

29 January

Reuters

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INDIVIDUAL MOTIONS TO DISMISS

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Monday, 27 January 1947

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

The Tribunal met, pursuant to adjournment,
at 0930.

Appearances:

For the Tribunal, same as before with the
exception of: LORD PATRICK, Member from the United
Kingdom of Great Britain and HONORABLE JUSTICE NORTHCROFT
Member from New Zealand, not sitting.

For the Prosecution Section, same as before.

For the Defense Section, same as before.

The Accused:

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

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

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

3 THE PRESIDENT: Mr. Smith.

4 MR. SMITH: If the Court please, it is the
5 plan of the defense to present a number of motions.

6 THE PRESIDENT: I would like to know -- the
7 Tribunal would like to know in what order you propose
8 to move them and what counsel will support each.

9 MR. SMITH: Might I suggest that I was going
10 to ask your Honor's direction on it? For example,
11 we have a motion for mistrial on behalf of eleven
12 defendants.

13 THE PRESIDENT: I have never known of such
14 a motion until now. I have heard of a motion for
15 a new trial after a trial had been completed, but
16 even that is rare in national jurisdictions with which
17 I am familiar. I notice the motion is based on the
18 assumption that we are prepared to review all the
19 decisions we have given in the course of the proceed-
20 ings, and we are not prepared to do that. If I
21 understand the feeling of my colleagues, such a motion
22 will not be entertained. You will not be allowed to
23 move that motion.

24 Now, have you any other motion? What is
25 the next motion?

1 MR. SMITH: If your Honor has finally decided
2 that you are not going to entertain a motion for a
3 mistrial, we would like to have it filed in the
4 record to show what we tendered, and ask your Honor
5 to allow us an exception.

6 THE PRESIDENT: We have never denied you
7 an exception, and we will not deny you an exception
8 in this case. The motion will appear in the record.
9 It will be part of it, but will not appear in the
10 transcript, not in extenso.

11 MR. SMITH: We have also, your Honor, in
12 addition to separate motions to dismiss on behalf
13 of each defendant in the dock, a general motion
14 which has been purposely drawn in two parts for
15 this reason:

16 THE PRESIDENT: First, let us deal with
17 the motion in respect of the Supreme Commander's
18 position..

19 MR. SMITH: The first part --

20 THE PRESIDENT: That assumes, of course,
21 that we judicially notice the United States Consti-
22 tution and, of course, the constitution of every
23 other nation represented on this Court without any
24 request that we so judicially notice it. That is a
25 wrong view, in my opinion.

1 Any motion you move must be based on the
2 absence of evidence or on some uncontested matter,
3 something that is proved beyond question, something
4 that we must judicially notice; and the Constitution
5 of the United States and the legislation of the
6 United States is not to be judicially noticed as a
7 matter of course.

8 Understand clearly that the Tribunal is
9 not denying you the right to move any motion when
10 you have established a proper foundation for it,
11 but you have established none in respect of the
12 Supreme Commander.

13 There is another motion based on matters
14 which were dealt with on the 3rd of May when we
15 gave our decision on the question of jurisdiction.
16 Now, if I understand rightly, it was the wish of
17 the defense that that matter of jurisdiction and
18 the constitution of the Court should be disposed of
19 on a preliminary application. Dr. KIYOSE, repre-
20 senting all accused, spoke on the motions. I think
21 they were two. He spoke on one or both. The
22 motions were heard and disposed of by nine members,
23 then the whole Court, of whom eight are present today.
24 There was no dissentient, although I do not say that
25 every member voted on all the points; but an

1 overwhelming majority of the Court at the time thought
2 that the motions should be dismissed for reasons to
3 be given later. Those reasons will be given in due
4 course. Here, again, I say that at the proper time,
5 at the end of the trial, it will be open for the
6 defense to put every point they have already put
7 and additional points for the benefit of the three
8 new members.

9 Lastly, in Chambers I was assured, if my
10 recollection serves me rightly, and I can be cor-
11 rected from the records, that the motions today
12 would be motions to dismiss because of the absence
13 of evidence or of sufficient evidence. We had a
14 discretion to allow or not to allow those motions,
15 and we allowed them on that understanding. So, pro-
16 ceed to move those individual motions. At present
17 I cannot see the need for a motion on behalf of all
18 the defendants based on the absence of evidence or
19 sufficient evidence to convict, but you may be able
20 to show there is a need for it.

21 You have, without the asking, exceptions
22 from everything the Tribunal has said and done this
23 morning.
24
25

1 MR. SMITH: If your Honor please, your
2 Honor has made a number of statements this morning
3 and I would like to have an opportunity to say some-
4 thing in reply to your Honor.

5 THE PRESIDENT: Be as brief as I was, Mr.
6 Smith.

7 MR. SMITH: Well, your Honor, I don't think
8 anybody has ever accused me of being verbose in
9 this case. If your Honor doesn't want me to say
10 anything this morning, I would appreciate it if
11 you would say so frankly.

12 In the first place, I wasn't in Chambers
13 when counsel said that the general motions would
14 be limited to the sufficiency of the evidence.

15 THE PRESIDENT: I said what I mean, Mr.
16 Smith. Address the Tribunal briefly, please.

17 MR. SMITH: If your Honor could have
18 listened in on the discussions among American
19 counsel during the last week as to what is properly
20 included in a motion to dismiss and what is improper,
21 your Honor would realize there is no agreement among
22 ourselves as to what the order of the Court
23 meant.

24 THE PRESIDENT: The cooperation among the
25

1 defense counsel has for months been excellent. I
2 realize that there must be differences always.

3 MR. SMITH: With respect to the second part
4 of the general motion to dismiss, in that part of
5 the motion are discussed, and nowhere else so far
6 as I can see in an individual motion to dismiss,
7 the broad aspects of the insufficiency of the evi-
8 dence and the broad points of law which affect the
9 position of each man in this dock.

10 As far as the first part of the motion to
11 dismiss is concerned, dealing with the jurisdic-
12 tion of the Court, our thought was that all inter-
13 national tribunals take judicial knowledge of their
14 level of law, that is, the international level, and
15 all bodies and systems of law, law in statute.

16 THE PRESIDENT: Seeing we are not a court
17 of any of the particular countries concerned, that
18 may be difficult to establish; but we are always
19 prepared to hear argument on it. This, however,
20 is not the time.

21 MR. SMITH: As far as the jurisdiction goes,
22 there seems to be a misunderstanding. Last June,
23 before this trial started, I came into chambers
24 and merely sought leave from your Honor to file a mo-
25 tion on behalf of Mr. HIROTA alone, going to the juris-

1 diction. A majority of the defendants in the box
2 joined in that motion and it has been amplified.
3 If it is necessary, we intend to go to the federal
4 courts in Washington and raise these matters all
5 over. In order to get into that court we must show
6 that we fairly presented the matter to your Honors
7 and that this Tribunal was given an opportunity to
8 correct it.

9 THE PRESIDENT: It is a matter of sheer in-
10 difference to us whether you go to the federal court
11 in Washington or to the federal court in Sidney or
12 to the federal court in Ottawa or the federal court
13 in Moscow or any other court. One has as much right
14 to review as the other.

15 MR. SMITH: If your Honor has finally deter-
16 mined not to hear that part of the general motion to
17 dismiss which deals with the jurisdiction, then I
18 would like to have it spread on the record, and ask
19 your Honor to allow me an exception to your refusal
20 to entertain it.

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THE PRESIDENT: You have an exception. I told you that you already have an exception to anything we have said or done today.

MR. SMITH: Your Honor, with respect to the motion to jurisdiction, I had a minor amendment which merely adds one sentence, so I will call it to the Court's attention, or the clerk's attention, rather, in order that it be complete.

Your Honor, there is this further to be said about the motion for jurisdiction: At one time or another it was indicated while the papers were being drawn that all defendants joined in that part of the motion. I am now advised that all the defendants except TOJO, SUZUKI, KAYA, OSHIMA, DOHIHARA, MATSUI, and ITAGAKI make that motion.

THE PRESIDENT: What particular motion is that Mr. Smith? They are not numbered yet, not in our papers. You might give us the numbers.

MR. SMITH: The motion, general motion dealing with the jurisdiction, your Honor, has no number on it. It is simply entitled "A motion to dismiss on behalf of all defendants."

THE PRESIDENT: Mr. Mantz assures me the original has not been filed. You are improperly before the Court.

1 MR. SMITH: I am sure it was sent over;
2 certainly by this morning.

3 Your Honor, I would like to add two more
4 names to the list of those who do not join the motion
5 with respect to jurisdiction. In addition to the
6 names which I previously read there should be HIRANUMA
7 and OKA.

8 THE PRESIDENT: Here are four general motions
9 and I do not know which one you are talking about.

10 MR. SMITH: Your Honor, we might pass this
11 for the time being. Evidently the papers have not
12 been brought into the court but they were delivered.
13 Nearly all of them were delivered Saturday but I
14 think this MacArthur Motion through an inadvertence
15 was not delivered until nine o'clock this morning.

16 THE PRESIDENT: We will call it the Supreme
17 Commander Motion. It has fifteen pages. Is that
18 right?

19 MR. SMITH: No, your Honor. The motion
20 itself consists of only four pages.

21 THE PRESIDENT: I haven't it.

22 MR. SMITH: But the argument on the motion,
23 which your Honor is evidently looking at, consists
24 of fifteen pages.

25 THE PRESIDENT: I have it now. Well, you are

1 moving that formally, Mr. Smith?

2 MR. SMITH: Your Honor, I would like to have
3 this proposed motion, which we are calling the Supreme
4 Commander Motion, and the argument connected with it,
5 copied into the record in order to show what our
6 contention is.

7 THE PRESIDENT: There is no need to publicly
8 challenge the position of the Supreme Commander. It
9 is not necessary in the interests of justice. It can
10 do no good. In this place and under these circumstances
11 it is undesirable unless it becomes necessary in the
12 interest of justice, and it is not yet necessary. You
13 will be allowed to do it if you establish a proper
14 foundation for it during the course of putting the case
15 for the defense, but you will do it as a respectful
16 legal argument and not as a political harangue. This
17 is not the floor of Congress or the floor of the
18 Senate of the United States or of any other parliament.

19 MR. SMITH: I would like to have your Honor
20 allow me an exception to your Honor's remark that our
21 motion and the argument connected with it is a political
22 harangue. It was not intended to be anything of the
23 kind. Counsel are certainly entitled to make their
24 contentions in this record and have this record show
25 what we tried to bring to your attention.

1 THE PRESIDENT: The point could be put in
2 sober legal language in one-tenth the space you have
3 taken up in saying what you intended to say. It will
4 not be read into the record and you have your excep-
5 tion.

6 MR. SMITH: Does that include the motion
7 itself? Your Honor refuses to allow the motion to
8 be copied into the record?

9 THE PRESIDENT: The Tribunal has already
10 told you it will be part of the record but it will
11 not be read into the record, that is to say, into the
12 transcript.

13 MR. SMITH: All that would mean that I have
14 to deal with, Your Honor, is the second part of the
15 general motion to dismiss which deals with the in-
16 sufficiency of the evidence and also hits the broad
17 points of law in this case.

18 THE PRESIDENT: Mr. Smith, I think we would
19 like you to move the individual motions first, that
20 is, the motions based on the ground there is not
21 enough evidence or no evidence, and then at the end
22 to deal with the motions generally on behalf of all
23 the accused.

24 Colonel Warren.

25 ~~MR. LOWWARRENE~~ If the Tribunal please, in order

1 that the record will be clear, the accused HIRANUMA,
2 DOHIHARA, and OKA did not join either of these two
3 motions, but unless the remarks of counsel might be
4 misconstrued we do not desire to waive our right to
5 raise the jurisdictional question at any time we feel
6 proper, and I want to call that to the Court's
7 attention at this time. Thank you, sir.

8 THE PRESIDENT: I thought I had made this
9 perfectly plain. You will be entitled to move any-
10 thing that you are capable of moving on the state of
11 the record at the end of the trial, but it is for us
12 to say when you will be entitled to move. Up to the
13 end of the trial we have control, subject always to
14 compliance with the Charter.

15 Mr. Levin.

16 MR. LEVIN: Mr. President, Mr. Smith I do
17 not believe made it clear that a number of counsel
18 did not join in the motion with reference to the mis-
19 trial, and I am authorized to say that counsel for
20 KIMURA did not join in that motion. Neither did I
21 join it on behalf of the clients that I represent.
22 I desire to state further to the Court that in such
23 participation that I had in relation to getting the
24 permission of the Court to make motions to dismiss
25 that there were no reservations of any kind in my mind.

1 While other counsel participated in presenting that
2 matter both in chambers and, I believe, in open court
3 to some extent, the record I am sure speaks for itself.
4 I have just been given a list of those who are not
5 joining in the various motions and if the Court will
6 give me permission I should like to read those names.

7 On the motion for mistrial the following do
8 not join: TOJO, SUZUKI, KAYA, OSHIMA, DOHIHARA,
9 ITAGAKI, MATSUI, HOSHINO, KIMURA, and OKA.

10 On the MacArthur motion, TOJO, SUZUKI, KAYA,
11 HOSHINO, DOHIHARA, ITAGAKI, MATSUI, HIRANUMA, OKA, and
12 KIMURA.

13 On the general motion to dismiss the follow-
14 ing do not join: SUZUKI, KAYA, OSHIMA, HOSHINO,
15 ITAGAKI, and MATSUI.

16 THE PRESIDENT: Mr. McManus.

17 MR. McMANUS: If your Honor pleases, on
18 behalf of the defendant ARAKI I now present an individu-
19 al motion to dismiss. However, in view of your Honor's
20 rulings it has become necessary for me to somewhat
21 revise the prepared copy that I have now before me.

22 THE PRESIDENT: I do not recollect saying
23 anything to which exception could be taken on individu-
24 al motions, but there may be something.

25 MR. McMANUS: If your Honor pleases, I shall

1 read to page 13 and then ask further directions of
2 the Tribunal.

3 THE PRESIDENT: This is one I did not read.
4 I must confess I did not get some of them until very
5 late yesterday afternoon.

6 MR. McMANUS: Mr. President:

7 If it pleases the members of this Tribunal,
8 I should like at this time on behalf of the accused
9 ARAKI, Sadao to request that the said accused ARAKI
10 be considered as having participated and joined in all
11 motions heretofore made by any and all defense counsel
12 and more particularly with reference to those motions
13 heard by this Tribunal before arrival of a number of
14 American counsel to represent their individual accused.
15 I further request this Tribunal to consider the defend-
16 ant ARAKI as having made such motions and that he be
17 granted an exception to any adverse ruling by this
18 Tribunal where such adverse rulings were rendered.

19 The court will undoubtedly recollect that
20 when these proceedings first started only several of
21 the accused were represented by American counsel and
22 on a number of occasions motions were made by the
23 American counsel for these few individual defendants
24 and a number of the accused did not join in such
25 motions. It will also undoubtedly be recalled that

1 the President of the Tribunal informed the remaining
2 American counsel whose clients were not represented
3 on these motions by American counsel that the said
4 counsel could make such motions at the time the
5 Tribunal decided to hear motions for dismissal at the
6 end of the prosecution's case. I presently so move
7 this Court and pray that the accused ARAKI be per-
8 mitted to have made all such motions made by the
9 aforementioned several attorneys and that he be
10 granted the exceptions to any adverse rulings by
11 the Tribunal as aforementioned.

12 THE PRESIDENT: I do not recollect that
13 statement but you can point it out to me. Perhaps
14 it is in the record.

15 MR. McMANUS: If your Honor pleases, during
16 the discussions with American counsel I am sure
17 that on several occasions several of the American
18 attorneys stated that they had discussed these matters
19 with your Honor and that you stated that at the proper
20 time or at the end of the prosecution's case that we
21 could make these particular motions in which the
22 defendants, our individual defendants, had not joined
23 before the arrival of American counsel.

24 THE PRESIDENT: The words I object to there
25 as representing my views are "the end of the

1 prosecution's case." No doubt I would have said it
2 as regards the defense summation.

3 MR. McMANUS: If your Honor would prefer I
4 could withdraw this request now and present it at
5 the end of the entire case, if you so desire.

6 THE PRESIDENT: I think so, Mr. McManus.

7 MR. McMANUS: I shall now delete the next
8 three paragraphs.

9 THE PRESIDENT: Where do you come to the
10 submissions based on the absence of evidence, Mr.
11 McManus? I think that is where we will start.

12 MR. McMANUS: On page 2, your Honor, bottom
13 of page 2.

14 Consequently, now comes the defendant ARAKI
15 and moves this Tribunal to dismiss these charges
16 allegedly attributed to him in the Indictment on the
17 grounds that the prosecution has failed to establish
18 a prima facie case against him in

19 (a) Conspiracy.

20 The Indictment charges that the accused
21 ARAKI conspired with the defendants and divers other
22 persons between the first of January, 1928, and the
23 second of September, 1945, to commit or encourage the
24 commission of crimes against peace, war crimes and
25 crimes against humanity. It is the contention of the

1 accused that the prosecution has failed to connect
2 him in any way with these defendants or any other
3 persons by a combination, an agreement or otherwise
4 to commit or perform any unlawful acts contrary to any
5 laws, international or otherwise, or to commit or
6 perform any lawful acts by unlawful means as so alleged
7 in the Indictment.

8 Concerning conspiracy itself, let us examine
9 briefly the definition thereof and the elements neces-
10 sarily essential to constitute a criminal conspiracy.
11 We are undertaking to delve briefly into these funda-
12 mentals for the purpose of showing to this Tribunal
13 that the prosecution has failed not only in its
14 endeavor to connect the accused ARAKI with the con-
15 spiracy so alleged in the Indictment but that it has
16 failed also to establish any conspiracy whatever,
17 wherein it is alleged ARAKI participated.

18 There are several definitions for a conspir-
19 acy, a very common one being an agreement between or
20 a combination of two or more persons for an unlawful
21 purpose. However, the conspiracy charged in this
22 Indictment is a conspiracy to commit crimes. There-
23 fore we might concern ourselves with the definition
24 of a conspiracy to commit a crime, to wit, an agree-
25 ment or a combination of two or more persons to do an

1 unlawful act.

2 The elements required to prove such a conspir-
3 acy are as follows:

4 1. There must be a crime set out by statute
5 or existing by common law;

6 2. The combination or agreement by two or
7 more persons to commit such a crime;

8 3. The intent of the two or more persons to
9 violate the statute setting out the above-mentioned
10 crime;

11 4. There must be a meeting of the minds;

12 5. The overt act done by one or more persons
13 after the aforementioned agreement had been reached.

14 First, let us consider the crime. It is the
15 contention of the accused ARAKI that insofar as the
16 prosecution has decided to proceed under the terms of
17 an international Charter set up for the purpose of
18 trying alleged war criminals for various violations,
19 the crime or crimes alleged in the Indictment are,
20 therefore, statutory and that the charges attributed
21 to them is a conspiracy to commit a statutory crime
22 or crimes.

23 Consequently, insofar as this Charter or
24 statute making certain acts a crime was not set up
25 until after the cessation of hostilities, the crimes

1 so attributed to the accused ARAKI were not in
2 existence at the time of their alleged commission.

3 It is fundamental that a person cannot be
4 charged retroactively for an offense committed before
5 a statute setting out such an offense came into
6 existence.

7 In the present case, the Court will take
8 judicial notice of the fact that no such crimes as
9 "crimes against peace, war crimes, or crimes against
10 humanity" had existed by statute internationally
11 before the drafting of this Charter or the Nuremburg
12 Charter, both of which came into existence as a result
13 of World War II.

14 THE PRESIDENT: Well, I think you had better
15 omit any reference to that part, Mr. McManus.

16 MR. McMANUS: Concerning the second
17 essential element to be proven for the purpose of
18 establishing a conspiracy, namely, the agreement or
19 combination of two or more persons to perform an
20 unlawful act, it is the contention of the accused
21 ARAKI that he, at no time during the course of the
22 testimony taken at this Tribunal, has been connected
23 up with any of the other accused or any other un-
24 known divers persons to perform any such acts here-
25 tofore described. The accused respectfully points

1 out to the Court the improbability and impossibility
2 of the existence of any such continuing conspiracy
3 from 1928 until 1945 by virtue of the fact that
4 during this period of time there have been great
5 differences of opinion between members of various
6 cabinets and this point can be unquestionably corro-
7 borated by the fact that during this set period there
8 have been fifteen different cabinets, each new cabinet
9 taking office as a result of the fall of the previous
10 one because of dissatisfaction with the previous
11 cabinet's policies.

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1 It is also pointed out to the Tribunal that
2 on several occasions the fall of the above-mentioned
3 cabinets was marked by violence. Many of the accused
4 were members of different cabinets during this period
5 of time. How, then, can it be said that they were of
6 one mind or that any combined agreement or conspiracy
7 existed between them for any single unlawful purpose?

8 Calling the Tribunal's attention to the
9 many incidents concerning political unrest in Japan
10 during the years 1928 to 1945 and the acts of violence
11 accompanying same, together with those accompanying
12 the fall of several of these cabinets, it is respect-
13 fully pointed out to the Court that this might well
14 depict the characteristics and the general attitude
15 of the Japanese public. Consequently, if public
16 opinion and the populace of Japan demanded that their
17 leaders resort to activities which might appear to the
18 rest of the world somewhat unorthodox (exhibit 2177-A),
19 how again can it be said that the leaders at various
20 times were performing anything more than their official
21 national obligations which might be placed in the
22 category of purely ministerial acts demanded by the
23 Japanese public itself? It further should be taken
24 into consideration that this feeling of unrest existed
25 in the Japanese public themselves and that if their

1 leaders were compelled to perform such ministerial
2 functions, where again can it be inferred, as the
3 prosecution so desires it should be, that there
4 existed a conspiracy among these defendants?

5 The next essential requirement for the
6 establishment of a conspiracy is the proof of intent
7 on the part of any one or more of the alleged con-
8 spirators. As the accused ARAKI is charged with
9 entering this conspiracy in 1928, it is respectfully
10 called to the Court's attention that at the time of
11 the outbreak of the Manchurian Incident the accused
12 ARAKI held no portfolio. The Manchurian Incident was
13 well under way before the defendant ARAKI was requested
14 to assume the post of War Minister. It is pointed out
15 to this Tribunal that by documentary evidence already
16 adduced, ARAKI assumed this post with the sole purpose
17 of bringing the incident rapidly to a close. It is
18 further called to the Court's attention that an over-
19 whelming amount of testimony has been adduced to show
20 that any activity on the part of Japan toward Manchuria
21 concerning this Manchurian Incident was definitely one
22 of self defense. The fact that the Manchurian Incident
23 had been extended to the area which later comprised
24 Manchukuo has also been shown to this Court to be due
25 to additional uprisings of bandits and insurgents in

1 that area. The testimony will show that the Incident
2 was brought to a close as expeditiously as possible
3 under the then existing circumstances and that the
4 State of Manchukuo was acknowledged and recognized
5 first by Salvador, a member of the League of Nations,
6 and then by Italy while she was still in the League.
7 Germany also acknowledged it. Poland and the Soviet
8 Union exchanged consuls with her and recognized her
9 virtually or economically by bargaining, railroads,
10 and so forth. Spain and the Balkan States also recog-
11 nized her. Even between Japan and America there had
12 been an understanding concerning her recognition. In
13 1934 after the completion of the Manchurian Incident,
14 ARAKI left office and was without portfolio again
15 until 1938.--

16 THE PRESIDENT: Mr. McManus, what you are
17 saying is most interesting and we want to hear every
18 word of it but you are reading fast. We do not mind
19 taking a little more time with a good thing.

20 MR. McMANUS: All right, your Honor.

21 In 1934 after the completion of the Manchurian
22 Incident, ARAKI left office and was without portfolio
23 again until 1938. In view of this fact that upon
24 completion of this one obligation imposed upon him,
25 to-wit, to donate his services to his country during

1 a time of emergency and national stress, how then can
2 it be said that the accused ARAKI, well knowing at
3 that time that there was hardly sufficient armaments
4 in Japan to meet the requirements of the Manchurian
5 Incident just completed, had any intent on his part
6 to be a member of any conspiracy to dominate the
7 world?

8 Concerning the essential element required
9 to be proven for the purpose of establishing a con-
10 spiracy, to-wit, a meeting of the minds of the con-
11 spirators, it is respectfully called to the Tribunal's
12 attention that it is a well-known fact that to establish
13 a conspiracy it is not necessary to actually show the
14 conspirators gathered around a round table plotting
15 for an unlawful purpose or to produce any agreements
16 in writing or to record any conversations between the
17 conspirators setting out a combination or agreement to
18 so perform an unlawful act. Conspiracy can be inferred
19 by the acts of the conspirators. But if this be the
20 case where a conspiracy is to be inferred by such acts
21 of individuals to make them part of the conspiracy,
22 then it must be determined which were acts pertaining
23 to the conspiracy and which were separate individual
24 acts. It is the contention of the accused ARAKI and
25 we believe substantiated by the evidence heretofore

1 adduced that any acts of his were his own and were
2 entirely individual and not performed because of any
3 agreement with any one or several other persons. It
4 is further the contention of the accused ARAKI that,
5 as a soldier and as a patriot of Japan, all his actions
6 militated towards duty to his country and even if
7 there were a conspiracy he at no time was part of it,
8 he had no agreement with any of the accused or any
9 unknown divers persons and that at no time did he
10 have any understanding or meeting of the minds with
11 any of the accused or any other persons concerning
12 the commission of war crimes, crimes against peace,
13 crimes against humanity, or any plan to dominate the
14 world.

15 The prosecution has failed to show ARAKI at
16 any such meetings at a round table; has not produced
17 any written agreement setting out any unlawful purpose
18 showing a combination of ARAKI and others to commit
19 any of the acts alleged in the Indictment; has not
20 produced any recordings or statements of the accused
21 ARAKI setting out any agreements with the accused or
22 any other persons; but in lieu thereof, it has attempted
23 to connect the accused ARAKI with this conspiracy by
24 inference and although definitely not conceding any,
25 if there can be considered, even remotely, any unlawful

1 acts committed by the defendant ARAKI, it should be
2 contended that they were committed individually, on
3 behalf of the government of Japan.

4 Concerning the next essential requirement
5 to be proven to establish the conspiracy, to-wit, the
6 overt act, and even conceding, for the sake of argument,
7 that the conspiracy has been established, the prosecu-
8 tion has defeated its own purpose insofar that they
9 have blown hot and cold by making the same acts overt
10 acts to be considered as part of the conspiracy and
11 alleging these acts again as substantive crimes. It
12 is the contention of the accused ARAKI that the prosecu-
13 tion must make an election to use any unlawful acts as
14 overt acts in a conspiracy or list them as substantive
15 crimes but not to employ them in a double or dual
16 capacity.

17 Consequently, on the over-all conspiracy the
18 defendant ARAKI moves to dismiss on the grounds that a
19 prima facie case has not been established against him,
20 not only in the prosecution's attempt to connect him
21 with the conspiracy but that it has failed to make out
22 a prima facie case of any conspiracy at all.

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1 Coming now to certain specific counts in the
2 Indictment, let us place these counts into two categories.
3 First, those counts which should be summarily dismissed
4 because of the irrefutable fact that on their face they
5 cannot be charged to the defendant ARAKI. Second,
6 those counts which should be dismissed because of lack
7 of evidence.

8 COUNTS WHICH SHOULD BE SUMMARILY DISMISSED

9 It is respectfully called to the Tribunal's
10 attention that Count 18 of the Indictment charges the
11 defendant ARAKI with having initiated a war of aggression
12 against the Republic of China on September 18, 1931.
13 It is undoubtedly obvious to this Court that in view of
14 the overwhelming testimony produced thus far by the
15 prosecution, and the Court can even take judicial notice
16 of a fact which is a matter of record, that the defendant
17 ARAKI did not become War Minister until December 13, 1931
18 (Exhibits 103 and 187-M), three months after the outbreak
19 of the Manchurian Incident. He held no portfolio at
20 the time of the outbreak of this Incident other than
21 Chief of the General Affairs Bureau here in Tokyo. He
22 had no say concerning any policies of the government; he
23 was not a member of the Cabinet, but merely a professor.
24 How, then, can he be held responsible for the outbreak
25 of the Manchurian Incident in the light of the testimony

1 that this Incident resulted from maneuvers and operations
2 in the field abroad?

3 Count 19 charges the defendant ARAKI with having
4 initiated a war of aggression against the Republic of
5 China on or about the 7th of July 1937. Again it is
6 respectfully pointed out to this Court in view of the
7 testimony adduced so far and it is requested that the
8 Court take judicial notice as it is also a matter of
9 record that at the outbreak of this incident the accused
10 ARAKI was on the reserve list, having been placed on
11 such reserve list on the 6th of March 1936 (Exhibit 103).
12 During this period of time, while on the reserve list,
13 it is pointed out that the accused ARAKI was practically
14 in retirement and for this reason it is urged that
15 Count 19 be summarily dismissed.

16 Count 23 charges the defendant ARAKI with having
17 initiated a war of aggression against the Republic
18 of France on or about the 22nd of September 1940.
19 Again it is called to the attention of the Tribunal that
20 it is also a matter of record that the accused ARAKI
21 resigned from the office of Cabinet Councillor on
22 August 3, 1940 and from this date to the end of the war
23 held no responsible position with the government of
24 Japan and was practically in retirement. As the accused
25 ARAKI, from the 3rd of August 1940, had no say whatever

1 in any of the affairs or policies of the government to
2 the end of the war, it is respectfully requested that
3 this Count 23 also be summarily dismissed, together with:

4 Count 29 which charges the accused ARAKI
5 with responsibility for waging a war against the United
6 States of America between the 7th of December 1941
7 and the 2nd of September 1945;

8 Count 30, which charges him with waging a
9 war of aggression against the Commonwealth of the
10 Philippines between the 7th of December 1941 and the
11 2nd of September 1945;

12 Count 31, which charges him with waging a
13 war of aggression against the British Commonwealth of
14 Nations between the 7th of December 1941 and the 2nd
15 of September 1945;

16 Count 32, which charges the accused ARAKI
17 with waging a war of aggression against the Kingdom
18 of the Netherlands, between the 7th of December 1941
19 and the 2nd of September 1945;

20 Count 33, which charges the accused ARAKI
21 with waging a war of aggression against the Republic of
22 France on the 22nd of September 1940;

23 Count 34, which charges the accused ARAKI
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1 with waging a war of aggression against the Kingdom of
2 Thailand between the 7th of December 1941 and the 2nd
3 of September 1945.

4 All these above counts, as can be readily
5 observed by this Tribunal, relate to charges implicating
6 the defendant ARAKI and charging him with the respon-
7 sibility for the acts of others or of the government,
8 whichever it may be, when the accused ARAKI held no
9 portfolio; had no say whatever in determining any policies
10 of the government; had no control whatever over any
11 individuals holding responsible offices in the government;
12 had no connection with any political parties of the
13 government; had no influence over any members of the
14 Diet or Cabinet; or the military; and in most instances
15 was considered to be in a state of disrepute with his
16 associates. For the above reasons the defendant ARAKI
17 respectfully requests this Court to summarily dismiss
18 these counts heretofore mentioned.

19 THE PRESIDENT: Mr. McManus, this is a
20 convenient break.

21 I think you will find that the Japanese
22 translation will be continuing long after you finished.
23 You were reading very fast.

24 We will recess for fifteen minutes.
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1 (Whereupon, at 1045, a recess
2 was taken until 1100, after which
3 the proceedings 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: Mr. McManus.

4 MR. McMANUS: (Continuing)

5 Concerning the second classification of
6 these counts, these which should be dismissed for lack
7 of evidence, the accused ARAKI now enumerates same
8 and his reasons for their dismissal, and they are as
9 follows:

10 Concerning Counts 1 to 17 charging re-
11 sponsibility for conspiracy and preparations for
12 aggressive warfare, it is respectfully pointed out to
13 the Court that the only testimony adduced at this
14 trial which in any slightest degree implicates the
15 accused ARAKI in the prosecution's endeavor to con-
16 nect the aforementioned ARAKI with such preparations
17 for aggressive warfare is that given by the witness
18 OUCHI, Hyoe. This witness states that military train-
19 ing in schools which started as a result of an educa-
20 tional rescript in 1890 was extended to universities
21 under ARAKI's regime as Education Minister in 1938.
22 He stated further that some form of military training
23 had been going on since the date of this rescript,
24 that in 1933 a request was made by the accused to
25 extend it to the universities and then in 1938 when

1 ARAKI became Education Minister it was extended to the
2 universities. However, may it be pointed out to the
3 Court at this time that the year 1933 was immediately
4 after the Manchurian Incident and the year 1938
5 followed the China Incident. May it also be called to
6 the Court's attention that after every war or incidents
7 such as these people become conscious of their lack of
8 adequate arms which such an incident or war will
9 certainly bring to light and practically every nation
10 in the world, after such an incident or war, because of
11 this consciousness, endeavors to promote military
12 training for purposes of preparedness in the event of
13 any future similar occurrence. I might call to the
14 Court's attention that even now Representative Brooks
15 in the United States is advocating in Congress today
16 the passage of a bill for compulsory military training
17 for the youth of the United States. The fact that
18 military training is advocated by a person is not
19 indicative of a desire on his part to conquer the
20 world. It may very well be a step toward a nation's
21 security. Mr. OUCHI also stated that this military
22 training consisted of lectures and propaganda to in-
23 spire militaristic and ultra-nationalistic spirit
24 in the students. He stated that these views were
25 adhered to by the Educational Minister ARAKI when he

1 requested that such training be extended to the
2 universities. He further stated, however, on cross-
3 examination, that he never attended any of the military
4 lectures and he received his information entirely
5 from some of the students. Then when the witness
6 was asked on cross-examination concerning whether or
7 not the accused ARAKI between the years 1938 and 1939
8 had intensified this training that this information
9 was purely hearsay and that he had not heard it
10 directly as a school authority but that he had heard
11 it indirectly (page 979 of the record). During the
12 course of OUCHI's examination he stated that the
13 Education Minister acted on the request of the War
14 Minister; so it is pointed out to the court that if
15 military training was intensified during that year it
16 might very well have been at the request of another
17 government official rather than an individual direct
18 act on the part of the Education Minister. It is
19 also pointed out to the Court that the witness OUCHI
20 was imprisoned on several occasions for his writings
21 and lectures which unquestionably embodied thoughts
22 and theories resulting from his close association
23 with the works of Marx and Engels and other utili-
24 tarian philosophers (page 948 of the record). Might
25 it not be assumed that because of this imprisonment

1 the witness's testimony might be, to say the least,
2 somewhat biased if not wholly antagonistic toward any
3 of educators of Japan at that time?

4 This witness's testimony stands alone in all
5 the pages of the testimony taken during the entire
6 prosecution's case which tends to even remotely con-
7 nect the accused ARAKI with "preparing for aggressive
8 war." For the reasons stated above, and because of
9 the fact that the witness himself so stated that he
10 had only "heard this indirectly" concerning the
11 intensification of military training by ARAKI, and
12 further because of a direct contradiction of the
13 statements contained in his affidavit, on cross-
14 examination, it is respectfully requested that
15 Counts 6 to 17 be dismissed because of lack of
16 evidence and because the testimony is insufficient
17 to constitute a prima facie case.

18 In considering these Counts 6 to 17 it is
19 also respectfully requested that the Court take into
20 consideration the argument relating to the general
21 conspiracy heretofore stated and apply the same
22 to these counts as well as from Counts 1 to 5.

23 Now referring to Counts 25, 35, and 52 which
24 charge the accused ARAKI with the responsibility for
25 aggression and murder in the region of Lake Khason,

1 it is respectfully pointed out to this Tribunal
2 that the accused at that time in 1938 was Minister
3 of Education and that he had no responsibility for
4 any friction in a frontier region. It is further
5 pointed out to the Tribunal that also in 1939 ARAKI
6 was Minister of Education during which year he is
7 charged in the Indictment with being responsible for
8 aggression and murder in Counts 26, 36 and 51, and
9 again it is asked of this Tribunal how any responsi-
10 bility can rest on the Education Minister for hostili-
11 ties in the outlying district of Khalkhan-Gol River.

12 It is called to the attention of the court
13 that no testimony thus far has been introduced by
14 the prosecution as to why the Education Minister
15 should be responsible for military activities con-
16 ducted in regions far from the homeland and where, as
17 the testimony conclusively shows, that such fields
18 or frontier activities are the sole responsibility of
19 the Chief of Staff or the area commanders. Of course,
20 if it is to be assumed that all members of the
21 Cabinet should shoulder responsibility for any
22 activities of the Japanese military, why then were
23 not all the Members of that Cabinet indicted here and
24 why then was not the Navy Minister who held a much
25 more important post concerning the military than the

1 Education Minister charged with some responsibility
2 for these actions? The above reasoning might also
3 be applied to Counts 28 and 45, the China Incident
4 and the Nanking attack respectively, when the
5 accused ARAKI was Cabinet Councillor and Education
6 Minister, with the additional explanation that the
7 testimony has shown that a Cabinet Councillor is
8 more of an honorary position than an active one, and
9 where the testimony has also shown that a Cabinet
10 Councillor is not in any way responsible for any
11 operational orders of the military (Exhibit 187-N).

12 Concerning Counts 46 and 47, the Canton
13 attack and the Hankow attack respectively, it is
14 called to the Tribunal's attention that during these
15 periods ARAKI was the Minister of Education, and it is
16 respectfully requested that the Court consider the
17 arguments advanced heretofore mentioned for Counts
18 25, 35, 52, 26, 36 and 51.

19 Concerning Count 44, to wit, conspiracy for
20 murder, it is pointed out that there has been no
21 testimony introduced by the prosecution to substan-
22 tiate this count and that there has not been a
23 scintilla of evidence adduced.

24 With reference to Counts 53, 54 and 55, to
25 wit, general conspiracy, orders to commit offenses,

1 and breaches of observance of the laws and customs
2 of war, it is pointed out to this Tribunal that there
3 is no evidence to show that the accused ARAKI should
4 be held responsible in any degree for the charges
5 alleged therein.

6 With reference to Count 27, it is respect-
7 fully requested that the Court take into consideration
8 the arguments heretofore advanced re the responsi-
9 bility of the War Minister during the Manchurian
10 Incident. For all the reasons stated above, the
11 accused ARAKI contends that a prima facie case has
12 not been made out by the prosecution against him;
13 that no conspiracy has been established; that the
14 prosecution has failed to connect him with any plot
15 or plan to commit crimes against peace, war crimes,
16 and crimes against humanity as defined in the Charter
17 of this Tribunal, and moves this Court to dismiss
18 this Indictment."
19

20 THE PRESIDENT: That is the end of the
21 submissions on the evidence, Mr. McManus?

22 MR. McMANUS: Yes, your Honor. Now, if
23 your Honor would just read (c) -- I ask your Honor
24 if I may continue in view of your Honor's ruling?

25 THE PRESIDENT: I think I have covered that
in my remarks to Mr. Smith, Mr. McManus.

1 MR. McMANUS: Yes. Then your Honor rules
2 that I should not continue?

3 THE PRESIDENT: That is so.

4 MR. McMANUS: Thank you.

5 THE PRESIDENT: We will give you an exception
6 if you desire it.

7 MR. McMANUS: I beg your pardon?

8 THE PRESIDENT: We will give you an exception
9 if you desire it.

10 MR. McMANUS: Will it be considered, if the
11 Court please, as a part of the record, the balance
12 of the argument?

13 THE PRESIDENT: Yes.

14 Colonel Warren.
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1 MR. WARREN: If the Tribunal please. I
2 represent the accused DOHIHABA.

3 THE PRESIDENT: If a majority of the Tri-
4 bunal desires that each of these motions should be
5 answered as they are made, would the prosecution be
6 in a position to give the answer?

7 MR. E. WILLIAMS: The prosecution, due to
8 the shortness of the time that we have had to pre-
9 pare to answer these motions, has decided and has
10 made preparation to answer them all together.

11 THE PRESIDENT: You have had very short
12 notice. Some of these motions were served only yes-
13 terday afternoon.

14 MR. E. WILLIAMS: Some of them only this
15 morning.

16 THE PRESIDENT: None of them earlier than late
17 on Friday.

18 MR. E. WILLIAMS: Mr. Comyns Carr, who is
19 going to make part of the answer on behalf of the
20 prosecution, is at the present time working on com-
21 pleting the part of the presentation which he will
22 make. I have already concluded the part that I will
23 give, which is generally of this character.

24 THE PRESIDENT: And to answer them together
25 would avoid probable duplication and triplication.

1 MR. E. WILLIAMS: I may say I discussed this
2 matter just a few moments ago with Mr. Warren and
3 some other of the defense counsel and they seem to
4 feel that the method which we have decided upon was
5 entirely satisfactory to them.

6 THE PRESIDENT: Some of the Judges haven't
7 been served with copies yet.

8 MR. WARREN: This motion was served, I am
9 sure, your Honor, last Wednesday -- Tuesday or Wed-
10 nesday.

11 THE PRESIDENT: The Members from China,
12 Russia and France have not copies of this motion
13 you are about to move, Colonel.

14 MR. WARREN: My motion, your Honor, my
15 stamped copy, shows it was received in the Clerk's
16 office on 21 January.

17 THE PRESIDENT: We had better take a motion
18 where every Judge has a copy.

19 Commander Harris.

20 MR. HARRIS: Mr. President, this is a motion
21 of the defendant HASHIMOTO, Kingoro to dismiss. I
22 presume that copies have been distributed to all the
23 Honorable gentlemen.

24 THE PRESIDENT: Some of the Judges didn't
25 bring in their copies. I certainly am not going to

1 allow you to proceed until each Member has a copy
2 and until each Member authorizes me to tell you to
3 go ahead.

4 MR. HARRIS: Yes, sir.

5 THE PRESIDENT: I think we will have to
6 adjourn, because no Judge -- I haven't got the full
7 concurrence of all the Judges to any motion. The
8 Member from the United States hasn't his copy and
9 I am not going ahead without his concurrence.

10 LIEUT. LAZARUS: Might I suggest, Mr. President -
11 Mime is No. 664, on behalf of the accused HATA,
12 Shunroku --

13 THE PRESIDENT: I have authority from my
14 colleagues to take these matters only in alphabetical
15 order and copies have not been distributed to enable
16 that to be done.

17 MR. BROOKS: Colonel Warren, if your Honor
18 please, has gone to the Secretariat to get extra
19 copies of his motion and should be back --

20 THE PRESIDENT: Well, we shall have to wait
21 until he returns.

22 (Slight delay).

23 MR. WARREN: If the Tribunal please, the
24 Clerk of the Court is bringing the additional copies
25 of the DOHIHARA motion as quickly as he can get them,

1 which he thinks will be in a very short period of
2 time, a few minutes.

3 THE PRESIDENT: That will be in a few minutes.

4 MR. WARREN: If the Tribunal please, if the
5 Tribunal will give us an indication of the number
6 of motions they are short, perhaps among defense
7 counsel they may have copies here so we can proceed.

8 THE PRESIDENT: As far as I know, there are
9 three Judges without copies of the DOHIHARA motion.

10 Proceed, Colonel, please.

11 MR. WARREN: Thank you, sir. (Reading):

12 In presenting argument in support of the de-
13 fendant DOHIHARA's motion for dismissal, it has been
14 deemed advisable, for the sake of brevity, not to
15 argue the evidence with respect to each individual
16 count but to so arrange the argument that it would
17 apply to the general category in which each count
18 naturally falls.

19 Counts one to five inclusive purport to allege
20 the crime of conspiracy to wage aggressive warfare.
21 Conspiracy, of course, contains several elements
22 necessary to constitute the crime, among them is the
23 meetings of the minds of the conspirators to perform
24 an unlawful act or to perform a lawful act in an
25

1 unlawful manner. Ordinarily, in order for a court
2 or tribunal to overrule a motion of this type, there
3 should be some evidence of each element of the offense
4 charged, and substantial evidence of all the elements
5 as a whole. Inasmuch as there has been no indica-
6 tion from the Tribunal that another construction
7 will be used in determining the issues raised by
8 this motion, this argument will be based upon such a
9 premise.

10 The evidence, taken in its entirety, fails to
11 show that this defendant did at any time conspire with
12 other defendants to wage aggressive warfare. It is
13 clear that this defendant was, at all periods of time
14 embraced by the counts against him, a member of the
15 armed forces, and subject to the orders of his
16 superior officers. The testimony discloses that the
17 acts, apparently relied on by the prosecution to
18 prove the meeting of the mind of this defendant with
19 the minds of the others to perform unlawful acts
20 were but acts which he carried out in furtherance of
21 orders received from superior officers. There is no
22 evidence that the defendant was ever in a position
23 where he could, even if he so desired, enter into a
24 conspiracy to wage aggressive war with any hope of a
25 successful conclusion. It is suggested that before a

1 defendant could be guilty of the crime of conspiracy
2 to wage aggressive war he must have held a position
3 of power of such magnitude as to be able to sway the
4 issues and give orders to subordinates in furtherance
5 of his conspiracy. This is not true in the case of
6 the defendant DOHIHARA. It is contended that with
7 reference to counts one through five the prosecution
8 has failed to produce substantial evidence that this
9 defendant engaged in a common plan or conspiracy to
10 wage war.

11 Counts six through seventeen purport to charge
12 the defendant with planning and preparing a war of
13 aggression and a war in violation of international
14 law, treaties, agreements and assurances. The pro-
15 secution has produced a mass of testimony in the form
16 of documentary evidence in an attempt to substantiate
17 these charges, among which has been various treaties,
18 agreements and assurances. As evidence, the contents
19 of such documents become material to be analyzed in
20 arriving at a settlement of the issues involved, and
21 as interpretation as to their meanings, their scope and
22 their limitations is necessary. Standing alone they
23 are not evidence of a violation of international
24 law, and while they are necessary to the determina-
25 tion of the issues the real question which presents

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itself, after the terms of such instruments have been interpreted, is the parole and additional documentary evidence which explains or proves the violation of the terms of the particular instrument involved, and what holds true of counts one through six, holds true in this instance.

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1 These counts under discussion are stated
2 in terms which can lend themselves to no interpreta-
3 tion except that the framers intended that if they
4 failed to prove conspiracy on counts one to six,
5 that they could do so by pleading and proving conspiracy
6 in a new and novel manner. All of the defendants
7 are joined in these counts, and if they together
8 planned and prepared a war of aggression in defiance
9 of the precedents of international law they would be
10 conspirators regardless of any contention to the
11 contrary, and each element of the offense of conspiracy
12 would have to be proved before this Tribunal would be
13 justified in holding this defendant for further
14 action upon these counts. Regardless of pleading
15 or definition the crime of conspiracy in all of its
16 elements remains constant. The Charter provides that
17 technical rules of evidence need not be adhered to,
18 and it necessarily follows that the technical rules
19 of pleading need not be adhered to, and that so long
20 as a defendant is fully apprized of the charges
21 against him that the count is good and is not subject
22 to attack.

23 The Tribunal has passed upon this question,
24 and inasmuch as there appears to be no other
25 construction which can be placed upon the verbiage

1 used in the counts under discussion, it is believed
2 that in the absence of proof that there was a meeting
3 of the mind of this defendant with the minds of other
4 alleged co-conspirators to perform an unlawful act, that
5 there is a failure of proof and not sufficient evidence
6 to warrant the holding of this defendant for further
7 action by this Tribunal. It is contended that there
8 is a failure of proof on this point.

9 Counts eighteen through twenty-six allege
10 that this defendant, together with other defendants,
11 initiated wars of aggression in violation of inter-
12 national law, treaties, agreements, and assurances.
13 It appears that these counts, although they allege
14 in substance that many of the defendants acted in
15 concert, in initiating the so-called war or wars of
16 aggression must of necessity depend upon individual
17 proof with reference to each of the co-defendants
18 named in any particular count. Without going into
19 detail it is contended that there is a failure of proof
20 on all such counts against this defendant.

21 Counts twenty-nine through thirty-six allege
22 that this defendant in concert with other defendants,
23 waged wars of aggression in violation of international
24 law, treaties, agreements and assurances. It appears
25 that initiating and waging aggressive wars is as

1 closely allied as is conspiring and planning wars
2 of aggression, and consequently the argument thus far
3 advanced with reference to the counts alleging ini-
4 tiation of wars of aggression is here adopted. It
5 becomes a matter of proof as to each individual defen-
6 dant. With reference to this defendant it is submitted
7 that there is no proof that he waged aggressive war,
8 unless it be contended that all the enlisted, non-
9 commissioned and commissioned officers of the army
10 and navy of Japan are guilty. It is not believed
11 that any such contention could be seriously entertained.

12 Counts thirty-seven through fifty-two purport
13 to charge the defendants named therein with crimes
14 against peace, conventional war crimes and crimes
15 against humanity, contrary to all the paragraphs of
16 Article 5 of the Charter.

17 The defendant IOHIHARA is named in counts
18 thirty-seven through forty-four and in counts fifty-one
19 and fifty-two. Counts thirty-seven and thirty-eight
20 allege, in substance, a conspiracy to commit murder
21 by initiating unlawful hostilities. Counts thirty-
22 nine through forty-three allege murder as a result of
23 homicide in armed combat.

24 It is contended that the so-called crime of
25 conspiracy to commit murder, as a result of homicide

1 occurring in any type of warfare, is a new and unusual
2 application of the crime of conspiracy; that such a
3 crime is not one of common knowledge and never existed
4 before the commencement of this trial, and therefore a
5 court or tribunal may not take judicial notice thereof.
6 If it is a crime, it becomes a question of fact to be
7 proved by the evidence. If it be contended that it is
8 a crime because the Charter authorizing this Tribunal
9 outlines it as a crime, it must of necessity be con-
10 tended that it became a crime because the Supreme
11 Commander for the Allied Powers in the Pacific so
12 decreed.

13 International law has never been created by
14 mandate of an individual, and if international law can
15 be created in any such manner that also becomes a
16 matter of proof. It is no new thing to prove the
17 existence of a law by the presentation of evidence.
18 The prosecution has wholly failed to produce evidence
19 that such a crime in truth and in fact exists, or is
20 recognized in international law or to go further that
21 international law may be created in the manner this
22 alleged law is purported to have been brought into being.
23 The same argument as applied to these two counts can
24 likewise be applied to counts forty-two through forty-
25 three.

1 Count forty-four alleges a plan or conspiracy
2 to procure and permit the murder on a wholesale scale
3 of prisoners of war and other such categories of per-
4 sons. The defendant DOHIHARA is named in this count
5 but the following counts, which charge murder as a
6 culmination of the conspiracy alleged in count forty-
7 four, do not name him. It is contended that not only
8 is there no substantial evidence of a conspiracy alleged
9 on the part of this defendant, but that there is no
10 evidence of his participation in such conspiracy, if
11 any there was.

12 Counts fifty-one and fifty-two allege in
13 substance that the defendant is guilty of murder as a
14 result of homicide during armed conflict. This point
15 has been previously argued.

16 Counts fifty-three through fifty-five allege
17 a conspiracy to authorize mistreatment of prisoners of
18 war, et cetera, and are referred to as conventional
19 war crimes in the Indictment. As to whether the defen-
20 dant DOHIHARA participated in such conspiracy, if any
21 there was, or did any of the acts complained of in the
22 other remaining counts is a question of proof. We are
23 unable to find any such proof.

24 In presenting this argument it had been the
25 intention of counsel to analyze completely the entire

1 evidence produced by the prosecution against the
2 defendant DOHIHARA. However, in deference to the sug-
3 gession of the President that arguments in support of
4 motions of this type were expected to be short, such
5 analyzation, which has heretofore been prepared, has
6 been deleted from this argument; but the defendant
7 respectfully requests the Tribunal to analyze the evi-
8 dence in accordance with the propositions herein
9 advanced.

10 THE PRESIDENT: Commander Harris.

11 MR. HARRIS: This is a motion of the defendant
12 HASHIMOTO, Kingoro, to dismiss.

13 Now comes the defendant HASHIMOTO, Kingoro,
14 by his counsel, and moves the Court to dismiss each and
15 every one of the counts in the Indictment against him
16 on the ground that the prosecution has not offered
17 evidence in support of these counts sufficient to
18 warrant a conviction of this defendant.

19 Accompanying memorandum in support of motion
20 of defendant HASHIMOTO, Kingoro, to dismiss:

21 An examination of the defendant's career as
22 set forth in exhibit 105 shows that throughout the
23 period of this Indictment the defendant was either an
24 ordinary civilian without any official position, or
25 when serving as an army officer -- the only official

1 post he ever occupied -- such position was never of
2 sufficient importance to enable him to participate
3 either in the planning or executing of the conspiracy
4 set forth in Counts 1 to 5 inclusive, nor in the
5 planning and preparation for a war of aggression as
6 charged in Counts 6 to 17 inclusive.

7 Although Count 18 charges the defendant with
8 having initiated a war of aggression against the
9 Republic of China on or about 18 September 1931, at
10 this time the defendant was not in China but was
11 stationed in Japan attached to the Headquarters of the
12 General Staff, Russian Section. The evidence produced
13 with the intention of connecting HASHIMOTO with the
14 Mukden Incident is insufficient to warrant a conviction
15 on this count.

16 Count 19 likewise charges initiation of a war
17 of aggression against the Republic of China on or
18 about 7 July 1937. No evidence has been adduced to
19 connect the defendant with such a war since he was at
20 that time an ordinary civilian without any official
21 position.

22 Counts 27 and 28 charge the defendant with
23 waging a war of aggression against the Republic of
24 China. No evidence has been produced substantiating
25 the charge set forth in these counts.

1 Counts 29 to 32 and 34 charge the defendant
2 with waging a war of aggression against various
3 countries. The evidence is insufficient to warrant a
4 conviction, since after March, 1939, HASHIMOTO was a
5 civilian without any official position and could not
6 have participated in the acts of which he is accused.

7 No evidence has been submitted to show that
8 the defendant participated in any manner in the attacks
9 on Nanking, Canton, and Hankow or in any conspiracy to
10 murder as set forth in Counts 44 to 47 inclusive.

11 In Counts 53 to 55 inclusive, the defendant
12 HASHIMOTO is charged with conventional war crimes and
13 crimes against humanity in the case of the Republic
14 of China. The evidence is insufficient to support the
15 charges set forth in these counts.

16 Exhibit 954-C, dealing with the "Ladybird"
17 Incident is insufficient to establish the fact that
18 the firing on that ship was other than a mistake.

19 The prosecution has produced evidence to show
20 that the defendant HASHIMOTO was a member of certain
21 societies, such as the SAKURAKAI, the SEKISEIKAI and
22 the Imperial Rule Assistance Association, but it has
23 failed to adduce sufficient evidence to show that the
24 aims or activities of these societies and of the
25 defendant HASHIMOTO were concerned with any matters

1 other than those of a purely domestic nature or that
2 such aims or activities were part of a conspiracy to
3 commit crimes against peace.

4 Evidence has further been produced with the
5 intention of proving that the defendant HASHIMOTO by
6 virtue of his authorship of certain books and articles
7 conspired to commit crimes against peace, but beyond
8 the mere fact that his authorship of such texts has
9 been proven, the evidence has failed to show that these
10 books and articles were other than expressions of the
11 personal opinions and sentiments of the defendant
12 HASHIMOTO on certain subjects, made in an unofficial
13 capacity and totally without authority or influence
14 to produce or compel cooperation; nor has such proof
15 been sufficient to warrant a conviction on the charge
16 that such expressions were part of a conspiracy to
17 commit the crimes charged.

18 Dated this 17th day of January, 1947.
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1 THE PRESIDENT: Captain Lazarus.

2 MR. LAZARUS: Mr. President, for the sake of
3 brevity, I will omit reading the formal part.

4 The prosecution's case against HATA, Shunroku
5 is noteworthy for the fact that in well over 2,000
6 exhibits and in about 15,000 pages of court record
7 the name of the accused HATA has appeared but very
8 few times, and even then never in connection with an
9 important document or policy-directing or delineating
10 speech, pamphlet, or book, nor a policy-making
11 conference or meeting; never in connection with any
12 military clique, faction, uprising, demonstration
13 or movement; never in connection with or as a member
14 of any political faction, association, political
15 party, research institute, or Jingoistic group; never
16 in connection with or as a member of any government
17 position, board, department or bureau which made any
18 decision for the planning, preparation or initiating
19 of war or wars; never in connection with any depart-
20 ment of the government when a war broke out, and most
21 certainly never in connection with any board, bureau
22 or department that at any time had any control of or
23 voice, directly or indirectly, in matters pertaining
24 to Prisoners of War.

25 We shall now proceed to examine the counts

1 of the Indictment and the position of the accused HATA
2 under them.

3 Counts 1 - 4, inclusive, charge conspiracy
4 to control various areas of the world, and, as stated
5 above and as will be shown later, the accused HATA,
6 Shunroku has not been proved by any evidence to have
7 taken part in such conspiracy.

8 Count 5 alleges a conspiracy with Germany
9 and Italy. The best evidence that the accused HATA
10 was not involved in such conspiracy is the fact that
11 after the signing of the Tri-Partite Pact he, HATA,
12 was not among those shown by the prosecution to have
13 been recommended to Hitler by the German ambassador
14 to Japan to receive an award from the German Govern-
15 ment for their services in sponsoring the Tri-Partite
16 Pact.

17 Counts 6 - 17, inclusive, are general counts
18 alleging the planning and preparing of war against
19 countries named therein. At no time was it ever
20 shown, as has been stated above and as will be shown
21 later in the specific counts involving those same
22 countries, that the accused HATA helped plan and pre-
23 pare any war or wars.

24 Count 19 alleges the initiation of a war
25 against China, on the 7th of July 1937. The curriculum

1 vitae introduced by the prosecution as exhibit 106
2 shows that on that date the accused HATA was Commander-
3 in-Chief of the Taiwan (Island of Formosa) Army and
4 that he did not arrive in Japan until August 26, 1937,
5 about seven weeks after the outbreak of the war with
6 China. The same exhibit shows that the accused HATA
7 held this position as Commander of the Taiwan Army
8 for almost a year before July 7, 1937. No evidence
9 whatsoever was introduced to show that he was in any
10 wise connected with any government office, any mili-
11 tary clique, or any political faction or any group
12 whatsoever which may have been responsible for the
13 China War on July 7, 1937, nor has it been shown that
14 the Taiwan Army took part in the China War after its
15 outbreak and indeed it did not.

16 Count 25 alleges the initiation of war in
17 July - August 1938 against the U.S.S.R. Exhibit 106
18 reveals that at the time mentioned the accused HATA
19 was commander of the Japanese Army in Central China.
20 All the evidence introduced in the fully-documented
21 Russian phase of this case showed that it was the
22 Kwantung Army which was involved in this alleged war
23 and never the army of Central China. Many times in
24 the documents produced by the Russian prosecution the
25 name of a General HATA, no first name, appeared; and,

1 on the one occasion when the name HATA was read into
2 the transcript by the Russian prosecutor, Colonel
3 Ivanov explained to this Tribunal that it was not
4 HATA, Shunroku who was involved, but the other HATA --
5 Hikosaburo HATA, who was a staff officer of the Kwan-
6 tung Army. It may safely be said that if it has
7 been the accused HATA who was meant every time the
8 name HATA appeared in these statements and affidavits,
9 those said parts would have been read into the trans-
10 cript. At no time during this phase was any evidence
11 introduced naming the accused HATA, Shunroku.

12 Count 26 alleges initiation of a war against
13 the Mongolian Peoples' Republic. Again, as stated in
14 answer to Count 25, no evidence was adduced naming
15 the accused HATA.

16 Count 27 alleges all the accused waged a war
17 against China between 1931-1945. It is respectfully
18 submitted on behalf of the accused HATA that never
19 anywhere in all history has it ever been even suggested
20 that the profession of arms is criminal, and as a life-
21 long soldier and an officer in the Japanese Army, the
22 accused HATA had absolutely no alternative other
23 than to obey his country's call and to follow im-
24 plicitly the orders of his superiors, once war broke
25 out. As has been shown previously, the accused HATA

1 had nothing whatsoever to do with the outbreak of the
2 China War and the evidence shows that he landed in
3 China for the first time in late February of 1938.
4 Never more than in this instance had the words of the
5 great American patriot and fighter Commodore Stephen
6 Decatur seemed more appropriate to explain the posi-
7 tion of a soldier: "Our country! In her intercourse
8 with foreign nations may she always be in the right;
9 but our country, right or wrong!"

10 Count 28 alleges that all the accused between
11 7 July 1937 and 2 September 1945 waged war against
12 China. The same may be said here as in Count 27.

13 Count 29 - 32, inclusive, and Count 34 allege
14 all the defendants waged war against the United States,
15 the Commonwealth of Philippines, the British Common-
16 wealth of Nations, the Kingdom of the Netherlands,
17 and the Kingdom of Thailand between 7 December 1941
18 and 2 September 1945. At no time did the accused
19 HATA appear in any field of battle except in China,
20 and never between the dates stated did he hold any
21 position from which it could be said he waged war
22 against any of these named countries. Nor has any
23 evidence been introduced that he did so. Indeed,
24 Counts 20, 21, 22, and 24 do not allege that he
25 initiated a war against the first three and the last

1 of these named countries.

2 Count 35 alleges the same defendants as in
3 Count 25, including HATA, waged war against U.S.S.R.
4 in the summer of 1938, and Count 36 alleges that the
5 same defendants as in Count 26, again including HATA,
6 waged war against the Mongolian Peoples' Republic
7 and the U.S.S.R. in the summer of 1939. The same
8 answers given in Counts 25 - 26 may be given here --
9 NO EVIDENCE.

10 Count 44 charges all defendants with conspir-
11 acy to murder Prisoners of War. At no time has any
12 evidence been introduced to show that the accused
13 HATA participated in any such conspiracy, was a member
14 of any government department, bureau, or office that
15 at any time made any decision or had anything to do
16 with reference to Prisoners of War, either directly
17 or indirectly.

18 Count 45 alleges the attack on the city of
19 Nanking and the slaughter of inhabitants. The evi-
20 dence shows that the city of Nanking fell on 13
21 December 1937 and that the accused HATA arrived in
22 China for the first time in late February 1938 to
23 assume command of the Central China Army, by which
24 time all evidence shows the city was again quiet and
25 under no circumstances can HATA be charged with

1 responsibility for the Nanking Incident.

2 Count 46 alleges that the same defendants
3 as in Count 45, including accused HATA, attacked the
4 city of Canton. Although it was not pointed out to
5 Court by the prosecution, a glance at the map will
6 show that the city of Canton is in South China and
7 not in the area of command of Central China Army,
8 commanded at this time by the accused HATA. This
9 city was in the area of command of South China Army,
10 and no evidence whatsoever was introduced to show
11 that the accused HATA was in any wise connected with
12 the operation against Canton. Exhibit 106 verifies
13 that HATA was at this time in command only of Central
14 China Army.

15 Counts 47, 48, 49 and 50. No evidence what-
16 soever was introduced to show that the accused HATA
17 was in any wise responsible for the allegations con-
18 tained in these counts.

19 Counts 51 and 52 allege attacks on Mongolia
20 and the U.S.S.R. and the murder of citizens of those
21 countries. As already pointed out in answer to counts
22 25, 26, 35 and 36, no evidence whatsoever was intro-
23 duced during Russian phase naming the accused HATA,
24 Shunroku.

25 Counts 53, 54 and 55. No evidence whatsoever

1 was introduced that between 7 December 1941 and 2
2 September 1945 the accused HATA at any time par-
3 ticipated as leader, organizer, instigator or accom-
4 plice in a conspiracy to order or authorize breaches
5 of the Laws and Customs of War against Prisoners of
6 War. At no time has it been shown that the accused
7 HATA held any position in the government or in any
8 department or bureau in which he could have partici-
9 pated in such conspiracy. Exhibit 106 reveals that
10 from March 1941 - November 1944 the accused HATA
11 was in China, and on his return to Japan held no
12 government position, was a member of no bureau,
13 attended no conferences of any nature whatsoever, nor
14 was he at any time in the period stated in these
15 counts in any way connected with any department having
16 anything to do, directly or indirectly, with Prisoners
17 of War, and the best evidence on this point is that
18 Mr. Justice Mansfield in his opening address on this
19 phase did not name the accused HATA as one of the
20 accused liable under these counts.

21 We come to the positions held by the accused
22 HATA during the critical years. He was Inspector
23 General of Military Education, member of the Supreme
24 War Council, War Minister, Aide-de-Camp to the
25 Emperor, and member of Board of Marshals and Admir-

1 als. What are the powers of these positions? We
2 take the statements of Brigadier Nolan and Mr.
3 Horwitz made in the opening phase when they ex-
4 plained to the Tribunal the functions of the various
5 government divisions.

6 BOARD OF FIELD MARSHALS AND ADMIRALS. On
7 Page 672 of the transcript Mr. Horwitz says: "This
8 Board was originally created in 1898 and its member-
9 ship is limited to field marshals and fleet admirals.
10 Theoretically, this body is supposed to be the high-
11 est advisory body to the Throne on Army and Navy
12 matters, but it is in fact purely an honorary body
13 with little or no power." No evidence was ever
14 introduced to show the contrary, nor even to prove
15 that this Board ever held a meeting.

16 SUPREME WAR COUNCIL. On the same page Mr.
17 Horwitz tells us: "Its function is to advise on all
18 military and naval policy generally and to coordinate
19 all administrative and tactical organizations. It
20 plays no part with respect to tactics and strategy."
21 No evidence was introduced to show that this body
22 ever made any decisions or that it even ever held a
23 meeting.

24 CHIEF AIDE-de-CAMP TO THE EMPEROR. Mr.
25 Horwitz tells us, page 674: "While this officer, a

1 full general, has no connection with Supreme Command,
2 he has full access to it. All military memorials
3 and requests for audiences with the Throne are sub-
4 mitted through him and all Imperial orders for army
5 and navy are transmitted by him." Purely an honorary
6 position and again, no evidence was ever introduced
7 to show otherwise.

8 WAR MINISTER AND INSPECTOR GENERAL: Brigadier
9 Nolan tells us, in his explanation of these position,
10 page 589 of the transcript: "Briefly, one might say
11 that the Minister of War administers, the Inspector
12 General trains, and the Chief of Staff employs the
13 army, both in maneuvers and in battle." General
14 HATA was never a member of Imperial Headquarters or
15 General Staff.

16 It can thus be seen, from the prosecution's
17 own words, the accused HATA never held any position
18 that had policy-making powers or which allowed him
19 to help formulate policy or to make decisions, from
20 which it might be inferred he conspired to wage,
21 that he initiated, or that he did wage war or wars.

22 HATA was War Minister in the conservative
23 ABE and YONAI Cabinets. The evidence showed YONAI
24 and his Foreign Minister ARITA fought the Tri-Partite
25 Pact. No evidence was introduced to show HATA held

1 contrary convictions. Mr. Tavenner in his opening
2 of that phase stated (5865-5866 of transcript):
3 "After several attempts to bring about the downfall
4 of the YONAI Cabinet had proved unsuccessful, the
5 military resorted to the device of having the War
6 Minister resign. General HATA tendered his resig-
7 nation to Premier YONAI 16 July 1940." No evidence
8 exists to show HATA was one of the military who
9 wanted the downfall of the YONAI Cabinet. That HATA
10 had to resign and thus cause the downfall of the
11 YONAI Cabinet and that he could not insist on stay-
12 ing in office and save the conservative YONAI Cabinet
13 then fighting the Tri-Partite Pact is proven from the
14 opening address of Mr. Horwitz, page 666 of the
15 transcript. There, explaining the powers of the high
16 command in matters of such a situation as this, he
17 says (line 17): "Second, by compelling the war or
18 navy ministers, subject to the orders of the high
19 command because of their active service status, to
20 resign, either the army or the navy could bring about
21 the resignation of the Cabinet." When later that
22 day, 16 July 1940, HATA notified YONAI no one else
23 could be found to fill the post of War Minister,
24 thus precluding the formation of a new YONAI Cabinet,
25 or the continuation of the old one, the explanation

1 for this situation is again found with Prosecutor
2 Horwitz' address (same page). He points out that by
3 refusing to name a War Minister, the high command
4 could prevent the formation of a cabinet. And who
5 had the power to name the new War Minister? The
6 same people who had just forced HATA to resign as
7 War Minister.

8 If it were true that HATA had wanted the
9 downfall of the YONAI Cabinet, such evidence could
10 have been supplied by the prosecution by the pro-
11 duction of YONAI and ARITA in court. They both live
12 in Tokyo today. Further evidence that HATA was not
13 a part of that group stems from the fact that he was
14 not a member of the KONOYE Cabinet which succeeded
15 the YONAI Cabinet and in fact never held a cabinet
16 minister's post again. These facts are mentioned
17 here in order to stress that at no time can it be
18 said HATA conspired with anyone or even belonged to
19 the group the prosecution alleges is guilty of con-
20 spiracy.

21 In conclusion, it is respectfully submitted
22 that no evidence of any nature whatsoever has been
23 adduced to show that the accused HATA at any time
24 conspired or planned or initiated any war against any
25 country, as has been pointed out in answering the

1 specific counts. In the case of the Russian counts
2 he has been named by mistake, or confused with General
3 Hikosaburo HATA. It is a singular fact that at the
4 times when it is alleged by the prosecution that wars
5 were being planned or initiated, the accused HATA was
6 not in any position of authority so that it could be
7 said that he participated in their planning or in
8 their initiation. It is finally pointed out to the
9 Tribunal that Counts 18, 20, 21, 22, 23 and 24, which
10 allege initiation of wars against those respective
11 countries and the Counts 37 and 38 which allege con-
12 spiracy between June 1, 1940 - December 8, 1941 to
13 murder citizens of respective countries named therein,
14 and Counts 39, 40, 41, 42, and 43 which allege murder
15 of citizens of countries named in 38 and 39 at
16 various times and places do not name HATA. How then
17 can it be held that he planned and prepared a war,
18 or wars, as alleged in Counts 6 - 17, inclusive?
19 Clearly, the specific Counts which do not name him
20 clear the accused HATA of complicity in the general
21 counts.

22 WHEREFORE, in view of all these facts, the
23 accused HATA respectfully moves this Tribunal to dis-
24 miss each and every one of the counts in the Indict-
25 ment against him.

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

(Whereupon, at 1200, a recess was taken.)

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AFTERNOON SESSION

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The Tribunal met, pursuant to recess, at 1330.

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

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THE PRESIDENT: Colonel Warren.

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MR. WARREN: If the Tribunal please, thus far I have not appeared on record as counsel for Baron HIRANUMA. He was formerly represented by Captain Kleiman who returned to the United States because of ill health, and it now appears that he will not return, that is, insofar as we can determine. I, therefore, ask -- I have consented, rather, with the approval of the Tribunal, to act as American counsel for the defendant HIRANUMA.

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THE PRESIDENT: You have the Tribunal's approval, Colonel Warren.

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MR. WARREN: Thank you, sir.

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Now, if the Tribunal please, we have prepared and I served last Friday a typewritten copy of the motion, on behalf of Baron HIRANUMA, on the prosecution. Unfortunately, in the mechanical preparation of the motion and argument for presentation to the Tribunal there were some errors which had to be corrected, and they have been corrected this

1 morning; but the motion is not in form to bring
2 to the Tribunal. I, therefore, request that Baron
3 HIRANUMA's name be passed to the end of the list
4 and defense counsel who are concerned have agreed
5 if the Tribunal will agree to that.

6 THE PRESIDENT: We are reluctant to change
7 the order, Colonel Warren. Are the alterations
8 extensive?

9 MR. WARREN: No, sir.

10 THE PRESIDENT: You might note them as
11 you go along.

12 MR. WARREN: All right, sir.

13 THE PRESIDENT: We will take the accused
14 HIRANUMA's motion now.

15 THE MONITOR: Mr. Warren, the revised copy
16 of Japanese, is it correct in the Japanese copy, sir?

17 MR. WARREN: That is correct.

18 THE MONITOR: Thank you, sir.

19 MR. WARREN: May I have just about thirty
20 seconds, your Honor?

21 THE PRESIDENT: Yes.

22 MR. WARREN: For the sake of brevity, the
23 counts in the Indictment concerning this defendant
24 will, for the most part, be referred to in the group
25 within which they naturally fall and will be argued

1 in such manner rather than individually. Counts
2 one to five are general counts alleging conspiracy
3 between this defendant and others between January 1,
4 1928, and September 2, 1945. The prosecution has
5 introduced as exhibit 107 the personnel record of
6 this defendant which discloses that he held the
7 post of Vice President and President of the Privy
8 Council, Prime Minister and Cabinet Minister during
9 such time and that he also was in retirement, holding
10 no public office, from August 30, 1939, until
11 December 20, 1940; from October 18, 1941 to August 28,
12 1942; and from October 14, 1942 until April 9, 1945.
13 It is submitted that a perusal of the evidence
14 adduced against this defendant will fail to disclose
15 that this defendant participated in the alleged
16 conspiracy. The evidence wholly fails to disclose
17 that he did at any time use his official positions
18 as a means of fostering such alleged conspiracy and
19 certainly there is no single word of testimony in
20 the record to show that he participated in or was in
21 any way connected with it during his periods of
22 retirement from public life.

23 Counts six to seventeen relate to the planning
24 and preparation of a war of aggression. The arguments
25 which apply to counts one through five likewise apply

1 to these counts and the same evidence relied upon
2 in an attempt to prove such counts is apparently
3 relied upon to prove these. There is no need for
4 further enlargement and the argument advanced with
5 reference to counts one to five is here adopted.

6 Counts eighteen to twenty-six charge the
7 initiation and waging of wars of aggression against
8 various countries specified in the several counts.
9 Although the accused is named in each of these
10 counts the evidence will disclose that the only
11 event which occurred while he was Prime Minister
12 is the event which is alleged in count twenty-six.
13 All other events occurred at a time when he was
14 either a member of the Privy Council or in retirement.
15 The evidence fails to disclose that the Prime
16 Minister had anything to do with the outbreak of
17 the alleged war of aggression as set forth in count
18 twenty-six and it is submitted that there is a failure
19 of proof on this point. At the time of the alleged
20 initiation of wars of aggression against the Republic
21 of China, as set forth in counts eighteen and nine-
22 teen, and against the Union of Soviet Socialist
23 Republics, as set forth in count twenty-five, the
24 defendant was, according to the testimony, a member
25 of the Privy Council. There is no evidence to show

1 that this defendant or the members of the Privy
2 Council, during his tenure of office, initiated or
3 had the authority to initiate any such wars of
4 aggression. With reference to the alleged wars of
5 aggression against the United States of America,
6 the Commonwealth of the Philippines, British Common-
7 wealth of Nations, the Republic of France, and the
8 Kingdom of Thailand as set forth in counts twenty
9 through twenty-four, the evidence shows that this
10 defendant was in retirement and held no public
11 office on the date of December 7, 1941, at which
12 time the alleged wars of aggression are supposed
13 to have been commenced. It is contended that the
14 evidence is entirely insufficient on any of the
15 counts eighteen through twenty-six to warrant a
16 conviction.

17 Counts twenty-seven through thirty-six
18 allege the waging of a war of aggression against
19 the various countries specified in such counts. The
20 evidence does disclose that at the time of the alleged
21 waging of a war of aggression against the Union of
22 Soviet Socialist Republics as set forth in count
23 thirty-six that this accused held the post of Prime
24 Minister. It is contended that this fact alone is
25 not sufficient, without additional evidence, to warrant

1 a conviction of the accused and a search of the
2 record fails to disclose that this defendant ever
3 was responsible for the waging of any such war of
4 aggression. During the period of time covered by
5 counts twenty-seven and twenty-eight alleging the
6 waging of aggressive war against the Republic of
7 China the evidence discloses that the defendant
8 held the post of Prime Minister for a period of
9 approximately eight months from January 5, 1939
10 to August 30, 1939, and later, on two separate
11 occasions, was appointed a Cabinet Minister and
12 held such post for approximately ten months alto-
13 gether from December 21, 1940 to October 18, 1941.
14 The evidence also discloses that he was dispatched
15 to China as a Special Envoy of good will for about
16 seven weeks during the year 1942.

17 There is a correction there, sir. That
18 reads on your copy "1941".

19 During the rest of the time, covered by
20 the two counts twenty-seven and twenty-eight, he
21 was either in the Privy Council or in retirement.
22 It is contended that there is a failure of proof,
23 presented by the prosecution to show that this
24 accused was personally responsible for waging a war
25 of aggression against the Republic of China. During

1 the period of time embraced by count thirty-five,
2 which alleges a war of aggression against the
3 Union of Soviet Socialist Republics, the evidence
4 shows that the defendant was a member of the
5 Privy Council but wholly fails to show that there
6 was any connection between the defendant or Privy
7 Council with any alleged hostilities against such
8 nation. During the period of time from December 7,
9 1941 through September 2, 1945 -- and there should
10 be inserted here, your Honor, "embraced by counts
11 twenty-nine through thirty-four," -- the accused
12 held no public office, except as previously stated,
13 he did hold the post of Special Envoy of good will
14 to China in 1942 and was appointed to the President
15 of the Privy Council for the second time on April 9,
16 1945. It is contended that the evidence adduced
17 against this accused with reference to these counts
18 is entirely insufficient to warrant a conviction.

19 Counts thirty-seven to fifty-two allege
20 murder. We most strongly urge that there is no
21 evidence to connect this defendant with any responsi-
22 bility in connection with these alleged offences. It
23 is significant that the accused is not charged in
24 counts forty-eight through fifty.

25 Counts thirty-five to fifty-five -- that

1 should be changed, if the Tribunal please, to
2 "Counts fifty-three to fifty-five," -- relate to
3 conventional war crimes and crimes against humanity.
4 This accused is named in these counts only insofar
5 as they relate to the Republic of China and the
6 argument that has been advanced with reference to
7 counts thirty-seven to fifty-two would likewise
8 apply to these charges and need not be enlarged
9 upon.

10 In conclusion, it is submitted that there
11 is not sufficient evidence, of a substantial nature,
12 even under the leeway given this Tribunal, to warrant
13 conviction of this accused, and therefore respect-
14 fully submit that all charges against him ought,
15 in the interests of justice, be dismissed.

16 THE PRESIDENT: Mr. Smith.
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1 MR. SMITH: If the Court please, we now come
2 to the defendant HIROTA, Koki, and I move this
3 Honorable Tribunal to dismiss each and every count
4 in the indictment against that defendant, being
5 counts 1-17, 19-25, 27-35, 37-47, and 52-55, for
6 the reason that there has been a total failure on
7 the part of the prosecution to offer any substantial
8 evidence to support any of the foregoing counts
9 against said defendant..

10 GROUNDS IN SUPPORT OF THE FOREGOING MOTION
11 AND ARGUMENT.

12 As American counsel, I have the honor to
13 present on behalf of the Honorable Koki HIROTA a
14 motion to dismiss each and every of the counts of
15 the indictment affecting Mr. HIROTA. There has
16 been a palpable failure on the part of the
17 prosecution to introduce a scintilla of eivence
18 to sustain any of the wide, sweeping allegations
19 contained against him in any count of the indictment.
20 A mere reflection on the part of the Tribunal will
21 disclose at once the gross miscalculation on the
22 part of the prosecution in joining Mr. HIROTA in the
23 instant indictment. The prosecution has not produced
24 one jot of evidence to show that Mr. HIROTA either
25 individually or in concert with any other defendant

1 in the dock or in combination with that bewildering
2 category of persons described as "divers unknown
3 persons" ever made any plan, or common plan or con-
4 spiracy, to do any of the things so extravagantly
5 charged in the indictment against him in the desig-
6 nated counts.

7 In order to clarify the points and argument
8 it is well to recall the offices held by Mr. HIROTA
9 and the times in which he lived and conducted his
10 official actions. After serving for four years
11 as Minister to the Netherlands and as a well-liked
12 Ambassador to the Soviet Union, he returned to Japan
13 in 1932 and was placed on the retired list and pen-
14 sion as a career service diplomat of Japan. He
15 has never been a member of the armed forces. On
16 September 14, 1933, he was appointed to his first
17 high office in the home government, having been
18 appointed Foreign Minister in the SAITO Cabinet,
19 which continued until July 7, 1934, when the SAITO
20 Cabinet resigned. At the time of the appointment of
21 Mr. HIROTA as Foreign Minister in September 1933,
22 the Manchurian incident was then two years old,
23 Manchuria had already declared her independence and
24 had been recognized as a separate and independent
25 State by Japan; the Shanghai incident of 1932 was

1 then a closed book; and Japan had already withdrawn
2 from the League of Nations. In this situation Mr.
3 HIROTA found Japan virtually isolated in the family
4 of nations and he earnestly set about, as is shown
5 by many pieces of prosecution evidence, to bring
6 Japan into good relations with the nations of the
7 world, especially China, Britain and the United
8 States, and to promote better feeling and under-
9 standing in every direction. Witness, for example,
10 the evidence introduced by the prosecution which
11 shows that Mr. HIROTA sent a message to Secretary
12 Hull on February 21, 1934, saying that no issue
13 existed between the United States and Japan which
14 was "fundamentally incapable of amicable solution,"
15 and that Japan had no intention whatever of making
16 trouble with any other power; and the cordial reply
17 of Secretary Hull of March 3, 1934, to the open hand
18 of friendship and good will extended by Mr. HIROTA.

19 The SAITO Cabinet was succeeded on July 8,
20 1934, by the OKADA Cabinet in which Mr. HIROTA
21 continued as Foreign Minister until March 8, 1936.
22 Peace existed in the Far East during all of Mr.
23 HIROTA'S service as Foreign Minister in both the
24 SAITO and OKADA Cabinets. The prosecution has
25 totally failed to prove any act or omission on the

1 part of Mr. HIROTA or the SAITO or OKADA Cabinets
2 as a whole falling within the issues made by the
3 indictment in this case. The court will vividly
4 recall that Mr. OKADA, former Prime Minister of
5 Japan, was called to the stand as a prosecution
6 witness and testified under questioning by the prose-
7 cutors that when he came to office the Manchurian
8 incident was an accomplished fact and it was too
9 late to set back the hands of the clock; and that
10 his Cabinet recognized Henry Pu Yi as Emperor hav-
11 ing in mind the sole consideration of "the happiness
12 of the people" in Manchoukuo. Here the Tribunal
13 will recall that Manchoukuo declared her independ-
14 ence on March 1, 1932, during the previous INUKAI
15 Cabinet (December 13, 1932 - May 25, 1932) and that
16 Manchoukuo had been formally recognized as an inde-
17 pendent State during the INUKAI Cabinet tenure;
18 also that Pu Yi had been recognized as Emperor dur-
19 ing March 1934 during the tenure of the SAITO Cab-
20 inet but some five months before Mr. HIROTA became
21 Foreign Minister in the SAITO Cabinet. The
22 prosecution has failed to offer a scintilla of evi-
23 dence to show that Mr. HIROTA conspired with any
24 member of the SAITO or OKADA Cabinets or any member
25

1 of the Privy Council or ever approved the maneuvers
2 in Manchuria, the outcome of which was presented to
3 him some two years later as an accomplished fact.
4 Surely the Tribunal will appreciate that after a
5 long lapse of time even old sores must be dealt with
6 reason and common sense.

7 The OKADA Cabinet resigned on March 8, 1936.
8 Between February 26-29, 1936, the City of Tokyo had
9 been thrown into a state of terror by the action
10 on the part of more than 1400 young officers and
11 men of the army who conducted a series of assassina-
12 tions, ostensibly for the purpose of ridding the
13 Government of so-called old timers whom they con-
14 sidered stood in the way of ends sought by some of
15 the younger men in the army. The Tribunal will
16 remember the testimony of Mr. OKADA with respect
17 to the attempt against his life and the fact that a
18 secretary was assassinated in his place by mistake.
19 The court will also recall that Tokyo was in a stage
20 of siege and martial law for a number of days
21 immediately after February 26, 1936, and that by
22 reason of the conditions and disorders at that time
23 Mr. OKADA and his entire Cabinet resigned. In
24 that strange and incredible day Mr. HIROTA was
25 summoned by His Majesty, the Emperor and ordered to

1 form a new Cabinet which he did after a delay of
2 five days. The HIROTA Cabinet held office from
3 March 9, 1936, to February 1, 1937, at which later
4 date Mr. HIROTA and his entire Cabinet voluntarily
5 resigned. For less than a month Mr. HIROTA held
6 the office of Foreign Minister concurrently with
7 that of Prime Minister and in April 1936 Mr. ARITA
8 took over as Foreign Minister. The Tribunal will
9 realize that it is plain as day that the Emperor
10 summoned Mr. HIROTA to occupy the high office of
11 Prime Minister of Japan in order to control the so-
12 called "hot headed" and rebellious elements among
13 the younger men in the army and to bring order and
14 stability to Japan. All the evidence of the prosecu-
15 tion, fragmentary as it is in this respect, shows
16 that Mr. HIROTA devoted himself to efforts to con-
17 trol elements within the army of Japan, to make the
18 civil side of the Government of Japan supreme over
19 the army and navy, especially as it related to the
20 foreign affairs of Japan; and that when he realized
21 he had failed in this respect as a result of a demand
22 by the army for dissolution of the House of Repre-
23 sentatives of the Diet as the result of an attack
24 upon the army by Mr. HAMADA, he voluntarily, together
25

1 with every member of his Cabinet, resigned on
2 February 1, 1937. Japan was at peace during the
3 entire tenure of the HIROTA Cabinet.

4 The Tribunal is confronted with the astound-
5 ing fact shown by all the evidence in the case that
6 Mr. HIROTA is the only person among the large num-
7 ber of persons who occupied high official offices
8 in the SAITO, OKADA, HIROTA and first KONOE Cabi-
9 nets who stands as a prisoner in the dock, except
10 the defendant ARAKI, who occupied the post of War
11 Minister in the SAITO Cabinet for about three months
12 while MR. HIROTA was Foreign Minister and nothing
13 occurred affecting any issue in this case; and ex-
14 cept that the defendant KIDO occupied the innocuous
15 posts of Minister of Education and Welfare in the
16 first KONOE Cabinet; and except that the late
17 Admiral NAGANO occupied the post of Navy Minister
18 during the HIROTA Cabinet and at a time when Japan
19 was at peace and naval construction was at a vir-
20 tual standstill. There has been a total failure
21 of proof on the part of the prosecution to show
22 that Mr. HIROTA conspired with ARAKI, KIDO or
23 NAGANO or any other officials in any of those
24 Cabinets to commit any of the things alleged in
25 the indictment. There is a total failure of proof

1 to show that Mr. HIROTA ever conspired with any
2 member of the Privy Council or member of the Diet
3 of Japan, or any other alleged "unknown person"
4 to do any of the things alleged against him in
5 the indictment.

6 The HIROTA Cabinet was succeeded by the
7 HAYASHI Cabinet which continued in office from
8 February 2 to June 3, 1937. The HAYASHI Cabinet
9 was succeeded by the first KONOE Cabinet (the
10 court will remember that there were three separate
11 and distinct KONOE Cabinets). Mr. HIROTA was
12 urged to become Foreign Minister in the first
13 KONOE cabinet by the late Prince SAIONJI, one of
14 the most learned, liberal and distinguished elder
15 statesmen Japan ever produced. It was thought at
16 the time that MR. HIROTA would lend strength to
17 the first KONOE Cabinet in the post of Foreign
18 Minister. He assumed the post of Foreign Minister
19 on June 4, 1937, and resigned on May 26, 1938,
20 never again to resume any high official post in the
21 Government of Japan. Shortly after Mr. HIROTA
22 had assumed the post of Foreign Minister in the first
23 KONOE Cabinet he was confronted on the night of
24 July 7, 1937 with the Marco Polo Bridge incident
25

1 in China. All the prosecution evidence shows that
2 he immediately attempted as Foreign Minister to
3 localize the issue and to bring the incident to a
4 speedy settlement. As meager and unfair as the
5 prosecution evidence stands at the conclusion of
6 its case, its own evidence shows that Mr. HIROTA
7 made repeated efforts to settle the incident in
8 China and in November 1937, made a peace proposal
9 to Chiang Kai-Shek which contained four simple
10 points as follows: (1) immediate cessation of
11 hostilities on both sides; (2) cessation of anti-
12 Japanese activities; (3) cooperation to prevent the
13 spread of Communism; and (4) indemnity to Japan for
14 the damages inflicted. And I would like to digress
15 here to say to your Honors that the evidence shows
16 that still later on Mr. HIROTA dropped the request
17 for indemnity for the damages in order to try to
18 settle the matter. The court will notice the
19 highly significant request for "indemnity to Japan"
20 as it relates to the fantastic assertion on the
21 part of the prosecution that Japan was engaged in
22 the "territorial" conquest of China, "overlordship,"
23 and effort at aggression.
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1 While Mr. HIROTA occupied the office of
2 Foreign Minister in the First KONOE Cabinet the so-
3 called "rape of Nanking" occurred. Nowhere has the
4 prosecution shown any responsibility of the Foreign
5 Minister of Japan for the lack of good order and
6 discipline on the part of the Japanese army. In this
7 connection the Court will recall the opening explan-
8 ation of Brigadier Nolan with respect to the constitu-
9 tion and distribution of powers thereunder in Japan;
10 he explained lucidly that under the constitution and
11 practice of Japan the army and navy were autonomous
12 and answerable only to the Emperor himself for their
13 acts and omissions; that throughout recent Japanese
14 history the army had proceeded to take actions with-
15 out first consulting the civil officers of the Govern-
16 ment of Japan; and invariably presented the civil
17 government of Japan with a fait accompli. In this
18 background and in these circumstances admitted by the
19 prosecution itself, the prosecution has failed to pro-
20 duce a shred of evidence that any act or omission of
21 Mr. HIROTA contributed to the activities of the armed
22 forces of Japan in Nanking or China as a whole or that
23 after the incident came to his attention he omitted
24 to do anything whatever to remind the responsible com-
25 manders of the Japanese army to watch the "reputation"

1 of the Japanese army. And in these circumstances it
2 is perfectly fantastic for the prosecution to indict
3 Mr. HIROTA in Count 55 and to charge him with being
4 "responsible" for alleged war crimes committed by
5 the Japanese army in Nanking. The Nanking incident
6 is the only respect in which Mr. HIROTA is charged
7 with ~~so~~-called "conventional war crimes and crimes
8 against humanity."

9 "Mr. HIROTA resigned as Foreign Minister of
10 the first KONOE Cabinet on May 26, 1938, because of
11 a difference of views with the Prime Minister with
12 respect to the activities of the Japanese army in China.
13 Although he was offered high office thereafter, he
14 declined.

15 Throughout this argument the Court will
16 notice that Mr. HIROTA had absolutely nothing to do
17 with the so-called "new order" in China or the so-
18 called "Greater East Asia Co-Prosperity Sphere,"
19 irrespective of the varying constructions put upon
20 those terms. All the evidence shows that the term
21 "new order" in East Asia was first heard in government
22 circles in Japan in November 1938, some five months
23 after Mr. HIROTA last occupied the high office of
24 Foreign Minister in the first KONOE Cabinet and that
25 it was not until at least August 1940, that the term

1 "Greater East Asia Co-Prosperity Sphere " was put for-
2 ward in governmental circles in Japan. Hence, regard-
3 less of what interpretation may be put on the two fore-
4 going terms, it has been demonstrated by the evidence
5 of the prosecution that Mr. HIROTA has no connection
6 with the aims expressed in those slogans and no personal
7 responsibility therefor.

8 The prosecution has contended in argument and
9 in opening statement that the Anti-Comintern Pact
10 signed on November 25, 1936, was the "forerunner" of
11 the Tri-Partite Agreement signed in September 1940
12 by Foreign Minister MATSUOKA. At the time the Anti-
13 Comintern Pact was signed on November 25, 1936, that
14 action had already been unanimously approved by the
15 Privy Council and by His Majesty, the Emperor. Mr.
16 HIROTA was merely one of the many persons in official
17 life in Japan who had a voice and vote as to whether
18 or not Japan would enter into that Pact. The prosecu-
19 tion has failed to offer a scintilla of evidence that
20 any other person who had a voice in the final deter-
21 mination of whether or not Japan would sign that Pact
22 is a defendant in this case or one of the persons
23 mentioned in that vague category of persons described
24 as "divers unknown persons." The alleged "secret
25 agreement" which accompanied the Anti-Comintern, as

1 appears from its face, was nothing more than a mild
2 defensive agreement with Germany to the effect that
3 should the Soviet Union attack either without provoca-
4 tion, neither as the case might be, would furnish any
5 active aid or assistance to the Soviet Union, but with-
6 out any obligation on the part of Germany or Japan to
7 intervene or take any positive action. The defensive
8 agreement is a far cry from the allegations of the
9 Indictment and amounts to nothing more than the usual
10 duty of a neutral during hostilities.

11 Moreover, the prosecution has failed to
12 demonstrate in any respect how a defensive alliance
13 against Communism could contribute in anywise to a war
14 of aggression or a war for the domination of any people
15 in the world. Nothing in the Anti-Comintern Pact or
16 secret agreement connected therewith shows any reason-
17 able tendency toward a war of aggression.

18 It is too plain for argument that the prosecu-
19 tion has failed to demonstrate any connection whatso-
20 ever between the Anti-Comintern Pact and the Tri-
21 Partite Agreement which transpired some three years
22 and ten months later and after Japan had lived through
23 the HAYASHI Cabinet, the first KONOE Cabinet, the
24 HIRANUMA Cabinet, the ABE Cabinet, the YONAI Cabinet
25 and the second KONOE Cabinet, and the changing times

1 in which those Cabinets functioned. What is more
2 important is that Mr. HIROTA is not indicted in any
3 count for having negotiated the Anti-Comintern Pact.
4 At the time that Pact was signed Japan had tradition-
5 ally lived by the standards of the so-called "capitalistic
6 system" in which the right of private property and
7 ownership was recognized and respected. At that time
8 practically the entire civilized world outside the
9 Soviet Union was taking action by law, regulation,
10 practice, and police measures to actively combat Communism
11 and its encroachment throughout the world. It was then
12 universally believed that the Third Communist Inter-
13 nationale and the Soviet Union were one and the same
14 thing. Moreover, the prosecution evidence shows that
15 the Third Internationale had declared both Japan and
16 Germany to be natural "enemies" of the Soviet Union.
17 The United Kingdom and the United States were notable
18 in that respect for the measures and protests taken
19 against the activities of the Third Internationale.
20 The prosecution has wholly failed to explain how the
21 effort on the part of Japan to protect its ideal and
22 philosophy of private ownership of property and recog-
23 nition of the dignity and place of the individual in
24 civilized society contributed in any respect to a war
25 or wars of aggression.

1 Again in the Soviet phase of the prosecution
2 the prosecutors asserted, but wholly failed to intro-
3 duce any evidence to substantiate the fact, that Mr.
4 HIROTA "forced" the Soviet Union to sell the Chinese
5 Eastern Railway to Manchukuo. This incident illustrates
6 perhaps better than anything else in the case the
7 extraordinary and fantastic lengths to which the prose-
8 cution went in an effort to tie Mr. HIROTA in with even
9 a short period of Japanese history as it relates to the
10 acts charged in the Indictment. As previously stated,
11 there is no evidence in the case to show that Japan
12 or any official of Japan ever "forced" the great Soviet
13 Union to do anything, much less sell the Chinese
14 Eastern Railway. All the evidence of the prosecution
15 does demonstrate beyond doubt that the Soviet Union
16 sold the Chinese Eastern Railway to Manchukuo (thereby
17 de facto recognizing Manchukuo as a sovereign and
18 independent state) and in connection with the sale
19 exacted a guarantee of the payment of the purchase
20 price from Japan itself; and further that the
21 negotiations between Japan, Manchukuo and the Soviet
22 Union extended over a period of nearly two and one-
23 half years, and consisted principally in haggling over
24 the purchase price; and that the Japanese Government
25 was actuated solely by the desire to remove Soviet

1 influence, employees and guards from Manchukuo terri-
2 tory in order to give that new and independent State
3 a fair and decent opportunity to develop without the
4 friction which in years past had caused so many dis-
5 orders and disturbances within that primitive territory.

6 There is a total failure of proof on the part
7 of the prosecution to show any economic or military
8 preparation for war during the tenure of offices held
9 by Mr. HIROTA. For example, exhibit No. 380, dealing
10 with the total strength of the Japanese army shows
11 that there was no increase in the number of divisions
12 and brigades in the Japanese army between 1933 and the
13 occurrence of the Marco Polo Bridge incident in China
14 on July 7, 1937, and that during the foregoing period
15 the enlisted personnel of the Japanese army was in-
16 creased by only 70,000 men who were apparently recruited
17 in order to bring the existing seventeen divisions of
18 five brigades each up to normal strength. The Court
19 will also recall the testimony of the prosecution
20 witness, General TADA, Chief of Staff of the Japanese
21 army in 1937, who testified that there was no military
22 preparation for a war in China and that Japan was ill
23 prepared for such a conflict; and further that there
24 was no thought in the army in 1937 of preparation for
25 an alleged Pacific War.

1 Consider, also, the informal statement issued
2 by Mr. HIROTA on January 16, 1936, on the occasion
3 of Japan's withdrawal from the London Naval Conference
4 (IPS document 915, exhibit 2226) in which he said
5 in part:

6 "- - - our delegates made a proposal looking
7 to a reduction of armaments which, without impairing
8 the sense of security of each Power in its national
9 defense, would make it difficult for any Power to
10 attack another but easy to defend itself. For that
11 purpose, our proposal provided for the establishment
12 of a common upper limit for all the navies, to be fixed
13 at the lowest possible level. It also provided for the
14 abolition of the armaments of offensive nature, such
15 as capital ships and aircraft carriers, and for a drastic
16 reduction in the first class cruisers. Thus we hoped
17 to achieve a thorough-going disarmament and to establish
18 the principle of non-menace and non-aggression among
19 nations.

20 "But, in spite of the earnest endeavours of
21 our delegates, these fair and reasonable basic claims
22 of our Government were not accepted by the other Powers;
23 and moreover, the earnest proposal of our Government
24 was also rejected, in which it was proposed to conclude
25 such agreements as might be possible at the conference,

1 and to terminate the conference in an amicable manner
2 after making for the purpose of forestalling naval
3 competition a joint declaration to the effect that the
4 Powers concerned would not enter upon an armament race.
5 In the light of these circumstances, it became unavoidable
6 that our delegates should withdraw from the conference.

7 "However, it is needless to say that our
8 Government, devoted to the principle of non-menace and
9 non-aggression, have not the slightest intention of
10 doing anything to stimulate an armament race, irrespec-
11 tive of whether or not there exists a treaty for dis-
12 armament. Furthermore, there is not the slightest
13 change in the cherished desire of our Government to
14 co-operate for the realization of disarmament for the
15 cause of world peace. It is our fervent wish that all
16 the Powers concerned will soon come to appreciate the
17 sincerity of our Government in proposing a thorough-
18 going limitation and reduction in armament."

19 It is a matter for sound reflection how much
20 better off the entire world would have been since 1935
21 had it adopted the Japanese proposal for abolition of
22 battleships, heavy cruisers, aircraft carriers and sub-
23 marines, especially as such offensive types of arms
24 appear to have become virtually useless in the fact of
25 the development of atomic energy.

1 The very evidence of the prosecution shows
2 that the construction of warships during the tenure
3 of Mr. HIROTA in office (September 1933 - May 1938)
4 was insignificant and in this connection the Tribunal
5 is referred to Exhibits 913, 917 and 918.

6 Finally, the prosecution has apparently
7 attempted to hold Mr. HIROTA responsible for wars of
8 aggression in the Pacific War because as one of the
9 "elder" statesmen of Japan he was commanded to appear
10 before the Emperor and express his views in the criti-
11 cal days preceding December 7, 1941. It is said that
12 when the third KONOE Cabinet went down that Mr. HIROTA
13 agreed with Marquis KIDO that a military man should
14 be appointed to head the Government and that Mr. HIROTA
15 agreed with KIDO that Mr. TOJO would be an appropriate
16 appointment in the conditions of that time. Irrespec-
17 tive of whether the assertion by the prosecution is
18 correct or not, the prosecution has wholly failed to
19 show by any evidence that at the time Mr. TOJO was
20 appointed Prime Minister of Japan he ever expressed
21 the intention of waging war against the United States,
22 Great Britain or any other nation or had exhibited in
23 anywise warlike characteristics. Compare, the KONOE
24 statement, IPS Document 2-A, in which KONOE said he
25 took the sole responsibility for recommending TOJO.

1 All the evidence of the prosecution fails to show a
2 single utterance by Mr. HIROTA that tends to show by
3 any stretch of the imagination an attitude or desire
4 that war should be made against the United States,
5 Great Britain or any other country, or that war against
6 those countries was "inevitable" even from the stand-
7 point of self-preservation and self-defense on the
8 part of Japan. The "elder" statesmen of Japan, as
9 the prosecution evidence clearly shows, exercise no
10 official office and traditionally merely express their
11 points of view to the Emperor for such weight and con-
12 sideration as the Emperor may care to accord to such
13 views. But whatever the prosecution has striven so
14 mightily to prove against Mr. Hirota is utterly destroyed
15 by its own evidence, being Exhibit 1196, a revised
16 translation of an "extract" from an entry from Marquis
17 KIDO's diary of 29 November 1941; there the conference
18 between the Emperor and the elder statesmen on the eve
19 of the Pacific War is recorded in substance and Mr.
20 HIROTA, true to his traditional lifetime attitude of
21 patience, liberality, tolerance and peace among all
22 men is quoted as saying in the face of the Government
23 decision that war was "inevitable:"

24 "HIROTA - After having talked on conditions
25 of each of the world powers since the World War, Japan

1 has adopted every possible means to avoid the inter-
2 vention of Britain and America in the China Incident.
3 In spite of this the diplomatic situation has become
4 so serious as it is today. According to the explana-
5 tions of the Government we seem to stand now face to
6 face with a diplomatic crisis. Though the diplomatic
7 crisis has a close relation to the strategic moment,
8 I think the true intentions of both sides in diplo-
9 matic negotiations are only revealed after passing
10 through several crises. Why should we hastily rush
11 into war immediately after being confronted with the
12 present crisis? Granting that war is inevitable, I
13 believe we should always be on the watch to seize the
14 opportunity for a solution by diplomatic negotiations
15 even though blows have been exchanged."

16 What has been said ought to dispose of all
17 counts against Mr. HIROTA. However, the attention of
18 the Tribunal is specially directed to counts 20, 21,
19 22, 24, 29, 30, 31, 32, 34, 39, 40, 41, 42 and 43,
20 all of which relate to events in the Pacific War
21 which occurred on and after 7 December 1941. As the
22 prosecution evidence positively demonstrates that Mr.
23 HIROTA had nothing whatever to do with the Pacific War
24 and actually tried to stop it in the conference before
25 the Emperor and that he had held no official office

1 since May 26, 1938, it is obvious the foregoing counts
2 cannot be sustained. Again counts 23, 24, 33, 35, 37,
3 38, 46, 47 and 52 relate to events which occurred after
4 Mr. HIROTA had resigned his last office on May 26, 1938,
5 and otherwise there has been a total failure to connect
6 Mr. HIROTA with any of the allegations in those counts.

7 Thus, it appears that the prosecution made a
8 grievous mistake in indicting Mr. HIROTA on any one of
9 the foregoing counts and has failed to offer a scin-
10 tilla of evidence tending to show a prima facie case
11 with respect to any single count. The prosecution has
12 produced nothing to overcome the presumption of inno-
13 cence which clothed Mr. HIROTA throughout the trial.
14 Moreover, the prosecution evidence demonstrates in a
15 positive way the innocence of Mr. HIROTA under each
16 count against him.

17 Counsel plead most earnestly that the Tribunal
18 will enter an order dismissing the indictment as against
19 Mr. HIROTA and summarily order his discharge from
20 custody. All of which is most respectfully submitted.

21 THE PRESIDENT: At the bottom of page 2 you
22 have in brackets "December, 13, 1932 - May 25, 1932."
23 There appears to be a mistake there, Mr. Smith.

24 MR. SMITH: That is an error, your Honor. I
25 had not noticed it. I will see that it is corrected

1 and due notice sent.

2 THE PRESIDENT: Mr. Williams.

3 MR. G. WILLIAMS: If the Tribunal please,
4 now comes the accused HOSHINO, Naoki, by his counsel,
5 and moves the Tribunal to dismiss each and every one
6 of the Counts in the Indictment against him on the
7 ground that the evidence offered by the prosecution
8 is not sufficient to warrant a conviction of the
9 accused.

10 Argument in support of motion of accused
11 HOSHINO, Naoki to dismiss. Counts 1 to 5.

12 There is no evidence to show that the accused
13 conspired or entered into any common plan for the ob-
14 jects therein mentioned. The evidence of his positions
15 as a civilian in the Government of Manchukuo from 1932
16 to 1940, as Minister without Portfolio and President
17 of the Planning Board of the Japanese Government from
18 1940 to April 1941, and as Chief Secretary of the
19 Cabinet from October 1941 to 1944, shows that he filled
20 various government posts but nowhere points to his
21 personal participation in a conspiracy nor use of his
22 official influence and position for such purposes. I
23 shall omit the references to the transcript pages, if
24 the Tribunal please.

25 The gist of the case revolves around the issue

1 of conspiracy as set out by the prosecution in its open-
2 ing statement, and by paragraph 3 of the first part of
3 the Indictment. The evidence fails to show the founda-
4 tion which must be laid before a criminal conspiracy
5 can be shown herein, i.e., that there is an organized
6 society of nations against which individuals or nations
7 can conspire. It indicates that the accused was a
8 career public servant and that during his period of
9 government service he performed various functions and
10 acts, all capable of any one of several reasonable inter-
11 pretations and inferences other than that of participa-
12 tion in a conspiracy. For example, the evidence dis-
13 closes that as an official of the Finance Ministry of
14 Manchukuo, the accused signed a loan contract in 1932
15 between his government and certain Japanese banks pledg-
16 ing the government's opium monopoly profits for the
17 loan, but it does not show that he signed the document
18 in other than a purely administrative capacity nor that
19 he set the policy. Similarly, the charge in Section 3,
20 Appendix A of the Indictment as to economic exclusion
21 of other nations from Manchuria is refuted by the
22 interrogation of the accused evidencing a plan to bring
23 foreign capital into that country. It is submitted
24 that this is insufficient evidence from which to infer
25 a conspiracy or the intent to commit aggression.

1 At the Privy Council meeting of 26 September
2 1940 at which the Tri-Partite Alliance was discussed,
3 this accused was present in his capacity as head of
4 the Planning Board as an "explaining" member only and
5 he withdrew after performing that duty, thereby indi-
6 cating his lack of authority in setting policy in the
7 highest post held by him in the Government of Japan.

8 Counts 6 to 17.

9 The evidence nowhere shows that this accused
10 planned and prepared a war of aggression nor a war in
11 violation of international law against the nations named
12 in these Counts. Instead it shows routine planning
13 for international contingencies in the effort to
14 strengthen the economy of first, Manchuria, later of
15 Japan, in order to make them self-sufficient.

16 The accused was Acting Director of the Total
17 War Research Institute from October 1940 to January
18 1941, prior to the commencement of its operations in
19 April 1941. The evidence discloses that the Institute
20 was founded for the hypothetical study of total war,
21 was divorced from government policy, and that the
22 accused's post as a counselor of the Institute was not
23 important.

24 Counts 19, 27, 28.

25 The evidence does not connect the accused with

1 the commencement of hostilities in China in 1937, and
2 fails to prove that he waged a war of aggression against
3 that country.

4 Counts 20 to 22, 24, 29 to 32, 34, 37 to
5 43, 53 to 55.

6 The evidence shows that the accused held no
7 policy-making position in December 1941 when the wars
8 herein referred to began, but indicates only that he
9 held an administrative post as Chief Secretary of the
10 Cabinet. It was in such a secretarial capacity that
11 he attended Cabinet meetings and the Liaison and Imper-
12 rial Conferences of 28 November and 1 December 1941,
13 respectively, at which war with the Allied Nations was
14 decided.

15 If the Tribunal please, I should like to insert
16 this short addition here: It should be inserted that
17 the charge in Appendix E of the Indictment that the
18 accused was a Minister of State under TOJO is erroneous,
19 an error pointed out by Mr. Higgins of the prosecution
20 at page 9305 of the transcript. Exhibit 102, a list
21 of the Japanese Cabinet members, and exhibit 109, the
22 personnel record of the accused, disclosed that at this
23 time he was Chief Cabinet Secretary only, a post
24 below ministerial rank.
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1 To get on with paragraph V next:

2 V. Counts 23, 33.

3 The evidence does not show that the Vichy
4 Government which controlled the Military Governor of
5 French Indo-China was, de facto or de jure, the
6 Government of the Republic of France.

7 VI. Counts 25, 35, 52.

8 The evidence does not connect the accused
9 with the hostilities against the Soviet Union in 1938
10 but shows only that he held a civilian position in
11 the Manchurian Government.

12 VII. Count 44.

13 The evidence wholly fails to connect this
14 accused with any common plan or conspiracy to murder
15 prisoners of war. As previously contended, it does no
16 more than establish his position in an administrative
17 capacity with the Cabinet under which hostilities
18 were commenced in 1941.

19 All of which is most respectfully submitted.

20 THE PRESIDENT: Mr. Mattice.

21 MR. MATTICE: If the Tribunal please, comes
22 now the accused ITAGAKI, Seishiro, and moves this
23 Tribunal to dismiss the Indictment herein as to him
24 for the reason and upon the ground that the evidence
25 adduced by the prosecution is insufficient to justify a

conviction.

Memorandum in Support of Motion to Dismiss.

1. The evidence is insufficient to connect the accused ITAGAKI with the charges contained in Counts 1, 2, 3, 4, and 5, to the effect that he with others participated in the formulation or execution of a plan, the objects of which were as stated in each of said counts. The evidence thus far adduced does not show that ITAGAKI designedly, culpably and knowingly participated in any such formulation. In the first place it has not been shown that there was any such plan. If any such plan has been established, the evidence does not show that ITAGAKI participated in it, was a member of it, or that in any respect he acted consciously in aid thereof.

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

At the times stated in said counts ITAGAKI held no post or position in which he was authorized to or could formulate policy or plan war. During the Manchurian phase and for some time thereafter he was

1 not in command of any military forces. He was a
2 staff officer, third in authority, subject to the
3 judgment and the orders of his commanding officer
4 (General HONJO, and others) and the General Staff and
5 other Government offices and bureaus in Tokyo.

6 Respecting Count 7, war against the United
7 States, the evidence shows that from 7 July 1941 to
8 April 1945 ITAGAKI was in Korea serving as commander
9 of the Korean Army. He, and that army, had no part in
10 the commencement of or carrying on the war against
11 the United States.

12 3. In Count 18, he is charged, with others,
13 with initiating a war of aggression, and so forth,
14 against the Republic of China in September 1931. The
15 evidence shows that ITAGAKI was not in command of the
16 Kwantung Army; that General HONJO was; that ITAGAKI was
17 a staff officer thereof and subject to the orders and
18 views of his commander and the War Ministry in Tokyo;
19 and the evidence fails to show that any war of aggres-
20 sion ensued against China. The evidence shows, what
21 was common knowledge, that a state of war already
22 existed in which Japanese, who were in a place where
23 they had a right to be, to-wit, in Manchuria, were
24 subjected to continued violence in which their lives
25 were endangered and their property stolen and destroyed,

1 a continuance of which would result in their extermina-
2 tion. The Japanese Empire, as it had a right to do,
3 took steps to defend and protect its nationals and
4 their property and to defend its duly acquired, lawful
5 and existing rights in that area.

6 4. In Count 19, he is charged, with others,
7 with initiating a war of aggression against the
8 Republic of China, about 7 July 1937.

9 The evidence shows that at the time mentioned
10 in this count, ITAGAKI was commander of the 5th
11 Division, stationed at Hiroshima, Japan, and he is
12 not shown to have had any connection with or part in
13 the 1937 military operations in China.

14 5. He is not charged in Counts 20, 21 and 22.

15 6. In Count 23, he is charged, with others,
16 with initiating a war of aggression against the Republic
17 of France, about 22 September 1940.

18 The evidence shows that ITAGAKI at the time
19 mentioned was Chief of Staff of the Chinese Expeditionary
20 Force in China, but it does not show that he had any
21 connection with or part in the action taken in French
22 Indo-China. Some troops of the Chinese Expeditionary
23 Force were detached and sent to Indo-China, but there
24 is no evidence that it was done upon his initiative or
25 his order, or that he had any connection with it.

1 Obviously such an order would emanate from General
2 Headquarters at Tokyo and the General Staff or other
3 over-all authority in Tokyo, would necessarily not
4 only have ordered such diversion of troops but con-
5 trolled their movement and actions thereafter, not the
6 accused ITAGAKI.

7 7. He is not charged in Count 24.

8 8. In Count 25, he is charged, with others,
9 with initiating a war of aggression, by attacking the
10 Russians in the area of Lake Khasan, about July 1935,
11 and in Count 26, with attacking the Mongolian Peoples
12 Republic in the area of Khalkhin-Gol River, in the
13 summer of 1939.

14 At the time mentioned in Count 25, ITAGAKI
15 was Minister of War, but the War Ministry had no
16 control over the operations in the Lake Khasan area,
17 and such operations has not been shown to have been
18 instigated by Japan's armed forces. The same is true
19 as to Count 26. The evidence indicates that Russia
20 caused the Incident as much as it indicates the con-
21 trary and where a given state of facts may be recon-
22 ciled as easily upon the basis or theory of innocence
23 as upon one of guilt, the accused is entitled to the
24 benefit thereof and there should be an acquittal.

25 9. In Counts 27, 28, 29, 30, 31 and 32, he

1 is charged, with all the defendants, with waging a
2 war of aggression against the countries named in
3 those counts. The evidence does not show that
4 ITAGAKI had the power to wage war against either of
5 those countries, or that he caused the same to be
6 done. When he became Minister of War in 1938, the
7 warfare in China was already under way.

8 10. In Count 33, he is charged, with others,
9 with waging a war of aggression against the Republic
10 of France in September 1940. This appears to be the
11 same charge as that set out in Count 23. At the time
12 stated ITAGAKI was Chief of Staff of the Chinese
13 Expeditionary Force and had no connection with or
14 part in the military actions concerning France. Some
15 troops had been detached from his command by General
16 Headquarters of the Japanese Empire and sent to Indo-
17 China, but it is not shown that the accused ITAGAKI
18 caused that to be done or that he had any control
19 over said troops thereafter.

20 11. In Count 34, he is charged, with all
21 the defendants, with waging a war and so forth against
22 Thailand, from 7 December 1941 to 2 September 1945.
23 During that period, ITAGAKI was in command of the
24 Korean Army in Korea and he had no contact with or
25 part in any military operations in Thailand.

1 12. In Count 35, he is charged, with others,
2 with waging a war against Russia in 1938, and in Count
3 36, against Russia in 1939. There is no evidence
4 warranting this accused conviction under either of
5 these specifications.

6 13. He is not charged in Counts 37, 38, 39,
7 40, 41, 42 and 43.
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1 14. In Count 44 he is charged with participating
2 in the formulation of a plan to procure and permit the
3 murder of prisoners of war. There is no evidence
4 justifying his conviction on this charge, there being
5 no showing that he either counseled or procured any
6 such thing to be done, or that he permitted same.

7 15. In Count 45, he is charged, with others,
8 with having, about 12 December, 1937, ordered, caused
9 and permitted an attack on the City of Nanking and
10 murdering thousands of civilians and disarmed soldiers
11 of China. There is no evidence connecting this accused
12 with the actions at Nanking. For aught the evidence
13 shows, ITAGAKI may have been one thousand miles away
14 and stationed at a place known as Shanshi. He is not
15 shown to have had any connection with or part in the
16 Nanking operation.

17 16. In Count 46 he is charged, with others,
18 as in Count 45, with respect to the City of Canton,
19 and in Count 47, with respect to the City of Hankow.
20 True, he was, at this time, Minister of War, but with-
21 out more, this falls short of establishing his respon-
22 sibility criminally. As is shown by the evidence, the
23 Minister of War, had not, alone, the authority or power
24 to order an attack.

25 17. He is not charged in Counts 48, 49 and 50.

1 18. In Count 51, he is charged, with others,
2 with ordering, causing and permitting an attack on
3 Mongolia and Russia in the region of Khalkhin-Gol
4 River, in 1939, and the killing of members of the armed
5 forces of Mongolia and Russia. There is no evidence
6 upon which his conviction could be justified under this
7 charge. The same is true as to the charge in Count
8 52.

9 19. Group three. Conventional War Crimes.

10 Counts 53, 54 and 55

11 Late in the period concerning which evidence
12 was given respecting mistreatment of prisoners of war,
13 etc., it appeared that ITAGAKI was placed in command
14 of the 7th Army, at Singapore, where, from April,
15 1945, to the end of the war, he served in that capacity.
16 No evidence has been adduced showing any action or
17 order on ITAGAKI's part about which any complaint could
18 be made. The evidence shows that about that time there
19 was improvement in the conditions in the prisoners
20 of war camps. At the most, the prosecution merely
21 states that he had "some responsibility."

22 Comment on some of the documentary evidence

23 Reference is made to the prosecution exhibit
24 No. 838, which was the interrogation of KUSABA. The
25 prosecution did not read it, but the document, which is

1 in evidence, at page 10 (page 5 of the served copy)
2 states that when asked what Japanese persons he thought
3 were responsible for the policies of the Manchurian
4 occupation, that General HONJO, the commander of the
5 Kwantung Army at the time, is responsible for the
6 happening of the Manchurian Incident, which was operated
7 following a plan made by HONJO.

8 In prosecution exhibit No. 157, the affidavit
9 of SHIMIZU, the affiant states that OKAWA, while drunk,
10 made certain statements concerning the Mukden Incident.
11 It need only be noted that this was hearsay and very
12 probably the bragging of a drunken person.

13 In prosecution exhibit No. 453-A, interrogation
14 of HOSHINO, page 8 (page 4 of the served copy), when
15 asked who had the final say in the Kwantung Army, stated
16 that the Commander had, and asked if the Chief of Staff
17 had final say, stated that he didn't think so; that the
18 Kwantung Commander had been serving for a long time,
19 so he knew the conditions and the situation, and,
20 therefore, he had final say. And, at page 18 (page 12
21 of the served copy), he stated that the Kwantung Army
22 advocated a Manchurian corporation to handle industries
23 in Manchuria; that the industries in Manchuria should
24 be controlled by Manchukuons.

25 In prosecution exhibit No. 668, page 6,

1 affidavit of Semyonov, the affiant states that Pu-Yi
2 asked him to help him in his negotiations with the
3 Japanese for assistance in the restoration of his
4 Imperial prerogatives. And, on page 7, the affiant
5 stated that HONJO, the Commander of the Kwantung Army,
6 directed the operation of the seizure of Manchuria.

7 In prosecution exhibit No. 2191, diary of KIDO,
8 it is stated that ITAGAKI reported on the condition
9 in Manchuria and Mongolia, and on the progress of the
10 campaign against soldier bandit forces in Manchuria.
11 This could mean nothing else than Chinese soldier bandit
12 forces. He also states that with respect to the new
13 State and new ruler, that the Japanese army would take
14 charge of the national defense. The new State would
15 naturally have no force for the purpose of preserving
16 order and defending itself and the Japanese forces
17 would, necessarily, have to attend to that. It is also
18 stated that the Japanese would take part in the manage-
19 ment of a new State as officials, who would become
20 Manchurian subjects by naturalization.

21 In prosecution exhibit No. 2192, diary of KIDO,
22 it is stated, that it was the idea of persons named,
23 including ITAGAKI, to let the military, instead of the
24 diplomatic circles, take the lead in negotiations
25 with China regarding North China. The evidence shows

1 that Japan had an army in North China (at Tientsin)
2 at that time, of which one SAKAI, was Chief of Staff.
3 It was this army which had to do with the North China
4 affairs, not the Kwantung Army and ITAGAKI had nothing
5 to do with those matters and was not responsible.

6 In prosecution exhibit No. 2197, an extract
7 from the Japan Advertiser, stating that ITAGAKI urged
8 long preparedness because it might be that Chiang-Kai-
9 shek intended to resist "the rest of his life".
10 It is not seen how this statement, if made by ITAGAKI,
11 could afford any basis for his conviction herein.

12 In prosecution exhibit No. 2201, ITAGAKI is
13 said to have scored the Powers for their interference
14 with the execution of Japan's mission of constructing
15 a new order in East Asia. Whether he said it or not,
16 it would be a natural thing for any Japanese official
17 to say in view of the fact that Japan honestly and
18 actually felt that the Powers were interfering, among
19 other things, by rendering aid to Chiang-Kai-shek.

20 It may be noted from prosecution exhibit No.
21 2193, the telegram from HAYASHI, at Mukden, to HIDEHARA,
22 that it discloses that the Chinese Army had attacked the
23 troops of Japan, and, as naturally would be the case
24 with any country, Japan's troops would strike back. The
25 matter had progressed beyond the diplomatic stage and

1 a shooting affair had come into being.

2 It may also be noted that the prosecution
3 witness Pu-Yi was impeached by the prosecution's own
4 evidence. The affidavit of the Russian G.M. Semyonov,
5 exhibit 668, page 6, and by another document introduced
6 by the prosecution consisting of an affidavit of a
7 Japanese diplomatic official at Tientsin, both of these
8 items of documentary evidence squarely dispute Pu-Yi's
9 testimony that he had given no thought to the matter
10 of restoration to the throne.

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

13 (Whereupon, at 1447 a recess was
14 taken until 1500, after which the proceed-
15 ings were resumed as follows:)
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1 MARCHAL OF THE COURT: The International
2 Military Tribunal for the Far East is now resumed.

3 THE PRESIDENT: The next motion listed is
4 that of the defendant KAYA.

5 MR. LOGAN: We sent somebody after Mr. Levin.
6 He should be here in a minute, your Honor.

7 THE PRESIDENT: Mr. Levin.

8 MR. LEVIN: May it please the Tribunal:

9 (Reading): MOTION OF DEFENDANT KAYA, Okinori,
10 TO DISMISS.

11 Now comes the defendant KAYA, Okinori, by
12 his counsel, and moves the Court to dismiss each and
13 every one of the counts in the Indictment against him
14 on the ground that the evidence offered by the prosecu-
15 tion is not sufficient to warrant a conviction of this
16 defendant.

17 Dated this 8th day of January, 1947.

18 - - -

19 ACCOMPANYING MEMORANDUM IN SUPPORT OF MOTION
20 OF DEFENDANT KAYA, Okinori, TO DISMISS.

21 With reference to Counts 1 to 5 -- these
22 counts are general counts, charging conspiracy between
23 January 1, 1928 and September 2, 1945. The official
24 position of this accused, as indicated by his personnel
25 record, exhibit lll, shows that he is a career

1 administrative officer. On February 2, 1937, he be-
2 came Vice-Minister of Finance and was Minister of
3 Finance from June 4, 1937 to May 26, 1938, and again
4 became Minister of Finance on October 18, 1941, re-
5 signing on February 19, 1944.

6 THE PRESIDENT: February 2, 1944.

7 MR. LEVIN: February 2, 1944. His only other
8 position of consequence was President of the North
9 China Development Company from August 1939 to
10 October 1941, which was purely an administrative
11 office. At no time does the evidence indicate that
12 defendant participated either in planning or execut-
13 ing the conspiracy set forth in these counts.

14 Counts 6 to 17 relate to the planning and
15 preparation of a war of aggression. What we have
16 said with reference to Counts 1 to 5 applies to these
17 counts. Although the accused is not charged with the
18 initiation of a war of aggression against France,
19 as set forth in Count 23, nevertheless, under Count 15
20 he is charged with the planning and preparation of a
21 war of aggression against France. Not only is the
22 charge under Count 15 inconsistent with the fact that
23 the accused is not charged in Count 23, but no evidence
24 has been offered by the prosecution to sustain the
25 charge in Count 15.

1 In Count 17 the accused KAYA is charged, with
2 the other defendants, in the preparation and planning
3 of a war of aggression against Soviet Russia. We
4 submit that throughout the detailed record presented
5 on the Russian phase that not the slightest evidence
6 has been offered to indicate any relation of the
7 defendant KAYA to the evidence offered on this phase
8 of the case.

9 Count 19 charges the defendant. among others,
10 with having initiated a war of aggression on or
11 about July 7, 1937, against the Republic of China.
12 Throughout this record no evidence has been adduced
13 which would in any way connect the accused with the
14 China affair. It is true that for a short period of
15 time the accused was President of the China Develop-
16 ment Company, but no evidence has been indicated that
17 any act which he performed was other than a proper
18 act in the administration of this corporation.

19 It will be noted that the defendant is not
20 charged under Count 18. There is no evidence to
21 indicate, except for the mere fact that he held
22 office, that he in any manner initiated a war of
23 aggression against the Republic of China.
24 Counts 20, 21, 22, 24 and Counts 27 to 36

25 charge the defendant with initiating a war of

1 aggression against those countries specified in the
2 various counts. Counts 27 and 28 relate to the
3 waging of war against the Republic of China, Count 27
4 relating to the Incident of September 18, 1931, and
5 Count 28 to the Incident of July 7, 1937. It is
6 strongly urged that there is nothing in the record
7 to charge this defendant with any participation in
8 connection with the waging of these wars except as
9 a mere incident to the holding of office at or about
10 the time specified in Count 28. Except in a minor
11 capacity, he held no office in September 1931.

12 For the reasons heretofore given, and the
13 fact that the accused held purely administrative
14 offices, it is submitted that the evidence offered by
15 the prosecution is not sufficient to warrant a con-
16 viction on these counts, and in addition thereto,
17 there is no evidence in any manner connecting the
18 defendant KAYA with the charges set forth therein.

19 Group 2, Counts 37 to 47, inclusive: It is
20 submitted there is no evidence against this defendant,
21 nor any responsibility on his part in relation to the
22 matters set forth in these counts. The evidence
23 offered by the prosecution is not sufficient to
24 warrant a conviction of this defendant on said counts.
25 Count 45 relates to the Nanking attack; Count 46 to

1 the attack on Canton, and Count 47 to the attack on
2 Hangkow. These took place after the resignation of
3 the defendant as Finance Minister and there is no
4 evidence to connect the defendant with these counts.
5 The evidence is abundantly clear that the responsi-
6 bility for the opening of hostilities was not that
7 of a Minister of Finance. There is no evidence in
8 this record indicating any activity or participation
9 or power on the part of this accused to be responsi-
10 ble for the acts charged in these counts.

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

22 In referring to special counts in the
23 Indictment, it is not intended in any manner to admit
24 the charges against this accused in any of the counts
25 to which no special reference has been made. Where

1 no special reference is made to particular counts,
2 it is intended that the general statement in relation
3 thereto shall be considered as a specific argument to
4 each of said counts.
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1 Mr. President, I should like to add a word,
2 and I have given the interpreters and the translators
3 the data. The attention of the Tribunal is directed
4 to the fact that only seven exhibits were introduced
5 in evidence to make the slightest reference to Mr.
6 KAYA, one of which is his personnel record. The ex-
7 hibits are No. 111, 492, 853, 1207-A, 1240 and 1241.
8 In several of these in which the Finance Minister
9 is referred to it is not indicated that he was the
10 initiator of any policy, plan or action. His ac-
11 tivities were merely routine in connection with the
12 functions of his office.

13 The accused KAYA, Okinori, devoted his life to
14 public service. In preparation for this, he studied
15 political science at the Tokyo Imperial University.
16 In April, 1917, he entered the Finance Ministry. In
17 October, 1917, he passed the higher civil service ex-
18 amination and rose in the Ministry, either by re-
19 ceiving promotions or passing further civil service
20 examinations, his services in that Ministry being
21 almost continuous until his resignation as Finance
22 Minister in February, 1944. He is a career public
23 servant, practically born and raised in the Finance
24 Ministry. He is the type of official whom govern-
25 ments look for and need, one who has been brought up

1 in the Department, with a background of abundant
2 experience and knowledge of the intricate affairs of
3 the finances of government. He performed his ser-
4 vices well and conscientiously. The evidence offered
5 by the prosecution proves no more.

6 THE PRESIDENT: Mr. Logan.

7 MR. LOGAN: If the Tribunal please, the
8 accused KIDO moves the Honorable, the International
9 Military Tribunal for the Far East, to dismiss the
10 Indictment and all the counts contained therein as
11 to him and for a judgment of acquittal on the ground
12 that there is insufficient evidence to sustain the
13 charges. The evidence not only fails to sustain the
14 counts in the Indictment but also conversely es-
15 tablishes that KIDO is innocent of any of the charges
16 contained therein.

17 With respect to crimes against peace, Counts 1
18 to 5 inclusive.

19 The evidence shows that KIDO never participated
20 as leader, organizer, instigator or accomplice in the
21 formation or execution of any common plan or con-
22 spiracy for waging war or wars to secure Japanese
23 military, naval, political and economic domination of
24 the areas stated in these counts between January 1,
25 1928 and September 2, 1945 or at any other time.

1 The evidence is that from January 1, 1928 until
2 October 22, 1937 KIDO held minor positions in the
3 government including his position as Chief Secretary
4 to the Lord Keeper of the Privy Seal, which position
5 he held from October 28, 1930 until October 22, 1937.
6 His subsequent offices were (Exhibit 112): October 22,
7 1937 - May 26, 1938, Minister of Education (1st KONOYE
8 Cabinet). January 11, 1938 - January 5, 1939, a con-
9 current post also in the first KONOYE Cabinet.
10 January 5, 1939 - August 30, 1939, Minister of Home
11 Affairs in the HIRANUMA Cabinet. August 30, 1939 -
12 June 1, 1940, he was retired. June 1, 1940 - November,
13 1945, he was Lord Keeper of the Privy Seal.

14 There is no evidence that as Chief Secretary to
15 the Lord Keeper of the Privy Seal KIDO had any policy
16 making functions or that he participated in any de-
17 cisions of the government or the military. No evidence
18 has been adduced of any cabinet meetings attended by
19 him at which he voted for any act or measure bearing
20 directly or indirectly on any of the charges in the
21 Indictment. His duties as Lord Keeper of the Privy
22 Seal were to keep custody of the Privy Seal and the
23 Great Seal, take charge of affairs concerning Imperial
24 Rescripts, Imperial messages and other documents of
25 the Inner Court and "he shall regularly assist the

1 Emperor and supervise the office of the Lord Keeper
2 of the Privy Seal." (exhibit 95).

3 KIDO's position as Lord Keeper of the Privy Seal
4 is generally misunderstood. The evidence is that
5 "The respective Ministers of State shall give their
6 advice to the Emperor, and be responsible for it."
7 (exhibit 68). No such duty or responsibility rested
8 on the Lord Keeper of the Privy Seal. The Diary is
9 replete with entries showing that KIDO only gave the
10 Emperor information when he was requested to do so,
11 and this was part of his duties. The entries also
12 show that Cabinet members had access to the Emperor.
13 KIDO merely acted as a liaison officer between the
14 Emperor and other governmental officials. There is
15 an utter lack of evidence that he carried out his
16 duties, or conspired with anyone in the exercise of
17 his duties, for a criminal purpose.

18 All the evidence and reasonable inferences to
19 be drawn therefrom show that as Lord Keeper of the
20 Privy Seal he committed none of the acts charged in
21 the Indictment. Nor is there any evidence that as
22 a private individual he committed any of the acts
23 charged. There is no evidence that there was in
24 existence in 1931 or subsequent thereto, any con-
25 spiracy which had as its object and purpose that set

1 forth in the Indictment.

2 When the Manchurian Incident broke out in
3 September 1931 KIDO was only Chief Secretary to the
4 Lord Keeper of the Privy Seal and as such had no
5 part in any conspiracy. The entries in KIDO's Diary
6 in evidence from July 11, 1931, through October 15,
7 1931, which are the only ones introduced by the Pro-
8 secution for that year, show that he was worried at
9 the opposition of the Army to a reduction of armaments
10 and economy; (exhibit 179-A - Record 1925-1926); ex-
11 pressed regret at Army plots; (exhibit 179-F - Record
12 1927); recorded the "under-handed" activities of the
13 Army; (exhibit 179-G - Record 1931; exhibit 179-D -
14 Record 1936; stated "we shall have to think up an
15 adequate counter-measure" to the attempt of certain
16 militarists to create a Fascists' government; (exhibit
17 179-C - Record 1934-1935); referred to the plot of the
18 militarists to create a dictatorship of "a national
19 calamity," and "It is very difficult to devise a
20 counter measure;" (exhibit 179-L - Record 1940); dis-
21 cussed the formation of an association as a permanent
22 counter measure to the Army plots; (exhibit 179-P -
23 Record 1941-1942); and in referring to the cause of
24 the Manchurian Incident, concerning which no report
25 was received, he stated "it seems very strange to me."

1 (exhibit 179-J - Record 1939). On January 11, 1932,
2 when he heard of the Army's plans regarding the
3 government of Manchuria, he was astonished "to find
4 that there was such a wide difference between my
5 ideas and theirs." (Doc. 1632W(1) to be offered.)

6 In view of this overwhelming evidence is there
7 any logic to the charge that in 1931 KIDO was a con-
8 spirator? In fact is it not conclusively shown,
9 quite to the contrary, that he was not involved?

10 At the outbreak of the China Affair on July 7,
11 1937, KIDO was still Chief Secretary to the Lord
12 Keeper of the Privy Seal. No excerpts from his Diary
13 have been introduced in evidence from the period of
14 time from January 11, 1932, to July 14, 1937.

15 I might say at this point that last Friday after
16 this motion was prepared there were three innocuous
17 excerpts introduced covering this period of time.

18 There is a complete lack of evidence that KIDO
19 participated either directly or indirectly in any
20 alleged conspiracy in connection with the commence-
21 ment of the China Affair.

22 There is no evidence to indicate that he par-
23 ticipated in any conspiracy during the period he was a
24 Cabinet member from October 22, 1937, to August 30,
25 1939. The testimony of OUCHI, Hyoe, and IKESHIMA,

1 Shigenobu with respect to several minor matters while
2 he was Minister of Education were admitted by both
3 of these witnesses on cross-examination to be based
4 purely on hearsay. (Record 954, 1106.) There is no
5 evidence that a general historical statement attributed
6 to the Ministry of Education (exhibit 266 - Record
7 3543) was ever seen or approved by KIDO nor is there
8 any evidence indicating that it has any probative
9 value proving any issue in the Indictment. The
10 announcements of the Japanese Government relating to
11 the China Incident and the policy outlined therein,
12 fails to establish any alleged conspiracy charge.
13 (exhibit 268 - Record 3553; exhibit 972-A - Record
14 9505).

15 Although KIDO was a member of the Cabinet during
16 the occurrence of the Panay and Ladybird Incidents
17 there is no evidence that he participated in any
18 alleged conspiracy in regard to these actions of the
19 military, and as a matter of fact the government as
20 such apologized and paid indemnity therefor.

21 The entries of KIDO's Diary show that he depended
22 on Imperial Household Minister MATSUDAIRA and con-
23 ferred frequently and exchanged opinions with him on
24 many matters. MATSUDAIRA was referred to by Ott on
25 May 18, 1941, as an "anglophile." (exhibit 1073 -

1 Record 9909, 9912.) The Court circle, of which
2 KIDO was a member, was referred to by Ott in July,
3 1940, as a "pro-British group." (exhibit 546 - Record
4 6293.) Thus the prosecution's own evidence in-
5 dicates that KIDO was pro-British, and certainly that
6 is not a chargeable offense in the Indictment. This
7 is so foreign to the allegations in the Indictment as
8 to render them absurd by the inconsistency contained
9 therein.

10 In respect to the so-called "Rape of Nanking"
11 in December, 1937, and early 1938, there is no evidence
12 that KIDO, either individually or as a member of the
13 Cabinet, ordered or countenanced the commencement or
14 continuance of this event. Throughout his Diary he
15 frequently expressed his opinion that the China In-
16 cident should be settled.

17 Although KIDO in April, 1939, was in favor of
18 negotiations for an alliance with Germany due to the
19 precarious situation at home and in China at that
20 time, (Doc. 1632W(28), to be offered), the evidence
21 introduced from KIDO's Diary from June 1, 1940, to
22 September 26, 1940, fails to show that KIDO par-
23 ticipated in or approved of the Tri-Partite Pact of
24 September 27, 1940. It does appear that he was in-
25 formed of it on September 14, 1940 and tried to have

1 the proposal submitted to the Elder Statesmen, but
2 this was opposed by the War Minister and Navy Vice
3 Minister. (exhibit 627 - Record 6972). KIDO had no
4 responsibility in his official capacity as Lord
5 Keeper of the Privy Seal and certainly there is no
6 evidence that he conspired with any one in connec-
7 tion with this Alliance. The evidence is that the
8 Alliance itself was designed to avoid war between
9 the United States and Japan. (exhibit 550 - Record
10 6329).

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1 KIDO was not a member of, nor a participant
2 in, the Four Minister Conference held June 19, 1940,
3 which arrived at a decision regarding French Indo
4 China. On September 14, 1940 when he was asked his
5 opinion with respect to French Indo China, KIDO re-
6 quested that the Emperor issue a direction to be very
7 careful before taking any action and that he should
8 so warn the government. In the Diary entry of
9 September 26, 1940 KIDO expressed regret at the bom-
10 bardment of Haiphong because it was a measure taken
11 by the military in the field, contrary to orders.

12 The evidence definitely establishes that
13 KIDO was vigorously opposed to the hostilities which
14 commenced on December 7, 1941. The entries in his
15 Diary after September 26, 1940 amply demonstrate
16 this. These excerpts are replete with admonitions
17 by KIDO to various officials to be prudent; and when
18 he was asked by the Emperor for information, on many
19 occasions he continually urged him to give careful
20 consideration to the various points involved. In
21 the Diary entry of June 12, 1941 KONOYE, HIRANUMA and
22 KIDO were unable to judge MATSUOKA's intentions.

23 On July 15, 1941 when MATSUOKA, contrary
24 to KONOYE's idea, instructed NOMURA to reject
25 Secretary Hull's oral statement, KIDO acquiesced

1 in the contention that MATSUOKA should resign, and
2 if not, the Cabinet should resign "en bloc" and a
3 new Cabinet be recommended with KONOYE as Prime
4 Minister. This evidence demonstrates KIDO was
5 ardently hoping for the success of the negotiations
6 with the United States under KONOYE's guidance. The
7 Cabinet did resign en bloc, and at the meeting of
8 the Elder Statesmen, KONOYE was recommended as Prime
9 Minister on July 17, 1941.

10 On July 31, 1941 after the Emperor received
11 a report from the late Admiral NAGANO, KIDO, in
12 reply to the Emperor's questions, stated, "The
13 U.S.A. recognized the existence of the Tri-Partite
14 Pact in our previous parley with America, and I was
15 very doubtful whether we could deepen the confidence
16 of the U.S.A. for us by the act of annulment of the
17 pact, as the U.S.A. was a nation which showed re-
18 spect for international treaties, or we would only
19 be held in contempt by the U.S.A. There are several
20 means to be tried regarding the relationship between
21 America and Japan. We must deliberate patiently on
22 the matter in a constructive manner. I would urge
23 the Premier's careful consideration on this point.

24 On August 7, 1941 in reviewing circumstances
25 with Prince KONOYE, KIDO recognized that the situa-

1 tion was serious and that if the report with respect
2 to oil was correct "we must reach the conclusion that
3 our war with the U.S.A. would be a hopeless one."

4 He urged restoration of "friendly relations be-
5 tween the U.S.A. and Japan." He was of the opinion
6 that the Japanese people should be resolved to toil
7 through ten years of hard struggles and roughly
8 mapped out a ten-year plan. As shown in the Diary
9 entry of October 6, 1941 he had in mind a plan to
10 build up a defensive nation.

11 On September 6, 1941, in response to ques-
12 tions by the Emperor, KIDO advised him to warn the
13 Supreme War Command at the Council in the Imperial
14 presence, to be held that day, to exert every effort
15 to bring about a diplomatic success, "inasmuch as
16 the present decision was such an important one that
17 it might lead to a war in which our national fortunes
18 would be staked." At the meeting, which KIDO did
19 not attend, the Supreme War Command did not answer
20 the questions concerning diplomatic moves put by
21 the President of the Privy Council and the Emperor
22 expressed his regrets that such a reply was not
23 given. The Emperor also emphasized that whole-
24 hearted efforts should be made in the conduct of
25 diplomatic negotiations with the United States.

1 On September 26, 1941 KONOYE told KIDO that
2 if the military insisted on starting a war on October
3 15, he would have no choice but to consider resign-
4 ing. KIDO, hoping that KONOYE would continue in his
5 efforts, said, "I hoped that he would be prudent.
6 The prosecution has further shown affirmatively
7 that KIDO was not a participant in any conspiracy
8 in submitting the entry in his Diary of October 9,
9 1941 wherein he expressed his opinion to Prince
10 KONOYE that the resolution of the Council in the
11 Imperial Presence on September 6, 1941 seemed to
12 him to be too outright and was not the result of an
13 exhaustive discussion. KIDO further stated that
14 "it would be inadvisable to declare war against
15 the U.S.A. immediately We should acquire
16 freedom without paying any attention to economic
17 pressure by the U.S.A. The people should be
18 made to understand the necessity for ten or fifteen
19 years of hard struggle on the part of our nation
20 and to establish a highly defensive nation." I call
21 the Court's attention to the word "defensive." In
22 view of this opinion by KIDO, it is inconceivable by
23 any stretch of the imagination that he can be so
24 charged as a criminal as stated in this Indictment.

25 On October 12, 1941 KIDO recorded the

1 results of a meeting, which he did not attend, of
2 the War, Navy and Foreign Ministers and President
3 of the Planning Board as related to him by the Chief
4 Secretary to the Cabinet. At this meeting War
5 Minister TOJO stated that he did not insist on war
6 and the Ministers discussed the possibility of res-
7 toration of friendly relations with the United
8 States by diplomatic negotiations. On the advice
9 of War Minister TOJO the Ministers made an agree-
10 ment among themselves that they should not change
11 their policy of stationing troops in China and that
12 they should not entertain anything that might affect
13 the results of the China Incident. With these points
14 in view, they further agreed that it should be found
15 out whether negotiations can be successful within
16 the time set by the High Command. When this had
17 been ascertained, the matter should be settled
18 through diplomacy. Such being the case, all
19 operational preparations be discontinued.

20 When it became apparent that was was in-
21 evitable and that the KONOYE Cabinet was falling,
22 TOJO presented his idea to the President of the
23 Planning Board for a Prince's Cabinet and various
24 discussions were held with respect to Prince
25 HIGASHIKUNI becoming Premier. This idea was re-

1 jected for the reasons set forth in the Diary of
2 October 15, 1941.

3 Again KIDO pointed out that the decisions
4 of the Imperial Conference of September 6, 1941 were
5 careless, in a conversation with TOJO on October
6 16, 1941. When the KONOYE Cabinet resigned en bloc
7 October 16, 1941, the next day KIDO suggested TOJO
8 as Prime Minister at the meeting of the Elder States-
9 men. After due consideration, the Elder Statesmen
10 recommended TOJO. That evening KIDO told OIKAWA
11 and TOJO, after being ordered to do so by the
12 Emperor, that it was the Emperor's message that there
13 should be cooperation between the Army and the Navy
14 and that in deciding the fundamental policy of
15 Japan, they need not necessarily follow the de-
16 cisions of the Council of September 6, 1941.

17 As the country was on the brink of war,
18 it is unarguable that it was imperative to have a
19 Premier with the following qualifications:

20 1. A man who would endeavor to settle the
21 differences between the United States and Japan in
22 a diplomatic manner.

23 2. A man who, if diplomatic negotiations
24 with Japan and the United States proved successful,
25 would be strong enough to keep the younger militar-

1 ists in check.

2 Prince KONOYE favored TOJO as the next
3 Premier so as to avoid war. As shown, TOJO, prior
4 to being recommended as the next Premier, stated
5 that he did not insist on war and had agreed to
6 explore the possibilities of the differences between
7 the United States and Japan. Certainly the mere
8 fact that Japan did go to war after the failure of
9 negotiations is no reason to say that KIDO or the
10 Elder Statesmen are criminals, because they recom-
11 mended TOJO. There is no evidence and no inference
12 from the evidence that KIDO conspired with anyone
13 to make a recommendation with a criminal intent
14 or for the purpose of plunging Japan into war. The
15 Elder Statesmen were ex Prime Ministers; and their
16 statesmanship and integrity were relied upon by the
17 Emperor for the proper selection of a Prime Minister.
18 They had no reason for having any criminal motives.
19 The next Premier was never suggested on KIDO's
20 individual judgments. It is certainly not a fact,
21 nor does any evidence so state, that TOJO was
22 selected solely as a result of KIDO's actions. Even
23 if he were, no conspiracy or crime has been shown.

24 On October 20, 1941 KIDO told the Emperor
25 that "one mistaken step taken in the present Cabinet

1 change might have inadvertently plunged us into war.
2 After careful consideration, I believe this to be
3 the only way of giving a new turn to the situation
4 and had thus recommended it." The Emperor replied
5 with a Japanese axiom equivalent to "nothing ven-
6 tured, nothing gained."

7 After becoming Prime Minister, in his ef-
8 forts to continue diplomatic negotiations with the
9 U.S.A., TOJO sent KURUSU to the United States and
10 so advised KIDO on November 5, 1941. He prepared
11 items for re-examination at the Liaison Conference
12 at the Imperial Headquarters after he became Premier
13 to determine among other things the possibilities of
14 "giving up the war plan against the United States,
15 England and Holland."

16 As late as November 19, 1941 KIDO was
17 still hopeful of peace and had a conversation with
18 the Emperor wherein after reviewing the prospects
19 of negotiations with Washington he said, "Thus,
20 several phases of the situation must be foreseen,
21 and it would appear that there is left enough ground
22 for controversy with regard to our rushing into the
23 war headlong on the mere automatic grounds that the
24 last day of the month of November has passed." He
25 further told the Emperor that "when the Premier

1 solicits His Majesty's final decision, if circum-
2 stances require, the Premier should be ordered to
3 hold the Council in the Imperial presence with the
4 participation therein of all the senior statesmen."
5 Here again KIDO advocated reliance on the wisdom,
6 experience and prudence of the Elder Statesmen.
7 Does this seem like the act of a man advocating
8 aggressive war or the act of a criminal conspirator?

9 Again on November 26, 1941 KIDO, in his
10 answer to the Emperor's questions, said, "Once the
11 final decision be made this time, it would truly be
12 the last and irretrievably final one. Thus, if
13 there should be any doubt or any better idea to sur-
14 mount the difficulties in your Majesty's mind, I
15 pray that your Majesty be pleased to elucidate the
16 same without the least reserve and take appropriate
17 steps which your Majesty might not repent of after-
18 wards. I, therefore, pray that your Majesty command
19 the Premier without reserve."

20 On November 29, the Senior Statesmen had a
21 discussion with respect to the war, and on November
22 30, 1941 KIDO replied to the Emperor that "His
23 Majesty's decision is of such gravity that, once
24 decided, it could not later be retracted. Hence,
25 it is felt that, if there is the least uncertainty,

1 every possible precaution should be taken to do that
2 to which His Majesty can give assent."

3 On December 1, 1941 the Council, in the
4 presence of the Emperor, decided on war. The evi-
5 dence further shows that even at the eleventh hour,
6 when KIDO was advised that President Roosevelt's
7 message had been received, he arranged a midnight
8 audience for Foreign Minister TOGO to report
9 President Roosevelt's message to the Emperor. KIDO,
10 himself, went up to the Palace at 2:40 A.M. to see
11 if he couldn't do something in so far as the message
12 was concerned. There can be no criticism of KIDO's
13 patriotic remarks after the broadcast of the attack
14 that morning. Is the price of criminal immunity
15 the corruption of patriotism? KIDO early advocated
16 that the war should be terminated as shown by his
17 Diary entry of January 6, 1944 nearly two years
18 before it ended.

19 The prosecution, by its own evidence, has
20 proven KIDO innocent of any alleged conspiracy.
21 There is no evidence in the other entries of his
22 Diary, not mentioned above, which can possibly lead
23 to a contrary conclusion.

24 With respect to Counts 6 to 17, inclusive:
25 There is no evidence that KIDO planned and

1 prepared a war of aggression or a war in violation
2 of international law and treaties against the
3 various nations set forth in these counts between
4 January 1, 1928 and September 21, 1945. As shown,
5 the testimony is that he never personally or in
6 any of his official capacities planned and prepared
7 any wars of aggression.

8 I have made no remarks about Count 18
9 because that is the only count in which he is not
10 named in the Indictment.

11 With respect to Count 19:

12 There is no evidence at all that KIDO
13 initiated a war of aggression against China on July
14 7, 1937. On that date and for some years prior
15 thereto he was merely Secretary to the Lord Keeper
16 of the Privy Seal.

17 With respect to Count 20 to 26:

18 These counts should be dismissed as the
19 evidence definitely establishes that he was person-
20 ally opposed to the initiation of any wars against
21 the various countries mentioned in these counts and
22 was not in an official position to initiate any such
23 wars.

24 With particular reference to Counts 25
25 and 26, the evidence clearly shows that the border

1 affairs referred to therein occurred at a time
2 when KIDO was a cabinet member, and there is no evi-
3 dence in the case that he either individually or as
4 a member of the cabinet initiated these affairs.
5 Both of these incidents were settled with Russia
6 through diplomatic channels, and there exists no
7 legal foundation for the charges in these counts.

8 Counts 27 to 36, inclusive:

9 There is no evidence that KIDO either
10 personally or in his official capacity waged any
11 war of aggression against the various nations on
12 the various dates set forth in these counts of the
13 Indictment. It is fundamental that no public
14 official appointed or elected can be held respons-
15 ible for acts as such in merely carrying out his
16 duties when his government has been plunged into a
17 state of war, particularly where that public official
18 consistently tried to avert war. The mere fact
19 that one happens to hold an official position in
20 a government during the period of time that govern-
21 ment is at war does not ipso facto make him a
22 criminal.
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1 With respect to Counts 37 and 38, charging
2 murder:

3 All of the evidence and the reasonable
4 inferences to be drawn therefrom demonstrate that
5 between June 1, 1940, and December 8, 1941, KIDO was
6 not a leader, organizer, instigator or accomplice in
7 any plan or conspiracy to kill or murder anyone. The
8 evidence shows that he did everything in his power
9 personally to avert war and in his official capacity
10 as Lord Keeper of the Privy Seal he did not participate
11 in any such plan or conspiracy as charged. He was not
12 in a position to nor did he order, cause or permit the
13 armed forces of Japan to murder anyone.

14 With respect to Counts 39 to 43:

15 The prosecution has failed to show by evidence
16 that KIDO ordered, caused and permitted the armed
17 forces of Japan to commit murder against the various
18 nations at the various times and places set forth in
19 these counts. As Lord Keeper of the Privy Seal, KIDO
20 was not authorized to, nor did he, issue any orders
21 nor was he in a position to cause or permit the armed
22 forces of Japan to commit the acts charged.

23 With respect to Count 44:

24 This count should be dismissed as the evidence
25 fails to show that KIDO had any connection whatsoever

1 as a leader, organizer, instigator or accomplice to
2 procure and permit murder on a wholesale scale of
3 prisoners of war.

4 With respect to Counts 45 to 51:

5 No evidence has been adduced by the prosecution
6 that KIDO ordered, caused or permitted the armed
7 forces of Japan to attack the city of Nanking on
8 December 12, 1937. At this time he was Minister of
9 Education in the KONOYE Cabinet. There is no evidence
10 that he individually or as a member of the Cabinet had
11 any control over the armed forces of Japan. On
12 October 21, 1938, when the city of Canton was attacked
13 and on October 27 of the same year when the city of
14 Hangkow was attacked KIDO was Welfare Minister in the
15 KONOYE Cabinet. Here, too, there is an absence of
16 evidence that he either ordered, caused or permitted
17 the armed forces of Japan to commit the acts alleged.
18 KIDO was Lord Kepper of the Privy Seal at the time of
19 the alleged attacks on Changhsa, Hangyang, Kwelein
20 and Liuchow. It is self-evidence that in such capa-
21 city he was not in a position to command and issue
22 orders to the expeditionary forces abroad. KIDO was
23 Minister of Home Affairs in the HIRANUMA Cabinet
24 when the alleged Khalkhin-gol Incident occurred. There
25 is no evidence that he either individually or as a

1 member of the Cabinet, ordered, caused or permitted
2 the armed forces of Japan to make such an alleged
3 attack.

4 With respect to Count 52:

5 This count should be dismissed as to KIDO
6 because there is no evidence that KIDO participated
7 in any of the acts charged against Russia.

8 Conventional war crimes and crimes against
9 humanity.

10 Count 53:

11 There is an absence of evidence that KIDO,
12 either individually or in his official capacity,
13 participated in any conspiracy for maltreatment of
14 prisoners of war and civilian internees. Diary entries
15 showing knowledge by him of a few instances of treat-
16 ment of POW's is no basis for an unsupported conclusion
17 of responsibility where none is shown, and where the
18 evidence shows that responsibility rested elsewhere.

19 With respect to Counts 54 and 55:

20 These counts should be dismissed as there is
21 no evidence that KIDO ordered, authorized or permitted
22 the alleged offenses charged in these counts or that
23 he was in any position to do so as Lord Keeper of the
24 Privy Seal.

25 The accused KIDO also moves at this time to

1 strike out in so far as the charges in the Indictment
2 against him are concerned, all the testimony, affida-
3 vits, documents, synopses and statements including
4 interrogations of other accused, except the evidence
5 referred to in this motion, on the ground that they are
6 immaterial, irrelevant and have no probative value,
7 the rulings on which having been reserved by the
8 Tribunal.

9 In conclusion, it is respectfully submitted
10 that the Indictment and each and every count therein
11 be dismissed as to the accused Koichi KIDO for the
12 reasons that the evidence conclusively establishes:

13 1. That he is innocent of any of the charges
14 contained therein.

15 2. That there is no evidence that he parti-
16 cipated, either individually or in his official capa-
17 city, in any alleged plan or conspiracy.

18 3. There is no evidence that he committed
19 any of the crimes alleged in the Indictment.

20 Dated January 14, 1947.

21 THE PRESIDENT: Mr. Howard.

22 MR. HOWARD: Mr. President, and Members of
23 the Tribunal:

24 Now comes the defendant KIMURA, Heitaro, by
25 his counsel, and moves the Court to dismiss each and

1 every one of the counts in the Indictment against him
2 on the ground that the evidence offered by the prose-
3 cution is not sufficient to warrant a conviction of
4 this defendant.

5 There has been no evidence adduced that would
6 tend to prove that KIMURA, Heitaro, knowingly took
7 any part in the formulation or execution of a common
8 plan or conspiracy, if there was one, as charged in
9 Counts 1, 2, 3, 4, and 5.

10 There has not been sufficient evidence adduced
11 to prove that KIMURA knowingly planned and prepared a
12 war of aggression against the countries mentioned in
13 Counts 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17.
14 In fact, there is no evidence that he did anything more
15 than he was duty bound to do as a soldier who was loyal
16 to his country which was engaged in preparing for war
17 or waging war. A prosecution witness testified that
18 KIMURA was not an advocate of war with the United
19 States, and told him, not on one occasion alone, that
20 if Ambassador KURUSU went to the United States a settle-
21 ment could be reached between the two countries.

22 There has not been sufficient evidence
23 adduced to prove beyond a reasonable doubt that KIMURA
24 knowingly took any part in initiating a war of aggression
25 against the countries mentioned in Counts 20, 21, 22, 24,

1 27, 28, 29, 30, 31, 32, and 34. There is nothing to
2 show that he did anything more than his duty as a
3 loyal soldier of a nation engaged in waging war.

4 There has been no evidence adduced that would
5 tend to show that KIMURA knowingly took any part in
6 the formulation or execution of a common plan or cons-
7 piracy to commit murder as charged in Counts 37, 38,
8 39, 40, 41, 42, 43, and 44.

9 There has not been sufficient evidence adduced
10 to prove beyond a reasonable doubt that KIMURA parti-
11 cipated in the formulation or execution of a common
12 plan or conspiracy to permit breaches of the Laws and
13 Customs of War as charged in Counts 53, 54, and 55.

14 Neither does Appendix E, Statement of Indivi-
15 dual Responsibility for Crimes, set out in the Indict-
16 ment, list KIMURA as being present and concurring in
17 any decisions taken at some of the conferences and
18 cabinet meetings held in 1941, which decisions allegedly
19 prepared for and led to unlawful war on 7 December
20 1941; nor is there any evidence that KIMURA attended
21 any of the meetings listed. In fact, there was testi-
22 mony by a prosecution witness that he did not attend.

23 Appendix E states in part that the defendant
24 KIMURA, between 1928 and 1945, was, among other posi-
25 tions held, Vice War Minister under KONOYE and TOJO

1 (1941 to February 1944); Member, Supreme War Council
2 (1943); Commander-in-Chief, Japanese Army, Burma
3 (1944); full General (1945).

4 The evidence shows that KIMURA was Vice War
5 Minister from 10 April 1941 to 11 March 1943 and not
6 to February 1944 as shown by Appendix E.

7 There is evidence that KIMURA was assigned
8 as War Councillor 11 March 1943. There is no evidence
9 that the Supreme War Council had any authority, nor is
10 there any evidence that it ever held a meeting while
11 KIMURA was a member. Evidence has been adduced that
12 would tend to prove that KIMURA attended a meeting of
13 the Supreme War Council June 30, 1941, as Vice War
14 Minister and one of the representatives of the army,
15 but not as a member.

16 There has been evidence adduced that KIMURA
17 was Commander-in-Chief, Japanese Army, Burma, from
18 30 August 1944 to the surrender. There is no evidence
19 that any prisoners of war were taken during this time.
20 The Tribunal may take judicial notice of the fact that
21 at the time KIMURA was in Burma the Japanese army was
22 being defeated. The natural assumption is that it
23 was not taking any prisoners of war.

24 Evidence has been adduced by the prosecution,
25 through Witness TANAKA, that KIMURA, while Vice War

1 Minister, had no authority or responsibility in
2 important prisoner of war matters other than the duty
3 to transmit notifications by order of the War Minister
4 to army commanders. Prosecution Witness WAKAMATSU also
5 testified that the Vice War Minister did not have the
6 power of decision in matters concerning prisoners of
7 war. WAKAMATSU also stated that KIMURA was not
8 basically responsible for the decision to use prisoners
9 of war in the construction of the Burma-Siam Railway
10 (Exhibit 1989).

11 Prosecution Witness TANAKA testified that
12 KIMURA had no authority to take part in forming
13 decisions at meetings at Imperial Headquarters, that
14 he attended meetings as attendant only of the War
15 Minister; that the Vice War Minister did not have the
16 right to hire or discharge employees in the army or
17 the War Ministry; that the Vice War Minister did not
18 have the authority to punish those in the army or
19 War Ministry who disobeyed instructions; that the Vice
20 War Minister had no command authority over Chiefs of
21 Bureaus; that when TOJO was Premier and War Minister,
22 small matters only were turned over to KIMURA but
23 not any matters pertaining to state affairs, such as
24 policy-making, politics, economics and diplomacy; that
25 external negotiations were handled by Chief of the

Military Affairs Bureau.

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2 No evidence has been adduced that KIMURA had
3 charge of any prisoners of war while in Burma. On
4 the other hand, there is evidence that the Rangoon
5 POW camp was under the control of the Southern Army.

6 Now, I would like to add that there has been
7 evidence adduced since the filing of this motion that
8 KIMURA was never a minister of state and, therefore,
9 could not have performed all of the functions of War
10 Minister.

11 THE PRESIDENT: We will adjourn until half-
12 past nine tomorrow morning.

13 (Whereupon, at 1605, an adjournment
14 was taken until Tuesday, 28 January 1947, at
15 0930.)

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