DISSENTING JUDGMENT OF THE MEMBER FROM FRANCE
OF THE
INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

12 November 1948

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Though dissenting from the majority both on questions of law and of fact, I did not at first intend to keep on record my disagreement in the form of a dissenting judgment. I was under the impression that the majority decision would be pronounced in the name of the majority so as to exclude the possibility of any final silence on my part being misunderstood as my concurrence in that decision. The majority, however, ultimately decided to announce its decision simply in the name of the Tribunal. In these circumstances, in fairness to the Accused, I consider it to be my duty briefly to give expression to my own view of the questions of fact and of law involved in this case insofar as this view differs from that of the majority.

Constitutionality of the Creation of the Tribunal

It is to a superior authority recognized as such by all the parties concerned or most of them that belongs the right of settling differences among parties. The acceptance of this principle within each nation is sufficient proof of its conformity to natural and universal law, respect of which indeed supplies the very foundation of law and civil society. A Universal authority would be the one competent to create tribunals to judge individuals accused of crimes against universal order. But for want of an organism endowed with such universal authority, he who possessed of actual power and moral authority sufficient to assume that duty can set up the necessary tribunals for the trial of persons suspected of acts supposed to be in criminal infringement of natural and international law. For this purpose he can give the rules of procedure for securing the appearance of the Accused before the Tribunal

for the judgment of the Accused as also for execution of the judgment.

The crimes committed against the peoples of a particular nation are also crimes committed against members of the universal community. Thus, the de facto authority which can organize the trial of crimes against peace and against humanity can, if it finds it opportune, prosecute for crimes against peoples of particular nations also along with them. The law to be applied in such case, however, will not then be of a particular nation, the victor or the defeated, but that of all nations.

The authority which assumed the duty of setting up the necessary tribunal for the trial of persons accused of crimes against universal law would find itself disqualified if, by doing this, it deliberately refused to grant to the Accused the maximum guarantee possible for a fair judgment. The best proof of its good-will on this point will be to grant to the Defendants at least as much guarantee as it would grant to his own nationals for the judgment of crimes which they commit against internal order.

Attributing to criminal activities the wars which played havoc in the Far East during the period concluded by the surrender of 2 September 1945, the Allied Nations were, as a consequence of the above-mentioned principles, perfectly qualified to create the International Military Tribunal for the Far East. The dispositions of the Charter approved and promulgated on 19 January 1946 in their name by the Supreme Commander for the Allied Powers superabundantly manifest their desire to assure the Defendants the maximum guarantees possible. If it is true that a few of those guarantees considered indispensable by the conscience and universal reason, are not expressly granted by the Charter, it is no less true that they are not refused them and that the authorization given to the Tribunal by Article VII of the Charter to draft and amend rules of procedure consistent with the fundamental provisions of this Charter is equivalent at least in this respect to the direct grant of these guarantees.

The fact that the authors of the Charter were precisely the victors and that only the government leaders of the defeated nation could be prosecuted could not be taken into consideration either. It is sufficient proof of the good-will of the Allies that instead of

punishing the Defendants without any trial of any kind, they turned them over to a Tribunal free to acquit them. Moreover, the political non-organization of the world is to be blamed for the fact that a decision prior to the trial--the one excluding the eventual proclamation of the responsibility of the conquerors--was reached by the victorious nations both judges and partakers in this decision. Inaction on the part of the victor nations would have deprived the world of a verdict, the necessity of which was universally felt.

In the light of these remarks may be rejected all the objections made by the Defense to the right of the Allied Nations and to the competence of the Supreme Commander for the Allied Powers in their name to set up the International Military Tribunal for the Far East and confer on it the jurisdiction purported to be granted by the Charter.

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Jurisdiction of the Tribunal

If the word 'jurisdiction' is accepted in the sense in which it is usually recognized, it means and signifies the limits within which a court has authority to hear and determine a cause or causes.

It may be noticed in passing that any assumption of criminal jurisdiction does not in itself imply criminality of the facts or the acts in relation to which such jurisdiction is assumed. This is particularly true when the authority which relays the facts to the judges is not the one qualified to legislate on their criminality. The reference to the judges only implies that in the estimation of this authority the facts or the acts in question are certainly or perhaps crimes.

The jurisdiction in rem of the International Military Tribunal for the Far East is determined by the Potsdam Declaration of 26 July 1945, the act of surrender of 2 September 1945, the Moscow Conference of 26 December 1945, and by Article V of the Charter approved on 19 January 1946 by the Supreme Commander for the Allied Powers, establishing the International Military Tribunal

for the Far East. This jurisdiction is manifestly limited to the facts which could be deeds only of the people of the enemy nations or of renegades.

The Charter does not limit as to date the facts susceptible of being prosecuted and it can be assumed that only the normal rules of prescription, if any, as accepted by conscience and universal reason would limit the action of the Prosecution. However, it is to be noted that the Far East Commission in its session of 5 April 1946 in adopting the policy in regard to the apprehension, trial and punishment of war criminals in the Far East seems to have had in contemplation some limitation in this respect. By its committee number 5: "war criminals", it says: "the offense need not have been committed after a particular date...but in general, should have been committed since, or in the period immediately preceding the Mukden Incident of 18 September 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao Incident of 7 July 1937."

In the light of this text and of the report adopted on 24 February by the League of Nations Assembly according to which "while at the origin of the state of tension that existed before September 18, 1931, certain responsibilities would appear to be on one side and the other, no question of Chinese responsibility can arise for the development of events since September 18, 1931", it can be concluded that in the mind of the Far Eastern Commission, whose above-mentioned policy was transmitted to the Supreme Commander for the Allied Powers, the facts of the same category as those of Lake Khassan and Khalkhin Gol River did not figure with those contemplated for prosecution. Without doubt, however, if they can be established as having formed an integral part of the whole of the facts uncontestedly referred to the judgment of the Tribunal, they would validly come within cognizance of the Tribunal.

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In the opinion of the majority "as all the Accused are charged with the conspiracies, it is not necessary, in respect of those it may find guilty of conspiracy, to enter convictions also for planning and

preparing or in other words to take into consideration nor to enter convictions upon counts 6 to 17 inclusive." Further, according to the majority, "A conspiracy to wage aggressive or unlawful war arises when two or more persons enter into an agreement to commit that crime" and, of course, those who adopt the purpose of the conspiracy and plan and prepare for its fulfillment become conspirators. From this last remark it would not necessarily follow that he who has conspired has later planned and prepared. In other words, the majority justly accepts as true that conspiracy and preparation are two distinct things. In my opinion, and in view of the above-mentioned definition of conspiracy, the planning and preparing are more serious matters than the mere conspiracy; consequently, they must be taken into consideration by the Tribunal and should be taken as the basis for conviction if found established.

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The majority did not deem it necessary to take into consideration counts 37 and 38 which charge conspiracy to murder, nor, for the same reasons, invoked counts 43 and 44 which charge conspiracies to commit crimes in breach of the laws of war. Although, for reasons indicated later, I am in accord with the conclusion of the majority relative to counts 37 and 38, I do not share their opinion regarding counts 43 and 44. In my opinion, the reasons given by the majority concerning counts 37 and 38 would not apply to the case of counts 43 and 44.

The majority expresses itself in these terms (Chapter II, pages 11 and 12):

"Counts 37 and 38 charge conspiracy to murder. Article 5, sub-paragraphs (b) and (c) of the Charter, deal with Conventional War Crimes and Crimes against Humanity. In sub-paragraph (c) of the Article 5 occurs this passage: 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.' A similar provision appeared in the Nuremberg

Charter although there it was an independent paragraph and was not, as in our Charter, incorporated in sub-paragraph (c). The context of this provision clearly relates it exclusively to sub-paragraph (a), Crimes against Peace, as that is the only category in which a 'common plan or conspiracy' is stated to be a crime. It has no application to Conventional War Crimes and Crimes against Humanity as conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal."

The reasoning is based upon the assumption that in Article 5 of the Charter "Crimes against peace is the only category in which a common plan or conspiracy is stated to be a crime." This statement, repeated in other parts of the judgment, seems to be misleading. Nowhere in Article 5 is it stated regarding the facts listed under the heading of Crimes against Peace, Conventional War Crimes, or Crimes against Humanity, that they are crimes. It is only said--a propos of those facts already accompanied as subjects of the sentence by the epithet crime--that they are "crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsib lity." In other words, the purpose of the second paragraph of Article 5 is not to enunciate that the particular fact listed therein is a crime, --not to define Crimes against Humanity--but to state the principle that regarding facts qualified as war crimes, etc., which do come within the jurisdiction of the Tribunal, there shall be individual responsibility. It can moreover be stated that the listing in Article 5 of acts numbered as deserving the qualification of Crimes against Peace, Conventional War Crimes and Crimes against Humanity is not limitative.

Similarly, the already mentioned policy of the Far Eastern Commission states the following:

1. The term 'War Crimes' as used herein included (a) planning, preparation... (b) Violations of the laws of customs of war. Such violations shall include but not be limited to murder, illtreatment, etc. ..." As the latter paragraph (c) speaks of other inhumane deeds committed whether or not in violation of the domestic law of the country where perpetrated.

If, as is suggested by the majority, it could be inferred from the first part of the Article 5 that the author of the Charter implicitly decided that the common plan or conspiracy for the accomplishment of any of the previously enumerated facts was a crime, it could equally be inferred from the last sentence of the same article, the author of the Charter implicitly added conspiracy for Conventional Crimes and for Crimes against Humanity to the list of facts stated to be crime in the preceding lines. The normal logical consequences of the assertions of the majority, --namely that instead of applying the last four lines also to Conventional War Crimes and Crimes against Humanity, they should be taken only as applying to Crimes against Peace--would lead us to the highly improbable conclusion that the leaders, organizers, instigators and accomplices participating in the execution of the agreement to commit a conventional war crime or a crime against humanity would not be responsible for all acts performed in execution of such a plan. For instance, the Japanese scholar who would have decided with the aid of a general to utilize and would have utilized a discovery capable of annihilating in one blow the population of an entire region would not be responsible for any such ruthless destruction if it were effectuated by soldiers acting upon the order of a general.

In truth, there is no reason why the Allied Nations would have refused to submit to the action of justice the conspiratorial acts, such as for the destruction of an entire population, which could have been more abominable than that for an aggressive war.

What the authors of the Charter wished to submit to the Tribunal were not, as is ordinarily the case, eventual facts which would come within the scope of a penal definition previously established by a qualified legislator, but on the contrary, facts already committed and specified concerning which the Tribunal itself will have to decide whether they were in fact and validly subjected to penal sanctions by a competent authority and to investigate and decide whether the Accused were the authors of them. Under these conditions the Tribunal has the right to examine the facts submitted to it with due regard to all the qualifications recognized possible by the conscience and universal reason; it is its duty to examine those of them that would entail the most severe sanctions.

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The Substantive Law

According to the majority judgment, "The law of the Charter is decisive and binding on the Tribunal... In the trial its members have no jurisdiction except such as is to be found in the Charter... In the result, the Members of the Tribunal being otherwise wholly without power in respect to the trial of the accused, have been empowered by the documents, which constituted the Tribunal and appointed them as members to try the accused but subject always to the duty and responsibility of applying to the trial the law set forth in the Charter."

After having analyzed as follows four of the substantial grounds of the defense challenge to the jurisdiction of the Tribunal (Chapter II, page 2):

"(1) The Allied Powers acting through the Supreme Commander have no authority to include in the Charter of the Tribunal and to designate as justiciable 'Crimes against Peace' (Article 5(a));

"(2) Aggressive war is not per se illegal and the Pact of Paris of 1928 renouncing war as an instrument of national policy does not enlarge the meaning of war crimes nor constitute war a crime;

"(3) War is the act of a nation for which there is no individual responsibility under international law;

"(4) The provisions of the Charter are 'ex post facto' legislation and therefore illegal..."

the majority concludes: "Since the law of the Charter is decisive and binding upon it this Tribunal is formally bound to reject the first four of the above...contentions."

From the above-quoted statements, it must be concluded that according to the majority a substantive law is furnished by the Charter, that this substantive law is the one to be applied to the judgment of the accused and that the Tribunal could not for any reason whatsoever refuse to apply it.

It is true the majority defended its judgment against such an interpretation in several places and especially in the lines immediately following the above-quoted passage which state (Chapter II, page 1):

"The foregoing expression of opinion is not to be taken as supporting the view, if such view be held, that the Allied Powers or any victor nations have the right under international law in providing for the trial and punishment of war criminals to enact or promulgate laws or vest in their tribunals powers in conflict with recognized international law or rules or principles thereof. 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."

But other passages of the judgment, such as those in which the Tribunal declares not being able to see a crime in the conspiracy for a conventional war crime or a crime against humanity, show nevertheless that this interpretation reveals the real guiding view of the majority.

I cannot share such a view. Supposing, which, however, is not the case here, that the authors of the Charter had the intention themselves to make crimes of the facts enumerated under the headings Crimes against Peace, Conventional War Crimes, or Crimes against Humanity, the fact would still remain that the Tribunal would be competent to examine ex-officio the legality of these substantive provisions, and if it found them to be beyond the competence of their author, to refuse to apply them. It would be obliged to do so if it were so urged by the Accused. It was claimed that because of the fact of the acceptance of their appointment, the Members of this Tribunal could not deny the validity of substantive rules included in the Charter. This claim is without foundation. It is possible that a judge makes for himself a rule to accept a work only from an authority whose decisions or opinions concerning the substantive law he has previously known and approved. This rule is in no place written into the law and its generalized application would jeopardize any proper administration of justice. The approbation given to the law by the judge outside of any judicial forum cannot be made to prevail against the parties; it must be submitted to a scrutinizing examination with the probable consequence of a contrary decision.

Actually and contrary to the opinion shared by the majority in certain parts of its judgment, though rejected in others, nowhere do the authors of the

Charter express their determination to make crimes of certain facts or to give definition of certain crimes. Article 5 of the Charter only furnishes an enumeration of acts which, listed under the three titles of Crimes against Peace, Conventional War Crimes, and Crimes against Humanity, are alleged crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.

It is nevertheless exact that the terms of the acts which resulted in the creation of the Tribunal involve that in the minds of the authors war as an instrument of national policy or aggressive war is a crime. Consequently, if those acts do not constitute the law and are not as such binding upon the Tribunal, they are nevertheless as evidence of that law.

It was stated by the majority that the signing of the Pact of Paris implied the same proposition as do the above-mentioned acts. In my opinion this is not the case. The signatories of the Pact were able to outlaw the war as an instrument of national policy without troubling themselves to know to what extent society would be authorized to go towards repression of eventual violations of their agreement. But the fact that these signatories did not wish to, or simply did not consider deciding that war as an instrument of national policy or that aggressive war was a crime does not in the least imply that they believed it was not a crime.

There is no doubt in my mind that such a war is and always has been a crime in the eyes of reason and universal conscience, --expressions of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it.

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There is no doubt either that the individual cannot shelter behind the responsibility of the community the responsibility which he incurred by his own acts. Assuming that there exists a collective responsibility, obviously the latter can only be added to the individual

responsibility and cannot eliminate the same. It is because they are inscribed in natural law and not in the constitutive acts of the Tribunal by the writers of the Charter, whose honor it is, however, to have recalled them, that these principles impose themselves upon the respect of the Tribunal.

In the light of these considerations will appear the justification of the rejection of the objections of the Defense based upon the principle "nullum crimen sine lege", upon the principle of the non-retroactivity of laws, or upon the nullity of the dispositions of article of the Charter setting forth the principle of individual responsibility.

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It was further contended à propos of the facts alleged by counts 25 and 26 of the Indictment--attacks in the area of Lake Khassan and of Nomonhan--that because of the Russo-Japanese agreements of 19 April 1938 and of 9 September 1939, then of 9 June 1940 and April 1941, the responsibilities if any involved in such acts, assuming they were of a nature to merit a penal sanction were pardoned. The majority rejected this demand upon the grounds that "in none of the agreements on which the Defense argument is based was any immunity granted nor was the question of liability, criminal or otherwise dealt with." I share the conclusion of the majority though for reasons somewhat different. Silence regarding the agreements in question is not in itself alone conclusive. It is conceded by a certain doctrine that the signing of an agreement destined to terminate a difference is supposed to rule out all rights of reparation. But there it can affect only the question of the reparations which the parties owe to one another. One could not go beyond that: no individual, at least to the extent of jeopardizing it, can dispose of the right of society to prosecute criminals. Undoubtedly, as in the national order of things, time limits must be assigned to this right of society and consideration of delay shall come in in an action on the part of the latter in international order as in national order; but the facts in question can be considered not only as isolated facts, the prescription of which could have been invoked, but also as part of a whole unit of facts, the culminating date of which is sufficiently recent so that there cannot seriously be any question of prescription.

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Conventional War Crimes

There can be no doubt that on all steps of its hierarchy the members of the Japanese Army and Police made themselves guilty of the most abominable crimes in respect to the prisoners of war, internees and civilians of the occupied regions.

The Defendants are specially accused of not having prevented the mistreatment of the prisoners. While setting forth the substantive law, which according to the majority would make a crime of this inaction, the majority invokes Article IV of the Hague Convention in the following terms:

"Prisoners taken in war and civilian internees are in the power of the Government which captures them. This was not always the case. For the last two centuries, however, this position has been recognized and the customary law to this effect was formally embodied in the Hague Convention No. IV of 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as 'prisoners') rests therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners." (Part A, Chapter II, pages 6 and 7).

After having asserted that from the above-mentioned article results for the detainer of the prisoners penal responsibility for the ill-treatment which they did not prevent, the majority proceeded to specify what was meant by Government: "In general", states the majority, "the responsibility for prisoners held by Japan may be stated to have rested upon (1) Members of the Government; (2) Military or Naval officers in command of formations having prisoners in their possession; (3) ...; (4) officials, whether civilian, military or naval, having direct and immediate control of prisoners.

There is no doubt in my opinion that the persons listed above can under certain conditions be held guilty

for not preventing maltreatment. But this responsibility certainly does not rest on Article IV referred to above, the exact text of which is as follows: "Prisoners of War are in the power of the hostile government but not of the individuals or corps who capture them." If this article is to be considered as the foundation of the responsibility of the members of the Government, it would be necessary to admit--which isn't possible--that it exonerates from the same responsibility the individuals or the corps which capture the prisoners.

Studying the conditions under which the persons in whose power are the prisoners, become responsible, the majority foresees the cases where:

(1) Those persons fail to establish an appropriate system to secure proper treatment and to prevent maltreatment of prisoners;

(2) Those persons having established such a system fail to secure its continued and efficient working;

(3) Those persons neglect to learn of the application of the system; (it doesn't seem necessary that this negligence have consequences).

(4) Those persons had knowledge that such crimes were being committed and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future;

(5) Such crimes having been committed, those persons are at fault in having failed to acquire such knowledge;

In the last two cases, "it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further inquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

(6) A member of a Cabinet which collectively,

as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of illtreatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any illtreatment in the future."

(7) Army and Navy commanders, Ministers of war or of the Navy are responsible, if crimes are committed against prisoners under their control, of the likely occurrence of which they had or should have had knowledge in advance;

(8) Department officials whose functions included the administration of the system of protection of prisoners and which had or should have had knowledge of crimes and did nothing effective to the extent of their powers to prevent their occurrence in the future, are responsible for such future crimes.

I cannot agree with these various propositions.

3. Of the four categories of persons, to whom the first of these propositions, inadvertently no doubt, imposes the duty of establishing and securing the continuous and efficient working of a system appropriate to secure proper treatment to prevent illtreatment, there are three upon which an obligation of this nature could not reasonably be imposed, and two of which are distinctly exempted from it by Article IV of the Hague Convention No. IV, dated 18 October 1907.

2. The wording of this part of the judgment leads one to believe that the majority sees, in each of the seven cases considered, a crime of equal seriousness with all those qualified as Conventional War Crimes. In each of these cases, where the crimes in question have some distinct immediate author and thus directly

responsible for the act, the culprit in question before us is declared responsible for the crime without any kind of reservation, in the same terms no doubt as would be affirmed in the case of the responsibility of the immediate author. The responsibility seems to be judged equally as serious in either case. No doubt this appraisement can be attributed to the fact that whereas the immediate author is generally accused of only a limited number of crimes, in the above hypothesis they choose to see the case of individuals responsible for a much greater number of crimes. The truth, however, is that the responsibility involved is of an entirely different nature from that of the immediate author and that the seriousness of the anticipated sentence cannot be determined, unless the nature of this responsibility is specified.

In order to do this, it is necessary to recall that no-one can be held responsible for other than the necessary consequences of his own acts or omissions. The application of this principle to the case of active participation in an offense either as author, co-author, or accomplice, implies no difficulty. There cannot be much more in the case of passive participation, that is, participation by omission. Responsibility by omission supposes, of course, an ultimate commission following the omission, and emanating either from the individual to whom the omission is imputed, or from one or several others. The responsibility for the results of this commission is only imputable to the author of the omission if the commission is the certain result of the latter. The relation of cause and effect may be easily ascertainable when the author of the omission and that of the commission are the same individual; it is no longer the case when they are different. The only possible manner of establishing this causal connection would consist in proving that the author of the omission could by an action of some kind prevent the commission and its direct harmful consequences.

The application of these principles leads to the conclusion that the consequences of the responsibility for the atrocities committed upon the prisoners of war cannot be imputed to any individuals outside of those who actively participated in them, other than those who could have prevented them and did not do so. Proof that the defendant could have prevented the wounds, sickness, death, etc., inflicted upon the prisoners cannot result from a legal presumption (with the exception of the case

in which the defendant would be accused of being the author of an act which resulted in these wounds, sickness, death, etc., as direct consequences); from the position of the culprit, abstention from acts or orders of a determined nature, etc. Regarding the latter, we must say that there would be no other possible way to assuredly prevent an individual from committing a crime than to make sure of his previous incapacitation to continue by means which reason and conscience would condemn. To state as a principle as did the majority that Army or Navy commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners, appears to be contrary to all the known facts of experience. "Can" is not right; "might" only would be true. No general rule can be made upon this point and proof that omission is the cause of harm done must be furnished in each case by the prosecution.

It goes without saying that abstention from important duties connected with the acceptance of certain situations can constitute in itself and regardless of consequences an offense. This will be the case each time the eventual consequences will be deemed by the law particularly harmful. Fear of the seriousness of the latter authorizes legislature not to wait for their realization in order to punish the culprit for the abstention. But it would not be just to place on the same footing, on the one hand the person guilty of the abstention, who did not consider the consequences of his act, and the one who, having taken them into consideration obtained nevertheless from any action, and on the other hand, the case of both culprits, in the hypothesis in which the feared consequences occurred and in the hypothesis in which they do not occur.

3. In short and as a consequence of the principles recalled above:

Is guilty of passive complicity of violation of laws of war only one who, able to prevent that violation from being committed, did not do so. No legal presumption could be invoked to establish that the defendant could have prevented such violation of such wholesale or particular violations of the laws of war, and the failings from their professional duty or from their moral obligations could not be considered as an element of the crime of complicity by negligence, imprudence, or omission unless the crimes committed were

the direct result of this negligence, imprudence or omission, or could only have been committed because of this negligence, imprudence or omission.

Are guilty in failing in their duties towards the prisoners of war those who by imprudence, negligence, voluntary disregard of orders or regulations, created a state of fact suited to the multiplication of violations of the laws of war.

The following constitute aggravating circumstances of the crime of failing in duties towards the prisoners of war:

a. The circumstance whereby the defendant, having anticipated or had as duty to anticipate because of his office the consequences of his imprudence, negligence or non-observance of orders or regulations, committed it nevertheless;

b. The circumstance whereby violations of the laws of war of the same nature as those occasioned by imprudence, negligence or voluntary non-observation of orders or regulations, took place.

Are liable:

a. of punishment by death those who rendered themselves guilty of passive complicity of violation of the laws of war;

b. of life imprisonment those who rendered themselves guilty of failing in their duties toward the prisoners of war if the said failings were accompanied by at least one of the above-mentioned aggravating circumstances;

c. of a penalty of imprisonment of a limited duration those who rendered themselves guilty of failing in their duties toward prisoners of war.

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Several times in expressing my opinion I preferred the expression of natural or universal law to that of international law. The latter has been used too often to define the whole of the rights and obligations of nations as a result either of custom, social convention, treaties or agreements. This whole can or cannot conform to the law shared by all individuals and all nations but does not identify itself with it. It is to this law that I have reserved the qualification of "natural" and "universal". It exists outside and above nations. If opinions differ as to its nature, its existence is not seriously contested or contestable and the declaration of this existence is sufficient for our purpose.

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Opinion relative to the Proceedings of the Tribunal

Though I am of opinion that the Charter permitted granting to the Accused guarantees sufficient for their defense, I think that actually these were not granted to them.

Essential principles, violation of which would result in most civilized nations in the nullity of the entire procedure, and the right of the Tribunal to dismiss the case against the Accused, were not respected. I will only emphasize that:

a. The Defendants, inspite of the fact that the charges concerned crimes of the most serious nature, proof of which lent itself to the greatest of difficulties, were directly indicted before the Tribunal and without being given an opportunity to endeavor to obtain and assemble elements for the defense by means of a preliminary inquest conducted equally in favor of the Prosecution as of the Defense by a magistrate independant of them both and in the course of which they would have been benefitted by the assistance of the defense counsel. The actual consequences of this violation of principles have been, in my opinion, particularly serious at the present case.

b. The prosecution was carried out in personam

and not in rem, the Prosecution claiming the right not to prosecute all the suspects at the same time; the Tribunal did not find itself in a position to control, on the occasion for the case apprehended, that prosecution be exercised in an equal and sufficiently justified manner regarding all justiciable; on the other hand, it found itself exposed to appraising its severity in an unequal and unjustified way. The consequences of this inequality are particularly apparent and regrettable in regard to Emperor Hirohito whom the trial revealed could have been counted among the suspects and whose absence from the trial, while making one wonder whether, if his case is measured by a different standard, international justice would merit to be exercised, was certainly detrimental to the defense of the Accused.

c. The manner in which deliberations were conducted may be contested as to having assured the Defendants all the guarantees which the law of nations grants them and which can be summarized as follows: oral deliberations, outside of all influence, bearing upon all produced evidence, among all the judges who sat at the trials. All the part of the judgment relative to the findings of fact was prepared by a drafting committee and submitted by the latter as its preparations progressed, first to a committee of seven judges called the 'Majority'. Copy of this draft was also distributed to the four other members of the Tribunal. The latter were called upon to submit their own views to the majority in view of their discussion, and should the case arise, for modification of the draft. But the eleven judges which compose the Tribunal were never called to meet to discuss orally a part of or in its entirety this part of the judgment.

Only the part of the draft relative to individual cases was the object of oral discussions.

In the course of what may be called the period of deliberation several of the judges of the 'Minority' submitted in writing to each member of the Tribunal memorandums containing remarks induced by the reading of the draft. Certain of these remarks were not shared by the majority and occasioned the modification of the first draft. Also distributed to all the judges of the Tribunal were the drafts of one dissenting and another possibly dissenting opinion.

The placing of my signature at the bottom of the judgment must be interpreted as acknowledgment of the respect of the customary forms of the deliberations of

Tribunals. I consider it my duty to declare here that it cannot be taken as acknowledgment thereof. I find myself unable to deny or attest: (1) that all the judges, those of the majority as well as those of the minority have taken cognizance of each opinion expressed by each judge as they would have done in oral deliberations which would have necessitated the presence of each of them; (2) that points of law and findings of facts adopted by the majority were done so outside of all assistance of persons other than judges; (3) that all the evidence and only the evidence produced during the course of the trial was taken into consideration.

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Verdict and Sentences

A verdict reached by a Tribunal after a defective procedure cannot be a valid one. The majority having expressed their verdict, I will however make known mine also subject to caution and revisable as it is.

Inspite of the violation of rules the respect of which was essential to the defense of the Accused, and perhaps because of it, I reached the conclusion that the culpability of the Accused regarding the accusation of crimes against peace cannot be regarded as certain.

From among the numerous factual reasons which are in favor of the Accused, I will only mention the two following ones because of their connection with considerations of law which did not attract or retain the attention of the Tribunal:

1. Although it is not necessary to the prosecution in the presence of an officially promulgated law to prove that the Accused had knowledge of it, it is still true that the judge cannot condemn the latter without being certain that he was in a position at the date of the facts considered reprochable to discover the criminal character of them.

Anyone was certainly in a position to learn during the period covered by the Indictment that conspiring, planning, preparing, initiating, or waging

an aggressive war was a crime. But it is evident that those expressions, conspiring, planning, etc. were at the time too vague to serve in themselves the citizen of a nation called upon to play a part, whatever it may be, in conducting the relations of his country with other countries to form an opinion on the merit of his conduct. If the words conspiring, planning, preparing, initiating were at the time considered relatively easy to define insofar as international repression is concerned, when used alone, their meaning became infinitely more difficult to specify when associated with the words "aggressive war". Moreover, what was the part of responsibility befalling the actual authors of the acts which the said citizens were called upon to accomplish and which they very often accomplished by order or within the limit of functions concerning which they were subject to control? So many questions over which before the war many students of international law had pondered without being able to resolve them. It seems extremely doubtful to me that the Defendants were in a position to better succeed at it. Only the formal proof that they had actually succeeded could disperse this doubt and permit the condemnation of the Defendants. Indeed, in several parts of the judgment quoting discourses, policies adopted, etc., by the Defendants, the word war is accompanied by the epithet aggressive in such a way that the latter seems to emanate directly from the mouth or the pen of the Accused. Never, however, did any of them in manifesting their fear, their desire of a war, their efforts to assure, impede, retard the outbreak of a war, speak of this war as an aggressive war. It is only by substituting the conclusions drawn from the examination of those discourses, policies, etc., to the text itself of those discourses, policies, etc., that the majority was able to write the findings of fact permitting to arrive at the confession on the part of the Defendants of their guilt and implicitly of the cognizance of the law.

2. No direct proof was furnished concerning the formation among individuals known, on a known date, at a specific point, of a plot the object of which was to assure to Japan the domination unaccepted by its inhabitants of some part of the world. The only thing proven is the existence among certain influential classes of the Japanese nation of the desire to seat at all costs

the domination of Japan upon other parts of East Asia. To this tendency, the Defendants adherred in a permanent or temporary way; but the question remains completely to ascertain whether by doing this they did or did not act criminally. The question was neither raised by the Prosecution nor answered by the judgment of the majority. This tendency developped up to the time when it crystallized in the declaration of the Pacific war. The question of the responsibility of the latter regarded as an isolated act and which, in my opinion, constituted the most serious of acts committed against peace remains unanswered. It cannot be denied, it had a principal author who escaped all prosecution and of whom in any case the present Defendants could only be considered as accomplices. If it is desired to make of these Defendants something other than eventual accomplices and substitute their responsibility to that of the principal author, I will merely quote in opposition to such a claim the following extract from an entry in KIDO's Diary, Exhibit 1198:

"I visited the Emperor at 3.30 p.m. in response to his request. He said that Prince TAKAMATSU had told him that the Navy's hands were full and it appeared that he wished to avoid war, but did not know what to do. I advised the Emperor to ask the opinions of the Navy Minister, the Chief of the Naval General Staff, and the Premier, for the situation was really grave. We could not be too prudent in the matter. At 6.35 p.m. I again visited the Emperor in response to his request. He said that he had ordered the Premier to act according to program on account of the affirmative answers of the Navy Minister and the Chief of the Navy General Staff concerning the question as to the success of the war."

I have already said that the defects of the procedure followed by the Prosecution and by the Tribunal did not permit me to formulate a definite opinion concerning the questions raised by the accusations of crimes against peace. The same is necessarily true regarding the

accusations of conventional war crimes and crimes against humanity.

The most abominable crimes were committed on the largest scale by the members of the Japanese police and navy I esteemed I could say nevertheless, and I will add there is no doubt in my mind that certain Defendants bear a large part of the responsibility for them, that others certainly rendered themselves guilty of serious failings in the duties towards the prisoners of war and towards humanity. I could not venture further in the formulation of verdicts, the exactitude of which would be subject to caution or to sentences, the equity of which would be by far too contestable.