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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST

The United States of America
and others

versus

ARAKAI Sadao and others

JUDGMENT

of

The Hon'ble Mr. JUSTICE PAL

Member from India

Pages 742 to 1049

PART IV

OVERALL 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 Tripartite 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 the conclusion of the Mongolian - USSR pact of mutual assistance, the conduct of the negotiations was transferred from the accused OSHIMA, then 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-partrite Pact Mr. Tavenner made the following observations.

- (i) (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.
- (ii) (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 OHIRATORI refused to follow the direction delivered by the Ito Commission.
- (f) OSHIMA and OHIRATORI wired the Japanese Foreign office to accept the pact of alliance without reservation, threatening that otherwise they would resign as ambassador at 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 tripartite military alliance.

In connection with this Tripartite 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 on March 1940. (p 5859)
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 American in the Pacific area, (for instance, by promise to attack the Philippines 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 YAMATO 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 nation's 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 1940 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 Tripartite Pact was concluded on 27 September 1940. (Exh. 43, 550, 551, 553, 553, 555, 557, 558, 559)

Mr. Tavenner next emphasized the instances of collaboration between Japan, Germany and Italy under the provisions of the Tripartite 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 Tripartite 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 MURUSU 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) On 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 Tripartite 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, diplomatically 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 Tends 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 cooperate with each other as regards the exchange of information relating 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 cooperation 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 accessory 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 between 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 can not 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. 2694). This abrogation, of course, means nothing remembering that prior to this date, on 22 June 1941, Germany had already invaded Russia. Further, the Tripartite 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, T. 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. No 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, whome 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 centers 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'Ouvreur alleged that Borneo had been recognized as falling within the Japanese zone." . . .

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^y 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 hope 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

Hankow 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 donot 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 cooperate 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 cooperative hands over all nations willing to endeavor 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 cooperate 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 overall 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 alteration 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 facts 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 three-fold 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 rebellion 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 Pigot C.G., D.S.U. (Exh. 3548) 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, in all appearance, in friendly relations.

PART IV

OVERALL CONSPIRACY

AGGRESSIVE 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 Council 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 Anschluss.
- (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 USSR 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-Wa-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-Wa-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

subotage, 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 ^W ^v 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 barlords, 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 extension 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 USSR 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 USSR 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 USSR.
 - (i) She decided not to enter into the war with the USSR only for the time being, but to use arms if the German-Soviet war ^{went} on in a way advantageous for Japan;
 - (ii) Till that time Japan would secretly carry out military preparations against the USSR under the cover of diplomatic negotiations;
 - (iii) Following this decision the Japanese General Staff and the Awantung 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 overall 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 ^{Vasilyev} 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 ^{this account} 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 1904-5 or 1918-22. The historical investigations are relevant insofar 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, were 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 give 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 agreeable 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

friendly 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 favor 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 neighbor 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 ^{and} ^{meet} not 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 23d, 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-center 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 3d 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 Russian 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 endeavor 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 colored 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

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.

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 railway 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 Hsinnintun to Fokumen, 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 neighborhood 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 cooperation 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 cooperate 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 international 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 indirect-

ness 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 battle-fields 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 Fayson 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 followed 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 for 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

The Japanese effort 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 favorable 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 judicial 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 Ryukyans 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 Ryukyans as Japanese subjects. The Chinese Government, however, did not accept all its implications. The Japanese proceeded to incorporate the islands more completely.

ly 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 of 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 modeled on the commercial treaty which Japan had negotiated with the Western Powers. The Japanese in Korea were

to enjoy extraterritoriality 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 a 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 unfriendly 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 un-

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 turn-over 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 a 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 details 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 ^{annexed} 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 renounced 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 War ~~last~~ 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} International Affairs by the Royal Institute. In the Survey of ^{INTERNATIONAL} 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 Trans-baikal, 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 Magyar³ 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 Vladivostok in order to cover their vacation 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^K 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^K 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 West of the Lake.

"The Commander of the American contingent at Vladivostok^K announced on the 8th January 1920, to his Japanese colleague that his Government had ordered him to withdraw on account of the 'indefinite character' which the undertaking had assumed." "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^K (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 Bolshevist 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 'bourgeois civilization' against Bolshevism.

In August 1920 the Japanese troops were actually withdrawn - not only from Semenov's country in Eastern Transbaikalia, 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 these 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 four a commercial treaty was concluded on a most-favoured-nation basis. It will be pertinent to notice in this connection that the U.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

against the Soviet Union. I do not think any evidence in support of this could be adduced by him.

General ^{V. G. V. G.} in summing up the case, placed the evidence under the following heads:

1. Planning and preparation of war against the USSR during the period from 1928 until the German attack on the USSR in 1941.

(a) Seizure of Manchuria and turning her and Korea into a springboard for war against the USSR.

(i) Plans of war vis-a-vis the USSR in 1928-31; seizure of Manchuria in order to convert her into a springboard for an attack against the USSR.

(ii) Plans of war vis-a-vis the USSR in the period 1932-41.

(iii) Preparation of Japanese Armed Forces for war vis-a-vis the USSR.

(iv) The establishment of military bases in Manchuria and Korea.

(v) The preparation of the population of Manchuria for a war against the USSR.

(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 1935.

2. Subversive activities of the Japanese Imperialists against the USSR:

- (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 USSR in the Lake Khasan Area (1938).
- 4. The undeclared aggressive war of Japan against the USSR in the Momonham area. (1939)
- 5. The alliance of Japan, Hitlerite Germany and Fascist Italy for aggression against the U. S. R.
 - (a) The Anti-Comintern Pact - a block of aggression against the USSR.
 - (b) The Tri-partite Pact as the final embodiment of a conspiracy of aggressors against democratic nations and the U. 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 USSR.
 - (a) The preparation by Japan of an attack against the USSR after the conclusion of the Neutrality Pact.
 - (b) Furnishing to Germany information on the economic, political and military position of the USSR.

(c) Harperring Soviet shipping in the War 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 USSR. 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.

Such reliance was placed by the prosecution on the various army operational plans made by Japan allegedly against the USSR 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, or intention entertained, or design made, for any such war. These were more plans of tentative measures in contemplation of probably 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 USSR 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 respecter 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 to violate 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 favorable 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 Soviet Russia 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 USSR that he viewed the USSR to be the "regime which refuses to recognize the

sanctity of international obligations". President Wilson in 1919 characterized the USSR 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 attached to Commissar Litvinov's illustrating the value of non-aggression pacts by the fact that such pacts had 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 appears 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 aggressi-

intention or design.

The spread of ^{the} 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 350,000 square miles) was uncultivated, and was sparsely inhabited by hunters and graziers, though vast tracts possessed great agricultural possibilities. This was due largely to the lack of means of ^{transportation} 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, Nen and Hulan, the productivity 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 took upon this apparently boundless extension of rich fields."

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 southbound 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, which ^{was} 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. Serebryakov, 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. Serebryakov 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 transaction 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 Kanto^Kquen 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 Manchuria.

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.

PART IV

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

He 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 forebear 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, 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 policy 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 entre-prenuer 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 presented 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, its removal could be accomplished only if these treaty provisions and their correlated duties and obligations could be somehow gotten 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 system 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. Eiichi Amai, 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 air-dromes in China and the detailing of military instructors and advisors 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 ³in 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 inter-relations 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 ~~Amu~~ 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 Amai 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 One 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 Five, China made definite agreement not to permit or exercise unfair discrimination 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 agitations. 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, coordinated 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 neighboring 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 clausula 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 salut³ary 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 Conventions 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 robis 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 multi-partite 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, HIRATA, 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 Amai 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 obligations 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 Amai 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 Amai statement itself indicates Japanese belief and apprehension of menacing preparations within China. In my opinion, these sufficiently explain the development of the policy announced in the Amai 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 then 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 not 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 ^{was} to succeed;

(iii) because through solemn treaty and agreement Japan stood firmly bound with them to forego the aims and ends of the conspiracy and to forebear 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. 9340-43)
- (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. 9344-47)
- (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. 9348-49)
- (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. 9352-3)

- (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. 9366-67)
- (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 inter-dependant 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. 9370-72)
- (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. 9383-4)
- (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. 9403-5)

- (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. 9424-26)
- (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 formulas, 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 harbored no territorial designs in Manchuria. (Exh. 923, R.P. 9349-50)
- (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 fulfill 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 endeavoring 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 advisors or loans for political uses. (Exh. 935, R.P. 9389-92)
- (ii) The other signatories having received the statement without a great deal of enthusiasm, Foreign Minister Hirota took the earliest opportunity to assure that Amai had given out this statement without Hirota's knowledge or approval. (Exh. 936, R.P. 9393-94)
- (e) Despite Hirota's purported retraction of the Amai 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. 9398, 9401-2)
- (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. 954A, R.P. 9444-5; Exh. 954B, R.P. 9446-5(i))

- (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 cooperate.

- (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. 972A, R.P. 9506-7)
- (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. 972F, R.P. 9516-20)

- (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. 9534-5)

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. 9573-8)

- (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. 9576)

- (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. 1291, R.P. 11695-97)

- (d) As a start toward the fulfilment of this mission, on November 25, 1938, it was decided by the five-ministers conference that Hainan Island would be captured by military action in case of necessity. (Exh. 612, R.P. 6731)
- (e) On February 10, 1939 Hainan Island was captured in a surprise attack by Japanese combined naval and ^{military} forces. (Exh. 613A, R.P. 6733)
- (f) This was shortly followed by the occupation of the Spratley Islands. (Exh. 512, R.P. 6145-46)
- (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. 6817)

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. 6802)

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. 6731)

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. 6833-4)

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 Government-General of Taiwan for the protection and interests of the Japanese nationals living there. (Exh. 512, R.P. 6145-46)

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. 6814-5)

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 territory 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. 6801-10)

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. 6810-3)

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. 6857-64)

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. 6733)

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. 6864)

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. 6848-9)

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. 6853) 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. 6824-5)

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. 6162-5)

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. 6853)

On 7 July 1940, the French Indo-China authorities agreed to ban imports from China for one month. (Exh. 618-A, R.P. 6852)

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. 1020, R.P. 9695)

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. 6191-6211)

"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 cooperative 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 cooperate 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. 6875-95)

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. 6875-95)

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. 6295)

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. 6910-3)

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. 6919-9)

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. 6920-1)

In the exchange of draft notes on 25 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. 6921-2)

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 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 without delay and wished "the Government of France to issue, hereafter necessary instructions to the Indo-China authorities for this purpose". (Exh. 620, R.P. 6939)

On 30 August Hatsuoka 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 fulfill 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. 6923-5)

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 India 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. 6925-7)

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. 6927-8)

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. 6928)

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. 6971)

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. 6972-3)

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. 6933)

The French attitude changed suddenly on 22nd September and the agreement on details was signed. (Exh. 620, R.P. 6933)

This agreement, concluded between Nishihara and Martin on 22 September, dealt more specifically with actual landing (on 26 September), transporta-

tion, 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; 5147)

"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 Prabang 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. 6869)

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. 6869)

On 28 September Thailand repeated her demands for the Mekong River boundary but reserved her demand for Laos and Cambodia on the left bank for the time "when the position of French Indo-China is altered". (Exh.

618-A, R.P. 6870)

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 between 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. 6975-80)

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 was discontinued. The situation became tense and both countries concentrated troops along the border. "But as 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 cooperate both politically and economically in the establishment of the New Order in East Asia. This was conveyed to Thailand." (Exh. 618-A, R.P. 6873)

"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. 6873)

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. 6874)

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. 6444-5)

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. 1303, 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 favor 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 non-belligerent 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. 2840) The evidence discloses the various nationalistic economic measures of the Western Powers which affected Japan and the Japanese industries, necessitating for her to adopt 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. 2800A) 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 endeavored with renewed vigor 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 an 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. 1309A, R.P. 11,789)
 - (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. 1284, 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. 1285, 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. 6157-58; Exh. 518, R.P. 6159; Exh. 519, R.P. 6161)
- (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. 6824)
 - (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. 6162)
- (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. 6175-76)

- (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. 1092, R.P. 11,702; Exh. 1293, R.P. 11,706-7; Exh. 1296, 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 hakko-ichiu, 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. 6271)

- (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. 1310, 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 the Japan-China-Manchukuo group as one of the links. (Exh. 1297, 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. 1298, 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 notified the Netherlands that

it was sending to the Netherlands Indies a delegation comprising of diplomatic, military and naval experts for economic negotiations. Koiso had been designated as chief delegate but subsequently he was replaced by Kobayashi. (Exh. 1309A, R.P. 11796-97)

- (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 cooperate 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 cooperation request 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. 6886-86)
 - (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. 6933; Exh. 621,

R.P. 6830; Exh. 3865, R.P. 38,584-85; Exh. 3851, 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. 5314-5)

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 center, 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. 6976)

(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 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 cooperate 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. 1303, 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. 9602)

(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. 1007, R.P. 9635; R.P. 10736)

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. 9542-6; Exh. 979, R.P. 9550-3)

- (iii) At the Privy Council meeting of September 26, 1940, which considered the ratification of the Tripartite 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 Tripartite 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 negoti-

ations 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 guarantees 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 con-

cealing and disguising the Japanese plans for an attack upon that country. (Exh. 878, 1169, 1176, 877, 1313)

(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, 1214)

(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. 1241, 1332, 1338-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 Netherland 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 Netherland Indies; but certainly does not in the least support the alleged overall 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 1326-C and 1307-A. These two documents push the story back to 1935.

Exh. 1326-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. 1326 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. 1326-C, record page 11,905)

The other document (Exh. 1307-A) is an excerpt from Exh. 1307 and purports to be "Collections of the Official Announcements of the Foreign Ministry, 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 or 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 Netherland 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 overall 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 preceeding 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 fulfillment 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 negotiation 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 Tripartite 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 or 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. 1008, R.P. 9643-50) 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 Tripartite 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 neighborhood 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 Tripartite 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 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 Tripartite Pact and was moving forward to ward 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. 1059)
- (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. 1061)
 - (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, practiced 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 non-interference 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 favored acceptance but only on certain conditions:

- (i) First, it must be made clear that there was to be no infringement of the Tripartite 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. 2866)

7. On May 12, 1941, following the receipt of instructions, NOMURA presented the first Japanese draft proposal: (Exh. 1070)

(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 Tripartite 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 neighborly friendship with China and request Chiang Kai-shek to negotiate peace with Japan.
 - (iv) It was maintained that KONOYE's three principles of neighborly 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 plans: (Exh. 1071)
- (i) As to the European War, he suggested that Japan's obligations of military assistance under the Tripartite 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 neighborly 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 differences 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 cooperation of both nations.
- (c) While Hull was endeavoring 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 Tripartite Pact and the solution of the China question.
- (g) Hull emphasized that unless Japan clarified its attitude of 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. 1078)

- (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 Tripartite 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 cooperation 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 Tripartite 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 break-down 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 obstacles to United States-Japan agreement, the China Incident and the Tripartite 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 Tripartite 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. 1107)
 - (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, regardless 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 moves 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. 1131)
- (d) On August 17, Roosevelt replied 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 United States principles, the United States would consider continuing the interrupted, informal exploratory discussions. (Exh. 2889)
- (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. 1245-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. 1245-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 United States responsible for its failure. (Exh. 1245-C)
- (h) On 6 September the Japanese Ambassador presented a new draft of proposals. (Exh. 1245-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. 1107)
- (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, that Japan would attack. The accused present

were TOJO, MAGANO, 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. 1245-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. This 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 ^{MIYOKAWA} 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. Grow, 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. Grow 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 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 Tripartite 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 ^b bearing the meaning which the prosecution now seeks to ascribe to them, I do not see how they would have succeeded to lull the United States and Great Britain into any sense of security.

Look at, for example, Exhibit 1008 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 the President Roosevelt and the 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 negotiations 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 appearances 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 condition 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 change 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 is Exhibit 1059 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 developed 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 aforementioned 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 neighborly friendship, joint defense against communistic activities and economic cooperation.

- (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 cooperate 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 Hong-kong 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 Tripartite 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 Tripartite 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 practicing certain principles of 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 1071). 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 1078. The oral statements explanatory thereof are Exhibits 1079 and 1080.

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 Tripartite 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 2895, 2903, 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 Tripartite 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, 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 Tripartite 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 Tripartite 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 ambassadors 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. 2874, 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 off-shore 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 America^s We in the America^s 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. 2876)

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 Tripartite Pact outright. The United States had

always been specific that she did not insist on Japan's denouncing the Tripartite 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 Tripartite Pact between Japan, Germany and Italy will be applied in accordance with the stipulation of Article 3 of the said Pact." (Exh. 1092)

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 Tripartite 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 Tripartite 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. 1245-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. 1245-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 extension of the interpretation of the right of self

defense. With regard to the interpretation and application of the Tripartite 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. 2934) 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 Tripartite Pact question again came up and Ambassador KURUSU pointed out that Japan, having treaty obligations as well as her national honor 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 commitment 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 Tripartite 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 obligation under the Tripartite Pact, to point out that "the Empire can decide independently as to whether or not there had been an attack without being bound

to the interpretations of the other countries involved in the Tripartite Treaty". He was also asked to make it clear that there were no secret agreements in the Tripartite 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 2945 and may be quoted here in full.

"Mr. Secretary: Through several conversations I have had the honor 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 Tripartite 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 can not 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 cooperator 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 Excellency 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 Tripartite 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. 1071), 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 Tripartite 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 cooperation shall be given in the production and procurement of natural resources (such as oil, rubber, tin, nickel) which Japan needs". (Exh. 1070)

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 cooperate 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. 1071)

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. 2873)

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 cooperate 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. 1078)

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. 1079)

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: "Noting that Japanese expansion in the direction of the Southwestern Pacific area is declared to be of peaceful nature, American cooperation and support shall be given in the production and procurement of natural resources (such as oil, rubber, tin, nickel) which Japan needs". (Exh. 1083)

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 1087. 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 cooperate 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 cooperate 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 cooperate 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 cooperate 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 cooperate for the con-

clusion 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. 1245-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. 1246)

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. 2928)

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 fulfillment. 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 neighborly friendship with China, shall forthwith request the Chiang Kai-shek regime to negotiate peace with Japan." (Exh. 1070)

The following oral explanation was annexed to this:

"The terms for 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) neighborly friendship; (2) joint defense against communism; (3) economic cooperation - by which Japan does not intend to exercise 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 cooperating as good neighbors 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 neighborly 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 cooperation 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. 1092)

"Annex: The basic terms as referred to in the above section are as follows:

- "1. Neighborly friendship;
- "2. "Cooperative defense against injurious communistic activities including the stationing of Japanese troops in Chinese territory' subject to further discussion;
- "3. (Economic cooperation) 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 cooperating 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 by Secretary Hull to Ambassador NOMURA. (Exh. 1059) The American counter-proposal of 31 May included a clause for "amicable negotiation in regard to Manchukuo". (Exh. 1078)

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. 2873)

No. 3 of these items relating to economic cooperation 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 neighborly friendship, joint defense against communism, and economic cooperation free from economic monopoly or limitation of the interests of other countries, could, with some modification, it is believed, be acceptable." (Exh. 2874)

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 interest against lawlessness in areas where special measures for safeguarding the rights and interests of nationals of third powers were necessary". (Exh. 2875)

On 31 May, an American redraft of the proposal was presented. It retained the statement that the question of cooperative 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. 1078)

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. 1080)

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 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 cooperation 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 Ambassador 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 fulfill 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 honor 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. 2896)

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. 2899) 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 cooperate 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. 1245-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 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. 2914)

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 it 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. The question is, 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 intercepted messages may indeed be regarded as the tragedy of the

Japanese-American war. 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 TOGO 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 2924 in this case. Its intercept as decoded and translated by the Intelligence Service of the U.S. is Exhibit 1164. There is not much factual errors 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 the 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.

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"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.

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"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. ^{Blakely} ~~Blakely~~ ^{Tracy} ~~Tracy~~ for 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 sober, 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 2925, the original telegram transmitting proposal 'A' and explanation of it, and Exhibit 1165, 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

This is our proposal setting forth what are virtually our final concessions.

We make the following relaxation

(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.

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

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

Intercept 246

This proposal is our revised ultimatum.

We have toned down our insistence as follows

(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 fact that the United States is so much opposed to our stationing soldiers in undefined areas, our purpose is to shift the regions of occupation and our officials, thus attempting to dispel their suspicions.

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 un-

not to be stationed either permanently or for an indefinite period.

With regard to the principle of non-discrimination in trade, our contention hitherto made on the basis of geographical propinquity is withdrawn

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."

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

limited occupation does not mean perpetual occupation

Of course, there is the question of geographical proximity when we come to consider non-discrimination in commerce

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

(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

declaration)

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 Tripartite 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.

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",

other sort of a statement)

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.

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 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 coordinate with "(1) Non-discrimination and Trade", "(2) Interpretation and Application of the Tripartite 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 Tripartite 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 2926 and its intercept is Exhibit 1170. 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

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

Intercept 249

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 Prosecutions sense of an ultimatum.

It might have been noticed that the telegram spoke about parallel conversation between the Foreign Minister, Tokyo, 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 unwaivering 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. 6478). From 5 July rumors 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 President 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 the suit.

It may be of some importance to note that on 2 July, at least three days before the State Department even heard any rumors of the Indo-China

move, the Japanese Embassy had already heard rumors 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 takes any further steps in pursuance of a policy or program of military domination by force or threat of force of neighboring 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 position 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. 1245-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 fulfill this requirement of the cessation on the part of Japan of its progressive acts of aggression. (This is Exhibit 2598 in this case).

Of the clause in the proposal relating to Indo-China and those concerned with China and with the Tripartite Pact, Ambassador Grew felt that the commitments contained in the Japanese proposal, if implemented, would fulfill 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. 1245-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 23 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. 2920) 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 ^{did} 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 it she was agreeing to do, irrespective of the question that what she was agreeing to do 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 Tripartite 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 Tripartite 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 they 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 1245-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 South-eastern 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 cooperate 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 endeavors 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 1245-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 endeavor 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 endeavor 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 extraterritorial rights in China, including rights under the Boxer Protocol and concessions, and to endeavor 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-favored-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 ^{was} cut off, Manchukuo ^{was} to be abandoned;
- (b) Similarly the Hull note requires^d 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 Tripartite 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. 1092) putting the terms in parallel lines. They would stand thus:

21 June 331
(No equivalent provision)

26 November 332
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 Tripartite Pact satisfactory to America that American actions in self-defense would not call it into operation against her	Abrogation of the Tripartite 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.F. . . . 30126-27)

Even the 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 Harbor."

A contemporary American historian says:

". . . ., it required no profound knowledge of Japanese history, institutions, and psychology to warrant two other conclusions respecting the memorandum 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 conversations

'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 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

It remains only to consider the cumulative effect of the entire evidence laid 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 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 such 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 adopting 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 ^{adoption} ~~action~~ 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 couldn't 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 developments 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 rumors 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 rumors, 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, ^t 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,

indicate 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 were 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 favor 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. 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 developments 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 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

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 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 leaders with the commission of a crime of conspiracy apart from the actual perpetration of the conspired act, asserting that the said crime was commit'

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, instiga-

tors 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 kinds 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 Nuremberg Charter Article 6 contained the corresponding provisions.

Count one of the Nuremberg 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 Nuremberg 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 Nuremberg 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 nonjusticiable 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.

The Statute of Article 38 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 can not 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 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 conventions 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 sphere of international relations has hitherto been absent from the international system. Those that have hitherto been taken cognizance of as crime in 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 coordinated 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 legislatures 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 ^{purpose} or not;
2. That the offense extends subject to the same conditions to an agreement to commit any felony;
3. Also to any misdemeanor;
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 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 person who actually committed the offense;
7. That in all cases where there is in fact a common plan or conspiracy 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 analagous 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 countries 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 the proposition.

The basic principle of this crime as recognized by the various nation 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 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 co-conspirators 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 insofar 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 common sense, 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 Anglo-American system. He says:

"Under such a principle every one who acts in cooperation 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 is 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 favorable 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 penitentiae 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 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, 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 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 containin

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 indicative 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 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. 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 Peking 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-IMEZU 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 OKAWA 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 aggression 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 long ceased 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 legitimize 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 Potsdam 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 Harbor.

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 Harbor 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 Harbor, both America and Japan, however, were considering themselves to be at 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 "war" perhaps because she thereby expected to elude the constraints of the Kellogg-Briand 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 "war" to this hostility before Japan became involved in war with the United States of America by her attack on Pearl Harbor.

China did not give it the name "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 "war" to that course of the hostility which elapsed before the date of the attack on Pearl Harbor.

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 "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 a 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 was 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 Strict^c Sensus. 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, DOHIMARA, 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 hostilities 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, fulfills 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 fulfills all the other elements of

murder, in that he has purposely order 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. Insofar 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

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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 jurial 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 of 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 defence, and it is needless to say that no one asserts such quizzicism 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 'ural 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 the 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 legal 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 or 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 probably 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 can not 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, insofar 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 subordinatesto 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.

A very voluminous evidence has been laid 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 atrocity-stories 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 "B. Hesseltine's "Civil War Prisons; - A Study in War Psychology", where these stories are dealt with in considerable details. 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 quartermaster 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 cornbread 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 honorably 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 in-flame 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 those 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 laid 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 problem 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 1765 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. Hesselstine, "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 of 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 factor 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 count 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 Nuremberg 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 counts 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."