Held For Release

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

THE UNITED STATES OF AMERICA, et al.

vs

ARAKI, Sadao, et al.

Defendants

ARGUMENT IN SUPPORT OF GENERAL MOTION TO DISMISS ON BEHALF OF ALL DEFENDANTS

If the Tribunal please:

The argument will not attempt to cover each of the points made in the 73 paragraphs of the motion to dismiss. However, even though it has not been possible to argue each point, counsel wish to make it plain that the defendants and each of them rely on every point made in said motion to dismiss. The argument has been necessarily limited to a brief outline argument of some of the major points because of the pressure of time, lack of personnel and other matters.

1. Upon a careful examination of the treaties and conventions relied upon by the Prosecution, as well as other treaties and conventions not mentioned by them, and the opinions of jurists and text writers, counsel have been unable to discover the existence of any system or body of law which provides an international penal code, or an international standard or criterion of criminal justice, or an international standard or criterion of moral conduct which carries with it or supports the right of criminal adjudication and criminal penalties. All the evidence points to the non-existence of any such body of law. Even the few voices from the wilderness

here and there who have proposed the erection of an entirely new international system for the outlawry of war by conclave of the nations have admitted the total inadequacy of the treaties and conventions now in existence to deal with alleged wars of aggression in a practical and satisfactory way, or in any way at all.

Along the lines of wishful thinking and proposals for the erection of a new body of law to deal in penal form with the persons alleged to be guilty of planning and waging wars of aggression, consider for illustration the lecture delivered by Dr. Hans Wehberg before the Academy of International Law at The Hague in 1928.

In commenting upon the total impotency of the then structures of treaties and conventions to deal with the perpetrators of alleged wars of aggression which is no different today, and in proposing a new line of action for the outlawry of war, he said:

> "We might go further and demand an accounting from those physical persons who are responsible for the war. But the condemnation should then be pronounced by an impartial court of justice in accordance with the principle 'nulla poena sine lege,' that is, no punishment except by virtue of law.
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> "The committee of jurists at The Hague in 1920, and the International Law Association in 1922 and 1926, advocated a High Court of International Justice, which some

day will probably become a reality.[1] But until this has been achieved, the states should be asked to introduce in their national penal code rules concerning the punishment of those responsible for war, and the form of the procedure to be followed in such cases.[2] Only when national justice is insufficient should the High Court of International Justice be appealed to."

See also the detailed proposal of Dr. Pella at Bucharest in 1926, a copy of which is attached to the printed argument but will not be read. He proposed a new system of international law which would impose certain standards of conduct upon nations and individuals in connection with wars and he there spelled out in detail the sanctions and penalties to be imposed against nations or persons and the machinery for dealing with the matter. None of these proposals have gained the slightest recognition among nations: and even a casual study of such proposals discloses that they are enmeshed with insuperable problems, such as the legitimate range of self defense and

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[1]Cf. Pella, La criminalite collective des Etats et le droit penal de l'avenir (2d ed., Bucharest, 1926); Politis, les nouvelles tendances du Droit international, p. 113; Saldana, "La justice penale internationale," Recueil des Cours (Academie de Droit international), X, 227; Vadasz, "Juridiction criminelle internationale," Revue Sottile, 1927, p. 274; International Law Association, Report of the thirty-first Conference, I, 63; Report of the thirty-third Conference, p. 74; Report of the thirty-fourth Conference, p. 277; the articles of Volume III (1926) in the Revue internationale de Droit penal; the questionnaire of the Friedenswarte (April, 1927), and the replies of numerous jurists.

[2]Cf. Pella, "La propagande pour la guerre d'aggression," Revue de Droit international (La-pradelle-Politis), 1929, p. 174; idem, Les Modifications d'ordre international qu'importe le Pacte de Paris. Rapport presente au XXVII[e] Congress universel de la Paix, 1929.

effective collective security in lieu of self defense.

It is absolutely certain that none of the treaties, conventions and assurances relied upon by the Prosecution in the indictment establish any body or principle of either national or international criminal standards for either nations or individuals. None of the high representatives of the foreign governments who signed said treaties and conventions ever supposed for a moment that they were erecting a criminal statute or standard against themselves or against those who might succeed them as heads or quasi heads of sovereign governments. Assuming arguendo that such a standard of criminal conduct was erected, still the fact remains that no machinery was provided on either national or international levels with which to enforce such standards against individuals, particularly heads or quasi heads of government. The defendants and each of them cannot be held to answer for offenses against alleged international criminal or moral standards which have been heretofore defined in loose, vague, general and indefinite terms, nay, not at all by the standards heretofore required of criminal statutes and criminal pleading, that no individual defendant in the dock could be expected to know what such standard or criterion of conduct was and the criminal penalties certain to follow upon an established violation thereof. The alleged standard or criterion relied upon by the Prosecution is nothing more than a reed in the wind and no man of common sense could

say that any such standard or criterion exists with the requisite certainty to spell out a criminal intent and course of conduct. Moreover, assuming the standard was there, it has never been defined heretofore with the certainty that any defendant who chose to run might read and be conscious of the fact that he was intentionally and purposefully violating a criminal standard or criterion of conduct.

2. Because of the unusual character of this trial, the extraordinary claims made by the Prosecution to support the indictment, and the nebulous state of existing international law, even in its civil aspects, there can be no judicial notice by the Tribunal of the "law" of this case; the law in this case must be proved by the Prosecution as a fact like any

other fact in the case; and there being no proof by the Prosecution in this respect, the Indictment fails in its entirety.

3. The defendants, except in a few instances, are indicted for acts committed while serving in the highest civil or military offices, or both, within the framework of the government of Japan; their acts were the acts of the government of Japan acting in its sovereign capacity. The defendants and each of them are not answerable for such official acts within the scope of their respective offices under any body or system of law, national or international, heretofore known in the world. Their acts and omissions are beyond the reach of any system of law heretofore known and are likewise immune to re-examination by any sovereign nation or group of nations. No defendant could have effectively committed the alleged offenses set forth in the indictment without the power and authority of his official office.

The heads and quasi heads of government acting in their official capacity have been clothed since ancient days with national and international immunity. Along national lines, consider for example immunity to a tort

action for acts and omissions within the scope of their official position; along international lines consider the diplomatic immunity in many directions of both the head of a state and quasi heads of a state while in foreign territory. Neither Japan nor any other nation in the world has ever heretofore agreed to any treaty or convention, or recognized any principle of international law common to mankind, which would permit another sovereign nation or group of nations to sit in judgment in a criminal proceeding upon either the head or quasi heads of its government. It requires only casual reflection to realize that no sovereign nation would ever have lightly undertaken any such responsibility; and after an examination of all the material available counsel make the unqualified argument that Japan never undertook or assumed any such international obligation with respect either to the head of the Japanese Empire or the quasi heads of such empire, or with respect to that small body of persons who closely assist and advise the Emperor. If this Tribunal should set a precedent otherwise it is easy to see that every sovereign nation in the world would have great difficulty in attracting able men to public office; that

no man of reason and ability would undertake or assume the vicarious criminal responsibility for the decisions or omissions which he in good faith made as either the head or quasi head of a sovereign nation; and furthermore the precedent sought to be made by the Prosecution can only be calculated to work to the detriment of the public service throughout the world and in this respect gives promise of being nothing more than an engine of mischief.

4. When men are summoned to the highest offices in the government of a sovereign nation they in legal effect lose their identity as individuals and while discharging their official duties they are really artificial persons in the law. They are the law makers and the law givers and in this sense they rule. It seems too clear for argument that modern government has become so diverse and complicated that no one man called to high official station in public life would care to be held to a standard of criminal conduct under circumstances where his action or omission is merely one aliquot part or segment of a common action on behalf of the government as an entirety; and this is all the more emphasized in the case of Japan where it appears that no defendant had a final voice in any of

the major decisions taken by Japan between 1928 and 1945.

5. Heretofore it has been uniformly recognized that the heads and quasi heads of state, ex necessitiae, are clothed with the great principle of immunity to re-examination of their official acts under national law. This principle of national law is recognized by every civilized nation in the world and therefore, there could be no recognition by the nations of the world of a principle in direct derogation to so basic and fundamental principle of all the national systems in the world. The denial of immunity would undermine effectively the sovereign authority itself. There is no such thing as international law in even the civil sense unless one is prepared to demonstrate that the principle has been recognized by the common consent and usage of mankind. Furthermore, it would seem to be a long day in the future before any considerable body of nations in the world will ever agree to an international penal standard which permits the actions and omissions of its topmost officials to be re-examined according to the ideas of foreign nations or to permit any international tribunal called upon to administer any such penal code to re-examine all the innermost secrets and confidential com-

munications between the highest officials of a sovereign nation, the disclosure of which could only be against the national interest and safety and therefore prejudicial to all the best and highest interests of the nation. Moreover, no nation ever makes a disclosure to even its own courts of state secrets, the disclosure of which would be prejudicial to the best interests of the nation; and no international law to the contrary could arise or come into being in the face of this uniform policy and practice of nations.

6. The ordinary law of criminal conspiracy has no application to official actions taken or omitted in the exercise of sovereign authority. Criminal conspiracy has not heretofore been known at the high level of international law; it has heretofore been applied exclusively under domestic law and has been used exclusively as a weapon against positive actions inimical to the sovereign and people in a purely national sense. It needs no argument that the heads and quasi heads of a sovereign nation necessarily are required to consult together, compromise and reach some agreement with respect to a uniform pattern of sovereign action. What is necessarily required in the discharge of official duties could not possibly be a conspiracy inter sesse among the heads or quasi heads of government; and no principle, rule or standard of international conduct could possibly exist in contravention or derogation of what is lawful conduct under the laws of every sovereign nation in the world. On the other hand, criminal conspiracy has heretofore been applied only to low and mean situations, the existence of which constitute a serious threat to the well-being of organized society viewed from a

strictly national sense and point of view.

7. Neither Japan nor any other nation has conceded to any other nation or group of nations the right to determine in a judicial trial or in a criminal proceeding at the international level, what constitutes a war of aggression pursued as an instrument of national "policy"; and what conduct constitutes the legitimate exercise of the right of self preservation, self existence and self defense. The foregoing point is perhaps best illustrated by the negotiations leading up to the Briand-Kellogg Pact of 1928, which was supposed to outlaw the use of war as "an instrument of national policy." That Pact originated in an exchange of letters between Mr. Kellogg, Secretary of State of the United States, and M. Briand, Foreign Secretary of France. The purpose of the Pact was high sounding and pious enough but the nations who were called upon to sign the Pact were seriously disturbed as to what any other nation or group of nations might determine either arbitrarily or otherwise to be a war fought from the standpoint of "policy" and utterly divorced from any idea of

self preservation, self existence and self defense. Before that Pact was signed the leading nations of the world, including Britain, France, Italy and Japan required an exchange of notes in order to clarify the meaning and intention of the Pact. M. Briand, for France, advised the other nations: "Nothing in the new treaty restrains or compromises in any manner the right of self defense. Every nation in this respect will always remain free to defend its territory against attack or invasion; it alone is competent to decide whether circumstances require recourse to war in self defense. Secondly, none of the provisions in the new treaty is in opposition to the provisions of the Covenant of the League of Nations, nor with those of the Locarno Treaties or the Treaties of Neutrality. Moreover, any violation of the new Treaty by one of the contracting parties would automatically release the other parties from their obligations to the Treaty-breaking states." Mr. Kellogg, Secretary of State of the United States, made the interpretation and conditions of the Pact still more explicit. He wrote on 23 June 1928 as follows:

"(1) Self-Defense. -- There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. (That right is inherent in every sovereign State and is implicit in every treaty (Italicized). Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense."

Japan as well as every other major nation in the world signatory to said Pact signed the Pact on the conditions and with the interpretation expressed in the foregoing letters of M. Briand and Mr. Kellogg. By the Briand-Kellogg Pact, Japan, by the common consent of the majority of the nations of the world, alone was competent to decide whether the circumstances confronting it at any given time required recourse to war for self preservation, self existence or self defense and neither Japan nor any other signatory nation committed or ever intended to commit to the judgment of any foreign power or group of powers the right to decide de novo whether activities on the part of the armed forces of Japan constituted the legitimate exercise of the right of self preservation, self existence and self defense. A mere examination of all the historic efforts on the part of international bodies, and the discussions contained in the texts of international writers, show the well nigh practical impossibility under changing world conditions of attempting by words or expression of intention to spell out a sharp or even a rough line of demarcation between

a war of aggression and a war fought for self preservation, self existence and self defense. All the writings on the subject show that international experts have uniformly become mired or immured in a hopeless morass at all attempts to define what is legitimate and what is illegitimate war in that respect. It is certain as the day is long that neither Japan nor any other sovereign nation committed to the judgment of an international tribunal in a criminal sense the final determination of what was orthodox and what was unorthodox in that respect. Out of the several hundred wars that have been fought since the beginning of the 17th Century, it is undoubtedly true that no nation could be found which had admitted that it fought a war without excuse or justification and for the sake of "policy" alone. Again in the numerous wars fought in the past century it is a matter of common knowledge that each belligerent had his own side to the story and his own idea as to who and what caused the final hostilities. Yet the Prosecution has the temerity to ask this high international tribunal to walk and decide in a field where the international law experts have always feared to tread and this in the face of their own evidence which shows in every detail that Japan had the strongest sort of provocation and justification for all its armed

activities since September 1931.

8. Each defendant has made the solemn point that there can be no punishment for crime without a pre-existing law; nullum crimen sine lege, nulla poena sine lege. And further that ex post facto punishment and definition of crime is abhorrent to the laws of all civilized countries, as well as opposed to all the basic and decent instincts of mankind. There can be no argument against the fact that before any man can be held to personal responsibility for a crime that the crime should have been defined with certainty as well as the punishment. That principle is embedded in the Constitution or laws and practice of all civilized nations. No nation or group of nations could for a moment admit the possibility of the existence of an alleged international criminal law which rode roughshod over so basic, fundamental and universal a principle as ex post facto; and a recent effort in that regard will not be acknowledged by those who have reverence for law and justice.

Moreover, it is inconceivable how the Prosecution could contend that a crime and punishment could be defined and prescribed ex post facto, or that any such principle had received approval by the common consent of mankind and had thus gained acceptance by usage as a principle of international law. It is all too clear that this argument on the part of the Prosecution is sheer hindsight born in the heat and aftermath of war; and it will not stand examination, much less the sober scrutiny and test of time.

9. Finally it should be noted that under the conditions attached to the Briand-Kellogg Pact a nation might be an aggressor in fact in the opinion of

one or more opposed nations, but it is not a breaker of the Treaty, recourse to war in self defense or for self preservation or self existence having been expressly excluded by prior agreement from the sweep of the terms outlawing war as an instrument of national "policy"; and by agreement of all the signatories to the Pact the definition and circumstances of the exercise of the right of self defense was left to the exclusive judgment of each separate signatory power, including Japan. A breach of the foregoing Pact carried no criminal penalties and otherwise it defined no criminal standard of conduct. The only sanction it imposed was one of possible moral disapproval on the part of one or more nations. The Tribunal will also recall that situations relating to self preservation, self existence and self defense have been treated since time immemorial as implied exceptions to every treaty and convention; otherwise expressed, no nation could disable itself in that respect; and this position was simply reinforced and made doubly clear by the expressed conditions attached to the Briand-Kellogg Pact. This definition of the scope and area of self preservation, self existence and self defense, and the right of a nation to finally and exclusively decide that question for itself, of course, overrode all other treaties and conventions antecedent in point of time.

10. The "Convention for the Pacific Settlement of International Disputes" signed at the Hague, 18 October 1907, dealing with a socalled reasoned declaration of war or a conditional ultimatum, imposed no sanctions or penalties or criminal standard of conduct, and merely left the door open for moral disapproval because of action in violation of said Convention. The Convention was superseded

by the Briand-Kellogg Pact of 1928, insofar as it relates to situations of self defense and who has a right to finally determine the circumstances calling for the exercise of that right.

The Treaty was not violated by the hostilities at Pearl Harbor. The very evidence of the Prosecution shows that the non-delivery of the final Japanese message to the United States Government could not be a material point in this case in view of the uncontradicted evidence of the Prosecution that the contents of said final Japanese message breaking off diplomatic negotiations were in fact known to the highest officials of the United States well in advance of the actual attack on Pearl Harbor. See, for example, the testimony of Mr. Ballantine that the first thirteen parts of the final Japanese message were available in Washington by means of wire tapping on the night of 6 December 1941, that they were actually read by President Roosevelt on the night of 6 December 1941 (R. 10,979), and that the fourteenth and last part of said final Japanese message was translated and available in the United States State Department by 10 o'clock on the morning of 7 December 1941. (R. 10,980) Moreover, all the evidence of the Prosecution shows that the Japanese Government had instructed the Ambassador in Washington to have the final message decoded and ready for delivery to the Secretary of State at 1 o'clock p.m. precisely on 7 December 1941, Washington time, and further that there is no evidence that the Japanese Government attempted an evasion of the foregoing Hague Convention insofar as it required notification of the beginning of hostilities. Moreover, as all the evidence shows that the United Kingdom was working in close concert

with the United States, and had previously threatened to go to war within "the hour" it is to be inferred that she likewise had the information which the United States had.

As the government of the United States had actual notice before the first shot was fired, it is idle to say that formal delivery of the final note adds anything to the legal situation. Heretofore the courts of every civilized nation have uniformly held that actual notice is just as good and effective as a technical or legal notice and in those circumstances it is difficult to see how the Prosecution can maintain that the foregoing Convention was violated in the circumstances immediately attending the opening of the Pacific War. All sides knew the war was coming head on. The spirit of the Convention is designed to insure that an enemy nation shall not be attacked without notice; here all the evidence of the Prosecution shows actual notice prior to 7 December 1941; cessante ratione legis, cessat et ipso lex.

Beyond question, in the circumstances immediately preceding the Pacific War, the United States and Great Britain could not have read the final Japanese note as being anything else than a declaration of war. None of the defendants in the dock had the power to finally declare war on behalf of Japan. The final Japanese note had been described by the Foreign Ministry of Japan in advance as having the effect of rupturing relations and the American Government knew that fact on the uncontradicted evidence of Mr. Ballantine. (R. 10,950) Indeed, the record shows that President Roosevelt considered the final Japanese note at the time it was intercepted to be tantamount to a declaration

of war and that Secretary of State Hull had already acted on such assumption by placing the entire matter" in the hands of the Army and Navy". (R.10,979, 10,954) The Prosecution argument that the attack on Pearl Harbor came as a surprise and that the foregoing Hague Convention was not complied with is a sheer technicality, the drawing of a fine bead at a gnat's heel and a mere form of words in the face of the admitted facts.

The Hague Convention of 1907 regarding the opening of hostilities has no application to situations involving the exercise of the right of self preservation, self existence and self defense on the part of any sovereign government. The very evidence of the Prosecution shows without any contradiction that the United States and Great Britain had been engaged in a de facto state of war with Japan for several years prior to December 7, 1941, because of their substantial and continuous economic, financial and military assistance to China during the Chino-Japanese hostilities which had been in progress since July 7, 1937. that both the foregoing countries were supporting Chiang-Kai-Shek and literally keeping him in the fight against Japan notwithstanding strenuous efforts made by Japan all along to bring the hostilities to a conclusion; and at the same time those governments were applying economic strangulation to Japan which was followed still later on by military encirclement ; and by reason of the foregoing action the United States, the United Kingdom and the Netherlands lost their status as neutrals and assumed the status of belligerents as against Japan. In this situation and under all the orthodox and traditional rules of international law, Japan was entitled to visit a

"reprisal" against those belligerents without giving any such notice as was required by the Hague Convention of 1907. Hence, said Convention, viewed from any angle and in the light of actual facts shown by the prosecution, was not violated by Japan or by any defendant in this case.

11. Other treaties and conventions relied upon by the Prosecution which required conciliation, mediation, etc. could not have been applied in the situations which existed in Manchuria, China and the countries involved in the Pacific War. In the first place

neither China nor the other countries involved in the Pacific War ever paid any attention to those procedures. The fighting broke out in each instance spontaneously and had been preceded by long periods of bad feeling, deeply embedded controversies and a well defined attitude on the part of the belligerents against Japan which could not be solved by any outside intervention or by the mild procedures of conciliation, mediation or discussion. Moreover, during all the period in question China had no stable government which was capable in good faith of executing any agreement arrived at with Japan through the foregoing procedures. The Tribunal is faced with the astounding statement of Mr. Ballantine that during the 1941 negotiations with the Japanese in Washington it was "the Japanese" who asked repeatedly for the opening of diplomatic discussions and that the State Department had no attitude or disposition to open up the discussions at its own instance, an attitude which is in the teeth of the spirit of all international treaties and conventions for the outlawry of war as an instrument of national "policy" and the procedures providing for conciliation, mediation, good offices, etc.

12. In this case it seems to be admitted that none of the governments represented among the prosecutors paid any attention to the treaties and conventions relied upon by them to sustain the Indictment in the instant case and we therefore make the serious point that the Prosecution is estopped in good conscience to complain about the conduct of the defendants in the same respect. Moreover, Mr. Ballantine admitted that Secretary

of War Stimson testified he urged the President of the United States nearly a week before December 7, 1941 to attack Japan and this without any formal declaration of war by the Congress of the United States which has the sole power under the Constitution to declare war.

13. There is a presumption that when a nation engages in hostilities it does so in good faith. The burden is on the Prosecution to offer substantial evidence to overcome that presumption and this it has failed to do with respect to each count of the Indictment which charges the preparation, planning and waging of a war of aggression. The evidence relating to Manchuria, including the findings of fact in the Lytton Report, shows that Japan had the strongest sort of provocation and acknowledged right to defend the lives of its nationals and their property. Viewed in any light the evidence with respect to Manchuria is a matter for interminable debate and this being the case it could not be said that the Prosecution evidence proves anything one way or the other; and above all it is just as consistent with the hypothesis of innocence as it is with the hypothesis of guilt.

Evidence relating to Chinese hostilities beginning July 7, 1937 shows that the Chinese without any adequate provocation fired upon Japanese troops at a place where they had a right to be under the Boxer Protocol of 1901, as amended; that thereafter the Japanese made repeated efforts first to localize the matter and then to settle it with Chiang-Kai Shek. Witness in the respect the testimony of Goette who testified that

the Japanese must have been trying to settle the China conflict because they had been sending and recalling a whole succession of envoys to China. Aside from this, all the Prosecution evidence, particularly the testimony of Baron SHIDEHARA, General TANAKA and Goette, shows that the Chinese had been engaged in bitter anti-Japanese propaganda, boycotts, discrimination of various kinds and assaults upon Japanese nationals which constantly grew worse in intensity without the Japanese adding any fuel to the fire; that Manchuria was practically a primitive country overrun by 300,000 bandits, there still being 8,000 bandits operating in Manchuria several years after the Japanese Army attempted to clean up the situation and to restore law and order. Nothing in the Prosecution evidence by any stretch of the imagination shows that Japan engaged in hostilities in Manchuria and China without any cause, excuse or justification, a matter which they would be bound to demonstrate by substantial evidence to substantiate the allegations with respect to "Wars of Aggression", assuming again arguendo that there is any such concept defined in international law at the present time as a "war of aggression."

With respect to the Pacific War, all the evidence shows that the United Kingdom and the Netherlands declared war on Japan. In these circumstances no international legal tribunal has authority to go behind the formal declaration of war and to weigh the circumstances in its own favor by labeling such a declaration of war as in reality a declaration of war in self defense. Especially is the foregoing true with respect to the

Netherlands which formally declared war against Japan because of its close relations with several other powers. All the evidence of the Prosecution shows that the economic strangulation of Japan by the A-B-C-D bloc could do nothing but force Japan to fight in order to preserve its economy, self existence and pride as a nation. Who was the actual aggressor in the Pacific War is also a matter at best for interminable future debate and in these circumstances it could not be said reasonably that the Prosecution evidence proves anything one way or the other, much less the allegations contained in the instant Indictment.

14. There is no substantial evidence that any defendant either individually or in concert with any other defendant or in concert with "divers other persons" ever made a common plan or conspiracy to wage a war of aggression against any country. Nowhere has the Prosecution shown any direct, immediate or efficient relation between any act or omission of any defendant or two or more defendants which directly, immediately or efficiently led to a war of aggression against any country. Such acts as have been established are too far removed and are too remote from the result which later transpired. All the evidence of the Prosecution shows that no defendant or group of defendants ever had the final voice as to whether or not Japan would engage in hostilities against any country. Indeed there has been a failure on the part of the Prosecution to show that the majority of the defendants were ever acquainted with one another between 1928 and 1945. There has been a total failure to demonstrate any common plan or conspiracy

to dominate the world, East Asia or any other region by military force. The evidence is to the contrary. There has been a total failure on the part of the Prosecution to show any connection whatsoever between the hostilities in Manchuria, China or the Pacific War. In this respect consider the testimony of General Tada, who testified that the Army of Japan had made no preparations for the Chinese hostilities and was in fact ill-prepared for such hostilities; and in 1937 there was no thought in the Army about preparation for Pacific War. What is even more striking is that the defendants in the dock held various and unrelated offices in at least twelve separate and distinct cabinets in Japan scattered between 1928 and 1945; and that it would not have been possible for any two or more of said defendants, wielding the powers of their official offices at widely separated periods of time, to carry out any of the things charged in the Indictment with respect to wars of aggression. In this situation Japan stands in striking contrast to the situation at Nurenberg where all the evidence showed that the defendants acted under a single government.

15. With respect to the allegations of the Indictment which charge "Murder" and "Conventional War Crimes" and "Crimes Against Humanity", it need only be said that Prosecution has failed to offer a scintilla of evidence that any defendant ordered, caused or permitted the armed forces of Japan to "murder" the inhabitants of any country as alleged or prisoners of war, members of the armed forces of opposing countries, civilians or crews of ships. There is not a scintilla of evidence that any defendant

had any reason to apprehend that a killing by the armed forces of Japan during hostilities constituted "Murder" or that international law had been strained to comprehend any such crime as "Murder." With respect to the allegations of "Conventional War Crimes" there is not a scintilla of evidence that any defendant or two or more defendants was personally responsible for the treatment accorded to prisoners of war, interned civilians, etc. or that any defendant omitted, when knowledge of the facts came to his attention, to do anything within his power to correct the situation. No defendant in the dock ever had any reason to suppose that violation of the provisions of the Geneva Convention of 1929 would ever be punished by other than a national court of the nation offended by the action or that the person to be punished would be other than the immediate offender and his immediate, efficient commander in the military field. Moreover, all the Prosecution evidence shows that Japan issued rules and regulations for the treatment of Prisoners of War and interned civilians which substantially complied with the spirit, intention and basic humanitarianism expressed in said Convention and that no defendant ever authorized any substantial departure by the armed forces of Japan from the requirements of such rules and regulations. Nothing in this paragraph is to be considered as an admission that Japan as a non-ratifying power to the Geneva Convention of 1929 was bound to comply with all the detailed provisons and minutias contained in that Convention; what is insisted upon is that all the evidence of the Prosecution shows that the Japanese Government

and those defendants who had any connection with the matter promulgated rules and regulations which did fulfill within the limits of personnel and material resources all the basic and humanitarian requirements of that Convention; and that the defendants can not be held personally responsible for any infraction thereof.

Therefore, on both the facts and the law the Prosecution has failed to substantiate its case by any substantial evidence and having failed to establish a prima facie case the defendants, and each of them, beseech this Honorable Tribunal to dismiss the Indictment and each and every count thereof and to order that the defendants, and each of them, stand acquitted.

All of which is most respectfully submitted.

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THE UNITED STATES OF AMERICA, et al.

vs

ARAKI, SADAO, et al.

Defendants

Motion No.____

GENERAL MOTION TO DISMISS THE INDICTMENT
ON BEHALF OF ALL DEFENDANTS

Now come all of the defendants remaining in the above-entitled cause at the conclusion of the evidence on behalf of the prosecution and hereby jointly and severally move the Honorable, The International Military Tribunal for the Far East, to dismiss the alleged indictment heretofore filed with the Tribunal on 3 May 1946, and each and every count thereof as it severally relates to and affects each of said defendants, upon the grounds hereinafter set forth:

For clarity of statement the grounds of the motion are divided into five categories as follows:

(1) "General Grounds Common to All Defendants"

(2) "Crimes Against Peace" (Counts 1 - 36)

(3) "Murder" (Counts 37 - 52)

(4) "Conventional War Crimes and Crimes Against Humanity" (Counts 53 - 55)

(5) "The Individual Counts"

General Grounds Common to All Defendants

The points to be argued are:

1. There is no substantial evidence introduced by the prosecution tending to show that any defendant individually or in concert, combination, confederation or conspiracy with

any other defendant or with any other persons vaguely described as "divers other persons" committed any alleged offense described in any of the fifty-five counts of the alleged indictment and in addition the evidence introduced does not amount to even a scintilla of proof and otherwise fails to demonstrate a prima facie showing in that respect.

2. There is not and never has been in existence any system or body of law known as an international code, standard or criterion of criminal justice or an international code, standard or criterion of moral conduct carrying with it the right of criminal adjudication and criminal penalties· and the prosecution has wholly failed to show by evidence the existence of any such law or concept.

3. No system or body of law heretofore known authorizes any international legal tribunal to sit in judgment upon and adjudicate the criminal or moral conduct of individuals and a sovereign nation.

4. All previous feeble attempts to set up an alleged code of international criminal justice have failed of recognition or approval by all sovereign nations including Japan.

5. The defendants and each of them cannot be held to answer for offenses against alleged international criminal or moral standards which have been heretofore defined in such vague, general and indefinite terms, if at all, that no individual could be expected to know what such standard or criterion of conduct was and the criminal penalties attendant upon violation thereof; that such alleged standard or criterion has never been defined with the requisite certainty to support criminal intent; and further, that no international standard of criminal or moral conduct has heretofore been defined with the certainty that he who runs may read.

6. The alleged body or system of law which this tribunal undertakes to administer under the amended charter issued by General MacArthur on 26th April 1946 is entirely ex post facto in character and, hence, abhorrent to and contrary to the practice followed by all civilized nations since time immemorial.

7. The defendants with few exceptions are indicted for acts and possibly acts of omission committed while serving in the highest civil or military offices or both within the gift of the government of Japan. Their acts were the acts of the government of Japan acting in its sovereign capacity and the defendants and each of them are not answerable therefor under any body or system of law, national or international, known in the world. Their acts and omissions are beyond the reach of any body or system of law known to the world and are immune to re-examination by any sovereign nation or group of nations. It would have been impossible for any defendant to have committed the alleged offenses without wielding the power of his official office and consequently the defendants and each of them are indicted for alleged acts and omissions which arose entirely out of their official acts.

8. The alleged acts and possibly acts of omission charged against the defendants and each of them were acts of the Japanese government acting in the sovereign capacity as a nation and none of the defendants is subject to prosecution as an individual by reason of having been an actor in the performance of his governmental functions.

9. None of the fifty-five counts of the indictment informs any defendant of the nature and cause of the accusation against him and each of said counts is drawn in such broad,

general, indefinite and vague form as to amount to a mere dragnet and snare.

10. The law of conspiracy has no application whatever to official actions, compromise, consultation, and agreement between the highest officers of the government of Japan acting within the scope of their sovereign authorities for the reason that civilized government necessarily implies and requires cooperation toward the end sought by sovereign action and heretofore criminal conspiracy has never been known to apply to any act or situation except positive acts inimical to the sovereign itself and defined and punished by domestic law.

11. No nation or individual can make a law of nations.

12. Neither the Potsdam Declaration nor the Japanese Instrument of Surrender generated or established any law, national or international, and the action taken on those occasions furnished no justification or support for the indictment herein.

13. In the light of the unusual character of this trial and the nebulous state of existing international law, even in its civil aspects, there can be no judicial notice of the "law" of this case; hence the law of this case must be proved by the prosecution as a fact and there being no proof in this respect, the indictment fails in its entirety.

14. The Peace Pact of Paris (Briand-Kellogg Pact), of 27 August 1928, was conditioned that "Nothing in the new Treaty restrains or compromises in any manner the right of self defense. Every nation in this respect will always remain free to defend its territory against attack or invasion; it alone is competent to decide whether circumstances require recourse to war in self

defense. Secondly, none of the provisions in the new Treaty is in opposition to the provisions of the Covenant of the League of Nations, nor with those of the Locarno Treaties or the Treaties of Neutrality. Moreover, any violation of the new Treaty by one of the contracting parties would automatically release the other parties from their obligations to the Treaty-breaking States." "Under these conditions" (M. Briand for France); "On this premise" (Signor Mussolini for Italy); and "In the light of the foregoing explanations" (Sir Austen Chamberlain for England), the chief signatory powers signed the Treaty. A similar representation and condition was made to the Empire of Japan which ratified the pact upon the condition set forth in a note of Mr. Kellogg, Secretary of State of the United States, dated 23 June 1928, which reads in part as follows:

> "(1) Self-Defense. - - There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. (That right is inherent in every sovereign State and is implicit in every treaty /Italicized/). Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense."

Consequently, Japan alone was competent to decide whether the circumstances confronting it required recourse to war in self defense and no international tribunal is competent to re-examine that question anew. Moreover, should a nation bona fide believe that war is required as a measure of self defense, it might be an aggressor in fact, but it is not a breaker of the Treaty - - - recourse to war in self defense having been

expressly excluded by prior agreement from the terms of the Pact, and the definition and circumstances of the exercise of self defense left to the exclusive judgment of each separate signatory Power. Consequently, a breach of the foregoing Pact incurred no sanction other than moral disapproval.

15. The "Convention for the Pacific Settlement of International Disputes", signed at the Hague, 18 October 1907, imposes no sanctions or penalties other than moral disapproval for violation of said Convention; the Convention became obsolete and was superseded by the Briand-Kellogg Pact of 1928 as it specifically relates to the determination of what constitutes a war of self preservation and self defense. Many of the signatory nations thereto have in recent years resorted to war to settle disputes without any attempt to follow the prescribed procedures for Pacific settlement and no attempt has heretofore been made to punish or even censure those nations for breach of said Convention. The Convention has fallen into disuse and was obsolete long prior to 1928 by common consent and practice of nations. Since the evidence produced by the prosecution shows beyond doubt that the procedures of conciliation, mediation and arbitration would have been futile in the situation of Japan with respect to the disputes in Manchuria and China and that Japan substantially followed the procedures prescribed by said Convention in its dealings with the United States and Great Britain in the negotiations preceding the commencement of the Pacific war, the Treaty has no application to the evidence in this case.

16. The Treaty of Versailles has no application to the activities of Japan in Manchuria in that all the evidence showed that Japan complied with the procedures prescribed by said Treaty up to the point of the decision by the League of Nations, a decision Japan was not bound to accept without regard to its merit and fairness and its inalienable right to act in self defense. The Treaty otherwise provided no punishment other

than moral disapproval for any alleged violation thereof. All the substantial evidence introduced by the prosecution shows that the actions taken by Japan were in self defense, a matter outside the scope of the provisions of the Treaty of Versailles. Japan occupied a special, historical and incontrovertible position in Manchuria which it was entitled to defend. Otherwise the Treaty of Versailles was superseded by the Briand-Kellogg Pact of 1928 in situations relating to self preservation and self defense on the part of Japan.

17. The "Convention for the Pacific Settlement of International Disputes", signed at the Hague, 29 July 1899, is obsolete, was superseded by the "Convention for the Pacific Settlement of International Disputes" signed at the Hague, 18 October 1907, and both Conventions were superseded by the Briand-Kellogg Pact of 1928 in situations relating to self preservation and self defense which conditions Japan alone was competent to finally decide for itself. The Convention of 1899 is so vague, general and indefinite as to be without meaning in the context of this trial and provided for recourse to the procedures mentioned in the Convention "as far as circumstances allow." The prosecution has failed to show either the existence of the foregoing Treaty or its relevancy or application to the facts in this case.

18. The so-called "Nine-Power Treaty", signed at Washington 6 February 1922, has no application to the evidence presented by the prosecution in this case for the reason that all the substantial evidence shows that the activities of Japan in Manchuria and China were acts in self defense; that there was no infringement of the territorial integrity of China in any permanent sense; and that otherwise there was no infringement of the so-called "open-door" in China -- whatever the loose term "open-door" might be taken to mean in view of the radically altered circumstances and situation in China since 1922, particularly with

respect to the hostile attitude of China itself in regard to said Treaty. The "Nine-Power Treaty" was superseded by the Briand-Kellogg Pact of 1928 in situations relating to the self defense of Japan and its citizens and Japan alone was competent to determine finally what facts and circumstances entitled it to act in self defense.

19. The assurance given by Japan, the United States, France and the British Empire to the Netherlands government on 4 February 1922 with respect to territorial integrity of insular dominions in the region of the Pacific Ocean has no possible application to this case for the reason that all the evidence shows that the Netherlands government declared war on Japan on 8 December 1941, which was long prior to the time that Japanese troops entered the Dutch East Indies. Moreover, on 8 December 1941 the Netherlands government and the Netherlands East Indies declared war against Japan "in view of Japan's aggression against two powers with whom the Netherlands maintain particularly close relations."

20. There is no substantial evidence that any defendant caused Japan to violate the Treaty of amity and respect for each other's territorial integrity between Thailand and Japan, signed 12 June 1940. All the evidence introduced by the prosecution shows that Japanese armed forces entered Thailand territory with the consent and approval of the duly constituted Thailand government.

21. There is not even a scintilla of evidence tending to prove that any of the defendants violated the provisions of the Versailles Treaty or the agreement between Japan and the United States, signed at Washington, 11 February 1922, by fortifying the mandated islands of the Pacific at any time prior to the commencement of the Pacific war; nor any evidence that any defendant employed or permitted to be employed forced labor without compensation.

22. Japan never ratified the "Convention Relative to the Treatment of Prisoners of War", signed at Geneva, 27 July 1929, and is not bound by any provision of that Convention. The undertaking of Japan after the beginning of the Pacific war unilaterally to respect the provisions of that Convention "mutadis mutandis" meant nothing more or less than Japan recognized the spirit and principle involved in said Convention but did not follow the Convention in all its detailed requirements. The aforesaid Convention imposes no criminal sanctions against the heads of government and those occupying high places in government. Nothing in the aforesaid Convention authorizes an international legal tribunal to sit in judgment upon alleged violations of the Convention or the spirit or principle embodied in the Convention; and otherwise the punishment of breaches of said Convention or the principle thereof by members of the armed forces or belligerents is left to the processes of the individual nation offended by such breach. Nothing in the provisions of said Convention establishes a so-called international code of criminal conduct relating to the treatment of prisoners of war punishable by an International Military Tribunal. These same considerations apply to the Convention for the treatment of civilian internees.

23. The Hague Convention of 1907 regarding the opening of hostilities has no application to situations involving a war of self-preservation and self-defense; it has no application because the very evidence of the Prosecution shows that the United States, Great Britain and the Soviet Union were and had been engaged in a de facto state of war with Japan for several years prior to December 7, 1941, by reason of their substantial and continuous economic, financial and military assistance to China during the Sino-Japanese hostilities which had been in progress since July 7, 1937, and that by reason thereof the foregoing nations placed themselves in the status of belligerents against Japan; and further that the foregoing Convention has no application because all of the evidence of the Prosecution shows that all nations represented before the Tribunal gave no heed to the provisions of said Convention, either with respect to intervention in the Sino-Japanese hostilities or in the negotiations immediately preceding the commencement of the Pacific War.

24. There is no substantial evidence to show that any defendant violated any of the treaties, conventions or assurances relied upon by the Prosecution.

25. As the governments represented by the prosecutors before the Tribunal failed to respect and abide by the provisions of the treaties, conventions and assurances set forth in the Indictment, the aforesaid governments are estopped in good conscience to bring into question in this proceeding acts and possibly acts of omission tending to show alleged violations of the same treaties, conventions and assurances.

26. All of the evidence introduced by the Prosecution is as equally consistent with the hypothesis of innocence as it is with the hypothesis of guilt and, hence, there has been a palpable failure on the part of the Prosecution even to make out a prima facie case with respect to any count in the Indictment.

CRIMES AGAINST PEACE

(Counts 1-36)

The Points to be Argued are:

27. The Prosecution has failed to show by any substantial evidence that any defendant either individually or acting in concert, combination, confederation or conspiracy with any other defendant or with persons in the vague category described as "divers other persons" ever planned, prepared or initiated a declared or undeclared war of aggression against any country or prople. There has been no attempt on the part of the Prosecution to trace any outline of a criminal conspiracy or to show any overt acts in pursuance of an alleged conspiracy. No immediate connection is anywhere shown between acts of the defendants and results which transpired in the course of time; that is to say, the connection between isolated acts of the defendants and events which subsequently transpired in Manchuria, China and in the Pacific War are too remote to sustain the allegation of conspiracy. As none of the defendants had the final voice in any of the allegations contained in the Indictment, they cannot be held responsible for the final and ultimate decision which was put into action with respect to all matters mentioned in Counts 1-36 of the Indictment.

28. The Prosecution has wholly failed to prove a war of aggression with respect to any of the Counts 1-36. There has not been the slightest effort on the part of the Prosecution to prove the absence of any valid reason or justification for the activities of the armed forces of Japan in Manchuria, China, Indo-China and the countries involved in the Pacific War. On the other hand, with respect to Manchuria and China, all the Prosecution evidence shows that the Chinese caused the hostilities and that the surrounding circumstances were such that Japan was forced to fight a war of self-defense. In any event, the

evidence with respect to Manchuria and China is so equivocal that it does not prove anything one way or the other with respect to alleged wars of aggression.

29. The Prosecution has failed to offer any evidence to overcome the ordinary presumption that armed hostilities comprise legitimate self-defense.

30. There is a failure of proof to show that any defendant or defendants or "divers unknown persons" were acting in bad faith in their determination that Japan was entitled to engage in hostilities for the purposes of self-preservation and self-defense and in this respect the Prosecution has failed to overcome the ordinary presumption of innocence.

MURDER

(Counts 37-52)

Points to be Argued are:

31. There is a total failure of proof on the part of the Prosecution that any defendant, either individually or acting in concert, combination, confederation or conspiracy with any other defendant or with the alleged category of persons vaguely described as "divers other persons" ever "murdered" any of the inhabitants of the nations described in the foregoing counts. There is no international criminal law which defines the crime, standard or criterion, of "murder." At common law, and by the domestic law of all civilized nations "murder" has been heretofore defined as the deliberate, purposeful and premeditated killing of a human being with malice aforethought. There has been a total failure of proof to show that any defendant or defendants ever murdered any human being. "Murder" by its very nature requires a showing of a close, immediate relationship between two human beings and involves all the elements of purpose, premeditation, "cooling time" and above all, the extremely personal element of malice aforethought. It has

never heretofore been supposed that the heads of governments of sovereign nations are guilty of "murder" by reason of either legal or extra-legal activities on the part of the armed forces of a sovereign nation. Moreover, a killing by the armed forces of a sovereign nation has never been regarded as "murder", and, hence, there is nothing in international law to support the accusations against any of the defendants. There is a total failure by the Prosecution to show that any defendant ordered, caused or permitted the Japanese armed forces to kill any human being inany of the countries designated in any of the foregoing counts. The Prosecution has likewise failed to offer any evidence to overcome the ordinary presumption that a killing by a member of the armed forces was a legal act during the continuation of hostilities.

CONVENTIONAL WAR CRIMES AND CRIMES AGAINST HUMANITY

(Counts 53-55)

32. There has been a total failure of proof on the part of the Prosecution to show that any defendant, either individually or acting in concert, combination, confederation or conspiracy with any other defendant or with "divers unknown persons" ever knowingly, intentionally or wilfully violated the rules, customs and usages of land or sea warfare or ever committed any act which might be construed to be an alleged conventional war crime or a crime against humanity. There is an entire failure of proof to show that any defendant had any personal connection with or knowledge of any individual activities on the part of the armed forces of Japan with respect to the treatment of prisoners of war and interned civilians or that any defendant was personally guilty of negligence in that respect. The assurances on the part of Japan that it would recognize the principle involved in the Geneva Convention in

regard to the treatment of prisoners of war and civilians of 1929 "mutatis mutandis" left Japan almost unbridled judgment and discretion within the scope of common, ordinary conceptions of humanity, to apply or not to apply the details of said Convention. The Prosecution has failed to show, by substantial evidence, that any of the defendants were in the chain of command or in the line of responsibility which would fasten upon them or any of them legal or criminal responsibility for acts of commission and omission in the treatment of prisoners of war and interned civilians. Nothing in international law holds the high policy making officials of a sovereign nation, especially civilian officials, responsible for the activities of armies in the field. The Prosecution has failed to introduce any evidence to overcome the ordinary presumption that the commanding officers of armies in the field have the final and ultimate responsibility for the treatment of prisoners of war and civilians coming into their custody during the existence of a state of war. Nothing in the practice of the past entitled an International Military Tribunal to sit in judgment upon averments of breach of the rules, customs and usages of land warfare; heretofore all such violations have been left to trial by the military tribunals of the nation which was offended by such breach of the rules, customs and usages of land warfare. Finally, all the evidence introduced by the Prosecution dealing with alleged violations of such rules, customs and usages necessarily have a definite geographical location and by reason thereof are not within the competence of an International Military Tribunal. Nothing in the Potsdam Declaration or the Japanese instrument of surrender undertook or purported to define so-called "war criminals" in other than the traditional sense or to enlarge the category of persons traditionally held to responsibility for such offenses.

THE INDIVIDUAL COUNTS

The points to be argued are:

(Count 1)

33. There is no substantial evidence tending to prove that any two or more defendants ever engaged in a common plan or conspiracy to "secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein."

(Count 2)

34. There is no substantial evidence tending to show that any two or more defendants engaged in a common plan or conspiracy to "secure the military, naval, political and economic domination of the Provinces of Liaoning, Kirin, Heilungking and Jehol, being parts of the Republic of China."

(Count 3)

35. There is no substantial evidence tending to prove that any two or more defendants engaged in a common plan or conspiracy to "secure the military, naval, political and economic domination of the Republic of China, either directly or by establishing a separate State or States under the control of Japan."

(Count 4)

36. There is no substantial evidence tending to show that any two or more defendants engaged in a common plan or conspiracy to "secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein." This count appears to be a mere duplication of Count 1, supra.

(Count 5)

37. There is no substantial evidence tending to prove that any two or more defendants engaged in a common plan or conspiracy that "Germany, Italy and Japan should secure the military, naval, political and economic domination of the whole world." All the evidence of the prosecution tends to prove the reverse of the foregoing allegation.

(Count 6)

38. There is no substantial evidence tending to show that any two or more defendants "planned and prepared a war of aggression and a war in violation of international law, etc. against the Republic of China." This count appears to be a mere duplication of Counts 1, 2, 3 and 4.

(Count 7)

39. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression and a war in violation of international law, etc. against the United States. The evidence of the prosecution clearly shows that the United States acting in concert with other great powers applied economic embargoes and sanctions against Japan to the point of strangulation, indulged in military encirclement of Japan and otherwise forced Japan into the position of fighting a war of self preservation and self defense. There is a total failure of proof that Japan engaged in a war of aggression against the United States.

(Count 8)

40. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against the United Kingdom of Great Britain and northern Ireland and all parts of the British Commonwealth of Nations. All the evidence of the prosecution shows beyond doubt that the United Kingdom itself declared war on Japan and had previously threatened Japan that the United Kingdom would go to war "within the hour" of the beginning of hostilities between the United States and Japan.

(Count 9)

41. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against the Commonwealth of Australia. All the evidence shows that Australia itself declared war on Japan long prior to the time that hostilities reached the territory of Australia.

(Count 10)

42. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against New Zealand. All the evidence shows beyond doubt that New Zealand declared war on Japan.

(Count 11)

43. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against Canada. All of the evidence shows beyond doubt that Canada declared war on Japan.

(Count 12)

44. There is no substantial evidence tending to prove that any two or more defendants planned and prepared a war of aggression against India.

(Count 12) par 44 cont'd

All of the evidence shows beyond doubt that India declared war on Japan in line with the policy of the United Kingdom.

(Count 13)

45. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against the Commonwealth of the Philippines. As the Philippines had not attained its independence at any time during the continuance of the Pacific war and was subject to the sovereign jurisdiction of the United States and its inhabitants were nationals thereof, this count appears to be a mere duplication of Count 7 which avers a planned and prepared war of aggression against the United States of America.

(Count 14)

46. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against the Kingdom of the Netherlands. All the evidence shows beyond doubt that the Netherlands itself declared war upon Japan.

(Count 15)

47. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against the Republic of France. All of the evidence in the case shows that there was no war of aggression against France and that the landing of troops in Indo-China was pursuant to a voluntary agreement between the Vichy French Government and Japan, the Vichy Government having exercised both de jure and de facto authority over Indo-China after the capitulation of France.

(Count 16)

48. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against

Thailand. There is a total failure of proof in this respect. All the evidence shows beyond doubt that the entry of Japanese troops into Thailand after the commencement of the Pacific war was pursuant to a voluntary agreement with the Thailand Government. Moreover, the Kingdom of Thailand is not a party to the prosecution and nowhere does it appear by what authority the existing prosecutors undertake to carry on a prosecution without the consent of the Kingdom of Thailand.

(Count 17)

49. There is no substantial evidence tending to show that any two or more defendants planned and prepared a war of aggression against the Union of Soviet Socialist Republics. All the evidence in the case demonstrates beyond doubt that Japan never entertained the slightest intention of attacking the Soviet Union and that Japan for many years had been genuinely disturbed by Soviet aggressiveness, large preparations for war and desire to fasten its communistic philosophy upon Japan and China as well as other nations throughout the world.

(Count 18)

50. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the Republic of China. All the evidence of the prosecution shows that China caused the hostilities against Japan and that China had otherwise been engaged for many years in hostile actions against Japanese citizens, anti-Japanese propaganda and boycotts, and had otherwise been engaged in a long period of civil war and internal chaos which threatened the lives and property of Japanese citizens.

(Count 19)

51. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the Republic of China. This count appears to be a mere duplication of Count 18 with the exception that several additional defendants are named in this count. No reason appears why the indictment was split in this respect.

(Count 20)

52. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the United States of America. This count is a duplication of Count 7, with the exception that Count 7 names all defendants, whereas the instant count names only fifteen defendants.

(Count 21)

53. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the Commonwealth of the Philippines. This count appears to be a duplication of Counts 4, 5, 7 and 13.

(Count 22)

54. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the British Commonwealth of Nations. This count appears to be a duplication of Counts 4, 5, 8, 9, 10, 11 and 12. As previously pointed out, the British Commonwealth of Nations themselves declared war on Japan.

(Count 23)

55. There is no substantial evidence tending to show that any two or more defendants initiated a war of aggression against France. This count appears to be a mere duplication of Counts 4, 5 and 15.

(Count 24)

56. There is no substantial evidence tending to prove that any two or more named defendants initiated a war of aggression against the Kingdom of Thailand.

(Count 25)

57. There is a total failure of proof that any two or more of the named defendants initiated a war of aggression against the Union of Soviet Socialist Republics. There is no evidence in the record to show that any such war transpired.

(Count 26)

58. There is no substantial evidence tending to show that any two or more of the named defendants initiated a war of aggression against the Mongolian People's Republic. The Mongolian Republic is not a complainant before the Tribunal or represented among the prosecutors. Nowhere does it appear that the Mongolian People's Republic has given its consent to a complaint before the Tribunal and otherwise it does not appear by what authority the instant prosecutors present a case on behalf of such Republic.

(Count 27)

59. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against China. This count appears to be a duplication of Counts 1, 3, 4, 5, 18 and 19.

(Count 28)

60. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Republic of China. This count appears to be an exact duplication of Count 27 and all the previous counts identified under Count 27.

(Count 29)

61. There is no substantial evidence tending to prove that any two or more defendants waged a war of aggression against the United States. This count appears to be an exact duplication of Count 20, except that Count 20 names only part of the defendants.

(Count 30)

62. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Commonwealth of the Philippines. This count appears to be an exact duplication of Count 21 except that Count 21 names less than all the defendants.

(Count 31)

63. There is no substantial evidence that any two or more defendants waged a war of aggression against the British Commonwealth of Nations. This count appears to be a mere duplication of Count 22.

(Count 32)

64. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Kingdom of the Netherlands. This count appears to be a mere duplication of Counts 1, 4 and 5.

(Count 33)

65. There is no substantial evidence tending to show that any two or more of the named defendants waged a war of aggression against the Republic of France. This count appears to be a duplication of Counts 1, 4 and 23.

(Count 34)

66. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Kingdom of Thailand. This count appears to be a mere duplication of Counts 1, 4 and 24.

(Count 35)

67. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Union of Soviet Socialist Republics.

(Count 36)

68. There is no substantial evidence tending to show that any two or more defendants waged a war of aggression against the Mongolian People's Republic and the Union of Soviet Socialist Republics. Moreover, no authority appears for the representation of the Mongolian People's Republics in the complaint before the Tribunal.

(Count 37)

69. There is no substantial evidence tending to show that any two or more of the named defendants made a common plan or conspiracy to unlawfully kill and murder inhabitants of the named countries; nor any evidence tending to show the personal responsibility of any defendant for the death of any such persons.

(Count 38)

70. There is no substantial evidence tending to show that any two or more named defendants made a common plan or conspiracy to "murder" any persons within the designated territories.

(Counts 39-43)

71. There is no substantial evidence tending to prove that any two or more defendants ordered, caused or permitted the armed forces of Japan to unlawfully "murder" the persons described in the foregoing counts.

(Count 44)

72. There is no substantial evidence tending to show that any two or more defendants made a common plan or conspiracy to effect the "murder" on a wholesale scale of prisoners of war, members of the armed forces of countries opposed to Japan who might lay down their arms, and civilians or crews of ships destroyed by Japanese forces.

(Counts 45-52)

73. There is no substantial evidence tending to show that any two or more defendants ordered, caused or permitted the armed forces of Japan to slaughter the inhabitants of the city of Nanking, the city of Canton, the city of Hankow, the city of Changsha, the city of Hengyang, the cities of Kweilin and Liuchow, or to unlawfully "murder" certain members of the armed forces of Mongolia and the Union of Soviet Socialist Republics. There is a total failure of proof to show the personal

responsibility of any defendant for the death of any of the foregoing inhabitants of said territories as alleged.

(Counts 53-55)

74. There is no substantial evidence tending to show that any two or more of the named defendants ever made a common plan or conspiracy to commit conventional war crimes and crimes against humanity as alleged in the foregoing counts or to commit breaches of the laws, customs and usages of war in any of the named territories. There is not a scintilla of evidence in the case to show that any individual defendant personally committed any of the acts and omissions alleged in said counts. The responsibility for the commission of any such acts lay with the immediate military commanders of Japan in the field and by the Geneva Convention for the treatment of prisoners of war and internees of 1929, and by immemorial practice the responsibility for such acts was always fastened upon the individual guilty of the particular act or omission in question and the immediate, active commander of such offender in the field of operation. Furthermore, such violations were not subject to trial before an international military tribunal and were solely and exclusively punished under the domestic processes of the nation offended by such offense if and when the offender came under the power of such offended nation; and the indictment in the instant case cannot be sustained in those respects because all such alleged offenses necessarily have a definite geographical location.

/s/ Somei Uzawa
UZAWA, Somei
Chief Defense Counsel

Hold For Release

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST

THE UNITED STATES OF AMERICA,
et al

vs

Paper No. 651

ARAKI, Sadao, et al,
Defendants

MOTION OF DEFENDANT SUZUKI, Teiichi,
TO DISMISS

Now comes the defendant SUZUKI, Teiichi, by his counsel, and moves the court to dismiss each and every one of the Counts in the Indictment against him on the ground that the evidence offered by the prosecution is not sufficient to warrant a conviction of this defendant.

Dated this 8th day of January, 1947.

TAKAYANAGI, Kenzo

KAINO, Michitaka

KATO, Ippei

MICHAEL LEVIN
Counsel for SUZUKI,
Teiichi

Reg army
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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST

THE UNITED STATES OF AMERICA,
et al

vs

Paper No. 651

ARAKI, Sadao, et all
Defendants

ACCOMPANYING MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT SUZUKI, Teiichi, TO DISMISS

With reference to Counts 1 to 5: These counts are general counts, charging conspiracy between January 1,1928, and September 2, 1945. The character of the official position of this accused is indicated by his personnel record, Exhibit 126. From this it must be clear beyond peradventure that this accused, being a regular Army officer, on the basis of the evidence which has been adduced, has not been shown to have participated in the conspiracy set forth in these counts.

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

Count 19 charges the defendant, among others, with having initiated a war of aggression on or about July 7, 1937, against the Republic of China. From 1933 until November 1, 1937, the accused SUZUKI, was a Colonel in the regular army and

nothing in the evidence or the record indicates any implication on his part in regard to a war of aggression against the Republic of China.

Counts 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35 and 36 charge the defendant with initiating a war of aggression against the countries specified in the various counts. It will be specifically noted that the defendant is not charged, under Count 18, as being one initiating a war of aggression against the Republic of China. For the reasons heretofore given, and the fact that the accused did not become the head of the Planning Board and a member of the Cabinet until April, 1941, it is submitted that the evidence offered by the prosecution is not sufficient to warrant a conviction on these counts.

4/41

Group 2, Counts 37 to 47, inclusive: It is submitted there is no evidence against this defendant, nor any responsibility on his part in relation to the matters set forth in these counts. The evidence offered by the prosecution is not sufficient to warrant a conviction of this defendant on said counts.

Count 51 charges the defendant in relation to the Mongolian Incident on the Khalkhin-gol River in the summer of 1939. Count 52 charges responsibility by ordering and causing and permitting the armed forces of Japan to attack the Union of the Soviet Social Republic, and unlawfully killing and murdering certain numbers of the armed forces of the Soviet Union. We submit that in the evidence offered by the prosecution in connection with this phase of the case there is no evidence of any kind or character which in any way connects the defendant with Counts 51 and 52.

Counts 53, 54 and 55 deal with conventional war crimes and crimes against humanity. We submit that the evidence offered by the prosecution is not only insufficient to warrant a conviction of this defendant, but that there is not the slightest evidence in the record to charge any responsibility on the part of the defendant in connection therewith. The matters indicated in these counts are matters of military administration and in the very nature of things this defendant could not possibly have participated in them.

In referring to special counts in the Indictment, it is not intended in any manner to admit the charges against the accused in any of the counts to which no special reference is made. Where no special reference is made to particular counts, it is intended that the general statement in relation thereto shall be considered as a specific argument to each of said counts.

Without discussing in detail the nature of the evidence adduced, it seems to us that no responsibility can be placed on one who became the head of the Planning Board at a time when whatever action was to be taken by either the War or Navy Departments was already planned. Irrespective of the determination of the Court as to the various issues in this case, no responsibility can be placed in that respect on a subordinate board of a Department of the Government.

Dated this 8th day of January, 1947.

SUBMITTED BY:

TAKAYANAGI Kenzo
KAINO, Michitaka
KATO, Ippei
MICHAEL LEVIN
Counsel for SUZUKI, Teiichi

Hold For Release

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST

CASE NO. 1

THE UNITED STATES OF AMERICA, et al

vs

ARAKI, Sadao, et al

Defendants

Paper No. 689

MOTION BY THE ACCUSED SHIMADA, Shigetaro TO DISMISS THE INDICTMENT AT THE CLOSE OF THE PROSECUTION'S CASE

COMES NOW the accused SHIMADA, Shigetaro and at the close of the Prosecution's case moves the Court to dismiss each and every Count in said Indictment contained for the reason that the evidence is insufficient to sustain a verdict of guilty against him.

Dated this 17th day of January 1947. Shimada

Takahashi Yoshitsuga
TAKAHASHI, Yoshitsugu

and

Ed P McDermott
Edward P. McDermott

POW camps
only "army"

Please one in before I leave
may split w/ army

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST

CASE NO. 1

THE UNITED STATES OF AMERICA, et al

vs

PAPER # 699

ARAKI, Sadao, et al

Defendants

MOTION BY THE ACCUSED SHIMADA, Shigetaro TO DISMISS
THE INDICTMENT AT THE CLOSE OF THE PROSECUTION'S CASE

COMMENT ON MOTION TO DISMISS

The Prosecution evidence has shown that the accused SHIMADA, Shigetaro became Minister of the Japanese Navy and a Cabinet Member only fifty days prior to the commencement of hostilities, December 7, 1941. The evidence further has shown that the planning and preparing of the Pearl Harbor attack as well as the other phases of the commencement of hostilities was under the exclusive control and preparation of the Chief of Naval General Staff. The Indictment alleges that SHIMADA attended only three conferences relative to deciding on the policy of war, and the proof does not sustain his attendance at these.

Prosecution evidence further reveals (Document 7512, Exhibit 124) that immediately prior to his appointment as Navy Minister the accused SHIMADA served only as the Commander of the YOKOSUKA Naval Station and was not in a command position sufficient in any sense to engage in a common plan or alleged conspiracy to commit any of the acts set forth in this Indictment. It is clearly indicated that practically all of the naval career of this accused was spent as a man of the sea and that he was not such an officer as did participate in policy formation.

At the time of the entry of this accused into the Cabinet as Minister of Navy, Prosecution evidence has shown that the situation between the United States and Japan was so tense that the possibility of war had ceased to exist and in its place the probability of war had succeeded. The Prosecution has failed to show that this

accused either encouraged the outbreak of war or could have prevented it in any way, and in fact, it is apparent that the pattern of war had clearly been cut prior to his assumption of duties.

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

Prosecution has further shown that it was the customary practice in all nations for high-ranking and senior naval officers to succeed to the higher positions in the naval department and they have failed to show that the assumption of such a post is criminal in and of itself.

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

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

In reference to the Counts under Group 3 entitled "Conventional War Crimes and Crimes Against Humanity", Prosecution has failed to

show that this accused either ordered, consented or had knowledge of or gave permission to any of the commanders of the Navy to commit any of the alleged acts or atrocities complained of. The impossibility of controlling the spontaneous actions of all naval commanders, thousands of miles from the Navy Ministry, is self evident.

The Court should take particular notice that the Prisoner of War camps were largely under the control of Army personnel and not naval. And that the misconduct set forth in the Indictment in reference to the Japanese Navy in this regard has been unsustained by the evidence presented. A distinction exists between spontaneous acts committed on the battlefront and the housing and keeping of Prisoners of War far removed from those areas.

THEREFORE, for the reasons stated herein, the accused SHIMADA respectfully requests this Tribunal to dismiss each and every Count of the Indictment as heretofore stated and to at this time weigh the entire evidence of the Prosecution to the end that it be discovered that the matters herein shown constitute a complete failure of proof of the charges so stated.

Dated this 17th day of January 1947

SUBMITTED BY:

Takahashi Yoshitsuga

TAKAHASHI, Yoshitsugu

and

Edward P McDermott

Edward P. McDermott

Held For Release.

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST.

THE UNITED STATES OF AMERICA,
et al

vs

Paper No. 651

ARAKI, Sadao, et al,

Defendants

Following to be added to Memorandum in support of Motion of Defendant SUZUKI, Teiichi, to Dismiss:

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

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

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

I pass over his career up until 1941, not because I do not want to meet any issue there, but because the evidence adduced in relation to him up to that time simply indicates that his activities were the customary and usual ~~xxxxxxxxxxx~~ ones of a man who devoted his life to military service and such additional /civil assignments as are frequently given to able military men by their governments. Since the making of the original

motion, evidence has been introduced that in 1931 the 10-year plan was evolved, and in 1931 the 5-year plan of total warfare, Exhibit No. 841, was created. Whether these plans were for defense or offense is not a subject of argument now, but these plans were the genesis of future conduct by the government of Japan, and developed into fruition long before General SUZUKI became a member of the Cabinet and President of the Planning Board in April, 1941.

Throughout the record, however, we see evidence which indicates the position of this accused as being opposed to factions who it is claimed are responsible for the acts charged in the Indictment. In an early part of KIDO's Diary he writes that SUZUKI counsels against certain actions which might lead to war. There is no evidence in the record which shows that SUZUKI favored the Tri-Partite Pact and I am not now at liberty to discuss his attitude thereto because it is not in the record. If the Prosecution had such evidence there is no doubt that it would have been tendered.

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

The accused became Minister without Portfolio in the Third Konoye Cabinet, and became President of the Planning Board in April, 1944. All the laws referred to in Exhibit No. 840, Mr. Liebert's statement, in relation to the preparation, to the acceleration, of Japanese economy and industry for war had already been passed when he assumed those offices. The mere assumption of office and the performance of duties in carrying on that office, in carrying out the functions of a department of the government, without evidence

of creating policies and of activities by the individual outside and beyond these functions does not constitute evidence sufficient to warrant a conviction.

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

This we respectfully submit for the consideration of the Tribunal.

Held for Release

INTERNATIONAL MILITARY TRIBUNAL FOR THE
FAR EAST

No. I

THE UNITED STATES OF AMERICA, et al

VS

ARAKI, Sadao, et al

- Defendants -

PAPER NO. 617

Togo

MOTION TO DISMISS OF

TŌGŌ SHIGENORI

NOW COMES the defendant TŌGŌ Shigenori and moves the Tribunal to dismiss the indictment and the several counts thereof insofar as they relate to him upon the ground that the evidence adduced by the prosecution is insufficient to warrant a conviction upon any of the counts charged by the indictment.

20 January 1947

TŌGŌ SHIGENORI

by

NISHI HARUHIKO

and

BEN BRUCE BLAKENEY

His Counsel

Nat. Pol. Research arch.

POW's

ARGUMENT IN SUPPORT OF

MOTION TO DISMISS

In support of the motion of Tōgō Shigenori to dismiss the indictment I wish to direct the attention of the Tribunal to, and briefly to analyze, the evidence as it bears upon this defendant. For the convenience of the Tribunal, I shall summarize the evidence under a few general points or heads, indicating the specific counts of the indictment involved in each of such points. (Although reference is made to the page of the record for each citation of evidence, in the interests of clarity I omit them in reading.)

Japanese-Russian Relations

The counts of the indictment charging this defendant in connection with offences alleged against the U S S R are:

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

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

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

Count 51, charging murder by ordering, causing and permitting attack on the territories of Mongolia and the U S S R in connection with the Khalkin-gol or Nomonhan incident.

It is quite noteworthy that despite inclusion of his name in these counts (and despite his long connection with Russian affairs), no pretense was made in the Russian phase of the case of attempting to connect the defendant Tōgō by evidence with any of these alleged crimes. His name does not appear in the opening statement of this phase. Only twice during the presentation of the evidence of the phase was the name of Tōgō referred to (and both of those references were purely incidental); one other piece of evidence relates to the Foreign Ministry during his incumbency. These three references in the Russian phase were in Exhibits 767 (Record, p. 2,147), 678 (Record, p. 7,358) and 683 (Record, p. 7,400). The first

is the agreement between the Japanese and Soviet governments, executed on 9 June 1940 by Molotov and Tōgō, providing for demarkation of the frontier between the Mongolian Peoples Republic and Manchoukuo. This agreement recites that it is the result of negotiations carried on between Molotov and Tōgō, and that Tōgō had stated that the government of Manchoukuo consented to it. There is nothing of any nature in the document suggesting any further connection of the defendant Tōgō with the Nomonhan (Khalkin-gol) incident, and patently it has no tendency to prove the commission of any crime, participation in any conspiracy, or indeed anything except that a frontier was agreed upon--and thus to show Tōgō in the aspect not at all of a warmonger, but rather of a peace-maker.

not. Pol. Research assoc

The other reference to Tōgō in the Russian phase were in connection with the National Policy Research Association (Kokusaku Kenkyūkai), Exhibits 678 and 683. Exhibit 683 is an extract from the membership list of that association, which includes among those claimed as members "Tōgō Shigenori, Member of the House of Peers". Before discussing the character of the association it might be well to point out that at the time Mr. Tōgō held no office in the government, as is evidenced by his description as a member of the House of Peers, a position which he assumed only upon quitting the government; see the Cabinet Secretariat personnel record of Tōgō, Exhibit 127, (Record, p. 791). Beyond the simple, unvarnished statement of Tōgō's membership in the association, there is nothing to connect him with its activities, nefarious or otherwise.

However, reference to Exhibit 678, the affidavit of Yatsugi Kazuo, and his cross-examination upon it (Record, pp. 7,358-7,399) will effectually dispose of the National Policy Research Association as a sinister organization. The association was a "private organization", composed of "non-official civilian members" who "had no responsibility to the association except payment of their established membership fees". It is true that funds were solicited--and received--from the Foreign Ministry among other sources, governmental and otherwise, even

during the time that Mr. Tōgō was Foreign Minister. But the witness' statement of the explanation which accompanied the request for funds leaves it very doubtful whether the Foreign Ministry--or any contributor--understood what it was spending its money for: that the Association "in pursuing a study of Greater East Asiatic problems" requested support by donation from "both private and official sources". Not only is there a complete failure of proof of any knowledge by the Foreign Minister of the activities of the Association, but there is nothing except the Association's rather ludicrous "research documents" to prove any criminality. The Tribunal will readily recall the impression which the testimony of this witness produced, and will, I think, agree that the National Policy Research Association emerged in the end as a thing far more ridiculous than sinister.

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

Japanese-German-Italian Relations

The counts charging this defendant in connection with a three-power conspiracy are presumably these:

Count 4, charging that all the defendants conspired that Japan should, in concert with other nations, wage wars in pursuance of a plan for domination of East Asia;

Count 5, charging that all the defendants, with others, conspired that Japan, Germany and Italy should secure domination of the world.

Turning to the evidence, we find ourselves concerned with the Anti-Comintern Pact and the Tripartite Alliance, and with the question of economic collaboration between Japan and Germany. First considering the Anti-Comintern Pact, we find from Exhibit 485 (Record, p. 5,967) that the defendant Tōgō was present at the meeting of the Privy Council which considered and approved it. As is shown by the personnel record (Exhibit 127), he was at that time, November 1936, Director of the European-Asiatic Bureau of the Foreign Ministry. What the functions of the Bureau Director in connection with the pact may have been is not disclosed by the exhibit or by other

evidence; but the document at all events contains no suggestion that any action was taken or any word spoken on the subject at that time or at any other time by Mr. Tōgō. It is doubtless superfluous to state that Tōgō, attending the Privy Council meeting as a "commissioner" and not as a Privy Councillor or a Minister of State, had no vote and no voice in the resulting decisions of the Council.

Moreover, the record is lacking in proof that the Anti-Comintern Pact was in any sense an instrument of criminal aggression. The Pact itself (Exhibit 36, Record, p. 5,934) shows on its face that it is directed against the spread of Communist ideology; and while the secret agreement annexed to the Pact (Exhibit 480, Record, p. 5,936) relates to measures to be taken in the event of unprovoked attack or threat of attack by the U S S R, it appears by its terms to be wholly defensive in nature. That the Soviet government and the Communist International are separate, discrete entities is a point which need not be labored, since it has always been the Soviet contention; the distinction between anti-Communism and Russophobia was well recognized and preserved during the late war by the several United Nations, for whom it would certainly be extremely difficult to discover aggression in the mere fact of the execution of the Anti-Comintern Pact. Exhibits 479 (Record, p. 5,931) and 484(Record, p. 5,957), reports of studies of the Anti-Comintern Pact by Privy Council committees, further expound this distinction and elucidate the point. On the other hand, there is nothing in the record to indicate that the secret agreement to the Pact was intended or treated as other than the defensive agreement which it purports to be. Let it, finally, be noted that in no event could Tōgō have conspired, through execution of this pact, with Italy, which adhered to it only in November 1937, and then not to the secret agreement (Exhibit 491. Record, p. 6,037)--this after Tōgō had ceased to be connected with the European-Asiatic Bureau.

Much was made by the prosecution of the fact that the Anti-Comintern Pact was renewed and adhered to by additional

nations on 25 November 1941 (Exhibit 495, Record, p. 6,047) at a time when Mr. Tōgō was Foreign Minister. Mr. Tōgō was, of course, Foreign Minister at the time; but even if we could concede the existence of an individual responsibility for acts of the government, much more would still be needed here to convict him of any offence. The Pact, as has been pointed out, is itself innocuous; its renewal represents only the continuation of a policy already determined upon and adopted long before Tōgō's entry into the cabinet (the renewal itself had been orally agreed to in effect by Matsuoka in Berlin--see the conversations of Matsuoka with Ribbentrop, Goering and Hitler, Exhibits 577-583, Record, pp. 6,483-6,55ȝ, passim); and above all, there is no showing that the secret agreement, which alone might be considered colorable evidence of aggressive intent, was renewed. The evidence actually invites the inference (which is the fact) that the secret agreement was abrogated when the Pact was renewed (see Exhibit 1,182, Record, p. 10,391)--action which shows the opposite of aggressive intent. The Foreign Minister's explanations before the Privy Council committee, as contained in Exhibit 1,182, show that he was the vigorous advocate of abrogation of the secret agreement.

At this point it may be well to anticipate the reply, in the effort to clarify a somewhat complex point. It will doubtless be contended that Mr. Tōgō's advocacy of abandonment of the secret agreement of the Anti-Comintern Pact is of no significance by reason of the fact that the Tripartite Alliance, concluded in September 1940, had replaced the secret agreement. (The Tripartite Alliance, identified as Exhibit 43, Record, p. 513, was apparently not offered in evidence.) Tōgō did indeed, in making his explanation to the Privy Council, state that the secret agreement had no further utility because inter alia of the existence of the Alliance. But this does not at all mean--despite the ambiguity of his language--that the Alliance had replaced the secret clause as an implement of anti-Soviet policy; for the Alliance specifically, by its Article V, excludes the suggestion of any such purpose:

"Article V: Japan, Germany and Italy shall confirm that the above stated articles of this alliance shall have no effect whatsoever to the present existing political relation between each or any one of the signatories with Soviet Union."

(Exhibit 551, Record, p. 6,345--explanations given to the Privy Council of the purpose of the Tripartite Alliance--puts it beyond all doubt that the expectation of government, Army and Navy, was that the Alliance would improve Japanese-Soviet relations.) In consequence--with whatever trivial and unconvincing ring such an argument may fall on our ears--the only construction which it is possible to put upon these words of Mr. Tōgō is that for reasons unexplained Japan desired that some sort of bond with Germany be kept extant, perhaps to forestall a sense of isolation. It is in this sense only that Foreign Minister Tōgō's words can be taken, and in this sense they must be taken. So understanding them, we can reiterate that it was Tōgō who, from no apparent motive other than proper ones, led in the expunging of the only obligation which was conceivably anti-Russian.

It should be mentioned that in the course of this same explanation Mr. Tōgō also drew the distinction between the Soviet government and the Communist International. This is the more worthy of note in view of the fact that although it occurred at a secret meeting, where considerable bluntness of expression might be expected, there is nothing in Tōgō's words to suggest that he considered the Anti-Commintern Pact to be a covert threat to the U S S R. In short, with perfect honesty he accepted at its face value the U S S R's contention that the Commintern was a separate entity, with which it had no concern.

We are not, of course, directly concerned with the Tripartite Alliance, for at the time of its birth Mr. Tōgō was Ambassador in Moscow. If there were any real suspicion that he entertained anti-Soviet sentiments, it would be dispelled by reference to the words of Ambassador (to Berlin) Kurusu in June 1940, to a German official, Knoll (Exhibit 522, Record, p. 6,170). At this very

time when the Tripartite Alliance was forming, Kurusu assured the Germans that he and Tōgō were "feverishly working" for "improvement in Japanese-Russian relations", and that "the enemy in the North must be made a friend".

Much evidence in the record shows affirmatively that with the questions of "strengthening" the Anti-Commintern Pact and arranging the Tripartite Alliance Mr. Tōgō had nothing to do. Throughout his brief term--twelve months--as Ambassador in Berlin these questions were being agitated, but without his knowledge or participation or that of the Foreign Ministry. See the Kido Diary, Exhibit 2,262 (Record, p.): "I heard from the Premier that the German Foreign Minister von Ribbentrop made

a very important proposal to Ambassador Ōshima (Ambassador Tōgō was ignorant of this fact)." Reference to Exhibits 478 (Record, p. 5,917) and 497 (Record, p. 6,050), the interrogation of General Ōshima, makes this clear. Ōshima--then military attaché, later Tōgō's successor as ambassador--here details the activities of himself and his staff in this matter. He points out that the military attaché is not under the jurisdiction of the ambassador but is responsible only to the Army General Staff, and may even carry on negotiations with the military officials of other nations, looking to the conclusion of pacts or treaties relating to military matters, "without going through the ambassador". Which, he says, is what was done in this case; only upon Ōshima's appointment as ambassador in succession to Tōgō were negotiations concerning alliance between Germany and Japan "opened", and only then did they become the concern of the Foreign Ministry (Record, p. 6,057). In passing, it might be pointed out that the personnel record, Exhibit 127, is inaccurate (as was called to the Tribunal's attention on 25 September, Record, p. 6,364) in showing Tōgō continuing as Ambassador to the U S S R after August 1940; thus he was either in Moscow or (if we assume that he quitted his post soon after being relieved) holding no governmental position at the time of execution of the Tripartite Alliance, and obviously he can be charged with no responsibility in connection with it.

In accordance with Article IV of the Tripartite Alliance, Mr. Tōgō was on 12 February 1942 designated a member of the joint commissions therein provided for (Exhibit 559, Record, p. 6,417). His membership was ex officio (Record, p. 6,418), and his designation took place a year and a half after conclusion of the alliance, two months after commencement of the Pacific war. There is no evidence from which it can be inferred that the commission ever met or functioned, and on the record nothing can be predicated of Mr. Tōgō's membership in it.

On the question of German-Japanese economic collaboration (with reference especially to trade and commerce in China), a number of documents refer to activities of the defendant Tōgō.

These need not be discussed individually, but are listed for convenience: Exhibits 591 (Record, p. 6,585), 592 (Record, p. 6,588), 593 (Record, P. 6,591), 594 (Record, p. 6,597), 595 (Record, p. 6,603), 597 (Record, p. 6,627) and 39 (Record, p. 6,625). I do not discuss these memoranda of conversations between Tōgō and German Foreign Ministry officials because they all show Tōgō's stubborn refusal to concede to Germany anything more in the China trade than most-favored nation treatment--which is not the economic collaboration of conspirators--and his inflexible opposition to German demands for special economic concessions. I do not discuss this question in detail because the President of the Tribunal, at the time of the reading of the documents, summed up their significance in the statement that "it is the sort of material the defence might use to show lack of coöperation between Japan and Germany" (Record, p. 6,621). It unquestionably cuts the ground from beneath the feet of any effort to show Tōgō as a conspirator with Germany.

The agreement among Japan, Germany and Italy not to conclude separate peace, entered into after the beginning of the Pacific War (Exhibit 51, Record, p. 6,668) is by the very fact of its date no evidence of any warlike designs; once a war has started such agreements are routine among allies. Tōgō's direction to his ambassadors to request conclusion of such an agreement, to be prepared for the worst once it appeared to his government that war was most probable, likewise is not probative of sinister intent.

There remains to mention Exhibit 486D (Record, p. 5,990), a memorandum by von Neurath of a conversation with Ambassador Tōgō concerning the China affair. While presumably this is offered to show Japanese-German conspiracy toward China, in fact it shows only that, acting under instructions, the ambassador was stating the policy of his government, which was to try to persuade Germany to use her presumed influence by applying pressure on China to make peace. Ambassador Tōgō's assertion of Japan's determination to gain military victory

over China, as reported by von Neurath, in likewise no more that the reflection of the Japanese policy embodied in the Konoe Declaration (Exhibit 972A, Record, p. 9,505) of a few days later, but already known to him (as is obvious inferentially from Exhibit 486F, Record, p. 5,993). It is submitted that consideration of all the evidence offered in this phase conclusively absolves the defendant Tōgō of all charges of conspiracy with Germany and Italy.

Conventional War Crimes

In "Group 3" of the indictment the defendant Tōgō is charged with "conventional war crimes and crimes against humanity" as follows:

Count 53, charging conspiracy to order, authorize and permit certain subordinates to commit breaches of the laws and customs of war, and to abstain from taking adequate steps to secure observance of the conventions relating to prisoners of war;

Count 54, charging the authorizing and permitting of such acts;

Count 55, charging deliberate and reckless disregard of duty to take adequate steps to secure observance of the conventions relating to prisoners of war.

Voluminous evidence, much of it of a peculiarly revolting character, has been introduced to prove the widespread commission by Japanese troops of atrocities against prisoners of war and civilians. The question remains, "Who is guilty?" There is nothing in the record to show that the defendant for whom I am speaking bears any part of this burden of guilt.

It is proved that it was in the name of Foreign Minister Tōgō that Japan's assurances concerning application mutatis mutandis of the Geneva Convention and observance of the Red Cross Convention were given; these communications need not be itemized here. Thereafter the Foreign Ministry received and answered various communications relative to the subject--giving replies which in instances seem on the evidence of the prosecution to have been false. But there is a vast abundance of evidence touching upon the point to show conclusively that neither the Foreign Ministry nor the Foreign Minister had any responsibility

for management or control of prisoners of war, nor any facilities for independent ascertainment of the facts concerning their lot, nor indeed any reason to disbelieve nor power to disprove the replies to inquiries and protests prepared by the military bureaux concerned. The witness General Tanaka twice unequivocally stated (Record, pp. 14,365, 14,419) that the Foreign Ministry, in receiving and transmitting these documents, acted as a mere "post office". In explanation of this, he said (Record, p. 14,419) that the Prisoners-of-War Information Bureau and the Prisoners-of-War Administration Bureau--which between them had, as he had previously fully explained (Record, pp. 14,346 14,366-70, 14,383-84), the whole control of prisoners of war--were "both under the jurisdiction of the War Minister"; and that having no organization nor authority for investigating protests, the Foreign Ministry could only "relay the decisions reached at the War Ministry by the Army". See also on this point the testimony of Yamazaki Shigeru (Record, pp. 14,839-42, 14,866-68, 14,872-76, 14,885), especially his statements that the responsibility for action taken on protests was with the bureau to whom the protest was forwarded (Record, p. 14,868) and that the replies were prepared within the War Ministry and sent to the Foreign Ministry (Record, p. 14,876). The testimony of the witness Suzuki Tadakatsu (Record, pp. 12,832-43, 15,506-33) explains the procedure for dealing with these documents within the Foreign Ministry, and clarifies further the point that the Foreign Ministry's only function was receipt and transmittal of papers. This testimony as a whole is of great importance on this point, but I refrain from more than quoting its salient points and urging that reading the entirety of it will render this point quite perspicuous.

The extent of the Foreign Ministry's authority or power in connection with the prisoner-of-war matter, Mr. Suzuki testified, was the handling of the correspondence--the incoming protests and inquiries, the outgoing answers. This forwarding was done as expeditiously as possible in every instance (Record, pp.

15,528, 15,531), and the War Ministry officials concerned were from time to time requested to hasten the preparation of the replies which the Foreign Ministry was to translate and deliver (Record, p. 15,529). The Foreign Ministry had no means of obtaining information concerning prisoners of war except as it was provided by the War Ministry (Record, p. 15,530). Notwithstanding the Foreign Ministry had no further authority in the matter, it did on occasion make recommendations to the War Ministry authorities, request reinvestigations of various matters (Record, p. 15,529), and in general do everything possible to ameliorate the condition of prisoners (Record, p. 15,532). Although Mr. Suzuki's bureau was established after Mr. Tōgō had left the Foreign Ministry, the practice of the Treaty Bureau, which had managed the business theretofore, was in all respects the same (Record, p. 15,529).

During Mr. Tōgō's first incumbency of the Foreign Ministry (to 1 September 1942) occurred the notorious "Bataan Death March". It is significant that even the Premier, General Tōjō, concurrently Minister of War and as such the superior official of the bureaux concerned with prisoners of war, first learned of the Bataan case as late as the end of 1942 or early in 1943 (see his interrogation, Exhibit 1,980E, Record, at p. 14,567)--after Tōgō had quit office. If not even the Minister of War had such information, clearly the Foreign Minister, who had no jurisdiction nor responsibility in the matter, cannot be chargeable with notice.

The case of the working of prisoners on the Burma-Thailand railway patently concerns the Foreign Minister even less; the affidavit of General Wakamatsu (Exhibit 1,989, Record, p. 14,632) is explicit that this action was decided upon by the Imperial General Headquarters, at the request of the Southern Army, in the summer of 1942. Exhibit 475 (Record, p. 5,513), a report by

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construction was commenced, according to Exhibit 475, in November 1942, which is some time after Mr. Tōgō had left the Foreign Ministry.

If there is no evidence of Tōgō's ordering, authorizing or permitting the commission of atrocities, or conspiring thereto, there is equally a failure of proof of his having deliberately, recklessly or otherwise neglected any duty in the matter. So far as the evidence concerning his only duty--that of dispatching his share of the business of attending to the diplomatic correspondence--goes, every duty was discharged fully and faithfully. It would do violence to the principles of judicial proof to hold that the prosecution's burden has been sustained against Tōgō on these counts.

China, Manchuria and other Asiatic Relations

The defendant Tōgō is charged by the indictment with various offences in connection with China, Manchuria, Indo-China and Thailand, as follows:

Counts 4 and 5, charging conspiracy to wage war against France and Thailand, inter alia;

Counts 6, 15 and 16, charging the planning and preparation of war against China, France and Thailand, respectively;

Count 24, charging the initiation of war against Thailand;

Counts 27, 28 and 34, charging the waging of war against China and Thailand respectively.

This part of the case can be rather summarily dealt with in view of the complete absence of evidence to connect this defendant with those matters.

Prior to Mr. Tōgō's assumption of the Foreign portfolio he had had no connection with China, Manchoukuo or other Asiatic affairs. In this connection it should be pointed out that although he was, from June 1934 to October 1937, Director of the Foreign Ministry's European-Asiatic Bureau, that Bureau had no connection with the matters here in question. The record of the opening statement on the subject of Foreign Ministry organization is patently garbled, for it states (Record, p. 602) that the duties of this Bureau "pertain only to America"; if

I may venture to go outside the record to state the fact, the "Asiatic" affairs of concern to this bureau are those other than Chinese and Manchurian .

During the short period of time from his installation as Foreign Minister until the outbreak of the Pacific War, Tōgō was obviously absorbed with the Japanese-American negotiations, and quite naturally is not shown to have had any concern with Asiatic affairs. With the decision for commencement of the war, of course he requested for his government the coöperation of the governments of Manchoukuo (Exhibit 1,214, Record, p. 10,530) and Nanking China (Exhibit 1,219, Record, p. 10,538), but with war once decided upon this is only a formal matter.

As to Indo-China, there were no such diplomatic measures as would concern the Foreign Minister at the time of the opening of the war. The conclusion of the military agreement (referred to by the prosecution--Record, p. 6,724--but not in evidence), was of course not within the province of the Foreign Ministry; other measures vis-à-vis Indo-China which occurred in the interim between his two periods as Foreign Minister (October 1941-September 1942, April-August 1945) likewise do not concern him--especially as they show that by the end of that period military and not diplomatic relationships concerned that country (Exhibits 661-665, Record, pp. 7,165-7,194, and passim).

Perhaps the most significant evidence concerning Tōgō's attitude toward other Asiatic countries is to be found in the Foreign Minister's speech before the Diet on 22 January 1942 (Exhibit 1,338A, Record, p. 12,027). This speech calls for close coöperation of Eastern Asiatic nations, in that respect being a routine piece of war-time propaganda. But it also clearly shows throughout that Japan entertained no aggressive intentions toward those nations, and that Mr. Tōgō insisted upon the necessity of observing the rights and dignity of all Asiatic peoples. Parenthetically, it also reiterated the necessity of maintaining the Neutrality Pact with the U S S R.

Tōgō's true attitude toward the nations and peoples of Asia is most clearly evident in his vehement opposition to the creation of the Greater East Asia Ministry in 1942, which led to his resignation of his office in September of that year. See the Kido Diary (Exhibit 1,273, Record, p. 11,359); minutes of the Privy Council (Exhibit 687, Record, p. 12,071); as well as the opening statement of this phase, explaining the Greater East Asia Ministry (Record, p. 620).

As is set forth in argument of the general motion to dismiss, there is no sufficient evidence proving or tending to prove aggression against Thailand; hence we need not consider whether any connection of Mr. Tōgō individually is shown.

The complete dearth of proof against the defendant Tōgō in connection with the counts under this head requires that they be dismissed as against him.

Japanese-American Relations

The counts charging the defendant Tōgō in connection with relations and hostilities between Japan and the United States are:

Counts 1, 4 and 5, charging conspiracy to dominate the Pacific or the world, and in effectuation thereof to wage war against the United States;

Counts 7, 20 and 29, charging respectively the planning, initiating and waging of war against the United States;

Counts 13, 21 and 30, charging respectively the planning, initiating and waging of war against the Commonwealth of the Philippines (a possession of the United States).

Since Mr. Tōgō is not a military man, we may say that the charge of his having waged war against enemy nations is sustained by no proof unless it be the contention that all members of the government of a nation at war are "waging" war--a question to be argued elsewhere. We shall therefore consider here the questions of conspiracy to wage war and the planning and initiating of war.

Mr. Tōgō's motives in entering the Tōjō ministry upon its formation in October 1941 have been clearly stated by a prosecution witness. The Tōjō government has been widely advertised as a war cabinet ab initio, but the evidence fails to bear out this interpretation: rather it shows that Tōjō was enjoined by the

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Emperor upon his appointment, and was expected by those concerned, to make further efforts for a peaceful settlement with America even so late, when Japan was already upon the brink of war (Kido Diary, Exhibit 1,154, Record, p. 10,291). It was upon this understanding that Tōgō entered the cabinet as Foreign Minister. The witness Suzuki Tōmin testified (Record, p. 1,235) that Tōgō told him, in a conversation soon after formation of the Tōjō government, that he had accepted office solely upon Premier Tōjō's assurance that his policy would be to work for peace, and because on the basis of that assurance he believed that he would be able to bring about a peaceful settlement. This fitted in with the belief which Suzuki explained that he held, that Tōgō had always been an exponent of peace. That the prosecution witness Tanaka Ryūkichi also considered Tōgō to be a leader of pacific and non-militaristic sentiment is interestingly revealed by his testimony (Record, p. 2,055) that he approached Tōgō in 1942 and urged him to start a political movement to oust Tōjō, of whose war policies Tanaka seems to have disapproved.

Throughout the diplomatic correspondence between the Foreign Ministry and the Embassy in Washington, as it is exhibited in the evidence, are many indications of Mr. Tōgō's efforts to conclude the Japanese-American negotiations successfully. From the mass of such evidence, we may select a few points for mention. Exhibits 1,163 (Record, p. 10,315) and 1,164 (Record, p. 10,318), the new Foreign Minister's instructions to the Ambassador at the beginning of his connection with the negotiations, contain a clear statement of his policy of making the utmost possible concessions in a spirit of friendship and conciliation. Ambassador Kurusu was specially sent to Washington to contribute to the success of the negotiations (Exhibit 1,166, Record, p. 10,329). Tōgō invited Great Britain to take part in the negotiations, in order that all interested parties might be available to ensure a complete settlement (Exhibit 1,174, Record, p. 10,356). He made numerous concessions to the opposing demands in the course of the negotiations, in an apparent effort to bring them to fruition. (Exhibits 1,165,

Record, p. 10,323; 1,246, Record, p. 10,810; 1,245-H Record, p. 10,811 at 10,812; and passim throughout the testimony of Mr. Ballantine).

On the other hand, all the evidence clearly shows that the final outbreak of war between Japan and Britain and America was in spite of, certainly not because of, Tōgō's efforts. It is quite clear from the record that long before Mr. Tōgō took office in October the situation was so tense that there was the ever-present, explosive possibility of war. The decision of the Imperial Conference of 2 July (Exhibit 587, Record, p. 6,566) was a grave one which, as was conceded by the prosecution (Record, p. 10,140) had a direct bearing upon the ultimate result, war; that of the 6 September Conference (Exhibit 588) even included preparations for either eventuality, of war or peace, so dubious were the prospects. That, in short, the possibility of war at any time was recognized on both sides of the Pacific is plain from this evidence as well as from numerous references--which I do not pause to collect here--scattered through the testimony of the witness Ballantine (Record, pp. 10,712-11,165).

In these circumstances, what could a newly-appointed Foreign Minister do to avert war except carry on negotiations with the consciousness that if they ended in failure there could be no peace? Limited as he was by the decisions already taken, as well as by those of the subsequent Liaison Conferences which he himself attended--but in which, as a matter of course, the newer members (those, in other words, who had not participated in the September Imperial Conference decision) were relatively uninfluential--he could do no more than strive, as the prosecution's own evidence shows that he strove, for a satisfactory formula, and in the end accept the result which was not of his doing, but preordained (compare Ambassador Grew's opinion that Japan would be driven to war by such economic measures as the July freezing of assets, Record, p. 11,115). If, when the end came, he voted for the inevitable war, shall we then label him a warmonger?

There is the charge that Japan perfidiously professed to be still negotiating in good faith for peace, the while she prepared and launched her war. Since the intention of this charge is to incriminate the Foreign Minister, let us examine it to determine what factual basis it has. The decision for war was made at the Imperial Conference of 1 December (Exhibit 588). Until that decision had actually been taken--by the only body competent to take it--the Foreign Minister was still working for a solution, as is evidenced by his instructions to his Ambassador to attempt to obtain reconsideration by the United States (Exhibit 1,194, Record, p. 10,444). Quite naturally, he continued striving, even thereafter, so long as there was any faintest hope--just as did Secretary of State Hull on his side (Record. p. 10,369). And although in late November the fleet had been given its orders, in case worst should come to worst (no evidence shows knowledge by the Foreign Ministry of this), yet on the 21st and even on 2 December--significant date, the day following the decision for war!--the Commander-in-Chief of the Combined Fleet was given instructions by the Naval General Staff for its recall and for the cancellation of the war-plans in the event of a successful conclusion of diplomatic negotiations (Exhibits 809, Record, p. 7,988--pages 76-77 of the document, not read into evidence--and 1,197, Record, p. 10,464). Is this the scheming of perfidy? Rather, it is submitted, the effect of this evidence in sum is to show Tōgō earnestly endeavoring to save the situation in the face of hopeless odds, and not to raise even the suspicion of insincerity or duplicity.

One or two subsidiary questions may be put into proper perspective. Much was made of the delay in delivery of the message (which "might have changed the course of history") from President Roosevelt to the Emperor. Aside from the question of the probable effect on the course of history, question not really of any difficulty in view of Mr. Ballantine's testimony, there is no evidence to connect the Foreign Ministry with the

deliberate delaying of the communication. The statement by the prosecution (Record, p. 10,566) that the contents of the message were known in "Japanese Government offices" by 6 P.M. of 7 December is supported by no scintilla of evidence that it was so known to the Foreign Ministry; but the testimony of the witness Shirao is specific that the orders which brought about the delay in delivery to Ambassador Grew until 10:30 P.M. were those of the General Staff (Record, p. 10,569). No knowledge of this arrangement by the Foreign Ministry is shown.

On the question of the delivery of the final Japanese note in Washington after the commencement of hostilities, the evidence is clear that this was contrary to the direct order of the Foreign Ministry. Exhibits 1,216 and 1,218 (Record, p. 10,534 and 10,537), Tōgō's instruction to Nomura to make all necessary preparations without fail and to deliver the note at 1 P.M., leave no doubt of the intention of the Foreign Minister; whatever the reason for the delay in delivery until 2:20, it has not been traced to him.

It should be added that, not alone under this branch of the argument but in relation to the motion as a whole, other points of greater or lesser concern to this defendant have been presented in argument of the general motion. To the argument of that motion reference is made to the extent that it is applicable. Other minor points might be adverted to, but at the risk of tedium. Suffice it to say that in my judgment the evidence introduced in the Pacific War phase not only does not convict Tōgō of any deviousness or disingenuity, but on the contrary affirmatively shows him as a sincere worker for the preservation of a peace which, tragically, could not be preserved.

Summary

It is respectfully submitted that the analysis of the record offered above, taken in conjunction with that contained in the general motion to dismiss, leads to the conclusion that prima facie proof of none of the offences charged against the defendant Tōgō has been made, and that the indictment should be dismissed as against him.

Hold For Release

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

THE UNITED STATES OF AMERICA, et al.

vs   Paper No. 661

ARAKI, Sadao, et al.

Tojo - "not me"

Defendants

MOTION OF THE DEFENDANT TOJO, Hideki
TO DISMISS THE INDICTMENT

Now comes the Defendant, TOJO, Hideki, by his counsel of record, and moves the HONORABLE, the INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, to dismiss all the charges and counts against him in the Indictment upon the grounds that all the evidence offered by the Prosecution is not sufficient to warrant the conviction of this Defendant.

Dated this 15th day of January 1947.

/s/ Kiyose, Ichiro
KIYOSE, Ichiro

/s/ George Francis Blewett
GEORGE FRANCIS BLEWETT

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INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

THE UNITED STATES OF AMERICA, et al.

vs Paper No. 661

ARAKI, Sadao, et al.

Defendants

ARGUMENT SUPPORTING DEFENDANTS
MOTION TO DISMISS

The Prosecution in its Opening Statement offered to show by competent legal evidence that every attack made by Japan from 18 September 1931 on Mukden down to Pearl Harbor, Manila, Davao, and Hongkong on the 7th and 8th of December 1941 and others were illegal acts, and that everyone of the accused named in the Indictment played a part in these unlawful proceedings, and that they acted with full knowledge of Japan's treaty obligations and of the fact that their acts were criminal.

It also represented that it would prove by competent legal evidence that these accused by virtue of their positions in the Japanese government conspired to and planned, prepared, initiated and waged illegal wars, and that each accused was personally liable for acts alleged to be criminal.

The Prosecution also asserted it would set out to prove that only positive orders from these accused made possible crimes against humanity.

The crux of the Prosecution case, and the objective of its evidence, are charges that the accused participated in the formulation or execution of a common plan or conspiracy to wage declared or undeclared war or wars of aggression and war or wars in violation of international law, treaties, agreements and assurances against any country or countries which might appose them, with the object of securing military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and all countries bordering thereon and islands therein and ultimately the domination of the world.

To prove that charge it was prepared to prove the fact of a conspiracy, and that these Defendants were parties to it, which burden it assumed.

I

Among other charges, in order to prove the facts of a conspiracy and the participation of this Defendant therein evidence was introduced to prove that in the public school system of Japan a program was introduced to build up a military spirit and to cultivate a concept that the future progress of Japan depended upon wars of conquest.

It is submitted that the evidence presented in no manner proves the existance of a conspiracy for any such purpose or that this Defendant was in any way involved in such a program.

II

A vast amount of evidence was presented concerning the occupation and development of China and Manchuria by the Japanese and the Prosecution attempted here, as was its burden, to prove that the entire

movement extending over several years was the direct purpose of a conspiracy lead and controlled by those accused.

It is submitted that the proof offered is insufficient to show the existance of such a conspiracy, and no positive legal evidence was offered to prove that this defendant participated as a leader, organizer, instigator or accomplice in any such plan.

III

Evidence was offered by the Prosecution in attempting to prove as alleged in the Indictment, that all the defendants acting in a concerted, specifically directed conspiracy entered in to an agreement with Germany and Italy to dominate the world.

It is submitted to the Tribunal that there is no conclusive evidence in the record to support this allegation, nor any legal competent evidence to prove that this Defendant is criminally responsible for any such enterprise.

IV

It is submitted that the Prosecution has not presented evidence sufficient to prove that all the Defendants, acting in concert, conspired to plan, prepare and wage a war of aggression and a war in violation of international law, treaties, agreements and assurances against China, United States of America, United Kingdom of Great Britain and North Ireland, Australia, New Zealand, Canada, India, Philippines, Netherlands, France, Thailand and Soviet Russia.

It is submitted that there is no legal competent evidence in the record to prove that this Defendant alone or acting with others initiated or waged a war

or wars of aggression against the aforementioned nations including the Mongolian People's Republic.

V

As was readily accepted by the Prosecution, in order to convict these Defendants for Murder it was incumbent upon it to prove that the waging of war was the direct result of a conspiracy to wage wars of aggression, with the object ultimately of world domination. To prove that all deaths connected with hostilities constituted crimes of murder it was necessary to prove that all these wars were illegal, and to prove, further, that as to this defendant he was individually criminally responsible.

It is represented that the Prosecution has failed to prove by competent evidence that the war or wars enumerated in the Indictment constitute so-called "wars of aggression", waged as the objective of a powerful conspiracy, and therefore they cannot be classed as illegal wars as charged. As a natural consequence, therefore, there is no proof capable of supporting the allegations of murder and conspiracy to murder.

It is suggested that the Prosecution's witnesses and documents conclusively indicate that the Japanese government and these defendants initiated the proposal to the complaining nations in this indictment for a peaceful solution of all problems in the Pacific area.

VI

With regard to the final charges in the Indictment concerning Conventional War Crimes and Crimes Against Humanity, the Prosecution undertook the burden of showing that only positive orders from these accused made possible these alleged crimes.

It is submitted that nowhere in the record of these proceeding has the Prosecution offered any competent legal evidence to prove that the Defendant, TOJO, as Premier or War Minister issued a single positive order to any Field Commander or to any Prisoner of War Camp Commander to commit or permit any act or acts averred in Counts 53-55 inclusive of the indictment.

WHEREFORE; it is respectfully submitted that the motion of this defendant to dismiss should be granted by the Tribunal.

/s/ Kiyose, Ichiro
KIYOSE, Ichiro

/s/ George Francis Blewett
GEORGE FRANCIS BLEWETT

Held For Release

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

No. I

THE UNITED STATES OF AMERICA, et al

-VS-

ARAKI, Sadao, et al

- Defendants -

PAPER NO. 636

Umezu

re Russia

MOTION TO DISMISS OF

UMEZU YOSHIJIRŌ

NOW COMES the defendant UMEZU Yoshijirō and moves the Tribunal to dismiss the indictment and the several counts thereof insofar as they relate to him upon the ground that the evidence adduced by the prosecution is insufficient to warrant a conviction upon any of the counts charged by the indictment.

20 January 1947

UMEZU YOSHIJIRŌ

by

MIYATA MITSUO

and

BEN BRUCE BLAKENEY

His Counsel

For the convenience of the Tribunal, the argument of this motion will be presented under a few general heads, with reference in each instance to the specific counts of the indictment concerned

China Questions

The counts of the indictment charging this defendant with offences toward the Republic of China are:

Count 2, charging conspiracy to dominate Manchuria through the waging of war of aggression;

Count 3, charging conspiracy to dominate China through the waging of war of aggression;

Count 6, charging the planning and preparing of war of aggression against China;

Counts 18 and 19, charging the initiation of war against China in September 1931 and July 1937 respectively

Counts 27 and 28, charging the waging of war against China from September 1931 and July 1937 respectively;

Count 45, charging murder in connection with the taking of Nanking in December 1937;

Count 46, charging murder in connection with the taking of Canton in October 1938;

Count 47, charging murder in connection with the taking of Hankow in October 1938;

Count 48, charging murder in connection with the taking of Changsha in June 1944;

Count 49, charging murder in connection with the taking of Hengyang in August 1944;

Count 50, charging murder in connection with the taking of Kweilin and Liuchow in November 1944.

First, considering the Manchuria Incident, we find that General Umezu had at the time of the incident been Chief of the General Affairs Department of the General Staff Office (concerned with personnel, organization and mobilization--Record, p. 589) for just some six weeks (Cabinet Secretariat personnel record, Exhibit 129, Record, p. 803). Of the numerous witnesses who testified in extenso to the details of the planning and execution of the Manchuria Incident, not one breathed the name of Umezu; there is not a suspicion in the record that he had even any knowledge of, far less any part in, this incident. Counts 2, 18 and 27, therefore, are sustained by no evidence against this defendant.

From March 1934 to August 1935 General Umezu was in China, as Commander-in-Chief of the North China Garrison in Tientsin (Exhibit 129). During this time there came into being the "Ho-Umezu Agreement", of which so much has been made in the attempt to establish it as a casus belli and the fount and source of the autonomy movement in North China. The attempt falls very flat: upon investigation, the "agreement" proves to be no more than a military understanding, based upon established treaty-rights, made between military commanders in the always-troubled arena of North China. So much is conceded by one of the chief witnesses on the subject, Tanaka Ryūkichi (Record, pp. 2,144-52). Tanaka says that General Umezu's purpose in making this agreement was clearly the legal one of implementing the Boxer Protocol, under which the North China Garrison had the right and the duty of protecting Japanese nationals and communications, by suppressing anti-Japanese actions in North China; that the intention of the agreement was to establish an atmosphere of peace and quiet; and that "it is a fact that as a result of the Ho-Umezu agreement the assasination of pro-Japanese Chinese, as well as inflammatory editorials against Japan in Chinese papers, disappeared" (Record, pp. 2,145-46).

If the object was lawful, what of the means employed? Most of the evidence bearing on the terms and circumstances of the agreement is to be found in the testimony of the witness Goette (Record, pp. 3,746-50, 3,805-12). This testimony is, to say the least of it, unsatisfactory. The witness says that the agreement was "enacted" on 9 June 1935, but he does not know whether it was written or oral, and in fact confesses that he knows none of its terms (Record, p. 3,806), but only "what was carried out thereafter" (Record, p. 3,748). By this post hoc, ergo propter hoc reasoning we learn that certain Chinese troops were withdrawn from the area; that the political offices which had contributed to the strained Sino-Japanese relations were closed; that some Chinese commanders were recalled. But not even the witness himself is entirely convinced by his reasoning: he can't say, for

example, whether the removal of the Hopei provincial capital was one of the terms of the agreement, even though the removal followed (Record, p. 3,805). Although some Chinese, who remain anonymous, told him that the agreement was forced upon them by the threat of military occupation (Record, p. 3,811-12), even after the withdrawal of their 51st Army they still outnumbered the Japanese in the Peiping-Tientsin area by at least 25,000 to 10,000 (Record, p. 3,807). At the time of the agreement, Ho Ying-chin was "Chinese Minister of War in Peiping" (Record, p. 3,746); Umezu, he "presumes", was "on a special mission" for the Japanese Army (Record, p. 3,810).

In this testimony several points stand out. Ho Ying-chin, as is shown by Exhibit 210 (Record, p. 2,696--from p.1 of the document, not read into evidence), from Chinese sources, was not Minister of War; he was "acting Chairman of the Peiping Branch Council of the National Military Council". Umezu was of course not on a "special mission", and it is almost incredible that a "dean of correspondents", professing to have an expert knowledge of Sino-Japanese affairs of North China, should not know the name of the Commander-in-Chief of the Japanese garrison at such a time of crisis as he alleges this to have been. Mr. Gootte is quite sure that the Chinese 32d Army was withdrawn southward as a "result" of the "Ho-Umezu Agreement" (Record, pp. 3,748, 3,809), but is again contradicted by Exhibit 194 (Record, at p. 2,276), which shows it to have been the 51st Army which was withdrawn. It is perhaps a fair deduction from all the evidence that the "Ho-Umezu Agreement" never actually existed as such. No one has seen it; its terms cannot be ascertained; and it appears to have been no more than an agreement between military commanders trying to maintain peace in the face of disturbing incidents.

If the "Agreement" did exist, it can scarcely be seriously contended that there has been shown to have been anything sinister in it. The witness Tanaka tried to show that the autonomy movement in North China which followed was grounded upon it--and

so it may have been, but that can upon no reasonable construction be imputed to the defendant Umezu, in view of Tanaka's positive statement of what General Umezu's motives were during his time as commander-in-chief (the first autonomous government was established four months after Umezu left China--Record, p. 2,147; Exhibit 210--whence the witness perforce concedes that Umezu had no responsibility for its establishment, Record, p. 2,151). To what ends those who followed may have perverted his work can be no evidence of waywardness in him. At all events, there was no suspension of Chinese sovereignty as a consequence of this agreement; the army of Sung Che-yuan, who was the appointee of the central government (Record, p. 3,808) remained in occupation of the area (Record, p. 3,749).

Tanaka, by the way, points out also that whatever responsibility for the agreement rests upon General Umezu, it is by virtue solely of his position of command, for the ardent advocate of it, to whose hands General Umezu confided the entire matter, was his chief of staff, Colonel Sakai (Record, pp. 2,147-48). That he should have done so is but natural, since he was a man who "dislikes very much to put his finger into politics", and was "one of our senior officers who has constantly instructed us not to interfere in politics" (Record, p. 2,152). Thus the much-publicized term "Ho-Umezu Agreement" is a memorial to this defendant's vicarious responsibility for an innocuous settlement which is in large part mythical.

One other incident of the North China days may be mentioned. This is the "North Chahar Incident" of June 1935, testified to by the witness Ching Teh-chun (Exhibit 199, Record, p. 2,311). The only connection with General Umezu is that according to this testimony the matter was referred for settlement to the headquarters of the garrison force at Tientsin--where, however, surprisingly, the whole negotiation was controlled by General Dohihara (Record, pp. 2,312-14). "Surprisingly", because there is no evidence whatever that Dohihara was at that time connected in any way with the

North China garrison--rather, the personnel record (Exhibit 104, Record, at p. 696) shows that he was attached to the Kwantung Army. General Ching, in fact, admitted on cross-examination (Record, p. 2,441-43) that when he said that the matter was referred to the Japanese headquarters in Tientsin he meant that it was referred to the Japanese headquarters represented by General Dohihara; his surmise that Dohihara represented both the North China garrison and the Kwantung Army is hardly evidence of the fact. Ching admits that the matter was not taken up in any other way with the North China garrison headquarters.

The commencement of the China Incident in July 1937 found General Umezu Vice-Minister of War. Since no evidence was proferred to connect him with the hostilities in China, we must assume that it is the contention that his official position establishes his guilt. That the vice-minister has no authority to make important decisions and merely carries out the will of the minister was stated by the witness Tanaka (Record, pp. 14,388, 14,396) and by the prosecution (Record, p. 578), and must be self-evident. In no event, of course, had the War Ministry responsibility for operations (testimony of Tanaka, Record, pp. 14,364 and passim). Vice-Minister Umezu is therefore in no way shown to share any responsibility for the China Incident.

Lastly, in connection with China, Umezu is charged with murder as the result of alleged massacres accompanying the taking of a number of cities in China in various years. As to those dating from 1937, the remarks in the preceding paragraph apply--the vice-minister has no responsibility. As to those in 1938, the personnel record (Exhibit 129) shows that from May of that year General Umezu was commander of the 1st Army, the location of which is not shown by evidence; by no reasoning, therefore, could he be charged on the record with responsibility for events in South China in October of that year. And as to those occurring in 1944, when he was Chief of the General Staff (from July, however, he was in Manchuria when the massacre at Changsha, in

South China, is laid by Count 48), there is again no evidence of any order by him or knowledge in him of those events, and it is submitted that there is no ex officio guilt.

In connection with Manchoukuo there is much evidence intended to prove that it was but a puppet state under Japanese domination. Two considerations occur here. First, there is the question whether from its inception Manchoukuo was a mere false front, rigged by the Japanese for the purpose of furthering their aggressive designs; if this was the fact, then even a commander-in-chief of the Kwantung Army arriving eight years later might be considered a manipulator of the puppets; if it was not, then the position of the commander-in-chief is only that of any military commander carrying out his duties. The chief evidence on this point is that of the witness P'u-yi (Record, pp. 3,945-4,350). Without taking the time of the Tribunal to analyze it, we may say that cross-examination, together with other surrounding circumstances, shows this testimony to be incredible. The witness repeatedly contradicted himself, evaded direct answers to questions, took refuge in "I can't remember" and "I said it, but under compulsion" and in general made such an impression that even taking his testimony at its face value it is impossible to say that his contentions are borne out by the proof. As to the origin of Manchoukuo and his return as ruler he is contradicted on the record by the witness Semyonov, who states in his affidavit (Exhibit 668) that P'u-yi suggested to him that he had asked Japanese assistance in restoring him to the throne, and that he himself negotiated with the Japanese on P'u-yi's behalf (see pp. 6-7 of the affidavit, not read into the record). By a curious quirk of procedure, P'u-yi stands impeached on the record in the matter--irrelevant in itself, but basically affecting his credibility--of whether he wrote the letter to General Minami, Exhibit 278 (Record, p. 4,116). Inasmuch as the prosecution offered the questioned document in evidence, it assumed the burden of proof of its non-authenticity (Record, pp. 4,160-9,

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4,199). This it undertook to prove by the affidavit of a self-styled expert, Chang (Exhibits 2,176 and 2,189, Record pp. 15,543 and 15,708). Unfortunately, this "expert" committed the tactical blunder of going beyond the question involved and passing his judgment that another specimen of handwriting, the Chinese fan (Exhibit 282, Record, p. 4,893) was not the hand of P'u-yi. This was a blunder because P'u-yi himself had identified the fan as being in his own writing ("That was my own writing I copied from the poem", Record, p., 4,292), which entirely destroys the "expert's" qualifications and leaves the burden of proof assumed by the prosecution unsustained. On the record we can say only that P'u-yi is an incredible witness, whose testimony must be ignored.

Otherwise, there is no evidence to prove any charge against Umezu of "dominating" Manchoukuo. To take one example of many from the evidence, there was much evidence concerning opium-cultivation in Manchoukuo. But this evidence all tends to show that it was the government, not the Kwantung Army nor its commander-in-chief, which was in control. (Incidentally, the opium charges do not in themselves state crimes even within the purview of the charter; unless some connection with the waging of aggressive war or the domination of Asia is demonstrated, all such evidence is irrelevant to any issue.)

Soviet Relations

The charges in connection with the U S S R are:

Count 17, charging the planning and preparing of war against the U S S R ;

Counts 26 and 36, charging respectively the initiating and the waging of war against the U S S R in connection with the Khalkhin-Gol (Nomonhan) incident;

Count 51, charging murder in connection with the Khalkhin-Gol (Nomonhan) incident.

Nomonhan is readily disposed of. General Umezu was appointed Commander-in-Chief of the Kwantung Army on 7 September 1939 (Exhibit 129). If he arrived at his post in Manchuria on the very day of his appointment, the Nomonhan incident had already been in

progress for 4 months (Exhibit 766, Record, p. 7,845). It ended within the week thereafter (ibid.). This looks far more like the initiating and waging of peace than of war--an interpretation borne out by the absence of any evidence tending to connect Umezu with Nomonhan.

The other Russian question is in connection with General Umezu's period as Commander-in-Chief of the Kwantung Army. When we embark upon an analysis of the evidence in this phase, we enter the realm of fantasy. The evidence is a mass of affidavits of absent witnesses, some of them dead by their own hands or by the firing squad, only two of whom were produced (with devastating results) for cross-examination; of conclusions, rumor, hints and hearsay; of tendencious studies by Red Army General Staff deputy chiefs of department, prepared for use in this trial; and of charges of aggression leading up to a war in which Japan was attacked. Analysis of this evidence to disclose contradictions, improbabilities and omissions could be protracted to great length, but is quite unnecessary at this stage; reference to some of its high points should suffice to present purposes.

FIRING SQUAD

The witness Takebe (affidavit, Exhibit 670, Record, p. 7,330) may be taken as typical of many who professed to say that Japan was plotting--especially during the years 1940-45--aggression against the Soviet Union. The purpose of occupying Manchuria, he says, was to build up a military base against the U S S R; and he heard from Commander-in-Chief of the Kwantung Army Umezu talk of the problem of preparing for war on the U S S R. The purpose of the Kwantung Army, he was led to say, was "for attack against the U S S R." But this whole structure collapses when the witness is permitted to explain that "the purpose of the Kwantung Army being stationed in Manchuria was for defence"; what now becomes of the whole elaborate theory of aggression? General Ushiroku, commander of an army group in the Kwantung Army, knew of no operations plans except defensive ones (Exhibit 703, Record, p. 7,515); General Kita heard explanation from Umezu in late

1941 of the war-time duties of his command, but was not told of any time for the opening of a war (Exhibit 835, Record, p. 8,127). Lieutenant-General Kusaba, who killed himself in Tōkyō rather than face cross-examination, does not divulge how he knew that the 1941-1943 "offensive" operations plans were "decided by Sugiyama, Tōjō and Umezu" (Exhibit 838, Record, p. 8,164). (Just by the way, the two witnesses produced for cross-examination on this question both affirm that there was no operations plan vis-à-vis the Soviet Union for 1943. See the testimony of Sejima Ryūzō, Record, p. 8,099, and of Matsumura Tomokatsu, Record, p. 8,144). Major Matsumura heard a rumor that the war against the U S S R was to start in 1943, but doesn't say why it did not (Exhibit 833, Record, p. 8,092). Lieutenant-General Tominaga, who to date has been too sick in Siberia to attend for cross-examination, when Vice-Minister of War "drew an aggressive plan against the U S S R in 1940" (Exhibit 705, Record, p. 7,526); but his meaning is clear from what follows. He "handed it over to the Commander-in-Chief of the Kwantung Army to put it into practice", in April 1940; if it was put into practice, it was not aggressive, for no war ensued. The renegade Russian, Semyonov, put to death--after making his affidavit--for treason against his country, discoursed of two and a half decades and all the Orient; but he makes no mention of General Umezu, confining his claims like the mercenary which he boasts of being only to having dealt with underlings (Exhibit 668, Record, p. 7,319).

The Kantokuen, Kwantung Army Special Maneuver, was much discussed. Takebe asked War Minister Tōjō whether the strengthening of the Kwantung Army meant war, but got no answer (Exhibit 670); Lieutenant-General Akikusa interprets it as having "the purpose of taking military aggression against the Soviet Union by Japan" (Exhibit 743, Record, p. 7,708), but that is only his conclusion; he mentions no act of aggression. All the evidence shows that the Kantokuen was a precautionary reinforcement of the forces in

Manchuria at a time when international relations were disturbed. White Russians were much in evidence, but no one of them is alleged ever to have fired a shot against his native country. There were spies, of course; there always are. Numerous documents purport to show that the Manchurian railroads and highways were greatly developed after the foundation of Manchoukuo (Exhibit 712, Record, p. 7,546), airfields (Exhibit 713, Record, p. 7,550), dumps (Exhibit 715, Record, p. 7,554) and barracks (Exhibit 716, Record, p. 7,555) were constructed and the borders fortified (Exhibit 714, Record, p. 7,552), and that the seaports of the country exhibited much growth (Exhibit 718, Record, p. 7,559). All utterly consistent with Takebe's "the purpose of the Kwantung Army is for defence". We know from other evidence (the testimony of Sejima, Record, pp. 8,120-21) that during 1942, at all events, the strength of the Kwantung Army was hardly more than half that of the Soviet Far Eastern Army; and from the summer of 1943 it was steadily depleted (Record, p. 8,150).

The Japanese Army, it is charged, had plans for operations against the U S S R. Also, in the eventuality of conflicts, for operations against the United States, Great Britain, the Philippines and perhaps other countries (the testimony of Sejima, Record, pp. 8,112-14). As the President of the Tribunal noted (Record, p. 8,115), general staffs do prepare such plans; such is their function, to be prepared to defend their countries. These plans against Russia were annually drawn and discarded; they were drawn without the assistance of the Kwantung Army, to whom they were sent as its instructions; they contained within themselves no provision for the commencement of operations, and the Commander-in-Chief of the Kwantung Army was prohibited from commencing operations pursuant to them; and none of them ever did take effect by the initiation of hostilities (Record, pp. 8,109-19). The operations plans of the Kwantung Army were drawn by the general staff of that army, in accordance with the orders received from Tōkyō (testimony of Matsumura, Record, p. 8,154). Finally, all

such plans after the Nomonhan affair were defensive in nature: see the testimony of Takeba that "until the Nomonhan Incident the Kwantung Army had taken an offensive stand towards the U S S R, but after the above incident it changed to an attitude of aggressive defence" (Exhibit 670, at p. 2).

So far as concerns the time that this defendant was in Manchuria--1939-44--not only was there no aggression by Japan against the Soviet Union, but there is no credible evidence of any plans for such aggression. The whole record shows that all Japanese plans were defensive, and these counts should be dismissed for want of proof.

Pacific War

Participation in the Pacific War is charged against General Umezu by these counts:

Counts 7 and 29, charging respectively the planning and preparing, and the waging, of war against the United States;

Counts 8 and 31, charging respectively the planning and preparing, and the waging, of war against the British Commonwealth of Nations;

Counts 9-12 and 15, charging respectively the planning and preparing of war against Australia, New Zealand, Canada, India and France;

Counts 13 and 30, charging respectively the planning and preparing, and the waging, of war against the Philippines;

Counts 14 and 32, charging respectively the planning and preparing, and the waging, of war against the Netherlands;

Counts 16 and 34, charging respectively the planning and preparing, and the waging, of war against Thailand.

With the Pacific War General Umezu is shown by the evidence to have had nothing to do prior to his becoming Chief of the General Staff in July 1944. From May 1938 to that date he was out of Japan--commanding the 1st Army or the Kwantung Army--and if war was planning he is not shown to have been called into council.

From July 1944, as Chief of the General Staff of the Japanese Army, he "waged" war beyond any question. This is perhaps not the appropriate time to argue at length the question of the responsi-

bility of a professional soldier for practicing his profession of arms in a war in which he is summoned to participate. Suffice it for now to say, on this point, that in the absence of any evidence that he schemed for war, brought war about, desired war--or even delighted in war--it seems a shocking judgment which should condemn such a man for merely obeying the command of patriotism and his oath.

Prisoners of War

The following counts relate to this point:

Count 44, charging all defendants with conspiracy to procure and permit the murder of prisoners or war;

Count 53, charging conspiracy to order and permit certain subordinates to commit breaches of the laws and customs of war;

Count 54, charging the ordering and permitting of breaches of the laws and customs of war;

Count 55, charging deliberate and reckless disregard of duty to ensure the observance of the laws and customs of war.

The conspiracy is, of course, not proved, but like all charges of conspiracy in the case is constructive at most.

The question of the responsibility of the General Staff, and its chief, for maltreatment of prisoners of war has fortunately been made clear by the testimony of Tanaka Ryūkichi. "In Japan the handling of prisoners is quite different from other countries, and the Prisoners-of-War Information Bureau and administration of prisoner-of-war matters were under the supervision of the War Minister himself" (Record, p. 14,365). In answer to the inquiry concerning the sort of matters handled by the War Minister, "....where to locate POW camps, how to handle prisoners of war, how to promote the health of prisoners of war, and other general treatment of prisoners of war; how to distribute Red Cross messages and parcels, and the question relating to the exchange of POW letters...."(Record, p. 14,366). "Outside Japan" the policy is "handled by the chief of the general staff after consultation with the War Minister"; but: "it was carried out by the various commanders in the field in accordance with the orders and instructions

of the War Minister" (Record, p. 14,367), and "actually the matters were carried out by the commandants of the various prisoner-of-war camps in the field who communicated directly with the Chief of the Prisoners-of-War Information Bureau where the matters pertaining to POWs were disposed of" (Record, p. 14,369). ". . . matters pertaining to prisoners of war were not connected in any way with operations, but being a policy matter, these matters could be handled directly with the Prisoners-of-War Information Bureau. . ." (ibid.).

Plainly the General Staff had no responsibility for control of prisoners, no voice in determining their treatment, and no opportunity to influence it. The counts above enumerated, charging General Umezu with responsibility for atrocities to prisoners of war, should be dismissed.

Miscellaneous

Various conspiracies are charged by the following counts:

Counts 1 and 4, charging conspiracy to bring about domination by Japan of Eastern Asia;

Count 5, charging conspiracy with Germany and Italy to bring about domination of the world.

The first point, conspiracy to dominate Eastern Asia, will be treated in the general motion to dismiss. Of the second, it will suffice to say that there is not a scintilla of evidence showing Umezu as a conspirator with a German or an Italian.

It is possibly in connection with these counts that the testimony of Kawabe Torashirō (Exhibit 2,660, Record, p. 7,677), Vice-Chief of the General Staff under General Umezu at the end of the war, was offered--"to prove", as the prosecution pointed out, "that the Commander of the General Staff permitted the destruction of all secret documents after the surrender" (Record, p. 7,676). The point is trivial, perhaps--especially in view of the cross-examination of Kawabe, who unequivocally states that the destruction of documents was not carried out by order or with knowledge of Umezu, but was the responsibility wholly of subordinates (Record, pp. 7,683-88)--but so is much of the evidence

introduced with no apparent purpose other than simply mentioning this defendant's name. Thus, in the final phase, we find that the subdivision purporting to be "additional proof" against Umezu consists of: The prosecutor's assertion (Record, p. 15,789), contrary to the prosecution's own evidence above set forth, that the Ho-Umezu Agreement resulted in the withdrawal of Chiang Kai-Shek's forces from North China, an assertion supported by no evidence. The prosecutor's assertion that Umezu, "in conjunction with General Minami", "engineered the taking over of North China and establishment of the North China Autonomous Government"--an assertion already dealt with above. There was no evidence of conjoint action by Umezu and Minami. Finally, the prosecution's assertion, the only one supported by any pretence of evidence, that Umezu was "the leader of the military clique which was responsible for the failure of General Ugaki to form a new cabinet in January 1937." On this point the evidence consists of five documents: two (Exhibits 2,208A and 2,208B, Record pp. 15,790, 15,794) emenating from the Peace Section of the Home Ministry, and apparently introduced by inadvertence, as they have no connection with Umezu or this case; a speech (Exhibit 2,208C, Record, p. 15,796) by War Minister Terauchi explaining the reasons for his resignation; a talk (Exhibit 2,208D, Record, p. 15,798) by Vice-Minister Umezu, stating that the Army opposed General Ugaki but would take no measures to check the formation of a cabinet by him; and a "Notice to the Ex-soldiers' Organization" from Umexu, explaining the Army's attitude toward General Ugaki, but not evidencing any plot or anything more than that the Army opposed him, which so far as appears is not a constituent of any crime being tried here. In regard to the various snippets of documents showing disbursement of Army funds to or through General Umezu (Exhibit 2,209, Record, at p. 15,806, is typical), we can only echo the wonderment of the President (ibid.), "What is the significance of this?"

Conclusion

It is most respectfully submitted that in no branch of the case does the evidence rise to the dignity of *prima facie* proof of guilt of the defendant Umezu. There being no substantial evidence going to connect him with commission of any of the offences laid in the indictment, it should be dismissed as against him.

ERRATA SHEETS

(Incorrect Translations)

The inclosed corrections have been made pursuant to the request of the Defense Section of 25 July 1946.

The notation "(D)" signifies that the correction suggested by the Defense Section is agreed to by the Prosecution Section. Language Division.

The notation "(P)" signifies that the correction suggested by the Defense Section is rejected by the Prosecution Section Language Division which has, however, offered a new translation.

The notation "(same)" signifies that the Prosecution Section Language Division feels that no correction is necessary.

Doc. 684.

"Asia, Europe, Japan"

Page	Doubtful Translation	Corrected Translation
10-11:	Governing the world	(D) The peace of the world
69:	uneasiness in Asia	(D) unrest in Asia
70:	Regardless of how	(same)
82-83:	We must prepare	(P) We must be ready

Doc. 685

Extract from Shumei OKAWA's

"the Establishment of Order in Greater East Asia"

Page	Doubtful Translation	Corrected Translation
27:	"Asia of Asiatics"	(D) "Asia for Asiatics"

Doc. 687

Sato Shinen's Ideal State

Page	Doubtful Translation	Corrected Translation
67:	the pure reconstruction for the Japanisim country	(P) a purely Japanese style of National Reconstruction.

Doc 687 (Continued)

Page	Doubtful Translation	Corrected Translation
68:	to improve both the material culture and spiritual culture ..... divine will.	(P) the sovereign in obedience to the will of heaven as ..... , is responsible for improving both the material and spiritual culture of the nation by administering his country and educating his entire people.
73-74:	home offices and rural offices	(D) City and local districts
87-88:	preached on the ways. ... creating things	(P) through various means of creation and explitation

Doc. 688

Introduction

Page	Doubtful Translation	Corrected Translation
1:	Those lessons are all the more an empire on loftier foundation	(P) These subjects of interest and instruction cannot but be all the more ..... a sublime and glorious Third Empire

Doc. 689

Various Problems of Reviving Asia
By
OKAWA, Shumei

Page	Doubtful Translation	Corrected Translation
167-168:	its honor	(D) its prestige

Doc. 690

Biographical Sketch of Dr. Shumei OKAWA

Page	Doubtful Translation	Corrected Translation
29:	to submit those who did not submit to the Emperor's will	(P) to make non-worshippers (MATSUROWANUNONO) into worshippers (MATSUROWASU).
"	To obey the Emperor's will	(P) To worship together
"	the same ideal as them in	(D) the same ideal as they in
264:	careful attention in order to console those tired people	(P)....ought to have devoted all their efforts to alleviating the troubles and augmenting the welfare of a people exhausted by the wars with China and Russia

Doc. 690 (continued)

Page	Doubtful Translation	Corrected Translation
265:	of the plutocracy	(same)
"	and interest, easily disregarding law	(P) and interest contravening both law and custom
"	to ask their help	(P) to ask their support and assistance
267:	secession	(same)
"	withdrawal from	(P)renunciation of ...
"	adoration	(same)
"	to realize that Japan	(P) to realize vividly that Japan

Doc. 692

2600 Years of Japanese History
By
OKAWAM Shumei

Page	Doubtful Translation	Corrected Translation
443-444:	the other to their hope that	(D) the other to their expectation that
"	the respective interests of these powers vary,	(P) the respective interests and aims of these powers vary,
"	will mean the Restoration of the world.	(same)

Doc. 693

The Way of Japan and the Japanese

Page	Doubtful Translation	Corrected Translation
7	cries of distress	(D) urgent cries
7	The State today ...	(P) More or less distinctly, a large number of people have graduall become conscious of the fact that the state today can no longer be recognized as the objective realization of national morality.

Doc. 693 (continued)

Page	Doubtful Translation	Corrected Translation
7-8	Since the people ...morality, absolute	(P) This is the reason why the people .... morality, and absolute ...
11-12	logically	ethically
12-13	to grasp the just ideal ... national life.	(same)
20	we must love	(same)
21	this is characteristic	(P) this is one distinguishing feature
85-86	we call the relation	(P) we call the realization of its just relation
100-1	outlook	(D) spirit
102	themselves as the spirit	(P) the spirit
102	naturally ... but still	(same)
120	I claim a new mental independence	(P) I advocate a new separation
135	through the soul	(same)
142-3	I consider that	(P) I have a feeling that

Doc. 694

The Founders of Asia

Page	Doubtful Translation	Corrected Translation
1	A great achievement cannot	(same)
1	and moreover	(D) but still
2	help	(D) (omit)
~~278-9~~	~~Thirty years ago an admirable English Woman~~	~~(D) So far as the present state of India is concerned, thirty years ago an admirable English woman~~
278-9	nationality	(same)
333	It is the fact, me thinks, that ... spiritually.	(P) Is it not true that ... spiritually?

Doc. 695

Words and Deeds Japanese Style

Page	Doubtful Translation	Corrected Translation
9-10	glory	(same)
9-10	To obey (MATSUROU)	(D) To worship (MATSUROU) (NB the same change should be made wherever MATSUROU in any form occurs).
9-10	the supreme ideals	(same)
113-4	It is plain logic that	(P) It is in the logic of things that
154-7	The so-called military (BUMON) rule	(same)
154-7	military caste	(same)

Doc. 696

Excerpts from the History of the Civilization of Japan

Page	Doubtful Translation	Corrected Translation
318	"Imperialism"	(D) "Loyalty to the Throne"
319	Southwestern Rebellion	(D) SEINAN (Southwest) Rebellion
319	Imperialists	(P) royalists
319	Fifthly, ... Asiatic invasion.	(D) Fifthly, ... Asiatic aggression invasion.

Doc. 1907

Proceeding, Tokyo District Court: Marked 46,
"May 15th Incident and OKAWA, Shumei." Vol. 25 of 65

Page	Doubtful Translation	Corrected Translation
21	became the manager of	(D) became the director of

Doc. 1908

PROCEEDINGS, TOKYO COURT OF APPEALS
Marked 46, "May 15th Incident and OKAWA, Shumei Faction," Vol. 63
12 Sept 1934

Page	Doubtful Translation	Corrected Translation
521	to reform .... sixty-five years ago	(D) to establish the Japan of the Restoration
528	dissolved	(P) split up
529	Dr.	(D) (omit)
529	there was a gap	(D) there has been a gap
552	from poverty and uneasiness	(D) (omit)
574	as a rule	(same)
576	bombs but	(D) bombs at Shanghai, but
576	RED terror	(P) mass terrorism
579	that we were going	(P) that we (or they) were going
579	risk of our lives	(P) risk of our (or their) lives
579	laying ourselves	(P) laying ourselves (or themselves
588	associated with them	(D) associated with them intimately

正誤表統括

飜譯ニナキモノ 著書名	書類番号	頁	行	記事	申出ノ正否	英文正誤表番号
亜細亜、欧羅巴、日本	六八四	一-二	一頁～二頁二八	「加ハルニ……行ッタ」	正	1
		三	八-一九	「天皇ハ常ニ劍影裡ニアル」	正	2
		四	一	「從來モ然リシ如ク」	正	3
		四	五-一二	「ヲ両國ハ……三千年後カ」	正	4
		五	三	「夫々……夫ヨリ選バレ」	正	5
佐藤信淵、理想國家	六八七	一	五-一七	「故ニ彼ハ……樹立ミタ」	正	6
		二-三	二頁～三頁一五	「カクテ……デアル」	正	7
		四	一七-一八	「カクシテ……基サントスルデアル」	正	8
		五	二一-一六	「或ハ……ナクッタ」	否	/
國史讀本	六九〇	一	五	「天ノ益人」	正	9
		二-三	二頁～三頁一八	「一層……拮据シ」	正	10
		七	二	「一君萬民ノ國風ニ基キ」	正	11
		七	六-一七	「本末……ヲ改革シ」	正	12
日本及日本人之道	六九三	四	二一-一五	「恥ヲ知ル……感情デアリマス」	正	13
		六	七-九	「而モ人生ハ……遂ゲルデアリマス」	正	14
		一〇	二一-二五	「餘迄ニテ……來リテ」	正	15
		一二	七-九	「經學……哲學デアリマス」	正	16
亜細亜建設者	六九四	[illegible]	六	「其ノ國境ハ漠然トシテアイル」	正	17
		四	一〇	「之ヲ當面ノ印度ニ就テ見ル」	正	18
		五	五-一四	「印度ニ於ケル……翹望シテヰル」	正	19
		六	一〇-一六	「英國政府ノ……言葉デアル」	否	/
日本的言行	六九五	二	七-八	「其最後……ニセヨ」	否	/
		二	一〇-一一	「最初……コトハ」	否	/
		三	二五-二六	「武士ガ……」	否	/
日本文明史	六九六	三	一-四	「深刻ニ……忍勝ハ」	正	20
五・一五事件ト大川周明等	一九〇八	一四	八-一二	「村岡中將……考ヘマシタ」	正	21
		一七	七-一二	「昭和五年……[illegible]」	正	22

Translation Errata Sheet

Not in translation.

No.	Title	Doc. No.	Page Line	Translations to be Added
			1	
1	Asia, Europe, Japan	684	20	/...of civilization/ In addition, surprisingly, an ever decreasing percentage of the population was adequat to supply fighting men, even though the scale of war was gradually increasing. (p. 9)
			2	
2	"	"	19	/...completed in peace/ "Heaven is always found within the shadow of the sword."
			2	
3	"	"	20	/...there must be/, as was the case heretofore, /a deadly fight..../
			2	
4	"	"	24	/...is America/ These two countries, whether by Heaven's will or by coincidence, have as their national symbols the 'SUN' and the 'STARS', respectively. This contrast between the two seems to signify the contrast between broad daylight and dark night These two countries are destined to fight each other as Greece did Persia and Rome Carthage. Japan! You might be summoned to fight at any time. Whether one year or thirty years henc God only knows! /We must prepare.../
			2	
5	"	"	39	/...of Europe/, each chosen by Heaver as the champion of the East and West, respectively. /In short..../
6	Sato Shin-en's Ideal State	687	1 4	/...and safety/ Therefore, he established a most concrete world policy by which Japan should achieve Heaven's will to instruct all nations (p. 47)
7	"	"	1 30	/...the divine will/ Thus "the admir istration for making the nation rich and prosperous begins with the ruler' daily conduct." This is quite natura for an autocratic nation and consequ ly this is the reason why SHIN-EN particularly attached importance to the ruler's morality as a branch of political science. The fundamental

Not in Translation.

No.	Title	Doc No.	Page Line	Translations to be Added
	Sato Shin-en's Ideal State	687		morality which a ruler should cultiv is "KYO" and "KEN". "KYO" means to follow intently Heaven's orders, doing away with all selfishness and egoistic ideas and devoting oneself exclusively to the interests of the state and people. "KEN" means to devote both one's energy and wealth to national enterprises and to remove all luxury from private life. Consequently, "KYO" means self-control in mind, while "KEN" means self-contro in conduct, and "KYO" and "KEN" together "signify the one virtue of self-control." (p. 68)
8	"	"	2 26	/...supporting the law/ Thus he tries to realize "the great government of absolute sincerity" (pp. 73-74)
9	Reader on Japanese History	690	2 26	/...the self-consciousness of/ "AME NO MASUBITO" (T.N. Defined by the author in page 28 as "the people who either descending from Heaven or obeying Heaven's will, prosper on earth; in other words, the people who realize Heaven's will on earth") of olden times /in the present generation./
10	"	"	3 5	/...followed/ The people, in the full ardour of their newly invigorated patriotism, devoted themselves to the Great Principles of our Nation, and through their loyalty and bravery /Japan was able..../
11	"	"	5 10	/They also demand/, in conformity with the national tradition of "one ruler ten thousand subjects," /the realization of..../
12	"	"	5 16	/...the ideals of the Japanese nation and by reforming the evil practices of formal education, which is fundamentally topsyturvy. /As these...../

Not in Translation.

No.	Title	Doc. No.	Page Line	Translations to be Added
13	The Way of Japan and the Japanese	693	3 21	/...govern them./ (Page 15) The sense of shame is found only among human beings. It is the sense that separates human beings from other animals, and, furthermore, one individual from another, that is, OKAWA from KATO, and KATO from SATO.
14	"	"	5 8	/...and the other two/ And since life can not settle down in the midst of rivalry and contradiction, it is unifi by any kind of effort, and thus a new spiritual development takes place.
15	"	"	7 5	/...line to this day./ As I have stated repeatedly, the father of a family is a religious object in family life, and the /family's/ proper religious relation to the father is called "filial piety." In Japan, this develop in a natural way into the worship of the Emperor as the present embodiment of the nation's founder, /and the Emperor has become..../
16	"	"	7 32	/...and history./ "KEIGAKU" means philosophy and "SHI" means history or politics. "SHISHO-GOKYO" (Four Books and Five Scriptures) is nothing but philosophy which teaches the meaning of the world and of life. /In studying .../
17	The Founders of Asia	694	2 2	/...countries are/ far wealthier than Arabia and their boundaries are vague.
18	"	"	2 32	/...call it superhuman. (page 213)/ When we contemplate the present-day India, /thirty years ago an..../
19	"	"	3 5	/...Make me thine own." (pp.278-279)/ If the national movement in India is in fact based upon such righteous self-consciousness, we cannot help adoring and admiring it.....And the impregnable fortresses that hinder the restoration of India are falling one after another. In addition, the new

So far as the present state of India is concerned, admirable English woman

Not in Translation

No.	Title	Doc. No.	Page Line	Translations to be Added
	The Founders of Asia	694		world which is to appear in the near future ardently demands the restoration of India. The world hopes that the spirit of India, which has been the mother of a noble and great culture, will be resuscitated in the present generation, and devote itself to the creation of a new world culture to replace the now decaying culture of Western Europe. (pp. 279-281)
20	The History of the Civilization of Japan	696	1 44	/...public sentiments very/ dangerous Thus the World War made wider the gul between rich and poor on the one hand and, on the other hand, made prices soar /to no one knew.../
21	May 15th Incident and OKAWA	1908	6 45	/...but a suggestion/ Lt. General MURAOKA is such an excellent soldier that he may be rated as first or second among the army officers. Hence it was absurd to send to this man, who was in Mukden, a telegram suggesting that he meet a certain person there. Be that as it may, I deemed it undesirabl that the OKURA-GUMI was behind what had happened.
22	"	"	8 13 p.547	/...of Japan at the Conference."/ (Ques) "Did Admiral YATSUSHIRO, who I understand died 30 June, 1930, /Showa 5/, say to the defendant anything about the state at that time?" (Ans.) p.547 "He did not say it definitely but he urged that Japan's conditions should be made better."

ERRATA SHEETS

(Incorrect Translations)

The inclosed corrections have been made pursuant to the request of the Defense Section of 25 July 1946.

The notation "(D)" signifies that the correction suggested by the Defense Section is agreed to by the Prosecution Section. Language Division.

The notation "(P)" signifies that the correction suggested by the Defense Section is rejected by the Prosecution Section Language Division which has, however, offered a new translation.

The notation "(same)" signifies that the Prosecution Section Language Division feels that no correction is necessary.

Doc. 684.

"Asia, Europe, Japan"

Page	Doubtful Translation	Corrected Translation
10-11:	Governing the world	(D) The peace of the world
69:	uneasiness in Asia	(D) unrest in Asia
70:	Regardless of how	(same)
82-83:	We must prepare	(P) We must be ready

Doc. 685

Extract from Shumei OKAWA's

"the Establishment of Order in Greater East Asia"

Page	Doubtful Translation	Corrected Translation
27:	"Asia of Asiatics"	(D) "Asia for Asiatics"

Doc. 687

Sato Shinen's Ideal State

Page	Doubtful Translation	Corrected Translation
67:	the pure reconstruction for the Japanisim country	(P) a purely Japanese style of National Reconstruction.

著書名	書類番号	頁	行	記事	申出ノ正否	原文照会番号
復興亜細亜ノ諸問題	六八九	一	六	括弧内	否	/
		一	二三	括弧内	否	/
		一	二四	括弧内	否	/
		一	二四～二五	「而シテ亜細亜……至ラン」	正	1
國史讀本	六九〇	四	二一～二四	「爾来……把ニ至ッタ」	正	2
日本及日本人ノ道	六九三	四	六～一三	「東洋デ……区別ガナイ」	正	3
		五	三六～三八	「日本人ニ……宗教デナリマス」	正	4
		七～八	七頁一四～八頁一	「無論軍隊ニモ色々缺点ハアルケレド上」	正	5
日本文明史	六九六	四	一～一〇	「故ニ……周年 祢 ハキラ又」	正	6

原文ニナキモノ

N01

原文正誤表

原文ニナキモノ

番號	巻書名	書類番号	頁行	追加
一、	復興亜細亜ノ諸問題	六八九	二 三六下	七、而シテ亜細亜全土ニ亘リテ白人支配ニ對スル抵抗ガ昂マル潮ノ如クナッテ来タ。カクテ白人對非白人ノ抗争ガ漸ク具体的ニ民族闘争ノ相（スガタ）ヲ取ラントスルニ至ッタ（二三一—二四）
二、	國史讀本	六九〇	五 三六下	第二百六十七頁 爾來日本の国情は巨巖の急阪を下るが如きものがある。貧民と富豪との敵視、小作人と地主との確執、労働者と資本家との抗争は年と共に深刻を加へ、最早温情主義などを以て如何ともすべからざるに至った。この國民生活の不安を救ふためには幾多の缺陥を明らさまに暴露せる資本主義経済機構に對して巨大なる斧を加へねばならぬ事が明白なるに拘らず富豪階級と権力階級との多年に亘る悪因縁はついに徹底せる改革の断行を妨げて唯一日の安を偸む彌縫的政策が繰返されるだけである。曽て萬悪の源なるかに攻撃せられし藩閥政治は亡び去り專制頑冥と罵られたる官僚政治また亡び今や明治初年以来の理想なりし政黨政治の世となった。而して国民は早くも政黨に失望しその心に新しき政治理想を抱くに至った。

三、日本及日本人の道　六九三　七ノ十五

東洋で求めて來たのは、全體としての「道」その者であったからであります。而して道は私が先程から申上げた一つの方面を具い（その一方に於て正しき関係を實現して初めて体得されるのであります。さうしてこれにより價値の優れるものに對する関係が取りも直さず宗教でありますから矯にこの一面を抽象せず唯だ人格的生活の一面として之を存養して来たのであります。これがために宗教と道徳との區別がない。（三四頁）

四、〃　〃　七　五ノ下

日本人に取っては家族の員として友なること、国民の一尺としては忠なることが取りも直さず最も具体的なる宗教であります（三一頁）

五、〃　〃　一三　臨

無論軍隊にもろもろな缺點はあるけれども

六、日本文明史六九六　二ノ七

故に革命歐羅巴と復興亜細亜とが來る〻き世界史の經緯であるなればその第一頁を書くものは日本でなければなるぬ。東西一切の要素を抱擁する日本の魂から若し日本が眞個に自覚して独創的に奮（且つ行ならば必ずや新しき或るものが生れるであらう、未だ知られずして然も現を往くこあるもの、未だ「時間」の實驗室に於て試みられず未だ「自然」の黄金に於て描き上げられざる或るものが日本の国民的生活の上に實現せらるることによって、世界は初めて眞個進歩の一段階を登るであらう。日本国民は此の神聖なる事業のためにその身体と精神の全力を用ねばならぬ。

（三三七―三三八頁）

Held For Release

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST

THE UNITED STATES OF AMERICA, et al

- VS -

ARAKI, Sadao, et al

Defendants

Motion No.____

MOTION OF CERTAIN DEFENDANTS FOR A MISTRIAL

NOW COME the defendants designated below, by their respective counsel of record, and move The Honorable, The International Military Tribunal for the Far East for an order declaring a mistrial in the above-entitled cause for the following reasons:

1. In perhaps a thousand or more instances the Tribunal, over the constant objections of the defendants, has admitted into evidence affidavits, ex parte statements, synopses of evidence, and other hearsay, thereby denying to the defendants and each of them the right enshrined since time immemorial to be confronted by the witnesses against them and to be afforded an opportunity to cross-examine such witnesses;

2. The Tribunal has erroneously admitted into evidence on behalf of the prosecution hundreds of exhibits and statements, notwithstanding the Chief of Counsel for the prosecution advised the Tribunal that it did not vouch for the credibility of such evidence;

3. In numerous instances the Tribunal has unduly restricted the right of cross-examination with the result that the issues have not been fully developed;

4. The evidence covers such an expanse of Japanese governmental action, particularly action and non-action of fifteen separate and distinct cabinets of Japan, and otherwise is so vast in quantity, that no defendant can obtain the fair trial provided for in the amended Charter;

5. The Tribunal has admitted into evidence in numerous instances statements and reports made by private persons, bodies societies having no connection with any defendant, the govern-

ment of Japan, or any official action by any official in the government of Japan; and this without any showing on the part of the prosecution that any defendant knew of such material or ever acted upon the strength thereof;

6. In numerous instances the Tribunal has admitted statements made by the defendants without regard to whether the statements were made during the course or execution of the alleged conspiracy;

7. In numerous instances the Tribunal has admitted statements and admissions of the defendants without any proof having been first offered to prove the corpus delicti; that is to say, the alleged conspiracy charged in the indictment and overt acts in pursuance thereof;

8. The foregoing action and rulings of the Tribunal separately and in their entirety have rendered a fair trial impossible for the defendants and this course of action has proceeded in its cumulative effect to the point where it could not be corrected or cured by the Tribunal or anything that the defendants or any of them might prove.

HIROTA, Koki
by

Tadashi Hanai,
Japanese Counsel

David F. Smith,
American Counsel

ITAGAKI, Seishiro
by

Honzo Yamada,
Japanese Counsel

Floyd J. Mattice,
American Counsel

MINAMI, Jiro
by

Toshio Okamoto,
Japanese Counsel

Alfred W. Brooks,
American Counsel

OKAWA, Shumei
by

Shinichi Ohhara
Japanese Counsel

Alfred W. Brooks,
American Counsel

KOISO, Kuniaki
by

Shohei Sammonji,
Japanese Counsel

Alfred W. Brooks,
American Counsel

MUTO, Akira
by

Shoichi Okamoto,
Japanese Counsel

Roger F. Cole,
American Counsel

KIDO, Koichi
by

Shigetoka Hozumi,
Japanese Counsel

William Logan, Jr.
American Counsel

SHIMADA, Shigetaro
by

Yoshitsou Takahashi,
Japanese Counsel

Edward P. McDermott,
American Counsel

TOGO, Shigenori
by

_____

Haruhiko Nishi,
Japanese Counsel

_____

George Yamaoka,
American Counsel

_____

Ben B. Blakeney,
American Counsel

UMEZU, Yoshijiro
by

_____

Mitsuo Miyata,
Japanese Counsel

_____

Ben B. Blakeney,
American Counsel

MATSUI, Iwane
by

_____

Kiyoshi Ito,
Japanese Counsel

_____

Floyd J. Mattice,
American Counsel

Held For Release

8

INTERNATIONAL MILITARY TRIBUNAL FOR THE
FAR EAST

No. I

THE UNITED STATES OF AMERICA, et al

-VS-

ARAKI, Sadao, et al

PAPER NO. 685

- Defendants -

Shigemitsu
Deft

MOTION TO DISMISS OF

SHIGEMITSU MAMORU

NOW COMES the defendant SHIGEMITSU Mamoru and moves the Tribunal to dismiss the indictment and the several counts thereof insofar as they relate to him upon the ground that the evidence adduced by the prosecution is insufficient to warrant a conviction upon any of the counts charged by the indictment.

20 January 1947

SHIGEMITSU MAMORU

by

YANAI TSUNEO

and

GEORGE A. FURNESS

His Counsel

In moving the Tribunal for the defendant Shigemitsu to dismiss the indictment, we invite the attention of the Tribunal to the evidence adduced by the prosecution against the defendant, which we very briefly analyze under the following headings:

(1) Sino-Japanese Relations

(2) The Pacific War

(3) Japanese-German-Italian Relations

(4) Soviet-Japanese Relations

(5) Conventional War Crimes

To shorten the argument, the citations of pages of the Record pertinent to the various points will not be read.

(1) SINO-JAPANESE RELATIONS

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

Moreover, abundant evidence offered by the prosecution has clarified the fact that the Manchurian Incident occurred without desire or intention on the part of the Japanese Government--or, rather, occurred against its intention. See, for instance, the testimony of the witnesses Shidehara, the then Foreign Minister; Wakatsuki, then Premier; Tanaka, ex-Director of the Military Service Bureau; Morishima, et al. (Record, pp. 1,340, 1,561, 1,976, 3,019, respectively). The defendant Shigemitsu, the evidence discloses, had nothing to do with the outbreak of such incident.

Baron Shidehara, Foreign Minister at the time of the

Manchuria Incident, has also testified to the facts that Shigemitsu was a faithful apostle of "Shidehara diplomacy"; that he himself recommended appointment of the defendant as Minister to China; that the appointment took place during his tenure of office as Foreign Minister; that the defendant spared no effort to relax the tension then prevailing between China and Japan; and that strenuous efforts were made by the defendant, after the outbreak of the incident in Manchuria, toward a peaceful solution of the conflict (Record, p. 1,363 et seqq.; Exhibit 246, Record, p.). Also the testimony of the witness Morishima, Consul at Mukden, Manchuria, at the time of the Manchurian Incident, is as clear on these points (Record, p. 3,043 et seqq.). The witness Powell has testified to the fact that Shigemitsu, after the unfortunate outbreak of hostilities around Shanghai, succeeded by dint of his untiring efforts in concluding the Agreement for Cessation of Hostilities on 5 May 1932 (Record, p. 3,262).

Attention is now invited to the facts that the defendant Shigemitsu is not indicted in Count 19 for initiating war against China on or about 7 July 1937, and that, though Count 28 charges him with waging war against China, he was neither in Tōkyō nor in China at the time when those hostilities occurred between China and Japan, but was in Europe as ambassador until the hostilities in China had reached a much advanced stage (Cabinet Secretariat curriculum vitae, Exhibit 123, Record, p. . It may be also noted in this connection that one page--covering the period of five years from 1930 to 1934--is evidently missing from this personnel record).

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

(2) THE PACIFIC WAR

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

(a) The war against the United States, the British Commonwealth, the Philippines and the Netherlands started about sixteen months before his appointment as Foreign Minister, and about two years and seven months before he became Minister for Greater East Asia;

(b) The advance of the Japanese Army into French Indo-China was completed about three years before the defendant Shigemitsu was made Minister for Greater East Asia (retaining his portfolio as Foreign Minister). In this respect, it has been made clear in the opening statement on this phase that the Japanese Army moved into Northern French Indo-China on 22 September 1940, and into Southern French Indo-China on 26 July 1941, and that Japan was, from that moment onward, the master of Indo-China (Record, p. 6,724). As Mr. Shigemitsu was not in Tōkyō at that time (Exhibit 123), he did not participate in governmental conferences in 1941 concerning that occupation, nor had he any knowledge of the negotiations which were conducted exclusively by a very limited number of people in utter secrecy in Tōkyō, Vichy and Hanoi. It is only natural that the prosecution did not mention in court the name of the defendant as one of those who occupied positions of authority in regard to matters concerning French Indo-China (Record, p. 6,792).

On the other hand, the French National Committee of de Gaulle declared war on Japan on 8 December 1941; i.e., two years

and seven months before the defendant took office as Minister for Greater East Asia (Record, p. 6,724);

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

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

The statement under this heading will apply also to Count 23 for initiating war against France, and Counts 29 to 34 for waging war against the United States, the British Commonwealth, China, France, the Philippines and the Netherlands, with which the defendant Shigemitsu is charged. It is to be noted that the defendant is not indicted on Counts 19, 20, 21, 22 and 24, for the initiation of the aforesaid wars.

(3) JAPANESE-GERMAN-ITALIAN RELATIONS

This is Count 5. During the time when the negotiations on the Anti-Comintern Pact were being conducted, the defendant Shigemitsu was on the reserve list of the Foreign Office (Exhibit 123).

When later the negotiations on the Tripartite Pact were going on, he was ambassador to the Court of St. James (Exhibit 123), and innumberable evidentiary documents of the prosecution have proven that the negotiations were expedited mainly in Tōkyō by a very small number of people, in complete secrecy. These facts reinforce the inference from his failure to be mentioned in this connection to indicate that this defendant had no connection with either of these pacts, or with the alleged three-power conspiracy.

(4) SOVIET-JAPANESE RELATIONS

As for Counts 17 and 35--initiating and waging war against the Union of Soviet Socialist Republics--the defendant, as a

career diplomat, was Ambassador in the U S S R at the time of the Lake Khasan incident mentioned in Count 35 (Exhibit 123). Whatever he said during the negotiations in 1938 was all within the scope of the instructions he received from his home government (Exhibit 754, extract from the Record of the Talk of Litvinov and Shigemitsu on 20 July 1938, in Moscow, concerning Khasan Lake, Record, p.), and no evidence has been adduced by the prosecution to establish that the Tōkyō government had any idea of initiating or waging war against the U S S R. In executing the instructions mentioned above, the defendant made no slightest pretention of demanding cession of Soviet territory by demarcating the border between the U S S R and Manchoukuo, as it was contended without proof in the opening statement of the Russian prosecutor. On the contrary, the "Record of the Talk of Litvinov and Shigemitsu" (Exhibit 754) testifies to the facts that what the defendant wished was that the border should be accurately demarcated not on the basis of the data of Manchoukuo alone, but that the data of both parties should be consulted, and that the first and foremost concern of the defendant in these negotiations was tranquility on the Soviet-Manchoukuoan border in the region of Lake Khasan. And thus agreement was reached between Commissar Litvinov and Ambassador Shigemitsu on the border clash of 1938. The prosecution has in this way tendered evidence that the defendant made a valuable contribution to peace between the two nations; the charge that he initiated war against the U S S R is sustained by no evidence.

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

(5) CONVENTIONAL WAR CRIMES

Mr. Shigemitsu is indicted in Counts 53, 54 and 55 for conventional war crimes. As far as the defendant is concerned, we

understand that he is directly charged with matters regarding the treatment and administration of prisoners of war and civilian internees, as well as murder of such and similar persons. The Minister for Foreign Affairs, which post the defendant assumed well after the commencement of the war, had no competence or responsibility for prisoners and civilian internees. His sole competence in this respect was to transmit to appropriate Japanese authorities documents received on this matter from foreign governments, and to inform those foreign governments of replies from such authorities whon he was furnished with them. The opening statement of the prosecution for this phase admitted that such was the competence of the Minister for Foreign Affairs (Record, p.), and this fact has been established by the evidence of Tanaka Ryūkichi, ex-Director of the Military Service Bureau, and Suzuki Tadakatsu, during the war Chief of the Bureau for Affairs of Japanese Residents in Enemy Countries, witnesses introduced by the prosecution (Record, pp. 14,365 and 14,419; 12,832-33 and 15,506-33, respectively).

Abundant proof as to who the competent authorities on this matter were may be found in numerous evidentiary documents tendered by the prosecution--for example, Exhibit 1303, 1965A (Record, p.), containing the Regulations concerning the Prisoners-of-War Information Bureau and Prisoners-of-War Camps, ordinances and orders issued by the Minister of War concerning the treatment, supplying, employment for labor of prisoners of war, etc. That the Minister for Foreign Affairs had no competence in regard to prisoners of war and similar persons, nor any organization to conduct investigation concerning protests from foreign governments, may be found stated in the testimony of Tanaka (Record, p. 14,419) and Suzuki (Record, p. 15,530).

The foregoing statement applies of course to the employment of prisoners of war for the construction of the Burma-Thailand Railway and to the "Bataan Death March". Especially it has been clarified, as to the former, by a prosecution document, Exhibit

475, Report of the War Ministry (Record, p. 5,513), and the affidavit of the witness Wakamatsu, ex-Lieutenant-General, (Exhibit 1989, Record, p. 14,632), that the employment of prisoners of war was based upon a decision of the Imperial General Headquarters; and further as to the latter, by Exhibit 1980E (Record, p. 14,567), it appears not only that it occurred before the inauguration of the defendant Shigemitsu as Minister for Foreign Affairs, but that even the accused Tōjō, the then Minister for War, had no knowledge of the matter. In brief, no evidence has been adduced to prove the responsibility of the defendant on these counts. And not only that, but the evidence tendered by the prosecution has clearly shown that this defendant had no connection with the matter.

It may be interesting to note that, although the Foreign Ministry had no competence or responsibility whatever for the treatment or administration of prisoners of war, evidence by the witness Suzuki has made it clear that the Foreign Ministry did its best to secure amelioriation by the competent authorities of the conditions of the prisoners of war (Record, p. 15,529 et seqq.).

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

CONCLUSION

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

W/ that we should take note of US Court & and all other Court of

"absence of evidence". Court of US is not to be off. noticed.

But — in not denying your right to make any motion — when you for relief Sup. Comm.

on Pag 3 of our ruling on motion — relief on G 9 mem — then Gall — may thought not should be recommit for reasons to be given later.

was assumed in Clause I not would be occ chief of that so in a cannot see nec of give mot

Proceed of Indiv mot.

W/ "Be as brief as I was."

S/ Broad aspect of the evidence as it applies to variety of actions — (give mot to dismiss)

Last you need to take a mot. on juris alone on mot. K Keenan now may.

If nec we will take matter to Ded Aut in Wal — but we must show we have brought to your honor and you given opport to correct it.

W/ The matter of place indiff to whether you go to Ded Ct in Wal — Sydney — Ottawa — or Ded Ct in Moscow or any other Court — one has as much right to hear you as the other —

S/ want this spread on record.

all others — motion TOff Doihara that join HIR — Shim (the main mot)

W/ "well call it the Sup. Comm. mot) - 4-11- no-15 PR.

"there's two card (to challenge the auth of the SCAP). it can do no good". In this place and under these circumstances — it is not desirable unless it is proven nec — in interest of justice. that need has not yet been shown

W/ "you will do it"

"or legal argument not a pol. forensic Harangue.

this is the floor of congress of the Senate of the USA — or any other place —

S/ Counsel have right to have record show what are true & bring to attention of your Honor.

W/ Point could be made in sober legal language in 1/10 the of the language — It will not be read into the record — but you have your exception."

Hold. For Release

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST
SITTING AT TOKYO, JAPAN

Sato

Case No. 1

Paper No 696

THE UNITED STATES OF AMERICA; et al	) MOTION BY ACCUSED SATO,
	) Kenryo TO DISMISS THE
- vs -	) INDICTMENT AT THE CLOSE
	) OF THE PROSECUTION'S
ARAKI, Sadao; et al	) CASE

POW - 1942

only a stooge

Blue people

COMES NOW the accused SATO, Kenryo and at the close of the Prosecution's case moves the Court to dismiss each and every count against him in said Indictment contained for the reason that the evidence is insufficient to sustain the charges.

Signatures

[redacted]
Japanese Counsel

[redacted]
American Counsel

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST
SITTING AT TOKYO, JAPAN

Case No. 1

THE UNITED STATES OF AMERICA; et al	) MOTION BY ACCUSED SATO, Kenryo TO DISMISS THE INDICTMENT AT THE CLOSE OF THE PROSECUTION'S CASE.
- vs -	)
ARAKI, Sadao; et al	)

COMMENTS IN SUPPORT OF MOTION TO DISMISS

For the purpose of this brief discussion relative to the failure of the Prosecution to discharge its burden of sustaining the counts of the Indictment against the accused SATO, Kenryo, we will accept the general divisions named in the Indictment and treat the counts under three classifications:

1. Crimes Against Peace.
2. Murder.
3. Conventional War Crimes and Crimes Against Humanity.

I. CRIMES AGAINST PEACE (Counts 1 - 36)

Since it would be little more than repetitious to describe the contents of these counts and those to follow under the other two groupings, it will suffice to say they deal with the alleged conspiracy or common plan to wage, plan, prepare and initiate wars of aggression as well as the acts which tend to compose the alleged conspiracy. This accused is not charged in Counts 18, 19, 23, 25, 26, 33, 35 and 36.

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

The Prosecution can not intend this. Such would be fantastic for there would be neither time nor personnel enough to complete the task of trying those involved in the war effort. Therefore, reason would dictate that the gist of the alleged conspiracy accusations comprises as its objective the accusation of those high governmental figures who possessed sufficient power and influence to actually formulate the policies of the country.

My colleagues have discussed the question of conspiracy and the substantive law applying thereto. We do not propose to elaborate further but to now point out, from the Prosecution evidence and the failure of the Prosecution evidence, why the accused SATO, Kenryo can not by any stretch of reasoning be judged guilty of complicity herein.

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

Certainly then, up to this date at least, the accused occupied such a minor role in the governmental and military affairs of Japan that he can not with seriousness be held accountable as a participant in the formulation of even minor governmental policies - not to mention such a momentous decision as war. The very nature of his position makes it physically impossible for him to have done so unless the criterion be so broad as to encompass, as said before, the actions of many thousands, if not millions, of Japanese people.

The evidence recites further that on November 15, 1941, just twenty-three days prior to the attack on Pearl Harbor,

this accused was ordered to assume charge of the Military Section of the Military Affairs Bureau under the jurisdiction of the War Ministry. The Tribunal should bear in mind that this was merely a section under a Bureau of the War Ministry. The evidence fails to show that this position carried with it any duty of such a nature as could possibly involve the accused in the charges contained under this group of the Indictment. Moreover, there is a total failure of proof that the assumption of an administrative military assignment under orders is, in and of itself, a criminal act.

Prosecution evidence reveals that not even the Chiefs of Bureaus under the War Ministry had authority to make decisions on official documents sent to the War Ministry. And certainly a Section Head under such a Bureau would be in a much lesser position of authority. (Record Page 14377.)

Prosecution evidence further shows that prior to April 20, 1942, at which time the accused SATO succeeded to the office of Chief of the Military Affairs Bureau, he was not even qualified to attend the conferences of Bureau Chiefs. The effect of this is obvious. How can he be successfully charged with the planning, preparing or initiating of wars of aggression or any other acts stated in these counts when a necessary corollary is the ability to participate by virtue of the office or influence held.

Having thus shown the Tribunal, by the evidence presented, that up to the period of commencement of hostilities December 7, 1941 this accused possessed neither the rank nor occupied any position or influence wherein or whereby he could participate in, control, command or authorize the initiating, planning or waging of war of aggression, we move to the next group.

II. MURDER
(Counts 37 - 52)

Encompassed under this group are counts charging the initiation by Japan of hostilities between June 1, 1940 and

December 8, 1941 and subjecting the accused to liability for the crime of Murder. This accused is omitted from Counts 45, 46, 47 relative to certain cities in China, together with Counts 51 and 52 pertaining to the U.S.S.R.

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

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

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

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

4/20/42

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

The Prosecution has consumed a larger portion of its time under these counts in dealing with the commission of the individual acts which compose the alleged war crimes against humanity. The legally all-important proposition of connecting such alleged acts with the responsibility of this accused has failed of proof and the evidence offered therefore is of a weak and varying nature which can not but be considered a complete failure of proof in this regard.

The heartbeat of the Prosecution's case against this accused is that he, as Chief of the Military Affairs Bureau

commencing April 20, 1942 as aforesaid, was in charge of the Prisoner of War Bureaus. This allegation of the Prosecution has not been substantiated by the evidence offered but in fact has been disproven by their own witnesses and documents.

Exhibit 92 describes the set-up and origin of the Prisoner of War Internment Camp and Prisoner of War Information Bureaus. The Tribunal should take particular note of the use of the word "bureaus". In this document are contained the words and I quote: "The Prisoner of War Information Bureau shall be under the jurisdiction of the Minister of War." A like statement is contained in reference to the Prisoner of War Internment Camps. They were thereby given the rank and dignity of bureaus and so designated as such.

The witness TANAKA on Page 14346 said "There is no bureau in War Ministry which is under the control of the Military Affairs Bureau. They are all under the jurisdiction and control of the Minister of War. The Prisoner of War Information Bureau is a special existence in Japan and is under the control of the Minister of War."

In connection with this line of thought, the Tribunal should carefully note the testimony of the witness TANAKA that UEMURA as Chief of the Prisoner of War Bureaus was a Lieutenant General and superior in rank to this accused. Therefore the proof before the Tribunal as to the relationship between the Military Affairs Bureau and the Prisoner of War Bureaus can well be expressed in the words of their own witness TANAKA (Record 14404): "The Prisoner of War Information Bureau was established as an outside bureau attached to the War Ministry."

The evidence further shows the needs of the commanders of Prisoner of War Camps were communicated directly to the Prisoner of War Information Bureaus where the matters pertaining to the Prisoners of War were disposed of.

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

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

The burden is on the Prosecution to prove these things and their failure to do so can not be supplied by implication or innuendo. The evidence should be clear and concise. But by whatever rule the Tribunal wishes to apply in judging the sufficiency of the evidence it is demonstrated that in regard to the accused SATO a conviction can not be sustained by the evidence presented.

The witness TANAKA has admitted that he was in charge of the Military Service Bureau of the War Ministry and that friction existed between his bureau and the Military Affairs Bureau. Therefore the Tribunal should take into consideration the possibility of biased testimony on the part of this witness which may be retalliatory in a sense. (Record Page 14343)

It has not been the purpose of counsel to take each count separately for the reason that it would be tiresome and repetitious to state and restate simply that there has been a failure of proof. Therefore this accused incorporates the arguments heretofore made by counsel in reference to general matters and statements pertaining to law relative

to the Indictment.

Relying upon the Tribunal at this time, at the close of the Prosecution's evidence, to weigh the value and nature of the evidence offered, and to note the lack of evidence, in reference to each and every count the accused SATO renews his motion that the Indictment be dismissed and requests that he be not required to go forward with evidence in his behalf.

Hold for Release

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

"Stalled"

UNITED STATES OF AMERICA et al (
(
vs (
(
ARAKI, Sadao et al (

#697
Shiratori

MOTION TO DISMISS

NOW COMES SHIRATORI, Toshio, through counsel and makes and enters a formal motion to dismiss each and every count of the Indictment heretofore filed in this matter as pertains the said Defendant SHIRATORI and in support of said motion submits the following facts and contentions:

GROUP ONE -- "CRIMES AGAINST PEACE"

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

Inasmuch as these counts cover from January 1, 1928 to September 2, 1945, it will of necessity require later reference to various dates and the corresponding activities of the accused during this period in later parts of this motion. Inasmuch as the Defendant had no connection, whatsoever, with the charges contained in said Counts 1 to 4, the same should be dismissed.

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

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

With reference to Counts 7 to 17, it is called to the attention of the Tribunal that in Prosecution Exhibit 125, it is shown that the accused was relieved as a diplomatic adviser in the Foreign Office at his own request on July 22, 1941 and thereafter was never again connected with the Foreign Office or

with the Government. That is to say, inasmuch as he had no part in the Government after July 22, 1941 and the alleged offenses occurred December 7, 1941 and thereafter, said Counts 7 to 17 should be dismissed.

With reference to Counts 18 to 26, the alleged charges are contained in said counts against specific Defendants which group does not contain the name of the Defendant SHIRATORI, and it is assumed that in view of this condition, said counts do not in any way involve the accused SHIRATORI. However, for the sake of clarity, it is requested that his status in this regard be officially recognized by the Tribunal.

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

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

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

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

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

Count 35 should be dismissed on the grounds that from April 1937 until September 1938 the accused was on the waiting list at the Foreign Office and had nothing, whatsoever, to do with governmental operations as shown in Prosecution Exhibit 125, and further that said count designates specific persons among which the accused SHIRATORI does not appear.

Count 36 should be dismissed due to the fact that at the time of the alleged offense contained in said count, the same being the summer of 1939, the accused was in Italy as shown by Prosecution Exhibit 125, and further that said count designates specific persons among which the accused SHIRATORI does not appear.

GROUP TWO -- "MURDER"

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

Counts 39 to 43 should be dismissed on the grounds set forth covering Counts 7 to 17 and Counts 37 and 38.

With reference to Count 44, the same should be dismissed on the ground that the Defendant was a diplomat and had no connections or functions of a military nature, whatsoever, and at no time advocated or became a part of any conspiracies to murder prisoners of war, or crews of ships destroyed by Japanese forces, or any other such alleged charge as contained in said count, and there has been absolutely no evidence, whatsoever, introduced to connect said accused with such atrocities.

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

GROUP THREE -- "CONVENTIONAL WAR CRIMES AND CRIMES AGAINST HUMANITY"

With reference to Count 53 to 55, it is brought to the special attention of the Tribunal that there are specific persons named in said counts among which the name of the accused SHIRATORI does not appear, and further that these counts come within the province of grounds for dismissal as set forth herein covering Counts 7 to 17.

The accused through counsel has substantiated the motions covering all counts with the exception of Count 5 relating to a general plan of conspiracy between Germany, Italy and Japan. Said accused asks that this count be dismissed, and in setting forth the grounds for such dismissal, it will be necessary to relate not only his activities while Ambassador to Italy, but also to give a brief resume' of the action of the accused prior to and after such service as Ambassador to Italy

and set forth predominant facts that exist relative to exhibits heretofore introduced in evidence by the Prosecution relating to the accused's activities in this regard:

Prosecution Exhibit 125 shows that on June 2, 1933, the accused was appointed Minister to Sweden and that on June 28, 1933 he was assigned to similar service in Norway, Denmark and Finland; that he continued in this capacity until April 28, 1937 when at which time he was relieved of this assignment; that thereafter from April 28, 1937 to September 22, 1938 the accused was placed on the waiting list with no duties, whatsoever; that on September 22, 1938 the accused was appointed Ambassador to Italy by UGAKI, Kazushige, the then Foreign Minister. However, before his arrival in Rome, UGAKI resigned as Foreign Minister and ARITA, Hachiro replaced him in this position; that the accused did not arrive in Rome until December 29, 1938, and immediately thereafter the entire Cabinet fell on January 3, 1939 with HIRANUMA replacing Prince KONOYE as Premier. So in view of these facts, that is to say, a new government having been set up after his appointment, of which the Court has ample evidence, it is impossible to believe or even consider that the accused was appointed Ambassador to Italy for the sole purpose of promoting and concluding the Tri-Partite Pact as alleged by the Prosecution.

In various excerpts from CIANO's diary as submitted by the Prosecution, being Prosecution Exhibits 499-A and 501, the Presecution endeavors to show that the accused was attempting to conclude said pact. Exhibit 499-A is dated January 7, 1939, and inasmuch as the Cabinet fell on January 3, 1939, it cannot be successfully concluded that the accused had any idea, whatsoever, of the attitude of the new government as pertains this pact. Consequently, this exhibit or evidence should be concluded to be without any basis of foundation. As to Exhibit 501, another excerpt from CIANO's diary, it should be concluded that CIANO was unfamiliar with SHIRATORI's attitude or functions and, consequently, spoke whereof he knew not, inasmuch as in the middle of

the second paragraph on the entry of March 8, 1939 CIANO writes as follows: "OSHIMA and SHIRATORI have refused to communicate through official channels. They ask Tokyo to accept the pact of alliance without reservation otherwise they will resign and bring about the fall of the Cabinet." The absurdity of this statement appears upon its face, and we have to this day to hear of any cabinet or government falling or even tottering upon the resignation of any ambassador.

According to Prosecution Exhibit 125, the accused SHIRATORI was ordered home from Rome September 2, 1939 and arrived in Tokyo on October 13, 1939 and that on January 9, 1940, was relieved as Ambassador to Italy. He remained in an inactive status in the nominal role of Ambassador with no assignment on one-third salary until August 28, 1940 when upon his own request he was released from this duty. On this date according to said exhibit, he was appointed adviser in the Foreign Ministry and his activities thereafter bring us to various prosecution exhibits heretofore introduced relating to purported communications from the German Ambassador to Japan, one Eugene OTT, to the German Foreign Office. The Tribunal should bear in mind that OTT for a number of years tried to conclude an alliance between the German Government and the Government of Japan, and remained as Ambassador over a period of several years. During this time, he sent glowing and enthusiastic communications to his Government describing the progress he was making and in a number of instances mentioned the assistance he was obtaining from the accused SHIRATORI and also from time to time enumerated the power, authority, and influence that the said SHIRATORI carried, but upon consideration of the fact that over this long period of time the said OTT was able to accomplish absolutely nothing in the way of any alliance between his Government and that of Japan, it must upon its face be concluded that the said OTT sent communications which belied the facts and distorted the truth in an effort to conceal and cover up his own shortcomings.

It is further brought to the attention of the Court that fully one year elapsed from the time SHIRATORI left Rome in September of 1939 until September 1940 when the Tri-Partite Pact was concluded between Foreign Minister MATSUOKA and the then German Special Envoy Heinrich STAHMER. It is the contention of the Defense and should be the general knowledge of the Tribunal that Ambassador Heinrich STAHMER, who first came to Japan as a Special Envoy, was sent here by his Government to determine what the true facts were and indicated very strongly that after such a long period of time and after such glowing and enthusiastic reports from the said OTT, as aforesaid, with absolutely no results, the German Government was likewise cognizant of the fact that OTT had been "doctoring" his communications. As to the conclusion of said pact, we think the Tribunal will take judicial notice of the fact that Foreign Minister MATSUOKA was a man of strong and domineering will and did not seek or consider the advice of anyone and acted absolutely upon his own volition and that the accused, as adviser to MATSUOKA, was neither considered, required, nor otherwise used in any respect, form, or manner as an adviser of the said MATSUOKA and in his said capacity, under the circumstances, wielded no influence, whatsoever, on the Foreign Policy of his Government.

We therefore request that all communications of said OTT heretofore introduced by the Prosecution be adjudged to be not founded on facts but to have been a ruse and a sham on the part of the said OTT to cover up his failures and shortcomings.

The Prosecution has made a great deal over various written articles and statements alleged to have been written or made by the Defendant SHIRATORI, but at no time have they introduced any evidence to show that any article or speech made by the said accused was in behalf of or formed a part of a policy of the Japanese Government. Such speeches and articles were strictly the personal opinion of the said accused and we contend that he was well within his right of exercising that prerogative guaranteed to every man in every democratic country in this world -- that of freedom of speech and expression, and in no way has the Prosecution shown such articles or speeches to be a part of any conspiracy on the part of the said

accused or that such influenced in any way the decision and policies of the Japanese Government.

It is further called to the attention of the Tribunal that throughout the entire presentation of the Prosecution's case, the said Prosecution has not produced one live witness to testify against the accused SHIRATORI nor has the Prosecution produced even one sworn statement against the said accused.

And in conclusion, we wish to impress upon the Tribunal that the Defendant SHIRATORI never held but one ambassadorial post, his other activities outside of Japan being just a Minister; and that this ambassadorial post which was served in Italy was for only a period of a little over eight months. In view of such limited service, it is impossible to conceive that he was a man of such influence and authority and of having such a great part in the formulation and direction of the foreign policies of the Japanese Government as the Prosecution tried to lead the Tribunal to believe.

Respectfully submitted this 22nd day of January 1947.

COUNSEL FOR THE DEFENDANT SHIRATORI:

NARITOMI, Nobuo

SAKUMA, Shin

HIROTA, Yoji

CHARLES B. CLUDLE

T 5 j 5

If I amy have the pribilege of one more comment. The Chief Chief Prosecutor and his extremely able and conscientious staff consisting of fine jurists and lawyers from many nations have performed a tremendous task with credit.

That they have failed to make out a case against the accused is not due in anyway to their lack of integrity or resourcefulness. No prosecution in all history, nor all the great prosecutors of all time combined here in this court of justice could with the material at hand prove these defendants guilty of the acts alleged to be crimes under this Indictment. Under existing law it is humanly impossible to do so.

MEMORANDUM

Paper No. 711

BRIEF OF AUTHORITIES

MOTION TO DISMISS INDICTMENT AND COUNTS

BY

OWEN CUNNINGHAM

AMERICAN COUNSEL FOR OSHIMA, HIROSHI

JANUARY 27, 1947

1. That the evidence fails to show that the accused OSHIMA was a party to any agreement, plan or conspiracy which had for its purpose the initiating or waging of any war of aggression.

In support of Paragraph I of the accused OSHIMA's "Motion to Dismiss" the following quotation is taken from page (i), Appendix E of the Indictment.

"Statement of Individual Responsibility
For Crimes Set Out in the Indictment.

The statements hereinafter set forth following the name of each individual defendant constitute matters upon which the Prosecution will rely inter alia as establishing the individual responsibility of the defendants."

"OSHIMA:

The defendant OSHIMA between 1928 and 1945 was, among other positions held:- Military Attache in Berlin (1936); Ambassador to Germany (October 1938 to October 1939); and again from February 1941 to April 1945."

From Exhibit 121 is cited the following vital data relied upon by the Prosecution:

"1934 Mar. 5	Appointed Resident Attache to the Imperial Embassy in Germany (Cabinet); In addition appointed Resident Officer in Germany of the Army Technical Research Headquarters; In addition appointed Resident Officer in Germany of the Army Air Headquarters (War Ministry);
1938 Oct. 8	Appointed Envoy Extraordinary and Ambassador Plenipotentiary in Germany (Cabinet);
1939 Dec.27	Resigned from the regular post (Cabinet)
1940 Dec.20	Appointed the Envoy Extraordinary and Ambassador Plenipotentiary in Germany (Cabinet);
1941 Apr.12	Appointed in addition the Envoy Extraordinary and Minister Plenipotentiary in Slovakia (Cabinet);
1946 Feb.19	Resigned from the regular post (Cabinet).

2. <u>The evidence fails to show that the accused OSHIMA was a member of any group, organizations or association which had for its purpose aggressive war or any object which was contrary to international law, treaties, or assurances.</u>

In support of Paragraph 2 of the accused OSHIMA's Motion to Dismiss, reference is made to Paragraph 4, page (i), Appendix E of the Indictment, which states as follows:

> "It is charged against each of the Defendants, as shown by the numbers given after his name, that he was present at and concurred in the decisions taken at some of the conferences and cabinet meetings held on or about the following dates in 1941, which decisions prepared for and led to unlawful war on 7th/8th December, 1941."

The record discloses that the accused OSHIMA was <u>not present</u> at any of the following meetings:

1.	25th June, 1941	(Liaison)
2.	26th June, 1941	(Liaison)
3.	27th June, 1941	(Liaison)
4.	28th June, 1941	(Liaison)
5.	30th June, 1941	(Supreme War Council)
6.	2nd July, 1941	(Imperial)
7.	7th August, 1941	(Thought Control Council
8.	22nd August, 1941	(Cabinet)
9.	6th September, 1941	(Imperial)
10.	17th October, 1941	(Ex-Premiers)
11.	28th November, 1941	(Liaison)
12.	29th November, 1941	(Ex-Premiers)
13.	1st December, 1941	(Imperial)
14.	1st December, 1941	(Cabinet)

Doc. 527 of the Record re Meeting 12 July 1940
".....The Foreign Office gave instructions to Ambassador SATO.....Ribbentrop said that he could not understand in the least what Japan was after

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

In support of Para. 3 of the accused OSHIMA's Motion to Dismiss reference is made to Article I, Sec. I, of the Charter of the International Military Tribunal for the Far East.

"ARTICLE I. Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

"Diplomacy is an instrument of Peace"
Title III On International Commissions of Inquiry
ART. 9. In differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the contracting parties, who have not been able to come to an agreement by means of diplomacy should as far as circumstances allow, institute a commission of inquiry etc.....Hague Convention of 1907.

"Diplomacy is the art, science or practice of conducting negotiations between nations. It involves tact in conducting any affair. A Diplomat is one employed or skilled in diplomacy."
Funk and Wagnalls Standard Dictionary.

When matters of grave importance threaten the peace between two nations, the negotiations are often transferred to the principals and taken out of the hands of the agents as in the case:

"The conference of the Prime Minister of the United Kingdom with the Chancellor of the German Reich in September, 1938, and the ensuing conferences of those individuals with the heads of the governments of France and Italy, are illustrative. They accentuate the fact that where agreement is necessary in grave matters and immediate concern as a means, for example, of arresting the outbreak of a war that appears imminent, the normal instruments of diplomacy available in the persons of ambassadors or others associated with the foreign service may be supplanted by the heads of the Governments of the States concerned.....
Hyde Vol. II Sec. 410 P 1222

Illustrations: Proposed meeting of Konoye and Roosevelt.

Meetings of Stalin, Roosevelt, Churchill and Kiang Kai-check.

Special missions are usually appointed to handle special assignments:

President Taft to the Pope of Rome on Philippines Case.
Ito's mission to Germany re Abortive Tri-Partite Pact.

4. The evidence fails to disclose that the accused OSHIMA held any position in the Japanese Government to which any criminal responsibility was attached, for acts committed in the performance of the duties of the office; but the proof discloses that he was an Ambassador when all of the acts complained of were committed and therefore immune by virtue of the rights, privileges, and protection afforded his office under the rules of international law - set out more fully in the Appendix attached to this Motion.

James Wilford Garner in discussing treatment of diplomatic representatives following the outbreak of World War I:

"TREATMENT OF DIPLOMATIC REPRESENTATIVES FOLLOWING THE OUTBREAK OF WAR.

On account of the intense bitterness and excitement which prevailed in some of the capitals at the outbreak of the war, the diplomatic and consular representatives of enemy powers were subjected to discourteous treatment and even to gross indignities, in violation of the customary immunities. Practically all writers on international law hold that diplomatic representatives are entitled by a long-established customary rule of the law of nations to have their diplomatic immunities and privileges respected after the rupture of diplomatic relations and until they have had a reasonable time to withdraw from the enemy country and return to their own land. During this period they are entitled to protection and respect, and it is customary to provide special facilities for their transportation to the frontier of the country from which they are withdrawing. If, of course, a minister insists on remaining in the enemy's country longer than is reasonably necessary for him to withdraw, he loses his diplomatic immunities and may be made a prisoner of war."

Garner International Law and the World War
Vol. I. P 39-40

".....in the United States a foreign diplomatic representative is accorded all the immunities, privileges, and exemptions to which he may be entitled by international law. He is immune from the criminal and civil jurisdiction of the United States and cannot be sued, arrested, or punished by the laws thereof; he is exempt from testifying before any tribunal whatever; his dwelling house and goods and the archives of his mission cannot be entered, searched, or detained under process of law or by the local authorities; but real or personal property held by him aside from that which pertains to him as a public minister is subject to the local laws. The personal immunity of a diplomatic representative extends to his household, and especially to his secretaries. Generally his servants share therein, but this

4. - Continued (2)

is not always the case when they are citizens of the United States. The statutes on the subject are contained in Sections 4062-4066 of the Revised Statutes....." Secretary Knox to the Spanish Minister (Riano y Gayangos), No. 97, Jan. 18, 1912, MS. Department of State, File 701.0011/3. Digest of International Law Hackworth Vol. IV, P 514-15

"Declared Secretary Hull, in the course of a statement made public on December 6, 1935:

The immunity of duly accredited foreign diplomatic representatives and their staffs from arrest, detention, or molestation of any sort is a practice the necessity of which has for many centuries been universally recognized by civilized nations. It is furthermore a long-established principle of international law to which the American Government has since the earliest days of the Republic attached the greatest importance. This is evident from the fact that Federal legislation was enacted on this subject by the Congress in 1790 during the first administration of President Washington.

It should be obvious that the unhampered conduct of official relations between countries and the avoidance of friction and misunderstandings which may lead to serious consequences are dependent in large measure upon a strict observance of the law of nations regarding diplomatic immunity. If we are to be in a position to demand proper treatment of our own representatives abroad, we must accord such treatment to foreign representatives in this country, and this Government has no intention of departing from its obligations under international law in this respect."

International Law - C. C. Hyde Vol. 2 P 1267-8

For further reference see Manley O. Hudson "Cases on International Law", 2nd Ed. Pages 778 to 808

"AMBASSADORIAL PRIVILEGES. As a consequence of his being the personal representative of his sovereign, or, in the case of a republic, of the whole people of his country, an ambassador is accorded special distinction."

International Law - C. C. Hyde Vol. 2 P 1309

"OPINION OF ATTORNEY GENERAL CUSHING.....With diplomatic agents thus existing as a class, of recognized legal rights, but ....., and of power, the Constitution of the United States intervenes to lay the foundation of their appointment under this Government, in these words:

'The President.....shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, appoint, ambassadors.....'

4. - Continued (3)

Thus it is perceived that the Constitution, specifying "Ambassadors" only, as examples of a class, empowers the President to appoint these.....without making the appointment of them subject.....to the exigency of an authorizing act of Congress....."

Cases on International Law - Manley O. Hudson 2nd Ed. P 773 and 774

"The long-established privileges and immunities conceded by states to foreign diplomatic agents are not enjoyed by consuls in like degree, there being no representative character attaching to their persons."

International Law - Chas. G. Fenwick 2nd Ed. P 385

"At the present time, the chief difference between an Ambassador and a Minister is one of rank and precedence. In consequence of his being the personal representative of his sovereign or, in the case of a republic, of the whole people of his country, an Ambassador is accorded special distinction.

The American Minister to the Union of South Africa requested that the Department furnish him with any definitions of "diplomatic agent" contained in American law in connection with discussions which he was having with the South African Department of External Affairs in regard to a law to "Define and Provide for the Immunities of the Diplomatic Agents and Consular Officers of Other States in the Union." The Department replied that under the laws of the United States and standing instructions of the Department the following persons were deemed to come within the definition of 'diplomatic officers': 'Ambassadors, Envoys, Extraordinary, Ministers Plenipotentiary, Ministers Resident, Commissioners, Charges d'Affaires, Counselors, Agents, and Secretaries of Embassies and Legations.' It added:

'You should point out, however, that while Attaches are not included in the foregoing definition they enjoy diplomatic immunities in this country including free entry privileges and for all intents and purposes they are assimilated to other diplomatic officers.'

"On the general subject of diplomatic officers, see: Feller and Hudson, Collection of the Diplomatic and Consular Laws and Regulations of Various Countries (1933), 2 Vols; the Harvard draft convention on 'Diplomatic Privileges and Immunities', 26 A.J.I.L. Supp. (1932) 19; Ogdon, Juridical Bases of Diplomatic Immunity (1936); Satow, Guide to Diplomatic Practice (3rd Ed., London, 1932).

A convention on diplomatic officers was adopted at Habana in 1928. Sixth International Conference of American States, 1928; Final Act (Habana, 1928) 142; 22 A.J.I.L. Supp. (1928) 142. The United States is not a party.

4. - Continued (4)

Digest of International Law - G. H. Hackworth
Vol IV Pages 393 - 394

"(a) Diplomatic agents of the first rank, ambassadors, legates, and nuncios are theoretically held to represent the person and majesty of the accrediting sovereign. In states recognizing the papal supremacy, the legal representatives may be given precedence in their class."

International Law - Geo. G. Wilson 3rd Ed.
P 169, Sec. 59

"Certain persons are by practice exempt from foreign jurisdiction, and are under the authority of the state to which they owe allegiance, as in the case of a diplomat and the persons connected with his suite."

Page 132 - Wilson International law

"According to Art. XLVI of the Hague Convention of 1907 for the pacific settlement of international disputes, members of the tribunal selected from the permanent court shall 'In the exercise of their duties and out of their own country, enjoy diplomatic privileges and immunities'."

Hyde - P 1232 Vol II

"In 1933, the Department of State declared that 'under customary International Law, diplomatic privileges and immunities are only conferred upon a well defined class of persons, namely, those who are sent by one state to another on diplomatic missions'."

Hyde - P 1234 Vol II

"It is significant.....that among the rules in which states and the political entities which preceded them, have since the earliest times been ready to acquiesce, were those pertaining to the treatment to be accorded diplomatic officers."

Hyde - P 1211 Part III Vol II

Art. 15 - Draft Convention of the Research on International Law

"When a member of a mission, a member of his family.... is en route to or from his post in the receiving state, a third state shall permit his transit and shall accord him during the transit, such privileges and immunities as are necessary to facilitate it....."

Hudson Cases - International Law - P 794-5

Art. 19 - Convention on Diplomatic Officers

"Diplomatic officers are exempt from all civil or criminal jurisdiction of the state in which they are accredited; they may not, except in cases when duly authorized by their government waive immunity, be prosecuted or tried unless it be by the courts of

4. - Continued (5)

their own country."

Hudson Cases - P 799

Concerning British Commonwealth of Nations

"Diplomatic relationship was born in England..... treaty of July 14, 1520 between Henry VIII and Charles V provided that 'an ambassador in ordinary shall reside in both Kingdoms for confidential communications'."

From 1522-25 Richard Pace resided in Venice with the title 'King's ambassador in Italy'."

See Diplomatic Privilege - 3 Cambridge Law Journal 1929 P 441

"Mr. Frelinghuysen, Secretary of State, in 1884, declared that it was an historical fact that the so-called personal representative character adhering to an ambassador was compatible with the representative of a republic.....regardless of whom the ambassador is supposed to represent - there remains the comparatively simple question, whether he is the representative of the President of of the people, he is in fact, both....."

Page 147 - Basis for Diplomatic Immunity - Ogdon

"Who appoints, and how is the Foreign Service entered?"
Moore, 632, Hyde 418, Wilson 60
U.S. Constitution, Art. II, Sec. 2
U.S. Code, 1926, tit. 22
The American Foreign Service; General Information
Shaw, The Foreign Service and How to Prepare for It, D.S. Press Release, No. 427, Dec. 4,1937
Wigmore Part i

Wharton, I, 92-98, Moore, PP 660-666, 711-714
Hyde, P 423-438, Wilson PP 54, 65
U.S. Code 1926, tit. 22 PP252-255
U.S. Diplomatic Instructions
Harvard Research, vol. II; also, A.J.I.L. XXVI, Suppl. 19 and 193
Wigmore Part I
Jennings, The Caroline and McLeod Cases, A.J.I.L. XXXII, 82
Wigmore Part I.

5. <u>The evidence fails to sustain the charges contained in the Indictment, but it does establish that the accused OSHIMA was the personal representative of the Sovereign of Japan and that his acts were not personal but the acts of state, therefore not punishable under international law by virtue of their very nature.</u>

"As a consequence of his being the personal representative of his sovereign, an Ambassador is accorded special distinction."
Hyde - International Law Vol. II P 1309

"....An ambassador is the highest rank of diplomatic agent and is considered to be the personal representative of his sovereign or the head of his state, while the minister is the representative of his state."
See Digest of International Law-Hackworth
Vol. IV P 394
Also Wilson on International Law-Diplomatic Agents
P 169 (A)

"The privilege and immunities of diplomatic agents are so well established that few questions arise in connection with the head of the diplomatic mission or his subordinates.....the more practical principle of recognizing certain definite exemptions belonging to the diplomatic agent, based upon the necessity of securing for him the fullest possible freedom in the discharge of his official duties."
Fenwick Cases on International Law - P 605

Art. 7 The official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment.
Nuremburg Charter

Compare with "neither the official position of the accused at any time of an accused, nor the fact that an accused acted pursuant to order of his government, or of a superior shall <u>OF ITSELF</u> be sufficient to free such accused from responsibility for any crime with which he is charged but such circumstances.....
Tokyo Charter

6. The evidence fails to show that as a diplomatic agent of Japan the accused OSHIMA received instructions to do anything which was beyond customary diplomatic protocol, or beyond his authority as Ambassador; but has established that all negotiations and instructions were in compliance with the established policy of Japan and in conformance with the laws of Japan and with International Law.

THE DUTIES OF AN AMBASSADOR ARE OUTLINED BY THE LAWS OF ALL NATIONS, FOR EXAMPLE:

"Diplomatic agents have, within the countries to which they are accredited, four major functions to perform:

(a) To establish and maintain friendly relations between the government of the United States and the government and people of that country;

(b) To keep the American Government promptly and accurately informed regarding political and economic developments abroad affecting its interests;

(c) To extend protection to American citizens and to promote just American interests in every proper manner;

(d) To interpret faithfully the viewpoint of the American Government in any question at issue.

.....Diplomatic officers have to deal with the officers of the governments to which they are accredited.....

See Diplomatic and Consular Laws - Feller and Hudson - Vol II P 1253

2. His Majesty's diplomatic representative is, subject to the control of the Secretary of State, vested with full authority over consular offices.....if the instructions be maintained then he must obey them.

No express instructions of diplomatic agent the Ambassador is set out.

Diplomatic and Consular Laws - Feller, etc. Vol I Ch V P 13

CHINA Art. 5. Ambassadors, etc.....shall comply with instructions of the Ministry of Foreign Affairs in performing diplomatic functions between China and the nations to which they are accredited and in supervising members of the Staff and Consuls under their jurisdiction.

Art. 9. Attaches shall comply with the orders of their superiors in handling correspondence, making investigations and making reports.

Id Vol I P 21

6. - Continued (2)

U.S.S.R. Plenipotentiary representatives..... accredited to foreign governments, shall be recalled and appointed by decision of the Central Executive Committee of the U.S.S.R.....letters conferring full powers on chiefs and members of delegations appointed for negotiation and conclusion of treaties shall be signed by the President and Secretary and countersigned by the Peoples Commissar for Foreign Affairs. No specific powers or instructions covered.

Id. Vol II P 1196

NETHERLANDS Before leaving for their posts, the Chiefs of our permanent foreign missions will receive the necessary service instructions.

Id. Vol I P 62

For similar provisions under Japanese Law see note on #10.

Duties of a diplomat?
U.S. Instructions to Diplomatic Officers
Wigmore Part I. No. 39

7. The evidence fails to show that there was any effective collaboration between the German and Japanese Governments, or military or naval forces; but proves that the relationship between the two nations were created by treaties, agreements, and alliances, entered into through the established governmental channels.

TREATY OF COMMERCE AND NAVIGATION 20 July 1927 at Tokyo. Signed by Foreign Minister Giichi Tanaka for Japan; and Ambassador Solf for Germany;

ANTI-COMINTERN PACT 25 Nov. 1936 at Berlin, Signed by Ambassador Kintomo Mushakoji for Japan; and Ambassador J. Von Ribbentrop for Germany;

PROTOCOL BETWEEN JAPAN, GERMANY AND ITALY 6 Nov. 1937 at Rome. Signed by Ambassador Masaki Hotta for Japan; by J. Von Ribbentrop for Germany; and by Foreign Minister Count Ciano for Italy;

CULTURAL AGREEMENT 2 Nov. 1938 at Tokyo Signed by Foreign Minister Hachiro Arita for Japan; and by Ambassador Eugen Ott for Germany;

TRI-PARTITE PACT 27 Sept. 1940 at Berlin. Signed by Ambassador Saburo Kurusu for Japan; by Foreign Minister J. Von Ribbentrop for Germany; and by Foreign Minister Count Ciano for Italy;

PROTOCOL CONCERNING THE EXTENSION OF THE ANTI-COMINTERN PACT Signed by Ambassador Hiroshi Oshima at Berlin on 25 Nov. 1941. Approved 21 Nov. 1941 at Tokyo. Foreign Minister Von Ribbentrop signed for Germany;

TREATY BETWEEN JAPAN, GERMANY AND ITALY - NO SEPARATE PEACE PACT Approved at Tokyo on 8 Dec. 1941; signed by Hiroshi Oshima on 11 Dec. 1941 for Japan; and by Ambassador Alfieri for Italy; and by Minister Von Ribbentrop for Germany. Decided for Japan at Privy Council Meeting reported at page 6355 of official record;

MILITARY AGREEMENT Germany, Japan and Italy 18 Jan. 1942 at Berlin. Signed by Admiral Nobokuni Nomura for Japan; by General Ichiro Banzai for Japan; by General Keitel for Germany; and by General Marras for Italy;

ECONOMIC AGREEMENT Germany and Japan at Berlin 20 Jan. 1943. Signed by Ambassador Oshima for Japan and by Foreign Minister Von Ribbentrop for Germany;

AGREEMENTS CONCERNING COPYRIGHTS Germany and Japan at Berlin on 10 July 1943. Signed by Minister Shin Sakuma for Japan; and by Minister Six for Germany.

"In International Law, treaties bear in some respects a close analogy to contracts of Municipal Law..... treaties have been resorted to by nations for the

7. - Continued (2)

protection or promotion of many interests.....states have been obliged to do for themselves two by two or in small groups, what the community of nations as a whole has been unable to do. Since the defense of national existence is the primary interest of every state, the most important have been those of alliance by which the parties have attempted to secure a measure of protection.....for themselves which the community of nations, in its existing state of organization, was unable to furnish."

Fenwick Text - International Law - P 326

"International Law has long recognized as one of the distinguishing tests of international personality that the state possessing it should be able to contract freely with other states. At the same time it has recognized that a sovereign state, or state holding full membership in the community of nations, may as a matter of fact bind itself by one treaty not to enter into another that might have the effects which the parties agree that it would be desirable to prevent."

Fenwick - Pages 331-332

The distinction between treaties bears merely to the number. International Law knows no formal classification of treaties.

Fenwick - P 330

"Prior to development of modern constitutional governments, there was a clear rule of international law that the agents delegated by their governments to negotiate a treaty must have full powers to conclude a binding agreement. Since the decision of the Monarch was final from the standpoint of domestic law it was only necessary for him to authorize the agent to act in his name, and agreements bearing the signature of the agent became binding forthwith."

Fenwick - P 334

"Note" All treaties must be approved by the Privy Council in Japan, previous to their signing by diplomats.

******In Japan, all treaties are concluded by the Emperor through his plenipotentiaries (Article XIII of Japanese Constitution).

Imperial sanction must be obtained before signing.

Emperor must consult the Privy Council before giving his sanctions.

Art. XIII provides: "The Emperor declares war, makes peace, and concludes various treaties."

Art. VI of the Imperial Ordinance on the organization of the Privy Council: "The Privy Council shall hold deliberations and present its opinions to the Emperor for his decisions on the under-mentioned matters:..... 6 Conclusion of International Treaties.

8. The proof fails to establish that any of the acts complained of in the Indictment were performed in a manner contrary to International Law and custom; but the facts prove that the acts complained of were performed in the manner required and prescribed for the conduct of ambassadors in international relationships by International Law and custom.

"The functions or duties of the diplomatic agent are primarily determined by the municipal law of their home states...a group of functions brings the minister into direct and official contact with the foreign government. Here International Law intervenes to prescribe certain rules of procedure and to impose certain restraints... in the interest of promoting cooperation and preventing friction between the two countries.....

"In no case may the diplomatic representative negotiate with any other officer of the local government (than the foreign minister)....

"In persuance of their function of observing the progress of events in the country to which they are accredited, public ministers are forbidden by International Law to interfere, whether by word or deed, with the internal political affairs of the local government....

"Diplomatic etiquette likewise forbids public ministers to correspond with the press upon matters which are the subject of official communication, or to publish a note or dispatch from their home government before it has been received by the foreign government, or to publish correspondence with the foreign government without requesting its consent in advance....

"Once appointed to his post, International Law prescribes that the diplomatic agent shall be armed with certain documents which are the credentials of his office. A "letter of credence" addressed by the head of the state sending the minister to the head of the foreign state, identifies the minister and designates his rank and the general object of his mission; at the same time, it asks that the minister be received favorably and that full credence be given to what he shall say on behalf of his state.

"International Law contains no positive rules regarding the personal character or qualifications of the persons appointed by a state as its representatives abroad....."

Above quotations from International Law, Fenwick 2 Ed, PP 365-6-7.

"The foreign relations of a state are necessarily conducted by an agent or agents who act either directly or thru subordinates, (see also Hackworth Digest IV, Vol. Ch XIV) .... Each member of the family of nations enjoys a large freedom in determining thru what instrumentalities it will hold [illegible] with the outside world.

"....Accordingly it has been deemed improper for a foreign diplomatic officer to attempt to make official com-

munication to the government thru any channel other than the executive, of which the Secretary of State is the organ...."

From Hyde Int. Law, Vol. II PP 1215-16.

"It is one of the main functions of a diplomatic officer to keep his state informed of the condition of affairs in the state to which he is accredited and to send to his state information of a character to be of service."

Wilson, Int. Law 3d Ed. P. 183 (b).

9. <u>The evidence fails to show that the accused Oshima performed any duties other than those required of his office.</u>

"As the accrediting state has jurisdiction over its diplomatic representative, it may recall the diplomat at pleasure....recall in the ordinary course of events, is merely a routine matter in the succession of officials."

"(c) A complete change of government in a state which has sent out diplomatic representatives....often results in a change of diplomatic agents, on the ground that these representatives are probably not in sympathy with the new government....this is caused by a simple change of parties in control of the administration formerly brought about extensive changes in the diplomatic service in the United States....

"(f) Sometimes a mission is terminated by the diplomatic representative thru request for his passports because of personal reasons. Such action does not break off diplomatic relations...."

Wilson on International Law PP 185, 186.

"War breaks off friendly relations between the belligerent states, and thereby terminates diplomatic relations. Necessary negotiations are under such circumstances usually entrusted to the representatives of third states friendly to both belligerents."

Same as above (B) P. 185.

"The general principle appears to be recognized that a state may for good cause demand of a foreign government that it recall an individual minister who has rendered himself "persona non grata" but the law is not clear as to what circumstances shall give rise to good and sufficient reason .....dismissal is an extreme measure and there is no law governing its justice or injustice in a given case...."

Fenwicks International Law "Recall" P. 379.

"....the state being composite in nature cannot act as a physical unit. It can only act thru designated agents, its public officers, who by reason of constitutional privilege or de facto control, are recognized by other states as the legal representatives of the corporate body. The acts of these officers are attributed to the state and the state is therefore held responsible for them (see note page 203 Fenwick's text), but the officers of the state do not thereby become subjects of International Law; and the rules of International Law do not bind them personally but only upon the state they represent. In like manner, International Law does not deal directly with the individual citizens of the state so that in a legal sense the individuals as such are not contemplated by International Law."

Page 86, International Law, Fenwick "Community of Nations".

10. The evidence fails to prove that the accused Oshima was a policy-maker in the Japanese government, or that he was an official of the government within the contemplation of the amended charter; or that he exercised any governmental political control, or military command over Japanese forces.

Imperial Ordinance No. 280, June 20, 1899 entitled, "Organic Regulations relating to Diplomatic and Consular Officials" is as follows:

"Art. 1. Diplomatic officials shall comprise ambassadors etc. and diplomatic attaches.....

"Art. 2. Ambassadors shall be of 'Shon-nin' rank (of the Imperially commissioned class)..

"Art. 16. Ordinance No. 153 states: 'The Japanese ambassador or minister accredited to the country in which consular officials are stationed may order the suspension of execution of orders issued by consular officials which he considers in contravention of treaties or laws or ordinances, or injurious to the public interest. In such case the ambassador shall immediately report the matter to the Minister of Foreign Affairs."

"The office instrusted with the conduct of International negotiations usually called "the department of foreign affairs" since 1789 in the United States....the chief officer of such a department usually bears the title of minister or secretary. He signs the important documents issued by the head of the state. The functions of officers of the department dealing with foreign affairs are determined by the state, rather than by International Law. (Satow 2d Ed. I Ch. 3.)"

Wilson on International Law, 3d Ed. P. 166.

"The inability of courts to exercise jurisdiction in regard to a sovereign act of a foreign government.... should apply where the defendant is held personally for acts done by him in his capacity as a public official ...though he no longer retains that capacity at the time of the proceedings....or under powers conferred upon him by a foreign state."

From the report of the committee of experts for the progressive Codification of International Law, April 1927. From Publications of the League of Nations ....Legal.

For further points see Vol. 31, Cal. Law Review P. 540.

In the report of the Sub-committee on the Trial and Punishment of War Criminals appointed by the House of Delegates of the American Bar Association, July 20, 1943, published in Am. J. Int. Law, P 663, it is said:

11. <u>The evidence fails to establish any tangible relationship between the accused ambassador and the political administration of Japan; but the record discloses that he served under nine different foreign ministers during his tour of duty as ambassador and that the interpretation and translation of their policies differed according to the policy of the cabinet in power.</u>

"Conspiracy" defined, "It is essential that two or more of the accused agreed on a certain date with the purpose of initiating or waging an aggressive war against a certain country. The agreement must be clearly outlined in its purpose which must be criminal. It must not be too far removed from the time of decision and action and the definite participants must be determined by overt acts of their own. They must have acknowledged the aggressive nature of the war planned against a specific power. The agreement must be of such a nature that it could bring about the result."

Definition of Conspiracy from Nurnburg judgment P.1682.

Query: To what extent does an ambassador participate in the decisions of either government, the one he represents or the one he is accredited (to which)?

Duties....To establish and maintain friendly relations.
To keep his government informed.
To extend protection to his nationals.
To interpret the viewpoint of his government.

To deal only with the head of state and foreign ministers.
To avoid differences.
To follow diplomatic protocol.
To follow implicitly the department's instructions.

"General and special instructions...the diplomatic representative will also receive such general and special instructions as the Secretary of State may deem it necessary to give him for his guidance." See Diplomatic Laws, Hudson & Fuller, P. 1254-5.

"The general negotiations between two states may be conducted thru the diplomatic officers of either of the states in the other, and in some cases both diplomats and both foreign offices may be concerned. Matters particularly appertaining to the state in which a diplomat is, and requiring attention of the local authorities, are usually transacted thru the diplomat residing in the state, as in cases of extradition, where the procedure may be prescribed by treaty."

Wilson Int. Law P. 183 (a) 3d Ed.

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

Exhibit No. 500 from the Record:
"This is a telegram by secret cipher process from Tokyo, 18 February 1939.....Further news concerning Anti-Comintern Pact.....Japanese Cabinet is supposed to have finally decided upon an intensification of the pact...."

Exhibit No. 502
"...time had come in the opinion of the Japanese Army to conclude general offensive alliances..."

Exhibit No. 503, 4 May 1939, from the Record:
".....As far as the strengthening of our relations is concerned, I can affirm that Japan is firmly and steadfastly resolved to stand at the side of Germany and Italy even if one of these two powers were attacked by one or several powers without the participation of the Soviet Union and to afford them political and economic and, to the extent possible to her power, military assistance....."

Exhibit No. 520 from the Record:
".....The head of the European Department of the Japanese Foreign Ministry declared confidentially that the Japanese Ambassador to Berlin had received the direction.....The Ambassador is instructed to suggest.....the Foreign Minister evidently decided on this step, in order to save his policy and to keep the cabinet from the otherwise inevitable collapse....."

Exhibit No. 536 from the Record:
".....Prime Minister Konoye, Foreign Minister Matsuoka, War Minister Tojo together with, member of the previous cabinet, Navy Minister Yoshida, came together and drew up an authoritative foreign policy program for the future cabinet. These 4 men have the decisive positions in the cabinet. Among other things, their foreign policy program contained a rapprochement with the Axis powers....."

13. That the Prosecution has failed to prove the acts of the accused OSHIMA were contrary to law, that they were contrary to the country of his Ambassadorial residence, that they were prohibited in the land of his permanent residence, or that they were in violation of any of the laws of any of the complaining nations at the time of their commission. It is established that the acts of the accused OSHIMA in the performance of his duties were exempt from judicial inquiry in the country of his Ambassadorial residence, were within the law of his permanent residence, and were permitted by international law and custom.

LAW OF JUDICIAL ORGANIZATION OF JANUARY 24, 1877

Revised March 22, 1924

Section 18
"Domestic jurisdiction does not extend to the chiefs and members of missions accredited to the German Reich....." Feller & Hudson Vol. I P 563

PENAL CODE OF MAY 15, 1871

Sec. 104
"Whoever is guilty of an insult to any envoy..... accredited to the court.....shall be punished with imprisonment up to one year....."
From Diplomatic & Consular Laws for Germany
Feller & Hudson Vol. I P 562

CRIMINAL CODE OCTOBER 1, 1908

Article 92. "Persons who have committed acts of violence or made threats against diplomatic ministers of a foreign power accredited to the Japanese Empire shall be punished with penal servitude for a term not exceeding three years."
Id P727

II. STATUS OF FOREIGN DIPLOMATIC OFFICERS AND CONSULS

AN ACT

For Preserving the Privileges of Ambassadors and others Public Ministers of Foreign Princes and States of 1708

Great Britain
"Whereas several turbulent and disorderly persons having in a most outragious manner insulted the person of his excellency Andrew Artemonowitz Matueof ambassador extraordinary of his Czarish Majesty Emperor of Great Russia her Majesties good friend and ally by arresting him and taking him by violence out of his coach in the publick street and detaining him in custody for several hours in contempt of the protection granted by her Majesty contrary to the law of nations and in prejudice of the rights and privileges which ambassadors and other publick ministers authorized and received as such have at all times been thereby possessed of and ought to be kept sacred and inviolable.

1-2 (Repeated by 30 and 31 Vict., C. 59)
3. "And to prevent the like insolences for the future declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince

13. Continued (2)

"or state authorized and received as such by her Majesty her heirs or successors or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods or chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatsoever."
Diplomatic and Consular Laws and Regulations
Feller and Hudson Vol. I Pages 211-12

II. STATUS OF FOREIGN DIPLOMATIC OFFICERS & CONSULS
DECREE OF 13 VENTOSE, YEAR II (MARCH 3, 1794)
Relating to the Envoys of Foreign Governments

FRANCE
"The national convention forbids every constitued authority from interfering in any manner with the persons of envoys of foreign governments; the claims which may arise against such envoys shall be brought before the Committee of Public Safety which alone is competent to give judgment thereon."
Diplomatic and Consular Laws and Regulations
Feller and Hudson Vol. 1 P 536

"The primary purpose which seems to have been present during the origin and development of diplomatic immunity has been the protection of the channels of diplomatic intercourse. It was their protection which men sought in the beginning and which they have consistently continued to proclaim as the purpose of the law."
Bases of Diplomatic Immunity Ogdon P 207

"States have given their assent to the principle that they may make themselves liable for the protection of an ambassador by receiving him. They have also agreed that within certain limits the local territorial authority will not be exercised over him. In other words, the ambassador enjoys immunity - the State, within certain limits, has no jurisdictional power over him."
Bases of Diplomatic Immunity Ogdon P 202

"In considering the immunities of diplomatic officers it is important to draw a distinction, which it is believed, has not usually been noticed, between measures of punishment and measures of prevention. The theory of diplomatic immunity is not that the diplomatic officer is freed from the restraints of the law and exempt from the duty of observing them, but only that he cannot be punished for his failure to respect them. The punitive power of the state cannot be directly enforced against him. It will hardly be denied however, that it is his duty to respect the laws of the country in which he resides, and that he may in many concievable cases be prevented from doing unlawful acts, for which, if he were allowed to commit them, he could not be punished.

"For failure to observe law, a diplomat may be requested to leave the state, or in an extreme case may be expelled."

13, Continued (3)

"A recent instance of the request of the recall of an ambassador in Washington was that of Dr. Dumba, the Austro-Hungerian, whose recall was requested in 1915 for having proposed plans to his government for instigating strikes in American Munition factories and employing an American citizen as bearer of these proposals".

See Wilson PP 177-179.

See Wharton Sec 84, 106.

See Moore Sec 639, 640, 657.

Hyde Sec. 421, 423, 424 Citing Cases.
Also 426

Wilson #67

See US Code 1926 Title 22 Sec 253

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

In support of the statements made above the accused OSHIMA submits the following brief of authorities:

The rules of land warfare had their beginning by the promulgation by President Lincoln in 1863 of the "Instructions for the Government of the Armies of the United States in the Field." The draft prepared was revised by a board of American officers after its approval by the President and was issued as General Order 100. . . Questions involving knowledge of the laws of international law and particularly those relating to the powers and duties of commanders in respect to the treatment of enemy were constantly arising and in some cases conflicting decisions were rendered by commanders in different fields and at times in different parts of the same field. . . The instructions thus prepared and issued were distributed to the armies and rigorously enforced. . . "Thus it was to the United States and to Abe Lincoln," says Martens, "that the honor belongs in having taken the initiative to define and determine with precision the laws and usages of war." The instructions of 1863 remained in force until 1914 when they were superseded by a new manual entitled, "Rules of Land Warfare" prepared and issued under the direction of the War Department. . . Various obsolete provisions were left out and new rules added to bring the manual into conformity with the Hague and Geneva Conferences. . . The example thus set by the United States was soon followed by other governments which proceeded to issue additions "and manuals of instruction for the guidance of their military commanders." Manuals were issued by Netherlands 1871, by France 1877, and Italy 1896. The Hague Convention of 1899 revived the laws and conditions of war on land imposed on the contracting parties, an obligation to issue instructions to their armed forces which should be in conformity with the regulations annexed to the said convention.

Pages 2 to 4, Garner's "International Law and World War", Volume I.

The regulations laid down:
The two general principles that prisoners of war are "in the power of the official government" as distinct from that of the individual's or corps which captured them and that they must be humanely treated.

Page 478, Fenwick's "International Law."

"The British Manual of Military Law enumerates a list of acts which it denominates as war crimes for the commission of which the authorities should be punished, but it adds that "members of the armed forces who commit such violations of the recognized rules of land warfare as are ordered by the government or commander, cannot be punished by the enemy," but the officers or commanders responsible for such orders may if they fall into the hands of the enemy, be punished."

15. (Continued 2)

This provision also appears in the American rules of land warfare which states in Article 366 as follows:

"Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders; the commanders ordering the commission of such acts or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

Oppenheim "Approves the Rule of the American and British Manuals."

"Whether or not the individual soldier should be held responsible and punished in such cases, there will always, perhaps, be a difference of opinion; but concerning the general proposition that commanders upon whom the responsibility for criminal acts in violation of the generally recognized laws of war, should be held accountable and punished by the adversary in case they fall into his hands, there ought to be no dissent. If it were generally understood in the future that commanders would be so held responsible, it is probable that such orders . . . would be rarer. Provision might well be made for collection information concerning acts in violation of the laws of war and for keeping registers of the names of officers guilty of issuing order under which acts are committed, and the victorious belligerent should require in the treaty of peace the surrender of such persons for trial and punishment."

Pages 487, 488, Garner's "International Law and the World War", Vol. II.

As to the acts which provoke the war, although the responsibility could be definitely placed, the Commission (after the last war) advised that the authorities be not made the object of criminal proceedings. The same conclusion was reached in respect to the violation of neutrality of Belgium and Luxemburg. Finally it was suggested that "for the future it was desirable that penal sanctions should be provided for such grave outrages against the elementary principles of international law." 1/

1/ The two American members of the Commission, Messrs. Lansing and Scott, dissented from the conclusions and recommendations of the commission . . . that they would not consider that a judicial tribunal was a proper forum for the trial of offenses of a moral nature and they objected to the proposal of the majority to place on trial before a court of justice, persons charged with having violated the principles of humanity or the laws of humanity. They also objected to the unprecedented proposal to put on trial before an international criminal court, the heads of state, not only for having directly ordered illegal acts of war but for having abstained from preventing such acts. This would be to subject chiefs of State to a degree of responsibility heretofore unknown to municipal or international law for which no precedents are to be found in the modern practice of nations.

15. (Continued 3)

The two Japanese members of the commission also dissented from certain of the conclusions of the majority and expressed doubt whether under the law of nations offenders against the laws of war, belonging to the forces of the adversary, can be tried before a court constituted by the opposing belligerents.

Page 492, Garner's "International Law and the World War." Vol. II.

"It is necessary in International relations that some person represent the authority of the state. The head of the state whether called Emperor, King, President, or by other title, and whatever the limitation of his authority by local law, may act within legal competence in International affairs on behalf of the state".
See Wilson P. 165.

"A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Art. 3 Hague Convention IV.

(h) "As claims are generally numerous and varied at the close of a war, the treaties of peace provide for their adjustment . . .
Wilson P. 454 Sec. 187.

. . . . "It is true that the army under General Miles, was under a duty to observe the rules, governing the conduct of independent nations when engaged in war - - - a duty for the proper performance of which the United States may have been responsible in its political capacity to the enemy government. If what was done was in conformity of those rules - - - as upon the facts found we must presume that it was - - - then the owner of the property has no claim of any kind for the damages, for in such a case the Commanding General had as much right to destroy the property in question if the health and safety of his troops required that to be done, as he would have had if at the time the property had been occupied and was being used by the armed troops of the enemy for hostile purposes.
See 212 US 297, 306, 309 (1909)

"In a note presented to the Japanese foreign office on March 22, 193_, by the American ambassador, reference was made to the Japanese undertaking in the note of December 14, 1937, to make "indemnifications" for all of the losses sustained, and it was stated that the total amount of such loss was $2,214,007.36. It further stated:
"These figures have been arrived at after careful consideration and represent only the actual property losses and a conservative estimate of the damages resulting from deaths and personal injuries. The amount includes no item of punitive damages." . . .
Re Panay Incident Vol. V. Ch. XVIII
Hackworth P. 686-7-8.

"Governments like individuals are responsible only for the proximate and natural consequences of their acts."
Same citation as above P. 691

"Acts of hostility committed subsequently to the treaty of peace, in ignorance of its conclusion are null and void, and, where possible compensation must be made for them,

15. (Continued 4)

as for any other illegal act."

. . . ."Prior to the world war it was the custom for belligerents to insert in their treaties amnesty clauses. See Hyde P. 582.

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

"International Law governs relations between individual States."
Page 4, Hyde Vol I.

"International Law may be defined as a body of rules regarded by nations as binding upon them and their relations with one another."
Page I, Fenwick's Cases

"International Law, otherwise called the law of nations, is the law of society of States or Nations."
P. I Westlake's "International Law" Vol. I

"The law of nations or international law may be defined as a body of rules and principles of action which are binding upon civilized States and their relations with one another."
P. I J.L.Breirly, Second Edition

This subject is further digested in connection with the motion as it relates specifically to Counts 53 to 55.

18. Re Count I
See Wharton Criminal Law Sec. 230

Re Count 2 - "There must be a government at place"
See 4 Cambridge Law Journal (1932) P 308
"Resort to War, Etc." 28 A.J.I.L. P 43
Also 26 A.J.I.L. P 362

Re Counts 3, 6, 19, 27, 28. Reprisals as distinguished from War.
See Fenwick P. 434 Methods falling short of War.
See Fenwicks Cases PP655 - 660 "Forcible procedure short of War.
See Wharton III Sec. 333
See Moore III Sec 808 VII 1092, 1093, 1168

"MAY SOME RULES OF THE STATE OF WAR BE APPLIED WITH ALL?"
See Hyde II Sec 597, 602
Wilson Sec 101-103
U. S. Congress Joint Res. April 22, 1914
Re War on Mexico
U.C. Code Title 50, Sec 201, 203
"The Prize cases" 2 Black 636
Also A.J.I.L. 1937 P. 642
Also A.J.I.L. Oct. 1945 Bol. 39 P 655

Re Counts 4 and 5
See US vs Bowman US Supreme Court 1922 260 US 94
"We have in this case" it says " a question of statutory construction. The necessary locus, when not specially defined depends upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the Law of Nations. Crimes against private individuals or their property like assaults, murder, burglarly.....and frauds of all kinds, which affect the peace and good order of the community must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it. If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard .....
See Hudsons Cases on International Law P 562

Sec 41 of the Judicial Code (28 U.SCA #102 provides that "The Trial of all offenses committed on the high seas or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought".
Hudsons Cases P. 564

Also "Jurisdiction with respect to crime"
American Journal International Law
Supp. 1935 PP 435-651

Art. 7. "A State has jurisdiction with respect to any crime committed outside its territory, by an alien against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in the exercise of a liberty

guaranteed the alien by the law of the place where it was committed.....

"The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where committed. A.J.I.L. as above under art. 10.

Re Counts 7 to 13, 20, 21, 22, 29, 30 and 31.

"Negotiations do not always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the parties definitely declares himself unable, or refuses to give way, and there can therefore be no doubt that the dispute cannot be settled by diplomatic negotiation".

From Permanent Court of International Justice
Publications of the court, Series "A" No. 2.

"This will also be the case, in certain circumstances if the conversation between the governments are only the continuation of previous negotiations between a private individual and the government."

"Under what conditions has the US made a display of Naval Force to support diplomatic requests?"
Wharton III Sec. 321 Moore VII, Sec. 1091
Wilson Sec. 100
Wilson, Sec. 86, Differences Legal or Political?
Stowell, Japan Attacks the U.S. A.J.I.L. 1942 P87.
Fenwick, "War Without a Declaration" 1937 P. 694

Re Counts 14 and 32 Netherlands

Taking the prosecutions definition of Aggression, "The aggressor being the state which goes to war in violation of its pledge to submit the matter of dispute to peaceful settlement, having already agreed to do so".
P. 22 Mr. Keenan's Opening Statement.

Re Counts 15, 23 and 33 "Republic of France"

"THE PROVISIONAL GOVERNMENT OF THE FRENCH REPUBLIC"
Quotation from the "Agreement for the establishment of an International Military Tribunal"
Vol. XIX Temple Law Quarterly P. 160

"Closely associated with the special problems connected with the acquisition, continuity, and loss of International personality is the difficult and largely unsettled problem of the extent to which one state succeeds to the rights and obligations of another in cases of change in jurisdiction over a given area of territory. Succession between states must be sharply distinguished from a mere succession of governments.....
See Fenwick P 122 "Succession of States"

Re Counts 16, 24 and 34.

"By the Nations Participating in this Trial"
Mr. Keenan's address" P. 1

"Therefore, the above named Nations by their undersigned representatives, duly appointed to represent their respective governments in the investigation of the charges..... pursuant to the Potsdam Declaration and Instrument of Surrender.....
P. 2 Indictment.
Neither Thailand nor Mongolia named nor represented.

No showing that either Nation was party to any of the treaties, conventions or agreements relied upon.

"The governments of the High contracting parties"
Art 29 Geneva Convention

Re Counts 17, 25, 35 and 36. U.S.S.R.

"Soviet Unions paramount Interest in the Far East"
See American Journal of International Law
Volume 39 No 3. July 1945 PP 479-482.
See Yalta Secret Agreement-Roosevelt, Stalin & Churchill

Re Counts 37--44 Inclusive "Said Hostilities were unlawful"

105 (A) War in the material sense exists from the time of the first act of hostilities.

(B) War in the legal sense exists from the time named in the Declaration, and in the absence of the declaration, from the first act of hostilities. An act of hostility is in itself a full declaration of intention; any sort of previous declaration therefore is an empty formality, unless an enemy must be given time and opportunity to put himself in a state of defense; and it is needless to say that no one asserts such a quixotism to be obligatory.
Wilson P. 257
See Garner Vol. I P 37 Footnote I.

.....A Nation is responsible for acts of soldiers, officers and men. Liability extends to personal injuries, deaths, thefts, wanton destruction of property and requisitions. A government is not responsible for malicious acts of soldiers committed in their private capacity, that is when soldiers are not under some form of authority.....
There is no liability for lasses that, within the meaning of International Law, are war losses, in the sense that they are incident to the proper conduct of Military operations.....
Fred K. Nielson, American-Turkish claims settlement Opinions and Report (1937) 23".....Any losses.... resulting from proper conduct of Military operations would be a war loss for which the law would require no compensation.....

".....War damages which are caused in due course in the conduct of hostilities do not ordinarily form the basis for International reclamation"
See Hackworth Vol. V. P 684 "Acts of Regular Forces".

"That the accused unlawfully killed by armed attacks by Japanese armed forces...in time of peace."

"By ordering, causing and permitting....."

See Mr. Keenan's Opening Statement P. 10.

"It is believed to be a sound principle, that when misconduct on the part of persons concerned with the discharge of governmental functions, whatever their precise status might be under domestic law, results in a failure of a nation to live up to its obligations under International Law, the delinquency on the part of such persons is a misfortune for which the nation must bear the responsibility."

For further details see Vo. V, Hackworth, P. 590.

Aside from the Nurnburg decision, the only precedents worth citing on this proposition are the cases which followed World War I, which can be summarized with the explanation given in Fenwick's text on International Law which states as follows:

"By the treaty of Versailles a striking exception to to the customary law was made in the clauses providing for the trial and punishment of the German Kaiser and of individual members of the German Armed forces.... In the case of the Kaiser, the treaty provided that he should be tried for a supreme offense against International morality and the sanctity of treaties" (see Art. 227). The offense was thus not one cognizable in accordance with existing law. A special tribunal appointed by the five leading powers, was to be constituted to try the accused, and was to be guided in its decision "by the highest motives of International policy" 1. (Note, since these "motives" could not be defined on the basis of past practice, it would have been necessary for the court first to formulate the principles by which the accused was to be judged and then try them accordingly)."

"In case of other offenders, the measures provided were legal rather than political.....

"In both cases however, the proposed trials had to be abandoned....The Dutch Government refused to surrender the Kaiser....and the general Ex-post facto character of the provisions of the treaty, lead the Allied and associated powers to yield subsequently to the German request that the accused persons be tried by German judicial tribunals....

"Nevertheless, the general principle that individual members of the armed forces shall, at the close of the war, be held personally responsible for their acts in violation of the laws of war, whether committed on their own initiative or at the command of authority, met with a degree of international approval and

efforts were made to create a new convention rule on the subject...the treaty however remains unratified."

For details see Washington Conference on Limitation of Armaments. Quotations from PP 582, 583, Fenwick.

"TIME OF PEACE"

(A) Has the government a duty to aid in securing redress for wrongs done to its citizens in foreign countries?

See Moore Sec. 973,978, 986, also 543, 971, 972.
Hyde Sec. 271-272.
Wilson #51
Amer. Institute Int. Law 20 AJIL Supp. P. 329

"MURDER BY ARMED FORCES OF ENEMY IS PARADOXICAL"

"DEFINITION OF WAR"

"Much confusion may be avoided by bearing in mind that fact that by the term "war" is meant, not the mere employment of force, but the existence of the legal condition of things in which rights are and may be prosecuted by force...Thus, if two nations declare war, one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against another, as in the case of reprisals, and yet, no state of war may arise. In such a case there may be said to be an act of war, but no state of war. This distinction is of the first importance, since from the moment when a state of war supervenes, third parties become subject to the performance of neutrals, as well as to all of the inconveniences that result from the exercise of the belligerents' rights."

See Wilson #102
Hyde II #597
Moore VII #1100, P. 153.

18. (4)
Re Counts 53, 54, 55.
Objection to the consideration of.....11,405 record.

....of any evidence relative to the commission of any Conventional War Crimes, especially those which have a definite geographical location....

Robert Jackson in his report to President Truman concerning the Nurnburg case covers this point as follows:

"The responsibilities you have conferred on me extend only to "the case of major criminals whose offenses have no geographical localizations and who will be punished by joint decision of the governments of the Allies" as provided in the Moscow Declaration of November 1, 1943, by President Roosevelt, Prime Minister Churchill and Premier Stalin. It does not include localized cases of any kind....the cases fall into three principal classes:

'1. The first class comprises offenses against the military personnel of the United States...such for example, as the killing of American air men who crash-landed, and other Americans who became prisoners of war. In order to insure effective military operation, the field forces from time immemorial have dealt with such offenses on the spot.....

"2. A second class of offenders, the prosecution of which will not interfere with the major case, consists of those who under the Moscow declaration are to be sent back to the scene of their crimes for trial by local authorities. They comprise localized offenses or atrocities against persons or property, usually of civilians of countries formerly occupied.....3. Traitors, and other criminals.

" The United Nations War Crimes Commission is especially concerned with cases of this kind. It represents many of the United Nations with the exception of Russia. It has been usefully engaged as a body with which the aggrieved of all nations have recorded their accusations and evidence. Lord Wright, representing Australia, is the Chairman of this commission and Lt. General Hodgson is the U.S. member."

"The persons who are to be reached by these charges will be determined by the rule of liability, common to all legal systems, that all who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offenses committed and are responsible for the acts of each other."

(Emphasis ours)

....That the defendant Oshima, during all of the period of hostilities described..was beyond the jurisdiction of this tribunal....

"The defendant Oshima, between 1928 and 1945 was, among other positions held: Military Attache in Berlin, 1936,

Ambassador to Germany (October 1938 to October, 1939) and again from February 1941 to 1945.

Page (i) Appendix (E) of Indictment.

"....by ordering, causing and permitting the armed forces of Japan to attack...in each of the several theatres of war in which Japan was then engaged..."

No showing that the accused was ever near any theatre of war in which Japan was engaged.

....Charter does not contemplate conspiracy to commit this class of crimes (Crimes against humanity and violations of rules of land warfare)

"But the charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war....The tribunal will therefore disregard the charges...that the defendants conspired to commit war crimes and crimes against humanity...."

P. 16884, Nurnburg Judgment.

....And that proof be confined strictly to the individual or personal responsibility of those in charge:

P. 11,405 record.

Garner at P. 486, Volume II says,..."But the officers or commanders responsible for such orders may, if they fall into the hands of the enemy, be punished."

See Art. 347, FM 27-110.

....That the charter limits the scope of this inquiry to bring to justice only those individuals whose acts were beyond the jurisdiction of the other courts organized for the punishment of offenses against the rules of land warfare and crimes against humanity...(P. 11,405, Record)

Art. 3. Proclamation 19 January, 1946 creating this tribunal says, "Nothing in this order shall prejudice the jurisdiction of any other International, National, or occupation court, commission, or other tribunal, established, or to be established in Japan, or in any territory of a United Nation, with which Japan has been at war, for the trial of war criminals...."

Unless the record establishes "conspiracy" then there is nothing in this case for this court to try.

"There are two issues involved: (1) the fact of conspiracy; and (2) who were parties to it?

Mr. Keenan's opening speech, P. 32.

Under this statement, the evidence under Crimes against humanity and violations of the rules of land warfare is superfluous.

....That the rules of land warfare prescribe that the character of the courts which have jurisdiction over military offenses depends upon the local laws of each country;....(P. 11,406).

In re Yamashita, Chief Justice Stone declared:

"We are not here concerned with the power of military commissions to try civilians." P. 5 Opinion.

"There are under the Constitution three kinds of military jurisdiction....the second may be distinguished as Military Government, superseding, as far as may be deemed expedient the local law, and exercised by the Military Commander under the direction of the President, with the express or implied sanction of Congress....."

See Ex Parte Milligan 18, Law. Ed. 281.
In Quirin, October 29, 1942, U.S. Sup. Ct.

Prosecution has failed to prove that the complaining nations have performed their reciprocal obligations under the rules of land warfare, before having recourse to complain against the Japanese.

"At the opening of a judicial proceeding directed against a prisoner of war the detaining power thereof as soon as possible and always before the date set for the opening of the trial shall advise the representative of the protecting power."

See 31 Cal. Law Review, 1943, P. 564.

19. The evidence proves conclusively the following:
(A) That the Japanese form of government with its checks and balances provides a system which is incompatible, irreconcilable with the theory of conspiracy charged by the complaining nations against the accused Oshima in this cause.

See Japanese Constitution.
Organization of Privy Council.
Separation of Powers.
Constitution and Procedure of Cabinet.
Bureaus, Ministries, Departments.

(B) That the foreign policy of Japan was always in the hands of the Government alone.

The foreign policy of a nation is not a proper subject of judicial inquiry of other nations as shown by Mr. Justice Murphy's statement in the Yamashita case:

"This doesn't mean, of course, that the foreign affairs and policies of the nation are a proper subject of judicial inquiry."

"A well-known rule of municipal law and of International Law establishes a presumption of the propriety of the conclusive proof necessary to establish complaints against officials in connection with International claims espousedoby one government against another ....In speaking of the government, I mean the executive who must be presumed to be acting in accordance with law and whose acts, those dealing with the government, are justified in treating as acts of the government....."

US vs Turkey, Neilsen's opinion at P. 561, V. 5
Hackworth's edition on Acts of Civil Authorities.

(C) That the acts complained of as respects the accused OSHIMA were committed in the lawful exercise of his function as the agent of a sovereign nation.

See Annotations under #8.

(D) OSHIMA had no power or influence.

See abortive Pact.
Resignation 1939-1940.
See Matsuoka's series of interrogations.

(E) That the decisions leading to war were accomplished through the established government channels.

See Constitution.
Imperial Rescript.
Conferences leading to decisions as set out in the Indictment.

(F) All international differences had been judicially and politically adjudicated....

"In the international sphere and in the sense of International Law, negotiation is the legal and orderly administrative process by which governments in the exercise of their unquestionable powers, conduct their relations, one with another and adjust their differences.."

Page 2, V. VI, Hackworth's Series.

"....WAR is not the release of primitive combative instincts; it is an enterprise conducted for purposes consciously understood, whose realization gives to it its only rational significance...."

Quotation from Judge Learned Hand, one of America's greatest jurists.

"....The existence of a condition of war must be determined by the political department of the government, and the courts will take judicial notice of such determination and be bound by it...."

See comment by Hyde, P. 734, Sec. 220.
A Treaty of Peace.....

"Usually provides for the settlement of the differences which have lead to the war."

Wilson, P. 451.

20. The record fails to establish the following vital elements of proof which are indispensable to the proper exercise of the authority of this Tribunal over the acts complained of in the Indictment.

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

"It is not in our tradition for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place, or in language not sufficient to inform him of the nature of the offense.....

Re. Yamashita Rutledge dissenting Opinion P.3

"International Law cannot bear novel theories and subtle questionings. Harmless as they may be in the sphere of Municipal Law, where they dash their waves with a pleasing splash against the solid rocks of daily practice, they are infinitely mischievous in the realm of International Law, where intercourse is sparse and rudimentary, and where the common understanding, so painfully created and established rests to a great extent upon accepted theories."

Baty - Canons of International Law - P 27-29

Reported in 38 No. 2 - A.J.I.L. P 287 footnote

(2) That the complaining nations are authorized to join in this proceeding.....

Scott, Judge, "This case comes up on a demurrer, and raises the question whether a foreign sovereign can sue in our courts.....Kings have been allowed to sue in the U.S.....Our tribunals afford no assistance in the enforcement of the penal codes of foreign nations, nor would they aid despotic rulers, in the exercise of an arbitrary power, in making special and retrospective laws affecting foreigners residing here, who were once their subjects.....Foreign nations have the same right to determine the form of government most conducive to their happiness that we have, and to deny the validity of their laws, because they have not made in a manner conformable to our notions of government, would be to destroy all comity among nations and introduce endless wars and quarrels....."

See Page 496 - Hudsons Cases. Quotation from "Jurisdiction of States Over other States", King of Prussia vs. Kueppers Administrators U.S. Supreme Court of Missouri 22 No 550

Emperor of Austria and King of Hungary vs. Day et al

"In the first place they deny the right of the plaintiff as a sovereign prince to maintain this

20. - Continued (2)
suit, and if the suit were instituted merely to support his political power and prerogatives, or for any alleged wrong, sanctioned by the Government of England, I should acquiesce in that position.....but the argument failed to satisfy my mind that this court can or ought to interfere in aid of the prerogatives of a foreign sovereign....."

Great Britain, High Court of Chancery
3 de Gex, etc. 217.

"The question raised by these proceedings, which came before the court by way of motion, was whether the English courts would recognize and enforce a claim in England by a foreign state against the subjects of the foreign state in respect of revenue due from the foreign subject....."

Claim not allowed.....and as the sovereign state has submitted to the jurisdiction.... must pay the costs.

See P 594 - Hudsons Cases

(5) Prosecution has failed to establish that "That the amended Charter is in compliance with the Potsdam Declaration."

"If individuals who are morally responsible for this war, the persons who have, as organs of state, disregarded general or particular International Law, and have resorted to or provoked this war, if these individuals as the authors of the war shall be made legally responsible by the states, it is necessary to take into consideration that general International Law does not establish individual, but collective responsibility for the acts concerned, and that the acts for which the guilty persons shall be punished are acts of state.....that is, according to International Law, acts of the governments command or with its authorization."

Vol 31 Cal. Law Review P 538

See 1 Oppenheim - P 274 Note 4. for Review of Acts of States and Individual Responsibility

"The extent to which the power to prosecute violations of the Law of War shall be exercised before Peace is declared rest, not with the courts, but with the political branch of the government, and may itself be governed by the terms of an armistice or the treaty of Peace. Here, Peace has been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trial of those guilty of the "Laws of War".

See Justice Stone's opinion Re. Yamashita, P 8

".....unless the charge against him is of a violation of the law of war....."

20. - Continued (3)

(7) Have failed to establish "That the presumption of self-defense was overcome"

".....Political considerations may project themselves and serve effectively to remove the problem from the domain of law to that of politics..... accordingly it cannot be confidently maintained that in general the more enlargement or broadening of military power by an independent state, confined to acts committed within the limits of its own territory, is as yet in practice deemed to constitute internationally illegal conduct....."

See Hyde Vol i P 238

"The time has not yet arrived" says Mr. Wigmore in his review and digest of the "The Law for a State of War" (but it is approaching) he says, when an international tribunal of law will have full jurisdiction. Until that time arrives war will remain the ultimate mode of self-redress, but it will be conducted under rules accepted by general international custom."

(8) "That the appointing authority over the persons of the accused."

"By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the articles, Congress gave sanction, as we held in ex parte Quirin, to any use of military commissions contemplated by the common law of war."

In re. Yamashita

".....being an incidentof war, military occupation confers upon the invading force the right to exercise control for the period of the occupation. It does not transfer the sovereignty.....but simply the authority or power to exercise some of the rights of sovereignty. from the necessity of maintaining law and order....."

FM 27--10 Vol VI Hackworth Ch XX War

Also note 35 Vol 31 Cal. Law Review P 562 covers this point.

(9) That the members of the Tribunal are legally appointed and sworn to administer any established system of laws, universal in character, enforcible by judicial order, or that the scope of the inquiry is unlimited.

"Only a court established by an International Treaty, to which not only the victorious nations but also the vanquished contracting parties, will not meet with certain difficulties which a national court is confronted with....."

(Same as above)

(10) "That amended Charter is not sufficient evidence of the court's power"

20. - Continued (4)

See General Order Number One - Jan. 19, 1946

Art. 2. The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

Corrected copy amends this provision. These documents not on record.

Amended Charter, 26 April 1946, unsigned, mimeographed and not certified as a true copy.

No authority contained for amendment.

(11) No agreement on file between nations complaining

See Nurenburg Agreement

See World Court Charter and creditials of agents

See Charter of Permanent Court of International Justice.

28 January 1947

From: Owen Cunningham

To : Whom It May Concern

SUBJECT: Corrections in Oshima's Motion To Dismiss

Page 2, Par. 3, Line 2 "all times" to "the times"

Page 2, Par. 4, and 5 delete "all the".

Page 4, Par. 13, Line after, after "prove" insert "that".

Page 4, Par. 13, Line 3, Insert "law of" before country.

Page 5, Par. 18, middle page eliminate figures (19).

Page 6, Par. 18, middle page eliminate figures (13) (23) (33)

Page 7, Par. 18, Eliminate from line 2 beginning with "It is to" honestly entertained.

Page 9, Par. 20, Strike and add the following "The record fails to establish the following vital elements of proof which are indispensible to permit a finding by the Tribunal that the evidence offered by the prosecution is sufficient to find the accused Oshima responsible under any of the Counts in the Indictment". (1) etc.

Page 17, Par. 15, Line 2 Insert "Pacific" before "War".

Page 18, Par. 16, Line 2 change "and" to "to".

Same page Par. 16, (2) Line 4, Delete "neither" insert "only the latter".

Last page, fourth line from the bottom delete "but what" insert "That".

28 January 1947

From: Floyd J. Mattice

TO: Whom It May Concern

SUBJECT: Correction in Matsui's Motion To Dismiss

It is requested that the following correction be made in Defense Motion 669 (Motion of the accused Matsui, Iwane, To Dismiss).

On Page 4, Paragraph 12, it is rewritten to read as follows:

"In Count 46 the same charge as in Count 45 is made against the accused MATSUI with respect to the City of Canton on 21 October 1938, and in Count 46 with respect to the City of Hankow, the date of which is 27 October 1938. As to the attack on these cities the evidence does not show that the accused MATSUI had anything whatever to do with those operations. At said times the accused MATSUI had resigned from his post as commander of the Middle China Expeditionary Force and was living in retirement in Japan."

27 January 1947

IMPORTANT NOTICE

To Whom It May Concern:

It is requested that the following corrections be made with reference to defense motion number 685, (Motion To Dismiss Of Shigemitsu, Mamoru.)

Page 2, lines 9-10	To omit Exhibit 246, Record, p.
Page 2, line 13	To insert after et seqq.: Exhibit No. 246, Record p. 3,050
Page 2, line 25	To insert the Record page: 776
Page 3, line 21	To insert 28 July instead of 26 July
Page 5, line 7	To insert the Record page: 7,760 et seqq.
Page 5, line 23	To insert after 1938.: Exhibit No. 273, Record p. 3,685
Page 6, line 13	To insert the Record page: p. 12,872-3
Page 6, line 21	To omit the Exhibit number: 1303
Page 6, line 22	To insert the Record page: p. 14,440 et seqq.

27 January 1947

IMPORTANT NOTICE

Hold For Release

From: F. E. N. WARREN, Defense Counsel.

To: Whom It May Concern.

It is requested that the following corrections be made with reference to defense motion number 698. (Motion Of The Accused Hiranuma Kiichiro To Dismiss.)

On page 5, line 11 from the top of the page, "the year 1941", should be changed to read, "the year 1942".

It is requested that the additional pages attached to this memorandum be substituted for pages six and seven of the copy of the argument now in your hands.

The following corrections have been made:

On page 6 at line 7 from the top of the page, there has been inserted between the date "September 2, 1945" and the words "the accused", the following words, "embraced by counts twenty-nine through thirty-four".

On page 7 of the copy of the motion now in your hands, the first two words which appear "counts thirty-five" have been changed to read "counts fifty-three".

count thirty-five, which alleges a war of aggression against the Union of Soviet Socialist Republics, the evidence shows that the defendant was a member of the Privy Council but wholly fails to show that there was any connection between the defendant or Privy Council with any alleged hostilities against such nation. During the period of time from December 7, 1941 through September 2, 1945, embraced by counts twenty-nine through thirty-four, the accused held no public office, except as previously stated, he did hold the post of Special Envoy of good will to China in 1942 and was appointed to the President of the Privy Council for the second time on April 9, 1945. It is contended that the evidence adduced against this accused with reference to these counts is entirely insufficient to warrant a conviction.

Counts thirty-seven to fifty-two allege murder. We most strongly urge that there is no evidence to connect this defendant with any responsibility in connection with these alleged offences. It is significant that the accused is not charged in counts forty-eight through fifty.

Counts fifty-three to fifty-five, relate to conventional war crimes and crimes against humanity. This accused is named in these counts only insofar as they relate to the Republic of China and the argument that has been advanced with reference to counts thirty-seven to fifty-two would likewise apply to these charges and need not be enlarged upon.

In conclusion it is submitted that there is not sufficient evidence, of a substantial nature, even under the leeway given this Tribunal, to warrant conviction of this accused and therefore respectfully submit that all charges against him ought, in the interests of justice, be dismissed.

Usami Rokuro

Franklin E. N. Warren

Counsel for the Accused.