Hy Doc #933 Tsunajima

I M T F E

SWORN DEPOSITION

Deponent : SHINOBU, Junkei

Having first duly sworn an oath as on attached sheet and in accordance with the procedure followed in my country I hereby depose as follows.

On this 11th day of June, 1947

At Tokyo

DEPONENT SHINOBU, Juzaburo ~~(seal)~~

I, SUENOBU, Sanji hereby certify that the above statement was sworn by the Deponent, who affixed his signature and seal thereto in the presence of this witness.

On the same date

At Tokyo

Witness: (signed) SUENOBU, Sanji ~~(seal)~~

OATH

In accordance with my conscience I swear to tell the whole truth withholding nothing and adding nothing.

SHINOBU Iwasaki (seal)

100 copies.

Translation Certificate.

I, Charles D. Sheldon, Chief of the Defense Language Branch, hereby certify that the foregoing translation described in the above certificate is, to the best of my knowledge and belief, a correct translation and is as near as possible to the meaning of the original document.

/s/ Charles D. Sheldon.

Tokyo, Japan
Date 20 Dec. 1947

Affidavit of SHINOBU, Junkei.

International Military Tribunal for the Far East

The United States of America et al

against

Araki, Sadao, et al

Affidavit (Translation)

of

SHINOBU, Junhei

~~Junhei Shinobu~~

I, SHINOBU, Junhei ~~Shinobu~~, being first duly sworn according to the customary formality in this country depose and state:

I, the undersigned, venture to submit the following statement as my affidavit, in answer to the given querries, namely: (1) What is ~~your~~ the record of your past life? ~~in the past?~~ (2) ~~How~~ What do you understand by the term "war crimes" ? Particularly, how did you ~~understand it in~~ interpret Article 10 of the Potsdam Declaration ~~when~~ at the time Japan accepted the conditions laid down in it? And (3) Don't you think that rules of international law should go ~~by~~ along with the changes ~~of circumstances of the~~ in world conditions?

(1) I was born in 1871 at Shimodate, Ibaraki-ken. In my early life I devoted myself mainly ~~to~~ to the study of Chinese classics in private schools for several years, and thus missed the opportunity of undergoing the normal curriculum of university or ~~the~~ preparatory schools. I studied by myself the science of jurisprudence and the English language. In 1897, I passed the examination for diplomatic and consular agents, and

entered the Foreign Office. After having served in various parts of the Orient and the Occident, and ~~with~~ as First Secretary of the Embassy at Vienna and subsequently ~~with~~ as Consul-General at Calcutta, ~~as~~ my last ~~career~~ post, I retired from the foreign service in 1917.

During the Russo-Japanese War of 1904-5, I was temporarily attached to the ~~Military Office~~ army, and engaged in administrative work of the Japanese occupied territory in South Manchuria as a legal adviser. At that time I came into association with the late Dr. Nagao ~~Ariga~~ ARIGA, adviser of international law at the General Headquarters of the Japanese Manchurian Army, and took the opportunity of pursuing my further studies under him, and became in later years his ~~unique~~ sole successor in the field of diplomatic history as well as of international law particularly relative to war.

With ~~the~~ my retirement from the Foreign Office, I entered into my new life of professorship ~~in the~~ at Waseda University (and sometime ~~in the~~ at Hosei University), and continued lectures ~~in~~ at Waseda ~~during the length of~~ for twenty-five years, until 1943.

In 1925, my thesis "International Law and International Morality" (in Japanese) passed the Faculty Council of the Tokyo Imperial University, and I was conferred the degree of Doctor of Law.

When in 1932, the "Shanghai Incident" broke out, I went to Shanghai as the adviser of international law of the Japanese Third Fleet at that port. After ~~the crisis had been over~~ completing my work and

~~Re~~returning to Tokyo, I published my work ~~in the camp~~ "International Law in the Shanghai Conflict" (in Japanese and in English), which I had written at the scene (of the disturbance).

In 1935-6, I was an adviser ~~of~~ to the Government of the Republic of China, my duty being in giving lectures ~~of~~ on international law to the higher naval officers in Nanking. The efforts of my mission ~~was~~ were so highly appreciated by the Chinese Government that I was honoured by Generalissimo Chiang Kai-shek with the decoration of the Blue Grand Cordon of the Order of the Coloured Jewel.

With the outbreak of the "China Incident" in 1937, I went ~~again~~ a second time as adviser on international law to the Japanese China Sea Fleet, and stayed there for nearly two years, ~~of the first half of the hostilities.~~

It is my privilege to add that, throughout the aforesaid Shanghai Incident and the first phase of the China Incident, I felt it my pride that my legal advice to the War Councils on various occasions contributed greatly to the comparatively good reputation of the Japanese ~~naval~~ blast operations (I am not informed as to ~~not to say of the military authorities of which I was not concerned~~ the Army), which were carried on in conformity, on the whole, with the ~~dictates of the universally accepted~~ laws and customs of war.

My humble work "Lectures on International Law in Time of War" (in Japanese), the draft of which I had been writing since 1930 was finished in 1940, went to press subsequently, and was published in November, 1941, ~~as a bulky literature of~~ in

four volumes, consisting of nearly five thousand pages. The Imperial Academy recognized its merit by endorsing it as an unprecedented and standard work, greatly contributing to the advancement of this field of jurisprudence, and was pleased to bestow the Imperial Gift on the author.

In June 1943, I was appointed a Councillor of the Higher Prize Court (Maritime Tribunal). In February of the following year, I was nominated a Member of the Imperial Academy by the Imperial mandate.

(2) At the time when the Potsdam Declaration was proclaimed on July 26, 1945, the vast majority of Japanese international jurists, including myself, understood ~~by~~ the term "war crimes" to ~~have meant~~ mean solely and exclusively an offence against the laws and customs of war, as had generally been held by authoritative international lawyers, and they apparently considered, if my presumption is not mistaken, that that term in Article 10 of the Declaration was accepted by the Japanese Government in that sense. I myself, in ~~my~~ the above-mentioned work "Lectures on International Law in Time of War " defined a "war crime", which I ~~am used to say~~ am accustomed to express in Japanese as "Sen ritsu han" (literally: "War statute offence") as "an act of violation of the laws and customs of war. . . . The matters to be treated under war crimes are mostly, though not all, stipulated in international conventions with regards to their prohibition (as, for instance, acts of hostilities by those who are not recognized as lawful belligerents under Articles I and 2 of the

Hague code of land warfare; acts prohibited under Articles 23, 25, 28, etc. of same; various clauses under the Geneva Red Cross Convention; violation of the rules to be observed by submarines under the London Naval Treaty of 1930.)" (Vol.11, pp.769-770)

This is not necessarily my own creative opinion, but that which has been advanced by a certain number of authorities on international law. * ~~publicists~~. ~~Not~~ only in their dissertions, but that interpretation finds a place not ~~in~~frequently even in official texts, such as in Sections 441 and 442 of the British "Manual of Military Law", enacted in 1914, re-enacted in 1929, and amended in 1936, as well as in Section 366 and 369 of the American "Rules of Land Warfare" of 1914. The former reads:

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* See, for instance, Oppenheim, International Law, 3rd et., pp. 431-3; Pitt Cobbett, Leading Cases of International Law, 4th ed. by H.L. Bellot, p. 176; Tachi (late prominent Japanese international jurist), Treatise on International Law in Time of War (in Japanese), 1931, p. 41. See also an informative essay by Dr. Nathan (of the Middle Temple and Advocate of the Supreme Court of South Africa) entitled "The Renaissance of International Law" in The Grotius Society Publication, No. 3, 1925 in which the problem of war crimes is dealt with (pp, 79-100, 181-184). He seems to define them as "infringement of the civilized customs of war" (p.79), though he says that "there is great room for controversy, and probably for improvement." (p.181)

"(iii) The Punishment of War Crimes.

"441. The term 'War Crime' is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders. It is usual to employ this term, but it must be emphasized that it is used in the technical military and legal sense only, and not in the moral sense. For although some of these acts, such as abuse of the privileges of the Red Cross badge, or the murder of prisoners, may be disgraceful, yet others, such as conveying information about the enemy, may be highly patriotic and praiseworthy. The enemy, however, is in any case entitled to punish these acts as war crimes.

"442. War crimes may be divided into four different classes;

(i) Violations of the recognized rules of warfare by members of the armed forces.

(ii) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces.

(iii) Espionage and war treason.

(iv) Marauding."

The latter, without defining the term "war crimes", enumerates the examples pertaining to them as follows:

"War Crimes.

"366. Offenses committed by armed forces. — The principal offenses of this class are: Making use of poisoned and otherwise

forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request for quarter; maltreatment of dead bodies on the battle field; ill-treatment of prisoners of war; breach of parole by prisoners of war; firing on undefended localities; abuse of the flag of truce; firing on the flag of truce; abuse of the Red Cross flag and emblem; and other violations of the Geneva Convention; use of civilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings, improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill-treatment of inhabitants in occupied territory. Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

"369. Hostilities committed by individuals not of armed forces. — Persons who take up arms and commit hostilities without having complied with the conditions prescribed for securing the privileges of belligerents, are, when captured by the enemy, liable to punishment for such hostile acts as war criminals."

During ~~the~~ World War I ~~of 1914-18,~~ there were numerous in-

stances of the so-called "war crimes", which led to lengthy discussions at the Peace Conference of Paris of 1919, and the subject was also considered by various writers. Even after the conclusion of peace, a number of arguments pertaining to the same subject were brought forward by ~~publicists~~ writers, but the interpretation of war crimes by them remained unshaken from that in the above-cited theories and official texts. Thus assuming, as may safely be assumed, that these commentaries were maintained in authoritative official documents, supported by a large majority of distinguished contemporary writers, it was entirely ~~out of~~ beyond our conception to perceive, at the time of the acceptance by Japan of the conditions of the Potsdam Declaration in general, and those laid down in Article 10 in particular, that a war crime denoted, besides an offence against the laws and customs of war, an act of planning, instigating or accomplishing a war, whatever its nature or purpose might be.

(3) Nevertheless, the conception of war, or at least, of an aggressive war, has undergone a great change in the minds of statesmen and thinkers of the civilized nations of the world, which manifested itself in a few post-War drafts or ratified treaties. The fore-runner of them was the Draft Treaty of Mutual Assistance of 1923, submitted to the Fourth Assembly of the League of Nations of that year, and which provided that "The High Contracting Parties, affirming that

aggressive war is an international crime, undertake the solemn engagement not to make themselves guilty of this crime against any other nations."(Art. 1, Par.1). The provisions of this Draft Treaty were, however, fell short of determining precisely what was the nature of an aggression itself, or what did constitute an aggression in its legal sense. Consequently, the draft was abandonned at the Fifth League Assembly, though had been accepted in principle by eighteen Member-States.

The next was the Geneva Peace Protocol, commonly so called, of 1924. This Protocol, together with the Locarno Pacts of the following year, appeared before the world as exceedingly important diplomatic documents since the First World War, revealing the guiding spirit underlying the foreign policy of the leading European statesmen of the age. The gist of this Protocol was in denouncing aggressive wars as a crime, in its violating the recognized solidarity of the international community, by clarifying the nature of an aggressor more definitely, at least to a certain extent. Had this Protocol been ratified by the principal signatory Powers, particularly by Great Britain, by whose ultimate refusal — by the British Conservative Government which had succeeded the Labour Cabinet of Ramsay MacDonald, the principal author of the synopsis side by side with his French colleagu M.Herriot

it had been dropped —

and had it been materialized as an international compact, it must have marked the greatest advancement ever made by the community of nations towards the elimination of war, by providing machinery and sanctions to make the principle operate with much vitality. But it met with the same fate as the Draft Treaty of Mutual Assistance.

Leaving aside a few other similar attempts to eliminate some kind of wars in a form of bilateral or multilateral treaties, we would mention lastly, but not the least in its importance, the Pact of Paris of 1928 — the Kellogg-Briand Pact — which renounces war as an instrument of national policy. However, since its embodying principles, as well as its full text, are too well known to the public at large, we see no necessity here to enter into the details in respect to the Pact.

Nevertheless, under these draft or ratified treaties, it would be premature to conclude that every sort of wars is to be condemned as a crime. To condemn aggression, which is an action denoting a first act of proceeding to unprovoked attack or invasion, is quite understandable; but war is not an act, though hostilities are. War in the light of international law, that is to say, not in common expression but theoretically, is not an act but a state — a state in certain time and certain region, wherein acts of violence which, though not permissible in time of peace and in every region of the world, is exceptionally permissible, provided they be done in

conformity with universally recognized rules of warfare,

War is a state, a phenomenon, an event, a sympton of abnomal condition in the international organic body— or, to put it more simply, as a disease. ~~more plainly illustrated.~~ An event itself is neither lawful nor unlawful. It constitutes neither crime nor non-crime. To condemn any war as a crime, as is often attempted by some treaty framers or asserted by some contemporary ~~publicists~~ writers, whatever moral considerations may be urged in their support, legally it is simply nonsense, just as to condemn illness itself as a crime is nonsense, though neglect or carelessness of health, one of the main causes of illness, may be pronounced as such.

Closely connected with the conception of war or of aggressive war, that of war crimes has, since the Four Power Agreement made in London on August 8, 1945, and the subsequent publication of the Charter of the International Military Tribunal in Nuremberg, begun to take a new aspect compared with that which had been prevailing prior to that date. This, however, should be put aside from the question at issue, as I think it is outside of my province so far as the present affieavit is concerned. However, with such vicissitudes of the conception of war in general, and that of war crimes in particular, it seems to be a fact that rules of international law, hitherto held as sacred and inviolable by orthodox jurists, have come to experience a radical evolution, so as to meet the new idea

of the new age. But it must be borne in mind that a change of the rules of international law, in order to make itself adaptable and effective, cannot reach the destination at a jump. It must undergo a certain process ~~through the natural selection of which a new theory, a new principle, or a new rule, advanced by a flash publicist or appeared in an unprecedent international convention could hold a commanding position as the survival of the fittest in the field of jurisprudence~~ by means of which new theories, new principles, and new laws, from these beginnings, may come into existence by natural selection as the fittest to survive in the field of international jurisprudence. In order to make an interpretation of a given term as authoritative in international law and as effective in binding the whole civilized nations of the world, a single new definition advanced by a State or a group of States, a single new decision of a court of justice, even with the name of "international", a single new stipulation of a treaty, or any other single case of legal action, is insufficient for overturning traditional rules in that branch of law, though either could be invoked as a good reference and sometimes a powerful precedent. It is rightly stated in the Nuremberg judgment against the German war criminals given on August 31, 1946, that international law "is not static, but by continual adaptation follows the needs of a changing world." Most exactly. But the qualifying word" continual" is essential. Repetition to a certain extent of a given practice, and supported by a vast majority of prominent jurists of the world, particularly by such an influential organization as l'Institut de Droit International, are the necessary conditions for con-

stituting the new rules of international law as being accepted by civilized nations. It is to be hoped that the new theory of war criminals ~~would~~ will pass through such a process, and ~~would~~ will grow up as the fittest of positive legal rules for governing future international misdemeanours.

This eleventh day of January, 1947, at Tokyo

Joseph C. Keenan

Sworn to and subscribed before me on the above-mentioned date and at the above-mentioned place.

Sanji Suenobu

Sanji Suenobu

O A T H

I swear according to my conscience to state the whole truth, reserve nothing what I know, nor add anything what I do not know.

Jonathan Rinnebarger

Legal

Jap. Doc. No. 497

Subject.

信夫淳平供述書

Defence Counsel. 清瀬 Phase General

Certification. is attached to this.
~~will be lately completed.~~

Priority (I) Express.

(A) ~~Copy only~~
~~(The official translation is attached to this.)~~

(B) Translated copy.
(Translation for reference is ~~not~~ attached to this.)

Date Jan. 13. 1947

Sign J. D. C. J Kujose (JK)

Note

def doc # 433

作2

極東國際軍事裁判所

亞米利加合衆國其他

對

荒木貞夫其他

宣誓供述書

供述書 巻

信夫 榛平

自分儀我國ニ行ハルル方式ニ從ヒ先ヅ別紙ノ通リ宣誓ヲ爲シタル上次ノ如ク供述致シマス

（　　）

下名の拙者は、露與へら礼たる問題即ち（一）過去の経歴は如何に、（二）戦争犯罪なる語を如何に解するや、殊に日本がポツダム宣言を受諾したる際、同宣言ポツダム条にある同語を如何に解したるや、（三）国際法の諸法則は世界の事情の変化と併行すべきものと思惟せざるや、の三問題に対し、供述書として左の陳述を致します。

「日本國際協會」原稿用紙

（二）明治四年（一八七一年）宍戸館（茨城県）出生。

幼少の頃数年の久しきに亘り三の私塾に在りて漢学を専攻しつつありたるがため、大学及び大学予備校の正常課程を踏むの機会を逸し、独習にて法律学及英語学を修めた。

明治三十年（一八九七年）外交官及領事官試験に合格して外務省に入り、東西各地に勤務し、在ウイーン大使館一等書記官、次でカルカッタ総領事を最後とし、大正六年（一九一七年）退職した。

明治三十七八年（一九〇四・五年）の日露戦役に法律顧問として臨時陸軍に出仕し、南満洲占領地行政事務に従事した。其の間満洲軍総司令部国際法顧問として従軍中の亡有賀長雄博士に師事し其の指導の下に戦時国際法及外交史に於て同博士の唯一の後継者となるに至つた。

大正六年（一九一七年）外務の官職を去る

と同時に早稲田大學の教職に就き（其の間一時法政大學にも講師となつた）爾来昭和

十八年（一九四三年）に至る二十五年間、早稲田大學に於て引續き外交史及國際法を講述した。

大正十四年（一九二五年）論文「國際法上ノ道徳ノ地位ヲ東京帝國大學に提出し、法學博士の學位を授けられた。

昭和七年（一九三二年）上海事変に際し在上海日本三艦隊國際法顧問として同地に滞在中數箇の陣中日誌を作成し、後歸朝上海戦と國際法との關係を論じた。

任務終り歸朝後「英文」を刊行した。

昭和十二年（一九三五・六年）中華民国政府顧問に在職、南京に在りて同国海軍幹部将校に国際法を講述した。任務終り同国政府其の功績を嘉賞し、蔣介石主席より特に藍色大綬采玉勲章を贈與せられた。

昭和十二年（一九三七年）支那事變勃發と共に再び在上海日本支那艦隊国際法顧問として同地に赴任、二ケ年弱其の任務に従事した。

前記上海事変を通じ及支那事変初期に於ける中、陸軍のことは承知せざるも、日本艦隊の

関する限り、其の行動を一と大体に於て交戦の法規慣例に遵由するの比較的令聞を得せしめたのは、自分の性帽に於ける随時の法律的助言相応に與りて力ありしものと自誇するに憚らざることを茲に附記するは私かに欣幸とする所である。

昭和五年（一九三〇年）以来執筆中であつた日戦時国際法講義」（邦文）は昭和十五年（一九四〇年）の初め脱稿すると共に印刷に着手し、翌十六年（一九四一年）十一月、四巻通

計約五千頁の大冊として刊行した。帝国學士院は本書を以て斯學に貢献すること至大なると認め、昭和十八年（一九四三年）四月著者に對し恩賜賞を授與せられた。

昭和十八年（一九四三年）六月高等捕獲審檢所評定官被仰付。

昭和十九年（一九四四年）二月勅旨を以て帝国學士院會員被仰付。

六日に聲明ありたる當時にありては、自分自

（ニ）ポツダム宣言の一九四五年七月二十

日本の国際法學者の大多数は、

身をも含めて

日本の国際法學者の大多数は、

戰爭犯罪

なる語を従来權威ある国際法學

者の説ける如く、專ら交戰の法規慣例

を意味するものと解し、且自分の推測に

誤りなく、日本政府が該宣言を受諾するに

當り、米十條の同字句を同樣の意味に解した

ものと思惟した。

自分も前掲の拙著「日本國際協會」原稿用紙

戰時國

際法講義』に於て、戦争犯罪（自分は之を『戦律犯』と稱する）を交戦の法規慣例の違反である。……戦律犯を以て論ぜらるべき事項は、その總てではないが、多くは国際法規の上に禁止のことが規定されてある。例へば陸戦法規慣例規則第一條及び第二條に依り適法の交戦者と認められざる者の敵對行爲、第二十三條の各号、第二十五條、第二十八條等の禁止事項、赤十字條約の諸規定、一九三〇年の倫敦海軍條約中の潜水艦の

すべき法則等の違反の如き」と解説して居る。

以上は必ずしも自分の創見ではなく、既に世の国際法學者の若干が提唱した所でもある。

一頁乃至四三頁、ピットコベット同国際法論」（邦文）一九三一年版、第四一頁参照。その他クロチウス協会の主要先例」ベロット監修第四版、第一七九頁、ウートン国際法」第三版、第四三頁、ハイムク国際法」第三版、第一四頁乃至一五頁、オッペンハイム国際法」第三版、第四三頁、ウェストレーキ国際法論」（邦文）一九一三年、第三帰所載ナサン博士会叢書」一九二五年、第三帰所載ナサン博士

の国際法の再生」と題する有益の論文をも参照（一分七九頁乃至分一。。頁、分一八一頁）。彼は戦争犯罪を国文明国間の交戦慣例の侵害」と解するやうであるが、尤も之に就て彼は国議論の余地ありとなし、又改善の余地もありと説く。

雷に學者の論文に於てのみと限らず、公文書の上にも同様の解説を見ること稀ではない。例へば英国の一九一四年制定、一九二九年再

制定、一九三六年改正の日陸戦法規提要ヨリ

四四一郎及ビ仲四四二節ニハ

（三）戦争犯罪ノ處罰

四四四一。日戦争犯罪ヨなる語は犯人の處罰又は逮捕に依りて報いらるべき敵国の軍人、及び常人の行為に對する専門語であるも、専ら軍事裁判所ニ於ケル通信的ニ用ヒラルル

る。この語は慣用的意義に於ての み用ゐらるべく、道徳的意義に於ては用ゐらるべきものに非ざることと注意を要す。蓋し此等

「日本國際協會」原稿用紙

20 × 10

行為の或もの、例へば赤十字徽章の特權の濫用の如き、將た俘虜の殺害の如きは、勿論恥づべきことなれど、他方例へば敵國人に愛國的感情の傳達の如きは、大に賞揚すべき類の行為もある。

叉いはゆる敵國としては、これ等の行為を如何なる場合に於ても戰爭犯罪として處罰するの權利を有する。

四四二。戰爭犯罪は左の四種に類別するを得べきである。

（一）軍隊の構成員に依りて行はるる周認の交戦法則の違反。

（二）軍隊の構成員に非ざる個人に依りて行はるる違法の武力的敵対行為及び敵軍幇助罪

（三）間諜及び敵軍幇助罪

（四）強奪

又米国の一九一四年制定の陸戦法規慣例を左の如く列挙してある。

三六節及び第三六節乃至第四五節に於ては、特に同盟国に対する犯罪の定義を下す所なきも、之に属する

戰
爭
犯
罪

三六六。軍隊員に依りて行はるる犯罪（別行）

一 この種類に屬する重なる犯行左の如くである。

施毒その他禁止の武器彈藥の使用。

者の殺害、助命の拒否。助命の背信的要求。戰場に於ける死体への凌辱。俘虜の宣誓違反。不防守地への射撃。休戰旗への射撃。赤十字旗及び徽章の濫用。休戰旗の濫用。その他赤十字條約の違反行爲。兵員の戰鬪中軍事的性質

を隨意せんかため常人の被服の使用。病院その他保護建物への砲撃。保護建物の軍事的用途への不當使用。井水泉水への施毒。掠奪及び不必要の破壞。占領地住民の虐待。

軍隊所屬員にしてその政府又は指揮官の命令又は許可の下に以上の犯行を爲せる場合には處罰せらるゝことなし。左記の犯行を命令し又は慶下軍隊員の犯行を認識したる指揮官は、その權内に陷

りたる對戰軍に依り處罰せらるることがある。

三六九 軍隊員に非ざる個人に依りて行はるる犯罪。

交戰者たる特權を享有するに必要なる條件を具備せずして武器を手にし敵對行爲に就て捕獲せら

れたる場合には、斯かる行爲に就て戰爭犯罪人として處罰せらるべきである。

第一次大戦中、戦争犯罪の事例多々ありしが為め、一九一九年の巴里講和會議に於ては、それが問題となり、局外の諸學者の所見も世に出で、同講和會議終了後にありても、同様の論議は各方面に現はれたが、しかも戦争犯罪なるものに関する論者の見解は、以上の解説及び公文書掲記のものから依然離るる所なかつた。乃ち権威ある公文書の規定と、それが時代の有力なる學者に依りて支持せられたるものと推定し、且つ推定し得るの事実に

鑑み、日本がポツダム宣言の全條件、殊に同宣言中十條所規の條件を受諾せる際に於て、戦争犯罪なるその交戦の法規慣例の違反以外に、當該戦争の性質又は目的の如何に論なく、凡て戦争を計畫し、指導し、又は実行する

（別行）

（三）然しながら戦争の觀念、若くは少なくも侵略戦争の觀念が、第一次大戦以後の若干の條約乃至條約案の上に現はれたるが

は、吾等の全然觀念以外にありしものである。

ること の行爲を稱呼するものと解するが如き

如く、晩近文明諸国の政治家及び學者の間に一大変化を示すに至ったのは事実である。この小等の條約の条の如きは條約の先駆を作せるものは一九二三年の第四回国際聯盟總会に附議せられ仏たる相互援助條約案である。同條約案は第一條第一項に於て凡締約国ハ侵略的戦爭ヲ国際的罪悪ナルコトヲ厳ニ宣言シ、各自之ヲ犯サザルコトヲ約スルと規定した。仏仏ども本條約案の諸條項を通じ、侵略そのものの性質仏仏的意義に於ける侵略の構成要

件如何、を正確に規定するに至らず、随つて次の第四回聯盟總會に於ては、主義としては之に賛成する聯盟国は十八の多きを占めたけれども、遂に廢案となつたのである。

次は一九二四年の調ゆるゼネバ平和議定書であるが、この議定書は、翌年成立のロカルノ協定と共に、第一次大戦以後の欧洲主要政治家の外交的指導精神の表現として、最も重要なる文書たりしものである。その核心は侵略国の性質を明かにし、且侵略戦争を排斥す

るにあった。假に世界の主要国、殊に英国政府にして本議定書を批准し、それが一の国際條約となったとしたならば、戦争の非認といい企図に向って甚大の貢献を為したに相違ないい。然るにその後、最に佛国のエリオ首相と共に本議定書の主要の作者たりし英国の労働党内閣の主班ラムセー・マクドナルドは失脚し、代って成立せる保守黨政府がその批准を拒絶するに至りたるがため、本議定書は遂に前年の相互援助條約と同一の運命に陥った。

（別行）

この外に二国間又は多邊的の條約の形成に於て或種類の戰爭を非認する同樣の企圖はありしも、然しながら（ニ）十年前、最後に非ざる一擧げたその重要性に於ては最後に非ざる一擧げたきは、国家の政策の具としての戰爭の抛棄を宣言したる一九二八年のケロッグ・ブリアン不戰條約である。然しながらこの條約は、條句も精神も共に世上周知のものであるから、ここに之を援用するの要はあるまい。

以上の條約又は條約案に於ても、凡ゆる種

類の戦争を犯罪と一たものと論ずるのは早計である。侵略とは挑発せられたるに非ざる攻撃又は侵入の外一歩の行為を言表はすものと解すべきであらう。この意味に於て侵略を排斥する行為が、交戦の法規慣例に遵由して行はるる限り、例外的に許さるるといふ

特定の時及び場所に於て、平時には為すを許されざる所の敵対行為

の状態であって行為ではない。その状態とは一

為ではない。戦争は国際法の眼に照さば、一

午するのは当然である。然しながら戦争は行

解すべきであらう。この意味に於て侵略を排

撃又は侵入の外一歩の行為を言表はすものと

である。侵略とは挑発せられたるに非ざる攻

状態である。戦争は一の状態であり、一の現象であり、一の出来事である。一層簡単に云へば、一の病悪である。出来事そのものは過ちでもなければ違法でもない。犯罪でもなければ非犯罪でもない。軈て或條約の起草者が往々唱ふるが如き、戦争を一の犯罪と見ることは、道徳的にも如何にこれを弁護すべき論據があるにもせよ、法律的には一のノンセンスである。恰も病気の主なる原因の一たるべき健康の疎略又

は不注意は、罪と云はるるかも知れぬが、気そのものを犯罪と論ずることのノンセンスであるのと撰ばぬのである。

戦争又は侵略戦争の観念と関聯し、戦争犯罪の観念も、一九四五年八月八日の倫敦四国協定の成立以来、そしてニュールンベルク国際軍事法廷の憲章の公表以来、従前行はれ来つた所のそれに比すれば、一の新様相を呈するに至つた。

されば、この問題は、本供述書に関する限り當面の問題以外に属すと思惟

する
のて、今觸れぬことにする。さりながら
一般に戦争の觀念、殊に戦争犯罪のそれの斯
かる変遷に伴い、從来オルソドツクス的法學
者の神聖不可侵と思惟し来りたる国際法の諸
法則が、新時代の新思想に順應せんがため、
今や根本的進化を体験せんとするに至ったこ
とは事実のやうである。然しながらここに留
意せねばならぬことは、凡そ国際法の諸法則
の変化は、一定不動の所期の彼岸に達し得る
ものに非ざることこれである。即ちそれには

或順序が要る。新しき理論、新しき主義、新しき法則は国際法学界に於ける自然淘汰を経、ここに始めて適者として生存するに至るという順序がそれである。或與へら㠯たる文字の解釋が国際法上一の權威あるものとなり、世界の文明諸国全体を拘束すべき有効的のものとなるには、單に一国若くは若干国の新に唱ふる一定義、將た一の司法裁判所へよーんば

それが国際という名を冠するにもせよ〜の單なる一新判決、一方的の一新規定その他法的

措置の一新事例は、将来に於て有力なる参考として又先例として援用さるることあるは勿論なるも、それのみで国際法則を一変せしむるには力尚ほ足らぬのである。かのニューレンベルグの判決中の一節に曰く国際法なるものは静的のものに非ず、不断の順応に由り変化しつつある世界の必要に随伴すべきものである。」といふ一句があるが、これは確に至言であるが、然しながら右の曰く不断の順応といふ形容詞が大切である。或行為の或程度に於ける繰

返しといふことと、そして世界の有力なる国際法學者の大多数に依り、殊に萬国国際法學會の如き有力なる團體に依り、そ此が支持せらるるといふことと、こ此が文明諸国を有効的拘束すべき国際法の新法則を構成するに就ての心要條件である。戦争犯罪に関する新理論を経そして将来の国際的非行を斯かる順序を経そして将来の国際的非行を取締るべき法則の最適者として、生存且成長することを望まーとする。

「日本國際協會」原稿用紙

昭和廿二年(一九四七年)一月十一日於栗原

供述者

右ハ當立會人ノ面前ニテ宣誓シ且ツ署名捺印シタルコトヲ證

明シマス

同日

於

立會人

宣誓書

良心ニ從ヒ眞實ヲ述ベ何事ヲモ默祕セズ又何事ヲモ附加セザルコトヲ誓フ

（署名捺印）

DEF DOC # 433

Translated by
Defence Language Branch

International Military Tribunal for the Far East

The United States of America et al

against

Araki, Sadao, et al

Affidavit

of

SHINOBU, Junhei

I, SHINOBU, Junhei being first duly sworn according to the customary formality in this country depose and state:

I, the undersigned, venture to submit the following statement as my affidavit, in answer to the given querries, namely: (1) What is the record your past life? (2) What do you understand by the term "War crimes"? Particularly, how did you interpret Article 10 of the Potsdam Declaration at the time Japan accepted the conditions laid down in it? And (3) Don't you think that rules of international law should go along with the changes in world conditions.

(1) I was born in 1871 at Shimodate, Ibaraki-ken. In my early life I devoted myself for several years, mainly to the study of Chinese classics in private schools, and thus missed the opportunity of undergoing the Normal curriculum of university or preparatory schools. I studied by myself the science of jurisprudence and the English language. In 1897, I passed the examination for diplomatic and consular agents, and entered the Foreign Office. After having served in various parts of the Orient and the Occident, and as First Secretary of the Embassy at Vienna and subsequently as Consul-General at Calcutta, my last post, I retired from the foreign service in 1917.

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During the Russo-Japanese War of 1904-5, I was temporarily attached to the Army, and engaged in administrative work of the Japanese occupied territory in South Manchuria as a legal adviser. At that time I came into association with the late Dr. ARIGA, Nagao, adviser of international law at the General Headquarters of the Japanese Manchurian Army, and took the opportunity of pursuing my further studies under him, and became in later years his sole successor in the field of diplomatic history as well as of international law particularly relative to war.

With my retirement from the Foreign Office, I entered into my new life of professorship at Waseda University (and sometime at Hosei University), and continued lectures at Waseda for twenty-five years, until 1943.

In 1925, my thesis "International Law and International Morality" (in Japanese) passed the Faculty Council of the Tokyo Imperial University, and I was conferred the degree of Doctor of Law.

When in 1932, the "Shanghai Incident" broke out, I went to Shanghai as the advisor of international law of the Japanese Third Fleet at that port. After completing my work and returning to Tokyo, I published my work "International Law in the Shanghai Conflict" (in Japanese and in English), which I had written at the scene of the disturbance).

In 1935-6, I was an adviser to the Government of the Republic of China, my duty being in giving lectures on international law to the higher naval officers in Nanking. The efforts of my mission were so highly appreciated by the Chinese Government that I was honoured by Generalissimo Chiang Kai-shek with the decoration of the Blue Grand Cordon of the Order of the Coloured Jewel.

With the outbreak of the "China Incident" in 1937, I went to Shanghai a second time as adviser on international law to the Japanese China Sea

Fleet, and stayed there for nearly two years.

It is my privilege to add that, throughout the aforesaid Shanghai Incident and the first phase of the China Incident, I felt it my pride that my legal advice to the War Councils on various occasions contributed greatly to the comparatively good reputation of the Japanese fleet operations (I am not informed as to the Army), which were carried on in conformity, on the whole, with the laws and customs of war.

My humble work "Lectures on International Law in Time of War" (in Japanese), the draft of which I had been writing since 1930 was finished in 1940, went to press subsequently, and was published in November, 1941, in four volumes, consisting of nearly five thousand pages. The Imperial Academy recognized its merit by endorsing it as an unprecedented and standard work, greatly contributing to the advancement of this field of jurisprudence, and was pleased to bestow the Imperial Gift on the author.

In June 1943, I was appointed a Councillor of the Higher Prize Court (Maritime Seizures). In February of the following year, I was nominated a Member of the Imperial Academy by the Imperial mandate.

(2) At the time when the Potsdam Declaration was proclaimed on July 26, 1945, the vast majority of Japanese international jurists, including myself, understood the term "war crimes" to mean solely and exclusively an offence against the laws and customs of war, as had generally been held by authoritative international lawyers, and they apparently considered, if my presumption is not mistaken, that term in Article 10 of the Declaration was accepted by the Japanese Government in that sense. I myself, in the above-mentioned work "Lectures on International Law in Time of War" define a "war crime", which I am accustomed to express in Japanese as "Sen ritsu han" (literally: "War statute offence") as "an act

of violation of the laws and customs of war . . . . The matters to be treated under war crimes are mostly, though not all, stipulated in international conventions with regards to their prohibition (as, for instance, acts of hostilities by those who are not recognized as lawful belligerents under Articles 1 and 2 of the Hague code of land warfare; acts prohibited under Articles 23, 25, 28, etc. of same; various clauses under the Geneva Red Cross Convention; violation of the rules to be observed by submarines under the London Naval Treaty of 1930.)" (Vol. 11, PP. 769-770)

This is not necessarily my own creative opinion, but that which has been advanced by a certain number of authorities on international laws. That interpretation finds a place not only in their dissertions, but also frequently even in official texts, such as in Sections 441 and 442 of the British "Manual of Military Law", enacted in 1914, re-enacted in 1929, and amended in 1936, as well as in Section 366 and 369 of the American "Rules of Land Warfare" of 1914. The former reads:

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* See, for instance, Oppenheim, International Law, 3rd ed., PP. 431-3; Pitt Cobbett, Leading Cases of International Law, 4th ed. by H.L. Bollot, p. 176; Tachi (late prominent Japanese international jurist), Treatise on International Law in Time of War (in Japanese), 1931, P. 41. See also an informative essay by Dr. Nathan (of the Middle Temple and Advocate of the Supreme Court of South Africa) entitled "The Renaissance of International Law" in The Grotius Society Publication, No. 3, 1925 in which the problem of war crimes is dealt with (PP, 79-100, 181-184). He seems to define them as "infringement of the civilized customs of war" (P. 79), though he says that "there is great room for controversy, and probably for improvement." (p.181)

"(iii) The Punishment of War Crimes.

"441. The term 'War Crime' is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders. It is usual to employ this term, but it must be emphasized that it is used in the technical military and legal sense only, and not in the moral sense. For although some of these acts, such as abuse of the privileges of the Red Cross badge, or the murder of prisoners, may be disgraceful, yet others, such as conveying information about the enemy, may be highly patriotic and praiseworthy. The enemy, however, is in any case entitled to punish these acts as war crimes.

"442. War crimes may be divided into four different classes;

(i) Violations of the recognized rules of warfare by members of the armed forces.

(ii) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces.

(iii) Espionage and war treason.

(iv) Marauding."

The latter, without defining the term "war crimes", enumerates the examples pertaining to them as follows:

" War Crimes.

"366. Offenses committed by armed forces. —— The principal offenses of this class are: Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request for quarter; maltreatment of dead bodies on the battle field; ill-treatment of prisoner of war; breach of parole by prisoners of war; firing on undefended

localities; abuse of the flag of truce; firing on the flag of truce; abuse of the Red Cross flag and emblem; and other violations of the Geneva Convention; use of civilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings, improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill-treatment of inhabitants in occupied territory. Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

"369. Hostilities committed by individuals not of armed forces. Persons who take up arms and commit hostilities without having complied with the conditions prescribed for securing the privileges of belligerents, are, when captured by the enemy, liable to punishment for such hostile acts as war criminals."

During World War I, there were numerous instances of the so-called "war crimes", which led to lengthy discussions at the Peace Conference of Paris of 1919, and the subject was also considered by various writers. Even after the conclusion of peace, a number of arguments pertaining to the same subject were brought forward by writers, but the interpretation of war crimes by them remained unshaken from that in the above-cited theories and official texts. Thus assuming, as may safely be assumed, that these commentaries were maintained in authoritative official documents, supported by a large majority of distinguished contemporary writers, it was entirely beyond our conception to perceive, at the time of the acceptance by Japan of the conditions of the Potsdam Declaration in general, and those

laid down in Article 10 in particular, that a war crime denoted, beside an offence against the laws and customs of war, an act of planning, instigating or accomplishing a war, whatever its nature or purpose might be.

(3) Nevertheless, the conception of war, or at least, of an aggressive war, has undergone a great change in the minds of statesmen and thinkers of the civilized nations of the world, which manifested itself in a few post-War draft or ratified treaties. The fore-runner of them was the Draft Treaty of Mutual Assistance of 1923, submitted to the Fourth Assembly of the League of Nations of that year, and which provided that "The High Contracting Parties, affirming that aggressive war is an international crime, undertake the solemn engagement not to make themselves guilty of this crime against any other nations." (Art. 1, Par.1). The provisions of this Draft Treaty were, however, fell short of determining precisely what was the nature of an aggression itself, or what did constitute an aggression in its legal sense. Consequently, the draft was abandon ed at the Fifth League Assembly, though had been accepted in principle by eighteen Member-States.

The next was the Geneva Peace Protocol, commonly so called, of 1924. This Protocol, together with the Locarno Pacts of the following year, appeared before the world as exceedingly important diplomatic documents since the First World War, revealing the guiding spirit underlying the foreign policy of the leading European statesmen of the age. The gist of this Protocol was in denouncing aggressive wars as a crime, in its violating the recognized ... solidarity of the international community, by clarifying the nature of an aggressor more definitely, at least to a certain extent. Had this Protocol been ratified by the principal signatory Powers, particularly by Great Britain, by whose ultimate refusal —— by the British Conservative Government which

had succeeded the Labour Cabinet of Ramsay MacDonald, the principal author of the synopsis side by side with his French colleagu M.Herriot —— it had been dropped —— and had it been materialized as an international compact, it must have marked the greatest advancement ever made by the community of nations towards the elimination of war, by providing machinery and sanctions to make the principle operate with much vitality. But it met with the same fate as the Draft Treaty of Mutual Assistance.

Leaving aside a few other similar attempts to eliminate some kind of wars in a form of bilateral or multilateral treaties, we would mention lastly, but not the least in its importance, the Pact of Paris of 1928 —— the Kellogg-Briand Pact —— which renounces war as an instrument of national policy. However, since its embodying principles, as well as its full text, are too well known to the public at large, we see no necessity here to enter into the details in respect to the Pact.

Nevertheless, under these draft or ratified treaties, it would be premature to conclude that every sort of wars is to be condemned as a crime. To condemn aggression, which is an action denoting a first act of proceeding to unprovoked attack or invasion, is quite understandable; but war is not an act, though hostilities are. War in the light of international law, that is to say, not in common expression but theoretically, is not an act but a state —— a state in certain time and certain region, wherein acts of violence which, though not permissible in time of peace and in every region of the world, is exceptionally permissible, provided they be done in conformity with universally recognized rules of warfare, War is a state, a phenomenon, an event, a symptom of abnomal condition in the international organic body —— or, to put it more simply; a disease. An event itself is neither lawful nor unlawful. It constitutes neither crime nor non-crime.

To condemn any war as a crime, as is often attempted by some treaty framers or asserted by some contemporary writers, whatever moral considerations may be urged in their support, legally it is simply nonsense, just as to condemn illness itself as a crime is nonsense, though neglect or carelessness of health, one of the main causes of illness, may be pronounced as such.

Closely connected with the conception of war or of aggressive war, that of war crimes has, since the Four Power Agreement made in London on August 8, 1945, and the subsequent publication of the Charter of the International Military Tribunal in Nuremberg, begun to take a new aspect compared with that which had been prevailing prior to that date. This, however, should be put aside from the question at issue, as I think it is outside my province so far as the present affidavit is concerned. However, with such visissitudes of the conception of war in general, and that of war crimes in particular, it seems to be a fact that rules of international law, hitherto held as sacred and inviolable by orthodox jurists, have come to experience a radical evolution, so as to meet the new idea of the new age. But it must be borne in mind that a change of the rules of international law, in order to make itself adaptable and effective, cannot reach the destination at a jump. It must undergo a certain process by means of which new theories, new principles, and new laws, from those beginnings, may come into existance by natural selection as the fittest to survive in the field of international jurisprudence. In order to make an interpretation of a given term as authoritative in international law and as effective in binding the whole civilized nations of the world, a single new definition advanced by a State or a group of States, a single new decision of a court of justice, even with the name of "international", a single new stipulation of a treaty, or any other

single case of legal action, is insufficient for overturning traditional rules in that branch of law, though either could be invoked as a good reference and sometimes a powerful precedent. It is rightly stated in the Nuremberg judgment against the German war criminals given on August 31, 1946, that international law "is not static, but by continual adaptation follows the needs of a changing world." Most exactly. But the qualifying word "continual" is essential. Repetition to a certain extent of a given practice, and supported by a vast majority of prominent jurists of the world, particularly by such an influential organization as I'Institutde Droit International, are the necessary conditions for constituting the new rules of international law as being accepted by civilized nations. It is to be hoped that the new theory of war criminals will pass through such a process, and will grow up as the fittest of positive legal rules for governing future international misdemeanours.

This eleventh day of January, 1947, at Tokyo

(Signed) Junkei Shinobu

Sworn to and subscribed before me on the above-mentioned date and at the above-mentioned place.

(Signed) Sanji Suenobu

DEF DOC # 433

O A T H

I swear according to my conscience to state the whole truth, reserve nothing what I know, nor and anything what I do not know.

(Signed) Junhei Shinobu

DEF DOC # 433

O A T H

In accordance with my conscience I swear to tell the whole truth withholding nothing and adding nothing.

/S/ SHINOBU, Junhei (seal)

TRANSLATION CERTIFICATE

I, Charles D. Sheldon, Chief of the Defense Language Branch, hereby certify that the foregoing translation described in the above certificate is, to the best of my knowledge and belief, a correct translation and is as near as possible to the meaning of the original document.

/S/ Charles D. Sheldon

Tokyo, Japan
Date 20 Feb., 1947

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I, SHINOBU, Junhei being first duly sworn according to the customary formality in this country depose and state:

I, the undersigned, venture to submit the following statement as my affidavit, in answer to the given querries, namely: (1) What is the record your past life? (2) What do you understand by the term "War crimes"? Particularly, how did you interpret Article 10 of the Potsdam Declaration at the time Japan accepted the conditions laid down in it? And (3) Don't you think that rules of international law should go along with the changes in world conditions.

(1) I was born in 1871 at Shimodate, Ibaraki-ken. In my early life I devoted myself for several years, mainly to the study of Chinese classics in private schools, and thus missed the opportunity of undergoing the Normal curriculum of university or preparatory schools. I studied by myself the science of jurisprudence and the English language. In 1897, I passed the examination for diplomatic and consular agents, and entered the Foreign Office. After having served in various parts of the Orient and the Occident, and as First Secretary of the Embassy at Vienna and subsequently as Consul-General at Calcutta, my last post, I retired from the foreign service in 1917.

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During the Russo-Japanese War of 1904-5, I was temporarily attached to the Army, and engaged in administrative work of the Japanese occupied territory in South Manchuria as a legal adviser. At that time I came into association with the late Dr. ARIGA Nagao, adviser of international law at the General Headquarters of the Japanese Manchurian Army, and took the opportunity of pursuing my further studies under him, and became in later years his sole successor in the field of diplomatic history as well as of international law particularly relative to war.

With my retirement from the Foreign Office, I entered into my new life of professorship at Waseda University (and sometime at Hosei University), and continued lectures at Waseda for twenty-five years, until 1943.

In 1925, my thesis "International Law and International Morality" (in Japanese) passed the Faculty Council of the Tokyo Imperial University, and I was conferred the degree of Doctor of Law.

When in 1932, the "Shanghai Incident" broke out, I went to Shanghai as the advisor of international law of the Japanese Third Fleet at that port. After completing my work and returning to Tokyo, I published my work "International Law in the Shanghai Conflict" (in Japanese and in English), which I had written at the scene of the disturbance).

In 1935-6, I was an adviser to the Government of the Republic of China, my duty being in giving lectures on international law to the higher naval officers in Nanking. The efforts of my mission were so highly appreciated by the Chinese Government that I was honoured by Generalissimo Chiang Kai-shek with the decoration of the Blue Grand Cordon of the Order of the Coloured Jewel.

With the outbreak of the "China Incident" in 1937, I went to Shanghai a second time as adviser on international law to the Japanese China Sea

Fleet, and stayed there for nearly two years.

It is my privilege to add that, throughout the aforesaid Shanghai Incident and the first phase of the China Incident, I felt it my pride that my legal advice to the War Councils on various occasions contributed greatly to the comparatively good reputation of the Japanese fleet operations (I am not informed as to the Army), which were carried on in conformity, on the whole, with the laws and customs of war.

My humble work "Lectures on International Law in Time of War" (in Japanese), the draft of which I had been writing since 1930 was finished in 1940, went to press subsequently, and was published in November, 1941, in four volumes, consisting of nearly five thousand pages. The Imperial Academy recognized its merit by endorsing it as an unprecedented and standard work, greatly contributing to the advancement of this field of jurisprudence, and was pleased to bestow the Imperial Gift on the author.

In June 1943, I was appointed a Councillor of the Higher Prize Court (Maritime Seizures). In February of the following year, I was nominated a Member of the Imperial Academy by the Imperial mandate.

(2) At the time when the Potsdam Declaration was proclaimed on July 26, 1945, the vast majority of Japanese international jurists, including myself, understood the term "war crimes" to mean solely and exclusively an offence against the laws and customs of war, as had generally been held by authoritative international lawyers, and they apparently considered, if my presumption is not mistaken, that term in Article 10 of the Declaration was accepted by the Japanese Government in that sense. I myself, in the above-mentioned work "Lectures on International Law in Time of War" define a "war crime", which I am accustomed to express in Japanese as "Sen ritsu han" (literally: "War statute offence") as "an act

of violation of the laws and customs of war . . . . The matters to be treated under war crimes are mostly, though not all, stipulated in international conventions with regards to their prohibition (as, for instance, acts of hostilities by those who are not recognized as lawful belligerents under Articles 1 and 2 of the Hague code of land warfare; acts prohibited under Articles 23, 25, 28, etc. of same; various clauses under the Geneva Red Cross Convention; violation of the rules to be observed by submarines under the London Naval Treaty of 1930.)" (Vol. 11, PP. 769-770)

This is not necessarily my own creative opinion, but that which has been advanced by a certain number of authorities on international laws. That interpretation finds a place not only in their dissertions, but also frequently even in official texts, such as in Sections 441 and 442 of the British "Manual of Military Law", enacted in 1914, re-enacted in 1929, and amended in 1936, as well as in Section 366 and 369 of the American "Rules of Land Warfare" of 1914. The former reads:

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* See, for instance, Oppenheim, International Law, 3rd ed., PP. 431-3; Pitt Cobbett, Leading Cases of International Law, 4th ed. by H.L. Bollot, p. 176; Tachi (late prominent Japanese international jurist), Treatise on International Law in Time of War (in Japanese), 1931, P. 41. See also an informative essay by Dr. Nathan (of the Middle Temple and Advocate of the Supreme Court of South Africa) entitled "The Renaissance of International Law" in The Grotius Society Publication, No. 3, 1925 in which the problem of war crimes is dealt with (PP, 79-100, 181-184). He seems to define them as "infringement of the civilized customs of war" (P. 79), though he says that "there is great room for controversy, and probably for improvement." (p.181)

"(iii) The Punishment of War Crimes.

"441. The term 'War Crime' is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders. It is usual to employ this term, but it must be emphasized that it is used in the technical military and legal sense only, and not in the moral sense. For although some of those acts, such as abuse of the privileges of the Red Cross badge, or the murder of prisoners, may be disgraceful, yet others, such as conveying information about the enemy, may be highly patriotic and praiseworthy. The enemy, however, is in any case entitled to punish these acts as war crimes.

"442. War crimes may be divided into four different classes;

(i) Violations of the recognized rules of warfare by members of the armed forces.

(ii) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces.

(iii) Espionage and war treason.

(iv) Marauding."

The latter, without defining the term "war crimes", enumerates the examples pertaining to them as follows:

" War Crimes.

"366. Offenses committed by armed forces. — The principal offenses of this class are: Making use of poisoned and otherwise forbidden arms and ammunition; killing of the wounded; refusal of quarter; treacherous request for quarter; maltreatment of dead bodies on the battle field; ill-treatment of prisoner of war; breach of parole by prisoners of war; firing on undefended

localities; abuse of the flag of truce; firing on the flag of truce; abuse of the Red Cross flag and emblem; and other violations of the Geneva Convention; use of civilian clothing by troops to conceal their military character during battle; bombardment of hospitals and other privileged buildings, improper use of privileged buildings for military purposes; poisoning of wells and streams; pillage and purposeless destruction; ill-treatment of inhabitants in occupied territory. Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.

"369. Hostilities committed by individuals not of armed forces. Persons who take up arms and commit hostilities without having complied with the conditions prescribed for securing the privileges of belligerents, are, when captured by the enemy, liable to punishment for such hostile acts as war criminals."

During World War I, there were numerous instances of the so-called "war crimes", which led to lengthy discussions at the Peace Conference of Paris of 1919, and the subject was also considered by various writers. Even after the conclusion of peace, a number of arguments pertaining to the same subject were brought forward by writers, but the interpretation of war crimes by them remained unshaken from that in the above-cited theories and official texts. Thus assuming, as may safely be assumed, that these commentaries were maintained in authoritative official documents, supported by a large majority of distinguished contemporary writers, it was entirely beyond our conception to perceive, at the time of the acceptance by Japan of the conditions of the Potsdam Declaration in general, and those

laid down in Article 10 in particular, that a war crime denoted, beside an offence against the laws and customs of war, an act of planning, instigating or accomplishing a war, whatever its nature or purpose might be.

(3) Nevertheless, the conception of war, or at least, of an aggressive war, has undergone a great change in the minds of statesmen and thinkers of the civilized nations of the world, which manifested itself in a few post-War draft or ratified treaties. The fore-runner of them was the Draft Treaty of Mutual Assistance of 1923, submitted to the Fourth Assembly of the League of Nations of that year, and which provided that "The High Contracting Parties, affirming that aggressive war is an international crime, undertake the solemn engagement not to make themselves guilty of this crime against any other nations." (Art. 1, Par.1). The provisions of this Draft Treaty were, however, fell short of determining precisely what was the nature of an aggression itself, or what did constitute an aggression in its legal sense. Consequently, the draft was abandoned at the Fifth League Assembly, though had been accepted in principle by eighteen Member-States.

The next was the Geneva Peace Protocol, commonly so called, of 1924. This Protocol, together with the Locarno Pacts of the following year, appeared before the world as exceedingly important diplomatic documents since the First World War, revealing the guiding spirit underlying the foreign policy of the leading European statesmen of the age. The gist of this Protocol was in denouncing aggressive wars as a crime, in its violating the recognized solidarity of the international community, by clarifying the nature of an aggressor more definitely, at least to a certain extent. Had this Protocol been ratified by the principal signatory Powers, particularly by Great Britain, by whose ultimate refusal —— by the British Conservative Government which

had succeeded the Labour Cabinet of Ramsay MacDonald, the principal author of the synopsis side by side with his French colleagu M.Herriot —— it had been dropped —— and had it been materialized as an international compact, it must have marked the greatest advancement ever made by the community of nations towards the elimination of war, by providing machinery and sanctions to make the principle operate with much vitality. But it met with the same fate as the Draft Treaty of Mutual Assistance.

Leaving aside a few other similar attempts to eliminate some kind of wars in a form of bilateral or multilateral treaties, we would mention lastly, but not the least in its importance, the Pact of Paris of 1928 —— the Kellogg-Briand Pact —— which renounces war as an instrument of national policy. However, since its embodying principles, as well as its full text, are too well known to the public at large, we see no necessity here to enter into the details in respect to the Pact.

Nevertheless, under these draft or ratified treaties, it would be premature to conclude that every sort of wars is to be condemned as a crime. To condemn aggression, which is an action denoting a first act of proceeding to unprovoked attack or invasion, is quite understandable; but war is not an act, though hostilities are. War in the light of international law, that is to say, not in common expression but theoretically, is not an act but a state —— a state in certain time and certain region, wherein acts of violence which, though not permissible in time of peace and in every region of the world, is exceptionally permissible, provided they be done in conformity with universally recognized rules of warfare; War is a state, a phenomenon, an event, a sympton of abnomal condition in the international organic body —— or, to put it more simply; a disease. An event itself is neither lawful nor unlawful. It constitutes neither crime nor non-crime.

To condemn any war as a crime, as is often attempted by some treaty framers or asserted by some contemporary writers, whatever moral considerations may be urged in their support, legally it is simply nonsense, just as to condemn illness itself as a crime is nonsense, though neglect or carelessness of health, one of the main causes of illness, may be pronounced as such.

Closely connected with the conception of war or of aggressive war, that of war crimes has, since the Four Power Agreement made in London on August 8, 1945, and the subsequent publication of the Charter of the International Military Tribunal in Nuremberg, begun to take a new aspect compared with that which had been prevailing prior to that date. This, however, should be put aside from the question at issue, as I think it is outside my province so far as the present affidavit is concerned. However, with such visissitudes of the conception of war in general, and that of war crimes in particular, it seems to be a fact that rules of international law, hitherto held as sacred and inviolable by orthodox jurists, have come to experience a radical evolution, so as to meet the new idea of the new age. But it must be borne in mind that a change of the rules of international law, in order to make itself adaptable and effective, cannot reach the destination at a jump. It must undergo a certain process by means of which new theories, new principles, and new laws, from those beginnings, may come into existance by natural selection as the fittest to survive in the field of international jurisprudence. In order to make an interpretation of a given term as authoritative in international law and as effective in binding the whole civilized nations of the world, a single new definition advanced by a State or a group of States, a single new decision of a court of justice, even with the name of "international", a single new stipulation of a treaty, or any other

single case of legal action, is insufficient for overturning traditional rules in that branch of law, though either could be invoked as a good reference and sometimes a powerful precedent. It is rightly stated in the Nuremberg judgment against the German war criminals given on August 31, 1946, that international law "is not static, but by continual adaptation follows the needs of a changing world." Most exactly. But the qualifying word "continual" is essential. Repetition to a certain extent of a given practice, and supported by a vast majority of prominent jurists of the world, particularly by such an influential organization as I'Institutde Droit International, are the necessary conditions for constituting the new rules of international law as being accepted by civilized nations. It is to be hoped that the new theory of war criminals will pass through such a process, and will grow up as the fittest of positive legal rules for governing future international misdemeanours.

This eleventh day of January, 1947, at Tokyo

(Signed) Junkei Shinobu

Sworn to and subscribed before me on the above-mentioned date and at the above-mentioned place.

(Signed) Sanji Suenobu

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O A T H

I swear according to my conscience to state the whole truth, reserve nothing what I know, nor and anything what I do not know.

(Signed) Junhoi Shinobu

DEF DOC # 433

OATH

In accordance with my conscience I swear to tell the whole truth withholding nothing and adding nothing.

/S/ SHINOBU, Junhei (seal)

TRANSLATION CERTIFICATE

I, Charles D. Sheldon, Chief of the Defense Language Branch, hereby certify that the foregoing translation described in the above certificate is, to the best of my knowledge and belief, a correct translation and is as near as possible to the meaning of the original document.

/S/ Charles D. Sheldon

Tokyo, Japan
Date 20 Feb., 1947