

28 January

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Pentecost

I N D E X

INDIVIDUAL MOTIONS TO DISMISS

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Tuesday, 28 January 1947

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

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The Tribunal met, pursuant to adjournment,
at 0930.

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Appearances:

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For the Tribunal, same as before with the
exception of: HONORABLE JUSTICE NORTHCROFT, Member
from New Zealand, not sitting.

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LORD PATRICK, Member from the United
Kingdom of Great Britain, now sitting.

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For the Prosecution Section, same as before.

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For the Defense Section, same as before.

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The Accused:

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All present except OKAWA, Shumei, who is
represented by his counsel.

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(English to Japanese and Japanese

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to English interpretation was made by the
Language Section, IMTFE.)

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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Mr. Smith.

4 MR. SMITH: If your Honor please, if it is
5 appropriate I would like to suggest a couple of correc-
6 tions in the record of yesterday's proceedings. The
7 first correction is on page 16,267 of the record, the
8 last three words in the second paragraph. The words
9 "law in statute" should be stricken and in place of it
10 should be "lower in stature."

11 The next, page 16,268 of the record, in the
12 first sentence, the first sentence should be corrected
13 to read, "A majority of the defendants in the box have
14 joined in the present motion and it has been amplified."

15 THE PRESIDENT: Captain Brooks.

16 MR. BROOKS: Now comes KOISO, Kuniaki, by
17 his counsel, and respectfully moves the Tribunal to
18 dismiss each and every one of the Counts in the Indict-
19 ment against said Defendant on the ground that the
20 evidence offered by the prosecution is not sufficient
21 to warrant a conviction of said Defendant.

22 Before stating the argument in support of this
23 motion to dismiss, we submit our legal basis therefor,
24 and state that to determine whether a crime has been
25 committed, it must be established:

1 1. That an act was committed which was
2 sufficient to constitute a crime objectively, i.e.,
3 having the objective elements of a crime.

4 2. That the accused had the intention or
5 knowledge of committing said crime, subjectively, i.e.,
6 he must have committed the act with the knowledge of
7 facts or subjective elements, that they would rightly
8 constitute the said crime, and we submit that the prose-
9 cution has failed to prove that KOISO committed any
10 act which constituted a crime objectively or that he
11 had guilty knowledge that any act he committed was wrong,
12 or that he committed any act with knowledge subjective-
13 ly that it **constituted a crime.**

14 We submit it is necessary for the prosecution
15 in order to establish crimes against peace to prove
16 that planning and preparation of a war was carried out
17 with subjective knowledge or intention to initiate or
18 wage a war of aggression or a war in violation of
19 international law, treaties, agreements or assurances,
20 or a war must have been initiated and waged with the
21 knowledge that the war was an aggressive war or a war
22 in violation of international law, treaties, agreements
23 or assurances.

24 A crime against peace can not be said to have
25 been committed where ones actions were without the

1 foregoing knowledge and where the prosecution's evidence
2 points to an emergency situation and to a prevailing
3 international situation that caused the initiation of
4 measures for self-defense; or where the accused came
5 into a responsible position without the foregoing know-
6 ledge or intention and carried out the duties of his
7 office as a patriotic citizen of his country in what
8 he believed to be a war of self-defense.

9 All wars are not criminal, and the burden of
10 proof is on the prosecution to show the accused had
11 knowledge that the said war was one of aggression or
12 in violation of international law, treaties, agreements
13 or assurances, and that the accused did not rely on
14 official statements that his government was exercising
15 its exclusive, sovereign prerogative to institute
16 and carry out measures on the basis of self-defense.

17 Since the causes of a war are complicated
18 and divergent, it is difficult for any one other
19 than the sovereign nation itself to analyze what
20 action is a measure of self-defense and even the govern-
21 ing body of a country may be wrong in its judgment and
22 decision and statement, due to omissions in its infor-
23 mation or misinformation, or misunderstanding when
24 coupled with the difficulty of understanding and
25 analyzing the real situation prevailing inside an

1 opposing country, especially when the relations of
2 countries are strained and the sentiment, passion and
3 pride of the people is aroused.

4 Therefore, assuming it was clear after peace
5 has been restored and abundant revealing information
6 has been collected from the various countries concerned
7 that in the light of difficult and profound theory of
8 international law, treaties, agreements and assurances,
9 a war has been waged that was illegal or aggressive,
10 these facts alone do not establish that the officials
11 of the country concerned were cognizant that said war
12 was or would be considered illegal or aggressive. The
13 prosecution must show by facts and evidence that at
14 the outset and at the time thereof the accused had such
15 guilty knowledge beyond a reasonable doubt which they
16 have failed to do.

17 Since international law, treaties, agreements
18 or assurances require highly technical knowledge in
19 relation to the interpretation thereof, together with
20 the circumstances enumerated above, it becomes
21 impossible for an individual or the general public to
22 form an independent judgment as to the legality of
23 a war and they are compelled to listen and depend
24 naturally upon government announcements and opinions
25 of other men of authority and as in the case of an

1 interpretation of the reservation of the right for
2 the use of self-defense mentioned in the Kellogg-Briand
3 Pact since a clear and concise definition has not been
4 reached by international agreement and proclamation,
5 the exclusive determination and interpretation thereof
6 is an individual sovereign right of each nation.

7 When we consider the above stated points,
8 we readily understand why in the Nuernberg judgment
9 they did not find guilty of crimes against peace any
10 defendant who failed to attend those important confer-
11 ences at which Hitler confidentially expressed his
12 aggressive intention and only where the prosecution
13 proved beyond a reasonable doubt that those in this
14 small inner circle had guilty knowledge and intention
15 to act, to carry out Hitler's aggressive war plans,
16 did the Court impose penalty.

17 We submit that the finding of the Nuernberg
18 trial in relation to the "General Staff and High
19 Command" reaffirmed the principle that the simple
20 fact that an accused occupied a certain important
21 position at the time when a certain incident broke out
22 does not establish that said accused is guilty of a
23 crime against peace and a sharp distinction was made
24 between this and a criminal organization such as the
25 Nazi party of Germany. Here, the Cabinet, the Ministry

1 of War, other Ministries, the General Staff Office and
2 the Kwantung Army Headquarters have not been shown by
3 the prosecution to be criminal organizations, and the
4 occupation of a position thereon does not establish
5 the fact that the defendant was guilty of a crime
6 against peace.

7 If the prosecution has established that a
8 certain criminal act occurred in which several persons
9 participated, we submit that only those members of
10 said joint action can be held responsible for the
11 crime who had guilty knowledge that said act was a
12 crime, or whose official acts were carried out with
13 knowledge and intention to aid and assist or conspire
14 to commit said crime. Otherwise, we overthrow the
15 principle of law that in the case where a nurse pre-
16 pares medicine and administers it in accordance with
17 a doctor's prescription in good faith, or in the case
18 where the doctor who, without knowing the patient's
19 abnormal constitution, prescribed for him properly,
20 neither nurse nor doctor can be charged with murder
21 even though the patient dies as a result of taking the
22 medicine.

23 Moreover, in the ordinary criminal offense,
24 the actual relations or objective elements of the crime
25 are not very complicated, and belong in principle

1 to illegal acts; therefore, those who brought about
2 facts or objective elements which constitute the crime
3 can generally be presumed to have had knowledge that
4 their acts were criminal but this theory is only
5 followed where the burden of proof rests with the
6 defendant who contends his innocence.

7 In the case of a war the actual relations as
8 previously stated are not only complicated and
9 divergent but if there is a presumption it would be
10 that a war is not illegal. Therefore, except in a
11 special instance where a defendant is a member of an
12 organization which has been declared by a court of
13 justice to be criminal the burden of proof regarding
14 amlicious intention or guilty knowledge is on the
15 prosecution and has not been established by the evidence
16 presented against the defendant KOISO.

17 Mere knowledge by a defendant that following
18 a war or an act of hostility a change is brought about
19 in the territorial sovereignty of a certain area does
20 not establish that said war or act of hostility was
21 one of aggression or was intended to be one of aggres-
22 sion. For example, during World War I, the Allied
23 Powers occupied certain territories and countries,
24 and, after the war, made a part of them either their
25 own territory, or acquired same as mandated territory.

1 No one by reason thereof would accuse such countries
2 of having or of having considered this change as being
3 interpreted as being aggressive, or contemplated as
4 such either during the waging of the war or thereafter.

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1 We submit that simple declarations in news-
2 papers, or marshalling of various policies alone are
3 far from sufficient to establish that a plan for an
4 aggressive war existed. The Nuernberg finding clearly
5 stated this point:

6 "But in the opinion of the tribunal, the
7 conspiracy must be clearly outlined in its criminal
8 purpose. It must not be too far removed from the
9 time of decision and of action. The planning, to be
10 criminal must not rest merely on the declaration of
11 a party program, such as are found in the 25 points
12 of the Nazi party, announced in 1920 or the political
13 affirmation expressed in 'Mein Kampf' in later years.
14 The tribunal must examine whether a concrete plan to
15 wage war existed and determine the participants in
16 that concrete plan."

17 We further submit, that to be a participant,
18 guilty knowledge must be proven by the prosecution to
19 have existed on the part of the accused and to have
20 governed his actions.

21 In examining various counts under Group I,
22 Crimes Against Peace, we find their constitution ex-
23 temely complicated and hard to comprehend, and that
24 no clear charge with sufficient connecting and support-
25 ing evidence has been established against the defendant

1 KOISO, and we submit that KOISO had no connection
2 with the crimes charged, even if such a general and
3 abstract conspiracy as charged by the prosecution
4 existed. We further submit that such a charge by the
5 prosecution under Count I cannot be said to constitute
6 a crime against peace as set forth by Article 5 A of
7 the Charter of the Tribunal in light of the Nuernberg
8 decision above quoted. The prosecution has failed to
9 show that KOISO conspired with the defendants or other
10 divers persons. The prosecution's evidence (Court
11 exhibit 1278) shows KOISO was not intimately known
12 by other accused and members of the government, and
13 was considered by the Army circle to belong to a neutral
14 faction, and by government officials he was described
15 as a just, moderate and moral character, possessed of a
16 well-developed common sense. The prosecution has failed
17 to show that KOISO was member of either the Minseito
18 or Seiyukai political parties, or active in any other
19 political group or factions. The prosecution's evidence
20 establishes that the so-called March Incident and
21 October Incident of 1931 were domestic political issues
22 due to the corruption of domestic administration and
23 aimed at internal reform, and that there was no relation
24 between these incidents and any war or plan for war, as
25 was testified to by witnesses SHIMIZU, Konosuke;

1 TOKUGAWA, Yoshichika; and UGAKI, Kazushige; during
2 cross-examination on 26 June and 1 July 1946. (Court
3 record pages 1404-1410, 1411, 1418, 1419, 1626 and
4 1627.)

5 This testimony clearly shows that the defendant
6 KOISO was not a participant but that KOISO, by order of
7 his superior, prevented the carrying out of the incident
8 and caused the firecrackers to be used in the demonstra-
9 tion to be confiscated.

10 Court exhibit 179-C, an excerpt from KIDO's
11 diary, we submit is not reliable as it was based on
12 hearsay received by KIDO from HARADA after the incident
13 occurred. Since HARADA was not a participant in the
14 incident his information could only be based on rumors
15 unfounded on facts, many of which were circulating in
16 political circles. The above also explains why KOISO
17 was kept at a respectful distance by extremist political
18 factions. Furthermore, UGAKI, the War Minister in the
19 Minseito Cabinet which was then in power, could not
20 conceivably be expected to discuss a scheme for over-
21 throwing the Cabinet with Mr. MORI, a leader of the
22 Seiyukai, an opposition party. (Court record pages
23 1626-27.) Wherefore, defendant moves to dismiss
24 Count I of the Indictment.

25 On the 18th of September 1931, the time of

1 the Manchurian Incident, the prosecution's evidence
2 fails to prove that KOISO in any of the positions of
3 government occupied (Court exhibit 114) was in a position
4 of authority or responsibility, or was connected in any
5 illegal or criminal activity or conspiracy, and it was
6 therefore natural that in the opening statement pertain-
7 ing to the Manchurian Incident read by Prosecutor Darsey,
8 1 July 1946, there was no specific mention of defendant
9 KOISO.

10 The prosecution's evidence in this phase of
11 the case presented by the witness SHIDEHARA, Kijuro,
12 Minister of Foreign Affairs at the time of the Inci-
13 dent (Court record page 1385), and the testimony of
14 WAKATSUKI, Reijiro, Prime Minister (Court record page
15 1571) discloses that the defendant MINAMI, Minister
16 of War, supported SHIDEHARA's policy for localization
17 of the incident and assisted in carrying out this
18 policy. KOISO, Chief of Military Affairs Bureau under
19 MINAMI (Court exhibit 162), also acting under War
20 Minister MINAMI's orders, carried out his duties in
21 conformity with the SHIDEHARA policy, and the prose-
22 cution's evidence does not show any illegal or criminal
23 activity in KOISO's exercise of the functions and duties
24 of his office.
25

Later, on the formation, in December 1931, of

1 the INUKAI Cabinet in place of the WAKATSUKI Cabinet,
2 Premier INUKAI stuck to the policy of localizing the
3 Manchurian Incident (Court exhibit 161, court record
4 pages 1479-1480,) and Defendant ARAKI, War Minister,
5 supporting the same policy (Court record page 1489)
6 utilized Defendant KOISO, first in the capacity of
7 Chief of Military Affairs Bureau as theretofore, and
8 also later as Vice-Minister of War where KOISO's
9 authority and responsibility was very limited. (Court
10 record pages 14397, 14405 and 14406.)

11 On 8 August 1932 KOISO was appointed Chief of
12 Staff of Kwantung Army under Field Marshal MUTO,
13 Commander in Chief of Kwantung Army, where he executed
14 his duties in conformity with the orders of the Com-
15 mander in Chief, (Court record pages 2075-2076 and
16 2101-2102,) and in the belief that the administrative
17 duties assigned to him were in conjunction with the
18 subjugation of bandits, the maintenance and restoration
19 of peace and order, and for the protection of Japanese
20 and Korean residents and property rights under the
21 Japanese Government's previous steps taken in the exer-
22 cise of its sovereign right of self-defense, which was
23 generally accepted on the basis of a report of investi-
24 gation as testified to by witnesses SHIDEHARA, 25 June
25 1946, WAKATSUKI, 28 June 1946, and TANAKA, 8 July 1946.

1 We submit Defendant KOISO had no means or facilities
2 of his own to inquire into the state of affairs, and
3 was dependent on the announcements made by the Japanese
4 Government, and the prosecution's evidence fails to
5 establish that Defendant KOISO had guilty knowledge
6 that said incident was or would be considered an aggres-
7 sive act as alleged.

8 In connection with Court exhibit 230 it can
9 be inferred from the introductory part of this document,
10 entitled, "The Principles for Guiding Manchukuo," the
11 Second Division of the Army General Staff drafted this
12 in accordance with government policies decided by the
13 Cabinet (Court exhibit 222,) then seeking the advice
14 of the authorities on the spot as to the advisability
15 and practicality of the principles to be used, the
16 Second Division sent such rough drafts to the Staff
17 office of the Kwantung Army for their comments. Said
18 Staff officers in consultation with NAGATA, Chief of
19 Second Division of Army General Staff then in Manchukuo,
20 suggested revisions deemed necessary in view of local
21 conditions, and when approved by the Commander in Chief,
22 sent such draft back to the War Ministry. Therefore,
23 we submit that KOISO's actions in this matter were not
24 unlawful.
25

We further submit that any promotions received

1 by KOISO, as indicated in Court exhibit 114, were
2 based on length of service and followed as a matter of
3 course, and that certain technical transfers were made
4 in order to place him on the reserve list, as, for
5 example, his attachment to the General Staff on 18
6 July 1938, which was not meant to make him occupy any
7 effective function as a member of the General Staff
8 but made him eligible for retirement on the reserve
9 list, which was, in fact, done two weeks later, and
10 the prosecution's evidence does not supply any proof
11 that any promotion or change in position was an award
12 for or a part of any unlawful activity. Wherefore,
13 defendant moves to dismiss Counts 2, 18 and 27 of the
14 Indictment.

15 We submit that in relation to the China Inci-
16 dent that an examination of Court exhibit 114 will dis-
17 close that KOISO was not in any position where he could
18 have taken any part in the movement for autonomy for
19 the five North China Provinces (Court record page 2026)
20 nor in the outbreak of the so-called China Incident
21 resulting from the clash between Japanese and Chinese
22 forces, 7 July 1937, at Marco Polo Bridge near Peking,
23 KOISO was in Keijo, Korea, from 2 December 1935 until
24 15 July 1938 -- the brief shows 18; it should be 15.
25 Although KOISO was Minister of Overseas Affairs in the

1 HIRANUMA Cabinet from 7 April to 30 August 1939 and in
2 the YONAI Cabinet from 16 January to 22 July 1940, and
3 Prime Minister from 22 July 1944 to 7 April 1945, there
4 is no evidence connecting KOISO, or proving he partici-
5 pated, or had any responsibility for the military actions
6 that occurred, or were being carried on during said
7 periods of occupying said government posts. The
8 KONOYE Cabinet having adopted a policy of not enlarg-
9 ing the said conflict, negotiated with the Chinese in
10 the hope of coming to a solution, but failed and
11 succeeding cabinets failed in their efforts.

12 The military action necessitated by the con-
13 flict was solely in the prerogative of the Chief of the
14 General Staff, and the cabinet had no authority there-
15 in, as shown by the evidence of UGAKI (Court Record
16 page 1620), by SHIDEHARA (Court Record page 1389-1392)
17 and Court exhibit 179-L. Furthermore, the Japanese
18 Government having publicly declared that the outbreak
19 of the China Incident originated in self-defensive
20 action taken to protect Japanese residents and property
21 rights and against provocative Chinese acts resulting
22 from anti-Japanese propaganda, it was natural that
23 KOISO not having at his disposal any organization
24 or means to personally investigate such matters,
25 should give full credence to the declaration of the

1 government, and there is no evidence which indicates
2 that the defendant was cognizant, that the Chinese
3 Incident and the actions taken therein was or would
4 be considered unlawful or illegal as alleged and
5 the evidence does not show that he conspired or partici-
6 pated in any manner as charged or that his action in
7 the exercise of his duties and responsibilities in
8 any government position was unlawful or illegal, or
9 done with guilty knowledge or malicious intent to
10 conduct or assist in any unlawful act. Wherefore,
11 defendant moves to dismiss Counts 3, 6 and 28.

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1 We submit that in relation to the Anti-
2 Comintern Pact of 1938, renewed in 1941, the Tri-
3 Partite Pact of 1940, and the Cultural and Trade
4 Agreements signed between Japan in 1938 and 1939,
5 and the No Separate Peace Pact of 1941, the prosecution
6 contends that these agreements signed by the military
7 representative on behalf of their separate countries
8 were concluded with the view of obtaining the ends
9 of Count 5 in the Indictment, and preferred charges
10 thereunder against all persons participating in the
11 conclusion of said treaties and agreements. We
12 submit that Court exhibits 480, 483, 37, 38, 39 and
13 589 indicate this could not be true in regard to the
14 Anti-Comintern Pact and the Cultural and Trade Agree-
15 ments. As to the other pact, treaties and agreements,
16 in their conclusion, the will of the state was ex-
17 pressed by the signed instrument to preclude the
18 extension of hostilities and the aim of the aforesaid
19 pact was defensive and pacific as made clear by Court
20 exhibits 43, 554, 553-page 3, and 558-page 1. The
21 prosecution construes "Establishment of a Co-Prosperity
22 Sphere" to mean or indicate "Invasion." This is erron-
23 eous. States lying in geographical propinquity are
24 deeply affected by conditions of their neighbors, and
25 the above phrase means that countries with common

1 interests should unite their efforts to cooperate
2 and further their mutual prosperity taking into
3 consideration the resources and needs of their
4 respective people in a regional community, itself a
5 component and cooperating part of the universal
6 community, thus cooperating and contributing to the
7 progress of culture, well-being, and understanding
8 and taking advantage of the special abilities of
9 each to contribute thereto. Court exhibits 529-page
10 1, 553-page 3, 557-page 1, 558-page 1 and 2 indicate
11 that although misuse can be made of the term "Co-
12 Prosperity," in a sense which it originally does
13 not possess, it is improper and erroneous to give
14 it such meaning.

15 "Concerning war criminals of Germany, who
16 endeavored to drive Japan into a war with the U.S.S.R.,
17 the United States and Great Britain, the Nuernberg
18 decision did not question the treaty of alliance
19 between Germany and Japan but only stated, "Ribbentrop
20 attended a conference in May 1941 with Hitler and
21 Antonescue relating to Rumania's participation in the
22 attack on the U.S.S.R. He also consulted with Rosen-
23 berg in preliminary planning for political exploitation
24 of Soviet territories and in July, 1941, after the
25 outbreak of war urged Japan to attack the Soviet Union."

1 This confirms the error of the prosecution's view.
2 Moreover, defendant KOISO at the conclusion of the
3 Anti-Comintern Pact, 1936, was residing in Keijo,
4 Korea.--

5 THE PRESIDENT: Captain Brooks, we are not
6 bound by Nuernberg's findings of fact which may turn
7 on different evidence. That may prove to be in your
8 favor as well, perhaps, as against you.

9 MR. BROOKS: Yes, sir.

10 As Minister of Overseas Affairs in the
11 HIRANUMA cabinet in 1939 which was after Ribbentrop's
12 approach to Japan in the early part of said year,
13 cabinet opinion was divided as to concluding said
14 alliance, and KOISO opposed it and a committee of
15 those mostly concerned was set up to study this prob-
16 lem but they never reached a conclusion. (Court
17 exhibit 504; Court record, page 6108). The cabinet
18 fell 30 August 1939 as the result of the conclusion of
19 the Non-Aggression Pact between Germany and U.S.S.R.,
20 23 August 1939, KOISO resigned as Minister of Overseas
21 Affairs (Court record, page 5859, Court exhibit 114),
22 and took no part in the conclusion of the Japanese-
23 German alliance. On 16 January 1940 KOISO joined the
24 YONAI cabinet as Minister of Overseas Affairs, but in
25 this cabinet, the Prime Minister, YONAI, Foreign

1 Minister, ARITA, the defendant KOISO and others
2 opposed the conclusion of the Tri-Partite Alliance
3 during their tenure of office. Dissatisfaction on
4 the part of the Army, concerning this opposition,
5 caused the cabinet to fall 22 July 1940 and KOISO
6 was obliged to resign (Court exhibits 515, 520, 530,
7 531 and 532, Court record, page 5865-5866).

8 Court exhibit 523, a telegram from Ott to
9 Germany was offered during the Dutch East Indies
10 phase and is inconsistent, for at said time, KOISO
11 was Minister of Overseas Affairs in the YONAI cabinet,
12 and was told by TOKUGAWA, Yoshitomo, that Ott desired
13 to meet KOISO, although KOISO was not Minister of
14 Foreign Affairs, there was great concern in Japanese
15 Government circles as to the future of Netherlands
16 East Indies and French Indo-China, since they were
17 colonies of Netherlands and France, who had been
18 recently defeated by Germany. (Court exhibits 517,
19 518, 519, 520, 525, 526, 527 and 528). And also
20 because of the supervision of the South Seas Mandated
21 Islands, former German colonies, it was feared con-
22 flict might arise between Japan and Germany in the
23 future. Therefore, having obtained approval of Prime
24 Minister YONAI and Foreign Minister ARITA, to meet Ott
25 and sound out the attitude of Germany, unofficially,

1 a conversation took place, and KOISO pointed out he
2 had no authority to negotiate or responsibility in
3 such diplomatic matters as proposed by Ott. The
4 German Ambassador had many intimate friends in the
5 Japanese Army, as made clear in Court exhibit 498,
6 504, 508, 511, and if the Japanese Army had wanted to
7 sound German attitude concerning such an important
8 military operation in French Indo-China or Netherlands
9 East Indies, they would not have entrusted this to
10 KOISO, as he was not on specially good terms with
11 them, and was not even acquainted with Ott nor could
12 they converse without an interpreter. And, further-
13 more, military operations were outside the scope of
14 KOISO's jurisdiction.

15 The fact that KOISO was not of the KONOYE
16 political faction, and the fact that he was not on
17 especially intimate terms with the Army is pointed
18 out in exhibit 1278, pages 9-10.

19 Furthermore, contrary to Ott's observation,
20 KOISO withdrew from official life with the fall of
21 the YONAI cabinet, and for two years retired as a
22 private citizen engaged in agriculture (Court exhibit
23 114), and the KONOYE cabinet came in and KOISO being
24 opposed to conclusion of the Tri-Partite Pact, had no
25 expectations of holding cabinet positions therein.

1 Ott's reason for meeting KOISO who was opposed to the
2 Tri-Partite Pact in the anti-alliance YONAI and ARITA
3 cabinets is not clear and his telegram following
4 said meetings may have been calculated only to impress
5 his government with his efforts (Court record, page
6 5860, lines 4-16).

7 Furthermore, KOISO did not attend any of
8 the Imperial or liaison conferences or cabinet
9 meeting listed in Appendix E of the Indictment.
10 Therefore, the evidence of the prosecution has not
11 indicated that Counts 4, 5, 7, 8, 9, 10, 11, 12, 13,
12 14, 15, 16 or 17 implicate defendant KOISO. Wherefore,
13 we move their dismissal on behalf of KOISO.

14 We submit that the portion of Court exhibit
15 730 tendered by the Soviet prosecutor, dealing with
16 the defendant KOISO is inconsistent with the fact
17 that KOISO was Chief of Staff of the Kwantung Army
18 from 8 August 1932 to 5 March 1934, and Minister of
19 Overseas Affairs from 7 April to 30 August 1939, and
20 since the witness was executed in Soviet Russia and
21 the right to cross-examination was thereby prevented,
22 the probative value and consideration of this document,
23 under the circumstances, is dubious. Court exhibit
24 668 is contrary to fact and absurd in stating that
25 KOISO issued Education Ministry instruction. This

1 witness was also executed and cross-examination
2 prevented thereby. The incident between Japanese
3 and Soviet troops in the Khalhin-gol River area occurred
4 when KOISO was Minister of Overseas Affairs in the
5 HIRANUMA cabinet. The evidence shows this to be a
6 local incident over an undefined boundary line and
7 was settled among Japan, Manchukuo, Mongolia and the
8 Soviet Union, without the fighting spreading outside
9 the area in question. Moreover, the movement of
10 armed forces in areas outside Japan is under the
11 jurisdiction of the Army General Staff and not under
12 the jurisdiction of the cabinet, as is clear by the
13 testimony of various witnesses (Court record, pages
14 1623, 1389, 1392, etc.).

15 We submit that when defendant KOISO occupied
16 the post of Prime Minister during the Pacific War,
17 22 July 1944 to 7 April 1945, this war had already
18 been initiated and was being waged by the TOJO cabinet,
19 and on the fall of said cabinet, because this military
20 situation could not be left to itself, on recommenda-
21 tion of senior statesmen, after investigation of
22 KOISO's past record, KOISO was commanded by the
23 Emperor to form a cabinet in cooperation with admiral
24 YONAI, and to devote their efforts toward saving their
25 country. (Court exhibit 1279).

1 These were the circumstances of KOISO's
2 undertaking the Premiership, and it was not as a
3 result of any request by the TOJO cabinet to take
4 charge of the situation, and KOISO's activity and
5 duties of said office were understood to follow the
6 Imperial Rescript, issued on 8 December 1941 (Court
7 exhibit 1240), proclaiming this to be a legitimate
8 war of self-defense in the exercise of the exclusive
9 sovereign rights to take defensive measures.

10 Therefore, KOISO, as a citizen of this
11 country, and unrelated in any way with planning,
12 preparing or initiating this war, had no alternative
13 but to place reliance and trust on said declaration,
14 and in doing so, had no knowledge that he was com-
15 mitting any unlawful act. The prosecution's evidence
16 does not prove or indicate that KOISO had knowledge
17 that this was an illegal war as alleged, and, we sub-
18 mit that KOISO cannot be regarded as having waged an
19 illegal war merely on the ground that he assisted in
20 conducting affairs of state as Prime Minister. KOISO,
21 by reason of his office as Premier, in accordance
22 with regulations previously passed, unavoidably became
23 president of the I.R.A.A. which was originally a public
24 organization for carrying out the ways of the subject,
25 (Court exhibit 167, 168, Court record page 1643 and

1 1946) and it was not an organization such as the
2 Nazi Party, and did not have any political platform
3 advocating aggressive war; moreover, actual leader-
4 ship was entrusted to the Vice-President, a minister
5 without portfolio (Court record, page 637).

6 The Administrative Speech delivered in the
7 Imperial Diet (Court exhibit 829) is what would be
8 expected in the speech of any war time premier and
9 it is clear that similar to a platform of a political
10 party this cannot be taken to mean the waging of an
11 illegal war--as discussed in the Nuernberg decision.

12 Wherefore defendant moves to dismiss the
13 balance of counts in Group I, that is: Counts No.
14 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 26, 29,
15 30, 31, 32, 34 and 36.

16 We submit that in relation to the counts
17 under Group II -- murder, and Group III -- conventional
18 war crimes and crimes against humanity, the prosecution
19 has failed to establish the proof in any way of the
20 existence of facts as related to the accused KOISO
21 as charged in counts thereof. Moreover, since the
22 movement of armed forces outside of Japan come primarily
23 under the jurisdiction of the Supreme Command, and are
24 controlled exclusively by the Chiefs of the General
25 Staff, the responsibility thereof has no connection

1 with any office held by KOISO during said time.

2 Furthermore, prisoners of war outside of
3 Japan are the responsibility of the Commander in
4 Chief of the Army in the field, where as the Commander
5 in Chief of the respective place concerned is respon-
6 sible for executing the policy for the treatment of
7 prisoners of war in Japan proper. Anyone outside
8 of the Army, even the Prime Minister, has no authority
9 to intervene in these matters, and no responsibility
10 in connection therewith. Moreover, the Prime Minister
11 has no authority to punish or prevent illegal acts in
12 the Army (Court record, page 575, 586, 588, 594, 595,
13 596, 597, 599, 600, 601, 1389, 1392, 1862, and Court
14 exhibit 68, 70, 74, 75, 78, 79, 80 and 92).

15 Also, Court exhibit 114 makes clear that
16 defendant KOISO never filled the post of Minister of
17 War, Chief of the General Staff, or Commander in Chief
18 of any front line armies, and was not in the service
19 of the army after 29 July 1938.

20 Furthermore, protests by foreign countries
21 concerning treatment of prisoners of war were as a
22 matter of routine transferred by the Foreign Office
23 to certain prisoner of war administration offices
24 under the Ministry of War, where such matters were
25 forwarded to the respective commander in the field

1 responsible for supervising and reporting as to pris-
2 oners of war and other internees. None of this
3 information whatever thereanent was forwarded to
4 the Prime Minister (Court exhibit 2170, 2174, Court
5 record, last line--page 14286 and page 14287; also
6 testimony of Tadakatsu SUZUKI in afternoon session of
7 the Court, 17 January 1947).

8 Whereas, the accused KOISO, as stated
9 above, does not fall under any of the crimes against
10 peace in Group I, it would be quite clear that there
11 is no basis for any charge in relation to the counts
12 relating to crimes of murder in Group II, or conven-
13 tional war crimes and crimes against humanity in
14 Group III. Wherein, counsel moves to dismiss Counts
15 44, 48, 49, 50, 51, 53, 54 and 55.

16 The defendant KOISO voluntarily presented
17 himself to the authorities for trial and thereafter
18 pleaded not guilty at the time of arraignment and
19 cooperated by way of interrogatory to place the truth
20 before this Tribunal so that his actions might be
21 judged in the light of the circumstances as set out
22 above and his name be cleared of any implication
23 that he was knowingly a participant in any dishonor-
24 able act or guilty of malicious or unlawful intentions
25 in carrying out his obligations in behalf of his native

1 land and since the sands of time are running short in
2 his life and because he has been deprived of liberty
3 in Sugamo Prison more than a year, counsel confidently
4 and most earnestly requests the Tribunal, and firmly
5 believes that your Excellencies, Mr. President and
6 Members of the Tribunal, all of whom have deep
7 understanding concerning such matters, after solemn
8 deliberation and reflection, setting aside the
9 prejudices and passions aroused by the holocaust of
10 war, will understand and discern the difference
11 between loyal devotion to duty, however mistaken,
12 as distinguished from guilty knowledge and malicious
13 intention to commit evil, and for the reason that
14 there has been a total failure on the part of the
15 prosecution to offer any substantial evidence to
16 support any of the counts of the Indictment against
17 said defendant will enter an order dismissing the
18 Indictment as against Mr. KOISO and summarily order
19 his discharge from custody.
20

21 All of which is most respectfully submitted.
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1 THE PRESIDENT: Mr. Mattice.

2 MR. MATTICE: May it please the Tribunal,
3 omitting the caption and the signatures:

4 COMES NOW the accused MATSUI, Iwane, and moves
5 this Tribunal to dismiss the Indictment herein as to
6 him, for the reason and upon the ground that the
7 evidence adduced by the prosecution is insufficient
8 to justify a conviction.

9 Inasmuch as the accused MATSUI is not charged
10 in all of the Counts of the Indictment this memorandum
11 will be directed first to the various counts for the
12 purposes of clarity.

13 1. The evidence is insufficient to connect
14 the accused MATSUI with the charges contained in
15 Counts 1, 2, 3, 4 and 5 to the effect that he with others
16 participated in the formulation or execution of a plan,
17 the object of which is as stated in each of the Counts.
18 The evidence thus far adduced shows that the accused
19 MATSUI was called out of retirement and appointed
20 Commander of the Shanghai Expeditionary Forces on 15
21 August 1937 and that he was relieved of his post in
22 February 1938. Nowhere else in all of the evidence
23 adduced in this case does MATSUI appear. The military
24 actions in China had commenced and had been under way
25 for a long period of time before MATSUI was appointed

1 as aforesaid.

2 2. There is not sufficient evidence to warrant
3 his conviction in charges 6, 7, 8, 9, 10, 11, 12, 13,
4 14, 15, 16 and 17, where he is charged with others as
5 planning a war of aggression and a war in violation
6 of International Law, treaties, agreements and assurances
7 against countries named in those Counts.

8 3. He is not charged in Count 18.

9 4. In Count 19 he is charged with others in
10 having initiated a war of aggression and in violation
11 of International Law against China. The evidence adduced
12 shows that the military actions in China had been
13 commenced and had continued for a long period of time
14 before MATSUI had any connection with it.

15 5. MATSUI is not charged in Counts 20, 21,
16 22 and 23, and in addition to what was stated in this
17 motion it should be stated that he is also not charged
18 in Count 24 and by reason thereof lines 1 and 2 of
19 paragraph No. 6 should be deleted so that paragraph
20 6 will read as follows:

21 6. In Count 25 initiating war against Russia,
22 and in Count 26 initiating war against Mongolian Peoples
23 Republic. In Counts 27, 28, 29, 30, 31 and 32 with
24 having waged war against the countries named in these
25 Counts. It is submitted that there is no substantial

1 evidence to justify the conviction of the accused
2 MATSUI on those specifications.

3 7. He is not charged in Count 33.

4 8. In Count 34 he is charged again with others
5 with having waged war against Thailand. In Count 35
6 against Russia and in Count 36 against the Mongolian
7 Peoples Republic and the Russians. To sustain these
8 charges, as to the accused MATSUI, there is not sufficient
9 evidence.

10 9. He is not charged in Counts 37, 38, 39,
11 40, 41, 42 and 43.

12 10. In Count 44 he is charged with others
13 with participating in the formulation of a plan to
14 procure and permit murder of Prisoners of War and
15 civilians. It is submitted that there is no evidence
16 to sustain these charges against the accused MATSUI.

17 11. In Count 45 he is charged with others
18 in unlawfully ordering, causing and permitting an
19 attack on the city of Nanking in breach of treaties,
20 and to kill and murder thousands of civilians and
21 disarmed soldiers of China. It is submitted that there
22 is no evidence in the record establishing beyond a
23 reasonable doubt that MATSUI either ordered, caused or
24 permitted the attack on Nanking, or that he either
25 ordered, caused, permitted or even had knowledge of

1 the killing of thousands of civilians and disarmed
2 soldiers in China. The attack on Nanking by Japanese
3 forces, was, of course, not an action which the accused
4 MATSUI initiated, as is shown by the evidence. The
5 attack was ordered by the Headquarters of the Japanese
6 Army in Tokyo. As Commander of the Japanese Forces the
7 accused simply carried out such orders. As will be
8 more fully set out subsequently in this memorandum,
9 there is no evidence to show that the accused MATSUI
10 had any culpable part in any killing or murder of
11 civilians or disarmed soldiers of China.

12 12. By reason of an error in the date this is
13 in addition to what is taken in the motion. By reason
14 of an error in the date named in line 3, paragraph 12
15 has been amended and the correction or amended paragraph
16 12 has been mimeographed and is being distributed --The
17 Language Section has been furnished with the correction --
18 so that paragraph 12 will read as follows:

19 In Count 46 the same charge as in Count 45
20 is made against the accused MATSUI with respect to the
21 City of Canton on 21 October 1938 and in Count 46 with
22 respect to the City of Hankow, the date of which is
23 27 October 1938. As to the attack on these cities
24 the evidence does not show that the accused MATSUI
25 had anything whatever to do with those operations.

1 At the said time the accused MATSUI had resigned
2 from his post as Commander of the Middle China
3 Expeditionary Force and was living in retirement
4 in Japan.

5 13. He is not charged in Counts 48, 49 and
6 50, but in Count 51, he is charged with others in
7 having ordered, caused and permitted the attack on
8 Mongolia, and Russia in the summer of 1939 and with
9 having unlawfully killed and murdered members of the
10 armed forces of Mongolia and Russia. This likewise
11 was a military operation which occurred after the accused
12 MATSUI retired from the armed forces of Japan and the
13 evidence fails to show that he had any connection with
14 it.

15 15. In Count 52 he is charged with others with
16 having ordered, caused and permitted an attack on
17 Russia and the killing and murder of members of the
18 armed forces of Russia and for the same reason as
19 stated in paragraph 14 above. The evidence is wholly
20 insufficient to justify his conviction.

21 16. In Count 53, Group 3, "Conventional
22 War Crimes" he is charged with others in having partici-
23 pated in the formulation of a plan to order, authorize
24 and permit the Commander-in-Chief of several Japanese
25 Naval and Military forces in each of several theaters

1 of war, and the officials of the Japanese War Ministry,
2 and the persons in charge of each of the Prisoner of
3 War Camps to commit breaches of the Laws and customs
4 of war. It is submitted that there is no evidence to
5 sustain the charge set out in this Count as to the
6 accused MATSUI.

7 17. In Count 54 he is charged with others
8 in having ordered, authorized and permitted the offenses
9 of Count 53 and thereby violated the laws of war.
10 There is no evidence to sustain this charge as to the
11 accused MATSUI.

12 18. In Count 55 he is charged with others
13 during the period 7 December 1941 to 2 September 1945
14 with disregarding their duty to take adequate steps
15 to secure the observance of conventions and assurances
16 and the Laws and Customs of War in the respects described
17 in said Count and thereby violated the laws of war.
18 It is submitted that there is no evidence to sustain
19 this charge as to the accused MATSUI.

20 In connection with the post of Commander of
21 the Shanghai Expeditionary Force held by the accused
22 MATSUI from 15 August 1937 to 30 October 1937 and of
23 the Middle China Expeditionary Force from 30 October
24 1937 to February 1938, it may be noted that so far as
25 the evidence thus far adduced is concerned it shows that

1 the only theater in which action occurred in which his
2 command participated was at Nanking. There is evidence
3 that he was at his Headquarters at Soochow at the time
4 of such attack. How distant from Nanking Soochow was
5 does not appear from the evidence. There is evidence
6 that the accused MATSUI went to Nanking on 17 December
7 1937. This was several days after the attack and taking
8 of the City of Nanking. There is also evidence that
9 after a few days in Nanking the Accused MATSUI returned
10 to Shanghai.

11 Prosecution introduced in evidence exhibit
12 199, titled "Facts of Japanese Aggression in North
13 China" in which Ching Teh-chun, formerly Deputy Commander
14 of the 29th Army, stated that one Chen-Cho Shung had
15 told him that DOHIHARA and MATSUI, Chief of the Japanese
16 Special Service Board in Peiping that the Japanese made
17 certain demands in respect to the building of a rail-
18 road, and revision of the customs.

19 It was developed on cross-examination (record
20 page 2376) that the MATSUI mentioned in exhibit No. 199
21 is not the accused.

22 Prosecution introduced in evidence exhibit
23 257, which was an excerpt from interrogation of the
24 accused MATSUI. It should be noted on page 4 thereof
25 the accused MATSUI directed that discipline be maintained

1 and the punishment of all evil-doers, and also directed
2 a thorough investigation of the Nanking Incident and
3 collaboration with foreign officials and diplomats and
4 this was done. From this interrogation it also appears
5 that the accused MATSUI was in Nanking only from 17
6 December to 24 December, that he met with United States
7 and British Commanders and Admirals, also Italian and
8 French Ambassadors, with view of settling matters in a
9 peaceful manner. It also appears from this page of the
10 interrogation that the accused MATSUI had never commanded
11 troops before this time. On page 5 of this excerpt it
12 appears that Division Commanders were responsible for
13 whatever may have occurred at Nanking, and on page 6
14 it appears that there were court martial proceedings
15 against an officer and some soldiers in regard to charges
16 of rape of Chinese in Nanking, that the officer was
17 executed and the soldiers imprisoned.

18 Prosecution introduced in evidence exhibit 552,
19 titled "Conclusion of Pact between Japan-Germany-Italy".

20 Prosecution introduced in evidence exhibit
21 650, "Minutes on Privy Council Meeting", in regard to
22 Protocol between Japan and France. Also introduced
23 exhibit 660 titled "Investigation Committee of Privy
24 Council on the Treaty between Japan and France",
25 regarding residence, navigation, tariffs and trade.

1 In each of these exhibits the name of one of the
2 Councilors was MATSUI. Attention is called to the
3 fact that there was no evidence identifying the accused
4 MATSUI as the individual mentioned in exhibits 552,
5 650 and 660, and it is not believed that the prosecution
6 will claim that the MATSUI mentioned in those exhibits
7 is the accused.

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1 THE PRESIDENT: In paragraph 15 you refer
2 to paragraph 14.

3 MR. MATTICE: Paragraph 15?

4 THE PRESIDENT: It is pointed out to me
5 there is no paragraph 14. Do you mean 13?

6 MR. MATTICE: I see. No 14 seems to be --
7 there seems to be no No. 14; so the numbers, of
8 course --

9 THE PRESIDENT: You alone know, Mr. Mattice.

10 MR. MATTICE: It should be rearranged.

11 THE PRESIDENT: Should that be 13?

12 MR. MATTICE: No, they seem to follow in
13 sequence. No. 14 is missing between 13 and 15,
14 which here appears. So, of course, the paragraph to
15 which your Honor refers, which is No. 15, would
16 really become No. 14.

17 THE PRESIDENT: Well, read paragraph 15 of
18 your motion, your reasons for it.

19 MR. MATTICE: Yes, your Honor is quite right.
20 It should refer to 13.

21 THE PRESIDENT: Captain Brooks.

22 MR. BROOKS: Now comes MINAMI, Jiro, by his
23 counsel, and respectfully moves the Tribunal to
24 dismiss each and every one of the counts in the
25 Indictment against said defendant on the ground

1 that the evidence offered by the prosecution is not
2 sufficient to warrant a conviction of said defendant.

3 The evidence adduced utterly fails to
4 establish that the accused, MINAMI, Jiro, is guilty
5 as a matter of law of any one of the counts alleged
6 in the Indictment. In order to facilitate the
7 Tribunal's consideration of these special aspects
8 not considered in the general motion in behalf of
9 all defendants, the defendant desires to present
10 this memorandum brief which he respectfully submits
11 is clearly in support of his contentions.

12 We find in Count 1:

13 That all the defendants are charged with
14 participation in the formation or execution of
15 conspiracy to make Japan secure the military, naval,
16 political and economic domination of East Asia of the
17 Pacific and Indian Oceans, and to make her wage
18 declared or undeclared war or wars of aggression and
19 war or wars in violation of international law,
20 treaties, agreements and assurances.

21 Section 1 of Appendix A states:

22 "From January 1, 1928, onwards there was
23 plot in the Japanese Army, and particularly in the
24 Kwantung Army, supported by certain civilians, to
25 create an incident in Manchuria, which should form

1 a pretext for Japan to conquer, occupy and exploit
2 that country as the first step in a scheme of
3 domination which later extended to other parts of
4 China, to the territory of the Union of Soviet
5 Socialist Republics, and ultimately to a wider field,
6 aiming to make Japan a dominant power in the world."

7 That such a plot ever existed was denied
8 by all the witnesses produced to this Tribunal by
9 the prosecution (e. g., WAKASUKI's testimony, C. R.
10 p. 1591). Even the notorious TANAKA Memorial was
11 proved by the prosecution's own evidence to be a
12 fake (see MORISHIMA's testimony, C. R. p. 3098).
13 Grnating for argument's sake; that such a plot
14 had existed somewhere in Japan or in Manchuria,
15 the prosecution failed to connect the defendant
16 MINAMI with it as a leader, organizer, instigator
17 or accomplice thereof. Furthermore, if the so-
18 called October Incident was the plot, then the
19 defendant MINAMI was the one who successfully nipped
20 it in the bud, as ex-Premier WAKATSUKI, testified
21 that in the middle of October, 1931, MINAMI, as War
22 Minister in his Cabinet, arrested the group of hot-
23 blooded young officers involved in said plan, which
24 was to start with the assassination of WAKATSUKI
25 (C. R. pp. 1567-8).

1 Furthermore, Ryukichi TANAKA also testi-
2 fied: "However, on 12 September a cable was re-
3 ceived by the Foreign Minister SHIDEHARA from the
4 Japanese Consul General in Mukden reporting the
5 fact that a company commander of a patrol unit in
6 Fushun had said that within a week a big incident
7 would break out. Foreign Minister SHIDEHARA brought
8 this matter to the attention of the War Minister
9 MINAMI and strongly protested against the report
10 that he had on hand. As a result, the War Minister
11 MINAMI ordered General TATEKAWA to go to Mukden as a
12 special emissary post haste to put a stop to any
13 contemplated action of the Kwantung Army and, in
14 accordance with that order, General TATEKAWA made
15 a hasty trip to Mukden." (C. R. p. 2006).

16 TANAKA further testified that General
17 TATEKAWA told him that General MINAMI, War Minister,
18 had instructed TATEKAWA to stop any such incident at
19 all costs (C. R. p. 2006).
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1 Furthermore, SHIDEHARA, the Foreign Minister
2 above mentioned, testified that General MINAMI, far
3 from opposing SHIDEHARA, was in complete agreement
4 with his views (Court record, page 1385). Baron
5 WAKATSUKI, the Prime Minister at that time, also
6 testified that MINAMI was opposed to the spreading of
7 the warfare in Manchuria (Court record, page 1571)
8 and that MINAMI at Cabinet meetings never raised any
9 objection to policies decided by the Cabinet. (Court
10 record, page 1583.)

11 Furthermore, Mr. Hammock, 17th June, 1946,
12 stated in opening, that they would prove the Cabinet
13 of Baron WAKATSUKI, Premier from April 1931 to
14 December 1931, was forced to resign by reason of the
15 actions of the Defendant MINAMI, who was then War
16 Minister. WAKATSUKI however, testified that the
17 collapse of his Cabinet was caused not by any action
18 on the part of War Minister MINAMI, but by the actions
19 of the Home Minister ADACHI. (Court record, page
20 1580.) Baron SHIDEHARA also testified that the
21 WAKATSUKI Cabinet was not forced to resign because
22 of any action of General MINAMI (Court Record, page
23 1376). SHIDEHARA further testified that in spite of
24 all the preventive measures taken by General MINAMI,
25 the Incident continued to develop and to expand.

1 (Court Record, page 1389.)

2 Furthermore, the prosecution's evidence
3 shows MINAMI also resigned in December 1931, and for
4 a full three years was nearly forgotten by the public
5 in an insignificant position in an office which had
6 no special duty assigned to it but to attend a meeting
7 or lectures once or twice a year.

8 Furthermore it was after his resignation
9 that the Manchurian Incident reached its height and
10 the Empire of Manchukuo was created. Would he have
11 been in such a disfavored position during this time
12 if he was a participant of any plan for the forma-
13 tion of that Empire?

14 Furthermore, Court exhibit 286, presented
15 by the prosecution, a telegram from Foreign Minister
16 SHIDEHARA to Consul General KUWASHIMA in Tientsin
17 under the date of November 1st, 1931, shows General
18 MINAMI, and the central military authorities were op-
19 posed to the independence of Manchuria, and to the
20 restoration of the former Emperor Hsuan Tung, i.e.,
21 Pu-Yi. Court exhibit No. 299 a telegraphic instruc-
22 tion of General MINAMI to General HONJO, Commander
23 of the Kwantung Army, warns the latter not to meddle
24 with a new regime movement in Manchuria. Is it not
25

1 obvious that because he tried to enforce the
2 Cabinet's policy to such an extent was the reason he
3 had to resign with the WAKATSUKI Cabinet because
4 they met with the dissatisfaction of public opinion?

5 Referring again to the Indictment Appendix A
6 states: "About 3rd January, 1932, the Japanese
7 forces occupied Chinchow in spite of assurance given
8 by their Foreign Office to the United States on 24th
9 November 1931 that they would not do so."

10 In regard to this matter we refer to Court
11 exhibit No. 190, wherein the U.S. Ambassador Forbes
12 in Tokyo sent a telegram on said date to the Depart-
13 ment of State, informing that the Japanese Prime
14 Minister, War Minister, Foreign Minister and the
15 Chief of General Staff were all in full accord that
16 hostile operations should not be extended to Chinchow,
17 and that orders had been issued to that effect.

18 Furthermore, the Lytton Report, introduced
19 by the prosecution, sets out on page 77 that the
20 Japanese Army withdrew from the neighborhood of Chin-
21 chow to Shinmin, to the great surprise of the
22 Chinese side, on 28th November. These facts clearly
23 show that, while General MINAMI was in office, i.e.,
24 up to the 10th December, 1931), that said assurance
25 given to Ambassador Forbes was faithfully observed.

1 Furthermore, the prosecution's own evidence
2 shows that the power of the War Minister in the
3 Japanese Government was very much limited compared
4 with that of other countries, and that in Japan,
5 matters concerning military operation, and of ex-
6 peditionary forces came under the jurisdiction of the
7 Chief of General Staff who had direct access to the
8 throne in such matters. Mr. Horwitz, in his opening
9 statement, June 14, 1946, discussed these matters as
10 follows:

11 "According to the Constitution, the Emperor has
12 the following powers with respect to the armed services:
13 Article XI. The Emperor has the supreme command of
14 the Army and Navy.

15 Article XII. The Emperor determines the organization
16 and peace standing of the Army.

17 Based on these two articles, the Imperial pre-
18 rogative over military affairs has in practice been
19 divided into the prerogative over the supreme command
20 and the prerogative over the administration of the
21 armed forces. The former covers the power of using
22 the armed forces for the protection of the State from
23 attack from both without and within, and the powers
24 directly relating to military operations. The latter
25 includes the organization of divisions and of fleets,

1 and all matters relating to military districts and sub-
2 districts, to the storing up and distribution of
3 arms, to education, inspections, discipline, modes
4 of salute, uniforms, guards, fortifications, naval
5 defenses, preparation for expeditions and fixing the
6 annual number of recruits. This division has been
7 constantly maintained since the cabinet system was
8 started in 1885. In the exercise of the former power,
9 that of the supreme command, the Emperor does not
10 exercise it through the cabinet...." (C.R. p.p.
11 667-669).

12 Thereafter, Mr. Horwitz states that such
13 power of supreme command was exercised through the
14 Minister of War, the Minister of Navy, the Chiefs of
15 the General Staff and the Chief Aide-de-camp to the
16 Emperor (C.R. P. 669). This is in contradiction to
17 the previous statement and is a mistaken inter-
18 pretation of the distinct separation of the two
19 powers, i.e., the power of supreme command and the
20 power of military administration. The prosecution's
21 evidence if studied will show who should be res-
22 ponsible for the former and who for the latter, and
23 that the former was exercised through the chief of
24 the General Staff, and the latter through Ministers
25 of War and Navy. In other words, the Minister of War

1 was not responsible for matters of supreme command,
2 but dealt with administrative personnel and budget
3 problems as a member of the Cabinet. Reference to
4 Court exhibit No. 188-B, ARAKI's interrogations, as
5 offered by the prosecution, states: "After a policy
6 has been decided by the Government, orders for
7 operations would be issued by the Chief of General
8 Staff. The War Minister has no right to issue orders
9 in connection with operations." (C.R. p. 2220).

10 Furthermore, General UGAKI, called as a wit-
11 ness on behalf of the prosecution, testified: "The
12 military movements and actions overseas come under
13 the command of the Chief of Staff." (C.R. p. 1620).
14 Furthermore, Baron WAKATSUKI testified to the same
15 effect. (C.R. p. 1584).

16 Furthermore, Brigadier Nolan, in his state-
17 ment, June 13th, 1946, quoted Prince ITO's interpre-
18 tation of the Japanese Constitution as follows:

19 "The exercise of the right of warfare in the
20 field - as the exigency of circumstances may require,
21 may be entrusted to the commanding officer of the
22 place, who is allowed to take such actual steps as
23 his discretion dictates, and then report to the govern-
24 ment. This is to be regarded as a delegation of
25 sovereign power to a general in command of an army

in order to meet the stress of emergencies."

1 (C.R. p. 586).

2 Therefore, the prosecution's evidence shows
3 that the War Minister had no power or right to order
4 the commanding officer of the field to obey his
5 desire. All he could do as a Cabinet Minister was
6 to advise and negotiate through the Chief of General
7 Staff and make his advice or requests known in-
8 directly to the army on the spot. In view of this
9 restriction on the power of the War Minister and in
10 consideration of what he had actually done to make
11 known the policy of the Cabinet, we must admit that
12 MINAMI excelled any of his predecessors or successors
13 in an effort to control out-post garrisons at such a
14 time of intermingling crisis and emergency.

15 THE PRESIDENT: We will recess for fifteen
16 minutes.

17 (Whereupon, at 1045, a recess was
18 taken until 1100, after which the proceedings
19 were resumed, as follows):
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1 THE MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Captain Brooks.

4 MR. BROOKS: Resuming reading, if the
5 Tribunal please, in the center of page 6:

6 The prosecution presented as evidence
7 (court exhibit No. 186) an excerpt from an article
8 in the Japan Times dated August 6, 1931, "to prove
9 that MINAMI was in sympathy with the ultimate ob-
10 jective of the army in Manchuria." (Court record
11 page 2205.) Mr. Hyder read this excerpt as follows:

12 "Some other observers, without studying
13 the conditions of neighboring foreign countries,
14 hastily advocate limitation of armaments and engage
15 in propeganda unfavorable for the nation and the
16 army." (Court record page 2209.) "Manchuria and
17 Mongolia are very closely related to our country
18 from the viewpoint of our national defense as well
19 as of politics and economics. It is to be regretted
20 that the recent situation in that part of China
21 is following a trend unfavorable to our empire.
22 The recent ascendancy of anti-foreign agitation
23 and new economic power in China, are responsible
24 for such a tendency, which is a phenomenon of
25 permanent duration instead of being a passing one.

1 In view of such a situation, I hope you will exe-
2 cute your duty in educating and training the troops
3 with enthusiasm and sincerity, so that you may
4 serve the cause of His Majesty to perfection."

5 (Court record pages 2209, 2210.)

6 What is wrong with this speech? It was
7 delivered at an anniversary meeting of division
8 commanders. Is it, as was called by Mr. Hyder, "the
9 dissemination of expansionist propaganda to the
10 divisional officers by the accused General MINAMI"?
11 (Court record page 2193.) Is it not customary for
12 a war minister to instruct the officers to educate
13 and train their troops with enthusiasm and sin-
14 cerity? Is it not customary for a war minister to
15 admonish hasty propagandists for armament limitation
16 who do not take into consideration the conditions
17 of neighboring countries and was it not proper to
18 point out the seriousness of the Manchurian question
19 from the viewpoint of national defense? Was MINAMI's
20 speech any different than the commonplace, ordinary
21 and matter-of-fact speech that would have been made
22 by any minister of war on such an occasion and
23 under like circumstances? We contend that the prose-
24 cution's evidence does not show sympathy with the
25 army in Manchuria nor any dissemination of expansion-

1 ist propaganda.

2 Furthermore, the defendant MINAMI, after
3 three years' silence as hereinbefore mentioned,
4 was thereafter appointed Commander of the Kwantung
5 Army and concurrently Ambassador to Manchukuo
6 December 1934. What made him come back to such a
7 post with which he had such painful experiences
8 three years before? The answer may be found in the
9 testimony of Ryukichi TANAKA:

10 "I think General MINAMI was appointed be-
11 cause of his very amiable character and his
12 administrative ability. By speaking of General
13 MINAMI's administrative ability, I am referring to
14 the fact that there was a big job to be done, since
15 Manchuria at that time was a hotbed of many disputes,
16 especially between the police and the military
17 police, and because banditry was still widespread,
18 and his job was to restore peace and order, (cor-
19 rection by Monitor: because it was right after
20 the time when there was an open clash between civil
21 police and military police, and also because of
22 guerrillas and bandits the situation was in chaos)."
23 (Court record page 2140.)

24 In studying this matter, the attention of
25 the Tribunal is called to the evidence that, when

1 MINAMI served as war minister in 1931, he served
2 in the Cabinet formed by the MINSEITO Party, one
3 of the two great political parties at that time;
4 and that after the fall of the cabinet and simul-
5 taneous resignation of MINAMI in December of that
6 year, the SEIYUKAI Party took power lasting until
7 May 1932. On the assassination of the Premier
8 INUKAI, a new cabinet was formed under Admiral SAITO,
9 who was a non-partisan man. This super-party cabinet
10 was succeeded by Admiral OKADA in July 1934, who was
11 also disconnected with any party. Court exhibit
12 No. 175 is cited, in which Admiral OKADA stated:

13 "The SAITO Cabinet which came into office
14 in May of 1932, in which, as previously stated, I
15 was Minister of the Navy, and my cabinet, which
16 came into office in July of 1934, were known in
17 government and army circles as 'Navy Cabinet.'
18 The army resented both of these cabinets, because
19 it recognized in them navy influence in opposition
20 to the army policy of the use of force in connection
21 with the expansion of Japanese influence in Asia."
22 (Court record pages 1823, 1824.)

23 During cross-examination, OKADA testified
24 that the administrative policy of his cabinet was
25 the control or supervision of the military, the

1 economy of expenditures, and relief to the farming.
2 population. (Court record page 1886.) Was it
3 then a mere coincidence that MINAMI, who had once
4 tried to keep the military within bounds, was again
5 chosen by the OKADA Cabinet to continue and accomplish
6 the difficult task, on the spot?

7 Furthermore, Ryukichi TANAKA testified
8 that immediately after General MINAMI's arrival to
9 take over the post of Commander-in-Chief, he
10 abolished the special service department in order
11 to remove the evils of the practice of meddling in
12 politics, inasmuch as he felt that it would lead to
13 the corruption of the army itself. TANAKA stated
14 also that MINAMI took the first decisive step toward
15 the abolition of extraterritoriality in Manchuria
16 and the transfer of the administrative rights of
17 the South Manchurian Railway Zone. (Court record
18 page 2118.) TANAKA emphatically denied that he had
19 any recollection whatsoever of having ever testified
20 to Prosecutor Sackett that General MINAMI was an
21 instigator of aggressive action. (Court record
22 page 2140.)

23 Mr. Darcey in his opening statement July 1,
24 1946, said he would prove that General MINAMI,
25 Commander-in-Chief of the Kwantung Army, General

1 UMEZU, Commander-in-Chief of the Tientsin Army,
2 and Colonel DOHIHARA cooperated in an effort to
3 establish an autonomous area in the provinces of
4 North China for the purpose of extending and
5 strengthening the military, political, and economic
6 domination of Japan in China.

7 In reference to this, court exhibit No.
8 211, an official document of the Chinese govern-
9 ment, is cited:

10 "The Kuomintang Government despatched its
11 War Minister, General Ho Ying-Chin to the north.
12 As a result of his conference with General Sung Cheh-
13 Yuan and General Han Fu-Chu, the Hopei-Chahar
14 Political Council was established as an organ to
15 manage the administration of North China. General
16 Sung Cheh-Yuan was appointed as its chairman and
17 assumed the office on December 18, 1935. This
18 institution, while being under the supervision of
19 the Kuomintang Government, is a new political organ
20 which has in its hand the power to negotiate with
21 Japan and Manchukuo for the maintenance of amiable
22 relations with them." (Court record page 2704.)
23

24 On cross-examination, Chinese General Ching
25 Teh-Chun replied that probably there was such a fact
that General Sung Cheh-Yuan very greatly welcomed

1 the establishment of the Hopei-Chahar Political
2 Council and that he had given voice to the principle
3 of respecting the will of the people and the main-
4 tenance of harmony between Japan and China. (Court
5 record page 2367, 2368.) He admitted also that the
6 complex interests possessed by Japan in North China
7 far exceeded those of other nations there (court
8 record page 2473), and that on 10 June 1935,
9 Generalissimo Chiang Kai-Shek issued an executive
10 order for amicable relations between two neighboring
11 countries, namely, between China and Japan. (Court
12 record page 2480.) "The purpose of this order,"
13 Ching Teh-Chun explained, "was to admonish the people
14 as a whole, as well as the Chinese army, to respect
15 and be friends with neighbor countries." (Court
16 record page 2480.)

17 From this evidence, it is clearly indicated
18 that unprecedented relations of friendship existed
19 between China and Japan in 1935 and 1936, the period
20 in which the defendant MINAMI was the Chief of the
21 Kwantung Army. It must be pointed out, moreover,
22 that, according to court exhibit No. 215 (item 5 of
23 the gist of plans in the instruction to the commander
24 of the stationary troops in China from the General
25 Staff in Tokyo under date of 13 January 1936), the

1 management of matters concerning North China was
2 definitely assigned to the duty of the Commander
3 of the Japanese stationary troops in China and did
4 not belong to the jurisdiction of the Commander of
5 the Kwantung Army. In line with this, Ryukichi
6 TANAKA testified that he had seen the instruction
7 of December 31, 1935, from the central authorities
8 to the Chief of Staff of the Kwantung Army, to
9 transfer General DOHIHARA from the Kwantung Army
10 to the North China Army. The reason for such transfer,
11 according to witness TANAKA, was that Major-General
12 TADA, head of the North China garrison forces,
13 protested to the coming of DOHIHARA, unless DOHIHARA
14 was put under TADA's command. (Court record pages
15 2125, 2126.) It is, therefore, obvious that MINAMI's
16 authority as Commander of the Kwantung Army did not
17 extend to North China. Furthermore, he resigned
18 from said office of commander and was retired from
19 the active list in March 1936.

20 As to Section 2 (Military Aggression in the
21 Rest of China) of appendix A, there is no need to
22 mention the disconnection of MINAMI, as he was only
23 a civil governor in Korea at the period of the so-
24 called China Incident.

25 As to Section 3 (Economic Aggression in

1 China and Greater East Asia), it is maintained by
2 the prosecution: "During the period covered by
3 this Indictment, Japan established a general super-
4 iority of rights in favor of her own nationals,
5 which effectively created monopolies in commercial,
6 industrial and financial enterprises, first in
7 Manchuria and later in other parts of China, etc."

8 In reference to this, it has already been
9 pointed out above that MINAMI was the one who took
10 the first step for abolition of Japanese special
11 rights and interests in Manchuria, and said alle-
12 gation of the prosecution, in this section, in
13 relation to MINAMI, is not borne out by their evidence.

14 There was not the slightest evidence con-
15 necting MINAMI with the charges set forth in the
16 remaining section.

17 Section 4 (Methods of Corruption and Coercion
18 in China and Other Occupied Territories, in par-
19 ticular, secret transaction in opium and other
20 narcotics). Section 5 (General Preparation for War),
21 Section 6 (The Organization of Japanese Politics and
22 Public Opinion for War), Section 7 (Collaboration
23 between Japan, Germany and Italy, Aggression against
24 French Indo-China and Thailand), Section 8 (Aggression
25 against the Soviet Union), Section 9 (Japan, the

1 United States of America, the Commonwealth of the
2 Philippines and the British Commonwealth of Nations),
3 and Section 10 (Japan, the Kingdom of the Nether-
4 lands and the Republic of Portugal).

5 The prosecution's evidence shows that
6 MINAMI did not take part in any of the Imperial
7 conferences or liaison conferences of 1941 but
8 that MINAMI was Governor of Korea from August 1936
9 to May 1942, when he was appointed a member of the
10 Privy Council. The fact that the Privy Council
11 was simply and purely an advisory board without
12 any executive power was made clear to the Tribunal,
13 in the prosecution's evidence on the departments
14 of the Japanese government. The appointment of
15 the defendant MINAMI was due to his resignation from
16 the governorship of Korea on account of being deaf.
17 MINAMI never spoke at meetings of the Privy Council,
18 because of the difficulty in hearing, except on one
19 occasion in 1943 when the Great East Asia Ministry
20 was proposed to be set up, and then his only remark
21 was that he was opposed to the proposition.
22

23 Finally in March 1945, when Japan was
24 on the verge of collapse under the burden of a titanic
25 war, MINAMI despite his age and infirmity was re-
quested to take the chair of a society called the

1 Political Association of Great Japan, where he exerted
2 his last effort to control the military and save
3 the country from ruin. The prosecution never men-
4 tioned this political party, except in his life record
5 attached to the Indictment. It must not be overlooked,
6 however, that this society was entirely different
7 from the Imperial Rules Assistance Association and
8 that under his leadership or perhaps because of his
9 leadership, the Japanese people, as distinguished from
10 the government, accepted the Potsdam Declaration in
11 such a calm and peaceful manner without great
12 internal dissention.

13 THE PRESIDENT: We are assuming that these
14 motions are based on the evidence that we already
15 have and not on evidence that you propose to give.
16 One gets the impression, perhaps wrongly, that you
17 are at times projecting yourself into evidence to
18 be given by the defense later. However, proceed.

19 MR. BROOKS: If the Court please, I think
20 that a check on the references given will bear out
21 the points I have in mind, although in one or two
22 instances we have more or less previewed what we
23 thought was coming in, and if it does not have pro-
24 bative value the Court can of course disregard it.

25 While we are digressing, if the Court

1 please, I might also point out that in relation to
2 the opium problem that was brought out you will
3 recall the testimony of witness TANAKA that MINAMI
4 was responsible for the change in that.

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1 Count 2 of the Indictment refers to a cons-
2 piracy to wage war against the Republic of China
3 for the purpose of securing for Japan the military,
4 naval, political and economic domination of the
5 provinces of Liaoning, Kirin, Heilungkiang and Jehol,
6 either directly or by establishing a separate state
7 under the control of Japan.

8 As already set out herein, all the evidence
9 produced by the prosecution establishes that MINAMI
10 during the time he was War Minister, supported the
11 cabinet policy to localize the conflict and prevent
12 its expansion, but under the circumstances, it was
13 humanly impossible for him to succeed in this task.
14 As Baron WAKATSUKI testified, it was a sad truth that
15 the Manchurian Incident continued to spread in spite
16 of the unanimous efforts of his cabinet. (Court Record
17 page 1575.) The fact that MINAMI was opposed to the
18 establishment of a new regime in Manchuria has also
19 been clearly indicated heretofore by the prosecution's
20 evidence. Thus he incurred the disfavor of the public
21 and kept an obscure post for three full years. Had
22 he participated in the Manchurian Incident or fostered
23 the establishment of Manchukuo, he would have been
24 acclaimed by the jingoists, and also have received a
25 title of baron, at least, as was bestowed by the

1 Emperor in the case of General HONJO.

2 When MINAMI was appointed in 1934 as
3 Commander of the Kwantung Army and concurrently
4 Ambassador to Manchukuo under the circumstances of
5 which we discussed above, the independence of Manchu-
6 kuo had already been recognized by Japan, by the
7 Pope, the Republic of Salvador and the Republic of
8 Dominica, and the Kwantung Army was stationed in
9 Manchukuo by virtue of the Japan-Manchukuo Treaty of
10 September 15, 1932. He was the third ambassador to
11 the court of Manchu, after Marshal MUTO and General
12 HISHIKARI. Soviet Russia sent her consuls to Manchu-
13 kuo, concluded agreements for the sale of railways,
14 and settled waterway and border questions. Even the
15 Republic of China made various agreements with Man-
16 chukuo, such as postal, telegraphic, traffic and
17 customs affairs. Never were the relations between
18 China and Japan better than at that time, exchanging
19 declarations of amity and promoting their legations
20 to the status of embassies. Ryukichi TANAKA testified
21 that the policy of the Japanese Government toward
22 Manchukuo had been fixed when MINAMI went to Manchuria,
23 and that it could not have been changed or modified by
24 MINAMI's single authority. (Court Record pages 2114-5)

25 In this connection, TANAKA stated:

1 "The Kwantung Army exercised the authority
2 of inner guidance over Manchukuo by virtue of the
3 Japan-Manchukuo Treaty. This treaty being concluded
4 by the Japanese Government, it goes without saying
5 that this authority was conferred upon the Kwantung
6 Army by the Japanese Government." (Court Record
7 page 2174)

8 TANAKA also stated:

9 "There is a very great difference between
10 interference and inner guidance. It is natural not
11 to interfere. But as to pulling the strings, as it
12 were, that is a separate question." (Court Record
13 pages 2115-6)

14 Even by the interpretation of a hostile
15 witness, the inner guidance or the pulling of strings
16 by Japan does not mean interference with the indepen-
17 dent status of Manchukuo. In fact, there are many
18 countries in the present world which are perfectly
19 independent but placed under some sort of guidance by
20 foreign states. For instance, we do not doubt the
21 independence of the Republic of China, in spite of
22 our common presumption that the United States and
23 U.S.S.R. are both pulling strings in regard to her
24 inner politics. When the defendant MINAMI took the
25 new post in Manchukuo, he believed that it was an

1 independent country in law and in fact, and that it
2 was his duty as per the command of the Emperor to
3 protect Japanese life and property rights therein. In
4 the testimony of Ryukichi TANAKA, we can see a glimpse
5 of MINAMI's attitude toward Manchukuo, and, inciden-
6 tally, toward Mongolia. TANAKA testified that the
7 treaty of July 1935 between Manchukuo and the Inner
8 Mongolian Autonomous Government was concluded between
9 the two parties on an equal footing, not by the
10 demands of the Kwantung Army, but by the earnest desire
11 on the part of Prince Teh himself. (Court Record
12 page 2042)

13 TANAKA testified also that MINAMI flatly
14 refused TANAKA's request in 1944 to strengthen the
15 said autonomous government by establishing a Mongolian
16 Society. (Court Record pages 2143-4.) Why did MINAMI
17 decline to become the president of a society for the
18 promotion of the independence of Inner Mongolia? The
19 evidence does not show he was conspiring to create a
20 separate state or states under the control of Japan,
21 as alleged in Counts 2 and 3 of the Indictment, but
22 it does show that MINAMI was neither an empire-builder
23 nor a state-maker.

24 Count 3 has been generally covered in the
25 above discourse. During MINAMI's tenure of office

1 as Commander of the Kwantung Army from December 1934
2 to March 1936, we can find nothing but manifestations
3 of friendship between Japan and China. Even the
4 autonomy movements that did exist at that time in Mon-
5 golia and North China were spontaneous actions of the
6 inhabitants of those areas, or inspired by the
7 Kuomintang Government itself, as shown by court exhibit
8 No. 211, quoted above. (Court Record page 2704.)
9 Exhibit No. 210, prepared by the Chinese Foreign
10 Office on March 25, 1946, states:

11 "On 20 October 1935, a Chinese traitor by the
12 name of Wuin Hsiang-Ho Hsien, Eastern Hopei Province,
13 bribed many local bad elements and started a riot, on
14 the pretext of demanding autonomy." (Court Record
15 page 2702)

16 Whether he was a traitor or bad element is of
17 small concern here. The fact remains that it was the
18 Chinese themselves who started the demand for autonomy
19 during this period. Ryukichi TANAKA, the key witness
20 for the prosecution in this phase, testified:

21 "Not once since I appeared on this witness
22 stand have I said that this autonomy movement was cal-
23 culated to cause friction or dispute with China."
24 (Court Record page 2139)

25 And further:

1 "I have no recollection whatsoever of having
2 ever testified to Prosecutor Sackett that General
3 MINAMI was an instigator of aggressive action."

4 (Court Record page 2140)

5 We shall not be able to understand these
6 words of the witness, unless we call the charge false
7 which alleges MINAMI a conspirator to wage war against
8 the Republic of China for the purpose of dominating
9 her either directly or by establishing a separate state
10 or states under control of Japan.

11 In Count 4, the prosecution charges a
12 conspiracy to wage war against the United States of
13 America, the British Commonwealth of Nations, the
14 Republic of France, the Kingdom of the Netherlands,
15 the Republic of China, the Republic of Portugal, the
16 Kingdom of Thailand, the Commonwealth of the Philippines,
17 and the U.S.S.R. for the purpose of dominating East
18 Asia and the Pacific and Indian Oceans.

19 The prosecution's evidence does not connect
20 MINAMI with this formidable charge. Their evidence
21 shows that when the Pacific war was started, MINAMI
22 was the Governor of Korea and had been a resident in
23 Seoul since August 1936. The evidence does not show
24 that he was summoned to Tokyo to be present at any
25 of the Imperial or liaison conferences of the

1 government or of general headquarters to discuss the
2 pros and cons of the war, nor even that he had any
3 information that such a war was contemplated in Tokyo.

4 In Count 5, the prosecution charges a
5 conspiracy to wage war against the whole world by
6 mutual assistance of Germany, Italy and Japan, for
7 the purpose of securing for each of the three countries
8 special domination in its own sphere. The prosecution's
9 evidence does not show that MINAMI had hand in this
10 matter. When the Anti-Comintern Pact was signed in
11 November 1937, and when the Tripartite Pact was con-
12 cluded in September 1940, MINAMI was Governor General
13 of Korea, and did not return to Tokyo until May 1942,
14 some time after the outbreak of the war. It should
15 be mentioned in passing that the governmental charts
16 show the Governor of Korea is a civilian official
17 under the jurisdiction of the Ministry of Colonies.
18 (Court Exhibit No. 87)

19 In relation to Count 6, as already stated
20 above the prosecution has failed to show by the evi-
21 dence that MINAMI ever planned or prepared a war against
22 the Republic of China, but their evidence does show
23 that he was strongly opposed to any measure or action
24 that might lead to such a war, and was never in a
25 position where he could be said to be responsible for

1 any action causing such war.

2 In relation to Counts 7, 8, 9, 10, 11, 12,
3 13, 14, 15, 16 and 17, the prosecution has failed to
4 show that MINAMI had any position of responsibility
5 or any connection with the wars against the various
6 allied nations therein set out, as an instigator or
7 conspirator or any other capacity or took any part in
8 formulating or advising on the war plans in relation
9 thereto.

10 While Count 18 mentions specifically the
11 name of the defendant MINAMI as one who, on or about
12 18 September 1931, initiated a war of aggression and
13 a war in violation of international law, treaties,
14 agreements and assurances against the Republic of
15 China, this allegation has already been refuted at
16 length by the prosecution's own witnesses and evidence.
17 The same is true of Count 27 (which charges him for
18 actually waging a war against China between the
19 18th of September, 1931, and the 2d of September, 1945)
20 and of Count 28 (which charges waging war against China
21 between the 7th of July, 1937, and the 2d of Septem-
22 ber, 1945), Count 29 (against the United States of
23 America between the 7th of December, 1941, and the 2d
24 of September, 1945), Count 30 (against the Philippines),
25 Count 31 (against the British Commonwealth), Count 32

1 (against the Netherlands), and of Count 34 (against
2 Thailand).

3 Coming to Count 44 which charges a conspiracy
4 to procure and permit murder on a wholesale scale of
5 prisoners of war, members of the armed forces of
6 countries opposed to Japan who might lay down their
7 arms, and civilians who might be in the power of
8 Japan, on land or sea, in territories occupied by
9 Japan, and crews of ships destroyed by Japanese
10 forces, in ruthless pursuit of victory in the unlawful
11 wars in which Japan was or would be engaged during the
12 period between 18 September 1931 and 2 September 1945,
13 a conspiracy of this kind is beyond imagination; and
14 because it was so ridiculous the Nuernberg Tribunal
15 excluded such a charge from war crimes and crimes
16 against humanity. (Decision and Judgment given on
17 31 August 1946, page 16,884.)

18 Furthermore, there is no evidence connecting
19 MINAMI therewith or no showing that MINAMI ever held
20 a position of such a nature or committed any act or
21 issued any order as would make him responsible
22 therefor.

23 In Count 53, the prosecution charges the
24 defendant MINAMI for a conspiracy to order, authorize
25 and permit the commander-in-chief of the several

1 Japanese naval and military forces in each of the
2 several theaters of war in which Japan was then
3 engaged, and the officials of the Japanese War Ministry,
4 and the persons in charge of each of the camps and
5 labor units for prisoners of war and civilian internees
6 in territories of or occupied by Japan and the military
7 and civil police of Japan, and their respective sub-
8 ordinates, frequently and habitually to commit the
9 breaches of the laws and customs of war, as contained
10 in and as proved by the conventions, assurances and
11 practices, against the armed forces of the Republic
12 of China and against many thousands of prisoners of
13 war and civilians then in the power of Japan, and that
14 the government of Japan should abstain from taking
15 adequate steps in accordance with the said conventions
16 and assurances and laws and customs of war, in order to
17 secure observance and prevent breaches thereof, during
18 the period beginning with the 18th of September, 1931.
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1 Count 54 charges MINAMI for having ordered,
2 authorized and permitted the same persons as men-
3 tioned in Count 53 to commit the offences therein
4 mentioned.

5 Count 55 charges MINAMI for having delib-
6 erately and recklessly disregarded the legal duty
7 to take adequate steps to secure the observance and
8 prevent breaches of the said conventions and assur-
9 ances, Laws and Customs of War, he being by virtue
10 of his office responsible for securing such obser-
11 vance.

12 In relation to the above and to the bal-
13 ance of the charges, there is no evidence to con-
14 nect MINAMI therewith. During the period from
15 April to December 1931 when MINAMI was war minister
16 and also from December, 1934, to March, 1936, when
17 he was Commander of the Kwantung Army, there was,
18 as a matter of fact, not a single prisoner of war
19 in existence. We do not mean by this that there
20 were no prisoners of war on the basis that the Man-
21 churian Affairs was not a legal war. It means that
22 captured Chinese troops and bandits were disarmed
23 during this period and were either turned over to
24 Chinese authorities or released on their avowal to
25 become good citizens and there was no necessity for

1 Japanese guards to detain them. During his period
2 of office, no harm was done to civilians in any
3 fighting in Manchuria and none were detained as
4 P. O. W's or internees. (C.R. p. 14370).

5 It must be pointed out, moreover, that no
6 evidence was produced by the prosecution to show
7 that MINAMI ordered, authorized and permitted any
8 kind of offences in Manchuria and China, or that
9 he had deliberately and recklessly disregarded his
10 legal duty to prevent breaches of international law.

11 Same being respectfully submitted.

12 THE PRESIDENT: Mr. Cole.

13 MR. COLE: Now comes the accused MUTO,
14 Akira, by his counsel, and moves the Tribunal to
15 dismiss each and every Count in the Indictment in
16 which he is accused, on the ground that the prosecu-
17 tion has failed to prove by substantial and suffi-
18 cient evidence the offenses therein charged against
19 him.

20 MEMORANDUM.

21 In addition to joining in the over-all
22 motion to dismiss, the accused MUTO moves the Tribunal
23 to dismiss the Indictment as to all Counts thereof
24 in which he is charged.

25 The accused, throughout his career, has

1 been a military man. The record is completely bare
2 of any evidence to show that he ever committed any
3 act, at any time or place, which was not in accord
4 with the highest traditions of military service,
5 whether those traditions be of Japan or any other
6 country. On the contrary, the evidence plainly
7 shows that throughout the greater part of his mili-
8 tary career he has held subordinate positions, in
9 the sense that those above him were the ones to de-
10 termine policies; and that his duty, by every recog-
11 nized concept of the military throughout the world,
12 was to carry out the orders of his superiors. We
13 contend that this is a principle beyond argument and
14 recognized by all the world, including the highest
15 military men of the countries represented on this
16 Tribunal.

17 This principle, and the complete failure
18 of the prosecution to show that this accused com-
19 mitted any act outside the proper scope of his duties
20 should require a dismissal of the charges against
21 him. In brief, there is not one incident in the
22 record to show that the accused did anything which
23 others of comparable rank could not have properly
24 done in any country in the world which has a mili-
25 tary establishment.

1 For the sake of brevity, the various counts
2 in the Indictment will be considered in groups.

3 Group One is composed of Counts 1 to 36,
4 inclusive. The accused MUTO is named in all except
5 Counts 18, 25, and 35. He is charged in taking
6 part in the formulation or execution of a common
7 plan or conspiracy, having planned and prepared a
8 war of aggression, and having initiated and waged
9 a war of aggression. The evidence discloses that
10 the accused never at any time had a position which
11 would permit him to formulate policies which would
12 bind Japan or the individuals in power. Others
13 above him were the ones who formulated such policies
14 as existed.

15 Brief reference to the record will suffice
16 to show how far the prosecution has failed to es-
17 tablish these charges against the accused. His
18 tenure of office as Chief of the Military Affairs
19 Bureau is relied on by the prosecution as proof
20 of these counts. But no where in the whole record
21 is there the slightest quotation of this accused to
22 show the part he is supposed to have contributed.
23 It is clear that he attended various conferences,
24 by virtue of his office. But he attended them in
25

1 his minor capacity of "secretary", "exponent",
2 or "explainer", to quote the documents in ques-
3 tion.

4 We refer to Exhibits 649, 1030, 1241, and
5 1266, in all of which the accused is referred to as
6 an "exponent" or "explainer". It is highly signifi-
7 cant that in all these instances the accused's super-
8 iors were present. This in itself is enough to show
9 that he was not a spokesman or policy maker. And
10 it is more significant, not to say curious, that
11 although minutes of such conferences and meetings
12 were kept, as is obvious from the fact that what the
13 prosecution considers important has been quoted,
14 there is not one word of quotation of the accused
15 throughout the entire record.

16 Further, as proof of the minor capacity of
17 this accused in the conferences referred to, we quote
18 from Exhibit 649, which was a meeting of the Privy
19 Council regarding a protocol between France and Japan,
20 held on 28 July 1941: "Chairman of the Committee
21 SUZUKI ruled that the inquiries were over and
22 requested the Cabinet Ministers and Explainers to
23 retire. (Cabinet Ministers and Explainers retired)."
24 In Exhibit 1266, which refers to a meeting of the
25

1 Investigation Committee of the Privy Council, 10
2 December 1941, it is said. "After the above-men-
3 tioned questions were completed, Chairman of the
4 Committee SUZUKI, deeming that all the questions
5 were over, asked the Ministers and Explainers to
6 retire. (Ministers and Explainers retired)."

7 Other examples to the same effect could be cited.

8 With reference to Exhibit 1103, it should
9 be noted that the meetings or conferences referred
10 to are proved, not by any official minutes or records
11 but by an article from a newspaper. Why were no
12 official records produced. If these conferences
13 were of the grave importance attributed to them by
14 the prosecution, it is highly improbable that news-
15 paper men were allowed to attend. If they were not
16 allowed to attend, it is absurd to assume that the
17 list of persons attending or the matters discussed
18 could have been determined by an outsider. This
19 type of evidence is wholly unconvincing and the
20 President of the Tribunal made pointed comments
21 regarding this exhibit at Pages 10,054 and 10,056
22 of the record.

24 We call attention to Exhibit 1207-A, an ex-
25 cerpt from the interrogation of the accused TOGO.
In speaking of the composition of a note, he says:

1 "The note itself was written by the Foreign Office,
2 but the responsibility for the composition rests
3 with the participating members of the liaison con-
4 ference." Thus a significant distinction is made
5 between those who, by their very duties, participa-
6 ted in such matters, and those who attended merely
7 as secretaries or explainers. The importance of
8 these latter has been shown to be negligible. We
9 quote from Exhibit 1209, an extract from the inter-
10 rogation of the accused TOJO: "There were also
11 probably three other persons in the capacity of
12 secretaries, for these three usually came to
13 Imperial Conferences. These three were Mr.
14 HOSHINO . . . Mr. MUTO . . . and Vice Admiral OKA."
15 And further in the same document, "I am not posi-
16 tive that they were there." This, indeed, is
17 strange proof of the importance of those whom
18 the prosecution would like to describe as policy-
19 makers.

20
21 It is claimed by the prosecution that the
22 accused MUTO was appointed to various committees,
23 etc., the claim being that such committees were parts
24 of the common plan or conspiracy, but it is curious
25 that there has been a complete failure on the part
of the prosecution to show the accused MUTO's par-

1 ticipation in the work of such committees, his
2 attendance at meetings, or indeed whether any meet-
3 ings were held. It is absurd to claim that the
4 accused participated in a plan or conspiracy of
5 such magnitude, and then to fail to show any official
6 act or utterance made by that accused in the meet-
7 ings or conferences in which such alleged plan or
8 conspiracy was originated, forwarded, and executed.

9 As to the Counts of Group One dealing with
10 initiating and waging of war of aggression, it is
11 contended, and the records show, that the accused
12 was never in a position of power sufficient for that
13 purpose. There is nothing in the record in this
14 respect to show anything but his devotion to duty
15 as a military man, the doing of his duty as imposed
16 upon him by his superior officers.

17 Groups Two and Three will be considered
18 together for the sake of brevity. Group Two includes
19 Counts 37 to 52 and all are charged against this
20 accused with the exception of Counts 48, 49, 50 and
21 52. He is charged under Counts 53, 54, and 55, which
22 compose Group Three. These two groups charge murder,
23 conspiracy to murder, to authorize and permit viola-
24 tions of laws of war, and disregard of duty in regard
25 thereto.

1 The prosecution has failed completely to
2 establish such charges against the accused. They
3 have shown no conspiracy, and surely no participa-
4 tion by this accused in such an alleged conspiracy.
5 There is not even a hint of evidence to show that
6 this accused murdered any person, knowingly permit-
7 ted the murder of any person or approved of any
8 alleged murder after it was committed. The same
9 applies in full to all violations complained of in
10 these counts.

11 With particular regard to the matter of
12 Prisoners of War, to take an example, the testimony
13 is muddled at best and totally insufficient to es-
14 tablish the faintest degree of guilt upon this
15 accused. A great amount of evidence was adduced to
16 show that Prisoner of War policies were handled
17 through the Military Affairs Bureau of the War Min-
18 istry, but this evidence is garbled and totally un-
19 convincing. Further, the accused MUTO held the office
20 as Chief of said bureau only until 20 April 1942.
21 The only matter shown to have transpired during the
22 period from the outbreak of war to 20 April 1942
23 regarding Prisoners of War is the exchange of notes
24 which established policies. It is important to
25

1 note that it was after the accused MUTO had left
2 this office -- in late April or early May -- the
3 testimony is conflicting here, too -- that Prisoner
4 of War policies complained of by the prosecution
5 were adopted.

6 Regarding atrocities and Prisoner of War
7 matters in the field, it should be noted that the
8 accused held only one position in which he had any-
9 thing approaching command responsibility; from April
10 1942 until October 1944, while he commanded the
11 Imperial Guards Division in Sumatra. During that
12 entire period there was no fighting in Sumatra, no
13 prisoners were taken, and those prisoners who were
14 confined in camps in Sumatra were already reported
15 to Tokyo and were under the control and direction
16 of higher authorities, as the evidence clearly shows.
17 The evidence further shows that Prisoner of War
18 matters were handled almost exclusively through
19 other than the regular channels of command, for the
20 sake of expeditiousness, and thus did not involve
21 this accused.

22 To conclude, it is respectfully contended
23 that the evidence shows that the accused MUTO was
24 in subordinate positions at all pertinent periods,
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1 was never on a policy-making level, and could not
2 and did not commit the acts charged to him in the
3 Indictment. The prosecution has failed wholly to
4 prove the offenses therein charged.

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THE PRESIDENT: Colonel Warren.

MR. WARREN: If the Tribunal please, before commencing my argument I should like to make this observation. In view of the Tribunal's ruling with reference to statements of co-defendants made after the consummation of the alleged conspiracy, it is submitted that virtually all of the State's case with reference to OKA has fallen.

In presenting arguments on behalf of the accused OKA with reference to his motion to dismiss, counsel, for the sake of brevity, will not argue each individual count and will confine themselves to the overall evidence bearing on this defendant. It is our contention that there has been insufficient evidence adduced by the prosecution to prove each element of each offense charged in the Indictment and that, therefore, the accused OKA should not be required to assume the burden of proceeding and introducing evidence in his own behalf.

There has been no contention on the part of the prosecution at any time that the defendant OKA acted in any capacity other than with regard to his duties in the Navy of Japan; consequently the position of the Navy is of great importance in deciding the issues with reference to this defendant.

1 What, then, was its position? The answer
2 is clear. The position of the Navy in opposing war
3 has at all times been well defined. As late as
4 the Third KONOYE Cabinet it remained adamant in its
5 position that war should be avoided if at all pos-
6 sible. Reference is made to page 10,254 of the trans-
7 cript of evidence for November 12, 1946, wherein the
8 then Navy Minister OIKAWA made plain the Navy's
9 position. This particular part of the evidence is
10 a quotation from the Memoirs of the then Prime
11 Minister KONOYE who states that OIKAWA made the
12 following statements which are here quoted and are
13 extracts from the transcript of evidence.

14 "Let us leave the decision as to whether
15 there is any hope for a successful conclusion
16 of the diplomatic negotiations in the hands of
17 the Prime Minister and the Foreign Minister,
18 and as for the Navy, she will comply with that
19 decision***."

20 "If there is any hope for a successful
21 conclusion of the diplomatic negotiations,
22 we want the negotiations to be continued***."

23 "That is if we are to rely on diplomatic
24 negotiations, we would like it to be carried
25 out thoroughly***We want to make it a success

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at all costs***We want the decision of the
Prime Minister***We want to comply with this
decision."

Continuing with his statement, the then
Prime Minister KONOYE made an additional remark which
appears of record at page 10,263 of the transcript
of the evidence, and which is here quoted:

"In the meantime it became gradually known
***that since the Navy herself had not the will
to fight, but couldn't say so herself, she was
appealing to the Premier through Bureau Chief
OKA by the way of Chief Secretary TOMITA for
the Premier to express it***."

"As an outcome of it, Chief MUTO of the
Military Affairs Bureau called on Chief Secretary
TOMITA and reportedly requested that the Navy
be asked to make a definite statement at this
time. Hence, when Chief Secretary TOMITA relayed
this to Chief OKA of the Navy Affairs Bureau,
Bureau Chief OKA reportedly stated that the
Navy, as usual, cannot say it and that she can
say no more than that she will comply with the
decision of the Premier***."

There is other evidence in the record, which
the Tribunal will recall, that corroborates these

~~quoted statements of the then Prime Minister KONOYE.~~

1 At this time when the negotiations referred to were
2 being carried on between the Prime Minister and the
3 Navy Minister, it is clear from the evidence that
4 the acts of the defendant OKA were his official acts
5 as liaison officer and he was merely delivering
6 messages of higher officials. In view of the fact
7 that it is clear from the evidence that the Navy did
8 not want nor desire war at that time and that it was
9 the Navy's hope that the negotiations to avert war
10 would be successful, it does not follow that any
11 logical conclusion may be drawn from the evidence which
12 would support the prosecution's contention that the
13 accused OKA aided, abetted, assisted, participated
14 or otherwise engaged in any common plan or conspiracy
15 to wage aggressive war, or a war of any kind, but
16 that, on the contrary, he and his superior officers
17 diligently attempted to avert war.

18 There is evidence that the defendant OKA
19 attended certain liaison conferences and Imperial
20 Conferences held during the year 1941, but there is
21 no evidence to show that he did at any time voice or
22 express an opinion in such meetings, other than to
23 answer questions propounded to him by participating
24 members concerning technical or factual matters which
25

1 might be expected to be within the knowledge of a
2 person occupying the subordinate positions which
3 the evidence indicates he held from time to time.
4 It is suggested that all the evidence introduced
5 concerning him shows that his position was at all
6 times that of a secretary and of a liaison officer,
7 and that he never did attain a position which would
8 place him on a policy-making level. Messages
9 conveyed by him or prepared by him or his subordinates
10 contained the decisions of his superior officers;
11 and there is no substantial evidence to indicate
12 that he at any time influenced such decisions.

13 There is some evidence that the accused was
14 present on November 5, 1941, at an alleged Imperial
15 Conference in which decisions were reached concerning
16 Japan's attitude toward various nations in the event
17 of war. The evidence with reference to this incident
18 plainly shows that in addition to the presence of
19 the accused such conference was also attended by
20 the Navy Minister. There is no evidence to indicate
21 that the accused was a participating member of this
22 conference or that he acted in any manner other than
23 that of a secretary.

24 In support of the contention concerning the
25 position of this defendant, reference is made to

1 exhibit 1209, which is an extract from an interrogation
2 of Hideki TOJO concerning a similar Imperial Conference
3 held on December first or second in which he gives
4 the names of certain persons who attended such con-
5 ference and states concerning them:

6 "These were the responsible people who
7 were there***."

8 In continuing his statement he says:

9 "There were also probably three other persons
10 in the capacity of secretaries, for these three
11 usually came to the Imperial Conferences. The
12 three were the Chief Cabinet Secretary Naoki
13 HOSHINO, Chief of the Military Affairs Section
14 of the War Ministry, Mr. Sho MUTO, Chief of the
15 Military Affairs Section of the Navy Ministry,
16 Vice-Admiral OKA.***I am not positive that they
17 were there***."

18 This remark becomes significant in view of
19 the fact that so unimportant was the accused OKA in
20 the minds of those responsible persons who attended
21 such conferences that Hideki TOJO was not even certain
22 they were present but they may have been because they
23 were secretaries that usually attended. The only
24 logical conclusion which can be drawn is that when
25 the defendant OKA attended such meetings, he attended,

1 not as a responsible person, but in the capacity of
2 secretary.

3 Reference is again made to the evidence
4 which indicates that the accused OKA attended liaison
5 conferences during the year 1941. The evidence with
6 reference to these conferences indicates just as
7 strongly that the accused acted in his accustomed
8 capacity as secretary and not as a participating
9 member. There is no evidence to show that he partici-
10 pated in any of the decisions or that he wielded
11 undue or great influence upon his superior officers
12 who were always in attendance at such meetings. It
13 is contended that the accused cannot be chargeable
14 with the acts and decisions of his superior officers.

15 It is suggested that at best the evidence
16 upon which the prosecution relies to show the presence
17 of this defendant and other persons at the liaison
18 conferences has little evidentiary value. It is
19 significant that the accused OKA never attended any
20 such meetings unless there was also present an officer
21 superior in rank and on a policy-making level. The
22 evidence relied upon to show the attendance of persons
23 at such conferences appears to be an extract from an
24 article which appeared in the newspaper "Asahi"
25 introduced as exhibit 1103. In commenting upon the

1 introduction of this particular document at page
2 10,054 of the transcript of evidence, the President
3 of the Tribunal made the following observations:

4 "Well, is there any part you would like to
5 point in particular? It may be an extremely
6 useful document, but there is no advantage, so
7 far as I can see, in reading it into the trans-
8 cript if the nature of the business is so
9 indefinite***."

10 "You might consider for what purpose you
11 are really introducing this***."

12 And on page 10,056 there appears this
13 additional remark,

14 "This document at this state of the
15 transcript would be no more useful to us than
16 the exhibit itself if omitted from the trans-
17 cript***."

18 In analyzing this documentary evidence it
19 does not appear to counsel that it would be logical
20 to reach the conclusion that newspaper reporters were
21 permitted in the conference rooms. Otherwise, it
22 seems certain that the prosecution would have been
23 able to produce news stories concerning the topics
24 under discussion and that such topics would not have
25 to be referred to any such vague and indefinite terms

1 as "exchange of views", "exchange of information on
2 important matters", or "discussion of important
3 matters". Apparently news reporters were not per-
4 mitted to attend these conferences and, therefore,
5 it is not illogical to conclude that perhaps upon
6 many occasions, when the defendant OKA was alleged
7 to have been present, he was merely present in the
8 chambers where the conferences were held in order
9 that his services, if needed, would be available
10 to those on policy-making levels and that he was
11 not physically present in the actual conferences
12 themselves. In this connection it is believed signi-
13 ficant that many of the reports do not list him as
14 present but in each instance where he is listed his
15 superior officer was in attendance.
16

17 The capacity of the accused at such of the
18 liaison conferences as he did attend is explained
19 in exhibit 1207A, which is an extract from the
20 Interrogation of Shigenori TOGO. This extract is
21 with reference to a note written by the Foreign
22 Office of the Japanese Government concerning negoti-
23 ations with the United States in which appear the
24 following statements:

25 "The note itself was written by the Foreign
Office, but the responsibility for the composition

1 rests with the participating members of the
2 liaison conferences***."

3 In the same document is the additional
4 statement:

5 "As I have said at a previous meeting,
6 members of a liaison conference who were
7 responsible for the study and discussions
8 on the matter were TOGO, SHIMADA, SUGIYAMA,
9 NAGANO, TSUKADA, ITO, KAYA, SUZUKI, and the
10 three secretaries -- HOSHINO, MUTO and OKA.
11 As to the members of the Cabinet, under the
12 constitution they were responsible for
13 decisions of the Cabinet even on matters
14 outside of their respective offices***."

15
16 It is clear from the extracts of the docu-
17 ments here quoted, that is to say, exhibits 1209 and
18 1207A, that Imperial Conferences and liaison confer-
19 ences were attended by two separate categories of
20 persons, one referred to as the responsible or
21 participating members and the other as secretaries.
22 In each instance the line of demarcation is clear
23 and the evidence leaves little room to doubt that
24 those in the capacity of secretaries were of little
25 or no importance in so far as the participating

1 or responsible members were concerned. The last
2 quoted statement from exhibit 1207A might be
3 confusing inasmuch as it refers to the members of
4 a liaison conference who were responsible for the
5 study and discussions on the matter. However, it
6 is believed that if the entire document is taken
7 as a whole, the only construction that can be placed
8 thereon is that the secretaries, as such, were not
9 participating or responsible members of such
10 committees.

11 There is also evidence that the accused OKA
12 attended a meeting referred to as the "Assembly of
13 Greater East Asiatic Nations' Joint Declaration
14 Adopted on November 6, 1943." This is set out in
15 exhibit 1346 and appears of record at page 12,098
16 continuing through page 12,102. In examining this
17 evidence it is again disclosed that the defendant OKA
18 accompanied his superior officer. In analyzing all
19 of the evidence in the record concerning meetings
20 attended by the accused OKA there is not recorded
21 one single instance when he attended a meeting in
22 the absence of a superior officer on a policy-making
23 level.
24

25 In view of these facts, it is the contention
of counsel that the defendant OKA always acted in a

1 subordinate manner without power to make important
2 decisions and without power to engage in discussions
3 except when asked. To further bolster this contention
4 reference is made to exhibit No. 649 which is used
5 only as an example because other exhibits will
6 disclose the same situation. However, they are
7 not dealt with here for the sake of brevity. On
8 page two of the document appear the names of persons
9 referred to as explainers. Among them appears the
10 name of the accused OKA. This exhibit refers to
11 a meeting of the Privy Councillors. After a full
12 and complete discussion was had concerning the
13 business in hand, explainers and ministers present
14 were requested to retire after which the Privy
15 Councillors conferred among themselves and arrived
16 at their own conclusions.

17 In this argument it has been the intention
18 of counsel to refer to each instance in which the
19 name of the accused OKA appears in the transcript
20 of evidence and to refer to those documents which
21 appear most likely to shed light upon his activities.
22 Reference has not been made to all documents which
23 might in some manner affect the accused; and if a
24 discussion of any document which might be pertinent
25 to the issues has been overlooked, it is not intentional.

1 The Honorable Mr. Justice Mansfield in
2 presenting that phase of the prosecution's case
3 dealing with the events under Article 5B of the
4 Charter states in substance that copies of the
5 complaints lodged by the Swiss Legation as pro-
6 tecting power on behalf of the United States, Great
7 Britain, Australia, Canada and New Zealand were
8 transmitted to the Foreign Ministry, to the War
9 Ministry, Navy Ministry and Home Ministry, and draws
10 the conclusion that the accused OKA by virtue of
11 his office was guilty of making misleading state-
12 ments. This statement, of course, is of no evidentiary
13 value and is merely a conclusion on the part of
14 the prosecution which appears to be nowhere substanti-
15 ated in the evidence. That is to say, there is
16 no substantial evidence to indicate that the accused
17 OKA had at any time command functions which would give
18 him power to issue orders respecting treatment of
19 prisoners of war. Apparently the only power he did
20 possess was that of drafting notes in reply to
21 inquiries presented through the protesting power
22 by the various nations and to return such replies
23 through the proper channels and his superior officers.
24 There is no evidence that the accused personally
25 drafted any such notes or that he had any knowledge

1 of the mistreatment of prisoners. On the contrary,
2 the evidence as a whole tends to conclusively prove
3 that the only information available to the accused
4 was official information furnished his department by
5 other agencies properly charged with the knowledge
6 and administration of such matters.

7 In conclusion it is respectfully submitted
8 that the evidence taken as a whole proves conclusively
9 that the accused OKA acted in a subordinate manner
10 at all times, was never on a policy-making level,
11 and that, therefore, he could not have been guilty
12 of any of the crimes lodged against him in the
13 indictment and that consequently the prosecution has
14 wholly failed to produce any substantial evidence
15 which would be sufficient to warrant holding the
16 accused for any further action before this Tribunal.

17 All of which, your Honor, is respectfully
18 submitted.

19 THE PRESIDENT: We will adjourn until
20 half-past one.

21 (Whereupon, at 1200, a recess was taken.)
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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Captain Brooks.

4 MR. BROOKS: Now comes OKAWA, Shumei, by his
5 counsel, and respectfully moves the Tribunal to dis-
6 miss each and every one of the counts in the Indictment
7 against said defendant on the ground that the evidence
8 offered by the prosecution is not sufficient to warrant
9 a conviction of said defendant.

10 In support of the motion to dismiss on behalf
11 of OKAWA, Shumei, argument will be presented in a
12 general and limited way as to all counts of the indict-
13 ment, because of the time limit, and also because of
14 the limited amount of evidence against OKAWA, under
15 the charges made by the prosecution; we submit the
16 prosecution has failed to connect OKAWA with any un-
17 lawful or illegal act, or crime and the prosecution
18 has failed to prove that OKAWA, individually, or with
19 any other divers persons, committed any of the acts
20 charged by the Indictment, or that OKAWA was ever in
21 a position of power, or responsibility, such as would
22 enable him to have acted as charged, if such inclina-
23 tion was proved. We submit that early in this case
24 the prosecution's own witnesses testified that OKAWA
25 was by profession a teacher of History in the Imperial

1 University, and a writer, and that his living was
2 derived from such efforts.

3 The books he wrote were his interpretation
4 and recording of current historical events, discussions
5 on colonial and diplomatic matters, and he did not
6 advocate, or publish the material in said books,
7 because of personal ambitions or with criminal inten-
8 tions and motives, and the prosecution's evidence does
9 not prove otherwise.

10 In relation to the March and October Incidents,
11 prosecution's own witnesses have testified that these
12 local political Incidents had nothing to do with any
13 war, or international situation, at that time or
14 later, and that domestic problems, corrupt politics,
15 and political struggles between rival political groups
16 to bring about internal reform was the basis for such
17 incidents, actions, and demonstrations as transpired.

18 We submit that possibly through misunderstand-
19 ing or because of translation difficulties and not
20 being thoroughly acquainted with Japanese activities
21 and the conditions of the time, the prosecution placed
22 undue emphasis on these incidents; they believed that
23 if 300 bombs were to be used, in what they thought,
24 and charged, was an attempt to destroy the Diet Build-
25 ing that this must be incorporated for examination by

1 the Court, but our submission is made very clear, when
2 on cross-examination it was found that this was only
3 a political demonstration, such as we see nearly every
4 week in Japan, and the bombs were naught but fire-
5 crackers, and that KOISO, acting on orders of higher
6 authority, seized the firecrackers and ordered OKAWA
7 and the others to abandon said demonstration. The
8 evidence shows this fact and confirms that matters in
9 issue were purely domestic issues, and that said
10 incidents failed to achieve any change, and that during
11 the time, or thereafter, no position of responsibility
12 or trust was sought or obtained by OKAWA, thus, we
13 submit that all said counts and charges against OKAWA
14 should be dismissed.

15 We further submit that in the trial that
16 followed covering such incidents as set out in exhibit
17 2177, OKAWA was censored for his political activity,
18 and although he tried to explain the same, however
19 as a result of this series of trials instituted by
20 those government officials in power, OKAWA was removed
21 from the political scene by sentence of the Court to
22 five years imprisonment for his part in such activities,
23 which sentence OKAWA duly served, as the prosecution
24 were willing to stipulate and agree.

25 We submit it is illogical to charge OKAWA

1 with being a conspirator as set forth in the Indict-
2 ment, for had he been in any conspiracy with those in
3 power, or control of the Japanese Government, as
4 alleged by the prosecution, would they have stood silent-
5 ly by, and let him be tried, if he had been aiding,
6 abetting and assisting their cause, or would they
7 have caused his arrest and allowed him to remain in
8 prison to serve a five years sentence if he were a
9 fellow conspirator? Furthermore, how could OKAWA
10 conspire as charged during the years that he was in
11 prison, and is it logical that such charges made by
12 the prosecution are well founded?

13 We submit that another matter is raised, if
14 we assume for argument, that, prior to said trial the
15 actions of OKAWA had unlawful and criminal significance
16 and he was called to account therefor, then what is
17 the effect of this former trial, conviction and
18 punishment for activities previous to said date; can
19 said defendant be tried again, or for any other offense
20 if either offense is necessarily included in the other?
21 We submit these matters should be considered in Bar
22 of trial and as to their placing said defendant in
23 double jeopardy as a result of this trial.

24 Wherein counsel moves that all counts pertain-
25 ing hereto be dismissed as against defendant OKAWA.

1 Furthermore, the prosecution has failed to
2 show any connection, between OKAWA, and any other
3 defendant, or other divers persons, acting in con-
4 junction with OKAWA, to be responsible or to have had
5 any part in any unlawful activity after his release
6 from said prison on completion of said five years
7 sentence. Therefore, since no evidence against OKAWA
8 has been introduced by prosecution and he has not
9 been mentioned or connected with either the China
10 Incident, or the Pacific War that followed in 1941,
11 and thereafter, we submit that said counts as they
12 pertain to OKAWA should be dismissed for lack of
13 evidence.

14 In the opening phases of this case a personal
15 record was presented on every defendant except OKAWA.
16 This is understandable as OKAWA was never in military
17 service, because of being physically disqualified
18 therefor from youth, and since OKAWA had never held
19 any political office there was no political record.
20 The only record of OKAWA is that of his student days
21 showing his training to become a teacher of the History
22 of Colonization by foreign powers, and he wrote, during
23 vacation periods. However, if a check is made on the
24 dates of publication of his books, we find that his
25 greatest period of literary activity was during his

1 time in prison when he was serving the five years
2 sentence previously referred to and the proceeds from
3 the sale of these books went to support his family
4 during said tragic years of his life as a political
5 prisoner.

6 The only evidence presented against OKAWA
7 in relation to the Manchurian Incident was very sketchy
8 and hazy and based entirely on hearsay testimony, with-
9 out the chance for cross-examination or confrontation
10 of said witness, and it was only to the effect that
11 OKAWA expressed no surprise for such an incident, and
12 what followed, as from current events and knowledge of
13 anti-Japanese sentiment in China, such an action was
14 sooner or later, more or less, expected but there is
15 no evidence that OKAWA participated, planned or had
16 knowledge and assisted in any of the acts charged by
17 the counts in relation thereto. Wherein such counts
18 should be dismissed as against OKAWA.

19 The evidence of the witness TANAKA and of
20 the witness SHIMIZU make it very clear that OKAWA
21 is not guilty as charged.

22 There is no evidence that OKAWA had any con-
23 nection with diplomatic negotiations, or with initi-
24 ating any hostilities, and the evidence as to murder
25 counts, atrocities or the case for prisoners of war

1 do not charge OKAWA with any participation or responsi-
2 bility therein; nor was OKAWA charged as participating
3 in any of the Important Liaison and Imperial conferences
4 of Cabinet meetings throughout any period of the Indict-
5 ment; and as to conventional war crimes and crimes
6 against humanity the attention of the Tribunal is
7 called to the fact that OKAWA is not named or shown
8 to have been connected directly or indirectly there-
9 with by even a scintilla of evidence.

10 Wherein such counts should be dismissed as
11 against OKAWA.

12 It has not been shown by the prosecution that
13 the accused had guilty knowledge or a malicious inten-
14 tion or criminal motive for or behind any action of
15 said defendant during said periods covered by the
16 counts of said Indictment or that he either objectively
17 or subjectively committed any act that was a crime or
18 unlawful as alleged in said Indictment.

19 Furthermore there has been no showing that
20 any of the articles written by OKAWA were used by the
21 Japanese Government or by any of the accused in making
22 any important decision, charges, formulation of policy
23 or otherwise, and furthermore even had such articles
24 been so used for an unlawful purpose, there has been
25 no evidence to show that the writer thereof had

1 knowledge that they would be so used, or intended for
2 same to be used for such criminal purpose, or that
3 they could or would be used in such a manner if said
4 fact had been proved to be true.

5 Many books, articles and expressions of
6 personal opinion are daily made in every democratic
7 country in the world, under the right of free speech,
8 and rights established for freedom of the press, and
9 freedom of speech and expression is a prerogative that
10 has been encouraged and guaranteed, and though such
11 expressions may influence decisions and policies of
12 government, it is only by the process of adoption,
13 and making them the opinion of the government official,
14 with such modifications and changes, and for such pur-
15 pose as he has in mind, does such result occur and the
16 writer does not get credit or share in the responsi-
17 bility therefor.

18 In view of the limited activity of OKAWA
19 and his civilian status and background as has been
20 brought out in prosecution's evidence, and as he was
21 considered as a crackpot writer by high authorities,
22 it is impossible to conceive that he was ever in a
23 position of such influence and authority as it would
24 be necessary for him to have had, to be able to formu-
25 late and direct the foreign policies of Japan in any

1 such way as the prosecution has tried to lead the
2 Tribunal to believe.

3 The Tribunal is requested to consider that
4 had OKAWA been sane during the period 1928 to 1945
5 that there is insufficient evidence to convict him of
6 any of the charges made, and we submit that the Tribunal
7 should clear this defendant of any charges of guilt,
8 so that his small home and property may be released
9 from government control for the benefit of his
10 family and so they may utilize what little money he
11 has accumulated from his writings to pay his hospital
12 and institutional expenses.

13 We submit that since the evidence has been
14 necessarily heard, and OKAWA has been represented
15 daily in Court, to avoid leaving any cloud on OKAWA's
16 past record and also to avoid the expense of or
17 necessity for a trial at some future date over this
18 same evidence.

19 The Court's action on this motion should be
20 taken for if said motion to dismiss is granted
21 defendant is not prejudiced or harmed thereby and
22 if it is denied then the question of sanity during
23 said period may be determined.

24 Wherein we respectfully request all counts
25 against OKAWA and that a finding of not guilty be

1 entered, and that OKAWA be released to the custody
2 and care of his family and legal representatives.

3 All of which is most honorably submitted.

4 THE PRESIDENT: Mr. Cunningham.

5 MR. CUNNINGHAM: If the Tribunal please:

6 Comes now the accused OSHIMA, Hiroshi, and
7 respectfully moves the Tribunal to dismiss the charges
8 contained in the Indictment as to him, on account of
9 the insufficiency of the evidence to prove his partici-
10 pation in any conspiracy as charged, or his commis-
11 sion of the offense of murder, or any crimes against
12 humanity, or his violation of the rules of land war-
13 fare, or any other offense described in the Charter
14 or Indictment or counts thereof.

15 The following points are submitted for the
16 consideration of the Tribunal:

17 1. That the evidence fails to show that
18 the accused OSHIMA was a party to any agreement, plan
19 or conspiracy which had for its purpose the initi-
20 ating or waging of any war of aggression.

21 The evidence fails to show that the accused
22 OSHIMA was a member of any group, organization, or
23 association which had for its purpose aggressive war
24 or any object which was contrary to international
25 law, treaties, or assurances.

1 That the evidence fails to show that the
2 accused OSHIMA was within the jurisdiction of this
3 Tribunal when the acts complained of were committed,
4 particularly the charge of murder, crimes against
5 humanity and conventional war crimes; but the evidence
6 discloses that the accused OSHIMA was in Europe at the
7 times when the acts complained of were committed.

8 The evidence fails to disclose that the
9 accused OSHIMA held any position in the Japanese Govern-
10 ment to which any criminal responsibility was attached,
11 for acts committed in the performance of the duties of
12 the office; but the proof discloses that he was an
13 ambassador when the acts complained of were committed
14 and therefore immune by virtue of the rights, privileges
15 and protection afforded his office under the rules of
16 international law -- set out more fully in the brief
17 to be submitted.

18 The evidence fails to sustain the charges
19 contained in the Indictment, but does establish that
20 the accused OSHIMA was a personal representative of
21 the sovereign of Japan and that his acts were not
22 personal but the acts of state, therefore not punish-
23 able under international law by virtue of their
24 nature.
25

1 The evidence fails to show that as a diplo-
2 matic agent of Japan the accused OSHIMA received in-
3 structions to do anything which was beyond customary
4 diplomatic protocol, or beyond his authority as Ambassa-
5 dor; but has established that all negotiations and in-
6 structions were in compliance with the established
7 policy of Japan and in conformance with the laws of
8 Japan.

9 The evidence fails to show that there was any
10 effective collaboration between the German and Japan-
11 ese Governments, or military or naval forces; but
12 proves that the relationships between the two nations
13 were created by treaties, agreements, and alliances
14 entered into through the established governmental chan-
15 nels.

16 The proof fails to establish that any of the
17 acts complained of in the Indictment were performed
18 in a manner contrary to international law and custom;
19 but the facts prove that the acts complained of were
20 performed in the manner required and in the manner
21 prescribed for the conduct of Ambassadors in inter-
22 national relationships by international law and cus-
23 tom.

24 The evidence fails to show that the accused
25 OSHIMA performed any tasks other than those required

of his office.

1 The evidence fails to establish that the
2 accused OSHIMA was a policy maker in the Japanese
3 Government, or that he was an official of the Japan-
4 ese Government within the contemplation of the amended
5 Charter, or that he exercised any governmental politi-
6 cal control, or military command over Japanese forces.
7

8 The evidence fails to establish any tangible
9 relationship between the accused Ambassador and the
10 political administration of Japan; but the record
11 discloses that he served under nine different Foreign
12 Ministers during his tour of duty as Ambassador, and
13 that the interpretation and translation of their
14 policies differed according to the policy of the cab-
15 inet in power.

16 The evidence fails to prove that any of the
17 administrative acts of the accused OSHIMA were illegal,
18 but the evidence discloses that they were based upon
19 the established policy of the Japanese Government,
20 were legitimate exercises of the powers given to
21 persons of such responsibility, and were consistent
22 with the Imperial policy and political decisions of the
23 Japanese Government.

24 That the prosecution has failed to prove that the
25 acts of the accused OSHIMA were contrary to law, that

1 they were contrary to the law of the country of his
2 ambassadorial residence, that they were prohibited
3 in the land of his permanent residence, or that they
4 were in violation of any of the laws of any of the
5 complaining nations at the time of their commission.
6 It is established that the acts of the accused OSHIMA
7 in the performance of his duties were exempt from ju-
8 dicial inquiry in the country of his ambassadorial
9 residence, were within the law of his permanent resi-
10 dence, and were permitted by international law and
11 custom.

12 The record is silent as to any participation
13 of the accused in the Manchurian and China Phases;
14 and there is insufficient evidence to establish the
15 guilt of the accused in any other phase of the case.
16 The proof discloses affirmatively that the accused
17 OSHIMA was kept in the dark concerning the events lead-
18 ing up to the war between Japan, United States, Great
19 Britain, Philippines, Netherlands, and the other
20 Allied Powers.

21 There is no evidence to sustain the charge
22 that the accused OSHIMA committed any offense against
23 humanity, or violated the rules of land warfare in any
24 respect. The Counts 53 to 55 charging these offenses
25 to the accused should be dismissed as to him.

1 That the Prosecution does not sustain the
2 charge that the accused OSHIMA participated in any
3 plan or conspiracy to violate international law,
4 treaties, or assurances.

5 That the prosecution has failed to establish
6 that the accused OSHIMA committed any of the offenses
7 described in the Indictment, or that the acts of
8 omission or commission of ambassadors were contem-
9 plated in the definition of the offenses described in
10 the amended Charter.

11 18. Concerning the individual Counts the
12 accused OSHIMA states that there is insufficient evi-
13 dence to prove his guilt under the following Counts,
14 and moves that they be dismissed as to him for the
15 reasons set forth:

16 Count I. The charge is indefinite and the
17 evidence too abstract to establish proof of commis-
18 sion of any of the offenses charged in the Count.

19 Count 2. The prosecution has failed to prove
20 that there was a government in existence in the terri-
21 tory described in the Count capable of protecting
22 life, property and interests which had been acquired
23 under treaties and agreements, but the proof affirma-
24 tively shows that Manchukuo having become an inde-
25 pendent state, the issues raised in Count 2 have been

1 adjudicated politically through the only means avail-
2 able at the time.

3 Counts 3, 6, 27 and 28, eliminating 19.

4 Under these Counts the prosecution has failed to present
5 sufficient evidence to establish a prima facie case
6 showing that the accused OSHIMA had any connection
7 whatever with the China conflict, ~~ex~~cept that he used
8 his best efforts to secure mediation and settlement
9 through the good offices of third parties.

10 Counts 4 and 5. These Counts contain numerous
11 charges which are not sustained against the accused
12 OSHIMA. There is a misjoinder of causes and complain-
13 ants in these Counts which has neither been justified
14 nor authorized under the amended Charter.

15 Count 6 is the same as Count 3.

16 As to Counts 7 to 13, 20, 21, 22, 29, 30 and
17 31, the prosecution has failed to substantiate these
18 Counts but has proven by the greater weight of the
19 evidence that the settlement of the dispute between
20 the United States, Great Britain and the Commonwealth
21 of Nations was impossible of disposition by pacific
22 means.

23 Counts 14 and 32: That the evidence fails
24 to establish a just cause of complaint under these
25 Counts, for the reason that no act of aggression has

1 been proved; on the contrary, the Government of the
2 Kingdom of the Netherlands violated conventions and
3 treaties by making a sudden and unexpected declara-
4 tion of war against Japan. There is a misjoinder of
5 complaining nations under these Counts.

6 Count 15, eliminating 23 and 33; there is
7 a question as to whether or not those Counts cover
8 this accused. The proof fails to sustain this Count,
9 but shows that the action taken by the Japanese Gov-
10 ernment was in accordance with agreement between the
11 Japanese and French Governments as it existed at the
12 time. This Count presumes the existence of the "Re-
13 public of France" which has not been proved by any
14 evidence introduced in this cause.

15 Counts 16, 24 and 34. The evidence fails
16 to disclose that the Kingdom of Thailand and the
17 Mongolian Peoples Republic are authorized complainants
18 in these proceedings and no evidence has been intro-
19 duced to sustain the charges as against the accused
20 OSHIMA.

21 17. The charges in these counts have not
22 been substantiated. Striking the rest of that alle-
23 gation--
24

25 Counts 37 to 44 inclusive. These Counts
 should be dismissed as to the accused OSHIMA for the

1 reasons set out in Paragraph 3 of this Motion, and
2 more particularly for the reasons set out in the ob-
3 jection to the introduction of evidence made in be-
4 half of the accused OSHIMA, and set out in Appendix
5 18 in the brief. Also, for the further reasons that
6 the Charter does not contemplate a charge of conspiracy
7 to commit murder or other crimes against humanity, and
8 that the proof does not sustain the charge of personal
9 responsibility of the accused OSHIMA for any of the
10 offenses described. The proof does not define the
11 crime of murder or conventional war crimes which
12 strictly defined are restricted to military responsi-
13 bility, whereas crimes against humanity require venue,
14 presence personally, overt acts and a specific viola-
15 tion against some established law of a specified
16 country. No such offense has been proved. Therefore,
17 Counts 37 to 44 inclusive should be dismissed as to
18 the accused OSHIMA.

19 Counts 53, 54 and 55. These Counts should
20 be dismissed as to the accused OSHIMA for the reasons
21 stated in Paragraph 15 of this Motion and more particu-
22 larly set out in the objection to the evidence in the
23 atrocity phase of the case. Said objection found in
24 the official record on pages 11,405, 11,406 and 11,407,
25 dated 27 November 1946, and are hereto referred to and

1 made a part of this Motion by this reference in Section
2 18 of the Brief and Memorandum filed herewith. I be-
3 lieve the brief will be distributed during the day.
4 Prosecution has failed in its responsibility to es-
5 tablish that the complaining nations have performed
6 their reciprocal obligations under the rules of land
7 warfare before having recourse to complain against the
8 Japanese. That by resorting to inhuman illegal methods
9 to subdue Japanese armed forces and to destroy the
10 morale of the Japanese war effort, the complaining
11 nations have forfeited any right to punish violators
12 of the rules of land warfare in their own right.

13 19. The evidence proves conclusively the
14 following:

15 (a) That the Japanese form of government
16 with its checks and balances provides a system which
17 is incompatible, irreconcilable with the theory of
18 conspiracy charged by the complaining nations against
19 the accused OSHIMA in this cause.

20 (b) That the foreign policy of Japan was
21 always in the hands of the government alone.

22 (c) That the acts complained of as respects
23 the accused OSHIMA were committed in the lawful exer-
24 cise of his function as the agent of a sovereign
25 nation.

1 (d) That the accused OSHIMA held no power or
2 influence sufficient to place him in a position to
3 commit the offenses charged against him in the Indict-
4 ment.

5 (e) That the decisions leading to war were
6 accomplished through the established governmental
7 channels. The complaining nations have waived their
8 rights by negotiating and making agreements with the
9 same governmental officials as they charge with con-
10 spiracy in the Indictment.

11 (f) The acts complained of in the Counts
12 naming the accused have been judicially and politically
13 determined and settled by treaties, non-aggression and
14 mutual assistance pacts and by financial settlement
15 according to the only existing legal processes as of
16 the time of their commission. This was accomplished
17 further by applying economic sanctions, embargoes,
18 freezing of assets, and all other acts short of war,
19 and by electing to have recourse to war to determine the
20 issues.

21 I have submitted an amendment on 20 which I
22 think has probably been circulated as a correction.

23 THE PRESIDENT: Read it as corrected.

24 MR. CUNNINGHAM: Has it been received? I
25 read it as corrected.

1 The record fails to establish the following
2 vital elements of proof which are indispensable to
3 permit a finding by the Tribunal that the evidence
4 offered by the prosecution is sufficient to find the
5 accused OSHIMA responsible under any Counts of the
6 Indictment.

1 (1) That the acts complained of were criminal
2 at the time of commission.

3 (2) That the complaining nations are authorized
4 to join in these proceedings.

5 (3) That the prosecutors are empowered to
6 represent humanity or mankind.

7 (4) That conspiracy is a crime recognized
8 by International Law.

9 (5) That the amended Charter is in conformance
10 to the Potsdam Declaration.

11 (6) That the Indictment complies with the
12 amended Charter or that the Japanese Government was
13 controlled by any group of the accused at any time
14 during the period covered by the Indictment.

15 (7) That the presumption of self-defense was
16 overcome.

17 (8) That the appointing authority has power
18 or authority over the persons of the accused in this
19 cause.

20 (9) That the Members of the Tribunal are
21 legally appointed and sworn to administer any established
22 system of laws, universal in character, enforceable by
23 judicial order; or that the scope of this inquiry is
24 unlimited.

25 (10) That the record embraces basic documents

1 upon which this Tribunal bases its power; but only an
2 unsigned mimeographed copy of an amended Charter, which
3 fails to satisfy its own requirements as documentary
4 evidence, is of record.

5 (11) That there is no evidence on record to
6 show any international agreement, treaty or convention
7 creating this Tribunal as in similar cases provided.

8 THE PRESIDENT: Of course, many of these
9 submissions are outside the scope of the motions which
10 we permitted. Nevertheless, we will be satisfied to
11 keep that in mind.

12 Now, talking of "(10)", I might scotch this
13 thing at once. An unsigned mimeographed copy is a
14 mistaken description of the document. The person who
15 signs the wax sheet intends that every copy shall be
16 a duplicate or a triplicate, and so on; and you can use
17 a duplicate or a triplicate as much as the original.
18 Obviously, the wax sheet is never intended to be the
19 original. In any event, it is for us to say what we
20 will accept as proof, if proof be needed, and if we
21 cannot judicially notice our own existence. However,
22 it may be thought by one or more Members of the Court
23 that the wax sheet is the original.

24 MR. CUNNINGHAM: My only thought, your Honor,
25 was that the original Charter of January 19 probably

1 should be on file together with the amendment, showing
2 that the amended Charter modified the original Charter
3 and the chain of events which led to exhibit 10,
4 being the official record of this Court's existence. That
5 was my only thought.

6 THE PRESIDENT: Well, we will say no more
7 about it for the time being.

8 MR. CUNNINGHAM: With the exception of isolated
9 instances the facts of the case disclose that the only
10 acts upon which the prosecution relies for implication
11 of the accused OSHIMA were those committed while he
12 was military attache or ambassador plenipotentiary in
13 Germany. The record sets forth that 9 foreign ministers
14 directed the foreign policy of Japan during the seven
15 year tour of the accused. From this and other facts
16 it must be evident that the foreign and domestic policy
17 of Japan towards Germany varied, as the different
18 Cabinets which directed the destiny of Japan while the
19 accused was in Europe, rose and fell. There is no
20 logical way to connect this accused with the charge of
21 conspiracy. If unity of purpose or continuity of plan
22 is an essential element of the crime, this link is
23 certainly missing in this instance.

24 If participation in the deliberation of policy
25 and decisions as to the course to be followed by the

1 Japanese Government is at all required to establish
2 responsibility of the accused for the initiation of or
3 planning for war, then the accused OSHIMA must be excused
4 for he was never an official charged with decisions or
5 allowed to participate in the deliberation leading to
6 decisions. The second link of the chain is also missing.

7 If criminal intent, knowledge of illegal
8 plan, consent or agreement are indispensable elements,
9 and positions or influence necessary to carry out the
10 plan can be attributed to one of the Japanese Empire's
11 ambassadors, then there must be absolute proof as to
12 the essential elements in order to establish guilt.

13 The facts bespeak the opposite in the case
14 of the accused. His sincerity of purpose, his limited
15 access to governmental processes, the impossibility of
16 the exercise of discretion or choice in the performance
17 of his duties add greatly to his presumption of innocence.
18 "Instructions" was the keynote of the accused OSHIMA's
19 relation to his government. The chain of evidence has
20 omitted another important link.

21 All decisions for the Japanese Government were
22 made in Tokyo; decoding and transmission through dip-
23 lomatic channels only were handled by the accused OSHIMA,
24 but this to a very limited extent. Can it be said or
25 read in any degree of fairness from the record that the

1 accused OSHIMA could determine what was coming next from
2 Tokyo, or what he would be asked in Berlin to transmit
3 to his government? Common knowledge tells us that an
4 ambassador is only a person who receives instructions
5 and who reflects reactions; diplomacy will not admit
6 greater participation. A nation's policy is formed by
7 its leaders at home and the proof does not indicate
8 that the accused OSHIMA exercised any influence what-
9 ever in this determination.

10 If sovereignty has lost its right of repre-
11 sentation with immunity in international relations; if
12 freedom from restraint is no longer an attribute of
13 its agents; and if diplomats are now required to pattern
14 their negotiations and operate with the fear of punish-
15 ment if their mission fails; and if the ordinary
16 consequences follow their errors of judgment, then
17 perhaps the acts of the accused are within the scope
18 of this inquiry.

19 But if nations continue to carry on diplomatic
20 relations, if world citizenship is to be enjoyed by
21 spokesmen, if each nation is to have its seat at the
22 table of family of nations, then ambassadorial immunity
23 will continue to be a measure by which the acts of the
24 sovereign representatives will be protected.

25 If the official acts of the accused OSHIMA

1 furnish a link in the chain of evidence from what proof
2 can it be constructed from this record? The accused
3 OSHIMA does not rely solely upon the immunity which
4 international law provides for his official acts, but
5 emphasizes this privilege as an additional release from
6 any personal responsibility to be attached to his
7 ambassadorial functions.

8 The duties of an ambassador are so well described
9 and their field so circumscribed by long usage, custom
10 and the necessities of the assignment that the term
11 "agent" truly describes the role. Discretion and use
12 of moral choice are uncalled for, they have no place.
13 Human personalities and individual responsibility are
14 beyond the field, when nations deal with each other.
15 Nations deal through the heads of their states and the
16 foreign ministers are the organs for communication, the
17 ambassador, the conduit. Resignation, recall and
18 dismissal of agents are prerogatives exercised extensively
19 during recent years.

20 Analyzing German-Japanese relations we find ten
21 agreements, none of which were negotiated or signed
22 by the accused OSHIMA until after their approval in
23 Tokyo and instructions received. Performing the admin-
24 istrative task of signing agreements which were within
25 the ordinary course of diplomatic procedure cannot be

1 considered proof for any of the charges contained in
2 the Indictment. To predicate a conspiracy charge upon
3 an agreement with Germany is contradictory in itself.
4 Looking at the alleged cooperation it resolves itself
5 into three main demands:

6 (1) Germany wished Japan to go against
7 England, Japan refused at a time when the war was
8 going hard for the British Empire.

9 (2) Germany urged Japan to go against Soviet
10 Russia when Hitler's army was marching towards Moscow,
11 and later; this Japan refused to do.

12 (3) The foreign policy of Germany was directed
13 in the crucial period towards keeping the United States
14 out of the European War.

15 Japan was unable to comply with all three demands.
16 There was no effective cooperation between Germany and
17 Japan. The accused is charged with creating a situation
18 which did not in reality exist.

19 His presence in Germany from 1934-39 and again
20 from 1941 until 1945, the time during which most of the
21 acts complained of were being committed in Japan and
22 in occupied areas in the Far East, places the accused
23 in a position far remote from the internal operations
24 which were deciding peace or war for Japan. Lack of
25 communication, strained conditions in international

1 relations specially limited the opportunity of the
2 accused OSHIMA to participate in any organization or
3 governmental program, and any acts which the accused
4 OSHIMA committed were those initiated in Tokyo.

5 No instructions, orders or directives could be
6 issued by the accused OSHIMA by the nature of his
7 assignment. It should be noted that the United States
8 of America carried on diplomatic relations with Germany
9 until war was declared.

10 9. With the close control which a foreign
11 minister exercises over the ambassador and the limited
12 scope of operation allowed, it is inconceivable that one
13 in such a position could be accused so generally as the
14 charges embrace. With the distance involved, the
15 probability of interception of messages, the lack of
16 confidence among nations, and the delicate situation
17 throughout the world the Japanese ambassador in Germany
18 was out of touch with conditions at home far more than
19 the average Diet member or Japanese citizen. He
20 received only that information which the governmental
21 leaders chose to impart to him and the further information
22 obtained from the press and radio. His field of activity
23 was too limited to permit him to commit the offenses
24 with which he is charged.
25

 In all of the opening statements, the prosecutors

1 in explaining their theory of the case, have emphasized
2 throughout, the importance of government posts which
3 determine policy and the official position of the accused,
4 who occupied them. On this basis alone the accused
5 OSHIMA was beyond the scope of this inquiry. If the
6 decision war or peace was critical, if the determination
7 of the Japanese foreign policy was decisive, if the
8 ability to direct or order action of any kind is a
9 material element of the case, then this link of the
10 chain of evidence is most conspicuous in its absence
11 so far as the accused OSHIMA is concerned. He was
12 never a policy maker, military commander, Minister
13 of State, or head of a department. His role was
14 purely administrative, perfunctory, prescribed by
15 the law of his own country and through restraints
16 imposed by international law.

1 Since the people of Japan could not go in
2 a body to Germany, or any other country in the world,
3 to express friendship or desire for cooperation,
4 they must of necessity send their representative.
5 The presence of the head of the state and also the
6 foreign minister is most desirable at home, therefore,
7 there was selected "an agent" who was given instruc-
8 tions and messages to deliver in the name of all of
9 the people. The will of the nation is expressed in
10 the policies of the government translated through
11 official communications, treaties and agreements
12 through the ambassador who is a symbol of his country.
13 The whole nation is bound by what he does. We cannot
14 associate official personality with the individual.

15 All of the agreements, treaties, commitments
16 made to Germany were directed by the Japanese govern-
17 ment through its established governmental channels.
18 This is without question. Not one illegal agreement
19 has been suggested, each nation is the sole judge as
20 to what extent it will carry out intercourse with
21 other sovereign powers. The brief of the evidence
22 under this point shows forcefully how the two nations
23 carried on their relations since World War No. I. It
24 proves conclusively that the accused OSHIMA did only
25 as directed. His country could not have been bound

otherwise.

1
2 Although no case appears in the record of
3 courts of any land convicting the ambassador for any
4 offense committed during his tour of duty -- that I
5 have been able to discover; I had better insert that --
6 or while he was engaged as a diplomat, international
7 law books and treatises abound with authority showing
8 release and exoneration from blame and dismissal of
9 charges without trial. Courts are ordinarily held to
10 be without jurisdiction to try offenses committed by
11 ambassadors. In the United States, cases involving
12 ambassadors are held exclusively to the United States
13 Supreme Court, but Federal procedure prohibits prosecu-
14 tion of foreign ministers. Expediency and necessity
15 have been the keynote of the development to the
16 immunity of ambassadors.

17 All civilized nations recognize their right
18 to perform their duties unrestrained, subject only
19 to the limitations imposed and instructions from
20 their homeland. International law has been the champion
21 and their protector. All the authorities and legal
22 scholars sanction this principle.

23 To contend that an ambassador residing in
24 Germany thousands of miles away from the scene of the
25 Pacific war, secluded from communication with his

1 country except through the courtesy of Russia,
2 Switzerland and other neutrals, could commit any of
3 the offenses charged under crimes against humanity,
4 or the rules of land warfare, is fantastic.

5 It is not to be seriously considered that
6 conspiracy to commit this class of offenses described
7 in Counts 53 to 55 was contemplated by the amended
8 Charter, or that the accused OSHIMA is deemed respon-
9 sible for the commission of any such offenses personally
10 or by remote control. His position, mission and
11 location all negative any connection with these
12 offenses.

13 To charge and attempt to sustain by proof that
14 an ambassador who is the representative of one country
15 to the government of another has violated international
16 law, treaties and assurances requires a complete re-
17 versal of action. Can a legislator be guilty of
18 violating a law by attempting to change or alter it
19 in his official capacity, at the instance of his
20 constituent? Does the executive make himself criminally
21 responsible for error in judgment or is that for the
22 voters, parliament or the senate in impeachment to
23 determine, solely as a political question?
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25 Is international law for individuals, states,
or both? One is the subject, the other is the object.

1 Public international law is for the state, private
2 international law, for individuals. Only the latter
3 concerns itself with crimes. The issue is being con-
4 fused; we are attempting to apply the law of states
5 to individual conduct. This not only leads to con-
6 fusion but is contrary to the purpose and intent of
7 international law itself. Theorists and academicians
8 may temporarily have their day in advocating such
9 extensions, but judges and practitioners must show
10 the fallacy of this erroneous premise.

11 If the framers of the amended Charter had
12 contemplated making ambassadors responsible as public
13 officials and as authors of war, this fact would have
14 been expressly stated. It is assumed that the authors
15 of the amended Charter and the Potsdam Agreement knew
16 of the existence of immunity for they were enjoying
17 the privilege themselves while they were meeting.

18 Since the amended Charter says "OF ITSELF"
19 in Article 6, it must have contemplated that certain
20 offices would be beyond the reach of the Charter as
21 amended. It cannot be imagined that ambassadors are
22 classed with governmental leaders, mere politicians
23 who make decisions and policy. Ambassadors are presumed
24 to be above party politics and represent the sovereignty.
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CONCLUSION

So long as nations must act through their duly appointed representatives, whether it be League of Nations, United Nations, or private consuls of two or more countries, there must be some freedom of expression on the part of the plenipotentiaries, as of necessity the governments of the world must speak through their duly constituted emissaries. If the ambassador or the minister is to bind his country and to express the view of his nation manifested through the organized machinery, he must also be vested with some qualities and characteristics of the sovereignty and his right to speak must be respected and held inviolate.

The Von Papen acquittal indicates that the International Military Tribunal charter employed in Nuernberg was directed toward policy makers primarily. As the court there indicated, it in nowise intended to reach beyond and punish the mere spokesmen. There is a principle of international law involved there which grants immunity and impunity to the sovereign's representative. If the nations of tomorrow wish to maintain the integrity of expression and rely upon the word of the ambassador as expressive of the policy of the nation he represents, then this principle must

1 be followed to the letter. There is no doubt that
2 the law of the future will assume what it so well
3 established in the law of the past: that the ambas-
4 sador must have freedom from the ordinary consequences
5 of his acts.

6 THE PRESIDENT: Mr. Freeman.

7 MR. FREEMAN: If the Tribunal please, comes
8 now the accused SATO, Kenryo and at the close of the
9 prosecution's case and moves the Court to dismiss
10 each and every count against him in said Indictment
11 contained for the reason that the evidence is insuf-
12 ficient to sustain the charges.

13 For the purpose of this brief discussion
14 relative to the failure of the prosecution to dis-
15 charge its burden of sustaining the counts of the
16 Indictment against the accused SATO, Kenryo, we will
17 accept the general divisions named in the Indictment
18 and treat the counts under three classifications:

- 19 1. Crimes Against Peace.
20 2. Murder.
21 3. Conventional War Crimes and Crimes Against
22 Humanity.

23 I. CRIMES AGAINST PEACE (Counts 1 - 36)

24 Since it would be little more than repetitious
25 to describe the contents of these counts and those to

1 follow under the other two groupings, it will
2 suffice to say they deal with the alleged conspiracy
3 or common plan to wage, plan, prepare and initiate
4 wars of aggression as well as the acts which tend to
5 compose the alleged conspiracy. This accused is not
6 charged in counts 18, 19, 23, 25, 26, 33, 35 and 36.

7 To intelligently discuss this matter, it
8 becomes necessary not only to determine the theory
9 behind the alleged conspiracy charges but to
10 rationally treat this subject in the light of
11 logical reasoning. Certainly the application of
12 the broadest concept of conspiracy law might well
13 include a charge against every citizen of Japan who
14 did not openly work contrary to the governmental
15 policies during the period alleged in the Indictment.

16 The prosecution cannot intend this. Such
17 would be fantastic for there would be neither time nor
18 personnel enough to complete the task of trying those
19 involved in the war effort. Therefore, reason would
20 dictate that the gist of the alleged conspiracy accusa-
21 tions comprises as its objective the accusation of
22 those high governmental figures who possessed sufficient
23 power and influence to actually formulate the policies
24 of the country.

25 My colleagues have discussed the question of

1 conspiracy and the substantive law applying thereto.
2 We do not propose to elaborate further but to now
3 point out, from the prosecution's evidence and the
4 failure of the prosecution's evidence, why the accused
5 SATO, Kenryo cannot by any stretch of reasoning be
6 judged guilty of complicity herein.

7 Prosecution exhibit 122 is a brief biography
8 of the positions held by the accused during his
9 military career. It reveals that he was a military
10 man by vocation. Fifty days, or less than two months,
11 prior to the commencement of hostilities December 7,
12 1941 this accused held only the rank of colonel. On
13 October 15, 1941 he was promoted to the rank of
14 "Shosho" which is perhaps comparable to Brigadier
15 General and is the lowest ranking general in the
16 Japanese Army.

17 Certainly then, up to this date the accused
18 occupied such a minor role in the governmental and
19 military affairs of Japan that he cannot with serious-
20 ness be held accountable as a participant in the
21 formulation of even minor governmental policies --
22 not to mention such a momentous decision as war. The
23 very nature of his position makes it physically impos-
24 sible for him to have done so unless the criterion be
25 so broad as to encompass, as said before, the actions

1 of many thousands, if not millions, of Japanese people.

2 The evidence recites further that on November
3 15, 1941 -- and this date is subject to correction
4 because the record varies as to the month -- just
5 twenty-three days prior to the attack on Pearl Harbor,
6 this accused was ordered to assume charge of the
7 Military Affairs Section of the Military Affairs
8 Bureau under the jurisdiction of the War Ministry.

9 The Tribunal should bear in mind that this was merely
10 a section under a Bureau of the War Ministry. The
11 evidence fails to show that this position carried with
12 it any duty of such a nature as could possibly involve
13 the accused in the charges contained under this group
14 of the Indictment. Moreover, there is a total failure
15 of proof that the assumption of an administrative
16 military assignment under orders is, in and of itself,
17 a criminal act.

18 Prosecution evidence reveals that not even
19 the chiefs of bureaus under the War Ministry had
20 authority to make decisions on official documents
21 sent to the War Ministry. And certainly a section
22 head under such a bureau would be in a much lesser
23 position of authority. (Record page 14377).

24 Prosecution evidence further shows that prior
25 to April 20, 1942, at which time the accused SATO

1 succeeded to the office of Chief of the Military
2 Affairs Bureau, he was not even qualified to attend
3 the conferences of bureau chiefs. The effect of this
4 is obvious. How can he be successfully charged with
5 the planning, preparing or initiating of wars of ag-
6 gression or any other acts stated in these counts
7 when a necessary corollary is the ability to
8 participate by virtue of the office or influence
9 held.

10 Having thus shown the Tribunal, by the
11 evidence presented, that up to the period of commence-
12 ment of hostilities December 7, 1941 this accused
13 possessed neither the rank nor occupied any position
14 or influence wherein or whereby he could participate
15 in, control, command or authorize the initiating,
16 planning or waging of war of aggression, we move to
17 the next group.
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1 II. MURDER (Counts 37 - 52).

2 Encompassed under this group are counts
3 charging the initiation by Japan of hostilities
4 between June 1, 1940 and December 8, 1941 and sub-
5 jecting the accused to liability for the crime of
6 murder. This accused is omitted from Counts 45,
7 46, 47 relative to certain cities in China, together
8 with Counts 51 and 52 pertaining to the U. S. S. R.

9 What does the evidence show to sustain
10 these charges against this accused. At the risk of
11 the patience of the Tribunal, we reiterate that the
12 accused SATO was without the means to qualify as to
13 those charges.

14 The record of various meetings where at
15 the grave and weighty matters which were to guide
16 the destiny of Japan were decided do not include the
17 name of SATO, Kenryo as one present nor does the
18 prosecution offer even a scintilla of evidence that
19 he was a participant, leader, organizer, instigator
20 or accomplice in the matters herein alleged.

21 Whether or not the charge of murder can
22 successfully be applied to the act of destroying
23 human lives upon the commencement of war is a matter
24 which has been treated in the general argument and
25 will not be further discussed here.

1 The accused's advancement to the position
2 of Chief of the Military Affairs Bureau dates as
3 of April 20, 1942 and will be considered in the
4 following group.

5 III. CONVENTIONAL WAR CRIMES AND CRIMES
6 AGAINST HUMANITY (Counts 53 - 55).

7 The prosecution has consumed a larger
8 portion of its time under these counts in dealing
9 with the commission of the individual acts which com-
10 pose the alleged war crimes against humanity. The
11 legally all-important proposition of connecting such
12 alleged acts with the responsibility of this accused
13 has failed of proof and the evidence offered there-
14 fore is of a weak and varying nature which cannot
15 but be considered a complete failure of proof in
16 this regard.

17 The heartbeat of the prosecution's case
18 against this accused is that he, as Chief of the
19 Military Affairs Bureau commencing April 20, 1942
20 as aforesaid, was in charge of the Prisoner of War
21 Bureaus. This allegation of the prosecution has not
22 been substantiated by the evidence offered but in
23 fact has been disproven by their own witnesses and
24 documents.
25

Exhibit 92 describes the set-up and origin

1 of the Prisoner of War Internment Camp and Prisoner
2 of War Information Bureaus. The Tribunal should
3 take particular note of the use of the word
4 "bureaus." In this document are contained the
5 words and I quote: "The Prisoner of War Informa-
6 tion Bureau shall be under the jurisdiction of
7 the Minister of War." A like statement is contained
8 in reference to the Prisoner of War Internment Camps.
9 They were thereby given the rank and dignity of
10 bureaus and so designated as such.

11 The witness TANAKA on page 14,346 said:
12 "There is no bureau in War Ministry which is under
13 the control of the Military Affairs Bureau. They are
14 all under the jurisdiction and control of the
15 Minister of War. The Prisoner of War Information
16 Bureau is a special existence in Japan and is
17 under the control of the Minister of War."

18 In connection with this line of thought,
19 the Tribunal should carefully note the testimony of
20 the witness TANAKA that UEMURA as Chief of the
21 Prisoner of War Bureaus was a Lieutenant General
22 and superior in rank to this accused. Therefore,
23 the proof before the Tribunal as to the relationship
24 between the Military Affairs Bureau and the Prisoner
25 of War Bureaus can well be expressed in the words

1 of their own witness TANAKA (Record 14,404). "The
2 Prisoner of War Information Bureau was established
3 as an outside bureau attached to the War Ministry."

4 The evidence further shows the needs of
5 the commanders of Prisoner of War Camps were com-
6 municated directly to the Prisoner of War Information
7 Bureau where the matters pertaining to the Prisoners
8 of War were disposed of.

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1 Prosecution relied upon the testimony of
2 witness SUZUKI to show that protests relative to
3 treatment of prisoners of war delivered by the Swiss
4 Legation to the Japanese Government were connected
5 with the accused SATO. Their attempt has been highly
6 unsuccessful for the evidence reveals time and time
7 again that the duties pertaining to the handling of
8 prisoners were in the hands of the two bureaus known
9 as the Prisoner of War Information Bureau and the
10 Prisoner of War Administration and/ or Control
11 Bureau; that the protests were sent directly to them.

12 The witness is of the opinion that copies
13 may have been sent to the other bureaus (Record Page
14 15526) but this, in and of itself, does not put the
15 accused SATO in a position dissimilar to that of any
16 of the Bureau Chiefs.

17 The burden is on the prosecution to prove
18 these things and their failure to do so cannot be
19 supplied by implication or innuendo. The evidence
20 should be clear and concise. But by whatever rule
21 the Tribunal wishes to apply in judging the suf-
22 ficiency of the evidence it is demonstrated that in
23 regard to the accused SATO a conviction cannot be
24 sustained by the evidence presented.

25 The witness TANAKA has admitted that he was in

1 charge of the Military Service Bureau of the War
2 Ministry and that friction existed between his
3 bureau and the Military Affairs Bureau. Therefore
4 the Tribunal should take into consideration the pos-
5 sibility of biased testimony on the part of this
6 witness which may be retaliatory in a sense. (Record
7 Page 14343).

8 It has not been the purpose of counsel to
9 take each count separately for the reason that it
10 would be tiresome and repetitious to state and re-
11 state simply that there has been a failure of proof.
12 Therefore this accused incorporates the arguments
13 heretofore made by counsel in reference to general
14 matters and statements pertaining to law relative to
15 the Indictment.

16 Relying upon the Tribunal at this time, at
17 the close of the prosecution's evidence, to weight
18 the value and nature of the evidence offered, and
19 to note the lack of evidence, in reference to each
20 and every count the accused SATO renews his motion
21 that the Indictment be dismissed and requests that he
22 be not required to go forward with evidence in his
23 behalf.

24 MR. BLAKENEY: May it please the Tribunal --

25 THE PRESIDENT: Which are you taking, Major?

1 MR. BLAKENEY: In the absence of Mr.
2 Furness, I have been asked to read the motion on
3 behalf of SHIGEMITSU, Mamoru.

4 THE PRESIDENT: I think it will be con-
5 venient to have the recess now. We will recess for
6 fifteen minutes.

7 (Whereupon, at 1440, a recess was
8 taken until 1500, after which the proceedings
9 were resumed as follows):

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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Major Blakeney.

4 MR. BLAKENEY: Now comes the defendant
5 SHIGEMITSU, Mamoru, and moves the Tribunal to dismiss
6 the Indictment and the several counts thereof in so
7 far as they relate to him upon the ground that the
8 evidence adduced by the prosecution is insufficient to
9 warrant a conviction upon any of the counts charged
10 by the Indictment.

11 In moving the Tribunal for the defendant
12 SHIGEMITSU to dismiss the Indictment, we invite the
13 attention of the Tribunal to the evidence adduced by
14 the prosecution against the defendant, which we very
15 briefly analyze under the following headings:

- 16 (1) Sino-Japanese Relations
- 17 (2) The Pacific War
- 18 (3) Japanese-German-Italian Relations
- 19 (4) Soviet-Japanese Relations
- 20 (5) Conventional War Crimes

21 To shorten the argument, the citations of
22 pages of the record pertinent to the various points will
23 not be read.

- 24 (1) Sino-Japanese Relations.

25 The defendant SHIGEMITSU is indicted in

1 Counts 1, 2 and 3 for conspiracy to dominate
2 respectively Eastern Asia, Manchuria, and China; in
3 Count 6 for planning and preparing war; and in
4 Counts 18 and 27 for waging war against China. No
5 evidence has been adduced by the prosecution to estab-
6 lish any responsibility of his of whatever kind on
7 these charges. Not only that, but all the witnesses
8 produced by the prosecution for testimony pertinent
9 to this point have testified affirmatively to his
10 efforts and his fruitful services toward peace between
11 China and Japan.

12 Moreover, abundant evidence offered by the
13 prosecution has clarified the fact that the Manchurian
14 Incident occurred without desire or intention on the
15 part of the Japanese Government -- or, rather, occurred
16 against its intention. See, for instance, the testi-
17 mony of the witnesses SHIDEHARA, the then Foreign
18 Minister; WAKATSUKI, then Premier; TANAKA, ex-Director
19 of the Military Service Bureau; MORISHIMA, et al.
20 The defendant SHIGEMITSU, the evidence discloses, had
21 nothing to do with the outbreak of such incident.

22 Baron SHIDEHARA, Foreign Minister at the time
23 of the Manchuria Incident, has also testified to the
24 facts that SHIGEMITSU was a faithful apostle of
25 "SHIDEHARA diplomacy"; that he himself recommended

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1 appointment of the defendant as Minister to China;
2 that the appointment took place during his tenure of
3 office as Foreign Minister; that the defendant spared no
4 effort to relax the tension then prevailing between
5 China and Japan; and that strenuous efforts were made
6 by the defendant, after the outbreak of the incident
7 in Manchuria, toward a peaceful solution of the con-
8 flict. Also the testimony of the witness MORISHIMA,
9 Consul at Mukden, Manchuria, at the time of the
10 Manchurian Incident, is as clear on these points.
11 The witness Powell has testified to the fact that
12 SHIGEMITSU, after the unfortunate outbreak of hostili-
13 ties around Shanghai, succeeded by dint of his untiring
14 efforts in concluding the Agreement for Cessation of
15 Hostilities on 5 May 1932.

16 Attention is now invited to the facts that
17 the defendant SHIGEMITSU is not indicted in Count 19
18 for initiating war against China on or about 7 July
19 1937, and that, though Count 28 charges him with
20 waging war against China, he was neither in Tokyo nor
21 in China at the time when those hostilities occurred
22 between China and Japan, but was in Europe as ambassador
23 until the hostilities in China had reached a much
24 advanced stage (Cabinet Secretariat curriculum vitae,
25 exhibit 123. It may be also noted in this connection

1 that one page -- covering the period of five years
2 from 1930 to 1934 -- is evidently missing from this
3 personnel record.)

4 This defendant is indicted also on Counts 48,
5 49 and 50 for slaughtering the inhabitants of the
6 cities of Changsha, Hengyang, Kweilin and Liuchow.
7 The statement above applies also to these charges,
8 and no evidence can be said to have been adduced to
9 connect him with such murders.

10 (2) The Pacific War.

11 The defendant SHIGEMITSU is charged, in
12 Counts 4 and 7 to 16, with the conspiracy for and
13 the planning and preparation of the war against the
14 United States of America and nine other nations.
15 But the fact is that the war had been begun before he
16 was appointed Minister for Foreign Affairs on 20 April
17 1943; and of course before he was concurrently appointed
18 Minister for Greater East Asia on 22 July 1944. He
19 was at his posts abroad not only before but after
20 the outbreak of the war. Exhibit 123 shows that:

21 (a) The war against the United States, the
22 British Commonwealth, the Philippines and the Nether-
23 lands started about sixteen months before his appoint-
24 ment as Foreign Minister, and about two years and seven
25 months before he became Minister for Greater East Asia;

1 (b) The advance of the Japanese Army into
2 French Indo-China was completed about three years
3 before the defendant SHIGEMITSU was made Minister for
4 Greater East Asia (retaining his portfolio as Foreign
5 Minister). In this respect, it has been made clear
6 in the opening statement on this phase that the
7 Japanese Army moved into northern French Indo-China
8 on 22 September 1940, and into southern French Indo-
9 China on 28 July 1941, and that Japan was, from that
10 moment onward, the master of Indo-China. As Mr.
11 SHIGEMITSU was not in Tokyo at that time (exhibit 123),
12 he did not participate in governmental conferences
13 in 1941 concerning that occupation, nor had he any
14 knowledge of the negotiations which were conducted
15 exclusively by a very limited number of people in
16 unnter secrecy in Tokyo, Vichy and Hanoi. It is
17 only natural that the prosecution did not mention in
18 court the name of the defendant as one of those who
19 occupied positions of authority in regard to matters
20 concerning French Indo-China.

21 On the other hand, the French National
22 Committee of de Gaulle declared war on Japan on
23 8 December 1941; that is, two years and seven months
24 before the defendant took office as Minister for
25 Greater East Asia;

1 (c) The same facts as in paragraph (a) apply
2 to the war against Thailand.

3 Not only, therefore, has no evidence been
4 tendered by the prosecution to sustain the charges
5 against the defendant SHIGEMITSU of conspiracy for
6 and the planning and preparation of the above-mentioned
7 wars; but all the evidence, through the exhibits
8 cited above, demonstrates the contrary; that is, that
9 he had nothing whatever to do with these wars.

10 The statement under this heading will apply
11 also to Count 23 for initiating war against France,
12 and Counts 29 to 34 for waging war against the United
13 States, the British Commonwealth, China, France, the
14 Philippines and the Netherlands, with which the
15 defendant is not indicted on Counts 19, 20, 21, 22
16 and 24, for the initiation of the aforesaid wars.

17 (3) Japanese-German-Italian Relations.

18 This is Count 5. During the time when the
19 negotiations on the Anti-Comintern Pact were being
20 conducted, the defendant SHIGEMITSU was on the reserve
21 list of the Foreign Office (exhibit 123).

22 When later the negotiations on the Tripartite
23 Pact were going on, he was ambassador to the Court of
24 St. James (exhibit 123), and innumerable evidentiary
25 documents of the prosecution have proven that the

1 negotiations were expedited mainly in Tokyo by a very
2 small number of people, in complete secrecy. These
3 facts reinforce the inference from his failure to be
4 mentioned in this connection to indicate that this
5 defendant had no connection with either of these
6 pacts, or with the alleged three-power conspiracy.

7 (4) Soviet-Japanese Relations.

8 As for Counts 17 and 35 -- initiating and
9 waging war against the Union of Soviet Socialist
10 Republics -- the defendant, as a career diplomat,
11 was ambassador in the U.S.S.R. at the time of the
12 Lake Khasan Incident mentioned in Count 35
13 (exhibit 123). Whatever he said during the negotiations
14 in 1938 was all within the scope of the instructions
15 he received from his home government (exhibit 754,
16 extract from the record of the Talk of Litvinov and
17 SHIGEMITSU on 20 July 1938, in Moscow, concerning
18 Khasan Lake), and no evidence has been adduced by the
19 prosecution to establish that the Tokyo government
20 had any idea of initiating or waging war against the
21 U.S.S.R. In executing the instructions mentioned
22 above, the defendant made no slightest pretention of
23 demanding cession of Soviet territory by demarcating
24 the border between the U.S.S.R. and Manchukuo, as it
25 was contended without proof in the opening statement

1 of the Russian prosecutor. On the contrary, the
2 record of the Talk of Litvinov and SHIGEMITSU
3 (exhibit 754) testifies to the facts that what the
4 defendant wished was that the border should be accurately
5 demarcated, not on the basis of the data of Manchukuo
6 alone, but that the data of both parties should be
7 consulted, and that the first and foremost concern
8 of the defendant in these negotiations was tranquility
9 on the Soviet-Manchukuoan border in the region of
10 Lake Khasan. And thus agreement was reached between
11 Commissar Litvinov and Ambassador SHIGEMITSU on the
12 border clash of 1938. (exhibit 273). The prosecution
13 has in this way tendered evidence that the defendant
14 made a valuable contribution to peace between the
15 two nations; the charge that he initiated war against
16 the U.S.S.R. is sustained by no evidence.

17 This defendant is also indicted in Count 52
18 for murder in the affair of Lake Khasan. The state-
19 ment above under the present heading applies a fortiori
20 to this point; and not even the slightest evidence
21 which might connect the defendant with any such murder
22 has been tendered by the prosecution.

23 (5) Conventional War Crimes.

24 Mr. SHIGEMITSU is indicted in Counts 53, 54
25 and 55 for conventional war crimes. As far as the

1 defendant is concerned, we understand that he is
2 directly charged with matters regarding the treatment
3 and administration of prisoners of war and civilian
4 internees, as well as murder of such and similar
5 persons. The Minister for Foreign Affairs, which
6 post the defendant assumed well after the commencement
7 of the war, had no competence or responsibility for
8 prisoners and civilian internees. His sole competence
9 in this respect was to transmit to appropriate Japanese
10 authorities documents received on this matter from
11 foreign governments, and to inform those foreign govern-
12 ments of replies from such authorities when he was
13 furnished with them. The opening statement of the
14 prosecution for this phase admitted that such was
15 the competence of the Minister for Foreign Affairs, and
16 this fact has been established by the evidence of
17 TANAKA, Ryukichi, ex-Director of the Military Service
18 Bureau, and SUZUKI, Tadakatsu, during the war Chief
19 of the Bureau for Affairs of Japanese Residents in
20 Enemy Countries, witnesses introduced by the prosecu-
21 tion.
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23 Abundant proof as to who the competent
24 authorities on this matter were may be found in numerous
25 evidentiary documents tendered by the prosecution --
for example, exhibit 1965-A, containing the regulations

1 concerning the Prisoners of War Information Bureau
2 and prisoners of war camps, ordinances and orders issued
3 by the Minister of War concerning the treatment,
4 supplying, employment for labor of prisoners of war,
5 etc. That the Minister for Foreign Affairs had no
6 competence in regard to prisoners of war and similar
7 persons, nor any organization to conduct investigation
8 concerning protests from foreign governments, may be
9 found stated in the testimony of TANAKA and SUZUKI.

10 The foregoing statement applies of course to
11 the employment of prisoners of war for the construction
12 of the Burma-Thailand Railway and to the Bataan Death
13 March. Especially it has been clarified, as to the
14 former, by a prosecution document, exhibit 475, Report
15 of the War Ministry, and the affidavit of the witness
16 WAKAMATSU, ex-Lieutenant General (exhibit 1989), that
17 the employment of prisoners of war was based upon a
18 decision of the Imperial General Headquarters; and
19 further as to the latter, by exhibit 1980-E, it appears
20 not only that it occurred before the inauguration of
21 the defendant SHIGEMITSU as Minister for Foreign
22 Affairs, but that even the accused TOJO, the then
23 Minister for War, had no knowledge of the matter. In
24 brief, no evidence has been adduced to prove the
25 responsibility of the defendant on these counts. And

1 not only that, but the evidence tendered by the prose-
2 cution has clearly shown that this defendant had no
3 connection with the matter.

4 It may be interesting to note that, although
5 the Foreign Ministry had no competence or responsibility
6 whatever for the treatment or administration of
7 prisoners of war, evidence by the witness SUZUKI has
8 made it clear that the Foreign Ministry did its best
9 to secure amelioration by the competent authorities
10 of the conditions of the prisoners of war.

11 It is also to be noted that SHIGEMITSU is
12 indicted in Count 44, that is, murder of prisoners
13 of war, civilian internees, and similar persons.
14 What has been said above under this heading will
15 prove the defendant's lack of responsibility for any
16 such murder.

17 Conclusion.

18 By this very brief analysis of the evidence
19 we are led to believe that no sufficient evidence has
20 been adduced by the prosecution to warrant a conviction
21 upon any of the counts charged by the indictment
22 against the defendant SHIGEMITSU, and we submit that
23 those parts of the indictment pertaining to this
24 defendant should be stricken and the defendant
25 discharged.

1 THE PRESIDENT: Mr. McDermott.

2 MR. McDERMOTT: Mr. President, and Members
3 of the Tribunal:

4 Comes now the accused SHIMADA, Shigetaro,
5 and at the close of the prosecution's case moves the
6 Court to dismiss each and every count in said
7 Indictment contained for the reason that the evidence
8 is insufficient to sustain a verdict of guilty against
9 him.

10 The prosecution evidence has shown that the
11 accused SHIMADA, Shigetaro, became Minister of the
12 Japanese Navy and a cabinet member only fifty days
13 prior to the commencement of hostilities, December 7,
14 1941. The evidence further has shown that the
15 planning and preparing of the Pearl Harbor attack, as
16 well as the other phases of the commencement of hosti-
17 lities, was under the exclusive control and preparation
18 of the Chief of Naval General Staff. The Indictment
19 alleges that SHIMADA attended only three conferences
20 relative to deciding on the policy of war, and the
21 proof does not sustain his attendance at these,
22

23 Prosecution evidence further reveals (docu-
24 ment 7512, exhibit 124) that immediately prior to
25 his appointment as Navy Minister the accused SHIMADA
served only as the Commander of the Yokosuka Naval

1 Station and was not in a command position sufficient
2 in any sense to engage in a common plan or alleged
3 conspiracy to commit any of the acts set forth in
4 this Indictment. It is clearly indicated that
5 practically all of the naval career of this accused
6 was spent as a man of the sea and that he was not such
7 an officer as did participate in policy formation.
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1 At the time of the entry of this accused
2 into the Cabinet as Minister of Navy, prosecution
3 evidence has shown that the situation between
4 the United States and Japan was so tense that the
5 possibility of war had ceased to exist and in its
6 place the probability of war had succeeded. The
7 prosecution has failed to show that this accused
8 either encouraged the outbreak of war or could
9 have prevented it in any way, and in fact, it is
10 apparent that the pattern of war had clearly been
11 cut prior to his assumption of duties.

12 The evidence of the prosecution's main
13 witness against the Japanese naval accused on trial
14 here was that of Admiral J.O. Richardson of the
15 United States. And his testimony, full of incon-
16 sistencies and incorrect statements, did not affect
17 this accused in any way, but in fact exonerated him
18 of many of the counts in this Indictment for the
19 reason that it was shown that the entire naval
20 strategic operational plans, known as General
21 Order Number One, had been originated and prepared
22 prior to the time this accused assumed office and
23 were carried out under the direction of the Naval
24 General Staff and not the Navy Ministry.

25 Prosecution has further shown that it was

1 the customary practice of all nations for high-
2 ranking and senior naval officers to succeed to
3 the higher positions in the naval department and
4 they have failed to show that the assumption of such
5 a post is criminal in and of itself.

6 A distinction must be drawn between the
7 Naval Department and others because in a sense the
8 procedure of accepting an assignment to a position
9 is more in the nature of a duty or obligation and
10 not an individual matter of choice.

11 Prosecution evidence clearly indicates a
12 split in naval thought as to even the possibility of
13 successful outcome of war with the United States and
14 has even shown that the Chief of Naval General
15 Staff advised the Emperor to this effect. The
16 evidence shows that Admiral OIKAWA, Minister of Navy
17 under the KONOYE Cabinet, resigned because of the
18 general over-all issue of war or no war. How then
19 could a conspiracy exist with the multitude of
20 divergent thoughts that then existed?

21 In reference to the counts under Group 3
22 entitled "Conventional War Crimes and Crimes Against
23 Humanity," prosecution has failed to show that this
24 accused either ordered, consented or had knowledge
25 of or gave permission to any of the commanders of

1 the navy to commit any of the alleged acts or
2 atrocities complained of. The impossibility of
3 controlling the spontaneous actions of all naval
4 commanders, thousands of miles from the Navy
5 Ministry, is self evident.

6 The Court should take particular notice
7 that the prisoner of war camps were largely under
8 the control of army personnel and not naval. And
9 that the misconduct set forth in the Indictment in
10 reference to the Japanese Navy in this regard has
11 been unsustainable by the evidence presented. A
12 distinction exists between spontaneous acts com-
13 mitted on the battlefield and the housing and keep-
14 ing of prisoners of war far removed from those areas.

15 Therefore, for the reasons stated herein, the
16 accused SHIMADA respectfully requests this Tribunal
17 to dismiss each and every count of the Indictment
18 as heretofore stated and to at this time weigh the
19 entire evidence of the prosecution to the end that
20 it be discovered that the matters herein shown
21 constitute a complete failure of proof of the
22 charges so stated.

23 Thank you, Mr. President.

24 THE PRESIDENT: Mr. Caudle.

25 MR. CAUDLE: If the Tribunal please: Now

1 comes SHIRATORI, Toshio, through counsel and makes
2 and enters a formal motion to disniss each and every
3 count of the Indictment heretofore filed in this
4 matter as pertains the said defendant SHIRATORI,
5 and in support of said motion submits the follow-
6 ing facts and contentions:

7 GROUP ONE -- "Crimes Against Peace"

8 With reference to Counts 1 to 4, the
9 defendant SHIRATORI was, during the time such
10 offenses were alleged to have taken place, a
11 career diplomat serving in the Foreign Office of
12 Japan and had no activity whatsoever relative to
13 these counts. The highest position held by him
14 during that part of the period to June 1933 was
15 Chief of the Information Bureau of the Foreign
16 Ministry under Baron SHIDEHARA, then Foreign Minister,
17 in which position he exercised a conciliatory attitude
18 and, according to Baron SHIDEHARA's own testimony
19 (page 1356 of the record dated 25 June 1946) as a
20 prosecution witness, cooperated in every respect
21 with the Baron in an effort to stop all forms of
22 military aggression.

23 Inasmuch as these counts cover from January
24 1, 1928 to September 2, 1945, it will of necessity
25 require later reference to various dates and the

1 corresponding activities of the accused during this
2 period in later parts of this motion. Inasmuch as
3 the defendant had no connection whatsoever with the
4 charges contained in said Counts 1 to 4, the same
5 should be dismissed.

6 Count 5 relating to world domination by the
7 Tri-Partite Pact and the planning and conspiracy
8 thereof, will be discussed later in this motion.

9 Count 6 should be dismissed on the grounds
10 set forth covering Counts 1 to 4.

11 With reference to Counts 7 to 17, it is
12 called to the attention of the Tribunal that in
13 prosecution exhibit 125, it is shown that the
14 accused was relieved as a diplomatic adviser in the
15 Foreign Office at his own request on July 22, 1941 and
16 thereafter was never again connected with the
17 Foreign Office or with the government. That is to
18 say, inasmuch as he had no part in the government
19 after July 22, 1941 and the alleged offenses
20 occurred December 7, 1941 and thereafter, said
21 Counts 7 to 17 should be dismissed.

22 With reference to Counts 18 to 26, the
23 alleged charges are contained in said counts
24 against specific defendants which group does not
25 contain the name of the defendant SHIRATORI, and

1 it is assumed that in view of this condition,
2 said counts do not in any way involve the accused
3 SHIRATORI. However, for the sake of clarity, it
4 is requested that his status in this regard be
5 officially recognized by the Tribunal.

6 With reference to Count 27, that part of
7 the same relating to waging aggressive war between
8 September 18, 1931 and September 2, 1945 against the
9 Republic of China should be dismissed for the reason
10 set forth covering Counts 1 to 4.

11 With reference to Count 28, the same should
12 be stricken from the Indictment in that this count is
13 covered by Count 27 and is only repititious.

14 With reference to Counts 29 to 32, the
15 same should be dismissed on the grounds set forth
16 covering Counts 7 to 17.

17 With reference to Count 33, inasmuch as
18 said count charges specific individuals among which
19 the name of the accused SHIRATORI does not appear,
20 it is assumed that the Tribunal will not consider
21 this count as pertains to said accused. However,
22 it is requested that the Tribunal take official
23 cognizance of this circumstance.

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25 Count 34 should be dismissed on the grounds
set forth covering Counts 7 to 17.

1 Count 35 should be dismissed on the grounds
2 that from April 1937 until September 1928 the accused
3 was on the waiting list at the Foreign Office and
4 had nothing whatsoever to do with governmental
5 operations as shown in prosecution exhibit 125, and
6 further that said count designates specific persons
7 among which the accused SHIRATORI does not appear.

8 Count 36 should be dismissed due to the
9 fact that at the time of the alleged offense
10 contained in said count, the same being the summer of
11 1939, the accused was in Italy as shown by prosecu-
12 tion exhibit 125, and further that said count
13 designates specific persons among which the accused
14 SHIRATORI does not appear.

15 GROUP TWO -- "Murder"

16 Counts 37 and 38 should be dismissed in
17 that said counts contained charges alleging offenses
18 by specific individuals among whom the name of the
19 accused SHIRATORI does not appear and further, being
20 a career diplomat, had nothing whatsoever to do
21 with the alleged atrocities contained in said counts.

22 Counts 39 to 43 should be dismissed on the
23 grounds set forth covering Counts 7 to 18 and Counts
24 37 and 38.

25 With reference to Count 44, the same should

1 be dismissed on the ground that the defendant was
2 a diplomat and had no connections or functions of
3 a military nature whatsoever, and at no time advocated
4 or became a part of any conspiracies to murder
5 prisoners of war, or crews of ships destroyed by
6 Japanese forces, or any other such alleged charge
7 as contained in said count, and there has been
8 absolutely no evidence whatsoever introduced to
9 connect said accused with such atrocities.

10 With reference to Counts 45 to 52, the alleged
11 charges are contained in said counts against specific
12 defendants, which group does not contain the name
13 of the defendant SHIRATORI, and it is assumed that
14 in view of this condition said counts do not in any
15 way involve the accused SHIRATORI. However, for
16 the sake of clarity, it is requested that his status
17 in this regard be officially recognized by the
18 Tribunal.

19 GROUP THREE -- "Conventional War Crimes and
20 Crimes Against Humanity"

21 With reference to Count 53 to 55, it is
22 brought to the special attention of the Tribunal
23 that there are specific persons named in said counts
24 among which the name of the accused SHIRATORI does
25 not appear, and further that these counts come

1 within the province of grounds for dismissal as set
2 forth herein covering Counts 7 to 17.

3 The accused through counsel has substantiated
4 the motions covering all counts with the exception
5 of Count 5 relating to a general plan of conspiracy
6 between Germany, Italy and Japan. Said accused
7 asks that this count be dismissed, and in setting
8 forth the grounds for such dismissal, it will be
9 necessary to relate not only his activities while
10 Ambassador to Italy, but also to give a brief resume'
11 of the action of the accused prior to and after
12 such service as Ambassador to Italy and set forth
13 predominant facts that exist relative to exhibits
14 heretofore introduced in evidence by the prosecution
15 relating to the accused's activities in this regard:

16 Prosecution exhibit 125 shows that on June
17 2, 1933, the accused was appointed Minister to Sweden
18 and that on June 28, 1933 he was assigned to similar
19 service in Norway, Denmark and Finland; that he
20 continued in this capacity until April 28, 1937
21 when at which time he was relieved of this assign-
22 ment; that thereafter from April 28, 1937 to
23 September 22, 1938 the accused was placed on the
24 waiting list with no duties whatsoever; that on
25 September 22, 1938 the accused was appointed

1 Ambassador to Italy by UGAKI, Kazushige, the then
2 Foreign Minister. However, before his arrival in
3 Rome, USAKI resigned as Foreign Minister and
4 ARITA, Hachiro replaced him in this position; that
5 the accused did not arrive in Rome until December
6 29, 1938, and immediately thereafter the entire
7 Cabinet fell on January 3, 1939 with HIRANUMA re-
8 placing Prince KONOYE as Premier. So in view of
9 these facts, that is to say, a new government having
10 been set up after his appointment, of which the Court
11 has ample evidence, it is impossible to believe or
12 even consider that the accused was appointed
13 Ambassador to Italy for the sole purpose of promot-
14 ing and concluding the Tri-Partite Pact as
15 alleged by the prosecution.

16 In various excerpts from CIANO's diary as
17 submitted by the prosecution, being prosecution
18 exhibits 499-A and 501, the prosecution endeavors to
19 show that the accused was attempting to conclude said
20 pact. Exhibit 499-A is dated January 7, 1939, and
21 inasmuch as the Cabinet fell on January 3, 1939, it
22 cannot be successfully concluded that the accused
23 had any idea whatsoever of the attitude of the new
24 government as pertains this pact. Consequently
25 this exhibit or evidence should be concluded to be

1 without any basis of foundation. As to exhibit
2 50F, another excerpt from CIANO's diary, it should
3 be concluded that CIANO was unfamiliar with
4 SHIRATORI's attitude or functions and, consequently,
5 spoke whereof he knew not, inasmuch as in the
6 middle of the second paragraph on the entry of
7 March 8, 1939 CIANO writes as follows: "OSHIMA
8 and SHIRATORI have refused to communicate through
9 official channels. They ask Tokyo to accept the pact
10 of alliance without reservation, otherwise they will
11 resign and bring about the fall of the Cabinet."
12 The absurdity of this statement appears upon its
13 face, and we have to this day to hear of any cabinet
14 or government falling or even tottering upon the
15 resignation of any ambassador.

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1 According to Prosecution Exhibit 125, the
2 accused SHIRATORI was ordered home from Rome
3 September 2, 1939 and arrived in Tokyo on October
4 13, 1939 and that on January 9, 1940, was relieved
5 as Ambassador to Italy. He remained in an inactive
6 status in the nominal role of Ambassador with no
7 assignment on one-third salary until August 28, 1940,
8 when upon his own request he was released from this
9 duty. On this date, according to said exhibit, he
10 was appointed adviser in the Foreign Ministry and
11 his activities thereafter bring us to various prose-
12 cution exhibits heretofore introduced relating to
13 purported communications from the German Ambassador
14 to Japan, one Eugene Ott, to the German Foreign
15 Office. The Tribunal should bear in mind that Ott
16 for a number of years tried to conclude an alliance
17 between the German Government and the Government of
18 Japan, and remained as Ambassador over a period of
19 several years. During this time, he sent glowing
20 and enthusiastic communications to his Government
21 describing the progress he was making, and in a
22 number of instances mentioned the assistance he was
23 obtaining from the accused SHIRATORI and also from
24 time to time enumerated the power, authority, and
25 influence that the said SHIRATORI carried, but upon

1 consideration of the fact that over this long period
2 of time the said Ott was able to accomplish absolu-
3 tely nothing in the way of any alliance between his
4 Government and that of Japan, it must upon its face
5 be concluded that the said Ott sent communications
6 which belied the facts and distorted the truth in
7 an effort to conceal and cover up his own short-
8 comings.

9 It is further brought to the attention of
10 the Court that fully one year elapsed from the time
11 SHIRATORI left Rome in September of 1939 until
12 September 1940 when the Tri-Partite Pact was con-
13 cluded between Foreign Minister MATSUOKA and the then
14 German Special Envoy Heinrich Stahmer. It is the
15 contention of the defense and should be the general
16 knowledge of the Tribunal that Ambassador Heinrich
17 Stahmer, who first came to Japan as a Special Envoy,
18 was sent here by his Government to determine what
19 the true facts were and indicated very strongly that
20 after such a long period of time and after such glow-
21 ing and enthusiastic reports from the said Ott, as
22 aforesaid, with absolutely no results, the German
23 Government was likewise cognizant of the fact that
24 Ott had been "doctoring" his communications. As to
25 the conclusion of said pact, we think the Tribunal

1 will take judicial notice of the fact that Foreign
2 Minister MATSUOKA was a man of strong and domineer-
3 ing will and did not seek or consider the advice of
4 anyone and acted absolutely upon his own volition
5 and that the accused, as adviser to MATSUOKA, was
6 neither considered, required, nor otherwise used in
7 any respect, form, or manner as an adviser of the said
8 MATSUOKA and in his said capacity, under the cir-
9 cumstances, wielded no influence whatsoever on the
10 Foreign Policy of his government. We therefore
11 request that all communications of said Ott hereto-
12 fore introduced by the Prosecution be adjudged to be
13 not founded on facts, but to have been a ruse and a
14 sham on the part of the said Ott to cover up his
15 failures and shortcomings.

16 The Prosecution has made a great deal over
17 various written articles and statements alleged to
18 have been written or made by the Defendant SHIRATORI,
19 but at no time have they introduced any evidence to
20 show that any article or speech made by the said
21 accused was in behalf of or formed a part of a policy
22 of the Japanese Government. Such speeches and
23 articles were strictly the personal opinion of the
24 said accused and we contend that he was well within
25 his right of exercising that prerogative guaranteed

1 to every man in every democratic country in this
2 world -- that of freedom of speech and expression,
3 and in no way has the Prosecution shown such articles
4 or speeches to be a part of any conspiracy on the
5 part of the said accused or that such influenced
6 in any way the decision and policies of the Japan-
7 ese Government.

8 It is further called to the attention of
9 the Tribunal that throughout the entire presentation
10 of the Prosecution's case the said Prosecution has
11 not produced one live witness to testify against
12 the accused SHIRATORI, nor has the Prosecution pro-
13 duced even one sworn statement against the said
14 accused.

15 And in conclusion we wish to impress upon
16 the Tribunal that the Defendant SHIRATORI never held
17 but one ambassadorial post, his other activities
18 outside of Japan being just a Minister -- and I
19 would like to amend that to say also a secretary;
20 and that this ambassadorial post which was served
21 in Italy was for only a period of a little over
22 eight months. In view of such limited service, it
23 is impossible to conceive that he was a man of such
24 influence and authority and of having such a great
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1 part in the formulation and direction of the foreign
2 policies of the Japanese Government as the Prosecu-
3 tion tried to lead the Tribunal to believe.

4 Respectfully submitted this 22nd day of
5 January 1947.

6 THE PRESIDENT: Mr. Levin.

7 MR. LEVIN: Motion of Defendant SUZUKI,
8 Teiichi, to Dismiss.

9 Now comes the defendant SUZUKI, Teiichi,
10 by his counsel, and moves the court to dismiss each
11 and every one of the counts in the Indictment against
12 him on the ground that the evidence offered by the
13 prosecution is not sufficient to warrant a convic-
14 tion of this defendant.

15 Dated this 8th day of January, 1947.

16 Accompanying Memorandum in Support of
17 Motion of Defendant SUZUKI, Teiichi, to Dismiss.

18 With reference to Counts 1 to 5: These
19 counts are general counts, charging conspiracy be-
20 tween January 1, 1928, and September 2, 1945. The
21 character of the official position of this accused
22 is indicated by his personnel record, Exhibit 126.

23 From this it must be clear beyond peradventure that
24 this accused, being a regular army officer, on the
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1 basis of the evidence which has been adduced, has
2 not been shown to have participated in the conspir-
3 acy set forth in these counts.

4 Counts 6 to 17, inclusive, relate to the
5 planning and preparation for a war of aggression.
6 We make the same point with reference to these counts
7 as we make with reference to Counts 1 to 5.

8 Count 19 charges the defendant, among others,
9 with having initiated a war of aggression on or about
10 July 7, 1937, against the Republic of China. From
11 1933 until November 1, 1937, the accused was a
12 Colonel in the regular army and nothing in the evi-
13 dence or the record indicates any implication on
14 his part in regard to a war of aggression against
15 the Republic of China.

16 Counts 20, 21, 22, 24, 25, 26, 27, 28, 29,
17 30, 31, 32, 34, 35, and 36 charge the defendant with
18 initiating a war of aggression against the countries
19 specified in the various counts. It will be specifi-
20 cally noted that the defendant is not charged, under
21 Count 18, as being one initiating a war of aggres-
22 sion against the Republic of China. For the reasons
23 heretofore given, and the fact that the accused did
24 not become the head of the Planning Board and a mem-
25 ber of the Cabinet until April, 1941, it is submit-

1 ted that the evidence offered by the prosecution
2 is not sufficient to warrant a conviction on these
3 counts.

4 Group 2, Counts 37 to 47, inclusive: It
5 is submitted there is no evidence against this defen-
6 dant, nor any responsibility on his part in rela-
7 tion to the matters set forth in these counts. The
8 evidence offered by the prosecution is not suffic-
9 ient to warrant a conviction of this defendant on
10 said counts.

11 Count 51 charges the defendant in relation
12 to the Mongolian Incident on the Khalkhin-gol River
13 in the summer of 1939. Count 52 charges responsibil-
14 ity by ordering and causing and permitting the armed
15 forces of Japan to attack the Union of the Soviet
16 Social Republic, and unlawfully killing and murder-
17 ing certain numbers of the armed forces of the Soviet
18 Union. We submit that in the evidence offered by
19 the prosecution in connection with this phase of the
20 case there is no evidence of any kind or character
21 which in any way connects the defendant with Counts
22 51 and 52.

23 Counts 53, 54 and 55 deal with conventional
24 war crimes and crimes against humanity. We submit
25 that the evidence offered by the prosecution is not

1 only insufficient to warrant a conviction of this
2 defendant, but that there is not the slightest evi-
3 dence in the record to charge any responsibility on
4 the part of the defendant in connection therewith.
5 The matters indicated in these counts are matters
6 of military administration and in the very nature
7 of things this defendant could not possibly have
8 participated in them.

9 In referring to special counts in the In-
10 dictment, it is not intended in any manner to admit
11 the charges against the accused in any of the counts
12 to which no special reference is made. Where no
13 special reference is made to particular counts, it
14 is intended that the general statement in relation
15 thereto shall be considered as a specific argument
16 to each of said counts.

17 Without discussing in detail the nature of
18 the evidence adduced, it seems to us that no respon-
19 sibility can be placed on one who became the head
20 of the Planning Board at a time when whatever action
21 was to be taken by either the War or Navy Depart-
22 ments was already planned. Irrespective of the
23 determination of the Court as to the various issues
24 in this case, no responsibility can be placed in
25 that respect on a subordinate board of a Department

of the Government.

1 This is dated this 8th day of January
2 1947.
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1 MR. LEVIN: The following to be added to
2 Memorandum in support of Motion of defendant SUZUKI,
3 Teiichi, to Dismiss:

4 It will be noted from the date on the paper
5 that this Motion and the KAYA Motion were filed on
6 January 8, 1947, and I believe were in the possession
7 of the prosecution shortly thereafter. I feel it
8 my duty to direct the attention of the Tribunal to
9 some additional facts in connection therewith.

10 It is a simple matter to blandly say there
11 is no evidence to sustain a finding against the
12 accused, but I desire to point out to the Tribunal
13 that there is not a modicum of proof in this record
14 as against this accused to show this defendant is
15 guilty of any of the charges set forth in the various
16 counts of the Indictment. We emphasize the absence
17 of proof.

18 I think it is fair to say that General
19 SUZUKI was interrogated by the prosecution on numerous
20 occasions, which interrogations covered many pages of
21 testimony, yet not one word of these interrogations
22 was offered by the prosecution to sustain the charges
23 against the defendant.

24 I pass over his career until 1941, not because
25 I do not want to meet any issue there, but because the

1 evidence adduced in relation to him up to that time
2 simply indicates that his activities were the
3 customary and usual ones of a man who devoted his
4 life to military service and such additional civil
5 assignments as are frequently given to able military
6 men by their governments. Since the preparation of
7 the original motion, evidence has been introduced
8 that in 1931 the 10-year plan was evolved, and in
9 1937 -- the typing there is 1931, but 1937 is
10 correct -- the 5-year plan of total warfare, exhibit
11 No. 841, was created. Whether these plans were for
12 defense or offense is not a subject of argument now,
13 but these plans were the genesis of future conduct
14 by the government of Japan, and developed into
15 fruition long before General SUZUKI became a member
16 of the Cabinet and President of the Planning Board
17 in April, 1941.

18 Throughout the record, however, we see
19 evidence which indicates the position of this accused
20 as being opposed to factions who it is claimed are
21 responsible for the acts charged in the Indictment.
22 In an early part of KIDO's Diary he writes that
23 SUZUKI counsels against certain actions which might
24 lead to war. There is no evidence in the record which
25 shows that SUZUKI favored the Tri-Partite Pact, and I

1 am not now at liberty to discuss his attitude thereto
2 because it is not in the record. If the prosecution
3 had such evidence, there is no doubt that it would
4 have been tendered.

5 The Germans said he was one of the moderates
6 when his name was suggested for a decoration, which
7 ultimately they must have decided not to give, because
8 there is no evidence in the record that it was ever
9 awarded, and in exhibit 2247 introduced subsequent
10 to our original motion, where such awards were given
11 to certain of the Japanese, SUZUKI received no such
12 award.

13 The accused became Minister without Portfolio
14 in the Third KONOYE Cabinet, and became President of
15 the Planning Board in April, 1941. The typing is
16 1944. The correct date is 1941. All the laws referred
17 to in exhibit No. 840, Mr. Liebert's statement, in
18 relation to the preparation, to the acceleration, of
19 Japanese economy and industry for war had already been
20 passed when he assumed those offices. The mere
21 assumption of office and the performance of duties
22 in carrying on that office, in carrying out the
23 functions of a department of the government, without
24 evidence of creating policies and of activities by
25 the individual outside and beyond these functions does

1 not constitute evidence sufficient to warrant a
2 conviction.

3 As I have heretofore called the attention
4 of the Tribunal to the fact that there is no evidence
5 in the Indictment on Counts 53 to 55 -- here it is
6 52 to 55 -- inclusive, I shall not repeat what I
7 said with respect thereto, but call the Tribunal's
8 attention to my statement in the record at pages
9 15,558 to 15,560.

10 This we respectfully submit for the
11 consideration of the Tribunal.

12 THE PRESIDENT: Major Blakeney.

13 MR. BLAKENEY: I present the motion to
14 dismiss of TOGO, Shigenori.

15 NOW COMES the defendant TOGO, Shigenori
16 and moves the Tribunal to dismiss the Indictment
17 and the several counts thereof in so far as they
18 relate to him upon the ground that the evidence adduced
19 by the prosecution is insufficient to warrant a
20 conviction upon any of the counts charged by the
21 Indictment.

22 In support of the motion of TOGO, Shigenori,
23 to dismiss the Indictment I wish to direct the
24 attention of the Tribunal to, and briefly to analyze,
25 the evidence as it bears upon this defendant. For

1 the convenience of the Tribunal, I shall summarize
2 the evidence under a few general points or heads,
3 indicating the specific counts of the Indictment
4 involved in each of such points. (Although reference
5 is made to the page of the record for each citation
6 of evidence, in the interests of clarity I omit them
7 in reading.)

8 Japanese-Russian Relations

9 The counts of the Indictment charging this
10 defendant in connection with offences alleged against
11 the U. S. S. R. are:

12 Count 17, charging the planning and preparing
13 of war of aggression against the U. S. S. R.
14 between the years 1928 and 1945;

15 Counts 25 and 35, charging respectively the
16 initiating and the waging of war of aggression
17 against the U. S. S. R. in connection with the
18 Lake Khasan incident;

19 Counts 26 and 36, charging respectively the
20 initiation and the waging of war of aggression
21 against the U. S. S. R. in connection with the
22 Khalkin-gol or Nomonhan incident;

23 Count 51, charging murder by ordering, causing
24 and permitting attack on the territories of
25 Mongolia and the U. S. S. R. in connection with

1 the Khalkin-gol or Nomonhan incident.

2 It is quite noteworthy that despite inclusion
3 of his name in these counts (and despite his long
4 connection with Russian affairs), no pretense was
5 made in the Russian phase of the case of attempting
6 to connect the defendant TOGO by evidence with any
7 of these alleged crimes. His name does not appear
8 in the opening statement of this phase. Only twice
9 during the presentation of the evidence of the
10 phase was the name of TOGO referred to (and both of
11 those references were purely incidental); one other
12 piece of evidence relates to the Foreign Ministry
13 during his incumbency. These three references in
14 the Russian phase were in exhibits 767, 678,
15 and 683. The first is the agreement between the
16 Japanese and Soviet governments, executed on the
17 9th of June 1940 by Molotov and TOGO, providing for
18 demarkation of the frontier between the Mongolian
19 Peoples Republic and Manchoukuo. This agreement
20 recites that it is the result of negotiations carried
21 on between Molotov and TOGO, and that TOGO had stated
22 that the government of Manchoukuo consented to it.
23 There is nothing of any nature in the document sug-
24 gesting any further connection of the defendant TOGO
25 with the Nomonhan (Khalkin-gol) incident, and patently

1 it has no tendency to prove the commission of any
2 crime, participation in any conspiracy, or indeed
3 anything except that a frontier was agreed upon--
4 and thus to show TOGO in the aspect not at all of a
5 warmonger, but rather of a peace-maker.

6 The other references to TOGO in the Russian
7 phase were in connection with the National Policy
8 Research Association (Kokusaku Kenkyukai), exhibit
9 678 and 683. Exhibit 683 is an extract from the
10 membership list of that association, which includes
11 among those claimed as members "TOGO Shigenori,
12 Member of the House of Peers". Before discussing
13 the character of the association, it might be well to
14 point out that at the time Mr. TOGO held no office
15 in the government, as is evidenced by his description
16 as a member of the House of Peers, a position which
17 he assumed only upon quitting the government; see
18 the Cabinet Secretariat personnel record of TOGO,
19 exhibit 127. Beyond the simple, unvarnished statement
20 of TOGO's membership in the association, there is
21 nothing to connect him with its activities, nefarious
22 or otherwise.

23 However, reference to exhibit 678, the affi-
24 davit of YATSUGI, Kazuo, and his cross-examination upon
25 it will effectually dispose of the National Policy

1 Research Association as a sinister organization. The
2 association was a "private organization", composed
3 of "non-official civilian members" who "had no
4 responsibility to the association except payment
5 of their established membership fees". It is true
6 that funds were solicited -- and received -- from the
7 Foreign Ministry among other sources, governmental
8 and otherwise, even during the time that Mr. TOGO
9 was Foreign Minister. But the witness' statement of
10 the explanation which accompanied the request for
11 funds leaves it very doubtful whether the Foreign
12 Ministry -- or any contributor -- understood what it
13 was spending its money for: that the Association
14 "in pursuing a study of Greater East Asiatic problems"
15 requested support by donation from "both private and
16 official sources". Not only is there a complete failure
17 of proof of any knowledge by the Foreign Minister of
18 the activities of the Association, but there is
19 nothing except the Association's rather ludicrous
20 "research documents" to prove any criminality. The
21 Tribunal will readily recall the impression which the
22 testimony of this witness produced, and will, I think,
23 agree that the National Policy Research Association
24 emerged in the end as a thing far more ridiculous than
25 sinister.

1 It is submitted that there is no substantial
2 evidence to connect the defendant with the counts
3 above mentioned in this phase.

4 THE PRESIDENT: I suggest this is a
5 convenient break, Major Blakeney. We will adjourn
6 until half-past nine tomorrow morning.

7 (Whereupon, at 1555, an adjournment
8 was taken until Wednesday, 29 January 1947,
9 at 0930.)

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