

Jan 29 - '47

I N D E X

INDIVIDUAL MOTIONS TO DISMISS

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I N D E X

Of

MOTIONS AND ARGUMENT

Direction re:

General Motion to Dismiss

- 1) Supreme Commander Motion, not to be read because necessary facts not there 16662
 - 2) Motion re Jurisdiction to be read so far as:
 - a) it is based on state of prosecution's evidence;
 - b) it raises new points of law not calling for proof of facts; and
 - c) such points of law go to whole of any count 16662
- General Motion to Dismiss the Indictment on behalf of all Defendants (Jurisdiction) 16663

I N D E X
Of
MOTIONS AND ARGUMENT
(cont'd)

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1 Wednesday, 29 January 1947

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3
4 INTERNATIONAL MILITARY TRIBUNAL
5 FOR THE FAR EAST
6 Court House of the Tribunal
7 War Ministry Building
8 Tokyo, Japan

9 The Tribunal met, pursuant to adjournment,
10 at 0930.

11 - - -

12 Appearances:

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

16 For the Prosecution Section, same as before.

17 For the Defense Section, same as before.

18 - - -

19 The Accused:

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

22 - - -

23 (English to Japanese and Japanese
24 to English interpretation was made by the
25 Language Section, IMTFE.)

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

3 THE PRESIDENT: Major Blakeney.

4 MR. BLAKENEY: I resume the argument on
5 behalf of the defendant TOGO with Japanese - German -
6 Italian relations, page 3 of the printed copy.

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

10 Count 4, charging that all the defendants
11 conspired that Japan should, in concert with other
12 nations, wage wars in pursuance of a plan for domin-
13 ation of East Asia;

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

17 Turning to the evidence, we find ourselves
18 concerned with the Anti-Comintern Pact and the Tri-
19 Partite Alliance, and with the question of economic
20 collaboration between Japan and Germany. First
21 considering the Anti-Comintern Pact, we find from
22 exhibit 485 that the defendant TOGO was present at
23 the meeting of the Privy Council which considered
24 and approved it. As is shown by the personnel record
25 (Exhibit 127), he was at that time, November 1936,

1 director of the European-Asiatic Bureau of the
2 Foreign Ministry. What the functions of the Bureau
3 Director in connection with the pact may have been
4 is not disclosed by the exhibit or by other evidence;
5 but the document at all events contains no suggestion
6 that any action was taken or any word spoken on the
7 subject at that time or at any other time by Mr. TOGO.
8 It is doubtless superfluous to state that TOGO,
9 attending the Privy Council meeting as a "commissioner"
10 and not as a Privy Councillor or a Minister of State,
11 had no vote and no voice in the resulting decisions
12 of the council.

13 Moreover, the record is lacking in proof
14 that the Anti-Comintern Pact was in any sense an
15 instrument of criminal aggression. The Pact itself
16 (Exhibit 36) shows on its face that it is directed
17 against the spread of communist ideology; and while
18 the secret agreement annexed to the Pact (Exhibit 480)
19 relates to measures to be taken in the event of un-
20 provoked attack or threat of attack by the USSR, it
21 appears by its terms to be wholly defensive in nature.
22 That the Soviet government and the Communist Inter-
23 national are separate, discrete entities is a point
24 which need not be labored, since it has always been
25 the Soviet contention; the distinction between anti-

1 Communism and Russophobia was well recognized and
2 preserved during the late war by the several United
3 Nations, for whom it would certainly be extremely
4 difficult to discover aggression in the mere fact of
5 the execution of the Anti-Comintern Pact. Exhibits
6 479 and 484, reports of studies of the Anti-Comintern
7 Pact by Privy Council committees, further expound
8 this distinction and elucidate the point. On the
9 other hand, there is nothing in the record to indicate
10 that the secret agreement to the Pact was intended
11 or treated as other than the defensive agreement
12 which it purports to be. Let it finally be noted
13 that in no event could TOGO have conspired, through
14 execution of this pact with Italy, which adhered to
15 it only in November 1937, and then not to the secret
16 agreement (Exhibit 491) -- this after TOGO had ceased
17 to be connected with the European-Asiatic Bureau.

18 Much was made by the prosecution of the
19 fact that the Anti-Comintern Pact was renewed and
20 adhered to by additional nations on 25 November 1941
21 (Exhibit 495) at a time when Mr. TOGO was Foreign
22 Minister. Mr. TOGO was, of course, Foreign Minister
23 at the time; but even if we could concede the existence
24 of an individual responsibility for acts of the
25 government, much more would still be needed here to

1 convict him of any offense. The Pact, as has been
2 pointed out, is itself innocuous; its renewal repre-
3 sents only the continuation of a policy already
4 determined upon and adopted long before TOGO's
5 entry into the cabinet (the renewal itself had been
6 orally agreed to in effect by MATSUOKA in Berlin --
7 see the conversations of MATSUOKA with Ribbentrop,
8 Goering and Hitler, Exhibits 577-583); and above all,
9 there is no showing that the secret agreement, which
10 alone might be considered colorable evidence of
11 aggressive intent, was renewed. The evidence
12 actually invites the inference (which is the fact)
13 that the secret agreement was abrogated when the
14 Pact was renewed (see Exhibit 1,182) -- action which
15 shows the opposite of aggressive intent. The Foreign
16 Minister's explanations before the Privy Council
17 committee, as contained in exhibit 1,182, show that
18 he was the vigorous advocate of abrogation of the
19 secret agreement.

20
21 At this point it may be well to anticipate
22 the reply, in the effort to clarify a somewhat complex
23 point. It will doubtless be contended that Mr. TOGO's
24 advocacy of abandonment of the secret agreement of
25 the Anti-Comintern Pact is of no significance by
reason of the fact that the Tri-Partite Alliance,

1 concluded in September 1940, had replaced the secret
2 agreement. (The Tri-Partite Alliance, identified as
3 exhibit 43, was apparently not offered in evidence.)
4 TOGO did indeed, in making his explanation to the
5 Privy Council, state that the secret agreement had
6 no further utility because inter alia of the existence
7 of the Alliance. But this does not at all mean --
8 despite the ambiguity of his language -- that the
9 Alliance had replaced the secret clause as an imple-
10 ment of anti-Soviet policy; for the Alliance specifical-
11 ly, by its Article V, excludes the suggestion of any
12 such purpose:

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

18 (Exhibit 551 -- explanations given to the Privy Council
19 of the purpose of the Tri-Partite Alliance -- puts it
20 beyond all doubt that the expectation of government,
21 Army and Navy, was that the Alliance would improve
22 Japanese-Soviet relations.) In consequence -- with
23 whatever trivial and unconvincing ring such an argument
24 may fall on our ears -- the only construction which it
25 is possible to put upon these words of Mr. TOGO is

1 that for reasons unexplained Japan desired that some
2 sort of bond with Germany be kept extant, perhaps to
3 forestall a sense of isolation. It is in this sense
4 only that Foreign Minister TOGO's words can be taken,
5 and in this sense they must be taken. So understanding
6 them, we can reiterate that it was TOGO who, from no
7 apparent motive other than proper ones, led in the
8 expunging of the only obligation which was conceivably
9 anti-Russian.

10 It should be mentioned that in the course of
11 this same explanation Mr. TOGO also drew the distinc-
12 tion between the Soviet government and the Communist
13 International. This is the more worthy of note in
14 view of the fact that although it occurred at a
15 secret meeting, where considerable bluntness of ex-
16 pression might be expected, there is nothing in TOGO's
17 words to suggest that he considered the Anti-Comintern
18 Pact to be a covert threat to the USSR. In short,
19 with perfect honesty he accepted at its face value
20 the USSR's contention that the Comintern was a separate
21 entity, with which it had no concern.

22 We are not, of course, directly concerned
23 with the Tri-Partite Alliance, for at the time of its
24 birth Mr. TOGO was Ambassador in Moscow. If there were
25 any real suspicion that he entertained anti-Soviet

1 sentiments, it would be dispelled by reference to the
2 words of Ambassador (to Berlin) KURUSU in June 1940,
3 to a German official, Knoll (Exhibit 522). At this
4 very time when the Tri-Partite Alliance was forming,
5 KURUSU assured the Germans that he and TOGO were
6 "feverishly working" for "improvement in Japanese-
7 Russian relations," and that "the enemy in the North
8 must be made a friend."

9 Much evidence in the record shows affirmatively
10 that with the questions of "strengthening" the Anti-
11 Comintern Pact and arranging the Tri-Partite Alliance
12 Mr. TOGO had nothing to do. Throughout his brief
13 term -- twelve months -- as Ambassador in Berlin
14 these questions were being agitated, but without his
15 knowledge or participation or that of the Foreign
16 Ministry. See the KIDO Diary, exhibit 2,262 (Record,
17 page 16,225): "I heard from the Premier that the
18 German Foreign Minister von Ribbentrop made a very
19 important proposal to Ambassador OSHIMA (Ambassador
20 TOGO was ignorant of this fact)." Reference to exhibits
21 478 and 497, the interrogation of General OSHIMA, makes
22 this clear. OSHIMA -- then military attache, later
23 TOGO's successor as ambassador -- here details the
24 activities of himself and his staff in this matter.
25 He points out that the military attache is not under

1 the jurisdiction of the ambassador but is responsible
2 only to the Army General Staff, and may even carry on
3 negotiations with the military officials of other
4 nations, looking to the conclusion of pacts or
5 treaties relating to military matters, "without
6 going through the ambassador," which, he says, is
7 what was done in this case. Only upon OSHIMA's
8 appointment as ambassador in succession to TOGO
9 were negotiations concerning alliance between Germany
10 and Japan "opened," and only then did they become
11 the concern of the Foreign Ministry. In passing, it
12 might be pointed out that the personnel record,
13 exhibit 127, is inaccurate (as was called to the
14 Tribunal's attention on 25 September,) in showing
15 TOGO continuing as Ambassador to the USSR after
16 August 1940; thus he was either in Moscow or (if we
17 assume that he quitted his post soon after being
18 relieved) holding no governmental position at the time
19 of the execution of the Tri-Partite Alliance, and
20 obviously he can be charged with no responsibility
21 in connection with it.

22 In accordance with Article IV of the Tri-
23 Partite Alliance, Mr. TOGO was on 12 February 1942
24 designated a member of the joint commissions therein
25 provided for (Exhibit 559). His membership was

1 ex officio and his designation took place a year
2 and a half after conclusion of the alliance, two
3 months after commencement of the Pacific war. There
4 is no evidence from which it can be inferred that
5 the commission ever met or functioned, and on the
6 record nothing can be predicated of Mr. TOGO's
7 membership in it.

8 On the question of German-Japanese economic
9 collaboration (with reference especially to trade
10 and commerce in China), a number of documents refer
11 to activities of the defendant TOGO. These need not
12 be discussed individually, but are listed for conven-
13 ience:--I omit reading the numbers--(Exhibits 591,
14 Record, p. 6,585; 592, Record, p. 6,588; 593, Record,
15 p. 6,591; 594, Record, p. 6,597; 595, Record, p. 6,603;
16 597, Record, p. 6,627; and 39, Record, p. 6,625). I
17 do not discuss these memoranda of conversations between
18 TOGO and German Foreign Ministry officials because they
19 all show TOGO's stubborn refusal to concede to Germany
20 anything more in the China trade than most-favored
21 nation treatment -- which is not the economic collabora-
22 tion of conspirators -- and his inflexible opposition
23 to German demands for special economic concessions.
24 I do not discuss this question in detail because the
25 President of the Tribunal, at the time of the reading

1 of the documents, summed up their significance in
2 the statement that, "it is the sort of material the
3 defense might use to show lack of cooperation between
4 Japan and Germany" (Record, p. 6,621). It unquestion-
5 ably cuts the ground from beneath the feet of any
6 effort to show TOGO as a conspirator with Germany.

7 The agreement among Japan, Germany and Italy
8 not to conclude separate peace, entered into after
9 the beginning of the Pacific war (Exhibit 51) is by
10 the very fact of its date no evidence of any warlike
11 designs; once a war has started such agreements are
12 routine among allies. TOGO's direction to his
13 ambassadors to request conclusion of such an agree-
14 ment, to be prepared for the worst once it appeared
15 to his government that war was most probable, like-
16 wise is not probative of sinister intent.

17 There remains to mention exhibit 486D, a
18 memorandum by von Neurath of a conversation with
19 Ambassador TOGO concerning the China affair. While
20 presumably this is offered to show Japanese-German
21 conspiracy toward China, in fact it shows only that,
22 acting under instructions, the ambassador was stating
23 the policy of his government, which was to try to
24 persuade Germany to use her presumed influence by
25 applying pressure on China to make peace. Ambassador

1 TOGO's assertion of Japan's determination to gain
2 military victory over China, as reported by von Neurath,
3 is likewise no more than the reflection of the Japanese
4 policy embodied in the KONOE Declaration (Exhibit 972-A)
5 of a few days later, but already known to him (as is
6 obvious inferentially from Exhibit 486-F). It is sub-
7 mitted that consideration of all the evidence offered
8 in this phase conclusively absolves the defendant
9 TOGO of all charges of conspiracy with Germany and
10 Italy.

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1 Conventional War Crimes

2 In "Group 3" of the Indictment the defendant
3 TOGO is charged with "conventional war crimes and crimes
4 against humanity"as follows:

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

10 Count 54, charging the authorizing and per-
11 mitting of such acts;

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

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

23 It is proved that it was in the name of Foreign
24 Minister TOGO that Japan's assurances concerning
25 application mutatis mutandis of the Geneva Convention

1 and observance of the Red Cross Convention were given;
2 these communications need not be itemized here.
3 Thereafter the Foreign Ministry received and answered
4 various communications relative to the subject --
5 giving replies which in instances seem on the evidence
6 of the prosecution to have been false. But there is
7 a vast abundance of evidence touching upon the point
8 to show conclusively that neither the Foreign Ministry
9 nor the Foreign Minister had any responsibility for
10 management or control of prisoners of war, nor any
11 facilities for independent ascertainment of the facts
12 concerning their lot, nor indeed any reason to dis-
13 believe nor power to disprove the replies to inquiries
14 and protests prepared by the military bureau concerned.
15 The witness General TANAKA twice unequivocally stated
16 that the Foreign Ministry, in receiving and transmitting
17 these documents, acted as a mere "post office". In
18 explanation of this, he said that the Prisoners-of-War
19 Information Bureau and Prisoners-of-War Administration
20 Bureau -- which between them had, as he had previously
21 fully explained, the whole control of prisoners of war --
22 were "both under the jurisdiction of the War Minister";
23 and that having no organization nor authority for in-
24 vestigating protests, the Foreign Ministry could only
25 "relay the decisions reached at the War Ministry by

1 the Army". See also on this point the testimony
2 of YAMAZAKI, Shigeru, especially his statements that the
3 responsibility for action taken on protests was with the
4 bureau to whom the protest was forwarded and that the
5 replies were prepared within the War Ministry and sent
6 to the Foreign Ministry. The testimony of the witness
7 SUZUKI Tadakatsu explains the procedure for dealing
8 with these documents within the Foreign Ministry, and
9 clarifies further the point that the Foreign Ministry's
10 only function was receipt and transmittal of papers.
11 This testimony as a whole is of great importance on
12 this point, but I refrain from more than quoting its
13 salient points and urging that reading the entirety
14 of it will render this point quite perspicuous.

15 The extent of the Foreign Ministry's authority
16 or power in connection with the prisoner-of-war matter,
17 Mr. SUZUKI testified, was the handling of the correspon-
18 dence -- the incoming protests and inquiries, the outgoing
19 answers. This forwarding was done as expeditiously as
20 possible in every instance, and the War Ministry officials
21 concerned were from time to time requested to hasten
22 the preparation of the replies which the Foreign Ministry
23 was to translate and deliver. The Foreign Ministry had
24 no means of obtaining information concerning prisoners
25 of war except as it was provided by the War Ministry.

1 Notwithstanding the Foreign Ministry had no further
2 authority in the matter, it did on occasion make
3 recommendations to the War Ministry authorities, request
4 reinvestigations of various matters, and in general do
5 everything possible to ameliorate the condition of
6 prisoners. Although Mr. SUZUKI's bureau was established
7 after Mr. TOGO had left the Foreign Ministry, the
8 practice of the Treaty Bureau, which had managed the
9 business theretofore, was in all respects the same.

10 During Mr. TOGO's first incumbency of the
11 Foreign Ministry (to 1 September 1942) occurred the
12 notorious "Bataan Death March". It is significant that
13 even the Premier, General TOJO, concurrently Minister
14 of War and as such the superior official of the bureau
15 concerned with prisoners of war, first learned of the
16 Bataan case as late as the end of 1942 or early in
17 1943 (see his interrogation, exhibit 1,980E) -- after
18 TOGO had quit office. If not even the Minister of
19 War had such information, clearly the Foreign Minister,
20 who had no jurisdiction nor responsibility in the matter,
21 cannot be chargeable with notice.

22 The case of the working of prisoners on the
23 Burma-Thailand railway patently concerns the Foreign
24 Minister even less; the affidavit of General WAKAMATSU
25 (Exhibit 1,989) is explicit that this action was decided

1 upon by the Imperial General Headquarters, at the request
2 of the Southern Army, in the summer of 1942. Exhibit
3 475, a report by the War Ministry, also states that it
4 was the order of Imperial General Headquarters; nowhere
5 is it suggested that the Foreign Ministry, or indeed
6 the government itself, had any knowledge of the plan
7 for using prisoners of war in the work. The actual
8 construction was commenced, according to Exhibit
9 475, in November 1942, which is some time after Mr.
10 TOGO had left the Foreign Ministry.

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

22 China, Manchuria and other Asiatic Relations

23 The defendant TOGO is charged by the Indictment
24 with various offences in connection with China, Manchuria,
25 Indo-China and Thailand, as follows:

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

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

6 Count 24, charging the initiation of war
7 against Thailand;

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

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

13 Prior to Mr. TOGO's assumption of the Foreign
14 portfolio he had had no connection with China, Manchoukuo
15 or other Asiatic affairs. In this connection it should
16 be pointed out that although he was, from June 1934 to
17 October 1937, Director of the Foreign Ministry's
18 European-Asiatic Bureau, that Bureau had no connection
19 with the matters here in question. The record of the
20 opening statement on the subject of Foreign Ministry
21 organization is patently garbled, for it states that
22 the duties of this Bureau "pertain only to America";
23 if I may venture to go outside the record to state the
24 fact, the "Asiatic" affairs of concern to this bureau
25 are those other than Chinese and Manchurian.

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

11 As to Indo-China, there were no such diplomatic
12 measures as would concern the Foreign Minister at the
13 time of the opening of the war. The conclusion of the
14 military agreement (referred to by the prosecution --
15 Record, p. 6,724 -- but not in evidence). Other
16 measures vis-a-vis Indo-China which occurred in the
17 interim between his two periods as Foreign Minister
18 (October 1941-September 1942, April-August 1945)
19 likewise do not concern him -- especially as they show
20 that by the end of that period military and not diplomatic
21 relationships concerned that country.

22 THE PRESIDENT: After the words in parentheses
23 in the middle of the paragraph you omitted to read "was
24 of course not within the province of the Foreign Ministry".

25 MR. BLAKENEY: Yes, I am sorry.

1 THE PRESIDENT: But it will appear in the
2 transcript, no doubt.

3 MR. BLAKENEY: Thank you, sir.

4 Perhaps the most significant evidence concern-
5 ing TOGO's attitude toward other Asiatic countries is
6 to be found in the Foreign Minister's speech before the
7 Diet on 22 January 1942 (Exhibit 1,338A). This speech
8 calls for close cooperation of Eastern Asiatic nations,
9 in that respect being a routine piece of war-time
10 propaganda. But it also clearly shows throughout that
11 Japan entertained no aggressive intentions toward those
12 nations, and that Mr. TOGO insisted upon the necessity
13 of observing the rights and dignity of all Asiatic
14 peoples. Parenthetically, it also reiterated the necessity
15 of maintaining the Neutrality Pact with the U.S.S.R.
16 TOGO's true attitude toward the nations and peoples of
17 Asia is most clearly evident in his vehement opposition
18 to the creation of the Greater East Asia Ministry in
19 1942, which led to his resignation of his office in
20 September of that year. See the KIDO Diary (Exhibit
21 1,273); minutes of the Privy Council (Exhibit 687): as
22 well as the opening statement of this phase, explaining
23 the Greater East Asia Ministry.

24 As is set forth in argument of the general
25 motion to dismiss, there is no sufficient evidence

1 proving or tending to prove aggression against Thailand;
2 hence we need not consider whether any connection of
3 Mr. TOGO individually is shown.

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

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Japanese-American Relations.

The counts charging the defendant TOGO 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. TOGO 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. TOGO's motives in entering the TOJO ministry upon its formation in October 1941 have been clearly stated by a prosecution witness. The TOJO

1 government has been widely advertised as a war
2 cabinet ab initio, but the evidence fails to bear
3 out this interpretation: rather it shows that TOJO
4 was enjoined by the Emperor upon his appointment,
5 and was expected by those concerned, to make further
6 efforts for a peaceful settlement with America, even
7 so late, when Japan was already upon the brink of
8 war (KIDO Diary, exhibit 1,154). It was upon this
9 understanding that TOGO entered the cabinet as
10 Foreign Minister. The witness SUZUKI Tomin testi-
11 fied that TOGO told him, in a conversation soon
12 after formation of the TOJO government, that he
13 had accepted office solely upon Premier TOJO's
14 assurance that his policy would be to work for
15 peace, and because on the basis of that assurance
16 he believed that he would be able to bring about a
17 peaceful settlement. This fitted in with the
18 belief which SUZUKI explained that he held, that
19 TOGO had always been an exponent of peace. That
20 the prosecution witness TANAKA Ryukichi also
21 considered TOGO to be a leader of pacific and
22 non-militaristic sentiment is interestingly revealed
23 by his testimony that he approached TOGO in 1942 and
24 urged him to start a political movement to oust
25 TOJO, of whose war policies TANAKA seems to have

1 disapproved.

2 Throughout the diplomatic correspondence
3 between the Foreign Ministry and the Embassy in
4 Washington, as it is exhibited in the evidence, are
5 many indications of Mr. TOGO's efforts to conclude
6 the Japanese-American negotiations successfully.
7 From the mass of such evidence, we may select a few
8 points for mention. (Exhibits 1,163 and 1,164).
9 The new Foreign Minister's instructions to the
10 Ambassador at the beginning of his connection with
11 the negotiations contain a clear statement of his
12 policy of making the utmost possible concessions in
13 a spirit of friendship and conciliation. Ambassador
14 KURUSU was specially sent to Washington to contribute
15 to the success of the negotiations (Exhibit 1,166).
16 TOGO invited Great Britain to take part in the
17 negotiations, in order that all interested parties
18 might be available to ensure a complete settlement
19 (Exhibit 1,174). He made numerous concessions to
20 the opposing demands in the course of the negotia-
21 tions, in an apparent effort to bring them to fruition.
22 (Exhibits 1,165 and others).

23 On the other hand, all the evidence clearly
24 shows that the final outbreak of war between Japan
25 and Britain and America was in spite of, certainly

1 not because of, TOGO's efforts. It is quite clear
2 from the record that long before Mr. TOGO took office
3 in October the situation was so tense that there was
4 the ever-present, explosive possibility of war. The
5 decision of the Imperial Conference of 2 July
6 (Exhibit 558) was a grave one which, as was conceded
7 by the prosecution, had a direct bearing upon the
8 ultimate result, war; that of the 6 September
9 Conference (Exhibit 588) even included preparations
10 for either eventuality, of war or peace, so dubious
11 were the prospects. That, in short, the possibility
12 of war at any time was recognized on both sides of
13 the Pacific is plain from this evidence as well as
14 from numerous references -- which I do not pause to
15 collect here -- scattered through the testimony of
16 the witness Ballantine.

17 In these circumstances, what could a newly-
18 appointed Foreign Minister do to avert war except
19 carry on negotiations with the consciousness that
20 if they ended in failure there could be no peace?
21 Limited as he was by the decisions already taken,
22 as well as by those of the subsequent Liaison
23 Conferences which he himself attended -- but in
24 which, as a matter of course, the newer members
25 (those, in other words, who had not participated

1 in the September Imperial Conference decision) were
2 relatively unimportant -- he could do no more
3 than strive, as the prosecution's own evidence
4 shows that he strove, for a satisfactory formula,
5 and in the end accept the result which was not of his
6 doing, but preordained (compare Ambassador Grew's
7 opinion that Japan would be driven to war by such
8 economic measures as the July freezing of assets.
9 If, when the end came, he voted for the inevitable
10 war, shall we then label him a warmonger?

11 There is the charge that Japan perfidiously
12 professed to be still negotiating in good faith for
13 peace, the while she prepared and launched her war.
14 Since the intention of this charge is to incrimi-
15 nate the Foreign Minister, let us examine it to
16 determine what factual basis it has. The decision
17 for war was made at the Imperial Conference of
18 1 December (Exhibit 588). Until that decision had
19 actually been taken -- by the only body competent
20 to take it -- the Foreign Minister was still work-
21 ing for a solution, as is evidenced by his instruc-
22 tions to his Ambassador to attempt to obtain re-
23 consideration by the United States (Exhibit 1,194).
24 Quite naturally, he continued striving, even there-
25 after, so long as there was any faintest hope --

1 just as did Secretary of State Hull on his side.
2 And although in late November the fleet had been
3 given its orders, in case worst should come to
4 worst (no evidence shows knowledge by the Foreign
5 Ministry of this), yet on the 21st and even on
6 2 December -- significant date, the day following
7 the decision for war! -- the Commander-in-Chief of
8 the Combined Fleet was given instructions by the
9 Naval General Staff for its recall and for the
10 cancellation of the war-plans in the event of a
11 successful conclusion of diplomatic negotiations
12 (Exhibit 809). Is this the scheming of perfidy?
13 Rather, it is submitted, the effect of this evi-
14 dence in sum is to show TOGO earnestly endeavoring
15 to save the situation in the face of hopeless odds,
16 and not to raise even the suspicion of insincerity
17 or duplicity.

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

1 to connect the Foreign Ministry with the deliberate
2 delaying of the communication. The statement by
3 the prosecution that the contents of the message
4 were known in "Japanese Government offices" by
5 6 P. M. of 7 December is supported by no scintilla
6 of evidence that it was so known to the Foreign
7 Ministry; but the testimony of the witness SHIRIO
8 is specific that the orders which brought about
9 the delay in delivery to Ambassador Grew until
10 10:30 P. M. were those of the General Staff. No
11 knowledge of this arrangement by the Foreign
12 Ministry is shown.

13 On the question of the delivery of the
14 final Japanese note in Washington after the com-
15 mencement of hostilities, the evidence is clear
16 that this was contrary to the direct order of the
17 Foreign Ministry. (Exhibits 1,216 and 1,218).
18 TOGO's instructions to NOMURA to make all necessary
19 preparations without fail and to deliver the note
20 at 1 P. M., leave no doubt of the intention of
21 the Foreign Minister; whatever the reason for the
22 delay in delivery until 2:20, it has not been
23 traced to him.

24 It should be added that, not alone under
25 this branch of the argument but in relation to the

1 motion as a whole, other points of greater or
2 lesser concern to this defendant will be presented
3 in argument of the general motion. To the argument
4 of that motion reference is made to the extent that
5 it is applicable. Other minor points might be
6 adverted to, but at the risk of tedium. Suffice
7 it to say that in my judgment the evidence intro-
8 duced in the Pacific War phase not only does not
9 convict TOGO of any deviousness or disingenuity,
10 but on the contrary affirmatively shows him as
11 a sincere worker for the preservation of a peace
12 which, tragically, could not be preserved.

13 It is respectfully submitted that the
14 analysis of the record offered above, taken in
15 conjunction with that contained in the general
16 motion to dismiss, leads to the conclusion that
17 prima facie proof of none of the offenses charged
18 against the defendant TOGO has been made, and that
19 the indictment should be dismissed as against him.

20 THE PRESIDENT: Mr. Blewett.

21 MR. BLEWETT: If the Court please:

22 Now comes the defendant, TOJO, Hideki, by
23 his counsel of record, and moves the Honorable,
24 the International Military Tribunal for the Far
25 East, to dismiss all the charges and counts against

1 him in the Indictment upon the grounds that all
2 the evidence offered by the prosecution is not
3 sufficient to warrant the conviction of this
4 defendant.

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

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

21 The prosecution also asserted it would
22 set out to prove that only positive orders from
23 those accused made possible crimes against humanity.
24 The crux of the prosecution case, and the ob-
25 jective of its evidence, are charges that the

1 accused participated in the formulation and
2 execution of a common plan or conspiracy to wage
3 declared or undeclared war or wars of aggression
4 and war or wars in violation of international law,
5 treaties, agreements and assurances against any
6 country or countries which might oppose them,
7 with the object of securing military, naval,
8 political and economic domination of East Asia
9 and of the Pacific and Indian Oceans, and all
10 countries bordering thereon and islands therein
11 and ultimately the domination of the world.

12 To prove that charge it was prepared to
13 prove the fact of a conspiracy, and that these
14 defendants were parties to it, which burden it
15 assumed.

16 I. Among other charges, in order to
17 prove the facts of a conspiracy and the participa-
18 tion of this defendant therein evidence was intro-
19 duced to prove that in the public school system of
20 Japan a program was introduced to build up a
21 military spirit and to cultivate a concept that
22 the future progress of Japan depended upon wars
23 of conquest.

24 It is submitted that the evidence pre-
25 sented in no manner proves the existence of a

1 conspiracy for any such purpose or that this
2 defendant was in any way involved in such a
3 program.

4 II. A vast amount of evidence was
5 presented concerning the occupation and develop-
6 ment of China and Manchuria by the Japanese and
7 the prosecution attempted here, as was its burden,
8 to prove that the entire movement extending over
9 several years was the direct purpose of a con-
10 spiracy lead and controlled by those accused.

11 It is submitted that the proof offered
12 is insufficient to show the existence of such
13 a conspiracy, and no positive legal evidence was
14 offered to prove that this defendant participated
15 as a leader, organizer, instigator or accomplice
16 in any such plan.
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1 III. Evidence was offered by the prose-
2 cution in attempting to prove as alleged in the In-
3 dictment, that all the defendants acting in a con-
4 certed, specifically directed conspiracy entered
5 into an agreement with Germany and Italy to dominate
6 the world.

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

12 IV. It is submitted that the prosecution
13 has not presented evidence sufficient to prove that
14 all the defendants, acting in concert, conspired to
15 plan, prepare and wage a war of aggression and a
16 war in violation of international law, treaties,
17 agreements and assurances against China, United
18 States of America, United Kingdom of Great Britain
19 and North Ireland, Australia, New Zealand, Canada,
20 India, Philippines, Netherlands, France, Thailand
21 and Soviet Russia.

22 It is submitted that there is no legal
23 competent evidence in the record to prove that this
24 defendant alone or acting with others initiated or
25 waged a war or wars of aggression against the

1 aforementioned nations, including the Mongolian
2 People's Republic.

3 V. As was readily accepted by the pro-
4 secution, in order to convict these defendants for
5 murder it was incumbent upon it to prove that the
6 waging of war was the direct result of a conspiracy
7 to wage wars of aggression, with the object ultimately
8 of world domination. To prove that all deaths con-
9 nected with hostilities constituted crimes of murder
10 it was necessary to prove that all these wars were
11 illegal, and to prove, further, that as to this de-
12 fendant he was individually criminally responsible.

13 It is represented that the prosecution has
14 failed to prove by competent evidence that the war
15 or wars enumerated in the Indictment constitute so-
16 called "wars of aggression," waged as the objective
17 of a powerful conspiracy, and therefore they cannot
18 be classed as illegal wars as charged. As a natural
19 consequence, therefore, there is no proof capable
20 of supporting the allegations of murder and con-
21 spiracy to murder.

22 It is suggested that the prosecution's
23 witnesses and documents conclusively indicate that
24 the Japanese Government and these defendants initiated
25 the proposal to the complaining nations in this

1 Indictment for a peaceful solution of all problems
2 in the Pacific area.

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

8 It is submitted that nowhere in the record of
9 these proceedings has the prosecution offered any
10 competent legal evidence to prove that the defendant,
11 TOJO, as Premier or War Minister issued a single
12 positive order to any Field Commander or to any
13 Prisoner of War Camp Commander to commit or permit
14 any act or acts averred in Counts 53-55 inclusive of
15 the Indictment.

16 If I may be privileged, your Honor, to make
17 one further comment, which has been translated.

18 The Chief Prosecutor and his extremely able
19 and conscientious staff, consisting of fine jurists
20 and lawyers from many nations, have performed a tre-
21 mendous task with credit.

22 That they have failed to make out a case
23 against the accused is not due in any way to their
24 lack of integrity or resourcefulness. No prosecution
25 in all history, nor all the great prosecutors of all

1 time, combined here in this court of justice, could,
2 with the material at hand, prove these defendants
3 guilty of the acts alleged to be crimes under this
4 Indictment. Under existing law it is humanly im-
5 possible to do so.

6 THE PRESIDENT: Major Blakeney.

7 MR. BLAKENEY: Motion to dismiss of UMEZU,
8 Yoshijiro.

9 Now comes the defendant UMEZU, Yoshijiro,
10 and moves the Tribunal to dismiss the Indictment and
11 the several counts thereof insofar as they relate to
12 him, upon the ground that the evidence adduced by the
13 prosecution is insufficient to warrant a conviction
14 upon any of the counts charged by the Indictment.

15 For the convenience of the Tribunal, the
16 argument of this motion will be presented under a
17 few general heads, with reference in each instance
18 to the specific counts of the Indictment concerned.

19 I must ask the Tribunal's indulgence for
20 making a few slight additions to the printed copy.

21 China Questions.

22 The counts of the Indictment charging this
23 defendant with offenses toward the Republic of
24 China are:

25 Count 2, charging conspiracy to dominate

1 Manchuria through the waging of war of aggression.

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

4 Count 6, charging the planning and preparing of
5 war of aggression against China.

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

9 Counts 45, 46, 47, 48, 49 and 50, charging
10 murder in connection with the taking of Nanking in
11 December 1937; Canton in October 1938; Hankow in
12 October 1938; Changsha in June 1944; Hengyang in
13 August 1944, and Kweilin and Liuchow in November 1944.

14 First, considering the Manchuria Incident,
15 we find that General UMEZU had at the time of the
16 Incident been Chief of the General Affairs Department
17 of the General Staff Office (concerned with per-
18 sonnel, organization and mobilization -- Record p.
19 589) for just some six weeks (Cabinet Secretariat
20 personnel record, exhibit 129, Record p. 803). Of
21 the numerous witnesses who testified in extenso to
22 the details of the planning and execution of the
23 Manchuria Incident, not one breathed the name of
24 UMEZU; there is not a suspicion in the record that
25 he had even any knowledge of, far less any part in,

1 this Incident. Counts 2, 18 and 27, therefore, are
2 sustained by no evidence against this defendant.

3 From March 1934 to August 1935 General
4 UMEZU was in China, as Commander-in-Chief of the
5 North China Garrison in Tientsin (exhibit 129).
6 During this time there came into being the "HO-UMEZU
7 Agreement," of which so much has been made in the
8 attempt to establish it as a casus belli and the
9 fount and source of the autonomy movement in North
10 China. The attempt falls very flat. Upon investi-
11 gation, the "agreement" proves to be no more than
12 a military understanding, based upon established
13 treaty rights, made between military commanders in
14 the always troubled arena of North China. So much
15 is conceded by one of the chief witnesses on the
16 subject, TANAKA, Ryukichi (Record pp. 2,144-52).
17 TANAKA says that General UMEZU's purpose in making
18 this agreement was clearly the legal one of im-
19 plementing the Boxer Protocol, under which the North
20 China Garrison had the right and the duty of pro-
21 tecting Japanese nationals and communications, by
22 suppressing anti-Japanese actions in North China; that
23 the intention of the agreement was to establish an
24 atmosphere of peace and quiet; and that "it is a
25 fact that as a result of the HO-UMEZU Agreement

1 the assassination of pro-Japanese Chinese, as well
2 as inflammatory editorials against Japan in Chinese
3 papers, disappeared" (Record pp. 2,145-46).

4 If the object was lawful, what of the means
5 employed? Most of the evidence bearing on the terms
6 and circumstances of the agreement is to be found
7 in the testimony of the witness Goette (Record pp.
8 3,746-50, 3,805-12). This testimony is, to say
9 the least of it, unsatisfactory. The witness says
10 that the agreement was "enacted" on 9 June 1935, but
11 he does not know whether it was written or oral,
12 and in fact confesses that he knows none of its
13 terms (Record p. 3,806), but only "What was carried
14 out thereafter" (Record p. 3,748). By this post hoc
15 ergo propter hoc reasoning we learn that certain
16 Chinese troops were withdrawn from the area; that
17 the political offices which had contributed to the
18 strained ~~Sino~~-Japanese relations were closed; that
19 some Chinese commanders were recalled. But not
20 even the witness himself is entirely convinced by
21 his reasoning; he can't say, for example, whether
22 the removal of the Hopei provincial capital was one
23 of the terms of the agreement, even though the removal
24 followed (Record p. 3,805). Although some Chinese,
25 who remain anonymous, told him that the agreement was

1 forced upon them by the threat of military occupa-
2 tion (Record p. 3,811-12), even after the withdrawal
3 of their 51st Army they still outnumbered the
4 Japanese in the Peiping-Tientsin area by at least
5 25,000 to 10,000 (Record p. 3,807). At the time of
6 the agreement, Ho Ying-chin was "Chinese Minister
7 of War in Peiping" (Record p. 3,746); UMEZU, he
8 "presumes," was "on a special mission" for the Jap-
9 anese Army (Record p. 3,810).

10 In this testimony several points stand out.
11 Ho Ying-chin, as is shown by exhibit 210 (Record p.
12 2,696, from p. 1 of the document, not read into
13 evidence), from Chinese sources, was not Minister of
14 War; he was "Acting Chairman of the Peiping Branch
15 Council of the National Military Council." UMEZU
16 was of course not on a "special mission," and it is
17 almost incredible that a "dean of correspondents,"
18 professing to have an expert knowledge of Sino-Jap-
19 anese affairs of North China, should not know the
20 name of the Commander-in-Chief of the Japanese
21 garrison at such a time of crisis as he alleges this
22 to have been. Mr. Goette is quite sure that the
23 Chinese 32nd Army was withdrawn southward as a
24 "result" of the "HO-UMEZU Agreement" (Record pp.
25 3,748, 3,809), but is again contradicted by exhibit

1 194 (Record, at p. 2,276), which shows it to have
2 been the 51st Army which was withdrawn. It is
3 perhaps a fair deduction from all the evidence that
4 the "HO-UMEZU Agreement" never actually existed as
5 such. No one has seen it; its terms cannot be as-
6 certained; and it appears to have been no more than
7 an agreement between military commanders trying to
8 maintain peace in the face of disturbing incidents.

9 If the "Agreement" did exist, it can scarcely
10 be seriously contended that there has been shown to
11 have been anything sinister in it. The witness
12 TANAKA tried to show that the autonomy movement in
13 North China which followed was grounded upon it, and
14 so it may have been, but that can upon no reasonable
15 construction be imputed to the defendant UMEZU, in
16 view of TANAKA's positive statement of what General
17 UMEZU's motives were during his time as Commander-in-
18 Chief (the first autonomous government was established
19 four months after UMEZU left China -- Record p. 2,147;
20 exhibit 210 -- whence the witness perforce concedes
21 that UMEZU had no responsibility for its establishment.
22 (Record p. 2,151). To what ends those who followed may
23 have perverted his work can be no evidence of way-
24 wardness in him. At all events, there was no sus-
25 pension of Chinese sovereignty as a consequence of

1 this agreement; the army of Sung Che-yuan, who was
2 the appointee of the central government (Record p.
3 3,808) remained in occupation of the area. (Record
4 p. 3,749).

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1 TANAKA, by the way, points out also that
2 whatever responsibility for the agreement rests upon
3 General UMEZU, it is by virtue solely of his position
4 of command, for the ardent advocate of it, to whose
5 hands General UMEZU confided the entire matter, was his
6 Chief of Staff, Colonel SAKAI. That he should have
7 done so is but natural, since he was a man who
8 "dislikes very much to put his finger into politics,"
9 and was "one of our senior officers who has constantly
10 instructed us not to interfere in politics." Thus
11 the much-publicized term "Ho-Umezu Agreement" is a
12 memorial to this defendant's vicarious responsibility
13 for an innocuous settlement which is in large part
14 mythical.

15 One other incident of the North China days may
16 be mentioned. This is the "North Chahar Incident"
17 of June 1935, testified to by the witness Ching
18 Teh-chun (exhibit 199). The only connection with
19 General UMEZU is that according to this testimony the
20 matter was referred for settlement to the headquarters
21 of the garrison force at Tientsin -- where, however,
22 surprisingly, the whole negotiation was controlled by
23 General DOHIHARA. "Surprisingly," because there is
24 no evidence whatever that DOHIHARA was at that time
25 connected in any way with the North China garrison --

1 rather, the personnel record (exhibit 104) shows that
2 he was attached to the Kwantung Army. General Ching,
3 ~~in~~ fact, admitted on cross-examination that when he
4 said that the matter was referred to the Japanese
5 headquarters in Tientsin he meant that it was referred
6 to the Japanese headquarters represented by General
7 DOHIHARA; his surmise that DOHIHARA represented both
8 the North China garrison and the Kwantung Army is
9 hardly evidence of the fact. Ching admits that the
10 matter was not taken up in any other way with the
11 North China garrison headquarters.

12 The commencement of the China Incident in
13 July 1937 found General UMEZU Vice-Minister of War.
14 Since no evidence was proffered to connect him with
15 the hostilities in China, we must assume that it is
16 the contention that his official position establishes
17 his guilt. That the vice-minister has no authority
18 to make important decisions and merely carries out
19 the will of the minister was stated by the witness
20 TANAKA and by the prosecution, and must be self-evident.
21 In no event, of course, had the War Ministry respon-
22 sibility for operations (testimony of TANAKA).
23 Vice-Minister UMEZU is therefore in no way shown to
24 share any responsibility for the China Incident.

25 Lastly, in connection with China, UMEZU is

1 charged with murder as the result of alleged massacres
2 accompanying the taking of a number of cities in China
3 in various years. As to those dating from 1937,
4 the remarks in the preceding paragraph apply -- the
5 vice-minister has no responsibility. As to those in
6 1938, the personnel record (exhibit 129) shows that
7 from May of that year General UMEZU was commander of
8 the 1st Army, the location of which at the time is shown,
9 by exhibit 2282, record at page 16,259, to have been in
10 North China; by no reasoning, therefore, could he be
11 charged on the record with responsibility for events
12 in South China in October of that year. And as to
13 those occurring in 1944, when he was Chief of the
14 General Staff (from July, however; he was in Manchuria
15 when the massacre at Changsha, in South China, is
16 laid by Count 48), there is again no evidence of any
17 order by him or knowledge in him of those events, and
18 it is submitted that there is no ex officio guilt.

19 In connection with Manchukuo, there is much
20 evidence intended to prove that it was but a puppet
21 state under Japanese domination. Two considerations
22 occur here. First, there is the question whether
23 from its inception Manchukuo was a mere false front,
24 rigged by the Japanese for the purpose of furthering
25 their aggressive designs; if this was the fact, then

1 even a commander-in-chief of the Kwantung Army arriving
2 eight years later might be considered a manipulator
3 of the puppets; if it was not, then the position of
4 the commander-in-chief is only that of any military
5 commander carrying out his duties. The chief evidence
6 on this point is that of the witness Pu-Yi. Without
7 taking the time of the Tribunal to analyze it, we
8 may say that cross-examination, together with other
9 surrounding circumstances, shows this testimony to be
10 incredible. The witness repeatedly contradicted him-
11 self, evaded direct answers to questions, took refuge
12 in "I can't remember" and "I said it, but under com-
13 pulsion" and in general made such an impression that
14 even taking his testimony at its face value it is
15 impossible to say that his contentions are borne out
16 by the proof. As to the origin of Manchukuo and his
17 return as a ruler, he is contradicted on the record
18 by the witness Semyonov, who states in his affidavit
19 (exhibit 668) that Pu-Yi suggested to him that he had
20 asked Japanese assistance in restoring him to the
21 throne, and that he himself negotiated with the
22 Japanese on Pu-Yi's behalf. By a curious quirk of
23 procedure, Pu-Yi stands impeached on the record in the
24 matter -- irrelevant in itself, but basically affecting
25 his credibility -- of whether he wrote the letter to

1 General MINAMI, exhibit 278. Inasmuch as the prosecu-
2 tion offered the questioned document in evidence, it
3 assumed the burden of proof of its non-authenticity.
4 This it undertook to prove by the affidavit of a self-
5 styled expert, Chang (exhibits 2176 and 2189).
6 Unfortunately, this "expert" committed the tactical
7 blunder of going beyond the question involved and
8 passing his judgment that another specimen of hand-
9 writing, the Chinese fan (exhibit 282) was not the
10 hand of Pu-Yi. This was a blunder because Pu-Yi him-
11 self had identified the fan as being in his own
12 writing ("That was my own writing I copied from the
13 poem"), which entirely destroys the "expert's"
14 qualifications and leaves the burden of proof assumed
15 by the prosecution unsustainable. On the record we can
16 say only that Pu-Yi is an incredible witness, whose
17 testimony must be ignored.
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1 incident.

2 Nomonhan is readily disposed of. General
3 UMEZU was appointed Commander-in-Chief of the
4 Kwantung Army on the 7th of September 1939
5 (Exhibit 129). If he arrived at his post in Man-
6 churia on the very day of his appointment, the
7 Nomonhan incident had already been in progress for
8 4 months (Exhibit 766). The last battle occurred
9 in August and the incident itself ended within
10 the week after UMEZU's appointment. This looks
11 far more like the initiating and waging of peace
12 than of war -- an interpretation borne out by the
13 absence of any evidence tending to connect UMEZU
14 with Nomonhan.

15 The other Russian question is in connec-
16 tion with General UMEZU's period as Commander-in-
17 Chief of the Kwantung Army. When we embark upon
18 an analysis of the evidence in this phase, we enter
19 the realm of fantasy. The evidence is a mass of
20 affidavits of absent witnesses, some of them dead
21 by their own hands or by the firing squad, only
22 two of whom were produced (with devastating results)
23 for cross-examination; of conclusions, rumor, hints
24 and hearsay; of tendencious studies by Red Army
25 General Staff deputy chiefs of department,

1 prepared for use in this trial; and of charges
2 of aggression leading up to a war in which Japan
3 was attacked. Analysis of this evidence to disclose
4 contradictions, improbabilities and omissions could
5 be protracted to great length, but is quite
6 unnecessary at this stage; reference to some of its
7 high points should suffice to present purposes.

8 The witness TAKEBE (affidavit, Exhibit
9 670), may be taken as typical of many who pro-
10 fessed to say that Japan was plotting -- especially
11 during the years 1940 to 1945 -- aggression
12 against the Soviet Union. The purpose of occupy-
13 ing Manchuria, he says, was to build up a military
14 base against the USSR; and he heard from Commander-
15 in-Chief of the Kwantung Army UMEZU talk of the
16 problem of preparing for war on the USSR. The
17 purpose of the Kwantung Army, he was led to say,
18 was "for attack against the USSR." But this whole
19 structure collapses when the witness is permitted
20 to explain that "the purpose of the Kwantung Army
21 being stationed in Manchuria was for defence";
22 what now becomes of the whole elaborate theory
23 of aggression? General USHIROKU, commander of an
24 army group in the Kwantung Army, knew of no
25 operations plans except defensive ones (Exhibit 703);

1 General KITA heard explanation from UMEZU in late
2 1941 of the war-time duties of his command, but
3 was not told of any time for the opening of a war
4 (Exhibit 835). Lieutenant-General KUSABA, who
5 killed himself in Tokyo rather than face cross-
6 examination, does not divulge how he knew that the
7 1941-1943 "offensive" operations plans were
8 "decided by SUGIYAMA, TOJO and UMEZU" (Exhibit
9 838). (Just by the way, the two witnesses produced
10 for cross-examination on this question both affirm
11 that there was no operations plan vis-a-vis the
12 Soviet Union for 1943. See the testimony of
13 SEJIMA Ryuzo, and of MATSUMURA Tomokatsu.) Major
14 MATSUMURA heard a rumor that the war against the
15 USSR was to start in 1943, but doesn't say why it
16 did not (Exhibit 833). Lieutenant-General TOMINAGA,
17 who to date has been too sick in Siberia to attend
18 for cross-examination, when Vice-Minister of War
19 "drew an aggressive plan against the USSR in 1940"
20 (Exhibit 705); but his meaning is clear from what
21 follows. He "handed it over to the Commander-in-
22 Chief of the Kwantung Army to put into practice," in
23 April 1940; if it was put into practice, it was not
24 aggressive for no war ensued. The renegade Russian,
25 Semyonov, put to death -- after making his affidavit --

1 for treason against his country, discoursed of two
2 and a half decades and all the Orient; but he makes
3 no mention of General UMEZU, confining his claims
4 like the mercenary which he boasts of being only
5 to having dealt with underlings (Exhibit 668).

6 The Kantokuen, Kwantung Army Special
7 Maneuver, was much discussed. TAKEBE asked War
8 Minister TOJO whether the strengthening of the
9 Kwantung Army meant war, but got no answer (Exhibit
10 670); Lieutenant-General AKIKUSA interprets it as
11 having "the purpose of taking military aggression
12 against the Soviet Union by Japan" (Exhibit 743),
13 but that is only his conclusion; he mentions no
14 act of aggression. All the evidence shows that the
15 Kantokuen was a precautionary reinforcement of
16 the forces in Manchuria at a time when international
17 relations were disturbed. White Russians were much
18 in evidence, but no one of them is alleged ever to
19 have fired a shot against his native country.
20 There were spies, of course; there always are.
21 Numerous documents purport to show that the Manchurian
22 railroads and highways were greatly developed after
23 the foundation of Manchoukuo (Exhibit 712), airfields
24 (Exhibit 713), dumps (Exhibit 715), and barracks
25 (Exhibit 716) were constructed and the borders

1 fortified (Exhibit 714), and that the seaports of
2 the country exhibited much growth (Exhibit 718).
3 All utterly consistent with TAKEBE's "the purpose
4 of the Kwantung Army is for defence." We know from
5 other evidence (the testimony of SEJIMA, that during
6 1942, at all events, the strength of the Kwantung
7 Army was hardly more than half that of the Soviet
8 Far Eastern Army; and from the summer of 1943 it
9 was steadily depleted.

10 THE PRESIDENT: We will recess for fifteen
11 minutes.

12 (Whereupon, at 1045, a recess was
13 taken until 1100, after which the proceed-
14 ings were resumed as follows:)
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1 MARSHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: Major Blakeney.

4 MR. BLAKENEY: The Japanese Army, it is
5 charged, had plans for operations against the
6 U. S. S. R. Also, in the eventuality of conflicts,
7 for operations against the United States, Great
8 Britain, the Philippines and perhaps other countries
9 (the testimony of SEJIMA) As the President of the
10 Tribunal noted, general staffs do prepare such plans;
11 such is their function, to be prepared to defend
12 their countries. These plans against Russia were
13 annually drawn and discarded; they were drawn without
14 the assistance of the Kwantung Army, to whom they
15 were sent as its instructions; they contained within
16 themselves no provisions for the commencement of
17 operations, and the Commander-in-Chief of the
18 Kwantung Army was prohibited from commencing operations
19 pursuant to them; and none of them ever did take
20 effect by the initiation of hostilities. The operations
21 plans of the Kwantung Army were drawn by the general
22 staff of that army, in accordance with the orders
23 received from Tokyo (testimony of MATSUMURA). Finally,
24 all such plans after the Nomonhan affair were defensive
25 in nature; see the testimony of TAKEBE that "until the

1 Nomonhan Incident the Kwantung Army had taken an
2 offensive stand towards the U. S. S. R., but after
3 the above incident it changed to an attitude of
4 aggressive defence" (Exhibit 670).

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

12 Pacific War

13 Participation in the Pacific War is charged
14 against General UMEZU by these counts:

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

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

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

24 Counts 13 and 30, charging respectively the
25 planning and preparing, and the waging, of war against

1 the Philippines:

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

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

8 With the Pacific War General UMEZU is shown
9 by the evidence to have had nothing to do prior to
10 his becoming Chief of the General Staff in July 1944.
11 From May 1938 to that date he was out of Japan --
12 commanding the 1st Army or the Kwantung Army -- and
13 if war was planning he is now shown to have been
14 called into council.

15 From July 1944, as Chief of the General Staff
16 of the Japanese Army, he "waged" war beyond any question.
17 This is perhaps not the appropriate time to argue at
18 length the question of the responsibility of a
19 professional soldier for practicing his profession of
20 arms in a war in which he is summoned to participate.
21 Suffice it for now to say, on this point, that in the
22 absence of any evidence that he schemed for war, brought
23 war about, desired war -- or even delighted in war --
24 it seems a shocking judgment which should condemn
25 such a man for merely obeying the command of patriotism

1 and his oath.

2 Prisoners of War

3 The following counts relate to this point:

4 Count 44, charging all defendants with con-
5 spiracy to procure and permit the murder of prisoners
6 of war;

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

10 Count 54, charging the ordering and permit-
11 ting of breaches of the laws and customs of war;

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

15 The conspiracy is, of course, not proved, but
16 like all charges of conspiracy in the case is con-
17 structive at most.

18 The question of the responsibility of the
19 General Staff, and its chief, for maltreatment of
20 prisoners of war has fortunately been made clear by
21 the testimony of TANAKA, Ryukichi. "In Japan the
22 handling of prisoners is quite different from other
23 countries, and the Prisoners-of-War Information Bureau
24 and administration of prisoner-of-war matters were
25 under the supervision of the War Minister himself."

1 In answer to the inquiry concerning the sort
2 of matters handled by the War Minister, "...where
3 to locate POW camps, how to handle prisoners of war,
4 how to promote the health of prisoners of war, and
5 other general treatment of prisoners of war; how
6 to distribute Red Cross messages and parcels, and
7 the question relating to the exchange of POW letters...".
8 "Outside Japan" the policy is "handled by the Chief
9 of the General Staff after consultation with the
10 War Minister"; but: "it was carried out by the various
11 commanders in the field in accordance with the orders
12 and instructions of the War Minister", and "actually
13 the matters were carried out by the commandants of
14 the various prisoner-of-war camps in the field who
15 communicated directly with the Chief of the Prisoners-
16 of-War Information Bureau where the matters pertaining
17 to POWs were disposed of". ". . . matters pertaining
18 to prisoners of war were not connected in any way
19 with operations, but being a policy matter, these
20 matters could be handled directly with the Prisoners-
21 of-War Information Bureau. . ."

22 Plainly the General Staff had no responsibility
23 for control of prisoners, no voice in determining their
24 treatment, and no opportunity to influence it.
25

I make the following insertion:

1 The considerations pointed out above apply
2 with equal force to the prisoner-of-war question
3 in Manchuria so far as General UMEZU, Commander-
4 in-Chief of the Kwantung Army, is charged in con-
5 nection with it, that the matter was not operational,
6 but being administrative was disposed of by the War
7 Ministry; hence, in the absence of proof of any
8 personal knowledge or participation in atrocities,
9 is not chargeable against the Army Commander.

10 The counts above enumerated, charging
11 General UMEZU with responsibility for atrocities to
12 prisoners of war, should be dismissed.

13 Miscellaneous

14 Various conspiracies are charged by the
15 following counts:

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

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

20 The first point, conspiracy to dominate Eastern
21 Asia, will be treated in the general motion to dismiss.
22 Of the second, it will suffice to say that there is
23 not a scintilla of evidence showing UMEZU as a con-
24 spirator with a German or an Italian.

25 It is possibly in connection with these counts

1 that the testimony of KAWABE Torashiro (exhibit
2 2,660), Vice-Chief of the General Staff under General
3 UMEZU at the end of the war, was offered -- "to prove",
4 as the prosecution pointed out, "that the Commander
5 of the General Staff permitted the destruction of
6 all secret documents after the surrender." The
7 point is trivial, perhaps -- especially in view of
8 the cross-examination of KAWABE, who unequivocally
9 states that the destruction of documents was not
10 carried out by order or with knowledge of UMEZU, but
11 was the responsibility wholly of subordinates -- but
12 so is much of the evidence introduced with no apparent
13 purpose other than simply mentioning this defendant's
14 name.

15 THE PRESIDENT: Major Blakeney, there is no
16 such exhibit as 2260. What is the correct number?

17 MR. BLAKENEY: I am sorry, sir. It appears
18 that way in my copy, but I shall try to ascertain the
19 correct number.

20 THE PRESIDENT: Anyhow, you have given us
21 the page of the record.

22 MR. BLAKENEY: That is right, sir.

23 Thus, in the final phase, we find that the
24 subdivision purporting to be "additional proof" against
25 UMEZU consists of:

1 The prosecutor's assertion that UMEZU, "in
2 conjunction with General MINAMI", "engineered the
3 taking over of North China and establishment of
4 the North China Autonomous Government" -- an assertion
5 already dealt with above. There was no evidence of
6 conjoint action by UMEZU and MINAMI. Finally, the
7 prosecution's assertion, the only one supported by
8 any pretence of evidence, that UMEZU was "the leader
9 of the military clique which was responsible for
10 the failure of General UGAKI to form a new cabinet
11 in January 1937." On this point the evidence con-
12 sists of five documents: two (exhibits 2,208A and
13 2,208B) emanating from the Peace Section of the Home
14 Ministry, and apparently introduced by inadvertence,
15 as they have no connection with UMEZU or this case;
16 a speech (exhibit 2,208C) by War Minister TERAUCHI
17 explaining the reasons for his resignation; a talk
18 (exhibit 2,208D) by Vice-Minister UMEZU, stating that
19 the Army opposed General UGAKI but would take no
20 measures to check the formation of a cabinet by him;
21 and a "Notice to the Ex-soldiers' Organization" from
22 UMEZU, explaining the Army's attitude toward General
23 UGAKI, but not evidencing any plot or anything more than
24 that the Army opposed him, which so far as appears is
25 not a constituent of any crime being tried here. In

1 regard to the various snippets of documents showing
2 disbursement of Army funds to, or through General
3 UMEZU (exhibit 2,209 is typical), we can only echo
4 the wonderment of the President (ibid.), "What is
5 the significance of this?"

6 Conclusion

7 It is most respectfully submitted that in no
8 branch of the case does the evidence rise to the
9 dignity of prima facie proof of guilt of the defendant
10 UMEZU. There being no substantial evidence going to
11 connect him with commission of any of the offences
12 laid in the Indictment, it should be dismissed as
13 against him.

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1 THE PRESIDENT: Mr. Smith.

2 MR. SMITH: If your Honor please, I have
3 the second part of the general motion to dismiss
4 and also an argument which covers some of the major
5 legal points raised in the motion. The second
6 part of the general motion contains seventy-three
7 paragraphs, and I would like to have your Honor
8 indicate whether the motion itself should be read.

9 THE PRESIDENT: The general motion should
10 be read so far as it is based on the state of the
11 prosecution's evidence, so far as it raises new
12 points of law which do not call for the proof of any
13 facts, and so far as such point or points of law
14 go to the whole of any count. We must remember we
15 are dealing with motions to dismiss counts, and
16 further, that we must avoid repetition of arguments,
17 and still further, that the three members of the
18 Court who were not parties to the motion as to
19 jurisdiction in May last have read the record and
20 know the points raised. We have not shut out a
21 single argument which can be raised on the state
22 of the evidence or on facts already established.
23 The argument relating to the Chief Commander cannot
24 be put at this stage because the necessary facts
25 are not there. The matter that you mentioned about

1 the Chief Commander's powers under the United States
2 constitution or legislation may be one entirely
3 between him and the United States and may have no
4 effect whatever as regards the other Allied Powers.
5 That can be decided later, after we have heard argu-
6 ment on both sides.

7 Yes, Mr. Smith.

8 MR. SMITH: Your Honor, the points that I
9 have raised in the second part of the motion to dis-
10 miss I believe are well within the lines which your
11 Honor delineated.

12 THE PRESIDENT: We accept your word for it,
13 Mr. Smith, so you can proceed to read the general
14 motion to that extent.

15 MR. SMITH: Could I also explain to your
16 Honor that the question of the jurisdiction of the
17 Court was in the first part of the motion and was
18 deliberately separated from this part?

19 General Motion to Dismiss the Indictment
20 on Behalf of all Defendants.

21 Now come all the defendants remaining in
22 the above-entitled cause at the conclusion of the
23 evidence on behalf of the prosecution and hereby
24 jointly and severally move the Honorable The
25 International Military Tribunal for the Far East

1 to dismiss the alleged indictment heretofore filed
2 with the Tribunal on 3 May 1946 and each and every
3 count thereof as it severally relates to and
4 affects each of said defendants, upon the grounds
5 hereinafter set forth.

6 For clarity of statement the grounds of the
7 motion are divided into five categories, as
8 follows: (1) General Grounds Common to all Defen-
9 dants; (2) Crimes Against the Peace, Counts 1 to
10 36; (3) Murder, Counts 37 to 52; (4) Conventional
11 War Crimes and Crimes Against Humanity, Counts
12 53 to 55; (5) Individual Counts.

13 General Grounds Common to all Defendants.

14 The points to be argued are --

15 THE PRESIDENT: Can you give us the argu-
16 ment without enumerating the points twice? I take
17 it your general argument will refer to the points.

18 MR. SMITH: No, it does not, your Honor.
19 It is going to be almost impossible to handle it
20 that way. I mean, I was brought in at the last
21 minute to draft this motion, and had there been
22 some time it could have been handled in that way.

23 THE PRESIDENT: Other arguments on behalf
24 of individual accused have been so framed, and I
25 thought this one might be so framed, but apparently

1 it isn't. Proceed, Mr. Smith.

2 MR. SMITH: Your Honor, I explained in
3 the argument that it would be impossible to dis-
4 cuss all of these points. We simply were going to
5 argue the major points, but we relied on every
6 point which is made in the motion, even though we
7 didn't argue it.

8 THE PRESIDENT: We can take it that this
9 is a motion on behalf of all the defendants? It
10 says it is, but is there any contest about it?
11 Apparently there is not, so proceed, Mr. Smith.

12 MR. SMITH: Well, your Honor, I didn't
13 want to leave the Tribunal under a misapprehen-
14 sion. This motion is signed by Dr. UZAWA as Chief
15 Defense Counsel, and at one time or another while
16 the papers were being drawn, all the defendants
17 in the case indicated, either in meeting or in-
18 dividually, that they joined in this motion.

19 THE PRESIDENT: Apparently they still
20 join in it. There is no indication to the contrary,
21 so proceed to put the motion.

22 MR. SMITH: Your Honor, I was cut off.

23 THE PRESIDENT: You understand why I am
24 repeating this position, because of what occurred
25 yesterday or the day before when Mr. Levin came to

1 the lectern. But apparently they are listening to
2 me in silence. I may state we are assuming this
3 motion is being put on behalf of all accused, and
4 there is no contradiction.

5 Mr. Levin.

6 MR. SMITH: If your Honor please --

7 THE PRESIDENT: Mr. Levin.

8 MR. SMITH: If your Honor please, I hadn't
9 completed my sentence when the light went on, and
10 I would like to complete it before Mr. Levin is
11 heard.

12 THE PRESIDENT: I have called on Mr.
13 Levin.

14 MR. LEVIN: Mr. President, I should like
15 to state that there has been no change in the
16 position of the gentlemen whose names I indicated
17 as not joining in this motion, and I should like to
18 state further that Mr. Smith is in error in the
19 statement to the effect that all defense counsel had
20 joined in this motion at any time.

21 THE PRESIDENT: I would like each counsel
22 who represents any accused who does not join in it
23 to come to the lectern and say so.

24 MR. LEVIN: I take it, Mr. President,
25

1 there is no further necessity for me to indicate
2 that I do not join in this motion on behalf of the
3 clients I represent.

4 THE PRESIDENT: You might repeat whom you
5 represent.

6 MR. LEVIN: I represent the accused KAYA
7 and SUZUKI.

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1 THE PRESIDENT: Dr. UZAWA.

2 DR. UZAWA: I have signed Mr. Smith's motion
3 on behalf of Japanese counsel -- all Japanese counsel.
4 That is in order to assure smooth progress in the
5 proceedings I had desired to avoid any confusion.

6 THE PRESIDENT: Apparently you had no author-
7 ity to do that.

8 DR. UZAWA: I think I have the authority to
9 affix my signature.

10 THE PRESIDENT: You said you signed it for
11 convenience sake and not because you were authorized
12 by individual Japanese counsel.

13 DR. UZAWA: Mr. President, if you state that
14 I have no authority to make my signature, then I shall
15 reconsider my position or reconsider this matter.

16 THE PRESIDENT: Tell me, please, whether you
17 were authorized by each Japanese counsel to sign
18 that general motion.

19 DR. UZAWA: I believe that I have that author-
20 ity.

21 THE PRESIDENT: I would like each Japanese
22 counsel to come to the lectern and say whether or not
23 you have it.

24 DR. UZAWA: I have been given the authority
25 to defend all accused and their counsel by the

1 signature of all accused -- each and all accused --
2 and the signature of each and all defense counsel.

3 THE MONITOR: Slight correction: I have been
4 given the power to represent all the accused, represent
5 all the Japanese counsels, by signatures of all the
6 defendants and all the counsels.

7 THE PRESIDENT: We will take that to be so
8 until the contrary appears.

9 DR. UZAWA: Thank you.

10 THE PRESIDENT: Now, Mr. Smith, proceed to
11 put the motion on behalf of all the accused because
12 it appears that by their Japanese counsel they are
13 parties.

14 MR. SMITH: Your Honor, in order to save
15 time I was wondering whether this couldn't be copied
16 into the transcript, that is, the points, and treated
17 as though it had been read. Now, there is some
18 duplication as far as the argument goes.

19 THE PRESIDENT: Read it into the transcript,
20 Mr. Smith.

21 MR. SMITH: 1. There is no substantial
22 evidence introduced by the prosecution tending to
23 shown that any defendant individually or in concert,
24 combination, confederation or conspiracy with any
25 other defendant or with any other persons vaguely

1 described as "divers other persons" committed any
2 alleged offense described in any of the fifty-five
3 counts of the alleged indictment and in addition the
4 evidence introduced does not amount to even a scin-
5 tilla of proof and otherwise fails to demonstrate a
6 prima facie showing in that respect.

7 2. There is not and never has been in
8 existence any system or body of laws known as an
9 international code, standard or criterion of criminal
10 justice or an international code, standard or criter-
11 ion of moral conduct carrying with it the right of
12 criminal adjudication and criminal penalties, and
13 the prosecution has wholly failed to show by evidence
14 the existence of any such law or concept.

15 THE PRESIDENT: Those points have been put
16 already. You need not repeat them.

17 MR. SMITH: Well, certainly all of the
18 defendants in the case, your Honor, have not put that
19 before. The only one I ever recall who put it was
20 was Mr. HIROTA in one of his motions last May or June.

21 3. No system or body of law --

22 THE PRESIDENT: Mr. Smith, the motion will
23 be part of the record and any of us who want to refer
24 to it may do so without having to read it in the trans-
25 cript. We want read into the transcript only new

1 points and new matter.

2 MR. SMITH: Well, in my view, your Honor,
3 everything in here is new. Now, I don't know how I
4 am going to cut it up to fit your Honor's point of
5 view about the matter here.

6 THE PRESIDENT: Would it be correct to say
7 that in this general motion you have included every
8 point taken on behalf of any accused?

9 MR. SMITH: The answer is no, Your Honor,
10 so far as I have ever heard.

11 THE PRESIDENT: Well, you could hardly take
12 the points on behalf of the diplomatic section; they
13 would not be particularly concerned. Or perhaps the
14 points on behalf of the chiefs of staff and of the
15 Navy. Would it be correct to say that you have taken
16 every point of general application?

17 MR. SMITH: What I intended to do when I
18 drafted this was to cover every general point common
19 to every defendant in the case irrespective of his
20 personal situation.

21 THE PRESIDENT: Well, you have
22 raised no general point not already put on behalf of
23 some or other of the accused. Is that so?

24 MR. SMITH: The answer to your Honor's
25 question is no. There are some points raised here

1 that I never heard any counsel in the case mention
2 before; I happened to think of them myself and put
3 them in here.

4 THE PRESIDENT: As you read the motion slip
5 over those that have already been put. If you will
6 give us the numbers of the paragraphs we will know
7 at a glance what has been omitted and we can refer
8 to the motion itself if we wish.

9 MR. SMITH: Well, I don't know of any single
10 paragraph which falls within what your Honor just
11 stated about skipping paragraphs. However, I will
12 skip on down to paragraph 5.

13 The defendants and each of them cannot be
14 held to answer for offenses against alleged inter-
15 national criminal or moral standards which have
16 been heretofore defined in such vague, general and
17 indefinite terms, if at all, that no individual
18 could be expected to know what such standard or crite-
19 rion of conduct was and the criminal penalties attendant
20 upon violation thereof; that such alleged standard or
21 criterion has never been defined with the requisite
22 certainty to support criminal intent; and further,
23 that no international standard of criminal or moral
24 conduct has heretofore been defined with the certainty
25 that he who runs may read.

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

7 7. The defendants with few exceptions are
8 indicted for acts and possibly acts of omission
9 committed while serving in the highest civil or mil-
10 itary offices or both within the gift of the govern-
11 ment of Japan. Their acts were the acts of the govern-
12 ment of Japan acting in its sovereign capacity and
13 the defendants and each of them are not answerable
14 therefor under any body or system of law, national or
15 international, known in the world. Their acts and
16 omissions are beyond the reach of any body or system
17 of law known to the world and are immune to re-examin-
18 ation by any sovereign nation or group of nations. It
19 would have been impossible for any defendant to have
20 committed the alleged offenses without wielding the
21 power of his official office and consequently the
22 defendants and each of them are indicted for alleged
23 acts and omissions which arose entirely out of their
24 official acts.

25 8. The alleged acts and possibly acts of

1 omission charged against the defendants and each of
2 them were acts of the Japanese government acting in
3 the sovereign capacity as a nation and none of the
4 defendants is subject to prosecution as an individual
5 by reason of having been an actor in the performance
6 of his governmental functions.

7 THE PRESIDENT: Well, that has been put before
8 and repeatedly put, individual responsibility --
9 the doctrine of respondeat superior.

10 MR. SMITH: Respondeat superior has nothing
11 to do with what I am talking about here, your Honor.
12 I am talking about the high sovereign immunity and
13 not any ordinary relation of master and servant.

14 9. None of the fifty-five counts of the
15 Indictment informs any defendant of the nature and
16 cause of the accusation against him and each of
17 said counts is drawn in such broad, general, indefinite
18 and vague form as to amount to a mere dragnet and snare.

19 10. The law of conspiracy has no applica-
20 tion whatever to official actions, compromise, con-
21 sultation, and agreement between the highest officers
22 of the government of Japan acting within the scope of
23 their sovereign authorities for the reason that
24 civilized government necessarily implies and requires
25 cooperation toward the end sought by sovereign action

1 and heretofore criminal conspiracy has never been
2 known to apply to any act or situation except positive
3 acts inimical to the sovereign itself and defined
4 and punished by domestic law.

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

7 12. Neither the Potsdam Declaration nor the
8 Japanese Instrument of Surrender generated or estab-
9 lished any law, national or international, and the
10 action taken on those occasions furnished no justi-
11 fication or support for the indictment herein.

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

19 THE PRESIDENT: All those points were put
20 in May, last, and subsequently by learned counsel.
21 You are reading nothing new, Mr. Smith. We may
22 have to confine you to a consideration on this general
23 motion of the state of the evidence and that may be
24 difficult, because after twenty-six accused have
25 dealt with that there would seem to be nothing left

1 to be dealt with on a general motion.

2 MR. SMITH: If your Honor will just tell me
3 what to do I will certainly appreciate it. The
4 trouble is that I sometimes have to read a paragraph
5 before I am conscious of the fact that some one
6 counsel may have mentioned it somewhere.

7 THE PRESIDENT: Perhaps we will save time
8 eventually if we adjourn now for luncheon to allow
9 you opportunity to go through the motion, Mr. Smith.

10 We will adjourn until half past one.

11 (Whereupon, at 1155, a recess was
12 taken until 1330, after which the proceedings
13 were resumed as follows:)

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AFTERNOON SESSION

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2 The Tribunal met, pursuant to recess, at 1330.

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

5 THE PRESIDENT: Major Moore.

6 LANGUAGE ARBITER (Major Moore): Mr. President,
7 if the Tribunal please, we present the following lan-
8 guage correction:

9 Exhibit 1146, Record page 10,242, line 5,
10 substitute, "for the government to open hostilities"
11 for, "to declare war."

12 This correction was to have been made with
13 corrections presented as found on Record page 11,139.

14 THE PRESIDENT: Mr. Smith.

15 MR. SMITH: If your Honor please, during
16 the recess I have hurriedly gone through the remaining
17 sections of this motion and I really find nothing that
18 can be omitted and nothing which has been adequately
19 covered by any other counsel in the case so far as my
20 recollection goes.

21 THE PRESIDENT: Well, read on.

22 MR. SMITH: 14. The Peace Pact of Paris
23 (Briand-Kellogg Pact), of 27 August 1928, was conditioned
24 that, "Nothing in the new Treaty restrains or compromises
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1 in any manner the right of self defense. Every
2 nation in this respect will always remain free to
3 defend its territory against attack or invasion; it
4 alone is competent to decide whether circumstances
5 require recourse to war in self defense. Secondly,
6 none of the provisions in the new Treaty is in opposi-
7 tion to the provisions of the Covenant of the League
8 of Nations, nor with those of the Locarno Treaties or
9 the Treaties of Neutrality. Moreover, any violation
10 of the new Treaty by one of the contracting parties
11 would automatically release the other parties from
12 their obligations to the Treaty-breaking States."

13 "Under these conditions" (M. Briand for France);
14 "On this premise" (Signor Mussolini for Italy); and
15 "In the light of the foregoing explanations" (Sir
16 Austen Chamberlain for England), the chief signatory
17 powers signed the Treaty. A similar representation
18 and condition was made to the Empire of Japan which
19 ratified the pact upon the condition set forth in a
20 note of Mr. Kellogg, Secretary of State of the United
21 States, dated 23 June 1928, which reads in part as
22 follows:

23 "(1) Self-Defense. There is nothing in the
24 American draft of an anti-war treaty which restricts
25 or impairs in any way the right of self-defense. (That

1 right is inherent in every sovereign State and is
2 implicit in every treaty (Italicized)). Every
3 nation is free at all times and regardless of treaty
4 provisions to defend its territory from attack or
5 invasion and it alone is competent to decide whether
6 circumstances require recourse to war in self-defense."

7 Consequently, Japan alone was competent
8 to decide whether the circumstances confronting it
9 required recourse to war in self defense and no
10 international tribunal is competent to re-examine
11 that question anew. Moreover, should a nation bona
12 fide believe that war is required as a measure of
13 self defense, it might be an aggressor in fact, but
14 it is not a breaker of the Treaty -- recourse to war
15 in self defense having been expressly excluded by
16 prior agreement from the terms of the Pact, and the
17 definition and circumstances of the exercise of self
18 defense left to the exclusive judgment of each separate
19 signatory power. Consequently, a breach of the fore-
20 going Pact incurred no sanction other than moral
21 disapproval.

22 THE PRESIDENT: Of course, the British and
23 the American approach is to take the words of the
24 agreement and give them their full effect. If they
25 are clear there is no occasion to make any further

1 inquiry, but under no circumstances do you ask the
2 opinion of the makers of the agreement. However,
3 proceed to read what you have written, Mr. Smith.

4 MR. SMITH: 15. The "Convention for the
5 Pacific Settlement of International Disputes,"
6 signed at the Hague, 18 October 1907, imposes no
7 sanctions or penalties other than moral disapproval
8 for violation of said Convention; and the Convention
9 became obsolete and was superseded by the Briand-
10 Kellogg Pact of 1928 as it specifically relates to
11 the determination of what constitutes a war of self
12 preservation and self defense. Many of the signatory
13 nations thereto have in recent years resorted to war
14 to settle disputes without any attempt to follow the
15 prescribed procedures for Pacific settlement and no
16 attempt has heretofore been made to punish or even
17 censure those nations for breach of said Convention.
18 The Convention has fallen into disuse and was obsolete
19 long prior to 1928 by common consent and practice of
20 nations. Since the evidence produced by the prosecution
21 shows beyond doubt that the procedures of conciliation,
22 mediation and arbitration would have been futile in
23 the situation of Japan with respect to the disputes in
24 Manchuria and China and that Japan substantially fol-
25 lowed the procedures prescribed by said Convention in

1 its dealings with the United States and Great Britain
2 in the negotiations preceding the commencement of the
3 Pacific war, the Treaty has no application to the
4 evidence in this case.

5 16. The Treaty of Versailles has no appli-
6 cation to the activities of Japan in Manchuria in
7 that all the evidence showed that Japan complied
8 with the procedures prescribed by said Treaty up to
9 the point of the decision by the League of Nations,
10 a decision Japan was not bound to accept without
11 regard to its merit and fairness and its inalien-
12 able right to act in self defense. The Treaty other-
13 wise provided no punishment other than moral dis-
14 approval for any alleged violation thereof. All the
15 substantial evidence introduced by the prosecution
16 shows that the actions taken by Japan were in self
17 defense, a matter outside the scope of the provisions
18 of the Treaty of Versailles. Japan occupied a special,
19 historical and incontrovertible position in Manchuria
20 which it was entitled to defend. Otherwise the Treaty
21 of Versailles was superseded by the Briand-Kellogg
22 Pact of 1928 in situations relating to self preserva-
23 tion and self defense on the part of Japan.

24 17. The "Convention for the Pacific Settle-
25 ment of International Disputes," signed at the Hague,

1 29 July 1899, is obsolete, was superseded by the
2 "Convention for the Pacific Settlement of International
3 Disputes" signed at the Hague, 18 October 1907, and
4 both Conventions were superseded by the Briand-Kellogg
5 Pact of 1928 in situations relating to self preserva-
6 tion and self defense which conditions Japan alone
7 was competent to finally decide for itself. The
8 Convention of 1899 is so vague, general and indefinite
9 as to be without meaning in the context of this trial
10 and provided for recourse to the procedures mentioned
11 in the Convention "as far as circumstances allow."
12 The prosecution has failed to show either the exist-
13 ence of the foregoing Treaty or its relevancy or
14 application to the facts in this case.

15 18. The so-called "Nine-Power Treaty,"
16 signed at Washington, 6 February 1922, has no appli-
17 cation to the evidence presented by the prosecution
18 in this case for the reason that all the substantial
19 evidence shows that the activities of Japan in Manchuria
20 and China were acts in self defense; that there was no
21 infringement of the territorial integrity of China in
22 any permanent sense; and that otherwise there was no
23 infringement of the so-called "open-door" in China --
24 whatever the loose term "open-door" might be taken to
25 mean in view of the radically altered circumstances

1 and situation in China since 1922, particularly with
2 respect to the hostile attitude of China itself in
3 regard to said Treaty. The "Nine-Power Treaty" was
4 superseded by the Briand-Kellogg Pact of 1928 in
5 situations relating to the self defense of Japan and
6 its citizens and Japan alone was competent to determine
7 finally what facts and circumstances entitled it to
8 act in self defense.

9 19. The assurance given by Japan, the
10 United States, France and the British Empire to the
11 Netherlands government on 4 February 1922 with respect
12 to territorial integrity of insular dominions in the
13 region of the Pacific Ocean has no possible applica-
14 tion to this case for the reason that all the evidence
15 shows that the Netherlands government declared war on
16 Japan on 8 December 1941, which was long prior to the
17 time that Japanese troops entered the Dutch East Indies.
18 Moreover, on 8 December 1941 the Netherlands government
19 and the Netherlands East Indies declared war against
20 Japan "in view of Japan's aggression against two
21 powers with whom the Netherlands maintain particular-
22 ly close relations."

23 20. There is no substantial evidence that
24 any defendant caused Japan to violate the Treaty of
25 amity and respect for each other's territorial integrity

1 between Thailand and Japan, signed 12 June 1940.
2 All the evidence introduced by the prosecution
3 shows that Japanese armed forces entered Thailand
4 territory with the consent and approval of the duly
5 constituted Thailand government.

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

15 22. Japan never ratified the "Convention
16 Relative to the Treatment of Prisoners of War," signed
17 at Geneva, 27 July 1929, and is not bound by any pro-
18 vision of that Convention. The undertaking of Japan
19 after the beginning of the Pacific war unilaterally
20 to respect the provisions of that Convention "mutadis
21 mutandis" meant nothing more or less than Japan
22 recognized the spirit and principle involved in said
23 Convention but did not follow the Convention in all
24 its detailed requirements. The aforesaid Convention
25 imposes no criminal sanctions against the heads of

1 government and those occupying high places in govern-
2 ment. Nothing in the aforesaid Convention authorizes
3 an international legal tribunal to sit in judgment
4 upon alleged violations of the Convention or the
5 spirit or principle embodied in the Convention; and
6 otherwise the punishment of breaches of said Conven-
7 tion or the principle thereof by members of the armed
8 forces or belligerents is left to the processes of
9 the individual nation offended by such breach. Nothing
10 in the provisions of said Convention establishes a
11 so-called international code of criminal conduct
12 relating to the treatment of prisoners of war punish-
13 able by an International Military Tribunal. These
14 same considerations apply to the Convention for the
15 treatment of civilian internees.

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1 23. The Hague Convention of 1907 regarding
2 the opening of hostilities has no application to
3 situations involving a war of self-preservation and
4 self-defense; it has no application because the very
5 evidence of the prosecution shows that the United
6 States, Great Britain and the Soviet Union were and
7 had been engaged in a de facto state of war with Japan
8 for several years prior to December 7, 1941, by reason
9 of their substantial and continuous economic, financial
10 and military assistance to China during the Sino-Japanese
11 hostilities which had been in progress since July 7,
12 1937, and that by reason thereof the foregoing nations
13 placed themselves in the status of belligerents against
14 Japan; and further that the foregoing Convention has
15 no application because all of the evidence of the
16 prosecution shows that all nations represented before
17 the Tribunal gave no heed to the provisions of said
18 Convention, either with respect to intervention in the
19 Sino-Japanese hostilities or in the negotiations immedi-
20 ately preceding the commencement of the Pacific war.

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

24 25. As the governments represented by the
25 prosecutors before the Tribunal failed to respect and

1 abide by the provisions of the treaties, conventions
2 and assurances set forth in the Indictment, the afore-
3 said governments are estopped in good conscience to
4 bring into question in this proceeding acts and possibly
5 acts of omission tending to show alleged violations
6 of the same treaties, conventions and assurances.

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

13 CRIMES AGAINST PEACE

14 (Counts 1-36)

15 The Points to be Argued are:

16 27. The prosecution has failed to show by
17 any substantial evidence that any defendant either
18 individually or acting in concert, combination, confed-
19 eration or conspiracy with any other defendant or with
20 persons in the vague category described as "divers
21 other persons" ever planned, prepared or initiated a
22 declared or undeclared war of aggression against any
23 country or people. There has been no attempt on the
24 part of the prosecution to trace any outline of a
25 criminal conspiracy or to show any overt acts in

1 pursuance of an alleged conspiracy. No immediate
2 connection is anywhere shown between acts of the defend-
3 ants and results which transpired in the course of time;
4 that is to say, the connection between isolated acts
5 of the defendants and events which subsequently trans-
6 pired in Manchuria, China and in the Pacific War
7 are too remote to sustain the allegation of conspiracy.
8 As none of the defendants had the final voice in any
9 of the allegations contained in the Indictment,
10 they cannot be held responsible for the final and
11 ultimate decision which was put into action with
12 respect to all matters mentioned in Counts 1-36 of the
13 Indictment.

14 28. The prosecution has wholly failed to
15 prove a war of aggression with respect to any of the
16 Counts 1-36. There has not been the slightest effort
17 on the part of the prosecution to prove the absence of
18 any valid reason or justification for the activities of
19 the armed forces of Japan in Manchuria, China, Indo-
20 China and the countries involved in the Pacific war.
21 On the other hand, with respect to Manchuria and China,
22 all the prosecution evidence shows that the Chinese
23 caused the hostilities and that the surrounding circum-
24 stances were such that Japan was forced to fight a war
25 of self-defense. In any event, the evidence with

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

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

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

14 MURDER

15 (Counts 37-52)

16 Points to be argued are:

17 31. There is a total failure of proof on the
18 part of the prosecution that any defendant, either
19 individually or acting in concert, combination, confed-
20 eration or conspiracy with any other defendant or with
21 the alleged category of persons vaguely described as
22 "divers other persons" ever "murdered" any of the
23 inhabitants of the nations described in the foregoing
24 counts. There is no international criminal law which
25 defines the crime, standard or criterion, of "murder".

1 At common law, and by the domestic law of all civilized
2 nations "murder" has been heretofore defined as the
3 deliberate, purposeful and premeditated killing of a
4 human being with malice aforethought. There has been
5 a total failure of proof to show that any defendant
6 or defendants ever murdered any human being. "Murder"
7 by its very nature requires a showing of a close,
8 immediate relationship between two human beings and
9 involves all the elements of purpose, premeditation,
10 "cooling time" and above all, the extremely personal
11 element of malice aforethought. It has never heretofore
12 been supposed that the heads of governments of sovereign
13 nations are guilty of "murder" by reason of either
14 legal or extra-legal activities on the part of the
15 armed forces of a sovereign nation. Moreover, a killing
16 by the armed forces of a sovereign nation has never
17 been regarded as "murder", and, hence, there is nothing
18 in international law to support the accusations against
19 any of the defendants. There is a total failure by the
20 prosecution to show that any defendant ordered, caused
21 or permitted the Japanese armed forces to kill any
22 human being in any of the countries designated in any
23 of the foregoing counts. The prosecution has likewise
24 failed to offer any evidence to overcome the ordinary
25 presumption that a killing by a member of the armed

1 forces was a legal act during the continuation of
2 hostilities.

3 CONVENTIONAL WAR CRIMES AND CRIMES AGAINST
4 HUMANITY

5 (Counts 53-55)

6 32. There has been a total failure of proof
7 on the part of the prosecution to show that any defendant,
8 either individually or acting in concert, combination,
9 confederation or conspiracy with any other defendant or
10 with "divers unknown persons" ever knowingly, intention-
11 ally or wilfully violated the rules, customs and usages
12 of land or sea warfare or ever committed any act which
13 might be construed to be an alleged conventional war
14 crime or a crime against humanity. There is an entire
15 failure of proof to show that any defendant had any
16 personal connection with or knowledge of any individual
17 activities on the part of the armed forces of Japan with
18 respect to the treatment of prisoners of war and interned
19 civilians or that any defendant was personally guilty
20 of negligence in that respect. The assurances on the
21 part of Japan that it would recognize the principle
22 involved in the Geneva Convention in regard to the
23 treatment of prisoners of war and civilians of 1929
24 "mutatis mutandis" left Japan almost unbridled judg-
25 ment and discretion within the scope of common, ordinary

1 conceptions of humanity, to apply or not to apply the
2 details of that Convention. The prosecution has failed
3 to show by substantial evidence that any of the defendants
4 were in the chain of command or in the line of respon-
5 sibility which would fasten upon them or any of them
6 legal or criminal responsibility for acts of commission
7 and omission in the treatment of prisoners of war and
8 interned civilians. Nothing in international law
9 holds the high policy making officials of a sovereign
10 nation, especially civilian officials, responsible for
11 the activities of armies in the field. The prosecution
12 has failed to introduce any evidence to overcome the
13 ordinary presumption that the commanding officers of
14 armies in the field have the final and ultimate respon-
15 sibility for the treatment of prisoners of war and
16 civilians coming into their custody during the existence
17 of a state of war. Nothing in the practice of the past
18 entitled an International Military Tribunal to sit in
19 judgment upon averments of breach of the rules, customs
20 and usages of land warfare; heretofore all such violations
21 have been left to trial by the military tribunals of the
22 nation which was offended by such breach of the rules,
23 customs and usages of land warfare. Finally, all the
24 evidence introduced by the prosecution dealing with
25 alleged violations of such rules, customs and usages

1 necessarily have a definite geographical location and
2 by reason thereof are not within the competence of an
3 International Military Tribunal. Nothing in the Potsdam
4 Declaration or the Japanese instrument of surrender
5 undertook or purported to define so-called "war criminals"
6 in other than the traditional sense or to enlarge the
7 category of persons traditionally held to responsibility
8 for such offenses.

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1 Now, your Honor, I come to individual
2 counts and here I see an opportunity to avoid
3 reading. You will notice throughout the discussion
4 of the individual counts that it uniformly says that
5 no defendant, individually or acting in concert
6 with any other defendant, or with any divers unknown
7 persons, ever did any of the things charged in each
8 one of those counts.

9 I hope your Honors will read each one of
10 these statements with respect to the individual
11 counts, especially as I call attention to duplication
12 of counts. For example, there are some counts in
13 the Indictment which are identical except that one
14 count charges all defendants and the other count
15 charges only a part of them by name, and I will ap-
16 preciate it if your Honor will allow the remainder
17 of this motion dealing with the individual counts
18 to be copied into the transcript and treated as
19 though I had read it.

20 THE PRESIDENT: Well, we could do it, but
21 we will have to consider seriously how far we will
22 allow things to be read into the record which were
23 not read. That is what it amounts to. We will have
24 it before us as an exhibit -- we will have it before
25 us as a part of the record, I should say.

1 MR. SMITH: Well, your Honor, I will go on
2 and read it if it can't be handled in that way. I
3 just don't want half of my motion appearing in the
4 record and then have the record show that it ab-
5 ruptly dropped off. I am pressing this point.

6 THE PRESIDENT: You are speaking for all
7 the accused. There are only about six pages, so go
8 ahead.

9 MR. SMITH: (Reading): The Individual Counts.
10 The points to be argued are:

11 (Count 1) 33. There is no substantial evidence
12 tending to prove that any two or more defendants ever
13 engaged in a common plan or conspiracy to "secure the
14 military, naval, political and economic domination
15 of East Asia and of the Pacific and Indian Oceans,
16 and of all countries and islands therein."

17 (Count 2) 34. There is no substantial evidence
18 tending to show that any two or more defendants en-
19 gaged in a common plan or conspiracy to "secure the
20 military, naval, political and economic domination of
21 the Provinces of Liaoning, Kirin, Heilungking and
22 Jehol, being parts of the Republic of China."

23 (Count 3) 35. There is no substantial evidence
24 tending to prove that any two or more defendants
25 engaged in a common plan or conspiracy to "secure

1 the military, naval, political and economic domina-
2 tion of the Republic of China, either directly or
3 by establishing a separate State or States under
4 the control of Japan."

5 (Count 4) 36. There is no substantial evidence
6 tending to show that any two or more defendants en-
7 gaged in a common plan or conspiracy to "secure the
8 military, naval, political and economic domination
9 of East Asia and of the Pacific and Indian Oceans,
10 and of all countries and islands therein." This
11 count appears to be a mere duplication of Count 1,
12 supra.

13 (Count 5) 37. There is no substantial evidence
14 tending to prove that any two or more defendants
15 engaged in a common plan or conspiracy that "Germany,
16 Italy and Japan should secure the military, naval,
17 political and economic domination of the whole world."
18 All the evidence of the prosecution tends to prove
19 the reverse of the foregoing allegation.

20 (Count 6) 38. There is no substantial evidence
21 tending to show that any two or more defendants
22 "Planned and prepared a war of aggression and a war
23 in violation of international law, etc. against the
24 Republic of China." This count appears to be a mere
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1 duplication of Counts 1, 2, 3 and 4.

2 (Count 7) 39. There is no substantial evidence
3 tending to show that any two or more defendants
4 planned and prepared a war of aggression and a war
5 in violation of international law, etc. against the
6 United States. The evidence of the prosecution
7 clearly shows that the United States acting in con-
8 cert with other great Powers applied economic em-
9 bargoes and sanctions against Japan to the point of
10 strangulation, indulged in military encirclement of
11 Japan and otherwise forced Japan into the position
12 of fighting a war of self preservation and self
13 defense. There is a total failure of proof that
14 Japan engaged in a war of aggression against the
15 United States.

16 (Count 8) 40. There is no substantial evidence
17 tending to prove that any two or more defendants
18 planned and prepared a war of aggression against the
19 United Kingdom of Great Britain and Northern Ire-
20 land and all parts of the British Commonwealth of
21 Nations. All the evidence of the prosecution shows
22 beyond doubt that the United Kingdom itself declared
23 war on Japan and had previously threatened Japan
24 that the United Kingdom would go to war "tihin the
25 hour" of the beginning of hostilities between the

1 United States and Japan.

2 (Count 9) 41. There is no substantial evi-
3 dence tending to prove that any two or more de-
4 fendants planned and prepared a war of aggression
5 against the Commonwealth of Australia. All the
6 evidence shows that Australia itself declared war
7 on Japan long prior to the time that hostilities
8 reached the territory of Australia.

9 THE PRESIDENT: You could add the same thing
10 in respect to New Zealand and Canada and India.

11 MR. SMITH: (Continuing to read):

12 (Count 10) 42. There is no substantial evi-
13 dence tending to prove that any two or more de-
14 fendants planned and prepared a war of aggression
15 against New Zealand. All the evidence shows be-
16 yond doubt that New Zealand declared war on Japan.

17 (Count 11) 43. There is no substantial evi-
18 dence tending to prove that any two or more de-
19 fendants planned and prepared a war of aggression
20 against Canada. All of the evidence shows beyond
21 doubt that Canada declared war on Japan.

22 (Count 12) 44. There is no substantial evi-
23 dence tending to prove that any two or more defendants
24 planned and prepared a war of aggression against India.
25 All of the evidence shows beyond doubt that India

1 declared war on Japan in line with the policy of the
2 United Kingdom.

3 (Count 13) 45. There is no substantial evi-
4 dence tending to show that any two or more defendants
5 planned and prepared a war of aggression against the
6 Commonwealth of the Philippines. As the Philippines
7 had not attained its independence at any time during
8 the continuance of the Pacific war and was subject
9 to the sovereign jurisdiction of the United States
10 and its inhabitants were nationals thereof, this
11 count appears to be a mere duplication of Count 7
12 which avers a planned and prepared war of aggression
13 against the United States of America.

14 (Count 14) 46. There is no substantial evi-
15 dence tending to show that any two or more defendants
16 planned and prepared a war of aggression against the
17 Kingdom of the Netherlands. All the evidence shows
18 beyond doubt that the Netherlands itself declared
19 war upon Japan.

20 (Count 15) 47. There is no substantial evi-
21 dence tending to show that any two or more defendants
22 planned and prepared a war of aggression against the
23 Republic of France. All of the evidence in the
24 case shows that there was no war of aggression against
25 France and that the landing of troops in Indo-China

1 was pursuant to a voluntary agreement between the
2 Vichy French Government and Japan, the Vichy Govern-
3 ment having exercised both de jure and de facto
4 authority over Indo-China after the capitulation of
5 France.

6 (Count 16) 48. There is no substantial evi-
7 dence tending to show that any two or more defendants
8 planned and prepared a war of aggression against
9 Thailand. There is a total failure of proof in this
10 respect. All the evidence shows beyond doubt that
11 the entry of Japanese troops into Thailand after the
12 commencement of the Pacific war was pursuant to a
13 voluntary agreement with the Thailand Government.
14 Moreover, the Kingdom of Thailand is not a party to
15 the prosecution and nowhere does it appear by what
16 authority the existing prosecutors undertake to
17 carry on a prosecution without the consent of the
18 Kingdom of Thailand.

19 (Count 17) 49. There is no substantial evi-
20 dence tending to show that any two or more defendants
21 planned and prepared a war of aggression against the
22 Union of Soviet Socialist Republics. All the evi-
23 dence in the case demonstrates beyond doubt that
24 Japan never entertained the slightest intention of
25 attacking the Soviet Union and that Japan for many

1 years had been genuinely disturbed by Soviet aggressive-
2 ness, large preparations for war and desire to fasten
3 its communistic philosophy upon Japan and China, as
4 well as other nations throughout the world.

5 (Count 18) 50. There is no substantial evi-
6 dence tending to show that any two or more of the
7 named defendants initiated a war of aggression against
8 the Republic of China. All the evidence of the pro-
9 secution shows that China caused the hostilities
10 against Japan and that China had otherwise been en-
11 gaged for many years in hostile actions against
12 Japanese citizens, anti-Japanese propaganda and boy-
13 cotts, and had otherwise been engaged in a long period
14 of civil war and internal chaos which threatened the
15 lives and property of Japanese citizens.

16 (Count 19) 51. There is no substantial evi-
17 dence tending to show that any two or more of the
18 named defendants initiated a war of aggression against
19 the Republic of China. This count appears to be a
20 mere duplication of Count 18 with the exception that
21 several additional defendants are named in this count.
22 No reason appears why the Indictment was split in
23 this respect.

24 (Count 20) 52. There is no substantial evi-
25 dence tending to show that any two or more of the

1 named defendants initiated a war of aggression
2 against the United States of America. This count
3 is a duplication of Count 7, with the exception
4 that Count 7 names all defendants, whereas the in-
5 stant count names only fifteen defendants.

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1 (Count 21)

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

8 (Count 22)

9 54. There is no substantial evidence
10 tending to show that any two or more of the named
11 defendants initiated a war of aggression against
12 the British Commonwealth of Nations. This count
13 appears to be a duplication of Counts 4, 5, 8, 9,
14 10, 11 and 12. As previously pointed out, the
15 British Commonwealth of Nations themselves de-
16 clared war on Japan.

17 (Count 23)

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

23 (Count 24)

24 56. There is no substantial evidence
25 tending to prove that any two or more named

1 defendants initiated a war of aggression against
2 the Kingdom of Thailand.

3 (Count 25)

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

9 (Count 26)

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

21 (Count 27)

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

1 5, 18 and 19.

2 (Count 28)

3 60. There is no substantial evidence
4 tending to show that any two or more defendants
5 waged a war of aggression against the Republic of
6 China. This count appears to be an exact dupli-
7 cation of Count 27 and all the previous counts
8 identified under Count 27.

9 (Count 29)

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

16 (Count 30)

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

23 (Count 31)

24 63. There is no substantial evidence
25 that any two or more defendants waged a war of

1 aggression against the British Commonwealth of
2 Nations. This count appears to be a mere duplica-
3 tion of Count 22.

4 (Count 32)

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

10 (Count 33)

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

16 (Count 34)

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

22 (Count 35)

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

1 Soviet Socialist Republics.

2 (Count 36)

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

10 (Count 37)

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

18 (Count 38)

19 70. There is no substantial evidence
20 tending to show that any two or more named
21 defendants made a common plan or conspiracy to
22 "murder" any persons within the designated terri-
23 tories.

24 (Counts 39-43)

25 71. There is no substantial evidence

1 tending to show that any two or more defendants
2 made a common plan or conspiracy to effect the
3 "murder" on a wholesale scale of prisoners of war,
4 members of the armed forces of countries opposed
5 to Japan who might lay down their arms, and
6 civilians or crews of ships destroyed by Japanese
7 forces.

8 (Counts 45-52)

9 73. There is no substantial evidence
10 tending to show that any two or more defendants
11 ordered, caused or permitted the armed forces of
12 Japan to slaughter the inhabitants of the city
13 of Nanking, the City of Canton, the City of Hankow,
14 the city of Changsha, the city of Hongyang, the
15 cities of Kweilin and Liuchow, or to unlawfully
16 "murder" certain members of the armed forces of
17 Mongolia and the Union of Soviet Socialist
18 Republics. There has been a total failure of
19 proof to show the personal responsibility of any
20 defendant for the death of any of the foregoing
21 inhabitants of said territories as alleged.

22 (Counts 53-55)

23 74. There is no substantial evidence
24 tending to show that any two or more of the named
25 defendants ever made a common plan or conspiracy

1 to commit conventional war crimes and crimes
2 against humanity as alleged in the foregoing counts
3 or to commit breaches of the laws, customs and
4 usages of war in any of the named territories.

5 There is not a scintilla of evidence in the case
6 to show that any individual defendant personally
7 committed any of the acts and omissions alleged in
8 said counts. The responsibility for the commis-
9 sion of any such acts lay with the immediate
10 military commanders of Japan in the field and by
11 the Geneva Convention for the treatment of
12 prisoners of war and internees of 1929, and by im-
13 memorial practice the responsibility for such acts
14 was always fastened upon the individual guilty of
15 the particular act or omission in question and the
16 immediate, active commander of such offender in
17 the field of operation. Furthermore, such vio-
18 lations were not subject to trial before an
19 international military tribunal and were solely
20 and exclusively punished under the domestic
21 processes of the nation offended by such offense
22 if and when the offender came under the power of
23 such offended nation; and the indictment in the
24 instant case cannot be sustained in those respects
25 because all such alleged offenses necessarily have

1 a definite geographical location.

2 Now, your Honor, I have an argument
3 which I would like to make on some of the major
4 points. They are arguments in support of general
5 motion to dismiss on behalf of all defendants.

6 THE PRESIDENT: Will there be any
7 repetition? We are obliged to hear you, but
8 not to allow you to repeat yourself.

9 MR. SMITH: Necessarily, your Honor,
10 there is a duplication to the extent that I
11 have mentioned some of the points and then taken
12 them up for argument.

13 THE PRESIDENT: Well, go ahead with
14 your argument, Mr. Smith; but we do trust you to
15 behave reasonably to avoid repetition, which we
16 are not bound to tolerate.

17 MR. SMITH: The argument will not attempt
18 to cover each of the points made in the seventy-
19 three paragraphs of the motion to dismiss. How-
20 ever, even though it has not been possible to
21 argue each point, counsel wish to make it plain
22 that the defendants and each of them rely on
23 every point made in said motion to dismiss. The
24 argument has been necessarily limited to a brief
25 outline argument of some of the major points

1 because of the pressure of time, lack of personnel
2 and other matters.

3 1. Upon a careful examination of the
4 treaties and conventions relied upon by the
5 prosecution, as well as other treaties and con-
6 ventions not mentioned by them, and the opinions
7 of jurists and text-writers, counsel have been
8 unable to discover the existence of any system or
9 body of law which provides an international penal
10 code, or an international standard or criterion of
11 criminal justice, or an international standard or
12 criterion of moral conduct which carries with it
13 or supports the right of criminal adjudication
14 and criminal penalties.

15 THE PRESIDENT: That point has been heard
16 and reheard, and you have pages devoted to it. We
17 are not going to hear any more on that point at this
18 stage.

19 MR. SMITH: Well, your Honors, that is
20 merely an opening to the argument. That is
21 simply stating the basic fact in connection with
22 this rather extended argument as to whether there
23 is any law --

24 THE PRESIDENT: The framing of the argu-
25 ment in different terms does not make it a new

1 argument. As regards the Kellogg Pact, you have
2 quoted word for word what you have said already.
3 As far as I can discover from a hasty perusal of
4 this document now before us, there is nothing new.

5 MR. SMITH: Well, your Honor, I would like
6 to tender this written argument for filing and let
7 the record show what I sought to argue before your
8 Honors and ask your Honors to allow me an excep-
9 tion.

10 THE PRESIDENT: It is already a part of
11 the record, and you can have an exception, whatever
12 that means.

13 Where are the prosecution?

14 Mr. Williams.
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1 MR. E. WILLIAMS: Mr. President, Members of
2 the Tribunal:

3 To answer the motions to dismiss made by
4 the several defendants by treating each motion
5 separately would involve a lengthy and in our judg-
6 ment, unnecessary repetition. For that reason it is
7 our purpose to make one series of arguments which
8 will answer collectively all points presented by the
9 motions of all defendants and each point made by
10 the motion of each defendant.

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

14 Counts 1 to 5 charge that the defendants
15 entered into unlawful conspiracies having as their
16 object the domination by unlawful aggression in
17 violation of treaties etc. (1) All of East Asia,
18 Pacific and Indian Oceans, against any country or
19 countries which might oppose that purpose; (2)
20 that part of the Republic of China commonly known
21 as Manchuria; (3) all of the Republic of China;
22 (4) all of East Asia and of the Pacific and Indian
23 Oceans etc. against the United States, British
24 Commonwealth, France, Netherlands, China, Portugal,
25 Thailand, Philippines, and the Soviet Union; and

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

8 Counts 6 to 17 inclusive, allege that all
9 of the defendants planned and prepared the wars
10 of aggression and in violation of international
11 law, treaties, agreements, etc. against various
12 nations separately named in each count, and in-
13 cluding in addition to the nations engaged in this
14 prosecution, the Kingdom of Thailand.

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

17 Counts 18 to 26, inclusive, allege that
18 certain of the defendants initiated wars of
19 aggression and in violation of international law,
20 treaties, etc., against China, United States,
21 Philippines, British Commonwealth, France, Thailand,
22 Soviet Union and the Mongolian Peoples Republic.

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

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

8 Counts 37 and 38 allege that certain defend-
9 ants therein named conspired together to murder any
10 and all such persons, both military and civilian,
11 as might be present at the place attacked in the
12 course of initiating of unlawful hostilities against
13 the United States, the Philippines, British Common-
14 wealth, Netherlands and Thailand.

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

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

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

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

4 Count 53 alleges that certain named defend-
5 ants conspired to commit breaches of the law and
6 customs of war in respect of the treatment of
7 prisoners of war and civilian internees.

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1 Count 54 alleges that certain named defend-
2 ants ordered, authorized and permitted such offenses.

3 Count 55 alleges that certain named defend-
4 ants deliberately and recklessly disregarded their
5 legal duty to take adequate steps to prevent such
6 breaches and thereby violated the laws of war.

7 In this analysis no effort has been made
8 to name the particular defendants charged in spe-
9 cific counts which include any less than all of the
10 defendants. The reason for this will appear from
11 a consideration of the theory and procedure followed
12 by the prosecution in establishing its case.

13 The prosecution has presented its case in
14 accordance with the well recognized "Conspiracy"
15 method of proof. That is to say, it has proceeded
16 to prove that an overall conspiracy of a comprehen-
17 sive character, and of a continuing nature, was
18 formed, existed and operated during the period from
19 1928 to 1945 covered by the Indictment, and that
20 the object and purpose of said conspiracy consisted
21 in the complete domination by Japan of all of the
22 territories generally known as Greater East Asia
23 described in the Indictment; that it was the
24 purpose to secure such domination by war and wars
25 of aggression and in violation of international law,

1 treaties, etc., at whatever places and against
2 whatever nations and persons should be convenient
3 or necessary to accomplish the overall purpose of
4 the conspiracy.

5 It followed, of course, as an incident,
6 and as a necessary part of such conspiracy, that in
7 pursuing the object of the conspiracy, and in the
8 planning, initiating and waging of wars of aggres-
9 sion, and wars in violation of international law,
10 treaties, etc., that numerous individuals, both
11 military and civilian, would be killed.

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

15 It, therefore, follows from fundamental,
16 universal principles of the law of Conspiracy, that
17 any and all persons who were members of the overall
18 conspiracy which I have just described, became
19 individually and severally criminally responsible
20 and liable to prosecution and conviction for each
21 and every act committed in the course of the con-
22 spiracy, whether that act be the unlawful planning,
23 initiation, or waging of war, or whether it be a
24 murder or other atrocity in violation of law com-
25 mitted in the course of the carrying out of the

conspiracy.

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

5 FIRST: Has a general and continuing con-
6 spiracy of the character and scope set forth in
7 Count 1 of the Indictment been established?

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

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

19 It is perhaps an unnecessary precaution, in
20 view of the wide learning and experience of the
21 Members of this Tribunal, for me to do so; but, as
22 indicating the prosecution theory in presentation of
23 this case, and the legal basis therefor, I take the
24 liberty of quoting an approved instruction given to
25 the jury in the California case of People v. Sacramento

1 Butchers' Association, 12 Cal. App. 471, at P. 495,
2 which is as follows:

3 MR. BROOKS: If the Tribunal please, we
4 would like to object to the introduction of statutory
5 law, as the prosecutor has put forth here at the
6 bottom of page 7 which is based wholly upon statu-
7 tory law, and the introduction of cases based upon
8 such statutory law before an International Military
9 Tribunal of this kind on conspiracy.

10 THE PRESIDENT: Criminal conspiracy in the
11 law of my country and, I believe, in the law of all
12 British countries and of America is not based upon
13 statute but is the development of the common law;
14 and we may be very much helped by decisions and
15 directions to juries by eminent American judges.
16 Certainly, we will disregard any American decision
17 which was based and based alone on American statute.

18 MR. E. WILLIAMS: Shall I proceed?

19 THE PRESIDENT: Proceed, yes.

20 We will recess now for fifteen minutes.

21 (Whereupon, at 1445, a recess was
22 taken until 1500, after which the proceed-
23 ings were resumed as follows:)
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MARSHAL OF THE COURT: The International
Military Tribunal for the Far East is now resumed.

THE PRESIDENT: Mr. Williams.

MR. E. WILLIAMS: I started with a quotation
from the case just cited.

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

1 member of the conspiracy, although the part he was to
2 take therein was a subordinate one, or was to be
3 executed at a remote distance from the other conspira-
4 tors."

5 I also quote from the opinion of the United
6 States Circuit Court of Appeals for the Seventh
7 Circuit, in the case of Allen vs. The United States,
8 4 Fed. (2) 688 as follows:

9 "A conspiracy may be established by circum-
10 stantial evidence or by deduction from facts. The
11 common design is the essence of the crime, and this
12 may be made to appear when the parties steadily pursue
13 the same object, whether acting separately or together,
14 by common or different means, but ever leading to the
15 same unlawful result. If the parties acted together
16 to accomplish something unlawful, a conspiracy is
17 shown, even though individual conspirators may have
18 done acts in furtherance of the common unlawful design
19 apart from and unknown to the others. All of the
20 conspirators need not be acquainted with each other.
21 They may not have previously associated together.
22 One defendant may know but one other member of the
23 conspiracy. But if, knowing that others have combined
24 to violate the law, a party knowingly cooperates to
25 further the object of the conspiracy, he becomes a

1 party thereto."

2 Another case which indicates the prosecution
3 theory of proof is the case of People v. Walker, 17 Cal.
4 App. (2) 372, which was a case in which the defendant
5 was convicted of the crime of grand theft, a specific
6 offense. Proof was made by showing that he was a
7 member of a conspiracy in the course of which the
8 theft was committed. The defendant claimed that
9 he was not responsible because while the theft had
10 admittedly been committed, it had been committed
11 by another person.

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

14 "On the trial of the action it was neither
15 asserted nor attempted to be proved by the prose-
16 cution that defendant either directly participated
17 in the actual commission of the offense for the com-
18 mission of which he was being prosecuted, or even that
19 he was personally present at the time when and the
20 place where the crime was actually committed. To
21 the contrary, defendant's conviction depended upon
22 legal proof of his membership in the conspiracy, or
23 of his having been a party to an agreement to commit
24 the crime.
25

"Appellant concedes the fact that on the

occasion in question the crime of grand theft was
1 committed.

2 "Apparently without conflicting authority
3 with reference thereto, as a matter of common know-
4 ledge, the law recognizes the fact that where two
5 or more persons have engaged in the commission of
6 some criminal act, their antecedent agreement or
7 common understanding, one with the other or the
8 others, so to do, ordinarily has been entered
9 into in secret; but manifestly, where the crime is
10 shown to have been committed by two or more individuals
11 who in its commission have acted in concert, one with
12 the other or the others, it is an inevitable conclusion
13 that the crime was the result of an agreement of
14 conspiracy between or among the participants therein
15 that the crime should be committed."

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

22 I purpose now, very briefly, to point out
23 a sufficient amount of the evidence produced over
24 these many months of trial, to show that such a
25

1 conspiracy as described in the Indictment has been
2 proved to have existed, and to point out to the
3 Court the evidence which shows the object, purpose
4 and scope of this conspiracy.

5 When I have completed this presentation,
6 I believe it will appear to the satisfaction of
7 the Court that the answer to the First Question,
8 namely:

9 "Has a conspiracy been proved?"
10 must be answered in the affirmative.

11 Following this presentation, my brother,
12 Mr. Comyns-Carr, Prosecutor for the United Kingdom,
13 will point out to the Court so much of the evidence
14 in respect of the activity of each of the defendants
15 as is sufficient to show that that defendant was at
16 the times involved in the various counts, a member
17 of the conspiracy and therefore liable for the com-
18 mission of the crimes specifically set forth.

19 We feel that this presentation will adequately
20 answer all contentions made by the defense, and that
21 in addition thereto, it will serve to point out and
22 clarify the issues and will be of some assistance
23 to the Court in passing upon such questions of
24 admissibility as may arise in the course of the
25 presentation of the defense.

1 As seen from the quotations just read, the
2 cardinal requirement on the prosecution in a con-
3 spiracy case is to prove the common design. In
4 some cases the common design is difficult to find
5 while in other cases it is comparatively easy. How-
6 ever, in either case, once the common design has
7 been established, all the evidence, regardless of
8 how disconnected it may seem to be, or regardless
9 of how disconnected the actions of the various
10 defendants may seem, falls easily into its proper
11 and logical sequence.

12 In this case, it is submitted, it is not
13 at all difficult to locate and spell out the common
14 design. Aside from the evidence on Class B and C
15 Offences, almost each and every document and the
16 testimony of each and every witness highlights the
17 common design as being nothing less than to obtain
18 political, military and economic domination of what
19 has come to be known as the Greater East Asiatic
20 Area by and through any and all methods whatsoever
21 including the fighting of aggressive wars. If one
22 grasps this common design as the key string of
23 the mosaic of the evidence, one must inevitably
24 recognize that between the years 1928 and 1945 a
25 conspiracy among certain of the militaristic class

1 of Japan and certain civilians was formed and put
2 into operation. The prosecution, of course, is unable
3 to name all of the members of that conspiracy. We
4 do know, and the evidence has established, that
5 even prior to 1928 and continuously on down to
6 the end of the conspiracy the defendant OKAWA was
7 engaged in promoting, publicizing and inciting the
8 people of Japan to join in a militaristic and ultra-
9 nationalistic "renovation" of Japan for the purpose
10 of bringing about the subjugation and domination
11 by the Japanese Empire of all of East Asia and
12 the Islands of the Pacific and Indian Oceans and
13 the ousting of all the whites from that territory.
14 The purpose was to start by taking Manchuria, then
15 the rest of China, then (dependent as to order upon
16 current conditions) to move northward and take
17 Siberia, and to move southward and to take Malaya,
18 Thailand, French Indo-China, the Netherland Indies,
19 Burma and India, the Philippines, Australia and
20 New Zealand. The grandiose object of the conspiracy
21 is adequately expressed in exhibit 2182A.

22 This exhibit, taken from the book, "The
23 Establishment of Order in Greater East Asia", by
24 OKAWA, was published 20 August 1943 during the course
25 of the conspiracy and was an expression by one of

1 the conspirators of its object and purpose. I quote
2 as follows:

3 "If I were to write a modern history of
4 Japan, I should begin it with a description of
5 Shin-en SATO's ideas. This is because in the soul
6 of this great scholar had already been conceived
7 a new Japan in the most concrete form. (From page
8 9)

9 "Shin-en SATO, first of all, thought Japan
10 'the foundation of the world' and believed that
11 Japan would be able to make all the rest of the
12 world her countries or prefectures if she succeeded
13 in 'ruling over the foundation of the world'. With
14 a view to carrying out this 'great work of renovating
15 the world', he advocated a drastic political reno-
16 vation of the interior Japan and the order of uni-
17 fying all nations. 'In order to develop other coun-
18 tries, it is best for the Empire /i.e. Japan/ to
19 make a start by absorbing China into her first of
20 all,' he advocated '....Even the powerful China is
21 no match for the Empire, not to speak of other
22 barbarous countries.... If China becomes our pos-
23 session, is it possible for the other countries in
24 the East, Siam and India not to come gradually under
25 the sway of the Empire yearning for her power of

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

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

22 Something of the course of the conspirators'
23 plans is shown in the book written by the accused
24 HASHIMOTO (published in 1936 during the course of the
25 conspiracy), in which he states that in 1930 while

1 returning to Japan from Turkey:

2 "During my thirty days' voyage I pondered
3 on how to reform Japan, and as a result I succeeded
4 in drawing a definite plan to a certain degree.
5 And on returning to the General Staff Office, my
6 former haunt, I devised several schemes in order
7 to put my ideas into execution. Although I dare
8 not say it was the only cause of such results,
9 however, the Manchurian Incident, secession from
10 the League of Nations, and renunciation of the Dis-
11 armament Treaty, took place successively and within
12 the country, May 15 Incident, Shinpei Tai Incident,
13 and the February 26 Incident took place in success-
14 ion."

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

21 Testimony of OKADA; testimony of TANAKA.

22 I may say, if the Court please, I have the
23 citations in the left-hand column of the prepared
24 matter. I am not reading them.

25 The testimony of OKAWA at his trial in

1 Tokyo in 1934 (during the existence of the conspiracy)
2 showed the relation of the March and October Inci-
3 dents to the Manchurian Incident and the aggressions
4 in Manchuria. He stated that he (OKAWA) and the
5 accused HASHIMOTO, ITAGAKI and DOHIHARA were all
6 in the conspiracy.

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1 OKAWA's defense in the Tokyo Court of
2 Appeals sets forth some of his activities in the
3 conspiracy to set off the Manchurian aggressions,
4 and in particular his close cooperation with the
5 KWANTUNG ARMY in selecting Japanese "officials"
6 for Manchuria.

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

14 That the high military command of Japan and,
15 in particular, the KWANTUNG ARMY were involved in
16 this conspiracy to seize and dominate Manchuria is
17 shown by the fact that within twenty-four hours
18 of the Incident at Mukden large Japanese armies were
19 spreading out over Manchuria. Such immediate ac-
20 tion (in view of our knowledge of logistics) must
21 have been preceded by many weeks or months of
22 preparation. This is also indicated by General
23 MINAMI's strong militaristic speech at a conference
24 of Division Commanders concerning Manchuria and
25

1 Mongolia August 4, 1931.

2 That the Mukden Incident was a planned one
3 is shown not only by the evidence concerning the
4 plot to which reference has already been made, but
5 is also strongly indicated by the written report of
6 the League of Nations Committees, the testimony of
7 the witness John B. Powell, the reports of Consul
8 General HAYASHI to Foreign Minister SHIDEHARA, and
9 the testimony of the witness MORISHIMA.

10 All of the evidence concerning what the
11 Japanese did in ruling the territory, politics, and
12 economy of Manchuria, together with the circumstances
13 of the establishment of the puppet governments in
14 Manchuria (the latter designed to deceive the other
15 powers), shows that it was at all times the intent
16 of the Japanese conspirators to take permanent
17 physical, political and economic possession of Man-
18 churia, and that this was to be accomplished, and in
19 fact was accomplished, by means of aggressive war-
20 fare, in violation of international law and treaties
21 and assurances and, in particular, in violation of
22 the Nine-Power Treaty and the Kellogg-Briand Pact.

23 At the time of the Mukden Incident the ac-
24 cused MINAMI was War Minister. He claimed to know
25

1 nothing of the activities of the Kwantung Army and
2 the troops from Korea who were spreading over Man-
3 churia. He claimed he could not control them. It
4 is significant, however, that no action to control
5 the supply of money, material or reinforcements to
6 those armies was undertaken by MINAMI. He was short-
7 ly followed as War Minister by the accused ARAKI
8 who actively supported the additions to and reinforce-
9 ments of the Japanese Armies fighting in Manchuria.
10 ARAKI was engaged in propoganda, seeking to whip
11 up the militaristic spirit of the Japanese, to
12 glorify the Japanese Army, to point out its goal
13 in conquering all of East Asia, to point out the
14 probability of war with the United States, and by
15 means of flags and airplanes to show that Japan
16 could conquer and dominate the whole world. This
17 was done by means of a motion picture entitled
18 "Japan in Time of Emergency" which was made and
19 distributed in 1933.

20 During the period from 1932 to 1936 Japan
21 completed its conquest of Manchuria (including
22 Jehol Province); expanded its Governmental, economic
23 and industrial control for that territory and pre-
24 pared for the next step which was further Armed
25

1 advance into China.

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

12 In this dilemma, the accused or their leaders
13 sought the political strength and bargaining power
14 which would be acquired by military alliance with
15 Germany, a nation then engaged in a program of mili-
16 tary preparedness for aggressive action in Europe.
17 The result was the conclusion of the Anti-Comintern
18 Pact on 25 September 1936. The Pact on its face
19 was directed against the activities of the Communist
20 International, but it was converted into a military
21 alliance aimed at the U.S.S.R. by an accessory
22 protocol and secret agreement. The Anti-Comintern
23 Pact was designed and intended, through the threat
24 of joint military action between Japan and Germany,
25

1 to operate as a check against the Soviet Union,
2 to strengthen the hand of Japan in China and to
3 afford an excuse for continued Japanese military
4 aggression.

5
6 Japan, thus fortified in her international
7 situation, was in a position where she could proceed
8 in comparative safety with the execution of her so-
9 called divine mission of renovating the world, the
10 first step of which was the creation of a New Order
11 in East Asia. The accused or their leaders, by
12 the conclusion of this Pact, laid the groundwork for
13 further cooperation of aggressive nations in the
14 accomplishment of the objects of the conspiracy.

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

24 "The military aim of the Japanese Army as
25 reiterated to me by such Japanese officers was not

1 so much the acquisition of territory as the anni-
2 hilation, submission, and killing of Chinese
3 Nationalist Armies."

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

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

16 I skip something and end with this:

17 "I hope the above intention of Japan will
18 be understood correctly by the Chinese so that
19 they may cooperate with us without the slightest
20 apprehension. Otherwise the construction of the
21 new order would be impossible. As for those who
22 fail to understand to the end and persist even
23 hereafter in their opposition against Japan, we have
24 no alternative than to exterminate them."
25

1 It may be stated in passing that as indica-
2 ted by ARAKI's speech in the motion picture above
3 referred to, the "extermination" of those who stand
4 in the way or who do not understand the high spiritual
5 purpose of Japan's military aggressions is called
6 "self-defense."

7 As the Japanese armies fought the Chinese
8 in an "Incident" which lasted from September 1931
9 to September 1945, and which included from 1937 to
10 1945 a total casualty list of Chinese soldiers in
11 excess of three million as well as uncounted numbers
12 of civilians killed, wounded and rendered homeless,
13 the Government of Japan undertook to take over the
14 Government, the soil, the economy and the industry
15 of each part of China as it was conquered.

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

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

25 Through the organization and operation of

1 the China Affairs Board, the North China Development
2 Company, Ltd., and Central China Promotion, Ltd;
3 through tremendous investment in Chinese industry;
4 through the setting up of puppet governments in
5 Peiping and Nanking; through the obtaining of special
6 rights and privileges under secret agreements in
7 contravention of the Nine Power Treaty, Japan took
8 possession of all of the resources of such parts of
9 China as she conquered.

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

14 It was Japan's policy not only to establish
15 her "new order" in East Asia, but to drive out Anglo-
16 Americans from China. In 1935 the accused MATSUI,
17 in a conversation with General Ching,"advocated that
18 Asia should be the Asia of the Asiatics and that
19 European and American influences should not be ex-
20 panded."

21 In 1940 the accused HASHIMOTO wrote:

22 "The moment we establish a policy to drive
23 out all Anglo-Americans from China, China will be-
24 gin to move toward a new order."
25

1 In 1941 the accused MATSUOKA said:

2 "*** The work of the establishment of
3 Manchukuo is the first step of the reconstruction
4 of the new order in East Asia, and at the same time
5 was a herald of the construction of the world new
6 order and its position in the world history should
7 be said to be very important. The true significance
8 of the Manchurian Incident will be realized for the
9 first time when the construction of the new order
10 in East Asia will be accomplished for which we are
11 now making every endeavor."
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1 In 1944 the accused KOISO in an address
2 before the Diet stated:

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

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

10 "I was afraid that what he (MATSUI) meant
11 by Asia of the Asiatics was actually the Asia of the
12 Japanese."

13 The League of Nations report of 8 October
14 1937 concludes:

15 "After examination of the facts laid before
16 it, the Committee is bound to take the view that the
17 military operations carried on by Japan against China
18 by land, sea and air are out of all proportion to
19 the incident that occasioned the conflict; that such
20 action cannot possibly facilitate or promote the
21 friendly cooperation between the two nations that the
22 Japanese statesmen have affirmed to be the aim of
23 their policy; that it can be justified neither on the
24 basis of existing legal instruments nor on that of
25 the right of self-defense, and that it is in

1 contravention of Japan's obligations under the Nine
2 Power Treaty of February 6, 1922, and under the Pact
3 of Paris of August 27th, 1928."

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

7 The all-pervading vice of this contention
8 is that Japan in her aggressions in Manchuria and the
9 rest of China undertook to decide in Japan (and with-
10 out consulting China) what territory belonging to China
11 she would occupy and how, what form of government
12 should exist and by whom it shall be organized, what
13 industrial, commercial and financial systems should
14 be established, how transportation, communications,
15 press, radio, propaganda, censorship, customs and
16 foreign relations should be controlled and conducted.
17 Yet, neither by custom, International law, treaty,
18 precedent nor otherwise were any of these matters
19 in the slightest or most remote degree the business
20 of Japan. She had no more right to arrogate to her-
21 self powers such as these in China than China had to
22 do so in Japan. Her acts were those of a lawless,
23 aggressive invader and conqueror. They were in
24 violation of Chinese sovereignty and of Japan's
25 solemn obligations to China and the other signatories

1 of the Nine Power Pact and other treaties.

2 These acts were the result of the plotting and
3 planning of these conspirators and a part of the over-
4 all plan for the conquest of "Greater East Asia."

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

14 Germany was promised preferential trade treat-
15 ment in China in consideration of the special relations
16 which existed between Japan and Germany after the con-
17 clusion of the Anti-Comintern Pact. The controversy
18 which arose out of the division of spoils in China
19 afford a high degree of proof of the Japanese plan of
20 subjugation and exploitation by aggressive warfare.

21 Japan and Germany embarked upon extensive
22 programs of preparation for military operations and
23 demonstrated similar intentions to wage aggressive
24 warfare in their respective spheres of the world. Japan,
25 acting through and under the influence of the accused,

1 and Germany conceived the idea of strengthening their
2 respective international positions by inducing other
3 nations to unite in close association with them.
4 This plan first took shape in the form of recruiting
5 Italy as a member of the Anti-Comintern Pact on
6 6 November 1937, and was followed by the admission of
7 Manchukuo and Hungary to the Pact on 22 February 1939
8 and Spain on 27 March 1939. The Pact was renewed on
9 25 November 1941, at which time Bulgaria, Denmark,
10 Finland, Croatia, Rumania, Slovakia and the puppet
11 Nanking regime, under the name of "National Chinese
12 Government," were admitted by declarations of ad-
13 herence. The next move was to obtain closer cooper-
14 ation between the people of the Axis Powers by resort-
15 ing to the device of concluding so-called cultural
16 treaties.

17 Although the accused, acting through their
18 leaders, mobilized the entire strength of the nation
19 for its war against China and won many naval and
20 military victories, they were unable to conclude the
21 so-called China Incident. Consequently, they were
22 brought to the realization of the necessity for closer
23 collaboration of Germany, as demonstrated by the
24 future course of negotiations. In the words of OSHIMA,
25 the accused wanted a military alliance with Germany

1 "which would help to conclude the China Incident and
2 (1) to clarify the Russian situation so that troops
3 could be deployed elsewhere, (2) to strengthen Japan's
4 international position, and (3) to receive technological
5 and economic aid from Germany."

6 A division of opinion developed in the
7 Japanese government as to the extent to which Japan
8 should be committed to participation in a German war
9 against England, France and the United States. In
10 April 1939 the conclusion was reached that a limited
11 interpretation of the Pact was necessary from Japan's
12 standpoint for the reason that Japan "was at the
13 moment not yet in a position to come forward openly
14 as the opposer of the three democracies." Negotiations
15 continued until the conclusion of a non-aggression
16 treaty between Germany and the Soviet Union, the re-
17 action from which caused the downfall of the Japanese
18 Cabinet.

19 The expediency of quickly concluding the
20 German-Russian non-aggression pact became apparent
21 upon the dramatic German invasion of Poland on
22 1 September 1939. Notwithstanding the temporary set-
23 back to the conclusion of a Japanese-German-Italian
24 military alliance, efforts were continued by the
25 accused to develop closer Japanese-German relations

1 with the view to ultimate conclusion of a tri-partite
2 military alliance.

3 As the day of world conflagration approached
4 the conduct and declarations of the accused, or their
5 leaders, revealed more and more the common plan for the
6 accomplishment of the so-called divine mission which
7 they were preparing to impose upon East Asia and the
8 world by resorting to aggressive warfare to the ex-
9 tent necessary for the accomplishment of their objec-
10 tives.

11 In the southern areas French Indo-China
12 occupied a strategic position of the highest importance
13 over which Japanese control was necessary for any
14 contemplated military operations against Malay,
15 Singapore and the Netherlands East Indies and the
16 Philippines. In addition, Indo-China was rich in
17 natural resources vitally needed by the Japanese
18 economy for the continuance of war. OSHIMA, timing
19 his action with Hitler's initiation of war against
20 Poland, advised military aggression in the southern
21 areas of Greater East Asia and against Hong Kong, for
22 which he declared the Japanese navy was prepared.

23 Within two days after the German invasion of
24 Belgium, Luxembourg, and the Netherlands on 9 May
25 1940, and within two days after the fall of France on

1 17 June 1940, the accused asked German assurances
2 of a free hand in the Netherlands East Indies and
3 French Indo-China. This was followed by a Japanese
4 ultimatum to French Indo-China relative to transporta-
5 tion of materials to Chiang Kai-shek. At the same time
6 negotiations were renewed with Germany for the con-
7 clusion of the military alliance. So strong was the
8 demand for conclusion of a military alliance that a
9 joint conference of the Japanese Army, Navy and Foreign
10 Office officials was held on 12 July 1940 for the pur-
11 pose of intensifying efforts to procure such a pact.
12 In this conference it was determined that "it is
13 our object to realize the expansive purpose of the
14 Japanese Empire and strengthen our international
15 position by embodying an ultimate cooperative connec-
16 tion between our Empire, which is establishing a 'New
17 Order' in East Asia, and Germany, which is fighting
18 for a 'New Order' in Europe.

19 A unified policy based on the opinions of the
20 Army and Navy was adopted in which it was determined
21 that the area to be embraced within the "New Order in
22 the Far East" should extend from Burma and the eastern
23 part of India to New Zealand; that the fundamental
24 principle of the coalition should be cooperation with-
25 in the respective spheres intended to be established

1 by the Axis Powers; that the Japanese conception of
2 "political leadership" was considered to be "occupation"
3 of the areas in question; and that necessity existed
4 for immediate execution of their plans.

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

14 At a Four-Minister conference on 4 September
15 1940 it was determined that the time was ripe for
16 speedy initiation of conversations for strengthening
17 of collaboration among Japan, Germany and Italy. The
18 basic principles for such conversations were declared
19 to be the making of a fundamental agreement for mutual
20 cooperation "by all possible means," which included
21 "recourse to armed forces."

22 On 27 September 1940 the Tri-Partite Pact
23 between Japan, Germany and Italy was concluded with
24 unprecedented speed. By its provisions the Axis Powers
25 attempted to apportion the world by establishing areas
in which the leadership of the respective powers was

1 recognized. Each pledged full cooperation in the
2 establishment of leadership within the sphere of the
3 others, and political, economic and military aid was
4 pledged in the event of an attack against any one of
5 the signatories by a nation not then involved in the
6 European war or in the war with China. Letters were
7 secretly exchanged providing for consultation among
8 the signatories for the purpose of determining whether
9 action or a chain of actions would constitute an
10 attack within the meaning of the Pact. This Pact in
11 its essence contained the ultimate development of the
12 plot of the aggressive powers directed toward the
13 division of the world and the establishment of the so-
14 called New Order, which had for its purpose the
15 extinguishment of democracy throughout the world and
16 the subjugation of all the nations by the aggressive
17 states. It was the culmination of years of effort
18 on the part of the accused or their leaders to form
19 a military alliance in which the participating powers
20 would by solemn agreement recognize Japan's so-called
21 divine mission and agree to link their fate in the
22 accomplishment of its objectives. Without this
23 coalition the accused could not have risked the fate
24 of the Japanese Empire in initiating the final phases
25 of their plan to establish a New Order in East Asia

1 and the South Seas. In the atmosphere of the Privy
2 Council meetings held prior to the conclusion of the
3 Pact and in the light of the declarations made by the
4 accused and their co-conspirators in such meetings,
5 there is no room left for doubt that the accused or their
6 leaders had planned aggressive warfare and were seeking
7 the political and military aid that such a treaty would
8 afford.

9
10 Almost immediately after the conclusion of
11 the Pact a rapprochement with Russia was suggested as
12 a prerequisite for a Japanese advance in the regions
13 south of China. The accused, or their leaders, seized
14 the opportunity to mediate in the Indo-China-Thailand
15 border dispute as a device by which both Powers could
16 be placed under obligation to the Japanese Government.
17 In the spirit of the Tri-Partite Pact, Germany extended
18 valuable and effective aid in coercing Indo-China to
19 its submission to Japanese demands.
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1 Close collaboration continued between the
2 Axis Powers until the attack against American and
3 British possessions on 7 December 1941. Foreign Min-
4 ister MATSUOKA and Ambassador OSHIMA in conferences
5 with Hitler, Ribbentrop, Goering and Funk discussed
6 plans for an attack on Singapore, the coordination of
7 operations in the Pacific with operations in Europe,
8 the exchange of technical information, and information
9 derived from military operations in the field, and
10 cooperation required by the Axis Powers in all spheres
11 after the completion of the war. General commissions
12 and commissions of a technical character, one military
13 and one economic, were formed under the provisions of
14 the Tri-Partite Pact in order to effectuate full
15 collaboration among the Axis Powers.

16 Acting in full collaboration with their Axis
17 partners, the accused unified the Japanese Government
18 and nation behind the Tri-Partite Pact, and by their
19 declarations and conduct put into motion forces
20 designed to accomplish the objects of the conspiracy.
21 On 18 November 1941, Germany was asked if she would
22 consider herself at war with the United States if Japan
23 initiated the attack and whether Germany would enter into
24 an agreement not to conclude separately peace or an
25 armistice in case of war with the United States, and

1 Germany, without hesitation and in accord with the
2 spirit of the Tri-Partite Pact, replied favorably to
3 both inquiries. On 28 November 1941, Ribbentrop de-
4 clared, "There never has been and probably never will be
5 a time when closer cooperation under the Tri-Partite Pact
6 is so important." He also stated, "Should Japan become
7 engaged in a war against the United States, Germany of
8 course would join the war immediately." Italy made
9 the same commitments.

10 The efforts of the accused to obtain Axis
11 assistance in the executions of their plans bore
12 fruit. The Pearl Harbor attack occurred. Japan, Ger-
13 many and Italy concluded a "No Separate Peace Pact" on
14 11 December 1941 to remain in force during the life of
15 the Tri-Partite Pact. In this treaty the three Powers
16 also agreed after the termination of the war to "coop-
17 erate most closely for the purpose of realizing a
18 righteous new order in the meaning of the Tri-Partite
19 Pact." "A military agreement in the spirit of the
20 Tri-Partite Pact" was concluded by the three Powers on
21 18 January 1942 by which the world was divided into
22 zones for military operations.

23 The conduct and declarations of the accused and
24 their co-conspirators relating to the negotiations for
25 the Anti-Comintern Pact, the various trade and collateral

1 agreements, the Tri-Partite Pact, the No Separate
2 Peace Pact, and the Military Operational Agreement
3 between the Axis Powers and collaboration under the
4 same, we submit, constitute indubitable proof of the
5 existence of the conspiracy charged.

6 In so far as the conspiracy included plans to
7 prepare for, initiate and wage wars of aggression
8 against the Soviet Union, ample evidence has been of-
9 fered to show that at all times included in this case
10 it was the intention of the conspirators to attack
11 Russia and to seize and permanently hold parts of her
12 territory lying in East Asia (particularly Siberia.)
13 The only differences which existed among the conspira-
14 tors were as to when this should be done -- whether the
15 advance should first be north or south. It has already
16 been shown that the decision was to go south. This did
17 not involve any abandonment of the plans to attack
18 Russia -- it merely delayed their execution.

19 Throughout the period of the conspiracy many
20 things were done in the planning of the aggressions
21 against Russia. Within the limits of this presentation
22 it is not possible or even desirable to make an ex-
23 haustive analysis of the evidence. It is sufficient
24 to state that the evidence clearly shows that in the
25 course of this conspiracy the following things were done:

1 During the period of 1928-1945 propaganda for
2 war of aggression against the Soviet Union was spread.

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

7 The establishment of a military base for an
8 attack on the USSR in Korea in violation of the Ports-
9 mouth Treaty and the Peking Convention.

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

16 Sabotage activities of the Japanese on the
17 Chinese Eastern Railroad.

18 Systematic violations of the state frontier of
19 the USSR.

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

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

1 Refusal to accept Russia's proposal to conclude
2 a non-aggression pact as a manifestation of hostile
3 aggressive policy of Japan against the USSR.

4 The conclusion of the Anti-Comintern Pact.

5 The conclusion of the Tri-Partite Pact.

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

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

22 Military and naval plans not only required the
23 mobilization, training and arming of vastly increased
24 numbers of soldiers and sailors, acquisition of war
25 ships, carriers, aircraft, tanks, artillery and the

1 countless impedimenta of modern war, but demanded the
2 accumulation of vast stores of material and long range
3 plans for the acquisition of replacements as these were
4 used.

5 The Mandated Islands were fortified and other-
6 wise prepared for tactical and strategic use in war.
7 This was in direct violation of the mandate and of
8 Japan's treaty obligations with the United States.

9 The proposed wars being of an aggressive charac-
10 ter, involving the invasion of other countries, military
11 currency to be used in such other countries in denomina-
12 tions of dollars, pesos and guilders was ordered printed
13 and held for use.

14 The true scope of the grand design of the con-
15 spirators to achieve political, military and economic
16 control of the Asiatic continent and adjacent areas was
17 fully developed in the evidence presented during the
18 phase which covered the relations of Japan with the
19 United States and Great Britain during the period of the
20 Indictment.

21 This evidence showed that apart from the resist-
22 ance of the Chinese and other peoples of Asia, these two
23 powerful nations were the great and formidable obstacles
24 to the successful achievement of all that the conspirators
25 planned. They were obstacles not only because of the

1 vast financial and economic interests which they or
2 their nationals possessed in China and the rest of Asia,
3 which had to be expelled or limited and subordinated to
4 those of Japan if the conspiratorial plan was to be
5 successful, but also because through solemn treaty and
6 agreement Japan stood firmly bound with them to forego
7 the aims and ends of the conspiracy and to forbear from
8 any and all of the actions required to effectuate it.

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

21 The evidence in this phase of the case from
22 the period from 1931 on told the story of the efforts
23 of the conspirators to rid Japan of the duty of carry-
24 ing out the various obligations which they had volun-
25 tarily undertaken of respecting the rights of others

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in the Asiatic-Pacific world and of the resistance of

the United States and Great Britain to such efforts. To
1 free Japan of her duties and obligations under these
2 treaties so as to eliminate Britain and the United States
3 from the Asiatic world or to subordinate their rights
4 there to those of Japan within the limits allowed by
5 Japan, the evidence shows that the conspirators resorted
6 to every known or conceivable method to evade, alter,
7 abrogate or redefine the treaties.

8 They used intimidation, fraud, artifice and
9 chicanery, subtle redefinition of terminology, negotia-
10 tion, and when all else failed they resorted to the
11 use of armed force in an aggressive war against these
12 two western powers.

13 The evidence showed that by the beginning of the
14 year 1941 the situation had reached a critical stage
15 and at this juncture the conspirators decided to finally
16 accomplish their purpose of dominating the Asiatic-
17 Pacific world and remove the obstacles to that project
18 presented by Great Britain and the United States. To
19 accomplish this they adopted a two-fold policy; on the
20 one hand they negotiated with Britain and the United
21 States on certain specific outstanding problems in
22 accordance with certain proposals which, if accepted,
23 would have left Japan the master of the Asiatic-Pacific
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1 world, with Britain and the United States relegated to
2 whatever position Japan might allow; on the other hand
3 they actively prepared for war with these countries with
4 the same objectives and results. Both programs had the
5 same objectives, and while some felt that they could
6 accomplish the objectives of the conspiracy through
7 negotiation, others viewed them as impossible from the
8 beginning and regarded them only as useful camouflage
9 for active war preparations, to lull the United States
10 and Britain into a false feeling of security. To this
11 latter group the negotiations were an integral part
12 of the preparation for war.

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

21 THE PRESIDENT: We will adjourn now until half
22 past nine tomorrow morning.

23 (Whereupon, at 1600, an adjournment
24 was taken until Thursday, 30 January 1947, at
25 0930)

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