INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

DISSENTIENT JUDGMENT OF JUSTICE PAL

KOKUSHO－KANKOKAI, Inc.,
Tokyo
1999

Radhabinod Pal (Calcutta in 1948)

DISSENTIENT JUDGMENT
OF
JUSTICE PAL

First published in 1999 by
Kokusho-Kankokai, Inc
2-10-5 Shimura, Itabashiku,
Tokyo, Japan
174-0056
TEL(03)5970-7421
FAX(03)5970-7427

ISBN4-336-04110-5
Printed in Taiwan

Foreword

The first time I read Justice Pal's dissenting judgment at the Tokyo trial was in the library of Tokyo University's Institute of Social Sciences, on June 21, 1974. It was not in book form but a typewritten copy of over 1,200 pages, with the signature of Richard Harris, one of the thirty-odd American lawyers who had come to Tokyo in defense of the accused Japanese. He died on September 23, 1990, in Los Angeles, the news of which I read with a renewed feeling of gratitude to him as well as deepest sorrow.

Publication of Pal's dissenting opinion at the Tribunal was prohibited during the Occupation years, and even after the allied Occupation was over and Japan had regained her independence, it failed to draw the attention of the Japanese except for a few who had special interest in the Tokyo Military Tribunal. In a word, it was almost forgotten among the Japanese.

Twenty-six years was long enough to affect the thought and opinions of the Japanese, especially when the media themselves, the people's main source of knowledge and information, had been deeply influenced by the Tokyo verdict. Feeling the need to let the Japanese know about critical views on the Tokyo judgment, I determined to get Pal's opinion published in handy book form so that it might be more widely read. I made extracts from the original, wrote notes on historical matters, and compiled them in two volumes. It was published by the Kenkyusha Publishing Company, Tokyo, in November 1976, as a textbook for college use, under the title '*In Defense of Japan's Case*.' It was just about one-tenth as long as the original, but anyhow it was the first time since the end of the Tokyo trial that Pal's dissenting opinion got into print at all. It is a great pleasure to me that now, half a century after the Tokyo trial ended, not just extracts, but the full text of Pal's dissenting judgment has been made available to be read widely by people and researchers of many different nationalities, thereby furnishing them an excellent opportunity to question and reexamine the "time-hon-

oured" conclusion of the Tokyo tribunal.

It exceeds my competence to make comprehensive explanatory comments on this voluminous work, and its juridical details are beyond my scope. To us of Japan, Justice Pal's opinion is especially convincing and sometimes even moving because it is based upon a profound understanding of Asian history. Firmly believing that the happenings that led up to the war can be explained by other means than the existence of an over-all conspiracy or some aggressive design, he devotes the greater part of his judgment to the historical background of disputes, incidents and wars, so much so, in fact, that one might at times feel as if one were reading a history, not a verdict. As a judge representing India, which had long been under British colonial rule, Pal was strongly critical of Western colonialism, while, on the other hand, he naturally had a deep sympathy with the struggle of modern Japan against political and economic oppression by the Western nations. How many of us have read his few lines inscribed on a stone monument in the precincts of the Honsho-ji Temple in the city of Hiroshima? They run as follows:——

For the peace of those departed souls who took upon themselves the solemn vow at the salvation ceremony of oppressed Asia,

"Oh, Lord, thou being in my heart, I do as appointed by you"

1952. 11. 5
Radhabinod Pal

His verdict is also marked by his keen insight into the grave menace of communism. In fact, it is impossible to express any definite opinion on the complex background and causes of the Manchurian Incident or the China Incident without adequate knowledge of the communist movement then rampant in China. The Manchurian Incident, as I see it, is the result of long years of Sino-Japanese conflicts, mostly instigated or provoked by the Chinese communists, rather than the beginning or the first stage, as the Tokyo tribunal finds it, of Japan's aggression against China and the Pacific area. In this sense, it was unfortunate that, due to highly

political considerations, argument about communist activities in China was banned by the President of the Tribunal. I say unfortunate not only for Japan but also for the rest of the world because many of the conflicts and wars that have occurred after the Tokyo trial are attributable to communist provocations. Had the Tribunal allowed the defense more freedom to refer to the communist plots and activities and found the communist movement responsible for the war, the world at large would have become more watchful against communist activities thereafter and have taken more effective measures to prevent wars arising from them.

One thing that Pal was especially concerned about regarding the war was the atomic bombing of Hiroshima and Nagasaki. On visiting Hiroshima in November 1952, four years after the Tokyo trial ended, he was reportedly shocked to know the meaning of the monumental inscription dedicated to the A-bomb victims: "Sleep peacefully, for we shall never repeat the mistake." "Why should the Japanese apologize to the Japanese?" he said with resentment, "it is not the Japanese who dropped the atomic bombs." I would like to know what he would have said or, for that matter, what judgment the Tribunal would have passed on Japan if they had known at that time about the Emperor's order to stop a project by the Japanese military to build an atomic weapon. The Emperor reportedly said that Japan should not be the first to make and use such an inhuman device, and thereupon the Japanese Army, by instructions from General Tojo, immediately gave up its A-bomb production project even at the cost of a possible final victory, while the U. S. decided to develop such a weapon and actually dropped two of them on Japanese cities just to shorten the war. Justice Pal goes as far as to say that "... if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the present accused." The Tribunal condemned the atrocities and misdeeds committed by the Japanese, yet I would like to point out that the human race as a whole was

then still at a moral low point as the use of the atomic bomb might indicate.

I have no space to refer to other important questions presented in his judgment, but I might safely conclude that his views on the Tokyo tribunal are founded on his firm belief in legal justice, on the one hand, and his profound thinking on man and history, on the other. There is an impressive episode about him that goes like this: at a reception to welcome Dr. Pal's first visit to Japan since the Tokyo trial, some Japanese expressed their deep thanks for his "sympathetic" judgment. At this he reportedly said: "It is a misunderstanding to think that I wrote my verdict as a sympathizer with Japan. I did not write it out of sympathy for Japan nor out of hatred of the West. I just wrote what I believed to be right and just, neither more nor less."

A jealous lover of truth, Justice Pal had nothing but truth to guide him in trying the accused at the Tribunal, and yet the spirit of the court as a whole was not generous enough to listen to the reason and justice of the defeated. Seeing how much is made of, say, Iris Chang's *The Rape of Nanking* in some parts of the world today, I cannot but question how far the world has progressed over the last half century in the search for truth as well as knowledge and reason. All the Japanese, including newspaper reporters and news cameramen, who were then in Nanking, admit that a large number of plain-clothes Chinese soldiers (unlawful belligerents) were executed by the Japanese troops, but unanimously assert that there were no large-scale or systematic atrocities committed against civilians. The strange thing is that, despite the world-famous tale of the holocaust of hundreds of thousands of Chinese or of knee-deep pools of blood in the city of Nanking, not a single panoramic photograph of heaps of corpses in Nanking is known to us nor is there even a single person who witnessed the scene of the holocaust. It may be safe, after all, to conclude that the repeated story of the slaughter of more than 300,000 Chinese civilians in Nanking is one of the biggest lies ever told in history. The same shameless lie that once deceived the military court at Tokyo and elsewhere, thereby sending a number of innocent Japanese to the scaffold, are still being blatantly repeated,

producing a perverted sense of pleasure in some corners of the world.

Quoting in part from Justice Pal's Dissentient Judgment, I would like to say that, fifty years being long enough time to "soften passion and prejudice," the time is now ripe for "justice to require much of past censure and praise to change places."

Akira Nakamura

Dokkyo University,
Japan
November 5, 1998

CONTENTS

PART I

FIRST STAGE

SECOND STAGE

THIRD STAGE

THE UNITED STATES OF AMERICA

AND OTHERS

Versus

ARAKI SADAO AND OTHERS

JUDGMENT

OF

HON'BLE MR. JUSTICE PAL

Member from India

PART 1

PRELIMINARY QUESTION OF LAW

THE UNITED STATES OF AMERICA, THE REPUBLIC OF CHINA, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, THE UNION OF SOVIET SOCIALIST REPUBLICS, THE COMMONWEALTH OF AUSTRALIA, CANADA, THE REPUBLIC OF FRANCE, THE KINGDOM OF THE NETHERLANDS, NEW ZEALAND, INDIA AND THE COMMONWEALTH OF THE PHILIPPINES.

— AGAINST —

ARAKI, Sadao; DOHIHARA, Kenji; HASHIMOTO, Kingoro; HATA, Shunroku; HIRANUMA, Kiichiro; HIROTA, Koki; HOSHINO, Naoki; ITAGAKI, Seishiro; KAYA, Okinori; KIDO, Koichi; KIMURA, Heitaro; KOISO, Kuniaki; MATSUI, Iwane; MINAMI, Jiro; MUTO, Akira; OKA, Takasumi; OSHIMA, Hiroshi; SATO, Kenryo; SHIGEMITSU, Mamoru; SHIMADA, Shigetaro; SHIRATORI, Toshio; SUZUKI, Teiichi; TOGO, Shigenori; TOJO, Hideki; UMEZU, Yoshijiro.

Defendants.

I sincerely regret my inability to concur in the judgment and decision of my learned brothers. Having regard to the gravity of the case and of the questions of law and of fact involved in it, I feel it my duty to indicate my view of the questions that arise for the decision of this Tribunal.

On April 29, 1946 the eleven prosecuting nations named above filed their indictment against twenty-eight persons. Accused MATSUOKA, Yosuke and NAGANO, Osami died during the pendency of this trial and accused OKAWA, Shumei was discharged from the present proceeding because of his mental incompetency. The remaining twenty-five persons are now arraigned as accused before us to take their trial for what has been stated to be the major war-crimes.

Evidence has been given in this case connecting each of the accused with the Government of Japan during the relevant period. Details showing this connection will be given as occasion arises.

The charges against these accused persons are laid in fifty-five counts grouped in three categories:

1. Crimes against Peace. (Count 1 to Count 36)
2. Murder. (Count 37 to Count 52)
3. Conventional War Crimes and Crimes against Humanity. (Count 53 to Count 55).

The counts of charges are prefaced by an introductory summary amply indicating the nature of the prosecution case and are appended with five appendices in the nature of bills of particulars.

In the language of the prosecution itself—

"*In Group One*, Crimes against Peace AS DEFINED IN THE CHARTER are charged in thirty-six counts. In the first five counts the accused are charged with conspiracy to secure the military, naval, political and economic domination of certain areas, by the waging of declared or undeclared war or wars of aggression and of war or wars in violation of international law, treaties, agreements and assurances. Count I charges that the conspiracy was to secure

the domination of East Asia and of the Pacific and Indian Oceans; Count 2, domination of Manchuria; Count 3, domination of all China; Count 4, domination of the same areas named in Count 1, by waging such illegal war against sixteen specified countries and peoples. In Count 5, the accused are charged with conspiring with Germany and Italy to secure the domination of the world by the waging of such illegal wars against any opposing countries. The prosecution charges in the next twelve counts (6 to 17) that all or certain accused *planned and prepared* such illegal wars against twelve nations or people attacked pursuant thereto. In the next nine counts (18 to 26) it is charged that all or certain accused *initiated* such illegal wars against eight nations or peoples, identifying in a separate count each nation or people so attacked. In the next ten counts (27 to 36) it is charged that the accused *waged* such illegal wars against nine nations or peoples, identifying in a separate count each nation or people so warred upon.

"*In Group Two*, murder or conspiracy to murder is charged in sixteen counts (37 to 52). It is charged, in Count 37, that certain accused conspired unlawfully to kill and murder people of the United States, the Philippines, the British Commonwealth, the Netherlands, and Thailand (Siam), by ordering, causing and permitting Japanese armed forces, *in time of peace*, to attack those people in violation of Hague Convention III, and in Count 38, in violation of numerous treaties other than Hague Convention III.

"It is charged in the next five counts (39 to 43) that the accused unlawfully killed and murdered the persons indicated in Counts 37 and 38 by ordering, causing and permitting, *in time of peace*, armed attacks by Japanese armed forces, on December 7 and 8, 1941, at Pearl Harbour, Kota Bahru, Hong Kong, Shanghai and Davao. The accused are charged in the next count (44) with conspiracy to procure and permit the murder of prisoners of war, civilians and crews of torpedoed ships.

"The charges in the last eight counts (45 to 52) of this group are that certain accused, by ordering, causing and permitting Japanese armed forces unlawfully to attack certain cities in China (Counts 45 to 50) and territory in Mongolia and of the Union of Soviet Socialist Republics (Counts 51 and 52), unlawfully killed and murdered large numbers of soldiers and civilians.

"*In Group Three*, the final group of counts (53 to 55), other conventional War Crimes and Crimes against Humanity, are charged. Certain specified accused are charged in Count 53 with having conspired to order, authorize and permit Japanese commanders, War Ministry officials, police and subordinates to violate treaties and other laws by committing atrocities and other crimes against many thousands of prisoners of war and civilians belonging to the United States, the British Commonwealth, France, Netherlands, the Philippines, China, Portugal and the Union of Soviet Socialist Republics.

"*Certain specified accused* are directly charged in Count 54 with having ordered, authorized and permitted the persons mentioned in Count 53 to commit offences mentioned in that Count. The same specified accused are charged in the final count (55) with having violated the laws of war by deliberately and recklessly disregarding their legal duty to take adequate steps to secure the

observance of conventions, assurances and the laws of war for the protection of prisoners of war and civilians of the nations and peoples named in Count 53."

Summarized particulars in support of the counts in Group One are presented in Appendix A of the Indictment. In Appendix B are collected the Articles of Treaties violated by Japan as charged in the counts for Crimes against Peace and the Crime of Murder. In Appendix C are listed official assurances violated by Japan and incorporated in Group One, Crimes against Peace. Conventions and Assurances concerning the laws and customs of war are discussed in Appendix D, and particulars of breaches of the laws and customs of war for which the accused are responsible are set forth therein. Individual responsibility for crimes set out in the indictment and official positions of responsibility held by each of the accused during the period with which the indictment is concerned are presented in Appendix E.

In presenting its case at the hearing the prosecution offered what it characterized to be "the well-recognized conspiracy method of proof". It undertook to prove:

1. (*a*) that there was an over-all conspiracy;
   (*b*) that the said conspiracy was of a comprehensive character and of a continuing nature;
   (*c*) that this conspiracy was formed, existed and operated during the period from 1 January, 1928 to 2 September, 1945;
2. that the object and purpose of the said conspiracy consisted in the complete domination by Japan of all the territories generally known as Greater East Asia described in the indictment;
3. that the design of the conspiracy was to secure such domination by—
   (*a*) war or wars of aggression;
   (*b*) war or wars in violation of—
      (*i*) international law,
      (*ii*) treaties,
      (*iii*) agreements and assurances;
4. that each accused was a member of this over-all conspiracy at the time any specific crime set forth in any count against him was committed.

The prosecution claimed that as soon as it would succeed in proving the above matters, the guilt of the accused would be established without anything more and that it would not matter whether any particular accused had actually participated in the commission of any specified act or not.

In counts one to five the accused are charged with having participated in the formulation or execution of a common plan or conspiracy, the *object* of such plan or conspiracy being the military, naval, political and economic domination of certain territories and the means designed for achieving this object being:

1. declared or undeclared war or wars of aggression;

2. war or wars in violation of—
   (*a*) international law,
   (*b*) treaties,
   (*c*) agreements and assurances.

It is implied in these charges that acts in execution of such plan were performed. The accused are sought to be made criminally liable for such acts.

In these counts the questions that would arise for our decision are:

1. Whether military, naval, political and economic domination of one nation by another is a crime in international life;
2. Whether war or wars
   (*a*) of aggression,
   or
   (*b*) in violation of
   (*i*) international law,
   (*ii*) treaties,
   (*iii*) agreements and assurances
   are crimes in international life and whether their legal character would in any way depend upon their being initiated with or without declaration.

Counts six to seventeen charge the accused only with having planned and prepared wars of the categories mentioned above. In order to sustain these charges it is essential that such wars must be criminal or illegal.

Counts eighteen to twenty-four relate to initiation of wars of the same categories and would, therefore, stand or fall according as such wars are or are not crime in international life.

Counts twenty-five to thirty-six charge the accused or some of them with having waged wars of the same categories and would thus fail if such wars are not crime in international life.

Counts thirty-seven to fifty-two contain charges on the footing that hostilities started in breach of treaties would not have the legal character of war and did not therefore confer on the Japanese forces any right of lawful belligerents.

I shall examine these several counts in detail later on. It is obvious that they all involve the question whether wars of the categories mentioned above became crime in international life.

The prosecution case is that these accused persons did the acts alleged in course of working the machinery of the Government of Japan taking advantage of their position in that Government. Grounds of individual responsibility for the alleged crimes are set out in Appendix E of the Indictment thus:

> "It is charged against each of the accused that he used the power and prestige of the position which he held and his personal influence in such a manner that he promoted and carried out the offences set out in each Count of this Indictment in which his name appears.
>
> "It is charged against each of the accused that during the periods hereinafter set out against his name he was one of those responsible for all the acts and omissions of the various governments of which he was a

member, and of the various civil, military or naval organizations in which he held a position of authority.

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

The acts alleged are, in my opinion, all *acts of state* and whatever these accused are alleged to have done, they did that in working the machinery of the government, the duty and responsibility of working the same having fallen on them in due course of events.

Several serious questions of international law would thus arise for our consideration in this case. We cannot take up the questions of fact without coming to a decision on these questions.

The material questions of law that arise for our decision are the following:

1. Whether military, naval, political and economic domination of one nation by another is crime in international life.
2. (a) Whether wars of the alleged character became criminal in international law during the period in question in the indictment.

If not,

(*b*) Whether any *ex post facto law* could be and was enacted making such wars criminal so as to affect the legal character of the acts alleged in the indictment.

3. Whether individuals comprising the government of an alleged aggressor state can be held criminally liable in international law in respect of such acts.

Several subsidiary questions of law will also fall to be decided before we can justly take up the evidence in this case. These questions will be indicated in their proper places in course of the decision of the main questions specified above. But before all this, I must dispose of some PRELIMINARY MATTERS CONCERNING OURSELVES.

The accused at the earliest possible opportunity expressed their apprehension of injustice in the hands of the Tribunal as at present constituted.

The apprehension is that the Members of the Tribunal being representatives of the nations which defeated Japan and which are accusers in this action, the accused cannot expect a fair and impartial trial at their hands and consequently the Tribunal as constituted should not proceed with this trial.

Regarding the Constitution of THE COURT FOR THE TRIAL of persons accused of war crimes, the Advisory Committee of Jurists which met at The Hague in 1920 to prepare the statute for the Permanent Court of International Justice expressed a "voeu" for the establishment of an International Court of Criminal Justice. This, in principle, appears to be a wise solution of the problem, but the plan has not as yet been adopted by the states. Hall suggests that

"it should be possible for both the victor and the vanquished in war to be able to bring to trial before AN IMPARTIAL COURT persons who are accused of violating the laws and usages of war".

I feel tempted in this connection to quote the views of Professor Hans Kelsen of the University of California which may have the effect of turning our eyes to one particular side of the picture likely to be lost sight of in a "floodlit court house where only one thing is made to stand out clear for all men to see, namely that the moral conscience of the world is there reasserting the moral dignity of the human race".

The learned Professor says: "It is the jurisdiction of the victorious states over the war criminals of the enemy which the Three Power Declaration signed in Moscow demands ..... It is quite understandable that during the war the peoples who are the victims of the abominable crimes of the Axis Powers wish *to take the law in their own hands* in order to punish the criminals. But after the war will be over our minds will be open again to the consideration that criminal jurisdiction exercised by the injured states over enemy subjects is considered by the peoples of the delinquents *as vengeance rather than justice*, and is consequently not the best means to guarantee the future peace. The punishment of war criminals should be an act of international justice, not the satisfaction of a thirst for revenge. It does not quite comply with the idea of international justice that only the vanquished states are obliged to surrender their own subjects to the jurisdiction of an international tribunal for the punishment of war crimes. The victorious states too should be willing to transfer their jurisdiction over their own subjects who have offended the laws of warfare to the same independent and impartial international tribunal."

The learned Professor further says: "As to the question—what kind of tribunal shall be authorized to try war criminals, national or international, there can be little doubt that AN INTERNATIONAL COURT is much more fitted for this task than a national, civil, or military court. Only a court established by an international treaty, to which not only the victorious but also the vanquished states are contracting parties, will not meet with certain difficulties which a national court is confronted with ....."

Though not constituted in the manner suggested by the learned Professor, HERE IS AN INTERNATIONAL TRIBUNAL for the trial of the present accused.

The judges are here no doubt from the different victor nations, but they are here in their personal capacities. One of the essential factors usually considered in the selection of members of such tribunals is MORAL INTEGRITY. This of course embraces more than ordinary fidelity and honesty. It includes "a measure of freedom from prepossessions, a readiness to face the consequences of views which may not be shared, a devotion to judicial processes, and a willingness to make the sacrifices which the performance of judicial duties may involve". The accused persons here have not challenged the constitution of the tribunal on the ground of any shortcoming in any of the members of the tribunal in these respects. The Supreme Commander seems to have given careful and anxious thought to this aspect of the case and there is a provision

in the Charter itself permitting the judges to decline to take part in the trial if for any reason they consider that they should not do so.

Ordinarily, on an objection like the one taken in this connection, the judges themselves might have expressed their unwillingness to take upon themselves the responsibility. Administration of justice demands that it should be conducted in such a way as not only to assure that justice is done but also to create the impression that it is being done. In the classic language of Lord Hewart, Lord Chief Justice of England, "It is not merely of *some* importance, but it is of *fundamental importance* that justice should not only be done but should manifestly and undoubtedly be *seen* to be done . . . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice". The fear of miscarriage of justice is constantly in the mind of all who are practically or theoretically concerned with the law and especially with the dispensation of criminal law. The special difficulty as to the rule of law governing this case, taken with the ordinary uncertainty as to how far our means are sufficient to detect a crime and coupled further with the awkward possibilities of bias created by racial or political factors, makes our position one of very grave responsibility. The accused cannot be found fault with, if, in these circumstances, they entertain any such apprehension, and I, for myself, fully appreciate the basis of their fear. We cannot condemn the accused if they apprehend, in their trial by a body as we are, any possible interference of emotional factors with objectivity.

We cannot overlook or underestimate the effect of the influence stated above. They may indeed operate even unconsciously. We know how unconscious processes may go on in the mind of anyone who devotes his interest and his energies to finding out how a crime was committed, who committed it, and what were the motives and psychic attitude of the criminal. Since these processes may remain unobserved by the conscious part of the personality and may be influenced only indirectly and remotely by it, they present permanent pitfalls to objective and sound judgment—always discrediting the intergrity of human justice. But in spite of all such obstacles it is human justice with which the accused must rest content. We, on our part, should always keep in view the words of the Supreme Commander for the Allied Powers with which Mr. Keenan closed his opening statement and avoid the eagerness to accept as real anything that lies in the direction of the unconscious wishes, that comes dangerously near to the aim of the impulses.

With these observations I persuade myself to hold that this objection of the accused need not be upheld.

The defense also took several other objections to the trial; of these *the substantial ones* may be subdivided under two heads:

1. Those relating strictly to the jurisdiction of the Tribunal.
2. Those which, while assuming the jurisdiction of the Tribunal, call on the Tribunal to discharge the accused of the charges contained in several counts on the ground that they do not disclose any offence at all.

Some of these objections even related to war crimes *stricto sensu* alleged

to have been committed during the war which ended in the surrender. As preliminary objections, these are of no substance.

A war, whether legal or illegal, whether aggressive or defensive, is still a war to be regulated by the accepted rules of warfare. No pact, no convention has in any way abrogated *jus-in-bello*.

So long as States, or any substantial number of them, still contemplate recourse to war, the principles which are deemed to regulate their conduct as belligerents must still be regarded as constituting a vital part of international law. There is a persistent tendency on the part of the belligerents to shape their conduct according to what they consider to be their own needs rather than the requirements of international justice. Strong measures are required to curb this tendency in the belligerent conduct.

War crimes *stricto sensu*, as alleged here, refer to acts ascribable to individuals concerned in their individual capacity. These are not acts of State and consequently the principle that no State has jurisdiction over the acts of another State does not apply to this case.

Oppenheim says: "The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognized principle of international law. It is a right of which he may effectively avail himself as he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there. He may, as a condition of the armistice, impose upon the authorities of the defeated state the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in the position to occupy. For in both cases the accused are, in effect, in his power. And, although normally the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of international law prevents the victorious belligerent from imposing upon the defeated State the duty, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes."

Similar views are expressed by Hall and Garner.

"The principle", says Garner, "that the individual soldier who commits acts in violation of the laws of war, when these acts are at the same time offences against the general criminal law, should be liable to trial and punishment, not only by the courts of his own state, but also by the courts of the injured adversary in case he falls into the hands of the authorities thereof, has long been maintained ....."

Hall says: "A belligerent, besides having the rights over his enemy which flow directly from the right to attack, possesses also the right of punishing persons who have violated the laws of war, if they afterwards fall into his hands ..... To the exercise of the first of the above-mentioned rights no objection can be felt so long as the belligerent confines himself to punishing breaches of UNIVERSALLY ACKNOWLEDGED LAWS."

It should only be remembered that this rule applies only where the crime in question is not an *act of state*. The statement that if an act is forbidden by

international law as a war crime, the perpetrator may be punished by the injured state if he falls in its hands is correct only with this limitation that the act in question is not an act of the enemy state.

IN MY JUDGMENT, it is now well-settled that mere high position of the parties in their respective states would not exonerate them from criminal responsibility in this respect, if, of course, the guilt can otherwise be brought home to them. Their position in the State does not make every act of theirs an *act of state* within the meaning of international law.

The first substantial objection relating to the jurisdiction of the Tribunal is that the CRIMES TRIABLE BY THIS TRIBUNAL MUST BE LIMITED TO THOSE COMMITTED IN OR IN CONNECTION WITH THE WAR WHICH ENDED IN THE SURRENDER on 2 September, 1945. In my judgment this objection must be sustained. It is preposterous to think that defeat in a war should subject the defeated nation and its nationals to trial for all the delinquencies of their entire existence. There is nothing in the Potsdam Declaration and in the Instrument of Surrender which would entitle the Supreme Commander or the Allied Powers to proceed against the persons who might have committed crimes in or in connection with ANY OTHER WAR.

The prosecution places strong reliance on the CAIRO DECLARATION read with paragraph 8 of the Potsdam Declaration and urges that the Cairo Declaration by expressly referring to all the acts of aggression by Japan since the First World War in 1914 vested the Allied Powers with all possible authority in respect to those incidents. The relevant passage in the CAIRO DECLARATION RUNS THUS: "It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the First World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed. The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that in due course Korea shall become free and independent."

THE POTSDAM DECLARATION in paragraph 8 says: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."

THESE DECLARATIONS ARE MERE ANNOUNCEMENTS OF THE INTENTION OF THE ALLIED POWERS. They have no legal value. They do not by themselves give rise to any legal right in the United Nations. The Allied Powers themselves disown any contractual relation with the vanquished on the footing of these Declarations: Vide paragraph 3 of the Authority of the Supreme Commander.

AS I READ THESE DECLARATIONS I do not find anything in them which will amount even to an announcement of intention on the part of the declarants to try and punish war criminals in relation to these incidents. I am prepared to go further. In my judgment, even if we assume that these Declarations can be read so as to cover such cases, that would not carry us far. The Allied Powers

by mere declaration of such an intention would not acquire in law any such authority. In my view, if there is any international law which is to be respected by the nations, that law does not confer any right on the conqueror in a war to try and punish any crime committed by the vanquished not in connection with the war lost by him but in any other unconnected war or incident.

The CAIRO DECLARATION referred to in the Potsdam Declaration rather goes against the contention of the prosecution. That Declaration expressly refers to certain specified past matters and proclaims what steps should be taken in respect to them. I do not find anything in that Declaration which would suggest any trial or punishment of any individual war criminal in connection with those past events. Nor do I find anything in the Charter which would entitle us to extend our jurisdiction to such matters.

In my opinion, therefore, crimes alleged to have been committed in or in connection with any conflict, hostility, incident or war not forming part of the war which ended in the surrender of the 2nd September, 1945 are outside the jurisdiction of the Tribunal.

The defense claims the following incidents to be thus outside our jurisdiction, namely, —

1. The Manchurian Incident of 1931.
2. The activities of the Japanese Government in the Provinces of Liaoning, Kirin, Heilungkiang and Jehol.
3. The armed conflicts between Japan and the USSR relating to Lake Khasan affiairs and Khalkhingol River affairs.

This will affect our jurisdiction over the matters involved in counts 2, 18, 25, 26, 35, 36, 51 and 52 of the Indictment. Apart from their being parts of the overall conspiracy charged in count 1, the hostilities relating to these matters ceased long before the Potsdam Declaration of 26 July 1945 and the Japanese Surrender of 2 September 1945.

In the Indictment the prosecution makes the case of an over-all conspiracy in count 1 which, if proved, may bring in all these incidents as part of the war which ended in the aforesaid Surrender.

The question, thus, ultimately becomes a question of fact to be determined on the evidence in the case.

If on the evidence on the record we are unable to find the over-all conspiracy as alleged in count 1, then, in my opinion, the charges in the above named counts would fall for want of our jurisdiction.

I may now take up the material questions of law involved in the case as specified above. These were also raised by the defense in their preliminary objections.

The questions are:

1. Whether a war of the alleged character is crime in international law.
2. Whether individual members of a State commit a crime in international law by preparing, etc. for such a war.

Law Applicable to the Case:

I shall, first of all, take up the question WHETHER THE CHARTER establishing this Tribunal, in any way, OBLIGES IT TO APPLY ANY PARTICULAR LAW other than what may be determined by the Tribunal itself to be the international law, and, if so, what that law is,—whether the Charter has defined "war crimes" and whether the Tribunal is bound by that definition, if any, in determining the guilt of the persons under trial here.

The indictment in one place mentions the offences as "Crimes against Peace, War Crimes, and Crimes against Humanity *as defined* in the Charter of this Tribunal", and in another, characterizes them as "Crimes against Peace, War Crimes, and Crimes against Humanity and of Common Plans or Conspiracies to Commit those Crimes, all as defined in the Charter of the Tribunal".

In grouping the counts, "Crimes against Peace are characterized as being acts for which it is charged that the persons named and each of them are individually responsible *in accordance with Article 5 and particularly Article 5 (a) and (b)* of the Charter of the International Military Tribunal for the Far East and *in accordance with International Law, or either of them*."

Group Two, Murder, is named as "being acts for which it is charged that the persons named and each of them are individually responsible, being at the same time Crimes against Peace, Conventional War Crimes, and Crimes against Humanity, contrary to all the paragraphs of Article 5 of the said Charter, to International Law, and to the domestic laws of all the countries were committed, including Japan, or to one or more of them".

Group Three, Conventional War Crimes and Crimes against Humanity, are named as "being acts for which it is charged that the persons named and each of them are individually responsible, in accordance with Article 5 and particularly Article 5 (*b*) and (*c*) of the Charter of the International Military Tribunal for the Far East, and in accordance with International Law, or either of them".

Mr. Keenan in opening the case for the prosecution devoted considerable time to what purported to be a statement of *the law upon which the indictment is based*, but again kept the position vague. He said, "In the first instance, what constitutes cognizable crime by this Tribunal is defined by the Charter." He then proceeded to define and explain conspiracy, saying, "The first offense charged in the indictment is conspiracy. Since this offense is merely named and not defined, some definition must be made." By saying "this offense is merely named and not defined", he seems to have meant, named in the Charter and not defined there. After explaining conspiracy, Mr. Keenan proceeded thus: "The next offenses charged run through Counts 6 to 36 in various forms; but the same essential elements are contained in all, that is: 'The planning, preparation, initiation or waging of a declared or undeclared war of aggression', or 'The planning, preparation, initiation or waging of a war in violation of international law, treaties, agreements or assurances.'"

"Taking the first section of this definition, the essential element here is "war of aggression". *Is this a crime under international law*, and has it been so understood during all the time referred to in the indictment? We claim that it is and has been. To reach this conclusion we must establish two things:

First, that there is international law covering the subject, and second, that it is a crime under that law. The establishment of these two things is, we believe, among the important questions before this Tribunal."

He then proceeds to examine the international law on the point and invites the Tribunal to take judicial notice of the fact "that there is a large body of International Law known at different times and by different writers as the "common law" or "general law" or "natural law" or "international law".

My appreciation of the position taken up by the prosecution in this case is that according to it, it is the already existing rules of international law, existing at the date of commission of the acts alleged, on which the indictment is based, and that whether the charges shall stand or fall will depend upon what view the Tribunal takes of those rules.

Mr. Comyns Carr for the prosecution made this position clear in his address of 14 May 1946 at the hearing of the preliminary objection taken by the Defense Counsel as to the jurisdiction of this Tribunal. He said:

> "We are not asking this Tribunal to make any new law, nor are we admitting that the Charter purports to create any new offence."

According to him, international law itself

> "being the gradual creation of custom and of the application by judicial minds of old established principles to new circumstances . . . it is unquestionably within the power, and . . . the duty of this Tribunal to apply well-established principles to new circumstances, if they are found to have arisen, without regard to the question whether precise precedent for such application already exists in every case."

The position is made clearer by the Prosecution in the final summation of the case. In its summation the prosecution submitted that 'the Charter is conclusive as to the *composition* and *jurisdiction* of the Tribunal and as to all matters of evidence and procedure'. "As to the crimes LISTED in Article 5", the prosecution submission was "that the charter is and purports to be merely declaratory of international law as it existed from at least 1928 onwards and indeed before." The prosecution urged the Tribunal to examine this proposition and to base its judgment upon it.

But whatever be the prosecution view, in my opinion, the criminality or otherwise of the acts alleged must be determined with reference to the rules of international law existing at the date of the commission of the alleged acts. In my opinion, the charter cannot and has not defined any such crime and has not, in any way, limited our authority and jurisdiction to apply the rules of international law as may be found by us to the facts alleged in this case.

The prosecution is stated to be "pursuant to the Potsdam Declaration of 20 July, 1945, and the *Instrument of Surrender* of 2nd September, 1945, and the Charter of the Tribunal."

The relevant provisions of the Potsdam Declaration in question are contained in paragraphs 5 to 8, 10 and 13 and they stand thus:

> "5. *Following are our terms*. We will not deviate from them, There are no alternatives. We shall brook no delay.
>
> "6. There must be eliminated for all time the authority and influ-

ence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

"7. Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objective we are here setting forth.

"8. *The terms of the Cairo Declaration* shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.

"10. We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, *but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners*. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

"13. We call upon the Government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction."

The Instrument of Surrender acceded to this demand and in paragraph two proclaimed unconditional surrender thus:

"We hereby proclaim the *Unconditional Surrender* to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated."

I need only quote also the last paragraph of this instrument for my present purpose. The paragraph stands thus:

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

The expression "unconditional surrender" has almost become an expression of art in the military vocabulary to mean admission of total defeat. Some trace the history of its origin to the scene at Appomattox, Virginia, where on April 9, 1865, General Robert E. Lee commanding the Confederate Army, surrendered to General Ulysses S. Grant, then leading the Federal Forces. But we are not concerned with the history of the expression. For our present purpose we are concerned with, not how it came to possess a particular import, but what is its import. Unconditional surrender implies a complete defeat and an admission of such complete defeat. It imports complete surrender to THE MIGHT and MERCY of the victor. What the vanquished gets, he gets, not by a stipulation, but by the grace of the victor; it does not matter that some indication of the policy to be followed is graciously indicated by the victor even be-

fore the formal surrender. Of course, by saying this, I do not mean to say that the defeated party has no protection whatsoever from the whims of the VICTOR'S MIGHT. International law and usage purport to define the rights and duties of the victor in such a case. However impotent such law may be to afford any real protection, it at least does not LEGALLY place the vanquished at the absolute mercy of the victor.

We shall see later what is the position of the victor nations AS SUCH in international law in relation to a conquered nation. All that I need point out here is that so far as the terms of the demand of surrender and of the ultimate surrender go there is nothing in them TO VEST ANY ABSOLUTE SOVEREIGNTY in respect of Japan or of the Japanese people either in the victor nations or in the Supreme Commander. Further there is nothing in them which either expressly or by necessary implication would authorize the victor nations or the Supreme Commander to legislate for Japan and for the Japanese or in respect of war crimes. It will be pertinent to notice here that in vesting authority on the Supreme Commander the victor nations did not claim any AUTHORITY DERIVED FROM the vanquished *under any agreement*. THE AUTHORITY OF THE SUPREME COMMANDER in paragraph 3 runs thus:

> "The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a *contractual relationship* with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East."

I would now come to the Charter constituting this Tribunal. The relevant provisions are contained in Articles 1, 2, 5 and 6 and they stand thus:

SECTION I

CONSTITUTION OF TRIBUNAL

"*Article 1. Tribunal Established.* The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

"*Article 2. Members.* The Tribunal shall consist of not less than six nor more than eleven Members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

SECTION II

JURISDICTION AND GENERAL PROVISIONS

"*Article 5. Jurisdiction Over Persons and Offenses.* The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include

Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"(a) *Crimes against Peace* : Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foreging;

"(b) *Conventional War Crimes* : Namely, violations of the laws or customs of war;

"(c) *Crimes against Humanity* : Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

"*Article 6. Responsibility of Accused*. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Excepting these the Charter contains no other provisions having any bearing on the question under consideration. There is no express provision in the Charter making it obligatory on the Tribunal either to apply or to exclude any particular law.

Before proceeding to examine the provisions of the Charter in relation to the question now under consideration, I would like to dispose of one branch of the arguments of the defense in this connection, based, I am inclined to believe, on a misconception of a well-recognized rule of construction of statutes arising from the principle of non-retroactivity of law. The defense wanted to say that the definitions, if any, in the Charter would be void on this principle.

The rule denying retroactivity to a law is not that law cannot be made retroactive by its promulgator, but that it should not ordinarily be made so and that if such retroactive operation can be avoided courts should always do that.

The Charter here is clearly intended to provide a court for the trial of offences, if any, in respect of past acts. There cannot be any doubt as to this scope of the Charter and consequently it is difficult for us to read into its provisions any non-retroactivity.

Nor can it be denied that if the promulgator of the Charter was at all invested with any authority to promulgate a law, his authority was in respect of acts which are all matters of the past and already completed.

The real questions that arise for our consideration are:

1. Whether the Charter has defined the crime in question; if so,
2. Whether it was within the competence of its author so to define the crime;
3. Whether it is within our competence to question his authority in this respect.

Article 5 of the Charter, it is said, defines the different categories of crimes. The article in its plain terms purports only to provide for "jurisdiction over persons and offenses". In so doing the Charter says: "the following acts .... are crimes coming within the jurisdiction of the Tribunal ...." The intention, in my opinion, is not to enact that these acts do constitute crimes but that the crimes, if any, in respect to these acts, would be triable by the Tribunal. Whether or not these acts constitute any crime is left open for determination by the Tribunal with reference to the appropriate law. In my opinion, this is the only possible view that we can take of these provisions of the Charter. The Potsdam Declaration and the Instrument of Surrender certainly did not contemplate that the Allied Powers would have authority to give, whatever character they might choose, to past acts and then meet such acts with such justice as they might, in the future, determine. It is impossible to read into these instruments any such authority and I cannot for a moment imagine that the Allied Powers would assume such a grave power in violation of the solemn declarations made in them, AND PERHAPS IN DISREGARD OF INTERNATIONAL LAW AND USAGE. I do not see any reason why we should make such an uncharitable assumption against the Allied Powers or against the Supreme Commander when such reading of the Charter is not the only possible reading.

It will be interesting to notice here what Lord Wright says in connection with the Tribunal set up for the trial of the major war criminals of the European Axis countries.

Referring to the Agreement of August 8, 1945, made in London between the Governments of the United Kingdom, of the United States, of the French Republic and of the Union of Soviet Socialist Republics, establishing the Tribunal for the trial and punishment of the major war criminals of the European Axis countries, Lord Wright says:

"The Agreement includes, as falling within the jurisdiction of the Tribunal, persons who committed the following crimes:

"(*a*) Crimes against Peace, which means in effect, planning, preparation, initiation or waging of a war of aggression;

"(*b*) War crimes, by which term is meant mainly violation of the laws and customs of war;

"(*c*) Crimes against Humanity, in particular, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.

"The Tribunal so established is described in the Agreement as an International Military Tribunal. Such an International Tribunal is intended to act under International Law. It is clearly to be a judicial tribunal constituted to apply and enforce the appropriate rules of International Law.

"I understand the Agreement to import:

"(*a*) That the three classes of persons which it specifies are war criminals;

"(*b*) That the acts mentioned in classes (*a*), (*b*), and (*c*) are crimes for which there is properly individual responsibility;

"(*c*) (*i*) That they are not crimes because of the agreement of the four governments;

"(*ii*) But that the governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law.

"ON ANY OTHER ASSUMPTION THE COURT WOULD NOT BE A COURT OF LAW, but A MANIFESTATION OF POWER."

The same principles apply with equal force in the present case also. We have been set up as an International Military Tribunal. The clear intention is that we are to be "a judicial tribunal" and not "a manifestation of power". The intention is that we are to act as a court of law and act under international law. We are to find out, by the application of the appropriate rules of international law, whether the acts constitute any crime under the already existing law, *dehors* the Declaration, the Agreement or, the Charter. Even if the Charter, the Agreement or the Declaration schedules them as crimes, it would only be the decision of the relevant authorities that they are crimes under the already existing law. But the Tribunal must come to its own decision. It was never intended to bind the Tribunal by the decision of these bodies, for otherwise the Tribunal will not be a 'judicial tribunal' but a mere tool for the manifestation of power.

The so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengence can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through *genuine legal process* alone may contribute substantially to the re-establishment of order and decency in international relations."

But that is not the only consideration which influences me to the view I am taking of the Charter in this respect. THE CONTRARY VIEW would make the Charter *ultra vires*.

THE TERMS OF AUTHORITY of the Supreme Commander have been quoted above. These are in the simplest possible form and nowhere expressly authorize the Supreme Commander to define the provisions of international law.

It is contended in this connection that the Moscow Declaration made the intention of the Allied Powers in this respect clear and that there the Allied

Powers clearly proclaimed that "war criminals" would mean and include persons who are now classed as having committed offenses against peace.

THE MOSCOW DECLARATION was released on November 1, 1943 and I could not discover anything in this document which would support this view. The Declaration refers to war criminals *stricto sensu*. The only reference to others is in the last paragraph which stands thus:

> "The above declaration is without prejudice to the case of the major criminals, whose offenses have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies."

The document nowhere says who are these "major criminals". In the earlier parts of the document actual perpetrators of the various cruelties in violation of *jus in bello* are specifically named; these major criminals may only be the persons responsible for issuing general orders, if any, relating to those cruel actions. But even assuming that the expression was intended to include persons responsible for the preparation of aggressive war, the Declaration does not say that the Allied Powers HAD SCHEDULED them as war criminals irrespective of their legal position in this respect under international law. EVEN IF THE ALLIED POWERS INTENDED TO DO THAT, this, their Declaration alone, will not invest them with any such *legal* authority, if international law be otherwise. This might have been a declaration of threat on the strength of might; but if the Allied Powers, instead of executing the *might*, choose to place the matter in the hands of judicial tribunal, by this very fact they express their intention clearly enough that they want to deal with such persons *according to law*.

It will be pertinent here to notice what Professor Hans Kelsen of the University of California has said regarding the position of the victor in this respect. I am referring to him in this connection as his is the view most favourable to the prosecution. The learned Professor says:

> "If the individuals who are morally responsible for this war, those persons who have, as organs of their states, disregarded general or particular international law, and have resorted to or provoked this war, if these individuals as authors of the war shall be made legally responsible by the injured states, it is necessary to take into consideration:
>
> "1. That general international law does not establish individual, but collective responsibility for the acts concerned, and
>
> "2. That the acts for which the guilty persons shall be punished are acts of state—that is, according to general international law, acts of the government or performed at the government's command or with its authorization."

According to the learned Professor:

> "If individuals shall be punished for acts which they have performed as acts of state, *by a court of another state, or by an international court*, the legal basis of the trial, as a rule, *must be an international treaty* concluded with the state whose acts shall be punished, *by which treaty* jurisdiction over these individuals is conferred upon the national

> or international court." The learned Professor then points out: "If it is a national court, then this court functions, at least indirectly, as an international court. It is national only with respect to its composition in so far as the judges are appointed by one government only; it is international with respect to the legal basis of its jurisdiction."

The law of a state, says Professor Kelsen, contains no norms that attach sanctions to acts of other states which violate international law. Resorting to war in disregard of a rule of general or particular international law is a violation of international law, which is not, at the same time, a violation of national criminal law, as are violations of the rules of international law which regulate the conduct of war. The substantive law applied by a national court competent to punish individuals for such acts can be international law only. *Hence, the international treaty must not only determine the delict but also the punishment*, or must authorize the international court to fix the punishment which it considers to be adequate.

According to Professor Kelsen:

> "An *international treaty* authorizing a court to punish individuals for acts they have performed as acts of state *constitutes a norm* of international criminal law *with retrospective force*, for the acts were at the moment when they were committed not crimes for which the individual perpetrators were responsible."

With due respect I do not accept all the propositions propounded by the learned Professor in support of the legality of trial and punishment of such criminals. I cannot accept the view that by such a treaty *ex post facto* law can always be created and applied to the case of such persons. It is, however, not necessary for me to quarrel with this proposition in the present connection. HERE THERE IS NO SUCH TREATY; and the terms of authority of the Supreme Commander make it expressly clear that any power conferred on him is not in any way derived from the vanquished through any contractual relationship.

From what has been stated above it seems amply clear that if the ALLIED POWERS AS VICTORS HAVE NOT, UNDER THE INTERNATIONAL LAW, THE LEGAL RIGHT to treat such persons as war criminals, they have not derived any such right by a treaty or otherwise. The Allied Powers have nowhere given the slightest indication of their intention to assume any power which does not belong to them in law. It is therefore pertinent to inquire what is the extent of THE LAWFUL AUTHORITY OF A VICTOR over the vanquished in international relations. I am sure no one in this Twentieth Century would contend that even now this power is unlimited in respect of the person and the property of the defeated. Apart from the right of reprisal, the victor would no doubt have the right of punishing persons who had violated the laws of war. But to say that the victor can define a crime at his will and then punish for that crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants or take them away into captivity. When international law will have to allow a victor nation thus to define a crime at its will, it will, like

David Low's "Peace", be surprised to find itself back on the same spot whence it started on its apparently onward journey several centuries ago. Perhaps humanity also will feel the same inward surprise though it may be civilized enough not to give any outward expression of the same.

When Lord Wright says that THE VICTORS HAVE ACCURATELY DEFINED the crime in accordance with the existing international law, he overlooks the fact that if it is not open to the Tribunal to examine this definition with reference to the existing law, it becomes a definition NOW given by the victor, though it may happen to be a correct definition. In my opinion, such a power is opposed to the principles of international law and it will be a dangerous usurpation of power by the victor, unwarranted by any principle of justice.

While considering the questions whether aggressive war can be denominated an international crime and whether individuals comprising the government or general staff of an aggressor state may be prosecuted as liable for such crime, *Dr. Glueck says* that the Charter under which the International Military Tribunal at Nurnberg is supposed to operate gives dogmatically affirmative answers to both of the questions. In his view "there is no question but that, as an act of the *will* of the conqueror, the United Nations had the *authority* to frame and adopt such a Charter; and it may well be that the Tribunal at Nurnberg will deem itself completely bound by the restrictions above quoted" (*i. e.*, Articles 6 and 7 of the Nurnberg Charter, corresponding to Articles 5 and 6 of the present Charter).

The Tribunal at Nurnberg seems to have deemed itself bound by the so-called definition of the law given in the relevant charter. But in fairness to the prosecution in the case before us it must be pointed out that it does not claim any conclusive character for the present charter in this respect. According to the prosecution "The Charter is conclusive as to the *composition* and *jurisdiction* of the Tribunal and as to all matters of *evidence* and *procedure*." As to the crimes listed in Article 5, the prosecution submits that "the Charter is and purports to be *merely* declaratory of international law as it existed from at least 1928 onwards." We are urged by the prosecution to examine this proposition and base our judgment upon it. The prosecution, of course, does not say what we are to do in case we find the international law in this respect to be otherwise.

Assuming that the supposed definition given in the Charter does not represent the correct position under international law, I can understand Dr. Glueck if he means to say that the Charter is the act of the *will* of the conqueror and therefore must be obeyed by those who are bound to obey such *will*. But I fail to see how Dr. Glueck can speak of the conqueror having *authority* so to will. I believe the existing international law nowhere confers on the conqueror any such authority. Neither the belligerent's rights with respect to the person of any enemy nor the conqueror's rights with respect to such person would cover any such authority. Neither the rights following the military occupation of an enemy territory nor the rights following the conquest of such a territory would confer such an authority on the invader or the conqueror. Whether the accused be treated as prisoners of war or not, they

are not legally at the mercy of the invader or the conqueror. Only military necessity seems to invest the invader or the conqueror with very wide power and perhaps it is impossible to set bounds to the demands of such military necessity. But even there it must be remembered that military necessity is not a mere phrase of convenience, but is to be an imperative reality.

A belligerent, besides having the rights over his enemy which flew directly from the right to attack, no doubt also possesses the right of punishing persons who have violated the laws of war, if they fall into his hands. Hall says: "To the exercise of the above-mentioned rights no objection can be felt so long as the belligerent confines himself to punishing breaches of UNIVERSALLY ACKNOWLEDGED LAWS.... When, however, the act done is *not universally thought to be illegitimate* .... it may be doubtful whether a belligerent is justified in enforcing *his own views* to any degree, and unquestionably he ought as much as possible to avoid inflicting the penalty of death, or any punishment of a disgraceful kind." Hall is here speaking of war crimes *stricto sensu* and even in such cases the belligerent's own view of the law does not justify his action or will. In my opinion a conqueror does not enjoy any higher right in this respect in international law.

It is also my opinion that an International TRIBUNAL, by whomsoever set up and manned, is not bound by any such expression of the WILL of the conqueror. I need not stop here to examine this question further as in my opinion the Charter does not define the crime but only specifies the acts the authors whereof are placed under the jurisdiction of the Tribunal.

The prosecution refers us to the judgment of the Nurnberg Tribunal in this respect. In delivering the judgment of that Tribunal, Lord Justice Lawrence, referring to the provisions of the Charter establishing that Tribunal, is reported to have observed as follows:

> "These provisions are binding upon the Tribunal *as the law to be applied to the case*. The Tribunal will later discuss them in more detail; but, before doing so, it is necessary to review the facts."

Later while considering 'the Law of Charter' his Lordship said:—

> "The jurisdiction of the Tribunal is defined in the agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive and binding upon the Tribunal."

Coming later to the definition in the Charter, his Lordship said:

> "It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. *Nullum crimen sine lege, nulla poena sine lege*. It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

His Lordship then said:

"In the first place, it is to be observed that the *maxim nullum crimen sine lege* is not a limitation of sovereignty, but it is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished . . . . ."

According to Lord Justice Lawrence:

"This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned." He said: "The General Treaty, for the Renunciation of War of August 27, 1928, more generally known as the Pact of Paris or the Kellogg-Briand Pact, was binding on sixty-three nations, including Germany, Italy and Japan at the outbreak of war in 1939.

"The question is, what was the legal effect of this Pact? The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact . . . . . ."

The question as to what is international law *dehors* the Charter and where the law stood after the Pact of Paris will be discussed later. Here we are concerned only with that part of the observations of Lord Justice Lawrence which deals with the obligatory character of the Charter.

I would not arrogate to myself the duty of examining the scope of the other Charter in order to see whether or not it defined war crimes. I would assume that it did so define as was held by the other Tribunal. Assuming that the Charter purported so to define war crimes the question is whether this definition is *intra vires*.

Lord Justice Lawrence considers that the maxim *nullum crimen sine lege* has no application to the case as it is not a maxim *in limitation* of sovereignty but is only a principle of justice.

I am not quite sure if the Constitution of the U. S. A., in its Article 1 Sections 9 and 10 providing that "no *ex post facto* law shall be passed" by the Congress and "no state shall . . . pass any *ex post facto* law", did not limit its sovereignty itself in this respect. The author of the Charter in the case before us derived his authority at least in part from the U. S. A., and, so far as his power of legislation is concerned, it may be subject to this limitation, at least

when this power is sought to be supported as delegated by that sovereignty. But let us proceed on the assumption that the characterization of the maxim by Lord Justice Lawrence is correct and let us see how the QUESTION OF SOVEREIGNTY comes in.

Lord Justice Lawrence says: "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories had been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law."

His Lordship continues: "The Signatory Powers created this Tribunal, *defined the law* it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."

According to his Lordship: "The Charter MAKES the planning or waging of a war of aggression or a war in violation of international treaties a crime, and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London agreement . . . . ."

Lord Justice Lawrence refers to "the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered." He again refers to "what any one of the Signatory Powers might have done singly." It is thus not very clear which sovereignty was in the mind of Lord Justice Lawrence when he made these observations. It may be that His Lordship had in his mind either one or both of the following two sovereignties:

1. The sovereignty of the defeated state,
2. The sovereignty of the victor state.

This portion of the judgment comes under the heading "The Law of the Charter", and it seems to deal with TWO DISTINCT MATTERS relating to the question of jurisdiction. The first is the question of CREATION OF THE TRIBUNAL and the second is THAT OF DEFINING THE LAW TO BE ADMINISTERED by the Tribunal thus created.

These observations of Lord Justice Lawrence, therefore, involve the following questions:

1. (*a*) Whether the victor states in the right of their own respective national sovereignties can try and punish PRISONERS OF WAR falling within their custody for War Crimes;
   (*b*) Whether, for this purpose, they can in the right of their own sovereignty
      (*i*) set up a Tribunal for such a trial,

(*ii*) legislate defining such war crimes.

2. Whether any state (victor or vanquished) in exercise of its right of sovereignty
   (*a*) can try and punish ITS OWN CITIZENS for war crimes, and
   (*b*) for this purpose can,
      (*i*) set up a Tribunal for such a trial,
      (*ii*) legislate defining such war crimes.
3. (*a*) Whether a victor state derives the sovereignty of a defeated state
      (*i*) by reason of the unconditional surrender of the vanquished state,
   or (*ii*) by the terms of the surrender,
   or (*iii*) by anything more.
   (*b*) If so, whether this acquired sovereignty includes all the rights, ordinary and extraordinary, of the vanquished sovereign.

The pronouncements are not very clear so far as these several questions are concerned. It is not, for example, clear what is intended to be pronounced as "not to be doubted" about any nation's right. The judgment says, "it is not to be doubted that any nation has the right *thus* to set up special courts to administer law." If this refers to the question of *setting up* of special courts, we need not trouble ourselves with it here. If, however, it refers to the right of "defining the law" such "court is to administer", I respectfully beg to differ from the view thus expressed. International law certainly does not yet recognize any such right in any nation.

The observations of Lord Justice Lawrence seem to contain the following pronouncements:

1. War criminals are within the jurisdiction of:
   (*a*) their own national state;
   (*b*) the belligerent state when they fall within its custody.
2. (*a*) Their national state had power to legislate defining war crime;
   (*b*) By reason of surrender, this power now vests in the victor state.
3. (*a*) Any belligerent state within whose custody such persons might come had right to legislate defining their crime;
   (*b*) The combined victor states also consequently have that right.

As I have already noticed there is no quarrel with the first of the above three propositions. But the entire difficulty is with the propositions 3 (*a*) and 2 (*b*) as set down above.

No one, I believe, will seriously support the proposition marked 3 (*a*) above. As I have noticed already, prisoners can be tried and punished only for breaches of *recognized rules of law*. Any power of the nature contemplated in item 3 (*a*) above will obliterate the centuries of civilization which stretch between us and the days of summary slaying of the vanquished.

The questions whether the Charter is or is not "an arbitrary exercise of power on the part of the victor nations," and whether it is or is not "the expression of international law existing at the time of its creation" and to that

extent is or is not "itself a contribution to international law are not relevant for our present purpose. *If the authors of the charter had the right to legislate* and GIVE THE LAW WHICH THE TRIBUNAL WOULD BE BOUND TO ADMINISTER, then while administering that law, the Tribunal would have no business to raise such questions. If such authors are ever called upon to justify their action, then only such considerations would be relevant. The question now before us is whether the author or authors of the charter had RIGHT TO LEGISLATE AND GIVE THE LAW defining war crimes for the trial of the prisoners of war in their custody."

Professor Quincy Wright of the Board of Editors of the American Journal of International Law, in an Article entitled "The Law of Nurnberg Trial" published in the Journal in January 1947 referring to this part of the judgment says: "Every state does . . . have authority to set up special courts to try any person within its custody who commits war crimes, at least if such offenses threaten its security. It is believed that this jurisdiction is broad enough to cover the jurisdiction given by the Charter." It is not clear if Professor Wright wants to support even the belligerent's *right to legislate* for the purpose of defining 'war crimes'. I hope he did not purport to do any such thing. As I read his view, it seems even to limit the belligerents' power of trial only to cases when the act over and above being a criminal act *under the recognized rule of law*, also goes to threaten the security of the belligerent state.

Professor Wright's reference to the Lotus case and the conclusions drawn therefrom do not, in any way, advance the case of the alleged legislative power of the victor states. Extending criminal jurisdiction is one thing, and extending the criminal law itself by defining crime' is a different thing. In my opinion, the principle of international law forbids a state from doing this last thing in respect of Prisoners of War in its custody.

A victor state, as sovereign legislative power of its own state, might have right to try prisoners of war within its custody for *war crimes as defined and determined by the international law*. But neither the international law nor the civilized world recognizes any right in it to LEGISLATE DEFINING THE LAW IN THIS RESPECT to be administered by any court set up by it for the purpose of such trial.

I am further inclined to the view that this right which such a state may have over its prisoners of war is not a right derivative of its sovereignty but is a right CONFERRED ON IT as a member of the international society BY THE international law.

A victor nation promulgating such a Charter is only exercising an authority conferred on it by international law. Certainly such a nation is not yet a sovereign of the international community. It is not the sovereign of that much desired superstate.

Professor Wright suggests a novel source for this legislative power. According to him "Art. 5 of the Moscow Declaration of November 1, 1943 and Art. 2 (6) of the Charter of the United Nations support the idea that the four Powers acting in the interest of the United Nations had the right to legislate for the entire community of nations."

Indeed occasions may sometimes arise for such desperate efforts!

Article 5 of the Moscow Declaration runs thus: "That for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inauguration of a system of general security, they will consult with one another and as occasion requires with other members of the United Nations with a view to joint action on behalf of the community of nations."

Article 2 (6) of the United Nations Charter says that the organization shall ensure that non-members act in accordance with the principle of Article 2, so far as may be necessary for the maintenance of international peace and security.

I do not see what is there in these provisions which authorizes such a revolutionary creation of *ex post facto* international law. Of course, law can also be created illegally otherwise than by the recognized procedures—*ex injuria jus oritur*: Any law NOW created in this manner and applied WILL perhaps be the law *henceforth*.

Under international law, as it now stands, a victor nation or a union of victor nations would have the authority to establish a tribunal for the trial of war criminals, but no authority to legislate and promulgate a new law of war crimes. When such a nation or group of nations proceeds to promulgate a Charter for the purpose of the trial of war criminals, it does so only under the authority of international law and not in exercise of any sovereign authority. I believe, even in relation to the defeated nationals or to the occupied territory a victor nation is not a sovereign authority.

At any rate the sovereignty is recognized by the civilized world to have been limited in this respect by the international law at least in respect of its power over the Prisoners of War within its custody.

The next question is whether the victor nations derived the sovereignty of the defeated nations by reason of the latter's defeat and unconditional surrender, and whether a sovereignty thus acquired or derived vested the victor nations with the legislative power in question.

The judgment mentions "the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered." It is not very clear what is the view of Lord Justice Lawrence about the acquisition or the derivation of this "sovereign legislative power" by the victor countries. If his line of approach is dependent on any special factual features of the case before him, namely, that the character and terms of the surrender or of occupation in question vested the victors with the sovereignty of the vanquished state, then very little remains for me to say in this connection excepting that the terms of surrender here in the case before us and the character of occupation did not vest the sovereignty of Japan in the victor nations.

I have quoted the relevant terms of the Potsdam Declaration, as also, of the instruments of surrender. Reference may here be made to clauses 7, 8 and 10 of the instruments. We should also remember that in spite of the limited occupation by the Allied Powers the Government of Japan has all along been allowed to function.

Professor Quincy Wright in supporting this part of the judgment seems to enunciate the following propositions:

1. The derivation of the Tribunal's jurisdiction from the sovereignty of Germany is well-grounded:
   (*a*) such derivation is supportable on the special factual features of the case;
   or (*b*) as a legal consequence of the surrender.
2. Under International law a state may acquire sovereignty of territory by declaration of annexation after subjugation of the territory if that declaration is generally recognized by the other states of the world;
   (*a*) There is no doubt but that sovereignty may be held jointly by several states;
   (*b*) (*i*) The Four Allied Powers assumed the Sovereignty of Germany in order, among other purposes, to administer the country until such time as they thought fit to recognize an independent German Government;
   (*ii*) Their exercise of powers of legislation, adjudication, and administration in Germany during this period is permissible under international law, limited only by the rules of international law applicable to sovereign states in territory they have subjugated;
   (*iii*) Their powers go beyond those of a military occupant.

It is not very clear whether he too considers this derivation of sovereignty as the result of the *special factual features* of the German case.

I have already indicated that the factual position in this respect in the case before us is quite different.

As a proposition of international law 'that the unconditional surrender transfers the sovereign legislative power of the vanquished state from it to the victor', it has no support in international law as it stood during the relevant war.

As has been warned by Oppenheim "subjugation must not be confounded with conquest, although there can be no subjugation without conquest". "Conquest is taking possession of enemy territory by military force, and is completed as soon as the territory is effectively occupied." "A belligerent, although he has annihilated the forces and conquered the whole of the territory of his adversary, and thereby brought the armed contention to an end, may nevertheless not choose to exterminate the enemy state by *annexing* the conquered territory, but may conclude a treaty of peace with the .... defeated state, re-establish its government and hand back to it the whole or a part of the conquered territory. *Subjugation* takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by *annexing* the conquered territory. Subjugation may, therefore, be correctly defined as *extermination* in war of one belligerent by another through annexation of the former's territory after conquest, the enemy forces having been annihilated."

I need not pursue the question whether the legal effect of subjugation would be the derivation of the sovereignty of the defeated state by the victor state. In my opinion, even assuming that the victor state becomes the sovereign of the subjugated territory, it is wrong to say that such sovereignty is *derived from the defeated state or the defeated people* and hence is the continuation of the sovereignty of the defeated state. Even if it is a sovereignty, it is *a sovereignty of the victor* state now extended to the subjugated territory. If it is a sovereignty at all it is *not derived from* the vanquished people or the vanquished state—but *is acquired* IN SPITE of them.

I would not call it a sovereignty of the defeated state at all. That state is *non-est*, having been annihilated. A new state might have come into existence; but such a state is based entirely on the MIGHT of the conqueror. The sovereignty of the vanquished state, or, more correctly, the sovereignty of which the vanquished state was the depositary is annihilated with its depositary or only remains in abeyance. Indeed the sovereign power is not a mysterious subject which might be served from the state itself; it is only a general personification of the sum total of the conception and activity of the state so far as it has became self-conscious and asserts its functions self-consciously.

Whatever that be, the case before us, is not one of subjugation, though it is a case of complete defeat and unconditional surrender.

It is obvious that mere conquest, defeat and surrender, conditional or unconditional, do not vest the conqueror with any sovereignty of the defeated state. The legal position of the victor prior to subjugation is the same as that of a military occupant. Whatever he does in respect of the vanquished state he does so in the capacity of a military occupant. A military occupant is not a sovereign of the occupied territory.

But even assuming that in international law, a victor state derives the sovereignty of the vanquished state, the former would not have the power claimed for it even in this capacity.

Prisoners of war, so long as they remain so, are under the protection of international law. No national state, neither the victor nor the vanquished, can make any *ex post facto* law affecting their liability for past acts, particularly when they are placed on trial before AN INTERNATIONAL TRIBUNAL. Their own state might try and punish them in its own national court, either already existing or created specially for the purpose; and, even if we assume that for this purpose, it might create some *ex post facto* law binding on such national tribunal, it does not follow that it would have been competent to create law for the application by an INTERNATIONAL TRIBUNAL. *So long as the prisoners are placed on trial before an* INTERNATIONAL TRIBUNAL, it does not matter whether as prisoners of war, by the victor state, or, as its citizens, by the vanquished state, NEITHER STATE can legislate so as to give any *ex post facto* law to be applied by that INTERNATIONAL tribunal in order to determine their crime. Such states might have an option in the matter of setting up the tribunal: they might create a national tribunal for the trial. We are not concerned with what they might or might not have done in defining the law in such a case. But as soon as they set up an INTERNATIONAL TRIBUNAL, they cannot create any law

defining the crime for such tribunal.

It may be observed in passing that the Charter of a German Sovereign giving some law for its national court would not, I am sure, be in any extent, a contribution to international law. This question of the scope of legislative power in respect of the trial and punishment of prisoners of war for war crimes will arise for our consideration also in connection with the charges in the present indictment regarding the trial and punishment of the U. S. air pilots by Japan. There, of course, the prosecution denies any such power to the Japanese government.

Mr. Justice Jackson of the United States in his report as Chief of Counsel for the United States in prosecuting the principal war criminals of the European Axis observed:

> "We could execute or otherwise punish them without a hearing. But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not set easily on the American conscience or be remembered by our children with pride."

It is, indeed, surprising that no less a person than Mr. Justice Jackson, in his considered report to no less an authority than the President of the United States, could insert these lines in the Twentieth Century. On what authority, one feels inclined to ask, could a victor execute enemy prisoners without a hearing? I need not stop here to consider what would be the legal position of a victor if we accept the view that by the Pact of Paris war has been renounced as an instrument of national policy rendering such a war a crime and that such a war only entitles the other party to a right of self-defense. Whether the weapon of defense can be of any avail to the victor for any acquisitive or aggressive purpose is a question which we need not consider here. Even apart from any limiting effect of the outlawry of war on the victor's rights, I do not think that during recent centuries any victor has enjoyed any such right as is declared by Mr. Justice Jackson in his report. If the victor really had such a right then perhaps it might have been possible for him to give a new definition of a crime in respect of past acts and punish the prisoners as criminals according to such new definition after hearing them if that would ease the conscience of any nation. In that case it would have been mere adaptation of a particular method to the enforcement of an existing right. But I do not see anything anywhere in the existing international law conferring any such power on the victors. Neither temporary military occupation of a territory nor final acquisition by conquest, if acquisition by war is even now possible, of a territory and subjugation would confer any such rights on the occupying belligerent or victor over the inhabitants or over the prisoners either taken during the war or after truce. Even under the martial law of the occupant the position of the prisoners and of the inhabitants of the occupied territory is not so helpless.

Whatever view of the legality or otherwise of a war may be taken, victory does not invest the victor with unlimited and undefined power now. Inter-

national laws of war define and regulate the rights and duties of the victor over the individuals of the vanquished nationality. In my judgment, therefore, it is beyond the competence of any victor nation to go beyond the rules of international law as they exist, give new definitions of crimes and then punish the prisoners for having committed offense according to this new definition. This is really not a norm in abhorrence of the retroactivity of law : It is something more substantial. To allow any nation to do that will be to allow usurpation of power which international law denies that nation.

Keeping all this in view my reading of the Charter is that it does not purport to define war crimes; *it simply enacts what matters will come up for trial before the Tribunal*, leaving it to the Tribunal to decide, with reference to the international law, what offense, if any, has been committed by the persons placed on trial.

A view seems to have been entertained in some quarters that as this Tribunal is set up by the victor nations, it is not competent to question their authority in respect of any of the provisions of the Charter establishing the Tribunal. Even the view expressed by Lord Wright in his Article on " Nurnberg" may bear this construction. Lord Wright in this Article after having quoted the provisions contained in Article 6 of the Nurnberg Charter, observed: "these provisions defined the law to be applied by the Tribunal and were binding on it." Later on he said : "The judges could not, of course, question the competency of their appointment and refuse to apply the definitions of the law laid down in the London Agreement and the Charter. . . ." I do not see why questioning any legislation purporting to give definitions of the law would necessarily involve questioning the competency of the judges' appointment. I must confess, I do not see any principle in support of this view.

Those who entertain this view, say:—

1. That "the sole sources of the powers of the judges of the Tribunal are the Charter and their appointments to act under the Charter";
2. That apart from the Charter they have no power at all; and
3. That each judge of this Tribunal accepted the appointment to sit under the Charter and that apart from the Charter he cannot sit at all nor pronounce any order at all.

From these they conclude that this Tribunal is not competent to try the question whether the Supreme Commander has exceeded his mandate, "as the Charter has not remitted such a question to it".

I sincerely regret I cannot persuade myself to accept this view. I believe the Tribunal, established by the Charter, is not set up in a field unoccupied by any law. If there is such a thing as international law, the field where the Tribunal is being established is already occupied by that law and that law will operate at least until its operation is validly ousted by any authority. Even the Charter itself derives its authority from this international law. In my opinion it cannot override the authority of this law and the Tribunal is quite competent, under the authority of this international law, to question the validity or otherwise of the provisions of the Charter. At any rate unless and until the

Charter expressly or by necessary implication overrides the application of international law, that law shall continue to apply and a Tribunal validly established by a Charter under the authority of such international law will be quite competent to investigate the question whether any provision of the Charter is or is not *ultra vires*. The trial itself will involve this question. Its specific remittance for investigation by the Charter will not be required.

In national systems it is not inconceivable that an authority competent to set up a Tribunal may not at the same time be competent to legislate. In such a case simply because such an authority sets up a Tribunal by a document wherein it also purports to legislate, the Tribunal would not be incompetent to declare that piece of legislation *ultra vires*.

As I have pointed out above, a victor nation is, under the international law, competent to set up a Tribunal for the trial of war criminals, but such a conqueror is not competent to legislate on international law. A tribunal set up by such a nation will certainly be a valid body. But if the nation in question purports also to legislate beyond its competency under the recognized rules of international system, that legislation may be *ultra vires* and I do not see what can debar the Tribunal from examining this question if called upon to apply this legislated norm. It makes no difference in this respect that the same document which sets up the Tribunal also purports to legislate. This fact would not obligate the Tribunal:

1. To uphold the authority of its promulgator in every other respect.
2. To uphold every provision of the document promulgating the Tribunal.
3. To construe the Charter in any particular manner.

After careful consideration of the question I come to the conclusion:

1. That the Charter has not defined the crime in question;
2. (*a*) That it was not within the competence of its author to define any crime;
   (*b*) That even if any crime would have been defined by the Charter that definition would have been *ultra vires* and would not have been binding on us.
3. That it is within our competence to question its authority in this respect.
4. That the law applicable to this case is the international law to be found by us.

THE PRINCIPAL QUESTION which thus ultimately arises for our decision is whether the acts alleged in the indictment under the category of "Crimes against Peace" constituted any crime under the international law.

The acts alleged are "the planning, preparation and initiation" of wars of specified characters.

It is not the prosecution case that "war", irrespective of its character, became a crime in international law. Their case is that a war possessing the alleged character was made illegal and criminal in international law and that consequently persons provoking such criminal war by such acts of planning, etc., committed a crime under international law.

TWO PRINCIPAL QUESTIONS therefore arise here for our decision, namely;

1. Whether the wars of the alleged character became criminal in international law.
2. Assuming wars of the alleged character to be criminal in international law, whether the individuals functioning as alleged here would incur any criminal responsibility in international law.

I would take up the first of these questions first.

For the sake of convenience the question may be considered with reference to four distinct periods, namely:

1. That up to the First World War of 1914;
2. That between the First World War and the date of the Pact of Paris (27 August 1928);
3. That from the date of the Pact of Paris to the commencement of the World War under consideration;
4. That since the Second World War.

So far as the first of the above four periods is concerned it seems to be generally agreed that no war became crime in international life, though it is sometimes asserted that a distinction between "just" and "unjust" war had always been recognized. It may be that international jurists and philosophers sometimes used these distinctive expressions in their learned discourses. But international life itself never recognized this distinction and no such distinction was ever allowed to produce any practical result. At any rate an "unjust" war was not made "crime" in international law. In fact any interest which the western powers may now have in the territories in the Eastern Hemisphere was acquired mostly through armed violence during this period and none of these wars perhaps would stand the test of being "just war".

During the second of the above periods Mr. Quincy Wright writing in 1925 on "The Outlawry of War", said:

> "Under present international law "acts of war" are illegal unless committed in time of war or other extraordinary necessity but the transition from a state of peace to a "state of war" is neither legal nor illegal.
>
> "A state of war is regarded as an event, the origin of which is OUTSIDE of international law although that law prescribes rules for its conduct differing from those which prevail in time of peace. The reason for this conception, different from that of antiquity and the Middle Ages, was found in the complexity of the causes of war in the present state of international relations, in the difficulty of locating responsibility in the present regime of constitutional governments and in the prevalence of the scientific habit of attributing occurrences to natural causes rather than to design.
>
> "In so far as wars cannot be attributed to acts of responsible beings, it is nonsense to call them illegal. They are not crimes but evidences of disease. They indicate that nations need treatment which will modify current educational, social, religious, economic, and political standards and methods in so far as they affect international relations."

Senator Borah, on December 12, 1927, in his Resolution before the United States Senate, stated thus:

> "Whereas, war is the greatest existing menace to society, ... and
>
> "Whereas, civilization has been marked in its upward trend out of barbarism into its present condition by the development of law and courts to supplant methods of violence and force; and.....
>
> "*Whereas, war between nations has always been and still is a lawful institution, so that any nation may, with or without cause, declare war against any other nation and is strictly within its legal rights*, and ....
>
> "Whereas, the overwhelming moral sentiment of civilized people everywhere is against the cruel and destructive institution of war;
>
> "'Resolved, that it is the view of the Senate of the United States that war between nations should be outlawed as an *institution or means for the* settlement of international controversies *by making it a public crime under the law of nations*, and that every nation should be encouraged by solemn agreement or treaty to bind itself to *indict and punish* its own international war-breeders or instigators and war profiteers under powers similar to those conferred upon our Congress under Article 1, Section 8, of our Federal Constitution, which clothes the Congress with the power to define and punish offenses against the law of nations.....'"

So even on the 12th day of December 1927, Senator Borah could say that "War between nations HAS ALWAYS BEEN AND STILL IS a lawful institution and that "any nation may, *with* or *without* cause, declare war against other nation and be strictly within its legal rights...."I fully agree with this view. As the preamble itself shows, Senator Borah, in making this statement, was fully alive to the evil of war.

In the 8th edition of Hall's International Law (1924), we find the following passages:

> "As international law is destitute of any judicial or administrative machinery, it leaves states, *which think themselves* aggrieved, and which have exhausted all peaceable methods of obtaining satisfaction, to exact redress for themselves by force. It thus recognizes war as a permitted mode of giving effect to its decisions. *Theoretically*, ... as it (international law) professes to cover the whole field of the relations of states *which can be brought within the scope of law*, it *ought* to determine the causes for which war can be justly undertaken; .... it *might* also not unreasonably go on to discourage the commission of wrongs by subjecting a wrongdoer to special disabilities.
>
> "The first of these ends it attains to a certain degree, though very imperfectly.... In most of the disputes which arise between states, the grounds of quarrel, though they might probably be always brought into connection with the wide fundamental principles of law, *are too complex*

to be judged with any certainty by reference to them; sometimes again they have their origin in divergent notions, honestly entertained, as to what those principles consist in, and consequently as to the injunctions of secondary principles by which action is immediately governed; and sometimes they are caused by collisions of naked interest or sentiment, in which there is no question of right, but which are so violent as to render settlement impossible until a struggle has taken place. It is not, therefore, possible to frame general rules which will be of any practical value.

"The second end international law does not even endeavour to attain. However able law might be to declare one of two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war when it is powerless to enforce its decisions. . . . . International law has consequently no alternative but to accept war, *independently of the justice of its origin*, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights."

I need not stop here to express my view of the character of an international community or of international law. Both the expressions are used in specific senses in relation to international life as I would endeavour to show later. But even taking them in unqualified sense, no distinction was made between just and unjust war or between non-aggressive and aggressive war, and no difference in the legal character of a war was based on any such distinction.

In the 6th edition (1944) of Oppenheim's "International Law", revised by Dr. Lauterpacht of the University of Cambridge, we find the following statement:

". . . . So long as war was a recognized instrument of national policy both for giving effect to existing rights and for changing the law, the *justice or otherwise* of the cause of war was not of legal relevance. The right of war, for whatever purposes, was a prerogative of national sovereignty. Thus conceived every war was just."

Whether the legal position has now changed after the covenants and the Pact of Paris will be examined later. So far as the position unaffected by such covenants and pacts is concerned, it seems amply clear that no war became crime during THE FIRST TWO OF THE ABOVE FOUR PERIODS. War might have been an evil in international life; it might have become even its disease as Mr. Quincy Wright says; but certainly was not a crime.

Before leaving these two periods it would be fair to point out that at least two distinguished international jurists of the present age seem to think that aggressive war became crime in international life during perhaps the second of these periods. I mean Dr. Glueck of the United States of America and Mr. Trainin of the U. S. S. R. Dr. Glueck seems to think that a customary international law developed making aggressive war a crime in international life. Ac-

cording to Mr. Trainin even before the Second World War there were "two tendencies of the historical process", —one being the collision of imperialistic interests, the daily struggle in the field of international relations and the futility of international law—the tendency reflecting the policy of the aggressive nations in the imperialistic era—and the other, just a parallel and opposite to the former, being the struggle for peace and liberty and independence of nations, tendency in which is reflected the policy of a new and powerful international factor—the socialist state of the toilers, the U. S. S. R.

According to him there was some scope for the introduction of the conception of criminal responsibility in international life in view of the second tendency named above.

In my opinion neither view is sustainable. I would examine them in detail while considering the position during the next period.

Coming now to THE THIRD OF THE PERIODS specified above, namely, THE PERIOD BEGINNING WITH THE PACT OF PARIS, I must say there has already come into existence a formidable array of literature relating to the question. A careful examination of these various authorities would, I believe, yield the following CONFLICTING RESULTS:

1. The Kellogg-Briand Pact made resorting to a war of aggression a delict: (Prof. Hans Kelsen of the University of California)
2. The Pact of Paris failed to make violations of its terms an international crime punishable either by national courts or some international tribunal: (Mr. George A. Finch and Dr. Glueck of the U. S.)
3. (*a*) The time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime: (Dr. Glueck)
   (*b*) Considering international law as a progressive system, the rules and principles of which are to be determined at any moment by examining all its sources, "general principles of law", "international custom" and teachings of the most highly qualified publicists, no less than "international conventions" and "judicial decisions" there can be little doubt that international law had designated as crimes the acts. . . . specified in the Charter *long before* the acts charged against the defendants were committed. (Prof. Wright)
4. (*a*) The Pact of Paris is *the evidence of the acceptance* by the civilized nations of the principle that war is an illegal thing. (Lord Wright)
   (*b*) This principle so accepted and evidenced is entitled to rank as a rule of international law. (Lord Wright)
   (*c*) The Pact of Paris converted the principle that "aggressive war is illegal" from a rule of "natural law" to a rule of "positive law". (Lord Wright and Prof. Wright)
   (*d*) International law, being a living and operative force in these days of widening sense of humanity, has progressed, and AN

INTERNATIONAL COURT, faced with the duty of deciding if the bringing of aggressive war is an international crime, is *entitled* and *bound* to hold that it is: (Lord Wright)

5. (*a*) (*i*) In order that there may be international crime, there must be international community: (Mr. Trainin and Lord Wright)

(*ii*) There is a community of nations, though imperfect and inchoate: (Mr. Trainin and Lord Wright)

(*iii*) The basic prescription of this community is the existence of peaceful relations between States: (Mr. Trainin and Lord Wright)

(*b*) (*i*) War is a thing evil in itself: It breaks international peace: (Mr. Trainin and Lord Wright)

(*ii*) It may be justified on some specified grounds: (Lord Wright)

(*iii*) A war of aggression falls outside that justification, and is, therefore, a crime. (Lord Wright)

(*c*) Whatever might have been the legal position of war in an international community prior to the Pact of Paris, the Pact clearly declared it to be an illegal thing: (Lord Wright)

6. Since the Moscow Declaration of 1943 and as a result of the same, a new international society has developed. To facilitate this process of development and to strengthen these new ideas, juridical thought is obliged to forge the right form of these new relations, to work out a system of international law and, as an indissoluble part of this system, to dictate to the conscience of nations the problem of criminal responsibility for attempts on the foundations of international relations. (Mr. Trainin)

This last proposition of Mr. Trainin really falls to be considered in relation to the fourth period specified above. But I would examine it along with the other propositions formulated by the learned author.

I would first of all proceed to examine *the effect of the Pact of Paris*.

In my opinion the Pact did not in any way change the existing international law. It failed to introduce any new rule of law in this respect.

The question falls to be considered FROM TWO DISTINCT VIEWPOINTS, namely:

1. Whether the Pact made any war a crime in international life?
2. Whether the Pact introduced the question of justification of war in international life and thus, making aggressive war unjustifiable, made such a war a crime or an illegal thing by reason of its own harmful character?

The Pact commonly known as the Kellogg-Briand Pact or the Pact of Paris was signed on the 27th August 1928.

In the preamble, after acknowledging a deep sensibility of their solemn duty to promote the welfare of mankind, the parties announce that:

"Persuaded that the time has come when a frank renunciation of

war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

"Convinced that all changes in their relations with one another should be sought only by *pacific means* and be the result of a peaceful and orderly process, and that any signatory power which shall hereafter seek to promote its national interest by resort to war, *should be denied the benefits* furnished by this treaty;

"Hopeful that, encouraged by their example, all other nations of the world will join in this humane endeavor, and by adhering to the present treaty as soon as it comes into force, bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy; they have agreed to the following articles:

Article 1. The High Contracting Parties solemnly declare, in the names of their respective peoples, that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Article 3. The present treaty shall be ratified by the High Contracting Parties, in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington.

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by all the other powers of the world. . . . . "

It will be profitable to have a brief sketch of the history of the Pact.

I would start from the ABORTIVE Geneva Protocol of 1924. In the preamble of this Protocol, the parties declared themselves to be animate by the firm desire to ensure the maintenance of general peace and the security of nations, whose existence, independence or territories may be threatened, purported to recognize the solidarity of the members of the international community, and asserted "that a war of aggression constituted a violation of this solidarity and was an international crime". The purpose of the Protocol was declared to be the realization of the reduction of the national armaments to the lowest point consistent with national safety, the enforcement by common action of international obligations. THE PROTOCOL WAS NEVER RATIFIED by the several states, and consequently, never came to have any legal effect. In these circumstances, the assertion in this document that aggressive war is international crime, produced no legal consequences. But it might have given birth to the idea of condemning

aggressive war in international life.

On the 6th September 1927, the representative of the Netherlands, in the 8th Assembly of the League of Nations, put forth a draft resolution in taking up the study of the fundamental principles of the Geneva Protocol again. The leading opponents of the Geneva Protocol had been Great Britain and the self-governing Dominions of the British Crown. This opposition continued, and *this attempt at revival failed*.

During this Eighth Session of the League Assembly, however, on the 24th September 1927, the following POLISH RESOLUTION was adopted:

"The Assembly

"Recognizing the solidarity which unites the community of nations;

"Being inspired by a firm desire for the maintenance of general peace;

"Being convinced that *a war of aggression* can never serve as a means of settling international disputes and is, in consequence, *an international crime*;

"Considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence, calculated to facilitate the progress of the work undertaken with a view to disarmament:

"Declares:

"1. That all wars of aggression are, and shall always be, prohibited.

"2. That every pacific means must be employed to settle disputes of every description which may arise between states."

It may be noted that this Resolution already contained the two features of the Pact of Paris, namely:

1. A renunciation of a certain kind of war;
2. An undertaking not to seek the settlement of international disputes by other than pacific means.

At the last plenary session of the Sixth International Conference of American States, which sat at Havana from the 16th January to the 20th February 1928, the Mexican Delegate introduced a resolution to the effect that:

1. All aggression is considered illicit and as such is declared prohibited.
2. The American States will employ all pacific means to settle conflicts which may arise between them.

This resolution was accepted at the conference.

In the meantime, France was thinking of celebrating the tenth anniversary of the entry of the United States into the General War. The date fell on the 6th April 1927. Monsieur Briand met Professor James T. Shotwell on the 22nd March, who formulated to him the idea of renunciation of war as an instrument of national policy. Following his suggestion, Monsieur Briand sent a

personal message to the American people, suggesting that France and the United States might celebrate the occasion by subscribing publicly to some mutual engagement tending to outlaw war as between these two countries. He interpreted the American slogan "to outlaw war" as meaning "the renunciation of war as an instrument of national policy".

This gave rise to correspondence between Monsieur Briand and Mr. Kellogg. On the 1st June 1927, Briand transmitted to Kellogg a draft treaty of his own, consisting of a preamble and three articles. This was intended only to be a bilateral instrument. These three articles eventually reappeared as the three articles of the Pact signed on the 27th August 1928, with little change of the text, apart from what was required to alter the same into a multilateral one.

In the meantime, the then existing Franco-American Arbitration Treaty of 1908, which was due to expire on the 27th February 1928, was replaced by a new treaty, duly signed on the 6th February 1928, containing a new preamble, with a declaration to the effect that the two parties were:

> "Eager by their example not only *demonstrate* their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of *international arrangements* for the pacific settlement of international disputes shall have eliminated forever the possibility of war among any of the powers of the world."

As regards the other treaty, Mr. Kellogg, in his note of the 28th December 1927, suggested that the treaty for the renunciation of war, proposed by Monsieur Briand, should not be merely bilateral, but multilateral.

There followed a conflict. The French Government insisted that, if the treaty was to be multilateral, the terms proposed by Monsieur Briand should be *qualified*; the American Government insisted that the text of the Pact, even in case of its being made multilateral, should be as in the proposed draft. Eventually the French Government accepted a suggestion from the American Government that the two governments should jointly submit to the Governments of Germany, Great Britain, Italy and Japan, the correspondence exchanged between them since June. The U. S. S. R. was excluded up to this stage.

In the third phase, Mr. Kellogg, on the 13th April 1928, issued a circular letter to the German, British, Italian, and Japanese Governments, submitting to these governments the draft of a multilateral treaty to be signed by all the surviving great powers except the U. S. S. R. The two substantive articles of this draft were identical with those of Briand's draft of the preceding June, except some verbal change making it multilateral.

On the 20th April, the French Government circulated to the same powers an alternative draft in which the two substantive articles were expanded to five, and a number of qualifications and provisos were introduced in precise terms. This French draft sought to bring to a point the various provisos, interpretations, and understandings that had been put forward on the French side in the course of the Franco-American correspondence.

On the 29th April, Mr. Kellogg dealt with these French considerations

in a speech delivered before the American International Law Association, to demonstrate that the French desiderata could be *satisfied within the framework of the draft circulated by him*. This he did, not only to his immediate audience, but to the governments and to the world at large. These interpretations were the turning point of the whole transaction. The British, the Italian, and the Japanese Governments had before them Kellogg's interpretative exposition of the 29th April 1928, before they had dispatched their replies to Kellogg's note of the 13th April.

I need not stop here to examine the long series of correspondence that followed after this. Eventually, the British Government accepted Kellogg's proposal of the 13th April, *as read together* with his speech of the 29th, in a long and reasoned note dated the 19th May 1928. Further, the British Government suggested that Mr. Kellogg's invitation should be extended to the British self-governing Dominions and to India, and postulated an understanding which came to be nicknamed as the "British Monroe Doctrine". Mr. Kellogg promptly acted upon the suggestion of extending an invitation to the Governments of the Dominions and India, and received favourable replies from them all by the middle of June. As regards the postulate, the British Government did not either demand that it should be incorporated in the text of the treaty or formulate it in so many words as a British reservation. They did, however, reassert this postulate in a note of the 18th July 1928, in the act of accepting the treaty re-submitted by Mr. Kellogg in its definitive form; and on the 6th August they forwarded copies of the two notes of the 19th May and the 18th July to the Secretary General of the League of Nations at Geneva, with a request that they should be circulated to the governments of other states members.

The postulate in question stood thus:

> "The language of Article 1, as to the renunciation of war as an instrument of national policy, renders it desirable that I should remind Your Excellency that there are certain regions of the world, the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests, any disregard of which by a foreign power they have declared that they would regard as an unfriendly act. His Majesty's Government believe, therefore, that in defining their position they are expressing the intention and meaning of the United States Government." On the 23rd June 1928, Mr. Kellogg dispatched another circular note to the several governments, quoting therein the interpretative paragraphs from his speech of the 29th April. With this note the draft treaty was re-submitted with no change in the text of the articles, but with a modification in

the preamble postulating "that any signatory power which" should thereafter "seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty".

The treaty was accepted by the various governments in this form.

Before the Senate of the United States ratified the Pact, Mr. Kellogg often appeared before the Senate Committee on Foreign Relations, and in the colloquies between the Secretary of State and individual members of the committee, most of the controversial points were brought out. On the question whether the terms of the treaty were affected by the previous correspondence between the signatory powers, Mr. Kellogg stuck to the opinion that there was nothing in any of those notes that was not contained, explicitly or implicitly, in the treaty itself. On the question of self-defense, Mr. Kellogg declared that the *right of self-defense was not limited to the defense of territory under the sovereignty of the state concerned*, and that under the treaty, *each state would have the prerogative of judging for itself*, WHAT ACTION THE RIGHT OF SELF-DEFENSE COVERED and when it came into play, subject to the *risk* that this judgment might not be endorsed by the rest of the world. "The United States must judge ..... and it is answerable to the public *opinion* of the world if it is not an honest defense; that is all." This is Mr. Kelloggg's own statement.

THIS IS HOW THE PACT OF PARIS CAME INTO BEING and what it was intended to convey by its authors.

The account given above is substantially taken from that given by Professor Toynbee. It indicates that the parties thereto intended to create by this Pact only a CONTRACTUAL OBLIGATION. Its originators did not design it for the entire Community of Nations. There were several reservations introduced by the several parties for their respective interests. This is compatible with contractual obligations, but not with law. No doubt it was a multilateral treaty or pact. But though a law can be created only by a multilateral treaty, every multilateral treaty does not create law. A rule of law, once created, must be binding on the states independently of their will, though the creation of the rule was dependent on its voluntary acceptance by them. THE OBLIGATION of this Pact, however, always remains DEPENDENT ON THE WILL OF THE STATES, in as much as it is left to these states themselves to determine whether their action was or was not in violation of the obligation undertaken by the Pact.

Apart from any other consideration, *the single fact* that war in self-defense in international life is not only not prohibited, but that it is declared that EACH STATE RETAINS "THE PREROGATIVE OF JUDGING for itself WHAT ACTION the right of self-defense covered and when it came into play" is, in my opinion, sufficient to take the Pact out of the category of law. As declared by Mr. Kellogg, the right of self-defense was not limited to the defense of territory under the sovereignty of the state concerned.

Considerations relevant for the determination of the LEGAL CHARACTER of rules of conduct obtaining in society are:

1. That only through final ascertainment by agencies other than the

parties to the dispute can the law be rendered certain; it is not rendered so by the *ipse dixit* of an interested party. Such certainty is of the essence of law.

2. That it is essential for the rule of law that there should exist agencies bearing evidence of or giving effect to the imperative nature of law.

THE LAW'S EXTERNAL NATURE may express itself either in the fact that it is a precept created independently of the will of the subject of the law, or that no matter how created, it continues to exist in respect of the subjects of the law independently of their will.

The Pact of Paris as explained by Mr. Kellogg and as understood and accepted by the parties thereto would not stand these tests. The reservation of the right of self-defense and self-preservation in the form and to the extent explained by Mr. Kellogg would take the Pact out of the category of a rule of law.

It must also be remembered that in the present state of the international life this reservation cannot be lightly dealt with. At the present stage of international community, if it can be called a community at all, this right of self-defense or self-preservation is even now a fundamental right and follows from the very nature of international relations. The whole of the duties of states are normally subordinate to this right.

Hall says:

"Where law affords inadequate protection to the individual, he must be permitted, if his existence is in question, to protect himself by whatever means may be necessary, and it would be difficult to say that any act not inconsistent with the nature of a moral being is forbidden, so soon as it can be proved that by it, and it only, self-preservation can be secured. But the right in this form is rather a governing condition, subject to which all rights and duties exist, than a source of specific rules, and properly perhaps it cannot operate in the latter capacity at all. It works by suspending the obligation to act in obedience to other principles . . . . . There are . . . . . circumstances falling short of occasions upon which existence is immediately in question, in which, through a sort of extension of the idea of self-preservation to include self-protection against serious hurt, states are allowed to disregard certain of the ordinary rules of law in the same manner as if their existence were involved . . . . . .

"The right of self-preservation in some cases justifies the commission of acts of violence against a friendly or neutral state, when from its position and resources it is capable of being made use of to dangerous effect by an enemy, when there is a known intention on his part so to make use of it, and when, succeed, either through the helplessness of the country or by means of intrigues with a party within it . . . . . .

"States possess a right of protecting their subjects abroad."

RIVIER gives an account of this right of self-defense or self-preservation thus:

"These rights of self-preservation (conservation, respect, independence and mutual trade), which can all be carried back to a single right of self-preservation, are founded on the very notion of the state as a person of the law of nations. They form the general statute (loi) of the law (droit) of nations, and the common constitution of our political civilization. The recognition of a state in the quality of a subject of the law of nations implies *ipso jure* the recognition of its legitimate possession of those rights. They are called essential, or fundamental, primordial, absolute, permanent rights, in opposition to those arising from express or tacit conventions, which are sometimes described as hypothetical or conditional, relative, accidental rights."

"When", RIVIER says, "a conflict arises between the right of self-preservation of a state and the duty of that state to respect the right of another, the right of self-preservation overrides the duty. PRIMUM VIVERE. A man may be free to sacrifice himself. IT IS NEVER PERMITTED TO A GOVERNMENT TO SACRIFICE THE STATE of which the destinies are confided to it. The government is then authorized, and even in certain circumstances bound, to violate the right of another country for the safety of its own. That is the excuse of necessity, an application of the reason of state. It is a legitimate excuse."

According to KAUFMANN, the state is the instrument of an ideal which can justly claim the subjection of its members to an imposed command. *That ideal is* self-preservation and self-development in history in a world of competing physical forces represented by other states. This *ideal* can be ultimately fulfilled only by physical and moral force on the part of the state; it can be fulfilled only by enlisting all the physical and moral powers of its members. The essence of the state is power, as revealed in victorious war.

According to HEGEL, the relation of states is one of independent entities which make promises, but at the same time stand above their promises. Nothing done *in the interest of the preservation of the state* is illegal.

There are writers who support the view that there is nothing higher than the INTEREST OF EACH OF THE PARTIES AS JUDGED BY EACH PARTY HIMSELF. If the other party is unwilling to give in, then only war can decide whose interest is legally stronger. This, according to them, is not the denial of law, but the only legal proof possible in international life.

WESTLAKE, who takes a more restricted view of the right says:

"What we take to be pointed out by justice as the true international right of self-preservation is merely that of self-defense. A state may defend itself by preventive means if, in *its conscientious judgment* necessary, against attack by another state, threat of attack, or preparations or other conduct from which an intention to attack may reasonably be apprehended. In so doing, it will be acting in a manner *intrinsically defensive*, even though *externally aggressive*. In attack, we include all violation of the legal rights of itself or of its subjects, whether by the offending state or by its subjects without due repression by it or amply compensation, when the nature of the case admits compensation. And

by due repression we intend such as will effectually prevent all but trifling injuries (de minimis non curate lex), even though the want of such represssion may arise from the powerlessness of the government in question. *The conscientious judgment of the state acting on the right thus allowed must necessarily stand in the place of authoritative sanction, so long as the present imperfect organization of the world continues.*"

THESE DIFFERENT VIEWS OF THE RIGHT OF SELF-DEFENSE ARE NOT OF MUCH consequence to us for our present purposes. What is necessary for us to notice is that the conception of aggression being only the complement of that of self-defense, so long as the question whether a particular war is or is not in self-defense remains unjusticiable, and is made to depend only upon the "conscientious judgment" of the party itself, THE PACT FAILS TO ADD ANYTHING TO THE EXISTING LAW. It only serves to agitate the opinion of the world, and the risk involved in its violation lies only in rousing an unfavourable world opinion against the offending party. Nothing can be said to be "law" when its obligation is still for all practical purposes dependent on the mere will of the party.

Professor Lauterpacht points out that "the question of the fulfillment of the Pact of Paris *has been treated as non-justiciable matter* as the result of the determination of its principal signatories to remain the sole judges whether a case for self-defense (that is for disregarding the object of the treaty) has arisen". The question is undoubtedly of the highest importance for the state concerned, but, as Professor Lauterpacht very rightly points out, it is at the same time *par excellence* a question *capable of* judicial cognizance. The claim that it should be removed from the purview of judicial determination is not an illustration of non-justiciability of important matters, but a controversial interpretation calculated to reduce the value of the Pact of Paris as a legal instrument.

The question before us, however, is not whether the fulfillment or non-fulfillment of the Pact was *capable of* judicial cognizance, but WHETHER IT WAS SO MADE BY THE PARTIES. Remembering that the question is entirely dependent upon the Covenant of the Parties—upon the meaning of the Parties to the Covenant, if the Parties themselves intended to give it a particular meaning or have understood and acted upon it in a particular way, it is not open to us now to ascribe any other meaning to it.

The learned Professor suggests that probably the view as to the impossibility of judicial determination of the recourse to force in self-defense is due to the confusion of two different aspects of this question. There is, first, the actual use of force when a state believes its life and vital interests to be endangered beyond possibility of redress if immediate action is not taken, when, in the words of the classical definition, a state believes that there is a necessity for action which is instant, overwhelming, and leaving no choice of means and no moment for deliberation. It is of the essence of the legal conception of self-defense that recourse to it must, in the first instance, be a matter for the judgment of the state concerned. But this is no reason why is should not remain justiciable to see if the state really had any occasion so to believe—why

the legitimacy of the action taken should not be justiciable.

It is rightly pointed out that:

> "It is not the right of self-defense which threatens to introduce the principal element of disintegration into the General Treaty for the Renunciation of War. The possible element of disintegration lies in the assertion that recourse to self-defense is not amenable to judicial determination."

If this were the correct interpretation of the Treaty, then, it is admitted that the result would be *to deprive it of its legal value* as a means of preventing war. The Treaty would stamp as unlawful such wars only as the belligerents might openly declare to be undertaken with the intention of aggression. It could not be described as rendering unlawful wars which States, fully conscious of the moral and political implications and risks of their action, honestly declared to be undertaken in repelling a danger, actual or threatened, to their vital interests. It would be immaterial that, under this interpretation, discretion in the exercise of the right of self-defense would be subject to the general legal requirement of good faith in the performance of treaty obligations. Various systems of law contain provisions which expressly refer to the requirement of good faith. It is the elimination of any objective legal authority endowed with the competence to ascertain whether the duty of good faith has been complied with, which would largely be destructive of the legal object of the Treaty so interpreted.

Professor Lauterpacht himself, however, is of the opinion that there is nothing in the declaration or reservations referring to the Pact for Renunciation of War, and concerning the right of self-defense, which necessitates the assumption that the signatories of the Treaty intended to adopt this interpretation which would deprive the Treaty of most of its legal value. He says:

> "It is possible, perhaps probable, that the intention was merely to reaffirm a principle necessarily valid without any express declaration, namely, that implied in the first-mentioned interpretation of the non-justiciability of the right of self-defense."

This may be so; or from what has been said of the nature of this right the States might have thought otherwise. We are not much concerned with the question what should or could have been done. IF, AS A MATTER OF FACT, THE QUESTION WAS KEPT TO BE DETERMINED BY THE STATE CONCERNED, THE VALUE OF THE PACT MUST BE APPRAISED WITH REFERENCE TO THIS FACT, and not with reference to what the fact might have been. Even if the Parties did so under a misapprehension or misconception of the scope of self-defense, it is not open to us to go behind it so far as the effect of the Pact is concerned. The prosecution in the case before us very fairly admitted in its summation that "when the Kellogg-Briand Pact was signed, it was stipulated that it did not interfere with the right of self-defense, and that each nation was to be the judge of that question."

In my opinion, it would not be correct to say that the parties to the Pact intended to reserve for their own judgment only the question of immediate action. The parties themselves never understood the Pact in that way, and, I

believe, Mr. Kellogg himself made it amply clear what the Pact was intended by the parties to mean in this respect.

Professor Lauterpacht points out the principal difficulty to be that there is no machinery provided in the Pact for a legal regulation of the recourse to self-defense. Such machinery exists in the Covenant of the League of Nations. According to him, the Council and the Assembly of the League provide a possibility for evolving not only a moral, but also a legal judgment on the observance of the provisions of the Covenant as to recourse to war. It should, however, be remembered that the League of Nations was not an organization for all nations, and the organization itself provided for withdrawal of nations from it. The United States was no party, and Japan withdrew and the U. S. S. R. became a member after her withdrawal. Further, covenants prior to the Pact of Paris had reference only to a procedure to be followed in coming to war; these did not affect the legality or otherwise of the war itself.

In interpreting the Pact, we must not in any way be influenced by the fact that we are called upon to interpret it in a case against a vanquished people. Our interpretation must be the same as it would have been had the question come before us prior to any decisive war. With international law still in its formative state, great care must be taken that the laws and doctrines intended to regulate conduct between state and state do not violate any principles of decency and justice. History shows that this is a field where man pays dearly for mistakes. Those who feel interested in these trials, not for retaliation, but for the future of world peace, should certainly expect that nothing is done here which may have the effect of keeping the hatefire burning.

The function of law is to regulate the conduct of parties by reference to rules whose formal source of validity lies, in the last resort, in a precept IMPOSED FROM OUTSIDE.

Within the community of nations, this essential feature of the rule of law is constantly put in jeopardy by the conception of the Sovereignty of States which deduces the binding force of international law from the will of each individual member of the international community.

The inquiry involved in the consideration of the question raised in the case before us is at the vey start confronted with the doctrine of sovereignty. The same doctrine confronts us in our inquiry as to the question of limitation of the function of law in the settlement of international disputes.

The theory of the sovereignty of states may reveal itself in international law mainly in two ways:

First, as the right of the state to determine what shall be for the future the content of international law by which it will be bound,

Second, as the right to determine what is the content of existing international law in a given case.

As a result of the first:

1. A state is not bound by any rule unless it has accepted it expressly or tacitly.
2. In the field of international legislation, unanimity and not mere majority is essential.

The second aspect connotes that the state is to be the sole judge of the applicability of any individual rule to its case.

So long as the states retain this right in respect of any rule, that rule, in my opinion, does not become law in the ordinary sense of the term. Even if we choose to give it the name "law", it will only be so in a specific sense, and its violation leads us nowhere. Its violation does not become a crime for the simple reason that none but the alleged defaulter can say whether it has been violated.

The view I take of the legal effect of the Pact makes it unnecessary for me to consider the various adverse comments made on it. It is sometimes said that the Pact was designed to be a perpetual guarantor of the *status quo* and thus, by it, an unstable and unjustifiable *status quo*, was sought to be erected in 1928.

We need not proceed to examine these criticisms; perhaps they are correct. At least Mr. Justice Jackson of the U.S.A. in his summing up of the case against the German War Criminals at the Nurnberg Trial lent much support to this view by refusing to go behind the state of affairs in Europe existing in a certain specified year. He would not allow any justification to come in from any prior period. But these criticisms have no bearing on the question before us. If otherwise law, such shortcomings as are propounded through these comments would not have changed the character of the Pact as law.

In order to introduce the *conception of crime* in international life, it is essential that there would be an INTERNATIONAL COMMUNITY brought under the reign of law. But, as yet, there is no such community.

The expressions "International Law" and "International Community" are both used in relation to the existing international life only in some *specific sense*.

I have elsewhere discussed the character of international community. No doubt there is such a community in a sense, but to say that it is a COMMUNITY UNDER THE REIGN OF LAW is only to extend the meaning of both law and community so as to enable them to cover some strange fields.

Apart from the domain regulated by expressly accepted international obligations, there is no international community. As these obligations exist only in the limited sphere of the expressly recognized partial community of interests, the individual interests of each state must always remain the guiding consideration.

Modern international law was developed as a means for regulating external contacts rather than as an expression of the life of a *true society*.

Maine, writing before the necessity for an international constitutional system became evident, uses harsh language. He calls it an Eighteenth Century superstition, "a superstition of the lawyers' seized upon and promulgated by philosophers, in their eagerness to escape from what they deemed a superstition of the priests".

It is the misfortune of the international lawyers, not their fault, that the confusions and perplexities of our time should have excited false hopes and led to a revival of superstition and even to the promulgation of what may not un-

fairly be described as *substitute religions in legal wrappings*.

On a careful consideration of THE NATURE AND THE SCOPE OF THE OBLIGATIONS ASSUMED BY THE STATES UNDER THE PACT OF PARIS, I have arrived at the conclusion that the pre-existing *legal* position of war in international life remained unaffected. The only effect produced by the Pact is the possible INFLUENCING OF THE WORLD OPINION against the offending belligerent and thereby developing the law-abiding sentiment as between states. However insignificant this effect may appear to some writers, men of very high position and authority attached much importance to it. Lord Parker of Waddington, one of the Lords of Appeal, in the debate of March 19, 1918, in the House of Lords on the League of Nations, remarked:

> "One thing only I fear, and that is that the movement in favour of the League of Nations runs some risk by reason of the fact that its advocates are in somewhat too great a hurry. They are devoting their attention to the details of the superstructure rather than to the stability of the foundation."

He was speaking on the schemes for an international tribunal and an international police force. After pointing out that the schemes were based upon a false analogy between municipal and international law, Lord Parker said:

> "Every sound system of municipal law, with its tribunal and organized police, is a creation of historical growth, having its roots far in the past ..... if we attack that part of the problem at first, I have very serious fears that the whole structure that we are trying to build may fall about our ears. It is a very serious matter to ask great nations in the present day to agree *beforehand* to the arbitrament of a tribunal consisting of representatives of some two dozen or three dozen states, many of whom may be indirectly interested in casting their votes on this side or on that ....."

He pointed out that the only sound course was to recognize that lawabiding sentiment as between states was still only in the embryonic stage. The right method of approach was to concentrate on mobilizing sentiment and opinion against war itself, as anti-social conduct, a crime in violence against the community. Professor Zimmern sums up the speech saying that on the basis of embryonic world citizenship, Lord Parker builds a structure more firmly grounded, if less imposing, than that of the legalists. It is the organization of the hue and cry and nothing more. This is a stage preceding the stage of reign of law and is one without which no reign of law is possible.

Some such consideration might have prevailed with the parties to the PACT OF PARIS which induced them to leave the Pact where it now stands. Perhaps this is all that was thought possible and advisable in the present *rudimentary stage of the world community*. Perhaps much expectation was based on the assumption that a country does not lightly throw away its fair fame—that national reputation is an asset that is generally high prized by modern states.

The possibility of influencing the world opinion one way or the other does not seem to be looked upon as a negligible factor in the present day inter-

national life. At least the nations seem to attach much value to this opinion and propaganda for this purpose is daily gaining in importance in that life.

It will be of some interest to notice in this connection what M. Briand himself said about this matter while welcoming the first signatories of the Pact.

> "It may be objected," Briand said, "that this pact is not practicable; that it lacks sanctions. But does true practicability consist in excluding from the realm of facts THE MORAL FORCES, *amongst which is that of public opinion*? In fact, the state which would risk incurring the reprobation of all its associates in the pact would run the positive risk of seeing a kind of general solidarity, gradually and spontaneously directed against it, with the redoubtable consequence which it would soon feel. And where is the country, signatory to the pact, which its leaders would assume the responsibility of exposing to such a danger?" Vide Ex. 2314A in this case.

The same view of its sanction was taken in 1929, by Mr. Stimson, the then Secretary of State of the United States of America, in a statement made public in which he denied the British argument that as between the Signatory States 'there has been in consequence a fundamental change in the whole question of belligerent and neutral rights', and declared that "its efficacy depends *solely* upon the PUBLIC OPINION of the world and upon the *conscience* of those nations who sign it."

I would now take up the remaining question in relation to the Pact, namely, whether, THOUGH THE PACT OF PARIS DID NOT DECLARE ANY WAR TO BE A CRIME, ITS EFFECT WAS TO DEMAND JUSTIFICATION for a war in international life and thus to render any war that would not be justifiable a crime or an illegal thing by its very nature.

This is Lord Wright's view and it requires a serious consideration.

As I understand him, Lord Wright wants to say that as soon as by the Pact of Paris the signatory nations renounced war as an instrument of national policy, it no longer remained within the right of any nation to wage any war; war as a right was thus banished from international life. If after this any nation should think of war, it must justify its action. Otherwise the nation commits a crime, a war by its very nature involving criminal acts. A war can be justified only if it is necessitated by self-defense. Hence an aggressive war being a war which is not in self-defense, is unjustifiable and consequently a crime.

Perhaps this would have been so had the Pact been unqualified by any reservation. The whole difficulty is that the Pact of Paris by leaving the question what is war in self-defense to be determined by a Party itself, subject only to the risk of an adverse world opinion, rendered its effect absolutely nugatory in this respect. In my opinion, when by any rule the Party itself is allowed to remain the sole judge of the justifiability of any action taken by it, the action still remains without the province of any law requiring justification and its legal character remains unaffected by the so-called rule.

As I have already noticed, Dr. Lauterpacht inclines to the view that the Pact should be taken to mean that war as an instrument of national policy is given up, subject only to the right of self-defense. The party claiming this right may take action on the strength of his own judgment, but the existence or otherwise of this right is justiciable by others. This is also the contention of the Prosecution in the present case.

Similar seems to be the opinion of Mr. Quincy Wright. After pointing out how in the earlier ages the concept that war is a suitable instrument of justice prevailed subject only to certain limitations upon the application of this concept, Mr. Wright says:

> "The covenant with hesitation, and the Pact of Paris with more firmness, proceed upon a different hypothesis—that war is not a suitable instrument for anything except defense against war itself, actual or immediately threatened. Thus, under these instruments, the tests of "just war" have changed from a consideration of the *subjective ends* at which it is aimed, to a consideration of the *objective conditions* under which it is begun and is continued."

He points out how with the post-war efforts at world organization, the *jus ad bellum* becomes the predominating feature of international law, with a concept which no longer attempts to distinguish between the justice or the injustice of the belligerent's cause, but instead, *attempts* to distinguish between the *fact of aggression* and the *fact* of defense.

I have already given my reason why I could not accept the view of Dr. Lauterpacht in this respect. Mr. Quincy Wright only says that the test provided is a consideration of the *objective conditions* instead of the *subjective ends*. But to whom is this consideration left? Mr. Wright does not give any decisive answer to this question. I have already given my view of this question and in my opinion this is the crucial question so far as the present matter is concerned.

The right of self-defense referred to by the various states in relation to the Pact of Paris is certainly not the same as the right of private defense given by a national system against criminal acts, as is contended by the Prosecution in the present case. It is the right inherent in every sovereign state and implied by the sovereignty of the state. It is not the right which comes into existence by some act of violence of an opponent. I have already quoted from authorities to show the scope of this right and its fundamental character. It is the very essence of sovereignty and so long as sovereignty remains the fundamental basis of international life, IT CANNOT BE AFFECTED BY MERE IMPLICATION.

The proposition that the question of interpretation of a treaty is a matter justiciable in international law need not be denied. At the same time the right of self-defense or self-preservation is equally a fundamental matter in international life. Such a right cannot be said to have been limited in any way by implication. If the right was non-justiciable for the purposes of international law at the date of the Pact, it must be left still a non-justiciable matter. The Pact of Paris did not change the legal position in this respect.

There is certainly a great deal of difficulty in reconciling the uncompro-

mising claims of national sovereignty in international relations with the growing necessities dictated by political developments in international relations and by demands of the growing public consciousness and opinion of the world. But the solution of this difficulty does not lie in staging trials of this kind only.

In international law, unlike municipal law, the general justiciability of disputes is no part of the existing law; it is in the nature of a specifically undertaken and restrictively interpreted obligation. Accordingly in international law, when the question arises whether any actual dispute is justiciable or not, the proper procedure is necessarily to inquire whether the contesting states have in regard to that particular dispute undertaken to accept the jurisdiction of an international tribunal.

As far back as 1934 at a conference of the International Law Association held in Budapest views were expressed that the Pact of Paris had brought in a revolution in international law—not a revolution in the sense that war had ceased—but that, while war waged as an instrument of national policy prior to 1928 was lawful, and gave rise to belligerent rights and neutral duties, such a war waged after 1928 had become unlawful and, consequently, could not give rise to rights and duties: *ex injuria non oritur jus*. Similar views were reiterated at the Fortieth Conference of the Association held at Amsterdam in 1938. Some of the international lawyers asserted that no party to the Pact of Paris, which would violate the Pact, would have any rights whatever as a belligerent, as regards either the state attacked or neutrals, and that it would render itself in law liable for every injury done, whether to the state attacked and its members or to a neutral state and its members.

This view as to the effect of the Pact on the legal character of war was not shared by all and certainly did not in any way reflect the changes that might take place amongst nations in their practical regard for the Pact. If the effect of the Pact were to render war illegal depriving its author of belligerent rights there would be no duty of neutrality in any nation on the occasion of any such war.

Dr. Scheuner of Vienna examined the practice of nations with regard to neutrality since 1928, and the result of his examination was presented before the Conference at Amsterdam referred to above. The learned Professor traced the development of neutrality first since the foundation of the League of Nations up to 1928 and then since the Kellogg-Briand Pact. For the first period he considered how much regard the several nations paid to the Articles of the League Convention and summed up the result thus:

> "In practice ... all the states have acted during this period as though the law of the neutrality had continued to exist."

He then cited instances in support of this view.

> Coming to the second period Dr. Scheuner found "that the governments since 1928 have in their treaties as well as in their political declarations and actions accepted the point of view that neutrality in its traditional sense is not incompatible with the obligations of the members of

the League and of the signatories of the Briand-Kellogg Pact of Paris. A number of governments have not hesitated to declare themselves neutral, to undertake obligations to remain neutral in the event of a war, or to declare that in the event of war they wish to remain neutral . . . ."

Though not decisive, this throws some light on the question as to what changes took place amongst nations in their PRACTICAL REGARD FOR THE PACT. Nations do not seem to have behaved as if war after 1928 became an illegal thing. At least they preferred to recognize belligerent rights even in the case of a war in violation of the Pact. As I shall show later, both the U. S. A. and the U. K. entertained this view of the incidents of belligerency attaching to such a war. On February 27, 1933, Sir John Simon, discussing in the House of Commons the embargo on the shipments to China and Japan spoke of Great Britain as a "neutral government", and of the consequent necessity of applying the embargo to China and Japan alike. So, at that time Japan's war in China was not considered to be an illegal thing.

As has been pointed out by Mr. Finch:

1. In January 1933, during the alleged aggression of Japan upon China in violation of the Nine Power Treaty, the covenant of the League of Nations and the Pact of Paris, Secretary of State Mr. Stimson, recommended that Congress "confer upon the President authority in his discretion to limit or forbid, in co-operation with other producing nations, the shipment of arms and munitions of war to any foreign state when in his judgment such shipment may promote or encourage the employment of force in the course of a dispute or conflict between nations." No congressional action was taken upon this recommendation, but two years and a half later Congress passed the Neutrality Act of August 31, 1935, placing an embargo on the export of munitions of war to *every* belligerent state.
2. This law was put into effect by President Roosevelt in the War of Italy upon Ethiopia.
3. The Neutrality Act of 1935 was of a temporary character. It was replaced by permanent legislation in the Neutrality Act of May 1, 1937. This Act continued the embargo on the shipment of arms etc. to ALL belligerents . . .
4. War in Europe started by the invasion of Poland on September 1, 1939.

   Three weeks later, on September 21, President Roosevelt sent a message to Congress requesting the repeal of the embargo and a return to the "historic foreign policy" of the U. S. based on the "age-old doctrines of international law", that is "on the solid footing of real and traditional *neutrality*", which, according to John Quincy Adams "recognizes the cause of both parties to the contest as just—that is, it avoids all consideration of the merits of the con-

test."

Mr. Finch points out that in the light of this legislative history of the official attitude of the government of the U. S. toward the interpretations of the pact, it is impossible to accept the thesis that a war in violation of the Pact was illegal in international law on September 1, 1939.

My own view is that war in international life remained, as before, outside the province of law, its conduct alone having been brought within the domain of law. The Pact of Paris did not come within the category of law at all and consequently failed to introduce any change in the legal position of a belligerent state or in the jural incidents of belligerency.

If the Pact of Paris thus failed to affect the legal character of war, either directly or indirectly, the next question is WHETHER ANY CATEGORY OF WAR BECAME CRIME OR ILLEGAL THING in international life in any other way.

Dr. Glueck answers this question in the affirmative and says that a CUSTOMARY INTERNATIONAL LAW developed making an aggressive war a crime in international life.

For this purpose Dr. Glueck relies on the following data:

1. The time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime.
2. It is familiar law in the international field that custom may, in the words of Article 38 of the statute of the Permanent Court of International Justice, be considered "as evidence of a general practice accepted as law".
   (*a*) All that is necessary to show is that during the present century a widespread custom has developed among the civilized states to enter into agreements expressive of their solemn *conviction* that unjustified war is so dangerous a threat to the survival of mankind and mankind's law that it must be branded and treated as criminal.
3. In addition to the Pact of Paris, the following solemn international pronouncements may be mentioned as the evidence of this custom and of this conviction:
   (*a*) The agreements limiting the nature of the deeds permissible in the extreme event of war: The Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1929 regulating the treatment of prisoners of war;
   (*b*) The draft of a treaty of mutual assistance sponsored by the League of Nations in 1923, solemnly declaring (Article 1) that aggressive war is an international crime, and that the parties would undertake that no one of them will be guilty of its commission.
   (*c*) The preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes (Geneva Proto-

col) referring to aggressive war as crime.

(*d*) The declarations made at the Eighteenth Plenary meeting of the Assembly of the League of Nations held on September 24, 1927.

(*e*) The unanimous resolution, February 18, 1928, of the twenty-one American Republics at the Sixth (Havana) Pan American Conference declaring that "War of aggression constitutes an international crime against the human species".

(*f*) The preamble of the general convention signed by the representatives of all the republics at the international conference of American states on conciliation and arbitration held at Washington in December 1928, containing the statement that the signatories desired "to demonstrate that the condemnation of war as an instrument of national policy in their mutual relations set forth in the Havana Resolution constitutes one of the fundamental bases of inter-American relations . . . ."

(*g*) The preamble of the Anti-war Treaty of Non-Aggression and conciliation signed at Rio de Janeiro, October 10, 1933, stating that the parties were entering into the agreement "to the end of condemning wars of aggression and territorial acquisitions . . . ."

(*h*) Article 1 of the notable Draft Treaty of Disarmament and Security prepared by an American group and carefully considered by the Third Committee on Disarmament of the Assembly of the League of Nations 1924, providing that "The High Contracting Parties solemnly declare that aggressive war is an international crime . . . ."

(*i*) Senator Borah's Resolution introduced on December 12, 1927.

As evidence of the suggested custom Dr. Glueck refers to a few solemn international pronouncements noticed above. These pronouncements, it may be observed, are mostly in agreements between states.

Agreements between states no doubt may have the significance attached to them by Dr. Glueck. Besides creating rights and duties *inter-partes*, they may have the significance of being the pronouncement of some GROWING POPULAR CONVICTION and may thus *ultimately contribute to* the growth of a rule as an international customary law.

There is however some difficulty in determining the value of usages professing to be the groundwork of rules derogating from accepted principles. As has been pointed out by Hall, in some cases their universality may establish their authority; but in others, there may be a question whether the practice which is said to uphold them, though unanimous as far as it goes, is of value enough to be conclusive; and in others again it has to be decided which of two competing practices, or whether a practice claiming to support an exception,

is strong enough to set up a new, or destroy an old, authority.

In the present case the alleged customary law, if established, would destroy a well-established fundamental law, namely, the sovereign right of each national state. Before the alleged custom was established this right was recognized as a fundamental one in the international system and THE REASON WHY THIS HAD TO BE RECOGNIZED as an essential one still exists.

> "The interests protected by international law are not those which are of major weight in the life of states. It is sufficient to think of the great political and economic rivalries to which no juridical formula applies, in order to realize the truth of this statement. International law develops its true function in a sphere considerably circumscribed and modest, not in that in which there move the great conflicts of interests which induce states to stake their very existence in order to make them prevail."

This is what Anzilotti says about the sphere of international law as it now stands. It may not be an accurate statement from the point of view of the actual content and scope of international law in so far as it wants to say that international law is concerned only with minor issues between states. The major questions of the existence of states and their rights as members of the international community certainly form the subject matter of that law. But even now questions of very great weight in the life of states are left OUTSIDE the system and no state would agree to make them justiciable. It is an undeniable fact that such major questions of international relations have been regarded as pertaining to the domain of politics and not of law. *No customary law can develop in respect of them until they are brought within the domain of law*. So long as states persist in retaining their own right of judgment as to whether or not a certain requirement is necessitated by their self-defense, the matter remains outside the domain of law.

I have already quoted from the views expressed by Professor Quincy Wright in 1925 to show that in his view no war was crime up to that time.

In December 1927, Senator Borah in his resolution before the United States Senate stated that until then "War between nations has always been and still is lawful institution, so that any nation may, with or without cause, declare war against any other nations and be strictly within its legal rights." Dr. Glueck refers to this resolution but omits to notice this statement of the then existing law.

These statements, in my opinion, correctly give the law then existing. The question, therefore, is when did the alleged customary law develop? It did not certainly develop during the few months preceding the date of the Pact of Paris. In my opinion it never developed even after that date. CUSTOMARY LAW DOES NOT DEVELOP ONLY BY PRONOUNCEMENTS. Repeated pronouncements at best developed the custom or usage of making such pronouncements.

Before we can accept pronouncements referred to by Dr. Glueck as evidence of proposed customary rule we must remember that these pronouncements relate to the very foundation of the present international system which keeps such issues outside the domain of law.

NATIONAL SOVEREIGNTY is, even now, the very basis of the so-called international community. States are not only parties but also judges and executors in their own cases in relation to certain matters. The dangers of a too rigid application of the doctrine of national sovereignty and of the principles of "self-determination" are not even now fully appraised. It is still considered better to run the risk of sacrificing the directing influence of any central authority, than to allow its operations to be extended into the sphere of the internal activity of states.

The division of mankind into national states dates from the time when the idea of the World Empire had disappeared, and all the states confronted one another independently, and without supreme authority.

The division was indispensable: ITS JUSTIFICATION had been that the members of the different states could develop their qualities and talents without being hindered by the contradictory views and endeavours of others who might be dominated by an entirely different view of life. Such a national formation is of special value, because it is the only way in which a uniformly gifted national group can develop its own life, its own talents and abilities to the utmost. It is the vocation of a national society to thoroughly develop every capability inherent in any people and its justification is its affording an opportunity for the profitable employment of everyone's activity everywhere.

A national society, from the very circumstances of its origin and development, is aware of the bearing of the interests of its own members upon the universal objects of general humanity and consequently is bound to regard other national societies not only as entitled to rights equal with its own, but as supplementing itself. National states thus cannot seek any absolute seclusion, nor strive after any absolute self-sufficiency; and IN THIS SENSE the period of national states is also marked by the period of international society. But this international society is anything but a society under the reign of law.

No doubt the national state cannot be considered so definite and perfect a policy amongst the societies as to form THE UTMOST BOUNDARY OF *their development*. Every class of the population has its own onesidedness; it will remain stationary on a certain plane of education and knowledge unless it receives impulses from without and feels the influence of foreign images and ideas; so that a constant exchange between its own development and between the assimilation of, and adaptation to, external ideas takes place. In this way nations have developed and are developing in state communities.

The federation of mankind, based upon the external balance of national states, may be the ideal of the future and perhaps is already pictured in the minds of our generation. But until that ideal is realized, the fundamental basis of international community, if it can be called a community at all, is and will continue to be the national sovereignty.

INTERNATIONAL ORGANIZATION has not, as yet, made any provision for full realization of this very essence of national sovereignty. Its realization is left to the POWER of the national state. There has not, as yet, been any organization for real international peace. Peace, hitherto, has been conceived of only as negation of war and nothing more. In such circumstances, so long as

the application of "power" remains the fundamental principle, PRONOUNCEMENTS LIKE THOSE REFERRED TO BY DR. GLUECK WOULD, in my opinion, FAIL TO CREATE ANY CUSTOMARY LAW.

But what are really these pronouncements? And before we attach any value to them we must not ignore the fact that whenever called upon to declare a war to be a crime states did not adequately respond.

The states have always been careful in retaining their right to decide WHAT THEY WOULD CONSIDER TO BE WAR IN DEFENSE. None as yet is prepared to make the question whether a particular war is or is not "in defense" justiciable. So long as a state retains its own decision as final in this respect, no war is made criminal.

After a careful consideration of all these facts and circumstances I am of the opinion that NO INTERNATIONAL CUSTOMARY LAW COULD DEVELOP through the pronouncements referred to by Dr. Glueck and relied on by the prosecution.

The pronouncements at most only amounted to expressions of the conviction of persons making them. But these are not yet attended by any act on the part of any of the states. Custom as a source of law presupposes two essential elements:

1. The juristic sentiments of a people.
2. Certain external, constant and general *acts* by which it is shown.

It is indicated by identical conduct under similar external circumstances. THE CONDUCT OF NATIONAL STATES during the period in question rather goes the other way.

It may be that Dr. Glueck is thinking of "customary law" in a specific SENSE. It cannot be denied that in one sense customary law, statute and juristic law are all shoots from the same slip, namely, POPULAR consciousness. In this sense the center of gravity of the development of all law—not only of customary law—can be placed into the legal consciousness, "the natural harmony of the conviction of a people, which is a popular universal conviction". For this purpose its emergence in usage is not essential to the origin of law. In this *sense* there need be no other prerequisites to the origination of customary law than a common popular conviction. We are, however, not much concerned with customary law in this SPECIFIC SENSE. No doubt it has its own scientific value. But we are concerned with customary law in a sense in which it becomes applicable by a judge. There are prerequisites to its applicability by the judge. Puchta was not concerned with such prerequisites in his scientific evaluation of customary law, but he recognized them: "But if we take prerequisites to mean something else, *e.g.*, if we take it in the sense of a prerequisite to the application by the judge, to his acceptance of customary law, then that whereof we are speaking no longer is a prerequisite to customary law itself. In this case the question to be answered is: What must the judge take into account when a party litigant appeals to customary law or when for any other reason he is called upon to consult this source of law? What are the presuppositions under which customary law can actually be assumed to exist?" *There is thus a sharp distinction between the question as to the origin of customary law*

in the mere popular conviction and as to its applicability by a court. There may be customary law in the sense that it exists in the conviction of the people; yet it may not be law applicable by a court because the prerequisites to its applicability by the court are lacking. Herein comes THE USAGE which is wanting in the present case. The people should not merely be conscious of their law but they must live their law, —they must act and conduct themselves according to it.

This living according to law is required not as a mere form of manifestation but also as a means of cognition of customary law. When the conduct of the nations is taken into account the law will perhaps be found to be THAT ONLY A LOST WAR IS A CRIME.

I may mention here in passing that within four years of the conclusion of the Pact there occurred three instances of recourse to force on a large scale on the part of the signatories of the Pact. In 1929 Soviet Russia conducted hostilities against China in connection with the dispute concerning the Chinese Eastern Railway. The occupation of Manchuria by Japan in 1931 and 1932 followed. Then there was the invasion of the Colombian Province of Leticia by Peru in 1932. Thereafter, we had the invasion of Abyssinia by Italy in 1935 and of Finland by Russia in 1939. Of course there was also the invasion of China by Japan in 1937.

Dr. Lauterpacht points out that it is arguable that a war or a succession of wars between a considerable number of important signatories would remove altogether (*i.e.*, also for other signatories) the basis of a Pact in which a substantial degree of universality may appropriately be regarded as being of the essence. But we may leave this question alone for the present.

In my opinion, no category of war became illegal or criminal either by the Pact of Paris or as a result of the same. Nor did any customary law develop making any war criminal.

Mr. Comyns Carr for the prosecution appealed to what he characterized as the very foundation of international law and invited us to apply what he called well-established principles to new circumstances. He said:

> "International law like the legal system of . . . all of the English speaking countries . . . consists of a common law and a more specific law, which in the case of individual countries is created by statute, and in the case of international law is created by Treaties. But the foundation of international law, just like the foundation of legal system . . . of English speaking countries is, common law. That is to say, it is the gradual creation of custom and of the application by judicial minds of old established principles to new circumstances. It is unquestionably within the power, and, . . . the duty of this Tribunal to apply well-established principles to new circumstances, if they are found to have arisen, without regard to the question whether precise precedent for such application already exists in every case."

I would presently consider how far this so-called foundation of international law will carry us towards declaring any category of war as having been a crime in international life. The context in which Mr. Carr made this appeal

only goes to indicate that the well-established principle referred to by him relates to a "nomenclature". Mr. Carr is there dealing with the defense contention as to the import of the expression "war criminal" as used in the Potsdam Declaration. He refers to Article 227 of the Treaty of Versailles as "laying down the principle and applying what was already a well-established principle to new circumstances". The Article in question of the Treaty of Versailles is the one wherein "the Allied and Associated Powers" proposed "publicly to arraign" the German Emperor "for a supreme offense against international morality and the sanctity of treaties". The only principle or principles that can possibly be gathered from this Article seem to be:

1. That the Allied and Associated Powers may place on trial the head or heads of the defeated state.
2. That such powers may constitute a Tribunal for such trial.
3. That such a Tribunal is to be guided by the highest motives of international policy, with a view to vindicating the solemn obligation of international undertakings and the validity of international morality.

As I read the Article it contains no principle making the war a crime or obliging the tribunal set up by the victors to declare such a war illegal or criminal.

Analogous to Mr. Carr's appeal seems to be the appeal of Lord Wright to the progressive character of international law and to the creative power of an international tribunal. Similarly there have been appeals to the developed character of international community, to the laws of nature as also to a widening sense of humanity.

Lord Wright says:

> "It may be said that for ages it has been assumed, or at least taken for granted in practice, among the nations that any state has the right to bring aggressive war as much to wage war in self-defence and that the thesis here maintained is revolutionary. In fact, the evil or crime of war has been a topic of moralists for centuries. It has been said that 'one murder makes a felon, millions a hero'. The worship of the great man, or perhaps the idea of sovereignty, paralyses the MORAL SENSE OF HUMANITY. But INTERNATIONAL LAW IS PROGRESSIVE. The period of growth generally coincides with the period of world upheavals. THE PRESSURE OF NECESSITY stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind. THE EXPERIENCE OF TWO GREAT WORLD wars within a quarter of a century cannot fail to have deep repercussions on the senses of the peoples and their demand for an International Law which reflects international justice. *I am convinced that International Law has progressed*, as it is bound to progress if it is to be a living and operative force in these days of *widening sense of humanity*. An International Court, faced with the duty of deciding if the bringing of aggressive war is an international crime, is, I think, entitled and bound to hold that it is, for the reasons which I have briefly and imperfectly here sought to advance. I may add to what I have said,

that the comparatively minor but still serious outrages against the Pact, such as the rape of Manchuria in 1931 and the conquest of Abyssinia in 1935 were strongly reprobated as violations of the Pact of Paris; indeed though the Pact did not provide for sanctions, the latter outrage provoked certain sanctions on the part of some nations. In addition there is a strong weight of legal opinion in favour of the view here suggested."

He then proceeds: "An International Court, faced with the duty of deciding the question, would do so somewhat on the same principles as a municipal Court would decide the question whether a disputed custom has been proved to exist. It would do so on the materials before it. These materials are of course different in character where the dispute is whether the existence of a rule of International Law has been established as part of the customary law between the nations. I have indicated my view as to what such materials are. A Court would also seek to harmonize the customary rule with the principles of logic or morality and of the conscience of civilized mankind. The law merchant (to compare small things with great) existed as law enforceable by its proper courts before it was accepted as part of the national legal system. The Court would bear in mind that time and experience bring enlightenment and that obsolete ideas and prejudices become outworn."

The reference to the PROGRESSIVE CHARACTER OF INTERNATIONAL LAW is really an appeal to the ultimate vital forces that bring about the development of legal institutions.

The observations made in this connection are very valuable contributions to a theory of the sources of law and certainly are of permanent value as such. They expose the real workshop of the law.

No doubt it is the function of a theory of the sources of law to discover the vital forces that bring about the development of legal institutions. But these are yet to pass through some adequate social process in order to develop into law. I do not consider trials of the defeated nationals to be the just and adequate social progress of this purpose. At least in international life, in developing legal relations, the feeling of helplessness should not be allowed to serve as the basis. A mere Might's grip cannot long elude recognition as such and pass for Law's reach.

Like Lord Wright, Prof. Wright, Mr. Trainin and Dr. Glueck also appeal to this progressive character of the law and to a widening sense of humanity.

According to Dr. Glueck the time has arrived in the life of civilized nations when an international custom should be taken to have developed to hold aggressive war to be an international crime. He insists that an issue of this kind ought not to be disposed of on the basis of blind legalistic conceptualism; it should be dealt with realistically in the light of the practical as well as logical result to which one or the other solution will lead.

Mr. Trainin relies principally on the Moscow Proclamation of October 30, 1943 and emphasizes that this marks a new era of development of social life in international community. According to him to facilitate this process of

development and to strengthen these new ideas, juridical thought is obliged to forge the right form for these new relations, to work out a new system of international law, and, as an indissoluble part of this system, to direct the conscience of nations to the problem of criminal responsibility for attempts on the foundations of international relations.

In my view, international society has not yet reached the stage where the consequences contemplated by these learned authors would follow.

Even after the formation of the League of Nations we had only a group of COORDINATED STATES with their sovereignty intact. The best account of the developments of international society is given by Professor Zimmern in his book entitled "The League of Nations and the Rule of Law". Dr. Schwarzenberger also takes the same view.

"People learned from the war only "to substitute the notion of organic association between *independent*, self-governing and *cooperatively* minded peoples." Democracy and centralization do not, it is said belong to the same order of ideas. They are, in essence, as incompatible as freedom and slavery. The League of Nations thus "while morally a great effort of faith was administratively a great effort of decentralization."

It was simply *a system of international cooperation*.

> "The high contracting parties in order to promote international cooperation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, agreed to this covenant of the League of Nations."

No international community of any higher order came into being. The League showed particularly scrupulous regard for national sovereignty and laid special emphasis on such sovereignty by adopting the PRINCIPLE OF UNANIMOUS VOTE. *National sovereignty and national interest* continued to play the fundamental part in this organization.

There has no doubt been, since the outbreak of the World War, a feeling on the part of many writers that there should be some *restatement of the fundamental principles of international law* in terms of international life.

At the same time it must be said that THIS IS YET TO HAPPEN. The international organization as it now stands still does not indicate any sign of abrogation of the doctrine of national sovereignty in the near future.

As to the "WIDENING SENSE OF HUMANITY" prevailing in international life, all that I can say is that at least before the Second World War the powerful nations did not show any such sign. I would only refer to what happened at the meeting of the Committee drafting resolutions for the establishment of the League of Nations when *Baron Makino* of Japan moved a resolution for the declaration of the equality of nations as a basic principle of the League.

Lord Robert Cecil of Great Britain declared this to be a matter of highly controversial character and opposed the resolution on the ground that it "raised extremely serious problems within the British Empire." The resolution was declared lost: President Wilson ruled that in view of the serious objections on the part of some it was not carried.

Coupled with this, if we take the fact that there still continued domination of one nation by another, that servitude of nations still prevailed unreviled and that domination of one nation by another continued to be regarded by the so-called international community only as a domestic question for the master nation, I cannot see how such a community can even pretend that its basis is humanity. In this connection I cannot refrain from referring to what Mr. Justice Jackson asserted in his summing up of the case at Nurnberg. According to him, a preparation by a nation to dominate another nation is the worst of crimes. This may be so now. But I do not see how it could be said that such an attempt or preparation was a crime before the Second World War when there was hardly a big power which was free from that taint. Instead of saying that all the powerful nations were living a criminal life, I would prefer to hold that international society did not develop before the Second World War so as to make this taint a crime.

THE ATOM BOMB during the Second World War, it is said, has destroyed selfish nationalism and the last defense of isolationism more completely than it razed an enemy city. It is believed that it has ended one age and begun another—the new and unpredictable age of soul.

> "Such blasts as leveled Hiroshima and Nagasaki on August 6 and 9, 1945, never occurred on earth before—nor in the sun or stars, which burn from sources that release their energy much more slowly than does Uranium." So said John J. O'Neill, the Science Editor, New York Herald Tribune. "In a fraction of a second the atomic bomb that dropped on Hiroshima altered our traditional economic, political, and military values. It caused a revolution in the technique of war that forces immediate reconsideration of our entire national defense problem".

Perhaps these blasts have brought home to mankind "that every human being has a stake in the conduct not only of national affairs but also of world affairs". Perhaps these explosives have awakened within us the sense of unity of mankind,—the feeling that:

> "We are a unity of humanity, linked to all our fellow human beings, irrespective of race, creed or color, by bonds which have been fused unbreakably in the diabolical heat of those explosions."

All this might have been the result of these blasts. But certainly these feelings were non-existent AT THE TIME WHEN the bombs were dropped. I, for myself, do not perceive any such feeling of broad humanity in the justifying words of those who were responsible for their use. As a matter of fact, I do not perceive much difference between what the German Emperor is alleged to have announced during the First World War in justification of the atrocious

methods directed by him in the conduct of that war and what is being proclaimed after the Second World War in justification of these inhuman blasts.

I am not sure if the atom bombs have really succeeded in blowing away all the pre-war humbugs; we may be just dreaming. It is yet to be seen how far we have been alive to the fact that the world's present problems are not merely the more complex reproductions of those which have plagued us since 1914; that the new problems are not merely old national problems with world implications, but are real world problems and problems of humanity.

There is no doubt that the international society, if any, has been taken ill. Perhaps the situation is that the nations of the international group are living in an age of transition to a planned society.

But that is a matter for the future and perhaps is only a dream.

The dream of all students of world politics is to reduce the complex interplay of forces to a few elementary constants and variables by the use of which all the past is made plain and even the future stands revealed in lucid simplicity. Let us hope it is capable of realization in actual life. I must, however, leave this future to itself with the remark that this future prospect will not in the least be affected even if the existing law be not strained so as to fix any criminal responsibility for state acts on the individual authors thereof in order to make the criminality of states more effective. The future may certainly rely on adequate future provisions in this respect made by the organizers of such future.

During and after the present war, many eminent authors have come forward with contributions containing illuminating views on the subject of "War Criminals—their Prosecution and Punishment". None of these books and none of the prosecutions professed to be prompted by any desire for retaliation. Most of these contributors claim to have undertaken the task because "miscarriage of justice" after World War 1 shocked them very much, particularly because such failure was ascribable to the instrumentality of jurists who deserved the epithets of being "stiff-necked conceptualists", "strict constructionists", and men "afflicted with an ideological rigor mortis". These Jurists, it is said, by giving the appearance of legality and logic to arguments based on some unrealistic, outworn and basically irrelevant technicality caused the greatest confusion in the minds of ordinary laymen with regard to the problems of war criminals. Thses, it is claimed, were the chief present-day obstacles to the just solution of the problem and these authors have done their best to remove such obstacles and to supply "not a mere textbook on some remote technically intricate phrase of a branch of law," but "a weapon with which to enforce respect for the tenets of international law with its underlying principles of international justice."

Some of these authors have correctly said that law is not merely a conglomeration of human wisdom in the form of rules to be applied wherever and whenever such rules, like pieces in a jigsaw puzzle, may fit in. "Law is instead a dynamic human force regulating behaviour between man and man and making the existence and continuity of human society possible."

Its chief characteristic is that it stems from man's reasonableness and

from his innate sense of justice.

> "Stability and consistency are essential attributes of rules of law, no doubt,"

says such an author:

> "Precedent is the *sine qua non* of an orderly legal system. But one must be certain that the precedent has undoubted relevancy and complete applicability to the new situation or to the given set of facts. And if applicable precedent is not available, a new precedent must be formed, for at all times law must seek to found itself on common sense and must strive for human justice."

With all respect to these learned authors, there is a very big assumption in all these observations when made in connection with international law. In our quest for international law are we dealing with an entity like national societies completely brought under the rule of law? Or, are we dealing with an inchoate society in a stage of its formation? It is a society where only that rule has come to occupy the position of law which has been unanimously agreed upon by the parties concerned. Any new precedent made will not be the law safeguarding the peace-loving law-abiding members of the Family of Nations, but will only be a precedent for the future victor against the future vanquished. Any misapplication of a doubtful legal doctrine here will threaten the very formation of the much coveted Society of Nations, will shake the very foundation of any future international society.

Law is a dynamic human force only when it is the law of an organized society; when it is to be the sum of the conditions of social co-existence with regard to the activity of the community and of the individual. Law stems from a man's reasonableness and from his innate sense of justice. But what is that law? And is international law of that character?

A national society, as I have pointed out above, from the very circumstances of its origin and development, is aware of the bearing of the interests of its own members upon the universal objects of general humanity, and is thus bound to regard other national societies not only as entitled to rights equal with its own, but as supplementing itself. A national state cannot therefore seek any absolute seclusion, or strive after an absolute self-sufficiency. *In this sense*, from the very moment of the origin of national states, international society also came into existence. This also accounts for the circumstance that the period of national states is also marked by the development of the system of international law.

Yet it is difficult to say that this international society is a society *under the reign of law*. I shall quote extensively from Professor Zimmern, where he very ably and truly characterizes international society.

> "For anyone", says Professor Zimmern, "trained in the British tradition, the term *International Law* embodies a conception which is, at its best, confusing and at its worst exasperating. It is never law as we understand it, and it often, as it seems to us, comes dangerously near to being an imposter, a *simulacrum* of law, an attorney's mantle

artfully displayed on the shoulders of *arbitrary power*.

"A satisfactory political system, in British eyes, is the offspring of a harmonious marriage between law and force ..... It is the essence of what we call British Constitutionalism. By it is ensured working of two processes, separable in theory for the analysis of the political scientist, but inextricably blended in practice, the observance of the law, or, to use the language of post war controversy, 'sanctions' and 'peaceful change'. Thus the judge, the legislator and the executive throughout its range, from the Prime Minister to the policeman, form interdependent parts of a single system.

"This constitutional system does not function because it is wound up from outside or impelled from above. Its driving force is supplied from within. It derives its validity from consent; and its energy is constantly renewed and refreshed by contact with public opinion. It is the popular will which the legislature is seeking to embody in appropriate statutes. It is the popular will which the judge is engaged in interpreting and the policeman in enforcing. All these are performing what is felt to be *social function*. *They are adapting the organization of the state*, which is the most continuous and potent agency of social service in the community to the permanent and changing needs of *society*.

"Seen as a part of this larger whole, law may be defined as *social habit* formulated into regulations. When these regulations, if any part of them, are felt to be anti-social, no longer in accordance with the general sentiment of the day, or even repugnant to it, they are changed. Thus the notion of law and the notion of change, so far from being incompatible, are, in fact, complementary. The law is not a solid construction of dead material, a fixed and permanent monument, it is an integral part of a *living* and *developing* society created and transmitted by men .....

"Turn now to international law, what do we find? *A situation almost exactly the opposite of what has just been described*.

"To begin with, where are we to look for the rules and obligations of international law? We *shall not* find them embodied in the habits of the will, still less in the affections, of a *society*.

"International law, in fact, is a law without a constitution. And since it is not grounded in a constitution *it lacks the possibility of natural growth*. Unconnected with a society, it cannot adjust itself to its needs. It cannot gather itself together by imperceptible stages into a system .....

"The reason for this is very simple. The rules of international law, as they existed previous to 1914, were, with a few exceptions, not the outcome of the experience of the working of a *world society*. They were simply the result of the contacts between a number of *self-regarding political units*—stars whose courses, as they moved majestically through a neutral firmament, crossed one another from time to time. The multiplication of these external impacts or collisions rendered it *mutally con-*

venient to bring their occasions under review and to frame rules for dealing with them."

In my judgment this is where the international law stands even now and will stand unless and until the political units agree to yield their sovereignty and form themselves into a society. As I have shown elsewhere, the post war United Nations Organization is certainly a material step towards the formation of such a society. I know that as a judge, it is not for me to preach the need for a wider social consciousness or to propound practical solutions for the problems involved in the material interdependence of the modern world. Yet the international relation has reached a stage where even a judge cannot remain silent though the task that is given him is only one of formulation, classification and interpretation. I believe with Professor Lauterpacht that it is high time that international law should recognize the individual as its ultimate subject and maintenance of his rights as its ultimate end. "The individual human being—his welfare and the freedom of his personality in its manifold manifestations—is the ultimate subject of all law. A law of nations effectively realizing that purpose would acquire a substance and a dignity which would go far toward assuring its ascendency as an instrument of peace and progress." *This certainly is to be done by a method very different from that of trial of war criminals from amongst the vanquished nations*. An international organization of the kind recommended by Dr. Lauterpacht would not permit a dominating foreign power to claim its dealings with the dominated nation as its "domestic affairs" outside the jurisdiction of the organization.

Inducements to the exercise of CREATIVE JUDICIAL DISCRETION in the field before us do not inspire much enthusiasm in me. The decision would not create anything new: It would only create precedent for a victor in war to bring the vanquished before a tribunal. It can never create precedent for the sovereign states in general unless such states voluntarily accept such limitations. Certainly this is open to them to do by treaties or conventions.

I am told that if the persons in the position of the present accused are not made responsible for acts such as are alleged against them, then *the Pact of Paris brings in nothing useful*. I am not sure whether that is the position. Law, no doubt, ends by being what it is made to be by the body which applies it to concrete situations: Yet the body called upon to apply it should not force it to be what it is not even at the risk of missing the most attractive opportunity for contributing towards the development of a temptingly significant concept of international law,—I mean "the legal concept of the crime against peace".

I doubt not that the need of the world is the formation of an international community under the reign of law, or correctly, the formation of a world community under the reign of law, in which nationality or race should find no place. In an organization like that it would certainly be most conducive to the benefit of the community as a whole and to the necessity of stable and effective legal relations between its members to chastize activities like those alleged in the present case. *But, until then it serves no useful purpose. When*

the fear of punishment attendant upon a particular conduct does not depend upon law but only upon the fact of defeat in war, I do not think that law adds anything to the risk of defeat already there in any preparation for war. There is already a greater fear—namely, the power, the might of the victor. If law is not to function unless the violating party succeeds in violating the law effectively and then is overwhelmed by power or might, I do not find any necessity for its existence. If it is really law which is being applied I would like to see even the members of the victor nations being brought before such tribunals. I refuse to believe that had that been the law, none of the victors in any way violated the same and that the world is so depraved that no one even thinks of bringing such persons to book for their acts.

I cannot leave the subject without referring to another line of reasoning in which reference is made to the various doctrines of natural law and a conclusion is drawn therefrom that "the dictates of the public, common, or universal conscience profess the natural law which is promulgated by man's conscience and thus universally binds all civilized nations even in the absence of the statutory enactment". A wealth of authority, both ancient and modern, is requisitioned to establish that public international law is derived from natural law. The authorities cited for this purpose range from Aristotle to Lord Wright. That this natural law is not a mere matter of history but is an essential part of the living international law is sought to be established by reference to the preamble of the Hague Convention of 1907 (Convention No. 4) as also to the text of the American Declaration of Independence. The Hague Convention in its preamble, it is pointed out, refers to the laws of humanity and the dictates of the public conscience. The American Declaration of Independence refers to "the laws of nature and nature's God". From these and various other authorities it is concluded "that public international law" is based on natural law: It is said "the principles of international law are based on the very nature of man and are made known to man by his reason, hence we call them the dictates of right reason. They are, therefore, not subject to the arbitrary will of any man or nation. Consequently, the world commonwealth of nations forms one natural organic, moral, juridical and political unity". It is further said, "From what has been said so far it follows that the world commonwealth must needs enjoy an inherent authority to enact positive law for the promotion of the common good. For, on the one hand, the dictates of right reason are only general provisions that must be applied and determined according to the particular circumstances of any given case. Thus, the positive legal enactments or agreements which govern international relations represent the political interpretations and applications of the general principles of the natural and moral law .... On the other hand, unified cooperation of all can only be obtained by issuing binding rules."

It is not for me to question the relevancy of this appeal to natural law. There may be deep-seated reason that in all ages and countries the idea of natural law, that is, one founded on the very reality of things and not on the simple "placet" of the legislature has been cultivated. There have no doubt been fundamental divergencies in the doctrine of natural law. The relations

between the dictates of natural justice and juridical norms have also been variously conceived, depending upon diverse speculative tendencies and historical phases. Often a wide and impassable separation arose between the two systems of determination, while at other times the difference seemed one of genus and species, or two views of the same object. These divergencies however should not prevent the recognition of the deep-seated unity of the conception containing all the characteristics of a psychological necessity. What is a source of difficulty for science does not cease to exist in reality; and it would be a vain illusion to ignore a need because we cannot satisfy it.

The war against natural law, which many have declared in our day, is a reaction against the errors and omissions of the philosophical systems of the past. Indeed "for many the term 'natural law' still has about it a rich, deep odor of the witches' caldron, and the mere mention of it suffices to unloose a torrent of emotions and fears." It would certainly be unjust and irrational, if, under the pretext of correcting errors and omissions, this hostility is carried to the destruction of the very object of these systems.

We must not however forget that this doctrine of natural law is only to introduce a fundamental principle of law and right. The fundamental principle can weigh the justice of the intrinsic content of juridical propositions; but cannot affect their formal quality of juridicity. Perhaps its claim that the realization of its doctrines should constitute the aim of legislation is perfectly legitimate. BUT I DOUBT IF ITS CLAIM THAT ITS DOCTRINES SHOULD BE ACCEPTED AS POSITIVE LAW IS AT ALL SUSTAINABLE. At any rate in international law of the present time such ideal would not carry us far. I would only like to refer to Hall's International Law, Eighth Edition, Introductory Chapter where the learned author discusses what international law consists in and gives his views as to its nature and origin. The learned author gives in the footnote the fundamental ideas of the writers who have exercised most influence upon other writers or upon general opinion and assigns two weighty reasons for discarding this theory of natural law as a guide in determining what the law is at present. His conclusion is given in the following terms:

> "States are independent beings subject to no control, and owning no superior; no person or body of persons exists to whom authority has been delegated to declare law for the common good; a state is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit; if therefore states are to be subject to anything which can either strictly or analogically be called law, they must accept a body of rules by general consent as an arbitrary code irrespectively of its origin or else they must be agreed as to the general principles by which they are to be governed . . . Even if a theory of absolute right were universally accepted, the measure of the obligations of a state would not be found in its dictates but in the rules which are received as positive law by the body of states . . . . However useful . . . an absolute standard of right might be as presenting an ideal towards which law might be made to approach continuously nearer . . . it can only be source of confusion and mischief when it is regarded as a test of

the legal value of existing practices."

I respectfully agree with this view and therefore do not consider that the various theories of natural law should detain me any longer. I should only add that the international community has not as yet developed into "the world commonwealth" and perhaps as yet no particular group of nations can claim to be the custodian of "the common good".

International life is not yet organized into a community under a rule of law. A community life has not even been agreed upon as yet. Such an agreement is essential before the so-called natural law may be allowed to function in the manner suggested. It is only when such group living is agreed upon, the conditions required for successful group life may supply some external criteria that would furnish some standard against which the rightness or otherwise of any particlar decision can be measured.

IN MY JUDGMENT no category of war became a crime in international life up to the date of commencement of the world war under our consideration. Any distinction between just and unjust war remained only in the theory of the international legal philosophers. The Pact of Paris did not affect the character of war and failed to introduce any criminal responsibility in respect of any category of war in international life. No war became an illegal thing in the eye of international law as a result of this Pact. War itself, as before remained outside the province of law, its conduct only having been brought under legal regulations. No customary law developed so as to make any war a crime. International community itself was not based on a footing which would justify the introduction of the conception of criminality in international life.

It is not quite relevant for the purposes of this case to examine whether there has been any development of international law in this respect SINCE THE SECOND WORLD WAR. Even if law has since developed so as now to make such a war a crime, that in my opinion would not affect the present accused.

Apart from the suggested progress of international law by its own inherent nature TWO POSSIBLE SOURCES OF DEVELOPMENT of the law during this period seem to have been suggested: Mr. Trainin suggested the Moscow DECLARATION OF 1943 and Dr. Glueck suggested THE WILL of the victor and its product, THE CHARTER. I have already expressed my views why I consider that if there was any such attempt on the part of the victor nations it would fail to produce the desired effect. The same principle would apply to the suggested consequences of the Moscow Declaration. If this declaration has really started any new era in international life and if, as a result, any new rule of law has come into being, I do not see any principle of justice that would entitle us to invoke the aid of any such *ex post facto* development in condemning the long-past acts of the accused.

After the answer that I give to the question whether war of the alleged category became crime in international life, it becomes somewhat unnecessary for me to discuss WHETHER THE INDIVIDUALS FUNCTIONING AS ALLEGED HERE WOULD INCUR ANY CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW. As, however, much has recently been said about this matter by various learned jurists and politicians I prefer to notice these authorities and express my view of the

question ON THE ASSUMPTION that aggressive war, whatever it is, is crime in international life.

The indictment in this respect alleges that the accused planned and prepared for aggressive war in their capacity as leaders, organizers, etc. of the Japanese Government. In other words their act in this respect would ordinarily be an *act of state*.

AS REGARDS THE INDIVIDUAL RESPONSIBILITY in respect of acts of state, Mr. Keenan has very rightly emphasized that this question is the crucial one. The question whether those individuals committed any international crime by working the constitution of the government of their nation is really of grave moment in international relations. The answer to the question would largely depend upon what answer we can give to the other questions, namely, whether in their international relations the covenanting nations agreed to limit their sovereign right of non-intervention from outside in the matter of working their own constitution and whether in any event they can be found as having yielded to the common will of all so as to hand over to an international tribunal the persons entrusted with the working of their own machinery of government for having worked the same badly. The question is, not how badly they behaved and thus brought their own nation to grief, but whether thereby they made themselves answerable to the international society.

THE QUESTION OF THE RESPONSIBILITY OF THE AUTHORS OF THE FIRST GREAT WAR was made the subject of an elaborate REPORT BY A COMMISSION of the Peace Conference. This report is printed in English by the Carnegie Endowment for International Peace. The Commission reported that:

1. The war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria;
2. It was the result of acts deliberately concocted in order to make it unavoidable.
3. That the war was carried on by these powers by barbarous methods in violation of:
   (*a*) The established laws and customs of war;
   (*b*) The elementary laws of humanity.

YET, while dealing with the question of personal responsibility of individual offenders against the laws of nations, the Commission could not recommend their trial.

As to the acts *which provoked the war*, although in the opinion of the Commission the responsibility could be definitely placed, it advised that the authors thereof should not be made the object of criminal proceedings. The same conclusion was arrived at in respect of the violation of the neutrality of Belgium and Luxembourg. Nevertheless, in view of the gravity of the outrages upon the principles of the law of nations and upon international good faith, it was recommended that they should be made the subject of a formal condemnation by the Peace Conference.

IT WAS RECOMMENDED that as to the acts by which the war was provoked it would be right for the Peace Conference in a matter so unprecedented to adopt special measures and even to create a special organ in order to deal as

they deserve with the authors of such acts. FINALLY, it was suggested that for the future it was desirable that *penal sanctions* should be provided for such grave outrages against the elementary principles of international law.

THE TWO AMERICAN MEMBERS of the Commission, Messrs Lansing and Scott, who dissented from certain conclusions and recommendations of the Commission, declared that they were as earnestly desirous as the other members that those persons responsible for causing the war and those responsible for violations of the laws and customs of war should be punished for their crimes, moral and legal, and that the perpetrators should be held up to the execration of mankind, but that they did not consider that a judicial tribunal was a proper forum for the trial of offenses of a moral nature. They objected to the proposal of the majority to place on trial before a court of justice persons charged with having violated the principles of humanity or the "laws of humanity". They also objected to the "unprecedented proposal to put on trial before an international criminal court the heads of states not only for having directly ordered illegal acts of war but for having abstained from preventing such acts".

Mr. Quincy Wright, writing in 1925 on the "Outlawry of War" pointed out:

> "THE MAIN DIFFICULTY found by the commission was that international law did not recognize war-making as positively illegal; but even if it had, there would be doubt whether any particular individual, even a sovereign, could be held liable for the act of the state."

According to the learned author:

> "With the complexity of modern state organization, it would be difficult to attribute responsibility for declaring war to any individual or group of individuals. There are few absolute monarchs. Ministers act under responsibility to legislatures which are in turn responsible to electorate. In an age of democracies an effort to hold individuals responsible for a national declaration of war would frequently involve an indictment of the whole people. This practical difficulty coupled with the theory of state independence has brought about recognition of the principle of state responsibility in international law, with a consequent immunity from international jurisdiction of individuals acting under state authority."

Judge Manley O. Hudson, in his treatise entitled "International Tribunals, Past and Future" published in 1944, while dealing with the question of "The Proposed International Criminal Court" in Chapter 15, says:

> "International law applies primarily to states in their relations *inter se*. It creates rights for states and imposes duties upon them, *vis-a-vis* other states. Its content depends very largely upon the dispositions of interstate agreements and upon deductions from the practices of states."

According to the learned Judge this is why it reflects but feebly a community point of view and why the halting progress made in international organization has not facilitated its protection of community interests as such. "His-

torically", says the learned Judge, "international law has not developed any *conception of crimes* which may be committed by states. From time to time certain states have undertaken to set themselves up as guardians of community interest and have assumed competence to pronounce upon the propriety of the conduct of other states. Yet, at no time in history have condemnations of states' conduct, whether before or after the event, been generally FORMULATED by legislation FOR INTERNATIONAL CRIMES. Only in quite recent times have official attempts been made to borrow the concept of criminality from municipal law for international purposes. In the abortive Geneva Protocol of 1924 "a war of aggression" was declared to be "an international crime" and this declaration was repeated by the assembly of the League of Nations in 1927, and by the Sixth International Conference of American states in 1928; no definition was given to the terms, however, though the 1924 Protocol was designed to ensure "the repression of international crimes". At no time has any authoritative formulation of international law been adopted which would brand specific conduct as criminal, and no international tribunal has ever been given jurisdiction to find a state guilty of a crime."

Coming to the question of individual responsibility, Judge Hudson says:

> "If international law be conceived to govern the conduct of individuals, it becomes less difficult to project an international penal law. It was at one time fashionable to refer to pirates as enemies of all mankind and to piracy as an offense against the law of nations." The United States Constitution of 1789 empowered Congress to define and punish "piracies and felonies committed on the high seas and offenses against the law of nations". Unanimity does not obtain upon the meaning to be given to these terms, but modern opinion seems to be inclined to the view that a broad category of armed violence at sea is condemned by international law as piratical conduct, with the consequence that any state may punish for such conduct and that other states are precluded from raising the objections which might ordinarily be advanced against the assumption of jurisdiction."

He then points out that:

> "It is in this sense that the conception of piracy as an offense against the law of nations has been seized upon, BY WAY OF ANALOGY, for the service of other ends. Various treaties of the Nineteenth Century provided for the possibility of states punishing persons engaged in the slave trade as pirates ....."

The learned Judge then points out

> "Despite the employment of such analogies no authoritative attempt has been made to extend international law *to cover the* CONDEMNED AND FORBIDDEN CONDUCT OF INDIVIDUALS. States have jealously guarded their own functions in the repression of crime, and differences in national and local outlooks and procedures have precluded the development of an international or supernational criminal law .....

He concludes the topic by saying:

"Whatever course of development may be imminent with reference to political organization, THE TIME IS HARDLY RIPE FOR THE EXTENSION OF INTERNATIONAL LAW TO INCLUDE JUDICIAL PROCESS FOR CONDEMNING AND PUNISHING ACTS EITHER OF STATES OR OF INDIVIDUALS."

It may be noticed in this connection that whenever in international relations it has been considered desirable to control the conduct of individuals, care has been taken to make adequate provision for the same in the treaty itself.

Numerous treaties of recent date contain condemnations of the anti-social conduct of individuals and the states parties agree to adopt their national penal laws to serve common ends.

The treaties do not directly apply to individuals, and their impact on individual conduct will depend upon each state's performance of its treaty obligations by the incorporation of the provisions into national law or otherwise.

This view was clearly expressed in the 1899 and 1907 Hague Convention on the laws and customs of war on land, by which the states parties undertook to give their armed forces instructions conforming to regulations annexed to the Convention. Neither of the Conventions operated directly on individuals; but the 1907 Convention provided that a state would be responsible for acts committed by persons belonging to its armed forces in violation of the provisions of the regulations and would be liable for indemnities. The same view was taken in the numerous suggestions which were made for dealing with violations of the 1929 Geneva Convention on the treatment of sick and wounded soldiers, but Articles 29 and 30 of the Convention are not clear on the point.

This is how INFRINGEMENT ON NATIONAL PREROGATIVES in this field has always been avoided.

AN APPARENTLY CONTRARY VIEW is expressed by Professor Hans Kelsen of the University of California who says:

"When the Second World War broke out, the legal situation was different from that at the outbreak of the First World War. The Axis Powers were contracting parties to the Kellogg-Briand Pact by which resorting to a war of aggression is made a delict; and Germany has, by attacking Poland and Russia, violated, in addition to the Kellogg-Briand Pact, non-aggression pacts with the attacked states. Any inquiry into the authorship of the Second World War does not raise problems of extraordinary complexity. Neither the *questio juris* nor the *questio facti* offers any serious difficulty to a tribunal. Hence, there is no reason to renounce a criminal charge made against the persons morally responsible for the outbreak of World War II. In so far as this is also a question of the constitutional law of the Axis Powers, the answer is simplified by the fact that these states were under more or less dictatorial regimes, so that the number of persons who had the legal power of leading their country into war is in each case of the Axis States very small. In Germany it is probably the Fuehrer alone; in Italy, the Duce and the King; and in Japan, the Prime Minister and the Emperor. If the assertion attributed to Louis XIV "'Etat c'est moi" is applicable to any dictatorship, the punishment of the dictator amounts almost to a

punishment of the state."

THIS IS HOWEVER, ONLY APPARENTLY CONTRARY, as will appear from what I have already quoted from Professor Kelsen elsewhere. The learned Professor prefaces the above statement thus:

> "If the individuals who are morally responsible for this war, the persons who have, as organs of their states, disregarded general or particular international law, and have resorted to or provoked this war, if these individuals as the authors of the war shall be made legally responsible for the injured states, *it is necessary to take into consideration that general international law does not establish individual*, but collective *responsibility for the acts concerned*, and that the acts for which the guilty persons shall be punished are acts of state—that is, according to general international law, acts of the government or performed at the government's command or with its authorization."

Professor Kelsen then proceeds to examine the meaning of the expression "act of state" and says:

> "The legal meaning of the statement that an act is an act of state is that this act is to be imputed to the state, not to individual who has performed the act. If an act performed by an individual—and all acts of state are performed by individuals—must be imputed to the state, the latter is responsible for this act ... If an act is to be imputed to the state and not to be imputed to the individual who has performed it, the individual, according to general international law, is not to be made responsible for this act by another state without the consent of the state whose act is concerned. As far as the relationship of the state to its own agents or subjects is concerned, national law comes into consideration. And in national law the same principle prevails; AN INDIVIDUAL IS NOT RESPONSIBLE FOR HIS ACT IF IT IS AN ACT OF STATE, i.e., if the act is not imputable to the individual but only to the state ... THE COLLECTIVE RESPONSIBILITY OF A STATE FOR ITS OWN ACTS EXCLUDES, according to general international law, THE INDIVIDUAL RESPONSIBILITY OF THE PERSON WHO, AS A MEMBER OF THE GOVERNMENT .... HAS PERFORMED THE ACT. This is a consequence of the immunity of one state from the jurisdiction of another state." According to the learned Professor, "this rule is not without exceptions but any exception must be based on A SPECIAL RULE OF CUSTOMARY OR CONVENTIONAL INTERNATIONAL LAW RESTRICTING the former."

He then points out:

> "In this respect there exists no difference between the head of state and other state officials .... THERE IS NO SUFFICIENT REASON TO ASSUME THAT THE RULE OF GENERAL CUSTOMARY LAW UNDER WHICH NO STATE CAN CLAIM JURISDICTION OVER THE ACTS OF ANOTHER STATE IS SUSPENDED BY THE OUTBREAK OF WAR, and consequently that it is not applicable to the relationship between belligerents ....."

According to the learned Professor:

> "If individuals shall be punished for acts which they have performed as acts of state, by a court of another state, or by an interna-

tional court, the *legal basis* of the trial, as a rule, *must be an international treaty concluded with the state* whose acts shall be punished, by which treaty jurisdiction over individuals is conferred upon the national or international court. If it is a national court, then this court functions, at least indirectly as an international court."

He is positive that:

"The law of a state contains no norms that attach sanctions to acts of other states which violate international law. Resorting to war in disregard of a rule of general or particular international law is a violation of international law, which is not, at the same time, a violation of national criminal law, as are violations of the rules of international law which regulate the conduct of war. *The substantive law applied by a national court competent to punish individuals for such acts can be international law only*. Hence *the international treaty must determine not only the delict but also the punishment*, or must authorize the international court to fix the punishment which it considers to be adequate ....."

ALL THAT I NEED ADD TO THESE OBSERVATIONS of the learned author is that in the present case there has been no treaty of the kind contemplated by him as I have noticed already.

The learned author is clear in his view:

1. That for such acts as are alleged in this case, international law, by itself, does not make their individual authors criminally responsible.
2. That such acts do not constitute crime in any individual in international law as it now stands.
3. That a victor nation cannot, on the mere strength of conquest:
   (*a*) Make such acts criminal with retrospective effect;
   (*b*) Punish in law the individual authors of such acts.
4. That a victor nation may derive such authority by appropriate treaty from the state for which the individuals in question acted.

His summarization of the position after the Second World War does not thus differ from the view expressed by Judge Manley O. Hudson. Only Professor Kelsen thinks that with the help of an appropriate treaty such a trial and punishment would have been made legitimate. As I have already indicated above, this view of his may or may not be supportable on principle, and in my opinion, it is not. But so far as the present case is concerned it would suffice to say that there is no such treaty.

This view finds support in what Professor Glueck says in his treaties on "War Criminals, their Prosecution and Punishment" published in September 1944 after the Moscow Declaration of 1943 and after the learned Professor had served on the commission on the trial and punishment of War Criminals of the London International Assembly. In Chapter III of his book, the learned Professor defines "war criminals" as "persons—regardless of military or political rank—who, in connection with the military, political, economic or industrial preparation for or waging war, have, in their official capacity, com-

mitted acts contrary to (*a*) the laws and customs of legitimate warfare or (*b*) the principles of criminal law generally observed in civilized states; or who have incited, ordered, procured, counseled, or conspired in the commission of such acts; or, having knowledge that such acts were about to be committed, and possessing the duty and power to prevent them, have failed to do so."

We need not stop here to examine the correctness or otherwise of this definition with reference to the norms of international law. The learned author, after giving his definition makes certain observations which will be pertinent for our present purpose. He says:

> "Observe certain features of this definition. First, it is not intended to include the "crime" of flagrantly violating solemn treaty obligations or conducting a war of aggression. The Commission of Fifteen appointed by the Preliminary Peace Conference at the close of the World War 1 to examine the responsibility for starting that war and for atrocities committed during its conduct, *found* former Kaiser Wilhelm II and other high placed personages "guilty" of "gross outrages upon the law of nations and international good faith", BUT CONCLUDED that"no criminal charge" could be brought; although the outrages should be the subject of a formal condemnation by the Conference."

They emphasized it to be "desirable that *for the future* penal sanctions should be provided for such grave outrages against the elementary principles of international law". BUT THROUGHOUT THE QUARTER CENTURY BETWEEN THE TWO WORLD WARS NOTHING HAS BEEN DONE BY THE NATIONS of the world to implement this recommendation. The Kellogg-Briand Pact, signed in Paris in 1928, condemned recourse to war for the solution of international controversies, renounced it as an instrument of national policy, and bound the signatories to seek the settlement of all disputes by pacific means only. BUT THAT PACT TOO FAILED TO MAKE VIOLATIONS OF ITS TERMS AN INTERNATIONAL CRIME punishable either by national courts or some international tribunal. Therefore, the legal basis for prosecutions for violations of the Pact of Paris may be open to question, though the moral grounds are crystal clear.

> "Besides, to prosecute Axis leaders for the crime of having initiated an unjust war, or having violated the "sanctity of treaties", would only drag a red herring across the trail and confuse the much clearer principle of liability for atrocities committed during the conduct of a war, be it a just or an unjust one. The Germans would surely argue that the Allies had first violated the Treaty of Versailles in not disarming; and learned historians would insist, as they did at the close of World War 1, that only lengthy historical and economic investigations could really fix responsibility for "causing" the war.
>
> "For these reasons, the origination of an unjust war ought, for the present, not to be included among the acts triable as "war crimes", however desirable it would be to establish judicially the principles involved ....."

DR. GLUECK, however, IN A RECENT BOOK PUBLISHED IN 1946 and entitled

"The Nurnberg Trial and Aggressive War" has EXPRESSED THE OPPOSITE OPINION. The learned Professor in this new book says:

> "During the preparation of my previous book on the subject of war crimes, I was not at all certain that the act of launching and conducting an aggressive war could be regarded as "international crime". I finally decided against such a view, largely on the basis of a strict interpretation of the Treaty for the Renunciation of War (Kellogg-Briand Pact) signed in Paris in 1928. I was influenced also by the question of policy ... However, further reflection upon the problem has led me to the conclusion that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded *as evidence of a sufficiently developed custom* to be acceptable as international law."

THE LEARNED PROFESSOR STILL SAYS that "The case for prosecuting individuals and states for the "crime" of launching an aggressive war is not as strong as the case for holding them responsible for violations of the recognized laws and customs of legitimate warfare". He, however, considers it "strong enough to support the relevant count in the Nurnberg Indictment".

The count in question stands thus:

> "All the defendants, with diverse other persons, during a period of years preceding 8th May 1945, participated in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances."

The revised opinion of the learned Professor is based on the following data in addition to those already given by me while considering his view that war became crime by an international customary law:

1. The United Nations could have executed the Nurnberg defendants without any judicial procedure whatsoever; "summarily by executive or political action ..... without any consideration whatsoever of whether the acts with which the accused were charged had or had not previously been prohibited by some specific provision of international penal law";
   - (*a*) The law of an armistice or a treaty is, in the final analysis, the will of the victor;
   - (*b*) Although duress may be a good ground for repudiation of an international contract entered into during a period of peaceful relationships between law-observing states, compulsion is to be expected and is an historic fact in the case of international agreements imposed by a victorious belligerent state upon the vanquished;
2. The Fact that the contracting parties to a treaty have agreed to render aggressive war illegal does not necessarily mean that they have decided to make its violation an international crime. Even a multinational contract and one dealing with a subject so vital to the survival of nations as the Kellogg-Briand Pact is not a penal statute;

and the remedy for breach of contract does not consist of prosecution and punishment of the guilty party, but rather of obtaining compensation for its breach.

3. (*a*) THE CHARTER constituting the Tribunal gives dogmatically affirmative answers to the two following questions:
   (*i*) Whether aggressive war can be denominated an international crime.
   (*ii*) Whether individuals comprising the government or general staff of an aggressor state may be prosecuted as liable for such crime.
   (*b*) There is no question but that, as an ACT OF THE WILL of the conqueror, the United Nations had THE AUTHORITY to frame and adopt such a charter.
4. Assuming modern aggressive war to be a crime, *i. e.*, an offense against the Family of Nations and its international law, then THE DEFENDANT MUST NORMALLY BE THE IMPLICATED STATE.
   (*a*) BUT, action against a state must necessarily be ineffective in reducing international criminalism, compared to the imposition of penal sanctions upon members of a cabinet, heads of a general staff, etc., who have led a state into aggressive war.
   (*i*) There are sound reasons for the familiar application of the act-of-state doctrine to the normal, peaceful intercourse of nations, without it necessarily following that it is also to be applied to the situation presented by the acts of Nazi ringleaders . . . .
   (*ii*) An issue of this kind ought not to be disposed of on the basis of blind legalistic conceptualism; it should be dealt with realistically in the light of the practical as well as logical result to which one or the other solution will lead.
   (*iii*) As Blackstone pointed out, a sovereign would not willingly ally himself with the criminal acts of his agents.
   (*iv*) It is perfectly obvious that the application of a universal principle of non-responsibility of a state's agents could easily render the entire body of international law a dead letter.
   (*v*) This is a doctrine contrary to reason and justice and it is high time the error were remedied . . . . Since law is supposed to embody the rule of reason in the interests of justice, and the unqualified act-of-state doctrine emasculates both reason and justice, it cannot be regarded as sound law.
5. Individuals are liable under international law in many instances; the relevant principles of the law of nations may and do obligate individuals.

(*a*) The traditional view, that "individuals are not subjects of the law of nations", is open to question historically and in a practical sense: (The learned author cites the instances of piracy and the like.)

THE TWO FUNDAMENTAL ELEMENTS in Dr. Glueck's approach here are:

1. The unlimited power of the victor under international law;
2. The growth of the customary law in the international system.

If the learned Professor is correct in his first proposition, then there is no doubt that the United Nations can adopt any procedure for the exercise of this power, and, though quite unnecessary, may introduce a sort of definition of a crime covering the acts alleged to have been committed by the accused and on a finding of the constituent facts, thus specified, execute them. Dr. Glueck's authority for this proposition, as far as I could see, is the statement of Mr. Justice Jackson in his report to the President of the United States. I cannot accept this proposition either *ratione imperii* or *imperio rationis*. I have already expressed my own view of the question. In my opinion, the view taken by the learned author, as also by Mr. Justice Jackson, has no support in the modern system of International Law.

It may be that Dr. Glueck and Mr. Justice Jackson are thinking of the right of the belligerent to kill such persons during belligerency. But the right of killing ceases as soon as they are taken prisoners. From the date of their seizure they become entitled to the protection of the rule that more than necessary violence must not be used.

Th learned author cites the case of Napoleon and points out how the powers there declared that Napoleon had put himself outside "civil and social relations and that, as enemy and perpetrator of the world, he has incurred liability to public vengeance". Had the Allies followed the recommendation of the Prussian Field Marshal Blucher, Napoleon would then have been shot on sight as one who, under the above declaration, was an "outlaw".

I need not stop here to examine this view with reference to the provisions of International Law. It would be sufficient to say that International Law in this respect does not still stand where it might have been in those days and that THE PROCLIVITIES OF THE VICTORS unhindered as they may be by the weaknesses of their adversary may reveal determinations that are uninfluenced by a sense of legal obligation; such determinations, however, should never be confused with law.

I believe Dr. Glueck did not ignore the fact that even in those days considerable doubts were entertained and difficulties felt about the legality of the steps taken in respect of Napoleon. We may refer to Dr. Hale Bellot's article on "The Detention of Napoleon Bounaparte" published in the Law Quarterly Review Vol. XXXIX, pp. 170-192.

The Prussian Project referred to by Dr. Glueck did not find favour with the Duke of Wellington. The Duke disputed the correctness of the Prussian interpretation of the Viennese declaration of outlawry and asserted that it was never meant to incite the assassination of Napoleon. According to the Duke

the victors did not acquire, from this act of outlawry, any right to order Napoleon to be shot.

Then, again, a considerable difficulty was felt about Napoleon's status. Napoleon himself never assented to the proposition that he was a Prisoner of War, and never claimed any rights as such. Before surrender, when arrangement for his escape on board a Danish vessel was completed, he refused to go and made up his mind to surrender to the British, saying, "There is always danger in confiding oneself to enemies, but it is better to take the risk of confiding in their honour than to fall into their hands as a prisoner according to law." After his surrender he repeatedly denied that he was a prisoner of war although he was aware of the rights of such a prisoner in international law. He professed to consider himself as a simple individual seeking asylum in Great Britain.

Apart from Napoleon's own view of his status, grave difficulties in this respect were felt by the then British authorities also. Legal opinion was sharply divided on the question. The first legal advice was that Bounaparte should be regarded as a rebel and surrendered to his Sovereign. This view was taken by the Master of the Rolls and was adopted by Lord Liverpool. Lord Ellenborough and Sir W. Scott saw following alternative possibilities.

Either 1. He was a subject of France and Britain was at war with France.

or 2. He was a French rebel and Britain was assisting the Sovereign of France as an ally.

The war had not yet been put to an end by any treaty.

Lord Ellenborough suggested that he should be regarded as an individual of the French nation, at war with Great Britain, and consequently in common with the French nation an enemy to Great Britain. He thought that it would be possible to exclude him from the benefit of a treaty of peace that might be made subsequently with the French nation. Sir William Scott could not agree with this view. According to him, Great Britain could surrender him to France as a rebel subject; but to Great Britain he was a Prisoner of War and there was a clear general rule of the law of nations, that peace with the Sovereign of a State was peace with all its subjects. Lord Eldon raised the question whether Bounaparte could in fact be considered as a French subject: Great Britain had not been at war with France as France. He said: "We have acted upon the notion that ..... we are justified by the law of nations in using force to prevent Bounaparte's being Governor of France—that we have made war upon him and his adherents—not as French enemies—not as French rebels—but as enemies to us and the allies when France was no enemy to us—that in this war with him, he has become a prisoner of war, with whom WE CAN MAKE NO PEACE, because we can have no safety but in his imprisonment—no peace with him, or which includes him."

In the House of Lords, Lord Holland considered that the case involved *inter alia* the following questions:

1. Could any person be held as a prisoner of war, who was not the subject of any known state?

2. Could any man be detained who was the subject of a state with whom we were not at war?
3. Whether any person could be considered as an alien enemy, who was not the subject of any state with which we were at war?

At the Congress of Aix-la-Chapelle, 1818, the Protocol by which Napoleon's matter was brought before the Congress described Bounaparte in 1815 as merely "the chief of a shapeless force, without recognized political character, and consequently, without any right to claim the advantages and the courtesies due Public Power by civilized nations ... Bounaparte, before the battle of Waterloo, was a dangerous rebel; after the defeat, an adventurer whose projects were betrayed by fate .... In this situation, his fate was submitted to the discretion of the governments which he had offended; and there existed then in his favour (with the exception of the rights inseparable from humanity) no positive law, no salutary maxim applicable to him ..."

Certainly what happened to Napoleon cannot be cited as adding to or detracting from international law in any respect.

The regulations annexed to The Hague Convention No. 4 of 1907 respecting The Laws and Customs of War on Land, the Geneva (Prisoners of War) Convention of 1929, the War Rules of the several national states, especially the U. S. War Department Rules of Land Warfare of 1940, all point to a direction contrary to what Mr. Justice Jackson, and following him, Dr. Glueck, assert to be the legal position of a conqueror. Charles Cheney Hyde in his treatise on "International Law Chiefly as Interpreted and Applied by the United States" states: "According to the Instructions for the Government of the Armies of the United States in the Field", of 1863, and the Rules of Land Warfare of 1917, the Law of War disclaims all cruelty, as well as all acts of private revenge, or connivance at such acts, and all extortions. NOR DOES IT ALLOW PROCLAIMING either an individual belonging to the hostile army or a citizen or a subject of the hostile government, AN OUTLAW, who may be slain without trial by any captor, "anymore than the modern law of peace allows such intentional outlawry; on the contrary it abhors such outrage".

The Hague Regulations expressly forbid a belligerent to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion, or to declare that no quarter will be given.

The Hague Convention No. 4 of 1907 no doubt does not apply except between the Contracting Powers and then only if all the belligerents are parties to this convention. But the regulations annexed to this convention purport to incorporate only the existing principles of the law of nations resulting from the usages established among civilized peoples.

AS THE LAW NOW STANDS, it will be a "war crime" *stricto sensu* on the part of the victor nations if they would "execute" these prisoners OTHERWISE THAN UNDER A DUE PROCESS OF INTERNATIONAL LAW, though, of course, there may not be anyone to bring them to book for that crime at present.

Dr. Glueck takes the view that the Pact of Paris, itself, does not make its violation an international crime. His third proposition as given above,

therefore, is only a corollary to his first proposition. The "dogmatically given affirmative answer" referred to in his third proposition would not stand if his first proposition fails. In my view if the alleged acts do not constitute any crime under the existing international law, the trial and punishment of the authors thereof WITH A NEW DEFINITION OF CRIME given by the victor would make it a "war crime" on his part. The prisoners are to be dealt with according to the rules and regulations of international law and not according to what the victor chooses to name as international law.

I need not stop here to examine the proposition regarding the law of armistice and treaty propounded by Dr. Glueck. For my present purposes it would be sufficient to notice, as I have noticed already, that there is nothing in the terms of the armistice or surrender here which would confer on the victor nations any such unfounded authority as is enunciated by Dr. Glueck. The international law, itself, does not vest in the victor any boundless authority.

Dr. Glueck in his fourth, fifth, and sixth propositions, as analyzed above, seeks to establish that "aggressive war" is an international crime not because it is made so by any pact, convention or treaty, but by what he calls the CUSTOMARY INTERNATIONAL LAW. In his seventh and eighth propositions he develops individual responsibility.

I have already examined this part of Dr. Glueck's reasoning and given my view that no such customary international law developed during the relevant period.

At any rate the alleged "custom" or "customary law" does not touch the individuals. The body of growing custom to which reference is made is, at most, custom directed to sovereign states, not to individuals.

I believe, what Mr. Finch has said very recently about the individual criminal responsibility in international law while commenting on the Nurnberg judgment will supply an answer to Dr. Glueck's thesis. I would summarize what Mr. Finch says on the point. Mr. Finch says:

1. The charge of crimes against peace is a new international criminal concept.
   - (*a*) (*i*) It was not envisaged in the warnings issued by the Allies before hostilities ended;
     - (*ii*) nor made part of the original terms of reference to the United Nations War Crimes Commission established in London during the war;
     - (*iii*) In Dr. Lachs' collection of texts there is an *aide memoire of* the British Government issued August 6, 1942, stating that "in dealing with war criminals, whatever the court, it should apply the laws already applicable and no special *ad hoc* law should be enacted."
   - (*b*) It may be traced to the influence of Professor A. N. Trainin of the Institute of Law of the Moscow Academy of Science, who, in 1944, published a book entitled "Ugolovnaya Otvetstvennost Gitlerovtzev".

2. The crux of the argument by which it is sought to establish personal responsibility for crimes against peace centre around the Pact of Paris for the Renunciation of War.

(*a*) (*i*) The Pact itself makes no distinction between aggressive, defensive, or other kinds of war but renounces all wars.

(*ii*) Kellogg in the negotiations with France preceding the signature of the Pact definitely declined to accede to the French proposal that the Pact be limited to the renunciation of 'wars of aggression'.

(*iii*) According to him "from the broad standpoint of humanity and civilization, all war is an assault upon the stability of human society, and should be suppressed in the common interest."

(*b*) The Pact does not mention SANCTIONS for its enforcement other than statement in the preamble that "any Signatory Power which shall hereafter seek to *promote* its national interests by resort to war should be denied the benefits furnished by this treaty."

(*i*) This provision is not imperative but conditional in the discretion of each signatory;

(*ii*) In identic notes submitting the draft treaty to the other signatories, Kellogg stated that the preamble "gives express recognition to the principle that if a state resorts to war in violation of the treaty, the other contracting parties are released from their obligations under the treaty to that state."

(*iii*) Both by the preamble and Secretary of States' (Kellogg's) interpretation, any action which might result from a violation of the Pact was to be directed against THE VIOLATING GOVERNMENT.

(*iv*) PERSONAL CRIMINAL RESPONSIBILITY WAS NOT STIPULATED NOR EVEN IMPLIEDLY SUGGESTED.

(*c*) In the years immediately following its conclusion, the meaning of the Pact became the subject of discussion in other countries.

(*i*) When the British Government signed the optional clause of the statute of the Permanent Court of International Justice in 1929, it published a memorandum explaining its view of the position created by the acceptance of the Covenant of the League of Nations and the Pact of Paris:

According to this British Memorandum: "The effect of those instruments, taken together is to deprive nations of the right to employ war as an instrument of

national policy, and to forbid States which have signed them to give aid or comfort to an offender. As between such states there has been in consequence a fundamental change in the whole question of belligerent and neutral rights."

(*ii*) Upon receipt of the British Memorandum, Mr. Stimson, the then Secretary of State made public a statement in which he denied that this British argument applied to the position of the United States as a Signatory of the Pact. "As has been pointed out many times," he emphasized, "the Pact contains no covenant similar to that in the covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor. Its efficacy depends SOLELY UPON THE PUBLIC OPINION OF THE WORLD and upon the conscience of those nations who sign it."

(*d*) In September 1934, the International Law Association in its meeting at Budapest, adopted articles of interpretation of the Pact. This interpretation of these distinguished international law experts DOES NOT CONTAIN THE REMOTEST SUGGESTION OF CRIMINAL ACTION AGAINST INDIVIDUALS for the violation of the Pact.

(*i*) They expressed the view that in case of a violation the other signatories would be justified in modifying their obligations as neutral states so as to favour the victim of the aggression against the state making war in violation of the Pact.

(*ii*) This interpretation was relied upon in part in support of the modification of the attitude of the U. S. EARLY in 1941 (Lend Lease Act, March 11, 1941) from that of traditional neutrality to the furnishing of official aid to the countries whose defense was considered necessary to the defense of the U. S.

(*iii*) Earlier attempts made in the U. S. to implement the Pact of Paris by legislation which would have authorized the Government to discriminate between the belligerents in future war, all failed and resulted in the passage of more rigid laws to preserve the neutrality and peace of the United States.

(*e*) (*i*) In the light of the legislative history of the official attitude of the Government of the United States toward the interpretations of the Pact, from January 1933 to the passing of the Neutrality Pact of November 4, 1939, it is impossible to accept the thesis of the Nurnberg Tribunal that a war in violation of the Pact was illegal in international law on September 1, 1939, and

that those who planned and engaged in it were guilty of international criminal acts at the time they were committed etc.

(*ii*) The Budapest articles of interpretation were cited in support of the Lend Lease legislation.

3. It requires an attenuated legal conceptualism to go further and deduce *dehors* the written instrument PERSONAL CRIMINAL LIABILITY for non-observance of the Pact never before conceived of in international law as attaching to violation of treaties regulating state conduct.

4. (*a*) It cannot be denied that beginning with the establishment of the League of Nations the concept of preventing aggressive war has been growing.

(*b*) All such efforts deserve the utmost praise, sympathy and support.

(*c*) But unratified protocols cannot be cited to show acceptance of their provisions, and resolutions of international conferences have no binding effect unless and until they are sanctioned by subsequent national or international action; and treaties of non-aggression that are flagrantly disregarded when it becomes expedient to do so cannot be relied upon as evidence to prove the EVOLUTION OF AN INTERNATIONAL CUSTOM OUTLAWING AGGRESSION.

Dr. Glueck, however, does not rely on any customary law in fixing the criminal responsibility on the individuals. He admits that the alleged customary law will only take us to *the state* concerned. He correctly says that if war is crime the criminal responsibility attaches to the state concerned. He however reaches the individuals by a process of reasoning which seems to indicate as if we must get hold of them anyhow. Individuals must be got hold of in order to make the responsibility effective. This he considers to be the realistic view in the light of the practical as well as logical result to which one or the other solution will lead.

Even keeping in view the very harsh reproaches to which one must subject himself if he is not prepared to share this view of Dr. Glueck, I am afraid, I cannot induce myself to this view of the law.

I cannot forget that so LONG AS NATIONAL SOVEREIGNTY REMAINS THE FUNDAMENTAL BASIS OF INTERNATIONAL RELATION, ACTS DONE WHILE WORKING A NATIONAL CONSTITUTION WILL REMAIN UNJUSTICIABLE IN INTERNATIONAL SYSTEM and individuals functioning in such capacities will remain outside the sphere of international law. I, myself, am not in love with this national sovereignty and I know a strong voice has already been raised against it. But even in the post-war organizations after this Second World War NATIONAL SOVEREIGNTY STILL FIGURES VERY LARGELY.

One great authority relied on by Dr. Glueck is the Right Honourable Lord Wright. His views are expressed in an article on "War Crimes Under

International Law", published in the Law Quarterly Review in January 1946. After all, as daily experience shows, the success of a thought in every field of human activity including the legal field does not always depend exclusively upon its inner value but also upon certain outward circumstances, particularly upon the weight generally attached to the words of the person who has given utterance to the thought. I must say with due respect that Lord Wright's utterances deserve special weight on both these grounds and these must be examined very carefully before we can decide one way or the other. I would quote from Lord Wright's article at some length.

Lord Wright does not *base* his conclusion on any unlimited power of the victor. He is rather against the view that any judiciary should be instrumental to the mere manifestation of the victor's power, if the trial is to be such a manifestation only. His thesis is that such acts constitute crime in the individuals concerned under the international law.

Lord Wright says:

> "War crimes are generally of a mass or multiple character. At one end are the devisers, organizers, originators, who would in many cases constitute a criminal conspiracy; at the bottom end are the actual perpetrators; in between these extremes are the intermediate links in the chain of crime."

He then quotes from Professor Trainin's work on "Hitlerite Responsibility under the Criminal Law", where the learned Professor observes that all members of the Hitlerite clique were not only participants in an international band of criminals but also organizers of a countless number of criminal acts and concludes that "all the Hitlerite criminals are liable without exception from the lance-corporal in the Army to the lance-corporal on the throne". Accepting this view of Professor Trainin and referring to the several acts ascribed to the Hitlerite group, Lord Wright proceeds to observe: "A 'political' purpose does not change murder into something which is not murder. Nor do they cease to be crimes against the law of war because they are also crimes against the moral law or the elementary principles of right and wrong. Law and morality do not necessarily coincide, though in an ideal world they ought to. But a crime does not cease to be a crime because it is also an offense against the moral code."

With "the above thought in mind" Lord Wright approaches the question "whether the initiation of war, the crime against peace, which the Agreement of the four Governments pillories, is a Crime calling for the punishment of individual criminals." He then proceeds to consider the question from two different viewpoints, namely:

1. That "the war was ushered in by the most brutal and blatant announcements that it WOULD BE CONDUCTED with every possible atrocity in order to strike terror"; and thus it became criminal;
2. That "even WITHOUT THE CALCULATED SYSTEM OF TERRORISM" the war was criminal as it aimed at aggression and world domination.

Coming to THE SECOND ASPECT OF HIS APPROACH, Lord Wright says:

"But the category of crimes against peace which is one of the counts in the Indictment of 1945 and includes the planning, preparation and initiation of aggressive or unjust war, requires a short further discussion. It does raise one of the most debated questions of international law. I have stated why I think it is an international crime and indeed the master crime. It is the source and origin of all the evils of war—modern war, even without the calculated system of terrorism exhibited by the Germans and their Allies in the war just ended, is about the greatest calamity which can be inflicted upon mankind. No one can doubt that to bring this about with cold, calculated villainy, for the purpose of spoliation and aggrandisement, is a moral crime of the foulest character."

Lord Wright then points out how legal writers are fond of distinguishing moral from legal crime, and says:

"There is, however, no logical distinction in the character of the act or its criminality; the only question is whether the crime can be punished on legal grounds, that is WHETHER THE OFFENSE HAS ACHIEVED THE STATUS OF BEING FORBIDDEN BY LAW."

He then proceeds:

"To punish without law is to exercise an act of power divorced from law. Every act of punishment involves an exercise of power, but if it is not based on law it may be morally just, but it is not a manifestation of justice according to law, though some seem to think that if the justice and morality of the decision are incontrovertible, it may serve as a precedent for similar acts in the future and thus establish a rule of International Law. Thus the banishment of Napoleon I to St. Helena by the executive action of the Allies may, according to that way of thinking, be taken in some sort to create a precedent for the similar executive action for the punishment of deposed or of abdicated sovereigns. But the idea of an International Law between different members of the community of nations would not be thus developed."

Lord Wright then points out:

"The punishment of heads or other members of Governments or national leaders for complicity in the planning and initiating of aggressive or unjust war has not yet been enforced by a Court as a matter of International Law."

In this connection he also refers to the fact that:

"The 1919 Commission did not recommend that the act which brought about the war should be charged against their authors."

According to Lord Wright, however:

"between then and the commencement of the war just ended, civilized nations, appalled by reviewing the destruction and suffering caused by the First Great War and appalled by the thought of the immeasurable calamities which would flow from a Second World War, gave much thought to the possibility of preventing the second war. The

Covenant of the League of Nations did contain certain machinery for that end. Certain conventions were summoned to declare that unjust or aggressive war was to be prohibited; one of these actually declared that it was a crime."

Lord Wright then considers THE EFFECT OF THE PACT OF PARIS in this respect and says:

"In 1928 the Pact or the Kellogg-Briand Pact was signed or adhered to by over sixty nations. It was a solemn treaty. Its central operative clause was brief, unusually brief for an international document, but its terms were plain, clear and categorical. The nations who signed or adhered to it unconditionally renounced war for the future as an instrument of policy. There would seem to be no doubt or obscurity about the meaning of this ..... There seems to be no room for doubt that the Pact was, as is clear by its very terms, intended to declare war to be an illegal thing: This which is plain enough on its face has been declared to be the fact by the most eminent statesmen of the world."

Lord Wright then seeks to explain away the want of any provision in the Pact with regard to sanctions and machinery for the settlement of differences between nations. He says:

"The concert of the nations evidenced by the Pact had the sanction of being embodied in a Treaty, the most formal testimony to its binding force. As a treaty or agreement it only bound the nations which were parties to it. But it may be regarded from a different aspect. It is evidence of the acceptance by the civilized nations of the principle that war is an illegal thing. This principle so accepted and evidenced, is entitled to rank as a rule of International Law."

So far the criminal responsibility is traced to the aggressive nation. The reasoning with which Lord Wright justifies fixation of responsibility on the individuals finds expression thus:

"It may be that before the Pact the principle was simply a rule of morality, a rule of natural as contrasted with positive law. The Pact, which is clear and specific, converts the moral rule into a positive rule comparable to the laws and customs of war, and like these laws and customs binding on individuals since the principle that individuals may be penally liable for particular breaches of International Law is now generally accepted. Thus violation of the principle that war, if unjust, is illegal and is not only a breach of treaty on the part of the nation which violates it, carrying with it all the consequences which attend a treaty-breaking, but is also a crime on the part of the individuals who are guilty as conspirators, principals or accessories of actively bringing it about, as much as a violation of the customary laws of war. Nations can only act by responsible instruments, that is by persons. If a nation, in breach of a treaty, initiates aggressive war the guilt of the responsible agents of the nation who bring this about, being able to do so by reason of their high position in the State, is a separate, independent and different liability, both in its nature and penal consequences. This

> is merely an illustration of the thesis that international crimes are of a multiple character; even violations of the laws of war will, unless the case is one of purely individual wrongdoing, generally involve multiple penal liability. Here the nation breaks the treaty, but the heads of the State who bring about the war are by their acts personally guilty of doing what the Pact declares to be illegal. That is a crime on their part like the crime of violating the laws of war. The nation is liable as a treaty-breaker, the statesmen are liable as violating a rule of International Law, namely, the rule that unjust or aggressive war is an international crime. The Pact of Paris is not a scrap of paper. This, in my opinion, is the position when the Pact of Paris is violated. It is on this principle, as I apprehend, that crimes against peace may be charged personally against the leading members of the Nazi Government."

Lord Wright's last appeal is to the progressive character of international law, already noticed by me.

THE AUTHORITIES such as I have referred to above or hereafter may have occasion to refer to are only of PERSUASIVE VALUE to us and in spite of what I have said as to why a special weight is due to his view, I should at once say with due deference that for the reasons given below I do not feel inclined to the view supported by the Right Honourable Lord Wright.

The passages wherein Lord Wright quotes from Professor Trainin and concludes that however "high his rank in the hierarchy", a member of the Hitlerite clique "is still only a murderer, robber, torturer, debaucher of women, liar and so on", need not detain us long. These are mere expressions of indignation roused by the remembrance of recent abominable acts during war. It may not be possible for one to avoid such feeling who had to study the tale of Nazi atrocities. But such a feeling must be avoided by a Tribunal sitting on trial for such alleged acts.

LORD WRIGHT approaches the question in two different ways. His first line of approach is dependent on A SPECIAL FACTUAL FEATURE of the case before him, namely, that the war in question was not only an aggressive war but that it was expressly designed to be conducted in a criminal manner—it was ushered in by the most brutal and blatant announcements that it would be conducted with every possible atrocity in order to strike terror. *In my opinion*, this fact, if established, would make these persons responsible for war crimes *stricto sensu*. Legal or illegal, war is to be regulated in accordance with the regulating norms of international law. Those who actually violate such regulations and those who direct their violations are equally war criminals *stricto sensu*. This line of approach, therefore, does not help us in answering the question raised before us.

In his *second line of approach*, Lord Wright takes up the case of war without the calculated system of terrorism and this is what we are concerned with for our present purpose.

So far as the question before us is concerned, *Lord Wright's real reasons* for declaring individual responsibility will be found to be the following:

1. In order that there may be international crime, there must be an

international community.

(*a*) There is a community of nations, though imperfect and inchoate;

(*b*) The basic prescription of this community is the existence of peaceful relations between states.

2. War is a thing evil in itself: It breaks international peace.
   (*a*) It may be justified on some specified grounds;
   (*b*) A war of aggression falls outside that justification;
   (*c*) To initiate a war of aggression is therefore a crime.
3. Granted the premises:
   (*a*) That peace among nations is a desirable thing;
   (*b*) That war is an evil in itself as it violates that peace;
   (*c*) That there is a criminal international law affecting individuals;

   It follows that individuals responsible for planning, preparing, starting and waging war are criminally liable under the international law.
4. Whatever might have been the legal position of war in an international community, the Pact of Paris or the Kellogg-Briand Pact of 1928 clearly declared it to be an illegal thing.

Reasons 1, 2, and 4, specified above, relate to the question whether aggressive war is at all a crime in international law. I have already considered that question and have answered it in the negative. The question now under our consideration is, assuming such a war to be a crime, what is the position of the individual state AGENTS responsible for bringing about this war condition? Lord Wright touches this question only in his reason 3 (*c*) as specified by me.

He, himself, points out that the punishment of heads or other members of governments or national leaders for complicity in the planning and initiating of aggressive or unjust war has not yet been enforced by a court as a matter of international law.

The cases of criminal international law affecting individuals referred to by Lord Wright are also referred to and discussed by Judge Manley O. Hudson, Professor Glueck and Professor Hans Kelsen. Those are all cases where the act in question is the act of the individual on his own behalf committed on high seas or in connection with international property. Most of these cases are expressly provided for. I do not see how the existence of such international law helps the solution of the present question. It may be that even the present case could have been provided for, either in the several national systems or in international law. In fact, Senator Borah in 1927 placed a Resolution before the Senate to that effect. As has been pointed out by Professor Glueck, that has not been done by any of the nations for reasons best known to them. It may only be added here that during the period intervening between the two World Wars recommendations in this respect came from various unofficial bodies but all these seem to have gone unheeded by the several states.

Considering (1) that sovereignty of states has been the fundamental basis

of hitherto existing international law; (2) that even in the post-war organizations this sovereignty is being taken as the fundamental basis; and (3) that so long as sovereignty of the states continues to play this important role, no state is likely to allow the working of its constitution to be made justiciable by any agency, I cannot hold that this omission on the part of the states in respect of the present question was not deliberate. I doubt if the states would even now agree to make such acts of their agents justiciable by others.

I have already given the view expressed by Prof. Quincy Wright in 1925. This is the place where I should notice what he now says while endeavouring to support the Nurnberg judgment. Prof. Wright says:

1. "The Tribunal reached the conclusion that THE CHARTER declared pre-existing international law when it provided that individuals were liable for crimes against peace.
2. In coming to this conclusion the Tribunal emphasized the development of an *international custom* which regarded the initiation of aggressive war as illegal and which had been given formal sanction by substantially all the states in the Pact of Paris of 1928.
3. (*a*) The nexus between the obligation of states not to resort to aggressive war and the criminal liability of individuals who contribute to the violation of this obligation was illustrated by analogy to the generally recognized individual liability for *War Crimes Stricto Sensu*.

   (*b*) If an individual act is of a criminal character, that is, *mala in se*, *and* is in violation of the states' international obligation, it is crime against the law of nations."

Professor Wright supports this view and for this purpose relies on the authority of Lord Wright, who, according to Prof. Wright, pointed out that the Pact of Paris converted the principle that "aggressive war is illegal" from a rule of "natural law" to a rule of "positive law", which like the rules of war is binding on individuals as well as states. I have already given my reasons why I could not accept this view of the effect of the Pact of Paris.

Lord Wright in arriving at his conclusion placed great reliance on the views of Mr. Trainin of the U. S. S. R. who with Mr. I. T. Nikitchenko signed the London agreement for the Government of the U. S. S. R. for the establishment of the International Tribunal for the trial of the major war criminals of the European Axis.

MR. TRAININ, it must be said, frankly points out the real urge for these trials. He says:

> "The question of the criminal responsibility of the Hitlerites for the crimes that they have committed is therefore of the greatest importance; it has become a very pressing problem, as the monstrous crimes of the Hitlerite butchers have *aroused the most burning and unquenchable hatred*, thirst for severe retribution in the hearts of all the honest people of the world, the masses of all liberty-loving people."

MR. TRAININ'S ARTICLE is entitled "The Criminal Responsibility of the

Hitlerites". The learned author starts with the following propositions:

1. The problems of international criminal law have not hitherto been dealt with clearly.
   (*a*) There is no clear definition of the fundamental meaning of international criminal law or international crime.
   (*b*) No orderly system of institutes of international criminal law is recognized.
2. In the existing literature all problems of international criminal law usually boil down to one question—that of jurisdiction.
   (*a*) The policy of aggressive imperialistic supremacy, a constant threat to peace, a policy systematically giving ample scope for the use of force in the sphere of international relations, naturally could not contribute to the development and strengthening of international law as a system of rules protecting the liberty, independence and sovereignty of nations.
      (1) But it would be a serious mistake to draw the general conclusion from this fact—that the introduction of the problem of international criminal law was inopportune or fruitless.
      (2) Two conflicting tendencies of the historical process had been visible even before the Second World War; namely:
         (*a*) the collision of imperialistic interests, the daily struggle in the field of international relations and the futility of international law—the tendency reflecting the policy of the aggressive nations in the imperialistic era;
         (*b*) the struggle for peace and liberty and independence of nations—a tendency in which was reflected the policy of a new and powerful international factor.
3. The present great war has given the latter tendency extraordinary scope and enormous power.
   (*a*) Liberty-loving nations have agreed that they respect the right of all nations to choose their own form of government and will strive to attain complete cooperation among all nations in the economic field in order to guarantee a higher standard of living, economic development and social security.
   (*b*) The Declaration of the Four Nations on general security proclaimed in Moscow on October 30, 1943 replaced "the period of full play of imperialistic plundering, and of the weakness of international legal principles" by a period which strengthens the laws which are the basis of international relations and which consequently leads to the strengthening of the battle against all the evil elements.
   (*c*) That is why there is an indissoluble organic tie between the *beginning of the creation* of a new system of international le-

gal relations and the fight against the Hitlerite crimes and against the international misdeeds of the aggressors.

4. To facilitate this process of development and to strengthen these new ideas, juridical thought is obliged:
   (*a*) to forge the right form for these new relations;
   (*b*) to work out a system of international law, and
   (*c*) as an indissoluble part of this system to dictate to the conscience of nations the problem of criminal responsibility for attempts on the foundation of international relations.

Towards the end of the first chapter Mr. Trainin considers it to be "the most serious problem and *the honourable obligation* of the Soviet jurists to give legal expression to the demand for retribution for the crimes committed by the Hitlerites". He then proceeds in his second chapter to enumerate "German crimes in the First World War and the Treaty of Versailles".

In chapter three he takes up the discussion of "The Concept of International Crime". The learned author points out that though the War of 1914-1918 showed the great importance of the problem of the responsibility of the aggressor, juridical thought still continued to wander in formal, unrealistic abstractions.

He points out that the problem in this respect is quite different in the field of international law from that in any national system. Here in the international field "there is no experience, no tradition, no prepared formulae of crime or punishment. *This is a field in which criminal law is only beginning to penetrate, where the understanding of crime is only beginning to take form*".

He then examines certain existing definitions and international conventions relating to certain crimes and rejects the definitions, observing that in them "the concept of an international offense as a particular kind of infringement upon sphere of international relations disappears completely, being dissolved in the mass of crimes provided against in national laws and committed on the territory of different states".

As regards the international conventions the learned Professor points out that "the selection of this or some other crimes as the object of the provisions of international conventions is necessitated, not by theoretical considerations concerning the nature of international crime, but by various political motives; the interests of one country or a group of countries in the combat against a given crime, material facilities for organization of such combat, and other reasons of that nature". These do not help the solution of the problem now raised. "Because of their juristic nature and because of their factual significance, conventions for certain common criminal offenses appear to be one of the various forms of reciprocal support for criminal law by governments having in view a realistic combat against crime. This reciprocal action of governments is not connected directly with the problem of international crimes."

MR. TRAININ points out that such international conventions do not make

these crimes international crime. Again, simply because there is no international convention relating to something that does not mean that this might not constitute international crime.

The learned author then takes up the League Conventions, and finds in them mere attempts at "classifying certain acts as criminal" and concludes that these also failed to "establish a concept of international crime".

He then proceeds to give his own views thus:

1. The conception of international crime and the combating of international crimes should be *henceforth* constructed on the basis:
   (*a*) Of experience of the "Fatherland Defense War".
   (*b*) On principles imbued with a real solicitude for the strengthening of the peaceful cooperation of the nations.
2. An international crime is an original and complex phenomenon. It differs in quality from the numerous crimes provided for by the national criminal legislations. Crimes in national systems are connected by one common basic characteristic—they are infringements upon social relations existing within a given country.
3. The epoch when governments and peoples lived isolated or practically isolated from each other is long past.
   (*a*) The capitalistic system specially developed complicated relations between nations.
      (1) A steady international association has developed.
      (2) Despite the conflicting interests of various nations, despite the differences in patterns of the political systems of countries, this international association forms innumerable threads connecting peoples and countries and represents, in fact, a great economic, political and cultural value.
4. An international crime is an attempt against the abovementioned achievement of human society—an international crime is directed toward the deterioration, the hampering and the disruption of these connections.
   (*a*) An international crime should be defined as infringements on the bases of international association.
5. The legal regime of international relations rests on its own peculiar basic source of law, namely a treaty which is the only law-creating act.
   (*a*) It is wrong to say "that because the states accepted for themselves, by voluntary agreements, the rules of their conduct, they themselves are also the final judges to decide if they can recognize these rules for a long time, or due to changed conditions, they will regulate in a new way the vital rights of the nation".
6. The rule that criminal law has no retroactive force can be provided against BY THE TERMS OF A TREATY. The treaty itself may supply the

basis for the acknowledgment of the retroactive effect of such a rule of law.

In chapter four, the learned author gives a classification of international crimes. He begins by defining an international crime to be "a punishable infringement on the bases of international associations", classifies such crimes into two groups, the first group being "Interference with Peaceful Relations between Nations"; and the second, "Offenses connected with War". In the first group he places seven items, namely:

1. Acts of aggression;
2. Propaganda of aggression;
3. Conclusion of agreements with aggressive aims;
4. Violation of treaties which serve the cause of peace;
5. Provocation designed to disrupt peaceful relations between countries;
6. Terrorism;
7. Support of armed bands (Fifth Column).

According to him, with the exception of terrorism, none of the others are covered by international conventions.

Chapter five is devoted to "Crimes of the Hitlerites against Peace" and the learned author concludes his enumeration by saying that "the Hitlerites, having criminally exploded the world, transformed war into an elaborately thought out system executed according to plan, a system of militarized banditry".

In the next chapter he again enumerates "War Crimes of the Hitlerites" giving war crimes *stricto sensu* committed during the last war.

IN CHAPTER SEVEN, Mr. Trainin proceeds to find out "the PERPETRATOR of an international crime". His propositions here seem to be the following:

1. The central problem in the sphere of criminal justice is the problem of guilt; there is no criminal responsibility without guilt. Guilt is expressed in two forms: In the form of intention and in the form of negligence.
2. A state as such cannot act with intention or negligence: This brings in the criminal exemption of a state.
3. For criminal acts committed in the name of the state or under its authority, the physical persons who represent the government and act in its name must bear the responsibility.
   (*a*) The criminal responsibility of persons acting in the name of the state is natural under any form of government, but it is specially appropriate in Germany, ruled by tyranny.
   (*b*) The criminal responsibility of physical persons acting on behalf of juridical persons is recognized in criminal legislations in force now. (*e.g.*, Art. 172 of the Swiss Criminal Code of 1937 making directors of a company criminally liable for some act of the company.)
   (*c*) The physical persons are criminally responsible because it is they who infringe the relations based on international law—it does not matter that such individuals are no party in such

international relations.

THIS IS THE WHOLE THESIS OF MR. TRAININ. The remaining four chapters are not relevant for our present purpose.

Unlike the other authors named above, MR. TRAININ DOES NOT BASE HIS CONCLUSION EITHER ON ANY PACT OR CONVENTION OR ON ANY CUSTOMARY LAW. He does not say that international law, as it stood before World War I, did contemplate such acts as criminal. It is not his case that any particular pact, including the Pact of Paris, made such acts criminal. He does not even claim that the criminality developed as a customary law. On the other hand, he seems to point out that it will be a *false analogy* to rely on the cases of crimes hitherto recognized in international relations and, from such recognition, to attempt the introduction of the present crime.

It may sometimes be legitimate to apply the juristic concept of a legal proposition to phenomena which were not within the original contemplation of the proposition. But I doubt if it is legitimate to pour an altogether new content into such a proposition, a content which is not even approximately similar to its original content.

Mr. Trainin's thesis seems to be that since the Moscow Declaration of 1943 and as a result of the same, a NEW INTERNATIONAL SOCIETY has developed. To facilitate this process of development and to strengthen these new ideas, juridical thought is obliged to forge the right form for these new relations, to work out a system of international law and, as an indissoluble part of this system, to dictate to the conscience of nations the problem of criminal responsibility for attempt on the foundations of international relations.

Mr. Trainin speaks of some "HONOURABLE OBLIGATION" of the Soviet jurists to give legal expression to the demand of retribution for the crimes committed by the Hitlerites. I hope this sense of obligation to satisfy any demand of retribution did not weigh too much with him. A judge and a juridical thinker cannot function properly under the weight of such a feeling. Yet, it cannot be denied that Mr. Trainin's is a very valuable contribution to deep juridical thinking.

The rules of law, no doubt, to a great extent, flow from the facts to which they apply. Yet an attempt to find such rules directly by such a consideration alone is likely to lead one to lose his way in a sort of labyrinth. The theoretical legal principles involved in this manner are not likely to stand the test of real life.

The Moscow Declaration is only a Declaration that a new epoch of international life is going to begin.

Even assuming that this new epoch has commenced, that will only mean the "reason" for the suggested law has come into existence. But the reason for the law is not, itself, the law.

The legal rule in question here is not such as would necessarily be implied in the state of facts related by Mr. Trainin and would thus originate simultaneously with those facts. International relations, even as premised by the

Moscow Declaration, will still constitute a society in a very specific sense. It would be under the reign of law also in a specific sense, and, however much it may be desirable to have criminal law in such a life, such a law would not be its necessary implication.

At most, Mr. Trainin has only established a demand of the changing international life. But I doubt whether this can be a genuine demand of that life and whether it can be effectively met by the introduction of such a criminal responsibility which would under the present organization only succeed in fixing such responsibility upon the PARTIES TO A LOST WAR.

The learned author ignores the fact that even now national sovereignty continues to be the basic factor of international life and that the acts in question affect the very essence of this sovereignty. So long as submission to any form of international life remains dependent on the volition of states, it is difficult to accept any mere implication of a pact or agreement which would so basically affect the very foundation of such sovereignty.

In any case, even assuming that such a criminal law flows naturally from mere reason, it is difficult to see how it is carried back to the past.

If Mr. Trainin is thinking of any treaty eliminating this difficulty as to retroactivity, it would suffice to say, as I have said already, that in the case before us there is no such treaty.

THE MOST VALUABLE CONTRIBUTION OF MR. TRAININ in this respect is his view of the place of criminal responsibility in international life. He rightly points out that piracy, slavery and the like that have hitherto been included in international system as crimes cognizable by international law are really not international crimes in the correct sense of the term. He points out that "In reality, the selection of this or some other crimes as the object of the provisions of international conventions is necessitated, not by theoretical considerations concerning the nature of international crimes, but by various political motives: The interests of one country or a group of countries in the combat against a given crime, material facilities for organization of such combat and other reasons of that nature .... Because of their juristic nature and because of their factual significance, conventions for certain common criminal offenses appear to be one of the various FORMS OF RECIPROCAL SUPPORT for criminal law by governments having in view a realistic combat against crime. This reciprocal action of governments is not a loss of practical attributes, but it is not connected directly with the problem of international crimes."

Mr. Trainin points out that the conception of criminal responsibility in international life can arise ONLY WHEN THAT LIFE ITSELF REACHES A CERTAIN STAGE IN ITS DEVELOPMENT. Before we can introduce this conception there, we must be in a position to say that that life itself is ESTABLISHED ON SOME PEACEFUL BASIS: International crime will be an infringement of that base—a breach or violation of the peace of *pax* of the international community.

I fully agree with Mr. Trainin in this view. What I find difficult to accept is his meaning of the term "peace" in this context; as also his view of the nature of the international community as it stood before the Second World

War. Further, I doubt if it would at all be expedient to introduce such criminal responsibility in international life.

The question of introduction of the conception of crime in international life requires to be examined from the viewpoint of the social utility of punishment. At one time and another different theories justifying punishment have been accepted for the purpose of national systems. These theories may be described as (1) Reformatory, (2) Deterrent, (3) Retributive and (4) Preventive. "Punishment has been credited with reforming the criminal into a law-abiding person, deterring others from committing the crime for which previous individuals were punished, making certain that retribution would be fair and judicious, rather than in the nature of private revenge, and enhancing the solidarity of the group by the collective expression of its disapproval of the law-breaker." Contemporary criminologists give short shrift to these arguments. I would however proceed on the footing that punishment can produce one or the other of the desired results.

So long as the international organization continues at the stage where the trial and punishment for any crime remains available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and the preventive effects.

The risk of criminal responsibility incurred in planning an aggressive war does not in the least become graver than that involved in the possible defeat in the war planned.

I do not think anyone would seriously think of reformation in this respect through the introduction of such a conception of criminal responsibility in international life. Moral attitudes and norms of conduct are acquired in too subtle a manner for punishment to be a reliable incentive even where such conduct relates to one's own individual interest. Even a slight knowledge of the processes of personality-development should warn us against the old doctrine of original sin in a new guise. If this is so, even when a person acts for his own individual purposes, it is needless to say that when the conduct in question relates, at least in the opinion of the individual concerned, to his national cause, the punishment meted out, or, criminal responsibility imposed by the victor nation, can produce very little effect. Fear of being punished by the future possible victor for violating a rule which that victor may be pleased then to formulate would hardly elicit any appreciation of the values behind that norm.

In any event, this theory of reformation, in international life, need not take the criminal responsibility beyond the STATE concerned. The theory proceeds on this footing. If a person does a wrong to another, he does it from an exaggeration of his own personality, and this aggressiveness must be restrained and the person made to realize that his desires do not rule the world, but that the interests of the community are determinative. Hence, punishment is designed to be the influence brought to bear on the person in order to bring to his consciousness the conditionality of his existence, and to keep it within its limits. This is done by the infliction of such suffering as would cure

the delinquent of his individualistic excess. For this purpose, an offending State itself can be effectively punished. Indeed the punishment can be effective only if the delinquent State as such is punished.

In my opinion it is inappropriate to introduce criminal responsibility of the agents of a state in international life for the purpose of retribution. Retribution, in the proper sense of the term, means the bringing home to the criminal the legitimate consequences of his conduct legitimate from the ethical standpoint. This would involve the determination of the degree of his moral responsibility, a task that is an impossibility for any legal Tribunal even in national life. Conditions of knowledge, of training, of opportunities for moral development, of social environment generally and of motive fall to be searched out even in justifying criminal responsibility on this ground in national life. In international life many other factors would fall to be considered before one can justify criminal responsibility on this retributive theory.

The only justification that remains for the introduction of such a conception in international life is revenge, a justification which all those who are demanding this trial are disclaiming.

It may be contended that indignation at a wrong done is a righteous feeling and that that feeling itself justifies the criminal law.

It is perhaps right that we should feel a certain satisfaction and recognize a certain fitness in the suffering of one who has done an international wrong. It may even be morally obligatory upon us to feel indignant at a wrong done.

But it would be going too far to say that a demand for the gratification of this feeling of revenge alone would justify a criminal law. In national systems a criminal law, while satisfying this feeling of revenge, is calculated to do something more of real ethical value and that is the real justification of the law. Though vengeance might be the seed out of which criminal justice has grown, the paramount object of such is the prevention of offenses by the menace of law.

The mere feeling of vengeance is not of any ethical value. It is not right that we should wish evil to the offender unless it has the possibility of yielding any good. Two wholly distinct feelings require consideration in this connection. The one is a feeling of moral revulsion and is directed against the crime. The other is a desire for vengeance and is directed against the criminal. To revenge oneself is, in truth, but to add another evil to that which has already been done, and the admission of it as a right is, in effect, a negation of all civil and social order, for thereby are justified acts of violence not regulated by nor exercised with reference to, the social good. There are few who in modern times assert the abstract rightfulness of a desire for vengeance.

I am not unmindful of the view expressed by Fitzjames Stephen wherein he asserts the rightfulness of vengeance. "The infliction of punishment by law", says Stephen, "gives definite expression and a solemn ratification to the hatred which is excited by the commission of the offense, and which constitutes the moral or popular, as distinguished from the conscientious, sanction of that part of morality which is also sanctioned by the criminal law. The criminal law thus proceeds upon the principle that it is morally right to hate

criminals and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it." "I think it is highly desirable", he continues, "that criminals should be hated, that the punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it."

Though apparently this seems to indicate as if Stephen defends the desire for vengeance as ethically proper, on a careful examination of the thought thus expressed by him it would be found that what he really has in mind is that feeling of indignation which we justly feel at the commission of a wrong rather than the feeling of revenge pure and simple. If from his thought the belief in the possible educative or preventive value of the punishment is eliminated then the sentiment hardly justifies the law. Indignation arises on the commission of the wrong act. The justification of the law is its preventive capacity. If in an organization this prevention is not at all possible, the justification for its introduction there is absent: The organization is inapt for the introduction of criminal punishment.

In the feeling of indignation, the element that really matters much for the community is the expression of disapprobation. This disapproving feeling prevails primarily against the act; but of necessity it extends also to its author. The question is what is the possible and proper method of expressing this disapproval! In my opinion at the present stage of the international society, the method that would necessarily depend on the contingency of a war being lost, and that would be available only against the vanquished, is not what can be justified on any ethical ground. There are other available methods of giving expression to this disapprobation and in the present stage those other methods of expressing world opinion should satisfy the international community.

According to Mr. Trainin, before the present World War, "The policy of AGGRESSIVE IMPERIALISTIC SUPREMACY, a constant threat to peace, a policy systematically giving ample scope for the use of force in the sphere of international relations, naturally could not contribute to the development and strengthening of international law as a system of rules protecting the liberty, independence and sovereignty of nations."

"But", Mr. Trainin says, "it would be a serious mistake to draw the general conclusion from this fact that the introduction of the problem of international criminal law was inopportune or fruitless: This would be to disregard the difficulty and complexity of international relations."

According to him even before the Second World War there were two "tendencies of the historical process", —one being the collision of imperialistic interests, the daily struggle in the field of international relations and the futility of international law—the tendency reflecting the policy of the aggressive nations in the imperialistic era—and the other, just a parallel and opposite to the former, being the struggle for peace and liberty and independence of nations, a tendency in which is reflected the policy of a *new* and *powerful*

international factor—the Socialist State of the toilers, the U. S. S. R.

Thus there was some scope for the introduction of the conception of criminal law in international life in view of the second tendency named above.

This tendency, says Mr. Trainin, has been given extraordinary scope and enormous power by the Second War. The nations have now agreed that they "respect the right of *all* nations to choose their own form of government and will strive to attain complete cooperation among all nations in the economic field in order to guarantee a higher standard of living, economic development and social security". He refers to the Moscow Declaration of October 30, 1943 as having confirmed this solemnly. It is not very clear, but it seems that Mr. Trainin takes this solemn resolve on the part of the great powers as establishing the *base* of the international life and consequently as supplying the basis of criminality in the international system. He says: "Just as earlier, in the period of full play of imperialistic plundering, the weakness of international legal principles hindered the development of a system of measures to prevent the violation of international law, *now*, on the contrary, the strengthening of the laws which are the basis of international relations must consequently lead to the strengthening of the battle against all the elements which dare, through fraud, terror or insane ideas upset international legal order".

It seems Mr. Trainin here takes the Moscow Declaration as establishing an international association completely under the reign of law and consequently making any breach of its peace criminal. In this view all wars will be crime unless they can be justified on the strength of the right of private defense as in the national systems.

In another place Mr. Trainin gives credit to the capitalistic system as developing complicated relations between individual nations. From this, according to him, a steady international association has developed. "Despite the conflicting interests of various nations, despite the difference in patterns of the political systems of countries, this international association forms innumerable threads connecting peoples and countries and represents, in fact, a great economic, political and cultural value." An international crime, according to Mr. Trainin, is an attempt against the association between countries, between peoples, against the connections which constitute the basis of relations between nations and countries. An international crime is said to be one which is directed toward the deterioration, the hampering and the disruption of these connections.

I have elsewhere given my view of *the character of the so-called international community as it* stood on the eve of the Second World War. It was simply a co-ordinated body of several independent sovereign units and certainly was not a body of which the order or security could be said to have been provided by law.

By saying this, I do not mean to suggest any absolute negation of international law. It is not my suggestion that the observance of the rules of inter-

national law, so far as these go, is not a matter of obligation. These rules might have resulted from the calculation that their observance was not incompatible with the interest of the state. Yet, their observance need not be characterized as the result of such calculation. A state before being a willing party to a rule, might have willed thus on the basis of some such calculation, but after contribution of its "will", which is essential for the creation of the rule, it may not retain any right to withdraw from the obligation of the rule thus created: The rule thus exists independently of the will of the parties: It is of no consequence that in coming into existence it had to depend on such will. Yet, simply because the several states are thus subjected to certain obligatory rules, it does not follow that the states have formed a community under a reign of law. Its order or security is not yet provided by law. PEACE IN SUCH A COMMUNITY is only a negative concept— it is simply a negation of war, or an assurance of the *status quo*. Even now each state is left to perform for itself the distributive function. The basis of international relations is still the competitive struggle of states, a struggle for the solution of which there is still no judge, no executor, no standard of decision. There are still dominated and enslaved nations, and there is no provision anywhere in the system for any peaceful readjustment without struggle. It is left to the nations themselves to see the readjustment.

Even a pact or a covenant which purports to bind the parties not to seek a solution of their disputes by other than pacific means, contains no specific obligation to submit controversies to any binding settlement, judicial or otherwise. It is a recognized rule of international life that in the absence of an agreement to the contrary, no state is bound to submit its disputes with another state to a binding judicial decision or to a method of settlement resulting in a solution binding upon both parties. This is a fundamental gap in the international system. War alone was designed to fill this gap—war as a legitimate instrument of self-help against an international wrong, as also as an act of national sovereignty for the purpose of changing existing rights independently of the objective merits of the attempted change. Even when a pact is made to renounce war the gap is left almost unobserved and certainly unprovided for. THE BASIS OF A SOCIETY SO DESIGNED IS NOT THAT PEACE WHICH MEANS PUBLIC ORDER OR SECURITY AS PROVIDED BY LAW AND OF WHICH AN INFRINGEMENT BECOMES A CRIME. For a community thus designed, the conception of crime is still premature.

The most ingenious of the reasons that were given for fixing the criminal responsibility on the accused is that thereby the character of the whole defeated nation will be amply vindicated, and this will help the promotion of better understanding and good feeling between the individual citizens of the defeated and of the victor states. The entire defeated nation, it is said, has, by the war, provoked the hatred of the peace-loving nations. By the trial and punishment of these few persons who were really responsible for the war, the world will know that the defeated nation like all other nations was equally sinned against by these warlords. This will be a real and substantial contribution to the future peace of the world by repelling from the minds of the peace-

loving nations all hatred towards the defeated nation and replacing such hatred with sympathy and good feeling. Assuming it to be so, I do not see how this coveted object would justify the punishment of these individuals by a court of law. If such is the object of a trial like the present, the same result could easily have been achieved by a commission of enquiry for war responsibility. Such a commision might have been manned by competent judges from different nationalities and their declaration would have produced the desired effect without any unnecessary straining of the law.

After giving my anxious and careful consideration to the reasons given by the prosecution as also to the opinions of the various authorities I have arrived at the conclusion:

1. That no category of war became criminal or illegal in international life;
2. That the individuals comprising the government and functioning as agents of that government incur no criminal responsibility in international law for the acts alleged;
3. That the international community has not as yet reached a stage which would make it expedient to include judicial process for condemning and punishing either states or individuals.

I have not said anything about the alleged object of the Japanese plan or conspiracy. I believe no one will seriously contend that domination of one nation by another became a crime in international life. Apart from the question of legality or otherwise of the means designed to achieve this object it must be held that the object itself was not yet illegal or criminal in international life. In any other view, the entire international community would be a community of criminal races. At least many of the powerful nations are living this sort of life and if these acts are criminal then the entire international community is living that criminal life, some actually committing the crime and others becoming accessories after the fact in these crimes. No nation has as yet treated such acts as crimes and all the powerful nations continue close relations with the nations that had committed such acts.

Questions of law are not decided in an intellectual quarantine area in which legal doctrine and the local history of the dispute alone are retained and all else is forcibly excluded. We cannot afford to be ignorant of the world in which disputes arise.

Mr. Trainin's hopes are based on the Moscow Declaration of 1943 whereby, according to him, the nations have NOW agreed that they "respect the right of ALL nations to choose their own form of government". His hopes, however, are not yet realized in actual life and certainly BEFORE the Second World War, during the period we are here concerned with, the tendency reflecting the policy of the powerful nations did not even offer any scope for such a hope.

In the circumstances I would prefer the view that at least before the Second World War international law did not develop so as to make these acts criminal or illegal.

PART II

WHAT IS "AGGRESSIVE WAR."

There is yet another question which must be answered before we can deal with the evidence in the case: We must determine what is meant by an *aggressive war*.

Dr. Schwarzenberger in his 'Power Politics' says that while in a system of Power Politics the distinction between aggressive and defensive wars is only of propagandist relevance, and the naturalistic distinction between just and unjust wars was bound to degenerate into a meaningless ideology, the difference is essential in an international community which seriously attempts to limit resort to war to exceptional cases, or to abolish it completely.

At the Paris Conference of 1936 of the International Law Association the question of the right of self-defense came up for discussion. It was however, resolved to adjourn the question for the further consideration of the Committee on "Conciliation between nations." At the time of this adjournment, however, the examination of the question of aggression was added to it as it was considered *that the two could not be separated from each other*.

The Committee at the next conference of the Association held in 1938 at Amsterdam reported that the Association was not likely "to arrive at a general agreement with regard to the *definition* and the INCIDENTS of the right of self-defense." The Committee accordingly suggested that the further consideration of the subject as also of the question of aggression be adjourned.

The following members served on the committee: Professors J. L. Brierly, H. Lauterpacht and Messrs H. E. Caloyanni, C. John Colombos, C. G. Dehn, Albr. D. Dieckhoff, B. Geocze, F. T. Grey, F. N. Keen, M. J. Makowski, G. M. Palliccia, and W. A. Bewes and Sir J. Fischer Williams.

The report came before the Conference presided over by Lord MacMillan.

Mr. Bewes in presenting this report observed that the Committee without division approved "that they should wait until, among other things, LARGE DIVERSITIES OF OPINION *between the different states had quieted down in some way or other*, when they should have a chance of doing some useful work."

Mr. Temple Grey characterized the question of aggression as having become A HARDY ANNUAL and wanted to have an exchange of views on what he called "a difficult part of a difficult subject". He referred to some prior attempts at a definition of aggression in certain conventions, notably between the Soviet Russia and the neighbouring powers. One such definition was: "He is an aggressor who is found on enemy territory." Mr. Grey observed that this definition had the DEMERIT of appearing to make the matter much more simple than it is. He then referred to an undertaking in Article 5 of the Pact of Non-Aggression between France and Russia and observed that this was an *interesting step towards taking into consideration* other than mere mechanical methods of defense. Mr. Grey then said:

> "It does not, however, deal with certain things which are hostile acts, that is to say, *he may be an aggressor who indulges in unfriendly acts which are not physical and who takes part in international mischief-making*."

He referred to adverse PROPAGANDA as one such act.

Mr. Whitman suggested that, "Whenever trouble brews or starts, the nation which declines to submit the question involved to some peaceful determination either by arbitration or by some tribunal to be determined, is the aggressor. If either part is so unwilling, nothing can be done but *to let them fight* it out."

Mr. Rabagliati observed that: "If it is impossible to define 'aggression' at a time when the world is reverberating with aggressions and threats of aggressions, it will probably never be possible to define it at all." He further observed that: "As between self-defense and aggression there is sometimes such a balance as makes it almost impossible to say WHICH IS WHICH."

Lord MacMillan said that he personally had always taken the view that nothing was more dangerous than definition—that in definition *latet periculum*. He was for postponing the consideration of the question. Ultimately the question was postponed.

The views quoted above, of course, have no official authority, the Institute being a wholly unofficial body of international jurists. Yet, from the eminence of its members, its pronouncements are always entitled to respect.

At the Paris Conference a definition of the right of self-defense was proposed which defined purely from what might be said to be a pre-war view of self-defense.

Mr. Quincy Wright in 1935 dealt with the concept of aggression in international law; but in proposing a definition he expressly stated THAT THE DEFINITION PROPOSED DID NOT DEMAND THAT THE CONSEQUENCE OF AGGRESSION BE OF THE NATURE OF CRIMINAL LIABILITY. According to him: "An aggressor is a state which may be subjected to preventive, deterrent, or remedial measures by other states because of its violation of an obligation not to resort to force." He emphasized that aggression is not the equivalent of the violation of an international obligation. Even if a state violates an obligation not to resort to force, it would still not be an aggressor under the definition proposed unless the law draws some practical consequence therefrom. The measures consequent upon aggression may be preventive, deterrent or remedial rather than punitive, and their application may be discretionary rather than obligatory with other states; but unless there is some sanction, some legal consequences of the breach, the breaker is not, under this definition, an aggressor.

Mr. Wright distinguishes three classes of tests of aggression, each again being divided into four sub-classes according as attention is directed primarily to legal, military, psychological or procedural events. His three principal classes are:

1. The tests giving weight to events which occurred before fighting began.
2. The tests confining attention to events which occurred at the time fighting began.
3. The tests based upon events after fighting is in progress.

The first class conforms best to the usual conception of justice, though it is incapable of rapid application. Hundreds of thousands of events may have

to be examined before the just evaluation of a controversy may be possible and this is bound to be a matter of long and laborious analysis.

The second class, according to Mr. Wright, conforms less to the usual conception of justice but perhaps more to the usual conception of aggression. Even here there is the difficulty that the events occurring where and when hostilities began are likely to be witnessed only by excited or prejudiced observers. Tests of this class, being dependent upon an appreciation of unexpected circumstances at a time of unusual tension, are seldom capable of precise conclusions which a war-prevention procedure demands.

The third class contemplates the following definition of an aggressor: "An aggressor is a state which is under an obligation not to resort to force, which is employing force against another state, and which refuses to accept an armistice proposed in accordance with a procedure which it has accepted to implement its no-force obligation."

Mr. Quincy Wright elsewhere points out that the League of Nations has moved toward the following different tests each adopted for a distinctive use:

1. The state responsible for THE FIRST ACT OF WAR, especially by invasion of foreign territory, is the aggressor: This test was proposed in connection with disarmament discussions.
2. The state UNDER THE LEAST DEFENSIVE NECESSITY at the time hostilities began is the aggressor: This was proposed in connection with claims for reparation after hostilities have ceased.
3. A state is an aggressor if it REFUSES TO ACCEPT AN ARMISTICE proposed in accordance with a procedure which it has accepted to implement its no-force obligation: This test has been suggested in most of the disputes involving hostilities before the League. Instead of examining the temporal priority of the belligerents in committing acts of war, or the moral necessities of the belligerents at the time fighting began, the League has examined the willingness of the belligerents to stop fighting when invited to do so.

Mr. Quincy Wright's own view seems to be to accept the first of the above three tests. According to him, a state of war can never exist among parties to the Pact of Paris without violation of the Pact. The initiation of a state of war, Mr. Wright says, can hardly be a proper defensive measure. The term defense has, however, tended to be used to cover all the unnamed circumstances which should extenuate the strict application of the rule against force.

The definition proposed by Mr. Wright, however, would not help us very much as will be seen later. He himself limited his definition to purposes OTHER THAN DETERMINATION OF CRIMINAL LIABILITY.

Some suggest that a definition of the term is neither expedient nor necessary. A Court would experience no difficulty, it is said, on the facts in each particular case, in determining whether there has been an aggression or not. Certainly in definition there is danger. But I do not agree that all danger is eliminated simply by leaving the term undefined and thus allowing it to remain

chameleonic. It may be easy for every nation to determine for others what is aggression. Perhaps every nation will say that war against what it considers to be its interest is aggressive. No term is more elastic or more susceptible of interested interpretation, whether by individuals, or by groups, than aggression. But when a court is called upon to determine the question it may not always be so easy for it to come to a decision.

In my opinion in international life as at present organized it is not possible "by the simple aid of popular knowledge" to find out which category of war is to be condemned as agrressive. The duty of definition in such a case is obvious; it would not only make the matter clear but would also give it its true place in the scheme of knowledge showing its origin and connection with other cognate facts and determining its essentials. The so-called "simple popular" idea in a case like this would not be sufficient and we must not make a confusion between the idea entertained by a particular group and the real popular idea of the entire international community. It is a question of a clear agreement of the different nations as to the measures which they would deem to be aggressive.

The question involves further difficulty in view of the fact that the fundamental basis of these trials has been declared to be the organization of international life on the footing of humanity, but as a matter of fact there are still nations under the domination of another nation. The question would naturally arise whether the term aggressive would have reference to the interest of the dominated nation as distinct from that of the dominating power, or whether it would only have reference to the *status quo*. It is obvious that there is thus the possibility of want of agreement in popular ideas if the word 'popular' is to be taken in a sense comprehensive enough to embrace the dominated population as well. I do not see any reason why in a community organized on the basis of humanity, the interest of the dominated people should not be adverted to in such a case, if the word humanity again is not being used in any specific sense so as to exclude reference to the unlucky dominated nations of the world.

One of the most essential attributes of law is its predicability. It is perhaps this predicability which makes justice according to law preferable to justice without law,—legislative or executive justice. The excellence of justice according to law rests upon the fact that judges are not free to render decision based purely upon their personal predilections and peculiar dispositions, no matter how good or how wise they may be. To leave the aggressive character of war to be determined according to "the popular sense" or "the general moral sense" of the humanity is to rob the law of its predicability. In those fields of international controversy where passion runs high and where even now nations are only beginning to be induced to substitute for war settlement by peaceful action, the law has a very difficult and delicate function to fulfil. Here, at any rate, no rule of law should be made to stand on a veritable quicksand of shifting opinion and ill-considered thought. Let not its very vagueness be accepted as the magic jingle through whose potency bewitched adventurers would be delivered from all their troubles.

I have already considered the views of Dr. Lauterpacht as to the legal position of the Pact of Paris and as to reservation of the right of self-defense having reference only *to the faculty* of determining what action should be taken when there is *periculum in mora*. According to him the legality of recourse to force in self-defense is in each particular case a proper subject for impartial determination by judicial or other bodies. I have already given my reason why I could not accept this view. Dr. Lauterpacht, however, in the connection says something about the definition of aggression which may be of some use for our present purpose.

The learned Professor proposes to lay down in advance in what circumstances recourse to force, including war, must be regarded *prima facie* as a measure of self-defense, and says: "Such circumstances constitute aggression on the part of the State against which the measures of self-defense are directed." He then refers to a number of treaties in which different states have adopted a definition of aggression and concludes by recommending further attempts in that direction. According to him such attempts cannot be regarded either as legally unsound or as inimical to justice.

The treaties referred to by Dr. Lauterpacht are:

> The conventions between Russia and the several other states for the definition of aggression.

According to Article II of the Convention for the definition of aggression of July 3, 1933, between Russia and Afghanistan, Esthonia, Latvia, Persia, Poland, Roumania and Turkey, the *aggressor* in an international conflict will be considered *the state* which will be the *first to commit any* of the following acts:

1. Declaration of war against another State;
2. Invasion by armed forces, even without a declaration of war, of the territory of another State;
3. An attack by armed land, naval, or air forces, even without a declaration of war, upon the territory, naval vessels, or aircraft of another state;
4. Naval blockade of the coasts or ports of another State;
5. Aid to armed bands formed on the territory of a State and invading the territory of another State, or refusal, despite demands on the part of the State subjected to attack, to take all possible measures on its own territory to deprive the said bands of any aid and protection.

The learned professor then points out that this definition followed closely the definition of aggression proposed in May 1933 by the Committee on Security Questions of the Disarmament Conference. The Draft Convention submitted by Great Britain to the Disarmament Conference in 1933 contained a definition of 'resort to war' within the meaning of Article 16 of the covenant which followed closely the definition quoted above except as to part 4.

Closely following this, Mr. Justice Jackson, at the Nurnberg trial, proposed a definition of 'aggressor' for the purpose of determining the criminali-

ty of the act of aggression. Mr. Jackson said:

"An aggressor is generally held to be that state which is the first to commit any of the following acts:

"(1) Declaration of war upon another state.

"(2) Invasion by its armed forces, with or without declaration of war, of the territory of another state.

"(3) Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another state.

"(4) Provisions of support to armed bands formed in the territory of another state, or refusal notwithstanding the request of the invaded state, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection."

According to Mr. Jackson:

"It is the general view that no political, military, economic, or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, RESISTANCE to an act of aggression, or ACTION TO ASSIST a state which has been subjected to aggression, shall not constitute a war of aggression."

He emphasized that by these trials we are not inquiring into THE CONDITIONS WHICH CONTRIBUTED TO CAUSING THIS WAR. He pointed out the difference between the charge that this war was one of aggression and a position that Germany had no grievances and said:

"It is no part of our task to vindicate the European *status quo* as of 1935, or as of any other date. The United States does not desire to enter into discussion of the complicated pre-war currents of European Politics . . . .

"Our position is that whatever grievances a nation may have, however objectionable it finds the *status quo*, aggressive warfare is an illegal means for settling those grievances or for altering those conditions."

We need not stop here to consider whether a static conception of peace is at all justifiable in international relations. I am not sure if it is possible to create 'peace' once for all, and if there can be *status quo* which is to be eternal. At any rate in the present state of international relations such a static idea of peace is absolutely untenable. Certainly, dominated nations of the present day *status quo* cannot be made to submit to eternal domination only in the name of peace. International law must be prepared to face the problem of bringing within juridical limits the politico-historical evolution of mankind which up to now has been accomplished chiefly through war. War and other methods of SELF-HELP BY FORCE can be effectively excluded only when this problem is solved, and it is only then that we can think of introducing criminal responsibility for efforts at adjustment by means other than peaceful. Before the introduction of criminal responsibility for such efforts the international law must succeed in establishing rules for effecting peaceful changes.

Until then there can hardly be any justification for any direct and indirect attempt at maintaining, in the name of humanity and justice, the very *status quo* which might have been organized and hitherto maintained only by force by pure opportunist "Have and Holders", and, which, we know, we cannot undertake to vindicate. The part of humanity which has been lucky enough to enjoy political freedom can now well afford to have the deterministic ascetic outlook of life, and may think of peace in terms of political *status quo*. But every part of humanity has not been equally lucky and a considerable part is still haunted by the wishful thinking about escape from political dominations. To them the present age is faced with not only the menace of totalitarianism but also the ACTUAL PLAGUE of imperialism. They have not as yet been in a position to entertain a simple belief in a valiant god struggling to establish a real democratic order in the Universe. They know how the present state of things came into being. A swordsman may genuinely be eager to return the weapon to its scabbard at the earliest possible moment after using it successfully for his gain, if he can keep his spoil without having to use it anymore. But, perhaps one thing which you cannot do with weapons like bayonets and swords is that you cannot sit on them.

The approach suggested by Mr. Justice Jackson might have appealed to us had we been dealing with a recognized rule of law already settled with that limitation. But in a field where we are called upon to exercise our creative function, where we are called upon to have recourse to the progressive character of international law, and to declare and apply, in the name of justice and humanity, a newly found norm in order to fix criminal liability on a group of persons who acted in a particular manner while working the constitution of their country, I do not see how we can shut our eyes to the period beyond an arbitrarily fixed limit. The approach suggested would certainly deliver us from all our troubles and would afford an easy solution of all our bewilderment. But I am not sure if it would lead us to anything which in the name of humanity we can call wholesome and salutary.

When international law will be made to yield the definition suggested by Mr. Justice Jackson, it would be nothing but "an ideological cloak, intended to disguise the vested interests of the interstate sphere and to serve as a first line for their defense." A device to perpetuate a casual *status quo* without providing any machinery for peaceful change may not command much respect in international life.

This emphasis on an arbitrarily fixed *status quo* would certainly not lead us to any understanding of the real conditions of peace and would fail to build any respect for justice. A trial conducted on this basis may be sufficiently unrevealing so as to shut out the essential facts responsible for the world trouble and may, at the same time, afford ample opportunity for a collective expression of retributive and aggressive sentiment. Guilt is usually an elusive idea, especially when it is to be assigned under the pressure of strong emotions stimulated and snarled by wartime propaganda. When to this we add the proposed arbitrary and artificial limit to our enquiry, the resulting situation may eminently suit the occasion for any vindictive and oratorical plea in the language

of emotional generalities. But such an enquiry may only entertain; it would hardly educate. It would contribute little to a comprehension of the causes of war or the conditions of peace.

Some of the tests suggested above would land us in some difficulties in this case. We must remember that the U. S. S. R. and the Netherlands are some of the prosecuting nations in this case and both declared war against Japan first. So far as the U. S. S. R. is concerned, even if self-defense be taken as admitting of initiation of war under certain conditions, the circumstances in which that state declared war against Japan would hardly justify it as war necessitated by any consideration of defense. It would perhaps be difficult to read "an instant and overwhelming necessity for self-defense, leaving no choice of means, and no moment of deliberation" in a war against already defeated Japan.

The Prosecution in its summation says: "We do not deny that in the Spring of 1944 the Japanese General Staff for the first time had to begin drafting defensive plans contemplating war with the U. S. S. R.. But that took place when the Soviet Army had already broken the spine of the German Fascist army and the Japanese Army was suffering defeat from the Allies." It may be difficult to guess any necessity, instant or otherwise, overwhelming or otherwise, for defense where there is no danger of attack. Japan had already been fatally weakened and the U. S. S. R. knew it. Japan was given the first atom blast on the 6th August 1945.

The U. S. S. R. declared war against Japan on 8th August 1945. The Potsdam Declaration demanding unconditional surrender of Japan was issued on July 26, 1945. Japan had requested the Soviet Union to mediate in the early part of June, 1945, and ultimately offered to surrender on August 10, 1945. In the meantime, on 8 August, the U. S. S. R. declared war stating the following in justification of the action thus taken by it:

"After the rout and capitulation of the Hitlerite Germany, Japan is the only great power which is still for the continuation of the war.

"The demand of the unconditional surrender of the Japanese armed Forces made by the Three Powers—the United States of America, Great Britain and China—on July 26, this year, was declined by Japan. Thus the proposal made by the Japanese Government to the Soviet Union containing the request of mediation in the war in the Far East loses all ground.

"Taking into consideration the fact that Japan refused to surrender, the Allied Powers made a proposal to the Soviet Government to join the war against the Japanese aggression and thus to shorten the period of time necessary to end the war, to reduce the number of victims, and to contribute to the speedy restoration of peace in the world. True to the allied cause, the Soviet Government accepted the proposal made by the Allied Powers and joined the declaration of the Allied Powers made on July 26, this year.

"The Soviet Government believes that such a policy of its is the only way to bring nearer the advent of peace, to free the nations from further sacrifices and sufferings, and to give a chance to the Japanese people to avoid those dangers and damages, which were suffered by Germany, after she had de-

clined the unconditional capitulation. On the basis of the above said, the Soviet Government declares, that from tomorrow, *i. e.*, August 9, the Soviet Union will consider herself to be in a state of war against Japan."

I have given the above extract from the prosecution document, Exhibit No. 64. The declaration does not refer to any *periculum in mora* and, as a matter of fact, there was none. The U. S. S. R. did not say, and in the circumstances disclosed by the evidence in this case, could not have said, that it believed its very life and vital interests to have been endangered beyond possibility of redress if immediate action was not taken. In its summation the prosecution says that "true to her commitment to the Allies, the U. S. S. R. at the request of the U. S. A. and Great Britain, declared war on the Japanese aggressor on August 9, 1945, thereby contributing to the speedier termination of World War II . . . ." The evidence discloses that this action on the part of the U. S. S. R. HAD BEEN ARRANGED BEFOREHAND with the other allied Powers who were all parties to the Pact of Paris. In my opinion we should not put such a construction on the Pact which would lead us to hold that all these big powers participated in a criminal act.

The justification offered by the U. S. S. R. in this document is certainly not one of self-defense; and, though at the hearing of the case, evidence has been introduced to show Japan's alleged aggressive design against the U. S. S. R., no such consideration seems to have weighed with that State in its decision in this respect. In my opinion, in the view of the law on the assumption of which we are now proceeding we must either accept the justification sought to be given in this document as a VALID EXCUSE for war in international law or declare the action taken to be unjustifiable and consequently aggressive and criminal. Of course, it might be contended that so far as the Pact of Paris is concerned, the war declared by the U. S. S. R. would not offend against its provisions. The U. S. S. R. might contend that it resorted to war as an instrument of international policy. Further, Japan having already violated this Pact, forfeited its benefit and consequently this war by the U. S. S. R. did not violate the Pact, being against a signatory who had been waging war in violation of the same. This plea would be available only if we say that the test whether or not a particular war is criminal is whether it is or is not in violation of the Pact.

So far as the act of the Netherlands is concerned it may be supportable as a measure of self-defense only if we do not accept the test of aggression suggested by Mr. Jackson. At the time when the Imperial Rescript declaring war on the United States and Great Britain was issued, no declaration of war was made against the Netherlands. The Prosecution contends that this was so only "in view of future strategic convenience". According to the Prosecution "there was no doubt that on December 8, 1941, Japan entered into a war with the Netherlands. Recognizing this situation, the Netherlands declared that a state of war existed between the Netherlands and Japan".

I need not proceed to examine this question further at this place. All that I need point out is that from the very fact that the prosecuting nations includ-

ing these two nations made a common case, the test of aggression must be sought somewhere else. Otherwise the test suggested by the various authorities would lead to the result that the U. S. S. R. committed the crime of starting aggressive war against Japan: That it also committed the same crime by its war against Finland and consequently committed crime against humanity as well, may be left out of consideration in the present case. I am pointing this out here only to show where the suggested tests would lead us. As I cannot believe for a moment that the nations themselves having thus committed crimes would combine to prosecute the defeated nationals for the same crime, ignoring altogether similar criminals of their own nationalities, my conclusion is that the nations have not accepted any one of those tests of aggression that would produce this result.

It may be suggested, as has very often been done in course of this trial, that simply because there might be robbers untried and unpunished it would not follow that robbing is no crime and a robber placed under trial for robbery would gain nothing by showing that there are other robbers in the world who are going unpunished. This is certainly sound logic when we know for certain that robbery is a crime. When, however, we are still to determine whether or not a particular act in a particular community is or is not criminal, I believe it is a pertinent enquiry how the act in question stands in relation to the other members of the community and how the community looks upon the act when done by such other members.

Before we can decide which meaning should be attached to the words 'aggressor', 'aggression' and 'aggressive', we must decide which of the views as to a certain category of war having become criminal is being accepted by us. It is needless to say that we are now proceeding ON THE ASSUMPTION that a certain category of war is a crime under the international law.

We have already noticed that there are at least four different views as to how war becomes a crime in international life.

According to Lord Wright, war is a crime in so far as it cannot be justified: The only justification of war being that it is necessitated by self-defense or self-protection, it would follow that the term 'aggressive' in this view should mean what is not justifiable on this ground. The Nurnberg Tribunal seems to have taken this view. In this connection it will be necessary for us to decide whether there need be any OBJECTIVE CONDITION as the basis of self-defense or whether mere SUBJECTIVE END would suffice. Even if we accept the position that an objective condition is essential for self-defense, the question would still remain: Who, under the international law, is to judge the existence or otherwise of such objective condition?

According to Dr. Glueck, neither the Pact of Paris nor any of the Covenants made any war a crime. But repeated pronouncements of popular conviction that aggressive war is a crime gave rise to a customary international law making war a crime in international life. In this view we must look to these pronouncements to find out the meaning of aggression.

Professor Kelson's view seems to be that the distinction between just and unjust war has always been recognized. The Pact of Paris now definitely de-

fines what is unjust war: The war thus declared unjust will be a crime. This view is substantially the same as that of Lord Wright for our present purposes and will lead to the same meaning of the terms aggressor, aggressive, or aggression.

Mr. A. N. Trainin's views are somewhat difficult of application in this respect. He defines international crimes as infringements on the basis of international association, and consequently the conception of crime in international life can come into existence only when peace is established as the basis of such association.

I have already shown that in the ultimate analysis, Mr. Trainin's view comes to this that any infringement or attempted infringement of the *status quo* is crime. This seems to correspond to the view asserted by Mr. Jackson at the Nurnberg Trial.

The prosecution in the present case invites us to a fifth view, namely, that a war started with a certain procedural defect is a crime and consequently this procedural defect will amount to aggression.

I have already expressed my view that no war was made a crime in international life. In this view, of course, the present question of determining the aggressive character of war does not at all arise.

Assuming, however, that a certain category of war has been made a crime in international life, the only view that might be accepted is that of Lord Wright where the learned author says that a war which cannot be justified has become a crime as the consequence of the Pact of Paris. The position in international law in this respect, prior to the Pact of Paris, was lucidly given by Senator Borah in December 1927 and our consideration need not be pushed behind that declaration of the then state of law.

If we accept the above view of Lord Wright as to what category of war is now a crime, the test of aggression will be *want of justification*. Of course in order to be an aggressor, the state must be the first to commit the act of war. The temporal priority in my opinion is essential though not enough.

If we proceed on the assumption that there exists an international community organized on the basis of humanity, then, domination of one nation by another against the will of that nation will be the worst type of aggression, and, an action to assist such a dominated nation, which has thus been subjected to aggression, to free itself from such aggression, must also be accepted as justifiable. Mr. Jackson supports, as justifiable, an action to assist a STATE which has been subjected to aggression. I do not see why in an international community organized on the footing of humanity, similar action to assist a NATION subjected to aggressive act of domination should not be equally justifiable.

Self-defense is certainly such a justification. The prosecution in the present case concedes that the Kellogg-Briand Pact "did not interfere with the right of self-defense" and that under the Pact "each nation was to be the judge of that question". Its contention, however, is that even with such wide scope left for self-defense it cannot be "raised as a defense at the will of the aggressor without regard to the fact". "Whether action under the claim of self-de-

fense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced." The prosecution relied on the Nurnberg judgment as also on the observations of Dr. Lauterpacht in his edition of Oppenheim's International Law already noticed by me in an earlier part of this judgment. According to Prosecution submission, "self-defense can only apply in the case of a reasonably anticipated armed attack."

I have already discussed the nature and scope of self-defense of States in international life, and have pointed out wherein it differs from individual right of private defense in a national system. I have also pointed out how the Kellogg-Briand Pact left this right altogether unaffected.

Even in course of the negotiations between Japan and the United States of America just on the eve of the present Pacific War, an action of legitimate self-defense was understood by the United States of America to mean "their own decision for themselves *whether* and *when* and *where* their interests were attacked or their security, threatened". This self-defense was understood to extend to the placing of armed forces in any strategic military position keeping in view "the lightning speed of modern warfare". (Vide Exh. 2876)

I have already noticed how, before the ratification of the Pact of Paris by the United States, Mr. Kellogg, on the question of self-defense, declared that the right of self-defense was not limited to the defense of territory under the Sovereignty of the State concerned, and that, under the treaty, each State would have the *prerogative of judging for itself* WHAT ACTION the right of self-defense covered and WHEN IT CAME INTO PLAY, subject only to the risk that this judgment might not be endorsed by the rest of the world.

Mr. Logan in summing up the defense case invited us to hold that this right of self-defense extended to what may be characterized as economic blockade by other powers. Mr. Logan said: "The evolution of man, with his advancement in science, with the ever-increasing interdependence of nations upon each other for their sustenance introduces into the realm of warfare more than the explosion of gun-powder and the resultant killing of the enemy, but other, and, equally formidable, methods of reducing the resistance of an opposing nation and curbing it to the will of another . . . To deprive a nation of those necessary commodities which enable its citizens and subjects to exist is surely a method of warfare not dissimilar to the violent taking of lives through explosives and force because it reduces opposition by delayed action resulting in defeat just as surely as through other means of conventional hostilities. It can even be said to be of a more drastic nature than the blasting of life by physical force, for it aims at the slow depletion of the morale and well-being of the entire civilian population through the medium of slow starvation." It cannot be denied that this would require a serious consideration.

In the colloquies between him and individual members of the Senate Committee on Foreign Relations, Mr. Kellogg explained that the right of self-defense extended even to economic blockade. The treaty, it was understood, did not impair or abridge the right of the United States to defend its territory, possessions, trade or interests. In its report, the Committee made

inter alia the following pertinent statement: "The Committee reports the above treaty with the understanding that the right of self-defense is in *no way* curtailed or impaired by the terms or conditions of the treaty. *Each nation* is free at all times and regardless of the treaty provisions to defend itself, and is the sole judge of what constitutes the right of self-defense and the necessity and extent of the same." This is what the Committee understood to be "the true interpretation of the treaty."

In my judgment, the nature and scope of self-defense and the occasion for its application should all be determined with reference to the law as it stood before the Pact. Of course it is also my view that the question remained UNJUSTICIABLE even after the Pact. I have already given my reasons for saying so. But here I am proceeding on the assumption that it was made justiciable to a certain degree by the Pact.

The Prosecution submitted that "it must be for the Tribunal to determine

(*a*) whether the facts alleged raise a case of self-defense within the proper meaning of that term;

(*b*) whether the accused honestly believed in the existence of that state of affairs, or whether it was ... a mere pretext; and

(*c*) whether there were any reasonable ground for such a belief."

According to the Prosecution "it is only if all three of these conditions are satisfied, that the right of each nation to judge for itself can operate." But none of these conditions would be satisfied in the case of the war by the U. S. S. R. against Japan.

Perhaps at the present stage of the International Society the word "aggressors" is essentially 'chameleonic' and may only mean "the leaders of the losing party".

It may only be suggested that for the purpose of determining this question of justifiability or otherwise of the war we should see:

1. Whether according to the information and *bona fide* belief of the invading state there existed any *objective condition* as the basis of the justification pleaded.
2. Whether the alleged objective condition as believed by the invading state was such as would justify a reasonable statesman in acting on it in the manner it was acted upon by the accused.

In determining the questions of '*bona fides*' or otherwise or of "reasonableness", the contemporaneous behaviour and opinion of similar statesmen of other countries including the victors would certainly be pertinent consideration. Such questions can hardly be decided in an intellectual quarantine area. When any determination of these questions is destined to determine the question of life or liberty of the accused, it is only fair that his conduct should be measured by a standard having universal application. In so doing we may not ignore any possible elusive connection between non-verbal behaviour and the words employed to describe or disguise it.

I would take the law relating to self-defense or self-protection to be substantially what it was, prior to the Pact of Paris, subject only to such modifications as might have been warranted by any changed circumstances of inter-

national life.

The International world seems to consider it legitimate for one state to pursue the policy of "supporting free peoples of other states who are resisting attempted subjugation by armed minorities of those states or by outside pressure." This may lead us to the consideration of the real character of the world's 'terror of Communism' and its bearing on the extent of legitimate interference with other states affairs. It is a notorious fact that the world's nightmare was Communism since the Bolsheviks had made themselves masters of Russia in 1917. The "catastrophe" which the existing states were contemplating in their "terror of communism" was perhaps not so much the obstructive impact of an external force but a spontaneous disintegration of society from within. But in their expression of this terror they always preferred to minimize or altogether ignore this internal disintegrating infirmity and emphasize the delusion of impact coming from without.

Ordinarily a state can have no right to interfere with the affairs of another state simply on the ground of any ideological development in that state. But COMMUNISM in China did not mean only a political doctrine held by certain members of existing parties, or the organization of a special party to compete for power with other political parties. IT BECAME AN ACTUAL RIVAL OF THE NATIONAL GOVERNMENT. It possessed its own law, army and government, and its own territorial sphere of action. Consequently, its development was, for all practical purposes, on a par with a foreign intrusion, and, it is certainly a pertinent question whether other states *having interest in China* would be entitled to come in and fight this development in order to protect their interest.

It may also be pertinent to notice here that Communism itself is not looked upon as a mere development of a different ideology. There is a grave fundamental difference between the COMMUNISTIC THEORY OF THE state and property and the existing democratic theory. In short, Communism means and attempts at "withering away of the state". The traditional French and Anglo-American democracies may roughly be said to be based on Lockean, Humean, and Jevonian philosophy interspersed with Church of England or Roman Catholic, Aristotelian philosophical assumptions. The Russian Communism has for its basis the Marxian philosophy.

No doubt the words "democracy" and "freedom" are used also in connection with communistic ideal. But there, they are made to bear a fundamentally different import. The "democracy" of the communistic ideal means and implies the withering away of the present day "democracy". The possibility of Communistic 'freedom' is seen only in the disappearance of the present day democratic state organizations.

Lenin says: "Only in Communistic Society, when the resistance of the capitalists has been completely broken, when the capitalists have disappeared, when there are no classes . . (*i. e.*, when every member of society spontaneously accepts the Marxian philosophy), only then does 'the state . . cease to exist', and it 'becomes possible to speak of freedom.' Only then will really complete democracy, democracy without any exceptions, be

possible and be realized. And only then will democracy itself begin to wither away ... Communism alone is capable of giving really complete democracy, and the more complete it is, the more quickly will it become unnecessary and wither away of itself."

Thus the attitude of the Communist with respect to a democracy grounded on the Lockean or Humean philosophy is definite.

In these circumstances it is generally felt that the Communistic development is not directed by a correct ideology and that therefore the Communists are not thoroughly safe neighbours for the rest of the world.

It is not for me to comment on the justification or otherwise of these feelings. Such feelings have not always been shared by the world's wisest minds. While frankly condemning "the ruthless suppression of all contrary opinion, the wholesale regimentation, and the unnecessary violence in carrying out various policies" in Soviet Russia, some with equal frankness point out that "there was no lack of violence and suppression in the capitalist world". "I realized more and more", says Pandit Jawaharlal Nehru of India, "how the very basis and foundation of our acquisitive society and property was violence ... A measure of political liberty meant little indeed when the fear of starvation was always compelling the vast majority of people everywhere to submit to the will of the few ... Violence was common in both places, but the violence of the capitalist order seemed inherent in it; while the violence of Russia, bad though it was, aimed at a new order based on peace and cooperation and real freedom for the masses." Pandit Nehru then points out how, with all her blunders, Soviet Russia had triumphed over enormous difficulties and taken great strides toward this new order, and concludes by saying that the presence and example of the Soviets "was a bright and heartening phenomenon in the dark and dismal world."

Such appraisals, however, do not help any solution of the difficulties which the present International Society, composed as it is of Capitalist democratic states as also of Communist states, feels in adjusting and stabilizing the relations between the two groups. Real o fancied, such difficulties were, and, still are, being felt almost universally.

Solution of such difficulties, however, is not what concerns me now. All that I need point out is that as the Communistic development thus goes to the very foundation of the existing state and property organizations, the following questions would naturally arise for our determination:

1. Whether a sister STATE of the existing international society would have right to help the distressed state when ITS existence is thus threatened by internal communistic development; if so, what is the extent of this right?
2. Whether a sister STATE having interests within the distressed state would have right to protect that interest from the dangers of communistic revolution. If so, what is the extent of this right?
3. Remembering the ideology of Communism and keeping in view the fact that some of the states of international society have already assumed communistic organizations, what, if any, is the extent of

the rights of interference of other existing sister states if and when they *bona fide* apprehend the spread of this communistic development in other states.

The present-day world behaviour in the matter of helping one group of peoples of a particular nation in fighting another group of the same on the plea that that other group are communists would throw much light on the solution of these questions.

Some of the victor states, we are told, "have always felt .... that they cannot prosper and live securely *in contact* with states where governments work on principles radically different from their own." It is to be seen whether the defeated nations also are entitled to share such feelings and shape their policy and behaviour accordingly. We are told that "no nation can endure in a politically alien and morally hostile environment", and are given "the profound and abiding truth" that "a people which does not advance its faith has already begun to abandon it." It may only be noticed here that even the width of the Pacific or of the Atlantic may not be considered sufficient to prevent 'contact' in this respect.

These behaviours will indeed be very material for our present purpose. If an individual life or liberty is to be taken, it would certainly be proper that this conduct should be measured by a standard having universal application.

The bearing of Chinese boycott on the present question will be considered while dealing with the Chinese phase of the case. It may not be possible for us to ignore these boycott movements altogether when called upon to determine whether the action taken by Japan in this connection was or was not aggressive.

There is yet another difficult matter that must enter into our consideration in this connection. We must not overlook the system of Power Politics prevailing in international life. It will be a pertinent question whether or not self-defense or self-protection would include MAINTENANCE of a nation's position in the system. The accused in the present case claim such defensive character also for their action in the Pacific.

As, in my opinion, the Pact of Paris left the parties themselves to be the judge of the condition of self-defense, I would only insist upon there having been *bona fide* belief in the existence of some sufficient objective condition.

In order to appreciate what may be sufficient objective condition we must look to the behaviour of the international community itself. As we shall see later, powerful nations seem to have shaped their behaviour on the footing "that protracted impotence of a state to maintain within its domain stable conditions in relation to alien life and property both inspires and *justifies* the endeavour of an aggrieved neighbour to enter the land and possess itself thereof." The Lytton Report seems to justify such actions even on the part of non-neighbours. The international society is supposed to look upon its individual member as fatally delinquent if it be persistently negligent of certain standards of conduct believed to be established by international law in relation to occurrences within the territory which it regards as its own. In the event of such delinquency, it is said, "the delinquent member must be regarded as

inviting conquest or an external attempt to subject it to wardship." "Such grim alternatives do not necessarily point to lawlessness on the part of countries which avail themselves, possibly for selfish reasons, of the failures of the palsied state. They merely accentuate the fact that respect for the territorial integrity of a state invariably demands of the sovereign an assertion of a supremacy within its domain which is responsive to all that international law demands." I am not supporting this justification of conquest. I am simply pointing out that this has not been a mere theory but has been a PRINCIPLE OF ACTION at least in respect of areas outside the western hemisphere.

There is yet another matter which would require our consideration in this connection—I mean the question of neutrality and of the extent of neutral's rights and duties. This question would have a very important bearing here in view of the fact that in the counts distinct charges of planning, initiating and waging aggressive wars have been laid in respect of Japan's action against different nations at different dates. After, for example, Japan's war in violation of the Pact of Paris was initiated against China, the behaviour of other nations towards her would be a pertinent consideration in order to determine the character of any subsequent action of Japan against those nations. It would, therefore, be essential to enquire

1. Whether, even after the China Incident, those other nations owed any duty to remain neutral;
2. Whether their behaviour including their hostile comments, if any, upon the action of belligerent Japan was within the right and consistent with the duty of a neutral;
3. If not, whether Japan's action against such nation was justifiable in view of such behaviour.

Apart from any other matter, the question how far a neutral has the right to make hostile comment upon the actions of a belligerent is decidedly a grave one, remembering that today, besides the power of the press, the radio carries the spoken word to all corners of the earth in a moment. The effect of a nation's broadcasting may alone do more harm to a combatant than the destruction of any army corps; so that if a combatant feels that the broadcasting and the press utterances of a nation which owed the duty of remaining neutral are sufficiently damaging to him, he may be within his right to demand discontinuance of such utterances or fight.

In the explanatory note which Kellogg dispatched to the powers on June 23, 1928, he declared that he did not share the scruples of France that adhesion of France to the Pact could prevent her from fulfilling her obligations towards the states whose neutrality she had guaranteed. According to this note a supersession of neutrality was not regarded as the consequence of the Pact.

"Neutrality legislation which has been enacted in the U. S. A. from time to time since the Pact of Paris, seems to indicate that both Congress and the President believe that the U. S. A., though a signatory of the Briand-Kellogg Pact, can also remain neutral. American neutrality legislation is the result of a lively difference of opinion. On the one hand, it was claimed that the Unit-

ed States ought to draw, from the notion that neutrality is no longer compatible with the new international law, the logical conclusion that the exportation of arms, munitions and war materials to the aggressor should be forbidden. In February 1929, Senator Capper brought in a resolution to forbid the exportation of arms and munitions to any country which the President declared had violated the Kellogg Pact. The resolution was rejected." This is taken from Dr. Scheuner's report placed before the Amsterdam Conference of 1938 already referred to. It throws a good deal of light on the question now raised. Incidentally this seems also to indicate that at least this powerful state did not consider war in violation of the Pact an illegal thing. In any other view such a strong power would have to be taken to be so unscrupulous in its international behaviour as to openly help the doing of an illegal thing. The prospect of profits from the sale of arms alone could not have been responsible for such a behaviour in such a big power.

Many well-known authors are also of opinion that the traditional law of neutrality has lost none of its validity as a result of the Pact.

Judge J. B. Moore writing in 1933 says: "As a lifelong student and administrator of international law, I do not hesitate to declare the supposition that neutrality is a thing of the past is unsound in theory and false in fact. There is not in the world today a single government that is acting upon such supposition. Governments are acting upon the contrary supposition, and in so doing are merely recognizing the actual fact."

On February 27, 1933, Sir John Simon, discussing in the House of Commons the embargo on the shipment of arms to China and Japan, spoke of Great Britain as a "neutral government" and of the consequent necessity of applying the embargo to China and Japan alike.

Of course the law of neutrality does not preclude any government from taking part in a war if it sees fit to do so. "It merely requires the observance of candor and decency in international dealings, by inhibiting acts of war under the guise of neutrality." From the elementary principles of international law it necessarily follows that if a government bans the shipment of arms and munitions of war to one of the parties to an armed conflict and permits it to the other, it intervenes in a conflict in a military sense and makes itself a party to a war, whether declared or undeclared.

The fact that America was helping China in all possible ways during Sino-Japanese hostilities would thus be a pertinent consideration in determining the character of Japan's subsequent action against the U. S. A. . The prosecution admits that the United States "rendered aid economically and in the form of war materials to China to a degree unprecedented between non-belligerent powers and that some of her nationals fought with the Chinese against the aggression of Japan".

In this connection we may have to consider the bearing of boycott of a belligerent state by the so-called neutral states or of economic sanction against such a state.

I have discussed elsewhere the question of legality or otherwise of boycott in international relations. The really parallel situation in international life

arises when two or more countries combine to cut off all commercial intercourse with another that may be singled out for penalization. It may be that this uniting or combining of two or more states transforms conduct to which a single country might legitimately have recourse, into conduct which at once attains a sinister aspect, and of which the proscribed country may justly complain.

As has been observed by Charles Cheney Hyde and Luis B. Wehle:

"It is greatly to be doubted whether a group of countries enjoys a broader right to restrict or penalize a particular state (except, of course, in consequence of some general arrangement to which it is a party) than does the individual member of the group. The sheer POWER of the matter to achieve its end is not indicative of a special LEGAL RIGHT to do so. Yet the very success of some instances of joint intervention may tend to encourage the notion that the pressure brought to bear upon a country whose conduct is offensive to a group gains sanctity from the united power that is welded together against it. If a weapon such as the international boycott be applied to check the conduct of a member of the family of nations, THE REASONABLENESS OR FAIRNESS OF THE MEASURE depends not upon the power behind it or upon its success, but upon quite a different consideration—the nature of the conduct of the state that is interfered with.

"States may be expected to intervene, and to assert the right to do so, even collectively, to thwart the conduct of a particular country that is internationally illegal, when they smart enough from the consequences of it. What justifies their action is the ESSENTIAL WRONGFULNESS of the conduct that is repressed. This principle is obviously applicable when the boycott, rather than any other, happens to be the instrument of interference. Yet the very potency of that instrument accentuates the care to be taken lest it minister to caprice or revenge, rather than to the demands of justice."

Certain safeguards are suggested in this respect:

1. The scheme of organized intervention exemplified by the international boycott ought not to be put into force save as a deterrent of, or as a penalty for, the commission of a well-defined act, the existence of which is ascertainable as a fact;
2. It should not be applied without giving the state charged with the commission of the act, an opportunity for a hearing before an impartial body;
3. It should be directed solely against a state which has previously agreed, as a member of a group participating in a multipartite agreement, to the use of the weapon under specified contingencies for the common weal.

I would briefly notice the explanations offered on these suggested safeguards by Messrs Charles Cheney Hyde and Luis B. Wehle:

1. It is of utmost importance that the proscribed conduct be of unequivocal character: it must not be a complicated superstructure calling for a conclusion on a question of law as a means of determining its existence: it must be a simple *factual situation* easily

recognizable as such and not likely to be misapprehended. The distinction between these tests of requisite improper conduct is seen in the difference between a so-called WAR OF AGGRESSION and a mere ACT OF HOSTILITY. To apply a penalty for the former necessitates an enquiry into a complex situation not unmixed with law, and a conclusion which in numerous cases may well be open to doubt.

2. The opportunity for a hearing before an impartial body is essential because the strength and virility of the international society is proportioned to its respect for law; The foundation of international justice is likely to be lost sight of and even held in contempt when the sheer power of a group of countries is launched against a single state by a summary process that gives it no opportunity for defense.
3. The reason for the limitation that boycott be confined for use against a state that has previously agreed to that use under specified circumstances, ought to be obvious. The boycotters need assurance that they may stay at peace and penalize the covenant-breaking belligerent, and at the same time be not charged with violating a legal duty towards it because of their taking sides and abandoning every pretence of neutrality. When war breaks out in any quarter, the law of nations imposes heavy burdens upon the country that professes to stay with peace with the fighting powers. It forbids its government to help either belligerent at the expense of the other. That law takes no cognizance of the efforts or desires of the country that seeks to participate in the contest and yet remain at peace; IF IT WILL PARTICIPATE AS SUPPORTER OF A FAVOURED BELLIGERENT, INTERNATIONAL LAW DECREES THAT IT DOES SO SQUARELY AS A BELLIGERENT, AND NOT AS A NEUTRAL. In a word, governmental participation by a state supposedly at peace is not only not contemplated, but is also sharply proscribed. Upon the outbreak of war these requirements immediately become operative. The point to be emphasized is that they are not modified or lessened by a general arrangement designed to minimize occasions for a just and excusable war, and which do not in terms purport to alter them.

The mere embarking upon war in violation of the terms of a multipartite treaty hardly suffices in itself to deprive the treaty-breaking belligerent of the right to demand that the other parties to the arrangement which elect to remain at peace, respect their normal obligations as neutrals. Thus, if two or three of them unite to apply the boycott against the offender, and even succeed in checking its further belligerent activities, they still subject themselves to the charge of *unneutral conduct*.

THE EMPLOYMENT OF A BOYCOTT AGAINST A COUNTRY ENGAGED IN WAR AMOUNTS TO A DIRECT PARTICIPATION IN THE CONFLICT, which may, in fact, prove to be as decisive of the result as if the boycotters were themselves belligerents. It is defiant of the theory of neutrality and of the fundamental obligations that the law of nations still imposes upon non-belligerent Powers.

The economic measures taken by America against Japan as also the factum of ABCD encirclement scheme will thus have important bearings on the question of determining the character of any subsequent action by Japan against any of these countries. Of course, whether or not, any such encirclement scheme, military or economic, did exist in reality is a question of fact to be determined on the evidence adduced in the case.

The prosecution characterized the economic blockade against Japan as aiming only at the diminution of military supplies. According to the defense "the blockade affected all types of civilian goods and trade, even food". The defense says: "This was more than the old fashioned encirclement of a nation by ships of overwhelming superiority and refusing to allow commerce to enter or leave. It was the act of all powerful and greatly superior economic states against a confessedly dependent island nation whose existence and economics were predicated upon world commercial relations." I shall revert to this matter while considering the phase of the case relating to the attack on Pearl Harbour.

I believe I have said enough to indicate that in deciding whether or not any particular action of Japan was aggressive we shall have to take into account the antecedent behaviour of the other nation concerned including its activity in adverse propaganda and the so-called economic sanction and the like.

Before leaving this topic I would like once again to recall to our memory that in international life even after the Pact of Paris certain compulsive measures short of war are deemed legitimate. We shall be failing in our duty if we lose sight of this fact in our approach to the evidence adduced in this case. If any evidence has been adduced which unequivocally speaks of the intention to wage war, there will not be any difficulty in this respect. If, however, the evidence, so far as it goes, by itself, does not go far enough in this direction and we are invited to attach some *retrospectant* indication to the subsequent war in appraising the significance of any prior incident or agreement, we must keep in view the possibility of this legitimate mental state at such prior stage.

The indictment in the present case characterizes the following as illegal wars:

1. A war to secure the military, naval, political and economic domination of certain countries and of the Pacific and Indian Oceans.
2. A war in violation of:
   (*a*) Treaties,
   (*b*) Agreements,
   (*c*) Assurances,
   (*d*) International Law.

The prosecution case is that a war in violation of treaties, agreements, assurances or international law is illegal and hence those who planned or waged such a war committed a crime thereby.

A war in violation of treaties, agreements or assurances without anything more may only mean a breach of contract. In my opinion such a breach would not amount to any crime. The treaties, agreements or assurances do

not change the legal character of the war itself.

The treaties and the agreements in question are detailed in Appendix B of the Indictment and the Assurances are given in Appendix C.

Appendix B names the following Treaties and Agreements:

1. The Convention for the Pacific Settlement of International Disputes, signed at the Hague, 29 July 1899.
2. The Convention for the Pacific Settlement of International Disputes, signed at the Hague, 18 October 1907.
3. The Hague Convention No. III relative to the Opening of Hostilities, signed 18 October 1907.
4. Agreement effected by exchange of notes between the United States and Japan, signed 30 November 1908.
5. The Convention and Final Protocol for the suppression of the abuse of opium and other drugs, signed at the Hague, 23 January 1912 and 9 July 1913.
6. The Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles, 28 June 1919, known as the Versailles Treaty.
7. The Mandate from the League of Nations pursuant to the Versailles Treaty made at Geneva, 17 December 1920.
8. Treaty between the British Commonwealth of Nations, France, Japan and the United States of America relating to their Insular possessions and Insular Dominions in the Pacific Ocean, 13 December 1921.
9. Identic communication made to the Netherlands Government on 4 February 1922 on behalf of the British Commonwealth of Nations and also "mutatis mutandis" on behalf of Japan and the other Powers Signatory to the Quadruple Pacific Treaty of 13 December 1921.

   Identic Communication made to the Portuguese Government on 6 February 1922 on behalf of the British Commonwealth of Nations and also "mutatis mutandis" on behalf of Japan and the other Powers signatory to the Quadruple Pacific Treaty of 13 December 1921.
10. The Nine-Power Treaty of Washington, of 8 February 1922.
11. The Treaty between the United States and Japan signed at Washington, 11 February 1922.
12. The League of Nations Second Opium Conference Convention, signed at Geneva, 19 February 1925.
13. The Kellogg-Briand Pact—27 August 1928.
14. The Convention relating to Narcotic Drugs, signed at Geneva, 13 July 1931.
15. Treaty between Thailand and Japan concerning the continuance of friendly relations etc., signed at Tokyo, 12 June 1940.
16. Convention respecting the Rights and Duties of Neutral Powers etc., signed at the Hague, 18 October 1907.

17. Treaty of Portsmouth between Russia and Japan, signed 5 September 1905.
18. The Convention on Embodying Basic Rules of the Relations between Japan and the U. S. S. R. signed 20 January 1925 in Peking.
19. The Neutrality Pact between the Union of Soviet Socialist Republics and Japan, signed 13 April 1941 in Moscow.

Of these treaties and agreements, items 1 and 2, The Hague Convention of 1899 and 1907 for the Pacific Settlement of International disputes 3 (The Hague Convention No. III relative to the opening of hostilities) and 13 (The Kellogg-Briand Pact of 1928) alone seem to have any direct bearing on the question of the legal or illegal character of the war. The effect of items 1, 2 and 13 has already been considered in detail. I shall presently take up the examination of the Hague Convention No. III.

Of the rest of these treaties and agreements, items 4, 8, 9, 10, 11, 15, 17, 18, and 19 are bilateral treaties giving rise to certain rights and duties as between the parties thereto. They, by their terms, did not prohibit any war. When the indictment speaks of 'a war in violation of' such treaties and agreements, it seems to have either of the two following things in view:

1. War having the effect of injuriously affecting the legal relations constituted by these treaties and agreements;
2. War designed as a means for the procuration of the cessation of the legal relations constituted as above.

In my opinion, a war, if not otherwise criminal, would not be so, only because it involves any violation of the rights and duties arising out of legal relations constituted by such bilateral treaties and agreements. Any breach of such treaties and agreements, though brought about by war, would only give the other party a right to protest, to resist and to maintain its rights even by having recourse to war. In any case a war involving such a breach does not, in international law, bring in any individual responsibility or criminality.

The second item specified above however will have an important bearing on the charges of conspiracies in this case. I would take it up while considering such charges.

Item 6 is the treaty of Versailles and item 7 relates to that treaty. The relevant provisions of this treaty have already been considered at some length in an earlier part of this judgment. Item 16 relates to the question of neutrality. I have already considered the bearing and the rights and duties of neutrality on the question before us.

Items 5, 12, and 14 refer to treaties and agreements relating to the use of opium and other drugs. I do not see any bearing of these treaties on the question before us now. There is no evidence before us that any of the wars in question was for the purpose of violating any of these treaties. If these were violated during war in occupied territories, such violations might amount to war crimes *stricto sensu*. But I do not see how such facts would go to affect the character of the war itself.

I shall have occasion to come back to some of these treaties, agreements and assurances later on.

As regards war in violation of international law, the question falls to be considered in relation to:

1. Law renouncing war;
2. Law making aggressive war criminal;
3. Law regarding the opening of hostilities.

Cases 1 and 2 have already been considered while disposing of the material questions of law arising in this case.

The third case falls to be considered under two different heads, namely, (1) In relation to law, if any, dehors the Third Hague Convention of 1907 regarding the opening of hostilities and (2) In relation to the Third Hague Convention of 1907.

In the Seventh Edition of Wheaton's International Law, Dr. B. Keith discusses the history and the principle of declaration of war and concludes that non-declaration does not make the war illegal. Dr . Keith points out that a formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. It was uniformly practised by the ancient Romans, and by the states of modern Europe until about the middle of the Seventeenth Century. In the Seventeenth Century formal declarations were not regarded essential. From the Eighteenth Century previous notifications became exceptional. Out of some one hundred twenty wars that took place between 1700 and 1872 there were barely ten cases in which a formal declaration preceded hostilities. In the latter part of the Nineteenth Century, however, it became customary to publish a manifesto, within the territory of the state declaring war, announcing the existence of hostilities and the motives for commencing them. This publication perhaps was considered necessary for the instruction and direction of the subjects of the belligerent state in respect to their intercourse with the enemy, and regarding certain effects which the law of nations attributes to war in form. Dr. Keith also points out that apart from the conclusions to be drawn from actual practice, there was by no means unanimity of opinion among jurists and publicists. On the whole, continental writers urged the necessity of a previous declaration. The British view was contrary to this. According to Lord Stowell a war might properly exist without a prior notification—the notification only constituted the formal evidence of a fact.

Dr. Keith then cites examples from the period between 1870 and 1904 to show that in some cases there were formal declarations while in others there were none. Among the latter group were the hostilities of 1884-1885 between France and China, the Serbian invasion of Bulgaria of 1885, the Sino-Japanese War of 1894, the Greek invasion of Turkey of 1897, and the allied action against China on June 17, 1900. In the Russo-Japanese War, 1904, Japan attacked the Russian Fleets two days before she formally proclaimed war. Russia thereupon accused the Japanese of treacherous conduct. Dr. Keith says that as there had been no surprise attack, the charge was hardly main-

tainable. Diplomatic relations between the two powers had been going on fruitlessly since the preceding July, and were severed on February 6, by the Japanese note declaring that "The Imperial Government of Japan reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests." A few hours before the delivery of this note however, the Japanese captured a Russian cruiser, as the Russian Fleet appeared on February 4 between Port Arthur and the Japanese Coast.

As has been pointed out above, though a practice developed to issue a general manifesto, this practice was uncertain and was only a matter of courtesy rather than of legal obligation. Dr. Keith says that because of this unsatisfactory state of the matter, the Hague Conference of 1907 took up the question, and laid down definite rules in its third convention, which is now binding on the belligerents.

The Convention in question is entitled "Convention Relative to the Opening of Hostilities" and comprises eight articles, of which Articles 1, 2, 3, and 7 are relevant for our present purpose.

Article 1 stands thus: "The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."

Article 2 requires that the existence of a state of war must be notified to the neutral powers without delay . . . .

Article 3 says that Article 1 shall take effect in case of war between two or more of the contracting powers.

Article 7 enables any of the contracting parties to denounce the present convention and lays down how such denunciation is to be made.

A careful reading of the articles will show that the Convention only created contractual obligation and did not introduce any new rule of law in the international system. Westlake thinks that this convention did not seriously affect the previous law on the subject. According to Pitt-Cobbett "The signatories do not pledge themselves absolutely to refrain from hostilities without a prior declaration, but merely recognize that as between the belligerents hostilities *ought* not to commence without previous unequivocal warning". Bellot considers that despite the limits imposed by custom and convention the opening of hostilities appears to be mainly a question of strategy.

Dr. Keith also concludes that the rule introduced by the Convention in no degree stigmatizes a war without declaration as illegal. It would appear from the rules that it is not necessary to allow any definite interval to elapse between the declaration and the actual opening of hostile operation. A delay of twenty-four hours was suggested at the Conference, but it was not approved and no period was mentioned as requisite interval: Vide Exhibit No. 2315, Report to the Conference from the Second Commission on Opening of Hostilities. For the present war an ultimatum was presented by Britain to Germany on September 2 at 9 A. M. to expire at 11 A. M. France delivered a

similar ultimatum which expired at 5 P. M. on the same date. Russia attacked Finland in 1939 without formal notice. *Dehors* this convention there was no law rendering war without declaration illegal.

I would further consider the question in connection with the murder charges in the indictment.

In my judgment a war in violation of treaties, agreements, and assurances or in violation of the conventions regarding the opening of hostilities did not become a crime in international law without something more, and the persons, if any, who planned, initiated or waged such a war did not commit any crime thereby.

The prosecution case, however, goes further than that of mere violation of treaties, agreements, assurances and conventions regarding the opening of hostilities. It charges the accused with treachery in this respect. The charge is not merely that these wars were planned and initiated in violation of such treaties, conventions etc. but that the whole design was that the planned war *was to be* in violation of such treaties etc., and was to be initiated in violation of such conventions etc., and further that the other party concerned WAS TO BE misled to think otherwise . According to the prosecution, it was an integral part of the plan or design that the existence of a design to wage war against the other party concerned should be kept concealed from that other party intending by such concealment to facilitate the initiating and waging of such war.

The question involves a question of fact, namely, whether there was any such treachery. I would discuss this matter more in detail in connection with the surprise attack on Pearl Harbour. The prosecution characterizes this attack as a treacherous one and claims it to be symbolic of the whole program of fraud, guile and duplicity. I would consider the evidence on this point later while discussing this attack. In the meantime it would suffice to say that a treacherous initiation of war is very different from an initiation of war without notice or declaration and in my opinion there can be no doubt that such a treachery, if any, would make the initiation a delinquency. It must however be pointed out that I do not accept the prosecution contention that "the quality of treachery rests in the minds of those making the attack and cannot be cured by the fact that it is found out." We are not much concerned with the mental delinquency of treachery but with the initiation of war being treacherous and for this purpose it is of vital importance whether the treacherous design could be kept concealed from the other party and whether the other party was really deceived by this design. Of course, if the mere formation of a treacherous design be a crime then the knowledge of the other party might not have any material bearing on the question. As I would discuss later, in my opinion, mere design of this character is not a crime in international life.

Referring to this defense of 'knowledge' the Prosecution in another place of its summation characterizes it as 'a curious one' and says: "It certainly cannot be the contention of counsel for the defense that such knowledge on the part of the intended victims is a valid defense against the charges of aggressive warfare, murder and the conspiracies to commit these crimes. It certainly has

never been in any civilized jurisdiction since ancient days a defense to a charge of murder that the victim knew he was being killed. The knowledge or lack of knowledge of the intended crime on the part of the victim has never been a defense anywhere in cases of assault, battery, maiming, rape, robbery or burglary. It cannot, therefore, be a defense to the crime of aggressive warfare. . . "

In fairness to the defense counsel, it must be said that the defense of "knowledge on the part of the intended victims" was not at all directed to any of the matters referred to by the Prosecution. This defense was taken only to the charge of treachery so far as such treachery goes to determine the character of the act complained of. If the act is criminal apart from its being treacherous, the defense counsel never wanted to say that its character would in any way be changed by the knowledge of the intended victim.

A war to secure domination of certain territories as alleged in the indictment would perhaps constitute a breach of the Pact of Paris, if such a measure cannot be justified by the party adopting it on the grounds indicated above. But I have already given my view of the Pact. So far as the question of criminal liability, either of the state or of the state agents, is concerned, I have already given my conclusion in the negative.

I would only like to observe once again that the so-called Western interests in the Eastern Hemisphere were mostly founded on the past success of these western people in "transmuting military violence into commercial profit". The inequity, of course, was of their fathers who had had recourse to the sword for this purpose. But perhaps it is right to say that "the man of violence cannot both genuinely repent of his violence and permanently profit by it."

PART III

RULES OF EVIDENCE

AND

PROCEDURE

The view of law that I have taken makes it somewhat unnecessary for me to enter into the evidence in the case in respect of the counts other than those relating to war crimes *stricto sensu*. But as I have heard the entire case and have formed my own opinion of the facts as well, on the evidence brought on the record, I would prefer briefly to indicate my conclusions in respect of some of them.

While proceeding to weigh the evidence I would like to say a word about the apparent infirmity attaching to the major portion of the same.

In prescribing the rules of evidence for this trial THE CHARTER PRACTICALLY DISCARDED ALL THE PROCEDURAL RULES devised by the various national systems of law, based on litigious experience and tradition, to guard a tribunal against erroneous persuasion, and thus left us, in the matter of proof, to guide ourselves independently of any artificial rules of procedure.

The relevant provisions of the Charter are to be found in article 13 clauses (*a*), (*b*), (*c*), and (*d*) and article 15 clause (*d*). These provisions stand thus:

Article 13. Evidence.

(a) *Admissibility*. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.

(b) *Relevance*. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.

(c) *Specific evidence admissible*. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.

(2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.

(3) An affidavit, deposition or other signed statement.

(4) A diary, letter or other document, including sworn or unsworn statements which appear to the Tribunal to contain information relating to the charge.

(5) A copy of the document or other secondary evidence of its contents, if the original is not immediately available.

(d) *Judicial Notice*. The Tribunal shall neither require proof of facts of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.

Article 15. *Course of Trial Proceedings*. The proceedings at the Trial will take the following course:

* * * * * *

(*d*) The prosecution and defense may offer evidence and the admissibility of the same shall be determined by the Tribunal.

Following these provisions of the Charter we admitted much material which normally would have been discarded as HEARSAY EVIDENCE.

While speaking of the hearsay rule we must keep in view the distinction between the rule requiring an extra-judicial speaker to be called to the stand to testify, and that requiring one who is already on the stand to speak only of his personal knowledge. The mark of the witness is knowledge—acquaintance with the facts in issue, and knowledge resting on his own observation. His distinctive function is to speak *de visu suo et audito*.

At present I am thinking of that branch of the rule according to which when a specific person, not as yet in court, is reported to have made assertion about a fact, that person must be called to the stand, or his assertion will not be taken as evidence. Such an assertion is not to be credited or received as evidence however much the asserter may know, unless he is called and deposes on the stand. WE DID NOT OBSERVE THIS RULE.

The exclusion of this category of hearsay evidence is not grounded upon its intrinsic lack of probative value. It is ordinarily excluded because the possible infirmities with respect to the observation, memory, narration and veracity of him who utters the offered words remain untested when the deponent is not subjected to cross-examination. These might be so far exposed by cross-examination as to enable the judge fairly to evaluate the utterance.

THE MAJOR PART OF THE EVIDENCE given in this case consists of HEARSAY OF THIS CATEGORY. These are statements taken from persons not produced before us for cross-examination. Much caution will be needed in weighing this evidence.

There is one piece of evidence on the record which strictly speaking comes under this category, but is supposed to be covered by some recognized exceptions to the rule. I mean the extracts from KIDO'S DIARY.

THE EXCLUSIONARY RULES OF EVIDENCE and the procedure for enforcing them are not always designed to be automatic eliminators of untrustworthy testimony. In the main they rather provide a privilege of protection against such testimony to the party against whom it is offered. When the extra-judicial declarations of another are offered against him, he is entitled to the benefits of the ordinary safeguards against hearsay, unless some doctrine of vicarious responsibility intervenes.

When such statements are received, their reception is justified not so much on any ground of representation but because of the existence of some *independent guarantee of trustworthiness*. No magic covering hides their hearsay infirmity unless they come clothed with some GUARANTEE OF TRUSTWORTHINESS.

An almost hopeless confusion beclouds THE RULES DEALING WITH DECLARA-

TIONS OF CO-CONSPIRATORS. The orthodox rule makes one conspirator responsible for the *acts* of his co-conspirators *done* in furtherance of the conspiracy during its existence.

To that extent each conspirator is the agent of all others; and this applies to verbal as well as non-verbal acts—to assertive as well as to non-assertive statements. Where the assertive statement is made after the termination of the conspiracy, few systems find any difficulty in excluding it as against the co-conspirators. The fact that the conspiracy is over makes it manifest that the narrative could have no tendency to further it or accomplish its object. Communications between conspirators, which are always admissible to show the terms and circumstances of the plot, are usually received without limitation. In theory a narrative by one to another, even though for the express purpose of encouraging the latter or inciting him to action for the accomplishment of the common design, ought not to be received against the latter for its truth unless he adopts it.

In order to be competent as evidence the declaration must have been made in furtherance of the prosecution of the common object, or must constitute a part of the *res gestae* of some act done for the accomplishment of the object of the conspirators, otherwise such a statement should not be competent evidence against the others. WE MUST AVOID CONFUSING THE TIME AND CONTENT OF THE UTTERANCE WITH ITS EFFECT AND PURPOSE. In numerous instances it would perhaps be clear that the words could not possibly have been uttered to further the common design. The conspirator perhaps was indulging in idle or ill-advised talk which constituted the worst method imaginable for reaching the conspiracy.

The rule seems to be that an admission of one conspirator, if made *during the life* of the conspiracy, is admissible against a joint conspirator, when it relevantly relates to and is in FURTHERANCE of the conspiracy. In some cases it has been said that in construing the expression "in furtherance of the conspiracy" reference is not to the admission as such, but rather to the act concerning which the admission is made. This however seems to be injecting new content into old formula and may amount to adding a new penalty to conspiracy.

The rule most favourable for admitting in evidence the things said or done by a co-conspirator seems to require the following:

1. The existence of a conspiracy must first be established by *prima facie* evidence before the acts and declarations of one of the alleged co-conspirators can be used against the others;
2. The connection of the alleged conspirators with the conspiracy must be established *prima facie*;
3. What is offered in evidence must be something said, done or written by any one of such persons;
   (*a*) In reference to their common intention;
   (*b*) After the time when such intention was first entertained by any one of them;
4. Matters referred to above will be evidence;

(*a*) For the purpose of proving the existence of the conspiracy itself;

(*b*) For the purpose of showing that any such person was a party to it.

The ultimate principle underlying all these rules is to secure some guarantee of trustworthiness of the statement. In dealing with the several extracts from KIDO's diary we must not lose sight of this safeguarding principle.

Perhaps there would be nothing inherently untrustworthy in its entries when a diary only purports to keep records of isolated daily occurrences observed by its author. When, however, the author proceeds to record the whole course either of a life or any event, there may come in some unconscious influence of his own creation which may greatly affect the record detracting from its initial trustworthiness. Life's course is always shrouded in mystery. In it there are always numerous self-contradictions and self-conflicts;—there are always irreconcilable pasts and presents. But a human creator's pen generally seeks to follow a defined course, settling and reconciling all conflicts and contradictions. From that moment, instead of the diary following the course of events, the events are unconsciously made to follow the diary. The possibility of such a distorting influence becomes greater when the author of the diary, instead of being a disinterested observer, is himself a chief participant in the entire event.

If this is so with any ordinary event or life, such possibility is specially graver when it is the political event or political life which forms the subject of the record.

But even then we may not discard a diary as wholly untrustworthy. There may still be some circumstantial guarantee of trustworthiness. As has been pointed out by Wigmore, the circumstances may be such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed. Or, even though a desire to falsify might present itself, considerations such as the danger of easy detection would probably counteract its force. Or, the entry was made under such *conditions of publicity* that an error, if any, would have been detected and corrected.

Whatever be the position of KIDO's Diary, none of these guarantees, however, can be held out in support of another such document which was introduced by the prosecution at a very late stage of the trial. The prosecution named it as the "Saionji-Harada Memoir".

Numerous extracts from this document were introduced in evidence in this case at that late stage. This meant introduction into the case of hearsay of both the categories specified above, or perhaps something worse than that.

The document is voluminous. It will serve no useful purpose to scrutinize its entire contents. It has not, in its entirety, been introduced in evidence. But even a cursory glance through its contents will render it difficult for us to credit it with the requisite guarantee of circumstantial trustworthiness so as to entitle us to make an exception in its favour to the rule against hearsay evidence.

I took Part XIII of this 'memoir' at random. This part comprises two volumes; one volume is from page 1837 to 1907, and the other, from page 1908 to 1979. The first volume contains chapters 246 to 252 being entries of 27 July 1937 to 30 October 1937 and the other volume comprises chapters 253 to 258 being entries of 25 October 1937 to 18th of December 1937. The first of the above chapters purports to have been recorded on the 27th July 1937 and it purports to record the events that happened from the 19th to 26th. The next chapter on the face of it was recorded on the 4th August 1937 and it purports to record events of the 25th July to 3rd August. The next chapter bears the date of 12th August 1937 and purports to record events that took place on the morning of the 4th within the knowledge of the author of the diary. Chapter 250A and 250B are both dated 9th October 1937 while the preceding chapter 249 is dated 20th of August 1937. This chapter 249 seems to give us events from the 13th to 20th. The first entry in this chapter mentions the recorder meeting the Lord Keeper of the Privy Seal at his residence but gives no date as to when this meeting took place. The last entry of this chapter seems to relate to 20th of August. It seems that the entry does not complete the story of the 20th and is continued on the 9th of October 1937 in Chapter 250A. Chapter 250B begins with the record of a conversation that had taken place a month earlier, that is on the 10th September and purports to end with a story of the 20th. The next chapter recorded on the 13th October 1937 begins with undated stories which seem to have taken place prior to the 27th of September and ends with 4th October. The next entry is chapter 252 and is dated 30th October 1937. It begins with an account of the 5th October and ends with what the author learnt on the 14th. Chapter 253 dated the 25th October 1937 also begins with undated events and ends with the night of 24th. I need not multiply these examples. They sufficiently indicate that there is no regular course observable in these entries. Most of these entries purport to record the statements made by others in course of some conversation. These statements appear in the entries within quotation marks, and most of them are very long quotations. In some of these conversations Baron HARADA records himself as being a participant. But in others he does not even claim to have been present there and what he records purports to be what, sometime after the conversation, had been reported to him either by a participant in the conversation or by a third party, some considerable time before he could find time to record the same.

I for myself find great difficulty in accepting and acting upon an evidence of this character in a trial in which the life and liberty of individuals are concerned. Some of these statements are ascribed to persons who had already appeared before us as prosecution witnesses. The defense was not even told at that time that this record of their prior statement would be offered in evidence.

An account of the manner in which this document was brought into existence will appear from the evidence of the witness Mrs. KONOYE at pages 37,462 to 37, 534 of the record. She was Baron HARADA's stenographer. Or, more correctly, she was Countess KONOYE, wife of the younger broth-

er of Prince KONOYE. As she had knowledge of shorthand, her assistance in this respect was specially requisitioned and obtained by Baron HARADA. She says that during the period from 1930 to 1940 she took down in shorthand the notes dictated by the Baron. Her evidence is:

"These notes taken by me in shorthand were transcribed in Japanese by me and given to Baron HARADA for approval.

"Baron HARADA took the transcription to Prince Kimmocchi SAIONJI for corrections and suggestions.

"Prince SAIONJI's corrections and/or suggestions were incorporated in the completed form which I wrote in my own handwriting."

The witness says that she had been shown by Mr. J. G. Lambert, IPS investigator, a photostatic copy of this *finished* transcription and that she recognized that to be the memoirs of Baron HARADA written by her in her own handwriting. Her evidence is that Baron HARADA dictated to her once or twice a week *from notes* and from memory the first drafts of the record. In her cross-examination she said that on several occasions there might have been such recording once every two weeks or once every three weeks. After some confusion the witness succeeded in making it clear that the method adopted in making this memoir was as follows:

1. Baron HARADA dictated to the witness either from a previous note or from memory.
2. She took down in shorthand.
3. She then transcribed the note and placed it before the Baron.
4. The Baron sometimes made corrections and showed it to Prince SAIONJI.
5. Prince SAIONJI also made corrections from time to time.
6. These corrected transcriptions were given to the witness and she rewrote the whole thing as corrected.
7. This rewritten transcription was again corrected by one Mr. SATOMI.
8. The corrected transcript was again rewritten by the witness.

At one time we were told that the photostatic copy was of the rewritten transcription mentioned in item 6; that is to say, of the fair copy which was made by this witness after Prince SAIONJI had made his corrections on the original draft and incorporating those corrections. (Record page 37, 529). Subsequently, however, the prosecution corrected that statement of the witness by saying that the copy was of the transcriptions corrected up to item 5. This the prosecution had to say after comparing with the original of the photostatic copy.

The condition of the entries made on dictation was such that "it would have been difficult for one to determine whether Baron HARADA was referring to present tense or past tense and it was difficult to determine the predicate and subject of the sentence and it was also difficult to tell who was saying what." While transcribing her shorthand notes the witness "had great difficulty in trying to discover just what portion in a given sentence was the subject." She "did the best she could and wrote it out the way she thought it

should be."

This document, it must be noticed, was offered in evidence only after the defense closed their case. It was sought to be presented under the garb of evidence in rebuttal.

It was pointed out by the President of the Tribunal that the British law regarding rebuttal can be stated as follows:

"Whenever evidence has been given by the defense introducing new matter which the Crown could not foresee, counsel for the prosecution may be allowed to give evidence in reply to contradict it. The matter is one within the discretion of the judge at the trial."(R. P. 37, 188)

He also pointed out that"the American practice before the military courts is not substantially different from the British in this regard."

Mr. Comyns Carr for the prosecution urged that there are three types of additional evidence which may, in an ordinary case in an English or American Court, be offered by the prosecution at the close of the case for the defense:

1. Rebuttal in the strict sense.
2. Evidence of a statement previously made by an accused or other defense witness which has been put to him and which he has in whole or in part denied.
3. An entirely new matter which has only come to the knowledge of the prosecution after the prosecution case was closed.

Mr. Carr claimed A SPECIAL CLASS for this case, namely,

4. Certain matters which were opened as part of the case for prosecution; but, owing to the evidence not being available, permission was asked and granted by the Tribunal for that evidence to be produced at a later stage when it would be available.

He claimed yet another class as a special one for this case, namely, cases where a witness has been called on the part of an accused to give evidence as to the opinion and policy of that accused, previous statements alleged to have been made by the accused contrary to the evidence of the witness should be admitted in rebuttal.

The Tribunal ruled that it should receive "evidence in rebuttal". Whether any particular piece of evidence will be received will depend upon the circumstances. (R. P. 37, 205)

With this ruling evidence began to be tendered. But soon difficulties arose as to their coming in as evidence of rebuttal in the strict sense of that term. The Tribunal ultimately ruled in these terms:

"The Tribunal has decided to receive *any* evidence tendered by the prosecution which in the judgment of the Tribunal has probative value and is of importance; but the defense may apply to tender evidence in answer to the prosecution's further evidence and each application will be considered on its merits." (R. P. 37, 330)

It was further clarified by saying that "there will be only two tests of evidence offered: Has it probative value? Is it important?" This we did on the

14th of January 1948 and it was a majority decision. It was made clear that "REBUTTAL" WOULD NOT BE THE RIGHT TERM to apply to this further evidence. (R. P. 37, 333)

The excerpts from HARADA-SAIONJI memoir were offered in evidence under this ruling on the 16th of January 1948.

Mr. Logan took objection to their admission stating the following:

1. The probative value of the memoirs is best demonstrated by the evidence of Mrs. KONOYE where she speaks of many difficulties she felt in transcribing her notes.
2. The memoirs are entirely predicated upon hearsay, prejudice, gossip, opinion, speculation, rumour, and conjecture.
3. Before any conversations which HARADA had with any other person are admitted in evidence in this case, the prosecution should produce evidence that Prince SAIONJI did not edit those particular conversations. (R. P. 37, 339)
4. The prosecution should explain why they withheld the introduction of these excerpts so long though they had the documents shortly after the war.
5. The original small pocket note-books from which HARADA is said to have dictated this memoir from time to time are the best evidence and therefore should have been offered in evidence.
6. Many instances are found in the memoir where HARADA who was not in the Cabinet, Privy Council or in the Military, is reporting second and third hand hearsay of what took place at meetings of these bodies.

We overruled this objection and allowed the prosecution to bring in the excerpts. The very first excerpt that was placed before us was full of translator's notes in parenthesis. I believe it would not be an exaggeration to say that almost half of this excerpt consisted of such notes. This excerpt purports to give the reason why this memoir was undertaken. It says: "This record was started in 1929. The following is the reason why this was undertaken: At the time of the London Treaty only false rumours about the issue prevailed; and the truth about the matter was never known. Especially, the attitude taken by the Emperor has been, for the most part, falsely rumoured. However, the counsel given to the Throne and actions taken by the Genro, court officials close to the Emperor, and the Cabinet Ministers on the whole, created serious perturbations in the political circles; and this was the direct cause of subsequent disturbances in the Army and Navy. The virtues and intelligent perspicacity of the Emperor were perverted almost beyond imagination by propaganda. I felt that this was an exceedingly regrettable fact. Since I knew, in my capacity the truth of the matter, I felt that there was a necessity for recording this in written form for posterity. Therefore, I consulted KONOYE, we decided to seek the assistance of (Viscountess KONOYE, Yanuko) the wife of (Viscount KONOYE) Hidemaro, the younger brother of Prince KONOYE, and have her take it down (as I dictated it) and thus preserve it for posterity. It has now grown to 10, 000 pages."

This occurs in chapter 378 dated 20th October 1940 in pages 2, 974 to 2, 977.

So, the author starts his work with the set object of leaving for a distant future generation a particular account of a course of political events which, according to him, is to be the true version, correctly depicting the part of rectitude played by his own favourite group and thereby exposing at that distant future the untruthfulness of the hitherto known version. It was designed to be kept secret during the life-time of the living generation. It does not purport to record from the author's own personal knowledge. In most cases it was not made contemporaneously with the occurrence of the facts recorded. The likely errors of perception, recollection and narration are present in it with multiple possibilities. The effective witness whose supposed statements the narrating witness relates might himself have made errors in any of these respects. Then comes the possibility of such error with each intervening narrator. Last of all comes the author himself with his possible errors, prejudices, pre-conceptions, and designs. Both the *ability* and *willingness* of so many persons to declare the truth remain untested. We have no means of testing what opportunity any of them had of ascertaining the fact to which his statement relates; his ability to acquire the requisite knowledge equally remains untested. His powers of memory, his situation with respect to the parties, his motives, must all be left unscrutinized and unexamined. Even when all suspicion of veracity is excluded from consideration, it may still be said that facts which the narrator might not have considered material, and therefore did not narrate, might have been disclosed now by cross-examination as having material bearing on the case. We cannot also ignore the possibility that observations like those reported in this memoir are likely to be misunderstood, mis-remembered and mis-reported. These are also exposed to misconstruction from *the ignorance* or *inattention* of the hearers or from their preconceptions. Take with all these infirmities the fact disclosed by the entries themselves that the author cherished a certain amount of dislike for most of the persons against whom these entries are now offered in evidence, and it is not unlikely that, if not designedly, at any rate unconsciously, he might have given them bad character.

The author did not intend to publish the memoir immediately. So he had no fear of contradiction from any source and had not to trouble himself with any risk of detection even if he wanted to give any distorted or garbled version.

In Chapter 378 at page 2, 977 of the memoirs , the author discloses how he was anxious for the safe custody of his memoirs and how it was designed not to allow these memoirs to be published till after the death of Prince SAIONJI and perhaps till long after the extinction of the living memory. Prince SAIONJI himself in his will "expressly prohibited the preparation of an official biography lest the revelation therein produce disastrous, unpredictable effects in future ages." Baron HARADA, however, is said to have contemplated the future official publication of the Memoirs, though not for "one hundred or more years after the death" of the Prince: (See Part I of the

Memoirs—Introductory Notes.)

Even assuming that, though started with a definite pre-conceived object, no circumstances have been disclosed indicating any possibility of falsification, or raising any suspicion that the record of events would not be sincere and accurate, there is still a great deal of difficulty in accepting the excerpts as evidence of what the prosecution sought to establish thereby. The prosecution sought to utilize the excerpts from this document, not so much to establish the happening of any contemporaneous event, as to introduce the sinister STATEMENTS alleged to have been made by the several accused in relation to that event, and from such statements to infer a particular attitude of the accused in relation thereto. In my opinion, the entries in the memoirs are specially worthless for this purpose. Most of the statements were not statements made to the author or heard by him personally. His information is sometimes more than second hand. His informants in most cases purport to have reported to him several days after they themselves heard the statement or got their information about that statement. There is no evidence that the author himself recorded the statement even at the time when it was narrated to him by his informant. He himself dictated his memoir several days after he got the information. Very often when proceeding to dictate his note for these memoirs he purported to dictate several statements made by several different persons on several different occasions. It is difficult to attach any value to such a recording of alleged statements ascribed to the accused. By way of illustration I might refer to an excerpt marked exhibit 3788-A which is an excerpt from a day's entry purporting to record sixteen different conversations with sixteen different persons. On the strength of such recording we are to ascribe the sinister expression used therein to the accused and therefrom to infer their criminal mentality. I must confess it will be difficult for me to utilize this sort of evidence for that purpose.

THE RULE AGAINST LEADING QUESTIONS lost all its practical importance when we decided to allow the prosecution to adduce, in lieu of presenting the witness for direct examination in court, the affidavit of the witness or his statement taken out of court, offering the witness only for cross-examination. We arrived at this decision almost at the commencement of the trial on the 18th June 1946. We allowed this with certain amount of misgivings. In communicating our decision in this respect the President observed: "You recognize, Mr. Justice Mansfield, that we are making a big concession here, perhaps not without grave misgivings. This matter was debated among us very seriously for a considerable time. You realize that the witness, as the deponent probably, in most cases, said what he did say as the result of a number of leading questions which we would not allow if he were examined in court. For that reason if we do admit these affidavits, in view of the peculiar circumstances attending them, we will, I venture to say on behalf of my colleagues, insist on a high standard of cross-examination. You see, the defect of it is that the deponent is allowed to give evidence in response to leading questions." (page 935—June 19, 1946)

The defense, of course, objected to this procedure, but we overruled

their objection saying that we were "not bound by the rules of evidence or the rules of the procedure". Yet, it cannot be denied that a leading question may often induce an answer which misrepresents the actual recollection of the witness and perhaps causes aberration from a correct spontaneous narration. In the language of Chief Justice Appleton "the real danger is that of collusion between the witness interrogated and the counsel interrogating that the counsel will deliberately imply or suggest falsely facts with the expectation on his part and with an understanding on the part of the witness that he will assent to the truth of the false facts suggested." We did not think that in the present case there was any such danger and we still feel there was no such danger. The infirmity which might have attached to the evidence taken thus goes only to the extent to which the process of narrative-utterance can possibly be affected by suggestion in general and by interrogation in particular. Modern experimental psychology confirms that the use of the interrogatory increases the range but decreases the accuracy of the narration.

We were from time to time called upon by the defense to reject some items of the prosecution evidence on the ground that they had *no probative value*.

As far back as 22 July 1946, the affidavit of the prosecution witness, Mr. Morishima, was objected to by the defense on the ground that "it stated theories and opinions of the witness and did not confine itself to the statement of facts."

In overruling this objection the President observed: "It certainly should not be in that form but I am afraid we *will have to* receive it for what probative value it has."(proceedings, page 2,324)

On July 30, 1946 objection was made by the defense to the introduction of a document on the ground that it had no probative value, because it was not clear when the document was first written. In overruling the objection the President observed: "The question of whether any document or any other evidence has any probative value or not will have to be considered when we come to review the whole of the evidence. There may be rare exceptions but I cannot say this is one of them." (proceedings, page 2,700—July 30, 1946)

THE CONSIDERATION OF "PROBATIVE VALUE" AS A FACTOR in determining the admissibility or otherwise of the evidence offered arose in this case in view of the provisions in the Charter contained in Article 13. As I read the Charter, it does not say that on this consideration we can reject any evidence otherwise relevant to the issue and hence admissible. Its true meaning appears to me to be that, free as we were from any technical rule of evidence, we might admit anything though not admissible under any technical rule, provided the thing offered had, in our opinion, some probative value. In other words, the Charter instead of introducing greater stringency in any technical rule of exclusion prevailing in any national system, intended this little restriction only when we were in the otherwise unrestricted field. It did not entitle us to exclude any evidence, otherwise relevant and admissible, on the strength of this new exclusionary provision.

As regards the affidavit of Morishima it was no evidence at all in so far

as it consisted of his opinion or belief.

THE OPINIONS OR BELIEFS of third persons are as a general rule no evidence at all, and therefore inadmissible. Witnesses are to state facts only, *i. e.*, what they themselves saw or heard. It is the function of the judge and jury to form their own conclusion or opinion on the facts stated. In the language of Phipson "opinions, in so far as they may be founded on no evidence or illegal evidence, are worthless, and in so far as they may be founded on legal evidence, tend to usurp the functions of the Tribunal whose province alone it is to draw conclusions of law or fact."

There are, however, cases in which the court is not in a position to form a correct judgment, *e. g.*, when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special experience therein is necessary. In such cases the *help of experts* is required in matters in which special study or training or experience is necessary . In these cases expert evidence is admitted to enable the court to come to a proper decision. The rule admitting expert evidence is founded on necessity.

The principle relating to opinion testimony may roughly be summarized thus: First, all witnesses, whether testifying on observed data of their own or on data furnished by others, may state their inferences so far only as they have some SPECIAL SKILL which can be applied to interpret or draw inferences from these data. Secondly, witnesses having no special skill, who have had personal observation of the matter in hand, may, as a result of their personal observation, have drawn inferences or made interpretations which the tribunal could equally well make from the same data of personal observation, if laid before them; and thus if it is possible to detail these data fully for the Tribunal, the witness's own inferences are superfluous.

Following the principle discussed above we rejected much evidence sought to be adduced in this case which, in our opinion, simply purported to testify to the opinion entertained by the authors thereof. On this ground, for example, we rejected the statements of Mr. Grew expressive of his estimate of the events happening in China or in Japan during the relevant period. We similarly rejected the views of the Right Hon'ble Sir Robert Craigie, Sir Reginald Johnston, Mr. John Powell and similar other persons. We also declined to admit in evidence opinions of the then Japanese statesmen, reviews of the then affairs by the Institute of Pacific Relations and the like.

In my opinion the indiscriminate application of the principle to all these matters was not justifiable in the circumstances of the present case. I have already pointed out the difficulty we shall have to face in determining whether or not any particular action taken by Japan was aggressive. If for that purpose, we are called upon to see NOT so much whether any particular circumstances were actually present or any particular event actually happened, but whether the persons acting upon their assumption, *bona fide* believed their existence or happening and acted reasonably on that belief, then, in my judgment, contemporaneous views, opinions and beliefs of diverse statesmen, diplomats, journalists and the like of different nationalities including Japan

would have much evidentiary value. Such views, beliefs and opinions would, in my opinion, be very valuable and pertinent evidentiary facts in this case, not for the purpose of establishing the actual existence of any circumstance in question or the actual happening of any event in issue, but to establish the general prevalent view and thence the *bona fides* of the views and beliefs of the persons concerned in the present case.

Though the Charter sought to make us independent of all artificial rules of procedure, we could not discard such rules altogether. The practical conditions of the trial necessitated CERTAIN RESTRICTIONS. This however might not have always yielded happy results.

THE RESTRICTIVE RULES, which we introduced in determining the evidence offered by the parties in this case, stand thus:

1. All cross-examinations shall be limited to matters arising in the examination-in-chief. (p. 2,515, July 25, 1946.)
2. No evidence as to the contents of a document shall be accepted without producing the document or accounting for its absence.
3. No self-serving statement shall be taken in evidence.
4. No evidence of the existence or spread of Communism or of any other ideology in China or elsewhere is relevant in the general phase. Evidence of an actual attack on Japanese nationals or property by Chinese Communists or any other Chinese may be given in justification of Japan's acts. When the accused come to give evidence they may tender their fear of Communism in explanation of their acts. (p. 21,081, 29 April 1947.)

Later on, the Tribunal decided to receive evidence of THREATENED ATTACK OF CERTAIN CHARACTER, namely where the threat is of a serious nature, where it is imminent, and where the persons making it have present ability to give effect to it. (p. 21,115)

It is one of THE CARDINAL RULES OF EXAMINATION of witnesses in many systems that the examination-in-chief and cross-examination must relate to relevant facts, but that the cross-examination need not be confined to the facts to which the witness testifies in his examination-in-chief.

THE MOST EFFECTIVE AND MOST WIDELY USEFUL of all the different sorts of CROSS-EXAMINATION is that in which one has the opposite witness to prove independent facts in one's favour. John C. Reed in his "Conduct of Law Suits" while commenting on the essential function of cross-examination, says: "You cross-examine three classes (of witnesses): (1)The witness whose version you accept so far as it goes; (2)The witness whom you show to be mistaken, or the force of whose testimony you take off by other means, not however by attacking his veracity; (3) The witness whom you show to be unworthy of credit. We add that there are really but two kinds of witnesses, the truthful and the untruthful; and consequently there are at botton but two kinds of cross-examination, THE ONE intended to elicit friendly evidence, and the other to show the unreliability of the witness ... the first kind is in *general use in every sort of case*, while the second is only of occasional importance ... Your objects with him (the first class) are but two, (*a*) the first to have him com-

plete what the direct examiner has incompletely presented through . . . partial questions . . . and (*b*) the second to make him, if you can, re-enforce your own proofs." After explaining the first of these two objects, the learned author proceeds: "We now come to what is practically the most effective and most widely useful of all different sorts of cross-examination. In it you have the opposite witness to prove independent facts in your favour . . . Note the usual cross-examination by good practitioners, and you will find that in a large proportion they ask hardly any questions except such as are now our special subject. In most cases they see intuitively that there is no very distorted statement to be rectified, and that there are no serious mistakes to be corrected; *and they only make the witness re-enforce* their side as to some detail . . . While the kind of cross-examination now in hand is the most important of all, it is also the most easy . . ."

This no doubt is the English rule: But it is also sound principle. It is followed in some jurisdictions in America. The Federal Rule introduced by Story J. in 1840 "that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination", now prevails in most states. According to this rule, if the cross-examining party wishes to examine the witness on other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the suit.

By a majority decision we adopted this American Rule in preference to the English Rule.

We could not admit in evidence the contents of the published books of eminent authors like the Right Hon'ble Sir Robert Craigie, former ambassador to Japan from Great Britain, Mr. Grew, former ambassador to Japan from the United States, Sir Reginald F. Johnston and Mr. Woodhead, a journalist, perhaps for some sound reasons. Jonh Powell was another such author and he came to depose on behalf of the prosecution. The prosecution kept his examination-in-chief within a narrow compass. The defense in their cross-examination of him wanted to take advantage of the information and knowledge of the witness as disclosed in his published book. But this rule of ours stood in their way. Subsequently they sought to bring in his book but failed. (Vide proceedings, pages 17,277, 17,298-17,302). John Powell had died in the meantime and whatever information in favour of the defense he might have possessed was lost to the defense.

As has been noticed above, the Charter released us from all technical rules of evidence and entitled us to admit any evidence which the Tribunal would deem to have *probative value*. In particular we were entitled to admit a copy of a document or other secondary evidence of its contents, if the original was not immediately available.

Despite this, we applied THE BEST EVIDENCE RULE as to the contents of a document with meticulous strictness. (p. 18,975—24 March 1947.)

We sometimes rejected statements made long before the termination of the present hostilities, almost contemporaneous with the time of any relevant incident, if the statement happened to refer to the contents of any document

and that document was not produced. We did not accept such statements even if it were certified by the requisite authority that it could not find the document now. We insisted upon a certificate that the document had been destroyed.

I, for myself, did not see much sense in the rule of exclusion at a trial where any amount of hearsay evidence had to be taken in.

The rule rests on the maxim that the 'best evidence' must always be produced. The importance of the strict observance of this rule is perhaps best expressed in the language of Lord Tenterden in Vincent *v*. Cole and of Lord Wynford in Strother *v*. Barr. Lord Tenterden observed: "I have always acted most strictly on the rule, that what is in writing shall only be proved by the writing itself. My experience has taught me extreme danger of relying on the recollection of witnesses, however honest, as to the contents of a written instrument; they may be so easily mistaken that I think the purposes of justice require the strict enforcement of the rule." Similarly Lord Wynford observed: "I seldom pass a day in a *Nisi Prius* court without wishing that there had been some written instrument evidentiary of the matters in dispute. More actions have arisen, perhaps from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witness being too ignorant, and too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of a parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents unless the instrument be proved to have been lost."

One of the main reasons for the adoption of this rule is, that the court may require a knowledge of the whole contents of the instrument, which may have a very different effect from the statement of a part.

Non-production of the more trustworthy kind of evidence certainly tells against the weight of the evidence produced, but, in my opinion, it does not affect the latter's admissibility.

I believe the rule that documents must be proved by primary evidence except in certain specified cases and under certain specified circumstances must be distinguished from another exclusionary rule of evidence apparently of the same category. I mean the rule of evidence which excludes other evidence of the terms of a contract or grant or of any other disposition of property which have been reduced to the form of a document or which are required by law to be so reduced to the form of a document. In the case of such contract etc. no evidence shall be given in proof of the terms of the contract or grant except the document itself or secondary evidence of its contents in cases in which such secondary evidence is admissible. Here the written contract is of the very essence of the transaction. But WHERE A WRITTEN INSTRUMENT IS NOT A FACT IN

ISSUE but only a piece of evidence in proof of some act, other independent evidence is admissible. Non-production of the document in such a case may amount to non-production of the more trustworthy kind of evidence and may thus tell against the weight of the evidence produced. It does not affect the admissibility. At any rate, in a proceeding where we had to allow the prosecution to bring in any amount of hearsay evidence, it was somewhat *misplaced caution* to introduce this best evidence rule, particularly when it operated practically against the defense only.

None of the documents in question here was in the possession or power of the accused or of the witnesses whose statements referred to them. The defense might, I believe, give secondary evidence of their contents by giving notice to the party in whose possession or power such documents were to produce them in court. Perhaps they did not follow this procedure with accuracy. But they produced certificates from the very person that the same were not available for production. I don't see why, even then, these statements could not be admitted in evidence.

Further, remembering that we were a Criminal Court, it perhaps devolved upon us to frame such a notice to produce the document as we might consider reasonable.

In some of the instances the document in question was in the possession or power of the adverse party. We might, at least in these cases, admit the statement leaving it to the prosecution to impeach its correctness by the production of the document.

Of course, even under the Charter we were to admit only the EVIDENCE RELEVANT to the fact or facts in issue.

The expression 'fact in issue' would mean any fact from which either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceedings, necessarily follows:

As regards criminal cases the charge constitutes and includes the facts in issue.

Of all the rules of evidence, the most universal and the most obvious is that the evidence adduced should be alike DIRECTED and CONFINED to the matters which are in dispute or which form the subject of investigation. Anything which is neither directly nor indirectly relevant to these matters ought, at once, to be put aside.

Evidence may be rejected as irrelevant for the following reasons:

1. That the connection between the principal and the evidentiary fact is too remote and conjectural;
2. (*a*) That it is excluded by the state of pleadings or what is analogous to the pleadings; or
   (*b*) is rendered superfluous by the admission of the party against whom it is offered.

WE HAVE DISALLOWED the following categories of evidence sought to be introduced by the defense:

1. Evidence relating to the state of affairs in China prior to the time when the Japanese armed forces began to operate: (p. 2,505, July 25, 1946)
2. The evidence showing that the Japanese forces in China restored peace and tranquillity there: (proc. page 2,154— July 9, 1946)

   It was observed in this connection that "none of the accused will be exculpated merely because it is shown, if it is shown, that the Japanese forces in China restored peace and tranquillity there. What you must establish . . . is that the Japanese armed forces . . . had authority or justification or excuse for what they did."
3. Evidence relating to the Chinese trouble with Great Britain in 1927. (proc. page 21,106)
4. Evidence showing the public opinion of the Japanese people that Manchuria was the life-line of Japan: (proc. page 3,134, August 2, 1946)

   It was observed in this connection that "that type of reasoning is useless. What does it matter . . . if the Japanese people did think they needed a part of China? Their honest belief, if it be an honest belief, as to their needs for part of China, is not justification for an aggressive war."
5. (*a*) Evidence as to the relations between the U. S. S. R. and Finland, Latvia, Esthonia, Poland and Roumania.
   (*b*) Evidence as to the relations between the U. S. and Denmark *vis-a-vis* Greenland and Iceland: (proc. page 17, 635— March 3, 1947)
   (*c*) Evidence as to the relations between Russia and Great Britain and Iran.
6. Evidence relating to A-Bomb decision. (proc. page 17, 662)
7. Evidence regarding the Reservation by the Several States while signing the Pact of Paris. (proc. page 17,665)
8. (*a*) The United Nations Charter. (proc. page 17,682)
   (*b*) The Lansing-Scott Report.
9. (*a*) Statements prepared by the then Japanese Government for the Press:—Press release—(proceedings, pages 20, 508, 20,511, 20, 549, 20, 606, 20, 608, 20, 801, 20, 807, 20, 809, 20,815, 20,825, 20,860, 20,866, 20,882, 20,939)

   We have discarded these on the ground that these were prepared for the PROPAGANDA PURPOSES and consequently have NO PROBATIVE VALUE.
   (*b*) Statements made by the then Japanese Foreign Office. (proc. page 21,134-21,139)—These were discarded as being SELF-SERVING STATEMENTS.
10. Evidence relating to Communism in China: The Tribunal was of opinion that no evidence of the existence or spread of Communism or of any other ideology in China or elsewhere is relevant in the

general phase. Evidence of an actual attack on Japanese nationals or property by Chinese Communists or any other Chinese may be given in justification of Japan's act.

When the accused come to give evidence, they may tender their fear of Communism in explanation of their acts. This was decided on 29 April 1947 by a majority of the Tribunal (proc. page 21, 081). Later on it was ruled that 'assault' includes a threat of assault (proc. page 21, 113), where the threat is of a serious nature, where it is imminent, and where the persons making it have present ability to give effect to it. (proc. page 21, 115)

11. Evidence otherwise considered to have NO PROBATIVE VALUE: (proc. pages 18, 805, 18, 809, 18, 826, 19, 178, 19, 476, 19, 614, 19, 715, 20, 930, 20, 960)

As regards THE PRESS RELEASES of the then Japanese Government, THE GROUNDS ON WHICH WE REJECTED them were in substance the following:

1. These documents emanate either from the Board of Information or from what are called Foreign Office Spokesmen. They paint with a Japanese brush a picture of events for consumption at home and abroad. Any statement by the Board of Information or by a Foreign Office spokesman as to what took place in China does not prove the fact of what took place in China one way or another. They may have no probative value. (proc. page 20, 508)

2. It is pure propaganda and nothing else. It seems to be nothing but argument from the Japanese viewpoint; propaganda, in short. (proc. pages 20, 806, 20, 801)

3. It is a document painting the picture from the Japanese point of view on matters which are in dispute before this Tribunal and which cannot be decided by a statement in English found in the Japanese Foreign Office.

4. Evidence relating to the activities of the belligerent armies would stand "in the order of probative value" thus:

(*i*) A person present who gives a credible account.

(*ii*) Dispatches of Commanders in the field.

Versions of (*i*) and (*ii*) for public or enemy consumption are not of probative value. (proc. page 20, 809)

5. These are self-serving statements and hence are not admissible. (proc. page 20, 810-15)

6. Public declarations of alleged facts by the Japanese Government which are to be circulated through the press for other and even enemy countries cannot be accepted as candid or complete so as to possess *Probative value*. (proc. page 20, 810-15)

We had, however, admitted in evidence press release of the prosecuting nations when offered in evidence by the prosecution: Vide Exhibits 952, 959, 960, 963, 982, 1, 013, 1, 102, 1, 287 etc. (proceedings, pages 9, 438, 9, 463, 9, 464, 9, 476, 9, 556, 9, 667, 10, 047, 11, 679 etc.)

I have considered elsewhere in this judgment the place of propaganda in

International life. No doubt efficient propaganda sometimes aims at convincing the world public of "the most bizarre fairy tales that have ever been devised."

"Between two countries at war there was always a danger that one or other of the combatants would seek to turn public opinion in his favour by resort to a propaganda in which incidents were magnified and distorted for the express purpose of inflaming prejudice and passion and obscuring the real issue of the conflict." Even the story of Nanking rape was looked upon in the above light at an address at Chatham House held on 10th November 1938 with Colonel G. R. V. Steward C. B., C. B. E., D. S. O. in the Chair.

Yet keeping in view the place assigned to this propaganda by the Great Powers in their respective government organizations, it would be unjustifiable to stigmatize it as synonymous with falsehood, or even as raising a presumption that it is a lie. I believe that when we make it a rule of evidence that this statement was prepared for propaganda and therefore has no probative value, we assume that a propaganda is *prima facie* a lie. In my opinion we have no materials before us to justify such sweeping assumption and I believe no power in the world would appreciate this implied characterization of propaganda. I may mention in this connection that we have no evidence before us which would entitle us to ascribe any special character to Japanese propaganda.

PROPAGANDA IS OFTEN ABUSED. But ITS PRIMARY FUNCTION is to inform, influence and win mass opinion of the world, not necessarily by *misinforming*.

Even if these press releases be taken as "painting with a Japanese brush a picture of events for consumption at home and abroad" they would present us with one version of the event, the prosecution having given us another version. It will be for us to decide which version we should accept. The prosecution version is also a version of a party. Some infirmity is likely to be present in both.

A rule rejecting "versions of a person present or of Commanders in the field given for public or enemy consumption" is perhaps an extreme rule of caution. Such a rule perhaps will help the elimination of everything tainted with any doubt or suspicion. But when our record has already been allowed to be filled up with dubious materials introduced by one party under relaxed rules, I doubt very much if it was not too late for us to introduce these healthy exclusionary rules only to eliminate equally dubious materials coming from the defense to compete with the prosecution materials of similar character.

I also have my doubts if we were correct in characterizing these statements as 'self-serving'. None of these press releases could be described to the authorship of any of the accused before us.

It might be noticed here in passing that those who hold that the Charter defines the crime for which this trial is being held and that that definition is binding on the Tribunal, offer, as one of their grounds for so holding, that the sovereignty of the vanquished state devolves on the victors by right of conquest and that the present prosecution is in exercise of that sovereign

right. If this is so, it may be that the prosecution would be bound by these statements of its predecessor state.

If the evidence offered relates to a relevant fact in issue, then its rejection on the ground that it has no *probative value* really means appreciation of its weight in fragment. In my opinion, it is risky thus to treat each piece of evidence singly and reject the same on the ground that it has no weight. *I believe the view we took on the 22nd July 1946 on the defense objection to prosecution evidence was preferable to that we subsequently took on the prosecution objection to the defense evidence.*

For weighing evidence and drawing inferences from it, there can hardly be any canon. Each case presents its own peculiarities and commonsense and shrewdness must be brought to bear on the facts elicited in every case.

The effect of evidence must necessarily be left to the discretion of each judge.

As regards item 4, I doubt if we were right in saying that THE VIEWS OF THE JAPANESE PEOPLE had no bearing at all on the question before us. It cannot be denied that in the realm of foreign policy, the preservation of interest of the nation has always been taken to be the main consideration. In the words of Lord Palmerston, the principle on which the foreign affairs of a country ought to be conducted is the principle of maintaining peace and friendly understanding with all nations, so long as it was possible to do so consistently with due regard to the interests, the honour and the dignity of the country. "If I might be allowed", says Lord Palmerston, "to express in one sentence the principle which I think ought to guide an English Minister, I would adopt the expression of Canning, and say that with every British Minister the interests of England ought to be the Shibboleth of his policy." It has been looked upon as a duty of statesmen to abide by this principle and it has been justified by the idea of the political trust which governments execute on behalf of their people.

Of course the mere voice of the people would not establish their interest. Existence of such interests must be established by other evidence, and it has been sought to be so established. If we accept that as established, then, the people's voice might go to show their aliveness to this interest and though not justifying, might at least, explain the adoption of this foreign policy without having recourse to a theory of conspiracy.

I am not sure that we were right in rejecting the evidence referred to in item 5 above.

Remembering the nature of the so-called family of Nations, THE MEANING WHICH THE PARTIES TO THE PACT GAVE TO IT is much more important than anything else in its interpretation. This meaning becomes a stronger guide when it is attended with a conduct consistent only with such meaning.

I equally felt difficulties in agreeing with the decision regarding items 1 to 3 of the rejected evidence.

The Defense proposed to establish that the state of affairs in China which since 1922 was put forward by the several Signatory Powers of the Treaty of

Washington as grounds for not giving effect to that treaty, and which provoked some pungent condemnation by America in 1925 and some hostile action by Great Britain in 1927 became even worse when the TANAKA Cabinet assumed the alleged policy towards China or when Japan took action against China. Their offer was thus to establish the existence of a state of affairs which always, by all the Powers has been considered as presenting occasions for similar statement of policy or similar action. They further offered to establish the result of Japan's action which, according to them, would retrospectantly indicate both necessity and justification for Japan's original action.

It would certainly be wrong to justify Japan's policy in China at the present moment by reference to the policy of other Powers in the long past. If the conduct of powers today were to be based upon the conduct of powers in the past, the outlook for the world in the future was very gloomy indeed. Ordinarily it is of little use to try to elucidate the present by a comparison with the past. It is to be hoped that during the course of years, the standard of international morality had not remained stationary, but had been advanced so that acts which had been justified by international practice in the past were no longer justifiable today.

But the past in question here had a very relevant connection with the present. The prosecution case lays much emphasis on the Nine-Power Treaty of Washington: the incidents in question relate to a period after that treaty and the Powers were all its Signatory Powers. I still feel difficulty in disregarding the defense reason for this offer. I would only add that even if such matters would fail *to justify* the action taken by Japan, they might at least offer AN EXPLANATION of the happening and to this extent might weaken the prosecution case of conspiracy.

As we shall see later, the very essence of the prosecution case is the existence of a conspiracy, plan or design of the kind alleged in Count 1 of the indictment.

In order to establish this conspiracy the prosecution relied mainly on circumstantial evidence. As I read the prosecution evidence there is not a single item in it which goes directly to establish this conspiracy. Whatever that be, the prosecution, at least, relied strongly on the evidence of subsequent occurrences and invited us to draw an inference therefrom that these were all the result of the alleged conspiracy and hence established that conspiracy by reference back.

After the close of the prosecution case the defense moved the Tribunal for dismissal of the case asserting that the evidence adduced did not disclose any *prima facie* case against any of the accused.

In reply to this motion the prosecution laid stress on what it characterized as *the conspiracy method of proof* and emphasized that the occurrences from the Mukden incident of 18th September 1931 to the invasion of Pearl Harbour all lead to the inference of the over-all conspiracy as asserted in count 1.

The defense motion was ultimately rejected by the Tribunal.

In the result the defense must be taken to have been called upon to adduce evidence:

1. to disprove the occurrences,
2. to explain them,
3. to justify them.

The importance of item 2 as specified above cannot be minimized by the defense in view of the charge contained in count 1. To the extent to which the defense succeeds in explaining any occurrence, the prosecution case of over-all conspiracy is explained away. Apart, therefore, from the consideration whether the incident offered by way of explanation of the occurrence would or would not *justify* the action taken by Japan, it is relevant as an EXPLANATION and consequently the defense was entitled to bring it in evidence. Unfortunately the Tribunal in laying emphasis on justification ignored this bearing of mere explanation.

We have rejected the evidence relating to the development of COMMUNISM IN CHINA.

A part of the bearing of this communism on the case before us would appear from the following passages in the summation of the prosecution. The prosecution says: "She (Japan) accused China of menacing Japan's national defense by supporting communism and failing to keep law and order. With respect to communism, it is true that for a short period prior to 1927 the communists were permitted to participate in the government, but in 1927 the national leaders decided that communism was a menace and began to fight against it, with the result that by July 1931 the communist strongholds had been taken and the communists were in retreat, having been driven by Generalissimo Chiang Kai-shek into the mountains. However, with the outbreak of September 18, China was compelled to suspend the offensive against the communists and withdraw a large part of her troops and the Communists thereupon resumed the offensive. Thus, at the time Japan was complaining of the communist menace in China, China had the Communists well in hand, only to lose her dominance over them because of Japanese action." In view of our rejection of the defense evidence we cannot accept this summation of the Prosecution. In this summation the prosecution invites us to accept all the findings of the Lytton Commission in this respect. In my opinion, the defense was entitled to adduce evidence and to ask this Tribunal to come to its own findings as to the questions of fact involved.

The Lytton Commission Report in pages 20 to 23 gives some account of this Communism in China and characterizes it as a menace to the authority of the Chinese Central Government as such. Elsewhere I have dealt with this question of Communist development in China during the relevant period. Here I need only point out what the Commission found in this connection. The Report says:

1. There is a menace to the authority of the Central Government of China from Communism;
2. The 'Chinese Communist Party' was formally constituted in May

1921;

3. In the autumn of 1922, the Soviet Government sent a Mission to China. Important interviews resulted in the joint declaration of January 26, 1923, by which assurance was given of Soviet sympathy and support to the cause of national unification and independence of China. It was explicitly stated, on the other hand, that the Communist organization and the Soviet system of government could not be introduced *at that time* under the conditions prevailing in China.
   (*a*) Following this agreement a number of military and civil advisers were sent from Moscow by the end of 1923 and undertook . . . the modification of the internal organization of the Kuomintang and of the Cantonese army.
   (*b*) At the first National Congress of the Kuomintang, convened in March 1924, the admission of Chinese Communists into the party was formally agreed to.
4. (*a*) There was a period of tolerance with regard to Communism which covered 1924-1927. In 1927 the National Revolution was almost on the point of being transformed into a Communist Revolution.
   (*b*) A national government was constituted at Nanking on 10th April 1927; a proclamation was issued by the government ordering the immediate purification of the Army and the civil service from Communism.
   (*c*) (*i*) On July 30, 1927 the garrison at Nanchang, Capitol of Kiangsi Province, together with some other military units, revolted and subjected the population to numerous excesses;
      (*ii*) On December 11, a communist rising at Canton delivered control of the city for two days into their hands;
      (*iii*) The Nanking Government considered that official Soviet agents had actively participated in these uprisings.
      (*iv*) An order of December 14, 1927, withdrew the *exequatur* of all the consuls of the U. S. S. R. residing in China.
5. (*a*) The recrudescence of civil war favoured the growth of Communist influence in the period between 1928 and 1931. A Red Army was organized and extensive areas in Kiangsi and Fukien were Sovietized.
   (*b*) Large part of the Provinces of Fukien and Kiangsi and parts of Kwangtung, are reliably reported to be completely Sovietized.
   (*c*) Communist zones of influences are far more extensive. They cover a large part of China south of the Yangtze, and parts of the provinces of Hupeh, Anhwei, and Kiangsu north of that river. Shanghai has been the centre of communist pro-

paganda.

(*d*) When a district has been occupied by a Red Army, efforts are made to Sovietize it. Any opposition from the population is suppressed by terrorism.

6. Communism in China does not mean only a political doctrine held by certain members of existing parties or the organization of a special party to compete for power with other political parties. *It has become an actual rival of the National Government. It possesses its own law, army and government and its own territorial sphere of action.*

7. (*a*) So far as Japan is China's nearest neighbour and largest customer, she has suffered more than any other power from the lawless conditions in China.

(*b*) Over two-thirds of the foreign residents in China are Japanese.

In rejecting the evidence offered by the defense to show the character and development of the Communist movement in China it was ruled that the only relevant evidence in this respect would be that which would show that Japanese interest was actually assailed, or was in imminent danger of being assailed.

The exact language of our ruling in this respect has been given above.

The INTERNATIONAL WORLD seems to consider it legitimate for one state to have the policy "to support free peoples of other states who are resisting attempted subjugation by armed minorities or by outside pressure."

In view of the very nature of the Communist movement in China as indicated in the Report of the Lytton Commission, the evidence offered by the defense might not have been beside the point. In any case, after excluding the evidence offered by the defense we cannot now accept what the Prosecution offers in its summation as stated above. If the matter at all enters into our consideration, we are, I believe, bound to take it as the defense contended it to be.

But apart from the question of its being a JUSTIFICATION, the defense contended that the evidence was relevant in view of the charge of an over-all conspiracy. MR. LOGAN for the defense contended "not only do these Communistic activities in China exist—did they exist before the beginning of the incident, but they also occurred during the entire period of time. And, since these incidents occurred during the entire period of time, they are material to the charge in the indictment as to whether or not these accused *conspired* to, and did, wage aggressive war. If this evidence proves, as we believe it does, that incidents were created and stirred up by Communistic activities, the activities of the Communist would be the material to that charge in the indictment. I might also point out, it was Japan's policy to try and settle and localize these incidents, and the activities of the Communists, it will be shown, prevented the settlement of the incidents and stirred up new ones."

It might certainly be pertinent evidence TO EXPLAIN THE OCCURRENCE. Whether or not the development sought to be established would have justified the action taken by Japan, it might certainly offer a good explanation of why

these occurrences took place and thus might shut out or weaken the inference of over-all conspiracy from such occurrences.

Further, in my opinion, in order to comply with the conditions of the above ruling it might not have been required of the defense to bring in only that item of evidence which would *at once* satisfy all the conditions. In my opinion, under the ruling, the defense might bring in evidence to establish the threat and then by some other evidence might establish that the threat was of the specified character and by persons of the required capacity. Each and every piece of evidence offered by them need not by itself have shown all these factors. In the application of the rule, however, we insisted that the item offered by itself must satisfy all these requirements.

In this connection we must not lose sight of the following pertinent considerations:

1. Japan had interest in China itself and consequently might not have been disinterested even if Communism in China were a mere ideology.
2. Communism in China might not have been a mere ideology as was noticed by the Lytton Commission.
3. The very history of the development of the Communist movement might justly lead Japan to see the hand of the U. S. S. R. in it.
4. The defense sought to connect the communist movement with the anti-Japanese movement during the relevant period.

Unfortunately in rejecting the evidence of this category we have regarded the situation involved in the case before us as a simple factual one easily recognizable as such and not likely to be mis-apprehended. As a matter of fact there is involved in this situation a complicated superstructure calling for a conclusion on a difficult question of law as a means of determining its existence.

In determining the extent of the right of self-protection in this respect it may again be necessary for us to examine the character of the so-called international society. Professor Schwarzenberger ably analyses the development of modern international law and shows that "its original standards of value were completely eliminated during the gradual process which, starting from the Christian law of nations, led *via* the law of civilized nations to the victory of positivism and voluntarism. It is apparent from the correlation between community and society and their respective systems of law that whatever community may have existed during the initial stages of the law of nations, it has gradually been transformed into a society."

"In pre-war Europe, the political system of alliances and counter-alliances, which brought in its train the balance of power as a means of preserving peace, was the overriding force. Within its limits, international law could fulfil the functions of society law which is 'founded on mutuality and reciprocity' only in subordination to the requirements of this system. The law of nations either directly served the objects of the balance system or pursued aims not incompatible with it. Even before the World War the forces of nationalism and imperialism threatened to reduce to unlimited anarchy the balance system on which the working of international law depended. In the post-

war period additional disintegrating forces were brought into play by the incompatibility between the two main objects of the Peace Treaties—hegemony over the former Central Powers on the one hand, and on the other an organized community of the 'fully self-governing' nations of the world based on the comprehensive rule of law."

As I have already pointed out, it requires a serious consideration how far growth of communism extends the right of intervention of a state, remembering the character of change involved in communism in relation to the very fundamentals of the existing state organization and property-rights.

We have rejected some evidence relating to the CHINESE BOYCOTT MOVEMENT offered by the defense, but that is because the existence of the boycott and its aims and effects were not seriously questioned by the prosecution.

As to the existence of this movement in China the Lytton Commission Report itself is sufficient evidence.

The Report says:

> "For centuries the Chinese have been familiar with boycott methods in the organization of their merchants, bankers and craft guilds. These guilds, although they are being modified to meet modern conditions, still exist in large numbers and exercise great power over their members in the defense of their common professional interests. The training and attitude acquired in the course of this century-old guild life has been combined, in the present-day boycott movement, with the recent fervent nationalism of which the Kuomintang is the organized expression.
>
> "The era of modern anti-foreign boycotts employed on a national basis as a political weapon against a foreign Power (as distinct from a professional instrument used by Chinese traders against each other) can be said to have started in 1905, with a boycott directed against the United States of America because of stipulation in the Sino-American Commercial Treaty, as renewed and revised in that year, restricting more severely than before the entry of Chinese into America. From that moment onward until today there have been ten distinct boycotts which can be considered as national in scope (besides anti-foreign movements of a local character), nine of which were directed against Japan and one against the United Kingdom."

The Report then after giving the causes and nature of these movements before 1925 proceeds to examine the character of the boycott organization since that year and points out that "the Kuomintang, having from its creation supported the movement, increased its control with each successive boycott until today it is the real organizing, driving, co-ordinating and supervising factor in these demonstrations."

The Commission noticed three controversial issues involved in the policy and methods of the boycott:

1. Whether the movement was purely spontaneous or was an organized movement imposed upon the people by the Kuomintang by methods which at times amounted to terrorism.

2. Whether or not, in the conduct of the boycott movement, the methods employed have always been legal.
3. What was the extent of the responsibility of the Chinese Government.

The Commission concluded:

1. that the Chinese boycotts were both popular and organized, the main controlling authority being the Kuomintang;
2. that it is difficult to draw any other conclusion than that illegal acts have been constantly committed, and that they have not been sufficiently suppressed by the authorities and the courts;
3. that the evidence indicates that the part taken by the Chinese Government in the present boycott has been somewhat more direct.

In connection with the second of the above conclusions the Commission observed: "In this connection, a distinction should be made between the illegal acts committed directly against foreign residents *in casu* Japanese, and those committed against Chinese with the avowed intention, however, of causing damage to Japanese interests. As far as the former are concerned, they are clearly not only illegal under the laws of China but also incompatible with treaty obligations to protect life and property and to maintain liberty of trade, residence, movement and action."

With regard to illegal acts committed against Chinese, the Chinese Assessor observed at page 17 of his memorandum on the boycott:

> "We would like to observe, in the first place, that a foreign nation is not authorized to raise a question of internal law. In fact, we find ourselves confronted with acts denounced as unlawful but committed by Chinese nationals in prejudice to other Chinese nationals. Their suppression is a matter for the Chinese authorities, and it seems to us that no one has the right of calling into account the manner in which the Chinese penal law is applied in matters where both offenders and sufferers belong to our own nationality. No state has the right of intervention in the administration of exclusively domestic affairs of another State. This is what the principle of mutual respect for each other's sovereignty and independence means."

So stated, the argument is incontestable, but it overlooks the fact that the ground of the Japanese complaint is not that one Chinese national has been illegally injured by another but that the injury had been done to Japanese interests by the employment of methods which are illegal under Chinese law, and that failure to enforce the law in such circumstances implies the responsibility of the Chinese Government for the injury done to Japan.

Coming to the question of LEGAL POSITION CREATED BY THESE BOYCOTT MOVEMENTS, the Commission observed: "The claim of the Government that the boycott is a legitimate weapon of defense against military aggression by a stronger country, especially in cases where methods of arbitration have not previously been utilized, raises a question of much wider character. No one can deny the right of the individual Chinese to refuse to buy Japanese goods, use Japanese banks or ships, or to work for Japanese employers, to sell com-

modities to Japanese, or to maintain social relations with Japanese. Nor is it possible to deny that the Chinese acting individually or even in organized bodies, are entitled to make propaganda on behalf of these ideas always subject to the condition, of course, that the methods do not infringe the laws of the land. Whether, however, the organized application of the boycott to the trade of one particular country is *consistent with friendly relations* or *in conformity with treaty obligations* is rather a problem of international law then a subject for our enquiry. We would express the hope, however, that in the interest of all States the problem should be considered at an early date and regulated by international agreement."

The Chinese Assessor in his memoranda presented to the Lytton Commission referred to the 1905 boycott against American goods and quoted the communication of the American Minister of August 7 of that year to Prince Ching, informing him that the United States Government would hold the Chinese Government directly responsible for the loss to American interests sustained through the failure on the part of the Imperial Government to put a stop to the movement. "The Chinese Government," says the author of the Memoranda, "opposed the claim of the American Minister and refused to admit it." An extract from Ching's reply to the American Minister is quoted, wherein it is stated that "this idea of a boycott of American goods came directly from the trades people. It did not come from the Chinese Government which certainly therefore cannot assume the responsibility." It is alleged in the Memoranda that "the responsibility of the state supposed to be involved in a boycott has never been seriously raised"; that "in no case has it resulted in the payment of indemnities"; that none were demanded by the United States in the present instance, or by the British on the occasion of the 1925 boycott, although here, too, it is stated that a representative of the aggrieved government alleged the existence of the national responsibility; and that "one can therefore say that international practice does not condemn the boycott as an illegitimate method of bringing pressure."

While the fact, that two of the members of the family of nations officially announce that a course of action followed by a third is an international delinquency which gives occasion for pecuniary redress, cannot *per se* create a delinquency, it by no means follows that a failure to demand an indemnity is evidence that a delinquency has not been committed. Nor would such restraint constitute evidence that the course of action complained of is not condemned as illegitimate either in international law or practice. On the other hand, it may be assumed that responsible states are not apt to declare the existence of national responsibility on the part of a sister state in the absence of any legal ground on which to support their contention. The statement in the memoranda that the question of national responsibility for a national boycott "has never been seriously raised" would seem to be controverted by the tenor of the diplomatic exchanges between the United States and China during the boycott controversy of 1905.

I shall deal with this matter more fully while examining the charges in relation to the Japanese action in China.

In considering the subject of the national responsibility in its relation to boycott, it would be necessary to examine carefully into its origin, methods and effect.

International law does not call upon the government of a country to thwart the establishments thereof when they decide, in the course of availing themselves of it, to stop trading with the people of any other.

No duty is imposed on a country to prevent the exercise of a normal right that is inherent in an independent country. The withholding of trade is ordinarily regarded as such a right.

Perhaps it is correct to say that international law standing by itself does not interfere with the freedom of the people of any single country to agree to withhold their trade from a particular foreign state.

But the question may not always remain so simple as that. The following matters may fall to be considered in this connection:

1. Whether the concerted action productive of non-intercourse
   (*a*) is attended with any acts of violence directed against
      (*i*) the interest of the proscribed country,
      (*ii*) the people of that country,
   or (*iii*) the country itself;
   (*b*) is, in fact, the precursor of such acts of violence.
2. Whether the action in question is really inspired by the Government, making the boycott an instrument of governmental conduct.
3. Whether the movement in question was the action of the Government itself being its officially undertaken policy. If so, how far this action can be said to amount to a breach of the recognized norm of international law that a civilized state must give protection to the life, liberty and property of foreigners more or less in accordance with the liberal traditions of the "burger-liche Rechtsstaat". (See, in this connection, the American Journal of International Law, Vol. 24, p. 517—The article on "Responsibility of States" by M. Borchard.)
4. Whether the two countries stand in any special relation as a result of any treaty.
5. Under what circumstances and to what extent the proscribed country can have recourse to self-help to remedy the injury caused to it or to prevent any apprehended injury.

I shall further deal with this matter while dealing with Japan's action in China.

It has been noticed above that the first act of Chinese boycott took place in 1905 and was directed against the United States of America. On that occasion the United States notified the Chinese Government that under the provisions of Article 15 of the treaty of 1858, it would be held responsible for any loss sustained by American trade on account of any failure on the part of China to stop "the present organized movement against the United States." That movement, embracing the so-called boycott of American goods, and the printing by the native press of inflamatory articles against the United States,

was described by the American Minister as "a conspiracy in restraint of our trade carried on under official guidance and with the sympathy of the central Government."

Japan too had acquired special treaty rights in China and a large number of her citizens had been in China under those treaty rights.

In these circumstances, the question certainly arises for our consideration what was the extent of Japan's right to protect these interests and whether the boycott in question created any situation which would entitle Japan to exercise that right.

Hall says: "If the safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there, WHICH THE GOVERNMENT OF THE LATTER IS UNABLE, OR PROFESSES ITSELF TO BE UNABLE TO PREVENT, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place the right of self-preservation above the duty of respecting a freedom of action which must have become nominal, on the supposition that the state from which the danger comes is willing, if it can, to perform its international duties .... When a state grossly and patently violates international law in a matter of serious importance, it is competent to any state, or to the body of states, to hinder the wrong-doing from being accomplished, or to punish the wrongdoer .... Whatever may be the action appropriate to the case, it is open to every state to take it. International law being unprovided with the support of an organized authority, the work of police must be done by such members of the community of nations as are able to perform it. It is however for them to choose whether they will perform or not."

It is now well-settled that states possess a right of protecting their subjects abroad. I need not stop here to examine the extent of this right. It is evident that the legitimacy of action in any given case and the limits of right of action are essentially dependent on the particular facts of the case.

But apart from this question of *justification*, the evidence may establish a CONVINCING EXPLANATION of the occurrence otherwise than as a product of the alleged conspiracy.

I have hitherto considered the question in reference to the ACTUAL INTERNATIONAL RELATIONS of the present day. There is, however, this additional consideration in the present case.

We must not forget that in introducing criminal responsibility in international relations we are proceeding on the assumption that THE SOCIETY OF NATIONS HAS DEVELOPED INTO A COMMUNITY brought under the rule of law. As was pointed out by Professor Schwarzenberger, there is a fundamental difference between 'a society' and 'a community'. The learned Professor defines 'a community' "as a social group in which behaviour is based on the solidarity of members, a cohesive force without which the community cannot exist." He says:

"The criterion of solidarity is the decisive test in the classification of so-

cial groups, and if this bond is lacking, or is not strong enough to create the necessary cohesive force, the collective entity fulfils another function—the adjustment of diverging interests. This is the essential feature of a society. Whereas the members of a community are united in spite of their individual existence, the members of a society are isolated in spite of their association. Neither group could exist without a cohesive force and an interdependence between members. There is, however, a decisive difference between the ties created by a community and by a society—a difference which affects the nature of the law in those groups, as the law fulfils a completely different function in each of them.

"The law which regulates the life of a community such as a family or of an organization such as the Catholic Church, generally formalize only customary behaviour, which would be observed even without its existence; it defines the relations between members which the majority regards as substantially sound and adequate, and finds its main justification in its application to abnormal situations. It is the visible expression of common values and of relations which are as such a valid and binding reality for the greater part of the members.

"On the other hand, the law regulating the relations between the members of a society such as a joint stock company has to fulfil a different function. Its purpose is to prevent the *Bellum omnium contra omnes*, or to make limited co-operation possible between individuals who, being anxious to maintain and improve their own positions and seeking primarily their own advantage, are therefore at the best only prepared to apply in proportion to their actual power the principle of reciprocity in their relations with each other."

I have already given my view of the character of international relations. In my opinion it is at best only a society in the sense as defined above by Prof. Schwarzenberger and as such does not admit of criminal responsibility. This is also substantially the view of Prof. Zimmern. Prof. Schwarzenberger quotes from a statement of Senor Don Salvador de Madariaga, an eminent authority on international relations, where, speaking of the existence of a world community, he says: "We have smuggled that truth into our store of spiritual thinking without preliminary discussion. We start with this preconceived idea or guess of our instinct that there exists a world community. 'With the intellectual honesty which is one of his main characteristics, he adds the significant words: 'We moderns have not only immediately guessed or felt the world community, but begun actually to assert, create and manifest it, though we do not know yet what the world community is, what are its laws, what are its principles, nor how it is going to be built in our minds.'"

Whatever that be, as the entire basis of criminal responsibility in international relations is the assumption of the existence of international community in the above sense of the expression, the present question of the legality or otherwise of the boycott and of the rights and remedies of the proscribed country must be approached on this ASSUMED CHARACTER of the international relations.

During the age of discoveries, at any rate, the Powers asserted their claim to connect the newly discovered territories as A RIGHT derived from natural law and justified by the fiction of the *territorium nullius*, —territory . . inhabited by NATIVES whose community is not to be considered as a state. Whenever this principle could not be applied, the right of *commerce* with the non-European countries was asserted and this right was said gradually to have developed from an imperfect into a *fundamental right*.

No doubt, time and conditions of the world are very much changed since those days. But mere reference to such changes would not suffice to discard these precedents. We must examine the character of international society then existing and compare the same with our ASSUMED community of the present day. No doubt, as has been pointed out by Prof. Schwarzenberger, actual international relations here have fundamentally changed since then, but have changed for the worse. But we are proceeding on a different assumption and we must consider the legal situation created by boycott on the footing of this assumed position of international relations.

On 27 February 1947 the prosecution objected to the extracts from the conference on the limitation of armaments at Washington being admitted in evidence in this case. Mr. Carr in making the objection observed that there must be some limit to the extent to which PRELIMINARY DISCUSSIONS can be taken as aids to interpreting an agreement finally signed. We over-ruled this objection and accepted the extracts as evidence.

When the question is one of construction of the agreement or of ascertainment of the intention of the parties, it must ordinarily be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances, as may be required to show in what manner the language of the document is related to existing fact. No evidence of any intention inconsistent with the plain meaning of the words used will be admitted, for the object is not to vary the language used, but merely to explain the sense in which the words are used by the parties.

The words of a written instrument may, to all appearance, appear to be free from ambiguity in themselves. Yet external circumstances may create some doubt or difficulty as to the proper application of the words. In such cases the question of construction may admit of extrinsic evidence.

Whether it be 'the intention of the writer' or 'the meaning of the words', the aim really is to ascertain the true nature of the transaction. Neither 'intention' nor meaning of the words can be the sole object. THE PRIMARY OBJECT is to determine what it was that was really intended and the PRIMARY SOURCE of determining such intention is the language used in the deed.

THE ROLE OF PREPARATORY WORK in the interpretation of contracts in private law may be determined on the line indicated above. Yet its role in the interpretation of TREATIES may be quite different.

Professor Lauterpacht in his "les travaux preparatories" points out that in this respect the jurisprudence of the permanent Court of International Justice has gone through three phases: (1) a period during which it either took

no account of such preparatory work, or positively rejected it; (2) a period during which it examined the evidence but found it unnecessary to make use of it; (3) the *more recent period* during which it has manifested a disposition to admit the utility of such evidence. On the whole the jurisprudence of the court has contributed little to the clarification of the subject.

As to the term 'preparatory work' it may include two kinds of materials: first, written acts reproducing the views of treaty negotiators, including the diplomatic correspondence preceding the conclusion of the treaty; and, second, the opinion of governments expressed before legislative assemblies.

As has been pointed out by Mr. Brown: "No rule of international law would seem more firmly established than this rule of interpretation of treaties in the light of intent of the negotiators. That intent naturally is assumed to be stated in the text of the treaty itself, but it also may be sought elsewhere, either in specific reservations attached to treaties at the time of signature or ratification, or in interpretations, clarifications, understandings, constructions, qualifications or actual conditions set forth during the negotiations prior to the ratification. Hence, it is to be expected that in any future divergence of opinions concerning THE NATURE OF THE OBLIGATIONS ASSUMED under the General Pact for the Renunciation of War recourse must necessarily be had, not only to the official correspondence of the negotiations, but to various official utterances of such government spokesmen as Sir Austen Chamberlain, M. Briand, Secretary Kellogg and Senator Borah. Their interpretations of this instrument will be entitled to the closest scrutiny and respect. So far as the commitments of the United States are concerned, the Report of the Senate Committee on Foreign Relations giving its understanding of the "true interpretation" of the Pact conditioning the American ratification must also be taken into account, whether by a judicial tribunal or by international public opinion . . . To make certain of the intent of every signatory to the Pact; to hold every signatory to the strict fulfilment of its commitments under that Pact, it would appear good sense and good ethics, as well as good law, to give due weight and credit to the interpretations placed on this momentous declaration by every signatory prior to ratification."

THE DEFENSE OFTEN CHARGED US WITH INCONSISTENCY in our rulings on the question of admissibility of evidence in this case. At least some of the rulings referred to above would appear to justify such a charge. There were a few more instances also like the following:

On 26 June 1946 in cross-examining a prosecution witness, the defense asked him a question from a prosecution document which had not yet been introduced into evidence. The document was not a statement of the witness. Objection was made by the prosecution to the use of the document without it being introduced into evidence. This objection was upheld and the defense was not allowed to use the document for the purpose. (proc. page 1,429)

On June 29, 1946 the defense in cross-examining a prosecution witness asked him a question with respect to a certain document. Objection was taken by the prosecution that the document could not be used unless served on the

prosecution twenty-four hours in advance and processed. This objection was also upheld by us and the defense was not allowed to use it. (p. 1, 368 to 1, 371; June 29, 1946)

Subsequently, however, on March 5, 1947 when prosecution offered to do the same thing in course of cross-examining the defense witnesses, we departed from this rule and announced that the rule as to processing and serving a copy of the document in advance did not apply in such cases, the very essence of cross-examination being the element of surprise. (p. 17, 808-12). Thus we could not therefore disown our inconsistency in this respect; but we had a very good explanation as was pointed out by the President.

The President said: "... I am not here to offer any apology on behalf of the Tribunal, but as you know the Charter says we are not bound by any technical rules of evidence. That not merely prevents us from following our own technical rules—we could hardly do that because there are eleven nations represented and in some particulars they all differ in these technical rules—but it has the effect of preventing us from substituting any other body of technical rules of our own. *All we can do on each piece of evidence as it is presented is to say whether or not it has probative value, and the decision on that question may depend on the constitution of the court.* Sometimes we have eleven members; sometimes we have had a low as seven. And you cannot say, I cannot say, that on the question of whether any particular piece of evidence has probative value you always get the same decision from seven judges as you would get from eleven. I know that you would not .... You cannot be sure what decision the court is going to come to on any particular piece of evidence—not absolutely sure—because the constitution of the court would vary from day to day and I would be deceiving you if I said decisions did not turn on how the court was constituted from time to time. They do. On the other day in court on an important point I know the decision would have been different if a Judge who was not here was present. How are we to overcome that. We cannot lay down technical rules. We might spend months in trying to agree upon them and then fail to reach an agreement. The Charter does not allow us to adopt them in any event. It is contrary to the spirit of the Charter. The decision of the Court will vary with its constitution from day to day. There is no way of overcoming it."

Lord Eldon once said: "This inconvenience belongs to the administration of justice, that the minds of different men will differ upon the result of the evidence, which may lead to different decisions on the same cause." It seems this further inconvenience also belongs to the administration of justice, that "it is impossible to reduce men's minds to the same standard, as it is to bring their bodies to the same dimensions."

PART IV

OVER-ALL CONSPIRACY

INTRODUCTORY

Coming now to the facts of the case we must remember how the prosecution presented to us what it characterized to be the structure of the entire case taken as a whole irrespective of its relation to each individual accused. I have already given a rough idea of this structure.

The prosecution itself gave us a summary in its reply to defense motions for dismissal of the case. In my opinion that summary gives the structure fairly accurately.

Counts 1 to 5 contain the charges of conspiracies. In Count 1 the prosecution alleges a general over-all conspiracy "covering not only the whole period but also all the various phases which subsequently developed although their details might not in the beginning have been foreseen." According to this count these "accused ... participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, ..." the object of such plan or conspiracy being the securing by waging declared or undeclared war or wars of aggression etc. of "the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans and of all countries bordering thereon and islands therein."

Counts 2 to 5 charge that the defendants entered into similar unlawful conspiracies having, as their object, similar domination, by similar unlawful aggressive means, of

(1) that part of the Republic of China commonly known as Manchuria; (count 2);
(2) the rest of the Republic of China; (count 3);
(3) the whole of East Asia and of the Pacific and Indian Oceans etc. against the United States, British Commonwealth, France, Netherlands, China, Portugal, Thailand, Philippines, and the Soviet Union; (count 4) and
(4) the whole world; (count 5).

Counts six to seventeen inclusive, allege that all of the defendants PLANNED AND PREPARED the wars of aggression and wars in violation of international law, treaties, etc. against various nations separately named in each count, and including, in addition to the nations engaged in this prosecution, the Kingdom of Thailand.

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

Counts eighteen to twenty-six, inclusive, allege that certain of the defendants INITIATED wars of aggression and wars in violation of international law, treaties, etc., against China, United States, Philippines, British Commonwealth, France, Thailand, Soviet Union and the Mongolian Peoples Republic.

Counts twenty-seven to thirty-six, inclusive, charge the defendants with WAGING *wars of* aggression and wars in violation of international law, treaties, etc.

All of these, except 33, 35 and 36, name all of the defendants. Count thirty-three alleging the waging of war against France, Count thirty-five alleging the waging of war against the Soviet Union, and Count thirty-six al-

leging the waging of war against the Mongolian Peoples Republic and the Soviet Union, do not include certain defendants.

Counts thirty-seven and thirty-eight allege that the defendants named therein conspired together TO MURDER any and all such persons, both military and civilian, as might be present at the place attacked in the course of initiation of unlawful hostilities against the United States, Philippines, British Commonwealth, Netherlands and Thailand.

Counts thirty-nine to forty-three, inclusive, charge specific MURDERS at specified places, including Pearl Harbour, Kota Bahru, Hongkong and the attack on H. M. S. PETROL at Shanghai, and at Davao in the Philippines, in which many persons were murdered.

Count forty-four alleges that all of the defendants participated in A CONSPIRACY FOR THE MURDER OF PRISONERS OF WAR and civilians on land and at sea.

Counts forty-five to fifty, inclusive, allege SPECIFIC ACTS OF MURDER against defendants named therein at various places in the Republic of China.

Counts fifty-one and fifty-two allege that the defendants mentioned therein MURDERED MEMBERS of the armed forces of the Mongolian and Soviet Republics.

Count fifty-three alleges that certain named defendants CONSPIRED TO commit breaches of the law and customs of war in respect of the treatment of prisoners of war and civilian internees.

Count fifty-four alleges that certain named defendants ORDERED, AUTHORIZED AND PERMITTED such offenses.

Count fifty-five alleges that certain named defendants DELIBERATELY AND RECKLESSLY DISREGARDED THEIR LEGAL DUTY to take adequate steps to prevent such breaches and thereby violated the laws of war.

In establishing this case the prosecution relied on what it characterized as the "well recognized conspiracy method of proof". The prosecution undertook to prove:

1. That an over-all conspiracy of a comprehensive character and of a continuing nature was formed, existed and operated during the period from January 1, 1928 to September 2, 1945;
2. That the object and purpose of the said conspiracy consisted in the complete domination by Japan of all the territories described in the indictment and generally known as Greater East Asia;
3. That it was the design to secure such domination by wars of aggression and in violation of international law and treaties;
4. That the defendants were members of the conspiracy at the time the specific crime set forth in any count was committed.

According to the prosecution, in view of the adoption of the "conspiracy method of proof" it became unnecessary for it to do more than examining and determining the two following questions:

"1. Has a general and continuing conspiracy of the character and scope set forth in Count 1 of the indictment been established?"

"2. As to any particular defendant, was he a member of the conspiracy at the time the specific crime set forth in any count, (other

than a conspiracy count) was committed?"

In approaching the evidence in relation to this conspiracy the prosecution invites us to remember:

1. That in the development of a vast conspiracy of this nature there was necessarily from time to time a choice open as to the particular direction in which the advance should be pressed at a particular time or at all, and therefore, as to how many and which countries should be attacked. This choice may have depended on opinion as to the desirability of an attack upon any particular country, or more often only as to its prudence;
2. That one of the difficulties in relation to the analysis of this conspiracy is that it was of such a breadth of scope that it is difficult to conceive of it being undertaken by a group of human beings;
3. That it is of vital importance in this proceeding to grasp the significance of the fact that none of the events which took place during this fourteen year period occurred by accident;
   (*a*) Every event was coldly calculated, planned for and put into execution;
4. That though the accused from time to time differed among themselves, at no time during the entire course of the conspiracy did any of the accused differ with the others on the fundamental object of the conspiracy itself;
   (*a*) All of the conflicts were based solely on a difference among the accused as to whether certain action being contemplated at a particular moment was properly timed.

Referring to the vastness of the conspiracy charged, Mr. YAMAOKA for the defense made the following pertinent observations:

"The alleged conspiracy which the prosecution has attempted to trace and describe is one of the most curious and unbelievable things ever sought to be drawn in a judicial proceeding. A long series of isolated and disconnected events covering a period of at least fourteen years are marshalled together in hodgepodge fashion; and out of this conglomeration the prosecution asks the Tribunal to find beyond all reasonable doubt that a "common plan or conspiracy" existed to accomplish the objectives stated in the indictment, although the prosecution, as is shown by their argument, has been hard put to it even to point out an outline of any such common plan or conspiracy ..... Men like DOHIHARA, HASHIMOTO, HATA, HOSHINO, ITAGAKI, KIMURA, KOISO, MUTO, OKA, OSHIMA, SATO, SHIMADA, SUZUKI and TOJO, UMEZU and others had no opportunity to come into contact with HIROTA during the days he occupied the Foreign Ministership and Premiership; and, of course, HIROTA had no opportunity to know any views entertained by those men or views entertained by most of the men indicated with him in this case."

Mr. YAMAOKA continued: "As all the larger powers in the world naturally desire to expand their foreign trade in order to maintain or increase the prosperity of their own people and at the same time concurrently take appro-

priate measures to insure the means for self-defense for themselves, it is easy to see that had the method pursued here by the prosecution of marshalling together hundreds of isolated and disconnected facts been applied to the activities over a similar period of other powers, every major nation in the world could be adjudged guilty of preparing for and waging wars of "aggression", although from their own nationalistic point of view and intention there was no such purpose."

The simple enormity of the charge certainly would not have any persuasive effect on us. If it is difficult "to conceive of the thing alleged as being undertaken by a group of human beings", it is all the more reason why we should not allow ourselves to be readily persuaded to its having been undertaken by this group of accused before us. Belief, no doubt, is purely mental, and probability belongs wholly to the mind. But we must remember that our belief would approximate a correct representation of the actual fact only if the data for that fact have fully entered into the mental formation of that belief. At least on an occasion like the present, we cannot entertain our mind with the pleasure which it is apt to take in readily adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole. This is specially so, when no direct evidence of the fact to be proved could be presented to us, and, the presented facts, by inference from which we are invited to conclude the enormous conspiracy, mostly admit of a plurality of causes. We may not even ignore the possibility of unknown antecedents.

In view of the most comprehensive character of the conspiracy alleged in Count 1, the prosecution contends that if that conspiracy is found to have been proved and if it be found that each of the accused either was a party to it from the beginning or joined it later it may be unnecessary to consider separately Counts 2 to 5.

In case Count 1 is found as "not proved as a whole" it will then be necessary to consider each of those other counts separately against all the accused.

If Count 1 is found "proved as a whole" "but one or more of the accused is not proved to have participated to that extent", "it would then be necessary to consider whether he did participate . . . in one or more of the conspiracies charged in Counts 2 to 5."

In the submission of the prosecution "a man who joins the conspiracy late may adopt the fruits of that conspiracy as he finds them and thereby approve *after the event* a policy which he did not support at that time."

At the same time we have the following assurances given by the Prosecution:

> (*a*) That each and every defendant is charged with the crimes . . . solely because of the responsibility he bears for his contribution to the formulation in whole or in part, of Japan's aggressive policy.
>
> (*b*) (*i*) That no man has been charged with either crimes against peace or Conventional War Crimes and crimes against humanity unless he is in some way responsible for the

aggressive policy followed by Japan, which gave rise to those crimes.

(*ii*) That no man has been charged in this proceeding because of any act committed or any statement made by him in the course of his official duties pursuant to an already established policy if those matters were his only connection with that aggressive policy.

(*iii*) No military man in the field, for example, is charged ... merely because he carried out military operations .... They are charged because of their activity in instigating ... and in bringing about the adoption of the program of aggression.

The Prosecution then urged as propositions of law:

1. That the wars of aggression and in violation of international law, treaties, etc., being illegal and unjustifiable, any killing in initiating and waging such wars amounted to murder;
2. That any and all persons who were members of the over-all conspiracy above described, became individually and severally criminally responsible and liable for each and every act committed in the course of the conspiracy:
   (*a*) Whether that act be the unlawful planning, initiating or waging of war;
   (*b*) Whether it be a murder as indicated above;
   (*c*) Whether it be any other atrocity in violation of law committed in the course of the carrying out of the conspiracy.
3. That any defendant who was a member of the conspiracy at the time any specific act charged in any count was committed is guilty of the crime which the acts constitute, irrespective of the question whether he personally participated therein or not.
   (*a*) "That if a man joins a conspiracy of the kind alleged in Count 1, he necessarily leaves the matters like that of deciding upon or directing any particular advance, at any particular time, to be determined by those of his fellow conspirators, who would, from time to time, be in power. "A man who has once joined the conspiracy cannot therefore absolve himself from responsibility for the subsequent actions of his co-conspirators merely by showing that he was not personally in favour of a particular action which they took, specially if his opposition was based on merely prudential grounds, provided that action was within the scope of the original conspiracy, and he did not definitely dissociate himself from it."
   (*b*) Once two or more persons have agreed to commit a crime, each of them is responsible for all subsequent *acts* and *words* of the others done or uttered within the scope and for

the purposes of that agreement, and if the crime is actually committed by any of them, all can be convicted of it.

(*i*) Where the agreement is that if in the course of pursuing an object, which may or may not itself be a crime, certain circumstances arise, a crime or further crime shall then be committed and in those circumstances it is then committed in accordance with the agreement by one of them, all can be convicted of that crime or further crime and each is bound by the decision of the others as to whether it should actually be committed or not.

(*ii*) Equally, if they plan or set out to achieve an object which is not in itself a crime and agree that if necessary for that purpose a certain crime shall be committed, and one of them does commit it, all can be convicted of it.

(*c*) (*i*) If any one having entered into the conspiracy and having taken part in the preparation for committing the offenses alleged, be out of office when the actual offense is committed, he is not exonerated from liability: The mere fact of his inability, because of his loss of office, to take part in the final decision to commit that offense cannot absolve him, provided it is within the class of offenses which he had agreed to commit: He must be taken to have delegated to his successors, in the direction of the conspiracy, the choice of action.

(*ii*) If, being still in office, he objected to the act in question, or, even strove to prevent it or stop it, but ultimately allowed his scruples to be overruled and continued in office, he is liable for the act.

The propositions of law, thus enunciated by the prosecution, certainly raise very grave questions for national societies of the so-called International Community. They involve unprecedented risk and responsibility on the part of those who might be called upon to work the machinery of their own national governments. The enormity of the risk will, I believe, be adequately appreciated only if we remember that for the alleged behaviour they are to be answerable to international authorities, whoever they be. Keeping in view the character of the present-day international life, these propositions must be very carefully examined and, in so doing, we must keep distinct THE FOLLOWING TWO CONSIDERATIONS: (1) the ripeness of conditions for their transposition into rules of law in international life; (2) the method to be followed to effect this transposition.

I shall examine what the Prosecution presented to us as "the law of conspiracy and cognate doctrines" after considering the facts relating to the charge of conspiracy, and in that connection shall consider in detail the above propositions of law enunciated by the prosecution. In the meantime, I should only point out that the legal aspect of these charges of conspiracy is presented by the prosecution from THE FOLLOWING VIEW-POINTS:

1. The jurisdiction of this tribunal being limited to the offenses listed in the Charter constituting it, the charges in this case must be confined only to the cases provided in Articles 5 (*a*) and 5 (*c*) of the Charter:
   (*a*) The charges are thus confined to
      (*i*) a common plan or conspiracy for the accomplishment of "the planning, preparation, initiation or waging of declared or undeclared war of aggression etc.": (Article 5 (*a*))
      (*ii*) a common plan or conspiracy to commit what is named in the Charter as a crime against humanity: (Article 5 (*c*))
   (*b*) The allegations of any common plan or conspiracy to commit 'conventional war crimes' are given up.
2. It is the submission of the prosecution
   (*a*) That the Charter is conclusive as to the composition and jurisdiction of the Tribunal and as to all matters of evidence and procedure.

but (*b*) That AS TO THE CRIMES LISTED in Article 5
   (*i*) The Charter is and purports to be MERELY declaratory of international law as it existed from at least 1928 onwards ....
   (*ii*) The Tribunal is to examine this proposition and to base its judgment on its own decision in this respect.

3. "THE PROVISIONS OF THE CHARTER with regard to conspiracy, planning, preparation, accessories and the common responsibility of those engaged in a common plan REPRESENT THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY ALL CIVILIZED NATIONS."
   (*a*) "The general principles of law recognized by civilized nations" being one of the sources of international law, these provisions are themselves part of international law.
4. The provisions in the Charter are merely FORMS of charge and of proof of responsibility:
   (*a*) As such "these are within the power of the Supreme Commander TO LAY DOWN."
5. There is an important distinction between conspiracy as a separate crime, and conspiracy as the METHOD OF PROOF of a crime alleged to have been committed by several persons jointly.
   (*a*) That principles are similar but the application of them is different.
   (b) These principles are applied to a joint crime, even if it is not one, the conspiracy to commit which, is a separate crime.

The prosecution offered to accept the law in this respect to be as expounded in the Nurnberg judgment; namely,

(*i*) that the conspiracy must be clearly outlined in its criminal purpose;

(*ii*) that it must not be too far removed from the time of decision and action;

(*iii*) that the planning to be criminal must not rest merely on the declaration of party program;

(*iv*) that there must be a concrete plan to wage war of *the kind* characterized as aggressive.

Mr. Brannon for the defense assailed the above propositions of law and laid stress on the factual differences between the Nurnberg case and the present in this respect. His criticism was levelled against each one of the prosecution approaches as specified above. These would indeed require close scrutiny. But I should proceed to examine the facts first.

In order to establish the existence of the conspiracy alleged in the indictment *the prosecution offered to prove* the common design and contended that once the common design was established, all the evidence, regardless of how disconnected it might seem to be, or regardless of how disconnected the actions of the various defendants might seem, would fall easily into its proper and logical sequence.

The common design or object of the conspiracy is given in Count 1 to be:

1. That Japan should secure the military, naval, political and economic domination of
   (*a*) East Asia,
   (*b*) The Pacific and Indian Oceans,
   (*c*) All countries bordering thereon and islands therein.
2. That for that purpose Japan should wage
   (*a*) declared or undeclared war,
   (*b*) wars of aggression,
   (*c*) wars in violation of
      (*i*) international law,
      (*ii*) treaties,
      (*iii*) agreements and assurances.

As has been stated above, Counts 2 to 5 also relate to charges of conspiracy, each in respect of a particular territory. In them, the object of the conspiracy is given to be (1) to secure ... domination of the territories named therein and (2) for that purpose to wage wars of the character stated above in connection with Count 1. The method of such domination is alleged to be "either directly or by establishing a separate state under the control of Japan."

Count 1 does not specify any date on which such conspiracy was formed. The date is given as "between 1st January 1928 and 2nd September 1945".

As I understand the prosecution case, its contention is that the alleged conspiracy was entered into at some date prior to this period and that it existed and continued to exist during the entire specified period. This must be so. Otherwise the acts of different dates of this period cannot all be caught in the net of the alleged conspiracy. The Prosecution summation supports this view in claiming the murder of Chang Tso-Lin as being "the first overt act in the conspiracy to carry out the objective of the conspiracy".

The Prosecution offered to establish the fact of conspiracy by direct and circumstantial evidence, including the conduct and declarations of the accused and their accomplices.

The prosecution contention is that in order to establish this fact "the prosecution is not required to prove the specific date of its inception so long as the proof establishes as a fact that the conspiracy charged existed within the dates specified in the indictment."

In its opening statement the prosecution proposed to establish and now claims to have established the following materials which, according to it, would evidence the *factum probandum*, (the over-all conspiracy):

1. That for years prior to January 1, 1928, the military in Japan had sponsored, organized and put into effect in the public-school system of Japan program designed to instil a militaristic spirit in the youth of Japan and to cultivate the ultra-nationalistic concept that the future progress of Japan was dependent upon wars of conquest;
2. (*a*) That as a result of her previous aggressive policy, Japan had acquired vast interests and privileges in China, particularly in that part known as Manchuria;
   (*b*) That by the special treaties Japan had acquired large areas in Manchuria in which she exercised extra territorial powers;
   (*c*) (*i*) That in 1927 the Japanese Government formulated a *positive policy* toward China which resulted in sending troops to China in May 1927 and in April 1928;
   (*ii*) That political writers and speakers advocated public support of military action in Manchuria;
   (*iii*) That a plan was developed for the creation of an incident in Manchuria which would supply a basis for military aggression there. This plan also included the exertion of *coercive methods in bringing the Japanese Government* into accord with military aims and purposes in Manchuria;
   (*iv*) That on September 18, 1931, a provocative occurrence which has come to be known as 'the Mukden incident' was planned and executed;
   (*v*) That it was followed by immediate military aggression well prepared and on the alert for the occasion, resulting in the occupation of the three north-eastern provinces of China and ultimately in the setting up of a puppet regime there;
   (*vi*) That the real purpose of this invasion was the acquisition of proprietary interest in Manchuria;
3. (*a*) That Japan, through these accused, gradually extended her aggression to other parts of China;
   (*b*) That throughout, the pattern and design conformed to one simple plan, though the details varied from time to time;
4. (*a*) That the waging of aggressive warfare against China was aid-

ed and facilitated by military groups acting in concert with civilians in securing control of governmental departments and agencies;

(*b*) That the power involved in the Imperial Ordinance of 1936 providing that the Minister of War must be a General or Lt. General on the active list and that the Minister of Navy must be an admiral or vice-admiral on the active list, was utilized by the Army in obtaining domination and control of the Government and promoting Japan's policy of expansion by force;

(*c*) That taking advantage of the express provisions of the Japanese Constitution making a sharp distinction between matters of general affairs of state and matters pertaining to the Supreme Command under the Army and Navy, the conspirators, throughout the life of the conspiracy, constantly tended to enlarge the scope of matters contained within the concept of Supreme Command at the expense of matters belonging to general affairs of state;

(*d*) (*i*) That militaristic cliques and ultra-nationalistic secret societies resorted to rule by assassination and thereby exercised great influence in favour of military aggression;

(*ii*) That assassinations and threats of revolt enabled the military branch more and more to dominate the civil government until on October 1941, the military acquired complete and full control of all branches of the Government, both civil and military;

(*iii*) That the military hierarchy caused the fall of the Yonai Cabinet in July 1940, in order to advance aggressive object;

5. That determination on the part of Japan and those responsible for Japanese policy to continue the program of expansion by force would be evidenced by

(*a*) withdrawal of Japan from the League of Nations;

(*b*) decision not to adhere to the London Naval Treaty;

(*c*) refusal to attend the Nine-Power Treaty conference at Brussels;

(*d*) fortification of mandated islands in violation of the trust under which she obtained them;

6. (*a*) That before committing herself to extensive military aggression against China in 1937, Japan sought and obtained an alliance with Germany on 25 November 1936 (Anti-Comintern Pact) and entered into a secret treaty with Germany;

(*b*) That in order to enable her to further aggression, Japan concluded the Tripartite Treaty with Germany and Italy on 20 September 1940;

7. That from the early days of conspiracy Japan had determined to wage war against the United States for the purpose of executing her Greater East Asia Policy;
8. That the ten years of planning and preparation along with the period of initiation and waging of war would evidence the details of the conspiracy;
9. That the pattern adopted or accepted by the accused leaders in waging the war was the same as that followed by their fellow-conspirators, the Nazi Germans.

According to the Prosecution the facts stated above have been proved in this case and they go to establish the conspiracy alleged in counts 1 to 5 and show that the said conspiracy WAS A CONTINUING ONE THROUGHOUT THE SPECIFIED PERIOD.

AS TO THE PARTIES TO THIS CONSPIRACY Mr. Keenan in his opening statement submitted that the proof relating to the *factum* of conspiracy and the matters and things set forth in the various appendices to the indictment will establish that these accused participated with others in the common plan and conspiracy and were the major leaders responsible for the formulation and execution of the conspiracy charged.

In the indictment "the whole of the particulars in the Appendix A, of the Treaty Articles in Appendix B, and of the Assurances in Appendix C", are stated as relating to these counts.

Appendix A is divided into ten sections giving summarized particulars showing the principal matters and events upon which the prosecution proposed to rely in support of the charges laid in the several counts of the indictment in group one.

The heads of the particulars are:

1. Military aggression in Manchuria.
2. Military aggression in the rest of China.
3. Economic aggression in China and Greater East Asia.
4. Methods of corruption and coercion in China and other occupied territories.
5. General preparation for war.
6. The organization of Japanese Politics and public opinion for war.
7. Collaboration between Japan, Germany and Italy. Aggression against French Indo-China and Thailand.
8. Aggression against Soviet Union.
9. Japan, the United States of America, the Commonwealth of the Philippines and the British Commonwealth of Nations.
10. Japan, the Kingdom of the Netherlands and the Republic of Portugal.

Different counsel for the prosecution opened the case involved in different sections of this Appendix. Almost every one of them said something about this conspiracy and tried to connect his phase of the case with the over-all conspiracy alleged in Count 1. These opening statements would throw consid-

erable light on THE PROSECUTION APPROACH of the case though all the learned counsel could not always avoid inflamatory and oratorical expressions and emotionalized generalities.

The defense, of course, disputed this charge of conspiracy, and characterized it as a fantastic one.

Different counsels for the defense summed up the cases on the different phases. Of these I would specially mention in this connection the summations on head 1 of Appendix A of the Indictment by Mr. OKAMOTO and Mr. Brooks, heads 2, 3, and 4 by Mr. Lazarus, head 5 by Messrs Blewett and Brannon, head 7 by Mr. Cunningham, head 8 by Major Blakeney as also by Major Furness and head 9 by Mr. Logan and Major Blakeney.

I would, first of all, proceed to see how far the evidence on record goes to establish the over-all conspiracy as alleged in the indictment.

As has been claimed by the prosecution, the existence of the over-all conspiracy as alleged in Count 1 is indeed "the basic matter of transcendent importance in this case." While considering the defense objection relating to the jurisdiction of the Tribunal, I have already expressed my view that the crimes triable by this Tribunal must be limited to those committed in or in connection with the hostility or hostilities which ended in the surrender of the 2nd September 1945. The Manchurian Incident of 1931, the subsequent activities of Japan in the provinces of Liaoning, Kirin, Heilungkiang and Jehol, the hostilities between Japan and China prior to the Marco Polo Bridge Incident of 1937, the armed conflicts between Japan and the U. S. S. R. relating to the Lake Khasan Affairs, and the Khalkhingol River Affairs, and the Ladybird and the Panay Incidents should all fall outside the jurisdiction of the Tribunal unless they can be caught within this widely spread net of over-all conspiracy. According to the defense, unless caught within this net, even the hostilities in China between the period from the Marco Polo Bridge Incident of 1937 and the formal declaration of war by China on 9-12-41 and the alleged aggressions in Thailand, French Indo-China and the Mongolian People's Republic would also be beyond our jurisdiction. I shall consider these questions in their appropriate places.

In its summation, the prosecution offered an analysis of this conspiracy in four successive steps, namely, —

1. "Obtaining control of Manchuria";
2. "The expansion of control and domination from Manchuria to all the rest of China";
3. "The preparation of Japan for aggressive war *internally* and *by alliance* with the Axis Powers";
4. "The further expansion of the conspiracy into the rest of East Asia and the Pacific and Indian Oceans by further aggressive wars."

I shall try to follow this division of steps in my examination of the evidence.

While considering the evidence adduced in this case on this matter we should remember:

1. That the fact to be proved is the existence of the conspiracy as as-

serted in the indictment;

2. (*a*) That though in its opening statement the Prosecution spoke about direct evidence, ultimately it did not claim to have given any direct evidence of this conspiracy. As a matter of fact, there is no such direct evidence on the record.
   (*b*) That the prosecution seeks to prove certain incidents and occurrences and invites us to draw the inference therefrom that there had been the conspiracy as alleged in Count 1, and that all these incidents and occurrences were results of that conspiracy.
3. That the several incidents and occurrences about which evidence has been adduced have two-fold significance:
   (*a*) if established, they may, by themselves, constitute some offense. In this respect they are the several principle matters for proof in this case; for our present purposes we may ignore this aspect;
   (*b*) when established, they would establish some evidentiary fact purporting to evidence the ultimate proposition, *viz.*, the existence of the conspiracy. For my present purpose, the evidence relating to such matters must be approached only from this point of view.
4. Consequently it will always be a pertinent enquiry to ask
   (*a*) if the evidence establishes the incident or the occurrence as a matter of fact;
   (*b*) if so, whether the incident or occurrence in question can be explained away from the proposed inference of conspiracy. If there is any other good and sufficient EXPLANATION of the occurrence, it fails as an evidentiary fact so far as our present *probandum* is concerned. It should be remembered that this explanation need not JUSTIFY the Japanese action in connection with the incident. The question of such justification would arise only in relation to item 3 (*a*) above.

FIRST STAGE

OBTAINING CONTROL OF MANCHURIA

MANCHURIAN INCIDENT

I would now take up what the prosecution names as "obtaining control of Manchuria" and characterizes as the first step in the conspiracy.

The materials or elements which, according to the Prosecution, would help the construction of the required body of evidence and were available for the purpose, have been placed before us. In its summation the Posecution tried to put these materials together and attempted to arrange them as far as possible, in their proper places, in the relative positions which they are alleged to have occupied or are reasonably supposed to have occupied in the alleged actual case as, according to the prosecution, it occurred. We have thus been offered a framework of facts, arranged in certain positions of alleged relation to the ultimate fact sought. It is for us to see to what extent these materials are really connected with each other and with the alleged over-all conspiracy: It is for us to examine their separate and united significance.

The fact to be proved is a conspiracy of an enormous magnitude as alleged in Count 1 of the Indictment. The materials presented relate to so many 'plots', 'conspiracies' and sinister incidents that our mind may easily be preoccupied by a tendency to believe in the inter-relation between these several plots and the ultimate master-plot. As I have already observed, we cannot entertain our mind with this pleasure, which it is apt to take in readily adapting circumstances to one another. We must avoid all eagerness to accept as real anything that may lie in the direction of our unconscious wishes,—that comes dangerously near to the aim of the impulses.

Let us have the prosecution reconstruction of the conspiracy as attempted through its summation.

The prosecution starts with the murder of Chang Tso-lin which event took place on June 3, 1928. The prosecution claims this to be the "first overt act in the conspiracy to carry out the objective of the conspiracy", and asserts that "it was the first overt act by the Army to project itself into the formulation of Government policy."

Referring to this incident the Lytton Commission reported: "The responsibility for this murder has never been established. The tragedy remains shrouded in mystery, but the suspicion of Japanese complicity to which it gave rise became an additional factor in the state of tension which Sino-Japanese relation had already reached by that time."

The prosecution claims that it has succeeded in adducing additional evidence in the case before us to clear up the mystery and establish as a fact that it was the doing of the Japanese and that it was done "to carry out the objective of the conspiracy" as charged in Counts 1 and 2.

We shall have to examine this evidence to see the following:

1. Whether what was shrouded in mystery according to the Lytton Report has now been cleared up and Japan's complicity clearly established.
2. Assuming that it has been so established, what evidence is there to connect this incident in any way with any larger conspiracy as asserted by the prosecution.

The second is indeed an essential link in the whole chain. For, this incident seeks to introduce TATEKAWA as a conspirator, and, his connection with the Mukden Incident is resorted to, in order to establish the conspiratorial character of that incident as also to locate the conspiratorial group.

The prosecution next places the following facts in the chain:

1. The fall of the TANAKA Cabinet in July 1929 and the accession of the HAMAGUCHI Cabinet with the revival of the friendship policy.
2. The organization of Sakura-Kai in October 1930.
3. Attempts on the part of the conspirators, who were hitherto outside the duly established Government of Japan, to seize the Government:
   (*a*) One such effort being the March Incident of 1931.
   (*b*) Another, the attempted assassination of Premier HAMAGUCHI.
   (*c*) Fall of HAMAGUCHI Cabinet and accession of WAKATSUKI Cabinet on the 14th April 1931.
4. The Mukden Incident of September 18, 1931.
   (*a*) The Lytton Commission left the authorship of this incident unsolved.
   (*b*) Additional evidence has been adduced in this case to remove this doubt and establish that it was the result of a plot by the Kwantung Army.
   (*c*) That this plot was also a part of the master conspiracy.
5. Further attempts to seize the Government being the October Incident of 1931.
6. The fall of WAKATSUKI Cabinet in December 10, 1931 and the accession of the INUKAI Cabinet.
7. The conquest of Manchuria and establishment of a puppet government there.

We shall take up these several matters one by one and examine to what extent they have been established by the evidence adduced and how far they lead to the alleged master conspiracy.

The most important evidence in this phase of the case is the Lytton Commission Report which is Exhibit 57 in this case. Both parties relied largely on this report; but both parties sought to supplement the same with additional evidence. Before proceeding to consider the items specified above, I would prefer to deal with this Lytton Commission Report first. Indeed this is the basic document on this phase of the case and, it must be admitted, is a very valuable document for our purposes. In its analysis of the conspiracy in this step the prosecution mainly relied on this document.

A careful scrutiny of this report is essential in order to appreciate the real character of the events that happened and the legal position of the parties in relation thereto in international life.

After a very careful review of the facts and circumstances of the case the Commission dismissed the past with this final reflection: "It must be apparent to every reader of the preceding chapters that the issues involved in this con-

flict are not as simple as they are often represented to be. They are, on the contrary, exceedingly complicated, and only an intimate knowledge of all the facts, as well as their historical background, should entitle anyone to express a definite opinion upon them. This is not a case in which one country has declared war on another country without previously exhausting the opportunities for conciliation provided in the Covenant of the League of Nations. Neither is it a simple case of the violation of the frontier of one country by the armed forces of a neighbouring country, because in Manchuria there are many features without an exact parallel in other parts of the world."

The Commission went on to say: "The dispute has arisen between two states, both Members of the League, CONCERNING A TERRITORY the size of France and Germany combined, in which both claim to have rights and interests, *only some of which are clearly defined by international law*; a TERRITORY which, although legally an integral part of China, HAD A SUFFICIENTLY AUTONOMOUS CHARACTER to carry on direct negotiations with Japan on the matters which lay at the root of this conflict."

These final reflections of the Commission, if properly appreciated, should, according to the defense, suffice to dispel the present charge of CRIME.

The actual steps taken by Japan were certainly in apparent violation of the obligations of the Covenant of the League of Nations, the Kellogg-Briand Pact and the Nine-Power Treaty of Washington. Japan claimed in justification that all the military operations had been legitimate acts of self-defense, the right of which was implicit in all the multilateral treaties mentioned above, and was not taken away by any of the resolutions of the Council of the League.

Besides an introduction covering eight pages, giving an account of the proceedings resulting in the appointment of the Commission and an appendix covering nine pages containing Itinerary in the Far East of the League of Nations Commission of Enquiry, the report consists of one hundred twenty-seven pages from page thirteen to page one hundred thirty-nine, both inclusive, and is divided into ten chapters.

The Commission spent about six months in the Far East interrogating members of the Government, leaders in business and finance and representatives of various organizations in China and Japan. Information was received through neutral technical advisers and a mass of documentary evidence accumulated. The main portion of the report is devoted to a narrative and appreciation of past events and conditions resulting from the political and economic development of Manchuria. The report outlines the development in China since the Revolution of 1911 and the differing principles and policies adopted by China and Japan respectively in intercourse with western nations. *The actions of the various western members of the international society in respect of the Chinese Territory are justified as being almost inevitable, being the inevitable reasonable consequences of the failure on the part of the Chinese sovereign to exercise full territorial sovereignty therein in special relation to the safe-guarding of alien life and property according to the western standard*. The increasing

importance of Manchuria as an economic entity is described in connection with the geographical, political and economic conditions affecting the relations of Manchuria with China, Japan and Russia. The report deals with the successive changes in the Government of Manchuria due to the Sino-Japanese War of 1894-95 and Russo-Japanese war ten years later, both of which were fought to a great extent on Manchurian Territory. The various negotiations and treaties are outlined, leading to the very complicated status of the different zones of Manchuria as they existed prior to events of September, 1931. Attention is also given to the various incidents, such as the Korean riots and the killing of Captain Nakamura, which may be taken as preludes to the seizure of Mukden. An entire chapter (Chapter IV) is devoted to the military events in Manchuria on and subsequent to September 18.

The report was signed by the members of the Commission on September 4, 1932.

I give below the few relevant salient facts FOUND AND RECORDED by the Commission:

1. THE EVENTS OF SEPTEMBER 18, 1931, which first brought the present conflict to the notice of the League of Nations, were but the outcome of a long chain of minor occasions of frictions, indicating a growing tension in the relation between China and Japan.
2. The nationalist aspirations of the Republic of China, the expansionist policy of the Japanese Empire and of the former Russian Empire, the present dissemination of Communism from the U. S. S. R., the economic and strategic needs of these three countries: Such matters as these, for example, are factors of fundamental importance in any study of the Manchurian Problem.
3. The dominating factor in China is the modernization of the nation itself which is slowly taking place.
4. China today is a nation in evolution showing evidence of transition in all aspects of its national life. Political upheavals, civil wars, social and economic unrest, with the resulting WEAKNESS OF THE CENTRAL GOVERNMENT, have been the characteristics of China since the Revolution of 1911.
   (*a*) Those conditions have adversely affected all the nations with which China has been brought into contact and, until remedied, will continue A MENACE TO WORLD PEACE and a contributory cause of world economic depression.
5. (*a*) At the beginning of the Nineteenth Century the improvement of modern communication diminished distance and brought the Far East within easy reach of other nations:
   (*b*) But, in fact, China was not ready for the new contact when it came.
   (*c*) (*i*) As a result of the Treaty of Nanking, which ended the War of 1842, some ports were opened to foreign trade and residence.
   (*ii*) Foreign influences were introduced into a country whose

Government had made no preparations to assimilate them.

(*iii*) Foreign traders began to settle in her ports before she could provide for their administrative, legal, judicial, intellectual and sanitary requirements.

(*iv*) The foreigners therefore brought with them conditions and standards to which they were accustomed. Foreign cities sprang up in the Treaty Ports. Foreign methods of organization, of administration and business asserted themselves . . . A long period of friction and misunderstanding followed.

(*v*) THE EFFICACY OF FOREIGN ARMS was demonstrated in a series of armed conflicts.

6. The reluctance of China to receive foreigners and her attitude towards those who were in the country was bound to have serious consequences. It concentrated the attention of her rulers on resistance to and restriction of foreign influence, and prevented her from profiting by the experience of more modern conditions in the foreign settlements. As a result, the constructive reform necessary to enable the country to cope with the new conditions was almost completely neglected.

7. (*a*) The inevitable CONFLICT OF TWO IRRECONCILABLE CONCEPTIONS of respective rights and international relations LED TO wars and disputes resulting in the progressive surrender of sovereign rights and the loss of territory, either temporary or permanent.

(*i*) Foreign courts, administration, police, military establishments were admitted on Chinese soil.

(*ii*) The right to regulate at will her tariff on imports and exports was lost for the time being.

(*iii*) Her very existence was threatened by the division of her territory into spheres of interest of foreign powers.

8. A Reform movement started after her defeat in the Sino-Japanese War of 1894-95 and the disastrous consequences of the Boxer Uprising of 1900.

9. (*a*) The Manchu Dynasty had ruled China for two hundred fifty years. After the death of the then Empress Dowager in 1908, it collapsed through its own inherent weakness.

(*b*) *On February 12, 1912*, the then Empress Dowager, in the name of the Child Emperor, signed a decree of abdication, and a provisional constitutional regime, with Yuan Shih-Kai as President, was then inaugurated.

(*c*) (*i*) With the abdication of the Emperor, his representatives in the provinces, prefectures and districts lost the influence and prestige derived from his authority.

(*ii*) The gradual substitution of military for civil governors

in the provinces was an inevitable consequence.

(*iii*) The post of central executive also could be held only by the military leader who had the strongest army or was supported by the strongest group of provincial or local military chiefs.

(*iv*) This tendency towards military dictatorship was more apparent in the north than in the south: In the southern province Dr. Sun Yat Sen and the other leaders remained faithful to the idea of constitutionalism.

10. (*a*) The First Parliament was convened in Peking in 1913 under Yuan Shih-Kai.

(*b*) He contracted a huge foreign loan without the consent of Parliament. This brought his political opponents of the Kuomintang or National Party under Dr. Sun's leadership into open revolt.

(*c*) During this time *China was ravaged by warring factions*; and the ever present bandits grew into veritable armies.

(*d*) In 1923 Dr. Sun Yat Sen REORGANIZED THE KUOMINTANG with "THREE PRINCIPLES OF THE PEOPLE"— National Independence, Democratic Government and Social Reorganization.

(*e*) (*i*) In 1927, a central government was established at Nanking.

(*ii*) For a time unity was maintained in the services. But not even the semblance of unity could be preserved when powerful war-lords concluded alliances amongst themselves and marched their armies against Nanking. Though they never succeeded in their object, they remained, even after defeat, potential forces to be reckoned with.

11. Disruptive forces in China are still powerful.

12. (*a*) At the time of the Washington Conference, China had two completely separate governments, one at Peking and one at Canton, and was disturbed by large bandit forces— preparations were being made for a civil war involving all China.

(*b*) As a result of the Civil War, which was preceded by an ultimatum sent to the Central Government on January 13, 1922, when the Washington Conference was still in session, the Central Government was overthrown in May, and the independence of Manchuria from the Government installed at Peking in its place was declared in July by Marshal Chang Tso-Lin. There existed no fewer than three governments professing to be independent.

(*c*) THE DANGER OF CIVIL WAR EXISTS AND MUST CONTINUE TO EXIST so long as the Central Government lacks the material means to make its authority swiftly and permanently felt

all over the country.

13. (*a*) The influence of the Kuomintang has introduced into the nationalism of China an additional and abnormal TINGE OF BITTERNESS AGAINST ALL FOREIGN INFLUENCE, and has EXPANDED ITS AIMS SO AS TO INCLUDE THE LIBERATION OF ALL ASIATIC PEOPLE still subject to "imperialistic oppression".

(*b*) Chinese nationalism today is also permeated by memories of former greatness, which it desires to revive.

14. (*a*) Foreign powers have in general taken a sympathetic attitude towards Chinese aspirations. At the Washington Conference 1921-1922, they were admitted to be acceptable in principle, though there was divergence of opinion as to the best time and method of giving effect to them.

(*b*) It was felt that an immediate surrender of such rights would impose upon China the obligation to provide administration, police and justice of a standard which, owing to financial and other internal difficulties, she could not at present attain.

15. (*a*) The Washington Treaty was designed to start China upon the road of international co-operation for the purpose of solving her difficulties. China could not make the desired and expected progress as she was hampered by the virulence of the anti-foreign propaganda which she pursued.

(*b*) In two particulars this has been carried so far as to contribute to the creation of the atmosphere in which the present conflict arose—

(*i*) The use made of economic boycott;

(*ii*) The introduction of anti-foreign propaganda into the schools.

(*c*) Unaccompanied by effective internal reforms or improvements in national standards, THIS ATTITUDE TENDED TO ALARM THE FOREIGN POWERS and to increase their reluctance to surrender the rights which are at the moment their only protection.

16. In connection with the problems of maintaining law and order, the present INADEQUATE MEANS OF COMMUNICATION IN CHINA is a serious handicap. Unless communications are sufficient to ensure prompt transportation of national forces, the safeguarding of law and order must largely, if not completely, be entrusted to provincial authorities, who, on account of the distance of the Central Government, must be allowed to use their own judgment in handling provincial affairs. Under such conditions, independence of mind and action may easily cross the boundary of law, with the result that the province gradually takes on the aspect of a private estate.

17. (*a*) BANDITRY HAS ALWAYS EXISTED IN CHINA and the administra-

tion has never been able to suppress it thoroughly . . . In more recent times, bandits have also originated from the ranks of unpaid soldiers.

(*b*) Bandit suppression has been long neglected: The soldiers even co-operate with bandits.

18. (*a*) THE COMMUNIST MOVEMENT IN CHINA gained considerable influence since 1921. After a period of tolerance with regard to Communism there was a complete break between Kuomintang and Communism in 1927.

(*b*) The recrudescence of civil war favoured the growth of communist influence in the period between 1928 and 1931. A Red Army was organized, and extensive areas in Kiangsi and Fukien were Sovietized.

(*c*) Communism in China not only means, as in most countries . . . either a political doctrine held by certain members of existing parties, or the organization of a special party to compete for power with other political parties. It has become an actual rival of the national government. It possesses its own law, army and government, and its own territorial sphere of action. For this state of affairs there is no parallel in any other country.

(*d*) Large parts of the Provinces of Fukien and Kiangsi, and parts of Kwantung, are reliably reported to be completely Sovietized. Communist zones of influence are far more extensive. They cover a large part of China, south of the Yangtze, and parts of the provinces of Hupeh, Anhwei and Kiangsu north of that river. Shanghai has been the centre of the communist propaganda. Individual sympathisers with communism may probably be found in every town in China.

(*e*) Armed struggle with the communist armies continues even now.

19. So far as Japan is China's nearest neighbour and largest customer, she has suffered more than any other power from the lawless conditions in China due to the inadequate means of communication, the danger of civil war, banditry and the menace of Communism.

She has more nationals than any other power, who would suffer if they were made amenable to Chinese law, justice and taxation under present conditions.

20. (*a*) Japan felt it impossible to satisfy Chinese aspirations so long as satisfactory SAFEGUARDS TO TAKE THE PLACE OF HER TREATY RIGHTS could not be hoped for.

(*b*) (*i*) JAPAN'S ANXIETY TO SAFEGUARD THE LIFE AND PROPERTY OF HER SUBJECTS IN CHINA CAUSED HER TO INTERVENE REPEATEDLY IN TIMES OF CIVIL WAR OR OF LOCAL DISTUR-

BANCES.

(*ii*) Such actions were bitterly resented by China.

21. This issue however, though AFFECTING JAPAN TO A GREATER EXTENT THAN OTHER POWERS, is not a Sino-Japanese issue alone. China demands immediately the surrender of certain exceptional powers and privileges because they are felt to be derogatory to her national dignity and sovereignty. The Foreign Powers have hesitated to meet these wishes as long as conditions in China did not ensure adequate protection of their nationals, whose interests depend on the security afforded by the enjoyment of special treaty rights.

22. (*a*) Manchuria, a large and fertile region, was only forty years ago almost undeveloped and even now under-populated.

(*b*) (*i*) It has assumed an increasingly important role in the solution of the surplus population problems of China and Japan.

(*ii*) Japan's over-population problem is very grave.

"Comparing the population of Japan per square mile of arable land with that of other countries, the ratio for Japan is exceptionally high, due to the particular geographical formation of the Island Empire:

"Due to a highly concentrated population on agricultural land, the individual holdings are exceedingly small, 35 percent of the farmers tilling less than one acre and 34 percent less than two and a half acres. The expansion limit of tillable land has been reached, as has also the limit of cultivation intensity—in short, the soil of Japan cannot be expected to produce more than it does today, nor can it provide much additional employment."

(*c*) Without Japan's activity, Manchuria could not have attracted and absorbed any large population.

(*d*) At first the Manchurian conflict was between Russia and Japan; later, between China and her two powerful neighbours.

(*e*) (*i*) At first, Manchuria entered into this great conflict of policies ONLY as an area, only for its strategic position.

(*ii*) IT BECAME COVETED FOR ITS OWN SAKE later, when its agricultural, mineral and forestry resources had been discovered.

23. (*a*) (*i*) Exceptional treaty rights were acquired in the first instance by Russia at the expense of China.

(*ii*) The Sino-Japanese War of 1894-1895 had given Russia an opportunity to intervene, ostensibly on behalf of China, but in fact in her own interest, as subsequent events proved.

(*iii*) China ceded to Japan by the Treaty of Shimonoseki in 1895, the Liao-tung Peninsula in South Manchuria.

Japan was forced by diplomatic pressure to return to China this Peninsula.

In 1898 Russia secured a lease for twenty-five years of the southern part of this Peninsula which Japan had been forced to give up in 1895.

(*iv*) In 1896 Russia secured railway building and operating rights.

(*v*) In 1900 Russia occupied Manchuria on the ground that the Boxer Rising had endangered her nationals.

(*vi*) Other Powers protested and demanded the withdrawal of her forces—but Russia delayed.

(*vii*) Russia was trying to enter into a secret Sino-Russian Treaty in 1901, by the terms of which China was to engage not to transfer to other nations or their subjects, without the consent of Russia, mines or other interests in Manchuria, Mongolia and Sinkiang, and to confer on Russia many special privileges including the maintenance of special guards.

(*b*) (*i*) Japan followed these maneuvers with particular attention.

(*ii*) On January 30, 1902, she concluded the Anglo-Japanese Treaty of Alliance.

(*iii*) In July 1903 Japan began negotiations with Russia urging for the maintenance of the policy of the Open Door and the territorial integrity of China.

(*iv*) Having met with no success in her negotiations she resorted to war on February 10, 1904. China remained neutral.

(*v*) Russia was defeated. On September 5, 1905, the Treaty of Portsmouth was concluded whereby Russia relinquished her exceptional rights in South Manchuria in favour of Japan.

(*vi*) By the Treaty of Peking of December 1905, China accorded her sanction to this transfer to Japan of the Kwantung leased territory and of the southern branch of the Russian controlled Chinese Eastern Railway as far north as Changchun.

(*vii*) In an additional agreement China granted to Japan a concession to improve the military railway line between Antung and Mukden.

(*viii*) In 1906 the South Manchurian Railway Company was organized by Japan.

(*ix*) Japan utilized the privileges so acquired in furthering the economic development of South Manchuria.

(*x*) China at first showed little activity in the field of development.

(*xi*) Even after the Treaty of Portsmouth, which affirmed Chinese sovereignty in Manchuria, the economic activities of Russia and Japan in developing Manchuria figured more prominently.

(*c*) In 1910, Japan annexed Korea. This annexation indirectly increased Japanese rights in Manchuria.

(*d*) (*i*) In 1915 as a result of Japanese "twenty-one demands", Japan and China signed a treaty and exchanged notes on May 25 regarding South Manchuria and Eastern Inner Mongolia.

(*ii*) By this Treaty the leases of the Kwantung Territory including Port Arthur and Dalany (Now—Dairen) and the concessions for the South Manchuria and the Antung-Mukden Railways were all extended from twenty-five years to ninety-nine years. Furthermore, Japanese subjects in South Manchuria acquired the right to travel and reside, to engage in business of any kind and to lease land necessary for trade, industry and agriculture. Japan also obtained rights of priority for railways. She also secured certain other rights which she relinquished at the Washington Conference of 1921-1922.

(*e*) (*i*) The war between Russia and Japan was followed almost immediately by a policy of close co-operation.

(*ii*) Russia and Japan delimited their respective spheres of interest in North and South Manchuria.

(*iii*) The Russian Revolution of 1917 shattered the basis of Russo-Japanese understanding and co-operation in Manchuria.

(*iv*) The Russian Revolution of 1917 gave China a favourable opportunity to assert her sovereign rights in North Manchuria; She began to take a more active part in the government and development of the country.

(*v*) The declarations of policy made in 1919 and 1920 by the Soviet Government with regard to China implied a complete relinquishment of the special rights which Imperial Russia had acquired in China, notably those acquired in North Manchuria.

(*vi*) This resulted in the Sino-Russian Agreement of May 31, 1924.

(*vii*) China was intolerant of even what remnant of interest remained with U. S. S. R. after this Agreement of 1924 and made final efforts to liquidate altogether

the Soviet influence in Manchuria in 1929.

(*viii*) This resulted in raids by Soviet Troops across the Manchurian Border which developed into a military invasion in November 1929.

24. (*a*) The Chinese Revolution of 1911, which resulted in the fall of the Manchu Dynasty as stated in number 9, above, was not favoured by the then Manchurian authorities. These authorities succeeded in saving Manchuria from the turmoil of civil war by ordering Chang Tso-Lin to resist the advance of the revolutionary troops.

(*b*) When the Revolution resulted in the establishment of the Republic, Manchuria accepted the *fait accompli* and voluntarily followed the leadership of Yuan Shih-Kai, the first President of the Republic.

(*c*) (*i*) In 1916 Chang Tso-Lin was appointed military governor of Fontien Province concurrently acting as civil governor.

(*ii*) IN JULY 1922 CHANG TSO-LIN RENOUNCED ALLEGIANCE TO THE CENTRAL GOVERNMENT AND MAINTAINED COMPLETE INDEPENDENCE of action in Manchuria until he extended his authority south of the wall and became master of Peking as well.

(*iii*) He expressed his willingness to respect foreign rights and accepted the obligations of China; but he requested foreign powers to negotiate henceforth directly with his administration in all matters concerning Manchuria.

(*iv*) Accordingly, he repudiated the Sino-Soviet Agreement of May 31, 1924, and persuaded the U. S. S. R. to conclude a separate agreement with him in September 1924. This is his Mukden Agreement with U. S. S. R..

(*v*) This fact emphasized Chang Tso-Lin's insistence on the recognition of his complete independence both in domestic and foreign policy.

25. (*a*) (*i*) Chang Tso-Lin became involved in Chinese Civil War.

(*ii*) In her own interest Japan advised him to keep out of the factional strife in China and concentrate his energy on the development of Manchuria.

(*iii*) The Marshal resented this advice and disregarded it.

(*b*) At one time he succeeded in advancing into Northern Provinces. Ultimately he was defeated and Japan in her own interest in South Manchuria advised him to withdraw his armies into South Manchuria before it was too late. THE OBJECT OF JAPAN was to save Manchuria from the evils of civil war which would have resulted from the entry of a defeated army pursued by its

victors.

(*i*) The Marshal resented the advise, but was obliged to follow it.

(*ii*) He left Peiping on June 3, 1928, for Mukden, but was killed on the next day by an explosion which wrecked his train just outside the city.

(*iii*) The responsibility for this murder has never been established. The tragedy remains shrouded in mystery but the suspicion of Japanese complicity became an additional factor in the state of Sino-Japanese tension.

(*iv*) One of the reasons for this suspicion was that in the last years of his life, Marshal Chang showed increasing unwillingness to allow Japan to profit by the privileges she derived from various treaties and agreements.

26. (*a*) After the death of Marshal Chang Tso-Lin, his son, Chang Hsueh-Liang, became the ruler of Manchuria.

(*b*) (*i*) In December 1928 he accepted the National Flag and declared his allegiance to the Central Government.

(*ii*) He was made the Commander-in-Chief of the North Eastern Frontier Army and was also confirmed as Chief of the administration of Manchuria with addition of Jehol.

(*iii*) The relationship with the Central Government depended in all affairs—military, civil, financial and foreign—on mere voluntary co-operation. Orders or instructions requiring unquestioning obedience would not have been tolerated.

27. ANTI-JAPANESE AGITATION WAS INTENSIFIED EVERY DAY. In April 1931, a five day conference under the auspices of the People's Foreign Policy Association was held at Mukden which discussed the possibility of liquidating the Japanese position in Manchuria. Pressure was brought to bear on Chinese houseowners and landlords to raise the rents of Japanese and Korean tenants or to refuse renewal of rent contracts. By gaining control over Manchuria's staple products, the authorities attempted to compel the foreigners, particularly the Japanese, to pay higher prices.

28. The above analysis shows a sufficient conflict between the fundamental interests of Japan and China in Manchuria.

29. (*a*) Japanese interests in Manchuria differ both in character and degree from those of any other foreign country.

(*b*) (*i*) Deep in the mind of every Japanese is the memory of their country's great struggle with Russia in 1904-1905, fought on the plains of Manchuria.

(*ii*) The war was life-and-death struggle fought in self-defense against the menace of Russian encroachments.

(*iii*) Japanese interest in Manchuria began ten years before that war.

(*iv*) The war with China, in 1894-1895, ended in the Treaty of Peace signed at Shimonoseki ceded to Japan IN FULL SOVEREIGNTY the Liao-tung Peninsula.

(*v*) To the Japanese, the fact that Russia, France and Germany forced them to renounce their cession does not affect their conviction that Japan obtained this part of Manchuria as the result of a successful war and thereby acquired a moral right to it which still exists.

(*vi*) Manchuria has been frequently referred to as the "life-line" of Japan.

Fundamental among the interests of Japan in Manchuria is the STRATEGIC IMPORTANCE OF THIS TERRITORY TO HER SELF-DEFENSE AND NATIONAL EXISTENCE.

(*vii*) There are those in Japan who think that she should entrench herself firmly in Manchuria *against the* possibility of attack from U. S. S. R. .

(*viii*) Especially in the minds of Japanese military men, the right claimed, under agreements with Russia and China to station a few thousand railway guards along the South Manchuria Railway is small recompense for the enormous sacrifices of their country in the Russo-Japanese War, and *a meagre security against the possibility of attack from that direction*.

(*ix*) Patriotic sentiment, the paramount need for military defense, and the exceptional treaty rights all combine to create the claim to a "special position" in Manchuria.

(*x*) Feelings and historical associations which are the heritage of the Russo-Japanese War, and pride in the achievements of Japanese enterprise in Manchuria for the last quarter-century, are an indefinable *but real* part of the Japanese claim to a "special position".

(*xi*) The signatories of the Nine-Power Treaty of the Washington Conference of February 6, 1922, challenged to a large extent the claims of a signatory state to a "special position" or to "special rights and interests" in any part of China.

(*xii*) Japan's claim was well expressed in Viscount Ishii's Memoirs when he said: "Even if the Lansing-Ishii Agreement is abolished, Japan's special interests un-

shakenly exist there. The special interests which Japan possesses in China neither were created by all international agreement, nor can they become the objects of abolition."

30. Japan's general policy towards Manchuria:
   (*a*) always has had THE SAME GENERAL AIM—namely, to maintain and develop Japan's interests, to obtain adequate protection of Japanese lives and properties;
   (*b*) but with different POLICIES FOR THE REALIZATION of this aim—
      (*i*) *the friendship policy* of Baron Shidehara rested on the basis of goodwill and neighbourliness.
      (*ii*) *the positive policy* of Baron Tanaka rested upon military force.
   (*c*) The two policies differed largely on the question as to the lengths to which Japan should go to maintain peace and order in Manchuria.
      (*i*) The Friendship Policy extended only to the protection of Japanese interests there;
      (*ii*) The Positive Policy placed greater emphasis upon the necessity of regarding Manchuria AS DISTINCT FROM THE REST OF CHINA—"if disturbances spread to Manchuria and Mongolia, and, as a result, peace and order are disrupted, thereby MENACING Japan's special position and rights and interests there, Japan would DEFEND them no matter whence the menace comes. Japan would take upon herself the task of preserving 'peace and order' in Manchuria."
   (*d*) In the policies adopted for realizing the aim specified above there was one COMMON CARDINAL FEATURE—namely, *to regard Manchuria and Eastern Inner Mongolia as distinct from the rest of China*.
   (*e*) The policy of Japan in Manchuria was chiefly concerned with its relations with the *de facto* ruler of the provinces.
   (*f*) In the spring of 1928, when the Nationalist armies of China were marching on Peking in an effort to drive the forces of Chang Tso-Lin, the Japanses Government under the Premiership of Baron Tanaka issued a declaration that on account of her "special position" in Manchuria Japan would maintain peace and order in that region.

31. (*a*) Besides what has been stated above there were Sino-Japanese Railway issues in Manchuria.
   (*b*) (*i*) Most of these issues, definite and technical, involving no problems of principles or policy, were obviously suited for arbitration or judicial discrimination;
      (*ii*) There were some due to intense rivalry between China

and Japan which resulted from a deep-seated conflict in national policies.

The Commission also noticed the Korean Problem in Manchuria, the Wanpaoshan Affair, and the Murder of Captain Nakamura by Chinese soldiers during the midsummer of 1931.

According to the Commission the Nakamura Case, more than any other single incident, greatly aggravated the resentment of the Japanese.

Coming to the incident of 18 September 1931, the Commission observed "the military operations of the Japanese troops during this night cannot be regarded as measures of legitimate self-defense", but that "it is not impossible that the officers on the spot might have thought that they were acting in self-defense".

The Japanese had a carefully prepared plan to meet the case of *possible* hostilities between themselves and the Chinese. On the night of September 18 and the night of September 19, this plan was put into operation with swiftness and precision.

No report offering a comprehensive view of the relations between China and Japan could well avoid a DISCUSSION OF THE BOYCOTT. The Lytton Report traces the origin of the boycott in China as far back as 1893 to the Society for the Regeneration of China. From 1925 onward the operations of the boycott were NOT ONLY INSPIRED BUT ORGANIZED, CO-ORDINATED AND SUPERVISED BY THE KUOMINTANG WITH all the formidable propaganda, using slogans well chosen to incite the popular mind against the enemy country. The Japanese merchants interviewed by the Commission insisted that the boycott as practised in China was an act of aggression. The Commission, though it did not confirm this view, refused to sustain the contention of its Chinese assessor that the boycott was pursued generally speaking, in a legitimate manner. The boycott, the Commission observed, may certainly be a legitimate weapon of defense against aggression by a stronger country. We do not know whether international jurists will some day be obliged to take a much more sophisticated attitude toward the boycott than is taken at the present time. The Commission regarded the question whether the organized application of boycott to a particular country was *consistent with friendly relations* or *in conformity with* treaty obligations, to be a *problem of international law*, and expressed the hope that, in the interest of all states, this problem should be considered at an early date and regulated by international agreement.

I have indicated elsewhere my view of the legal position created by such movements.

In the above analysis in item 22, I have given the view of the Commission regarding JAPAN'S OVER-POPULATION PROBLEM. It will be of some importance to notice here how the question of over-population in Japan was looked upon with much concern in other countries.

Professor W. Thompson of the University of Miami in pointing out the danger spots in world population said:

"In the Western Pacific area by far the most urgent needs are those of the

Japanese. Japan is decidedly overpopulated now as compared with most other countries. It needs more territory for agricultural expansion, and it needs larger mineral resources for the development of its industry. Japan's policies with regard to China are today being determined by this really urgent economic need.... Their policy towards China is being, and will be, determined by their estimation of the best way to exploit Manchuria... Since this is the customary method of procedure in international relations today, it does not in anyway reflect discredit upon Japan..."

In connection with the Japanese annexation of Korea in 1910 referred to in item 23 (*c*) above, it will be pertinent to notice the treaties of 1902 and of 1905 between Great Britain and Japan. Under the Treaty of 1902 the contracting parties, while mutually recognizing the independence of China and Korea, declared that in view of their SPECIAL INTERESTS in these countries, it should be admissible for either of them to take such measures as might be indispensable to safeguard those interests from the aggressive action of any other powers or *from internal disturbances* necessitating intervention for the protection of life and property. It was further agreed that if either Great Britain or Japan should become involved in war with another power in defense of their respective interests as above described, the other contracting party should maintain strict neutrality and use its best efforts to prevent other powers from joining in hostilities against its ally. Should, however, any other power or powers take part in the conflict, then, it was agreed that the other contracting party should come to the assistance of its ally, conduct the war in common, and make peace in mutual agreement with it. These provisions were greatly amplified by the terms of the new Treaty of 1905 in substitution of the former agreement. On August 8, 1905, while the peace negotiations were in progress at Portsmouth, the Second Alliance Treaty was concluded. By the terms of this Treaty it was agreed:

1. Firmly to maintain the peace of the whole of the Far East and of India.
2. To maintain the independence and territorial integrity of China and to respect the principle of the "open door".
3. Mutually to respect the colonial rights and SPECIAL INTERESTS of the contracting parties in the *Far East* and in *India*.

This new treaty provided for a whole-hearted offensive and defensive alliance. Great Britain recognized JAPAN'S SPECIAL SPHERE OF INTEREST in Korea and accorded her freedom to advise, oversee and protect that country. The chief thing that Japan and Great Britain hoped to secure by this extended treaty was mutual assistance in defending Korea and India against an attack by a third power. Japan was left free to annex Korea.

This treaty was revised and replaced by the Treaty of 1911.

It will be pertinent to notice in this connection the Lansing-Ishii exchange of notes in the year 1917 which contained the following statement: "The Governments of the United States and Japan recognize THAT TERRITORIAL PROPINQUITY CREATES SPECIAL RELATIONS BETWEEN COUNTRIES, and, consequently, the Government of the United States recognizes that Japan has SPE-

CIAL INTERESTS in China, particularly in that part to which her possessions are contiguous."

The signatories of the Nine-Power Treaty of the Washington Conference of February 6, 1922, challenged to a large extent this claim to a "special position" and favoured the Open Door Policy. This Open Door doctrine was of 1899 and was an Anglo-American Policy. The explanation is believed to be that the British held the strongest position in China and preferred exploitation of that country under a system of international privilege.

The Sino-Japanese Treaty of 1915 has been mentioned in item 23 (*d*) of the above analysis. It may be noticed in that connection that China sought to repudiate this treaty as procured by coercion.

The freedom of consent, which in principle is held to be as necessary to the validity of contracts between states as it is to those between individuals may be taken to exist as between states under conditions which would not be considered compatible with it in the case of individuals. In international law, so long as force and intimidation were permitted means of obtaining redress for wrongs, it was impossible to look upon them as vitiating the agreement, made in consequence of their use.

Whatever be the position after the Pact of Paris, there is no doubt that in 1915 war was a legitimate means of realizing a state's claim. Consent, therefore, must be conceived to have been freely given in international contracts of those days, notwithstanding that it might have been obtained by force. It might be contended that this rule should be confined only to cases where the claim of the intimidating state relates to compensation for alleged past wrongs or security against future possible wrongs and should have no application where admittedly the case is one of grant of some interest sought by one state from another. As international law cannot measure what is due in protection of a state which declares itself to be in danger, it regards all compacts valid, notwithstanding the use of force or intimidation, provided they do not destroy the independence of the state which has thus been obliged to enter into them. If the Pact of Paris be taken as having outlawed all forces, the position would now be quite different.

I have summarized above in item 23 (*e*) (*viii*) the account given by the Commission of the military invasion of China by the U.S.S.R. in November, 1929. It will be pertinent to notice in that connection that during this dispute, the Soviet Government had always taken the position, in answer to various memoranda from third power signatories to the Pact of Paris, that her action had been taken in legitimate self-defense and could in no way be interpreted as a breach of the agreement.

The Commission gave its view of the three-power intervention in the Sino-Japanese Treaty of 1895. I have noticed this in item 23 (*a*) of my analysis. It would be interesting to notice in this connection the world view of the legitimacy of this three-power intervention.

From the point of view of law, the states so intervening were considered as going beyond their legal powers. Their excuse or justification could only be a moral one. Referring to this particular intervention, HALL REMARKED: "An

instance of such an intervention is not calculated to illustrate the disinterestedness of the intervening powers. The original terms of the Treaty or Shimonoseki, concluded in April 1895, between China and Japan, provided for the cession to the latter of the Liao-tong Peninsula, including Port Arthur. Thereupon Russia, Germany and France interposed with what was euphemistically termed "a friendly representation", and informed Japan, practically under the threat of war, that she would not be allowed to retain any increase of territory on the mainland. The reason assigned for the intervention was the danger to the independence of Korea and the humiliation inflicted upon the Court of Peking if Japan were thus to acquire a footing upon the Gulf of Peohi-li. Great Britain was invited to join in the remonstrance, but declined to do so; Lord Rosebery however advised Japan to yield to the overwhelming forces arrayed against her, a course which was reluctantly adopted. Into the motives of France and Germany it is unnecessary to enter; but the fact that in 1898 Russia obtained from China a lease for twenty-five years of Port Arthur under which it was promptly converted into a strongly fortified naval port, and that she remained in occupation of the Liao-tong Peninsula until her forcible ejection by the armed forces of Japan, cast a significant light upon her action. The Treaty of Portsmouth (New Hampshire), concluded in September 1905, restored to Japan in fact, though not in set terms, the territory of which she had been deprived ten years earlier."

By a treaty signed at Peking on 6 March 1898, Germany obtained from China a lease of the Shantung Peninsula for ninety-nine years.

Great Britain secured a lease for ninety-nine years of Wei-hai Wei under a treaty of July 1, 1898.

The Commission speaks of the Japanese claim to a "*special position*" in Manchuria. Items 19, 20, 21, 22, 23 (*a*) and (*b*), 27, and 29 of the above analysis will indicate the character of Japan's special interest in Manchuria.

The prosecution prefers to characterize whatever interests Japan had in Manchuria and China as acquired by prior aggressions, and catalogues Japan's subsequent undertakings in respect of them, showing her obligations towards China and other nations. We have no evidence before us entitling us to accept this characterization of the Japanese interests. But assuming that these had been acquired by Japan by prior aggressions, her legal position in the present international system would not, in the least, be affected by that fact. It would be pertinent to recall to our memory that the majority of the interests claimed by the Western Prosecuting Powers in the Eastern Hemisphere including China were acquired by such aggressive methods, and when they were making reservations in relation to their respective interests in the Eastern Hemisphere while signing the Pact of Paris, they were certainly contemplating their right of self-defense and self-protection as extending to such interests.

I would like to add in this connection that at least Great Britain recognized this "special position" in her treaties of alliance with Japan. It may also be noticed that if, what Japan claims to be the character of her interest in

Manchuria, be correct—if the special position or special interests claimed by her be necessary for her self-preservation, then this Treaty of Washington of 1922 might not deprive her of such interests.

Self-preservation is not only a *right* of a state, it is also its paramount duty; all other duties are subordinated to this right and duty of self-preservation. In international relations all the states treat this right as a governing condition, subject to which all rights and duties exist. It works by suspending the obligation to act in obedience to other principles. The idea of self-preservation may extend under circumstances so as to include self-protection against serious hurt.

Hall says: "If the safety of a state is gravely and immediately threatened either by occurrences in another state, or aggression prepared there, which the government of the latter is unable, or professes itself to be unable, to prevent, or when there is an imminent certainty that such occurrences or aggression will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place the right of self-preservation above the duty of respecting a freedom of action which must have become nominal, on the supposition that the state from which the danger comes is willing, if it can, to perform its international duties."

Cheney Hyde seems to go further when he says: "Protracted impotence of a state to maintain within its domain stable conditions in relation to alien life and property both inspires and *justifies* the endeavour of an aggrieved neighbour to enter the land and possess itself thereof."

Japan claimed, on the strength of this special position, the right of intervention in the spring of 1928, when the nationalist armies of China were marching on Peking. Under the Treaty of Alliance with Great Britain, Japan had, so long as that treaty was in force, such an understanding with that great power. International law, I believe, allows such intervention. (See Hall, Chapter VIII). Whether intervention on behalf of any party to a civil war be legitimate or not, this was an offer of intervention to protect the intervener's own rights and interests. THE WASHINGTON TREATY made little actual change in Manchuria. In spite of the provisions with respect to the Open Door Policy, it has had but qualified application to Manchuria in view of the character and extent of Japan's vested interest there.

It may not be out of place to notice here how, by this time, THE OTHER SIGNATORY POWERS WERE VIEWING THIS WASHINGTON TREATY.

On September 4, 1925, the Signatory Powers presented to the Chinese Foreign Office notes in reply to the Chinese note of June 24th requesting a readjustment of Chinese Treaty relations with the Foreign Powers. In these notes the Powers state that they are "now prepared to consider the Chinese Government's proposal for the modification of existing treaties IN MEASURE as the Chinese authorities demonstrate THEIR WILLINGNESS AND ABILITY to fulfil their obligations and to assume the protection of foreign rights and interests now safeguarded by the exceptional provisions of those treaties." The Nine-Power identic note of September 4th also admonished China of "the necessity

of giving concrete evidence of its ABILITY and WILLINGNESS to enforce respect for the safety of foreign lives and property and to suppress disorders and anti-foreign agitations" *as a condition for the carrying on of* negotiations in regard to the desires which the Chinese Government has presented for the consideration of the treaty Powers.

The relations of China with the other Powers during 1925 assumed an ominous aspect and in that connection the Government of the United States considered it necessary to issue a public declaration of its policy in relation to Chinese affairs. The Secretary of State, Mr. Kellogg, utilized the occasion of his address before the annual meeting of the American Bar Association at Detroit on September 2, 1925, to make clear the attitude of the American Government. He declared that the policy of the United States "may be said to be to respect the sovereignty and territorial integrity of China, to encourage the development of an *effective state government*, to maintain the 'open door' or equal opportunity for the trade of nationals of all countries, to carry out scrupulously the obligations and promises made to China at the Washington Conference, and TO REQUIRE CHINA TO PERFORM THE OBLIGATIONS OF A SOVEREIGN STATE IN THE PROTECTION OF FOREIGN CITIZENS AND THEIR PROPERTY."

The Secretary of State concluded his address of September 2nd by pointing out that under the treaty arrangements which China now seeks to revise, thousands of American and foreigners have taken up their residence and carried on their business within that country. He undoubtedly expressed the sentiment of the people of the United States when he said that they "do not wish to control, by treaty or otherwise, the internal policies of China, to fix its tariffs, or establish and administer courts, but *that they look* FORWARD TO THE DAY *when this will not be necessary*;" BUT THE GOVERNMENT OWES TO ITS CITIZENS IN CHINA "the duty of adequate protection and the Chinese Government must have a realization of its SOVEREIGN OBLIGATIONS according to the law of all civilized nations. "ONE OF THE MOST DIFFICULT QUESTIONS, he said, in the discussion and settlement of the problem relating to conventional tariffs, extra-territorial rights and foreign settlements in China, "is whether China now has a stable government capable of carrying out these treaty obligations."

IT IS A NOTORIOUS FACT THAT THE TREATY WAS NOT GIVEN EFFECT TO BY ANY OF THE SIGNATORIES and one of the reasons for this was given by the British Government in 1926 to be the PROGRESSIVE DECLINE, during this interval, IN THE EFFECTIVE POWER OF THE GOVERNMENT, nominally representing all China, at Peking.

In an official statement of British Policy made on the 14th October 1926, the new British Minister, Mr. Miles Lampson, declared that "in the absence of any settled and permanent Chinese Government, British lives and property were endangered by the prevailing lawlessness, and British interests were liable at any moment to be prejudiced by the action of irresponsible individuals or bodies." He added that, "Where no Chinese authority was in existence, His Majesty's Government were bound to accord to their nationals their fullest protection and support and to exact reparation for the wrong

done." On the 18th December 1926, while Mr. Lampson was on his way to Peking, a memorandum on British Policy was communicated to the diplomatic representatives of the Washington Treaty Powers. The general purport of this memorandum so far as the same is relevant for our present purpose is conveyed in its paragraphs 2, 5, and 6 which read as follows:

2. Unfortunately the Tariff Conference did not meet for four years, and during that period the situation had greatly deteriorated. During a succession of civil wars THE AUTHORITY OF THE PEKING GOVERNMENT HAD DIMINISHED ALMOST TO VANISHING POINT, while in the south a powerful Nationalist Government at Canton definitely disputed the right of the Government at her name. This process of disintegration, civil war, and waning central authority continued with increased acceleration after the Tariff Conference had met until eventually the Conference negotiations came to an end because there was no longer a Government with whom to negotiate.

5. *The situation which exists in China today is thus entirely different from that which faced the Powers at the time they framed the Washington treaties*. In the present state of confusion, though some progress has been made by means of local negotiation and agreements with regional Governments, it has not been possible for the Powers to proceed with the larger programme of treaty revision which was foreshadowed at Washington or to arrive at a settlement of any of the outstanding questions relating to the position of foreigners in China. The political disintegration in China has, however, been accompanied by the growth of a powerful Nationalist movement, which aimed at gaining for China an equal place among the nations, and any failure to meet this movement with sympathy and understanding would not respond to the real intentions of the Powers towards China.

6. His Majesty's Government, after carefully reviewing the position, desire to submit their considered opinion as to the course which the Washington Treaty Powers should now adopt. His Majesty's Government propose that these Governments shall issue a statement setting forth the essential facts of the situation; declaring their readiness to negotiate on treaty revision and all other outstanding questions AS SOON AS THE CHINESE THEMSELVES HAVE CONSTITUTED A GOVERNMENT WITH AUTHORITY TO NEGOTIATE; and stating their intention pending the establishment of such a Government to pursue a constructive policy in harmony with the spirit of the Washington Conference but developed and adapted to meet the altered circumstances of the present time.

For various reasons this *demarche* on the part of the British Government found little favour with any of the parties concerned. Even the Kuomintang, to whose aspirations the memorandum was a response, were reported to be divided in the matter; and the right wing, who were inclined to accept the document as evidence of sincere though moderate British goodwill, appear to

have been overborne by the left, who denounced it as an insidious attempt to forestall the complete realization of the Nationalist programme by inadequate concessions.

The memorandum refers to THE PROGRESSIVE DECLINE IN THE EFFECTIVE POWER OF THE CHINESE GOVERNMENT SINCE THE TREATY OF WASHINGTON. This decline culminated in the virtual dissolution of the Peking Government at the moment in April 1926 when Peking passed out of the hands of the Kuominchun into those of Chang Tso-lin and Wu P'ei-fu in the course of the northern Campaign in the Chinese civil war; and though the momentarily victorious dictators found it politic, at their convenience, to set up the shadow of a Central Government at Peking again, *the impotence of Peking to negotiate authoritatively and implement effectively any international agreements with the Powers* was demonstrated finally by the inconclusive termination of the Tariff Conference on the 23rd July, 1926, and by the impossibility of taking immediate action upon the report of the Extra-Territoriality Commission which concluded its sittings on the 16th September, 1926.

The defense pointed out that since the signing of that Nine-Power Treaty, at least five important incidents occurred in the Far East which had not been anticipated at the time of the conclusion of the treaty: Amongst others, they referred to the following:

1. The abandonment by China of the very basic principle of the treaty: The basic premise for the treaty was that China was to keep friendly relations with foreign countries,—that it was thought desirable "to adopt a policy to promote intercourse between China and the other powers upon the basis of equality of opportunity." China, however, since then adopted, as one of her governmental policies, anti-foreign attitude, including intense and extensive anti-Japanese attitude.
2. The development of Chinese Communist Party: Communism in China did not mean only a political doctrine held by certain members of existing parties, or an organization of special party to compete for power with other political parties: It became an actual rival of the national government possessing its own law, army and government and having its own territorial sphere of action.
3. Increase in the Chinese armament: At the time of the Washington Conference armament limitation was generally desired, and it was ardently desired that China immediately would take effective steps to reduce her troops. Instead of any reduction, the Chinese troops went on increasing and China was maintaining a large standing army equipped with up-to-date weapons.
4. The development of the Soviet Union into a powerful state: Despite her being the neighbouring country to China, she was not called upon to participate in the treaty. Since the treaty, however, she grew to be a big power with extraordinary military strength and became a menace not only to China but to Japan herself.
5. A fundamental change in the world economic principle: With

> Great Britain taking steps forward in the direction of protectionism, world economy since then headed for what has been termed "bloc economy". Under the circumstances, neighbouring countries in East Asia, specially Japan and China, had to think of bringing their economic ties much closer as a measure of protection against economic collapse.

The Nine-Power Treaty sets no definite time of expiration. The defense contended that such a treaty is understood, in international law, as concluded with the tacit condition, "if things remain as they are"—*clausula rebus sic stantibus*. Things having all changed, the defense claimed that the treaty obligation terminated.

There is much force in these contentions and if anything turns upon this treaty obligation, these certainly would require serious consideration. I would take up this question while examining the *bona fides* or otherwise of the Japanese view of the American attitude as disclosed in the Hull note of the 26th November 1941. Of course the question of Chinese sovereignty and of her territorial integrity would not be dependent entirely on this treaty. It would certainly require consideration apart from its position under the Nine-Power Treaty. So far, however, as any claim to such integrity is based on this treaty, its examination would involve serious consideration of the above matters.

It will also be interesting to note in this connection what happened after the Manchurian incident.

On the 7th January 1932, the Secretary of State at Washington, Mr. Henry Stimson, sent an identic note to the Chinese and Japanese Governments, in which the most important passage was to the following effect:

> In view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify the Government of Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between these governments, or agents thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the Sovereignty, the independence or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the Open Door Policy, and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligation of the Pact of Paris of the 27th August 1928, to which treaty both China and Japan, as well as the United States, are parties.

Copies of this note were handed simultaneously to the diplomatic representatives at Washington of the other six Powers that were co-parties to the Nine-Power Treaty with China and Japan and the United States.

THE RESPONSE WHICH THIS AMERICAN NOTE ACTUALLY EVOKED from the Government of the United Kingdom was the following *communique*, which was issued by the Foreign Office in Whitehall on the 9th January, 1932:

"His Majesty's Government stand by the policy of the open door for international trade in Manchuria, which was guaranteed by the Nine-Power Treaty at Washington.

"Since the recent events in Manchuria, the Japanese representatives at the Council of the League of Nations at Geneva stated on the 13th October that Japan was the champion in Manchuria of the principle of equal opportunity and the open door for the economic activities of all nations. Further, on the 28th December, the Japanese Prime Minister stated that Japan would adhere to the Open Door Policy, and would welcome participation and co-operation in Manchurian enterprise."

"In view of these statements, his Majesty's Government have not considered it necessary to address any formal note to the Japanese Government on the lines of the American Government's note, but the Japanese Ambassador in London has been requested to obtain confirmation of these assurances from his Government." The Times of the 11th January 1932 characterized this as *a wise action* on the part of the British Government. The Times wrote:

"In the circumstances it was fully justified in limiting its action to a request for a confirmation of the assurances given by Mr. Yoshizawa to the League Council in October and by the new Japanese Prime Minister a fortnight ago, to the effect that Japan would adhere to the principle of the 'open door' which her Government claims to be defending in Manchuria. There is no doubt that these assurances will be repeated—all the more readily since the principle of equal opportunity for foreign commerce and industry in China has been challenged by the Chinese Nationalists on several occasions since 1922, while the party which organized the boycotts, first of British and subsequently of Japanese commerce, is now in nominal control of China. Nor does it seem to be the immediate business of the Foreign Office to defend the '*administrative integrity*' *of China until that integrity is something more than an ideal*. IT DID NOT EXIST IN 1922, AND IT DOES NOT EXIST TODAY."

The last two sentences of the passage require special notice in this connection.

It is indeed a very pertinent consideration having important bearing on the questions involved in the case before us, how far a people can claim the protection of international law when its organization AS A STATE fails and it is hopelessly involved in anarchy. I shall examine this matter while considering the question of Japanese action in the rest of China. This would only have some bearing on the question of justification of any action taken by Japan. For our present purpose, however, that is somewhat beside the point.

In item 18 above I have given the views of the Lytton Commission about the character of the communistic development in China. The prosecution in its summation refers to a portion of this report and invites us to hold that communism ceased to be a menace to the Japanese interest in China in 1931. The Lytton Report is against this view. Further, as I have already noticed, the defense offered additional evidence relating to this danger of communistic development but that evidence was rejected by us as irrelevant. In my

opinion, after such exclusion of evidence we cannot accept the prosecution summation in this respect. I have already given my reason for saying so in an earlier part of this judgment.

When the whole world is reverberating with expressions of terror of communistic development, and when from every quarter we are having reports of extensive and immediate preparations, economic and military, against the apprehended menace of communistic spread, it is, I believe needless to remind that, justifiable or not, Japan's fear of this supposed menace and its consequent preparations and actions are at least explicable without the aid of the theory of any enormous conspiracy as alleged in Counts 1 to 5.

Even today, we are told that "failure to block the communist in China would doom Japan." "Communist conquest of China", it is declared by the politicians and diplomats of the "peace-loving" democratic countries, "would lead rapidly to communist victory in Indo-China, and communist control of Indo-China would be followed by communist subjection of Siam and the Malaya Peninsula". Such control of East Asia, it is apprehended, would separate Japan from the Asiatic Continent's market and raw materials. "If the Japanese cannot get rice and raw materials from sales on the Continent of Asia, then Japan economically is doomed." In such a case "Japan's only solution would be to go under the iron curtain and become a satellite nation." It is not for us to see whether there is any real justification for such an apprehension; or, whether it is thus presented with the same fantastic enormity as is the charge of conspiracy in the case before us. But if such things can be apprehended by any respectable statesman, I do not see why when such apprehension is pleaded by the accused in this case, we should ascribe the same to any *malafides* on their part, specially when we know that they were more vitally concerned with the fate of Japan than any of those statesmen who are now expressing such apprehensions.

After reviewing all the facts and circumstances enumerated above, the Commission dismissed the past with a final reflection already noticed by me, and, as has been contended by the defense, these final reflections of the Commission, if properly appreciated, should suffice to dispel the present charge of crime. In my opinion, these ought at least to explain the incidents without having recourse to any theory of conspiracy.

On the report of the Lytton Commission, the League of Nations Assembly concluded on February 24, 1933, that the presence of Japanese Troops outside the zone of the South Manchurian Railway and their operations outside this zone are incompatible with the legal principles which should govern the settlement of the dispute and that while at the origin of the state of tension that existed before September 18, 1931, certain responsibilities would appear to be on one side and the other, no question of Chinese responsibility can arise for the development of events SINCE SEPTEMBER 18, 1931.

The Assembly's resolution of February 24, 1933, implied that Japan was the aggressor because of its failure to carry out the Council's resolution of September 30, and December 10, 1931 adopted under Article II of the Covenant of the League of Nations and accepted by Japan. These resolutions

required Japan to withdraw troops into the South Manchurian Railway Zone as rapidly as defensive necessities permitted.

Much has been made of the fact that Japan did not obey the League injunctions. The League insisted that the Japanese Forces must withdraw before anything else was discussed. As was observed in some quarters this attitude of the League might not have been justifiable in the circumstances of the case. The position of the Japanese forces was not that of a force having violated a national frontier. "It is one thing to withdraw troops behind a frontier in your own country where they would be perfectly safe; it is quite another thing to withdraw them to a railway line running through a foreign country where they might easily be surrounded." The order was a peremptory one issued by the League. "But everybody knew that nothing whatever would or could be done to enforce the order. If Japan had yielded to intimidation and withdrawn her troops, Manchuria would have been delivered over to a more horrible state of anarchy and misrule even than before." THE LEAGUE HAD NO MEANS TO STEP IN AND RESTORE ORDER IN MANCHURIA. The League equally had no means to guarantee security to the Japanese Force.

"The feeling that Europe did not care a straw about Japan's special difficulties or about the essential merits of the dispute tended to alienate Japan and to drive her to the extreme courses which she ultimately followed." "As for China", the Observer said, "we should have told her from the beginning that she was very largely to blame for her open disregard of treaty obligations and for her shocking misgovernment, both of which were ruining economic interests in Manchuria which were vital to Japan's existence as a nation; that it was useless to look to the Powers for protection because, whatever the covenant might say, no country was going to apply sanctions to Japan merely in order to re-establish Chinese misrule in Manchuria; that therefore China had better try and stop her own senseless civil wars, set her house in order and try and make the best terms she could with Japan; and that when she took this course we would do our best to see that she got a fair deal."

It may be noticed in this connection that the League was unwilling to consider the substance of the dispute before having secured a restoration of the military *status quo ante*. As to this, Japan passionately believed that she was in the right and China in the wrong, and she was therefore not much moved by the hostility with which she met at Geneva. "She may have attributed this to annoyance because Japan had upset Geneva's apple cart." Whatever it is, this disobedience does not indicate any design or conspiracy as alleged in Counts 1 and 2 of the Indictment.

Let us see how far the additional evidence adduced in this case would lead us away from this conclusion.

I shall take up the events in the order in which the prosecution presented them in its summation.

Let us take up the murder of Chang Tso-lin first.

The additional evidence relied on by the Prosecution in this respect is supplied by the depositions of Baron Okada, Tanaka Ryukichi and

Morishima.

The Prosecution claims that this additional evidence establishes the following:

1. That the Japanese Government had established the responsibility of Chang Tso-lin's murder and shown it to be with the Japanese;
   (*a*) (*i*) That by 1928 the Kwantung Army in Manchuria had become dissatisfied with the Tanaka policy of collaboration and desired to use force to occupy Manchuria; (Okada)
   (*ii*) That a clique of its officers had planned and plotted the murder; (Okada)
   (*b*) (*i*) That a report made in August 1928 by General Mine of the Tokyo Military Police Unit, showed that the murder was planned by Colonel Kawamoto, senior staff officer of the Kwantung Army; (Tanaka Ryukichi)
   (*ii*) That the report revealed that the Kwantung Army wanted to rid itself of Chang Tso-lin and to set up a new state separated from the Nanking Government under Japanese control; (Tanaka Ryukichi)
   (*iii*) That this report confirmed to Tanaka what he had heard in 1929 from Captain Ozaki, who had issued the mustering order, and what he had heard in 1935 about the killing and its purpose from Kawamoto.
   (*c*) That Morishima confirmed this testimony.
2. (*a*) That the killing of Chang Tso-lin grew out of THE PROGRAM of the Kwantung Army.
   (*b*) That the killing of Chang Tso-lin was the first, though abortive, act in effectuating the conspiracy.
3. (*a*) That the above killing was the first overt act by the Army to project itself into the formulation of Government policy.
   (*b*) That it shows that the army was already strongly enough entrenched so as to be able to defy the Government.
   (*i*) That this is evidenced by the fact that the Tanaka Cabinet was forced to resign because it wanted to take strong disciplinary action to maintain discipline in the Army.

I must say I am not at all satisfied with this additional evidence. But before giving my reason for discarding this testimony so much relied on by the prosecution, let us see how far the prosecution case is advanced even if we accept it *in toto*. The utmost this evidence can establish is that the murder of Chang Tso-lin was the act or a group of Japanese officers of the Kwantung army, that the same was planned by Col. Kawamoto, the then senior staff officer of that army, and that the plan was executed by one Captain Ozaki or Captain Tomiya or both. I am not saying that these matters have been established by any evidence before us. As I shall presently show, the evidence has not succeeded in advancing the case in the least beyond where it was in the

days of the Lytton Commission. But even assuming the full effect of the evidence as stated above, the prosecution case of the conspiracy is not in the least advanced thereby. All that we get is that Chang Tso-lin's murder was planned and executed by a certain group of the Kwantung army officers. There is absolutely nothing to connect this plan or plot with the alleged conspiracy. There is nothing in this evidence to give us any alleged "program of the Kwantung army" and to connect this incident or its plan with that program. There is nothing to show that the army had any plan or design "to project itself into the formulation of the Government policy"; nothing to indicate or suggest any attempt on the part of the army so to project itself, and nothing to connect the murder of Chang Tso-lin with any such attempt or plan or design.

Planning any murder and executing the same are certainly reprehensible by themselves. But we are not now trying any of the accused for that dastardly act of murder. We are to see what connection this story has with any relevant issue before us.

Chang Tso-lin's murder was planned, the prosecution tells us, because the Kwantung Army had become dissatisfied with the Tanaka Policy of Collaboration and desired to use force to occupy Manchuria. Nothing, however, could be placed before us to show anything, successful or abortive, which was designed or planned on the footing of this murder. Chang Tso-lin died and in normal course was succeeded by his son. There is nothing to show that anything else was designed, planned or attempted in this respect. Nor is there anything to show that the Army or the plotters considered his successor a more desirable person for their purpose. So far as the evidence goes, absolutely nothing happened or was expected or designed to happen towards the alleged occupation of Manchuria.

The incident stands equally unconnected with the alleged projection into the formulation of the Government Policy. The Tanaka Cabinet fell and the Hamaguchi Cabinet came in. The incident might have indirectly contributed to the fall of the one cabinet and to the accession of the other. But we have been given nothing to show any design, plan or attempt, successful or abortive, in this respect. It is preposterous to suggest that the murder of Chang Tso-lin was planned to cause the fall of the Tanaka Cabinet. There is nothing to show that there was any plan, design or attempt to bring in any particular person or group of persons in the succeeding cabinet. There is nothing to show that any expectation was entertained or calculation made by the plotters that the succeeding Hamaguchi Cabinet or any other expected or probable Cabinet would be favourable to their alleged program though that calculation of theirs was ultimately crossed. Even the prosecution assertion that "the Tanaka Cabinet was forced to resign because it wanted to take strong disciplinary action to maintain discipline in the army" does not take us anywhere in this respect.

Thus unconnected with either of the suggested limbs of the conspiracy charged, the incident is absolutely irrelevant for the purposes of this case and its introduction in it is only calculated to create some prejudice adverse to the

defense by simply adding one more ruthless and dastardly but wholly irrelevant incident to the whole story.

The Lytton Commission, as I have already noticed, reported that "the responsibility for this murder has never been established". Upto that report the tragedy remained shrouded in mystery, but it gave rise to a suspicion of Japanese complicity.

As to this suspicion, it should be noticed that Chang had no lack of bitter and powerful enemies and that neither Japan nor the alleged plotters stood to gain by his destruction.

Here is an account of the situation to be found in the Survey of International Affairs of 1928 by the Royal Institute of International Affairs, London.

"For sometime before Chang Tso-lin's death, there had been a sharp division of sentiment and policy in his entourage. The older school were in favour of continuing to take the lead in the Ankuochun coalition against the Kuomintang—a policy which meant spending the resources of Manchuria on military campaigns outside her own borders. The younger school sympathized with the programme of the Kuomintang—particularly, perhaps, in the matter of relations between China and foreign powers—and were in favour of coming to a friendly understanding with them, though they did not contemplate going so far towards unification as to surrender their own local autonomy. In their policy towards the Kuomintang, the younger school had the support of Chang Tso-lin's son Chang Hsueh-liang, who took control of the Manchurian Government at Mukden on the 20th June, 1928(the day before the official date of his father's death); and the young general's association to power transformed the relations between Mukden and Nanking. When the Nationalist commanders congregated at Peking at the beginning of July, Chang Hsueh-liang sent them a friendly message; and when they destroyed the remnants of Chang Tsung-ch'ang's army in September, the Manchurian forces co-operated with them against their own former allies. Meanwhile, the Japanese Government had intervened.

"On or about the 18th July, 1928, the Japanese Consul-General at Mukden, upon being consulted by Chang Hsueh-liang, advised him to pause before coming to an agreement with the Nanking Government; and though this advice was given personally and unofficially, the Consul-General expressed the belief that his Government were of the same mind. This was borne out by a statement made by the Japanese Prime Minister, Baron Tanaka, in an interview with the representatives of foreign Governments at Tokyo on the 25th July; and something in the nature of an ultimatum was delivered to Chang Hsueh-liang in a personal interview on the 9th August by Baron Hayashi, who had been sent on a special mission to Mukden—nominally to attend the funeral of Chang Tso-lin. In this interview, Baron Hayashi was reported to have declared that the unification of Manchuria with the territories under the Kuomintang Central Government would jeopardize Japan's special interests, privileges and acquired rights in the three eastern provinces of China, and that for this reason the Japanese Government desired the Manchurian Government to adopt a waiting policy for the time being. The Baron was reported to

have added that, if Chang Hsueh-liang were to override Japan's wishes and to hoist the Kuomintang flag, Japan had decided to take a free hand to act on her own initiative. Chang Hsueh-liang appears to have shown recalcitrance; and the Japanese Government refrained from forcing the issue."

Japan thus gained nothing by Chang Tso-lin's death and nothing in what followed his death indicates any design on Japan's part.

But let us see the evidence brought in to supplement the Lytton Report in this respect. As I have noticed above the prosecution relied on the testimony of Baron OKADA, TANAKA Ryukichi and MORISHIMA Morita.

In its summation, the Prosecution introduces Baron Okada as the Navy Minister in the Tanaka Cabinet during whose office the incident took place. This may be slightly misleading as the information which this witness in his testimony claims to have obtained in this respect is not stated by him as having been received while he was such a minister. It should be remembered that after the fall of the Tanaka Cabinet, the Hamaguchi, the Wakatsuki, the Inukai and the Saito Cabinets came in in rapid successions, the last named Cabinet coming in on the 26th May 1932, nearly four years after the incident. Baron Okada was Navy Minister in this cabinet also and whatever knowledge he claims to have of this incident he states as having been obtained by him while in this Saito Cabinet. Perhaps the incident remained equally shrouded in mystery during the lives of the earlier cabinets. Baron Shidehara of the Hamaguchi Cabinet, and Premier Wakatsuki have been examined in this case on behalf of the Prosecution. But apparently they had no knowledge of this plotting. At least they did not tell us anything about it. Inukai Ken, son and secretary of Premier Inukai, has also been examined by the prosecution. He too did not give us anything in this respect.

The testimony of Baron OKADA comprises his statements made out of court and presented to us in the form of two affidavits and his cross-examination in Court. These affidavits are exhibits 175 and 176 in this case. Exhibit 175 purports to relate to the Manchurian Incident. The other affidavit is stated by the prosecution to relate to another phase of the case.

In his first affidavit the witness states the following:

1. During 1927 and 1929 Japan claimed to have acquired by treaties, agreements, etc., substantial rights and interests in Manchuria.
2. (*a*) It was the policy of the Tanaka Cabinet to expand and develop such rights and interests to the fullest possible extent through collaboration with Manchurian authorities.
   (*b*) (*i*) In connection with this program, Tanaka planned to collaborate with and use Chang Tso-lin, who was then Marshal and *defacto* ruler of Manchuria.
   (*ii*) Tanaka's bargaining and trading power with him lay in the support which Japan might lend to the maintenance of his position of leadership in Manchuria.
   (*iii*) In 1928, when the armies of Chang Tso-lin suffered defeat at the hands of the Kuomintang Army, Tanaka advised him to withdraw his armies into Manchuria

before it was too late.

(*iv*) Chang Tso-lin was obliged to take this advice and was returning to Manchuria when he was killed.

3. (*a*) The Japanese Army in Manchuria with headquarters at Mukden under General Honjo had become dissatisfied with the Tanaka Policy of collaboration and negotiation with Chang Tso-lin.

(*b*) (*i*) They did not want to wait on negotiations and were impatient to employ force to occupy Manchuria.

(*ii*) A clique or group of officers in this Army, which had completely isolated General Honjo and shut him off from communication with the affairs of the Army, planned and plotted the murder of Chang Tso-lin upon his return to Manchuria.

(*iii*) They arranged on June 4, 1928 that the train in which Chang Tso-lin was travelling from Peiping to Mukden should be wrecked by explosives placed on the track just outside Mukden.

(*iv*) Chang Tso-lin was killed in this wreck as planned.

(*c*) This incident represented the first overt army move to project itself into the formulation of the policies of the Government.

(*d*) The occurrence greatly embarassed and prejudiced the program of the Tanaka Cabinet with respect to Manchuria and created a crisis which ultimately resulted in its resignation on July 1, 1929.

4. (*a*) After the murder of Chang Tso-lin, the influence of the Army in so far as participation in the formulation of policy on the part of the Government with respect to Manchuria was concerned grew progressively stronger.

(*b*) The Army policy was that the Manchurian problems could never be solved short of the use of force to establish a Japanese puppet government there.

5. (*a*) In the early part of 1931, the witness received many reports that the Army was planning an occurrence which might be made the basis for the occupation of Manchuria.

(*b*) Simultaneously, Shumei OKAWA was conducting a propaganda campaign consisting of public speeches and publications to the end of building up a public sentiment in support of such a movement on the part of the Army.

(*c*) (*i*) WHEN IN 1932 the witness came into the Saito Cabinet as Minister of the Navy he learned that the occurrence which came to pass on the night of September 18, 1931, was plotted and arranged by THE CLIQUE in the Kwantung Army.

(*ii*) The witness is definite that Shumei OKAWA was identi-

fied with this movement on the part of the Kwantung Army at that time. There were many young officers in the Kwantung Army also involved. The witness did not recall the names.

6. The Army during these years was completely out of control of the Government and no restraint could be placed upon it. (By Army he means only some of the younger officers.)
7. After the occupation of Manchuria, the Kwantung Army was the real Government there, although the so-called independent government was set up in Manchuria in the early part of 1932 whose independence was supposedly recognized by Japan in September of that year.

In his second affidavit the witness said:

1. Beginning around 1928, there was a general tendency in the Army to expand on the Continent of Asia.
2. (*a*) General Tanaka, the then Prime Minister, had completed a plan regarding the continent and sent a representative to Manchuria to obtain from Chang Tso-lin important railroad concessions for opening up new lines.
   (*b*) (*i*) This could be done only if a condition of peace prevailed in Manchuria.
   (*ii*) In order to maintain peace, Tanaka felt that it was important that Chang Tso-lin should be kept in Manchuria and not in Peking.
   (*iii*) Therefore, in order to prevent civil war in Southern Manchuria, Chang Tso-lin started for Mukden and on the way was killed by the blowing up of a railway bridge.
3. (*a*) Tanaka suspected the Kwantung Army and wanted to punish the culprits. As he failed, he resigned.
   (*b*) The Kwantung Army proved by this event that it was more powerful than the Japanese Government in Tokyo.
4. The power of the Army went on increasing until the AIZAWA Affair of 1935 proved how powerless the Prime Minister was: This time the witness, himself, was the Prime Minister.
5. On February 26, 1936, a revolt of the Army took place. The witness' cabinet resigned on account of this Army insurrection.

This affidavit is of earlier date.

The prosecution explanation of the two affidavits is that they were taken to represent two different phases of the case.

This affidavit, however, gives the same story though very vaguely here and very definitely in the other.

The witness in his cross-examination disclaimed any personal knowledge of what he stated about the murder of Chang Tso-lin. He stated that in 1932 while he was Navy Minister in the Cabinet of Admiral SAITO a full investigation of the matter was carried out and his knowledge was based on the infor-

mation obtained during that investigation. The witness says: "I had this matter investigated as Navy Minister during the SAITO Government, and I am confident as to the accuracy of the result of that investigation." When asked to state the basis of his findings the witness failed to give any, and stated "I am just speaking of these things only from my memory."

It will appear from the above analysis that this witness did not name any particular officer as connected with the murder of Chang Tso-lin. He made no immediate investigation into the matter. He is giving us the result of his investigation held some four years after the incident. He cannot tell us the character of the materials disclosed to him by this investigation. What he says about the incident being the first overt army-move to project itself into the formulation of the policies of the government, is only his opinion. It is not any evidentiary fact which can help us in the formation of our conclusion.

Opinions, in so far as they may be founded on no evidence or illegal evidence, are worthless, and in so far as they may be founded on legal evidence tend to usurp the functions of the Tribunal whose province alone it is to draw conclusions of fact or law. Unless we are prepared to allow this usurpation and accept his own conclusions without troubling ourselves as to the character of the materials on which such conclusion might be based, this evidence must be rejected as worthless for our present purposes.

Next comes the witness TANAKA Ryukichi whose services were freely requisitioned by the prosecution to fill in all possible gaps in its evidence. Here is a man who seems to have been very much attractive to every wrong doer of Japan who after having committed the act, somehow and sometime sought out this man and confided to him his evil doings.

In Manchukuo, IN 1935 Colonel Kawamoto told him all about his plan of and hand in the Chang Tso-lin murder and in that connection gave him every detail of his own policy regarding Manchuria.

Captain Ozaki met the witness in Tokyo IN 1929 and told him that he had issued a mustering up order at the command of Colonel Kawamoto but that he was reprimanded by the Chief of Staff of the Kwantung Army, Saito.

Captain Cho in June 1932 told him in Shanghai that the purpose of the Sakura-kai was two-fold: one, to carry out an internal revolution or renovation, and, second, to settle the Manchurian Problem.

Captain Cho and Lt.-Col. Hashimoto (accused) told him that "the Manchurian incident was a planned incident" and that it was planned by the Chief of the Second Division of the Army General Staff, the then Major General Tatekawa, the leader of the Sakura-Kai, the then Lt.-Col. Hashimoto (accused), among civilians, a group under the leadership of Okawa Shumei (accused), the leaders in the Kwantung army, the then Col. Itagaki (accused), the Chief of Staff and Lt.-Col. Ishihare, the Deputy Chief of Staff.

The then Lt.-Col. Hashimoto communicated these matters to the witness "at the Akebono-So Restaurant in Kojimachi Ward in Tokyo in the fall of 1934". On that occasion Hashimoto also told him that he and Captain Cho

planned the October incident that had failed.

Dr. Okawa had talked with the witness both before and after the Manchurian incident. In the summer of 1930 Okawa told the witness his plan about Manchuria and in November 1934, at Dr. Okawa's house at Meguro, Tokyo, he told the witness that the Manchurian incident was a planned one. Dr. Okawa also confessed to him what part he took in propagandizing that Manchuria must be placed under Japanese control. Accused Itagaki told him in June 1930 that Manchuria should be placed under Japanese control by all means. After the Mukden incident also the witness had talked with Itagaki. Itagaki told him nothing about the plan but told him how and why two heavy guns had been set up in Mukden prior to that incident. Itagaki told him this "in the fall of 1935". The witness was very careful in addressing Itagaki as "His Excellency, General Itagaki", all through his testimony.

The witness had talked with Tatekawa also both before and after the Mukden incident. In 1929 Tatekawa told him that Manchuria should be placed under Japanese control. IN 1934 "His Excellency Tatekawa" told the witness that he "both expected and supported the Manchurian incident." He further told the witness "that General Minami, War Minister had told him to stop the incident at all costs but that it was his (Tatekawa's) own desire not to stop it. General Tatekawa further told the witness "that he had arrived in Mukden in the evening of September 18; that the Kwantung Army, thinking that he had come to stop the Incident had brought him to a restaurant in Mukden to isolate him."

I need not multiply examples of such confessions to the witness. It will not be an exaggeration to say that his entire testimony is practically based on knowledge thus obtained. I shall have occasion to refer to such statements from time to time almost in every phase of this case.

I must confess I was not favourably impressed with this witness, and it will not be possible for me to accept his statement that the plotters of the Chang Tso-lin murder, of the Mukden Incident, of the other sinister incidents of the period, all came to him and confessed their heinous acts. His evidence is that Captain OZAKI after executing the plan told him in 1929 what he had done and further disclosed that what he had done, he had done at the command of Colonel KAWAMOTO. This Colonel KAWAMOTO also found out the witness in 1935, some seven years after the incident to tell him that it was he who planned the murder of Chang Tso-lin. 1935 seems to be a safe date; for, otherwise one might ask why TANAKA Ryukichi who seems to be so ready voluntarily to give out the truth now, was not so minded when the Lytton Commission was holding its enquiry. The other source of this witness's knowledge became available to him in 1942 when he was Chief of the Military Service Bureau and when the war office was being moved from Miyakezaka to Ichigaya. Amongst the papers he found, obviously accidentally, a report prepared in August 1928, by Major General Mine, Chief of the Tokyo M. P. Unit. This report, of course, could not be produced before us. Baron OKADA certainly had no knowledge of this report. At least he never spoke about any such thing.

Perhaps in order to impress upon the Tribunal that this witness would know many things in course of his official duties, it was brought out from him by the Prosecution just at the commencement of his examination-in-chief that in the course of his official duties he had had occasion to make many investigations as to criminal actions on the part of army personnel and that in course of such investigations he had access to and custody of various documents as well as reports of the Japanese Military Police. He became Chief of the "Military Service and Discipline Bureau" of the War Ministry in 1940. Being asked whether the Bureau had had anything to do with investigations, the witness answered that one of the principal duties of the Bureau was to control and supervise morale and morals of the entire army. The witness also said that as Chief of that Bureau he had custody and control of the prior records of investigations made and filed with that Bureau. Then comes the story of the official investigation of the killing of Chang Tso-lin. But, it must be remembered, he had nothing to do with this investigation, which, according to his testimony, had taken place prior to August 1928. The official record and the report was, according to him, in the Bureau Record room. He came across the same, not in course of any other investigation, but purely casually and accidentally when "clearing up of various documents was conducted" at the removal of the office from one place to another in January 1942.

According to the witness (Tanaka Ryukichi) this official report was prepared by Major General Mine of the Tokyo Military Police at the order of the then War Minister and was made in August 1928. YOSHINORI Shirakawa was the then War Minister. We do not know where is this War Minister now. Baron Okada was the Navy Minister in that Cabinet. He has been examined by the Prosecution in this case and the Prosecution took two affidavits from him to be presented to us in evidence. In neither of them there is even the slightest suggestion about this report, though he spoke of an investigation held by him while he again came in as Navy Minister in the Saito Cabinet some four years after this incident. The War Ministers in the next cabinet, Generals Ugaki and Abe were examined by the Prosecution in this case. Even they were not asked a single word about this report.

According to this witness the report stated that the killing of Chang Tso-lin was planned by Senior Staff Officer, Kwantung Army, Colonel Kawamoto. The report, according to the witness, purported to say: "This incident had no connection whatsoever with the Commander-in-Chief of the Kwantung Army at the time. The Kwantung Army, in accordance with the policy of the TANAKA Cabinet to secure an early settlement of Manchurian problems, endeavoured to disarm Chinese troops retreating from Mukden in the direction of Peiping and Tsientsin, in the direction of Kinshu, or Chinchow. The purpose was to get rid of Marshal Chang Tso-lin and to set up a new state separated from the Nanking Government with Chang Hsueh-liang as leader ....." "However, this plan was banned by the TANAKA Cabinet later. However, Colonel KAWAMOTO, still true to his own purpose of setting up an area of peace and order in Manchuria, endeavoured to get rid of Chang Tso-lin and set up Chang Hsueh-liang in his place ..." The dynamiting to

blow up the train was carried out by the officers of the 20th Engineer Regiment which had come to Mukden from Korea. "At this time Captain UZAKI, Staff Officer of Colonel KAWAMOTO tried to return the fire which was opened by the personal bodyguards of Chang Tso-lin. At that time the plan was an immediate mustering of the forces but this mustering of the forces—Kwantung Army forces—was stopped by Chief of Staff of the Kwantung Army, Lieutenant General SAITO. . . ."

The report, we are told, is not now available. We do not know on what materials it might have been based, if there was any such report at all. If based on any legal evidence why should we not be given that evidence so as to see if we can come to the same conclusion. If not based on any legal evidence, it is absolutely worthless as a piece of evidence in our case.

The report, we are told, said something about the policy having been banned by the Tanaka Cabinet. Why could not the Prosecution get anything about this from its witness Okada who was a member of that Cabinet?

In another part, General Saito, the then Chief of Staff of the Kwantung Army, is named. This General Saito could have been examined by the Prosecution.

As usual, Colonel Kawamoto himself, according to this witness, confessed to him in Manchukuo in 1935. The Colonel was still alive when Tanaka was being examined and according to Tanaka, was in Taiyuan, Shansi Province, China. We are not told why he could not be produced before us by the Prosecution. Apparently he was under the allied control. Even Tanaka says that Colonel Kawamoto told him that "it was a plan of his alone".

It may be noticed in this connection that though this witness gave evidence in Japanese his examination-in-chief took place in court. Perhaps this was so, because even the Prosecution could not anticipate how often and on which matters his evidence would be required. The defense, of course, could not have anticipated what the witness would say on any particular topic.

I shall come back to this evidence while considering the Mukden incident and shall show that it has not even the slightest guarantee of trustworthiness.

I am afraid I am unable to base any reliance on such evidence of this witness. Of course, excepting connecting certain named officers of the Kwantung Army with the murder of Chang Tso-lin, the evidence, even of this witness, would not have carried us further.

The testimony of MORISHIMA is claimed by the prosecution as corroborating the above testimony. This witness was not yet at Mukden in June 1928 when the incident took place. His source of information is best disclosed in his deposition where he says: "The explosion incident concerning Chang Tso-lin was a very important matter for the Consul at Mukden. As a result after my arrival at Mukden, *I heard* from various very wide sources concerning this incident." Then he says that at least two of his sources were exceedingly accurate. He heard from Captain TOMIYA who participated in this incident and from a very influential Chinese politician. I am afraid this evidence is no better than what we had from TANAKA Ryukichi.

In my opinion, the incident remains shrouded in mystery as before. At

any rate it remains an isolated incident without any connection whatsoever with any program, plan, design or conspiracy with which we are concerned in this case.

I would now take up the Mukden Incident of September 18, 1931.

Coming to this incident the Lytton Commission concluded with the following observations:

"Tense feeling undoubtedly existed between the Japanese and Chinese military forces. The Japanese, as was explained to the Commission in evidence had a carefully prepared plan to meet the case of possible hostilities between themselves and the Chinese. On the night of September 18th-19th, this plan was put into operation with swiftness and precision. The Chinese, in accordance with the instructions referred to on page 69, had no plan of attacking the Japanese troops, or of endangering the lives or properties of Japanese nationals at this particular time or place. They made no concerted or authorized attack on the Japanese forces and were surprised by the Japanese attack and subsequent operations. An explosion undoubtedly occurred on or near the railroad between 10 and 10:30 p.m. on September 18th, but the damage, if any, to the railroad did not in fact prevent the punctual arrival of the southbound train from Changchun, and was not in itself sufficient to justify military action. The military operations of the Japanese troops during this night, which have been described above, cannot be regarded as measures of legitimate self-defense. *In saying this, the Commission does not exclude the hypothesis that the officers on the spot may have thought they were acting in self-defense.*"

The Chinese instructions referred to in the above extract were contained in a telegram from Marshal Chang Hsueh-liang dated the 6th September 1931 which was shown to the Commission at Peiping and of which the text was as follows:

"Our relations with Japan have become very delicate. We must be particularly cautious in our intercourse with them. No matter how they may challenge us, we must be extremely patient and never resort to force, so as to avoid any conflict whatever. You are instructed to issue, secretly and *immediately*, orders to all the officers, calling their attention to this point."

The Lytton Commission seems to have attached some weight to the fact that the Japanese were better prepared than the Chinese when hostilities began on the night of September 18. The Prosecution also lays much stress on this fact. While such an appraisal of the relative preparedness at the time the incident took place may in general be of some value in determining the aggressor, it is of doubtful significance in the present case in view of its special circumstances. Remembering the tense situation and high feeling preceding the incident, and keeping in view the relative military strength of the parties in the locality, this preparedness on the part of Japan is nothing unusual and may indicate nothing beyond efficient farsightedness and vigilance on the part of the army authorities. Of course the relative efficiency of the combatants after the commencement of the hostilities would not have much bearing on the pre-

sent question. Military efficiency may exhibit some correlation with aggressiveness, but it is at least doubtful whether such correlation is sufficient to justify the conclusion that the more efficient and vigilant belligerent is invariably to be branded as the aggressor.

That there was sufficient cause for apprehension of sudden outbreak of hostilities is amply indicated even in the telegram of the Chinese Marshal referred to above. The Chinese side might have taken the precaution of the character indicated in the instructions conveyed in the telegram. But it is not the case of the prosecution that this instruction was the result of any mutual understanding of the parties; and there is no reason why the Japanese authorities might not have *bona fide* considered preparedness and vigilance to be the wiser course dictated by the gravity of the situation created by the then existing anti-Japanese feeling.

Further, if we are to build on this apparent military preparedness of the Japanese side, we must not ignore any possible preparedness on the Chinese side in some other respects. Preparedness, after all, depends upon what the party may be preparing for. The Chinese side might have been conscious of their relative weakness in military strength and therefore instead of counting upon their own military resources, might have counted upon international intervention for the solution of their Japanese difficulties in Manchuria. They might not have been inadequately prepared for securing such international intervention.

The slightness of the damage rather goes against the theory of Japanese plotting and is more in keeping with its having been planned by the party which might have been preparing for third party decision. If Japan would plot the incident, she would do so only to create for the world a justification for her subsequent action. The Japanese plotters certainly could be credited with this amount of sense that they would realize that the world opinion in this respect would largely depend upon the magnitude of the damage caused. They themselves being the plotters and there being no possibility of their suddenly facing any obstruction from any quarters, they might be expected to have done the destruction more nicely. As it is now revealed in evidence, the execution of the plan, whosesoever plan it might have been, was done rather hurriedly and stealthily. As executed, the plan seems to be more consistent with the theory of its having been hatched for the purpose of driving some excited group to rash action, and then, on the strength of such action, seeking redress from international organization.

I am saying this only to show the difficulty in drawing any conclusion against Japan from the mere circumstance of her relative preparedness. If military preparedness point to any hypothesis at all, here is another hypothesis, perhaps not less rational; and unless this could be excluded, any conclusion based on the hypothesis based on the relative preparedness would be defective.

This hypothesis is not in any way less rational than the other. If Japan entertained a strong desire to expand in Manchuria, China also was not less desirous of excluding the Japanese altogether from that country and freeing

Manchuria of every vestige of Japanese interest. If Japan was confident of her military strength and therefore might have designed realization of her desire by force, China too had reason to be confident of favourable international intervention and therefore, might have designed realization of her desire through such intervention. If subsequent military success of Japan can show retrospectantly that she was counting upon such achievements and was therefore, designing for the same, subsequent success of China in getting international decisions in her favour might have equally retrospectant significance. The incident itself with its insignificant character rather goes in favour of Japan as I indicated above.

No one would have accused the Chinese authorities of any miscalculation if they counted upon any favourable international intervention. The attitude of the other Powers of the World Power Politics towards Japan since the termination of the first World War might not have failed to produce some effect on Chinese mind in this respect. I have given elsewhere Japan's position in international relations since that war. The Survey of International Affairs for 1920-23 states how the statesmanship and the diplomacy of English speaking powers "step by step maneuvered" Japan out of what had seemed her impregnable positions. "Adroitly and differentially she was induced to play a distinguished part in undoing the work of her own hands". China too had occasion to participate in this maneuver. "The refusal of the Chinese Government to sign the Versailles Treaty was given significance by the refusal of the United States Congress to ratify it."

I am mentioning this at this stage not to say which side was right and which wrong. I am simply pointing out, in support of the hypothesis advanced by the Japanese that the Mukden incident was engineered by the Chinese, that even by the absence of military preparedness on the part of China the hypothesis is not altogether excluded.

As regards the ultimate decision which China succeeded in obtaining in her favour in this respect, third party critics were not wanting who viewed the decision of the League as calculated to give rise to "the feeling that Europe did not care a straw about Japan's special difficulties or about the essential merits of the dispute." Some even considered the decision to have been provoked only by "annoyance because Japan had upset Geneva's apple cart".

I am not, in the least, justifying these observations. On the contrary, I would most emphatically condemn such views. But we are now only on a question of hypothesis.

The prosecution adduced some additional evidence to supplement the Lytton Report.

In its summation, at pages from D19 to 139, the prosecution ably and lucidly presented the reconstructed picture of the alleged conspiratorial events forming parts of the conspiracy charged in Count 1, and, leading to the Mukden incident. The salient features of this picture should be observed with care and caution.

The following features in this picture as depicted by the Prosecution

would demand our special attention:

1. Murder of Chang Tso-lin was "the first precipitate attempt to obtain forcible possession of Manchuria".
   (*a*) The attempt failed.
   (*b*) (*i*) This failure resulted in another failure of the conspiracy by bringing about the "downfall of the TANAKA Cabinet and the abandonment of the TANAKA policy of obtaining Japan's desires in Manchuria" though "by peaceful means".
   (*ii*) The accession of the HAMAGUCHI and the WAKATSUKI Cabinets on the failure of the TANAKA Cabinet meant revival of the friendship policy.
2. The conspirators were (1) the Army in Japan, (2) the Kwantung Army and (3) Civilians.
   (*a*) The following were named by the Prosecution as the then conspirators:
   (*i*) In the General Staff, General Tatekawa, who was the leader there;
   (*ii*) The Lt.-Colonels and Majors who in October 1930 were in the War Office, the General Staff and the Office of the Inspector General of Military Education and who organized the Sakura-Kai.
   (*iii*) Accused Hashimoto under whose leadership the Sakura-Kai was organized.
   (*iv*) Lt.-Colonels Sakata, Nemoto, Hashimoto, Tanaka, and Captains Cho and Tanaka, who in January 1931 drafted a concrete plan.
   (*v*) Accused Minami and Koiso: Minami's character as a conspirator became known when he on July 1, 1931, as War Minister, discussed Manchurian-Mongolian Problems with officials of the South Manchurian Railway: the sinister statement of Minami which revealed himself as a conspirator was "that the army had long recognized the need for increasing its divisions in Korea and that he *hoped* the day would come when more divisions would be sent." The other sinister speech revealing his character was the one made by him on August 4, 1931, to the division commanders in which he stated that Manchuria and Mongolia were closely related to Japan's national defense as well as to her politics and economics.
   (*vi*) Itagaki (accused), Ishihara and Hanaya, all staff officers of the Kwantung Army—who became definitely identified with the leadership of the group in the Kwantung Army desiring to take over Manchuria.
   (*vii*) Dr. Okawa Shumei, who had previously written two

books in which he had preached the doctrine that it was unavoidable to have a 'deathly' fight between the Powers of the East and of the West and that Providence was trying to elect Japan as the champion of Asia, and who was now plotting and carrying on propaganda for purposes of realizing the object of the conspiracy.

(*viii*) Koiso, Itagaki, Dohihara, Tada and others, who became intimately acquainted with Dr. Okawa.

(*ix*) Ninomiya, Deputy Chief of Staff, Shimizu, a henchman of Okawa; Sugiyama, Nagata, Ikeda, Shigeto and Cho.

(*x*) General Miyake, Chief of Staff of the Kwantung Army.

(*xi*) Colonel Kawamoto and Captain Ozaki of the Kwantung Army.

(*xii*) Lt. Kawakami stationed at Fushun.

3. (*a*) The conspirators, despite the above failures, did not abandon their project: "they used the next two years to plot, plan and agitate for the *next step* in their conspiracy.

(b) "The plotting and planning

(*i*) followed so closely upon the murder of Chang Tso-lin, and

(*ii*) involved *so many of the same people* who were later involved in the Mukden Incident"

that the conclusion is inescapable that all the activity during the period from the murder of Chang Tso-lin until Mukden Incident was all part of one conspiracy.

(*c*) "The activity from 1929 on, involving many of the same persons as were involved in the Mukden Affair, including *some* of the present accused, was *definitely* part of the conspiracy charged and had as its purpose the furtherance of that conspiracy."

4. The conspiracy was conceived of, planned and advanced since 1929 in the following manner:

(*a*) In 1929 while serving in Peiping General TATEKAWA conceived that Manchuria should be placed under Japanese control and made into a state self-sustaining except for oil.

(*b*) (*i*) He communicated this to TANAKA Ryukichi and sent him to Manchuria to investigate.

(*ii*) TANAKA reported that this plan was not feasible.

(*iii*) Undaunted by this report, Tatekawa expressed his determination that efforts should be made to make Manchuria self-sustaining and that for this purpose Manchuria was to be seized by Japan.

(*iv*) In April 1929 at a conference of the chiefs of staff *a plan* for establishing self-sufficiency in Manchuria was

distributed to the chiefs of staff to impress upon them the fact that Manchuria was Japan's life line.

(*c*) (*i*) In 1929 the investigation section of the Kwantung Army was found insufficient to probe into the resources of Manchuria.

(*ii*) In an effort to enlarge the China and Manchuria investigation section of the War Ministry, the general investigation section was created on April 1, 1930.

(*d*) (*i*) In October 1930, "the Sakura-Kai" was organized.

(*ii*) The purpose of the society was national reorganization for the attainment of which the society was ready to use armed force: *One purpose of the organization was* TO SETTLE THE MANCHURIAN PROBLEM.

(*iii*) "In January 1931, work had begun on the drafting of a concrete plan."

(*e*) (*i*) On July 1, 1931, War Minister MINAMI and the War Ministry were favouring military action in Manchuria.

(*ii*) On August 4, 1931, MINAMI in a speech to the division commanders expressed his hope that in view of the situation in China, the commanders would carry out their duty of educating and training troops so that they could serve His Majesty's cause to perfection.

(*iii*) MINAMI was thus putting the divisional commanders against the politicians in a political dispute.

(*f*) (*i*) In the Kwantung Army, from the fall of the Tanaka Cabinet until late summer of 1931 the influence of the group desiring to take over Manchuria increased.

(*ii*) Itagaki, Ishihara and Hanaya, all staff officers of the Kwantung Army, became definitely identified with the leadership of this group.

(*iii*) They felt that the use of armed forces was necessary to preserve Japan's interests and they wanted to occupy Manchuria and establish a government separate from China.

(*iv*) This determination to use force became progressively stronger throughout the summer of 1931 and it was evident by the end of summer that it was only a matter of days until the Army would move in Manchuria.

(*g*) (*i*) While the army was busily preparing for its move into Manchuria, Dr. Okawa Shumei was plotting and carrying on propaganda for purposes of realizing the object of the conspiracy. The propaganda stressed Japan's particular position in Manchuria.

(*ii*) "Through co-operation with the Kwantung Army Okawa had done his best to further background operations."

(*iii*) This co-operation between Okawa and the Japanese Army shows CLEARLY that their aim was not limited to obtaining Manchuria.

(*iv*) As early as 1924 Okawa had openly espoused the ideas of Sato Shines who had advocated world conquest.

(*h*) (*i*) Internally, there was still one serious obstacle to the easy accomplishment of the conspiracy—the duly established government of Japan.

(*ii*) The Hamaguchi Cabinet was in power. Even more important, due to attempted assassination of Hamaguchi, Foreign Minister Shidehara, the hated exponent of the 'Friendship Policy' was acting Premier.

(*iii*) The conspirators conceived of and proceeded to execute a plan for seizing the government.

(*iv*) This effort became known as the March Incident. Amongst others Tatekawa and Koiso were among the plotters of this incident.

(*v*) The Manchurian incident was the motive for the March incident.

(*i*) Though the plot relating to the March incident became abortive, the movement to take over Manchuria continued with increasing vigour.

(*i*) Rumours and information about a plot on the part of the military officers in Manchuria began to reach Tokyo.

(*ii*) Shortly prior to the outbreak of the Mukden incident, the tension increased and there were reports of imminent action in Manchuria.

(*iii*) On September 15 or 16, 1931, Shidehara received a cable reporting that the Commander of a patrol unit had stated that within a week a big incident would break out and Shidehara protested to Minami.

(*iv*) Minami immediately sent *Tatekawa* as a special emissary to Mukden to stop the action at all costs.

(*v*) Tetekawa reached Mukden on the 18th September.—General Miyake, the chief of staff of the Kwantung Army sent Itagaki to meet Tatekawa. The two met; but Tatekawa did not deliver the message.

5. The incident took place that very night and gradually spread leading to the occupation of Manchuria.

6. In October the conspirators dissatisfied with the Government's policy and regarding it as the one obstacle to carrying out the conspiracy, again planned to seize the control of the government. This move became known as the October Incident.

(*a*) On December 10, 1931 the WAKATSUKI Cabinet resigned, failing to bring the spread of the Manchurian Incident un-

der control.

This is apparently formidable array of sinister events. Let us see which of them can be accepted as established by evidence in this case and what is their probative relation to each other and to the over-all conspiracy alleged in this case.

I can at once say that the following have been established to the extent indicated below:

1. The factum of the murder of Chang Tso-lin has been established.
2. The downfall of the TANAKA Cabinet and the accession of the HAMAGUCHI and the WAKATSUKI Cabinets in succession have been established.
3. The establishment of the General Investigation Section of the War Ministry on April 1, 1930.
4. The organization in October 1930 of the Sakura-Kai. (Exh. 183, R. P. 2,189).
5. (*a*) Admittedly on July 1, 1931 War Minister MINAMI stated that the Army had long recognized the need for increasing its divisions IN KOREA and that he hoped the day would come when more divisions would be sent. (Exh. 2, 202-A, R. P. 15,752).

   (*b*) On August 4, 1931, MINAMI made a speech to the division commanders in which he stated that Manchuria and Mongolia were closely related to Japan's national defense as well as to her politics and economics, and that it was to be regretted that the situation in China was following a trend unfavourable to Japan. He then stated that he hoped that in view of this the commanders would carry out their duty of educating and training troops so that they could serve His Majesty's cause to perfection. (Exh. 186, R. P. 2,209).
6. (*a*) Dr. OKAWA Shumei had written two books in which he had preached the doctrine that it was unavoidable to have a "deathly" fight between the powers of the East and of the West and that the Providence was trying to elect Japan as the champion of Asia. (Exh. 2,179-A, R. P. 15,605-09; Exh. 2,180-A, R. P. 15,610-11).

   (*b*) Dr. OKAWA espoused the ideas of SATO Shinen who some two hundred years ago advocated that Japan should first absorb China, then obtain the whole South Sea area so as to prepare for the Northward advance in England and then obtain control of India and Indian Ocean. (Exh. 2,183-A, R. P. 15,632-33).
7. The HAMAGUCHI and the WAKATSUKI Cabinets followed the friendship policy.
8. The plot which was known as the March Incident was organized and in it accused HASHIMOTO did participate.

9. (*a*) TATEKAWA was sent as a special emissary to Mukden to stop the rumoured incident.
   (*b*) TATEKAWA reached Mukden before the incident, met ITAGAKI but did not communicate to him his special message and did not do anything towards preventing any possible incident.
10. That the incident took place during that very night.
11. That the October incident was planned.

I have already considered the incident resulting in the murder of Chang Tso-lin and have pointed out that it had absolutely no connection with the alleged conspiracy, and that the tragedy still remains shrouded in mystery.

As regards the TANAKA Cabinet, the prosecution started by saying that its policy was an aggressive one. The Prosecution asserted that "during the period from April 1927 to July 1929, under the Ministry of Prime Minister Tanaka, Japan followed the Positive Policy which rested upon *military force* with respect to Manchuria." But coming to the incident of Chang Tso-lin's murder the Prosecution told us that "it was the policy of the Tanaka Cabinet to expand and develop Japanese rights in Manchuria to the fullest extent by collaborating with, aiding and using Chang Tso-lin".—"It was the policy of Tanaka to advance PEACEFULLY into Manchuria and then by degrees into China." This change in the characterization of Tanaka policy became necessary in order to introduce the theory of dissatisfaction and disagreement of the Army with that Policy. I shall come to this presently.

But whatever might have been the Tanaka Policy, there is nothing reliable on the record to substantiate the Prosecution case that the army or any group of army officers was dissatisfied with this policy and planned in any way to get rid of this policy and to bring in a Cabinet with a more favourable policy. I have discussed this matter while considering Chang's murder. In my judgment there is absolutely nothing on the record in any way to connect the murder of Chang Tso-lin or the consequent fall of the Tanaka Cabinet with any design, plan or conspiracy even to occupy Manchuria, not to speak of the whole of China or the whole world. The prosecution assertion that this murder was the "first precipitate attempt to obtain forcible possession of Manchuria" is absolutely without any foundation. There is nothing even to show that the designers or the plotters of the murder also designed, plotted or planned, or even contemplated the elimination of the Tanaka policy or the Tanaka Cabinet.

Coming to the list of the alleged conspirators built up by the Presecution, we find the same difficulty. The evidence does not bear even a cursory scrutiny and it is difficult to believe that any one could have founded this reconstruction on any genuine belief uninfluenced by any strong desire.

The material for the reconstruction of the list of conspirators is mainly supplied by the testimony of Tanaka Ryukichi. This witness again, as usual with him, derives his knowledge entirely from the voluntary confessions of the alleged conspirators.

Captain Uzaki in 1929 and Col. Kawamoto in 1935 confessed to him as to their connection with the Chang Tso-lin murder incident. The now lost report of General Mine helped this witness in 1942 to discern the object of this murder and to connect it with the conspiracy charged in this case. But long before this, in 1935, he got this also from Kawamoto. The report named Col. Kawamoto and "ten some odd others" as the conspirators. Col. Kawamoto claimed the plan to be "of his own alone."

I have already stated why I cannot believe this witness. But apart from the question what reliance we can place on the testimony of a witness of this type, let us see what value it is possible to attach to the supposed statement of Kawamoto alleged to have been made to the witness. Is there any guarantee that this supposed statement would be trustworthy? Kawamoto was making this statement in 1935, when Manchukuo had already been established and had been a success. Kawamoto's statement certainly was not a confession urged by any consciousness of guilt, as at that time no one was looking upon the Manchurian project as anything wrong or criminal. There does not seem to have been any pressure of conscience in any of these cases. On the other hand, the incident had produced a result which, at that time, could well be looked upon as a matter of gratification for the authors thereof. Kawamoto's alleged statement, claiming the entire credit to himself and asserting how Manchukuo could have been long established had his plan been then followed to its full extent, smacks of bragging. The whole statement might thus have been the result of this bragging and absolutely false.

Captain Uzaki, of course, could not give any "purpose for the killing of the Marshal".

As regards the alleged report of General Mine, we do not know who else was named in it. The expression "ten some odd others" in the testimony of Tanaka does not help us in this respect. Further we do not know on what materials General Mine's conclusions in this respect were based.

Perhaps a word of warning is needed here. It may easily appear as if the Report and Kawamoto's alleged statement are corroborating each other. This might be so, if we could accept that the alleged statement of Kawamoto to the witness was truly made and that the contents of the report as given by the witness was truly there. But this does not in the least remove or diminish the difficulty that we are feeling in accepting the hearsay testimony of this witness.

The witness in course of his testimony, says that there was no advocacy of an independent state in Manchuria in 1930-31. But "when the situation had reached such a state that diplomatic negotiations were of no avail, it was the stand of members of the army that armed forces should be resorted to in driving out the Chinese forces from Manchuria and to set up a new regime under Japanese control, a regime of peace and order."

He named the then Major General Tatekawa, who at that time was Chief of the Second Division, General Staff as 'one of the very strong advocates of the above view'—he also named Dr. Okawa Shumei, as another advocate of the view. As to the other advocates of the view the witness said: "Others ad-

vocating this strongly *in 1930 and the spring of 1931* was my friend Hashimoto Kingoro, and Captain Cho Isamu, who *was* a member of the Sakura-Kai". He then "recalled" "that it was Colonel Itagaki, Chief of Staff, Kwantung Army, and Staff Officer Lt.-Col. Ishihara" were also the leaders of this policy.

Of course in naming these persons the witness did not mention any conspiracy, design, plan, agreement or combination among them. He simply said that they entertained the above view. From this evidence the prosecution chose to list them as conspirators. I do not see why the simple fact of entertaining a particular view should make them conspirators.

After saying that the Manchurian incident was a planned one, the witness named, as persons involved in this plan, General Tatekawa, Lt.-Col. Hashimoto, Captain Cho Isamu, and "a group under the leadership of Okawa Shumei". The witness also named the then Col. Itagaki and Lt.-Col. Ishihara Kanji. His knowledge in this respect is derived from what Captain Cho and Lt.-Col. Hashimoto told him.

General Tatekawa also disclosed everything to this witness, of course, in 1934 and gave out the names of the other persons involved in the plan.

Tanaka's knowledge in respect of this Mukden incident does not date before 1934. Each of the confessions he received in this respect, thus came to him after the Lytton investigation. This must be so; otherwise it becomes difficult to explain why such a lover of truth, who is now so much prompted only by his desire for giving out the truth, did not feel the same urge when that Commission was investigating the matter.

There might be another reason for this late date. These confessors had to confess all their doings so as to complete the chain of conspiracy. It might not look nice to claim that so many different persons approached this man repeatedly for repeated confessions.

I am not satisfied as to why these conspirators suddenly felt that urge for confession to this man at such distant dates from the incident. If their urge were caused by any feeling of self-gratification at the then success of the incident in Japan's political and economic life, there comes in the possibility of bragging on their part and to that extent their supposed statements fail to satisfy the condition of any guarantee of trustworthiness.

Of course those of such confessors who could be produced before the tribunal, denied ever having made such statements to the witness.

The prosecution in its summation sought to strengthen the evidence of TANAKA Ryukichi by referring to the testimonies of SHIMIZU and FUJITA. The prosecution says:

"Other witnesses have also testified to contemporaneous statements made by some of the conspirators. In August 1931, OKAWA told SHIMIZU that Cols. KOMOTO and ITAGAKI would bring about an incident sometime later on. In August 1931, both SHIGETO and HASHIMOTO told the witness FUJITA that positive action should be taken in Manchuria. On September 19,

when FUJITA, after reading about the Manchurian Incident, confronted SHIGETO with the statement that they had accomplished what they were contemplating in Manchuria, SHIGETO answered affirmatively. When he asked on the same day a similar question of HASHIMOTO, the latter replied that things had come to pass as they should."

According to prosecution "the testimony of TANAKA and others about the statements made by the conspirators in the course of the conspiracy with respect to their relations to the plan and its execution is corroborative of and is corroborated by other vital evidence which fully reveals that the incident was no minor, unexpected clash, but a bold overt move to seize Manchuria."

The most corroborative evidence relied on by the prosecution in this respect is TATEKAWA's conduct during his mission to Mukden to stop the incident. Before coming to this conduct let us see what we get from SHIMIZU and FUJITA.

The evidence of SHIMIZU is exhibit 157 in this case. The witness spoke about the March Incident and his association with Dr. OKAWA in that connection. After this the witness in his affidavit stated thus: "After the failure of the aforesaid March Incident I continued to see the aforesaid Dr. OKAWA from time to time at the Kinryutei Inn. One of these occasions in August when the aforesaid Dr. OKAWA was drunk with sake he told me that he and a certain Colonel KOMOTO Daisaku and a certain Colonel AMAKASU of the Kempeitai, together with Colonel ITAGAKI, Vice-Chief of Staff of the Kwantung Army, would bring about an incident in Mukden sometime later on. After the occurrence of Manchurian Incident in September, I was arrested and spent three months in jail."

This would suggest as if the witness had something to do with Mukden Incident but in his cross examination the witness said that his arrest and imprisonment after the Mukden Incident had nothing to do with that incident. If so, it is difficult to see why such misleading statement was taken in the affidavit at all.

It looks like catching at a straw in utter despair when we are called upon to rely on the aforesaid hearsay statement of this witness of what he got from OKAWA when he was drunk with sake. I have elsewhere referred to a prosecution document which evidenced Dr. OKAWA's testimony given in the Tokyo Court of Appeal in 1934 in which he gave clear indication of his belief that the Mukden Incident started with a genuine case of destruction of the railway line by the Chinese. At least he did not ascribe that matter to any plotting on the part of the Japanese. SHIMIZU in his evidence emphasized that the import of the March plot was purely domestic.

FUJITA's evidence is exhibit 160 in this case. After the incident of 18 September he met HASHIMOTO when the latter was very busy. Yet later on HASHIMOTO went to the witness's house, it seems, only to be questioned by the witness about the incident, to satisfy the witness by admitting his connection with the plot and then leave him saying "I am busy".

I would examine the corroborative conduct of TATEKAWA later on.

Accused MINAMI is named as a conspirator on the strength of the evidence relating to his statements of 1 July 1931 and 4 August 1931. I must confess, I could not discover any such serious thing in these statements. Exhibit 184 is a letter written to MINAMI on 6 August 1931 by certain members of the Citizen's Disarmament League wherein these members ascribed certain intention to these statements of MINAMI. I do not see how this is at all any evidence of that intention and how it is evidence of MINAMI's being a conspirator. The prosecution, of course, relies on this for this purpose. An intention certainly can be inferred from a person's expressions. But it is beyond my comprehension how such an inference drawn by certain citizens is evidence of that intention.

Even accepting the entire evidence at its face value the worst that can be said is that some of them had been connected with the murder incident, some with the Mukden incident, some with the March incident and some with the October incident. But from this to name them as conspirators in relation to the conspiracy charged is really begging the whole question.

The prosecution invites us to connect all these incidents as parts of the conspiracy charged on two grounds:

1. They followed closely upon each other.

2. They involved so many of the same people.

As I have pointed out above I am not satisfied with the evidence on the strength of which the prosecution claims to have established that 'so many of the same people' were involved in these incidents.

Even if these two propositions are accepted, I do not see why the conclusion becomes inescapable that "all the activity during the period was all part of the conspiracy". Such a conclusion, far from being inescapable, is not at all possible unless the mind is prepared to take pleasure in straining them a little to force them to form parts of the connected whole.

Prosecution relied on Exh. 2, 177-A to connect the March incident with the Manchurian incident. This is a copy of the testimony of Dr. OKAWA given in September 1934 in the Tokyo Court of Appeal at trial for the May 15th incident of 1932. The prosecution, in its summation, says that in his testimony Dr. OKAWA stated "that the Manchurian *Incident* was the motive for the March incident." The actual statement as evidenced by the exhibit, however, is somewhat different. The statement is: "This Manchurian *Problem* was the important motive for the March incident." In answer to a question, which, in part, was "The military group reportedly believe..... that enmity of America toward Japan, *in the long run*, may bring about a Japanese-American war and that *if* a Japanese American war is unavoidable, it would be held now. Is it so?" Dr. OKAWA said: "Yes. If a Japanese-American war is unavoidable, this war probably will be a protracted one. Since Japan will be confronted with the food and other economic difficulties, the Manchurian Problem should be settled before this. Therefore, the national life, we thought, should be reconstructed on an economic foundation made up of Japan and Manchuria as a unit to enable Japan to withstand a protracted war." "This Manchurian Problem was the important motive for the March

incident. . . ."

So this is very different from "the Manchurian incident". It should be remembered that this statement was being made in 1934, long after the Manchurian *incident*, and though the witness was confessing many things he never claimed the Mukden incident itself as a planned one. On the other hand he testified that on September 18, the destruction of the Manchurian Railway line at Lukow-chiao had occurred and with this as the beginning, the Manchurian incident began. The Japanese were able to take prompt action after the destruction of the Railway line because their mind was made up. I shall come back to this piece of evidence while considering the question of seizure of political power. For the present purpose I would only say that there is nothing in this document to connect the March incident with the Mukden incident and to characterize the Mukden incident itself as planned.

It would be of some importance to notice here that though Dr. OKAWA in his testimony as evidenced by this document named several other persons as connected with the several plots, planning and policies, he never mentioned TATEKAWA or KAWAMOTO.

But TATEKAWA is an essential link in the whole chain of the prosecution case relating to the Mukden incident.

The prosecution presents TATEKAWA's conduct during his mission to Mukden to stop the incident as a vital evidence which is corroborative of the "testimony of TANAKA and others about the statements made by the conspirators in the course of the conspiracy with respect to their relation to the plan and its execution."

On September 15 or 16, 1931, Baron SHIDEHARA received a cable reporting that the commander of a patrol unit had stated that within a week a big incident would break out in Manchuria. Baron SHIDEHARA communicated this to General MINAMI, the then War Minister. There is some dispute as to who selected TATEKAWA for the purpose. But let us assume for our present purposes that it was MINAMI who did so as the prosecution asserts. MINAMI immediately sent TATEKAWA as a special emissary to Mukden to stop the action at all costs. TATEKAWA was dressed in civilian clothes for this mission both in travelling and while in Mukden. He reached Mukden in the afternoon of the 18th September. ITAGAKI of the Kwantung Army met him toward evening and dined with TATEKAWA; and in course of the conversation, TATEKAWA said nothing except that he was tired from his trip. Admittedly TATEKAWA did not disclose his mission that evening and the incident took place during night. TATEKAWA had to come back without fulfiling his mission.

The prosecution says "the pleasant chat between ITAGAKI and TATEKAWA with ITAGAKI skillfully preventing the discussion of any item touching on the subject was a mutual conspiracy to keep silent on the vital matter, since both were aware that the breaking of the silence might bring the entire project to a premature end." Why? One may wonder! Both were conspirators. Both knew the project. Both desired that the project be executed. Only two conspirators were there. It is not suggested that there was any third

person present. Unless the walls had ears how could the project be brought to a premature end if to their pleasant chat they added a word or two about the mission of TATEKAWA and enjoyed a hearty laugh over the same?

If we do not start with the assumption that TATEKAWA was in the conspiracy and knew that the project was to be accomplished that very night there was nothing extraordinary why he did not communicate anything to ITAGAKI that very evening. If his conduct is consistent with his being a conspirator, it is equally explicable without his being in the conspiracy. I, therefore, fail to see how this conduct corroborates the hearsay evidence of TANAKA Ryukichi already discussed above. Acceptance of this conduct as a corroboration of hearsay evidence of the kind we got from TANAKA would, indeed, require a very strong measure of desire.

We have now before us the defense evidence on the point including the evidence of General MINAMI, one of the accused and the statement of General HONJO who left this statement before he committed suicide. We have also the deposition taken on commission of ISHIHARA, the then Staff officer of Kwantung Army. They all deny that the incident was planned by the Japanese. Even accepting the evidence of TANAKA and OKADA that the Mukden Incident of 18 September, 1931 was planned by some young officers of the Kwantung Army, I do not find any substantial evidence to connect any of the accused with that group or clique. The position in my opinion still remains as was found by the Lytton Commission. The incident might have been the result of a design on the part of some unknown army officers, yet those who acted on the strength of the incident might have acted quite *bona fide*.

The object of the alleged common plan is also mainly supplied by the testimony of TANAKA Ryukichi based on knowledge derived by the witness from the voluntary confessions of the conspirators themselves to him from time to time.

From the alleged report of the Major General MINE referred to above, the witness gets the following to be the object of Chang Tso-lin murder:

"The Kwantung Army, in accordance with the policy of the TANAKA Cabinet to secure an early settlement of Manchukuo problems, endeavoured to disarm Chinese troops retreating from Mukden in the direction of Peiping and Tsientsin, in the direction of Kinshu, or Chinchow. The purpose was to get rid of Marshal Chang Tso-lin and to set up a new state separated from the Nanking Government with Chang Hsueh-liang as leader; in other words, to create a new state under Japanese control, a state of peace and order which later became Manchukuo."

"The purpose was to create a new regime of peace, law and tranquillity of the north by separating that area from the Nanking Government, and also by getting rid of the war lords whose influence prevailed in Manchuria. Separate from the Nanking Government, which was conducting a punitive expedition into Manchuria."

From Colonel KAWAMOTO also, in 1935 the witness had the above object. Over and above that, KAWAMOTO told him "that if the urgent mustering up of the Kwantung Army had been carried out, then the Manchurian

Incident would have been carried out then." The Colonel also told him "it (the murder) was a plan of his own alone." The Colonel also said "that the purpose was to get rid of the war lords then prevailing in Manchuria and to create a new regime separated from the Nanking Government, a regime of peace and order under the leadership of Chang Hsueh-liang" .... and "that a new state must be set up in the area of Manchuria and separated from the Nanking Government to place that regime under Japanese control and leadership, and to develop the area within, and also to strengthen this new regime for purposes of Japanese national defense."

From his own knowledge derived in his capacity as a member of the General Staff Office and while carrying on investigation on Manchurian Problems in 1930-31, the witness said "that there was no advocacy" by any elements in the Army, "of an independent state in Manchuria, but when the situation had reached such a state that diplomatic negotiations were of no avail, it was the stand of members of the army that armed force should be resorted to in driving out the Chinese forces from Manchuria and to set up a new regime under Japanese control, a regime of peace and order."

From Dr. OKAWA the witness got the following:

"By all means Manchuria must be separated from the Nanking Government, and place the new area under Japanese control; to create a land founded on the principle of the kingly way—a land of peace, law and order."

Dr. OKAWA further said that "since the first part of the 17th Century Asia has been under constant western aggression by the white race, and that Asia is either colonial—has become a colonial area—or Asia's territories has become either colonial or semi-colonial .... Outside of the people of Japan all the people of Asia are now suppressed and oppressed people..... After setting up an independent Manchuria a relationship—an inseparable relationship should be established between Japan and Manchuria, and that with the growth of Japan's national strength, Japan as leader of the peoples of Asia endeavoured to drive out the white race from this area, to bring about the emancipation of Asiatic peoples, and also to bring about the revival of Asia."

Dr. OKAWA further told the witness "that he had gone to Manchuria in the first part of 1930 to talk with Chang Hsueh-liang and had proposed this idea of his to the young Marshal. But Chang Hsueh-liang showed no desire whatsoever nor any agreement of OKAWA's plan. That being the case, in the light of the fact that Sino-Japanese relations had been so aggravated at that time, ... the only way to bring about the fulfilment of that ideal was by force of arms."

So, according to this statement, "the force of arm" idea came after this interview in 1930.

In 1934 Dr. OKAWA told the witness "that the independence of Manchuria, which he had as an ideal since his youth, was the first step in the emancipation of Asia."

In the same year (1934) HASHIMOTO told the witness that "the Manchurian Incident was planned by the Kwantung Army and that he, in ac-

cordance with this plan, would assist and support the Incident and by that means endeavour to bring about a renovation of internal politics in Japan, which at that time was extremely corrupted. He also said that he and Captain CHO had planned the October Incident that had failed .... But he also said that in spite of that failure they had succeeded in creating a new state, Manchukuo. He also said that at first it was the plan of Kwantung Army to exploit Manchuria while under the Japanese Kwantung Army occupation, but that he had urged that a new and independent state be created in order to avoid international complications. And this proposal of his was taken up."

On being questioned by the prosecution "Did he tell you what the ultimate objectives of the plans were?" the witness said "yes". "To make of Manchuria a base from which to bring about the revival of Asia."

In answer to a further question of the prosecution "Did he say anything with reference to what the Kwantung Army advocated concerning Manchuria at the time of the Incident?" the witness said: "He said that it was the Kwantung Army's intention to occupy Manchuria, to destroy the influence of the war lords in that area, and to bring about the economic development of that territory under army occupation."

Captain CHO in June 1932 told the witness at Shanghai "the the purpose of the October Incident was to cleanse the ideological and political atmosphere of that time, which was extremely corrupted; to renovate internal Japanese politics by assassinating the leaders of the Government at that time; to set a new renovated government, and thereby save the nation; and then to bring about unity among the people in order to secure their unanimou support of the settlement of the Manchurian situation.

HASHIMOTO also in 1934 told him exactly what Captain CHO had said in 1932.

In 1929 General TATEKAWA told the witness "that under all circumstances Manchukuo—Manchuria should be placed under Japanese control and that it should be made into a self-sustaining state or self-sufficient state, with the exception of petroleum."

In 1934 TATEKAWA gave to the witness the purpose of the October Incident to be one of overthrowing the government then in power and to set up in its place a new government which would support the Manchurian Incident, adding that he would support such a new government.

Excepting what is ascribed to Dr. OKAWA and Colonel HASHIMOTO, the object of the conspiracies named by this witness falls far short of what the prosecution claims to have established in this case. The utmost that we get from this evidence is that there was a plan to obtain control of Manchuria by military force. Even the statements ascribed to OKAWA and HASHIMOTO would not carry us to the object and the means of the conspiracy charged in this case.

I shall discuss the March and October incidents of 1931 and similar other incidents of subsequent dates while considering the question of seizure of political power by the alleged conspirators. For my present purpose it would suf-

fice to say that however sinister these incidents might be they had nothing to do with the conspiracy charged in this case. Their introduction into the evidence justly provoked the defense comment that "a long series of isolated and disconnected events covering a period of at least fourteen years are marshalled together in hodgepodge fashion; and out of this conglomeration the prosecution asks the Tribunal to find beyond all reasonable doubts that a common plan or conspiracy existed to accomplish the objectives stated in the indictment."

After a careful consideration of all the evidence adduced on the point at the present trial, I still feel we shall not be entitled to go beyond the report of the Lytton Commission, and, in my opinion, that report would not justify us in finding the Manchurian incident as the result of any conspiracy as alleged in the indictment.

If necessary, I would not have hesitated in saying that this incident was not aggressive war within the meaning that can be assigned to that expression for the purpose of fixing criminal responsibility on those who were at the helm of affairs of the Japanese Government and the Army at the time.

At any rate the powerful nations seem to have declined to treat this act as criminal and this conduct of the nations goes a great way to show the state of law then existing. Professor Max Radin of the University of California in an article published in April 1946 on "Justice of Nurnberg" speaks of the effect of the Kellogg-Briand Pact of 1928 and of the Geneva Protocol of 1924 in the following terms:

"By that Pact, Germany among many other nations formally renounced war as a means of international policy and vigorously denounced all wars of aggression. But whatever may have been the statements of individual statesmen and publicists, those who recall the circumstances in which the Pact was made will only with difficulty be persuaded that *at the time any sanction was contemplated in public opinion, other than at the most, an economic boycott, and, at the least, the moral disapproval of the world.*"

The learned Professor then pointed out that "the words 'international crime' used about an aggressive war in the Geneva Protocol of 1924 cannot be rated higher now than it was rated then as a rhetorical term—a noble rhetoric, to be sure—but not a term with definite legal content."

Professor Radin then makes certain observations which would have a pertinent bearing on the question before us. The learned Professor says:

"If the violation of the Kellogg-Briand Pact or of the Geneva Protocol constitutes a crime, either for the nation or for the persons instigating it, then the conduct at the time of all the Powers that joined in creating the Tribunal at Nurnberg puts them in the unfortunate light of having acquiesced in what they now denounce as criminal. No official protest was made by these Powers when acts violating the Pact were committed. The personal indignation of such high-minded men as Mr. Stimson, Secretary of State when Japan invaded Manchuria, was shared, so far as our records go, neither by the President nor the Congress. And if it was shared by the majority of the people, there is abundant reason to hold that at that time no substantial number of Americans

would have approved of war on Japan because of it.

"Did the United States, did Great Britain, France and Russia become accessories after the fact in these crimes when they declined to treat them as crimes and continued close relations both with the nations that had committed them and the persons who had instigated them? It is hard to understand why that conclusion does not follow."

That conclusion certainly follows if we accept the view that Japan and the present accused persons committed the crime now alleged in relation to the Manchurian Incident. I am however inclined to the view that there existed sufficient OBJECTIVE CONDITION so as to entitle Japan to plead that she *bona fide* decided upon this measure as necessitated by self-defense, and consequently, even if I could accept the view that aggressive war became crime in international law at the date of the Manchurian Incident I would not have held this to be such an aggressive war at all.

Japan herself in her statement presented to the Council of the League of Nations stated thus: "The special position of Japan in Manchuria to which so much mystery is attached is a very simple matter. It is nothing but the aggregate of Japan's exceptional treaty rights (plus the natural consequences of her propinquity, geographical situation, and historical associations) and vital and justified measures of self-protection as the standard principle laid down in the Caroline case, that every act of self-defense must depend for its justification on the importance of the interests to be defended, or the imminence of the danger and on the necessity of her act. . . . The statements at the time of the negotiations which led up to the signature of the Briand-Kellogg Treaty for the outlawry of war, made by Mr. Kellogg himself (Note of June 23, 1928) in the Senate of United States; by the British Foreign Secretary of the day (Notes of May and July 1928) and by the French and German Governments, clearly reserved the right of self-defense, and none contradict the observations made by Mr. Kellogg that "every nation . . . is *alone* competent to decide whether circumstances require recourse to war in self-defense," which the British and French notes expressly corroborate."

As has already been noticed by me, Mr. Kellogg's note of June 23, 1928 referred to in the above statement was a circular note addressed to various nations including Japan, where Secretary Kellogg commented on the question of self-defense in the following terms:

"There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign state, and is implicit in every treaty. Every nation is free at all times, and regardless of treaty provisions, to defend its territory from attack or invasion, and it alone is competent to decide whether circumstances require recourse to war in self-defense. If it has a good case, the world will applaud and not condemn its action. Express recognition by treaty of this inalienable right, however, gives rise to the same difficulty encountered in any effort to define aggression. It is the identical question approached from the other side. Inasmuch as no treaty provision can add to the natural right to

self-defense, it is not in the interest of peace that a treaty should stipulate a juristic conception of self-defense, since it is far too easy for the unscrupulous to mould events to accord with an agreed definition."

The then Japanese Minister of Foreign Affairs Baron Tanaka in replying to the above note on July 20, 1928, observed, *inter alia*:

"The Japanese Government are happy to be able to give their full concurrence to the alteration now proposed, their understanding of the original draft submitted to them in April last being . . . substantially the same as that entertained by the Government of the United States."

This is the record on which Japan rested the claim that its action in Manchuria had been in no way contrary to the Briand-Kellogg Pact.

No rule of international law would seem more firmly established than this that treaties are to be interpreted in the light of the intent of the negotiators. That intent, naturally, is assumed to be stated in the text of the treaty itself, but it may also be sought elsewhere, either in specific reservation attached to treaties at the time of signature or ratification, or in interpretations, clarifications, understandings, constructions, qualifications, or actual conditions set forth during the negotiations, prior to the ratification. The fact is that Japan, in common with other signatories, adhered to the Pact because of the very interpretations given by Mr. Kellogg, and particularly by his unreserved recognition of an undefined and unrestricted right of self-defense.

As I have already pointed out, even in course of the negotiation between Japan and the United States of America just on the eve of the present Pacific War, an action of legitimate self-defense was understood by the United States of America to mean "their own decision for themselves *whether* and *when* and *where* their interests were attacked or their security, threatened". This self-defense was understood to extend to the placing of armed forces in any strategic military position keeping in view "the lightning speed of modern warfare".

The action of Japan in Manchuria would NOT, it is certain, BE APPLAUDED BY THE WORLD. At the same time it would be difficult to condemn the same as CRIMINAL. If a territorial sovereign is required to pay the same price for external defense of territorial integrity, whether such defense is demanded of an eastern or western nation, I would not, in the facts and circumstances then prevailing in Manchuria, and in view of the international law then existing, condemn the action of Japan AS CRIMINAL.

I have given elsewhere Japan's position in international relations since the World War I. In the Peace Conference of Paris, Japan had taken rank as one of the four principal Allied Powers and in the Versailles Treaty Germany had to make formal transfer to her of former German rights and interests in the Chinese Province of Shantung. The signature of the Versailles Treaty on the 28th June, 1919, was looked upon by the other Allied Powers as crowning Japan's efforts at prosperity. Yet, as has been shown by the Surveyor of International Affairs, this proud moment proved to be, not the dawn of a golden age in which the Japanese people would be allowed to enjoy at ease the

fruits of so laborious a national effort but rather a culminating point from which Japan was to descend into a valley of tribulation. The years that intervened between 1919 and 1926 brought a dramatic reversal in Japan's international position. The Soviet Government, assisted by American diplomacy, succeeded in salving for the U. S. S. R. the heritage of the former Russian Empire as a Far Eastern and Pacific Power. The Chinese swiftly discomfited Japanese Economic Imperialism by those methods of half-spontaneous mass resistance which they afterwards employed with equal effect against Great Britain. Japan's industrial boom proved to be a mushroom growth stimulated by abnormal war conditions, and such permanent gains as she had made in the economic field turned out to have been made on a far larger scale by the United States. In the Washington Conference, the United States co-operated with the British Empire *to restore*, politely but insistently, *the balance of* power in the Pacific and the Far East. The earthquake followed the slump as a crowning economic blow. The United States Restriction of IMMIGRATION ACT OF 1924 followed the Washington Conference as an overt political humiliation. Last of all, in the year 1926 itself, came the rise of the Kuomintang in China with Russian Communist assistance. During the first stage in this movement when the Kuomintang was making itself master of the Yangtse Basin, the brunt was borne by Great Britain; and during 1926, as well as 1925, Japan saw her trade with China increase owing to British unpopularity. Yet, on a long view, these developments in China were more ominous for Japan than they were for Great Britain. Even if all British interests in China had perished, Great Britain herself would still have survived as one of the great commercial and political Powers of the world; but Japan—first bound to the Far Eastern mainland by an unalterable accident of geography, as Britain was bound to the continent of Europe—could scarcely hope to maintain her hard-won rank of a Great Power if the U. S. S. R. and a militantly Nationalist China, reunited by Russian aid, were to league themselves together against her. Poor as Japan was in minerals, her economic interests in Manchuria were not superfluities but vital necessities of her national life. On the other hand, her political status in the leased territory of Kwantung and in the zone of the South Manchurian Railway was not only an eyesore to Russia but was a servitude upon Chinese national sovereignty which Young China might be expected to challenge as soon as it would lay in her power.

Thus *the international position of Japan*—with Nationalist China, Soviet Russia, and the race-conscious English-speaking peoples of the Pacific closing in upon her—had suddenly become precarious again. At the same moment, the internal equilibrium of Japan had been disturbed by equally vast and equally sudden political and social changes. I shall notice this internal disturbance while considering the question of seizure of political power by the alleged conspirators. The prosecution, of course, chose to look upon this also as an integral part of the conspiracy alleged in the indictment.

I need not notice here in detail these momentous developments in the internal life of Japan. For my present purpose it would suffice to say that *all*

these had the effect of producing the then foreign policy of the Japanese Government and influencing the mind of the intellectuals.

The policy of a country is indeed an evolutionary process arising from similar circumstances. Whether the then Japanese policy was one of enlightened self-interest dependent upon justice and fair play towards a neighbour, or was only one of self-seeking aggression is not very material for our present purposes. All that I need point out here is *that the evidence simply discloses a certain attitude of Japan towards Manchuria* and does not necessarily indicate any design or conspiracy of the kind alleged in the indictment.

Circumstances were moulding the foreign relations of Japan. Whether the foreign policy that was developing were justifiable or not, *I cannot say on this evidence that it was the result of any over-all conspiracy as alleged in the indictment or that it, in any way, indicated the existence of any such conspiracy*. In my opinion the prosecution allegation in this respect is a fantastic one.

Manchuria itself was a pressing problem for Japan at that time and the evidence, in my opinion, does not lead us to any design against any country beyond Manchuria.

THE NINE-POWER TREATY of Washington has often been adverted to in this connection.

The significance on Japanese life of this Nine-Power Treaty and similar other measures of the time may be best expressed in the language of the Survey of International Affairs for 1920-23. After stating how the statesmanship of English speaking Powers was a factor operating to frustrate Japanese ambition and how the diplomacy of the English speaking peoples was strongest at precisely those points where that of Japan was weak, the Surveyor says:

"Step by step they maneuvered her out of what had seemed impregnable positions. The refusal of the Chinese Government to sign the Versailles Treaty was given significance by the refusal of the United States Congress to ratify it; the resistance of the Far Eastern Republic to Japanese policy in Siberia was reinforced by discreet but vigorous reminders from the State Department to the Japanese Ministry of Foreign Affairs, regarding the identic declaration of July and August, 1918. The Anglo-Japanese alliance was replaced by the Four-Power Treaty of the 13th December 1921, which had as its corollary the Yap Treaty of the 11th February, 1922; the Twenty-One Demands were replaced by the new Consortium Agreement of the 15th October, 1920, and the Nine-Power Treaty regarding China of the 6th February, 1922; the Shantung Articles of the Versailles Treaty were replaced by the Chinese-Japanese Treaty of the 4th February, 1922; and naval competition was replaced by the limitation of naval armaments. Yet all these movements were made with a courtesy and a good humour which deprived Japan of the slightest occasion to take offense or to precepitate a rupture. Adroitly and deferentially she was induced to play a distinguished part in un-doing the work of her own hands."

This is the part which the Western statesmanship and diplomacy played in this dramatic chapter of the history of Japan. We may also recall to our memory that this Washington Conference was followed by the United States-

Restriction-of-Immigration Act of 1924 as an overt political humiliation. There is no doubt that these events measure the triumph of diplomacy and statesmanship of the English speaking people. But I am not sure if this triumph can be made an occasion for congratulation. That, however, is beside the point here. These maneuvers might have greatly influenced the subsequent developments.

For the present purpose it is not necessary for us to see if the then world state of affairs including the internal and external affairs of Japan and the disorderly developments in China would *justify* the Japanese action. The developments certainly offer an *explanation* of the Japanese Manchurian Policy without a conspiracy as alleged in Count 1 or even in Count 2 of the indictment. If all other Powers can have foreign policies without a conspiracy between their statesmen and diplomats, I do not see what is there in the evidence adduced in this case which would drive us to infer such a conspiracy on the part of Japan.

But even assuming that there was a conspiracy as alleged in the Indictment and that the Manchurian Incident was the result of that conspiracy, it remains yet to be seen how the present accused are connected with them.

Of the persons arraigned for trial before us only DOHIHARA, HASHIMOTO, ITAGAKI, KOISO, MINAMI and OKAWA could even be named in connection with the alleged conspiracy upto this stage. There is not even the remotest suggestion in the evidence which, in my opinion, can raise even the lightest suspicion against any other of the accused.

Of course the witnesses have spoken of "some young officers of the Kwantung Army", and, certainly some of the present accused were, at the date of the incident, comparatively young and were officers of the Kwantung Army. But I hope no one, on this ground, would say that there is evidence against them in this respect.

The prosecution in its summation of the case against DOHIHARA characterizes him as a fore-runner of aggression and says that "he was one of the original conspirators and participated in the conspiracy from the very beginning to end." The prosecution laid emphasis on the following allegations and the evidence referred to against them, in order to establish DOHIHARA's participation in the conspiracy:

1. Prior to the Mukden Incident DOHIHARA already had spent 18 years in China and his knowledge of situation there had won the recognition of the superiors. (Exh. 2, 190-A, T. 15, 723 T. 19,995)
   (*a*) He was particularly familiar with the situation in Manchuria. (Exh. 2,190-A, T. 15,722)
2. DOHIHARA became intimately acquainted with Dr. OKAWA Shumei who fervently advocated the incorporation of Manchuria into the Japanese Empire. (Exh. 2,177-A, R.P. 15,565-6).
   (*a*) For more than two years prior to the Manchurian Incident OKAWA had been agitating for positive action in collaboration with the Army. (Exh. 2, 177-A, R. P. 15, 573-5,

Exh. 2,178, R.P. 15,595).

(*b*) (*i*) DOHIHARA being an army man and expert on China became one of the very inner circle.

(*ii*) Other members of the army who were intimately acquainted with OKAWA included the accused ITAGAKI and KOISO. (Exh. 2,177-A, R.P. 15,565).

(*iii*) DOHIHARA was involved in the drafting of a plan to set up a Cabinet centreing around the army with a more positive policy toward Manchuria. (Exh. 2, 177-A, R.P. 15,587).

3. In August 1931, DOHIHARA was appointed the chief of the Special Service Organ of the Kwantung Army at Mukden and arrived there on 18 August 1931. (Exh. 2,190-A, R.P. 15,713-4).

(*a*) (*i*) Ostensibly he went there to investigate the case of Captain NAKAMURA and to negotiate with the Chinese authorities on the matter.

(*ii*) His real mission was to investigate and determine the strength of the Chinese forces, their training, their communication and the condition of the civilian population. (Exh. 2,190-A, R.P. 15,724-25).

(*iii*) On this occasion he had made an extensive trip through Shanghai, Hankow, Peking and Tientsin. (R. P. 15,725).

(*b*) (*i*) While Chinese authorities were making every effort for an amicable solution of the NAKAMURA case, DOHIHARA continued to question the sincerity of the Chinese effort to arrive at a satisfactory solution. (Exh. 57, page 65; R.P. 28,642).

(*ii*) This shows that DOHIHARA after making the extensive trip counted on China's lack of power to resist, and consequently stood ready for positive measures.

4. Early in September 1931, reports came to Tokyo that ITAGAKI and other staff officers of the Kwantung Army, with the NAKAMURA case as the pretext, were scheming to start military action in Manchuria. (R.P. 1,324, 33,590).

(*a*) (*i*) DOHIHARA was summoned to Tokyo to report.

(*ii*) DOHIHARA was quoted by the press as the advocate of solving all pending issues in Manchuria by force, if necessary, and as soon as possible. (Exh. 57, pages 64-66).

(*iii*) Upon DOHIHARA's report, TATEKAWA of the general staff who had always maintained that Manchuria should be placed under Japanese control, was sent to Mukden. (R.P. 2,002; Exh. 2,190—R.P. 15,714; 15,725-26).

(*iv*) DOHIHARA immediately followed. (R. P. 15, 714,

15,725-26).

(*v*) On the day TATEKAWA made his appearance in Mukden, dressed in civilian clothes, the incident broke out. (R. P. 3,002-3).

(*b*) (*i*) Although DOHIHARA himself was not in Mukden on the night of September 18, 1931, when the Mukden Incident broke out, the office of DOHIHARA's special service organ was, nevertheless, the centre of invasion operations. (R. P. 30,353, 30,355).

(*ii*) Evidence of subsequent events clearly shows DOHIHARA's role in the activities of September 18.

5. Following his return from Tokyo, DOHIHARA was appointed on 21 September, 1931, Mayor of Mukden assisted by an Emergency Committee with a majority of Japanese members. (Exh. 57, page 88).

(*a*) The assumption of mayoralty by DOHIHARA was significant.

(*i*) For the first time an officer of the active service in the Japanese army took over the administration of a city in China, whose territorial and administrative integrity Japan had pledged to respect by the Nine-Power Treaty.

(*b*) In the latter part of September 1931, when the Self-government Guidance Board was set up in Mukden to foster the so-called independence movement, DOHIHARA was in charge of the special service or espionage division. (R. P. 2,793-4).

(*i*) Every effort was being made toward the realization of local autonomy sponsored by the Japanese army. (R. P. 33,628-9).

(*c*) DOHIHARA was also active on the Local Peace Preservation Committee and exercised a great deal of pressure on the Chinese officials left behind there. (R. P. 3, 962-3; 33,605-6).

(*d*) DOHIHARA headed and executed the plot to remove the Ex-Emperor PY YI from Tientsin to Manchuria. (R. P. 15,726, 33,618).

According to the prosecution the above allegations have been established by the evidence cited against them and they establish the two following matters:

1. That DOHIHARA was one of the plotters of the Mukden Incident of September 18, 1931.
2. That DOHIHARA was one of the conspirators of
   (*a*) the over-all conspiracy as charged in count 1,
   and (*b*) the limited conspiracy as charged in count 2.

Leaving aside for the present the over-all and the limited conspiracies charged in counts 1 and 2, it may safely be said that the evidence does not in

the least connect DOHIHARA with the alleged plotting of the Mukden Incident. Excepting the fact that his office room was utilized by the army officers during his absence for the purpose of carrying on operations immediately on the breaking out of the incident, there is absolutely nothing in the evidence which would in any way suggest his connection with the alleged plot.

Of the matters relied on by the prosecution for the purpose of connecting DOHIHARA with the Mukden Incident, item 1 as stated above need not detain us at all. DOHIHARA certainly had spent 18 years in China and was familiar with the situations there. But that does not indicate anything relevant for our present purpose.

For item 2, reliance is placed on exhibit 2,177-A, the testimony of Dr. OKAWA in the Tokyo Court of Appeal at the trial for the May Incident of 1932. Dr. OKAWA said that he became intimately acquainted with certain military officers, and named, amongst others, Major General DOHIHARA, Major General ITAGAKI, and Lieutenant General KOISO. It seems that he acquired this acquaintance after he became an employee of the South Manchurian Railway Company. As regards his "fervently advocating the incorporation of Manchuria into the Japanese Empire", reliance is placed on that portion of the above testimony where Dr. OKAWA was speaking about the essay for his degree of Doctor of Law. In course of his study for this essay he acquired "the belief that the age of great powers was gone and that the age of super-great powers had come". "For a nation to keep going as an independent country in this present age, she would possess a territory that is at least self-sufficient. The present state of world affairs proves this clearly." In answer to the question, "In the case of Japan, what kind of territory should she incorporate?" Dr. OKAWA answered by saying "Korea and Manchuria are within the scope of possibility, but I believe, Manchuria alone will not be sufficient." I do not know whether, because of this view of his, Dr. OKAWA became such a vicious person that even an acquaintance with him would indicate guilt in DOHIHARA. The evidence itself does not go beyond the *factum* of acquaintance. It does not even speak of DOHIHARA's acquaintance with OKAWA's "advocacy", and certainly there is nothing in it to indicate that DOHIHARA shared that view of Dr. OKAWA.

The statement that OKAWA "fervently advocated the incorporation of Manchuria into the Japanese Empire" is sought to be supported by the prosecution with the above testimony of Dr. OKAWA. In its summation the prosecution refers to exhibit 2,177-A at page 15,566. There he refers to his study which became the essay for his degree of Doctor of Law and in that connection speaks of the "age of super-great powers". In that connection he refers to Korea and Manchuria as the territories "within the scope of possibility" of incorporation. Of course there is no suggestion of any incorporation by force. On the other hand at the next page he speaks of "Japan's influence in Manchuria" gained through diplomacy, laments absence of unity in Japan's national opinion in its diplomacy towards foreign countries, refers to what he considers to be diplomatic stupidity and complains that "if such a thing is continued, Japan's overseas development can never be accomplished." Read-

ing the testimony as a whole it is difficult to find any advocacy of development or incorporation by force. Incorporation contemplated here seems to be more an economic incorporation than a political one. It is something like the "British World Order" depicted by the Surveyor of International Affairs in 1931. I shall have occasion to refer to this world order later on. The evidence relied on by the prosecution at least does not speak of any incorporation into *the Empire*.

As regards item 2 (*a*), reliance again is placed on the same testimony. But the testimony does not go so far as is summarized by the prosecution in this item. In this part of his testimony, Dr. OKAWA was saying that he started "a people's movement because he thought that the Manchurian and Mongolian problems could not be left in the hands of capitalists and politicians, but should be solved by a people's movement." He "gave lectures about this." "On the opinion that a small country cannot be independent, he reasoned that he should let the people know that Japan, for the time being, *should attempt economic development in Manchuria*; that the nation cannot go on without having the foundation of her national life built on a united economic system of both Japan and Manchuria and that if this is done, the Manchurian problems, too can be solved." Dr. OKAWA said that he undertook this lecturing in the latter days of April or in May 1929 and continued it upto the outbreak of the Manchurian Incident. Hitherto we have not heard anything about any "positive action" or "positive action in collaboration with the army." The witness, however, went on, and, in answer to a question "were there any repercussions?" said "There was a very unexpected reaction. At first, I did not know how much the repercussion would be, and when I consulted with the army authorities about undertaking the project together, the army *did not* agree, stating that it would be criticised as militarism and imperialism and lose its effect if the army would join. Hence I undertook it alone ...." The witness then claimed "that as the voice of dissatisfaction grew louder among the people, the army took note of this trend and began to take positive action gradually." "The army being alert on taking advantage of opportunities, began taking positive actions as soon as this trend became great. And finally, they began to act together with us, and the Army General Staff and other departments, even began sending lecturers to us." This is the whole story and as I read it, there is nothing in it to support the summation that "OKAWA had been agitating for *positive action* in collaboration with the army."

The prosecution summation by using the expression "positive action" and speaking of this "positive action" as something to be "in collaboration with the army" seemed to suggest some sinister overt act involving user of force. There is nothing in Exhibit 2, 177-A which would even suggest any such thing. So far as this testimony of Dr. OKAWA is concerned, the expression 'positive action' means nothing more than active collaboration in the matter undertaken by the witness; and the context shows that the witness was only speaking of his efforts towards moving the public mind in a certain direction.

'Seeking army assistance' in Japan did not necessarily mean any design

for the user of force. The Army in Japan was really a peoples' party. The Japanese army was recruited by universal conscription. The rising generation of the rural proletarians formed the backbone of the rank and file, and "the army at the relevant date regarded itself as the champion of the peasantry, which had been reduced to the condition of a desperate rural proletariat" by the then world condition. I shall have to consider later the relation in which the army at this time stood to "the people" of Japan. For my present purpose, it would be sufficient to say that appeal to army for collaboration by a person who was seeking to enlist the sympathy of the people in favour of his movement, did not necessarily have any sinister significance.

That DOHIHARA "became one of the very inner circle" as asserted by the prosecution in item 2 (*b*) (*i*) above is mere assumption on its part and, of course, there is no evidence in support of it.

As regards DOHIHARA's "involvement in the drafting of a plan to set up a cabinet," as stated in item 2 (*b*) (*iii*), the evidence relied on is again the same testimony of OKAWA. The witness is there speaking of the October Incident. On being questioned "who drafted the ultimate plan?" OKAWA said "I do not know exactly, but the person who gave me orders was Kingoro HASHIMOTO." Then he was asked "then you do not know who was at the top drafting the plan?" His answer was "I have an idea." The next question was "are SHIGETO, HASHIMOTO, ITAGAKI and DOHIHARA involved?" The witness said "yes". This is no better than OKAWA's guess and I do not see how such a guess or such a surmise on his part entitles us to say that DOHIHARA was involved in this plan.

In support of its summation as given in item 4 above the prosecution referred us to the evidence at pages 1,324 and 33,590 of the record. The evidence is the testimony of Baron SHIDEHARA, and it nowhere speaks of any report "that ITAGAKI and other staff officers of the Kwantung army with the NAKAMURA case as the pretext were scheming." The record page 1,324 records exhibit 156, the affidavit of Baron SHIDEHARA. The affidavit says, "Shortly before the Manchurian Incident as Foreign Minister I received confidential report and information that the Kwantung Army was engaged in amassing troops and bringing up ammunition and material for some military purpose, and knew from such reports that action of some kind was contemplated by the military clique." Nowhere the affidavit names "ITAGAKI and other staff officers" as claimed by the prosecution by its summation. In his cross-examination on this point at record page 1,333 the witness said that the word 'report' in this part of his affidavit was not quite correct. The witness said "what I actually meant was 'rumours'; that is to say, Japanese residents in Manchuria used to come and talk to me and in the course of these conversations they told me something of this nature. I did not receive anything in the nature of an official report." At page 1,335 he explained the expression "military clique" by saying "at the time I heard that it was the younger officers in the army who were contemplating this action." At page 33,590 also he did not carry the matter further. He spoke of some four or five civilian residents in Manchuria coming to him and saying that "*some young officers* came to

them and ordered some help etc." I do not see how on the strength of this evidence the prosecution could base its assertion that "reports came to Tokyo that *ITAGAKI and other staff officers* of the Kwantung army" were scheming and that they were scheming with *the NAKAMURA case as a pretext*. The entire thing appearing in the prosecution summation against DOHIHARA in this respect is mere assertion on the part of the prosecution not supported by the evidence.

The prosecution summation as given in item 4 (*a*) (*iii*) above is highly misleading. The summation seems to suggest as if DOHIHARA's report suggested TATEKAWA as the emissary. Certainly that is not the evidence. DOHIHARA had absolutely nothing to do with TATEKAWA's selection for the purpose. Exhibit 2, 190 is the interrogation of DOHIHARA taken by the prosecution on 11 January 1946. In this interrogation I could not find anything which would support the statement that DOHIHARA's report had anything to do with the sending of any emissary to Mukden. As regards TATEKAWA's "always maintaining that Manchuria should be placed under Japanese control," the evidence, of course, is only hearsay of TANAKA Ryukichi of whom I have already said enough.

I have given above the "subsequent events" relied on by the prosecution but I do not see how those events make DOHIHARA's role in the alleged scheme significant and clear.

DOHIHARA is named in Exhibit 2, 177-A as one of the persons who became intimately acquainted with Dr. OKAWA. Dr. OKAWA in that document admitted to have become intimately acquainted with Lt. General KOISO, Major General OKAMURA, Major General ITAGAKI, Major General DOHIHARA, Major General TADA, Colonel KAWAMOTO, Colonel SASAKI and Colonel SHIGETO. This evidence, at the worst, shows only the company which DOHIHARA at that time kept. But I believe we are not going to accept any theory of guilt by association. DOHIHARA's connection with the incident has also been sought to be established through the fact that after the Mukden incident "Colonel DOHIHARA was installed as Mayor of Mukden", and succeeded in restoring normal civil administration within three days. As a result of the event of September 18, 1931, the civil administration of Mukden City and the Province of Liaoning was completely disorganized and even that of the other two provinces was affected though to a lesser extent. Immediate necessity was the organization of a municipal government and restoration of the ordinary civic life of the city. This was undertaken by the Japanese and carried through quickly and efficiently. I do not see why the appointment of Colonel DOHIHARA as Mayor for this purpose would in any way indicate his connection with the alleged plotting of the incident or even with the conspiracy charged. DOHIHARA was an Army officer, and, the choice of the Army authorities fell on him probably for his efficiency. At least he proved to be an able administrator in this respect. I cannot, on this evidence, connect him with the plot or conspiracy.

The assumption of mayoralty by DOHIHARA might have significance in other respects. It might have even constituted some wrongful acts on the part

of Japan, if, and in so far as, it was in breach of any Japanese undertaking. But I do not see its significance having any bearing on the question of DOHIHARA's participation in the alleged plotting of the Mukden Incident. In my opinion, none of the subsequent events relied on by the prosecution, including the removal of PU YI from Tientsin to Manchuria, is of any significance so far as the present question is concerned. They may be of some consequence in relation to the question of the existence or otherwise of the conspiracies alleged in counts 1 and 2, and may have some significant bearing on the question whether DOHIHARA was a participator in those conspiracies. I shall consider this matter in its proper place. But I might at once say that I have not been satisfied as to the existence of any such conspiracy. At any rate I have not been able to connect any of these accused with any such conspiracy.

The evidence, on the basis of which HASHIMOTO, ITAGAKI and KOISO are sought to be connected with the Mukden Incident and with the conspiracy charged, comprises mainly the testimony of TANAKA Ryukichi given here and of OKAWA given in the Tokyo Court of Appeal in 1934. I have already considered this evidence in connection with the Mukden Incident. I would further discuss it while considering the question of seizure of political power. In my opinion the evidence does not establish their connection with the alleged plot and the conspiracy. HASHIMOTO and KOISO, no doubt, were involved in some of the incidents mentioned in the evidence. But, however sinister such incidents might be, they did not indicate any conspiracy of the kind alleged in the indictment.

In order to establish MINAMI's connection with the Mukden Incident and the conspiracy charged, the prosecution introduced the following materials and claimed that these fully established his connection.

1. MINAMI's activities as War Minister prior to the Mukden Incident.
2. His activities as such War Minister after the incident.
3. His views on Manchurian Incident.
4. His activities after his regime as War Minister.
5. His activities as Commanding General of the Kwantung Army (from 10 December 1934 to 6 March 1936).

MINAMI was War Minister in the Wakatsuki Cabinet from 14 April to 12 December 1931.

It must be remembered that, according to the prosecution case, the then Government of Japan was not in the conspiracy. The conspiracy, according to the prosecution, lay outside the government circle. MINAMI's position in the Cabinet, therefore, by itself did not make him a conspirator.

His policy, action and attitude as War Minister were testified to by the Prosecution witness WAKATSUKI, the then Premier of Japan. Nothing could be said against him on the basis of this evidence.

The prosecution emphasises the following materials on the strength of the evidence noticed against them:

1. (*a*) "MINAMI knew or should have known of the March Incident"; (p. 1,963)
   (*b*) "He knew or should have known"

(*i*) "that War Office was represented in the Sakura-Kai"; (p. 1,963)

(*ii*) "that the aims of the Sakura-Kai were to carry out an internal revolution and settle the Manchurian Problem"; (p. 1,963)

(*c*) "MINAMI was fully apprised of the seriousness of the situation in Manchuria as early as the summer of 1931"; (p. 32,308)

(*i*) KOISO spoke to MINAMI about this: (p. 32,308)

(*ii*) The upshot of such conversations was the dispatch of General Tatekawa to Manchuria to head off irresponsible action: (p. 32,309)

(*iii*) MINAMI knew that Tatekawa was interested in Manchurian problems: (p. 19,822)

(*iv*) MINAMI knew that Tatekawa was the person responsible for releasing the bombs to OKAWA in the March incident: (p. 32,325).

2. "MINAMI was fully apprised that a crisis was impending":

(*a*) This appears from a meeting which took place in July 1931;

(*i*) He summoned the Manchurian Railway authorities to his official residence to discuss Manchurian-Mongolian Problems: (p. 15,753)

(*ii*) The army side was represented by various officers including Tatekawa, the conspirator in the March Incident;

(*iii*) The parties present "exchanged their outspoken opinions regarding the Manchurian-Mongolian Problems"; (p. 15,753)

(*b*) Later in the same month MINAMI stated: "The Army has long recognized the necessity of increasing our divisions in Korea and we hope the day will come when more divisions will be dispatched there"; (p. 15,753)

(*c*) At a meeting of Army and Division Commanders held on 4 August 1931 MINAMI was quoted as having stated: "Guard Manchuria, our life line". (Ex. 2,207—pp. 15,784-85).

(*d*) MINAMI was far from passive in his relation to the Mukden Incident:

3. MINAMI was not an apostle of peace as he seeks to portray himself, as appears from the Report of the Lytton Commission where it is said that the "vigorous speeches by the Japanese War Minister in Tokyo, counselling direct action by the Army in Manchuria" were one of the things which set the stage for the events that took place on 18 September and thereafter. (Ex. 57, pp. 66-7; Ex. 186, pp. 2,209-10; Ex. 2,207, p. 15,783).

4. Studies were being made in the War Ministry prior to the Manchurian Incident concerning the conquest of Manchuria.

(Ex. 3,375; R.P. 32,330).

(*a*) MINAMI knew of this or should have been familiar with it.

(*b*) (*i*) He knew or should have known that a group in the army led by Lieutenant Colonel HASHIMOTO and SHIGEFUJI had become so powerful between July and October 1931, that the army could not check such persons. (Ex. 179, R.P. 1,926).

(*ii*) He knew or should have known that "this group including General TATEKAWA were strongly of the opinion that unless Manchuria were seized by Japan, it would be impossible for Japan to become one of the powers of the world as a highly developed national defense state".

5. (*a*) Prior to the Mukden Incident SHIDEHARA notified MINAMI that he had received a cable from the Japanese Consul General of Mukden that within a week a big incident will break out. (R.P. 2,006).

(*b*) At this point the officers responsible for the situation should have been dealt with appropriately, if MINAMI desired to stop an incident. MINAMI, hówever, did not do a single thing to stave off event. (Ex. 3,479; R.P. 33,639).

From the above materials the prosecution invited us to hold "that the SHIDEHARA policy of conciliation was thrown overboard and a new political force emanating from the army came into play, aided and abetted by MINAMI and the Mukden Incident, the overt act of the conspiracy, was permitted to occur. According to the prosecution, the fact that the new political force was aided and abetted by MINAMI, was found by the Lytton Commission. Reference is given as Exhibit 57 pages 66-67. The Commission report however does not give any such simple account of the development of the new policy and of its being thus aided and abetted by MINAMI. After discussing the growing tension between the Japanese and Chinese INTERESTS in Manchuria and describing its effect on the attitudes of the military forces of the two nations, the Commission observed that "certain internal economic and political factors had undoubtedly for sometime been preparing the Japanese people for a *resumption* of the positive policy in Manchuria." The Commission then referred to several factors which, according to the Commission "were preparing the way for the abandonment of the SHIDEHARA policy of conciliation with China which seemed to have achieved such meager result." As such factors the Commission named; (1) "the dissatisfaction of the army"; (2) "the financial policy of the government"; (3) "the appearance of the new political force emanating from the army, the country districts and the nationalist youths, which expressed dissatisfaction with all political parties ... and which included in its condemnation the self-seeking methods whether of financiers or politicians"; (4) "the fall in commodity prices, which inclined the primary producer to look to an adventurous foreign policy for the alleviation of his lot", and (5) "the trade depression, which caused the industrial

and commercial community to believe that better business would result from a more vigorous foreign policy."

Certainly if so many factors were preparing the way for the abandonment of one policy and the development of another, it is not possible to fix any responsibility in the matter on any person appearing in the whirlpool of such events and to brand him with the guilt of aiding and abetting. It should also be remembered that the 'positive policy' here does not mean any policy of criminal aggression. It was the name given to the TANAKA policy which, according to the prosecution itself, was a policy of collaboration and of full expansion and development of Japanese rights by peaceful means. The policy, it is said, "placed great emphasis on the necessity for regarding Manchuria as distinct from the rest of China and contained a declaration that if disturbances spread to Manchuria and Mongolia, thus menacing Japan's special position, Japan would defend them." A "resumption" of the "positive policy", therefore, does not necessarily indicate recourse to any unlawful or wrongful means.

The report in this connection also referred to the "protracted delay by the Chinese authorities in making satisfactory investigation of and redress for the murder of Captain NAKAMURA," and observed that this "had particularly incensed the young officers of the Japanese army in Manchuria, who clearly showed their sensitiveness to irresponsible remarks and slurs made by equally irresponsible Chinese officers on the streets or restaurants and other places of close contact."

The prosecution assertion of MINAMI's having aided and abetted the overt act in question is based on an observation by the Lytton Commission relating to a vigorous speech by the then Japanese War Minister. The prosecution says: "That MINAMI was not an apostle of peace as he seeks to portray himself, prior to the Mukden Affairs, appears from the Report of the Commission . . . where it is said, that the "vigorous speeches by the Japanese War Minister in Tokyo, counselling direct action by the army in Manchuria" were one of the things which set the stage for the events that took place on 18 September and thereafter."

The relevant portion of the Commission Report however refers to the part played by the public press of both countries in relation to the incident. The Commission says: "The public press of both countries tended rather to inflame than to calm public opinion. Vigorous speeches of the Japanese War Minister in Tokyo, counselling direct action by their army in Manchuria were reported." The Commission here was emphasizing, not so much the speech, as its reporting by the press. We are however asked to fix the guilt, if any, for such speech on the author thereof.

The prosecution pointed out this speech as one made by the War Minister MINAMI on August 4, 1931. The original text of the speech was not available. In lieu thereof the prosecution introduced an article in the Japan Times dated August 6, 1931 purporting to quote the alleged speech. This is Exhibit 186 in the case. It does not contain the whole speech but only purports to give an extract therefrom.

The portion of the speech that is before us stands thus: "Some other observers, without studying the conditions of neighbouring foreign countries, hastily advocate limitation of armaments and engage in propaganda unfavourable for the nation and the army. Manchuria and Mongolia are very closely related to our country from the viewpoint of our national defense as well as of politics and economics. It is to be regretted that the recent situation in that part of China is following a trend unfavourable to our Empire. The recent change in international politics and the recent decline of Japan's prestige coupled with the recent ascendancy of anti-foreign agitation and new economic power in China, are responsible for such a tendency, which is a phenomenon of permanent duration instead of being a passing one. In view of such a situation, I hope you will execute your duty in educating and training the troops with enthusiasm and sincerity so that you may serve the cause of His Majesty to perfection."

The occasion for this speech will appear from the statement of the accused MINAMI himself. He says: "On August 4, 1931, I called the customary conference of Division Commanders in the War Ministry for the first time since I assumed the office of War Minister. The address of instructions which I delivered on that occasion unexpectedly aroused the opposition of a section of the political circles. As it would be clear from the glance at its contents, I gave expression to nothing more than a view natural to a War Minister—stating that every effort should be made in the training of soldiers to maintain the efficiency of the Imperial Army under the difficult conditions caused by arms reduction."

The report contained editorial comments as well and we do not know which report was before the Lytton Commission. The extract before us does not, in my opinion, support the view that the War Minister was "counselling direct action by the army in Manchuria."

I have already discussed this piece of evidence while considering the Mukden Incident. Even now I fail to see why such a speech of the War Minister to his Division Commanders at a normal routine conference should indicate such a grave conspiratorial design.

I have already considered the bearing of the March Incident, of the organization of Sakura-kai, of the despatch of Tatekawa to Manchuria, and of the rumours coming from Manchuria about armies creating some incident, on the question of the Mukden Incident and of the conspiracy. I need not repeat that discussion.

The prosecution on the strength of Exhibit 3,376 at page 32, 302 asserts that studies were being made in the War Ministry prior to the Manchurian Incident concerning the conquest of Manchuria and that MINAMI knew or should have known it. Exhibit 3,376 is a report from the Commander of the Military Police to the War Minister on "study on the organization of M. P. force in Manchuria". It is dated July 25, 1931 and begins by saying "we have no need to enlarge upon the fact that in the future war our Empire should secure complete possession of Manchuria and Mongolia from the standpoints of maintenance of fighting ability and of self-sufficiency". It then

refers to studies by "the respective responsible organs" as to "how our Empire should manage and administrate Manchuria and Mongolia in the above case"— and points out "the necessity of enquiry on the M. P. in the occupied area". We do not know when this study commenced and it might only have been a study keeping in view some remote future contingency. There is nothing to connect this study with MINAMI and I am not sure if MINAMI at all knew it or should have known it.

After a careful consideration of the evidence that could be placed by the prosecution before us I am of opinion that MINAMI's connection with the alleged conspiracy has not been established.

The Manchurian Incident spread while MINAMI was still War Minister and it spread in spite of the Cabinet decision to the contrary. The evidence clearly establishes that this happened in spite of MINAMI's efforts to the contrary.

There is nothing in his views on the Manchurian Incident which need lead us to hold that MINAMI was a conspirator. MINAMI still believes that the action taken was justifiable as a measure in self-defense. HONJO even while committing suicide and making a clean breast of everything he had to do with the event still asserted his belief that the incident was started by the Chinese act. I have discussed the evidence above and have pointed out that the doubt is not yet repelled. I do not see why I should not accept MINAMI's expression of views as *bona fide*.

His activities after his regime as War Minister indicate nothing and I need not notice them at all.

I shall discuss his activities as Commanding General of Kwantung Army later on. There is nothing in these activities which would in any way connect him with any conspiracy.

OVER-ALL CONSPIRACY

SECOND STAGE

THE EXPANSION OF CONTROL AND DOMINATION

FROM

MANCHURIA

TO

ALL THE REST OF CHINA

I shall next take up the case of the developments after September 18, 1931, and see how far this can be said to have been the result of some conspiracy and to what extent it can lead us to the inference that there had been the over-all conspiracy as alleged in the indictment.

I have indicated above why I could not accept the prosecution case that the Manchurian Incident was the result of a conspiracy of a group of Japanese politicians and military men. I have quoted above from the Lytton Commission Report to indicate how many factors of diverse origin might have influenced the development of the Manchurian Policy of Japan. I shall later on discuss some of the cases of Japan's internal trouble and shall show that these did not originate from any conspiracy. I have indicated above the relation in which the army in Japan stands to its people: Army's participation in any matter of policy does not necessarily imply use of force. Keeping all these in view it is difficult for me to accept the simple solution offered by the prosecution of all the happenings of the time by ascribing each and everyone of them to an enormous conspiracy.

The military developments in Manchuria after September 18, 1931, were certainly reprehensible. Despite the unanimous opinion of the Cabinet that the operation must cease immediately, the expansion continued. The prosecution suggests that the army should have been checked by the Cabinet by withholding funds. As this was not done, the prosecution suggests that "the conclusion is clear that no one wanted to or dared to stop the supreme commander of the army." The evidence discloses that the army, which was responsible for the protection of Japanese lives and interests in Manchuria, did offer some plausible explanation as to why it had to take further action. In an occasion like this, it is not possible for any government, including its war minister, to disregard such explanations coming from such a responsible person of high position as a commander of the army. If no one wanted to, or dared to, stop the supreme command by having recourse to the extreme method suggested by the Prosecution of withholding funds on an occasion like this, it might only indicate that he was not so obsessed with the idea of his own personal prestige, or of the prestige of the Cabinet decision, as to take the risk of a national disaster by thus ignoring the decision of a responsible man on the spot. Unless we start with the *assumption* that the Cabinet knew that the army was only executing a conspiracy, I do not see how the alleged inaction on the part of any cabinet member in this respect can indicate his connection with the conspiracy. Instead of this conduct having the proposed persuasive effect on any mind, it will really require an already persuaded mind to see anything sinister in such a conduct.

The prosecution says that by May 31, 1933, the military conquest of all Manchuria and Jehol had been completed. On May 31, 1933, the Tangku Truce was signed. With the signing of this truce the good relation between China and Japan were restored. The prosecution itself says that after this truce the relations between China and Japan became good for the time being and on May 17, 1935, it had been decided to raise the Japanese legation in China to an embassy. There were, no doubt, certain disturbances in the early

part of 1935 but these were all compromised and settled, and, on June 10, 1935, the HO-UMEZU Agreement was concluded.

It seems, therefore, that whatever might have happened between China and Japan over Manchuria, the *hostility* at any rate completely ceased by June 10, 1935. It is difficult to see on what authority and on what legal basis the victors in a subsequent war can now question this action of Japan. But I shall come to this matter later on.

The prosecution case regarding the Japanese expansion in Manchuria may be summarized as yielding the following items:

1. As soon as the Government of Japan came to know of the Mukden Incident of 18 September 1931, an extraordinary Cabinet meeting was held on September 19, 1931, at which it was decided that the affair would be terminated at once. (Ex. 162; R. P. 1,554-55).
2. Despite the unanimous opinion of the cabinet that the operation must cease immediately the expansion continued.
3. (*a*) As a matter of fact, the army represented by the Supreme Command never wanted the policy of non-enlargement of the incident and never intended to carry it out.
   (*b*) On September 22, 1931, KIDO reported that the army was so strongly determined in its policy towards Manchuria that orders given by the central authorities might not be thoroughly understood, and that the army was indignant because the Emperor had approved the governmental policy under influence of his personal attendance. (Ex. 179-I, R. P. 1,938).
   (*c*) The army chief of staff was reported to have told WAKATSUKI that the army might be compelled to send troops to the Yangtse River, and that if this happened, he did not want the Government to interfere with the prerogative of the Supreme Command of the army. (Ex. 179-K, R. P. 1,939-40).
4. In October, the conspirators dissatisfied with the government policy and regarding it as the one obstacle to carrying out the conspiracy again planned to seize control of the government. This move became known as the October Incident. The plot was discovered; accused HASHIMOTO and others were arrested. (Ex. 3,195, R. P. 28,795, summation page D 43-44).
5. In the meantime the military operations in Manchuria continued to widen.
6. (*a*) On December 10, 1931, the WAKATSUKI Cabinet resigned. (R. P. 1,575-82; Ex. 2,435, R. P. 19,790, summation page D 45).
   (*b*) (*i*) As a result, INUKAI took office with the accused ARAKI becoming his War Minister.
   (*ii*) Immediately upon ARAKI's succession to office, there was an apparent change in the attitude of the Govern-

ment and in the co-operation between it and the Kwantung Army in furtherance of the conspiracy.

(*iii*) A device was found, which, while it permitted the Government to piously assert that it was carrying out the policy of the previous government of non-enlargement of incident, enabled it to render the aid needed by the Kwantung Army in effectuating the conspiracy. (Summation page D 46).

(*iv*) Soon after becoming War Minister ARAKI decided that the four Provinces under Chang Hsueh-liang should be pacified and occupied. He made up his plan and obtained the Cabinet approval. (Ex. 188-A, B, C; R. P. 2, 216-33, sum. p. D 47).

7. (*a*) While the Kwantung Army was in the process of expanding its military operations in Manchuria, a series of events took place which threatened to expand immediately the scope of the conspiracy beyond the area of the first stage, at a time when the main conspirators were not yet ready to proceed.

(*b*) This series of events has been often referred to as the First Shanghai Incident. (Summation page D 45-50).

(*c*) While on the surface Shanghai Incident may appear as a digression from the main stream of the story and to have no relation to the events in Manchuria, it has a definite connection with that portion of the conspiracy. (Sum. p. D 52).

(*d*) On May 5, 1932, the Shanghai Truce was signed putting an end to what was principally a navy project.

8. The Shanghai Truce gave rise to a Japanese claim which became the focal point of initiating aggression in China proper. (Sum. p. D 52).

9. On May 15, 1932 Premier INUKAI was assassinated by naval officers (Ex. 161, R. P. 1, 649, Sum. p. D 52); as a result SAITO became the Premier, ARAKI remaining the War Minister (Sum. p. D 53).

10. The military expansion in Manchuria continued according to plan. By May 31, 1933, the military conquest of all Manchuria and Jehol had been completed.

(*a*) On that day the TANGKU TRUCE was signed. (Sum. p. D 53).

11. Almost simultaneously with the beginning of military operations and continuing throughout the first half year, there took place a series of highly significant POLITICAL EVENTS WITHIN Manchuria leading to the establishment of the puppet government with PU YI as provisional President.

(*a*) On March 1932, PU YI was inaugurated, and on March

12, notice was given to foreign powers of the establishment of Manchukuo. (Sum. p. D 56, Ex. 57, R. P. 2,775).

12. This series of events was not a natural phenomenon. Each and every one of them was an integral part of the conspiracy to obtain control of Manchuria.

(*a*) The League found that a group of Japanese, civil and military, conceived, organized and carried through the Manchurian independence movement as a solution to the situation in Manchuria; that this movement received assistance and direction from the Japanese general staff and could have been carried through only because of the presence of Japanese troops. (Sum. p. D 66, Ex. 57, R. P. 2,882).

13. While the Kwantung Army was proceeding to set up Manchurian Government, Tokyo was taking step to carry out the plan. (Sum. p. D 66).

(*a*) At first the authorities in Tokyo were opposed to the establishment of an independent Manchuria.

(*b*) On January 4, 1932, ITAGAKI was sent to Tokyo. (Ex. 3,316, R. P. 30,278).

(*c*) Following ITAGAKI's visit, there was a marked change in the Japanese Government policy and the Cabinet took for itself the power to regulate the business in Manchuria. (Sum. p. D 67).

14. (*a*) In May, the INUKAI Cabinet was succeeded by SAITO Cabinet.

(*b*) This Cabinet was definitely committed to the recognition of Manchukuo. (Sum. p. D 68).

15. On September 15, 1932, formal recognition was given and the Japan-Manchukuo Protocol was signed. (Sum. p. D 69).

16. (*a*) As soon as the protocol had been signed, the accused KOISO, then Chief of Staff of the Kwantung Army, was given on November 3, 1932, an outline for the guiding of Manchukuo. (Ex. 230, R. P. 2,903-4).

(*b*) Diplomatically while Manchukuo was to adopt a non-interference attitude toward China in principle, she would adopt an anti-Chinese principle and would have the same attitude as Japan towards the Soviet and the United States. (Sum. p. D 70-71).

(*c*) To carry out these programs control was centralized both in Manchuria and in Tokyo.

(*d*) The Manchurian Affairs Board was set up under the presidency of the War Minister who was thus able to co-ordinate civil and military administration. (Sum. p. D 71, Ex. 451, 452, R. P. 5, 113-16).

17. (*a*) Pursuant to these policies Japan exercised complete political domination over Manchuria.

(*b*) The control exercised by Japan went far beyond the Government itself and extended to control and domination of the people and their thought. The agency for this part of the task was the Concordia Society. (Sum. p. D 74, Ex. 221, R.P. 2,795).

(*c*) This society was found on July 25, 1932, by a committee of which ITAGAKI was a member. (Ex. 2, 439, R. P. 20,179; Ex. 731-A, R.P. 7,606).

18. (*a*) Along with Japan's acquisition and exercise of political power, she also acquired and exercised economic domination and control over Manchuria. (Ex. 223, 225, 241, 230, 231, 233, 236, 851, 850, 842, 841, 446, 453, 444-A, 239, 438, 840 and 454-A).

(*b*) The dominant idea was to form a single economic unit of Japan and Manchukuo under Japan's control. (Sum. p. D 76).

It may, at once, be said that the evidence on record completely establishes items 1, 2, 5, 6(*a*), and 6(*b*) (*i*), 9, 10(*a*), 11(*a*), 15, 16(*a*), 17(*a*), and 18 of the above summation.

Item 3(*a*) is only the comment of the prosecution. I have already indicated above why I cannot take the same view of the military expansion. It may not be possible for us now sitting in a court-room to see the exact difficulties, imaginary or real, which the army authorities on the spot had to face, or felt that they had to face when the hostility was going on. From the evidence before us, including the testimony of General HONJO, who before committing suicide and in the spirit of making a clean breast of the entire happening, left this statement, I cannot ascribe the subsequent enlargement of the incident to a preconceived plot on the part of the responsible authorities.

In support of its observation regarding the attitude of the army the prosecution relied on two entries from KIDO's diary given in evidence on the 5th July 1946. These are exhibits 179-I and 179-K. Exhibit 179-I which is an entry in KIDO's diary dated 22nd September 1931 is only his opinion, although formed by him after discussing and studying "various things coming from various directions". Of course, the entry does not say "that the orders given by the central authorities might not be thoroughly understood" as is given in the prosecution summation. The entry says: "that orders given by the central authorities may not be carried out." The difference, however, is not very material for our present purposes though the one is a sarcastic and the other is only a definite statement of opinion.

We do not know what are the "various things" and what are the "various directions" from which these various things reached the author of the diary. It is difficult to appraise the value of the opinion formed without these materials.

Exhibit 179-K is a hearsay of the second degree, if not of the third degree. The Chief of the army general staff is alleged to have said something to the then Premier WAKATSUKI. WAKATSUKI is said to have reported it to HARADA. The author of the diary heard it from HARADA and reported it to the Lord Keeper of the Privy Seal and recorded in his diary what he thus reported. Premier WAKATSUKI himself had given evidence for the prosecution on the 28th June 1946. His evidence comprised his statement taken out of court by the prosecution and is exhibit 162 in this case. There is nothing in his testimony regarding this matter.

As regards item 4, the October Incident no doubt was planned. But the reason given is the observation of the prosecution. I shall discuss this matter in connection with the question of seizure of government control.

Item 6(*b*) (*ii*) and 6 (*b*) (*iii*) are also mere observations of the prosecution. Item 6 (*b*) (*iv*) is based on exhibit 188 series, these being the interrogatories of accused ARAKI taken in Sugamo prison after he became a prisoner. The accused said, "after I became War Minister, I discussed the policy of the occupation of General Chang's four Provinces to clear up the Manchurian situation. After I had made the plan up myself with the Prime Minister, the Foreign Minister and the Finance Minister, as agreed with me, the Prime Minister approached the Privy Council for approval." A policy was thus decided upon by the then government and it remained to be carried out by the general staff.

When a Government adopts a policy it does not necessarily form a conspiracy. It is needless to say that a government policy is not always of a very simple origin. As I have noticed elsewhere several factors were preparing the way for the resumption of the positive policy in Manchuria. Of such factors the Lytton Commission mentioned (*i*) "the dissatisfaction of the army"; (2) "the financial policy of the government"; (3) "the appearance of the new political force emanating from the army, the country districts and the nationalist youths, which expressed dissatisfaction with all political parties, which despised the compromise methods of western civilization and relied on the virtues of old Japan and which included in its condemnation the self-seeking methods whether of financiers or politicians"; (4) "the fall in the commodity prices, which inclined the primary producer to look to an adventurous foreign policy for the alleviation of his lot"; (5) "the trade depression, which caused the industrial and commercial community to believe that better business would result from a more vigorous foreign policy." None of these can be said to be the product of any conspiracy. Add to these the disturbances which the then Japanese statesmen and politicians felt that they had to face in Manchuria. I do not see why it would provoke any sarcastic remark even if any statesman adopting such a policy says that it was so adopted to bring peace and order to the territory. It may not be a justifiable policy, justifying one nation's expansion in another's territory. But remembering the trend of international behaviour I do not see why we cannot accept this even as an explanation of the expansion without having recourse to a hypothesis of an enormous conspiracy. No one would applaud such a policy. No one would perhaps justify

such a policy. Yet this need not drive us to a theory of conspiracy. As a program of aggrandisement of a nation we do not like, we may deny to it the terms like "manifest destiny", "the protection of vital interests", "national honour" or a term coined on the footing of "the whiteman's burden", and may give it the name of "aggressive aggrandisement" pure and simple. Even then we do not come to the conspiracy as alleged in the indictment.

Before leaving Japan's action in connection with Manchuria, I must say a word about the alleged puppet government of Manchuria and its bearing on the question of over-all conspiracy.

Manchukuo was established as an independent state and Japan accorded her recognition to it in September 1932.

Pu Yi, the ex-Emperor of Manchukuo, has given evidence in this case to say that he was a mere puppet in the hands of the Japanese and that the Government set up in Manchuria was a puppet government. I do not see much relevancy of this fact for our present purposes. The only way in which this evidence can be utilized in the present case is to view this fact as a retrospective evidence of the initial plan of Japan.

The Japanese Government's motives for taking this particular step are not easily discernible. There is no obvious answer to the question why it was that the Japanese had elected to play out this elaborate political farce.

Assuming that the ultimate aim of the Japanese was to make themselves masters of Manchuria, it is not immediately evident that this aim was served by the erection of 'Manchukuo', for it was not the fiction of 'Manchukuo' that was placing the realities of power in Manchuria in Japanese hands. On the contrary, the power to play the farce of 'Manchukuo' on the Manchurian stage, as well as the power to seize control over Manchuria had been acquired by the Japanese *manu military*. As has been observed in the Review of International Affairs, the military conquest and occupation of Manchuria by the Japanese Army was the real foundation of the Japanese position in Manchuria in 1932; and the whole world was aware that this was the fact. The Japanese were apparently prepared to defy the world's opinion and to risk the consequences of the world's disapproval in order to keep their ill-gotten gains. Why, then, did they not simply proclaim, out of hand, the annexation of Manchuria to the Japanese Empire instead of persisting in a farce which nobody in the world was taking seriously? An outright annexation would hardly have been a grosser violation of Chinese sovereign rights in Manchuria than the denial of these rights which was involved in the erection and recognition of 'Manchukuo'. On the point of principle, the breach of international law, if any, was equally beyond condonation in whichever of the two alternative forms it was effected. And, on the point of fact, if it was a mere farce, then the Japanese insistence that it was sober earnest, was calculated to exasperate the public opinion of the world even more sorely than a cynical avowal on Japan's part that she was doing what she was doing by sheer violence.

It is considered probable that it might be attributed in part to an anxiety

to imitate Western behaviour—an anxiety which had become an *idee fixe* in Japanese minds since the beginning of the Meiji era. "A candid Western historian" it is said, "cannot ignore this probability when he remembers how painstaking and how literal the Japanese manner of imitating Western fashions was apt to be, and when he considers that the policy of constitutional humbug was just as prominent in the colonial history of the modern Western World as it had been in the domestic history of medieval Japan."

"Was it not Western Imperialism that had coined the word 'protectorate' as a euphemism for 'annexation'? And had not this constitutional fiction served its Western inventors in good stead? Was not this the method by which the Government of the French Republic had stepped into the shoes of the Sultan of Morocco, and by which the British Crown had transferred the possession of vast tracts of land in East Africa from native African to adventitious European hands? And if the ex-victors in the General War of 1914-18 should protest that, since the War, they had experienced a conviction of sin and had replaced the tarnished word 'protectorate' by the brand-new word 'mandate', would not the Japanese be able to cite American and Russian, as well as German opinion in support of the view that this latest change of name had introduced a distinction without a difference?"

"Moreover a Japanese apologist might discover precedent for almost every use that Japan had made of 'Manchukuo' in Western post-war as well as pre-war practice. Conceivably, for example, it might be considered hypocritical on the part of the Japanese to have connived at the action of 'the Manchukuo Government' in seizing the China Maritime Customs House at Dairen, and then to have disclaimed all responsibility for this breach of a Sino-Japanese agreement on the ground that the problem did not concern Japan but was an issue solely between "Manchukuo" on the one hand and the Government of China and its Dairen Commissioner on the other. But if this incident was to be judged on the 'practical' basis of precedent and not by the merely 'idealistic' touchstone of Right-and-Wrong, was it not open to the Japanese to point out that they were here following, with almost pedantic exactitude, a precedent which had been set by the French in 1923-4 when they had engineered the fictitious 'Separatist Movement' in the Rhineland in the hope of achieving through this instrument a breach of the Peace Treaty of Versailles which they preferred not to perpetrate with French hands? Though the Japanese failed to make the most of these Western precedents in stating their case for performing the farce of 'Manchukuo', it may legitimately be conjectured that Western as well as Japanese precedents had in fact suggested, and commended, this line of policy to Japanese minds."

"These considerations go far towards explaining 'Manchukuo'. Yet, when all is said, it is difficult altogether to comprehend the state of mind in which a piece of make-believe is obstinately defended as being genuinely what it purports to be, long after its fraudulency has been conclusively exposed to the public eye. It can only be pointed out that this curious state of mind was at any rate not peculiar to the Japanese. It was also displayed, in this self-same post-war age, by the French, when they protested, as we have recalled,

that 'the Separatist Movement' in the Rhineland was a spontaneous expression of Rhinish aspirations with which the French Army of Occupation had nothing to do. And it was likewise displayed by the Russians, when they protested that the Government of the U. S. S. R. had nothing to do with the Third International. The state of mind which is illustrated in each of these instances must be regarded as one of those relics of an 'archaic' psychology which lingered on in the field of international relations and which constituted one of the most formidable obstacles to the progress of civilization in this particular sphere of social life."

This is what the Surveyor of the International Affairs says in his Survey of the year 1932.

It may be noticed in this connection that the Japanese upto 1928 favoured the consolidation of the Chang power and discouraged its opponents by their policy. Thus, in 1925 they frustrated the revolt of Kuo Sung-lin by proclaiming a neutral zone along the S. M. R. (see the Survey of 1925, Vol. 11, p. 346) and in 1928 they precluded a Nationalist invasion of Manchuria by declaring they would not allow the "Northern Expedition" to pass Shanhaikwan. (see the Survey of 1928, p. 337). This policy kept the situation *much more stable* than it was elsewhere in China, quite apart from the abilities of the Changs, and the Japanese would probably have continued it had not Chang Junior gone over to the Nationalists in December 1928 and admitted Kuomintang committees, etc., into Manchuria. In a sense "Manchukuo" is a restoration of the *status quo ante* 1928: that is, Manchurian autonomy with Japanese protection and no Kuomintang. Of course "Manchukuo" is much more of a Japanese protectorate than the pre-1928 regime ever was, but it is not so much of an innovation as it seems.

As regards the Lytton Commission's findings on the point whether or not Manchukuo was a genuine expression of the general will of the Manchurian people, it may be pointed out that the commission relied mainly on correspondence from unnamed persons, all evidence given publicly being discounted owing to the presence of Japanese and the exposure of witnesses to intimidation. The sort of evidence on which the denial is based is certainly of an unsatisfactory nature.

The Lytton Commission's statement that there never was any independence movement in Manchuria before the Japanese Army over-ran the country may not be quite accurate. It may be pointed out that Chang Tso-lin's Government performed all the functions of a sovereign state, including the making of regular treaties with foreign powers (*e. g.*, the Sino-Russian Agreement of 1924 made by Chang Tso-lin after he had explicitly declined to recognize the treaty previously made with Russia by the then internationally recognized Government of China), and that Chang Hsueh-liang's policy of submission to Nanking in return for powers in North China was strongly opposed by a party among his generals, notably by Yang Yu-ting, his father's Chief of Staff, who was murdered by Chang for that reason. The Japanese claim that, with the forcible ejection of Chang, Manchuria merely reverted to its pre-1929 status, only that this was now regularized by an assertion of *de jure*

sovereignty.

The evidence given before us cannot be said to be quite convincing on either side. I need not however pursue the matter further as in my opinion it has not been established that either the then Japanese Government or any of the accused had any PRECONCEIVED DESIGN of establishing a puppet government in Manchuria. Whatever be the origin of the Manchurian Incident it can be said without much hesitation that it has not been established beyond reasonable doubt that any of the accused before us had any hand in the matter.

It must be remembered that, according to the case of the prosecution itself, the then Government of Japan was not yet in the conspiracy and therefore any action of that government cannot be said to have been in execution of the alleged conspiracy.

We may notice here the several cabinets that came into office since the fall of the TANAKA Cabinet on July 1929. The TANAKA Cabinet was succeeded by the HAMAGUCHI Cabinet on July 2, 1929. In this Cabinet Baron SHIDEHARA was the Foreign Minister and General UGAKI, and then, General ABE, were the War Ministers. None of them are alleged by the prosecution to have been in the conspiracy. The HAMAGUCHI Cabinet was succeeded by the WAKATSUKI Cabinet on the 14th April 1931 with Baron SHIDEHARA as Foreign Minister, and accused MINAMI was War Minister. Excepting MINAMI none else of this Cabinet is alleged to have anything to do with the conspiracy. This Cabinet was succeeded by INUKAI Cabinet on 13 December 1931 with the accused ARAKI as War Minister. Excepting ARAKI none else of this Cabinet also is alleged to have been in the conspiracy. On 26 May 1932 this was followed by the SAITO Cabinet. Count UCHIDA was its Foreign Minister and accused ARAKI continued as War Minister. Excepting ARAKI again none else of this Cabinet too is alleged to have been connected with the conspiracy. Of course, when UCHIDA was later on succeeded by accused HIROTA as Foreign Minister another conspirator in his personality entered the Cabinet. This SAITO Cabinet continued till 8 July 1934 and was succeeded by OKADA Cabinet. Next came the HIROTA Cabinet on 9 March 1936. We need not at this stage proceed further than this. All that we should remember is that till the accession of the HIROTA Cabinet on 9 March 1936, the government as such is not alleged to have been in the conspiracy. The bearing on the question of conspiracy of any government pronouncement or action during this period must be determined keeping in view this case of the prosecution.

The Japanese government's decision to accord recognition to Manchukuo at some future date which was not yet fixed was announced by the then Japanese Foreign Minister, Count UCHIDA on the 18th July 1932. This intimation was repeated by him in a speech which he delivered before the Diet at Tokyo on the 25th August in which he went so far as to say that the Japanese Government regarded the recognition of Manchukuo as being the sole effective means of solving the Manchurian problem. Count UCHIDA elucidated this problem in his speech and said: "With regard to the question of finding a solution for the Manchurian problem, the Japanese Government attach the

greatest importance to the following two points:

"First, that, in seeking a satisfactory solution we should aim at the fulfilment of the legitimate aspirations of the Manchurian people, at adequate guarantees for the rights and interests of Japan, at prevention—in order to make Manchuria a safe place to live in, alike for Manchurians and foreigners—of any recrudescence of erstwhile anti-foreign policy and movements, and, finally, at bringing not only stability to Manchuria, but permanent peace to the Far East. Second, that such solution should be effected by rejecting all sentimental propositions and abstract theories and arrived at upon the solid basis of realities of the situation."

On the 13th September 1932, at Tokyo, the draft text of a protocol to be signed by representatives of Japan and Manchukuo was approved by the then Japanese Privy Council in the presence of Emperor of Japan and on the 15th this instrument was duly signed.

According to the case made by the prosecution we cannot take the above as acts of the conspirators or as giving any retrospectant indication of any conspiracy.

It was suggested that the reason why, instead of annexing Manchuria to the Empire of Japan, Japan set up a puppet government there, is that thereby Japan thought she would succeed in evading her obligation under the Washington Treaty.

I have already indicated where the Treaty stood at the relevant time and how it was being respected by the signatories thereof.

The question before us, however, is not what the legal position actually was, but how the persons concerned understood that legal position to be. The evidence before us shows that the then members of the Japanese Government felt some difficulty in recognizing Manchukuo as an independent state in view of the Washington Treaty, and it may be that they preferred to set up a puppet government in view of their obligation under the treaty as understood by them. Whatever that be, the then Government of Japan, which was showing its nervousness over the treaty obligation, and was trying to find out a means to avoid any violation of that obligation, was not yet in the alleged conspiracy, and, therefore, its deliberations, policies, and actions are, strictly speaking, irrelevant for our present purposes.

The picture of the economic domination of Manchuria by Japan as delineated by the prosecution is best given in the language of its summation. The prosecution says: "As early as April 11, 1932, immediately after the institution of the new government, the Japanese Cabinet decided that in order to solidify the foundation of the state by establishing a financial and economic policy to enhance international confidence and to realize a single economic unit of Japan and Manchukuo, the new state should employ Japanese as authoritative advisers on economic problems and should appoint Japanese officials to economic posts. (Ex, 223, R. P. 2, 826). The same decision reserved real power of management over rail-roads and other means of transportation for Japan. (Ex. 223, R. P. 2, 826-7). Acknowledging that Japan in November 1931 had decided to have the Japanese Transportation Company open regular

air routes on the pretext of military need to establish a foundation for acquiring aviation rights in Manchuria and Mongolia, the SAITO Cabinet, in August 1932, decided that it was important that this service become a permanent business organization to be managed so as to contribute to the execution of Japan's aviation policy, to the development of industry and to the acquisition of aviation rights in China proper. (Ex. 225, R. P. 2,831-2). The business was to be under the leadership and supervision of Japan through a joint Japan-Manchukuo company in which Japanese would hold substantial leadership and supervision. (Ex. 225, R. P. 2, 832). Subsidies were to be given by the Manchukuo government and the Railway. (Ex. 225, R. P. 2,833). In connection with the signing of the Protocol, three of the supplementary agreements dealt with Japanese rights in transportation, aviation and mining. (Ex. 241, R. P. 2,980-1).

"The fact that these early steps were not isolated phenomena of grabbing but were part of a complete plan to dominate Manchuria entirely becomes established even more strongly when Japan's actions subsequent to the recognition of Manchukuo are considered. In the first guiding plan given by the Cabinet to the Kwantung Army on November 3, 1932, it was stated that, economically, co-prosperity and co-existence should be the basic principle, and that the system was to be an economic bloc between Japan and Manchuria. (Ex. 230, R. P. 2, 907). The idea of a "fit industry for suitable locality" was to be adopted so that each member of the bloc might co-ordinate its industries with the other and abolish customs barriers with the aim of acquiring self-sufficiency and making an advance toward worldwide industry. (Ex. 230, R. P. 2,908). Following the adoption of this policy, the Cabinet decided a policy for Manchurian wire, wireless, telegraph, telephone and broadcasting enterprises. (Ex. 231, R. P. 2,919). This company was to be a joint enterprise under the joint control of the government and military of both nations, but the Manchurian military could not inspect or make demands without previous approval of the Japanese military, and in case of dispute between the supervising authorities, the view of the Japanese authorities was to prevail. (Ex. 231, R. P. 2, 920-4). In the guiding policy of August 8, 1933, it was provided that Manchuria's economic aim lay in unification of Japanese and Manchurian economics so as to securely establish Japan's expansion of economic powers to the whole world and at the same time to strengthen Manchuria economically. (Ex. 233, R. P. 2, 930). Japan's real aggressive designs cannot be expressed any better than as stated in this instrument. Japan was to come first, then Manchuria, and it is not at all clear that even the economic strengthening of Manchukuo, the secondary consideration, was to be for the benefit of the Manchukuoans. This document also stated that certain industries were restricted by demands of Japan's national defense but others were to be open to all. (Ex. 233, R. P. 2, 930). It will be recalled that in this policy decision all important matters were reserved to the Japanese Cabinet.

"On March 20, 1934, the Cabinet decided on a Japanese-Manchukuo Economic administration policy. The fundamental concept was the securing

of a base for Japan's worldwide economic expansion and the strengthening of Manchukuo's economic powers. (Ex. 236, R. P. 2, 939-40). Basic industries were to be restricted by the demands of Japan's national defense and such enterprises would be operated by special companies, which were to hold the dominant position and were to be directly or indirectly under the protection and supervision of Japan. (Ex. 236, R. P. 2, 940). The industries to be encouraged were, inter alia, light metal, petroleum, liquid fuel, automobile and mining industries. (Ex. 236, R. P. 2, 941-2).

"On July 17, 1935, Japan and Manchukuo established a Joint Economic Committee which was to advise the two governments on important matters of economics and on the control and inspection of the business of joint companies. (Ex. 851, R. P. 8, 434-5). The committee was to have eight members, four from each country. (Ex. 850, R. P. 8, 422). The committee was limited in its powers since matters important to the economies of both governments, but within Japan's power, were without the province of the committee, and such matters were to be made into a unilateral contract binding only upon Manchukuo. (Ex. 850, R. P. 8, 424). It was pointed out in the Privy Council, as a secret matter, that the agreement in fact only bound Japan. (Ex. 850, R. P. 8, 425). However, even the limited powers reserved to the Committee disturbed one of the councillors because of the equal division of members. His fears were quieted by the accused HIROTA's pointing out that one of the Manchukuoan members, the Chief of the General Affairs Board, was a Japanese whose primary duty was to see that there would be no conflict, and in case the Manchukuoan members should scheme against Japan, the Chief would take proper measures after considering the interests of both countries. (Ex. 850, R. P. 8, 429-30). In November 1935, the yen bloc was established and Manchukuo's currency was taken off silver and stabilized at par with the Japanese yen. (R. P. 8, 436).

"The purpose of all this control of Manchukuo's economy became clear in 1937 when the plans disclosed that its economy was being integrated with that of Japan for war purposes. In the Five Year Plan of Important War Industries of the War Ministry of May 29, 1937, it was planned that the requisite industries should be pushed to the continent according to the principle of right work in the right place with Japan and Manchuria being treated as a single sphere. (Ex. 842, Pt. 1, R. P. 8, 437). In the Outline of the Five Year Plan for the Production of War Materials of June 23, 1937, the two primary aims of which were to perfect war preparations and to realize the Major Industries Plan (Ex. 841, R. P. 8, 261), it was provided that in the Five Year Industrial Plan for Manchukuo guidance would be given to the war industries. (Ex. 841, R. P. 8, 439-40). Efforts were to be made to overcome the factors impending the speedy construction of war industries in Manchukuo. (Ex. 841, R. P. 8, 441).

"In January 1937, Manchukuo promulgated a Five Year Industrial Plan (Ex. 446, R. P. 5, 071), a plan in the drafting of which the accused HOSHINO admitted playing a large part. (Ex. 453, R. P. 5, 126). This plan, which provided for the creation and expansion of every type of

industry, stated that emphasis was to be placed on opening up Manchukuo's national resources necessary in time of emergency and that it was the desire to develop various types of industry to make Manchukuo self-supporting and to meet Japan's shortages. (Ex. 446, R. P. 5,071). Under the plan, the production of agricultural products required as military stores was to be increased. (Ex. 446, R. P. 5,072). In May 1937, Manchukuo enacted a law controlling important industries in which it required those who desired to engage in any important industry, including all those vital to war, to obtain government consent, and those already in such businesses were required to get government permission before making any change. (Ex. 444-A, R. P. 5,048-51). By May 1937, all important industries were effectively in the hands of Japan or its dominated puppet government under a plan having war as its principal aim.

"However, even the tremendous accumulation of power was not sufficient for Japan, and on October 22, 1937, the first KONOE Cabinet decided to set up one heavy industry company to establish and develop heavy industry in Manchukuo. One half of the capital was to come from Munchukuo and the other half from Japanese private interests, designated as the Nissan interests in the decision. The decision also provided for Japanese management and designated AIKAWA Gisuke, as manager. (Ex. 239, R.P. 2,963-6). Pursuant to this decision, Japan and Manchukuo entered into an economic agreement for the establishment of the Manchurian Heavy Industry Development Corporation. (Ex. 840, R.P. 8,472). While ostensibly a Manchukuo Company, in view of the economic agreement with Japan, it was really a "national policy" company of Japan. (Ex. 840, R. P. 8,472). The company was to be under joint management and its shares could be held only by the two governments or their nationals. The President and Directors were to be appointed by the two governments. (Ex. 438, R. P. 5,018-20)."

For my present purpose I do not see much significance in the charges of economic aggression in Manchuria so much dwelt upon by the prosecution in this connection. Placed at its highest, the evidence only discloses that after the founding of the State of Manchukuo, Japanese attention was directed to the exploitation of transportation and communication facilities, and increasing emphasis was laid on developing natural resources and heavy industries. But all this was done by the then Japanese Government which, according to the case of the prosecution itself, was not yet in the alleged conspiracy. In its final summation the prosecution puts the case thus: "From the beginning the original conspirators in the army had one over-all plan which they continuously put into practice. They were strong enough from the very beginning to force the government to acquiesce and participate with them in every individual act. Failure to participate and acquiesce brought the downfall of the recalcitrant cabinet and the installation of a new one which would participate at least to the extent of the portion of the plan then being put into effect. Finally in 1936 the conspirators became powerful enough to obtain as the price for allowing a government to be formed, the complete participation by the government in the conspiracy, and the common plan became the national policy of

Japan."

So, the only matter that will be of any importance here is to enquire if there is any evidence to show that what the Government of Japan was doing at this stage, was being done by it at the instance of the alleged conspirators. The question is not whether the action taken by the Government was justifiable, but whether by the evidence adduced before us it has in any way been connected with the alleged conspirators so as to make it yield some retrospectant indication of the original conspiracy. There is absolutely nothing in the evidence so to connect the actions of the Japanese Government with the alleged conspirators.

The evidence placed at its highest only indicates a certain policy of exploitation of the Manchurian resources adopted by the then Japanese Government. I have already indicated how many diverse factors of diverse origin might have operated in moulding this policy. None of these factors could be said to be the product of any conspiracy. Taking with this the fact that even according to the prosecution case the alleged conspiracy lay outside the then Government of Japan, I do not see how this evidence of economic exploitation can in any way advance the prosecution case of conspiracy.

The plans of industrial development since 1937 and their connection with any design for aggressive war will be examined in detail in connection with the case relating to general preparation for war. It would suffice for my present purpose to say here that I could not connect these plans and industrial developments with any aggressive purpose. At any rate they were subsequent developments having nothing to do with any conspiracy of the kind alleged in the indictment.

Coming to the expansion of control beyond Manchuria the prosecution gave us a detailed account of the methods which, according to the prosecution, Japan adopted in obtaining control of North China prior to 7 July 1937, the date of the Marco Polo Bridge Incident. In this connection the prosecution in its summation laid emphasis on the following matters:

1. Under the terms of the Tangku Truce of May 31, 1933, a demilitarized area was set up in North-eastern Hopei Province, north and east of the important cities of Peiping and Tientsin, and the Chinese army was withdrawn to the west and south of the demilitarized area.
2. The demilitarized area and adjacent territory which together constituted the five northern provinces of China proper, were of the utmost importance, strategically, politically and economically.
3. The Province of Chahar completely bordered Jehol which had been incorporated into Manchukuo on the west, while Hopei bordered it on the South. (Ex. 220, p. 2,751).
4. By April of 1935, it had been decided to set up this important region as an autonomous area in furtherance of their plans for the further disintegration of China and the destruction of the Chinese Nationalist Government, an essential prerequisite for the successful

achievement of the aims of the conspiracy. (p. 2, 026—Tanaka Ryukichi).

5. The authors of the movement were the accused MINAMI, Commander of the Kwantung Army, and the accused UMEZU, Commander of the North China Army. The work was divided between the two armies. The Army in the North China took up the case of the five Provinces and the Kwantung Army took up Inner Mongolia. (Tanaka Ryukichi, pp. 2,033-34).
6. The purpose was twofold:
   (*a*) to create an autonomous regime in Mongolia,
and (*b*) to create a regime in North China outside the Mongolia area.
7. (*a*) The reasons for establishing Mongolian regime were to prevent infiltration of Soviet-controlled Outer Mongolian influence and to set up an independent state.
   (*b*) The reason for establishing the North China regime were to separate the five provinces from Nanking, to set them up as an autonomous area in close relationship with Manchukuo under Japan's leadership and to reduce the power and influence of the Nanking Government. (Tanaka Ryukichi, pp. 2,026-27).
8. The method adopted was by creating incidents as pretexts for making demands: At this particular point, the conspirators found it extremely difficult to find incidents—At the time relations between China and Japan were rather good.
   (*a*) In the middle of May 1935 two Chinese were killed in the Japanese concession at Tientsin—UMEZU made certain demands on this pretext—For the sake of peace, China agreed to compromise, and on June 10, 1935, General HO accepted the demands thus bringing about the HO-UMEZU Agreement. (Ex. 2,491, R.P. 20,787-88).
   (*b*) In June 1935, four Japanese Army officers were alleged to have been insulted while motoring through the Chang-Pei district—MINAMI with the object of enlarging the scope of the Tangku Truce, under instruction from Tokyo set the accused DOHIHARA of his staff in the Kwantung Army to Tientsin to negotiate on the matter which had arisen in the area in which DOHIHARA was in charge of information. (Ex. 2,489, R.P. 20,755). On June 27, 1935 an agreement was reached by DOHIHARA and Ching settling the matter. (Ex. 2,489, R.P. 20,755).
9. About May 29, UMEZU came to Hsinking and there met MINAMI and the War Minister HAYASHI.
10. In September 1935, DOHIHARA was sent from the Kwantung Army by MINAMI to Peiping to foment the autonomy movement. (TANAKA Ryukichi, R.P. 2, 034, 2,124).
    (*a*) Anti-Communism was chosen as a slogan.

(*b*) DOHIHARA's first plan was one of inducement which failed. (TANAKA Ryukichi, p. 2,029).

(*c*) The Japanese then induced by threat and bribery some autonomous movement and on the 25th November, the East Hopei Anti-Comintern Autonomous Council was created.

11. In March 1933, the Inner Mongolia Autonomous Council had been set up under Prince Teh. Since Nanking had failed to support the council economically and the Governor of Suiyuan was opposed to the council because of Teh's desire to establish a unified Mongolian state comprising both Inner and Outer Mongolia, the situation was therefore ripe for the Japanese to make overtures to Teh. Accordingly, in April or May 1935, according to the testimony of TANAKA Ryukichi and MINAMI, MINAMI sent Colonel ISHIMOTO and TANAKA on a mission to Teh. While MINAMI stated he sent these emissaries for liaison purposes to observe conditions and admitted only that he had told them it would be a good thing to establish a liaison agency, TANAKA testified that they were sent for the purpose of having the Inner Mongolian Autonomous Council form a close relation with Japan to establish an autonomous government under Teh, which would become an independent government in line with the Kwantung Army anti-Soviet policy. While Teh at first did not agree, in August 1935, he promised close co-operation wth MINAMI, and the Kwantung Army gave him financial aid. In November 1935, DOHIHARA and the HOPEI-Chahar regime agreed that Teh should be in control of that regime, and on February 11, 1936, the Inner Mongolia Autonomous Council was transferred to West Sunito, where it was joined by Japanese civilians who served as advisers.

The observations in the above extracts from the prosecution summation ascribing sinister significance to the events happening during this period are mainly based on the evidence of TANAKA Ryukichi. I have already given my impression of this witness.

The defense contended that the Autonomous movement which began and was promoted in North China sometime before the Marco Polo Bridge Incident had nothing to do with the China Incident. After the making of Tangku Agreement in May 1933, it was the national government of China itself which established the North China Political Committee governing the five districts of Hupei, Chahar, Shantung, Shanshi and Suiyuan and the two cities Peiping and Tientsin on the 17th June the same year. It appointed Huangfu to be the head of the Committee. In 1935, the Autonomous movement of the farmers gained momentum and November of the same year, the Eastern Hupei Anti-Communist Autonomous Committee was established with Yinjuken as its Chief. Though this was strictly a local Chinese affair, the Chinese Government seized upon it and used it for anti-Japanese propaganda.

It is beyond my purpose to enter upon the merits or demerits of the respective cases of the parties in this connection. All that I need point out is that I find it difficult to ascribe every event that was happening during this period to the over-all conspiracy alleged in the indictment. Many of the events might have been engineered. Many of the Japanese might have had a hand in engineering such events. Yet there is hardly any evidence on record which would justify us to ascribe all these to an over-all conspiracy of the kind alleged by the prosecution.

The most attractive way of presenting the happenings in the appearance of a continuous chain of sinister significance is as follows:

1. After Japan's occupation of Manchuria and Jehol was completed with the signing of the Tangku Truce in the spring of 1933, Jehol became the frontier of the newly formed puppet state of Manchukuo.
   (*a*) If Japan was to advance further into China from the territory she had already occupied, her advance would be from Jehol westwards into Chahar or southwards into Hopei.
   (*b*) This is how the Hopei incident of May 1935 and the North Chahar incident of June 1935 would be explained.
2. On the 17th of April 1934 the Japanese Foreign Office issued the "*Amau Statement*" warning the powers who subscribed to the Nine-Power Pact that the Japanese government would not tolerate any interference with her plans in China.
   (*a*) HIROTA explained to the American Ambassador Grew that this "*Amau Statement*" had been issued without his approval or knowledge.
   (*b*) The fact, however, that this statement truly represented Japan's policy towards China at that time became clear since on the very day after HIROTA made his disclaimer to Ambassador Grew, he circulated to the Japanese embassies in the United States, Great Britain and China and to the Japanese consulate general at Nanking a telegram which repeated Japan's claim to a special position in regard to China, the claim which had been made in the Amau statement.
   (*c*) The telegram, dated 26 April 1934, states *inter alia*: "Japan cannot remain indifferent to any one's taking action under any pretext, which is prejudicial to the maintenance of law and order in East Asia for which she, if only in view of her geographical position, has the most vital concern."
3. (*a*) Then followed the May incident of 1935 in the Hopei province and the June incident of 1935 in the North Chahar province.
   (*b*) Then comes the establishment of the Inner Mongolia autonomous regime. On the strength of the evidence of Tanaka Ryukichi, this movement is connected with the alleged con-

spiracy.

4. We are then given what is called *a propaganda plan* of the Kwantung Army and it is said that this plan is most significant as to Japanese intentions towards North China. It was dispatched by the Vice-Chief of Staff of the Kwantung Army to the Vice-Minister of War on 9 December, 1935.
   (*a*) Certain passages in it are specially quoted as being of much significance.
5. Then we are told that when the Japanese armies in China were formulating plans in anticipation of military operations in North China, the Japanese Cabinet was working on a program of subjugating China through diplomatic measures.
   (*a*) On August 5, 1935, Foreign Minister HIROTA sent to the diplomatic and consular officials in China a plan prepared on his instructions by the Bureau of East Asiatic Affairs of the Foreign Office, as a result of the re-investigation of Japan's policy towards China which had been made by that Bureau in collaboration with the Army and Navy authorities.
   (*b*) Three general principles are stated in the plan as follows:
   "(*i*) China should carry out strict control over all anti-Japanese speeches and activities, and both Japan and China should make efforts to promote friendship and co-operation on the basis of the principles of mutual respect of independence, co-operation and mutual assistance, and should work for the development of relations between Manchukuo and China.
   "(*ii*) While the Ultimate aim of development of relations was that China would give formal recognition to Manchukuo and that Japan, Manchukuo, and China would conclude an agreement to regulate the new relations among the three countries, China for the time being should not deny the fact of Manchukuo's existence, at least in North China and in the Chahar district which bordered the Manchukuo territory and should enter into actual relations of interdependence and co-operation with Manchukuo in the economic and cultural fields;
   "(*iii*) Japan and China should co-operate in Chahar and other districts bordering Outer Mongolia, with a view to removing the communist menace."
   (*c*) On 21 January 1936 the three principles were made known to the public through HIROTA's address to the Diet.
6. Then followed the February Incident in Japan. The Incident occurred on 26 February 1936. It was an outburst of the Army's resentment against the Government under the premiership of

OKADA, which was known as a Navy cabinet and was reputed to be opposed to the Army's policy of expansion on the continent of Asia by military force.

(*a*) The purpose of this Incident was to replace the OKADA Cabinet by another with stronger policies which would fit into the policy of the Army for further expansion on the continent. OKADA testified that he supposed the Incident was a spontaneous outburst of resentment on the part of a group of young officers against the Government's sympathy with the ambition of the military.

(*b*) The OKADA Cabinet resigned on 8 March 1936 and HIROTA succeeded as premier.

(*c*) Instead of taking measures to enforce military discipline and eradicate the influence of the Army in political affairs, HIROTA yielded to Army demands as to the choice of some of his ministers.

7. On 30 June 1936 the War and Navy ministers agreed upon a basis of national policy. The fundamental policy was to consist in advancing toward and developing the South Seas as well as obtaining a firm position in the East Oriental Continent for stabilizing Japan's national defense.

(*a*) The principles stated were:

(*i*) Japan must strive to correct the aggressive policies of the great powers and to realize the spirit of the Imperial way by a consistent policy of overseas expansion;

(*ii*) Japan must complete her national defense and armament to secure the position of the empire as the stabilizing power in East Asia;

(*iii*) Japan expects the sound development of Manchukuo and thus hopes to stabilize Japanese-Manchukuoan national defense in order to promote economic development. Japan intends to get rid of the menace of the U.S.S.R.; to prepare against Britain and the United States and to bring about close collaboration between Japan, Manchukuo and China; in the execution of this continental policy, Japan must pay due attention to friendly relations with other powers; Japan plans to promote her national and economic development in the South Seas, and without rousing other powers will attempt to extend her strength by moderate and peaceful measures. Thus, with the establishment of Manchukuo, Japan may expect full development of her national resources and develop her national defense.

(*b*) These plans were adopted on 11 August 1936 as the basic principles of national policy by the Five-Ministers Conference.

8. While the HIROTA Cabinet was formulating its expansionist for-

eign policy under the name of national defense, the Kwantung Army had its attention directed toward Mongolia in the north. Earlier, on 28 March 1936, ITAGAKI, the then Chief of Staff of the Kwantung Army, said:

(*a*) "Outer Mongolia is of importance from the point of view of Japanese-Manchukuoan influence today, because it is the flank defense of the Siberian railroad, which is a connecting line between Soviet territory in the Far East and Europe. If Outer Mongolia be combined with Japan and Manchukuo, Soviet territory in the Far East will fall into a very dangerous condition and it is possible that the influence of the Soviet Union in the Far East might be removed without fighting. Therefore, the Army aims to extend Japanese-Manchurian power into Outer Mongolia by all means at hand."

(*b*) In connection with Inner Mongolia, he said:

"Western Inner Mongolia and the zone to the west of these are of great value for executing the continental policy of Japan. Should the said zone be placed in the sphere of Japanese and Manchurian influence, it means that will be a base for pacification of their brothers of the same race in Outer Mongolia. Moreover, that the influence of Soviet Russia which comes from Hainkiang, as well as a land link between Soviet Russia and China will be blocked.... From the above standpoint, the Imperial Army has been furthering its work with regard to Western Inner Mongolia for several years. The Imperial Army is resolved to further its work, overcoming all sorts of obstacles."

(*c*) As a result of the adoption of a positive Mongolian policy by Japan, the autonomous movement in Inner Mongolia made steady progress. The so-called 'state founding conference' was held from 21-26 April 1936.

9. On 11 August 1936 the second administrative policy toward North China was decided upon by the appropriate ministries in the HIROTA Cabinet.

(*a*) The main purpose of the policy was stated to be:

(*i*) to assist the people in North China to procure perfect independence in administration,

(*ii*) to set up an anti-communist, pro-Japanese and pro-Manchukuoan area,

(*iii*) to secure necessary materials for Japan's national defense and to improve the facilities of transportation against the possible invasion of Soviet Russia, thus making North China a base for co-operation between Japan, Manchukuo and China.

(*b*) The five provinces in North China should finally be put under

self-government.

10. Subsequently, on 20 February 1937, the third administrative policy toward North China was decided upon by the appropriate ministry of the HAYASHI Cabinet. There was no substantial change in contents.

11. On 18 September 1936 an incident occurred when a company of Japanese soldiers carried out maneuvers in Fengtai. As they passed through the garrison line of the Chinese troops there, the Chinese patrols attempted to halt them and a clash ensued. Although it was immediately settled, the Japanese used this incident as a pretext for re-inforcement and occupied Fengtai.

12. On 20 January 1937 the Seiyukai party issued a declaration attacking the HIROTA Cabinet on the ground *inter alia* that its members were too much influenced by the dogmatic prejudices of the bureaucrats and of the military, and that the wish of the military to interfere in every sphere was a threat to constitutional government in Japan.

    (*a*) On 22 January 1937 War Minister TERAUCHI tendered his resignation because, as he stated, the views on the prevailing situation held by the political party, which had some members sitting as cabinet members, differed fundamentally from the Army's. Under the then existing situation, there was no hope of getting a new war minister who could in any manner reconcile to extremist policy of the Army without party politics, and the HIROTA Cabinet had to resign.

    (*b*) Upon the resignation of the HIROTA Cabinet, UGAKI on 24 January 1937 was given the Imperial mandate to form a new cabinet. UGAKI was not regarded with favour by the Army. He failed to form a cabinet. The HAYASHI Cabinet was formed on 2 February 1937. The general policy of the government was not changed.

13. On 16 April 1937 the plan for guiding North China was decided on by the Foreign, Finance, War and Navy Ministers. The essence of the guidance of North China was stated to be to make the said area virtually a firm anti-communistic, pro-Japanese region and was to contribute to the acquisition of communicational facilities, thus partly preparing against the third threat and partly forming a foundation realizing the unity of mutual aid of Japan, Manchukuo and China.

14. After the fall of the HAYASHI Cabinet, Prince KONOYE assumed the premiership on 4 June 1937, with HIROTA as Foreign Minister and KAYA as Finance Minister.

15. TOJO, the then Chief of Staff of the Kwantung Army, sent a telegram on 9 June 1937 to the Army General Staff with the suggestion that judging from the present situation in China from the

point of view of military preparations against Soviet Russia, Japan should deliver a blow first of all upon the Chinese Central Government to get rid of the menace at the back if Japan's military power permitted it.

16. The Marco Polo Bridge Incident took place on 7th July 1937.

The Amau Statement is Exhibit 935 in this case. Of course, the statement itself did not say "that the Japanese Government would not tolerate any interference with *her plan in China*". This is only how the meaning and import of that statement is presented to us. The entire statement stands thus:

"Owing to the special position of Japan in her relations with China, her views and attitude respecting matters that concern China, may not agree in every point with those of foreign nations; but it must be realized that Japan is called upon to exert the utmost effort in carrying out her mission and in fulfiling her special responsibilities in East Asia.

"Japan has been compelled to withdraw from the League of Nations because of their failure to agree in their opinions on the fundamental principles of preserving peace in East Asia. Although Japan's attitude toward China may at times differ from that of foreign countries, such difference cannot be evaded, owing to Japan's position and mission.

"It goes without saying that Japan at all times is endeavouring to maintain and promote her friendly relations with foreign nations, but at the same time we consider it only natural that, to keep peace and order in East Asia, we must even act alone on our own responsibility and it is our duty to perform it. At the same time, there is no country but China which is in a position to share with Japan the responsibility for the maintenance of peace in East Asia. Accordingly, unification of China, preservation of her territorial integrity, as well as restoration of order in that country, are most ardently desired by Japan. History shows that these can be attained through no other means than the awakening and the voluntary efforts of China herself. We oppose therefore any attempt on the part of China to avail herself of the influence of any other country in order to resist Japan. We also oppose any action taken by China, calculated to play one power against another. Any joint operations undertaken by foreign powers even in the name of technical or financial assistance at this particular moment after the Manchurian and Shanghai Incidents are bound to acquire political significance. Undertakings of such nature, if carried through to the end, must give rise to complications that might eventually necessitate discussion of problems like fixing spheres of influence or even international control or division of China, which would be the greatest possible misfortune for China and at the same time would have the most serious repercussion upon Japan and East Asia. Japan therefore must object to such undertakings as a matter of principle, although she will not find it necessary to interfere with any foreign country negotiating individually with China on questions of finance or trade, as long as such negotiations benefit China and are not detrimental to the maintenance of peace in East Asia.

"However, supplying China with war planes, building aerodromes in China and detailing military instructors or military advisers to China or con-

tracting a loan to provide funds for political uses, would obviously tend to alienate the friendly relations between Japan and China and other countries and to disturb peace and order in East Asia. Japan will oppose such projects.

"The foregoing attitude of Japan should be clear from the policies she has pursued in the past. But, on account of the fact that positive movements for joint action in China by foreign powers under one pretext or another are reported to be on foot, it is deemed not inappropriate to reiterate her policy at this time."

In order to appreciate the occasion for this statement, it will be pertinent just to notice a few of the Western activities of the time in China which were the ostensible cause of this utterance. These activities consisted of proposals of loans to China, the sale of aeronautical equipment, the engagement of military experts and advisors, and the technical assistance supplied by the League of Nations experts who were attached to the Nanking Government.

As regards financial operations, newspaper reports had appeared, a short time before, concerning a scheme of Sino-foreign co-operation, through the medium of a financing corporation, for helping economic developments. The scheme had been elaborated by the Chinese government with the help of Monsieur Jean Monnet, a French citizen who had been Deputy Secretary General of the League of Nations in the early days of its existence. A message from Shanghai to the *New York Times* had represented this corporation as deliberately designed to counteract the growing Japanese dominance in the fields of commerce and investment and as a devise to circumvent the International Banking Consortium Agreement, which assured to Japan the option of participating in loans granted to China. Simultaneously a report emanating from Moscow had announced that a loan from an international banking group was actually impending.

The American wheat loan of the previous year was another financial arrangement which seems to have been objectionable to Japan. The ground of objection was that funds derived from the sale of the wheat had been used by the Chinese government to purchase armaments.

Military assistance to China furnished a more substantial ground for Japanese protests. The Nanking government, in their efforts to create an air force, had not only entered into large purchases of aeronautical equipment, but had also engaged the services of a considerable number of foreign experts and instructors. The United States had provided China with aircraft, including as many as seventy fighting planes as well as other machine for observation, bombing and training. The Curtis-Wright Company had, earlier in the year, contracted to erect an airplane factory to be operated with the help of American engineers. Furthermore, it was with American assistance that a large aviation base had been set up at Hangchow with a school for military pilots attached—a retired Colonel of the United States Air Corps acting as superintendent.

Germany had also provided China with military advisors, including not a few eminent senior officers of the old imperial army; and in April 1934 a

former head of the Reichswehr succeeded to the appointment of chief military advisor to the government at Nanking.

Meanwhile, the work of the League of Nations technical co-operation with China reached an important stage in the month of April 1934. A major part of the experts' work had been devoted, to the development of communications in China, a matter which might be assumed to possess a particular interest in Japanese eyes owing to its military significance. It may also be noticed that the technical agent of the League council, Dr. Rajchman, had acquired in Japan a reputation of being antagonistic to that country and of having engaged in political activities in China in a manner detrimental to Japanese interests.

Such were some at least of the foreign activities in China, which provided the occasion of the Japanese pronouncements of policy in the month of April 1934.

I would examine this Amau statement later in connection with the case of further expansion of the conspiracy into the rest of East Asia. That statement, no doubt, announced something about the special position of Japan in her relations with China. But such a claim was not unprecedented in international life. The assertion that a state may deem it proper as well as wise to act alone on its own responsibility in relation to the conduct of other powers of other continents towards areas and countries in a relative proximity to itself finds obvious precedent in the conduct of the United States in pursuance of the Monroe Doctrine.

On grounds of self-defense, the United States has for a long period asserted the right to oppose the acquisition by any non-American power of any fresh territorial control over any American soil by any process. The claim involved in the Monroe Doctrine is grounded on self-defense. A sense of its own defensive requirements prevents any admission by the United States that such an assertion constitutes unreasonable interference with the political independence of an American state. I do not see why a similar Japanese claim should be denied this defensive character and be characterized as aggressive.

That territorial propinquity creates special relations between countries was recognized even in respect of Japan's relation with China as far back as November 1917 when the Lansing-Ishii exchange of notes declared this. The Lansing-Ishii Agreement no doubt was terminated through an exchange of notes after the Washington Treaty. It may have thus ceased to be operative as a compact. Nevertheless, the principle remains that territorial propinquity creates a special relation between countries. It is a principle acted upon in international life.

As I have already pointed out, the foreign policy of a country may not be determined by one or two simple factors. I have already referred to several complex factors entering into the formation of Japan's China policy. Japan's interest in China, China's internal conditions endangering foreign interests there, China's increasing inter-relations with the U. S. S. R. (a state not a

party to the Nine-Power Treaty), were a few more additional factors.

There were a few more factors introduced by Japan's own action in Manchuria. Whatever may be the responsibility for that action, it was not possible for any subsequent statesmen of Japan shouldering responsibility for the management of her affairs to ignore these factors in adopting any future policy.

Since the signing of the Tangku Truce in the spring of 1933, the general relations between Japan and China were one of increasing amity. In both countries more and more conciliatory notes appeared in the public utterances of leading politicians. The Chinese Government gave evidence of a willingness to respond to Tokyo's demands for effective control of anti-Japanese agitation. The Japanese Government, for their part, made a gesture of good will and paid a compliment to China by elevating their diplomatic mission to the rank of embassy. The example was followed in the course of the next three months by Great Britain, Germany and the U.S.A.. As I shall show elsewhere, HIROTA's was indeed a co-operative policy and it was proceeding smoothly. His method was that of a steady and patient persuasion and of remaining on terms of at least outwardly friendly intercourse with the Government of Nanking.

Any deterioration in the Sino-Japanese relations thereafter had no such connection with the earlier events as would entitle us to connect any subsequent events with the earlier incidents as constituting parts of one entire chain. By the end of the year Japan had to face an unprecedented financial crisis, and in comparison with other countries her finance was in the most alarming state. Her financial predicament lent much emphasis to the importance of maintaining, if not increasing, her export trade. The increasing tendency throughout the world to raise trade barriers and in many cases—as in the British colonies and the Netherlands East Indies—specifically to limit the import of Japanese manufactures, gave serious cause for concern.

Japan was counting upon a friendly co-operation of China in the field of economics. It may be that in view of the world situation Japan was desiring that China should facilitate the creation of a Sino-Japanese economic bloc. In the meantime certain grave currency difficulties arose in China. The British Government entered into conversations with the governments at Washington, Paris and Tokyo with a view to concerting a plan of international assistance to China for correcting her currency difficulties. The American Under-Secretary of State, in addressing press correspondents, said that if China needed or desired financial assistance from abroad, his own government was at one with the British Government in favouring a sympathetic consideration of the possibility of rendering such assistance by co-operative action among the powers concerned. Japan looked upon this with certain amount of suspicion. This was a form of foreign activity in relation to Chinese affairs which Japan suspected as having been resorted to in order to checkmate a Chinese-Japanese *entente*. The Japanese Government hastened to declare that they considered an international loan unnecessary and undesirable. Then came Sir Frederick Leith-Ross on a mission to investigate and report upon the economic condi-

tions in China in order that his expert advice may be available to the British Government for the purpose of discussing with the Chinese Government and with other governments concerned the problems to which the present situation gives rise. Soon thereafter the Chinese Government introduced certain currency measures without consultation with Japan. It was not unnaturally deduced that advice from the British financial expert had played an important part in the formulation of the Chinese currency plan. Added to this belief there was the further suspicion aroused by the rumours of a loan with British assistance. It was looked upon in Japan that leaders of the Nanking Government were selling their country to foreigners for their own aggrandizement. Japan felt that she could not overlook any attempt on the part of Great Britain to place a semi-colonial China under the domination of British capital.

From Exhibit 3, 241, paragraph 5, we have the following:

"On April 17, 1934, when the negotiation for the improvement of the Sino-Japanese relations by the Japanese Minister to China, ARIYOSHI and Chinese Foreign Minister WANG had hardly been opened, there arose a question of the so-called unofficial statement of spokesman AMO.

"At that time, Mr. MONNET, an expert financier of the Secretariat of the League of Nations, was staying in China from the end of 1934. The Foreign Office frequently received information from the Japanese Legation at Nanking and other sources that Mr. MONNET was drafting a plan for international co-operation to China, from which Japan was to be excluded, in concert with those antagonists of Mr. WANG Chin-wei. The Foreign Office, thereupon, instructed the Japanese Minister to China and other officials to keep in touch with Mr. MONNET and discourage him so that his activity in China might be restrained. Telegraphic instructions to the same effect were frequently given to the Japanese representatives in China from the Bureau of East-Asiatic Affairs, in which rather exaggerated expressions were used with a view to impress Mr. MONNET strongly.

"The so-called unofficial statement of spokesman AMO to the newspapermen was a patchwork of the contents of those telegraphic instructions drawn up for such special purpose by a certain bureau of the Foreign Office."

HIROTA's disavowal of the Amau statement certainly did not mean that he was disowning also any particular policy covered by it. His telegrams to the Japanese ambassadors had nothing sinister about them. Japan was openly claiming this special position, though her meaning of the claim was quite different from the meaning ascribed to it by other powers.

As would appear from a memorandum dated May 19, 1934, by the Secretary of State, Cordell Hull, (Exh. 937), the Japanese Ambassador called on and promptly communicated to him the contents of the telegram which he received from Foreign Minister HIROTA, claiming this special position.

The memorandum says:

"I felt in order not to be misunderstood here or anywhere that I should in a friendly and respectful spirit offer a succinct but comprehensive restatement of rights, interests and obligations as they related to my country primarily

and as they related to all countries signatory to the Nine-Power Treaty, the Kellogg Pact, and international law as the same applied to the Orient. I then inquired whether the Japanese differed with any of the fundamental phases of the statement I sent to the Japanese Foreign Minister on the 28th day of April 1934? The Ambassador replied that it did not differ, that his Government did agree to the fundamentals of my note or statement, but that his Government did feel that it had a special interest in preserving peace and order in China. He then repeated the same formula that his government had been putting out for some weeks about the superior duty or function of his government to preserve peace and of its special interest in the peace situation in—to quote his words—'Eastern Asia'..... I then remarked that I would be entirely frank by saying that just now there was considerable inquiry everywhere as to just why his government singled out the clause or formula about Japan's claiming superior and special interests in the peace situation in 'Eastern Asia' ..... The Ambassador commenced protesting that this was not the meaning contemplated or intended .... The Ambassador again said that this so-called formula about the superior interests of Japan in preserving peace, etc., did not contemplate the interference or domination of overlordship such as I had referred to."

This document gives us Japan's meaning of her policy as also Secretary Hull's view of the same.

Referring to this Amau statement, Foreign Secretary Simon stated in reply to questions in Parliament that:

"It appears that the statement in question was made due to the apprehension that certain activities of the powers in China are injurious to peace in the Orient or to Sino-Japanese relations or to China's security, but there is no reason for such apprehension to arise as far as Britain's policies are concerned. Britain is, as a matter of fact, avoiding injurious measures such as mentioned." (Exh. 3,244)

As was understood by Mr. Grew, HIROTA told him that "Japan had no intention whatever of seeking special *privileges* in China of encroaching upon territorial and administrative integrity of China or of creating difficulties of the *bona fide* trade of other countries with China".

Mr. Grew in Exhibit 936 says: "Various FOREIGN ACTIVITIES have tended to disturb peaceful conditions in China, and Japan is naturally very much interested in those peaceful conditions owing to her nearness to China. But that does not mean that there is any intention or desire on the part of Japan to claim a privileged position in derogation of the rights and responsibilities to which the signatories of the Nine-Power Treaty are entitled." This is what Mr. Grew, at that time, considered to be the explanation of Japan's immediate attitude in relation to China.

The propaganda plan referred to above is Exhibit 195 in this case. It forms part of a routine daily report regarding Manchuria and is dated December 19, 1935. The entire plan stands thus:

"Kwantung Army's Propaganda Plan Which Shall be Carried Out

in Parallel with its Military Activity in North China.

"I. General Principle.

"We start our propaganda to convince the whole world of our lawfulness, as soon as the advancement of the Kwantung Army into China Proper takes place. We shall launch out on a movement to estrange the inhabitants of North China from the central government, by fermenting anti-Kumingtung and anti-communism agitation among them. As for the Chinese people and army of the rest of China, we shall take a measure to form an anti-war atmosphere.

"II. The program of propaganda.

"1. The central government has regarded North China as a colony, in a sense, and has long made it the object of exploitation. The inhabitants in North China, therefore, have been cherishing a strong desire to establish a separate government of their own in order to shake themselves from the fetters of the central government. Burning with strong aspiration for independence, the people concerned have expressed their firm resolution to establish an independent country.

"2. The enactment of the nationalization of silver has made the central government the object of resentment, and as a result of it, the movement to establish a new independent government in North China is making rapid progress.

"3. It is the greatest desire of the Japanese Government to form an anti-communist front with the North China independent government, for it may be considered the first ray of hope for the establishment of the lasting peace in the Orient by the harmonious co-operation among Japan, China, and Manchuria. We, therefore, shall assume a definite attitude to support wholeheartedly the establishment and development of the independent government in North China.

"4. The Chinese central government has violated the agreement of cessation of hostility in North China and other military agreements; they have been disturbing the peace of Manchuria; instigating a boycott of Japanese goods, and an anti-Japanese sentiment; and has become a great menace to the Japanese interest and residents in North China and the existence of the Manchurian Empire; therefore, we have to make it clear that we shall be obliged to resort to arms if the Chinese government continues such underhanded tactics.

"5. It must be made clear that when we do dispatch our military force to China sometime in the future, we do it for the purpose of punishing the Chinese military clique, and not the Chinese people at large.

"6. We shall try to enhance an anti-war sentiment among the people, by propagandizing extensively that the employment of military forces by the Chinese central government or other military Lords will reduce the people to the greatest misery and will lead to the destruction of the country.

"7. As for the Chinese forces, we will take a measure to promote antago-

nism between them and to increase their admiration for the strength of the Japanese military power, thus depriving their fighting spirit.

"8. Our propaganda for Manchuria will be, that the appearance of the independent government in North China is nothing but a concrete manifestation of their longing for the fine administration of the Manchurian government, and it will brighten the future of Manchuria.

"III. Execution program.

"1. Propaganda shall be planned and carried out by the Army staff. The special service facilities in China and Inner Mongolia and also the expeditionary forces there shall also perform the duty.

"2. Prior to the advance of our military forces into China Proper, this propaganda shall be launched, chiefly to support from the side, the propaganda of the Japanese government and the Japanese forces stationed in China. After the advance of our forces into China proper, it shall be performed so as to facilitate our military activities.

"3. Propaganda within their sphere of activities shall be carried out in conformity with the above-mentioned plan by the dispatched Force. As a rule, personnel necessary for such propaganda shall be raised by the dispatched troops. But, if it is impossible for them to raise the necessary personnel, Army staff section will solicit them. Propaganda section will be dispatched directly from the Army, if necessary.

"4. A close connection with the Japanese forces and various Japanese agents in China shall be maintained in the execution of this plan.

"5. Such propaganda activities as do not fall under this plan shall be carried out in conformity with the Kwantung Army's propaganda plan in peace time."

This is only a plan, and is only a plan for propaganda. There is absolutely no evidence to show that any propaganda on this line was ever actually made. As a plan for propaganda, it simply indicates, at the worst, some preparation for a contingent military move.

As I have pointed out elsewhere, propaganda has become an important function in international life. However much it may be abused by the nations, its gaining in importance in international society is indeed of a very healthy significance. Its importance signifies growing respect for world opinion and the consequent anxiety shown in informing the world public. We are not entitled to proceed on the assumption that propaganda necessarily implies false information.

The plan mentions the formation of an anti-communist front. Any cursory reading of the evidence that has been placed before us would convince one that one very important factor in moulding Japan's China policy was what Japan characterized as communist menace. It will be a mere repetition to point out here again that this was and still is a menace which is having a very great influence on the foreign policies of the various powers.

The accused offered evidence in order to establish that this was a real

menace which Japan had to face and consequently had to prepare herself for any eventuality that might happen. We have excluded the evidence on this point. I shall presently consider what difficulty has been created by such exclusion.

If we examine carefully the several items of the plan, we would find that there is nothing in them which would entitle us to assume any of the items to be false. No evidence has been laid before us to establish the falsity of any of the matters which the plan proposed to publicize to the world.

The HIROTA policy and the relevant cabinet decisions will be found in Exhibits 977 (30 June 1936), 216 and 704 (7 August 1936).

I shall take up the detailed examination of the HIROTA policy in connection with the case of general preparation for war. The prosecution laid great stress on this policy in that connection in order to characterize the preparation as one for the aggressive purposes.

The statesmen who in 1936 came to shoulder the responsibility of managing the affairs of Japan had to face the difficulty created also by the Manchurian Incident, irrespective of the question whether or not Japan deserved such difficulty. Once such steps were taken, it was no longer easy for the Japanese Government to slip back unobstrusively even into the position of 1931. The incident further aggravated the difficulty which the world economic depression had already put in the way of the intelligent management of Japanese affairs. World-wide repercussions actually followed the Japanese action at Mukden and the statesmen who afterwards came in office could not have ignored all these difficulties, whoever might have been responsible for the situation. The evidence sufficiently makes it clear that what happened was a subsequent development determined by several such new factors arising since the Manchurian Incident.

The policy did not involve any aggressive menas. HIROTA's method was that of steady and patient persuasion and of remaining on terms of friendly intercourse with the Government of Nanking. His was indeed a co-operative policy.

Japan required this co-operation both in the political sphere and in the field of economics. In the political sphere the co-operation implied first an official repression of all anti-Japanese manifestation in China and secondly a collaboration in Japan's crusade against communism. Emphasis on these two points were the main features of the three point program referred to in the chain of events presented to us. In the field of economics, the fundamental idea was the creation of a Sino-Japanese economic bloc. In view of the bloc economy developing everywhere in the world, this can hardly be condemned as aggressive or criminal on the part of Japan. It was indeed of supreme importance to Japan to develop a source of supply within her own sphere of control. It was not at all surprising that the policy of the Japanese Government would have a stamp of their disapproval of international schemes calculated to checkmate a Chinese and Japanese *entente*.

The February Incident of 1936 referred to in this connection will be dealt with in connection with the case of seizure of political power.

The incident was an attempt by the extreme element in the Japanese army to force the hands of their own military chiefs by taking direct action against the representatives of the social and political order which they designed to overthrow.

Introduced here in the present connection, the incident no doubt can give a sinister complexion to the *factum* of HIROTA's coming into premiership. But there is absolutely nothing on the record to show any connection between that incident and the formation of the HIROTA Cabinet, excepting that the incident caused the fall of the OKADA cabinet and the succession of the HIROTA Cabinet.

These domestic incidents certainly contributed towards the formation of Japan's policy. But, as I have repeatedly pointed out, they were only a few of the various complex factors operating in synergy and synchronism in this respect.

TOJO's telegram of 9 June 1937 is Exhibit 672. Much was made of this telegram, perhaps because it bears the name of TOJO and probably because this is the first time that TOJO could be named in connection with any stage of the case prior to 22 July 1940 when he became War Minister in the Second KONOE Cabinet. The document is dated 9th June 1937 when TOJO was the Chief of Staff of the Kwantung Army. It is marked ultra secret. It is a telegram from the Chief of Staff of the Kwantung Army to Vice-War Minister and Vice-Chief of General Staff. It runs as follows: "Judging the present situation in China from the point of view of military preparations against Soviet Russia, I am convinced that if our military power permits it, we should deliver a blow first of all upon the Nanking regime to get rid of the menace at our back. If our military power will not permit us to take such a step, I think it proper that we keep a strict watch on the Chinese government that they do not lay a single hand on our present undertakings in China until our national defense system is completed. We will thus wait for the Chinese government to reconsider. . . . ."

With this we are given the Marco Polo Bridge Incident which happened within a month of this telegram.

I would again emphasize the fact that for my present purpose it is not necessary for me to condemn or commend any particular policy adopted by any party. My purpose is only to see whether it can be explained satisfactorily without having recourse to the theory of a conspiracy as asserted by the prosecution.

In order to appreciate the policy or the proposal conveyed in Exhibit 672, we should remember one factor of a very grave consequence to Japan which came into existence in the early part of 1937: I mean the formation of the Kuomintang-Communist United Front. It may be that it was Japan's own policy in China which brought the Chinese communists into line with the Central Government. But that is immaterial for our present purpose.

After nearly ten years of separation and uninterrupted conflict, the reconciliation between the Kuomintang and the Chinese Communist party took

place early in 1937. Since the co-operation of China in combatting the spread of communism in East Asia had been the cornerstone of Japan's three point program, the restoration of amicable relations between the Nanking and the Chinese Communist party was calculated to produce grave effects on Japan's policy. Further, this reconciliation seems to have been to a great extent influenced BY Moscow.

Moscow realized that any support given to the Chinese communists in fighting against Nanking would play directly into the hands of the Japanese by prolonging the civil war and strengthening the pro-Japanese group in the Chinese capital.

It seems that owing to lack of support from Russia, the Chinese Reds were left with no other choice than to seek a reconciliation with Nanking. Whatever that be, remembering Japan's attitude towards communism, and keeping in view how Japan was always seeking China's co-operation in fighting communism and communist developments, this union would amply explain the proposal in Exhibit 672 without taking the matter back to any sinister design of any earlier period. We might also remember that the Protocol of Mutual Assistance between the U. S. S. R. and the Mongolian People's Republic was dated 12 March 1936 (Exhibit 214).

The territory of the Mongolian People's Republic was liberated with the support of the Red Army in 1921 and since then the country was in relation of close friendship with the U. S. S. R. We are told in this document that there had been a 'Gentleman's Agreement' existing between the two countries since 27 November 1934 providing for mutual support with all means in averting and preventing the threat of a military attack and for rendering each other aid and support. This agreement was being now confirmed in the form of the present protocol.

This Protocol by its Article I provided that "in the event of a threatened attack on the territory of the Union of Soviet Socialist Republic or the Mongolian People's Republic on the part of a third power, the governments of the Union of Soviet Socialist Republic and the Mongolian People's Republic obligate themselves to confer immediately on the situation created and to take all such measures as may be required for the defense of the security of their territories". This might give the Russian authorities virtually a free hand in Mongolia. They and the Mongolian governments had only to agree that an occasion for security measures had arisen.

It may also be noticed that by the time the Soviet government had their forces strongly entrenched in the Trans-Raikal region, the construction of the new Baikal-Amur Railway was already far advanced. Arrangements had now been completed which would give the Union a free hand in Outer Mongolia in the event of a threat of war.

"In the same month in which the outside world was apprised of the existence of this military alliance between the U. S. S. R. and Outer Mongolia, an event took place in Hsingan, the Mongol Province of 'Manchukuo' . . . . . A plot was stated to have been discovered involving several high provincial officials—among them the Mongol Governor himself—who were alleged to have

been found to be engaged in a scheme for bringing about, with Russian assistance, a revolt for the purpose of uniting Hsingan to Outer Mongolia."

I am mentioning all these only to show the complexity of the situation. It may be easy to present an attractive picture of a conspiracy by placing together a few of such events. But it is very difficult to unreveal their real relations. This difficulty does not in the least diminish when we are called upon to fix criminal responsibility on the members of a defeated Power for such happenings.

In this connection we may notice the utterances of ITAGAKI in full, of which a part has been given to us in the above chain. Exhibit 761A gives the relevant "extract from conversation of ITAGAKI Seisiro with Ambassador ARITA on 28 March 1936". ITAGAKI is credited with having said as follows:

"THE PROBLEM OF OUTER MONGOLIA

"Outer Mongolia is a secret zone. The Czarist Regime had already stretched out its evil hand and had made this secret zone a protectorate.

"Since the revolution the Government of Soviet Russia has adopted the same policy and succeeded in winning over this country. As is quite evident if we look at the map of East Asia, Outer Mongolia is of importance from the point of view of Japanese-Manchukuoan influence today because it is the flank defense of the Siberian Railroad which is a connecting line between Soviet territory in the Far East and in Europe.

"If Outer Mongolia be combined with Japan and Manchukuo, Soviet territory in the Far East will fall into a very dangerous condition, and it is possible that the influence of the Soviet Union in the Far East might be removed almost without fighting. Therefore, the Army aims to extend Japanese-Manchurian power into Outer Mongolia by all means at hand and as its first step, to establish normal and complete diplomatic relations between Manchukuo and Outer Mongolia regarding the latter as an independent country, without considering Soviet Russian will. They are furthering their work against Western Inner Mongolia, to be explained next, to conciliate the Outer Mongolian race.

"But if Outer Mongolia should set it at naught our moderate intentions as stated above and should invade Manchukuo with Soviet Russia, the Imperial Army is ready to hold fast to each foot and inch of territory with firm resolution in light of the spirit of the protocol between Japan and Manchukuo.

"THE PROBLEM OF INNER MONGOLIA

"Part 3.

"Western Inner Mongolia (Chahar and Suiyuen Province) and the zone to the west of these are of great value for executing the continental policy of Japan.

"Should the said zone be placed in the sphere of Japanese and Manchurian influence, it means that will be a base for pacification of their brothers of

the same race in Outer Mongolia, moreover that the influence of Soviet Russia which comes from HSING-KIANG, as well as a land link between Soviet Russia and China, will both be blocked, fundamentally frustrating the plan of the Third International movement against China. In a passive sense the said zone will be the shield against Communization of the establishment of peace and order in Manchukuo. If the said zone should not be placed in the sphere of Japanese and Manchurian influence, but left to natural tendencies, it is obvious that Bolshevization will immediately close in on the western frontier of Manchukuo through Outer Mongolia and Sinkiang district.

"From the above standpoint the Imperial Army has been furthering its work with regard to Western Inner Mongolia for several years. The conditions in the past and at present are described in a separate sheet. The Imperial Army is resolved to further its work overcoming all sorts of obstacles."

The Inner Mongolian autonomy movement had led in 1933 to the establishment of an autonomous council. The promises then given by the Chinese authorities to put a stop to Chinese encroachment on the tribal pasture lands had, it appeared, been very imperfectly honoured, and the discontent of the tribesmen remained unabated. The agents of Japanese Policy in North China only seized this opening. The autonomy movement itself was a genuine one. Of course, Japan always regarded the situation in the regions bordering on Manchukuo with interest. The Kwantung Army seems to have given the revolt its support as being a convenient instrument for carrying forward a stage further to the westward, the new "Great Wall" which it was in process of erecting between China and Outer Mongolia. The Kwantung Army represented the conflict in Suiyuan as a struggle against communism. It may be noticed in this connection that as a matter of fact in the spring of 1936 Suiyuan was being threatened with an invasion of Chinese communists. Over 20,000 men of the Red Army were reported to have passed from Shensi into Shansi by March and to be approaching the borders of Suiyuan. It was about this time also that the Chinese communist leaders sent out a circular message, addressed to the Chinese Government, Army and People, in which they pleaded for a united front against Japan and offered the co-operation of the Red Army.

The account of the autonomous movements in North China given in the chain of events presented to us was taken from the evidence of TANAKA Ryukichi. This evidence was given by the witness on July 6, 1946. The defense objected to this evidence and wanted "to know whether or not this man was testifying from his own personal knowledge or whether he was giving us facts from history". The President pointed out that "it was obviously hearsay". "He is giving us history, but it is admissible nevertheless."

Accounts of these movements can also be found in the Survey of International Affairs of 1933, 1934, 1935 and 1936. I believe the history given there would be more dependable than the 'hearsay' of this witness. No-doubt this witness was produced before us even by the Defense. Perhaps this situation was created by our adopting a stringent rule of cross-examination whereby we confined such examinations only to the matters brought out in examination-in-chief. I have already given my reason in connection with the

Manchurian incident why I could not rely on any hearsay of this witness.

I need not proceed further with the consideration of the matters as analyzed above. I must once again make it clear that at present I am only dealing with the question of the alleged over-all conspiracy. For this purpose, it is not at all necessary for me to consider whether or not Japan's actions in China were justified. What concerns me now is to see if such actions could be explained without the alleged over-all conspiracy. Every observation that I make in this connection should, therefore, be taken as limited to this purpose only.

At the very outset I must say that I am not a believer in one nation having interests within the territory of another. It is, in my opinion, an indication of a mere delusion when a people feels that "this thing which they want and must have from their neighbour is needed for their very life; they cannot live without it". It seems that whatever a nation strongly desires, to that the nation's mind gives a lurid importance. Death and destruction are fancied to await the nation if she does not possess this. A nation, it seems, easily comes to believe that she cannot live without the thing she desires to have.

But the question before us is not whether a nation should be allowed to have the delusion of such vital necessity and to behave accordingly. The question really is whether in international life such a behaviour can be condemned as abnormal. Remembering the character of the international society and international law, the question with which we are now concerned is not whether such delusions are justifiable in a nation but whether such delusions, as a matter of fact, exist in international life and how they influence the behaviour of the several member nations.

Japan had acquired some 'interest' in China which Japan felt was very vital for her existence. Almost every great power acquired similar interests within the territories of the Eastern Hemisphere and, it seems, every such power considered that interest to be very vital. I need not pause here to examine the history of the acquisition of these interests. It may safely be asserted that such acquisitions would very seldom be traced to any just method. Whatever that be, these interests did exist and the different powers felt it fully justifiable to extend their reservation of the right of self-defense to the protection of such interests as well while singing the Pact of Paris. Japan's right in respect of her interest in China must be measured by this standard, at least for our present purposes.

Three very important events will occupy our consideration on this phase of the case. I mean:

1. The civil war in China and the state of anarchy prevailing there consequent thereupon;
2. the Chinese National Boycott;
3. the development of Communism in China.

In international society the membership goes to a state. As yet the international organization does not seem to go beyond the state. However desirable it may be to have the international organization on the basis of humanity it did not as a matter of fact recognize as its member anything BUT A STATE. Even

the present day behaviour of the world powers negate any wider basis. In an international organization founded on the basis of humanity, it would hardly be justifiable for any Power to help one section of a people in its fight against another, even in the name of checking the spread of communism. It therefore becomes a very pertinent question in international law how far a people can claim the protection of international law when its organization as a state fails and it is hopelessly involved in anarchy.

It may be contended that to be a state with the rights of a state, a people must have a government which can represent them with the outside world and through which they can accept and discharge responsibility.

So long as any single government continues to rule the entire country the question remains simple. When however there are two or more contending governments it may be difficult to determine which one is entitled to be recognized as the continuation of the old state. Foreign countries may not be obliged to recognize all the contending governments as legitimate rulers of the country.

There are sometimes two armed parties, rendering it difficult for international purposes, to make out which, if either, is the state.

It is of no consequence that the rival parties wish to remain one nation; nor even that they think that they are remaining one nation. The sole matter which can entitle them to remain one nation is that they have one government which can represent them to the outside world.

A difficult question arises when a party in undisputed control, and consequently invested with valid and indisputable legal title, is confronted with a rebellion and reduced to great, though not total, insignificance.

The interests of foreign powers demand that the people who in fact wield the power shall have the responsibilities of government. This is what the several signatory powers of the Washington Treaty were repeatedly pointing out to the Chinese Government as has already been noticed by me. Foreign states cannot be expected to stand by and watch the ruin of their interests in cases where there is no government capable of protecting or willing to protect such interests.

'Anarchy' may mean the absence of all government; but it may also mean the presence of several competing governments. Such authorities are in fact, the rulers of embryo new states. Their desire to swallow up their neighbours is a matter with which third parties have no concern. Power and responsibility must go together, and, outside the territory which they actually control these contending authorities may neither have the legal power conferred by prior legitimate rule, nor the physical power conferred by actual presence of force. Of this territory they may or may not be considered to have formed a state. Foreign states cannot be expected to treat as a single state a region in which there are two perfectly independent governments, perhaps equally devoid of title. The idea is inconsistent with the very basis of international law.

I need not stop here to consider the theories of suspended state or suspended animation of states. For my present purpose it would suffice to remind

that the internal affairs in China had been viewed with alarm almost by all the powers since the Treaty of Washington and they could not always keep their hands off the state, and seek their remedy only in diplomacy or in candid war with all its risks and responsibilities. A more detailed discussion of this matter will be found in an earlier part of this judgment.

It is, I believe, amply evident from what I have said above, that the state of affairs in China prior to the Marco Polo Bridge Incident has a pertinent bearing on the present case. The "civil war in China and the state of anarchy prevailing there consequent thereupon", if established, might go a great way, at least to explain, if not, also to justify, the Japanese action in North China as alleged by the prosecution. I believe that in this connection it would be a pertinent enquiry to see if the Japanese forces in China restored peace and tranquility there as alleged by defense. Unfortunately, as has already been noticed by me we on the 9th and the 25th July 1946, ruled to exclude evidence relating to the state of affairs in China prior to the time when the Japanese armed forces began to operate as also the evidence showing that the Japanese forces in China restored peace and tranquillity there. This exclusion of evidence, in my opinion, makes it difficult for us either to come to a decision as to whether or not these Japanese actions were indicative of any prior over-all conspiracy as alleged in the indictment, or to characterize them as aggressive.

As I have already noticed, the defense in answer to this phase of the case offered to prove the character of communism in China and its rapid development there. The Tribunal by its majority decision dated 29 April 1947 ruled that such evidence was irrelevant.

It is really unfortunate that the evidence offered by the defense on this point had been rejected. I have already given my opinion about this ruling. In the absence of that evidence it would not be fair to come to any decision as to the nature of the Chinese Communism and its connection with the communism in Soviet Russia, or as to its part in the spread of the hostility. We have already seen what the Lytton Commission had to say about this communistic development in China.

The terror of Chinese Communism so far as the foreigners in China are concerned may also be seen from the Survey by the Royal Institute of International Affairs. The Survey says:

"Communism and banditry (in so far as a clear distinction could be drawn between them) were the twin features that were dominant, in 1932, over the Chinese scene; and these two scourges, again, had increased in intensity without any substantial change in their character. Since they were simply the aftermath of anarchy and civil war and famine, they were bound to increase so long as these efficient causes persisted. The prevalence of brigandage can best be indicated by a mention of a few typical outrages against foreigners—with the annotation that these are a few illustrations taken at random from a long list." . . .

"It will be seen that, by the year 1932, Communism in China had become AN ORGANIZED AND EFFECTIVE POLITICAL POWER exercising exclusive ad-

ministrative authority over large stretches of territory, and that the Chinese Communists were in some degree affiliated to the Communist Party in Russia. In view of the resumption of diplomatic relations, on the 12th December, 1932, between the Russian Communist Government at Moscow and the Kuomintang Central Government of the Chinese Republic at Nanking, it is pertinent to inquire how close the affiliations between the Chinese and the Russian Communists were, and how far Communism stood for the same things in China as in the Soviet Union. If Communism in China were really bone of the bone and flesh of the flesh of its Russian homonym, then, at the turn of the years 1931 and 1932, the world was faced with the possibility that the renewal of relations between Moscow and Nanking might be followed by an elimination of the discomfited Nanking Government and the discredited Kuomintang, in order to make way for an alliance between the Russian Soviet Union and a Chinese Soviet Union of the same colour. A geographical corridor between Russia and the Chinese Communist domain in the Yangtse Basin was offered by the Soviet Republic of Outer Mongolia, which was under Moscow's aegis, and by the Chinese province of Shensi; the stronghold of Feng Yuhsiang's Kuominchun, with its Russian proclivities. The possibility that Chinese and Russian Communism might join hands was thus to be reckoned with if Chinese Communism were Communism in the Russian sense. On the other hand, it was little more than theoretical, if the common ground between the Russian and the Chinese movements did not extend beyond the mere community of name; and from the passage here quoted from the Lytton Report it will be seen that this, also was a tenable view. The so-called Chinese Communism, as far as its character was known to the outer world in 1932, might plausibly be interpreted as a mere agrarian revolt against intolerable mis-government—a revolt which had sought prestige in the unwarrantable adoption of a dreaded name..... In the light of such information as existed at the turn of the years 1932 and 1933, it was hardly possible to judge which of these two alternative estimates of the nature of Chinese Communism was nearer to the truth."

The Survey says that the Communists started a parallel government in China.

"The frontier of this particular Communist Government in Hupeh (the so-called King Li Government) was marked by a notice-board planted on the north bank of the Yangtze, above Hankow, in a prominent position; and THIS GOVERNMENT ISSUED ITS OWN COINAGE AND STAMPS FROM ITS LOCAL CAPITAL. A part of the picture of the Chinese Communism in 1932 as painted in the *Lytton Report* may again be viewed in this connection. The Report says:

"Large parts of the provinces of Fukien and Kiangsi, and parts of Kwangtung, are reliably reported to be completely sovietized. Communist zones of influence are far more extensive. They cover a large part of China south of the Yangtse, and parts of the provinces of Hupeh, Anhwei, and Kiangsu north of that river. Shanghai has been the centre of the Communist propaganda. Individual sympathisers with Communism may probably be found in every town in China. So far, two provincial Communist govern-

ments only have been organized in Kiangsi and Fukien, but the number of minor Soviets runs into hundreds. The Communist Government itself is formed by a committee elected by a congress of local workers and peasants. It is in reality, controlled by representatives of the Chinese Communist Party, which sends out trained men for that purpose, a large number of whom have been previously trained in the U. S. S. R.. Regional Committees, under the control of the Central Committee of the Chinese Communist Party, in their turn control provincial committees and these, again, district committees and so on, down to the Communist cells organized in factories, schools, military barracks, etc.. When a district has been occupied by a Red Army, efforts are made to sovietize it, if the occupation appears to be of a more or less permanent nature. Any opposition from the population is suppressed by terrorism. The programme of action consisted in the cancellation of debts, the distribution among landless proletarians and small farmers of land forcibly seized, either from large private owners or from religious institutions, such as temples, monasteries and churches. Taxation is simplified; the peasants have to contribute a certain part of the produce of their lands. With a view to the improvement of agriculture, steps are taken to develop irrigation, rural credit systems, and co-operatives. Public schools, hospitals and dispensaries may also be established."

"Thus the poorest farmers derive considerable benefit from Communism, whereas the rich and middle-class land-owners, merchants, and local gentry are completely ruined, either by immediate expropriation or by levies and fines, and, in applying its agrarian programme, the Communist Party expects to gain the support of the masses. In this respect, its propaganda and action have met with considerable success, notwithstanding the fact that Communist theory conflicts with the Chinese social system. Existing grievances resulting from oppressive taxation, extortion, usury, and pillage by soldiery or bandits were fully exploited. Special slogans were employed by farmers, workmen, soldiers, and intellectuals, with variations specially adapted to women."

"COMMUNISM IN CHINA IS NOT by any means, as in most countries other than the U. S. S. R., either a POLITICAL DOCTRINE held by certain members of existing parties, or the organization of a special party to compete for power with other political parties. IT HAS BECOME AN ACTUAL RIVAL OF THE NATIONAL GOVERNMENT. It possesses its own law, army, and government, and its own territorial sphere of action. For this state of affairs there is no parallel in any other country."

Hall says: "If the safety of a state is gravely and immediately threatened either by occurrences in another state or aggression prepared there, which the government of the latter is unable, or professes itself to be unable, to prevent, or when there is an imminent certainty that such occurrences or aggressions will take place if measures are not taken to forestall them, the circumstances may fairly be considered to be such as to place right of self-preservation above the duty of respecting freedom of action which must have be-

come nominal, on the supposition that the state from which the danger comes is willing, if it can, to perform its international duties."

It would be necessary for us to consider how far this right would extend to the protection of interests of the kind claimed by Japan in China and how the international community viewed the threat of communism in relation to such interests. Rightly or wrongly, it seems that since 1917 international mind was seized with the terror of Communism and somehow Russia was not considered to be a thoroughly safe neighbour for the rest of the world. Even now it is believed in many quarters that "before Russia can have a correct ideology and thereby become a thoroughly safe neighbour for the rest of the world, certain unjustified portions of her Marxian philosophy must be dropped." One such defect is said to be the determinism of her dialectic theory of history and the application of this dialectic to nature itself, rather than merely to theories of nature. The essential point in the error is said to be "the supposition that the negation of any theory or thesis gives one and one antithesis, and one and only one attendant synthesis." "Nobody has the right to affirm with dogmatic certainty that he is giving expression either to the nature of the historical process or to the dialectic achievement of greater good, when he selects a given utopian social hypothesis such as the traditional communistic theory and forthwith proceeds to ram it down the throats of mankind in the name of the determinism of history."

It might not be necessary for us to examine the correctness or otherwise of such criticism of communism or of Russian theory and practice of the same. At the same time we might have to take into our consideration THE WORLD TERROR of these factors, the growth of Communism in China, its connection with the Soviet Russia and its probable effect on Japanese interest in China. We might have to consider whether the circumstances would indicate the *bona fides* of the measures taken by Japan to forestall the danger, if any, involved in such developments. The so-called threat of Communism being a new development in international life and in lives of the states, the question would require a very serious and careful consideration.

Even assuming that the right of self-protection would not extend to such interests as Japan had in China and that Japan's action in China was not justifiable even if such interests were endangered by the development of communism there, the growth of communism might, at any rate, explain the action taken and thus go against the theory that such actions were only several steps in an over-all conspiracy.

In my opinion, therefore, the exclusion of evidence on this point also has made it unjustifiable on our part to discard the case of the defense that the spread of hostility in China was due to communist attitude and disturbances. Apart from the question of justification, such developments sufficiently explain the occurrences and to that extent lead us away from the inference of any over-all conspiracy.

There is yet another *explanation* of the spread of the hostility and this also satisfactorily *explains* the spread without the alleged conspiracy.

During the period from 1905 to 1931 the Chinese people launched no less

than eleven major boycott movements directed at Nations with which the Chinese Government was at peace: One against the United States, one against Great Britain and nine against Japan. The defense case is that since 1931 such boycotts against Japan were intensified.

During their investigation of the Manchurian affair, the members of the Lytton Commission had occasion to examine carefully into the origin, methods and effect of the nation-wide boycotts which had been declared so frequently by the Chinese. The Report of the Commission, which includes an additional volume entitled Supplementary Documents—together with the material submitted to the League by the Japanese and Chinese Assessors offer us a rich and authoritative source of information in this respect.

It is remarked in the supplement that information as to the effects of the boycott on various Japanese interests is unavoidably, almost exclusively, of Japanese origin "because of the fact that no one else is in possession of such documentation." The commission had occasion to remark that "the description given in Document "A" Appendix 7, submitted to the Commission by the Japanese Assessor, may be safely taken as correct."

According to the figures in the Commission's supplement, Japanese trade had already, as the result of the 1931 boycott, suffered a loss of 105,000,000 yen compared with the results of the preceding year. There is inserted in the Supplement the following statement of the effect of 1931 boycott on Japanese residents:

> "In places so far apart as Tientsin, Shanghai, Hangchow, Soochow, Wuhu, Nanking, Kiukang, Hankow, Ichang, Chungking, Shashih, Chengtu, Foochow, Wenchow, and Yunnan, anti-Japanese feeling seems to have been, and still is, intense. In numerous cases, Chinese servants left Japanese by whom they were employed, Japanese were cut off from the supply of food and other daily necessities, and Japanese were subject to various forms of abuse and threats. In many cases, Japanese had been compelled to flee for safety or to withdraw altogether to Japan. Many Japanese lost their employment."

It may be assumed that the above extract is representative in kind, if not in degree of the effects of all national boycotts on Japanese residing in China.

The Commission of Enquiry found that in certain of the movements under discussion THE CHINESE GOVERNMENT had actually participated in the organization and encouragement of boycott activities.

Where the government itself participates in a boycott, the question of the legality or illegality of the methods employed, viewed from the standpoint of the domestic law, is not of primary importance in determining national responsibility. If the methods were illegal from the standpoint of the local law, that fact would probably be regarded as an aggravating circumstance, for governmental participation of itself may at once constitute a violation of international law and a breach of treaty stipulations. The high contracting party which had accorded the right would be engaged not only in destroying that which it had bound itself by contract to permit and preserve, but would be employed in annihilating rights which by the law of nations it is its duty to

protect.

In connection with the question of governmental participation in the boycott, an interesting and novel situation was presented to the Lytton Commission. On behalf of Japan, it was asserted that the Chinese Government took an active part in pushing the movement. The contention was denied by the Chinese Assessor. In conversations which the Commission of Enquiry had with a representative of the Chinese Government, the latter, in response to the question as to whether government officials or departments had directly participated in certain activities of the boycott, replied that "... the Government had given no such orders; members of the Kuomintang may possibly have done so." The Kuomintang is the Nationalist Party of China. It is important to note that the Commission found that until 1925, or possibly 1928, the "national" boycotts were organized and directed by various unofficial organizations; and that "to begin with the boycott of 1925, and quite clearly with that of 1927-28, the direction of the movements was more and more centralized in the hands of the Kuomintang .... the standard bearer of Chinese nationalism....." It appears from the Commission's Supplement, and the authorities therein quoted, "that from the beginning the Kuomintang assumed a position of direction and control with respect to the National Government and its predecessor, the National Government; that the so-called "Principles Underlying the Period of Political Tutelage" were confirmed by the Third National Congress of the Kuomintang in March of 1929; that while under the principles the exercise of executive, legislative, judicial and other powers was delegated to the National Government, the direction and control of the National Government in the administration of important state affairs shall be entrusted to the Central Political Council of the Central Executive Committee of the Kuomintang." It is not surprising that the Commission puts the question: "What is the responsibility of a government which is practically an organ of the controlling political party of the country?"—finding, as the Commission does, that "the real source of Government power is not the Government itself, but the party."

In the Report proper, the Commissioners referring to the question of national responsibility for injuries resulting from the boycotts, says:

> "In this connection, the question of relations between the Government and the Kuomintang must be considered. Of the responsibility of the latter there can be no question. It is the controlling and co-ordinating organ behind the whole boycott movement. The Kuomintang may be the master and maker of the Government; but to determine at what point the responsibility of the party ends and that of the Government begins is a complicated problem of constitutional law on which the Commission does not feel it proper to pronounce."

A state cannot, it is believed, elude responsibility by designating as its "government" an organization which in fact, as a matter of domestic constitutional law, is not vested with unrestricted power to determine policies, but is subject to the direct control of another entity. If the "National Government" is "responsible" to a National Party and is "guided" by it, then

for all practical purposes the party would appear to be the government, the real repository of public power, of which the visible government is the creature, devoid of independent initiative.

. . . . It goes without saying that a national boycott movement can, and does, under certain conditions, assume the character of a defensive measure; but whether the action taken is defensive is inevitably bound to depend upon the facts of each case.

The Committee of Nineteen (Special Committee of the Assembly) appointed by the League of Nations to study and report on the Report of the Commission of Enquiry found that "the use of the boycott by China, subsequent to the events of September 18, 1931, falls under the category of reprisals." The view expressed by the Commission of Enquiry that "it seems difficult to contest that the boycott is a legitimate weapon of defense against military aggression by a stronger country. . . ." was accordingly accepted by the Committee.

. . . . In considering the question 'whether national boycotts give rise to national responsibility', the steps which characterize the conduct of such movements are the essential considerations. The record of such methods in Chinese boycotts seems plainly to establish that the institution which has come to be known as the national boycott, far from being an expression of the liberty of choice of the individual, is an instrumentality the efficiency of which has been due to the lavish and unlawful exercise of threats and force; and that, generally speaking, it may not constitute an example of defensive action.

It may be contended that the national boycott, as exemplified by the instances herein discussed, does constitute an international delinquency for which liability may arise under the generally accepted principles of international law.

The matter was first brought to the attention of Prince Ching by the American Minister on June 3, 1905, who on that date was assured that steps would be taken by the Chinese Government to stop the agitation. On July 1 of that year, Prince Ching informed the American Minister, *inter alia*, that "this movement has not been inaugurated without some reason, for the restrictions against the Chinese entering America are too strong and American exclusion laws are extremely inconvenient to the Chinese." From this statement it was concluded by the American Minister that "the movement had a certain amount of sympathy" from the Chinese Government; and in his communication to Prince Ching, dated August 7, this view was expressed, and was followed by the announcement that the United States would hold the Chinese Government responsible for losses accruing from the boycott. On August 26, Prince Ching disclaimed governmental responsibility, adding that "at the very first, orders were sent out to crush the movement on account of the great friendship of our two countries." In a communication of August 27 to Prince Ching, the Minister again declared it to be the duty of the Chinese Government to put a stop to the movement. On August 31 the government issued an Imperial Edict condemning the boycotting of American goods and enjoining

upon governors and viceroys the duty of taking effective action to stop it. On September 4, Prince Ching informed the Minister that the Chinese Government "has taken thorough action in the matter to the end that neither Chinese nor American citizens may suffer pecuniary loss." The terms of the edict were ignored, and this circumstance was brought to the attention of Prince Ching by the American Minister in a communication of September 26, "insisting" upon the taking of "such additional measures as may be necessary to secure prompt obedience of the Imperial will and proper respect for the treaties between the United States and China." "Immediately upon the receipt" of this communication, the Chinese authorities were instructed to take the needed action. But the steps taken were inadequate, and on October 3 the American Minister again addressed Prince Ching announcing the necessity of effective action, and declaring that further delay on the part of the official who had hitherto failed to meet the terms of the edict "will inevitably be understood by my government as a *flagrant manifestation of hostility* by an agent of your government, for whose shortcomings the Imperial Government must be held responsible." Still further delay was made the subject of complaint by the American Minister in a despatch to Prince Ching of October 30. On November 4, a further communication was addressed to Prince Ching by the American Minister "urging the pressing necessity of orders being given to the Viceroy of the Liang Kuang provinces which will compel him to take measures for the complete termination of the boycott in his jurisdiction." A proclamation by the Viceroy in language characterized by the Minister in a communication to Secretary Root as "vigorous and emphatic" would seem to have been of effect in terminating the situation which was the basis of the action taken by the United States on this occasion.

The question of China's obligation to put an end to the boycott appears not only to have been seriously raised by the United States, but to have been pressed to a satisfactory conclusion with marked persistence and vigour. Prince Ching's initial disclaimer of responsibility was not accepted by the United States. On the contrary, on the receipt thereof by the American Minister, the demands of this government that China adopt a course consistent with the contentions of the United States with respect to national responsibility were immediately renewed, persistently maintained, and finally respected by China. Similar action was taken by that government on the occasion of the demand of Japan for the suppression of the boycott movement initiated in China in 1915 in connection with the "Twenty-one Demands". In the case of the British boycott of 1925-26 for which the Canton Government repeatedly denied responsibility, a settlement was reached by the two governments which did not, it seems, involve any indemnity for boycott losses, and the movement came to an end, at least officially, in October of 1926.

But these considerations will be relevant only for the purpose of determining the justification, if any, of the Japanese action in China. Apart from such a question of justification, however, these boycott movements would sufficiently explain the spread of hostilities and would, to that extent, have relevant bearing on the question whether or not this spread of hostility was the

outcome of any prior conspiracy.

The prosecution, in this connection, placed much reliance on its exhibit 3,262, "An Outline Regarding the Settlement of China Incident". This is a document dated October 1, 1937 and it purports to contain the following provisions: (1) General policy, (2) military operations, and (3) diplomatic measures, etc.. The contents of the document will be found at pages from 29,772 to 29,785 of the record. Its provisions no doubt throw much light on Japan's future policy regarding China Incident. But I cannot read into it anything which would indicate any conspiracy of the kind alleged in the indictment.

I would discuss the Hirota Policy of 1936 later on. It does not indicate any conspiracy.

OVER-ALL CONSPIRACY

THIRD STAGE

THE PREPARATION OF JAPAN

FOR

AGGRESSIVE WAR

INTERNALLY AND BY ALLIANCE

WITH

THE AXIS POWERS

PSYCHOLOGICAL PREPARATION OF

THE NATION FOR WAR

* * *

RACE FEELING

Coming to establish the charge of Conspiracy, the prosecution began with section 6 of the Appendix which speaks of "the organization of Japanese politics and public opinion for war."

Mr. Hammack who opened the case in this section of the Appendix submitted that the evidence he would adduce would tend "to prove a criminal conspiracy on the part of the defendants as charged, beginning about the year 1928, and even prior thereto, *to prepare the people of* Japan for *illegal wars of aggression* upon peace-loving peoples of other nations."

It must have been observed that section 6 itself contains two distinct categories of matters, namely, (1) The organization of Japanese politics for war, (2) The organization of Japanese public opinion for war.

As regards THE ORGANIZATION OF PUBLIC OPINION for war, the particulars are given thus: "The educational system, civil, military and naval, were used to inculcate a spirit of totalitarianism, aggression, desire for war, cruelty and hatred of potential enemies." It was further stated that during this period a vigorous campaign of incitement to expansion was carried on; free speech and writing by opponents of the policy were stamped out.

Mr. Hammack in presenting this phase of the case, after describing the conspiracy alleged in the indictment, stated that the evidence will tend to prove that "in the execution of this conspiracy to attain such objective, they (the accused) purposely, systematically, and intelligently used the *educational system of Japan*, *censorship*, *propaganda*, *police coercion*, *political organizations*, *assassinations and threats and political devices* to obtain control of the Government of Japan itself. To attain their ends they used to the fullest possible extent the agencies of the government, laws, religion and old established customs."

In its summation the prosecution named this as "psychological preparation of the nation for war" and placed the evidence under the three following heads, namely,—(*a*) militarization of education, (*b*) control and dissemination of propaganda and (*c*) mobilization of the people for war. It then summed up by saying: "to enable the programs for economic, and military and naval preparations to be satisfactorily and adequately carried out and to be effectively used in accordance with the plans of the conspirators, it was necessary to prepare the Japanese people psychologically for war, so that they might feel it to be necessary and even come to desire it. This mission was accomplished through instruction in the schools, through use and control of all known media of propaganda, and through the mobilization of the people into a single organization for purposes of propaganda and control."

Much was sought to be made of what was characterized as A CHANGE IN THE JAPANESE EDUCATIONAL POLICY whereby it was designed to create in every youthful mind a feeling of RACIAL SUPERIORITY.

I believe this is a failing common to all nations. Every nation is under a delusion that its race is superior to all others, and, so long as racial difference will be maintained in international life, this delusion is indeed a defensive weapon. The leaders of any particular nation may *bona fide* believe that it protects the nation from the evil effects of any inferiority complex, and that

the western racial behaviour necessitates this feeling as a measure of self-protection. This might simply mean encouraging self-expression and preparing the new generation to promote and defend their national self-interest in a competitive world. The ideal of asceticism and self-repression has not as yet been adopted by any of the modern civilized nations.

Professor Toynbee in his "Study of History" points out how in the Western World of our day racial explanations of social phenomena are much in vogue and how racial differences in human physique, regarded as immutable in themselves and as bearing witness to likewise immutable racial differences in the human psyche, are put forward by them as accounting for the difference which we observe empirically between the fortunes and achievements of different human societies. The learned Professor further says:

"In the Eighteenth Century of our era, the competition between the peoples of Western Europe for the command of the overseas world ended in the victory of the English-speaking Protestants, who secured for themselves the lion's share of those overseas countries, inhabited by primitive peoples, that were suitable for settlement by Europeans, as well as the lion's share of the countries inhabited by adherents of the living non-western civilizations who were incapable at the time of resisting western conquest and domination. The outcome of the Seven Years' War decided that the whole of North America, from the Arctic Circle to the Rio Grande, should be populated by new nations of European origin whose cultural background was the Western Civilization in its English Protestant version, and that a Government instituted by English Protestants and informed with their ideas should become paramount over the whole of Continental India. Thus the race-feeling engendered by the English Protestant version of our western culture became the determining factor in the development of race-feeling in our Western Society as a whole."

This has indeed been a misfortune for mankind.

According to the learned Professor:

"The 'Bible Christian' of European origin and race who has settled among peoples of non-European race overseas has inevitably identified himself with Israel obeying the will of Jehovah and doing the Lord's Work by taking possession of the Promised Land, while he has identified the non-Europeans who have crossed his path with the Canaanites whom the Lord has delivered unto the hand of His CHOSEN PEOPLE to be destroyed or subjugated."

"Race-feeling" has indeed been a dangerous weapon in the hands of the designing people from the earliest days of human history. Right-thinking men have always condemned this feeling and have announced that the so-called racial explanation of differences in human performance and achievement is either an ineptitude or a fraud; but their counsel has never been accepted by the world. Plato, in a famous passage of "The Republic", while propounding "a noble lie" drove home the truth that "the racial explanation of differences in human ability and achievement cannot be put forward by any rational mind except as a deliberate and cold-blooded piece of deception, in which the differentiating effects of upbringing and education are mendaciously ascribed to pre-existing differences of a racial order—and this with the calculated object

of producing certain effects in the practical field of social and political action."

This, however, never deterred anybody who designed to exploit this racial feeling. Professor Toynbee points out how this exploitation has gone on. He says:

"When we Westerners call people "Natives" we implicitly take the cultural colour out of our perceptions of them. We see them as trees walking, or as wild animals infesting the country in which we happen to come across them. In fact, we see them as part of the local flora and fauna, and not as men of like passions with ourselves; and, seeing them thus as something infra-human, we feel entitled to treat them as though they did not possess ordinary human rights. They are merely natives of the lands which they occupy; and no term of occupancy can be long enough to confer any prescriptive right. All this is implicit in the word "Natives", as we have come to use it in the English language in our time. Evidently the word is not a scientific term but an instrument of action: an *a priori* justification for a plan of campaign. It belongs to the realm of Western practice and not of Western theory;"

That this Western race-feeling has not as yet been mere matter of history will appear from what is reported to have happened at the time of the drafting of the League Convention after the first World War.

I would only quote a few lines from an account of what happened at the meeting of the committee drafting resolutions for the establishment of the League. The account runs thus:

"Grave as were her (Japan's) economic preoccupations, something else, *graver still*, was on her mind. She was haunted by the problem of RACE RELATIONS. For four centuries, the white man, by his mastery of the arts of power, had been hammering into the mind and spirit of the non-white peoples the conviction that they were his *natural* inferiors. The Russo-Japanese War had indeed demonstrated that this supremacy could be challenged in the fields of battle. But the stigma still remained. Habits and attitudes were slow to change. Now the moment seemed to have come, at the turning of a new page in the world's history, for lifting this question on to a higher plane and settling race relations once and for all on a basis of equality. This was to be the Japanese contribution to the Covenant.

"But the occasion would lose more than half of its grace if the initiative were publicly taken by those whose status was to be vindicated. Thus the task of the Japanese delegates, Baron Makino and Viscount Chinda was a delicate one. They came with a national demand which they hoped that they would find others to voice. It was in this mood that, on February 4, they sought out Colonel House. "'On July 8'", they told him, "'you expressed to Viscount Ishii sentiments which pleased the Japanese Government; therefore we look upon you as a friend and we have come to ask for your advice.'" Then followed a drafting and redrafting of resolutions. . . . . .

"At this point Colonel House and the Japanese found that the British Empire Delegation blocked their path. It was not Great Britain which stood in the way, but principally Australia, or rather it was a single Australian, Mr.

William Morris Hughes, the then Premier of the Commonwealth, who constituted himself Champion of the cause of White Supremacy." On February 9, Colonel House records: "Every solution which the Japanese and I have proposed, Mr. Hughes of the British Delegation objected to;" and the British Delegation apparently were unwilling to override his objections. By February 12 Viscount Chinda had decided in disgust to present a resolution himself. . . ."

The resolution which Viscount Chinda of Japan had drafted was for the insertion of a new clause; the text was as follows:

"The equality of nations being a basic principle of the League of Nations the High Contracting Parties agreed to accord, as soon as possible, to all alien nationals of states members of the League, equal and just treatment in every respect, making no distinction, either in law or fact, on account of their race and nationality. . . ."

It was moved by Baron Makino of Japan as an additional paragraph to the religious equality article . . . Baron Makino's speech, which was read, is given in full in the minutes. It is an earnest, dignified, courteous and moderate statement of his case. He pointed out that the Covenant was creating a system of mutual obligations between states "comprising all kinds of races" and asked that "the principle at least of equality among men should be admitted and be made the basis of future intercourse". At the same time he admitted that deeplying prejudices were involved and therefore he did not expect an immediate practical realization of the principle that he was putting forward. He would be content to "leave the working out of it in the hands of the responsible leaders of the states members of the League, who will not neglect the state of public opinion."

"When he had finished, Lord Robert Cecil said that this was "'a matter of a highly controversial character'"; and "raised extremely serious problems within the British Empire!" "In spite of the nobility of thought which inspired Baron Makino, he thought that it would be wiser for the moment to postpone its discussion. . ."

"The postponed discussion on racial equality took place at the Fifteenth and last meeting of the committee. . . The Japanese now no longer pleaded for a special article. All they asked for was the insertion of a sentence in the Preamble, the relevant part of which would then read as follows:

"By the prescription of open, just and honourable relations between nations;

"By the endorsement of the principle of equality of nations and just treatment of their nationals;

"By the firm establishment of the principles of international law, etc.

"Baron Makino was again studiously moderate in his presentation. His amendment, he claimed, did no more than lay down a general principle. This was indeed clear from the fact that it would have taken its place in the Preamble, with no substantive article to follow it up . . . Lord Robert Cecil refused to accept the amendment and stood on his refusal, acting, he said, under instructions from his government. . . . After making his statement Cecil sat with

his eyes fixed on the table and took no part in the subsequent debate. . . .

The Japanese pressed for a vote. Eleven of the nineteen members of the commission voted in favour of the amendment. Two were absent. No negative vote was taken. President Wilson then ruled that, in view of the SERIOUS OBJECTIONS on the part of some of us, the amendment was not carried. . . ."

On that occasion Baron Makino, who was studiously moderate in his presentation of the case, uttered an ominous note of warning. "Pride", he said, "is one of the most forceful and sometimes uncontrollable causes of human action. I state in all seriousness that, although at this particular centre of international life the practical bearing of such a dangerous development of the question may not at this moment be properly realized, I, for one, entertain much anxiety about the possible future outcome of this question."

Baron Makino raised the matter again at the plenary meeting of the Peace Conference on April 28. He ended his speech there with the following words:

"In closing, I feel it my duty to declare clearly on this occasion that the Japanese Government and people feel poignant regret at the failure of the Commission to approve of their just demand for laying down a principle aiming at the adjustment of this long-standing grievance, a demand that is based on a deep-rooted national conviction. They will continue in their insistence for the adoption of this principle by the League in future."

Neither the League nor any other international organization ever could get rid of this race-feeling.

Add to this the actual application of this feeling in the movement on the part of the white nations on the Pacific rim to exclude Asiatics on economic and racial grounds. If this exclusion movement indicated anything it was an index of the rising tide of national and racial consciousness. In its initial stages the movement on the part of the white nations fringing the Pacific to exclude Orientals was of a purely local character. Gradually, however, the movement everywhere assumed a national form characterized by national legislation and national machinery for enforcement. This exclusion sentiment went on unabated after the First World War and the trend of emphasis gradually passed from economic to cultural and biological arguments for restriction and exclusion. I may refer only to the American Acts of 1917 and 1924. In their exclusion movements the white nations did not show any consideration for the national sensibilities of the excluded nations including the Japanese, and it may not be denied that these exclusion laws did not foster any ideal human relations organized on the basis of humanity.

Dr. Schwarzenberger in his Power-Politics says: "Underneath the surface questions of formal equality and the disposal of the spoils of the war, the more fundamental issue of the alleged superiority of the white race and the over-emphasis on Europe compared with the rest of the world are problems which have accompanied the League throughout the years. True, Japan, as one of the principal Allied and Associated Powers, had been accorded a permanent seat on the League Council, and it received its share in the distribution of the mandates. There was, however, another question for which the

proposed League did not seem to provide a remedy: Japan's over population. As Colonel House pointed out to Mr. Balfour, who expressed 'a great deal of sympathy with this view, 'the world said that they could not go to Africa; they could not go to any white country; they could not go to China, and they could not go to Siberia; and yet they were a growing nation, having a country where all land was tilled; but they had to go somewhere.' Even when the Japanese delegates in the Drafting Commission toned down their original suggestions to a proposal which merely asked for an insertion into the Preamble of the Covenant of a clause endorsing the principle of the equality of nations, and the just treatment of their nationals, a minority of the commission prevented its acceptance." According to him this move on the part of the Peace Conference was "partially responsible for the inculcation of an inferiority complex into Japan."

In view of what I have pointed out above to be the actual operations of this feeling I cannot condemn those of the Japanese leaders who might have thought of protecting their race by inculcating their racial superiority in the youthful mind. I might mention here in passing that like the Western people the Japanese also were mostly worshippers of "a god of the chosen people".

I am not sure if the fear which the white world was entertaining from this rising racial feeling in the East might not be ascribable to what Professor Toynbee refers to as the third of the elements in "the situation which go far towards accounting for the strength and virulence of Western race-feeling in our time."

The atom bomb, we are told, has destroyed all selfish racial feelings and has awakened within us the sense of unity of mankind. It may, indeed, be that the atom blasts at the close of the Second World War really succeeded in blowing away all the pre-war humbugs; or it may be that we are only dreaming. We still have men who can advance views like those contained in "Take your choice, —separation or Mongrelization." But in spite of this I would hope and believe with others that the Second World War has succeeded in killing this race-feeling and in humbling every mind so as to make it capable of thinking in terms of racial equality. No one, I would believe, will *now* be deterred from advancing the cause of such racial equality by the fear of its raising race-issue throughout the world or raising any serious problem within any particular domain. The position, however, was quite different when the Japanese leaders conceived of the measure in question. I do not find any reason to doubt their *bona fides* if they considered this to be a *necessary measure of protection* for their race.

OVER-ALL CONSPIRACY

THIRD STAGE

PSYCHOLOGICAL PREPARATION OF

THE NATION FOR WAR

* * * * *

MILITARIZATION OF EDUCATION

Coming to "militarization of education", the prosecution introduced both oral and documentary evidence. Putting this evidence at its highest we get at the following story:

Military training was first introduced in the schools of Japan in the name of "physical exercise". The curriculum was based on the Rescript on Education of 1890 of the Emperor Meiji: (*Ex. 139, Record* page 1,022). Its original purpose was to encourage social discipline and reasonable national defense: (Witness Ouchi, page 968, Kaigo, pages 905-13). After a period of slackened interest in this training after World War I, the training was revived in 1922-25 under the pressures of depression and unrest: (*Ouchi, 955, 968*). The War and Education Ministries directed their attention toward reinstituting the military training at this time. In 1925 there was an increase in the intensity of this training, as marked by the appointment of regular army instructors in the schools: (*Takikawa, 990*).

In order to give military training, Imperial Ordinance No. 135 of 13 April 1925, provided for the stationing of active army officers at government or public schools, and other educational institutions. It was provided that the officers so stationed, "shall obey the order and supervision of the head of the schools concerned with respect to military training." Such Officers might also be stationed at private schools upon request. Certain provisions were made for the inspection of the training courses: (*Ex. 132, Record page 1,007*).

Since then, the military instructors became more and more influential until gradually the Army largely dominated the universities and the school system: (*Ouchi, 940; Takikawa, 990*).

The "Regulations of the Youngmen's Training Institute", promulgated by the Education Ministry Ordinance of 20 April 1926, provided that "the hours of training at the Youngmen's Training Institutes shall not be less than 100 hours for morals and civics, 400 hours for military training, 200 hours for the ordinary course, and 100 hours for the vocational course."

War Ministry Ordinance No. 19 of 27 September 1926 outlined the regulations governing the appointments of "training inspector officers," inspections, and reports.

The inclusion of military lectures in the curricula of the universities was made compulsory; but on the part of the students, attendance was still optional. In 1931, the accused ARAKI, then Minister of War, demanded compulsory attendance to military classes. He tried also to introduce drill with rifles but was successfully opposed: (*Kaigo: Takikawa, 994-1, 021; Ouchi, 936-44*).

In August 1935 by Imperial Ordinance, the War Minister was enabled to "order active military officers to inspect the military drill courses at youth schools".

The subsequent regulations of the War Minister, dated 13 August 1935, stated that the purpose of the inspection was to "consider whether all students finishing the courses of such schools have the special qualifications necessary for future military service, or not, and at the same time to contribute to the development and progress of military training"; (*Ex. 136, 1,019*).

After the China Incident in 1937, it was considered necessary further to intensify the training, and while the accused KIDO was Education Minister during this time, the school system was reorganized and more time was devoted to military subjects: (*Ikeshima, 1, 101-2*).

In May 1938, when accused ARAKI became Minister of Education, he was able to put his ideas into effect: (*Takikawa, 994-1, 021; Ouchi, 936-44*). Completion of the military training course became a requirement for graduation with the added inducement that those who passed would be required to do only one year of military service, as against the usual two or three.

By 29 June 1938, prompted by the European War, the unfinished China Incident and the rapidly changing world situation, the Education Ministry urged public administrators and educational leaders to lay emphasis on patriotism, unity, and service in their teaching. The outline of the curriculum for instruction and training in Youths' Schools of 21 August 1935 (revised in 1939 and 1941) directed teachers to uphold certain moral conceptions in their general instruction. With regard to military training: "With thorough knowledge of the essential significance of national structure, and in conformity with the true significance of universal conscription . . . students should be made to master necessary military abilities to do his part as a subject of the Imperial Empire: (*Ex. 138, Record page 1, 020*).

On 30 November 1938, the Imperial Ordinance of August 1935 (*Ex. 134*) was amended over the signatures of ARAKI, as Education Minister, and ITAGAKI, as War Minister, to enable the War Minister to order inspection of the "corresponding subjects" as provided for in the Youngmen's Training Schools: (*Ex. 135, 1, 018*).

By 1939, the Education Council was deliberating inspirational changes in the textbooks. Military drill with rifles was introduced: (*Kaigo, 893, 889*). The regulations regarding the inspection of military training at the Youth Schools were revised in April 1940 over HATA's signature: (*Ex. 137, 1, 021*). Professors were required to co-operate fully in teaching military ideals for the purpose of inspiring the Japanese to their duty of gaining control of the Far East and later, the world: (*Ouchi, 940*). Teachers who expressed pacifistic ideas about world affairs were sometimes discharged, and sometimes penalized under the Public Peace Law: (*Ouchi, 945; Takikawa, 990-4*).

Even if we accept the whole story, I do not see why we should take this organization as indicative of any aggressive design or preparation. The picture given is certainly one of extensive and effective military education. But I am sorry I cannot accept the prosecution characterization of this as militarization of education.

The witnesses examined on this phase are:

1. Lt. Colonel Donald Ross Nugent (p. 821).
2. Tokiomi, Kaigo (p. 879).
3. Ouchi, Hyoe (examined on affidavit Ext. 130; p. 936).
4. Takikawa, Yukitoki (examined on affidavit Ext. 131; p. 988).

5. Maeda, Taman (examined on affidavit Ext. 140; p. 1,024).
6. Nobufumi, Ito (examined on affidavit Ext. 142; p. 1,077).
7. Ikeshima, Shigenobu (examined on affidavit Ext. 143; p. 1, 099).
8. Saki, Akio (examined on affidavit Ext. 144; p. 1,116).
9. Ogata, Taketora (examined on affidavit Ext. 146; p. 1,148).
10. Kimbei, Nakai (examined on affidavit Ext. 147; p. 1,156).
11. Suzuki, Tomin (examined on affidavit Ext. 150; p. 1,217).
12. Goro, Koizumi (examined on affidavit Ext. 152; p. 1, 259).

Documentary evidences are:

Exhibit No. 132 —Imperial Ordinance No. 135, p. 1,007.

Exhibit No. 133 —Regulation of the youngmen's training institute promulgated by Education Ministry Ordinance of April 20, 1926 (p. 1,017).

Exhibit No. 134 — Imperial Ordinance No. 249—the Ordinance of the Youth School military drilling course dated August 10, 1935 (p. 1,018).

Exhibit No. 135 —Amendment dated 30 November, 1938 of the Ordinance concerning the inspection of military training at the young men's school (p. 1, 018).

Exhibit No. 136 —Army Ministry Ordinance No. 8—Inspection Regulation for military training at youth school dated 13 August 1935 (p. 1,019).

Exhibit No. 137 —"War Ministry Ordinance No. 10; a revision of the regulations regarding inspection of military training courses in the youth schools" dated 12 April 1940 (p. 1,019).

Exhibit No. 138 —Extract from pages 516-517, in the Existing Law and Ordinance of the Educational Ministry, June 29, 1938 entitled "For the Cultivation and Enlightment of Students and Pupils Through the Faculty Members of the Schools Concerned in View of the Present Situation" (p. 1,020).

Exhibit No. 139 —"The Imperial Rescript on Education" dated the 30th day of the 23rd year of Meiji, that being 1897 (p. 1, 020).

Exhibit No. 98 — The New Peace Preservation Law, 1941 revising the Peace Preservation Law of 1925 (p. 1, 023).

Exhibit No. 68 —Constitution of Japan (p. 1, 237).

Exhibit No. 151 — The outline of program concerning the execution of intelligence activities dated 20th May 1936 (p. 1, 246).

Exhibit No. 167 — Excerpt from Japanese Government Files (p. 1, 674).

Film—(p. 1, 677).

Exhibit 132 is the Imperial Ordinance of 1925 concerning stationing of officers of active status in schools. This ordinance provides that for the purpose of giving military training to all male students of all normal, middle and industrial schools and colleges, officers of active status shall be stationed at these schools. These officers shall be despatched according to agreement between the Ministries of War and Education and are to obey and be under the orders of the heads of the schools. With respect to private schools, such officers might be stationed on request from the school. By the additional provision of the Ordinance of September 27, 1926, a system of inspection of the schools and methods of reporting were set up. By War Ministry Ordinance of 30 November 1935 a system was established whereby the school training officers might examine the results of their teaching and issue certificates of military training.

Exhibit 139 is the Imperial Rescript on Education of October 30, 1897. This document sets forth the principal virtues which were expected of people in Japan. The people of Japan should be filial to parents, affectionate to family, harmonious in martial relations, be modest and moderate, be benevolent to all, to pursue learning and cultivate arts and thereby develop intellectual faculties and moral powers. They are also urged to advance the public good, to promote common interest, to respect the law, and in emergency to offer themselves courageously to the state.

I give below the gist of the testimony of the witness examined in this connection:

LT. COLONEL DONALD ROSS NUGENT: (p. 821).

The witness was a teacher of English and commercial subjects in a commercial university, a commercial college, and a commercial school of middle school rank in Japan FROM MARCH 1937 TO MARCH 1941. He testifies that during the years in which he was teaching in those educational institutes in Japan *there was military training as part of the curriculum of those particular institutions*. The training consisted of close order drill, conditioning marches, maneuver over open terrain, nomenclature, the handling of weapons up to and including the light machine guns and military lectures.

From one and a half to five hours per week was devoted to military training in its different phases. Additional time was used for maneuvers, conditioning marches and inspections. The subjects were taught by officers of the Japanese army. Army officers assigned to the colleges were part of the faculty. The witness is the Chief of the Civil Information and Education Section of SCAP (Supreme Commander of Allied Powers) and therefore, he purported to testify as an expert. He gave his opinion as to the effect of military training. He said, "IN MY OPINION, such teachings would have the effect of inculcating ultra-nationalism, aggressive militarism, a fanatical devotion to their country, a blind obedience to authority, and a belief in Japan's mission to become dominant in the so-called "East Asia Co-prosperity sphere." (pp.

832-833).

In answer to a question whether or not such teaching would have the effect of impressing upon the mind of the Japanese students that the Japanese as a race were superior to all other persons the witness answered in the affirmative.

In the witness' opinion the result upon the students of Japan of drill, lectures and field maneuvers was that such teachings did, in fact, impress upon the students of Japan a belief in the so-called divine mission of the Japanese Empire, a belief in the superiority of Japanese culture over the cultures of other countries, belief in the necessity of military aggression, if necessary to accomplish Japan's so-called divine mission of leadership of Greater East Asia, and, if necessary, what was called "all the world under one roof." (pp. 835-36)

In his cross-examination when asked to give the grounds of this opinion the witness answered by saying, "From the interviews with students, with teachers, both before and since the war, teachers who are both Japanese and foreign in nationality, and interviews, as I stated, with prisoners of war." (p. 842)

The witness told us that for this purpose he interviewed some 300 to 350 persons including prisoners of war. The witness no doubt claims to be an expert in this matter; but I am afraid I cannot attach any importance to his opinion in this respect. I do not consider him an expert in the matter testified to by him and I, for myself, am not convinced by his reasons for ascribing the effects to the training testified to by him. Though it became necessary for the prosecution to put him forward as an expert, the witness himself, in his cross-examination by Mr. Warren, had to disown any expert knowledge. (Vide his deposition, p. 872 of the record of proceedings)

TOKIOMI KAIGO: (P. 879)

The witness is Assistant Professor at the Imperial University, Tokyo. He has been there for ten years. He teaches educational history and specially contemporary educational history of Japan.

The witness says that military training in Japan began in the elementary, secondary and normal schools since the year 1886. It continued until the World War I. After World War I, it was reinforced in the year 1925 when a law was promulgated ordering the active army officers to be attached to schools as instructors and in the next year, that is, in 1926, training schools for young men were established. Instructors of military training were the officers on active duties attached to the schools. In the elementary, middle and junior colleges, military training became compulsory since 1925. In the University it became compulsory for students to attend classes where lectures on military subjects were given since 1925. It was decided IN THE YEAR 1939 to introduce military drills with rifles but at that time the students were told to conduct rifle practice only on the occasion of field maneuvers, on other occasions they were to attend lectures only. IN NOVEMBER 1941 a new curriculum

for military training was made and since then rifle drill was to be conducted even in universities. Prior to the year 1941 a wholesale renovation of the educational system in Japan was conducted. In 1937 an educational council was established whose mission was to study, investigate as a whole the educational system and its contents and methods. On being asked by the prosecution whether as a result of this study military training and lectures became more important in the Japanese school system the witness answered, "No decision as to intensifying military training was made during the Educational Council. However, in the years following 1937, AS THE CHINA INCIDENT BROKE OUT, it was necessary to intensify military training of the nation as a whole." (p. 891)

The witness further said that the subjects discussed during the Educational Council *in 1937* were the renovation of the educational system in Japan so that the educational system of Japan may serve the country. Being asked whether the textbooks relating to any subjects were changed following the renovation of the school system of 1937 the witness said, "It was after 1941 that the real changes of textbooks were made. The educational council which met in 1937 had studied for long years various programs concerning the change of the educational system. After 1941, changes were made in such subjects as ethics, history, geography, and the national language."(p. 893)

Being asked by the prosecution what was the effect of teaching beginning with 1937 the witness said, "As the policy of basing the education on the cause of serving the country was decided by the Educational Council, the education in Japan after 1937 was based upon the education to promote *patriotic feeling* of the nation." (p. 894)

The next question put to the witness was "would you say, Professor, that the patriotic feeling included therein teachings to inculcate an ultra-nationalistic and militaristic spirit?" (p. 894). Obviously this was a suggestive question and an objection being taken by defense the prosecution withdrew it, and then asked the witness whether or not the effect of the teaching on the students was to create in them the opinion that the Japanese were a superior race. The witness said, "As far as I can judge, it is my opinion that this kind of education, namely, that Japan was a great nation, was given to the students." (p. 897)

In cross-examination the witness said that after the World War I, there was a great social unrest in Japan and that frivolousness prevailed there. The putting into execution of military training in the year 1925-26 did a great deal to check this tendency. *There is nothing in the evidence of this witness which shows anything wrong with the renovation of the educational system.*

After the examination of this witness the prosecution offered to adduce in evidence the statements of the witnesses taken by it out of court producing the witness in Court for cross-examination by the defense. The Tribunal allowed the prosecution to do so.

The next witness thus examined was *OUCHI HYOE*: (p. 936)

His statement taken by the prosecution out of court was offered as his tes-

timony-in-chief. The statement is Exhibit No. 130 in this case.

The witness is a Professor at the Imperial University of Tokyo where he teaches economics and public finance. He has been a professor teaching these subjects for the last 27 years. The witness says:

"Military training and lectures, beginning in the elementary schools, were a part of all schools in Japan. Such training was first instituted in the elementary, secondary and normal schools about 1886 and continued thereafter.

"Following the Japanese-Chinese War about 1898 military training was conducted in the schools by regular Army officers, which system prevailed until about the time of the first World War. After World War I, there was a liberal trend in the school system, and two or three years thereafter little importance was placed upon military training and teachings. Beginning about 1922 military training and teaching was again instituted in the schools, these subjects increasingly being given more consideration in the schools until 1927 when such training became compulsory in the secondary, normal and junior college grade schools. Such training, however, was not compulsory at this time in the University.

"In 1927 the War Ministry demanded that a special course in military lectures be given in the University of Tokyo, this demand being refused, but again made later. On the second occasion demand was made that military lectures and military training be given, as a result of which the university compromised by consenting that military lectures be given, these lectures being given by Army officers assigned from the War Ministry who became part of the faculty. At first the military lectures were not compulsory and most of the students did not attend them. For this reason a rule was put in effect by the military instructors that a roll-call be taken. Further pressure was made upon the students by the rule that if the students did not attend the lectures, following their graduation when they were called into Army service they did not receive credit for any military training while in school. This was important for the reason that students who participated in military training and lectures while in college had one year's service only to do in the Army on completion of their education, while those who had not attended military lectures and training were required to do their full time of two or three year's military service.

"Upon the insistence of the War Ministry, military training became a part of all universities, including private universities, such training becoming compulsory in 1938 when General ARAKI became Minister of Education. Previous to this time, in 1931, when General ARAKI was War Minister he had demanded that the Imperial University of Tokyo have military training and lectures as a part of its curriculum, which demand was refused by the University officials, thus postponing such training in the University for a few years. Later General ARAKI as Minister of Education ordered compulsory military training and lectures in all universities." (pp. 940-43)

Then follows the following passage in the statement of the witness, "The

military training and lectures were conducted in schools of all grades by regular Army officers, the officers conducting the courses making every effort by lectures, training and propaganda to inspire a militaristic and ultranationalistic spirit in the students. It was taught by the military instructors that the Japanese were a superior race, that war was productive, and it was Japan's destiny to rule the Far East, and thereafter the whole world, and that the progress of the nation required the students to be prepared for aggressive warfare in the future to accomplish these ends.

"The foundation of the effort to inspire a militaristic and ultra-nationalistic spirit in the students was based upon a rescript of Emperor Meiji on education, published in 1890, which rescript provided that the most important duty of a subject was to the country and the Emperor, together with a rescript issued by the Emperor to military and naval officers, soldiers and sailors on their duties. These rescripts, together with the textbooks, lectures, military training and teachings, were used by the military instructors to teach and inculcate in the students a belief in the great glory of Japan, and the duty of the Japanese to aid and further the Holy Mission of Japan to gain control of and rule the Far East, and thereafter the world, and that in the accomplishing of this Holy Mission the greatest glory of all for a Japanese was a privilege of dying in the service of the Emperor.

"That beginning in 1931 domination by the military of the universities and schools increasingly became more apparent, such domination having reached such proportions in 1937 FOLLOWING THE CHINA INCIDENT that professors and teachers were required to co-operate fully and wholeheartedly in the program of inculcating in the students a fanatical militaristic and ultra-nationalistic spirit. Failure to co-operate fully in this program would bring punishment by dismissal from the school or imprisonment, all expressions of thought in favour of the ideals of peace or in opposition to the policy of preparation for aggressive warfare being rigidly suppressed in the schools, this suppression being directed to students as well as teachers and professors." (pp. 943-44)

The statement concludes with the following passage: "As an educator in the universities for the past 27 years and from my own personal experience as a student in the various grade schools in Japan, it is my opinion that the military training, lectures and teaching given to students in all grade schools and universities had the effect of creating in the students a militaristic and ultranationalistic spirit, a belief that the Japanese as a race were superior to all other peoples, glorification of war, that wars were productive and necessary for the future welfare of Japan, and had the effect of preparing the students for future wars of aggression." (p. 946)

By way of illustration of his statement that the failure to co-operate fully in this program would bring punishment by dismissal or imprisonment, the witness mentioned the instances of Professor YANIHARA, of the witness himself as also of the three professors of Tokyo Imperial University. Professor YANIHARA, the witness says, wrote an article on "peace and the ideals of the State in 1936". Marquis KIDO on becoming Minister of Education in

1937 demanded that the professor should be dismissed. The professor, however, was asked by the University authorities to submit his resignation which he did.

As regards himself he was arrested by the police charged under the public peace law and was kept confined for nearly 18 months without trial and was ultimately found not guilty on trial.

As to the other three professors from Tokyo they were also arrested by the police under the public peace law in 1937. In cross-examination it transpired that all these persons wrote some articles which were considered offensive. As REGARDS HIS OPINION as to the effect of military education the witness in cross-examination says that the statement is made on the basis of the facts which were brought to his attention by his students. The witness himself never heard any lecture. He heard from the students the contents of the lectures. The students told the witness that they were inculcated with a desire to gain control of the Far East and thereafter the world. He could not name any student.

I am not satisfied that this witness was competent to give the opinion which he expressed in this statement. His evidence does not disclose any materials on which such opinion could be founded.

TAKIKAWA YUKITOKI: (p. 988)

The statement of this witness taken out of court by the prosecution is Exhibit No. 131 in this case and is offered in evidence as his examination-in-chief. He is Dean of Law at Kyoto University. The witness says: "Military training, beginning in the elementary schools, was a part of the curriculum of all schools in Japan. Beginning about 1925 more attention was given to military lectures and training in Kyoto University, there being on the staff teaching military subjects one colonel and three captains, these officers became more dominant in the schools and they increasingly had more to say in the manner in which the university should be operated. When they first came to the college they did not have a great deal of influence but gradually following the Manchurian Incident in 1931 and the China Incident in 1937 they gained more and more influence, with the result that the university eventually was completely under the control of the military." (pp. 990-91)

The witness says: "I am familiar with the form of education that prevailed generally in the Japanese school system up to the present time and it was a very bad form of education. It completely *omitted free thought and liberal ideas* and was devoted to justifying Japanese aggressive warfare in Manchuria and China and was intended to teach the students that war was glorious, that war was necessary, that war was productive, that the future greatness and destiny of Japan was dependent upon aggressive warfare and had the effect of inculcating in the minds of the students a contempt for other races and peoples, a hatred for potential enemies and prepared them for future wars of aggression." (pp. 992-93)

The witness was discharged from the University in 1933. According to the witness this happened because of his article in opposition to the Manchuri-

an Incident and another article in opposition to the Nazi form of Government. In his cross-examination the witness admits that education itself is not his speciality. It further transpired that witness' criticism of court procedure or trials in his book called "Keiho Tokuhon" developed into some affair between him and the then Minister of Education HATOYAMA Ichiro and he was ultimately dismissed for that book. Excepting his own opinion the witness does not give us any material from which we can draw any inference as to the effect given by the witness in his opinion.

MAEDA TAMON: (p. 1, 024 & p. 3,122)

His statement taken by the prosecution out of court is Exhibit No. 140 in this case and this is offered as his testimony-in-chief. During the years 1928-38 he was an editorial writer on the "Tokyo Asahi Shimbun". He became Minister of Education on August 18, 1945.

In his PREPARED STATEMENT the witness stated that after being Minister of Education he ordered textbooks to be destroyed for the reasons that they were used to teach the students, first, that Japan was a country superior to all other countries, that was most objectionable; another was the confusion of facts with mystery and legend; too much admiration of military action and warfare; too much admiration and homage to military officers and the idea of absolute subjection of the individual in favour of the state. The witness then says: "In addition to the textbooks which I ordered to be destroyed for the reasons stated, there was also issued by the Ministry of Education to be widely read by teachers, students and citizens at large, a book entitled 'Fundamental Principles of the National Polity', published in May 1937, and 'The Way of National Subjects' which was published in March 1941. Upon becoming Minister of Education in 1945, a survey of the Japanese school system as it had existed previously established that before the China Incident the military took over control of all schools by placing in the schools Army officers who supervised the military teaching and training, this control FOLLOWING THE CHINA INCIDENT becoming so absolute that such officers instructed the principals of the schools as to how the courses and administration of the school system should be conducted." (pp. 1,037-38)

The offensive book named by the witness is "Way of a Subject" which seems to have been published on 31ST MARCH 1941. (p. 1, 047). This book is Exhibit No. 141 in this case. The witness said that the book was published by the Department of Education. It was published for the purpose of being read not only by the teachers and students but also by the people at large. The OFFENDING PASSAGES were read into the proceedings at pages 1,047 to 1,065 and 3, 124 to 3, 126. In substance these passages emphasize:

1. that the Imperial throne is coeval with Heaven and Earth, and that the way of a subject originates in the fundamental character of the empire and is in the guarding and maintaining the prosperity of the Imperial throne;
2. that this is not an abstract form but a historical standard set down

firmly for the daily life and conduct; the peoples' entire lives and activities solely point toward the enhancing of the Imperial foundation;

3. (*a*) that with the introduction of occidental civilization, the Japanese people have come to be influenced by individualism, liberalism, utilitarianism, materialism and others and have fallen often into the error of running counter to their time-honoured national character;
   (*b*) that the urgent need of the hour is to discard the ideas of individualism and utilitarianism and to live up to the duty of the Imperial subject;
4. (*a*) that the world penetration by the European nations was mainly prompted by insatiable materialistic desires;
   (*b*) that they slaughtered the aborigines, or enslaved them or dispossessed them of their lands, making it their colonies;
   (*c*) that natural resources were taken to their homelands in great quantities and enormous profits were gained through trade;
   (*d*) that in their invasions all the world over, they dared to commit atrocities which neither heaven nor man could tolerate;
   (*e*) that the American Indians, the African blacks and the people of the Greater East Asia co-prosperity sphere were all equally treated—they were rounded up as white men's slaves;
5. (*a*) that the World War I had undoubtedly a great deal to do with the long standing hostile relations between Germany and France, but the primary cause lay in the Anglo-German Strife for maritime and economic supremacy;
   (*b*) that basic factors of occidental civilization became cause and effect reducing the whole world into veritable shambles and finally brought about the self-destruction of World War I.
6. As a result of that war, fear of the possible downfall of the western civilization occupied every mind;
   (*a*) Britain, France and America became engrossed in their effort to maintain the *status quo*;
   (*b*) a formidable movement for social revolution by class wars based on thorough-going materialism was intensified in communism;
   (*c*) Nazism and Fascism were being ushered into the world: the doctrine of racialism and totalitarianism in Germany and Italy was the eliminating and reforming of the will occasioned by Individualism and Liberalism;
7. (*a*) that the Manchurian incident was an outburst of the Japanese suppressed national life;

(*b*) that this incident with China signifies Japan's step towards the creation of a moral world and the establishment of a new order in the eyes of the Powers;

8. (*a*) that the amazingly brilliant national development and expansion of Japan gave rise to envy and jealousy on the part of the European and American nations; whose aspiration was to annex East Asia, and they, as a counter measure tried to check the ever-enhancing national strength by laying economic pressure on Japan or scheming political disturbance, or planning Japan's international isolation;

(*b*) that with the increasingly strained situation on the Pacific, Japan's position in East Asia confronts serious condition.

9. That Japan must politically assist the countries with the coprosperity sphere of Greater East Asia which have been colonized as the result of the Westerner's aggression in the East.

10. (*a*) That a group of liberal democratic nations—ardent supporters of maintaining the *status quo*—are co-operating together to baffle Japanese undertakings and the colonies are still entrapped in the illusion that they have to rely on the Europeans and the Americans for their subsistence;

(*b*) that to reach the set goal Japan has long way to go yet and the path is by no means a broad level highway.

11. That the brilliant success that the Germans are achieving in the present war is not due only to their highly developed mechanized forces but to the vigorous nationalistic spirit and to the fervent popular co-operation in national defense;

12. (*a*) that the guarding and maintaining of the prosperity of the Imperial Throne is the true object of strengthening the national total war system;

(*b*) that the Japanese people ventured to look upto the people of Imperial household as their head family and are enjoying the privilege of leading one nation one family life;

(*c*) that to be united in one body in serving the Emperor who loves his people tenderly is the essential qualities of the subjects;

(*d*) that in Japan loyalty comes before filial piety. Loyalty is the the great principle.... Loyalty and filial piety are one and inseparable;

(*e*) Imperial subjects in this new era must strengthen themselves as subjects of this empire; that is to say, by fully understanding the significance of the Japanese nationality, living on strength faith as subjects of the empire adhering fidelity, excelling in clear sightedness, straining strong will and prime physical strength, cultivating practical ability the Japanese must stride forward for the attainment of historical mission of this empire;

(*f*) that training for Imperial subject should be directed at the cultivation of the spirit to push forward with decision and bravery;

13. (*a*) that great importance should be attached to discipline which constitutes one of the characteristic features of the Japanese education;

(*b*) that the subjects of the empire have been entrusted with the grave responsibility of supporting Imperial prosperity eternally ever since the foundation of the empire;

(*c*) that what is commonly called private life lies in the performance of the duty of the subjects: it is not permissible for any one to indulge in self-will, thinking that one's private life has nothing to do with the state;

14. that home is a training place of the Imperial subjects: that there the noble national spirit, sturdy yet affectionate, is trained and developed, and loyal subjects that are capable of successfully enhancing and supporting prosperity of the Imperial Throne are brought up;

15. that in Japan "one's occupation was originally the duty they owed to perform for the sake of the emperors, each in his assigned part of the State affairs ... "The underlying meaning of occupations in our country was not in the making of profits, but in the production itself, and they were preserved in the custom of respecting labour for labour's sake."

Mr. Hammack then read out the following passages from pages 84 and 89 of the book:

"You can never consider those that dare to evade law or sacrifice others for the purpose of profit, or those that neglect others in adversity if no profit is involved and solely aim at profit making, as loyal to the country by being true to their jobs. At the present time, especially the small and medium traders and manufacturers are in a wretched plight, but nevertheless we must think over the conditions prevailing at home and abroad and devote ourselves to our true duty, positively engaging in commerce and, thereby, perform our duty to the country.

"To fulfil our respective roles with a clear understanding of what part of the national activity each of us is charged with, no matter what work we may be engaged in, and by dropping all ideas of personal interests and profits reviving the old custom of our forefathers who did their best to serve the state, is truly the cardinal point for the way of the subject.

"The China Incident is indeed the very sacred undertaking for the purpose of diffusing the idea with which the foundation of our Empire was originally purported, not only in Asia, but to all parts of the world, and the responsibilities shouldered by the 100,000,000 people of Japan cannot by any means be slighted. We have a long way to go before we

can hope to achieve the Empire's mission and succeed in setting up a new order, and we must, of course, be prepared to face a good many obstacles yet." (p. 3,126)

I have quoted here the entire portions read out by the prosecution for fear of unwittingly omitting any vital offending word, sentence or sense.

I do not see that a book like this published as it was IN MARCH 1941 when Japan was involved in serious hostilities would go any way in the direction of establishing any criminal responsibility on the part of anybody or organization connected with its publication at that time. Mr. MAEDA who, after the war, considered this book to be so pernicious as not to brook its existence in Japanese soil gave his own reason for ordering its destruction and it would be better to have that reason from his testimony. The witness in his cross-examination gave the following reason for destroying the book:

1. Its general tendency or underlying philosophy was very objectionable.
   (*a*) The book pointed out or indicated that Japan was greater than other countries and by mixing legend, myth and facts it tried to show that Japan was a country especially selected and blessed by Providence.
   (*b*) It greatly emphasized the Imperial Way—it placed the state above truth and justice.
2. That it placed the main emphasis on the way of the people or way of the nation or the way of subjects—*the way of humanity* was entirely neglected; such a thought entirely negates the idea of building a cultural state.

Mr. MAEDA had many other books destroyed after the war and those books, he admitted, had existed since a long time past. His reason for destroying them was that in this era such books should not be permitted to exist.

I need not question his prudence in this respect. But this condemnation by him does not necessarily make the book condemnable. However unpleasant its contents might appear to us, they were perhaps not devoid of truth. Items 4, 6, 7 (*a*) and 8 of the above analysis of the contents of the condemned book substantially correspond with the opinions of authors of very high authority. I have already dealt with the question of prevalence of race-feeling in international life. As to the fear of the possible downfall of the Western civilization, one is simply to refer to the Survey of the International Affairs for 1931 by the Royal Institute of London. I would have occasion to refer to its contents later on. The Survey for 1920-23, 1925 and 1926 by the same high authority would go a great way in supporting the opinion expressed in items 7 (*a*) and 8. Item 3 is, of course, a matter of opinion and I do not think the author committed any grave error in emphasizing the fundamental differences between the Eastern and the Western civilizations and saying a word of warning against blind imitation. The meeting of East and West has been inevitable and unavoidable. At the same time this meeting has given rise to some basic problems which must be clearly understood and thoroughly grasped before we

can find out a happy and workable solution. Many will advocate adoption of the one by the other; many will advocate adaptation and many again will advocate rejection. The most healthy attitude towards such diverse opinions would be to follow the principles of free-thought and opinion, "not free thought for those ones who agree with us but freedom for the thought that we hate."

Whatever that be, facts disclosed in the evidence of this witness do not in the least advance this phase of the prosecution case. What was said or done, was done at a time when Japan was in the midst of a global war and was done only as a part of the strategy of the war. This cannot in the least lead us to any inference of the kind of design alleged in the indictment.

ITO NOBUFUMI: (p. 1,077)

The statement of this witness taken out of court by the prosecution was offered in evidence in lieu of his examination-in-chief. This statement is Exhibit No. 142 in this case.

The witness speaks of ORGANIZATION OF PROPAGANDA by the Government since 1936. IN 1940 the witness became Chairman of the Bureau of Information which was later dissolved as the result of the establishment of the Board of Information of which the witness became the first President. *Censorship power* was given to this Board. In JANUARY 1941 all publishers in Japan were organzied into the 'Japanese Publisher's Association', all book distributors were organized into the 'Japanese Book and Magazine Distributors Corporation', and all newspapers into the 'Japanese Newspaper League'. The establishment of these organizations resulted in complete government control of all information media included within the respective groups. (p. 1,081)

The witness states that the War Ministry disseminated propaganda prejudicing the people of Japan against POTENTIAL ENEMIES such as the United States and Great Britain from May or June 1941.

IKESHIMA SHIGENOBU: (P. 1, 099)

In the case of this witness also his statement taken out of court by the prosecution was accepted in evidence in lieu of his examination-in-chief. The witness is a Professor at Hosei University and teaches cultural politics. This witness also speaks of the military training in Japanese educational institutes. The witness says that upto 1925 this military training "did not require much school time of the students", that since 1925 such training began "to absorb more school time upto and until the Manchurian Incident," that following the Manchurian Incident "time devoted by the students to military training and teaching dropped a little until 1936 when this subject again became important and more time of students was being devoted to this subject."

According to this witness "AFTER the China Incident because of the pressure from the War Ministry, ULTRA-NATIONALISTIC and MILITARISTIC THOUGHTS were inculcated in the students under the supervision of the military in the schools." .... Beginning in the early part of 1941, the students were taught

that the failure of the Japanese Army to conquer China was because of the assistance which the United States and Great Britain were rendering China, the students being impressed with the idea that for this reason the great enemy of Japan was not China but United States and Great Britain." (pp. 1,012-13)

The witness also speaks of Government control of Japan Broadcasting Corporation and censorship of news.

We do not know what is 'ultra-nationalistic thought' according to this witness. However debased and distorted its present manifestations may be, nationalism is an organic and not necessarily evil development of the political life of man.

As has been pointed out by Dr. Schwarzenberger "even if Europeans and Americans who have drunk too deeply from this dangerous cup might now be inclined to disagree with this opinion, those countries now just passing through those stages through which the western people have gone during past centuries will feel that they cannot overleap this essential and formative stage." In the words of Sun Yat-Sen 'we, the wronged races, must first recover our position of national freedom and equality before we are fit to discuss cosmopolitanism. We must understand that cosmopolitanism grows out of nationalism; if we want to extend cosmopolitanism, we must, first, establish strongly our own nationalism.' It may be that 'if nationalism is to fulfil really positive functions from the standpoint of the international community as a whole, it would have to undergo a process of rather far-reaching self-limitations.' According to Dr. Schwarzenberger, for this purpose "in the first place, nationalist would have to realize that the nation, though a reality and a high value, only represents a relative value. Secondly, it may be easy to perceive differences between nations, but so far nobody has succeeded in establishing a just hierarchy between them." "Judgments based, in a matter-of-course way, on our own civilization", says Dr. Schwarzenberger, "are only one of the many hypocrisies of which the West has become guilty, particularly regarding the Far East."

SAKI AKIO: (p. 1,116)

His statement is Exhibit 144 in this case. He comes to prove propaganda. He is President of Nihon Kami Shibai Association. His company manufactures what the witness calls 'paper theatre productions'. The witness speaks about such propaganda during the period FOLLOWING the China Incident.

OGATA TAKETORA: (p. 1,148)

The statement of this witness is Exhibit No. 146 in this case. The witness was formerly Vice-President of the 'Asahi Shimboon' newspaper. The witness says: "I have been in the newspaper business for 35 years, During all the time that I have been in the newspaper business, FREEDOM OF THE PRESS in Japan has been limited by government censorship. Censorship became particularly noticeable immediately preceding the Manchurian Incident. After the

Manchurian Incident, newspapers were not permitted to write on military matters unless such material was properly approved by the censorship Section of the Police Bureau of the Home Ministry. Immediately preceding the Manchurian Incident all newspapers were required to submit a copy of their papers to the Home Ministry for censorship before such paper could be released on the stands. "IN 1939 censorship became so strict that it was found necessary to place a censorship Section within our own plant, for the reason that so many press bans were coming in from the Home Ministry. Upon numerous occasions prior to DECEMBER 1941 my newspaper received telegrams from the various theatres of war wherein the Japanese troops were fighting. Such telegrams would instruct us as to how we should treat specific military information." (pp. 1,153-54)

NAKAI KIMBEI: (p. 1,156)

The statement of this witness is Exhibit 147 in this case. The witness speaks of his connection with the moving picture industry. His evidence also is directed to propaganda in justification of war. The witness speaks of such propaganda since 1929.

SUZUKI TOMIN: (p. 1,217)

The statement of this witness is Exhibit 150 in this case. This witness is an editorial writer and has been employed since 1935 by the newspaper 'Youmiuri Shimboon'. The witness speaks of censorship. The witness says:

"Newspapers and publications in Japan since 1935 have been subjected to strict censorship directed by the government and put in practice by the Home Ministry. Newspapers were not permitted to print anything on political matters except such news items as were issued by the various ministries of the government, with the result that newspapers published little besides propaganda tending to justify Japanese militaristic and aggressive warfare objectives. In addition to the various censorship laws in existence, it was the practice for the government through the Home Ministry, to issue press bans on news items, which officials of the government decided should be withheld from the Japanese public. The various ministries of the government directed newspapers in relation to the manner in which news items should be treated, and in addition thereto, it was the practice particularly of the Navy Press Bureau, Army Press Bureau and Foreign Office Press Bureau to call individual writers and journalists to their officer periodically and issue instructions to them as to the material which could be published and the manner in which such material must be published. That newspapers and publications in Japan from 1935 until the termination of the Pacific War were completely under the control and domination of the Japanese Government, and during these years there was no such thing as the semblance of a free press in Japan." (pp. 1,219-20)

GORO KOIZUMI: (p. 1,259)

The statement of this witness is Exhibit No. 152 in this case. The wit-

ness was CHIEF OF POLICE in various prefectures from 1935 to 1940. The witness speaks of the enforcement of censorship over newspapers, publications, writings, books, moving pictures, plays and other forms of entertainments, public speeches, public gatherings etc. The witness says: "In 1928 there was organized on a national basis from the Police Department a section called the High Police, the duties of which were primarily to watch over the activities of extreme leftists and extreme rightists, and in addition whose duties were to watch over the activities of anyone who was opposed to the policy of the Japanese Government as it existed from 1931 to December 7, 1941. For illustration, FOLLOWING THE CHINESE-JAPANESE INCIDENT OF 1937, no one in Japan was permitted to express opposition to the war with China. If they did so, they would be arrested under the Preservation of Peace Law and imprisoned. (pp. 1, 264-65). The witness also says that, "That from ancient times in Japan, there was the family group movement throughout Japan. In ancient times these groups were banded together for the purpose of preventing and reporting crime and for mutual aid. That in the latter part of 1940, the family or neighbourhood group movement was revived for the purpose of educating the Japanese people on governmental policy and to make the people war conscious as well as for mutual aid, and to make them co-operate with the government, these families or neighbourhood groups being under the local administration." (pp. 1,265-66)

THE DEFENSE WITNESS Mr. YOSHIDA who from March 1930 to December 1935 served as an officer in charge of School Training and from August 1937 to March 1941 served in a section of the Personal Affairs Bureau and then in a section of the Military Service Bureau of the War Ministry and was in charge of School Training, gave us the reason why the system of school training and youth training in question was adapted by Japan. His evidence is Exhibit No. 2,377 in this case. The witness says: "National training especially the training of youths, which had been carried out by leading powers since the close of World War I had characteristics and developments of their own according to their respective internal conditions. Those countries had striven for the realization of a common ideal towards the development of these trainings, based on the lessons they had learned from World War I. On the other hand, Japan was the only country that did not have such systems and institutions. Not only had the young men and boys of the labouring class of Japan who formed the greater part of the youths, no definite educational institution after finishing compulsory education, but they were left to be infected with the evil ways of the world in pre-war and post-war times. Such being the case, men of intelligence feared that this might cast a gloomy shadow over the future of the state. The investigation of youth training which had been carried out by leading powers showed that, if let alone, Japan alone would be far behind the progress of leading powers. In short, this world-wide tendency especially national training, which was being carried out assiduously by the other powers, compared with that of Japan, made the Japanese Government and people awake to the necessity of carrying out this training. After all, the deficiency of civic training revealed at the time of the great EARTHQUAKE IN

1923, prompted Japan to adopt the system of school training in 1925 and subsequently the system of youth training in 1926. .... A large section of public opinion was for the adoption of these systems in those days and the bill was carried unanimously in both houses of parliament." The witness continues, "We believed that it would be most simple and effective to adopt military drill as a course of the school in order to foster the spirit of fortitude, and to cultivate the habit of observing discipline and decorum, valuing labour, as well as to develop physical education and thus to elevate the nation's character. The military authorities had not the slightest intention of forcing this military training to be adopted."

Mr. YOSHIDA then explains why the officers on the active list came to be attached to the schools and says: "Military drill which had been adopted as a school course as early as 1886 by MORI, the then Minister of Education, became existent in name only since the end of the Meiji era. The main reason why it had no beneficial effect on the discipline of the students was that the students ceased to place confidence in the retired officers in charge of this training. In view of this fact, we concluded that, if school training was to be developed, officers on the active list had to be attached to the schools. Therefore, the military authorities believed that physical and mental discipline of the students through training in schools and youth training would result in the strengthening of national defense."

AFTER THE OUTBREAK OF CHINA INCIDENT IN 1937 greater importance was attached to this training. The witness gives us the training curriculum adopted, the hours of drill in a week and days of field exercise in a year. His evidence in this respect is to be found in the record of proceedings pages 18,454 to 18, 460. I for myself find nothing unusual in this training and I do not see why this should lead us to infer a preparation for any aggressive act.

Military training does not necessarily mean preparation for any aggressive design. Even in a peaceful world such training may be considered advisable. At least in a world still controlled by Power-Politics such training is deemed essential by every power. Elsewhere I have dealt with why the Powers failed in their disarmament move. For the same reason the Powers would advocate military training of their youth. Dr. Schwarzenberger in his Power-Politics while dealing with the essential problem involved in the disarmament question, says: "What was lacking was the political agreement between the governments, without which disarmament was not feasible. While the Governments were approaching this problem in a spirit of competition and power-politics, the function of their service experts could not be to transform themselves into peace doves. It was their job to protect the special interests of their country and to see that the relative position and strength of their own country in the balance of the contending forces are not injuriously affected. So long as there is this Power-Politics in the world organization and so long as the hierarchy of States is there, every nation would try to occupy a position in that hierarchy where it can command respect and would therefore lay emphasis on that which the world has elected to value as respectable.

Remembering that the Peace Conference after the First World War did its best for "the inculcation of an inferiority complex into Japan by its rejection of the Japanese demands to recognize the principle of racial equality as one of the fundamentals of the new community system" and remembering also that in International society "a Greater Power is a country which has at its disposal more than an average amount of powers (military, political, economic and financial) and, furthermore, is willing to use this power in order to maintain or improve its own position in international society". I do not see why this change in the educational policy of Japan would indicate anything beyond this legitimate ambition in the minds of its statesmen and politicians. They knew that in the International Society in which their nation was to live and function, strength counts for much and such "Strength is measured not only by reference to past trials, but also by forecasting the likely display of energy in potential strife."

Excluding the expressions of opinion of some of the witnesses there is nothing in the evidence to indicate any aggressive preparation in the steps taken by the then authorities toward reorganization of the military education of the Japanese youth. The very fact that the prosecution had to introduce evidence of this character in its attempt to set up a case of an over-all conspiracy indicates its hopeless character. It may be noticed here that the prosecution case of conspiracy did not extend to bringing within its net the Japanese Government itself as it existed prior to the Manchurian Incident of 1931. One or two members of the Government might have been alleged as being in it. But in the main the conspiracy alleged was of persons outside the Government. The educational policy in evidence here is however the policy of the then Government. I do not know if members of any government in any country in the world would be safe, if its policies, actions and utterrances be subjected to this sort of scrutiny. To read into this evidence the alleged incriminating fact will indeed require a mind already provided with its theories in this respect and ingenious enough, to over-reach and mislead itself, to supply the links that are wanting and to take for granted facts supporting its preconceived theories. There is always the danger in a case like the present that conjecture or suspicion would take the place of legal proof. This is certainly a case where one must be on one's guard against approaching the same with prejudice or conscious bias.

The censorship measures adverted to by some of the witnesses have nothing to do with the matter under our consideration here.

This evidence has been introduced with a view to establish the allegation that "during this period free Parliamentary institutions were gradually stamped out and a system similar to the Fascist or Nazi model introduced".

But I am afraid that evidence does not carry us far in this direction. The evidence substantially *relates to a period subsequent to the outbreak of the Chinese hostility*. On the outbreak of such hostilities almost in every civilized country legislation is enacted or automatically invoked giving to the executive broad powers to adapt rules for the conduct of the war and the regulation of

the civilian scene. These measures are recognized everywhere as the inevitable corollary of modern warfare; the need for quick and flexible administrative action leads to a policy of judicial abnegation. The development by the enemy of propaganda as a scientific weapon of modern warfare to break down the all important morale of civilians and soldiers makes necessary the countermeasures of suppressing by, punishment and censorship, utterances and statements which may reasonably have this effect and which would probably be made to achieve this end. It is not unlikely that during such a period of war there would be indiscriminate prosecution in this respect, the natural result of which would be the feeling that the authorities are punishing all expressions of dissatisfaction and criticism. It may also look like unnecessary encroachment upon fundamental liberties of the people and such encroachment may appear to be far from the reasons suggested for the adoption of such measures, namely, prevention of systematic or wilful attempts to create disunity and lower morale. But this happens almost in every country involved in modern warfare, and I see no reason why such measures adopted by Japan would lead us to an inference that all these were being devised as measures for some future aggressive war. Japan imposed restrictions on freedom of written opinion and of speech during this period but the reason again is obvious. During modern warfare every government feels the need of preventing the publication of information useful to the enemy and of limiting expression of criticism and opinion calculated to undermine a national unity. With the extension of the field of modern war to include civilian and the domestic scene, matter which may be directly or indirectly useful to any enemy is probably included in every issue of newspaper. Censorship and suppression of publications may therefore extend very far and precautions may legitimately be taken in respect of publication of all documents, pictorial representations, photographs or cinematograph films. It may be that in the actual application of these restrictive regulations the administrators did not limit their operation where the danger to the peace and safety of the state was imminent and certain, but extended them even where such danger was merely speculative and remote. We are not concerned here with the justice or otherwise of these measures. The restrictive laws might have been misapplied and it may be possible for us now to show the frequent absurdity of the pretention that the imminence of the evils was in any way increased by the words of any war-time defendant. These are matters which would not change the character of the measures adapted and would, at the worst, indicate their occasional abuses. I need not enter into the details of the evidence adduced in this phase of the case. All that I need say is that the evidence does not necessarily lead to the inference that Japan was preparing for aggressive war or that the heads of the various departments of the Japanese Government were conspiring to wage any aggressive war.

Though in democratic countries and in peace-time, the political control of the free press and like other forces at work in the international society "is not so strong as not to allow them a radius of their own in which they can display their own influence and acquire a considerable amount of nuisance value," yet the very possibility of their last named 'acquisition' may lead any

particular country at any particular moment of its life to take to some controlling measures with relentless severity. But such steps would not necessarily lead to the inference that the country is entertaining any aggressive international design.

Some evidence has been given showing repressive measures against communists. This again indicates nothing for our present purposes. This might have been the result of fear almost common with every nation. Almost every nation seems even now to entertain a fear that its domestic communists will overthrow the government by internal violence. Every nation seems also to be worried that its traditional way of life will be undermined by the infection of public opinion. There are many responsible persons who believe that though there may be no clear and present danger of violent revolution, the threat of diseased morale is immediate. Such belief may or may not be justifiable and, in most cases, it is not. Yet if in any country persons responsible for the working of their constitutions entertain this belief and behave accordingly, I do not see how we can draw any inference therefrom beyond the fact that such administrators entertained such fear.

I would deal with the case of "control and dissemination of propaganda" and "mobilization of the people for war" in connection with the question of seizure and control of political powers.

THE PREPARATION OF JAPAN

FOR

AGGRESSIVE WAR

INTERNALLY AND BY ALLIANCE

WITH

THE AXIS POWERS

* * *

SEIZURE OF POLITICAL POWER

I should next take up what is named, in the indictment, as "the organization of politics", and, at the presentation of the case, as "the seizure and control of the governmental power". In giving the particulars in the indictment it is stated:

1. That the provisions in the Japanese Constitution gave to the militarists the opportunity of gaining control over the Governments.
   (*a*) The first such provision:
      (*i*) Afforded the Chief of Staff and any other leaders of the Army and Navy direct access to the Emperor;
      (*ii*) Enabled them to appoint and withdraw the War and Navy Ministers;
      (*iii*) In May 1936, this power was further increased by a regulation that the Army and Navy Ministers must be senior officers on the active list;
      (*iv*) These powers enabled them either to prevent a government from being formed or to bring about its fall after it was formed.
   (*b*) The second provision was that although the Diet had the right to reject a budget, this did not give them any real control, as in case of such a rejection by the Diet, the budget of the preceding year remained in force.
   (*c*) During this period free Parliamentary Institutions were gradually stamped out and a system similar to the Fascist or Nazi model introduced.

The statement itself, in my opinion, is not much convincing.

Mr. Keenan in his opening statement gave an account of this organization of politics or seizure of power. Item 4 in my analysis of his opening statement given above may be referred to in this connection. It will perhaps be convenient if I repeat it here. Mr. Keenan said:

"4. (*a*) That the waging of aggressive warfare against China was aided and facilitated by military groups acting in concert with civilians in securing control of governmental departments and agencies;
   (*b*) That the power involved in the Imperial Ordinance of 1936 providing that the Minister of War must be a General or Lt. General on the active list and that the Minister of Navy must be an admiral or vice-admiral on the active list, was utilized by the Army in obtaining domination and control of the Government and promoting Japan's policy of expansion by force;
   (*c*) That taking advantage of the express provisions of the Japanese Constitution making a sharp distinction between matters of general affairs of state and matters pertaining to the Supreme Command under the Army and Navy, the conspirators, throughout the life of the conspiracy, constantly

tended to enlarge the scope of matters contained within the concept of Supreme Command at the expense of matters belonging to general affairs of state;

(*d*) (*i*) That militaristic cliques and ultra-nationalistic secret societies resorted to rule by assassination and thereby exercised great influence in favour of military aggression;

(*ii*) That assassinations and threats of revolt enabled the military branch more and more to dominate the civil government until on October 1941, the military acquired complete and full control of all branches of the Government, both civil and military;

(*iii*) That the military hierarchy caused the fall of the Yonai Cabinet in 1940, in order to advance aggressive object;"

Before proceeding further with this matter, it will be better to have a clear grasp of the prosecution case in this respect. The prosecution finally presents its case in the following clear and distinct stages:

1. In the first stage, the conspirators, whoever they be, are completely outside the governing body and have no inufluence with that body.
2. In the second stage, the conspirators are still outside the governing body, but are having more and more influence with that body.
3. In the third stage, the conspirators are gradually coming into the governing body.
4. In the fourth or the final stage, there has been complete seizure of the government by the conspirators.

The prosecution does not seem to be sure of its attitude towards the TANAKA Cabinet. It is absolutely clear that it has no complaint against any earlier cabinet and its policy towards China. As a matter of fact, at least before the TANAKA Cabinet, the Japanese Government had been studiously and persistently pursuing a "genuine policy of peace in harmony with the spirit of a deliberately Pacific World Order." "Japan, in this phase of her history, gave impressive evidence of her will to peace in a number of practical ways: In her acquiescence in the lapse of the Anglo-Japanese alliance; in her decision to withdraw her troops from the Vladivostok and from Tsingtao; in her dignified self-restraint in face of the provocative American immigration (exclusion) clause of 1924; and, not least, in her deliberate practice of her nonretaliation to Chinese provocation on certain notable occasions; for instance, on the occasion of the Nanking outrages of 1927, when the Japanese were decidedly less militant in their own self-defense than either the American or the British."

The TANAKA Cabinet came into office on the 20th April 1927. According to the Prosecution, the Cabinet adopted a policy towards China which was fundamentally different from the preceding "friendship policy" of SHIDEHARA. TANAKA's policy is given the name 'positive policy'. At one place

we had the idea as if the prosecution was starting its case of aggression from the adoption of this policy. The prosecution says: "During the period from April 1927 to July 1929, under the Ministry of Prime Minister TANAKA, Japan followed the 'positive policy' which rested upon military forces with respect to Manchuria. This 'positive policy' placed great emphasis on the necessity for regarding Manchuria as distinct from the rest of China and contained a declaration that if disturbances spread to Manchuria and Mongolia, thus menacing Japan's special position, Japan would defend them. The TANAKA policy asserted that Japan herself would undertake to preserve peace and order in Manchuria in contrast with the friendship policy which limited the objective to the protection of Japanese interests." In another place, however, the policy of TANAKA is characterized as one of "obtaining Japan's desire in Manchuria by peaceful means."

Evidence regarding this policy is to be found in documents like Exhibits 171, 172, 173, 174, 175 and Exhibit 57, page 41.

This evidence shows that the Japanese Government under TANAKA, while respecting the sovereignty of China over Manchuria and doing everything for the preservation of the "open door and equal opportunity policy", was fully determined to see that no state of affairs arose in Manchuria which would disturb the local tranquillity and put Japan's vital interests in jeopardy. TANAKA often declared that the Japanese Government attached the utmost importance to the maintenance of peace and order in Manchuria and was prepared to do all it could to prevent occurrences of a state of affairs which would disturb that peace and order. He further declared that if the disturbances developed menacing the peace and order of Manchuria, Japan might be constrained to take appropriate steps for the maintenance of peace and order.

The defense offered evidence to show the then internal state of China in order to explain this apparent change in policy. Unfortunately we rejected this evidence as irrelevant. I have already expressed my opinion about this ruling in that part of my judgment where I have dealt with the Rules of Evidence and Procedure followed by the Tribunal. We allowed the prosecution to bring in evidence regarding the TANAKA policy. I believe, if this policy was a relevant fact, any fact explaining its development, and thus indicating its true character, was equally relevant.

In order to appraise the TANAKA policy we may, with profit, refer to an account of the events happening in China at the time given by the Royal Institute of International Affairs. The Survey says:

"During the years 1925 and 1926, when the storm-centre of the Chinese Revolution had hovered over the southern littoral and the Yangtse Basin, and when Russian Communist influence had been in the ascendant in the Counsels of the Kuomintang, the campaign against foreign encroachments upon Chinese sovereignty had been directed first and foremost against Great Britain and British nationals. In the course of the year 1927, however, the situation underwent radical changes, for Russian Communist influence, after reaching its zenith in January, declined to its final fall in December; and at the same

time the storm-centre of the Revolution travelled forward again from the Yangtse Basin, where the predominant foreign interests were British, towards the North-eastern provinces, where the predominant foreign interests were Japanese. In response to this double change in the situation, the Chinese movement against foreign 'imperialism' took a new direction, and its brunt began to fall upon the Japanese, while the British in China experienced a certain relaxation of pressure.

"As soon as Chiang Kai-shek's troops crossed the southern boundary of Shantung in the 1927 campaign of the civil war between Kuomintang and Ankuochun, Japanese interests in the Tsingtao-Tsinanfu Railway were placed in jeopardy; and the Japanese Government acted as the British Government had recently done, in somewhat similar circumstances at Shanghai, by sending a defense force to the spot. This measure was repeated when, in the spring of 1928, Shantung became one theatre of the final and conclusive campaign of the Chinese civil war; and this time there was a violent collision between the Japanese and the Chinese Nationalist forces.

"The risk of such a clash war inherent in the policy; and though that rise had been run with impunity by the British Defense Force at Shanghai and by the Japanese Defense Force which had been despatched to Shantung and then withdrawn again in the preceding year, it must be remembered that Shantung was a particularly dangerous field for the despatch of a Defense Force by Japan, of all Powers. From 1915 to 1922, the Japanese Government's attempt to step into the German Government's shoes in this Chinese Province had been the burning question in China's foreign relations: and the feeling aroused throughout China by this foreign encroachment upon the homeland of Confucious had done more than anything else to awaken a national consciousness in the Chinese people. Accordingly, Japanese policy in Shantung had become 'the acid test' of Sino-Japanese relations. The Signature of the Bi-partite Shantung Treaty at Washington on the 4th February 1922, and the withdrawal of the last Japanese troops from Shantung on the 17th December of that year, had been followed by a Sino-Japanese *detente*; but the painful memories which the settlement of 1922 had begun to efface in Chinese minds were sharply recalled when Japanese troops reappeared at Tsingtao and Tsinanfu in 1927 and again in 1928; and these memories revived some of the *animus* which the Japanese policy of 1915-22 had evoked at the time." . . . .

"Tsingtao was a maritime 'treaty port' in a territory which China had been compelled to lease to a foreign Power in 1898; and this territory had only been brought back under Chinese administration in 1922 by certain effects of the General War of 1914-18 and of the Washington Conference of 1921-22 upon which the Chinese could not have reckoned." Tsinanfu was an inland city which had been opened to foreign trade by a unilateral decree of the Imperial Chinese Government in 1904. It was a provincial capital and a railway junction. The two railways which met at Tsinanfu were the Tsingtao-Tsinanfu line and the Tientsin-Pukow line. The Tsingtao-Tsinanfu line was owned by Japan. "On the lst January, 1923, in pursuance of the Sino-Japanese treaty signed at Washington on the 4th February, 1922, the Tsingtao-Tsi-

nanfu Railway had been formally transferred to the Chinese by the Japanese Government—subject only to the retention of a Japanese traffic-manager and a Japanese joint-accountant until China's purchase of the railway from Japan had been completed. In the neighbourhood of the railway junction, and outside the walls of the Chinese city, a trading centre had been laid out in 1906 on the Chinese Government's initiative; and this new quarter attracted the foreign residents and foreign business concerns to whom Tsinanfu had been thrown open in 1904."....

"At the beginning of 1927 the Ministry of Foreign Affairs at Tokyo was still occupied by Baron SHIDEHARA, who had represented Japan at the Washington Conference in 1921-22 and pursued a studiously moderate and conciliatory policy since taking office in June 1924. From January 1927 onwards some pressure was put upon Baron SHIDEHARA at home to take precautionary measures in China in case the militant movement against foreign privileges, the brunt of which was then being borne by the British in the Yangtse Valley, might travel further north and come to the directed against the Japanese (as eventually happened)."....

"On the 16th April 1927, the Government of which Baron SHIDEHARA was a member resigned and were succeeded on the 19th by a new Government in which General Baron TANAKA . . . combined the offices of Prime Minister and Foreign Minister. On the 28th May, 1927, Baron TANAKA's Government announced that, in view of the situation created by the advance of the Kuomintang Forces and the contingent threat to Japanese interests in Shantung, they had decided to despatch to Tsingtao two battalions, with the necessary ancillary troops, for the protection of Japanese interests in the province. They added that, while they regarded this action as an indispensable measure of defense, they had no intention of keeping the troops in Chinese soil for a prolonged period and would withdraw them immediately when the fear of danger to Japanese residents ceased to exist. The troops landed at Tsingtao on the 31st May ; and on the 8th July they moved up the railway and occupied various points on it, including Tsinanfu itself, while 500 naval ratings were landed at Tsingtao for local defense and 200 more troops, with artillery, arrived there on the 12th July from Dairen."....

There was, however, no clash between the Chinese and the Japanese troops. Before the end of July 1927, the Chinese troops began to fall back southwards towards Pukow. "On the 29th August Baron TANAKA announced that it had been decided to withdraw all Japanese troops from Shantung in the immediate future; and the withdrawal was duly completed by the 8th September."

"The original landing at Tsingtao at the end of May 1927 and the advance to Tsinanfu in July evoked popular protests in China; and during July an anti-Japanese boycott, tentatively supported by the Nanking-Kuomintang Government, was partially enforced in the Lower Yangtse Basin and at Canton. In Shantung itself, however, the Japanese Defense Force came and went without falling into any violent collision either with Chinese troops or with the Chinese civil population; and thus, in the first experiment, Baron

TANAKA's policy might seem to have been justified by its fruits. Accordingly, in his announcement of the 29th August, the following intimation appeared:

"In case peace and order are disturbed in future not only in Shantung, but in any part of China where many Japanese reside, and it is feared that their safety may be affected, the Japanese Government may be constrained to take such self-defense steps as circumstances require. We remain firmly confirmed that the timely despatch of troops certainly accounts for the fact that, notwithstanding serious disturbances, we have been able to protect our residents satisfactorily and to prevent the occurrence of any untoward event."

Here is then and account of the development of TANAKA policy.

Even on this account of the development it might be difficult to say that the policy adopted was without justification. *At any rate its development would be sufficiently and satisfactorily explained without a conspiracy of the kind alleged by the prosecution.*

Whatever that be, in its final summation of the case, the prosecution does not condemn the TANAKA Cabinet as having any connection or sympathy with the alleged conspiracy. In fact the fall of the TANAKA Cabinet is said to be the result of "the first overt act by the army to project itself into the formulation of the government policy." The government and its policy were till then hostile to the aims of the conspirators, though "the army was already strongly enough entrenched so as to be able to defy the Government." It might defy the government but was not yet in a position to influence that body.

According to the prosecution case, then upto the fall of the TANAKA Cabinet on 2 July 1929, the alleged conspiracy was outside the government and was in the army. The evidence limits it to "some young officers' of the Kwantung Army."

The prosecution case is that the murder of Chang Tso-lin was the first overt act by the conspirators to project the army into the formulation of the government policy. There is some difficulty in understanding this case of "projection into the formulation of policy." It is, however, clear in one respect that this "projection" did not mean any SEIZURE OF POLITICAL POWER by the conspirators themselves. At least there is absolutely no evidence of any such attempt on the part of any body. I have already discussed this matter while examining the case of Chang Tso-lin's murder.

The TANAKA Cabinet fell in July 1929 and was succeeded by the HAMAGUCHI Cabinet, with Baron SHIDEHARA as Foreign Minister and INOUE, as Finance Minister. The friendship policy was again resumed by this Cabinet and this policy continued to be followed by the succeeding WAKATSUKI Cabinet at least until September 1931. This is the prosecution case, and, up until then, though the army might have been in a position "to defy the government", it failed to influence this policy in any way SHIDEHARA and INOUE continued to be the Foreign and Finance Ministers respectively in this Cabinet also and accused MINAMI was its War Minister. I have

already given my reason why I could not accept the prosecution case of General MINAMI's participation or sympathy with the alleged conspiracy.

The statesmanship of a SHIDEHARA and an INOUE was considered exemplary of "the intelligent management of which human nature is capable". In this phase of her history Japan was not only pursuing, but was also recognized by her neighbours as pursuing a genuine policy of peace.

The second stage of the conspiracy in this respect is alleged to have been reached with the accession of the INUKAI Cabinet on 13 December 1931, with ARAKI as the War Minister. According to the prosecution, "immediately upon ARAKI's succession to office, there was an apparent change in the attitude of the government and in the co-operation between it and the Kwantung Army in furtherance of the conspiracy. A device was found, which, while it permitted the government to piously assert that it was carrying out the policy of the previous government of non-enlargement of the incident, enabled it to render the aid needed by the Kwantung Army in effectuating the conspiracy."

This, however, is only an assertion on the part of the prosecution. No evidence could be adduced in support of this "co-operation between the government and the Kwantung Army in effectuating the conspiracy".

There is no suggestion against any other member of this Cabinet and there is absolutely no evidence against them. If the policy of the government was really changing at that time, it is absurd to ascribe such a change to the entry of ARAKI in the Cabinet. As I have already pointed out from the Lytton Report itself, several factors were operating in order to prepare the way for the abandonment of the SHIDEHARA Policy of conciliation. The Lytton Report says:

"Certain internal, economic and political factors had undoubtedly for some time been preparing the Japanese people for a resumption of the "positive policy" in Manchuria. The dissatisfaction of the army; the financial policy of the Government; the appearance of a new political force emanating from the army, the country districts and the nationalist youth, which expressed dissatisfaction with all political parties, which despised the compromise methods of Western civilization and relied on the virtues of Old Japan and which included in its condemnation the self-seeking methods whether of financiers or politicians; the fall in commodity prices, which inclined the primary producer to look to an adventurous foreign policy for the alleviation of his lot; the trade depression, which caused the industrial and commercial community to believe that better business would result from a more vigorous foreign policy. All these factors were preparing the way for the abandonment of the SHIDEHARA "policy of conciliation" with China which seemed to have achieved such meagre results."

These and perhaps several other factors operated in wrenching the direction of Japanese foreign policy out of a course which it had been following for a decade since the time of the Washington Conference. "The intelligent management of which human nature is capable, as exemplified in the statesmanship of a SHIDEHARA and an INOUYE, had been frustrated by the play of

collective social forces which were operating in a world-wide field on so vast a scale that they had the effect of blind impersonal movements against which the utmost efforts of national statemanship seemed of no avail." "Racked by the remorseless turning of the economic screw in the long drawn-out course of the world depression," the Japanese people at last felt disillusioned with the policy hitherto followed in their enterprise of sustained industrial and commercial expansion. Rightly or wrongly, "they despaired of continuing the attempt to win their national livelihood in the eonomic field", pursuing the hitherto followed policy which "seemed doomed to frustration by inhuman forces beyond human control," as also by human forces beyond Japanese control. Perhaps by this time they came to feel that after the Anglo-American economic world order no scope was left for the realization of their hope of providing for "Japan's rankly growing population by acquiring for Japan an increasing share in an increasing aggregate turnover of international trade". Their disillusionment in this respect perhaps impelled them to a course which only indicated their "ignorant improvidence." But certainly it did not indicate any attempt at effectuating any conspiracy.

The "device" referred to in the above extract is the prosecution characterization of the Japanese reservation in accepting the League Council resolution of December 10, 1931. When accepting that resolution the Japanese delegate at Geneva stated that his acceptance "was based on the understanding that this paragraph (No. 2) was not intended to preclude the Japanese forces from taking such action as might be necessary to provide directly for protection of lives and property of Japanese subjects against the activity of bandits and lawless elements rampant in various parts of Manchuria". That the menace was a real one would appear from item 17 of my analysis of the Lytton Report itself. The Lytton Report observed that "having made their reservation at Geneva, the Japanese continued to deal with the situation in Manchuria according to their plans". This might have been according to the plan of the Kwantung Army or of a group of officers of that army. But as yet there is no evidence that the government was any party to that plan. The reservation certainly was made in view of a real menace.

Though MINAMI and ARAKI, the War Ministers in the WAKATSUKI and the INUKAI Cabinets, are also classed as conspirators, the real third stage of conspiracy is alleged to have commenced with the HIROTA Cabinet which took office on March 9, 1936.

HIROTA came in as foreign minister in the SAITO Cabinet on 14 September 1933, the Cabinet itself having been formed on 26 May 1932 on the fall of the INUKAI Cabinet as a result of the May incident of 1932. The strongest evidence against him comprises the records of his China policy. These are Exhibits 216 and 935 in this case. I shall presently consider this policy and see how far it leads to the prosecution case of the conspiracy and of HIROTA's participation in it.

The fourth stage is said to the reached with the TOJO Cabinet on 18 October 1941.

The first definite attempt at the seizure of political power is traced to the

March Incident of 1931. We are then given the October Incident of 1931, the May Incident of 1932 and the February Incident of 1936.

Before proceeding further with the matter, I would like to clarify the correct approach to the question under consideration. We must be careful not to be led by the mere sinister character of any such incident. We must keep in view the following distinct questions and see which of them the evidence can be said to have established:

1. Whether the incident was designed for the overthrow of the government or whether the overthrow took place merely as a result of the incident.
2. Whether the incident was designed for
   (*a*) the mere overthrow of a particular government, party or individual minister;
   or (*b*) the overthrow of a particular government, party or individual minister, and the installation of any other particular government, or individual minister.
3. Whether the overthrow was designed for the advancement of the conspiratorial object or for any other reason.
4. How is the incident or the design connected with the conspiratorial group.

The following witnesses were examined to give some account of this alleged gradual seizure of power by the conspirators.

1. SHIDEHARA, Kijuro (examined on affidavit Exh. 156; p. 1, 318)
2. SHIMIZU, Konosuke (examined on affidavit Exh. 157; p. 1, 399)
3. TOKUGAWA, Yoshichika (examined on affidavit Exh. 158; p. 1,440)
4. INUKAI, Ken (examined on affidavit Exh. 161; p. 1,478)
5. UGAKI, Kajushige (examined on affidavit Exh. 163; p. 1,604)
6. WAKATSUKI, Reijiro (examined on affidavit Exh. 162; p. 1, 553)
7. GOTO, Fumio (examined on affidavit Exh. 166; p. 1,638)
8. FUJITA, Isamu (examined on affidavit Exh. 160; p. 1,462)
9. DONOHUE, T.F. (p. 1,211)

Of these FUJITA and DONOHUE gave nothing on this point. I give below the gist of the evidence of the rest.

Kijuro SHIDEHARA: Affidavit, Exhibit 156.

Baron SHIDEHARA is the *present* Minister of the State. He is a Minister without Portfolio now. Prior to this he was Prime Minister. In 1931 he was Minister of Foreign Affairs. He had been Minister of Foreign Affaris since 1925.

His evidence is:

Premier Hamaguchi approved and recommended reductions in the Army

and Navy Budgets. He pushed through the ratification of the London Naval Treaty and in doing so created strong opposition by the military. HAMAGUCHI was shot by a silly young man named Sagoya. The motive of this assassination was found to be dissatisfaction with the Naval Disarmament, with the military clique or with the people in the Government.

Hamaguchi Cabinet was formed in 1929. In 1930 it was followed by Wakatsuki Cabinet.

The Foreign Policy of this Cabinet was definitely conciliatory and co-operative so far as international affairs were concerned. It came to be called the *Friendship Policy* of the Shidehara Diplomacy. A great strain was put on this foreign policy in September 1931 by the outbreak of the Manchurian Incident.

The witness says: "Shortly before the Manchurian Incident, as Foreign Minister, I received confidential reports—rumours—and information that the Kwantung Army was engaged in amassing troops and bringing up ammunition and material for some military purpose, and knew from such reports that action of some kind was contemplated by the military clique." In cross-examination the witness said this was based on mere rumour. He had no report official or non-official. He talked about this with the Premier Wakatsuki and the then War Minister, General Minami. General Minami co-operated with him fully in the matter.

Before introducing his affidavit the witness made it clear that this *military clique* was different from the *Kwantung Army*. The War Minister, General Minami, certainly was not in that clique. In cross-examination he says some young officers of the Army formed this clique but he could not give their names.

The witness said that after the Incident the Cabinet and himself, as Foreign Minister, made every effort to control the Army and prevent further territorial expansion but were unable to do so. The ultra-nationalists and the militarists were clamouring for a "positive policy" in Manchuria.

This Cabinet was forced to resign as a result of the inability of the Cabinet to control the Army and suppress their expansion. In cross-examination he explained what actually happened. A coalition ministry to take measures to overcome depression was considered advisable. The fall of the Cabinet was due to *internal dissension*.

The causes of the fall of the Cabinet were:

1. The financial policy adopted by the Finance Minister Inouye.
2. Trouble regarding the maintenance of the gold standard in Japan.
3. Adaptation of certain deflationary measures including the measures in decreasing the salary of government employees.

The Manchurian Incident aggravated the situation.

It was not through any action of General Minami that the Cabinet fell.

In the Hamaguchi Cabinet General Ugaki was the War Minister. He fully co-operated with the Cabinet in making armament reductions.

General Minami became the War Minister in the Wakatsuki Cabinet. The same political party controlled both the Hamaguchi and the Wakatsuki

Cabinets.

The Cabinet had no direct control of the action of the Army as it was not in their jurisdiction. The Cabinet had no direct voide in Army affairs. It could not directly interfere with the Army, but might convery to the Army through the War Minister what the Government thought of any action the Army might take, so that by this means, to a certain extent, the Government was able to have a say to control Army Policy. The government under the Constitution had no authority, no power directly to interfere with the Army. The Privy Council of the Japanese Government had even less control over the Army.

It was THE UNANIMOUS DECISION OF THE CABINET that the Manchurian Incident was in self-defense.

On 26 September the Cabinet adopted a resolution that Japan had no territorial ambition and on the next day this was intimated to the United States through Ambassador Debuchi. All these were sincere and honest. All that time the Government entertained no intention or idea of territorial expansion.

Anti-Japanese movements in China were frequent.

Marshal Chang Hsueh-Liang's Government oppressed and exploited Japanese industries and economical enterprises in Manchuria in spite of the protests by the Japanese residents. He referred to several incidents including the Wan Po Shan Incident in which several hundred Koreans were massacred, and the murder of Captain Shintaro NAKAMURA.

Konosuke SHIMIZU: Affidavit, Exhibit 157.

The witness claimes to have been an associate of Dr. Shumei OKAWA, being introduced to him by one KITA whom he became acquainted with at Shanghai in 1919.

The witness speaks of a plot planned by Dr. OKAWA in March 1931 and drags in Colonel Kingoro HASHIMOTO of the Army General Staff in the plot.

The plot was "planning a revolution for the purpose of renovating the Japanese Government". His part in the plot was arranged to be "to throw some bombs outside the Diet Building during a demonstration of Dr. OKAWA's followers. It was arranged that thereupon Dr. OKAWA would lead the mob into the Diet and proceed to take over the Government. Colonel HASHIMOTO was to procure bombs from the Army for the purpose. Three hundred bombs came to the witness. He, however, did not say by whom these were brought. *The plan failed and the incident never took place*. The witness incidentally drags in General UGAKI, the then War Minister, General KOISO, the Chief of the Military Affairs Bureau, and Lt. Colonel NEMOTO, his assistant.

The most curious part of the evidence of this witness is the following statement:

"After the failure of the aforesaid March Incident I continued to see the aforesaid Dr. OKAWA from time to time at the Kinryutei Inn. On one of

these occasions in August when the aforesaid Dr. OKAWA WAS DRUNK with sake he told me that he and a certain Colonel KOMOTO Daisaku and a certain Colonel AMAKASU of the Kempetai, together with Colonel ITAGAKI, Vice Chief of Staff of the Kwantung Army, *would bring about an incident in Mukden sometime later on*.

"After the occurrence of the Manchurian Incident in September, I was arrested and spent three months in jail. When I got out of jail in December 1932 I saw the aforesaid Dr. OKAWA several times. *He was very busy* at this period organizing Jimmu Kai, au ultra-nationalistic, rightist society, the aims of which were to bring about a renovation in the Japanese Government with the ultimate purpose of expelling the white race from Asia and the liberation of Asiatic people under the leadership of Japan. During one of our meetings sometime in March 1932 the aforesaid Dr. OKAWA told me that he was interested in a plot with a certain TACHIBANA Kozaburuo. who was the leader of the farmers group and certain young naval officers who were dissatisfied with the weak Japanese Government at that time. I told the aforesaid Dr. OKAWA that any such movement was contrary to public opinion and could not succeed and that I culd not participate in any further attempts with him."

No connection whatsoever has been established between the alleged plot and the present war. The witness denied that there was any such connection. The bombs were nothing but firecrackers.

In his corss-examination the witness said that his arrest and imprisonment after the Mukden Incident had nothing to do with the Incident. If so, it is difficult to see why such misleading statement was taken in the affidavit at all.

The import of the March plot was given out by him to be purely domestic.

Yoshichika TOKUGAWA: Affidavit, Exhibit 158.

This witness is introduced to supplement the story of the previous witness regarding the abortive plot of March 1931. He comes in because SHIMIZU delayed in returning the bombs to General KOISO. SHIMIZU however was not asked a single word about his delay and difficulty caused thereby to General KOISO.

The witness was approached by General KOISO also to request him to exert his influence on Dr. OKAWA to abandon this plot. But we are not told what hold this witness had on Dr. OKAWA, how he was connected with him and how General KOISO knew of this. He was not known to General KOISO before. He did not know about the plot either.

Ken INUKAI: Affidavit, Exhibit 161.

The witness is at present a member of the Diet. He is the son of Premier INUKAI and was his secretary in 1931 and 1932. On May 15, 1932 his father was shot at his official residence by some Naval Officer.

His knowledge is derived from his reading, as secretary to his father, of the minutes of discussions held in the Cabinet meetings. He also claims to have discussed all matters before the Cabinet with his father, the Prime Minister. He also kept his father's papers and records and handled his correspondence.

He stated that during his father's tenure of office as Prime Minister he was opposed to the extension of the Manchurian Incident and was in favour of having the Japanese Army withdrawn from Manchuria. Several months after the Manchurian Incident his father decided to recommend to the Emperor that the Army be withdrawn. He had an audience with the Emperor but was not successful. Another policy of his father was to oppose the recognition of the Puppet State of Manchuria as he considered such a recognition to be the violation of the sovereignty of China.

In an effort to settle the Manchurian problem his father sent a secret delegate to Nanking to talk with General Chiang Kai-shek. This effort failed as the military intercepted the secret code used between the delegate and the Premier.

General ARAKI was war Minister in that Cabinet. He too tried his best to check the spreading of the unfortunate incident. But it was beyond his power to control the younger officers of the Army who were the motivating force to spread incidents in Manchuria.

Kajushige UGAKI: Affidavit, Exhibit 163.

The witness was War Minister in the HAMAGUCHI Cabinet.

He speaks about his coming to know in January or February 1931 of Dr. OKAWA's planning some kind of demonstration around the Diet Building, and his being scheduled to become the head of the Government to be set up if the plot succeeded. He ordered the plot to be stopped. He resigned with HAMAGUCHI Cabinet on April 13, 1931 and voluntarily retired from the Army.

In 1937 after the fall of the HIROTA Cabinet he was invited to form a cabinet but he failed to do so because of the opposition of the military.

Exhibit 163, part 2, a letter written by Dr. OKAWA to the witness was proved by him in support of his statement regarding OKAWA's plot.

He too asserts that this plot did not relate to any affairs outside Japan.

In his cross-examination the witness explained what he meant by military opposition of 1937. He referred to only those of the military personnel in active service who meddled with politics.

WAKATSUKI Reijiro: (Exhibit 162, p. 1,553)

The witness was Prime Minister of Japan from April to December 1931. It was the policy of the Government to put into effect the budget prepared by the HAMAGUCHI Cabinet and the effect of this budget was to reduce the money allotted to the Army. When the Mukden Incident broke out on September 18, 1931, the first time the Cabinet knew it was on the 19th.

(Dig. 108)

The witness stated that he tried everything in an effort to control the situation but without success. His last move was to try to form a coalition Cabinet with the Seiyukai, hoping that through the combined strength of both parties he would be able to control the Army in Manchuria, but various Cabinet members were unwilling to form the coalition, so the measure failed. At that time the situation stood as follows: The policy of the Cabinet had never varied on the question. They had unanimously opposed any expansion by the Army and day after day had been unceasing in its efforts to terminate aggressive operations. MINAMI had failed to control the Army in Manchuria and had not carried out the unanimous policy of the Cabinet. Therefore, the witness resigned as Premier. (Dig. 109)

In his cross-examination the witness stated that he had heard the story that MINAMI had ordered the Kempei-Tai or gendarmery to arrest younger officers in the middle of October. This was told to him not at a Cabinet meeting but on October 17th at a ceremony performed at the Imperial Palace. While he did not recall the matter exactly, the reason for the arrest was that the younger officers had contemplated an attempt on the witness' life and the Kempei-Tai had stopped this. The witness stated he had not heard of any reason why these younger officers intended to harm him. (Dig. 112)

The witness also stated that despite the Cabinet's policy the Manchurian Incident had spread and expanded; that this was a sad truth, but it was the truth and since it was his desire to bring the Manchurian Incident to a close as soon as possible, he exerted every effort. Various things were tried—one of them being a coalition Cabinet which he hoped would be able to stop the action of the Army. This did not materialize, and the Cabinet resigned.

The coalition Cabinet idea was the witness' only hope but he could not say that if such a Cabinet had come about, it would have been possible to have attained the idea hoped for. He tried various steps but without result and he thereupon came to the conclusion that if a coalition Cabinet was formed it would show that the people as a whole were opposed to the spreading of the Manchurian Incident and the Army would naturally be controlled. This was his idea and he didn't know whether it was right or wrong.

Finally, coming to the conclusion that the government as at the time constituted—that is, only by the Minseito party—was too weak and it would be necessary to include the Seiyukai party in order to show that it was the people's wish that the Incident be stopped and thus cause the Army to self-reflect, he asked ADACHI Home Minister, who well knew the political situation, to ascertain whether the Seiyukai were willing to join his Cabinet, and if so, how this should be accomplished. If such a Cabinet was to be formed it would be necessary to change a few Ministers, so while asking ADACHI to ask the opinions of the Seiyukai, the witness contacted one or two of his fellow Ministers and told them of his idea.

They replied that such a coalition Cabinet should be formed only after much deliberation because if the composition of the Cabinet was changed the diplomatic and financial policies would necessarily have to change and this

would not be good for Japan.

In view of this opposing opinion, the witness was forced to give his own judgment on the matter. He weighed the advantages and disadvantages and finally came to the conclusion that it would not be good for Japan and therefore asked ADACHI to stop his negotiations. Notwithstanding this ADACHI continued to negotiate and rumours went around to the effect that the Cabinet was not united. The witness asked ADACHI to stop the negotiations, but yet he continued such negotiations. As this gave rise to all kinds of rumours, the witness decided that all Cabinet Ministers should convey to the Home Minister that they were against continued negotiations, and ask him to attend a Cabinet meeting. The Home Minister refused to come to the meeting. He was then asked to resign. The Home Minister's reply was that he would not resign unless the Cabinet resigned as a whole. At this point the Cabinet showed complete disunity and the government could not continue. Therefore, a resignation of entire Cabinet was submitted. The witness stated that he had not called for the resignation of War Minister MINAMI.

The direct cause of the collapse of the Cabinet was the action of Home Minister ADACHI.

Since MINAMI always came to Cabinet meetings and never raised any objection to Cabinet policy, the witness believed that he did nothing in opposition to the policy of the Cabinet.

GOTO FUMIO (Exhibit 166, p. 1,638).

The witness was Minister for Home Affairs in the OKADA Cabinet in 1934 and during that time the Army rebellion of 1936 occurred and an attempt was made to assassinate Prime Minister OKADA. The witness acted as Prime Minister for three days while OKADA was besieged. OKADA and his Cabinet experienced difficulties with the Army. The highest officers in the Army at that time were General KAWASHIMA, Minister of War; Prince KANIN, Chief of the Army General Staff, who was not very active; General SUGIYAMA, Vice-Chief of the Army General Staff, General WATANABE, Inspector General of Military Education, General INAI, Chief of the Military Affairs Bureau, General MINAMI, Commander-in-Chief of the Kwantung Army, General ITAGAKI, Chief of Staff of the Kwantung Army.

In 1940 when Premier KONOYE decided to set up the I. R. A. A. he asked for the witness to advise him with respect to forming the plans of the organization. The witness made many attempts with the preparatory committee of which HASHIMOTO was a member. He later occupied a position in the General Affairs Committee and participated in the affairs of that organization.

After the formation of the I. R. A. A. no other important organizations existed. The result was to create the important public organization which was controlled in its entirety by government officers who occupied high positions. It was subsidized by government funds to the extent of 8 million yen a year. It reached to every prefecture, ward and street.

In his cross-examination the witness stated he took part in the formulation of the I. R. A. A.—its practical policy and also of its movement policy. He was one of the Directors of the I. R. A. A. and although he does not remember the exact number of the members of the Committee it was somewhere between thirty and forty. The organization was founded on October 10 , 1940, and was dissolved during the SUZUKI Cabinet in 1945. By the words in the platform of the I. R. A. A. that "We shall become the moral leaders of the world" it meant that they endeavoured to raise the moral standard of the nation and gain respect from other countries.

As to the words in the second Article of the platform "that the Society shall strive for the establishment of a new world order", the witness stated that the Society had no time to do it and fortunately never gained enough power to do it.

The witness stated that the object of the I. R. A. A. was nothing less than this "that the entire nation shall be one and shall fulfil their duties each in his own sphere, and establishing such an organization shall work in order that this organization shall function smoothly and in this way strive to fulfil their duties as subjects". There is not included in the purpose the idea of being the moral leader of the world and to work for the establishment of a new world order. By calling it a public organization he meant it as one which is not a political organization. He stated that the organization was controlled by the government and not that the organization controlled the people. The sum of 8 million yen received from the government was used to operate the Association so that the people might carry out their duties as subjects.

By carrying out the duties of subjects, he meant that the Japanese nation carried out duties which are incumbent upon the people of Japan, including duties of miliary service, payment of taxes and other legal and moral duties.

The I. R. A. A. was not formed to prepare the people for inhumane and illegal war against Great Britain and America.

The witness further said that political parties were not dissolved as a result of the establishment of the I. R. A. A. Parliamentary political parties were dissolved before the Preparatory Committee had been assembled. There was a prevailing opinion that KONOYE was about to form one great political party and the witness believes that the leaders of the various parties were dissolving their parties with the idea of joining this one joint party. He might be mistaken, but the political parties were dissolved. KONOYE abandoned his original plan of forming one party; at the same time the trend of public opinion was that such an idea was not in accordance with Japanese national structure. In this atmosphere the Preparatory Committee met.

KONOYE's ideal thus was to form an organization in which all strata of the Japanese people could be in agreement, even though they would have different political ideologies and political opinions. It was not one great political party with a definite platform and the ability to push it, but an organization in which all kinds of people of all kinds of opinions and trends could agree and operate. For those persons who had desired a strong party, the Associa-

tion was a disappointment. They had dissolved their parties so they could join the I. R. A. A. but they were greatly dissatisfied with its lack of political power.

The politicians felt the need of establishing a new political party which would have power, so they resigned from the I. R. A. A. and formed the I. R. A. P. S. It was at this time that the KONOYE Cabinet declared in the Diet that I. R. A. A. was a public organization, not a political one.

The I. R. A. A. carried on mainly movement of a spiritual kind, as to what their duties should be. It was mainly concerned with domestic movements; for instance, the increase in the production and the regulation of national living. After the formation of I. R. A. P. S. there was not much change in the functions; it continued its functions whereas the I. R. A. P. S. indulged in parliamentary activities and the assertion of a political platform. (R. P. 1, 664-72)

The witness was brought to depose in this case from the Sugamo jail.

I would also refer to the evidence of Keisuke OKADA (affidavits, Exhibits 175 and 176) already noticed by me while considering the Mukden Incident, as also Exhibit 2, 177-A the testimony of Dr. OKAWA given before the Tokyo Court of Appeal in 1934, also already noted by me.

In his cross-examination the witness said:

1. TANAKA's positive policy in Manchuria was not to be by force but was to be made peacefully.
2. The national policy of Japan was to advance peacefully into the Chinese country. This policy was forced upon Japan as a result of the fact that peaceful advance elsewhere was stopped by the Gentleman's Agreement. At that time Japan was greatly overpopulated, and if it did not expand somewhere the situation would have been terrible.

TANAKA Ryukichi was also requisitioned by the prosecution for the present purpose.

The witness spoke of:

1. The murder of Chang Tso-Lin on June 4, 1928:
   (*a*) In 1942 he saw the report regarding the murder. That report is lost (Exhibit 180). He gives its contents from memory.
   (*b*) The killing was planned by Senior Staff Officer, *Kwantung Army*, COLONEL KAWAMOTO.
   (*c*) The commander-in-chief of the Kwantung Army had no connection with it.
   (*d*) The plan was by Colonel KAWAMOTO and ten others. The plan was the Colonel's own alone. Captain Ozaki's part was to follow his order. He had nothing to do with the explosion.
   (*e*) (*i*) The witness was told by Colonel KAWAMOTO of this incident in 1935.
   (*ii*) The purpose of the plot was also to be—setting up of an

independent government.

(*f*) The witness heard from Captain Ozaki in 1929.

2. Attitude of the Army toward Manchuria in 1930 and 1931:

(*a*) Names the officers—General TATEKAWA; Kingoro HASHIMOTO; Captain CHO Isamu; Colonel ITAGAKI; Lt. Colonel ISHIHARA.

3. Sakura-kai Organization of 1931 (spring):

(*a*) The meeting of 1 December 1930 was called by Lt. Colonel HASHIMOTO.

(*b*) The objectives were: (1) to carry out internal renovation; (2) to settle Manchurian problem.

4. Manchurian Incident of 18 September 1931:

(*a*) Planned incident.

(*b*) Leading Japanese people involved: Major General TATEKAWA, Lt. Colonel HASHIMOTO, Shumei OKAWA, Captain Isamu CHO. According to what Captain Cho and Lt. Colonel HASHIMOTO told me the leaders in the Kwantung Army were: The Chief of Staff, Colonel ITAGAKI, and Deputy Chief, Colonel ISHIHARA.

(*c*) The plan was to find a solution of the internal and Manchurian situations.

It was the intent of those who were in Manchuria to destroy the Chinese warlords then in Manchuria, to set up a new country based on the kingly way and a country maintaining peace, tranquillity and order, a country under the control of Japan, so that close co-operation and co-ordination may be made in the economic exploitation of this area and thereby to stabilize the Japanese conditions at home, as well as to make of Japan a stabilizing factor in East Asia.

(*d*) The witnes was told in 1934 by HASHIMOTO:

(*i*) That the Manchurian Incident was planned by the Kwantung Army.

(*ii*) That the ultimate object was to make of Manchuria a base from which to bring about the revival of Asia.

(*iii*) The desire before the Incident and after the Incident.

This witness was giving the detailed plan and on Saturday could say that TATEKAWA told him that this Incident was being planned by the Kwantung Army (*vide* proceedings 2,010). On the previous day in spite of the repeated efforts made by the Prosecution the witnesss could not be made to say this (*vide* proceedings pages 1,966, 1,975, 1,983, 1,987, 2,003 and 2,086).

As I have already noticed, the alleged statement has absolutely no guarantee of trustworthiness. It has not even the usual guarantee of trustworthiness of a confessional statement. HASHIMOTO, in making this alleged statement to the witness, was not making any confession. He could not then have been prompted by any motive to confess guilt; he cannot be credited with any consciousness of guilt, for the simple reason that it is not the case of anybody

that at that time any one in Japan was considering the act as criminal. At that time the incident had produced some result then considered advantageous to Japan, and a claim to its authorship might very well have been motived by false pride or bragging. In my opinion it would be dangerous to rely on a hearsay evidence of this character in order to fix any responsibility on any of the persons alleged to have been named by HASHIMOTO as his associate in the act.

It has been shown that since 1928, eleven different cabinets rose and fell in Japan till the formation of the Tojo Cabinet.

ACCORDING TO THE DEFENSE many of them fell because of purely domestic reasons, unrelated to any international situation. Among the reasons for their termination are the following: The TANAKA Cabinet fell on July 1, 1929 because of internal dissension in the Cabinet. The HAMAGUCHI Cabinet's fall on April 13, 1931 was due to the illness of the Prime Minister. The 2nd WAKATSUKI Cabinet fell on December 12, 1931 because of a difference of opinion between WAKATSUKI and ADACHI, Minister of Home Affairs, with regard as to whether or not the Cabinet should be a coalition form of Government.

The INUKAI Cabinet fell on May 25, 1932 when INUKAI was assassinated by some young officers over a domestic political issue. The SAITO Cabinet fell on July 7, 1934 because of a public scandal which compromised some of the ministers and high officers of the government. The OKADA Cabinet's fall on March 8, 1936 was the result of the February 26th Incident. The fall of the HIROTA Cabinet on February 1, 1937 was occasioned by a difference of opinion between HIROTA and TERAUCHI, Minister of War, on the issue of whether the House of Representatives should be dissolved. The HAYASHI Cabinet fell on June 3, 1937 when HAYASHI dissolved the Diet. The new Diet which was elected was opposed to HAYASHI's domestic policies. The lst KONOYE Cabinet fell on January 4, 1939 due to a difference of opinion among Cabinet members with regard to the Anti-Comintern Pact. The HIRANUMA Cabinet's fall on August 29, 1939 was due to internal dissension and the sudden and unexpected conclusion of the nonaggression pact between Germany and Russia. The ABE Cabinet fell on January 15, 1940 because of the domestic price commodity policy and the question of whether or not the Trade Ministry should be established. The YONAI Cabinet fell on July 21, 1940 because of differences of opinion concerning the formation of a new political party. The 2nd KONOYE Cabinet's fall on July 17, 1941 was brought about by KONOYE's difference of opinion with MATSUOKA, Minister of Foreign Affairs, as to foreign negotiations. The 3rd KONOYE Cabinet fell on October 16, 1941 because of KONOYE's differences with TOJO with respect to American policy.

Unlike Hitler, no one in Japan was in a continuous position of control in these cabinets or in the military during the period of time covered in the indictment. In three of these cabinets—The TANAKA Cabinet, April 20, 1927 to July 1, 1929; the HAMAGUGHI Cabinet, July 2, 1929 to April 13, 1931 and the HAYASHI Cabinet, February 2, 1937 to June 3, 1937 not one of the

accused was even a member nor were any of them Chief of the Army General Staff or Navy General Staff during those times.

The several sinister incidents brought out by the evidence adduced in this connection are the following:

1. The fall of the TANAKA Cabinet in July 1929 as a result of the murder of Chang Tso-lin on 4 June 1928.
2. The March Incident of 1931 during the HAMAGUCHI Cabinet.
3. The murder of HAMAGUCHI and the consequent fall of his Cabinet on 14 April 1931.
   (*a*) The accession of the WAKATSUKI Cabinet on 14 April 1931 with accused MINAMI as War Minister.
   (*b*) The Mukden Incident of 18 September 1931.
   (*c*) The October Incident of 1931.
   (*d*) The fall of the WAKATSUKI Cabinet and the accession of INUKAI Cabinet on 13 December 1931, with accused ARAKI as War Minister.
4. The May Incident of 1932: The murder of INUKAI on May 15, 1932 and the consequent fall of his cabinet.
5. The accession of the SAITO Cabinet on 26 May 1932 with accused ARAKI as War Minister.
   (*a*) Accused HIROTA comes in as Foreign Minister.
6. The fall of the SAITO Cabinet and accession of the OKADA Cabinet with accused HIROTA remaining the Foreign Minister on 8 July 1934.
   (*a*) The army rebellion of 1936.
7. The fall of the OKADA Cabinet and the accession of the HIROTA Cabinet on 9 March 1936.
   (*a*) Imperial Ordinance of 1936.
   (*b*) The accession of the HAYASHI Cabinet on 2 February 1937, none of the accused being in this Cabinet.
8. On the fall of the HIROTA Cabinet, General UGAKI was called upon to form a Cabinet but because of military opposition, he failed.
   (*a*) The accession of the first KONOYE Cabinet on 4 January 1937 with HIROTA, KAYA, ITAGAKI, and KIDO and the ARAKI as Foreign, Finance, War and Education Ministers respectively.
9. The formation of I.R.A.A. in 1940.

The military clique charged with the various political assassinations during this period is not any particular Army or Navy. Not a single prosecution witness could say that this clique was the Kwantung Army itself or any other Army or Navy. Baron SHIDEHARA in his evidence made it clear that this clique was different from the Kwantung Army and that War Minister MINAMI certainly was not in the clique. According to him "some young officers" of the army formed this clique. He could not give their names. He did not name any of the accused before us as belonging to that clique. Accused

HASHIMOTO, ITAGAKI and KOISO have been named by some of the witnesses in connection with some of the sinister incidents of the period. But even these witnesses did not place them in that clique. No one connected General ARAKI with this clique. INUKAI Ken, on the other hand, testified that ARAKI tried his best to check the spreading of the Manchurian Incident, but it was beyond his power to control the 'young officers' group. ARAKI himself was sought to be murdered by the group.

In a survey of 1932, by the Royal Institute of International Affairs these developments in Japan were accounted for in the following manner: On the 13th December 1931, the MINSAITO Cabinet of the day was replaced by a SEIYUKAI Cabinet, with Mr. INUKAI as Prime Minister. The new government placed an embargo upon the export of gold on the day on which it assumed office. "The late Government, which had been in office since July 1929 and had been reconfirmed in office by the results of a general election held in February 1930, still commanded its old majority in the Diet; and the Diet was not even in session when it fell. The replacement of the Liberal by the Conservative Party in these circumstances was an indication that in Japan .... parliamentary government was still an unacclimatized and tender exotic; but the domonstration was soon to take a violent form; for the financiers and industrialists who were the nucleus of the Seiyukai Party were not THE DRIVING FORCE BEHIND the new movement in Japanese politics. The departure from the Gold Standard, by which they had promptly signalized their UNEXPECTED ADVENT to power, was no doubt advantageous to the interest which they represented, but their actual or supposed success in turning this measure of public finance to their private profit was counted against them for unrighteousness by the new political force which was rapidly rising to power in Japan on the wings of the economic storm that was sweeping over the world at this time—Japan included. And the return of the Seiyukai with a majority in the Diet of 136 over all other parties, as the result of a general election which was held on the 20th February, did save the Conservative parliamentarians from going the way of their Liberal confreres less than three months later.

"THE NEW DRIVING FORCE which was forcing its way to the front—or, rather, to the surface, since it was rising from below upwards—was hostile to parliamentary politicians of all complexions; and it was also hostile to the bourgeois urban civilization of the industrial and financial 'capitalists', for which this parliamentarism was conceived to stand. This force was the Japanese Army; and the Army regarded itself as the champion of the Peasantry, which had been reduced to the condition of a desperate rural proletariat by the recent catastrophic fall in the world prices of its crops in combination with the economic recoil of an over-population and overcultivation of the Japanese countryside that had already been showing itself in the shape of diminishing returns. Since the rural population still constituted 52 per cent of the population of Japan at this time, notwithstanding the recent rapid increase in the urban population of industrial workers, and since *the Japanese Army was recruited by universal conscription*, the rising generation of the ru-

ral proletarians formed the backbone of the rank and file. The straits of the soldiers and their families were well known to the junior ranks of the corps of officers (who, to their credit, were in humane relations with their men, and who, for that matter, were themselves drawn from a relatively humble stratum of society); and the political movement which the spectacle of agrarian misery evoked among the young officers had the tacit sympathy and approval of their superiors. The senior officers of the Japanese Army were as ready as the rank and file to profit by the fruits of the younger officers' zeal; but since the seniors kept themselves in the background out of prudence, while the rank and file remained passive through helplessness and inexperience, it was left to the younger officers to play the part of spearhead (or, in less romantic language, to use the assassin's knife or bomb or bullet) in the military-agrarian outbreak.

"In Western terms this outbreak was a 'Fascist' or a 'National-Socialist' movement. . . . . .

"Had these young 'Fascist' Japanese officers been merely muddle-headed idealists, the havoc wrought by their advent to power would still no doubt have been very great; but unhappily in Japan THE TRADITION OF THE SAMURAI taught that political crimes of violence were not inconsistent with either idealism or honour so long as the criminal was inspired by patriotic motives and was prepared to sacrifice his own life as the price of fulfilling his murderous intent. Accordingly, the military *pronounciamento* which was carried through in Japan, in fact, though not in form between the 18th September 1931, and the 26th May 1932, was sped on its way by a succession of political murders.

* * * * * *

"The political murders of Japanese by Japanese, of which there was an outbreak in 1932, were a peculiar manifestation of the Japanese national ethos.

"The first victim in this series was Mr. Hamaguchi, the statesman who had formed the Minseito Government in July 1929." He died on the 27th of August 1931, from the injuries which he had received on the 14th November 1930. "Thereafter, a 'Death Band', founded by a Nichiren Buddhist priest and a naval airman who had become acquainted with each other during the London Naval Conference of 1930, successfully assassinated Mr. Junnosuke INOUYE (The Minister of Finance in the fallen Minseito Cabinet) on the 9th February 1932, and Baron Takuma Dan (the General Director of the Mitsui Firm) on the 6th March. These crimes were particularly dastardly, since in each case the actual deed was done by a peasant boy whom THE TWO founders of the band had instigated and armed." . . . . .

* * * * * *

"In the culminating crime of the series, which was perpetrated on the 15th May 1932, the Prime Minister of the Seiyukai Government of the day, Mr. Inukai, was shot down and mortally wounded in his official residence,

and five important buildings in Tokyo were bombed, by members of a band of six young naval officers and eleven students, or ex-students, of the Military Academy. The criminals were all wearing their uniforms; and they entitled themselves 'Young Officers of the Army and the Navy and the Farmers' Death-Band' in a sheaf of handbills that were scattered in the streets by the bombing-parties, several of which did their business in motor-cars. The five places bombed were the Headquarters of the Seiyukai Party, the Headquarters of the Metropolitan Police, the Bank of Japan, the Mitsubishi Bank and the House of the Lord Keeper of the Privy Seal. Abortive attacks on power stations in Tokyo were made by civilian members of 'The Farmers' Death-Band" simultaneously. Eight persons in all received injuries in this day's outbreak besides Mr. INUKAI, though the Prime Minister himself was the only victim whose injuries were fatal.

"These scenes conformed to Japanese tradition in every respect. The assassins, on their side, preserved their personal honour, according to Japanese conventions, by voluntarily presenting themselves for arrest, after they had done their business, at the Headquarters of the Military Gendarmerie. And the utmost bravery and dignity was shown by Mr. INUKAI and his household when the murderous assault was made .....

* * * * * *

"In the small hours of the morning of the 16th, two infantry lieutenants and one second lieutenant, together with three officers in mufti, presented themselves, armed, at the War Office and demanded an audience with the Minister of War, General ARAKI. Their demand was refused; and they were interviewed—but not detained—by the Vice-Chief of the General Staff.

"Upon receipt of the news, the Cabinet resigned *en bloc*, whereupon Ministers were commanded by the Emperor to remain at their posts pending further orders. Stock exchange transactions were suspended not only in Tokyo but also at Osaka, Kobe and Nagoya. Instructions to suppress any symptoms of agitation in the fighting services were issued by Admiral OSUMI, the Minister of the Navy, to the Fleet, and by General ARAKI, the Minister of War, to all Divisional Commanders of the Army.

"This official condemnation of the outrages of the 15th May 1932, did not mean, however, that the Naval and Military High Commands *were unwilling to take political advantage of the resulting situation*. Their actual intentions were foreshadowed in an inspired article which appeared on the following day in the *Asahi* newspaper of Tokyo:

> "The fact that no military officers were involved in yesterday's incidents shows that the leaders retain the confidence of all ranks, but as the young officers are aware of the country's sufferings, it is doubtful if discipline could be maintained if the high officers were associated with the politicians who lack the country's confidence. The nation should therefore get rid of corrupt party governments and demand a strong national government able to cope with the present situation. The Army

cannot approve a continuation of the Seiyukai Cabinet nor a party coalition."

"In the ensuing negotiations for the reconstruction of the Government the Army did, in fact, impose a veto upon even the formal return to power of the politicians of either party; and they were able to make this veto effective, not only *de facto* but also *de jure*, IN VIRTUE OF THE REQUIREMENT IN THE JAPANESE CONSTITUTION that the Minister for the Navy and the Minister for War must be officers on the active list who had been recommended for ministerial office by their respective services. Nor was the Army's intervention in politics at this juncture merely negative, for it also laid down the condition that whatever new Government took office must take energetic and effective steps for the relief of the agricultural proletariat. The Army had its way." The Saito Cabinet was the result.

The Naval and Military High Command might have indicated no unwillingness to take political advantage of the resulting situation. BUT THE SITUATION ITSELF WAS IN NO WAY THEIR CREATION.

This coming into power of the military does not in the least indicate any aggressive design on the part of any of the present accused. I believe we can in this connection refer to Mr. Stimson's estimate of the then situation in Japan.

After pointing out how Japan within the short space of a single human lifetime had emerged from the isolation of feudal military autocracy into a modern industrialized state, Mr. Stimson says: "Under the guidance of a very far-sighted group of elder statesmen she had assimilated with extraordinary rapidity the material elements of a Western civilization. Her energetic and intelligent people had made gigantic strides in the technical arts, in manufactories, and in commerce. This industrial development was also gradually resulting in social and political ideas. Japan had adopted a constitution with parliamentary features and she had been extending the suffrage among her people. But for seven centuries prior to 1850 her administrative and privileged class had been the soldier, while the breadwinner and business-man were relegated to a role of inferiority. . . . . .

"This long inheritance in the case of a people as keenly patriotic as the Japanese had borne fruits which were not easily dislodged by the theories of modern popular sovereignty. For many years after a Cabinet was introduced, its leaders were military men. The theory that the civilian government as the representatives of the entire people should command the loyalty of the army and the navy had not been generally accepted by the Japanese nation. The chiefs of those military services, instead of being subordinate to the Cabinet, had direct and independent access to the Emperor as the head of the state. The western school of democratic thought was making progress, but that progress was slow and never fully shared by large elements of the population. In 1930 ratification by the Naval Treaty with Britain and the United States was opposed by Admiral Kato, the head of the naval staff. When the Emperor ratified that treaty on the advice of the Premier Yoko Hamaguchi, the civilian head of the government, over this naval protest, this step in the di-

rection of modern constitutionalism caused deep resentment and was probably influential in producing some of the violent reactionary consequences which followed. Mr. Hamaguchi was soon afterwards assassinated by a military fanatic, and secret organizations were formed which were destined to have a baleful influence upon the course of Japanese history.

"But in September 1931, the statesmen in office still belonged to the moderate or constitutional school and were those who had been in the lead of the movement towards Western ideas. Mr. Hamaguchi had been succeeded as Premier by Mr. Reijiro Wakatsuki, who had headed the Japanese delegation at the London Naval Conference. The Foreign Office was presided over by Baron Kijuro Shidehara, well-known for his enlightened and liberal policies in foreign affairs and particularly towards China. Mr. Inouye, the Finance Minister, had brought Japanese credit and finance to a condition of soundness which was recognized throughout the financial world. General manhood suffrage had been adopted for the election of the members of the lower house of the Diet and the first election thereunder had been held in February 1928.

"In short, to the windows of the State Department our Japanese neighbours across the North Pacific appeared as a proud, sensitive, and ambitious people, intensely patriotic, with a tradition of original friendliness towards the United States, though it had been recently marred by what they considered *the insulting form* adopted by our Congress in its immigration laws. Their basic inheritance of the virtues and weaknesses of militarism had been only partially modified by the developing economic and social conditions of the industrial revolution and the ideas of Western democracy which had come with it, and their government still reflected the two elements, as yet imperfectly blended and each striving for mastery."

It is no wonder that the military was not unwilling to take political advantage of the situation. But I do not see why this should lead us to infer the existence of any conspiracy or aggressive design *in them* who thus came into power. There is no evidence to connect them in any way with the events which created the situation bringing them into political power. At any rate, these sinister incidents are amply explained by *the internal affairs* of Japan then prevailing and need not lead us to the inference of any conspiracy of the kind alleged in this case. Nor does the fact that the persons who thus came into power happened to be military personnel indicate any design of military aggression of the kind asserted in the indictment. The account given above sufficiently explains the incidents and the involvement therein of some military personnel without any such aggressive design. I am, therefore, unable to accept these incidents as implying any over-all design for aggressive war or for the seizure of Power with the ultimate object of such war.

I need not, after this, proceed to examine each incident separately. The March and the October Incidents of 1931 were designed for the overthrow of the government, and admittedly accused HASHIMOTO participated in them. But I do not find any evidence to connect these designs with the object of the conspiracy alleged in this case.

The failure of General UGAKI to form a cabinet after the fall of the HI-

ROTA Cabinet was due to the opposition of the military. General UGAKI says that this opposition came from "those of the military personnel in the active service who meddled with politics." I am not satisfied that there was anything sinister in it. The Cabinet which followed was the HAYASHI Cabinet and in it none of the accused held any office.

The military rising which took place in Tokyo on the 26th February 1936 was an attempt by the extreme element in the Japanese army to force the hands of their own military chiefs by taking "direct action" against the representatives of the social and political order which they designed to overthrow. It had the double character of a political revolution and of a mutiny. This mutiny was possible in so highly disciplined a body as the Japanese army because of the division which had arisen between the conservative group and "the young officers" group. The conservative group professed to honour the Emperor MEIJI's injunction against the army's interference with politics. Whatever that be, the Cabinet that followed is not charged with any participation in the conspiracy, and, as I have pointed out above, none of the accused excepting HIROTA had any place in it.

The passing of the Imperial Ordinance in 1936 making an important change in the constitution has been characterized by the prosecution as a significant step towards seizure of political power by the military. The Ordinance dealt with the positions of War and Navy Ministers. I do not see that this change in the constitution was actuated by any such sinister motive as is ascribed to it by the prosecution. The army discipline came to be a burning question of the day. The way to effectuate this, which seems to have suggested itself to the authors of the ordinance, was to bring in the Cabinet some high ranking general from the active list who would thus normally be expected to have some control over the younger officers. The idea does not seem to me unreasonable, and I do not see why we should read into it any evil design.

The fall of the WAKATSUKI Cabinet had no sinister significance so far as the present question is concerned. WAKATSUKI himself gave us an account as to how his Cabinet fell. He made the attitude of his Home Minister ADACHI responsible for this fall. He did not in any way connect his War Minister MINAMI with this event. Baron SHIDEHARA, who was Foreign Minister in this Cabinet, also deposed to the same effect, and said, it was not through any action of General MINAMI that the Cabinet fell.

The I. R. A. A. organization was decided to be set up by the Premier KONOYE in 1940. The organization was founded on October 10, 1940. The prosecution witness GOTO Fumio gave its object to be that "the entire nation shall be one and shall fulfil their duties *each in his own* SPHERE and establishing such an organization shall work in order that this organization shall function smoothly and in this way strife to fulfil their duty as subjects." According to the prosecution "the I. R. A. A. was a faithful replica of the well-known nazi-fascist prototype of political party, which controls the people to benefit the government and to suppress opposition." There is absolutely no evidence to support this characterization of the organization. It is merely the suspicion

of the prosecuting nations. The defense witness spoke of it as a peaceful organization created to meet a mounting national crisis. The prosecution comments on this evidence only by saying that "in so contending the defense completely overlooks the important fact that the crisis was one which the conspirators alone were responsible for bringing into being." Even assuming that the crisis was so created, it would not change the character of the organization itself. No statesman can overlook a crisis simply because it might have been caused by some prior steps taken by the nation itself. The comment does not help the pertinent examination of the character and function of the organization. It only supplies a diverting theme tending to create an emotional inclination of the mind towards acceptance of the imputation of a particular motive to those controlling the policy of the State. But we should confine our endeavour to the proper appraisal of the facts giving the functions and operations of the organization. "Taking one's proper station" has a special meaning in the Japanese social mechanism. Japan's confidence in hierarchy is basic in her whole notion of man's relation to the state. However ominous the I.R.A.A. organization may appear to international mind it had nothing so sinister in it, if we only remember the normal Japanese reliance upon order and hierarchy.

As I have noticed above, the prosecution, for the purpose of tracing the seizure of political power by the conspirators, names the HIROTA Cabinet as marking the third stage of the conspiracy. HIROTA is named as a conspirator mainly on the strength of his foreign policy as evidenced by Exhibits 935 and 216.

HIROTA was first appointed Foreign Minister on 14 September 1933 in the SAITO Cabinet. There is nothing on record to show HIROTA's connection with the alleged conspiracy before this date. Before this he never occupied any office in the army or navy. He served in the diplomatic service in the United States, England, China, Holland and the Soviet Union. He also occupied important positions in the Foreign Ministry at home. From 15 October 1930 to 19 November 1932 he was ambassador to the Union of Soviet Socialist Republic. Being relieved of this post he returned to private life till he was called upon to accept the position of Foreign Minister on September 14, 1933. Many things have been said by the prosecution about his activities while ambassador to the U.S.S.R. But I believe no one will see anything in any way sinister in such activities. The evidence relating to this period rather shows the hopeless character of the prosecution case against him and a frantic effort on its part somehow to rope him in.

The utmost that we get from this evidence against HIROTA is that his policy towards the U.S.S.R. was hostile to that Government. But at that time many other responsible statesmen were entertaining similar policies against the U.S.S.R. We may remember that even the United States of America did not accord its recognition to that state till the year 1933. At the time the Soviet Government was established, it made itself obnoxious to other states by its own policies, which included the sovietizing of other nations through propaganda and activities encouraging revolution against the estab-

lished government of the world. President Wilson declared in 1919 that "in the view of this (U. S.) Government there cannot be any common ground upon which it can stand with a power whose conceptions of international relations are so entirely alien to its own, so utterly repugnant to its moral sense.... We cannot recognize, old relations with, or give friendly reception to the agents of a government which is determined and bound to conspire against our institution, whose diplomats will be the agitators of dangerous revolt....."

Secretary Kellogg in 1928 summed up the attitude of Coolidge's administration thus: "It is the conviction of the Government of the United States that the relation on a basis usual between friendly nations cannot be established with a governmental entity which is the agent of a group which hold it as their mission to bring about the overthrow of the existing political, economic and social order throughout the world and to regulate their conduct toward other nations accordingly."

The case of the prosecution against HIROTA really starts from the Cabinet decision of August 7, 1936. Exhibit 216 is this decision. The prosecution claims this decision to the clearly aggressive. I shall presently examine this matter. It would be sufficient for my present purpose to say that there is absolutely nothing on the record to show that HIROTA had any connection with the alleged conspiracy before he became the Foreign Minister either as a participator or as a sympathizer. There is nothing even to show that he was known to the alleged conspirators or that his views about the object of the conspiracy were known to anybody. Further there is absolutely nothing to show that there was any design of any kind anywhere to bring him in this office. As a matter of fact there was no such design and he came in office without his seeking for it and without any alleged conspirators even knowing it.

The Prosecution condemns HIROTA's policy as Foreign Minister towards Manchukuo as also his policy towards China. We shall have occasion to examine these policies later on. These are not relevant for our present purpose. All that we need remember here is that his advent to foreign ministry or to premiership has not been established to be the result of any design either on his own part or on the part of anybody else. There was thus no seizure of political powers by the conspirators, whoever they be, at least upto this stage.

HIROTA continued as Foreign Minister in the succeeding OKADA Cabinet which fell as a result of the February 26th Incident of 1936. He was summoned by His Majesty to form the cabinet on March 9, 1936. His Cabinet fell on February 1, 1937 as a result of his refusal to dissolve the Diet on the demand of War Minister TERAUCHI over matters which have no possible relation to the case in the indictment.

On January 20, 1937 SEIYUKAI Party mass meeting issued a declaration criticising the policy which his cabinet had followed. The bungling of the Anti-Comintern Pact, they declared, had resulted in suspicion among other powers and the institution of semi-wartime organization and the pure bureau-

cratic economy had done more harm than good. They charged that the measures of HIROTA's Cabinet were not generally based on the welfare of the nation, but influenced by the dogmatic prejudices of the bureaucrats and the military. Two weeks later HIROTA's Cabinet fell. Witness TSUGITA placed the responsibility for the fall of HIROTA's Cabinet on the Army, particularly delegates in the House of Representatives who opposed the reform of the parliamentary system. The conflict grew so tense that the War Minister finally resigned and HIROTA could no longer maintain his Cabinet.

We would next come to the final stage depicted by the prosecution in this respect. According to the prosecution this final stage was reached when the TOJO Cabinet was formed on 18 October 1941.

I do not see anything sinister in TOJO's coming into the ministry on the fall of the YONAI Cabinet. TOJO had nothing to do with the downfall of that cabinet. The Prosecution could not adduce any evidence to show that any action or attitude of TOJO was the cause of the downfall of that Cabinet in July 1940. Upto that time TOJO occupied the post of Inspector General of the Army Air Post and was devoted wholly to the training of Japanese air force personnel, not having the slightest concern or interest in politics. The ex-war minister, HATA, might have been overhasty in recommending TOJO to the Emperor as a candidate for succeeding war minister. But I do not read into it any design, attempt or eagerness to seize political power. Haste does not indicate anything as whenever it would have been proper to do it, the nomination would have been with the ex-war minister.

TOJO's part in the fall of the KONOYE Cabinet was very much emphasized by the prosecution. But certainly it was no part of any sinister design. TOJO entertained an honest opinion and he did not hesitate to express that opinion and show the strength of his conviction. The evidence clearly shows that at that time, in view of the critical situation of the country, the entire Cabinet, including TOJO, desired to go out of office so as to enable a fresh batch of statesmen to try, and, if possible, to avert disaster.

Coming now to the TOJO Cabinet itself, the prosecution characterizes it as the complete grouping of the conspirators. The combination of SHIMADA, TOGO and TOJO itself is looked upon as something sinister.

SHIMADA never had any political assignment before he became the Navy Minister. His entire early career had been relegated to sea assignments and in the Naval General Staff. Nothing could be placed before us in any way connecting him with the alleged conspiracy before he became the Navy Minister. Something has been said about his action as Commander-in-chief of the China Seas Fleet but I don't think that for this action anyone can in any way hold him connected with the conspiracy. There is absolutely no evidence before us to show any design behind his selection as the Navy Minister. It appears that no Navy Minister of Japan has ever been other than a senior officer on the active list. So far, therefore, as the position of this Navy Minister is concerned, the Ordinance of 1936 really did not affect the position, if we keep in view the actual practice in the matter. The duty and obligation of recom-

mending a Navy Minister was in the hands of the outgoing Navy Minister. After the Navy Minister had made a recommendation as to his successor, such nomination was tantamount to appointment, for in practice it was accepted as mandatory upon the Premier who had no personal choice in the matter. The outgoing Navy Minister was OIKAWA, who nominated SHIMADA. OIKAWA has given evidence in this case and has given his reason for nominating SHIMADA as his successor. There is nothing in this evidence which would in any way suggest any design either on the part of OIKAWA or on the part of anybody else in bringing in SHIMADA in the Cabinet. SHIMADA himself certainly had no hand in the matter of his choice as minister. There is not even the remotest suggestion that he was in any way trying to come into this position. SHIMADA himself gave evidence in this case and subjected himself to lengthy examination. I must say he impressed me as a highly straightforward soldier, always giving straight answers to straight questions. He told this Tribunal in a straightforward fashion that he accepted the assignment although it was never solicited, initially refused and in fact was an unwelcome assignment. These statements by Admiral SHIMADA are fully substantiated by the testimony of Admiral OIKAWA. Nothing has been placed before us which would entitle us to say that there was any connection betwen TOJO and SHIMADA either personally or through any mutual political interest. Admiral SHIMADA and TOJO were not even acquainted with each other at that time. There is absolutely no evidence in support of the allegation that Admiral SHIMADA was appointed because TOJO wanted him to be in his Cabinet. There is absolutely no truth in such allegation.

The policy of SHIMADA and his conduct as minister are not relevant considerations for my present purpose. There is, however, evidence that before accepting the position, SHIMADA got an assurance from TOJO that it would be the policy of the government to "start from scratch"in attempting to whole-heartedly and sincerely reach a diplomatic understanding to the end of preventing war in accord with the Emperor's wish. Of this I shall have occasion to say more later. For my present purpose it would suffice to observe that SHIMADA's coming into the office of Navy Minister was not a seizure of power by himself. It is not the case of a conspirator seizing the power and seizing the same with the object of advancing the conspiracy. It is really the case of a statesman coming into power in due course and thereby perhaps deserving for the first time the epithet of being a conspirator.

The same thing can be said about TOGO. There is absolutely nothing against TOGO showing him even as a sympathiser with the alleged conspiracy. The Prosecution at one stage admitted that it did not charge the defendant TOGO with having joined any conspiracy before he joined the TOJO Cabinet in October 1941. What services TOGO rendered while in the TOJO Cabinet and whether thereby he committed any offense either becoming a conspirator or otherwise, we shall see later. For my present purpose it would suffice to observe that in his case also there is absolutely nothing to show that either TOGO or anybody else had any design to seize this power, which in the most constitutional way came to him. When he received the call from the premier

designate to serve as foreign minister in the Cabinet to be formed, Mr. TOGO had been in effect in retirement without rank and the nominal post of ambassador but with no assignment since November 1940. The offer of the appointment was not the result of any personal relationship between Gen. TOJO and Mr. TOGO. There was no such relationship between the two nor was there any intimacy between Mr. TOGO and others of the new ministry. Mr. TOGO was then a senior of the Foreign Ministry, eligible in the normal course for appointment to the highest post in that ministry. We need not seek for any reason other than the natural and obvious one for his selection. Whatever else be the basis of his selection, there was at least no design or plan of the sinister nature behind it as suggested by the Prosecution. There is nothing to connect TOGO's antecedence with the conspiracy either as a participator or as a sympathizer. It could not even be suggested that he was in any way in the good grace of the conspirators. The Prosecution attempt to characterize this as seizure of political power by the conspirators is, to say the least, preposterous. As I have said, for the present purpose it is not material how he behaved as Foreign Minister in this Cabinet. Whether thereby he committed any crime will be examined later on. All that I need say here is that he did not seek this power and he did not seize this power. His coming into this position was not the act or result of design of any of the alleged conspirators.

The intent with which Mr. TOGO accepted the office is clear enough from the evidence. He was unwilling to accept the responsibilities of the foreign affairs portfolio at this stage until he could gain some understanding of how international affairs, and especially Japanese-American relations stood; he learned from TOJO the general direction in which the negotiations were proceeding and obtained from him the assurance that reconsideration of the various questions involved in the negotiations, including that of stationing troops in China, would be undertaken. On this assurance he agreed to accept the position. Whatever that be, his is also not a case of a conspirator or a sympathiser of conspiracy seizing his political power or coming into political power. It is a statesman's shouldering grave responsibility at the critical moment of his nation's life history and perhaps thereby deserving the epithet which the Prosecution now desires to confer on him.

But let us see if it can be said even of TOJO that he seized political power by being Premier of Japan in October 1941. The principal persons who were considered for the premiership were: Prince HIGASHIKUNI, General UGAKI, Admiral OIKAWA and General TOJO. A premier was needed who could cope with the grave problems of the time.

On October 15, 1941 the question of a cabinet headed by Prince HIGASHIKUNI arose. The Imperial Household Minister, MATSUDAIRA, and the Emperor were opposed to this. There were some real difficulties regarding Prince HIGASHIKUNI. There was possibility of the Army availing themselves of the Prince's position as a Prime Minister and dragging the country into war. The Prince's entourage was considered to include many dangerous elements. In addition, Prince HIGASHIKUNI, although talented, was lacking in political experience and training and, as the situation was extremely

difficult, it would have been well nigh impossible for the Prince to grasp this situation and work out a plan to cope with it.

OIKAWA was considered undesirable as at that time there was disagreement between the Navy and the Army, the Army urging immediate war. If OIKAWA were appointed, the Army might react in a stronger way.

General UGAKI had failed to form a Cabinet on a previous occasion and the possibility of such failure still continued.

In this way, by eliminating all possible choice, the ultimate choice fell on TOJO. It was considered that if TOJO were selected and ordered by the Emperor to disregard the decisions of the Imperial Conference of September 6, he would be able to control the Army. It was considered that if the Army got out of control at that stage, no one could tell what situation might be precipitated, particularly as the troops were by that time down south as far as southern French Indo-China. To avoid such eventuality, it was considered that TOJO, who was expected to have the Army in hand, should accept the appointment, specially as judging from his remarks within the past few days, he did not advocate waging war immediately with America.

All these matters were seriously considered at a meeting of the senior statesmen of October 17, 1941. There were present at this meeting: WAKATSUKI, HARA, OKADA, ABE, KIYOURA, YONAI, HIROTA and HAYASHI. The reputation and high standing of the participants could hardly be questioned. There were only two Army men, General ABE and HAYASHI; and two Navy men, Admirals YONAI and OKADA. There is no evidence that there was any exterior influence on these statesmen before the meeting or at the meeting. There is no evidence and it is really preposterous to suggest that the thoughts, words or actions of these men could have been in any way controlled by any person or group of persons. It could not be suggested that these statesmen had any reason to recommend TOJO with any ulterior purpose in mind. There could be no claim by the Prosecution that there was any concealment of the facts from these statesmen. A complete and lengthy resume of events carefully prepared by Prince KONOYE, the outgoing premier, was read to them as the first order of business. In this statement, Prince KONOYE clearly pointed out the decision of the Imperial Conference of September 6, 1941, which was that if diplomacy should fail by early October, the government would make up its mind to go to war. He set forth the divergent contentions of the Army and the government on the likelihood of success of a diplomatic settlement. The Army's position was that there was no prospect of Japan's contentions being accepted, while the government felt that if more time was given, diplomacy might succeed. Attention was drawn by Prince KONOYE to the fact that the Supreme Command was urging the government to go to war pursuant to the decision of September 6, 1941. TOJO of course was not in the Supreme Command. Prince KONOYE further pointed out that the knotty questions which were involved in the negotiations with America were: (1) the question of the intention of withdrawal of troops from China, (2) the Tri-Partite Alliance, (3) commercial non-discrimination in the Pacific area. He explained the attitude of the Army, the

government and of the United States on the question of withdrawal of troops from China. The views of the government and the Army on war were set forth in detail. He also explained the Navy's position and its conclusion to leave the decision of diplomacy or war entirely to the Prime Minister. He pointed out the strong opinion in Navy circles that war should be avoided. In addition, Prince KONOYE chronologically stressed the diplomatic relations with America step by step from April up to date. He concluded by again pointing out the divergent views of the Army and the government about the possibility of success of diplomatic negotiations with America. With this background the senior statesmen then expressed their views. They considered the cases one by one and ultimately came to the decision that TOJO should be recommended and that he should assume the portfolio of war concurrently.

We need not enter into the question whether this choice was wise or not. All that we need observe is that, after what has been pointed out above regarding the selection of TOJO as prime minister, it is preposterous to suggest that his premiership was the result of any design or that he or anybody else for him was thus seizing power at that critical moment.

Mr. Comyns Carr for the prosecution asserted that "a consideration" of all of the evidence leads to the *inevitable conclusion that* TOJO was one of the 'Young Army' officers who in the early days of conspiracy plotted for the conquest of all East Asia ..... I do not see how Mr. Carr could be so assertive of TOJO's being one of the "young army officers" referred to by the witnesses. None of the witnesses named him. The only basis for Mr. Carr's assertion is that TOJO was an army officer and was young in those days. I must confess I cannot even get at the psychology of the mind which, on the state of the evidence on record, can persuade itself to believe that TOJO was one of the group named by the witnesses as young army officers. There are no data which would in any way help the approximation of such a belief to a probable representation of this as a fact; no substantial data seem to have entered into the mental formation of this belief. It is, I am afraid, not the belief of on open mind. It is the belief of a mind that did not require any persuasion. The evidence, as it now stands, does not even raise any suspicion that way, not to speak of leading to the "inevitable conclusion".

Referring to TOJO, Mr. Carr says: "His history is one of steady and rapid advancement throughout the life of the conspiracy, from the position of Colonel and Section Chief of the Army General Staff, through increasingly important and powerful positions, until, as War Minister in the Third KONOYE Cabinet, he attained such power that he brought about the fall of that Cabinet, became Premier and War Minister, led Japan to attack the United States, Great Britain and the Netherlands, during the earlier years of the war with these countries and until the beginning of her final defeat.

"As Colonel, as Section Chief (L Aug. 1931—5 March 1934) and as Major General Commander of the 23rd Infantry Brigade (1 Aug. 1934—1 Aug. 1935) TOJO played a sufficiently important part in the Manchurian Aggressions to be awarded a decoration for his services."

The steady and rapid advancement does not, I believe, necessarily depend upon an officer being a conspirator. The characterization of the period as the life of the conspiracy is only the assertion of the prosecution. At least nothing has been placed before us connecting his steady and rapid advancement and decoration with anything else than his merit, or what the superior authority recognized as merit.

The suggestion is that it was TOJO who in order to grasp power as Prime Minister caused the fall of the KONOYE Cabinet.

The basis of this suggestion will appear from the following extract from Mr. Carr's summation:

"On July 2, 1941, TOJO, SUZUKI, HIRANUMA and OKA attended an Imperial Conference at which important decisions in reference to Greater East Asia Co-Prosperity Sphere, disposition of the China Incident, matters connected with the Northern Problems were made, and a decision to remove all obstacles in attaining Japan's policy to pursue her schemes against French Indo-China and Thailand, to negotiate and "take measures" with relevant nations to the south, to secretly arm against the Soviet, and prepare for war against Britain and the United States, was made. (Exhibits 588, 1,107,779, R. 6,566).

"The Imperial Conference of 6 September 1941, attended by TOJO, SUZUKI, MUTO and OKA, decided:

(1) That Japan would continue for southern advance;

(2) That Japan would complete her plans aiming at war with the United States, Britain and the Netherlands;

(3) That Japan would try to gain her demands by diplomatic means and if not successful, by early October, would determine on war with the United States, Britain and the Netherlands;

(4) That she would try to check the formation of any Russo-American Combine.

(Exhibits 588, 1, 107, R. 8, 814)

"About October 12, 1941, TOJO made the final moves in the plan which was to lead him to the Premiership and Japan to attack the United States, Britain and the Netherlands. At a meeting between himself, KONOYE, OIKAWA, (the Navy Minister), SUZUKI, (the President of the Planning Board), and the Foreign Minister, TOJO demanded a strong resolution for war. OIKAWA wanted to avoid war. (Exh. 1,147, R. 10, 246, Exh. 1,148, R. 10,251, Exh. 1,136-A, R. 10,272).

"At a Cabinet meeting of 14 October, there was a deadlock on this subject. (Exh. 1,148, R. 10,258-10,263).

"On October 15, SUZUKI delivered a message from TOJO to KIDO that unless KONOYE came to TOJO's views, a general resignation of the Cabinet would be inevitable. (Exh. 1,150, R. 10,276). Later SUZUKI phoned KIDO that TOJO's idea was to establish harmony between the Army and Navy. (Exh. 1,150, R. 10,276).

"The result was that the KONOYE Cabinet resigned. (R. 10, 285).

TOJO became Prime Minister, OIKAWA was deposed as Navy Minister, SHIMADA took his place, and NAGANO continued as Chief of the Naval General Staff. TOJO has gained his ends — with SHIMADA as Navy Minister and NAGANO as Chief of General Staff, harmony was restored — there would be no dissent to the attacks on Pearl Harbour, Khota Bahru, Davao and Hongkong."

The documents referred to in the above summation are the following:

Exh. 588 —Resolutions concerning the Japanese-American Negotiation dated 2 July 1941.

Exh. 1,107 —Lists of names of persons attending Imperial Conference 1941. (proc. p. 10,140)

Exh. 779 —Excerpts from the minutes of the Imperial Conference dated July 2, 1941. (p. 7,904)

Exh. 1,147 —Extract from KIDO's diary of 12 October 1941.

Exh. 1,148 —Premier KONOYE's own account as to why the Cabinet resigned.

Exh. 1,136A —Extract from TOJO's statement taken in prison.

Exh. 1,150 —Extract from KIDO's diary of 15 October 1941.

We have the evidence of SHIMADA, TOGO and TOJO on this point. This evidence fully discloses their respective views of the then situation and gives their reason accounting for the fall of the prior cabinets.

I have carefully considered the entire evidence adduced on the point both by the prosecution and the defense. To my mind they certainly indicate that TOJO arrived at his own decision about the then situation and gave expression to his firm attitude.

It is not necessary for our present purpose to examine whether or not his conclusions about the irreconcilability of the then issue between Japan and the U. S. on which his decision was based, were correct. Perhaps they were. The defense evidence now given on this point amply supports the conclusion then arrived at by TOJO. I shall discuss this evidence later on. It would be sufficient for my present purpose to say that the evidence clearly indicates that long before July 1941 the U. S. Government had arrived at a decision that the issue between the U. S. and Japan was irreconcilable. Actions taken by that government against Japan at least since March 1941 could not have left any statesman of either country in doubt about this decision. I would again emphasize that for the present purpose it is immaterial which party was to blame for this situation. That was the situation and TOJO clearly saw it. At any rate, he came to his own conclusions and based his decision thereon.

I believe, at a moment like the one in question here, it is expected that people occupying TOJO's position should be capable of coming to a decision and should have the courage of his conviction. What followed, did so as a matter of course. I cannot read any design in these happenings. TOJO certainly was not designing to grasp the power, though he might have been fully prepared to shoulder the full responsibility, if called upon to do that under the circumstances that might follow.

As the evidence now amply discloses, it was not a moment in the life of Japan when power was considered to be of any consequence to any individual or group of individuals. It was a critical moment in the life of Japan when, to the knowledge of every statesman including TOJO, Japan's very existence as a nation was gravely imperilled. Every statesman and diplomat of any consequence was nervously thinking of finding out some honourable escape for the nation from utter destruction. At a moment like this, statesmen do not grasp power. They are called upon to shoulder the grave responsibility and undertake the solemn duty of facing the imminent danger with courage.

It is in evidence that TOJO came in with full knowledge of the impending danger. He, to the best of his ability as a statesman, continued the diplomatic move, but ultimately failed in coming to any honourable settlement with the U. S. I do not see what there is in the evidence that has been laid before us in this connection that can, in any way, lend any justification to the characterization of this event as one of grasping power.

As regards the prior political reversals the evidence at the most indicated that there were persons dissatisfied with any particular minister or ministry. It may be conceded that such dissatisfied persons or groups successfully or unsuccessfully attempted to cause the fall of any particular ministry or the removal of any particular minister. It may also be that such persons or groups of persons entertained certain views regarding foreign policy or foreign relations of Japan. If, as a consequence of the fall of any Cabinet, any of the accused came into power it was not because he designed the capture of such power but because he happened to be the person who enjoyed the requisite confidence, not of the designers, but of the proper constitutional authorities.

The story here has been pushed a little too far, perhaps, to give it a place in the Hitler series.

OVER-ALL CONSPIRACY

THIRD STAGE

THE PREPARATION OF JAPAN

FOR

AGGRESSIVE WAR

INTERNALLY AND BY ALLIANCE

WITH

THE AXIS POWERS

* * *

GENERAL PREPARATION FOR WAR

Section 5 of Appendix A speaks of direct general preparation for war. Brigadier Quillium im presenting this phase of the case characterized it as the part "which deals with the general naval, military production and financial preparation for aggressive war which were made by Japan from 1932 onward." He proposed to adduce evidence to establish the following proposition:

Japan made naval, military and economic preparations
(*a*) which far exceeded the requirements of legitimate defense,
and (*b*) which had, as their real object, the fulfilment of the conspiracy to wage wars of aggression and in violation of treaties etc.

To establish the same he offered the following materials:

1. The steps taken by Japan to increase the production of munitions and materials of war and the financial measures adapted for that purpose.
2. Japan's general military preparations.
3. Japan's general naval preparations.

In order to establish Japan's production and financial preparations for war he mainly relied on the evidence of Mr. J. G. Liebert. Mr. Liebert was offered as an expert witness in economic and financial matters. He had been employed since October 1945 in the Economic and Scientific Section of the General Headquarters of the Supreme Commander for the Allied Powers and had made a special investigation of Japan's economic and financial preparations for war, obviously with a view to its use in this trial.

Mr. Liebert's statement is Exh. 840 in this case. The principal documents relied on by Mr. Liebert in the preparation of his statement are "The Five Year Plan" dated June 23, 1937 (Exhibit No. 841) and "a programme for extension of important industries". (Exhibit No. 842)

On the strength of this evidence the prosecution claims to have established the propositions laid down by Brigadier Quillium as stated above. According to the prosecution the evidence of Mr. Liebert establishes the following:

1. (*a*) In June 1937 the Japanese war office prepared a five year plan for the production of war materials. (Exhibit No. 841)
   (*b*) The purpose of this plan was to ensure the stimulation and control of industries in order to obtain perfection in the war time supply of the principal war materials.
2. This plan was closely bound to another plan relating to major industries, a product of the planning board. (Exhibit No. 842)

The prosecution emphasized the following features of these plans in order to indicate their ominous character:

1. They necessitated the artificial stimulation and control of Japan's whole economy.
2. They required a national self-sufficiency to be achieved at a cost which normal legitimate enterprise would not support or justify.
3. They required the application by the government of subsidies,

special privileges and protections, grants-in-aid, guarantees of dividends and profit and other financial concessions.

4. They were based on the unification of national policy with military administration.
5. They provided for the acceleration of self-sufficiency in respect of raw and other materials and fuel in Japan, Manchuria and China and for the speedy enforcement of control over material industries, having in mind the conversion from a peace time to a war time basis.
6. Emphasis was laid on the speedy production of airplanes, arms ammunitions, tanks and army trucks and other equipments constituting the main factors of fighting powers as well as items directly connected with such factors.
7. The plans were as complete and comprehensive as human ingenuity could make them in order to ensure that by the end of the year 1941 Japan should be in a position so far as the production of war materials is concerned which would enable her to put into execution her plans for the conquest and domination of the countries of East Asia and the Pacific Ocean.
8. The full import and purpose of the production plans will be revealed by the survey of a few selected industries:
   (*a*) The electric power industry. (Exh. No. 843)
      (*i*) the plans provided for an enormous increase by the year 1941 in the production of electric power;
      (*ii*) this industry was placed in 1938 on a totalitarian basis by the enactment of the Electric Power Control law under which a national policy company controlled by the government was formed. The control measures were extended to the distribution of electricity.
   (*b*) The production and imposition of petroleum. (Exh. No. 844)
   (*c*) The development of the coal industry.
   (*d*) The development of the chemical industry.
   (*e*) The development of the ship building industry.
   (*f*) The development of the iron manufacturing industry.
   (*g*) The development of the machine, tool industry.
   (*h*) The development of the motor vehicle industry.
   (*i*) The production of nonferrous metals.
   (*j*) The development of aircraft industries.
9. Drastic controls were imposed in every respect.
10. The totalitarian financial controls were introduced in order to integrate dependent territories into Japan's economic system so as to obtain from them materials and wealth necessary for Japan's economy as also to achieve the maximum benefit of foreign trade in support of industrial production.

The prosecution further claims to have established a general military and naval preparations since 1931 and lays stress on

1. the general mobilization law of April 1938;
2. the establishment of the total war research institute towards the end of 1940 and its activities;
3. the fortification of mandated islands;
4. Japan's general naval preparation for war.
   (*a*) Japan freed herself from the limitations and restrictions imposed by the armament limitation treaties to which she was a party.
      (*i*) Japan refused to subscribe to the "1936 Naval Treaty". (Exh. No. 58)

The defense case in this respect will be found mainly in the opening statement of Mr. TAKAHASHI and in the depositions of the following witnesses:

1. YOSHINO, Shinji: The witness had been with the Ministry of Commerce and Industry from 1925 to 1938, as section chief, as bureau chief, as Vice-Minister, and lastly as Minister of Commerce and Industry. During the war he was governor of Aichi Prefecture for two years: His affidavit is Exh. 2, 368 in this case: His entire evidence was recorded in pages 18, 198 to 18, 240 of the proceedings.
2. OKADA, Kikusaburo: From 1935 the witness was in the War Preparation Section of the Mobilization Bureau of the War Ministry and was connected, for all that time, with the formulation of plans for national mobilization and military mobilization. His evidence was recorded in pages 18,271 to 18,339.
3. OWADA, Teiji: The witness was with the Ministry of Communications from 1917 to August 1940 and held the offices of Chief of the Electricity Bureau, Director of the Bureau for the preparation of Electric Power Control and finally Vice-Minister of Communications. He was directly concerned with the drafting and carrying out of the National Electric Power Control Law. His evidence will be found at pages 18, 243 to 18, 270. The prosecution did not crossexamine this witness. (Record Page 18,270)
4. ONO, Takeshi: The witness became Director of Mercantile Marine Bureau in July 1935 and then became Vice-Minister of Communications in January 1938. His evidence will be found at pages 18, 342 to 18,355. His affidavit is Exh. 2,369.
5. MAYAMA, Kwanji: This witness was Research Secretary for the Planning Board and was engaged in the establishment of materials, mobilization and plans for each quarter of the year. His evidence will be found at pages 18,357 to 18,378.

Mr. YOSHINO stated that as Minister of Commerce and Industry he had been responsible for formulating and executing war time economic policies for one year at the beginning of the China incident, and was concerned either directly or indirectly with all the economic policies touched upon by Liebert. According to this witness, the economic measures adopted after the

China incident indicate a genuine war time economy rather than war preparation.

With respect to the policy for the establishment of basic industries, the witness pointed out the great changes that had taken place, since the first World War, in the relations between war and economy, in theory and practice. Previously to that, though war was not wholly unrelated to the economic power of a country, it was considered possible for a major power to confine all its needs within its own economic capacity.

It could always avail itself of supplies from neutrals because there was no real world war. Japan fought the Russo-Japanese war on loans from the United States and Great Britain. In World War I, however, international trade was completely interrupted since practically all the major powers were involved in it. The battles called for the exhaustion of all economic resources: the advent of high explosives, aircraft and chemicals disclosed deficiencies in the then existing armaments for national defense.

It became a matter of commonsense for a country to strive, at all costs, to build up the necessary industries to guarantee its safety. This wartime factor retained its importance even in the post-war economy.

The witness then proceeded to explain the developments of several particular industries in Japan as also in other countries in alliance with Japan during the First World War. He dealt with, in detail, the development of (1) the dye and glycerine industry, (2) the iron industry, (3) the petroleum industry and (4) the ship building industry and explained the measures adopted by Japan for rationalizing the various industries.

These industries certainly had war potentialities. At the same time their importance in Japan's economic life must also be recognized. I do not see any reason why, simply because of their grave potentiality, we should ascribe to this development the sinister motive alleged by the prosecution.

The various measures adapted during the period for rationalizing the industries were fully justifiable under the circumstances prevailing in the then world. Referring to these rationalizing measures the witness said: "It was not a problem which concerned only Japan, but was a policy common to all countries, including Britain, the United States and others. Japan was late in this and her measures were modelled after those of the others.

"The main problem was one of readjusting industries which had sprung up during World War I. All the powers had not only expanded their existing industries, but had set up new ones to procure various articles for which they were dependent on other countries. This was not limited to belligerents; even the neutrals did this. As the war ended, world economy was confronted with excessive supplies compared with demands. And, furthermore, the world purchasing power had decreased due to war-time dissipation. The world powers had to adopt new economic policies to readjust and wind-up war industries.

"This would have given rise to severe unemployment, which was dangerous in a time of labour unrest. Efforts, at unreasonable costs, were made to maintain industrial equipments and installations. The powers followed the

new policy of "take and take". Each country took measures to encourage the use of its domestic products. Japan, in 1920, followed suit by starting a movement for promoting domestic industries and use of home products."

The witness rightly pointed out that "a peculiar feature of Japan's industry was its dependence on numerous medium and small-scale manufacturers for producing export articles. Overseas markets were plunged into confusion due to reckless competition."

Japan had to maintain order among the small-scale industrialists, export industrialists, and to suppress reckless and excessive competition. There had to be government control in this respect.

In the beginning, the government took the attitude of *laissez-faire* toward large industry, feeling that those people would arrange matters by themselves. During the great depression Japan adopted a number of countermeasures, including the lifting of the gold embargo, which resulted momentarily in the suffocation of her industrial activities. The government was going ahead to rationalize industry and to assist certain large-scale industry, but the efforts were not satisfactory. The government then came to the view that the state should exercise its authority over large scale industry in an economic crisis. The law for control of vital industries was thus passed in 1931.

"While it appears to be totalitarian in ideology, its contents would show it was not so in the least. This law aimed at controlling medium and smallscale industry and a voluntary agreement among industrialists. It was based on the principle that the state would intervene to compel the minority when they did not comply with the desires of the majority. It did not purport to allow the use of authority to satisfy the needs of national policies against the desires of the majority. It was a measure to promote cartels.

With respect to cartels, Japan drafted legislation following generally the studies of the League of Nations. In the law for vital industries there were stipulations for controlling cartels, as well as promoting them. Provision is made for due publicity. It follows the principle of the Clayton Act in the United States by exposing the matters widely to public opinion, this being considered preferable to controls by penalties. Japan's plans for industrial rationalization followed orthodox methods practised by other countries and do not deviate from them. The special measures law of 1937 on import and export restrictions is in an entirely different category. This is a basic law for enforcing wartime economy.

The witness did not know anything about the five-year plan for the production of important war materials referred to by Mr. Liebert.

Mr. OKADA explained this five-year plan. The said plan was drawn up by this witness. Referring to Exhs. 841 and 842 this witness said: "Each plan had a definite purpose and it meant the increase of Japan's national power. Exhibit 841 was entirely concerned with military plans. Exhibit 842, ("The essentials of the Five-Year Program of important industry, May 29, 1937, the resume of policy relating to execution of summary of Five-Year Program of important industries, June 10, 1937, and outline of the plan for the Expansion of Production Power by the Planning Board",) has many mili-

tary aspects in it, but it is a plan for establishing a peace-time economy. Japan had to take measures to cope with the expansion of Russia's military power.

The Soviet development of industries could be called startling. In 1929 its steel production had attained a pre-war level, but after the two Five-Year plans it was three and a half times in excess of pre-war days, In 1933 the U. S. S. R. ranked third in steel production in the world and second in Europe. The next year it had advanced to second in the world and first in Europe. By 1937 its steel production had reached 17, 700, 000 tons. Japan further believed that the Soviet was about to begin a third Five-Year plan. They were thus forced to decide that Japan should try to reach at least half of the Soviet's planned production.

Since many of Japan's important industries depended on raw materials imported from abroad, Japan's economic basis was shaky, and independence, unreal. She was at a disadvantage in international trade. Prior to this, Japan had been able to maintain a precarious trade balance through the textile industry and a few light industries. It was believed that Japan should develop her heavy industries to be qualified as a modern state for the future welfare of the people.

The witness says: "Japan believed that the Soviet would start on the third five-year plan, and Japan started its plan so that it would end with Soviet's third five-year plan, but there was no special Japanese meaning behind the year on which Japan's five-year plan was scheduled to end. Any plan for industrial development must come from a cycle of years, and it was intended that when the first plan was finished they would embark upon a second five-year plan, so no importance was placed on the end of 1941 when the first five-year plan was scheduled to end." .....

"Exh. 841 was not actually used because the outbreak of the China Incident necessitated much bigger plans for increasing production, especially in munitions. In order to give the military as much as possible for military consumption, the plans in Exh. 842 had to be curtailed and changed so that the actual execution was quite different from the plan.

"Both exhibits planned only a very limited economic control. However, the outbreak of the China Incident made necessary the mobilization of industry and a large scale economic mobilization, and finally a total mobilization of national strength." .....

In his cross-examination with respect to Exh. 841 the witness stated that he noticed the wording that the goal was to be five years hence and that 1942 and thereafter required wartime capacity. This did not indicate that there would be a war by 1941. It merely meant that army aircraft production for the 140 plane squadrons would be completed, since it would be meaningless if the companies were organized without supplying them with airplanes.

With respect to paragraph 5-c stating that in the event hostilities broke out during that year special measures for rapid replenishment of equipment would be devised, the witness stated that this had reference to 1942. When asked whether he still persisted in saying that the year 1941 had no signifi-

cance, the witness said that it was merely an estimate as to whether or not, IF hostilities opened between Japan and the U. S. S. R. in 1941, Japan could supply sufficient aircraft to 140 air companies.

The witness stated that he himself wrote the words "first year of the hostilities" as they appeared in the document. This was merely an estimate of whether the supply could be replenished when the organization of aircraft squadrons were completed. Plans were formulated to extend to the year 1943 and a renewal was expected. The witness pointed out that prior plans had been formulated, one showing 1935 as the first war-time year, and there had been a national mobilization plan many years before showing 1933 as the first war-time year, and 1934 as the second.

Mr. OWADA, Teiji, fully explained the electric power industry. The witness said that the main provisions of the National Electric Power Control Law were put in force from August 10, 1938.

According to the prosecution the development of water power in Japan was directed toward war purposes, (R.P. 18,252) and with this end in view this industry was gradually brought within totalitarian control. According to the prosecution this was indicated by the fact that all the generating companies were private concerns to begin with till this Control Law was passed. The Prosecution case is that "from the adoption of that law the industry became totalitarian." (Record page 18,253)

Mr. OWADA fully explained the occasion for this law. It is indeed absurd to scent only preparation for war even in this measure.

The witness explained how with the setting up of international block economies about the year 1929 Japan was faced with the necessity of setting up a minimum economy of self-sufficiency. The plans were taken up at about that time though they finally matured at about 1938.

According to this witness: One purpose of the Electric Power State Control Law was to insure development of Japanese water power over a long period of time. If the prior method had been continued, it would have been done piece-meal and Japanese available water power would have been exhausted in a short time. Japan had to avoid unnecessary waste of water power to utilize it in the most economical and useful way.

The western part of Japan is scarce in water power, while the eastern part is rich. If the generating stations in the east and west could be joined by power lines, the western section could economize on coal formerly used for generating purposes. The economical use of coal was another purpose of law. Then there was the question of sending power to agricultural districts. According to the evidence of this witness, Japan took Switzerland as a model while considering this question of electric power control as that was also a country which like Japan lacks natural resources. Like Switzerland Japan also aspired to see, with the use of electric power in every home, the growth of small scale factories with the home as a unit, thus "aiding in maintaining Japan's economy." If the development of electric power were to be continued on a profit making basis this bringing of electric power to the household was considered impossible.

The motives of state control were first, "to utilize available water power in the most rational and effective manner, and to utilize it, 100 per cent. Second, to economize on oil and coal, which are very scarce in Japan. And third, to make plentiful the generation of electric power, and thus to make it available at low cost and to make it available at a specially low cost to matters of a public nature."

"Since they started from the premise that they hoped to achieve a large scale development of electric power, the basic policies were to be decided by the government. However, the decisions were not drawn up merely by government officials, but on the basis of questions submitted to the electric power investigation committee and their replies. The greater number of members of the committee were consumer representatives and consisted of members of the House of the Diet and other people of high intelligence and experience. The government did not execute the policy itself. It set up a special company, the Japan Electric Power Distribution, Generation and Transmission Company, to carry it out. This company is like others and its stockholders are entirely private individuals."

In my opinion the evidence of this witness sufficiently explains the development of the electric power industry in Japan as occasioned by her economic necessity though this development might equally have the potentiality of being switched to war industry. Mr. Liebert might have been correct in saying that 'the electric power industry was one of the first Japanese industries to be nationalized" and perhaps it had the potentiality of being used as "one of the pillars in the new structure in support of total war"; but I cannot accept the view that this was a step in preparation for war, much less in preparation for any aggressive war.

Mr. ONO spoke about shipbuilding. He explained why the Shipbuilding Encouragement Law and the Ocean Navigation Subsidy Law were passed, encouraging and subsidizing the building and commissioning of large type vessels. This witness also was not cross-examined by the prosecution. (Record page 18,355)

"Japan's earliest policy had been to import old ships from abroad. The majority were outmoded or inferior. This interfered with efficient operation of her shipping and gave rise to frequent disasters at sea. There were severe criticisms against the government's policy because of the unusually great loss of lives involved in these disasters." .....

"Public opinion demanded that the government should carry out a thorough-going re-adjustment of surplus ship tonnage and improvements in the grades of ships employed. However, because of the excess ship tonnage, shipbuilding facilities had to remain idle. A large number of workers lost employment, and it was necessary to give them relief."

"After consultation with the National Ship Owners Association, the Shipbuilders Association, and the labour organization, "*the scrap and build measure*" was proposed to improve the condition of shipping trade, the rationalization of shipping, the development of the shipbuilding industry, and re-

lief to the unemployed." The measure was put into effect in 1932. "With the measure, the economic objectives were attained and the industry recovered. England and Norway, basing on Japan's success, adopted similar measures. The measure resulted in scrapping 500, 000 tons of old ships and building 300, 000 new. In May 1933, the importation of foreign vessels was banned."

"What the Japanese Government intended was an out and out economic measure to improve the shipping trade by getting rid of surplus tonnage, and by this measure Japan's ship bottoms were actually reduced. The government intended that the individual ships should have superior economic performance. They did not have high grade ships of specially high speed built in anticipation of war. Their high speed was an economic requirement. The measure required that the ships should be built on domestic yards, using domestic materials." In 1937 this plan was abolished and the construction of up-to-date ships was taken up.

"This was a materialization, with a limited subsidy, of the long desired unrealized wishes. Competition for Atlantic shipping among the great powers in building ultra-modern ships was well known and was the envy of Japan shipping concerns."

The witness then explained why the Iron Manufacturing Enterprise Law of 1937 was passed over the objection of the Navy. It stipulates a license system for shipbuilding similar to other important industries. It is done to prevent unnecessary competition and confusion. Existing shipbuilding yards were given licenses and the *status quo* maintained.

The witness fully explained the marine transportation and shipbuilding policy of Japan. Whatever might have been the potentiality of this shipbuilding industry, the policy adopted was sufficiently explained without indicating preparation for any definite war.

In this connection the evidence of YOSHIDA, Hidemi, (Exh. 3, 003), Mr. KONDO, Nobutake (Exh. 3, 006, and Exh. 3, 001, 3, 003-A and 3, 003-B) may also be referred to. Mr. KONDO was First Section Chief of the Naval General Staff from June 1930 to December 1932. From December 1935 to December 1938 he was First Division Chief; from October 1939 to September 1941 he was Vice-Chief of the Naval General Staff.

"Immediately after the London Disarmament Conference of 1930 the witness was appointed First Section Chief of the First Department. At this time the national defense plan had to be revised to a more defensive order to conform to the new situation. By the Washington Treaty, Japan's capital ships and aircraft carriers were limited to 60% of the U. S. and Britain. However, information collected after the Treaty showed that the U. S. Navy was preparing for trans-ocean operation, and it was felt that if necessary the U. S. fleet could at any time reach Japan's home waters. To oppose this, efforts were made to complete national defense with fleet-footed cruisers and lesser craft which would depend principally on torpedoes for interception in the home waters."

"With the limitation placed on strength of auxiliary vessels by the London Treaty of 1930, the characteristic armament of the Navy was restricted.

They had to watch while the U. S. Navy constructed new types of warships. Ratification of the treaty was a serious problem in the Privy Council, while Stimson's "Hats off" speech contributed largely to aggravate the feeling of the Japanese people. The Navy Staff concluded that there was no way of coping with the matter except through intensive training for raising technical strength and through building such small warships as were not limited by the treaty, and airplanes to cover up defects in armament."

As has been stated above the witness was the Chief of the First Division of the Naval General Staff when the 1935-1936 London Conference was in session. A month later Japan seceded from the conference. The witness says: "At the conference Japan advocated a step forward from the earlier demand for non-aggressive and non-menacing armaments. This thesis was not accepted by the others. Japan directed its attention to various experiments to fulfil its responsibilities in national defense within a minimum possible budget, in consideration of meagre resources. The result was the discovery that there was no other way but to give their armament program the characteristics hereafter shown." The witness then explained what he named as "the Third Supplementary Program" and "the Fourth Program" and how these were influenced by the U. S. expansion plans. He specially referred to the 'Vinson Plans' and the 'Stark plan' of July 1940 and said:

"Up to that time they had managed to form national defense plans against U. S. expansions, but they could discover no means to discharge national defense duties within the scope of limited national resources if the U. S enormous plan materialized. Since U. S. trade restrictions were being stiffened and negotiations with Netherlands East Indies and French Indo-China were not progressing, the very foundation of the nation seemed to be threatened. The movements of the U. S. fleet in Hawaii, together with strengthened U. S. and British support to Chungking, made Chungking confident of victory, and made more difficult the settling of China Incident. In this situation, with every present danger of war spreading to the Far East at any time, the execution of the Third and Fourth Supplementary Programs had to be hurried.

Since the construction of the two battleships of the Fourth Supplementary Program was not progressing, and in order to concentrate all efforts of speeding construction of small craft needed for defense, construction of capital ships was discontinued in November 1940. In the autumn of 1940, plans were submitted for an emergency conversion of merchant-men into auxiliary carriers.

Toward the end of 1940 the international situation took a sudden turn for the worse. Information was received that the Philippine Reserve was mobilized, that the U. S. War Secretary declared martial law in Pearl Harbour, that U. S. troops in North China were withdrawn, and that mines were being laid in the eastern entries of Singapore Straits, that Australian troops were being reinforced in Malaya, and that the U. S., Britain and Australia were conferring to reinforce the Philippine Army in Manila etc.

The General Staff realized that, though lacking in resources, Japan had

to do something about navel armaments in view of the U. S. expansion, and the international situation. The Emergency Supplementary Program went into effect in May 1941, with the construction of 9 medium and 9 small submarines, besides defensive warships. In August 1941, an Emergency Armament Program for one carrier, two cruisers, 26 destroyers, 33 submarines, and other defense forces, was executed. They could not keep pace with the U. S. Navy and suffered from apprehension. The armament plans were stimulated by the overwhelming expansion plan of the U. S. and by what they considered military encirclement of Japan. The plans were formulated on the spur of the moment, and were mainly based on small defensive warships."

"While these policies were being made, the poverty of national resources was a large source of worry. There were many difficulties. In the event of war, it was quite possible that Japans' shipbuilding program might slow down, but it could not be increased, while the U. S. and Britain were expected to accelerate their construction rate at a rapid pace.

"While Japan had only a few first rate merchant ships which could be converted into auxiliary warships in case of emergency, Britain and U. S. had many. Japan had no civilian aircarft convertible into a reserve air force as did the U. S. and Britain. Japan had only a few civilian factories capable of being converted into munition factories during war time, while the U. S. and Britain were capable of large scale conversion of civilian industrial plants into military use during war time."

"Japan faced a shortage of wartime materials, while the U. S. and Britain had an abundance. In the face of these facts, Japan needed to maintain a comparatively large peace force, even though it was a heavy strain on meagre national resources. The ability of the U. S. and Britain to mobilize rapidly and draw on vast resources dictated this. To have failed to consider these factors would have been a serious defect in national defense."

Coming to the question of aircraft carriers, the witness says: "In Admiral Richardson's affidavit, he stated that the Japanese Navy in its preparation for an aggressive war, had exerted itself toward building aircraft carriers.

"Aircraft carriers may be utilized easily for offensive purposes, but it was generally recognized that they were necessary for defense against attack by fleets which included aircraft carriers. The Japanese Naval authorities believed that carriers were absolutely needed for defense purposes as long as other powers had them.

"There were great danger that Japan would be attacked by carrier-borne planes, and damage would be great. Japan is narrow and surrounded by sea, and no area of the island is outside the attacking radius of carrier-borne planes. Nearly all major cities, industrial areas, and trunk lines of communications are close to the coast. Japanese houses are inflamable, and damage through bombing would be great, and there would be damage of large fires if incendiaries were used.

"To defend itself, Japan needed numerous airfields and aircraft. To defend against such attack there are airplanes, anti-aircarft weapons and bar-

rage balloons, but aircraft is the most effective. When objectives lie along the coast, anti-aircraft and balloon barrages would not be expected to be sufficiently effective to ward off attack. Weather conditions being very bad would prove an obstacle to movement and concentration of aircraft, and there was greater need for large number of airfields and aircraft.

"It was impossible to maintain large numbers of aircraft owing to meagre national resources, and constructing airfields was difficult because of narrow territory and scarcity of flat land.

"For the fleet not to include carriers while others possessed them would have meant a marked difference in ability for reconnaissance, long distance attacking potential, and strength in anti-aircraft defense. With the development of aircraft, a fleet without aircraft carriers lost its meaning. It was therefore advantageous to maintain the fleet carrier strength at a point where it could fully hold its own against opponents and thereby serve national defense.

"It can be seen from the nature and capacity of Japanese carriers that they were built for defensive purposes. To utilize carriers offensively, it is necessary to have attending warships, but the Japanese Navy did not have them."

MR. YOSHIDA, HIDEMI was a member of the Staff of the Research Division of the Second Demobilization Bureau from June 1946 to May 1947. Since 1946 he had prepared many reports pertaining to armaments of the former Japanese Navy. In April 1947, the Defense section handed him a copy of an official document of the U.S. Navy pertaining to the vessels of the U. S. Navy, and requested that he prepare a comparative table of the vessels which the U. S. and Japan had already completed and had under construction as of December 7, 1941. He prepared COMPARATIVE TABLES in two sheets and handed them to the Defense Section. These are contained in Exhibit No. 3,003-A and 3,003-B.

The witness made one significant discovery, that the estimate which the Naval General Staff had made of the U. S. Navy strength was a strikingly close approximation of the actual strength as shown by the official document, and if anything the Japanese estimate was somewhat lower than the actual figures.

As regards THE FORTIFICATION OF MANDATED ISLANDS, the Prosecution evidence was not, in my opinion, at all convincing. The defense evidence is that these islands were not fortified and that if the Japanese Government did not allow any inspection of these islands by other Powers, it was because it did not want to disillusionize them in this respect. I feel inclined to accept the defense version as more convincing.

Much was made of the steps taken by Japan in what was characterized by the prosecution as freeing herself from the limitations and restrictions imposed by the armament limitation treaties. A comparatively large amount of evidence has been adduced by the defense in explaining Japan's position in this respect. The evidence of the witnesses (1) Enomoto, Juji and (2) Kondo, Nobutake may be referred to in this connection.

In order to appreciate the significance of the steps taken by Japan and their bearing on the question whether or not we should therefrom infer any aggressive design or preparation it would be pertinent to notice a phenomenon which was then happening almost everywhere and which, it is believed, was the reason why disarmament movement failed. I would prefer to quote from what the Surveyor of International Affairs says in this respect. Speaking of the entire international society, the Surveyor says:

"It was notorious that, in every field of social life, power had latterly been concentrating itself in the hands of the experts *de facto* more rapidly and effectively than it had been diffusing itself through the electorates *de jure*. And the reason for this marked and ever increasing discrepancy between constitutional theory and political fact was not obscure. The reason was that Democracy was only one of the two master-institutions of the modern age. The other was industrialism; and the development of industrialism had brought with it an increase in the complexity of social organization and material technique which inevitably played into the experts' hands as a matter of fact—at the very time when the peoples fancied themselves to be progressively assuming the control over their own destinies.

"This tendency was uniform in all spheres of life; but the consequences differed widely in different spheres in correspondence with certain fundamental differences in the respective functions of the diverse experts and in their respective relations with the public. In the economic field, for example, the experts in question were experts in the management of an industrial and commercial and financial system which, as it developed was more and more insistently demanding for itself in a world-wide field of operations if it were to work profitably or effectively or indeed if it were to work at all. In fact the economic experts were constrained by their very profession to become more and more oecumenical in their outlook; and the parochial nationalism which was strangling the life of Mankind at the time was a dragon with which the economic experts were engaged in mortal combat in their professional efforts to make a success of their own proper business. Accordingly, in the economic sphere, any transfer of power from the national electorates to the experts was unlikely to obstruct—and was, indeed, likely to promote— a constructive international co-operation for the common good. On the other hand, in the sphere of Disarmament and Security the effect of the transfer of power from the electorates to the experts here in question was just the opposite.

"In this sphere the men and women of the world were alive, in 1932, to the prospect that, in a 'next war', both they and their children and their homes would be bombed from the air, and they were therefore, keenly anxious to prevent the outbreak of another war, whereas the insurance of peace through Disarmament and through collective arrangements for Security was not at all the business which the experts in this department had originally been trained and commissioned to carry out. In this department, the business of the experts had been, not to insure the maintenance of peace, but to do their best to insure the victory of their respective countries IN THE EVENT of

any outbreak of war. And the experience of the Disarmament Conference with its committees of experts in 1932 made it plain that a mere reversal of standing instructions could not avail to perform the miracle of effacing a professional tradition of immemorial antiquity and transforming Generals, Admirals and Air-Marshals from experts in the national conduct of war into experts in the international organization of peace.

"The utter failure of the war-experts, on the technical committees of the World Disarmament Conference at Geneva, to serve their principals in their new capacity can be accounted for sufficiently by reckoning with the NOTORIOUS STRENGTH OF PROFESSIONAL HABIT, WITHOUT RESORTING TO THE HYPOTHESIS OF PERSONAL ILL-WILL OR BAD FAITH."

With every nation, "the change in the objective of official policy and popular desire from *preparedness* for war to the *organization* of peace had been half-hearted and ambiguous. On the one hand, the experts were being instructed to consider how the organization of peace might be rendered most efficient, from a technical standpoint, against a potential peace-breaker, on the assumption that an effective organization of peace was now the genuine objective of the statesmen. But at the same time, *each national group of experts* was still being instructed to consider, in narrowly national terms, how a reduction of armaments could be arranged *with the minimum diminution* of their own country's war-power in the event of the statesmen agreeing upon a substantial reduction of national forces." ....

If this happened at the disarmament conference itself, this was influencing the mind of every nation throughout and no one believed in the success of peace organization.

The "notorious strength of professional habit" referred to in this survey may not have any particular relation to any special feature of the relevant time. It seems the regulation of military interests has always met with similar fate. Every power favoured disarmament of its possible opponent; every power disliked diminution of its own special strength. "The Lion looked the Eagle in the eye and said, 'We must abolish talons'. The Eagle looked squarely back into the Lion's eyes and said, 'We must abolish claws.'" The Bear was for abolishing everything except universal embraces.

Beginning from the Paris Conference of 1856, whenever any attempt at regulating any military matter has been made, the attitude of the various powers has always been intimately correlated to their respective existing or prospective strength in that respect. They have always been moved by a narrow utilitarian motive. Dr. Royse in his treatise on 'Aerial Bombardment' explains this attitude as having been necessitated by the very nature of what he designates 'military interests.'

It is not my purpose to examine the views of this learned author here. All that I need point out is that the Japanese attitude at or in relation to these conferences had nothing unusual in it so as to drive us to an inference that they were thus preparing for some *aggressive design* of theirs.

Mr. English presented evidence in respect of military preparations. He

adduced in evidence the following:

1. Exh. 862-A and 863-A—Excerpts from an Article entitled "Army explains War Bill" issued in a newspaper called "The Japan Advertiser" on *May 19 and 20 of 1938*. This is said to be a pamphlet issued by the War Department explaining the provisions of the National Mobilization Bill.
2. Exh. 864—Excerpts from the Japan Year Book, 1941-42 to show that the Military Service Law was amended on March 8, 1939, and revised by the Imperial Diet on April 1, 1941.
3. Exh. 865—A pamphlet entitled "Outline of Fundamental National Policies" published by the Planning Board in 1941, to show that on 22 *January 1941*, as part of Japan's general military preparations, the Cabinet decided to enforce a population policy to insure a source of military strength. In giving the purport of this policy the pamphlet says, "it is the mission of the Empire to establish the East Asia co-prosperity sphere and promote its everlasting healthy development."
4. Exh. 866—An excerpt from a book entitled "The Inevitability of the Renovation" written by the accused HASHIMOTO and published in 1940. It is contended that this will show that HASHIMOTO in 1940 developed the increase of armaments to the extent necessary for conquering other countries.
5. Exh. 867—A photostatic copy of a telegram dated 13 July 1941 from OTT, the German Ambassador in Tokyo to Ribbentrop for the purpose of showing that by that date Japan had taken serious mobilization measures and made military preparations. The telegram says: "there are *symptoms* perceptible here that Japan is seriously undertaking military mobilization measures."
6. Exh. 588—To show that on September 6, 1941, a resolution was adopted by the Imperial Conference that Japan, with a determination for a war with the United States, Great Britain and the Netherlands, was to have completed preparations for the war by the end of October 1941. The document refers to "the aggressive moments the United States, Britain and the Netherlands had assumed".
7. Exh. 868—Showing the establishment of the 'Total War Research Institute' by the Imperial Ordinance No. 648 in 1940.
8. (*a*) Exh. 870—Record of table-talk maneuvers held by the 'Total War Research Institute'; lst half of August 1941.
   (*b*) Exh. 871—Records of the progress of theoretical maneuvers for total war No. 1 being the result for the third period, August, 1941 to the ninth period, October, 1942 prepared by the Institute.
9. Exh. 872—Charts and telegrams showing the quantities of munitions, ammunitions, machinery, fuel, oil etc. delivered to cer-

tain sea ports in Japan; November 11, 1941.

10. Exh. 873—Telegram from the Chief of the Third Air Group at Nanking in November 1941 to the Vice-Minister of War and Vice-Chief of the General Staff stating that the Chief of Aerial Group leave Nanking on the 15th for the Southern part of Indo-China.
11. (*a*) Exh. 874—The monthly war time report dated November 1941, the documents state that the corps is preparing whole-heartedly for the military preparation against Hongkong.

    (*b*) Exh. 875—Top Secret Telegram from O. TASUKADA, Chief of Staff of Southern Army to H. KIMURA, Assistant Minister of War.

    Exh. 876—Military Administrative measures to be taken in the event of Japan's Participation in War dated 12 November 1941.

    Exh. 876-A—Excerpt from Exh. 876.

    Exh. 877—Details of the Execution of Administration in the Southern occupied territories.

    Exh. 878—Measures to be taken towards Foreign Countries re the Outline for the Execution of National Policies which was decided at the Council in the presence of the Emperor held on 5 November; "Liaison Conference Decision, 13 November 1941".
12. Exh. 809—A research report entitled 'Japan's Decision to Fight' dated December 1, 1945 prepared by Allied Translators by the command of General MacArthur. The prosecution claims that this document would show that the Japanese Government had positively committed itself to the waging of war against United States, Great Britain and the Netherlands by the end of October 1941. It may be admissible in evidence under the Charter but I do not attach to it any evidence in value.
13. Exh. 879—Ministerial Address of the accused TOJO to the 78th Session of the Imperial Diet on 16 December, 1941 in which he expressed his admiration for the great prowess shown by the officers and the men of the Army and Navy.
14. Exh. 880—A chart prepared by the first Demobilization Bureau showing the total strength of the Japanese Army from lst January 1930 to lst January 1944. The Chart shows big changes in 1938 and 1943.

Items 2 to 14 do not advance the case of the prosecution so far as the question under out present consideration is concerned. These relate to a period when Japan had every reason to apprehend trouble ahead and it would have been criminal on the part of her statesmen and politicians not to have foreseen the same. The whole world was nervously preparing for the apprehended

eventuality.

Much emphasis was laid by the prosecution on the contents of the Article referred to in item 1 above.

The pamphlet says:

"Japan faces on her north the Soviet Union, which with an ambition to sovietize the world, has organized an immense army and has completed her national defense all along her boundary lines. On her west she has the Chiang Kai-shek political power with a violent policy of resistance against her. Moreover, she is surrounded by the powerful navies of the United States and Great Britain. As an island Empire she is narrowly limited in her land area and woefully lacking in natural resources. Under such conditions, it is simply inevitable that Japan has to face great difficulties in organizing a plan which makes for the efficiency of her national defense.

"The Manchurian Incident has brought about a great change in the condition of national defense. The situation has been changed by the present Incident. Under the new situation, the line of national defense has been shifted several hundred miles further from the national boundary and extended to Central China by way of North Manchuria and North China, a distance of more than a thousand miles. In the face of this, it had become a matter of supreme importance for Japan to expand and strengthen all aspects of her national power to hold this line of defense effectively for the establishment of permanent peace in the Orient in co-operation with Manchukuo and North and Central China. .... By the national general mobilization, Japan aims to control and operate her entire personal and material resources to the fullest possible extent in order to enable her to demonstrate her national power most effectively for her national defense in time of emergency. In other words, she seeks to mobilize her national vitality to the greatest possible extent, in order to enable her to supply her army and navy with the vast amount of war materials they require in time of war to secure the smooth economic operation for the stability of national life, and at the same time to demoralize the enemy on the battlefield as well as on the economic and propaganda fronts. Military success in the future depends chiefly upon superiority to the enemy in the ability to fight by mobilizing systematically and effectively the synthetic national strength as long as war continues. By synthetic national strength, we mean the national strength consisting of all elements, tangible and intangible, of personal and material resources. The national general mobilization calls for the concentration of these elements most systematically to one constant synthetic national power for an effective demonstration in order to gain the final victory in a war... The source of fighting strength is the people and their spiritual power. From this consideration, it is obvious that the mobilization of spiritual power is more important than any other element of national strength. All possible efforts, therefore, must be made by mobilizing educational institutions and propaganda organs for a unified campaign to intensify the fighting spirit of the people, which will enable them to endure any amount of hardship and difficulties.

"Another important matter in the scheme of general mobilization is the

acquisition of vast quantities of necessary materials to supply the army and the navy. In time of war, all kinds of materials will be consumed in great quantities due to the vast expansion of fighting equipment in keeping with the progress of science. In order to satisfy this demand, the government must collect and prepare them for use speedily in the shortest time possible. A shortage of war materials must be made by acquiring them from abroad in good time. On the other hand, the government must make efforts to increase the production of such materials at home and have them in store to provide for any possible contingency. It may be necessary for the government to limit or prohibit the consumption of certain war materials for ordinary purpose or to encourage the people to use substitutes for them.

"In order to facilitate such activities, it is necessary to unify all producing enterprises and organs of exports and imports for a systematic production and distribution. For this purpose, the government will have to issue various regulations by Imperial Ordinances. It will also take necessary steps to prevent a rise in prices of commodities and may go the length, if necessary, of fixing official prices on such commodities. . . . .

"In time of war, a speedy transportation of men, munitions and provisions to the war fronts is essential for gaining a victory. This calls for the unified operation of all transportation facilities on land and sea to the greatest possible extent. . . . .

"Mobilization of the scientific elements of national strength is another important item in the scheme of general mobilization. . . . For this purpose the government will make special arrangements for enabling scientists and scientific institutions to raise their efficiency to the highest possible point.

"In order to facilitate the national general mobilization, the government will accurately collect all kinds of information at home and abroad as a part of the mobilization of information propaganda and guard services. It also will launch a propaganda campaign for mobilization of the national spirit and the unification of national opinion for the execution of war. As a part of the propaganda, efforts will be made to create in foreign countries favourably public opinion for Japan . . . .

"It is important for the government to make necessary preparations in time of peace to provide against any possible contingency necessitating the general mobilization. The government, therefore, must be equipped with far-reaching plans to raise efficiency promptly in production of necessary materials, their transportation and other activities to facilitate the general mobilization.

"The Cabinet first will draw a rough draft on the basis of which all departments of the government will make their respective plans and preparations for the general mobilization. Parties engaged in foreign trade and those engaged in enterprises for producing and distributing commodities must conform to the plans prepared by the departments of the government. The conduct of the parties concerned will be controlled by the regulation to be promulgated by Imperial ordinances or to be brought into existence by revising existing law. . . ." (pp. 8,792-8,800)

I have given the contents *in extenso* for fear of unwittingly excluding any offending passage from it. In my judgment the article gives a *bona fide* account of the then prevailing circumstances and certainly discloses that amount of awareness which should be expected of any responsible statesman. It certainly discloses an apprehension of a future war and of its terrible character. It clearly indicates its author's conception of '*la guerre totale*' and his view of the preparedness required for such emergency. But I do not see why this should lead us to an inference of preparation for any aggressive war as alleged in this case.

The prosecution invites our attention to the Cabinet decision of 7 August 1936 (Exh. 216) adopting as basic principle of national policy "intensification of national defense of Japan and Manchukuo in order to eradicate the Soviet menace in the North and *at the same time to prepare against Britain and America*; and realization of close co-operation among Japan, Manchukuo and China for economic development". This, according to the Prosecution, is the ultimate objective of the conspiracy.

Reference to preparation against Britain and America in 1936 does not necessarily indicate any aggressive preparation. It is very easy to impute particular motives to those controlling the foreign policy of any state. But such responsible statesmen are not always actuated by mere sinister design. Their functions involve certain responsibility to the people of their nation; and we can presume that in deciding their policy the requirements and difficulties of their people as understood by them are allowed to operate as the determining factors. As I have noticed elsewhere Japan always had one imperious and never-ceasing national problem to solve: The problem of providing additional means of livelihood, on a rising standard of living, year by year, for a rapid increase in her population. This problem was the ceaseless concern of Japanese statesmanship, but in different phases of Japanese policy a solution was sought on different lines. For nearly a decade since the time of the Washington Conference such a solution was sought by the tactics of commercial expansion and political good neighbourliness. Unfortunately Sino-Japanese conflict which started from the Mukden Incident produced a world repercussion highly injurious to Japan. The statesmen who in 1936 came to shoulder the responsibility of managing the affairs of Japan might or might not have any hand in the creation of this difficulty. But, all the same, once that difficulty was created, they had to face it. "Once such steps were taken, it was no longer easy for the Japanese Government to slip back unobstrusively into the SHIDEHARA policy, even if the militarists and the terrorists had covertly signified their assent. For the 'ignorant improvidence' of Japanese militarism had vastly aggravated the difficulties which the world economic depression had already put in the way of the intelligent management of Japanese affairs. When the Japanese militarists delivered their stroke at Mukden, they did not foresee—or did not pause to consider—that their action would have profound effects beyond the limits of Manchuria and the frontiers of China and in regions remote altogether from the Far East. World wide repercussions actually followed and were bound to follow." "The sense of international security to

which the Japanese operations in Manchuria dealt so damaging a blow, was the political expression of a state of mind which took the shape of credit in the transaction of the international finance. Through this underlying but intimate connection between credit and security the Japanese coup in Manchuria gave a formidable impulsion to the progress of the world economic depression and thus promoted effectively, if indirectly, the decline of Japan's foreign trade, not only with Manchuria or with intra-mural China, but with the world at large."

"As for the eventual political consequences of the Japanese outbreak, the possible degree of their gravity was foreshadowed in the note which the American Secretary of State, Mr. Stimson addressed to the Chinese and Japanese Governments on the 7th January 1932, and again in the letter addressed by the same statesman to the American Senator Borah on the 24th December."

These two momentous state papers were considered, even at that time, as opening up the posssibility of "the great deeps of international passion in the Pacific being broken up and the Japanese Empire and the four English speaking countries with sea-boards on the Pacific being launched again into a current of naval competition and political hostility", with the consequence of "the formidable spectre which statesmanship had sought to exercise" stalking abroad once more: "The Pacific Ocean might be destined, after all, to become the arena in which the opposing forces of unprecedently Great Powers were to meet in mortal combat, with the mastery of the world as the guerdon for the delivery of 'the knock-out blow'."

This is what the Surveyor of International Affairs of 1931 says. If this could be foreseen by him in 1931, I do not see why in 1936 a Japanese statesman should not be in a position to see this possibility and allow his policy to be determined accordingly. I do not see why I should assume that he was preparing Japan for an aggressive future war against these countries instead of preparing only for the contingency of such a clash as might legitimately be apprehended.

The never-ceasing national problem of Japan rendered it inevitable, at least to the then statesmen of Japan, that the Japanese Government and people must set themselves to provide for Japan's rankly growing population by acquiring for Japan an increasing share in an increasing aggregate turnover of international trade. But they could not altogether ignore the fact that their peaceful pursuit in this respect had been frustrated, may be, by "inhuman forces beyond human control"; but, rightly or wrongly, they ascribed this frustration also to human forces beyond their control. The four English speaking countries with sea-boards on the Pacific did not appear to them to be sympathetic with their peaceful aspirations. When Japan came on the field there had already been the Anglo-American economic world order leaving no space for expansion to any new power. From its very nature this did not admit of any sharing with others. Yet "it was almost inevitable that the British feat of imposing a British Economic system upon the world should sooner or later evoke energetic reactions of a disruptive tendency—partly in negative resistance to the British pressure and partly in positive emulation of the British

achievement". In fact an endeavour on the part of any other party to take steps to hold its own against the dominant partner in the system in order to secure for itself some share of the freedom and the wealth and the power which were at once the cause and the effect of the Anglo-British hegemony, was logically fated to defeat its own ends; "for the coveted freedom and wealth and power of the classic British industrial revolutionists had depended on their having a free hand for their ability and a world-wide field, and these were two assets which could not be partitioned without being destroyed". Those who enjoyed these assets would not readily agree to their partition. Even peaceful pursuit on the part of a new aspirant would thus involve some apprehension of opposition from these privileged participants, specially when "their whole conception of the evolution of human affairs from a distant past towards a distant future" was "that the future belonged to them only" and that others had "fulfilled their destined function in history by ministering to the divinely appointed advancement" of them. The statesmen of Japan kept this possibility in view and all that we find in Exhibit 216 is only indicative of this foresight. I cannot read into it any aggressive preparedness.

This need not indicate anything more than their preparedness for an "enterprise of sustained industrial and commercial expansion", "in emulation of the British achievement". Only they seem to have been alive to the fact that they shall have to operate in a field already occupied. Yet in the policy chalked out we need not read any plan of deliberate frontal attack on any political position. Like the British statesmanship, they too might reasonably have expected to turn the political position by the automatic progress of sweeping economic advance. Only they could not be bold enough to have their political flank exposed. Yet the policy adopted does not exclude the possibility on their part of a "tacit assumption that a certain minimum measure of world wide political good sense and good will and moderation could yet be taken for granted".

It cannot, however, be denied that the evidence adduced sufficiently establishes the fact that Japan was keeping herself prepared for war. It has been contended by the prosecution that this, taken with the fact that Japan ultimately started aggressive war, should lead to the inference that *the preparation itself was for such aggressive act*. In order to emphasize the enormity of aggression planned the prosecution lays stress on the comprehensiveness of the preparation and condemns it as the wicked design for a totalitarian aggressive war.

I am afraid I cannot accept this contention of the prosecution. The First World War to End War, it seems , instead of ending war succeeded in raising a world-wide apprehension of a future war of attrition in the mind of every nation. The terrible transformation in the character of war which had been brought about by the introduction of the new driving powers of industrialism and of democracy took our generation by surprise in 1914. No doubt it is the American Civil War of 1861-65 which marks the new epoch in the history of war because it saw the application of both the two new driving forces—democracy and industrialism—to an ancient international evil.

In consequence of the introduction of the formidable new weapons which democracy and industrialism had forged, war had become a more terrible thing by the year 1865, when the American Civil War stopped, that it had been in 1861, when the Civil War began. As has been observed by Professor Toynbee, "since then war has no longer been 'the sport of kings'; it has been the *absorbing business* of whole nations.... If the experience of the wars of 1861-71 had evoked an anti-war movement of anything like the same intensity and persistence as the anti-slavery movement which had been set on foot before the end of the Eighteenth Century, then our position today might perhaps have been more favourable than it actually is."

The 'totalitarian' kind of warfare, which is the antithesis of the Eighteenth Century 'sport of kings' both in its spirit and in its social consequences, is the only kind of warfare that is open to us any longer to wage now, that the ancient institution of war has received a fresh and unprecedentedly powerful impetus from the impact of the new social forces of democracy and industrialism.

The totalitarian character of war thus is not the result of any design by any particular individual or group of individuals. It is the modern character of war itself.

This is the enormity into which the evil of warfare has been fatally transformed by the combined impact of democracy and industrialism. Democracy has turned "the sport of kings" into the wars of Nationality passionately. Industrialism has converted the entire material wealth of a belligerent community into *materiel de guerre*, and has at the same time enabled and compelled a belligerent government to mobilize the entire working population of the belligerent country. The men and women who produce the supplies and munitions in the interior are as indispensable for the waging of war, and as strongly imbued with the spirit of it, as the soldiers at the front.

The picture of the future war that would be fought perhaps in the very near future and the fear that such war as imminent, seized every mind. Every nation was more or less preparing itself for the same.

In France on the 7th March 1927, a drastic bill was voted by the Chamber of Deputies unanimously, with the sole exception of the communist members, providing for the conscription of wealth, intellect and manpower. The bill passed in the Senate on 17 February 1928. The presuppositions on which it was based were elucidated and endorsed by the Senate's *rapporteur* on the bill, Monsieur Klotz: "The conception of *la guerre totale*, which is the formula that we have to envisage in the future and the formula to which the organization that we contemplate must response (and on this point your Army Commission is in complete agreement with the authors of the bill) — this conception condemns the people who tomorrow may find themselves engaged in a fresh conflict to find that their efforts can no longer be limited to the action of armed masses, but that they must be ready to throw into the battle, in order to snatch victory out of it, the totality of their forces and their resources. Their duty is to attain superiority in means of warfare up to the maximum degree; and, in pressing this aim, they will never be able to allow themselves to

relax, since none can feel sure that he is strong enough so long as he has the possibility of being still stronger than he is already".

We may also refer to the elaborate American economic mobilization since 1920. Since then elaborate planning had been undertaken with the objective of "an adequate, co-ordinated, integrated programme of *wartime* procurement adapted to the American system of government and industry, which will function effectively *in case of war*". The difficulties involved and the methods which would be used to combat them were clearly outlined.

While war procurement is ordinarily a military function, the modern concept of war, as primarily a battle between industrial societies, makes adequate procurement a task for the whole nation. Any organization of procurement methods cannot ignore their relation to the problem of efficiently producing materials and transporting products from assembly lines to battle fronts with the least possible dislocation of the nations' economy. Any prudent organizer would remember that the regular procurement technique may break down in practice when current exigencies necessitate a departure and would try to provide against such breakdown.

The planning now adopted by many nations was with the object of making possible the early introduction of the centralized type of control that developed only late in the First World War, and was designed to eliminate the disastrous inter-agency competition which accounted then for skyrocketing prices, congestion of orders with certain manufacturers, and an over-abundance of materials for some agencies with a dearth for others. During the first war the few who did think of preparedness, thought of it in terms of men and not of materials. Resources had not been catalogued; the army lacked knowledge of its own requirements, and there were no plans for initiating the necessary production. Keeping in view these defects every nation was devoting its resources to economic mobilization similar to that adapted by Japan.

War procurement injects into the economy sudden demands for machines and instruments of war. Preparation for modern warfare is to a large extent a problem of integrating the economy so that no groups may be working at cross purposes. Achievement of adequate economic mobilization presupposes a co-ordinated management, and must mind as its essential parts (1) Procurement, (2) Priority Control, (3) Price Control including the control of speculations, hoarding, and trade practices, and (4) Commandeering and the taking of industrial properties. All these form essential parts of economic mobilization.

Evidence adduced in the case does not carry us beyond the picture of such mobilization on the part of Japan, following the lesson which it, along with other warring nations, learned from the necessities of modern warfare in all its complexity affecting them during the First World War. It shows no doubt a preparation for war but keeping in view the circumstances stated above and remembering that similar preparation was being made more or less everywhere throughout the world, I do not see any reason why this should drive us to hold that Japan was *preparing for any aggressive war*. The utmost that can be said on the evidence is that Japan shared the same fear and with character-

istic clear-sightedness envisaged the character of future warfare and took what steps she could in order to be prepared for it. They realized that another war, when it would come, would engulf everything and everybody, and they, like many other countries, were keeping themselves ready for such a contingency. At least the evidence of preparation adduced in the case need not carry us further.

The very character of the international life led to these consequences.

The concentration of national efforts on attaining a maximum of power necessary led to an increasing control of the state over the individual politically, as well as economically. Such a situation could not fail to have a profound effect on inter-state relations. Its immediate consequences were an unparalled armament race, increasing mutual distrust and the constant danger of a major war.

The prosecution laid much stress on a statement in Appendix 3 of Exhibit No. 841 wherein the year 1942 is referred to as the first year of war. The prosecution contends that this shows that the authors of the plan were preparing for a definite war designed by themselves and that their design was to start this war by the end of 1941. This coupled with the fact that war, as a matter of fact, was started by them in December 1941 completely establishes that this plan was a step in preparation for this war started by them in December 1941. I am afraid, I am unable to accept this contention. Characterization of 1942 as the first year of war in the five-year plan refers to, in my mind, a hypothetical war and this has been made clear by the defense witness OKADA whose evidence I have no reason to disbelieve. There is ample evidence on the record that Japan was trying to avoid clash with America and always showed her hesitation to come to conflict with Great Britain and America at the invitation of Germany.

I have discussed this evidence in detail in connection with the case made in Section 9, Appendix A of the indictment, It would suffice to say here that Japan was really driven to take action against these Powers by the circumstances then created by them. She did not see any other way out of the situation created by these powers. She no doubt made preparations keeping in view Great Britain and America as hypothetical enemies and was trying to keep herself in complete preparedness for an eventuality of ultimate hostility with them. But I cannot accept the view that this preparedness was for any aggressive hostility.

OVER-ALL CONSPIRACY

THIRD STAGE

THE PREPARATION OF JAPAN

FOR

AGGRESSIVE WAR

INTERNALLY AND BY ALLIANCE

WITH

THE AXIS POWERS

* * *

ALLIANCE WITH THE AXIS POWERS

Mr. Tavenner opened the case laid in Section 7 of the Appendix dealing with collaboration between Japan, Germany and Italy. Mr. Tavenner stated: "For the purpose of proving that the accused participated in the formulation and execution of the common plan or conspiracy charged, and for the purpose of demonstrating the effective and indispensable contribution made by leaders in Germany and Italy in the attainment of the objects of the conspiracy, we shall introduce evidence, much of which has hitherto been secret, regarding clandestine negotiations for the conclusion of various treaties and collaboration between the participating powers under these treaties. This evidence will show that in spite of the distrust that each Axis power had for the others and occasional differences that arose among them by reason of immediate conflicting interests, Japan, on the one hand, sought and obtained from the alliance with her Axis partners tremendous military strength and political bargaining power, and that Germany and Italy, on the other hand, likewise profited substantially thereby. The manner in which this military strength and political bargaining power was used in furtherance of the objects of the conspiracy will unfold as the evidence progresses. This evidence will prove both the fact of conspiracy and that the accused were parties to it".

The learned Counsel offered to deal with the facts relating to

1. The Anti-Comintern Pact of November 25, 1936 (Exh. 36), and the Secret Agreement (Exh. 480).
2. The Tri-Partite Pact,
   (*a*) Negotiations for a Tri-Partite Military Alliance.
3. Collaboration between Japan, Germany and Italy under the provisions of the Tri-Partite Pact.

Regarding the Anti-Comintern Pact and secret treaties Mr. Tavenner observed *inter alia* as follows:

1. (*a*) Kwantung Army in early part of 1936 was restrained in its westward advance from Manchuria into Mongolia by the danger of war with the Soviet Union.
   (*b*) Japan's expansion into the remainders of China also was checked as the result of the refusal of the Chinese war lords in North China to desert the National Chinese Government.
   (*c*) Confronted with this situation Japan entered into negotiations for a military alliance with Germany.
2. (*a*) Negotiations began in June, 1935, the date of the so-called Ho-Umezu Agreement. (Exh. 477, 478, 479)
   (*b*) These negotiations were conducted through military channels because the subject of negotiations was a strictly military matter.
   (*c*) In April 1936, shortly after conclusion of the Mongolian U. S. S. R. pact of mutual assistance, the conduct of the negotiations was transferred from the accused OSHIMA, the military attache to Germany, to the foreign ministry.
3. (*a*) The pact was concluded on 25th November, 1936, and, on its

face, was directed against the activities of the communist international. (Exh. 36)

(*b*) At the same time a secret agreement was entered into between Japan and Germany. (Exh. 480)

4. The anti-Comintern pact was designated and intended to strengthen the hand of Japan in China, to create impression in all countries that the signatories constituted a united front, and to afford an excuse for continued military aggression.
5. The pact was approved at the meeting of the Privy Council and at this meeting the accused HIROTA, NAGANO, TOGO and HIRANUMA were present. (Exh. 85)
6. On 4th February 1938 Hitler assumed supreme command of military and naval forces of Germany and shortly thereafter Germany withdrew her military advisers from China, stopped delivery of war materials to China and recognized the state of Manchukuo. (Exh. 591, 592, 593, 594, 595)
7. The German army and the Japanese army in September or October 1938 agreed to furnish each other with the intelligence about the Russian military. (Exh. 487, 488, 489, and 492)
8. Subsequently Italy, Manchukuo, Hungary and Spain were admitted as participants to the anti-Comintern pact and on 25th November 1941 the pact was renewed for an additional period of five years. (Exh. 491, 492, 493, 494, 495)
9. On 22nd February 1939 the scope of the pact was extended and a general policy was adopted with regard to methods of collaboration in economic and financial relations.

Coming to the Tri-partite Pact Mr. Tavenner made the following observations:

1. (*a*) Shortly after the reorientation of Germany's policy with respect to the Sino-Japanese conflict VON RIBBENTROP, then German Foreign Minister, proposed a German-Japanese military alliance aimed at the entire world. (Exh. 497)

   (*b*) Accused OSHIMA and SHIRATORI were sent to Rome for the purpose of inducing MUSSOLINI to unite in the proposed alliance. (Exh. 497 and 498)

   (*c*) In January 1939 MUSSOLINI indicated his approval.
2. (*a*) OSHIMA and SHIRATORI desired a military alliance without reservation.

   (*b*) To this the army in Japan was agreeable but the navy was not.

   (*c*) The HIRANUMA Cabinet reached a compromise which contemplated that there should be reserved to each of the signatories the right to determine whether an emergency had occurred which required the treaty to be put into operation.

   (*d*) The Ito Commission was sent to Berlin and Rome with this modified proposal.

(*e*) OSHIMA and SHIRATORI refused to follow the direction delivered by the Ito Commission.

(*f*) OSHIMA and SHIRATORI wired the Japanese Foreign office to accept the pact of alliance without reservation, threatening that otherwise they would resign as ambassador in Germany and Italy respectively. (Exh. 502)

(*g*) (*i*) The Foreign Ministry by wire to OSHIMA modified its position to a mere declaration that Japan did not want to give more than non-military aid if the country concerned was other than Russia. (Exh. 502)

(*ii*) On May 4, 1939 Premier HIRANUMA in a declaration addressed to Hitler stated that Japan was resolved to furnish military aid to Germany and Italy in case they were attacked by any power even if such power be other than Russia. But that in view of Japan's existing situation such support could not be given until a change of circumstances would make it possible. (Exh. 503, 504)

(*h*) (*i*) While the negotiations were thus going on, Germany and the Soviet Union concluded a non-aggression pact on 23rd of August, 1939.

(*ii*) This was considered in Japan as constituting a violation of secret agreement attached to the anti-Comintern Pact. (Exh. 486-L, 506)

(*iii*) The repercussion in Japan was so great that the HIRANUMA Cabinet immediately fell.

(*iv*) Ambassadors OSHIMA and SHIRATORI resigned upon the failure to conclude the Tri-partite military alliance.

In connection with this Tri-partite Pact Mr. Tavenner laid stress on the following matters:

1. In September 1939 Ambassador OSHIMA expressed the view of HITLER that Japan, especially the navy, was ready for an advance in South East Asia, an action which HITLER himself had proposed.
2. In March 1940 there was an apparent stiffening of political attitude by England and America arising out of protest against the establishment of the WANG CHING-WEI Government in China in March 1940. (p. 5,859)
3. In opposition to the YONAI-ARITA Government efforts to reach an agreement with Britain and America, Germany endeavoured to excite Japan's feeling against America by influencing the press and the leading political personalities and by representing that a conflict between America and Japan in the long run was inevitable. (Exh. 515, 516)

4. (*a*) After Germany's invasion of the Netherlands, Japan demonstrated concern regarding Germany's intention with respect to the Netherlands East Indies. (Exh. 517, 518, 519, 525)

(*b*) On June 19, 1940 two days after the fall of France, Japan expressed similar concern regarding French Indo-China and requested Germany to accord Japan a free hand in these areas. (Exh. 520)

(*c*) The German ambassador to Japan recommended to his Government the annexation of French Indo-China by Japan on the grounds

(*i*) that it would increase the chance for an early end of the China conflict; (Exh. 523)

(*ii*) that it would intensify the difference between Japan and the Anglo Saxon powers;

(*iii*) that it would result in the severe blow to the YONAI Cabinet and would probably bring about its replacement by a pro-German Cabinet.

5. (*a*) On the same day (19 June, 1940) negotiations for Japanese-German alliance were renewed by KURUSU, Japanese ambassador to Germany.

(*b*) He represented that by close co-operation between Japan and Germany in the development of heavy industry Japan would gain freedom of action toward the United States.

(*c*) He further represented that he and the accused TOGO, then ambassador to Russia were feverishly working for the improvement of Russo-Japanese relations, it having become clear in Japan that the future of the nation lay in the South, wherefor enemy in the North must be made a friend.

(*d*) The German Ambassador intimated that Germany would have no objection to Japanese action in Indo-China on condition that Japan obligate herself to tie up America in the Pacific area, (for instance, by promise to attack the Philippine or Hawaii in case of American participation in war against Germany).

6. (*a*) On 12 July 1940 a joint conference of the Japanese army, navy and foreign office officials was held for the purpose of intensifying efforts to procure a military alliance between Japan, Germany and Italy. (Exh. 527)

(*b*) The conference was reconvened on 16 July, 1940 for the purpose of obtaining the opinion of the Army and the Navy and the adoption of a unified policy with regard to the draft of the proposed pact. (Exh. 528)

7. (*a*) After several attempts to bring about the downfall of YONAI Cabinet had proved unsuccessful, the military resorted to

the device of having the War Minister resign. General HATA, the War Minister, resigned on 16 July 1940. The three military officers were unwilling to recommend a successor. Premier YONAI therefore was obliged to resign. (Exh. 532, 533)

(*b*) "The army considered that delay in the negotiations with Germany and Italy would be fatal to Japan, that the YONAI Cabinet was not feasible in carrying out satisfactorily the foreign policy, and that a cabinet change was necessary to face the grave international situation." (Exh. 532)

(*c*) "MATSUOKA was appointed Foreign Minister. The retiring War Minister General HATA secretly recommended to the Emperor the appointment of the accused TOJO as War Minister." (Exh. 535, 537, 538, 539)

8. In a meeting on 26th July 1940 the new Cabinet outlined Japan's *basic national policy*. (Exh. 537, 538 539)

(*a*) "The fundamental aim of the basic policy was determined to lie in the establishment of world's peace in accordance with the lofty idea of HAKKO ICHIU on which the Empire was founded." (Exh. 529, 541)

(*b*) It is directed toward the construction of a new order of Greater East Asia built upon a firm solidarity of Japan, Manchukuo and China. (Exh. 544)

(*c*) For the realization of the national policy the total strength of the nation must be mobilized.

(*d*) The armament should be so increased as to insure the execution of national policy on the basis of the states' structure for national defense through manifestation of the nations total strength.

(*e*) War Minister TOJO entered upon a program by which he sought to promote anti-British feeling among the Japanese.

(*f*) On 23rd August 1940 Foreign Minister MATSUOKA announced the recall of numerous ambassadors, ministers, councillors and consuls and declared that this action had become necessary in order to make secure the new foreign policy introduced by him. In September 1946 a four-minister conference was held in which the basic principle was declared to be the making of a fundamental agreement among the three countries in order that they shall mutually co-operate by all possible means in the establishment of a new order in Europe and Asia. Concerning the possible use of armed force against Great Britain and the United States Japan is to make a decision independently. (Exh. 541)

9. The Tri-partite Pact was concluded on 27 September 1940. (Exh. 43, 550, 551, 552, 553, 555, 557, 558, 559)

Mr. Tavenner next emphasized the instances of collaboration between

Japan, Germany and Italy under the provisions of the Tri-partite Pact. He proposed to adduce evidence to show

> that the accused, acting through their leaders and in full collaboration with their Axis Partner, unified the government and nation behind the Tri-partite Pact and by their declaration and conduct put into motion forces designed to accomplish the objects of the conspiracy charged in the indictment.

For this purpose he offered to establish the following matters:

1. (*a*) Activist circles in Japan, as early as January 1941, demanded an attack on Singapore as the key of the British position in the West Pacific Ocean; (Exh. 562, 569)
   (*b*) In November 1940, Ambassador KURUSU had declared that Sino-Japanese and Russo-Japanese agreements were required as a pre-requisite for a Japanese advance through the region south of China, including Siam, without the use of which Singapore could not be successfully attacked;
   (*c*) Such an attack was designed to give Japan a free hand in establishing her Greater East Asia Policy in China and in the Pacific and Indian Oceans. (Exh. 588)
   (*d*) The capture of Singapore by Japan was also the fulfilment of Japan's desire to aid Germany in bringing the war against England to a speedy close. (Exh. 573, 572, 574)
   (*e*) In February 1941 in a conference with the Secretary of State Ambassador OSHIMA expressed the view that in order to seize Singapore it was first necessary to take Hongkong. (Exh. 570)
2. (*a*) On 22 June 1941, Germany invaded Russia.
   (*b*) At the Imperial conference on 2 July 1941 a resolution was adopted which had the effect of postponing definite action on Germany's request that an attack be made on the Soviet Union from the East.
3. Cultural and trade agreements paralleled political and military collaboration between the Axis Powers. Cultural treaties were concluded between Germany and Japan on 25 November 1938 and Italy and Japan on 23 March 1939. (Exh. 37, 39, 598)
4. On 18 JANUARY 1942 the Japanese, German and Italian armed forces concluded a military agreement in the spirit of the Tri-partite Pact and provided for operational co-ordination among them.

In summing up its case on this phase the prosecution observed: "The preparation of her armed forces, her economy and her people for aggressive war was only one side of Japan's blueprint for war in furtherance of her policy of aggressive expansion. At the same time as she was gearing the nation internally for war, Japan, in accordance with her plans, also prepared for war by entering into alliances with the Axis powers, principally Germany, to provide herself with allies who would aid her directly or indirectly, diplomatical-

ly or militarily, as the situation might require, in her program of expansion. Since with the decision of August 7, 1936, the conspirators had finally accomplished their mission of making their conspiracy the national policy of Japan, there was no longer any important internal opposition, and the only restraint on Japan's expansion was that which came from foreign powers. As already pointed out, this opposition could come from two sources, the Soviet Union and the Western Powers, who had interests in China and in the area involved in the advance to the south.

"The more immediate of the two obstacles to expansion was the Soviet Union. The Soviet Union presented a real dilemma for the conspirators and their plans. On the one hand, the Soviet Union was itself an object of the conspiracy of aggression.... On the other hand, even if the Soviet Union had itself not been an object of Japan's aggression, it was a serious obstacle to Japan's movement to the south.... For both of these reasons, as early as 1932 war with the Soviet Union was considered unavoidable.....

"If the Soviet Union could be restrained by an alliance of Japan with a third power from entering into the conflict to assist China by being faced, if she did enter, with a war with another powerful enemy on another front, the better solution would be to initiate in the first instance the aggressive action against China. This was the solution finally adopted. The plan of August 7, 1936, while electing to move to the south, also recognized that the European political situation had great influence on East Asia and that Japan must exert its every effort to bring European powers to its support, especially in restraining the Soviet Union. To accomplish this end the European nation which Japan chose as her military ally because of its political strength and bargaining power was Germany, a nation then engaged in a program of military preparation for aggressive action in Europe."

The plan of August 7, 1936 referred to in the above extract from the prosecution summation is Exhibit 704 in this case. The prosecution names it to be the "top secret decision of the conference of the four ministers: the Prime Minister, Foreign Minister, War Minister, and Navy Minister of August 7, 1936 under the title of 'Foreign Policy of the Empire'". The prosecution referred to only a portion of this document under the title "Most Important Trends of the Policy", which stood as follows: "But at present taking into consideration today's state of the relation between Japan and the Soviet Union, it is rendered the important point in the practical scheme for China, first to make the North China immediately a special district of pro-Japan-and-Manchukuo and anti-Communism, to obtain resources for national defense and to extend traffic establishments as well as to make whole China anti-Soviet and pro-Japanese. Measures which should be carried out practically for the present shall be made up separately."

Exhibit 704 comprises six pages. I have carefully examined this entire document and have been confirmed in the views that I have already expressed while examining Exhibit 216 in connection with the question of general preparation for aggressive war.

As regards the particular passage referred to by the prosecution I shall presently indicate its harmless character while noticing Japan's change of attitude toward Communism.

The policy of expansion, even of aggressive expansion, is not the same thing as conspiracy. Anything done, any measure adopted, 'even in furtherance of her policy of aggressive expansion', would not necessarily point to any conspiracy; much less the enormous conspiracy alleged in the indictment.

The Anti-Comintern Pact in question or what the parties named as "Agreement against the Third International", stood as follows:

> "The Government of the German Reich and the Imperial Japanese Government, recognizing that the aim of the Communist International, known as the Comintern, is to disintegrate and subdue existing states by all the means at its command; convinced that the toleration of interference by the Communist International in the internal affairs of the nations not only endangers their internal peace and social well-being, but is also a menace to the peace of the world; desirous of co-operating in the defense against Communist subversive activities; have agreed as follows:
>
> *Article I*
>
> The High Contracting States agree to inform one another of the activities of the Communist International, to consult with one another on the necessary preventive measures, and to carry these through in close collaboration.
>
> *Article II*
>
> The High Contracting Parties will jointly invite third states whose internal peace is threatened by the subversive activities of the Communist International to adopt defensive measures in the spirit of this agreement or to take part in the present agreement.
>
> *Article III*
>
> The German as well as the Japanese text of the present agreement is to be deemed the original text. It comes into force on the day of signature and shall remain in force for a period of five years. Before the expiry of this period the High Contracting Parties will come to an understanding over the further method of their co-operation."

The accessory Protocol to the Pact was in the following terms: "On the occasion of signing today of the Pact against the Communist International, the undersigned Envoys plenipotentiary agreed as follows:

(*a*) The authorities of the two contracting parties will closely co-operate with each other as regards the exchange of information re-

lating to the activities of the Communist International and the enlightenment and defense measures against the Communist International.

(*b*) The authorities of the two contracting parties will take drastic steps, within the bounds of the existing law, in dealing with persons who, at home or abroad, directly or indirectly, are serving with the Communist International or foster its destructive activity.

(*c*) In order to facilitate the co-operation of the authorities of the two contracting parties, as provided in forementioned (*a*), a standing commission will be established. Other defense measures necessary for checking the destructive activities of the Communist International will be studied and discussed by the said Commission."

There is absolutely nothing in the Pact and the Protocol in support of the Prosecution case. The prosecution had to admit this. Its contention, however, was that there was a secret agreement contemporaneous with this Pact and it was this secret agreement which really mattered.

According to the prosecution "the Pact as signed and made known to the world was only a blind for the secret agreement entered into between Japan and Germany and attached to the Anti-Comintern Agreement". The contention of the Prosecution is that "the Pact was converted into a military alliance by the secret agreement together with the necessary protocol and the German assurance that its political treaties with the Soviet, such as the Rapallo Treaty of 1922 and the Neutrality Treaty of 1926, were not regarded as contradictory to the secret agreement and its obligations".

In his speech of the 28th November, Mr. Litvinov also attached sinister significance, not so much to the Pact, as to this secret agreement. He said:

"Well-informed people refuse to believe that in order to draw up the two short-tailed articles which have been published of the German-Japanese agreement, it was necessary to carry on negotiations throughout fifteen months, that these negotiations should necessarily have been entrusted to a Japanese general and a German super-diplomat, and that they should have been conducted amidst the greatest secrecy, and kept secret even from German and Japanese official diplomacy. It is not surprising that there are assumptions that the German-Japanese agreement is written in a special code in which anti-Communism means something entirely different from what is written in the dictionary and that people decipher this code in different ways..... As for the Japanese-German agreement which has been published, it really has no meaning whatsoever, for the simple reason that it is only a cover for another agreement which was simultaneously discussed and initialled, and probably also signed, and which was not published and is not intended for publication. I declare with a full sense of responsibility that it was precisely to the working out of this secret document, in which the word Communism is not even mentioned, that were devoted to the fifteen months of negotiations be-

tween the Japanese military attache and the German super-diplomat."

This secret agreement is Exhibit 480 before us. It runs as follows:

"SECRET ATTACHED AGREEMENT TO THE AGREEMENT AGAINST THE COMMUNIST INTERNATIONAL

"The Government of the German Reich

and

"The Imperial Japanese Government

"In the recognition that the Government of the Union of Soviet Socialist Republics is working toward the realization of the goal of the Communist International and wants to use its Army for this cause,

"In the conviction that this fact not only threatens the existence of the High Contracting States, but World Peace in general in a most serious way,

"Have agreed for the preservation of common interests as follows:

"ARTICLE I

"Should one of the High Contracting States become the object of an unprovoked attack or unprovoked threat of attack by the Union of Soviet Socialist Republics, the other High Contracting State obligates itself, not to carry out any measures which would, in their effect, be apt to relieve the position of the Union of Soviet Socialist Republics.

"Should the case, mentioned in Clause I occur, the High Contracting States will immediately consult which measures they will use to preserve their common interests.

"ARTICLE II

"The High Contracting States will during the validity of this agreement and without mutual assent conclude no political treaties with the Union of Soviet Socialist Republics which do not conform to the spirit of this agreement.

"ARTICLE III

"The German as well as the Japanese texts will be regarded as the originals of this agreement. It goes into force at the same time as the agreement against the Communist International which was signed today and has the same length of validity."

So in the secret agreement Japan and Germany agreed that if one of them were unprovokedly attacked or menaced by the Soviet Union, the other would not carry out any measure which would in effect relieve the position of the Soviet Union, and that both would immediately consult on measures to preserve their common interests. It also provided that during the five year period of the agreement the parties would not without mutual consent conclude political treaties with the Soviet Union which did not conform to the spirit of the agreement.

Certainly this secret agreement relates to the U. S. S. R. But I cannot say that it had anything aggressive in it.

The Pact was renewed in November 1941. The Defense says that at this renewal this secret agreement was abrogated: (Exh. 2, 694). This abrogation, of course, means nothing remembering that prior to this date, on 22 June 1941, Germany had already invaded Russia. Further, the Tri-partite Pact had already come into existence on 27 September 1940.

"Negotiations throughout fifteen months" referred to in the speech of Mr. Litvinov have now been placed before us.

It is difficult to find anything in this vast mass of evidence itself that would support the prosecution case.

The Defense summed up this evidence thus:

"Contrary to the prosecution's theory, all of the evidence clearly shows that both the pact and protocol were purely of a defensive nature against growth of the menace of communism, and its spread, and the growing armed pressure being exerted by the Soviet Union. These events affected the most vital interests of all nations, especially Japan and Germany. The 7th Congress of the Comintern held in Moscow in 1935, adopted a resolution designating Japan and Germany as its primary enemies. (Exh. 484, p. 22, 486)

"Of course it cannot be denied that an inseparable relation existed between Soviet Russia and the Comintern. The Japanese Government never lost sight of this fact, as indicated by Hirota in the Privy Council session (Exhibit 484, p. 22, 480). Indeed it was in view of the sinister nature of this relationship between the two organizations that the Japanese Government considered some international agreement against the Comintern necessary in order to combat the menace of its destructive activities.

"As to the Secret Protocol attached to the Anti-Comintern Pact, its content was also purely defensive, having in view only the contingency when one of the participants was unprovokedly attacked or menaced by Soviet Russia. It did, however, not stipulate a mutual assistance between the parties for that event, but only an obligation not to take any such measures as to relieve the situation of Soviet Russia. Hirota and Arita explained in the Privy Council how the Soviet Russia strengthened her armament by the Five Year Plan, and how Japan was feeling the heavy pressure put on her by the vastly increased Soviet Army in the Far East (Exhibit 484, pp. 22,480, 22,483).

"Hirota explained that the object of the pact was simply to make it an instrument for preparing for checking the armed pressure of the Soviet Union and Bolshevistic activities (Exhibit 484, p. 22,482). It is indeed a very far-fetched assertion on the part of the prosecution to claim that the Anti-Comintern Pact was converted into a military alliance by this secret agreement. We claim that nothing of a nature of military alliance is included in these agreements.

"Further statements of Hirota and Arita in the Privy Council proved the defensive and peaceful character of the agreements, leaving no room for any

doubt in this respect.

"Both declared that Japan should of course refrain from taking any positive measures which might aggravate relations with the Soviet Union, and would always do its utmost to maintain and promote amicable relations with Britain (Exh. 484, p. 22,482)."

Japan, during the first decade after Russian Revolution, had shown less concern with the dangers of "Russian Revolutionary propaganda and subversive action abroad" than had several of the democratic countries which were much further removed from possible source of infection. "Indeed in 1925, when the Communist danger was looming large to European eyes, when the U. S. S. R. was still ranked generally as an outcast, when Communist influence was at its height in China and when no 'Manchukuo' existed to serve as a buffer between Japan and Russia, the Japanese Government had made a treaty with Moscow re-establishing friendly relations; and the first Soviet envoy to Japan had been warmly received on his arrival in that country."

Several factors were responsible for the change of attitude which afterwards took place in Japan. The Survey of International Affairs 1936 gives an account of such factors thus:

"In the first place the governing power in Japan, which had in 1925 been in the hands of comparatively liberal statesmen, had passed in the meanwhile largely into the control of military class composed of men who were intensely nationalistic and to whom the Communist theory of the state was anathema. Under their influence and guidance Japan had assumed for herself a 'mission' in the Far East. This not only implied a demand to be treated as the 'sole stabilizing force' in that part of the world; it also meant that Japan saw herself as the divinely appointed "promulgator of a particular type of political and cultural ideas". In the fulfilment of this role she found herself faced with the formidable competition of Communist doctrines spreading among the Chinese and Mongolian peoples, whom she wished to bring under her influence. Finally Russia herself, the personification of Communism, had grown from a harmlessly weak neighbour to a powerful military rival whose power imposed restrictions upon Japanese expansionist aims that were intolerable to the Japanese militarists.

"Accordingly the rulers of Japan—who had been successful, so far as appearance went, in dealing with Communism as a *domestic* problem by means of drastic suppression and by diverting agrarian discontent into other political channels—had come to regard the spread of Communism on the East Asiatic mainland as Japan's principal *external* danger; and there is no question but that the repulse of this danger was the motive underlying a very large part of Japan's actions in Manchuria and North China from 1932 onwards. Co-operation against Communism had from the start been among the demands most vigorously pressed upon the Chinese Government; and when, after the breaking up of the Chinese Communist bloc in Kiangsi in 1935 and the dispersal of the 'Red' forces, there was a strong reinforcement of the Communist centres in the north-west of China in close proximity to Japan's projected line of advance, this served to increase Japanese apprehensions."

If this was the background, on the Japanese side of the picture, to the German-Japanese Anti-Comintern Pact, I do not see how we can accept the Prosecution theory of its conspiratorial character. The Surveyor says: "In the early days of the National-Socialist regime in Germany there were already signs of a *rapprochement* between Germany and Japan, who had a natural bond of union", not in any common aggressive design, but "in their common feeling of political isolation and their common fear and hatred of Bolshevism." We are not concerned here with its European repercussions or its repercussions in the Far East. These repercussions were mostly due to wild speculation concerning the secret agreement. "A persistent rumour obtained in Paris and London that the published agreement cloaked a secret understanding which included not only a military alliance but also a detailed arrangement for partitioning the isles in the neighbourhood of the Equator in the Pacific Ocean into German and Japanese spheres."

"According to one version of this report which was cabled to *The New York Times* by its correspondent in London, who described it as being based on 'reliable information', the effect of the reputed partition was to leave Japan in unchallenged possession of the ex-German territories for which she held a Mandate and to place Sumatra and Java in a German zone of influence subject to the safeguarding of the market for textiles which Japan enjoyed in those islands. Another report quoted in *L' Oeuvre* alleged that Borneo had been recognized as falling within the Japanese zones." . . . .

But now we have the secret agreement and now we know that it was only a defensive alliance against the U. S. S. R. It would have served none of the purposes specified by the Prosecution.

The militarists of Japan were not alone in their fear of Communism and in associating such fear with the U. S. S. R. We know that even the United States could not free itself of that fear, so much so that it was afraid of according its recognition to the U. S. S. R. until November 16, 1933. In 1919 President Wilson declared "we cannot recognize, hold relations with or give friendly reception to the agents of a government which is determined and bound to conspire against our institutions, whose diplomats will be the agitators of dangerous revolts, ..." Secretary of State Hughes also charged the U. S. S. R. with "the continued propaganda to overthrow the institutions of this country". In 1923 he said: "What is most serious is that there is conclusive evidence that those in control at Moscow have not given up their original purpose of destroying existing governments wherever they can do so throughout the world". Secretary Kellogg in 1928 issued a statement characterizing the U. S. S. R. as"a group which hold it as their mission to bring about the overthrow of the existing political economy and social order throughout the world and to regulate their conduct toward other nations accordingly". According to him even "a recognition of this Soviet regime has not brought about any cessation of interference by the Bolshevik leaders in the internal affairs of any RECOGNIZING COUNTRY. . . . ." "Indeed, there is every reason to believe", says Secretary Kellogg, "that the granting of recognition and holding of discussions have served only to encourage the present rulers of Russia in the

policy of repudiation and confiscation as well as in their hop that it is possible to establish a working basis, accepted by other nations whereby they can continue their war on the existing political and social order in other countries."

As I have already pointed out in an earlier part of this judgment, the Russian protest, that the government of U. S. S. R. had nothing to do with the Third International, was not accepted by the then world. The Surveyor of International Affairs, in his survey of the year 1932, characterized this protest as the display of that curious state of mind which must be regarded as one of those relics of an archaic psychology which lingered on in the field of International relations and which constituted one of the most formidable obstacles to the progress of civilization in this particular sphere of social life.

It should also be remembered in this connection that, by the year 1932, communism had become an organized and effective political power in China, exercising exclusive administrative authority over large stretches of territory, and, that, the Chinese Communists were in some degree affiliated to the communist party in Russia. As I have already pointed out, there were circumstances which led the world to believe that Communism in China was really bone of the bone and flesh of the flesh of its Russian homonym, and, that, at the turn of the years 1931 and 1932, the world was faced with the possibility that the renewal of relations between Moscow and Nanking, as a result of the resumption of diplomatic relations on the 12th December 1932 between the Russian communist government at Moscow and the Kuomintang Central Government of the Chinese Republic at Nanking, might be followed by an elimination of the discomfited Nanking Government and the discredited Kuomintang in order to make way for an alliance between the Russian Soviet Union and the Chinese Soviet Union of the same colour. A geographical corridor between Russia and the Chinese communist domain in the Yangtse Basin was offered by the Soviet Republic of outer Mongolia, which was under Moscow's aegis, and by the Chinese province of Shensi. The possibility that the Chinese and Russian communists might join hands was thus to be reckoned with. If this was the world fear, I do not see why should we condemn the Japanese statesmen if they too shared this fear and took what measures they considered likely to be the efficient check. In any case, why should we read into this alliance any aggressive design, remembering that even now the whole world is reverberating with the sounds of such alliances.

The prosecution at last says that "the real significance of the Anti-Comintern Pact did not lie in its immediate or practical effects, regardless of their great importance for the effectuation of the conspiracy. It lay in the fact that by concluding the pact Japan took her first step toward allying herself with Germany, the then leading aggressive nation of Europe, if not of the world. The Japan of the conspirators found in Hitlerite Germany a kindred spirit."

I do not know if this association by itself would fix any guilt on the present accused. But this has no bearing on the present question.

I now come to the Tri-partite Pact, which is Exh. 43 in the case. It runs as follows:

"TRI-PARTITE ALLIANCE OF JAPAN, GERMANY AND ITALY.

"We, the governments of Japan, Germany and Italy, under the common belief that the first essential for lasting peace rests only upon enabling every nation to have contentment and peace, being lotted to a certain sphere of activity of her own, have made it our fundamental principle to establish a new order for co-prosperity of its own race, in Great Asia and Europe, and to maintain the same; and have reached the decision to co-operate and co-assist each other in carrying out this basic fundamental in each respective field; and further, the governments of these three nations to be willing to extend their co-operative hands over all nations willing to endeavour in realization of the same idea in any part of the world; and in hope of the realization of our final object of establishing lasting peace, the governments of Japan, Germany and Italy have hereby entered into the following agreement:

"*Article I.* —Japan shall recognize and respect the leadership of Germany and Italy for establishment of new order in Europe.

"*Article II.*—Germany and Italy shall recognize and respect the leadership of Japan for establishment of new order in Great Asia.

"*Article III.*—Japan, Germany and Italy shall agree to co-operate with one another in carrying out the aforementioned policy; and, further, if and when any one of the signatories be attacked by any third power not presently engaged in the present European war, or the China Incident, the other two shall aid her in any way, political, economical or military.

"*Article IV.*—In order to effect this alliance, a joint specialized committee, composed of representative members appointed by each power of Japan, Germany and Italy, shall meet as early as possible.

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

"*Article VI.*—This alliance shall become effective on the day of signature and shall remain in force for the period of 10 years.

"Upon demand of any one of the signatories before expiration of the term, the signatories will confer over its renewal.

"As evidence for the conclusion of this alliance, the undersigned, duly authorized by each respective nation hereby, has signed his signature on this paper on this day of twenty-seventh, the month of September, the Fifteenth Year of Showa, that is 1940 A. D.; the twenty-seventh day of September of Fascist Eighteenth year, 3 copies were made in Berlin."

It was concluded on 27 September 1940 long after the China Incident and long after many circumstances had affected the position of Japan in International life.

The evidence adduced in support of the several matters referred to in the Opening Statement of Mr. Tavenner was mainly documentary. These are exhibits 36, 37, 39, 43, 45, 49 and 477 to 609 in the case.

The evidence is voluminous. But we must again recall to ourselves the

question which we are considering here. The question whether by entering into these Pacts with Germany and Italy and by collaborating with these Powers Japan committed any offense is a distinct one, very different from the question how far the facts sought to be established by this voluminous material evidence the PRESENT PROBANDUM—THE OVER-ALL CONSPIRACY as alleged in the indictment.

For our present purpose, the *factum* of Japan's alliance with Germany and Italy really does not lead us very far. It is the OBJECT of such alliance as suggested by the prosecution which is material and which, if established, would mean much.

There is, of course, nothing in the evidence itself which anywhere speaks of this object. Explicit reasons as disclosed by this evidence are quite different and certainly do not support the prosecution case.

The question therefore resolves itself into this: whether from the entire evidence and the circumstances we are led to the inference of the suggested purpose. The prosecution invites us to draw such inference. To my mind it would be acting on mere conjecture if we draw such an inference from the materials before us. Unless we are prepared to adapt the various circumstances disclosed by the evidence to one another and strain them a little to force them to form parts of one connected whole supplying the wanting links by mere guess or conjecture, we cannot draw the proposed inference. As regards the Anti-Comintern Pact we have already seen other plausible and authoritative explanations.

It is needless to point out that in International relations alliances and counter-alliances are not necessarily based on ideological differences and uniformities. As has been ably demonstrated by Dr. Schwarzenberger "in a system of power-politics the overriding strength of the need to define relations of friend and enemy according to such impersonal principles of what may be called 'bad neighbour policy' can be gauged from cases in which interests of power-politics and ideological fronts seemed to clash." The most superb refutation of the doctrines of ideological fronts would be seen in the alliance between the democratic states and the U. S. S. R. as also between the U. S. S. R. and Germany. These experiences ought to offer a warning against over-estimating the importance of ideological differences and uniformities in the international sphere.

These alliances in international life are entered into to fulfil certain important functions. "They are the compensation for an imaginary or real inferiority of a state as compared with a rival Power." There was nothing wrong if the Pact was, as is said by the Prosecution, designated and intended to create impression in all countries that the signatories constituted a united front.

An alliance certainly may be an openly or secretly avowed aggressive combination. Their purpose may also be the maintenance of the existing state of affairs. Such alliances are also calculated to compensate the feeling of isolation, fear and insecurity on the part of a state. Sometimes through alliances it may be possible to uphold a given *status quo*: the state interested in its al-

teration may fear the alliance rallied against it. Before, therefore, we can ascribe any particular object to any particular alliance, we must take into account all these other possible objects as also the other groupings amongst the powers. We must not forget that a system of alliances and counter-alliances is the necessary concomitant of any system of Power-Politics.

The prosecution ascribed important roles in connection with these pacts to accused OSHIMA and SHIRATORI. Both these accused came to the witness box in this case and submitted to searching cross-examination by the prosecution.

The prosecution introduced many statements made by the accused when they were ambassadors in Berlin and Rome respectively. Most of the statements are ascribable to diplomatic decorum and discretion; their discussion would serve no useful purpose at all. The accused OSHIMA made certain observations in this connection concerning the German documents produced by the prosecution. The documents purported to contain the records of OSHIMA's conversation with Hitler, Ribbentrop and other Germans. OSHIMA says: "These observations were conducted always in German, of course without interpreter. At my conversations with Hitler, Ribbentrop was always present. Stahmer or his successor was sometimes present at my interview with Ribbentrop. There was, however, no stenographer or recorder present. The record of these conversations must have been made afterwards from memory, some of them even several days after the conversations. Therefore, they cannot always be accurate." "With respect to the documents concerning my conversation with Ribbentrop, I find that they were generally compiled in a one-sided vein favourable for Ribbentrop. Sometimes it is even stated that I agreed with him on certain matters while actually these matters were only talked about in the course of our conversations and I expressed no opinion thereon. I think this was because Ribbentrop had many enemies in the German Government as well as within the German military circles, and in distributing these documents to such people he had to resort to this sort of internal-political maneuvering in order to show the success of the pro-Japanese policy initiated by him." ... "In the records prepared by such people as Weizsaecker, Erdmannsdrof, etc., on my conversations with them, which are now in exhibit in this trial, there are many matters of which I have no recollection. They evidently drafted these documents, adding much to my informal chats and putting them in such a form as to make it appear as if they had important talks with me, and then presented them to Ribbentrop." I see no reason why we should not accept this statement of the accused.

The accused OSHIMA gave his own appreciation of the PURPOSE of the Japanese Government in concluding the anti-Comintern Pact and the secret agreement with Germany. According to him the Pact was to serve threefold purpose: "First: Inasmuch as Japan was INTERNATIONALLY isolated after the Manchurian Incident, it was desirable to remove that uneasy feeling by finding some ally or allies; Secondly: Since the destructive activities of the Comintern were rampant in Europe and in Asia at the time, eating into the internal structure of nations as seen in the Spanish civil war and the communist re-

bellion in China, it was felt advisable that as many nations as possible should join hands and take countermeasures; this was especially necessary for Japan in view of the resolution of the Seventh Congress of the Comintern in Moscow in 1935 which declared Japan and Germany as its primary enemies; and Thirdly: Japan was keenly feeling pressure from Soviet Russia at the time. Russia had developed her heavy industries by the Five-Year Plan and had increased her armament to a great extent. She had considerably reinforced her army in the Far East.

"Therefore, Japan wanted to come to a political agreement with Germany which was similarly situated *vis-a-vis* Soviet Russia, in order thus to make her position more secure against the Russian pressure."

The accused gave us a detailed account of the negotiations relating to the Tri-Partite Pact and its object. Whether we accept this account in its entirety or not, it cannot be denied that Japan at that time was in need of providing against *diplomatic isolation* and I do not think there is anything in the prosecution evidence which would lead us to reject this explanation. The evidence of SHIRATORI also in substance offers the same explanation. See also, in this connection, the statement of Major General Francis Stewart Gilderay Piggot C.G., D.S.U. (Exh. 3,548) wherein he opines that "the very origin of the Three-Power Pact was really Psychological rather than Political, due to Japan's feeling of loneliness."

In a society in which the interests of members are primarily conflicting, the main concern of each entity must necessarily be directed towards self-preservation. The Society of States which has developed is composed of nations too strong and too self-conscious to permit any of its members to attempt to solve its problem of self-preservation by means of impartial universality. On the PLANE OF POWER-POLITICS, therefore, *the only realistic alternative* for those countries, which were neither geographically nor politically in a position of exceptional security, was provided by the principle of the balance of power, the only factor of relative stability in a world divided by alliances and counter-alliances. In the very nature of it, this polity involves *continuous efforts at balancing* in order to avert the ever-present danger of the preponderance of one or other group.

Any SECRECY observed in relation to such Pacts does not necessarily indicate their sinister object. Secretiveness is usually associated with Power diplomacy: it is an inherent element of Power-Politics. There was no dearth of secret treaties, pacts or understanding between the Allied Powers as well. We have evidence of secret understanding between Stalin and the Allied Powers whereby Stalin undertook to join the war against Japan though at that time Japan and the U.S.S.R. were, to all appearance, in friendly relations.

OVER-ALL CONSPIRACY

AGGRESSION AGAINST THE SOVIET UNION

(INDICTMENT—APPENDIX A—SEC. 8)

The Prosecution case of conspiracy against the U. S. S. R. really stands outside the division of the stages given above. It will be convenient to examine this part of the case here at this stage before taking up the Fourth or the Final Stage of the conspiracy as specified above.

This phase of the case is made in Section 8 of Appendix A to the indictment. Counts 1, 4, 5, 17, 25, 26, 35, 36, 44, 51 and 52 of the indictment specially relate to this phase. *Minister Golunsky* presented the case made in this respect.

At the outset, Minister Golunsky gave a short account of what he characterized as —"generally known historic events preceding the period covered by the Indictment"—as supplying the historic background in which the aggression to be dealt with by him was developing. According to him the conditions in which the present accused acted were pre-determined by these historic events. He began his account with the Russo-Japanese War of 1904, and told us how Japan had to pay a very high price for her military success in that war, and how her man-power and military resources having been exhausted she could not fully make use of the fruits of her successes. Her next aggressive action was said to be the intervention of 1918 in the Soviet Far East, and we were given a pretty long story of the then Japanese attempt at establishing a Puppet Government in the Maritime Provinces.

He then offered to establish the Japanese Policy towards the Far Eastern Soviet Republic in 1922 and invited us to compare the same with her later Manchurian Policy of 1931 and hold that Japan's aggressive aspirations of 1931 and the method adopted by her for their realization were the same as in 1922. Japan's attempt to seize the Soviet Far Eastern territories failed. But the Japanese militarists could not forget their natural resources. She regarded her withdrawal from the Soviet Territories as a temporary retreat forced on her by the circumstances. The Japanese militarists and politicians entered into the period of World War II with this "firmly established tradition" of cherishing aggressive plans directed against Russia.

The learned Counsel then emphasized the following in his opening statement:

1. The propaganda activity of Japan: The Japanese were giving out:
   (*a*) That the Russo-Japanese war and the war between Japan and China preceded World War I;
   (*b*) That Manchurian Incident preceded
      (*i*) the German Nazis' coming to power,
      (*ii*) the annexation of Abyssinia,
      (*iii*) the Civil war in Spain,
      (*iv*) the remilitarization of the Rhine area;
   (*c*) That the Sino-Japanese Incident preceded the annexation of Czechoslovakia and Albania and the Anschluz.
   (*d*) That they were the initiators of world fascism and world aggression.
2. The features common to all the three main aggressors of our time:
   (*a*) Advocacy of brutal nationalism, —an attempt to impress upon

their people the idea of their alleged right to rule over other peoples;

(*b*) Utilization of the State machine itself as weapon of crime.

3. The development of the Japanese aggression against the Soviet Union during the period covered by the indictment:

(*a*) The aggression progressed in such a way, that, though only on two occasions it led to the state of an open, though undeclared war, the conduct of Japan in regard to the Soviet Union for the rest of the time was such that the Soviet-Japanese relations could by no means be fitted into the notion of "State of Peace";

(*b*) The whole period of the Japanese aggression against the U. S. S. R. covered by the Indictment is divided into four parts, namely, —

(*i*) the period from 1928 until the seizure of Manchuria;

(*ii*) the period from 1931 to 1936;

(*iii*) the period from 1936 until the outbreak of the big war in Europe in 1939;

(*iv*) the last period until the surrender of Japan.

The learned counsel for the prosecution offered to prove the following:

1. Japan grossly violated all the pledges given by her

(*a*) in the Portsmouth Treaty of 1905

(*i*) not to carry on any military preparation either in Korea or in Manchuria directed against Russia;

(*ii*) not to use the Manchurian railroad for military purposes;

(*b*) in the Peking Agreement of 1925

(*i*) not to support directly or indirectly any organizations or groupings whose activities would be hostile to the Soviet Government.

2. (*a*) Japan created on the Manchurian territory the so-called "Kyo-We-Kai" society, the membership of which later on reached 4.5 millions.

(*b*) In spite of the obligation, which the Japanese Government took upon itself in the Peking Convention of 1925, the Kwantung Army command making use of the funds specially assigned for the purpose, undertook the organization of elements hostile to the Soviet Union, elements that were among the Russian emigrants living in Manchuria.

(*c*) The Japanese created a special organization "Bureau of Russian Emigrants" which was connected in its structure with the "Kyo-We-Kai" society and worked under the direct leadership of the so-called Japanese military mission in Kharbin.

(*d*) The organization pursued the aim of carrying out pro-Japanese propaganda hostile towards the Soviet Union, among Russian emigrants, to teach Russian emigrants methods of sab-

otage, to form them into special sabotage detachments, which were in time of peace secretly smuggled into the Soviet territory and carrying out all sorts of provocation raids on the Chinese Eastern Railroad, which passed on the Manchurian territory and was joint property of the Soviet Union and China.

(*e*) In our time it was planned to recruit special detachments out of Russian white-guards, who had undergone special training under the direction of the Japanese intelligence service.

(*f*) These detachments were to operate in the Red Army rear.

3. Beginning from 1928 the Japanese Warlords, the Japanese General Staff and the Japanese Government were planning a war of aggression against the Soviet Union.

(*a*) (*i*) The attention of the Japanese military was drawn first of all to Manchuria, with the object of transforming the same into a military base for a further expansion of the Japanese aggression both towards China and towards Soviet Union.

(*ii*) Already in the summer of 1931 the question of an attack against the Soviet Union was put on the agenda.

(*b*) (*i*) While preparing for this first step the Japanese military during the period of 1928-1931 and later on as well, were planning and carrying on an underground war of sabotage against the Soviet Union.

(*ii*) The military-diplomatic personnel of Japan took active part in all these sabotage activities.

(*c*) In view of this aggressive design, Japan refused to conclude a non-aggression Pact with the U. S. S. R. in 1931-32.

(*d*) The Japanese military planned the occupation of the Mongolian People's Republic intending to turn her territory into the military base for an attack against the vital lines of communication of the Soviet Union.

(*e*) On November 25, 1936 the so-called Anti-Comintern Pact with Germany was signed by Japan. There was a secret agreement attached to this Pact which was directed directly against the Soviet Union. (Exh. 36)

4. Japan's actual acts of aggression:

(*a*) The Soviet Government in 1935 was forced to agree to sell the Chinese Eastern Railroad, at a low price.

(*b*) In summer of 1937 Japan began a new round of aggression in China.

(*c*) In the following year, 1939, they renewed their aggression, this time on the territory of the Mongolian People's Republic, in the Nomon-Gan Area.

5. Japan's aggressive alliances:

(*a*) The anti-Comintern Pact of 1936 together with the Secret

Agreement.

(*b*) On September 27, 1940, the Tri-partite Pact was concluded.

6. (*a*) On 13 April 1941 Neutrality Pact between Japan and the U. S. S. R. was signed.

(*b*) Germany treacherously violated the non-aggression Pact on June 22, 1941 and attacked the Soviet Union.

(*c*) Japan was feverishly preparing for a military attack against the U. S. S. R.

(*i*) She decided not to enter into the war with the U. S. S. R. only for the time being, but to use arms if the German-Soviet war goes on in a way advantageous for Japan;

(*ii*) Till that time Japan would secretly carry out military preparations against the U. S. S. R. under the cover of diplomatic negotiations;

(*iii*) Following this decision the Japanese General Staff and the Kwantung Army Headquarters worked out special plan of secret mobilization;

(*iv*) In 1942 about 35% of the Japanese entire Army were concentrated in Manchuria.

The evidence on this Phase also has been very voluminous. Whatever else this evidence may establish, it does not indicate the over-all conspiracy now under our consideration. As I have pointed out elsewhere, at least so far as the U. S. S. R. is concerned, Japan did not take any aggressive steps against it throughout the period of war, and even Germany could not induce her to take such steps.

The evidence that has been laid on this Phase covers the entire history of Russo-Japanese relations. I do not see how the events of 1904-05, of 1918, or of 1922 are relevant for the purpose of the present case.

We have noticed the reason for its introduction given by the Prosecution at the opening of the case. General Vassiliev in the final summation of the evidence on this phase urged that "many of the events from 1928 to 1945 become more explicit in the light of the acts of aggression committed by Japanese Imperialism prior to that period of time. In this aspect the aggressive acts which the major Japanese war criminal suspects are charged with are closely linked up with the war of Japan against Russia in 1904-05 and with the Japanese intervention in Siberia in 1918-22".

We are here to consider certain charges against the present accused in respect of certain alleged acts of theirs against the *Union of Soviet Socialist Republics*. This Union of Soviet Socialist Republics *de facto* came into existence only in 1917. Its *de jure* existence in international society did not begin before it was recognized by some of the civilized powers in 1924. The United States of America withheld recognition till 1933. Japan accorded her recognition *de jure* in 1925, and at least from that date, a new chapter in the Soviet-Japanese relation commenced. The charges here, it should be remembered,

are not against the Japanese Government as such. According to the prosecution itself, during the first two stages of the alleged conspiracy, the conspirators were outside the government group. The evidence at the most seeks to locate the conspiracy with a certain group of military personnel, at least at its inception. Persons responsible for the alleged acts against the Czarist Russia or against the unrecognized Soviet Union are not before us.

Even if we are prepared to visit on sons their fathers' guilt, I do not think that we can in any way reach the present accused or judge their guilt by any reference to the acts or attitude of the Japanese government or the then "small military group" who might have behaved in some particular way towards Russia of 1904-05 or of 1918-22.

The prosecution purported to give these acts as supplying the historic background in which the aggression to be dealt with in the present case was developing, and it purported to give us what it characterized as "generally known historic events".

If it is at all legitimate to refer to any historic background, I do not see why we should start with the years 1904-05 or 1918-22. The historical investigations are relevant in so far as they help us in understanding the causes of many of the present conditions in the Far East, thus putting them in their proper perspective.

We may start with the date when the Empire of Japan, after more than two centuries of strict seclusion, entered, or, more correctly, was made to enter, again into relations with the outer world, under the terms of treaties obtained by the Western Powers from her by methods which, when later on imitated by Japan in relation to her neighbours, were characterized by these very treaty powers as aggressive. To understand the origin and development of these new relations, which eventually resulted in the admission of Japan to the family of nations, and finally, to a place among the five great Allied and Associated Powers in the First World War, we should begin our consideration from at least these treaties.

I need not state in detail what happened between 1853 and 1894. These are all matters of history, and, whatever be their character, they do not, at least, indicate any aggressive mentality of Japan. Even if we assume that everything that was done by the Western Powers during this period was done by them with a "noble purpose of a pure heart" and only to give Japan the blessings of western intercourse, the method adopted in doing this was certainly not aggreeable to Japan. In international law, however, it was only "the peaceful opening" of Japan.

The treaties of 1854 and 1855 with the United States, Great Britain and Russia were the starting points of this story. The Japanese had to grant every formal "request" for a treaty. But these were only the beginning. New demands and further concessions were to follow.

In July 1857 "a United States ship arrived at Shimoda with news that in June, China had been forced to sign new treaties with Great Britain and France, under pressure of their ships and men, and with Russia and the United States. And it was reported that the victorious allies were about to proceed

to Japan with their fleets." This news created consternation at the capital. Early on the morning of July 29, Japan agreed to sign a new treaty. "The success of the European intervention in China would probably occasion a strong effort to secure similar terms from Japan. If the Imperial Court had continued to forbid further concessions then hostilities might easily have followed. . . . ." "Within a few weeks, representatives of Russia and Great Britain arrived from China, to be followed a little later by the envoy of France. From Nagasaki came the Dutch agent also seeking a new treaty."

Japan had to enter into these four treaties. We are told that "if concessions had been won through the presence of imposing armaments, the new intercourse would have been inaugurated under conditions which would have rankled in the breast of every Imperial supporter." It is difficult to see how the method actually adopted prevented this rankling. We do not know exactly what "condition confronted" these Western powers entitling them to take these actions. But international society would view these only as "marches of events ruling and overruling human action."

If all these treaties, thus procured, benefited Japan, it also created a feeling which is best expressed in the following communication of the Shogun to his feudatories advocating the restoration of authority to the Imperial Court: "Our intercourse with foreign powers becomes daily more extensive, and our foreign policy cannot be pursued unless directed by the whole power of the country."

Then follows Japan's struggle for getting revision of these treaties. This struggle continued till the year 1894. During this period, Japan made every effort to master the great contributions of western thought and science. Perhaps Japan also realized that in the world in which she had been thus forced to appear, *right* and *justice* were measured in terms of battleships and army corps.

The Japanese efforts to get these treaties revised were certainly not blameworthy. The principal points at issue between Japan and the treaty powers were concerned with tariff autonomy and extra-territorial jurisdiction, both in impairment of Japan's sovereign right.

The Japanese naturally desired to escape from the limitations imposed on their right to fix their own tariff laws. Some of the great commercial powers wished to retain the advantage created by the conventional tariff. They were loath to agree to any treaty revision which would restore tariff autonomy to the Japanese. The United States alone was consistently favourable to this desire of Japan.

Although the principle of sovereignty was involved in the conventional tariff also, a more serious impairment arose from the extra-territorial rights of the foreigners.

We cannot afford to ignore the possible effects upon Japan of this long struggle for the revision of such treaties. "One effect was to stimulate the adoption of western methods in order to assimilate the government and especially the judicial administration to those of the West. But it could hardly have been an unmixed advantage to compel a people to organize its whole ju-

dicial system along foreign lines in order that the rights of a handful of alien residents might be safeguarded."

"*Another effect* was to inculcate a strong sense of the injustice and selfishness of the treaty powers." "The retention of extra-territoriality by the powers struck at the pride of the Japanese, but the maintenance of the old tariffs was felt to be absolutely unjust. So, with the repeated failure of the revision negotiations, a wave of anti-foreign feeling swept over the land. And with it went the willingness to sacrifice, if need be, to make Japan strong enough in armaments *to demand* the restoration of *rights* which had been lost in days of weakness."

"If some of the Japanese developed a cynical attitude toward foreign relations in these days, there was some excuse for it. Certain of the Western Powers had shown them how to make the most of every advantage, no matter how acquired. And the young men of the late eighties and early nineties who passed through these years of bitterness became the men who in later years and today have had great influence on their nation's policies. It would have been better if some of the powers had thought a little more of the feelings of a whole people than of the privileges of their own merchants and residents."

Throughout this period the attitude of the United States toward Japan was consistently friendly and sympathetic. The Japanese statesmen never for a moment doubted the honourable intentions and the genuine goodwill of the American Government.

Coming to the relation between Japan and her neighbours, we shall, first of all, take up her friction with China, which led to the war between the two countries in 1894, and, for this purpose, shall begin with the incident at which Korea gave the United States a cause for offense.

In August 1866, the American merchant ship, *General Sherman*, on a trading voyage to the west coast of Korea, was destroyed and her people were killed under circumstances which are still shrouded in mystery. Two months later a French expedition with seven ships and four hundred soldiers tried to force their way in Seoul to secure reparation for the execution of French missionaries, but they were repulsed.

In January 1867 an American ship of war visited Korea to ascertain the fate of the crew of the *General Sherman*, but without success.

Learning of these events, the Grand Council of the Shogun, on May 10, 1867 offered to General Valkenburgh of America, Japan's friendly intervention, and proposed to send a mission to Korea for this purpose.

A mission was sent by Japan but was not received by Korea.

The United States, however, did not give up the idea of securing some explanation from the Koreans. In 1871 a strong squadron was sent over to China, bearing Mr. F. F. Low, the American Minister, for the purpose of securing a treaty. In this year the Japanese also sent over a mission to negotiate a treaty with China.

On July 29, 1871 a treaty between Japan and China was signed at Peking. This treaty is of interest, in view of later developments, because its

terms were absolutely reciprocal. This treaty had scarcely been signed when TWO OCCASIONS FOR CONTROVERSY arose; one, over the Chinese claim to suzerainty in Korea, and the other, over the possession of the Ryukyu Islands.

The Ryukyu Islands, which lie between Japan and Formosa, had accepted political obligations to both Japan and China. In December 1871, sixty-six natives of Ryukyu were wrecked on the southern coast of Formosa; fifty-four of them were murdered by the Formosans. Japan decided to take action in the matter and proceeded to ascertain what responsibility China assumed for the acts of the Formosans. The Chinese Government practically denied all responsibility saying that the Formosan aborigines were beyond the reach of the Chinese Government and culture. They, however, claimed that the Ryukyuans were Chinese subjects. This the Japanese promptly denied.

The Japanese Government decided upon an expedition to Formosa. Public notice of the intentions of the government was given in a proclamation on April 17, 1874. It recited the murder of fifty-four people of Ryukyu in 1871 and the looting of the property of four Japanese in March 1873. It repeated the verbal statement of the Chinese Ministers about the Formosans and announced:

"As this island of Formosa is near to Japan, and such wrecks as described may occur again, it seems necessary for the protection of our commerce that the people inhabiting these parts of Formosa should be restrained from committing such acts in the future. And in pursuance of this determination Saigo, as chief, with a number of subordinates, has been dispatched thither, with instructions to investigate the preceding matters, and to institute such proceedings as shall guarantee safe conduct for our people in the future. As it may be possible that these people may not pay proper regard to his mission, and create a disturbance, a sufficient guard has been dispatched with him."

This expedition, it must have been noticed, was not unlike that of Commodore Perry to Japan. But in the case of Formosa there entered at once the question of Chinese sovereignty.

General Saigo, with the main body of troops, which finally numbered 3,600 men, landed in Formosa on May 22. Several engagements with the savages took place, and the operations were conducted with great difficulty because of the wild nature of the country. Informal negotiations took place with Chinese representatives sent over from Amoy, but, as they demanded that the Japanese withdraw and offered no satisfactory guarantees, no agreement could be reached. It should be noticed here that three American citizens had been employed to serve with this Japanese expedition. General Le Gendre was one of them.

In July General Le Gendre was sent on a mission to Amoy to discuss the matter with the Viceroy. He was arrested there, by the American consul, and sent to Shanghai, where he was released. He promptly started north and joined Mr. Okubo, who, in the meantime, had been sent over by Japan to negotiate with China.

The negotiations lasted from September 14 until October 30. Twice the British Minister, Mr. Wade, used his good offices to bring about an agreement. The negotiations were on the point of breaking up, which would have meant war, when the Chinese finally agreed to admit that the Japanese were justified in sending over the punitive expedition. A treaty was signed on October 31, 1874, China agreeing to control the Formosan savages henceforth.

This convention recognized the status of the Ryukyuans as Japanese subjects. The Chinese Government, however, did not accept all its implications. The Japanese proceeded to incorporate the islands more completely in its realm, sending down a garrison in 1875 and ordering the king of the Ryukyus to cease the payment of tribute to China. We need not notice the details that followed in this respect.

The dispute relating to Korea may be taken up from what happened in 1875.

In 1875, a party of Japanese seamen, engaged in surveying the coast, were fired upon, and in retaliation the fort was bombarded and its armament destroyed. Japan, thereafter, decided to dispatch a High Commission to negotiate, if possible, a treaty of peace and amity with Korea.

Two foreign precedents seem to have been followed by the Japanese in this respect. One was that of the Perry mission to Japan, and the other was that of the French Treaty with Annam in 1874. Annam, like Korea, was a vassal state of China. By the treaty of 1874, France recognized the entire independence to Annam and granted the king protection against foreign aggression and internal disorder. In accepting this treaty, Annam seemed to dissolve her old relations with China, although she had no intention of doing so. The Japanese, following this precedent, inserted the following clause in their treaty with Korea: "Korea, being an independent state, enjoys the same sovereign rights as Japan." The Koreans, however, had no desire to accept the full implication of this declaration, and finally refused to consider either treaty as breaking the old bonds of dependency on the part of the two neighbouring states.

The Korean treaty of 1876 was modelled on the Commercial treaty which Japan had negotiated with the Western Powers. The Japanese in Korea were to enjoy extra-territoriality in criminal matters. This treaty thus resulted in "the peaceful opening" of Korea exactly as the United States had opened Japan twenty-four years before.

China, however, claimed suzerainty over Korea and the relation between China and Japan came to the very verge of war.

By mutual understanding, the parties agreed to submit their case to General Grant, formerly Commander-in-chief of the American Armies and recently President of the United States. This was a purely informal and unofficial reference. At Peking, General Grant had several interviews with Prince Kung and Li Hung-chang, the great Viceroy, and formal statement of China's case was submitted to him.

On the 20th June 1879 the General arrived at Nagasaki. The matters in

controversy between China and Japan were carefully considered by him, and his views were set forth in dispatches which were transmitted to the Emperor at Tokyo and to Prince Kung at Peking.

In regard to the Ryukyu dispute, General Grant advised the Chinese government to recede from its contention.

In the case of Korea, he proposed a joint INTERNATIONAL CONTROL of the political affairs of the kingdom. "This arrangement", he said, "may not be entirely satisfactory to either country, but it will satisfy the conscience of the world and thus shut the door to unfirendly European interference in Oriental affairs, which, above all things else, should be the policy of both China and Japan. Any amicable adjustment of these questions between the two countries is better than war. Your quarrels are their opportunity for unfriendly intervention, and, if war should ensue between the two countries over either of these questions, the Powers of Europe will end it in their own way, in their own interests, and to the lasting and incalculable injury of both nations."

General Grant's pacific advice in the matter of the Chinese relations was accepted. Not only was a peaceful solution of the Ryukyu controversy found, but the Japanese tried to negotiate a treaty of defensive alliance with China, which failed through the inveterate hostility of Li Hung-chang. Peace, however, was preserved for fifteen years, and when the war did ensue, three of the European Powers proceeded to end it as Grant had predicted—"in their own way, in their own interests, and to the lasting and incalculable injury of both nations". But that is a different story to which we shall come later.

The formal settlement, however, was delayed, Ultimately in 1881 China sent a minister to Japan to discuss the subject, and the next year both governments desired the good offices of the United States. Nothing, however, was accomplished, and the pressure of other foreign complications caused China to recognize tacitly the *status quo*.

The negotiation of a commercial treaty by Japan revived American interest in Korea. The American treaty of friendship and commerce with Korea was agreed upon on May 22, 1882.

Within a few months of the signing of the American treaty, came the first attack upon the Japanese in Korea, on July 23, 1882, resulting in the expulsion of the Japanese legation and the loss of several Japanese lives. Again the question of peace or war had to be decided, and again the Emperor of Japan decided in favour of peace.

"In May 1883, General Lucius Foote exchanged the ratified American treaty, and took up his residence as minister at Seoul."... "The following year came the second attack upon the Japanese legation, and this time Chinese troops were involved. This brought to a head the question of China's right to interfere in Korea. At this time, China was involved with France over the Annam controversy, and there was a possibility that war with both France and Japan might ensue, in which case Japan could furnish the troops and France the ships. But the Japanese government had no such intention."... Count Inouye assured China that Japan would endeavour to settle all the questions with China in an amicable spirit. The matter was ultimately amicably

settled. China expressed regret for the conduct of her troops in Seoul; both countries agreed to withdraw their forces and not to send any in the future, even if required to preserve order, without notifying the other. Although China would not recognize the independence of Korea, she was compelled to admit that Japan stood on an equal footing with her in that country.

"Between 1885 and 1894, China continued to assert her superior position in Seoul, where Yuan Shih-kai resided as Chinese Commissioner."

"In March 1894 a rebellion of the members of the Tong Hak sect broke out. They were anti-government, and, to some extent, anti-foreign. The impotent Korean government seemed unable to suppress this rebellion." China decided to send Chinese troops and notified Japan of this decision. The Japanese government, in her turn, also prepared to send over troops. In their notification, the Chinese claimed Korea as a tributary state. This was an assertion which could not be acquiesced in by Japan.

Before either body of troops arrived, the rebellion had been suppressed by Korean soldiers. The king of Korea requested the Chinese to leave, but they refused to go until the Japanese did so. "By the middle of June the situation was most tense. Japan took the position that the rebellion had been due to official corruption and oppression, and she decided to ask China to join her in inaugurating radical reforms which would guarantee peace in the future." China refused, saying that she would not interfere in the internal affairs of Korea. "Japan now decided to bring about the needed reforms without the cooperation of China."

It will be interesting to notice how this action of Japan was viewed differently by the different representatives of America. The American representative at Peking reported on June 26 that "the action of Japan is criticized here as hasty and unduly bellicose". The American representative at Seoul, Mr. Sill, wrote: "I may add that Japan seems to be very kindly disposed toward Korea. She seems only to desire, once for all, to throw off the yoke of Chinese suzerainty, and then to assist her weak neighbour in strengthening her position as an independent state, by aiding her in such reforms as shall bring peace, prosperity, and enlightenment to her people, a motive which pleases many Korean officials of the more intelligent sort, and one which I imagine may not meet with disapproval in America." It did not meet with any disapproval there. But China could not approve of it.

Ultimately, war took place between China and Japan, China declared war on July 31, 1894, and Japan on August 1. "The success of the Japanese armies was entirely unexpected by many of the Europeans in the Far East. They had over-estimated the strength of China and failed to appreciate the progress which Japan had made. By the middle of September, the Chinese troops had been expelled from Korea, and their fleet defeated at the Yalu."

The treaty of Shimonoseki was signed on April 17, 1895, "but before that day RUSSIA had taken steps to bring about a three-power intervention to rob Japan of one of the fruits of victory. Germany and France joined with her, and on April 23rd, their ministers at Tokyo presented identic notes advising Japan to restore the Liaotung Peninsula, as the Japanese occupation of

that territory not only endangered the existence of the Chinese capital and of Korean independence, but would upset the peace of the Orient." I have noticed elsewhere the world view of this intervention.

"In spite of the bitterness caused by the three-power intervention, Japan emerged from the war with enhanced prestige and with large indemnity. The successful revision of the foreign treaties, which had been going on since 1894, meant that in 1899 she would regain the judicial autonomy which she had yielded up in 1858." "Japan had been admitted to the family of nations, but her experience in the past had convinced her that 'eternal vigilance was the price of peace'. In the world as she knew it, right and justice seemed to be measured in terms of battleships and army corps."

"The war between China and Japan settled one problem, but gave birth to others far more serious. China had been compelled to recognize the independence of Korea, but in her place a far more aggressive power appeared to challenge Japan's influence in the Peninsula."

"Between 1895 and 1904, Russia became increasingly powerful in Korea, until Japan was compelled to fight a second war to prevent that strategic territory passing under hostile control. Korea continued to be a STORM-CENTRE of Japanese diplomacy, as it had been ever since 1869."

China, it seemed, "had given the three European allies what was practically a signed note with the amount unspecified". Up to that time, Great Britain had been the dominant influence in Peking, but now Russia, supported by her allies, France and Germany, took the lead. This became evident when Russia and France forced China to borrow money for the first indemnity payments from them instead of from British bankers.

"Russia was also interested in securing the right to build her Trans-Siberian Railway across Manchuria to Vladivostok. This concession was apparently gained by November, 1895." Russia's influence was supreme, and her plan was for the "penetration of Manchuria" though, of course, only "peaceful penetration". But that could not bring peace to Japanese mind.

"Germany also had no intention of standing by with empty hands." I need not enumerate here how the vicious circle of demands upon China by her Russian and German allies went on. "The Russian fleet had entered Port Arthur soon after the Germans occupied Kiaochow in 1898, and on March 3rd a request was made for the lease of Port Arthur, Dalny, and the lower part of the Liaotung Peninsula. Such a lease for twenty-five years was signed on March 27. The effect of this proceeding upon Japan can easily be imagined. Within three years after Russia had taken the lead in forcing Japan to give up a fortress which her troops had taken in war, on the ground that Japan's occupation of it would endanger Peking and the independence of Korea, Russia herself had moved in. The Japanese Government had no illusions." China, which was "ever trying to play off one power against another, had offered to lease Weihaiwei to Great Britain". After Russia leased Port Arthur, Great Britain instructed its minister at Peking to obtain a lease on the terms on which Russia held Port Arthur.

I have already noticed elsewhere how the partition of China among the

Western powers happily went on. Japan, whose military success had brought about the collapse of Chinese resistance, took little part in these aggressive moves, though next to China herself, she had more at stake than any other power in this threatened European control of her immediate neighbour. "But she took no part in the scramble for concessions except to protect herself from European control of Fukien Province, opposite Formosa."

The United States also hitherto stood aloof. But the year which witnessed the European aggression upon China and the threatened dissolution of the Chinese Empire, also saw the United States becoming an Asiatic power as a result of the Spanish-American War.

The annexation of the Philippines gave the United States a stake in Asiatic affairs.

It will be beyond my purpose to give here any detailed account of the Boxer incident of 1900. During the operations, the six Powers of Great Britain, the United States, Russia, France, Germany and Japan worked together in general harmony. After the occupation of Peking, however, Russia's conduct gave occasion for alarm. She had advocated the prompt evacuation of the city, but the Associated Powers had failed to concur. And then "while protesting that she had no designs of territorial acquisition in China, she suddenly turned and overran Manchuria, capturing the capital, Mukden, October 2nd. This led to the Anglo-German agreement of October which was an enunciation of the principles of the Open Door and integrity of China. The United States, France, Italy, Austria, and Japan accepted the principles there recorded."

During these days Russian diplomacy was closely following the successful precedent laid down in 1858 and 1860.

In 1900 "Admiral Alexieff at Port Arthur negotiated a convention with Tseng Chi, ... which would have made Manchuria a Russian protectorate". "The first news of this agreement was published in London on January 3, 1901, and, although both Russia and China denied its authenticity, Japan, the United States, Great Britain and Germany warned China of the danger of negotiating with one power while she was trying to restore friendly relations with all. Russia pressed for the ratification of the convention. On February 28th, the Chinese government appealed to the United States, Japan, Great Britain, and Germany to join in a mediation between her and Russia. Russia then modified her demands somewhat and demanded that the convention be signed by March 26th. China again appealed to the powers to influence Russia to extend the time for negotiation, and the United States again warned China and Russia not to engage in separate negotiations. Germany, Great Britain, and Japan suggested that the convention be placed before the diplomatic conference at Peking, which Russia refused to do."

"During the Chinese crisis, from 1898 until 1901, the United States, Great Britain, and Japan had worked in harmony. Each believed in the wisdom of the Open Door and the territorial integrity of China. And certainly no power had more at stake than Japan. But China was unable to defend herself against the thinly veiled aggressions of Russia, and Russia could count upon

the support of France, and often of Germany. Japan had most at stake, for the southward march of Russia to Ice-free ports meant the eventual occupation of Korea and South Manchuria, and this would be intolerable. But Japan, alone, could hardly face the old triple *entente* which had humiliated her in 1895. She must have some support."

The United States had uniformly refused to enter into alliances for any purpose. Great Britain, on the other hand, had long feared the Russian advance, first toward India, and now toward Korea and China, where British commercial interests would be jeopardized. She was, therefore, well disposed to an alliance which would strengthen her against Russia in the Far East. "A difference of opinion arose in the highest circles in Japan as to whether an alliance should be made with Great Britain, which would probably lead to a clash with Russia, or whether an attempt should be made to settle the conflicting interests with the latter country."

Russia, however , was not in a mood to tolerate Japanese interference in her scheme of state. So, on the 30th of January 1902, the Anglo-Japanese alliance was signed in London, in which "the two high contracting parties recognized the independence of China and Korea and declared that they held no aggressive tendencies in either country. The special interests of Britain were in China, while, in addition to those which she possessed in China, Japan was held to have political, commercial, and industrial interests in Korea".

"The resolute actions of Japan and Great Britain caused Russia to appear to withdraw from her Manchurian adventure. On the 8th of April, she signed a convention with China in which she agreed to evacuate Manchuria within eighteen months, a definite zone to be relinquished each three months. But Russia had no intention of keeping this pledge."

In Korea, since 1895, Russian influence had steadily increased. "Japan had watched this tightening of Russia control with great alarm. So when Russia failed to keep her agreement with China, and at the close of the first year had not only not removed her troops from the second zone, but tried to secure additional privileges, it was decided, ... on June 26, 1903, that Japan would approach Russia directly and endeavour to secure from her an unequivocal assurance of her intention to respect the independence and territorial integrity of China and Korea."

Russia refused to respect the integrity of China. "As the Russians were massing troops on the Korean border and strengthening their naval forces in the Far East, Japan decided to break off negotiations. This was done on February 8, 1904, and hostilities began on the night of the 9th at Port Arthur."

"The United States promptly urged both Japan and Russia to respect the neutrality of China and to limit the area of hostilities as much as possible. Both powers agreed to this, although Russia insisted that all Manchuria should be included in the war zone."

"This war was fought on Chinese territory, presumably in order to prevent the acquisition of Korea and Manchuria by Russia. But Japan never

would have made such sacrifices if her own national interests had not been at stake. Japan was, therefore, fighting for herself, in self-defense. But it was the weakness of Korea and China which had compelled her to enter the arena. For this reason there was, naturally, much indignation in Japan because China would not raise a hand in her own defense. The weakness and the supineness of China had involved Japan in this dangerous enterprise. This fact coloured the attitude of many Japanese toward China in the coming years."

"During the war public opinion in the United States was strongly favourable to Japan. She was believed to be engaged in a war of self-defense." "The uniform success of her forces on land and sea, her excellent hospital and sanitary arrangements, her humane treatment of prisoners of war, all redounded to the credit of Japan."

Even in her treaty with Russia in termination of this war, Japan evinced much toleration. "She secured recognition of her paramount political, military, and economic interests in Korea, and forced Russia out of South Manchuria, taking for herself the leasehold and railway rights which Russia had held there."

After the Russo-Japanese war, Japan seemed to follow closely the precedents set by Europe in its dealings with China.

I believe it is but natural that those, whose responsibility it is to shape the peace after a war, would think of first keeping, and then developing, the gains which perhaps have been achieved by a stupendous sacrifice and effort of the war. It is not natural to squander the victory. It is criminal to squander the victory so as thus to frustrate the very war aim, if any. It is considered to be the fundamental task of the public men to conserve what could be accomplished by war.

Japan emerged from the Russian war burdened with an enormous debt of over a billion dollars. In return she had received the South Manchurian railway, half the island of Saghalien, and a nominal sum in payment of the expenses of the Russian prisoners in Japan.

"In October 1905 Count Katsura, the then premier signed a memorandum with Mr. E. H. Harriman, the American railway manager, for the transfer of the South Manchurian Railway to a syndicate, to be formed by Mr. Harriman, which would operate under Japanese law. Mr. Harriman proposed to buy up the Chinese Eastern Railway (the Russian raliway in Manchuria) and secure transportation rights over the Trans-Siberian, thus forming a round -the-world transportation system financed by American capital." But Baron Komura opposed the scheme. "He was opposed to the plan on principle, for he believed that, as the railway was the only valuable asset which Japan had won in the war, the people would resent bitterly the transfer of this productive enterprise to foreigners. On this point he was doubtless right, for great indignation had already been manifested because of the slight gains from a war which had seemed to be so entirely successful."

The decision to exploit Manchuria seems, therefore, to have been a subsequent development.

"The Chinese took the position that Japan had gallantly plunged into war

in order to free Manchuria from the Russian menace, and to safeguard the integrity of China. For all that Japan had done, they professed much gratitude, but, in addition, they expected that Japan also would withdraw and thus demonstrate the unselfishness of her deeds."

"The Japanese, in the course of the war, had arrived at very different conclusions. They had been compelled to fight Russia BECAUSE of the weakness of China. They had sacrificed much in blood and treasure and they were entitled to compensation. All that they asked was no more than China had voluntarily given Russia." Besides there was apprehension of Russian return.

This sharp difference of opinion between the two countries explains much that followed.

The situation in Manchuria was complicated by a struggle for railway concessions. China, fearing lest Japan use her railway for political as well as economic purposes, tried to enlist British and the American capital in rival enterprises. Japan, resolved to make the most of her Manchurian concessions, naturally opposed all competition.

"In November 1907 China gave a concession to British capitalists to build a short line from Hsinmintun to Fakumen, with the ultimate right to extend it to Tsitsihar, four hundred miles north on the Trans-Siberian. Japan promptly opposed this concession as a violation of one of the secret protocols of the Peking Treaty of 1905, in which China agreed not to construct any main line in the neighbourhood of and parallel to the South Manchurian Railway, or any branch line which might be prejudicial to its interests. Great Britain supported Japan, and the concession was not carried through."

"At the very time that this concession was under discussion, the Chinese Viceroy of Manchuria ... negotiated ... an outline of agreement for an American loan of twenty million dollars with the right to establish a Manchurian bank which would be the financial agent of the government in mining, timber and agricultural development, and in the construction of railways." This negotiation ultimately failed by the death of the Emperor and the Empress Dowager of China.

"At this time Manchuria was considered to be one of the danger spots of the world. China was alarmed at the presence of Russia in North Manchuria and Japan in South Manchuria. Each power used the railroad as a powerful agency in developing its commercial and political interests. In spite of predictions that Russia would soon strike back at Japan to regain the sphere of influence, which it had lost, the two countries had rapidly reached the decision that co-operation was better than strife..."

An attempt was made at this point by the United States to eliminate the rivalries in Manchuria and to quiet the assertion that the Open Door and the integrity of China were endangered.

Mr. Knox, the then Secretary of State, proposed to Great Britain, Russia, France, Germany, Japan and China that "the six powers co-operate to advance funds to enable China to repurchase the lines held by Russia and Japan before 1937". Both Russia and Japan disapproved of this scheme, and Great Britain and France supported them. Japan asserted that an internation-

al railway administration as proposed would in its opinion sacrifice economy and efficiency to political exigencies, while divided responsibility would lead to serious disadvantages. Furthermore, many Japanese industrial and commercial undertakings had grown up alongside the railway, which could be protected against pillage and attack because Japan possessed that line of communication, and the government could not surrender the means by which such protection and defense were made possible. Bearing in mind the price in blood and treasure, which Japan had paid for this gain, it cannot be doubted that any other country similarly placed would have replied in the same way. It was quite possible to use the railway to develop her industrial and commercial interests without violating either the Open Door or the integrity of China. And she believed herself entitled to every legitimate advantage which her sacrifices had won.

A very prompt result of the incident was the signing of the Russo-Japanese Treaty of July 4, 1910 for the maintenance of the *status quo* in Manchuria.

"The war with Russia had been caused in large part by Russia's threatening position in Korea. Japan had fought China to prevent foreign control of the Peninsula; and after that war, Russia had stepped into the place vacated by the Middle Kingdom. Japan did not intend to have that happen again. Within two weeks after the declaration of war, Japan signed a treaty with Korea, which guaranteed the independence and territorial integrity of the Korean Empire and the safety of the Imperial House."

"In August 1904 Korea agreed to accept Japanese financial and diplomatic advisers. The former was Mr. Megata, a Harvard graduate, and the latter was Mr. Durham White Stevens, an American citizen. In November of the following year, a Japanese protectorate was established."

"The United States and the other treaty powers recognized the logic of events and withdrew their legations from Seoul." Mr. Roosevelt realized that Korea "had shown herself utterly impotent for self-government or self-defense" and he refused to intervene.

"During the next three years, under Marquis Ito, as Resident General, many striking improvements were made, which won the admiration of foreigners who were familiar with conditions in the old days." But unhappily that great statesman lost his life at the hands of a Korean fanatic in Manchuria on October 26, 1909. On the 22nd of August 1910 a treaty was signed by which the Emperor of Korea ceded his rights of sovereignty to the Emperor of Japan.

"The annexation of Korea, in spite of repeated promises to preserve its integrity, has occasioned the most circumstantial criticism of the indirectness of Japanese foreign policies. Although every step in the process was correct diplomatically, ... yet, taken by itself, the result was in direct opposition to the pledges."

But in a world where precedents count for much, the Japanese could defend their conduct by many examples. "The British occupation of Egypt was in violation of a pledge to retire. The Austrian annexation of Bosnia and

Herzegovina tore up a solemn treaty. Korea was not the only weak Asiatic country which had passed under foreign control. And measured by national interest the Japanese had a better claim to Korea than the British to their Indian possessions, the French to Indo-China, the Dutch to the East Indies or the Americans to the Philippines. In Korea, the Japanese could say with an American statesman, that a 'condition and not a theory' confronted them. Or, as President McKinley said, in justifying the annexation of the Philippines, 'the march of events rules and overrules human action'."

After this event, both the governments of the United States and of the British Empire testified to their desire to maintain the traditional friendship with Japan by entering into treaties.

The year 1905, which saw the triumph of Japan on Manchurian battlefields and eastern seas, witnessed also the first signs of a change in the public opinion of the international world against Japan. In the United States there appeared the beginnings of a Japanese immigration problem as well as the voicing of suspicions regarding the foreign policies of Japan. I need not discuss in detail the immigration questions which, since then, rapidly came to a head. Japan was not spared the blow even though she had always tried to demonstrate her traditional friendship in various ways, and although she under the "Gentleman's Agreement" faithfully and carefully restricted the immigration so as to eliminate all the grounds of objection, fancied or real. It may also be noticed here that "man for man, the Japanese immigrants compared very favourably with the European immigrants of this period. They were generally literate, almost always law-abiding, industrious, and ambitious to rise in the world". But this is beside the point now under consideration.

During the war both Japan and Russia made effective use of propaganda to present their respective causes before the neutral world. The American press was almost uniformly friendly to Japan during the war, but at its close, a distinct change might be noticed. From this time most absurd articles were printed and accepted by people too little informed to distinguish between fact and fancy. "Americans were warned that Japan could easily wrest the Philippines from them, and then Hawaii, and finally the whole Pacific coast. Canadians were told that British Columbia was really the Japanese objective. The Australians were alarmed lest their sparsely peopled northern territory might invite invasion, which, it was asserted, would surely come when the Anglo-Japanese alliance expired in 1911." "The French thought that Japan would soon conquer French Indo-China, and the Dutch were alarmed lest their rich tropical empire tempt the new war-lords of the East." "Even British India was not too remote for their intrigue, and Mexico and the west coast of South America were also mentioned as probable scenes of Japanese aggression."

This change in the attitude of the press is generally ascribed to the successful propaganda measures of the Russian representative, Count Witte.

"These statements may be found in many serious articles published soon after 1905. They seemed absurd, of course, when they are brought together

in a single paragraph. We find that according to these publicists, the Japanese were about to launch offensives in every direction and become embroiled with the United States, the British Empire, France, the Netherlands and the South American Republics. China, of course, was to be promptly overrun, commencing with South Manchuria." Such stories were current throughout the West and they were at the bottom of most of the suspicion which since then was entertained of the Japanese policies.

Writing about "The States of Mind" during "Annus Terribilis 1931" an illustrious historian observes how the dominant position in the world which a non-English speaking nation occupied in this year was both an intellectual and a moral stumbling-block to the English speaking peoples, and how the possibility of such a dominance "came to stand in English and American minds as the supreme symbol of the topsy-turvydom—the revolutionary reversal of all established values and proportions and expectations..." The whole conception of the English speaking peoples of the evolution of human affairs from a distant past towards a distant future is that future belonged to them and that others would fulfil their destined function in history by ministering to the divinely-appointed advancement of the English speaking peoples.

Perhaps only a similar attitude of mind could present a receptive field for the flowering of a deft propaganda of this kind. The propaganda did flower and fructify.

As has been noticed above, the Japanese success of 1905 was followed by much loose talk, and the possibility of war was lightly discussed. At this juncture, President Theodore Roosevelt gave orders for the battleship fleet to proceed into the Pacific on its way around the world. When the plans were announced, many people promptly misinterpreted the purpose of the cruise and others predicted a disastrous conclusion. By some it was considered to be a threat to Japan, while others, including high naval authorities in certain European nations, were convinced that the Japanese fleet would certainly take the offensive.

The world cruise of the battleship fleet was carried out as planned by President Roosevelt. In President Roosevelt's opinion, the most noteworthy incident of the cruise was the reception given to the fleet in Japan. The President said:

"In courtesy and good breeding, the Japanese can certainly teach much to the nations of the western world. I had been very sure that the people of Japan would understand aright what the cruise meant, and would accept the visit of our fleet as the signal honor which it was meant to be, a proof of high regard and friendship, I felt, and which I was certain the American people felt, for the great island empire. The event even surpassed my expectations. I cannot too strongly express my appreciation of the generous courtesy the Japanese showed the officers and crews of our fleet; and I may add that every man of them came back a friend and admirer of the Japanese."

Japan, as a faithful ally, rendered valuable assistance in an hour of serious and very critical need to the Allied Powers during the First World War.

This is, indeed, the historic background in which the relevant Policy of

Japan was developing. The account given above is taken substantially from Professor Payson Treat's "Japan and the United States" and certainly it is a faithful account of the events happening since 1853.

I have noticed elsewhere what folowed the First World War. So far as Japan's attitude towards the U.S.S.R. is concerned, a historian of a very high authority records in the *Survey of International Affairs of 1936* as follows:

"In spite of the prominent part which Japan played in the inter-Ally Siberia expedition of 1918-22, she had, during the first decade after the Russian Revolution, shown less concern with the dangers of Russian Revolutionary propaganda and subversive action abroad than had several of the democratic countries which were much further removed from possible sources of infection. Indeed in 1925, when the Communist danger was looming large in European eyes, when the U.S.S.R. was still ranked generally as an outcast, when the Communist influence was at its height in China and when no Manchukuo existed to serve as a buffer between Japan and Russia, the Japanese Government had made a treaty with Moscow re-establishing friendly relations; and the first Soviet envoy to Japan had been warmly received on his arrival in that country."

Indeed, referring to the Japanese Government at least upto 1932, the same authority speaks in very high terms of praise. In his survey of 1931 this high authority says, "The tactics of conquest and colonization which had been pursued from 1914 to 1921, were superseded, from 1922 to 1931, by the entirely different tactics of commercial expansion and political good neighbourliness. During these latter years, the Japanese Government and people set themselves to provide for Japan's rankly growing population by acquiring for Japan an increasing share in an increasing aggregate turnover of international trade. And they accepted the logical political consequences of this economic programme." The surveyor further says: "They realized that this enterprise of sustained industrial and commercial expansion could only be attempted with any chance of success by Japan which, on the political plane, *was pursuing* and *was recognized by her neighbours to be pursuing*—a genuine policy of peace in harmony with the spirit of a deliberately pacific world order. And Japan, in this phase of her history, gave impressive evidence of her *will to peace* in a number of practical ways: in her acquiescence in the lapse of the Anglo-Japanese alliance; in her decision to withdraw her troops from Vladivostok and from Tsingtao; in her dignified self-restraint in face of the provocative American Immigration (exclusion) clause of 1924; and not least in her deliberate practice of non-retaliation on Chinese provocation on certain notable occasions: for instance, on the occasion of the Nanking outrages of 1927, when the Japanese were decidedly less militant in their own self-defense than either the American or the British. During the same period, Japan showed herself, as far as it came her way, in the guise of an exemplary member of the League of Nations. This was a remarkable record of good citizenship in the international life of the great world society."

Then comes the Japanese *volte face*. I have already noticed the reason

why this could happen. I shall have occasion to say more about this.

I do not propose to discuss in detail the evidence relating to these prior events. I would only like to observe that a detailed consideration of those events may not disclose a balance against Japan.

Let us take the case of the Russo-Japanese War of 1904-05. Historians could not always characterize it in the same manner as was done here by the Prosecution. There are historians who would say that this Russo-Japanese War of 1904-05 was brought about by the intransigence of imperialistic Russia of the Czars when, having over-ran Manchuria and established a military occupation, she refused, in flagrant violation of a solemn international agreement, to withdraw her military forces and the threat posed by them to Japan and to Asia. As I have already noticed, Great Britain renewed and strengthened the Anglo-Japanese Alliance at that time and the contemporary powers did not condemn Japan's action as aggressive.

Let us next take up the case of Japanese intervention of 1918 in the Soviet Far East referred to in the opening statement of Minister Golunsky. I would prefer to read the account of the event given in the Survey of International Affairs by the Royal Institute. In the Survey of the Affairs of 1920-23 it is pointed out that from the moment of the 1917 Revolutions, the Russians of the Far East were divided against themselves and that "the autonomous Cossack Communities of the Transbaikal, the Amur, and the Ussuri took the extreme Counter-Revolutionary point of view, and their Atamans Semenov and Kalmykov began to operate as independent military powers from their respective headquarters at Chita and Khabarovsk, while the rest of the country was captured first by the moderate Revolution and afterwards (though less completely) by the Bolshevik movement. This was the situation when THE ALLIES DECIDED to send troops into Eastern Siberia in the summer of 1918." The learned Surveyor then points out (1) that THE INITIATIVE DID NOT COME FROM JAPAN, where there was a strong anti-interventionist party from the beginning, and (2) that the original motive was a military consideration connected with events in the distant theatre of the European war. The Survey runs thus: "After the signature of the Peace Treaty of Brest Litovsk , the Czechoslovak troops serving in the Russian Army on the East European front had set out to reach Vladivostok by the Trans-Siberian Railway, in order to take ship thence to France and rejoin the Allies in the West. This adventurous Czechoslovak project had been brought to the knowledge of the Western Allies, and at the same time rumours had reached them that the retreat of the Czechoslovaks was being menaced by armed bodies of German, Austrian, and Magyr ex-prisoners of war, or even by the Soviet authorities acting in collusion with the Central Powers. The European Allies were genuinely afraid that German influence (and even German armies, which were already overrunning the Ukraine) might advance eastwards across Siberia. *They wished to build up a Siberian front against this danger, and they also wanted to give Japan a more definite share in the War.* The first nucleus of an Allied front against the German-Bolshevik menace was Semenov's force, and this was receiving assistance from Japan already, but THE JAPANESE GOVERNMENT LONG

HESITATED to plunge into the indeterminate responsibilities of a Siberian campaign. *The European Allies then realized that Japan would never move without a signal from America*; and President Wilson, after at first holding back, gave way—possibly to some extent under pressure from American railway experts who had conceived ambitious, though rather nebulous, projects for reopening the way into Russia across Siberia. In these circumstances, *the retreat of the Czechoslovaks provided a useful pretext for intervention*, and the dispatch of an Allied force to Vladivostock in order to cover their evacuation was therefore advocated BY THE WESTERN ALLIES; but it was evident that the bulk of the troops would have to be supplied by the United States and Japan; and, since Japan was already suspect to Russians of almost all parties—and specially to the parties of the left on account of the support which she had been giving to the Cossack Atamans during the past year—it was decided that the diplomatic initiative should be taken by Washington.

"Accordingly in July 1918, the United States Government published a declaration to the Russian people, announcing that, on the proposal of the United States, and with the previous approval of Great Britain, France and Italy, the American and Japanese Governments had decided to send troops to Vladivostok in order to assist the Czechoslovaks." It had been agreed among the Allies that the United States and Japan should each send 7,000 men.

"The landing of these troops at Vladivostok took place on the 11th August 1918."

For our present purpose we are not concerned with what followed these events within Russia itself. Suffice it would to say that by the end of 1919 the whole of Siberia to the West of Lake Baikal came under the direct authority of the Moscow Soviet Government and the Czechoslovaks passed to the East of the Lake.

"The Commander of the American contingent at Vladivostok announced on the 8th January 1920, to his Japanese colleague that his Government had ordered him to withdraw on acount of the 'indefinite character' which the undertaking had assumed."... "*A sharp division of opinion at once declared itself in Japan* between those who regarded the Siberian expedition as financially and politically unprofitable and those who were resolved to make the most of the opportunities which it appeared to offer. The latter party hoped to pick up concessions for Japan and to consolidate her commercial position in Eastern Siberia, and possibly to acquire control over the Chinese Eastern Railway. There were also dreams of territorial conquest, though these seem to have been confined to a small handful of 'militarists'. STRONGER MOTIVES were the desire to disarm or neutralize Vladivostok (the last foreign naval base in Far Eastern waters which directly threatened Japan after the expulsion of the Russians and the German respectively from Port Arthur and Tsingtao) and TO PREVENT BOLSHEVIK IDEAS, of which the Japanese governing class were mortally afraid, from spreading into the Far Eastern World—in the first instance among the disaffected subjects of Japan in Korea. *Finally, the Japanese were anxious to show their independence of the United States*. This combination of mixed motives prevailed."

Even the last of the motives suggested above was not a mere matter of sentiment in a world of *Power-Politics*.

The Japanese action is now looked upon as 'aggressive' by the Allied Powers. At that time, however, in view of the possibility of the Soviet Forces pushing on eastwards until they had asserted their authority upto the former frontiers of the Russian Empire, the Japanese almost assumed the role of Champion of 'bourgeous civilization' against Bolshevism.

In August 1920 the Japanese troops were actually withdrawn—not only from Semenov's country in Eastern Transbaikal, but from the main line of the Chinese Eastern Railway as far as Harbin.

I need not pursue this account further. As I have stated above it has no relevancy for our present purposes, except so far as it goes to show that the Japanese intervention of 1918 was not at all Japanese design and certainly was not the result of any conspiracy of the kind alleged in the indictment.

At any rate these events cannot supply any background for the purpose of the present case. If "there were also dreams of territorial conquest" in this expedition those dreams were confined to "a small handful of militarists". There is absolutely nothing on the record before us in any way to connect any of the accused or their alleged associates outside the accused dock, with that military group. I know of no process whereby the sin of that military group can be visited on the present accused.

The Russo-Japanese relationship began a new chapter after the Soviet-Japanese Treaty signed at Peking on the 21st January 1925. (Exh. 31). The treaty consisted of a convention, and various notes and declarations. By the first three Articles of the Convention, there was to be mutual recognition *de jure* and the exchange of diplomatic and consular representatives; previous treaties between Russia and Japan, prior to 1917, were to be revised or cancelled at a future conference, except the Treaty of Portsmouth of 1905; The Fishery Convention of 1907 was to be revised, and in the meantime the temporary procedure in regard to fishery bases established in 1924 was to be maintained. By *Article 4* a commercial treaty was concluded on a most-favoured-nation basis. It will be pertinent to notice in this connection that the U. S. S. R. had practically recognized Manchuria as a separate state by having entered into an agreement with Chang Tso-lin in 1924 after he had explicitly declined to recognize the Treaty previously made with Russia by the then internationally recognized government of China.

Minister Golunsky in his opening statement undertook to show that beginning from 1928 the Japanese warlords were planning a war of aggression aganist the Soviet Union. I do not think any evidence in support of this could be adduced by him.

General Vasilyev, in summing up the case, placed the evidence under the following heads:

1. Planning and preparation of war against the U. S. S. R. during the period from 1928 until the German attack on the U. S. S. R. in

1941.

(*a*) Seizure of Manchuria and turning her and Korea into a springboard for war against the U. S. S. R.

(*i*) Plans of war *vis-a-vis* the U. S. S. R. in 1928-31; seizure of Manchuria in order to convert her into a springboard for an attack against the U. S. S. R.

(*ii*) Plans of war *vis-a-vis* the U. S. S. R. in the period 1932-41.

(*iii*) Preparation of Japanese Armed Forces for war *vis-a-vis* the U. S. S. R.

(*iv*) The establishment of military base in Manchuria and Korea.

(*v*) The preparation of the population of Manchuria for a war against the U. S. S. R.

(*vi*) The part played by the Commander-in-chief and by the Staff of the Kwantung Army.

(*vii*) The violation by Japan of the Portsmouth Treaty of 1905 and of the Peking Convention of 1925.

2. Subversive activities of the Japanese Imperialists against the U. S. S. R.:

(*a*) Systematic violations of the Soviet Border.

(*i*) Sabotage activities of the first period.

(*ii*) Subversive activities of the Chinese Eastern Railway.

(*iii*) Systematic violations of the Soviet Border.

(*iv*) Subversive activities of the last period.

3. The undeclared aggressive war of Japan against U. S. S. R. in the Lake Khasan Area. (1938)

4. The undeclared aggressive war of Japan against the U. S. S. R. in the Nomonham area. (1939)

5. The alliance of Japan, Hitlerite Germany and Fascist Italy for aggression against the U. S. S. R.

(*a*) The Anti-Comintern Pact—a bloc of aggression against the U. S. S. R.

(*b*) The Tri-partite Pact as the final embodiment of a conspiracy of aggressors against democratic nations and the U. S. S. R. in particular.

6. The violation by Japan of the Neutrality Pact and aggressive actions against the Soviet Union in the period after the German attack against the U. S. S. R.

(*a*) The preparation by Japan of an attack against the U. S. S. R. after the conclusion of the Neutrality Pact.

(*b*) Furnishing to Germany information on the economic, political and military position of the U. S. S. R.

(*c*) Hampering Soviet shipping in the Far East, illegal detention and piratic attacks on Soviet ships.

The prosecution thus made much of the Manchurian Incident and asserted that attention of the Japanese military was directed to Manchuria with the

ultimate object of converting it into a base for a further expansion into the U. S. S. R. I have shown elsewhere the importance of Manchuria to Japan in the Japanese estimation, and I do not see why from Japan's action in Manchuria we should draw the inference as suggested by the prosecution. Of course, there is no direct evidence in support of this allegation of the prosecution.

Much reliance was placed by the prosecution on the various army operational plans made by Japan allegedly against the U. S. S. R. during this period. The evidence, however, disclosed that these were annual plans such as it was customary with the General Staff to formulate each year against eventualities. Besides the plans, we have the evidence of Lieutenant Colonel SEJIMA, Ruizo, Major General MATSUMURA, Tomokatsu, Lieutenant General MURAKAMI, Keisaku, Lieutenant General KASAHARA, Yukio and Lieutenant General YANO, Masao. I need not discuss this evidence in detail. I am satisfied from the testimony of these witnesses that these were not war plans in the sense that there was any decision arrived at, or intention entertained, or design made, for any such war. These were mere plans of tentative measures in contemplation of probable contingencies. They were annually made and when the next new year approached the plans for the former year were destroyed. There was in these plans no mention of any particular date for the commencement of operations. They were prepared in the General Staff office by the officers who had no knowledge whatsoever of the relations between the strategic plan of the general staff and the Government policy. Japan's having a strategic plan of war against Soviet Russia was an entirely different question from her having the intention of waging war against that country. Such plans moreover were drawn not only against the contingency of hostilities with the U. S. S. R. but also against other possible countries. On a careful examination of the evidence on this point, I have come to the conclusion that these plans were mere tentative ones, prepared as routine measures only on the footing of apprehended contingencies. They do not indicate the existence or the non-existence of aggressive intent. We have in evidence similar American plans against Japan. These indicate nothing so far as the question before us is concerned.

The prosecution laid some emphasis on the fact that Japan refused to conclude a non-aggression Pact with the Soviet Russia during 1931-32. The prosecution contended that from this reluctance on the part of Japan to conclude a non-aggression pact, it is legitimate to draw the inference that Japan at that time must have been entertaining an aggressive intent against Russia. I do not think that this alleged conduct of Japan can support any inference of the intention in question.

According to the prosecution itself, Japan was no respector of pact or treaties. If this is so, I do not see why Japan would hesitate to conclude such a pact even if she had the aggressive design against the U. S. S. R. On the contrary, if the prosecution characterization of Japan be correct, then one would expect that Japan would readily enter into such a pact in order at least to take a chance if she would succeed thereby to throw U. S. S. R. off its

guard. Nothing could prevent Germany from violating its non-aggression pact with the U. S. S. R. Japan ultimately did conclude a neutrality pact with the U. S. S. R., but that did not prevent the U. S. S. R. from declaring war against Japan when Japan was already defeated in her war with the other three allied powers.

Minister Golunsky in his opening statement put the prosecution case thus:

> "At the end of 1931 the Soviet Government proposed to the Japanese Government that a non-aggression pact be concluded; this proposal was repeated in 1932. The Japanese Government rejected the proposal. . . . . .
>
> "The Japanese Government refused to conclude a non-aggression pact with the U. S. S. R. on the ground that disputable questions existed between the U. S. S. R. and Japan and the time had not yet come to conclude the pact.
>
> "The Japanese Government paid no attention to the argumentation of the Soviet Government that the conclusion of the pact would have created favourable ground for solving these disputable questions.
>
> "Such attitude of the Japanese Government has only one meaning: The Japanese Government wanted to use the threat of military attack as an argument while negotiating on these disputable questions and if that threat would not have been effective enough, to carry out such an attack.
>
> "This refusal to sign the pact, proposed by the Soviet Union proves beyond any doubt that those military preparations which were started by the Japanese military authorities immediately after the occupation of Manchuria did not aim at defense but that the purpose of those preparations was to turn Manchuria and Korea into a military base for waging a war of aggression against the Soviet Union."

Along with this Minister Golunsky offered to show that approximately between 1931 and 1936 the military strength of Japan in Manchuria was enhanced and "barracks and military dumps were being built in uninhabited territories in Northern Manchuria, and strategic railroads and highways leading to the frontiers of the Soviet Union were being constructed and fortified districts were being built on the Soviet frontiers".

When the proposal of this non-aggression Pact came to Japan, it was dealt with by the then Japanese Government, and not by the alleged 'military clique' or the group of conspirators, whoever they be.

The reply given by the Japanese Government is contained in Exhibit 745, the verbal note delivered by Uchida to Troyanovsky on December 13, 1932. This reply, *inter alia*, contained the following statement:

"Japan and the Soviet Union are mutually ready to scrupulously respect the sovereign rights of one another and punctually refrain from any violation of each other's border. Different opinions may be maintained, however, concerning the proper time and methods of bringing these satisfactory relations to the formal conclusion of a non-aggression treaty. Some people are of

the opinion that, in view of the fact of the existence of different problems of such nature as may lead to differences between the two nations, it would be preferable to clear up the atmosphere and provide of the settlement of these differences by means of a preliminary conclusion for such a non-aggression pact. On the other hand, the opposite opinion is adhered to by those who believe that first of all efforts should be made to remove the cause of such differences prior to the consideration of problems of a more general nature such as the conclusion of a non-aggression agreement."

The note summed up by saying that "the formal beginning of the negotiations on the subject between the two Governments in this case seems to be untimely", and suggested that it would be preferable to try and achieve the solution of various problems facing both nations.

The Soviet note on this reply is Exhibit 746 of January 4, 1933. The Japanese reply to that note is Exhibit 747 of February 13, 1933.

We need not proceed to examine the merits and demerits of the reasons given by either side in this respect. All that I need point out is that the reason given by the then Japanese Government does not seem to be quite unreasonable. At any rate, this is how the Japanese Government viewed the situation at that time. I cannot say that the view taken was such that no other reasonable statesman of the time could have taken it.

It may be noticed in passing that at least at that time the world powers were not viewing the Soviet Russia as quite acceptable for friendly relations. We may recall to our memory here that the Soviet Government was not recognized by the United States of America till the year 1933. President Coolidge of America, as far back as December 1923, gave as one of the reasons for his government not entering into relations with the U. S. S. R. that he viewed the U. S. S. R. to be the "regime which refuses to recognize the sanctity of international obligations". President Wilson in 1919 characterized the U. S. S. R. by saying that it "signed agreement with no intention of keeping them". Secretary Kellogg in 1928 issued a statement in which he said, among other things, "that a recognition of this Soviet regime has not brought about any cessation of interference by the Bolshevik leaders in the internal affairs of any recognizing country, nor has it led to the acceptance by them of the fundamental obligation of international intercourse".

The defense commented on this part of the prosecution case by saying: "In the light of history, there is a certain pathetic interest attaching to Commissar Litvinov's illustrating the value of non-aggression pacts by the fact that such pacts has been concluded by the U. S. S. R. with various countries, including Lithuania, and that the U. S. S. R. was then "conducting negotiations with Poland, and starting negotiations with Finland, Estonia, Latvia." It cannot be denied that there is some truth in this comment. In any case the world view showed this tendency and I cannot say that thereby the whole world was showing any aggressive inclination towards Soviet Russia.

The alleged military preparations adverted to by the prosecution in this connection appear from the summation to refer to a period commencing from

the HIROTA policy of 1936. I have already given my view of this policy and shall have occasion to say more about it. I do not see much relation between such alleged preparation and the refusal to conclude the non-aggression pact. I cannot read into this conduct of Japan any aggressive intention or design.

The spread of Railway in Manchuria does not necessarily imply any aggressive design against the U. S. S. R.

The Manchurian Railway situation upto the year 1925 was reviewed by the Royal Institute in its Survey of international Affairs of that year. The dominating factor in Soviet-Japanese relations upto that time at least was the question of the economic penetration of Manchuria and the development of the rival railway system. The stakes involved were primarily the commercial predominance of either Vladivostok or Dairen, and ultimately the predominance of either Russia or Japan in Manchuria.

Railway construction in Manchuria was initiated by Russia in 1896. At that time almost the whole territory (area 3, 50, 000 square miles) was uncultivated, and was sparsely inhabited by hunters and graziers, through vast tracts possessed great agricultural possibilities. This was due largely to the lack of means of communication which would enable the products to be marketed at a reasonable rate.

The construction of the first railways was immediately followed by the cultivation of the land within easy reach of them, and the process of colonizing Manchuria commenced in earnest.

A further event which greatly contributed to the increase in the economic importance of Manchuria was rise of the 'soya bean' to a crop of special importance in the world's commerce.

Of the agricultural possibilities of Manchuria the Economic History of Manchuria published by the Bank of Chosen says:

"Manchuria is yet the most favoured spot for agriculture in the Far East, and its opportunities may well be termed 'immense'. That great mass of level land extending over the whole of Central Manchuria and comprising the basins of the Liao, Sungari, Nonni and Hulan, the productiveness of which can compare favourably with any part of Japan or Korea, is by itself as large as the whole of the Chinese Peninsula (Chosen, or Korea) or of the mainland of Japan, and, to those who know how little of level land there is in these two countries that is really arable or actually under cultivation, it will not be at all difficult to imagine the wonder in which the two peoples look upon this apparently boundless extension of rich field."

The learned Surveyor of International Affairs says: "Manchuria thus presented an ideal field for exploitation by railway. Vast stretches of fertile land were crying out for cultivation; hardy and industrious settlers were ready at hand, in the over-populated provinces of China, to bring these prospective wheatfields under the plough; all that was required was a network of railways to bring the people to the land and to facilitate the disposal of the produce. Any railway constructed in these fertile plains had, therefore, a virtual certainty of building up remunerative traffic for itself and at the same time developing the resources of the territory and providing a potential source

of food for the over-populated islands of Japan.

"This development, moreover, was, by providing a new market for her manufactures, bound to react favourably on the economic life of Japan herself. The possibilities were thus summed up, in the early days of Japanese penetration, by Mr. Yamanobe, President of the Osaka Spinning Company:

> "In our eyes the purchasing power of the Manchurians is almost boundless. The inhabitants of Manchuria are much better off than the Koreans, and, in addition to this advantage, about 20,000 persons are yearly flowing into the country from Shantung and thereabouts. These new settlers add to the demand, and it is difficult to imagine how great will grow the consumption of cotton goods in Manchuria.
>
> "Manchuria itself is one of the best markets in the world for cotton textiles. The art of weaving is yet in a very primitive state, and as it can by no means be improved in the near future, the inhabitants must look abroad for the supply of the cotton stuff for their clothing. The large majority of the population are peasants and labourers, and they are naturally inclined to prefer coarse and more durable Japanese cottons to finer calico.

"Japan accordingly entered whole-heartedly into the struggle for the railway domination of Manchuria, if indeed it can be called a struggle where one party rests content with the ground previously won. During the first quarter of the twentieth century, the Chinese Eastern Railway threw out no new branches, and the one existing branch, from Harbin to Changchun (148 miles), had to meet, in so far as south bound traffic was concerned, the competition of carts which carried produce to Changchun to be loaded direct on to the 4 ft. 8½ in. system. The Chinese Eastern Railway could thus attract traffic only throughout its own straight and elongated zone; while the railway under Japanese influence, whcih were spreading fanwise north of Mukden could tap several portions of Manchuria simultaneously.

"Not only was Japan systematically developing her own region of special interest, as she described South Manchuria and the eastern portion of Inner Mongolia in the correspondence prior to the formation of the Four-Power-Group Consortium, but she was thrusting forward into the Russian zone."

Then commences the tale of Japanese penetration of the Russian Sphere and the Russian apprehension of a potential threat to its position in North Manchuria.

"The Soviet Government did not watch the extension of Japanese influence without making some effort to safeguard its own interests. In May 1926 it essayed to come to an understanding with Japan, sending to Tokyo for this purpose M. Sorebryakov, an ex-Minister of Communications. He left Tokyo, however, without having accomplished anything beyond securing from Japan an acceptance 'in principle' of proposals for through traffic over the Siberian, Chinese Eastern, and South Manchurian Railways. It was reported also that M. Sorebryakov endeavoured to reach an understanding with Japan by which Manchuria should, for purpose of railway exploitation, be divided

into two spheres of influence, as in the old secret treaties between Japan and the Russian Empire. In this he was totally unsuccessful, Japan quoting to him the Washington Treaties as an insuperable obstacle to her entering into any agreement which ignored China's sovereign rights."

I do not see any bearing on the present question of transactions relating to the sale of the Chinese Eastern Railroad by the Soviet Government in 1935. Introduction of matters like this in this case with certain amount of solemnity rather goes to demonstrate the hopeless character of the prosecution case.

The prosecution gave some prominence to the Kyowakai or the Concordia Society and urged that this society existed for the purpose of contributing to the transformation of Manchuria into a military base for the preparation of a war against the Soviet Union. I was not much impressed with this evidence. The Kwantung Army was not assigned to the invasion or the occupation of Soviet territory.

The evidence shows that the purpose of this army being stationed in Manchuria was for defense. At any rate this stationing of the army in Manchuria was no part of any conspiracy.

The Kantoquen or the Kwantung army special maneuver again does not advance the prosecution case so far as the question now under consideration is concerned. We may again recall in this connection that Japan did not even take advantage of Russia's involvement in the European war and if conduct is any evidence of the mind, here is positive evidence contrary to the existence of any design or conspiracy against the U. S. S. R.

Whatever might have been said by Japan from time to time, and whatever might have been her preparations, the evidence sufficiently indicates her anxiety to avoid clash with the U. S. S. R. She seems always to have been afraid of such a clash. Even German request could not induce her to move against the U. S. S. R. In my opinion the cumulative effect of the evidence in this case goes to indicate only Japan's terror of Russian might and preparedness and possible advance into Manchuria and her consequent alertness and nervous preparedness for the contingency of Russian advance into Manchuira.

I have already dealt with the bearing of the anti-Comintern Pact and of the attendant secret agreement on the present question while examining the significance of Japan's alliance with the European Axis Powers. There I have pointed out how the alleged menace of Communism terrified the world, and what view the world took of Russia's connection with the Third International.

I may point out in this connection that amongst the World Powers there were profound differences of opinion as to Russia's interests and intentions. Mr. Lippmann points out this difference thus: "There are those who hold that the Russians will for a long time to come be absorbed in the internal development of their vast country, and that the Soviet Union will be very nearly as self-centred as was the United States during the nineteenth century. This is one hypothesis. There is no way of proving that it is correct.

"The other view is, of course, that Soviet Russia is an aggressive state which in various combinations fuses the ambitions of the Tsarist Empire with

the projects of the Third International. There is no way of proving that this hypothesis is incorrect."

But, as has been observed by Mr. Lippmann, a foreign policy ought not to be based on a blind choice between two unprovable hypothesis. Prudence requires that a state should be prepared for all the eventualities that can reasonably be anticipated. This is the elementary rule of prudence in statecraft and Japan's preparation in relation to the U. S. S. R. discloses nothing more than this elementary prudence.

The evidence does not establish that Japan had any aggressive design against the U. S. S. R. No doubt she shared the world dislike of Communism and perhaps this dislike was the most unmerited. Somehow Russia was not considered to be a thoroughly safe neighbour for the rest of the world since her adoption of the Communistic ideology. Even now it is believed that "before Russia can have a correct ideology and thereby become a thoroughly safe neighbour for the rest of the world, certain unjustified portions of her Marxian philosophy must be dropped". One is said to be "the determinism of her dialectic theory of history and the application of this dialectic to nature itself, rather than merely to theories of nature". "The essential point in the error is the supposition that the negation of any theory or thesis gives one and only one attendant synthesis." ... But "nobody has the right to affirm with dogmatic certainty that he is giving expression either to the nature of the historical process or to the dialectic achievement of greater and greater good, when he selects a given utopian social hypothesis such as the traditional communistic theory and forthwith proceeds to ram it down the throats of mankind in the name of the determinism of history."

Whatever that be, the whole world suffered from the terror of Communism and Communistic developments and Japan only shared this feeling. Even today the world has not been able to free its mind of this terror, real or fancied. The whole world was preparing, and is, even now, preparing against the apprehended aggression of communism and of the communist state. I do not see why we should single out Japan's preparation alone as an aggressive one.

The border incidents relied on by the Prosecution are mere border incidents. I cannot spell any conspiracy out of them.

OVER-ALL CONSPIRACY

FINAL STAGE

THE FURTHER EXPANSION OF THE CONSPIRACY

INTO

THE REST OF EAST ASIA AND THE PACIFIC

AND

INDIAN OCEAN

BY

FURTHER AGGRESSIVE WARS

We may now take up the alleged fourth stage of the conspiracy. The Prosecution, in the summation of its case on this Phase, starts from the Hirota plan of 1936. If it be its case that this plan of 1936 is the starting point of the alleged further expansion into the rest of East Asia and the Pacific, then, in my opinion, this account of expansion would not be of any relevant consideration in determining the question whether or not there was any over-all conspiracy of the kind alleged in the Indictment during any earlier period. As I read the Prosecution case, this reference to the plan of 1936 is not for the purpose of fixing the starting point of the design for further expansion, but only for showing that the plan, already conceived of, became only well-pronounced at this stage.

The Prosecution says that "the plan of 1936 to secure a steady footing on the Asiatic continent and to advance to the South Seas for the purpose of building Japan's new order in Greater East Asia and the all-out preparation for war in excess of the needs occasioned by the hostilities in China MAKE IT APPARENT that Japan's plans for expansion did not stop at the borders of China." According to it "the conspiratorial plans envisaged not only domination of the vast domain of China but also domination of the rest of East Asia and of the Southwest Pacific."

According to the Prosecution, there were two formidable obstacles to any realization of this 'grandiose object':

1. With respect to the expansion into China Proper and into the areas south of China, the obstacle was the Western Powers, particularly Britain, the United States, France and Holland;
2. With respect to the expansion into China Proper and into the areas north of China, the obstacle was the Soviet Union.

The Western Powers named above, especially Britain and the United States, were obstacles, according to the Prosecution, for three-fold reasons:

1. Because they themselves were objects of Japan's aggression;
2. Because of the vast financial and economic interests which they or their nationals possessed in China and the rest of Asia and the Pacific, they had to be expelled or limited and subordinated to those of Japan if the conspiratorial plan were to succeed;
3. Because, through solemn treaty and agreement, Japan stood firmly bound with them to forego the doing of the very things which formed the aims and ends of the conspiracy and to forbear from any and all of the actions required to effectuate it.

It seems clear that, according to the Prosecution case, any expansion into China Proper itself would bring in these two sets of obstacles. If that is so, any preparation for removal of these obstacles, standing by itself, would not push the inference further than that of expansion into China Proper only.

The pertinent treaties and agreements were divided by the Prosecution into three classes:

1. Agreements designed to prevent the outbreak of hostilities;
2. Agreements defining the relations between Japan and the other countries;

3. Agreements dealing specially with China.

The Prosecution began with "the conventions for the public settlement of international disputes, signed at the Hague, 29 July 1899", which marks the first world-wide attempt by convention to prevent the outbreak of hostilities. (This convention is Exhibit 12 in this case).

Along with the above convention, the following were placed under the first class named above:

1. The Covenant of the League of Nations, dated 29 June 1919 (Exh. 23);
2. The Kellogg-Briand Pact of 27 August 1928 (Exh. 33).

It may be noticed that the United States was never a member of the League. Japan seceded from the League in 1935. The U. S. S. R. was admitted to the League after that, and the League Council adopted a resolution on 14 December 1939 on the Finnish appeal of December 3, 1939, declaring that the U. S. S. R. was no longer a member of the League.

Under group II, the Prosecution referred to the following:

1. The agreement of 30 November 1908, entered into between the United States and Japan; (Exh. 22)
2. The Treaty dated 13 December 1921, to which the British Commonwealth Force, Japan and the United States were original parties and the Netherlands and Portugal became parties on 4 and 6 February, 1922 respectively. (Exh. 24)

   By this Treaty the Parties agreed, as between themselves, to respect their rights in relation to their insular possessions and insular dominions in the Pacific region.
3. (*i*) Japan agreed under the mandate of the League of Nations, that islands covered by the mandate should not be fortified. (Exh. 23)

   (*ii*) The military training of natives otherwise than for the purpose of internal police and the local defense of the territory shall be prohibited. (Art. IV)

   (*iii*) The United States, not being a member of the League, obtained the benefits of Article IV by entering into a treaty with Japan on 11 February 1922. (Exh. 29)

Under THE THIRD CLASS Mr. Higgins for the Prosecution laid stress on the Nine-Power Treaty dated 6 February 1922, to which the United States of America, the British Commonwealth, Belgium, China, France, Italy, Japan, the Netherlands and Portugal are parties, and which contains the essential obligations of Japan and the other contracting powers with respect to China. (Exh. 28)

According to Mr. Higgins the Nine-Power Treaty was but declaratory of the foreign policy of the United States not only toward China but toward all nations.

From the date of the treaty, which is without time limitation, the other powers had a right to assume that these provisions constituted the foreign poli-

cy of Japan toward China. Japan, in simple terms, was committed:

(*a*) To respect the sovereignty of China,

(*b*) To permit China to settle her internal problems without interference,

(*c*) To promote equality of commercial opportunity in China,

(*d*) To refrain from taking advantage of conditions in China to seek special privileges.

Mr. Higgins then said:

1. The evidence will show that from the date of the Treaty until September 1931 Japanese pledges were reasonably observed;

2. (*a*) After September 1931, pronouncement of Japanese foreign policy became more and more irreconcilable with the commitments in the Nine-Power Treaty;

   (*b*) Since then Japan's policy became one of opportunity and not of principle; —it became a policy of force and conquest.

3. (*a*) From the beginning of the Manchurian aggression Japan stated in her communications with the United States and the British Commonwealth that she had no territorial designs in Manchuria; (Exh. 293, 924, 931)

   (*b*) As the Mukden Incident expanded into aggressive military domination of the whole of Manchuria both the United States and the British Commonwealth followed an announced policy of peace and of adherence to treaty obligations;

   (*c*) The puppet government of Manchukuo was set up. Both the United States and Great Britain refused to recognize this puppet government.

4. (*a*) The relations between Japan and the United States were disturbed, by the aggressions in China.

   (*b*) In February 1934 the accused Hirota, Japan's Foreign Minister expressed to the Secretary Hull, a desire for peaceful diplomatic relations stating that there was no question between the nations "that is fundamentally incapable of solution". Secretary Hull responded cordially.

   (*c*) However, in less than one month, Amau, Chief of the Information Bureau of the Japanese Foreign Office, proclaimed the "hands off China" policy, setting up Japan as the political guardian and economic entrepreneur of China. Other powers were warned against any undertaking prejudicial to Japanese interests.

   (*d*) The British Commonwealth and the United States made earnest, though non-violent, objections.

According to the Prosecution, the object of the conspiracy could be successfully attained only if the formidable obstacles named above could be removed. I have already considered that aspect of the case, which was present-

ed on the footing of the U. S. S. R. being one of the obstacles. Here I shall confine myself to the Western Powers.

According to the Prosecution, so far as the obstacles offered by the Western Powers were concerned, their removal could be accomplished only if these treaty provisions and their correlated duties and obligations could be somehow got over. The conspirators, therefore, resorted to every conceivable means to evade, alter and ignore these treaties. The Prosecution offered to establish such attempts on the part of Japan and contended that if established, they will show Japan's preparation in aid of the conspiracy charged.

Their attempts in this respect were sought to be classified by the Prosecution thus:

1. During the first period the conspirators piously maintained that they were faithful to their obligations. They devoted their energies to devising new formula, ostensibly within the treaty system, which, if accepted by the Western Powers, would have completely emasculated these treaties;
2. During the next period they sought to rely on special interpretation of the treaty system which would justify Japan's action;
   (*a*) On April 17, 1934, to test the reactions of the treaty powers to the new formula, a "trial balloon" in the shape of Amau's Statement was raised.
3. During the third period the conspirators added several new elements to their interpretation of the treaty system;
   (*a*) One such new element was the interesting proviso that the objectives of the principles of the treaty sysem could only be attained in the Far East by fully recognizing and practically considering the ACTUAL PECULIAR CIRCUMSTANCES of that region;
   (*b*) Another was that Japan's action was a matter of self-defense which Japan had been compelled to take in view of Chinese anti-Japanese policy and practice, and, therefore, was outside the Nine-Power Treaty.
4. During the fourth and the final stage, a new approach was introduced; it was decided
   (*a*) to avoid all phraseology that would affirm the principles of the Pact and
   (*b*) to make the United States understand that the existing rights and interests of third powers would be respected but
      (*i*) not as a corollary of the Pact.
   (*c*) Henceforth it was decided that the standard laws governing the future government activities by third powers in China were to be established in conformity with the new conditions.

In April 1934 one Mr. Eiji Amau made public a statement which purported to give the then Japanese policy towards China. That statement is Exhibit 935 in the case. The statement may be summarized as follows:

1. Owing to the special position of Japan in her relations with China,

her view and attitude respecting matters that concern China may not agree at every point with those of foreign nations.

2. Japan has a special mission and responsibilities in Eastern Asia.
3. Japan's attitude toward China may at times differ from that of foreign countries owing to Japan's position and mission.
4. To keep peace and order in Eastern Asia, Japan must ever act alone on her own responsibility and it is her duty to do so.
5. There is no country but China that is in a position to share with Japan the responsibility for the maintenance of peace in Eastern Asia.
6. Accordingly, the unification of China and the preservation of her territorial integrity as well as the restoration of order in that country are most ardently desired by Japan.
7. Japan opposes any attempt on the part of China to avail herself of the influence of any other country in order to resist Japan.
8. Japan also opposes any action taken by China calculated to play one power against another.
9. Any joint operations undertaken by foreign powers, even in the name of technical and financial assistance, at this particular moment after the Manchurian and Shanghai Incidents, are bound to acquire political significance.
10. Undertakings of such a nature, if carried through to the end, must give rise to complications that might eventually necessitate the discussion of problems like the division of China, which would be the greatest possible misfortune to China and at the same time would have the most serious repercussions upon Japan and Eastern Asia.
11. Japan, therefore, must object to such undertakings as a matter of principle, although she will not find it necessary to interfere with any foreign country's negotiating individually with China on questions of finance or trade as long as such negotiations benefit China and are not detrimental to peace in Eastern Asia.
12. However, the supplying to China of planes, the building of airdromes in China and the detailing of military instructors and advisers to China, or the contracting of a loan to provide funds for political uses would obviously tend to alienate the friendly relations between Japan and China and other countries, and to disturb the peace and order of Eastern Asia. Japan will oppose such projects.

The statement then says that this is no new policy of Japan. On account of the fact that positive movements for joint action in China by foreign powers under one pretext or another are now reported to be on foot, it is deemed not inappropriate to reiterate her policy at this time.

There is some controversy over the identity of Mr. Amau. The Prosecution tells us that he was the official spokesman of the Japanese Foreign Office. We shall proceed on this footing.

Japan thus asserted her right to thwart a certain conduct on the part of China regardless of the terms in which Japan's statement described the contemplated policy; the statement was of utmost concern to the Western Powers, specially, the signatory Powers of the Washington Treaty. For our present purpose we are not much concerned with the legal aspect of what this statement involves.

While considering the legal aspect of this very pronouncement, Mr. Cheney Hyde made certain very pertinent observations which would be of much help to us in the present connection. After pointing out that:

"The statement announces that the *special position* of Japan in her relations with China are productive of a viewpoint and attitude respecting matters concerning that country," which make it proper as well as wise for Japan to act alone on its own responsibility in relation to the conduct of other powers towards China, Mr. Cheney Hyde said: "The assertion that a state may deem it proper as well as wise to act alone on its own responsibility in relation to the conduct of other powers of other continents towards areas and countries in a relative proximity to itself finds obvious precedent in the conduct of the United States in pursuance of the Monroe Doctrine. On grounds of self-defense, the United States has for a long period asserted the right to oppose the acquisition by any non-American power of any fresh territorial control over American soil by any process. Moreover, it has done so on its own responsibility, denying any obligation to permit the exercise of this assertion of right to be modified or impaired by agreement with any Latin American or other state. A sense of its own defensive requirements prevents any admission by the United States that such an assertion constitutes unreasonable interference with the political independence of an American state, should it desire to transfer territory to a non-American power." .... "Without discussing the merits of the North American stand, it suffices to observe that it affords in part an interesting replica, at least in point of theory, of the Japanese argument." .....

Thus, there might not have been anything inherently wrong or sinister in the Policy itself. At least such a policy would not have been unprecedented in international life so as to lead us to seek its origin in any conspiracy.

It may be recalled that in November 1917 the Lansing and Ishii exchange of notes declared that "territorial propinquity creates special relations between countries". The Government of the United States thereby recognized that Japan had special interest in China, particularly in the part to which her possessions were contiguous. As I have pointed out while dealing with the Manchurian Phase of this case, Great Britain recognized this special position in her treaties of alliances with Japan.

The Ishii-Lansing Agreement was terminated through an exchange of notes on April 14, 1923, Thereafter it might have ceased to be operative AS A COMPACT. Nevertheless, THE PRINCIPLE REMAINS that territorial propinquity creates a special relation between countries. It is a principle acted upon in international life. Its significance, therefore, may not be measured or limited by the termination of the agreement in which it found expression.

As is pointed out by Mr. Cheney Hyde, "the invocation of the principle

which attributes a special interest to territorial propinquity cannot be said to be unreasonable. Nor is such interest incompatible with the independence of the country in relation to which it is asserted."

We have already noticed Japan's interests in China, China's internal conditions endangering foreign interests there and China's increasing interrelations with the U. S. S. R., a state not a party to the Nine-Power Treaty. We have also adverted to the burden normally resting upon a state to maintain her obligations toward the outside world as an essential incident of her status of independence. Apart from any agreement or treaty, a state in international society seems, under certain circumstances, to possess the right to demote another state in rank through the impairment of her political independence.

Protracted impotence or unwillingness of a state to maintain within its domain stable conditions in relation to the life and property of the citizens of another state living there seems to be recognized in international life as legitimately inspiring and justifying such endeavours of the aggrieved neighbour.

I might again point out in this connection that international law seems to countenance the position that if the occurrences or preparations within another state be fairly considered by a state to threaten its safety gravely and immediately and the government of the state within whose domain such occurrences or preparations take place is either unable or professes itself to be unable to prevent them, the right of self-preservation of the foreign state may be placed above its duty of respecting the freedom of action of the other state. Such seems also to be the position when in the *bona fide* belief of the foreign state there is an imminent certainty that such occurrences or preparations will take place if measures are not taken to forestall them.

Any condemnation of the Amau Statement, therefore, would involve consideration of at least the following two questions:

1. Whether, in the facts and circumstances then prevailing in China, the policy pronounced in the Amau Statement could be justified in international law without reference to any treaty or agreement.
2. Whether Japan, by agreement or treaty, lessened her rights, if any, in this respect to any extent.

The Nine-Power Treaty in its *Article 1* contained an undertaking on the part of the signatory powers to respect not only the sovereignty and the territorial and administrative integrity of China, but also the independence of that country. They also agreed "to refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly states and from countenancing action inimical to the security of such a state. The treaty embodied also restraints to be exercised by China.

The basic premise was that China was to adopt a policy to promote intercourse between China and the other powers upon the basis of equality of opportunity. That country made formal announcement undertaking not to alienate or lease any portion of its territory or littoral to any power. Again in *Article 5*, China made definite agreement not to permit or exercise unfair dis-

crimination in the uses of or charges on its railways.

China's anti-foreign attitude including her intense and extensive anti-Japanese attitude was certainly opposed to the very basic premise of the treaty.

As I have already pointed out, the signatory powers including both Great Britain and the United States were repeatedly pointing out

1. "the progressive decline in the effective power of the Chinese government since the Treaty of Washington",
2. "the impotence of Peking to negotiate authoritatively and implement effectively any international agreements with the powers",
3. "diminution, almost to a vanishing point, of the authority of the Peking Government"

and

4. "the process of disintegration, civil war, and waning central authority, continuing with increased acceleration.

These powers also admonished China of the necessity of giving concrete evidence of its ability and willingness to enforce respect for the safety of foreign lives and property and to suppress disorders and anti-foreign agitatations. They also doubted if China had a stable government capable of carrying out these treaty obligations. In reference to the question of defending the "administrative integrity" of China, it was considered in some quarters that no such question should arise "until that integrity was something more than ideal".

I have already considered how the development of communism introduced a basic change in the conditions prevailing in China since the Washington Treaty.

We may also remember how from 1925 onward the operations of the Chinese boycott were not only inspired but organized, co-ordinated and supervised by the Kuomintang.

The Defense thus contended that since the signing of the Nine-Power Treaty at least five important incidents occurred in the Far East, which had not been anticipated at the time of the conclusion of the treaty. According to them, this changed condition entitled Japan to disregard her obligations under the treaty.

The five important incidents referred to by the Defense are the following:

1. The abandonment by China of the very basic principles of the treaty: China since the treaty adopted as one of her governmental policies anti-foreign attitude, including intense and extensive anti-Japanese attitude;
2. The development of Chinese communist party: It became an actual rival of the national government, possessing its own law, army and government and having its own territorial sphere of action;
3. Increase in the Chinese armament;
4. The development of the Soviet Union into a powerful state; despite her being the neighbouring country to China, she was not called

upon to participate in the treaty;

5. A fundamental change in the world economic principle.

On these grounds the Defense invoked the operation of the *maxim clausela rebus sic stantibus*.

The circumstances under which a party to a multi-partite treaty may reasonably claim the right to be no longer bound by any of its provisions are doubtless complicated and sufficiently various to give salutory warning against the danger of attempting to lay down dogmatic rules. Several undertakings breed obligations to each contracting party. "The conduct of any one, if fairly to be deemed a substantial breach of the agreement, may serve in a particular case to excuse another from heeding a specified undertaking closely entwined with the conduct of a party that was seemingly contemptuous of the arrangement. Again the design of the contracting parties may have been that certain of their undertakings should cease to be operative if conduct incompatible therewith were indulged in by any one of them."

There is the doctrine, *rebus sic stantibus*. On August 9, 1941, President Roosevelt proclaimed that the International Load Lines Convention of 1930 was no longer binding on the United States "for the duration of the present emergency". He based this unilateral suspension of the treaty on "changed conditions" which, he said, had conferred on the United States "an unquestioned right and privilege under approved principle of international law" to declare the treaty operation. The President's proclamation was made on the advice of Acting Attorney General Francis Biddle who had informed the President that "it is a well established principle of international law, *rebus sic stantibus*, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. Suspension of the convention in such circumstances is the unquestioned right of a state adversely affected by such essential change."

The doctrine *rebus sic stantibus* as thus understood by the Attorney General, and, on his advice, by the President of the United States, might not have been correctly understood. But unless we think of having "conveniently two international laws .... one for one's own nation and those we like, the other against the nation we do not like", it is difficult to question the *bona fides* of those politicians and statesmen who might have understood and applied the doctrine in the same way in which the President of the United States could understand and apply it.

It might with some reason be contended that a contracting power dissatisfied with the terms of a treaty, and having, in its judgment, solid reason to be free, or to free itself, from its undertaking thereunder, might at the same time not deem it desirable to discuss the situation with the other parties, or do more than make communication of its position.

The prosecution contends that the principle is well-established that one party to a treaty does not have the right to terminate its treaty obligation unilaterally merely upon the ground that it believes that the doctrine of *rebus sic stantibus* is applicable to it. Perhaps this view of the doctrine is correct. It may indeed be reasonable to expect that a party who seeks release from a

treaty on the ground of a change of circumstances should have no right to terminate the treaty unilaterally, and that recognition that the doctrine is applicable should be sought either from the parties to the treaty or from some competent international authority. The practice of treaty-making through multipartite arrangement of large import would really serve no good purpose, if a single contracting power may, on the strength of his own unilateral judgment, treat lightly the carefully devised undertakings once jointly decided to be for the common weal. The well-being of the international society would not be promoted by the securing of such a right to a single contracting power. Of course, it does not imply that treaties must at all hazards be preserved, still less that excuses for non-observance necessarily lack weight or should be ignored. It is entirely consistent with the maintenance of amicable relation between such states that any one or more of the parties to a multi-partite arrangement should seek and obtain an impartial determination of the changed circumstances. But for our present purposes we are not much concerned with the correctness of the explanation or of the procedure followed in the application of the doctrine. We are concerned with the question of the *bona fides* of the statesmen concerned and I do not see why we should question such *bona fides*.

The prosecution here refers to one particular conduct of Japan in relation to the Nine-Power Treaty which may deserve notice. Prosecution says that on October 27, 1937, HIROTA, having received on October 20 the invitation of Belgium Ambassador to a meeting of the signatory powers of the Nine-Power Treaty, declined the invitation, since it was based on the Declaration of the League of Nations that the military operation of Japan in China violated the Nine-Power Treaty.

It should be remembered that this happened after the outbreak of the China Incident. Admittedly some of the powerful signatory powers were openly siding with China and were aiding China in all possible ways. We have now in evidence before us what was Japan's apprehension and why Japan decided not to accept the invitation. Right or wrong, this was not a decision of HIROTA alone, but of the then Japanese Cabinet. We are not concerned with the question whether this attitude was right or wrong. The only question now before us is whether any sinister significance should be attached to it. I do not see what is sinister in this refusal.

We have instances of similar conduct of other states of international society on other occasions. I might recite here, by way of illustration, the cases of such refusal, by the U.S.S.R., of the invitations extended to it on two occasions by the League Council in connection with its dispute with Finland in 1939.

If we are to condemn the Amau pronouncement, we may not ultimately avoid answering the following questions:

1. Whether China having, through the treaty, got her status of independence strengthened, was in any way and to any extent relieved of the burden normally resting upon herself to maintain her obliga-

tions towards the outside world.

2. Whether any conduct on her part subsequent to the conclusion of the arrangement served to deprive her of the right to demand that freedom from external control which the treaty purported to hold out.
3. To what extent the terms of the treaty measured or restricted the right of Japan or any other party to demote China in rank through the impairment of her political independence.
4. To what extent the treaty affected the privilege of the Signatory Powers of so doing, even for cause.
   (*a*) Whether exercise of that privilege ceased to be the possession of any single state to be exercised according to its own individual judgment or whether its exercise became, in consequence of the treaty, a matter of common concern to all parties thereto.
   (*b*) Whether Japan or any other contracting power was in a position to rid itself lawfully of such restrictions as the treaty imposed in relation to the independence of China.

For my present purpose, it is, however, not necessary either to condemn or to commend the policy pronounced in the Amau statement. That question would arise only when we shall proceed to examine whether Japan's action in China was, or, was not, aggressive—was, or, was not, justified. For my present purpose, all that is necessary for me to see is, whether or not we find any sufficient explanation of the policy adopted without having recourse to the theory of enormous conspiracy alleged in the Indictment.

I have already noticed how the Lytton Commission, even in 1932, referred to diverse factors influencing the Japanese foreign policy, specially her China policy. Since then, other factors have arisen. The Amau statement itself indicates the Japanese belief and apprehension of menacing preparations within China. In my opinion, these sufficiently explain the development of the policy announced in the Amau statement, if it really had any official connection and pronounced official policy at all.

I have already discussed the Hirota policy of 1936 and its significance so far as it mentions Britain and America as possible powers with which Japan might have to fight. I have also examined that policy so far as it refers to the Soviet Union. In my opinion, this policy also need not lead us to any inference of the alleged conspiracy. I have also pointed out why I could not take it as a policy indicative of aggressive preparations on the part of Japan.

In any case, even by the showing of the Prosecution itself, any expansion only into China Proper would bring in both the obstacles, both the Western Powers and the U. S. S. R. What is there in the naming of these powers in these policies or plans, which would lead us to the inference that the plan was for the conquest of any territory beyond China?

We may now have the reconstructed picture of the conspiracy as presented to us by the Prosecution. According to the Prosecution, in order to realize

the grandiose object, Japan proceeded thus:

1. Her first attempt was to remove two formidable obstacles:
   (*a*) With respect to the expansion into China Proper and into the area south of China, the obstacle was the Western Powers, particularly Britain, the United States, France and Holland.
   (*b*) With respect to the expansion into China Proper and into the areas north of China, the obstacle was the Soviet Union.
2. A removal of the first obstacle meant efforts to eliminate the Western Powers:
   (*a*) These Western Powers, especially Britain and the United States, were obstacles—
      (*i*) because they themselves were objects of Japan's aggression;
      (*ii*) because the vast financial and economic interest which they or their nationals possessed in China and the rest of Asia and the Pacific, had to be expelled or limited and subordinated to those of Japan if the conspiratorial plan were to succeed;
      (*iii*) because through solemu treaty and agreement Japan stood firmly bound with them to forego the aims and ends of the conspiracy and to forbear from any and all of the actions required to effectuate it.
   (*b*) The object of the conspiracy could be successfully attained only if the formidable obstacle of the Western Powers could be removed, and that could be accomplished only if these treaty provisions and their correlated duties and obligations could be evaded, etc.
      (*i*) The conspirators resorted to every conceivable method to evade, alter, etc., the treaties.
3. From 1931 to 1941 the conspirators made every effort to deprive the Western Powers and their nationals of their legitimate interests in Asia and the Pacific, to force them to withdraw from the area or to accept a position inferior to that of Japan.
   (*a*) As fighting progressed in China there were many hostile acts performed, all designed, contrary to treaty provisions, to bring about the elimination of Britain and the United States and other nations from the Chinese picture either voluntarily or involuntarily.
   (*b*) Western business interests were interfered with and compelled to shut down or to evacuate during the period of hostilities.
4. The Western Powers, particularly the United States and Great Britain, made abundantly clear to the Japanese, both by words and actions, that they supported the principles of the treaties, that Japan's actions were in violation of treaty rights and that they expected Japan to act in accordance with her treaty obligations:

(*a*) On September 22, 1931 Secretary of State Stimson pointed out to the Japanese ambassador the serious impression the Manchurian Incident would make in the United States if the situation in Manchuria was not restored to *status quo*. (Exh. 920, R. P. 9, 340-43).

(*b*) On the same day he delivered a memorandum to the Japanese ambassador in which he made it clear that the situation was of military, legal and political concern to nations other than China and Japan. (Exh. 921, R. P. 9, 344-47).

(*c*) On the same day the United States addressed a note jointly to China and Japan in which Secretary Stimson expressed the hope that hostilities would cease and the matter be settled amicably. (Exh. 922, R. P. 9, 348-49).

(*d*) When the League of Nations passed its resolution on September 30, 1931, Stimson notified the League that the United States, acting independently, would try to reinforce the League because of its definite interest in the matter and because of its awareness of the obligations which the parties had assumed to the signatories of the Pact of Paris and the Nine-Power Pact. (Exh. 925, R. P. 9, 352-3).

(*e*) On January 7, 1932 Stimson warned both China and Japan that the United States could not admit the legality of any *de facto* situation and would not recognize the validity of any treaty or agreement which would impair United States' treaty rights in China. (Exh. 930, R. P. 9, 366-67).

(*f*) This was shortly followed by a press release in the form of a letter from Stimson to Senator Borah in which he pointed out that it was an integral part of the inter-related and interdependent Washington treaty system in which Japan had joined and that it could not be modified or abrogated without considering the premises on which it was based. (Exh. 932, R. P. 9, 370-72).

(*g*) In February 1933 the United States concurred with the findings of the League of Nations on the Manchurian Incident and endorsed the principles of settlement recommended by the League. (Exh. 933, R. P. 9, 383-4).

(*h*) On September 25, 1935 Secretary of State Hull made clear the United States' attitude on the autonomy movement in North China and stressed that the movement was being carefully watched because of the United States' treaty rights and obligations. (Exh. 938, R. P. 9, 403-5).

(*i*) On July 21, 1937 Hull made clear the policy of the United States toward adherence to treaties and pacific settlement of disputes. (Exh. 947, R. P. 9, 424-26).

(*j*) The United States repeatedly offered to assist in facilitating

the settlement of the conflict between China and Japan by peaceful processes.

5. The conspirators maintained piously throughout that they were faithful to their obligations.

(*a*) They devoted their energies to devising new formula, ostensibly within the treaty system which, if accepted by the Western Powers, would have completely emasculated both the Nine-Power Treaty and the Pact of Paris.

(*b*) On September 24, 1931 it was announced that Japan harboured no territorial designs in Manchuria. (Exh. 923, R. P. 9, 349-50).

(*c*) The policy actually pursued was so clearly inconsistent with the statements of adherence to the treaty system that it was deemed necessary to set up a formula within or on special interpretation of the treaty system which would justify Japan's actions.

(*d*) On April 17, 1934, to test the reactions of the treaty powers to the new formula, a trial balloon was raised in the form of the Amau statement.

(*i*) In this statement Amau maintained that due to Japan's special position in China her views might not agree on all points with other nations, but it must be realized that Japan had to exercise the utmost effort to carry out her mission and fulfil her special responsibilities in Asia. Because of Japan's position and mission, the difficulties in attitude toward China could not be evaded; and while Japan was endeavouring to maintain and promote friendly relations with other nations at the same time she must act alone on her own responsibility to keep peace and order in East Asia, a responsibility which could be shared with no country other than China. Japan therefore opposed any attempt by China to avail herself of the help of any other country to resist Japan and felt that any joint operations with a foreign power, even in the nature of technical or financial assistance after the Manchurian and Shanghai Incidents, had significance. Japan had, therefore, to object to such action as a matter of principle, although she would not interfere with any foreign country negotiating with China on questions of finance and trade, so long as the negotiations benefited China and did not endanger peace in the Far East. Japan would oppose the supplying of China with planes, airdromes, military advisers or loans for political uses. (Exh. 935, R. P. 9, 389-92)

(*ii*) The other signatories having received the statement with-

out a great deal of enthusiasm, Foreign Minister Hirota took the earliest opportunity to assure that Amau had given out this statement without Hirota's knowledge or approval. (Exh. 936, R. P. 9, 393-94)

(*e*) Despite Hirota's purported retraction of the Amau statement, that portion of THE NEW FORMULA as to Japan's special position and interest became the new dominant theme in dealing with Far Eastern matters.

(*f*) Shortly after the outbreak at Marco Polo Bridge, the conspirators added several new elements to their interpretation of the treaty system:

(*i*) On August 13, 1937 concurrence in the principles for maintaining world peace as set forth by Hull in his statement of July 16 was expressed with THE INTERESTING PROVISO that the objectives of these principles could only be attained in the Far East by fully recognizing and practically considering the actual peculiar circumstances of that region. (Exh. 937, R. P. 9, 398, 9, 401-2)

(*ii*) On October 27, 1937 Hirota, having received on October 20 the invitation of the Belgium ambassador to a meeting of the Signatory Powers of the Nine-Power Treaty, declined the invitation since it was based on the declaration of the League of Nations that the military operations of Japan in China violated the Nine-Power Treaty. (Exh. 954-A, R. P. 9, 444-5; Exh. 954-B, R. P. 9, 446-50)

(*iii*) THE NEW FORMULA adopted was that Japan's action was a measure of self-defense which Japan had been compelled to take in view of Chinese anti-Japanese policy and practice, and therefore was outside the Nine-Power Treaty.

6. On January 16, 1938 the Japanese government made its formal announcement that it would thereafter cease to deal with the government of China and look forward to the establishment and growth of a new Chinese regime which could be counted upon and with which Japan would fully co-operate.

(*a*) Yet, notwithstanding this direct treaty violation, the statement went on to say that this action involved no change in policy respecting Chinese territorial integrity and sovereignty and the rights and interests of others. (Exh. 972-A, R. P. 9, 506-7)

(*b*) Shortly after this announcement, Premier Konoye announced on January 22, 1938 that it was Japan's inevitable national aim to bring permanent peace to East Asia based on close cooperation between Japan, Manchukuo and China, and that

there would be a comprehensive industrial scheme for these three nations. (Exh. 972-F, R. P. 9,516-20)

(*c*) Throughout the year 1938 both Foreign Ministers Hirota and Ugaki continued to assure the United States that American interests in China would be respected and the principles of open-door and equal opportunity would be maintained. (Exh. 973, R. P. 9,534-5)

7. At the end of 1938, upon the appointment of Arita as Foreign Minister, a new approach was introduced.

(*a*) It was decided

(*i*) to avoid all phraseology that would affirm the Pact's principles;

(*ii*) to make the United States understand that the existing rights and interests of third powers would be respected, but not as a corollary of the Pact.

(*iii*) The standard laws governing the future government activities by third powers in China were to be established in conformity with the new conditions. (Exh. 989, R. P. 9,573-8)

(*b*) The Japanese reply of November 18, 1938 made no mention of the Nine-Power Pact, but pointed out that permanent peace could not be gained on ideas or principles in their original form as applied to pre-incident conditions. (Exh. 989, R. P. 9,576)

(*c*) From this time Japan ceased to avow her ostensible allegiance to the treaty system, although she continued to maintain that she was paying allegiance to its underlying principles.

8. On November 21 ARITA told Grew that it was impossible for Japan to recognize the unconditional application of equal opportunity and the open-door WHEN THE STATE OF AFFAIRS HAD CHANGED IN CHINA.

9. By the end of 1938 the conspirators were ready to take the first step to expand beyond the borders of China:

(*a*) The first movement was into French territory.

(*i*) For geographical-strategical reasons it was necessary for the success of the conspiratorial plan of expansion and aggression that the move be made in this direction.

(*ii*) French Indo-China occupies a strategic position of the highest importance. Her northern frontier skirts the southern frontier of China and joins that country with Siam and Burma, thus establishing a line of communication with Peiping, Hankow, Canton, Hanoi and Bangkok.

(*iii*) Indo-China is rich in the natural resources vital to the prosecution of war.

(*b*) As early as January 1938 the movement into French territory was being considered by the conspirators.

(*c*) On November 3, 1938 Konoye issued his declaration that Japan's ultimate aim was to establish a new order which would secure eternal peace, and that completion of this task was Japan's glorious mission. (Exh. 1,291, R.P. 11,695-97)

(*d*) As a start toward the fulfilment of this mission, on November 25, 1938, it was decided by the five minister conference that Hainan Island would be captured by military action in case of necessity. (Exh. 612, R.P. 6,731)

(*e*) On February 10, 1939 Hainan Island was captured in a surprise attack by Japanese combined naval and military forces. (Exh. 613-A, R.P. 6,733)

(*f*) This was shortly followed by the occupation of the Spratley Islands. (Exh. 512, R.P. 6,145-46)

(*g*) The passage of alleged war materials through Indo-China to Chiang Kai-shek gave rise to protest from the Japanese government at various times in 1938, 1939 and 1940.

10. On July 26, 1939, after numerous protests against commercial discriminations against its citizens, the United States notified Japan of its intention to abrogate its commercial treaty of 1911 with Japan.

Even if we accept the whole picture, it amply indicates gradual development of unforeseen events.

This is the entire picture of the situation. In my opinion, it is not a picture of any conspiracy of the kind alleged in the Indictment. It clearly indicates developments of unforeseen events.

I believe I have considered the several items of the above analysis in connection with Amau Statement, HIROTA Policy, general preparation for war and aggression against U.S.S.R. For my present purpose I do not consider that any further discussion of these items would serve any useful purpose.

Some importance has again been attached by the prosecution to the decisions of the League of Nations on the Manchurian Incident and Japan's attitude towards the decision. I have discussed that fully in connection with the Manchurian phase of the case.

The evidence sufficiently makes it clear that what happened was a subsequent development determined by several new factors. "When the Japanese militarists delivered their stroke at Mukden they did not foresee—or did not pause to consider—that their action would have such profound effects beyond the limits of Manchuria and the frontiers of China and in regions remote altogether from the Far East. Yet, world-wide repercussions actually followed." The two momentous state papers referred to in items 4(e) and (f) of the analysis of the prosecution case, foreshadowed the eventual political consequences of the Japanese action and the possible degree of their gravity.

The Prosecution says that by the end of 1938, pursuant to their policy the conspirators were ready to take the first step to expand beyond the borders of China and the first movement was into French territory.

Before proceeding further with the consideration of the Prosecution viewpoint of this phase of the conspiracy, I would prefer to see the evidence relating to this alleged first step of expansion beyond the borders of China.

The evidence relating to Japan's advance into Indo-China and Thailand discloses that with the extension of the Sino-Japanese conflict after the Marco Polo Bridge Incident of July 1937, Japanese troops occupied the seacoast area of China down to the border of French Indo-China. Accepting the Prosecution evidence in its entirety, we shall get at the following account:

As a member of the League of Nations, FRANCE, in October 1937, had joined in the condemnation of Japan's action in China, and agreed with the suggestion of actual aid which might be offered to China by the individual countries. (Exh. 617-A, R.P. 6,817)

On 25 October 1938, Japan objected to the shipment of war supplies to China through French Indo-China. The French denied such shipment and "refused to adopt the measures demanded by Japan". (Exh. 616-A, R.P. 6, 802)

A Five Minister Conference of the Japanese Cabinet decided on 25 November 1938, "that the Hainan Island, would be captured by military action in case of necessity". (Exh. 612, R.P. 6,731)

In December 1938 it was agreed by all the ministries concerned that the only remedy to French refusal of Japanese representations regarding shipment of supplies to China was the bombing of the Yunnan railway, as the railway was being used for the transportation of military supplies to an enemy. The Japanese Ambassador to France was instructed to explain accordingly in case the bombing actually took place. (Exh. 616-A, R.P. 6,803-4)

On 31 March 1939 the Japanese government informed the French Ambassador in Tokyo that the Spratley Islands, off the coast of Indo-China, long known as ownerless, and settled by Japanese nationals as early as 1917, had been placed under the administrative jurisdiction of the Governor General of Taiwan for the protection and interests of the Japanese nationals living there. (Exh. 512, R.P. 6,145-46)

On 26 August 1939 the French representative at Hanoi (de Taste) informed the Japanese Consul General (Urabe) that at 11-00 a.m. of the same day, two Japanese seaplanes, flying from the direction of the Chinese border had dropped two bombs in French Indo-China territory, causing about thirty casualties. The Japanese requested local settlement and on 17 November paid 62,550 piastres indemnity. Receipt was acknowledged on 29 November and the incident was considered closed. (Exh. 616-A, R.P. 6,814-5)

Diplomatic conversations were undertaken to arrive at an understanding that if Japan would not intervene in the European War, France would adopt a conciliatory policy toward Japan. The Japanese Foreign Minister explained to the French Ambassador on 30 November 1939 that the French desire for a diplomatic rapprochement with Japan would not be possible so long as France continued deliberately to assist the Chiang regime by allowing passage of supplies and material through Indo-China. Unless France ceased such transportation, military necessity made the bombing of the transport lines in French ter-

ritory inevitable. The Japanese desired to send a military liaison commission for negotiation between the Japanese Consul General and the French Indo-China authorities. (Exh. 616-A, R. P. 6,801-10)

On 12 December 1939, the French denied the charge of transportation of munitions to Chiang. However, the French government had no objection to a conference regarding "the occupation of Hainan Island, the annexation of SHINNAN archipelago, the obstruction of navigation on the YANTZE River, the infringement on commercial freedom in the occupied territory and all the other damages sustained by the French interests in China". Since Japanese military operations near the border might upset the political equilibrium of French Indo-China, the French Government desired to have an explanation of the *nature*, *object* and *duration* of the operations.

The Japanese Minister reiterated the Japanese stand on transportation of munitions, and said that the military operations along the border were part of the Japanese attempt to blockade China and it would be impossible to state the duration.

The main point, then, in the negotiations was traffic of supplies to China through Indo-China. The parties had widely divergent opinions at the outset. (Exh. 616-A, R. P. 6,810-3)

On 5 February 1940, the French Ambassador protested against a recent bombing of the Yunnan railway, charging damage to French property and killing of French subjects. In reply, Japan maintained her stand on the military necessity of bombing the railway. Japan would be satisfied with the actual stoppage of aid to Chiang and would not press for a public announcement to that effect. The particular bombing, it was said, would be investigated. (Exh. 618-A, R. P. 6,857-64)

On 10 February 1940, Hainan Island, French possession off the south coast of China, was taken over by a Japanese landing party. British, American and French Ambassadors made representations to the Japanese Government regarding this move. (Tokyo Gazette, Exh. 613, R. P. 6,733)

On 20 February the Japanese explained the bombing of the Yunnan train earlier in the month as accidental because of bad flying conditions and poor visibility. Japan was ready to pay "a reasonable sum of condolence money to the French nationals". (Exh. 618-A, R. P. 6,864)

In the middle of March 1940, Japan proposed that during the course of the negotiations, France would suspend transportation of arms, gasoline and trucks to Chiang while Japan would refrain from using military force. France agreed for a period of one month only and Japan, displeased with this attitude, felt that further negotiation was impossible. (Exh. 618-A, R. P. 6, 848-9)

In Europe, Germany was advancing rapidly against France and the French Government had asked Japanese companies for airplanes and large amounts of munitions. Japan expressed her willingness to meet these French desires "If France would accept Japan's request of the then pending Franco-Japanese problems, especially the suspension of transportation of munitions to CHIANG via French Indo-China". (Exh. 618-A, R. P. 6,853). On 4 June

1940, Japan made another strong representation on the subject. On 12 June the Japanese Expeditionary Forces in China announced that they would not be able to overlook this aid given to Chiang Kai-shek by France. (Exh. 615-A)

On 17 June 1940, France asked armistice terms of Germany.

Japan notified France on June 19, 1940, that Japan could no longer overlook the continuation of the transportation of munitions to CHIANG. (Exh. 618-A)

KIDO stated in his diary for 19 June 1940 that the Four Minister Conference (18 June) relative to French Indo-China had decided to make her requests, wait for the reply and then determine the question of using force. Italy and Germany had been informed of Japan's economic and political concern over Indo-China and "England and America are to be dealt with after the replies from Germany and Italy". (Exh. 619, R. P. 6,824-5)

Local French Indo-China authorities were again cautioned about transportation of supplies on 19 June and permission to send inspectors to investigate the matter on the spot was again requested. (Exh. 615-A)

On 19 June 1940, the German Ambassador in Tokyo telegraphed that the Japanese Ambassador in Berlin had received instructions to offer Japan's congratulations on the French armistice and to take that opportunity to press for a German declaration giving Japan a free hand in French Indo-China. "If, ... a consideration of the Japanese request should be intended, a formula would have to be found which would fix Japan's course definitely along the German lines. . . . In this connection, Ott said that he was confidentially told by army circles that there the idea of occupying the strategically important Yunnan railway is being propagated." (Exh. 520, R. P. 6,162-5)

On 20 June 1940, the French Ambassador said that transportation of such items as gasoline and trucks had been prohibited since 17 June, but in view of the strong representations by the Japanese, the prohibition would be extended to include a wide range of goods and materials. There would be no objection to the dispatch of Japanese investigators. (Exh. 615-A, R. P. 618-A). A military mission was dispatched under Maj. Gen. Nishihara to see that the understanding was observed. (Exh. 615-A, above)

To enforce the blockade of the French Indo-China border, on 22 June, Japan made three stipulations concerning the commission of military experts: (1) easy entrance and all necessary facilities for the commission of 30 and any others who might be sent later from Japan or China; (2) an advance party of seven from China, with the same treatment; (3) complete blockade until the Japanese list of contraband was decided. France accepted the above. (Exh. 618-A)

On 29 June, General Nishihara and party of 40 observers arrived at Hanoi. (Exh. 618-A, R. P. 6,853)

On 7 July 1940, the French Indo-China authorities agreed to ban imports from China for one month. (Exh. 618-A, R. P. 6,852)

On 10 July 1940, it was reported to *Arita* from Berlin that no definite attitude regarding the Netherlands East Indies and French Indo-China had been obtained from Germany yet. (Exh. 1,020, R. P. 9,695)

On 12 July 1940, a conference of the Foreign War and Navy Ministries was held to consider the draft of the Tri-Partite Pact. The Foreign Office spokesman said, "The object of this draft is to have Germany understand that Japan has no territorial ambition over these spheres, but Japan wants to firmly establish not only the freedom of economic activities but also political leadership." To prevent German dominance over the islands, "Japan's policy toward French Indo-China and the Dutch East Indies must be hastened..... and she must also endeavour to sever French Indo-China and the Dutch East Indies from European influence as soon as possible". (Exh. 527, R. P. 6, 191-6, 211)

"According to the reports from the observation personnel of Nishihara's group sent to various parts in French Indo-China, the embargoes were actually being carried out", and a co-operative attitude from the French authorities was shown through "the construction of a submarine cable between HAIPHONG and HAIKOW, and the installation of wireless machines for the observation party." The Japanese Government then decided to conclude political, military and economic agreements with French Indo-China. Negotiation would be conducted with the following aims in mind: "France shall co-operate with Japan in the construction of a New Order in East Asia and especially, for the time being, recognize the passage and the utilization of aerodromes (including the stationing of ground forces for guard purposes) in French Indo-China by the Japanese Army which has been sent for the China operations, and provide the various facilities which are necessary for the transportation of arms and ammunition and other materials of the Japanese army." In return, "Japan shall respect the territorial integrity of French Indo-China." (Exh. 620, R. P. 6, 875-95)

On August 1, the French Ambassador, being informed of these Japanese desires, replied that for France to grant them would be equivalent to her declaring war on China. Since Japanese demands on French Indo-China were becoming greater and greater, it was impossible to foresee what new demands would be forthcoming if France acceded to the present ones. The French Ambassador finally agreed to exchange notes and transfer the Japanese request to his home government. (Exh. 620, R. P. 6, 875-95)

The German Ambassador reported to Berlin on 15 August that the French Ambassador, departing from his basic acceptance of the Japanese terms, had asked for a Japanese guarantee for renouncement of all territorial claims before France could consider the demands. The Japanese Foreign Minister desired Germany to use its influence on the French government to support Japan. (Exh. 647, R. P. 6, 295)

On 15 August, in a conference between Matsuoka (Japanese Foreign Minister) and Henri (French Ambassador) Japan stated that her "demands are not based on the intention to invade the territory of French Indo-China". The demand clearly stated "'for the operations against China' and no further guarantee to respect French territory seemed necessary to Japan. Matsuoka further intimated that as Japan's military demands were so urgent, it may happen that she may have to discontinue negotiations and execute necessary

military actions." (Exh. 620, R.P. 6,910-3)

The second exchange of notes took place on 20 August.

On the night of 20 August a third exchange of notes transpired in a conference of the Ambassador and Vice-Minister Ohashi. The Japanese again objected to the refusal of France to recognize the general principle of passage of troops, etc. The French limited the zone to the border line in Tongking Province. Both sides accused each other of delaying settlement, but the Japanese stated, "In case France should further postpone the settlement (of the matter) the responsibility will be with the French, should an unforeseen incident occur in French Indo-China." (Exh. 620, R.P. 6,919)

On the night of 21 August, the Chief of the Eurasian Bureau told the Ambassador that while Japan was under no compulsion to reveal her military plans, it had been decided to outline the specific needs unofficially in order to speed settlement. Japan wished three airfields near Hanoi, Phulang Thuong and Phutho. Guards, supply troops, air force personnel would number 5,000—6,000. The route of passage, according to necessity of operations against China, would be along the Haiphong, Hanoi and Laokay line and the Hanoi-Langson line. Japanese troops here would be in addition to air personnel above. Ships of the Imperial Navy would enter Haiphong. Communications equipment would accompany the above Japanese forces. He asked for approval without delay or alteration. (Exh. 620, R.P. 6,920-1)

In the exchange of draft notes on 25th August, the French Ambassador remained reluctant to make a specific agreement in an official letter as to Japan's military requirements and wanted time for instructions from his home government. (Exh. 620, R.P. 6,921-2)

The official Japanese memorandum of 30 August quoted the French letter of 30 August to the effect that "the Government of France recognize the predominant interests of Japan in the economic and political fields in the Far East.

"Therefore, the Government of France anticipates that the Government of Japan will give their assurance to the Government of France that Japan would respect the rights and interests of France in the Far East, especially the territorial integrity of Indo-China and the sovereignty of France in all parts of the Union of Indo-China."

Economically, France would negotiate to make Japan's trade position in Indo-China superior to Third Powers.

As for the special military facilities desired by Japan, France understands that they would be for the duration of the Chinese conflict only and would be confined to the province of Indo-China adjacent to China. Under these conditions, France was prepared to order its Commander in Indo-China to settle military problems with the Japanese Commander, so long as Japanese orders would not restrict the competence of French officials. Facilities would be limited to strategic necessity and not be of an occupational nature. Compensation for damages either by Japanese troops or by Sino-Japanese engagements in Indo-Chinese territory was expected.

Japan accepted the French proposals, desired negotiations to start with-

out delay and wished "the Government of France to issue, hereafter necessary instructions to the Indo-China authorities for this purpose". (Exh. 620, R. P. 6,939)

On 30 August Matsuoka informed the French Ambassador of the steps taken according to the results of the two months' negotiation. General Nishihara, already in French Indo-China as Chairman of the Inspection Committee, was named as representative of the Supreme Commander combining both posts. He was instructed to conduct on the spot negotiation to fulfil Japan's military requirements as presented to the Ambassador on 21 August and, as Japan understood, accepted by him. The task should be accomplished in two weeks. The Ambassador was requested to inform the French Indo-China Governor General that "France has substantially accepted the military requirements of Japan". (Exh. 620, R.P. 6,923-5)

On 31 August, Nishihara tried to open negotiations with the Governor General who refused because he had not received instructions from his government. On 2 September the Japanese Ambassador was instructed to urge France to instruct the Governor General to commence on the spot negotiation immediately. The Governor General received a long message from France and asked that discussions be delayed until 3 September. "Therefore the Major General handed the notification previously prepared as to the withdrawal of Japanese residents and the stationing of troops after September 5th to the Governor General." The Governor General then promised an answer within an hour and Nishihara withdrew his notification temporarily. The Governor General shortly informed Nishihara that his instructions from France differed greatly from what the Japanese proposed to do. Nishihara decided that if negotiations were to start on revisions of what he considered already settled, no conclusion would be reached in a short period and "immediately proposed to the Governor General what the Commander-in-Chief of Japanese Expeditionary Force in South China has decided to advance his Army into French Indo-China after September 5th". The Japanese Consul General, being informed of this, retained two Japanese ships in Haiphong and Bangkok, respectively, and prepared for evacuation. (Exh. 620, R.P. 6,925-7)

Meanwhile in Tokyo and France, French representatives were urged to instruct the Governor General to accept the Japanese demand. The French Ambassador in Tokyo accepted. (Exh. 620, R.P. 6,927-8)

Finally on 4 September an agreement on the spot was signed between the Commanding General of the French Indo-China Army and Major General Nishihara. (Exh. 620, R.P. 6,928)

KIDO reported in his diary of 9 September that "the Chief Aide-de-Camp reported that the military agreement parley, which had been making smooth progress with the Governor General, had taken a turn for the worse since the advance of one battalion or so of our troops into French Indo-China". (Exh. 626, R.P. 6,971)

On 14 September KIDO wrote that Matsuoka was going to send an ultimatum to French Indo-China. The Emperor told KIDO that the statements of the Foreign Minister and of the Army General Staff Headquarters did not

seem to coincide exactly. KIDO advised the Emperor to suggest caution, but to give his approval to what the government planned. (Exh. 627, R. P. 6, 972-3)

Japan and France maintained their divergent views and on 16 September, the French Ambassador in Tokyo was informed that "the actual situation on the spot is very serious".

On 19 September in Tokyo, the French Ambassador was informed "that the Japanese forces would advance into TONKING Province at any time after zero hour of September 23rd, whether the agreement on details will be concluded or not". (Exh. 620, R. P. 6,933)

The French attitude changed suddenly on 22nd September and the agreement on details was signed. (Exh. 620, R. P. 6,933)

This agreement, concluded between Nishihara and Martin on 22 September, dealt more specifically with actual landing (on 26 September), transportation, stationing of troops, and equipment of airfields in conformity with the 4 September agreement.

On 15 June 1940, Thailand and Japan had entered into a treaty professing friendly relations and respect for each other's territory. (Exh. 41, R. P. 513; 6,147)

"Thailand, stimulated by a sudden and serious agitation and change in international relations demanded in a memorandum dated 13 September, as a condition for the exchange of ratification of the non-aggression treaty, the revision of the Mekong River frontier . . . by insisting that the circumstances in French Indo-China were no longer normal. This demand meant the cession of the areas along the right bank of River Mekong across from Luang Probang and Bakuse (Note: ceded from Siam to France by 1904 treaty) to Thailand. Thailand, in addition, expressed her hope to obtain a guarantee from the French that the territory of Cambodia and Laos would be returned to Thailand in the case when France renounces her sovereignty over Indo-China". (Exh. 618-A, R. P. 6,869)

France replied on 19 September that the status of French Indo-China had not changed and "she will not be able to respond to any demand that may alter the territorial integrity of French Indo-China". France had no objections to establishing a committee to solve any pending questions. (Exh. 618-A, R. P. 6,869)

On 28 September Thailand repeated her demands for the Mekong River boundary but reserved her demand for Laos and Cambodia on the left bank fro the time "when the position of French Indo-China is altered". (Exh. 618-A, R. P. 6,870)

A secret outline of Japan's foreign policy dated 28 September 1940, reveals that Japan "should maneuver an uprising of an independence movement (in French Indo-China) and should cause France to renounce its sovereign right. . . ."

The secret document says: "We should conclude a military alliance with Thailand, and use Thailand as a rear base. However, in order to delay her in making preparations, it is well to pretend that the diplomatic relations be-

tween Japan and Thailand are now secure until we start military actions. In case we consider that the military alliance cannot be kept in strict secrecy because of the internal affairs of Thailand, there is room for consideration that we should set up a secret committee based on the non-aggression treaty between Japan and Thailand to enable us to enter into a military alliance as soon as we start military action." (Exh. 628, R. P. 6,975-80)

At this time on 4 October 1940, "Tentative plans for policy towards the Southern Regions" also were drawn up. (Exh. 628, R. P. 11,722. See also: GEA.)

The French authorities again refused Thai's demands on 11 October, and direct negotiations between France and Thailand were discontinued. The situation became tense and both countries concentrated troops along the border. "But the advance of Japanese forces into French Indo-China being limited to the northern district, and the remainder of French Indo-China being guaranteed by Japan, the ensuing chaos which Thai anticipated did not occur, consequently Thailand was placed in a dilemma, and compelled to depend on Japan in the achievement of her aims.

"In the beginning, Japan did not like Thai to adopt such an attitude."

"At the Four-Ministers Conference held on 5th November, it was decided ... to assist Thailand in her recovery of lost territory and to make Thailand co-operate both politically and economically in the establishment of the New Order in East Asia. This was conveyed to Thailand." (Exh. 618-A, R. P. 6, 873)

"At the second Four-Ministers Conference held on the 21st November, it was decided that when Thailand accepts Japan's demands Japan would immediately assist her in the recovery of LUANG PRABANG and PAKUSE." Thailand accepted Japanese demands. (Exh. 618-A, R. P. 6,873)

Mounting tension on the border resulted in recurrent clashes between the troops of Thailand and Indo-China. The Japanese Foreign Minister advised the French Ambassador that Japan intended to arbitrate in the matter. (Exh. 618-A, R. P. 6,874)

On 21 November, Ott, the German Ambassador in Tokyo, cabled his government that Japan had advised the Thai government to limit its demands on Indo-China. "The Vice Foreign Minister informed me most confidentially that the Japanese Government intends to send warships to Saigon. The French Government will be informed that this will be a friendly visit, but it will be, in fact, aimed as a demonstration against Thailand." Any Anglo-American diplomatic success with Thailand would be "countered by the occupation of Saigon, and thereby be compensated". (Exh. 563, R. P. 6,444-5)

The Treaty between Japan and Thailand, negotiated in June 1940, was ratified at Bangkok, 23 December 1940. It provided for friendly relations, contact on matters of common interest, and non-assistance to a third power attacker. (Exh. 41, R. P. 513)

KIDO wrote, on 1 February 1941, that the Liaison Conference of 30 January had decided general principles of Japan's policy towards French Indo-China and Thailand. "The purpose of the plan is to establish the leading

position of the Empire in French Indo-China and Thailand by utilizing the opportunity presented by their having accepted our arbitration, in order to contribute to the preparation for the Southward policy. The Navy aims to use Camranh Bay and the air bases near Saigon. But as this cannot be stated openly it has been decided to represent the action taken as aimed at the preservation of trade and communications, and security against war between French Indo-China and Thailand. In case military force is to be used to attain the objective, it has been decided to ask the further approval of the Emperor." (Exh. 1,303, R.P. 11,744-5)

On 5 February Foreign Minister Matsuoka was appointed Japanese mediator in the dispute between France and Siam.

The peace agreement between France and Thailand was signed on 9 May 1941 and provided for a boundary adjustment along the Mekong River, in favour of Thailand, adjustment of public and private property and citizenship of French nationals in the transferred areas, the setting up of a demilitarized zone, and police enforcement in the zone. Various commissions and negotiations would conclude detailed arrangements. In case of disagreement which could not be settled by diplomatic means, the conflict "shall be submitted to the mediation of the Government of Japan". Regarding the Boundary Commission, "the duties of the Chairman of the Commission shall be entrusted to one of the Japanese Delegates". A provision was made for the convention of a Mixed Commission, if necessary, for the demilitarized zone and "the functions of the Chairman of this Commission shall be entrusted to one of the Japanese delegates". (Exh. 47)

The Protocol between France and Japan concerning the Guarantee and Political Understanding was signed on 9 May 1941.

This is what happened; but it did not happen pursuant to any policy of the conspirators.

French Indo-China admittedly occupies a strategic position of the highest importance even in respect of China Proper. Her northern frontier skirts the southern frontier of China and joins that country with Siam and Burma, thus establishing a line of communication with Peiping, Hankow, Canton, Hanoi and Bangkok. The evidence now before us clearly establishes Japan's case of help coming to China through Indo-China.

It is also admitted that the United States "rendered aid economically and in the form of war materials to China to a degree unprecedented between nonbelligerent powers and that some of her nationals fought with the Chinese against Japan".

The prosecution is correct in saying that the United States notified Japan of its intention to abrogate its commercial treaty of 1911 with Japan on July 26, 1939; but the embargoes against Japan really commenced in 1938, if not earlier, and even before that the United States was helping China.

According to Secretary Hull, the step taken by America on July 26, 1939 was adopted because "the operation of the most favored nation clause of the treaty was a bar to the adoption of retaliatory measures against Japanese commerce". (Exh. 2,840). The evidence discloses the various nationalistic eco-

nomic measures of the Western Powers which affected Japan and the Japanese industries, necessitating for her the adoption of measures to overcome their effect on Japanese trade and commerce.

When Japan's treaty with the United States lapsed by being abrogated on July 26, 1939, an aggravated economic pressure was applied to Japan. A cursory glance at the list of the commodities embargoed with the dates when such embargo became effective will reveal how this might have affected Japan's civilian life as well. Undoubtedly, many of these commodities were absolutely necessary for Japan's civilian life. On June 28, 1940, the United States' Secretary of State discussed the Far Eastern situation with the British Ambassador and the Australian Minister. On that occasion Secretary Hull declared "that the United States had been exerting economic pressure on Japan for a year, that the United States' fleet was stationed in the Pacific and that everything possible was being done, short of serious risk of actual military hostilities, to keep the Japanese situation stabilized." This course, he added, was the best evidence of the intentions of the United States in the future. (Exh. 2,848). Proclamations were issued increasing the severity of the embargo on July 2, 1940; July 26, 1940; September 12, 1940; September 25, 1940; September 30, 1940; October 15, 1940; December 10, 1940; December 20, 1940 and January 10, 1941.

Japan was so worried about the economic pressure that she endeavoured with renewed vigour to enter into new negotiations with the Netherlands East Indies, particularly with respect to oil. Discussions there were started on September 12, 1940 when KOBAYASHI arrived in Batavia. Negotiation with the Netherlands East Indies continued till 17 June 1941. In the meantime, further economic pressure was exerted by the United States by the issuance of further embargo proclamations.

As a result of the embargoes, what steps might reasonably be expected to be taken by Japan would be amply indicated from what President Roosevelt himself said on July 21, 1941 in course of his conversation with the Japanese Ambassador. The President stated that the United States had been permitting oil to be exported from the United States to Japan because OTHERWISE the Japanese Government would have moved down upon the Netherlands Indies. On July 25, 1941, a radio-bulletin was issued by the White House, wherein President Roosevelt stated that the matter of letting the oil go to Japan was intended for keeping war out of the South Pacific for the good of the United States and in defense of Great Britain and for the freedom of the seas.

The statesmen, politicians and military authorities of the United States all were of opinion that these economic sanctions against Japan would drive Japan to the very steps which Japan as a matter of fact pursued. I do not see why then we should read into these steps any design or conspiracy of the kind alleged by the Prosecution.

Let us see the evidence relating to Japanese action in the Netherlands East Indies.

The Prosecution claims that at about the same time when Japan was planning its movement into Indo-China, her designs in the South Seas were

being manifested with respect to the Netherlands East Indies and New Guinea. In the East Indies, Japan had built and was building and extensive system of organizations for espionage and general underground activity. The Prosecution says that the statements of the conspirators during this period make it clear that these events in the South Seas from 1934 to early 1940 were not isolated instances resulting from the conflict with China but that they had broader implications and were planned steps in Japan's large program of expansion. Let us first of all see what the Prosecution claims to have established in this respect. The Prosecution claims the following:

1. With the intensification of war in Europe in May and June 1940, the conspirators took full advantage of the situation presented to push their plans for the areas south of China.
   (*a*) In February 1940 Japan had presented to the Netherlands a list of economic demands which would have secured for Japan a preferential position in the general economic life of the Netherlands East Indies. (Exh. 1, 309-A, R. P. 11, 780)
   (*b*) Even before the war in Europe had spread to the Netherlands in April 1940, Foreign Minister Arita had publicly announced that Japan was intimately bound economically to the South Seas regions, especially the Netherlands Indies, and as the European war spread to the Netherlands and there were repercussions in the East Indies they would interfere with the maintenance and furtherance of co-prosperity and co-existence. (Exh. 1,284, R. P. 11,672-73)
   (*c*) Though Japan was assuring the other interested powers that the *status quo* of the Netherlands East Indies should not be changed (Exh. 1, 285, R. P. 11, 675), the Japanese Ambassadors in Berlin were seeking a German declaration on the subject and on May 22, 1940 Japan was advised by Germany that she was disinterested in the Netherlands East Indies. (Exh. 517, R. P. 6, 157-58; Exh. 518, R. P. 6, 159; Exh. 519, R. P. 6, 161)
   (*d*) Having thus assured themselves, the conspirators then turned their immediate attention to French Indo-China.
      (*i*) On June 18, 1940 a decision was reached at a Four-Minister Conference that a request be submitted to Indo-China regarding discontinuance of assistance to Chiang Kai-shek, and in the event of refusal by the French, that force be used. (Exh. 619, R. P. 6, 824)
      (*ii*) On the following day Japan asked Germany for a declaration by which Japan would receive a free hand in Indo-China. (Exh. 520, R. P. 6, 162)
   (*e*) The fact that Japan was vitally interested in and had plans in connection with both the Netherlands East Indies and French Indo-China was made clear to Germany on June 24,

1940.

(*i*) Koiso stated that the realization of Japan's colonial wishes in Indo-China and the Netherlands East Indies would make Japan economically independent of America and would offer to the expected Konoye government a promising starting point to settle the China Incident. (Exh. 523, R. P. 6, 175-76)

(*f*) Any uncertainty as to Japan's immediate plans was dissipated when on July 1, 1940 Japan refused to enter into a treaty with the United States designed to maintain a *status quo* in the Pacific and prevent forceful changes. (Exh. 1, 092, R. P. 11, 702; Exh. 1, 293, R. P. 11, 706-7; Exh. 1, 296, R. P. 11, 712)

2. With the advent of the second Konoye Cabinet not only was there an orientation of Japan's Axis policy in the direct collaboration with Germany, but also there was exhibited a marked determination to go forward with the policy of southern expansion.

(*a*) In the Cabinet Decision of July 26, 1940

(*i*) the basic aim of Japan's national policy was defined as the firm establishment of world peace in accordance with hakkoichiu, and in the construction, as the first step, of a new order in Greater East Asia with Japan, Manchuria and China as foundation.

(*ii*) Establishment of a Japanese economic self-sufficiency policy, making the three countries a single unit and embracing the whole of East Asia, was advocated.

(*iii*) A complete program for the establishment of a completely militarized totalitarian state was formulated. (Exh. 541, R. P. 6, 271)

(*b*) At the Liaison Conference of July 27, 1940, in addition to the adoption of policies toward Germany, Italy, the Soviet Union and the United States, it was decided to settle the southern problem within limits so as not to cause a war against a third power and to strengthen the diplomatic policy toward the Netherlands East Indies in order to obtain important materials. (Exh. 1, 310, R. P. 11, 794-95)

(*c*) The immediate aim of Japan's foreign policy at that time was to establish a greater East Asia chain of common prosperity with Japan-China-Manchukuo group as one of the links. (Exh. 1, 297, R. P. 11, 716)

(*d*) This policy involved ultimately the use of military operations in execution of the plan for the South Seas.

(*i*) This is apparent from the statement on August 10, 1940 of Prince Fushimi. (Exh. 1, 298, R. P. 11, 718)

(*ii*) This was a plain indication that Japan would resort to war to attain her aims when her preparations for war

were completed.

3. (*a*) The new national policy was immediately reflected in the determination of the economic demands to be made by Japan on the Netherlands Indies.

(*i*) On July 16, 1940 Japan had noitfied the Netherlands that it was sending to the Netherlands Indies a delegation comprising diplomatic, military and naval experts for economic negotiations. Koiso had been designated as chief delegate but subsequently he was replaced by Kobayashi. (Exh. 1,309-A, R. P. 11,796-97)

(*b*) The new policy was likewise immediately reflected in the demands made on France and French Indo-China.

(*i*) On August 1, 1940 Matsuoka presented to the French Ambassador Japan's proposal that Indo-China co-operate with Japan in political, military and economic affairs for the establishment of Japan's new order in East Asia and to foster settlement of the China Incident.

(*ii*) The political and military co-operation requested was the right of passage of Japanese troops through Indo-China, the utilization by the Japanese army of air bases and of all necessary facilities for the transportation of arms, ammunition and other materials for Japanese troops in Indo-China. (Exh. 620, R. P. 6,886)

(*iii*) Realizing the isolation of France, Japan decided to seize this opportunity. Japanese troops crossed the French Indo-China border on September 22, 1940 even though the negotiations continued. On the following day, France submitted to Japanese coercion and the final agreement was signed. (Exh. 620, R. P. 6,933; Exh. 621, R. P. 6,830; Exh. 3,865, R. P. 38,584-85; Exh. 3,851, R. P. 38,581-82)

(*iv*) Before the movement of troops had begun on September 23, the conspirators had already formally defined their real purpose. The decisions of the Cabinet on September 4 and of the Liaison Conference of September 19 had already been made. (Exh. 541, R. P. 5,314-5)

4. Immediately after the troop movement on September 28, 1940, it was decided as Japan's foreign policy that all the areas in the limited sphere plus the Philippines, with Japan, Manchukuo and China as the centre, would comprise a sphere in which politics, economy and culture were combined.

(*a*) By October 4, 1940 the plan with respect to the southern regions had been worked out in some detail which clearly set forth Japan's entire aggressive program. (Exh. 628, R. P.

6,976)

(*b*) The above is supported by Exhibit 628.

(*i*) Defense witness Sato attacked the validity of this document.

(*ii*) It was submitted by the Prosecution that where there is a plan which is admittedly a government document found in a government office, and it has been shown that subsequent events followed the course prescribed in the plan, there is an almost conclusive inference that the plan was adopted and that the actions were carried out pursuant thereto.

5. In the meantime Japan had clearly begun to further prepare herself for military action in the southern region. Her first move was to attempt to separate Thailand from Britain and bring Thailand within the Japanese sphere.

(*a*) At the Four-Ministers Conference of November 5, 1940 it was determined to aid Thailand to recover her lost territory and to make her co-operate politically and economically in establishing the new order.

(*b*) This was reaffirmed by the decision of November 21.

(*c*) These military motives were the real incentives for the movement. This was made clear in the decision of the Liaison Conference of January 30, 1941.

(*d*) That conference had decided that the purpose of the plan was to establish Japan's leading position in Indo-China and Thailand. (Exh. 1,303, R.P. 11,744-45)

6. While Japan was applying pressure against the Netherlands Indies and making her first military movements into the South Seas, the other Western Powers were viewing the situation with alarm.

(*a*) When, notwithstanding the timely warnings against her course of aggression against China and other areas in East Asia and the South Seas, Japan not only continued but intensified her aggressive activities, the United States took certain precautionary measures:

(*i*) On January 26, 1940 she permitted the Commercial Treaty of 1911 between the United States and Japan to lapse after notification of abrogation by the United States on July 26, 1939, because it did not afford sufficient protection to United States' commerce in Japan or in occupied portions of China and acted as a bar to the adoption of retaliatory measures against Japanese commerce. (Exh. 994, R.P. 9,602)

(*ii*) In addition the United States had also imposed embargoes on the export of aviation gas, refining machinery and certain metals, all vital materials needed for war. (Exh. 1,007, R.P. 9,635; R.P. 10,736)

7. By the beginning of 1941 the situation had reached a point where the conspirators decided to finally accomplish their purpose of dominating the Asiatic Pacific World and to remove the obstacles to that project presented by Great Britain and the United States.
   (*a*) To accomplish this they adopted a two-fold policy:
      (*i*) on the one hand, they would negotiate with Britain and the United States on certain specific outstanding problems in accordance with certain proposals, which, if accepted, would leave Japan the master of the Asiatic-Pacific world with Britain and the United States relegated to whatever position Japan might allow;
      (*ii*) on the other hand, they would actively prepare for war with those countries with the same objectives and results.
   (*b*) The two policies were carried forward side by side simultaneously.
   (*c*) The negotiations were viewed as impossible from the beginning and regarded only as useful camouflage for the active war preparations going on which would lull the United States and Britain into a false feeling of security.
      (*i*) The negotiations were an integral part of the preparation for war.
   (*d*) The idea of going to war with the United States and Britain to gain the purposes of the conspiracy was not a wholly novel one in the early days of 1941.
      (*i*) Already on June 30, 1936, during Hirota's premiership, the Foreign, Navy, War and Finance Ministers had worked out a plan of state-policy to secure a steady footing of Japan on the Asiatic continent through diplomacy and national defense in which the entire program of aggression and its methods of accomplishment were laid down in broad outline.
      (*ii*) This program stated that Japan was to be prepared for Britain and America, and naval armaments should be strengthened until sufficient to assure command of the western Pacific against the United States. (Exh. 977, R. P. 9,542-6; Exh. 979, R. P. 9,550-3)
      (*iii*) At the Privy Council meeting of September 26, 1940, which considered the ratification of the Tri-partite Pact, the question of a possible war with the United States and Japan's readiness therefor was considered.
8. Early in February 1941, Japan began conversations simultaneously with both Britain and the United States for the ostensible purpose of clarifying Japan's position in Far Eastern matters.
   (*a*) The conversations with Britain served only to delimit the problem.

(*b*) These negotiations lasting less than a month sharply delineated the major issues then existing between Britain, the United States and Japan.

(*c*) Hidden in diplomatic language, the questions were: (1) would Britain and the United States accept the policy which Japan was following in her actions in China, French Indo-China and Thailand, and (2) would Japan, under cover of its alleged allegiance to the Tri-partite Pact, extend its aggressive actions to British and American possessions in the Far East.

(*d*) The negotiations with Britain merely posited the problems and helped clarify the issues.

(*e*) The solutions, if any, were left to be handled by negotiations with the United States.

9. The 1941 negotiations between Japan and the United States began with the appointment of a new ambassador from Japan to the United States, Admiral NOMURA.

10. (*a*) From July 1941 onward it was clear that the resolve to continue the advance to the South could only be effected through the actual exertion of military force.

(*b*) At the Imperial Conference of 6 September 1941 it was decided that, in view of the acute situation, the execution of Japan's Southern advance policy necessitated a determination for war with the United States, Great Britain and the Netherlands by the middle of October, should Japanese demands for British American guarantee not to strengthen their position in the south be rejected.

(*c*) Occupation currency for the Netherlands Indies had been ordered as far back as January 1941 and the first deliveries had been made in March of that year.

(*d*) After the third KONOYE Cabinet had been succeeded in October 1941 by the TOJO Cabinet, the preparations were intensified.

(*e*) (*i*) At the Imperial Conference of 5 November, 1941 it was decided to begin hostilities sometime after the 25th of November and it was planned to open new negotiations with the Netherlands Indies for the purpose of concealing and disguising the Japanese plans for an attack upon that country. (Exh. 878, 1, 169, 1, 176, 877, 1,313)

(*ii*) At the Imperial Conference of 1 December 1941 the final decision to declare war on the United States, Great Britain and the Netherlands was made. (Exh. 588, 1,214)

(*iii*) On 8 December 1941, Japan attacked and subsequently declared war upon the United States and Great

Britain. No formal declaration of war by Japan on the Netherlands was made, or even contemplated, as according to Prime Minister TOJO, such a step would be undesirable for strategic reasons. (Exh. 1, 241, 1,332, 1,338-B)

(*f*) The Netherlands Government could harbour no doubt that the attacks on Pearl Harbour and Singapore were but a prelude to a military conquest of the Netherlands Indies. Accordingly it recognized the existence of a state of war and formally declared war on Japan.

I shall presently come to the question of negotiations between Japan and the United States and examine how far Japan's behaviour in relation to such negotiations is indicative of any insincerity or deception on her part and, as such, indicative of the conspiracy charged in the case.

But before that let us see what we get from the evidence adduced in connection with Japan's action against Netherlands Indies.

A large volume of documentary evidence was adduced in support of this part of the case. I have already indicated above against each item the evidence adduced in support of the several matters urged in this particular phase.

This large volume of evidence may indicate Japan's subsequent design against Netherlands Indies; but certainly does not in the least support the alleged over-all conspiracy or design under consideration.

The evidence on this phase of the case really covers the period from May 1938. The only evidence relating to an earlier period would be found in exhibits 1, 326-C and 1, 307-A. These two documents push the story back to 1935.

Exh. 1, 326-C is an excerpt from what is said to be "an official report of the Netherlands Indies Government on Japanese subversive activities in that country". This report is Exh. 1, 326 for identification only.

The excerpt in question purports to be a letter dated 15 March 1935 from the President of a Company styled 'South Seas Development Co. Ltd.' to Mr. Kosugi Michinari at Momi office. The subject is named as 'Foundation of the Dutch New Guinea Oil Company'. The letter purports to transmit the reports received from the Naval Staff and from the Consulate-General at Batavia, both dated February 14th, concerning the conditions regarding the starting of enterprises in Dutch territory. It says: "Our company would also like to apply for the permission to do experimental drillings" in certain territories. A thorough study of the Dutch mining legislation was requested in the letter and the addressee was asked to make preparations for the future. It was anticipated that the Dutch would not be well disposed to this application and consequently the addressee was requested to bear this possibility in mind and to make investigations regarding the specified territory "in great secrecy". (Exh. 1, 326-C, record page 11, 905)

The other document (Exh. 1, 307-A) is an excerpt from Exh. 1, 307 and purports to be "Collections of the Official Announcements of the Foreign Min-

istry, No. 14, for 1935". It speaks of the establishment of the Permanent Conciliation Commission between Japan and the Netherlands. The establishment was announced on 31 October 1935, as provided in Article 12 of the Japanese-Netherlands Treaty of Judicial Settlement, Arbitration, and Conciliation.

There is nothing even covertly sinister in the second document. The first document no doubt speaks of investigations to be made in 'great secrecy'.

I fail to see any indication of conspiracy in the disclosures made by these documents. Even the suggested 'great secrecy' need not suggest anything unusually sinister. Not a single powerful member of the so-called International society can perhaps say that its behaviour does not disclose similar concern with foreign resources. Japan was a country without any material resources of her own. She started on her career when "Western Society had come to embrace all the habitable lands and navigable seas on the face of the planet and the entire living generation of mankind".

The Japanese emulated the western powers in this respect but unfortunately they began at a time when neither of the two essential assets, "a free-hand" for their ability and a world-wide field, was any longer available to them. The responsibility for what Japan was thinking and doing during the period under our consideration really lies with those earlier elder statesmen of Japan who had launched her upon the stream of westernization and had done so, at a moment when the stream was sweeping towards a goal which was a mystery even to the people of the West themselves.

Whatever that be, the evidence above referred to does not indicate any aggressive design on the part of Japan though it may be that Japan was casting her wistful eyes on the undeveloped resources of the Netherlands. But in this we need not read any plan of deliberate attack on any political position. The Western Powers in their enterprise of sustained industrial and commercial expansion could proceed on a "tacit assumption that a certain minimum measure of world-wide political good sense and good will and moderation could be taken for granted". The fact that the field was now occupied by the Western Powers should not exclude the possibility of such an assumption on the part of a new enterprise. The Western Powers certainly were not devoid of these elements.

The evidence relating to the events from May 1938 onward only discloses the gradual development of the circumstances explaining the happenings that followed. I cannot, for myself, ascribe these happenings to any prior design of conspiracy.

I have already noticed how even the American statesmen, politicians and military authorities, including Roosevelt himself, were viewing the consequences of the United States' action against Japan. We should not lose sight of the steps taken by the United States against Japan during this period in order to appraise correctly Japan's action in the Netherlands East Indies. These may not justify Japan's action. But now, for our present purpose, an explanation of the occurrence without the alleged conspiratorial design is the only

thing that matters.

I am not satisfied that there is anything in this evidence which in any way can lead us to any inference of the over-all conspiracy.

The evidence rather shows the gradual development of the situation. There is clear indication that Japan did not start with any design of the Pacific war which ultimately happened. In shaping her policy and making preparation Japan certainly could not ignore the eventual possibility of such a war. But there is positive evidence that she always wanted to avoid this ultimate clash.

There remains only the last step in the conspiracy as alleged by the prosecution.

The principal matter that would demand examination in this connection is the behaviour of Japan in relation to the Japanese-American negotiations preceding her attack of Pearl Harbour.

The Prosecution case is—

1. That there was never any intention on the part of the conspirators to grant a single concession during the conversations with the United States.
   (*a*) That the conversations were prolonged until the proper time had come under the plans of aggressive action, at which time they were terminated;
      (*i*) The matter was taken away from the diplomats and placed into the hands of the militarists for immediate action;
   (*b*) That the whole matter was one of deliberate planning and cold calculation;
      (*i*) That in 1937 War Ministry had laid down its basic plan for complete preparedness for military action by the end of the year 1941.
      (*ii*) That it was at the end of the year 1941 that the negotiations with the United States were terminated and the real ultimatum decided upon.
      (*iii*) That this was so not because of any attitude taken by the authorities of the United States but because the month and date had arrived for the fulfilment of the design to open hostilities.
   (*c*) That the truth is that from the beginning to the end there was never a change in the policy of Japan.
      (*i*) That this is best proved by the fact of official lament of Ambassador NOMURA, a former Admiral of the Japanese Navy and a former Foreign Minister of Japan, that the negotiations were causing him to live a life of hypocrisy among people who trusted and respected him.
      (*ii*) That there was never a basic alteration or concession

made in a single term.

(*iii*) That Japan never intended to modify the Tri-partite Pact; it never intended to remove its troops from China until its purpose had been fully accomplished; it never intended at any time that the United States or any one else should have equality of commercial opportunity in the Far East.

2. That looking backward in the light of subsequent events it is not unreasonable to conclude that Japan, in fact, either sought to obtain from the United States recognition of her right to occupy and to conquer at her own caprice or to lull the United States and Great Britain into a sense of security while she made secret preparations and determined upon the most advantageous time to make further aggressive moves.

3. (*a*) That the United States and the British Commonwealth took the position that all problems of consequence could be solved by simply observing the existing treaty provisions.

(*b*) That these countries insisted that Japan's claim to the rights conferred under the treaties carried an obligation equally strong to perform the duties required.

(*c*) That Japan, on the other hand, claimed rights greatly in excess of those conferred and refused utterly to recognize duties imposed.

(*d*) That there was no claim in the conversations that the United States and Great Britain were not living up to their treaty commitments.

The prosecution summation of the whole course of the negotiation would roughly stand thus:

1. The negotiations between Japan and the United States began with the appointment of the new ambassador from Japan to the United States, Admiral NOMURA.

(*a*) At that time the second KONOYE Cabinet was in office with MATSUOKA as Foreign Minister, TOJO as War Minister and OIKAWA as Navy Minister.

2. (*a*) On January 22, 1941, in instructing NOMURA, MATSUOKA emphasized that Japan had made a definite resolution to stand against the United States entering the European War. He instructed NOMURA to make this attitude clear to President Roosevelt and Secretary Hull so that it would act as a check against the United States participating therein. (Exh. 1,008, R. P. 9,643-50). He further instructed the ambassador to keep the following matters clearly in view in conducting the negotiation:

(*i*) Unless Japan were bold enough to make great changes in national policy, she would not be able to get United

States understanding for maintaining peace in the Pacific;

(*ii*) If the present situation continued, there was no guarantee that the United States might not join the present war or might not declare war on Japan;

(*iii*) If there was no basis for mutual understanding between the two, Japan had to join with others to prevent the United States from declaring war on Japan or from participating in the European War, and Japan had therefore to contract an alliance with Germany and Italy.

(*b*) The ambassador was instructed clearly to impress upon President Roosevelt and Secretary Hull this attitude of Japan and to make the following points clear to them:

(*i*) Japan would be faithful to the Tri-partite alliance; but when Japan would decide on an important matter she would deliberate carefully in a Cabinet council;

(*ii*) While Japan's conduct in China was at present regarded as being illegal, unjust or aggressive, this was only temporary and Japan would finally have equal and reciprocal treaties with China;

(*iii*) The Greater East Asia Co-prosperity sphere would be built on the principle of *hakko-ichiu* and it was Japan's desire to build a world of international neighbourhood and mutual assistance;

(*iv*) Putting aside the ideal and dealing with daily matters, Japan found it necessary to settle the problems of self-support and self-sufficiency in Greater East Asia, which was not unjust or unreasonable;

(*v*) By her policy Japan did not mean the exclusion of foreigners.

(*c*) Matsuoka's instruction to NOMURA emphasized that Japan intended to go forward with her program of building up the Greater East Asia co-prosperity sphere and that an understanding could be reached only upon that basis.

(*d*) On February 7, 1941 MATSUOKA wired further instructions to NOMURA, asking him to point out that no one in Japan wanted war with the United States and if the United States brought on a war and even defeated Japan, Japan would not remain conquered. Such a war would ruin both countries and bolshevize Asia. Japan did not understand why America was therefore aiming against Japan. The United States should not meddle in the "living sphere" of others.

(*e*) On February 14, 1941 NOMURA met for the first time with President Roosevelt and Secretary Hull.

(*i*) The President, after specifying the action of Japan in

French Indo-China and the Tri-partite Pact as having created difficulties, suggested that NOMURA and Hull review and re-examine the important phases of the relations of the two nations to ascertain when and how the divergencies had arisen and their effects and to see if the relations could be improved.

(*f*) On February 14, 1941 MATSUOKA again instructed NOMURA to make continuous efforts to make the President and other members of the United States Government see Japan's real intention. They must know that Japan was determined to carry out the already fixed policy at the risk of the nation's destiny.

(*g*) Thus at the very beginning the dichotomy between the two countries of the approach to the problems was made abundantly clear.

(*i*) The United States, on the one hand, sought to improve the relations;

(*ii*) On the other hand, Japan served notice that she would follow her policy to the end.

3. On February 3, 1941 the Liaison Conference arrived at a decision which was to be used as instructions or reference by MATSUOKA in his negotiations with Germany, Italy and the Soviet Union during his European visit:

(*a*) The document provided that Japan would be the political leader in the areas of the Greater East Asia co-prosperity sphere and would be responsible for the maintenance of order there.

(*b*) The peoples of the area were either to maintain independence or to be made independent.

(*c*) The peoples of the areas in the possession of Britain, France, Portugal, Holland and others who were incapable of being independent were to be permitted to have as much self-government as possible in accordance with their abilities under the guidance of Japan.

(*d*) Japan would have preference over the defense resources in these areas.

(*e*) As to the other commercial enterprises, Japan would follow the principle of the open door and equal opportunity mutually with other economic blocs.

(*f*) The world was to be divided into four great blocs: the Greater East Asia bloc, the European bloc (including Africa), the American bloc, and the Soviet bloc (including India and Iran).

4. Shortly following the opening of the negotiations, the conspirators took several actions which made the potential success of the negotiations more difficult, if not entirely abortive:

(*a*) On February 25, 1941 OSHIMA, with MATSUOKA's knowledge, assured Germany that Japan was absolutely faithful to the Tri-partite Pact and was moving forward toward the realization of her national policy with that treaty as the keynote of her foreign relations.

(*b*) On March 4, 1941 MATSUOKA requested NOMURA in answering certain types of questions to act in concert with him in view of the fact that MATSUOKA had replied in the affirmative to the question whether Japan would participate in a war in case the United States should attack Germany.

(*c*) On March 7, 1941 it was decided by the Cabinet that the detailed regulations of the national mobilization law would be put into force on March 20.

5. (*a*) On March 8, 1941 Hull and NOMURA met for an exploratory conversation.

(*b*) On March 14, 1941 Hull and NOMURA again met with President Roosevelt.

(*c*) While NOMURA and the President and Hull were exploring and stating the basic issues lying between the two countries, the stage for carrying out the program of preparation for war was being set in Japan.

(*d*) On April 9, 1941 there was presented to the Department of State in Washington AN UNOFFICIAL PROPOSAL for settling the differences. (Exh. 1,059)

(*e*) On April 14, 1941 Hull sent for NOMURA to ascertain the extent of his knowledge of this latest private proposal and whether he desired to present it officially as the first step in negotiations.

(*f*) On April 16, 1941 Hull laid down THE TWO CONDITIONS under which the United States would begin negotiations on the basis of this proposal: (Exh. 1,061)

(*i*) FIRST, it must be understood that while it contained numerous proposals to which the United States could readily agree, there were others which required modification, expansion or elimination and additional ones which the United States might submit;

(*ii*) THE SECOND and paramount consideration was that the United States must have in advance a definite assurance that Japan was willing and able to go forward with the plan outlined and with the plans brought up in the conversations, that Japan would abandon its doctrine of conquest by force together with the use of force as an instrument of policy and would adopt the principles which the United States proclaimed, practised and believed should govern all relations between nations;

(*iii*) These principles were: respect for the territorial integrity and sovereignty of all nations; support of the principle of noninterference in the internal affairs of others; support of the principle of equality, including that of commercial opportunity; and non-disturbance of the *status quo* in the Pacific except by peaceful means.

(*g*) NOMURA transmitted the proposal to his government and pointed out that the idea that Japan's advance to the south would not be made by armed force was the foundation of the whole understanding.

6. Immediately upon the receipt of NOMURA's request for instructions on April 18, 1941, KONOYE convened a meeting of high government and military leaders for the same right.

(*a*) The consensus of opinion was that the acceptance of such a proposal was the speediest way to dispose of the China Incident and would provide the best means of avoiding a United States-Japan war and of preventing the European conflict from becoming world-wide.

(*b*) They favoured acceptance but ONLY ON CERTAIN CONDITIONS:

(*i*) First, it must be made clear that there was to be no infringement of the Tri-partite Pact, but Japan was to keep faith with Germany;

(*ii*) It must also be made clear that the object of the negotiations was to promote world peace;

(*iii*) It would be a breach of faith with Germany if the understanding would relieve the United States of her commitments in the Pacific and allow her to increase her support to Britain;

(*iv*) The agreement must clearly express the idea of building a new order;

(*v*) Japan must bend every effort to keep good faith with Germany and Italy and not to interfere with the establishing of a new order in the co-prosperity sphere, Japan's fixed national policy. (Exh. 2,866)

7. On May 12, 1941, following the receipt of instructions, NOMURA presented THE FIRST JAPANESE DRAFT PROPOSAL: (Exh. 1,070)

(*a*) It was similar in outline and structure to the original proposal but contained important points of difference.

(*i*) With respect to the European War, Japan proposed a direct reference to the Tri-partite Pact by stating that her obligations of military assistance under it would be applied under *Article* 3 of the Pact on the ground that the change would clarify the relationship of the understanding to the Pact.

(*ii*) In respect to the China affairs, an entirely new section was substituted, which provided that the United States

acknowledge the KONOYE three principles and the principles based on these set forth in the Treaty with Nanking and the joint declaration of Japan, Manchukuo and China.

(*iii*) It provided that the United States rely upon Japan's policy to establish neighbourly friendship with China and request Chiang Kai-shek to negotiate peace with Japan.

(*iv*) It was maintained that KONOYE's three principles of neighbourly friendship, joint defense against communism and economic co-operation involved everything contained in the original.

(*b*) On May 16, 1941 Mr. Hull made certain suggestions for changes in the draft plan: (Exh. 1,071)

(*i*) As to the European War, he suggested that Japan's obligations of military assistance under the Tri-partite Pact be spelled out and that Japan declare that she was under no commitment under the Axis alliance or otherwise which was inconsistent with the terms of declaration of policy agreed upon by Japan and the United States;

(*ii*) For the settlement of the China question he substituted a provision similar to the original private draft under which, on the conclusion of the agreement, the President would suggest to both Japan and China that they negotiate to terminate hostilities on the basis of neighbourly friendship, mutual respect of sovereignty and territories, withdrawal of Japanese troops according to an agreed schedule, no annexation or indemnity, equality of commercial opportunity fair to all, parallel measures of defense against external subversive activities and friendly negotiations on the future of Manchuria.

(*iii*) On the matter of economic activity in the Southwest Pacific, Hull stated the matter in terms of the activity and co-operation of both nations.

(*c*) While Hull was endeavouring to reach with NOMURA a satisfactory solution of outstanding problems, MATSUOKA was busily giving ample additional proof that he was directing the negotiations on the part of Japan insincerely and solely for the purposes of delay.

(*d*) Others of the conspirators were adamantly opposed lest it endanger the objective of the conspiracy.

(*e*) In the meantime the negotiations continued. On May 28, 1941 the day after Roosevelt declared an unlimited national emergency, Hull and NOMURA met again.

(*f*) In the conversation it became more and more clear that two of the great stumbling blocks to reaching an agreement lay in the divergence of views as to the extent of Japan's obligation under the Tri-partite Pact and the solution of the China question.

(*g*) Hull emphasized that unless Japan clarified its attitude towards its obligations under the Pact, if the United States were drawn into the European War through action in the line of self-defense, there would be no assurance as to Japan's position.

8. On May 31, 1941 the United States submitted a revision of the proposed agreement: (Exh. 1,078)

(*a*) The new proposal provided for a complete revision of the section relating to the attitudes of the two countries toward the European War. Japan would state that the purport of the Tri-partite Pact was defensive to prevent an extension of the European War and that its provisions did not apply to a nation becoming involved in the war in self-defense; and the United States would state that its attitude would be determined solely by considerations of protection, self-defense and national security. In an annex to the oral statement, the United States elaborated on its attitude toward Hitler's conquests and pointed out that any fight by the United States against him would be one of self-defense. With respect to China, the section was also re-written to retain its underlying meaning. It proposed a provision that upon Japan's communicating to the United States her terms to China, which would be in harmony with KONOYE's principles, the United States would suggest to China that it enter into negotiations with Japan to terminate hostilities and resume peaceful relations. In a separate annex, the terms to be submitted were set forth and were the same as suggested by Hull on May 16, 1941. There was to be further discussion of co-operation against communism and stationing of troops.

9. (*a*) On June 4, 1941 Colonel IWAKURA stated that Japan was prepared to drop from its draft the suggestion that the United States would not resort to any aggression and to assist one nation against another, if the United States would drop from its draft the provision that the Tri-partite Pact did not apply to involvement through act of self-defense.

(*b*) On June 6, 1941 Hull told NOMURA that the Japanese revisions appeared to have gradually narrowed down the extent of advance toward a liberal policy and carried the negotiations away from the fundamental points the United States believe to be involved. The revisions and recent

manifestations of Japan's attitudes revealed three tendencies:

(*i*) stressing of Japan's alignment with the Axis;

(*ii*) avoiding indicating clearly any intention to place Japan's relations with China on a basis which would contribute to peace and stability in the Far East;

(*iii*) veering away from clear-cut commitments on policies of peace and nondiscriminatory treatment.

10. While the diplomatic conversations were taking place between Hull and NOMURA, events were happening in Japan and elsewhere in the world, *which further complicated and obstructed the path* to a peaceful solution and introduced new problems which led to a breakdown in the negotiations and eliminated whatever chances the conversations might have had for a successful conclusion.

(*a*) It was feared that the Premier-Foreign Minister split in Japan would lead to the downfall of the Cabinet.

(*b*) When the war broke out on June 22, 1941 between Germany and Russia, OTT discovered that KONOYE and his group had come to the conclusion that nothing must be done which would injure Japan's military position in China and that Japan should tighten her grip on French Indo-China.

(*c*) Japan's armed occupation of French Indo-China signified that there could be no hope for settling the two obstales to United States-Japan agreement, the China Incident and the Tri-partite Pact.

11. On June 16, 1941 the second KONOYE Cabinet resigned and the third KONOYE Cabinet was formed, eliminating MATSUOKA.

(*a*) The new Cabinet continued the policy of the old with respect to French Indo-China.

(*b*) It also notified Germany that Japan's policy would continue to rest on the basis of the Tri-partite Pact and that there would be no change in Japan's attitude toward Germany and Italy.

12. (*a*) By June 1, 1941, the conquest and occupation of France by Germany was complete.

(*b*) On the 22nd June 1941, Germany attacked Russia.

(*c*) With this factual background, liaison conferences were held daily in Tokyo, beginning on 23 June and ending on 30 June.

(*d*) (*i*) On 2 July 1941, an Imperial Conference was called at the request of War Minister TOJO. (Exh. 1,107)

(*ii*) It was there decided that the Japanese national policy, in view of the "changing situation" would be based on three main points:

(1) That Japan would continue its endeavour to dispose of the China Incident;

(2) That Japan would establish the Great East Asia Co-Prosperity Sphere, regardlesss of how the world situation might change.

(3) That measures would be taken by Japan to advance southward.

(*e*) (*i*) It was determined that Japan would attain these ends, even if it meant war with the United States, Great Britain and the Netherlands.

(*ii*) General preparations were made for war with these nations.

(*iii*) The military preparations in question proceeded on a large scale and included the calling up of more than one million reservists and conscripts.

13. (*a*) From some date, at least as early as 18 June, negotiations were in progress by which German aid was sought and obtained to compel the Vichy Government to admit Japanese troops into Southern Indo-China.

(*b*) Troops had been stationed in Northern Indo-China for several months. Japan's intention was to occupy the country by force if Vichy did not agree.

14. (*a*) DURING JULY the American Government RECEIVED REPORTS that the movement of a large number of troops into Southern Indo-China was imminent.

(*b*) At first the reports were flatly denied. But on 23 July, the Japanese Ambassador, by way of further reply stated that Japan needed to secure an uninterrupted source of supplies and raw materials and that it was also necessary to insure against the military encirclement of Japan.

(*c*) It will be proved that the intention was to provide a base for further operations, particularly against Singapore and Siam.

15. (*a*) On 27 July, President Roosevelt made a proposal to the Japanese Government that Indo-China be regarded as a "Neutralized" country.

(*b*) The Japanese Government refused to accept the President's proposal. Large Japanese forces moved into Southern Indo-China.

(*c*) This military movement was but a follow-up of a plan begun at Mukden.

16. (*a*) In order that the resources under the control of the United States might not be used by Japan for these aggressive purposes, the President on 26 July issued an order freezing assets of China and Japan.

(*b*) Britain and the Netherlands immediately took similar steps.

(*c*) An embargo on oil was shortly afterwards placed.

(*d*) The prosecution emphasizes that these measures by the United States, the British Commonwealth and the Netherlands did not precede the aggressive action of Japan in Indo-China but FOLLOWED AS A CONSEQUENCE.

17. (*a*) On 8 August Japan started a new proposal for the purpose of discussing means for reaching an adjustment of views.

(*b*) After reviewing the steps leading to discontinuance of the former conversations, Hull replied that Japan must decide whether it could find means of shaping its policies along lines which would make it possible to adjust views.

(*c*) On August 16, 1941, NOMURA advised Foreign Minister TOYODA that relations with the United States were critical. (Exh. 1,131)

(*d*) On August 17, Roosevelt replid to NOMURA's inquiry and stated that if Japan felt it could suspend its expansionist activities, readjust its position and embark on a peaceful program along the lines of the Unites States principles, the United States would CONSIDER continuing the interrupted, informal exploratory discussions. (Exh. 2,889)

(*e*) On August 27, Prince KONOYE sent a message to President Roosevelt urging a meeting of the heads of the two governments to discuss all important problems between Japan and the United States. (Exh. 1,245-B)

(*f*) On August 28, NOMURA delivered this personal message. At the same time he delivered a governmental statement which maintained that Japan's actions were taken in self-defense. It further stated that the measures in French Indo-China were in self-defense to accelerate the China Incident and at the same time to secure Japan an equitable supply of essential materials, but Japan was prepared to withdraw her troops as soon as the China Incident was settled or there was general peace in East Asia and gave her assurance that this action was not in preparation for a military advance into neighbouring territories. It also stated that Japan would take no military action against the Soviet Union, so long as the latter was faithful to the neutrality treaty and did not menace Manchukuo or Japan. The statement also said that Japan's fundamental policy agreed with the basic principles to which the United States was committed. (Exh. 1,245-B, R.P. 10,764-71)

(*g*) On September 3, President Roosevelt replied to KONOYE's invitation, saying *inter alia* that, in view of past events, he felt that unless such a meeting produced concrete, clear-cut commitments for peace, Japan would distort its significance to discourage the Chinese and to hold the U-

nited States responsible for its failure. (Exh. 1,245-C)

(*h*) On 6 September the Japanese Ambassador presented a new draft of proposals. (Exh. 1,245-D)

(*i*) (*i*) On the same date, 6 September, War Minister TOJO and a military group desirous of waging immediate war on the United States, Great Britain and the Netherlands, caused another Imperial Conference to be called. (Exh. 1,107)

(*ii*) At this Imperial Conference it was decided that the military group would go forward with preparations for war and if the pending conversation had not terminated in a manner satisfactory to Japan by the middle of October, then Japan would attack. The accused present were TOJO, NAGANO, MUTO, OKA and SUZUKI.

(*j*) On 25 September the Japanese Government presented to Ambassador Grew a complete new draft of proposals and urged that an early reply be made thereto. Among the commitments the United States was asked to make was the following: "In case the United States should participate in the European War, Japan would decide entirely independently in the matter of interpretation of the Tri-partite Pact between Japan, Germany and Italy, and would likewise determine what actions might be taken by way of fulfilling the obligations in accordance with the said interpretation". (Exh. 1,245-E)

19. (*a*) As the middle of October approached, some of those (including KONOYE), who had been parties to the decision of the Imperial Conference on 6 September, became alarmed and after a bitter quarrel (the details and parts played by personalities will be shown in the evidence) the third KONOYE Cabinet resigned.

(*b*) TOJO took office as Premier on the following two conditions specified by KIDO:

(*i*) The deadline of the middle of October set in the resolution of 6 September should be extended and the conversations continued.

(*ii*) The quarrel between Army and Navy should be resolved.

20. (*a*) On 5 November, an Imperial Conference was held. It was decided to begin hostilities as soon after 25 November as preparations could be completed.

(*b*) The accused taking part in this decision were TOGO, TOJO, KAYA, SUZUKI, SHIMADA, NAGANO, MUTO and OKA.

21. The Pearl Harbour attack plan, known as the "Yamamoto Plan"

was formulated in the Spring of 1941.

22. On 10 November the order was given for all Japanese ships to complete battle preparations by 20 November, and for a powerful Japanese task force to rendezvous at Tankan Bay in the Kuriles.

23. (*a*) Early on 26 November that order was given: "Attack Pearl Harbour".

(*b*) At 6 o'clock that morning the task force steamed east and then south to carry out that order.

24. (*a*) Despite these various plans.... the conversations which had been carried on between Japan and the United States since the Spring of 1941 continued.

(*b*) On 26 November the Secretary of State made a reply to the Japanese representatives in the form of two documents which proposed that if Japan were really interested in a settlement of all Pacific questions, it could be done by accepting the four points given by Mr. Hull on 16 April.

25. (*a*) Between 28 November and 1 December inclusive, meetings were held at which the final plans for war with the United States, the British Commonwealth and the Netherlands were again reviewed.

(*b*) On 1 December the final Imperial Conference and Cabinet meetings were held.

(*c*) There seems to have been no dissent in either of these meetings from the decision for war.

26. (*a*) It will be seen from the chart that on the evening of 6 December, the press was told in Washington at 7:40 P. M. about the proposed telegram from the President of the United States to the Emperor of Japan, and at 8:00 P. M. Mr. Hull sent a telegram to Mr. Grew, American Ambassador in Tokyo advising him that such a message was on the way.

(*b*) An hour later this telegram reached Tokyo, where it was then 12 noon, 7 December.

(*c*) Yet before it was delivered into the hands of Mr. Grew no less than ten and a half hours of precious time had elapsed.

(*d*) The attack on Pearl Harbour had begun at 7:55 A. M.

Even from the account given by the prosecution of the negotiation it seems clear that whatever might have been the intention of Japan, that intention was made absolutely clear at the very outset. The authorities in Tokyo were repeatedly instructing the ambassador at Washington to make Japan's attitude clear to the American authorities and even from the prosecution account of the negotiation it is manifest that the ambassador followed this instruction carefully. Throughout the whole course of negotiation, I do not find a single instance wherein any insincerity can be ascribed to the proposal made. The proposals might have been selfish, the attitude expressed might

have been unyielding; but there was no hide and seek on the part of Japan in her proposals to the United States. I do not know what inference it is possible to draw from the "official lament of Ambassador NOMURA"; but this seems to be clear that Japan never said anything deceptive or hypocritical about her intention regarding the modification of the Tri-partite Pact or the removal of her troops from China. If Japan's proposal amounted to her seeking to obtain from the United States' recognition of her right to occupy and to conquer at her own caprice, those proposals were clearly made to the United States in clear language. At least there was nothing ambiguous in these proposals. If those proposals were really capable of bearing the meaning which the prosecution now seeks to ascribe to them, I do not see how they would have succeeded in lulling the United States and Great Britain into any sense of security.

Look at, for example, Exhibit 1, 008 relied on by the prosecution to show Foreign Minister's initial instructions to Ambassador NOMURA. It might have instructed NOMURA to assume an intolerable attitude; but there was nothing ambiguous in the instruction and nothing was asked to be kept concealed from President Roosevelt and Secretary Hull. The instruction was to make Japan's position and attitude clear to those authorities. It is not the prosecution case that they were not made so clear by the ambassador.

If Japan intended to go forward with her program of building up the Greater East Asia Co-prosperity sphere, Ambassador NOMURA was instructed clearly to emphasize that and to make it clear that an understanding could be reached only upon that basis. The attitude might have been unreasonable, aggressive, and audacious, but nothing was sought to be concealed from American authorities to lull them to any sense of security in this respect.

If there was any "dichotomy" between the two countries on the approach to the problems for negotiation, it became abundantly clear to both the parties. Nothing again was kept concealed.

On a careful consideration of everything that happened in course of the entire negotiation I could not induce myself to view anything in it even with the suspicion of any treachery. The negotiation failed. It is very unfortunate that it so failed. But everything, at least on the Japanese side, seems to have been done with sincerity, and I do not find any trace of treachery anywhere in it. There were preparations for war in course of these negotiations. Such preparations were being made by both sides. There was the Atlantic Conference when these negotiations were going on. Whatever might have been its appearancs then disclosed to the world, its actualities are now amply revealed. We now know that one of the four basic agreements reached by President Roosevelt and Prime Minister Churchill at that conference was an agreement on parallel and ultimative action in respect of Japan. When the state of relation between the parties reaches the stage at which Japan and the United States began negotiations, it is but natural that they would not proceed only on the sanguine expectation of ultimate success of that negotiation. There was another possibility; and neither party could ignore that unfortunate contingency.

If the negotiation can be taken as contrived by any of the parties only for the purpose of taking time for preparation, then it must be said that such time was not with Japan but with America. Remembering their respective resources, Japan was not to gain anything by lapse of time.

The whole theory of Japan's having recourse to the contrivance of negotiations for the purpose of taking time for preparation is based on the prosecution hypothesis of Japan's aggressive preparation as evidenced by Exhibit 841. I have already discussed that evidence and have explained why I could not accept that hypothesis.

The evidence in the case rather goes to show that the time which became necessary for the negotiation was benefiting America but was injuriously affecting Japan's war resources. In fact, Japan's impatience in the negotiation was mainly due to this fact.

The view that I am taking of the character of the negotiations makes it unnecessary for my present purpose to examine whether or not Japan made any concession during the conversations at all. Yet, I would like to say a few words about the question of sincerity or otherwise of the parties to the negotiation. I need not, and, I do not propose to, examine the justness or otherwise of the proposals.

The prosecution contention is that from beginning to end of the negotiations, Japan made no concessions from her original position, such changes as did occur being in the direction of narrowing her proposals.

Let us therefore see the original position taken up by Japan in the negotiations as contained in the draft proposal.

The unofficial proposal referred to in item 5(d) above in Exhibit 1,059 in this case. Besides certain suggestions about certain preliminary understanding, it contained proposals under the following seven heads:

I. The concepts of the United States and of Japan respecting international relations and the character of nations;
II. The attitudes of both Governments toward the European War;
III. China Affairs;
IV. Naval, aerial and mercantile marine relations to the Pacific;
V. Commerce between both nations and their financial co-operation;
VI. Economic activity of both nations in the Southwestern Pacific;
VII. The policies of both nations affecting political stabilization in the Pacific.

For the purpose of preliminary understanding it was proposed:

1. That both the governments accept joint responsibility for the initiation and conclusion of a general agreement disposing the resumption of traditional friendly relations.
2. That without reference to specific causes of recent estrangement, both wish to prevent incidents from recurring and to correct them and hope by joint effort to establish a just peace in the Pacific.
3. Since protracted negotiations would be ill-suited and weakening for such decisive action, adequate instrumentalities should be devel-

oped for the realization of a general agreement, (binding, meanwhile, on both,) comprising only the pivotal issues of urgency.

I. Coming to the first substantial head, namely, the concepts of the United States and of Japan respecting international relations and the character of nations, it was suggested *inter alia* that both governments might declare that it is their traditional, and present, concept and conviction that nations and races compose, as members of a family, one household; each equally enjoying rights and admitting responsibilities with a mutuality of interest regulated by peaceful processes etc.

II. Regarding the attitude of both governments toward the European war the suggestions were the following:

(*a*) The Government of Japan maintains that the purpose of its Axis Alliance was, and is, defensive and designed to prevent the extension of military grouping among nations not directly affected by the European War.

(*b*) The Government of Japan, with no intention of evading its existing treaty obligations, desires to declare that its military obligation under the Axis Alliance comes into force only when one of the parties of the Alliance is *aggressively attacked* by a power not at present involved in the European War.

(*c*) The Government of the United States maintains that its attitude toward the European war is, and will continue to be, determined by no aggressive alliance aimed to assist any one nation against another. The United States maintains that it is pledged to the hate of war, and will continue to be, determined solely and exclusively by considerations of the protective defense of its own national welfare and security.

III. Coming to THE CHINA AFFAIRS the suggestion was that on the guarantee of terms by Japan, the United States would request the Chiang Kai-shek regime to negotiate peace with Japan on terms which would provide for:

(*a*) Independence of China.

(*b*) Withdrawal of Japanese troops from Chinese territory, in accordance with an agreement to be reached between Japan and China.

(*c*) No acquisition of Chinese territory.

(*d*) No imposition of indemnities.

(*e*) Resumption of the "Open Door"; the interpretation and application of which shall be agreed upon at some future, convenient time between the United States and Japan.

(*f*) Coalescence of the Governments of Chiang Kai-shek and of Wang-Ching-Wei.

(*g*) No large-scale or concentrated immigration of Japanese into Chinese territory.

(*h*) Recognition of Manchukuo.

It was further suggested in this connection that:

(1) With the acceptance by the Chiang Kai-shek regime of the afore-

mentioned Presidential request, the Japanese Government shall commence direct peace negotiations with the newly coalesced Chinese Government, or constituent elements thereof.

(2) The Government of Japan shall submit to the Chinese concrete terms of Peace, within the limits of aforesaid general terms and along the line of neighbourly friendship, joint defense against communistic activities and economic co-operation.

(3) Should the Chiang Kai-shek regime reject the request of President Roosevelt, the United States Government shall discontinue assistance to the Chinese.

IV. (*a*) With respect to naval relations, neither nation would dispose its naval and aerial forces so as to menace each other, this to be decided in detail at the proposed joint conference.

(*b*) Japan would also use good offices to release for American contract a certain total percentage of tonnage of her merchant vessels when released from present commitments.

V. (*a*) In matters of commerce, both would assure each other a mutual supply of commodities available and required, and both would resume friendly trade relations, either under a treaty like that of 1911 or a new one to be worked out.

(*b*) The United States would extend to Japan a gold credit in amounts sufficient to foster trade and industrial development directed to bettering Far East economy.

VI. On Japan's pledge that her activities in the Southwest Pacific would be carried on by peaceful means, the United States would co-operate and support her in producing and procuring the natural resources she needed.

VII. (*a*) As to political matters, neither would acquiesce in the transfer of territory in the Far East and Southwest Pacific to any European power, and both would jointly guarantee the independence of the Philippines.

(*b*) Japan would ask the United States for aid in removing Hongkong and Singapore as doorways to further political encroachment by Britain, and Japanese emigration to the United States and Southwest Pacific would be on a basis of equality and nondiscrimination.

(*c*) A conference between the two nations was to be held at Honolulu and would be opened by KONOYE and Roosevelt as soon as possible after the present agreement was reached and it would not reconsider this agreement.

(*d*) The understanding was to be kept confidential and jointly announced.

The first group of substantive suggestions related to the attitude of both governments toward the European War.

Article 3 of the Tri-partite Pact provided *inter alia* that "if and when any one of the signatories be attacked by any third power not presently engaged in the present European War, or the China Incident, the other two

shall aid her in any way political, economical or military".

Article 4 of the Pact provided that "in order to effect this alliance, a joint specialized committee, composed of representative members appointed by each power of Japan, Germany and Italy shall meet as early as possible.

The language of the Pact seemed to suggest that the obligation under it would arise in case of *attack* by any third power, irrespective of the question why such attack was made. It might further be contended that whether an occasion for aid under Article 3 had arisen might fall to be determined by the joint committee named in Article 4.

The suggestions purported to eliminate the possibility of such extensive operation of the article so far as Japan is concerned. In this sense Japan began with a concession at least in respect of the Tri-partite Pact. Japan maintained that the purpose of its Axis alliance was defensive and designed to prevent the extension of military grouping among nations not directly *affected* by the European War. She further limited its military obligation under the alliance only to cases of *aggressive* attack by a third power. The United States Government was suggested to declare that its attitude towards the European War would be determined by no aggressive alliance but solely and exclusively by considerations of the protective defense of its own national welfare and security.

As regards the China Affair again, if we only look at the terms suggested it would appear that concessions were being made. Further, if we compare them with what the Prosecution itself brought in evidence as Japan's China policy adopted as far back as the HIROTA Cabinet, we cannot avoid saying that the suggestions began with some concession at least to the extent of accepting the Chiang Kai-shek regime for the purpose of negotiating peace.

This proposal was presented on 9 April 1941. Secretary Hull, on 16 April 1941, informed the Japanese Ambassador that the purpose of the discussions should be to explore the questions of improving the relations between the United States and Japan.

1. Mr. Hull stated that the United States had been proclaiming and practising certain principles on which relations between nations should rest.
2. The principles were:
   (*a*) Respect for the territorial integrity and the sovereignty of each and all nations.
   (*b*) Support of the principle of non-interference in the internal affairs of other countries.
   (*c*) Support of the principle of equality, including equality of commercial opportunity.
   (*d*) Non-disturbance of the *status quo* in the Pacific except as the *status quo* may be altered by peaceful means.
3. The Secretary, Mr. Hull, made it plain that the conversations should relate to matters within the framework of these principles.

This proposal was discussed at some length by Secretary Hull and Ambassador NOMURA on 16 May. The Secretary at that time handed to the

Ambassador some draft suggestions relating to this Japanese proposal. (This draft is Exhibit 1,071). The chief points of this draft were as follows:

1. The American views of the extent of the right of self-defense were explained by excerpts from an address of the Secretary of State on 24 April 1941.
2. The section on the attitude of the United States and of Japan toward the European War was redrafted.
3. The section on China affairs was redrafted with considerable alterations of the details of the proposed settlement with China.
4. The section on economic activities in the Southwest Pacific area was to some extent amended.

After some further discussions, the United States presented on 31 May its draft counterproposal, which is Exhibit 1,078. The oral statements explanatory thereof are Exhibits 1,079 and 1,080.

The significant issues framed by the end of May were understood by the Japanese and were confirmed by the Americans to have been three:

1. The attitudes of the respective governments toward the European War—the Tri-partite Pact question;
2. The question of Chinese-Japanese relations and the settlement of the China affair;
3. The question of the economic activities of the two nations in the Pacific area, especially with reference to the principle of non-discrimination in international commercial intercourse; and the question of Indo-China came in later on.

That these were the significant issues would appear from Exhibits 2,895, 2,903, and the testimony of Mr. Ballantine.

The issue between the two nations concerning their respective attitudes toward the European War was ostensibly that of the interpretation which Japan was making and would make of Article 3 of the Tri-partite Pact.

As stated above, this article provided in part that "if and when any one of the signatories be attacked by any third power not presently engaged in the present European War, or the China Incident, the other two shall aid her in any way, political, economical or military". (Exh. 43)

America was then rapidly and irrevocably becoming involved in the European War. This involvement was regarded and justified by her as being a legitimate exercise of the right of self-defense. Any further involvement which was foreseen at that time would inevitably and in an openly avowed state of war between America and Germany, be brought about, in the American view, as a result of AMERICA'S ACTION in self-defense.

What America really wanted to be assured of was that Japan should so interpret her obligation under the Tri-partite alliance as not to compel her going to war in aid of Germany in such an event.

Japan, while readily agreeing that an action of legitimate self-defense by America would not call into operation the provisions of the Tri-partite Pact for aid to Germany, was not willing to give advance agreement that any action whatsoever which America might choose to label as self-defense was in

fact legitimately so and would be so accepted by Japan.

There was no difference on the point that each nation must be the judge of what should constitute its own self-defense. What the Japanese representatives said was that they could not, in an agreement, give America a "blank check" and agree not to go in aid of Germany accepting America's decision of self-defense as final. America was, however, in fact demanding this.

The representatives of the Department of State referred the Japanese ambassdors for a definition of the American attitude to public speeches made by the President and the Secretary of State. The Secretary's definition was that "the safety of this hemisphere and of this country calls for resistance wherever resistance will be most effective." (Exh. 2, 874, address of 24 April 1941). The President, speaking on 27 May, made American position in this respect more explicit. He said, "in September 1940 an agreement was completed with Great Britain for the trade of fifty destroyers for eight important offshore bases..... I have said on many occasions that the United States is mustering its men and its resources only for the purpose of defense—only to repel attack. I repeat that statement now. But we must be realistic when we use the word 'attack'; we have to relate it to the lightning speed of modern warfare..... First we shall actively resist wherever necessary and with all our resources, every attempt by Hitler to extend his Nazi domination to the Western Hemisphere, or to threaten it. We shall actively resist his every attempt to gain control of the seas. We insist upon the vital importance of keeping Hitlerism away from any point in the world which could be used and would be used as a base of attack against the Americas..... We in the Americas WILL DECIDE FOR OURSELVES WHETHER and WHEN and WHERE our American interests are attacked or our security threatened. We are placing our armed forces in strategic military position. We will not hesitate to use our armed forces to repel attack." (Exh. 2,876)

This would indicate the extent of the American demand in this respect. The Japanese representatives had early made it clear that Japan could not at that time repudiate the Tri-partite Pact outright. The United States had always been specific that she did not insist on Japan's denouncing the Tri-partite Pact alliance, but throughout was requiring of Japan only the making of such an interpretation of its obligation as would permit America to rest easy concerning her claims of the right to act in self-defense AS UNDERSTOOD BY AMERICA.

According to the Defense, Japan's attempt throughout the negotiations was to find an interpretation of the alliance obligation which would be satisfactory to the United States and yet would not expose her to the charge of bad faith and disregard of her treaty obligations.

The history of this attempt can be traced in the successive interpretations offered by the Japanese.

1. In the first Japanese counter-proposal of 12 May, it was stated as follows: "The Government of Japan maintains that its alliance with the Axis powers was, and is, defensive and designed to prevent the nations which are

not at present directly affected by the European War from engaging in it. The government of Japan maintains that its obligations of military assistance under the Tri-partite Pact between Japan, Germany and Italy will be applied in accordance with the stipulation of Article 3 of the said Pact." (Exh. 1, 092)

2. By September 6, Japan indicated her preparedness to undertake as follows: "That the attitudes of Japan and the United States towards the European War will be decided by the concepts of protection and self-defense and in case the United States should participate in the European War, the interpretation and execution of the Tri-partite Pact by Japan shall be independently decided."

3. In her proposals of 25 September, Japan formulated the terms of agreement thus: "With regard to the developments of the situation prior to the restoration of world peace, both governments will be guided in their conduct by considerations of protection and self-defense; and, in case the United States should participate in the European War, Japan would decide entirely independently in the matter of interpretation of the Tri-partite Pact between Japan, Germany and Italy and would likewise determine what actions might be taken by way of fulfilling obligations in accordance with the said interpretation."(Exh. 1,245-E)

In the oral statement of 2 October, the Secretary of State revealing the negotiations and commenting on the latest Japanese proposals said, "With reference to the attitude of each country toward the European War, this government has noted with appreciation the further step taken by the Japanese government to meet the difficulties inherent in this aspect of the relations between the two countries. It is believed that it would be helpful if the Japanese government could give further study to the question of possible additional clarification of its position." (Exh. 1,245-G)

Ambassador NOMURA reported to the Foreign Ministry on 8 October that the Americans "figured that they must be much surer of our attitude toward the three power pact". Soon after this the KONOYE Cabinet fell. The next Cabinet, conformably to the Ambassador's suggestion, gave him the following instruction: "It should be further clarified that Japan has no intention of making any unwarranted extention of the interpretation of the right of self-defense. With regard to the interpretation and application of the Tri-partite Pact, it should be stated that the Japanese Government, as has been repeatedly explained in the past, will act in accordance with its own decision, and that it is believed that the understanding of the American Government has already been obtained on this point". This proposal was placed to the Secretary of State on 7 November.

Mr. Ballantine in his evidence characterized these proposals as further narrowing down the original suggestion and the assurance given in the statement communicated to the President on August 28.

According to the defense contention, these indicated further and further concessions on the part of Japan. In their submission, the position was more correctly appreciated by Ambassador Grew when he said: "In regard to

Japan's Axis relations, the Japanese Government, though refusing consistently to give an undertaking that it will overtly renounce its alliance membership, actually has shown a readiness to reduce Japan's alliance adherence to a 'dead letter' by its indication of willingness to enter formally into negotiations with the United States".

I am afraid, here there seems to have been some misapprehension on the part of the parties. Referring to the statement of 6 September, the Defense says that it could not be denied that this statement at least implied that Japan would not be under German domination and that she would reach her own decision without reference to Germany. This certainly would be a substantial assurance if it was part of America's apprehension that Japan's decision would be dominated by Germany. On the face of the negotiations up to this stage, there was nothing to suggest that America was in any way apprehensive of Japan's decision being dominated or determined by Germany. Up to this stage, America never seems to have expressed her doubt about Japan's independence in this respect and never suggested her suspicion that Japan might be dominated by the German view of the Pact. Her trouble hitherto seems to have been about Japan's own independent interpretation.

If America was really viewing the situation thus, Mr. Ballantine was perfectly justified in characterizing the proposal as narrowing down the original suggestion. With the undertaking of September 6, Japan would have been forced not to limit "attack" to "aggressive attack" only.

On the other hand, if apprehension of "German domination" in the matter of interpretation of the Pact were anywhere in the negotiation, then certainly this proposal was an advance in the direction of removal of that apprehension.

That Japan understood the American position being based on some such apprehension was made clear by her during the subsequent course of the negotiation. I would better follow that course.

On 15 November there was a further meeting between Ambassador NOMURA and Secretary Hull at which the Secretary again brought up the Tripartite Pact question. (Exh. 2,934). On this occasion the Secretary requested "reassurance of the peaceful promise which the Japanese Government had made on 28 August".

The same day Ambassador KURUSU arrived in Washington and he had his first interview with Secretary Hull and President Roosevelt on 17 November. In the conversation with the President, the Tri-partite Pact question again came up and Ambassador KURUSU pointed out that Japan, having treaty obligations as well as her national honour to consider, dared not commit treaty violations. "It was not to be assumed", he said, "that the United States, which has been a strong advocate of observance of international commitments, would request Japan to violate one....." Whereas Japan had stated that her action with respect to the obligation to go to war under the Tripartite Pact will be determined entirely independently, it appears that the United States took it to mean that Japan intended to stab the United States in the back when she had become deeply entangled in the European War. He

stated that such an interpretation was entirely wrong, and that clarification had been made to the effect that Japan would act independently, for the purpose of dispelling an apparent misapprehension on the part of the United States that Japan would, under the influence of Germany, move at Germany's demand. "If some such broad understanding as was suggested by the President were reached at the present moment between Japan and the United States concerning the Pacific problems", KURUSU went on, "it would naturally 'outshine' the Tri-partite Pact and American apprehension over the problem of application of the Pact would consequently be dissipated."

In sending explanations to Ambassador NOMURA concerning Proposal B, Foreign Minister TOGO authorized the Ambassador, in explanation of the statement that "Japan would decide independently" concerning its obligations under the Tri-partite Pact, to point out that "the Empire can decide independently as to whether or not there had been an attack wihout being bound to the interpretations of the other countries involved in the Tri-partite Treaty". He was also asked to make it clear that there were no secret agreements in the Tri-partite Treaty. Consequently Ambassador KURUSU promptly called upon Secretary Hull to offer one further attempt at an interpretation of the alliance obligation satisfactorily to Mr. Hull. The Ambassador handed to the Secretary on 21 November a draft letter which he proposed to sign by way of attempting clarification. This letter is Exhibit 2,945 and may be quoted here in full.

"Mr. Secretary: Through several conversations I have had the honour of holding with Your Excellency, I was rather surprised to learn that a deep-seated misconception prevails among your people about the obligation which Japan assumed under the Tri-partite Pact.

"As your Excellency is fully aware I am the one who signed the said treaty under the instructions of my Government; and I am very happy to make the following statement which I trust will serve to eradicate the aforesaid false impression:

"It goes without saying that this treaty cannot and does not infringe, in any way, upon the sovereign right of Japan as an independent state.

"Besides, as Article III of the Pact stands, Japan is in a position to interpret its obligation freely and independently and is not to be bound by the interpretation which the other high contracting parties may make of it. I should like to add that my Government is not obligated by the aforementioned treaty or any other international engagement to become a collaborator or co-operator in any aggression whatever by any third Power or Powers.

"My Government would never project the people of Japan into war at the behest of any foreign Power: it will accept warfare only as the ultimate, inescapable necessity for the maintenance of its security and the preservation of national life against active injustice.

"I hope that the above statement will assist you in removing entirely the popular suspicion which Your Excellency has repeatedly referred to. I have to add that, when a complete understanding is reached between us, Your Excel-

lency may feel perfectly free to publish the present communication."

If America really apprehended German domination of Japan's decision, here was a complete surrender by Japan.

But, apart from this question, statements contained in this letter certainly went far even in throwing light on the possible Japanese independent interpretation. It may be noticed that there was also the authorization to publish the letter upon conclusion of the Japanese-American understanding. It requires little imagination to conceive what would have remained of the Tripartite alliance once this letter was published.

Secretary Hull, however, thought that this would not be of any particular help and so dismissed it.

Bearing in mind that the demand of the United States was not an abrogation of the Tri-partite Pact by Japan but only such an interpretation of it as should be satisfactory to the United States, it is difficult to say that this proposal deserved such a summary dismissal. Perhaps by this time the Secretary was afraid that "what might go for" the current cabinet might not "go for the next cabinet". By this time, it seems, the State Department thought that it knew Japan to be entirely insincere in the negotiations and therefore had no confidence in any undertakings which she might give. Rightly or wrongly, the State Department seems to have formed the opinion that Japan was only "keeping up the appearance of continuing negotiations". It is very unfortunate, but that is what seems to have happened. Perhaps the intercepted telegrams as decoded by the U. S. were largely responsible for this unfortunate distrust. I shall come back to this presently while discussing those interceptions.

As noticed above, in their proposal of 16 May (Exh. 1,071), the United States had desired the government of Japan to declare "that it is under no commitment to the Axis Alliance or otherwise which is inconsistent with the terms of the proposed Japanese-American agreement". The government of Japan certainly did declare this and I do not see why this declaration would not satisfy any reasonable requirement in this respect.

There seems to have been no further discussion of the Tri-partite question. Within a few days after the meeting of 21 November, Secretary Hull, having come to the decision to break it off, handed to the Japanese representative his note of 26 November which was the last document or proposal on the American side in the negotiation.

Of the three chief programs forming the subject matter of the Japanese-American negotiations, the question of the economic activities of the two nations in the Pacific area was an important one. The original Japanese position on this point as stated in the draft proposal of May 12 was this: "Economic activity of both nations in the Southwestern Pacific area—having in view that the Japanese expansion in the direction of the Southwestern Pacific area is declared to be of peaceful nature. American co-operation shall be given in the production and procurement of natural resources (such as oil, rubber, tin, nickel) which Japan needs". (Exh. 1,070)

On 16 May Secretary Hull produced a redraft of the clause in the following language: "On the pledged basis of guarantee that Japanese activity and American activity in the Southwestern Pacific area shall be carried on by peaceful means, the Japanese Government and the Government of the United States agree to co-operate each with the other toward ensuring on the basis of equality of opportunity equal access by Japan and by the United States to supplies of natural resources (such as oil, rubber, tin, nickel) which each country needs for the safeguarding and development of its own economy". (Exh. 1,071)

In discussing the matter, the Secretary "expressed the hope that subsequently other countries could be brought in". He alluded in this connection to the fact that the benefits of our trade program in South America are enjoyed by all nations". (Exh. 2,873)

On 31 May Ambassador NOMURA was handed a complete redraft of the proposed agreement. The relevant clause on economic activity stood thus: "On the basis of mutual pledges hereby given that Japanese activity and American activity in the Pacific area shall be carried on by peaceful means and in conformity with the principle of non-discrimination in international relations, the Japanese Government and the Government of the United States agree to co-operate each with the other toward obtaining non-discriminatory access by Japan and by the United States to commercial supplies of natural resources (such as oil, rubber, tin, nickel) which each country needs for the safeguarding and development of its own economy". (Exh. 1,078)

An oral statement accompanying the draft pointed out that the section had been re-phrased to make the provisions thereof applicable equally to the United States and Japan. (Exh. 1,079)

The significant alteration was the substitution of the word "Pacific" for "Southwestern Pacific".

On 4 June the Japanese representatives offered another formula for this clause. Their proposal was in the following terms: "nothing that Japanese expansion in the direction of the Southwestern Pacific area is declared to be of peaceful nature, American co-operation and support shall be given in the production and procurement of natural resources (such as oil, rubber, tin, nickel) which Japan needs". (Exh. 1,083)

In explanation of limiting the application of the clause to the Southwestern Pacific area only, the Japanese side said that it was in view of the special interest of Japan in that area that it was felt that this section should be made to relate to it specifically.

On 15 June, however, the Japanese side accepted the wording "Pacific" and "mutual pledges" and presented a complete redraft of the agreement, which is Exhibit 1,087. The relevant clause stood thus: "On the basis of mutual pledges hereby given that Japanese activity and American activity in the Pacific area shall be carried on by peaceful means and in conformity with the principle of non-discrimination in international commercial relations, the Japanese Government and the Government of the United States agree to co-

operate each with the other toward obtaining non-discriminatory access by Japan and by the United States to commercial supplies of natural resources (such as oil, rubber, tin, nickel) which each country needs for the safeguarding and development of its own economy.

The State Department responded promptly with what was to be the last proposal made by it in negotiations. This proposal was of 21 June, and Section 5 of the draft is in the identical language of the Japanese 15 June draft. The Japanese had then made the concession of accepting the two major concessions in this branch of the negotiations.

Thereafter the negotiations were suspended, being resumed in August.

On 6 August the negotiations were resumed and Ambassador NOMURA handed to Secretary Hull a proposal containing an additional item which runs thus: "that in order to remove such causes as might be responsible for the instability of economic relations between Japan and the United States in East Asia, the Japanese Government will co-operate with the Government of the United States in the production and procurement of such natural resources as are required by the United States".

Secretary Hull showed little interest in the proposal. Ambassador NOMURA however considered agreement to have been reached on this question. He was of the opinion "as to the three pending issues an agreement in principle had been reached so far as two of them were concerned".

On September 6, negotiations not having progressed, a further Japanese proposal was presented. This is not a complete redraft of the understanding, but relates to certain points only, the part concerning economic activities being contained in two separate clauses: "that Japan's activities in the Southwestern Pacific area will be carried on by peaceful means and in accordance with the principle of non-discrimination in international commerce, and that Japan will co-operate in the production and procurement by the United States of natural resources in the said area which it needs . . . that the United States will reciprocate Japan's commitment in point A referred to above".

Here there is return to the phraseology "Southwestern Pacific area".

The Japanese redraft proposal of 25 September came next, which still retains the limitation to the "Southwestern Pacific area". This new proposal was in the following form: "Both the Governments mutually pledge themselves that the economic activities of Japan and the United States in the Southwestern Pacific area shall be carried on by peaceful means and in conformity with the principle of non-discrimination in the international commercial relations in pursuance of the policy stated in the preceding paragraphs: "Both the Governments agree to co-operate each with the other toward the creation of conditions of international trade and international investment under which both countries will have a reasonable opportunity to secure through the trade process the means acquiring those goods and commodities which each country needs for the safeguarding and development of its own country. Both Governments will amicably co-operate for the conclusion and execution of the agreements in regard to the production and supply on the basis of non-discrimination of such specific commodities such as oil, rubber, nickel and

tin." (Exh. 1,245-E)

Ambassador NOMURA was still reporting the economic question to the Foreign Minister on October 3 as having already been nearly settled. He, however, also noted that "Mr. Hull abides by the principles of free trade and regards bloc-economy as a cause of war. He is now trying to make this principle prevail in regard to the United Kingdom also." There seems to have been no further development in the matter of economic activities until the KONOYE Cabinet was replaced by the TOJO Cabinet and proposal A was agreed upon for submission to the United States. Proposal A was not actually a completely redrafted proposal; it consisted of modifications to be made in the proposal of 25 September.

The provision on economic activities appears in proposal A in the form of the following sentence to be included in a revision of Section 5 of the pending draft: "Principle of Non-discrimination. The Japanese Government recognizes the principle of non-discrimination in international commercial relations to be applied to all the Pacific areas, inclusive of China, on the understanding that the principle in question is to be applied uniformly to the rest of the entire world as well." (Exh. 1,246)

The Defense contends that this was a complete acceptance of the American position on this question. The point again on 21 June is retained, with an addition to incorporate Secretary Hull's desire often expressed in these negotiations of making the principle universal in application. It was supposed that this additional clause would be entirely satisfactory inasmuch as on the one hand it represented a total abandonment of the long-standing Japanese insistence on recognition of special Japanese rights in China growing out of geographical propinquity; and on the other hand, in suggesting the extension of the principle of non-discrimination to the whole world, it represented merely an application of the United States' own suggestion that "it would be undesirable if either the United States or Japan were to pursue one course of policy in certain areas while at the same time pursuing an opposite course in other areas".

The Prosecution, however, contended that "some of the wordings" suggested by the American side "were embodied but they were largely, in effect, nullified by the various qualifications the Japanese put in".

It is in evidence that Ambassador NOMURA had pointed out to President Roosevelt that the application of the principle throughout the whole world was a long cherished scheme of Mr. Hull's—that it was a consistent position of the Secretary of State. This might have been also the immediate reaction on Secretary Hull himself. Ambassador NOMURA reported that "after careful reading, Hull concurred in the clause respecting non-discrimination in trade and revealed his opinion that its adoption would prove beneficial also to Japan". (Exh. 2,928)

Later on, however, on 15 November the Secretary handed to Ambassador NOMURA an oral statement in which he pointed out that the last sentence of the Japanese proposal "sets forth a condition, the meaning of which is not entirely clear".

It was made clear that the principle was not meant to bind the United States to responsibility for practices outside of its jurisdiction or practices by other nations. The defense evidence is that what the Japanese Government meant by this phrase in question was that the principle would be applied by the United States and by Japan and did not refer to the universal application of those principles by all countries.

The Prosecution contends that this proviso was at the time well-known to be impossible of fulfilment. It is difficult to see why, with the explanation given above, it would be so impossible. At least it does not seem to have been so understood at that time. The Secretary of State said that the "earnest efforts on the part of the United States have ripened into the present proposal concerning the problem of commerce". It seems it was thus perfectly understood and cordially welcomed. There was, therefore, no occasion for saying that the United States could not commit itself to anything which concerns countries outside its jurisdiction. No one really demanded that. It was quite understood that the parties were contracting for themselves, not for the world at large.

We may now turn to the THIRD QUESTION, which is by far the most important one. I mean the question of Chinese-Japanese relations. In course of negotiations, the question ultimately narrowed down to the matter of the stationing of Japanese troops in China and their withdrawal therefrom.

In view of the complexity of the China affair, this question proved to be one of exceeding intricacy and difficulty. It may be remembered that this question brought about the downfall of a government in Japan.

THE FIRST JAPANESE PROPOSAL of 12 May contained the following provision relative to the China affair:

"The Relations of Both Nations Toward the China Affair.

"The Government of the United States, acknowledging the three principles as enunciated in the KONOYE statement and the principles set forth on the basis of the said three principles in the Treaty with the Nanking Government as well as in the joint declaration of Japan, Manchukuo and China, and relying upon the policy of the Japanese Government to establish a policy of neighbourly friendship with China, shall forthwith request the Chiang Kai-shek regime to negotiate peace with Japan." (Exh. 1,070)

The following oral explanation was annexed to this:

"The terms from China-Japan peace as proposed in the original understanding differ in no substantial way for those herein affirmed as the principles of KONOYE. Practically, the one can be used to explain the other. We should obtain an understanding in a separate and secret document that the United States would discontinue her assistance to the Chiang Kai-shek regime if Chiang Kai-shek does not accept the advice of the United States that he enter into negotiations for peace. If, for any reason, the United States find it impossible to sign such a document, a definite pledge by some high authorities will suffice. The three principles of Prince KONOYE as referred to in this paragraph are: (1) neighbourly friendship; (2) joint defense against communism; (3) economic co-operation—by which Japan does not intend to ex-

ercise economic monopoly in China nor to demand of China a limitation in the interest of third powers.

The following are implied in the aforesaid principles:

1. Mutual respect of sovereignty and territories;
2. Mutual respect for the inherent characteristics of each nation co-operating as good neighbours and forming a Far Eastern nucleus contributing to world peace;
3. Withdrawal of Japanese troops from Chinese territory in accordance with an agreement to be concluded between Japan and China;
4. No annexation, no indemnities, and
5. Independence of Manchukuo.

The corresponding section of THE AMERICAN PROPOSAL of 21 June stood as follows:

"Action toward a peaceful settlement between China and Japan.

"The Japanese Government, having communicated to the Government of the United States the general terms within the framework of which the Japanese Government will propose the negotiations of a peaceful settlement with the Chinese Government, which terms are declared by the Japanese Government to be in harmony with the KONOYE principles regarding neighbourly friendship and mutual respect of sovereignty and territories and with the practical application of those principles, the President of the United States will suggest to the Government of China that the Government of China and the Government of Japan enter into a negotiation on a basis mutually advantageous and acceptable for a termination of hostilities and resumption of peaceful relations.

"Note: The foregoing draft of Section III is subject to FURTHER DISCUSSION of the question of co-operative defense against communistic activities, including the stationing of Japanese troops in Chinese territory, and the consideration of economic co-operation between Japan and China. With regard to suggestions that the language of Section III be changed, it is believed that consideration of any suggested change can advantageously be given after all points in the annex relating to this section have been satisfactorily worked out, when this section and this annex can be viewed as a whole. (Exh. 1, 092)

"Annex: The basic terms as referred to in the above section are as follows:

"1. Neighbourly friendship;
"2. "Co-operative defense against injurious communistic activities including the stationing of Japanese troops in Chinese territory" subject to further discussion;
"3. (Economic co-operation) Subject to agreement on an exchange of letters in regard to the application to this point of the principle of non-discrimination in international commercial relations;
"4. Mutual respect of sovereignty and territories;
"5. Mutual respect for the inherent characteristics of each nation co-operating as good neighbours and forming an East Asian nucleus

contributing to world peace;

"6. Withdrawal of Japanese armed forces from Chinese territory *as promptly as possible* and IN ACCORDANCE WITH AN AGREEMENT TO BE CONTRACTED between Japan and China;

"7. No annexation;

"8. No indemnities;

"9. Amicable negotiation in regard to Manchukuo."

Points 2, 3, 6 and 9 in the American list of items are those on which there were differences at this stage.

Recognition of Manchukuo had been a term of the original draft proposal presented to Secretary Hull by Ambassador NOMURA. (Exh. 1,059). The American counter-proposal of 31 May included a clause for "amicable negotiation in regard to Manchukuo". (Exh. 1,078)

The Secretary had told the Ambassador early in the conversations that the American "position right along was that THAT WAS A QUESTION BETWEEN CHINA AND JAPAN. If China were voluntarily, through amicable negotiations, willing to agree to it, we had nothing to say".

On 16 May, according to Mr. Hull's own memorandum of the conversation, "There was some discussion of the questions of joint defense against communism and the recognition of Manchuria". The Secretary indicated that if China and Japan could agree on the other points listed in the Japanese annex and explanation, he did not believe that difficulties which might arise over these two points would be such as to prevent an agreement between China and Japan. (Exh. 2,873)

No. 3 of these items relating to economic co-operation in China eventually merged into the discussion of economic activities in the Pacific area generally, and in the world.

The remaining items taken together constitute the third of the basic points of contention between Japan and America in the negotiations. A SUBSIDIARY QUESTION, which came to assume more importance later, was the tendering of good offices by the United States between Japan and China with the object of ending the China Incident.

On 16 May, Secretary Hull said that he did not consider the question of joint defense against communism to involve such difficulties as would prevent an agreement between China and Japan. In his oral statement of that date he said:

"While one or two of the points might present difficulties, it is believed that, if China and Japan could come to agreement on the basis of the other points mentioned, the remaining points with some modification need not suffer insuperable obstacles. The principles embodied in the KONOYE statement as defined in the Annex and explanation as relating to neighbourly friendship, joint defense against communism, and economic co-operation free from economic monopoly or limitation of the interests of other countries, could, with some modification, it is believed, be acceptable." (Exh. 2,874)

THE QUESTION OF STATIONING OF JAPANESE TROOPS IN CHINA received early and intensive consideration. The question had two aspects:

1. The subject of leaving troops stationed in specified areas of China after conclusion of a general peace;
2. The withdrawal from the territory of China, after the peace, of Japanese forces other than those to be stationed in the areas specified.

The first of the above two matters underwent the most exhaustive exploration and offered the greatest difficulty in solution.

The second item was discussed relatively little and was eventually solved by Japanese agreement to the American terms.

On 20 May, Hull indicated that he did not care at that time to discuss the merits of the Japanese proposal to keep troops stationed in Chinese territory and to undertake joint defense against communism. He seemed to feel at that time that it should be "possible to cover these two points under some broader provision, such as a provision which would call for special measures of protection for Japanese nationals and property interests against lawlessness in areas where special measures for safeguarding the rights and interests of nationals of third powers were necessary". (Exh. 2,875)

On 31 May, an American redraft of the proposal was presented. It retained the statement that the question of co-operative defense against communism was subject to further discussion, but contained the new provision that "withdrawal of Japanese military and naval forces from China" should be carried out "as promptly as possible". (Exh. 1,078)

Simultaneously Secretary Hull handed over another oral statement in which the undertaking was given that the "Government of the United States will at some appropriate stage prior to any definite discussion talk over in strict confidence with the Chinese Government the general subject matter involved in the discussions, especially as it relates to China". (Exh. 1,080)

On 4 June, an important meeting among members of the Japanese Embassy staff and representatives of the State Department took place. It was made clear in the course of discussion of revised clauses that notwithstanding Japan's policy not to regard the Chungking government as more than a regional regime, she did not intend, in pursuance of the proposed understanding, to deal with Chungking for settlement of the China Incident, and that Japan expected to leave it to the Chinese people to decide whether the Nanking or the Chungking or a coalition of the two should be the eventual government of China. It was also made clear that the American proposal of providing by the agreement for withdrawal of naval as well as military forces was accepted with only the phraseology to be settled.

On 6 June, Secretary Hull contended that the proposed revisions of 4 June had gradually narrowed down the Japanese proposal of 12 May.

Some ten days later, on 15 June, the Japanese revised counter-proposal was presented. On 21 June, the United States also produced a revised proposal together with an oral statement. The section of the proposal relating to the China question is, with one exception, in the identical words of the draft of 31 May. The exception is an addition to the note suggesting that questions of verbal change in this section can advantageously be postponed to solution of

the details of the problem.

In the oral statement the Secretary for the first time expressed his misgiving over the desire of Japan to retain the right of stationing its troops in Inner-Mongolia and North China as a measure of co-operation with China in resisting communistic activities. He also expressed his feeling that this proposal might affect the sovereign rights of a third country.

We need not enter into details of these negotiations in this connection. A Japanese proposal of 6 September was handed to Ambsasador Grew by Foreign Minister TOYODA. Mr. Grew reported his views of this proposal to the State Department. His conclusion was that in respect to the China question, "the commitments contained in the latest Japanese proposal, if implemented, would fulfil this requirement of the cessation on the part of Japan of its progressive acts of aggression".

Mr. Grew pointed out that "If an adjustment of relations is to be achieved, some risk must be run, but the risk taken in the pursuance on our part of a course which would not only provide inducements to the Japanese to honour their undertakings but would also leave to the United States Government a certain leverage of compulsion would appear to be relatively less serious than the risk of armed conflict entailed in the progressive application of economic sanctions which would result from a refusal to accept these proposals." (Exh. 2, 896)

Meanwhile, for use in explanation of the current proposals, Foreign Minister TOYODA sent instructions to the Embassy, handing a copy of them to Ambassador Grew on 13 September. (Exh. 2, 899). This explanation stood thus:

"For the purpose of preventing communistic and other subversive activities threatening the safety of both Japan and China and also of maintaining the peace and order in China, Japan and China will co-operate in the form of common defense. The execution of the common defense by Japan and China will contain the stationing of Japanese troops for a certain period in accordance with the agreements between both countries. The Japanese troops, which have been sent to China with the object of executing the China affairs, will be withdrawn when the said affairs have been settled."

In his elaborate oral statement of 2 October, Secretary Hull seems to have departed a great way from his original position that the matter of stationing Japanese troops in China was subject to further discussion. In this oral statement he said, "This Government has noted the views of the Japanese Government in support of its desire to station troops for an indeterminate period in certain areas of China. Entirely apart from the question of the reasons for such a proposal, the inclusion of such a provision in proposed terms of a peaceful settlement between Japan and China at a time when Japan is in military occupation of large areas in China is open to certain objections. For example, when a country in military occupation of territory of another country proposes to the second country the continued stationing of troops of the first country in certain areas as a condition for a peaceful settlement and thus for the withdrawal of the occupationary forces from other areas, such procedure

would seem to be out of keeping with the progressive and enlightened courses and principles which were discussed in the informal conversations and thus would not, in the opinion of this Government, make the peace or offer prospects of stability." (Exh. 1,245-G)

It must be said that however sound in principle this statement may be, remembering the course which the negotiation took, it is difficult to withhold the observation that the position now taken was not quite consistent with the position hitherto assumed for the purpose of the negotiation.

The available evidence makes it questionable whether thenceforward the State Department did really negotiate on the question at all; further Japanese efforts thereafter were given scant consideration. Tokyo, it seems, came gradually to feel a lack of sincerity in the American attitude.

On 16 October 1941 the KONOYE Cabinet fell. The direct and proximate cause of this change of government was the question of the stationing of troops in China in relation to the Japanese-American negotiations, as is explained by Prince KONOYE himself in his memoirs. (Exh. 2,914)

In a last effort to save the negotiations, Foreign Minister TOYODA had prepared and submitted to Premier KONOYE his estimate of what would be necessary to secure American understanding on the troop stationing problem. It proved impossible in the end to secure internal agreement to the making of such concessions as he thought essential. The Cabinet resignation came about in consequence.

Upon formation of the TOJO Cabinet, the study of the entire question of the Japanese-American negotiations was made the first order of business. The first product of this process of reconsideration was a new Japanese proposal, known as proposal A, which was presented to Secretary Hull on 7 November and to President Roosevelt on the 10th. This proposal provided thus:

"*Disposition of Japanese Forces*

"(A) Stationing of Japanese forces in China and the withdrawal thereof:

"With regard to the Japanese forces that have been despatched to China in connection with the China Affair, those forces in specified areas in North China and Mengchiang (Inner Mongolia) as well as in Hainan-tai (Hainan Island) will remain to be stationed for a certain required duration after the restoration of peaceful relations between Japan and China. All the rest of such forces will commence withdrawal as soon as general peace is restored between Japan and China, and the withdrawal will proceed according to separate arrangements between Japan and China and will be completed within two years with the firm establishment of peace and order.

"(B) Stationing of Japanese forces in French Indo-China and the withdrawal thereof:

"The Japanese Government undertakes to guarantee the territorial sovereignty of French Indo-China. The Japanese forces at present stationed there will be withdrawn as soon as the China Affair is settled or

an equitable peace is established in East Asia.

"*Principle of Non-Discrimination*

"The Japanese Government recognizes the principle of non-discrimination in international commercial relations to be applied to all the Pacific areas, inclusive of China, on the understanding that the principle in question is to be applied uniformly to the rest of the entire world as well."

By proposal A, Japan was prepared for the first time to state DEFINITELY THE AREAS in which would be stationed the troops to remain in China after the conclusion of a Sino-Japanese peace.

Here for the first time during the negotiations was stated specifically in a formal proposal the condition of retention of troops in Hainan. Then again for the first time in the course of the negotiations, by proposal A Japan placed a DEFINITE LIMIT ON THE TIME for withdrawal from China of troops generally after the conclusion of peace.

Ambassador NOMURA was instructed with the proposal A that in case the United States inquires into the length of the necessary duration, reply should be made to the effect that THE APPROXIMATE GOAL IS TWENTY-FIVE YEARS. Twenty-five years might have been a reasonable period in the circumstances or it might have been unreasonable, but that is not the question before us. If it was unreasonable, one would expect further negotiation on the point. America, however, did not show any interest in the matter.

Some days after the presentation of proposal A, the question of the number of troops to be stationed in China after the peace was also clarified by the Japanese. At a conversation with Mr. Hull on 18 November, Admiral NOMURA, apparently having obtained more definite instructions, in response to a question, 'how many soldiers would the Japanese want to retain in China', answered by saying that possibly 90 per cent WOULD BE WITHDRAWN.

Mr. Ballantine told us how America viewed this proposal. I shall presently consider his views. In the meantime America intercepted several telegrams sent from Tokyo to Ambassador NOMURA and, it seems these intercepted telegrams largely influenced the American attitude.

The interception of messages may indeed be regarded as the tragedy of the Japanese-American relations. The Department of State did not know what was in the Embassy's correspondence; it had before it the intercepted telegrams as decoded and translated by the intelligence service of the United States. These interceptions certainly indicated the watchfulness, sagacity and hard work of this service. At the same time it seems NOW that the interceptions succeeded only in conveying half knowledge, if not sometimes altogether contrary knowledge to the State Department.

By way of illustration, the Defense placed before us three of such intercepted messages, these three being those conveying to Ambassador NOMURA Proposals A and B and the intention behind them.

THE FIRST is Foreign Minister TOGO's telegram No. 725 of 4

November, advising Ambassador NOMURA of the anticipated approval by the Imperial Conference of the following day of Proposals A and B, and explaining the intention with which the TOJO Cabinet had determined to continue the Japanese-American negotiations. The original telegram as found in the Japanese Foreign Office and presented to us by the Defense is Exhibit 2, 924 in this case. Its intercept as decoded and translated by the Intelligence Service of the U. S. is Exhibit 1, 164. There is not much factual error of any apparent consequence in the intercepted version. Yet the whole spirit of the communication seems to have suffered such a distortion as is likely to give rise to some misgiving in the mind of one reading this intercept about the trend of its author's intention.

I would place certain corresponding passages from these two documents in order to show how one fails to represent the correct spirit of the other.

THE ORIGINAL DOCUMENT runs as follows:

"1. Strenuous efforts are being made day and night in order to adjust Japanese-American relations, which are on the verge of rupture. The Government has held daily meetings of the Liaison Conference with the High Command to examine the fundamental principles of our national policy. After long and thorough deliberations and discussions, the Government and the High Command have reached unanimous agreement on the proposals in the Japanese-American negotiations. . . . . .

"2. The situation both within and outside the country is extremely pressing and we cannot afford to allow any procrastination. Out of the sincere intention to maintain peaceful relations with the United States, the Imperial Government continues the negotiations after thorough deliberations. The present negotiations are our final effort, and you must realize that these proposals are truly our last. If speedy conclusion of the negotiations is not to be attained even on the basis of these proposals, breakdown of the negotiations is unavoidable, however regrettable it may be. Relations between the two countries face rupture in such a case. The future of our country is profoundly involved in the outcome of the present negotiations and the security of the Empire depends on it.

"3. . . . . Our Government has made concession after concession, in spite of difficulties, for the speedy consummation of the negotiations, but the United States insists on the assertions with which she started, showing no response whatsoever to our concessions. There are not a few in this country who are suspicious of the real intention of the United States. In such circumstances, it is only out of our sincere desire to maintain the peace of the Pacific that we express our sincerity and dare to make further concessions. . . . . Now that we make the utmost concession in the spirit of utmost friendliness for the sake of peaceful solution of the situation, we hope earnestly that the United States will, ... reconsider the matter

and approach this grave situation properly . . . . . .

* * * * * *

"5. . . . . In view of the serious nature of the negotiations, I intend to carry on talks with the American Ambassador in Tokyo parallel with the negotiations in Washington . . . . . In order to avoid any *contretemps*, you are directed to abide strictly by your instructions and you are given no room for discretion."

THE INTERCEPT runs as follows:

"1. Well, the relations between Japan and the United States have reached the edge, and our people are losing confidence in the possibility of ever adjusting them. In order to lucubrate on a fundamental national policy, the Cabinet has been meeting with the Imperial Headquarters for some days in succession. Conference has followed conference, and now we are at length able to bring forth a counter-proposal for the resumption of Japanese-American negotiations based upon the unanimous opinion of the Government and the Military High Command . . . . . .

"2. Conditions both within and without our Empire are so tense that no longer is procrastination possible, yet in our sincerity to maintain pacific relationships between the Empire of Japan and the United States of America, we have decided as a result of these deliberations, to gamble once more on the continuance of the parleys, but this is our last effort. Both in name and spirit this counter-proposal of ours is indeed the last. I want you to know that. If through it we do not reach a quick accord, I am sorry to say the talks will certainly be ruptured. Then indeed will relations between our two nations be on the brink of chaos. I mean that the success or failure of the pending discussions will have an immense effect on the destiny of the Empire of Japan. In fact, we gambled the fate of our land on the throw of this die.

". . . . . Hoping that we could fast come to some understanding we have already gone far out of our way and yielded and yielded. The United States does not appreciate this, but through thick and thin sticks to the self-same propositions she made to start with. Those of our people and of our officials who suspect the sincerity of the Americans are far from few. Bearing all kinds of humiliating things, our Government has repeatedly stated its sincerity and gone far, yes, too far, in giving in to them. There is just one reason why we do this—to maintain peace in the Pacific . . . . . This time we are showing the limit of our friendship; this time we are making our last possible bargain, and I hope that we can thus settle all our troubles with the United States peaceably.

* * * * * *

"5. In view of the gravity of these talks, as you make contacts there, so I will make them here. I will talk to the American Ambassador here in Tokyo and as soon as you have got the consensus of the American officials through talking with them, please wire me..... Furthermore, lest anything go awry, I want you to follow my instructions to the letter. In my instructions, I want you to know there will be no room for personal interpretation."

The whole spirit of the intercept seems to be wrong. Mr. Blackeney for the defense perhaps was right when he said that "a reading of the two documents in parallel will expose the dichotomy of the flamboyant, reckless gambler whose message the State Department read, and the sobar, responsible statesman seriously communicating with his ambassador". Certainly the author of the telegram in instructing his ambassador was not thinking of "gambling once more on the continuance of the parleys". There is nothing in his communication sporty or anything in the spirit of bargaining. His appreciation of the gravity of the situation, his grave concern with fate of his country in case the negotiation really remains closed, his expression of grave concern equally felt by the whole Cabinet and the High Command, his earnestness are all lost.

Next, we may compare Exhibit 2, 925, the original telegram transmitting Proposal 'A' and explanation of it, and Exhibit 1, 165, its intercept as decoded and translated by the American intelligence service. We may put a few excerpts from the original and from its intercept in parallel columns so as to see how they stand to each other:

Original 245	Intercept 246
This is our proposal setting forth what are virtually our final concessions.	This proposal is our revised ultimatum.
We make the following relaxation	We have toned down our insistence as follows
(Note) In case the United States inquires into the length of the necessary duration, reply is to be made to the effect that the approximate goal is 25 years.	(Note: Should the American authorities question you in regard to "the suitable period", answer vaguely that such a period should encompass 25 years.)
In view of the strong American opposition to the stationing for an indefinite period, it is proposed to dismiss her suspicion by defining the area and duration of the stationing	in view of the fact that the United States is so much opposed to our stationing soldiers in undefined area our purpose is to shift the regions of occupation and our officials, thus

attempting to dispel their suspicions

you are directed to abide, at this moment, by the abstract term "necessary duration", and to make efforts to impress the United States with the fact that the troops are not to be stationed either permanently or for an indefinite period.

we have hitherto couched our answers in vague terms. I want you in as indecisive yet as pleasant language as possible to euphemize and try to impart to them to the effect that unlimited occupation does not mean perpetual occupation

With regard to the principle of non-discrimination in trade, our contention hitherto made on the basis of geographical propinquity is withdrawn

Of course, there is the question of geographical proximity when we come to consider non-discrimination in commerce

the statement in ('the United States') memorandum of 2 October to the effect that "it would be undesirable if either the United States or Japan were to pursue one course of policy in certain areas while at the same time pursuing an opposite course in other areas."

In a memorandum of the American Government, they state in effect, however, that it might be feasible for either country within a certain specified area to adopt a given policy and for the other party within another specified area to adopt a complementary policy

Especially note this one:
With regard to the four principles, every effort is to be made to avoid including them in the terms of a formal agreement between Japan and the United States (whether in the form of agreement or other declaration)

(4)As a matter of principle, we are anxious to avoid having this inserted in the draft of the formal proposal reached between Japan and the United States (whether it is called an understanding proposal or some other sort of a statement)

It should be further clarified that Japan has no intention of making any unwarranted extension of the interpretation of the right of self-defense. With regard to the interpretation and application of the Tri-partite Pact, it should be stated that the Japanese Government, as has been repeatedly explained in the past, will act in accordance with its own decision, and that it is believed that the understanding of the American Government has already been obtained on this point.

At the same time that you clarify to them that we intend no expansion of our sphere of self-defense, make clear, as has been repeatedly explained in the past, that we desire to avoid the expansion of Europe's war into the Pacific.

Much comment is not needed here. The first few excerpts from the intercept perhaps would sufficiently explain the American impression of the Japanese bad faith. We now see that what the State Department knew as Japan's "revised ultimatum" was really a proposal setting forth, not even an absolutely final concession, but only what was VIRTUALLY final concessions. A "reply to the effect that the approximate goal is 25 years" is not answering "vaguely that such a period should encompass 25 years". When "it is proposed to dismiss . . . suspicion by defining the area and duration", it is really unkind to take the purpose to be "to shift the regions of occupation and . . . . officials, thus *attempting* to dispel . . . . suspicions". "Necessary duration" as explained in the original certainly can be a sincere statesman's explanation and honest direction. But no statesman can claim any honesty or sincerity if he directs his ambassador as in the corresponding intercept. Even a statesman who designs "to baby his opponents for some time" would not expose himself thus to the ambassador of his country. Of course, no one will contend that withdrawal of a contention is the same as keeping it off for another occasion.

This telegram was indeed a crucial factor in moulding the State Department's attitude in the negotiations.

Coming to the question of the American four principles, the paragraph in the intercepted message is given a separate number, (4), thereby making it appear co-ordinate with "(1) Non-discrimination and Trade", "(2) Interpretation and Application of the Tri-partite Pact" and "(3) Withdrawal of Troops". By thus seeming to be one of the main divisions of the message and cognate with the others, and by omission of the words "the four principles" and instead referring to anxiety to avoid having "this" included in the agreement, this clause of course says that the Japanese will try to escape committing themselves to a formal agreement embodying the points which they have proposed above—all of them. "Naturally", the State Department was on its guard in dealing with anyone believed to have sent such a message as this.

Even on the most important topic relating to the Tri-partite Pact, the intercept was a ruthless distortion.

Last of the three telegrams available for comparison is No. 735, of 5 November, from Foreign Minister Togo to Ambassador Nomura. The original is Exhibit 2, 926 and its intercept is Exhibit 1, 170. There is in the two versions of this message only one difference worth calling attention to, but that one is of considerable importance in view of the prosecution's assertions of the final nature of Proposals "A" and "B".

Original 248	Intercept 249
It is our intention to present Proposal "B" . . . as the last resort to save the situation in case Proposal "A" fails to conclude the negotiations	If it becomes apparent that an agreement cannot be reached, we intend to submit our absolutely final proposal, Proposal B

According to the defense, Proposal "B" was an attempt at a *modus vivendi*, and as such properly and accurately described as a "last resort to save the situation" if negotiations for a substantive agreement seemed for the moment to have broken down. It is in this sense of a last-resort effort that Proposal "B" is described in the succeeding paragraph of the original telegram as "the final proposal". This is a different matter from an absolutely final proposal, in the Prosecution's sense of an ultimatum.

It might have been noticed that the telegram spoke about parallel conversation between the Foreign Minister, Togo, and the local United States' Ambassador. It is in evidence that Mr. Grew from time to time communicated his views of the situation as also of the Japanese attitude. It is very unfortunate that not much importance seems to have been attached to his views. In my opinion, in view of the contents of the telegram, and of Mr. Grew's unwavering opinions, the State Department might apprehend that perhaps the decodification of the interception did not represent the correct state of things. At any rate, there were those misgivings and the whole unfortunate situation might be well explained if we only keep these misgivings in view.

Mr. Grew on more than one occasion urged upon his government the wisdom of giving Japan an opportunity to prove whether her professed desire to establish a reorientation was sincere. The Department of State did not accept his advice, nor apparently did the British Government urge it to do so, in reliance upon the advice of its own ambassador, Sir Robert Craigie.

Questions arising out of Japan's movement into southern French Indo-China in July 1941 presented from that time A FOURTH QUESTION of major importance in the Japanese-American negotiations. This question ruptured the negotiations for a time, induced American suspicion of subsequent Japanese professions of peaceful intent, and contributed to the American decision to rupture economic relations with Japan.

When the Japanese-American negotiations opened, Japanese troops were already stationed in the northern areas of French Indo-China, under agreement entered into in September 1940 with the then government of France: (Exh. 620). The Indo-China question, however, was not directly raised in the Washington negotiations until almost a year later. The question was raised when the further Japanese advance into the SOUTHERN PART of the colony was made under the agreement with France for joint defense: (Exh. 651).

Japan claimed that it was a precautionary measure against such an encirclement as would menace Japan's economic existence, and would affect Japan's position in the China affair.

The French and Japanese governments had reached an agreement about 20 July 1941 for the occupation of certain bases in southern Indo-China: (Exh. 6,478). From 5 July rumours of such a move had been afloat; and on that day the State Department had pointed out to Ambassador Nomura the harmful effect upon the negotiations then in progress of such a move.

The agreement with France was nevertheless executed. Ambassador Nomura obtained an interview with President Roosevelt on the 24th; the Presi-

dent warned him that if the move into southern Indo-China was carried through, it would probably be unavoidable for him to impose an oil embargo on Japan. The President suggested that it might be possible to withdraw the Japanese troops then stationed in Indo-China if the area could be neutralized by agreement and resources made freely and equitably available.

The final protocol for joint Franco-Japanese defense of Indo-China was, however, executed and Japanese troops moved in on 29 July.

Prior to this, however, on 26 July, as a professed counter-measure to execution of the agreement of the 20th, President Roosevelt by executive order had frozen all Japanese assets in the United States, Britain and the Netherlands following suit.

It may be of some importance to note that on 2 July, at least three days before the State Department even heard any rumours of the Indo-China move, the Japanese Embassy had already heard rumours that the freezing of assets was under contemplation or had been decided on by the State Department. President Roosevelt claimed on the 24th that he had been able theretofore to resist this freezing order on the ground of maintaining the peace of the Pacific. The strong public sentiment had been for embargo on the export of petroleum to Japan. He could resist it till then but that the move into southern Indo-China would deprive him of his justification. Japan, on the other hand, claimed that this embargo had already been decided on and that that is why Japan had to take this move in order to escape from the immediate consequences of this embargo.

As a consequence of the Indo-China move and the rupture of economic relations by the American freezing order of 26 July, negotiations languished for some weeks.

The United States felt that Japan's action in making the southward advance was menacing and was inconsistent with her professed purpose of working for a comprehensive peaceful settlement of the Pacific problems.

On 6 August Ambassador Nomura received a new Japanese suggestion in the form of an answer to the President's proposal of 24 July of neutralization of Indo-China. This gave him an opportunity to make another approach. He presented the proposal to Secretary Hull on the same day.

Japan did not accept the President's suggestion but offered to undertake to withdraw the troops, already dispatched, upon the settlement of the China Incident, provided America undertook to suspend military measures in the South Pacific and advise the British and Netherlands governments to do the same. The United States was to recognize a special status of Japan in French Indo-China even after the withdrawal of the Japanese troops from that area.

We are not much concerned here with the details of the negotiations. Ambassador Nomura made a suggestion that a meeting be arranged between the President and the Premier of Japan to make an exchange of views with an eye to the general peace of the world. The President discussed various aspects of such a meeting with much apparent interest and ultimately handed over two oral statements to the Ambassador.

One was a serious warning to Japan that America would be compelled to

take all steps which it might regard as necessary if the Japanese Government took any further steps in pursuance of a policy or program of military domination, by force, or threat of force of neighbouring countries.

The other document was in reference to the proposed meeting of the heads of the two states. It said, "In case the Japanese Government feels that Japan desires and is in a position to suspend its expansionist activities, to readjust its posit on and to embark upon a peaceful program for the Pacific along the lines of the program and principles to which the United States is committed, the Government of the United States would be prepared to consider resumption of the informal exploratory discussions which were interrupted in July and would be glad to arrange a suitable time and place to exchange views."

On 6 September the Japanese counter-proposal designed to reopen the negotiations was delivered. The clause relative to Indo-China provided "that Japan will not make any military advancement from French Indo-China against any of its adjoining areas, and likewise will not without any justifiable reason, resort to any military action against any regions lying south of Japan". (Exh. 1,245-D)

This proposal was handed over to Ambassador Grew beforehand and on it he had sent to the State Department his opinion whereon his conclusion was that in respect to the China question, the commitments contained in the latest Japanese proposal, if implemented, would fulfil this requirement of the cessation on the part of Japan of its progressive acts of aggression. (This is Exhibit 2,898 in this case).

Of the clause in the proposal relating to Indo-China and those concerned with China and with the Tri-partite Pact, Ambassador Grew felt that the commitments contained in the Japanese proposal, if implemented, would fulfil the basic requirements of a satisfactory solution of the Pacific problems. Mr. Hull, however, felt that the proposal as a whole had narrowed down the spirit and scope of the proposed understanding.

The proposal by Japan of 25 September introduced a new idea into the negotiation over the Indo-China question. This was: "The Government of Japan will not make any armed advancement, using French Indo-China as a base, to any adjacent area thereof (excluding China) and upon the establishment of an equitable peace in the Pacific area, will withdraw its troops which are now stationed in French Indo-China." (Exh. 1,245-E)

The new element in this proposal is the provision for withdrawal upon conclusion of AN EQUITABLE PEACE in the Pacific area. This expression, "equitable peace in the Pacific area", seems to have been explained as far back as 28 August in a telegram of explanation to Ambassador Nomura. Therein it was written, "that the withdrawal of Japanese troops can be considered EVEN WHILE the China Affair is not yet brought to a general settlement, if the Chiang Kai-shek regime descends literally to a local government owing to the closing of the supply routes, normal relations between Japan and China are in effect restored, and equitable and free acquisition of resources from French

Indo-China is assured to Japan". (Exh. 2, 920). This shows that Japan had come to the point of abandoning the contention that the troops must be stationed in Indo-China to see the China Affair through.

So, this clause relating to equitable peace does not really narrow down the original terms. It is a substantial concession.

The Prosecution contended that Japan being already committed to France, the agreement to withdraw troops upon conclusion of the China affair or conclusion of an equitable peace in the Pacific area does not amount to a concession. This, in my opinion, confuses the issue. It does not matter whether what Japan was now promising to do she was bound to do by reason of her agreement with another power. Whether or not she was making any concession in course of her negotiations with America must be judged by how the negotiations started and what in course of these she was agreeing to do, irrespective of the consideration that what she was agreeing to do it was already her duty to do.

Negotiations went on with no notable progress into November.

Proposal A had only one difference in the Indo-China section from the 25 September draft. It added a proviso that the Japanese Government undertakes to guarantee the territorial sovereignty of French Indo-China. The word "guarantee" is used in place of assurances.

The changes in Japan's position on the three chief issues of the negotiations were briefly as follows:

(1) In the matter of interpretation of the Tri-partite Pact, Japan had receded from her original stand that her obligations would be applied in accordance with the stipulation of Article III of the Pact to the point of giving assurances that, should America participate in the European War, Japan would decide entirely independently in the matter of interpretation of her obligation. Japan had also agreed to insertion in any agreement of a provision that both governments will be guided in their conduct by considerations of protection and self-defense. (2) The question of economic activities had once been completely settled by Japanese concession of the American position, though later the positions of the parties moved apart again. The only real question here was whether the agreement for non-discriminatory international commercial relations was to be restricted to the Southwest Pacific area or to the Pacific area as demanded by the United States.

The third and crucial point, the question of withdrawal of Japanese troops from China, showed little progress during this period (KONOYE Cabinet). The whole matter remained only subject to further discussion.

The TOJO Cabinet, through its Proposal A, made the first really significant concessions in this respect.

Proposal A on its face represented no significant change in the Japanese position regarding the Tri-partite Pact question. Remembering, however, America's preparations and the measures already taken by America, Japan's commitment to make her own decision of the character of America's acts would in this context take an entirely different meaning from what it had had before. If America had already, before Proposal A was handed over on 7

November, gone to war against the European Axis members and if Japan, knowing full well of this, had not attacked America and on the other hand were saying that she would herself adjudge the character of the measures taken by America and was entering into this agreement with America, it seems that that would have implied that those measures at any rate were being adjudged as measures in self-defense. In my opinion, the State Department might take the same view as was done by Mr. Grew.

In regard to the question of economic activities, Proposal A stood thus:

"Japan recognizes the principle of non-discrimination in international commercial relations to be applied to all the Pacific areas, inclusive of China, on the understanding that the principle in question is to be applied uniformly to the entire world as well." It was explained that the condition would bind only the contracting nations and would not bind them to control the conduct of third powers.

As regards withdrawal of troops from China, some concession can be said to have been made in Proposal A as has been pointed out above.

Proposal 'B' is Exhibit 1,245-H, in this case. It runs as follows:

"1. Both the Governments of Japan and the United States undertake not to make any armed advancement into any of the regions in the Southeastern Asia and the Southern Pacific area excepting the part of French Indo-China where the Japanese troops are stationed at present.

"2. The Japanese Government undertakes to withdraw its troops now stationed in French Indo-China upon either the restoration of peace between Japan and China or the establishment of an equitable peace in the Pacific area.

"In the meantime the Government of Japan declares that it is prepared to remove its troops now stationed in the Southern part of French Indo-China to the northern part of the said territory upon the conclusion of the present arrangement which shall later be embodied in the final agreement.

"3. The Government of Japan and the United States shall co-operate with a view to securing the acquisition of those goods and commodities which the two countries need in Netherlands East Indies.

"4. The Governments of Japan and the United States mutually undertake to restore their commercial relations to those prevailing prior to the freezing of the assets.

"The Government of the United States shall supply Japan a required quantity of oil.

"5. The Government of the United States undertakes to refrain from such measures and actions as will be prejudicial to the endeavours for the restoration of general peace between Japan and China."

Mr. Ballantine in his evidence said that its acceptance "would have meant condonement by the United States of Japan's past aggressions, assent by the United States to unlimited courses of conquest by Japan in the future, abandonment by the United States of its whole past position in regard to the

most essential principles of its foreign policy in general, betrayal by the United States of China, and acceptance by the United States of a position as a silent partner aiding and abetting Japan in her effort to create a Japanese hegemony in and over the Western Pacific and Asia; it would have destroyed the chances of asserting and maintaining American rights and interests in the Pacific; and in its final analysis would have made a most serious threat to American national security."

Later on he says, "Their conditional offer to withdraw troops from Southern Indo-China to Northern Indo-China was meaningless as they could have brought those troops back to Southern Indo-China within a day or two, and furthermore, they placed no limit on the number of troops they might continue to send there."

In this view the whole negotiation was meaningless. If this was the United States' attitude toward Japanese offer and undertaking, then it is difficult to understand why the United States' authorities at all agreed to such negotiations. By revealing this attitude they raise a suspicion that perhaps they only wanted to take time.

On November 26, the Secretary of State made a reply to the Japanese representatives in the form of two documents, the first, an outline in a tentative form of a proposed basis for agreement between the United States and Japan, and the second, an explanatory statement in regard to it. This Hull note of 26 November is Exhibit 1, 245-I in this case. It commences with a statement of general principles. The operative provisions are found in the second section, entitled, "Steps to be Taken by the Government of the United States and the Government of Japan". These may be summarized as follows:

"1. The two Governments to endeavour to conclude a multilateral non-aggression pact among themselves and the British Empire, China, the Netherlands, the Soviet Union and Thailand.

"2. The two Governments to endeavour to conclude among themselves and the British, Chinese, Dutch and Thai Governments an agreement for respecting the territorial integrity of French Indo-China, for joint consultation over necessary measures to meet any threat to it which might develop, and for maintenance of equality of commercial opportunity in Indo-China.

"3. Japan to withdraw all military, naval, air and police forces from China and Indo-China.

"4. The two Governments to support no government or regime in China other than the Chungking Government.

"5. Both Governments to give up all extra-territorial rights in China, including rights under the Boxer Protocol and concessions, and to endeavour to obtain the agreement of other Governments to do likewise.

"6. The two Governments to enter into negotiations for conclusion of a trade agreement based on most-favoured-nation treatment and reduction of trade barriers.

"7. The freezing of assets to be rescinded by both Governments.

"8. A plan to be agreed upon and a fund established for stabilization of the dollar-yen rate.

"9. Both Governments to agree that no agreement which either had concluded with any third Power should be interpreted in such a way as to conflict with the fundamental purpose of this agreement, the establishment and preservation of peace throughout the Pacific area.

"10. Both Governments to use their influence to induce other nations to adhere and give practical application to the basic political and economic principles of this agreement."

The Japanese Government took this as ignoring the progress toward any understanding by the eight-months negotiations.

1. The multilateral Non-aggression Pact had never before been mentioned, so far as the evidence discloses, in the negotiations. This proposal thus imported into the discussion two additional nations, the U. S. S. R. and Thailand, and also suggested actions which would mean much time;
2. Japan had already, by Proposal B, abandoned any claim on her part to special rights in French Indo-China. To put the matter in the form of a multilateral agreement would only complicate the solution of the Indo-China problem;
3. The clause provides for the withdrawal of Japanese forces—military, naval, air and police—forthwith and unconditionally from China and Indo-China;
4. The proposed mutual undertaking to support no government or regime in China other than that of Chungking was also a radical new departure in two ways:
   (*a*) The question of Manchukuo had hitherto always been subject to further discussion; Japan had included recognition of Manchukuo. By this proposal the discussion is cut off, Manchukuo is to be abandoned;
   (*b*) Similarly the Hull note requires the repudiation of the Wang Ching-wei regime.
5. The proposal of abandonment by the parties of all extra-territorial rights in China was certainly not a request that Japan should do something that she was already committed to do.

(6-8 need not be commented on.)

9. The clause aimed at the Tri-partite Pact goes considerably beyond America's insistence theretofore, amounting in effect to the requirement that the Pact be repudiated. The phrasing of the clause, on the face of it, is not offensive but read in the context, it might go much beyond the previous American demands.

We may compare the Hull note of 26 November with the American proposal of 21 June (Exh. 1, 092), putting the terms in parallel lines. They would stand thus:

21 June 331	26 November 332
(No equivalent provision)	Multilateral non-aggression pact
(No equivalent provision)	Multilateral convention concerning French Indo-China
Questions of the time and terms for withdrawal of Japanese troops from China subject to further discussion (no equivalent provision as to Indo-China)	Immediate and unconditional withdrawal of all Japanese military, naval, air and police forces from China and Indo-China.
Amicable negotiations in regard to Manchukuo	Non-recognition of any regime or government in China other than the Chungking Government
Japan to give an interpretation of the Tri-partite Pact satisfactory to America that American actions in self-defense would not call it into operation against her	Abrogation of the Tri-partite Pact
(No equivalent provision)	Renunciation of extraterritorial rights, concessions and Boxer Protocol rights in China

The defendants considered this note as an ultimatum. As one of the defendants pointed out, "Such a political condition or situation would of itself affect even the area of Korea. That is to say, Japan would be placed in a predicament wherein she must also withdraw from Korea. Her Continental interest totally abandoned, her prestige in Asia vanished, Japan truly, *vis-a-vis* international relations, would have been placed in the same situation that she is in today. To say that again in different words, this demand was asking Japan to return to a situation and circumstances which were already much worse than the situation which existed at the time of the Manchurian Incident. Or, more than that, to return to the situation in which Japan was before the Russo-Japanese War. In other words, this was asking for Japan's suicide as a great Power in East Asia." (R. P. 34,665)

Even contemporary historians could think that "as for the present war, the Principality of Monaco, the Grand Duchy of Luxembourg, would have taken up arms against the United States on receipt of such a note as the State Department sent the Japanese Government on the eve of Pearl Harbour."

A contemporary American historian says:

"....., it required no profound knowledge of Japanese history, institutions, and psychology to warrant two other conclusions respecting the memo-

randum of November 26, 1941. First, that no Japanese Cabinet, "liberal" or "reactionary", could have accepted the provisions of the memorandum as a basis of negotiating a settlement without incurring the risk of immediate overthrow, if nothing worse. Second, that every high official in the State Department, especially in the division concerned with Far Eastern affairs, must have been aware, while the memorandum was being framed, that the Japanese Government would not accept it as a program of renewed conversation 'looking toward the maintenance of peace in the Pacific'. Nor was it to be supposed that President Roosevelt and Secretary Hull were so unfamiliar with Japanese affairs as to imagine, on November 26, 1941, that Tokyo would accept the terms of the memorandum or that the delivery of the document to Japan would prove to be otherwise than a prelude to war."

President Roosevelt and Secretary Hull were so certain of Japanese refusal to accept the proposals of the memorandum that, without waiting for the Japanese reply, they authorized a war warning to the American outpost commanders the very next day after the document had been handed to the Japanese representatives. The Roberts Report declared that the American outpost commanders had been duly warned of the coming war as early as November 27.

A scrutiny of this Hull note would reveal that it categorically rejected the Japanese proposal for a *modus vivendi*. The memorandum made it patent that America did not choose to follow the methods long recognized in diplomacy as calculated to arrive at such a *modus vivendi*. It did not limit the issues to primary and essential terms. In deciding upon the substance of the memorandum, it refrained from directing the main emphasis to the recent southward movements of Japanese troops which might be said to have menaced the Philippines as well as British and Dutch possessions in that area. It ignored that Japan had already offered to withdraw her troops from the south and thus to remove cause for this menace.

At no time in the whole course of the negotiations before this note, had the Government of the United States proposed to Japan such a sweeping withdrawal from China over a veiled threat of war and under the pressure of economic sanctions known by the American authorities as likely to lead to war.

Instead of limiting the demands to the protection of the Philippine Islands, for which the United States still had the obligation, or even to the minimum terms necessary to protect the British and Dutch imperial possessions against Japanese aggression, the note amounted to the maximum terms of an American policy for the whole Orient. It called upon Japan to withdraw all military, naval, air and police forces from China and Indo-China; to recognize only the Chungking Government; to make additional concessions of a similar nature; to observe in China the political and economic practices once covered by the "open door", in short to undo everything hitherto done by Japan in the name of *modus vivendi*. It represented in sum and substance an expansion of the very doctrine to cover all China, Indo-China, and indeed almost any part of the Orient, which ten years previously President Hoover, despite the urging of his Secretary of State, had firmly refused to support by

economic sanctions and war in respect of Manchuria alone.

In 1931 President Hoover had solemnly informed his Cabinet that, deplorable as they were, the actions of Japan in Manchuria "do not imperil the freedom of the American people, the economic and moral future of our people. I do not propose ever to sacrifice American life for anything short of this. If that were not enough reason, to go to war means a long struggle at a time when civilization is weak enough. To win such a war is not solely a naval operation. We must arm and train Chinese. We would find ourselves involved in China in a fashion that would excite the suspicions of the whole world."

It is now known that at the end of 1936 Chiang Kai-shek and the Kuomintang united with the Chinese Communists against Japan. It was this unification, which in July 1937, precipitated the present Japanese war against China. Since this unification of the Chinese, America helped them against Japan in various ways.

The Prosecution admits that "the United States rendered aid economically and in the form of war materials to China to a degree unprecedented between non-belligerent powers and that some of her nationals fought with the Chinese against the aggression of Japan".

Aggression, I believe, is not always easily discernible. It may necessitate an enquiry into a complex situation not unmixed with law. Japan might take this participation by the United States as an act of belligerency.

International law perhaps does not take cognizance of the efforts or desires of the country that seeks to participate in a contest and yet remain at peace. If it will participate as a supporter of a favoured belligerent, international law decrees that it does so squarely as a belligerent and not as a neutral.

Perhaps the plea of the United States Government would have been that there was yet no war between China and Japan as neither party declared it to be so. But the Prosecution may not be allowed to characterize this hostility as war for one purpose and not war for the purpose of justifying the United States' action in relation to it.

I do not know whether the United States' authorities would have extended their plea of self-defense to this action. I have already referred to the very wide view of self-defense entertained by the then President, Roosevelt. According to him, "attack" "begins by the domination of any base which menaces our security—North or South" and "we have to relate it to the lightning speed of modern warfare". The occupied base "may be thousands of miles away from our own shores". "The American Government must, of necessity, decide at which point any threat of attack against this hemisphere has begun, and to make their stand when that point has been reached." "Modern techniques of warfare" have thus extended the scope of self-defense. "It would be suicide to wait until the enemy is in our front yard." "It is stupid to wait until a probable enemy has gained a foothold from which to attack. Old-fashioned common-sense calls for the use of a strategy which will prevent such an enemy from gaining a foothold in the first place."

Whether or not we accept this definition of self-defense, this at least represents the honest view of a statesman of very high position. This should help us at least in determining the *bona fides* or otherwise of statesmen and politicians of other countries if they professed to have taken similar view of self-defense, though that country might have been worsted in the resultant war. We shall come to this later. Here, at this stage, we are only concerned with the question as to how to view the action taken by the United States in helping China against Japan. If it was an act of belligerency, it does not matter whether it was aggressive or defensive, the two countries would no longer, in the eye of law, be at peace. It was not an act of belligerency only if there was no war between China and Japan.

We shall proceed on the footing that these were not acts of belligerency so as to disturb the peaceful relation between the United States and Japan at this stage.

After a series of diplomatic moves, the United States began to take measures, just short of war, against Japan. In July 1938, it laid a "moral embargo" on the export of aircraft to Japan. In July 1939, after the introduction of Senator Vandenberg's resolution, Secretary Hull served notice that the commercial treaty of 1911 would expire at the end of six months. In the summer of 1940 the United States began to impose export restrictions which, though they were also designed to support the American armament program, brought a large part of their exports to Japan under control. In June 1941 an American political adviser was appointed by General Chiang Kai-shek; Americans were sent to reorganize traffic on the Burma Road; American aviators under General Chennault were allowed to resign from the United States' armed forces and to volunteer with the Chinese Army. In August 1941 an American military mission under Brigadier General John Magruder was sent to China.

On July 26, 1941, the United States froze Japanese assets in the United States for the purpose of bringing all transactions with Japan under the control of the government.

This was declaration of economic war and certainly was not a neutral behaviour. Along with the other economic and military measures taken at the same time by Australia, the Netherlands, and Great Britain, IT WAS WHAT THE Japanese called it: an "anti-Japanese encirclement policy".

Accused SHIMADA gave us an account of these happenings and their effect on the Japanese mind. He said:

"On October 23rd, before any liaison meeting had been called, a ceremony for the war-dead was held at the Yasukuni Shrine. TOJO called and suggested that I appear ten minutes earlier than scheduled ..... This I did and he then told me he was planning to call the first Liaison Conference that day and reiterated his firm resolve to commence the discussion of negotiations with America from a clean slate and *to explore* deeply into the maximum concessions Japan could afford to make to the United States.

"Thus I did not have the impression that I was joining a war cabinet under which the nation would be plunged into the bitter and tragic struggle that

followed, but rather I believed it was an appointment in a government which, by its very military strength, control and attitude would seek to exhaust the last possibilities in a peaceful effort to settle the grave international dispute.

"Liaison Conferences began on October 23rd with all present exhibiting confidence that matters could be settled by negotiations. Everyone, moreover, was wholeheartedly in favour of peace, but the question was how to secure it. Long and continuous meetings were held.

"In the period between the Liaison Conferences and the Imperial Conferences of November 5th, 1941, I recall that all my thoughts were focused on the following two problems:

"1. How best to ease the most difficult conditions of withdrawal of troops from abroad and to reconcile this fact with the views of the Army Section of the Imperial General Headquarters.

"2. What were the greatest possible concessions that Japan could afford to make in its endeavour to reach an understanding with the United States? The greatest difficulty concerned the withdrawal of troops from China and French Indo-China. I studied the issue deeply. I ascertained the general sentiment in naval circles, fully observed the thinking of other government members and the trend of public opinion at the time. Since the navy had opposed and had never attached a strong interpretation to the Tri-partitie Pact, I did not feel that that was a problem incapable of solution if a meeting of the minds could be achieved as to the other issues. Regardless of how Japan found itself in such a perplexing international situation, my consideration of the questions was from the approach of the present. The best solution, therefore, was a compromise with the United States and Great Britain with each side giving ground. Consequently, I directed my efforts along this line of action in a sincere attempt to avoid the possible tragic effect of hostilities.

"There was a strong prevailing opinion that matters had developed so far as to make it physically impossible to withdraw *all of our forces* from China and that it would have been a psychological blow which would stun the Japanese people. It was argued that it would have amounted to a victory for China over Japan and would have raised the prestige and standing of the United States and Great Britain in the Far East, *thereby relegating Japan to a position of being dependent upon these powers* for its economic existence and position as a world power. Therefore, my thinking at that time was that it would be advisable to effect a compromise by a strategic withdrawal of our forces over a period of time from China proper and to effect an immediate withdrawal from French Indo-China if this could be correlated with the opposition to such a step. There was no doubt that Japan then would be making deep concessions which had not been possible to make at the time of the Third KONOYE Cabinet.

"On November 5th at an Imperial Conference a decision was made to put into effect preparations for war while at the same time steadfastly maintaining

our efforts toward peace through diplomacy. This was not inconsistent reasoning considering the plight of Japan at that time. *The Allies had effected an economic encirclement of Japan with a result more telling than we dared admit to the world*. We viewed with alarm the increasing armaments of the United States and could not reason that such military steps were taken in contemplation of war with Germany alone. The American Pacific Fleet had long before moved from its west coast base to Hawaii and there stood as a threat of Japan. The United States policy toward Japan had been strict and unsympathetic, revealing a determination to enforce their demands without compromise. *The American military and economic aid to China had aroused the bitterest of feeling among the Japanese people*. The Allied Powers had carried on military conferences which were pointedly directed against Japan. It was a tight, tense and trapped feeling that Japan had at that time.

"(*b*) Considering these facts ..... there were two solutions open to Japan. One being to relieve the over-all situation through diplomacy, hoping that a give and take policy on the part of the United States and Japan would answer the problems. The other was to overcome by our own power the actual and impending difficulties caused by the Allied encirclement. At all times we considered this last measure to be purely defensive and *to be adopted only as a last resort*. I never entertained a doubt that Japan or any nation had the sovereign right to act in self-preservation and to determine for herself what accumulation of events would entitle her to exercise that right. The government, working in conjunction with the High Command, studied the situation seriously. Not a single member of either group wanted war with the United States and Great Britain. The military men knew too well that Japan had on its hands the China Affair of over four years duration and which promised no hope of being successfully terminated. Therefore, to reason that we would voluntarily incur additional hostilities with such powers as the United States and Great Britain would be to attribute to us unthinkably juvenile military reasoning."

"(*c*) The Government had been carefully considering the maximum amount of concessions that could be made and was exerting every effort to reach an agreement with the United States ..... On the other hand the High Command was faced with the problem of being called upon to carry out its function if peace negotiations failed. Their situation was simply a practical one. The High Command argued that the Navy had approximately a two years supply of oil on hand. There was no more coming in. The civilian oil could not have lasted more than six months. With the advent of December, northeasterly monsoons would blow with force in the Formosan Straits, the Philippines and Malaya areas rendering military operations difficult. They charged that if forced to wait until the following spring they would be unable to risk a naval fight if called upon to do so by the government because of the steadily decreasing oil supply.

"(*d*) It was in this setting that the High Command revealed its position at the Imperial Conference of November 5th and argued that if diplomatic negotiations failed and they were called upon to go into action it would have to

be a step taken by early winter or they would be unable to act at all. It was then *in an atmosphere of growing desperation* brought on by the factors which I have described that caused the government to take detailed steps for war even though they hoped for and still felt peace possible through negotiations.

* * * * * *

"I was not a statesman nor a diplomat but I tried to borrow upon all of the skill and reasoning I possessed to seek a solution. It was in this mixed atmosphere of doubt, hope, fear and speculation that the Hull Note of November 26 was received.

"(*b*) This was a jarring blow. It was my prayer that the United States would have viewed whatever concessions we had made as a sincere effort to avoid war and would attempt to meet us half way thereby saving the whole situation. Here was a harsh reply from the United States Government unyielding and unbending. It contained no recognition of the endeavours we had made toward concessions in the negotiations. There were no members of the Cabinet nor responsible officials of the General Staff who advocated acceptance of the Hull Note. The view taken was that it was impossible to do so and that this communication was an ultimatum threatening the existence of our country. The general opinion was that acceptance of the conditions of this note would be tantamount to the defeat of Japan.

"(*c*) . . . . . No nation willingly relegates itself to a secondary position as a world power if it can help it. History to this very minute dictates that every leading power constantly seeks to preserve its rights, prestige and dignity and to this end constantly follows a policy which it deems most beneficial to itself. As a patriotic Japanese loving my country I was confronted with the question of whether or not Japan could bow to the American demands and yet preserve its standing in the world. It would have been treasonable to have advocated a step contrary to the best interests of my country."

Here is then an account of what was happening in the Japanese mind; and certainly this is a highly probable account, if we are to judge by what we now know of the events and circumstances then happening. The account given may or may not justify the action taken by Japan. But, it must be said, it amply EXPLAINS the events that happened without any conspiracy.

It has been amply established in this case that America supported the Chinese regime at Chungking. They encouraged it and helped it to wage war against the Japanese and their Chinese puppet governments. They induced Britain and the Netherlands to join them in preparing for war with Japan. They severed economic relations and at least a week before the attack on Pearl Harbour, Mr. Hull told the British Ambassador that "the diplomatic part of their relations with Japan was virtually over and that the matter will now go to the officials of the Army and Navy". In fact, after the embargo of July 1941 the United States was simply taking time. Both parties knew that their differences were irreconcilable. For America to begin hostility the risk was very great even in July 1941. It was by no means certain then that Russia could withstand the German attack. This risk, however, had to be balanced

against the risk of China's coming to a settlement with Japan and forming a Sino-Japanese combination hostile to Western aspirations.

After the embargo of July 1941 the only question was when and where Japan would strike the blow that precipitated war. Since American strength was growing, the longer they could postpone hostilities, the better. Time was working in their favour and they had every reason for wanting to gain time.

The reason why any effective embargo was not applied earlier is not that the United States was friendly towards Japan at that time. The view which prevailed was that Japan would be ruined if a complete embargo was laid down. So she would be compelled to fight. But America was not yet ready to take the risk of war with Japan. They could not take the chance of a full scale war in the Pacific until they were reasonably sure that Germany could not attack them through South America and in the Atlantic.

This is what the evidence in this case seems to establish beyond all reasonable doubt. At any rate this was one possible and reasonable way of viewing the situation. Even the American Statesmen and Army men of high position did not fail to see this and no one was in doubt as to the possible policy which Japan could thereby be compelled to adopt.

The prosecution placed much reliance on the Pact of Paris of 1928, the Nine-Power Treaty of Washington of 1922 and the Four-Power treaty of Washington of 1921 in condemning the conduct of Japan and in justification of the steps taken by the prosecuting countries. We are not concerned here with the question of justification. We are now seeking an explanation of the happening. Yet we may just turn our eyes to see in what relation these pacts and treaties would stand so as to justify the DESIGNED CONCERTED ACTION ON THE PART OF THESE POWERS.

Regarding the Pact of Paris of 1928 Mr. Cheney Hyde says: "Honeycombed as it is with reservations, and purporting, according to its distinguished authors, not to have reference to wars waged on grounds of defense, a breach of the Pact is not easy to establish. To conclude, for example, the embarking on war is a breach, calls for a decision based upon a complicated appraisal of facts and law, which in a particular case it may be highly difficult to reach correctly. The Pact contemplates no arrangement for a hearing upon, or investigation of, the charge that the waging of a particular war constitutes a breach. Moreover, there is no provision to safeguard the parties which, after determining that a breach has taken place, proceed to take sides and penalize the offender. THE ARRANGEMENT GIVES NO FREEDOM TO MODIFY NEUTRAL OBLIGATIONS BY SUCH PROCESSES. Hence the group of states that does so, and EMPLOYS THE BOYCOTT as an instrument of repression, places itself legally in a distinctly vulnerable position. As it stands, therefore, the Briand-Kellogg Pact does not lend itself to the employment of the boycott even when there is reason to conclude that its provisions are disregarded.

"The Nine-Power Treaty of 1922 also contains no scheme for the penalization of a contracting Power that flouts the arrangement and proceeds to deal with China in a forbidden way. I have discussed the position of the parties in relation to this treaty of Washington elsewhere.

"The Four-Power Treaty of 1921 relating to the insular possessions of the contracting Powers and their insular dominions in the Pacific, envisions a plan that is significant. "It is provided in substance (in Articles I and II) that if a controversy between any of the parties on certain questions, invoking the "rights" of the parties is not satisfactorily settled by diplomacy, and is "likely to affect the harmonious accord now happily subsisting between them," the other contracting party shall be invited to a "joint conference" to which the whole subject shall be referred for consideration and adjustment. Moreover, if those "rights" are threatened by "aggressive action of any other Power", the contracting parties agree to communicate with each other fully and frankly, in order to arrive at an understanding as to the most efficient measures to be taken, jointly or separately, to meet the exigencies of the particular situation. *There is no plan of penalizing a party to the treaty, as by a boycott*; and no definite scheme of common defensive action against an outside state not a party to the arrangement."

As has already been pointed out, the employment of measures like those taken by the Allied nations against Japan, then engaged in war with China, amounted to a direct participation in the conflict. Their conduct was in defiance of the theory of neutrality and of the fundamental obligations that the law of nations still imposes upon non-belligerent Powers. By saying this, I am not questioning their policy and condemning the steps taken by them in helping China against the Japanese action. All that I want to say here is that, justly or unjustly, rightly or wrongly, the Allied Nations had already participated in the conflict by these actions and any hostile measures taken against them by Japan THEREAFTER would not be "aggressive".

Anyway, these facts sufficiently explain the subsequent developments leading to the attack on Pearl Harbour without there being any conspiracy of the kind alleged in the indictment. The evidence convinces me that Japan tried her utmost to avoid any clash with America, but was driven by the circumstances that gradually developed to the fatal steps taken by her.

The evidence does not entitle us to characterize the Japanese attack as a sudden, unexpected, treacherous act committed while relations between the two countries were peaceful. We have seen to what extent the United States was at peace with Japan, and how she was actually engaged in a peace conference with Japan's envoys. There was no treachery on the part of Japan in this respect. It does not matter whether there was any maneuvering anywhere to make Japan commit the first overt act.

OVER-ALL CONSPIRACY

CONCLUSION

It remains only to consider the cumulative effect of the entire evidence led before us so far as this question of over-all conspiracy is concerned.

I would again emphasize that, for our present purpose, it is not for us to see whether or not the events and their spread could be JUSTIFIED. We are now only to see whether the happenings could be EXPLAINED otherwise than by the existence of a conspiracy or design of the character specified in Count 1 of the indictment.

As I have already pointed out, there is no direct evidence of this conspiracy or design. The factum of this alleged conspiracy, design or plan has not been attested to directly by any witness, thing, or document. By evidence the prosecution has sought to establish certain *intermediate facts* which, according to it, are sufficiently proximate to the principal fact to be proved, so as to be receivable as evidentiary of it. The evidentiary facts thus brought in are only of presumptive value; the connection between them and the principal fact to be proved is not of any necessary consequence of the laws of nature; their connection is only such as to make the inference of the principal fact a *probable* one from these evidentiary facts.

Absolute certainty amounting to demonstration is seldom to be had in the affairs of life. We are, therefore, obliged to act on degrees of probability which may fall short of certainty. But the degree of such probability must be so high as to justify one in regarding it as certainty. Conjecture or suspicion must not be confused with this probability. We must not start with a pre-occupied mind. It will be a very valuable aid to recall the warning words of Baron Alderson where he said: " the mind was apt to take a pleasure in adopting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete".

The evidentiary facts relied upon by the prosecution must have such a bearing upon the principal fact as would make them inconsistent with any result other than the truth of the *factum probandum*.

I have considered above the several evidentiary facts relied on by the prosecution as leading to the establishment of the conspiracy, design or plan as alleged in Count 1 of the indictment and have shown how they could be well explained without any suh conspiracy, design or plan.

It may be contended that although each event may thus be explained away, they all taken together can best be explained only by the existence of such an over-all conspiracy, design or plan.

In my opinion, that will not be the effect of the evidence.

But even assuming that that would be the case, there is a big assumption involved in this approach, and, in my opinion, thereby we beg the whole question. Why should we assume that all these events had one, single determining cause? If each event is completely explained otherwise, why should we think of connecting it with another at all, or adapting them to one another?

Perhaps in doing this we will only be entertaining our mind with the pleasure which Baron Alderson thinks it is apt to seek.

Even if we are to find out any single cause, we are not necessarily driven to the alleged conspiracy. Foreign policy of no nation in the world indicates a conspiracy. Even when several nations form themselves into a group, and adopt a particular policy against any particular ideology prevailing somewhere in the international society, we do not characterize this as conspiracy. Whatever that be, circumstances certainly developed in such a way during the relevant period as to lead Japan to adopt certain policies in her foreign relations, which as a matter of fact she did adopt from time to time.

I have already indicated on several occasions how several diverse factors of diverse origin influenced the development of Japan's Manchurian policy, policy towards the rest of China and foreign policy in general. I have noticed in that connection that even the resumption of the so-called positive policy in respect of Manchuria was not of conspiratorial origin. The Lytton Commission itself mentioned several factors as preparing the way for the resumption of that policy. In deciding upon their policy, from time to time, the responsible statesmen of Japan could not and did not ignore the requirements and difficulties of their people as understood by them, and these must have operated as the determining factors. It is easy to impute particular motives to those controlling the foreign policy of any state. But such responsible statesmen are not always actuated by mere sinister design. Even in the case of the statesmen of a state which we do not like we must not forget that their functions involved responsibility to the people of their nation. As I have already noticed, these statesmen may not afford to ignore any difficulty even though such difficulties might have been their own creation or the creation of their predecessor. Even such origin of the difficulty would not make their policy a conspiracy when such policy is adopted to face such difficulty.

I would again emphasize here that it is immaterial for our present purpose to see whether any policy adopted at any particular time, or any action taken by Japan pursuant to that policy, was justifiable in law; perhaps it was not. All that we are concerned with here is to see if the circumstances can explain the adaptation of the policy or the action without the existence of the alleged conspiracy.

I believe I have already given enough materials in the foregoing pages of this judgment to satisfy any but a pre-occupied mind that these events happened without the alleged conspiracy. The statesmen, diplomats and politicians of Japan were perhaps wrong, and perhaps they misled themselves. But they were not conspirators. They did not conspire.

To appreciate what happened, it is only just to see the events by putting them in their proper perspective. We should not avoid examining the whole of the circumstances, political and economic, that led up to these events. This is why I had to refer to matters like the Britanocentric economic world order, the diplomatic maneuvers at Washington, the development of communism and the world opinion of the Soviet policy, the internal condition of

China, the China policy and practice of other nations and the internal condition of Japan from time to time.

The Prosecution traces the conspiracy from at least the plotting of Chang Tso-lin's murder, which event took place in 1928. I have shown above why I could not accept the story that this murder was planned by the Japanese or that the incident had anything to do with the subsequent Manchurian Incident. As I have said already, the incident remains shrouded in mystery as before. At any rate, it remains an isolated incident without any connection whatsoever with any program planned or designed for the conspiracy with which we are concerned in this case. None of the accused could in any way be connected with this incident. Of course, it was not even the case of the Prosecution that either the then Government of Japan or any member of that government had anything to do with that incident. It is not even the Prosecution case that the then policy of the Japanese Government would be consistent with this murder or that the murder was calculated in any way to further that policy.

We may view the Manchurian Incident in two parts, namely (1) the Mukden Incident of September 18, 1931, itself and (2) the subsequent development in Manchuria following this incident.

I have carefully examined the Prosecution case that the Mukden Incident of September 18, 1931 was planned by the Japanese, and have given my reason why I could not accept that case. Circumstances no doubt raise a suspicion against Japan. It seems that even at the time of the Incident, the Japanese were suspected of having planned the Incident. There were rumours both before and after the Incident about Japanese involvement in it. I have carefully considered every item of the evidence that could be placed before us in this respect, including such rumours, and have recorded the result of my examination of that evidence. I have already said why I still feel we shall not be entitled to go beyond the report of the Lytton Commission. At any rate, even assuming that the bombing of the railway line was planned by the Japanese, the Commission did not exclude the hypothesis that the officers on the spot might have thought that they were acting in self-defense.

We do not yet know who were the conspirators who might have planned this incident. I have examined the evidence adduced on this point and have explained how the utmost which this evidence might be said to indicate was that some young officers of the Kwantung Army were the then conspirators. We do not know who these young officers were. Of the accused, only DOHIHARA, HASHIMOTO and ITAGAKI could be named in this connection. I have explained why I could not accept that evidence.

We must remember again that it is not the Prosecution case that the then Government of Japan as such had anything to do with this incident. The only member of the Cabinet who could be named in this connection is accused MINAMI. I have examined the evidence and have explained why I could not accept that case of the Prosecution.

The Mukden Incident led to the subsequent developments in Manchuria leading to the formation of Manchukuo. This does not, in my opinion, indi-

cate any conspiracy even for the occupation of Manchuria, much less for the domination of the whole world. I have explained why I say this.

A formidable array of sinister events was placed before us in this connection, beginning with the murder of Chang Tso-Lin and coming up to the fall of the Wakatsuki Cabinet. These are no doubt sinister incidents but they are of no significance so far as the matter under our consideration is concerned.

Some evidence has been given as to the views entertained in Japan about Manchuria. These views were being propagated in Japan through organized propaganda. There was nothing sinister in this propaganda. It was done exactly in the same peaceful manner as is usually done in other countries. Anyone entertaining any opinion is entitled to spread his opinion to the public and this is all that was done in this respect in Japan. If he succeeded in winning the public opinion in favour of his views, it is to his credit that he succeeded in doing so. There is absolutely no allegation of any illicit means adopted for this purpose. The Army is named in this connection perhaps to insinuate force. But there is absolutely no evidence of any force, fraud or coercion in this respect.

The public opinion thus formed might have been a factor in determining or in giving shape to the subsequent government policy. But this was only one of the factors. I have already indicated some of the factors then existing in Japanese life, which went a great way in moulding the then Japanese China policy. I must say here that even the public opinion was not the result of mere propaganda by Dr. OKAWA and his group. If his opinion was so easily acceptable to the public, it was because the field was already ready for its acceptance by reason of other factors working on Japanese life. I have already examined this aspect of the case, and, in my opinion, the development both in policy and in action was the result of several factors working in synergy and synchronism. There was no conspiracy even for what happened in respect of Manchuria, and the happening was not the result of any such conspiracy.

I have shown how gradually circumstances were developing, leading to the events that took place. Any particular incident in connection with these subsequent developments might have been designed for the accomplishment of any particular object which any particular group of persons might have thought of realizing in view of the then circumstances. But, simply because there were designs here and there in the course of these developments, it does not follow that the whole development was also the result of any design. In my opinion, the whole story of the over-all conspiracy is a preposterous one.

Before leaving this subject, I would like to draw attention to one very significant fact, which seems to have been overlooked by the Prosecution altogether while it likened the present case to the case of Hitlerite Germany. We now know what happened in Germany and how the public of Germany stood to the Hitler group. In Japan the public opinion always remained a powerful factor. It could always determine the fate of the Cabinet. If public opinion had to be shaped, it was done in a perfectly legitimate manner. Nothing could be placed before us showing that any person or any group of persons

could in any way stifle this public opinion. Many Japanese elder statesmen, politicians, public men and individuals have given evidence in this case; but we have never heard anything like what, we are told, happened, in Germany under Hitler regime. The evidence of these witnesses, who once occupied very high and influential positions in Japan, and consequently in the whole world, discloses how the conduct of the persons under trial was never considered by such powerful groups among their own countrymen as anything but patriotic. Whatever they did, they did out of pure patriotic motives.

TOJO and his group, who are likened by the Prosecution to the Hitler group, are now not in power. They are prisoners before us. Those who appeared before us to give evidence in this case certainly were no longer in terror of these persons. This group might have done many wrong things; but, so far as the public of Japan is concerned, certainly by their behaviour towards them they did not succeed in reducing them to the position of terror-stricken tools without any free thinking or free expression. The population of Japan was not enslaved as in Hitler's Germany. Members of the public retained complete freedom in respect of their own creeds, beliefs and behaviour and, however influenced by legitimate propaganda, these still corresponded to the real nature of the citizen. Any influence exercised on their views is not fundamentally different from what is done even in other peace-loving, democratic countries.

The social techniques which aim at influencing human behaviour and which may act as a powerful means of social control are being availed of everywhere in the world. Perhaps it is correct to say that the main point about these improved social techniques is not only that they are highly efficient, but that this very same efficiency fosters minority rule. The most important thing about these modern techniques is that they tend to foster centralization. It is true that the new science of human behaviour brings into the service of the government a knowledge of the human mind, which can either be exploited in the direction of greater efficiency or made into an instrument playing on mass emotions. This "knowledge of the human mind", however, is being utilized everywhere by every government. In this sense, nowhere in the world can public opinion be said to be the absolutely independent and free opinion of the individual members. If it is an evil, it is an evil of the day.

Public opinion in Japan during this period might have been influenced by propaganda but there was nothing unusual, illicit or criminal in the means adopted for this purpose. There was no dictator in Japan. Neither any particular individual nor any group of individuals did ever emerge as dictator, rising above all democratic control. Not a single decision taken by the government could be said to be the decision of a dictator or of a dictatorial group. The evidence discloses how every measure suggested and every step taken was the result of careful and anxious deliberations of the persons responsible for the management of the affairs of the state and how, in arriving at these decisions, they were always alive to the public opinion and public interest as understood by them.

Keeping everything in view, and on a careful consideration of the entire evidence of the case, I have arrived at the conclusion:

1. That no conspiracy either "of a comprehensive character and of a continuing nature", or of any other character and nature was ever formed, existed or operated during the period from January 1, 1928 to September 2, 1945 or during any other period;
2. That neither the object and purpose of any such conspiracy or design for domination of the territories, as described in the indictment, nor any design to secure such domination by war has been established by evidence in this case;
3. That none of the defendants has been proved to have been members of any such conspiracy at any time.

I may add here a few words by way of explanation of the method adopted by me in the evaluation of the evidence adduced in the case. I have already pointed out how we had to refrain from adopting any restrictive rules with regard to the admissibility of evidence and how as a result a large quantity of materials of dubious value might have crept in. Under the Charter we were not bound to adhere to any strict judicial rules of evidence, and from the very character of the proceedings before us perhaps it was not possible to adopt any such restrictive rules. But this relaxation of the rule as to admissibility certainly did not imply similar relaxation in determining the probative force of such evidence. Judges of international tribunals are often accused of "having sought to escape from this dilemma by admitting all evidence offered and then declining to reveal what was made of it in reaching the decision". This would hardly be occasion for surprise in the present case in view of the volume and character of the evidence we have to sift. I have however tried my best to reveal as far as possible what I have made of the evidence admitted in reaching my decision.

I have given above my reading of the evidence relating to the charge of conspiracy. I am, however, of opinion that conspiracy by itself is not at all a crime in international life.

In the indictment in this case conspiracy has been allotted a very prominent place and has, by itself, been introduced as a crime.

Lord Wright in his article on "War Crimes under International Law" seems to have hinted at *conspiracy* as constituting a crime in international life. He said:

> "War crimes are generally of a mass or multiple character. At one end are the devisers, or organizers, or originators who would, in many cases constitute a criminal conspiracy; at the bottom end are the actual perpetrators. . . . . "

What Lord Wright says here does not necessarily support the view that conspiracy by itself, apart from the actual perpetration of the act, constitutes a crime in the international system. All that he says is that when there has been a war there may be these two categories of criminals in relation to it.

The prosecution, however, in its indictment, charges the Japanese lead-

ers with the commission of a crime of conspiracy apart from the actual perpetration of the conspired act, asserting that the said crime was committed as soon as the conspiracy was completed.

According to the prosecution, the Japanese war leaders became guilty of this crime even prior to the commission of the act itself, as soon as they entered into an understanding either among themselves, or with the leaders of Italy and Germany, to commit any of the acts alleged in the indictment.

In the facts placed before us, excepting in the case of Soviet Russia, there is no other instance where the planned war was not actually waged.

In the case of the Soviet Russia, though the Indictment brings in the two border incidents as instances of actual waging of war, the case substantially lies only in bare conspiracy.

In conferring jurisdiction on the Tribunal, the Charter in Article 5 says:

"5. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility;

"a. Crimes against peace; namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; . . . . .

* * * * * *

"c. Crimes against humanity; . . . Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

Count 1 of the indictment stands thus:

All the accused, together with other persons, ... participated as leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by any person in execution of such plan.

The object of such plan or conspiracy was that Japan should secure . . . domination of East Asia . . . and for that purpose they conspired that Japan should alone or in combination with other countries . . . wage declared or undeclared war or wars of aggression, and war or wars in violation of international law . . . against any country or countries which might oppose their purpose.

Count 1 contains the charge of over-all conspiracy. It is apparent that it is framed in the very language of Article 5-C of the Charter.

Count 2 charges similar planning against Manchuria; Count 3, against rest of China; Count 4, against the United States, the British Commonwealth of Nations etc. including the U. S. S. R. and Count 5, the whole world. Counts 6 to 17 speak of planning and preparing wars of aggression against

different countries.

A careful analysis of the charge would show that the requirements of the offense contemplated therein are the following:

1. The persons charged must be leaders, organizers, instigators or accomplices in the formulation or execution of the plan;
2. The object of the plan was that Japan should secure the military, naval, political and economic domination of the countries named;
3. The persons who participated as leaders, etc., in the formulation or execution of the plan must also be shown to have conspired that, for the purpose of the above domination, Japan should wage declared or undeclared war;
4. That such war need not be against the country sought to be dominated but against any country which might oppose their purpose.

The fourth item in the requirements seems to be a little too widely expressed in the count. As the war to be waged must be war or wars of aggression and war or wars in violation of international law, treaties, agreements and assurances, it may be that the idea was that "any country" was intended to mean any country standing in such a relation to the question of particular domination that war against it would be a war of the kind named above. Thus, for example, by reason of the Treaty of Washington, the Signatory Powers were to maintain the integrity of China and respect her sovereignty. If Japan wanted any domination of China which would violate her treaty obligation, any of the Signatory Powers might come and oppose such domination, though China herself might not oppose. If Japan planned to wage war against such opposing power, the action would come under Count 1 though China might not have opposed it or might even have supported it.

The Count simply speaks of the leaders conspiring for the purpose of domination that Japan should wage war against any country. It is comprehensive enough to cover a case where no war, as a matter of fact, is waged. The substantive portion of the charge seeks to make the persons charged responsible for all acts performed by any person in execution of such plan. Acts performed in execution would not necessarily imply that the war is to be actually waged. The execution of the plan may take place in part even before the actual waging of the war.

In the Nurnberg Charter Article 6 contained the corresponding provisions.

Count one of the Nurnberg indictment related to "the common plan or conspiracy" and charged that "all the defendants . . . participated as leaders . . . . in the formulation or execution of a common plan or conspiracy to commit . . . . crimes against peace, war crimes, and crimes against humanity, as defined in the Charter. . . . ."

The Nurnberg Tribunal held that the Charter did "not define as a separate crime any conspiracy except the one to commit acts of aggressive war". Referring to the clause "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by

any persons in execution of such plan", that Tribunal opined that "these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in the common plan." The Tribunal, therefore, disregarded "the charges in Count one that the defendants conspired to commit war crimes and crimes against humanity" and confined its consideration only to "the common plan to prepare, initiate and wage aggressive war".

The prosecution in the case before us accepted this construction of the Nurnberg Tribunal as applicable to Article 5 of the present Charter. Consequently the charge of conspiracy must be taken as limited to "the common plan to prepare, initiate and wage aggressive war".

As I have pointed out above, in view of the charges relating to the U. S. S. R., the question whether conspiracy is a crime in international law will not be a mere academic one.

The Prosecution invites us to hold:

1. That bare conspiracy has been listed as a crime in the Charter;
2. That the Charter in this respect is, and purports to be, merely declaratory of international law as it existed from at least 1928 onwards;
3. That the Tribunal is to examine this proposition and to base its judgment on its own decision in this respect;
4. That the provisions of the Charter, with regard to conspiracy, planning, preparation, accessories and the common responsibility of those engaged in a common plan, represent the general principles of law recognized by all civilized nations;
   (*a*) The general principles of law recognized by civilized nations being one of the sources of international law, these provisions are themselves part of international law.

In the alternative, the Prosecution urges that:

1. The provisions in the Charter are merely forms of charge and of proof of responsibility:
   (*a*) As such, these are within the power of the Supreme Commander to lay down.
2. There is important distinction between conspiracy as a separate crime, and conspiracy as the method of proof of a crime alleged to have been committed by several persons jointly;
   (*a*) The principles are similar, but the application of them is different;
   (*b*) These principles are applied to a joint crime, even if it is not one, the conspiracy to commit which, is a separate crime.

As I have pointed out already, here are grave questions for our consideration. Keeping in view the character of the present-day international life, the propositions must be very carefully examined, and in so doing, we must keep distinct the following considerations:

1. Whether conspiracy is crime in international law, at least from 1928 as asserted by the Prosecution;

2. If not, whether we can accept the definition of the Charter as binding on us;
3. Whether the definition in the Charter really gives a substantive law or only a rule of procedure.

I would, first of all, take up the question whether it is correct to say that conspiracy has been a crime in international law as it existed from at least 1928 onwards.

The Prosecution approach to the question may be put thus:

1. One of the sources of international law is "the general principles of law recognized by civilized nations";
2. Conspiracy is recognized by civilized nations as crime in their national systems;
3. Therefore, it must be taken that conspiracy has been a crime in international law.

I am afraid I cannot accept this submission of the Prosecution.

The prosecution names "the general principles of law recognized by civilized nations" as one of the *sources* of international law, and bases its whole argument on this statement. It relies on "the Statute of the Permanent Court of International Justice, 1936", for this purpose and refers to Article 38, paragraph 3, of the Statute in support of the proposition.

Article 38 of that Statute is as follows:

"The Court shall apply—

"1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
"2. International custom, as evidence of a general practice accepted as law;
"3. The general principles of law recognized by civilized nations;
"4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

"This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

The Permanent Court of International Justice was established pursuant to Article 14 of the Covenant of the League of Nations.

Article 14 of the Covenant stood thus:

"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a permanent court of international justice. The Court shall be competent to hear and determine any dispute of an international character *which the parties thereto submit to it*. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

It was pointed out by the United States when the Covenant was presented for ratification, that there was in it no provision for a judicial settlement of differences through which a nation might assert its legal rights in lieu of war, and that there was in the Covenant no declaration of the existence of any right which could be successfully vindicated against an aggressor by any other

means than war.

The proposal embodied in Article 14 of the Covenant is clearly less committed to the conception of imperative justice than the Hague Conference of 1907. In that conference it was in effect conceded that an international court should have jurisdiction over all justiciable cases, a previous agreement being made as to what disputes should be recognized as having this character. Article 14 on the contrary attempts no discrimination between justiciable and non-justiciable differences, limiting the jurisdiction of the court to any dispute of an international character *which the parties thereto may submit to it*.

Leaving aside this Permanent Court of International Justice for a moment, we should remember that international judicial proceedings are always unique in that the parties create the tribunal before which their case is to be tried and select its judges. The nature of the authority of the tribunal and the extent of its jurisdiction are defined and fixed by the parties. It is the consent of the parties that gives life to the tribunal. In the arbitral agreement creating the tribunal, the question to be decided is stated, the jurisdiction of the tribunal is defined, and the extent of its power in matters of procedure is delimited.

The Statute of Permanent Court of International Justice is really in the nature of such arbitral agreement.

Article 38 of the statute says that the court shall apply "the general principles of law recognized by civilized nations". In my opinion it simply amounts to a common consent that such general principles shall be applicable for the purposes for which the court is being established. From this common consent we cannot arrive at the conclusion that "the general principles of law recognized by civilized nations" in every sphere of law are adopted by the consenting nations for all the purposes of international life.

As I have already pointed out, the basis of the international law is the common consent of the member states of the family of nations. The common consent is the essential source of such law and it is essential in order to vest any rule with the character of law. The question, therefore, resolves itself into this: what is the extent to which the implication of the consent of nations conveyed through this clause in the Statute would carry us?

On the face of it, such consent cannot be implied beyond the purposes of the Statute.

It may be remembered that the advisory committee of the jurists which met at the Hague to prepare this statute expressed a "voeu" for the establishment of international court of criminal justice. But this was not then adopted by the nations and has not yet been adopted.

I have shown how in the present state of international life introduction of criminal law in it has been considered at least inexpedient.

It may be pertinent to notice in this connection that even in the Charter of the United Nations, though one of the purposes of the United Nations is expressed to be "to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other

breaches of the peace", there is no provision even implying any individual criminal responsibility. Neither this Charter nor the Statute of the Permanent Court of International Justice did conceive of any measure to govern the conduct of individuals.

Remembering that international law is applied primarily to states in their relations *inter se*, and that it creates rights of states and imposes duties upon them *vis-a-vis* the states, its content must be determined accordingly. If and when international law would be conceived to govern the conduct of individuals, it may become less difficult to project an international penal law.

I have already pointed out where the conception of piracy and the like stands in the international legal system. Despite the employment of such analogies, no authoritative attempt has been made to extend international law to cover the condemned and forbidden conduct of individuals. As I have already quoted from Judge Manley O. Hudson: "Whatever course of development may be imminent with reference to political organization, the time is hardly ripe for the extension of international law to include judicial process for condemning and punishing acts either of states or of individuals."

The instances of criminal international law affecting individuals are all cases where the act in question is the act of the individual on his own behalf, committed on high seas or in connection with international property. Most of these cases are expressly provided for. The selection of these crimes as the object of the provisions of international convention was necessitated, not by theoretical considerations concerning the nature of international crime, but by various political motives; the interest of one country or a group of countries in the combat against a given crime, material facilities for the organization of such combat, and other reasons of that nature.

The concept of an international offense as a particular kind of infringement upon the sphere of international relations has hitherto been absent from the international system. Those that have hitherto been taken cognizance of as crime in the international system are really individual crimes. "Because of their juridic nature and because of their factual significance, conventions for certain common criminal offenses appear to be one of the various forms of reciprocal support for criminal law by governments having in view a realistic combat against crime. This reciprocal act of governments is not connected directly with the problem of international crimes."

As I have already pointed out, the conception of international criminal responsibility in international life can arise only when that life itself reaches a certain stage in its development. Before we can introduce this conception there, we must be in a position to say that that life itself is established on some peaceful basis. International crime will be an infringement of that base—a breach or violation of the peace or pax of the international community.

I have already given my view of the character of the so-called international community at least as it stood on the eve of the second World War. It was simply a co-ordinated body of several independent units and certainly was not a body of which the order or security could be said to have been provided

by law.

Keeping all this in view it may safely be asserted that the nations have not as yet considered the conditions of international life ripe enough for the transposition of principles of criminality into rules of law in international life.

I cannot therefore read into the consent conveyed through adopting the general principles for their application by the Permanent Court of International Justice, a consent to effectuate any transposition of the principles of criminal responsibility into rules of law in international life. I do not consider this as sufficiently indicative of the requisite consent for our present purpose.

The prosecution laid emphasis on the fact that the Charter, which declared conspiracy to be a crime, was created by several civilized nations and was adhered to by others. I do not see how this in any way helps the prosecution.

The prosecution says that it would be strange that the twenty-three nations involved, eighteen of which were not followers of the Anglo-American system, should sign a document defining conspiracy as a crime if that doctrine was foreign to their own legal concepts. I do not see why it should be so strange, remembering that they were laying down law not for themselves, but for the trial of the vanquished leaders. The Charter provided law, if it did so at all, only for the "major war criminals of the European Axis". We, as a court of justice, cannot assume that the legal concepts of the authors of the Charter and of its adherents were correct. We must also remember that it was not enacted even by the lesgilatures of these civilized nations. Men of very high positions, no doubt, represented these nations; but there is nothing before us to show their juristic competence.

Coming to show that conspiracy is a concept common to most legal systems, the prosecution proceeded to analyse the Anglo-American doctrine fully, and placed the following rules as a result of that analysis:

1. That the crime of conspiracy is complete with the agreement by two or more to commit a crime AGAINST THE SECURITY OF THE STATE, whether in fact it is committed or any active steps are taken for the steps or not;
2. That the offense extends subject to the same conditions to an agreement to commit any felony;
3. Also to any misdemeanour;
4. Also to any unlawful act or any lawful end agreed to be attained by unlawful means, although not a crime if actually committed by one person alone;
5. That planning and preparation by one person to commit a crime is not by itself a crime unless it amounts to at least an attempt;
6. That a joint offender, a principal in the the second degree or an accessory before the fact, *i. e.*, "a leader, organizer, instigator or accomplice", may be tried and convicted as a principal, and in the absence of the person or other persons who actually committed the offense;
7. That in all cases where there is in fact a common plan or conspira-

cy whether that is the crime actually charged, or one or more of the parties are charged with the substantive offense, any person who joins in it at anytime, from that moment until the moment, if any, when it comes to an end or he definitely dissociates himself from it, responsible for all acts and words of his fellow conspirators, whether known to him or not, provided that they are within the scope of the plan or conspiracy to which he has become a party, either originally or by subsequent extension with his consent.

The Prosecution then proceeded to point out which of these rules represent the general principles of law as recognized by civilized nations. It said:

1. Rules 1 and 7 are part of the law of every country concerned, including Japan.
   (*a*) That a conspiracy to disturb the peace of the world or of a number of countries by waging wars of aggression and in breach of treaties is so closely analogous in the international sphere to the conspiracy against the security of the state in the municipal sphere.
2. As regards Rule 2, the practice of the countries varies.
3. Rules 3 and 4 are unknown to other countries, but this is academic because the Prosecution is not making any such charges.
4. Many countries do include planning or preparation as crimes apart from conspiracy, contrary to Rule 5. But as in none of the counts any individual has been charged alone, this point is also academic.
5. Rule 6 relates to a matter of procedure only. All countries recognize the persons there mentioned as criminals. But practice varies as to whether they can be charged as principals or must be separately charged.

The prosecution contended that the offenses which are here sought to be punished under the international doctrine of conspiracy, are also punishable or approximately so, besides the Anglo-American systems, in the French, German, Dutch, Spanish, Chinese, Japanese and Russian legal orders. Consequently, the prosecution urged, the doctrine of conspiracy became a rule of international law being grounded on juridical notions existing in the French, German, Japanese, Chinese and Anglo-American legal orders and on a Russian juristic philosophy.

I do not think this would be of any avail to the prosecution case unless we accept the proposition that "the general principles of law recognized by civilized nations" became a source of international law even for the purposes of introducing individual criminal responsibility in international life. I have already given my reason why I cannot accept this proposition.

The basic principle of this crime as recognized by the various national systems is that every state has a right to evolve legal institutions to *suppress by force*, as criminal, certain agreements for the ultimate commission of acts which are at least *mala in se* and irrevocably involve grave social evils. Every

state has a right to anticipate the ultimate commission of the act and suppress the combination by force.

The only general principle which these various systems will yield is that it is legitimate and expedient to evolve legal institutions for the prevention and suppression of potential crimes of certain categories. Such crimes are generally those endangering the very existence of the state.

Strictly speaking, in the present stage of the international society, there is no such organization at all whose security would attract the operation of this principle. There is no international superstate as yet. The national states are only individual members of that society occupying the position of individuals in a national state.

Even apart from these considerations, if we carefully examine the principles of the law of conspiracy as prevailing in the several civilized countries, we cannot fail to see that the essential principle underlying that law is the desirability and possibility of prevention. In my opinion, this object cannot be achieved in international life as at present constituted.

Conspiracy is fundamentally a mental offense.

The Prosecution says that in order to constitute conspiracy there must be a crossing of the line of mere meditation. The essence of the offense is the joint agreement, the joint undertaking. The crossing of the line of meditation may require some overt act. But "the act required does not amount to the dignity of the act required to sustain a conviction for an attempt to commit a crime. It is any act which is in furtherance of the conspiracy. It need not be a criminal act; it need not be an illegal act; it need not be an act of any importance; it need not be performed by more than one of the conspirators; . . . the sole purpose of requiring the overt act is to ensure that there is sufficient evidence that a conspiracy has actually been entered into. Any single one of the thousands of acts by any one of these defendants or by any one of their coconspirators would meet the requirements of an overt act necessary to establish a conspiracy in those jurisdictions where it is required."

Activity in the external forum is relevant for determining whether there has been a conspiracy only in so far as it establishes the existence of the internal elements sufficient to constitute the crime. The two factors of will and reason, which enter into the making of any agreement, are the starting points in any analysis of the nature of the conspiratorial agreement.

Basically "conspiracy is an inchoate act for which the essential act is *slight*. It involves an intent to commit a further act. It is the commission of that act *which the state desires to prevent*".

The essential element in the principle of the law of conspiracy is thus the desirability as also the possibility of prevention of the design contemplated by the conspirators.

Manifestly, there is grave danger where conviction and punishment can be based purely on intent. This has been recognized. The commissioners, on behalf of the Legislature of New York, in revising the conspiracy statutes of New York, in the introduction to the section which required an overt act before one could be convicted of conspiracy observed as follows:

"By a metaphysical train of reasoning, which has never been adopted in any other case in the whole criminal law, the offense of conspiracy is made to consist in the intent, in an act of the mind; and to prevent the shock to commonsense, which such a proposition would be sure to produce, the formation of this intent by the interchange of thoughts, is made itself an overt act, done in pursuance of the interchange of agreement. SURELY an opportunity for repentance should be allowed to all human beings; and he who has conspired to do a criminal act, should be encouraged to repent and abandon it. Acts and deeds are subjects of human laws; not thoughts and intents, unless accompanied by acts."

Professor Sayre of the Harvard Law School is more outspoken in his denunciation of the doctrine of criminal conspiracy in the Anglo-American system. He says:

"Under such a principle every one who acts in co-operation with another may some day find his liberty dependent upon the innate prejudices or social bias of an unknown judge. It is the very antithesis of justice according to law.

"A doctrine so vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to the law; it is veritable quicksand of shifting opinion and ill considered thought.

"It is a doctrine which has proved itself the evil genius of our law wherever it has touched it. May the time not be long delayed in coming when it will be nothing more than a shadow stalking through past cases."

Thus even in national systems conspiracy as constituting a crime has not gone unchallenged. Its only justification is the prevention and suppression of potential danger. It can have no place in a community which has not as yet organized any preventive means. Even if fully discovered at the conspiracy stage, the international community, as it now stands, has no means of punishing the offense and consequently the punishment provided in view of its potentiality is *brutum fulmen*. The law must wait till the potentiality becomes an actuality and then again till the favourable contingency happens, that is, till the conspirators lose the war.

On the other hand, if completed conspiracy by itself is a crime in international law, once certain parties enter into this conspiracy, there remains no scope for *locus penetentiae* for them. They gain nothing by desisting from further act so far as a conspiracy for aggressive war is concerned. They have already completed their offense. I do not think there is any justification for introducing such a crime in international life at the stage where it now stands.

We must also remember that in transposing the law of conspiracy in the international system we are really not seeking to prevent any dangerous combination, because, as I have shown above, such prevention is impossible at this stage of international life. The proposed extension may only give a dangerous weapon in the hands of an unscrupulous victor. Nations while making preparations for war would never think or admit that they are making such

preparation for aggressive purposes. I should not repeat it here, but we have seen how statesmen in very high positions were claiming openly very wide and extensive right of self-defense. Every nation, for itself and for the nation which it likes, would take self-defense in such extensive sense, while at the same time, it would never appreciate its opponent's similarly wide definition. In order to make aggressive war a crime in international life, it would be necessary for us to hold that whether or not a measure taken by a state was in self-defense, the decision of the state concerned would not be final. The ultimate decision as to the lawfulness of the action claimed as taken in self-defense may not lie with the state concerned. But, in the absence of any international agency or court with compulsory jurisdiction competent to decide whether or not any right of self-defense was involved, it becomes the right of the victor to decide whether or not any right of self-defense was involved, it becomes the right of the victor to decide whether or not the vanquished resorted to war in self-defense. The application of the rule which we are now seeking to introduce will thus necessarily be in the hands of the opponent who would happen to be the victor, and who could never appreciate its defensive character. We can well imagine what may be the consequence. In my opinion, while serving no useful purpose, it would be introducing a dangerous principle in the international system, further retarding the peaceful relations in that life.

There is yet another consideration against the introduction of conspiracy as a crime in international life. The international society even now recognizes the compulsive means of settlement of differences between states. Even now it is permissible to a state to take to measures containing a certain amount of compulsion for the purpose of making another state consent to such settlement of a difference as is required by the former: See Oppenheim's International Law, Chapter II. These compulsive means remain legitimate even after the Pact of Paris. "The question", says Dr. Lauterpacht, "whether the Paris Pact by forbidding resort to war has also prohibited resort to force short of war is a controversial one. Article 2 of the Pact refers to the obligation of the contracting parties not to solve disputes by any other except *pacific* means; and in the Preamble the contracting parties express their conviction that 'all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process'. In the view of some writers these provisions must be interpreted as meaning that the Pact prohibits recourse to force short of war. But the last-quoted passage refers only to changes in relations, not to the enforcement of existing legal relations; as to Article 2, it must be borne in mind that *although measures of force short of war are compulsive means, they are still pacific means.*" Compulsive means are in theory and practice considered peaceable, although not amicable, means of settling international differences. I need not stop here to examine in detail the various compulsive means in contradistinction to war. All that I want to point out in this connection is that in the preparatory stages the line between the two may be very thin and a preparation ultimately to serve only the purposes of a legitimate compulsive measure may be mistaken for a preparation for war. The same outward manifestation of mind may thus be indica-

tive of two different mental states—one of them being legitimate in international life and the other criminal, if conspiracy be introduced as a crime. While serving no practical useful purpose, the introduction of this mental crime in international life would bring with it this difficulty of ascertaining the particular criminal state of the mind.

After giving my anxious thought to the question I have come to the conclusion that "conspiracy" by itself is not yet a crime in international law.

In my view of the authority of the Charter, conspiracy will not be a crime although listed as such by the Charter, if it is not a crime in international law. As I have already pointed out, even the Prosecution in the case before us does not seem to claim that a definition of crime given in the Charter would, as such, be binding on the Tribunal. The Tribunal is invited to examine whether or not what is *listed* as crime in the Charter is crime in international law and to base its judgment on the result of such examination.

The Prosecution, however, contends that it was within the competence of the Supreme Commander to lay down binding rules of procedure including "forms of charge and of proof of responsibility" and that the provisions in the Charter relating to conspiracy were simply such "forms of charge and of proof of responsibility".

I cannot accept the relevant provisions in the Charter as giving mere "forms of charge and of proof of responsibility" and consequently I need not examine the other proposition relating to the competence of the Supreme Commander.

PART V

SCOPE OF TRIBUNAL'S JURISDICTION

The first substantial objection taken by the defense to the jurisdiction of the Tribunal was that the crimes triable by this Tribunal must be limited to those commited in, or in connection with, the war which ended in the surrender on 2 September 1945. In my judgment this objection must be sustained. I have already given my reason for this decision in an earlier part of my judgment.

There, however, I pointed out that in the indictment the prosecution made the case of an over-all conspiracy in Count 1 which, if proved, might bring in all the incidents referred to in the indictment as part of the war which ended in the aforesaid surrender. The question thus ultimately became a question of fact to be determined on the evidence in the case.

I have now examined this evidence and have come to the conclusion that the alleged over-all conspiracy has not been established thereby.

In view of this finding, and in view of my decision on the question of law involved in this objection, I am of opinion that this Tribunal would have no jurisdiction over the matters involved in counts 2, 18, 25, 26, 35, 36, 51 and 52 of the indictment, for the simple reason that the HOSTILITIES relating to these matters ceased long before the Potsdam Declaration of 26 July 1945 and the Japanese Surrender of 2 September 1945. As already pointed out by me, the crimes triable by this Tribunal must be limited to those committed in or in connection with the HOSTILITY which ended in the surrender of 2 September 1945. International law does not invest the victors with any right more extensive than this. There is nothing in the Potsdam Declaration and in the instrument of Surrender which would entitle the Supreme Commander or the Allied Powers to try and punish the vanquished for any crime committed in or in connection with any other hostility. There is nothing in the Charter that would extend its provisions to hostilities other than those ended by the Surrender.

Count 2 charges all the accused with having participated in the formulation or execution of a common plan or conspiracy being 'the military, naval, political and economic domination of the provinces of Liaoning, Kirin, Heilungkiang and Jehol'.

There is some controversy over the position of Jehol. It is a territory situated immediately outside the Great Wall, to the Northwest of Peking, which had originally formed part of Inner Mongolia, had gradually been colonized and had eventually become attached to the Province of Chihli, but was now in Manchurian hand. Before the end of December 1928, a comprehensive agreement was reached by which Nanking agreed to leave Jehol as well as Manchuria under Chang Hsueh-liang's administration and to give him the title of Commander of the North East Frontier Defense Force.

The question whether or not Jehol formed part of Manchuria is, however, not material for our present purposes.

According to the prosecution itself the military conquest of all Manchuria including Jehol had been completed by May 1933. On May 31, 1933, the Tangku Truce was signed, and whatever might be the position of the Sino-

Japanese *dispute* relating to these provinces, the actual *hostility* concerning them ceased.

With the signing of this truce the good relations between China and Japan were restored. The prosecution itself says that after this truce the relation between China and Japan became good for the time being. There were, no doubt, certain disturbances in the early part of 1935 but these were all compromised and settled, and on June 10, 1935, the HO-UMEZU Agreement was concluded. In both countries conciliatory notes appeared in the public utterances of leading politicians; personal contact was restored, after a long term of suspension, between General Chiang Kai-shek and the representatives in China of the Japanese Government, The Chinese Government gave evidence of a willingness to respond to Tokyo's demands for more effective control of anti-Japanese agitation by circulating warnings to the provincial and municipal authorities to suppress movements likely to impair relations with other countries, and by having school text-books revised with a view to eliminating passages offensive to Japan. The Japanese Government for their part made a gesture of good will and paid a compliment to China by elevating their diplomatic mission to the rank of Embassy. The change took place on the 14th June, and the example was followed in the course of the next three months by Great Britain, Germany and the United States of America.

After that, the officials of the Chiang Kai-shek Government concluded arrangements with Manchukuo with regard to customs, postal service, telegraph and railroad. In June 1935 Chiang Kai-shek promulgated the Good Neighbour Ordinance toward Japan. Mr. HIROTA, Foreign Minister of the OKADA Cabinet, negotiated with China and formulated the "HIROTA-three principles" including the recognition of the *status quo* in Manchuria and North China and secured the consent of the Chinese Government to discuss the details with those principles as the basis. The Soviet Union recognized Manchuria as a separate state and in the Neutrality Treaty of 1941, between Japan and the U. S. S. R., it was provided that the Soviet Union respect the territorial integrity and inviolability of Manchukuo. In my opinion the evidence given in the case fully supports the defense contention. This hostility ceased long before the surrender of 2 September 1945 and nothing in connection with that incident, except what was expressly mentioned in its terms, was within the scope of this surrender.

In my opinion, in the absence of any express reference to the contrary, the terms of the Potsdam Declaration, as also of the Surrender, must be limited to such hostilities as were being terminated by them. As I have already pointed out, a victor's power under International law does not entitle him to sit on trial over the vanquished for all his life's doings. Neither the Potsdam Declaration nor the deed of Surrender nor the Charter expressly covers this matter.

Count 18 charges some of the accused named therein with having initiated a war of agression etc. on or about the 18th September 1931. This is the date of the Mukden incident. For the reasons given above the charges in this count must also fail for want of jurisdiction.

Counts 25, 35 and 51 relate to the hostility between Japan and the U. S. S. R. in the area of Lake Khasan, during July and August 1938.

The evidence given in the case conclusively shows that THESE HOSTILITIES also ceased long before the Potsdam Declaration and the Surrender. It should be remembered that Japan stood in friendly diplomatic relations with the U. S. S. R. all along after this incident. The two States entered into neutrality pact after this incident and it can safely be asserted that, till the U. S. S. R. declared war on Japan on the 8th August 1945, the relations between the two countries, in the eyes of International Law, were completely friendly. In my opinion, therefore, these long past hostilities were not, and could not have been, within the contemplation of the Potsdam Declaration, the deed of Surrender and the Charter constituting this Tribunal. The evidence in this connection goes to show that even *the dispute* here was settled by agreement.

In my opinion, therefore, these charges should also fail for want of jurisdiction.

The same reasons apply also to counts 26, 36 and 52. These counts relate to A HOSTILITY between Japan and the Mongolian People's Republic in the area of the Khalkhin-Gol River during the summer of 1939. This hostility also ceased long before the present Surrender. The Mongolian People's Republic was not in war with Japan at all at the date of the Surrender or of the Potsdam Declaration. Neither the Declaration nor the Deed of Surrender expressly refers to this incident. The Mongolian People's Republic was not a party either to the Declaration or to the deed of Surrender. The Charter also nowhere expressly refers to this incident. The Mongolian People's Republic is not a prosecuting nation. In these circumstances I do not see how we can entertain these charges.

The charges contained in counts 2, 18, 25, 26, 35, 36, 51 and 52 therefore fail on this ground also and the accused must be acquitted of these charges.

The defense contends that, for the purposes of this trial, even war with China should be taken as commencing from the 9th of December 1941, the date of China's declaration of war, and that consequently crimes alleged to have been committed during any prior course of the hostility would be outside the jurisdiction of this tribunal.

I believe there is not much difficulty in saying that war with China, which ended in the surrender by Japan on the 2nd of September 1945, commenced on 7 July 1937 with the Marco Polo Bridge Incident.

War is a contention between two or more States through their armed forces, for the purpose of overpowering each other. Recourse to hostilities without a previous declaration of war, or a qualified ultimatum, is forbidden. But a war can nevertheless break out without these preliminaries. A State might deliberately order hostilities to be commenced without a previous declaration of war. The armed forces of two states having a grievance against one another might engage in hostilities without having been authorized thereto, but at the same time, without the respective Governments ordering them to desist from further hostilities. We are not now concerned with the

question whether or not a State which deliberately orders the commencement of hostilities without a previous declaration of war, or which thus omits to order its armed forces to desist from hostilities does or does not thereby commit any delinquency. It may or may not commit any delinquency thereby; but nevertheless it is engaged in war. War is actually in existence if the other party forcibly resists acts of force undertaken by a State. War is thus a condition and that condition existed and continued between China and Japan from 7th July 1937. The struggle certainly attained the proportions of a war.

War is now a matter of concern to the entire community of nations. The community may not afford to legitimatize hostility on the scale of war by permitting the war-making state, in its independent judgment, to decide that it is not making war.

The moment at which war begins is fixed, as between belligerents, by the commission of the first act of hostility on the part of the belligerent who takes the initiative.

The question before us, however, is not really one of determination of the character of the particular hostility as between the parties thereto or even in general. The question really is to find out the meaning of the declarants of the Potsdam Declaration.

The question is which "war" they intended to mean in their Potsdam Declaration or in the Cairo Declaration, when they used the word "war".

In the Cairo Declaration, the three great Allies declared it to be their purpose that Japan "shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China. Japan will also be expelled from all other territories which she has taken by violence and greed."

The postdam Declaration of July 26, 1945 referred to "the prodigious land, sea and air forces" of the three great Powers and declared that "this military power is sustained and inspired by the determination of all the Allied Nations to prosecute THE WAR against Japan until she ceases to resist". In its Clause 8, the Declaration referred to the terms of the Cairo Declaration and declared that the same shall be carried out.

In these Declarations, the war that is referred to seems to be the war which these three Powers were jointly waging. In this sense, strictly speaking, it can only mean the war which commenced on the 7th of December 1941 with the Japanese attack on Pearl Harbour.

The hostility between Japan and China before that date certainly had the character of war. But the difficulty is that this was never declared to be such by the hostile parties themselves, and at least America chose by her conduct not to recognize this as war. Admittedly, America rendered all possible helps to China and such helps were inconsistent with the neutral character of that country. If we take it that this hostility was recognized as war by America, then, in international law, America was already involved by her action in that belligerency, and the case relating to attack on Pearl Harbour becomes

absolutely meaningless. Long before that attack, America, by her action, became, in that case, a belligerent country, and whatever might have been the nature of the war which Japan was carrying on against China, as soon as America chose to take part in it on the side of China, Japan became entitled to take any belligerent steps at any time against America.

The negotiations between Japan and America certainly were not indicative of any truce. Even if it were so, America herself took actions during it which were again hostile to Japan.

Before the attack on Pearl Harbour, both America and Japan, however, were considering themselves to beat peace on the footing that hostility between China and Japan was not war and that consequently America owed no duty to be neutral in respect of that hostility.

Japan did not give the hostility the name of "war" perhaps because she thereby expected to elude the constraints of the Kellogg-Brind Pact, perhaps she thought that simply by omitting to issue a declaration it would be possible for her to avoid the opprobrium of waging war, and to evade the duties imposed by international law for the conduct of war.

Japan says that she was anxious to localize the matter. Of course, it must be said that by not declaring the hostility to be war, Japan deprived herself of certain valuable rights of belligerency also, like rights of blockade, etc.

China also did not want to give the name of "war" to this hostility before Japan became involved in war with the United States of America by her attack on Pearl Harbour.

China did not give it the name of "war" perhaps because she needed the assistance of the so-called neutral countries who were anxious to avoid being openly at war.

America also did not give it that name: perhaps she desired to escape the disabilities of her neutrality legislation whereby the shipments of arms and munitions of war to belligerents were automatically forbidden. America certainly could have openly acknowledged a state of war.

A nation intent on peace and determined to uphold the reign of law might consider it a solemn duty to avoid any implied connivance in the evasion of international obligations. Whatever that be, the hostility was not acknowledged as war by America, and America continued her helps to China and yet continued in her so-called peaceful relations with Japan.

Thus, if they were consistent, neither China nor the United States, two of the three declaring powers at Potsdam, could have given the name of "war" to that course of the hostility which elapsed before the date of the attack on Pearl Harbour.

It seems, therefore, not unreasonable to contend that when these parties subsequently used the term "war", they, thereby, did not refer to that hostility to which they had hitherto denied that name.

There are other indications in these declarations which might also point to similar intention. Formosa, Manchuria, Korea and the Pescadores are specifically referred to in the declaration. It is also mentioned that Japan "will be expelled from all other territories which she has taken by violence

and greed". These must refer to matters affected by acts of force already decisive. They cannot refer to territories occupied in course of the war in question. That war is still indecisive. "Surrender is being demanded from Japan" certainly on the footing that Japan "is going to be defeated". Therefore, when we find express reference to these territories, they are at least considered by the declaring Powers as having fallen into the hands of Japan as the result of aggressive acts not in course of the very war in which Japan "is going to surrender" and which is thus going to be decisive against Japan. This is obvious at least in the case of Korea and Formosa.

There is thus much force in the contention of the Defense that the Allied Powers, by using the term "war" in the Cairo and Potsdam Declarations, referred only to the war which commenced on 7th December 1941 and was being jointly waged by the three declaring Powers and, therefore, the surrender must be taken as terminating only that war. The jurisdiction of the Tribunal should, therefore, be confined to the acts in or in connection with that war.

At the same time, as I have pointed out above, the hostility which commenced between China and Japan on 7th July 1937 cannot be denied the name of "war"; as a matter of fact, the entire subsequent development can be traced to the trouble created by this hostility. It is difficult to think that the parties, including China, were not at all intending to refer to this portion of the hostility, which really formed the major portion of the trouble. To assume that the Powers were excluding this portion of the hostility from the term "war" as used by them in the declarations, in view of certain anomalous legal consequences involved in recognizing the same as war, is to assume that even in those moments the Parties were meticulous about legal technicalities. There is no evidence that the Parties were not taking a broad view of the facts as known in the world, but, in the choice of their name, were being influenced by the legal technicalities noticed above.

On a careful consideration of everything that could be said in this connection, I am inclined to the view that the word "war" as used in these declarations included the hostilities which commenced with the Marco Polo Bridge Incident of 7th July 1937.

PART VI

WAR CRIMES *STRICTO SENSU*

CHARGES OF MURDER AND CONSPIRACY

(COUNTS 37 TO 53.)

I would now take up the counts wherein the accused persons have been charged with "murder". I mean the counts thirty-seven to fifty-two.

The charges in counts thirty-seven to forty-three relate to the period between 1 June 1940 and 8 December 1941 and are based on the following allegations:

1. The accused persons (named in the counts) participated as leaders, organizers, instigators and accomplices in the formulation or execution of a common plan or conspiracy.
2. The object of such plan or conspiracy was unlawfully to kill and murder:
   (*a*) By initiating unlawful hostilities against the countries named,
   and (*b*) By unlawfully ordering, causing and permitting the armed forces of Japan to attack.
3. (*a*) The hostilities and attacks were unlawful *because* they were in breach of Treaty Articles specified in Appendix B of the Indictment.
   (*b*) On this ground the armed forces of Japan could not acquire the rights of lawful belligerents.
4. The accused persons
   (*a*) Intended that such hostilities should be initiated in breach of Treaty Articles specified in Appendix B;
   or (*b*) Were reckless whether such Treaty Articles would be violated or not.
5. The accused unlawfully killed and murdered the persons named in counts thirty-nine to forty-three, by ordering, causing and permitting the armed forces of Japan to attack . . . .

THE BASIS OF CRIMINAL LIABILITY of the persons charged in these counts is given to be the following:

1. That the common plan has been executed.
2. That the conspirators are responsible for all acts done in execution of the common plan.

The execution of the common plan and the acts done in such execution are detailed in counts thirty-nine to forty-three, and in these counts it is charged that the accused unlawfully killed and murdered the persons named therein BY ordering, causing and permitting the armed forces of Japan TO ATTACK the territories etc. named therein.

The charges in counts FORTY-FIVE TO FIFTY are that the accused persons named therein,

1. Unlawfully killed and murdered—
   (*a*) Civilians;
   (*b*) Disarmed soldiers;
2. BY unlawfully ordering, causing and permitting the armed forces of Japan,
   (*a*) TO ATTACK the territory named in breach of treaty

and (*b*) To slaughter the inhabitants contrary to international law.

These charges may be split up into two categories:

1. The charges of unlawful killing and murdering BY unlawfully ordering, causing and permitting the armed forces of Japan TO ATTACK the territories named, —acts of killing etc. coming in as necessary incidents of such attack.
2. The charges of unlawful killing and murdering BY unlawfully ORDERING, CAUSING and permitting the armed forces of Japan TO SLAUGHTER the inhabitants of the territories named.

The first of the above two categories will be considered along with the charges in counts 37 to 43.

The second, if established, would, in my opinion, constitute *War Crimes Stricto Sensu*. I would deal with this part of the charges in these counts separately.

The charges in counts fifty-one and fifty-two are that the accused persons named therein:

1. Unlawfully killed and murdered certain members of the armed forces of the attacked country,
2. By ordering, causing and permitting the armed forces of Japan to attack the territories named therein.

Count fifty-one relates to the incident of the summer of 1939 in the region of the Khalkhin-Gol River in the territories of Mongolia and the Union of Soviet Socialist Republics. The persons charged are ARAKI, HATA, HIRANUMA, ITAGAKI, KIDO, KOISO, MATSUI, MUTO, SUZUKI, TOGO, TOJO and UMEZU.

Count fifty-two relates to the incidents of July and August of 1938 in the region of Lake Khasan in the U. S. S. R. The persons charged are ARAKI, DOHIHARA, HATA, HIRANUMA, HIROTA, HOSHINO, ITAGAKI, KIDO, MATSUI, SHIGEMITSU, SUZUKI and TOJO.

I have already given my reason why I consider the charges laid in these two counts to be beyond the jurisdiction of this Tribunal.

The prosecution case in counts thirty-seven to forty-three, and forty-five to fifty-two, is:

1. That the hostilities referred to therein were illegal, being in breach of treaties or having been initiated in violation of the regulations;
2. That consequently the jural incidents of belligerency did not attach to them and the invading party had not any belligerent right;
3. That as a result, all the acts of killing etc. done in course of such hostilities were without the protection of any belligerent right and were ordinary murder etc.

I have already given my view of the questions involved in the propositions 1 and 2 as above stated while examining the definition of aggressive war. In my opinion, the hostilities referred to in these counts constituted "WAR" within the meaning of the international law in spite of the infirmities attendant upon their initiation and in spite of their being in violation of treaties etc. In spite of the alleged facts, deficiencies or violations, these hos-

tilities attracted to themselves the normal jural incidents of belligerency.

As I have noticed in an earlier part of this judgment, the charter establishing this Tribunal in its Article 5 (*c*) speaks of 'crimes against humanity' and names them as 'murder, extermination, enslavement, deportation and other inhumane acts committed before or during the war...' Originally this provision in the Charter was confined to acts "committed against any civilian population, before or during war..." A few days before the indictment in the present case was presented, the Charter was amended dropping these limiting words 'against any civilian population'.

I have already given my reason why I could not construe the Charter as defining any crime and why, even if the Charter purported so to define, the definition would not have been binding on us. In this view of the provisions of the Charter, I need not proceed to examine whether the acts alleged in these counts would be covered by this alleged definition of "crimes against humanity", and, how the amendment of the Charter would affect the position.

Mr. Comyns Carr coming to these counts contended that "murder" would be the inevitable consequence of aggressive warfare. According to him these counts reduce the matter to its simplest and most conclusive form. Mr. Carr says:

"Every statesman or commander who is a party to ordering his army to attack and kill an enemy, *even in legitimate warfare*, fulfils all the conditions of murder if it was done without lawful justification. However, if it appears that this was done in lawful belligerency he is not guilty... The accused who necessarily fulfils all the other elements of murder, in that he has purposely ordered the killing of human beings, has to rely upon a lawful justification." He says, "War is such a justification, but if the war is unlawful his justification fails. Now even if it were not established ... that aggressive war ... is itself a punishable crime, it is certainly not lawful, and therefore cannot afford a justification for what is otherwise plain murder... It has always been implicit in the definition of murder in every civilized country."

I am afraid I cannot accept this contention of Mr. Carr. In order to take any killing outside the definition of murder all that is necessary is to show that it was done in war, the war itself is not required to be justified at the same time. The killing in question does not come within the definition of the national system because of the war-relation between the two states. In so far as the definition extends to acts done by the subjects of other Sovereign States, it contemplates peaceful relation between the states and not war-relation, If the relation has been the result of any unjust or unjustifiable act of a state that state may be answerable in various other ways; but that fact would not change the character of the relation. The killing is done under the authority of the killer's state *animo belligerendi* and this is sufficient to place it outside the definition of murder in any national system.

As is pointed out by Oppenheim, armed forces are organs of the state which maintains them. They are organs of their home state, even when on foreign territory, provided only that they are there in the service of their

state, and not for their own purposes. Whenever armed forces are on foreign territory in the service of their home state, they are considered extra-territorial and remain under its jurisdiction.

I have already given my reason for saying that the wars of the categories referred to in these counts do not constitute any crime and are not illegal in international law. In this view, acts alleged in counts thirty-seven to forty-three, fifty-one and fifty-two would be only acts of war and would not be murder, etc. as alleged in these counts.

The prosecution laid these charges on the assumption that such wars were illegal. In my opinion, even this assumption would not render these acts murder, pillage, etc. as asserted in these counts. An act of force committed under the authority of a state *animo belligerendi* will bring in the state of war and will have all the jural incidents of belligerency.

Hall says: "On the threshold of the special laws of war lies the question whether, when a cause of war has arisen, and when the duty of endeavouring to preserve peace by all reasonable means has been satisfied, the right to commence hostilities immediately accrues, or whether it is necessary to give some preliminary notice or intention. *A priori* it might hardly be expected that any doubt could be felt in the matter. *An act of hostility*, unless it be done in the urgency of self-preservation or by way of reprisal, *is in itself a full declaration of intention*; any sort of previous declaration therefore is an empty formality unless an enemy must be given time and opportunity to put himself in a state of defense, and it is needless to say that no one asserts such quizotism to be obligatory." According to him "the date of the commencement of a war can be perfectly defined by the first act of hostility." After reviewing the opinions of various jurists in the present century and recent practice, Hall concludes thus: "Looking at the foregoing facts as a whole it is evident that it is not necessary to adopt the artificial doctrine that notice must be given to an enemy before entering upon war. The doctrine was never so consistently acted upon as to render obedience to it at any time obligatory.... The moment at which war begins is fixed, as between belligerents, by direct notice given by one to the other, when such notice is given *before* any acts of hostility are done, and when *notice is not given, by the commission of the first act of hostility on the part of the belligerent who takes the initiative*."

In the Sixth Edition (1944) of Oppenheim's International Law edited by Dr. Lauterpacht the law on the subject is stated thus: "WHATEVER MAY BE THE CAUSE OF WAR that has broken out, and WHETHER OR NOT THE CAUSE BE A SO-CALLED JUST CAUSE, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral states. This is so, even if the declaration of war is *ipso facto* a violation of International Law, as when a belligerent declares war upon a neutral state for refusing passage of its troops, or when a state goes to war in patent violation of its obligations under the Covenant of the League or of the General Treaty for the Renunciation of War. To say that, because such a declaration of war is *ipso facto* a violation of International Law, it is 'inoperative in law

and without any judicial significance' is erroneous. The rules of International Law apply to war from whatever cause it originates."

It may be noticed here that this is the view of the learned author as to belligerency and its jural incidents, though, according to him, the justice or otherwise of the causes of war has been of much legal relevance after the Pact of Paris. The learned author says: "So long as war was a recognized instrument of national policy both for giving effect to existing rights and for changing the law, the justice or otherwise of the causes of war was not a legal relevance. The right of war, for whatever purposes, was a prerogative of national sovereignty. Thus conceived, every war was just. The legal position has now changed with the limitation of the right of war in the Covenant of the League and with its abolition as an instrument of national policy in the General Treaty for the Renunciation of War." According to the learned author, "War cannot now legally, as it could be prior to the conclusion of the Pact, be resorted to either as a legal remedy or as an instrument for changing the law. Resort to war is no longer a discretionary prerogative right of States, Signatories of the Pact; it is a matter of legitimate concern for other signatories whose legal rights are violated by recourse to war in breach of the Pact; it is an act for which a justification must be sought in one of the exceptions permitted by the Pact of Paris." I have already considered this aspect of the case and have given my reason why I cannot accept this view. What is pertinent for my present purpose is to point out that in spite of this view of the Pact, the learned author does not deny jural incidents of belligerency even to an unjust and unjustifiable war. Indeed war is a condition producing certain effects as between the contending states and the condition is there no matter whether it is brought justly or unjustly. In the language of Oppenheim himself war is a fact recognized by International Law. It is a *particular relation* between States. It comes into being as a fact irrespective of its legitimacy or otherwise, and the very fact of its existence takes all killing in due course of its conduct out of the category of murder of the peacetime legal system. If any illegality is attached to the origination of the fact, that is to be dealt with otherwise. That does not change the character of the fact or relation itself or its jural incidents.

Hall says: "When differences between States reach a point at which both parties resort to force, or one of them does an act of violence which the other chooses to look upon as a breach of the peace, THE RELATION OF WAR is set up, in which the combatants may use regulated violence against each other until one of the two has been brought to accept such terms as his enemy is willing to grant."

In conferring THE STATUS OF BELLIGERENTS the Hague Regulations contemplate no distinction between the just and the unjust cause of war.

The position is neither affected by the Hague Convention relative to the opening of hostilities. The crucial point, the period of time which must elapse between the presentation of the declaration of the ultimatum and the beginning of hostilities, is left undetermined by that Convention.

It will be pertinent to notice here the views of Oppenheim on this point.

Though such initiation of hostility is looked upon by the author as a delinquency, he still holds that it will all the same be 'war' with all the incidents of belligerency.

Oppenheim says: "There is no doubt that, in consequence of Convention III, recourse to hostilities without a previous declaration of war, or a qualified ultimatum, is forbidden. *But the war can nevertheless break out without these preliminaries*. A state might deliberately order hostilities to be commenced without a previous declaration of war, or a qualified ultimatum... It is certain that States which deliberately order the commencement of hostilities without a previous declaration of war or a qualified ultimatum commit an international delinquency; *but they are nevertheless engaged in war*... In all the similar cases, all the laws of warfare must find application, for *a war is still a war in the eyes of International Law, even though it has been illegally commenced*."

It should be noticed here that though the learned author observed that the commencement of hostilities without a previous declaration of war is a delinquency, the war itself is not illegal. In an earlier passage he says: "The failure to observe it (The Hague Convention III of 1907) does not render the war illegal; *neither does it take away from the hostilities thus* commenced the character of war." In my opinion this correctly states the position of International Law. Otherwise the entire invading army would be guilty of murder and the victors in such a war will return to their primitive rights of total destruction of the vanquished, though now in the name of justice and of a developed sense of humanity.

As I have already noticed, the prosecution case in this respect really goes further than mere want of declaration of war, and is founded on a charge of treachery.

I had occasion to examine the evidence in this respect while discussing the final stage in the alleged over-all conspiracy. There I pointed out why I could not accept the prosecution charge of treacherous conduct of the Japanese statesmen concerned. No doubt preparation for war was going on while the diplomatic negotiations were being held. But such preparations were being made by both sides. If the Japanese side "had little confidence that the KURUSU-NOMURA negotiations would achieve their purposes", I do not feel that the American side entertained any greater confidence in the diplomatic achievement. The steps taken by the American side during the progress of the negotiation did not indicate much confidence on their part in the final achievement of the negotiation. Since at least July 1941 America was taking steps with the full knowledge of their probable effects on Japan. Japan was preparing for surprise attack in case the negotiation would ultimately fail and Japan did set a time limit to the continuance of the negotiation. But I cannot say that this was in any way inconsistent with her sincerity in the negotiation.

The evidence now fully establishes that America had prior knowledge of the fact that Japan was going to strike. America was certainly not entitled to be informed where she would be struck first. Even if there were any treacherous design on the part of Japan, the design thus failed, it being disclosed to

America beforehand. The resulting act of war therefore at the time when it was committed was not deprived of its character of belligerent act.

In my judgment *the charges laid in counts thirty-seven to forty-three, forty-five to fifty as limited above and fifty-one and fifty-two should fail and the accused should be* ACQUITTED OF SUCH CHARGES.

Charges under counts forty-five to fifty, in so far as they relate to "ordering, causing and permitting the armed forces of Japan . . . TO SLAUGHTER the inhabitants contrary to international law," are covered by the more comprehensive count fifty-four.

Like these counts, count fifty-four also, at least in one part, charges the accused named therein as having ORDERED, AUTHORIZED and PERMITTED certain specified persons TO COMMIT the specified offenses.

There is absolutely no evidence on the record to show that there was any order, authorization or permission "to slaughter the inhabitants contrary to international law" as alleged in counts 45 to 50, beyond, of course, the order to attack these territories. I have already considered the case of killing *animo belligerendi*. Apart from slaughter or killing involved in initiating or waging war, there was no other order, authorization or permission for the alleged purpose.

In my judgment therefore these charges should fail in *toto* and the accused should be acquitted of all the charges contained in these counts.

I would next take up counts 44 and 53 wherein the charges laid are based on certain specific conspiracies, distinct from the alleged original comprehensive conspiracy charged in counts 1 to 5. In order to sustain these charges the specific conspiracies alleged in them must be proved.

In count forty-four the object of the plan or conspiracy is given to be TO PROCURE AND PERMIT the murder on a wholesale scale of

1. prisoners of war,
2. members of the armed forces etc. who might lay down their arms,
3. civilians,
4. crews of ships destroyed by Japanese forces.

The essential elements in the charge contained in count fifty-three are:

1. That there was a common plan or conspiracy.
2. (*a*) The object of such plan or conspiracy was to order, authorize and permit
   - (*i*) the commander-in-chief,
   - (*ii*) the officials of the Japanese War Ministry,
   - (*iii*) the persons in charge of several camps and labour units and their subordinates

   to commit the breaches of laws and customs of war.

   (*b*) That the Government of Japan should abstain from taking adequate steps in order to secure observance of the conventions, assurances and laws and customs of war and to prevent breaches thereof.

Very voluminous evidence has been led before us to establish the atrocities actually perpetrated at various places at various times. But not an iota of

evidence having any direct bearing on the establishment of the ALLEGED PLAN OR CONSPIRACY could be adduced in this case. The prosecution ultimately invited us to infer such a conspiracy from the fact that everywhere SIMILAR ATROCITIES were committed by the Japanese forces. According to them, "this similarity of treatment throughout the territories occupied by the Japanese forces will lead to the conclusion that such mistreatment was the result not of the independent acts of the individual Japanese Commanders and soldiers, but of the general policy of the Japanese forces and of the Japanese Government."

The similarity in the alleged atrocities may cut just the other way as well. It may as well indicate some common source shaping the allegations and evidence. The world is not quite unaware of some baseless atrocitystories designed to arouse animosities. Professor Arnold Anderson of the Iowa State College in his recent Article on "The Utility of the Proposed Trial and Punishment of Enemy Leaders" points out how in connection with the American Civil War 'Prison atrocity stories', later disproved almost totally, were the major elements in a propaganda designed to arouse the animosities. He refers to W. B. Hesseltine's "Civil War Prisons; —A Study in War Psychology", where these stories are dealt with in considerable detail. It will be interesting to notice here that the prison atrocity stories there given bear a striking similarity to the stories of atrocities now before us. There, the world was told of the southerners 'slashing the throats of some prisoners of war from ear to ear, cutting off the heads of others and kicking them about as foot-balls; setting up the wounded against trees and firing at them as targets or torturing them with plunges of bayonets into their bodies.' An illustrated Weekly carried a full page picture of rebels plunging their bayonets into the bodies of the wounded soldiers. It was also told how prisoners were confined in closed rooms 'whose poisoned atmosphere was slowly sapping their strength hour by hour'. There were stories of bad food, cruel treatment and utter destitution. An escaped quarter master of an Iowa regiment reported to the Governor of his state an account of *his experiences*: he said that the two hundred and fifty officers who shared his confinement received *less than one fourth* the rations of a private in the United States Army and were "subjected to all the hardships and indignities which venomous traitors could heap upon them." "The prisoners were confined in a foul and vermin abounding cotton shed." "They were forbidden to leave the crowded room to go to the sinks at a time when diarrhoea was prevalent;" 'the prisoners were destitute of clothing': "the hospitals were denied medicines". "Cornbread issued to prisoners was made of unsilted meal and the meat was spoiled". Men were killed for looking out the window—prohibiting them the poor privilege of looking at their mother earth." A surgeon told that "in the wounds of many of the men there were enough maggots to fill a wine glass".

There were OFFICIAL REPORTS also prepared on an examination of the *condition of the returned men*. Pictures of these returned prisoners also were taken to accompany the report and the report contained all of the stories of atrocities told of the treatment of prisoners upto that time. One report recounted "the absence of shelter, the huddled men who were fed like swine on corn-

bread made from unbolted meal, soup with worms and bugs and mule meat." "Rats were eaten by the starving men—once a dog was eaten—and men were grateful for the scraps thrown to them from the surplus supplies of their guards. The sick were not sent to the hospitals until past recovery, were mistreated by surgeons, and died." The bleak tobacco warehouses of Richmond were described in lurid detail, the lack of furniture, the unheated rooms with broken windows, and the crowds confined within each room were dwelt upon. "Prisoners were shot at windows, the men were without food, and many became insane.... Men were brutally punished for trivial offenses; the naked bodies of the dead were placed in heaps awaiting burial and were eaten by hogs, dogs, and rats....."

In short the entire program of mistreatment was such as to be charged to '*a predetermined plan, originating somewhere in a rebel counsel*, for destroying and disabling the soldiers of their enemy, who had honourably surrendered in the field'.

Before the end of that war, however, the confederacy took an opportunity to strike a blow for its own defense in the field of propaganda. A senate resolution in the Confederate congress appointed A JOINT COMMITTEE to investigate the treatment of prisoners by the two sides. Early in March this committee presented a preliminary report which began with an examination of the charges made in the earlier reports and publications. The spirit and intent of these publications, it was asserted, was to *inflame the evil passions of the North*. The photographs were cited as evidence of this spirit; such cases, the committee believed, could have been found in every Northern hospital and even in homes.

I need not multiply these stories. The truth or falsehood of those stories would not help us in the least in our present case. We have evidence before us, and shall have to come to our own decision on the evidence that has been led here. All that I want to emphasize is that a certain amount of caution is needed in the sifting of the evidence on this point. Even narratives of personal experiences revealing a uniformity of testimony do not, by the very mass of such testimony, necessarily guarantee the truthfulness of the charges. If there is similarity in the prisoners meeting with cruel guards and murderous keepers everywhere, and in the detailed atrocities narrated, we must not fail to notice that there is uniformity in the stories of escapes also, —almost always one escaping from each massacre by strikingly similar chances. Intriguing psychological problems may be involved in this. We know, we cannot always believe men who saw 'something happen' even when they say they saw with their own two eyes. Suggest something to them, set their thought processes working on clearly defined lines, alarm them just a little, intrigue them somewhat, and anything may happen.

The evidence before us on this phase cannot all be said to be above all suspicion of this character.

I need mention here only Exhibits 1, 765 A, B, C and D, being the films styled "Nippon Presents". According to prosecution, "early in the Pacific war the Japanese who had overrun Java made a film for screening in a conquered

Australia to show how well they treated their prisoners". The prosecution case is that the English, Australian and Dutch Prisoners of War and internees were forced to play parts in it. Java fell in March 1942. These films, according to prosecution, were made during the period from June to mid-September 1943 under the direction of Captain IANAGAWA of the Japanese force. The prosecution evidence is that these prisoners and internees were never given sufficient food from the very beginning and that consequently they all suffered from mal-nutrition. This evidence about insufficient food is without any reservation. We can understand that the persons who were made to take part in the film, adult male and female and small children, —were all forced by the Japanese to assume cheerful appearance when the pictures were being taken. It is however difficult to see how after starvation for a period exceeding one year they could be forced to appear well-fed. The picture apparently shows the prisoners and internees all well-fed and cheerful. One would find thus some difficulty in accepting the prosecution version of the Japanese treatment of these prisoners to the full extent.

As was pointed out by Dr. Hesseltine, "an inevitable concomitant of armed warfare is the hatred engendered in the minds of the contestants by the conflict. The spirit of patriotism which inspires men to answer the call of their country in its hour of need breeds within those men the fiercest antagonism toward that country's enemies. Such enmity finds its natural expression not only on the battlefield in the heat of conflict but also in the lives of the soldiers and the sentiment of the community from which they come, both of which have been thrown out of their accustomed peacetime routine by the outbreak of the war. The attachment to an ideal, a cause, or a country, when such attachment calls for the sacrifice of security and life, blinds the person feeling that attachment to whatever of virtue there may be in the opposing ideal, cause, or country. Seemingly, it becomes necessary for the supporters of one cause to identify their entire personality with that cause, to identify their opponents with the opposing cause, and to hate the supporters of the enemy cause with a venom which counter-balances their devotion to their own.

"To a people actuated by such a devotion to a cause, it is inevitable that their opponents appear to be defective in all principles which are held dear by that people. The enemy becomes a thing to be hated; he does not share the common virtues, and his peculiarities of speech, race, or culture become significant as points of difference or, better sins of the greater magnitude. The critical faculties, present to some degree in times of peace, atrophy on the approach of national catastrophe.

"With such a state of mind coming as the natural result of the upheaval of the social order which the war produced, it was not difficult for credence to be gained for stories of atrocities committed by one or the other side in the War."

Sometimes the defeat of the army produces a depression which is to be fed by the stories of barbarities of the enemy.

All the factors that can provoke a propaganda of this character were present in the case before us. Besides there was AN ADDITIONAL UNFORTUNATE FAC-

TOR which also cannot be neglected. The prisoners of war in the hands of the Japanese were extraordinarily overwhelming in number and indicated a result of the fight which, as every white nation felt, completely undermined the myth of white supremacy. A certain amount of propaganda against the non-white enemy might have been thought of to repair the loss. At any rate it is not possible for us to ignore these factors while dealing with the evidence on this phase. We can well imagine how in a matter like this the defense is necessarily helpless. Nothing could be gained here by cross-examinations.

I have carefully followed the evidence adduced in the case but I must confess I have not been able to induce myself to infer any common plan or conspiracy in this respect. No doubt the atrocities were similar. But I do not find any basis for inference therefrom that these were the result of common plan or conspiracy of the persons charged with such plan. Nothing could be placed before us which would go to show that the concurrence of the persons named in the counts was in any way essential for the perpetration of these atrocities. In my judgment the similarity referred to by Mr. Mansfield does not necessarily indicate any policy of the Japanese Government in this respect. The similarity in many cases lies in the details of tortures. I cannot believe that such details would be settled by any government. One of the items of maltreatment relates to the quantity of food and medical help given to the prisoners. But even the prosecution evidence goes to show that there was not always insufficiency in the supplies in this respect from the government. In any event even assuming all that has been said by Mr. Mansfield on the basis of similarity, we shall not arrive at the conspiracy alleged. Coming to this group in the indictment Mr. Comyns Carr indicated the ways in which the prosecution claims to have proved the responsibility of the accused for the outrages referred to in these counts. None of the items in his summation would in any way go towards establishing the specific allegation of conspiracy made in these counts.

In my judgment no part of the charges of conspiracy contained in counts forty-four and fifty-three has been established in this case.

The prosecution might have seen this difficulty. In any case they gave up these charges in their summation of the case, though for a different reason. They said: "Having regard to the decision of Nurnberg as to the meaning of the last sentence in their Article 6, corresponding to our Article 5 of the Charter, which we accept, *we do not ask for* conviction on count 44 or 53 of the indictment; nor on counts 37 and 38 so far as they depend upon clauses (*b*) and (*c*) of the Charter."

WAR CRIMES *STRICTO SENSU*

COUNTS 54 AND 55

IN RELATION TO

THE CIVIL POPULATION OF THE TERRITORIES OCCUPIED BY JAPAN

There remain only counts 54 and 55 of the indictment for my consideration.

Count 54 charges that the accused named therein . . . *ordered*, *authorized* and *permitted* the commanders-in-chief and other persons mentioned in Count 53 *to commit* the offenses therein mentioned. . .

Count 55 charges that the accused named therein . . . being by virtue of their respective offices responsible for securing the observance of the . . . conventions, assurances and the laws and customs of war in respect of armed forces . . . and in respect of . . . prisoners of war and civilians then in the power of Japan . . . deliberately and recklessly DISREGARDED THEIR LEGAL DUTY to take adequate steps to secure the observance and prevent breaches thereof, and thereby violated the laws of war.

It may be noticed in this connection that in the indictment at the Nurnberg Trial there were no charges corresponding to those contained in Count 55 of the indictment before us. The accused at the Nurnberg Trial were all charged with having committed some positive acts of atrocity. Count 3 of that indictment contained charges relating to war crimes. In the statement of the offense it was charged that all the defendants acting in concert with others, formulated and executed a common plan or conspiracy to commit war crimes. . . This plan, it was charged, involved the commission of crimes perpetrated. The said war crimes were alleged to have been committed by the defendants and by other persons for whose acts the defendants were responsible, as such other persons, when committing the said war crimes, performed their act in execution of a common plan or conspiracy to commit the said war crimes. . . The charges in this respect related to:

A. Murder and ill-treatment of civilian population of or in occupied territory and on the high seas;
B. Deportation, for slave labour and for other purposes, of the civilian population of and in occupied territories;
C. Murder and ill-treatment of prisoners of war, etc. ;
D. Killing of hostages;
E. Plunder of public and private properties;
F. The exaction of collective penalties;
G. Wanton destruction of cities, towns, etc. ;
H. Conscription of civilian labour;
I. Forcing civilians of occupied territory to swear allegiance to a hostile power;
J. Germanization of occupied territories.

In each case the defendants were charged with positive acts of atrocities.

The Tribunal at Nurnberg, therefore, had no occasion to consider any charge like the one contained in Count 55 of the Indictment before us. Those of the defendants, who were found guilty of war crimes, were found guilty of having themselves participated in the atrocious doings, as is charged in Count 54 of the Indictment before us.

There is, indeed, some difficulty in reconciling Count 55 with the provisions of the Charter. The Charter lists as crime only "violations of the laws or

customs of war". It does not list as crime "disregard" of "legal duty to take adequate steps to secure the observance of and to prevent the breaches of" the laws of war. If Count 55 be taken to mean that "the deliberate and reckless disregard of legal duty" itself constitutes a crime, then the crime charged therein would be outside the provisions of the Charter and as such, outside our jurisdiction.

The Count, however, may be taken as mentioning "deliberate and reckless disregard of duty" only as evidentiary conduct whereupon the resulting violation of the laws of war should be ascribable to the persons charged. The crime charged is the violation of the laws of war and the act must ultimately be brought home to the accused named. Any disregard of duty on his part, if established, would only supply some evidentiary fact for this purpose. The expression "and thereby violated the laws of war" in such a case would mean not that "the deliberate and reckless disregard of duty" itself amounts to violation of the laws of war, but that the prosecution undertakes to establish the act of violation of the laws of war to be the act of the accused named and it proposes to do so by establishing a particular conduct of the accused. The question whether the particular conduct, if and when established, does or does not establish the *factum probandum*, would always be for the tribunal to determine. The charge will not be established till the act of violation is established to be the act of the accused.

Count 54 refers to offenses mentioned in Count 53.

Count 53 speaks of the *frequent* and *habitual* commission of the breaches of the laws and customs of war as contained in and proved by the conventions, assurances and practices referred to in Appendix D, against

(1) the armed forces of the countries named;

(2) the prisoners of war;

(3) civilians then in the power of Japan.

The conventions, assurances and practices that are referred to in Appendix D are the following:

1. The practice of civilized nations.

2. (*a*) The convention No. IV done at the Hague on the 18th October 1907, concerning the laws and customs of war on land;

(*b*) The regulations set out in the Annex to the said convention;

(*c*) The convention No. X done at the same time and place concerning Maritime War;

(*d*) The Geneva Red Cross Convention of 1929, being the International Convention for the Amelioration of the Condition of The Wounded and Sick in Armies in the Field, done at Geneva on the 27th July 1929.

(*e*) The Geneva Convention of 1929 being the International Convention relative to the Treatment of Prisoners of War, done at Geneva on the 27th July 1929, though not ratified, yet acceded to by Japan within the meaning of its Article 95, as a result of the assurances given as per communications referred to below.

3. (*a*) The assurances given by Japan to the effect that

Although not bound by the Convention relative to the treatment of Prisoners of War, Japan WILL APPLY *mutatis mutandis*:

(*i*) The provisions of that convention to American prisoners of War. (Communication dated the 29th January 1942: Exh. 1,490)

(*ii*) The conditions of that Convention to English, Canadian, Australian and New Zealand Prisoners of War in their power. (Communication dated the 30th January 1942: Exh. 1,496)

Japan, by this communication, further assured that 'with regard to supply of food and clothing to prisoners of war, they will consider on condition of reciprocity national and racial customs of the prisoners'.

(*b*) The assurance given by Japan in a communication dated the 13th February 1942, in the following terms:

"The Imperial Government will apply during the present war, on condition of reciprocity, the provisions relative to the treatment of prisoners of war of the 29th July 1929, TO ENEMY CIVILIAN INTERNEES, as far as applicable to them, and provided that labour will not be imposed upon them contrary to their free choice." (Exh. 1,491)

(*c*) The said communications constituted an assurance to all the nations at war with Japan *other than* the Republic of China.

THE ALLEGED ACTS in breach of the laws and customs of war are given in fifteen sections in Appendix D of the Indictment. They may be summarized as follows:

1. Inhumane treatment, contrary to Article 4 of the Annex to the Hague Convention IV of 1907 and the whole of the Geneva Convention of 1929 and the said assurances. Prisoners of war and civilian internees were murdered, beaten, tortured and otherwise ill-treated, and female prisoners were raped by members of the Japanese forces.
2. Illegal employment of prisoner of war labour:
   (*a*) prisoners of war were employed on work having connection with the operations of war;
   (*b*) prisoners of war were employed on work for which they were physically unsuited, and on work which was unhealthy and dangerous;
   (*c*) the duration of daily work was excessive, and prisoners were not allowed rests of twenty-four consecutive hours in each week;
   (*d*) conditions of work were rendered more arduous by discipli-

nary measures;

(*e*) prisoners were kept and compelled to work in unhealthy climates and dangerous zones, and without sufficient food, clothing and boots.

3. Refusal and failure to maintain prisoners of war:

(*a*) In supplying food and clothing differences in national and racial customs were not adverted to. Adequate food and clothing were not supplied.

(*b*) The structural and sanitary condition of the camps and labour detachments failed entirely to comply with the Regulation and was extremely bad, unhealthy and inadequate.

(*c*) Washing and drinking facilities were inadequate and bad.

4. Excessive and illegal punishment of prisoners of war:

(*a*) Prisoners of war were killed, beaten and tortured without trial or investigation of any kind, for alleged offenses;

(*b*) Such unauthorized punishments were inflicted for alleged offenses which, even if proved, were not under the said Conventions' offenses at all;

(*c*) Collective punishments were imposed for individual alleged offenses;

(*d*) Prisoners were sentenced to punishment more severe than imprisonment for thirty days for attempting to escape;

(*e*) Conditions of the trial of prisoners did not conform to those laid down in the said Chapter;

(*f*) Conditions of imprisonment of prisoners sentenced did not conform to those laid down in the Geneva convention.

5. Mistreatment of the sick and wounded, medical personnel and female nurses:

(*a*) Officers and soldiers who were wounded or sick, medical personnel, chaplains, and personnel of voluntary aid Societies were not respected or protected, but were murdered, illtreated and neglected;

(*b*) Medical personnel, chaplains and personnel of voluntary aid Societies were wrongfully retained in Japanese hands;

(*c*) Female nurses were raped, murdered and ill-treated;

(*d*) Camps did not possess infirmaries, and seriously sick prisoners and those requiring important surgical treatment were not admitted to military or civil institutions qualified to treat them;

(*e*) Monthly medical inspections were not arranged;

(*f*) Sick and wounded prisoners were transferred although their recovery was prejudiced by their journeys.

6. Humiliation of prisoners of war, and especially officers:

(*a*) Prisoners were deliberately kept and made to work in territories occupied by Japan, for the purpose of exposing them

to the insults and curiosity of the inhabitants;

(*b*) Prisoners in Japan and in occupied territories, including officers, were compelled to work on menial tasks and exposed to public view;

(*c*) Officer prisoners were placed under the control of non-commissioned officers and private soldiers and compelled to salute them, and to work.

7. Refusal or failure to collect and transmit information regarding prisoners of war, and replies to enquiries on the subject. Proper records were not kept, nor information supplied as required by the said Articles, and the most important of such records as were kept were deliberately destroyed.
8. Obstructions of the rights of the Protecting Powers, of Red Cross Societies, of prisoners of war and of their representatives:

(*a*) The representatives of the Protecting Power (Switzerland) were refused or not granted permission to visit camps and access to premises occupied by prisoners;

(*b*) When such permission was granted they were not allowed to hold conversation with prisoners without witness or at all;

(*c*) On such occasions conditions in camps were deceptively prepared to appear better than normal, and prisoners were threatened with punishment if they complained;

(*d*) Prisoners and their representatives were not allowed to make complaints as to the nature of their work or otherwise, or to correspond freely with the military authorities or the Protecting Power;

(*e*) Red Cross parcels and mail were withheld.

9. Employing poison gas.
This allegation is confined to the Republic of China.
10. Killing enemies who, having laid down their arms or no longer having means of defense, had surrendered.
11. Destruction of Enemy Property, without military justification or necessity, and pillage.
12. Failure to respect family honour and rights, individual life, private property and religious convictions and worship in occupied territories, and deportation and enslavement of the inhabitants thereof; Large numbers of the inhabitants of such territories were murdered, tortured, raped and otherwise ill-treated, arrested and interned without justification, sent to forced labour, and their property destroyed or confiscated.
13. Killing survivors of ships sunk by naval action and crews of captured ships.
14. Failure to respect military hospital ships and unlawful use of Japanese hospital ships.
15. Attacks, and especially attacks without due warning, upon neutral ships.

Item 9 (Employing poison gas) may at once be disposed of as abandoned by the prosecution. No evidence to substantiate this charge was adduced at the hearing.

Item 15 (Attacks without due warning upon neutral ships) also was abandoned by the prosecution. On 8 December 1947, Captain Robinson for the prosecution stated in Court that it has been brought out that in this indictment "there is no charge of conducting submarine warfare as a matter of sinking merchant ships without warning ....." (R. P. 34, 772). On the basis of this statement by the Prosecution, Mr. Brannon for the Defense withdrew on 9 December 1947, Defense Document No. 2, 484 purporting to contain the statement of Admiral Nimitz of the U. S. Navy pertaining to American submarine warfare in the Pacific. (R. P. 34, 819)

As regards the rest of the acts alleged, the accused are sought to be made responsible for them on the allegation that they ORDERED, AUTHORIZED and PERMITTED their commission.

The charge against the present accused is that they ordered, authorized and permitted THE FOLLOWING PERSONS to commit the alleged offenses:

1. The commanders-in-chief of the several Japanese naval and military forces in each of the several theatres of war in which Japan was then engaged,
2. The officials of the Japanese War Ministry,
3. The persons in charge of each of the camps and labour units for prisoners of war and civilian internees in territories of or occupied by Japan,
4. The military and civil police of Japan, and
5. Their respective subordinates.

THE QUESTIONS that arise for our consideration here are:

1. Whether the evidence adduced establishes these acts;
2. Whether the evidence adduced establishes the alleged connection of the accused with these acts;
3. Whether these acts or any of them constitute a crime in international law;
4. Whether in international law the accused or any of them is criminally liable for such criminal acts.

Before proceeding to the evidence adduced in this case on this phase, I would once again utter a word of caution. Stories of war crimes generate passion and desire for vengeance. We must avoid all influence of resentment. We must avoid all possible interference of emotional factors and remember that we are here concerned with events which occurred at the time when fighting was going on. There is the special difficulty that the events occurring then were likely to be witnessed only by excited or prejudiced observers.

Further, belligerents, who during war succeed in winning victories and getting prisoners of war, are liable to be credited with cruelties of the character alleged in the present indictment and , if ultimately defeated, their very defeat as it were establishes their most devilish and fiendish character. We are told, if punishment does not strike here, it should strike nowhere. We must

avoid any such feeling.

In appraising the value of any contemporary press report or the like we must not forget the part propaganda is designed to play in wartime. As I have noticed already, a sort of vile competition is carried on in exerting the imagination as a means of infuriating the enemy, heating the blood of the stay-at-homes on one's own side and filling the neutrals with loathing and horror. I have given above some war atrocity stories. I might also mention the story given out during the First World War about the use of dead bodies by the Germans. The story will remain recorded in history as the classic lie of war propaganda. Mr. A. J. Cuming, the then political editor of the "News Chronicle", an influential and widely circulated daily newspaper of England, in his book entitled "The Press" published in 1936, exposed the lie of this piece of propaganda and narrated how it was utilized. He said: "In Parliament, on April 30th, the late Mr. Ronald McNeil asked whether the Prime Minister would take steps to make known 'as widely as possible in Egypt, India and the East generally the fact that Germans were boiling down their dead soldiers into food for swine'." When Mr. John Dillon intervened to ask whether the Government had any solid ground for believing it, Lord Robert Cecil, Minister of Blockade, replied that he had no information beyond the extracts that had appeared in the Press, but "in view of other actions taken by the German military authorities there is nothing incredible in the present charge against them".

He added: "His Majesty's Government *has allowed* the circulation of the facts as they appeared through the usual channels."

* * * * * *

"The incident has now rearly slipped out of the public memory. The British authorities tried to forget it as soon as it had done its dirty work. But it is still dimly believed in as a fact by many persons who read no denials in the British Press and, like Lord Robert Cecil, saw 'nothing incredible' in the charge made in responsible papers whose *bona fides* they still artlessly trusted."

Mr. John Basset Moore, formerly a Judge of the Permanent Court of International Justice writing in 1933 says: "There are, I believe, a few persons who realize the extent to which propaganda has been used in connection with international relations, ... Only this year a leading English periodical has said: During the war the astonishingly efficient British propaganda service convinced the Americans of some of the most bizarre fairy tales that have ever been devised. To this day most of the population has not recovered from the alleged information which it then swallowed whole."

We cannot ignore the fact that the nations of the present-day civilized world do not always show much scruple in adopting a different standard of conduct in their behaviour in connection with what they consider to be their national cause, from what they follow in their private life. They feel no scruples in *devising* "bizarre fairy tales" and spare no pains in making people "swallow the same whole".

To add to this, since the First World War there has been such a demand for the trial and conviction of defeated warlords, that a sort of unconscious processes were going on in the mind of everyone who devoted his interest and energies to get these persons punished. These processes in most cases remain unobserved by the conscious part of the personality and are influenced only indirectly and remotely by it. The result might be a partial distortion of reality. There would always be some eagerness to accept as real anything that lies in the direction of the unconscious wishes.

The past history of propaganda would have a very important bearing on the present case, at least when we would come to consider the legal effect of any alleged INACTION on the part of any of the accused. Even if it be now established that during the war with which we are at present concerned, these factors did not at all operate, it will still remain a pertinent consideration whether or not the past experience of war-time propaganda would be likely to influence the inclination of the mind of the accused towards acceptance or rejection of the several war-time stories of atrocities coming, as they were, from the hostile sources.

I might mention in this connection that even the published accounts of Nanking "rape" could not be accepted by the world without some suspicion of exaggeration. Referring to the same incident, even as far back as November 10, 1938, Colonel Steward (in the chair) at Chatham House considered that such things as happened at Nanking were regrettable, but that he "could cast his mind back to 1900, and see that whatever was happening now, it was probable that the Japanese had learned it from other nations".

Referring to the same incident, Sir Charles Addis on that occasion could say:

"Between two countries at war there was always a danger that one or other of the combatants would seek to turn public opinion in his favour by resort to a propaganda in which incidents, inseparable alas (!) from all hostilities, were magnified and distorted for the express purpose of inflaming prejudice and passion and obscuring the real issues of the conflict."

That purpose like the above might have operated on the present occasion also cannot be ignored altogether. I have already referred to some instances wherein some suspicion of distortion and exaggeration cannot be avoided. If we scrutinize the evidence about Nanking rape carefully, similar suspicion would again be unavoidable.

The two main witnesses of Nanking atrocities are Hsu Chuan-ying and John Gillespie Magee.

Dr. Hsu was a Ph. D. from the University of Illinois. His statement, taken out of court, was sought to be given in evidence in this case. This was prosecution document 1,734. We disallowed this and ruled that he should be examined in court. Accordingly, he was so examined. He was a resident of Nanking and in December 1937 was connected with the Red Swastika Society.

Mr. Magee was a minister of an Episcopal church at Nanking from 1912

to 1940 and was in Nanking throughout the month of December 1937 and January and February 1938.

Both these witnesses have given us horrible accounts of the atrocities committed at Nanking. It is, however, difficult to read this evidence without feeling that there has been distortions and exaggerations. I would only point out a few instances to indicate that it may not be quite safe to accept the entire story given out by these witnesses.

Dr. Hsu gives us the following stories. I give them in his own language. He says:

1. "I see with my very eyes the Japanese soldier raping a woman in a bathroom, and his clothes outside, and then AFTERWARDS we discovered the bathroom door, and found a woman naked and also weeping and downcast."
2. "... We went to the camp to try to get—to catch two Japanese who were reported to be living there. At the time we reached there we saw one Japanese still sitting there, with a woman on the corner and weeping. I told FUKUDA, 'This is the man who did the raping,' ....."
3. "Once we caught a Japanese raping, and he was naked. He was sleeping, because then we tied him and we got him to that police office."
4. "I know another case where because of the boatman, he happens to be a member of the Swastika Society, he told me this: where he saw that too on his boat, it happened on his boat. There was a family of respectable people tried to cross the river on that boat. Now, in the middle of the water of the river, two Japanese soldiers came. They found—they want to inspect that boat; where, on seeing the young women there, the young women and girls there, two of them, so they began, started raping right in the eyes of their parents and one of their husbands.

   "After raping, the Japanese asked the old man in that family: 'Isn't that good?' Where his son, the husband of one of the young women, he got so angry so he began to beat the Japanese soldier. The old man cannot stand such a thing so he knows that they were all in trouble so he immediately jumped into the river. Then his wife, old wife, the mother of that young man, she began to weep and came out and also followed her husband. I forgot to say that when the Japanese asked the older man whether it is good or not, he wanted the old man to rape that young girl, so all the girls—now I saw this—they all jumped into the river. So the whole family jumped into the river and all drowned. This is not secondhand story. This is a real, real and genuine, and we have, we know that, the boatman has been with us for a long time."

We may next take some instances from Mr. Magee's evidence:

1. "On December 18th, I went with Mr. Sperling, a German member of our Committee, to the residential section of the city. It

seemed to us that there were Japanese soldiers in every house after women. We went into one house. On the ground floor a woman was weeping, and the Chinese there told us she had been raped. They said there was still another Japanese in the house on the third floor. I went up there and tried to get into the room that was indicated. The door was locked. I pounded on the door and shouted and Sperling soon came and joined me. After about ten minutes a Japanese soldier came out leaving a woman inside."

2. "I was called to another house, drove out three Japanese in the woman's quarters on the second floor; and then the Chinese there pointed to a room. I rushed into the room, bursting open the door and found a soldier—a Japanese soldier—in the act of rape. I drove him out of the room, ..."
3. "One woman that I have known for almost thirty years, one of our Christians, told me she was in a room with one girl and then when the Japanese soldier came in, she knelt before him, begging him to leave the girl alone. He hit her over the head with the flat side of a bayonet and raped the girl."

It seems these witnesses accepted every story told to them and viewed every case as a case of rape. Is it really so easy to accept the story given by the boatman? There were only two Japanese soldiers. On the other side, there were the girls raped, their father, as also the husband of one of the girls. Of course, there was also the boatman himself. The entire family valued their honour more than their life. The whole family subsequently did jump into the river and all killed themselves drowning. How with such a family could it be possible for the two soldiers to rape the girls "right in the eyes of their parents and one of their husbands"? Dr. Hsu did not see anything improbable in this story. He could give this story to us as a "real and genuine", because the boatman had been with the Red Swastika Society for a long time.

The other stories may certainly be accepted as instances of misbehaviour on the part of the Japanese soldiers with the Chinese women. But the witnesses unhesitatingly assert them as cases of rape. Even when they found one soldier and one Chinese girl inside a room and the soldier was sleeping, the witness could tell us that he went to sleep after raping; and, while giving this story, the witness almost felt that there could be no doubt about what he was saying.

I am not sure if we are not here getting accounts of events witnessed only by excited or prejudiced observers.

If we proceed to weigh the evidence carefully we shall find that in many cases the opportunity for observing the happening must have been of the most fleeting kind; yet the positiveness of the witnesses is sometimes in the inverse ratio to their opportunity for knowledge. In many cases, their conviction was induced only by excitability which perhaps served to arouse credulity in them and acted as a persuasive interpreter of probabilities and possibilities. All the irrelevancies of rumours and canny guesses became hidden under a predisposition to believe the worst, created perhaps by the emotions normal to the vic-

tims of injury.

Keeping in view everything that can be said against the evidence adduced in this case in this respect and making every possible allowance for propaganda and exaggeration, the evidence is still overwhelming that atrocities were perpetrated by the members of the Japanese armed forces against the civilian population of some of the territories occupied by them as also against the prisoners of war.

The question is how far the accused before us can be made criminally responsible for such acts. As I have pointed out above, the charge against these accused is—

(1) that they ordered, authorized and permitted CERTAIN PERSONS to commit those acts and such persons actually committed them; (Count 54)

or (2) that they deliberately and recklessly disregarded their legal duty to take adequate steps to prevent the commission of such criminal acts. (Count 55)

It should be remembered that in the majority of cases "stern justice" has already been meted out by the several victor nations to the persons charged with having actually perpetrated these atrocious acts along with their immediate superiors. We have been given by the prosecution long lists of such convicts. The length of such lists given in evidence is in no way incommensurate with the devilish and fiendish character of the alleged atrocities. I believe no one will be able to accuse any of the victor nations of any mistaken clemency towards any of the alleged perpetrators of all these foul acts. These convictions can, I believe, be taken as having sufficiently quenched any resentment and satisfied any passion and desire for vengeance generated by such resentment. Even as 'acts of moral reconstruction' and as 'the means by which the conscience of the world is re-asserting the dignity of the human race', such trials and convictions have not been inadequate in number.

We may now afford to proceed dispassionately to see if the guilt would reach these accused before us.

I would first of all consider the cases of atrocities committed against "the civilians then in the power of Japan belonging to" the various countries. For this purpose, I would prefer to take up counts 54 and 55 together.

The charges cover two different periods as follows:

1. In respect of atrocities in China the period is from 18 September 1931 to 2nd September 1945.
2. In respect of the atrocities in other theatres of war the period runs from 7 December 1941 to 2nd September 1945.

The evidence of atrocities really commences from the rape of Nanking after the fall of that city on the 13th December 1937. I would therefore take the first of the above periods as commencing from that date and subdivide it into the following sub-periods:

(*a*) The period from 13 December 1937 to 6th December 1941.

(*b*) The period from 7 December 1941 to the 2nd September 1945.

It should be remembered that besides alleging these atrocities generally in Count 54, the prosecution charged some specific instances of such atrocities committed in China in Counts 45 to 50.

Count 45 relates to the happening at Nanking. The period is given there as "on the 12th December 1937 and succeeding days".

At that time accused HIROTA was the Foreign Minister, KAYA, the Finance Minister and KIDO, the Education Minister. No other accused was in the Cabinet at that time.

The army concerned was the Central China Area Army of which accused MATSUI was the Commander-in-Chief and accused MUTO was the Vice-Chief of Staff. Accused HATA replaced General MATSUI as Commander-in-Chief from the 17th February 1938. I shall consider the constitution of the Army in further detail later on.

So far, therefore, as the Nanking Incident is concerned no other accused comes into the picture. We must keep this clearly in view.

The next incident in China is the fall of the city of Canton, which event took place on the 21st October 1938. Count 46 contains specific charges of atrocities alleged to have been committed there.

Of the accused before us accused ITAGAKI was the War Minister at that time, KIDO was the Welfare Minister and ARAKI, the Education Minister. Only these three accused were in the Cabinet at that time.

The Army concerned was the Central China Area Army as stated above, of which HATA was then the Commander-in-Chief.

These are the only accused who might have some connection with the atrocities, if any, committed there. As I shall show presently, there is absolutely no evidence of this alleged atrocity.

The next instance of atrocities is given in the indictment as those happening at the fall of the city of Hangkow.

Count 47 specifically relates to this incident. The period is given as prior and subsequent to the 27th October 1938.

At this time also accused ITAGAKI, KIDO and ARAKI continued in the Cabinet as stated above, and the same army with the same Commander-in-Chief was concerned with this event. As I shall indicate presently, I cannot accept as established any atrocity at this city, either.

These are the only three events which are specifically charged in the indictment during the first sub-period named above.

While giving evidence, the following instances were also introduced:

1. Alleged atrocities at the time of the capture of Soochow in Kiangsu Province in November 1937.
2. Instances of murder and destruction of houses in a village in Hupeh Province in 1937.
3. Instances of torture and murder of civilians in 1938, described by Colonel Kiang, Judge of Chinese Military Court for trying war criminals.
4. Instances of rape and murder in Peiping in 1940.

5. Instances of looting, burning and murdering of civilians in Suiyuan Province in 1940.
6. Instances of acts of robbery and wanton destruction of property at Liang Dung village in 1941.
7. Atrocities in the village of Si Tu Ti in Bing Chuang District in Jehol Province in August 1941.
8. During the Second Changsa campaign in September 1941.

These are all the instances of atrocities in China during the period preceding the Pacific War.

Some of the cases of atrocities in China during the Pacific war are also specifically charged. These are to be found in counts 48, 49 and 50.

Count 48 relates to the atrocities alleged to have been committed in the city of Changsha. The date is given as prior and subsequent to 18th June 1944. As I shall show presently the evidence about this matter is anything but satisfactory.

At that time the following accused were in the Cabinet: TOJO, War, Prime and Home Minister, SHIGEMITSU as Foreign Minister, and SHIMADA as Navy Minister.

Accused TOGO ceased to be a member of that Cabinet on lst September 1942 and accused KAYA ceased to be a member on 19 February 1944.

From March 1, 1941 to November 22, 1944 accused HATA was the Commander-in-Chief of the Expeditionary Force to China. These are the only accused who could be mentioned in connection with this incident. No one else had any connection whatsoever with it.

The next instance relates to the occurrences in the city of Hengyangi in the Province of Hunan. Count 49 relates to this incident. The date is given as prior and subsequent to the 8th August 1944. It must be remembered that the TOJO Cabinet fell by the 22nd of July 1944. At the date of this incident accused KOISO was the Prime Minister and SHIGEMITSU was the Foreign Minister. No other accused was in the Cabinet. Accused HATA was still Commander-in-Chief of the Expeditionary Force to China. The Prosecution did not adduce any evidence in support of this case.

Next comes the allegations of atrocities in the cities of Kweiling and Liuchow in the Province of Kwangsi. Count 50 relates to this and the date is given as prior and subsequent to the 10th November 1944. Here again the evidence is not convincing and in my opinion the allegations have not been established.

The connection of the accused with the incident continued to be the same as in the case of the city of Hengyang.

These are the only instances specifically mentioned in the Indictment. During trial, the following instances were also introduced through evidence:

1. Instances of wanton destruction of the property by the 65th Regiment, 104th Brigade, 13th Division of the Japanese Army occurring in Hupeh Province in 1943.
2. The incident that took place in the village of witness Ti Shu Tang

in 1942.

3. Atrocity in Jenchiu Hsien in September 1943.
4. At the village Chuar Twen Tseng in 1945 by the 38th battalion of the 4, 204th Japanese Army unit.
5. Occurrences in Kwangsi Province during 1944-45.
6. Looting by Japanese troops of Chinese civilians at the Salwin River in Burma Highway in May 1942.

Accounts of atrocities at other theatres of war were all introduced through evidence in this case. The prosecution, in summing up the evidence, separated the Philippine Islands from the rest of the theatres, and divided the entire period into seven divisions. We shall try to follow this division both as to place and time.

The division as to time stands as follows:

I. From the 7th December 1941 to 30th June 1942
II. From 1st July 1942 to 31st December 1942
III. From 1st January 1943 to 30th June 1943
IV. From 1st July 1943 to 31st December 1943
V. From 1st January 1944 to 30th June 1944
VI. From 1st July 1944 to 31st December 1944
VII. From 1st January 1945 to 2nd September 1945.

The places named in the summation are in the following order:

1. Ambon Island Group
2. Andaman and Nicobar Islands
3. Borneo
4. Burma and Siam
5. The Celebes and Surrounding Islands
6. China other than Hongkong
7. Formosa
8. French Indo-China
9. Hainan Islands
10. Hongkong
11. Japan
12. Java
13. New Britain
14. New Guinea
15. Singapore and Malaya
16. Solomon Islands, Gilbert and Ellice Islands, Nauru and Ocean islands
17. Sumatra
18. Timur and Lesser Sunda Islands
19. Wake Island, Kwajalein and Chichi Jima.

To this list I shall add the Philippine Islands as the 20th item with a further subdivision in its case of the sixth period into one from 1st July to 8th October and the other, from the 9th October to the end of the year.

I shall place the incidents alleged to have taken place at each place sepa-

rately, keeping in each case the occurrences during the periods named above distinct. At present I am giving only the occurrences relating to the "civilians in the power of Japan" belonging to the different countries as alleged in Count 54.

The Prosecution account of the atrocities committed against civilians in the power of Japan in different places stands thus:

1. AMBON ISLANDS GROUP:

There was no case of such atrocities during the first and third to seventh periods specified above. There was only one case during the second period. A witness named Van Nooten says that during this period a pregnant native woman was punched, knocked to the ground and kicked in the stomach by a Japanese guard in the presence of other guards. This is the only instance of atrocity against the civilians on this group of islands narrated by the Prosecution.

2. ANDAMAN AND NICOBAR ISLANDS:

There are no cases given for the first two periods and none during the fifth period. During the third period we are given two incidents: one in January 1943 and the other in March 1943.

The January item is evidenced by the statements of four different persons taken out of court. They all relate to cases of torture of individuals suspected as spies.

The March incident is evidenced by a similar statement of one Murad Ali, and that also relates to torture of persons suspected of espionage.

During the fourth period there is one case given of a coolie dying as a result of being beaten in August 1943.

During the sixth period, again one case is mentioned having taken place in October 1944 when an individual, suspected of theft of signal lamps, was tortured.

During the seventh period we are given four cases, three in July 1945 and one in August 1945. The first case is of two coolies being beaten to death for alleged stealing, and the second is of two Indians being beaten to death to compel them to confess having fired rockets. The case in August 1945 is that about 700 Indians were taken by sea towards another island. When 400 yards from shore they were forced overboard; all except 203 drowned. The remainder were left on the island without food for fifty days when the Japanese returned. The evidence in support of this case is again the statement of a man named Mohamed Hassen taken out of court. In this statement he claims to have been one of the party of 700 and the only one surviving.

3. BORNEO:

The first incident is of 27 December 1941. It is stated that 213 Indians were confined in one cell for day and night for one month. Later they were forced to work long hours on an airstrip. The evidence is again the statement

of a man named Naik Chandgi Ram of 2/15 Punjab Regiment, taken out of court, and he seems to be the only escaping member of the group. He claims to have escaped by hiding in the bushes.

During the third period we are given three instances. The first two seem to relate to two prisoners of war. The first one relates to the maltreatment of a private Hinchcliffe; and the second, which happened in March 1943, speaks of how an Australian, whilst a member of a working party, was tied up by his wrists to a tree and beaten about the head.

The third one says that from early 1943 onwards throughout Western Borneo, Indian and Chinese women were arrested and forced into brothels.

For the fourth period we are given two instances: One happened in August 1943 and the other in October 1943. The August incident relates to one Sticpewich, who is alleged to have been put in a cage with six others. The October incident is evidenced by the affidavit of one Mrs. Hoedt. The statement says that at Bandjermasin, in October 1943, the governor of Dutch Borneo, Dr. Haga and some ten officials were executed as well as four men after a so-called trial. Among them was a Swiss minister, Dr. Fischer, the official delegate of the International Red Cross.

One would expect much better evidence for such an incident. At any rate, we do not know what was the trial for.

During the fifth period we are given twelve instances beginning from 13 February 1944 to June 1944.

In support of these incidents we are given what is called a report made by one Captain M.J. Dickson of the British Army and a statement out of court of one Hassan Inanam.

The report of Captain Dickson states that in October 1943 a revolt broke out in Jesselton, Borneo. About forty Japanese were killed. What happened thereafter was in retaliation of this incident.

4. BURMA AND SIAM:

For this theatre of war we are given fourteen instances for the entire seven periods: The first on 13 December 1941, the second in July 1942, the third between July and November 1942, the fourth in September 1942, the next one in September 1943. Then four instances are given from February 1944 to August 1944, and the remaining four in the year 1945. These are mostly evidenced by statements taken out of court. At the worst these are all stray instances of cruelty towards individuals covering a period of five years.

5. CELEBES AND SURROUNDING ISLANDS:

Here we are given nine instances of which two occurred in March 1942; the next two occurred in September and October 1943; and the rest during 1944 and 1945. There were no occurrences during the second and third periods.

The incidents of March 1942, strictly speaking, do not relate to civilian population at all. The first one is that at Menado five Dutch NCO's, who

had participated in guerrilla activities and had been captured, were executed; and the second is about the maltreatment and execution of two Dutch NCO's who had defended the aerodrome and had been captured.

In September 1943 we are told that at Foelic one native was beheaded and another bayonetted to death.

The incident of October 1943 is that at Pomala a seriously wounded flier was operated on without anaesthetic and he died within a few hours.

In January 1944 at Pare-Pare internment camp a Roman Catholic priest was thrashed to death.

In March 1944 at Lolobata a native was beheaded without trial.

In September 1944 at Soegita three natives were beheaded without trial. A fourth was attempted but he escaped somehow and gave this evidence.

In January 1945 at Tondane two Dutch internees were put in gaol and later executed for communicating with outside people; and in February 1945 at Menado a Dutch internee died from ill-treatment.

6. CHINA OTHER THAN HONGKONG:

There are no incidents during the first, second, fourth, fifth and sixth periods.

During the third period in August 1943 at Haiphong Road Camp a civilian internee was tortured to unconsciousness and subsequently died several days later.

On 2 April 1945 at China Matan a captured American airman, whose right leg was injured, had his foot amputated by a Japanese civilian using a crude knife and no anaesthetic.

7. FORMOSA:

No incident could be named for any of the periods, obviously because Formosans were not enemies of Japan.

8. FRENCH INDO-CHINA:

No incidents could be named during the first five periods. During the sixth period there was one incident in June 1944. As some cases of disloyalty appeared amongst the coolies bringing water to the camp, the Japanese seized a 19-year old boy who had just left work, bound him to a tree and beat him violently. He was found dead the next morning from strangulation.

During the seventh period we are given nine instances of atrocities occurring at this place. The evidence about these atrocities is the testimony of one Gabrillagues. His knowledge is based on his "Study of the Documentation of the War Crimes" that the witness was making of the war crimes in Indo-China. The witness was a "delegate of the Service of the War Tribunal in Indo-China". The witness says, "Being in charge of the investigation bureau for war criminal suspects, I have been led in the performance of my functions to study a comprehensive body of documents and this fact has permitted me to have cognizance of the war crimes committed in Indo-China by the Japanese

forces." The witness then continues, "The number of these crimes is considerable, the documents containing them is voluminous and there could be no question of making a complete expose of them. Certain of them are and will remain unknown because of the absence of witnesses and the systematic destruction of their files carried out by the Japanese in anticipation of an allied landing." The materials on which the conclusion of this witness is based, of course, remain unknown to us. What we get is only the conclusion of the witness on materials which he considers sufficient for his conclusion. The other evidence of course are statements of persons taken out of court.

9. HAINAN ISLAND:

No instances of atrocities could be given for any period excepting the fourth. Only one instance is named for the fourth period.

On 17 July 1943, 120 Chinese from a coolie camp were bayonetted to death without trial. The evidence is the statement taken out of court of one A. F. Winsor.

10. HONGKONG:

We are given no incidents from the second to the seventh periods. Five incidents are given, all occurring in December 1941.

11. JAPAN:

Nil.

12. JAVA:

Fourteen instances are named occurring during the entire seven periods beginning from 12 March 1942 and ending in August 1945.

13. NEW BRITAIN:

We are given two cases during the first period, none during the second, three during the third, two during the fourth, one in the sixth and none in the seventh period. These are all stray cases. The evidence is mostly statements of persons taken out of court.

Though in the summation the Prosecution spoke of Australians and Chinese being captured or killed, these are mostly cases of Australian and Chinese soldiers being captured or killed.

14. NEW GUINEA:

There is one case during the first period; five during the second; none during the third, fourth and fifth period; one during the sixth period, and none during the seventh period. These are also stray cases and are evidenced mostly by statements of persons taken out of court. Most of the cases relate to captured soldiers.

15. SINGAPORE AND MALAYA:

We are given six instances during the first period, none during the second and third, four cases during the fourth period, and one during the fifth, sixth and seventh periods.

16. SOLOMON ISLANDS, GILBERT AND ELLICE ISLANDS, NAURU AND OCEAN ISLANDS:

Here we have no case during the first two periods; four cases during the third period; none during the fourth, fifth and sixth periods, and one during the seventh period.

The incident during the seventh period speaks of what happened at the conclusion of war. There were only one hundred natives left on Ocean Islands. The Japanese marched them away in two sections, they were shot and the dead bodies towed out to sea. The earlier incidents are all stray cases. The evidence is of the same character.

17. SUMATRA:

We are given four cases during the first period, one during the second period, none during the third period, one during the fourth period, none during the fifth, and one each during the sixth and seventh periods.

18. TIMOR AND LESSER SUNDA ISLANDS:

We have one case for the first period, six for the second, one for the third, one for the fourth, none for the fifth, one for the sixth, and none for the seventh period. All these are stray cases, and the evidence is, as before, statements of persons taken out of court.

19. WAKE ISLAND, KWAJALEIN AND CHICHI JIMA:

We are given no instances from the second to seventh periods; only one instance is given for the first period.

In May 1942 an American civilian was badly beaten and then beheaded in the presence of Admiral Sakibara for an attempt at warehouse breaking.

20. THE PHILIPPINE ISLANDS:

During the first period we are given three incidents. In her affidavit Exhibit 1,417, Leonora Palacio stated that in the middle of February 1942 she, her two brothers and others were taken to the municipal building in Palo. At their home there had been a number of guerrillas and friends of the family. One of the guerrillas was discovered and the Japanese, believing there were others, took these people to the jail. These people were tortured there in various ways.

In May 1942 in Iloilo City, an American by the name of Dr. Gilbert Isham Cullen was questioned for several hours during which he was struck in the abdomen with a club, kicked while lying on the floor, slapped repeatedly with the heel of the hands of the inquisitor. He was tortured in various other ways.

About the middle of June 1942, a young woman was ordered by the puppet governor to go to the home of Colonel MINI in Tagbilaran. When she refused they threatened to kill her. Colonel MINI raped her. The following morning she jumped out of the window and succeeded in escaping to a nearby island.

These are the three incidents of the first period. During the second period, we are given an incident having taken place during July 1942 and another in August 1942. In support of the July incident we are given the testimony of Nena Alban, a nurse at the trial of General HOMMA. This witness saw many incidents. She saw four Filipinos being beheaded. She later saw two more and thereafter seven more who were made to kneel across a hole in the ground and were beheaded. She later saw ten more beheaded. She saw other atrocities. She saw Filipinos slapped, boxed, kicked and beaten. She saw four Filipinos being bayonetted later near San Beda College. She saw at least seven Filipinos have their tongues pulled out by pliers. It is unfortunate that an eye witness of so many incidents was not produced before us and we had simply what she stated before another tribunal where none of the present accused was represented. I would not for the present purpose accept this eivdence.

The incident of August 1942 is that one early dawn some Japanese soldiers from Dansalan City, under the command of four officers, raided the witness's barrio, which had a population of about 2,500. They immediately began bayonetting the people and burned down the whole barrio. This incident also is sought to be established by a statement taken out of court and we are not told why the witness could not be produced before us.

The incident during the third period is of March 13, 1943 when an old Filipino, Tayambong Chagsa by name was tortured for not telling the Japanese the whereabouts of the American and Filipino soldiers.

For the fourth period we are given five instances.

In August 1943, after an investigation of an hour, twenty-four men and three women were all tied with hands behind their backs and strung on a piece of rope and pulled to a thicket where they were beheaded. The evidence is a statement made out of court of one Jose G. Tupaz. The man did not come before the Tribunal.

On October 17, 1943 another punitive expedition arrived at Bataan. All civilians were investigated and beaten with clubs and made to walk through fire. In the morning the Japanese received orders to proceed and 140 civilians including two priests were beheaded by Japanese soldiers. This we are told from a summary of evidence of JAG Report No. 140 on punitive expeditions on Panay Island by Japanese forces. This report may be admissible in evidence under the Charter but I cannot accept this as of much probative force on a grave matter like the one before us. I do not see why the materials on which this report might have been based could not be disclosed to us so that instead of having to rely on a conclusion of the report, we might see what conclusion we can ourselves arrive at.

On December 18, 1943 Japanese officers and enlisted men left Libacao

for Iloilo City. The next morning they entered Camp Hopevale which they surrounded and entered. Sixteen American and three others were placed under guard without food or water. On the afternoon of December 20, one American woman was seen kneeling with hands tied and asking for mercy. This was refused. An hour later a house was found in flames with twelve bodies in it, some of the victims having been bayonetted and others beheaded. This is also from the same JAG Report. I need not further comment on this evidence.

For the fifth period we are given an occurrence which took place in February 1944 when 35 Filipinos were questioned, beaten and taken to a corn field and there bayonetted. This story again is given on the strength of JAG Report No. 142.

In March 1944 a young woman was caught hiding in the grass. The officer-in-charge tore off her clothes and took her to a small hut and cut her breasts and womb. This is a statement taken out of court of a man Lorenzo Polito.

On April 10, 1944, six Japanese bayonetted one woman. On August 27, 1944, soldiers fired on people in the cockpit in Santa Catalina. On October 20, 1944, thirty were arrested and tortured. On November 15, 1944, three prisoners were beheaded. On December 27, 1944, several persons were tortured and on January 7, 1945, nine of the prisoners were beheaded. All this we are given from JAG Report No. 302.

On June 6, 1944, about 300 Japanese together with Filipino Constabulary and Moro troops entered Ranao-Pilayan and gathered the civilians. On June 7, twenty prisoners were put in one house where they were bayonetted and the house set on fire. We are given this story also on the strength of JAG Report No. 302.

During the first half of the sixth period we are given two instances. One happening on August 19, 1944 and the other on October 1, 1944.

At about 9 o'clock in the evening of August 19, 1944 the witness and others left Cebu and were taken to Cordova. When they arrived there the Japanese soldiers gathered all civilians in a central school house. The women were compelled to disrobe completely. Many of the men were beaten with clubs. All money and valuables were taken. The next morning three men were beheaded. The witness made this statement out of court and did not appear before the Tribunal.

On October 1, 1944, about fifty Japanese soldiers entered the hospital area at Barrio Umagos and bayonetted two Filipino guards and one civilian. Two bedridden patients were bayonetted to death. Three days later, the Japanese burned the buildings and about thirty-two houses and left. This is again JAG Report No. 282. There is nothing else in support of it.

I need not give in detail the incidents taking place since November 1944. We are given several incidents taking place during this period and certainly these were atrocious misdeeds.

These are the instances of atrocities perpetrated by the Japanese army against the civilians at different theatres during the entire period of the war.

The devilish and fiendish character of the alleged atrocities cannot be denied.

I have indicated against each item the nature of the evidence adduced in support of the occurrence. However unsatisfactory this evidence may be, it cannot be denied that many of these fiendish things were perpetrated.

But those who might have committed these terrible brutalities are not before us now. Those of them who could be got hold of alive have been made to answer for their misdeeds mostly with their lives. We have been given by the Prosecution long lists of such criminals tried and convicted at different forums. The very length of such lists is sufficiently assuring that no mistaken clemency towards these alleged perpetrators of all such foul acts could find any place anywhere. We are, however, now considering the case of persons who had no apparent hand in the perpetration of these atrocious deeds.

It may at once be said that so far as this part of the case is concerned, there is absolutely no evidence of any order, authorization or permission as alleged in Count 54. There is nothing on the record which can in any way support the allegation of ordering, authorizing and permitting the commission of the offenses named in Count 53 and charged in Count 54. In this respect the case before us stands on a footing entirely different from what was found established by the evidence at the trial of the European-Axis-Major-War-Criminals.

As I have already pointed out, there were in evidence at the Nurnberg trial many orders, circulars and directives emanating from the major war criminals indicating that it was their policy to make war in such a reckless, ruthless way. We know that during the first World War, also, the German Emperor was charged with issuing directives like that.

The Kaiser Wilhelm II was credited with a letter to the Austrian Kaiser Franz Joseph in the early days of that war, wherein he stated as follows:

"My soul is torn, but everything must be put to fire and sword; men, women and children and old men must be slaughtered and not a tree or house be left standing. With these methods of terrorism, which are alone capable of affecting a people as degenerate as the French, the war will be over in two months, whereas if I admit considerations of humanity it will be prolonged for years. In spite of my repugnance I have therefore been obliged to choose the former system."

This showed his ruthless policy, and this policy of indiscriminate murder to shorten the war was considered to be a crime.

In the Pacific war under our consideration, if there was anything approaching what is indicated in the above letter of the German Emperor, it is the decision coming from the allied powers to use the ATOM BOMB. Future generations will judge this dire decision. History will say whether any outburst of popular sentiment against usage of such a new weapon is irrational and only sentimental and whether it has become legitimate by such indiscriminate slaughter to win the victory by breaking the will of the whole nation to continue to fight. We need not stop here to consider whether or not "the atom bomb comes to force a more fundamental searching of the nature of warfare and of the legitimate means for the pursuit of military objectives". It would

be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war. Nothing like this could be traced to the credit of the present accused.

The Prosecution seeks to build up its case in this respect inferentially from the alleged knowledge and inaction on the part of the accused concerned. It asserts that the evidence adduced in the case establishes that the Japanese Government had knowledge that war crimes had been and were being committed. From this factum of knowledge coupled with the fact that it made no effective attempt to prevent their continuance, we are invited to hold that such crimes were being committed as part of the government's policy.

The Prosecution told us that in its summation the expression "Japanese Government" is used in a very wide sense as embracing not merely members of the Cabinet but also senior officers of the Army and Navy, ambassadors and senior career public servants. We must, therefore, take the expression as used here in that wide sense.

So far as the Nanking rape is concerned, the Prosecution claims to have established that the following persons had knowledge of it:

1. Accused MATSUI, who at that time commanded the Central China Expeditionary Force (Exhs. 25, 255);
2. The Japanese diplomatic officials in China;
3. The Foreign Office in Tokyo;
4. The Foreign Minister, accused HIROTA;
5. Accused MINAMI, who was at that time Governor General of Korea;
6. Nobufumi Ito, Japanese Minister at large in China;
7. The House of Peers; and
8. Accused KIDO.

For the knowledge of accused MATSUI, his own statement is relied on where he says that he was in Nanking on 17 December 1937 and remained there for one week before returning to Shanghai. He heard from Japanese diplomats as soon as he entered Nanking that the troops had committed many outrages there.

The defendant, General MUTO, then Adjutant to the Chief of Staff, stated that he went to Nanking with General MATSUI for the "taking-over" exercises and remained there for ten days.

The Prosecution points out that General MATSUI remained in command until February 1938, but that during the period no effective steps were taken to correct the situation.

As to the knowledge of the Japanese diplomatic officials, the evidence is of Dr. Lewis Smythe, who was secretary of the International Committee of the Nanking Safety Zone, organized by a group of German, British, American and Danish citizens who were in Nanking at the time of the fall of that city. Dr. Smythe was secretary of this committee from 14 December 1937

until 10 February 1938. His evidence is that the committee made daily personal reports to the Japanese Embassy in Nanking. Dr. Smythe says that the Embassy continually promised that it would do something about it, but it was February 1938 before any effective action was taken to correct this situation.

Dr. Bates, professor of history in the University of Nanking, who was a founding member of the International Committee for Safety Zone, in his evidence stated that almost daily for the first three weeks he went to the Embassy with a typed report or letter covering the preceding day, and frequently had also a conversation with the officials regarding it. These officials were Mr. T. Fukui, who had the rank of consul; a certain Mr. Tanaka; and the Vice-Consul, Mr. Yoyoyasu Fukuda. Mr. Fukuda is now secretary to the Premier, Yoshida.

According to Dr. Bates, these Japanese authorities were honestly trying to do what little they could in a very bad situation but they themselves were terrified by the military and they could do nothing except forward these communications through Shanghai to Tokyo. These officials in the Embassy also assured the witness that on several occasions strong orders were sent from Tokyo to restore order in Nanking. The witness also learned from the foreign diplomats and from a Japanese friend of his who accompanied the deputation, that A HIGH MILITARY OFFICER called together a large body of lower officers and non-commissioned officers, telling them very severely that they must better their conduct for the sake of the name of the army.

The witness further testified that the situation did not substantially improve until the 5th and 6th of February 1938 and that he knew that reports made to the Japanese Consulate in Nanking were sent by it to the Japanese Foreign Office in Tokyo. "After February sixth and seventh", the witness said, "there was a noticeable improvement in the situation, and although many serious crimes occurred between then and summer, they were no longer of a mass and intolerable character."

He further stated, "I have seen telegrams sent by Mr. Grew, the Ambassador in Tokyo, to the American Embassy in Nanking, which referred to these reports in great detail and referred to conversations in which they had been discussed between Mr. Grew and officials of the Gaimushoo including Mr. HIROTA". Of course, he did not otherwise know if these reports were really sent to Tokyo and to whom they were sent.

According to the Prosecution "all reports concerning those atrocities were forwarded to HIROTA in addition to condemning press reports from the Foreign Press, but even when reports continued to come in, he did not press the question with the War Minister, nor refer it to the Cabinet".

The evidence is that HIROTA communicated this to the then War Minister, General SUGIYAMA. The War Minister promised to take immediate steps and did send a strong warning. Accordingly, HIROTA assured Grew that "the strictest possible instructions had gone out from the General Headquarters to be handed down to all the commanders in China to the effect that these depredations must cease and that Major General HOMA had been sent to Nanking to investigate and to ensure compliance". (Exh. 328)

It is in evidence that on January 19, Mr. Grew reported from Tokyo that HIROTA had taken action on Grew's protest and that "a drastic measure to assure compliance by forces in the field with instructions from Tokyo is being considered".

Accused MINAMI at that time was Governor General of Korea. He read reports of the atrocities in the press. I do not see how this helps the prosecution case in any way. This only shows that there were press reports of these atrocities. No one denies that.

Nobufumi Ito, Minister at large from Japan to China from September 1937 to February 1938, testified that he received reports from members of the diplomatic corps and from pressmen that the Japanese Army at Nanking had committed various atrocities at the time. He further testified that he did not seek to verify these reports but sent a general resume of the reports to the Foreign Office in Tokyo, all of which were addressed to the Foreign Minister.

Foreign newspaper accounts of the atrocities were referred to in the Budget Committee of the House of Peers on the 16th of February 1938, after the situation had already been brought under control. The accused KIDO was present there. But I do not see how this fact supports the prosecution theory of government policy at all. These criticisms and comments would rather go against any such hypothesis.

The above evidence no doubt shows that the reports of the Nanking atrocities reached the Tokyo Government. The evidence also discloses that the Government did move in the matter and ultimately the Commander-in-Chief, General MATSUI, was replaced by General HATA. The atrocities also abated by the first week of February. I do not see why, from this evidence, we should be driven to the conclusion that such atrocities were the results of the policy of the Japanese Government.

The Prosecution contends that as, even after this Nanking Incident, similar atrocities were perpetrated subsequently in several other theatres of war, it would be legitimate to infer that the Government did not want to prevent the continuance of this atrocious conduct of the Japanese Army. The Prosecution claims that the evidence adduced establishes the following facts:

1. The Japanese Government acquired knowledge of the rape of Nanking and thereafter it had reason to be on its guard against the repetition of war crimes by the Japanese forces throughout the fighting in China and the Pacific War;
2. It acquired knowledge of the commission of other war crimes prior to the outbreak of the Pacific War;
3. It acquired knowledge of the commission of war crimes in almost every theatre of the Pacific War;
4. Yet it made no real attempt to prevent their continuance.

The contention of the Prosecution is that the above facts would be very cogent evidence of the fact that such crimes were committed as part of the Government's policy or that the Government was quite indifferent as to whether they were committed or not.

I would examine how far the evidence on the record would go to establish

the facts stated above by the Prosecution.

I would, first of all, take up the case of atrocities alleged to have been committed at Nanking. The Prosecution evidence is that when Nanking fell on 13 December 1937, all resistance by Chinese forces within the city ceased. The Japanese soldiers, advancing into the city, indiscriminately shot civilians on the street. Once the Japanese soldiers had obtained complete command of the city, an orgy of rape, murder, torture and pillage broke out and continued for six weeks.

During the first few days, over 20, 000 persons were executed out of hand by the Japanese. The estimates of the number killed in and around Nanking within six weeks vary from 2, 60, 000 to 3, 00, 000, all of whom were practically murdered without trial. The accuracy of these estimates is indicated by the fact that the records of the Third Swastika Society and the Tsung Shan Tong shows that these two organizations between them buried over 1, 55, 000 bodies. During the same period of six weeks, not less than 20, 000 women and girls were raped by Japanese soldiers.

This is the Prosecution account of the Nanking rape. As I have already pointed out, there is some difficulty in accepting the account given in its entirety. There have been some exaggerations and perhaps some distortions. I have already noticed some such instances. There were certainly some overzealous witnesses whose evidence would require careful scrutiny.

I may mention here one particular witness whose name was Chen Fupao. The statement of this witness is Exhibit 208. In this statement he claims to have been eye-witness of thirty-nine persons having been taken away from the refugee area on the 14th December and having been machine-gunned and killed near a little pond. This, according to the witness, happened in the daytime in the morning near the American Embassy. On the 16th he was taken by Japanese soldiers and again saw a lot of healthy young men being killed with bayonets. On the same day in the afternoon he was taken to Taiping Road and there saw three Japanese soldiers set fire to two buildings. He could even give the names of these Japanese soldiers.

This seems to me a somewhat strange witness. The Japanese seem to have taken such a special fancy to him as to take him to various places to witness their various misdeeds and yet spare him unharmed. This witness, as I have said, states that on the very second day the Japanese were in Nanking they took thirty-nine persons from the refugee area. The witness is definite that it was the 14th of December when this took place. Of this group, thirty-seven were killed on that very day. Even Dr. Hsu Chuan-ying could not say that any such thing happened on the 14th of December. He speaks of the Japanese behaviour of the 14th December in relation to the refugee camp, but does not say that anybody was taken away from the camp on that day.

Whatever that be, as I have already observed, even making allowance for everything that can be said against the evidence, there is no doubt that the conduct of the Japanese soldiers at Nanking was atrocious and that such atrocities were intense for nearly three weeks and continued to be serious to a total of six weeks as was testified to by Dr. Bates. It was only after February 6 or

7 that there was a noticeable improvement in the situation.

The defense did not deny the fact of atrocities having taken place at Nanking. It only complained of exaggerations and suggested that a number of the atrocities were committed by retreating Chinese soldiers.

There is absolutely no evidence about the atrocities in the City of Canton in 1938. The Prosecution introduced some evidence of atrocity here, but that related to the years 1941 and 1944.

The evidence relating to the year 1941 is Exhibit 351, being the statement of a man named Liu Chi-yuan taken out of court. The witness did not come before the Tribunal. The statement purports to narrate the incident of one single day. The entire statement stands thus:

> "On the 21st day of the 12th month (lunar calendar), 1941, Japanese troops entered the city of Wei-Yang, Kwangtung. They indulged in a massacre of the Chinese civilians, bayonetting them all, male and female, old and young without discrimination. I was the eyewitness of more than 600 Chinese slaughtered by Japanese troops in such places as the West Lake, Wu Yen Chiao, Sha Shia, Zai Pu Chang, Ho Bien, Fu Cheng, Shiao Kung, Hsien Cheng, Chiao Si An, the outside of the West Gate and North Gate, Pai Sha. Many others were killed in various other places. Those killed by the Japanese amounted to approximately 2,000 and they were all civilians. I escaped from the city and fled as far as Wu Yang Chaio where ten Japanese stabbed the left side of my abdomen with bayonets. I went through 20 days of medical treatment. The scar on my abdomen is an evidence."

The other evidence relates to the year 1944. It is also the statement of a man taken out of court. The statement is Exhibit 350. The name of the man is Wang Shi-Ziang. The entire statement stands thus:

> "In the morning of July 4, 1944, the whole Japanese Kojo troops arrived at Hiang Doong village of the Shan District, a place then under my administration. They indulged in arson, robbery, slaughter, and numerous other atrocities. As a result thereof, 559 shops were burnt, and more than 700 Chinese civilians killed. The damage sustained in the destruction of properties amounted to more than 200,000,000 Chinese dollars, according to the estimation made in 1944. Besides, there were more than 100 Chinese civilians wounded by the Japanese soldiers. Those whose whereabouts are unknown since their escape from this village are not included in the above mentioned number."

This is the entire evidence about the alleged atrocities in the Kwantung Province. However much we may consider ourselves free from any restrictive rules of evidence, I am afraid, we cannot entertain ourselves with similar relaxation in determining the probative force of any supposed evidence. I decline to attach any value to statements like these in a case of such gravity. I cannot believe that had atrocities been really committed in that province, the Prosecution could not have adduced any better evidence of the same.

I am not satisfied with the evidence of similar atrocities at Hankow. The only witness whose evidence in this respect is worthy of some consideration is

Albert Dorrence. The witness is the Manager, Standard Oil Company and was at Hankow during the latter part of October 1938. The Japanese occupation of Hankow took place on 27 October 1938. There were four or five American gunboats at Hankow at that time. The witness saw some atrocious incidents from these gunboats which he narrates in his examination-in-chief. The occupation took place in the afternoon. The morning after the occupation the witness saw several hundred Chinese soldiers collected by the Japanese at customs wharf. At that time in the Yangtze River the water being extremely low gangplanks running about half a mile from the solid ground out into the river are used. The Chinese soldiers in groups of three or four were taken down this long gangplank and were being thrown into the water. They were shot when their heads appeared above the water. This witness along with others on the American gunboat was watching this. When the Japanese soldiers saw them doing that they stopped. After that they put a group in a steam launch at the same place, took that out in the stream and there threw them overboard and shot them when they came up.

The story is given by this witness only and unfortunately none of the other eye-witnesses have been examined.

It may be remarked here that practically for each kind of story only one witness is produced, may be to minimize the possibility of discrepancies and contradictions. According to this witness, Chinese were being led down the gangplank and just at the point whence they were kicked into the river they were being physically examined. It is difficult to see why the Japanese felt the need of following this useless process of inspection right at the water edge.

In any case on the evidence of this witness alone I am not prepared to fasten any guilt of omission on the accused.

The evidence of two of the defense witnesses may be specially mentioned in this connection—both witnesses were before the Tribunal for cross-examination by the Prosecution and, in both cases, the Prosecution did not cross-examine them. Witness Yoshikawa was in charge of the rear staff members of the 6th Division during the Hankow campaigh. At the termination of the war he held the rank of Lt. Colonel. The other witness, Yoshibashi, Kaizo, was a captain at the time of the attack upon Hankow and was attached to the staff of the Second Army. These witnesses gave us quite a different account from what was given by Mr. Dorrance. I do not see why we should not accept this evidence, specially when the Prosecution did not even suggest anything against their veracity.

The Prosecution admits that there is no evidence of the alleged atrocities at Hankow having ever been reported to the Japanese Government as in the case of Nanking. This is not a negligible factor in these days of propaganda.

Coming to the case of atrocities at Changsha again, the Prosecution relies on a statement taken out of court of one Hsieh-Chin-Hua. The statement is Exhibit 342 and it stands thus:

"After the Japanese forces had occupied Changsha, they freely indulged in murder, rape, incendiarism, and many other atrocities throughout the district.

"On 17 June 1944, more than 10 soldiers went to To-shih, Shi Shan, to plunder. One of them was however shot to death by the Chinese Chen Ni troops, and this greatly enraged the Japanese soldiers who thus hit upon retaliation against civilians. On that evening, more than 100 Japanese soldiers, armed with machine guns, visited the place again. They machine-gunned and then set fire to all houses from both ends of the streets. Over 100 business houses including stocks of goods were thus entirely reduced to ashes.

"I was one of the victims who managed to escape from the town. Deprived of all personal belongings by the fire, I became homeless and had to live on alms."

I wonder if this witness did not really manage to escape before anything could happen to the city. In any case, such a statement may be admissible in evidence under the Charter; but I cannot place any reliance on it. Defense witness Yokoyama was commander of the 11th Army Corps that launched the attack on Changsha and occupied the city. He testified that there were no atrocities committed there.

The Prosecution introduced another such statement in order to show another instance of atrocity committed at Changsha. This statement is of one Tamura, Nobusada, lance corporal of the First Company, First Battalion, Second Independent Mounted Artillery Regiment of the Japanese Army. It is Exhibit 341 in this case and it relates to an incident alleged to have taken place in September 1941. So, this had nothing to do with the allegations in Count 48, which was alleged to have taken place in 1944. Moreover, the statement only shows some stray act of certain battalion, having nothing to do with any atrocity committed against any civilian population.

As regards the alleged atrocities committed at Hengyang, charged in Count 49, there is no evidence on record. The city is in the province of Hunan. Changsha also is in the same province. The Prosecution perhaps thought that the evidence relating to Changsha as noticed above would cover also this case. Whatever that be, so far as this particular city is concerned, there is absolutely no evidence to support this case.

Atrocities at Kueilin and Liuchow are alleged in Count 50. In support of this case, we have Exhibits 352 and 353.

Exhibit 352 is a statement signed by the president and vice-president of the city council at Kueilin, chairman of the board of directors of the Chamber of Commerce at Kueilin, two managing directors of the Chamber of Commerce of Kueilin, and the chairman and vice-chairman of the General Labour Union of Kueilin. It is dated May 21, 1946 and relates to atrocities committed by the Japanese troops in that city on a particular day in 1945.

Count 50 relates to certain incidents occurring in November 1944. The statement refers to what the Japanese troops stationed at Kueilin did a few days before their withdrawal from that city on the 28th of July 1945, fearing that the communication between Kwangsi and Hunan might be cut off by the Chinese Army then pushing forward. The Japanese Army was in occupation of the city for nearly a year. The incident mentioned is alleged to have taken place only when they were forced to withdraw from that city.

The next exhibit, 353, is a statement purporting to be of nine citizens of Kueilin, dated 27 May 1946. This statement says that "during the period of Japanese occupation of Kueilin, which lasted about a year, they freely indulged in all kinds of atrocities such as rape and plunder," etc. The statement is very general. There might have been stray cases; even such stray instances would provoke similar statement from the villagers.

Defense witness Masuda, who took part in the capture of Kueilin, having been a staff officer of the Eleventh Army under the command of the commander-in-chief of the China Expeditionary Force, gave evidence in this case in court, and he was not cross-examined by the Prosecution. He denied that there was any atrocity committed there or that there was any disorderly conduct on the part of the Japanese troops.

Yokoyama, Isamu, who was the commander of the Eleventh Army Corps which attacked and occupied Changsha, Hengyan, Kueilin and Liuchow, also gave evidence in this case; and he, too, was not cross-examined by the Prosecution. He also denied any disorderly conduct of the troops.

The Prosecution evidence does not convince me of the account given therein.

I need not proceed to examine in detail the evidence relating to the other stray cases of atrocious acts introduced in the evidence in this case. The evidence in almost every case is of the same character.

At any rate such stray cases prove absolutely nothing for our present purpose.

The case of the Philippines is presented as another instance of organized mass atrocity, and the rape of Manila is likened to the rape of Nanking.

During the first period, we are given only three incidents, one happening in the middle of February 1942, another in May 1942 and the third in June 1942. These are all stray instances and, I believe, the actual perpetrators of these misdeeds have been adequately dealt with. For our present purpose such stray instances prove nothing. There is hardly any army of any of the Powers including the victors where similar stray occurrences did not take place.

The real "rape of Manila" begins at a time when the war takes its turn against Japan.

While considering the cases of atrocities in the Philippines we cannot attach much importance to what happened there subsequent to October 9, 1944. That was a period when it became impossible for the Japanese commanders to control the troops effectively. All lines of communications became destroyed or disorganized and the victorious American army was effectively blocking all lines of communication. Their failure to control the troops during this period cannot be ascribed to any disregard of duty, not to speak of any wilful disregard of such duty. We should remember that under the Charter "disregard of duty" itself, though deliberate and reckless, is not a listed crime and consequently is not within the competence of this Tribunal to try and punish. Disregard of duty is only a relevant evidentiary fact to establish that the actual criminal act was the act of the person who is said to have disregard-

ed his duty.

If we analyze the evidence, it will appear that instances of the alleged atrocious incidents were very rare during the first five periods mentioned above. There might have been some stray cases but such incidents are not at all unusual. There is no army or navy in the world which has not committed crimes of this nature. Those who committed such acts have, I believe, already been punished. I do not think that from such stray cases we can draw any conclusions as to the policy of the government; and it is this policy with which we are now concerned. The analysis given above will show that the real atrocities on a larger scale were committed during the latter part of 1944 at a time when the war had taken its turn against Japan and the Japanese Army got hopelessly disorganized.

It is difficult to make even the commanders of the army responsible for what was happening at that time. Such acts would not, in my opinion, even indicate any negligence or wilful omission on the part of the commanders in the field. It would be absurd to suggest that such conduct of the soldiers at that stage of the war would in any way reflect on the policy of the government, which was operating far away from the field, having at that time even no satisfactory means of communication.

On a review of the entire evidence on this point, I have come to the conclusion that the evidence would not entitle us to infer that the members of the government in any way ordered, authorized or permitted the commission of these offenses. Nor can I accept the Prosecution hypothesis that such offenses were committed pursuant to any government policy. There is no evidence, testimonial or circumstantial, concomitant, prospectant, retrospectant, which would in any way lead to the inference that the government in any way permitted the commission of such offenses.

I would, therefore, at once say that so far as ARAKI, HIRANUMA, HIROTA, HOSHINO, KAYA, KIDO, KOISO, MINAMI, OKA, OSHIMA, SATO, SHIGEMITSU, SHIMADA, SUZUKI, TOGO and TOJO are concerned, I do not find any evidence which would entitle me to infer that they or any of them in any way ordered, authorized or permitted the commission of these offenses; or that there was any such inaction or omission on their part which would indicate that these were really pursuant to their policy or that they desired or intended that such acts be done. In my opinion, as members of the government, it was not their duty to control the troops in the field, nor was it within their power so to control them. The commanding officer was a responsible personage of high rank. The members of the government were certainly entitled to rely on the competency of such high-ranking officers in this respect.

Every government functions with the help of the appropriate machinery. These high-ranking members of the government were entitled to rely on the proper functioning of the machinery. There is no evidence in this case that there was any wilful distortion of this machinery. War is hell. Perhaps it has been truly said that if the members of the government can be tried and punished for happenings like this, it would make peace also a hell.

As the evidence stands, I cannot find any of the above persons guilty either of any criminal omission or commission in this respect.

The case of the persons in command of the armies involved would, however, stand on a footing different from that of the other members of the government. I would, therefore, consider their case separately.

Of the accused before us, the persons in command of the several armies concerned are DOHIHARA, HASHIMOTO, HATA, ITAGAKI, KIMURA, MATSUI, MUTO, SATO and UMEZU.

The relevant facts in respect of these persons are given below against their respective names:

1. DOHIHARA: Commander-in-Chief of Eastern Army in Japan, 1943-44; Commander-in-Chief of 7th Area Army in Singapore, 1944—April 1945.
2. HASHIMOTO: Commander of Artillery Regiment which shelled the "Ladybird", 1937.
3. HATA: Commander-in-Chief of Expeditionary Force in Central China, July 1940-44.
4. ITAGAKI: Commander-in-Chief of Japanese Army in Korea, July 1941—March 1945; Commander-in-Chief of 7th Area Army in Singapore, April 1945—August 1945.
5. KIMURA: Commander-in-Chief of Japanese Army in Burma, March 1944 to the end of the war.
6. MATSUI: Commander-in-Chief of Japanese forces in China, October 1937—February 1938 (Rape of Nanking —December 1937).
7. MUTO: Commander of the 2nd Guards Division in Sumatra, 1943; Chief of Staff of 14th Area Army in the Philippines under General YAMASHITA in 1944.
8. SATO: Assistant Chief of Staff of China Expeditionary Forces, January 1945; then Commander of the 37th Division in Indo-China and in Thailand to the end of the war.
9. UMEZU: Commander-in-Chief of the Kwantung Army, 7 November 1939—18 July 1944.

The evidence on the record would not certainly entitle us to hold that these commanders ordered or authorized the doing of the atrocious things by the personnel of the army under their command. The evidence certainly is not such as would entitle us to hold that these commanders in any way instigated the soldiers to do these atrocious things. I would, therefore, at the very outset dispose of count 54 in this connection by saying that the charge contained therein in respect of civilian population has not been established against any of these accused.

There is, however, count 55 of the indictment. It is a well-established

principle in criminal law that liability may arise from omission as well as commission, though it is often problematic as to what circumstances give rise to such liability for omission. The assimilation of omissions to positive actions takes place only when there is a duty to act. Further, in order that an omission may be criminal, we must be sure that the event was causally connected with the inactivity.

In my opinion, these commanders were legally bound to maintain discipline in the army and to restrain the soldiers under their command from perpetrating these atrocities.

It is true that a commanding officer is not liable for the acts of those in his command merely because he is their superior officer; but, because of his great control over them, he should be responsible for such acts of theirs which he could reasonably have prevented. He had the duty to take such appropriate measures as were in his power to control the troops under his command.

This, of course, would not mean that a commander or a commander-in-chief, in relation to the soldiers of the army under his command, stands in the same position as does a teacher in relation to his students in a classroom. We must not forget the actual area of operation of the army and the normal machinery provided wherewith the commander or the commander-in-chief is expected to exercise this control and on the proper functioning of which he is entitled to rely in this respect.

Accused General MATSUI was the Commander-in-Chief of the Central China Area Army which was responsible for the Nanking fall. He returned to Tokyo in February 1938 when General HATA replaced him on 17 February 1938.

On August 15, 1937 General MATSUI was appointed Commander of the Japanese Expeditionary Forces to Shanghai. On November 5 of the same year, the Imperial General Headquarters combined the then existing expeditionary forces to Shanghai and the tenth army to form the Central China Area Army, and appointed General MATSUI to be its commander-in-chief.

It was the duty assigned to the Central China Area to be over the headquarters of the Expeditionary Forces and of the Tenth Army, and unify the command of both armies. The duty consisted in co-ordination of a joint operation of both headquarters, the actual management and command of army strength being conducted by the commanding officers of each army. In each of the headquarters besides the staffs and the adjutants, there were the ordinance department, the medical department, the judicial department etc. But in the headquarters of the Central China Area Army there were no such personnel. (Exh. 2,577, R. P. 38,900)

The Imperial General Headquarters issued on December 1, to the Central China Area Army an order to attack Nanking in concert with the Navy.

On December 5, the headquarter of Central China Area Army moved to Soochow, 140 miles away from Nanking. General MATSUI was then ill but he took action on important matters in his sick bed having consultation with his staff. (Exh. 341)

On December 7, another commander was appointed for the Expedi-

tionary Forces to Shanghai. So, after this date, General MATSUI was the Commander-in-Chief of the Central China Area Army which comprised the Tenth Army under one Commander and Expeditionary Forces to Shanghai under another Commander.

Before carrying out the order of Supreme Headquarters to attack Nanking, General MATSUI issued orders to the Japanese Forces to the following effect:

"That Nanking was the capitol of China and the capture thereof was an international affair; that therefore, careful study should be made so as to exhibit the honour and glory of Japan and augment the trust of the Chinese people, and that the battle in the vicinity of Shanghai is aimed at the subjugation of the Chinese Army, therefore protect and patronize Chinese officials and people, as far as possible; that the Army should always bear in mind not to involve foreign residents and armies in trouble and maintain close liaison with foreign authorities in order to avoid misunderstandings."

Whereupon the Chief of Staff of the Expeditionary Forces, INUMA, and others, immediately transmitted the above-mentioned orders to all officers and men under General MATSUI's command. The Chief of Staff of Central China Area Army, TSUKADA, and six staff officers under him, prepared an order to the following effect:

1. The Central China Area Army intends to capture Nanking Castle.
2. The Shanghai Expeditionary Forces and the Tenth Army shall capture Nanking in accordance with the main points as to the capture of Nanking.

The main points, in the order as to the capture of Nanking, referred to above, were set out as follows:

1. Both Armies (Shanghai Expeditionary Forces and the Tenth Army) shall stop and prepare for capture of Nanking at the point 3 or 4 kilometers away from Nanking Castle when they so far advance.
2. On December 9th, scatter from airplanes, the bills advising surrender of the Chinese Army, stationed within the Castle of Nanking.
3. In case of surrender of the Chinese Army, only the two or three battalions, chosen from among the various divisions and military police, shall enter the castle and guard the assigned area within the castle as indicated in the map. Especially, perfectly carry out the protection of foreign interests and cultural facilities, as indicated on the map.
4. In case of the Chinese Army refusing to surrender, begin attack against Nanking Castle on the afternoon of December 10. Even in this case, the movements of the troops that enter the castle shall be the same as described above, *especially making military discipline and morality very strict* and restoring peace within the castle.

Simultaneously with the preparation of the above-mentioned order, AN INSTRUCTION was formulated under the head "Matters to be Borne in Mind regarding Capture of and Entry into Nanking Castle".

The substance thereof was as follows:

1. Entry of the Imperial Army into a foreign capital is a great event in our history and one that is to be perpetuated in history, attracting the attention of the world. Therefore let no unit enter the city disorderly; let the various units of ours be careful not to shoot one another; and above all let them be absolutely free from unlawful deeds.
2. Let the discipline and morality of every unit be especially strict thereby earning the respect and submission of the Chinese Army for the imposing air of the Imperial Army; and insure that no act whatsoever, which tends to disgrace honour, be perpetrated.
3. Absolutely observe off-limits of zone of neutrality especially established by the foreign diplomatic corps, except for cases of necessity, disposing sentry on needed points, to say nothing of absolutely refraining from encroaching upon foreign rights and interests in accordance with the map shown elsewhere. Beside, entry into Chungshan Mausoleum and the cemetery of other Revolutionary heroes as well as the Mausoleum of Emperor HSIAO, Ming Dynasty, is strictly prohibited.
4. The units to enter the Castle shall be the one especially chosen for that purpose by the division commanders concerned; let them know beforehand the matters to be remembered and the positions of foreign rights and interests in the Castle; let them be absolutely free from plunder; dispose sentry, if needed.
5. Plundering and causing fires, even carelessly, shall be punished severely. Together with the troops, let many military police and auxiliary police enter the Castle, and thereby prevent unlawful conduct.

On December 17, General MATSUI entered Nanking and learned from reports that, notwithstanding his strict warning, there were breaches of military discipline and morality. He ordered strict compliance with his former orders and removal of the troops in the Castle to the region outside the Castle. TSUKADA, Chief of Staff, and his subordinate staff officers, investigated the quartering capacity in the region outside of the Castle but found that the region concerned was unfit for quartering troops. (Exh. 2,577)

On December 19, therefore, the Tenth Army was sent back to the Wuho area of the Shanghai Expeditionary Forces. The 16th Division, alone, was assigned to remain in Nanking for guard duty and the other units were ordered to evacuate, one after another, to the northern shore of the Yangtze and Shanghai area. (Exh. 3,454)

After the General had returned to Shanghai with his staff officers, HE AGAIN HEARD RUMOURS of the unlawful acts of the Japanese Army in Nanking. On hearing this, he ordered a staff officer to transmit the following instruction to the Chief of Staff of the Expeditionary Force to Shanghai on the 26th or the 27th of December:

"It is rumoured that illegal acts are being committed in Nanking by Japanese troops. As I gave instructions on the occasion of the entry ceremony

into Nanking, no such acts should be taken under any circumstances for the honour of the Japanese Army. Especially, because Prince ASAKA is our Commander, military discipline and morals must be even more strictly maintained. Anyone who would misconduct himself must severely be punished. As for damage done, measures should be taken that they may be compensated or returned." (Exh. 2,577)

The steps thus taken by General MATSUI proved ineffective. But there is no suggestion that these were in any way insincere. On this evidence, I cannot ascribe any deliberate and reckless disregard of legal duty on the part of General MATSUI in this respect.

The Prosecution lays stress on the fact that there was an inadequate number of punishments in this case. As I have pointed out above, a commander-in-chief is entitled to rely on the efficient functioning of the machinery supplied for the purpose of enforcing discipline in the army. The army certainly was provided with personnel whose function it was to prosecute the offenders. It is in evidence that this part of the mechinery did function.

I do not believe that it is the function or duty of a commander-in-chief to proceed to prosecute such offenders. There were rumours and reports of atrocities coming to the commander-in-chief. He adequately expressed his disapproval, and he was entitled thereafter to rely on the two commanders of the two armies as also on the other high officials charged with the duty of maintaining discipline and meting out justice. We must also remember that General MATSUI was ill at that time and was relieved of his duty within a few weeks of these occurrences.

The position of a commander-in-chief of any army would be intolerable if he be not allowed, even for such a short period, to wait and see whether the machinery is adequately functioning. In my judgment, the evidence does not disclose any such inaction on his part as would entitle us to hold him criminally liable for what happened at Nanking in respect of the civilian population.

So far as this part of the case is concerned, there is no evidence against DOHIHARA, HASHIMOTO, ITAGAKI and UMEZU. As I have shown above, no satisfactory evidence of atrocities towards civilian population by the troops under their command during their command could be adduced which would entitle us to ascribe any such act to any criminal omission on their part.

As regards HATA, the evidence is that after the Nanking Incident MATSUI returned to Japan in February 1938 and General HATA succeeded him on 17 February 1938. Since then the atrocious conduct was notably brought under control though there still were some stray cases. In my opinion, the evidence would not justify a finding of inaction on the part of General HATA and would not sustain an inference of any causal connection of those stray incidents with any inactivity or omission of the Commander-in-Chief.

I have given above my view of the evidence relating to the atrocities alleged to have been committed during subsequent campaign. The Prosecution in my opinion, has failed to establish this part of the case.

In my judgment, therefore, accused HATA should be found not guilty of this charge.

KIMURA was Commander-in-Chief of the Japanese Army in Burma from March 1944 to the end of the war. No satisfactory evidence of any atrocities perpetrated against the civilian population of Burma during this period is on record which would entitle us to ascribe such acts to any criminal omission on the part of this accused.

SATO was Commander of the 37th Division in Indo-China and in Thailand from January 1945 to the end of the war. The evidence adduced by the prosecution regarding the maltreatment of the civilian population there during this period is worthless and I do not consider it safe to act on such evidence.

MUTO was Commander of the Second Guards Division in Sumatra in 1943 and Chief of Staff of the 14th Area Army in the Philippines under General YAMASHITA in 1944. There is evidence of atrocities towards the civilian populations of Sumatra and of the Philippines. The evidence on record relating to such atrocities in Sumatra refers to a period prior to MUTO's command. As regards Philippines, Exhibits 1, 355 to 1, 489 were given in evidence to establish these acts of atrocities. Witnesses Wanda O. Warff, S. B. Moody, Donald F. Ingle, gave evidence in Court about these acts. General YAMASHITA was in command of the Army and he has already been tried and punished for these acts.

MUTO was the Chief of Staff of the Army. I have already given my reason why I cannot make any of the authorities responsible for what was happening in the Philippines at that time.

I do not think the shelling of the 'Ladybird' is within the competence of this Tribunal to try. The matter was completely settled long before the present war commenced. The Prosecuting Powers would have been well advised not to seek thus to re-open such settled matters. Undoubtedly it would have been more dignified and graceful on their part to refrain from raking up matters which they themselves got settled otherwise to their complete satisfaction, even if they had nothing else to complain against their vanquished enemy.

WAR CRIMES *STRICTO SENSU*

IN RELATION TO

PRISONERS OF WAR

I would now take up the charges in Counts 54 and 55 of the Indictment in relation to the prisoners of war.

As I have noticed before, the crimes are mentioned in Appendix D of the Indictment. Sections 1-8 of Appendix D enumerate such crimes.

The crimes are alleged to be in breach of the laws and customs of war including those contained in the conventions, assurances and practices referred to in Appendix D.

The laws and customs of war and the conventions, assurances and practices that are referred to in Appendix D are the following:

1. The laws and customs of war as established by the practice of civilized nations.
2. The Convention No. 4, done at The Hague on the 18th of October 1907, concerning the laws and customs of war on land.
   (*a*) The regulations set out in the annex to the said Convention and forming part thereof.
3. The Convention No. 10, done at The Hague on the 18th of October 1907, concerning maritime war.
4. The international convention relative to the treatment of prisoners of war, done at Geneva on the 27th of July 1929 (hereinafter called the Geneva Convention).
   (*a*) Although Japan did not ratify the said Convention, it became binding upon her.
5. The international convention for the amelioration of the condition of the wounded and sick in armies in the field, done at Geneva on the 27th of July 1929 (known as the Red Cross Convention).
6. The assurances as per communications signed by the Foreign Minister TOGO.
   (*a*) (*i*) Communication dated the 29th of January 1942, signed by TOGO and addressed to the Swiss Minister in Tokyo, assuring that the Geneva Convention will apply *mutatis mutandis* to American prisoners of war.
   (*ii*) A communication dated 30 January 1942, addressed to the Argentine Minister in Tokyo, assuring that the Geneva Convention will be applied *mutatis mutandis* to English, Canadian, Australian and New Zealand prisoners of war.
   (*b*) A communication dated the 29th of January 1942, whereby Japan assured that she observes strictly the Red Cross Convention.
   (*c*) A communication dated the 13th of February 1942, signed by TOGO and addressed to the Swiss Minister in Tokyo, assuring that the Imperial Government will apply during the present war, on condition of reciprocity, the provisions relative to the treatment of prisoners of war of the Convention of 27 July 1929 to enemy civilian internees.
   (*d*) The above mentioned assurances were repeated by the Japanese

Foreign Minister on several occasions, as recently as the 26th of May 1943.

Coming to the particulars of the breaches of these conventions and assurances, the Prosecution gives them in eight sections.

Section 1 of Appendix D charges inhuman treatment, contrary to Article 4 of the Annex to the Hague Convention 4 of 1907 and the whole of the Geneva Convention 1929 as also to the said assurances.

Section 2 charges illegal employment of prisoners of war labour, contrary to Article 6 of the said Annex to the Hague Convention and to Part 3 of the Geneva Convention as also to the said assurances.

Section 3 speaks of refusal and failure to maintain prisoners of war, contrary to Article 7 of the said Annex to the Hague Convention and Article 4 and Part 3, Articles 9-12 of the said Geneva Convention.

Section 4 complains of excessive and illegal punishment of prisoners of war, contrary to Article 8 of the said Annex to the Hague Convention, Part 3, Section 5, Chapter 3 of the said Geneva Convention.

Section 5 deals with mistreatment of the sick and wounded, medical personnel and female nurses, contrary to Articles 3, 14, 15 and 25 of the said Geneva Convention and Articles 1, 9, 10 and 12 of the said Red Cross Convention.

Section 6 complains of humiliation of prisoners of war, especially officers, contrary to Article 8 of the said Annex to the Hague Convention and Articles 2, 3, 18, 21, 22 and 27 of the Geneva Convention.

Section 7 charges refusal or failure to collect and transmit information re prisoners of war and replies to inquiries on the subject, contrary to Article 14 of the said Annex to the said Hague Convention and to Articles 8 and 77 of the Geneva Convention.

Section 8 speaks of obstructions of the rights of the protecting powers, of Red Cross societies, of prisoners of war and of their representatives, contrary to Article 15 of the said Annex to the said Hague Convention, and to Ariticles 31, 42, 44, 78 and 86 of the said Geneva Convention.

In its summation of the evidence, the prosecution claimed to have established the following:

1. That the war crimes, of which evidence has been given, were in fact committed;
2. That they were committed in some cases as a part of the policy of the Japanese Government;
3. That in the remaining cases the Government was indifferent as to whether they were committed or not.

The prosecution used the expression "Japanese Government" in this connection in a very wide sense as embracing not merely members of the Cabinet but also senior officers of the army and navy, ambassadors and senior career public servants.

The evidence is overwhelming to establish maltreatment of the prisoners of war in various ways. It will serve no useful purpose to discuss this evidence in detail. The actual perpetrators of these brutalities are not before us. Those

of them who could be got hold of alive have been adequately dealt with by the allied powers.

We have now before us a different set of persons, who were at the helm of affairs in Japan during the war and who are sought to be made responsible for those brutal atrocities roughly on the ground that these were the result of the policy adopted by Japan at their instance in making the war in that ruthless manner.

The alleged criminal acts committed in relation to the prisoners of war are not all of the same category. They are not all criminal *per se*. Some of them are alleged to be criminal by reason of their being in violation of the conventions and assurances. Others are alleged to be criminal *per se*. We shall have to keep them distinct for our present purpose and see how far we can make any of the present accused criminally liable for such acts.

Mr. Carr for the prosecution invited us to hold the accused criminally liable because of the following factors:

1. (*a*) That the Government of Japan was in effect bound by the Geneva Convention of 1929

or (*b*) failing that,

(*i*) They were unquestionably bound by the Hague Conventions Nos. 4 and 10 of 1907,

(*ii*) All the conventions are merely declaratory of international law.

2. (*a*) That the prisoners of war are in the power of the capturing Government and not of the individuals or corps which capture them.

(*b*) (*i*) No Government or member of it can evade responsibility by trying to shift it on to a particular department.

(*ii*) The main responsibility remains with every *individual member* of the government.

3. (*a*) All persons who have power to control the acts of others who commit breaches of the laws of war

and (*i*) who, knowing that such breaches have been committed, take no steps to prevent their repetition

or (*ii*) who, having reason to anticipate violation of the laws of war by persons under their control, fail to take proper measures to prevent their occurrence

or (*iii*) who, having a duty to ensure that their colleagues conform to the laws of war, neglect to perform that duty are themselves guilty of offenses against the laws of war.

(*b*) In fixing responsibility for violations of the laws of war upon such persons, it may be necessary that they should have knowledge

(*i*) that the atrocities are likely to be committed

or (*ii*) have been committed.

(*c*) Once it is shown that a person

(*i*) has the knowledge

or (*ii*) ought to have the knowledge that atrocities are likely to be committed or have been committed by others, a duty immediately arises to exercise the power of control,

(*iii*) their duty was to bring the matter before the cabinet, and failing to get satisfaction, to resign.

(*d*) (*i*) No person can rid himself of responsibility if he deliberately omits to make enquiries.

(*ii*) When a state of things is widespread and notorious, there is a *prima facie* presumption of knowledge which calls for rebuttal by the defendants.

As regards the law applicable to the case, the prosecution referred us to Appendix D of the Indictment and submitted that its legal argument on this subject was fully set out there.

Appendix D gives in its paragraphs marked 1, 2, and 3 the relevant provisions of the conventions and regulations relied on by the prosecution in this respect. I have given above the conventions and assurances named therein.

As regards the applicability of the Geneva Convention of 1929 the prosecution position is given in the Appendix thus:

"Although Japan did not ratify the said Convention, it became binding upon her for one or more of the following reasons:

"(*a*) It was signed on the said date by or on behalf of forty-seven nations, including Japan and each of the nations bringing the charges in this Indictment, and ratified by over forty nations, and thus became part of evidence of the Laws and Customs of war.

"(*b*) A communication dated the 29th January 1942, signed by TOGO, Shigenori, one of the accused, as Foreign Minister on behalf of Japan, addressed to the Swiss Minister in Tokyo, contained the following statement:

'Although not bound by the Convention relative to the Treatment of Prisoners of War, Japan will apply *mutatis mutandis*, the provisions of that Convention to American prisoners of war.'

"In a communication dated on or about the 30th January 1942, addressed to the Argentine Minister in Tokyo by TOGO, Shigenori, one of the accused, as Foreign Minister on behalf of Japan, it is stated:

'The Imperial Government has not yet ratified the Convention of 27 July 1929, regarding the treatment of prisoners of war. They are not therefore subject to the said Convention. None the less, they will apply *mutatis mutandis* the conditions of that Convention to English, Canadian, Australian and New Zealand prisoners of war in their power. With regard to supply of food and clothing to prisoners of war, they will consider on condition of reciprocity national and racial customs of the pris-

oners.'

"By the said communications or one of them, Japan acceded to the said Convention in accordance with Article 95 thereof, and the state of war then existing gave immediate effect to such accession.

"(*c*) The said communications constituted assurances to the United States of America, the United Kingdom of Great Britain and Northern Ireland, Canada, Australia and New Zealand, to whose governments the said communications were intended to be, and were, repeated by the respective recipients thereof, and in each case to all nations who were at war with Japan.

"Except in the said matters there are no provisions of the said Geneva Convention to which the expression 'mutatis mutandis' could properly be applied."

As regards the International Convention for the Amelioration of the Condition of the Wounded and Sick, the Appendix asserted thus:

"Japan was a party to the said Convention, together with over forty other nations, which thus became part or evidence of the Laws and Customs of War. In the above mentioned communication dated on or about the 29th January 1942, Japan stated:

"'Japan observes strictly the Geneva Convention of 27th July 1929, relative to the Red Cross, as a state signatory of that Convention.'

"A communication dated the 13th February 1942, signed by TOGO, Shigenori, one of the accused, as Foreign Minister on behalf of Japan, addressed to the Swiss Minister in Tokyo, contained the following statement:

"'The Imperial Government will apply during the present war, on condition of reciprocity, the provisions relative to the treatment of prisoners of war of the 27th July 1929, the enemy civilian internees, as far as applicable to them, and provided that labour will not be imposed upon them contrary to their free choice.'

"The said communication constituted an assurance to all the nations at war with Japan, (who in fact carried out the provisions of the said Convention as applicable to Japanese civilian internees) other than the Republic of China.

"The above-mentioned assurances were repeated by the Japanese Foreign Ministry on several occasions, as recently as the 26th May 1943."

At the final summation, the prosecution ascribed a sinister significance to the *factum* of non-ratification by Japan of the Geneva Convention, which would indeed have a pertinent bearing on the question just before us. According to the prosecution, there had already been the over-all conspiracy for aggressive war at the time when the question of ratification of the convention came up and the ratification was opposed and ultimately denied because the opposing group had already formed this policy of brutal treatment of the prisoners taken during the designed war.

The Prosecution seriously urged this contention and adduced evidence in support of it.

Japan had signed the Ceneva Prisoner of War Convention in 1929 and in 1934 the question arose as to whether the Emperor should ratify it. The Army and Navy petitioned against ratification, the Navy supplying reasons for its petition (Exh. 3,043 and 3,044, pp. 27,177-81).

The documents embodying these reasons are summarized by the Prosecution as follows:

1. The obligations are unilateral since no Japanese would become a prisoner of war;
2. Article 86, enabling Protecting Powers to interview prisoners of war without observance would be dangerous to military security;
3. The ratification of the Convention would double the range of enemy aircraft as, having completed their mission, the crew could land on Japanese territory secure in the knowledge that they would be well treated;
4. Prisoners of war could not be so severely punished as Japanese soldiers, and this would involve a revision of Japanese military and naval disciplinary codes to put them on an equal footing, a revision which was undesirable in the interest of discipline.

The Prosecution then contends that the objections are baseless inasmuch as the Geneva Convention practically stood on the same footing as the Hague Convention of 1907, which had been ratified by Japan.

The Prosecution says: "The only penal provision of the Hague Convention relevant to our present purpose is Article 8. This corresponds almost in terms with Articles 45 and 50 of the Geneva POW Convention of 1929 and so in that respect the two Conventions may be said to cancel out each other. The only other material provision restrictive of punishment in the Geneva Convention are those contained in Article 46—'Any corporal punishment, any imprisonment in quarters without daylight and, in general, any form of cruelty is forbidden. Collective punishment for individual acts is also forbidden'."

"It was these restrictions that the Japanese Government wished to avoid. It wished to prevent the right to ill-treat prisoners under the guise of punishment and so to deter airmen from raiding the country. The ill-treatment of prisoners was to be a matter of government policy."

It should, however, be remembered that these reasons were given not by the Government but by the Navy, and that was done in 1934, long before the war commenced.

The Army also objected to the ratification, but, without giving any specific reason. (Exh. 3,044)

TOJO dealt with the Geneva Convention in paragraph 132 of his affidavit thus:

"As to the Geneva Protocol, it was not ratified by Japan. As a matter of fact the Japanese conception regarding prisoners of war differs from that of Europeans and Americans. Furthermore, differences in every day living conditions, as well as customs and manners between Japanese and other nationals, together with the enormous number of prisoners covering such a vast area and embracing many different races, plus the acute shortage of var-

ious materials and supplies, made it impossible for this country to apply the Geneva Protocol verbatim.

"The statement that the Japanese conception regarding P. O. W.'s differs from that of Europeans and Americans means that from ancient times the Japanese have deemed it most degrading to be taken prisoner, and all combatants have been instructed to choose death rather than be captured as a P. O. W. Such being the case it was considered that a ratification of the Geneva Protocol would lead public opinion to believe that the authorities encouraged them to be captured as prisoners, and there was fear that such a ratification might conflict with the traditional idea concerning P. O. W.'s and this fear had not been dispelled up to the beginning of this war. In response to an inquiry from the Foreign Office regarding the Geneva Protocol the War Ministry replied that although it could not announce complete adherence to this Protocol, it perceived no objection to the application, with necessary reservations, of its stipulations concerning Prisoners of War. In January 1942 the Foreign Minister announced through the Ministries of Switzerland and Argentina that Japan would apply the Protocol with modification (Junyo) (Exhibits, 1,469; 1,957). By the term 'apply with modifications' (Junyo) the Japanese Government meant that it would apply the Geneva Protocol with such changes as might be necessary to conform to the domestic law and regulations as well as the practical requirements of existing conditions. . . . ."

It must be remembered that in 1934 the OKADA Cabinet was in office. There is no allegation against this Cabinet. The only accused who was in this Cabinet is HIROTA. He was Foreign Minister in it. It is not even suggested by the prosecution that this Foreign Minister had any hand in this non-ratification. The then War Minister and Navy Minister are not alleged to have been in the conspiratorial group. The then Prime Minister OKADA has given evidence in this case on behalf of the prosecution. Not a word about this non-ratification was put to him.

As I have pointed out already, in 1934 neither the Japanese Government nor the Army and the Navy were contemplating the Pacific War. At any rate they cannot be credited with any foresight of the extraordinary phenomena that took place during this war.

An unusually large number of troops surrendered during this war. Sometimes the surrendered army was much larger than the Japanese army on the spot to which the surrender was made. Last year an account was published in America of a Secret Session of British Parliament in which Mr. Churchill stated that 1,00,000 British in Malaya surrendered to 34,000 Japanese. This extraordinary fact made the administration of the prisoners of war a really difficult one and contributed largely to what happened to these prisoners. I shall deal with this matter later. It is absurd to suggest that the Japanese were contemplating all this in the year 1934 and were therefore refusing to ratify the Convention.

In order to appreciate the reasons given by the Army and the Navy for recommending non-ratification of the Convention, we must not forget the

Japanese no-surrender policy. "Any occidental army which has done its best and finds itself facing hopeless odds surrenders to the enemy, they still regard themselves as honourable soldiers and by international agreement their names are sent back to their countries so that their families may know that they are alive. They are not disgraced either as soldiers or as citizens or in their own families." But the Japanese define this situation differently. With them "honour is bound up with fighting to death". "In a hopeless situation a Japanese soldier should kill himself with his last handgrenade or charge weaponless against the enemy in a mass suicide attack. But he should not surrender. Even if he were taken prisoner when he was wounded and unconscious, he could not hold up his head in Japan again; he was disgraced; he was dead to his former life. . ." There was no need of special official introduction at the front about this. "The army lived up to the code to such an extent that in the North Burma campaign, the proportion of the captured to the dead was 142:17, 166. That was a ratio of 1:120, and of the 142 in the prison camps, all except a small minority were wounded or unconscious when taken; only a very few had surrendered singly or in groups of two or three. In the armies of the occidental nations it is almost a truism that troops cannot stand the death of one-fourth to one-third of their strength without giving up; surrenders run abou 4:1." This is what Miss Ruth Benedict says. Miss Ruth Benedict was assigned by the United States office of War Information in 1944 to the study of Japan.

This indicates the real feeling of the Japanese army and navy and explains their opposition. Justifiable or not, this was the Japanese mental make-up and the decision as to non-ratification was arrived at on a careful consideration of what occurred to them to be worthy of consideration. Rightly or wrongly, Japan considered these rules as likely to retard the efficiency of military operations. The real sanction of the rules of war is considered to lie in the fact that their observance is in the interest of all concerned. It is indeed absurd to suggest that in 1934, the Army and the Navy were designing to maltreat the prisoners of future war or wars.

I cannot accept the Prosecution contention that, by the communications referred to in Appendix D, Japan acceded to the Geneva convention in accordance with Article 95 thereof.

The Geneva convention, by its Article 91, requires that the convention shall be ratified as soon as possible.

Article 93 provides that the convention shall be open for adherences given on behalf of any country in whose name this convention was not signed.

Article 94 provides how adherence shall be given by written notification addressed to the Swiss Federal Council.

Article 95 says that a state of war shall give immediate effect to ratifications deposited and to adherences notified by belligerent powers prior to or after the outbreak of hostilities.

As the convention stands, Japan being one of the original signatories, no question of adherence can arise in her case. Adherence is open only on behalf

of a country in whose name the convention was not signed. Further, the formalities required by Article 94 were not observed in this case.

The convention had to be ratified by Japan. Admittedly, Japan did not ratify it. Article 95, therefore, has no application so far as Japan is concerned. Japan neither deposited ratifications nor notified adherences. Of course, in my view, adherence was not at all open to Japan.

The question whether the convention would have any legally binding effect on Japan because of its having been signed on behalf of that country would really depend upon how we interpret Article 92 of the convention.

Article 92 says: "The present convention shall become effective six months after the deposit of at least two instruments of ratification. Subsequently, it shall become effective for each high contracting party six months after the deposit of its instrument of ratification."

The minimum number of instruments of ratification required by this article had been deposited and consequently the convention became effective. Japan was one of the high contracting parties in the sense that the convention was originally signed on her behalf; but, as there was no deposit of any instrument of ratification on her behalf, the covenant could not be effective FOR HER.

As I read Article 92, this convention, without the instrument of ratification, did not become effective in any way so far as Japan is concerned. Reading the whole convention, I cannot construe this Article 92 to say that the effect of non-ratification by a contracting party only prevents that contracting party from being *benefited* by the convention, but that the convention is binding on it even without its own ratification, provided the least number of instruments of ratification are deposited as required by Article 92.

I, therefore, cannot accept the Prosecution contention that, as Japan was a signatory to the Geneva convention and as the Geneva convention has been otherwise effective within the meaning of Article 92, it has been binding on Japan though, because of non-ratification by her, it has not become effective FOR her benefit. In my opinion, the convention as such has not become effective either for or against Japan.

The Prosecution next contends that the convention did not lay down any new law or rule of war but only enacted what was already the recognized rule of warfare. I am afraid I find some difficulty in accepting this view.

Articles 91-96 would go against this contention. Article 96 reserves for each of the high contracting parties the right to denounce the present convention. The high contracting parties seem to have understood that they were entering into an agreement in respect of the subject matter of the convention and that thereby they were creating new legal relations between them in respect of the matter dealt with in the convention.

The correspondence relied on by the Prosecution does not, in my opinion, make the Geneva convention applicable to the case.

At the beginning of the Pacific War, the allied powers enquired of Japan whether or not she would apply the Geneva convention. Exhibit 1,468, dated

December 18, 1941, is the U. S. note in this respect and Exhibit 1,494, dated January 3, 1942, is the U. K. note on the same subject.

The Japanese Foreign Office requested the opinion of the War Ministry and obtained the following reply:

"In view of the fact that the Geneva Convention relating to POW's was not ratified by His Majesty, we can hardly announce our observance of the same, but it would be safe to notify the world that we have no objection to acting in accordance in the treatment of POW's."

"The 1929 Geneva Convention, relating to POW's, has no binding power whatsoever on Japan. But this Ministry has no objection to applying the principles of the Convention to noncombatant internees within such limits as it is applicable, provided, however, that no person be subjected to labour against his will." (Exh. 1,958)

After these deliberations, the following reply was made to the United Kingdom on January 29, 1942:

"The Imperial Government has not yet ratified the Convention relative to treatment of POW's, of 27 July 1929. It is, therefore, not bound by the said convention. However, it will apply *mutatis mutandis* provisions of the said Convention to English, Canadian, Australian and New Zealand POW's in its hands."

"As to provisions of food and clothing for POW's, it will consider on conditions of reciprocity, the national and racial customs of the prisoners." (Exh. 1,956)

Similar reply was given to America also on February 4, 1942. The reply stood thus:

"Japan is strictly observing Geneva Red Cross Convention as a signatory state. Second, although not bound by the Convention relative to treatment of POW's, Japan will apply *mutatis mutandis* provisions of that Convention to American POW's in its power."

Witness MATSUMOTO, who handled the discussion between the Foreign Office and the War Ministry, explained to the Tribunal what they meant by the expression "*mutatis mutandis*". It was the intention of Japan with respect to treatment of POW's that the stipulations of the Geneva convention shall be applied so far as circumstances permitted. He was referring to two kinds of difficulties:

1. The Japanese domestic law, peace law, army and navy penal code and court-martial law, which were in some respects not compatible with the Geneva Convention.
2. The difficulties Japan would face due to the vastness of the area of East Asia.

The prosecution rightly contends that the Hague Convention was ratified by Japan. That convention, however, contains a provision in its Article 2 that "the Provisions contained in the Regulations .... do not apply except between contracting powers, and *then only* if all the belligerents are parties to the Convention".

Neither Italy nor Bulgaria had ratified the 1907 Convention.

In my opinion, therefore, neither the provisions of the Hague Convention of 1907 nor those of the Geneva Convention of 1929 shall apply to this case.

This, of course, does not mean that the fate of the prisoners of war was absolutely at the mercy of the Japanese. All that I find here is that those conventions, as conventions, would not apply to this case.

Before proceeding further with the matter I would like to notice two very pertinent factors which had tremendous effects on the events that happened. One is the fundamental difference between the Japanese and the Western view of surrender, —the "shame" or the "honour" of surrender. And the other is the overwhelmingly large number of surrenders which Japan had to face during the Pacific War. The latter was almost as unexpected as the atom bomb. If the atom bomb has come "to force a more fundamental searching of the legitimate means for the pursuit of military objectives," these overwhelmingly large numbers of surrenders have equally come to force a more fundamental searching of the extent of the victors' obligations to give quarters to the surrendering army. An army of 1, 00, 000 surrendering to an army of 34, 000 creates a very grave problem for the small victor army. In these days of total war with such technique of war involving possibilities of sudden surrenders like this, many of the provisions of the existing conventions may require fundamental modifications. We should not forget that whenever any of the laws of war have been found to be a definite and permanent obstacle to the achievement of the objectives of war, the sanction of common interest and the reason for the continuance of the rule has disappeared and the rule has not been observed.

Pending a more perfect world organization and union shown to be capable of preventing wars, if the laws of war cannot RULE OUT any means effective to secure the ends of war, these cannot equally RULE IN anything which may prove highly obstructive to the achievement of its objectives. If the countries having the atom bomb can expect to keep the technique of the atom bomb secret, it would hardly be reasonable to expect them to forego this advantage any more than it would be to expect them to make public any other plan of military defense and the military advantage derived from superior research or administrative organization. The frightful efficiency of the bomb, in spite of the consequent indisriminate destruction of civilian life and property, offers an advantage, which, we are told, would not be foregone simply on the sentimental humanitarian objections. The incidental civilian loss and suffering, we are told, is also of military advantage in that it weakens the enemy's morale. If this is so, we are also to think over the situation that is created by surrender in overwhelming numbers, specially when the policy of one party is fighting to death and of the other is avoidance of facing hopeless odds.

I have noticed above the Japanese policy of surrender. It is not a policy of the conspiratorial group; it is a policy coeval with Japanese national life. It went a great way in moulding the mental make-up of the Japanese soldiers and was largely responsible for many of the happenings with which we are now concerned. Of course this would not, in any way, justify their misdeeds,

and, I am sure, this has not been allowed to justify their conduct by the victor nations in their trial for such misdeeds. We are, however, not considering here the criminality or otherwise of those deeds. We are only considering how far, in the absence of any evidence of "order, authorization or permission" emanating from any of the accused before us, the mere general prevalence of such misdeeds in every theatre of war, would lead us to any inference of such order, authorization or permission.

It is no wonder that to the Japanese with the above mental make-up, the westerners, who became prisoners of war, were disgraced by the mere fact of surrender. "In Japanese eyes they have suffered ignominy and it was bitter to them that the Americans did not know it. Many of the orders which American prisoners had to obey, too, were those which had also been required of their Japanese keepers by their own Japanese officers; the forced marches and the close-packed trans-shipments were common place to them." ..... "Open challenging of authority was terribly punished even if it were mere 'answering back'. Japanese rules are very strict against a man's answering back even in civilian life and their own army practices penalized it heavily. It is no exoneration of the atrocities and wanton cruelties that did occur in the prison camp to distinguish between these and those acts which were the consequences of cultural habituations."

"... The shame of surrender was burned deeply into the consciousness of the Japanese. They accepted as a matter of course a behaviour which was alien to our conventions of warfare. And ours was just as alien to them. They spoke with shocked disparagement of American prisoners of war who asked to have their names reported to their government so that their families would know that they were alive. The rank and file, at least, were quite unprepared for the surrender of American troops at Bataan for they had assumed that they would fight it out the Japanese way. And they could not accept the fact that Americans have no shame in being prisoners of war."

One of the Japanese attitudes which had to do more specially with the Japanese army concerned "the expendability" of their fighting forces. "Americans thrilled to all rescue, all aid to those pressed to the wall. A valiant deed is all the more a hero's act if he saves the damaged. Japanese valour repudiates such salvaging. Even the safety devices installed in our B-29's and fighter planes raised their outcry of cowardice.... There was virtue only in accepting life and death risks; precautions were unworthy. This attitude found expression in the case of the wounded and of malarial patients. Such soldiers were damaged goods and the medical services were utterly inadequate even for reasonable effectiveness of the fighting force. As time went on, supply difficulties of all kinds aggravated this lack of medical care, but that was not the whole story. Japanese scorn of materialism played a part in it; her soldiers were taught that death itself was a victory of the spirit and our kind of care of the sick was an interference with heroism,—like safety devices in bombing planes. Nor are the Japanese used to such reliance on physicians and surgeons in civilian life as Americans are. Preoccupation with mercy toward the damaged rather than with other welfare measures is especially high in the United

States and is often commented on even by visitors from some European countries in peacetime. It is certainly alien to the Japanese. At all events, during the war the Japanese army had no trained rescue teams to remove the wounded under fire and to give first aid; it had no medical system of front line, behind-the-lines and distant recuperative hospitals. Its attention to medical supplies was lamentable. . . . ."

"If this attitude of the Japanese toward damaged goods was fundamental in their treatment of their own countrymen, it was equally important in their treatment of American prisoners of war. According to our standards the Japanese were guilty of atrocities to their own men as well as to their prisoners. The former chief medical officer of the Philippines, Colonel Harold W. Glattly, said after his three years internment as a prisoner of war on Formosa that the American prisoners got better medical treatment than the Japanese soldiers. . . ."

This is what an anthropologist writes of the Japanese view of soldier's life. This would not justify their inhuman behaviour towards prisoners of war and certainly was not accepted by the Allied Powers in exoneration of their atrocious conduct. But this would explain their conduct without ascribing the same to government policy. Whatever be the mental make-up of the Japanese soldiers and however much their conduct towards the prisoners of war might have been justifiable in their own eyes, they had to answer for all their brutalities and, as I have already pointed out, most of them have done so with their own lives. We are now concerned with a very different set of persons. Before we can make them responsible for these acts, we must see their connection with such acts well-established by the evidence before us.

For this purpose we must keep in view the following questions:

1. How far the evidence establishes the connection of any of the accused with any of these acts.
2. (*a*) Whether the act in question can be said to be the act of state; or (*b*) Whether it can be ascribed to any of the accused in his individual capacity.
3. If an act of state, whether the accused can be held criminally liable for it.

The Charter constituting the present Tribunal in its Article 6 enacts:

"Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, *of itself*, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

All that the Charter enacts is that the official position of the accused shall not *of itself* be sufficient to free such accused from responsibility of any crime.

The Charter does not say and certainly it is not the law that the accused must be held criminally responsible only because of his official position. Criminal responsibility must first of all be brought home to him, and then, if

the accused pleads his official position *only* in defense, the Charter purports to exclude such a plea.

The Nurnberg Charter in its Articles 7 and 8 made corresponding provisions. These Articles stood thus:

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

"Article 8. The fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Though not so relevant for our present purposes we may notice the following two provisions having bearing on the plea of superior order.

British Manual of Military Law, Article 443 (Land Warfare) lays down:

"It is important, however, to note that the members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government or by their commanders are not war criminals and cannot therefore be punished by the enemy."

The American rule was also the same up to 1944. Its rules of land warfare, Article 366 stood thus:

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

I have stated above how the prosecution seeks to fix the criminal responsibility for the charges under consideration on the accused before us.

It would be convenient for the present purpose to divide the accused into the following four classes:

1. Those of the accused who, as members of the government, had duties assigned to them in respect of the prisoners of war;
2. Those of the accused who were in command of armies, the personnel of which actually perpetrated the crimes;
3. The rest of the members of the government;
4. Those of the accused who held no position either in the Government or in the Army.

It may be noticed here that, according to the Prosecution evidence, the departments immediately responsible for the prisoners of war were: (1) The War Ministry, (2) The Ministry of Foreign Affairs and (3) The Imperial General Headquarters.

In the War Ministry the principal responsible officers were:

(*i*) The War Minister,
(*ii*) the Vice-Minister of War,
(*iii*) the Chief of the Military Affairs Bureau,
(*iv*) the Chief of the Military Affairs Section, and

(*v*) the Chief of the War Information Bureau.

In the Ministry of Foreign Affairs the responsible officers were:

(*i*) The Foreign Minister and

(*ii*) the Vice-Minister.

In the Imperial General Headquarters the responsibility lay on

(*i*) The War Minister,

(*ii*) the Chief of the Army General Staff,

(*iii*) the Navy Minister, and

(*iv*) the Chief of the Navy General Staff.

Accused KIMURA, KOISO, MUTO, OKA, SATO, SHIGEMITSU, SHIMADA, TOGO and TOJO would be the persons having responsibility under this category.

KIMURA was Vice-Minister of War from 10 April 1941 to February 1944.

MUTO was Chief of the Military Affairs Bureau from October 1939 to April 1942.

OKA was Chief of the Navy General Staff from 15 October 1940 to 18 July 1944.

SATO was Chief of the Military Affairs Section from February 1941 to April 1942 and Chief of the Military Affairs Bureau from April 1942 to December 1944.

SHIGEMITSU was Minister of Foreign Affairs from April 1943 to 6 April 1945.

SHIMADA was Navy Minister from October 1941 to July 1944 and was Chief of the Navy General Staff from July 1944 to August 1944.

TOGO was Foreign Minister from October 1941 to March 1942.

TOJO occupied the position of the Minister of War from July 1940 to July 1944.

KOISO became Prime Minister on 22 July 1944 and his cabinet functioned till 6 April 1945.

Accused DOHIHARA, HASHIMOTO, HATA, ITAGAKI, KIMURA, MATSUI, MUTO, SATO and UMEZU come under the second category.

Those of the accused who come under the third category only: Accused ARAKI, HIRANUMA, HIROTA, HOSHINO, KAYA, KIDO, MINAMI, OSHIMA, SHIRATORI, SUZUKI thus come under this category.

As to the responsibilities involved in the office held by the accused of the first category named above, the prosecution evidence is to be found in the deposition of its witness, TANAKA Ryukichi.

The witness was Chief of the Military Service Bureau in the War Ministry and was familiar with the organization and responsibilities of the various bureaus of the War Ministry as they existed between 1940 and 1945. The testimony of the witness may be summarized as follows:

1. The most important bureau in the War Office is the Military Affairs Bureau. The reason for so stating is that the Military Affairs Bureau is in charge of the Army's budget, the organization, equipment and installation of the military forces, the making of domestic

and external plans, the conducting of propaganda, the conducting of investigation, all of which constitute important functions. (R. P. 14, 285-86)

2. Matters concerning international regulations affecting the army were handled in the Military Affairs Section of the Military Affairs Bureau. (R. P. 14, 286)
3. The responsibility regarding the location and construction of prisoners of war camps is with the Minister of War; but as to the location and construction of such camps, the business was handled by the Military Section of the Military Affairs Bureau. (R. P. 14, 286)
4. (*a*) In the matter of protests regarding the treatment of prisoners of war, documents and other papers were sent by the Ministry of Foreign Affairs to the War Office, the Home Office and the Navy Ministry.
   (*b*) Such diplomatic documents were first sent to the Adjutant's Office in the War Ministry and from there to the Military Affairs Section. Those relating to prisoners of war were sent by the same section to the Prisoners of War Information Bureau. (R. P. 14, 287)
   (*c*) Replies to be made to the authorities outside of the War Office were prepared in the Military Affairs Section of the Military Affairs Bureau. (R. P. 14, 287)
   (*d*) The proposed replies would next go to the Foreign Office by way of Adjutant's Office—War Office. These went to the Foreign Office after being given the approval of the Minister and the Vice-Minister.
5. (*a*) Conferences of the Bureau Chiefs of the War Ministry were held twice a week.
   (*b*) (*i*) Immediately after the fighting at Bataan by the end of April 1942 a meeting was held at which the question of treatment of prisoners of war arose.
   (*ii*) At this conference the question as to HOW TO TREAT THE MANY PRISONERS OF WAR captured in the various combat zones in the southern areas was determined.
   (*iii*) Those present *at this conference* were TOJO, War Minister; KIMURA, Vice-Minister; TOMINAGA, Chief of the Personnel Bureau; SATO, Chief of the Military Affairs Bureau; witness himself and KAN, Chief of the Ordnance Bureau; and YOSHIZUMI, Chief of the Procurement and Mobilization Bureau; KURIHASHI, Chief of the Security Bureau; MIKI, Chief of the Surgeon General's Bureau; OYAMA, Chief of the Legal Affairs Bureau; NAKAJIMA, Chief of the—NAKAMURA, Commander of the Gendarmerie; HONDA, Chief of the Armoured Forces Bureau;

MATSUMURA, Chief of the Army Press Section; other than these, the private secretaries of the War Minister and the Vice War Minister. That is all.

(*iv*) At this conference at the request of EUMURA, Chief of the Prisoner of War Information Bureau, TOJO, War Minister, gave his decision.

(*v*) In the light of the prevailing situation in Japan at that time, which was to enhance the labour efficiency of the country, and in the light of the slogan then current, "No work, no food", THE FIRST POINT THAT WAS DECIDED at this meeting was to make all prisoners of war engage in forced labour.

With regard to this decision, UYEMUIA, Chief of the Military Affairs—Prisoner of War Information Bureau, said that engaging prisoners of war of the rank of warrant officers and above in forced labour would be in violation of the Geneva Convention. But in spite of the view thus expressed by UYEMUIA, War Minister TOJO gave the decision of utilizing these officers for labour purposes *in the light of the fact* that Japan had not ratified the Geneva Convention, although it was the government's position to respect the spirit of that Convention.

It was decided that prisoner of war camps be established not only in the southern areas but also in Japan proper, in Formosa, Korea, China, and Manchuria, and to send prisoners of war to these areas as a means of enhancing the trust and confidence of the peoples of Asia in Japan. (R. P. 14, 290-01)

6. THE IMPERIAL GENERAL HEADQUARTERS was established by an ordinance (Exh. 80). It was divided into two parts, the Army and the Navy. The Army, by the Army General Staff and the Navy Department constituted by Naval General Staff. In addition to this, the War Minister and the Navy Minister participated in the Imperial Headquarters as regular members. Then the Vice-Minister of War, the Chief of the Military Affairs Bureau, and other bureau chiefs, when necessary, attended as members of the staff of the War Minister. The most important positions in the Imperial General Headquarters were occupied by the Chief of the Army General Staff and the Chief of the Navy General Staff. Other important members, in their order, were the Vice-Chief of the Staff, the War Minister and the Chief of the First Division General Staff. By Chief of the First Division the witness meant the Operations Chief. (R. P. 14, 923)

7. (*a*) In Japan the handling of prisoners is quite different from other countries, and the Prisoner of War Information Bureau and

administration of prisoner of war matters were under the supervision of the War Minister himself. And, therefore, the actual handling of matters relating to the prisoners of war was the responsibility of the War Minister himself; the Foreign Office was merely a post office which handled the communications. (R. P. 14, 365-66)

(*b*) In the witness' recollection, the business of control of the prisoners of war included such functions as where to locate POW camps, how to handle prisoners of war, how to promote the health of prisoners of war, what to do with sick prisoners, and other general treatment of prisoners of war; how to distribute Red Cross messages and parcels, and the question relating to the exchange of POW letters as through the offices of a neutral country.

(*c*) The matter of policy regarding prisoners of war is carried out in Japan by the War Ministry, specifically by the Military Affairs Bureau. Outside of Japan it is handled by the Chief of the General Staff after consultation with the Minister of War. In the Army General Staff, it was handled by the Second Division.

(*d*) As to the requisitioning of food for prisoners of war, the matter was handled by the various commanders who supervised the various POW camps. In other words, it was carried out by various commanders in the field in accordance with the orders and instructions of the War Minister.

(*e*) (*i*) As to the needs of the commanders in the field depending upon the prisoners taken, the matters were carried out by the commandants of the various prisoner of war camps in the field who communicated directly with the Chief of the Prisoner of War Information Bureau where the matters pertaining to POWs were disposed of. (R. P. 14, 369)

(*ii*) As the matters pertaining to prisoners of war were not connected in any way with operations, but being a policy matter, these matters could be handled directly with the War Ministry through the Prisoners of War Information Bureau and this would not be in violation of any regulations. (R. P. 14, 369)

(*iii*) This direct reporting from the field to the Ministry of War was carried on for the sake of convenience and expedience with respect to matters which had to be settled quickly. According to the rule, communications from the field to the central authorities were to be channeled through the General Staff; any direct communication would be an infringement of those regulations if the rule were to be applied strictly; but prison-

er of war questions, being a purely policy matter, there was a tacit understanding that direct communication could be made and there was no protest with respect thereto from the Army General Staff.

In this connection we have also the following evidence:

1. Exhibit 68: Japanese Constitution.
2. Exhibit 73: Imperial Ordinance relating to general rules concerning the organization of the Ministries.
3. Exhibit 74: Organization of the War Ministry.
4. Exhibit 75: Organization of the Navy Ministry.
5. Exhibit 3,350: The regulations of the Kempei.
6. Exhibit 78: Regulations of the Army General Staff.
7. Exhibit 79: Regulations of the Navy General Staff.
8. Exhibit 2,983: Imperial Ordinance concerning the organization of the Fleet.
9. Exhibit 3,462: Regulations governing the duties of the officers of the War-time Superior Headquarters.
10. Exhibit 1,965: Regulations for the treatment of POW, 31 March 1942.
    Imperial Ordinance 23 December 1941 on POW Camp.
11. Testimony of TOJO.
12. Testimony of SHIMADA.

I need not examine this evidence in detail. For my present purpose the evidence of TANAKA Ryukichi gives a fairly accurate account of the working of the state machinery.

I may now take up the different items of crimes against the Prisoners of War. The several categories of crimes alleged to have been committed are given below:

1. Inhuman treatment of the Prisoners of War in contravention of Article 4 of the Hague Convention of 1907 and Article 2 of the Geneva Convention, 1929.
   (*a*) Treatment of Prisoners of War by the Kempei Tai.
   (*b*) The prisoners were starved and subjected to corporal punishment and their sick were neglected.
2. Insults and expositions to public curiosity in contravention of Article 2 of the Geneva POW Convention, 1929.
3. (*a*) The making of oaths or agreements not to escape.
   (*b*) Punishments of Prisoners of War for escaping, in excess of those provided by the Hague Convention 1907 and the Geneva Convention 1929.
4. Transportation of Prisoners of War:
   (*a*) By sea,
   (*b*) Bataan Death March.

5. (*a*) Employment of the Prisoners of War upon tasks having connection with the operations of the war.
   (*b*) Compulsory employment of Officer Prisoners in contravention of Article 6 of the Hague Regulations of 1907 and Article 29 of the Geneva Convention 1929.
   (*c*) Employment of the Prisoners of War in Burma-Thailand Railway.
6. Prisoners of War wrongfully convicted of espionage charges.
7. Execution of Allied airmen.
   (*a*) Creation of *ex post facto law*.
   (*b*) Execution on trial.
   (*c*) Execution without trial.

It cannot be denied that the treatment meted out to the Prisoners at the various theatres of war was inhuman. The actual perpetrators of these atrocities have been dealt with elsewhere, and there is no reason to suppose that in their case anything but stern justice has been adequately meted out. These actual perpetrators are not before us. The case against the accused before us is:

1. that they ordered, authorized and permitted the commission of these atrocities;

or 2. that they, being by virtue of their respective offices responsible for securing the observance of the laws of war, deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent the breaches of such laws and thereby violated the laws of war.

If the first of the above allegations be found established, there is no doubt that the atrocities committed would be their own acts and they would be criminally responsible for those of them that are criminal acts in international law.

So far as the second item is concerned, I have already given my reason why, as the Charter constituting this Tribunal stands, any deliberate and reckless neglect of duty alone would not suffice to fix any criminal responsibility on the present accused. No inaction as such, however deliberate and reckless, has been listed in the Charter as acts to be tried by the Tribunal. The inaction is only to supply an evidentiary fact, the ultimate PROBANDUM being 'the order, authorization or permission' emanating from these accused, so as to make the act in question their own act.

In order to fix the criminal responsibility for the charges under consideration on the accused before us, the prosecution stresses the following points:

1. Prisoners of war are in the Power of Government.
   (*a*) No government or member of it can therefore evade responsibility by trying to shift it on to a particular department.
   (*b*) The responsibility remains with every individual member of the Government.
2. (*a*) Every one of the accused must have been aware of the atrocities from their very notoriety.
   (*b*) A general similarity in the character of the outrages establishes

a universal plan or pattern and indicates that this was a recognized policy of terrorism.

Article 4 of the Hague Convention says that "prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them. They must be humanely treated." . . . .

Article 2 of the Geneva Convention also says the same thing though expressed in a slightly different language. According to this article, "prisoners of war are in the power of the hostile POWER, but not of the individuals or corps who have captured them. They must at all times be humanely treated and protected, particularly against acts of violence, insults and public curiosity. Measures of reprisal against them are prohibited".

According to the Prosecution, this "hostile power" or "hostile government" means and refers to every member of the government, and no member of it can evade responsibility by trying to shift it on to a particular department. The main responsibility, according to the Prosecution, remains with every individual member of the government. I am afraid I cannot accept this interpretation of these provisions.

In my opinion, the members of a government are entitled to rely on the proper functioning of every organ of it. A government under its constitution operates by distributing different functions amongst its different members. The responsibility for the proper discharge of any of those functions would lie on the particular member entrusted with its discharge. Other members are entitled to rely on the proper functioning of the particular organ taking up these distributed responsibilities. Even in his own sphere of responsibility, a member is entitled to rely on the proper working of the machinery provided by the constitution for the discharge of his functions.

According to the Prosecution every member of a Government owes a duty to bring such matters before the Cabinet and to resign, if he fails thereby to get satisfaction.

In my opinion, at least for our present purposes, when we are called upon to fix criminal responsibility on the ground of any inaction on the part of a particular member, I would not insist upon the observance of the standard of conduct laid down by the Prosecution. Such a standard may be an ideal one for the golden age of an international community. At present no government in the world functions in that way, and I would not expect any extraordinary standard of conduct of the present accused. We must not also forget that we are now considering the war-time behaviour of a Cabinet member. Any peace-time code of behaviour is likely to be more or less unsuitable to meet the exigencies of the situation as developed in the course of any current war. Every such war would give rise to new social, economic and belligerent conditions. We must not also ignore the part which propaganda is made to play by the Powers of the present-day international society, specially in such wartime.

The three main sources from which the Prosecution alleged that the Japanese Government obtained knowledge of the commission of war crimes by its nationals during the Pacific War are as follows:

1. Protests lodged by Protecting Powers on behalf of belligerents;
2. Transcriptions of recordings of broadcasts made from America and Great Britain during the Pacific War;
3. Official Japanese documents which constituted evidence of or a direction to commit war crimes.

Most of the protests had reference to prisoners of war held by the army. Copies of these with translations attached were sent to all sections in the War Ministry concerned with the subject matter, and at times, depending on the nature of the protest, copies were also sent to other ministries such as Ministry of Home Affairs, Justice, etc.

At the War Ministry, and protests received were discussed at the conferences between the Minister, Vice-Minister and the bureau chiefs. After this they were forwarded by the Prisoner of War Information Bureau to the army commander of the area in which the grounds of the protest had arisen and also to the chief of the prisoner of war camps in that area. Upon information being received from the last mentioned sources, a reply was prepared in the military affairs section of the Military Affairs Bureau and forwarded to the Foreign Office.

From various documents in evidence, it would appear to have been the practice to give protests and other documents originating with the Protecting Powers a fairly extensive circulation in the War Ministry; in addition, the Foreign Ministry would frequently send duplicates of protests to the Prisoner of War Information Bureau as well as to the War Ministry. (R. P. 27,158, Exh. 473; Exh. 3,529, 3,367-A)

The Prosecution admitted that, considered purely as a matter of machinery, no fault could be suggested with regard to this system. It, however, contended that it was not enough for the Japanese Government to pay "lip service" to its obligations under international law. We were invited to recall that the Japanese Government was already well-informed of the barbarous manner in which the Japanese forces customarily behaved.

The Prosecution contended that the very nature of the protests, coupled with the supporting evidence that accompanied them, and the replies made by field commanders to the Prisoner of War Information Bureau, in so far as such information is concerned, made it perfectly clear to the War Ministry and the Foreign Office that war crimes were being and had been committed and yet no effective steps were taken to stop them. It was, therefore, submitted that they were allowed to continue as a matter of government policy or as matters to which the Japanese Government was indifferent.

The official Japanese documents which, according to the Prosecution, constitute evidence of or a direction to commit war crimes, relate to different matters having nothing to do with the inhuman treatment of prisoners of war under our consideration. Some of these relate to employment of the prisoners of war on prohibited tasks and others relate to what the Prosecution characterizes as insults to the prisoners. I have listed these offenses separately and shall consider this part of the evidence in that connection. The third set re-

lates to censorship instructions issued during war. Such instructions prohibited "any reports which give an impression of cruel treatment, such as prisoners being punished or being made to labour without clothing". I do not think that such measures necessarily lead to the inference that the authorities had knowledge of such treatments of the prisoners. Certainly the authorities concerned had knowledge in the sense that there were those protests and broadcasts from the enemy sources and this was sufficient for the adoption of the precautionary measures. Such censorship measures were common to enemy belligerent nations. Fear of evil propaganda was not unusual with the belligerent powers.

As regards transcriptions of recordings of broadcasts made from America and Great Britain, I must again refer to the past history of propaganda already noticed by me. After the First World War it was widely known how a sort of vile competition was carried on in exerting imagination as a means of infuriating the enemy, heating the blood of the stay-at-homes on one's own side and filling the neutrals with loathing and horror. People were made to swallow even some of the most bizarre fairy tales. I believe the accused were entitled not to take these broadcasts and protests at their face value. They were no doubt bound to enquire, and they did so enquire. They were certainly entitled to rely on the reports coming from their own responsible officers. I do not think it would be merely paying 'lip service' to its obligation if any government accepts such reports from its responsible officers, specially during war-time. Every government did so.

I do not think it is expected of a war minister or of a foreign minister of any government that he should personally go to the alleged place of occurrence and verify whether the protests were well-founded or not. We must not forget the vastness of the theatres of war. A war minister or a foreign minister did not stand in relation to these prisoner camps in different parts of the Pacific theatre of war in the same position as does even the head of a police department in relation to the different police stations in a city.

I do not see anything of special reliability in the nature of the protests or in the so-called supporting evidence that accompanied them. The protests came through neutral powers; but these neutral powers were only transmitting what they got from the protesting belligerents.

No evidence of any customary behaviour of the Japanese forces is before us. I have already examined how the stories of atrocities in China stood at the time and stand now.

The Prosecution laid much stress on the similarity of patterns of crimes committed in this respect in every camp. I have already examined this alleged similarity of pattern in another connection. In my opinion, no such similarity of pattern has been established as would entitle us to hold that all these inhuman treatments were the result of the government policy or directive.

We have in evidence before us that the express directions and instructions emanating from the War Ministry were against such treatment. However inadequate in comparison with the stories of atrocities, there are in evidence cases of punishments of the guards and officers concerned for maltreatment of

the prisoners. There are admittedly cases of camps where the treatment was unobjectionable. There are neutral inspection reports of at least some of the camps which support the cases of good treatment of the prisoners there at least during a considerable period of the war. Every one of these matters would sufficiently counter the hypothesis of any central policy, directive, or permission countenancing the atrocities now disclosed in evidence.

I have already indicated what sort of inaction is required to be established in this case and for what purpose. In my opinion, no such inaction in this respect on the part of the accused has been established in this case as would entitle us to infer that these acts of inhuman treatment meted out to the prisoners of war were ordered, authorized or permitted by any of the accused. The war here might have been aggressive. There might have been many atrocities. Yet, it must be said in fairness to the accused that one thing that has not been established in this case is that the accused designed to conduct this war in any ruthless manner.

Insults and expositions to public curiosity in contravention of Article 2 of the Geneva POW Convention 1929 are supported by Exhibits 1,969, 1,973 and 1,975.

Exhibit 1,969 is the report dated October 1942, from the Governor of Kanagawa, to the Ministers of Welfare and of Home Affairs, which was also sent on to the Commander of the Eastern Area Army and the War Ministry. It states: "Though the public has not been informed of POW labour, those who have guessed about it from seeing them on their way to and from the place of labour and their camps seem to realize with gratitude the glory of the Imperial Throne, seeing before their eyes British and American POW's at their labour. A considerable influence seems to have been exercised over the people of this prefecture, many of whom had been considerably pro-Anglo-American."

Exhibit 1,973 is a signal which on 4 March 1942 the Chief of Staff of the Korean Army sent to the accused KIMURA the then Vice-Minister of War, in which he says, "As it would be very effective in stamping out the respect and admiration of the Korean people for Britain and America, and also in establishing in them a strong faith in victory and as the Governor general and the Army are both strongly desirous of it, we wish you would intern thousand British and thousand American prisoners of war in Korea".

On 23 March 1942, the accused ITAGAKI, as Commander-in-Chief of the Korean Army, sent to the accused TOJO a plan for the internment of prisoners of war. In this plan he sets out the purpose as follows:

"It is our purpose by interning American and British prisoners of war in Korea to make the Koreans realize positively the true might of our empire as well as to contribute to psychological propaganda work for stamping out any ideas of worship of Europe and America which the greater part of Korea still retains at bottom." (Exh. 1,973, p. 3)

The Prosecution in its summation described Exhibit 1,975 thus: "On 13 October 1942, the Chief of Staff of the Korean Army sends to the accused KIMURA a report of the parade of 998 POW along bystander-thronged roads

of Fusan, Seoul and Jinsen in Korea. He says: 'As a whole, it seems that the idea was very successful in driving all admiration for the British and Americans out of their (*i. e.*, the Koreans') minds and in driving into them an understanding of the situation'."

Exhibit 1,975, however, does not speak of any such PARADE of the prisoners of war. The report gives "reactions among the general public following internment of British prisoners of war", and says "the arrival of 998 prisoners captured in Malaya had so great an effect upon the people in general, especially upon the Koreans, that about 1, 20, 000 Koreans and 57, 000 Japanese bystanders lined the roads of Fusan, Seoul and Jinsen to see the prisoners of war being transported". Certainly this was not "parading the prisoners for exposing them to public curiosity". The Prosecution certainly cannot suggest that in all other countries prisoners of war are transported through roads protecting them from public gaze. I do not think Article 2 of the Geneva Convention prohibits such transportation. These prisoner soldiers were certainly accustomed to walk through public streets and were equally accustomed to public gaze. Even if the fact of their having been prisoners of war degraded them in the eyes of any public, they were not entitled to any protection from their gaze. There is no allegation of any molestation or insult offered to them by the public.

I must first of all point out that Article 2 of the Geneva Convention 1929 is not applicable to this case. I have already explained why I say so.

But apart from that question, I do not think that these really indicate anything intended to insult these prisoners of war. It is not in evidence that these prisoners of war were actually treated in any insulting manner. No abnormal treatment was accorded to them. They were not even exhibited for the purpose of exhibiting them to the public. They were taken to those places simply to convince the people there that even white soldiers could be defeated and could be taken prisoners. Their faith in white supremacy was considered by the Japanese authorities concerned to be mere myth and they simply thought that the very fact that white soldiers could be taken prisoners would demolish that myth. I do not see why this should be looked upon as an insult or exposition to public curiosity.

The Prosecution complains that the prisoners of war were compelled to sign agreements and take oaths not to escape, in contravention of the spirit of Article 2 of the Hague Convention, 1907.

The Japanese during the Pacific War made certain regulations and laws under which they authorized the compulsory administration to prisoners of oaths that they would not escape, and providing heavy penalties for breaches of such oaths.

Exhibit 1, 965 is the detailed regulations for the treatment of prisoners of war. Article 5 relates to non-escape oath. Article 10, relating to discipline law for prisoners of war enacts: "Those persons who have taken oath not to escape and who violate this oath shall be subject to either hard labour or imprisonment for a minimum of one year."

Articles 5 and 10 referred to above were introduced into Japanese law in

March and April 1943, respectively. Article 10 has a somewhat similar counterpart in Article 5 of the law No. 38 of 1905.

The Prosecution points out that according to Japanese official figures, between 2 June 1942 and 3 March 1945 sixty-four prisoners were convicted by court-martial for violation of non-escape oath and received sentence ranging from one year's imprisonment to death. (Exh. 1,998)

The imposition of these illegal penalties was known to the Japanese Government because monthly returns were required of all court-martial punishments and of all disciplinary punishments enforced. (Exh. 1,999). These returns were sent to the Prisoner of War Information Bureau.

I do not consider that making of oaths or agreements not to escape would be criminal on the part of the members of the government which authorized such things. I would again point out that the Geneva Convention of 1929 was never ratified by Japan, and neither the Geneva Convention nor the Hague Convention as such was applicable to this case.

Perhaps here is an occasion when the overwhelming number of surrenders in this case would specially affect the position. The steps taken by the Japanese authorities in this respect would be mere acts of state. I would not find any of the accused criminally liable for them.

The punishment of escaped prisoners, according to these regulations again would be mere act of state. It is not the case of the Prosecution that anything was done in this respect in breach of such regulations or without trial.

The Prosecution case regarding transportation of prisoners of war by sea in substance is that in every such case there were violations of the conventions. The Prosecution lays emphasis on the common features of such violations. According to it, these common features are overcrowding, underfeeding, inadequate sanitation and ventilation, lack of medical supplies and water, and ill-treatment of the prisoners.

Similarity of pattern of crimes in this respect is claimed by the Prosecution to be indicative of the fact that they were committed as a matter of government policy or of government indifference. The Prosecution points out as significant that not one of the accused has, by himself or by witnesses, given any evidence of any real attempt to prevent the commission of these crimes.

As regards the Cabinet Minister, the Prosecution urges that it was clearly his duty upon learning of the commission of these crimes to bring the fact to the notice of his colleagues in the Cabinet, and to resign unless effective steps were taken to prevent their commission. There was no evidence that any of them ever raised the question of war crimes in the Cabinet. Their failure to do so makes their guilt greater.

The Prosecution further submitted that there was a clear duty upon every official who knew about the commission of any of these war crimes to use such power as he possessed to put the matter right at once, at least to the extent of bringing the outrages to an immediate stop.

Here again the special difficulty created by the overwhelming number of surrenders must be taken into account. I do not accept the evidence on this point at its face value; but, even making every possible allowance for exag-

geration and distortion, it cannot be denied that there was overcrowding, underfeeding and inadequacy in sanitation and ventilation. There certainly were also instances of ill-treatment of the prisoners during transit; but I cannot accept it as indicative of any government policy or government indifference.

The Prosecution contention that the Cabinet ministers should have resigned on this issue really contemplates an ideal state of affairs, but I do not think we can measure for our present purposes the conduct of the prisoners with such an ideal standard.

There is no evidence that the matters now disclosed by evidence were known to the Cabinet Minister at the time of their occurrence.

The 'Bataan Death March' is really an atrocious brutality. It was sought to justify the Bataan death march on the grounds that it was unavoidable as neither transport nor food was available. (R. P. 27, 764)

Even if that were true, it would not justify the treatment meted out to the marching prisoners. Throughout a nine-day march, over 120 kilometers under a blazing sun, about 65, 000 American and Filipino prisoners were kicked and beaten by their guards; the only drink they had was water from caribou wallows; the only food, that which was thrown to them by Filipinos. Those who through illness or fatigue fell out of the march were shot or bayonetted. (R. P. 12, 579-91)

The Prosecution sought to meet the claim as to lack of transport by the evidence in the form of an affidavit made by Major-General King, the Commanding General of the American Forces at Bataan. He says, "In destroying arms and equipment in preparation for surrender, I had reserved enough motor transportation and gasoline to transport all my troops out of Bataan. I pleaded, after my surrender, that this be done, offering to furnish personnel as might be required by the Japanese for this purpose.... The Japanese told me that they would handle the movement of the prisoners as they desired, that I would have nothing to do with it, and that my wishes in that connection could not be considered." (Exh. 1,448)

Whatever that be, I do not think that the occurrence was at all justifiable. At the same time I fail to see how we can make any of the present accused responsible for it. It is an isolated instance of cruelty. The man responsible for it has been made to account for the same with his life. I cannot connect any of the present accused with this incident.

The Prosecution case regarding the employment of the prisoners of war upon tasks having relation with the operation of the war is that the prisoners were so employed by the Japanese Government in violation of the Provisions of Article 6 of the Hague Convention, 1907, and Article 31 of the Geneva Convention 1929.

Article 6 of the Hague Convention, 1907, provides *inter alia* that tasks upon which prisoners of war are employed "shall have no connection with the operation of the war".

Article 31 of the Geneva Prisoner of War Convention, 1929, states that

"labour furnished by prisoners of war shall have no direct relation with war operations".

A series of official Japanese documents, which have been put in evidence, show that the Japanese Government, deliberately and as a matter of policy, engaged its prisoners of war in such labours. The following are some of such documents:

1. Exhibit 2,010—a communication dated 6 May 1942 to the Chief of Staff of the Taiwan Army. The accused KIMURA states, "so that they can be used for the enlargement of our production and as military labour, white prisoners of war will be confined successively in Korea, Formosa and Manchuria".
2. In the monthly reports of the secret service police for August 1941 is set out a plan to use prisoners of war as a result of the labour shortage. (Exh. 1,972-A, R. P. 14,509)

   The plan says, "Owing to the good results obtained by 150 American prisoners of war at Zentsuji POW Camp who had been sent to Osaka in order to engage in labouring works as a neutralizing measure for labour shortage suffered in the military works and harbour equipment, the enterprising circles who were suffering from the labour shortage at several districts around Tokyo .... applied to the military authorities to allow them to use prisoners of war".
3. Exhibit 1, 970-A—letter dated 22 August 1942 from the accused KIMURA as Vice-Minister of War to the Chief of Staff of the Kwantung Army:

   "For the realization of the urgent organization of the aircraft production we want to improve the present capacity of the Manchuria Machine Tool Company according to the plan of utilization enclosed herewith, and to allot a large part of its improved capacity to the production of machine tools which are necessary for the urgent organization for the production of air ordnances, ammunition and aircraft in our country...." The plan which is referred to envisages the employment of 1,500 war prisoners.
4. Exhibit 1, 971-A—Foreign Affairs Monthly Report, September 1942, published by the Foreign Section of the Police Bureau of the Home Ministry. This speaks of the labour shortage problem in Japan and of a decision arrived at at a conference held by the Cabinet Planning Board, according to which it was decided: "Of the industries in the National Mobilization Plan, war prisoners shall be employed for mining, stevedoring and engineering and construction work for national defense".
5. Exhibit 1,967—letter dated 2 October 1942 from the Chief of Staff of the Eastern District Army to the accused TOJO, requesting his sanction of the employment of the war prisoners in the Tokyo POW Camp for, amongst others "industrial labour for the expansion of productive power" at "munition factories for expanding

production". This was approved by the War Minister.

6. Exhibit 1,969—A report of the Governor of Kanagawa Prefecture to the ministers of Welfare and Home Affairs, dated 6 October 1942, which states as follows:

"It is generally admitted by all the business proprietors alike that the use of POW labour had made the systematic operation of transportation possible for the first time, and has not only produced a great influence in the business circles but will also contribute greatly to the expansion of production, including munitions of war."

7. Exhibit 1,976—A report dated 4 September 1942 from the accused ITAGAKI as Korean Army Commander to the accused TOJO. This report sets out regulations in use in the Korean POW camps. They include the following:

"Article 2. Not one POW must be left to time in idleness. Allow appropriate labour according to their skill, age and physical strength, thereby using them in industrial development and military labour."

Regarding the employment of the Officer prisoners, the prosecution relied on the following documents:

1. Exhibit 1,961—On June 3, 1942 the Director of POW Custody Division sent a circular to army units on the subject of labour imposed on POW officers and non-commissioned officers. It states, "Although the imposition of labour upon POW officers and noncommissioned officers is prohibited under Article 1 of the POW regulations, it is the policy of the central authorities, in view of the present condition of this country which does not allow anyone to lie idle and eat freely, and also with a view to maintaining the health of prisoners of war, to help them volunteer to work in accordance with their respective status, intelligence, strength, etc. Therefore it is desired that proper direction be given accordingly."

A similar notification was sent to the Chief of Staff of the Taiwan Army on 5 June 1942. (Exh. 2,003)

2. On 4 September 1942 the accused ITAGAKI, as Commander of the Korean Army, sent to the accused TOJO a report on the regulations enforced in the Korean prisoner of war camp. (Exh. 1, 976). Article 3 of these regulations reads as follows:

"All prisoners of war, including officers, shall work. But guide those above warrant officers according to status, ability and physical strength to work voluntarily."

Apart from the question whether the Hague Convention or the Geneva Prisoner-of-War Convention is applicable to this case, the provisions therein speak of certain prohibited labour.

Whatever may be the meaning of the expression, "direct relation with war operations" in these days of total war, it cannot be denied that there is

some evidence of the prisoners having been used for transporting materials intended for combatant units.

I would, however, consider this violation as a mere delinquency on the part of the state. These are mere acts of state. I would not make any of the accused criminally responsible for such violations. The same observation would apply to the cases of compulsory employment of officer prisoners.

As regards the Burma-Thailand railway, the Prosecution case may be summarized thus:

From August 1942 onward, prisoners of war were despatched from Singapore and the Netherlands East Indies to Burma and Siam to construct a railway line from Kanchanburi in Thailand to Thanbuyzayat in Burma for the purpose of supplying Japanese troops in Burma who were preparing to invade India. The total distance was about 400 kilometers and the greater part of that was over virgin mountainous jungle, and it was built from each end at the same time. In all, about 46,000 prisoners of war were employed and, of these, 16,000 died in a period of 18 months from starvation, disease and ill-treatment. (R. P. 5, 415, 5, 434-41). Japanese sources place the maximum number of prisoners employed at 49, 776 and the deaths at 7, 746. (Exh. 473, R. P. 5, 492). In addition, from 1, 20, 000 to 1, 50, 000 Indonesians, Burmese, Chinese and Malayans were employed and their death-roll from the same causes was estimated at 60, 000 to 1, 00, 000. (R. P. 5, 415 and 5, 434-41)

The Prosecution evidence that the line was being constructed for operational reasons is corroborated by Japanese documents that came into existence in 1944. Thus in a report dated 6 October 1944 from Chief of Staff, Southern Army, to the Chief of Prisoner of War Information Bureau, the following statement appears:

"... For strategic reasons the completion of this railway was most urgent. Since the proposed site of this railway line was a virgin jungle, shelter, food, provisions and medical supplies were far from adequate and much different from normal conditions for prisoners of war. ..."

A communication received on October 4, 1944, at the same Bureau from the Chief of Prisoner of War Camps in Siam states *inter alia*:

"At that time .... provisions and rations were scarce. Quarters and establishments were poor and medical facilities were inadequate. Moreover, for strategic reasons, it was necessary to complete the railway by August and the work was pushed forward at a terrific rate, with the result that many prisoners of war became ill and many died." (Exh. 473, R. P. 5, 492)

There is ample Prosecution evidence to show that the deaths of prisoners were due to ill-treatment, excessive labour, starvation, disease and medical neglect. (R. P. 11, 411-41, 11, 478, 13, 000-11, 13, 020-35; Exh. 1, 561-70, Exh. 1, 574-5, 1, 580)

"F" Force and "H" Force arrived in Thailand from Singapore in April and May 1943, respectively. The latter force was 3, 000 strong and had a death-roll of 900 in seven months.

The decision to construct the railway was made by Imperial General

Headquarters in response to a request from Southern Army Headquarters. (R. P. 14, 633). Subsequently, in February 1943 Imperial General Headquarters decided for operational reasons to speed up the construction by four months but later extended the new period by two months. (Exh. 475, R. P. 5, 513). The result was that the line was completed in October 1943, two months earlier than was originally planned. (R. P. 5, 437)

The Defense does not deny the facts generally, but attributes the deathrate to the early onset of the rainy season preventing the transportation of supplies. (Exh. 475, R. P. 27, 412-24 and 27, 746). It says that the Southern Army Commander, realizing that the success of the construction depended upon sanitation, sent medical teams to the area to study and improve the sanitary conditions, to investigate malaria with a view to controlling it, and to purify water supplies. The Southern Army Headquarters had been advised by its medical officers of the grave danger of the prisoners contracting diseases, and from the end of 1942 onward of the growing death-rate among them. (R. P. 27, 746)

Even if this were so, if the Japanese had exercised every care and the deaths were solely attributable to the unexpected onset of the rainy season they would, in the circumstances, have committed a war crime. Southern Army Headquarters had no right to send prisoners of war to work in an area which it knew to be gravely dangerous to health, and further, it had no right to employ prisoners on the construction of a railway line to be used for military purposes. There can be no doubt that it was the intention of the Japanese at that time to use the line solely for military purposes, to supply and reinforce their troops in Burma.

But it was clearly not the rainy season that caused the deaths although it may have increased them. As early as March and April, even on the Japanese figures, the monthly death-roll already exceeded 200. If the rainy season had then already commenced, why send "F" and "H" forces there at the end of April and in May? (R. P. 5, 439)

Further, the deaths were almost entirely limited to the prisoners of war.

It follows that the deaths among the prisoners were due to the fact that they were subjected to conditions to which the Japanese were not subjected. They died from ill-treatment, excessive labour and unnecessary medical neglect and starvation.

This is the Prosecution case. I would divide this case into the following two parts:

1. Employment of the prisoners of war in the work having direct relation with war operations;
2. The inhuman treatment of the prisoners of war.

As regards the employment, I do not hesitate to say that the accused TOJO was fully responsible for it; but this violation of the rules regarding the labour of prisoners of war is a mere act of state. It is not criminal *per se* and I would not make him criminally liable for it.

As regards the inhuman treatment of the prisoners, during this employ-

ment, the evidence does not satisfy me that it was due to any inaction on the part of any of the accused, including TOJO, or that it was such as could have been, in any way, foreseen by any of the accused.

The most important witness examined in this connection is Colonel Dalrymple Wild. The relevant portion of his evidence commences at page 5,434 of the record. An analysis of this evidence will disclose the following:

1. From September 1942 the prisoners were taken over by the prisoner of war administration department.
2. Until September 1942 the prisoners were under the control of the 25th Army Headquarters and working camps were under the control of different Japanese units:
   (*a*) In September 1942 they were taken over by the administration centre in Tokyo.
   (*b*) Malaya and Sumatra were grouped together in one prisoner of war area under the command of Major Fukuye and of the prisoner of war administration.
   (*c*) As regards care and administration of prisoners of war, he took his orders from Tokyo. He had no duties whatsoever outside that of administration of prisoners of war.
3. The basis of administration was the same regarding the Burma-Siam railway, the commanding officer being a major general in charge of POW administration in Siam.
4. (*a*)From August 1942 onwards, men were being dispatched from Singapore to the Burma-Siam railway.
   (*b*) They included a large number who had come from the Netherlands East Indies to Changi camp.
   (*c*) Some had been sent by sea to Formosa and others by sea to Burma.
5. (*a*) Prisoners began to leave Singapore to work on the Burma-Siam railway in August 1942.
   (*b*) The first to go to Burma was a party of Australians, under Brigadier Varley, called "A" Force.
   (*c*) The witness accompanied "F" Force. They started in the latter part of April 1943. They were 7,000 in number, of whom about 3,600 were Australians and 3,400 were British.
   (*d*) 3,100 out of this 7,000 died. The survivors got back to Singapore in April 1944.
   (*e*) The total casualties during the construction of the railway amounted to 16,000 out of 46,000.
   (*f*) The work was finished by the end of October 1943.
6. (*a*) The whole of those deaths were duly recorded.
   (*b*) The witness's party remained under Malaya POW administration. The figures were always sent to the headquarters of the Japanese at Changi camp for onward transmission to Tokyo. As regards the other parties, they were under the same POW administration. Their figures were similarly

reported as they occurred to the major general's headquarters at Tarso, Siam. One copy was forwarded by Major General Sassa to the headquarters of the POW administration in Tokyo.

(*c*) There were nearly 1,50,000 Asiatic labourers employed in the construction works. Of them 1,00,000 died.

7. The witness gives details of the work done by the prisoners of war and of the ill-treatment beginning from April 1943.

From the evidence of this witness, it becomes apparent that the overzealousness of the local officers was mostly responsible for the disaster that happened. At page 5,445 of the record we are given an instance of such overzealousness on the part of Major General Arimura at Changi. The witness explained to the major general that there were not 7,000 fit men in Changi and that the most the witness could raise would be 5,000 men. The witness then says: "Major General ARIMURA's headquarters were most reassuring about it all. We were officially told that we must take two thousand unfit men whom the Japanese agreed to classify as non-walking sick. I was told that the sole reason for the move was that the food situation was getting difficult on Singapore Island; we were not going to working camps but to health camps; it was a nice place in the mountains, and none of the men would be required to leave their health camps to work; the most that we should be required to do would be to look after ourselves and do necessary work inside the camp; it would be in the best interests of the sick men to take them because they would have a better chance of recovering in these health camps than if they remained in Changi, as the food was short."

This only shows over-zealousness on the part of General ARIMURA and his roguish character. Certainly this could not in any way be connected with any steps taken by Tokyo. Then again, what we are told by Colonel Wild at page 5,457 of the record only indicates the brutality of a corporal. Fifty men were sick. The corporal, in spite of that, would make them march during the night. The witness took these fifty men to a Japanese medical officer. The Japanese corporal concerned was also with the party. The medical officer gave them some medical treatment and agreed that thirty-six of them should not march that night. At the witness's suggestion he gave this as an order to the Japanese corporal. Yet when the fifty men were brought back to the camp the Japanese corporal gave instructions that only fourteen should stay behind that night instead of thirty-six. After reporting this again to the Japanese medical officer, the witness succeeded in getting an order in writing from the medical officer to his own sergeant major that the thirty-six men should stay. This was given to the corporal. In spite of that, the corporal made the men march.

Similar is the story of over-zealousness shown by Lt. Colonel BANNO, the Japanese Commander of "F" Force. The account is given by the witness at pages 5,459-60 of the record.

The Australian marching party was being accommodated within a few yards of huts in which a large number of Asiatic labourers were dying from

cholera. Colonel Harris described the situation to Lt. Colonel BANNO at the staging camp at Konquita and warned, "You must either stop the march or by pass Konquita. If you don't, we will have a violent outbreak of cholera in all our camps within a week". Lt. Colonel BANNO was obstinate. The consequence of the obstinacy was outbreak of cholera in the Australian marching party. Lt. Colonel BANNO was an officer of the POW administration of Malaya and Sumatra.

Similar again is the account of unnecessary brutality of some of the Japanese engineers described by the witness at page 5,477 of the record. The actual perpetrators of these atrocities are not before us. I believe those of them that could be got hold of alive have already been made to answer for their brutalities. Colonel Wild himself told us in his evidence recorded at pages 5, 684-85, that since his engagement "in war crimes investigation in South East Asia, South East Asia Command" nearly four hundred cases had been brought to trial; of these, in over three hundred cases, the trial had been completed resulting in "well over a hundred death sentences and about a hundred and fifty, terms of imprisonment". These were exclusive of those brought to trial by Australian Courts, Dutch Courts and American Courts. So, there is no scope for any apprehension of any mistaken clemency having been shown towards any of the alleged perpetrators of all these foul acts. We are here concerned with a different set of persons. Certainly nothing has been placed before us which would entitle us to say that they should have even foreseen such brutalities or over-zealousness on the part of these persons.

The evidence of Colonel Wild rather goes to show that these local officers were conscious of their own guilt in showing such over-zealousness and therefore resorted to steps to conceal the effect of their over-zealousness from the Tokyo authorities. The Japanese medical officer interpreter of "F" Force compelled the witness's party to alter the cause of death to diarrhea. Similar suppression of the actual state of affairs in the locality is suggested against the Kempeitai at Kanchanburi at pages 5,485-86 of the record by the witness.

The evidence of this witness also makes it clear that the construction of the railway in question was not devised by the relevant authorities in Tokyo in expectation of utilizing the prisoner of war labour. Lay labour was very largely recruited for the purpose. Prisoners of war were employed only as a last resort.

A peculiar use has been made by the prosecution of its Exhibit 475. This exhibit purports to be a report on employment of war prisoners in the Siam-Burma railway construction. The prosecution offered it in evidence and described it as a report by the Japanese government on the Burma-Thailand railway.

The prosecution told us that "this was a document prepared by the Japanese War Ministry immediately AFTER the surrender of Japan and forwarded by them on the 19 December 1945 to the Supreme Commander, but prepared of their own motion and not on demand". We received it in evidence on 11 September 1946 and marked it Exhibit 475. Obviously it was a document sought to be relied on by the prosecution. Subsequently, however, the

prosecution went on seeking contradictions of its contents from the witness, Colonel Wild, as if it were being relied on by the defense. The defense certainly did not rely on this document and, even if its contents be of any evidential value, it would only be a piece of evidence against them to be weighed by us with other evidence. Its having been prepared by the Japanese War Ministry would not, in my opinion, give it any greater weight as against the present accused, specially when we know that it was prepared AFTER the surrender of Japan and we do not know on what materials, and for what purpose it might have been thus prepared by its authors. If this report is founded on any relevant materials, such materials must have been available even after the surrender; and we were entitled to have those materials before us in order to see what conclusion we could draw for ourselves from them. If there were no such materials before the author or authors of the report, the report is absolutely worthless as a piece of evidence and is only calculated to create prejudice against the present accused.

This report is divided into three parts: The first part refers to protests by allied powers; the second purports to give details of investigations; and the third part gives the conclusion.

The final conclusion of the report stands thus:

"1. The foregoing is an explanation of the circumstances which compelled a heavy toll of life during the progress of the construction work. In the final analysis, causes of the tragedy may be traced principally to the placement of a time limit on the construction, the immense difficulty in making thorough preparation and to the precipitancy with which the Japanese soldiers, despite their lack of experience in such large-scale construction work and meagre scientific equipment, dared to carry on their work in strict obedience to orders which they characteristically regarded as imperative. Thus the occurence of the casualties, it must be declared, was by no means due to any deliberate intention on the part of the Army Authorities.

"As regards the employment of prisoners of war in the above construction work, it may be stated that at the time the Japanese Army as a whole entertained the ideas that the employment of prisoners of war in any work other than military operations was not a breach of the Geneva Convention. Furthermore, it is to be insisted that the incident was of a radically different character from the so-called maltreatment of prisoners of war.

"2. The incident, already stated was an inevitable outcome of the situation then prevailing, and, if anyone is to be called to account for the dreadful death-rate, the responsibility ought to be placed on the then Chief of the General Staff (General Sugiyama) who ordered the construction, the War Minister (General Tojo) who sanctioned the employment of prisoners and the Commander-in-Chief of the South Area Corps (General Terauchi) who was entrusted with the construction on the spot.

"3. As regards individual cases of maltreatment of prisoners of war, it

> is desired that investigation be started upon the further receipt from the Allied Powers of a report of the details, particularly the ranks, and names of the suspected offenders, and if, as a result, they should be found guilty severe measures should be meted out to them."

The author of the report traces the causes of the tragedy to the placement of a time limit on the construction. The witness, Colonel Wild, gave us just another version.

Colonel Wild deposed: "We told the Japanese that the way they were treating their labour, both Asiatic and military, was, from a soldier's point of view, worse than a crime; it was a blunder. We told them, and I consider now, that if they had treated their labour properly and fed it and housed it and given it reasonable working hours, they would have finished that railway by the time they wanted to. We told them then, and I consider now, that as a result of the way they treated their labour they were months later than they intended in finishing that railway, and in consequence lost a campaign which it was intended to supply in Burma."

The urgency of the completion of this railway was not responsible for the disaster that happened. It is in the evidence of Colonel Wild that there might have been no difficulty in the completion within the scheduled time had the prisoners and the labourers been treated well. The maltreatment was responsible for the delay, not the shortage of time, responsible for the disaster. Those, therefore, who might have been responsible for fixing the time limit did not in any way miscalculate and certainly their calculation was not responsible for what happened to the prisoners.

Whatever value the report may otherwise have, certainly it has no evidentiary value as to the apportionment of guilt made by it. In my opinion, in the absence of the materials on which it might have been based, this report should not have come in at all.

The members of the general headquarters and the War Minister certainly were responsible for the employment of prisoners of war in this construction work. That act is not *mala in se* and I would not make any of these persons criminally liable for it.

As regards the disaster that happened to the prisoners of war, there is no evidence before us that there were any materials before these authors which should have led them to foresee these consequences. Most of these consequences were due to the over-zealousness of the local officers. It is difficult to trace the responsibility for this disaster to the War Minister or any other member of the cabinet in order to fix any criminal liability on them.

Espionage occupies a peculiar position in international law. It has always been considered lawful for a belligerent to employ spies to obtain the necessary information.

Article 24 of the Hague Regulations enacted that ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible. The fact, however, that these

methods are lawful on the part of the belligerent who employs them does not protect from punishment such individuals as are engaged in procuring such information. Although a belligerent acts lawfully in employing spies and traitors, the other belligerent, who punishes them, likewise acts lawfully. Persons committing acts of espionage are considered war criminals and may be lawfully punished. The usual punishment for spying is hanging or shooting. A spy, however, may not be punished without a trial before a courtmartial.

The prosecution case is that some of the prisoners of war were convicted of espionage and sentenced to death, and one was convicted of attempted espionage, and sentenced to fourteen years imprisonment. It is not the prosecution case that any of the prisoners were punished in this respect without a trial.

I do not think anything has been placed before us which would entitle us to say that the convictions of espionage charges were wrongfully made. At any rate, these prisoners were charged of espionage, tried by the proper organ and convicted by the same. I do not see how we can make any of the accused criminally responsible for it.

The treatment meted out to the Allied airmen is one of the gravest of the charges against Japan.

The prosecution case, in this respect, begins with the treatment of the crews of the American planes commanded by Colonel Doolittle which raided Japan on the 18th April 1942. The crews were captured in China. The prosecution case is that subsequent to their capture "Regulations for the Punishment of Enemy Aircrew" were made in China by the accused HATA on the 13th August 1942. The crews of these planes were tried by courtmartial under these regulations and were sentenced to death. Later, the sentences in respect to five of them were commuted to life imprisonment. The remaining three were executed. These regulations had provided death penalty for boming, strafing or otherwise attacking civilian or non-military objectives. In support of this case reliance is placed by the prosecution on exhibits 3, 129 to 3, 131 record pages 27, 902 to 27, 908 and exhibits 1, 991 to 1, 993 record pages 14, 662 to 14, 670.

The prosecution then makes cases of execution of captured airmen without trial in the following places:

1. Bougainville — Two cases in December 1943 and one in May 1943.
2. New Britain — One case in July 1944 and another in November 1944.
3. New Guinea — One case on 29 March 1943 and another in 1944.
4. Ambon — One case on 29 August 1944 and another on 21 September 1943.
5. Celebes — Two cases on 13 September 1944, eight in the latter part of September 1944, nine in October 1944, one in January 1945, two in February 1945, one in July 1945, four on 23 March 1945

and another about June or July 1945.

6. Batavia — Seven cases in June 1945.
7. Borneo — Three cases in February 1945.
8. Burma — One incident in February or March 1945.
9. Hankow — Incident of 4th November 1945.
10. Philippines — One incident on 26 March 1945.
11. Singapore — One case in December 1944 or January 1945, another in June 1945 and several others between May and July 1945.
12. Japan Proper — Several cases from 11 May 1945 to 15 August 1945.

Exhibit 1,992 is a communication dated 28 July 1942 "dispatched from Vice War Minister KIMURA, Heitaro," to "each Chief of Staff stationed in Japan," regarding "Treatment of Enemy Air Crew Members". It runs as follows:

"I request you to take note and understand that the following decision was made in regard to the treatment of enemy air crew members who entered our jurisdiction with the object of raiding Japanese territory, Manchukuo and our regions of operation:

"1. Those who do not violate the war-time international law shall have to be treated as POWs and those who showed actions of violating the said law shall be treated as war-time capital criminals.

"2. Defense Commander-in-Chief of various places (including troops stationed in Japanese territory, outside Japan and the Governor of occupied Hongkong) shall send for court-martial such enemy air crew members, who entered the respective jurisdiction and are suspected of deserving treatment as war-time capital criminal. In regard to the above court-martial, the provisions of the Specially Established Court-Martial stated in the Army Court-Martial Law shall be applied."

Exhibit 1,993 is a "Notification of Matters Pertaining to the Treatment of Crew Members of Raiding Enemy Planes", of the same date from "Imperial Headquarters, Army Section Staff" to "Mr. Jun ATOMIYA, Chief of Staff, China Expeditionary Forces". It runs as follows:

"*Articles of War of OO Army (Draft)*

"*Article 1*. These articles of war shall be applicable to the crew members of enemy planes raiding our Imperial Domain, Manchukuo or our zone of operations and falling into the powers of OO Army.

"*Article 2*. Those having committed the acts listed below shall be subjected to military punishment:

"1. To bomb, strafe and conduct other types of attacks for the purpose of threatening and wounding or killing the ordinary populace.

"2. To bomb, strafe and conduct other types of attacks for the purpose of destroying or ruining private properties possessing no military

characteristics.

"3. To bomb, strafe and conduct other types of attacks against targets other than military targets unless inevitable.

"4. To conduct outrageous and inhuman acts ignoring humanity, besides the aforementioned three paragraphs.

"This is also applicable to those coming to attack our Imperial Domain, Manchukuo, or our zone of operations with the purpose of committing the acts mentioned in the above paragraphs, but having fallen into the powers of OO Army *prior to having accomplished* them.

"*Article 3*. The military punishment shall be death. However, depending on the situation, it may be changed to life or imprisonment of over ten years.

"*Article 4*. Death shall be by a firing squad. Imprisonment shall be at a place to be designated later, and they shall be subjected to prescribed labour.

"*Article 5*. When specific reasons exist, the execution of military punishment shall be suspended.

"*Article 6*. In regard to imprisonment, regulations pertaining to penal servitude of the criminal law shall be applicable, besides those stipulated in these articles of war.

"*Supplementary Provisions*

"These articles of war shall become effective as of ———— day of ———— month of ———— year.

"These articles of war shall be applicable against *de post facto* acts."

Exhibit 1,991 is the "Regulations for Punishment of Enemy Air Crews" dated 13 August 1942, obviously adopting the above draft. The Regulations stood thus:

"Article 1.

"These military regulations shall be applicable to enemy flyers who have raided Japanese territories, Manchukuo, or our operational areas and have come within the jurisdiction of the Japanese Expeditionary Forces in China.

"Article 2.

"Those who have committed the following acts shall be liable to military punishment:

"(1) Bombing, strafing, and other attacks with the object of threatening or killing and injuring ordinary people.

"(2) Bombing, strafing, and other attacks with the object of destroying or damaging private property of a non-military nature.

"(3) Bombing, strafing, and other attacks against objects other than military objectives, except those carried out under unavoidable circumstances.

"(4) Violations of wartime international law.

"The same shall be applicable to those who, with the object of carrying

out the acts enumerated in the preceding paragraph, have come to raid Japanese territories, Manchukuo, or our operational areas and have come within the jurisdiction of the Japanese Expeditionary Forces in China before accomplishing this object.

"Article 3.

"Death shall be the military punishment. However, life imprisonment or more than ten years confinement may be substituted for it according to extenuating circumstances.

"Article 4.

"Death shall be by shooting.

"Confinement shall be effected in a detention place and prescribed labour imposed.

"Article 5.

"Under special circumstances the execution of military punishment shall be remitted.

"Article 6.

"In respect to confinement, the provisions of the criminal law concerning penal servitude shall be correspondingly applicable, in addition to the provisions of these military regulations.

"Supplementary Regulations.

"These military regulations shall be enforced from 13 August 1942 (Showa 17).

"These military regulations shall be applicable also to the acts committed previous to their enforcement.

"Proclamation Appendix

"Enemy flyers who have raided Japanese territories, Manchukuo, or our operational areas, come within our jurisdiction, and violated wartime international law shall be tried by court-martial and sentenced to either death or heavy punishment as important war criminals."

Exhibits 3, 129 and 3, 130 are the defense documents, showing the trial and conviction of these fliers by a court-martial.

The charges in the case of the execution of the allied airmen fall under two heads: (1) Execution on trial and (2) Execution without trial.

Under the heading, Execution on Trial, it is alleged that this trial took place under an *ex post facto* law and that this making of *ex post facto* law itself was a crime.

I have already considered the question of the scope of legislative power of a belligerent in respect of the trial and punishment of prisoners of war for war crimes, and have denied this right to any belligerent power, including the victors.

There I have pointed out how the Tribunal at Nurnberg accepted the Charter creating that Tribunal as defining war crimes and thereby giving it a binding law in that respect. It seems that the victor powers think that international law authorizes them to make law in this respect. Whatever be my views, if the victor nations, and, for the matter of that, so many judges of the tribunals set up for the purpose of trying the war criminals could hold that

it was open to the victor nations to create *ex post facto* law for the trial of prisoners of war, I would be reluctant to fix any criminal responsibility on the authors of the *ex post facto* law for the trial of allied airmen. I should not ascribe any *mala fides* to this action of theirs.

The Charter, we should remember, not only gave *ex post facto* law but gave it not even for general purposes but for the purposes of trial of the particular prisoners. It was *ex post facto* law meant not for all people but for a special person or a special group of persons.

In judging the *bona fides* of the authors of these regulations, we must remember that as yet air warfare is not provided with any rules of conduct. The states represented at the Washington Conference of 1922 on the limitation of armaments decided on the appointment of a commission of jurists charged with the task of proposing a code of air warfare rules. The British Empire, the United States of America, France, Italy and Japan were represented at that conference. Holland was subsequently invited to participate in the work of the commission.

In 1923 the Commission produced the proposed code of rules. This, however, was not ratified by any of the Powers. The code is of importance only as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war; it will doubtless prove a convenient starting point for any future steps in this direction. But, in any case, this has not as yet been done, and it seems none of the belligerents including the allied powers paid any heed to these rules.

The Commission made certain rules regarding bombardment. They stated: "The subject of bombardment by aircraft is one of the most difficult to deal with in framing any code of rules for aerial warfare. The experiences of the recent war have left in the minds of the world at large a lively horror of the havoc which can be wrought by the indiscriminate launching of bombs and projectiles on the noncombatant populations of towns and cities. The conscience of mankind revolts against this form of making war in places outside the actual theatre of military operations, and the feeling is universal that limitations must be imposed."

In its proposed Article 22, the Commission suggested "aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring noncombatants is prohibited".

In Article 24 it suggested:

"1. Aerial bombardment is legitimate ONLY when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military objective to the belligerent.

"2. Such bombardment is legitimate ONLY when directed EXCLUSIVELY at the following objectives: Military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammu-

nition or distinctly military supplies; lines of communication or transportation used for military purposes.

"3. The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. IN CASES WHERE THE OBJECTIVE SPECIFIED IN PARAGRAPH 2 ARE SO SITUATED THAT THEY CANNOT BE BOMBED WITHOUT THE INDISCRIMINATE BOMBARDMENT OF THE CIVILIAN POPULATION, THE AIRCRAFT MUST ABSTAIN FROM BOMBARDMENT.

"4. In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate, provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population. . . . ."

We are told that there were four main viewpoints which the Commission took of the work before it:

1. Humanitarian;
2. National point of view of the respective delegations;
3. The juridic point of view with regard to the laws of war;
4. The combatant point of view with regard to the conduct of war in which the combatant services considered their respective nations both as neutrals and as belligerents.

We are further told that "with regard to the revision of the laws of war from the humanitarian point of view, all nations and all members of each delegation were agreed that it was desirable that the laws of war should be such as to prevent suffering of persons or destruction of private property, except such as was inevitable for the accomplishment of the war objective. Every now and then in the course of the discussion, someone would raise anew the humanitarian point and immediately there would be an echo from the representatives of every other national delegation that his country was behind no other in its desire to limit the horrors of war. But although the public at large in time of peace and in a state of emotional rest sees only the disturbances of war, governments, more foreseeing, know that wars must occur. Subsequently they are unwilling to permit public opinion of their respective nations in time of peace to drive them to agree to arrangements by international conventions which the same public under the influence of war emotions would be the first to urge their governments to break. Thus, the codes as agreed upon will scarcely satisfy the most radical pacifists and humanitarians."

". . . From the other three points of view there was cleavage of opinion in the Commission. In the formulation of the rules of war for these new agencies, each nation seemed chiefly guided by the principle of promoting its own national policies and its position in the world, neglecting neither the point of neutral nor of belligerent. Each national delegation was a unit in standing for a code which should favour its national situation . . . . . But there was another line of cleavage more or less visible, running between the jurists forming the Commission as a whole and the technical advisers as a whole. The majority of the commissioners had little or no technical acquaintance with the art

and practice of war. Some seemed inclined to believe that the course of war even when great national emotions were aroused, might be guided by the phrases of a code of rules previously agreed upon. They did not appear always to realize that at any time the code of accepted rules of warfare is based almost entirely on past experience and that when a new war arises, new social, economic and belligerent conditions will make the existing code more or less unsuitable to meet the exigencies of the situation as developed in the course of the current war. . . . ."

The Commission, in suggesting the rules of bombardment, took this into account. It said, "On the other hand, it is equally clear that the aircraft is a potent engine of war and no state which realizes the possibility that it may itself be attacked, and the use to which its adversary may put his air forces can take the risk of fettering its own liberty of action to an extent which would restrict it from attacking its enemy where that adversary may legitimately be attacked with effect."

The Commission, therefore, considered it useless to enact prohibitions unless there was an equally clear understanding of what constituted legitimate objects of attack. It is precisely in this respect that agreement was difficult to reach.

It is needless to say that during this war even the victor allied powers did not follow these rules of bombardment. Leaving aside the case of bombardment by atom bomb, even in using the ordinary bombs, the suggested rules of bombardment were not at all heeded. I shall not repeat here what is said in justification of the use of the atom bomb.

It has been rightly pointed out by Mr. Ellery C. Stowell of the editorial board of the American Journal of International Law that the atom bomb has come "to force a more fundamental searching of the nature of warfare and the legitimate means for the pursuit of military objectives". He then says, "In view of the frightful efficiency of the bomb and the consequent indiscriminate destruction of civilian life and property, it has aroused a considerable popular opposition. At the same time our military and governmental authorities have given it their support on the ground that it hastens the defeat of the enemy with a consequent saving of lives of allied soldiers. . . . When the pros and cons are summed up and all the arguments are heard, it will be found that, pending a more perfect world organization and union shown to be capable of preventing wars, the laws of war cannot rule out any means effective to secure the ends of war. . . . . If Great Britain, Canada and the United States can expect to keep the technique of the atom bomb secret, it would hardly be reasonable to expect them to forego this advantage any more than it would be to expect them to make public any other plan of military defense and the military advantage derived from superior research or administrative organization."

In this state of the aerial warfare, it is difficult to consider the conduct of the Japanese authorities in making the regulation for the purpose of trial of the air pilots criminal on the ground that the regulation gave *ex post facto* law. In my opinion, they did not commit any crime in making these regula-

tions.

We should not fail to remember that the real horror of the air warfare is not the possibility of a few airmen being captured and ruthlessly killed, but the havoc which can be wrought by the indiscriminate launching of bombs and projectiles. The conscience of mankind revolts not so much against the punishment meted out to the ruthless bomber as against his ruthless form of bombing.

As regards the trial according to these regulations, I do not think anything has been established which would fix any guilt on any of the accused. Even if we judge by the standard given by the rules suggested by the Commission, there were bombardments in complete disregard of them. At any rate, if the court-martial found that to be the fact and accordingly convicted the airmen of war crimes, I would not say that either the commander-in-chief or the members of the Cabinet or of the General Staff committed any crime in not opposing that conviction.

As regards execution without trial, we may once again refer to exhibits 1, 991 to 1, 993 wherein the authorities concerned expressly and clearly emphasized trial by court-martial, and certainly they cannot be said to have ever ordered, authorized or permitted any of these illegal things.

The alleged cases of execution of airmen without trial are noticed below with the evidence on which they are based. I would, at the very outset, observe that the Prosecution evidence in support of this part of the case is mostly worthless. We have been given extracts from what is named as JAG Report, and have been told that it is the report prepared by a 'Judge Advocate General'. A Judge Advocate General is no doubt a responsible personage of high position. But in the absence of the materials on which it might be based, I am not prepared to accept it only on his authority. If his conclusions are really based on any relevant materials, we are entitled to have those materials and to see for ourselves whether we too can come to the same conclusion. Minds of different men may differ upon the result of the evidence thus leading to different decisions even on the same cause. We are, however, here on a cause different from that before the Judge Advocate General. In so far as his conclusions might have been based on no evidence or on irrelevant evidence, these are worthless and must be rejected.

Another group of evidence relied on by the prosecution in connection with this matter is what is described as "Research Report about the Japanese Violations of the Laws of War". I am not prepared to pay any greater respect to the conclusion of this reporter whoever he be. The report may evince a very high worth as a piece of research. But in a case where the life and liberty of so many persons are involved, I am not prepared to be led by any sense of respect due to any research work.

The majority of the evidence is the statement of persons of unknown reliability taken out of court without any guarantee of trustworthiness. Both the ability and willingness of these persons to declare the truth remain untested.

1. Bougainville: Exh. 1, 875, R.P. 14, 131 and 1, 877, R.P. 14, 133.

Exh. 1, 875 is a record of the interrogation of Captain WATANABE, Kaoru, and Major ITO, Taichi, both of 17th Army Military Police Unit. This interrogation was made out of court obviously for use at the trial of these two men.

In the course of the interrogation it was admitted that two American airmen who had come down in the sea between Taiof Island and Porton in Bougainville were beheaded on orders of the M. P. Headquarters, 17th Army. This happened in December 1943.

Exh. 1, 877 is a statement taken out of court of a Chinese, Cher Chee by name, who says that he was captured by the Japanese at Hongkong in December 1941. His statement runs thus: "In May 1943, near Buin I saw a white man dressed in overalls like a pilot would wear. He was a young man. The Japanese tied his hands behind his back, and made him sit on the ground. They put a drum of boiling water beside him. About nine of them then filed past him and each one emptied a tin of boiling water over him. The man screamed with pain. I saw him fall flat on the ground and lie still and he stopped screaming. He appeared to me to be dead. The Japanese were soldiers, not officers. The white man was tall, of medium build, clean-shaven and fair. The overalls were khaki. I was the only Chinese who witnessed this." This statement was also taken for use at the trial of the minor war criminals.

2. New Britain: Exh. 1, 866, R. P. 14, 123 and Exh. 1, 873, R. P. 14, 129.

Exh. 1, 866 is a statement taken out of court of a Captain John J. Murphy of Allied Intelligence Bureau. The statement runs thus: "Norman Vickers of the Royal New Zealand Air Force, was with us as a prisoner of war off Tunnel Hill Road, Rabaul. He stated that he was shot down in the Bougainville-Shortlands Area I believe. When he arrived at the prison camp in Rabaul he had been cruelly ill-treated. He had been bound by ropes to which fish hooks had been attached in such a way that whenever he moved his head the fish hooks would pierce his face. Vickers' health deteriorated and in July 1944, he died in my presence as a result of malnutrition and dysentery."

Exh. 1, 873 is a statement taken out of court of one Havildar Changiram of the Indian Army. The statement stands thus: "On the 12th of November 1944 I was digging a trench for Japanese trucks in Totabil Area. About 16:00 hours one single engined United States fighter plane made a forced landing about 100 yards away from where I was working. The Japanese belonging to Go Butai Kendebo Camp rushed to the spot and got hold of the pilot, aged about 19 years, who had come out of machine himself before the Japanese reached him. General INAMORA also lived

there in the Japanese Army Headquarters. About half an hour from the time of forced landing, Japanese Military Police, Kempeitai, beheaded the Allied pilot. I saw this from behind a tree and noticed Japanese cut his flesh from arms, legs, chest and hips and carried the same to their quarters. I was shocked at the scene and followed the Japanese just to find out what they do to the flesh. They cut the flesh to the small pieces and fried it. About 18:00 hours a Japanese high official (Major-General) addressed about 150 Japanese, mostly officers. At the conclusion of the speech a piece of the fried flesh was given to all present, who ate it on the spot."

3. New Guinea: Exh. 1, 836-B, R. P. 14, 075; Exh. 1, 846, R. P. 14, 096.

Exh. 1, 836-B is an excerpt from a captured diary and the record of a statement made by a Japanese prisoner. The statement gives an account how on 29 March 1943 one of the two members of the crew of the Douglas, which had been shot down by A/A on the 18th, was beheaded by unit commander KOMAI. We were not given the captured diary. The owner and unit of the author of the diary is unknown. I hope it was written in Japanese.

Exh. 1, 846 is a record of the interrogation of Japanese Captain ONO, Satoru, of 53rd Field Anti-Aircraft Artillery Battalion, 36th Division, Second Army. ONO, Satoru states that he applied to Yoshino unit commander for an American prisoner of war to kill. He was given two. He had them bayonetted with a shovel. This was in 1944. He did it because he had a strong hostile feeling on account of Americans' bombing his battery.

4. Ambon: Exh.. 1, 830, R. P. 14, 063; Exh. 1, 831, R. P. 14, 071.

Exh. 1, 831 is the record of interrogation of Warrant Officer YOSHIZAKI of the Japanese Navy. According to this statement on the 29th August 1944, the deponent took part in the beheading of three American airmen at Sarara Prisoner of War camp. This was done on orders of superior officers. The district had been bombed by American planes on the previous day.

Exh. 1, 830 is a statement out of court of a Lt. Paul Alfred Stansbury of the U. S. Army Air Force. The affiant, we are told, "was a bombardier on a B-24 which crashed over Kai Islands on 21 September 1943". The statement runs thus:

"The crew had sustained serious injuries in the crash and the navigator was pinned down on the flight deck. A Japanese boat came out. The airmen with the exception of the navigator were taken prisoners. The Japanese refused to do anything for the navigator but left him there to die. The rest of the airmen were taken to Ambon. They were placed in mosquito infested cells without blankets, bedding or mosquito nets. No sunlight could penetrate

the cells and there was no ventilation. They were starved on weevily rice. No medical attention was given them. For 68 days they were interrogated to the accompaniment of beatings almost daily. Later the deponent and the co-pilot were shipped to Japan. They were frequently beaten by the guards. They both became paralyzed with beri-beri but received no treatment for this during the 60 days sea voyage. The deponent remained paralyzed for nine months and the co-pilot for 20 months."

5. Celebes: Exhs. 1, 798 to 1, 803, R. P. 13, 846-65; Exh. 1, 810, R. P. 13, 920.

Exh. 1, 798 relates to two airmen captured on 3rd September 1944.

Exh. 1, 799 relates to 8 airmen survivor of a plane crash in the latter part of September 1944.

Exh. 1, 800 relates to 9 airmen in October 1944, one in January 1945 and two in February 1945.

Exh. 1, 801 relates to an incident of July 1945.

Exh. 1, 802 and 1, 803 relate to an execution of four airmen on 23 March 1945.

These are all interrogatories of minor war criminals taken at the Prisoners of War Camp, Celebes.

Exh. 1, 810 is "evidence taken in Brisbane on November 5, 1945, by Mr. Justice Mansfield". The relevant statement is "Allied airmen caught were killed. I heard that all Allied airmen shot down or landed in Menado were all killed. The Tokki Tai were said to have killed them. When I worked at the Tokki Tai building I saw three airmen—Americans, I believe. We saw them in the gaol, about June or July 1945; and I think they were executed in Tondano. Mr. Stelma was put in a gaol and bamboo splinters were put under his nails. The Tokki Tai did this—YAMAGUCHI was the head of them."

6. Batavia: R. P. 13, 601.

The evidence relied on is the testimony of the Ringer. The witness says: "The Chief of the Japanese coolies reported to us that from the air raid of January 25th two airmen had bailed out of an aircraft over the landing strip. One, who landed on the strip, was promptly beheaded; the second man was hung up in a tree and was bayonetted. Again on the raid of the 29th of January 1945, a burning aircraft tried to make a forced landing on the strip. Two airmen got out of the plane but were thrown back into flames by the Japanese. After the surrender—we had seen on these two air raids seven airmen who had been exhibited in the city of Palembang blindfolded—we asked the Kempei Tai what had happened to these seven men. They denied all knowledge. However, we searched the Kempei Tai building and we found their names written on the cell wall. They then admitted that these men had

been sent to Singapore. These men were executed in Singapore in June 1945. The Japanese responsible made full confessions and committed suicide. The case was known as 'Operation Meridian'."

7. Borneo: Exh. 1, 690, R.P. 13, 500.

Exhibit 1, 690 purports to be a statement by the Japanese Warrant Officer TSUDA. It states that at Samarinda, East Borneo, in February 1945, three American airmen were beheaded.

8. Burma: Exh. 1, 574, R.P. 12, 976.

Exhibit 1, 574 is a statement taken out of court of an Anglo-Burman Robert Andrew Nicol. He gave the date of the occurrence as "7th either February or March 45, I can't remember—which". The name of the airman was given by this man as 'Stan Woodbridge of Chingford, Essex, England'. We do not even know whether there was really any such airman in the R.A.F. and whether he is really dead. The witness according to his own statement was merely a chance witness. He stated: "Prior to the occupation of Rangoon by the Japanese forces, I was a permanent resident at Rangoon but with the approaching advent of the Japanese, I evacuated from Rangoon on 20th February 1941 and I remained at Myaungmya till 25th May 1945. On Wednesday, 7th either February or March 45, I can't remember which, at about 10: 00 hours a lorry stopped in front of my house in Myaungmya, and BA HLAING, a young Burman accompanied by a Jap soldier (three stars), came to my house and enquired if I could speak English and Burmese fluently. When I told them I could, I was asked to accompany them." We are not told why the party arranged the scene in that forest. Obviously the airmen could not be questioned earlier for want of a competent interpreter.

9. Hankow: Exh. 1, 891, R.P. 14, 162.

Exh. 1, 891 is part 12 of the report of the Central Investigation Committee relating to Prisoners of War, dated 4 November 1945. It describes the killing of three American airmen at Hankow, China, in December 1944. The report states:

"4 November 1945. Major General KABURAGI

"I. Circumstances of the incident.

"1. Since around Autumn of last year, the indiscriminate shooting and bombing of the city of Hankow caused considerable damage to the homes of the citizens. Not only that, but the casualties inflicted upon the people, chiefly upon the Chinese forces, was great, and the indignation of the citizens gradually increased.

"2. The Hankow Youth Organization (?) forced the American fliers who participated in attacks against Hankow, to march through the city, as a reprisal for the above-mentioned indiscrim-

inate bombing and shooting. The citizens carried out beatings and violence against these fliers.

"I do not have a detailed knowledge of the methods, means, and degree of the atrocity.

"3. Before the above-mentioned incident was carried out, application for permission to do so was made to the 34th Army Headquarters by the Hankow Youth Organization (?). However, the Commander of the Army (Lieutenant General SANO) would not give permission at first, because the ill-treatment of prisoners of war is not only a violation of International Law, but would also have a bad influence upon the treatment of Japanese nationals interned in the United States. However, the Youth Organization repeatedly requested the permission for carrying it out, saying that the plan was a reprisal for the indiscriminate shooting and bombings and that it would be carried out under the responsibility of the Chinese people and that they will absolutely refrain from troubling the Japanese Forces. Consequently, the permission for the aforementioned was granted."

10. The Philippines at Cebu: Exh. 1, 461, R.P. 12, 778.

Exh. 1, 461 is described by the prosecution as "a summary of evidence of JAG Report No. 72 on the murder of two American captured fliers at Cebu city in March 1945".

The execution is said to have taken place on 26 March 1945.

11. Singapore: Exh. 1, 514, R.P. 12, 927.

Exh. 1, 514 is the statement taken out of court of Lt. Alexander Gordon WEYNTON of Australia. The relevant portion of the statement stands thus:

"On 8th March 1944, I was shipped from Kuching to Singapore to serve a sentence of 10 years imprisonment imposed on me by a Japanese Court on 29th February 1944. Nineteen other prisoners who had been sentenced to imprisonment by the same court accompanied me.

"On 11th March 1944, we were taken to Outram Road Gaol. . . .

"In December 1944, or January 1945, a B-29 which had been shot down in raids over Singapore caught fire. Two members of the crew were severely burnt. They were brought in to Outram Road Gaol. They were just one mass of burns and were black from head to foot. They were placed in a cell but were not allowed any medical treatment.

"In June 1945, I saw a party of nine Allied airmen taken out from their cells on a Saturday afternoon. They were accompanied by a heavily armed guard and a Japanese burial party. Some of this party were Japanese good conduct prisoners. Several days later some of them told me that nine airmen had had their heads taken off and that they had helped to bury them.

"In all between May and July 1945, I saw 17 Allied airmen and 15 Chinese civilians taken out in similar circumstances for execution. The burial party returned but the prisoners did not. The burial party were in a dirty condition, as though they had been digging when they returned. I had some contact with the airmen as I was engaged in taking latrine cans to and from their cells. They told me that they had not been tried.

"I was released when the Japanese surrendered in August 1945."

It is difficult to guess why there was any talk about the trial at all.

12. Japan Proper: Exhs. 1, 921 to 1, 924, R. P. 14, 204-18.

These exhibits are the different parts of the Report of the Japanese Central Investigation Committee relating to the Prisoners of War, dated 9 January 1946.

Exhibit 1, 921 is part 23 of this Report. The Report states:

"The treatment of the airmen of the Allied Forces captured in Eastern Region were divided into two categories. First, if they were suspected of violating military regulations, they were disposed of by court-martial. Second, if they were acquitted, they were interned in the POW camps and treated as ordinary POW. However, before these steps were taken they at first were detained in the guardhouse of the Eastern Military Police Unit Headquarters as suspected violators of military regulations. . . . . During the period of detention there were 17 deaths."

The following incidents are also recorded in this Report:

"1. On the night of May 25, 1945, 62 Allied airmen who were interned in the detention house of the Tokyo Army Prison as suspected violators of the military regulations were burned to death in the air raids.

"2. A seriously injured pilot of a B-29 which fell in Hiyoshi Village in Chiba Prefecture received Kaishaku, that is, he was beheaded on May 26, 1945, on the orders of the Japanese captain of the patrol. The report adds that there is an indication that bayonetting of the body took place after death.

"3. From February 11, 1945, when the Tokai (T. N. Eastern Sea) Military District was established until the time of truce, the number of surviving airmen of Allied planes who descended within the District was 44. Of these, six men at the beginning were interned as prisoners of war since it was clear that they had attacked military objects; and the eleven men who later descended on May 14th were sent to courts-martial because they had conducted indiscriminate bombings and were deeply suspected of being major war criminals; 27 men who later descended after the latter part of May, were disposed of by military regulations without formal procedures of the courts-martial due to the situation at

that time. It was decided that these men were clearly guilty of inhuman and indiscriminate bombings.

"4. Around May of this year, the Headquarters of the 13th Area Army (operational army formed in conjunction with the Headquarters of the Tokai Military District, with most of the personnel holding concurrent positions in the Headquarters of the Military District) estimated that the time of the landing on the mainland by the Allied Forces would be around August. At that time, the whole Army was concentrating on the preparations for the operation, and the work of the Headquarters was also extremely busy. By chance the headquarters received 11 men, airmen who participated in the indiscriminate bombing of Nagoya on May 14th, and discussions were going on about courts-martial for them. However, accompanying the air raids which were getting more violent, the situation was such that the number of airmen was increasing further. After the latter part of May, the enemy bombings seemed to have shifted to inhuman and indiscriminate bombing of cities, aiming mainly at destroying private houses with incendiary bombs, and killing and wounding of citizens. This was also clearly perceived through investigation of these airmen.

"With the passing of time, the operational work became busier than ever. Various situations had to be taken care of speedily, and despite the thorough efforts of the officials and the people, the damages caused by the indiscriminate bombings became gigantic, and the hostile feelings were reaching the limit. Meanwhile, under the severe and continuous air raids day after day, the administration of these airmen was very difficult. In other words, the area army decided that under the circumstances, sending these men to courtsmartial, which are complicated and delaying, would not be consistent with the prevailing state of affairs. Consequently, 11 men were executed in the mountains of Miyazu, Akazu-Cho, Seto City on June 28th, and 16 men were executed at the rear of No. 2 office building of the Headquarters on July 14th."

Exhibit 1, 922 is part 24 of the Report and is dated 26 December 1945. The Report states:

"Total number of the Allied Force Flight Personnel who were captured within the Central Military District by the Japanese Army was about forty-nine, of whom three were sent to Tokyo; about six died from injuries and sickness; two were put to death after trial by court-martial; and the rest, of about thirty-eight, were put to death without being court-martialed.

"The intensification of air raids from June, 1945 onwards, brought about a gradual increase also in the number of captured air flight personnel, but although the Central District M. P. Unit, following thorough investigations on the strength of the aforementioned orders, secured evidence of viola-

tion of Martial Law in each of these cases, these flight personnel could not be brought before Court-Martial due to the 15th Area Army Headquarters (an operational unit incorporated into one body with the Central Military District Headquarters, and the greater part of whose personnel were holding additional posts with the Military District Headquarters) being too busily occupied in the preparation of defense operations against the intensified air raids and supposed landing of our mainland by the U. S. forces, and on account of the Judicial Department, too, being kept busy in dealing with cases of violation of military discipline.

"At that time, the Central Military District Army opined that the intensification of air raids since the autumn of the year before—especially the fact that many lives and considerable private property had been destroyed as a result of the indiscriminate incendiary bombings on Tokyo, Nagoya, Osaka and Kobe, etc., since March of this year, had roused the indignation of the nation—especially towards the flight personnel—to an exceedingly high pitch.

"As, under the afore-mentioned circumstances, the Central District M. P. Unit received no instructions from the Central Military District Headquarters, regarding the measures to be taken against the flight personnel, they contacted the Tokyo M. P. Headquarters, and on the occasion of the first execution in the beginning of July, same was carried out by also contacting the Military District Headquarters."

Exhibit 1, 923 is part 27 of the Report and is dated 27 March 1946. The Report states:

"B. In regard to the public feeling against the captured airmen.

"After the bombings of the Japanese Mainland were initiated, not only were fearful air raids against important facilities continued, but in various places the losses in lives and properties of non-combatants started to mount. Accompanying this, the hostile feelings of the people began to increase. However, in March when large cities such as Tokyo, Nagoya, Osaka and Kobe began to suffer indiscriminate incendiary bombing raids, and huge losses were suffered, the people's feelings suddenly became violent and their hostile feelings increasd. The general pubilc opinion against the captured airmen hardened conspicuously. Later on, the indiscriminate bombings by Allied aircraft became increasingly and ceaselessly violent and the people's spirit of vengeance reached its limit. The situation came to the point where even Japanese airmen who parachuted down were in danger of harm, because the people did not take time to make distinctions.

"C. Relationship between the Central District Military Police Unit Headquarters and the Military Police Headquarters in regard to punishments.

"1. Accompanying the sharp increase in air raids against the mainland in the spring and summer of 1945, the number of captured airmen increased considerably. However, for various reasons, every unit was unable to speedily bring these men to courts-martial. Because of this, the Military Police Unit in the various areas had difficulties in the internment of these men on account of the poor and crowded internment facilities. Around June of 1945, Lieutenant General OKI-

DO, Sanji, the Military Police Commandant, after considering the general state of affairs, issued a personal message using the name of Colonel YAMAMURA, Yoshio, Chief of the External Affairs Section of the Military Police Headquarters. The message was issued to each Military Police Headquarters Commandant in the Northern, Northeastern, Eastern, Tokai, Central, Chugoku, Shikoku, and the Western District in regard to the handling of captured airmen.

"2. The gist of the said personal message, according to the memories of those who were then connected with the Military Police Headquarters, is generally as follows:

"Courts-martial for captured airmen are generally at a standstill. Because of this, it seems that the interned personnel have increased and the various Military Police Units are feeling extreme difficulties in the handling of these men. From the standpoint of the Military Police, they hope for the acceleration of the courts-martial. There are probably some men among the prisoners who carried out inhuman and indiscriminate bombings. It is only right that these men be immediately punished severely according to military regulations.

"If it is impossible to make immediate dispositions by courts-martial, perhaps other methods may unavoidably be used. However, it is up to the Military District Headquarters to decide which of the two methods should be adopted, and it is not a matter to be handled by the Military Police. Therefore, it is best to make contacts with the Chief of Staff of the Military District concerned, according to necessity. Moreover, it seems that he added that this case should first have the independent decision of the Chief of Staff of each Military District.

"3. According to Major-General NAGATOMO, Tsuguo, Commandant of the Military Police Unit Headquarters of the Central District, he was trying to find a solution to the difficulties of the internment of the increased number of captured airmen. Since he received the aforementioned personal message at this time, it seems that he interpreted the intention of the message to mean immediate punishment of the captured airmen and he ordered his officers to make preparations accordingly.

"D. Relationship between the Military Police Unit Headquarters of the Central District and the Central Military District Headquarters in regard to punishments.

"1. Around the end of June (or the beginning of July), Major-General NAGATOMO, Commandant of the Military Police Unit of the Central District who received the said message, paid a visit to Lieutenant General KUNITAKE, Michio, the Chief of Staff of the Central Military District. NAGATOMO made the following statement: 'As a result of investigating captured airmen, we find that their statements are generally all alike. Therefore, hereafter we will not submit every bit of information and we wish to take the appropriate measures for these airmen.'

"Lieutenant General KUNITAKE did not think that this negotiation was something in connection with anything as important as the punishment of the airmen, but he thought it was just a simple intelligence report. Therefore, he answered, 'I acknowledge it', and turned his attention to extremely pressing problems of operation preparations, and counter-measures against air raids.

"According to Lieutenant General KUNITAKE, it seems that he never even dreamed that the purpose of Major-General NAGATOMO's visit was the contact for the important matter based upon the personal message from the Military Police Unit Headquarters.

"2. In the early part of June (the exact date is not known) Major SHINAI, Ikomaro, of the Military Police Unit Headquarters of the Central District visited Colonel OBA, Kojiro, a Staff Officer of the Central Military District and said, 'Since we have had contact from the Military Police Headquarters, we will punish the captured airmen who are at present interned at the Military Police Unit of the Central District.'

"Thereupon, Colonel OBA asked, 'Is it proved that all of these captured airmen actually carried out indiscriminate bombings?' It seems that Major SHINAI answered, 'Yes'.

"It appears that Colonel OBA thought that these punishments were matters concerning captured airmen who were under the administration of the Military Police Unit of the Central District and based upon the plans of the higher Military Police Headquarters to which the unit belonged. Therefore it seems that he answered, 'It is inevitable, if they are to be punished by the Military Police Unit', thinking it was unavoidable, since they were to be punished in the light of military regulations."

Exhibit 1, 924 is part 25 of the Report and is dated 23 January 1946. The Report states:

"Of the Allied Air Force Flight Personnel captured by the Japanese Army within the Western Military District, about eight were put to death on the 20th of June, 1945 (Group I), another, approximately eight men, on the 12th of August in the same year (Group II), and another, approximately fifteen men, on the 15th of the same month in the same year (Group III), by personnel of the said Military District Headquarters."

The report further states in paragraphs 3, 4, and 5, commencing on page 1 as follows:

"III. RE-EXECUTION OF GROUP I.

"As a result of various cities in the Mainland having suffered one after another from incendiary bombing by the Allied Forces ever since the end of 1944, the hostile feeling of the military and government authorities, as well as the people, became steadily aggravated, especially upon Fukuoka City, the seat of the Military District Headquarters, being air-raided on the 19th of June, 1945, which resulted in the principal parts of the City being reduced to ashes, and presenting the tragic sight of large numbers of the general populace being made victims, whereupon the hostile feeling appears to have be-

come still further intensified.

"It was under the circumstances as per the foregoing paragraph that about eight of the captured Flight Personnel were executed by personnel of the Military District Headquarters within its compound on the 20th of June.

"IV. RE-EXECUTION OF GROUP II.

"On entering into August, successive atomic bomb raids were made by the U. S. Army on the cities of Hiroshima and Nagasaki, victimizing the majority of the citizens of both cities, and upon it becoming known that the miserable plight of the said victims was absolutely beyond words, the general feeling of animosity appears to have soared up to its zenith again.

"It was under the circumstances as per the foregoing paragraph that about eight captured Flight Personnel were executed by personnel of the Military District Headquarters in a hill near the Aburayama Crematorium in the southwest part of Fukuoka City, on the 12th of August.

"V. RE-EXECUTION OF GROUP III.

"Upon the war coming to an end on August 15th, various wild rumours became circulated throughout Kyushu District, and Fukuoka District especially was thrown into an indescribable state of confusion due to the weaker sex fleeing to places of refuge, etc., due to the fabricated report that a part of the Allied Forces had already landed, etc., and these factors appear to have aroused a sense of intense enmity among a section of the officers of the Military District Headquarters.

"It was under the circumstances as per the foregoing paragraph that about fifteen captured Flight Personnel were executed by personnel of the Military District Headquarters in a hill near the Aburayama Crematorium in the southwestern part of Fukuoka City, on the 15th of August."

I have already indicated my difficulty in accepting the account in its entirety. But even if I could accept it, it would not establish any guilt of any of the present accused.

The cases of execution without trial are really all stray cases at different theatres of war far away from Japan.

In Japan proper there are several cases, all occurring in 1945 when everything was in a chaotic condition here.

The only accused who would be concerned with these incidents in Japan at that time would be KOISO, SHIGEMITSU and TOGO. We must remember that the TOJO Cabinet fell by the 22nd July 1944. Between 22nd July 1944 and 7th April 1945 it was the KOISO Cabinet which was functioning, and of the accused, only KOISO and SHIGEMITSU were there. From the 7th April 1945 till the 17th August 1945 the SUZUKI Cabinet functioned, and only TOGO of the accused persons was in that Cabinet.

In any case, in view of the conditions of Japan at that time, I would not hold them criminally responsible for failing to prevent these unfortunate executions. Every failure does not imply fault.

PART VII

RECOMMENDATION

For the reasons given in the foregoing pages, I would hold that each and everyone of the accused must be found not guilty of each and every one of the charges in the indictment and should be acquitted of all those charges.

I have not considered whether or not any of the wars against any of the nations covered by the indictment was aggressive. The view of law that I take as to the criminality or otherwise of any war makes it unnecessary for me to enter into this question. Further, I have indicated the difficulty that I feel in defining 'aggressive war', keeping in view the generally prevalent behaviour of the powers in international life.

There is indeed one possible approach to the case, which I have, as yet, left unexplored. It is said that the victor nations, as military occupants of Japan, can take action under Article 43 of the Hague Convention IV of 1907 in order to 'ensure public order and safety' and that this power entitles them to define the circumstances in which they would proceed to take such action and the action which they would consider requisite for the purpose.

Reference is made to the case of Napoleon Bonaparte and thence to Article 43 of the Hague Convention of 1907, and it is contended that the victor powers would have every right, for the sake of ensuring public order and safety of the world, to remove any of the accused from any sphere of life where there would be any possibility of his doing any future mischief.

I believe this is really an appeal to the political power of the victor nations with a pretense of legal justice. It only amounts to "piecing up want of legality with matter of convenience".

I have already noticed the case of Napoleon Bonaparte and have pointed out how, even in those days, a good deal of difficulty was felt and doubts entertained as to the exact legal position arising in his case. Those who took the final step of detention of Napoleon realized that it was necessary for them to equip themselves with some authority for this purpose from their national legislature. 56 George III chapters 22 and 23 were enacted to furnish this authority.

At the Congress of Aix-la-Chapelle 1818, the Allied Powers, in their measures against Napoleon, proceeded on the assumption that the case was not covered by international law, and they gave their reasons for saying so. I do not see what productive principle we can derive from his case for the purposes of international law. The case only yields a particular rule having a very narrow sphere of attraction and, in my opinion, a strictly limited field of projection. We may no doubt sometimes apply even such a rule beyond the field covered by its original logical content. But such a projection must not be allowed to take it to a field essentially and fundamentally different from its field of origin. I do not know the position of the Hitler group, Perhaps it might have been possible to liken their case to the case of Napoleon.

The Allied Powers thought that they were justified by the law of nations in using force to prevent Bonaparte from usurping the governorship of France, and that with this justification they made war UPON HIM AND HIS ADHERENTS as ENEMIES TO THE ALLIES when FRANCE WAS NO ENEMY to them.

Bonaparte was designated as merely "the chief of a shapeless force WITHOUT RECOGNIZED POLITICAL CHARACTER", and, consequently, without any right to claim the advantages and the courtesies due to public power by civilized nations. That might have been the position of the Hitler group also, if that group stifled altogether the German constitutional life, and usurped power in the manner in which, and, to the extent to which, it is brought out in evidence in that case. In either case perhaps, the so-called state, if it could be called a state at all, succeeded in withdrawing from the influence of the social tendency and placing itself consciously into opposition to the society concerned.

The case of the accused before us cannot in any way be likened to the case either of Napoleon or of Hitler. The constitution of Japan was fully working. The Sovereign, the Army and the civil officials, all remained connected as usual and in normal ways with the society. The constitution of the State remained fashioned as before in relation to the will of the society. The public opinion was in full vigour. The society was not in the least deprived of any of its means to make its will effective. These accused came into power constitutionally and only to work the machinery provided by the constitution. They remained all along amenable to public opinion, and even during war the public opinion truly and vigorously functioned. The war that took place in the Pacific was certainly war with Japan. THESE PERSONS DID NOT USURP ANY POWER, AND CERTAINLY THEY WERE ONLY WORKING THE MACHINERY OF THE INTERNATIONALLY RECOGNIZED STATE OF JAPAN AS PARTS OF THE JAPANESE FORCE WHICH WAS AT WAR WITH THE ALLIED POWERS.

An appeal to Article 43 of the Hague Convention IV of 1907 may indeed look like seeking a pretext for the trial of these persons. We are told that the starting point for a discussion of the punishment of war criminals must be the Hague Convention IV of 18 October 1907. This convention, it is said, is essentially the handiwork of modern European scholarship and as such essentially reflects the tradition of modern Roman law and of modern Romanist codification. We are then told that it will be distorted or misunderstood, if it is conceived of exclusively in accordance with Anglo-American conceptions of legal or juridical method, and if it is conceived of without recognizing modern juristic theories concerning THE ROLE OF PURPOSE in law. It will be ineffectual and distorted if it is not interpreted and administered in accordance with Romanist conceptions relating to juridical method, as well as in accordance with the purposes or goals stated in the very text of the convention itself.

The purposes or goals said to be "stated in the very text of the Convention itself" are referred to in order to bring within Article 43 the right and power of the victors to make law declaring aggressive war a crime and a crime for individuals. I believe "the purposes and goals" of the convention would not take us to the determination of the character of the war itself. The whole purpose was to give the laws and customs of war, assuming the pre-existence of the war condition.

The Covenanting Powers, "Seeing that, while seeking means to preserve

peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms HAS BEEN BROUGHT about by events which their care was unable to avert;

"Animated by the desire to serve, even IN THIS EXTREME CASE, the interests of humanity and the ever progressive needs of civilization;

"Thinking it important, WITH THIS OBJECT, to revise the general laws and customs OF war, either with a view to defining them with greater precision or to confining them with such limits as would mitigate their severity as far as possible;

"Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land."

While so doing, they gave certain rules relating to "military authority over the territory of the hostile state" in Section III of the Annex to the Covenant, and Article 43 found a place in that section. The Article stands thus: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Its provisions would apply when a territory is occupied during belligerency by a hostile army. If the construction sought to be put on Article 43 be correct, then an army, in such occupation of a territory during war would be entitled to declare the war, conducted by the government of that territory as aggressive and criminal, and, if it succeeds in getting hold of any personnel of that government, would be competent to create a charter defining law for the trial of that personnel and get them tried and convicted. I shall not, for a moment, think that that was "the purpose and goal" of the Powers who covenanted themselves into the Hague Convention of 1907.

I am not prepared to strain and twist Article 43 of the Hague Convention to cull any such purpose and goal out of it. I am not also prepared to project the Napoleon case to the present. I have already pointed out, how even after this war, the charter of the United Nations, which was promulgated by the peoples of the United Nations avowedly "to save succeeding generations from the scourge of war" and expressly announced "the purposes of the United Nations" to be "to maintain international peace and security and to that end: to take corrective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . . .", did not introduce any such measure against the individual members of any offending state.

Chapter VII of that Charter provides for "action with respect to threats to the peace, breaches of the peace, and acts of aggression". The provisions of this chapter do not contemplate any steps against individuals. It may safely be asserted that the coercive actions envisaged by chapter VII would not be

invoked individually against those who might be responsible for the functioning of the offending collective entity.

As a judicial tribunal, we cannot behave in any manner which may justify the feeling that the setting up of the tribunal was only for the attainment of an objective which was essentially political though cloaked by a juridical appearance.

It has been said that A VICTOR CAN DISPENSE TO THE VANQUISHED EVERYTHING FROM MERCY TO VINDICTIVENESS; BUT THE ONE THING THE VICTOR CANNOT GIVE TO THE VANQUISHED IS JUSTICE. At least, if a tribunal be rooted in politics as opposed to law, no matter what its form and pretenses, the apprehension thus expressed would be real, unless " JUSTICE IS REALLY NOTHING ELSE THAN THE INTEREST OF THE STRONGER".

Had we been openly called upon to decide such political issues, the entire proceedings would have assumed a different appearance altogether and the scope of our enquiry would have been much wider than what we allowed it to assume. The past conduct of the persons under trial in such a case would have simply furnished some evidentiary facts; the real ultimate *probandum* would have been the future threat to the 'public order and safety' of the world. There is absolutely no material before us to judge of any such future menace. The parties were never called upon to adduce any evidence in this respect. The matter would certainly involve extensive investigation of facts perhaps hitherto undisclosed to the world. When the Nazi aggressors are all eliminated and the Japanese conspirators are well secure in prison, we are still authoritatively told that "never before in history has the world situation been more threatening to our ideals and interests". So, it may be that the world's attention has not yet been directed in the right direction. "The depressing aspect of the situation", the world is told, "is the duplication of the high-handed, calculated procedure of the Nazi regime". This may be so; or it may also be that we are only being betrayed by what is false within, — the incipient failure of will and wisdom.

It is indeed a common experience that, in times of trial and stress like those the international world is now passing through, it is easy enough to mislead the people's mind by pointing to false causes as the fountains of all ills and thus persuading it to attribute all the ills to such causes. For those who want thus to control the popular mind, these are the opportune times; no other moment is more propitious for whispering into the popular ear the means of revenge while giving it the outward shape of the only solution demanded by the nature of the evils. A judicial tribunal, at any rate, should not contribute to such a delusion.

The name of Justice should not be allowed to be invoked only for the prolongation of the pursuit of vindictive retaliation. The world is really in need of generous magnanimity and understanding charity. The real question arising in a genuinely anxious mind is, "can mankind grow up quickly enough to win the race between civilization and disaster?"

It is very true that "we must change our accustomed way of thinking far more rapidly than we have ever had to change them before. We must begin

systematically to reduce and eliminate all CHIEF CAUSES of war." Such causes do not lie in the war potentialities of a nation's industries. To look at the problem thus is only to visualize our present day problems as mere reproductions of old ones. We must not fail to realize that "they are in principle a new kind of problem. They are not merely national problems with world implications. They are indisputably world problems and humanity problems." We must cease to "grapple with these tremendous matters with the thought that they are only more complex reproductions of problems which have plagued us since 1914."

Let not "the implication of atomic explosion" fail to "spur men of judgment .... to seek a method whereby the peoples of the earth can live in peace and justice." But the course of action signified in the trial and punishment of the leaders of a defeated nation does not indicate much appreciation of this implication. Perhaps it has been truly said that "the turbulent emotions aroused by watching trials of hated enemy leaders .... will leave little room for consideration of the fundamentals of world union...." "Pubilc understanding of the real condition of peace would not be increased, but rather confused, by all the emphasis upon one detail, the trials...."

The trials should not be allowed to use up the precious little thought that a peace-bound public may feel inclined to spare in order to find the way "to conquer the doubts and the fears, the ignorance and the greed, which made this horror possible." "The vindictive and oratorial pleas of the prosecutors in the language of emotionalized generalities did entertain rather than educate." We may not altogether ignore the possibility that perhaps the responsibility did not lie only with the defeated leaders. Perhaps the guilt of the leaders was only their misconception, probably founded on illusions. It may indeed be that such illusions were only egocentric. Yet we cannot overlook the fact that even as such egocentric illusions these are ingrained in human minds everywhere. It is very likely that

"When time shall have softened passion and prejudice, when *Reason* shall have stripped the mask from misrepresentation, then justice, holding evenly her scales, will require much of past censure and praise to change places."

本書は1953年、カルカッタのSanyal社より発行された同名の本を底本にし、全文を新組に改めた上で、以下の者が編集・校正を行った。なお、原文における明らかな誤りは、これを一部訂正した。

中村　粲(監修)
青柳　明
三島りさ
稲坂三喜恵
上島　忍
横山ひとみ
中野　淳(国書刊行会)

東京裁判・原典・英文版　パール判決書(はんけつしょ)

平成11年7月1日　初版第一刷発行　ISBN4-336-04110-5

著　者　ラダビノッド・パール

発行者　佐藤今朝夫

〒174-0056　東京都板橋区志村2－10－5

発行所　株式会社　国書刊行会

電話 03(5970)7421(代)　Fax 03(5970)7427