Wednesday, 7 January 1947

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

PROCEEDINGS IN CHAMBERS

On

Application to re-open the case of the accused OSHIMA;

and

Application to re-open the case of the accused ARAKI and to reconsider documents previously rejected.

Before:

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

Reported by:

Antoinette Duda
Court Reporter
IMTFE

Appearances:

For the Defense Section:

Mr. Owen Cunningham, Counsel for the Accused OSHIMA, Hiroshi.

Mr. SHIMANOUCHI, Ryuki, Counsel for the Accused OSHIMA, Hiroshi.

Mr. USHIBA, Fujio, Counsel for the Accused OSHIMA, Hiroshi.

Mr. Lawrence P. McManus, Counsel for the Accused ARAKI, Sadao.

Mr. George Yamaoka, Counsel for the Accused HIROTA, Koki.

Mr. George A. Furness, Counsel for the Accused SHIGEMITSU, Mamoru.

For the Prosecution:

Mr. F. S. Tavenner, Jr., Assistant Prosecutor.

For the Secretariat:

Judge Edward H. Dell, Legal Adviser.
Mr. Paul Lynch, Clerk of the Court.

The proceeding was begun at 1600.

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THE PRESIDENT: Yes, Mr. Cunningham. Are you appearing?

MR. CUNNINGHAM: I will appear on the matter. I think the application and affidavits accompanying it explain pretty much the situation. If there are any questions--

THE PRESIDENT: You have nothing to add to what appears in the application?

MR. CUNNINGHAM: That is right.

THE PRESIDENT: Well, I shall place this before my colleagues, as I undertook to do. I don't know what they think. I am not in any position to give any decision on the matter.

MR. CUNNINGHAM: I might say this, that we have to have a little time, notice, because one witness lives in Hakone and it is a little difficult to contact him. The other one, I believe, is here.

THE PRESIDENT: I will tell you as soon as I can what we propose to do, Mr. Cunningham. I will see the other Judges tomorrow morning. They have not mentioned the matter to me since, so I have no idea what they think about it.

However, that is all you can tell me for

the time being?

MR. CUNNINGHAM: Yes.

THE PRESIDENT: What is the other matter?

MR. LYNCH: The other matter is Mr. McManus', and I believe that it was set for 4:15.

MR. CUNNINGHAM: Can you give me an idea on time, because we want to process and serve the affidavits so that they will be in sufficient time.

THE PRESIDENT: I could not do that now. There are eleven Judges, and I will wait until I see them all before I come to a conclusion. I would sit up all night to meet you, Mr. Cunningham, but I am afraid even that would not achieve what you would like me to do.

Mr. Tavenner, do you wish to be heard on this application by Mr. Cunningham?

MR. TAVENNER: I have not seen it yet, if your Honor please.

THE PRESIDENT: All I want to do is to refer the information now given in chambers to the other Judges for their decision, and to do so as speedily as I can. I have come to no conclusion about this except to refer it, as I undertook to do, to the Court.

I would like to know your attitude so that I may place it before the Judges.

MR. TAVENNER: A copy of this was not served on the prosecution, and I have not had an opportunity to read it.

THE PRESIDENT: It is a short statement. You may read it now.

MR. TAVENNER: Yes, sir.

A hasty reading of the application, if your Honor please, indicates to me that the subject matter into which counsel now desires to inquire was the subject of cross-examination when OSHIMA was on the stand; and if I am correct in that, it would seem that the matter should have been exhausted then, unless some satisfactory reason is given to the Court why it could not have been done.

MR. CUNNINGHAM: That is not the case. The case is, this evidence which we wish to contravert was presented in the case of TOGO.

MR. TAVENNER: Well, the fact that you mention TOGO does not change the fact that it was the subject of cross-examination, according to my recollection, when OSHIMA was on the stand.

MR. CUNNINGHAM: No.

MR. TAVENNER: In fact, the very language used by you in the application, of by-passing the Foreign Office, I assume you mean, was matter brought

out in cross-examination.

MR. CUNNINGHAM: These two matters were not touched upon in the OSHIMA case at all. They were not in controversy in the OSHIMA case. They came up for the first time in the TOGO case, and we were met by documents which were not introduced either in the prosecution case or presented to OSHIMA in OSHIMA's case, but came up after we had closed both cases. And, therefore, now we wish to come back with the facts and not merely hearsay evidence on these two points at issue.

MR. TAVENNER: I do not desire to speak too dogmatically on the subject, because I have not had an opportunity to study this evidence with relation to the points you raise, but that is our position.

THE PRESIDENT: I will refer the matter to all the Judges and give their decision as soon as I can; tomorrow morning, if possible, Mr. Cunningham. That is all we can do on this tonight.

Is Mr. McManus here?

MR. TAVENNER: May I have a copy of this application?

MR. LYNCH: I have a copy attached to that which you may have.

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THE PRESIDENT: Mr. McManus, we are ready to hear your application now.

MR. TAVENNER: Is this a matter in which the prosecution should be present?

THE PRESIDENT: Yes, this is a matter in which the prosecution should be present, undoubtedly.

This is an application to the Court to reverse its ruling on a number of documents rejected in the case of ARAKI, on the ground that similar documents were admitted in later cases.

MR. McMANUS: Yes, your Honor.

THE PRESIDENT: The documents are specified in this memo to me by Mr. McManus, the documents rejected in ARAKI's case and those admitted in the other cases.

MR. McMANUS: Yes, sir. Would your Honor care to have me read this second part of this memo addressed to you?

THE PRESIDENT: Yes, I would like you to deal with the whole matter, as a matter of fact.

MR. McMANUS: Yes, I will do that.

THE PRESIDENT: The application is in two parts. The first part is to reopen ARAKI's case because fresh evidence not available at the time that ARAKI put his defense -- that is your ground?

MR. McMANUS: Yes.

According to your Honor's ruling of 22 October 1947, wherein you stated on page 31,506 of the record that - "that, if . . . some new matter is brought out prejudicial to an accused who has already closed his case, the Court will favorably consider an application, a proper application, by that accused's counsel to receive further evidence" - we, therefore, are now making an application on behalf of the accused ARAKI to re-open his case on the following grounds:

On 8 October 1946 an affidavit was offered by the prosecution and received exhibit No. 670. The Court at that time ruled that the witness should be produced by the accusing power so that this Tribunal might determine by itself the credibility of the witness after cross-examination by the defense. The Court at that time stated such an affidavit and similar affidavits would not be considered by this Tribunal unless the affiants would be produced for cross-examination purposes.

The affiant TAKEBE was produced on the 27th of October 1947 (1 year later) after having been a prisoner of the U. S. S. R. for several years and a supplementary affidavit, IPS document 2239-A, exhibit 3371, page 31,836 of the record, was submitted to

this Court which the Court accepted.

At that particular time ARAKI's case was closed as far as his defense was concerned and in this new supplementary affidavit TAKEBE made a statement concerning the accused ARAKI, which we know and contend is not true. In the latter affidavit he stated that ARAKI made an aggressive speech (he also stated on cross-examination by Mr. Blewett on page 31,907 of the record that he made this supplementary affidavit after having a conversation and a discussion with Colonel IVANOV and offered this supplementary affidavit just a few days before he testified (The Court, of course, will take judicial notice of the fact that Colonel IVANOV is one of the Russian prosecutors).

On page 31,905 of the record Mr. Blewett asked the witness TAKEBE - "Q. Did you have an opportunity of reading over and correcting this affidavit after it was prepared? A. I did not feel there was any necessity of making corrections."

Now I point out to your Honor that on page 31,837 of the record that the witness TAKEBE stated - "Naturally at the present time I do not remember the exact words of ARAKI and SUZUKI as many years have elapsed since then."

Consequently, ARAKI requests this Tribunal to re-open his case because of the aforementioned facts, as pointed out to the Tribunal, and in view of the fact that TAKEBE said ARAKI and SUZUKI made speeches at a Prefectural Governor's Meeting where, of course, it is incumbent upon ARAKI to point out the true facts to this Court whereby he will produce at least one Prefectural Governor who was present at this meeting and who will definitely, undeniably and conscientiously inform this Tribunal that no such speech was ever made (i. e., the contents of which the witness TAKEBE stated to be so.)

Now, the second part of this request, Sir William, is an application--

THE PRESIDENT: Suppose you have an affidavit by this new witness and Mr. Tavenner reads it and says he does not want to cross-examine. That may make it easy to have the evidence admitted and to have the case reopened to that extent. I do not know what your attitude is, Mr. Tavenner.

MR. TAVENNER: Well, my attitude is that if, in fact, it is a new matter brought out by this witness after the close of the ARAKI case, ARAKI should have the opportunity to introduce the evidence he refers to.

THE PRESIDENT: Could you make that affidavit available to Mr. Tavenner tonight, Mr. McManus?

MR. McMANUS: Yes, I could. I believe it has been processed and served this morning.

MR. TAVENNER: But, on the other hand, I should state that if it relates to the same matter as to which the witness testified through a former affidavit, then he should not have that right; and until I see it, it would be very difficult to express an opinion upon it.

MR. McMANUS: I believe you have it, Mr. Tavenner. It has been served upon the prosecution. I believe this morning it was served. However, I can get another copy and give it to you this afternoon.

MR. TAVENNER: Yes. I did not see it in the distribution list.

MR. McMANUS: Now, this affidavit -- we did not know anything about the witness at that time, your Honor, and it was surprise testimony, in a way, in so far as that there had been a supplemental affidavit added to the original exhibit 670, which made a statement definitely stronger. And since ARAKI's case had been closed and because of the supplemental affidavit making this allegedly damaging statement, I think we should have an opportunity of unquestionably refuting

such testimony by the production of another witness.

THE PRESIDENT: I should like to know your attitude, Mr. Tavenner, after you see the document.

MR. TAVENNER: I feel that I can hardly express the prosecution's view on it without actually seeing the document, itself, and after having had an opportunity to make the comparisons which counsel for the defendant has already made.

MR. McMANUS: I shall get a copy for you this evening, but I am almost certain that it has been distributed to your office, Mr. Tavenner. After we leave here I shall get the copy and give it to you.

MR. TAVENNER: Yes.

MR. McMANUS: This affidavit, of course, is in question and answer form, your Honor. It is an interrogatory, but the witness himself preferred it to be in question and answer form, rather than to make an affidavit.

MR. TAVENNER: I would appreciate, also, a copy of this statement you just read to His Honor.

MR. McMANUS: All right, Mr. Tavenner.

THE PRESIDENT: Now, you have another section of this application.

MR. McMANUS: Yes.

THE PRESIDENT: For the review of decisions

rejecting documents in ARAKI's case.

MR. McMANUS: Yes.

THE PRESIDENT: This is a lengthy statement, Mr. Tavenner, but I should like you to remain if you have the time.

MR. TAVENNER: Yes; well, I will.

THE PRESIDENT: You had better read that statement.

MR. McMANUS: Yes, sir.

Due to the fact that Baron ARAKI was the first defendant to submit his case to this Tribunal, we call attention to the fact that he was handicapped in many ways; that is, in comparison to others -- both in preparation and presentation of evidence.

First of all, there was a difference of nearly four months between the first defendant and the last defendant in the presentation of individual cases. The Tribunal granted a seven-week recess for preparation and presentation of individual phases, but it was not sufficient for the first defendant in view of the aggravated conditions at that time, especially for the Japanese counsel for defense, who was hampered by transportation inconveniences.

In the schedule prepared by defense counsel for the presentation of individual phases ARAKI was

expected to take four days, excluding cross-examination, but actually his presentation was narrowed down to two and a half days, against which the prosecution took two and one-half days for cross-examination. Thus, ARAKI's case was over before it submitted less than half of the prepared evidence and much earlier than the scheduled time. (Reference is made to rejection of order of proof No. 4, page 28,591 of the record.)

Apart from the above difficulties on the part of defendant ARAKI, we venture to surmise that the Tribunal had not established a concrete standard or policy with regard to admission of evidence in individual phases.

THE PRESIDENT: There is no such thing as a concrete standard or policy. Each document is decided, the admission or rejection of each document is decided, upon its merits.

MR. McMANUS: Well, I point out to your Honor, for instance, sworn statements and accompanying letters of Major General Piggot, Sir Francis Lindley, Mr. Kennedy, which were, in our opinion, fully qualified as evidence, rejection pages 28,571, 28,575, and 28,576. It is further pointed out to Your Honor that such documents were admitted in the case of KOISO, page 32,546, and also in the case of SHIGEMITSU,

page 34,544, and then again in the case of MUTO, page 32,941.

We had prepared affidavits of Mr. Juko YAMAOKA (defense document 2241), Saburo ISHII (defense document 2572) and Nobuyuki ABE (defense document 1915), but the affiants were sick in bed and could not take the witness stand. The general practice at that time had been that evidence was not admitted unless its truth were testified to by the affiant before the Tribunal and faced the prosecution's cross-examination.

THE PRESIDENT: There was no practice about it. Had you said the person who made the affidavit was sick and was likely to be ill for a considerable time, we would have considered an application to have his affidavit read and to have his cross-examination deferred, if cross-examination were insisted upon by any party.

MR. McMANUS: I think I can explain that as I go along, Your Honor. I believe at that time commissions were being appointed in such instances, so I think I can explain it.

As the Tribunal was anxious to grant a just but also an expeditious trial at all times, we could not see our way to request a commission for these

testimonies, and the affidavits were quite reluctantly dropped. Later, a new practice was adopted where affidavits alone were admitted without the presence before the Tribunal of its affiant.

Affidavit of Sogen OMORI (defense document 1959) was most important to us. This evidence showed that ARAKI was one of the targets of assault together with other members of the SAITO Cabinet, by a terroristic party called SHIMPEITAI, by the reasons that his policy toward Manchuria was not satisfactory to the people of right-wing ideology. This, we trust, was the best refutation to the charge that ARAKI abetted and instigated such people. This evidence was rejected by the Tribunal, much to our disappointment, on page 28,478, whereas exactly the same type of evidence for defendant HIRANUMA by Mrs. Setsuko HIRANUMA, testifying that the former was attacked by a terroristic party, was admitted in evidence, pages 29,321-29,323.

We made futile effort to tender in evidence defense document 2122, page 28,588 of the record, which is a memoir of late Prince KONOYE entitled "Lost Politics." By this book we desired to show the fact that ARAKI, although he kept himself aloof from any party or group, was regarded by the military authorities at that time as one of the so-called Kodo (Imperial

Way) Party and was rejected by them. The book further said that those people of the Kodo Party, in spite of their sound and peaceful opinion, could not settle the China Incident because they were not officers of the active list and, accordingly, had no influence over the government. The very same book was admitted later on behalf of the defendant ITAGAKI.

THE PRESIDENT: I do not know whether there was any difference in the excerpts from that book; there may not have been. But this has happened frequently throughout the trial, that the majority of the Members have decided perhaps one day to admit a certain document and decided at a later date to reject a similar document. It may be due to some change in the constitution of the Court, or it may be due to a change of attitude on the part of one Member of the Court. I do not know how you are going to get out of that where you have eleven judges.

MR. McMANUS: Well, if the Court please, it--

THE PRESIDENT: I know of no way to get out of that.

MR. McMANUS: Well, if Your Honor please, I cannot see how a similar document or practically the same type of document should be admitted for other defendants and excluded against another one. It does

not seem just.

THE PRESIDENT: I might not be fair to the Member who changes his mind; he may see some difference which may escape the others.

MR. McMANUS: Incidentally, Your Honor, that particular book received exhibit No. 3300, the excerpts, 3300-A, B and C, pages 30,092-93-95-97 of the record.

THE PRESIDENT: I have commented on these matters from the bench. I am not saying something in chambers that I would not say in court. That has happened, and I have considered it, and I do not know how we are going to get out of it, Mr. McManus, especially where you have a court differently constituted at certain times.

I remember saying in court one day that had a certain document which was either admitted or rejected then come for consideration earlier, it might have been admitted or rejected, as the case may be, as far as I can judge, according to the constitution of the court. Well, are we to go over all these cases and say, now we shall have a reviewing; we shall review our decisions? There may be quite a few.

MR. McMANUS: If the Court pleases, I thought possibly maybe sufficient explanation might not have been made to the Court because we happened to be pressed

for time, being the first one to present our case, and I thought possibly if the Court would take that into consideration, that maybe some of these rejected documents might be reconsidered by the Tribunal. And I would appreciate it if Your Honor could put it to the other Members of the Tribunal to determine whether or not they might entertain this motion to reconsider it.

THE PRESIDENT: Then there is another point, that one counsel may make a point that another does not make and it may appeal to one or more judges. It may or may not be a good point, but it may appeal. Those things happen.

MR. McMANUS: Well, Your Honor, I have a few others, just a few others here I should like to continue with, if you don't mind.

ARAKI's speeches at the Liet (defense documents No. 1822, 1825, 1934) were submitted, being the official record of his official speeches, but they were rejected (pages 28,445-28,472 and 28,475 of the record) except No. 1822, on the ground that they were repetitive. The contents of these three documents were entirely different from each other, and the time was also different. Such refusal as this never happened for other defendants after that.

Articles of the Tokyo Asahi newspaper (defense documents No. 2190, 2547, 2548, 2178, 2194 and 2123) were also rejected (page 28,591). Apart from the fact that this was the real first-class newspaper of largest circulation, these were the only available pieces of evidence to show ARAKI's attitude and principle in those days because other such type documents were destroyed. Strange to us, many newspaper articles were admitted in evidence for other defendants at later days; besides, newspapers had been admitted for the prosecution, at page, particularly, 34,595 of the record.

ARAKI's interview with several leading pressmen (defense documents 2136, 2137, etc.) were rejected (pages 28,250-253). The reason given was as follows:

"A good conspirator can say a very good thing which he does not mean to journalistic people. It's no use to say something good on Saturday or even Friday when he committed murder on Thursday."

THE PRESIDENT: I do not recognize that language; it may be the substance. I did not say that; I know that.

MR. McMANUS: I believe it was Mr. Carr who made that argument.

THE PRESIDENT: Did he?

MR. McMANUS: Carr; yes.

THE PRESIDENT: It is certainly not my language.

MR. McMANUS: We contend it is an infringement of the Charter to refuse acceptance of evidence because of its credibility. The Tribunal had adopted a policy to the prosecution to accept all evidence as long as they were outwardly qualified as evidence. It is regrettable that this policy was somehow changed and such generous acceptance was not administered for the defense. It is more so when we consider that the charge of "murder on Thursday" had not been clearly established by the prosecution.

That ARAKI had an interview with Lord Lytton was described in the Lytton Report, and we considered this was most important evidence, in connection with the Lytton Report, to show the attitude and conduct of ARAKI during the Manchurian Incident. However, this was rejected by the Tribunal as repetitive and irrelevant. Because of the important evidence contained in this document, we ask for the reconsideration of the Tribunal of this document.

Articles of Yomiuri and Kyushu Nichi-Nichi newspapers were presented to show that ARAKI was eager to avoid war and to bring about peace, and that ARAKI was far from advocating war against the Soviet Union.

This was a direct refutation against prosecution charges, but was rejected.

"Be Glory on World's Peace and Humanity" (defense document 535) was a book containing speeches of ARAKI to express to the foreigners living in Japan his ardent desire for peace. In this book he disclosed his aspiration of making Japan an initiation of world's peace. We consider this was good evidence to show that ARAKI had not any aggressive idea. This book was rejected as irrelevant (page 28,512), but we see many evidences of a similar nature which had the same extent of relevancy with the charge, where such documents were admitted.

"Yo[illegible]h and Culture" (defense document 268) was also rejected by the Tribunal (page 28,521). It was once emphasized by the Tribunal that it did not matter what "Hakko Ichiu" meant. It mattered how it had been interpreted by the defendants. ARAKI explained in this book his interpretation of this expression and said Japan, according to this doctrine, should never invade the foreign land. We consider this is very important testimony, bearing every relevancy with the point at issue.

Witnesses YAGASAKI, MAEDA, HATOYAMA were either ARAKI's secretaries or colleagues in the cabinet.

Their testimony was important to show the ideology and belief of ARAKI, but it was rejected as being irrelevant. The same type of evidence was accepted for other defendants later, such as in the case of the accused HATA.

Witness NASU was one of the very few people to whom ARAKI had talked unreservedly, and was accordingly an important witness to testify that ARAKI had always rejected use of force for aggression and territorialism. He was in a position to show that ARAKI, from his principle, was against amalgamation of Korea. Such important evidence as this was also rejected as being irrelevant.

By the above, we tried to show how ARAKI was prejudiced in the presentation of evidence. In order that he may be accorded the same extent of generous treatment as other defendants, we request the reopening of ARAKI's case so that additional evidence may be tendered.

THE PRESIDENT: My colleagues will see or read what you say, Mr. McManus; but it is going to be very difficult to review decisions on the admission or rejection of documents. At the present moment I can only see one course for you to pursue, and that is, if there is any review of this case, as there will

be on sentences, to have these matters pointed out, if necessary, to the reviewing authority. You may or may not get an opportunity to address him. I do not think you will, actually. I do not know what the practice is in these reviews of military court decisions.

MR. McMANUS: If Your Honor pleases, yesterday I came in to speak informally to request whether or not, in your opinion and the opinion of the other Members of the Tribunal, I should make this motion in open court or in chambers. Now, will Your Honor consider this as part of the record as a chamber proceeding?

THE PRESIDENT: There is something about that, I think, some decision covering chamber proceedings. We have them all recorded for the very purpose of putting them with the record so they may be regarded as part of it.

MR. McMANUS: The reason I am bringing the point out now is that evidently Mr. Blakeney's case may close sooner than we expected; consequently, if Your Honor wanted a chamber proceeding to make the formal application, I would have to have made it, I believe, with Mr. Lynch maybe today to be heard tomorrow. But seeing that Mr. Tavenner is here,

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possibly this could be considered as an ordinary chamber proceedings without such formal application.

THE PRESIDENT: Yes, I am regarding it as such.

MR. McMANUS: Thank you, Your Honor.

THE PRESIDENT: We waive all our rules for the purpose of having this regarded as an ordinary application in chambers. You have no objection, Mr. Tavenner?

MR. TAVENNER: No, sir.

THE PRESIDENT: I will bring both matters, both Mr. Cunningham's and yours, before the Judges the first opportunity, which will be tomorrow morning about nine o'clock, and I will let you know what they think as soon as I get the decision.

MR. YAMAOKA: Mr. President.

THE PRESIDENT: Yes, Mr. Yamaoka?

MR. YAMAOKA: I am here since I have a related problem, and although I did not have an opportunity of making a definite appointment with Your Honor, I wonder if I might make an inquiry in order to obtain direction, Your Honor's direction, as to further procedure in the HIROTA case.

If Your Honor will recall, in the opening statement a reservation was made, requesting the

presentation at a later stage of certain evidence which was either then being processed in foreign countries, or en route. And then at the close of the case, since that evidence had not arrived, we did make a reservation requesting permission to present it later. The documents, naturally, have since arrived. Moreover, as Your Honor will recall, we sent interrogatories to Sir Robert Craigie and obtained his replies by cable also, and they are now all prepared for presentation.

In the light of these reservations, we were wondering whether it would be necessary for us to make a formal application to the Tribunal to reopen HIROTA's case, or whether we could just make it in open court and proceed?

THE PRESIDENT: I think you had better make all these applications in chambers, Mr. Yamaoka.

MR. YAMAOKA: I see.

THE PRESIDENT: That is the wish of the Judges. They save time by reading the application in chambers and coming to a decision as to whether there should be any proceeding in court.

It may be that the matter would be of such importance that you would insist on a hearing in court.

MR. YAMAOKA: Yes.

THE PRESIDENT: I say nothing of that, of

course. I cannot take the court business dealings and deal with them in chambers.

MR. YAMAOKA: These requests were made before the Tribunal, and I was wondering whether I could proceed right in open court in the light of that, that is all. Frankly, we had been going on that assumption.

THE PRESIDENT: I should like to have a preliminary consideration in chambers; the Court would like to have it.

MR. YAMAOKA: Yes.

THE PRESIDENT: So that in HIROTA's and similar cases, you had better make an application in chambers to me on the same lines as Mr. McManus' application, and Mr. Cunningham's. They are both for the reopening of their cases.

MR. CUNNINGHAM: It seems as though there is a misunderstanding on when mitigation evidence should be introduced. There is no sense in introducing mitigation evidence before decision?

THE PRESIDENT: Well, I do not know what the Americans think, but we do not do it in British courts. You find out whether there is any need for it first; that is, after the verdict.

MR. FURNESS: From the Court's statement

on what procedure should be done it does not appear that way.

THE PRESIDENT: It doesn't. It appears that you will give it now.

MR. CUNNINGHAM: Nobody admits that they are guilty enough to offer evidence in mitigation now.

MR. FURNESS: On that basis before decision, we do not know what mitigation means, except superior orders.

THE PRESIDENT: I suppose that is what the Court had in mind, superior orders and that type of thing -- superior orders alone, perhaps.

MR. CUNNINGHAM: We have two or three types of procedure: one, to allow defendants to say something before judgment is passed upon them, or to allow the defendants to offer evidence in mitigation after the announcement of the judgment of guilty or not guilty.

THE PRESIDENT: It may be that if the Court realizes there is a difficulty about giving evidence in mitigation before verdict they will review that; because you are taking the stand that it may be prejudicial to give it; it may make an assumption of guilt?

MR. CUNNINGHAM: Well, it is purely nonsensica

to admit anything, to say, "Well, even if I am not guilty, I am going to say that this is my excuse or reason why I shouldn't be punished." It struck me as very peculiar when I saw that order that came out that says it should be introduced.

THE PRESIDENT: I think that is the practice in some of the continental countries, in the European countries.

MR. CUNNINGHAM: In courts-martial we have that order of things. They, say, make their finding of guilty or not guilty, and then they give the defendant a chance to offer his past record, and so on, in mitigation before they pass sentence. And that is probably what someone had in mind when they wrote that Charter, or wrote that decision, but it does not apply in this case.

THE PRESIDENT: We will have to decide that quickly because that evidence in mitigation should, according to the ruling, be given after UMEZU's case and the other cases that have yet to be completed.

MR. YAMAOKA: It does state, as I recall, Your Honor, that it will be presented after the close of all the evidence. I believe those were the words.

THE PRESIDENT: Before the summations.

MR. YAMAOKA: Yes. So we were wondering,

also, whether that meant after the close of the prosecution's rebuttal and any surrebuttal, if we may have it, or whether it meant after the close of our own case.

THE PRESIDENT: The purpose may have been to save recalling the witnesses; I do not know. They are so scattered all over the world, aren't they?

MR. YAMAOKA: Yes, they are.

THE PRESIDENT: And that may have been one of the purposes to provide for mitigation evidence to be given at that stage, although the purpose is likely to be defeated anyhow, because you have to go back nearly eighteen months for the first witness.

MR. CUNNINGHAM: I thought we might restrict that, or might have been intended to be restricted in the Charter to evidence concerning the official positions and the lack of exercise of moral choice in the performance of the duties. That seems to me to be the reason why that term "mitigation" was put in there as contemplated by the Charter.

THE PRESIDENT: That may well be, yes. That is so. Well, all of it will be referred to the Judges.

MR. McMANUS: Your Honor, just one point. Your Honors, I presume, will make a decision with or without my making this statement in open court, unless

I am so directed by you?

THE PRESIDENT: Yes, I will let you know.

MR. McMANUS: All right; thank you.

THE PRESIDENT: I do not think you will have any right to get up and ask us to review our decisions, though, on evidence; not in court.

MR. McMANUS: In any event, possibly the original argument concerning this surprise witness, TAKEBE, being produced and the change of affidavit--

THE PRESILENT: That may be. But there was some statement made in court to meet that further Russian evidence.

THE PRESILENT: Thank you, Your Honor.

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(Whereupon, at 1645, the proceeding was concluded.)

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