

Opinion
of
Mr. Justice Roling
Member for the Netherlands

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Introduction.

The significance of the issue facing the IMTFE can hardly be over-emphasized. The President of the Tribunal went so far as to state at the beginning of its proceedings: "There has been no more important criminal trial in all history."¹⁾ This trial deals with accused held responsible for certain events in world history, on charges almost unknown before this war. In these observations could be found grounds by any dissenting member of the Tribunal to fully state the considerations which led him to disagree with the majority opinion as to points of law and findings of fact. However, the reason for the Netherland's Member of the IMTFE to record, contrary to the practice under his domestic law, his reasoned dissension in regard to some of the findings of the majority judgment is to be found in the implications of the authority vested with the Supreme Commander, "who may at any time reduce or otherwise alter this sentence, except to increase its severity." (Charter, Art. 17). Consequently, this dissension will only be given as far as it could have any significance in relation with the above provision.

1. Official Transcript of the Proceedings, p. 21. In the following, the page of the transcript will be indicated "T".

No argument will be advanced in those cases, where objections could be raised against certain opinions or findings which have no direct bearing on the matter of guilt and punishment, as, e.g. the Tribunal's standpoint concerning the Geneva Convention. Nor will the fateful decision -- in which the view taken by the U.S. Supreme Court "in re Yamashita" is adhered to -- on the scope of art. 60-63 of the Geneva Convention to be discussed. Finally, no argument will be advanced where, for reasons other than given by the Tribunal, the result of a decision is agreed with, as e.g., concerning the decision "that "it is unnecessary to determine counts 39 to 43 inclusive."

JURISDICTION

Art. 5 of the Charter, dealing with "jurisdiction over persons and offenses," limits the scope of the jurisdiction of the Tribunal as to persons and as to offenses.

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In the Nuremberg judgment it is stated -- and in our case the prosecution and the majority of the Tribunal have held the same view -- that the Tribunal is bound by its Charter. This is true in the sense that never could the Tribunal have power "to try and punish" beyond the Charter. But it does not, and cannot, imply that the Tribunal would be bound to follow the Charter in case it should contain provisions in violation of international law.

If the Nuremberg Judgment is correct in stating that "the very essence of the Charter is that individuals have "international duties which transcend the national obligations "of obedience imposed by the individual State,"² it would be surprising if the Charter, laid down on behalf of the Allied Nations, should be intended to be binding upon the Tribunal even if it disregarded existing international law. The authority of military tribunals, as the United States Supreme Court pointed out in "Ex parte Quirin,"³

1. The Nuremberg Tribunal, after quoting art. 6 of the Charter, has laid down that: "These provisions are binding upon the Tribunal as the law to be applied to the case" (Br.ed., H.M.'s Stat. Office, London 1946, p.3), and on a later occasion reaffirmed that: "The law of the Charter is decisive, and binding upon the Tribunal," o.c., p.38). The Tribunal, however, did not adhere to this principle, e.g., with regard to articles concerning the organizations (Judgment, p.67).

2. Judgment Nuremberg, p.42.

3. 317 U.S., 1, 1942.

derives from the national sovereignty, while their law in dealing with the enemy derives from international law.

The position taken in the majority judgment amounts to this: that the victorious nations, in providing for the trial and punishment of war criminals, have the right to promulgate a Charter and to create a Tribunal. "In the exercise of their right to create tribunals for such a purpose and in conferring powers upon such tribunals, belligerent powers may act only within the limits of international law." However, "the law of the Charter is decisive and binding on the Tribunal." The Tribunal may try the accused "but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter."

Consequently, according to the majority judgment, the Tribunal, though called upon to mete out justice, is not the authority called upon to judge whether the victorious powers have stayed within the limits of international law. Members of an International Tribunal, therefore, could only refuse office or resign in case they regard the Charter as trespassing those limits, and leave their places to judges prepared to share the views as set out in the Charter.

This standpoint seems to be not only dangerous for the future, but incorrect at this moment.

It would be the worst possible service this Tribunal could render to the cause of international law if it should establish as a rule that an international tribunal, called upon to mete out justice, would have to apply the rules laid

down by the Supreme Commander of the victorious nations, without having either the power or the duty to inquire whether it was applying rules of justice at all. As a matter of fact, the Nuremberg judgment, as well as the majority opinions in Tokyo, have been considering the question whether or not the crimes mentioned in the Charters were crimes according to international law.

The majority judgment, moreover, has, though stating that it was bound by the Charter, disregarded its provisions where it saw fit to do so. Art. 5a, stating that conspirators "are responsible for all acts performed by any persons in "execution of such plan" notwithstanding, accused found guilty of the conspiracy mentioned in Count 1, were not found guilty of waging the wars which resulted from that conspiracy. This decision was not only reached in cases, such as those of Araki and Minami, where no evidence was brought to show that they took any active part in those wars, but also in the case of Oshima, who, during the war, as ambassador in Germany, did play an active part in its execution. The interpretation which considers the Charter as giving rules of jurisdiction and procedure only is indicated by the very constitution of the Tribunal. We observe that in the Tokyo Tribunal eleven judges, representing eleven nations, constitute one Court in order to give authority to its decisions.

It would be surprising indeed if such a Tribunal had been convened almost exclusively for the purpose of finding facts. But if it is so constituted to create authority in the field of international law, in order to support with that authority any decision regarding international penal liability, it would follow that it has the power to determine whether the facts, brought before it in accordance with the Charter, are crimes according to international law. The Charter determines which facts may be subjected to a legal hearing. The Tribunal, having been invested by the Charter with "the power to try and punish" (Art. 5), will determine which of those facts are crimes according to international law. This follows from the principles of general international law.

In this case, the history of the Charter points to the same conception. The Charter is limited in its scope by the terms of the Instrument of Surrender, "a solemn agreement," as the Supreme Commander justly called it on board the USS Missouri.¹ In this

1 F.L. Miller. History of World War II, Philadelphia-Toronto 1945, p. 31. General MacArthur stated on the same occasion: "The terms and conditions upon which the surrender of the Japanese imperial forces is here to be given and accepted are contained in the instrument of surrender now before you." (l. c., p. 32).

Instrument of Surrender, Japan, in accordance with its declaration of August 14, 1945, accepted the conditions of the Potsdam Declaration. From the wording of the Instrument of Surrender it follows that the authority of the victorious nations, and consequently, of their Supreme Commander, is limited to the implementation of its provisions.

The Potsdam Declaration, to which the Instrument of Surrender refers, contains this provision: "Stern justice shall be meted out to all war criminals." At the Moscow Conference, "the "Big Four" agreed that the Supreme Commander shall issue all orders for the implementation of the terms of surrender. By virtue of those instructions, the Supreme Commander has established this Tribunal and laid down its Charter "in order to implement the term of surrender, which requires the meting out of stern justice to war criminals."¹ Two conclusions may be drawn from the above. First, that it is the principal task of the Tribunal to do justice, be it stern justice. Second, that the "war crimes" mentioned in the Charter have to refer directly to the "war criminals" mentioned in the Potsdam Declaration.

If it is correct to state that victorious powers have no authority to create new international crimes, but are bound by the provisions of existing international law, it follows that the Charter cannot decide the questions of whether a certain act or failure to act is a crime, but only whether a certain crime, acknowledged in international law, comes within the jurisdiction of the Tribunal. There can be no question of a Charter making

1. Special proclamation of the Supreme Commander, Jan. 19, 1946.

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certain activities criminal.

Victorious powers may convene a Tribunal, may promulgate rules for its procedure, and may determine which acts or "omissions" the Tribunal shall have the power to try and punish. It is the Tribunal which is called upon to decide whether these acts or "omissions" are crimes under international law.

From the Potsdam Declaration follows not only the limitation of the jurisdiction as to the offenses, but also a restriction as to persons. In the Potsdam Declaration are given the conditions on which "Japan shall be given an opportunity to end this war." One of these conditions was the meting out of stern justice to war criminals. It follows that our Charter can refer only to war criminals of this war, i. e., the war which led to Japan's surrender as formulated in the Instrument of Surrender. Consequently, this Tribunal has no jurisdiction to deal with war crimes committed in other wars, even if those wars happened to have been fought in the Far East and even if the perpetrators could thus also, in a wider sense, be referred to as "major war criminals in the Far East," (Charter, art. 1) or as "Far Eastern War Criminals" (Charter, art. 5).

This restriction to war crimes committed in the Pacific War" is also indicated by the fact that the Charter was given by the Supreme Commander of the Allied Powers which fought the Pacific War, and that the members of the Tribunal and of the prosecution staff are representatives of the nations who were

1. As, apparently, the majority judgment holds. Discussing the conspiracy to commit conventional war crimes, the judgment declares that "conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal." (Judgment, p. 34).

signatories to the Instrument of Surrender, together with representatives of two nations which participated in that war but were not signatories to the Instrument of Surrender because they had not, at that moment, achieved national independence.

This restriction follows also from the above mentioned Special Proclamation of the Supreme Commander, by which the Tribunal was constituted, and which gives as one of the considerations on which the Charter is based:

"Whereas the United States and the Nations allied therewith, in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice."

Never have the Allied Nations made any declaration about any war crime other than those committed in the last wars, the wars ending with the destruction of Germany and the Surrender of Japan. From this restriction it follows that the border clashes in the Lake Kasan (1938) and Khalkhin Gol Areas (1939), charged as aggressive wars in Counts 25, 26, 35, and 36, even if they had to be considered wars, would not come under the jurisdiction of this Tribunal. In case these were wars, those wars were ended by peace treaties: the Changkufeng incident by the agreement between Molotov and Shigemitsu signed at Moscow on 10 August, 1938 (Exh. 2661A, T. 23141), the Nomonhan incident by the Togo-Molotov joint communique of 16 September 1939 (Exh. 2641, T. 22878), later followed by the Neutrality pact concluded between Soviet Russia and Japan on April 13, 1941 (Exh. 45, T. 500).

Through these pacts those wars were separated from the

Pacific war, and therefore fall outside the scope of this Tribunal's jurisdiction.¹⁾ as is the case with any conspiracy to wage aggressive war against the USSR, which might have existed prior to the above neutrality pact, and which is charged in Counts 4, 5, and 17. For the same reason, as not belonging to the Pacific war, the mere existence of a conspiracy, not resulting in a war, would generally be excluded from the Tribunal's jurisdiction. Moreover, the text of art. 5^a reveals that the Charter intended to bring a conspiracy within the scope of the Tribunal's jurisdiction only if it has resulted in a war.

CRIMES AGAINST PEACE

The Charter, in art. 5, sub. 2, refers to crimes against peace. With regard to the question as to whether international law acknowledges, or did acknowledge this crime, it must be borne in mind that the word "crime" in international law, as in domestic law, may indicate concepts of quite different nature.

In international law, "crime" covers acts of espionage and war-treason, honored on one side of the border, punished on the other, as well as acts morally and legally condemned in all civilized nations, as, e. g., the torture of prisoners of war.

1. There is another reason why the mentioned border clashes, even if considered aggressive wars, would not come under the jurisdiction of this Tribunal. If those incidents were wars, the treaties which ended them were peace treaties. In these peace treaties, no provision was made for the punishment of war criminals. It is a rule of international law that after the conclusion of peace, war crimes trials are only possible in case the peace treaty provides for such trials. There certainly are exceptions to this rule, as in case of illegal threat, or in case treaties are concluded with a puppet government, created by the victor. These exceptions have no significance in the case now to be decided. The general rule, mentioned above, prohibits any trial concerning war crimes committed in relation with the two border clashes, and excludes from our jurisdiction the charges in counts 25, 26, 35, 36, 51 and 52.

In his "Report to the President"¹ Justice Jackson, who signed the London Agreement on behalf of the Government of the United States, qualified the crime of making unjustifiable war "the crime which comprehends all lesser crimes." The Nuremberg Judgment referred to the crime of initiating a war of aggression as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."²

The chief prosecutor in Tokyo, in his summation (T. 38965), spoke of the crime against peace as "the vilest," and many occasions could be cited on which the prosecution denied any difference of character between the crimes mentioned in art. 5, sub. a, b, and c.³

Considering, at this point, "crime" in the meaning of a vile act, violating the law in such a way that punishment has to be inflicted so as to maintain legal order, the question has to be answered as to whether or not the "crime against peace" is such a crime according to existing international law.

It will not be necessary to enumerate those authorities in the field of international law who recognize that, until the era of the League of Nations and the Pact of Paris, the waging of war was a sovereign right of states. "War was in law a natural function of the State, and a prerogative of its uncontrolled

1. Released by the White House on June 7, 1945. The full text may be found in the Dept. of State Bulletin of June 10, 1945, pp.1071 et seq. Its pertinent parts were published in "Trial of War Criminals, Dept. of State Publ. No. 2430, Wash. 1945."

2. Judgment p. 13.

3. E. g., "There is no distinction in principle between 'conventional war criminals' and 'those responsible for the war.'" T.39017.

sovereignty," according to Oppenheim-Lauterpacht.¹ Again, in the resolution introduced in 1927 in the Congress of the United States by Senator Borah during the negotiations which led to the Pact of Paris, one of the reasons given for his motion on outlawry of war reads: "Whereas war between nations has always been, and still is, a lawful institution, so that any nation may, with or without cause, declare war against any other nation and be strictly within its legal rights."² Reference to one student of international law, and one statesman will suffice. There very nearly is a "communis opinio doctorum" on this point. As the prosecution stated in this case: "The illegality of aggressive war is a modern concept chiefly arising from, or contained in, treaties adopted since 1914." (T. 39017)

Reference is occasionally made to the Treaty of Versailles to show a change in the law. However, art. 227, referred to in the Nuremberg Judgment, tends to show the true position in the then existing international law rather than to make the case which it desired to make. The Commission "On the Responsibility of the Authors of the War and of Enforcement of Penalty" advised in 1919 that "the acts which brought about the war should not be charged against their authors or made the subject of proceedings before a

1. Oppenheim-Lauterpacht, *International Law II Disputes, War and Neutrality*, 5th Ed. 1944, p. 145.

2. This resolution may be found in Dr. Hans Wehberg: *The Outlawry of War*, Washington 1931, p. 133, or in James T. Shotwell: *War as an instrument of national policy and its renunciation in the Pact of Paris*. New York 1929, p. 108-109.

tribunal." ¹ The proposed trial of Emperor Wilhelm II, therefore, was not based on a crime according to international law, but on "a supreme offense against international morality and the sanctity of treaties." Not justice would be the decisive principle of the Court, but it would be guided "by the highest motives of international policy." (art. 227). The Allied Powers requesting the extradition emphasized to the Dutch Government "the special character of their demands, which contemplate, not a juridical accusation, but an act of high international policy." ² It should, therefore, be no cause for wonder that authorities on international law have doubted whether Wilhelm II could have been really punished at all. As Garner stated: "Since he was not charged with a crime, he would hardly seem liable to the penalties prescribed for violations of the criminal law. . . ." ³

1. Report presented to the preliminary peace conference by the Commission on the Responsibility of the authors of the war and on enforcement of penalties, March 29, 1919, p. 13.

2. Quoted by J. W. Garner: International Law and the World War, 1920, II, p. 493.

3. J.W. Garner, o. c., p. 494

The question is whether in positive international law, which accepted war as a sovereign right of nations, any change has been brought about by the Covenant, the Resolutions of the League of Nations, the resolutions of other international institutions, and the Kellogg-Briand Pact.

Apart from the fact that Japan abrogated the League of Nations Pact in 1933, the criminality of aggressive war does not follow from that Pact. The Pact aimed at preventing wars, but art. 15 acknowledged conflicts arising "out of a matter which by international law is solely within the domestic jurisdiction" of a party, as well as cases where the Council might fail to reach a unanimous report. Here was the famous "loophole for war" which later the Geneva Protocol tried in vain to exclude.¹

1. "It was one of the main objects of the Protocol for the Pacific Settlement of International Disputes, adopted by the Assembly on October 2, 1924, commonly called the 'Geneva Protocol' to stop up this 'loophole for war' in the Covenant by introducing amendments into that document. The fact that the Protocol failed to secure the number of ratifications necessary to make it effective was largely due to the opposition of Great Britain, and that opposition was mainly due to the view that, there being no machinery, or no effective machinery, for the revision under Article 19 of the Covenant of Treaties which have become inapplicable, the Protocol would involve its adherents in a guarantee of the status quo, however unjust and precarious it might be." (Oppenheim-Lauterpacht, o. c., p. 91, note 2.)

It was, in particular, in an effort to fill the gap in the Covenant, or "the loophole for war" as it has been called, that the Assembly of the League of Nations attempted to bring about a change in the international situation by means of a general treaty.

The Treaty of Mutual Assistance (1923),¹ through which it was attempted to prevent wars by an organization of power, laid down in Article 1: "The High Contracting Parties solemnly declare that aggressive war is an international crime, and severally undertake that no one of them will be guilty of its commission." This Pact has never become valid.

The Geneva Protocol (The Protocol for the Pacific Settlement of International Disputes), "approved by the Fifth Assembly amid general enthusiasm"² in 1924, laid down rules for the peaceful settlement of disputes "recognizing the solidarity of the members of the international community, asserting that a war of aggression constitutes a violation of this solidarity, and an international crime." (Preamble) But neither did this Pact ever become valid.

1. Text in the Monthly Summary of the League of Nations, 1923, p. 236 seq.

2. This quotation is from Scialoja's address at the Sixth Assembly. See Journal of the Sixth Assembly of the League of Nations, Geneva, 1925, p. 80. The text was published in the League of Nations, Resolutions and Recommendations adopted by the Assembly during its Fifth Session, 1924, p. 21 seq. It is of importance to note that, despite these manifestations of enthusiasm, the delegates merely undertook to recommend the Protocol to their governments for their "serious consideration." (Alfred Zimmer, *The League of Nations and the rule of law, 1918-1935*, London, 1936, p. 350-351.)

Now, it has been said that these pacts have failed for reasons other than the objections which were raised against the clause that aggressive war is a crime. It should, however, be realized that not until other conditions, such as the acceptance of pacific settlement, have been fulfilled do such declarations on the criminality of aggression acquire significance and justification. It would indeed be a distortion of reality to attribute validity to the above-mentioned declarations in the abortive Geneva Protocol as proving a change in international relations.

The failure of the Geneva Protocol is all the more illuminating as, by its very text, an essential category of conflicts was excluded from obligatory arbitration, among these conflicts those affecting matters "within the domestic jurisdiction" of a given state (art. 5), and also "disputes in regard to treaties at present in force and the territorial integrity¹ of states."

1. This last exception "had not been formally mentioned in the Protocol, but it was quite clearly understood that it was admitted," according to Politis, acting as General Assembly Reporter. Journal of the Fifth Assembly of the League of Nations, Geneva, 1924, p. 329.

The Sixth Assembly of the League of Nations, 1925, was clearly influenced by the failure of the Geneva Protocol. The proposal of the Spanish Delegate Guinones de Leon, to adopt a resolution in which the Council was requested to make arrangements for a conference on the reduction of armaments, has to be considered in the same light. In the proposed resolution we read: "declaring afresh that a war of aggression constitutes an international crime."¹

The Spanish proposal was referred to the First and Third Committees which, in turn, referred it to sub-committees. (Journal, 1925, pages 105, 157). The discussions of those sub-committees have not been published in the Journal. At the Fifth Meeting of the Third Committee, Benes, reporter of the sub-committee, announced "that the preamble of the Resolution proposed by M. Guinones de Leon, amended by a sub-committee of the First Committee, had been accepted as it stood by the sub-committee of the Third Committee." (Journal, o. c., p. 202.

As a result of these amendments, the preamble read: "Declaring afresh that a war of aggression should be regarded as an international crime" (Journal, o. c., p. 239), and the resolution was adopted in this form. (Journal, o. c., page 247.)

1. Text of the proposed resolution is to be found in the Journal of the Sixth Assembly of the League of Nations, Geneva, 1925, p. 74-75.

It seems evident, in view of the above, that no indications can be found in the transactions of the Assembly of 1925 to the effect that aggressive war is a vile crime. Considering what was adopted by the Assembly, no weight can be attributed to the "resolutions adopted by the International Federation of League of Nations Societies at its Ninth Plenary Congress of July, 1925,"¹ including the resolution concerning the Geneva Protocol which recommended the conclusion of agreements "destined to hasten the reduction of armaments in conformity with Articles 8 of the Covenant, agreements which ought to contain the following principles:

a. Recognition that every war of aggression is an international crime."

The Assembly of 1927 did not meet under any more favorable international conditions than the Assembly of 1925. In 1925, it is true, the Pact of Locarno had been concluded in which a special guarantee was embodied instead of the general guarantees of the Geneva Protocol, which had met with objections, especially in Great Britain. Since then, however, the Three Power Conference for Disarmament at Geneva had ended in failure.

It is difficult from the records of its meetings to gauge the spirit in which the Assembly met in 1927. At the outset of the session, it appeared that the Polish delegate Sokal proposed to bring up a kind of East-Locarno. In secret preliminary discussions, this proposal was modified and something of a different nature was carried into discussion in the Assembly. "The draft of

1. Published in the Journal, c. c., p. 114 seq.

the non-aggression pact had become a declaration on the outlawry of aggressive war, a declaration which, according to the explanation of the Polish delegate Sokal, had only moral significance."¹

In order to fathom the significance of the resolution of 1927, it is well to make a closer study of the discussions in the Assembly. Sokal's proposal, as it was adopted finally at the meeting on the 24th of September 1927, read:

"The assembly, recognizing the solidarity which invites the community of nations; being inspired by a firm desire for the maintenance of general peace; being convinced that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime; considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence calculated to facilitate the progress of work undertaken with a view to disarmament:

"Declares: (1) That all wars of aggression are, and shall always be, prohibited. (2) That every pacific means must be employed to settle disputes, of every description, which may arise between States.

"The Assembly declares that the State Members of the League are under an obligation to conform to these principles."²

What could be the significance of such a declaration?

Nations, being living entities, change. Changed conditions require changes in relations. Thus, conflicts among nations find their origin in their very nature. These conflicts demand solution. This may be done by peaceful means, but, if peaceful means do not provide the solution, the only alternative left is war. In the maintenance of peace, it is therefore essential to

1. Hans Wehberg: *The Outlawry of War*, Washington, 1931, p. 43

2. Verbatim Record of the Eighth ordinary session of the Assembly of the League of Nations, 24 September 1927, 10:00 p. 9.

find pacific means for the solution of conflicts. When those means have been found, "outlawry of war" may follow logically. To ban war before the means for the solution of conflicts have been found would, in practice, merely amount to the maintenance of the status quo.

During the discussions at the Assembly in 1927, Mr. Politis rightly pointed out this connection:

"A formula prohibiting all wars -- that is, all wars of aggression -- and seeking to define the aggressor by means of arbitration, while maintaining art. 15, paragraph 8, of the Covenant in its present form, would still leave the gap in that article exactly as it is today owing to the absence of sanctions which, under the Geneva Protocol, rendered the system possible. Moreover, in addition to this defect, which I cannot too strongly emphasize, there would be a great danger of giving the public the impression that we had progressed whereas in point of fact we should have lost ground."¹

That Politis was correct in his appreciation of the measure of the nations' preparedness for peaceful solution is apparent from the reaction of the same Assembly to the proposal by the Netherlands delegation to reopen discussions on the Geneva Protocol. I quote from an address by Sir Austin Chamberlain:

"All the old controversies, all the old difference of opinion, are still expressed. There is no possibility of agreement until, on the one side or on the other -- or perhaps on both -- there has been some approximation of the views of the parties." (c. c. 10th September, p. 41)

Nevertheless, the proposal by Sokel declaring aggressive war a crime was accepted. Briand, in defense of this proposal, used a misleading metaphor:

1. Verbatim Record of the Eighth ordinary session of the Assembly of the League of Nations. 8th September, 1927, 10:30, p. 6.

"When we attempt to build a solid structure; when we have a juridical scheme such as our friend M. Politis loves, and our friend M. Scialoja, too; when we find that we cannot complete our building all at once but must stop at the first or second or third storey whereas the completed building is to be perhaps six, perhaps twenty, storeys high, are we to give up our undertaking? I say: No! We must go on, but we must find some other way. We must use another means: the League's power of propoganda." (o. c. 10th September, p. 6.)

It is misleading because the peaceful solution of conflicts is fundamental. It would have been more to the point had Friend asked himself whether it were possible, in building a house, to start with the roof as long as it was not yet possible to lay the foundations.

Apart from Friend's speech, the resolution itself was misleading. The text would give the impression that all aggressive wars in fact had been banned. However, the discussions show that the only objects kept in mind were those were referred to in, and already prohibited by, the Covenant. The Japanese delegate Nagasaki could state, without raising criticism, that "from the exchange of views in the Committee, he had understood that the draft resolution, as a whole, did not go beyond any of the obligations laid down by the Covenant."¹ In view of these circumstances, one can understand that it was in vain that the Netherlands delegate Loudon did propose to prohibit all wars. (Journal, o. c., p. 225).

1. Journal of the Eighth ordinary session of the Assembly of the League of Nations, Geneva, 1927, p. 226.

The resolution is misleading not only because it has less substance than appears on its face, but also because it was intended as a gesture, with merely moral value. Sokal, from the very outset, declared that his proposal "had no concrete legal scope" (the original French version is clearer: "n'a pas de portée juridique concrète") but only moral significance. (Journal, o. c., p. 124.)

To the various objections against the Polish proposal, to the effect that the proposal was pointless, and did not even go as far as the Covenant in that it lacked sanctions, Briand replied:

"If we raise a great cry at the close of a meeting after the speeches, we know quite well that it will not remain unheard. It awakens echoes in the conscience of the individual. It fixes itself in men's minds. It is re-echoed and spread abroad and duly achieves its purpose.

"Do you think it is worth while for this Assembly to utter such a cry, whether it has any legal value or not? (Underlined by me.) Or that we should feel issuing from the soul of the Assembly an aspiration, even if it have no juridical value, towards the ideal of peace?" (Verbatim record, 10 September 1927, p. 6.)

I have gone into some detail concerning the resolution of 1927 inasmuch as particular attention has been drawn by authors as well as by the Nuremberg and Tokyo Judgments¹ to this document in support of the theory that aggressive war was already considered a vile crime prior to the London Agreement of 1945, and the subsequent Charters of Nuremberg and Tokyo.

To the same end, the Sixth International Conference of American States, held at Habana from January 16 to February 20, 1928, is often quoted.² At this Conference, two resolutions were passed among others. The first concerned arbitration and read, in part:

1. Judgment of the IMT for the trial of German major war criminals, Nuremberg, 30 September and 1 October 1946. His Majesty's Stationery Office, cmd. 6964, p. 41.

2. Judgment - Nuremberg, o. c. p. 41.

"Whereas, the American Republics desire to express that they conduct war as an instrument of national policy in their mutual relations. . ."

Secondly, a resolution was adopted in which it was considered "that war of aggression constitutes an international crime against the human species" and it was agreed that:

"(1) All aggression is considered illicit and, as such, is declared prohibited; and

"(2) The American States will employ all pacific means to settle conflicts which may arise between them."

Now, firstly, we note that it is readily seen that aggressive war may be a crime between American States, and not between other States. If the American States have achieved relations of amity and of close kinship, which enables them to solve conflicts arising between them, then this may be coupled to its consequence, i. e., that violence becomes criminal. A certain development of legal conceptions, based on factual relations, in one part of the globe does not necessarily and automatically allow conclusions applicable to another.

But, secondly, had these relations already been attained?

One of the points on the agenda concerned the "pacific settlement of international disputes," and a far-reaching draft proposal was submitted.¹ After objections raised by the U. S. delegate Hughes, who pointed out that there were many disputes no

L. Report of the Delegates of the United States of America to the Sixth International Conference of American States, held at Habana in 1928, U. S. Government Printing Office, Washington, 1928, p. 21.

States would be prepared to submit to arbitration (questions involving the sovereignty of a State, "controversies which relate solely to political expediency," "matters of internal government").¹ The whole subject was referred to the next Conference in the above resolution, to the effect:

"(1) That the American Republics adopt obligatory arbitration as the means which they will employ for the specific solution of their international differences of a juridical character.

"(2) That the American Republics will meet in Washington within the period of one year in a conference of conciliation and arbitration to give conventional form to the realization of this principle, with the minimum exceptions which they may consider indispensable to safeguard the independence and sovereignty of the states, as well as matters of a domestic concern, and to the exclusion also of matters involving the interest or referring to the action of a state not-party to the convention." (o. c. p. 26).

In other words, the attempt failed, and it was realized that, even in the course of the next conference, the American States were not expected to reach an agreement on the specific settlement of all disputes. It was also realized that certain reservations would have to be made, for the present as well as for the future, excepting "political" controversies, involving sovereignty and "domestic affairs," which had to be excluded from a treaty for specific settlement of disputes. Subjects of vital interest, the very controversies which usually contain the seeds of war, were not considered amenable to obligatory arbitration. Immigration is one of these. During the discussions of resolution on this point at the same conference in Habana, Hughes observed:

1. Report, p. 23.

"... that the Government of the U. S. considers that the control of immigration is a matter of purely domestic concern, representing the exercise of a sovereign right, and that, as far as the U. S. of America is concerned, the authority of its congress in immigration matters is exclusive." (o. c., p. 71)

Despite the failure of the proposal for the obligatory solution of conflicts by peaceful means, the resolution that aggressive war constitutes a crime was easily passed. One cannot but feel that at this Conference again recourse was sought to a phrase for lack of concrete results. That these attempts at the Habana Conference were bound to fail is easily inferred from the proposals and discussions concerning the "Declarations of the Rights and Duties of States" (o. c. p. 10 seq.) which show a mentality of national individualism manifestly unsuitable for the acceptance of supra-national responsibility, which, in turn, would result in the pacific solution of conflicts and the outlawry of aggressive war. The price of unlimited national sovereignty is an occasional war. If aggressive war is recognized as criminal, partial surrender of national sovereignty is indicated, and a community of nations must have developed which no longer tolerates violence between its members, and in which war in a sense acquires the character of civil war. Without this development, a declaration on the outlawry of war is a fairly empty phrase which may perhaps indicate the willingness of the nations concerned to avoid war through peaceful solution of conflicts. But the value of the phrase does not then lie in the legal situation it ostensibly indicates, but in the measure of that very preparedness to solve disputes even if that solution might entail loss of historical rights.

Finally, in 1928, the "general act for the peaceful settlement of disputes" failed to materialize, and the Pact of Paris was concluded. In view of the above, it appears correct to assume that no international events prior to the Pact can be adduced which would permit one to conclude any change in international relations in the sense of outlawry of war. Neither abortive treaties, nor misleading resolutions could affect this change.

It would, moreover, be illogical to assume that aggressive war was accepted as criminal prior to the Pact of Paris, because in that case we should be forced to conclude that negotiations extending over a period of months had been carried on in order to reach an agreement not to commit crimes in the future. It is an established fact that one of the authors of the Pact, Briand, did not attach this significance to any previous resolutions. In his address on the occasion of the ratification he said --among other things:

"For the first time, in the face of the whole world, in a solemn covenant, pledging the honor of great nations which all have behind them a heavy past of political conflicts, war is renounced unreservedly as an instrument of national policy, that is to say, in its most specific and dreaded form: selfish and willful warfare. Considered formerly as based on divine right and having remained in international ethics as a tribute of sovereignty, that form of war is at last legally stripped of what constituted its most serious danger -- its legitimacy. Henceforth, branded with illegality, it is by common accord actually outlawed, so that the guilty nation would incur the certain repudiation and the probable enmity of all its consignatories." (Italics supplied.)¹

The Pact of Paris, signed on behalf of sixty-three nations, among those Japan, appears to be the only real basis for a different conception with regard to the jus ad bellum. It is questionable,

1. Treaty for the Renunciation of War, U. S. Government Printing Office, Washington, 1933, p. 314.

however, whether it did in fact bring about such a change that aggressive war became a vile crime. The Pact itself provides only the one sanction that states waging war in violation of the Pact "should be denied the benefits furnished by this Treaty." (Preamble). But hardly any mention was made (before the Second World War), by those who interpreted this Pact, of the consequence that aggressive war is criminal, and involves individual responsibility.¹

The essential significance of the Pact is undoubtedly contained in article 2, where the contracting parties agree

"that the settlement and solution of all disputes or conflicts of whatever nature, or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

The bare text, however, does not fully disclose the expressed design of the parties. Examination of the preparatory work reveals what is equivalent to an additional explanatory article, in definite acknowledgment that the agreement should not curtail the freedom of the signatories to have recourse to defensive measures.

1. In order to assess the significance attributed to the Pact of Paris before the Second World War, the "Budapest Articles of Interpretation" are essential. These articles were unanimously adopted at the Thirty-eight Conference of the International Law Association, held at Budapest in 1943. Stimson at the time referred to these as "the most authoritative statement of international law on that subject which, so far as I know, has ever been published." (Quoted in Hackworth's Digest of International Law, VII, p. 680, Washington, 1943). In the Budapest Articles no mention is made of any criminal responsibility. Violation of the Pact confers upon other states various rights which they did not possess under the traditional conception of neutrality; (Article 4) the culpable state shall pay indemnity to all states involved. (Article 6) (The text is to be found in the American Journal of International Law, 1933, p. 92 seq.)

In the identical note of the United States Government delivered June 23, 1928, to nine governments, the following was stated with regard to self-defense:

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

France answered for France, July 14, 1928:

"Nothing in the new treaty restrains or compromises in any manner whatsoever the right of self-defense. Each nation in this respect will always remain free to defend its territory against attack or invasion; it alone is competent to decide whether circumstances require recourse to war in self-defense."²

London Chamberlain answered July 18, 1928, for Great Britain:

"I am entirely in accord with the views expressed by Mr. Kellogg in his speech of the 28th of April that the proposed treaty does not restrict or impair in any way the right of self-defense, as also with his opinion that each state alone is competent to decide when circumstances necessitate recourse to war for that purpose."³

Japan had already stated earlier in a letter of May 26, 1928:

"The proposal of the United States is understood to contain nothing that would refuse to independent states the right of self-defense. . ."⁴

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1. In: Treaty for the renunciation of war. Text of the Treaty, notes exchanged, instruments of ratification and of adherence and other papers. Dept. of State publ. 468, Wash. 1933, p. 57
 2. o. c., p. 68.
 3. o. c., p. 73.
 4. o. c., p. 51.

But how far does self-defense go? The problem of self-defense in itself is most complicated. How it was understood in the United States at the time when the Kellogg-Briand Pact was proposed and accepted, can be learned from the statements made in Congress before its ratification. Senator Borah went so far as to maintain that it was a fact that every nation reserved the right to employ force to protect its nationals when their lives might be endangered in foreign lands.¹ Secretary of State Kellogg declared that the reservation of the right of self-defense meant "that this Government has a right to take such measures as it believes necessary to the defense of the country, or to prevent things that might endanger the country." (Italics supplied.)²

It appears that this went further than the reservation of the right of every nation to defend its territory from attack or invasion. However, with the vagueness of the text as it stands, it is essential to know with what ideas in mind parliamentarians were prepared to ratify the pact, especially so in view of author Kellogg's explanation of its implications.

In this respect, the second reservation of the Pact of Paris acquires special significance: that each State alone is competent to decide when circumstances necessitate recourse to war in self-defense. As Showell put it: "The importance of this last phrase in interpreting the Pact of Paris can hardly be overstated. Each nation is to remain the judge of its own actions. This is the real reservation of the Pact of Paris."³

1. Congr. Record, 70th Congress, 2nd Session, p. 1286.

2. U. S. Senate Committee on Foreign Relations, Dec. 7, 1928.

"General pact for the renunciation of war," p. 5. It may be considered of importance to note that this record of the transactions of the said committee was revised by Secretary of State

Kolligs before publication, as it appears from the record of the transactions of Dec. 11, 1928, p. 27

3. James T. Shotwell: War as an instrument of national policy and its renunciation in the act of Paris. New York 1928, p. 217.

This reservation makes it extremely difficult, if not impossible, to prove a breach of the Pact. The reasoning of the Nuremberg judgment on this point seems to be almost a *petitio principii*, where it says:

"Whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."¹

The question is whether the signatories ever intended to have the pact enforced in a judicial way. Hyde was right in stating:

"The agreement contained no provision requiring a party which might resort to non-amicable measures, on grounds of self-defense, to establish before any particular body the soundness of its pretensions."²

Secretary of State Kellogg, explaining the Pact to the U.S. Senate Committee on Foreign Relations, stated on December 7, 1928:

"I knew that this Government, at least, would never agree to submit to any tribunal the question of self-defense, and I do not think any of them would." (Record, p. 4)

Senator Borah, who played such an influential part before the Briand-Kellogg Pact was ratified by the American Senate, stated at the beginning of the discussions in the Senate:

"The only censor -- and these things we may understand and frankly admit -- the only censor or criticising power of a nation exercising the right of self-defense, if it does not exercise it upon true principle, is the power of public opinion. There being no super-government, no tribunal to which appeal, and no one willing to create a super-government, and no authority otherwise to pass upon the matter, that is the only judge that we can rely upon to censor this part of

1. Nuremberg judgment, Br. ed., p. 30.

2. Charles Cheney Hyde. International Law, chiefly as interpreted and applied by the United States. Vol. III, Sec. Ed., Boston 1945, p. 1683.

the treaty. I know of no other tribunal to which we can appeal for the rectitude of nations in the exercise of this right of self-defense."¹

The principal question in relation to the above is:

Did the Pact of Paris make aggressive war an international crime for which individuals can be held responsible?

Act 1 of the Pact states that the Parties "condemn recourse to war for the solution of international controversies." Could this word "condemn" indicate the criminality of the condemned activity? The word itself certainly does not warrant such a conclusion, and indicated strong feeling of misgiving rather than designation as criminal. Moreover, the term, as used in treaties generally is certainly not employed to brand a condemned activity or status as criminal. In the treaty to avoid or prevent conflicts between the American States, signed at Santiago de Chili, on May 3, 1933, the Governments represented at the Fifth International Conference of American States condemned "armed peace," and this certainly was not intended to create a new international crime.

Even among authorities in the field of international law, there is difference of opinion with regard to the meaning of the Pact of Paris where the solution of conflicts is involved.

According to Miller²⁾ the treaty places the parties under an obligation to settle all their disputes by pacific means. However, Oppenheim-Lauterpacht (o. c., p. 151) points out:

1. Congressional Record, Jan. 3, 1929, Vol. 70. 70th Cong., 2nd Session, p. 1063. And again on Jan. 4, 1929 (l. c. page 1126): "There is no superior court or other tribunal to which appeal can be made except the judgment of the world." or "But this treaty never can to to any court, because if it is violated we are the judges of that ourselves, and each signatory is the judge for it-self," or "This treaty does not provide for any tribunal." (l. c., p. 1133). On those assurances senators based their "yeah" to ratify, some of them recognizing at the same time that it was a "worthless,

but perfectly harmless peace treaty." (Jan. 15, l. c., page 1728).
2. David Hunter Miller: The Peace Pact of Paris, New York-London,
1928, p. 129.

"Even if Article 2 be construed as implying the positive duty to seek the solution of disputes by pacific means, it certainly does not imply the duty to settle disputes in that way."

Indeed, the negative wording of Article 2 is characteristic: no solution is to be sought other than by peaceful means.¹ In other words, if one of the parties is not prepared to cooperate by conceding rights or privileges peacefully, the status quo will be maintained. Yet, the occasional yielding of rights is essential to maintain peace inasmuch as it is not the strictly legal controversies which are the more vital, but the political conflicts in the course of which a change in existing legal relations is being sought.

As long as the relations between states are still such that any state, in accordance with its sovereign right, will decide its position in vital conflicts, there will be no place for outlawing war. It is said: laws, like houses, lean on one another. Applied to our case, this means: the prohibition of war can only be the consequence of certain legal relations between states:

Kelsen rightly observed:

"The complete failure of the Briand-Kellogg Pact clearly shows that it is useless to outlaw war without eliminating the possibility of legally unsettled and unsettable conflicts."²

Neither the lofty phrases used in resolutions, nor the ambiguous Pact of Paris outlawed war in the sense that waging an illegal war did become criminal in the ordinary sense. It would be superfluous to quote the great number of pre-war authorities who held this same view. Sufficient it is to give the opinion of David Hunter Miller, the American diplomat and author, who played

an essential part during the negotiations. Miller Stated:

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1. The significance of this negative wording is stressed by the positive wording of art. 2, sub. 3 of the Charter of the United Nations.
 2. Hans Kelsen: Peace through law. 1944, p. 32.

"Thus the Briand-Kellogg Treaty is a treaty for the 'outlawry of war' only if we use that American expression in its popular sense as meaning prevention of war or ending of war; the sense in which it is occasionally employed in the diplomatic correspondence. If, however, we think of 'outlawry of war' as having the significance ascribed to it by certain writers and others who have put forward plans for an international code to make war 'illegal' or a 'crime', then the Briand-Kellogg Treaty is not at all a treaty for the 'outlawry of war'; the Briand-Kellogg Treaty is intended to prevent war in any case among its parties by their own solemn agreement, just as an arbitration treaty is intended to prevent war in (generally) some cases between its parties; but neither the one treaty nor the other sets up or purports to set up or to 'codify' a principle or rule of international law.¹

One may see in the Pact of Paris the denial of the sovereign right of nations to go to war at will and the expression of the willingness "to renounce war as a means of national policy." To read more in it would leave unanswered the question why no provisions were made for the inevitable legal consequences of the new viewpoint.

But, it has been asked, does not the criminality of aggression follow from the entity of resolutions and pact together? Glueck has based his changed opinion on this thesis, "that the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed custom to be acceptable as international law."²

This, however, is a misunderstanding of the meaning of the source of international law as mentioned in Art. 38 of the Statute of the International Court of Justice, according/^{to} which the Court shall

1. David H. Miller: The Peace Pact of Paris, New York-London, 1928, p. 127.

2. Sheldon Glueck: The Nuremberg Trial and Aggressive War, New York 1946, p. 5; see also p. 37.

apply "international custom, as evidence of a general practice accepted as law." Custom can indicate law if it shows behavior thus accepted. The only custom referred to in Glueck's argument is the custom to use mere or less empty phrases where real issues failed to materialize. Actual practice of states in their dealing with each other since 1928, the only practice which could indicate the alleged fundamental change, would not support the new conception at all.

In this connection, it is illuminating to note that criminal responsibility on the part of the authors of aggressive war came under serious discussion only towards the end of the war. In 1928 this particular consequence of the Pact of Paris was by no means recognized.

1. In the course of the discussions about the Pact of Paris, the defense offered evidence concerning instances of international conduct which could be interpreted as breaches of the Pact committed by nations represented in this Tribunal. This evidence was not offered on the theme "thieves for their robbery have authority when judges steal themselves," but with the purpose of showing how the Pact of Paris was actually interpreted by the nations concerned, and to draw from that interpretation conclusions as to the real content of the treaty, in other words, "as proof of the present state of the international law relevant to this case." (T. 17605). Defense counsel Blakeney further stated in this connection: "I am interested in showing to the Tribunal that if the USSR, the U.S., Great Britain and other nations have done these things, they cannot be acts of criminal aggression." (T. 17615). However, the Tribunal ruled differently, when the President announced:

"The Tribunal has decided not to receive evidence as to the relations between the USSR and Finland, Latvia, Estonia, Poland and Roumania; nor as to the relations between Russia and Great Britain and Iran; nor as the relations between the U.S. of America and Denmark; vis-a-vis Greenland and Iceland. These are collateral and irrelevant issues. The decision is a decision of the majority." (T. 17635).

The interests of the defendants were not necessarily prejudiced by this ruling, where the matters concerned can be considered the subject of common knowledge, of which the Tribunal can take judicial notice. (Charter, art. 13d).

Studies dating from subsequent years occasionally expressed a desire to codify individual penal liability. But not until the later war years does individual responsibility for aggressive war appear considered as established under existing law. The development towards the punishment of war criminals owes its origin to atrocities committed by the enemy. Reacting to such atrocities, Roosevelt and Churchill declared on the 25th of October, 1941, that time would come when these crimes would be punished.¹⁾

1. Both addressed are recorded in "Punishment for War Crimes," London, H. M.'s Stationary Office, 1942, p. 15.

"The Molotov Notes on German atrocities"¹ of November 29, 1941, and January 6, 1942, contained the same idea, i.e., the declaration that the authors of these atrocities would be later called to account. The Russian announcement said, i.e., that "the Soviet Government . . . lays all responsibility for these inhuman and rapacious acts committed by the German troops on the criminal Hitlerite Government of Germany."

In the Declaration of St. James's Palace, dated January 13, 1942, the Governments of Belgium, Czechoslovakia, France, Greece, Luxemburg, the Netherlands, Norway, Poland, and Yugoslavia, issued a declaration on atrocities committed in their respective countries. In it, they affirm that acts of violence thus inflicted upon the civilian populations have nothing in common with the conceptions of an act of war or of a political crime as understood by civilized nations; and list among their principal war aims the punishment, through channels of organized justice, of those guilty of, or responsible for, these crimes, whether they have ordered them, perpetrated them, or participated in them.

This declaration was transmitted to the Great Powers. The replies were published in "Punishments for War Crimes (2)."² No mention is made of possible punishment for aggressive war as such. Only "Conventional War Crimes" would be tried.

1. Published by H.M.'s Stationary Office, London, 1942, p. 20.
2. Published by H.M.'s Stationary Office, London, 1943.

Molotov announced that his government, having heard of the "monstrous atrocities, once more declares to the world its inflexible determination that the criminal Hitlerite Government and all its accomplices must and shall suffer deserved stern punishment for the crimes perpetrated against the peoples of the Soviet Union and against all freedom-loving peoples in territories temporarily occupied by the German Army and its accomplices." (14th October, 1942.)

When Stalin made his speech on the 25th anniversary of the Revolution, November 6th, 1942, he mentioned as the third war aim: "to destroy the detestable 'new order in Europe' and to punish its builders!"¹ Did this mean the punishment of those responsible for the war? Careful reading of the text shows that Stalin reacted against those who committed atrocities systematically, where he says:

"The Hitler scoundrels have made it their rule to torture Soviet war prisoners, to slay them in hundreds, and to condemn thousands of them to death by starvation. They outrage and slaughter the civil population of the occupied territories of our country, men and women, children and the aged, our brothers and sisters. They have set out to enslave or exterminate the population of the Ukraine, Byelorussia, the Baltic Republics, Moldavia, the Crimea and the Caucasus. Only villains and scoundrels destitute of all honour, who have sunk to the level of brutes, can commit such outrages against innocent and unarmed people. But that is not all. They have covered Europe with gallows and concentration camps. They have introduced the vile 'hostage system.' They shoot and hang absolutely innocent citizens whom they take as 'hostages' because some

1. J. Stalin: On the great patriotic war of the Soviet Union. Moscow 1946, p. 78.

German beast was prevented from raping women or robbing civilians. They have converted Europe into a prison of nations. And this they call the 'new order in Europe.' We know the men who are guilty of these outrages, the builders of this 'new order in Europe,' all those upstart governor-generals, or just ordinary governors, commandants and sub-commandants. Their names are known to tens of thousands of tormented people. Let these butchers know that they will not escape responsibility for their crimes or elude the hand of retribution of the tormented nations. Our third task is to destroy the detestable 'new order in Europe' and to punish its builders."

It seems apparent that Stalin aimed at the punishment of the builders of an atrocious system.

A United Nations War Crimes Commission was established. A subcommittee,¹ appointed for the purpose of defining the lines along which the Commission should approach its task, prepared a report which was adopted on December 2, 1942. In this report, these crimes are enumerated which would generally be punishable. The report drawn up by the Responsibilities Commission of the Paris Peace Conference in 1919 was followed in outline. A note was added to the list of crimes to the effect that addition had to be made of "one or two items which seemed to be inadequately covered by the language employed in framing the list" while a few would have to be deleted "as these refer to acts which, in the present war, the forces of the United Nations have themselves been obliged to commit." It is important to point out that the Commission in 1919 did consider problems concerning the responsibility of the authors of the war, but that it came to the conclusion that "the acts which brought about the war should not be charged against their authors or made a subject of proceedings before a tribunal."²

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1. Consisting of Sir Cecil Hurst, de Baar, Ecer, de Moor and Glaser.
 2. Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War, and on the Enforcement of Penalties, 29th March, 1919, p. 13.

In the "draft convention for the creation of an international criminal court," of October 1943, drafted by the Chairman, Dr. de Baer, and amended by the Commission appointed by the London International Assembly, the crimes coming under the jurisdiction of the proposed International Criminal Courts were designated "war crimes." Art. 2 of the draft reads:

"War crimes are any any grave outrages violating the general principles of criminal law as recognized by civilized nations and committed in war-time or connected with the preparation, the waging or the prosecution of war, or perpetrated with a view to preventing the restoration of peace."¹ (italics supplied).

Neither does the Moscow Declaration of November 1, 1943, "on atrocities," mention any intended punishment of the authors of the war, although it does mention the future trial of those who have committed atrocities.² This declaration stated that guilty Germans "will be sent back to the countries in which their abominable deeds were done," except the "major criminals whose offenses have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies." The London Agreement, referring to this last statement as basis for its creation of the Nuremberg Charter, apparently lost sight of the fact that the declaration was

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1. The punishment of war criminals. Recommendation of the L. I. A. (London International Assembly) p. 18.
 2. The "Three Powers Declaration on Atrocities," made by the U.S., U.K. and USSR may be found in United Nations Year Book 1946, London-New York-Melbourne, 1946, p. 21.

"on atrocities" only.

The first occasion on which the punishment of those responsible for the war was announced, was on 6 November 1943, in Stalin's speech commemorating the 26th anniversary of the Revolution. In this speech Stalin said:

"In conjunction with our Allies we shall have to . . . take measures to ensure that all the fascist criminals who are responsible for this war and the suffering the peoples have endured shall meet with stern punishment and retribution for all the crimes they have committed, no matter in what country they may hide."¹

On the first of December, 1943, the Cairo Conference Statement was issued, in which Roosevelt, Churchill and Chiang Kai-shek said:

"The Three Great Allies are fighting this war to restrain and punish the aggression of Japan."

Only the punishment of Japan as a nation is here brought up. One wonders whether such punishment has any bearing upon judicial activity of a tribunal with regard to individual responsibility. Such punishment primarily manifests itself in the destruction of cities, in the loss of territory, and in the humiliation of an occupation.

In the Report of Commission I of the London International Assembly, issued in December 1943, it states:

1. J. Stalin. On the Great Patriotic War of the Soviet Union. Moscow 1946, p. 129.

"It is essential that the categories of crimes in respect of which post-war punishment is required, be stated as precisely as possible. After much discussion the majority of the Commission recommended that a comprehensive view should be taken, including not only the customary violations of the laws of war, but any other serious crime against the local law committed in time of war, the perpetrator of which has not been visited by appropriate punishment. Moreover, in accordance with Stalin's views as expressed on November 6, 1943, the Commission recommended that those responsible for the "crime of war," i.e., unprovoked aggression, should be branded as criminals and adequately punished."¹

In its "Recommendations," the Commission, having first given the definition its Chairman recommended in October, continued:

"From this point of view the Commission regards as war crimes especially: (a) the preparation and the waging of an aggressive war and all other acts of aggression (referred to in Marshal Stalin's Declaration of November 6, 1943). . . ."²

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1. The punishment of war criminals: Recommendations of the L. I. A. (London International Assembly), p. 7.
 2. O. c., p. 12.

Marshal Stalin's idea was further supported in a book by the Soviet-Russian professor A. N. Trainin ("The criminal responsibility of the Hitlerites," Moscow 1944), who, together with Maj. Gen. T. T. Nikitchenko (later the Soviet Member of the I. M. T. at Nuremberg), represented Soviet Russia at the London Conference which resulted in the London Agreement of August 8, 1945.

So far as American policy is concerned, I may quote Sheldon Glueck:

"Judging from available published data, this idea of including the launching of an aggressive war -- a 'crime against peace' -- among the offenses for which the Axis Powers were to be held liable had its origin, so far as American policy is concerned, in a report to the President made on June 7, 1945, by the American Chief of Counsel for the prosecution of major war criminals."¹

It was the later Chief of Counsel in Nuremberg, Justice Robert H. Jackson, who in behalf of the U.S. signed the agreements of London of Aug. 8, 1945, concluded between the representatives of the Governments of the U.S., France, U. K. and USSR, "acting in the interests of all the United Nations."

1. Sheldon Glueck: *The Nuremberg Trial and Aggressive War*, New York 1946, p. 5. Prof. Glueck was the American member of the above commission of the London International Assembly. In his book, *War Criminals: Their Prosecution and Punishment*, New York 1944, he had expressed the view that the acts of launching and conducting an aggressive war could not be regarded as international crimes (c.c., p. 37-38). Secretary of War Stimson was skeptical about the advisability of trying war criminals on the charge of aggressive war, when it was first suggested to him. He thought it "a little in advance of international thought," as he stated in a memorandum of Nov. 28, 1944 (Henry L. Stimson: *On Active Service in Peace and War*, by H. L. Stimson and McGeorge Bundy. New York 1947, Vol II, p. 587).

in which "crimes against peace" are mentioned as coming within the jurisdiction of the I. M. T.

From the above, it follows that "crimes against peace" were not regarded true crimes before the London Agreement, and were not considered as such before the end of 1943.

. . .

The question has to be faced and answered whether the concept of these crimes was, and could be, created as such by the London Agreement of August 8, 1945, or by the Charter for the IMTFE.

The defense in this case has submitted that this question is of no consequence, in view of the rule invalidating ex post facto law. This argument, however, will not stand examination. If the principle of "nullum crimen sine praevia lege" were a principle of justice,¹ the Tribunal would be bound to exclude for that very reason every crime created in the Charter ex post facto, it being the first duty of the Tribunal to mete out justice. However, this maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts (nullum crimen, nulla poena sine lege), as well as against arbitrariness of legislators (nullum crimen, nulla poena sine praevia lege). Nor does this rule consider the question whether a certain act was criminally wrong at the moment

1. As the majority judgment, following the Judgment of Nuremberg, holds.

it was committed, but only the question as to whether that act was or was not forbidden under penalty. As such, the prohibition of ex post facto law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom. It is, however, neither the task nor within the power of the Tribunal to judge the wisdom of a certain policy.

As indicated above, aggression was not considered a true crime before and in the beginning of this war, and could not be considered as such for lack of those conditions in international relations on which such a view could be based.

The dreadfulness of World War II may have made us realize the necessity of preventing wars in the future. But we need not discuss here whether the horror of the atomic bomb opened our eyes to the criminality of Japanese aggression.

These horrors of World War II may compel the nations to take the legal steps to achieve the maintenance of peace. This has not been done to date. Consequently, apart from the question as to whether, according to international law, victorious powers, either in a mutual treaty or by order of their Supreme Commander, could bring about a change in the legal situation of aggressive war, the relations of the nations did not change in the sense that even at this moment every illegal war could be qualified as a vile crime.

Positive international law, as existing at this moment, compels us to interpret the "crime against peace," as mentioned in the Charter, in a special way. It may be presupposed that the Allied

Nations did not intend to create rules in violation of international law. This indicates that the Charter should be interpreted so that it is in accordance with International Law.

There is no doubt that powers victorious in a "bellum justum," and as such responsible for peace and order thereafter, have, according to international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of the pertinent persons.¹ Napoleon's elimination offers a precedent.²

The Potsdam Declaration emphasized that duty:

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

In his opening statement, the Chief Prosecutor stressed this point of danger:

"For the accused in the dock are no contrite penitents. If we are to believe their claims as already asserted in this trial, they acknowledge no wrong and imply that if they were set free they would repeat their aggression again and again. So that from the sheer necessity for security they should be forever restrained." (T. 469).

¹ Co. are Hyde, o.c., P. 2411.

² The basic idea of the detention of Napoleon was his elimination as a dangerous man, who had to be prevented from again disturbing the peace of Europe. Compare H. Hale Bellot: The detention of Napoleon Buonaparte, in the Law Quarterly Review XXXIX - 123, p. 171-192.

The same thought was expressed by the Russian prosecutor:

"The accused have not laid down arms. Not only did they plead not guilty, taking advantage of the fact that their criminal actions in the past were thoroughly disguised and the aggressive policy was camouflaged by official lies about Japan's struggle for peace, etc., but they continue actively advocating their criminal aggressive policy which brought innumerable calamities and suffering to millions of people. The conspirators now in the dock are also dangerous because around them rally the most reactionary elements in Japan represented by former generals, intelligence agents and diplomats who appearing in this court as witnesses are doing their best to shield their former bosses." (T. p. 39738).

Mere political action, based on the responsibility of power, could have achieved this aim. That the judicial way is chosen to select those who were in fact the planners, instigators and wagers of Japanese aggression is a novelty which cannot be regarded as a violation of international law in that it affords the vanquished more guarantees than mere political action could do.

Again, the chief prosecutor in his opening statement said:

"This method of constituting an international legal tribunal and permitting such war criminals the privilege of defending themselves and asserting their innocence is but the culmination of the modern and civilized ideals of culture and tolerance which have become crystallized in concrete form." (T. 393).

Crime in international ~~law~~ is applied to concepts with different meanings. Apart from those indicated above, it can also indicate acts comparable to political crimes in domestic law, where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain, and where the punishment emphasizes the political measure rather than the judicial retribution.

In this sense should be understood the "crime against peace," referred to in the Charter. In this sense the crime against peace, as formulated in the Charter, is in accordance with international law.¹ It goes without saying that this conception of the character of the "crime" has certain consequences with regard to the appropriate "punishment".

It appears to me that the Nuremberg Judgment is based upon a somewhat similar conception of the "crimes against peace." Although it qualified the "crime against peace" of initiating a war of aggression as "the supreme international crime,

1. The prosecution in this case stated: "As to the crimes listed in Article 5, it is our submission that the Charter is and purports to be merely declaratory of international law as it existed from at least 1928 onwards and indeed before." (T. 39002). In the submission of the prosecution the Pact of Paris did not constitute the decisive moment at which aggressive war became a crime. This is correct. The special importance of the Pact of Paris consisted in the elimination of any doubt whether aggressive war might be the right of every sovereign nation.

differing only from other war crimes in that it contains within it-
 self the accumulated evil of the whole,"¹⁾ yet those defendants
 found guilty of the crime against peace, who were not, or to a
 limited degree, found guilty of conventional war crimes, were given
 only prison sentences (Hess, Doenitz, Raeder, Funk, von Neurath.)²⁾

As long as the dominant principle in the crime against
 peace is the dangerous character of the individual who committed
 this crime, the punishment should only be determined by consider-
 ations of security.

In this case, this means that no capital punishment should
 be given to anyone guilty of the crime against peace only.

At Nuremberg, November 21, 1945 Justice Jackson stated:

"That four great nations, flushed with victory and stung
 with injury stay the hand of vengeance and voluntarily submit
 their captive enemies to the judgment of the law is one of
 the most significant tributes that Power ever had paid to
 Reason."

This praise would apply to the Allied Nations in connection with
 the Pacific War if the crime against peace and the purpose of
 this trial were understood in the above sense.

1. Judgment, p. 13.

2. This interpretation of the Nuremberg Judgment was denounced by
 the Chief Prosecutor in his closing address as "a complete dis-
 tortion of the Nuremberg Judgment based upon statistics rather
 than the considered words of that Tribunal." (T. 38966). The
 phrase loses its conviction if one realizes that this interpretation
 is based upon the sentence proper rather upon the reasons given
 for it.

In this trial, together with the Nuremberg Trial, the first in which aggression-as-a-crime is at stake, it is not necessary to draw a sharp line between aggression and defense. Here, as the evidence shows, we are dealing with wars which can be called wars of conquest, wars of illegal expansion. These wars of conquest certainly come within the scope of illegal aggression, whatever definition might be given. The question whether the impulses which led to those wars of conquest did, perhaps, originate partly in the defensive sphere, may here be left out of discussion. Insight in the genesis of the crime has but limited importance, as it is not so much retribution for the offense by punishment of the perpetrators which is here being sought, as a measure for protection by elimination of dangerous persons.¹⁾

It being proved that Japan waged wars of aggression, it is not necessary to inquire in how far treaty provisions, too, were violated. It is clear that "aggression" in the Charter implies and presupposes the illegality of offensive war.

1. Such a very narrow legal view is supported by the circumstance that even in a trial lasting more than two years it is wellnigh impossible to write the exact story of 17 years of world history. It would be advisable not to approach a factual situation which has not been clarified in its smallest details with a legal concept which is of such subtlety that it would require those details in its application.

The author of the Charter has been most anxious to cover all the activities, which could be regarded as supporting aggressive war. The indictment has followed this course. It will not be necessary to decide in detail whether someone planned or prepared an aggressive war, or conspired in the accomplishment of the planning, preparation, initiation or waging of such a war. On the other hand, it is hard to find a distinction between initiating and waging, since initiating establishes waging.

More important in this case is the question whether every single member of the government, who votes for war after having entered the government with the purpose of maintaining peace, can be considered to have initiated the war. A similar problem arises in case of someone having entered the government during the war, similarly with the purpose of attempting to achieve peace as soon as possible.

Decision on this point is of great moment for the future. The Judgment must by all means avoid establishing such norms as would tend to create the consequence that individuals supporting peace would be forbidden to hold high office in a government which is inclined to aggressive war, or is in the process of waging an aggressive war.

It may be stated at this point that, unlike other crimes, the crime of aggression is such that the emphasis falls upon the activities in preparation. He who propagates, or plans, or starts the aggression takes upon himself a heavier responsibility than the statesman who cannot but accept the consequences of previous events, or who carries on an established policy.

It is wellnigh impossible to define the concept of initiating or waging a war of aggression both accurately and comprehensively. The simple fact of having been a member of the government which decided for war, or which was in the process of waging a war, is not sufficient. The intention with which one enters such a government is decisive. It should constantly be borne in mind that the question is whether certain activities, mentioned in art. 5^e of the Charter, are such that they can be considered as establishing a crime against peace.

Another problem is whether individuals, other than those forming the Government, can be considered to have waged the war of aggression. As a matter of course, those can be considered so who, without formally belonging to the government, exercise governmental functions. When the Army in a given country assumes a position which makes it the decisive agent in the formulation of the state policy, it can consequently wage war. The Army, if it restricts itself to the proper army function, i.e., to constitute the power which carries out the command of the Government, cannot "wage War." As such, the Army is merely one of the instruments with which war is waged.

Now, the argument could be advanced that at least the military, be they privates or fieldmarshals, assist in the waging, and that those individuals, if conscious of the aggressive character of the war, consequently could be held guilty of criminal participation in the crime.

However, this question need not to be answered here, since the Tribunal in any case lacks the jurisdiction to deal with such alleged participation in the crime against peace. Now that the

Charter grants jurisdiction only in the case of waging and of some forms of participation in this crime, viz., planning and preparation, other forms are excluded a contrario.

Further on in this opinion, where some individual cases will be treated, there will be opportunity to go into those questions in more detail.

Responsibility for Omission

A second problem arises with relation to conventional war crimes; who are responsible in case conventional war crimes are committed, and who can be said to have violated, either by commission or by omission, the laws and customs of war?

There is no problem with regard to the person who committed the forbidden act, or who ordered some other person to do the same. If under orders, the former is still considered to have committed the crime, but superior order may be considered in mitigation of punishment (Charter, Art. 6). The latter is, without any doubt, responsible for the deed done pursuant to his order. As art. 345.1 of the American Rules of Land Warfare correctly states: "The persons giving such orders may also be "punished."

The problem which has to be faced here is the question whether there are some persons responsible for the fact that they did not prevent the commission of crimes. This responsibility for "omission" is a very restricted one, in domestic law recognized only in special cases where the legal duty was clearly indicated. This duty to act varies in different countries with the degree of liberal individualism. The modern trend in most countries is to emphasize the duty of the individual towards his fellow citizens or the community. However, there does not appear to be a similar trend in international law. The American Rules of Land Warfare until 1944 carried this provision:

"The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose

hands they may fall." (Art. 347, last sentence.)

The meaning of the words, "under whose authority they were committed," was not considered sufficiently clear. Therefore, this phrase was deleted in 1944, and replaced by the above mentioned provision of art. 345. This new provision could indicate a reluctance to accept responsibility for "omission."

The British "Laws and Usages of War on Land" did, until the amendment of art. 443 in 1944, mention "the officials or commanders responsible for such orders," as persons who could be punished in connection with crimes committed on superior order. Here, too, the abolition of the "plea of superior order" as a general justification removed from the rules any indication of responsibility for "omission".

The same hesitation concerning "omission" may be found in the Nuremberg Judgment. In the Nuremberg trial, it was proved beyond any doubt that survivors of torpedoed ships were killed. There were laid before the Tribunal orders from Doenitz which are, as the Tribunal pointed out, "undoubtedly ambiguous and deserve strongest censure."¹ Yet, the Tribunal, without touching the question whether Doenitz was criminally responsible for those killings through his failure to take sufficient steps to prevent them, stated: "The sentence of Doenitz is not assessed on the ground of his breaches of the International Law of Submarine Warfare." As to the killing of survivors, this is apparently only based on the

1. Doenitz War Order No. 154, issued in 1939, and the so-called Laconia Order of 1942. Judgment o. c., p. 109.

fact "that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of ship-wrecked survivors."¹

The Indictment in this case, in counts 54 and 55, separately charges those accused who "ordered, authorized, and permitted" to commit the violations of the laws of war (count 54), and those who "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws of war (count 55). If there should be any difference between the "permission" charged in count 54 and the neglect of duty, charged in count 55, "permission" has to be taken in its sense of intentional granting of freedom to commit crimes. Such permission to violate the laws of war is an activity which is closely related to "authorizing", and is without doubt in itself a criminal violation of the laws of war.

The real problem arises in relation with count 55, namely, to determine the extent of the criminal responsibility for failure to prevent crimes. The "Commission on the Responsibility of the Authors of War and ^{On} Enforcement of Penalties" suggested as one of the groups to

1. Judgment, p. 109. The evidence above mentioned may be found in Nazi Conspiracy and Aggression, Vol. II, p. 815-844, Washington, 1946.

be dealt with by the proposed High Tribunal: "All authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to, or repressing, violations of the laws or customs of war."¹ As explained in the Report, and especially in the Memorandum of Reservations of the American delegates Lansing and Scott, these two restrictions of the responsibility, knowledge and power to intervene, were inserted at the suggestion of the American members.² In the Memorandum of Reservations, Lansing and Scott further deal with the criminal liability for crimes committed by others, stating: "To establish responsibility in such cases it is elementary that the individuals sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential." (Report, o. c.) This third element, the duty or obligation to act is apparently related with the authority to prevent violations of the laws of war.

1. Report presented to the preliminary peace conference, March 29, 1919, p. 14.

2. Report, p. 59.

"In re Yamashita," the Supreme Court of the United States dealt with the same question where the defense argued that the charge did not allege that Yamashita had either committed or directed the commission of such acts, and consequently that no violation was charged against him. "But this overlooks the fact," stated the Supreme Court, "that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result."

Mr. Justice Rutledge, in his dissenting opinion, expressed the view that at least there must be a case in which the accused is charged "knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so." Mr. Justice Murphy, in his dissenting opinion, stressed the

necessity of knowledge in cases such as YAMASHITA's, i.e., knowledge of the crimes committed.

The three elements seem to be essential in relation to liability for "omissions", viz., knowledge, power, and duty. These elements, however, are correlated in that the duty may imply the duty to know. Ignorance is no excuse in case the person in charge could and should have known. On the other hand, "power" means power in relation with legal duty. The three elements combined may lead to criminal responsibility.

To hold an official criminally responsible for certain acts which he himself did not order or permit, it will be necessary that the following conditions are fulfilled:

1. That he knew, or should have known of the acts.

Not only the knowledge, but also the lack of knowledge resulting from criminal negligence matters. If his function, and the duties involved place upon the official concerned the obligation to know what is happening, lack of knowledge -- if he could have known provided only he was normally alert -- cannot be claimed in defense.

2. That he had the power to prevent the acts.

It is a generally recognized fact that in every war -- war crimes are committed by soldiers of every army. No government or commander will be able to prevent all war crimes. There is criminal responsibility only where all possible steps to prevent war crimes have not been taken. But since it is a matter of common knowledge that war crimes are likely to be committed, the authority vested in an official position should be exercised with due regard to this possibility.

3. That he had the duty to prevent these acts.

One could argue that this duty exists, as soon as knowledge and power are apparent. International law may develop to this point. At this moment, however, one has to look for the specific obligation, placed on government officials or military commanders, which makes them criminally responsible for "omissions."

The scope of this responsibility is extensive. The majority judgment may be generally referred to with regard to the extension of its implications. It must be stated, however, that it seems that the judgment goes too far where it assumes the responsibility of every member of the government for the atrocities committed in the field or against POW or civilian internees.

The Chief Prosecutor stated in general: "The personal liability of these high-ranking civil officials is one of the most important, and perhaps the only new question under international law to be presented to this Tribunal." (T. 435).

It is advisable indeed to bear in mind that this is a new question, which carries a warning to be very careful not to apply rules which did not exist before. It will, moreover, be a wise policy not to extend this newly applied responsibility too far. In this case, this responsibility should not extend to every member of the Government. Although the Hague Rules state that POW are in the power of the hostile government (art. 4) and that the government is charged with their maintenance (art. 7), this does not necessarily

imply that every member of the Government can be held criminally responsible in case of mistreatment. In every government a division of labor is established, and where, as in Japan, special departments of the government were charged with a special task, e. g., the War and Navy Ministries with the care for POW and civilian internees in occupied territory, the Home Ministry with the care for civilian internees in Japan proper, the Ministry of Overseas Affairs with the care for civilian internees in Formosa, Korea and Saghalin -- the responsibility for not preventing violations of the rules of war should be limited to these officials especially indicated in the pertinent domestic law.

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SOME OBSERVATIONS ON THE FACTS

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1 To avoid extensive quotation, the full text of important government decisions is given in Appendices. The documents are numbered I to XIX. For a correct understanding of the plans of Japan's government perusal of these decisions in toto is essential.

INTRODUCTION

The majority judgment has dealt extensively with the factual history of Japan, and with the part which the accused played in this history. Reference may be made here to the findings.

It seems, however, necessary to dissent on some issues, where a different interpretation should be given to the facts laid before the Tribunal. This different interpretation is given only where it might have direct bearing on the question of criminal liability in the sense of the Charter.

THE THREE PHASES

Considering the events which led up to the Pacific War, it may be helpful to divide the interval concerned into certain periods. There existed in Japan a group which, in a peaceful way, was striving for a prosperous Japan, a Japan which would virtually dominate East Asia. On the other hand, there existed a group which aimed at the expansion of Japan by means of force. Ample evidence has been brought in this case to show that there existed in Japan a military clique which was eager and determined to solve political and economic problems by force of arms. This tendency gathered strength as the policy of peaceful expansion gradually seemed to become frustrated by foreign immigration laws, and by the world depression which led to tariff barriers and regional agreements. The decisive question in this trial is to determine how the relationship of the two different concepts, of expansion by means short of war, and of expansion by force of arms, developed.

In studying this development, a rough division into

three periods can be made.

The first period is characterized by a struggle in which the military clique attempted to achieve its aims by threats and assassinations at home, and by independent action abroad. This period approximately covers the years between 1928 and 1936, although independent action was still maintained in later years during the Marco Polo Bridge, the Nomonhan, and the Lake Khasan incidents.

The period of struggle was followed by one of collaboration, in which the two factions came to an agreement with regard to the object to be achieved -- the domination of East Asia. Even in this, however, they remained opposed with regard to the methods whereby this object was to be achieved. This period runs from approximately the February 26 incident in 1936, when several pacifists were murdered, to the decision of the Liaison Conference of September 19, 1940, although perhaps a change in official policy can be distinguished earlier during the Hiranuma Cabinet.

The next and final period starts with the Liaison Conference of September 19, 1940, during which the use of armed force was accepted as government policy, first as an alternative in case other methods failed, later as straightforward policy.

THE THREAT OF ASSASSINATION AND CIVIL WAR

It should not be necessary to describe the first period, and reference may be made to the pertinent passages in the majority judgment. It has been established in this trial that the military planned and started the Manchurian incident, and that the successive governments, although opposing their machinations, were frustrated by

war ministers who played an ambiguous part, by threats of the militarists, and by elimination of the strongest pacifists through assassination. Japanese statesmen in those days had to consider the fact that there was a power in their country which was prepared to achieve its ends by murder or revolution. The evidence in this case shows that the danger of civil war or revolution was imminent during the entire period covered by the indictment. We can observe this danger from the time when Kido thought it necessary to prevent the Emperor from pronouncing himself against the conduct of the militarists in the Manchurian incident, and judged it essential to keep Prince Sayonji away from Tokyo, for fear that he might be killed (Diary, entry of 22 September 1930, T. 1938), until the time when surrender became imminent, and Tojo threatened that if a civilian were chosen Premier "the Army might look the other way," (April, 1945, T. 31136), and until even later, when Kido, together with Imperial Household Minister Ishiwata, had to hide in a vault to escape assassination by the rebellious Guard Division (August 14, 1945, T. 31196).

BEARING OF JAPAN'S INTERNAL SITUATION

ON THE QUESTION OF GUILT

As the prosecution has stated correctly, Kido in particular considered it his duty to protect the Emperor and his immediate environment from attempts on their lives. (T. 31316, 31566). It is extremely difficult, in view of this background, to decide whether Kido in this function worked for peace or for war. Kido said to Harada, in July 1933: "It is disturbing to hear the Emperor taking such pointed actions," after the Emperor had rebuked Itagaki

about the abominable activities of the Army. (Harada Memoirs, T. 37754). In later years Kido confided to Harada: "The present Emperor is a scientist and very much of a liberal as well as a pacifist. Therefore, if the Emperor's ideas are not changed there will exist quite a gap between His Majesty and the Army and Rightist groups." (T. 37789). Harada was infuriated about this attitude, because he felt it to be Kido's task to lead the Army to comply with the wishes of the Emperor. (T. 37791). The prosecution in this case agreed with Harada's views when it stated: "Always he (Kido) was prepared to let the military have their way and in later years at length to make it easy for them, rather than risk the possibility of revolution or civil war in Japan." (T. T. 4). On the other hand, as the defense has pointed out, internal peace was an essential aim, inasmuch as assassinations could only eliminate the conservative elements and precipitate moves in the wrong direction. It is very difficult, indeed, correctly to interpret the activities of the accused when these activities can at times be understood only in the light of the menacing possibility that civil war might ensue as the result of some peaceful action, which might prove displeasing to the militarists.

To illustrate the complicated situation, another example may be given. Some of the accused are charged with supporting the appointment of soldiers to the premiership, and with giving their vote to men like Tojo. The issue is not as simple as it would be in a polity built on a democratic pattern. In Japan, the situation was often such that a peaceful policy would be acceptable to the younger officers only if carried out by a person whom they considered "a strong man". A similar move, sponsored by anyone considered a

pacifist, could easily have led to more assassinations and civil war. The selection of Tojo in the crucial months before Pearl Harbor has to be seen in this light. After the resignation of Konoye, who refused to take responsibility for war at that time, the situation became such that only a man generally considered strong, and therefore trusted by the younger officers, could have been able to bring the negotiations to a peaceful conclusion without bringing about civil war, followed by aggressive action abroad.

Tojo, after having first expressed that he considered war with the United States inevitable, and that "the opportune time for fighting was in danger of being lost" (T. 10290), showed himself willing to consider prolonging the negotiations at the time of the fall of the Third Konoye Cabinet. As Premier he received the Emperor's "clean slate message," to the effect that he was not bound by the Imperial Conference decision of September 6, 1941, to start war, unless the negotiations be concluded successfully, in October 1941 (T. 36309). Prior to receiving the command to form a new cabinet, he had expressed himself as favoring a last attempt in the negotiations. When he invited Togo and Kaya to join his cabinet, he assured them that "we would do our utmost to put through American-Japanese negotiations." (T. 36315). It is not proved beyond doubt that Tojo, at the time of Konoye's resignation, played a deceptive role. One does, however, obtain the impression that he deceived the more peaceful individuals, including the Emperor. The latter fully realized the danger of appointing a man like Tojo. The appointment was apparently decided upon on the basis that if any man could bring about peace and make that peace acceptable to the

"younger officers" at home, that man was Tojo. In this connection, Kido recorded in his diary: "After careful consideration I believe this to be the only way of giving a new turn to the situation and had thus recommended it." (Diary entry of October 20, 1941, T. 10295). Kido also recorded the Emperor's response: "His Majesty understood me well, replying: "As it is said, you know, He who will not go into the tiger's den will not get the tiger's cub." (T. 10295) Japanese statesmen did not only have to cope with pressure abroad, but also with opposition at home. The driving power on the road to war was supplied by the field grade officers, referred to by Harada as "the greatest nuisance" to a Foreign Minister. Without their approval nothing could be done. In appearance at least, every statesman had to act in accordance with their wishes. As Konoye told Harada, when discussing the position of Foreign Minister Ugaki: "If Ugaki wants to carry out some foreign policy matter, he will have to hold them down and yet let it appear that he is cooperating with them. Otherwise, he won't be able to accomplish anything." (Ex. 3791, T. 37743).

Actions taken against the militarists, unless executed in a very clever way, could often only do more harm than good. As an example may be mentioned the protest of the Seiyukai party on 20 January 1937 against the increasing control of the militarists over aspects of the government. The majority judgment, referring to this protest, states: "It had done no good. It had merely formed the occasion for a demonstration by the

"the military of the fact that without their willing cooperation
"a cabinet could not continue to exist, nor could a new cabinet
"be formed." (Judgment p. 158)

It is easily understood that some statesmen opined that
only by some form of cooperation the militarists could be guided
away from dictatorship and war.

In considering the parts played by Japanese statesmen,
this very conflicting situation should be kept in mind. That
the policy of appeasing the aggressive groups was a mistaken
policy, and, judging from the results, a fatal policy, does not
necessarily indicate that, as a policy, it was criminal. There
should be room here for a non-criminal error in judgment.

TOGO'S REPORT OF 1933

At the time of the Manchurian incident and during
the following years, Itagaki, Dohihara, Araki, Hashimoto, and
Minami

were exponents of the aggressive military group. During this period, three other accused came to the fore: Hirota, Minister of Foreign Affairs since September 14, 1933; Shigemitsu, Vice Minister of Foreign Affairs between May 6, 1933 and April 1936; and Togo, the Director of the Bureau of European-American Affairs. To evaluate the intentions of these officials, it is helpful to study the contents of a report on Japanese Foreign policy, made in 1933 by Togo. (Exh. 3609A). At that time, the Manchurian incident had run its course and the establishment of the new state of Manchukuo was a fait accompli. Togo warned in this report that the Japanese policy which had brought about these events was dangerous. He wrote:

"Respect for truthfulness should be alike among nations as among individuals, for it is manifest that when a nation forfeits international confidence it is ultimately the loser."

With regard to the Manchurian incident he warned, that such policies should not be repeated.

"We should not repeat requisition in violation of principle, then in reliance on the principle insist upon retention of the gains." (T. 35372).

The entire report was written on the theme of international cooperation and peaceful development. It is characteristic of the situation at that time, that the author of this report was subsequently appointed the Director of the key bureau of European-Asiatic Affairs by Hirota.

RELATIONS WITH RUSSIA UNTIL 1936

There is no doubt that, during these years, there were groups who regarded a war with Soviet Russia as inevitable. A deep feeling of distrust existed between the USSR and Japan. Both parties could point to certain phases in history to explain their mutu

distrust. It is an undeniable fact that there were people in Japan who, in perfect sincerity, kept howling that Japan was threatened by the USSR. Araki was one of these. We need not make reference in this connection to the document rejected by majority decision, in which former Military Attache Major General F. S. G. Piggot stated that Araki's fear of communism "might almost be called an obsession." (T. 28571). All other existing evidence shows clearly his feelings in this respect. In 1932, Araki proposed to Kono to increase the national armed strength within two years, and to consider whether or not it would be necessary to fight Russia. (Exh. 3766, T. 37614). As an alternative, however, he proposed the conclusion of a treaty between Japan, China, Manchuria, and Russia, with a provision prohibiting the spread of communistic propaganda, and stipulating that if adjacent countries were disturbed by Red Movements Japan would attack. (Exh. 3767A, T. 37615).

Because of this attitude Russian proposals for a non-aggression pact were turned down. Harada stated in his Memoirs that the Army opposed such a pact, since it might facilitate communistic propaganda. (Exh. 3769, T. 37630). Foreign Minister Uchida's reply to the Soviet Russian suggestion can be found in exhibit 745, T. 7720, T. 22682), in which he pointed out that it would be preferable to reach a settlement of pending problems before undertaking a non-aggression pact. Uchida suggested a Japanese-Soviet-Manchurian Committee to prevent border clashes. (T. 22683).

It is not warranted to conclude from this refusal to enter into a non-aggression pact that at that time the Japanese Government had aggressive intentions toward the USSR. Certain groups in Japan

did have the intention to fight. They considered the USSR, in her relations with the Comintern, as a positive enemy. Suzuki, Teiichi, then a Lieutenant Colonel, expressed this view in a conversation with Kido on April 18, 1932 (Exh. 2253, T. 16216), the same Suzuki, who in 1933 urged the necessity for the capture of Zabalkabaye, a Soviet Maritime Province, and Soviet Siberia. (Exh. 3371, T. 31835). Suzuki, in the course of this trial, has explained that he looked upon the USSR as an absolute enemy because he considered that Russia, as long as she aided and abetted the Third Internationale, which was plotting for a revolution in Japan, aimed at the destruction of the Japanese national structure, (T. 35231). However, during this period government policy was not led by the views held by Suzuki, Shiratori (as expressed in the letter to Arita in 1935, T 7883), Hashimoto (as early as 1929), and others. It has been proved that certain plans were made by the Kwantung Army and the General Staff. It has also been proved that, in military circles, many advocated attack in 1934. It has not been proved that the persons professionally involved in the drafting of military plans had an aggressive policy in mind. It is the recognized duty of General Staff officers to make plans, and to be prepared for the eventuality of war. The fulfillment of this duty, even where it involves the planning of a military offensive, does not necessarily prove aggressive intent.

At this point, it might be well to insert an observation on the legal significance of war propaganda, as made by individuals or groups. If such propaganda leads to government policy and to war, it can be condemned

as being an accessory to the crime. However, if the propaganda, and the plans for the waging of an aggressive war, are unsuccessful and do not result in hostilities then, according to international law as it stands at present, they have no legal significance whatsoever.

Neither the opinion held by certain individuals and groups in Japan, that Japan would have to fight the U.S.S.R. sooner or later, nor the propaganda made as a result of this view, nor yet the plans made for the waging of such a war constitute a crime within the jurisdiction of this Tribunal, for none of these led to the outbreak of hostilities with the U.S.S.R.

The Second Phase

After the Army insurrection of February 1936, during which several pacifist elements were eliminated, a new phase began in which Army and civil circles tried to find a modus vivendi whereby events such as had just occurred, would be excluded. The principal figures dominating this period are Hirota, Konoye, Kido, and Hiranuma. To give a rough definition, this modus vivendi consisted in the government accepting as official policy, the expansion of Japan in East Asia, on condition that that expansion be achieved by peaceful means. It consented to the growth of military power but only inasmuch as it would serve to prevent any outside interference by other powers. This plan carried the significant provision that the Army and Navy Ministers were to guarantee that the armed forces

would be restrained as far as possible from taking any kind of action such as that taken in 1931.

This new policy found its expression in the national policy decision of August 11, 1936, as formulated at the Five Ministers Conference. (Ex. 979)¹⁾

In order to understand this decision, which the majority judgment qualified as "The Basic National Policy Decision" which proved to be a cornerstone in the whole edifice of Japanese "preparations for war," it is necessary to consider its history.

On June, 1936, the War and Navy Ministers agreed a "Basis of National Policy." (Ex. 977, T. 9542)²⁾

The Service Ministers' draft contained the point that the fundamental policy of the Empire should consist in advance and development in the South Seas, as well as in securing a firm position in the "East Oriental Continent." Japan should strive to "correct" the Power Politics of the Powers. National defense was to be completed, inter alia, "to enable us to cope with every force which the U.S.S.R. can mobilize in the Far East." "We intend to get rid of

1) Appendix VI
2) Appendix II

"the menace of the U.S.S.R., while preparing against Britain and "the U.S." In the execution of this general policy, "we must "also pay due attention to friendly relations with the Powers." Racial and economical developments were to be promoted in the Southern Seas, and, "without rousing other powers to action, we "must attempt to extend our strength by moderate and peaceful "measures." "The military will give undercover assistance with- "out appearing on the surface so that the activities of our "diplomatic organs may progress advantageously and smoothly."

Discussions of this draft in a conference of Premier, Army, Navy, Foreign, and Finance Ministers, are contained in exhibit 978 (not read). In this document, it is stated:

"1. First, the Finance Minister remarked that to "correct the militaristic despotism of foreign powers," etc., as stated in (1) of Item 1 has been his intentions and he has followed this policy to date. He therefore stated that he had no objections to this policy in general. But he added that it is essential that Japan, too, must not carry out a militaristic despotism.

"2. The Foreign Minister declared that he too had no objections to this proposal and that its principles coincide with the foreign policy which he had under consideration.

"3. The Foreign Minister said that in view of the present international situation, it was necessary for Japan to make efforts to avoid isolation. Since in (3) of Item 1, it is stated "strive for friendly relationship with foreign "countries," the foreign minister considered the spirit to be in line with his idea. However, the phrase "to provide "against England and America" seemed to be cause for some apprehension and he requested a definition of this phrase. The Navy Minister explained that this was only a provision for military preparedness

in case of emergency and that it was absolutely not intended to look upon England and America as enemies. The Foreign Minister then stated that under the present international situation, Japan should not only be regardful of keeping friendly relationship with England and America but should strive further to assume a more conciliatory attitude than in ordinary circumstances.

"4. The Finance Minister remarked that "to make efforts to render assistance from the inside and to avoid outward activities" in (2) of Item 2 is exceedingly satisfactory. He sincerely hoped that it would be carried out in this manner." (italics supplied)

Further explanation of the intention of the government may be found in Ex. 704, setting out the "Foreign Policy of the Empire," as decided on August 7, 1936 by a Four-Ministers' Conference (Premier, Foreign, War, and Navy Ministers).¹

This Conference adopted the suggestions of the Service Ministers. The ultimate object--Japan as the "stabilizing power" in East Asia--was to be achieved by strengthening the ties with Manchukuo, and "by means of adjusting for ourselves the relations with the Soviet Union and China, and of planning simultaneously peaceful development and advancement in the South Seas regions." The U.S.S.R. was felt to be a threat to Japan's existence and Japan's plans. "Therefore, laying the chief object of foreign policy for the time being on frustrating Russia's aggressive plan into the East Asia, especially on effacing the threatening military preparations and on

"interrupting the penetrating Bolshevization, Japan must try to
"attain this end through diplomatic measures accompanied by im-
"provements of national defense." Consequently, "Japan must be
"strictly cautious towards the Soviet Union not to give rise to
"further troubles of its own accord, but to endeavor to solve
"pending problems by means of peaceful measures exclusively."
For this purpose, inter alia, committees for border demarcation
were envisaged, as well as the establishment of a demilitarized
zone. As for Chinese opinion, plans were considered to bring
about a turn in a pro-Japanese sense, especially in the Northern
provinces. Special ties with these Northern Provinces were con-
templated. However, "as for another provincial regime, Japan
"shall not take any measure which as a result of its adoption
"may either help or hinder the unification or segregation of
"China." "Increase of friendly relations between Japan and
"America is of great assistance in restraining the Soviet Union
"and Britain."

Friendly relations were to be promoted, with Britain
as with Germany. "The South Seas Area is a key point of the
"world commerce, and, as it is the sphere necessary and indis-
"pensable in the industries and national defense of our Empire
"as well as the natural sphere of development of our people, we
"must secure our footsteps

"for further advance. However, we should be discreet not to stimulate the Powers concerned but try to efface their apprehension toward our Empire, and we have to endeavor to make our progress gradually and peacefully."

On the 11th of August, 1936, the original Service Ministers' plan of June 30, 1936 was discussed and accepted.

(Ex. 979)¹ None but slight alterations were made. As the principal policy it was decided: "To expel the Power Policies² of the powers in East Asia." It was decided:

"In order to secure the stability of our Empire and to safe-guard its development . . . we are to complete our defensive armaments." "We should strive to eradicate the Russian menace on the North." "We should also be prepared for Britain and America, attempting at the same time an economic development by the close cooperation of Japan, China and Manchukuo." "For the achievement of such an object we should always be careful to hold most amicable relations with the Powers." As for the development of the Empire in the direction of the South Seas, "we should take a gradual and peaceful measure, always avoiding to stimulate other nations." The Army was to

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2 According to the Language Arbitration Board, the correct translation of the pertinent phrase in Ex. 977 should read: "To correct the Power-policies of the Powers," while in Ex. 979 it should read: "To expel the Power-policies of the Powers in East Asia." I received this information, at my request on August 2, 1948, and I consider it proper to employ the correct translation, since the Japanese text is the basic one, and the interests of the accused are not prejudiced by the use of this more correct translation.

be strong enough "to counteract all the military forces that Russia can furnish to employ in the Far East;" the Navy was to be able to secure "command of the sea" on the Western Pacific counter to the American Navy." "Our diplomatic policy is solely to make it the first principle to try to prosecute the national scheme in smooth and amicable manner, and thereby to conduct an innovation and improvement in general. The military authorities on their part are required to assist the activities of the diplomatic organ from within in order to have it act fully and advantageously, evening all the time to act from without as far as possible."

The tenor of the policy is clear. The Powers are to be expelled from East Asia, but in a peaceful and gradual manner; Japan has to be prepared against Russia, in order to prevent the growth of its influence and power; and Japan has to develop her military strength in order to support their peaceful expulsion, as well as to be able to meet an emergency which might arise in case the Powers were not prepared to be expelled--even peacefully--from East Asia.

There was more than one road towards peaceful elimination of the Powers from East Asia. Economic superiority was one of them,¹ immigration another, but the most obvious one was to stir up independence movements.

1 As late as 1939, it was laid down in the "Program for the Economic Development of China," adopted by the Planning Board, that economic collaboration was the basic step for establishing a new order in East Asia. Kobayashi, head of the Japanese Mission to the NEI, cabled on Oct. 18, 1940, to Matsuzaka that to bring the NEI within the Co-Prosperity Sphere "it is necessary to administer a

Japan realized that, if she succeeded in creating the independence of Asiatic peoples, she could gain decisive influence by concluding pacts of mutual assistance which would guarantee her the real power. Those pacts, too, necessitated a strong Japan.

It was the formula partly adhered to in Manchuria. Something of this nature was realized in North China, though in 1936, it still only was in the making. The Army plan of January 13, 1936 (Ex. 215, T. 2721)² laid down as policy towards North China: "To assist the Chinese people in realizing a self-government in North China by themselves." In the "Second Administrative Policy towards North China," adopted on August 11, 1936, (Ex. 217, T. 728)³ this plan was further developed. The main purpose of Japan's administrative policy towards North China is formulated as follows:

"To assist the people in North China in procuring perfect independence in administration. . . For this purpose we should guide the local political powers. . ."

But it was also decided:

"We should strictly avoid such acts as would be suspected of disapproving China's territorial right of North China or of bringing about an independent country free from the Nanking Government or of making North China an extension of Manchukuo." (T. 2741, as corrected T. 2800)

policy in such a way as to deeply implant our economic powers in the NEI." (Ex. 1313)

2 Appendix I

3 Appendix V

As the peaceful expansion to the South assumed more concrete form, the same policy was adopted. Here we find the same picture of attempts at economic pre-dominance, infiltration by immigration, and the subversive support of independence movements which were eventually to result in mutual assistance pacts. Such pacts, concluded as they would be with new born nations, required a strong Japan, prepared to prevent former rulers to take any action. In the conception of this plan, the desired domination of East Asia could and would be achieved without war.

In view of the above, the findings of the majority judgment, that the fundamental aim of the August 11 decision was: "The establishment of a steady footing on the Asiatic continent, and the domination of East Asia through military power," as well as the statement that this "national policy": "Reveals an intention of attacking the Soviet Union with the object of seizing part of its territory" do not seem warranted.

Hirota's and Konoye's Policies

The Hirota policy was more subtle indeed. It did not contemplate wars to accomplish the aims of the New Order. It saw other methods of gradually achieving the domination of East Asia, of gradually and peacefully expelling the Western Powers from Asia. Finally, it required a powerful Japan, in order to forestall any temptation on the part of the Western Powers to interfere by armed force in this slow and gradual process.

Konoye originally followed the same line of thought, but due to the machinations of the military, he gradually drifted away from his stand. The impulse to military aggression gathered momentum in Japan as a reaction against the countermeasures taken abroad against the New Order policy. Hirota, Konoye, Kido and others had taught their people that the New Order was essential to Japan, and that it was Japan's mission to establish it. Counteraction on the part of the Powers made it easier for the militarists to show that the only way to establish the New Order was through war. The path for the militarists was cleared by those who had set the goal. The latter had achieved the exclusion of any debate on this goal. The former had no difficulty in convincing the government that, in view of embargoes and freezing orders, no way other than war was left open to achieve this end.

However, as late as in 1940, this conclusion had not yet been drawn. At the Ogikubo Conference of July 19, 1940, when Konoye discussed the national policy with the War, Navy, and Foreign Ministers designate, it was decided that positive arrangements should be undertaken to include the British, French, Dutch and Portuguese possessions within the New Order. Britain, France and Holland were involved in a war, which made their dependencies it seemed, an easy prey for Japan. The real problem was formed by the U.S. Concerning the U.S., the Conference declared itself firmly determined "to eliminate any interference

"zation of our policy." (Ex. 3687A, T. 37864) ¹

In the majority judgment, this decision is interpreted as follows:

"If the U.S. did not interfere with these plans, Japan would not seek to attack her, but if the U.S. should attempt to intervene, Japan would not hesitate to resort to war."

The words used in the translation are ambiguous. However, without any doubt the Japanese text means that Japan will eliminate any interference by actual force on the part of the U.S. ² In other words: Japan will not start a war in her attempts to establish the New Order and to dominate East Asia. But if the U.S. were to intervene with armed force, Japan would fight.

This decision marks the road Japan took. She was not yet prepared to react with armed force against interference-by-means-short-of-war. She only showed herself prepared to fight in case the U.S. should open hostilities.

The cabinet decision of July 26, 1940, (Ex. 541, T. 6307) ³ stated: "The fundamental aim of Japan's foreign policy at present lies in the construction of a new order of Greater East Asia." It was decided to "march forward toward the realization of the national policy by mobilizing the total strength of the nation."

1 Appendix IX

2 The original Japanese text reads: "Kare no jitsuryoku," meaning, "actual force on her part," i.e. the part of the U.S.

3 Appendix X

The Liaison Conference of July 27, 1940, clearly stated the standpoint of the government--which remained within the scope of the plans adopted at the Ogikubo Conference--by deciding "to settle the Southern Problems within the limits so as not to cause a war against a Third Power." (Ex. 1310, T. 11794)

The clear-cut decision to employ armed force if necessary was made only at the Four Ministers Conference of September 4, 1940, confirmed by the Liaison Conference of September 19, 1940 (Ex. 541, T. 6311).¹ At that time, it was decided that "Japan should be resolved, if need be, to take any action, including recourse to armed force." This decision was reached in view of Stahmer's arrival in Tokyo. The reason why, at that moment, the conference resolved to fight if necessary, is clearly indicated, where it states: "Unless we are resolved on the employment of armed force, it will be impossible for us to carry on any useful talks with Germany." Such reasoning would not have been necessary if such decision had already been made at the conference of 19 July.

Now, at the Liaison Conference of 19 September, 1940, the fatal step was taken. Here, without any doubt, begins the third phase in which the military clique, having come to power, pushed through its long cherished aim, namely, to settle the conflicts with the Powers, and to establish Japan's leadership in East Asia, by the use of force.

1 Appendix XII

The Anti-Comintern Pact

Japan's attitude toward the Soviet Union in 1936 stands clearly revealed in the documents pertaining to the anti-comintern pact, concluded November 25, 1936.

The majority judgment quotes Cordell Hull, where he stated:

"While the pact was ostensibly for self-protection against communism, actually it was a preparatory move for subsequent measures of forceful expansion by the bandit nations."

The evidence in this case does not warrant this conclusion. What evidence is there? A secret agreement provided for limited assistance in case of an unprovoked attack by Russia. As the Tribunal knows, Togo, at the time Director of the European-Asiatic Bureau in the Foreign Office, claimed to have achieved that "attack" was altered to "unprovoked attack" (Togo, T. 35646).

The prosecution, on more than one occasion, has submitted that the provisions of the Pact were harmless in themselves, and that its importance lay "in the fact that by concluding the Pact Japan took her first step toward allying herself with Germany." (T. 33456) The same idea is expressed by the British associate prosecutor, where he admitted that there was nothing essentially sinister in the provisions (T. 22451)

The prosecution in the Russian phase, however, elaborated upon the expression "unprovoked attack," in an endeavor to show that the restriction to "unprovoked attack" did not mean anything, and that "since the policy

"of peace conducted by the Soviet Union is apparent to everybody, and is beyond any doubt, this reservation is of no importance whatsoever and moreover makes no sense." (T. 39276)

The majority judgment more or less follows this line of reasoning, stating:

"In fact, at this time there is no evidence of aggressive intentions on the part of the U.S.S.R., against either Germany or Japan."

Therefore, the limitation "would appear to have had no justification."

This statement, in my opinion, does not comply with the procedure in this trial. On several occasions, the Tribunal has denied the accused the right to prove aggressive intentions on the part of other countries. It seems to me incorrect subsequently to state in the judgment that there is no evidence.

There was in Japan, as has been mentioned before, a group which feared Soviet Russia, who feared the Comintern, and the relation between the two. However, in this trial, the Tribunal shared the prosecution's view:

"that the rules of the communist international are irrelevant for any purpose of this inquiry." (T. 23741)

and refused documentary evidence of the decisions of the Comintern of 1935, in which Germany and Japan were mentioned as the principal enemies of communism.

Consequently, relations between Soviet Russia and the Comintern have not been proved before this Court. The Russian Five Year Plans and increasing armament, on the other hand, have been proved. In 1934 and 1935, the Soviet Forces in the Far East were approximately four times as large as the Kwantung army, namely, 230,000 men (Ex. 2681, T. 22550) and 60,000 men (Ex. 2207, T. 15785), respectively. That the creation of these powerful armies did not merely aim at the defence of Russian soil appears from a telegram, dated 11 August 1938, from the U.S. Charge d'affaires in Moscow to the Secretary of State, in which he reported on the Soviet budget. According to this telegram, People's Commissar Sverev had pointed out officially that the increased expenditures for armaments bore relationship to the Soviet policy, directed "not only toward the defense of the Soviet land but also of the workers of all countries." (Ex. 2712, T. 23724-5)

Arita explained the Anti-Comintern Pact in the Privy Council, and his explanation clearly shows that Japan concluded this treaty out of fear. His statement gives four reasons for this fear, namely (1) the Russian Five Year Plans and her armament in the Far East, (2) the power position of the U.S.S.R. in Europe since the conclusion of pacts of mutual assistance with France and Czechoslovakia, (3) the fact that the U.S.S.R. and the Comintern actively tried to disturb the internal tranquility of foreign nations by their penetration into the internal machinery of other countries (as examples

Arita mentioned Spain and the communist armies in China), (4) the World Congress of the Comintern of 1935 had designated Germany and Japan as the principle enemies. (Ex. 484, T. 22483).

Arita stressed the point that the Japanese Government was very anxious to avoid war with Russia. When a Councillor expressed the fear that Russia might start a war in case she heard of the pact, Arita answered:

"The government's policy is to strenuously avoid any outbreak of an affair with Soviet Russia....."

and he went on to say that in case Russia started a war, Germany would probably join Japan:

"Henceforth, Soviet Russia has to consider the fact that she has to face both Japan and Germany and for that reason I believe that even if Japan's military preparations should not be adequate, Russia will not initiate any affair."

The fact that Russia would have to face Germany and Japan combined is only given as the reason why the U.S.S.R. was not expected to attack Japan. The interpretation given to these passages in the majority judgment seems to be incorrect.

At the same meeting of the Privy Council, Hirota made a similar statement. Having referred to the strengthening of Soviet arms in the Far East, and to Soviet Russia's activity through the Third Internationale, Hirota pointed out that Germany, too, felt threatened by Soviet Russia. Based on this similarity of position, the agreement was concluded "with a view to a common defense against the destructive activity of the communist internationale and check of the armed advance of the

"Soviet Union."

Hirota stressed the point that, since the object was defense, "we on our side should of course refrain from taking any positive measures which might aggravate relations with the Soviet Union." (T. 22482) He declared that the Government was very anxious to see border disputes and other problems settled.

Close scrutiny of the history of the Anti-Comintern pact reveals that, whatever certain individuals may have intended to achieve through it, the Government of Japan regarded the Pact as a means to check the U.S.S.R. Japan had begun to realize that her future lay in the south in the countries rich in raw materials, among the peoples which could be attached to Japan through the attraction of independence, and which could be lured into the Japanese orbit by the fascinating slogan of "Asia for the Asiatics." From the very moment that Japan's national policy was fixed upon the elimination of the colonial powers in the Far East, in order that Japan should take their place, she was quite prepared to leave the U.S.S.R. alone for the time being. Only, she had to be sure that the U.S.S.R. would not interfere with her plans which involved the establishment of close ties with Manchukuo and China, and a gradual expansion in the southern countries.

The Changkufeng Incident

The year 1938 is characterized by the events in the Lake Khasan Area, the second time, since the agreement of 1936, that the Army took independent action. The events of this incident will not be discussed here for the reason that they do not come within the scope of the Tribunal's jurisdiction. One point, however, has to be raised here in relation with the question whether Japan still harboured peaceful designs towards the U.S.S.R. at this time.

The evidence shows that as soon as the Government of Japan was informed that Soviet forces had entered Manchukuo territory (in this relation it is immaterial whether this information given to the Government was correct). Ugaki, then Foreign Minister, instructed Shigemitsu, then Ambassador at Moscow, to lodge a formal protest (Ugaki's testimony, T. 23839). Litvinov's diary shows that Shigemitsu proposed to restore the situation as it had existed until 11 July, and subsequently, on the basis of the data which both sides had at their disposal, to demarcate the border. (T. 22807)

This procedure does not at all indicate an aggressive intention of the Government in Tokyo, whatever may have been the inclination of the Army on the spot. Significant also is Kido's entry in his diary for August 2, 1938, (T. 30855) in which he relates the cabinet decision of non-aggrandisement in order to avoid a war with the

U.S.S.R. "If necessary we had better withdraw from the Changkufeng line." To Harada Kido said: "If the Army says that we will have to fight with Russia, then I will recommend to Konoye to resign resolutely. The Premier was also of that determination." (Harada Memoirs, T. 37758)

As the evidence in this case shows, the Emperor had to be deceived by Itagaki to obtain from him the necessary orders. Itagaki reported to the Emperor that Foreign Minister Ugaki had agreed to use force. Ugaki had only consented to make preparations (T. 23884). The Emperor reprimanded Itagaki for this conduct. (Ex. 3793A, T. 37754)

The Government in Tokyo did not desire a war with the U.S.S.R., and the Government of the U.S.S.R. was aware of this situation.

The U.S.S.R. authorities did not regard the incident as a war, although Foreign Commissar Litvinov realized that it amounted to more than the usual border incidents, as he expressed to Shigemitsu, on August 7, 1938, stating:

"We think that it is impossible in this case to talk about a border incident... Therefore, we are dealing with an intention to occupy a part of Soviet territory by regular troops and to draw the U.S.S.R. into a war with Japan." (Ex. 2638)

It is noteworthy that on August 7, 1938, i.e., a few days before the diplomatic settlement of the incident, Litvinov did not state that a war was going on, but that there was the intention to draw the U.S.S.R. into a war. Even to that interpretation Shigemitsu objected:

"It is ridiculous to talk about there being intentions of drawing the U.S.S.R. into a war with Japan." (T. 23856)

That Litvinov correctly appreciated the attitude of the Japanese Government follows also from the fact that he informed the U.S. Charge d'Affaires Kirk on August 5, 1938 that the Soviet Government knew that Japan did not desire a war with the U.S.S.R. (Ex. 2636, T. 22840).

The Nomonhan Incident

The fighting in the Khalkin Gol Area can be viewed in the same light. The evidence in this case does not exclude the possibility that on the Japanese side the border was considered, in good faith, to run as the Japanese officially claimed it did. There are Soviet Army maps of as late as 1933 which seem to support the Japanese claims. (Ex. 2714, T. 23848).

According to the majority judgment "the most convincing evidence of the character and extent of the operations is found in a captured Japanese document." A study of this document, the Proclamation of the C.-in-C. of the 6th Army, dated September 5, reveals that, after almost four months of fighting, and one week before the end of the hostilities, the C.-in-C. stated:

"I must now state with sorrow that the realization of the glorious task of defense of the Northwest area failed..."

It is difficult indeed to conclude from this statement that the incident was aggressive in nature. In this document, the reason for the failure is also given, viz.,

that insufficient preparations had been made.

Relations with China

The Manchurian Incident, followed by the creation of Manchukuo, had resulted in very bad relations between China and Japan. Hirota regarded it as his task to restore friendly relations. As one of the results of his endeavors may be seen that the legations in the two countries were raised to embassies.

The Army drafted a "Gist of Plans Dealing with North China," dated January 13, 1936 (Ex. 215, T. 2721.)¹ In this plan was mapped out the policy "to assist the Chinese people in realizing a self-government in North China by themselves." As is well known, the Army feared the penetration of Communism in China. It attempted to turn at least part of China pro-Japanese and anti-communistic. The plans provided for methods less brutal than those employed in Manchuria. "In giving guidance this time, we are to take no such measures as might be understood (by the world) that Japan is going to set up an independent state like Manchukuo, or she is intending to carry out an expansion of Manchukuo."

The "Basis of National Policy," as presented to the Cabinet by the Service Ministers (June 30, 1936, Ex.977)² provided for "close collaboration between Japan, Manchukuo and China. This is the basis of our continental policy

1 Appendix I

2 Appendix II

in the execution of which we must also pay due attention to friendly relations with other powers." Consequently, the following was agreed upon at the Five Ministers Conference of August 7, 1936 (Ex. 216): "Realization of a close cooperation among Japan, Manchukuo and China for our economic development. In carrying out these policies, we should be careful to have friendly relations with other countries." The Five Ministers decision of August 11, 1936, affirmed this principle. (Ex. 279)¹ The Four Ministers decision of August 7, 1936 (Ex. 704)² is even clearer:

Towards the Chinese central and provincial regimes, Japan shall always hold a solemn attitude and adopt just measures, and combined with an economic manoeuvre for the Chinese masses, Japan shall lead these regimes in such a way so that they may correct spontaneously their attitudes towards Japan, thereby materializing the concert between Japan and China based on the principle of live-and-let-live. In North China, Japan shall plan its economic and cultural fusion and concern between Japan and Manchuria, and shall endeavor, simultaneously, to make it a special region by which Japan, China and Manchukuo may unitedly defend themselves against the Bolshevizing obtrusion of the Soviet Union.

As for another provisional regime, Japan shall not take any measure which as a result of its adaptation may either help or hinder the unification or segregation of China."

The "Second Administration Policy toward North China," of August 11, 1936, (Ex. 217)³ expressed the same idea:

The main purpose of our administrative policy toward North China is to assist the people in North China in procuring perfect independence in administration and to set up anti-communistic and pro-Japanese and pro-Manchurian Area. . ."

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"For this purpose, we should guide the local political powers and make the Nanking Government recognize the characteristic feature of North China so that the Nanking Government may not only not hinder the self-administration of North China, but also may afford a special and comprehensive power of self-government."

"We should strictly avoid such acts as would be suspected of disapproving China's territorial right of North China or of bringing about an independent country free from the Nanking Government or of making North China an extension of Manchukuo."

"Five provinces in North China should finally be put under self-government."

Again, in the "Third Administration Policy toward North China," of February 20, 1937 (Ex. 218)¹, it is stated:

"The principal object of administering North China is to complete our aim of making North China quite pro-Japanese and pro-anticomintern. . ."

"To complete the above object, we do our best for the economic policy in North China, aid in secret government of North China and make Nanking Government recognize the speciality of North China and aid the concert between Japan, Manchukuo and China."

"The measures which we took for Manchuria made the foreign powers think that we were aggressive in China. So we must abstain from all the actions as give other powers misunderstanding or our intentions."

We find this principle expressed again in the Four Ministers' decision of April 16, 1937 (Ex. 219),² where it is stated:

It cannot be denied that our policy towards North China, with the geographical peculiarities of the region, has not infrequently in the past given the erroneous impression to China and other powers that our Empire has the intentions of enlarging the trust zone, advancing the frontier of Manchukuo or ~~else~~ realizing the independence of North China.

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2 Appendix VIII

'So in future policy towards North China, together with strict precautions against actions which may arouse such unnecessary misinterpretations, it is vitally important to attend solely to the execution of cultural and economic measures having as main objects secure and facile life and work for the North China populace, thus contributing to the achievement of our expected aims.'

Japan's attitude is clear from these secret documents which record official Government policy. Publicly, Hirota had offered his "three principles" as basis for an understanding. The views of Generalissimo Chiang Kai-shek was sought before they were published. From a telegram, dated November 21, 1935, sent by the Japanese Ambassador in Nanking to Hirota, appears that Chiang agreed with these three principles. (Ex. 3257, T. 29635)

The three principles (control of anti-Japanese activities; tacit consent to Manchukuo's independence; and anti-communism) were announced in the Diet by Hirota on January 20, 1936.

According to the above telegram, Chiang had warned that any form of cooperation would be defeated by military activities in North China. Notwithstanding the agreement, reached by the Service Ministers and the civil ministers, to the effect that the military should abstain from independent action, the military in North China did not. Perhaps in consequence, the situation in China changed. Chiang, who had assured the Japanese Ambassador, on November 21, 1935, "that he was by no means anti-Japanese and was sincerely hoping for friendly relations between Japan and China," (T. 29637)

apparently turned his back on Japan. In those very days, a sudden upsurge of anti-Japanese feeling in Chinese Government circles had become apparent. The Japanese Consul-General had cabled, on November 14, 1935: "The opinions towards Japan within the Nationalist Government have grown hostile suddenly, as my successive telegrams informed you. Communists and other lawless elements are suspected to be at work behind this sudden change." (Ex. 3256, T. 29633) The Sian Incident, in 1936, in which Chiang was kidnapped by the Young Marshall, apparently contributed to a marked change in official Chinese policy. Another contributing factor may be found in the above constant Japanese machinations in North China for the expansion of Japan's influence and the loosening of the ties between the Northern provinces and the Nanking Government.

In this trial, however, the history of the Sino-Japanese relations has not been sufficiently clarified. We know that there were groups in Japan, who opposed any policy of Sino-Japanese rapprochement. Therefore, it is quite possible that army circles had decided to start an incident, to be followed by hostilities, in order to prevent realization of Chinese unity based on anti-Japanism. It is also possible that the Marco Polo Bridge incident was seized by the Chinese as an opportunity to start an outright war against Japan, and put an end to Japanese machinations by force. The Government in Tokyo showed eagerness to avoid military clashes and war, and strove for amelioration of relations.

When the Marco Polo Bridge incident occurred, The Japanese Government at once decided upon a local settlement. (July 9, 1937, T. 29685). An agreement actually was reached on the spot, on July 11, 1937. It seems that the Foreign Office did what it could to come to an understanding. The agreement reached with Chang Chun, on July 27, 1937, apparently came too late. The clashes had spread, and troops from both sides were on the move. Hirota drafted peace plans, approved by the Cabinet on August 7, 1937, which were sent to China (Ex. 8280, T. 29935). In the draft he proposed the liquidation of the Hopen-Chahar and East Hopen regimes (T. 29940), informing his ambassador in China that:

"The army was very reluctant to agree but finally gave in." (T. 29942)

All these attempts failed. The Tribunal certainly lacks detailed information on this failure. Apparently, the Chinese had become convinced that the moment of positive action against the above mentioned Japanese machinations had come, and were consequently not very eager to settle the incident. The "peaceful policy," as adopted by Japan prior to the incident, may not be a crime according to the Charter, but surely this internal aggression could be a reason for war.

The China Affair brought about a change in the policy towards China to a point where, as in Manchuria, armed force was used to establish "independent" regimes. This is clearly shown in the Cabinet-Council decision of

December 24, 1937: "Outlines of Measures for China Incident." (Ex. 3263, T. 29717), in which it was decided that new regimes would be set up in occupied areas, in case negotiations with the Central Government should break down.

The true relations in the course of those months, however, are difficult to grasp. Again, the Tribunal has insufficient information on the Chinese attitude after the Sian Incident. The struggle within the Japanese Government itself, resulting from the collaboration between the aggressive and the conservative forces--forces which had based their collaboration on a similarity of objects, and a difference of methods--had gradually developed into a dominance of the "stronger attitude," as will occur wherever aggressive and conservative forces attempt to collaborate towards a common goal. The history of this struggle has not been made quite clear.

In judging the activities of given individuals, one should be extremely careful in placing responsibility for aggression on those statesmen who fought against aggressive forces in their own country and who lost. There is left sufficient room for doubt to preclude reaching a finding that men like Hirota or Kido planned and waged a war of aggression.

The New Order

In the basic decision of 11 August 1936,¹

¹ Appendix VI

the Japanese Government had laid down as its national policy to expel the power politics of the Powers in East Asia. This goal, which was to be achieved in a gradual and peaceful manner, became known as the establishment of a New Order in East Asia. The phrase, "New Order", was used for the first time by Hirota in his address to the Diet on January 22, 1938, with regard to the relations with China. Hirota explained that the Japanese policy not to have further dealings with Chiang Kai-shek (specifically announced on 15 January, 1938) was "the only way of realizing our ideal of securing the stability of East Asia under Sino-Japanese cooperation." Hirota expressed the hope that the Powers would recognize the new situation in China, and would "cooperate for the establishment of a new order in the Far East." (T. 9526) This concept of a New Order found public and official expression in the "Statement of the Imperial Japanese Government Concerning the Future of East Asia", made on November 3, 1938. (Ex. 1291, T. 11695) It clearly expressed that "the ultimate aim of Imperial Japan is to establish a New Order which will secure internal peace in the Far East." To achieve that aim, "Imperial Japan should take steps to renovate the various internal systems." Kenoye did not leave any doubt in a statement of December 22, 1938, that this New Order should be established by a close cooperation between Japan, China, and Manchukuo, which were to realize a relationship

of neighborly amity, common defense against communism, "and economic cooperation." (Ex. 972H).

It was Matsuo who, for this New Order, coined the expression, "Greater East Asia Co-Prosperity Sphere", in which the peoples and races of East Asia would each find its "proper place". (Ex. 1297, T. 11714, T. 17926).

As late as July 27, 1940, a. e. after the outbreak of war in Europe, the Liaison Conference of the Second Konoze Cabinet, considering "Main points in Regard to Dealing with the Situation to meet the Change in World Conditions", decided "To settle the Southern problems within the limits so as not to cause a war against a Third Power." (Ex. 1310, T. 11795)¹.

Plans were considered to strengthen the policy towards French Indo-China in order to check assistance to the Chiang Regime, and further, to strengthen diplomatic policy towards the NEI, in order to obtain essential materials.

This policy towards French Indo-China led to the agreement of September 1940. (T. 26844).

The policy towards the NEI failed because Japanese proposals were not acceptable to the Dutch Government, and consequently the negotiations, started on September 12, 1940, broke down on June 17, 1941 (Ex. 1309A, p. 37).

Negotiations with Germany 1938-1939

The collaboration between those forces in Japan which represented military aggression on one hand, and those which supported the economic, political, and ideological aggression on the other, very soon led to the acceptance of force. At first, the use of force was envisaged by Japan only in case the other Powers were to react with war, directed against Japan's plans aiming at the expulsion of those Powers from East Asia by means short of war.

The above point is clearly shown in the negotiations with Germany in 1938 and 1939. The Anti-Comintern Pact of 1936 was to be extended into a military alliance directed against the U.S.S.R. That, in any case, was the intention of the Services, as appears from the telegrams they sent to Oshima in response to Ribbentrop's proposal. (Ex. 3515, 3516, T. 34118). The pact was to aid at checking the U.S.S.R. through military cooperation in case of an unprovoked threat or attack by the U.S.S.R. (T. 34117). Japan desired a pact to prevent the U.S.S.R. from starting a war. Germany, on the other hand, desired an overall military alliance. It is not necessary to give the history of the failure of the Japanese plan. The Ito Commission proposed a military alliance directed against the U.S.S.R. and other countries, in case those countries should turn communistic. Step by step, Japan made concessions in order to achieve her main purpose,

which was a military alliance against the U.S.S.R. The Army and Navy, however, held different opinions, and the latter did not wish to be drawn into a war against the U.S. and the United Kingdom. (T. 16236). Premier Hirokuma attempted to bridge the gap in his ambiguous declaration of May 4, 1939, which left room for several interpretations, so that Ambassador Oshima and War Minister Itagaki on one hand, and Foreign Minister Arita on the other, could interpret it in different ways. (T. 37823).

This attempt to establish closer military ties with Germany failed through the conclusion of the Russo-German Neutrality Pact. Germany had made her choice of enemies, and was to turn against Britain, France, and the Low Countries. As long as Japan still hoped and expected to achieve her aims with regard to these Powers by means short of war, she was not prepared to follow Germany in her course. Itagaki, who had publicly stated his opinion that in order to establish a New Order a conflict with Third Powers was inevitable (Ex. 2200, T. 15746; Ex. 2201, T. 15748), came out strongly for an overall military alliance with Germany (T. 37403, 33769, 43001). His opinion, however, did not become government policy until conditions had changed.

The Tripartite Pact

That Japan was very anxious in those years to avoid a war with Russia because she feared the consequences can be easily deduced from the events surrounding the conclusion of the Tripartite Pact in 1940. Japan's policy, as decided in 1936, was to establish leadership over a large part of Asia. The center of this new structure was to be Japan, in close relation with Manchukuo and China. In this conception, the rich territories of the South Seas were essential for the supply of the necessary raw materials. Japan had realized that she had to be on the defensive in the north, and had to expand in the south. The key to her policy is to be found in this defense in the north. Japan was afraid because it was to be expected that the U.S.S.R. saw, with justified misgivings, emerge an empire which, if consolidated, would be able to resist every other power in the world. Moreover, the U.S.S.R. was not unaware that at least some groups in Japan regarded a part of the U.S.S.R. as belonging within the New Order. As has been shown, there were in Japan, individuals and groups who, after 1936 as well as before, advocated war with the U.S.S.R. But those groups did not succeed in making their views the official policy of the government. Those groups were to be found particularly in the Army, and plans drawn up in the General Staff reflect their influences.

As we have observed, the first moves for an al-

liance with Germany and Italy in the years 1938 and 1939 failed. Germany wanted an alliance directed not only against the U.S.S.R. but against the U.S. and the United Kingdom as well. Opinion in Japan was divided. Japan did not feel attracted to a pact which would open possibilities of being drawn into a war with the Western Powers, when she still expected to expel those Western Powers from East Asia by means short of war.

Japan was prepared to accept the risks of a military alliance in case she felt herself threatened. She was reluctant to take the same risks with regard to countries which did not threaten her at all, and with regard to whom Japan expected to achieve her aims without war.

The international situation in 1940 had changed. The German-Russian Neutrality Pact stimulated support for a similar course in Japanese-Russian relations. On the other hand, the relations with the United Kingdom and the U.S. had turned for the worse. Embargoes and other moves were symptoms of a growing Western resistance against Japanese ambitions. It was more and more clearly realized in Japan that an alliance with Germany and Italy, based on the assumption of peaceful (non-belligerent) relations with the U.S.S.R., could be useful in checking further action on the part of the U.S. Herein lay an interest common to Germany and Japan, which was to prevent the U.S. from entering into the war in Europe, and from opening hostilities against Japan.

Japan's attitude towards the U.S.S.R. in those days is clearly expressed in the decision reached at the Otsukubo Conference July 19, 1940, where the future policy of the 2nd Konoye Cabinet was discussed and agreed upon.

Concerning the U.S.S.R., it was decided at that Conference:

"As regards relations with the Soviet Union, a Non-Aggression Pact will be concluded with her by Japan, Manchukuo, and Mongolia (length of effectiveness, five to ten years), and in addition to planning the immediate solution of pending questions, we will realize sufficient military preparedness to safeguard against defeat by Soviet Russia during the period of effectiveness of the Non-Aggression Pact."
(Ex. 3687A, T. 37804)

Germany's new approach to Japan, which finally led to the Tripartite Alliance, was similarly based on the concept of peace with the U.S.S.R. The German purpose was evident. It was in her obvious interest that the U.S. should not enter the war in Europe. Japan's object was not only the neutralization of the menace in the north, but also the prevention of a Japan-American conflict. Both purposes could be served by the Alliance. This was expressed by Ribbentrop, when he said apropos of the Alliance: "This stroke will have a double edge. Against Russia and against America. (Ex. 784, T. 7923). From the context in his statement, as it was recorded in Ciano's diary, follows clearly that Ribbentrop saw in the alliance a means of preventing both the U.S.S.R. and the U.S. from entering the war. From the Japanese point,

too, the alliance itself was principally directed against the U.S.

As Matsuoka explained at the Imperial Conference:

"Germany wants to prevent American entry into the war, and Japan Japanese-American conflict." (Ex. 550)

With the existing peaceful relations between Germany and the U.S.S.R. the pact was further regarded as a stepping stone to the improvement of Soviet-Japanese relations.

For an understanding of Japanese intentions, the decision of the Four Ministers Conference of September 4, 1940, confirmed by the Liaison Conference of September 19, 1940--the decisions with regard to the arrival of Stahmer in Tokyo--are essential. (Ex. 541, T. 6311)¹. The Liaison Conference of July 27, 1940, had already decided to take very active steps to bring about good relations with the U.S.S.R. (Ex. 1310, T. 11794)².

Others, too, advocated that line of policy. In an interview with the Yomiuri, Shiratori, on June 24, 1940, had proposed a pact with the U.S.S.R. (Ex. 523, T. 6177) Oshima also, at that time favored rapprochement with Russia, and this idea found strong support in Army and Navy circles.

Shigemitsu had advised Matsuoka in a telegram, dated August 5, 1940:

"Our main object is to establish a powerful political and economical position in Greater East Asia, it is necessary to sweeten our relations with

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the Soviet Union and also to proceed with scrupulous consideration and prudence in our relation with United Kingdom and U.S." (Ex. 1023, T. 9711)

On September 19, 1940, it was decided by the Liaison Conference that:

"Japan and the two countries of Germany and Italy will cooperate in maintaining peace with the Soviet Union and in inducing the Soviet Union to bring her policy into line with the common ground of the two contracting parties." (Ex. 541, T. 6311)¹.

Cooperation between the contracting parties in the establishment of a New Order in Europe and in Asia was accepted as the basic principle. Concerning Japan's "Lebensraum" it stated:

"a. The sphere to be envisaged in the course of negotiations with Germany and Italy as Japan's Sphere of Living for the construction of a Greater East Asia New Order will comprise:

"The former German Islands under Mandate, French Indo-China and Pacific Islands, Thailand, British Malaya, British Borneo, Dutch East Indies, Burma, Australia, New Zealand, India, etc., with Japan, Manchuria and China as the backbone.

"It is understood, however, that the South Seas Region to be indicated by Japan in conducting the negotiations with Germany and Italy will be the region from Burma eastward, including the Dutch East Indies, and New Caledonia northward. It is further understood that India may be recognized, for the immediate purpose as being included in the Sphere of Living of the Soviet Union." (T. 6314)

It is noteworthy that the Soviet Maritime Province, which in unofficial schemes and plans was considered to belong to the Greater East Asia Co-Prosperity Sphere, was not

mentioned in this connection. It was decided to try to induce the U.S.S.R. to advance in a direction which would not interfere with Japan's plans.

"Restrain the Soviet Union on the east, west and south, and, inducing the Soviet Union so to act as to align with the common ground of Japan, Germany and Italy, endeavor to cause the advance of the Soviet sphere of influence to be oriented toward a direction where the advance has little direct effect upon the interests of Japan, Germany and Italy,--a direction such as the Gulf of Persia (it being also possible that, in case of need, Soviet advance toward India may have to be recognized)." (T. 6317)

Japan's attitude may further be interpreted through another important document, the "Outline of Japanese Foreign Policy", drafted on September 28, 1940.

(Ex. 628, T. 6276, T. 11719). At that time, again, the authors of the draft considered only peaceful relations with the U.S.S.R. I quote:

"We must...make furthermore, a rapid improvement in and adjustment of the Japanese-Soviet diplomatic relations." (T. 11719)

The document goes so far as to base its considerations on the concept that there is a kind of coalition with the U.S.S.R., which is considered an important factor in Japan's foreign policy. Japan envisaged forcing the U.S. to accept Japan's leadership in East Asia "taking advantage of the coalition among Japan, Germany, Italy, and Soviet Russia." (Ex. 628, p. 3, not read). As for China, the plan read:

"We must make effort to realize the general plan between Japan and China by making use of the pressure of Germany and the Soviet Union." (Ex. 628, p.1).

In the plan drawn up October 25, 1940 (Ex. 628, p. 11, not read) it was stated:

"The greatest obstacle to the rise of the influence of the advocates of peace in Chiang Kai-shek's camp is the existence of the Chinese Communist Party. To remove the aforementioned interference by the Chinese Communist Party, it is of the utmost importance that we start adjusting the diplomatic relations between Japan and Soviet Russia. For this purpose, we must begin our activities immediately to act through Germany."

When Stohmer arrived at Tokyo, he told Matsuoka, on September 9, 1940:

"What Germany wishes of Japan is to have Japan play the role of restraining and preventing the U.S. from entering the war by all means. Although Germany thinks at present that the U.S. will not enter the war, she cannot take a chance."

"Better to reach agreement between Germany, Italy and Japan first and then immediately to approach Soviet Russia. Germany is prepared to act part of an honest broker on the question of rapprochement between Japan and Soviet Russia, and she can see no unsurmountable obstacle in the path, may be settled with much difficulty. German-Soviet relations are good, contrary to what the British propaganda tries to represent, and Russia is carrying out to the satisfaction of Germany all her engagements." (Ex. 549)

The defensive, rather than offensive character of the alliance with regard to the U.S.S.R. is clearly shown in art. 5 of the Pact, and in the explanation given by Matsuoka in the Privy Council. One of the Councillors expressed doubt whether Germany would come to Japan's assistance in case of a Russian attack, in view of the German-Russian Neutrality Pact.

Matsuoka explained that in case war with the U.S.S.R. should yet break out, the partners would assist each other. But he stressed the point that the Pact aimed

primarily at the U.S., and stated:

"Specifically to make it clear that the treaty under review has nothing to do with the Soviet, art. 5 is provided..." (Ex. 552, T. 6357)

He further suggested that:

"It will be well to readjust Japan's relation with the Soviet Union hereafter." (T. 6374)

Speaking of the possibility of collaboration between the U.S.S.R. and the U.S., Matsuda said that he was convinced that so far nothing had been worked out in this connection, and he continued:

"Rather, we intend to take the initiative in adjusting Russo-Japanese relations." (T. 6358)

Tojo, too, in the Privy Council meeting on the following day expressed as his opinion:

"Adjustment of Japan-Soviet relations is a very important matter." (T. 9756)

In the final report, in which the Privy Council Committee recommended the Alliance Pact, it said:

"As regards to our country's relations with the Soviet Union, we need to make special efforts for smooth relations, and on this point also the Government has declared it will exert itself for the accomplishment of its object through Germany." (Ex. 553, T. 6385)

In view of this history it seems incorrect to conclude that art. 5 of the Alliance Treaty was ambiguous. It appears that there was in Japan a sincere desire to avoid all friction with the U.S.S.R., which desire materialized sometime later in the Russo-Japanese Neutrality Pact.

The Third Phase

As stated before, the fundamental change in Japan's foreign policy occurred at the September 13, 1940 Conference, at the time Stahmer was in Tokyo to negotiate an alliance with the Axis Powers.

The intensification of the coalition among Japan, Germany and Italy had been discussed by Army, Navy and Foreign Office authorities on July 16, 1940 (Ex. 528). In the course of those discussions, the fear had been expressed that Germany, after her victory over Holland and France, might take over French Indo-China and the NEI politically. Countermeasures were considered, and projected in a plan which was to offer Germany assistance in exchange for a German promise to leave the Far East to Japan. As further means of assistance to Germany, "the instigation of an independence movement in India and Burma", and the adoption of a strong attitude with regard to problems pertaining "to HongKong, Shanghai, and "Tientsin" were considered. "These should be executed to the "extent of not resorting to arms." (p. 6) As for Soviet Russia, it was recommended "to keep peace for the time being "and continually to guide Soviet Russia in such a way as to "conform to the common standpoint of Japan and Germany. De- "pending on the occasion the turning of Soviet Russia's spearhead toward Burma and India can be considered." (p.7)

The New Order found its recognition in the Tripartite Alliance, concluded on 27 September 1940, between Japan, Germany and Italy. Art. 2 of this Pact reads: "Germany and Italy shall recognize and respect the leadership of Japan for establishment of new order in Great Asia." (Ex. 43) At the time of the Tripartite Alliance, the aggressive forces in the Japanese Government had gained strength. In the decision of the Liaison Conference of 19 September 1940, one of the most important decisions produced in this trial, in which decision the national policy was formulated anew in view of the imminent negotiations with Germany--in this decision the basic policy was laid down as follows: "to make a fundamental agreement among the three countries, in order that they shall mutually cooperate by all possible means in the establishment of a New Order in Europe and in Asia." (Ex. 541)¹ This "by all possible means" meant: "Japan should be resolved, if need be, to take any action, including recourse to armed force." However, the decision to go to war would in any case be reached independently by Japan, based on certain conditions, one of which would be: "The state of adjustment of our relations with the Soviet Union." Japan was to render assistance to Germany primarily in the economic field, and

"will in larger measure cooperate with Germany and Italy in the war against Britain, in respect of the elimination of British interests in East Asia,

anti-British demonstrations and propaganda, the support of independence movements in the colonies and dependencies of Britain and other matters."

Again, in this decision, Japan essentially intended to establish the "New Order" by means short of war, by economic infiltration, and by promoting the independence of the Asiatic countries. As for the NEI, it was decided:

"The goal in regard to the Dutch East Indies is to have it in a state of preparedness for independence, but the immediate objective will be to secure recognition of Japan's position of political and economic predominance of that country."

Vis-a-vis British territories, the same line of action was projected. Only under certain special conditions was Japan prepared to take up arms, depending on the situation prevailing at home and abroad," which situation was further specified:

"The domestic and foreign conditions signify the European situation, especially the state of adjustment of our relations with the Soviet Union, the U.S.' attitude toward us, our preparations for war, as well as the state of disposal of the China incident."

The Neutrality Pact

This "state of adjustment" materialized in the Neutrality Pact, concluded on April 13, 1941. The majority judgment opines that Japan was not sincere in signing this pact, and stated that Japan had "every reason" to expect Germany's impending attack upon the "U.S.S.R." "She signed the Neutrality Pact to facilitate her plans for an attack upon the U.S.S.R." And again, in a different passage, it is said that the pact "seems to have been designed to serve as a screen for such aid as she could give Germany pending

"her own attack upon the U.S.S.R.

It seems that this interpretation is not borne out by the top-secret decisions and discussions, which preceded the conclusion of the Pact. Japan did certainly not have "every reason" to expect Germany's attack.

On 23 February 1941, Ribbentrop told Oshima:

"With Russia relations were good. Moreover, in view of our military strength, she would beware of taking any action against us. Stalin was a cool and clever politician. Go any way was viewing matters in the East with supreme ease. A Russo-German conflict--not wished by us--would mean a gigantic German victory and an end to the Soviet Regime."
(Ex. 571, T. 6461)

This discussion, on the contrary, did not give Japan any reason to expect a Russo-German clash. The "gigantic German victory" was given as the very reason why there would be no war started by the U.S.S.R.

On March 28, 1941, Ribbentrop said to Matsuka:

"It was possible that Russia might take the wrong course, although he really didn't expect this of Stalin." (T. 6514)

Hitler, at that time, discussing with Matsuka the possibility of a Russian attack, assured the Japanese Foreign Minister that there were not only pacts, but, more important, armies to protect Germany against Russia.

The entire conversation between Matsuka and the German officials, as recorded in the documents at that time, dwell upon the question whether the U.S.S.R. would attack or not. An attack on the U.S.S.R. by Germany was not mentioned at all by the German leaders.

From the evidence, laid before the Tribunal,

follows that Japan concluded the neutrality pact to enable her to advance to the south. War with the Western Powers, as it had been decided on September 19, 1940, should only be started in case relations with the U.S.S.R. were good.

The occasion of the German attack on the U.S.S.R., on June 22, 1941, coupled with German propaganda, caused a certain group in Japan again to advocate war with Russia. Individuals like Oshima and Shiratori, who blindly followed German policy, came out again for a Japanese-Russian war. But the Government, having decided on the establishment of the New Order in East Asia, stuck to its policy of the southern advance, even more determinedly so since the embargo made it necessary to obtain raw materials from the southern islands.

At the Imperial Conference of July 2, 1941, convened in connection with the German attack upon the U.S.S.R., it was decided that Japan would "step up the Southward advance," and that she would not interpose for "awhile." (Ex. 588, T. 6566)¹

The resolution adopted at the Imperial Conference on September 6, 1941, decided upon war with the U.S., United Kingdom and the Netherlands, to be started in October, unless Japan's demands should be met through diplomacy. The Liaison Conference gave as one of the special considerations which had led to this decision: "The Situation of Soviet Russia." (Ex. 588, T. 6566)²

1. Appendix XVI

2. Appendix XVII

The Imperial Conference of November 5, 1941, when it was realized that--unless negotiations succeeded--war with the U.S., United Kingdom and the Netherlands would break out by the end of November, decided against war with Russia, even if this refusal might lead Germany to non-participation in the war against the U.S. (Ex. 878, also to be found in Ex. 1169).

This decision was in line with Japan's policy. The advance to the south was rendered possible by the fact that the position in the north was secured. Accordingly, in Operational Order No. 1 it stated that the U.S.S.R. was considered to remain neutral as long as Japan did not attack her. (Ex. 809)

Foreign Minister Fetsuka belonged to those individuals who, as soon as the German-Russian war had broken out, advocated Japanese entry in that war.

But his views were not shared by the Government, and the second Kenryo Cabinet resigned for the express purpose of replacing him. As the prosecution correctly stated:

stated: "The second Kameyama cabinet resigned solely
"for the purpose of eliminating Matsuoka, who desired
"to move forward in a direction not desired by the
"majority of the conspirators."

Development toward the Pacific War.

The plan, dated September 28, 1940, and giving an
"Outline of Japanese Foreign Policy," (Ex. 628) stated
with regard to the "Establishment of the Greater East
"Asia Co-Prosperity Sphere:

"(1) In the regions including French Indo-China, Dutch East Indies, Strait Settlement, British Malaya, Thailand, and Philippine Islands, British Borneo and Burma, with Japan, Manchukuo and China as a centre, we should construct a sphere in which politics, economy and culture of these countries and regions are combined.

"(a) French Indo-China and Dutch East Indies. We must, in the first place, endeavor to conclude a comprehensive economic agreement (including distribution of resources, trade adjustment in regard of the Co-Prosperity Sphere, currency and exchange agreements, etc.), while planning such political conditions as the recognition of independence, conclusion of mutual assistance pact, etc.

"(b) Thailand. We should strive to strengthen the mutual assistance and coalition in political, economic, and military affairs."

The Tentative plan for policy towards the Southern Regions," dated October 4, 1940 (Ex. 628), contained inter alia:

With regard to French Indo-China:

"We should manoeuvre an uprising of an independence movement, and should cause France to renounce its sovereignty right." "Between Japan and these areas, a protective treaty under the title of military and economic alliance shall be concluded so that we can hold the real power. Moreover, steps shall be devised to enable Japan to hold strategic points in every area."

With regard to British Burma:

"We should cause an independence movement to arise." "We should make the whole area an independent country and conclude with it an economic and military alliance."

With regard to the Dutch East Indies:

"The Dutch East Indies shall at once declare its independence for the peace of Greater East Asia." After the Dutch East Indies becomes independent, "we must conclude a protective treaty under the name of military alliance, and make her appoint Japanese military and economic advisers who will be in powerful positions. We must lease the places which are important from the military point of view."

If these requests would not be fulfilled, "we should use military power."

With regard to British Malaya and the Straits Settlements: these territories should be taken by armed force. With regard to British Borneo and other territories:

"After we have grasped real power in the Dutch East Indies and Singapore, we must take proper measures to get hold of real power in other British territories."

In this draft, most of which was actually carried out, war was clearly planned against the United Kingdom and Holland.

Officially accepted policy slowly moved in this direction. The decision of July 19, 1940 had envisaged war in case the U.S. should start hostilities with the purpose of interfering with Japan's establishment of the New Order. The decision of 19 September 1940 had considered the possibility of war as a means of establishing the New Order, and had declared itself prepared to face this possibility.

The decision of Imperial Headquarters, April 16, 1941 (Ex. 1305, T. 11,751), went further into details. It decided upon the well-established policy of economic and political penetration, which was, in principle, to be accomplished through diplomacy. It further decided:

"In executing the foregoing measures resort to arms in the interest of self-existence and self-defense will be taken only when the following instances should occur and when no means for solution of same can be found:

"1. In case the Empire's self-existence should be threatened by the Embargoes of the United States, Great Britain and the Netherlands.

"2. In case the situation of the Anti-Japanese encirclement by the United States, Great Britain,

the Netherlands and China becomes so tense that it cannot be tolerated in the interests of national defense."

This decision should be seen in the light of the policy of embargoes adopted by the U.S., the cooperation among the A B C D Powers, and the certainty of the failure of the negotiations with the NEI.¹

As soon as this failure had become a certainty a decision of Imperial Headquarters was taken on June 25, 1941, "in connection with the return of the Japanese delegate from the Dutch Indies" to establish a military union with French Indo-China, for the stability and defense of East Asia," "which union should provide Japan with airbases and harbour facilities." The necessary troops were to be stationed in the southern part of French Indo-China. In case the French authorities should not comply with the demands, the objective should be obtained by force of arms. (Ex. 1306).

The object of the penetration in French Indo-China was "the southern advance." Matsuoka told Ott as early as June 21, 1941: "For proceeding against the NEI air and naval bases must be set up in French Indo-China." (Ex. 635)

1 Compare the cable from Yoshizawa to Matsuoka, January 27, 1941 (Ex. 1318), and Yoshizawa's telegram, February 6, 1941, in which he informed Matsuoka that: "It is thought that after all without resorting to armed force it would be probably impossible to make the NEI a member of the East Asia Co-Prosperity Sphere." (Ex. 1319).

As a matter of fact, the Liaison Conference of 2 July 1941 (Ex. 588, T. 11,757) decided that:

"Japan would set up the southward advance in order to establish for herself a basis for self-existence and self-defense." Japan would "remove all obstacles for the achievement of the foregoing purpose."

The Imperial Conference of July 2, 1941 (Ex. 583, T. 6566)¹ decided:

"We shall accomplish the execution of our schemes against French Indo-China and Thailand," . . . "thereby stabilizing our structure for the southern advance." "In order to achieve the above-mentioned purpose Japan will not hesitate to have a war with Britain and the U.S." (T. 6568)

On July 29, 1941 a formal protocol was signed between Japan and France (Ex. 651, T. 7079), by virtue of which Japan obtained the right to dispatch troops to South Indo-China. The French Government had been unable, as it communicated to the Japanese Government, to do anything but "to bow before the insistence of the Japanese government." (T. 7062) In the Privy Council meeting of July 28, 1941 (Ex. 649, T. 7069), the Foreign Minister, in reply to a question, confirmed that "we gave an intimation to the French Government . . . that an undesirable situation was liable to develop if it failed to accept our proposal."

On July 20, 1941, Japan had issued what amounted to an ultimatum, demanding a reply from France before six o'clock, 22 July 1941 (T. 7061) France yielded to this

Japanese demand. Thereupon, on July 26, 1941, the U.S. froze all Japanese assets within their jurisdiction. Britain and the Netherlands followed suit. (T. 10,762) President Roosevelt had served previous warnings that this would be done in case of an advance into Indo-China.

Thereupon, the decision was taken at the Imperial Conference on September 6, 1941 (Ex. 588)¹, to wage war with the U.S., United Kingdom, and the Netherlands in October, unless Japanese demands would be met "through diplomatic measures with the U.S. and the United Kingdom." This decision was amended by the Imperial Conference of November 5, 1941 (Ex. 878), when the fatal date was postponed until the end of November. At the Imperial Conference of December 1, 1941 (Ex. 588), the decision was made to declare war on the U.S., Britain and the Netherlands.

Difference between the policies of 1936
and of 1940

This short survey of the internal and external history of Japan tends to show that the turning point at which Japan's government decided in principle to take up arms against the Western Powers if war proved to be necessary for the establishment of the New Order, materialized in the decision taken on September 19, 1940. The crucial decision of August 11, 1936 aiming at the domination of East Asia (the New Order) by expelling the Western Powers, envisaged achieving that goal by means

short of war. Its decision concerning the NEI may be quoted as an example:

"As for our development in Dutch Indies, it is of the first necessity to eliminate her apprehension towards us and make her take a turn for pro-Japan. For this end, we must adopt suitable measures and, if necessary, we shall not refuse to conclude a non-aggressive treaty with Holland."

This statement of foreign policy in 1936 is in line with the Japanese-Dutch "Treaty of judicial settlement, arbitration and mediation" proposed and concluded by Hirota during the period when he was Minister to Holland, which treaty was not ratified by Japan until the time when Hirota had become Foreign Minister. It is obviously a very clever and wicked policy to conclude non-aggression pacts with countries which one intends to dominate by any means short of war, and to outlaw war in those cases where one intends to make conquests by other means. . . Japan served notice on January 12, 1940 of abrogation of this Treaty of Judicial Settlement, and it consequently expired on 27 September 1940. At that time, indeed, the Government seemed prepared to follow the other course, the military one. At the time of Hirota and the "Fundamental principles," Japan acted in the conviction that she could obtain the desired racial, economic and political relations in a way which was not criminal according to existing international law -- no matter how disastrous it might have been for the surrounding empires.

In the Indictment charging the accused with

conspiracy, it is stated in Count 1:

"The object of such plan or conspiracy was that Japan should secure the military, naval, political and economic domination of East Asia and of the Pacific and Indian Oceans, and of all countries and islands therein and bordering thereon and for that purpose should alone or in combination with other countries having similar objects, or who could be induced or coerced to join therein, wage declared or undeclared war or wars of aggression, and war or wars in violation of international law, treaties, agreements and assurances, against any country or countries which might oppose that purpose."

In deciding who committed the "crime against peace," it is necessary to realize that the object of military, naval, political and economic domination of East Asia," does not come under the scope of that crime unless it is pursued by means of illegal wars. It may seem futile to outlaw aggressive war as long as other methods of aggression, as effective as war, are not provided against. But such is the state of international law at present.

It seems that the prosecution at times lost sight of the paradoxical fact that in a case like this, as the law now stands, it is not so much the end that counts, as the means.

Relations between Japan and the
U.S.S.R. After the Neutrality Pact

A special aspect of the relations between Japan and the U.S.S.R. has to be considered. As shown in brief outline, Japan's policy towards the U.S.S.R. was one

dominated by considerations of fear. When she decided to a peaceful policy with regard to the U.S.S.R., she was certainly not inspired by considerations of correct international conduct, but based her decision on calculations of power. In those calculations the Soviet Far Eastern Army was a very important factor. Soviet strength was the main reason why Japan did not start a war with the U.S.S.R.

With the German-Russian war, the possibility of a withering of this strength was given. At the Imperial Conference of July 2, 1941, when it was decided not to enter war with the U.S.S.R., the following "principle" was also adopted: "The northern problems will be dealt with according to the changes in the situations." This principle was further elaborated upon:

"Though the spirit of the tripartite axis will form the keynote of our attitude toward the German-Soviet war, we shall not intervene for awhile, but take voluntary measures by secretly preparing arms against the Soviet Union. Meanwhile, diplomatic negotiations will be continued with detailed precautions, and should the conditions of the German-Soviet War progress favorable to Japan we shall execute arms to solve the northern problems, thereby securing stability in the northern regions."
(Ex. 588)¹

We see that the same policy is here adopted as with regard to French Indo-China, when France was overrun by Germany, which attitude was denounced by the Emperor (T. 36,715), who said to Kido: "Personally, I do not approve in principle of these policies of taking advantages and making demands while the opponent is weakened; that is, I do not

approve of anything in the nature of a thief at a fire."
 (Kido's diary, February 3, 1941. T. 30,919)

In this relation, however, it is significant that at the Imperial Conference of November 5, 1941, apparently another course was also decided upon. As a "principle of acceleration of termination of the war against the U.S., Britain, Holland and Chiang" was indicated:

"We shall manage to assist to make peace between Germany and the Soviet, according to results of talks between Germany and Japan, to restore the continental connection between Germany and Japan and readjusting, on the other hand, the relation between Japan and the Soviet (if possible we shall conclude a treaty of territorial inviolability), we will take measures so as to help the Soviet to advance to the direction of India and Persia." (Ex. 1169, p. 5)

In the Liaison Conference Decision Plan of November 11, 1941, it was stated:

"While Japan is engaged in military operations against southern areas she will do all in her power to avoid provoking a war with the U.S.S.R. She will take into consideration that if Germany and the U.S.S.R. are so inclined, they may be brought to make peace and the U.S.S.R. enticed into the Axis camp." (Ex. 919, T. 9261)¹

It is now clear that in the following years, when Germany showed herself less successful than was expected, and when Japan realized that even the southern problems could not easily be solved by force of arms, the question whether or not Japan would enter into the German-Russian war was no longer doubtful.

1 Appendix XVIII

The Claim by Defense that Japan
fought in a good cause

In view of the above, it is pertinent to the case to inquire whether or not the ideals, which Japan publicly adhered to in her propaganda for the New Order, were sincere. Defendants have claimed that Japan fought for the liberation of the peoples of Asia, and the construction of a regional economic bloc which would contribute to world peace. The New Order, which Japan claimed it her mission to establish, would consist, as it was said in public declarations, of the liquidation of Western imperialism, abolishment of the colonial system, and the building of a world in which all the peoples would find their proper places. (Ex. 1297)

This New Order showed itself principally in two aspects: independence, based on the severance of the ties with the Western Powers, and the Co-Prosperty Sphere, meaning the establishment of close ties with Japan.

There is no doubt that Japan's ambition to establish a New Order was the cause of World War II. As Tojo declared after Germany's entry in the Japanese-American war: "The world is now divided into two groups, one that vainly struggles to maintain the status quo, and the other who earnestly strives to establish the rightful new order . . ." (Ex. 826A, T. 8061)

This "New Order" was the rock upon which the negotiations with the U.S. foundered. In some defense summations it has been suggested that, at the end of 1941 the situation was such that it was impossible for Japan, in view of her internal situation, to withdraw her forces from China, and that it was equally impossible to conclude an agreement with the U.S. without such withdrawal, which dilemma led to the war. The evidence laid before the Tribunal compels to another conclusion. Hata, Supreme Commander of the Japanese forces in China, apparently considered it possible actually to withdraw the troops from China. He sent his Chief of Staff, Lt. General Ushiroku, to Tokyo to communicate to the authorities his (Hata's) opinion that the Japanese Army should withdraw from China in order to avoid war with the U.S. Admiral Oikawa testified that he, as Navy Minister, received this message in or about September 1941 (T. 29,004)

The same message: "in order to avoid a clash with America we must withdraw all our troops from China" was transmitted to Tanaka Ryukichi, then Chief of the Military Service Bureau, with a request to assist in promoting this plan in the War Ministry (testimony of Tanaka, T. 29,413)

The New Order was the real issue, the essential point of conflict. New Order meant the expulsion of the Western Powers. The New Order, if correctly understood, meant the birth of an empire so vast and mighty that it might have dominated the rest of the world. It is understandable that the U.S., with justifiable misgivings,

saw this "New Order" develop in violation of treaties.

It is pertinent to this case to weigh the question whether the concept of this New Order, supported by the slogan of "Asia for the Asiatics," was sincere, or whether it was just another method of internal ideological aggression, as was the case with national-socialism in Germany.

Evidence in this case shows that, as a matter of fact, this concept of the New Order, especially in its aspects of independence and of "Asia for the Asiatics," amounted to hardly more than Japan's method of internal aggression.

Japan and the Independence of the Asiatic Countries

Hashimoto, in his "Address to Young Men," published in 1937 (Ex. 1290A), had expressed himself candidly when he demanded lands to the north, south, east and west of Japan. Koiso, then minister of Overseas Affairs, had a frank conversation with the German Ambassador concerning Japan's colonial wishes in French Indo-China and in the Netherlands East Indies, when he proposed a free hand for Japan in these territories after Germany's victories in Europe (cable from Ott, June 24, 1940, Ex. 523, T. 6176).

It is significant that Japan attached her own interpretation to the concept of "freedom" and "independence," as is clearly expressed in the "Basic Plans for the Establishment of the Greater East Asia Co-Prosperity Sphere," drawn up by the Total War Institute on January 27, 1942 (Ex. 1336, T. 12010):

"It must also be noted that the independence of various peoples of East Asia should be based upon the idea of constructing East Asia as 'independent countries existing within the New Order of East Asia,' and that

this conception differs from an independence based on the idea of liberalism and national self-determination."

The Greater East Asia Ministry, whose creation, according to Suzuki Kantaro, was "not based upon the rules of righteousness, but on the rules of might,"¹ was organized to ensure that those countries granted independence would still, in reality, be ruled by Japan.

Moreover, Japan in other cases, as soon as she had won the position where she was able to do so, refused to grant the very independence which she had propagated and demanded before.

Before the war started, when the stirring up of independence movements was one of the methods of Japan's external policy, Japan supported and demanded total independence for the Dutch East Indies.

"The NEI should cut off relations with Europe."
 "Complete self-government by the Indonesians should be allowed."

Such were the Japanese demands laid before the Dutch authorities by the economic delegation which arrived at Batavia in September 1940. (Ex. 1311)

After the decision for war was made, the policy changed and complete independence was no longer considered. The Imperial Conference of November 5, 1941 decided to make a "a portion of the Dutch East Indies independent and secure the necessary portions for the Empire" (Ex. 1169). The Liaison Conference of November 20, 1941 went further. The issue was no longer independence from Holland, but dependence on Japan.

1. As he stated in the Privy Council meeting, October 20, 1942, T. 12093).

It was decided:

"Native inhabitants will be directed so as to promote their feelings of dependence on the Imperial Army. We must avoid giving rise to any premature independence movement." (Ex. 877, T. 8988)

When the Japanese occupied the NEI, one of their first acts was to forbid all meetings and all organizations (Ordinance No. 2, March 8, 1942, T. 12182), while all existing organizations were dissolved in July 1942 (T. 12143). At the Imperial Conference of 3 May 1943, it was decided to incorporate the Dutch East Indies area into Japanese territory. It was also decided not to announce this policy lest the Allied Powers take advantage of it for propaganda purposes (Ex. 1344, see also T. 17933)

Japanese policy was reversed again, but only after the war situation had become increasingly grave. When it became necessary to make gestures to ensure full cooperation from the local population, Prime Minister Koiso, in the Diet, promised future independence on September 7, 1944. (Ex. 277, Ex. 1349). On September 8, 1944, the population of Java was allowed to fly the Indonesian alongside the Japanese flag on certain specified days, and to sing the "Indonesia Raya" song as the national anthem (Ex. 1351, p. 48).

Later still, additional concessions had to be made. In an official Japanese document, giving "Data for the Foreign Minister's Explanation" of July 17, 1945, it states:

"Especially at this moment when the enemy's counter-offensive is already about to extend to a corner of the East Indies, it will be imminent, from the necessity of seeking a more positive cooperation from the native inhabitants, to further materialize

the statement made last year and to decide clearly the time for the independence and announce it at home and abroad." (Ex. 1349)

On July 17, 1945 the Supreme Council for the Direction of War decided to grant independence to the East Indies as soon as possible (Ex. 1250). This independence was actually granted about the middle of August 1945. The proclamation was broadcast in the morning of the 17th, after the surrender of Japan. (Ex. 1351)

After her armies had surrendered, after the use of armed force had become impossible, Japan returned to her former policy of obtaining power and influence by sponsoring independent nations in the East Asia area. Japan returned to this policy of creating independent neighbors at the precise moment when the use of armed force had proved to be a failure.

Japan and the Co-Prosperity

The other economic aspect of the New Order, the Co-Prosperity Sphere, had no more sincere basis than the slogan of independence. Japan publicly claimed that it was her mission to create prosperity in East Asia, but she intended to serve primarily the interests of the Japanese Empire. The interests of the other participants in the Co-Prosperity Sphere were of secondary importance.

It is significant to compare the secret Cabinet decision of October 25, 1940 "Re Measures for Economic Development of the NEI" (Ex. 1317)¹ with the public proposals

1: Appendix XIII.

made by the Japanese mission at Batavia (Ex. 1311). In the latter (the published demands), the welfare of the races of East Asia was considered, while in the former (a secret Cabinet decision), fundamentally, the expansion of the Empire only was plotted. Only by way of concession, towards the end of the exhaustive list of measures, all of which aimed at securing the interests of Japan, it was decided in the Cabinet meeting that "efforts shall be made towards expanding the interests of the Empire in harmony with the natives." (Ex. 1317)

As in the other fields, in the economic field, too, it appears that the slogan "Asia for the Asiatics," in reality meant "Asia for Japan." The "Greater East Asia Co-Prosperity Sphere," in point of fact, aimed primarily at the prosperity of the Japanese Empire.

The practice during the war years but reaffirms this conclusion.

In the joint declaration, adopted on November 6, 1943, by the Assembly of Greater East Asia Nations, it was agreed that the countries of Greater East Asia would respect one another's sovereignty, independence, and traditions, and that they would practice mutual assistance and amity. (Ex. 1346)

During the years of occupation, Japan not only failed to fulfill the pledges based on the principles of amity and assistance, but did not even live up to the rules of conduct as formulated in the Hague Convention IV, based on the principles of decent belligerency.

The claim of defendants that lofty ideals inspired Japan and guided her on the road which finally led to war has to be rejected. The policy, as it was executed, shows that it was not the spirit of the public statements, but the spirit of the secret decisions that prevailed. Those secret decisions aimed but at the greatness of the Japanese Empire.

APPENDICES TO THE CHAPTER: SOME OBSERVATIONS ON THE FACTS.

- I. Gist of Plans for Dealing with North China. 13 January 1936. Instructions to the Commander of the Stationary Troops in China. Exh. 215, T. 2721.
- II. The Basis of National Policy. June 30, 1936. The War and Navy Ministries. Exh. 977, T. 9542.
- III. Basic Principle of National Policy. August 7, 1936. (Five Ministers conference). Exh. 216, T. 2720.
- IV. Foreign Policy of the Empire, August 7, 1936. (Four Ministers Conference). Exh. 704, T. 7523.
- V. The Second Administrative Policy toward North China. August 11, 1936. Exh. 217, T. 2728 (corrected T. 2800).
- VI. The Fundamental Principle of our National Policy. August 11, 1936. (Five Ministers Conference). Exh. 979, T. 9549.
- VII. The Third Administrative policy toward North China. February 20, 1937. Exh. 218, T. 2745.
- VIII. Plans for Guiding North China. April 16, 1937. (Four Ministers Conference). Exh. 219, T. 2748.
- IX. Policy decided upon in Ogikubo Conference, July 19, 1940. Exh. 3687A, T. 37864 (as related in the Saionji-Harada Memoirs).
- X. Outline of the Basic National Policy, July 26, 1940. (Cabinet). Exh. 541, T. 6307.
- XI. Gist of Main Points in Regard to Dealing with the Situation to Meet the Change in World Conditions, July 27, 1940. (Liaison Conference). Exh. 1310, T. 11794.
- XII. Strengthening of the Japan-Germany-Italy Axis, September 4, 1940 (Four Ministers Conference). September 19, 1940. (Liaison Conference) Exh. 541, T. 6311.
- XIII. Measures for Economic Development of NEI, October 25, 1940 (Cabinet), Exh. 1317, T. 11837.
- XIV. Measures to be taken in the South. April 1941 (Imp. Hq.) Exh. 1305, T. 11751.
- XV. Acceleration of Measures in the South, June 25, 1941 (Liaison Conference) Exh. 1306, T. 11753.
- XVI. Summary of the Empire's Policy according to the changes in the situation. July 2, 1941 (Imperial Conference) Exh. 588, T. 6566.

- XVII. Execution of the Empire's Policy, September 6, 1941.
(Imperial Conference), Exh. 588, T. 4566.
- XVIII. Liaison Conference Decision Plan. November 11, 1941.
Exh. 919, T. 9261.
- XIX. Measures to be taken towards Foreign Countries relative
to the Outline for the Execution of National Policies,
which was decided at the council in the presence of the
Emperor held on November 5, November 13, 1941 (Liaison
Conference) Exh. 878, T. 3994.

I.
 GIST OF PLANS FOR DEALING WITH NORTH CHINA. 13 January 1936.
 Instructions to the Commander of the Stationary Troops in China,
 Exh. 215, T. 2721.

The principal objects to be borne in mind in dealing with North China area are to assist the Chinese people in realizing a self-government in North China by themselves, and thus to let the people enjoy their lives and jobs peacefully; also to let them adjust their relations with Japan and Manchukuo, and thus promote the mutual welfare of these three nations. In order to realize the above objects, we are determined to give support and guidance to the new political organization and thus expand and strengthen its functions.

Gist of the plans:

1. Territorially speaking, the five provinces of North China will be made the object of the above-mentioned self-government; but we must be careful not to be too eager to enlarge in self-government area; on the contrary, we should first aim at a gradual realization of self-government in the Hopeh and Chahar provinces as well as in Peiping and Tientsin cities in accordance with the points given in paragraph 2 and others of this letter, and thus, we should aim at inducing the remaining three provinces to join the two voluntarily. Our advice and guidance to the Hopeh-Chahar political council should be given through Mr. Sung che Yuan for the time being, and self-government movements by the people should be encouraged in so far as they remain fair and just, and should make use of them in gradually realizing an actual self-government among the people of these two provinces, thus laying firmly the foundation of the self-government for the five provinces in North China.

With regard to the East Hopeh self-government, we should uphold its independency as long as the self-government function of the Hopeh-Chahar political council remains unsatisfactory, but when the self-government in the Hopeh and Chahar Provinces is established to such a degree as will generally justify our confidence in it, we should induce the East Hopeh self-government to merge into the Hopeh-Chahar political council at the earliest opportunity as possible.

2. With regard to the extent of the self-government, it would, of course, be better to let the people have as much liberty as possible, but for the present, we should aim at and endeavor for the realization of such state as will leave no room for the Nanking Government to carry out anti-Japanese and anti-Manchukuo policies, and by leaving the rest for gradual achievement in future we should avoid too hasty desire for an acquisition of independent powers.

3. With regard to the guidance to be given by us, we should endeavor principally to guide in the economic field, especially in finance, and also, in military affairs, along with the education and guidance of the general populace; and in doing so, we should confine our guidance in the general line,

leaving, as much as possible, the details to the task and responsibility of the Chinese people. In this connection, we should like to call your special attention to the following points:

In giving guidances this time, we are to take no such measures as might be misunderstood (by the world) that Japan is going to set up an independent state like Manchukuo, or she is intending to carry out an expansion of Manchukuo; accordingly, appointments of Japanese advisers should be confined to various committees within the (Hopeh-Chahar) political council and to the 29th Army, and their members should be restricted to the smallest possible number; moreover, these personnel and material which are necessary for public utilities and exploitation of industries, etc., inclusive of advisers mentioned above, should be sought from Japan proper as far as possible. With regard to economic penetration, it should be left principally to voluntary debouchment of private capital, and should be so guided as to serve for the realization of the principle of live and let live.

4. Operations towards Inner Mongolia should, of course, be continued on the line pursued hitherto; but those measures which might become obstacles to the strengthening of self-governing power of the Hopeh-Chahar political council and an expansion of self-government in Shansi and Suiyuan provinces should be held back for the time being and the southward expansion of Mongolian influence should be kept under proper control; consequently our operations in Inner Mongolia should generally be confined to the areas north of the Great Wall of China, and should not be allowed to extend into the area belonging to East Suiyuan and Sumong villages.

5. The management of North China would be the duty of the commander of the Japanese stationary troops in China, and as a rule, he should execute this duty by direct contact with the Hopeh-Chahar and East Hopeh governments; in doing so, he should aim at giving advices and guidances informally.

With regard to economic penetration, the stationary forces should not assume a leading part, but should guide it from aside. However, for the convenience of assisting the Hopeh-Chahar political council, for the time being we are going to establish in Peiping a provisional organization which would be placed under the supervision of the commander of the Japanese stationary troops in China (concerning problems of the self-government organizations as well as of controlling advisers, etc.).

The Kwangtung Army and various organizations in North China should cooperate in these operations. Besides, each military attache in China should act in concert with these operations, especially the military attaches to the Japanese Embassy and those residing in Nanking should try, from time to time, to convince the Nanking Government of the necessity of granting self-government to the North China area, and at the same time should try to get the approval of the Nanking Government for the six items pertaining to self-governing power for North China area, or at least, get the Nanking Government's

promise that they will carry out no maneuvers which will disturb the self-government in North China.

6. In carrying out "these plans," the various military organizations mentioned above should keep close contact with the officials of the Foreign Office and the Navy stationed in China, as and when the occasion may require.

II

THE BASIS OF NATIONAL POLICY. June 30, 1936. The War and Navy Ministries. Exh. 977, T. 9542.

I. The fundamentals of administrating state affairs lie in strengthening our national foundation at home and bringing about the prosperity of our nation abroad so that, on the basis of the relations between sovereign and subject, our Empire may secure the peace of the Orient and contribute to the welfare of mankind as the real stabilizing power in East Asia, thereby realizing the ideal underlying the foundation of our nation. In view of the internal and external situation of the Empire, her fundamental policies must consist in advancing and developing in the Southern Seas as well as obtaining a firm position in the East Oriental continent for the stabilization of our national defense.

These fundamental policies are as follows:

(1) We must strive to correct the great Powers' aggressive policies and share happiness and favor with others according to a real principle of give and take; that is to say, our guiding principle must be to realize the spirit of the 'Imperial Way' (KODO) by a consistent policy of overseas expansion.

(2) We must complete our national defense armament in order to maintain peace and tranquility, to safeguard our prosperity and to secure the position of the Empire as the stabilizing power in East Asia in fact as well as in name.

(3) We expect the sound development of Manchukuo and hope by accomplishing this to stabilize Japan-Manchukuo national defense; thus in order to promote our economic development, we intend to get rid of the menace of the U.S.S.R., while preparing against Britain and the U.S. and bringing about close collaboration between Japan, Manchukuo and China. This is the basis of our continental policy in the execution of which we must also pay due attention to friendly relations with other powers.

(4) We plan to promote our racial and economic development in the Southern Seas, especially in the Outer Southern Seas, and without rousing other powers to action, we must attempt to extend our strength by moderate and peaceful measures. Thus with the establishment of Manchukuo in addition to the above, we may expect the full development of our national resources and the completion of our national defense.

II. On the basis of the above fundamental national policies we expect to reform our government system so as to make it suitable for the present external and internal situation, and to unify political, financial and economic policies both within and without the country. The essential points are as follows:

(1) Defensive armament preparations.

a) The aim of our military preparations is to enable us to cope with any force which the U.S.S.R. can mobilize in the Far East. Especially, our force in Manchukuo and Korea must

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be strengthened so that we may smash her Far Eastern force at one blow from the beginning.

b) As for the navy, we must complete its armament sufficiently to maintain the command of the Western Pacific against the U. S. Navy.

(2) The first principle of our diplomatic policy lies in the smooth execution of our fundamental state policies as well as synthesizing and renewing them. The military will give undercover assistance without appearing on the surface so that the activities of our diplomatic organs may progress advantageously and smoothly.

(3) We must reform and improve our administrative system and establish an economic and financial policy by means of every facility available so as to strengthen our defensive strength and to promote our economic development vigorously. For this purpose, we will take suitable steps concerning the following matters.

a) We should direct and unify internal public opinion and make the resolution of the people steady to tide over the present emergency.

b) We should appropriately improve our political and economic systems in order to develop the important trade and industries which are necessary for the execution of national policy and national defense.

c) We should take appropriate measures to stabilize the life of the people, promote their physical strength and lead their thoughts into sound channels.

d) We should make appropriate arrangements for the rapid development of the aviation and shipping business.

e) We should promote the establishment of a self-supporting and self-sufficient policy for resources and materials important for national defense and industry.

f) We should reform our diplomatic organs and also draw up a system of information and propaganda in order to make our diplomatic function and the spread of our culture in the world more active.

III.

BASIC PRINCIPLE OF NATIONAL POLICY. August 7, 1936.
(Five Ministers Conference). Exh. 216, T. 2720.

I. The basic principle of governing the state is to realize the ideal of the founding of the Empire, which means to solidify, based on righteousness, the national foundation inwardly and prosper outwardly, making the Empire both in name and reality a stabilizing power in East Asia, thus securing peace in East Asia, and contributing to the well-being and happiness of the whole world.

In view of the situation in and out of the Empire, the fundamental national policy to be established by the Empire is to secure the position of the Empire on the East Asia Continent by dint of diplomatic policy and national defense, mutually dependent on each other, as well as to advance and develop the Empire toward the South Seas. The basic principles are as follows:

1. It is the realization of the Imperial way to correct dominating policies of the powers and to share mutual happiness according to the real spirit of co-existence and co-prosperity. This should be our consistent guiding principle for our outward developing policy.

2. We should replete our national defense and military preparations, which are necessary to secure peace for the nation, protect its development, and to ensure the position of the Empire, which should be a stabilizing power in East Asia.

3. The fundamental principles of our continental policy are as follows: a sound development and accomplishment of Manchukuo; intensification of national defense of Japan and Manchukuo in order to eradicate the Soviet menace in the north and at the same time to prepare against Britain and America; and realization of a close cooperation among Japan, Manchukuo and China for our economic development. In carrying out these policies, we should be careful to have friendly relations with other countries.

IV. FOREIGN POLICY OF THE EMPIRE. August 7, 1936.
(Four Ministers Conference). Exh. 704, T. 7523.

In order to observe and achieve the national policy, we establish foreign policy, and expecting complete control on diplomacy, we intensify close relations between military and civil officials dispatched abroad, and we lead the people positively and appropriately for the purpose of adapting practical measures to the established policy.

And in protection and propulsion of our just and appropriate rights and interests, we must be careful not to yield and retrogress spontaneously but to maintain always positive attitude and at the same time we must try to efface suspicion or apprehension of other countries towards the Empire.

No. 1 General Plan

We render it the basic policy of diplomacy of the Empire to effect the true aim of Japan's being stabilizing power in the East Asia, by means of fostering Manchukuo and strengthening more and more the special unseparable relations with her in order to secure eternal peace in the East Asia and to execute the existence and development of the Empire, and also, seeing from worldwide viewpoint, by means of adjusting for ourselves the relations with the Soviet Union and China and of planning simultaneously, peaceful development and advancement in the South Seas regions.

Recently, the Soviet Union, according as her situation in national defense and international relations has been intensified rapidly, has increased her pressure of armed revolution on the East Asia, disposing too large military preparations, and has been intending Bolshevizing penetration in all directions, driving the Empire into more unadvantageous situations. This fact not only threatens directly the national defense of the Empire but gives a grave hinderance to Japan in achieving its East Asiatic policy. Therefore, laying the chief object of foreign policy for the time being on frustrating Russia's aggressive plan into the East Asia, especially on effacing the threatening military preparations and on interrupting the penetrating Bolshevization, Japan must try to attain this end through diplomatic measures accompanied by improvement of national defense.

Accordingly, the Empire must put its diplomatic function into full swing in considering synthetically the present international situations in adjusting the relations with the leading powers and in inviting a situation internationally favorable to Japan.

No. 2 Gists of Measures

1. Taking consideration of the present international and internal conditions, Japan must be strictly cautious towards the Soviet Union not to give rise to further troubles of its own accord, but to endeavor to solve pending problems by means of peaceful measures exclusively.

And at the same time,

a. Establishments of two committees, one for demarcation of the border line in the region from the Lake KHANAKA to the River TUMEN and the other for solution of troubles along the border line, as well as the establishment of similar organs dealing with the frontier of other regions between Manchukuo and the Soviet Union and Manchukuo and Mongolia shall be designed.

b. At an appropriate opportunity the establishment of a non-armed zone shall be proposed.

c. Furthermore, when the Soviet Union manifests her wish to conclude a non-aggressive treaty, Japan shall state plainly that it would rather welcome such treaty provided that the numerous pending problems of importance between Japan and the Soviet Union including such a readjustment of the Soviet's war preparations in the Far East as would give a balance of power between the two countries would be settled.

d. And we shall take adequate measures to defend Japan, Manchukuo and China from the Soviet's thought-obtrusion.

2. Towards the Chinese central and provincial regimes, Japan shall always hold a solemn attitude and adopt just measures and combined with an economic manœuvre for the Chinese masses, Japan shall lead these regimes in such a way so that they may correct spontaneously their attitudes towards Japan, thereby materializing the concert between Japan and China based on the principle of live-and-let-live. In North China, Japan shall plan its economic and cultural fusion and concert between Japan and Manchuria, and shall endeavor, simultaneously, to make it a special region by which Japan, China and Manchukuo may unitedly defend themselves against the Bolshevizing obtrusion of the Soviet Union.

As for another provincial regime, Japan shall not take any measure which as a result of its adaptation may either help or hinder the unification or segregation of China.

The aforementioned is a basic principle of Japan's Chinese policy (of Decision concerning Chinese policy, dated October 4, 1935) but at present taking into consideration today's state of the relations 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.)

3. Increase of friendly relation between Japan and America is of great assistance in restraining the Soviet Union and Britain. America magnifying zealously her military preparations, watches the cause of the policy of the Empire with much interest, from a viewpoint of traditional Far Eastern Policy; and so, according to Japan's future attitude towards China, not only there is a danger of America's assisting China, in inducing her to adopt policies depending upon Europe and America, but also, it can't be denied that there might arise matters disadvantageous to Japan's policy towards the Soviet Union. Therefore, the Empire should render effort to let America understand its fair attitude by respecting America's profit in her Chinese trade, and at the same time to make her not to hinder the achievement of East Asiatic policy of the Empire, promoting the friendly relations with her on the keynote of the economic interdependency between Japan and America.

4. The developments in the European political situation have a great influence on the East Asia, and so Japan must exert every effort in bringing European powers to its advantage, especially in restraining the Soviet Union.

a. As for Britain, though she has not a few interests in all aspects which conflict with the ones of Japan she has the largest rights and interests among the European Powers in the East Asia; and moreover the attitudes of European countries are affected largely by that of Britain. Taking consideration of these facts, it is of particular necessity for the Empire to make Britain adopt an attitude in favor of Japan in the relation between Japan and the Soviet Union, through its positive effort in promoting the friendly relations with Britain, so as to restrain the Soviet's attitude towards us and to mitigate and eliminate, simultaneously, the obstacles on the course of Japan's overseas development. To readjust the relations between Japan and Britain in China is of much effect, and therefore, combined with efforts to readjust the general relations between both countries, we must try to take the fittest measures to give a good turn to the relations of both countries in China, by means of making Britain respect that Japan possesses special and important interests in China and also by means of our respecting her rights and interests in China.

We must be particularly cautious on this point however, as there is an apprehension of Britain's adopting an oppressing policy towards Japan, inducing the great Powers, especially America, Soviet and China.

b. As to Germany, since she has generally the same interests as that of the Empire in the relations with the Soviet and also, from the special relation between the Soviet and France, she is in a position to find convenient in her national defense

and in counter measures against Bolshevization to maintain harmony with us, we shall promote the friendly relations with her, and in case of necessity we shall adopt some measures to realize the concert between Japan and Germany and further by extending this relation shall promote the good will of Poland and other countries thereby restraining the Soviet Union. Further, we shall pay attention to and try to promote the friendly relations with the countries neighboring the Soviet Union in Europe and Asia and with other Mohammedan peoples.

5. The south seas area is a key point of the world commerce, and, as it is the sphere necessary and indispensable in the industries and national defense of our Empire as well as the natural sphere of development of our people, we must secure our footsteps for further advance. However, we should be discreet not to stimulate the Powers concerned but try to efface their apprehension towards our Empire, and we have to endeavor to make our progress gradually and peacefully.

As to Philippines, we expect the realization of her perfect independence and, if necessary, we shall not hesitate to assure her neutrality.

As for our development in Dutch Indies, it is of the first necessity to eliminate her apprehension towards us and make her take a turn for pro-Japan. For this end, we must adopt suitable measures and, if necessary, we shall not refuse to conclude a non-aggressive treaty with Holland.

As to Siam and other unadvanced peoples, Japan shall lead and assist them properly based upon the principle of live-and-let-live.

6. Foreign trade is not only indispensable to maintain and improve the economic life of our people, but also helpful in betterment of finance and international balance, and our Empire, when we consider the present international and internal situations must pay efforts to extend it especially. Therefore, we need to try to develop reasonably our foreign trade and we must simultaneously, adjust interests between us and other countries and secure and gain important resources, effecting cultivation of our economic energy.

V.

THE SECOND ADMINISTRATIVE POLICY TOWARD NORTH CHINA.
August 11, 1936, Exh. 217, T. 2728 (corrected T 2800).

I. The main purpose of our administrative policy toward North China is to assist the people in North China in procuring perfect independence in administration and to set up anti-communistic and pro-Japanese and pro-Manchurian area and to secure necessary materials for our national defense, as well as to improve the facilities of transportation against the possible invasion by Soviet Russia, and for making North China a base for the cooperation of Japan, Manchukuo and China as well as for mutual aid.

II. For this purpose, we should guide the local political powers and make the Nanking Government recognize the characteristic feature of North China so that the Nanking Government may not only not hinder the self-administration of North China, but also may afford a special and comprehensive power of self-government.

The gist of the policy.

I. Contents of self-government.

The contents of self-government consists in making the North China Government exercise its power over the finance, industries and transportation of North China and in making North China free from the anti-Japanese interference of the Nanking Government by our taking political and economic policy aiming at the cooperation and the mutual aids of Japan, Manchukuo and China as well as by the promotion of the happiness of the people in North China. We should strictly avoid such acts as would be suspected of disapproving China's territorial right of North China or of bringing about an independent country free from the Nanking Government or of making North China an extension of Manchukuo.

II. Scope for self-government.

Five provinces in North China should finally be put under self-government. We, however, should not be too eager to enlarge this area, for that is not our purpose. We should put our efforts mainly in brightening Hopeh and Chahar Provinces by developing economically and keeping the public minds easy and stable. As for our measures towards the other three provinces, see Clause No. 5.

III. Guidance of Hopeh and Chahar political powers.

Our fair and square attitude is required for the guidance of the political powers of these two provinces. We should improve the governmental system and purge and innovate the personnels of the governments. We should also try to abolish the financial, economic and military administration of the Chinese military cliques, thus brightening the whole area and drawing the people's heart to Japan.

Exh. 217 - page 2.

However, in carrying out these measures confidentially, we should act in such a manner as to make the Nanking Government assist us in our policy toward North China, and, by making the most of the Nanking Government, we should strive for the best results.

IV. Guidance of the East Hopeh Autonomy Government.

In guiding the East Hopeh Autonomy Government, an advice should be given to the government so that the internal administration may be reformed, and that the reforms may serve as example for the Hopeh and the Chahar Government to follow.

Also, considering the fact that the said Autonomy Government cannot stand alone, we should see that no measure is taken toward the government that may prove a hindrance to the federating of the five provinces of North China.

It must be recalled that East Hopeh should be placed under the political power of the Hopeh and Chahar Autonomy Government as soon as the latter has been recognized to be consolidated enough to function as an independent government.

V. Guidance of Shantung, Shansi and Suiyuan Autonomy Governments.

It is not a wise policy to force Shantung under the Hopeh and Chahar Autonomy Government, for such a measure would make it hard for the province to depend upon Japan and would threaten the existence of the province itself. Accordingly, we should try to bring about a closer interrelation between Japan and the province by taking measures aiming at the diffusion of anti-communism and pro-Japanese sentiment as well as by forming an economic cooperation of Japan, Manchukuo and China.

The same measure should be taken toward Shansi and Suiyuan. It is a matter of course that our policy toward these two provinces should not conflict with that toward Inner Mongolia. As our policy toward China should be carried out smoothly, we should not take such a measure as to eliminate the political powers of the provinces or to place the provinces under the political power of Inner Mongolia.

VI. The purpose of our economic development in North China is to create an inseparable connection between China and Japan based on the mutual economic interest promoted by the civilians' free investment and also to make it contribute toward the preservation of friendly relations between Japan and North China, both in time of war or peace. Iron, coal and salt existing in the province should be utilized for our national defense and for the promotion of our transportation facilities and electric

power. And these materials should, in case of need, be produced with our own capitals.

Along with our economic development, we should make the third countries respect our interests. If necessary, we should undertake enterprises jointly with these countries, make use of their capitals and materials and should be careful to cooperate with them, especially with England and the United States.

VI.
THE FUNDAMENTAL PRINCIPLE OF OUR NATIONAL POLICY.
August 11, 1936. (Five Ministers Conference).
Exh. 979, T. 9549.

I. The fundamental principle of administering the state based on righteousness lies in realizing the ideal of our national foundation by strengthening the foundation of our country internally and prospering externally, thereby making the Japanese Empire develop into the stabilization Power, nominal and virtual, in East Asia, secure peace in the Orient and contribute to the peace and welfare of mankind throughout the world. In view of the situation of the Empire, both at home and abroad, to establish the fundamental national policy consists in securing a steady footing of our empire in the Eastern Continent as well as developing in the South Seas, under the joint efforts of diplomatic skill and national defense. The general basic principles are as follows:

(1) To exclude the Military Rule Policy of the Powers in East Asia and follow our policy to share mutual welfare by participating in co-existence and co-prosperity principle is the only way of realizing the ideal of our Imperial Rule of Justice. It should, therefore, be the immutable leading spirit in all times in relation to our overseas development.

(2) In order to secure the stability of our Empire and to safeguard its development so as to acquire the position of the real stabilization Power in the East Asia, nominally and virtually, we are to complete our defensive armament.

(3) We should strive to eradicate the Russian menace on the North, in order to realize a steadfast development of Manchuria, and for the solid defense of both Japan and Manchuria. We should also be prepared for Britain and America, attempting at the same time an economic development by the close cooperation of Japan, China and Manchuria. For the achievement of such an object we should always be careful to hold most amicable relations with the Powers.

(4) For the furtherance of our plan to achieve racial and economic development of our Empire toward the South Seas, especially on the Outer South Sea Islands area, we should take a gradual and peaceful measure, always avoiding to stimulate other nations and try to fulfill our

national strength correlative with the completion of Manchuria.

II. Making the above fundamental principle the pivotal point of our national policy, we expect thereby to unify all our policies, internal and external, and generally innovate the administration in accordance with the present situation of the Empire. The outline of our new policy is as follows:

(1) The fulfillment of the National Defense Armament.

(a) As to the Army armaments, we should aim to counteract all the military forces that Russia can furnish to employ in the Far East; and, especially, so as to enable us to strike a hit at the very outset of the war upon the Russians, we should complete our military force in Korea and Manchuria.

(b) As to the Naval Armaments, we should attempt to fulfill its strength to such an extent as to be sufficient for securing the command of the sea on the Western Pacific counter to the American Navy.

(2) Our diplomatic policy is solely to make it the first principle to try to prosecute the national scheme in smooth and amicable manner, and thereby to conduct an innovation and improvement in general. The military authorities on their part are required to assist the activities of the diplomatic organ from within in order to have it act fully and advantageously, evading all the time to act from without as far as possible.

(3) In order to renovate and improve political and administrative organ, to establish financial and economic policies, and to manage other plans and schemes, according to our fundamental principle, the following measures should be taken properly:

(a) Lead and unify public opinion at home, and strengthen the will of the people to tide over the extraordinary emergency of our country.

(b) In order to advance and further our trade and industry essential to the prosecution of the national policy, an appropriate improvement should be introduced to the administrative and economic organs.

(c) An adequate measure should be taken concerning the stabilization of the people's livelihood, the development of their physical strength, and fostering sound and healthy mind and idea.

(d) A suitable measure should be taken in order to make a drastic progress in air as well as sea transportation.

(e) It is required to accelerate the establishment of a self-supporting and self-sufficient policy for the important resources and materials essential to national defense and industry.

(f) By innovating diplomatic organs, as well as completing information and publicity systems we should strive to quicken our diplomatic function, and to enhance the national culture abroad.

VII.

THE THIRD ADMINISTRATIVE POLICY TOWARD NORTH CHINA. February 20, 1937. Exh. 218, T. 2745.

1. The principal object of administrating North China is to complete our aim of making North China quite pro-Japanese and pro-anti-comintern, procuring defense materials, enforcing transportation, preparing the defense against U.S.S.R. and establishing the concert between Japan, Manchukuo and China.

2. To complete the above object, we do our best for the economic policy in North China, aid in secret government of North China and making Nanking Government recognize the speciality of North China and aid the concert between Japan, Manchukuo and China.

Principles.

1. Attitude toward Administrating North China.

The measures which we took for Manchuria made the foreign powers think that we were aggressive in North China. So we must abstain from all the actions as give other powers misunderstanding of our intention. We should do our best for the culture of the people in North China.

For the economic development of North China we welcome the investment of private capitals. To the demand by the Government of East Hopeh and by that of Nanking we should always respond with sympathetic attitude. For the special trade and for free flight in East Hopeh we continue our already decided plan to settle the matter quickly.

2. In guiding the government of Hopeh and Chahar, we must take a fair attitude, evade all the militaristic policies in finance, economy and military affairs and win the popular mind.

3. In guiding the government of East Hopeh, we aid the progress in its inner government and its industries. We must establish there the paradise free from the exploitation by Chinese militarists.

Considering that East Hopeh cannot govern itself, we must not take any measures as to hinder the guidance of East Hopeh.

4. Guiding the governments of Shantung, Shanhsi and Suiyuan.

We aim the concert of these governments with Japan by our cultural and economic policy for these governments. As it may stimulate the anti-Japanese feeling among the Chinese if we carry out our anti-comintern and pro-Japanese and pro-Manchukuo propaganda, we must pay strict attention.

5. Object of developing Economy.

We welcome the investment of private capitals, and by the extension of our rights and interests in North China we establish the close friendship between Japan and China. By thus establishing the friendship not only in time of peace but in time of war we may procure the materials for munition industries.

As for the interests and rights of the third parties, we must estimate them, and in case of need we concern with them or we make the cost of their capitals.

VIII. PLANS FOR GUIDING NORTH CHINA. April 16, 1937.
(Four Ministers Conference). Exh. 219, I. 2748.

General Policy

1. The essence of the guidance of North China is to make the said area virtually a firm anti-Communist pro-Manchu-Japanese region, and also contribute to the acquisition of communicational facilities, thus partly preparing against the Red threat and partly forming a foundation for realizing the unity and mutual aid of Japan, Manchukuo and China.

2. In order to attain the above aims, for the present our first and main efforts will be in carrying out economical measures with the North China populace as object. When carrying out the above measures, besides internal guidance of the North China regime, the Nanking regime must be guided through policy applied to it to recognize the special position of North China, and to voluntarily cooperate to the policies of Sino-Manchu-Japanese unity and mutual aid.

IMPORTANT PRINCIPLES

1. Attitude in guiding North China.

It cannot be denied that our policy towards North China, what with the geographical peculiarities of the region, has not infrequently in the past given "the erroneous impression to China and other powers that our Empire has the intentions of entering the Bruce zone, advancing the frontier of Manchukuo or else realizing the independence of North China. So in future policy towards North China, together with strict precautions against actions which may arouse such unnecessary misinterpretations, it is vitally important to attend solely to the execution of cultural and economic measures having as main objects secure and facile life and work for the North China populace, thus contributing to the achievement of our expected aims."

In developing North China culturally and economically we must strive to assume a liberal attitude and labor for a free expansion of civilian capital; together with that; it is necessary to deal with an understanding manner, the demands of the Hopei-Chahar or the Nanking regimes which can be considered pertinent or understandable from the view of "face." Concerning the problems of special trade in the Hopei-Shantung area and unrestricted flying in North China, speedy solutions must be planned.

2. Guidance of the Hopei-Chahar regime.

In guiding the Hopei-Chahar regime, the most open and upright attitude must be maintained, and it is especially necessary to strive to win the people's good will by liquidating militaristic misrule of finance, economics, military affairs and all other matters, thus constructing a healthy region.

3. Guidance of the Hopei-Shantung Autonomous Government.

In guiding the Hopei-Shantung Autonomous Government, the improvement of its internal administration shall be espec-

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lally endeavored, and together with all out development of industry, it shall be made into a model region of safe and easy life and work, truly free from militaristic exploitation and misrule, thus endeavoring to realize as concrete facts, our Empire's just and equitable true will.

In the above policies, it must be considered that the Hopei-Shantung Autonomous Government cannot exist solely by itself, and it is necessary not to expect any measures which may be an obstacle in guiding the various regimes of North China.

4. Guidance of the Shantung Shansi and Suiyuan regimes.

The chief view in policy towards these regimes, especially that of Shantung, is to, by the gradual execution of cultural and economical measures with Sino-Manchu-Japanese fusion and unity as its aim, make still more firm the joint connections between them and our Empire. In the above policy the most open and upright attitude shall be maintained, and it is necessary to avoid political measures which may be feared might only excite the populace's emotions and give the Chinese excuses for anti-Japanese moves.

5. General lines for economical development.

The aims of economical development of North China is, together with promoting our interests which advocates the free advance of civilian capital, to invite Chinese capital also, thus constructing an inseparable Sino-Japanese situation based on the economical profits of Chinese and Japanese in accord, and to contribute to the maintenance of North China's pro-Japanese attitude both in peacetime and in war. Especially the development of those military resources vital to national defence (iron, coal, salt, etc.) and the establishments of communications, electricity, etc., connected to this shall be speedily realized, by special capital if necessary.

In the economical development, together with making the third powers respect our special position and interests in North China, their interests shall be respected, and if necessary projects will be made jointly or their capital and material utilized, thus, unity and mutual aid with them, especially Great Britain and the U.S.A., shall be considered also.

POLICY DECIDED UPON IN OGIKUBO CONFERENCE, July 19, 1940.
Exh. 3687A, T. 37864 (as related in the Seyonji-Harada Memoirs).

A. In order to evolve a policy for the settlement of the China Incident, and also for dealing with the new world situation, the establishment and the strengthening of our war-time economy shall be made the basis of our domestic and foreign policy. For this purpose, the government will assume unitary leadership in all economic activities and strive to the utmost in the promotion thereof, except in cases of absolute necessity for the existence of the operating forces (military) to dispose of or assume leadership themselves.

B. World Policy.

1. Corresponding to the sudden changes in the world situation, and in order quickly to establish a New Order for East Asia, we plan to strengthen the axis of Japan, Germany and Italy. The East Asiatic nations must act in concert and carry out various important policies. However, we must decide on the most opportune time in the world situation and not miss it; that is, as it concerns the method of strengthening the Axis and its time for realization.

2. As regards relations with the Soviet Union, a Non-Aggression Pact will be concluded with her by Japan, Manchukuo and Mongolia (length of effectiveness, five to ten years), and in addition to planning the immediate solution of pending questions, we will realize sufficient military preparedness to safeguard against defeat by Soviet Russia during the period of effectiveness of the Non-Aggression Pact.

3. In order to include the English, French, Dutch, and Portuguese colonies in the neighboring islands and the Orient within the substance of the New Order in the Far East, positive arrangements will be undertaken. Moreover, we will endeavor to exclude ourselves from international conferences in reference to the above.

4. Even though we will avoid unnecessary collisions with the United States, as long as it concerns the establishment of a New Order in the Far East we are firmly determined to eliminate any interference on her part by actual force, thereby assuring the realization of our policy.

The above were the items which were discussed by the Premier and the three State Ministers; MATSUOKA, YOSHIDA and TOJO, while the Cabinet was in the process of being organized. These were the fundamental policies for organizing the New Cabinet.

X.

OUTLINE OF THE BASIC NATIONAL POLICY, July 26, 1940. (Cabinet).
Exh. 541, P. 6307.

Outline of the Basic National Policy

The world is now on the threshold of a stupendous historic change. New political, economic and cultural orders are in the process of creation on the basis of the growth and development of several groups of nations. Japan is also faced by a great ordeal unparalleled in history. At this juncture, if we are to carry out a national policy truly in consonance with the lofty ideal on which our nation is founded, it is of the most urgent necessity to effect a fundamental renovation of the government administration along all lines, and to march forward toward the completion of a national defence structure, by surmounting all difficulties. The general principles of the basic national policy have been therefore formulated as follows:

1. Basic Policy.

The fundamental aim of Japan's national policy lies in the establishment of world peace in accordance with the lofty ideal of Hakkō Ichiu on which the Empire is founded. First of all, it is directed toward the construction of a new order of Greater East Asia built upon a firm solidarity of Japan, Manchukuo and China with this Empire as the center. We will therefore speedily secure for herself an unshakable national structure such as conforms to the new world situation and march forward toward the realization of the national policy by mobilizing the total strength of the nation.

2. National Defense and Foreign Policy.

In the light of the new external and internal circumstances of the Empire, we will so amplify armaments as to ensure the execution of national policy on the basis of a state structure for national defense through manifestation of the nation's total strength.

The fundamental aim of Japan's foreign policy at present lies in the construction of a new order of Greater East Asia. Attention will be focused upon a successful settlement of the China Affair, while, by taking a long-range view of the great world change, constructive and elastic measures will be adopted in order to advance the national fortunes of the Empire.

3. Renovation of the Internal Structure.

The urgent task concerning the country's internal administration is to renovate all branches of the government in accordance with the fundamental principle of the national policy and to lay down a firm foundation for a national defense state structure. For this purpose, we will aim at the realization of the following items:

1. In parallel with the renovation of the educational system in full accord with the fundamental principle of the national policy, we will establish national morality which

attaches the first importance to the idea of service to the state by rejecting all thoughts of selfishness and material gains. And we will aim at the encouragement of scientific spirit

ii. We will strive for a coordinated unity of government by setting up a new national political structure.

(a) Organizing the nation anew on the basis of cooperation between government and people, and of service to the state, every man according to his occupation.

(b) Reform of the Diet system so as to conform to the new national political structure.

(c) Creation of a new government service system through fundamental renovation of the administrative methods with a view to effecting unity and expedition.

iii. Establishment of the foundation for a national defense economy on the basis of autonomous construction of the economies of Japan, Manchukuo and China, with this Empire as the center.

(a) Establishment of Japan's economic self-sufficiency policy, making Japan, Manchukuo and China as a single unit, and embracing the whole of Greater East Asia.

(b) Execution of a planned economy through cooperation of government and people; especially perfection of a unified control system over production, distribution and consumption of vital commodities.

(c) Establishment of a financial plan aimed at the development of coordinated economic powers; also, strengthening of financial control.

(d) Renovation of the trade policy in line with the new world situation.

(e) Establishment of the measures for self-supply of the nation's daily necessities, especially staple food stuffs.

(f) An epochal expansion of important industries, especially heavy, chemical and machine industries.

(g) An epochal development of science, and rationalization of production.

(h) Improvement and replenishment of transportation and communication facilities in line with the new world situation.

(i) Establishment of a land development plan aimed at the development of the coordinated national strength of Japan, Manchukuo and China.

4. Establishment of the permanent policies for the enhancement of the mental qualities and physical powers of the people which constitutes the motive force for the execution of fundamental policies for the stabilization and development of agriculture and agricultural communities.

5. A decisive measure will be taken to rectify the inequality of sacrifices on the part of the people, attendant upon the execution of the national policy. Welfare measures will be fully carried out, and the living conditions of the people renovated, so as to ensure a living standard truly befitting a stout-hearted and strong-bodied people capable to survive ten years of trials and hardships and surmount the national crisis.

XI.

GIST OF MAIN POINTS IN REGARD TO DEALING WITH THE SITUATION TO MEET THE CHANGE IN WORLD CONDITIONS, July 27, 1940.
(Liaison Conference). Exh. 1310, T. 11794.

1. To improve conditions at home and abroad to cope with changes in the world situation.

2. To accelerate the settlement of the China Incident by promptly strengthening policies toward China for the main purpose of preventing Third Powers from assisting the Chiang regime.

3. To settle the Southern Problems within the limits so as not to cause a war against a Third Power.

4. To fulfil especially the following matters as policies for above three clauses.

(1) To foster a strong political tie with Germany and Italy and to take active steps in the adjustment of diplomacy towards the Soviet Union while maintaining a firm front towards the United States.

(2) To strengthen policies towards French Indo-China, Hongkong and Settlements to check assistance to the Chiang Regime and root out the feeling of enmity toward Japan.

(3) To strengthen the diplomatic policy towards the Dutch East Indies in order to obtain important materials.

(4) To reform the war-time organization at home.

XII. STRENGTHENING OF THE JAPAN-GERMANY-ITALY AXIS, September 4, 1940. (Four Ministers Conference), September 19, 1940, (Liaison Conference). Exh. 541, T. 6311.

The trends toward the strengthening of collaboration among Japan, Germany and Italy have lately become very pronounced and it is believed that now the time is ripe for speedy initiation of conversations among the three countries on this matter. It is accordingly proposed to commence negotiations in accordance with the under-mentioned Basic Principles, with Germany, to start with.

Basic Principles.

1. To make a fundamental agreement among the three countries, in order that they shall mutually cooperate by all possible means in the establishment of a New Order in Europe and in Asia.
2. To carry out consultations among the three countries in a short period of time as possible in regard to the best means of the above-mentioned cooperation.
3. To begin with, publicity will be given, at home and abroad, to the purpose in 1 and 2 above, in the form of a joint declaration of the three countries.

Explanations.

The German Government has specially sent Minister Stahmer to Japan. Although his mission may merely be to probe the situation here, yet the fact is that he enjoys the special confidence of Foreign Minister Ribbentrop. At this time, therefore, we had better take a step forward and commence talks for the strengthening of the Japan-Germany-Italy Axis. In the light of the situation now prevailing in this country and abroad, it is of urgent importance that to meet the immediate needs of the situation, a joint declaration should be issued on the sense of 1 and 2 under the Basic Principles.

Inasmuch as the proposed declaration is to the effect that the three countries will cooperate by all possible means for the construction of the respective New Orders, Japan should be resolved, if need be, to take any action, including recourse to armed force. In so far as Britain is concerned Germany may not immediately require our armed cooperation. In this event, our main objective will be the United States. The problem of the Soviet Union will also surely claim deliberation. At any rate, unless we are resolved on the employment of armed force, it will be impossible for us to carry on any useful talks with Germany.

The joint declaration mentioned above is preliminary in nature. It should be followed up by negotiations for conclusion of a military agreement. The consultation as to the best means of cooperation, mentioned in 2 under the Basic Principles, signify, in the final analysis, negotiations for military collaboration.

These negotiations are to be conducted in accordance with the Main Principles Governing Negotiations annexed hereto.

Basic Principles concerning Negotiations for a Military Alliance.

1. Japan, Germany and Italy, recognizing the fact that they stand on common ground in regard to the construction of a New World Order, will arrive at a mutual understanding with respect to support for the establishment and administration of their respective Spheres of Living, and also in regard to cooperation concerning their policies toward Britain, the Soviet Union and the United States. (See Appendix 1).

Note: On the basis of this fundamental understanding such further agreements as may be necessary will be concluded among Japan, Germany and Italy, or between Japan and Germany, and between Japan and Italy.

2. Japan, Germany and Italy will, along with the above mentioned fundamental understanding, speedily arrive at an understanding with respect to their mutual support and cooperation concerning the China Incident and the European war, by which they are respectively confronted. (See Appendix 2).

3. The negotiations under 1 and 2 above will be conducted in accordance with the Basic Essentials for the Strengthening of Japan-Germany-Italy Collaboration in Appendix 3) and on the basis of the Main Principles Governing Negotiations (in Appendix 4).

4. The understanding mentioned above need not necessarily take the form of agreements, but, if Germany and Italy so desire, there is no objection to the conclusion of agreements in this connection.

Appendix 1 - Terms of Political Understanding Forming the Basis for the Strengthening of Japan-Germany-Italy Collaboration.

1. Japan and the two countries of Germany and Italy, recognizing the fact that they stand on common ground in regard to the construction of a New World Order, for the realization of which they are presently putting forth their efforts, will mutually respect the Japanese Sphere of Living in East Asia, including the South Seas, and the German and the Italian Sphere of Living in Europe and Africa; and will cooperate by all possible means for the construction of New Orders in the said regions.

2. Japan and the two countries of Germany and Italy will mutually effect close economic cooperation.

With this end in view, they will carry out the preferential mutual interchange of material resources existing in their respective Spheres of Living and the exchange of techniques, and will also accord favorable consideration to the other party's economic activities in their respective Spheres of Living.

3. Japan and the two countries of Germany and Italy will cooperate in maintaining peace with the Soviet Union and in inducing the Soviet Union to bring her policy into line with the common ground of the two contracting parties.

(In addition, an understanding will also be reached with respect to consultation as to the action to be taken in the event of a danger of either Japan or Germany and Italy entering upon a state of war with the Soviet Union, if, in the course of negotiations with Germany and Italy, it turns out that such desire is entertained by the two countries).

4. Japan and the two countries of Germany and Italy will mutually cooperate in order not to allow the United States to interfere in regions other than the Western Hemisphere and the United States possessions, and also in order to safeguard the political and economic interests of both contracting parties in this connection. Further, in the event of either contracting party entering upon a state of war with the United States, the other contracting party will assist that party by all possible means.

Japan and the two countries of Germany and Italy will closely cooperate with respect to the action to be taken in regard to Central and South America.

Note: The present understanding will be treated as confidential.

Appendix 2 - Terms of Understanding concerning the Mutual Support and Cooperation of Japan and the Two Countries of Germany and Italy in regard to the European War and the China Incident:

Japan and the two countries of Germany and Italy, in settling the China Incident and the European War, by which the two contracting parties are respectively confronted, will effect mutual support and cooperation as follows:

Japan will:

a. Accord as much facility as possible in meeting the desires of Germany and Italy in regard to the acquisition of natural and material resources existing in East Asia, including the South Seas; and

b. Cooperate as much as possible in intensifying the pressure upon British influence in East Asia, including the South Seas; and in facilitating the prosecution of war by Germany and Italy against Britain.

Germany and Italy will

a. Cooperate as much as possible in regard to the supply of such machinery and similar articles, and in regard to such technical assistance, as may be desired by Japan, and

b. Give as much political and economic cooperation as possible in the settlement of the China Incident.

Note: The present understanding will be treated as confidential.

Appendix 3 - Basic Essentials for the Strengthening of Japan-Germany-Italy Collaboration.

1. Concerning Japan's Sphere of Living for the construction of a Greater East Asia New Order,

a. The sphere to be privileged in the course of negotiations with Germany and Italy as Japan's Sphere of Living for the construction of a Greater East Asia New Order will comprise:

The former German Islands under Mandate,
French Indo-China and Pacific Islands,
Thailand, British Malaya, British Borneo,

The former German Islands under Mandate,
French Indochina and Pacific Islands,
Thailand, British Malaya, British Borneo,

Dutch East Indies, Burma, Australia, New Zealand, India, etc., with Japan, Manchuria and China as the backbone.

It is understood, however, that the South Seas Region to be indicated by Japan in conducting the negotiations with Germany and Italy will be the region from Burma eastward, including the Dutch East Indies, and New Caledonia northward. It is further understood that India may be recognized, for the immediate purposes as being included in the Sphere of Living of the Soviet Union.

B. The goal in regard to the Dutch East Indies is to have it in a state of preparedness for independence, but the immediate objective will be to secure recognition of Japan's position of political and economic predominance in that country.

In this connection, if Germany proposals should be in variance with the above proposition, recognition should still be obtained of Japan's predominant position in the Dutch East Indies through the preferential supply to Japan of natural and material resources existing in that country, through the guarantee of Japan's continuance of the already existing German economic undertakings there, and by negotiations of a political nature on other matters in general.

c. The same principles as in b, above will be followed with respect to French Indo-China.

2. Concerning Japan-German-Italy economic cooperation.

a. With regard to trade, Japan will supply Germany and Italy with agricultural, forestry and aquatic products of Japan, Manchuria and China, and will also cooperate in supplying Germany and Italy with special mineral products, rubber and other articles of China, French Indo-China, the Dutch East Indies, etc. Germany and Italy, on their part, will supply Japan with such technical assistance, aircraft, machinery, chemical products, etc., as may be required by Japan.

With regard to mutual economic activities, Japan will especially in China and Manchuria, accord de facto preferential treatment to Germany and Italy, and enable the participation of their technique and equipment.

b. For the above-mentioned purposes, there will be separately concluded an Economic Agreement, a Trade Agreement and a Payments Agreement.

3. Concerning Japan's attitude toward Japan-Germany-Italy cooperation in regard to the Soviet Union and the United States.

Being destined to be the leader of East Asia in the postwar new order of things wherein it is anticipated that the world will be divided into the four large fields of East Asia, the Soviet Union, Europe and the American Continent, Japan, acting in close collaboration with Germany and Italy which will constitute the guiding force of Europe, will

Exh. 541, XII, page 5.

a. Restrain the Soviet Union on the east, west and south, and, inducing the Soviet Union so to act as to align with the common ground of Japan, Germany and Italy, endeavor to cause the advance of the Soviet sphere of influence to be oriented toward a direction where the advance has little direct effect upon the interests of Japan, Germany and Italy,--a direction such as the Gulf of Persia (it being also possible that, in case of need, Soviet advance toward India may have to be recognized); and,

b. While peaceful means will be adhered to as far as possible in dealing with the United States, contrive to bring about a posture of things wherein Japan can, as occasion may require, bring pressure to bear upon the United States through political and economic collaboration with Germany and Italy in the East Asian and European fields, so that such posture of things can contribute toward the attainment of Japan's aspirations

In taking these steps, Japan will keep it in mind to make the best of inducing the Soviet Union.

Further, Japan will make use of the immigrant and economic foothold, both of importance, which Germany and Italy presently have in South America, in regard to such steps as Japan may in future take with respect to the United States.

4. Concerning Japan's attitude toward the anti-British cooperation of Japan, Germany and Italy.

a. Japan will, in the construction of an East Asian New Order, take such steps as the situation may require, in order to eliminate the political and economic interests of Britain in East Asia, including the South Seas.

(Such steps are intended to weaken Britain's position. Fact shows that the policy which Japan is already taking toward Britain in China is automatically producing an effective influence on the war situation in Europe.)

b. With a view to furthering her cooperation with Germany and Italy in their prosecution of war against Britain, Japan will stand no cooperative effort on her part in meeting the desires of Germany and Italy in regard to the acquisition of natural and material resources existing in East Asia, including the South Seas. Further, Japan will in larger measure cooperate with Germany and Italy in the war against Britain, in respect of the elimination of British interests in East Asia, anti-British demonstrations and propaganda, the support of independence movements in the colonies and dependencies of Britain and other matters.

5. Concerning the possible use of armed force against Britain and the United States, Japan will make decisions independently in accordance with the following principles;

(1) In the event that the China Incident has nearly been settled, Japan will use armed force by taking as favorable an opportunity, as may be afforded by the situation prevailing at home and abroad.

(2) In the event that the China Incident has not yet been settled, it will be Japan's guiding principle to take action within limits short of war. If, however, domestic and foreign conditions take a

decidedly favorable turn, or if it is deemed that, irrespective of whether our preparations are complete or not, the development of the international situation permits of no further delay, Japan will resort to armed force.

(3) The "domestic and foreign conditions" signify the European situation, especially the state of adjustment of our relations with the Soviet Union, the United States' attitude toward us, our preparations for war, and etc., as well as the state of disposal of the China Incident.

Appendix 4 - Main Principles Governing Negotiations.

1. The principal purpose of the negotiations under Paragraph 2, Appendix 1, which is designed to have Germany and Italy recognize and respect Japan's Sphere of Living in East Asia, including the South Seas, is to obtain over-all recognition of Japan's position of predominance in the whole of East Asia, including the South Seas.

Should, however, Germany and Italy be inclined to make any reservations in regard to any designated areas, Japan will conduct negotiations on each particular matter concerning such areas in pursuance of Paragraph 1, a., and ensuing principles of Appendix 3 (Basic Essentials for the Strengthening of Japan-Germany-Italy Collaboration), and thus secure recognition of Japan's aspirations in these connections.

2. In the event that Germany and Italy propounds a desire for Japanese military cooperation with them against Britain, Japan is prepared, as a matter of guiding and principle, to meet the desire. It will be explained to Germany and Italy, however, that, in view of the existing state of affairs, Japan contemplates taking the courses of action outlined under (1), (2) and (3) in Paragraph 5, Appendix 4 (Basic Essentials for the Strengthening of Japan-Germany-Italy Collaboration), with respect to the use of armed force, i.e., participation in the war.

Germany and Italy will be enabled by such explanations to understand Japan's position, and, at the same time, efforts will be made to the end that Germany and Italy will cooperate with us in improving domestic and foreign conditions relating to Japan's entry into the war against Britain and the United States.

XIII.

MEASURES FOR ECONOMIC DEVELOPMENT OF NEI. October 25, 1940
(Cabinet) Exh. 1317, T. 11837

The inevitability of occurrences in economic affairs attendant on the progress of the New World Order and the priority of our Empire in the Netherlands East Indies based on the Tripartite Pact between Japan, Germany and Italy necessitates making the N.E.I. a link in the Greater East Asia economic sphere under the leadership of our Empire by establishing immediately close economic relations and developing and utilizing their rich natural resources from the general standpoint of co-existence and co-prosperity in connection with which the following measures must now be taken:

1. To stop the N.E.I. from relying on the European-American Economic Bloc, and to make it take the standpoint as being a member of the Greater East Asia Economy.
2. To remove or mitigate various restrictions which at present obstruct the economic activities of Japanese giving them preference and freedom in economic activities above others.
3. To propose a joint development of the N.E.I. so as to secure in the Greater East Asia Sphere the Supply of necessary war material needed by the Empire as far as possible, thus becoming independent from British/~~U.S.~~ Second Chinese character unreadable/ resources. If necessary, to lease or purchase suitable islands or territories.
4. Although we have already received a guarantee from the N.E.I. as to the supply of major items which are necessary to our Empire, we must furthermore obtain the N.E.I.'s agreement with regard to an increase in variety and quantities of these materials. Further, to make every effort for the realization of instituting under the Empire's guidance the trade control of important merchandise especially tin, rubber, quinine and others, over which the N.E.I. have a world monopoly.
5. To purchase as far as possible those agricultural products produced in the N.E.I., which bring profits to the natives and to stimulate their purchasing power in order to translate co-existence and co-prosperity into reality. For this purpose the N.E.I. should on their part accede to our demands as far as possible and encourage agriculture.
6. To seek special cooperation of the N.E.I. in regard to an increase in the export of Japanese merchandise to them.

7. With a view to the future establishment of a great monetary sphere within the Greater East Asia area under Japanese leadership, efforts shall be made to make the N.E.I. a link of the sphere also in regard to the establishment of new monetary relations with them, but it shall not be aimed to include the N.E.I. itself in the "YEN" bloc. To strive to place the Exchange Control in the N.E.I. under our guidance. For the time being, every advantage should be accorded to the Japanese with regard to the application of Exchange Control in the N.E.I. and at the same time N.E.I. banks should establish "credit" to the Japanese, as well as exert utmost efforts to give other financial facilities to the Japanese.

8. As a means to secure the leading position for the whole of Greater East Asia with regard to traffic and communications, efforts shall be made in establishing the following special rights and interests.

(a) The right of coastal trade, the right of entering unopened ports and the right of administering and using port facilities.

(b) The landing and operating right of submarine cables, the right of participating in the management of inland communication enterprises, and other communication rights.

(c) The inauguration of regular air services and the right of instituting air safety equipment.

9. In order to build a stable fishery position in the South we must strive towards increasing the number of fishing boats, removal of restrictions at ports of import of fish, establishment of fishery bases, and acquisition of other rights and interests pertaining to the conducting of the marine product industry.

10. To prohibit the establishment of new rights and interests of Third Powers in the N.E.I. and to endeavour to oust those already in existence likely to obstruct the expansion of our Empire.

11. To make the N.E.I. institute an Economic Constructional Commission and other suitable organs in which Japanese will be included and participate in forming the N.E.I. domestic and foreign economic policies and their enforcement, with a view towards guiding and strengthening economic collaboration with the Empire.

The N.E.I. shall be required to consult the above-mentioned organs with regard to trade, finance, taxation, custom duties, economic agreements with third countries, enterprises, traffic and communications, etc.

For the time being, Japanese importers in the N.E.I. will be made to participate in the Consultative Committee in the Ministry of Economics.

12. To demand the strict control of anti-Japanese commentaries by newspapers and other periodicals, at the same time ensuring freedom to Japanese in regard to the publication of newspapers.

13. To demand the N.E.I. authorities to exercise rigid control over Chinese residents assuming pro-Chiang Kai-shek and anti-Japanese attitudes. On the other hand, from a broad viewpoint, to plan the use of their organization and resources in consideration of their economic position.

14. In order to ensure the economic development of the Empire, various measures shall be resorted to, such as inviting influential natives to the Empire, or by propogandizing the true aspect of the Empire and creating a proper understanding thereof.

15. The Economic Policy shall be based upon the broad viewpoint of establishment of the Greater East Asia Co-prosperity Sphere and efforts shall be made towards expanding the interests of the Empire in harmony with the natives.

XIV.

MEASURES TO BE TAKEN IN THE SOUTH. April 1941 (Imp. Hq.)
Exh. 1305, T. 11751.

I. The aims of the measures to be taken by the Empire in the South are to promote the settlement of the China Incident as well as to expand our over-all national defensive power in the interests of self-existence and self-defence.

For these purposes,

1. To establish close and inseparable joint relations in military affairs, politics and economy with French Indo-China and Thailand.

2. To establish close economic relations with the Netherlands Indies.

3. To maintain normal commercial relations with the other various countries in the South.

II. The foregoing purposes shall, on principle, be accomplished through diplomatic measures.

III. In executing the foregoing measures resort to arms in the interest of self-existence and self-defence will be taken only when the following instances should occur and when no means for the solution of same can be found:-

1. In case the Empire's Self-existence should be threatened by the Embargoes of the United States, Great Britain and the Netherlands.

2. In case the situation of the Anti-Japanese encirclement by the United States, Great Britain, the Netherlands and China becomes so tense that it cannot be tolerated in the interests of national defense.

XV.

ACCELERATION OF MEASURES IN THE SOUTH, June 25, 1941.
(Liaison Conference) Exh. 106, T. 11753.

1. In view of the various existing conditions, the Empire shall, in accordance with its fixed policy accelerate its measures towards French Indo-China and Thailand. Especially, in connection with the return of the Japanese delegate from the Dutch Indies, a military union shall be established with French Indo-China as soon as possible for the purpose of the stability and defence of East Asia.

Concerning the establishment of joint military relations with French Indo-China, the essential factors which the Empire should stress upon are as follows:-

a) The establishment or use of Air Bases and Harbour Facilities in specified areas in French Indo-China, and stationing of the necessary troops in the southern part of French Indo-China.

b) Furnishing of facilities in connection with the stationing of Imperial troops.

2. To open diplomatic negotiations for the purpose of the preceding paragraph.

3. In case the French Government or the French Indo-China authorities do not comply with our demands, we shall attain our objective by force of arms.

4. In order to deal with such circumstance as mentioned in the above paragraph, preparations shall be commenced beforehand for the despatching of troops.

XVI. RESOLUTION adopted through the Imperial conferences on July 2, 1941.

A summary of the Empire's POLICY according to the changes in the situation.

I. PRINCIPLE.

a. Regardless of any change in the international situation, Japan will adhere to the principle of establishing a "Greater East Asia Co-prosperity Sphere," and accordingly contribute to the establishment of world peace.

b. Japan will continue the disposition of the Chinese Incident, and will step up the Southward advance in order to establish for herself a basis for self-existence and self-defense. The Northern problems will be dealt with according to the changes in the situations.

c. Japan will remove all obstacles for the achievement of the foregoing purpose.

II. SUMMARY.

a. In order to hasten the surrender of Chiang's Regime, further pressure through the Southern regions will be strengthened to the changes in the situations, we shall execute our rights of war against the Chungking Regime at the proper time, and shall confiscate the enemy concessions in China.

b. For the sake of her self-existence and self-defense Japan will continue necessary diplomatic negotiations with relevant nations in the Southern regions and will also promote other necessary measures. For this purpose we shall make preparations for a war with Britain and the United States. First, we shall accomplish the execution of our schemes against French Indo-China and Thailand following the "Principle Policy toward French Indo-China and Thailand," and "Matters concerning the Promotion of our Southern Policy," thereby stabilizing our structure for the Southern advance. In order to achieve the above-mentioned purpose, Japan will not hesitate to have a war with Britain and the United States.

c. Though the spirit of the tripartite axis will form the keynote of our attitude toward the German-Soviet War, we shall not intervene for a while, but take voluntary measures by secretly preparing arms against the Soviet Union. Meanwhile, diplomatic negotiations will be continued with detailed precautions; and should the conditions of the German-Soviet war progress favourable to Japan we shall execute arms to solve the northern problems, thereby securing stability in the Northern regions.

d. In the accomplishment of the above, all measures, especially in the case of execution of arms, must be decided so that there will be no great difficulty in maintaining our basic posture for a war with Britain and the United States.

e. We shall do our utmost in preventing the United States' participation in the War through diplomatic measures in the pre-arranged programmes, and every other possible way, but in case she should participate, Japan will act according to the Tripartite Pact. However, the time and method of military action will be decided independently.

f. We shall shift promptly to the complete stabilization of internal war-time structures, particularly we shall strive for the stabilization of national defense.

g. As to the definite measures we shall decide separately.

XVII. RESOLUTION adopted through the Imperial Conference on September 6, 1941.

Summary: Execution of the Empire's Policy.

In view of the present acute situation, especially the aggressive movements the United States, Britain and the Netherlands have assumed; the situation of Soviet Russia; and the suppression of our national power; Japan will execute her Southern advance policy, related in the "Principle of Japan's Policy according to the Change of Situations," as follows:

a. In order to secure self-existence and self-defense, Japan, with a determination for a war with the United States (Britain and the Netherlands), will have completed her preparations by the end of October.

b. Meanwhile, in pace with the above, Japan will strive for the fulfillment of her demands through diplomatic measures with the United States and Britain.

The minimum matters of demand to be accomplished in Japan's negotiations with the United States (Britain), and the limit Japan is able to come to an agreement in this connection will be stated on another sheet.

c. If, through the above negotiations, our demands have no hope of fulfillment by the beginning of October, we shall immediately determine to wage war against the United States (Britain and the Netherlands).

All measures, save for those concerned with the South will be executed according to the pre-arranged national policy, and we shall particularly endeavour to check the formation of a Russo-American combined front against Japan.

XVIII.

LIAISON CONFERENCE DECISION PLAN. 11 November 1941.

Exh. 919, T. 9261.

Policy

- I. We shall endeavor to overthrow quickly the American, British, and Dutch bases in the FAR EAST, establish our self-sufficiency, and at the same time hasten the surrender of the CHUNGKING Regime. Further, we shall endeavor to cooperate with GERMANY and ITALY in planning for the submission of ENGLAND first, and then to deprive AMERICA of her will to continue war.
- II. We shall do our utmost to avoid making more enemies.
/TM: can be translated: We shall do our utmost to prevent the expansion of enemy powers./

Principal Points

- I. JAPAN will execute a swift war by force of arms and will overthrow the American, British, and Dutch bases in EAST ASIA and in the Southwestern Pacific, thereby ensuring herself a strategically dominant position. At the same time she will secure areas of vital natural resources and principal communication lines, thereby facilitating self-sufficiency of long duration. We shall exhaust every effort to lure out at an opportune time the main naval force of the UNITED STATES and destroy it.
- II. The three countries, JAPAN, GERMANY, and ITALY, will cooperate in planning for the submission of ENGLAND first.
 - (1) JAPAN will adopt the following plans:
 - (a) In regard to AUSTRALIA and INDIA, she will use such methods as political warfare and disruption of commerce to cut their ties with the UNITED KINGDOM and so scheme to alienate them.
 - (b) She will promote the independence of BURMA.
 - (2) JAPAN will endeavor to have GERMANY and ITALY adopt the following plans:

- (a) Carry out military operations in the FAR EAST, NORTH AFRICA, and in SUEZ, and at the same time take measures with regard to INDIA.
 - (b) Strengthen the blockade against ENGLAND.
 - (c) Carry out landing operations against ENGLAND, when the situation permits.
- (3) The three countries will cooperate in the adoption of the following plans:
- (a) Strive for liaison and simultaneous action among the three countries via the INDIAN OCEAN.
 - (b) Intensify warfare for the disruption of commerce.
 - (c) Put an end to ENGLAND's receiving natural resources from occupied territory.

III. JAPAN, GERMANY, and ITALY will endeavor to deprive AMERICA of her will to fight and at the same time carry out measures against BRITAIN.

- (1) JAPAN will adopt the following plans:
- (a) A. Alienate the PHILIPPINE ISLANDS from the U.S. and give them independence.
 - B. Take into consideration that the PHILIPPINE ISLANDS must be so handled that they contribute to the rapid conclusion of war.
 - C. Leave matters concerning the PHILIPPINE ISLANDS alone.
- (b) Intensify warfare for the destruction of AMERICA's commerce.
- (c) Put an end to AMERICA's receiving natural resources from CHINA and the SOUTH PACIFIC.
- (d) Intensify propaganda and conspiracies against AMERICA. Lay emphasis on luring the main naval force of the UNITED STATES into the FAR EAST, on causing her to reconsider her Far Eastern policy, and on pointing out the senselessness of a Japanese-American war. Induce AMERICA to develop public opinion against war.

- (e) Plan for the alienation of relations between AMERICA and AUSTRALIA.
- (2) Endeavor to have GERMANY and ITALY adopt the following aggression against CENTRAL and SOUTH AMERICA.
 - (a) Intensify on-the-sea aggression against AMERICA in the ATLANTIC.
 - (b) Intensify military, economic, and political aggression against CENTRAL and SOUTH AMERICA.
- IV. JAPAN, in her relations with CHINA, will use to her own advantage the war against the UNITED STATES and the NETHERLANDS, especially the successful outcome of the military operations. She will plan to stop aid to CHIANG KAI-SHEK, thereby reducing his power to fight, and, by positive political and military measures, ensure the downfall of the CHUNGKING Regime.
- V. While JAPAN is engaged in military operations against southern areas, she will do all in her power to avoid provoking a war with the U.S.S.R. She will take into consideration that if GERMANY and the U.S.S.R. are so inclined, they may be brought to make peace and the U.S.S.R. enticed into the Axis camp.
- VI. While constantly keeping watch on and examining the international situation, trends of enemy public opinion, and developments in the war situation, JAPAN shall endeavor to make use of the following opportunities to end the war.
 - A. An important pause in military operations against the southern areas.
 - B. An important pause in military operations against CHINA, particularly the downfall of the CHIANG regime.
 - C. A favorable change in the European War situation, especially, the downfall of ENGLAND, termination of the Russo-German War, or success of the programme against INDIA.

To achieve these ends, JAPAN will immediately intensify her program of diplomacy and propaganda toward the countries of SOUTH AMERICA, SWEDEN, PORTUGAL, and the VATICAN. At the time of ENGLAND's surrender, the three countries, JAPAN, GERMANY, and ITALY will not immediately conclude peace with her, but will strive to have ENGLAND induce AMERICA /to make peace/.

XIX.

MEASURES TO BE TAKEN TOWARDS FOREIGN COUNTRIES RELATIVE TO THE OUTLINE FOR THE EXECUTION OF NATIONAL POLICIES, WHICH WAS DECIDED AT THE COUNCIL IN THE PRESENCE OF THE EMPEROR HELD ON NOVEMBER 5, NOVEMBER 13, 1941. (Liaison Conference) Exh. 878, T. 8994.

Policy Towards Germany and Italy.

When the present negotiations with the United States of America break down and a war with her becomes unavoidable (presumed to be after November 25th), the Japanese Government shall notify Germany (and Italy), without delay, of our intention to start war against the United States of America and Britain as soon as our war preparations are ready, and shall open necessary negotiations with them in connection with the following matters, telling them that these are a part of our war preparations:

1. Participation of Germany (and Italy) in the war against the United States of America.
2. No separate peace.

Remarks:

If we are requested by Germany to join in the war against the Soviet Union, we shall reply that we will not enter it for the time being. It cannot be helped if, as a result of it, Germany's participation in the war against the United States of America is delayed thereby.

Policy towards Britain.

Prompt measures shall be taken directly or through the medium of the United States of America to make Britain accept, and positively cooperate with us in, the matters included in the understandings reached in the negotiations between Japan and the United States of America.

In order to conceal our intentions, no other special diplomatic measures shall be taken.

Policy towards the Dutch East Indies.

In order to help conceal and disguise our intentions, we shall open as soon as possible a series of diplomatic negotiations /with the Dutch East Indies/, in the form of continuation of previous negotiations, with the chief object of obtaining commodities needed by our country.

Policy towards the Soviet Union.

Diplomatic negotiations /with the Soviet Union/ shall be continued in conformity with Item I of the Outline of Diplomatic Negotiations with the Soviet Union, which was decided at the Liaison Conference of Imperial Headquarters and the Government held on August 4, 1941.

Policy towards Thailand.

1. Just before commencing the advance into /Thailand/, the following demands shall be made and their immediate compliance obtained:

Our troops shall advance /into Thailand/, as pre-arranged, even if our demands are rejected by Thailand. However, efforts shall be made to localize as much as possible military collision between Japan and Thailand.

(a) Right of passage of Japanese troops through her territory and the grant of various facilities incidental thereto.

(b) Immediate enforcement of measures to avoid possible collisions between the troops of Japan and Thailand, owing to the passage of Japanese troops.

(c) Conclusion of a joint defence agreement, if Thailand desires it.

Note: No special change in our attitude towards Thailand shall be made before the commencement of the negotiations. In particular, great care shall be taken to conceal our plan of opening war.

2. After the penetration of our troops, we shall immediately open negotiations with the Government of Thailand for concrete arrangements on the following matters:

(a) Matters concerning the passage and stationing of Japanese troops.

(b) Provision, construction and enlargement of military establishments.

(c) Provision of necessary traffic and communication facilities as well as factory facilities.

(d) Matters concerning billeting and sustenance for the Japanese troops passing through or stationed in Thailand.

(e) Loans to defray necessary military expenditure.

Remarks:

In the negotiations on Items 1 and 2, we shall definitely promise to respect her sovereignty and territorial integrity in conformity with the Outline of Policies towards French Indo-China and Thailand, which was decided at the Liaison Conference of Imperial Headquarters and the Government held on February 1, 1941.

Moreover, depending on the attitude of Thailand, we shall try to turn the negotiations to our advantage by suggesting that we will in future consider the cession of a part of Burma or Malay to Thailand.

Policy towards China.

The following measures shall be taken, bearing in mind the necessity of preserving our all-round fighting power to cope with a protracted world war by avoiding military attrition in China as far as possible, and also bearing in mind the probable decrease of our military strength in the future:

1. To drive out the military forces of the

United States of America and Britain in China.

2. To place under our actual control enemy concessions in China (including the Legation Quarter in Peking) and important enemy interests (such as the maritime customs and mines), but care shall be taken to lighten as far as possible our burden in respect to man-power and materials.

Note: Though the International Settlements and the Legation Quarter in Peking shall be brought under our actual control after driving out the enemy's military forces, these areas shall not be completely taken over since they also include interests of countries friendly to us.

3. The above-mentioned plans shall be carried out only after the declaration of war against the United States of America and Britain, lest our intentions be revealed.

4. Our right of belligerency against the Chungking Regime shall not be obtained by a declaration or other formalities, but the actual effect of belligerency will be obtained by a declaration of war against the United States of America and Britain.

5. Among the enemy interests in China, even those interests connected with the National Government shall, if necessary, be brought under our control for the time being, and adjustment made separately.

6. The activities of influential Chinese in the occupied area shall be encouraged and fostered as far as possible, so as to win the people's mind to Sino-Japanese cooperation and thereby gradually establish localized peace in the areas where this is possible.

7. In our economic relations with China, we shall lay special stress upon the acquisition of goods. For this purpose reasonable adjustments shall be made in the various existing restrictions.

The Verdicts in the Individual Cases

From the law as it now stands, it follows that no one should be sentenced to death for having committed a crime against peace. Internment for life is, at this state, the appropriate punishment for this crime. An internment for life, which, according to the Charter may at any time be reduced by the Supreme Commander. (Charter Art. 17) Consequently, the accused found guilty of the charges of conspiracy to wage a war of aggression, or of waging a war of aggression, but not found guilty of any conventional war crime, should be sentenced to internment for life. These accused are Araki, Hashimoto, Hiranuma, Hoshino, Iinami, Kava, Oshima, Shiratori and Suzuki. The same penalty has rightly been given to Koiso, and to Umezumi.

As for the accused Oka, Fato, and Shimada, the Majority Judgment has meted out to these defendants the same punishment. They should have been found guilty of conventional war crimes, and should have been punished with the supreme penalty.

With the death penalties pronounced against the accused Doihara, Itagaki, Kimura, Matsui, Noto and Tojo I respectfully agree.

The accused Hata, Hirota, Kido, Shigemitsu and Togo should have been acquitted, for the reasons stated below.

HATA

Hata was a professional soldier. It would be well to define clearly, before the evidence brought against him is further considered, the responsibility of a soldier in relation with the crimes against peace.

The prosecution has stated:

"No military man in the field has been charged with the crimes pertaining to aggressive war merely because he carried out military operations during the course of an aggressive war being pursued by his government. He has been charged with such crimes only if he participated in the formulation of the aggressive policy of the government, or if he, in the first instance, induced the aggression which was subsequently made the policy of the government." (T. 40,540).

The scope of this statement deserves to be amplified beyond that of a mere submission concerning prosecution policy. The statement contains a norm which should be generally recognized.

No soldier who merely executed government policy should be regarded as a criminal, as guilty of the crime against peace. The duty of an army is to be loyal. Soldiers nor sailors, generals nor admirals should be charged with the crime of initiating or waging an aggressive war, in case they merely performed their military duty of fighting in a war waged by their government.

In this case, the danger of a situation where military men influence the policy of a country has been made clear for all time. The army should be the power to defend the country, and to execute the policy decided

upon by the government. It should not make, or influence, that policy.

A document has been produced in this trial, containing a rescript by the Meiji Emperor to the soldiers and sailors, in which it is stated:

"Remember that, as the protection of the state and the maintenance of its power depend upon the strength of its arms, the growth or decline of this strength must affect the nation's destiny for good or for evil. Therefore, neither be led astray by current opinions nor meddle in politics, but with single heart fulfill your essential duty of loyalty, and bear in mind that duty is weightier than a mountain, while death is lighter than a feather."
(Ex. 3465)

It has been said in this case, over and again, that the war, and the resulting disaster to Japan, were caused by the failure of the military to obey this Imperial command. The prosecution has charged military men for having interfered in politics.

If this is correct, it follows that one should not expect military officers to resign when ordered to fight in a war which is of aggressive nature. To demand this would amount to making interference in politics obligatory for the military. It would mean that one demands the very thing which, in a different connection, is considered to be at the root of the evil.

In considering the responsibility of military men with relation to the crime against peace, one should be extremely careful. As long as the honorable profession of arms (as the Nuremberg Judgment called it) is a necessity in the intercourse of nations, this profession

should be safeguarded from any compulsion to "meddle in politics," and it should, as long as it remains within its own province, be protected against charges brought against it after the war is lost.

No people would agree to see their soldiers punished simply because they fought on orders of their government. Rules of law, now being established, are intended to be applied in the future. It is to be avoided that "we but teach bloody instructions, which being taught return to plague the inventor."

Hata was appointed successor to Matsui, who was relieved from his command a few weeks after the capture of Nanking. It has been denied, during this trial, that the recall of Matsui and eighty staff officers constituted a disciplinary measure. However, it seems probable that as the successor to the General, under whose command the "Rape of Nanking" had proved possible, a man was selected who was known for his ability and intent to maintain strict discipline in his armies.

Hata is charged, in Count 45, with responsibility for the Rape of Nanking. However, at the relevant time, he was Inspector General of Military Education.

Hata is further charged with responsibility for atrocities committed at Canton (Count 46), but the attack on Canton was carried out by the South China Army, not under Hata's command, as the Prosecution acknowledged. (T. 16,832).

Again, Hata stands charged with responsibility for crimes committed after the capture of Hankow. The only evidence laid before this Tribunal concerning these atrocities consisted of testimony by A.A. Dorrance who saw the Japanese, after the capture of the city, collect several hundred Chinese soldiers, drive them, three or four at a time, down a gangplank, from the end of which they were thrown into the Yangtse, and fire at them when their head reappeared. (T. 3391) The Defense has produced dozen of witnesses to show that the entry into, and the occupation of, Hankow were quite correct. Even accepting that these events occurred as related by the one Prosecution witness, this would only mean that on a certain day certain atrocities occurred at Hankow. There is no evidence to prove that Hata was there on that day, or that he knew what was occurring, or that he could have prevented these events.

When Abe was commended to form a Cabinet, the Emperor expressed his desire that either Hata or Umezu should be appointed as Minister of War, the other wishes being that "diplomatic policy should follow the line of cooperation with Britain and the U.S.", and careful attention be given to the selection of Home and Justice Ministers (T. 16240).

Hata, at that time, was Aide-de-Camp to the

Emperor, and apparently considered by the latter to be prepared to ensure that a peaceful policy towards the U.S. and Britain would be followed.

The Prosecution submitted that "Hata's conduct "during the period that he was War Minister is more reprehensible in that he pretended to be in accord with the "policies of the government in which he was serving while "he was at first secretly and later in the less veiled "manner working for its overthrow."

It is essential to establish whether this submission is correct, especially with relation to a suggestion of the Prosecution that the Yonai Cabinet was devoted to peace (T. 31351). Both Yonai and Arita testified that Hata cooperated in their policies (Ex. 3198, T. 28917; Ex. 3200, T. 28945), and that he opposed the Tripartite Alliance. His opposition to the Alliance was testified to by Tanaka Ryukichi (T. 29408). In an earlier interrogation, Yonai had stated that Hata was in favor of the Tripartite Alliance (T. 38000), but as a witness he denied this.

In the Diet session of March 22, 1940, the War Minister was asked which group Japan was following, whether it was the U.S. and Britain, or Germany and Italy. Hata did not give a straight forward reply, as anyone supporting the Axis Powers would have done. He answered as follows: "There are various blocs, such as Anglo-American bloc, "or German-Italian bloc, but as for us, in order to "settle the incident, there will be no change in our "policy which is to concentrate all our ability to exclude "any third power which would persistently interfere with

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"the establishment of the new order in East Asia." (T. 38022)

It strikes one as being typical of the statement of a man placed in a position where he cannot express his own opinion (which would support a policy following the line of cooperation with Britain and the U.S.) but who, though War Minister, is not prepared to be a mere mouth-piece of those army circles supporting the alliance with Germany and Italy.

Much evidence has been laid before this Tribunal with relation to the part Hata played in the fall of the Yonai Cabinet. On the witness stand, both Yonai and Arita testified that they felt that Hata had been forced by higher military authority to resign, and thereby to cause the fall of the Cabinet. This view is supported by the witness Sawada (Ex. 3205). Prince Kanin, then Chief of Staff, according to his Vice-Chief of Staff Sawada, intended to use the War Minister in order to break the deadlock between the Army and the Cabinet. (T. 29010)

Sawada also testified that it was Vice-War Minister Anami, who in the War Ministry voiced the wishes of the militarists, and who played the most important part in the overthrow of the Cabinet. Tanaka supported this testimony (T. 29049)

A newspaper article concerning the role of Hata in those days has been produced (Ex. 3199-A) It states that Hata resigned at Yonai's request, and after the meeting of the three Army Chiefs reported to the Premier as follows:

"I conferred with the three army chiefs, recommended the succeeding War Minister and negotiated for their acceptance. But under the present circumstances, they had no mind to accept it. The entire army is absolutely opposed to your views." (italics supplied)

From this story, it does not follow at all that Hata purposely brought about the downfall of the Cabinet, but that this result was caused by the refusal of the two other army chiefs, who refused to accept Hata's nominee.

Under the Abe and Yonai Cabinets, the war with China which had started under another cabinet, was going on. Hata found that war waged when he assumed office. Tanaka testified that Hata, when he was War Minister, attempted to bring about peace with Chiang Kai-shek, and that he secretly conducted negotiations. (T. 29408) To show that he was in good faith, Hata reduced the Japanese forces from 900,000 to 600,000. (T. 29411)

The Prosecution quoted a reply given by Hata in the Diet on March 22, 1940, to prove that Hata "sought to thoroughly crush the Chiang Kai-shek regime." Hata mentioned "thoroughly crushing the Chiang Kai-shek government's pro-Communistic and anti-Japanese policies" (T. 38015)

Apart from the fact that words spoken on official occasions often do not reveal the true story, the relations between China and Japan, and the relations between the several groups and cliques in Japan, have not been

sufficiently clarified in this trial to prove Hata guilty of the crime of waging a war of aggression. Some doubt remains at this point, and in case of doubt a person is not to be declared guilty.

In view of the fact that war was being waged between China and Japan, it will be incorrect to qualify a strong demand on French Indo-China, to stop the supply of arms, as aggression against France.

Two days after the fall of the Yonai Cabinet, Hata had an audience with the Emperor, and informally recommended a successor. Tojo testified that such recommendation should have been made after the Premier had selected War and Navy Ministers. Hata, however, recommended Tojo before Konoye had reached a decision, and was therefore considered too hasty by the Emperor.

(Kido's diary, July 18, 1940, Ex. 539, T. 6266)

In this diary entry, it was said that the recommendation was made "naiso", and this word "naiso" was incorrectly translated by "secretly". On this "secret recommendation", the Prosecution based its charge that Hata conspired. It was, however, brought out in Tojo's cross-examination that "naiso" meant "informally", and the language Arbitration Board confirmed this orally in open court. (T. 36610) This correction was later overlooked in the Prosecution's summation, and even the majority judgment holds it against Hata that he "secretly" recommended Tojo. (Judgment, p. 479)

The fact remains that Hata recommended Tojo as his successor. Noda, the Chief of the Personal Affairs Bureau, testified that Hata did not mention Tojo's name to him but that he, Noda, recommended Tojo to Hata, and that Hata merely adopted his recommendation (T. 29400).

Noda explained that he recommended Tojo in consideration, inter alia, of the wishes of the General Staff and the views prevalent in the various bureaus of the War Ministry, "consulting fully with the Vice-Minister of War, General Anami." (T. 29394)

The majority judgment correctly states that "War Minister Hata is not shown to have taken any active part in the plotting which led to the Yonai Cabinet "downfall", (Judgment, p. 474) although in his individual verdict it is said that he "in collaboration with, and after consulting, "other high military authorities precipitated the fall of "the Yonai Cabinet." It is probable that Hata, a soldier who opposed the military meddling in politics "ref. Tanaka's testimony on Hata's actions against a Colonel who had delivered an address against the U.S. and Britain (T. 29410), was misused by the very army circles who intended to direct Japanese policy.

In the individual verdict on Hata, it is said that, "as C.-in-C. of the Expeditionary Forces in China, he continued to wage war in that country until November 1944. He continued to wage war against China and the Western Powers as Inspector General of Military Education, one of the highest active military posts in the Japanese Army".

No soldier should ever be found guilty of the crime of waging an aggressive war simply for the reason that he performed a strictly military function. Aggression is a political concept, and the crime of aggression should be limited to those who take part in the relevant political decisions.

Soldiers and sailors should never be considered to wage an aggressive war in the sense of the Charter, even if they be Generals or Admirals, as long as they do not, in that capacity, decide government policy.

Moreover, a soldier who merely performs his military duty cannot be said to have waged the war. In view of the meaning of this word, and the purpose to which it is used in the definition of the crime against peace, it should be so understood that only the government, and those authorities who carry out governmental functions and are instrumental in formulating policy, wage the war. As has been pointed out in the Nuremberg Judgment, this concept of "waging" should be of a very restricted scope. Activities in support of this waging, be they of an economic or of a military nature, do not fall within the scope of waging. Nor are they criminal as participation in the crime of waging an aggressive war. In any case, since in the Charter the forms of participation which come under the jurisdiction of this Tribunal have been enumerated, other forms of participation are excluded therefrom.

Consequently the fact that Hata was Supreme Commander in China between 1941 and 1944, and later Inspector General of Military Education, does not warrant that as such he committed crimes against peace.

Hata is further held responsible for war crimes committed by Japanese forces in China. Several witnesses were produced that he gave orders to behave correctly.

There has been brought no evidence to prove that Hata had knowledge of the atrocities established in this trial. These were not of such magnitude that reports could not have failed to reach Hata. It is a matter of common knowledge that atrocities are committed in every army. In this case, there has not been brought sufficient evidence before this court to conclude beyond reasonable doubt that Hata could, and should, have known of the events in time to put an immediate stop to them.

The negotiations with the U.S., whose failure led to the Pacific War, took place when Hata was Supreme Commander in China. Hata did not exercise any function in this respect. Nevertheless, he opposed a war between Japan and the U.S., and sent his Chief of Staff to Tokyo to convey to the authorities that, if that proved unavoidable, all Japanese troops should be withdrawn from China to prevent that war. Navy Minister Oikawa testified to this effect (T. 29004), and so did Tanaka (T. 29413). This action supports Kido's opinion that Hata did not belong to the military clique. (T. 31236) Had Hata's advice been followed, the Pacific War would not have broken out.

For the reason that it has not been established beyond reasonable doubt that Hata Shunroku is guilty of any of the charges brought against him, he should be acquitted.

HIROTA

Hirota is charged with, and in the majority judgment has been found guilty of, conventional war crimes and crimes against peace.

As for the conventional war crimes, it may be stated at the outset that he should, without any doubt, be acquitted of these charges. The reasons for this acquittal will be set out below.

As for the crimes against peace, it has to be realized that Hirota is charged with, and condemned for, two different activities, viz., conspiring to wage war in order to establish the New Order, and waging war in China. In the majority judgment, Hirota has been found guilty, over and over again, of creating, or in any case guiding, the foreign policy as formulated in the Basic Policy Decision of August 11, 1936. This foreign policy has been construed by the Tribunal to constitute military aggression from the very start.

In the general observations on the facts, it has been shown that this interpretation is not quite correct. From the text of the secret decision, it is apparent that Japan did not plan the domination of East Asia by means of aggressive war. Consequently, both criminal conspiracy and concrete planning to wage a real war of aggression lose all relevance. The policy makers of 1936 and later had in mind other roads to the domination of East Asia. They realized that Japan had to be strong lest other powers should react with armed force

against Japan's "peaceful" expansion. It has been shown that the critical moment when the policy turned to the use of armed force as a means of achieving the domination of East Asia, occurred in the later days of 1940, specifically on September 19, 1940.

The Judgment, in its general phases, concludes that the 1936 statements of National Policy "reveal an intention of attacking the Soviet Union with the object of seizing part of its territories" (p. 783). Elsewhere, the Judgment had already stated with regard to this August 11, 1936, decision: "The fundamental aim was... the establishment of a steady footing on the Asiatic Continent, and the domination of East Asia through military power" (p. 167).

This interpretation appears to be incorrect. In the individual verdict on Hirota, the Judgment reads: "In 1936, his cabinet formulated and adopted the national policy of expansion in East Asia and the Southern Areas. This policy of far-reaching effect was eventually to lead to the war between Japan and the Western Powers in 1941". Here, it seems to me, the decision of August 11, 1936, has been assessed correctly. It was a fateful decision. It is now realized in retrospect that, given that policy, war was inevitable, because on the road mapped out in this decision there was bound to occur a point where other Japanese would take over and proceed in a different direction, the direction of war.

The 1936 policy was certain to evoke reactions in the Western Powers. That he would no longer be able to maintain "the gradual and powerful way" in the days of this reaction--which as matter of course was to provoke a counter-reaction in Japan--Hirota apparently did not foresee. He resigned even before this crucial point had definitely arrived.

His was a miscalculation of his own power. Hirota did not realize before the event that he would not be able to retain command of the evil spirits he was evoking by his policy. When this fatal turn materialized, he disappeared into the obscurity of a "senior statesman" who vainly warned that Japan was rushing toward disaster.

However fateful for Japan this policy of 1936 may have been, it does not come under the concept of the crime against peace as mentioned in the Charter.

Hirota is also charged with crimes against peace, especially in relation with China. In the majority Judgment, it is expressed that he was instrumental in extending the war against Chiang Kai-shek. This point will be discussed below. Attention may here be drawn to the fact that the two foregoing charges are related. In case Hirota is regarded as a Foreign Minister who supported the war against China, there will be a tendency to interpret the basic policy decision of 1936 from that point of view. If one accepts that Hirota, having failed to realize his designs on China by means short of war, whole-heartedly supported force of arms to

reach his goal in China, one will be inclined to read the same attitude in the 1936 decisions, namely, an attempt to accomplish the New Order by means short of war, and preparedness to establish the New Order by means of aggressive war if necessary. Such is the interpretation given in the majority Judgment, which interpretation, however, is untenable in view of the gradual development toward a policy of armed force, as indicated in the 1940 and 1941 decisions.

Throughout the years when he was Foreign Minister and Premier--between September 14, 1933, and May 29, 1938, except for about four months in 1937--Hirota was the outstanding advocate of the policy of appeasing the militarists by cooperating with them. This cooperation consisted in adopting their ends, the New Order, but not their means, aggressive war. There may be solid reason to denounce this policy on the grounds of political immorality. Nonetheless, it has to be stressed here again that the Tribunal should avoid the creation of more legal crimes than are formulated in the Charter. Economic aggression, ideological aggression, aggression through propaganda and subversive activity, aggression through a fifth column, and through provocation of internal dissension--even if any of these methods has proved quite as effective as its military counterpart--are not, at present, considered crimes under existing international law.

It is not a crime to create a powerful army in order to strengthen one's position at the conference table, nor is it a crime to keep such an army in reserve when formulating any of the abovementioned policies.

The steps Hirota took, however fateful they may have been for the future of Japan and of the world, did not come within the scope of the concrete planning of aggressive wars. In retrospect, those steps may appear to have been conditions sine qua non for the later developments towards aggression. He did, however, not take those later steps which gave a twist to the policy he supported. There is evidence to show that he opposed these steps in every single case where he, in the minor position he held after his resignation as Foreign Minister, was called upon to express his opinion on Japan's foreign policy.

Some doubt may remain with regard to the role Hirota played with respect to China after the Marco Polo Bridge incident. Before that incident he had shown himself to be a supporter of amelioration of Sino-Japanese relations. Chiang Kai-shek had declared himself agreeable to his three principles, on which these relations were to be built.

Between 1935 and 1937, Sino-Japanese relations underwent a change. From documents produced in this trial one can conclude that Japan aimed at securing special relations with North China. From these documents, however, it appears that Japan realized that the methods

applied to Manchuria should not be repeated. The purpose was to induce the Nanking Government to recognize the special status of the Five Northern provinces.

Probably as a reaction on these Japanese schemes, the attitude of the Chinese government changed. China was perfectly justified in resisting this Japanese internal aggression. It has not been clarified in this trial to what extent the Sian Incident influenced the change in the Chinese attitude. However, there are indications that after the Marco Polo Bridge incident had occurred, the Chinese government decided on resistance without any concession. We do not require in evidence a statement by Chiang Kai-shek to the effect that he had resolved to resist and to fight it out. An excerpt from a book by Chiang which would have substantiated this contention, was refused in evidence because it was offered not in the general, but in an individual case. (T. 30146). There is a long history of Japanese attempts to come to an understanding, and of belated, delayed, and evasive answers on the part of the Chinese. Trautman cabled to the German Foreign Minister on January 13, 1938, (Ex. 486B) with regard to a statement by the Chinese Foreign Minister: "it seemed to me that the wish for an understanding does not find expression in the statement."

Von Dirksen reported to his Government, on January 26, 1938, concerning German mediation: "from the fact that Marshal Chiang Kai-shek evaded a definitive discussion of the Japanese terms with Mr. Trautman and that the Chinese Ministerial Council has not occupied

itself in an official session with the Japanese terms and the explanation given to them by us, until within the last few days, it was clearly evident that on the part of the Chinese, there was no decision even merely to seriously examine the Japanese terms" (Ex. 486H).

One cannot blame the Chinese in the least for this attitude. It has been established that Japan started the Marco Polo Bridge incident. But it is also beyond doubt that Hirota was not involved in that incident, and did his utmost to put a stop to it.

To sum up the situation in its simplest form: The military clique organized an incident, or rather a series of incidents. The government in Tokyo at once tried to settle the issues locally. However, the Chinese government decided to fight it out, without making any further concessions. From a legal point of view, what is the position of a Foreign Minister, who is not responsible for the original incident, and who made efforts to prevent war, but who was faced with the fact that Chinese armies were moving, and that negotiations apparently were not conducted in a spirit of sincerity?

Hirota attempted to settle the incident at once. A settlement was reached on the spot on July 11, 1937, (T. 29685) and the matter was taken up with the Chinese Government at Nanking, (T. 29901) as well as with the Ambassador in Tokyo. (T. 29682). Hidaka discussed matters with the Foreign Office, opened personal negotiations with

Surely the attempt to reach a settlement shows that Hirota did not want a Sino-Japanese war, and that he did not conspire to initiate a war of aggression in China. During the negotiations, decisions were taken in Tokyo concerning mobilisation of some divisions. Chinese armies were on the march, and military authorities insisted that reinforcement of the Japanese garrison was necessary. (Decisions of July 20 and July 27).

On August 7, 1937, a plan for peace was drafted, approved, and forwarded to the Chinese authorities (Ex. 3260). The provisions of this peace proposal clearly show how eager the Japanese Government was to settle the incident. It contained, inter alia, the dissolution of the Eastern Nopoh regime, while the Japanese government undertook to assist in bringing that regime under the jurisdiction of the Nanking government. (Ex. 3280A). Hirota cabled that "the Army was very reluctant to agree but finally gave in" (Ex. 3280B).

At the same time, Hirota endeavoured to bring about general adjustment of Sino-Japanese relations, and transmitted the "Outline of the Plan for overall adjustment of Sino-Japanese Relations" to Nanking. He instructed the Ambassador, however, to the effect that the endeavours for a general adjustment should not delay the settlement of the actual dispute, and should only be brought up in case there was prospect of a quick agreement. (Ex. 3280B/4, T. 29942).

The difficulty of Hirota's position at home may be gauged by the fact that only a few leaders in the Army were informed of the terms. (Ex 3280D, T. 29935).

It has been proved in the course of this trial that Hirota personally sent Funatsu to China in order to work out a peace settlement, and to negotiate secretly with Kao Tsun-fu (Ex. 3275, T. 29916). Hirota also dispatched Arita to China for a similar purpose. (T. 29694)

Hirota continued his efforts to bring about peace. He was eager to obtain and use the good offices of other powers. He explained to Ambassador Grew the terms on which Japan was prepared to come to an agreement (Grew's affidavit, Ex. 3716B, T. 37005). The U.S. was unwilling to offer its good offices, unless requested to do so by both sides. Ambassador Craigie offered the British Government's good offices, which were immediately accepted by Hirota, who again explained Japan's proposals. The Army, however, raised objections against British mediation, and consequently Craigie's negotiations failed. (T. 29699). In these days, strong anti-British feelings existed in Japan, Hirota warned against these feelings, pointing out that Britain might provide the link through which Japan could hope to bring about peace. (Ex. 3784A, T. 37695).

The "Outline regarding the settlement of the China Affair" (Ex. 3262, T. 29771) of October 1, 1937 added some special conditions as to the former peace proposals, namely, recognition of Manchukuo and reparations.

As Hirota later stated to Grew, Japan's attitude might undergo a change, and her conditions might become stiffer, if hostilities were protracted and casualties continued to increase (November 16, 1937, Ex. 3284, T. 29956). This tendency became noticeable particularly after the fall of Nanking and thereafter. The fact that it became more and more clear that China was not very eager to come to an understanding contributed to the new policy under which all dealings with Chiang Kai-shek were broken off.

In the "Outline regarding the settlement of the China Incident" of December 24, 1937, (Ex. 3263, T. 29815) Japan's preparedness to come to an agreement with Chiang Kai-shek was still expressed.

At the Liaison Conference of January 14 and 15, 1938, it was decided, after a reply from the Chinese had been received which was regarded as evasive and deceptive, no longer to have any dealings with Chiang Kai-shek.

It is difficult to obtain a clear picture of the real intentions and relations of the parties who played a role in the Sino-Japanese tragedy. It is beyond doubt, however, that Hirota was opposed to war, and that he did his utmost to maintain, and, later, to restore peace. He failed, but it is known, from the statement in Grew's diary, (Ex. 3282, T. 29949) that Hirota's position in these years was not a powerful one, and that the civil government had little influence with the Services.

This much is clear that Hirota did not belong to that group in Japan which propagated and supported military aggression in order to establish the New Order. Hirota wanted that New Order established only in a gradual and peaceful manner.

In the Sino-Japanese conflict, he opposed the war. From the insufficient evidence laid before this Tribunal, one gains the impression that he was powerless to prevent those events he tried to forestall.

It has been proved that he participated in the government decisions not to deal any longer with Chiang Kai-shek. Even in case this should lead to the conclusion that he, as a member of the Japanese government, waged a war of aggression against China, the history of his role shows that, he did not belong to those arch-aggressors who are judged by this Tribunal to deserve the death penalty. There is, in this case, good reason, in view of the existing doubt about the essential relations during these years, to grant him the benefit of that doubt.

The following points may be mentioned in support of the view that Hirota did not hold with the powerful group in Japan, which propagated military aggression.

In 1936, he advocated a compromise with regard to the Washington Naval Treaty. He was opposed to a withdrawal from the Conference, and on account of it he even went so far as to consider his resignation (Harada Memoirs, T. 39646).

When, under Hirota's premiership, the law was reinstated which made it compulsory for war and navy ministers to be active service officers, Hirota expressed his opposition by asking: "Will this reform not lead to a situation in which those commanded to form the cabinet will find it difficult to appoint future war and navy ministers."

He never reentered a Cabinet after having resigned as Foreign Minister in the First Konoye cabinet. He never thereafter even assumed a government position. The trend in Japan's policy had taken a turn no longer supported by Hirota. When he was suggested for the Premiership in 1939 he declined, saying that he was "worried about the attitude of the army" (T. 38677).

It has been proved that Hirota was against the Tripartite Alliance (Arita's testimony, T. 30006, Yonai, T. 30018, Romer, T. 30034), and that he regarded Matsuoka's policy as "fatal to Japan." (Grew's diary, February 1, 1941, T. 30036).

At the meeting of the Senior Statesmen, on November 29, 1941, Hirota expressed his opposition to war by asking:

"Though the diplomatic crisis has a close relation to the strategic moment, why should we hastily rush into war immediately after being confronted with the crisis?" (T. 16187)

It is pointed out that a question thus framed is the usual way in which the Japanese express dissension.

One may be led to the conclusion that Hirota's policy in 1936, his attempt to take the wind out of the sails of the aggressors by adopting their ends, was fatal to Japan, and that it could never have led to anything but the growing influence of the militarists, and eventually to war.

Judging after the event, it is altogether too easy to reach such a conclusion. In 1934, Hirota realized, as he said in the Diet, that "The path of a rising nation is always strewn with problems." (Ex. 3237) He made fatal errors in trying to solve these problems. It is not proved beyond reasonable doubt that he committed crimes in doing so.

Hirota is charged with responsibility for the conventional war crimes mentioned in Counts 45, 46, 47, namely, the atrocities committed in Nanking (1937-1938), Canton (1938) and Hankow (1938).

As for Canton, the prosecution did not bring evidence related with atrocities committed in 1938. Witnesses Wong Shi-liang (Ex. 350, T. 4648) and Lin Chi-yuan (Ex. 351, T. 4650) testified about atrocities which occurred in Kwantung province in 1941 and 1944 respectively.

As regards Hankow, the only evidence laid before this Tribunal is contained in the testimony of A. A. Dorrance, who saw the Japanese, after the capture of the city, collect several hundred Chinese soldiers, and drive them, 3 or 4 at a time, down a

appeared. (T. 3391). The defense produced more than ten witnesses to prove that Japanese conduct in the entry and occupation of Hankow was quite correct. Even when accepting that the events occurred as told by the one prosecution witness, this would only mean that on a certain day, certain atrocities occurred in Hankow, of which the Japanese Foreign Minister certainly had no knowledge whatsoever, and could have had no knowledge, while he certainly could not have prevented these atrocities. It is beyond any doubt that Hirota should be acquitted of the charges brought against him in Counts 46 and 47.

The question is whether Hirota, as Foreign Minister, should be held responsible for the atrocities in Nanking, collectively known as "The Rape of Nanking." It has been proved beyond any doubt that after the capture of Nanking, massacres, mass rape, general looting, and wanton destruction of property occurred. The foreign residents of Nanking, who had organized a safety zone and made every effort to save the young men from being shot, and the women from being raped, protested on the basis of their observations and experiences. I.T.C. Smythe, Secretary of the International Committee for the Safety Zone, filed two protests a day for the first six weeks. (T. 4457) According to Dr. Bates, the reign of terror was intense for two and a half to three weeks, and was

serious six to seven weeks following the fall of the city. (T. 2538) Witness Hsu estimated the period of the "rape" at three months. (T. 2584.)

There is evidence that the Japanese Embassy Staff tried to assist the foreigners in their endeavors to stop the atrocities, but they proved more or less helpless (McCallum, T. 4473). A Japanese Embassy official reported to the Committee that the Japanese military were "determined to make it bad for Nanking but the Embassy people were going to try to moderate that action." (T. 4587) The Reverend Boynton of the National Christian Council stated to the British Ambassador at Shanghai "that the Japanese Embassy officials who reached Nanking shortly after the entry of the Japanese troops were horrified when they saw the orgy of drunkenness, murder, rape and robbery which was going on openly in and around the refugee zone. Failing to make any impression on the military Commander, whose attitude of callous indifference makes it probable that the army was deliberately turned loose on the city as a punitive measure, and despairing of getting cables through to Tokyo owing to army control, Embassy officials even suggested to the missionaries that the latter should try and get publicity in Japan so that the Japanese government would be forced by public opinion to curb the army." (R. 4559-4560).

The reports which were sent to the Japanese Embassy at Nanking were forwarded to the Foreign Minister in Tokyo. (Defense witness Hidake, T. 21453).

They were received in Tokyo in two lots (Ishii, T. 29974), and the Foreign Office immediately informed the Chief of the Military Staff Bureau of their contents. The Foreign Minister personally informed War Minister Sugiyama on one or two occasions, but Hirota did not bring the question before the Cabinet because "it was not in a position to deal with questions regarding the military in the field." (Ishii, T. 29992). Shiono, the Minister of Justice, accordingly stated that the cabinet was not informed about the atrocities in China. (T. 30538) Kaya, the Finance Minister, (T. 30640) and Kido, the Minister of Education (T. 30841)¹ testified to the same effect.

¹ Later on, in the middle of February 1938, after the events concerned, the matter was discussed in the House of Peers, where Baron Okura said: "I find various distasteful things written about the actions of the Japanese forces in the Nanking and Shanghai areas." Kido replied: "I have also heard about the reports concerning the actions of Japanese troops in Shanghai which was referred to and just as Baron Okura said, I too, do not think that they are all absolutely true. However, on the other hand, it is a fact that there are quite a number of such reports from other sources." (Ex. 3737A, T. 37285). The Japan Times and Mail of February 18, 1938 reported this discussion in the House of Peers (Ex. 3342A, T. 31517).

The witness Ishii testified that the War Minister promised Hirota to act immediately, and to issue a strong warning (T. 29975). Accordingly, Hirota assured Ambassador Grew that "the strictest possible instructions had gone out from the General Headquarters to be handed down to all Commanders in China to the effect that these depredations must cease and that Major General Homma had been sent to Nanking to investigate and to insure compliance." (T, 3000).

That this activity had some results is shown by the fact that Matsui, the Commander-in-Chief, was recalled and that with him about eighty Staff Officers were sent back, one of whom was Prince Asaka; the Meiji Emperor's son-in-law, who, ten days before the fall of Nanking, had taken over command of the Army which occupied the city. (T. 3457-3461) It was denied, however, that this mass recall was a disciplinary matter.

In view of the above, Hirota should not be held responsible for the atrocities. The question is whether he neglected his duty to act in connection with these horrible events. The evidence shows that he did act, and that he personally approached the one member of the Government who was directly involved, the War Minister. The latter promised to take action, namely, to issue a warning and to dispatch an Officer for inquiries on the spot. That it took quite some time before these steps showed any result, is not Hirota's fault.

the Yangtze, where they were shot at when their heads

He did what a Foreign Minister is expected to do, who receives complaints about the conduct of the Army, viz., he informed the War Minister. The fact that he did this personally shows that he considered the issue of great importance. In view of the policy of the Government at the time--the policy of securing cooperation from the Chinese people, even if hostilities with the Chinese Government could not be avoided--it is readily understood that events such as the "Rape of Nanking" defied every wish of the Government. If only for this reason, one can understand that Foreign Office officials in general, including the Foreign Minister, were gravely concerned about the events at Nanking, and tried to put a stop to them. Evidence brought in this trial shows that it was far from easy for a Foreign Minister to deal with the military. Shigemitsu, in later years, complained about this to Kido. (T. 31106) Hirota had a conversation with Ambassador Grew on September 20, 1937, whereupon Grew noted in his diary that the civil government had very little influence with the Services (Ex. 3282, T. 29949). The peculiar structure in Japan, where the armed forces possessed an independent position, made it the more difficult for the government to interfere in Army affairs.

In the Majority Judgment, Hirota is found guilty of criminal neglect of duty "in not insisting before the Cabinet that immediate action be taken to put an end to
y other action open to him to

bring about the same result. He was content to rely on assurances which he knew were not being implemented..."

There has, however, been brought no evidence before this Tribunal to ascertain the time Hirota was informed that his demarche with the War Minister had remained without result. There is evidence, as given above, that Foreign office personnel in Nanking were "despairing of getting cables through to Tokyo owing to army control". (T. 4559) The dispatches of the Japanese Embassy in Nanking were received in Tokyo in two lots (Ishii T. 29974). Exactly when the second lot was received in Tokyo—from which Hirota could have concluded that no sufficient action had been taken—we do not know. That Army authorities keenly resented that the foreigners made every effort to inform the world about conditions and events in Nanking appears from an address by the new Garrison Commander. (T. 4588)

One can easily imagine that, in those circumstances, Army censorship prevented Hirota from being informed in due time that the "Barrage of Nanking" was still continuing.

For the above reasons, Hirota should not be convicted in connection with events in Nanking.

Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the Army in the field.

Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for "omissions." Considerations of both law and policy, of both justice and expediency indicate that this responsibility should only be recognized in a very restricted sense. A very strict line

should here be drawn also for reasons other than that those principles are being applied with regard to conventional war crimes for the first time since this last war.

In view of the above Hirota should be acquitted of the charges brought against him in Counts 45, 46 and 47, as well as of the charges contained in Counts 54 and 55.

Hirota Koki should be acquitted of all charges brought against him. He should be acquitted of the charges of Counts 54 and 55 for the reason that it has been proved that he was not guilty. He should be acquitted of the charge on Count 1 for the reason that it has been established that he is not guilty of having conspired to wage wars of aggression. He should be acquitted of the charge of waging a war of aggression against China, (Count 27), because it is not beyond reasonable doubt that he was guilty of this crime. In case he is found guilty of the crime of waging war, he should not be punished with the supreme penalty-- even if we accept the norm which the Majority of the Tribunal applied, i.e., only those accused who were the principal guides on the road to aggressive wars should be sentenced to death--especially so with regard to the circumstances in which he acted.

KIDO

Kido is not charged with anything that occurred before he entered the First Konoye Cabinet, on October 22, 1937. The prosecution stated: "We do not suggest that during this period (until 1937) he was a member of the conspiracy." Consequently, the prosecution submitted that it abandoned count 19 as far as Kido was concerned, "because the actual initiation took place before he joined the conspiracy." (T. 41128).

As Education Minister and Welfare Minister in the First Konoye Cabinet, and as Home Minister in the Hirokuma Cabinet, Kido is charged with waging an aggressive war against China. This war had started with the Marco Polo Bridge incident, and developed despite the wishes, and attempts to localize it, of the Government. The Marco Polo Bridge incident is the first example of independent action by the Army, which it was sought to prevent in the Five Ministers Conference of Aug. 11, 1936, when the Services and the civil ministers agreed that the armed forces should abstain from such actions, and confine themselves to support of the government policy.

Notwithstanding the large amount of evidence laid before this Tribunal with regard to the "China Affair," it is not quite clear which role was played by individual cabinet members. Neither the involved relations in Japan, nor the complicated events abroad have been sufficiently clarified to place responsibility, beyond reasonable doubt, on Kido.

There is, as in the case of Hirota, sufficient doubt about the intentions of Kido, and about his share in support of peace or promotion of war. Here, too, the accused should have the benefit of the doubt as to whether he promoted the war which had started before his entry in the Cabinet, or did his best to settle the incident.

In counts 45-50 Kido is charged with murder, by ordering, causing or permitting the slaughter of inhabitants of certain cities. There has been laid before this Tribunal neither evidence that Kido had knowledge of these events at the moment they occurred, nor that he, as Education, Welfare or Home Minister, had the power and duty to prevent them.

A special charge is brought against Kido for his part in the creation of the IRAA, the national unity party, which, according to Konoye's plan, was to replace the two former political parties (Kido's diary, May 26, 1940, T. 16247). Kido submitted that the ultimate aim of Konoye was to strengthen the Premier against the militarists. (T. 30894). There has been ample evidence in this trial of the corruption of the political parties, and their weak positions with regard to the militarists as result of their internal division. Konoye did not belong to either of them. The reason given by Kido, although not clearly supported in his diary or by other evidence, may be the correct one, or this reason may at least have been one of the leading motives. It is known that Kido was a man who considered himself a devoted follower of Konoye.

In the diary entry of May 26, 1940, a discussion with Konoye about the IRAA is related. Nothing is found in this recording which indicates a scheme to oppose the militarists. One of the decisions is: "The desires of the Army and Navy concerning national defense, foreign affairs, and finance shall be considered." (T. 16243). This does, however, not imply that Konoye and Kido were prepared to follow the army in its every wish in those fields. That those wishes would be "considered" seems a matter of course in view of the factual Japanese situation.

Considering all this, and with regard to the role which Kido played in the organization of the IRAA, there is no sufficient basis to put the case that Kido conspired to wage aggressive war on the ground of his relations with that movement.

The principal charge against Kido is related with either his acts or his failure to act during the period when he was Lord Keeper of the Privy Seal, and ex officio advisor to the Emperor of Japan.

In this relation, the position of the Emperor in Japan deserves attention. His was the position of a constitutional monarch. Tojo testified concerning this position as follows:

"Summing it up, the Emperor had no free choice from the governmental structure setting up the cabinet and the Supreme Command. He was not in a position to reject the recommendations and advice of the cabinet and the High Command. His wishes and hopes were necessarily assisted by the Lord Keeper, and even these hopes when expressed finally were to be scrutinized by the cabinet or the Supreme Command. Recommendations and suggestions after this careful examination had to be approved by the Emperor and never to be rejected." (T. 36383).

Kido testified that the Emperor could express his opinions to the cabinet, which would then act on its own responsibility. Once the Government takes a decision, "tradition, scrupulously observed since the Meiji Emperor, builder of modern Japan, dictates the Emperor to approve the government's decision where it is submitted to the Throne as national policy." (Kido, T. 30910).

That this statement is correct, is shown by other evidence laid before this Tribunal. When Abe was engaged in forming a cabinet, the Emperor instructed him that "diplomatic policy should follow the line of cooperation with Britain and the U.S." Kido advised Konoye to tell Abe that this was a matter which Abe could dispose of at his discretion. (Kido's diary, Aug. 28, 1939, T. 16240). From the same diary entry appears that Abe was quite embarrassed when he received this instruction from the Emperor as well as two other instructions, viz., to nominate either Umezumi or Hata as War Minister, and to be very careful in his selection of the Home and Justice Ministers, and that Konoye, when he heard about it, was perplexed. (T. 16241).

The accused Suzuki testified that, after the Ogikubi conference of October 12, 1941, he suggested to Konoye that the Emperor be consulted in order that he (the Emperor) express that he did not desire war. Konoye answered that to do this would require the concurrence of the War, Navy, and Foreign Ministers, and that, if that agreement could be obtained, it would do

longer be necessary to see the Emperor. (T. 35327).

There are several instances where the Emperor's views are in evidence (through Kido's diary and Harada's Memoirs) from which it appears that the Emperor disapproved of certain policies

and events, without being able to alter the course, or feeling justified in withholding the Imperial sanction, Kido was very anxious to prevent the Emperor from expressing again his disapproval of the Manchurian incident (diary, September 22, 1930, T. 1038). From the Harada Memoirs, it follows that the Emperor expressed his disapproval of the Army's intrigues and machinations in the Mukden and Marco Polo Bridge incidents, and rebuked Itagaki on account of the Army's abominable behavior in the Changkufeng incident. (T. 37757). The Emperor condemned Government policy with regard to French Indo-China, comparing the Army's activities with the practice of a thief at a fire. (Kido's diary, Feb. 3, 1941, T. 30919). The Emperor's attitude at the time of the appointment of Tojo as Prime Minister is clearly shown in his statement to Kido: "He who will not go into the Tiger's den will not get the Tiger cub." (Kido's diary, October 20, 1941, T. 10295).

There is in evidence one occasion on which the Emperor personally made an important decision: the Imperial Conference of August 14, 1945, at which the participants in the conference could not come to an agreement and, in view of the urgent situation, no time could be wasted in a resignation of the cabinet. In this situation, the Premier, Admiral Suzuki, requested the Emperor to render the decision, whereupon the Emperor decided upon surrender. (Togo, T. 35720).

The evidence in this trial does not warrant the statement of the prosecution that the Emperor would have been able to prevent the war by simply forbidding it, and that men such as

him should have advised him to do so. Legally and traditionally he was bound to follow the Government. This was stated clearly by Tojo:

"Cabinet decisions, as a matter of course, were made on the responsibility of the members of the cabinet and the decisions of the Supreme Command were made on the responsibility of the Members of the Supreme Command, and there was no space for any other person to interfere, and other people naturally includes the Lord keeper of the Privy Seal." (T. 36511).

From the limited power of the Emperor follows the limited power of his advisor.

This position of the Emperor, and that of his advisor, obtains special significance in relation with the fact that there existed powerful groups in Japan prepared to bring about revolution and civil war in case their aggressive wishes were not fulfilled. The military in Japan held a special position by virtue of the independence of the Supreme Command. But more important than that was the circumstance that the rightist groups in Army and Navy were prepared to use murder and revolt to influence the course of the national policy. Some of the accused in this trial carry heavy responsibility in relation with their arousing this spirit in the younger generation. In doing so they aroused spirits which they were not able later to keep in check, and they themselves - Araki and Hirayama, for instance - happened on occasion to become the objects of attempts on their lives when their policies no longer agreed with the plans of the younger officers. The position of the Emperor, too, was influenced by this situation. He was not only, as are other constitutional monarchs, bound

by the laws and customs of the country, but also by the fact that there was a constant possibility of attempt on his life or on the lives of members of his immediate environment.

Kido considered it his primary duty to prevent social unrest. In his advice to the Emperor, he recognized the powerful aggressive forces which were active in Japan as one of the elements on which he based his opinion. The prosecution attached to this attitude, stating: "Always he was prepared to let the military have their way and in later years at least to make it easy for them, rather than risk the possibility of revolution or civil war in Japan" (T. 41049), and "... he considered it his mission to guide the Emperor into a more sympathetic attitude towards the views of the Army and the right wing." (T. 41056). In relation with the Tripartite Alliance, the prosecution submitted that Kido was not so much concerned as to what kind of alliance was concluded with Germany so long as quarrels within Japan were avoided. (T. 41090). "His particular concern was always to avoid internal quarrels in Japan. He did not so much mind what they agreed upon as long as they agreed." (T. 16847). There is, indeed, convincing evidence on this point: during the Manchurian Affair, he advised that the Emperor remain silent (Diary, September 22, 1931, T. 1938); at the time of the conclusion of the Tripartite Alliance, his attitude was determined by considerations concerning the domestic situation (Diary, April 19, 1939, T. 16235); at the time of the Indo-China affair, denounced by the Emperor, Kido advised that the Emperor give his approval

"even though matters stand as they do" (Exh. 627, T. 6973 as corrected, T. 7029); at the time of Nomura's proposal to suggest that President Roosevelt cable a peace message to the Emperor, fear of civil war dominated his attitude. (Togo T. 35805).

Kido was prepared to yield to the aggressive group, if he considered this necessary to prevent unrest. Politically, he belonged to the group in which Konoye was the outstanding figure - the group which formulated the New Order as the official policy, aiming at the greatness of Japan and the domination of East Asia, which aims were to be achieved by any means short of war.

It was this policy, which had provided ^{a basis} for cooperation with the militarists, for it required a strong Japan. The leaders of this group realized that, in international negotiations, the weight of an argument is determined by the power behind it. This does not per se mean that they conspired to wage an aggressive war.

Kido belonged, as Konoye, to the circle around Prince Sayonji. It has been proved that in later years he did not always follow the Prince's advice, and even that he prevented the Prince from giving advice. Herada reproached Kido and Konoye for having persuaded the Emperor to agree to the Tripartite Alliance, and for having concealed this from Sayonji. (U. 37530). Kido stated in court that he advised the Emperor to give his consent in view of the possibility to prevent a

Japan so-American war through this alliance.

There is no doubt that Kido strongly supported the concept of a New Order in East Asia. The entry in his diary of April 19, 1941, shows that he agreed with Konoye as to the negotiations with the U. S. being restricted by the necessity of maintaining good faith towards the Germans, and by precluding any interference with the establishment of the New Order, the Greater East Asia Co-Prosperity Sphere, "which is our fixed national policy." (Ex. 1065, T. 9875). But, as stated above, the policy of establishing the New Order comes within the scope of crimes against peace only in case the aim is pursued through an aggressive war. There is no sufficient evidence that Kido supported aggression in that sense.

Of special significance is Kido's activity during the Third Konoye Cabinet, and his role in the selection of Tojo as Konoye's successor.

As stated, Kido considered himself a follower of Konoye. As Konoye, he changed in his opinions under influence of the cooperation with the militarists into an attitude apparently almost prepared to start war for the cause of the New Order. In this Konoye had gone further than Hirota, and Kido followed Konoye in this development.

In the diary entry of August 2, 1941, it is shown that Kido objected against "a hasty decision to go to war now." He realized at that time that if Konoye should resign after

having failed to secure an agreement, "the Army and Navy would then assume charge of the administration of the country." (Ex. 1129, T. 10196). This appears to be exactly what happened later on Kido's recommendation.

Kido's opinion in those days is clearly shown in his diary entry of August 7, 1941. He realized - arguing on the level of the militarists - that Japan would not be able to win a war with the U. S. in view of the oil situation. Therefore, he concluded that Japan had to give in, and that the same situation would arise as when the Three Powers intervened

after the Sino-Japanese war, in other words, that Japan would have to wait. "Our ultimate objective is Japan's advance to the Southern Regions," and in order to attain this object, a ten-year plan was mapped out, providing for heavy industry, synthetic oil and shipping (Exh. 1130, T. 10193). This opinion is apparently based on Nagano's advice to the Emperor, related in Kido's diary entry of July 30, 1941, in which it is reported that the Emperor communicated to Kido that, according to Nagano, there would be oil sufficient to last a year and a half only, and "that it was doubtful whether or not we would ever win." (T. 10184). The same opinion that Japan should wait 10 years, is again expressed in the entry for October 9, 1941 (T. 10241). Kido thus advised Konoyo. Now, the prosecution submitted that it was "the advice of a man who fully shares the aims of the militarists but not their confidence in immediate success." (T. 41105). It need not be repeated that it is not the aim in this case -- the domination of East Asia -- which constitutes the crime, but only the aggressive war as a means to achieve that aim. This was more correctly realized by the prosecution at an earlier date, when it stated: "If Kido had resigned after this advice was rejected we might not have included him." (T. 16852). One could, perhaps, sustain the view that the advice to spend 10 or 15 years of hardship in preparing for a better chance (entry of October 1941, T. 11139) also comes under conspiracy to wage an aggressive war. However, such planning would be too vague, too remote, and insufficiently concrete to be regarded as a criminal conspiracy to wage an aggressive war.

war.¹⁾

Kido's opposition to the war is clearly shown at the time of the Imperial Conference of September 6. Kido advised the Emperor to give a solemn warning that every effort should be made to bring about an agreement. (T. 31420).

In the entry of October 12, 1941, Tomita's account of the Five Ministers Conference at Ogikubo is related (Exh. 1147, T. 10246), when Navy Minister Oikawa stated: "If our advice is the restoration of friendly relations by diplomatic negotiations we must do it thoroughly," which, according to Kido, means: "even making considerable concessions." (T. 30968). To such a suggestion Tojo was opposed, insisting: "We should not change our policy of stationing troops in China or the other policies connected with it; we should not entertain anything that might affect the result of the China incident." Apparently, Navy Minister Oikawa referred here to the suggestion of Hata to withdraw all forces from China (T. 29004, T. 29413) and Tojo at once approved that suggestion.

1. This view conforms with the Nuremberg Judgment, as upheld by the U. N. decision, "The conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action." "The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan." (Judgment, p. 43).

Despite all this, Kido recommended Tojo, and was instrumental in arranging his premiership. The diary indicates that the internal situation was such that only a strong army man would be able to make the Army accept a fundamental agreement with the U. S. based on Japanese concessions. Consequently, it was necessary to have as Premier a personality willing to make the concessions, and at the same time able to restrain the army. Tojo had declared himself prepared to continue negotiations and to make concessions. Looking back upon it now, one has reason to doubt his sincerity, but at the pertinent moment he at least appeared as fulfilling the first condition. About the second condition, there was no doubt. On these grounds, Tojo was recommended by Kido. "After careful consideration I believe this to be the only way of giving a new turn to the situation and had thus recommended it." (Diary Oct. 20, 1941, T.10295). That the Emperor understood both the nature of this recommendation and the danger involved, is shown by his remark: "He who will not go into the Tiger's den will not get the Tiger cub." (T. 10295) One may qualify this activity as that of a gambler. But guilty of the crime against peace are those who conspire to steer government policy in the direction of war, not those who gamble and take risks in their attempts to give this policy another turn. That Kido opposed Ugaki as successor to Konoye on the ground that it would be extremely difficult for General Ugaki to restrain the militarists (T. 31014), shows his anxiety to prevent a revolution, to be

followed by war, in the event of an agreement having been reached.

Later, in November, Kido advised the Emperor to convene an Imperial Conference with the elder statesmen in case the Premier requested a final decision. (T.11143). Such advice could only mean the creation of a possibility to support opinion in favour of peace. As a matter of fact, the Council of the elder statesmen of Nov. 29, 1941, led to statements of practically all those present against war. It was here that Hirota wondered: "Though the diplomatic crisis has a close relation to the strategic moment, why should we hastily rush into war immediately after being confronted with the crisis," and where Wakatsuki clearly expressed that a country should fight, though foreseeing defeat, if it is necessary to fight for self-preservation or self-defense, but that it was dangerous to fight for ideals such as the Co-prosperity Sphere. (T. 16187-16192).¹⁾

It was at this time that Kido maintained a guard around his house, increased from 10 to 15 in daytime, and from 25 to 35 at night. Evidence has been laid before this Tribunal that he was regarded as pro-British and pro-American (T. 34908, T. 33920).

1. The majority judgment, in its Chapter on "The Pacific War," (p.975), gives a different interpretation to the statements of the elder statesmen, which different interpretation apparently is based on an incorrect appreciation of the Japanese way of expressing objections in the Imperial presence.

Kido's opposition to war shows itself during the war, when he supported peace practically from the outset. He discussed peace with the Emperor on February 5, 1942 (T. 31053, diary entry of Feb. 6, 1942, T. 31055), and on February 12 the Emperor told Kido that he had advised Tojo: "I presume that you are paying full attention so as not to miss the opportunity to terminate the war. It is not desirable for the sake of humanity and peace to have the war drag on needlessly, extending the ravages wrought by it." (T. 31056)

Kido discussed peace with Shigemitsu on April 11, 1942 (Diary, April 11, 1942, T. 31061). He talked to Yoshida Shigeru, the former Ambassador to England, about Konoye visiting Europe to pave the way for peace (Diary, June 11, 1942, T. 31065), with Matsudaira and Konoye (February 4, 1943, T. 31068), the Emperor (March 30, 1943, T. 31069), Shigemitsu (May 13, 1943, T. 31069), and Prince Takamatsu, whom he told that it would be hard "to reconcile the demands of the military with the terms of peace and that in such a case we should have to rely on the Prince's special assistance in solving the problem." (Diary, May 14, 1943, T. 31071).

One might feel that there is no particular merit in supporting peace the moment the chances of war became

unfavorable.¹⁾ But Kido proved that his activity for peace started earlier.

It is not pertinent to the case to mention Kido's peace efforts in the later war years. That he was known to hold these opinions for peace is shown by the fact that he had to hide in a vault in the night of August 14, 1945, when revolutionists, who opposed every thought of surrender, were looking for him and raided his house. (T. 31198).

In view of the above it seems incorrect to conclude that Kido was one of the group, which directed Japanese policy towards aggressive war. In his advice to the Emperor, his attitude often was the result of a choice between two evils, one of which was the risk of the assassination of pacifists, or civil war. In

1. Kido offered evidence to show that he supported peace endeavors from the very beginning (T. 38920). The objection from the prosecution, based on the ground that it was repetitive (T. 38919 0), was sustained by the Tribunal (T. 38921). Later the prosecution submitted that Kido's peace efforts did not commence until after the war developed unfavorably (T. 41124). Through the diary, however, Kido was able to prove some of the efforts for peace at the time when Japan was victorious on all fronts.

retrospect, he made fatal errors in judgment. It is probable that he could have done more for the prevention of war. But it seems premature to consider failure to act in relation with the crime against peace. As international law now stands, those should be regarded as guilty of the crime against peace who actively support, and bring about, the aggressive war, and not those who failed to sufficiently promote peace.

Kido should be acquitted of the charges concerning the crimes against peace, for the reason that it is not beyond reasonable doubt that he actively supported the conspiracy to wage an aggressive war.

Kido is charged with conventional war crimes. It has not been proved that this charge is substantiated as to his function of Minister of Education, Welfare, or Home Minister in 1938-1939. Neither has his knowledge before or during the events been proved nor his power and duty to intervene and forestall the atrocities.

Kido testified that Shigemitsu complained that the Army was difficult to deal with in connection with Allied protests. (T. 31106). The prosecution stated: "Nowhere does it even appear that he reported to the Emperor as he should have done." Kido claimed, however, that he sometimes did. The diary entry of March 31, 1942, shows that he discussed Eden's speech concerning atrocities in Hongkong. Kido testified that he reported this to the Emperor, and that, as a result, the Emperor consulted Tojo (T. 31059).

In view of Kido's position, seen in relation with existing Japanese laws concerning the authority and responsibility of the command, Kido should be acquitted

of the charges involving conventional war crimes.

Kido Krichi should be acquitted of all charges brought against him.

SHIGEMITSU

The evidence laid before this Tribunal reveals Shigemitsu as a diplomat and a statesman who worked for peace rather than for war. Before the Manchurian incident broke out, Shigemitsu, then Minister to China, and appointed as such by Shidehara, was instrumental in securing a peaceful settlement of existing conflicts and controversies. Plans made in August and September 1931 provided for a meeting of T. V. Soong, the President of the Executive Yuan, Count Uchida, the President of the South Manchurian Railway, and Chiang Hsueh-Liang, the Young Marshal. The meeting was to take place in Manchuria, and Shigemitsu was to assist in the conduct of negotiations on the spot (Exh. 3536, T. 34470). The outbreak of the Mukden incident prevented the execution of this plan. Shigemitsu deeply deplored the Manchurian affair. He expressed his views to Shidehara in a cable, sent soon after the Mukden incident, in which he stated:

"Deep is my feeling to see that whatever achievements in external affairs resultant of our untiring efforts have been all of a sudden reduced to nothing. I am profoundly distressed to think of the future of the nation." (T. 34477).

Shigemitsu was not at Shanghai at the time of the first Shanghai incident, but in Japan, where he gave a lecture before the Emperor. On this occasion, when questioned by the Emperor whether it was "not possible for the time being, to hope for an intimate friendship with China," he replied: "No friendship with China will be possible until the Manchurian Affair is settled

(Kido's diary, Jan. 21, 1932, T. 30754). Shigemitsu returned to Shanghai on Jan. 30, 1932, and worked for a truce, which was concluded on May 5, 1932.

There is certain evidence that his attitude was very critical of the military leaders responsible for the incident, and he warned the Government of the consequences of further reckless action, especially on the part of the Navy. In one of his cables to Shidehara, he stated:

"In this situation, it is most earnestly desired that arbitrary actions of the military should be interdicted so as to make the will of the State emanate solely through the channel of the government, that irresponsible and disadvantageous propaganda of the military circles should be stopped, and that, making its stand clear, the government should re-establish political leadership." (September 13, 1931, T. 34477).

It can safely be said that Shigemitsu fully supported the policy of the Foreign Minister of the time, Shidehara. He, Shigemitsu, should be acquitted of any charge relating to the Manchurian or the Shanghai incidents.

Shigemitsu is also charged in connection with the Chenkungfenz incident, which occurred while he was Ambassador to the U.S.S.R. As shown above, the events connected with this incident do not fall within the jurisdiction of this Tribunal. Moreover, the role played in this case by Shigemitsu does not by any means warrant a criminal charge. In this affair, Shigemitsu was merely acting as a mouthpiece, and on specific orders of his Government (Exn. 2633). The prosecution holds it against him that his negotiations with Litwinov were not conducted in good faith. The defense,

however, correctly submitted that it was the Ambassador's duty to rely on the information and instructions given to him by his government.

"No government could operate if its Ambassador was held responsible for the truth of the information supplied him by his government or the correctness of its contention or if he assumed to judge either." (Defense summation, T. 6326-7).

Shigemitsu was ordered by his government to negotiate the settlement of an incident, for the occurrence of which Shigemitsu was not responsible. He fulfilled his task in conformity with the wishes of his government, which was eager to prevent a war (testimony of Foreign Minister Uzeaki, Exh. 3715, T. 23871). There is no criminal aspect whatsoever in the part he played in this matter.

Shigemitsu should be acquitted of charges specified in Count 35.

Between 1936 and 1938, Shigemitsu was Ambassador to the U.S.S.R.; from 1938 until 1941, he was Ambassador to Great Britain. There is no evidence that, in the course of these years, he had anything to do with the outbreak of the China affair. On the contrary, in a conversation with the Under-Secretary of Foreign Affairs, he expressed his desire that an understanding be reached between the Nanking Government and the Chungking Government. (Telegram from Shigemitsu to Arita, March 23, 1940, Exh. 1016, T. 9674).

As Ambassador in London, Shigemitsu sent some telegrams to Arita, on which the prosecution bases its charge that Shigemitsu was involved in the conspiracy to wage aggressive war. In a

telegram dated May 13, 1940, i.e., three days after the invasion of the Low Countries, he advised to adhere to the old policy with regard to the South Seas: neither belligerent, nor neutral powers should interfere with the status quo. Japan, too, should declare her intention not to change the status quo. He regarded the conciliation of Wang and Chiang, or that of Chiang and Japan, as advantageous regardless of the conditions which either might entail. (Ex. 1017, T. 9683).

In a telegram dated May 25, 1940, Shigemitsu advocated that Japan undertake the responsibility for the stability of East Asia, whether she desired this role or not. He considered it advantageous to strengthen Japan's position in East Asia to some extent, in order to be able to take an active part in the future sphere of international politics. He felt it necessary "to conciliate with various parts or powers with reference to China problems." As positive steps, he recommended that measures be taken to realize Japan's desire for the withdrawal of troops from China by the belligerent powers. He further advocated that the declaration of the "three hundred-miles principle" be reconsidered. "Of course", he cabled, "it is more effective to take these measures by diplomatic procedure, rather than under the pressure of military side nor of public opinion." (Ex. 1018, T. 9688).

In a telegram of Arita dated June 19, 1940, Shigemitsu advised "to make use of the European war to strengthen the position of Japan in East Asia." If, after the collapse of France Australia should interfere in French Indo-China,

"Japan may grasp the opportunity to take positive activity."

In this telegram he further stated that "If the districts of East Asia and South Seas

... should be owned by a certain great power, Japan would be driven to dare the risk of war with that country." Therefore, it was considered necessary "to take courage to prevent it today." It is not clear which great Power he was referring to. The defense, on reasonable grounds, interprets it to mean Germany. The advice in this telegram "to take advantage of this opportunity to establish our position in East Asia firmly" does not prove criminal intent. (Exh. 1019, T. 9691).

The most ambiguous telegram is that of August 5, 1940, to the new Foreign Minister, Matsuoka. The fact that Shigemitsu congratulated Matsuoka on the establishment and enforcement of the Greater East Asia policy is no cause for wonder. Shigemitsu supported that policy. It had been the Japanese Government policy since 1936: The aim both of Hirota and Konoye was to achieve the New Order by "peaceful means". The importance of this telegram lies in the fact that Shigemitsu strongly advised not to conclude an alliance with Germany. He regarded it as "fundamentally essential to secure independence of policy." Further, he recommended, in order to establish Japan's position in Greater East Asia, that this policy be pursued at the expense of the weaker nations (such as France and Portugal) and thus maximum benefits be gained at a minimum loss, "avoiding conflict with other countries so as not to make many enemies at once, but to dispose of them one by one." Emphasizing that Britain and the U. S. already showed signs of retreat in the Far East, Shigemitsu expressed his opinion that obstructive measures (such as the embargoes) would be withdrawn if the Greater East Asia policy were carried out in a reasonable

and straightforward manner. He warned against tendencies in Japan to draw this country into a war with the U. S. and Britain, and opined that to show a liberal attitude in a settlement of the China Affair would reveal not weakness but strength. "It would be undesirable," he said, "to adopt an attitude of supplication or subordination" (towards Germany), adding, " needless to say it is necessary to sweeten our relations with the Soviet Union and also to proceed with scrupulous consideration and prudence in our relations with Britain and America." (Exh. 1023, T. 9712).

If the contents of this telegram are quoted here rather extensively, it is because only from the whole appears the purport, namely, "to establish a powerful political and economic position in Greater East Asia" by means short of war, in fact, so "reasonable; fair and square" that the U. S. and Britain could find cause to discontinue their "obstructing" measures. Here again, the "gradual and peaceful manner" already adopted in 1936, is being advocated. The advice to deal with the weak nations one by one, in their moment of helplessness, may be interesting from an ethical viewpoint; but it is not pertinent to the criminal charge of conspiring to organize a war of aggression.

There is ample evidence that Shigemitsu tried to prevent the war between Japan and Britain. In vain he opposed the Tripartite Pact. In vain he endeavored to

nullify its consequences. He cooperated fully with the British Government in its plans to send a British mission to Japan, but these plans failed on account of the conclusion of the Tripartite Pact. (Affidavit of Lord Gwyer,

Exh. 3547, T. 34511). He supported Lord Hankey's visit to Japan, which, however, did not materialize for reasons beyond Shigemitsu's control. (T. 34513). In order to influence the bellicose Japanese Foreign Minister, Shigemitsu cooperated whole-heartedly in a plan to supply Matsuoka with data compiled by the British Government. (Affidavit of Lord Sempill, Exh. 3549, T. 34525, Aff. of Under-Secretary of Foreign Affairs, R. A. Butler, Exh. 3550, T. 34529; these data were laid before this Tribunal in Exh. 1062). The attempt to contact Matsuoka failed, but later Shigemitsu brought these data to Tokyo, where in February 1941, he was appointed as Ambassador to the Wang Ching-wei government in China. He reported verbally to Foreign Minister Toyoda that Great Britain would never be defeated and he stated that in his opinion:

"Japan should in no case be involved in any war, and that the negotiations then under way with the U.S. should by all means be brought to a successful end." (Aff. Toyoda, Exh. 3554, T. 34641).

The frame of mind in which Shigemitsu reported to the Emperor on the British attitude is reflected in an entry in Kido's diary (July 23, 1941):

"I was deeply impressed by the high spirit of Prime Minister Churchill." (T. 31218).

The evidence laid before this Tribunal concerning facts prior to 1943 does in no way warrant a conviction of conspiracy to wage aggressive wars.

Shigemitsu entered the Tojo Cabinet in April 1943 as Foreign Minister, and retained that post in the Koiso Cabinet until its resignation on April 17, 1945. In considering the case of one who had no part in the events which contributed to the outbreak of an aggressive war, the question arises as to whether the fact of his entering a cabinet post during the course of war, thus begun, necessarily leads to the conclusion that he thereby waged that aggressive war. It goes without saying that a Foreign Minister is fully familiar with the circumstances which have led up to a war. Naturally, there is no doubt that Shigemitsu knew of the aggressive nature of this war.

However, the war was already in progress at the time he entered the cabinet. The war was an aggressive policy already established.

Now, the prosecution has stated:

"No man has been charged in this proceeding because of any act committed or any statement made by him in the course of his official duties pursuant to an already established policy if those matters were his only connection with that aggressive policy." (T. 40539).

The defense is eager to read in this not only a statement of fact but a norm to be applied under all circumstances. It is beyond question that the greatest responsibility with regard to crimes against peace devolves on acts committed before wars are declared. The internal forces striving towards a war are by far more guilty than those individuals who, entering upon the scene, after the outbreak of hostilities, carry out a previously established policy. As regards crimes against peace, the paradoxical truth of the matter is that the planning of such crimes is more criminal than the crimes themselves.

Although the above statement of the prosecution cannot be accepted as a general norm of law, it is beyond doubt that not everyone who acts pursuant to an already established criminal war policy is guilty of the crime against peace. The intentions with which acts are committed have an important bearing on the issue. If one has entered a War Cabinet, such as the Tojo or Koiso Cabinets, with the intention of promoting peace, and of bringing to a speedy end the war already in progress, one cannot be said to have waged that aggressive war. This war was planned and initiated by individuals, but once started, it assumed an impersonal existence of its own. However, those individuals who after the outbreak of war are appointed to public functions in the war machine but who actively support the aggressive policy which prolongs the war, such individuals may be guilty of the crime of waging war. But he who assumes public office in order to oppose that war, who accepts his appointment in order to promote peace, cannot and should not be accused of waging an aggressive war.

Although admitting that there may be grounds for mitigation of punishment in the case of a person entering a War-Cabinet in order to end the war as soon as possible, it is contended in the majority judgment that the mere fact of entering such a Cabinet in the capacity of Foreign Minister, as Shigemitsu did in 1943, is per se a crime. It seems that this ¹ view is incorrect and untenable. It would compel statesmen,

1. According to the Nuremberg Judgment the mere fact of having been a member of a Cabinet while a war of aggression was in progress does not lead to the conclusion that one did wage that war of aggression. Speer, who assumed the post of Reich Minister for Armaments and Munitions on September 2, 1943, was not found guilty of having waged aggressive war.

who desire to work for peace, to abstain from holding positions in which they could achieve their desire. It would, in any war, prevent anybody from joining his government, unless he supported the war whole-heartedly. To enter a cabinet, and to assume an office through which one obtains the power necessary to be able to work for peace, is a duty rather than a crime. This Tribunal should unequivocally establish the rule that he who enters his government to work for peace cannot be said to wage the aggressive war in which his government is involved.

The accused Shigemitsu chose not to take the stand as a witness. Consequently, the Tribunal does not have in evidence his motive for entering the Cabinet as it does in the case with the accused Togo. It would, however, be incorrect to conclude from this refusal to appear as a witness that, for fear of prejudicing himself, the individual in question did not see his way to explaining his actions. This refusal may have been based on various grounds as, e.g., reluctance to be forced into a position where he might not be able to avoid implicating his co-defendants. Consequently, no conclusion whatsoever should be drawn from a refusal by the accused to appear as a witness.

From the evidence laid before this Tribunal concerning the attitude and the activities of the accused Shigemitsu before 1943, it clearly follows that he was opposed to a war of aggression and that he endeavored to prevent such a war.

The evidence concerning Shigemitsu's activities as Foreign Minister in the Tojo and Koiso Cabinets shows that he did his best to end the existing war as early as possible. He

approached the Swedish Minister, Bagge, for that purpose (T. 34561). He sought promotion of peace through Russian mediation (T. 34551). He discussed the possibilities of peace with Kido ever since the early days of his tenure of office (T. 31069), and reported on his efforts in this direction to the Emperor (T. 31107).

There are numerous indications that Shigemitsu entered the War-Cabinets with the purpose of achieving the conclusion of peace. If there is any doubt concerning his intentions, he should have the benefit of the doubt.

The point could be raised that, as early as April 30, 1943, an intelligent man would have been able to conclude from information available that Japan would lose the war. Japan had realized from the very start that it would lose a protracted war. She counted on Britain being defeated, and on the U. S. becoming disinterested within a short period. The Liaison Conference of November 11, 1941, had decided as a basic principle to defeat Britain first, "and then to deprive America of her will to continue the war." (Exh. 919). It became apparent in 1943 that this was a miscalculation, and that U. S. willingness to fight had only grown through initial defeats. It could be argued that there is no merit in endeavors for peace once a war is clearly doomed to failure. However, this argument does not hold good. Intentions to promote peace may be based on moral, or on legal considerations, or, they may be based on calculations made out of sheer self-interest. In both cases, it is the intention to promote peace which counts. When that intention exists in an individual assuming government function, the finding that he wages an aggressive war is precluded.

Shigemitsu is charged with conventional war crimes

in that he ordered, authorized, and permitted violations of the laws of war (Count 54) and that he deliberately and recklessly disregarded

his legal duty to take adequate steps to secure the observance and prevent breaches thereof (Count 55).

As Foreign Minister, Shigemitsui's connection with conventional war crimes amounted to the fact that his Department received the protests and complaints from the Allied Governments, and that the replies to these protests and complaints, as formulated by other authorities, were transmitted to the Allied Government through his Department. The prosecution stated that the contents of the replies which Shigemitsui passed on were not in accordance with what actually happened. The prosecution further contends that the sending of a reply containing statements which have been shown to be absolutely false "carries the imputation of intent on his part and guilty knowledge of the offenses which had been committed."

The President at the time reacted as follows:

"That would be clear if this could be shown to be pure fabrication on the part of the defendant Shigemitsui. But it is otherwise if he was passing on information he had obtained from others, his subordinates included". (T. 14824).

Evidence shows that it was the duty of the Foreign Office to forward the protests to the competent authorities. These authorities were supposed to make inquiries and forward information to the Foreign Ministry for onward transmission to the Allied Governments. The Foreign Ministry had no way of conducting independent investigations. Tanaka Ryukichi described the Foreign Ministry as "merely a post office which handled the communications". (T. 14,365) Ocajima, Chief of the POW Information Bureau (T. 27,871)

and Suzuki Tadakatsu, who handled the complaints, have both given testimony to the same effect. (T. 3898, T.33789).

Kudo, who dealt with the complaints before October 31, 1942 testified:

"The Foreign Ministry having no means of investigation, they could only believe the reports." (T. 27148).

This evidence is borne out by the documents containing the pertinent regulations. The authority to investigate POW affairs was given to the Director of the POW Information Bureau (Exh. 1965A, T. 14440). The regulations concerning the treatment of POW were drafted and issued by the War Minister (e.g., Regulations for the Treatment of POW, War Ministry Notification 1904, as amended up to 1943, Exh. 1965A, T. 14447; Detailed Regulations for the Treatment of POW, War Ministry Notification, April 21, 1943, Exh. 1965A). POW matters were handled either by Commanding Officers in the field or in the War Ministry.

The position of the Foreign Minister in dealing with the protests and complaints was a very delicate one. It is not unreasonable to regard complaints from an enemy country with a certain amount of doubt, inasmuch as such protests and complaint may form part of war propaganda, in which a tendency to exaggerate does exist. Even in this trial a charge of using poison gas was brought forward (Appendix D, Section 9). This charge, the prosecution did not even attempt to substantiate. It cannot be assumed that it is the Foreign Minister's duty to accept the truth of all protests made by the enemy and to distrust the information supplied by his own administration.

It is obvious that the very nature and contents of the complaints Shigemitsu received must have led him to suspect that many were based on facts. Shigemitsu, however, had to rely on the information given to him by the military. He complained to

Kido that the military were not easy to deal with regarding these matters (T. 31106), and on some occasions personally approached the War Minister on this subject. (Suzuki Tadakatsu, T. 38791). He brought up the POW question in the Supreme Council for the Direction of War. (T. 38793).

In his replies to the allies he had to refuse almost every request they made to have POW camps visited by Red Cross representatives or neutral observers. But it was not within the power of the Foreign Minister to grant or refuse such requests. He could only communicate what the War Minister or the Supreme Command had decided.

It is beyond any doubt that Shigemitsu should be acquitted of the charge brought against him in Count 54. He neither ordered, authorized, or permitted violations of the laws of war.

As the domestic law of Japan did not even invest the Foreign Minister with the authority or the faculty to probe and investigate, which powers are essential in order to assume certain responsibilities, it is impossible to seek conviction on Count 55, namely, the deliberate and reckless disregard of legal duty. One may regret that, notwithstanding the provision in the Hague Rules that POW shall be in the power of the government, the national law in Japan assigned the care of POW exclusively to the War and Navy Ministries, and to the Commanders in the field. As this was the law, however, and in view of the fact that Shigemitsu is not responsible for that law, he, as Foreign Minister, should be

acquitted of the charges brought against him in counts 54 and 55.

Summarizing, the accused Shigemitsu Mamoru should be acquitted of all charges brought against him,¹

- 1 The Tribunal, having on one hand explicitly adopted the view that the crime of waging a war of aggression is of such magnitude that it contains within itself the evils of the illegal killings—for which reason the murder charges in Counts 37 to 41 were disregarded—has, on the other, sentenced Shigemitsu, who was found guilty not only of the crime of waging an aggressive war, but also of conventional war crimes, to a mere seven years. This is self-contradictory. He who has truly conventional war crimes, should, according to the very standards adopted in the majority judgment, receive a far more severe sentence.

TOGO

The Chief Prosecutor submitted to the Tribunal that, subject to the reservation concerning the Nomonhan incident, the prosecution "asks conviction of the accused Togo for his actions beginning with the assumption of duties in the Taj Cabinet." (T. 35347) This reservation, viz. "his conduct as Ambassador to the U.S.S.R. in 1939 and "whatever criminal conduct may be found to exist by virtue "thereof in reference to the Nomonhan incident," can be disregarded here if only for the reason that the Nomonhan incident does not even within the jurisdiction of this Tribunal.

However, it does not seem correct to disregard the aforesaid preceding Togo's acceptance of the post of Foreign Minister in the Taj Cabinet. It is pertinent to the case to notice that, in the years before 1941, Togo not only did not cooperate with the advocates of aggression, but actively supported a peaceful foreign policy. An understanding of Togo's attitude before 1941 is essential in order to be able to judge his attitude thereafter. In this respect, the report he submitted to Foreign Minister Uchida, towards the middle of April 1933, when he was Director of the European-American Bureau is very much to his credit. (Ex. 3809A, T. 35372). In this report, in which as a matter of course the international situation as it existed at that moment was taken as point of departure, Togo was still critical of Japanese action in the Manchurian

incident, and he warned that such conduct should not be repeated. Parts of this report are quoted above, and those speak for themselves.

Tage testified that, although opposed to the Anti-Comintern Pact, he played an important role in the negotiations leading to its conclusion. (T. 35842). He claims to have accomplished that the

text be altered to read "unprovoked attack" instead of "attack."
(T. 35646).

It has been proved beyond doubt that Togo was opposed to the Tripartite Alliance. For that very reason, he was removed from Berlin and sent to Moscow. (T. 16225, 5917, 34912).

As Ambassador in Moscow he was recalled by Foreign Minister Matsuoka, together with a number of other diplomats who were considered to be opposed to Matsuoka's warlike policy.

The crucial question in Togo's case devolves on his entry in the Tojo Cabinet, and his staying in this cabinet at the time it decided for war. This presents a problem of law and a problem of fact.

To deal with the question of law, it is convenient to assume, for argument's sake, that the facts are as contended by Togo.

According to Togo he entered the Tojo Cabinet with the intention of doing his utmost to prevent a Pacific War, convinced that, if anything at all could be achieved, he was the man in the best position to achieve it. In entering the Cabinet, he realized, too, that his endeavors might fail, and that, if they did, he would render a distinct and considerable disservice to his country by resigning, for, by his resignation it would be revealed that difference of opinion existed as to the inevitability of the war. Moreover, he could only enter the cabinet on Tojo's conditions. He understood that a time limit had been set for negotiations. He had to choose between remaining outside the cabinet, and letting another, less capable or less willing, man conduct the negotiations, or of joining the cabinet in order to work for peace. However, if he failed, he would be compelled to remain in that cabinet lest he betray his country and its government. Besides, by remaining in the cabinet, he still retained the opportunity

to continue his work for peace.

Assuming that these are the facts, the question is whether a crime was committed under mitigating circumstances, or whether no crime was committed at all. Comparison with situations under domestic criminal law would readily suggest the former conclusion. In view of the special nature of the crime against peace, and of the special nature and requirements of international relations, one is inevitably drawn to the latter. To join a cabinet, or, in general, to assume a function with the purpose of promoting opportunities for peace is an international duty if one is especially qualified to do so. If it were to follow from the law that a crime is committed by staying on in a war-minded cabinet, then that law would be unrealistic and impractical. It would defeat its purpose, namely, the maintenance and promotion of peace. The crime against peace cannot be committed for the sake of peace. In the crime against peace, the decisive element is the intention of aggression. If, as the inevitable result of having occupied a position for the sake of promoting peace, one is forced to vote for war, one cannot be accused of aggressive intent.

The factual problem is very difficult and delicate. The prosecution has produced documents in which Togo is shown defending Japan's standpoint, denying its former aggressions, justifying its actions (e. g., conversation with Grew, Nov. 10, 1941, Exh. 2918, T, 25927). He explained to the Diet, after the war had started, why it was a justified war. One should, however, exercise a certain amount of caution when interpreting public statements made by politicians. In politics, there is as much warlike talk with peaceful intent as there is peaceful talk with warlike intent. Many are

the occasions when the statesman has to pay lip-service to institutions or concepts he intends to alter.

The position of Togo was a very difficult one indeed. He could not formulate or decide the conditions to be offered to the U.S. His opposition to the powerful consensus of opinion among army circles was such that Tanaka, during the months before Pearl Harbour, considered it necessary to protect him from the militarists who wished to dispose of him. (T. 35543). The Government in Tokyo decided up to what point concessions were to be made. In this respect, Togo actively worked for concessions and did, indeed, achieve some results. His proposals, as made to the U.S., were turned down by the U.S. Government, not because they contained nothing new, but because they were not considered sincere. Ballantine testified that Proposal . . . was not regarded with much interest because he was convinced, through intercepted messages, that "the representations made to us . . . were not being made in good faith." (T. 10916). It is not necessary to discuss here to what extent incorrectly decoded messages may have contributed to this attitude. No doubt there were elements in the Japanese Government which were not sincere. It is even probable that these elements deliberately deceived those elements which were sincere. No proof exists, however, that Togo attempted to deceive the U.S.

We know that Togo accepted the post of Foreign Minister on condition that the negotiations would be carried on, and that the army would make considerable concessions as to the stationing of troops in China, and as to other matters as well. (T. 35671, 25919). Togo at least appeared to be fully cooperative. He has testified that he expressed to Togo his change of attitude. (T. 36315).

At the Liaison Conference of Nov. 1 and 2, 1941, Togo, after considering for one day, agreed to war in case the negotiations failed. His agreement was based on assurance given by Tojo that, if U.S. showed a receptive attitude, Tojo, the Premier, would support him in his efforts to obtain yet more moderation by further modification to what were then the minimum conditions. Before agreeing to war, Togo considered resigning, but, after having been advised by Hirota not to resign lest someone might be appointed who would support an immediate war, he decided to remain. (T. 35696). Togo claims that, as the price of gaining his point, he had to agree to the Liaison Conference decision to go to war if negotiations failed. (T. 47977). One cannot say that this claim has been proved beyond doubt. Even the defense surmises that Togo voted for war at the fateful conference of December 1, 1941 because, after the Hull note of November 26, he sincerely and reasonably believed that this note forced upon Japan a war in self-defense. (T. 47977), and not because of the agreement made at the Liaison Conference of November 1 and 2.

There is, however, sufficient evidence to conduce one to believe Togo's submission. If there is any doubt about Togo's motives, the defendant should have the benefit of that doubt. In view of the events leading up to the conferences of November 1 and December 1, the accused Togo should not be convicted on the charge of initiating and waging an aggressive war.

Togo resigned in 1942 in connection with the creation of the Greater East Asia Ministry. This Ministry was created to guarantee that even those countries in the Greater East Asia Co-Prosperity Sphere, which had been granted independence, were to be

ruled by Japan. Admiral Suzuki Kantaro stated concerning Tojo's draft for the establishment of this Ministry; "This draft is not based upon the rules of righteousness, but on the rules of might." (Privy Council meeting, Oct. 20, 1942, T. 12093).

Tojo joined the Cabinet again on April 9, 1945, at the request of Prime Minister Suzuki Kantaro, who testified that he invited Tojo to join his cabinet because he felt that Tojo had opposed the war from the beginning. (T. 35590). Tojo entered this cabinet, as he testified, on condition that the cabinet would support him in his work for peace (T. 35779). This submission is borne out by the testimony of Suzuki (T. 35591), Sakonizu (T. 35605), and Okada (T. 37167). Tojo's attitude is further shown by his attempts towards peace as Foreign Minister, through the Swedish Minister Bagge whom he approached secretly two days after he assumed office (Testimony of Bagge, T. 34559), and through Hirota, whom he instructed to approach in strictest secrecy the Soviet Ambassador Malik (letter half of May, Tojo, T. 35783, Neguchi, T. 35383). Tojo discussed his plans for peace with the Emperor and achieved that the Supreme Council for the Direction of War convened without secretaries, in order to have the opportunity for a frank discussion on peace. On the 14th of May, the Supreme Council agreed on a speedy termination of the war (Tojo, T. 35782, Suzuki, T. 35592, Sakonizu, T. 35605). Tojo's activity at this council certainly deserves consideration, for it constituted a dangerous undertaking. Matsuura Yasunasa, at the time, opined that "the war could not be terminated in the domestic circumstances then prevailing without a Foreign Minister who had unusual sincerity and the determination even to risk his life."

He further stated for that reason to have strongly urged Togo to accept the post of Foreign Minister. (T. 35597).

Now, the prosecution has argued that these attempts to achieve peace are without any significance in this case, because the tide of war had turned against Japan. However, those attempts are mentioned here only to indicate the intention with which Togo joined the cabinet.

As has been discussed in the observation regarding Shigemitsu, no one should be convicted for waging aggressive war if he entered a cabinet during war time solely with the intention of ending the war. He who undertakes this cannot be regarded as having committed an international crime under mitigating circumstances. On the contrary, he rather fulfilled an international duty.

As has been also decided in the majority judgment, Togo should be acquitted of charges 54 and 55.

For the above reasons Togo Shigenori should be acquitted of all charges.