Release Oct 29th.

OUR RELATIONS IN THE FAR EAST AS THEY APPEAR IN THE INTERNATIONAL WAR CRIMES TRIAL IN TOKYO

to be del. before Am. Bar. Assoc

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There is much to be learned from the International War Crime Trial in Tokyo of the American plan for getting along with other people. With all that has been said and written, many have no clear idea of just what that plan was even now. The writings and conversations between the diplomatic agents of the United States and Japan which took place during their meetings naturally could not be fully released currently when a desperate effort was being made by our representatives to prevent an outbreak of hostilities. It was not a fear of explosive action in the United States that caused this reticence, but the representations made by the Japanese diplomats that any chance for solution of the grave international problem would be lost if some powerful bellicose individuals in Japan were informed by the press of exactly what was taking place. Whether this representation was true or false, it had its influence. Moreover, these were purposely designated as exploratory conversations since the interests of several other nations would be effected and the United States could never be a party to arriving at any agreement before conferring with the representatives of such nations. The very suddenness of the Japanese attack and the startling results focused American attention on defense and an all out war effort to the exclusion of sober study and reflection on what caused the war itself. Now that the war is over and the victory has been won, our attention is drawn to consideration

of the problems left in the wake of hostilities so that as a result we are apt to miss some vital information.

Since the general subject matter of relations with other people is now found to be so close to our own individual interests, it is important that before any further time passes that the American people get the story so they may form their own judgment as the people of every democracy must so do if that form of government is to succeed.

It is especially important in view of the fact that this general subject matter may never have been too clearly understood by our own people; that is to say, what our foreign policy has been and how it has been applied. This has led to much loose comment of the type with which we are all familiar, namely, that we have had no foreign policy or whatever policy we have had has been weakly applied. To those who are in doubt and who take the time to study the record, there will be a most pleasant surprise, for there was a definite clear cut foreign policy, it was sound, it was just and most practical. It was applied with dignity, consistency, and although at all times tempered with reason, there never was a variance from any of its vital provisions. In a word when it is all brought to light, it provides a story with which the American people can be well satisfied. They will be glad to learn that this important part

of their leadership was fulfilled by men of wisdom, forthrightness, courage and determination.

These comments are confined entirely to what that policy was, and how it was implemented. They bear no reference to any current events.

The evidence being presented at the Tokyo trial shows that this foreign policy had been many years before 1941 well defined and set forth in clear and simple terms not only by the pronouncement of our executive officers charged with this duty, but had been incorporated in formal treaties entered into with most of the leading nations of the world, including Japan. It could not have been made more clear than it appears in the authentic records of the negotiations with the Japanese authorities up to the very moment of the Pearl Harbor attack. Time and again, the record is clear that the President of the United States and its Secretary of State both orally and in writing stated to the Japanese, the four points on which this policy was based with relation to Japan. Moreover, it was pointed out that these four points contained our foreign policy towards all nations wherever situated and at all times. The Secretary of State told the Japanese Ambassador, moreover, it could hardly be expected that our country would have one basic foreign policy for one half of the world and a conflicting one for the other half. Since the basis rested upon four points, reference will be made herein to these points and how they were applied.

This policy was set forth in the crucial document dated 26 November 1941. It was handed by the Secretary of State personally to the Japanese Ambassador in the State Department Building at Washington. It was the last document which the United States was permitted to present because Japan's answer was the attack upon Pearl Harbor. It is so vital and so much has been said about it that I quote revealing parts of it as follows. It was called a "Draft (of) Mutual Declaration of Policy." The reason for it was given in the opening paragraph:

> "The Government of the United States and the Government of Japan both being solicitous for the peace of the Pacific affirm that their national policies are directed towards lasting and extensive peace throughout the Pacific area that they have no territorial designs in that area, that they have no intention of threatening other countries or of using military force aggressively against any neighboring nation, and that, accordingly, in their national policies they will actively support and give practical application to the following fundamental principles upon which their relations with each other and with all other governments are based."
> (Foreign Relations, etc. Vol. II, page 768)

Then follows this important statement of the fundamental policy so described as the four points applicable everywhere.

> "1. The principle of inviolability of territorial integrity and the sovereignty of each and all nations.
> 2. The principle of non-interference in the internal affairs of other countries.
> 3. The principle of equality, including equality of commercial opportunity and treatment.
> 4. The principle of reliance upon international cooperation and conciliation for the prevention and pacific settlement of controversies and for improvement of international conditions by peaceful methods and processes."
> (Foreign Relations, etc. Vol. II, page 768)

Of course, these four broad principles always require amplification in their execution. Therefore, this important document proceeded to amplify the principles based upon these four pillars, as follows:

> "The principle of full protection of the interests of consuming countries and populations as regards the operation of international commodity agreements.
>
> The principle of establishment of such institutions and arrangements of international finance as may lend aid to the essential enterprises and the continuous development of all countries and may permit payments through processes of trade consonant with the welfare of all countries."
> (Foreign Relations, etc., Vol. II, pages 768 and 769)

The rest of the document suggested means of carrying these principles and specifications into effect for the prime purpose of reaching a comprehensive settlement of fundamental issues. It is important to note that nowhere in this document is contained even the mildest implied threat of the application of any military action. In other words, the United States did not say if these principles are violated, the United States will go to war. Nor was there any other type of threat contained therein. In that communication it was stated:

> "....the government of the United States offers for the consideration of the Japanese government a plan of a broad but simple settlement covering the entire Pacific area as one practical exemplification of a program which this government envisages as something to be worked out during our further conversations."

That is to say, the plan which we offered did not rule out alternative plans which either government was free to offer. What we did say and what we did do when these principles were

violated will be discussed later. So that it is fair to ask the American people, is this the foreign policy you wanted. If not, how much of it did you want to abandon and perhaps a third question, what would you have substituted in place of those parts abandoned? It is very important to point out how much of this policy had been previously agreed to by other nations, including Japan. To learn this we have to resort mainly to treaties. For these treaties are not agreed to impulsively nor without the greatest care and reflection. Their language, of course, was chosen with meticulous care after deep consideration.

Our State Department was informed on 6 September 1941 by Ambassador Grew that he had conferred with Prince Konoye, Prime Minister of Japan. Konoye spoke with the highest authority for the whole Japanese nation. Mr. Grew reported as follows:

> "Prince Konoye, and consequently the Government of Japan, conclusively and wholeheartedly agree with the four principles enunciated by the Secretary of State as a basis for the rehabilitation of relations between the United States and Japan."
> (Foreign Relations, etc. Volume II, page 604)

On 3 September 1941, President Roosevelt stated to the Japanese Ambassador Nomura:

> "On April 16, at the outset of the informal and exploratory conversations which were entered into by the Secretary of State with the Japanese Ambassador, the Secretary of State referred to four fundamental principles which this Government regards as the foundation upon which all relations between nations should properly rest. These four fundamental principles are as follows:

1. Respect for the territorial integrity and the sovereignty of each and all nations,
2. Support of the principle of non-interference in the internal affairs of other countries.
3. Support of the principle of equality, including equality of commercial opportunity.
4. Non-disturbance of the status quo in the Pacific except as the status quo may be altered by peaceful means."
(Foreign Relations, etc. Volume II, page 590)

On a previous occasion, 16 April 1941, the same four points in the exact language were stated. They were so basic that at that time the Secretary of State said:

"I will, therefore, hand to you as the basis for my preliminary question, the following four points on a blank piece of paper."
(Foreign Relations, etc. Volume II, page 407)

The four points he referred to were word for word those used by President Roosevelt above quoted. They were referred to several other times in this formal authentic government record of the entire proceedings. On 17 August 1941 there was a full discussion of their reasonableness and their purpose as an efficacious method of nations living one with another and fulfilling all of their practical requirements. In recapitulation the President stated:

"If the Japanese Government is seeking what it affirms to be its objectives, the Government of the United States feels that the program above outlined is one that can be counted upon to assure Japan satisfaction of its economic needs and legitimate aspirations with much greater certainty than could any other program."
(Foreign Relations, etc. Volume II, pages 558-559)

This was so important that our President took the time in detail to point out the reasons for this policy and the fairness to all, including the Japanese.

"The program envisaged in such informal discussions would involve the application in the entire Pacific area of the principle of equality of commercial opportunity and treatment. It would thus make possible access by all countries to raw materials and to all other essential commodities. Such a program would envisage cooperation by all nations of the Pacific on a voluntary and peaceful basis toward utilizing all available resources of capital, technical skill, and progressive economic leadership for the purpose of building up not only their own economies but also the economies of regions where productive capacity can be improved. The result would be to increase the purchasing power of the nations and peoples concerned, to raise standards of living, and to create conditions conducive to the maintenance of peace. If such a program based upon peaceable and constructive principles were to be adopted for the Pacific and if thereafter any of the countries or areas within the Pacific were menaced, the policy of aiding nations resisting aggression would continue to be followed by this Government and this Government would cooperate with other nations in extending assistance to any country threatened."
(Foreign Relations, etc. Volume II, pages 558-559)

So it can be seen from the foregoing that this was no vapid idealism attempted to be left hanging in the air. Nor was it blind in the sense that it failed to recognize the needs of other nations, including the Japanese. Quite to the contrary, such necessities were well recognized and, of course, efforts were made and as they should justly be made by all peoples to assist in their betterment. The sole question involved was whether Japan would obtain the satisfaction of its proper needs through cooperation with other nations by peaceful means, the product of our civilization, or whether it would attempt to take a short cut and obtain the same by force.

Now, it is not correct to assume that this was the first period in which this subject was discussed. To the contrary;

it had been discussed to the extent that formal agreements were reached in 1922. At that time, the agreements had reference only to the relation between Japan and the United States and other nations with reference to China. This was no small affair, since it concerned the largest country in the world in territory and population. The agreement took the form of the Nine-Power treaty between the United States, Japan, China, United Kingdom, France, Belgium, Italy, the Netherlands and Portugal (signed at Washington 6 February 1922, ratified by the United States 9 June 1923, effective on all signatories 5 August 1925). They were the nations with the exception of Russia most concerned with this subject matter. In this Nine-Power treaty appears clearly the same four points of American foreign policy put into practice. It was enacted during the term of President Calvin Coolidge and was signed by Charles Evans Hughes, Henry Cabot Lodge, Elihu Root and Oscar Underwood. The domestic political persuasion of these individuals and their economic philosophies are quite known to the American people. It is therefore important to understand that these four basic points of foreign policy were well established long before the administration of 1940. That they were emphatically adhered to and applied by a group in another administration of different domestic political persuasion shows that this was truly an American policy and not in the narrow sense, Republican or Democratic.

It is regrettable that it is not practical to set forth herein in full all of the provisions of the Nine-Power treaty.

But it was so important, and may still be, that some reference to its exact terms is required.

There was no doubt as to its purpose. We quote the second paragraph:

> "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;
>
> Have resolved to conclude a treaty for that purpose...."

Curiously enough, it too contains four points in Article I and they are now quoted:

Article I

> "The Contracting Powers, other than China, agree:
> (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 their 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."

If you put the above four points together with the four points referred to above by the President in our final document to Japan 26 November 1941 and previously on 16 April 1941 in the "blank piece of paper" handed by Secretary Hull to Ambassador Nomura the same as President Roosevelt stated to Japanese Ambassador Nomura on 3 September 1941 it will be shown that they contain practically no variance whatsoever.

Moreover in the Nine-Power treaty, Article II sets forth their implementation:

> "The Contracting Powers agree not to enter into any treaty, agreement, arrangement, or understanding, either with one another, or, individually or collectively, with any Power or Powers, which would infringe or impair the principles stated in Article I."

Moreover, these Contracting Nations in signing this treaty, of course, realized its futility unless they made it binding upon all of their individual inhabitants, so they said:

> ""with a view to applying more effectively the principles of the Open Door or equality of opportunity in China for the trade and industry of all nations....agree that they will not seek nor support their respective nationals in seeking --
>
> (a) any arrangement which might purport to establish in favor of their interests any general superiority of rights with respect to commercial or economic development in any designated region of China." (Article II)

And to see that there was no other loop-hole as to their nationals, the Powers agreed therein:

> "The Contracting Powers agree not to support any agreements by their respective nationals with each other designed to create Spheres of Influence or to provide for the enjoyment of mutually exclusive opportunities in designated parts of Chinese territory." (Article IV).

That is the whole story of this Nine-Power treaty. Since the Tokyo trial is in progress, reference will be made only to the recorded indisputable facts of history which never have and will not be denied. A part of China, Manchuria, with thirty million inhabitants was invaded while this treaty was in force by Japanese armies and through such efforts an allegedly independent state was set up in 1931 and 1932. All of this was referred

to the League of Nations. A commission was appointed by the League of representatives from the United Kingdom, France, the United States, Germany and Italy. This committee called the Lytton Commission investigated, reported its findings and made its recommendations. These recommendations were accepted by forty-four nations. In substance, it was held that this action by Japan was unjustified and although Japan agreed to these proceedings and argued its case formally before the League, it withdrew after the adverse decision. Thereafter, as history shows, the key areas of China were invaded and a long war ensued ending with the defeat of Japan in September of 1945.

In the meantime, in August of 1940 Japan entered into a treaty with the Hitler-Mussolini governments, the Tripartite agreement. By its provisions Japan, Germany and Italy attempted to apportion the world by establishing areas in which the leadership of the respective powers was recognized. Each pledged full cooperation in the establishment of leadership within the sphere of the others and political, economic and military aid was pledged in the event of an attack against any one of the signatories by a nation not then involved in the European war or in the war with China. It provided that its terms would not in any way affect the political status which existed between each of the signatories and the Soviet Union. It had for its purpose the establishment of a new order in Europe and in Asia and the new order had for its purpose the extinguishment of democracy throughout the world. There were secret agreements

between these three nations that will not be discussed here. But that it was a military alliance for a specific purpose can not be doubted. That the United States was a pointed object of the pact is very evident. The evidence already presented before the International Tribunal at Tokyo shows clearly that it was entered into after long reflection and consideration of its probable or inevitable consequences and one of these was war with the United States of America. It had as its aim the creatio of a new world order.

There were many other treaties and conventions establishing rights and duties of various nations including the United States and Japan. They included those enacted years ago at the Hague and the more recent one in which practically all nations were a party, the Kellogg-Briand Pact in 1928. The last mentioned pact recorded the affirmation of all nations that war would not be the policy of any nation; that it should not be employed for the purpose of effecting solution of problems and difficulties between various nations. It contained no specific sanction of substance and no specific means of enforcement of its provisions and certainly did not specifically provide for punishment of any individuals that caused their nations to break its terms.

We have discussed at some length and in detail the foreign policy of the United States, and the declared foreign policy of Japan in its treaties. Time does not permit a discussion of the detailed manner in which it is claimed that Japan violated

these treaties by its actions. The position of the prosecution could be summed up in a word with the observation that whatever Japan said by way of formal treaty or diplomatic utterances or in a public statement of its leaders, it sought to solve its problems and to enforce its will by war long before the exploratory conversations were entered into with the United States in 1941. These acts were not confined to attacks against the Chinese and seizure of Chinese territory and properties. They concerned attacks upon American vessels and its citizens where serious injury and death resulted in hundreds of cases. They encompassed the execution of a rather complete plan to exclude Americans and all other caucasians from not alone China but all of southeastern Asia as well. This story is too well known and clearly outlined in recorded history to require repetition. We were rather plainly informed by act and subsequently by word that any relations we had in Greater East Asia would be subject to Japanese control and license. This area was not a small one. It included all of China, Indo China, Siam, Burma, Malaya, and the Dutch East Indies, including the islands of Java and Sumatra and rather definitely New Zealand and Australia. It extended out to include the various smaller islands of the Pacific, the Marianas, the Marshalls, the Gilberts and others stretching far out into the Pacific within hailing distance of Hawaii. There was no direct claim made to the Hawaiian Islands. Some of this island area had been fortified by Japan already in violation of treaties, mandate agreements and assurances. All told, it was quite evident that while Japan was at it, it intended to get

plenty of elbow room. Finally by the official statements of the leaders of its government, we were told that that entire area was Japan's concern and that it did not intend to brook interference from the United States.

We now come to the prime question. In the face of all of this, what did the United States do about it prior to Pearl Harbor and what did it threaten to do about it? Our foreign policy as we believe we have clearly pointed out, was well established. But the means by which we attempted to protect it from violation or threat of violation by force remains to be described. That is of prime importance to the American people. Here is what we actually did in such emergency. In the middle of 1939, we gave notice to Japan that we were terminating in a period of six months our commercial treaty with Japan which we had signed in 1911. We gave the six months notice required by that treaty. We did this for two reasons. The actions already taken by Japan had made it a one sided proposition. It was never claimed that we violated any of its terms, but the facts showed that we were not being accorded the privileges it granted us and that we were stopped from acquiring them by Japan's practices its war in China after their invasion of Manchuria and other places. Moreover, we acquired abundant evidence that Japan was avidly engaged in building up a huge stock pile of basic war materials, most of which were being acquired from the United States. As we know now by a document already in evidence in the Tokyo trial, on the day before the Tripartite Pact was signed

with Hitler (September 26, 1940), there was a meeting of all the Japanese cabinet and first ranking war and navy leaders and war mobilizers. We presented the official Japanese government records of this which we found in Tokyo after the surrender and in preparation for the trials. There we find, in written record, that one official after another asked what about this stock pile of necessary war materials if this military alliance between Germany and Japan required Japan to go to war with the United States? Tojo made some remarks in answer -- he was War Minister at the time. The head of the Planning Board replied that they needed much war material especially oil and high octane gasoline. He was asked what he was doing about it, and he replied that they got a very large amount from the United States and had contracted for many many hundreds of millions of dollars worth more to be put away and preserved. He said that this would be needed for airplanes and warships in case of war with America, as Japan was lacking in the natural resources required. Our government did not know of these exact conversations in 1941, but knew what the general situation was. So when protest after protest brought us nowhere nearer an agreement to carry out our stated foreign policy, we finally put an embargo on oil and other basic war materials. Japanese planes had been using this fuel for their airplanes shooting down civilians in China, and was preparing to do the same thing to us, as their official government record clearly so stated. So in carrying out our foreign policy, we decided not to supply Japan with any more oil, or other similar

basic war material for the very simple reason that we did not want to be the purveyors of materials to be used for our own destruction. Nor would we permit Japan's nationals' assets in the United States to be free. Many people complained that we should have taken these steps long before, and while that certainly is a permissible viewpoint, there were many basic practical reasons concerning the effect of economic sanctions and the extent of public support which have caused most authorities to conclude that the proper course was followed. The point of it is that although we had much more than a suspicion of what was going on, we waited until the facts were clearly developed before we even took these steps. So the result is that the foregoing is all we did do. It is true that in the approaches to and in the final phase, we refused to enter into an agreement, formal or otherwise, acceding to the Japanese proposals which would have required us to abandon our well established and well defined foreign policy. Through all of these proceedings until we declared war after Pearl Harbor on December 9, 1941, we made no threats of any military steps to enforce our foreign policy. The American public can judge for itself whether it approves or disapproves first of its foreign policy, and secondly of the manner in which it was carried out.

When we study the conversations, the situation is clear and simple. Japan, prior to 1941, had shown by its acts its definite design and had steadily carried out that design in China for ten years. The only new development was its declared intention of carrying out that same plan and design in what it

called "East Asia," which amounted to control of almost half of the world's population. It referred to this plan and design as "co-properity." But the record shows that it was nothing other than conquest by brutal warfare on a huge scale and over a wide area. It is clearly set forth in Secretary Hull's testimony before the Pearl Harbor committee.

(Interrogated by United States Senator Ferguson)

28. Question:

When did the war with Japan become inevitable?

Answer:

The question of the inevitability of war with Japan involved two factors, the factor of Japanese plans and objectives and the factor of time.

With regard to Japanese objectives, it is clear from the record that following the advent in 1927 of the Cabinet of General Tanaka, who inaugurated the so-called "positive policy" toward China, Japan had consistently been pursuing only one fixed policy -- that of expansion by aggression. In 1931 Japan occupied Manchuria by force; in 1933, Japan seized Jehol, penetrated Chahar and extorted from China a demilitarized zone in north China. The truculent statement of Amau, spokesman of the Japanese Foreign Office, on April 17, 1934, in which Japan made clear a purpose to compel China to follow Japan's dictate and to permit other countries to have relations with China only as Japan allowed, made crystal clear Japan's policies of aggression. In 1937 Japan embarked upon military operations in north China which soon developed into an all-out attack on the whole of China. On September 21, 1938 I told the Canadian Minister that I had been proceeding on the theory that Japan definitely contemplated domination, by any and every kind of means, of East Asia and the Western Pacific area. In furtherance of these objectives Japan in September 1940 entered into the Tripartite Pact with Germany and Italy, Japan's program thus being merged into a far-flung drive for world domination of which Japan's share was to be East Asia. On January 15, 1941, in a statement in support of the Lend-Lease bill before the Committee on Foreign Affairs of the House of Representatives, I pointed out that Japan was out to establish herself

in a dominant position in the entire region of the Western Pacific and that her leaders had openly declared their determination to make themselves masters of an area containing almost one-half of the entire population of the world. In the light of Japan's steady course of expansion by force, it was manifest that she would attack in her own good time unless we surrendered our principles.

As I have repeatedly stated, this Government had fully taken into account Japan's record when it entered into the conversations with the Japanese in 1941.

Nevertheless, the American Government responded favorably to the Japanese request that we enter into conversations looking to a settlement of Pacific questions even though it realized that there was but a slight chance that thereby Japan could be brought around to adopt peaceful courses.

The second factor, that of time, was considered by us in the light of contemporary developments. Through the years that the Japanese Government was standing for policies of aggression, this Government was standing for policies of peace and of law and order with justice, as is clear from the record. These opposing policies were utterly irreconcilable. We knew that we would not surrender at any time our basic principles. As a result of our close-up conversations with the Japanese, we could not escape the conclusion that Japan would not abandon her policy of aggression. Our long-standing appraisal of Japanese policies and purposes of aggression and of attacking us and other countries in the Pacific area in furtherance of those purposes, was supported by Japanese utterances and acts. As regards the element of time, I was satisfied by early October from the evidence of feverish Japanese military activities and movements, the bellicose pronouncements of Japanese spokesmen and of the Japanese press, reports of growing political tension in Japan, as well as from what was disclosed by the intercepted Japanese messages that the time when they would attack us was rapidly approaching.

In looking back upon the developments in their entirety during the last weeks and months prior to Pearl Harbor, it can be clearly seen that our judgments and our methods of dealing with Japan as we did were overwhelmingly vindicated by Japanese acts and utterances as they later unfolded.

> At any time prior to Japan's attack it lay within her power to avert a war in the Pacific by abandoning her policy of aggression, just as a bandit might avert a clash with his intended victim by suddenly becoming law-abiding. Up to that time there was always open to her an honorable and reasonable alternative to the courses of aggression which she was pursuing -- an alternative which would have given her all she professed to seek in the way of access to raw materials and markets, as well as other rights and opportunities enjoyed by all nations. It lay solely within Japan's disposition to adopt a peaceful alternative and to revoke the decisions reached at the Imperial Conference of July 2, which reaffirmed Japan's purpose of subjugating China and which called for military advance to the south to establish "the great East Asia sphere of co-prosperity", that is to say, to establish Japanese domination in Southeast Asia and the islands of the Western Pacific area.
> (Report of Proceedings before Joint Committee on the Investigation of the Pearl Harbor Attack - pages 14282-14286)

From the foregoing, it clearly appears that Japan had embarked upon a career of conquest and could have stopped at any time it wanted to. She needed no help from anyone to do this. It did not need to have negotiations with, agreement with, or consent of the United States to stop the war in China for all the hostilities were confined entirely to China. There was no fighting on Japanese soil. Although the Japanese constantly referred to it as an "incident" or the "China affair," of course, it was a war. The Imperial Headquarters of the Japanese Army in their Year Book describing results of the Japanese military operations in China during July 1937 to June 1941, reported by the Army Information Center, Imperial Headquarters, stated the following:

Comprehensive Results of Japanese Military Operations in China During July 1937 to June 1941

1. Estimated number of Chinese killed	2,015,000
The loss of Chinese forces, including death, the wounded, captives, etc.	3,800,000
The booty:	
Arms	482,257
Tanks, cars, motor-trucks	1,475
Trains, engines, carriages	2,449
Warships and vessels	410
2. Results of Air Forces' Activities, including Nomonhan Incident:	
Enemy warplanes brought down	1,744
Destroyed on the ground	233
Total loss of the enemy	1,977
3. Losses of the Imperial Army, including Nomonhan Incident:	
Killed	109,250
Lost warplanes	203

(Japan Year Book 1941-1942, Sino-Japanese Hostilities, page 997)

Finally all the veneer is removed and in a formal statement Japan described its activities as four years of modern warfare on a gigantic scale.

It was Japan who forced the issue with the United States. We had confined our actions to protests and what might be termed economic sanctions. Therefore, when Japan came to this country and initiated this movement for a final formal agreement of settlement, it might well have been expected that the United States would require Japan to revert to peaceful courses everywhere before any formal negotiations would be entered into or at least before they would be put in treaty form. The reverse,

however, was true. Japan demanded that the United States refrain from sending any further supplies to the Chinese government and immediately lift the embargo of oil and other war materials before Japan would enter into such formal proceedings. This is most revealing of all. It clearly demonstrated Japan's intention of carrying on its plan of conquest whenever and wherever and however it saw fit. Its sole concession for a stop gap peace agreement was to remove troops from southern Indo China poised for an attack upon the Philippines as well as other strategic points. These troops were to be moved only a day's journey northward, still in Indo China, in the interim, until China made peace or a general peace treaty was effected. In addition thereto, the Japanese would continue to indicate their peaceful intention towards all nations in East Asia. But having already demonstrated what they referred to as peaceful negotiations, it amounted to nothing less than peace for the conquered after they were conquered. And, of course, dominance in accordance with Japanese demonstrated plan thereafter. When Japan demanded that we sign a general peace treaty on this basis, we refused. This and this alone caused the war. How could it have been otherwise from the standpoint of the United States if it were to remain a first class power with self-respect? As a practical matter, it would have meant ceding East Asia to Japan and a large part if not all of the Pacific Ocean to its dominance. This would have been done by the United States with its eyes open in face of the historical events

preceding and we would have agreed to it in a solemn binding treaty. This was the problem confronting the President of the United States and the Secretary of State in particular. It is well that the record is so clear. It shows that the United States had a just, humane and practical foreign policy and that it adhered to it. It attempted to enforce it by all reasonable peaceful means until it was attacked for failing to abandon it. This the American people should know and should ultimately decide whether this policy should be made permanent.

Defense of Trials

In the preceding paragraphs we have attempted to set forth the facts as documented and as they will accordingly appear in history. It attempts to pose no pious visionary ideal. It had its cold practical features. While it was based upon morality, we undoubtedly felt that in the long run it was the only safe and sound plan upon which we could proceed. It is important to note and even emphasize that at no time did we fail to recognize the advantages enjoyed by the United States with its vast expanse of territory all in one piece and our substantial and varied basic resources. We were not imperialistic. We did not need to be. We do not know just what we would do if we had to be. We are speaking only of the facts as they exist. But it would be very wide of the mark to conclude that we neither knew nor appreciated the disadvantage in these respects, and the consequent problems, of the Japanese. They were real, they were vital and they called for intelligence, resourcefulness and energy for their

solution. We felt that they deserved cooperation from us and from other nations. They were not our business in particular, but we were wise enough to observe that if we wanted to live in peace with other nations, we must observe them. Leaving all noble and altruistic motives aside, it was to our benefit to learn of them, recognize them and cooperate in bringing about their solution. Of course, our four basic principles, the keynote of these remarks, provided for such contingencies. But more important, our actions and our cooperation did provide means and methods for their solution. It is true that the method we suggested required time and patience. It is further true that the method Japan proposed, sheer force, if successful, would be more efficacious from the standpoint of time if the results would be permanent. We felt that Japan would be making a grave error in adopting this second course and we told them so. The authentic government record of these negotiations referred to many times herein sets forth with clarity and in detail our statements and position in support of this assertion. That record is immutable.

It developed as one might expect if the history of civilization could teach any lessons that our position was correct and that Japan's choice of method was wrong. It is true these problems were gigantic, but the principle involved was very simple. Not all nations have learned that you have to earn what you get, and you must put this principle into practice in acquiring your needs. Domestically we found many

instances that excite our sympathy where crimes have been committed because individuals gave in to the pressure of what they believed to be necessity. We have found, however, that such cannot be accepted as justification for breaking the law and often with considerable regret stern punishment is imposed nevertheless. We lawyers have a saying, "Hard cases make bad law." When crimes of violence are committed in our country, we arrest the accused, bring them before judges and juries and punish them upon conviction. We do this, of course, to enforce and maintain law. That is perhaps our chief crime deterrent and preventive. I suppose no one would seriously consider at this stage of our civilization ofabandoning this widespread practice in the United States. Nor would any other nation. Here in the Tokyo trials, we are carrying out the same principles and practices, nothing more and nothing less. Many people object to this proceeding. We will consider briefly the objections. There are some well known citizens, including members of our Congress, who do not believe at all in these International War Crime Trials. Others believe that they are too involved and that especially with reference to the Far Eastern war criminals, they should be brought to book before a military commission and should be concerned with the murder of individuals at Pearl Harbor. One prominent Englishman whose name will never be forgotten and who was well known in our country, advocated a quick process of executive political action of shooting the war criminals without trial. Heads

of the governments at Potsdam merely declared that stern punishment should be meted out to all war criminals, but they did not specify whether through trial or otherwise. These are all points of view and especially in a country of "free speech" like our own are properly expressed when believed.

Those who would do nothing about these war criminals would leave them at large and absolutely unpunished. We have tried this before at the end of the last war. If it makes a martyr of a nation's leader to try him and punish him, the restraint exercised in Hitler's case did not prevent him from becoming a hero. If it is intended to leave war criminals to the punishment of their own people, the treatment of Hitler in this respect could throw some light on the subject. In the Tokyo trials we hold that it is a crime even to plan a war in violation of international law, treaties, agreements and assurances. Hitler surely did this. He was arrested, tried by his own people and the world knows how ineffective that was. The method of detention imposed permitted him to employ his time with implements and appurtenances to work on his book, an elaborate plan for world war. Something more than curiosity impels reflection on this and invites the inquiry of what would have happened of value to the world if Hitler could have been tried by an International Tribunal when he advocated the breaking of the Versailles treaty and the breaches of all the main assurances engaged in by Germany. He did this

very early at a time when an International Tribunal could have been established and empowered to take the necessary steps for the world's protection. Without attempting to answer this question, we pass the subject by pointing out that there is grave reason to conclude that war criminals will not be punished by their own people. It is true that Mussolini and his son-in-law Ciano lost their lives without international court trials. But the manner thereof could hardly mean much by way of example.

Those who support these international trials follow a very simple line of reasoning. They believe that if the orderly trial and punishment of those who commit crimes at home is justified, the same procedure should be justified abroad. There is never any way that one can, with any assurance measure the deterring or preventive influence of punishment for crime. We believe that with the history of civilization supporting the view that such punishment does have justifiable deterring and preventive effect, it should be employed unless there is some good reason for its omission in the case of international war criminals. There is certainly no evidence in reviewing the lives of the Nuremberg accused or the Tokyo accused to assume that any of them as human beings are not subject to the same human reactions experienced by other individuals as applied to themselves. It is true that their

conduct as charged demonstrated that they cared little about the imprisonment or death of millions of others but there is abundant evidence that each and everyone of them individually cherished dearly life, liberty and the pursuit of happiness. They enjoyed their medals, their bows, and even luxuries. Here in Tokyo to a man they are a healthy looking group physically. Respect for propriety forbids commenting further in this regard. The facts, however, compel the conclusion that in all ordinary respects these accused give no indication of not being susceptible to the deterring and preventive influence customarily imposed in criminal trials. That alone would seem to state a fair case in such regard for these prosecutions. In a larger sense, is it not time that we attempt to make our treaties real in every respect? Do they not create law? Are they not binding upon the individuals of nations as well as the nations themselves? If they are not, does not justice require that we cease the gesture of going through motions? Would anyone contend that justice is fulfilled by punishing the people of a nation and not punishing their leaders who were responsible for directing and even enforcing their law breaking? This would be a strange interpretation of justice. Everyone knows that the people of these nations have little to do indeed with creating the policies and making the decisions and carrying them out. At least, they have little or no choice in the matter. Are we to hold that justice is fulfilled with

the youth of our nation being brought to an untimely end by the government's order and direction but that the leaders who bring about the events making the sacrifice of their lives necessary shall escape any punishment whatsoever? It is puzzling to follow this line of reasoning!

In the past war criminals accused have denied the justice of trying and punishing them by contending that these crimes were committed not by them but by their nations. Other defenses include the claim that such accused are innocently carrying out the national aspirations of their country. This shallow concept fails to take into account that in most cases it was the accused themselves who determined not only what these national aspirations should be, but more important, how they would be affected. You cannot destroy or jail a nation. You can jail or destroy the people of a nation. There are many objections to this procedure. They include the realization that you can't jail them for long and destroying them en masse would be unthinkable. More important is the realization that despite the fact that many of them have paid the supreme penalty during the course of the war, many others will continue to pay a grievous one for long periods in the future. If we add to that that this punishment has been and is being inflicted upon the relatively innocent, the failure to punish the real responsible leaders becomes the more illogical and unjust and stupid.

We complain of any such procedure at home. We have not failed in our own country to try and punish wrong doers in high places both in and out of the government. High public office or high private position have constituted no bar to such trials and punishment in the United States, and these trials and punishments (including impeachment proceedings) have not excluded charges for wrongdoing in office even when the accused claimed that they were attempting to do something for the benefit of the many. We are all familiar with examples of individuals being extradited from other sovereign states and even other sovereign countries for wrongs to our own people that they may be tried and punished in our own courts. We do not require physical presence in the locality where the crime is committed as a requisite for such jurisdiction. But here in Tokyo the defendants are accused with inflicting great harm upon the inhabitants of many nations. It would not be practical to choose which single nation should have jurisdiction through extradition or otherwise to bring the accused to any given country for trial and punishment. It seemed much more logical and practical to bring the Tribunal to Tokyo and to try these accused in groups here.

Such international proceedings take much time and effort. They are novel and substantially without precedent. We carefully distinguish here between the making of new laws and the

establishment of new and unprecedented courts for the enforcement of such laws. In an international court proceeding of this nature, it would be unthinkable to sacrifice thoroughness and all aspects of fairness to the impatient demands for speed. Their very novelty or lack of precedent would seem to justify errors upon the part of caution and thoroughness both in the presenting of the evidence and allowing full latitude for defense. International proceedings of this nature bring many complications and problems foremost of which is the necessity for reasonably accommodating the formal proceedings to the basic requirements of the individual nations in the administration of justice. The manner in which this has been attempted could not be fairly described in the space permitted for these comments. The very nature of the offenses charged and the issues involved require an inquiry into the events covering more than fifteen years and a very substantial part of the world's area. This has meant searching the archives of many countries for records and searching in wide spaces for witnesses and transporting them great distances.

The language problem in itself has required more than double the time for an ordinary trial. Of course, all proceedings have to be made intelligible to the accused and their counsel and that requires that every procedure written and oral, must be interpreted and translated into their own language. This is necessarily a very slow process indeed.

There are other reasons too numerous to mention, not the least of which is including an unusually large number of accused in one trial. Add to this the complexity and intricacies that need to be delved into and hammered out into intelligible and plain simplification and we are confronted with a very substantial task in and of itself. It is felt, however, that there was no middle course. One of three choices had to be made. Not to try them at all; or give them a summary trial which would have been open to the sharp criticism for its fairness or a thorough open detailed presentation of a case in conformity as near as practical with our domestic trials. To avoid the establishment of evil precedent in so important an occasion, of course, the third alternative is required.

To those who have not had the opportunity of careful study and understanding of the problem there is one point worthy of consideration. If these accused had been tried only for an attack upon and for murder at Pearl Harbor, such procedure would have meant ignoring the wrongs done to other nations. China lost millions of lives and untold resources. The Philippines were invaded and occupied and thousands were killed or wounded. The French possessions of Indo China were invaded; parts of the Dutch East Indies were occupied for more than three years with great suffering as a result. Australia and New Zealand were singled out as victims and escaped the sufferings of occupation and conquest only by the successful termination of

the war. Many British lives were lost and the citizens of our neighbor Canada did not escape unscathed. If we had confined the cause to a Pearl Harbor trial for murder, such wrongs to other nations, if not entirely ignored, would not have been emphasized to say the least. It appeared, moreover, while it is true that these are criminal trials against persons accused there is to be considered the precedent that is being established in its relationship to all nations and nationals.

Aside from the observations just made about the value of this international procedure, whever the accused were tried and for whatever they were tried by any military or other American Tribunal, the accused would have to be accorded the right of defense. It is more than probable that such defense would have led far into the areas already being explored in the Tokyo trial, and the same issues would arise in either event. It is undoubtedly for such reasons that those who have had the responsibility of choosing the method of these trials have taken the risk of the disadvantages of a long thorough trial rather than the dangers of a more summary proceeding. That is why those charged with the prosecution contend that while the issues are simple, the trial of them could not be satisfactorily concluded without the expenditure of a long period of time and substantial effort.

To those who shudder in the mere contemplation of the

possibility that the same procedure might be applied to our own leaders should we be defeated in a future war, there is a complete answer. If our leaders were guilty of what the prosecution charges these accused, they would deserve the same punishment that we are asking this International Tribunal to impose. Moreover, and perhaps more important, if any nations in the future become savage enough to let loose the bolts of war as they are already forged for the future, such leaders could well expect the same penalty anyway although there is little reason to believe that it would be in any such well ordered calm atmosphere as that prevailing in Tokyo and Nuremberg. These opponents of the Nuremberg and Tokyo proceedings fail to realize as already pointed out in both proceedings by the prosecution that the same law recognized and enforced against these accused by the Tribunal is expected to be recognized and enforced in similar manner against any individuals in any nation at any time in the future. Perhaps that is the outstanding contribution to civilization of these trials. We have referred herein to the crime preventive influence of such punishment upon human beings. While we can not forecast the effect of such influence on future prototypes of these accused should they attain power in any nation, we can point out that their own nations have already condemned such individual conduct as being worthy of the sternest punishment and have acquiesced in the procedure in enforcing the same in placing such

individuals, regardless of rank or prestige, in the prisoners' dock customarily occupied by ordinary, common fellows. It is more than barely possible that this in itself and the type of punishment imposed might have some influence in impeding the progress in seizing the reigns of government.

An inherent difficulty confronts any prosecutor when he is challenged with the efficacy of his criminal processes as a crime deterrent. There is no dependable yardstick by which it can be measured. In our domestic prosecutions where those who contravene laws that secure the life of individuals at home are executed, there is always a sense of regret and hesitation in the final imposition of the extreme penalty. The last minute appeal to the President or the Governor is the rule rather than the exception. But usually the law grinds on inexorably. It has to, because wise authority recognizes the misfortune in the frailties of the human race. Long experience hammered into tradition has taught that even the smallest community can not afford to relax in the exercise of this stern process. When the condemned murderer begins the last march to the gallows, an example is set. How many homes escape breaking and invasion on that very night by reason of example can never be known. Thus the forces of organized society have learned that it is not a question of taking a human life; it is a question of whose lives shall be sacrificed, those guilty of breaking the most fundamental of all laws, or the intended

victims of others who will be deterred by such example. That is the story and the whole story, and it seems simple and trite. But in the final analysis, the objections to these trials must rest upon objections to domestic procedure as old as civilization. The law involved is not new. It is the law forbidding homicide. The enforcement against marquises, prime ministers and marshalls is new. And not one good sound reason has yet been advanced why they should be immune from the same law that is applicable to the humblest citizen, unless it be the reassertion of the doctrine that "the King can do no wrong." That has long been rejected.

It is discouraging to hear voiced repeated objections on ex post facto grounds. This doctrine never meant more than objection to the making of a crime after the event; converting a lawful act into a crime for the first time after it took place. Where is the law that makes legitimate breaking a nation's law contained in a treaty? Especially when it means certain death to hundreds of thousands and even millions of innocent people. Do the proponents of this objection actually claim that such action is protected or even allowed by law--and, if so, by what law? Does the breaking of the law cease to be unlawful because it has not been punished?

Are treaties binding and, if so, upon whom? Nations separate and apart from those who control their actions in causing the nation's treaties pledged to be broken? Are we

to be confined to the sanction or punishment to the levying of a huge fine upon those who have no control of the law breaking? A strange doctrine is this! Whoever said so, and by whose authority? Is this a doctrine of sound law that infractions of law long remaining unpunished create a retroactive privilege of law breaking with immunity? All of this is fiction--it is squared neither with justice, nor reason, nor necessity. It is high time that this fiction die. It never had logic nor justice as its base. Ex post facto objection means in this case that laws long broken with impunity have no right thereafter to be employed. It means that long continued wrong and injustice create right. The reasoning is shallow and false. Respect for tradition and orderly legal processes (two worthy principles) should never be distorted to serve as a cloak of immunity for the crime of all crimes. If it has in the past, there is no sound reason for its continuance in the future, with the consequence both absurd and tragic.

WARU 1

The contention advanced that a crime recognized as such by law cannot exist unless it has been defined directly by a legislature or even by a court made law, has been definitely rejected by the United States Supreme Court. (Ex parte Quirin, etc., October 29, 1942). The further contention that no lawful punishment may be imposed in such cases unless similarly specified has been likewise ignored in that case. For therein, the late Chief Justice Stone, speaking for the Court, said:

"From the very beginning of its history, this Court has recognized and applied the law of War as including that part of the law of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." (Citing many cases)

This case, therefore, holds specifically that there is no requirement for this law's codification by any legislature including our own Congress for the authority of such law or its enforcement even in the United States and against a citizen of the United States. It states:

"It is no objection that Congress, in providing for the trial of such offenses, has not itself undertaken to codify that branch of international law or to mark its precise boundaries or to enumerate or define by statute all the acts which that law condemns."

"Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be deemed applicable by the courts. It chose the latter course." (The courts referred to were military tribunals).

It was further stated therein:

"By universal agreement and practice the law of War draws a distinction between the armed forces and the peaceful population of belligerent nations and also between those who are lawful and those who are unlawful combatants."
Citing Hague Convention No. IV, October 18, 1907, 36 Stat. 3295, Article I of the Annex to which defines to whom belligerent rights and duties attach, and was signed by forty-four nations. Further citation by the Court referred to the Manual of War of Britain and Germany and writers upon the subject of international law.

There clearly our highest court has, as late as 1942, held that valid law could be made by treaties among nations--

after which such treaties, having been enacted, became sufficiently binding law to establish crime. The court further held that offenders of such laws could be put to death even though those laws provided for no specific punishment or penalties. The issue presented was could those who break such laws, including American citizens, lawfully die by the act of a tribunal having no other authority than the appointment for that particular trial by the Chief Executive of our United States. The Supreme Court thus had the issue squarely presented and its decision is clear. It was without dissent on these points.

In a word, it held that nations could make war crimes by treaties alone and that such became law binding upon all of the nationals of each signatory nation at least. Several men were executed following this decision--the Supreme Court refused to prevent the same. It held that they were not unlawfully punished.

Returning again to the subject of this ex post facto objection, arguments can always be made to support any objection to discarding outmoded and utterly worthless "tradition." In objecting to these international war crimes trials, such arguments have the same blind support of tradition as that compelling the children to be thrown in the pathway of a juggernaut by their parents.

If the law enforced in these international war crimes trials is not the law, it had better be, for as lawyers, it behooves us to recall the stern warning of Woodrow Wilson addressing the American Bar Association of 1910 when he said: "The people will not be argued into impotency by lawyers." When they enforced their own law lynching Mussolini and Robespierre they recorded their reaction to the failure of lawful process to operate. Stern punishment imposed by orderly international tribunals authorized by the highest authorities of their governments is much more conformable to the lessons of sound tradition, much more worthy of being recorded in the history of progressive civilization, than the inevitable results that follow when the people are required to enforce the law themselves. We can expect nothing less when the law or its just enforcement fails to march along to meet the requirements of justice applicable to existing realities.

These trials are neither blood purges nor judicial lynchings, but if they are not held, the people in impatience and disgust, will have their own lynchings and blood purgings. We are faced with one or the other choice and there can be little doubt as to which path we should follow.

To the many who are always skeptical of any new procedure or any innovation and claim it will not work, history is full of examples to the contrary. They said the same about the steam boat, the telegraph, the telephone, the horseless

carriage and the wireless. There are those who say that nations can not get together and act in harmony. To those participating in the Tokyo war crime trials, one substantial privilege has been conferred. They have observed the prosecutors of eleven great nations in unprecedented harmony and agreement on all subject matter pertaining to these trials, procedure as well as substance, work together with earnest and complete cooperation in all of its aspects. They have observed a court of eleven nations presided over by the representative of one commonwealth containing the least but one in population. They have observed the steady progress of a long, gruelling trial with rulings made frequently with divided views but always on the democratic principle of the majority ruling. They have observed a common agreement on what constitutes conduct on the part of the leaders of nations subject to the severest known form of condemnation. One would be blind indeed in failing to observe the wholesome potentialities of these events alone.

The task itself is an arduous one for all concerned and will bear no other fruit than its ultimate contribution to the cause of peace. If there is one thing above all clear to those close to this proceeding, it is that none of these accused are being tried for losing a war; they are being judged for their part in causing an unjust and unlawful one.