

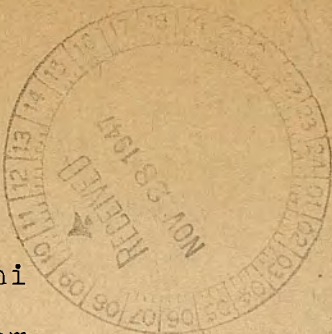
ORDER OF PROOF

SUPPLEMENTARY

Defendant: OSHIMA, Hiroshi

Counsel: Owen Cunningham

28 November 1947



Def. Doc. 2728-A Fenwick's excerpts
2793 Digest of International Law - Hackworth
2827-A Excerpts from Experts on International Law
2827-H Excerpt from American Journal Inter. Law
2727-B Feller & Hudson
322 Draft Convention 1932
323 Havana Convention
2728-B Feller & Hudson
2713 Shirer's Berlin Diary
2729 Treatment of Diplomats after Last War -
Garner
2836 Corbett - McLeod's Case
2797 Survival of Immunity - Biggs
2826 Oppenheim - Diplomatic Privileges Generally
2843 Fenwick
2803 Dept. of State, Bull - Experts on Nurnberg

ORDER OF PROOF

RUNNING COMMENTARY

Supplementary

Defendant: OSHIMA, Hiroshi

Counsel: Owen Cunningham

In the following series of documents it is suggested that International Law regulates the privileges and immunities which follow the official acts of an ambassador. It is contended that the ordinary consequences do not follow his acts but attach only to his office and to his government. That his exemption from personal responsibility is permanent. That his privilege of freedom from trial binds third powers as well as the nation to which he is accredited. That the law is so well established that mere reference here to the general rules is all that will be made. A brief of the cases supporting the theory will be filed with the argument on summation. The following documents are presented only for the purpose of emphasizing the present state of the law.

Defense Document 2728-A

To corroborate the evidence of the accused OSHIMA in that it was his duty to carry on his relations with the German foreign Minister and that his acts were recognized in International Law as acts of state and in no sense personal, we offer Defense Document 2728-A, an excerpt from "International Law by Fenwick", 2nd Edition. Fenwick is one of America's outstanding scholars of international law and is now legal adviser in the State Department. We offer to read only parts of this excerpt.

Defense Document 2793

For the purpose of showing the present state of the law on the duties of Military Attaches in international relations and the responsibility of an ambassador for his official acts, we offer Defense Document 2793, an excerpt from "Digest of International Law" by Green Haywood Hackworth, the U.S. member on the UN World Court.

We also offer this excerpt from Chapter XIV, Vol. IV, Pages 401-402 and 460-61, to show the force and extent of the obligation of nations to recognize their restraints imposed by the law of nations.

To prevent referring to this excerpt again, we offer to read quotations from Pages 472-73-74 (Non-interference in Politics).

Defense Document 2827-A is an excerpt from "American Journal of International Law", Vol. 26, No. 2, April, 1932, Pages 10, 11, 13, which shows that in the preliminary discussions which were directed toward the codification of International Law, the subject of ambassador's immunity was one of the major topics and according to the report was "ripe for codification". I offer Defense Document 2827-A and offer to read only the bottom of Page 1 and top of Page 2.

Defense Document 2827 is offered but will not be read. It is only a basic document upon which 2827-A is based.

Defense Document 2827-H

On Page 3, first paragraph, of Ambassador OSHIMA's affidavit, it is stated, "My direct approach to the German government was naturally through Foreign Minister Ribbentrop."

The law of international relations requires this procedure. There was no choice as we show by Defense Document 2827-H, an excerpt from "American Journal of International Law", Vol. 26, No. 2, April 1932, Art. 13, Sec. 3, Havana Convention. We offer this excerpt into evidence and offer Defense Document 2827 for identification.

Defense Document 2727-B

On Page 15, item 9, the accused explains his part in the negotiations for a treaty with Germany. In support of his position that he had a legal right and duty to represent his state in such an undertaking, we offer Defense Document 2727-B, an excerpt from "Diplomatic and Consular Laws and Regulations" by Feller and Hudson, Vol. II, Page 1253, entitled 'Instructions to Diplomatic Officers' and offer to read the document.

Defense Document 322

For the purpose of showing that the rights of ambassadors extend not only to the receiving state but extend to his transit to and from his post, we offer Defense Document 322, an excerpt from "26 American Journal of International Law" (Supp. 1932) P. 22, especially Art. 15, an excerpt taken from Hudson's Cases on International Law, 2nd Ed., P. 794-5.

Defense Document 323

For the purpose of showing that an ambassador is exempt from criminal process, under International Law, except by the courts of his own country, we offer an excerpt from the Convention on Diplomatic Officers taken from "4 Hudson International Legislation", P. 2385, and offer to read only Article 19 which states our position. We offer Defense Document 323 in evidence.

Defense Document 2728-B is offered to show that the purpose of the special privilege afforded to an ambassador is to secure to him the fullest possible freedom in the discharge of his official duties. We offer excerpt from "Cases on International Law" by Fenwick and offer to read only the second paragraph.

Defense Document 2713

We now offer Defense Document 2713 for the purpose of showing that in international relations the privileges and immunities are so well recognized that even in the midst of hostilities all of the formalities are followed. Our question here is, "How far do the privileges extend?"

Defense Document 2729

For the purpose of showing that the custom of preferential treatment of ambassadors was followed after World War I, we offer Defense Document 2729.

Defense Document 2836

To show that before the Charter of this Tribunal the established law of nations, recognized in the United States and England, two nations complaining here were embodied in the famous "McLeod Case" which is reported in "Pitt Corbett's Cases on International Law". If the Charter is now the law, the rules laid down in McLeod's case are offered in mitigation to lessen the responsibility contemplated by the Charter. For the light which it bears on the responsibility of agents for acts of state, I now present Defense Document 2836.

Defense Document 2797

It has been suggested by some here that immunity ceases at the enemy's borders but it is my contention that immunity survives and is permanent. I base this contention on a statement made by one of America's most distinguished writers on International Law, Edwin Borchard, who by the way was offered the position of adviser to this Tribunal. He says, "I would insist on the immunity accompanying the ambassador for life, otherwise he would be exposed to criminal prosecution for official acts." I offer Defense Document 2797.

Defense Document 2826

For the purpose of showing that ambassadorial immunity is the measure by which other officials engaged in international relations are protected, including "Judges of the International Court of Justice", we offer Defense Document 2826, an excerpt from Oppenheim's Vol. 1, P. 734-739, incl.

Defense Document 2843

To show that individuals are not the subjects but only the objects of International Law, I now offer Defense Document 2843, an excerpt from Fenwick's International Law, which states the present state of the law. This is an authoritative statement and coincides with the views expressed by all writers on international law, until Nurnburg. From the wholesale criticism of the Nurnburg principles, I contend that this excerpt states the present state of the law on individual responsibility. At least, it is worth consideration.

Defense Document 2803

At Page _____ of the transcript, the President, speaking for the court, suggested that the U.N. nations, then in session, were discussing the incorporation of the Nurnburg principles, which greatly resemble the rules being applied here, for the purpose of codifying them as a part of international law. For the purpose of showing the present state of that matter and to emphasize that the Nurnburg and Tokyo principles will not, at least not in our time, become law anywhere, I present Defense Document 2803, a report of the committee of experts who were appointed for that purpose.