International Law Studies – Volume 46

International Law Documents

U.S. Naval War College (Editor)

2. International Military Tribunal for the Far East, Judgment, 4–12 November 1948 (Excerpts)

NOTE. The trial of those accused in Indictment No. 1 on 3 May 1946 Pleas of "not guilty" were entered for all the defendants. Evidence was heard between 3 June 1946 and 10 February 1948; 419 witnesses testified in court, and 4, 336 exhibits and depositions and affidavits of 779 witnesses were admitted in evidence. Defendants Matsuoka and Nagano died during the course of the trial, and the indictment of the defendant Okawa was suspended by reason of his insanity. The judgment of the Tribunal was read by the President of the Tribunal, Sir William Webb, from 4 to 12 November 1948. The Indian Member of the Tribunal dissented, the French and Netherlands Members dissented in part, the Philippine Member wrote a separate concurring opinion, and the President filed a separate statement of reasons. The Tribunal's judgment was published at Tokyo in six fascicules with a total of 1,218 pages, and an annex of 130 pages.

PART A

CHAPTER 1. ESTABLISHMENT AND PROCEEDINGS OF THE TRIBUNAL

[The Tribunal summarized the instruments under which it was established and the course of its proceedings.]

CHAPTER II. THE LAW

(a) *Jurisdiction of the Tribunal*

In our opinion the law of the Charter is decisive and binding on the Tribunal. This is a special tribunal set up by the Supreme Commander under authority conferred on him by the Allied Powers. It derives its jurisdiction from the Charter. In this trial its members have no jurisdiction except such as is to be found in the Charter. The Order of the Supreme Commander, which appointed the members of the Tribunal, states: "The responsibilities, powers, and duties of the members of the Tribunal are set forth in the Charter thereof. . ." In the result, the members of the Tribunal, being otherwise wholly without power in respect to the trial of the accused, have been empowered by the documents, which constituted the Tribunal and appointed them as

members, to try the accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter.

The foregoing expression of opinion is not to be taken as supporting the view, if such view be held, that the Allied Powers or any victor nations have the right under international law in providing for the trial and punishment of war criminals to enact or promulgate laws or vest in their tribunals powers in conflicts with recognised international law or rules or principles thereof. In the exercise of their right to create tribunals for such a purpose and in conferring powers upon such tribunals belligerent powers may act only within the limits of international law.

The substantial grounds of the defence challenge to the jurisdiction of the Tribunal to hear and adjudicate upon the charges contained in the Indictment are the following:

(1) The Allied Powers acting through the Supreme Commander have no authority to include in the Charter of the Tribunal and to designate as justiciable "Crimes against Peace" (Article 5 (a));

(2) Aggressive war is not per se illegal and the Pact of Paris of 1928 renouncing war as an instrument of national policy does not enlarge the meaning of war crimes nor constitute war a crime;

(3) War is the act of a nation for which there is no individual responsibility under international law;

(4) The provisions of the Charter are "ex post facto" legislation and therefore illegal;

(5) The Instrument of Surrender which provides that the Declaration of Potsdam will be given effect imposes the condition that Conventional War Crimes as recognised by international law at the date of the Declaration (26 July, 1945) would be the only crimes prosecuted;

(6) Killings in the course of belligerent operations

except in so far as they constitute violations of the rules of warfare or the laws and customs of war are the normal incidents of war and are not murder;

(7) Several of the accused being prisoners of war are triable by court martial as provided by the Geneva Convention 1929 and not by this Tribunal.

Since the law of the Charter is decisive and binding upon it this Tribunal is formally bound to reject the first four of the above seven contentions advanced for the Defence but in view of the great importance of the questions of law involved the Tribunal will record its opinion on these questions.

After this Tribunal had in May 1946 dismissed the defence motions and upheld the validity of its Charter and its jurisdiction thereunder, stating that the reasons for this decision would be given later, the International Military Tribunal sitting at Nuremberg delivered its verdicts on the first of October 1946. That Tribunal expressed *inter alia* the following opinions:

The Charter is not an arbitrary exercise of power on the part of the victorious nations but is the expression of international law existing at the time of its creation;

The question is what was the legal effect of this pact (Pact of Paris August 27, 1928)? The Nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy and expressly renounced it. After the signing of the pact any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.

The principle of international law which under certain circumstances protects the representative of a state cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

The maxim "nullum crimen sine lege" is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

The Charter specifically provides . . . "the fact that a defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment." This provision is in conformity with the laws of all nations . . . The true test which is found in varying degrees in the criminal law of most nations is not the existence of the order but whether moral choice was in fact possible.

With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord. They embody complete answers to the first four of the grounds urged by the defence as set forth above. In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.

The fifth ground of the Defence challenge to the Tribunal's jurisdiction is that under the Instrument of Surrender and the Declaration of Potsdam the only crimes for which it was contemplated that proceedings would be taken, being the only war crimes recognized by international law at the date of the Declaration of Potsdam, are Conventional War Crimes as mentioned in Article 5 (b) of the Charter.

Aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam,

and there is no ground for the limited interpretation of the Charter which the defense seek to give it.

A special argument was advanced that in any event the Japanese Government, when they agreed to accept the terms of the Instrument of Surrender, did not in fact understand that those Japanese who were alleged to be responsible for the war would be prosecuted.

There is no basis in fact for this argument. It has been established to the satisfaction of the Tribunal that before the signature of the Instrument of Surrender the point in question had been considered by the Japanese Government and the then members of the Government, who advised the acceptance of the terms of the Instrument of Surrender, anticipated that those alleged to be responsible for the war would be put on trial. As early as the 10th of August, 1945, three weeks before the signing of the Instrument of Surrender, the Emperor said to the accused Kido, "I could not bear the sight . . . of those responsible for the war being punished . . . but I think now is the time to bear the unbearable."

The sixth contention for the Defence; namely, that relating to the charges which allege the commission of murder will be discussed at a later point.

The seventh of these contentions is made on behalf of the four accused who surrendered as prisoners of war—Itagaki, Kimura, Muto and Sato. The submission made on their behalf is that they, being former members of the armed forces of Japan and prisoners of war, are triable as such by court martial under the articles of the Geneva Convention of 1929 relating to prisoners of war, particularly Articles 60 and 63, and not by a tribunal constituted otherwise than under that Convention. This very point was decided by the Supreme Court of the United States of America in the Yamashita case. The late Chief

Justice Stone, delivering the judgment for the majority of the Court said: "We think it clear from the context of these recited provisions that Part 3 and Article 63, which it contains, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war. Section V gives no indication that this part was designated to deal with offences other than those referred to in Parts 1 and 2 of Chapter 3." With that conclusion and the reasoning by which it is reached the Tribunal respectfully agrees.

The challenge to the jurisdiction of the Tribunal wholly fails.

(b) *Responsibility for War Crimes Against Prisoners*

Prisoners taken in war and civilian internees are in the power of the Government which captures them. This was not always the case. For the last two centuries, however, this position has been recognised and the customary law to this effect was formally embodied in the Hague Convention No. IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as "prisoners") rests therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners.

In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control the functions of

Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the Government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general the responsibility for prisoners held by Japan may be stated to have rested upon:

(1) Members of the Government;

(2) Military or Naval Officers in command of formations having prisoners in their possession;

(3) Officials in those departments which were concerned with the well-being of prisoners;

(4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:

(1) They fail to establish such a system.

(2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by

merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

(1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or

(2) They are at fault in having failed to acquire such knowledge.

If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the

commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.

Departmental Officials having knowledge of ill-treatment of prisoners are not responsible by reason of their failure to resign; but if their functions included the administration of the system of protection of prisoners and if they had or should have had knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future then they are responsible for such future crimes.

(c) *The Indictment*

[The Tribunal gave its reasons for abstaining from consideration of certain counts in the indictment. Counts 6 to 17, which charged the planning and preparation of wars of aggression and wars in violation of international law, treaties, agreements and assurances, were not considered because the Tribunal found it unnecessary in respect to those defendants who were found guilty of conspiracy (charged in Counts 1 to 5) to enter convictions also for planning and preparing. Counts 18 to 26, which charged the initiation of a war of aggression and a war in violation of international law, treaties, agreements and assurances, were not considered because the offense of initiating such wars was included in the offense of waging them, alleged in Counts 27 to 36. Counts 39 to 43 and 44 to 52, which charged the unlawful killing and murdering of various persons by unlawfully ordering, causing and permitting the armed forces of Japan to make certain attacks, were not considered because these murders were part of the offenses of unlawfully waging war alleged in Counts 27 to 36.

[The Tribunal held it had no jurisdiction under the Charter to consider Counts 37, 38, 44 and 52, which charged conspiracy to murder and to commit crimes in breach of the laws of war. Article 5 (a) of the Charter gave jurisdiction over conspiracy to commit crimes against peace, but Article 5 (b) and (c) were held not to give jurisdiction of conspiracies to commit conventional war crimes and crimes against humanity; a reference in Article 5 (c) to "a common plan or conspiracy to commit any of the foregoing crimes" was held to refer exclusively to conspiracies to commit crimes against peace.]

Chapter III. Obligations Assumed and Rights Acquired by Japan

[The Tribunal made a detailed study of the international rights and obligations of Japan relevant to the indictment. It stated that these obligations form a background against which the actions of the accused as should be viewed and judged; later in the opinion it held that wars of aggression having been proved, it was unnecessary to consider whether they were also wars otherwise in violation of international law or in violation of treaties, agreements and assurances.]

PART B

Chapter IV. The Military Domination of Japan and Preparation for War

[The Tribunal reviewed at length the internal political history of Japan between 1 January 1928 and the conclusion of the Triple Alliance with Germany and Italy on 27 September 1940. The coming to power of military extremists in Japan was linked with external aggression in Manchuria and China.]

Chapter V. Japanese Aggression Against China

[The history of Japanese military and economic penetration in Manchuria and North China after 18 September 1931, and of the setting up and operation of puppet governments in those areas, was reviewed.]

Chapter VI. Japanese Aggression Against the U.S.S.R.

[The history of Japan's expectation, advocacy, planning and preparation of war against the U. S. S. R., of Japanese subversion and sabotage, and of the incidents at Lake Khassan in July 1938 and at Nomonhan in May 1939 was reviewed.]

Chapter VII. The Pacific War

[The history of the planning and preparation of the Pacific War between the end of 1938 and 7 December 1941 and of its initiation on the latter date is set out at length. The end of the chapter is reproduced.]

The Japanese Note Delivered in Washington On December 7th 1941

Hague Convention No. III 1907, relative to the opening of hostilities, provides by its first Article "The Contracting Powers recognise that hostilities between themselves must not commence without previous and explicit warning in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war". That Convention was binding on Japan at all relevant times. Under the Charter of the Tribunal the planning, preparation, initiation, or waging of a war in violation of international law, treaties, agreements or assurances is declared to be a crime. Many of the charges in the indictment are based wholly or partly upon the

view that the attacks against Britain and the United States were delivered without previous and explicit warning in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war. For reasons which are discussed elsewhere we have decided that it is unnecessary to deal with these charges. In the case of counts of the indictment which charge conspiracy to wage aggressive wars and wars in violation of international law, treaties, agreements or assurances we have come to the conclusion that the charge of conspiracy to wage aggressive wars has been made out, that these acts are already criminal in the highest degree, and that it is unnecessary to consider whether the charge has also been established in respect of the list of treaties, agreements and assurances—including Hague Convention III—which the indictment alleges to have been broken. We have come to a similar conclusion in respect to the counts which allege the waging of wars of aggression and wars in violation of international law, treaties, agreements and assurances. With regard to the counts of the indictment which charge murder in respect that wars were waged in violation of Hague Convention No. III of 1907 or of other treaties, we have decided that the wars in the course of which these killings occurred were all wars of aggression. The waging of such wars is the major crime, since it involves untold killings, suffering and misery. No good purpose would be served by convicting any defendant of that major crime and also of "murder" eo nomine. Accordingly it is unnecessary for us to express a concluded opinion upon the exact extent of the obligation imposed by Hague Convention III of 1907. It undoubtedly imposes the obligation of giving previous and explicit warning before hostilities are commenced, but it does not define the period which must be allowed between the giving of

this warning and the commencement of hostilities. The position was before the framers of the Convention and has been the subject of controversy among international lawyers ever since the Convention was made. This matter of the duration of the period between warning and hostilities is of course vital. If that period is not sufficient to allow of the transmission of the warning to armed forces in outlying territories and to permit them to put themselves in a state of defence they may be shot down without a chance to defend themselves. It was the existence of this controversy as to the exact extent of the obligation imposed by the Convention which opened the way for TOGO to advise the Liaison Conference of 30th November 1941 that various opinions were held as to the period of warning which was obligatory, that some thought it should be an hour and a half, some an hour, some half an hour. The conference left it to TOGO and the two Chiefs of Staff to fix the time of the delivery of the Note to Washington with the injunction that that time must not interfere with the success of the surprise attack. In short they decided to give notice that negotiations were broken off at so short an interval before they commenced hostilities as to ensure that the armed forces of Britain and the United States at the points of attack could not be warned that negotiations were broken off. TOGO and the naval and military men, to whom the task had been delivered, arranged that the Note should be delivered in Washington at 1.00 p.m. on 7th December 1941. The first attack on Pearl Harbor was delivered at 1.20 p.m. Had all gone well, they would have allowed twenty minutes for Washington to warn the armed forces at Pearl Harbor. But so anxious were they to ensure that the attack would be a surprise that they allowed no margin for contingencies. Thus, through the

decoding and transcription of the Note in the Japanese Embassy taking longer than had been estimated, the Japanese Ambassadors did not in fact arrive with the Note at Secretary Hull's office in Washington until 45 minutes after the attack had been delivered. As for the attack on Britain at Kota Bharu, it was never related to the time (1.00 p.m.) fixed for the delivery of the Note at Washington. This fact has not been adequately explained in the evidence. The attack was delivered at 11.40 a.m. Washington time, one hour and twenty minutes before the Note should have been delivered if the Japanese Embassy at Washington had been able to carry out the instructions it had received from Tokyo.

We have thought it right to pronounce the above findings in fact for these matters have been the subject of much evidence and argument but mainly in order to draw pointed attention to the defects of the Convention as framed. It permits of a narrow construction and tempts the unprincipled to try to comply with the obligation thus narrowly construed while at the same time ensuring that their attacks shall come as a surprise. With the margin thus reduced for the purpose of surprise no allowance can be made for error, mishap or negligence leading to delay in the delivery of the warning, and the possibility is high that the prior warning which the Convention makes obligatory will not in fact be given. TOJO stated that the Japanese Cabinet had this in view for they envisaged that the more the margin was reduced the greater the possibility of mishap.

The Formal Declaration of War

The Japanese Privy Council's Committee of Investigation did not begin the consideration of the question of making a formal declaration of war upon the United States, Great Britain and the Netherlands

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until 7.30 a.m., 8th December (Tokyo time) when it met in the Imperial Palace for that purpose at that time. SHIMADA announced that the attacks had been made upon Pearl Harbor and Kota Bharu; and a bill declaring war on the United States and Great Britain, which had been drafted at the residence of HOSHINO during the night, was introduced. In answer to a question during the deliberations on the bill, TOJO declared in referring to the peace negotiations at Washington that, "those negotiations were continued only for the sake of strategy". TOJO also declared during the deliberations that war would not be declared on the Netherlands in view of future strategic convenience; and that a declaration of war against Thailand would not be made as negotiations were in progress between Japan and Thailand for the conclusion of "an Alliance Pact". The Bill was approved; and it was decided to submit it to the Privy Council. The Privy Council met at 10.50 a.m., 8th December 1941 and passed the Bill. The Imperial Rescript declaring war against the United States and Great Britain was issued between 11.40 and 12.00 a.m., 8th December 1941 (Washington time, 10.40 p.m. and 11.00 p.m., 7th December) (London time, 2.40 a.m. and 3.00 a.m., 8th December). Having been attacked, the United States of America and the United Kingdom of Great Britain and Northern Ireland declared war on Japan on 9th December 1941 (London and Washington, 8th December). On the same day the Netherlands, Netherlands East Indies, Australia, New Zealand, South Africa, Free France, Canada and China also declared war on Japan. The next day, MUTO stated in a conversation with the Chief of Operations of the Army General Staff that the sending of Ambassador Kurusu to the United States was nothing

more than a sort of camouflage of events leading to the opening of hostilities.

Conclusions

It remains to consider the contention advanced on behalf of the defendants that Japan's acts of aggression against France, her attack against the Netherlands, and her attacks on Great Britain and the United States of America were justifiable measures of self-defence. It is argued that these Powers took such measures to restrict the economy of Japan that she had no way of preserving the welfare and prosperity of her nationals but to go to war.

The measures which were taken by these Powers to restrict Japanese trade were taken in an entirely justifiable attempt to induce Japan to depart from a course of aggression on which she had long been embarked and upon which she had determined to continue. Thus the United States of America gave notice to terminate the Treaty of Commerce and Navigation with Japan on 26th July 1939 after Japan had seized Manchuria and a large part of the rest of China and when the existence of the treaty had long ceased to induce Japan to respect the rights and interests of the nationals of the United States in China. It was given in order that some other means might be tried to induce Japan to respect these rights. Thereafter the successive embargoes which were imposed on the export of materials to Japan were imposed as it became clearer and clearer that Japan had determined to attack the territories and interests of the Powers. They were imposed in an attempt to induce Japan to depart from the aggressive policy on which she had determined and in order that the Powers might no longer supply Japan with the materials to wage war upon them. In some cases, as for example in the case of the embargo on the

export of oil from the United States of America to Japan, these measures were also taken in order to build up the supplies which were needed by the nations who were resisting the aggressors. The argument is indeed merely a repetition of Japanese propaganda issued at the time she was preparing for her wars of aggression. It is not easy to have patience with its lengthy repetition at this date when documents are at length available which demonstrate that Japan's decision to expand to the North, to the West and to the South at the expense of her neighbors was taken long before any economic measures were directed against her and was never departed from. The evidence clearly establishes contrary to the contention of the defense that the acts of aggression against France, and the attacks on Britain, the United States of America and the Netherlands were prompted by the desire to deprive China of any aid in the struggle she was waging against Japan's aggression and to secure for Japan the possessions of her neighbors in the South.

The Tribunal is of opinion that the leaders of Japan in the years 1940 and 1941 planned to wage wars of aggression against France in French Indo-China. They had determined to demand that France cede to Japan the right to station troops and the right to air bases and naval bases in French Indo-China, and they had prepared to use force against France if their demands were not granted. They did make such demands upon France under threat that they would use force to obtain them, if that should prove necessary. In her then situation France was compelled to yield to the threat of force and granted the demands.

The Tribunal also finds that a war of aggression was waged against the Republic of France. The occupation by Japanese troops of portions of French

Indo-China, which Japan had forced France to accept, did not remain peaceful. As the war situation, particularly in the Philippines, turned against Japan the Japanese Supreme War Council in February 1945 decided to submit the following demands to the Governor of French Indo-China: (1) that all French troops and armed police be placed under Japanese command, and (2) that all means of communication and transportation necessary for military action be placed under Japanese control. These demands were presented to the Governor of French Indo-China on 9th March 1945 in the form of an ultimatum backed by the threat of military action. He was given two hours to refuse or accept. He refused, and the Japanese proceeded to enforce their demands by military action. French troops and military police resisted the attempt to disarm them. There was fighting in Hanoi, Saigon, Phnom-Penh, Nhatrang, and towards the Northern Frontier. We quote the official Japanese account, "In the Northern frontiers the Japanese had considerable losses. The Japanese army proceeded to suppress French detachments in remote places and contingents which had fled to the mountains. In a month public order was re-established except in remote places". The Japanese Supreme War Council had decided that, if Japan's demands were refused and military action was taken to enforce them, "the two countries will not be considered as at war". This Tribunal finds that Japanese actions at that time constituted the waging of a war of aggression against the Republic of France.

The Tribunal is further of opinion that the attacks which Japan launched on 7th December 1941 against Britain, the United States of America and the Netherlands were wars of aggression. They were unprovoked attacks, prompted by the desire to seize the possessions of these nations. Whatever may be the

difficulty of stating a comprehensive definition of "a war of aggression", attacks made with the above motive cannot but be characterised as wars of aggression.

It was argued on behalf of the defendants that, in as much as the Netherlands took the initiative in declaring war on Japan, the war which followed cannot be described as a war of aggression by Japan. The facts are that Japan had long planned to secure for herself a dominant position in the economy of the Netherlands East Indies by negotiation or by force of arms if negotiation failed. By the middle of 1941 it was apparent that the Netherlands would not yield to the Japanese demands. The leaders of Japan then planned and completed all the preparations for invading and seizing the Netherlands East Indies. The orders issued to the Japanese army for this invasion have not been recovered, but the orders issued to the Japanese navy on 5th November 1941 have been adduced in evidence. This is the Combined Fleet Operations Order No. 1 already referred to. The expected enemies are stated to be the United States, Great Britain and the Netherlands. The order states that the day for the outbreak of war will be given in an Imperial General Headquarters order, and that *after 0000 hours on that day a state of war will exist* and the Japanese forces will commence operations according to the plan. The order of Imperial General Headquarters was issued on 10th November and it fixed 8th December (Tokyo time), 7th December (Washington time) as the date on which a state of war would exist and operations would commence according to the plan. In the very first stage of the operations so to be commenced it is stated that the Southern Area Force will annihilate enemy fleets in the Philippines, British Malaya and the Netherlands East Indies area. There is no evidence that

the above order was ever recalled or altered in respect to the above particulars. In these circumstances we find in fact that orders declaring the existence of a state of war and for the execution of a war of aggression by Japan against the Netherlands were in effect from the early morning of 7th December 1941. The fact that the Netherlands, being fully apprised of the imminence of the attack, in self defence declared war against Japan on 8th December and thus officially recognised the existence of a state of war which had been begun by Japan cannot change that war from a war of aggression on the part of Japan into something other than that. In fact Japan did not declare war against the Netherlands until 11th January 1942 when her troops landed in the Netherlands East Indies. The Imperial Conference of 1st December 1941 decided that "Japan will open hostilities against the United States, Great Britain and the Netherlands." Despite this decision to open hostilities against the Netherlands, and despite the fact that orders for the execution of hostilities against the Netherlands were already in effect, TOJO announced to the Privy Council on 8th December (Tokyo time) when they passed the Bill making a formal declaration of war against the United States of America and Britain that war would not be declared on the Netherlands in view of future strategic convenience. The reason for this was not satisfactorily explained in evidence. The Tribunal is inclined to the view that it was dictated by the policy decided in October 1940 for the purpose of giving as little time as possible for the Dutch to destroy oil wells. It has no bearing, however, on the fact that Japan launched a war of aggression against the Netherlands.

The position of Thailand is special. The evidence bearing upon the entry of Japanese troops into Thailand is meagre to a fault. It is clear that there

was complicity between the Japanese leaders and the leaders of Thailand in the years 1939 and 1940 when Japan forced herself on France as mediator in the dispute as to the border between French Indo-China and Thailand. There is no evidence that the position of complicity and confidence between Japan and Thailand, which was then achieved, was altered before December 1941. It is proved that the Japanese leaders planned to secure a peaceful passage for their troops through Thailand into Malaya by agreement with Thailand. They did not wish to approach Thailand for such an agreement until the moment when they were about to attack Malaya, lest the news of the imminence of that attack should leak out. The Japanese troops marched through the territory of Thailand unopposed on 7th December 1941 (Washington time). The only evidence the prosecution has adduced as to the circumstances of that march is (1) a statement made to the Japanese Privy Council between 10 a.m. and 11.00 a.m. on 8th December 1941 (Tokyo time) that an agreement for the passage of the troops was being negotiated, (2) a Japanese broadcast announcement that they had commenced friendly advancement into Thailand on the afternoon of the 8th December (Tokyo time) (Washington time, 7th December), and that Thailand had facilitated the passage by concluding an agreement at 12.30 p.m., and (3) a conflicting statement, also introduced by the prosecution, that Japanese troops landed at Singora and Patani in Thailand at 3.05 in the morning of 8th December (Tokyo time). On 21st December 1941 Thailand concluded a treaty of alliance with Japan. No witness on behalf of Thailand has complained of Japan's actions as being acts of aggression. In these circumstances we are left without reasonable certainty that the Japanese advance into Thailand was

contrary to the wishes of the Government of Thailand and the charges that the defendants initiated and waged a war of aggression against the Kingdom of Thailand remain unproved.

Count 31 charges that a war of aggression was waged against the British Commonwealth of Nations. The Imperial Rescript which was issued about 12 noon on 8th December 1941 (Tokyo time) states "We hereby declare war on the United States of America and the British Empire." There is a great deal of lack of precision in the use of terms throughout the many plans which were formulated for an attack on British possessions. Thus such terms as "Britain", "Great Britain", and "England" are used without discrimination and apparently used as meaning the same thing. In this case there is no doubt as to the entity which is designated by "the British Empire". The correct title of that entity is "the British Commonwealth of Nations". That by the use of the term "the British Empire" they intended the entity which is more correctly called "the British Commonwealth of Nations" is clear when we consider the terms of the Combined Fleet Operations Order No. 1 already referred to. That order provides that a state of war will exist after 0000 hours X-Day, which was 8th December 1941 (Tokyo time), and that, the Japanese forces would then commence operations. It is provided that in the very first phase of the operations the "South Seas Force" will be ready for the enemy fleet in the Australia area. Later it was provided that "The following are areas expected to be occupied or destroyed as quickly as operational conditions permit, a, Eastern New Guiena, New Britain". These were governed by the Commonwealth of Australia under mandate from the League of Nations. The areas to be destroyed or occupied are also stated to

include "Strategic points in the Australia area". Moreover, "important points in the Australian coast" were to be mined. Now the Commonwealth of Australia is not accurately described as being part of "Great Britain", which is the term used in the Combined Fleet Secret Operations Order No. 1, nor is it accurately described as being part of "the British Empire", which is the term used in the Imperial Rescript. It is properly designated as part of "the British Commonwealth of Nations". It is plain therefore that the entity against which hostilities were to be directed and against which the declaration of war was directed was "the British "Commonwealth of Nations", and Count 31 is well-founded when it charges that a war of aggression was waged against the British Commonwealth of Nations.

It is charged in Count 30 of the Indictment that a war of aggression was waged against the Commonwealth of the Philippines. The Philippines during the period of the war were not a completely sovereign state. So far as international relations were concerned they were part of the United States of America. It is beyond doubt that a war of aggression was waged against the people of the Philippines. For the sake of technical accuracy we shall consider the aggression against the people of the Philippines as being a part of the war of aggression waged against the United States of America.

Chapter VIII. Conventional War Crimes (Atrocities)

After carefully examining and considering all the evidence we find that it is not practicable in a judgment such as this to state fully the mass of oral and documentary evidence presented; for a complete statement of the scale and character of the atrocities reference must be had to the record of the trial.

The evidence relating to atrocities and other Conventional War Crimes presented before the Tribunal establishes that from the opening of the war in China until the surrender of Japan in August 1945 torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practiced by the Japanese Army and Navy. During a period of several months the Tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theaters of war on a scale so vast, yet following so common a pattern in all theaters, that only one conclusion is possible—the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces.

[There follows a detailed review of Japanese atrocities and instances of mistreatment of prisoners of war proved before the Tribunal. The Japanese system for handling prisoners of war, Allied protests against mistreatment of prisoners, and Japanese condonation and concealment of ill-treatment of prisoners of war and civilian internees are reviewed.]

PART C

Chapter IX. Findings on Counts of the Indictment

In Count 1 of the Indictment it is charged that all the defendants together with other persons participated in the formulation or execution of a common plan or conspiracy. The object of that common plan is alleged to have been that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein or bordering thereon, and for that purpose should, alone or in combination with other countries having similar objects, wage a war or wars of aggression

against any country or countries which might oppose that purpose.

There are undoubtedly declarations by some of those who are alleged to have participated in the conspiracy which coincide with the above grandiose statement, but in our opinion it has not been proved that these were ever more than declarations of the aspirations of individuals. Thus, for example, we do not think the conspirators ever seriously resolved to attempt to secure the domination of North and South America. So far as the wishes of the conspirators crystallised into a concrete common plan we are of opinion that the territory they had resolved that Japan should dominate was confined to East Asia, the Western and South Western Pacific Ocean and the Indian Ocean, and certain of the islands in these oceans. We shall accordingly treat Count 1 as if the charge had been limited to the above object.

We shall consider in the first place whether a conspiracy with the above object has been proved to have existed.

Already prior to 1928 Okawa, one of the original defendents, who has been discharged from this trial on account of his present mental state, was publicly advocating that Japan should extend her territory on the Continent of Asia by the threat or, if necessary, by use of military force. He also advocated that Japan should seek to dominate Eastern Siberia and the South Sea Islands. He predicted that the course he advocated must result in a war between the East and the West, in which Japan would be the champion of the East. He was encouraged and aided in his advocacy of this plan by the Japanese General Staff. The object of this plan as stated was substantially the object of the conspiracy, as we have defined it. In our review of the facts we have noticed many subsequent declarations of the con-

spirators as to the object of the conspiracy. These do not vary in any material respect from this early declaration by Okawa.

Already when Tanaka was premier, from 1927 to 1929, a party of military men, with Okawa and other civilian supporters, was advocating this policy of Okawa's that Japan should expand by the use of force. The conspiracy was now in being. It remained in being until Japan's defeat in 1945. The immediate question when Tanaka was premier was whether Japan should attempt to expand her influence on the continent—beginning with Manchuria—by peaceful penetration, as Tanaka and the members of his Cabinet wished, or whether that expansion should be accomplished by the use of force if necessary, as the conspirators advocated. It was essential that the conspirators should have the support and control of the nation. This was the beginning of the long struggle between the conspirators, who advocated the attainment of their object by force, and those politicians and latterly those bureaucrats, who advocated Japan's expansion by peaceful measures or at least by a more discreet choice of the occasions on which force should be employed. This struggle culminated in the conspirators obtaining control of the organs of government of Japan and preparing and regimenting the nation's mind and material resources for wars of aggression designed to achieve the object of the conspiracy. In overcoming the opposition the conspirators employed methods which were entirely unconstitutional and at times wholly ruthless. Propaganda and persuasion won many to their side, but military action abroad without Cabinet sanction or in defiance of Cabinet veto, assassination of opposing leaders, plots to overthrow by force of arms Cabinets which refused to cooperate with them, and even a military revolt which seized

the capital and attempted to overthrow the government were part of the tactics whereby the conspirators came ultimately to dominate the Japanese polity.

As and when they felt strong enough to overcome opposition at home and latterly when they had finally overcome all such opposition the conspirators carried out in succession the attacks necessary to effect their ultimate object, that Japan should dominate the Far East. In 1931 they launched a war of aggression against China and conquered Manchuria and Jehol. By 1934 they had commenced to infiltrate into North China, garrisoning the land and setting up puppet governments designed to serve their purposes. From 1937 onwards they continued their aggressive war against China on a vast scale, overrunning and occupying much of the country, setting up puppet governments on the above model, and exploiting China's economy and natural resources to feed the Japanese military and civilian needs.

In the meantime they had long been planning and preparing a war of aggression which they proposed to launch against the U.S.S.R. The intention was to seize that country's Eastern territories when a favourable opportunity occurred. They had also long recognized that their exploitation of East Asia and their designs on the islands in the Western and South Western Pacific would bring them into conflict with the United States of America, Britain, France and the Netherlands who would defend their threatened interests and territories. They planned and prepared for war against these countries also.

The conspirators brought about Japan's alliance with Germany and Italy, whose policies were as aggressive as their own, and whose support they desired both in the diplomatic and military fields,

for their aggressive actions in China had drawn on Japan the condemnation of the League of Nations and left her friendless in the councils of the world.

Their proposed attack on the U.S.S.R. was postponed from time to time for various reasons, among which were (1) Japan's preoccupation with the war in China, which was absorbing unexpectedly large military resources, and (2) Germany's pact of non-aggression with the U.S.S.R. in 1939, which for the time freed the U.S.S.R. from threat of attack on her Western frontier, and might have allowed her to devote the bulk of her strength to the defence of her Eastern territories if Japan had attacked her.

Then in the year 1940 came Germany's great military successes on the continent of Europe. For the time being Great Britain, France and the Netherlands were powerless to afford adequate protection to their interests and territories in the Far East. The military preparations of the United States were in the initial stages. It seemed to the conspirators that no such favourable opportunity could readily recur of realising that part of their objective which sought Japan's domination of South-West Asia and the islands in the Western and South Western Pacific and Indian Oceans. After prolonged negotiations with the United States of America, in which they refused to disgorge any substantial part of the fruits they had seized as the result of their war of aggression against China, on 7th December 1941 the conspirators launched a war of aggression against the United States and the British Commonwealth. They had already issued orders declaring that a state of war existed between Japan and the Netherlands as from 00.00 hours on 7th December 1941. They had previously secured a jumping-off place for their attacks on the Philippines, Malaya and the Netherlands East Indies by

forcing their troops into French Indo-China under threat of military action if this facility was refused to them. Recognising the existence of a state of war and faced by the imminent threat of invasion of her Far Eastern territories, which the conspirators had long planned and were now about to execute, the Netherlands in self-defence declared war on Japan.

These far-reaching plans for waging wars of aggression, and the prolonged and intricate preparation for and waging of these wars of aggression were not the work of one man. They were the work of many leaders acting in pursuance of a common plan for the achievement of a common object. That common object, that they should secure Japan's domination by preparing and waging wars of aggression, was a criminal object. Indeed no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it. The probable result of such a conspiracy, and the inevitable result of its execution is that death and suffering will be inflicted on countless human beings.

The Tribunal does not find it necessary to consider whether there was a conspiracy to wage wars in violation of the treaties, agreements and assurances specified in the particulars annexed to Count 1. The conspiracy to wage wars of aggression was already criminal in the highest degree.

The Tribunal finds that the existence of the criminal conspiracy to wage wars of aggression as alleged in Count 1, with the limitation as to object already mentioned, has been proved.

The question whether the defendants or any of them participated in that conspiracy will be considered when we deal with the individual cases.

The conspiracy existed for and its execution occupied a period of many years. Not all of the conspirators were parties to it at the beginning, and some of those who were parties to it had ceased to be active in its execution before the end. All of those who at any time were parties to the criminal conspiracy or who at any time with guilty knowledge played a part in its execution are guilty of the charge contained in Count 1.

In view of our finding on Count 1 it is unnecessary to deal with Counts 2 and 3, which charge the formulation or execution of conspiracies with objects more limited than that which we have found proved under Count 1, or with Count 4, which charges the same conspiracy as Count 1 but with more specification.

Count 5 charges a conspiracy wider in extent and with even more grandiose objects than that charged in Count 1. We are of opinion that although some of the conspirators clearly desired the achievement of these grandiose objects nevertheless there is not sufficient evidence to justify a finding that the conspiracy charged in Count 5 has been proved.

For the reasons given in an earlier part of this judgment we consider it unnecessary to make any pronouncement on Counts 6 to 26 and 37 to 53. There remain therefore only Counts 27 to 36 and 54 and 55, in respect of which we now give our findings.

Counts 27 to 36 charge the crime of waging wars of aggression and wars in violation of international law, treaties, agreements and assurances against the countries named in those counts.

In the statement of facts just concluded we have found that wars of aggression were waged against all those countries with the exception of the Commonwealth of the Philippines (Count 30) and the Kingdom of Thailand (Count 34). With reference

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to the Philippines, as we have heretofore stated, that Commonwealth during the period of the war was not a completely sovereign State and so far as international relations were concerned it was a part of the United States of America. We further stated that it is beyond doubt that a war of aggression was waged in the Philippines, but for the sake of technical accuracy we consider the aggressive war in the Philippines as being a part of the war of aggression waged against the United States of America.

Count 28 charges the waging of a war of aggression against the Republic of China over a lesser period of time than that charged in Count 27. Since we hold that the fuller charge contained in Count 27 has been proved we shall make no pronouncement on Count 28.

Wars of aggression having been proved, it is unnecessary to consider whether they were also wars otherwise in violation of international law or in violation of treaties, agreements and assurances. The Tribunal finds therefore that it has been proved that wars of aggression were waged as alleged in Counts 27, 29, 31, 32, 33, 35 and 36.

Count 54 charges ordering, authorising and permitting the commission of Conventional War Crimes. Count 55 charges failure to take adequate steps to secure the observance and prevent breaches of conventions and laws of war in respect of prisoners of war and civilian internees. We find that there have been cases in which crimes under both these Counts have been proved.

Consequent upon the foregoing findings, we propose to consider the charges against individual defendants in respect only of the following Counts: Numbers 1, 27, 29, 31, 32, 33, 35, 36, 54 and 55.