

Nov. 22, 1946

Proceedings.

Friday, 22 November 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan.

PROCEEDINGS IN CHAMBERS

On

Applications of the following Accused for
the production of witnesses and documents under the
Charter:

Paper No. 572 of SHIGEMITSU, Mamoru
Paper No. 559 of SHIMADA, Shigetaro
Paper No. 555 of SHIRATORI, Toshio
Paper No. 557 - Application of Prosecution
exemption Rule 6(b) (1) re: Documents 405, et.al.

Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth
of Australia.

Reported by:

Fred T. Abram
Court Reporter, IMTFE

Appearances:

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FOR THE PROSECUTION SECTION:

MR. SOLIS HORWITZ

FOR THE DEFENSE SECTION:

MR. BEN BRUCE BLAKENEY, Counsel for the
Accused UMEZU, Yoshihiro
MR. OWEN CUNNINGHAM, Counsel for the
Accused OSHIMA, Hiroshi
MR. CHARLES B. CAUDLE, Counsel for the
Accused SHIRATORI, Toshio
MR. E. R. HARRIS, Counsel for the
Accused SHIMADA, Shigetaro
MR. HIROTA, Yoji, Counsel for the
Accused SHIRATORI, Toshio
MR. MIURA, Kazuichi, Counsel for the
Accused SHIGEMITSU, Mamoru
MR. NARITOMI, Nobuo, Counsel for the
Accused SHIRATORI, Toshio
MR. YANAI, Hisao, Counsel for the
Accused SHIGEMITSU, Mamoru

FOR THE OFFICE OF THE GENERAL SECRETARY,
IMTFE:

MR. CHARLES A. MANTZ, Clerk of the Court
MR. H. W. DELANEY, Deputy Clerk of the Court

JUDGE E. H. DELL, Legal Adviser

The proceeding was begun at 0900.

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THE PRESIDENT: This is paper 557, an application by the prosecution under Rule 6 (b) (1) in respect to documents 405, 409, 3448, and 5333. What is the view of the defense?

MR. HORWITZ: Mr. President, this is an application of Mr. Justice Mansfield. He is unavoidably detained, so if there is no objection to it we would like to have the matter postponed until Monday morning, when he can be here.

THE PRESIDENT: Well, who appears for the defense on this?

MR. CUNNINGHAM: I would like to have it put over.

THE PRESIDENT: We will adjourn it until Monday morning.

The next is paper 572, an application by the accused SHIGEMITSU for witnesses. Who appears?

MR. BLAKENEY: By request of Mr. Furness, I am appearing for him, together with Mr. YANAI, the Chief Counsel.

THE PRESIDENT: Have you taken proofs from these witnesses, Mr. Blakeney.

MR. BLAKENEY: My understanding is that all these witnesses have been interviewed and written statements have been taken from at least three of them, one of whom has given an affidavit, but only one.

THE PRESIDENT: The first name seems familiar, TANAKA?

MR. BLAKENEY: Yes, sir. He has testified here before and has given an affidavit. As to the others, they are all readily available, either in Tokyo or the vicinity and have been interviewed, as I have said.

THE PRESIDENT: Yes. I will make the order for the subpoena. Are you asking for documents also.

MR. BLAKENEY: Yes, sir. There is one document at the back page, that is, on page 2 of the application. This is a document from which excerpts have already been put in and I believe your Honor will remember their bearing and relevance. Mr. Furness desires to use additional parts from it.

THE PRESIDENT: I will give the order for the document.

The next paper is 559, which is an application by the accused SHIMADA for subpoena for certain witnesses and for documents. Who appears?

MR. McDERMOTT: I do. Edward P. McDermott,

your Honor. The first four witnesses on this application have already been asked for by Mr. Brannon. The other witnesses have not been interviewed by me personally, but they have been interviewed by my Japanese counsel, and they live in the vicinity of Tokyo and their testimony is relevant and material.

THE PRESIDENT: They have given something in writing, have they?

MR. McDERMOTT: Yes.

THE PRESIDENT: Including those that Mr. Brannon asked for?

MR. McDERMOTT: I don't know anything about Mr. Brannon.

THE PRESIDENT: But all yours have?

MR. McDERMOTT: Yes.

THE PRESIDENT: Well, I will make the order as prayed.

The next paper is 555, an application on behalf of the accused SHIRATORI for production of witnesses. Who appears?

MR. CAUDLE: I do, sir, Caudle.

THE PRESIDENT: Mr. Caudle.

MR. CAUDLE: May it please your Honor, two witnesses we didn't have the names of at the time. I would like permission to amend this application to

include the names of Hans Ulrich Marchtaler and Heinrich Stahmer, German nationality, and former Secretary of the German Embassy, and is now residing somewhere near Atami, and the second one is Heinrich Stahmer, who is also a German now incarcerated at Sugamo, who was a special envoy.

THE PRESIDENT: Have you examined all these witnesses?

MR. CAUDLE: No, sir. Some I have; some I haven't been able to get hold of.

THE PRESIDENT: What witnesses have you statements from?

MR. CAUDLE: I think we have from OHOSHI and SAITO.

THE PRESIDENT: Only two?

MR. CAUDLE: Yes, sir. All of these with the exception of Mr. Ott, who, I understand is in China, reside in and around Tokyo.

THE PRESIDENT: What about these two you have examined?

MR. CAUDLE: They were formerly employed in the Foreign Office and they discussed its activities. The first is the spokesman for the publicity -- the head of the Bureau of Information for the Foreign Office.

THE PRESIDENT: I will give a subpoena for those two and the rest facilities for interrogation.

MR. CAUDLE: All right, sir.

THE PRESIDENT: You are not asking for documents?

MR. CAUDLE: Yes, I am getting around to that.

THE PRESIDENT: I suppose the defense have considered giving much of their evidence on affidavit, leaving it to the prosecution to ask for the witness to be called for cross-examination?

MR. CUNNINGHAM: I can't speak as to the group on it, because each individual has his own idea about how his case should be presented. As far as I am concerned, I would much rather have one live witness than seven affidavits, and I think several of the defense counsel feel the same way, because that has been our practice and that is the way we try cases and prove our facts.

THE PRESIDENT: Well, we have let the prosecution give evidence on affidavit and that concession as a matter of course will be extended to the defense.

MR. CAUDLE: These Germans at Atami and the ones at Hakone, I went down to question them, but

they wouldn't answer any questions without special permission from the IPS, and I came back to Mr. Eugene Williams and Mr. Tavenner and they said the IPS had no policy whatsoever in that regard and that such was not the case, but somebody, one Mr. Bolze, came to see Mr. Williams about it, or Mr. Tavenner, and he was so advised. Whether he advised the others I don't know, Mr. Tavenner seemed to think he would. I was wondering whether it would be necessary to get a statement from them or someone to allay their fears.

THE PRESIDENT: Well, this order should do that. You have a copy of it with you?

MR. CAUDLE: Yes, sir.

THE PRESIDENT: Has the Court a seal, Mr. Mantz?

CLERK OF THE COURT: The Secretary has a seal, official seal. The Court merely has a stamp. By that I mean an exhibit for the record stamp. The General Secretary has his own official seal.

THE PRESIDENT: A seal on a document is sometimes more convincing than a document without a seal.

CLERK OF THE COURT: That is quite right, sir.

MR. CAUDLE: May I bring up about the

documents?

THE PRESIDENT: Yes.

MR. CAUDLE: I have a list of some -- it runs into sixty, and practically all of them I think I can get without a subpoena, but there were so many we haven't had an opportunity to screen them all, and I would like to ask permission of the Court to forego this phase of it until I can see if I can get them all. There has been so many of them I felt reluctant to put them in the application.

THE PRESIDENT: Well, that is the end of the business for today?

CLERK OF THE COURT: That is all, sir.

(Whereupon, at 0915, the proceeding was concluded.)

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Nov 22, 1946

Friday, 22 November 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDING IN CHAMBERS

On

Paper No. 564 - Re: presentation of
testimony of Major deWeerd by means of a written
statement instead of by oral examination.

Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth
of Australia.

Reported by:

JACK GREENBERG
Chief Court Reporter
IMTFE

Appearances:

FOR THE PROSECUTION SECTION:

MR. W. G. F. BORGERHOFF MULDER, Justice,
Associate Counsel, acting on behalf
of the Kingdom of the Netherlands;

MR. SOLIS HORWITZ;

MR. A. T. LAVERCE.

FOR THE DEFENSE SECTION:

Mr. WILLIAM LOGAN, Jr; Counsel for the
accused KIDO, Koichi

MR. OWEN CUNNINGHAM, Counsel for the
accused OSHIMA, Hiroshi

MR. G. F. BLEWETT, Counsel for the
accused TOJO, Hideki.

FOR THE OFFICE OF THE GENERAL SECRETARY, INTF:

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat

MR. CHARLES A. MATNZ, Clerk of the Court

MR. H. W. DELANY, Deputy Clerk of the
Court.

The proceeding was begun at 1315.

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THE PRESIDENT: This is paper No. 564, the application by the Dutch prosecution to have the evidence of Major deWeerd taken in the form of a statement.

I cannot say that I have read the whole of the statement, but it does appear to me to be a general survey of the conduct of the Japanese in the Dutch possessions. It is not really directed to war crimes, and only so far as it is is it really evidence.

It seems to me, General, it is desirable to make from that report a statement confined to what you claim to be war crimes within the Charter. That should not take long to prepare. My colleagues expect me to put that proposition to you. They do not want to have the case overloaded with matters which clearly have no bearing on any issue. To discover, really, what is material, one has got to read the whole of that statement only to discover that the material part is only a fraction of the whole.

So, we see good grounds for the defense's objection to the statement as it stands. But, we do not want to delay matters. It will be sufficient if you go through it and pick out those things which

you really think can be placed before the Court as evidence of war crimes.

We quite understand that the Geneva Convention and the Hague Convention, and the other Conventions, not only protect soldiers but protect civilians in their persons and in their property, but it does appear to me that you have gone right beyond those matters, that is, the scope of the protection afforded by the Conventions.

It is a most interesting account and splendidly written, if I might say so. However, although it is a very important historic document, as evidence it is probably more than you can ask the Court to accept.

You can give your views on that, General.

MR. JUSTICE BORGERHOFF MULDER: Well -- go ahead, Mr. Hyde.

MR. HYDE: Your Honor, I was just going to make this observation: that this document sets forth exactly what happened to show what the intentions of the Japanese were. They went into this area and just superimposed Japan and Japanese institutions on these people, indicating not that it was a temporary affair but that this was intended permanently; they were going to take it as theirs. This

document shows in detail what happened in that respect.

THE PRESIDENT: Even so, you could put in a short statement exactly what they did in that regard.

MR. HYDE: Well, it was our feeling that, in order to show how they intended -- what they intended and how permanent it was to be, that that could best be demonstrated by showing the ultimate that they went in detail of imposition of their institutions and their ideals upon these people.

THE PRESIDENT: I think you could allege it and give some evidence of it without going into the extent that you have in that report.

MR. LAVERGE: The point is, your Honor, that the Indictment charges that it was a conspiracy to gain military, political and economic domination of the whole of East Asia and that this document is considered by the prosecution essential to show to what extent they went in executing that aim of theirs. That has not been shown up until now with any detail, I may say; and most of the proof that has been brought into Court is how Japan prepared for an aggressive war; but how, once an aggressive war had started, they went on to get hold of the great part of the world and make that part of the world subservi-

ent to Japan has been the question which has been left open until now. And the prosecution has deemed it necessary to prove their whole case, to finish up the case, with showing exactly what they did once they had conquered these territories which they had occupied through what we say is "aggressive war."

THE PRESIDENT: Well, I think, even so, you could summarize that document and get in all that the Court could be reasonably asked to consider. I will not say in half that compass. We have got to cut down the amount of time we are spending on this case -- unnecessary spending on it.

MR. LAVERGE: Yes, your Honor, but it wouldn't take more than a day to read this report anyway; and it is very hard to show exactly what the Japanese did unless you go into some details as to the actual measures they took in every field of life. We can allege, as you say, that they did make this into a sort of new Japanese colony; but, to prove it, we have to go on to show what they did in the military, economic and religious and social fields.

THE PRESIDENT: Well, I think I will go through the report myself and strike out the things

that I think should not be in it. I should not do it; but, to save time, I am prepared to go a long way. That is going a long way, but we are going to save time. There are a lot of conclusions in that report which my colleagues will disregard. You need not worry about that; they will disregard all conclusions.

MR. HORWITZ: That raises an interesting point: On the one hand there is an objection to the conclusions by the Members of the Tribunal; and we understand very well the reason why such objections come up. Then there is objection to the detail. If you leave out the detail, you are left with the conclusions. So, we are faced with the dilemma: how are we going to write this thing, and how are we going to prepare the evidence even if it is oral? That is the dilemma of the whole situation.

If we put in the detail, you can very well afford to say you are ignoring the conclusions because the detail then permits the Court to make its own conclusions. However, if the Court says, "Leave out the detail" and then says at the same time that "we will ignore the conclusions," then the thing is --

THE PRESIDENT: I say you can summarize

the facts. I did not say you can summarize the conclusions.

MR. LAVERGE: I think it will be very hard to summarize the facts.

THE PRESIDENT: I think I will make an attempt. I am taking on a big responsibility, but I think I will make an attempt. I hate doing it. It is the wrong thing for me to prepare the prosecution's case, but I have to do something. The prosecution are not prepared to do it, so I may have to do it to save the time of the Court.

MR. CUNNINGHAM: May I bring up another matter now, your Honor?

THE PRESIDENT: Yes.

MR. CUNNINGHAM: At the beginning of the trial you used to open with an opportunity for the counsel to bring up any matters that might be brought up before the Tribunal. And since, oh, for some long time, it has not been suggested that way, I wonder if I could have a renewal of that because there are some matters which come up which probably should be at least reopened a little for the counsel, maybe, who are not there at the time the matter was discussed or who would like to reopen a subject who have a different light on the thing.

Now, take, for example, this cross-examination rule that was made. I am convinced -- at least I feel that it has not been explored or has not been presented to the Court in toto, only piecemeal. And I feel like Mr. Smith did about that rule, that it is really an error to apply it; and I would like to have an opportunity some time to argue the thing fully from my point of view, and I know several other counsel would because it is just for one reason: We think -- I think, in violation of the Charter.

THE PRESIDENT: We will not review that. Whether right or wrong, we will not. We will have to stand on our decision.

MR. CUNNINGHAM: I gave you my reason for asking this privilege, not on this particular instance but the other. You see, we are faced with the proposition that there is no appeal from the decision, and it would give an opportunity to, at least, maybe, argue the proposition to a full hearing on it. That's the only thing I had in mind about the thing.

THE PRESIDENT: No decision will be opened.

MR. HORWITZ: Mr. President, going back to this report for a moment.

THE PRESIDENT: Yes.

MR. HORWITZ: The prosecution does not wish to impose any burden, either upon the Tribunal as a whole or upon the President, of preparing this document. We are not at all clear, however, as to just what the Tribunal might think is unessential in this document. If the Tribunal could indicate to us in a general fashion the parts they believe to be unessential, we will attempt ourselves to bring this document within the desires -- within the contention and desires of the Tribunal.

We just wish to be on grounds where there is a meeting of minds and clarity as to just what the Tribunal regards as unessential because we have looked upon this from one point of view, regarding the Charter and regarding the allegations in the Indictment. If the Tribunal feels that there is a certain portion of it which is unessential, we will be glad to redo it along the lines that the Tribunal suggests, eliminating those parts which the Tribunal feels has no bearing on it or not too much weight upon the case.

THE PRESIDENT: Confine it to statements of fact. Confine it to matters which are relevant to issues. Do not repeat evidence; avoid repetition. You may give the names of persons if you like.

Where several people deposed to the same episode, well, you can name them. I cannot give any further directions on that, Mr. Horwitz.

MR. HORWITZ: No. I just thought, in light of this particular document, your Honor, I have not had a chance to read this document fully yet, but we are perfectly willing to undertake the task of meeting the Court's desire along that line.

THE PRESIDENT: Well, that is all I can indicate. If I set out to revise that, I would be guided by what I just said. I have nothing else to guide me. You may exercise a little more judgment than I could because you are the prosecution; you are presenting the evidence.

You had better try to reduce the amount of the material in accordance with that direction. If you fail to do so, then I probably will be inclined to let you present the document leaving the defense the right to cross-examine. But, I will do that with great regret, and so will my colleagues, if they agree.

You could take a stand with a firm attitude; and, as Mr. Williams said, you can present that as a report, an investigation, leaving the defense with only the right to cross-examine. But, that would

not help the Court very much; it would waste a lot of time; it would not be very helpful to us.

MR. HORWITZ: I think I know what to do with this.

THE PRESIDENT: I will adjourn the matter for further consideration.

(Whereupon, at 1328, the proceeding was concluded.)

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