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**JUDGMENT**  
**of the**  
**INTERNATIONAL MILITARY TRIBUNAL**  
**for the**  
**FAR EAST**

**November 1948**

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JUDGMENT

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

PART A

CHAPTERS I, II, III

■ November 1948

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INTERNATIONAL MILITARY TRIBUNAL  
FOR THE FAR EAST

THE UNITED STATES OF AMERICA, THE REPUBLIC OF CHINA,  
THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRE-  
LAND, THE UNION OF SOVIET SOCIALIST REPUBLICS, THE  
COMMONWEALTH OF AUSTRALIA, CANADA, THE REPUBLIC OF  
FRANCE, THE KINGDOM OF THE NETHERLANDS, NEW ZEALAND,  
INDIA, AND THE COMMONWEALTH OF THE PHILIPPINES.

AGAINST

ARAKI, Sadao, DOHIHARA, Kenji, HASHIMOTO, Kingoro,  
HATA, Shunroku, HIRANUMA, Kiichiro, HIROTA, Koki,  
HOSHINO, Naoki, ITAGAKI, Seishiro, KAYA, Okinori, KIDO,  
Koichi, KIMURA, Heitaro, KOISO, Kuniaki, MATSUI, Iwane,  
MATSUOKA, Yosuke, MINAMI, Jiro, MUTO, Akira, NAGANO,  
Osami, OKA, Takasumi, OKAWA, Shumei, OSHIMA, Hiroshi,  
SATO, Kenryo, SHIGEMITSU, Mamoru, SHIMADA, Shigetaro,  
SHIRATORI, Tqshio, SUZUKI, Teiichi, TOGO, Shigenori,  
TOJO, Hideki, UMEZU, Yoshijiro.

JUDGMENT

The Judgment of the Tribunal was delivered on  
the 4th through 12th days of November 1948.

PART A - CHAPTER I

Establishment and Proceedings of the Tribunal

The Tribunal was established in virtue of and to implement the Cairo Declaration of the 1st of December, 1943, the Declaration of Potsdam of the 26th of July, 1945, the Instrument of Surrender of the 2nd of September, 1945, and the Moscow Conference of the 26th of December, 1945.

The Cairo Declaration was made by the President of the United States of America, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain. It reads as follows:

"The several military missions have agreed  
"upon future military operations against Japan. The  
"Three Great Allies expressed their resolve to bring  
"unrelenting pressure against their brutal enemies  
"by sea, land, and air. This pressure is already  
"rising.

"The Three Great Allies are fighting this  
"war to restrain and punish the aggression of Japan.  
"They covet no gain for themselves and have no thought  
"of territorial expansion. It is their purpose that  
"Japan shall be stripped of all the islands in the  
"Pacific which she has seized or occupied since the

"beginning of the first World War in 1914, and that  
"all the territories Japan has stolen from the Chinese,  
"such as Manchuria, Formosa, and the Pescadores, shall  
"be restored to the Republic of China. Japan will  
"also be expelled from all other territories which  
"she has taken by violence and greed. The aforesaid  
"Three Great Powers, mindful of the enslavement of the  
"people of Korea, are determined that in due course  
"Korea shall become free and independent.

"With these objects in view the three Allies,  
"in harmony with those of the United Nations at war  
"with Japan, will continue to persevere in the serious  
"and prolonged operations necessary to procure the un-  
"conditional surrender of Japan."

The Declaration of Potsdam (Annex No. A-1)  
was made by the President of the United States of  
America, the President of the National Government of  
the Republic of China, and the Prime Minister of Great  
Britain and later adhered to by the Union of Soviet  
Socialist Republics. Its principal relevant provisions  
are:

"Japan shall be given an opportunity to end  
"this war."

"There must be eliminated for all time the  
"authority and influence of those who have deceived  
"and misled the people of Japan into embarking on

"world conquest, for we insist that a new order of  
"peace, security and justice will be impossible until  
"irresponsible militarism is driven from the world."

"The terms of the Cairo Declaration shall  
"be carried out and Japanese sovereignty shall be  
"limited to the islands of Honshu, Hokkaido, Kyushu,  
"Shikoku and such minor islands as we determine."

"We do not intend that the Japanese people  
"shall be enslaved as a race or destroyed as a nation,  
"but stern justice shall be meted out to all war crimi-  
"nals including those who have visited cruelties upon  
"our prisoners."

The Instrument of Surrender (Annex No. A-2)  
was signed on behalf of the Emperor and Government of  
Japan and on behalf of the nine Allied Powers. It con-  
tains inter alia the following proclamation, under-  
taking, and order:

"We hereby proclaim the unconditional surren-  
"der to the Allied Powers of the Japanese Imperial  
"General Headquarters and all Japanese armed forces  
"and all armed forces under Japanese control where-  
"ever situated."

"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 action may be required by the Supreme Com-  
"mander for the Allied Powers or by any other des-  
"ignated representatives of the Allied Powers for  
"the purpose of giving effect to the Declaration."

"The authority of the Emperor and the Japan-  
"ese 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. We hereby command all civil,  
"military, and naval officials to obey and enforce  
"all proclamations, orders, and directives deemed by  
"the Supreme Commander for the Allied Powers to be  
"proper to effectuate this surrender and issued by  
"him or under his authority."

By the Moscow Conference (Annex No. A-3)  
it was agreed by and between the Governments of the  
United States of America, Great Britain, and the  
Union of Soviet Socialist Republics with the concu-  
rence of China that:

"The Supreme Commander shall issue all or-  
"ders for the implementation of the Terms of Surren-  
"der, the occupation and control of Japan and direct-  
"ives supplementary thereto."

Acting on this authority on the 19th day

of January, 1946, General MacArthur, the Supreme Commander for the Allied Powers, by Special Proclamation established the Tribunal for "the trial of those persons charged individually or as members of organizations or in both capacities with offences which include crimes against peace." (Annex No. A-4) The constitution, jurisdiction, and functions of the Tribunal were by the Proclamation declared to be those set forth in the Charter of the Tribunal approved by the Supreme Commander on the same day. Before the opening of the Trial the Charter was amended in several respects. (A copy of the Charter as amended will be found in Annex No. A-5).

On the 15th day of February, 1946, the Supreme Commander issued an Order appointing the nine members of the Tribunal nominated respectively by each of the Allied Powers. This Order also provides that "the responsibilities, powers, and duties of the Members of the Tribunal are set forth in the Charter thereof...."

By one of the amendments to the Charter the maximum number of members was increased from nine to eleven to permit the appointment of members nominated by India and the Commonwealth of the Philippines. By subsequent Orders the present members from the

United States and France were appointed to succeed the original appointees who resigned and the members from India and the Philippines were appointed.

Pursuant to the provisions of Article 9(c) of the Charter each of the accused before the opening of the Trial appointed counsel of his own choice to represent him; each accused being represented by American and Japanese counsel.

On the 29th of April, 1946, an indictment, which had previously been served on the accused in conformity with the rules of procedure adopted by the Tribunal, was lodged with the Tribunal.

The Indictment (Annex No. A-6) is long, containing fifty-five counts charging twenty-eight accused with Crimes against Peace, Conventional War Crimes, and Crimes against Humanity during the period from the 1st of January, 1928, to the 2nd of September, 1945.

It may be summarized as follows:

In Count 1 all accused are charged with conspiring as leaders, organisers, instigators or accomplices between 1st January 1928 and 2nd September 1945 to have Japan, either alone or with other countries, wage wars of aggression against any country or countries which might oppose her purpose of

securing the military, naval, political and economic domination of East Asia and of the Pacific and Indian oceans and their adjoining countries and neighbouring islands.

Count 2 charges all accused with conspiring throughout the same period to have Japan wage aggressive war against China to secure complete domination of the Chinese provinces of Liaoning, Kirin, Heilungkiang, and Jehol (Manchuria).

Count 3 charges all accused with conspiracy over the same period to have Japan wage aggressive war against China to secure complete domination of China.

Count 4 charges all accused with conspiring to have Japan, alone or with other countries, wage aggressive war against the United States, the British Commonwealth, France, the Netherlands, China, Portugal, Thailand, the Philippines and the Union of Soviet Socialist Republics to secure the complete domination of East Asia and the Pacific and Indian Oceans and their adjoining countries and neighbouring islands.

Count 5 charges all accused with conspiring with Germany and Italy to have Japan, Germany and Italy mutually assist each other in aggressive warfare against any country which might oppose them for the

purpose of having these three nations acquire complete domination of the entire world, each having special domination in its own sphere, Japan's sphere to cover East Asia and the Pacific and Indian Oceans.

Counts 6 to 17 charge all accused except SHIRATORI with having planned and prepared aggressive war against named countries.

Counts 18 to 26 charge all accused with initiating aggressive war against named countries.

Counts 27 to 36 charge all accused with waging aggressive war against named countries.

Count 37 charges certain accused with conspiring to murder members of the armed forces and civilians of the United States, the Philippines, the British Commonwealth, the Netherlands and Thailand by initiating unlawful hostilities against those countries in breach of the Hague Convention No. III of 18th October 1907.

Count 38 charges the same accused with conspiring to murder the soldiers and civilians by initiating hostilities in violation of the agreement between the United States and Japan of 30th November 1908, the Treaty between Britain, France, Japan and the United States of 13th December 1921, the Pact of Paris of 27th August 1928, and the

Treaty of Unity between Thailand and Japan of 12th June 1940.

Counts 39 to 43 charge the same accused with the commission on 7th and 8th December 1941 of murder at Pearl Harbour (Count 39) Kohta Behru (Count 40) Hong Kong (Count 41) on board H. M. S. PETREL at Shanghai (Count 42) and at Davao (Count 43).

Count 44 charges all accused with conspiring to murder on a wholesale scale prisoners of war and civilians in Japan's power.

Counts 45 to 50 charge certain accused with the murder of disarmed soldiers and civilians at Nanking (Count 45) Canton (Count 46) Hankow (Count 47) Changsha (Count 48) Hengyang (Count 49) and Kweilin and Luchow (Count 50).

Count 51 charges certain accused with the murder of members of the armed forces of Mongolia and the Soviet Union in the Khalkin-Gol River area in 1939.

Count 52 charges certain accused with the murder of members of the armed forces of the Soviet Union in the Lake Khasan area in July and August 1938.

Counts 53 and 54 charge all the accused except OKAWA and SHIRATORI with having conspired to

order, authorize or permit the various Japanese Theatre Commanders, the officials of the War Ministry and local camp and labour unit officials to frequently and habitually commit breaches of the laws and customs of war against the armed forces, prisoners of war, and civilian internees of complaining powers and to have the Government of Japan abstain from taking adequate steps to secure the observance and prevent breaches of the laws and customs of war.

Count 55 charges the same accused with having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war.

There are five appendices to the Indictment:

Appendix A summarises the principal matters and events upon which the counts are based.

Appendix B is a list of Treaty Articles.

Appendix C specifies the assurances Japan is alleged to have broken.

Appendix D contains the laws and customs of war alleged to have been infringed.

Appendix E is a partial statement of the facts with respect to the alleged individual respon-

sibility of the accused.

These appendices are included in Annex A-6.

During the course of the Trial two of the accused, MATSUOKA and NAGANO, died and the accused OKAWA was declared unfit to stand his trial and unable to defend-himself. MATSUOKA and NAGANO were therefore discharged from the Indictment. Further proceedings upon the Indictment against OKAWA at this Trial were suspended.

On the 3rd and 4th of May the Indictment was read in open court in the presence of all the accused, the Tribunal then adjourning till the 6th to receive the pleas of the accused. On the latter date pleas of "not guilty" were entered by all the accused now before the Tribunal.

The Tribunal then fixed the 3rd of June following as the date for the commencement of the presentation of evidence by the Prosecution.

In the interval the Defence presented motions challenging the jurisdiction of the Tribunal to hear and decide the charges contained in the Indictment. On the 17th of May, 1946, after argument, judgment was delivered dismissing all the said motions "for reasons to be given later". These

reasons will be given in dealing with the law of the case in Chapter II of this part of the judgment.

The Prosecution opened its case on the 3rd of June, 1946, and closed its case on the 24th of January 1947.

The presentation of evidence for the Defence opened on the 24th of February, 1947, and closed on the 12th of January, 1948, an adjournment having been granted from the 19th of June to the 4th of August, 1947, to permit Defence Counsel to coordinate their work in the presentation of evidence common to all the accused.

Prosecution evidence in rebuttal and Defence evidence in reply were permitted; the reception of evidence terminating on the 10th of February, 1948. In all 4336 exhibits were admitted in evidence, 419 witnesses testified, in court, 779 witnesses gave evidence in depositions and affidavits, and the transcript of the proceedings covers 48,412 pages.

Closing arguments and surrations of Prosecution and Defence opened on the 11th of February and closed on the 16th of April, 1948.

Having regard to Article 12 of the Charter which requires "an expeditious hearing of the issues" and the taking of "strict measures to prevent any

"action which would cause any unreasonable delay", the length of the present trial requires some explanation and comment.

In order to avoid unnecessary delay which would have been incurred by adopting the ordinary method of translation by interrupting from time to time evidence, addresses and other matters which could be prepared in advance of delivery, an elaborate public address system was installed. Through this system whenever possible a simultaneous translation into English or Japanese was given and in addition when circumstances required from or into Chinese, Russian, and French. Without such aids the trial might well have occupied a very much longer period. Cross-examination and extempore argument on objections and other incidental proceedings had, however, to be translated in the ordinary way as they proceeded.

Article 13(a) of the Charter provides that "the Tribunal shall not be bound by technical rules of evidence. It shall...admit any evidence which it deems to have probative value...." The application of this rule to the mass of documents and oral evidence offered inevitably resulted in a great expenditure of time. Moreover, the charges in the Indictment directly involved an inquiry into the

history of Japan during seventeen years, the years between 1928 and 1945. In addition our inquiry has extended to a less detailed study of the earlier history of Japan, for without that the subsequent actions of Japan and her leaders could not be understood and assessed.

The period covered by the charges was one of intense activity in Japanese internal and external affairs.

Internally, the Constitution promulgated during the Meiji Restoration was the subject of a major struggle between the military and the civilian persons who operated it. The military elements ultimately gained a predominance which enabled them to dictate, not only in matters of peace or war, but also in the conduct of foreign and domestic affairs. In the struggle between the civilian and the military elements in the Government the Diet, the elected representatives of the people, early ceased to be of account. The battle between the civilians and the military was fought on the civilian side by the professional civil servants, who almost exclusively filled the civilian ministerial posts in the Cabinet and the advisory posts around the Emperor. The struggle between the military and the civil servants was pro-

tracted one. Many incidents marked the ebb and flow of the battle, and there was seldom agreement between the Prosecution and the Defence as to any incident, Both the facts and the meaning of each incident were the subject of controversy and the topic towards which a wealth of evidence was directed.

Internally, also, the period covered by the Indictment saw the completion of the conversion of Japan into a modern industrialized state, and the growth of the demand for the territory of other nations as an outlet for her rapidly increasing population, a source from which she might draw raw materials for her manufacturing plants, and a market for her manufactured goods. Externally the period saw the efforts of Japan to satisfy that demand. In this sphere also the occurrence and meaning of events was contested by the Defence, often to the extent of contesting the seemingly incontestable.

The parts played by twenty-five accused in these events had to be investigated, and again every foot of the way was fought.

The extensive field of time and place involved in the issues placed before the Tribunal and the controversy waged over every event, important or unimportant, have prevented the trial from being

"expeditious", as required by the Charter. In addition, the need to have every word spoken in Court translated from English into Japanese, or vice versa, has at least doubled the length of the proceedings. Translations cannot be made from the one language into the other with the speed and certainty which can be attained in translating one Western speech into another. Literal translation from Japanese into English or the reverse is often impossible. To a large extent nothing but a paraphrase can be achieved, and experts in both languages will often differ as to the correct paraphrase. In the result the interpreters in Court often had difficulty as to the rendering they should announce, and the Tribunal was compelled to set up a Language Arbitration Board to settle matters of disputed interpretation.

To these delays was added a tendency for counsel and witnesses to be prolix and irrelevant. This last tendency at first was controlled only with difficulty as on many occasions the over-elaborate or irrelevant question or answer was in Japanese and the mischief done, the needless time taken, before the Tribunal was given the translation in English and objection could be taken to it. At length it became necessary to impose special rules to prevent this

waste of time.

The principle rules to this end were the prior filing of a written deposition of the intended witness and a limitation of cross-examination to matters within the scope of the evidence in chief.

Neither these nor any other of the rules imposed by the Tribunal were applied with rigidity. Indulgences were granted from time to time, having regard to the paramount need for the Tribunal to do justice to the accused and to possess itself of all facts relevant and material to the issues.

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.

Much time was taken up in argument upon the admissibility of evidence but even so the proceedings would have been enormously prolonged had the Tribunal received all evidence prepared for tendering. Still longer would have been the trial without these controls, as without them much more irrelevant or immaterial evidence than was in fact tendered would have been prepared for presentation.

Much of the evidence was given viva voce or at least by the witness being sworn and acknowledging his deposition which, to the extent that it was ruled upon as admissible, was then read by Counsel. The witnesses were cross-examined, often by a member of Counsel representing different interests, and then re-examined.

When it was not desired to cross-examine the witness, in most cases his sworn deposition was tendered and read without the attendance of the witness.

A large part of the evidence which was presented has been a source of disappointment to the Tribunal. An explanation of events is unconvincing unless the witness will squarely meet his difficulties and persuade the Court that the inference, which would normally arise from the undoubted occurrence of these events, should on this occasion be rejected. In the experience of this Tribunal most of the witnesses for the Defence have not attempted to face up to their difficulties. They have met them with prolix equivocations and evasions, which only arouse distrust. Most of the final submissions of Counsel for the Defence have been based on the hypothesis that the Tribunal would accept the evidence tendered in defence as reliable. It could not have been otherwise,

for counsel could not anticipate which witnesses the Tribunal was prepared to accept as witnesses of credit, and which witnesses it would reject. In large part these submissions have failed because the argument was based on evidence of witnesses whom the Tribunal was not prepared to accept as reliable because of their lack of candour.

Apart from this testimony of witnesses a great many documents were tendered and received in evidence. These were diverse in nature and from many sources including the German Foreign Office. The Tribunal was handicapped by the absence of many originals of important Japanese official records of the Army and Navy, Foreign Office, Cabinet and other policy-making organs of the Japanese Government. In some cases what purported to be copies were tendered and received for what value they might be found to have. The absence of official records was attributed to burning during bombing raids on Japan and to deliberate destruction by the Fighting Services of their records after the surrender. It seems strange that documents of such importance as those of the Foreign Office, the Cabinet secretariat and other important departments should not have been removed to places of safety when bombings commenced or were

imminent. If it should prove that they were not thus destroyed but were withheld from this Tribunal then a marked disservice will have been done to the cause of international justice.

We have perforce to rely upon that which was made available to us, relating it by way of check to such other evidence as was received by us. Although handicapped in our search for facts by the absence of these documents we have been able to obtain a good deal of relevant information from other sources. Included in this other evidence of a non-official or at least of only a semi-official nature were the diary of the accused KIDO and the Saionji-Harada Memoirs.

KIDO's voluminous diary is a contemporary record covering the period from 1930 to 1945 of the transactions of KIDO with important personages in his position as secretary to the Lord Keeper of the Privy Seal, State Minister and later as confidential adviser of the Emperor while holding the Office of Lord Keeper of the Privy Seal. Having regard to these circumstances we regard it as a document of importance.

Another document or series of documents of importance are the Saionji-Harada Memoirs. These have been the subject of severe criticism by the

Defence, not unnaturally, as they contain passages the Defence consider embarrassing. We are of opinion the criticisms are not well founded and have attached more importance to these records than the Defence desired us to do. The special position of Prince Saionji as the last of the Genro provoked full and candid disclosure to him through his secretary Harada. Harada's long period of service to the Genro in this special task of obtaining information from the very highest functionaries of the Government and the Army and Navy is a test of his reliability and discretion. Had he been unreliable and irresponsible, as the Defence suggest, this would soon have been discovered by Prince Saionji, having regard to his own frequent associations with the important personages from whom Harada received his information, and Harada would not have continued in that office. As to the authenticity of the Saionji-Harada documents presented to the Tribunal, the Tribunal is satisfied that these are the original memoranda as dictated by Harada and edited by Saionji. To the extent to which they are relevant the Tribunal considers them helpful and reliable contemporary evidence of the matters recorded.

PART A - 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  
 "neighbouring 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 Govern-  
 "'ment or of a superior shall not free him from responsi-  
 "'bility 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 rele-  
 vant 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 interna-  
 tional 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

Under the heading of "Crimes Against Peace" the Charter names five separate crimes. These are planning, preparation, initiation and waging aggressive war or a war in violation of international law, treaties, agreements or assurances; to these four is added the further crime of participation in a common plan or conspiracy for the accomplishment of any of the foregoing. The Indictment was based upon the Charter and all the above crimes were charged in addition to further charges founded upon other provisions of the Charter.

A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime. Thereafter, in furtherance of the

conspiracy, follows planning and preparing for such war. Those who participate at this stage may be either original conspirators or later adherents. If the latter adopt the purpose of the conspiracy and plan and prepare for its fulfillment they become conspirators. For this reason, as all the accused are charged with the conspiracies, we do not consider it necessary in respect of those we may find guilty of conspiracy to enter convictions also for planning and preparing. In other words, although we do not question the validity of the charges we do not think it necessary in respect of any defendants who may be found guilty of conspiracy to take into consideration nor to enter convictions upon counts 6 to 17 inclusive.

A similar position arises in connection with the counts of initiating and waging aggressive war. Although initiating aggressive war in some circumstances may have another meaning, in the Indictment before us it is given the meaning of commencing the hostilities. In this sense it involves the actual waging of the aggressive war. After such a war has been initiated or has been commenced by some offenders others may participate in such circumstances as to become guilty of waging the war. This consideration, however, affords no reason for registering convictions on the counts of initiating as well as of waging aggressive war. We propose therefore to abstain from consideration of Counts 18 to 26 inclusive.

Counts 37 and 38 charge conspiracy to murder. Article 5, sub-paragraphs (b) and (c) of the Charter, deal with Conventional War Crimes and Crimes against Humanity. In sub-paragraph (c) of Article 5 occurs this passage: "Leaders, organizers, instigators and accomplices

"participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." A similar provision appeared in the Nuremberg Charter although there it was an independent paragraph and was not, as in our Charter incorporated in sub-paragraph (c). The context of this provision clearly relates it exclusively to sub-paragraph (a), Crimes against Peace, as that is the only category in which a "common plan or conspiracy" is stated to be a crime. It has no application to Conventional War Crimes and Crime against Humanity as conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal. The Prosecution did not challenge this view but submitted that the counts were sustainable under Article 5 (a) of the Charter. It was argued that the waging of aggressive war was unlawful and involved unlawful killing which is murder. From this it was submitted further that a conspiracy to wage war unlawfully was a conspiracy also to commit murder. The crimes triable by this Tribunal are those set out in the Charter. Article 5 (a) states that a conspiracy to commit the crimes therein specified is itself a crime. The crimes, other than conspiracy, specified in Article 5(a) are "planning, preparation, initiating or waging" of a war of aggression. There is no specification of the crime of conspiracy to commit murder by the waging of aggressive war or otherwise. We hold therefore that we have no jurisdiction to deal with charges of conspiracy to commit murder as contained in Counts 37 and 38 and decline to entertain these charges.

In all there are 55 counts in the Indictment charged against the 25 defendants. In many of the counts

each of the accused is charged and in the remainder 10 or more are charged. In respect to Crimes against Peace alone there are for consideration no less than 756 separate charges.

This situation springs from the adoption by the Prosecution of the common practice of charging all matters upon which guilt is indicated by the evidence it proposes to adduce even though some of the charges are cumulative or alternative.

The foregoing consideration of the substance of the charges shows that this reduction of the counts for Crimes against Peace upon which a verdict need be given can be made without avoidance of the duty of the Tribunal and without injustice to defendants.

Counts 44 and 53 charge conspiracies to commit crimes in breach of the laws of war. For reasons already discussed we hold that the Charter does not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against peace. There is no specification of the crime of conspiracy to commit conventional war crimes. This position is accepted by the Prosecution and no conviction is sought under these counts. These counts, accordingly, will be disregarded.

Insofar as the opinion expressed above with regard to Counts 37, 38, 44, and 53 may appear to be in conflict with the judgment of the Tribunal of the 17th May, 1946, whereby the motions going to the Tribunal's jurisdiction were dismissed, it is sufficient to say that the point was not raised at the hearing on the motions. At a much later date, after the Nuremberg judgment had been delivered, this matter was raised by counsel for one of the accused. On this topic the Tribunal concurs in the view of the Nuremberg Tribunal. Accordingly, upon

those counts, it accepts the admission of the Prosecution which is favorable to the defendants.

Counts 39 to 52 inclusive (omitting Count 44 already discussed) contain charges of murder. In all these counts the charge in effect is that killing resulted from the unlawful waging of war at the places and upon the dates set out. In some of the counts the date is that upon which hostilities commenced at the place named, in others the date is that upon which the place was attacked in the course of an alleged illegal war already proceeding. In all cases the killing is alleged as arising from the unlawful waging of war, unlawful in respect that there had been no declaration of war prior to the killings (Counts 39 to 43, 51 and 52) or unlawful because the wars in the course of which the killings occurred were commenced in violation of certain specified Treaty Articles (Counts 45 to 50). If, in any case, the finding be that the war was not unlawful then the charge of murder will fall with the charge of waging unlawful war. If, on the other hand, the war, in any particular case, is held to have been unlawful then this involves unlawful killings not only upon the dates and at the places stated in these counts but at all places in the theater of war and at all times throughout the period of the war. No good purpose is to be served, in our view, in dealing with these parts of the offences by way of counts for murder when the whole offence of waging those wars unlawfully is put in issue upon the counts charging the waging of such wars.

The foregoing observations relate to all the counts enumerated; i.e., Counts 39 to 52 (omitting 44). Counts 45 to 50 are stated obscurely. They charge murder at different places upon the dates mentioned by

unlawfully ordering, causing, and permitting Japanese armed forces to attack those places and to slaughter the inhabitants thereby unlawfully killing civilians and disarmed soldiers. From the language of these counts it is not quite clear whether it is intended to found the unlawful killings upon the unlawfulness of the attack or upon subsequent breaches of the laws of war or upon both. If the first is intended then the position is the same as in the earlier counts in this group. If breaches of the laws of war are founded upon then that is cumulative with the charges in Counts 54 and 55. For these reasons only and without finding it necessary to express any opinion upon the validity of the charges of murder in such circumstances we have decided that it is unnecessary to determine Counts 39 to 43 inclusive and Counts 45 to 52 inclusive.

PART A  
CHAPTER III  
A SUMMARY

(To be read before the Tribunal in lieu of  
the text of Chapter III, Part A.)

Chapter III of Part A of the Judgment will not be read. It contains a statement of the rights which Japan acquired in China prior to 1930, together with a statement of Japan's obligations to other Powers, so far as relevant to the Indictment. The principal obligations fall under the following descriptions and are witnessed by the documents listed under each description.

1. Obligations to preserve the territorial and administrative independence of China.

United States Declaration of 1901  
Identic Notes of 1908  
Nine-Power Treaty of 1922  
Covenant of the League of Nations of 1920

2. Obligations to preserve for the world the principle of equal and impartial trade with all parts of China, the so-called "Open Door Policy."

United States Declaration of 1900 to 1901  
Identic Notes of 1908  
Nine-Power Treaty of 1922

3. Obligations to suppress the manufacture, traffic in, and use of opium and analogous drugs.

Opium Convention of 1912  
League of Nations of 1925  
Opium Convention of 1931

4. Obligations to respect the territory of Powers interested in the Pacific.

Four-Power Treaty of 1921  
Notes to Netherlands and Portugal of 1926  
Covenant of the League of Nations of 1920

5. Obligations to keep inviolate the territory of neutral Powers.

Hague V of 1907

6. Obligations to solve disputes between nations by diplomatic means, or mediation, or arbitration.

Identic Notes of 1908  
Four-Power Treaty of 1921  
Nine-Power Treaty of 1922  
Hague of 1907  
Pact of Paris of 1928

7. Obligations designed to ensure the pacific settlement of international disputes.

Hague of 1899  
Hague of 1907  
Pact of Paris of 1928

8. Obligation to give previous warning before commencing hostilities.

Hague III of 1907

9. Obligations relative to humane conduct in warfare.

Hague IV of 1907  
Geneva Red Cross of 1929  
Geneva P.O.W. of 1929

Many of these obligations are general. They relate to no single political or geographical unit. On the other hand, the rights which Japan had required by virtue of the documents considered in this Chapter were largely rights in relation to China. Japan's foothold in China at the beginning of the China war will be fully described in the forefront of the Chapter of the Judgment relating to China.

PART A

CHAPTER III

OBLIGATIONS ASSUMED AND RIGHTS ACQUIRED BY JAPAN

EVENTS PRIOR TO 1 JANUARY 1928

Before 1 January 1928, the beginning of the period covered by the Indictment, certain events had transpired and Japan had acquired **certain rights** and assumed certain obligations; an appreciation of these is necessary in order to understand and judge the actions of the Accused.

SINO-JAPANESE WAR OF 1894-5

The Sino-Japanese War of 1894-5, was concluded by the Treaty of Shimonoseki, whereby China ceded to Japan full sovereignty over the Liaotung Peninsula. However, Russia, Germany and France brought diplomatic pressure to bear upon Japan, thereby forcing her to renounce that cession. In 1896 Russia concluded an agreement with China authorizing Russia to extend the Trans-Siberian Railway across Manchuria and operate it for a period of eighty years, with certain rights of administration in the railway zone. This grant was extended by another agreement between Russia and China in 1898, whereby Russia was authorized to connect the Chinese Eastern Railway at Harbin with Port Arthur and was granted a lease for a period of twenty-five years of the southern part of the Liaotung Peninsula with the right to levy tariffs in the leased territory.

FIRST PEACE CONFERENCE AT THE HAGUE

The principal Powers of the World assembled at The Hague for the First Peace Conference in 1899. This Conference resulted in the conclusion of three Conventions and one Declaration.

The contribution of this First Peace Conference consisted less in the addition of new rules to the existing body of international law than in a restatement in more precise form of the rules of customary law and practice already recognized as established. The same observation applies to the Second Peace Conference at The Hague in 1907, as well as to the Conventions adopted at Geneva on 6 July 1906 and 27 July 1929.

The First Convention, that is to say the Convention for the Pacific Settlement of International Disputes (Annex No. B-1), was signed on 29 July 1899 and was ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, together with twenty other Powers, and was thereafter adhered to by seventeen additional Powers; so that a total of forty-four of the leading Powers acceded to the Convention. The Convention was, therefore, binding upon Japan before the beginning of the Russo-Japanese War on 10 February 1904 and at all relevant times mentioned in the Indictment, except in so far as it may have been superseded by the First Convention later adopted at The Hague on 18 October 1907.

By ratifying the First Convention concluded at The Hague on 29 July 1899, Japan agreed to use her best efforts to insure the pacific settlement of international disputes and, as far as circumstances would allow, to have recourse to the good offices or mediation of one or more friendly Powers before resorting to force of arms.

#### THE BOXER TROUBLES OF 1899-1901

The so-called Boxer Troubles in China of 1899-1901 were settled on 7 September 1901 by the signing of

the Final Protocol at Peking. (Annex No. B-2). That Protocol was signed by, or on behalf of, Japan and each of the Powers bringing the Indictment, as well as Germany, Austria-Hungary, Belgium and Italy. By this Protocol, China agreed to reserve the section of Peking occupied by foreign legations exclusively for such legations and to permit the maintenance of guards by the Powers to protect the legations there. She also conceded the right of the Powers to occupy certain points for the maintenance of open communications between Peking and the sea, these points being named in the Agreement.

By signing the Protocol, Japan agreed, along with the other Signatory Powers, to withdraw all troops from the Province of Chihli before 22 September following, except those stationed at the points mentioned under the Agreement.

#### RUSSO-JAPANESE WAR

Following the Anglo-Japanese Treaty of Alliance, which she concluded on 30 January 1902, Japan began negotiations with Russia in July 1903 concerning the maintenance of the Open Door Policy in China. These negotiations did not proceed as desired by the Japanese Government; and Japan, disregarding the provisions of the Convention for Pacific Settlement of International Disputes signed by her at The Hague on 29 July 1899, attacked Russia in February 1904. In the fighting that raged in Manchuria, Japan expended the lives of 100,000 Japanese soldiers and 2 billion gold Yen. The war ended with the signing of the Treaty of Portsmouth on 5 September 1905.

TREATY OF FORTSMOUTH

The Treaty of Portsmouth signed on 5 September 1905, terminated the Russo-Japanese War and was binding upon Japan at all relevant times mentioned in the Indictment. (Annex No. B-3). By ratifying this Treaty, Japan and Russia agreed to abstain from taking any military measures on the Russo-Korean frontier which might menace the security of Russian or Korean territory. However, Russia acknowledged the paramount interests of Japan in Korea. Russia also transferred to Japan, subject to the consent of China, her lease upon Port Arthur, Talien, and adjacent territory of the Liaotung Peninsula, together with all her rights, privileges, and concessions connected with or forming a part of the lease, as well as all public works and properties in the territory affected by the lease. This transfer was made upon the express engagement that Japan as well as Russia would evacuate and turn over to the administration of China completely and exclusively all of Manchuria, except the territory affected by the lease, and that Japan would perfectly respect the property rights of Russian subjects in the leased territory. In addition, Russia transferred to Japan, subject to the consent of China, the railway from Changchun to Port Arthur, together with all its branches and all rights, privileges, and properties appertaining thereto. This transfer was upon the engagement that Japan, as well as Russia, would exploit their respective railways exclusively for commercial purposes and in no wise for strategic purposes. Japan and Russia agreed to obtain the consent of China to these transfers and not to obstruct any general measures common to all countries

which China might take for the development of commerce and industry in Manchuria.

Russia ceded to Japan that part of the Island of Sakhalin south of the 50th degree of north latitude, as well as all adjacent islands below that boundary. This cession was upon the engagement that Japan as well as Russia would not construct on the Island of Sakhalin or adjacent islands any fortifications or similar military works and would maintain free navigation of the Straits of La Perouse and Tataria.

In the Protocol annexed to the Treaty of Portsmouth, Russia and Japan as between themselves reserved the right to maintain railway guards not to exceed fifteen men per kilometer along their respective railways in Manchuria.

#### TREATY OF PEKING

By the Treaty of Peking of 1905, China approved the transfer by Russia to Japan of her rights and property in Manchuria, but she did not approve the provision for maintenance of railway guards. By an additional agreement executed by Japan and China on 22 December 1905, which was made an annex to the Treaty, Japan agreed in view of the "earnest desire" expressed by the Chinese Government to withdraw her railway guards as soon as possible, or when Russia agreed to do so, or at any rate when tranquility should be re-established in Manchuria.

#### SOUTH MANCHURIAN RAILWAY COMPANY

Japan organized the South Manchurian Railway Company in August 1906 as a corporation with its shareholders limited to the Japanese Government and its nationals. The Company was organized as a successor of

the former Chinese Eastern Railway Company in the area traversed by the railroad from Changchun to Port Arthur. It was authorized to, and did, administer the railways and enterprises appertaining thereto, which had been acquired from Russia, together with any new railroads and enterprises established in Manchuria by Japan. In addition, it was vested with certain administrative functions of government in the leased territory and in the railway zone. In short, it was created as an agency of the Japanese Government to administer the interests of that Government in Manchuria.

Contrary to the provisions of the Treaty of Portsmouth, the charter of this company provided that the Commander of the Japanese Army in the leased territory should have power to issue orders and directives to the company in connection with military affairs and in case of military necessity to issue orders involving the business affairs of the company.

#### OPEN DOOR POLICY IN CHINA

The Open Door Policy in China was first enunciated during the so-called Boxer Troubles of 1899-1901 by the Government of the United States of America in the following language:

"The policy of the Government of the United States is to seek a solution which may bring about permanent safety and peace in China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly Powers by treaty and international law, and safeguard for the World the principle of equal and impartial trade with all parts of the Chinese Empire."

The other Powers concerned, including Japan, assented to the policy thus announced; and this policy became the basis of the so-called Open Door Policy toward China. For more than twenty years thereafter, the Open Door Policy thus made rested upon the informal commitments by the various Powers; but it was destined to be crystallized into treaty form with the conclusion of the Nine-Power Treaty at Washington in 1922.

JAPANESE-AMERICAN IDENTIC NOTES OF 1908

Japan recognized this Open Door Policy in China and in the region of the Pacific Ocean when her Government exchanged Identic Notes on the subject with the Government on the United States of America on 30 November 1908. (Annex No. B-4). The provisions of these Notes were duly binding upon Japan and the United States of America at all relevant times mentioned in the Indictment. By this exchange of Notes, the two Powers agreed:

- (1) That the policy of their Governments for encouragement of free and peaceful commerce on the Pacific Ocean was uninfluenced by any aggressive tendencies, was directed to the maintenance of the existing status quo in the Pacific region and to the defense of the principle of equal opportunity for commerce and industry in China;
- (2) That they would reciprocally respect the territorial possessions of each other in that region;
- (3) That they were determined to preserve the common interest of all Powers in China by supporting by all pacific means the independence

and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire; and,

- (4) That should any event occur threatening the status quo they would communicate with each other as to what measures they might take.

#### ANNEXATION OF KOREA

Japan annexed Korea in 1910, thereby indirectly increasing Japanese rights in China, since Korean settlers in Manchuria thereby became subjects of the Japanese Empire. The number of Koreans in Manchuria by 1 January 1928 amounted to approximately 800 thousand people.

#### CONFLICTING CLAIMS BY CHINA AND JAPAN

As was to be expected, the exercise by Japan of extra-territorial rights in China, in connection with the operation of the South Manchurian Railway and the enjoyment of the lease of the Liaotung Peninsula, gave rise to constant friction between her and China. Japan claimed that she had succeeded to all the rights and privileges granted to Russia by China in the Treaty of 1896, as enlarged by the Treaty of 1898; that one of those rights was absolute and exclusive administration within the railway zone; and that within that zone she had broad administrative powers, such as control of police, taxation, education, and public utilities. China denied this interpretation of the Treaties. Japan also claimed the right to maintain railway guards in the railway zone, which right also China denied. The controversies which arose regarding the Japanese railway guards were not limited to their presence and activities within the railway zone. These guards were regular Japanese

soldiers, and they frequently carried on maneuvers outside the railway areas. These acts were particularly obnoxious to the Chinese, both officials and private persons alike, and were regarded as unjustifiable in law and provocative of unfortunate incidents. In addition, Japan claimed the right to maintain Consular Police in Manchuria. Such police were attached to the Japanese consulates and branch consulates in all Japanese consular districts in such cities as Harbin, Tsitsihar, and Manchouli, as well as in the so-called Chientao District, in which lived large numbers of Koreans. This right was claimed as a corollary to the right of extra-territoriality.

TWENTY-ONE DEMANDS, SINO-JAPANESE TREATY OF 1915

In 1915, Japan presented to China the notorious "Twenty-one Demands". The resulting Sino-Japanese Treaty of 1915 provided that Japanese subjects would be free to reside and travel in South Manchuria and engage in business and manufacture of any kind. This was an important and unusual right enjoyed in China by the subjects of no other Nation, outside the Treaty Ports, and was later to be so interpreted by Japan as to include most of Manchuria in the term, "South Manchuria". The Treaty further provided that Japanese subjects in South Manchuria might lease by negotiation the land necessary for erecting suitable buildings for trade, manufacturing and agricultural enterprises.

An exchange of Notes between the two Governments, at the time of the conclusion of the Treaty, defined the expression, "lease by negotiation". According to the Chinese version this definition implied a long-term lease of not more than thirty years with the right of

conditional renewal; but according to the Japanese version, it implied a long-term lease of not more than thirty years with the right of unconditional renewal.

In addition to the foregoing, the Treaty provided for the extension of the term of Japanese possession of the Kwantung Leased Territory (Liaotung Peninsula) to ninety-nine years, and for prolongation of the period of Japanese possession of the South Manchurian Railway and the Antung-Mukden Railway to ninety-nine years.

The Chinese consistently claimed that the Treaty was without "fundamental validity". At the Paris Conference in 1919, China demanded the abrogation of the Treaty on the ground that it had been concluded "under coercion of the Japanese ultimatum threatening war". At the Washington Conference in 1921-2, the Chinese delegation raised the question "as to the equity and justice of the Treaty and its fundamental validity". Again in March 1923, shortly before the expiration of the original twenty-five year lease of the Kwantung Territory, China communicated to Japan a further request for the abrogation of the Treaty and stated that "the Treaties and Notes of 1915 have been consistently condemned by public opinion in China". Since the Chinese maintained that the Agreements of 1915 lacked "fundamental validity", they declined to carry out the provisions relating to Manchuria, except insofar as circumstances made it expedient so to do. The Japanese complained bitterly of the consequent violations by the Chinese of what they claimed were their treaty rights.

ALLIED INTERVENTION IN RUSSIA, 1917-20

The First World War gave Japan another opportunity to strengthen her position upon the Continent of Asia. The Russian Revolution broke out in 1917. In 1918 Japan entered into an inter-allied arrangement whereby forces, not exceeding above 7,000 by any one Power, were to be sent to Siberia to guard military stores which might be subsequently needed by Russian forces, to help the Russians in the organization of their own self-defense, and to aid the evacuating Czechoslovakian forces in Siberia.

RUSSO-JAPANESE CONVENTION OF PEKING, 1925

Russo-Japanese relations were eventually stabilized for a time by the conclusion of the Convention Embodying Basic Rules for Relations between Japan and the Union of Soviet Socialist Republics, which was signed at Peking on 20 January 1925. The Convention was binding upon Japan at all relevant times mentioned in the Indictment. (Annex No. B-5). By concluding this Convention, the parties solemnly affirmed:

- (1) That it was their desire and intention to live in peace and amity with each other, scrupulously to respect the undoubted right of a State to order its own life within its own jurisdiction in its own way, to refrain and restrain all persons in any governmental service for them, and all organizations in receipt of any financial assistance from them from any act overt or covert liable in any way whatever to endanger the order and security in any part of the other's territories;

- (2) That neither Contracting Party would permit the presence in the territories under its jurisdiction (a) of organizations or groups pretending to be the Government for any part of the territories of the other Party, or (b) of alien subjects or citizens who might be found to be actually carrying on political activities for such organizations or groups; and,
- (3) That the subjects or citizens of each Party would have the liberty to enter, travel, and reside in the territories of the other and enjoy constant and complete protection of their lives and property as well as the right and liberty to engage in commerce, navigation, industries and other peaceful pursuits while in such territories.

TREATY OF PEACE, 1919

World War I came to an end with the signing of the Treaty of Peace at Versailles on 28 June 1919 by the Allied and Associated Powers as one Party and Germany as the other Party. (Annex No. B-6). With the deposit of instruments of ratification by Germany on 10 January 1920, the Treaty came into force. The Allied and Associated Powers consisted of the Principal Allied and Associated Powers and 22 other Powers, among which were included China, Portugal and Thailand. The Principal Allied and Associated Powers were described in the Treaty as the United States of America, the British Empire, France, Italy and Japan. This Treaty was ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except the United States of America, the

Union of Soviet Socialist Republics and the Netherlands.

The Versailles Treaty contains, among other things: (1) The Covenant of the League of Nations, which is Part I consisting of Articles 1 to 26 inclusive; (2) The renunciation by Germany in favor of the Principal Allied and Associated Powers of all her rights and titles over her oversea possessions, which is Article 119; (3) The mandate provisions for government of the former German possessions so renounced, which is Article 22; (4) The declaration prohibiting the use of asphyxiating, poisonous and other gases, which is Article 171; and (5) The ratification of the Opium Conventions signed at The Hague on 23 January 1912, together with provisions for general supervision by the League over agreements with regard to the traffic in opium and other dangerous drugs, which are Articles 295 and 23 respectively.

Japan was bound by all the provisions of the Treaty of Versailles at all relevant times mentioned in the Indictment, except in so far as she may have been released from her obligations thereunder by virtue of the notice given by her Government on 27 March 1933 of her intention to withdraw from the League of Nations in accordance with the provisions of Article I of the Covenant. Such withdrawal did not become effective before 27 March 1935 and did not affect the remaining provisions of the Treaty.

#### COVENANT OF THE LEAGUE OF NATIONS

By ratifying the Versailles Treaty, Japan ratified the Covenant of the League of Nations and became a Member of the League. Twenty-eight other Powers also became Members of the League by ratifying the Treaty, including among them all the Powers bringing the Indictment

except the United States of America, the Union of Soviet Socialist Republics and the Netherlands. However, the Netherlands and twelve other Powers, who had not signed the Treaty, originally acceded to the Covenant; and the Union of Soviet Socialist Republics later became a Member. At one time or another sixty-three Nations have been Members of the League after acceding to the Covenant.

Under the terms of the Covenant, Japan agreed, among other things:

- (1) That maintenance of peace requires the reduction of armaments to the lowest point consistent with national safety, and that she would cooperate in such reduction by interchange of full and frank information respecting armaments;
- (2) That she would respect and preserve the territorial integrity and then existing political independence of all Members of the League.
- (3) That in case of dispute with another Member of the League, she would submit the matter to the Council of the League or to arbitration and would not resort to war until three months after the award of the arbitrators or the report of the Council;
- (4) That if she resorted to war, contrary to the Covenant, she would ipso facto be deemed to have committed an act of war against all Members of the League; and
- (5) That all international agreements made by the Members of the League would have no effect until registered with the Secretariat of the League.

With respect to colonies and territories, which as a consequence of the war ceased to be under the sovereignty of the vanquished nations, and were not then able to govern themselves, Japan agreed:

- (1) That the well being and development of the inhabitants thereof formed a sacred trust;
- (2) That those colonies and territories should be placed under the tutelage of advanced Nations to be administered under a Mandate on behalf of the League;
- (3) That the establishment of fortifications or military and naval bases should be prohibited in the mandated territories; and,
- (4) That equal opportunities for trade and commerce of other Members of the League with the mandated territories should be secured.

#### MANDATE OF THE PACIFIC ISLANDS

Germany renounced in favor of the Powers described in the Versailles Treaty as the Principal Allied and Associated Powers, namely: the United States of America, the British Empire, France, Italy and Japan, all her rights and titles over her oversea possessions. Although the United States of America did not ratify that Treaty, all her rights respecting these former German possessions were confirmed in a Treaty between the United States of America and Germany, which was signed on 25 August 1921. The said four Powers: The British Empire, France, Italy and Japan agreed on 17 December 1920 to confer upon Japan, under the terms of the Covenant of the League of Nations, a Mandate to administer the groups of the former German Islands in the Pacific Ocean lying

north of the Equator in accordance with certain additional provisions. Some of those provisions were:

- (1) That Japan should see that the slave trade was prohibited and that no forced labor was permitted in the Mandated Islands; and,
- (2) That no military or naval bases would be established and no fortifications would be erected in the Islands.

Japan accepted this Mandate, took possession of the Islands and proceeded to administer the Mandate, and thereby became bound, and was bound at all relevant times mentioned in the Indictment, to the terms of the Mandate contained in the Covenant of the League and the Agreement of 17 December 1920.

MANDATE CONVENTION, JAPAN & THE UNITED STATES, 1922

Since the United States had not agreed to this Mandate of Japan over the former German Islands, but possessed an interest therein, Japan and the United States of America began negotiations regarding the subject in Washington in 1922. A Convention was agreed upon and signed by both Powers on 11 February 1922. (Annex No. B-7). Ratifications were exchanged on 13 July 1922; and thereby, Japan, as well as the United States, was bound by this Convention at all times mentioned in the Indictment. After reciting the terms of the Mandate as granted by the said Principal Allied and Associated Powers, the Convention provided, among other things:

- (1) That the United States of America would have the benefits of Articles III, IV and V of that Mandate Agreement, notwithstanding that she was not a Member of the League;
- (2) That American property rights in the Islands would be respected;

- (3) That existing Treaties between Japan and the United States would apply to the Islands; and,
- (4) That Japan would furnish the United States a duplicate of the annual report of her administration of the Mandate to be made to the League.

In a Note delivered to the Government of the United States by the Government of Japan on the day of exchange of ratifications of the Convention, Japan assured the United States that the usual comity would be extended to the nationals and vessels of the United States visiting the harbors and waters of those Islands.

#### WASHINGTON CONFERENCE

A number of Treaties and Agreements were entered into at the Washington Conference in the Winter of 1921 and Spring of 1922. This Conference was essentially a Disarmament Conference, aimed to promote the responsibility of peace in the World, not only through the cessation of competition in naval armament, but also by solution of various other disturbing problems which threatened the peace, particularly in the Far East. These problems were all interrelated.

#### FOUR POWER TREATY OF 1921

The Four-Power Treaty between the United States, the British Empire, France and Japan relating to their insular possessions and insular dominions in the Pacific Ocean was one of the Treaties entered into at the Washington Conference. (Annex No. B-8). This Treaty was signed on 13 December 1921, and was duly ratified by Japan and the other Powers signatory thereto, and was binding on Japan at all times mentioned in the Indictment. In that Treaty, Japan agreed, among other things:

- (1) That she would respect the rights of the

other Powers in relation to their insular possessions and insular dominions in the region of the Pacific Ocean; and

- (2) That if a controversy should arise out of any Pacific question involving their rights, which could not be settled by diplomacy and was likely to affect the harmonious accord then existing between the Signatory Powers, she would invite the Contracting Parties to a joint conference to which the whole subject would be referred for consideration and adjustment.

The day this Treaty was signed, the Contracting Powers entered into a Joint Declaration to the effect that it was their intent and understanding that the Treaty applied to the Mandated Islands in the Pacific Ocean. (Annex No. B-8-a).

At the Washington Conference, the Powers Signatory to this Treaty concluded a supplementary treaty on 6 February 1922 (Annex No. B-8-b) in which it was provided as follows:

"The term 'insular possessions and insular dominions' used in the foresaid Treaty (The Four-Power Treaty) shall, in its application to Japan, include only the Southern portion of the Island of Sakhalin, Formosa and the Pescadores and the Islands under the Mandate of Japan."

FOUR-POWER ASSURANCES TO THE NETHERLANDS & PORTUGAL

Having concluded the Four-Power Treaty on 13 December 1921, the Powers Signatory, including Japan, being anxious to forestall any conclusions to the contrary, each sent identical Notes to the Government of the Netherlands (Annex No. B-8-c) and to the Government of

Portugal (Annex No. B-8-d) assuring those Governments that they would respect the rights of the Netherlands and Portugal in relation to their insular possessions in the region of the Pacific Ocean.

WASHINGTON NAVAL LIMITATIONS TREATY

Another of the interrelated treaties signed during the Washington Conference was the Treaty for Limitation of Naval Armament. (Annex No. B-9). This Treaty was signed on 6 February 1922 by the United States of America, the British Empire, France, Italy and Japan, and later was ratified by each of them. The Treaty was binding upon Japan at all relevant times mentioned in the Indictment prior to 31 December 1936 when she became no longer bound by virtue of the notice to terminate the Treaty given by her on 29 December 1934. It is stated in the Preamble to that Treaty: that "desiring to contribute "to the maintenance of peace, and to reduce the burdens "of competition in armament," the Signatory Powers had entered into the Treaty. However, as an inducement to the signing of this Treaty, certain collateral matters were agreed upon and those agreements were included in the Treaty. The United States, the British Empire and Japan agreed that the status quo at the time of the signing of the Treaty, with regard to fortifications and naval bases, should be maintained in their respective territories and possessions specified as follows: (1) The insular possessions which the United States then held or might thereafter acquire in the Pacific Ocean, except (a) those adjacent to the coast of the United States, Alaska and the Panama Canal Zone, not including the Aleutian Islands, and (b) the Hawaiian Islands; (2) Hongkong and the insular possessions which the British Empire then held or might thereafter acquire in the Pacific Ocean, east of the meridian 110 degrees east longitude, except (a) those

adjacent to the coast of Canada, (b) the Commonwealth of Australia and its territories, and (c) New Zealand; (3) The following insular possessions of Japan in the Pacific Ocean, to-wit: The Kurile Islands, the Bonin Islands, Amami-Oshima, the Loochoo Islands, Formosa and the Pescadores, and any insular possessions in the Pacific Ocean which Japan might thereafter acquire. The Treaty specified that the maintenance of the status quo implied that no new fortifications or naval bases would be established in the territories and possessions specified; that no measures would be taken to increase the existing naval facilities for the repair and maintenance of naval forces, and that no increase would be made in the coast defenses of the territories and possessions named.

The Signatory Powers agreed that they would retain only the capital ships named in the Treaty. The United States of America gave up its commanding lead in battleship construction; and both the United States and the British Empire agreed to scrap certain battleships named in the Treaty. Maximum limits in total capital ship replacement tonnage were set for each Signatory Power, which they agreed not to exceed. A similar limitation was placed on aircraft carriers. Guns to be carried by capital ships were not to exceed 16 inches, and those carried by aircraft carriers were not to exceed 8 inches in caliber, and no vessels of war of any of the Signatory Powers thereafter to be laid down, other than capital ships, was to carry guns in excess of 8 inches in caliber.

NINE-POWER TREATY

One further Treaty signed at the Washington Conference which cannot be disregarded without disturbing the general understanding and equilibrium which were intended to be accomplished and effected by the group of agreements arrived at in their entirety. Desiring to adopt a policy designed to stabilize conditions in the Far East, to safeguard the rights and interests of China, and to promote intercourse between China and the other Powers upon the basis of equality of opportunity, nine of the Powers at the Conference entered into a Treaty, which taken together with the other Treaties concluded at the Conference, was designed to accomplish that object. This Treaty was signed on 6 February 1922 and later ratified by the following Powers: The United States of America, the British Empire, Belgium, China, France, Italy, Japan, the Netherlands, and Portugal. (Annex No. B-10). This Treaty was binding upon Japan at all relevant times mentioned in the Indictment.

By concluding this Treaty, Japan as well as the other Signatory Powers, agreed, among other things, as follows:

- (1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China;
- (2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government;
- (3) To use her influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all

- nations throughout the territory of China;
- (4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from countenancing action inimical to the security of such States.
  - (5) To refrain from entering into any treaty, agreement, arrangement, or understanding with any Power or Powers, which would infringe or impair the foregoing principles;
  - (6) To refrain from seeking, or supporting her nationals in seeking any arrangement which might purport to establish in favor of her interests any general superiority of rights with respect to commercial or economic development in any designated region of China any such monopoly or preference as would deprive the nationals of any other Power of the right of undertaking any legitimate trade or industry in China or of participating with the Chinese Government or any local authority in any public enterprise or which would be calculated to frustrate the practical application of the principle of equal opportunity;
  - (7) To refrain from supporting her nationals in any agreement among themselves designed to create Spheres of Influence or to provide for mutually exclusive

- opportunities in designated parts of China;
- (8) To respect the neutrality of China; and
  - (9) To enter into full and frank communication with the other Contracting Powers whenever any situation should arise which in the opinion of any one of them involved the application of the stipulations of the Treaty.

Thus the Powers agreed in formal and solemn Treaty to enforce the Open Door Policy in China. Japan not only agreed to, signed and ratified this Treaty, but her Plenipotentiary at the Washington Conference declared that Japan was enthusiastically in accord with the principles therein laid down. He used the following words:

"No one denies to China her sacred right to govern herself. No one stands in the way of China to work out her own great national destiny."

#### OPIMUM CONVENTION OF 1912

Another important Agreement entered into by Japan, which is relevant to the issues, and which particularly applies to Japan's relations with China, is the Convention and Final Protocol for the Suppression of the Abuse of Opium and Other Drugs, which was signed on 23 January 1912 at the International Opium Conference at The Hague. (Annex No. B-11). This Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except the Union of Soviet Socialist Republics, and was binding upon Japan at all relevant times mentioned in the Indictment. Forty-six other Powers also signed and ratified the

Convention, and six additional Powers later adhered to it. Being resolved to pursue progressive suppression of the abuse of opium, morphine, and cocaine, as well as drugs prepared or derived from these substances giving rise or which might give rise to analogous abuse, the Powers concluded the Convention. Japan, together with the other Contracting Powers, agreed:

- (1) That she would take measures for the gradual and efficacious suppression of the manufacture, traffic in, and use of these drugs;
- (2) That she would prohibit the exportation of these drugs to the countries which prohibited the importation of them; and that she would limit and control the exportation of the drugs to countries, which limited the entry of them to their territories;
- (3) That she would take measures to prevent the smuggling of these drugs into China or into her leased territories, settlements and concessions in China;
- (4) That she would take measures for the suppression, *pari passu* with the Chinese Government, of the traffic in and abuse of these drugs in her leased territories, settlements and concessions in China; and,
- (5) That she would cooperate in the enforcement of the pharmacy laws promulgated by the Chinese Government for the regulation of the sale and distribution of these drugs by applying them to her nationals in China.

SECOND OPIUM CONFERENCE OF THE LEAGUE

The Second Opium Conference of the League of Nations further implemented and reinforced the Opium Convention of 1912 by the signing of a Convention on 19 February 1925 (Annex No. B-12), which represented a comprehensive effort on behalf of the Signatory Powers to suppress the contraband trade in and abuse of opium, cocaine, morphine, and other harmful drugs. This Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing this Indictment, except the United States of America, the Philippines and China. The Convention was also definitely acceded to by forty-six additional Powers. The Allied and Associated Powers had provided in Article 295 of the Versailles Treaty that the ratification of that Treaty would be deemed to be ratification of the Opium Convention of 23 January 1912. The Covenant of the League of Nations, which is found in Part I of the Versailles Treaty, provided in Article 23 thereof that the Members of the League would thereafter entrust the League with the general supervision over the execution of agreements with regard to the traffic in opium and other dangerous drugs. The Second Opium Conference was in response to these obligations; and the Convention of 19 February 1925 provided for the organization and functioning of a Permanent Central Board of the League for the Suppression of the Abuse of Opium and Other Drugs. In addition, Japan, as well as the other Signatory Powers, agreed among other things to the following:

- (1) That she would enact laws to ensure effective control of the production, distribution and export of opium and limit

exclusively to medical and scientific purposes the manufacture, import, sale, distribution, export and use of opium and the other drugs named in the Convention; and,

- (2) That she would send annually to the Central Board of the League as complete and accurate statistics as possible relative to the preceding year showing: production, manufacture, stocks, consumption, confiscations, imports and exports, government consumption, etc., of the drugs named in the Convention.

The Privy Council of Japan decided on 2 November 1938 to terminate further cooperation with this Central Board of the League. The reason assigned for this action was that the League had authorized its Members to invoke sanctions against Japan under the Covenant in an effort to terminate what the League had denounced as Japan's aggressive war against China. Notice of this decision was communicated to the Secretary General of the League on the same day.

#### OPIUM CONVENTION OF 1931

A third Convention, which is known as the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs was signed at Geneva on 13 July 1931. (Annex No. B-13). This Convention was signed and ratified, or acceded to, by, or on behalf of, Japan and each of the Powers bringing the Indictment, as well as fifty-nine additional Powers. This Convention was supplementary to and intended to

make more effective the Opium Conventions of 1912 and 1925 mentioned above. Japan, together with the other Contracting Powers, agreed:

- (1) That she would furnish annually, for each of the drugs covered by the Convention in respect to each of her territories to which the Convention applied, an estimate, which was to be forwarded to the Central Board of the League, showing the quantity of the drugs necessary for medical and scientific use and for export authorized under the Conventions;
- (2) That she would not allow to be manufactured in any such territory in any one year a quantity of any of the drugs greater than the quantity set forth in such estimate; and,
- (3) That no import into, or export from, the territories of any of the Contracting Powers of any of the drugs would take place, except in accordance with the provisions of the Convention.

#### LAWS OF BELLIGERENCY

The law governing the entrance of States into, as well as their conduct while in, belligerency received further restatement during the two decades immediately preceding the period covered by the Indictment and during the years 1928 and 1929. In 1907, the second Peace Conference at The Hague produced thirteen Conventions and one Declaration, all signed on 18 October 1907. The Kellogg-Briand Pact (Pact of Paris) condemning

aggressive war was signed at Paris on 27 August 1928. Then on 27 July 1929, two important Conventions were signed at Geneva, namely: the Convention Relative to the Treatment of Prisoners of War, and the Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field. These Agreements not only impose direct treaty obligations upon the Contracting Powers, but also delineate more precisely the customary law. The effectiveness of some of the Conventions signed at The Hague on 18 October 1907 as direct treaty obligations was considerably impaired by the incorporation of a so-called "general participation clause" in them, providing that the Convention would be binding only if all the Belligerents were parties to it. The effect of this clause is, in strict law, to deprive some of the Conventions of their binding force as direct treaty obligations, either from the very beginning of a war or in the course of it as soon as a non-signatory Power, however insignificant, joins the ranks of the Belligerents. Although the obligation to observe the provisions of the Convention as a binding treaty may be swept away by operation of the "general participation clause", or otherwise, the Convention remains as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation.

#### FIRST HAGUE CONVENTION

The First Convention agreed upon by the Conference at The Hague in 1907 was the Convention for the Pacific Settlement of International Disputes. (Annex No. B-14). The Convention was signed by, or on behalf of,

Japan and each of the Powers bringing the Indictment, and ratified by, or on behalf of, all of them, except Great Britain, Australia, Canada, India and New Zealand. Twenty-one other Powers also signed and ratified the Convention, and five additional Powers later acceded to it. The Powers bringing the Indictment, who did not ratify this Convention, remained bound, in so far as their relations with Japan were concerned, by the Convention for the Pacific Settlement of International Disputes signed at The Hague on 29 July 1899; since that Convention was signed and ratified by, or on behalf of, Japan and each of these Powers. Neither of the Conventions mentioned under this title contained a "general participation clause"; they were, therefore, binding upon Japan as direct treaty obligations at all relevant times mentioned in the Indictment. Japan, as well as the other Contracting Powers, among other things agreed:

- (1) That, in order to obviate as far as possible recourse to force in her relations with other States, she would use her best efforts to insure the pacific settlement of international differences; and,
- (2) That in case of serious disagreement or dispute, before an appeal to arms, she would have recourse to the good offices or mediation of one or more friendly Powers.

#### KELLOGG-BRIAND PACT

The Kellogg-Briand Pact or Pact of Paris, which was signed at Paris on 27 August 1928, condemned aggressive war and restated the law evidenced by the

First Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes. (Annex No. B-15). The Treaty was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except the Union of Soviet Socialist Republics, China and the Netherlands. Japan ratified the Treaty on 24 July 1929, and China adhered to the Treaty on 8 May 1929. The Netherlands adhered to the Treaty on 12 July 1929, and the Union of Soviet Socialist Republics adhered on 27 September 1928. Therefore, Japan and each of the Powers bringing the Indictment had definitely acceded to the Treaty by 24 July 1929; in addition, eight other Powers had signed and ratified the Treaty; and forty-five additional Powers, at one time or another, adhered to it. The Treaty was binding upon Japan at all relevant times mentioned in the Indictment.

The Contracting Powers, including Japan, declared that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

The Contracting Powers then agreed that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which might arise among them, would never be sought except by pacific means.

Prior to ratification of the Pact, some of the Signatory Powers made declarations reserving the right to wage war in self-defence including the right to judge for themselves whether a situation requires such action. Any law, international or municipal, which prohibits recourse to force, is necessarily

limited by the right of self-defence. The right of self-defence involves the right of the State threatened with impending attack to judge for itself in the first instance whether it is justified in resorting to force. Under the most liberal interpretation of the Kellogg-Briand Pact, the right of self-defence does not confer upon the State resorting to war the authority to make a final determination upon the justification for its action. Any other interpretation would nullify the Pact; and this Tribunal does not believe that the Powers in concluding the Pact intended to make an empty gesture.

#### THIRD HAGUE CONVENTION

The Third Convention concluded by the Powers in Conference at The Hague in 1907 was the Convention Relative to the Opening of Hostilities. (Annex No. B-16). The Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except China; but China adhered to the Convention in 1910. A total of twenty-five Powers signed and ratified the Convention, including Portugal and Thailand, and six Powers later adhered to it. This Convention does not contain a "general participation clause". It provides that it shall take effect in case of war between two or more of the Contracting Powers, it was binding upon Japan at all relevant times mentioned in the Indictment. By ratifying this Convention, Japan agreed, among other things:

That hostilities between her and any other Contracting Power must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war.

FIFTH HAGUE CONVENTION

The Fifth Hague Convention of 1907 was the Convention Respecting the Rights and Duties of Neutral Powers and Persons in War on Land. (Annex No. B-17). The Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except Great Britain, Australia, Canada, New Zealand, India and China. However, China adhered to the Convention in 1910. A total of twenty-five Powers signed and ratified the Convention, including Thailand and Portugal; and three Powers later adhered to it. Great Britain and sixteen other Powers, who signed the Convention, have not ratified it.

This is one of the Hague Conventions which contains a "general participation clause"; although it ceased to be applicable in the recent war as a direct treaty obligation of Japan upon the entry of Great Britain into the war on 8 December 1941, it remained as good evidence of the customary law of nations to be considered along with all other available evidence in determining the customary law to be applied in any given situation, to which the principles stated in the Convention might be applicable.

By this Convention, Japan agreed, among other things:

- (1) That the territory of neutral Powers is inviolable;
- (2) That Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power; and,
- (3) That a neutral Power is not called upon to

prevent the export or transport, on behalf of one or other of the Belligerents, of arms, munitions of war, or, in general of anything which can be of use to an army or a fleet.

FOURTH HAGUE CONVENTION

The Fourth Hague Convention of 1907 is the Convention Respecting the Laws and Customs of War on Land. (Annex No. B-18). Regulations Respecting the Laws and Customs of War on Land were annexed to and made a part of this Convention. (Annex No. B-19). The Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except China. Nineteen additional Powers, including Thailand and Portugal, also signed and ratified this Convention; and two other Powers later adhered to it.

This is another of the Hague Conventions which contains a "general participation clause". What we have said respecting this clause applies equally well here.

As stated in the Preamble to this Convention, the Contracting Powers were animated by the desire, even in the extreme case, to serve the interests of humanity and the needs of civilization by diminishing the evils of war and adopted the Convention and the Regulations thereunder which were intended to serve as a general rule of conduct for Belligerents. Realizing that it was not possible at the time to concert regulations covering all circumstances that might arise in practice, the Powers declared that they did not intend that unforeseen cases should be left to the arbitrary judgment of military commanders; and that until a more complete code should be issued, they declared that in cases not included in the Regulations the inhabitants and belligerents remained under the protection and principles of the

laws of nations as they resulted from the usages of civilized peoples, the laws of humanity, and the dictate of the public conscience.

By this Convention, Japan agreed, among other things:

- (1) That prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them; that they must be humanely treated; and all their personal belongings, except arms, horses, and military papers, remain their property;
- (2) That in case of capture of any of the armed forces of a Belligerent, whether they consisted of combatants or non-combatants, they would be treated as prisoners of war.
- (3) That although she might utilize the labor of prisoners of war, officers excepted, the task would not be excessive and would not be connected with the operation of war; and that she would pay to the prisoners compensation for all work done by them;
- (4) That as regards board, lodging, and clothing, in the absence of a special agreement between the Belligerents, she would treat prisoners of war on the same footing as the troops who captured them;
- (5) That prisoners of war in her power would be subject to the laws governing her own army and entitled to the benefits thereof;
- (6) That she would institute at the commencement of hostilities an inquiry office. That it would be the function of this office to reply to all inquiries about the prisoners and to keep

up to date an individual return for each prisoner of war in which would be recorded all necessary vital statistics and other useful information pertaining to such prisoner.

- (7) That relief societies for prisoners of war would receive every facility from her for the efficient performance of their humane task and their agents would be admitted to places of internment for the purpose of administering relief, etc.;
- (8) That it was forbidden: (a) to employ poison or poisoned weapons; (b) To kill or wound treacherously individuals belonging to the hostile Nation or Army; (c) To kill or wound an enemy, who having laid down his arms, or having no longer means of defence, has surrendered at discretion; (d) To declare that no quarter will be given; (e) To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, or of the distinctive badges of the Geneva Convention; or (f) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;
- (9) That in sieges and bombardments all necessary steps would be taken by her to spare buildings dedicated to religion, art, science and charitable purpose, historic monuments and hospitals and places where the sick and wounded are collected;

- (10) That the pillage of a town or other place, even when taken by assault was prohibited; and,
- (11) That family honor and rights, the lives of persons, and private property, as well as religious convictions and practice would be respected by her during war.

GENEVA PRISONER OF WAR CONVENTION

The Convention Relative to the Treatment of Prisoners of War was signed at Geneva on 27 July 1929. (Annex No. B-20). Forty-seven Powers signed the Convention; and thirty-four Powers either ratified it or adhered to it. Excepting Australia, China and the Union of Soviet Socialist Republics, the Convention was signed and ratified by, or on behalf of, each of the Powers bringing the Indictment.

Japan sent plenipotentiaries, who participated in the Conference and signed the Convention; but Japan did not formally ratify the Convention before the opening of hostilities on 7 December 1941. However, early in 1942 the United States, Great Britain and other Powers informed Japan that they proposed to abide by the Convention and sought assurances from Japan as to her attitude towards the Convention. Japan acting through her Foreign Minister, who was the Accused TOGO, declared and assured the Powers concerned that, while she was not formally bound by the Convention, she would apply the Convention, "mutatis mutandis", toward American, British, Canadian, Australian and New Zealand prisoners of war. Under this assurance Japan was bound to comply with the Convention save where its provisions could not be

literally complied with owing to special conditions known to the parties to exist at the time the assurance was given, in which case Japan was obliged to apply the nearest possible equivalent to literal compliance. The effect of this assurance will be more fully considered at a later point in this judgment.

This Convention is the "more complete code" of the laws of war contemplated by the Powers signatory to the Hague Convention Respecting the Laws and Customs of War concluded on 18 October 1907; and the Convention provides by its terms that it will be considered to be Chapter II of the Regulations annexed to that Hague Convention. The Convention does not contain a "general participation clause"; but it does contain a provision that it shall remain in force as between the Belligerents who are parties to it even though one of the Belligerents is not a Contracting Power.

The Convention provides, among other things:

- (1) That prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them; that they must be humanely treated and protected, particularly against acts of violence, insults and public curiosity; that they have the right to have their person and honor respected; that women shall be treated with all regard to their sex; and that all prisoners of war must be maintained by the detaining Power;
- (2) That prisoners of war shall be evacuated as quickly as possible to depots removed from

the zone of combat; but that the evacuation, if on foot, shall only be effected by stages of 20 kilometers a day, unless the necessity of reaching water and food requires longer stages;

- (3) That prisoners of war may be interned; but they may not be confined or imprisoned, except as an indispensable measure of safety or sanitation; that if captured in unhealthy regions or climates, they will be transported to a more favorable region; that all sanitary measures will be taken to insure cleanliness and healthfulness of camps; that medical inspections shall be arranged at least once a month to ensure the general health of the prisoners; that collective disciplinary measures affecting food are prohibited; that the food ration shall be equal in quantity and quality to that of troops in base camp; that prisoners shall be furnished facilities together with a sufficiency of potable water for preparing additional food for themselves; that they shall be furnished clothing, linen and footwear as well as work clothes for those who labor; and that every camp shall have an infirmary, where prisoners of war shall receive every kind of attention needed;
- (4) That although prisoners of war are required to salute all officers of the Detaining Power, officers who are prisoners are bound to salute only officers of a higher or equal rank of that Power;

- (5) That Belligerents may utilize the labor of able prisoners of war, officers excepted, and provided that non-commissioned officers are used only for supervisory work; that no prisoner may be employed at labors for which he is physically unfit; that the length of the day's work shall not be excessive, and every prisoner shall be allowed a rest of twenty-four consecutive hours each week; that prisoners shall not be used at unhealthful or dangerous work, and labor detachments must be conducted similar to prisoner-of-war camps, particularly with regard to sanitary conditions, food, medical attention, etc.; that prisoners must be paid wages for their labor; and that the labor of prisoners of war shall have no direct relation with war operations, particularly the manufacture and transportation of munitions, or the transportation of material for combat units;
- (6) That prisoners of war must be allowed to receive parcels by mail intended to supply them with food and clothing; and that relief societies for prisoners of war shall receive from the detaining Power every facility for the efficient performance of their humane tasks;
- (7) That prisoners of war have the right to make requests and register complaints regarding the conditions of their captivity; that in every place where there are prisoners of war they have the right to appoint agents to

represent them directly with the military authorities of the detaining Power; and that such agent shall not be transferred without giving him time to inform his successors about affairs under consideration;

- (8) That although prisoners of war are subject to the laws, regulations, and orders in force in the armies of the detaining Power, punishments other than those provided for the same acts for soldiers of the armies of the detaining Power may not be imposed upon them; and that corporal punishment, imprisonment in quarters without daylight, and in general any form of cruelty, is forbidden, as well as collective punishment for individual acts or omissions;
- (9) That escaped prisoners of war who are retaken shall be liable only to disciplinary punishment; and that the comrades who assisted his escape may incur only disciplinary punishment;
- (10) That at the opening of judicial proceedings against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof at least before the opening of the trial; that no prisoner shall be sentenced without having an opportunity to defend himself, and shall not be required to admit himself guilty of the act charged; that the representative of the protecting Power shall be entitled to attend the trial; that no sentence shall be pronounced against a prisoner except by the same courts and according to the same pro-

cedure as in the case of trial of persons belonging to the armed forces of the detaining Power, that the sentence pronounced shall be immediately communicated to the protecting Power; and that in the case of death sentences, the sentence must not be executed before the expiration of three months after such communication;

- (11) That Belligerents are bound to send back to their own country, regardless of rank or number, seriously sick and seriously injured prisoners of war, after having brought them to a condition where they can be transported;
- (12) That Belligerents shall see that prisoners of war dying in captivity are honorably buried and that their graves bear all due information and are respected and maintained;
- (13) That upon outbreak of hostilities each Belligerent shall institute a prisoner of war information bureau, which shall prepare and preserve an individual return upon each prisoner showing certain vital information prescribed, and which shall furnish such information as soon as possible to the interested Power.

Japan also assured the Belligerents that she would apply this Convention to civilian internees and that in applying the Convention she would take into consideration the national and racial manners and customs of prisoners of war and civilian internees under reciprocal conditions when supplying clothing and provisions to them.

GENEVA RED CROSS CONVENTION

The Geneva Red Cross Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field was also signed on 27 July 1929. (Annex No. B-21). The Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment as well as thirty-two other Powers. It was binding upon Japan and her subjects at all relevant times mentioned in the Indictment, as a direct treaty obligation. The Convention contains a provision to the effect that it must be respected by the Contracting Powers under all circumstances; and if in time of war, one of the Belligerents is not a party to the Convention, its provisions shall remain in force between the Belligerents who are parties to it.

By signing and ratifying the Convention, Japan, as well as the other Signatory Powers, agreed, among other things:

- (1) That officers, soldiers, and other persons officially attached to the armies, who are wounded or sick shall be respected and protected in all circumstances; and that they shall be humanely treated and cared for without distinction of nationality by the Belligerent in whose power they are;
- (2) That after every engagement, the Belligerent who remains in possession of the field of battle shall search for the wounded and dead and protect them from robbery and ill-treatment; and that those wounded and sick who fall into the power of the enemy shall

become prisoners of war to whom the general rules of international law respecting prisoners of war shall be applicable;

- (3) That all personnel charged exclusively with the removal, transportation, and treatment of the wounded and sick, including administration personnel of sanitary formations and establishments and chaplains, shall be respected and protected, and when they fall into the hands of the enemy they shall not be treated as prisoners of war, and shall not be detained, but will be returned as soon as possible to their own army along with their arms and equipment;
- (4) That mobile sanitary formations, and fixed sanitary establishments shall be respected and protected; and if they fall into the hands of the enemy, they shall not be deprived of their buildings, transport and other equipment which may be needed for the treatment of the sick and wounded;
- (5) That only those personnel, formations and establishments entitled to respect and protection under the Convention shall display the distinctive emblem of the Geneva Convention; and,
- (6) That it is the duty of commanders-in-chief of belligerent armies to provide for the details of execution of the provisions of the Convention, as well as unforeseen cases conformable to the general principles of the Convention.

TENTH HAGUE CONVENTION

The Tenth Convention agreed upon at the Conference at The Hague and signed on 18 October 1907 was the Convention for the Adaption to Naval War of the Principles of the Geneva Convention of 6 July 1906. (Annex No. B-22). The Convention was signed and ratified by, or on behalf of, Japan and each of the Powers bringing the Indictment, except Great Britain, Australia, Canada, India and New Zealand. The Convention was signed and ratified by twenty-seven Powers and later five other Powers adhered to it. The Indicting Powers who did not ratify this Convention and also Japan are parties to the Convention which was signed at The Hague on 29 July 1899; and, therefore, as between them, they are bound by the Convention of 1899, which contains most of the provisions found in the later Convention of 1907.

This, also, is one of the Hague Conventions, which contains a "general participation clause", and, therefore, it ceased to be applicable upon Japan as a direct treaty obligation when a non-signatory Power joined the ranks of the Belligerents. What we have said regarding this clause applies equally well here.

The Convention provides, among other things;

- (1) That after every engagement the Belligerents shall take steps to look for the shipwrecked, sick and wounded, and protect them and the dead from pillage and ill treatment; those falling into the power of the enemy shall become prisoners of war; the detaining Power shall send to their country as soon as possible a description of those picked up by him, and shall treat the sick and wounded and bury the dead;

- (2) That hospital ships shall be respected and cannot be captured; but these ships may not be used for military purposes and shall be distinguished by markings and flags displaying the emblem of the Geneva Convention; and that the distinguishing markings prescribed for hospital ships shall not be used for protecting any ships other than those entitled to protection under the Convention.

JAPAN WAS A MEMBER OF THE FAMILY OF NATIONS

Thus for many years prior to the year 1930, Japan had claimed a place among the civilized communities of the world and had voluntarily incurred the above obligations designed to further the cause of peace, to outlaw aggressive war, and to mitigate the horrors of war. It is against that background of obligations that the actions of the Accused must be viewed and judged.