

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 concur-
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.