced on such a vast scale with such deliberate, premeditated, and coordinated precision and which accomplished its purpose — that of a provocation into the expressed expectation and desire that Japan strike the first blow. Having accomplished the avowed purpose of goading Japan into an attack it would indeed be a black mark in history to record this attack as other than one of self-defense.
138. The well-considered statements of British Cabinet Minister Oliver Lyttleton and ex-President Herbert Hoover as originally reported perhaps best explains the entire situation, when they said respectively — that it would be “a travesty of history over to say that America was forced into the war with Japan” and “[W]e would never have been attacked by the Japanese if we had not given them provocation.”
139. As the A-B-C-D Powers had made the encirclement both military and economic complete, we submit that the first blow was not struck at Pearl Harbor; it was struck when the economic war started long before then. Steadily it constantly contracted, became more effective and devastating so that it threatened Japan's very existence and if continued would have destroyed her. It is evident that these men knew this, believed it, had reason to believe it and acted on their belief. These men are Japanese. They are not Americans or members of the great British Commonwealth of Nations — nor Dutch, nor Russian, nor French. They were Japanese and their decision was one of life or death for their country. They loved their country and they were in a position where they Tribunal to put himself in their position. Would you; could you as patriots, have made any other decision? With that situation, with that honest belief, with ample reason for such belief — can such a decision whether right or wrong, be called that of criminals and not of patriots? If it was not made with criminal intent but made from motives of patriotism and a sincere belief that the measures decided upon

^a (137.a. Ex. 2833-A, T. 25336, 25340, 25346, 25350; Ex. 2856, T. 25360, 25363.)

were necessary to protect and preserve their country, then we submit it cannot be held to be criminal by this Tribunal.

CHAPTER 18: EXCERPT FROM GENERAL DOUGLAS MACARTHUR'S TESTIMONY BEFORE THE JOINT COMMITTEE ON ARMED SERVICES AND FOREIGN RELATIONS OF THE U.S. SENATE

Today many Japanese are familiar with the testimony relating to the American policy in the Far East given by General MacArthur before the Joint Committee on Armed Services and Foreign Relations on May 3, 1951. The reason for its having become so well known is MacArthur's acknowledging that Japan went to war to protect its security. In other words, the Pacific War was a defensive war — a struggle for survival. The 50th anniversary of the ending of World War II occasioned a reexamination of and debates on the historical implications of the tumultuous first half of the Showa era (1926-1989). We were reminded of MacArthur's testimony before the Senate, and of the fact that some participants in the debate cite it without having fully understood its meaning.

MacArthur, then commander of the United Nations Forces, and the Truman administration disagreed completely about methods to be used to contain the Korean War. Ultimately, MacArthur was removed from command and ordered to return to the United States. This event, which sent shockwaves throughout the world, is a striking example of problems that can arise when the military is under civilian control, as it is in a democracy. In an address to Congress, MacArthur said that the Joint Chiefs of Staff were in complete agreement with his decisive strategy, i.e., full-scale war. An enormous political controversy erupted, which prompted the Senate to establish the Joint Committee on Armed Services and Foreign Relations. The Committee embarked on a fact-finding mission, and held hearings, to which witnesses were summoned.

Reports of these events captured the attention of the public, both in the U.S. and abroad. Even the Japanese found themselves following with great interest MacArthur's testimony and his political fortunes in the U.S., despite the fact that they had been at his mercy while he held the reins of authority in Japan (until a month before his dismissal). For instance, the *Asahi Shinbun* ran a report wired by its Washington correspondent on May 1, 1951, on the front page of its May 3 edition, part of which follows.

A MAJOR CONTROVERSY UNFOLDS: GENERAL MACARTHUR TAKES THE STAND

The U.S. Congress will launch an exhaustive investigation of Far Eastern policy on May 3, when hearings conducted by the Senate Joint Committee on the Armed Services and Foreign Relations begin. MacArthur will be the first to testify. Subsequent witnesses are likely to include George C. Marshall (secretary of defense), Omar Bradley (chairman of the Joint Chiefs of Staff), and the chiefs of staff of the Army, Navy, and Air Force. The interrogations are certain to create a major controversy over Far Eastern policy, the likes of which have never been seen before.

Subsequent front-page articles covering the testimony before the Committee appeared in Japanese newspapers from May 4-8.

A front-page spread in the May 7 edition of the *Asahi Shinbun* under the headline “General MacArthur Refers to Japan in His Testimony” covers the third and last day of MacArthur’s testimony (May 5). According to that article, MacArthur made several references to Japan. He said that when the Japanese police reserves were organized, they adopted American military division formation, and could easily be transformed into a formidable ground force if supplied with weapons. He also stated that the laws and regulations enacted during the Occupation would probably be revised after the Occupation ended, to better conform to Japanese tradition. MacArthur said that he had, in fact, offered advice to then Prime Minister Shidehara with respect to the portion of the Japanese Constitution that renounces war.

About Japanese sentiments towards the U.S., MacArthur said that the Japanese, like all East Asians, tended to defer to victors and disdain the vanquished. However, they seemed to have developed respect for the confidence exhibited by Americans. They had become familiar with and attracted to the American lifestyle. MacArthur believed that a social revolution was underway, and that in terms of strategy and financial administration, the Japanese perceived themselves as belonging to the Western bloc. Referring to Soviet military strength in the Far East, MacArthur voiced the opinion that the Soviets were capable of invading Japan and occupying Hokkaido, but lacked the necessary might to occupy Honshu, the main island, for any length of time.

His famous statement about Japan’s having commenced hostilities for security reasons was not made on the third day of his testimony, but on the first day, when he was interrogated about American strategy in the Far East. For reasons unbeknownst to us, the *Asahi Shinbun* does not refer to that statement, even though it provides otherwise thorough coverage of MacArthur’s testimony on the first day of the hearings, in its May 4 and 5 editions.

The newspaper describes the policies MacArthur advocated as follows (May 7 edition).

Using the combined strength of the U.S. Navy and Air Force, blockade the Chinese communists. Initiate bombing to cut off the supply of war materiel to the CCP from the USSR and other regions. If the support of the United Nations or NATO members cannot be obtained, the U.S. should conduct this mission independently, or with support from the Nationalist government.

This advice was followed by the famous exchange between MacArthur and Senator Bourke Hickenlooper. But nowhere in the *Asahi Shinbun* article is there any mention of that exchange. (We examined the abridged edition. Although the newspaper sometimes took liberties with the material in its abridged editions, we assume that that was not the case here. Also, we must remember that censorship was still in effect in 1951.)

The transcript from the Senate hearing begins as follows.

HEARINGS before the COMMITTEE ON ARMED SERVICES and the COMMITTEE ON FOREIGN RELATIONS / UNITED STATES SENATE / Eighty-second Congress First session to conduct an inquiry into the military situation in the Far East and the facts surrounding the relief of general of the Army Douglas MacArthur from his assignments in that area / Part I / May 3, 4, 5, 7, 8, 9, 10, 11, 12, and 14, 1951 / Printed for the use of the Committee on Armed Services and the Committee on Foreign Relations / United States Government Printing Office / Washington: 1951

The statement in question appears in a separate volume, "Military Situation in the Far East" in a section entitled "Senator Hickenlooper's Question No. 5 and MacArthur's Response," and subtitled "Strategy Against Japan in World War II."

We compared the transcript issued by the U.S. Government Printing Office with the version that appeared in the May 3, 1951 edition of *The New York Times*. There are very few discrepancies. However, above the fourth paragraph of MacArthur's response, the newspaper added a subtitle, "Nothing in Japan Except Silkworm." This is a misprint of only one letter, but it alters the meaning considerably. What MacArthur said was that there was "nothing indigenous to Japan except the silkworm." The Japanese translator worked from the newspaper article, believing it to be accurate, and translated the passage accordingly. "Silkworm" is correct.

The meeting between MacArthur and President Truman on October 15, 1950 on Wake Island, at which MacArthur admitted that the IMTFE was a mistake, is well known today. But at that time, the topics discussed at the meeting were kept secret. Not until the Senate hearing was the General's comment about the IMTFE made public, at the discretion of the Committee. The *Asahi Shinbun* touched upon this statement, but only obliquely, as follows.

MACARTHUR CONVINCED WAR CRIMES TRIALS HAVE NO CAUTIONARY EFFECT

Washington (UPI)

On May 2, the U.S. Senate Joint Committee on the Armed Services and Foreign Relations made public secret documents from a meeting that took place on Wake Island. Of particular note are the following opinions expressed by General MacArthur.

1. When asked by Averell Harriman (special assistant to the President) what should be done about North Korean war crimes, MacArthur urged him not to address them because nothing good would come out of doing so. He added that neither the IMTFE nor the Nuremberg trials were likely to have a cautionary effect.

Obviously, Japan's newspapers did not stress MacArthur's mentions of Japan at Wake Island or at the Senate hearings nearly as much as they should have (though we must be mindful that censorship may have been at work here). But apparently the Japanese intellectuals who read about them in English-language newspapers spread the word, and eventually they became known throughout Japan.

Of the information printed in the *Asahi Shinbun*, perhaps the most meaningful item was the end of MacArthur's reply to a question posed by Joint Committee Chairman Richard Russell: "It is my own personal opinion that the greatest political mistake we made in a hundred years in the Pacific, was in allowing the Communists to grow in power in China."³⁷

MacArthur was both voicing his convictions and making a confession. For five years and eight months he was the most powerful man in Japan, commanding more authority than the Emperor or the government. During that time, he witnessed the rapid growth of communist forces in Japan, who were essentially nurtured by left-wing elements in GHQ's Government Section. MacArthur had been informed of the defense arguments presented at the IMTFE, which described the communist threat in the 1920s and 1930s, and Japan's desperate struggle against it. On June 25, 1950, he came face to face with that threat when North Korean troops launched a meticulously planned southward attack; hundreds of thousands of Chinese communist soldiers were prepared to support them. His differences of opinion with the Truman administration brought an end to any political ambitions he may have had. In Korea he experienced a jolting realization — that his country (and he) had been wrong. He awakened to the dangers and the criminality of communism. But the central figures in his country's government were still in the dark. The comment he made to the effect that underestimating communism was the most serious American political blunder in 100 years was somewhat of an exaggeration, but MacArthur was exasperated at the time. From it we can safely extrapolate another realization on his part, i.e., that the IMTFE, too, was a mistake.

STRATEGY AGAINST JAPAN IN WORLD WAR II

Senator HICKENLOOPER. Question No. 5: Isn't your proposal for sea and air blockade of Red China the same strategy by which Americans achieved victory over the Japanese in the Pacific?

General MACARTHUR. Yes, sir. In the Pacific we bypassed them. We closed in. You must understand that Japan had an enormous population of nearly 80 million people, crowded into 4 islands. It was about half a farm population. The other half was engaged in industry.

Potentially the labor pool in Japan, both in quantity and quality, is as good as anything that I have ever known. Some place down the line they have discovered what you might call the dignity of labor, that men are happier when they are working and constructing than when they are idling.

This enormous capacity for work meant that they had to have something to work on. They built the factories, they had the labor, but they didn't have the basic materials.

³⁷

The New York Times, 04 May 1951.

There is practically nothing indigenous to Japan except the silkworm. They lack cotton, they lack wool, they lack petroleum products, they lack tin, they lack rubber, they lack a great many other things, all of which was in the Asiatic basin.

They feared that if those supplies were cut off, there would be 10 to 12 million people unoccupied in Japan. Their purpose, therefore, in going to war was largely dictated by security.