Doc. No. 0002

Hold For Release

STATEMENT AND ANALYSIS

SUBMITTED IN RESPONSE TO DEFENSE MOTIONS TO DISMISS

JG use ✓ Hashimoto plan to "reform Japan" 1930 p 15-16

BY:

EUGENE D. WILLIAMS

SPECIAL ASSISTANT TO CHIEF OF COUNSEL
INTERNATIONAL PROSECUTION SECTION.

TOKYO, JAPAN
JANUARY, 1947.

Mr. President, Members of the Tribunal:

To answer the motions to dismiss made by the several defendants by treating each motion separately would involve a lengthy and in our judgment, unnecessary repetition. For that reason it is our purpose to make one series of arguments which will answer collectively all points presented by the motions of all defendants and each point made by the motion of each defendant.

It is well to bear in mind something of the structure and contents of the Indictment which may be summarized as follows:

Counts 1 to 5 charge that the defendants entered into unlawful conspiracies having as their object the domination by unlawful aggression in violation of treaties etc. (1) all of East Asia, Pacific and Indian Oceans, against any country or countries which might oppose that purpose; (2) that part of the Republic of China commonly known as Manchuria; (3) all of the Republic of China; (4) all of East Asia and of the Pacific and Indian Oceans etc. against the United States, British Commonwealth, France,

Netherlands, China, Portugal, Thailand, Philippines, and the Soviet Union; and (5) a conspiracy between the defendants and Germany and Italy to secure military, naval, economic and political domination of the whole world against any country or countries which might oppose such purpose, and particularly the United States, British Commonwealth, France, Netherlands, China, Portugal, Thailand, Philippines, and the Soviet Union.

Counts 6 to 17 inclusive, allege that all of the defendants planned and prepared the wars of aggression and in violation of international law, treaties, agreements, etc. against various nations seperately named in each count, and including in addition to the nations engaged in this prosecution, the Kingdom of Thailand.

All of the defendants are named in each of the 17 counts above enumerated.

Counts 18 to 26, inclusive, allege that certain of the defendants initiated wars of aggression and in violation to international law,

treaties, etc., against China, United States, Philippines, British Commonwealth, France, Thailand, Soviet Union and the Mongolian Peoples Republic.

Counts 27 to 36, inclusive, charge the defendants with waging wars of aggression and in violation of international law, treaties, etc.

All of these counts except 33, 35, and 36, name all of the defendants. Count 33 alleging the waging of war against France, Count 35 alleging the waging of war against the Soviet Union, and Count 36 alleging the waging of war against the Mongolian Peoples Republic, and the Soviet Union do not include certain defendants.

Counts 37 and 38 allege that certain defendants therein named conspired together to murder any and all such persons, both military and civilian, as might be present at the place attacked in the course of initiating of unlawful hostilities against the United States, the Philippines, British Commonwealth, Netherlands and Thailand.

Counts 39 to 43, inclusive, include specific murders at specified places, including Pearl Harbor, Kota Bahru, Hongkong, and the attack on H.M.S. PETROL at Shanghai, and at Davao in the Philippines, in which many persons were murdered.

Count 44 alleges that all of the defendants participated in a conspiracy for the murder of prisoners of war and civilians on land and at sea.

Counts 45 to 50, inclusive, allege specific acts of murder against defendants named in said counts, at various places in the Republic of China.

Counts 51 and 52 allege that certain named defendants murdered members of the armed forces of the Mongolian and Soviet Republics.

Count 53 alleges that certain named defendants conspired to commit breaches of the law and customs of war in respect of the treatment of prisoners of war and civilian internees.

Count 54 alleges that certain named defendants ordered, authorized and permitted such offenses.

Count 55 alleges that certain named defendants deliberately and recklessly disregarded their legal duty to take adequate steps to prevent such breaches and thereby violated the laws of war.

In this analysis no effort has been made to name the particular defendants charged in specific counts which include any less than all of the defendants. The reason for this will appear from a consideration of the theory and procedure followed by the Prosecution in establishing its case.

The Prosecution has presented its case in accordance with the well recognized "Conspiracy" method of proof. That is to say, it has proceeded to prove that an overall conspiracy of a comprehensive character, and of a continuing nature, was formed, existed and operated during the period from 1928 to 1945 covered by the Indictment, and that the object and purpose of said conspiracy consisted in the complete domination

by Japan of all of the territories generally known as Greater East Asia described in the Indictment; that it was the purpose to secure such domination by war and wars of aggression and in violation of international law, treaties, etc., at whatever places and against whatever nations and persons should be convenient or necessary to accomplish the overall purpose of the conspiracy.

It followed of course as an incident, and as a necessary part of such conspiracy, that in pursuing the object of the conspiracy, and in the planning, initiating and waging of wars of aggression, and wars in violation of international law, treaties, etc. that numerous individuals, both military and civilian, would be killed.

The killing by a belligerent who has planned, initiated, or is waging an unlawful war, constitutes murder.

It therefore follows from fundamental, universal principles of the Law of Conspiracy, that any and all persons who were members of the overall conspiracy which I have just described, became individually and severally criminally responsible and liable to prosecution and conviction for each and every act

committed in the course of the conspiracy, whether that act be the unlawful planning, initiation, or waging of war, or whether it be a murder or other atrocity in violation of law committed in the course of the carrying out of the conspiracy.

In view of the adoption of this method of proof, it becomes unnecessary to do more than to examine into and determine two questions:

FIRST: Has a general and continuing conspiracy of the character and scope set forth in Count 1 of the Indictment, been established;

SECONDLY: As to any particular defendant, was he a member of the conspiracy at the time the specific crime set forth in any count, (other than a conspiracy count), was committed.

If these two questions are answered in the affirmative, it follows that any defendant who was a member of the conspiracy at the time any specific act charged as a crime was committed, is guilty of that crime, whether he personally participated therein or not. "Who does through another, he does it himself".

It is perhaps an unnecessary precaution, in view of the wide learning and experience of the members of this Tribunal, for me to do so, but as indicating the Prosecution theory in presentation of this case, and the legal basis therefor, I take the liberty of quoting an approved instruction given to the jury in the California case of People v. Sacramento Butchers' Association, 12 Cal. App. 471, at P. 495, which is as follows:

> "The common design is the essence of the charge, and while it is necessary in order to establish a conspiracy, to prove a combination of two or more persons, by concerted action, to accomplish the criminal or unlawful purpose, it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the detail of the plans or means by which the unlawful combination was to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together, in any way, in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators."

I also quote from the opinion of the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Allen vs. The United States, 4 Fed. (2) 688 as follows:

> "A conspiracy may be established by circumstantial evidence or by deduction from facts. The common design is the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but ever leading to the same unlawful result. If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All of the conspirators need not be acquainted with each other. They may not have previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto".
>
> (Italics ours)

Another case which indicates the Prosecution theory of proof is the case of People v. Walker, 17 Cal. App. (2) 372, which was a case in which the defendant was convicted of the crime of grand theft, a specific offense. Proof was made by showing that he was a member of a conspiracy in the course of which the theft was committed. The defendant claimed that he

was not responsible because while the theft had admittedly been committed, it had been committed by another person.

The court, in disposing of this contention, stated as follows:

> "On the trial of the action it was neither asserted nor attempted to be proved by the prosecution that defendant either directly participated in the actual commission of the offense for the commission of which he was being prosecuted, or even that he was personally present at the time when and the place where the crime was actually committed. To the contrary, defendant's conviction depended upon legal proof of his membership in the conspiracy, or of his having been a party to an agreement to commit the crime.
>
> "Appellant concedes the fact that on the occasion in question the crime of grand theft was committed.
>
> "Apparently without conflicting authority with reference thereto, as a matter of common knowledge, the law recognizes the fact that where two or more persons have engaged in the commission of some criminal act, their antecedent agreement or common understanding, one with the other or the others, so to do, ordinarily has been entered into in secret; but manifestly, where the crime is shown to have been committed by two or more individuals who in its commission have acted in concert, one with the other or the others, it is an inevitable conclusion that the crime was the result of an agreement or conspiracy between or among the participants therein that the crime should be committed."
>
> (Italics ours)

Having in mind the theory of the Prosecution, as above expressed and the legal principles set forth in the cases just quoted, we have proceeded to prove the existence of the conspiracies alleged, and the membership in the conspiracy, of each and all of the defendants.

I purpose now, very briefly, to point out a sufficient amount of the evidence produced over these many months of trial, to show that such a conspiracy as described in the Indictment has been proved to have existed, and to point out to the court the evidence which shows the object, purpose and scope of this conspiracy.

When I have completed this presentation, I believe it will appear to the satisfaction of the court that the answer to the First Question, namely:

"has a conspiracy been proved"

must be answered in the affirmative.

Following this presentation, my brother, Mr. Comyns-Carr, Prosecutor for the United Kingdom, will point out to the court so much of the evidence in respect of the activity of each of the defendants as is sufficient to show that that defendant was at the times involved in the various counts, a member of the conspiracy and therefore liable for the

commission of the crimes specifically set forth.

We feel that this presentation will adequately answer all contentions made by the Defense, and that in addition thereto, it will serve to point out and clarify the issues and will be of some assistance to the court in passing upon such questions of admissibility as may arise in the course of the presentation of the Defense.

As seen from the quotations just read, the cardinal requirement on the prosecution in a conspiracy case is to prove the common design. In some cases the common design is difficult to find while in other cases it is comparatively easy. However, in either case, once the common design has been established, all the evidence, regardless of how disconnected it may seem to be, or regardless of how disconnected the actions of the various defendants may seem, falls easily into its proper and logical sequence.

In this case, it is submitted, it is not at all difficult to locate and spell out the common design. Aside from the evidence on Class B and C Offenses, almost each and every document and the testimony of

each and every witness highlights the common design as being nothing less than to obtain political, military and economic domination of what has come to be known as the Greater East Asiatic Area by and through any and all methods whatsoever including the fighting of aggressive wars. If one grasps this common design as the key string of the mosaic of the evidence, one must inevitably recognize that between the years 1928 and 1945 a conspiracy among certain of the militaristic class of Japan and certain civilians was formed and put into operation. The Prosecution of course is unable to name all of the members of that conspiracy. We do know, and the evidence has established, that even prior to 1928 and continuously on down to the end of the conspiracy the defendant OKAWA was engaged in promoting, publicizing and inciting the people of Japan to join in a militaristic and ultra-nationalistic "renovation" of Japan for the purpose of bringing about the subjugation and domination by the Japanese Empire of all of East Asia and the Islands of the Pacific and Indian Oceans and the ousting of all the whites from that territory. The purpose was to start by taking Manchuria, then the rest of China, then (dependent as to order upon current conditions) to move northward and take Siberia, and to move southward

OKAWA.

and to take Malaya, Thailand, French Indo-China, the Netherland Indies, Burma and India, the Philippines, Australia and New Zealand. The grandiose object of the conspiracy is adequately expressed in Exhibit 2182-A.

(Ex.2182-A R.15619-15631)

This exhibit, taken from the book, "The Establishment of Order in Greater East Asia", by OKAWA, was published 20 August 1943 during the course of the conspiracy and was an expression by one of the conspirators of its object and purpose. I quote as follows:

Book Pub 8/20/43

> "If I were to write a modern history of Japan, I should begin it with a description of Shin-en SAITO's ideas. This is because in the soul of this great scholar had already been conceived a new Japan in the most concrete form. (From page 9)
>
> "Shin-en SAITO, first of all, thought Japan 'the foundation of the world' and believed that Japan would be able to make all the rest of the world her countries or prefectures if she succeeded in 'ruling over the foundation of the world'. With a view to carrying out this 'great work of renovating the world', he advocated a drastic political renovation of the interior Japan and the order of unifying all nations. 'In order to develop other countries, it is best for the Empire/i.e.Japan/ to make a start by absorbing China into her first of all,' he advocated'....Even the powerful China is no match for the Empire, not to speak of other barbarous countries.... If China becomes our possession, is it possible for the other countries in the West, Siam and India not to come gradually under the sway of the Empire

"yearning for her power of commanding love and respect, being overawed and falling prostrate before her?' Besides, it was his opinion that in order to control China, 'no other place is easier to occupy than Manchuria.' And at the same time he thought it necessary to obtain the whole 'area in the South Sea covering thousands of ri starting with the Philippines so as to prepare for the northward aggression of the European Powers, especially of Great Britain and then obtain gradual control of India and its neighbors and various islands in the Indian Ocean, following the occupation of China, Annam, Shan-Cheng and Cambodia.' (From pages 10-11)."

The conspirators, for the purpose of trying to bring about the dominance of a military class in Japan, planned the so-called March and October Incidents, as well as other incidents, and planned an occurrence at Mukden on September 18, 1931 which made an excuse for the KWANTUNG ARMY, poised in preparation for such an event, to sweep over Manchuria and effect its military conquest.

HASHIMOTO

Something of the course of the conspirators' plans is shown in the book written by the accused HASHIMOTO (published in 1936 during the course of the conspiracy), in which he states that in 1930 while returning to Japan from Turkey:

"During my thirty days' voyage I pondered on how to reform Japan, and as a result I succeeded in drawing a definite plan to a certain degree. And on returning to the General Staff Office, my former haunt, I devised several schemes in order to put my ideas into execution. Although I dare not say it was the only cause of such results, however, the Manchurian Incident, secession from the League of Nations, and renunciation of the Disarmament Treaty, took place successively and within the country, May 15 Incident, Shinpei Tai Incident, and the February 26 Incident took place in succession."

(Ex. 177
R.1917-20)

The evidence shows clearly that the defendants OKAWA, HASHIMOTO, DOHIHARA and ITAGAKI and others were members of this conspiracy and that they helped bring about the incident which was intended to, and did, lead to the military aggressions in Manchuria beginning September 18, 1931. See:

Testimony of OKADA; testimony of TANAKA.

(R.1821-22)
(R.1900-1 and
1966-1982)

The testimony of OKAWA at his trial in Tokyo in 1934 (during the existence of the conspiracy) showed the relation of the March and October Incidents to the Manchurian Incident and the aggressions in Manchuria. He stated that he (OKAWA) and the accused HASHI OTO, ITAGAKI and DOHIHARA were all in the conspiracy.

JAPANESE court records

(Ex.2177A
R.15560-
15589)

(R.15587)

(Ex.2178B R.15571-99)

OKA.A's defense in the Tokyo Court of Appeals sets forth some of his activities in the conspiracy to set off the Manchurian aggressions, and in particular his close cooperation with the KWANTUNG ARMY in selecting Japanese "officials" for Manchuria.

(R.15600)

The purpose of the Manchurian Incident was to seize Manchuria by military aggression, to reform it politically as a part of the Japanese Empire, and to consolidate and integrate its economy and finance with that of Japan so that its raw and manufactured materials and labor might be used as a supply and its soil as a base for further aggressions.

(R.1962, 1985-87)

That the high military command of Japan and, in particular, the KWANTUNG ARMY were involved in this conspiracy to seize and dominate Manchuria is shown by the fact that within twenty-four hours of the Incident at Mukden large Japanese armies were spreading out over Manchuria. Such immediate action (in view of our knowledge of logistics) must have been preceded by many weeks or months of preparation. This is also indicated by General MINAMI's strong militaristic speech at a conference of Division Commanders concerning Manchuria and Mongolia August 4, 1931.

MINAMI

(Ex.186, R.2209-10)

That the Mukden Incident was a planned one is shown not only by the evidence concerning the plot to which reference has already been made, but is also strongly indicated by the written report of the League of Nations Committee, the testimony of the witness John B. Powell, the reports of Consul General H.Y.SHI to Foreign Minister SHIDEHARA, and the testimony of the witness Morishima.

(Ex.57,67,70,71) (R.3212-16.)

(Ex.181, R.2178-9)

(R.3016-3023)

All of the evidence concerning what the Japanese did in ruling the territory, politics and economy of Manchuria, together with the circumstances of the establishment of the puppet governments in Manchuria (the latter designed to deceive the other powers), shows that it was at all times the intent of the Japanese conspirators to take permanent physical, political and economic possession of Manchuria, and that this was to be accomplished, and in fact was accomplished, by means of aggressive warfare, in violation of international law and treaties and assurances and, in particular, in violation of the Nine-Power Treaty and the Kellogg-Briand Pact.

(R.5014-5119)

(R.1969)

(Ex.57,P.111)

(Ex.187 I, R.2784-6)

(R.2819-2822)

At the time of the Mukden Incident the accused MINAMI was War Minister. He claimed to know nothing of the activities of the Kwantung Army and the troops from Korea who were spreading over Manchuria. He claimed he could not control them. It is significant, however, that no action to control the supply of money, material or reinforcements to those armies was undertaken by MINAMI. He was shortly followed as War Minister by the accused ARAKI who actively supported the additions to and reinforcements of the Japanese Armies fighting in Manchuria. ARAKI was engaged in propaganda, seeking to whip up the militaristic spirit of the Japanese, to glorify the Japanese Army, to point out its goal in conquering all of East Asia, to point out the probability of war with the United States, and by means of flags and airplanes to show that Japan could conquer and dominate the whole world. This was done by means of a motion picture entitled "Japan in Time of Emergency" which was made and distributed in 1933.

(R.1384-1393)

(R.2236-22 ?,2240)

(Ex.57,PP 77, 80)

(Ex.148 A)

During the period from 1932 to 1936 Japan completed its conquest of Manchuria (including Jehol Province); expanded its Governmental, economic and industrial control for that territory and prepared

(Ex.192 R.2269-70)

for the next step which was further armed advance into China.

ith Korea and the Provinces of Manchuria and Jehol as bases for operations, Japan was in a position to prosecute her plans against the Soviet Union to the north or against the remainder of China to the south. If she elected to proceed first against the Soviet Union, a hostile China more and more united under the strong leadership of Chiang Kai-shek was a threat from the rear, and if she elected to proceed first against China there was danger of unified opposition by China and Russia.

In this dilemma, the accused or their leaders sought the political strength and bargaining power which would be acquired by military alliance with Germany, a nation then engaged in a program of military preparedness for aggressive action in Europe. The result was the conclusion of the Anti-Comintern Pact on 25 September 1936. The Pact on its face was directed against the activities of the Communist International, but it was converted into a military alliance aimed at the U.S.S.R. by an accessory protocol and secret agreement.

AXIS

(Ex.36 R.5934)

(Ex.480, R.5937)

The Anti-Comintern Pact was designed and intended, through the threat of joint military action between Japan and Germany, to operate as a check against the Soviet Union, to strengthen the hand of Japan in China and to afford an excuse for continued Japanese military aggression.

(Ex.485, R.5969)

(Ex.484, R.5963)

(Ex.486 A, R.5976)

Japan, thus fortified in her international situation, was in a position where she could proceed in comparative safety with the execution of her so-called divine mission of renovating the world, the first step of which was the creation of a New Order in East Asia. The accused or their leaders, by the conclusion of this Pact, laid the groundwork for further cooperation of aggressive nations in the accomplishment of the objects of the conspiracy.

On July 7, 1937, occurred the so-called "Marco Polo Bridge Incident". From that time on aggressive warfare against the rest of China continued with the Japanese gaining month by month and year by year additional territory throughout the balance of the period of the conspiracy. The aggressions of the Japanese Army during this period may best be stated in the language of the witness Goette as follows:

7/7/37

(R.2320, 2363)

(R.3774)

"The military aim of the Japanese Army as reiterated to me by such Japanese officers, was not so much the acquisition of territory as the annihilation, submission, and killing of Chinese Nationalist Armies."

This view is verified by one of the accused, HIRANUMA, who, in his speech before the Diet on 21 January 1939, when as Prime Minister he stated: 1/21/39

(Ex.2229, R.15988)

"In regard to the China affair upon which both the Government and the people are concentrating their endeavors there exists an immutable policy, for which ample sanction was obtained by the previous Cabinet, and in accordance with which necessary steps have been taken in various directions. As the present Cabinet is, of course, committed to the same policy, it is determined to proceed at all costs to the achievement of the final purpose."****

"I hope the above intention of Japan will be understood correctly by the Chinese so that they may cooperate with us without the slightest apprehension. Otherwise the construction of the new order would be impossible. As for those who fail to understand to the end and persist even hereafter in their opposition against Japan, we have no alternative than to exterminate them."

(Ex. 148 A)

It may be stated in passing that as indicated by ARAKI's speech in the motion picture above referred to, the "extermination" of those who stand in the way or who do not understand the high spiritual purpose

use

of Japan's military aggressions is called "self-defense".

As the Japanese armies fought the Chinese in an "Incident" which lasted from September 1931 to September 1945, and which included from 1937 to 1945 a total casualty list of Chinese soldiers in excess of three million as well as uncounted numbers of civilians killed, wounded and rendered homeless, the Government of Japan undertook to take over the Government, the soil, the economy and the industry of each part of China as it was conquered.

(R. 3423)

(R.3476-7)
(R.5183
5254)

The railways were taken over and put under the joint control of the Kwantung Army and the South Manchurian Railway Company.

(R.3479-80)
(R.5036)

At the same time the economy of China was being integrated with that of Japan in accordance with the policy expressed by the accused HOSHINO, in which he envisaged the development of the resources of Manchuria, China and all East Asia for the benefit of Japan (which lacked necessary resources).

(Ex.453
R.5179)

Through the organization and operation of the China Affairs Board, the North China Development Company, Ltd., and Central China Promotion, Ltd;

(Ex.445,
R.5183)

(Ex.459,
R.5251,5297)

(Ex.471-474 R.5347-5499) through tremendous investment in Chinese industry; through the setting up of puppet governments in

(Ex.463, R.5297) Peiping and Nanking; through the obtaining of special rights and privileges under secret agreements in contravention of the Nine Power Treaty Japan took

(Ex.465, R.5327,5289) possession of all of the resources of such parts of China as she conquered.

At the same time she proceeded to embarrass and humiliate the Governments of the United States and England and to kill and destroy the property of nationals of those and other European countries.

It was Japan's policy not only to establish her "new order" in East Asia, but to drive out Anglo-Americans from China. In 1935 she accused, MATSUI,

(R.2317) in a conversation with General Ching "advocated that Asia should be the Asia of the Asiatics and that European and American influences should not be expanded".

In 1940 the accused HASHIMOTO wrote:

" "The moment we establish a policy to drive out all Anglo-Americans from China, China will begin to move toward a new order".

In 1941 the accused, MATSUOKA said:

"***The work of the establishment of Manchukuo is the first step of the reconstruction of the new order in East Asia, and at the same time was a herald of the construction of the

"world new order and its position in the world history should be said to be very important. The true significance of the Manchurian Incident will be realized for the first time when the construction of the new order in East Asia will be accomplished for which we are now making every endeavor."

(R.3500-01)

In 1944 the accused KOISO in an address before the Diet stated:

KOISO 1944

"The real intention of Japan lies in the expulsion of Anglo-American influence, the emancipation of China by those countries which has continued for one hundred years and the construction of a Greater East Asia based upon morality and a mutual cooperation." ****

(R.3715)

A prominent Chinese, General Ching, correctly interpreted Japan's intentions by stating:

(R.2317)

"I was afraid that what he (M.TSUI) meant by Asia of the Asiatics was actually the Asia of the Japanese".

The League of Nations report of 6 October 1937 concludes:

"After examination of the facts laid before it, the Committee is bound to take the view that the military operations carried on by Japan against China by land, sea and air are out of all proportion to the incident that occasioned the conflict; that such action cannot possibly facilitate or promote the friendly cooperation between the two nations

"that Japanese statesmen have affirmed to be the aim of their policy; that it can be justified neither on the basis of existing legal instruments nor on that of the right of self-defense, and that it is in contravention of Japan's obligations under the Nine Power Treaty of February 6, 1922, and under the Pact of Paris of August 27th, 1928."

Sometimes the conspirators have spoken pleasingly of their desire to stabilize East Asia and to bring peace to troubled peoples.

(Ex.230-233 R.2903-2932) (Ex.224, R.2933-5) (Ex.236 R.2939-43) (Ex.240 R.2967-71) (Ex.219 (R.2748-50)

The all-pervading vice of [illegible]vention is that Japan in her aggressions in Manchuria and the rest of China undertook to decide in Japan (and without consulting China) what territory belonging to China she would occupy and how, what form of government should exist and by whom it shall be organized, what industrial, commercial and financial systems should be established, how transportation, communications, press, radio, propoganda, censorship, customs and foreign relations should be controlled and conducted. Yet, neither by custom, International law, treaty, precedent nor otherwise were any of these matters in the slightest or most remote degree the business of Japan. She had no more right to arrogate to herself powers such as these in China than China had to do so in Japan. Her acts were those of a lawless, aggresive invader and conqueror.

They were in violation of Chinese sovereignty and of Japan's solemn obligations to China and the other signatories of the Nine Power Pact and other treaties.

These acts were the result of the plotting and planning of these conspirators and a part of the overall plan for the conquest of "Greater East Asia".

Military operations in 1937 and 1938 proved that Japan was engaged in a major war against China. Although Germany protested against Japan's aggression in China under the guise of fighting communism in third states, the accused who were directing and influencing the course of Japanese aggression in East Asia, by the early part of 1938 had won the unreserved support of Germany in her plans against China as well as against the Soviet Union.

(Ex.486 A, R.5976,5977, 5980)

(Ex.486-H, R.6002-15)

Germany was promised preferential trade treatment in China in consideration of the special relations which existed between Japan and Germany after the conclusion of the Anti-Comintern Pact. The controversy which arose out of the division of spoils in China afford a high degree of proof of the Japanese plan of subjugation and exploitation by aggressive warfare.

(Ex.595, R.6604)

Japan and Germany embarked upon extensive programs of preparation for military operations and demonstrated similar intentions to wage aggressive warfare in their respective spheres of the world. Japan, acting through and under the influence of the accused, and Germany conceived the idea of strengthening their respective international positions by inducing other nations to unite in close association with them. This plan first took shape in the form of recruiting Italy as a member of the Anti-Comintern Pact on 6 November 1937, and was followed by the admission of Manchukuo and Hungary to the Pact on 22 February 1939 and Spain on 27 March 1939. The Pact was renewed on 25 November 1941, at which time Bulgaria, Denmark, Finland, Croatia, Rumania, Slovakia and the puppet Nanking regime, under the name of "National Chinese Government", were admitted by declarations of adherence. The next move was to obtain closer cooperation between the peoples of the Axis Powers by resorting to the device of concluding so-called cultural treaties.

Axis PACT

Ex.493, R.6046)

Ex.494, R.6046)

Although the accused, acting through their leaders, mobilized the entire strength of the nation for its war against China and won many naval and military victories,

they were unable to conclude the so-called China Incident. Consequently, they were brought to the realization of the necessity for closer collaboration of Germany, as demonstrated by the future course of negotiations. In the words of OSHIMA, the accused wanted a military alliance with Germany "which would help to conclude the China Incident and (1) to clarify the Russian situation so that troops could be deployed elsewhere, (2) to strengthen Japan's international position, and (3) to receive technilogical and economic aid from Germany."

(Ex.487, R.6058)

A division of opinion developed in the Japanese Government as to the extent to which Japan should be committed to participation in a German war against England, France and the United States. In April 1939 the conclusion was reached that a limited interpretation of the Pact was necessary from Japan's standpoint for the reason that Japan "was at the moment not yet in a position to come forward openly as the opposer of the three democracies." Negotiations continued until the conclusion of a non-aggression treaty between Germany and the Soviet Union, the reaction from which caused the downfall of the Japanese Cabinet.

(Ex.502, R.6100)

The expediency of quickly concluding the German-Russian non-aggression pact became apparent upon the dramatic German invasion of Poland on 1 September 1939. Notwithstanding the temporary setback to the conclusion of a Japanese-German-Italian military alliance, efforts were continued by the accused to develop closer Japanese-German relations with the view to ultimate conclusion of a tri-partite military alliance.

As the day of world conflagration approached the conduct and declarations of the accused, or their leaders, revealed more and more the common plan for the accomplishment of the so-called divine mission which they were preparing to impose upon East Asia and the world by resorting to aggressive warfare to the extent necessary for the accomplishment of their objectives.

In the southern areas French Indo-China occupied a strategic position of the highest importance over which Japanese control was necessary for any contemplated military operations against Malaya, Singapore and the Netherlands East Indies and the Phillippines. In addition, Indo-China was rich in natural resources vitally needed by the Japanese economy for the continuance of war.

OSHIMA, timing his action with Hitler's initiation of war against Poland, advised military aggression in the southern areas of Greater East Asia and against Hongkong, for which he declared the Japanese navy was prepared. (EX.509. R.6136)

Within two days after the German invasion of Belgium, Luxembourg, and the Netherlands on 9 May 1940, and within two days after the fall of France on 17 June, 1940, the accused asked German assurances of a free hand in the Netherlands East Indies and French Indo-China. This was followed by a Japanese ultimatum to French-Indo-China relative to transportatinn of materials to Chiang Kai-Shek. At the same time negotiations were renewed with Germany for the conclusion of the military alliance. So strong was the demand for conclusion of a military alliance that a joint conference of the Japanese Army, Navy and Foreign Office officials was held on 12 July 1940 for the purpose of intensifying efforts to procure such a pact. In this conference it was determined that "it is our object to realize the expansive purpose of the Japanese Empire and strengthen our international position by embodying an ultimate cooperative connection between our Empire, which is establishing a "new Order" in East Asia, and Germany, which is fighting for a "New Order" in Europe. (Ex.615-A, R.6797) (Ex.522, R.6170)

A unified policy based on the opinions of the Army AND Navy was adopted in which it was determined that the area to be embraced within the "New Order in the Far East" should extend from Burma and the eastern part of India to New Zealand; that the fundamental principle of the coalition should be cooperation within the respective spheres intended to be established by the Axis Powers; that the Japanese conception of "political leadership" was considered to be "occupation" of the areas in question; and that necessity existed for immediate execution of their plans.

(Ex. 527
(R. 6191

(Ex. 528
R. 6212

The Yonai Cabinet was considered too weak to carry out the foreign policy, so the accused forced its resignation and such men as KONOYE, MATSUOKA, TOJO, HIRANUMA, OHASHI, OSHIMA, and SHIRATORI were put in responsible government positions. Thus the stage was set for the enactment of the final scene in carrying out that part of the conspiracy which was designed to secure Axis help in accomplishing the objects thereof.

At a Four-Minister conference on 4 September 1940 it was determined that the time was ripe for speedy initiation of conversations for strengthening of collaboration among Japan, Germany and Italy. The basic principles for such conversations were declared to be

(Ex. 541
R. 6271

the making of a fundamental agreement for mutual cooperation "by all possible means," which included "recourse to armed forces.".

7/27/40

On 27 September 1940 the Tri-Partite Pact between Japan, Germany and Italy was concluded with unprecedented speed. By its provisions the Axis Powers attempted to apportion the world by establishing areas in which the leadership of the respective powers was recognized. Each pledged full cooperation in the establishment of leadership within the sphere of the others, and political, economic and military aid was pledged in the event of an attack against any one of the signatories by a nation not then involved in the European war or in the war with China. Letters were secretly exchanged providing for consultation among the signatories for the purpose of determining whether action or a chain of actions would constitute an attack within the meaning of the Pact. This Pact in its essence contained the ultimate development of the plot of the aggressive powers directed toward the division of the world and the establishment of the so-called New Order, which had for its purpose the extinguishment of democracy throughout the world and the subjugation of all the nations by the aggressive states.

It was the culmination of years of effort on the part of the accused or their leaders to form a military alliance in which the participating powers would by solemn agreement recognize Japan's so-called divine mission and agree to link their fate in the accomplishment of its objectives. Without this coalition the accused could not have risked the fate of the Japanese Empire in initiating the final phases of their plan to establish a New Order in East Asia and the South Seas. In the atmosphere of the Privy Council meetings held prior to the conclusion of the Pact and in the light of the declarations made by the accused and their co-conspirators in such meetings, there is no room left for doubt that the accused or their leaders had planned aggressive warfare and were seeking the political and military aid that such a treaty would afford.

Almost immediately after the conclusion of the Pact a rapprochement with Russia was suggested as a prerequisite for a Japanese advance in the regions south of China. The accused, or their leaders, seized the opportunity to mediate in the Indo-China-Thailand border dispute as a device by which both Powers could be placed under obligation to the Japanese Government. In

(Ex.561, R.0427)

the spirit of the Tri-Partite-Pact, Germany extended valuable and effective aid in coercing Indo-China to its submission to Japanese demands.

Close collaboration continued between the Axis Powers until the attack against American and British possessions on 7 December 1941. Foreign Minister MATSUOKA and Ambassador OSHIMA in conferences with Hitler, Ribbentrop, Goering and Funk discussed plans for an attack on Singapore, the coordination of operations in the Pacific with operations in Europe, the exchange of technical information, and information derived from military operations in the field, and cooperation required by the Axis Powers in all spheres after the completion of the war. General commissions and commissions of a technical character, one military and one economic, were formed under the provisions of the Tri-Partite Pact in order to effectuate full collaboration among the Axis Powers.

Acting in full collaboration with their Axis partners, the accused unified the Japanese Government and nation behind the Tri-Partite Pact, and by their declarations and conduct put into motion forces designed to accomplish the objects of the conspiracy.

On 18 November 1941, Germany was asked if she would 11/18/41
consider herself at war with the United States if Japan initiated the attack and whether Germany would enter into an agreement not to conclude separately peace or an armistice in case of war with the United States and Germany without hesitation, and in accord with the spirit of the Tri-Partite Pact, replied favorably to both inquiries. On 28 November 1941, RIBBENTROP declared, "There never 11/28/41
has been and probably never will be a time when closer cooperation under the Tri-Partite Pact is so important". He also stated, "Should Japan become engaged in a war against the United States, Germany of course would join the war immediately". Italy made the same commitments.

The efforts of the accused to obtain Axis assistance in the executions of their plans bore fruit. The Pearl Harbor attack occurred. Japan, Germany and Italy concluded a "No Separate Peace Pact" on 11 December 1941 to remain 12/11/41
in force during the life of the Tri-Partite Pact. In this treaty the three Powers also agreed after the termination of the war to "cooperate most closely for the purpose of realizing a righteous new order in the meaning of the Tri Partite Pact". "A military agreement in the spirit of the Tri Partite Pact" was

concluded by the three powers on 18 Jan. 1942, by which the world was divided into zones for military operations.

The conduct and declarations of the accused and their co-conspirators relating to the negotiations for the Anti-Comintern Pact, the various trade and collateral agreements, the Tri-Partite Pact, the No Separate Peace Pact, and the Military Operational Agreement between the Axis Powers and collaboration under the same, we submit, constitute indubitable proof of the existence of the conspiracy charged.

Insofar as the conspiracy included plans to prepare for, initiate and wage wars of aggression against the Soviet Union, ample evidence has been offered to show that at all times included in this case it was the intention of the conspirators to attack Russia and to seize and permanently hold parts of her territory lying in East Asia (particularly Siberia). The only differences which existed among the conspirators were as to when this should be done -- whether the advance should first be north or south. It has already been shown that the decision was to go south. This did not involve any abandonment of the plans to attack Russia -- it merely delayed their execution.

Throughout the period of the conspiracy many things were done in the planning of the aggressions against Russia. Within the limits of this presentation it is not possible or even desirable to make an exhaustive analysis of the evidence. It is sufficient to state that the evidence clearly shows that in the course of this conspiracy the following things were done:

(Ex.666-839)
R.7302-8177) During the period of 1928-1945 propaganda for war of aggression against the Soviet Union was spread.

The seizure of Manchuria and turning it into a military base for an attack either on the Soviet Union or China in violation of the Portsmouth Treaty and the Peking Convention of 1925.

The establishment of a military base for an attack on the USSR in Korea in violation of the Portsmouth Treaty and the Peking Convention.

The preparation of the population of Manchuria for war against the USSR, including the formation of the "Kyo-wa-kai" Society. Subversive activities of the Japanese military and the employment of White Russian emigrants against the USSR in violation of the Peking Convention.

Sabotage activities of the Japanese on the Chinese Eastern Railroad.

Systematic violations of the state frontier of the USSR.

An undeclared war of aggression against the USSR in the Lake Khassan area during July and August of 1938.

An undeclared war of aggression against the USSR and the Mongolian Peoples Republic in the Nomongham area in May-September 1939.

Refusal to accept Russia's proposal to conclude

a non-aggression pact as a manifestation of hostile aggressive policy of Japan against the USSR.

The conclusion of the Anti-Comintern Pact.

The conclusion of the Tri-Partite Pact.

As the day drew near for the offensive which she believed would remove the last obstacles from the path of her conquest and control of Greater East Asia, Japan's preparations for war mounted to huge proportions, entailing a complete reorganization and greater control and centralization of her entire industrial, economic and financial structure and the closer integration of her political and economic systems with those of Manchuria and China. These preparations included over-all mobilization of all of Japan's manpower.

(Ex.840,841, 842, (R.8260-8567)

In carrying out her plans Japan, in 1933, withdrew from the League of Nations; in 1934 she gave notice of her withdrawal from the Washington Naval Treaty; she withdrew from the 1936 Naval Conference; she refused to adhere to the Fourteen-Gun Limitation which had been agreed to by Britain, France and the United States.

(Ex.38,pp 9-34, 55-57 (R.9189-9217, 9226-9233

Military and naval plans not only required the mobilization, training and arming of vastly increased numbers of soldiers and sailors, acquisition of war ships,

(R.684
(R.8791-9075 carriers, aircraft, tanks, artillery and the countless impedimenta of modern war, but demanded the accumulation of vast stores of material and long range plans for the acquisition of replacements as these were used.

(R.9232-9262)

(R.11,178) The Mandated Islands were fortified and otherwise prepared for tactical and strategic use in war. This was in direct violation of the mandate and of Japan's treaty obligations with the United States.

(R.9158-81,
R.11,196-11,202
(Ex.23,29

The proposed wars being of an aggressive character, involving the invasion of other countries, military currency to be used in such other countries in denominations of dollars, pesos and guilders was ordered printed and held for use.

(Ex.852,
R.8446-8470.

The true scope of the grand design of the conspirators to achieve political, military and economic control of the Asiatic continent and adjacent areas was fully developed in the evidence presented during the phase which covered the relations of Japan with the United States and Great Britain during the period of the indictment.

This evidence showed that apart from the resistance of the Chinese and other peoples of Asia, these two powerful nations were the great and formidable obstacles

to the successful achievement of all that the conspirators planned. They were obstacles not only because of the vast financial and economic interests which they or their nationals possessed in China and the rest of Asia, which had to be expelled or limited and subordinated to those of Japan if the conspiratorial plan was to be successful, but also because through solemn treaty and agreement Japan stood firmly bound with them to forego the aims and ends of the conspiracy and to forbear from any and all of the actions required to effectuate it.

The evidence has shown that so long as the provisions of the various treaties remained in full force, so long as the parties signatory to them felt themselves firmly bound to respect them both in letter and in spirit, the conspiracy to dominate the East Asiatic and Pacific worlds could not be fully carried out. The object of the conspiracy could be successfully accomplished only if the formidable obstacles of the United States and Great Britain could be removed, and this could be accomplished only if these treaty provisions and their co-relative duties and obligations could be evaded, abrogated, altered, redefined, or broken.

The evidence in this phase of the case from the period from 1931 on told the story of the efforts of the conspirators to rid Japan of the duty of carrying out the various obligations which they had voluntarily undertaken of respecting the rights of others in the Asiatic-Pacific world and of the resistance of the United States and Great Britain to such efforts. To free Japan of her duties and obligations under these treaties so as to eliminate Britain and the United States from the Asiatic world or to subordinate their rights there to those of Japan within the limits allowed by Japan, the evidence shows that the conspirators resorted to every known or conceivable method to evade, alter, abrogate or redefine the treaties.

They used intimidation, fraud, artifice and chicanery, subtle redefinition of terminology, negotiation, and when all else failed they resorted to the use of armed force in an aggressive war against these two western powers.

The evidence showed that by the beginning of the year 1941 the situation had reached a critical stage and at this juncture the conspirators decided to finally accomplish their purpose of dominating the Asiatic-Pacific world and remove the obstacles to that project presented by Great Britain and the

United States. To accomplish this they adopted a two-fold policy; on the one hand they negotiated with Britain and the United States on certain specific outstanding problems in accordance with certain proposals which, if accepted, would have left Japan the master of the Asiatic-Pacific world, with Britain and the United States relegated to whatever position Japan might allow; on the other hand they actively prepared for war with these countries with the same objectives and results. Both programs had the same objectives, and while some felt that they could accomplish the objectives of the conspiracy through negotiation, others viewed them as impossible from the beginning and regarded them only as useful camouflage for active war preparations, to lull the United States and Britain into a false feeling of security. To this latter group the negotiations were an integral part of the preparation for war.

(See Ex.920 to 1299)

(R. 9264 to 11393)

Perhaps we who are Americans or British are inclined to regard the sudden and unprovoked attacks on Pearl Harbor, Kotabahru, Hong Kong, and Davao as the culmination of this conspiracy. This is not true. The attacks on Britain and the United States were but steps in the grand design to become the masters of all East Asia. This was the true objective - the end and purpose of every act of the conspirators at home and abroad.

The machinations, the threats, the pressure, the military action, all under cover of misleading and false explanations, by which Japan forced large armies first into northern and later into southern Indo-China were but steps in the plans to acquire the complete control of that rich territory.

(Ex.612-665
R. 6731-7194

The attempts to force concessions, the subversive activities, the spreading of propaganda, the military invasion of the Netherlands East Indies, the forcing of Japan's political structure, of Japanese education, of Japanese propaganda, and the cultivation of Japanese inspired political movements within that country were but part and parcel of the objective to become its masters.

(Ex.1284-1354,
(R.11669-12342

In the course of the overall conspiracy which I have been discussing which is pleaded in Count 1 of

the Indictment, the lesser conspiracies alleged in Counts 2, 3, 4 and 5 were involved. They were but part and parcel of the overall plan. The preparations for war alleged in Counts 6 to 17 inclusive, the initiation of the wars alleged in Counts 18 to 26 inclusive, the waging of the wars set forth in Counts 27 to 36 inclusive were all crimes committed within the scope and course of the overall conspiracy pleaded in Count 1 and concerning which I have been addressing the Tribunal.

The charges of murder set forth in Counts 37 to 52 inclusive, were perpetrated in the course and as a part of the carrying out of the conspiracy. Each of these murders and countless tens of thousands not pleaded were but the ordinary, customary, expected and foreseen results of the wars of aggression contemplated by the conspirators.

The conventional war crimes and crimes against humanity set forth in Counts 53 to 55 inclusive were but the obvious, necessary and intended results of the kind of warfare planned and intended by these conspirators.

No one of the accused can disassociate himself from his participation in the overall criminal conspiracy

alleged and proved. No reasonable contention that any of the specific crimes charged was not within the scope, purpose or intent of that conspiracy can be made. It follows that each of the defendants is criminally liable for each act committed during the course of the criminal conspiracy.

It is no defense that the position of any accused was "subordinate", or that he but obeyed orders.--- neither under common law, nor the charter, is such claim a defense, and who can say in a conspiracy of this magnitude, what role was "subordinate"?

(Charter, II,6)

As we come now to a consideration of the evidence showing the connection of the several defendants with the over-all conspiracy and their individual guilt, it is well to bear in mind that the object of the plan or conspiracy upon which these defendants and others entered, was that Japan should secure and hold the military, naval, political and economic domination of all East Asia and the Pacific and Indian Oceans and all countries and islands therein and bordering thereon, and at the same time drive the "whites" out; that this object should be effected by means of declared or

drive out "whites"

undeclared wars of aggressi n and in violation of International law, treaties, agreements and assurances, against any country or countries, including the countries sought to be seized, which might oppose that purpose.

The conspiracy envisaged and required the preparation of the people of Japan by means of propaganda and censorship to accept and join in the program intended. It involved the economic and political renovation, coordination and integration of Japan itself. It involved the keying of the Japanese economical and financial system to the expanded requirements of aggressive war, and the integration of that system with those of conquered territories. It involved vast preparation by acquisition, manufacture and storing of arms, munitions and military and naval equipment. It involved the training of soldiers and sailors in vast numbers, and the mobilization for agriculture and industry of the man and woman power of Japan. It involved the organization and use of the communication and transportation system of Japan and all conquered territories. It involved the organization and use of the man power of conquered territories

for the benefit of Japanese military and civilian industrial and economic requirements. It involved the over-all integration of all of the people, the territory, the men and material of Japan and her conquered territories for the single purpose of further military aggression and domination, while at the same time it required that in her International relations Japan should on the one hand conceal her true purpose and her war-like preparations and on the other hand seek by means of diplomacy to lull the other nations of the world into a sense of security and at the same time to obtain from them any and all concessions which would enable Japan to proceed with her grand objective.

To accomplish this purpose there were required not only military men such as ARAKI, MINAMI, TOJO, and others, but naval officers such as NAGANO, SHIMADA and OKA, and propagandists such as OKAWA, HASHIMOTO, ARAKI and SHIRATORI; politicians such as KIDO and MATSUOKA; industrial and economic experts such as HOSHINO; financial experts such as KAYA; diplomats such as HIROTA, TOGO, SHIGEMITSU, OSHIMA; makers of puppets, such as DOHIHARA and ITAGAKI; and countless others.

The efforts of all these men in their many and varied fields were required in order that their grand objective might be attained, and while the roles of some were more spectacular and dramatic than those of others, each in his place and at the times required performed his part and contributed effectively to the development of the plans, strategy and the action of the conspiracy.

My brother, Mr. A.S. Comyns-Carr, Associate Prosecutor from the United Kingdom, will now present to the Tribunal an analysis of the evidence showing the connection of each of the individual accused with the conspiracies here alleged and their criminal responsibility for each of the specific crimes charged.

- - - - -

Under the Charter, it would seem not timely, or even proper, at this stage of the trial for the Prosecution formally to sum up, or fully to analyze the evidence. We have, therefore, made no effort to present our full views in respect of all of the evidence so far offered. This presentation and that to follow are intended simply and only to show:

(Charter: IV, 15)

(1) That there is sufficient evidence, if uncontradicted or unexplained, to prove the existence of the conspiracies and the commission of the substantive crimes alleged in the Indictment;

(2) That each of the accused was a responsible member of the conspiracy and as such criminally answerable as a conspirator and also for the substantive crimes committed, whether in the course of the conspiracies or otherwise.

If more than this is required we submit that under the express provisions of the charter the time to do so is after all evidence from the defense, as well as the prosecution, has been heard.

At any rate, it should be borne in mind that in considering a motion to dismiss at the end of the prosecution case, it is the duty of the Court to take

as true all evidence and to draw all inferences therefrom favorable to the prosecution; and at the same time to disregard all conflicts, whether of evidence or inference.

The arguments made by the defense have obviously disregarded this fundamental rule.

REPLY TO MOTION ON JURISDICTION OF TRIBUNAL

The motion of the accused attempts to restrict the jurisdiction of this Court by accused's construction of the language set forth in the Potsdam Declaration, that "stern justice should be meted out to all war criminals, including those who have visited cruelties upon our prisoners."

In the motion there are other assertions or implications that the surrender of Japan was subject to certain conditions in this respect. With this latter contention we have no concern in the consideration of this motion as a matter of law. We do desire, however, to challenge and to deny any claim or implication that the surrender of Japan was subject to any condition whatsoever. Examination of the two Japanese communications transmitted to the various Allied governments through the Swiss Government at the time of the surrender will show that the surrender of the Japanese Government was without condition.

An attempt is also made to limit the authority of this Court through a construction of the Proclamation which was issued by the Supreme Commander for the Allied Powers when the Charter establishing the Court was promulgated. These observations made by accused in this motion likewise are shown to be erroneous, since the very first paragraph of said Proclamation states: "WHEREAS, the United States and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice."

Both the Special Proclamation her inbefore referred to and the Instrument of Surrender show with abundant clarity that the Supreme Commander for the Allied Powers "is authorized to take such steps as he deems proper to effectuate the Terms of Surrender." There are other terms of the Proclamation showing the falsity of the concept set forth in the motion of the accused which it is not now necessary to indicate to this Tribunal.

The Potsdam Declaration, paragraph 6, reads as follows: "There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world."

Paragraph 13 of this Declaration reads: "We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction." This is plain language and is not susceptible of two views.

Paragraph 2 of the Instrument of Surrender, dated 2 September 1945, states: "We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated."

The third paragraph of this Instrument reads: "We hereby command all Japanese forces wherever situated and the Japanese people to cease hostilities forthwith . . . and to comply with all requirements which may be imposed by the Supreme Commander for the Allied Powers or by agencies of the Japanese Government at his direction."

The fifth paragraph of the Instrument provides: "We hereby command all civil, military and naval officials to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender . . ."

The sixth paragraph states: "We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the

Allied Powers for the purpose of giving effect to that Declaration."

The last paragraph of the Instrument states: "The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender."

It is important then, in any proceeding relating to the interpretation of the Terms of Surrender, emphatically to reject any false claim that this surrender instrument was conditional. Recourse to its terms will show that no such interpretation could be made by anyone.

The precise legal proposition presented to this Court constitutes a clear challenge to the capacity of civilized nations to take effective preventive steps to save civilization by punishing the responsible individuals who brought about the scourge of aggressive warfare over a great part of the earth. It amounts to a claim that treaties, obligations and assurances solemnly entered into by a nation, through its duly constituted authorities, have no real significance. The bold proposition is presented by the proponents of this motion that individuals proved to have set in motion and directed forces bringing about ruthless and unjustified wars threatening the existence of civilization are, by reason of high official positions of responsibility which they hold, immune from any punishment for such acts.

This is tantamount to a claim that a person, or group of persons acting in concert, may scatter gasoline and gunpowder throughout a building filled with human beings, stuff the closets with oil-soaked rags, pile tinder against the doors, nail the windows shut so that the occupants cannot escape, and then, having handed a torch already lighted by them to irresponsible and helpless individuals under their domination and control, can order it to be applied, all with impunity; and that these leaders, directors and officials, having obtained the

power to bring this about -- having planned, prepared and initiated it -- can never be brought to the bar of justice. The necessary corrolary follows that the helpless dupes and victims who were subject to the control and orders of these leaders, as well as millions of other innocent individuals, may undergo untold suffering for these acts while these leaders remain free from punishment. And this is said to be the law. Such a contention is as revolting as it is unsound.

And the broader point is raised by the accused's motion, whether mankind will place itself in a straightjacket of legal precepts (which are without foundation or logic) by bowing to the force of such wormwood legalisms, and leave these responsible criminals unpunished and at large? Is it supposed that in the meantime organized society must remain supinely quiescent, with the soft folded hands of indifference, and await its own destruction in a literal sense? It is tantamount to the assertion that mankind is without lawful power to save itself.

The motion sets forth the narrow legal contention that "according to the general conception prevailing in July 1945 'war criminals' meant those who violated rules and customs of war after the commencement of war and to be punishable according to the previous international law and customs." This proposition is said to be sustained by international law, and by what these Japanese accused had a fair right to understand was the meaning of the term "war criminals" as employed as late as July 26, 1945.

The accused conveniently omit some very important and relevant, and we contend determinative, statements and declarations addressed to this very subject. We shall proceed to outline some of them.

In 1919 the signatories to the Treaty of Versailles, including Japan, made provision for the trial of William II "for a supreme offense against international morality and the sanctity of treaty."

In 1920 the members of the League of Nations, including Japan,

agreed that a war entered upon in violation of the provisions of the Covenant providing for peaceful settlement should be regarded as an act of war against all of the members of the League. A war in violation of the Covenant thus became an illegal war, and any acts of violence accompanying it should be described as crimes against the international community.

The Geneva Protocol for the Pacific Settlement of International Disputes, signed by the representatives of forty-eight nations, provided specifically: "A war of aggression constitutes an international crime." This was followed in the Eighth Assembly of the League of Nations in 1927 by a unanimous resolution in almost the same language. Japan was a signatory of both of these instruments.

The Sixth Pan-American Conference of 1928 adopted a resolution on aggression, the preamble of which specifically states "that war of aggression constitutes an international crime against the human species."

By the Kellogg-Briand Pact, signed in Paris August 27, 1928, the Contracting Parties (that is, practically the whole community of the civilized world, including Japan), after solemnly declaring "in the name of their respective peoples" that they condemned recourse to war for the solution of international controversies, renounced war as an instrument of national policy in their relations with one another. Although the text of this Pact does not use the word "crime", it is clear that the Contracting Parties, by the fact of renouncing war "as an instrument of national policy", meant to put the system of aggressive warfare outside the law, that is, to make it illegal. It is, of course, of no import to make acts done by individuals illegal unless such individuals come within the classification of law breakers or criminals.

It is evident, then, that by 1928 all the civilized nations in the world, by solemn commitments and agreements, recognized and pronounced

wars of aggression to be international crimes, and thus established the illegality of war as a positive rule of international law. To this existing obligation not to wage an illegal war in violation of a positive rule of international law, there was a super-imposed contractual obligation not to wage war in violation of specific treaties. We hope that neither in points asserted in support of this motion nor throughout this trial there will be the claim made by anyone that treaties have no significance.

What is the meaning of the term "war criminals"?

On November 1, 1943 there was issued at Moscow an historic declaration by President Roosevelt, Prime Minister Churchill and Marshal Stalin on behalf of their respective governments, wherein a clear-cut line of distinction was drawn between war criminals, charged with having been responsible for or having taken part in atrocities, massacres and the execution of prisoners of war or civilian populations, and what were termed for convenience major war criminals, "whose offenses have no particular geographical location and who will be punished by the joint decision of the Government of the Allies."

On November 6, 1942, at a meeting of the Moscow Soviet on the 25th anniversary of the Revolution, Marshal Stalin announced that one of the objectives of the war was "to destroy the hated New Order in Europe and to punish those who established it."

A year later on the next anniversary, the same authority publicly reiterated the intention to punish all war criminals, including those responsible for the war. At that time Stalin told the Russian people and the world: "Together with our allies we shall take measures that all the Fascist criminals responsible for the present war and the sufferings of peoples in whatever country they may hide themselves will get severe punishment and retribution for all their crimes.

On February 12, 1943, President Roosevelt in his important address on the birthday of the Great Emancipator, Lincoln, clearly enunciated that: "To these panicky attempts to escape the consequences of their crimes we say — all the United Nations say — that the only terms on which we shall deal with an Axis government or any Axis factions are the terms proclaimed at Casablanca: 'Unconditional Surrender'. In our uncompromising policy we mean no harm to the common people of the Axis nations. But we do mean to impose punishment and retribution in full upon their guilty, barbaric leaders."

And as far back as October 12, 1942, President Roosevelt, in a radio broadcast to the American nation which was heard all over the world, emphatically declared that "We have made it entirely clear that the United Nations seek no mass reprisals against the populations of Germany or Italy or Japan. But the ringleaders and their brutal henchmen must be named, and apprehended, and tried in accordance with the judicial processes of criminal law."

In the Cairo Conference, 1 December 1943, the United States of America through President Roosevelt, the Republic of China through Generalissimo Chiang Kai-shek, and the United Kingdom through its Prime Minister Churchill, declared: "The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising. . . The Three Great Allies are fighting this war to restrain and punish the aggression of Japan."

What is the fair meaning of this stern warning, "to restrain and punish the aggression of Japan"? Do the accused contend that such punishment should be related only to those helpless and unfortunate among the Japanese people who had no part in bringing about these wars of aggression, and who, as we believe, were themselves dupes and victims of these very accused; to those Japanese whose lives were

sacrificed in figures running into the millions, and whose cities and harbors were smashed in a manner never before known in history; to those who are now left the bitter and difficult road to rehabilitation? Did the Allied leaders refer to these people in this stern warning? Did our leaders intend that a benevolent and kindly immunity was to be extended to the plotters, the planners and the dictators of this world holocaust? This is a queer sort of reasoning -- one that we believe would be difficult not only to impress upon this Court, but upon the peoples of all nations, including those of Japan.

The Potsdam Declaration, wherein the intentions of the Powers were set forth, proclaimed by heads of the Governments of the United States, the United Kingdom, and China, and later adopted by the Union of Soviet Socialist Republics, states in paragraph 10: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." This, together with paragraph 8 of the said Declaration, providing: "The terms of the Cairo Declaration shall be carried out," incorporating of course that part of the Cairo Declaration which stated: "The Three Great Allies are fighting this war to restrain and punish the aggression of Japan," show clearly that all of these accused were put upon notice, as was the entire Japanese nation, of the exact purposes of the Allies, and emphasizes that stern punishment would be meted out to those guilty of planning, initiating and waging these aggressive wars -- the same stern justice that is awarded to common felons.

MR. COMYNS CARR'S REPLY TO THE MOTION ON THE JURISDICTION OF THE TRIBUNAL

This Motion does not purport to attack the whole jurisdiction of the Tribunal, but is in effect an attempt to strike out certain Counts of the Indictment and an attack upon certain parts of the Charter. It is based entirely upon an attempt to construe in a narrow way certain phrases in the Potsdam Declaration and the Instrument of Surrender. It can quite easily be disposed of on this basis, but we desire to point out two objections to this method of approach.

The first is that as appears from the opening paragraph of the special Proclamation establishing this Tribunal, the right of the Allied nations to bring War Criminals to justice is not based solely upon the assent of the Japanese Government by the Instrument of Surrender to the terms of the Potsdam Declaration and other documents incorporated therewith. On the contrary any nation or group of nations has an inherent right to bring War Criminals to justice whenever and wherever they have the opportunity to do so, unless they have by Treaty debarred themselves from that right. This principle has been many times laid down and is well summarised in the following passage from Stowell's "International Law" published in 1931 at page 597-8:

> "The states assembled in a general conclave possess all the powers of international law, just as formerly the assembly of the tribe had plenary powers of legislation, judication, and administration. Generally and normally the punishment of the individual would, as has been said, be left to the state of the offender, and in the event of its delinquency or failure to apply the law, a state acting vicariously would then apply the same penal provisions. In extraordinary cases, however, when it is necessary to safeguard international society from the disgrace and the dangers of unpunished crimes against the peace of nations, the states in conference may post hoc (after the act) define the offence, organise the judicature, and enforce submission to the judgment. But in such a proceeding it is always to be remembered that international law guarantees to every individual a minimum of security, and requires that he be not tried, convicted, and punished without enjoying the due process of law."

The second objection is that although the Potsdam Declaration laid down certain terms in the form of statements as to the intentions of the Allies, it ended in paragraph 13 by demanding the unconditional surrender of all Japanese armed forces.

An attempt by the Japanese Government to introduce a condition in the communication forwarded by the Swiss Charges d'Affaires on August 10th, 1945, was promptly rejected on August 11th and in the Instrument of Surrender itself the Japanese Government in terms proclaimed unconditional surrender. The statements of intention in

the Potsdam Declaration and other documents are being and will be fully carried out, but they cannot in our submission give any rights to these Defendants or enable them to found any attack upon the Charter.

Coming now to deal with the first point in the Motion, on the basis of the Potsdam Declaration, it appears that the Motion is founded upon an attempt to give to the words "War Criminals" in paragraph 10, a narrow meaning restricting it to what are described in the Charter in Article 5 (b) as "Conventional War Crimes". It is obvious, however, that paragraph 10 of the Potsdam Declaration does not purport to contain a full definition of "War Criminals", but leaves that, as it leaves many other matters, to be amplified by subsequent orders of the Supreme Commander acting on behalf of the Allied Powers. This is made clear in the third paragraph of the letter of August 11th, 1945: "from the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied Powers, who will take such steps as he deems proper to effectuate the surrender terms". This sentence is repeated verbatim in the last paragraph of the Instrument of Surrender itself. Nevertheless Paragraph 10 of the Potsdam Declaration, when the appropriate words are read in full: "stern justice shall be meted out to all War Criminals including those who have visited cruelties upon our prisoners", makes it clear that Crimes other than those described as Conventional War Crimes, are included.

The Motion alleges that "according to the general conception prevailing in July 1945, War Criminals meant those who violated rules and customs of war after the commencement of war and to be punishable according to the previous international laws and customs". There is no warrant whatever for this statement or implication that the expression "War Criminals" was confined to this particular class. If it was not clear before the Treaty of Versailles by Article 227 made it plain. It reads as follows:

> "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
>
> A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.
>
> In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.
>
> The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial".

This treaty was signed by twenty eight States including Japan as one of the principal victorious Powers in the first World War, now one of the defeated, Italy another, Germany one of the nations then and now defeated and the following Powers then and now victorious and mentioned in this Indictment:- The United States of America (representing then also the Commonwealth of the Philippines now separately represented), the British Empire (including the Commonwealth of Australia, Canada, New Zealand and India now separately represented), France and China; also Portugal and Siam referred to in this Indictment,and a number of other nations then and now among the victorious Allies, but not represented here. It was ratified by twenty four of the above-mentioned twenty eight States, including Japan. It was not ratified by the United States of America owing to the change of view which developed there with regard to the Covenant of the League of Nations which formed Part I of the Treaty.

The trial of the Kaiser never took place owing to the fact that he had taken refuge in the Netherlands and there was no Treaty available for his extradition from that country on the charges named.

The passage from Stowell which I have already cited, continues as follows:-

> "The victorious allies, acting for international society, had a right to try the Kaiser, if so minded, for his personal responsibility in the events of August, 1914, but they would have had no right to appoint a court of politicians and to refuse him the production of such documents from their own archives as he might require for his defense.
>
> In the present state of public opinion it is probably as well that no attempt was made to carry out the provisions of the treaty in regard to the trial of the Kaiser, but it is necessary to preserve the principle of personal responsibility in order to protect society and to punish offenses which cannot be defined in advance".

In this case the question which caused some controversy in the case of the Kaiser as to the propriety of trying the head of a State does not arise. The Defendants whom we are bringing to trial are those who, as we expect to prove, exercised in Japan the effective power to commit the crimes against peace which we are charging. The principle was clearly laid down. The precedent was established and acknowledged by so many nations including Japan.

Even then, however, it was not in principle new. As the Motion itself admits,the right of a belligerent to try and punish offenders against the laws and customs of war had long been universally recognised. In reality it is based simply upon a breach of international law partly enshrined in treaties. The principle is exactly the same when applied to other breaches of international law and treaties such as those covered by Article 5 (a) of the Charter and

by the Counts in Group One of this Indictment. The only reason why the principle had not before 1919 been applied to breaches of international law other than the laws and customs of war , is that no clear case of such breaches had arisen and there were at that time very few general treaties of the type the breach of which we now allege

To take as a particular example, the opening of hostilities without a declaration of war or ultimatum. This was dealt with by Treaty for the first time in the Third Hague Convention of 1907. Stowell at page 452 summarises the position as follows:-

> "Warning of Intention. International security and respect for good faith require that the supposedly friendly and mutually trustful relations of peace should not be interrupted without a warning sufficient to constitute due notice. This it would appear has ever been the rule among all peoples. The fundamental purpose of the rule is to prevent treachery and the fear of it which would render peace of so precarious a nature as to be almost worse than war. Among primitive peoples generally and among European nations until more recent times, recourse to war was always preceded by a formal notice or declaration. But in more recent wars there have been instances in which recourse to hostilities occurred without a formal and prior declaration.
>
> It was for lack of such express notice that accusations were hurled at Japan in 1904 of having treacherously begun her attack on the Russian fleet. The merits of that particular controversy have been discussed by jurists with acrimony and ability. Japan herself recognised the desirability of avoiding the likelihood of any similar controversy in the future, and she therefore concurred in the adoption of the Hague Convention (III) of October 18, 1907, Relative to the Opening of Hostilities, which in the preamble stating its purpose declares that the signatory states: "Considering that it is important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning;
>
> "That it is equally important that the existence of a state of war should be notified without delay to neutral Powers;
>
> "Being desirous of concluding a Convention to this effect, have appointed the following as their plenipotentiaries:,...."
>
> And in fulfilment of this statement of purpose the Convention contains the following article :
>
> "Article I. The contracting powers recognise that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war"

The most important of the other Treaties, breaches of which are alleged in Groups One and Two of the Indictment, are Treaties which were entered into in or after 1907; many of them were entered into after 1919.

The Prosecution submits therefore, that Article 227 of the Treaty of Versailles was merely giving effect to a principle already well established although in relation to a new subject matter and that the same principle which was applied then by Japan, amongst other powers, to the responsibility of the highest individuals for breaches of treaties then in force, is equally applicable to breaches of treaties which have come into force since that date.

The absurdity of the Defendants' contention is well illustrated when one notices that it is extended to cover an objection to the trial of Crimes against Humanity, and of charges of Murder of combatants and non-combatants at the commencement of war and during its execution. Hague Convention IV of 1907 deals not only with Crimes committed against Prisoners of War, but with Crimes committed in the course of hostilities and also with Crimes committed against the civilian population in occupied territories. With regard to the charges of Murder in the initiation of hostilities, this is probably not the occasion on which to elaborate the argument which will be submitted to the Court on this question. The basis of it is that the Crime of Murder in the intentional killing of a human being without legal justification. Amongst other legal justifications for such killing which might exist, is lawful belligerency, that is to say, the right of a soldier to kill his enemy in the course of a lawful war, in a manner and under circumstances not forbidden by the laws of war. We shall contend when the evidence has been given that in the cases charged, no such justification existed; in some cases because hostilities were commenced without warning, in some cases because they were in breach of other treaties forbidding aggression, in other cases because they were contrary to the laws and customs of war which include unlawful conduct towards both combatants and non-combatants.

There is no Count in the Indictment charging the use of opium and other narcotics as a War Crime in itself; it is only alleged as one of the means by which unlawful wars were carried on.

To obtain convictions on these Counts, we shall have to deal with propositions both of law and fact, but to suggest that this Tribunal has no jurisdiction to entertain charges of Murder, a jurisdiction plainly conferred upon it by the Charter, is in our submission, the height of absurdity.

The fact that a particular international convention dealing with the law of war does not specify that violations thereof are punishable, does not preclude punishment for violations thereof which are war crimes.

The practice of punishing war crimes had been a part of customary law long before certain of the laws were put into the form of treaties and conventions. International conventions from the Red Cross Convention of 1864 to the Geneva Conventions of 1929 have not contained provisions for the punishment of war crimes committed in violation of

their provisions. Nothing could be clearer than that there was no intention to depart from the pre-existing practice of punishing violations when they amounted to war crimes.

The customary law prior to the first of these conventions is set out in Lieber's General Order 100 of 24 April 1863, par. 44 - "All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorised officer, all robbery, all pillage or sacking.... all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence".

The practice of punishment has continued down to the present time. Thousands of such cases have been tried by military tribunals since the start of the practice of stating the substantive law of war in international conventions. In addition to the thousands of military trials, the Leipzig trials are familiar examples of trial and punishment for war crimes committed in violation of the Hospital Ship Convention of 1907 and the Hague Regulations, neither of which expressly provided penal sanctions for violations of their terms.

In ex parte Quirin (291.U.S.) Chief Justice Stone accepts as established law that military courts have power to inflict punishments on individuals and that they have jurisdiction to give effect to offences specified in the Hague Convention and similar offences so as to give full scope to the governing purposes.

It follows that the lack of any statement in the treaties, on which we are relying and which are set out in Appendix B, as to the legal consequences to an individual responsible for their breach, is therefore of no significance. In our submission the consequences of a breach of such treaties are exactly the same as is shown by the established rule in the case of those which deal with Conventional War Crimes. Those who break treaties, or the International Laws which they amplify, are all equally War Criminals and punishable according to the gravity of their offence.

The Charter lays down that principle by which this Tribunal is bound, and in doing so follows well-known International Law.

Point II in the Motion falls into two parts. The first is an assertion that the purpose of the Potsdam Declaration and of the Instrument of Surrender was to terminate the state of war then existing between Japan and the Allied Powers, and goes on to submit that Crimes alleged to have been committed in Count 2 against China, and in Counts 25, 26, 35, 36, 51 and 52 against the Union of Soviet Socialist Republics, are not within the jurisdiction of this Court because they occurred at various dates in the past.

There are two fallacies in this contention. The first is that the Instrument of Surrender terminated a war. It did not, it terminated hostilities; a state of war continues in the form of military occupation and will be terminated at some future date. The second fallacy is that the Instrument of Surrender dealt only with matters arising out of hostilities commencing at any particular date. As far as China is concerned this is clear when one looks at paragraph 8 of the Potsdam Declaration, which incorporates the Cairo Declaration. The latter makes it clear that territories, including those referred to in Count 2, which Japan had stolen from the Chinese, should be restored to the Republic of China regardless of the date of the theft, or at all events going back to 1914. It also deals with the freedom of Korea. Whether the war of Japan against China should be regarded as continuous from the 18th September, 1931 onwards or as having a fresh start on 7th July, 1937, is one which the Tribunal may find it necessary to determine on the facts. The indictment provides distinct Counts (2 and 3, and 18 and 19, and 27 and 28,) enabling the Tribunal to give effect to either view which it may take on this question. In our submission even if the Tribunal should take the view (contrary to the submission that we shall make), that these are to be regarded as separate wars, there is nothing in the Charter, the terms of Surrender or the Potsdam Declaration to prevent the Tribunal from exercising jurisdiction with regard to Crimes committed by any of the Defendants in connection with either of them.

The same remarks apply with equal force to the Crimes against the Union of Soviet Socialist Republics alleged in the Counts above mentioned, so far as they are based upon the same contention with regard to time. It appears, however, that the objection to these Counts is also based upon a further contention that the matters in question have been settled by certain alleged agreements which are not before the Court, and must, together with the attendant circumstances be the subject of evidence. This is a matter which the Defendants can bring forward when they present their case.

If the Tribunal thinks it better to postpone giving any decision on either of the contentions raised in Point II until they have heard the evidence, the Prosecution would raise no objection to this course.

Point III begins by reiterating certain arguments with regard to the meaning and purpose of the Potsdam Declaration and the Instrument of Surrender, which have already been dealt with. It goes on to put forward the proposition that Crimes cannot be charged as being committed against any country which was not at war with Japan on July 26th 1945, or was not one of the Allied Powers mentioned in those documents, and seeks to apply that contention to Counts 4, 16, 24 and 34 so far as they relate to Thailand (Siam). The argument, if well-founded, would be equally applicable to the inclusion of that country in Count 5 and to the inclusion of the Republic of Portugal in Counts 4 and 5 and in Counts 53, 54 and 55. In our submission, however, there is no substance in it at all. There is no limitation in paragraph 10 of the Potsdam Declaration as to the countries against whom War Crimes may have been committed. There may be such limitation with regard to Prisoners for the obvious reason that there could not be prisoners of war except those who were nationals of countries at war. Again the mention of Korea in the Cairo Declaration helps to make this clear.

We ask therefore, that the Motion be dismissed. We have not put before the Tribunal at this stage our full argument on the questions of International Law which it raises. But it is our earnest hope that when the Tribunal comes to deliver its final judgment, after hearing full argument, it will contain an authoritative pronouncement on these matters.